UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Sue Ann Adams, Patricia J. Pettenger, and Marla K. Snead, on behalf of themselves and all others similarly situated, Plaintiffs, v. U.S. Bancorp, the Employee Benefits Committee and John/Jane Does 1-5, Defendants.	Case No. 0:22-cv-00509-NEB-BRT

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT AND STRIKE PLAINTIFFS' CLASS ALLEGATIONS

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Plaintiffs, Sue Ann Adams, Patricia J. Pettenger, and Marla K. Snead ("Plaintiffs"), submit this Opposition to Defendants' Motion to Dismiss Plaintiffs' Complaint and Strike Plaintiffs' Class Allegations (the "Motion"). ECF No. 21. As more fully described below, this Court should deny the Motion in its entirety.

I. INTRODUCTION

The Motion should be denied for the same reasons this Court articulated in *Smith v. U.S. Bancorp*, No. 18-cv-3405, 2019 WL 2644204 (D. Minn. June 27, 2019), a case Defendants acknowledge concerned "materially identical claims against Defendants on the same theory."[1] Here, Plaintiffs allege that their early retirement benefits are not actuarially equivalent to the benefits they would have received at their normal retirement date because their monthly payments are too low. Ignoring *Smith*, and ***every other case*** in the country that has dealt with the issue, Defendants contend that Plaintiffs claims' under ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3), should be dismissed based on a single out-of-circuit case on currently on appeal,[2] which held that a plan can use any actuarial assumptions or formulae, however absurd or punitive, to calculate benefits so long as the method is written down in a plan document. *Smith*, and every other case to consider the issue, has soundly rejected this analysis. This Court should as well.

Also, directly contrary to *Smith* and the great weight of authority, Defendants again latch on to outliers from other circuits to argue that Plaintiffs do not state a claim under

[1] Defendants' Memorandum of Law in Support of the Motion to Dismiss, ECF No. 23 ("D. Mem.") at 1.
[2] *Belknap v. Partners Healthcare Sys., Inc.*, No. 19-cv-11437, 2022 WL 658653 (D. Mass. Mar. 4, 2022).

ERISA § 203(a), 29 U.S.C. § 1053(a). This argument should also be rejected because *Smith* correctly decided this issue too. Accordingly, the Motion to Dismiss should be denied.

Additionally, this Court should deny the Motion to Strike because Plaintiffs' proposed Class is not a fail-safe class. Fail-safe classes are those where members cannot be ascertained before a court decides a case on the merits. Here, the members of Plaintiffs' proposed Class can be ascertained at any time based on Defendants' own records; the Court will not need to decide this case's merits to know which individuals are class members. Moreover, even if Plaintiffs' proposed Class is a fail-safe class, and it is not, the Motion to Strike is premature and the Court should follow the standard class action procedures set forth in Rule 23 of the Federal Rules of Civil Procedure.

II. SUMMARY OF PLAINTIFFS' CLAIMS

Plaintiffs, and other similarly situated individuals, are participants in the U.S. Bank Pension Plan (the "Plan") and the U.S. Bank Legacy Pension Plan (the "Legacy Plan") (together, the "Plans") who started receiving their pension benefits before the Plans' normal retirement age, 65. When participants retire before age 65, Defendants apply early commencement factors ("ECFs") to reduce the amount of benefits to which participants would have been entitled to receive at age 65. Complaint, ECF 1 ("Compl."), ¶ 4.

The ECFs that Defendants apply to benefits earned after 2002, "Part B" benefits, provide participants with a fixed percentage of their age-65 benefit based on the participants' ages when they begin receiving benefits. *Id*. For example, Defendants apply an ECF of .38 when a participant is 55, meaning that the participant will receive 38% of their age-65 benefit at age 55. *Id*., ¶ 34. The Part B ECFs excessively reduce and

wrongfully depress the present values of Plaintiffs' benefits, resulting in monthly payments that are lower than they would be if Defendants used ECFs based on reasonable actuarial assumptions. *Id.*, ¶ 5. As a result, Plaintiffs and Class members are not receiving the Part B benefits to which they are entitled. *Id.*, ¶ 6. Because Plaintiffs' early retirement benefits are not actuarially equivalent to the benefits they would have received at age 65, Defendants violated § 1054(c)(3), and caused Plaintiffs and the Class to forfeit part of their vested benefits in violation of 29 U.S.C. § 1053(a). *Id.*, ¶ 1.

Under the Plans, the normal retirement age is 65, but participants can begin receiving their benefits as early as 55. *Id.*, ¶ 33. When a participant begins receiving early retirement benefits, the Plans reduce the participant's "Accrued Benefit," which is single life annuity ("SLA") at age 65, by applying ECFs to each portion of the participant's Accrued Benefit (i.e., one set of ECFs for Part B and different sets for Parts A and C).[3] *Id.*, ¶¶ 32, 71. Individuals who receive early retirement benefits forego a higher monthly payment in exchange for receiving benefit payments for a longer period of time. *Id.*, ¶ 32.

Plaintiffs are participants in the Plans who began receiving early Part B benefits. *Id.*, ¶¶ 2–6. Plaintiff Adams began collecting an SLA at age 63 and 6 months; Plaintiff Pettenger began receiving an SLA at age 64; and Plaintiff Snead began receiving a 100%

[3] The Plans have different benefit accrual formulas based on when participants started accruing benefits. *Id.*, ¶ 27. Beginning in 2002 (and 2003 for certain participants), U.S. Bank introduced a new formula referred to as "Part B" benefits. *Id.*, ¶ 28. Starting in 2010, participants with Part B benefits could choose whether they would continue to accrue Part B benefits or begin accruing under a cash balance formula. *Id.*, ¶ 30. This case focuses on the actuarial reductions to participants' Part B benefits. *Id.*, ¶ 31. Each of the Plaintiffs accrued Part B benefits. *Id.*, ¶¶ 73–75.

joint and survivor annuity ("JSA") at age 55 and 2 months. *Id.*, ¶¶ 73–75.[4] Plaintiffs' Part B annuity benefits were reduced by the Part B ECFs. *See id.*, ¶¶ 73–75. These ECFs have not changed since at least 2002. *Id.*, ¶ 66.

The two primary assumptions used in an actuarial equivalence calculation are a mortality rate (to predict the likely length of time future payments will be made) and an interest rate (to discount the future payments to a present value). *Id.*, ¶ 45. These two assumptions are used to develop a numerical conversion factor, which is multiplied by the benefit at age 65 to covert that benefit into the early retirement benefit. *Id.*, ¶¶ 44–46, 67. The Plans do not specify the actuarial assumptions that were used to generate the Part B ECFs; rather, they simply list the ECFs as fixed percentages of the participant's age-65 SLA. *Id.*, ¶ 66. A plan's ECFs can be compared to ECFs generated by reasonable actuarial assumptions to determine if the plan provides actuarially equivalent benefits. Id., ¶ 67. Using an unreasonably high interest rate will excessively reduce a participant's pension benefits. *Id.*, ¶ 48. Likewise, a mortality assumption that predicts participants have a higher probability of death, e.g., mortality tables from the 1970s, 1980s and 1990s, excessively reduces the ECF. *Id.*, ¶¶ 61–62.

