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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

MARSHA R. DUVANEY, on behalf of herself and all others similarly situated,

Plaintiff,

vs.

DELTA AIR LINES, INC., THE ADMINISTRATIVE COMMITTEE OF DELTA AIR LINES, INC., GREG TAHVONEN, MINDY DAVISON, JANET BRUNK, and JOHN/JANE DOES 1-5,

Defendants.

Civil Action No. 2:21-cv-02186

DEFENDANTS' MOTION TO DISMISS THE COMPLAINT PURSUANT TO RULES 12(B)(1) AND 12(B)(6)

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Defendants Delta Air Lines, Inc. ("Delta"), the Administrative Committee of Delta Air Lines, Inc., Greg Tahvonen, Mindy Davison, and Janet Brunk (collectively, "Defendants"), pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, hereby move this Court for an Order granting Defendants' Motion to Dismiss Plaintiff's Complaint and dismissing all of Plaintiff's claims against the Defendants with prejudice.

MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

Plaintiff Marsha R. DeVaney[1] ("Plaintiff") is a participant in the Northwest Airlines Pension Plan for Contract Employees (the "Contract Plan" or "Plan"), a retirement plan sponsored by Delta, Plaintiff elected and is currently receiving a monthly pension benefit in accordance with the express terms of the Plan. Specifically, Plaintiff elected a 50% Qualified Joint and Survivor Annuity ("QJSA"), under which she is set to receive a stream of monthly payments for life, and—if Plaintiff predeceases her spouse—her spouse receives a stream of payments for life, valued at 50% of Plaintiff's benefit.

Plaintiff does not contend that she is entitled to additional benefits under the Plan or that her benefits were calculated incorrectly. Rather, she claims that the Plan's provisions are "outdated" and thus unreasonable, and posits that if Defendants had used more favorable actuarial assumptions for calculating benefits, then her monthly benefit would have been higher. According to Plaintiff, by failing to use these allegedly more reasonable assumptions—which are found nowhere in the Plan and not prescribed by ERISA—Defendants violated ERISA and breached their fiduciary duties to the Plan. Specifically, Plaintiff claims that Defendants violated ERISA § 205(d), 29 U.S.C. § 1055(d), and seeks relief pursuant to ERISA § 502(a)(1)(B) and 502(a)(3), 29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(3). Plaintiff's claims fail as a matter of law for several reasons.

First, nothing in ERISA nor any relevant regulation requires Defendants to use the suggested "reasonable" assumptions on which Plaintiff's entire Complaint is predicated when calculating the QJSA benefit she selected. Yet Plaintiff asks the Court to expand the scope of

[1] Plaintiff's name is misspelled in the case caption and throughout the Complaint as "DuVaney."

relief afforded under ERISA by reading requirements, such as those applicable to lump-sum payments, into the statute for QJSAs as well, despite their conspicuous and intentional absence. The law is clear that courts should take care not to authorize remedies Congress did not provide for, and this Court should decline Plaintiff's invitation to do so here. Defendants paid Plaintiff's pension benefits according to the Plan's stated definition of "actuarial equivalent," and, accordingly, did not violate ERISA.

Second, even if Plaintiff could plausibly allege an ERISA violation for failing to use her proposed reasonable actuarial assumptions (and she cannot), Plaintiff lacks both statutory and constitutional standing to pursue claims on behalf of participants in two other pension plans sponsored by Delta—the Northwest Airlines Pension Plan for Salaried Employees (the "Salaried Plan") and the Northwest Airlines Pension Plan for Pilot Employees (the "Pilot Plan"). Plaintiff does not allege that she is a participant, beneficiary, or fiduciary in either of these Plans (nor could she), defeating any finding that she has standing under the statute to pursue claims on their behalf. *See* ERISA § 502(a)(1); 29 U.S.C. § 1132(a)(1) ("A civil action may be brought . . . by a participant or beneficiary."); ERISA § 502(a)(3); 29 U.S.C. § 1132(a)(3) ("A civil action may be brought . . . by a participant, beneficiary, or fiduciary.").

Nor can she "allege [a] personal injury . . . [that is] likely to be redressed by the requested relief," as she must to establish standing under Article III of the United States Constitution. *Allen v. Wright*, 468 U.S. 737, 738 (1984). Because she is not a participant or beneficiary with regard to the Salaried Plan or the Pilot Plan, she is not receiving (and is not entitled to receive) benefits under those plans that were or even could have been diminished by the alleged misconduct here. As such, she has suffered no injury with respect to these Plans. Further, while the Salaried Plan and the Pilot Plan also use conversion factors to calculate benefit forms under those plans, respectively, the remedy Plaintiff seeks—reformation of the terms of those plans—would have no effect on the benefit that *Plaintiff* receives. Thus, as "[w]inning or losing . . . would not change the [plaintiff's] monthly pension benefits," Plaintiff's injury (if it did exist) would not be

redressable by this Court, and thus she lacks Article III standing with regard to these plans. *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1622 (2020).

Finally, Plaintiff's claim for benefits under ERISA Section 502(a)(1)(B) (Count II) fails for two additional, independent reasons. First, she did not exhaust the administrative procedures under the Contract Plan before filing her Complaint, and second, she is currently receiving benefits under the terms of the Contract Plan—and thus has not been denied any benefits under those same terms. Count II must be dismissed.

