Ron Kilgard, Bar No. 005902
Keller Rohrback L.L.P.
3101 North Central Avenue, Suite 1400
Phoenix, AZ 85012
Telephone: (602) 248-0088
Facsimile: (602) 248-2822
rkilgard@kellerrohrback.com

Attorney for Plaintiffs

[*Additional Counsel on Signature Page*]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jerome M. Skrtich, et al., on behalf of themselves and all others similarly situated, Plaintiffs, v. Pinnacle West Capital Corporation, et al., Defendants.	No. CV-2:22-01753-SMB **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** Oral Argument Requested

INTRODUCTION

Plaintiffs, Jerome M. Skrtich, Joseph F. Peck and Michael J. Riccitelli, are participants in the Pinnacle West Capital Corporation Retirement Plan (the "Plan"). Plaintiffs allege that Defendants violated ERISA by paying joint-and-survivor annuity benefits that were not actuarially equivalent to the single life annuity Plaintiffs could have received when they retired because Defendants calculated Plaintiffs' benefits using unreasonable actuarial assumptions. The Amended Complaint ("Complaint") asserts claims under ERISA § 205(d)(1), 29 U.S.C. § 1055(d), and ERISA § 404, 29 U.S.C. § 1104. Because the Complaint plausibly alleges these claims, Defendants' Motion to Dismiss [ECF 19] (the "Motion") should be denied.

FACTUAL ALLEGATIONS[1]

Pinnacle West sponsors the Plan, a defined benefit pension plan under ERISA. ¶ 2. Under the Plan, participants may select a single life annuity ("SLA") or one of several joint and survivor annuities ("JSA"). ¶ 40. An SLA provides retirees with monthly payments for the rest of their lives. *Id.* A JSA is an annuity for the participant's life with a contingent annuity payable to the participant's beneficiary, typically the spouse. *Id.* 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. ¶ 3.

The Plan offers JSAs in percentages of 50%, 75%, and 100%. ¶ 40. 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. *Id.* Plaintiffs Skrtich and Peck are receiving 100% JSAs, while Riccitelli is receiving a 50% JSA. ¶ 2.

While each of the Plan's JSA options meet the definition of a qualified joint and survivor annuity ("QJSA"), the 50% JSA is the Plan's designated QJSA, which means that it is the automatic form of benefit if a participant does not make a selection. *Id*. Pinnacle

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

West expressly deemed both the Plan's 75% and 100% JSAs qualified optional survivor annuities ("QOSA"), telling participants that both forms are at least the actuarial equivalent of the SLA. ¶ 41.

Two benefit options are actuarially equivalent when they have the same present value, calculated using the same, reasonable actuarial assumptions. ¶¶ 29-35. Calculating present value requires inputting projected mortality and interest rates. ¶ 4. To determine the amount of a benefit, mortality and interest rate assumptions, together, generate a "conversion factor," which is expressed as a percentage of the benefit being compared. ¶ 6. The conversion factor can be calculated by dividing the actual amounts payable under the plan. *Id*. For example, if a JSA benefit pays $900 a month and the SLA pays $1,000 a month, the conversion factor would be .90. *Id*. If the conversion factor between a JSA and an SLA is lower than the conversion factor that would be generated using reasonable mortality and interest rate assumptions, then the JSA will not be "actuarially equivalent" to the SLA. *Id*. Accordingly, the conversion factor (and the actuarial assumptions used to generate it) determine whether two benefit forms are actuarially equivalent. *Id*.

Defendants calculated the conversion factor and, therefore, the present value of the JSAs, using the 1971 Group Annuity Mortality Table for Males (the "1971 GAM"), which is based on mortality data from the 1960s, and a 7.5% interest rate. ¶ 7. Older mortality tables predict that people will die at a faster rate than current mortality tables. *Id*.[2] The use of an older mortality table decreases the present value of a JSA and, interest rates being equal, the monthly payments retirees receive. ¶ 7.

By using the 1971 GAM table and the 7.5% interest rate, Defendants depressed the present value of Plaintiffs' JSA benefits (relative to the SLA), resulting in monthly payments that are materially ***lower*** than if Defendants used reasonable, up-to-date actuarial assumptions. *Id*. Consequently, Defendants are causing Plaintiffs and Class Members to

[2] The Society of Actuaries (the "SOA") — an independent actuarial group — published mortality tables in 1971, 1976, 1983, 1994, 2000, 2014 and 2019 to account for changes in the mortality experience of participants in defined benefit plans like the Plan for use in pension calculations. ¶ 49.

receive less than they should as pension benefits each month, a harm that will affect them the rest of their lives. *Id*.

