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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Marsha R. DuVaney, on behalf of herself and all others similarly situated,

Plaintiff,

vs.

Delta Airlines, Inc., the Administrative Committee of Delta Airlines, Inc., Greg Tahvonen, Mindy Davison, Janet Brunk and John/Jane Does 1-5,

Defendants.

Case No.: 2:21-cv-02186-RFB-EJY

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT PURSUANT TO RULES 12(B)(1) AND 12(B)(6) [ECF NO. 34]

Oral Argument Requested

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INTRODUCTION

Plaintiff, Marsha R. DuVaney, is a participant in a Northwest Airlines pension plan that is sponsored by Delta Air Lines, Inc. ("Delta"). Plaintiff alleges that Defendants violated ERISA by paying joint-and-survivor annuity ("JSA") benefits that were not actuarially equivalent to the single life annuity she could have received when she retired because Defendants calculated her JSA using a flawed formula based on unreasonable actuarial assumptions. The Complaint asserts claims under ERISA § 205(d)(1), 29 U.S.C. § 1055(d), and ERISA § 404, 29 U.S.C. § 1104. Plaintiff brings these claims against Delta and the Administrative Committee of Delta Airlines, Inc. (the "Administrative Committee"), on behalf of herself and the participants and beneficiaries of three plans sponsored by Delta: The Northwest Airlines Pension Plan for Contract Employees (the "Contract Plan"), the Northwest Airlines Pension Plan for Salaried Employees (the "Salaried Plan"), and the Northwest Airlines Pension Plan for Pilot Employees (the "Pilots Plan") (together "the Plans"). Because the Complaint plausibly alleges these claims, Defendants' Motion to Dismiss [ECF 34] (the "Motion") should be denied.

Defendants primarily argue that the term "actuarial equivalence" has no objective meaning and instead means whatever a plan sponsor says it means. This argument is contrary to ERISA, Ninth Circuit precedent, *McDaniel v Chevron Corp*., 203 F.3d 1099 (9th Cir 2000), the ordinary meaning of "actuarial equivalence" and common sense. Defendants' argument that Plaintiff does not have standing to assert claims on behalf of the Salaried and Pilots Plan is wrong as a matter of law because Plaintiff's ability to represent members of other Plans is an issue of class certification, not standing. Finally, Defendants argument that Plaintiff must exhaust administrative remedies fails because exhaustion does not apply to the claims brought in this case.

FACTUAL ALLEGATIONS[1]

Delta sponsors the Plans, which are defined benefit pension plans under ERISA. ¶¶ 2, 37, 37, 54. Under the Plans, participants may select a single life annuity ("SLA") or one of several

[1] The Complaint's Paragraphs are cited as "¶ _".

JSAs. ¶ 3. An SLA provides retirees with monthly payments for the rest of their lives. ¶ 2. A JSA is an annuity for the participant's life with a contingent annuity payable to the participant's spouse if the participant pre-deceases the spouse. ¶ 3. The monthly JSA benefits are less than the amount payable as an SLA because the JSA accounts for the possibility that the Plan will have to pay benefits longer if a participant dies before the spouse. ¶ 4.

The Plans offers JSAs in percentages of 50%, 75%, and 100%. ¶¶ 44, 50, 59. A 50% JSA pays the spouse half of the amount that was paid to the participant before death; a 75% JSA pays the spouse three quarters; and a 100% JSA pays the same amount. *See* ¶ 3. Plaintiff is receiving a 50% JSA with her husband as the beneficiary. ¶ 13.

While each of the Plan's JSA options provide a survivorship benefit that qualifies as a qualified joint and survivor annuity ("QJSA"), the 50% JSA is the Plans' default form of benefit. ¶ 40, 57. Delta deemed the 75% JSA as the qualified optional survivor annuity ("QOSA") in the Contract Plan. ¶ 41.

QJSA benefits must be actuarially equivalent to SLA benefits. Two benefit options are actuarially equivalent when they have the same present value, calculated using the same, reasonable actuarial assumptions. ¶¶ 29-34. Calculating present value requires inputting projected mortality and interest rates. ¶ 5. To determine the amount of a benefit, mortality and interest rate assumptions, together, generate a "conversion factor," which expresses the dollar amount of one monthly benefit as a fraction of the dollar amount of the monthly benefit paid in the form of the comparator benefit. ¶ 6. If a plan's "conversion factor" for QJSA benefits, relative to either the SLA benefit or a more valuable plan benefit, is lower than the conversion factor that would be generated from reasonable actuarial assumptions about mortality and interest rates, then the plan's QJSA benefits are not "actuarially equivalent." *Id*.

The Plans' "conversion factors" for calculating JSA benefits are lower than the conversion factors generated by reasonable actuarial assumptions, resulting in the payment of JSA benefits that are not actuarially equivalent to the SLA benefits participants could elect to take instead. ¶ 7. Under the Plans, Defendants use a .90 conversion factor to calculate a 50% joint and survivor

1 annuity and a .80 conversion factor to calculate a 100% joint and survivor annuity. *Id*. These
2 conversion factors do not provide participants with actuarially equivalent benefits. *Id*. For a 65-
3 year-old participant with a 65-year-old spouse, the conversion factor for the 50% JSA in 2020,
4 based on reasonable actuarial assumptions, would have been .92, or 2.3% higher than the Plans
5 pay. *Id*. The conversion factor for the 100% JSA would have been .85, or 6.6% more than the
6 Plans pay. *Id*.

7 The Plans' conversion factors thus depress the present value of benefits received as a JSA,
8 resulting in benefits that are materially lower than the actuarial equivalent of the Plans' SLA
9 benefits. ¶ 8. In sum, Delta is causing Plaintiff and Class Members to receive less than they should
10 as pensions each month, which will continue to affect them throughout their retirements. *Id*.