FACTS[2]

A. The Contract Plan

The Contract Plan is one of several "defined benefit" retirement plans Delta sponsors for its employees as a vehicle for post-retirement income. ¶¶ 2, 37. Under the Contract Plan, which was formerly sponsored by Northwest Airlines, participants can earn retirement benefits in the form of a single life annuity ("SLA") that provides for monthly benefits for the rest of the participant's life. *See* Declaration of Melissa D. Hill ("Hill Decl.") at Ex. A § 1.2.26 at 20-21 (defining "Single Life Benefit" as "a pension payable monthly for the lifetime of the Participant");[3] § 4.2 at 31 (noting that a "Single Life Benefit" is the "presumptive form" of benefit for a participant who is not married as of their annuity starting date).

As an alternative to an SLA, the Contract Plan also offers certain optional benefit forms, such as a Joint and Survivor Annuity ("JSA"), which provide for a contingent annuity for the life of the participant's surviving beneficiary in varying amounts. ¶¶ 2, 37; Hill Decl. at Ex. A §§ 4.1.3 at 30 and 4.1.4 at 30-31. The 50% JSA, 75% JSA, and 100% JSA are at issue here, and

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[2] The facts referenced herein are those alleged in the Complaint (cited as "¶ _").

[3] The Hill Declaration and supporting Exhibit thereto are filed with the Request for Judicial Notice in Support of Defendants' Motion to Dismiss. On a motion to dismiss in ERISA cases, a court may consider plan documents and plan-related documents. *White v. Chevron Corp.*, No. 16-cv-0793, 2017 WL 2352137, at *5 (N.D. Cal. May 31, 2017), *aff'd*, 752 F. App'x 453 (9th Cir. 2018) (taking judicial notice of "Plan-related documents"); *Est. of Edward Idzior v. Medsolutions, Inc.*, 788 F. Supp. 2d 1203, 1207 n.1 (D. Nev. 2011) (considering a plan document in evaluating a Rule 12(b)(6) motion to dismiss an ERISA claim and noting "[d]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.").

provide for a benefit to the participant for their lifetime and then, after the participant dies, a benefit for the lifetime of their spouse. Hill Decl. at Ex. A § 4.1.3 at 30. Under ERISA and the terms of the Plan, the 75% JSA is designated as a "Qualified Optional Survivor Annuity" or "QOSA." ¶¶ 22, 41. The different amounts of these JSA options allow for a spouse to receive different amounts when compared to the participant's benefit. Hill Decl. at Ex. A § 4.1.3 at 30. For example, if a 100% JSA is selected, the participant and their spouse will receive the same benefit for the entire lifetime of both partners. Hill Decl. at Ex. A § 4.1.3 at 30. If a 50% JSA is selected, the participant will initially receive a higher benefit, but then—after their death—the spouse will receive just 50% of that original benefit. Hill Decl. at Ex. A § 4.1.3 at 30. Plaintiff also challenges the "Qualified Pre-Retirement Survivor Annuity" or "QPSA" option offered by the Plan, which provides a spouse or beneficiary with benefits in the event that the participant dies before commencing benefits. ¶ 23.

Because the JSA options have to account for payment over two lives, as opposed to just one lifetime as would be the case with the SLA, the Contract Plan uses certain conversion factors or assumptions to reduce the monthly payment that would have been made as an SLA if the benefit is paid as a JSA. Hill Decl. at Ex. A § 4.1.3 at 30.

ERISA requires that certain optional forms of benefits be "actuarially equivalent" to the SLA. Consistent with ERISA's requirements, the Contract Plan prescribes how it determines actuarial equivalence when converting a participant's SLA to an optional form, and defines "Actuarial Equivalent" as "a benefit of equal value [to the SLA] computed on the basis of the tables, factors and assumptions set forth in this Plan Statement (including Appendix C to this Plan Statement)." Hill Decl. at Ex. A § 1.2.3 at 10. Accordingly, the Contract Plan uses a .9[4] conversion factor to convert an SLA to a 50% JSA, a .85 conversion factor (plus .005 or minus .01) for a 75% JSA, and a .8 conversion factor (plus .005 or minus .01) for a 100% JSA. ¶ 43.

[4] This ".9" factor is increased by .005 for each year that the beneficiary is older than the participant and decreased by .01 for each year that the beneficiary is younger than the participant. ¶ 43. This is because, as noted, the JSAs account for two lifetimes (unlike the SLA that just accounts for one), so, to the extent that two partners have different life expectancies based on their ages, the plan makes actuarial adjustments accordingly. Hill Decl. at Ex. A § App. C at 79.

These factors are contained in Appendix C of the Contract Plan. Hill Decl. at Ex. A § App. C at 78-81. For the QPSA, the surviving spouse receives the monthly amount that they would have received as if the participant elected to receive the 50% JSA. ¶ 44.

Plaintiff is a participant in the Contract Plan and elected one of the optional benefit forms, a 50% JSA. Her monthly benefit amount was calculated based on conversion factors in the Contract Plan, and she is currently receiving the exact benefit she was promised under the terms of the Plan. ¶ 13.

The individually-named Defendants, Greg Tahvonen, Mindy Davison, and Janet Brunk, are all current or former members of the Administrative Committee. The Administrative Committee is responsible for administering the Contract Plan as well as the Salaried Plan and the Pilot Plan. ¶¶ 1, 15.

B. The Plans in Which Plaintiff Did Not Participate

In addition to the Contract Plan, Delta sponsors at least two other defined benefit pension plans for certain eligible employees: the Salaried Plan and the Pilot Plan, which are also plans formerly sponsored by Northwest Airlines. ¶¶ 2, 47, 54. Similar to the Contract Plan, participants earn retirement benefits in the form of an SLA, but participants can opt to receive their benefits in optional benefit forms that are calculated using conversion factors set forth in each plan. ¶¶ 51, 59. Plaintiff does not allege that she is (or ever was) a participant in or beneficiary of the Salaried Plan or the Pilot Plan—she is not. Accordingly, Plaintiff does not and cannot allege that she receives any benefits under these plans, or that the conversion factors used in these plans have any bearing on the calculation of benefits that Plaintiff receives.