Pinnacle West uses current, updated actuarial assumptions to calculate and report its Plan liabilities in its financial statements. *Id*. ¶ 55. Pinnacle West deems the current assumptions that it uses its "best estimates" and then uses those assumptions to justify increasing its customers' utility rates based on these increased liabilities. *Id*. ¶¶ 8, 55. For example, Pinnacle West's pension liabilities increased by $67 million when it updated the mortality assumption in 2014, and it cited this increase as a reason for increasing utility rates. *Id*. In other words, Pinnacle West uses current, reasonable mortality assumptions when reporting its pension costs to justify increasing utility rates but uses mortality rates from the 1960s when calculating retirees' actual benefits. *Id*.

RELEVANT ERISA STANDARDS

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

"A QJSA must be actuarially equivalent to the SLA participants earned under the Plan." 29 U.S.C. § 1055(d)(1); 26 U.S.C. § 417(b)). Additionally, "a QJSA 'must be at least the actuarial equivalence of the normal form of life annuity or, if greater, of any optional form of life annuity offered under the plan.'" *Id*. (quoting 26 C.F.R. § 1.401(a)-11(b)(2)). "A QJSA 'must be as least as valuable as any other optional form of benefit under the plan at the same time.'" 26 C.F.R. § 1.401(a)-20 Q & A 16. A QOSA must also be actuarially equivalent to an SLA. 29 U.S.C. § 1055(d)(2); 26 U.S.C. § 417(g); 29 U.S.C. § 1055(e)(1)(A).

ARGUMENT

I. COUNT ONE PLAUSIBLY ALLEGES DEFENDANTS VIOLATED ERISA § 205

A. Section 205 requires using reasonable assumptions to calculate actuarial equivalence

Plaintiffs plausibly allege that Defendants violated ERISA § 205(d) by using outdated, unreasonable assumptions to calculate QJSA and QOSA benefits that are not actuarially equivalent to the SLA. Defendants' argument that this section does not impose a reasonableness requirement is wrong. Motion at 5.

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

"Present value" is "the value adjusted to reflect anticipated events." ERISA § 3(27), 29 U.S.C. § 1002(27). This definition requires plans to use assumptions that legitimately reflect anticipated future events — that is, ***reasonable*** assumptions. Whether two benefits are actuarially equivalent must be "determined on the basis of actuarial assumptions with respect to mortality and interest which are reasonable in the aggregate." *Dooley v. Am. Airlines, Inc.*, 1993 WL 460849, at *10 (N.D. Ill. Nov. 1993). *see also Dooley v. Am. Airlines, Inc.*, 797 F.2d 1447, 1453 (7th Cir. 1986) (citing expert testimony that "actuarial equivalence must be determined on the basis of reasonable actuarial assumptions . . . .") The Ninth Circuit similarly found in *McDaniel v Chevron Corp*., 203 F.3d 1099 (9th Cir 2000), that "[t]he most important consideration in. . . . selecting a mortality table to be used in 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).[3]

Additionally, under 29 U.S.C. § 1002(27), present value adjustments must "conform to such regulations as the Secretary of the Treasury may prescribe." *Id.* "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).[4] The Regulations also rely on the standards of the American Society of Actuaries (the "SOA"),[5] which require actuaries to use "reasonable assumptions." *See* Actuarial Standard of Practice ("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

[3] *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.

[4] *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)).

[5] *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.

ASOP No. 27,[6] "each economic assumption used by an actuary should be reasonable."[7] 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*. at (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. *Stephens*, 644 F.3d at 443 ("ERISA's actuarial equivalence requirement serves to protect actual retirees, not merely ensure that pension plans perform abstract calculations.") (Kavanaugh, J., concurring). In *Urlaub v. CITGO Petroleum Corp*., No. 21 C 4133, 2022 WL 523129 (N.D. Ill. Feb. 22, 2022), the court stated:

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[6] 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).

[7] Available at: https://www.actuarialstandardsboard.org/asops/selection-economic-assumptions-measuring-pension-obligations/.

