No. 24-12773

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

William Drummond, *et al*.,

Plaintiffs-Appellants,

v.

Southern Company Services, Inc., *et al*.,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Georgia
Case No. 2:23-CV-00174-SCJ
The Honorable Judge Steve C. Jones

BRIEF FOR THE ACTING U.S. SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the undersigned counsel for the Acting Secretary of Labor as amicus curiae certifies that, in addition to those identified in the brief filed by Plaintiffs-Appellants, the following persons and entities may have an interest in the outcome of this case:

1. Ballard, Brendan, U.S. Department of Labor, Office of the Solicitor, counsel for the Secretary of Labor;

2. Berry, Wayne, U.S. Department of Labor, Office of the Solicitor, counsel for the Secretary of Labor;

3. Employee Benefits Security Administration, U.S. Department of Labor;

4. Hahn, Jeffrey, U.S. Department of Labor, Office of the Solicitor, counsel for the Secretary of Labor;

5. Nanda, Seema, Solicitor of Labor, U.S. Department of Labor, counsel for the Secretary of Labor;

6. Office of the Solicitor, U.S. Department of Labor; and

7. Su, Julie, Acting Secretary of Labor, U.S. Department of Labor.

The undersigned further certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

/s/ Brendan Ballard
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Date: December 4, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases:

Federal Cases (continued):

Federal Cases (continued):

Federal Statutes:

Internal Revenue Code:

Federal Statutes (continued):

Federal Statutes (continued):

Rules:

Regulations:

Other Authorities:

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Acting Secretary of Labor ("Secretary") has the primary authority to interpret and enforce Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), and is responsible for "assur[ing] the . . . uniformity of enforcement of the law under the ERISA statutes." *See Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 691–93 (7th Cir. 1986) (*en banc*). To that end, the Secretary has an interest in effectuating ERISA's express purpose of "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans" and "providing for appropriate remedies . . . and ready access to the Federal courts." *See* 29 U.S.C. § 1001(b). In this case, the district court erroneously held that ERISA does not require the use of reasonable assumptions to calculate actual equivalence for purposes of issuing joint and survivor annuities to ERISA plan participants and beneficiaries. *See* 29 U.S.C. § 1055(d). The Secretary has a substantial interest in ensuring that plans and plan fiduciaries comply with the substantive requirements that ERISA prescribes.

The Secretary files this brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

ERISA requires the default form of benefit for married participants in defined benefit pension plans (as well as certain defined contribution plans not relevant here) to be "a qualified joint and survivor annuity" (or "QJSA"). 29 U.S.C. § 1055(a)(1). A QJSA is an annuity (i.e., a fixed income stream) that (a) lasts "for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant and the spouse," and (b) "which is the actuarial equivalent of a single life annuity [or "SLA"] for the life of the participant." *Id.* § 1055(d)(1). With their spouse's written consent, participants can waive their right to receive a QJSA in favor of a different benefit form, such as an SLA. *Id.* § 1055(c)(1)(A). The upshot is that if a participant receives their benefit as a QJSA, the plan must ensure that it is the "actuarial equivalent" of the participant's SLA "for the life of the participant." *Id.* § 1055(d)(1).

Though ERISA does not define the term "actuarial equivalent," the Secretary of the Treasury has interpretive authority over certain provisions of ERISA, including 29 U.S.C. § 1055(d), pursuant to the Reorganization Plan No. 4

of 1978.[1] The Treasury regulation titled "Qualified joint and survivor annuities," which was implemented pursuant to the parallel provision in the Internal Revenue Code ("IRC"),[2] explicitly requires that actuarial equivalence be determined "on the basis of consistently applied *reasonable* actuarial factors." 26 C.F.R. § 1.401(a)-11(b)(2) (emphasis added).

ERISA separately requires that plans "provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age" and establishes that "an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions." 29 U.S.C. § 1053(a). Treasury

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[1] *See generally* EBSA, "Executive Order: Reorganization Plan No. 4 of 1978," available at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/executive-orders/4. ERISA Reorganization Plan No. 4 of 1978 provides, in pertinent part,

> Except as otherwise provided in Sections 104 and 106 of this Plan, all authority of the Secretary of Labor to issue the following described documents pursuant to the statutes hereinafter specified is hereby transferred to the Secretary of the Treasury: (a) regulations, rulings, opinions, variances and waivers under Parts 2 [29 U.S.C. 1051 et seq.] and 3 [29 U.S.C. 1081 et seq.] of Subtitle B of Title I [of ERISA] . . .

ERISA Reorganization Plan No. 4 of 1978 § 101, 43 Fed.Reg. 47713, 92 Stat. 3790, as amended Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095.