11 Delta uses current, updated actuarial assumptions to calculate and report its Plan liabilities
12 in its financial statements. ¶ 79. Delta represented that these assumptions used when preparing its
13 financial statements were its "best estimates." ¶ 80. In other words, Delta uses current, reasonable
14 mortality assumptions when reporting its pension costs for one purpose but uses different,
15 unreasonable assumptions when calculating retirees' actual benefits, even though both concern
16 the exact same benefits payable to the exact same retirees.

17 **RELEVANT ERISA STANDARDS**

18 Participants in defined benefit plans typically earn benefits in the form of an SLA. ERISA
19 § 3(23), 29 U.S.C. § 1002(23). For married participants, ERISA requires that the default form of
20 benefit be a "qualified joint and survivor annuity" ("QJSA"), which is a payment stream for a
21 participant's and a surviving spouse's life. ERISA §§ 205(a)(1), (d)(1), 29 U.S.C. §§ 1055(a)(1),
22 (d)(1). Pension plans must also offer as an option a "qualified optional survivor annuity"
23 ("QOSA"). ERISA § 205(d)(2), 29 U.S.C. § 1055(d)(2).

24 A QJSA must be actuarially equivalent to the SLA participants earned under the Plan.
25 ERISA § 205(d)(1), 29 U.S.C. § 1055(d)(1). Additionally, "a QJSA 'must be at least the actuarial
26 equivalence of the normal form of life annuity or, if greater, of any optional form of life annuity
27 offered under the plan.'" *Id*. (quoting 26 C.F.R. § 1.401(a)-11(b)(2)). A QJSA "must be as least
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1 as valuable as any other optional form of benefit under the plan at the same time." 26 C.F.R. §
2 1.401(a)-20 Q & A 16. A QOSA must also be actuarially equivalent to an SLA. ERISA §
3 205(d)(2), 29 U.S.C. § 1055(d)(2).

4
ARGUMENT

5
I. PLAINTIFF PLAUSIBLY ALLEGES DEFENDANTS VIOLATED ERISA § 205(d)

6
A. ERISA Section 205(d) requires the use of reasonable assumptions to determine
7 actuarial equivalence

8 Plaintiff plausibly alleges that Defendants violated ERISA § 205(d) by using a flawed
9 formula to calculate QJSAs and QOSAs that does not produce benefits that are actuarially
10 equivalent to the SLA. Defendants' argument that this section of ERISA does not impose a
11 reasonableness requirement is wrong. Motion at 7.

12 "Actuarial equivalence" is a term of art with an established meaning. *Stephens v. U.S.*
13 *Airways Grp., Inc.*, 644 F.3d 437, 440 (D.C. Cir. 2011). "Two modes of payment are actuarially
14 equivalent when their present values are equal under a given set of assumptions." *Id*. at 440. Not
15 all benefit forms are actuarially equivalent to each other – "special attention must be paid to the
16 actuarial assumptions underlying the computations." *Pizza Pro Equip. Leasing v. Comm. of*
17 *Revenue*, 147 T.C. 394, 411 (emphasis added), *aff'd*, 719 F. App'x 540 (8th Cir. 2018).

18 "Present value" is "the value adjusted to reflect anticipated events." ERISA § 3(27), 29
19 U.S.C. § 1002(27). This definition requires plans to use assumptions that legitimately reflect
20 anticipated future events — that is, reasonable assumptions. Whether two benefits are actuarially
21 equivalent must be "determined on the basis of actuarial assumptions with respect to mortality
22 and interest which are reasonable in the aggregate." *Dooley v. Am. Airlines, Inc.*, 1993 WL
23 460849, at * 10 (N.D. Ill. Nov. 1993); *see also Dooley v. Am. Airlines, Inc.*, 797 F.2d 1447, 1453
24 (7th Cir. 1986) (citing expert testimony that "actuarial equivalence must be determined on the
25 basis of reasonable actuarial assumptions . . . .").

26 In *McDaniel v Chevron Corp.*, 203 F.3d 1099 (9th Cir. 2000), the Ninth Circuit similarly
27 found that "[t]he most important consideration in. . . . selecting a mortality table to be used in
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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; emphasis added).[2] In other words, the assumptions must be reasonable by reflecting the projected mortality of the plan's population.

Additionally, under ERISA's definition of "present value," adjustments must "conform to such regulations as the Secretary of the Treasury may prescribe." ERISA § 3(27), 29 U.S.C. § 1002(27); ¶ 30. "Treasury Department regulations require employers to use 'reasonable' actuarial assumptions to determine actuarial equivalence." *Cruz v. Raytheon Co*., 435 F. Supp. 3d 350, 352 (D. Mass. 2020).[3] The Regulations also rely on the standards promulgated by the American Society of Actuaries (the "SOA"),[4] which require actuaries to use "reasonable assumptions." *See* ASOP No. 27, § 3.6 ("each economic assumption used by an actuary should be reasonable"); *see also* ASOP No. 35, § 3.3.5 ("Each demographic assumption selected by the actuary should be reasonable"). Additionally, under § 3.6 of ASOP No. 27,[5] "each economic assumption used by

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[2] *McDaniel* held that the plan sponsor satisfied ERISA § 204(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. Although, *McDaniel* concerned ERISA § 204, 29 U.S.C. § 1054, the same reasoning applies here.