The Part B ECFs are unreasonable and penalize participants who retire early when compared to the ECFs generated by reasonable actuarial assumptions. *Id.*, ¶ 5. To highlight

[4] Participants can also choose to receive their benefits in several different forms, including an SLA or JSA, which pays benefits for the lives of both the participant and a surviving spouse. *Id.*, ¶¶ 36–37. To calculate these other forms, the Plans applies a formula to the amount payable to the participant as an SLA when they begin receiving benefits. *Id.*, ¶¶ 38–39.

the extent to which the Part B ECFs are unreasonable, Plaintiffs compared them to the ECFs that the Plans use for participants' pre-2002 benefits ("Part A" benefits) and the ECFs produced by the Treasury Assumptions from 2021, which use current mortality data and market interest rates and are indisputably reasonable. *Id.*, ¶¶ 67, 70.

Contrary to Defendants' suggestion (*see* D. Mem. at 3, 4, 11, 24), Plaintiffs do ***not*** allege or "insist" that the Plans "must" use the ECFs produced by the applicable Treasury Assumptions.[5] Rather, Plaintiffs allege facts about ECFs produced by the Treasury Assumptions (and the Part A ECFs) to illustrate why the Part B ECFs are unreasonable. Compl., ¶¶ 66–72.[6]

III. STANDARD OF REVIEW ON THE MOTION TO DISMISS

Rule 8 of the Federal Rules of Civil Procedure requires only "a short and plain statement of the claim showing that [Plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a)(2). Courts must accept "as true the facts pleaded in the complaint," *Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 21 (2010), and "view them in the light most favorable to the plaintiff." *Dadd v. Anoka Cty.*, No. 14-cv-4933, 2015 WL 3935897, at *3 (D. Minn. Jun. 24, 2015), *aff'd*, 827 F.3d 749 (8th Cir. 2016). Plaintiffs are merely required to "nudge[]

[5] Indeed, if Plaintiffs had not alleged the Treasury Assumptions (and Part A ECFs) as a comparator, Defendants likely would have argued that Plaintiffs failed to allege a benchmark or other facts from which the Court could infer that the Part B ECFs were unreasonable.

[6] *See also Smith*, 2019 WL 2644204, at *2 ("Plaintiffs assert that the Plan ECFs must be based on factors that lead to an actuarially equivalent benefit.").

[their] claims . . . across the line from conceivable to plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009)

A complaint need only contain "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" supporting the claims. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). For ERISA claims in particular, the court "must also take account of [plaintiffs'] limited access to crucial information" and engage in a "careful and holistic evaluation of an ERISA complaint's factual allegations" to vindicate the statute's "remedial purpose and evident intent to prevent through private civil litigation misuse and mismanagement of plan assets." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597–98 (8th Cir. 2009).

IV. PLAINTIFFS STATE A CLAIM UNDER 29 U.S.C. § 1054(c)(3)

A. The Overwhelming Authority Supports Plaintiffs' Position

"ERISA's actuarial equivalence requirement serves to protect actual retirees, not merely ensure that pension plans perform abstract calculations." *Stephens v. U.S. Airways Group, Inc.*, 644 F.3d 437, 443 (D.C. Cir. 2011) (Kavanaugh, J., concurring). Accordingly, "ERISA requires actuarial equivalence between the actual distribution and the accrued benefit it replaces." *Miller v. Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871, 874 (9th Cir. 2006). In other words, ERISA's actuarial equivalence requirement ensures that each of a plan's benefit options are at least as valuable as the participant's age-65 SLA. *See*, *e.g.*, *Lyons v. Georgia-Pac. Corp. Salaried Emps. Ret. Plan*, 221 F.3d 1235, 1244 (11th Cir. 2000) (". . . the present value of ***any*** optional form of benefit . . . cannot be less

than the present value of the participant's normal retirement benefit") (emphasis in original).[7]

Section 1054(c)(3)'s actuarial equivalence requirement measures participants' actual benefits against their "accrued benefit," "a single-life annuity payable at normal retirement age." *Esden v. Bank of Boston*, 22 F.3d 154, 159 (2d Cir. 2000). If "an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age . . . [it] . . . ***shall be the actuarial equivalent of such benefit*** . . . ." 29 U.S.C. § 1054(c)(3) (emphasis added).

> What these provisions mean in less technical language is that: (1) the accrued benefit under a defined benefit plan must be valued in terms of the annuity that it will yield at normal retirement age; and (2) if the benefit is paid at any other time (*e.g.,* on termination rather than retirement) or in any other form (*e.g.,* a lump sum distribution, instead of annuity) it must be worth at least as much as that annuity.

Esden, 229 F.3d at 163.

This Court has already rejected the exact same argument Defendants make in the Motion that the actuarial assumptions used to calculate benefits do not have to be reasonable under § 1054(c)(3).[8] In *Smith*, a case concerning "materially identical claims .

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[7] *See also Bird v. Eastman Kodak Co.*, 390 F. Supp. 2d 1117, 1118–19 (M.D. Fla. 2005) ("By law, these optional forms of payment must have the same actuarial value as his [the plaintiff's] 'normal form of payment,' so that the cost to the Plan of providing the benefit is actuarially equivalent, regardless of what form is elected."); *Duffy v. Anheuser-Busch Companies, LLC*, 449 F. Supp. 3d 882, 889 (E.D. Mo. 2020) (discussing how ERISA's protections ensure "the participant receives the equivalent amount he or she earned under the plan, no matter the form of annuity under which he or she chooses to receive it.").

[8] Defendants acknowledge that Plaintiffs' claims involve a question of "statutory interpretation" (D. Mem. at 16) but then do not explain what "actuarial equivalence" means

. . on the same theory . . . ." (D. Mem. at 1), this Court held that the plaintiffs stated a claim. *Smith*, 2019 WL 2644204, at *3. This Court, in *Smith*, stated everything the Court needs to know to decide the Motion. First, *Smith* explained what actuarial equivalence is:

> "Although ERISA does not further define actuarial equivalence, we assume Congress intended that term of art to have its established meaning." Stephens v. U.S. Airways Grp., Inc., 644 F.3d 437, 440 (D.C. Cir. 2011). "Two modes of payment are actuarially equivalent when their present values are equal under a given set of actuarial assumptions." Id. More specific guidance, found in the regulations Plaintiffs cite, states: "[i]n determining the present value of any distribution of any accrued benefit from a defined benefit plan, the plan must take into account specified valuation rules . . . as set forth in section 417(e)." 26 C.F.R. § 1.411(a)–11(d). Section 417(e) requires that the accrued benefit be discounted to present value at the "applicable interest rate." 26 U.S.C. § 417(e)(3)(A); 29 U.S.C. § 1055(g)(3); 26 C.F.R. § 1.417(e)–1(d). Mortality data may also factor into an actuarial equivalence calculation. See Dooley v. Am. Airlines, Inc., No. 81-cv-6770, 1993 WL 460849, at *10 (N.D. Ill. Nov. 4, 1993) (holding that actuarially equivalent benefits must be "determined on the basis of actuarial assumptions with respect to mortality and interest which are reasonable in the aggregate").

