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 Benefits Administration Committee, and John/Jane Does 1-5, Defendants.	Case No.: 0:22-cv-00509-NEB-BRT

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND STRIKE PLAINTIFFS' CLASS ALLEGATIONS

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I. INTRODUCTION

In their Opposition to Defendants' Motion to Dismiss Plaintiffs' Complaint and Strike Plaintiffs' Class Allegations (Dkt. 33) ("Opposition" or "Opp."), Plaintiffs fail to meaningfully engage with Defendants' principal argument: that a plain text reading of the provisions Plaintiffs rely on, 29 U.S.C. § 1054(c)(3) and 29 U.S.C. § 1053(a), does not support their stated claim.[1] Mot. at 15-22. Recognizing this, Plaintiffs ask the Court to graft new requirements onto these provisions or otherwise expand the relief afforded under ERISA based on requirements in unrelated statutory provisions or inapplicable regulations arising in the context of (among other things) the benefits of terminated vested participants and the payment of lump-sum benefits. Plaintiffs' claims ignore the language of ERISA, Congress's intent in establishing the statutory scheme, and sound principles of statutory construction.

ERISA is "a comprehensive statute for the regulation of employee benefit plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). Like most statutes, it reflects a "careful balancing" of competing aims. *Id.* at 215 (citation omitted). Congress wanted ERISA to help ensure that employees receive the benefits that they earned. *Conkright v. Frommert*, 559 U.S. 506, 516 (2010). But Congress did not want a regime "so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place." *Id.* at 517 (citation omitted).

[1] Defendants' initial Memorandum of Law (Dkt. 23) is "Motion" or "Mot."

In balancing these aims, Congress decided not to treat all situations the same. For example, Congress was particularly concerned with protecting "individuals . . . separated from service prior to retirement and [who] have deferred nonforfeitable rights to plan benefits."[2] But there is no evidence of similar intent regarding the early retirement benefits at issue here, which pension plans are not even required to provide. Similarly, Congress specifically revisited the payment of lump-sum benefits to require the use of specific actuarial assumptions starting in 1986, but has thus far declined to do so with respect to the early retirement benefits Plaintiffs challenge here.[3] Plaintiffs' reliance on cases interpreting requirements for forms of benefits not at issue here are thus unavailing.

Plaintiffs ask the Court to tip Congress's "careful balancing" by adding new rules that apply in other sections of ERISA to early retirement benefits under § 1054(c)(3) and 29 U.S.C. § 1053(a). This is an invitation to error.

Finally, Plaintiffs' fail-safe class definition should be stricken. The Opposition fails to refute the fact that Plaintiffs' class, as proposed, is impermissibly defined to include only those individuals who have suffered an injury in fact and thus who would succeed on the merits. Plaintiffs' attempt to evade this Court's prior ruling in *Thorne* should be rejected.[4]

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[2] *See* House Rep. No. 93-807, 1974-3 C.B. 236 (I.R.S. 1974).

[3] *See, e.g.*, Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, 2487, Section 1139(b) (1986).

[4] *Thorne v. U.S. Bancorp*, No. 18-3405, 2021 WL 1977126, at *1-2 (D. Minn. May 18, 2021).

II. ARGUMENT

A. Plaintiffs' Claim for Violation of 29 U.S.C. § 1054(c)(3) Fails

1. *Belknap* Provides a Sound Roadmap for Statutory Interpretation of Plaintiffs' § 1054(c)(3) Claim

In their Opposition, Plaintiffs criticize the recent *Belknap*[5] decision as an "outlier" (Opp. at 16). It is. Unlike the decisions Plaintiffs cite as allowing similar claims to proceed at the Rule 12 stage, *Belknap* evaluated a nearly identical claim for violation of § 1054(c)(3) *on the merits* and, with the benefit of substantial briefing, expert testimony, and other evidence, held that § 1054(c)(3) requires only that a plan convert benefits according to its terms, including its prescribed definition of "actuarial equivalence." *Belknap*, 2022 WL 658653, at *11; Mot. at 15-21.[6] By entering summary judgment for the defendants, *Belknap* rejected the argument Plaintiffs advance here that the phrase "actuarial equivalent" in § 1054(c)(3) requires a pension plan to calculate retirement benefits using actuarial assumptions Plaintiffs deem reasonable, when such requirement is found nowhere in the statute or applicable regulations. *Belknap*, 2022 WL 658653, at *5.