[3] *See, e.g*., 26 C.F.R. § 1.401(a)-11(b)(2) ("[e]quivalence may be determined, on the basis of consistently applied ***reasonable actuarial factors***…." (emphasis added)); 26 C.F.R. § 1.417(a)(3)-1(c)(2)(iv) (a plan must determine optional benefits using "a single set of ***interest and mortality assumptions that are reasonable*** . . . ." (emphasis added)); 26 C.F.R. § 1.411(d)-3(g)(1) (actuarial present value (within the meaning of § 1.401(a)(4)-12) determined using ***reasonable actuarial assumptions***." (emphasis added)); 26 C.F.R. § 1.411(a)(13)-1(b)(3) (any optional form of benefit must be "at least the actuarial equivalent, using ***reasonable actuarial assumptions*** . . . ." (emphasis added)); 26 C.F.R. § 1.411(a)-4(a) ("[c]ertain adjustments to plan benefits such as adjustments in excess of ***reasonable actuarial reductions*** can result in rights being forfeitable." (emphasis added)).

[4] *See, e.g*., 26 C.F.R. § 1.430(h)(3)-1(a)(2)(C); IRS Notices: 2008-85, 2013-49, 2015-53, 2016-50, 2018-02; 82 Fed. Reg. 46388-01 (Oct. 5, 2017) ("Mortality Tables for Determining Present Value Under Defined Benefit Plans"), 72 Fed. Reg. 4955-02 (Feb. 2, 2007) ("Updated Mortality Tables for Determining Current Liability"); *see also, Stephens*, 644 F.3d at 440.

[5] Courts look to professional actuarial standards as part of this analysis. *See, e.g*., *Stephens*, 644 F.3d at 440 (citing Schwartzmann & Garfield); *see also McDaniel*, 203 F.3d at 1110 (citing American Academy of Actuaries' publication).

an actuary should be reasonable."[6] An assumption is "reasonable" if it "takes into account historical and current economic data that is relevant as of the measurement date," and "reflects the actuary's estimate of future experience." *See* ASOP No. 27, § 3.6 (emphasis in original).

Against this backdrop, ***every court*** that has analyzed the issue has found that ERISA § 205(d) requires the use of reasonable assumptions when measuring actuarial equivalence. For example, in *Herndon v. Huntington Ingalls Indus., Inc*., No. 4:19-CV-52, 2020 WL 3053465, * 2 (E.D. Va. Feb. 20, 2020), the court held that "[u]nder a straightforward and plain reading of the statute and regulations, defendants must use 'reasonable' data to ensure that Plaintiff is receiving benefits that are equivalent to a single life annuity." *Id*. (emphasis added). Likewise, *Cruz* held that "Treasury Department regulations require employers to use 'reasonable' actuarial assumptions to determine actuarial equivalence." *Cruz*, 435 F. Supp. 3d at 352 (emphasis added) (citing 26 C.F.R. §§ 1.401(a)-11(b)). *See also Masten v. Metro. Life Ins. Co*., 543 F. Supp. 3d 25, 29 (S.D.N.Y. 2021) (ERISA § 205's "[i]mplementing regulations. . . .direct employers to use 'reasonable actuarial factors' to determine . . . .actuarial equivalence. . . .") (emphasis added); *Smith v. Rockwell Automation, Inc*., 438 F. Supp. 3d 912, 921 (E.D. Wis. 2020) (ERISA § 205(d) requires plans to "use the kind of actuarial assumptions that a reasonable actuary would use. . . .").

Courts analyzing ERISA § 205 have found that ERISA's purpose requires plans to use reasonable assumptions. In *Urlaub v. CITGO Petroleum Corp*., No. 21 C 4133, 2022 WL 523129 (N.D. Ill. Feb. 22, 2022), the court stated:

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

Id. at * 6. The court in *Masten* similarly held:

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[6] Available at: https://www.actuarialstandardsboard.org/asops/selection-economic-assumptions-measuring-pension-obligations/ (last visited March 15, 2023).

> 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…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.

Masten, 543 F. Supp. 3d at 34-35.

The only case that Defendants offer to support their suggestion that plans do not have to use reasonable actuarial assumptions is the ***summary judgment*** ruling in *Belknap v. Partners Healthcare Sys., Inc.*, 588 F. Supp. 3d 161, 175 (D. Mass. 2022), a case under ERISA § 204(c)(3) ***that did not even analyze ERISA § 205(d)***. Motion at 7. Accordingly, *Belknap* is not persuasive authority, especially in light of *Herndon*, *Cruz*, *Masten*, *Smith* and *Urlaub*, each of which addressed ERISA § 205(d) claims exactly like the ones Plaintiff brings in this case.

To the extent *Belknap* even applies to ERISA § 205(d), and it does not, it is not a reason to grant the Motion because the court in *Belknap* denied the motion to dismiss, determining 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." *Belknap v. Partners Healthcare Sys., Inc.*, 19-cv-11437, 2020 WL 4506162, *2 (D. Mass. Aug. 5, 2020). *Belknap* granted summary judgment based on its erroneous interpretation of the expert testimony in that case. Accordingly, even under the *Belknap* motion to dismiss ruling, this Court should deny the Motion.

The *Belknap* summary judgment decision parsed ERISA to conclude that Treasury Regulations do not apply to claims under ERISA § 204(c)(3), a conclusion that is wrong and contrary to Ninth Circuit precedent. *See*, *e.g.*, *McDaniel*, 203 F.3d at 1115-16; *Miller v. Xerox Corp. Ret. Inc. Guar. Plan*, 464 F.3d 871, 875 and n. 4 (9th Cir. 2006). But, even under the *Belknap* analysis, the same is not true for claims under ERISA § 205. Reorganization Plan No. 4 of 1978 transferred authority to the Secretary of the Treasury to issue regulations for several provisions of ERISA, including section 205, which concerns joint and survivor annuities. *See* 92

1 Stat. 3790 (Oct. 17, 1978); *see also Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 746-
2 47 (2004) (the "duplication" between the Tax Code and ERISA's requirements "explains the
3 provision of the Reorganization Plan No. 4 of 1978…giving the Secretary of the Treasury the
4 ultimate authority" over overlapping provisions) and 53 Fed. Reg. 31837-03, * 31389
5 (promulgating regulations regarding ERISA § 205's requirements pursuant to "section 101 of the
6 Reorganization Plan No. 4 of 1978…"). Indeed, ERISA § 205(l) provides that Secretary of the
7 Treasury has the primary responsibility to prescribe regulations under section 205. ERISA §
8 205(l), 29 U.S.C. § 1055(l).