Smith, 2019 WL 2644204 at *2.

This Court in *Smith* also rejected the argument that Defendants make in the Motion that Plaintiffs are trying to insert the word "reasonableness" into the statute instead of

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under § 1054(c)(3). Nor did Defendants explain how the ECFs that Plaintiffs allege caused Defendants to violate ERISA were "actuarial" in nature since Plaintiffs allege that the Plans do not describe how the Part B ECFs were derived (Compl., at ¶ 66) or how they provide Plaintiffs with an "equivalent" pension benefit. Rather, Defendants circularly state that "actuarial equivalence" means that early retirement benefits "must be actuarially equivalent to the normal retirement age benefit." D. Mem. at 16.

seeking actuarially equivalent benefits that would be produced by using current mortality and interest rate (reasonable) assumptions. *Smith* stated:

> But what Plaintiffs seek is actuarial equivalence, a requirement under § 1054(c)(3), not reasonableness. Plaintiffs assert that the Plan ECFs must be based on factors that lead to an actuarially equivalent benefit. Seemingly looking to sidestep any analysis into the basis for the ECFs, Defendants imply that there are no underlying requirements at all for calculating and applying the ECFs. (See Defs.' Supp. Mem. at 13 ("Here, the Plan defines the benefit that each Plaintiff earned, including the ECFs applied to the benefit when commenced before normal retirement age. Each Plaintiff has received that benefit in accordance with the Plan terms. They are entitled to nothing more.")). However,
>
> > [f]or the purposes of [§ 1054(c)(3)], the regulations do not leave a plan free to choose its own methodology for determining the actuarial equivalent of the accrued benefit expressed as an annuity payable at normal retirement age. If plans were free to determine their own assumptions and methodology, they could effectively eviscerate the protections provided by ERISA's requirement of "actuarial equivalence."
>
> Esden, 229 F.3d at 164. Indeed, if § 1054 were as permissive as Defendants suggest, they would be free to apply an ECF that reduced monthly benefits by 99% if a participant retired at age 64 rather than 65. This is contrary to the purpose of ERISA. "To comply with ERISA, as well as to be considered a qualified plan under the Code, a plan must comply with specified valuation rules and certain consent rules." Id. (citing Treas. Reg. § 1.411(a)–11(a)(1) and Treas. Reg. § 1.417(e)–1(a)).

Smith, 2019 WL 2644204. at **2–3. Nothing has changed since *Smith* to warrant a different outcome here. Indeed, other than the summary judgment decision in *Belknap*,[9] an outlier case currently on appeal on which Defendants exclusively rely, every other case before and after *Smith* agrees with this Court's analysis in *Smith*.

Smith cited *Stephens* for the proposition that actuarial equivalence has an established meaning. *Smith,* 2019 WL 2644204, at *3. *Stephens* relied on materials that the Society of Actuaries uses to teach the concept to actuarial students. *See Stephens*, 644 F.3d at 440 (citing Jeff L. Schwartzmann & Ralph Garfield, "Actuarially Equivalent Benefits" ("Schwartzmann & Garfield")[10]). Schwartzmann & Garfield provides that the "fundamental principle" underlying actuarial equivalence is that the "actuarial present values of the pensions on each basis are equal." Schwartzmann & Garfield at 1. "Actuarial equivalence" does not exist every time one pension form is converted to another; rather, Schwartzmann & Garfield instructs that:

> The interest and mortality assumptions play a key role in determining the magnitude of the actuarial equivalence factor. Periodically, the assumptions used [for actuarial equivalence] must be reviewed and modified so as to insure [sic] that they continue to fairly assess the cost of the optional basis of payment.

[9] The decision in *Belknap* is titled "Memorandum and Order on Defendants' Motions to Dismiss," but the court converted the ruling to a motion for summary judgment. *See Belknap*, 2022 WL 658653, at *1.

[10] This article is publicly available through the website for the Society of Actuaries. Available at: https://www.soa.org/search/?q=%22actuarially+equivalent+benefits%22 . *See* the first search result; last accessed June 27, 2022.

Id. at 11.[11]

Smith also relied on *Esden*, which concerned a claim under § 1054(c)(3) regarding the assumptions used to calculate lump sum benefits. *Smith*, 2019 WL 2644204, at *2; *Esden,* 229 F.3d at 158–59. *Esden* established that all forms of benefits "must be worth at least as much as" the participant's annuity at normal retirement age. *Esden,* 229 F.3d at 163.[12] *Esden* also made clear that plan sponsors do not have unfettered discretion to determine the "methodology for determining actuarial equivalen[ce]." *Id*. at 164. To do so, would allow plan sponsors to "eviscerate the protections provided by ERISA's requirement of actuarial equivalence." *Id*.

Similarly, in *Dooley v. American Airlines, Inc.*, 797 F. 2d 1447 (7th Cir. 1986), the plaintiffs alleged that they received early retirement "benefits which were less than actuarially equivalent to the normal retirement annuity." *Id*. at 1449. The Seventh

[11] This "review and modification" is an important part of an actuary's work. Actuaries "measure and manage risk" with their "deep understanding of mathematics, statistics and business management." *See* Society of Actuaries' website, https://www.soa.org/future-actuaries/what-is-an-actuary/

[12] *Esden* concerned lump sum benefits, not annuities. However, *Esden* found that § 1054(c)(3) protected ***all*** optional forms of benefits, regardless "as to timing or form," not just lump sum benefits. *Id.* at 163. When prescribing the specific interest and mortality assumptions that plans must use to calculate lump sums in the Tax Reform Act of 1986, Pub. L. 99-514, § 1139(b), 100 Stat. 2085 (1986), Congress did not retroactively change ERISA's actuarial equivalence requirements, provide that actuarial equivalence means one thing for annuities and another for lump sums, or eliminate the protections ERISA provides to participants like Plaintiffs, who retired before age 65. Accordingly, Defendants attempt to distinguish *Esden* on the basis that it addressed only lump sum benefits fails. D. Mem. at 16, n. 12.

