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**UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

Jerome M. Skrtich, Joseph F. Peck, and Michael Riccitelli on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Pinnacle West Capital Corporation; the Benefit Administration Committee of the Pinnacle West Capital Corporation Retirement Plan, and; John/Jane Does 1-5,

Defendants.

Civil Action No. 22-cv-01753-SMB

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED CLASS ACTION COMPLAINT**

**(Oral Argument Requested)**

## INTRODUCTION

To state a claim for relief, Plaintiffs must, at a minimum, plausibly allege that the joint and survivor annuity benefit produced by the combination of actuarial assumptions specified in the written terms of the Pinnacle West Capital Corporation Retirement Plan ("Plan") falls outside the range of reasonableness permitted by ERISA. Plaintiffs do not meet this standard.

Plaintiffs rely primarily on their allegation that they would receive slightly higher benefits if the Plan calculated their benefits differently, using actuarial assumptions that were established for different purposes. The mere fact that the Plan's actuarial assumptions do not produce the same result as those inapposite assumptions does not make it plausible that the Plan's assumptions produce a result that violates ERISA.

The remainder of Plaintiffs' arguments merely repeat in various ways the allegation that the Plan-specified mortality table is outdated. But the relevant question is whether the Plan's actuarial assumptions as a whole result in actuarially equivalent benefits—not the isolated impact of any single assumption. And, as Plaintiffs' own brief makes clear, changes in mortality expectations alone do not result in a significant change in benefits. Plaintiffs' allegations are accordingly insufficient to state a claim.

The claims of Plaintiffs Skrtich and Peck also fail because neither is receiving a joint and survivor annuity ("JSA") protected by the statutory provision underlying their claims, 29 U.S.C. § 1055. That provision requires plans to provide participants with a Qualified Joint and Survivor Annuity ("QJSA") and a Qualified Optional Survivor Annuity ("QOSA") which are "actuarially equivalent" to a single life annuity. 29 U.S.C. § 1055. Accordingly, a Plan participant must be receiving a QJSA or a QOSA in order to bring a claim under 29 U.S.C. § 1055.

Plaintiffs' argument that "***any*** JSA with a percentage between 50 and 100" is a QJSA, ECF No. 23, Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Opp.") at 13, ignores the plain language of the statute and applicable regulations, which make clear that there can be only one QJSA and one QOSA for any given pension plan. For

example, applicable Treasury Regulations provide that if "there are two or more actuarially equivalent joint and survivor annuities that satisfy the requirements for a QJSA, the plan must designate which ***one*** is the QJSA." Treas. Reg. § 1.401(a)-20, Q&A-16 (emphasis added). The First Amended Complaint ("FAC") correctly alleges that the Plan specifies the joint and 50% survivor annuity as its QJSA. FAC ¶ 40.

Likewise, the statute specifies that if the QJSA percentage "is less than 75 percent, the applicable [QOSA] percentage is 75 percent." 29 U.S.C. § 1055(d)(2)(B)(i)(I). Thus, because the designated QJSA percentage under the Plan is 50%, the Plan's QOSA is the 75% JSA as a matter of law.

Plaintiffs argue, oddly, that the Plan's 100% JSA is a qualified *joint* and survivor annuity because certain Plan disclosures referred to the 100% JSA as a qualified *optional* survivor annuity. Opp. at 14. That argument makes no sense on its face. It also fails because nothing in a plan disclosure can change the scope of § 1055 and its implementing regulations, which make clear as a matter of law that the Plan's one and only QJSA is the Plan-designated 50% JSA.

Plaintiffs also suggest that, if the 100% JSA is not a QJSA, the Plan did not comply with ERISA's spousal consent rules. Opp. at 15. The FAC, however, does not assert any claims based on an alleged failure to comply with ERISA's spousal consent rules, and any such violation would have no bearing on whether the Plan complied with the actuarial equivalence rules in 29 U.S.C. § 1055.