9 The Treasury regulations for the Internal Revenue Code (the "Tax Code") provision
10 corresponding to ERISA § 205 (26 U.S.C. § 401(a)(11)) provide that a QJSA "must be at least
11 the actuarial equivalent of the normal form of life annuity or, if greater, of any optional form of
12 life annuity offered under the plan." 26 C.F.R. § 1.401(a)-11(b)(2). Indeed, a QJSA "must be as
13 least as valuable as any other optional form of benefit under the plan ***at the same time***." 26 C.F.R.
14 § 1.401(a)-20 Q&A 16 (emphasis added). JSA benefits cannot have the same present value as an
15 SLA "at the same time" if the JSA is calculated using outdated, unreasonable actuarial
16 assumptions based on mortality and economic conditions from an entirely different time. As
17 Plaintiff alleges in her Complaint, the Contract Plan's conversion factors have not changed since
18 1996. ¶ 72.

19 Additionally, this Court should reject *Belknap*'s summary judgment reasoning because it
20 is inconsistent with *McDaniel*, which found that ERISA requires plan sponsors to select a
21 mortality table for a population that "has characteristics that are typical of the plan's participants,"
22 i.e., reasonable assumptions. *McDaniel*, 203 F.3d at 1110; *see also* ¶ 32 (citing ASOP 35).
23 *Belknap* is also contrary to *Miller v. Xerox Corp.*, which rejected an interpretation under which
24 "ERISA's actuarial equivalence requirement would be meaningless – which…it cannot be…"
25 464 F.3d at 876, n. 5. Lastly, the only court to have examined *Belknap* has rejected its reasoning
26 in its entirety. *Adams v. US Bancorp et al.*, No. 22-cv-509, 2022 WL 10046049, * 8 (D. Minn.
27 Oct. 17, 2022).

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1 Defendants argue that "Congress's deliberate amendments to certain provisions of ERISA
2 but not others confirms Congress's intent to not require reasonable assumptions. Motion at 8-10.
3 Defendants are wrong for numerous reasons. First, Congress has acted – twice. As discussed
4 above, it defined "present value" as "the value adjusted to reflect anticipated events," and
5 provided that present value adjustments must "conform to such regulations as the Secretary of the
6 Treasury may prescribe." ERISA § 3(27), 29 U.S.C. § 1002(27); *Torres v. American Airlines,*
7 *Inc.*, 416 F.Supp.3d 640, 647 (2019) (quoting 29 U.S.C. § 1002(27)). It also adopted
8 Reorganization Plan No. 4 of 1978 which transferred authority to the Secretary of the Treasury
9 to issue regulations for several provisions of ERISA, including section 205.
10 The Treasury Regulations adopted pursuant to these provisions consistently require the
11 use of reasonable assumptions. As the *Torres* court found, "[c]onsistent with the ERISA's
12 definition of present value, the Secretary has prescribed several Regulations which require the
13 use of "reasonable" actuarial assumptions." *Id*. at 647-48.
14 Second, to the extent that Defendants are arguing that Congress' failure to amend ERISA
15 § 205 to compel the use of specific assumptions for annuity benefit calculations in the same way
16 that Congress subsequently amended the lump sum payment requirements, Defendants are
17 "read[ing] too much into congressional silence." *Michigan v. U.S. Army Corps of Engineers*, 667
18 F.3d 765, 775–76 (7th Cir. 2011). Post-enactment legislative history is a "contradiction in terms"
19 and "not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223,
20 242 (2011). That Congress was presented with and addressed a specific problem concerning
21 reduced pensions through, for example, lump-sum buyouts implies nothing about the meaning of
22 other provisions of the statute that was not addressed or amended, including those that form the
23 basis for Plaintiff's suit.
24 Defendants cite *Russello v. United States*, 464 U.S. 16 (1983) (Motion at 8) but that case
25 supports Plaintiff's position. First, *Russello* explained that, "in determining the scope of a statute,
26 we look first to its language" and "[i]f the statutory language is unambiguous, in the absence of
27 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded
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as conclusive.'" *Id*. at 20. Here, the phrase "actuarial equivalent of a single annuity for the life of the participant" unambiguously means having the same present value as a single life annuity. *Cruz*, 435 F. Supp.3d at 352; *Urlaub*, 2022 WL 523129 at * 1. Second, *Russello* explained that "[h]ad Congress intended to restrict [the statutory term], it presumably would have done so expressly . . . ." *Ruseelo*, 464 U.S. at 23. This reasoning supports Plaintiff's claim. If Congress intended that joint-and-survivor benefits could be calculated per plan terms with *no other* conditions or protections, it could have easily said so and it would ***not*** have used the phrase "actuarial equivalent," which is a term of art with an established meaning.[7] *Stephens*, 644 F.3d at 440; *see also id*. at 443 (("ERISA's actuarial equivalence requirement serves to protect actual retirees, not merely ensure that pension plans perform abstract calculations.") (Kavanaugh, J., concurring).[8]