Circuit reversed the trial court's award of summary judgment to the defendants. *Id.* at 1454. Citing the plaintiffs' expert's testimony—that "actuarial equivalence must be determined on the basis of reasonable actuarial assumptions, consistently applied, including a reasonable interest assumption"—the court found that the interest rate used was not reasonable compared to the "current market interest rate." *Id.*

On remand, the trial court in *Dooley v. American Airlines, Inc.*, No. 81-C-6770, 1993 WL 460849 (N.D. Ill. 1993) held that "[t]he term 'actuarially equivalent' means ***equal in value*** to the present value of normal retirement benefits, determined on the basis of actuarial assumptions with respect to mortality and interest which are reasonable in the aggregate." *Id.*, at *10 (emphasis added). Interpreting "the objective of the statutory actuarial equivalence requirement," the court found that the plaintiffs must receive a benefit calculated with an assumption "relative to the market," "not one which is but a ghost of the past." *Id.*, at **10, 11.[13]

Similarly, in *McDaniel v Chevron Corp.*, 203 F.3d 1099 (9th Cir 2000), the Ninth Circuit made clear that reasonable assumptions must be used for calculating benefits, finding that "[t]he most important consideration in. . . . selecting a mortality table to be used in

[13] *Dooley* also concerned lump sum benefits, which must now be calculated using prescribed interest rate and mortality table assumptions. *See* 26 U.S.C. §§ 417(e) and 430(h). But, as discussed above, *supra* n. 12, this requirement was not enacted until 1986, years after the relevant time in *Dooley*, 1981 to 1982. *Dooley*, 797 F. 2d at 1449. Thus, *Dooley* involves the same basis for determining actuarial equivalence that Plaintiffs assert should apply here. As discussed above, *supra* n. 12, "actuarial equivalence" under § 1054(c)(3) cannot have one definition for lump sum benefits and an entirely different definition for annuity benefits.

calculating pension benefits is whether the population from whom the mortality experience is developed. . . . has characteristics that are typical of the plan's participants." *Id.* at 1110 (citation omitted). *McDaniel* held that the plan sponsor satisfied § 1054(c)(3)'s actuarial equivalence requirement when it used a mortality table that reflected the plans participants' actual mortality experience and, therefore, was reasonable. *Id.* at 1120–21; Compl., ¶ 58 (mortality assumption is "reasonable" under Actuarial Standards of Practice if it takes "into account. . . current demographic data. . .").

All district court cases that have addressed the issue (other than *Belknap*) have also sustained claims that § 1054(c)(3) requires the use of reasonable actuarial assumptions. In *Smith v. Rockwell Automation, Inc.*, 438 F.Supp.3d 912 (E.D. Wis. 2020), the plaintiff alleged that the plan sponsor violated §1054(c)(3)'s actuarial equivalence requirements by using antiquated assumptions to calculate benefits. *Rockwell Automation*, 438 F.Supp.3d at 914–15. In denying the motion to dismiss, the court stated that "[f]or purposes of converting annuities, ERISA requires actuarial equivalence, not something that approximates actuarial equivalence. . . . any value outside of the reasonable range will violate ERISA." *Id.* at 921 n. 5.

Cruz v. Raytheon Co., 435 F. Supp. 3d 350 (D. Mass. 2020) found that reasonable assumptions must be used under § 1054(c)(3), relying on ERISA's definition of "present value." *Id.* at 352. Section 3(27) of ERISA defines the term "present value" as "the value adjusted to reflect anticipated events. Such adjustments shall conform to such regulations as the Secretary of the Treasury may prescribe." 29 U.S.C. § 1002(27). In this case, the "anticipated event[]" is the expected mortality of a participant when he or she begins

collecting benefits. *Cruz* relied on 26 C.F.R. § 1.411(d)-3(g)(1), which provides that actuarial present value must "be 'determined using reasonable assumptions.'" *Id*. at 352.[14]

The court in *Torres v. American Airlines*, 416 F. Supp. 3d 640 (N.D. Tex. 2019), also relied on ERISA's definition of "present value." *See id.* at 647. *Torres* identified numerous additional Tax Code regulations the Secretary of the Treasury prescribed that require the use of "reasonable" assumptions when "adjust[ing] to reflect anticipated events." *Id*.[15] Unreasonable assumptions, or fixed numerical factors like the Part B ECFs that are based on unreasonable assumptions, do not qualify because they do not reflect anticipated events. *See Herndon v. Huntington Ingalls Industries, Inc.*, No. 19-cv-52, 2020 WL 3053465, at *2 (E.D. Va. Feb. 20, 2020) (discussing reasonableness of assumptions).

Defendants' contrary interpretation of "actuarial equivalent" could lead to absurd results. The court in *Urlaub v. Citgo Petroleum Corp*., No. 21-cv-4133, 2022 WL 523129, at **6–7 (N.D. Ill. Feb. 22, 2022), stated when discussing section 1054(c)(3):

> [I]t cannot possibly be the case that ERISA's actuarial equivalence requirements allow the use of unreasonable mortality assumptions. Taken to the extreme, the defendants' argument suggests that they could have used any mortality table—presumably, even one from the

[14] While the regulation uses the term "actuarial present value," which is not specifically referenced in § 1054(c)(3), the statute requires actuarial equivalence, which is indisputably determined by calculating actuarial present value. *See, e.g., Stephens*, 637 F.3d at 440 (citing Schwartzmann & Garfield).

[15] As *Torres* noted, several of the regulations under the Tax Code contain definitions of present value. For example, 26 C.F.R. § 1.401(a)(4)-12, which expressly defines "[a]ctuarial equivalent," provides that benefits are actuarially equivalent "if the actuarial present value" of the benefits "is the same."

> sixteenth century—to calculate [benefits]. If this were true, the actuarial equivalence requirement would be rendered meaningless.

Similarly, as the court explained in *Masten v. Metropolitan Life Insurance Company*, 543 F. Supp. 3d 25, 35 (S.D.N.Y. 2021):

> Broadly speaking, some limits on the discretion of plan administrators in the selection of actuarial methodology are necessary to effectuate the protective purposes of ERISA, as recognized by the Second Circuit. The alternative interpretation, in which administrators have free reign to fashion the assumptions used to calculate actuarial equivalence, would permit all kinds of mischief inconsistent with that purpose. Allowing plans to set their own definition of actuarial equivalence would eliminate any protections provided by that requirement. [ERISA] must therefore be read to impose some boundaries on the determination of equivalence.
>
> ***
>
> In sum, the Court concludes that benefit plans must use actuarial assumptions that are reasonable in order to qualify as actuarially equivalent within the meaning of [ERISA].

The notion that "actuarial equivalence" under § 1054(c)(3) requires a standard of reasonableness was captured well by the Seventh Circuit, when it held that ERISA prohibited plan sponsors from inviting participants to "sell their pension entitlement back to the company cheap…." *Berger v. Xerox Corp. Ret. Inc. Guar. Plan*, 338 F.3d 755, 762 (7th Cir. 2003); *see Smith,* 2019 WL 2644204, *3 ("Indeed, if § 1054 were as permissive as Defendants suggest, they would be free to apply an ECF that reduced monthly benefits by 99% if a participant retired at age 64 rather than 65. This is contrary to the purpose of ERISA.")

The Eighth Circuit recognized this in *Pizza Pro*, 719 F.App'x 540 (8th Cir. 2018), affirming the Tax Court's definition of "actuarial equivalence" that found that "special attention must be paid to the actuarial assumptions underlying the computations." *Id.* at 543; *see Pizza Pro Equip. Leasing, Inc. v. Comm'r of Internal Revenue*, 147 T.C. 394, 411 (2016). If Defendants can use ***any*** actuarial assumptions (or ECFs), however unreasonable, then ***no*** attention would need to be paid to them and plans could penalize participants who commenced benefits early through excessive reductions to their benefits.