C. The Contract Plan's Exhaustion Requirements and Plaintiff's Failure to Exhaust

The Contract Plan prescribes an administrative process through which a Plan participant must submit any claims related to their benefits under the Plan. Specifically, Section 7.10 outlines the procedure a participant must follow to make a claim for benefits under the Plan. *See* Hill Decl. at Ex. A at 47. Then, if and when the participant receives a written denial from the Plan, they are afforded two opportunities to appeal, first to the Administrative Subcommittee and then to the Administrative Committee. Hill Decl. at Ex. A §§ 7.10.3 at 48 and 7.10.4 at 48-49.

The Contract Plan affords discretion to the Administrative Committee such that the Committee has the power to "interpret" the plan documents. Hill Decl. at Ex. A § 7.1 at 44. The Contract Plan also provides that "[t]he administrative remedies described in this Section 7.10 must be exhausted before any legal action on a claim is filed." Hill Decl. at Ex. A § 7.10.6 at 42.

Plaintiff does not allege that she even attempted to comply with the procedures available to her under the Contract Plan with respect to the claim for benefits she now asserts (nor can she).

STANDARD

To survive a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure ("Rule") 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1960 (2007). "Naked assertions devoid of further factual enhancement" or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009).

Claims for benefits under Section 502(a)(1)(B) of ERISA may be dismissed for failure to exhaust administrative remedies under Rule 12(b)(6). *See Probert v. Kalamarides*, 528 F. App'x 741, 742 (9th Cir. 2013) (affirming dismissal for failure to exhaust under Rule 12(b)(6)). Similarly, a Rule 12(b)(6) motion to dismiss is the proper procedural mechanism to dismiss a plaintiff's complaint for lack of statutory standing under ERISA. *DB Healthcare, LLC v. Blue Cross Blue Shield of Ariz., Inc.*, 852 F.3d 868, 873 (9th Cir. 2017) ("A dismissal for lack of statutory standing under ERISA is properly viewed as a dismissal for failure to state a claim rather than a dismissal for lack of subject matter jurisdiction.").

Challenges to subject matter jurisdiction for lack of Article III standing (unlike statutory standing) are instead properly brought under Rule 12(b)(1) for lack of subject matter jurisdiction. *Marshall v. Northrop Grumman Corp.*, No. 16-cv-06794, 2017 WL 2930839, at *3 (C.D. Cal. Jan. 30, 2017) ("A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) examines the court's subject matter jurisdiction. . . . If a plaintiff lacks standing, the court lacks subject matter jurisdiction under Article III of the U.S. Constitution."). Further, Plaintiff must establish

Article III standing with regard to *each* of her claims. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) ("[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek.").

ARGUMENT

A. Plaintiff Fails to State a Plausible Claim for Relief for Violation of ERISA

Plaintiff contends that, by calculating her benefit according to the terms of the Plan rather than using the actuarial assumptions she deems "reasonable," Defendants violated Section 205(d) of ERISA, 29 U.S.C. § 1055(d). ¶¶ 20, 21, 22, 23, 86.[5] But Section 205(d) of ERISA includes no such requirement, and courts are not permitted to expand relief afforded under the statute by reading in requirements where none exist.

1. Neither ERISA nor Any Relevant Regulations Define "Actuarial Equivalence" or Prescribe Specific or "Reasonable" Actuarial Assumptions

Under ERISA, certain of a plan's optional benefit forms, including the QJSA and QOSA, must be "actuarially equivalent" to an SLA, and the QPSA must not be less than the amounts payable as the default QJSA. *See* 29 U.S.C. §§ 1055(d)(1)(B), 1055(d)(2)(A)(ii), 1055(e)(1)(A). The statute, however, does not define actuarial equivalence for this purpose. *Id.* Nor does it require the use of certain actuarial assumptions or even "reasonable" actuarial assumptions when converting between benefit forms, such as when converting from an SLA to a JSA. *Id.*; *see also Belknap v. Partners Healthcare Sys., Inc.*, No. 19-cv-11437, 2022 WL 658653, at *7 (D. Mass. Mar. 4, 2022) ("ERISA does not define actuarial equivalence." (citations removed)). Plans generally use two actuarial assumptions to calculate the present value of alternative annuity forms: (1) an interest rate and (2) a mortality table. ¶¶ 5, 6. However, ERISA does not mandate

[5] While her Complaint focuses on 29 U.S.C. § 1055(d), Plaintiff also makes passing references to 29 U.S.C. § 1054(c) and 29 U.S.C. § 1053(a)—as well as a number of other provisions of ERISA and other regulations, but the Complaint fails to clearly connect the facts alleged to any violation of other provisions of the statute other than 29 U.S.C. § 1055(d). To the extent Plaintiff is bringing claims in connection with a provision other than 29 U.S.C. § 1055, dismissal is proper. *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (finding Rule 12(b)(6) dismissal is required where there is a "lack of . . . cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory").

the use of specific interest rates or mortality tables to calculate QJSAs or QOSAs. *See* 29 U.S.C. §§ 1055(d)(1)(B), 1055(d)(2)(A)(ii).