Stamper v. Total Petroleum, Inc. Ret. Plan, 188 F.3d 1233, 1238 (10th Cir. 1999), which was cited by Defendants, is inapposite. In *Stamper*, the plaintiff alleged defendants violated § 401(a)(25) of the Tax Code (Title 26) by not specifying the actuarial assumptions that would be used to calculate benefits in the plan document, known as the "definitely determinable" requirement. As the Ninth Circuit found in *McDaniel*, the Tax Code's "definitely determinable" requirement is different than ERISA's "actuarial equivalence" requirement. *McDaniel*, 203 F.3d at 1117. The "definitely determinable" requirement mandates that plans specify how benefits will be calculated; the "actuarial equivalence" requirement mandates that the results of those

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

[8] Defendants also cite *Gross v. FBL Fin. Servs., Inc*., 557 U.S. 167, 174 (2009), but that case is not relevant here. In *Gross*, the Court declined plaintiffs' request to apply a burden shifting framework to ADEA claims, relying, in part, on the fact that Congress did not add such a provision to the ADEA when *it did add it to Title VII,* even though the ADEA was contemporaneously amended in other ways. But this reasoning does not help Defendants because the phrase at issue here — "the actuarial equivalent of a single annuity for the life of the participant" — is clear and plaintiffs are not asking this Court to read something into the statute that is not already clear from its plain language.

1 calculations provide participants with an equal present value. Because the claim in *Stamper* did
2 not involve ERISA's actuarial equivalence requirement, its holding is beside the point.

3 **B. Plaintiff plausibly alleges the Plan violates Section 205(d)**

4 The Complaint plausibly alleges that the Plans' conversion factors do not produce benefits
5 that satisfy ERISA's actuarial equivalence requirements. ¶ 71. Although the Plans do not identify
6 the actuarial assumptions used to calculate the 50%, 75%, and 100% JSAs, based on the
7 conversion factors, it is reasonable to infer they were set decades ago when mortality rates were
8 significantly higher. ¶ 72. Indeed, ***the Contract Plan's conversion factors have not been changed***
9 ***since 1996***. *Id*. The actual conversion factors are unreasonably low compared to conversion
10 factors generated using actuarial assumptions that would have been reasonable *at any time during*
11 *the last decade*. *Id*.

12 The Complaint compares (A) the conversion factor and benefit a hypothetical participant
13 would receive using the Plans' conversion factors and, for example, (B) the conversion factor and
14 benefit that the participant would receive if the indisputably reasonable, up to date Treasury
15 Assumptions were used. ¶¶ 68-69, 73. The Plans' conversion factors result in Class Members
16 receiving substantially lower benefits (*i.e.*, worse for participants) compared to benefits generated
17 using the Treasury Assumptions. ¶ 74.

18 The Complaint also calculates the injury suffered by Plaintiff. She was offered an SLA
19 that would have paid her $2,164.56 per month. ¶ 77. Defendants — using an unreasonable
20 conversion factor — determined that her 50% JSA monthly benefit was $1,851.52. *Id*. But, if the
21 Treasury Assumptions were used to calculate her benefits instead of the Contract Plan's
22 unreasonable fixed conversion factors, her monthly benefit would have been $1,927.67 or $66.15
23 more per month. *Id*. By using these artificially low conversion factors instead of reasonable,
24 current actuarial assumptions like the applicable Treasury Assumptions, ***Defendants reduced the***
25 ***present value of Plaintiff's benefits when she retired by $12,605***. *Id*. By alleging that the
26 conversion factors produce unreasonable results, Plaintiff has plausibly alleged the Plans "violate
27 ERISA by relying upon unreasonable actuarial assumptions." *Cruz*, 435 F.Supp.3d at 353.
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Cruz is exactly on point. Like in this case, the plaintiff in *Cruz* alleged that the plan's use of a .90 conversion factor to calculate his 50% JSA violated ERISA § 205(d)'s actuarial equivalence requirements. Calculating the plaintiff's 50% JSA using the actuarial assumptions that the plan sponsor used in its "SEC filings to calculate its financial obligations" produced a benefit that was 2.7% higher than what he was receiving. *Cruz*, 435 F. Supp. 3d at 353. The court denied the defendants' motion to dismiss, stating:

> Cruz cannot directly attack the reasonableness of the [Raytheon] Plan's actuarial assumptions because Raytheon publishes only a fixed conversion factor, rather than the interest rate and mortality table that the [Raytheon] Plan actually uses…But [plaintiff] has alleged that the [Raytheon] Plan's conversion factor produces an unreasonable result, based on its divergence from a result produced by actuarial assumptions that Raytheon itself regards as reasonable. This complex claim cannot be assessed without a more developed record…Cruz plausibly alleges that the [Raytheon] Plan violates ERISA by relying on unreasonable actuarial assumptions.

Cruz, 435 F. Supp. 3d at 353.

The Complaint here similarly alleges that Delta used reasonable up-to-date actuarial assumptions, as required by GAAP, when calculating pension liabilities in its audited financial statements that it prepared with the assistance of an independent auditor throughout the relevant time period. ¶ 79. Delta represented that, for purposes of preparing its financial statements, it annually reviewed its assumptions used to calculate its pension liabilities to ensure that each assumption, and the resulting calculation, represented its "best estimate." ¶ 80.

Accordingly, throughout the Class Period, Delta reviewed the "most critical assumptions impacting [its] defined benefit pension plan obligations[,]" using reasonable, up-to-date actuarial assumptions, but neglected to update the actuarial assumptions used to calculate the conversion factors for determining benefits under the Plans. ¶ 81. Because these two analyses — determining Plan liabilities and determining Plan benefits actually paid to participants — measure the payment of the same benefit streams over the length of the same lives, they should be determined using the same actuarial assumptions. There is no reasonable justification for Defendants not to use equally up-to-date assumptions to calculate conversion factors that would generate actuarially equivalent JSA benefits, as required by ERISA.