[2] The definition of a QJSA was formerly located in IRC section 401(a)(11)(G)(iii), 26 U.S.C. § 411(a)(11)(G)(iii), so that the regulation interpreting that definition was located in 26 C.F.R. § 1.401(a)-11(b)(2). However, in 1984, the definition of QJSA was relocated to IRC section 417(b), 26 U.S.C. § 417(b).

regulations implementing the IRC provision (26 U.S.C. § 411(a)) containing the same non-forfeitability rule as the one in ERISA (29 U.S.C. § 1053(a)) state that "[c]ertain adjustments to plan benefits such as adjustments in excess of reasonable actuarial reductions, can result in rights being forfeitable." 26 C.F.R. § 1.411(a)-4(a); *see also* 29 C.F.R. § 2530.200a–2 (DOL regulation explaining that "regulations prescribed by the Secretary of the Treasury [under IRC § 411] shall also be used to implement the related provisions contained in [ERISA].").

B. Factual Background

Plaintiffs William Drummond and Richard Odom are retired, former employees of Southern Company Services, Inc. ("Southern" or the "Company") and are vested participants in the Southern Company Pension Plan ("Plan"), a defined benefit pension plan. Second Amended Complaint ("SAC"), Doc. 51 ¶¶ 1, 21. Plaintiffs received their pension benefits as a QJSA. *Id.* ¶¶ 5, 18-19.

Because ERISA requires QJSA benefits to be the actuarial equivalent of the corresponding SLA benefits, the Plan had to convert Plaintiffs' SLA benefits into their "actuarial equivalent" QJSA benefits. To do so, the Plan used two actuarial assumptions: (1) an interest rate, to account for the time value of money; and (2) expected longevity of the participant and spouse, based on mortality tables providing the mortality rate for each age. Doc. 51 ¶ 9; *Drummond v. S. Co. Servs., Inc.*, No. 2:23-cv-00174-SCJ, 2024 WL 4005945, at *1 (N.D. Ga. Jul. 30, 2024).

For Plaintiff Drummond, the Plan "calculated his joint and survivor annuity utilizing the modified 1951 Group Annuity Mortality Table ("1951-GAM")[.]" Doc. 51 ¶ 18. The 1951-GAM, which was published by the Society of Actuaries, is based on "life expectancy during the years 1946 to 1950 among persons at or near retirement age (i.e., persons born in the late 1800s)." *Id.* ¶ 48. Plaintiff Odom's benefits were likewise "calculated based on form factor tables that do not reflect . . . modern mortality expectations." *Id.* ¶ 19.

C. Proceedings Below

On September 15, 2023, Plaintiffs filed the Second Amended Complaint against Defendants Southern, the Plan, and the Plan's Benefits Administration Committee in the U.S. District Court for the Northern District of Georgia for alleged violations of ERISA. Specifically, the SAC alleges that, by calculating Plaintiffs' QJSA benefits using outdated mortality assumptions, Defendants violated ERISA's actuarial equivalence requirement in 29 U.S.C. § 1055(d) (Count I), SAC ¶¶ 35-70; its prohibition on forfeitures in 29 U.S.C. § 1053(a) (Count II), SAC ¶¶ 71-78; and its fiduciary standards in 29 U.S.C. § 1104(a) (Count IV), SAC ¶¶ 98-119.[3] In so doing, the SAC alleges that Plaintiffs received lower benefit

[3] Plaintiffs also assert an additional claim (Count III) alleging that Defendants violated ERISA's anti-forfeiture rule by first reducing their SLA benefit by a charge imposed for electing a qualified pre-retirement survivor annuity (or "QPSA"), which would have paid benefits to their surviving spouse in the event Plaintiffs died before retirement. *See* Doc. 51 ¶¶ 79-97. Plaintiffs claim that, in

payments than they would have received had Defendants used reasonable mortality assumptions.

Defendants moved to dismiss the SAC in its entirety, which the district court granted. Regarding Count I, alleging a violation of the actuarial equivalence requirement in 29 U.S.C. § 1055(d), the court relied primarily on a case from the District of Massachusetts, which, addressing a different ERISA provision, held that "'the calculation of actuarial equivalence under § 1054(c)(3) of ERISA [does not] require the use of reasonable assumptions.'" *Drummond*, 2024 WL 4005945 at *5 (quoting *Belknap v. Partners Healthcare Sys., Inc.,* 588 F. Supp. 3d 161, 175, 177 (D. Mass. 2022), *appeal dismissed sub nom. Belknap v. Mass Gen. Brigham, Inc.*, No. 22-1188, 2022 WL 4333752 (1st Cir. Aug. 30, 2022)) (internal quotation marks omitted). The district court, like the *Belknap* court, rested its interpretation entirely on the fact that Congress did not explicitly include a reasonableness requirement or identify specific actuarial factors (interest rates and mortality tables) in section 1055(d), when other provisions of ERISA include them. *Id.* The Court declined to look to industry definitions of "actuarial equivalence" or to a Treasury regulation defining a "qualified joint and survivor annuity," which

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determining the QPSA charge, Defendants impermissibly used outdated mortality assumptions. *See id.* The Secretary does not take a position on this claim.

provides that "[e]quivalence may be determined, on the basis of consistently applied reasonable actuarial factors." 26 C.F.R. § 1.401(a)-11(b)(2).