Even the court in *Belknap* correctly interpreted ERISA's requirements in its ruling on an earlier motion to dismiss. *See Belknap v. Partners Healthcare Sys., Inc.*, No. 19-cv-11437, 2020 WL 4506162 (D. Mass. August 5, 2020). In considering whether a plan could use a mortality table developed by Sir Edmund Halley in 1693, the court held that "[s]urely Congress intended the 'actuarial equivalence' requirement of §1054(c)(3) to provide some degree of protection to beneficiaries, and not to permit employers to use any assumptions they chose, no matter how outmoded or inapt." *Belknap*, 2020 WL 4506162, at *2. But, the *Belknap* court did a complete flip flop in its summary judgment decision. It was right the first time.

B. *Belknap* is an Outlier that this Court Should Not Follow

In its summary judgment decision, the court in *Belknap* ignored its previous finding that "Congress intended the 'actuarial equivalence' requirement of §1054(c)(3) to provide some degree of protection to beneficiaries, and not to permit employers to use any assumptions they chose, no matter how outmoded or inapt," 2020 WL 4506162, at *2, and instead substituted its own policy preference to conclude that "actuarial equivalence"

means whatever a plan says it means. *Belknap*, 2022 WL 658653, at *11. The court then embarked on a torturous and circuitous effort to avoid the mountain of law cited above. *Id*., at **6–10. Its statutory interpretation was fundamentally flawed in many ways.

First, *Belknap* did not give effect to every word and provision of the statute.[16] In particular, it rendered the phrase "actuarial equivalent" superfluous. ERISA requires that plans be "maintained pursuant to a written instrument that "specif[ies] the basis on which payments are made. . . . from the plan." 29 U.S.C. §§ 1102(b)(4). If § 1054(c)(3) only required that benefits be paid in accordance with a plan's terms, (*see Belknap*, 2022 WL 658653, at *11), it would be entirely duplicative of what § 1102(b)(4) already provides. Therefore, § 1054(c)(3) must provide additional protection for participants beyond those in § 1102. *Belknap's* interpretation would also effectively eliminate the word "equivalent" from the statute. Equivalence requires equal ***present*** values of two benefits "on the date. . . . of retirement." *Dooley*, 1993 WL 460849, at *11. A present value calculation that is not based on current mortality and interest rate assumptions could not produce an equivalent ***present*** value.[17]

[16] *Liu v. Sec. & Exch. Comm'n*, 140 S. Ct. 1936, 1948 (2020); *Vasseur v. Sowell*, 930 F.3d 994, 996 (8th Cir. 2019).

[17] *Belknap's* interpretation also effectively removed the word "actuarial" from the statute because plan sponsors, who are not actuaries, control how a plan converts one form of benefit to another. But, as even *Belknap* conceded, the selection of assumptions is a matter of professional actuarial judgment. *See Belknap*, 2022 WL 658653, at *10. If the assumptions used to calculate optional forms of benefit are selected without an actuary's professional judgment, the optional form will not be an "actuarial equivalent," it will be a "plan sponsor equivalent."

Second, *Belknap* violated the rule that the words of a statute must be read in context and consistent with all other parts of the statute.[18] By stripping reasonableness from "actuarial equivalence" in § 1054(c)(3), *Belknap* created a conflict between § 1054 and the other sections of ERISA that require that reasonable assumptions. For example, 29 U.S.C. § 1056(a)(3), provides that early retirement benefits for terminated vested participants (e.g., employees that leave a company before they can start receiving benefits) must not be "less than the benefits to which participants would be entitled at the normal retirement age, *actuarially reduced under regulations prescribed by the Secretary of the Treasury*." 29 U.S.C. § 1056(a)(3) (emphasis added). The associated Tax Code regulation to § 1056 is 26 C.F.R. § 1.401(a)-14(c), which is entitled "[s]pecial early retirement rule" and states that a terminated vested participants' "normal retirement benefit" can only be "reduced in accordance with ***reasonable actuarial assumptions***." 26 C.F.R. § 1.401(a)-14(c)(2) (emphasis added). The Commissioner would not give greater protections to terminated vested participants than active ones. Notably, *McDaniel* and *Esden* relied on regulations under 26 U.S.C. § 411 when interpreting § 1054(c)(3).

Belknap's analysis was also inconsistent with 29 U.S.C. § 1053(a), which provides that participants with a certain number of years of service have a non-forfeitable right "to 100% of the employee's accrued benefit." 29 U.S.C. § 1053(a)(2)(A)(ii). As discussed

[18] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–133 (2000). *King v. Burwell*, 576 U.S. 473, 492 (2015) (citing *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 371 (1988); *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 108 (2010).

below, this section requires the use of reasonable actuarial assumptions.[19] *See Smith,* 2019 WL 2644204, at *3, *Esden,* 229 F.3d at 162–68, and *Berger*, 338 F.3d at 762. Accordingly, a plan violates § 1053(a) by failing to make "a ***suitable*** actuarial adjustment". *Contilli v. Local 705 Intern. Broth. of Teamsters Pension Fund*, 559 F.3d 720, 723 (7th Cir. 2009) (emphasis added). "Suitable" is simply another way of saying "reasonable."

Third, *Belknap* violated the rule that "identical words used in different parts of the same act are intended to have the same meaning."[20] As discussed above, the term "actuarial equivalence" is used throughout ERISA and the Tax Code and regulations, and typically includes the requirement that the assumptions must be reasonable.[21] ERISA cannot require the use of reasonable actuarial assumptions everywhere but § 1054(c)(3). The most glaring example of *Belknap's* violation of this principle concerns its analysis of § 1054(c)(3) itself. As set forth above, *supra* 11–12 and n. 12 and 13, in attempting to distinguish *Esden* and *Dooley*, *Belknap* found that actuarial equivalence under § 1054(c)(3) requires reasonable

[19] The applicable regulation states that "adjustments to plan benefits . . . in excess of reasonable actuarial reductions, can result in rights being forfeitable." 26 C.F.R. § 1.411(a)-4(a).

[20] *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571 (2012); *Alam v. United States Citizenship & Immigr. Servs.*, No. 21-cv-755, 2022 WL 834645, at *7 (D. Minn. Mar. 21, 2022).

[21] For example, 26 C.F.R. § 1.401(a)(4)-12 defines "[a]ctuarial present value" as the "value as of a specified date of an amount or series of amounts ***due thereafter*** . . . ." 26 C.F.R. § 1.411(d)-3 explains that "[a]ctuarial present value" is "determined using ***reasonable actuarial assumptions.***" 26 C.F.R. § 1.417(a)(3)-1(f) provides that the actuarial present value of an optional annuity form will not be treated as less than the actuarial present value of the QJSA if ". . . [u]sing ***reasonable actuarial assumptions***, the actuarial present value of the QJSA for an unmarried participant is not less than the actuarial present value of the QJSA for a married participant." (Emphasis added.)

assumptions for lump sum benefits but permits unreasonable assumptions for annuity benefits. *Belknap*, 2022 WL 658653, at *8. A phrase in a single subsection of ERISA cannot have two different definitions. If Congress intended that result, it would have said so.[22]

While *Belknap* rejected that the regulations apply to § 1054(c)(3), *Belknap*, 2022 WL 658653, at *8, as this Court explained in *Smith*, they provide "guidance" for a harmonious interpretation of the statute:

> Defendants contend that Plaintiffs' claims arise under these regulations, which do not provide for a private right of action. This argument ignores that the regulations merely provide guidance, and the relief Plaintiffs seek is for violation of the actuarial equivalence requirement of § 1054(c)(3), not for violation of the Tax Code and Treasury regulations. Indeed, courts have often referred to the same regulations Plaintiffs cite to assist in actuarial equivalence analyses in ERISA cases.