> [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:

> 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 that did not even analyze ERISA § 205(d). Motion at 5-6. Accordingly, *Belknap* is not persuasive authority, especially in light of *Herndon*, *Cruz*, *Masten*, *Smith* and *Urlaub*, each of which addressed claims under ERISA § 205(d).

To the extent *Belkanp* even applies to ERISA § 205(d), it is not a reason to grant the Motion because the court in *Belknap* ***denied*** the motion to dismiss because "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 submitted in that case. Accordingly, even under the *Belknap* motion to dismiss ruling, this Court should deny the Motion.

Additionally, this Court should reject *Belknap's* summary judgment reasoning because it is inconsistent with *McDaniel*, which found that ERISA required plan sponsors to select a mortality table whose population "has characteristics that are typical of the plan's participants" a/k/a reasonable assumptions. *McDaniel*, 203 F.3d at 1110. *Belknap* is also contrary to *Miller v. Xerox Corp. Ret. Inc. Guar. Plan*, 464 F.3d 871, 876 n. 5 (9th Cir. 2006), which rejected an interpretation under which "ERISA's actuarial equivalence requirement would be meaningless – which…it cannot be…" Lastly, the only court to have examined *Belknap* has rejected its reasoning in its entirety. *Adams v. US Bancorp et al.*, No. 22-cv-509, 2022 WL 10046049, * 8 (D. Minn. Oct. 17, 2022).

B. Plaintiffs plausibly allege that their JSAs were not the actuarial equivalent of the SLA

Defendants use the 1971 GAM mortality table and a 7.5% interest rate to calculate Plaintiffs' benefits. Complaint ¶ 43. The 1971 GAM table was published in 1971 using mortality data ***from the 1960s***, and mortality rates have significantly declined since the 1960s, resulting in greater life expectancies for retiring participants. ¶¶ 7 and 58 at 23.[8] The 1971 GAM table uses dramatically different mortality rates than the RP-2014, the table that Pinnacle West uses, on its actuary's advice, and the table it tells shareholders best "reflect[s] our plan experience" in its Form 10-K. ¶¶ 50-59 at 18-22. Accordingly, the 1971 GAM was not developed from a population with "characteristics that are typical of the plan's participants," *McDaniel*, 203 F.3d at 1110.[9]

Defendants' assertion that "Plaintiffs fail to allege that the actuarial assumptions used by the Plan are outside the zone of reasonableness" fails. Motion at 6. Plaintiffs allege that 1971 GAM predicts that a 65-year-old male will live another 15.2 years (until age 80.2), while the RP-2014 table predicts the same individual will live another 21.6 years

[8] The Complaint inadvertently repeats paragraphs 56-59. Accordingly, the page number of the paragraph is also referenced in this brief when citing to these paragraphs.

[9] Defendants amplified the harmful effects of the 1971 GAM table by using a "gender blend" of that table that was only 4.3% female, even though Pinnacle West's workforce is 25% female, ¶ 60, a gender blend does not have "characteristics that are typical of the plan's participants." *McDaniel*, 203 F.3d at 1110.

(until 86.6), ***a 42 percent increase***. ¶ 59 at 23.[10] Likewise, the Plan's use of a 7.5% discount rate is more than double the rates that Plaintiffs cite as benchmarks in their Complaint in certain years. ¶ 59 at 23.

Masten, *Urlaub*, *Herndon* and *Rockwell Automation* each held that plaintiffs stated a claim under ERISA § 205(d) by alleging their benefits were calculated using the 1971 GAM table. *Masten*, 543 F. Supp. 3d at 35 (1971 GAM and 6% interest rate); *Urlaub*, 2022 WL 523129, * 1 (1971 GAM and 8% interest rate); *Herndon*, 2020 WL 3053465, ** 2-3; and *Rockwell Automation*, 438 F. Supp. 3d at 924 ("the complaint alleges that the 1971 GAM table is more than 40 years old and does not reflect the significant improvements in life expectancy that have occurred since they were published.") Defendants ignore these cases entirely.

Contrary to Defendants' suggestion, Plaintiffs allege that their benefits were not actuarially equivalent when considering the "assumptions used by the Plan together." Motion at 6-7. Plaintiffs detail in their Complaint how their monthly benefits would increase if reasonable mortality ***and*** interest rate assumptions were used, alleging that Skrtich's, Peck's and Riccitelli's benefits would increase by $62.91, $191.39 and $109.15 a month, respectively. ¶¶ 67–69. These well-pled, factual allegations, which must be accepted as true, state a claim under ERISA § 205(d). *McCune v. JD Towing LLC*, No. 22-cv-354, 2022 WL 16635373, * 2 (D. Ariz. Nov. 2, 2022) (Brnovich, J); *see also Masten*, 543 F. Supp. 3d at 33.