In reaching this conclusion, *Belknap* adhered to time-honored canons of statutory construction, first, noting that "ERISA does not define actuarial equivalence" and "[o]n

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[5] *Belknap v. Partners Healthcare Sys., Inc.*, No. 19-11437, 2022 WL 658653, (D. Mass. Mar. 4, 2022).

[6] Here the parties do not dispute that Plaintiffs' full benefits were calculated and paid according to the Plans' definition of "actuarial equivalence." ¶¶ 73-75. The facts referenced herein are those alleged in the Complaint (cited as "¶ _").

its face, § 1054(c)(3) contains no reasonableness requirement." *Id.*, at *7, 11. *See also* *Adams v. Apfel*, 149 F.3d 844, 846 (8th Cir. 1998) ("The plain language of a statute is the starting point in every case involving statutory construction."); Mot. at 16. Second, the court observed that, while other parts of ERISA include reasonableness requirements or the use of specific actuarial assumptions—such as in § 1055(g) and § 1085a(c)(3)(A)— § 1054(c)(3) does not. *Belknap*, 2022 WL 658653, at *8. *See also* Mot. at 16-18. In the face of these explicit statutory provisions either setting forth specific actuarial assumptions to be used (lump sums) or requiring actuarial assumptions that are reasonable (withdrawal liability and plan funding), the *Belknap* court appropriately rejected the plaintiff's argument as contrary to statutory construction. *Belknap*, 2022 WL 658653, at *7 ("If Congress had intended 29 U.S.C. § 1054(c)(3) to require actuarial equivalence to be calculated using 'reasonable' assumptions, it knew how to do so.").[7] Indeed, the Supreme Court has observed that "[w]here 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." *Russello v. United States*, 464 U.S. 16, 23 (1983). Analyzed

[7] Plaintiffs' accusation that the *Belknap* court "flip-flopped" between its first decision denying a motion to dismiss and its later grant of summary judgment misses the mark. In its more recent decision, the court evaluated more than mere plausibility to determine what § 1054(c)(3) requires as a matter of law. *See Belknap*, 2022 WL 658653, at *3-4 (granting summary judgment after "the parties were provided an opportunity to submit additional information as to the meaning of 'actuarial equivalence,'. . . a period of expert discovery. . . [and] [b]oth parties submitted expert affidavits and supplemental briefs on the meaning of the term 'actuarial equivalence'").

against *Belknap*'s thorough statutory construction, Plaintiffs' claims are not viable as a matter of law.[8]

Plaintiffs' attacks on *Belknap* fail. Opp. at 16-20. First, Plaintiffs' argument that *Belknap* "rendered the phrase 'actuarial equivalent' superfluous" misrepresents *Belknap*'s holding. Opp. at 17. *Belknap* did not hold simply that § 1054(c)(3) requires benefits be paid in accordance with a plan which, Plaintiffs suggest, would be duplicative of 29 U.S.C. § 1102(b)(4). Rather, *Belknap* acknowledges that ERISA requires a plan to have a definition of actuarial equivalence for purposes of converting optional forms of benefits and to follow that definition when paying benefits—rather than by calculating benefits in some other way. *Belknap*, 2022 WL 658653, at *11 (looking to the plan's definition of actuarial equivalence to convert benefits).[9]