Finally, Plaintiffs' breach of fiduciary duty claims are based entirely on the Plan's actuarial assumptions allegedly violating ERISA, and these claims fail for two reasons. First, Plaintiffs do not allege any plausible violation of ERISA. Even if they did, Plaintiffs fail to allege any breach merely because the fiduciaries did not depart from Plan terms. While 29 U.S.C. § 1104(a)(1)(D) imposes a duty on plan fiduciaries to follow plan documents insofar as they are consistent with ERISA, the statute creates no such inverse duty to deviate from plan documents that might be in violation of ERISA.

## ARGUMENT

### I. COUNT I SHOULD BE DISMISSED.

#### A. Plaintiffs Fail Plausibly to Allege that the Plan's Actuarial Assumptions Are Unreasonable.

Plaintiffs fail to state a claim under 29 U.S.C. § 1055 because they do not plausibly allege that the Plan's actuarial assumptions fall outside the range of assumptions permissible under ERISA.

While 29 U.S.C. § 1055(d) requires a pension plan to offer a QJSA and a QOSA that are "actuarially equivalent" to a plan's single life annuity, it does not define actuarial equivalence, provide mandatory actuarial assumptions, or even contain any express requirement that a plan's actuarial assumptions be reasonable. *See* 29 U.S.C. § 1055(d); *cf. Belknap v. Partners Healthcare Sys., Inc.*, 588 F. Supp. 3d 161, 175 (D. Mass. 2022), *appeal dismissed sub nom., Belknap v. Mass Gen. Brigham, Inc.*, No. 22-1188, 2022 WL 4333752 (1st Cir. Aug. 30, 2022). Even if ERISA required the use of "reasonable" assumptions, Plaintiffs fail plausibly to allege that the Plan's assumptions are outside the "range of reasonableness" in the aggregate. *See Combs v. Classic Coal Corp.*, 931 F.2d 96, 100 (D.C. Cir. 1991).

*First*, Plaintiffs erroneously assume that if a pension plan's actuarial conversion factors do not produce results that are identical to those produced by inapplicable Treasury assumptions, the plan's actuarial assumptions must be unreasonable. Opp. at 9-10. To support their argument, Plaintiffs rely on the Treasury Mortality Table and the Treasury "Segment Rates," which Congress has mandated for use when converting single life annuities to lump sums. *See* FAC ¶¶ 52-54; Opp. at 10.[1] But Congress has repeatedly and explicitly refused to mandate the use of these assumptions (or any other

[1] Specifically, Plaintiffs' allegations that their benefits were "2-6% too low" is based solely on a comparison of the Plan-mandated benefits they are receiving to the benefits that they would receive if the Plan instead used the inapplicable "lump sum" assumptions set forth in the Treasury regulations they cite. *See, e.g.*, FAC ¶¶ 67-69.

assumptions) for the purpose of converting single life annuities to alternate annuity forms. *See* ECF No. 21, Defendants' Motion to Dismiss ("MTD") at 7.[2] Plaintiffs' reliance on these lump-sum assumptions thus ignores the latitude Congress has allowed plans in selecting actuarial assumptions for purposes other than lump sum conversions under ERISA.[3] And it also reinforces their error in suggesting that actuarial assumptions used for a given purpose should—let alone must—be used for entirely different purposes, as they seek to do here.

*Second*, the Opposition leans heavily on Plaintiffs' allegation that Pinnacle West uses a different set of assumptions—including a different mortality table—in calculating its pension liabilities for accounting purposes. The FAC, however, only ever calculates the amount of benefits that Plaintiffs allegedly should have received by reference to the lump sum Treasury assumptions discussed above. *See* FAC ¶¶ 67-69. Indeed, Plaintiffs never even allege that they would have received greater benefits if the Plan instead calculated their benefits using these accounting assumptions. For this fundamental reason, Plaintiffs' allegations relating to Pinnacle West's accounting assumptions are irrelevant.