With respect to Plaintiffs' illegal forfeiture claim (Count II), Defendants argued that only the amount of the benefit as calculated by the terms of the Plan was protected from forfeiture, and that the Plan's terms here included the mortality assumptions that Plaintiffs challenge. Doc. 53-1 at 15-16. Agreeing with Defendants, the district court held that section 1053(a) "'prohibits forfeitures of vested rights,' and while 'the statutory definition of nonforfeitable assures that an employee's claim to the protected benefit is legally enforceable, . . . it does not guarantee a particular amount or a method for calculating the benefit.'" *Drummond*, 2024 WL 4005945 at *7 (quoting *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 512 (1981)) (further internal citation and quotation omitted).

As to Plaintiffs' fiduciary-breach claim (Count IV), which was premised on the ERISA violations underlying their other claims, the court summarily dismissed it for the same reasons it dismissed those claims. *Id.*

SUMMARY OF THE ARGUMENT

ERISA requires that defined benefit pension plans pay participants a qualified joint and survivor annuity that is the "actuarial equivalent of a single annuity for the life of the participant." 29 U.S.C. § 1055(a) and (d). Plaintiffs alleged that by using mortality assumptions from the mid-1900s to convert

Plaintiffs' SLA benefits into their actuarial equivalent QJSA benefits—thereby resulting in lower benefit payments than if more reasonable assumptions had been used—Defendants not only violated ERISA's actuarial equivalence requirement, but also its prohibition on forfeitures in 29 U.S.C. § 1053(a), and its fiduciary standards in 29 U.S.C. § 1104(a). The district court's decision dismissing these claims contravenes the plain statutory language, applicable regulations, ERISA's purpose of ensuring retirement security to workers and their surviving spouses, and the vast majority of district court decisions addressing the same issues.

As to Plaintiffs' claim under 29 U.S.C. § 1055, that provision's requirement that a QJSA be the "actuarial equivalent" of the corresponding SLA "for the life of the participant" inherently requires the use of reasonable actuarial assumptions. That reading is made clear in the first instance from the plain meaning of the term "actuarial equivalent" (including how that term is understood in the field of actuarial science). It is further underscored by the fact that the QJSA benefits must be the actuarial equivalent of the SLA benefits "for the life of the participant," meaning that the QJSA benefits must reasonably approximate the SLA benefits participants would have otherwise received over their *actual lives*. And it is reinforced by the applicable Treasury regulation, which explicitly requires the use of reasonable actuarial assumptions. The district court's contrary interpretation—allowing plans to use any assumptions of their choosing, no matter how patently

unreasonable—would make a mockery of ERISA's actuarial-equivalence requirement for QJSA benefits, directly frustrating ERISA's goal of protecting surviving spouses of plan participants. It is thus no surprise that the district court's conclusion departs from virtually every other court to consider the question.

The district court also erred in dismissing Plaintiffs' anti-forfeiture claim under 29 U.S.C. § 1053(a). Citing the Supreme Court's statement in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), that section 1053(a) does not "guarantee a particular amount or method for calculating" benefits, the district court believed that so long as plan terms are followed in calculating benefits, no forfeiture can occur. That interpretation misconstrues *Alessi*, which nowhere held that a plan is immune from violating ERISA's nonforfeiture provision so long as it follows plan terms, even where those terms violate ERISA. Indeed, the Supreme Court in *Alessi* held that no forfeiture occurred because it found that ERISA *permitted* the very type of offsets that the *Alessi* plaintiffs challenged as an illegal forfeiture. In contrast, as explained, Plaintiffs have adequately alleged that ERISA *prohibits* Defendants' use of unreasonable actuarial assumptions to calculate their QJSA benefits. And ERISA overrides plan terms that contravene its substantive requirements. That is why numerous courts have found that the use of unreasonable actuarial assumptions can give rise to illegal forfeitures.

Finally, because the district court's dismissal of Plaintiffs' fiduciary breach claim hinged on its erroneous dismissal of their statutory claims, that holding, too, was in error. This Court should reverse.