Smith, 2019 WL 2644204, at * 2 (citations omitted). Because a word or phrase cannot have two different meanings in the same statute, definitions of actuarial equivalence under other sections of ERISA—as well as the related Tax Code and regulations—are clear indicators that "actuarial equivalence" under § 1054(c)(3) must also require reasonable assumptions.

V. PLAINTIFFS STATE A CLAIM UNDER 29 U.S.C. § 1053(a)

ERISA provides that a participant's "right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and ***in addition*** shall satisfy

[22] While Congress requires the use of the Treasury Assumptions for lump sum benefits, that merely means that Congress deems those assumptions to be reasonable. Congress did not create two definitions of "actuarial equivalence" within ERISA.

the requirements of paragraphs (1) and (2) of this subsection." 29 U.S.C. § 1053(a) (emphasis added). Subsection (a)(2) specifically protects the "accrued benefit" of pension plan participants with five years of service. *Id*., § 1053(a)(2); *see Laurent v. PricewaterhouseCoopers, LLC*, 794 F.3d 272, 274 (2d Cir. 2015); *see also Berger*, 338 F.3d at 758 (finding that "[i]f the employee leaves the company before he reaches the normal retirement age, his 'normal retirement benefit,' which is to say his pension entitlement, is the benefit that he has 'accrued' to the date of his leaving").

The corresponding Tax Code provision to § 1053(a) is 26 U.S.C. § 411(a), which states that "adjustments in excess of reasonable actuarial reductions, can result in rights being forfeitable." 26 C.F.R. § 1.411(a)-4(a); *see also Contilli,* 559 F.3d at 722 (finding that a failure to make a "suitable actuarial adjustment" that resulted in "a reduction in the total value of monthly benefits is a kind of forfeiture."). In their Complaint, Plaintiffs allege that the Part B ECFs caused them to forfeit part of their accrued benefits. Compl., ¶¶ 6, 67, 77, 87, 89 and 100.

The plaintiffs in *Smith* made identical allegations. In finding that the plaintiffs had stated a claim under § 1053(a), this Court stated in *Smith*:

> Plaintiffs argue that by reducing their benefits in violation of § 1054(c)(3), Defendants have also violated the anti-forfeiture provisions of 29 U.S.C. § 1053(a). This section provides that an employee's right to his or her vested retirement benefits is nonforfeitable. The Treasury regulation for the Tax Code provision corresponding to § 1053 (26 U.S.C. § 411), states that "adjustments in excess of reasonable actuarial reductions, can result in rights being forfeitable." 26 C.F.R. § 1.411(a)-4(a). And courts have held that a distribution of pension benefits below the actuarial equivalent value

> can constitute a forfeiture of accrued benefits under § 1053(a). E.g., Berger v. Xerox Corp. Ret. Income Guarantee Plan, 338 F.3d 755, 759 (7th Cir. 2003); Esden, 229 F.3d at 162-68.
>
> For the same reasons stated above, discovery will determine whether the benefits given to Plaintiffs are the actuarial equivalent of the benefits they would have received at normal retirement age. Plaintiffs have alleged facts demonstrating that the benefits they receive are insufficient. Accordingly, Plaintiffs have stated a plausible claim for improper forfeiture of accrued benefits under ERISA.

Smith, 2019 WL 2644204, at **3–4. Again, nothing has changed since *Smith* to warrant a different outcome here.

Like *Smith,* the plaintiffs in *Urlaub* alleged that the excessive actuarial reductions to their early retirement benefits constituted a forfeiture under § 1053(a). Contrary to Defendants' argument, the court in *Urlaub* found that § 1053(a) must apply to early retirement benefits. *Urlaub*, 2022 WL 523129, at *7. The court concluded that "defendants' interpretation [that § 1053(a) does not apply until a participant reaches age 65] would mean that, despite the fact that, under the statute, a normal retirement benefit includes an early retirement benefit, this benefit is not protected under section 1053(a) until the attainment of normal retirement age. That makes no sense." *Urlaub*, 2022 WL 523129, at * 7. Accordingly, the court held "that reducing a participant's benefits by using unreasonable actuarial assumptions can constitute a forfeiture of rights under section 1053(a)." *Id*., at * 8.

Defendants misrepresent ERISA's anti-forfeiture rule by arguing that it ***only*** protects participants who are age 65. D. Mem. at 21. While this limitation applies to a

participant's "normal retirement benefit," the language immediately following the part of § 1053(a) that Defendants quote in their brief provides another requirement, stating "***and in addition***," protecting a participant's accrued benefit under subsection (a)(2). 29 U.S.C. § 1053(a) (emphasis added). Unlike the protections for a participant's "normal retirement benefit," the protection in subsection (a)(2) for a participant's ***accrued*** benefit is not limited to participants who are age 65. Indeed, *Esden* held that the defendant violated the anti-forfeiture requirement in § 1053(a)(2) when paying benefits to participants younger than age 65. *Esden*, 229 F.2d at 166.

DuBuske v. Pepsico, Inc., No. 18-cv-11618, 2019 WL 4688706 (S.D.N.Y. Sept. 25, 2019), the primary case on which Defendants rely, even states that ERISA's anti-forfeiture Rule has two requirements. *DuBuske*, 2019 WL 4688706, at *4; *see also Laurent*, 794 F.3d at 274 (stating "[i]n addition, specifically for defined benefit plans," to describe the protections provided by subsection (a)(2)). *DuBuske* only found that subsection (a)(2)'s protections did not apply ***in that case*** because the plaintiffs only alleged that their benefits were "less valuable than the SLA they were offered when they actually retired," ***not*** less valuable than their "accrued benefits." *DuBuske*, 2019 WL 4688704, at *4. *DuBuske* distinguished *Smith* because of the difference in these allegations. *Id*. at *4, n. 4. Here, as in *Smith* and in sharp contrast to *DuBuske*, Plaintiffs ***do allege*** that they have been deprived "of the full amount of pension payments they would achieve at normal retirement age," i.e., their "accrued benefit." Compl., ¶¶ 6, 67, 77, 87, 88 and 100. Accordingly, the reason

why *DuBuske* was distinguished from *Smith* does not apply here.[23]