1 Defendants wrongly contend that Plaintiff argues that ERISA § 205(d) ***requires*** the
2 application of the Treasury Assumptions. *See, e.g.*, Motion at 1-2 and 10 n.7. To be clear: Plaintiff
3 alleges that under ERISA § 205(d) requires that actuarial equivalence must be determined using
4 reasonable assumptions. Plaintiff cites the Treasury Assumptions as an example because they are
5 indisputably reasonable, they demonstrate that her benefits are too low using reasonable
6 assumptions. The same is true of the reasonable up-to-date assumptions Delta uses to calculate
7 its liabilities for financial statement purposes. ¶¶ 79-81. Accordingly, Plaintiff is ***not*** asking this
8 Court to hold that the Treasury Assumptions are the only reasonable assumptions or that they
9 ***must be*** read into the statute. Rather, Plaintiff alleges facts about factors produced by the Treasury
10 Assumptions to illustrate why Plans conversion factors are unreasonable because the Treasury
11 Assumptions are objective, reasonable assumptions that illustrate the harm Plaintiffs suffered.
12 *Smith v. U.S. Bancorp*, No. 18-cv-3405, 2019 WL 2644204 at *3 (D. Minn. June 27, 2019)
13 (denying motion to dismiss, finding that the Treasury Assumptions provide "guidance" when
14 measuring actuarial equivalence under ERISA).

15 **C. Defendants' policy argument misses the mark.**

16 Defendants make an irrelevant policy argument, contending (1) that "the crux of
17 Plaintiff's Complaint" is "that plan sponsors and fiduciaries should be required to continually
18 revise their plans' actuarial assumptions based on 'prevailing market conditions'" and (2) this
19 would "undermine[] ERISA's objectives and renders participants' retirement benefits wholly
20 unpredictable." Motion at 12. This novel argument should be rejected because it overstates
21 ERISA § 205(d)'s requirements, makes no sense as a matter of policy and ignores that interest
22 rate and mortality must be changed periodically for lump-sum distributions and financial
23 reporting and should be changed for annuities for the same reasons.

24 A JSA is a fixed income instrument like any market-based fixed income bond or annuity
25 that has a duration of the life of the participant and the participant's spouse. By using market
26 assumptions, participants and beneficiaries receive benefits with a value that incorporates the
27 likely period over which the payments are to be made (mortality) and how much each future
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1 payment should be discounted based on projections of future interest rates. Market-based rates
2 are the ***best*** prediction of an annuity's value. Contrary to Defendants' argument, it assures
3 employers of "a predictable set of liabilities." Motion at 13. Indeed, Delta makes this prediction
4 for its financial statements every year based on current market rates.

5 In contrast, using the same assumptions (or fixed factors) for decades causes the actual
6 value of different benefit forms to be the "moving target." Motion at 12. Similar to the changes
7 in value of a 30-year zero coupon Treasury Bond, variations in interest rates and projected
8 mortality cause the relative values of different forms of benefits determined using fixed
9 assumptions to move in relation to each other. Using market assumptions, in contrast, causes the
10 relative values of different forms of benefits to adjust in relation to each other.

11 Delta makes market-based benefit valuations constantly for lump sum distributions.
12 Lump-sum calculations necessarily change frequently because Treasury Assumptions are updated
13 frequently. Indeed, the Treasury interest rates are updated every month based on market
14 conditions. *See* 29 U.S.C. §§ 1055(g)(3)(B)(ii); 1083(h)(2)(C). Since the amounts of various
15 forms of benefit are calculated by a computer program that contains the actuarial assumptions, it
16 is nothing more than a push of a button for Delta to calculate JSA benefit amounts using, for
17 example, the market-based Treasury Assumptions or the market assumptions Delta uses for its
18 financial statements. Indeed, Delta creates more work and complexity for itself by using different
19 assumptions for lump sums, financial statements and calculation of JSA benefits. Perhaps for this
20 reason, many plans calculate JSA benefits using the very same Treasury Assumptions they use
21 for calculation of lump sum benefits.

22 The fact that "actuarial assumptions used to determine actuarial equivalence must be
23 reasonable as of the date benefits are calculated," does not necessarily mean sponsors and
24 fiduciaries must "***continually revise*** their plans' actuarial assumptions" (Motion at 12), but it does
25 require — at a minimum — that they ***periodically review*** the assumptions to ensure that joint and
26 survivor benefits are actuarially equal to a SLA, as required by ERISA § 205(d). For an
27 assumption to be reasonable it must "take[] into account historical and ***current*** economic data
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that is relevant as of the measurement date" that "reflects the actuary's estimate of future experience." ¶ 63 (quoting ASOP 27 ¶ 3.6). Moreover, actuarial tables must be adjusted on an ongoing basis to reflect improvements in mortality. ¶ 67 (citing ASOP 35 § 3.5.2). In other words, for the purposes of determining whether two benefits are "actuarially equivalent" under ERISA, the mortality assumptions used to calculate present value must be reasonable, which means that the selected mortality table must be updated and reasonable "to reflect anticipated events." ¶ 69 (quoting 29 U.S.C. § 1002 (27)).

ERISA did not leave plans free to choose their own methodology for determining the actuarial equivalent of the accrued benefit . . . '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.'" *Laurent v. PriceWaterhouseCoopers LLP*, 794 F.3d 272 (2d Cir. 2015) *quoting*, *Esden v. Bank of Boston*, 229 F.3d 154, 164 (2d Cir. 2000). As discussed above, those protections are particularly strong with respect to the claims alleged in this case.