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[8] Plaintiffs' reliance on prior decisions, including the *Smith v. U.S. Bancorp* decision that merely found a complaint's allegations sufficiently plausible to move forward to discovery is misplaced. *Smith v. U.S. Bancorp*, No. 18-3405, 2019 WL 2644204 (D. Minn. June 27, 2019); *See Urlaub v. Citgo Petroleum Corp.*, No. 21-4133, 2022 WL 523129 (N.D. Ill. Feb. 22, 2022); *Masten v. Metro. Life Ins. Co.*, 543 F. Supp. 3d 25 (S.D.N.Y. 2021); *Duffy v. Anheuser-Busch Cos.*, 449 F. Supp. 3d 882 (E.D. Mo. 2020); *Smith v. Rockwell Automation, Inc.*, 438 F. Supp. 3d 912 (E.D. Wis. 2020); *Cruz v. Raytheon Co.*, 435 F. Supp. 3d 350 (D. Mass. 2020); *Herndon v. Huntington Ingalls Indus., Inc.*, No. 19-52, 2020 WL 3053465 (E.D. Va. Feb. 20, 2020); *Torres v. Am. Airlines*, 416 F. Supp. 3d 640 (N.D. Tex. 2019). None of these cases addressed the claim on the merits with the full benefit of evidence and expert testimony in rendering their decisions.

[9] Leaning on *Urlaub,* 2022 WL 523129*,* at*6, Plaintiffs claim that such a reading could lead to "absurd results" because a plan would then be free to rely on "any" mortality table, such as one "from the sixteenth century." Opp. at 17; *Urlaub*, 2022 WL 523129, at *6. To start, speculation that a plan could use a mortality table "from the sixteenth century" is a parade of horribles belied by the fact that neither Plaintiffs here nor the plaintiffs in *Urlaub* identified any plan using a table anywhere near as old. *Urlaub*, 2022 WL 523129, at *6. Any concern that some participants could be left at risk amounts to a

Second, Plaintiffs' argument that *Belknap* failed to read § 1054(c)(3) in context and consistently with other parts of the statute (Opp. at 18) is undermined by even a cursory review of the statutory provisions and regulations Plaintiffs cite in support. Plaintiffs point to 26 C.F.R. § 1.401(a)-14(c), which is promulgated under 29 U.S.C. § 1056(a)(3) and requires that lump-sum payments to terminated vested participants be calculated under regulations prescribed by the Secretary of Treasury. But agency regulations, such as 26 C.F.R. § 1.401(a)-14(c), are only relevant and entitled to deference when they purport to resolve ambiguity in a particular statutory provision *under which they are promulgated and which they purport to interpret*. *See, e.g.*, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (If a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer [in the regulation] is based on a permissible construction of the statute."). Stated another way, while 26 C.F.R. § 1.401(a)-14(c) may be relevant for resolving ambiguity in the provision under which it is promulgated—§ 1056(a)(3)—it is not relevant for resolving ambiguity in § 1054(c)(3). Second, Plaintiffs also point to the regulations promulgated under § 1053(a) to say that because that section (they claim)

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public policy dispute—similar to the one regarding the erosion of benefits caused by rampant inflation—rather than an issue of statutory interpretation. *Belknap*, 2022 WL 658653, at *11-12 (noting that retirement plans 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"); *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").

requires reasonable assumptions for vesting purposes, § 1054(c)(3) must too. But § 1053(a) does not apply to the early retirement benefits Plaintiffs challenge here (*see infra* 12-15), but, even if it did, nothing authorizes—let alone requires—a court to impose requirements of one statutory provision onto another provision that is silent on the point.

Moreover, Plaintiffs' argument that by failing to graft a "reasonableness" requirement onto the definition of "actuarial equivalence" in § 1054(c)(3), *Belknap* created a conflict between § 1054 and other sections of ERISA that require reasonable assumptions, also fails because it ignores Congress's clear intent to treat certain benefits differently. Opp. at 18 (decrying purported inconsistency between § 1056(a)(3), which expressly requires benefits for "terminated vested participants" to be based on "reasonable" assumptions, and *Belknap*'s interpretation of § 1054(c)(3) as not requiring "reasonable" assumptions to satisfy actuarial equivalence for early retirement benefits). But what Plaintiffs suggest is inconceivable—*i.e.*, that different benefits may be treated differently under the statute (Opp. at 18) (claiming the "Commissioner would not give greater protections to terminated vested participants than active ones")—is, in fact, evidenced by the applicable legislative history. *See* House Rep. No. 93-807, 1974-3 C.B. 236 (I.R.S. 1974) (Congress noting that ERISA was designed, in part, specifically to protect "individuals . . . separated from service prior to retirement and [who] have deferred nonforfeitable rights to plan benefits" such as the "terminated vested participants" protected by 29 U.S.C. § 1056(a)(3)). In fact, ERISA does not require a plan to offer early retirement benefits at all.