VI. THE MOTION TO STRIKE SHOULD BE DENIED

A. Plaintiffs' Proposed Class is Not Fail-Safe

The proposed Class is not a fail-safe class. Fail-safe classes are those whose members cannot be ascertained before a court decides the case's merits. They are problematic "because the court cannot know to whom notice should be sent," and they allow "putative class members to seek a remedy but not be bound by an adverse judgment—either those class members win or, by virtue of losing, they are not in the class and are not bound." *Orduno v. Pietrzak,* 932 F.3d 710, 716 (8th Cir. 2019). This "head I win, tails you lose" result impermissibly "shields putative class members from receiving an adverse judgment" but still binds defendants if the class prevails. *Randleman v. Fid. Nat. Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011); *see also Garcia v. Execu|Search*

[23] In an earlier Motion to Dismiss, the court in *Belknap* relied on *DuBuske* and is irrelevant for the same reason. *Belknap v. Partners Healthcare Sys., Inc*., No. 19-cv-11437 (D. Mass. Jan. 24, 2020) (Dkt. 33 at 9). *Rossi v. Boston Gas Co.*, No. 88-cv-0079, 1994 WL 548101 (D. Mass. July 7, 1994) has little relevance here. The plan in *Rossi* provided disabled participants an "Additional Allowance" until age 65 or when they started receiving Social Security. The plan stopped paying the plaintiff's Additional Allowance when he received Social Security, which the court found was not a forfeiture because the plaintiff's "right to the Additional Allowance benefits was expressly ***not*** unconditional." *Id*., at * 4 (emphasis in original, citations omitted). But the court's analysis concerning whether ERISA's anti-forfeiture rule would be implicated if "some nonforfeitable right existed" conflated a Social Security offset with a plan's ability to suspend a participant's benefits under § 1053(a)(3)(B). *Rossi*, 1994 WL 548101, at *4. The plan in *Rossi* did not "suspend" the plaintiff's Additional Allowance because he would not again start receiving those benefits when he turned 65. Indeed, the Additional Allowance was a benefit that was only payable ***until age 65***. *Rossi*, 1994 WL 548101, at *1.

Grp., LLC, No. 17-cv-9401, 2019 WL 689084, at *2 (S.D.N.Y. Feb. 19, 2019) (discussing how fail-safe classes are unfair to defendants).

Here, all members of Plaintiffs' proposed Class[24] can be ascertained based on objective criteria ***before*** the Court determines liability. Based on U.S. Bank's internal records that show which of the Plans' participants received Part B annuity benefits and retired early, Class members can be determined by comparing the present values of their benefits calculated under the Plans' terms to the present values calculated using the applicable Treasury Assumptions in the year they commenced benefits.[25] The Treasury Assumptions provide an objective, replicable standard to determine the present value of pension benefits. *See McKeage v. TMBC, LLC*, 847 F.3d 992, 998 (8th Cir. 2017) (members of certified class were ascertainable "by reviewing TMBC's customer's files according to objective criteria"); *see also In re Community Bank of N. Vir. Mortg. Lending Litig.*, 795 F.3d 380, 397 (3d Cir. 2015) (class was ascertainable because class members could be identified using defendant's business records and a "reliable, repeatable process. . . .").

[24] Plaintiffs defined their proposed Class as: "All participants in the Plans, or their beneficiaries, (1) whose BCD is on or after March 1, 2016; (2) who received Part B annuity benefits that were reduced by the Part B ECFs; and (3) where the actuarial present value of their annuity benefit as of BCD was less than the actuarial present value of their age-65 SLA using the applicable Treasury Assumptions as of each participant's BCD. Excluded from the Class are Defendants and any individuals who are subsequently to be determined to be fiduciaries of the Plans." Compl., ¶ 78.

[25] The Treasury Assumptions consist of the "Applicable Mortality Table" and the "Applicable Interest Rates" that the Treasury Department publishes for the calculation of lump sum benefits. Compl., ¶ 41.

Much like this case, in *In re J.P. Morgan Stable Value Fund ERISA Litigation*, No. 12-cv-2548, 2017 WL 1273963 (S.D.N.Y. Mar. 31, 2017), the class and subclasses were defined as participants "whose stable value fund investment underperformed the Hueler Index or similar objective benchmark." *Id.*, at **3–4. The court found that the classes were ascertainable because "class members will be readily identifiable as having underperformed the objective benchmark or not" and certified the class. *Id*., at *12. The same is true of Plaintiffs' proposed Class here.

Contrary to Defendants' suggestion (D. Mem. at 25), Plaintiffs would not be asking the Court to find that the Treasury Assumptions satisfy ERISA's actuarial equivalence requirements when moving to certify their proposed Class. Individuals will be Class members, have notice sent to them, and be bound by any judgment, even if the Court concludes that the appliable Treasury Assumptions do not satisfy ERISA's actuarial equivalence requirements or, like the court discussed in *J.P. Morgan,* selects other assumptions when deciding the case's merits. *See In re J.P. Morgan*, 2017 WL 1273963, at *12 ("another benchmark could be substituted in place of the Hueler Index without changing any underlying methodology."). Here, there is ***no*** legal analysis involved in determining who is a Class member. Because membership in the Class is not dependent on the Court's finding of liability, and can be determined using objective criteria, the Class is not a fail-safe class. *See*, *e.g.*, *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 768 (8th Cir. 2020) ("Because all members of the class were bound by the judgment, regardless of whether they succeeded on their individual claims, the district court did not create a fail-safe class.")

Contrary to Defendants' argument (D. Mem. at 26), Class Members could be bound by an adverse judgment if they fail to prove their claims in any number of ways. For example, as discussed above, Defendants argue that the Plans' definition of "actuarial equivalent" *ipso facto* satisfies ERISA's actuarial equivalence requirement if that definition is stated in the Plan document. D. Mem. at 20. If, after a class is certified, the Court agrees, all class members would lose and be bound by the adverse judgment. The same would be true if the Court decides that Defendants calculate benefits for early retirees consistent with ERISA's requirements. In *Smith,* Defendants insisted that the ECFs used to reduce participants' Part B benefits were reasonable. Because Defendants will presumably take the same position in this case, the reasonableness of the Plans' formulae for calculating early retirement benefits will be a contested evidentiary issue. If Defendants prevail on that issue, all Class members will lose.

The cases upon which Defendants rely are very different than this one. *Adam v. CHW Grp., Inc.*, No. 21-cv-19, 2021 WL 7285905 (N.D. Iowa Sept. 9, 2021), and *Lindsay Transmission, LLC v. Off. Depot, Inc.*, No. 12-cv-221, 2013 WL 275568 (E.D. Mo. Jan. 24, 2013), both involved claims under the Telephone Consumer Protection Act ("TCPA") in which the plaintiffs sought to certify a class comprised of all persons that had not consented to receiving communications from the defendants. *Adam*, 2021 WL 7285905, at * 11; *Lindsay*, 2013 WL 275568, at *4. Because lack of consent is an element of a TCPA claim, the courts found that the proposed classes were fail-safe because they consisted "solely of persons who can establish that [defendants] violated the TCPA." *Adam*, 2021 WL 7285905, at *11; *Lindsay*, 2013 WL 275568, at *4 (striking class allegations because

"the proposed class consists solely of persons who can establish that the defendant violated the TCPA."). In other words, class membership in *Adam* and *Lindsay* depended on a finding that the defendants violated the TCPA.