Indeed, Congress has demonstrated elsewhere that, when intended, it knew how to impose additional requirements for determining actuarial equivalence of other types of benefits. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). For example, as Plaintiff notes, lump-sum distributions need to be calculated using a mortality table and interest rate set by the Secretary of the Treasury. ¶ 26; *see* 29 U.S.C. § 1055(g) (requiring the present value of an annuity to be calculated using the "applicable mortality table and the applicable interest rate," which are defined elsewhere, if the annuity is to be "immediately distributed");[6] *see also* 26 U.S.C. § 417(e)(3) (prescribing rates for lump-sum calculations pursuant to 1055(g)). Likewise, 29 U.S.C. § 1393(a)(1) requires employers to compute withdrawal liability using "actuarial assumptions and methods which, in the aggregate are reasonable," and 29 U.S.C. § 1085a(c)(3)(A) provides that, for plan funding purposes, a plan must use "actuarial assumptions and methods, each of which is reasonable." By contrast, Section 205(d), 29 U.S.C. § 1055(d), provides no such thing.

Congress's deliberate amendments to certain provisions of ERISA—but not others—further confirms its intent to not require specific assumptions for the conversion of JSAs. In particular, beginning in 1986, Congress specifically mandated via amendment (with further amendments in 1994 and 2006) that lump sums must be calculated with specific actuarial factors. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, 2487, Section 1139(b) (1986); Retirement Protection Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809, Section 767(a) (1994); Pension Protection Act of 2006, Pub. L. No. 108-280, 120 Stat. 780, Section 302(b) (2006). In

[6] As noted, Plaintiff brings her claims under 29 U.S.C. §§ 1055(d)(1) and (d)(2), which required "qualified joint and survivor annuit[ies]" and "qualified optional survivor annuit[ies]" to be the "actuarial equivalent of a single life annuity." *See* 29 U.S.C. §§ 1055(d)(1) and (d)(2). 29 U.S.C. § 1055(g), on the other hand, provides for the "immediate" distribution of an annuity as a lump sum. *See* 29 U.S.C. § 1055(g).

amending the statute in this way, Congress specifically intended to address lump-sum benefits by prescribing the actuarial assumptions to be used in their conversion. *See* H.R. Rep. No. 103-632, pt. 2, 103rd Cong., 2d Sess., at 57 (Aug. 26, 1994) (discussing rationale for 1994 amendment, stating, "Congress adopted the interest rate cap to prevent plans from using unreasonably high interest rates to determine the present value of participants' benefits"). But Congress never amended 29 U.S.C. § 1055(d) in such a way, despite having many opportunities to do so if it so desired, and courts should avoid reading in any such omitted requirements for specific or reasonable assumptions. *See Gross v. FBL Fin. Servs., Inc*., 557 U.S. 167, 174 (2009) ("When Congress amends one statutory provision, but not another, it is presumed to have acted intentionally.").

Indeed, as recently as 2021, Congress amended a section of ERISA, 29 U.S.C. § 1432, to require the use of "reasonable" actuarial assumptions for the purposes of determining eligibility and financial assistance for multiemployer plans, in part, as a response to the COVID-19 pandemic. *See* Am. Rescue Plan Act of 2021, Pub. L. 117-2, Mar. 11, 2021, 135 Stat. 4 (prohibiting the use of "unreasonable" actuarial assumptions in determining eligibility for financial assistance). That no similar action has been taken by Congress with regard to QJSA benefits, like those Plaintiff receives, is telling—no change is intended.

Without support in the text of the statute, Plaintiff looks to regulations, none of which apply to the conversion of annuity benefits at issue here. For example, while 26 C.F.R. § 1.411(a)(13)-1(b)(3) addresses actuarial equivalence and the use of "reasonable actuarial assumptions," Plaintiff admits that it applies only to "benefits under a lump sum-based benefit formula," and not to the optional annuity benefit forms at issue here. ¶ 23. As the *Belknap* court noted, "[t]hat distinction is significant." 2022 WL 658653, at *11. Additionally, Plaintiff's reliance on 26 C.F.R. §§ 1.401(a)-11(b)(2) and 1.417(a)(3)-1(c)(2)(iv) as requiring "reasonable" factors is likewise misplaced, as neither section of the tax regulations is enforceable under ERISA. *See Belknap*, 2022 WL 658653, at *9 (citing to 29 U.S.C. § 1202(c), which provides that certain enumerated regulations in 26 C.F.R. apply under ERISA, but which does not include

among them those regulations promulgated under Sections 401 and 417); *see also Stamper v. Total Petroleum, Inc. Ret. Plan for Hourly Rated Emps. with the Bargaining Unit Represented by Loc. 642 of the Int'l Union of Operating Engineers*, 188 F.3d 1233, 1238 (10th Cir. 1999) (affirming grant of summary judgment to defendants on the basis that regulations promulgated under Title 26 that were not incorporated via 29 U.S.C. § 1202(c) or otherwise were not enforceable under ERISA). Further, as *Belknap* rightly observed, "[t]here are no Treasury Department regulations that define 'actuarial equivalence,' at least in the context of annuity benefits." *Belknap*, 2022 WL 658653, at *11 (dismissing claims for alleged violations of 29 U.S.C. §§ 1054(c)(3) and 1055(d) as a matter of law).[7]

As noted, while 29 U.S.C. § 1055(d) requires certain benefit forms to be "the actuarial equivalent" of an SLA under certain circumstances, the statute does not define "actuarial equivalent" nor say anything about how actuarial equivalence is to be calculated, what inputs to use, or even that it must be calculated using "reasonable" assumptions. *See* 29 U.S.C. §§ 1055(d)(1)(B), 1055(d)(2)(A)(ii). And the law is clear that any such omissions from the statutory text should be deemed deliberate. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981)