Third, Plaintiffs' argument that *Belknap* should have found "actuarial equivalence" to mean the same thing for optional forms of benefits, such as those challenged here, as it does for lump-sum benefits (where Congress requires calculations based on specific actuarial assumptions), Opp. at 19, again ignores the important distinctions that Congress acknowledged between lump-sum benefits and other benefit forms. To start with, the requirement that lump-sum benefits be calculated using specific actuarial assumptions is contained in 26 U.S.C. § 417(e) and 29 U.S.C. § 1055(g) and not in any relevant part of § 1054(c)(3). 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). Moreover, in 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 § 1054(c)(3) in such a way, and courts should avoid reading in any similar 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.”).[10]

2. *Smith* Does Not Mandate a Different Outcome

Plaintiffs’ reliance *Smith v. U.S. Bancorp* to argue that “nothing has changed. . . to warrant a different outcome here,” overstates the reach of *Smith* and the narrow holdings espoused by the Court there. *Smith*, 2019 WL 2644204; Opp. at 10.

While *Smith* declined to credit an argument that “reasonableness” is not required by § 1054(c)(3) on a Rule 12(b)(6) motion, the court there was presented with a different argument than the one advanced here, the latter of which was subsequently endorsed by *Belknap* in granting defendants summary judgment. Specifically, *Smith* did not evaluate the question of whether § 1054(c)(3) is satisfied when a plan pays benefits according to its definition of “actuarial equivalence” and did not have the benefit of the *Belknap* decision or its reasoning in construing ERISA’s terms.

Even if this Court were to construe *Smith* as having reached the same question resolved by *Belknap*, Defendants respectfully submit that *Belknap*’s reasoning, as discussed above, reveals an error in the *Smith* court’s analysis that warrants

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[10] All of Plaintiffs’ cited cases dealing with the calculation of lump-sum benefits are distinguishable for the same reason. *Lyons v. Georgia-Pac. Corp. Salaried Emps. Ret. Plan*, 221 F.3d 1235, 1241 (11th Cir. 2000) (“The principal dispute in this case is about . . . [the calculation of] Lyons’ lump sum benefit.. . .”); *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 761 (7th Cir. 2003) (referring to “. . . the congressional policy of requiring that a lump-sum distribution of pension benefits equal the value of the benefits if the employee decides to wait to the normal retirement age and take them then in the form of a pension.”); *Miller v. Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871, 875 (9th Cir. 2006) (citing § 1054(c)(3) for the proposition that “any lump-sum substitute for an accrued pension benefit be the actuarial equivalent of that benefit”).

reconsideration of its holdings. Namely, the authority on which *Smith* relied to allow the plaintiffs' early retirement claims to survive dismissal all concerned lump-sum benefits which, as discussed above, are subject to materially different requirements under ERISA. *See Smith*, 2019 WL 2644204, at *3 (relying on *Stephens v. U.S. Airways Grp.*, Inc., 644 F.3d 437 (D.C. Cir. 2011) (interpreting required timing and interest for paid lump-sum benefits);[11] *Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000) (discussing the impact of whipsaw calculations for lump-sum payments); *Dooley v. Am. Airlines, Inc.*, No. 81-6770, 1993 WL 460849, at *12 (N.D. Ill. Nov. 4, 1993) (analyzing assumptions used to calculate lump sums for purposes of anti-forfeiture provision)).[12]

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[11] Plaintiffs' Opposition makes much of a 1991 actuarial study guide referenced in *Stephens* (for a different purpose) to suggest that "assumptions used for actuarial equivalence" must be "reviewed and modified" "periodically." *See* Jeff L. Schwartzmann & Ralph Garfield, *Actuarially Equivalent Benefits* (1991); Opp. at 10. To the extent this guide states that periodically interest and mortality assumptions can be reviewed and modified, such discussion has nothing to do with the meaning of "actuarial equivalence" in § 1054(c)(3) and what ERISA requires.