Plaintiffs did not "pluck" assumptions out of thin air. Motion at 6. Rather, the Complaint alleges Pinnacle West's "best estimate" assumptions, *i.e.*, the assumptions Pinnacle West used (on its actuary's advice) to calculate its pension liabilities, and those that Pinnacle West used when asking the Arizona Corporation Commission to increase customers' utility rates. ¶¶ 56 at 22, 64, 66. Defendants do ***not*** contend that their "best estimate" assumptions are invalid or irrelevant and, moreover, this issue should not be

[10] Females likewise have longer life expectancies under the RP-2014 than the 1971 GAM. *Id*.

decided on the pleadings. *Cruz*, 435 F. Supp. 3d at 353 (plaintiff stated ERISA § 205(d) claim based on the "divergence from a result produced by actuarial assumptions that Raytheon itself regards as reasonable.")

Defendants' attempt to undermine the Complaint's reference to the Treasury Assumptions fares no better. Motion at 6. The Treasury Mortality Table is reasonable because it uses recent mortality data from participants in private pension plans and, importantly, closely tracks Pinnacle West's "best estimate" of the Plan's experience. ¶¶ 52, 53 at 19, 56 at 20. In other words, they have "characteristics that are typical of the plan's participants," the exact criteria the Ninth Circuit set forth in *McDaniel*. *McDaniel*, 203 F.3d at 1110.

For the interest rate component of the Treasury Assumptions, Plaintiffs allege that the "Segment Rates" that the Treasury Department approves for the calculation of actuarially equivalent lump sum benefits are reasonable. ¶ 46. Like the single interest rate that Pinnacle West chooses as its "best estimate" when calculating pension liabilities in its 10-K, the Segment Rates are based on prevailing market conditions, use a similar methodology and produce a nearly identical result. ¶¶ 46, 59 at 22.

Contrary to Defendants' suggestion, the Treasury Assumptions are not Plaintiffs' "preferred" assumptions, Motion at 7; they are objective, reasonable assumptions that illustrate the harm Plaintiffs suffered. *Smith v. U.S. Bancorp*, No. 18-cv-3405, 2019 WL 2644204 at *3 (D. Minn. June 27, 2019) (denying motion to dismiss, finding that the Treasury Assumptions provide "guidance" when measuring actuarial equivalence under ERISA).

The cases on which Defendants rely support Plaintiffs' position. Motion at 6. In *Combs v. Classic* Coal *Corp.*, 931 F.2d 96 (D.C. Cir. 1991), the plaintiff alleged that the plan's actuary's "best estimate" assumption was ***unreasonable***. *Combs*, 931 F.2d at 101-02. The court held that the "assumption package" used in an actuarial calculation must be "reasonable in the aggregate," which is exactly Plaintiffs' point. ¶ 6 ("mortality and

interest rate assumptions, ***together***" determine whether benefits are actuarially equivalent) and ¶¶ 66 – 69 (Plan's assumptions do not produce actuarially equivalent benefits).

Like *Combs, Vinson & Elkins v. C.I.R.*, 7 F.3d 1235, 1237-38 (5th Cir. 1993) involved a challenge to the assumptions that "represent[ed] the actuary's best estimate of anticipated plan experience." In rejecting this challenge, the court in *Vinson & Elkins* noted that the plaintiff did not that "argue that [defendant's] estimates did not come from an actuary" or contend the defendant used different assumptions for financial reporting purposes. *Vinson & Elkins*, 7 F.3d at 1239. Here, Plaintiffs are not "second-guessing" Pinnacle West's actuary's best estimate; Plaintiffs support using the RP-2014, the mortality table Pinnacle West determined best reflected its "plan experience" beginning in 2014. ¶ 56 at 21.