[7] That the regulatory scheme treats lump-sum benefit payments and annuities differently further counsels against applying regulations promulgated expressly and exclusively for the payment of lump-sum benefits to other benefit forms. More to the point, in 2016, the Department of the Treasury promulgated new regulations governing bifurcated benefits that are paid partially as a lump sum and partially as an annuity. *See* IRS Final Rules (T.D. 9783) on Modifications to Minimum Present Value Requirements for Partial Annuity Distribution Options Under Defined Benefit Pension Plans Annotation ("IRS Final Rules"); 26 C.F.R. § 1.417(e)-1. These regulations require that the lump-sum portion of a bifurcated benefit be paid "using the specified applicable interest rate and the specified applicable mortality table" (i.e., the "Treasury Assumptions" Plaintiff advocates for here), but explicitly exempts annuity benefits from that requirement. *See* IRS Final Rules. In its rulemaking, the Department of the Treasury explained that this approach "would permit a plan to use its usual annuity [actuarial] equivalence factors for the annuity portion (rather than being required to make a special calculation of the annuity portion using the section 417(e)(3) assumptions)." *Id.* The Department of the Treasury further explained that "[t]he approach set forth in these regulations is simpler than applying the section 417(e)(3) assumptions to the entire optional form of benefit, and yields an intuitive result that is consistent with plan sponsor and participant expectations." *Id.* This regulatory distinction is consistent with Congress's determination that annuity benefits are *not* governed by the same actuarial assumptions as lump sums—and, indeed, is directly contrary to Plaintiff's suggested reading of the statute's requirements.

("ERISA is a comprehensive and reticulated statute, which Congress adopted after careful study of private retirement pension plans."); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (noting that ERISA's "[c]arefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly"). Indeed, the Supreme Court cautions against "tamper[ing] with [the] enforcement scheme embodied in the statute by extending remedies not specifically authorized by its text." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002).[8] Accordingly, the Court should decline Plaintiff's invitation to expand the scope of relief Congress prescribed under ERISA by injecting her hand-picked actuarial assumptions where Congress has not chosen to adopt any. *Belknap*, 2022 WL 658653, at *12 (declining to require the use of plaintiff's actuarial assumptions for calculating optional benefit forms and dismissing claims under 29 U.S.C. §§ 1055(d) and 1054(c)).

2. Plaintiff's Claims Fail Because the Plan Paid Benefits in Accordance with Its Terms

Given that ERISA does not mandate the use of the actuarial assumptions that Plaintiff's Complaint proposes, the Plan properly calculated benefits using its own definition of "actuarial equivalent." Here, the Contract Plan, like the plan at issue in the *Belknap* case, does define "actuarial equivalent." Specifically, the Plan instructs that actuarial equivalence means "a benefit of equal value computed on the basis of the tables, factors and assumptions set forth in this Plan Statement (including Appendix C to this Plan Statement)." Hill Decl. at Ex. A § 1.2.3 at 10. Plaintiff does not dispute that her 50% JSA was calculated using the definition laid out in the Contract Plan and the factors in Appendix C, and, accordingly, her claims must be dismissed. ¶¶

[8] *See also Castillo v. Metro. Life Ins. Co.*, 970 F.3d 1224, 1232 (9th Cir. 2020) ("Under the maxim of *expressio unius est exclusion alterius*, there is a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions."); *Bloch v. Arrowhead-Puritas Waters, Inc.*, 798 F.2d 1238, 1240 (9th Cir. 1986) ("[C]ourts will not inflate, expand, stretch or extend a statute to matters not falling within its expressed provisions."); *U.S. Bank, N.A. as Tr. to Wachovia Bank Nat'l Ass'n v. Fid. Nat'l Title Grp., Inc.*, No. 21-cv-00339, 2021 WL 5566538, at *5 (D. Nev. Nov. 29, 2021) ("The Supreme Court cautions that going behind the plain language of a statute in search of a possibility contrary congressional intent is a 'step to be taken cautiously' even under the best circumstances.").

43, 71; *Belknap*, 2022 WL 658653, at *11 (dismissing plaintiff's claims where "[t]he only relevant place where 'actuarial equivalence' is defined is in the Plan itself, and the parties appear to agree that the terms of the Plan were followed").

3. Plaintiff's Theory Runs Afoul of ERISA's Policy Goals by Rendering Pension Benefits Wholly Unpredictable

The crux of Plaintiff's Complaint—that plan sponsors and fiduciaries should be required to continually revise their plans' actuarial assumptions based on "prevailing market conditions" (¶ 62)—undermines ERISA's objectives and renders participants' retirement benefits wholly unpredictable. While Plaintiff claims to demand "reasonableness," in reality she insists that benefit calculations at retirement be based on then-current market rates or conditions. *Id.* But to adopt Plaintiff's approach would effectively make a participant's monthly annuity amount a moving target—both for participants receiving the benefits and plan sponsors making the payments. Take a participant planning for retirement in February 2020—with record low interest rates and steadily improving mortality. Three years later, following the COVID-19 pandemic and other socioeconomic factors at play, interest rates have skyrocketed and average life expectancy has *decreased*, two years in a row, for the first time in decades—despite Plaintiff's unsupported assumption that life expectancies will continue to increase indefinitely (¶ 66). Any benefit estimate that participant may have received in February 2020 would now be drastically remodeled under Plaintiff's theory, and he may stand to receive a much different monthly benefit than he anticipated. Similarly, a participant planning for retirement *now*, who receives an estimate of her monthly benefit based on today's "market" interest rates. But it is anyone's guess what may happen to interest rates in the next twenty-four months. If that participant continues to work for two more years, and the market shifts again, the participant may end up with a much lower benefit than they had anticipated by the time they retire, rendering any retirement planning or predictability virtually impossible.[9] ERISA was designed to do exactly the opposite. Emp.