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[2] Even since the motion to dismiss was filed, Congress has again modified the actuarial assumptions used for lump sums without extending the scope of the specified assumptions to include joint and survivor annuities. *See* Consolidated Appropriations Act of 2023, H.R. 2617, 117th Cong. Div. T. § 335 (2022) (limiting the use of mortality improvements included in mortality assumptions used for certain purposes, including lump sum calculations).

[3] Plaintiffs seek to achieve through litigation what Congress has repeatedly refused to do; that is, Plaintiffs ask this Court to mandate a specific set of assumptions that produce a "reasonable" result when calculating actuarial equivalence. *See* FAC ¶ 82 (seeking "recalculation" of JSA and QOSA benefits previously paid under the Plan). Implicit in Plaintiffs' request is a demand that this Court identify a set of actuarial assumptions that produces a minimal acceptable value when calculating the actuarial equivalence of QJSAs and QOSAs. That is precisely what Congress has repeatedly declined to do, MTD at 7, and the Court should refuse to do so here. *See id.* at 7-8 (citing *Castillo v. Metro. Life Ins. Co.*, 970 F.3d 1224, 1232 (9th Cir. 2020)).

The allegations are also entirely misplaced. As explained above, the fact that a given set of assumptions is reasonable for one purpose does not mean that it is reasonable—let alone compulsory—for an entirely different purpose. That is why, for instance, Congress saw fit to mandate the assumptions used to convert single life annuities to lump sums, without simultaneously mandating the use of those same mortality assumptions for the whole range of other actuarial calculations required under ERISA.

Here, Plaintiffs fail to explain why assumptions used for accounting purposes are appropriate for purposes of making annuity conversions. Nor could they. Overall pension liabilities are highly sensitive to changes in mortality—if participants on average live longer, then a company's pension liabilities will grow considerably.

As Plaintiffs' own brief demonstrates, however, annuity conversions are not nearly as sensitive. Thus, while, according to Plaintiffs, the RP-2014 mortality table predicts a 42% greater life expectancy for a 65 year-old male than the 1971 GAM table, *see* FAC ¶ 59; Opp. at 8-9, use of that table would result in only a very modest adjustment to Plaintiffs' benefits. *See* FAC ¶¶ 67-69. Accordingly, Pinnacle West's use of a more current mortality table for annual accounting purposes is insufficient to establish that the Plan's use of the 1971 GAM table (as just one component of the Plan's annuity conversion factor) for a very different purpose was unreasonable.

*Third*, Plaintiffs' bare assertion that the 1971 GAM mortality table used by the Plan is "outdated" is likewise insufficient. *See e.g.*, Opp. at 8-10; FAC ¶¶ 7, 57-61, 69. As an initial matter, supposedly "outdated" assumptions are not necessarily unreasonable. *See, e.g., Torres v. Am. Airlines, Inc.*, No. 4:18-CV-00983-O, 2020 WL 3485580, at *1 (N.D. Tex. May 22, 2020) (noting that the use of an allegedly "outdated" mortality table actually resulted in higher benefits for some participants than plaintiffs' preferred mortality table).

Furthermore, Plaintiffs' focus on this single variable—in isolation—is misplaced. Indeed, even the Opposition grudgingly acknowledges the reasonableness determination

turns on the "assumption package … in the aggregate." Opp. at 10. Thus, the allegation that a single input to the actuarial conversion factor used by the Plan is "outdated" or "unreasonable" necessarily fails to establish that the conversion factor as a whole is unreasonable or fails to achieve actuarial equivalence.

This, moreover, is not just idle speculation. Plaintiffs themselves assert that the Plan-specified interest rate of 7.5% "is more than double the rates that Plaintiffs cite as benchmarks in their Complaint in certain years." Opp. at 9. As Plaintiffs acknowledge, all else equal, use of a higher interest rate assumption will result in a greater benefit. *See* FAC ¶ 5. This reinforces the fact that Plaintiffs' criticism of the 1971 GAM mortality table, standing alone, is insufficient to establish that the Plan's actuarial conversion factors, taken as a whole, fall outside the range of reasonableness.