Moreover, in *Vinson & Elkins*, the actuary used a 1971 mortality table. *See Vinson & Elkins v. Comm'r*, 99 T.C. 9, 53 (1992). But, since the table was 15 years old at the time of the calculation, the actuary adjusted the table "to account for the mortality improvement that was not reflected," an adjustment the court found was reasonable. *Id*. As the court in *Torres v. Am. Airlines, Inc*., 416 F. Supp. 3d 640, 649 (N.D. Tex. 2019), found when analyzing a claim brought under ERISA § 205(d), *Vinson* "lends support to Plaintiffs' position that failure to adjust assumptions to consider mortality improvements in calculating post-retirement benefits. . . .may lead to unreasonable benefit calculations."

Defendants' assertion that Plaintiffs' claims should be dismissed because "reasonableness must be measured by reference to a range" also fails. Motion at 6. The Complaint details why the Plan's assumptions are unreasonable, including allegations about how those assumptions, when combined, do not produce actuarially equivalent benefits like ERISA § 205(d) requires. ¶¶ 62-69. In doing so, Plaintiffs reference Defendants' own "best estimate" assumptions, objective assumptions generated by third-parties and the ASOPs, the standards governing how actuaries select assumptions. ¶¶ 31-32, 47-61. These allegations are exactly the type of "factual assertions, which if accepted

as true, state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 US. 662, 678 (2009). Plaintiffs do not need to do any more to satisfy Rule 8.

The court in *Masten* rejected the exact "range" argument that Defendants raise here, stating it was "not persuaded" that plaintiffs needed to specify in their complaint "what…range of assumptions would be considered reasonable – or would be necessary for actuarial equivalence." *Masten*, 543 F. Supp. 3d at 32. The court continued:

> Plaintiffs claim that the Plan's use of decades old mortality tables violates a specific provision of ERISA, namely the Section 205 requirement that covered joint-and-survivor annuities be actuarially equivalent to the SLAs from which they were converted. The Complaint also refers to the more contemporary mortality tables used by the Society of Actuaries…and Treasury…as examples of available reasonable alternatives. Requiring Plaintiffs to further specify "what set of assumptions would be reasonable," *see* Mot. at 13, would impose a pleading standard that is more stringent than that required by either ERISA or the Federal Rules of Civil Procedure.

Masten, 543 F. Supp. 3d at 32-33.

The court in *Herndon* similarly rejected the argument that a potential range of possible assumptions required the dismissal of the complaint. The court stated:

> Although reasonableness is a range, not a point, that does not mean that Plaintiffs have not pleaded a case. Plaintiffs' allegations are not conclusory and rise to the "plausibility" standard required by Rule 8. E.g., [Complaint] ¶¶ 43 (rise in life expectancy), 44 (actuarial tables must be adjusted), 48 (different mortality assumptions impact benefits), 52 (the 1971 GAM table is "decades" old), 54 (the use of the 1971 GAM table results in benefits lower than what they would be under reasonable data), 63 (calculating benefits). Accordingly, while Defendant may still argue that its use of the 1971 GAM table is reasonable in a merits case, at this stage the Court rejects that argument and will not dismiss the case on those grounds.

Herndon, 2020 WL 3053465, * 3.

This Court should also reject Defendants' suggestion that the Plaintiffs' benefits were not reduced enough to state a plausible claim. Motion at 7. While the $17,000, $47,000 and $20,000 that Skrtich, Peck and Riccitelli were harmed, respectively, may seem "slight" to a corporate behemoth like Pinnacle West, Motion at 7, these amounts support a

claim under ERISA § 205(d). This is also true even on a percentage basis. For example, a 3.5% reduction in benefits supported a claim under ERISA § 205(d) because "ERISA requires actuarial equivalence, not something that *approximates* actuarial equivalence." *Rockwell Automation*, 438 F. Supp. 3d at 921, n. 5. Likewise, a 2.7% reduction in benefits violates ERISA § 205(d). *Cruz*, 435 F. Supp. 3d at 353, n.2. Accordingly, Plaintiffs' allegations that their benefits were 2-6% too low are sufficient. [11]

C. ERISA § 205's actuarial equivalence requirement applies to Skrtich's and Peck's benefits

Defendants wrongly contend that ERISA § 205(d)'s actuarial equivalence requirement does not apply to the 100% JSAs that Skrtich and Peck are receiving because the Plan's 100% JSA option is a QJSA or QOSA. Motion at 8. But ERISA § 205(a)(1) requires plans to provide married participants' pension benefits "in the form of a qualified joint and survivor annuity," which is ***any*** annuity for the life of the participant with a survivor annuity for the life of the spouse that is ***between 50% and 100%***, including "***any*** annuity in a form having the effect of an annuity described in the preceding sentence." ERISA § 205(d)(1)(A). (emphasis added). Accordingly, ***any*** JSA with a percentage between 50 and 100 is covered by § 205(d), including the 100% JSAs that Skrtich and Peck are receiving.[12]