[9] As the Chief Judge Saylor of the District of Massachusetts noted in rejecting nearly identical claims:

> [T]his litigation is premised on the notion that the mortality tables are unreasonable because life expectancy has substantially increased, and the interest

Benefit Sec. Act of 1973, 1974-3 C.B. 210 (I.R.S. 1973) (stating the legislative "purpose" is "to assure American workers that they may look forward, with anticipation, to a retirement with financial security and dignity"). Plaintiff's paradigm of variably shifting assumptions would remove the "defined" aspect of Delta's defined benefit pension plan.

And, as the Supreme Court observed, one of ERISA's policy goals also is "inducing employers to offer benefits by assuring a predictable set of liabilities." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002). Constantly fluctuating benefit payments would frustrate this goal, as well, depriving plan sponsors of the ability to predict their expected benefit payments. But such a result is not necessarily unfair to participants and beneficiaries, as the *Belknap* court observed:

> [R]etirement plans are not generally required to provide protection against various forms of economic or social change. For example, they are not required to provide cost-of-living adjustments—even though that might appear unfair to employees who expected a generous benefit, only to have the purchasing power of those benefits significantly eroded by inflation. The plans are private arrangements, not part of a government social welfare program.

2022 WL 658653, at *11-12.

Plaintiff may wish that ERISA provided something more than it does so that she could justify a modest increase to her monthly benefit. But it is up to Congress to amend the statute to add any such requirement, rather than the courts to read them into existence. *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 479-80 (1997) (recognizing that "[u]nderlying the statutory construction question before us . . . there is an important public policy dispute . . . however, these are arguments best addressed to the Congress, not the courts").

> rate is unreasonable because it is unduly high in light of current market conditions. But what happens if life expectancy decreases—as it did in 2020, as a result of the COVID-19 pandemic? Would benefits be decreased? And what happens if there is a period of hyperinflation, and the interest rate turns out to be unduly low?

Belknap, 2022 WL 658653, at *12.

B. Plaintiff Lacks Standing to Assert Claims on Behalf of Participants in the Salaried Plan or the Pilot Plan

In addition to her claims related to the benefit she is receiving under the Contract Plan, Plaintiff purports to assert claims on behalf of participants and beneficiaries in both the Salaried Plan and the Pilot Plan related to the benefits they are receiving. ¶ 87 (defining a putative class to include participants and beneficiaries of the Salaried Plan and the Pilot Plan). Those plans, Plaintiff alleges, also contained conversion factors based on allegedly unreasonable actuarial assumptions, which, she claims, reduced the optional forms of benefits elected by certain participants or beneficiaries in those plans. However, to sue under ERISA, a plan participant must have both statutory and Article III constitutional standing. *Draney v. Westco Chems., Inc.*, No. 19-cv-01405, 2019 WL 6465510, at *3 (C.D. Cal. Dec. 2, 2019) ("A plan participant suing under ERISA must establish both statutory standing and constitutional standing . . . . "); *Johnson v. Delta Air Lines, Inc.*, No. 1:17-cv-2608, 2017 WL 10378320, at *1 (N.D. Ga. Dec. 12, 2017) ("An ERISA plaintiff must meet both constitutional and statutory standing requirements."). As to her claims on behalf of the Salaried Plan and the Pilot Plan, Plaintiff has neither.

1. Plaintiff Lacks Statutory Standing to Bring Claims in Connection with the Salaried Plan and Pilot Plan

In her Complaint, Plaintiff seeks relief under ERISA Section 502(a)(1) and 502(a)(3). ¶¶ 95-94.[10] However, both ERISA Section 502(a)(1) and 502(a)(3) enumerate a limited list of individuals who may bring a civil action under each section which includes, at maximum, participants, beneficiaries, and fiduciaries. *See* ERISA Section 502(a)(1); 29 U.S.C. § 1132(a)(1) ("A civil action may be brought . . . by a participant or beneficiary."); ERISA § 502(a)(3); 29 U.S.C. § 1132(a)(3) ("A civil action may be brought . . . by a participant, beneficiary, or fiduciary."). But even though Plaintiff is a participant in the Contract Plan, she does not fit into any of the enumerated categories with regard to the Salaried Plan and the Pilot Plan—as she must.

[10] The paragraphs of Plaintiff's Complaint are misnumbered. Plaintiff's paragraph number "1" is on page 1 and the paragraphs increase numerically until paragraph "99" on page 22. The next paragraph, which begins on page 23, is numbered "78" and then the paragraphs increase numerically until the numbering terminates at "94" on page 25. The range "¶¶ 95-94" refers to the consecutive range as incorrectly numbered by Plaintiff.

TransUnion LLC, 141 S. Ct. at 2208 ("[P]laintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek."). Thus, because Plaintiff has not alleged that she is a participant, beneficiary, or fiduciary with regard to either the Salaried Plan or the Pilot Plan, she lacks statutory standing to bring these claims. *Alders v. YUM! Brands, Inc.*, No. 21-cv-1191, 2022 U.S. Dist. LEXIS 24113, at *10-11 (C.D. Cal. Feb. 1, 2022) ("[A] plaintiff must actually participate in a benefits plan to sue under ERISA . . . and a plaintiff cannot have a colorable claim to vested benefits when one never began accruing benefits at all."); *In re ING Groep, Naamloze Vennootschap Erisa Litig.*, 749 F. Supp. 2d 1338, 1345 (N.D. Ga. 2010) (dismissing claims for lack of standing where plaintiffs were not participants in one of the challenged plans since they could not "meet the statutory requirement limiting standing to plan participants, beneficiaries, and fiduciaries" with regard to those plans).