ARGUMENT

I. ERISA's Requirement That a Qualified Joint and Survivor Annuity Be the "Actuarial Equivalent" of a Single Life Annuity Requires the Use of Reasonable Actuarial Assumptions

A. A QJSA Is the "Actuarial Equivalent" of an SLA "for the Life of the Participant" Only if it Is Determined Using Reasonable Actuarial Assumptions

There is no dispute that ERISA requires that a QJSA be the "actuarial equivalent" of an SLA "for the life of the participant." 29 U.S.C. § 1055(d)(1)(B). While ERISA does not define what it means for a QJSA to be the "actuarial equivalent" of an SLA for the "life of the participant," those terms have a plain meaning that necessarily require the use of reasonable actuarial assumptions. *See Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020) ("'We must enforce plain and unambiguous statutory language' in ERISA, as in any statute, 'according to its terms.'").

First, as to the term "actuarial equivalent," the plain meaning of the word "equivalent" is "equal in force, amount, or value." *Urlaub v. CITGO Petroleum Corp.*, No. 21-CV-4133, 2022 WL 523129, at *6 (N.D. Ill. Feb. 22, 2022) (citing Equivalent, Merriam-Webster, https://www.merriam-webster.com/dictionary/

equivalent (last visited February 9, 2022)). And the thing a QJSA must be actuarially "equal in . . . value" to is the SLA "for the life of the participant." 29 U.S.C. § 1055(d)(1)(B). In other words, the expected value of the QJSA must be equivalent to the expected value of the SLA the participant would have received over their lifetime. And determining what a participant would have received as an SLA over their lifetime requires assumptions about mortality.[4] If unreasonable assumptions are made as to the participant's lifespan, then the expected value of the QJSA will not equal the expected value of what the participant would have received as an SLA over their lifetime (and therefore the former would not be the "actuarial equivalent" of the latter). Indeed, "[o]nly accurate and reasonable actuarial assumptions can convert benefits from one form to another in a way that results in *equal value* between the two." *Urlaub*, 2022 WL 523129 at *6 (emphasis added); *see also Dooley v. Am. Airlines, Inc.*, Civ. A. No. 81 C 6770, 1993 WL 460849, at *10 (N.D. Ill. Nov. 4, 1993) ("The term 'actuarially equivalent' means equal in value to the present value of normal retirement benefits, determined on the basis of actuarial assumptions with respect to mortality and interest which are reasonable in the aggregate.").

[4] As discussed on p. 4, *supra*, mortality assumptions are not the only inputs to the actuarial equivalence conversion. To convert a participant's SLA into its actuarially equivalent QJSA, plans (like the one here) also use an interest rate to discount each future payment to present value. *See* Doc. 51 ¶ 9. A mortality table is used to predict the duration of the future payments. *See id.*

Beyond ordinary dictionary definitions, where "Congress has used technical words or terms of art, 'it [is] proper to explain them by reference to the art or science to which they [are] appropriate.'" *Corning Glass Works v. Brennan*, 417 U.S. 188, 201 (1974); *see also Med. Transp. Mgmt. Corp. v. Comm'r of I.R.S.*, 506 F.3d 1364, 1368–69 (11th Cir. 2007) ("[W]here Congress borrows terms of art . . ., it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.") (citations omitted). To be sure, "actuarial equivalent" is a "term of art." *See Stephens v. U.S. Airways Grp., Inc.*, 644 F.3d 437, 440 (D.C. Cir. 2011); *id.* (referencing Jeff L. Schwartzmann & Ralph Garfield, Education & Examination Comm. Of the Society of Actuaries, Actuarially Equivalent Benefits 1, EA1–24–91 (1991), *available at* https://www.soa.org/globalassets/assets/files/edu/edu-2009-fall-ea1-02-sn.pdf (hereinafter "Schwartzmann & Garfield")).[5] And professional publications in the field of actuarial science make clear that "[t]he interest and mortality assumptions play a key role in determining the magnitude of the actuarial equivalence factor.

[5] *See Adams v. U.S. Bancorp.*, 635 F. Supp. 3d 742, 750-51 (D. Minn. 2022) (explaining that "when the appropriate methodology for calculating an actuarially-equivalent value is not apparent from the face of the definition of actuarial equivalence, nor from the statute or regulations as in effect, courts look to practice within the field of actuarial science." (internal citation and quotation marks omitted)).