[12] Plaintiffs' additional authority is distinguishable because they were rendered in unrelated and inapposite contexts. *Bird v. Eastman Kodak Co.*, 390 F. Supp. 2d 1117, 1119 (M.D. Fla. 2005) (deciding, for the purposes of a change in beneficiary designation, that there was no violation of ERISA where a plan was "administered according to its terms" and citing to the plan documents noting that these documents discuss the "actuarial equivalence requirement of optional forms of payment"); *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1110-13 (9th Cir. 2000) (finding that a plan administrator did not violate ERISA when it modified the ambiguous actuarial assumptions laid out in the plan document to better reflect the gender demographics of the participant population, but *not* requiring plan administrators to make such an adjustment); *Pizza Pro Equip. Leasing, Inc. v. Comm'r of Internal Revenue*, 147 T.C. 394, 411 (2016), *aff'd*, 719 F. App'x 540 (8th Cir. 2018) (finding plan sponsor liable for excise tax to IRS because plan became "overfunded" due to the use of improper actuarial assumptions—which has nothing to do with the conversion between benefit forms—and noting "[a]ctuarial equivalence ultimately relies *on what is being compared and how*, and special attention must be paid to the actuarial assumptions underlying the computations") (emphasis added).

B. Plaintiffs' Attempt to Expand § 1053(a) to Protect Early Retirement Benefits Fails

Plaintiffs' appeal to *Smith* to save their § 1053(a) claim from dismissal fails. Indeed, the *Smith* court was not presented with and thus did reach the question of whether Plaintiffs can state a claim for violation of § 1053(a)—which, by its terms, applies only to participants who have reached normal retirement age—when Plaintiffs commenced their benefit beforehand. *DuBuske v. PepsiCo, Inc.*, No. 18-11618, 2019 WL 4688706, at *3-4 (S.D.N.Y. Sept. 25, 2019), *reconsideration denied in pertinent part by* 2019 WL 5864995, at *3 (S.D.N.Y. Nov. 8, 2019) ("*Pepsico*") ("nonforfeitability attaches only after the employee attains normal retirement age"); *Belknap v. Partners Healthcare Sys., Inc.*, No. 19-11437 (D. Mass. Jan. 24, 2020) (Dkt. 33) [13] at 8 ("[A]ccording to the plain language of the provision, the anti-forfeiture provision attaches only after the employee attains 'normal retirement age.'") ("*Belknap* Dismissal Order").

Indeed, the single, out-of-circuit, unreported case Plaintiffs rely on in opposition, *Urlaub*, 2022 WL 523129, is unpersuasive. Opp. at 22. In finding that § 1053(a) applies to plan participants receiving early retirement benefits, *Urlaub* reasoned that "[t]he defendants' interpretation 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," and further concluded "[t]hat makes no sense." *Urlaub*, 2022 WL 523129, at *7.

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[13] *See* Ex. 1 to the Declaration of Melissa D. Hill submitted in support of Defendants' Motion ("Hill Decl.") (Dkt. 24-1).

But *Urlaub* erred by ignoring the plain language of § 1053(a), which requires only that a "normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." *Id.*; 29 U.S.C. § 1053(a). *See also McBarron v. S & T Indus., Inc.*, 771 F.2d 94, 99 (6th Cir. 1985) ("ERISA does not give an employee any nonforfeitable right to early retirement benefits. The express wording of the statute makes this clear: 'Each pension plan shall provide that an employee's right to normal retirement benefits is nonforfeitable upon the attainment of normal retirement age. . . '") (citing § 1053(a)); *Robertson v. Marques*, No. 19-1009, 2019 WL 2476616, at *2 (D. Minn. May 8, 2019), *report and recommendation adopted*, No. 19-1009, 2019 WL 2464805 (D. Minn. June 13, 2019) ("Courts must enforce plain and unambiguous statutory language according to its terms.").