2. Plaintiff Lacks Article III Standing to Bring Claims on Behalf of the Salaried Plan and the Pilot Plan

Even if Plaintiff could establish statutory standing under ERISA for all her claims, and she cannot, Plaintiff does not have Article III standing to assert claims on behalf of the Salaried Plan or the Pilot Plan because she has suffered no injury in connection with the either plan, let alone one that could be redressed by the relief she seeks.

Article III of the United States Constitution limits the jurisdiction of federal courts to "cases and controversies." U.S. Const. Art. III, § 2. To withstand a motion to dismiss for lack of Article III standing, Plaintiff must establish three necessary and independent elements: "(1) that . . . she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Thole*, 140 S. Ct. at 1618. It is Plaintiff's burden to establish each of these elements. *Landry's, Inc. v. Sandoval*, No. 15-cv-1160, 2016 WL 1298103, at *2 (D. Nev. Mar. 31, 2016) ("When subject matter jurisdiction is challenged, the burden of proof is placed on the party asserting that jurisdiction exists."). Further, Plaintiff must establish Article III standing with regard to *each* of her claims. *TransUnion LLC*, 141 S. Ct. at 2208 ("[S]tanding is not

dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek."). She cannot do so here.

First, Plaintiff cannot establish an injury in fact with regard to the Salaried Plan or the Pilot Plan because she does not allege that she receives benefits under those plans—nor can she. *See* ECF No. 23-2 (Declaration of Greg Tahvonen) at ¶ 14.[11] *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (requiring under Article III that plaintiff "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant"). Because Plaintiff is not a participant or beneficiary, she receives no benefits under these plans and thus cannot have suffered any injury by way of an alleged improper reduction. *See* ECF No. 23-2 (Declaration of Greg Tahvonen) at ¶ 14; *Thole*, 140 S. Ct. at 1618 (holding plaintiffs had no Article III standing where plaintiffs "still receive the exact same monthly benefits that they are already slated to receive"); *In re ING Groep*, 749 F. Supp. 2d at 1345 (finding plaintiffs could not establish requisite injury of fact and thus lacked constitutional standing to assert claims on behalf of plan in which they did not participate); *Singh v. Deloitte*, No. 21-cv-8458, 2023 WL 186679, at *3 (S.D.N.Y. Jan. 13, 2023) (finding that "plaintiffs lack standing with respect to the PSP because none of the plaintiffs have alleged participation in that Plan").

Second, Plaintiff cannot establish "redressability." *See Warth v. Seldin*, 422 U.S. 490, 505, 508 (1975) (to have standing, a plaintiff must establish that the requested relief "will remove the harm," and that "he personally would benefit in a tangible way from the court's intervention"). The relief she seeks—reforming the conversion factors used in the Salaried Plan

[11] A defendant can bring a "facial" or "factual" attack on standing. *Landry's, Inc.*, 2016 WL 1298103, at *2; *Hill v. Clark*, No. 11-cv-0057, 2012 WL 1903265, at *4 (N.D. Ga. May 25, 2012) ("The Court's subject matter jurisdiction can be challenged by both facial or factual attack."). A facial attack "attacks the sufficiency of the allegations to support subject matter jurisdiction," but a factual attack "attacks the existence of subject matter jurisdiction in fact." When a factual challenge is asserted, "the court need not presume the truthfulness of the plaintiff's allegations." *Nitta v. United States*, No. 17-cv-01137, 2020 WL 8254265, at *4 (D. Nev. May 28, 2020), *aff'd*, No. 20-16362, 2021 WL 3560685 (9th Cir. Aug. 12, 2021). "In resolving a factual attack, a court may review evidence beyond the complaint without converting the motion to dismiss into one for summary judgment." *Id.* Here, Defendants bring a factual attack and thus additional evidence is properly considered. *Id.*

and the Pilot Plan—would have no impact on the benefit Plaintiff receives or would receive if those plans were reformed, as her benefit was and is calculated under the terms of the Contract Plan. As the Supreme Court stressed in *Thole*, a plaintiff lacks standing where "[w]inning or losing . . . would not change the plaintiffs' monthly pension benefits." *See Thole,* 140 S. Ct. at 1622.

The fact that Plaintiff brings a putative class action does nothing to relieve her burden of establishing Article III standing. Indeed, where a plaintiff has not established an injury in fact with regard to certain claims in her complaint, courts regularly grant motions to dismiss for lack of standing for those claims. *See, e.g.*, *Johnson*, 2017 WL 10378320, at *1 ("[A] claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim."); *Marshall*, 2017 WL 2930839, at *3 (dismissing for lack of Article III standing plaintiffs' class claims with regard to the funds that they did not invest in because they suffered no injury in fact with regard to those claims). Even if Plaintiff purports to bring her claims in a representative capacity under ERISA, this still does nothing to save her claims as the Court in *Thole* explicitly rejected this argument. 140 S. Ct. at 1620; *see also In re LinkedIn ERISA Litig.*, No. 5:20-cv-05704, 2021 WL 5331448, at *4 (N.D. Cal. Nov. 16, 2021) (noting that in *Thole*, Supreme Court held that "plaintiffs could not assert standing as representatives of the plan itself without having suffered a concrete injury in fact"). As the Supreme Court explained, "[t]here is no ERISA exception to Article III." *Thole*, 140 S. Ct. at 1622.