Periodically, the assumptions used must be reviewed and modified so as to [e]nsure that they continue to fairly assess the cost of the optional basis of payment." Schwartzmann & Garfield at 11; *see also Duffy v. Anheuser-Busch Cos., LLC*, 449 F. Supp. 3d 882, 885 (E.D. Mo. 2020) ("Under various Actuarial Standard of Practice, actuarial tables must be adjusted on an ongoing basis to reflect what actuaries call 'improvements in mortality,' or what others may call longer life expectancies."). Indeed, "[u]sing a mortality table with shorter life expectancies creates lower present values of future benefits and decreases the amount of the monthly benefit under the joint-and-survivor annuity." *Duffy*, 449 F. Supp. 3d at 885-86.

The relevant regulation interpreting 29 U.S.C. § 1055(d) further supports the proposition that, for a QJSA to be "actuarially equivalent" to a participant's SLA, the actuarial assumptions used for the conversion must be reasonable. As noted, the Secretary of the Treasury has interpretive authority over certain provisions of ERISA, including 29 U.S.C. § 1055(d), pursuant to the Reorganization Plan No. 4 of 1978. The Treasury regulation, titled "Qualified joint and survivor annuities," explicitly requires the use of reasonable assumptions in actuarial equivalence conversions for a plan to maintain its tax-qualified status:

> A qualified joint and survivor annuity must be at least the actuarial equivalent of the normal form of life annuity or, if greater, of any optional form of life annuity offered under the plan. ***Equivalence may be determined, on the basis of consistently applied reasonable***

> ***actuarial factors***, for each participant or for all participants or reasonable groupings of participants, if such determination does not result in discrimination in favor of employees who are officers, shareholders, or highly compensated.

26 C.F.R. § 1.401(a)-11(b)(2) (emphasis added); *see also Masten v. Metro. Life Ins. Co.*, 543 F. Supp. 3d 25, 35 (S.D.N.Y. 2021) (noting that because "[a]llowing plans to set their own definition of actuarial equivalence would eliminate any protections provided by that requirement," ERISA must "be read to impose some boundaries on the determination of equivalence" and "[t]he use of reasonableness as a metric accords with Treasury's interpretation").[6]

In addition, allowing plans to use unreasonable actuarial assumptions in determining QJSA benefits under 29 U.S.C. § 1055(d) would be contrary to the provision's purpose. The Supreme Court has explicitly stated that "[t]he statutory object of the qualified and joint survivor annuity provisions, along with the rest of § 1055, is to ensure a stream of income to surviving spouses." *Boggs v. Boggs*, 520

[6] The Treasury Department's interpretation of 29 U.S.C. § 1055 has "particular power to persuade" and is "especially informative" because "it rests on factual premises within the agency's expertise." *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2267 (2024). The fact that the regulation was initially adopted shortly after ERISA's enactment, *see* 42 Fed. Reg. 1466 (Jan. 7, 1977), makes it even more persuasive as to the meaning of the statute. *Loper Bright*, 144 S. Ct. at 2258 ("Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time.").

U.S. 833, 843 (1997). "ERISA's solicitude for the economic security of surviving spouses" would be undermined by allowing employers to give married employees lower pension benefits than unmarried employees. *Id.* Allowing Defendants to manipulate the actuarial equivalence calculation for QJSA benefits either leaves married participants with depressed monthly payments during their lifetimes (and those of their surviving spouses) or forces them to choose a single life annuity instead, meaning that their spouses could be left "penniless" when they die. *Urlaub*, 2022 WL 523129, at *5. It makes no sense that Congress would authorize the use of interest rates and mortality data that would undermine the entire purpose of joint and survivor annuities.

It is not surprising, then, that the vast majority of district courts to consider the issue have held that the requirement that the QJSA be the "actuarial equivalent" of the SLA "for the life of the participant" inherently embraces the use of reasonable actuarial assumptions. *See Paieri v. West. Conference of Teamsters Pension Tr.*, No. 2:23-cv-00922-LK, 2024 WL 3455269, at *10 (W.D. Wash. June 21, 2024); *Franklin v. Duke Univ.*, No. 1:23-CV-833, 2024 WL 1740479, at *3 (M.D.N.C. Apr. 23, 2024); *Hamrick v. E.I. du Pont de Nemours & Co.*, Nos. 23-238-JLH, No. 23-271-JLH, 2024 WL 359240, at *4 (D. Del. Jan. 31, 2024), *report and recommendation adopted*, 2024 WL 2817966 (D. Del. June 3, 2024); *Urlaub*, 2022 WL 523129, at *6-7; *Masten*, 543 F. Supp. 3d at 33-36; *Duffy*, 449 F. Supp.