II. PLAINTIFF HAS STANDING TO REPRESENT THE CLASS

Defendants ignore Ninth Circuit precedent when arguing that Plaintiff lacks standing to assert claims on behalf of participants in the Salaried Plan and the Pilot Plan, conflating Article III standing with the ability to represent the class. Like the defendants in *Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir. 2015), "Defendants' argument . . . conflates standing and class certification." *Id*. at 1261. As the Ninth Circuit explained in *Melendres*, "Standing is meant to ensure that the injury a plaintiff suffers defines the scope of the controversy he or she is entitled to litigate," but "[c]lass certification, on the other hand, is meant to ensure that named plaintiffs are adequate representatives of the unnamed class." *Id*. Defendants are not alone in their confusion. "[W]hen courts have found a disjuncture between the claims of named plaintiffs and those of absent class members, they have not always classified the disjuncture consistently, some referring to it as an issue of standing, and others as an issue of class certification." *Id*.

The Ninth Circuit, however, adopted the class certification approach (*id.*), which negates Defendants' standing argument.[9] "Under the class certification approach, 'any issues regarding the relationship between the class representative and the passive class members — such as dissimilarity in injuries suffered—are relevant only to class certification, not to standing.'" *Id.* at 1262 (quoting *Newberg on Class Actions* § 2:6). In other words, "[r]epresentative parties who have a direct and substantial interest have standing; the question whether they may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation." *Id.* (citing 7AA Charles Alan Wright et al., *Federal Practice & Procedure* § 1785.1 (3d ed.)).

Defendants do not contend Plaintiff lacks Article III standing to pursue her own claims under the Contract Plan. Accordingly, as in *Johnson v. Fujitsu Technology and Business of America, Inc.*, 250 F.Supp.3d 460 (N.D. Cal. 2017), "once the named plaintiff demonstrates her individual standing to bring a claim, ***the standing*** inquiry ***is concluded***." *Id.* at 465 (quoting *Melendres*, 784 F.3d at 1261-62) (emphasis added).; *accord Tobias v. NVIDIA Corp.*, 2021 WL 4148706, at *6 (N.D. Cal. Sept. 13, 2021); *Johnson v. Providence Health & Services*, 2018 WL 1427421 **3-4 (W.D. Wa. Mar. 22, 2018).

Defendants do not even mention *Melendres* or the class certification approach in the Motion. And the cases that Defendants do mention are either irrelevant because they concern only the plaintiffs' individual Article III standing, which is not contested here, or are contrary to *Meldendres*. For example, the plaintiffs in many cases that Defendants rely on did not have standing to bring ***any*** claim. *See, e.g.*, *Draney v. Westco Chemicals, Inc.*, 2019 WL 6465510, at *2 (C.D. Cal. Dec. 2, 2019); *Johnson v. Delta Air Lines, Inc.*, No. 1:17-CV-2608-TCB, 2017 WL 10378320, at *1 (N.D. Ga. Dec. 12, 2017); *In re LinkedIn ERISA Litig.*, 2021 WL 5331448, at *4

[9] "This approach has been embraced several times (though not always) by the Supreme Court, and is the one adopted by 'most' other federal courts to have addressed the issue." *Melendres*, 784 F.3d at 1262. *See, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 397–403 (1975); *Novella v. Westchester Cnty.*, 661 F.3d 128, 149–50 & n. 24 (2d Cir. 2011); *Prado–Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279–80 (11th Cir. 2000); *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1998); *Cooper v. Univ. of Tex. at Dallas*, 482 F. Supp. 187, 191 (N.D. Tex. 1979).

(N.D. Cal. Nov. 16, 2021). Although *Marshall v. Northrop Grumman Corp*., 2017 WL 2930839, at *7 (C.D. Cal. Jan. 30, 2017) is from within the Ninth Circuit, the court does not mention *Melendres* or discuss whether the class certification approach applies so it must be assumed the plaintiff did not make the argument and bring this precedent to the court's attention. In any event, to the extent *Marshall* conflicts with the Ninth Circuit, it must be ignored. Similarly, the out-of-circuit cases cited by Defendants conflict[10] with *Melendres* and should be disregarded.

Lastly, Defendants cite to *Thole v. U. S. Bank N.A*., 140 S. Ct. 1615 (2020), and *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), but those cases concern only Article III standing and have not affected the class certification approach. *See Mattson v. Milliman, Inc*., 2022 WL 2357052, at *2 n.1 (W.D. Wash. June 30, 2022) ("Contrary to defendants' contention, [*Thole*] did not affect the binding nature of *Melendres*."). And courts in this Circuit continue to apply *Melendres*'s class certification approach post-*TransUnion* and -*Thole*. *See, e.g*., *Sousa v. Walmart, Inc*., 2023 WL 1785960, at *10 (E.D. Cal. Feb. 6, 2023); *Mendoza v. Electrolux Home Prod., Inc*., 2022 WL 4082200, at *6 (E.D. Cal. Sept. 6, 2022); *Mattson v. Milliman, Inc*., 2022 WL 2357052, at *1 (W.D. Wash. June 30, 2022). Accordingly, Defendants' argument must wait for the class certification stage of this case.

III. PLAINTIFF IS NOT REQUIRED TO EXHAUST

Defendants argue that Plaintiffs' ERISA § 502(a)(1)(B) claim alleged only in the Second Claim for Relief should be dismissed because she failed to exhaust the administrative remedies in her plan. Motion at 17-18. A beneficiary must only exhaust when she is "seeking a determination of rights or benefits ***under*** a plan." *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1416 (9th Cir. 1991) (emphasis added). Here, Plaintiff is not seeking benefits ***under*** the plan. The crux of Plaintiff's Complaint is a statutory violation, and "exhaustion is not required for statutory claims." *Spinedex Physical Therapy USA Inc. v. United Healthcare of Arizona, Inc*.,

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[10] *See In re ING Groep, Naamloze Vennootschap ERISA Litig*., 749 F. Supp. 2d 1338, 1345 (N.D. Ga. 2010); *Singh v. Deloitte LLP*, 2023 WL 186679, at *3 (S.D.N.Y. Jan. 13, 2023).