Urlaub also improperly ignored congressional intent in enacting ERISA. *See* Priv. Pension Tax Reform, House Rep. No. 93-779, 1974-3 C.B. 244 (I.R.S. 1974) ("[T]he accrued benefit to which the vesting rules apply is not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age. . ."); *Furrer v. Brown*, 62 F.3d 1092, 1102 (8th Cir. 1995) ("The role of the federal courts, of course, is as interpreters of the words chosen by Congress, not as policymakers or enlargers of congressional intent.").

Additionally, Plaintiffs' reliance a two-sentence musing on *Smith* in a footnote in *Pepsico* (Opp. at 23-24), does not undermine *Pepsico*'s clear pronouncement that "nonforfeitability attaches only *after* the employee attains normal retirement age."

Pepsico, 2019 WL 4688706, at *3-4. First, as noted, *Smith* did not have the benefit of *Pepsico* in reaching its conclusion and, in any event, did not address the question presented in *Pepsico*. Second, *Belknap* reached the same conclusion as *Pepsico* (making no mention of *Smith*). *Belknap* Dismissal Order at 8 ("[A]ccording to the plain language of the provision, the anti-forfeiture provision attaches only after the employee attains 'normal retirement age.'"). Third, in *Engers v. AT&T*, on which *Pepsico* relies, the court observed that "Section 1053(a) prohibits forfeiture after the attainment of normal retirement age. . ." No. 98-3660, 2002 WL 32159586, at *8 (D.N.J. Oct. 17, 2002), *aff'd*, 466 F. App'x 75 (3d Cir. 2011).[14]

Finally, Plaintiffs' reference to 29 U.S.C. § 1053(a)(2) is a red herring. Opp. at 20-21. Plaintiffs are right that this section confers an unrelated protection on plan participants when it references two schedules that a plan is required to choose from for its vesting rules: (1) "cliff vesting," in which the entire benefit vests after five years, or (2) "graded vesting," in which the amount vested increases gradually, starting at 20% at three years of service and fully vesting at seven years of service. 29 U.S.C. § 1053(a)(2). But ERISA's additional requirement that a plan pick one of two prescribed vesting schedules

[14] The other cases Plaintiffs refer to are equally unpersuasive. *See*, *e.g.*, *Contilli v. Loc. 705 Int'l Brotherhood of Teamsters Pension Fund*, 559 F.3d 720, 721 (7th Cir. 2009) (affirming increased payment of benefits where participant retired and started receiving benefits *later* than normal retirement age, rather than earlier); *Esden*, 229 F.3d at 160-61 (addressing conversion of lump-sum benefits).

says nothing about if a participant must reach normal retirement age for ERISA's anti-forfeiture provisions to apply—and is thus irrelevant here.[15]

The *Laurent* decision Plaintiffs cite highlights this difference. Opp. at 23; *Laurent v. PricewaterhouseCoopers LLP*, 794 F.3d 272, 286 (2d Cir. 2015). There, the Second Circuit found that, for § 1053(a) to attach to a benefit, a participant needs to have reached normal retirement age *and also* have satisfied a vesting schedule under § 1053(a)(2). *Laurent*, 794 F.3d at 274. The plan there conflated the two by defining "normal retirement age" as five years of service (the same as the cliff vesting option of § 1053(a)(2)), which resulted in plaintiffs' benefit fully accruing after just five years of service—rather than after reaching *both* five years of service and a typical normal retirement age around age sixty-five. *Id* at 277, 282. The court construed § 1053(a) as requiring both prongs be met, and thus the plan at issue violated ERISA by defining normal retirement age in a way that eliminated the separate and distinct requirement of § 1053(a)(1). *Id*. at 282. Here, Plaintiffs are not entitled to relief under 29 U.S.C. § 1053(a), not because the vesting schedule has not been met (the Complaint makes no allegations in that regard), but because Plaintiffs have not reached normal retirement age.