3d at 887-92; *Herndon v. Huntington Ingalls Indus., Inc.*, No. 4:19-CV-52, 2020 WL 3053465, at *2 (E.D. Va. Feb. 20, 2020); *Cruz v. Raytheon Co.*, 435 F. Supp. 3d 350, 353 (D. Mass. 2020); *Smith v. Rockwell Automation, Inc.*, 438 F. Supp. 3d 912, 915-16 (E.D. Wis. 2020); *see also Scott v. AT&T Inc.*, No. 20-CV-07094-JD, 2022 WL 2342645, at *1 (N.D. Cal. June 29, 2022); *Torres v. Am. Airlines, Inc.*, 416 F. Supp. 3d 640, 650 (N.D. Tex. 2019); *Smith v. U.S. Bancorp.*, Civ. No. 18-3405 (PAM/KMM), 2019 WL 2644204, at *2-3 (D. Minn. Jun. 27, 2019). As one court reasoned, "it 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' [Q]JSAs. If this were true, the actuarial equivalence requirement would be rendered meaningless." *Urlaub*, 2022 WL 523129, at *6.

Applying these principles here, the SAC states a plausible claim for relief under 29 U.S.C. § 1055(d). The SAC alleges that, to calculate Plaintiff Odom's QJSA benefit, the Plan used a form conversion factor table that reflects mortality assumptions even more outdated than the 1951 Group Annuity Table, which is based on "life expectancy during the years 1946 to 1950 among persons at or near retirement age (i.e., persons born in the late 1800s)." Doc. 51 ¶¶ 48, 19, 53. While Plaintiffs will still need to prove on the merits that their QJSA benefits were not

actuarially equivalent to their SLA benefits, the SAC's allegations that the Plan used a conversion factor based on outdated mortality assumptions is enough at the pleading stage to plausibly infer a violation of ERISA's actuarial equivalence requirement. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

B. The District Court's Reasons for Finding That "Actuarial Equivalence" Does Not Require Reasonable Assumptions Are Unpersuasive

Contrary to the meaning and purpose of the statute, governing regulation, and overwhelming weight of case law, the district court held that "actuarial equivalence" does not require reasonable assumptions because "'[t]he term reasonable appears throughout ERISA, but not in [29 U.S.C. § 1055(d)].'" *Drummond*, 2024 WL 4005945, at *5 (quoting *Belknap*, 588 F. Supp. 3d at 175). Relying on the outlier *Belknap* case, the court cited two provisions of ERISA that specify that actuarial assumptions must be "reasonable," whereas 29 U.S.C. § 1055(d) makes no mention of reasonableness. *Id.* (citing 29 U.S.C. § 1393(a)(1) and 29 U.S.C. § 1085a(c)(3)(A)). The court, like *Belknap*, also cited 29 U.S.C. § 1055(g), which specifies mortality tables for calculating lump-sum values of QJSA benefits. *Id.* The court concluded that, unlike these other provisions, because section 1055(d) does not provide that plans must use reasonable assumptions or

specific mortality tables to determine actuarial equivalence, the "omission from the text" was "deliberate." *Id.*

None of these provisions provide support for the district court's interpretation. First, the two provisions that use the term "reasonable" are entirely inapposite, both because they are found in different subsections of the statute covering different topics—withdrawal liability and plan funding—and more importantly, because neither even uses the term "actuarial equivalent." *See Adams*, 635 F. Supp. 3d at 753 (rejecting an identical argument and explaining that "[s]ections 1393(a)(1) and 1085a(c)(3)(A) do not use a term of art like 'actuarial equivalent'"). While section 1055(g) falls within the provision relating to QJSAs, it likewise does not use the term "actuarial equivalent." *See* 29 U.S.C. § 1055(g). Although the absence of a specific mortality table in section 1055(d) may give plans some discretion in choosing reasonable actuarial data, it does not give plans license to use unreasonable assumptions that will predictably shortchange beneficiaries through smaller payments than required by actuarial equivalence. *See Rockwell Automation*, 438 F. Supp. 3d at 921 (stating that while ERISA doesn't require plans to "use any specific mortality table or any specific interest rate," plans must choose among "options that fall within the range of reasonableness at the time of the benefit determination, as determined by professional actuaries"). Courts are perfectly capable of determining both a range of reasonableness and

when assumptions fall outside that range. *See Herndon*, 2020 WL 3053465, at *2 ("'Reasonable' is a word that is familiar to courts." (citations omitted)); *Cruz*, 435 F. Supp. 3d at 352 ("The Court will apply this range of reasonableness framework to determine whether the conversion of a single life annuity to another benefit option satisfies ERISA's actuarial equivalence standard." (internal quotations and citations omitted)).