1 770 F.3d 1282, 1294 (9th Cir. 2014).[11] More specifically, Plaintiff does not allege that Defendants
2 violated the Plans' terms; instead she is arguing the Plans violated ERISA § 205(d). That is why
3 Plaintiff is not bringing a conventional claim under ERISA § 502(a)(1)(B) for benefits under the
4 Plans' *current* terms. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (participant may bring
5 civil action "to recover benefits due to him under the terms of his plan…"). Her Second Claim
6 for Relief is a two-step claim[12] whereby she first seeks to reform the plan to comply with § 205(d)
7 and, second, seeks benefits according to the *reformed* plan.[13]

8 Because Plaintiff is not seeking to recover benefits under the *current* Plans, there is no
9 exhaustion requirement. Indeed, the claim procedures in the Plans cover only benefits "payable
10 ***under*** this Plan." Plan, ECF 10-1, § 7.10.1 (emphasis added). Because Section 7.10's procedures
11 concern only benefits "***under*** this Plan," there was ***no remedy*** for Plaintiff to exhaust and she is
12 entitled to bring suit. *See id*. § 7.10.6 ("The administrative remedies described in this Section 7.10
13 must be exhausted before any legal action on a claim is filed.").

14 But, even assuming Plaintiff was bringing a conventional claim for benefits under the plan
15 (she is not), exhaustion would still not be necessary for two reasons. First, "exhaustion is an
16 affirmative defense that the defendant 'must plead and prove,' and should only be a basis for
17 dismissal under Rule 12(b)(6) 'in the rare event that a failure to exhaust is clear on the face of the
18 complaint.'" *Prime Healthcare Servs. - Reno, LLC v. Hometown Health Providers Ins. Co., Inc.*,
19 2022 WL 1692525, at *6 (D. Nev. May 26, 2022) (quoting *Albino v. Baca*, 747 F.3d 1162, 1166,
20 1176 (9th Cir. 2014)). This is not one of those rare events. Second, any applicable remedies would
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22 [11] Plaintiffs' First and Third Claims for Relief are statutory violations. Defendants do not argue that exhaustion applies to these claims.
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24 [12] Defendants seem to have misunderstood the two-step nature of the claim because they argue in Part C.2 that Plaintiff's § 502(a)(1)(B) claim fails because she is receiving the benefits she is due under the Plan's *current* terms. This point is not in controversy.
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26 [13] In light of *Herndon*, *Cruz*, *Masten*, *Smith* and *Urlaub*, (*see supra* at 6-7), this two-step claim is unnecessary as it is duplicative of the First Claim for Relief, which seeks to remedy the violation of § 205(d). Assuming the Court agrees that the First Claim is duplicative of the Second, Plaintiff may voluntarily dismiss the two-step Second Claim for Relief.
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be deemed exhausted because Defendants failed to establish and follow reasonable claim procedures. *See Vaught v. Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620, 627 (9th Cir. 2008); *Eastman Kodak Co. v. STWB, Inc*., 452 F.3d 215, 223 (2d Cir. 2006).

Defendants' cited cases on this point (with one exception discussed next) are not on point as they don't involve the dismissal of a claim on a motion to dismiss for failure to exhaust.[14] The court in *Mellor v. Solomon Entities Defined Ben. Pension Plan*, 2011 WL 4477322, at *3 (C.D. Cal. Sept. 26, 2011), did dismiss a complaint for failure to exhaust, but that case is distinguishable because it was clear from the face of that complaint that the plaintiff did not exhaust as required by the plan (*i.e*., he sent a letter disputing the calculation rather than a request for a hearing as the plan required). In any event, *Mellor* predated *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc), where the Court of Appeals held that the failure to exhaust is "an affirmative defense the defendant must plead and prove." *See also Laura B v. United Health Grp. Co*., 2017 WL 3670782, at *5 (N.D. Cal. Aug. 25, 2017) (applying *Albino* to ERISA case); *accord Norris v. Mazzola*, 2016 WL 1588345, at *6 (N.D. Cal. Apr. 20, 2016) ("The Court agrees . . . that *Albino* applies to ERISA cases."). For these numerous reasons, Plaintiff is not required to exhaust administrative remedies.

CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the Court deny Defendants' motion to dismiss in its entirety.[15]

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[14] *Castillo v. Metro. Life Ins. Co*., 970 F.3d 1224, 1228 (9th Cir. 2020) (plaintiff exhausted remedies *before* initiating action); *Diaz v. United Agr. Emp. Welfare Ben. Plan & Tr*., 50 F.3d 1478, 1480 (9th Cir. 1995) (summary judgment); *Martinez-Carranza v. Plumbers & Pipefitters Union Loc. No. 525 Tr. Funds*, 2021 WL 1186325, at *2 (D. Nev. Mar. 29, 2021) (dismissed claim *with leave to amend* because complaint vaguely alleged the appeal was denied as untimely and also on the merits; and also failed to allege the benefits due or that a rule or term was violated).

[15] To the extent the Court dismisses the Complaint in whole or in part, Plaintiff respectfully moves for leave to amend.

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DATED this 17th day of March 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 2023, a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT PURSUANT TO RULES 12(B)(1) AND 12(B)(6) [ECF NO. 34]** was served via the United States District Court CM/ECF system on all counsel of record who have enrolled in this ECF system.

/s/ Charmaine Diaz
An employee of Kemp Jones, LLP