Here, in stark contrast, the Court will not need to decide any merits issues to determine membership in Plaintiffs' proposed Class. Membership can be ascertained by applying a common, replicable, mathematical formula to Defendants' data. Solely with that information, and nothing more, Plaintiffs can produce a list of Class members. Importantly, each of these Class members would be bound by the judgment, even if they do not prevail on their claims. *See Vogt*, 963 F.3d at 768.

B. Defendants' Motion to Strike Is Premature

Even if Plaintiffs' proposed Class is fail-safe, and it is not, the Court should still deny Defendants' motion to strike because there is no reason to ignore the detailed procedures for class certification under Rule 23, including allowing Plaintiffs the opportunity to amend the class definition as the case proceeds.

A court may strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). However, striking a party's pleading is an extreme, disfavored, and "drastic" measure that is often "sought by the movant simply as a dilatory or harassing tactic." *Donelson v. Ameriprise Fin. Servs.*, 999 F.3d 1080, 1091–92 (8th Cir. 2021) (citations omitted). A court should strike a party's class allegations only in the rare circumstance where it is "apparent from the pleadings that the class ***cannot*** be certified." *Id.* at 1092 (emphasis added). Courts "in the Eighth Circuit. . . . typically deny as premature motions to strike class allegations filed significantly in

advance of any possible motion for class certification." *In re Folgers Coffee*, No. 21-cv-2984, 2021 WL 7004991 *4 (W.D. Mo. Dec. 28, 2021) (citations omitted). This Court would be well-justified in denying the motion to strike here.

At the motion to dismiss stage, courts deny motions to strike class allegations if there is even a possibility that a class could be certified. For example, in *Chen v. Target Corp.*, No. 21-cv-1247, 2022 WL 1597417 (D. Minn. May 19, 2022), even though this Court found that the plaintiffs' proposed class "may ultimately need to be redefined or class certification denied," it denied the defendant's motion to strike because defining the class based on objective criteria was "likely feasible" and "decline[d] to exercise its discretion to take the 'extreme and disfavored measure' of striking Plaintiffs' class allegations on their pleadings alone." *Id.* at *18.

Similarly, the court in *In re Folgers Coffee*, denied a motion to strike because it could not "determine with certainty that the certification of a nationwide class [would be] ***impossible***." *Id.*, at *4 (emphasis added). Moreover, because the plaintiffs' proposed definition was simply a "working" definition that could be changed during the pendency of litigation, especially prior to class certification, the court found it was more appropriate to defer a ruling until the class certification stage. *Id.*; *see also Sandusky Wellness Ctr. LLC v. Medtox Sci., Inc.*, No. 12-cv-2066, 2013 WL 951143, at *2 (D. Minn. Mar. 12, 2013) (court "unpersuaded that no set of circumstances could lead to class certification");[26] *St.*

[26] Notably, in *Sandusky Wellness* the district court ultimately denied class certification, finding that the class was not ascertainable but the Eighth Circuit reversed. *See Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 997 (8th Cir. 2016). There, the

Louis Heart Ctr., Inc. v. Nomax, Inc., No. 15-cv-517, 2015 WL 9451046, at * 2 (E.D. Mo. Dec. 23, 2015) (while the proposed class definition was "overly vague and imprecise," the court refused to strike the class allegations because "there is ample time for Plaintiff to refine the class definition . . . ."); *Rios v. State Farm Fire & Cas. Co.,* 469 F. Supp. 2d 727, 741 (S.D. Iowa 2007) (" . . . at this time, on [the defendant's] motion to strike and dismiss, it does not appear beyond doubt that Plaintiffs cannot establish an actionable class action lawsuit").

Even in *Adam* (D. Mem. at 23), the court refused to strike two of the three sub-classes that it could not conclusively determine were fail-safe. *Adam*, 2021 WL 7285905, at *13. In *Lindsay Transmission* (D. Mem. at 23), just four days after granting the defendant's motion to strike the class allegations, the court granted the plaintiff's motion for leave to amend the complaint to refine the class definition. *See Lindsay Transmission, LLC v. Office Depot, Inc.*, No. 12-cv-221 (E.D. Mo.), ECF No. 79. Despite the defendant's objections that the narrower class was still fail-safe, the court permitted the plaintiff to proceed to the class certification stage. *Id*. at 5.

Defendants also rely on *Donelson* (D. Mem. at 22), but in that case the court struck the class allegations at the pleading stage only because it was both apparent from the

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district court found that the plaintiff's proposed class definition (All persons who . . . ***were sent*** telephone facsimile messages . . . . (emphasis added)) was not ascertainable. *Sandusky Wellness*, 2014 WL 3846037, at *4 (D. Minn. Aug. 5, 2014), rev'd, 821 F.3d 992 (8th Cir. 2016). Reversing the district court, the Eighth Circuit found that "fax logs showing the numbers that received each fax are objective criteria that make the recipient clearly ascertainable." *Sandusky Wellness*, 821 F.3d at 997–98. Defendants' data can be similarly used in this case to identify class members.

pleadings that a class could not be certified and failing to strike the class allegations at that stage would have prejudiced the defendants. *See Donelson*, 999 F.3d at 1092. There, an investment advisor convinced the plaintiff to open an investment account, which the advisor allegedly mishandled. *Id.* at 1085. The account application contained an arbitration clause covering all controversies except for "putative or certified class actions." *Id.* at 1085–86. Alleging that the investment advisor's other clients "experienced similar improprieties, Donelson sought to represent them in a class action." *Id.* at 1086. The defendants moved to strike the plaintiff's class allegations and to compel arbitration pursuant to the arbitration clause in the account application. *Id.* The district court denied the motions and the Eighth Circuit reversed. *Id.*

The Eighth Circuit ordered the district court to strike the class allegations because "the class claims would not be cohesive" and because "delaying the decision" until the class certification stage would force the defendants to continue litigating the case "with one hand tied behind their backs to avoid substantially invoking the litigation machinery and waiving their right to arbitrate." *Id.* at 1092. The court found that under these rare circumstances—where permitting the class claims would "prejudice the defendant by requiring the mounting of a defense against claims that ultimately cannot be sustained[,]" *id.*—striking a party's class allegation at the pleadings stage was permissible. *Id.*

Rule 23 provides specific and detailed procedures for dealing with class certification. *See, generally,* Fed. R. Civ. P. 23 and Advisory Committee Notes. There is no reason those procedures should be ignored. That is particularly true in this case because Plaintiffs' alleged Class is not fail-safe. But, even if it was, the Court should permit

Plaintiffs' class allegations to proceed because Plaintiffs could modify the definition of the proposed Class before the class certification stage. *See Jones v. Monsanto Company,* No. 19-cv-0102, 2019 WL 9656365, at *9 (W.D. Mo. June 13, 2019) ("Plaintiffs have presented a class definition, but they are not bound to it and may present something different in a formal motion.").

VII. CONCLUSION

For the reasons set forth above, the Court should deny the Motion in its entirety. To the extent the Court grants the Motion in whole or in part, Plaintiffs respectfully move for leave to amend.

Dated: June 27, 2022

Respectfully submitted,

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