The district court also deemed irrelevant the Treasury regulation on QJSA benefits—which expressly requires the use of reasonable assumptions for QJSA conversions, *see* 26 C.F.R. § 1.401(a)-11(b)(2)—explaining that the regulation is "not enforceable under ERISA." *See Drummond*, 2024 WL 4005945, at *6. But, as explained above, pursuant to Reorganization Plan No. 4 of 1978, the Secretary of Labor's authority to issue regulations "under Parts 2 and 3 of Subtitle B of [ERISA] Title I"—in which 29 U.S.C. § 1055 is located—was transferred to the Treasury Secretary.[7] And while the Treasury regulation technically implements

[7] As the Second Circuit explained in *Esden v. Bank of Boston*, 229 F.3d 154, 157 n.2 (2d Cir. 2000):

> Much of Title I of ERISA, codified at Title 29 U.S.C., was duplicated in Title II, which was codified as amendments to the I.R.C. Therefore, many of ERISA's provisions on vesting, accrual and funding . . . appear twice in the United States Code. As to which agency has rule-making authority, ERISA continues to be administered by three agencies: Labor, Treasury and the Pension Benefit Guaranty Corporation. Under Reorganization Plan No. 4 of 1978, § 101, 43 Fed.Reg. 47713, 47713, the IRS [Secretary of Treasury] was given

section 401(a)(11) of the IRC, it applies to the parallel provision in 29 U.S.C. § 1055(a) requiring that plans offer benefits in QJSA form. *Compare* 29 U.S.C. § 1055(a) *with* 26 U.S.C. 401(a)(11)(A) ("In the case of any plan to which this paragraph applies, except as provided in section 417, a trust forming part of such plan shall not constitute a qualified trust under this section unless—(i) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant is provided in the form of a qualified joint and survivor annuity . . ."). At the very least, it would certainly be incongruous for the same plan to be subjected to one rule for purposes of tax-qualification and another rule for purposes of ERISA's minimum standards.

II. Paying a QJSA That Is Less Than the Actuarial Equivalent of an SLA Is a "Forfeiture" of a Vested Benefit in Violation of 29 U.S.C. § 1053(a)

The district court dismissed Plaintiffs' forfeiture claim premised on the unreasonable SLA-to-QJSA conversion (Count II) on the ground that 29 U.S.C. § 1053(a) prohibits forfeitures only of vested rights, and Plaintiffs' only vested rights are their QJSA benefits as provided for in the Plan (i.e., using the Plan's unreasonable mortality assumptions). *Drummond*, 2024 WL 4005945, at *6. This

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primary jurisdiction and rule-making authority over ERISA's funding, participation, benefit accrual and vesting provisions.

holding is counter to the plain meaning and stated purpose of the statute, the relevant Treasury regulations, and numerous cases that have addressed the issue.

"[W]hen Congress enacted ERISA it 'wanted to . . . mak[e] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it.'" *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (citation omitted). Accordingly, ERISA provides that "an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions." 29 U.S.C. § 1053(a)(2)(A)(ii). The IRC contains a parallel provision. *See* 26 U.S.C. § 411(a)(2)(A)(ii). Courts have recognized that "a reduction in the total value of all monthly benefits is a kind of forfeiture." *Contilli v. Local 705 Int'l Bhd. of Teamsters Pension Fund*, 559 F.3d 720, 722 (7th Cir. 2009) (citing *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 759 (7th Cir. 2003)); *Esden*, 229 F.3d at 163.

That is true where the reduction is the result of using unreasonable actuarial assumptions. Treasury regulations implementing IRC section 411(a) governing minimum-vesting standards state that "[c]ertain adjustments to plan benefits such as adjustments in excess of reasonable actuarial reductions, can result in rights

being forfeitable." 26 C.F.R. § 1.411(a)-4(a).[8] And regulations promulgated by the Secretary of Labor explain that "regulations prescribed by the Secretary of the Treasury [under IRC § 411] shall also be used to implement the related provisions contained in [ERISA]." *See* 29 C.F.R. § 2530.200a–2. Accordingly, as numerous courts have held, claims for "reduction in benefits based on an unreasonable actuarial conversion . . . state a violation of ERISA's non-forfeiture requirements." *Masten*, 543 F. Supp. 3d at 36.[9]

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[8] *See also*, *supra*, n.6 discussing *Loper Bright*, 144 S. Ct. at 2267-68; *see also* 42 Fed. Reg. 42326 (Aug. 23, 1977) (showing regulation was initially adopted shortly after ERISA's enactment).