Finally, Plaintiffs' reliance on *McDaniel v. Chevron Corp.*, 203 F.3d 1099 (9th Cir. 2000), to support their argument that reliance on an outdated mortality table is sufficient to state a claim is misplaced. In *McDaniel*, the court considered whether a plan administrator could use discretion in applying mortality assumptions where the plan's reference to a mortality table was ambiguous. *Id.* at 1110. The court held that the plan administrator did not abuse its discretion under 29 U.S.C. § 1054—a provision which is not at issue here—given the plan's ambiguity and the reasonableness of the administrator's decision. *Id.* Any criteria to select a mortality table set forth in that case applies with respect to an interpretation of an ambiguous plan document under § 1054, and not with respect to the calculation of annuities using a mortality table clearly set forth in the Plan under § 1055.

### B. Plaintiff Skrtich and Plaintiff Peck Fail to Plead ERISA Violations Because 29 U.S.C. § 1055(d) Does Not Apply to Their Benefits.

Plaintiffs do not dispute that 29 U.S.C. § 1055 protects only QJSAs and QOSAs. *See, e.g.*, FAC ¶¶ 19-22. Instead, they argue that *any* JSA between 50% and 100%—including the 100% JSAs they are receiving—is a QJSA for purposes of the statute.

Because that argument is inconsistent with the plain language of the statute and its implementing regulations, their claims must be dismissed.

ERISA requires that pension plans offer married participants at least two annuity options as alternatives to a single life annuity: a QJSA and a QOSA. 29 U.S.C. § 1055(d). Plans are free to offer participants additional options, but not every such option qualifies as a QJSA or QOSA. Under ERISA, a pension plan must define which option is the QJSA. *See* 26 C.F.R. § 1.401(a)-20, Q&A-16. The QOSA, in turn, is defined by statute based on the JSA that the plan designates as the QJSA. *See* 29 U.S.C. § 1055(d).

Plaintiffs do not dispute that the 50% JSA is the Plan's designated QJSA. *See* FAC ¶ 40. ERISA therefore defines the Plan's QOSA as a 75% JSA. *See* 29 USC § 1055(d)(2). Plaintiff Skrtich and Plaintiff Peck admit that they are each receiving a 100% JSA. *See* FAC ¶¶ 13-14. A 100% JSA is not the Plan's QJSA or QOSA. Consequently, their benefits are not protected by 29 U.S.C. § 1055(d).[4]

Plaintiffs argue that *any* JSA between 50% and 100% is protected under 29 U.S.C. § 1055(d) as a QJSA. Opp. at 13-14. That argument, however, directly conflicts with the language of the Treasury regulations implementing the statute, which requires that the Plan designate "one" specific JSA as the QJSA:

> If there are two or more actuarially equivalent joint and survivor annuities that satisfy the requirements for a QJSA, ***the plan must designate which <u>one</u> is the QJSA***….

26 C.F.R. § 1.401(a)-20, Q&A-16 (emphasis added). While Plaintiffs are correct that plans may designated "any" annuity between 50% and 100% (or any annuity having the same effect) as the QJSA, *see* Opp. at 13, it does not follow that all such annuities are, in fact, QJSAs.

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[4] As noted in Defendants' opening brief, other provisions of ERISA do protect their benefits. Because it is beyond legitimate dispute that the Plan has complied with them, however, Plaintiffs do not bring suit under those provisions. MTD at 8 n.2.

Other provisions of ERISA confirm that each plan has only one QJSA and one QOSA. For example, the statute states that a plan must permit participants to waive "***the*** qualified joint and survivor annuity form of benefit"—singular—in favor of "***the*** qualified optional survivor annuity." 29 U.S.C. § 1055(c)(1)(A) (emphasis added). It likewise requires plans to provide participants with written explanations of "the terms and conditions of ***the*** qualified joint and survivor annuity and of ***the*** qualified optional survivor annuity." *Id.* § 1055(c)(3)(A). The statute's consistent references to "the" QJSA and "the" QJSA confirms that a given plan may only have one QJSA and one QOSA. *Cf. Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1482-83 (2021) (describing the use of a "definite article with a **singular** noun" to refer to a discrete thing in line with those terms' "ordinary meaning" and absent any evidence suggesting otherwise).