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[11] Any "range" would also be narrow. An annuity benefit is a fixed income financial instrument that provides a stream of fixed monthly payments. It is much like a bond, with an interest rate and a duration measured by the projected mortality of the beneficiary. Accordingly, the difference between reasonableness and unreasonableness is measured by a few basis points, not the hundreds of basis points by which Plaintiffs were shortchanged. The narrowness of the range is evident from the fact that Plaintiffs alleged two sets of assumptions, the Treasury Assumptions and the Pinnacle financial statement assumptions. Both sets of assumptions used interest rates based on current market interest rates and economic conditions which exist within a narrow range. ¶¶ 46-47, 59 at 22. Both also used mortality assumptions based on the same current participant mortality data. ¶¶ 52-53, 56-59 at 21-22.

[12] Pension plans may offer several JSAs in percentages between 50 and 100% covered by ERISA § 205(d). ERISA requires that one JSA to be the automatic form of payment when, for example, a participant does not select a benefit form (e.g., return the pension paperwork) or dies before starting their benefits. When a married participant dies before

Presumably for this reason, Defendants tell participants that the "[t]he 75 and l00 percent J&S options are QOSA's." [sic] ¶ 41. Defendants do not make this representation casually; it is made a form that ERISA § 205(c)(3) requires to provide "a written explanation of the terms and conditions of the qualified joint and survivor annuity and of the qualified optional survivor annuity." ERISA § 205(c)(3)(A), 29 U.S.C. § 1055(c)(3)(A). While Defendants attempt to belittle their own representation, Motion at 9-10, they cannot avoid Plaintiffs' allegation that they deemed the 100% JSA to be protected by ERISA § 205(d). ¶ 41.

If ERISA § 205(d) did not protect the Plan's 100% JSA option, Defendants would have required spousal consent for participants that wanted to receive this form of benefit. ERISA § 205(c) contains "strict spousal consent provisions" if a participant selects a form other than a QJSA. *Hamilton v. Washington State Plumbing and Pipefitting Indus. Pension Plan*, 433 F.3d 1091, 1099 (9th Cir. 2006). "The only way for the participant to opt out of the QJSA is for the participant *and* his spouse together to waive the QJSA benefit plan in writing." *Carmona v. Carmona*, 603 F.3d 1041, 1057 (9th Cir. 2010) (citing *Boggs v. Boggs*, 520 U.S. 833, 843 (1997)). Additionally, ERISA § 205(c)(2) provides that consent is ***not*** required under "circumstances as the Secretary of the Treasury may by regulations prescribe." ERISA § 205(c)(2), 29 U.S.C. § 1055(c)(2). ERISA § 205's interpreting regulation, 26 C.F.R. § 1.401(a)-20 Q&A 16 explains that when a plan offers more than one JSA that could qualify as a QJSA, it must designate one to be the "automatic form of payment." It further provides that spousal consent is ***not*** required to select other JSAs like Plaintiffs' 100% JSA, stating:

> A plan, however, may allow a participant to elect out of such a QJSA, without spousal consent, in favor of ***another actuarially equivalent***

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starting pension benefits, ERISA requires that plans provide the surviving spouse a "qualified pre-retirement survivor annuity" ("QPSA"). ERISA §§ 205(a)(2) and (e), 29 U.S.C. §§ 1055(a)(2) and (e). A QPSA must be actuarially equivalent to the benefit the surviving spouse would have received under the plan's QJSA. Accordingly, when a plan offers multiple joint and survivor annuities with survivorship percentages between 50 and 100 percent, the plan must designate one to be the default in order to calculate the QPSA for the surviving spouse.

> ***joint and survivor annuity that satisfies the QJSA conditions***. . . . For example, if a plan designates a joint and 100% survivor annuity as the QJSA and also offers an actuarially equivalent joint and 50% survivor annuity ***that would satisfy the requirements of a QJSA***, the participant may elect the joint and 50% survivor annuity ***without spousal consent***.

26 C.F.R. § 1.401(a)-20, Q&A 16. (emphasis added).

Likewise, the Treasury Department has determined that spousal consent is not needed when participants select an actuarially equivalent QOSA.