[9] *See Paieri*, 2024 WL 3455269, at *10 ("Paieri's allegations that the Plan uses mortality tables that do not reflect current mortality assumptions and improvements in mortality and result in joint and survivor annuity benefits that are less than the actuarial equivalent of the Life Only Pension when using reasonable . . . assumptions are sufficient to state a claim for violation of 29 U.S.C. §§ 1053 and 1055." (internal quotation marks omitted)); *Franklin*, 2024 WL 1740479, at *4 (holding that plaintiff "stated a claim for relief . . . under ERISA's anti-forfeiture provision" because she "alleged facts sufficient to draw the inference that the defendants used outdated formulas that underestimated the value of her accrued benefits and constituted an unreasonable actuarial conversion"); *Urlaub*, 2022 WL 523129, at *7-8 ("The Court concludes that reducing a participant's benefits by using unreasonable actuarial assumptions can constitute a forfeiture of rights under section 1053(a).")*Torres*, 416 F. Supp. 3d at 650 ("Improper actuarial adjustments that reduce a pension's value is a forfeiture under [29 U.S.C. § 1153]."); *Smith*, 2019 WL 2644204, at *3 ("[C]ourts have held that a distribution of pension benefits below the actuarial equivalent value can constitute a forfeiture of accrued benefits under § 1053(a).").

In holding otherwise, the district court cited the Supreme Court's decision in *Alessi* for the proposition that ERISA section 1053(a)'s nonforfeiture provision does not "'guarantee a particular amount or method for calculating'" benefits. *Drummond*, 2024 WL 4005945, at *7 (*quoting Allesi*, 451 U.S. at 512). However, this statement from *Allesi* is taken out of context. The Supreme Court there considered whether a plan provision that offset pension benefits by the amount an employee received in workers' compensation benefits amounted to an illegal forfeiture. The Court explained that the accrued benefit to which ERISA's forfeiture rules apply is defined "largely" by the plan's terms, and that the plan there expressly allowed for workers' compensation offsets. *Alessi*, 451 U.S. at 511. But it was "particularly pertinent" to the Court "that Congress did not prohibit 'integration,' a calculation practice under which benefit levels are determined by combining pension funds with other income streams available to the retired employees." *Id.* at 514. The Court was thus "unpersuaded by retirees' claim that [ERISA's] nonforfeiture provisions by their own force prohibit any offset of pension benefits by workers' compensation awards." *Id.* at 516. Further, the *Alessi* Court noted that its interpretation of the statute was consistent with Treasury regulations permitting integration. *Id.* at 517.

The facts here are entirely distinguishable. Whereas ERISA did not prohibit the offset practices at issue in *Alessi*, as explained in Part I, *supra*, ERISA *does*

prohibit the use of unreasonable actuarial assumptions in calculating QJSA benefits. That prohibition is underscored by the relevant Treasury regulation (also discussed above) explicitly mandating the use of reasonable actuarial assumptions. And while it is true that accrued benefits are a function of the plan's terms, plans cannot contract around ERISA's substantive requirements. *See* 29 U.S.C. § 1104(a)(1)(D) (plan fiduciaries must apply the terms of the plan "insofar as such documents and instruments are consistent with the provisions of" Title I of ERISA); *see also Bauer v. Summit Bancorp*, 325 F.3d 155, 160 (3d Cir. 2003) ("We are required to enforce the Plan as written *unless we find a provision of ERISA that contains a contrary directive*.") (cleaned up) (emphasis added). Because ERISA's actuarial equivalence requirement for QJSA benefits demands the use of reasonable assumptions, the SAC's allegations that the Plan used unreasonable assumptions—and thereby deprived Plaintiffs of their full QJSA benefits—states a claim for violation of ERISA's prohibition on forfeitures in 29 U.S.C. § 1053(a).

Indeed, in two cases more factually analogous to *Drummond* than *Alessi*, the Second Circuit held that the use of improper assumptions in calculating actuarial equivalence led to forfeiture of pension benefits under 29 U.S.C. § 1053(a). *See Laurent v. PricewaterhouseCoopers LLP*, 794 F.3d 272, 286 (2d Cir. 2015) ("[I]n substance, the PwC Plan accomplishes precisely what we forbade in *Esden*, by

choosing a methodology for calculating actuarial equivalence that effectively withholds that statutory protection from plaintiffs' accounts."); *Esden*, 229 F.3d at 164. As the Second Circuit put it in *Esden*, "[i]f plans were free to determine their own assumptions and methodology, they could effectively eviscerate the protections provided by ERISA's requirement of 'actuarial equivalence.'" 229 F.3d at 164.[10]

[10] Because the district court, as explained above, was incorrect that the SAC did not state claims for violations of 29 U.S.C. §§ 1053 & 1055 (underlying Counts I and II), it also erred in dismissing the fiduciary breach claim in Count IV.

CONCLUSION

The Secretary respectfully requests that this Court reverse the district court's dismissal of Plaintiffs' Second Amended Complaint.

Respectfully submitted,

Date: December 4, 2024

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I hereby certify that on this day, December 4, 2024, I electronically filed the foregoing amicus brief with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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