C. Plaintiff's Claim Under ERISA § 502(a)(1)(B) Must Be Dismissed

1. Plaintiff Failed to Exhaust Her 502(a)(1)(B) Claim

Plaintiff's Complaint seeks relief pursuant to ERISA Sections 502(a)(1)(B) and 502(a)(3), but it is well established in the Ninth Circuit that a plaintiff must fully exhaust her administrative remedies before bringing a Section 502(a)(1)(B) claim in federal court. *Castillo v. Metro. Life Ins. Co.*, 970 F.3d 1224, 1228 (9th Cir. 2020) ("An ERISA plaintiff claiming a denial of benefits must avail himself or herself of a plan's own internal review procedures before bringing suit in federal court."); *Diaz v. United Agric. Employee Welfare Benefit Plan & Trust*, 50 F.3d 1478, 1483 (9th Cir. 1995) ("[F]ederal courts have the authority to enforce the exhaustion requirement

in suits under ERISA, and as a matter of sound policy they should usually do so."). "ERISA § 502(a)(1)(B) claims have three general requirements: (1) *the plaintiff exhausted the plan's administrative appeals process*; (2) the plaintiff is entitled to a particular benefit under the plan's terms; and (3) the plaintiff was denied that benefit." *Martinez-Carranza v. Plumbers & Pipefitters Union Loc. No. 525 Tr. Funds*, No. 20-cv-01930, 2021 WL 1186325, at *2 (D. Nev. Mar. 29, 2021) (emphasis added) (granting motion to dismiss where, among other things, plaintiff made only vague allegations regarding participation in appeals process).

The Contract Plan indisputably contains a claims procedure. Hill Decl. at Ex. A § 7.10 at 47-78. This claims procedure explicitly provides that "[t]he administrative remedies described in this Section 7.10 must be exhausted before any legal action on a claim is filed." Hill Decl. at Ex. A § 7.10.6 at 49. The Contract Plan also grants the Administrative Committee broad power to "interpret" its plan documents, including the claims procedure. Hill Decl. at Ex. A § 7.1 at 44 ("The operation and administration of the Plan . . . [and] the exclusive power to interpret it . . . are vested in an Administrative Committee of at least three members. . ."). Further, Plaintiff has not alleged, nor can she, that she even attempted to exhaust her claims. These circumstances are fatal to Plaintiff's 502(a)(1)(B) claim. *See Mellor v. Solomon Entities Defined Ben. Pension Plan*, No. 11-cv-4396, 2011 WL 4477322, at *4 (C.D. Cal. Sept. 26, 2011) (dismissing 502(a)(1)(B) claim where plaintiff failed to administratively exhaust under the plan).

2. Plaintiff Received the Benefits She Was Owed Under the Plan

Even if she had exhausted, to state a viable 502(a)(1)(B) claim, Plaintiff must plead facts showing that there are "benefits due" to her "under the terms of" the relevant ERISA plans under which she is suing. *See* 29 U.S.C. § 1132(a)(1)(B). But no such benefits are due here because Plaintiff currently receives the benefits she is owed under the terms of the Contract Plan. ¶ 13.

"29 U.S.C. § 1132(a)(1)(B) allows for recovery of benefits due under the terms of an ERISA plan." *Forest Ambulatory Surgical Assocs., L.P. v. United HealthCare Ins. Co.*, No. 10-cv-04911, 2011 WL 2748724, at *5 (N.D. Cal. July 13, 2011); *Raygoza v. ConAgra Foods, Inc. Welfare Benefit Wrap Plan*, No. 15-cv-03741, 2016 WL 9454419, at *5 (C.D. Cal. Nov. 4, 2016) (granting motion to dismiss because "[r]ecovery of benefits under section 1132(a)(1)(B) is limited

to those benefits that the plaintiff contends are actually covered under the Plan's existing terms"). "Because Plaintiff does not contend that the existing terms of the Plan entitle her to the benefit that she seeks, Plaintiff cannot state a claim under section 1132(a)(1)(B), which speaks of '*enforcing*' the 'terms of the plan,' not of *changing* them." *Id.* (emphasis in original) (quoting *CIGNA Corp. v. Amara*, 563 U.S. 421, 437, 131 S. Ct. 1866, 1877 (2011)).

Plaintiff's Complaint admittedly seeks benefits that are not available to her under the terms of the Contract Plan, as written, and her 502(a)(1)(B) claim thus fails. *See Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 108 (2013) ("[W]e have recognized the particular importance of enforcing plan terms as written in § 502(a)(1)(B) claims."); *Wilson v. Cox*, No. 3:15-cv-00059-SI, 2015 WL 6123776, at *3 (D. Or. Oct. 16, 2015) ("Section 1132(a)(1)(B) can only be successful if recovering the benefits is consistent with the terms of the plan.").

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be granted.

Dated: February 24, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2023, I electronically transmitted the foregoing Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to Rules 12(B)(1) and 12(B)(6), supporting Memorandum of Points and Authorities, Request for Judicial Notice, and Declaration of Melissa D. Hill and exhibit thereto, to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel in this matter; all counsel being registered to receive Electronic Filing.

MORGAN, LEWIS & BOCKIUS LLP

Dated: February 24, 2023

By: */s/ Melissa D. Hill*
Melissa D. Hill

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