Plaintiffs' Opposition asks the Court to ignore the unambiguous statutory language and treat their 100% JSAs as protected QJSAs because a Plan disclosure allegedly describes the Plan's 75% and 100% JSAs both as QOSAs. Opp. at 13. Of course, it makes no sense to say that a reference to QOSAs in a disclosure document should mean that the statute is expanded to cover such annuities as QJSAs. Moreover, Plaintiffs do not assert claims that the Plan provided misleading disclosures. Instead, Plaintiffs claim only that their benefits violated 29 U.S.C. § 1055, and any alleged deficiencies in the Plan's disclosures are entirely irrelevant to that claim.

Plaintiffs similarly argue that their 100% JSAs are QJSAs because, if they were not, Plaintiffs should not have been allowed to select them without spousal consent. Even assuming that any required spousal consents were not obtained, however, that too would not create a cause of action under 29 U.S.C. § 1055(d).

In short, Plaintiffs' disclosure and spousal consent arguments are red herrings. It is undisputed that, unless Plaintiffs are receiving QJSAs or QOSAs, they cannot assert claims under 29 U.S.C. § 1055(d). As explained above, the 100% JSAs they are receiving are neither QJSAs nor QOSAs as a matter of law. Accordingly, their claims

should be dismissed, irrespective of any alleged deficiencies in the disclosure documents or the spousal consent process.

## II. PLAINTIFFS' CLAIM FOR BREACH OF FIDUCIARY DUTY SHOULD BE DISMISSED.

Plaintiffs' claim for breach of fiduciary duty should be dismissed for two reasons. *First*, Plaintiffs have failed to allege an ERISA violation. Plaintiffs' claim is entirely derivative of Plaintiffs' ERISA claims under 29 U.S.C. § 1055(d). *See* FAC ¶¶ 83-96. For the reasons set forth above and in the MTD, those claims fail. *DuBuske v. PepsiCo, Inc.*, No. 18 CV 11618 (VB), 2019 WL 4688706, at *5 (S.D.N.Y. Sept. 25, 2019) (where plaintiffs have "inadequately" pled a breach of ERISA, their derivative "breach of fiduciary duty claim…fails as a matter of law"), *vacated on other grounds*, No. 18 CV 11618 (VB), 2019 WL 5864995 (S.D.N.Y. Nov. 8, 2019).

*Second*, even if Plaintiffs could plausibly allege that the Plan's terms violate ERISA, it does not follow that fiduciaries breach their duties by faithfully administering the Plan according to its terms. *See* Opp. at 15-16. Plaintiffs attempt to read into ERISA a requirement to deviate from plan terms based on a logical "fallacy." *See Sec'y of Lab. v. Macy's, Inc.*, No. 17-CV-541, 2022 WL 407238, at *5 (S.D. Ohio Feb. 10, 2022) (describing an attempt to read such a requirement into the law as the "fallacy of the inverse"). While it is true that 29 U.S.C. § 1104(a)(1)(D) imposes a duty on plan fiduciaries to follow plan documents that are consistent with ERISA, the inverse does not automatically follow. Plaintiffs commit to an "overly broad reading of ERISA" when they allege that fiduciaries have a duty not to follow plan documents that are not consistent with ERISA. *Paul* v. *RBC Cap. Markets LLC*, No. C16-5616, 2018 WL 3630290, at *7 (W.D. Wash. July 31, 2018). Accordingly, Plaintiffs' breach of fiduciary duty claim should be dismissed.

## CONCLUSION

For the foregoing reasons, the Court should dismiss the FAC with prejudice.

Dated: February 24, 2023

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 24, 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.

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