III. **Plaintiffs' Class Definition Must Be Stricken Because It Is a Fail-Safe Class, Regardless of Its Ascertainability**

[15] In any event, the Plans here *do* use one of these two vesting schedules. *See* Hill Decl. at Ex. 2 (2020 Restatement of the Pension Plan) at § 5.2.1(a) (providing for a five-year "cliff" vesting schedule), Ex. 3 (2020 Restatement of the Legacy Plan) at § 5.2.1(a) (same).

In response to Defendants Motion, Plaintiffs argue only that their class is not fail-safe because "[f]ail-safe classes are those whose members cannot be ascertained before a court decides the case's merits." Opp. at 24. Plaintiffs' straw-man argument fails to engage with the deep-set problems plaguing Plaintiffs' class definition, which remain unopposed. Indeed, while fail-safe classes do present ascertainability issues, that is not the only hurdle to certification they present. Courts have variously treated fail-safe class concerns as a failure to define a sufficiently identifiable class, a failure to meet the "commonality" and "typicality" requirements of Rule 23(a), or a failure to meet the predominance requirement of Rule 23(b)(3). *Compare Lindsay Transmission, LLC v. Off. Depot, Inc.*, No. 4:12-221, 2013 WL 275568, at *4 (E.D. Mo. Jan. 24, 2013) (granting motion to strike allegations because the "fail safe" class failed to meet the "commonality" and "typicality" requirements of Rule 23(a)) *with Hoekman v. Educ. Minn.*, 335 F.R.D. 219, 249 (D. Minn. 2020) (denying class certification based on lack of ascertainability without reference to fail-safe arguments).[16]

But the primary problem with Plaintiffs' fail-safe class is not ascertainability—it is the fact that the class was defined to include only individuals who would prevail on the

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[16] Moreover, none of the cases plaintiff cites, to show that the class was "ascertainable" deal with arguments regarding a fail-safe class. *McKeage v. TMBC, LLC*, 847 F.3d 992, 998 (8th Cir. 2017) (affirming class certification, in part, because class was ascertainable but not addressing any fail-safe arguments); *In re Cmty. Bank of N. Va. Mortg. Lending Litig.*, 795 F.3d 380, 397 (3d Cir. 2015) (same); *In re J.P. Morgan Stable Value Fund ERISA Litig.*, No. 12-2548, 2017 WL 1273963 (S.D.N.Y. Mar. 31, 2017) (same).

merits (Mot. at 24-25) and that the definition precludes the possibility of an adverse judgment against class members (Mot. 25-26).

First, Plaintiffs fail to refute the argument that the class is impermissibly defined to include only individuals who would prevail on the merits. This argument should be deemed waived. *Espey v. Nationstar Mortg., LLC*, No. 13-2979, 2014 WL 2818657, at *11 (D. Minn. June 19, 2014) (granting motion to dismiss where ". . . plaintiff never responded to defendants' . . . argument in her responsive memorandum. Plaintiff's failure to respond amounts to a waiver, and on that basis alone defendant's motion to dismiss . . . should be granted."). Regardless, even in *Randleman,* which Plaintiffs cite elsewhere in their opposition (Opp. at 24), the court confirmed that a class should not be certified where the fail-safe class was defined to include only those "entitled to relief," noting that this was an "independent ground for denying class certification." *Randleman v. Fid. Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011).[17]

Second, Plaintiffs claim that "Class Members *could* be bound by an adverse judgment if they fail to prove their claims in any number of ways" (Opp. at 27) (emphasis added), but this does not deny Defendants' position that there is at least one outcome in

[17] *Vogt v. State Farm Life Insurance Co.*, on which Plaintiffs rely, also helps illustrate this point. 963 F.3d 753, 768 (8th Cir. 2020). There, the Eighth Circuit rejected defendant's arguments that plaintiff had defined a fail-safe class because unlike Plaintiffs' proposed class here, the class *did* contain individuals who suffered no damages (i.e., was not defined to include only those who would prevail on the merits) and thus was not an impermissible a fail-safe class. *Id.*; *see also Ford v. TD Ameritrade Holding Corp.*, 995 F.3d 616, 624 (8th Cir. 2021) (reversing grant of class certification where "district court certified a class in which membership depends upon having a valid claim on the merits").