> In general, spousal consent is required for a participant to waive a plan's QJSA form of distribution and elect an alternative distribution form. However, § 1.401(a)-20, Q&A-16, provides that a participant may elect out of the QJSA, in favor of an ***actuarially equivalent*** alternative joint and survivor annuity that satisfies the conditions to be a QJSA, without spousal consent. Because a QOSA, by definition, satisfies the conditions to be a QJSA, no spousal consent is required if a plan participant elects a QOSA that is actuarially equivalent to the plan's QJSA.

I.R.S. Notice 2008-30, 2008 WL 642557, Q&A 11 . (emphasis added).

Because Defendants do ***not*** require spousal consent when participants select a 100% JSA, ¶ 42, they acknowledge that the Plan's 100% JSA option must be actuarially equivalent and is protected by ERISA § 205(d).

II. COUNT TWO PLAUSIBLY ALLEGES FIDUCIARY BREACHES

Defendants' primary basis for seeking the dismissal of Plaintiffs' breach of fiduciary duty claim is that Plaintiff otherwise fails to state a claim. Motion at 10. For the reasons set forth above, that argument should be rejected. *See*, *e.g.*, *Masten*, 543 F. Supp. 3d at 36-37 (citing *John Blair Commc'ns, Inc. v. Telemundo Grp., Inc. Profit Sharing Plan*, 26 F.3d 360, 367 (2d Cir. 1994); *Urlaub*, 2022 WL 523129, at ** 9 – 10; *Smith v. US Bancorp*, 2019 WL 2644204, at * 4; and *Herndon*, 2020 WL 3053465, at * 4.

Defendants then wrongly argue that they are somehow immunized from fiduciary breaches because "fiduciaries do not breach their duties under ERISA merely by administering a pension plan in accordance with its written terms." Motion at 10. This

argument fails because fiduciaries must follow the plan's terms but only "insofar as such documents and instruments are consistent" with ERISA's other terms.

ERISA § 404(a)(1)(D) requires that fiduciaries act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter." "This provision makes clear that the *duty of prudence trumps the instructions of a plan document*." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421, 134 S. Ct. 2459, 2468, 189 L. Ed. 2d 457 (2014) (emphasis added). In other words, a fiduciary cannot say "the plan made me do it" when it violates ERISA. "Nothing in ERISA, including section 404(a)(1)(D), requires blind compliance with plan terms which would require a fiduciary to engage in imprudent conduct." *Agway, Inc. Employees' 401(k) Thrift Inv. Plan v. Magnuson*, 2006 WL 6903738, at *17 (N.D.N.Y. July 13, 2006), *report and recom. adopted*, 2006 WL 2934391 (N.D.N.Y. Oct. 12, 2006). "A fiduciary has a duty to ignore a plan term that is inconsistent with ERISA if implementing that term is contrary to a participant's interest." *Pender v. Bank of Am. Corp.*, 756 F. Supp. 2d 694, 704 (W.D.N.C. 2010*), aff'd sub nom. McCorkle v. Bank of Am. Corp.*, 688 F.3d 164 (4th Cir. 2012). "Indeed, ERISA casts upon fiduciaries an affirmative, overriding obligation to reject plan terms where those terms would require such imprudent actions in contravention of the fiduciary duties imposed under ERISA." *Agway*, 2006 WL 6903738, at *17. Here, because the Complaint plausibly alleges Defendants violated their fiduciary duties, Defendants' argument should be rejected. While Defendants cite cases that support a contrary view, those cases should be rejected.

III. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss in its entirety.

Respectfully submitted,

/s/ *Ron Kilgard*
KELLER ROHRBACK L.L.P.
Ron Kilgard
3101 North Central Avenue, Suite 1400
Phoenix, AZ 85012
Tel: (602) 248-0088
Fax: (602) 248-2822
rkilgard@kellerrohrback.com

IZARD, KINDALL & RAABE, LLP
Robert A. Izard (pro hac vice)
Douglas P. Needham (pro hac vice)
Oren Faircloth (pro hac vice)
29 South Main Street, Suite 305
West Hartford, CT 06107
Tel: (860) 493-6292
Fax: (860) 493-6290
rizard@ikrlaw.com
dneedham@ikrlaw.com
ofaircloth@ikrlaw.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2023, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel of record.

/s/ Kathy Kendrick