which putative class members would not be bound: if the Court were to find that ERISA requires the Plans to use different assumptions than their current definition of actuarial equivalence, but also declines to declare the Treasury Assumptions (on which Plaintiffs' class definition depends) necessary to satisfy ERISA's requirements. In such case, class members would be unbound by that adverse judgment and free to pursue yet another claim against US Bank on an entirely different theory of preferred assumptions. Fail-safe classes are prohibited not because every outcome would result in a situation where "class members either win or are not in the class," but rather because there is even one possibility in which class members would be free to pursue a new claim. *Orduno v. Pietrzak*, 932 F.3d 710, 716 (8th Cir. 2019) (affirming denial of class certification where plaintiff described a fail-safe class noting "[t]hat sort of class is prohibited because it would 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"). As one court explains, in a case on which Plaintiffs rely:

> [W]hat makes a fail-safe class asymmetrically unfair to defendants is that a finding of liability binds a defendant to an adverse judgment, while a finding of non-liability binds no class member because no class would exist by definition.

Garcia v. ExecuSearch Grp., LLC, No. 17-9401, 2019 WL 689084, at *2 (S.D.N.Y. Feb. 19, 2019).

Plaintiffs also claim that Defendants' motion to strike the pleading is premature. Opp. at 28-32. But the timing of Defendants' Motion is proper, and the Eighth Circuit has confirmed that it is an "abuse of discretion" for a district court to deny a motion to

strike class action allegations as "premature" where it was "apparent from the pleadings that [Plaintiff] could not certify a class." *Donelson v. Ameriprise Fin. Servs., Inc.*, 999 F.3d 1080, 1092 (8th Cir. 2021). While the Eighth Circuit observed a circuit split on the question of when to properly strike class allegations, it clarified its position that "a district court may grant a motion to strike class-action allegations prior to the filing of a motion for class-action certification."[18] *Id.*

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion should be granted.

[18] Plaintiffs' reference to cases finding a motion to strike was premature because the plaintiffs had not had an opportunity to engage in discovery ignores the realities of the instant case. *St. Louis Heart Ctr., Inc. v. Nomax, Inc.*, No. 4:15-517, 2015 WL 9451046, at *2 (E.D. Mo. Dec. 23, 2015) (denying motion to strike where "discovery has not yet commenced"); *Rios v. State Farm Fire & Cas. Co.*, 469 F. Supp. 2d 727, 733 (S.D. Iowa 2007) (denying motion to strike ". . . as class discovery has not yet been completed. . ."); *Sandusky Wellness Ctr. LLC v. Medtox Sci., Inc.*, No. 12-2066, 2013 WL 951143, at *2 (D. Minn. Mar. 12, 2013) (denying motion to strike where "no discovery has taken place"). To position this motion to strike as premature does not adequately account for the multiyear litigation history of the *Smith* case that Plaintiffs admit was "materially identical." Opp. at 1. The *Smith* case was originally filed nearly four years ago and there the parties engaged in substantial discovery. *See*, *e.g.*, *Smith v. U.S. Bancorp*, No. 18-3405 (D. Minn.) (Dkt. Nos. 1, 52, 58) (*respectively,* complaint, confidentiality order, and order regarding discovery of electronically stored information).

Respectfully submitted this 25th day of July, 2022.

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CERTIFICATE OF COMPLIANCE

I, Melissa D. Hill, certify that Defendants' Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss Plaintiffs' Complaint and Strike Plaintiffs' Class Allegations complies with the word limits in Local Rule 7.1(f) and with the type-size limit of Local Rule 7.1(h).

I further certify that, in preparation of this Memorandum, I used Microsoft Word, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the aforementioned Memorandum contains 5,344 words.

/s/ Melissa D. Hill
Melissa D. Hill

July 25, 2022