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VIA ECF

The Honorable Nelson S. Román
United States District Court, SDNY
300 Quarropas Street
White Plains, NY 10601

Re: *Knight, et al. v. IBM Corp., No. 7:22-cv-04592*

Dear Judge Román,

Plaintiffs respectfully request that, pursuant to Rule 3(a), Defendants' request for a stay and permission to file a Rule 12(b)(6) motion be denied.

This putative class action is filed on behalf of thousands of IBM's married retirees who unlawfully receive less than their full pensions because IBM uses mortality assumptions that are more than *40 years* out of date. *See* ECF No. 23 ("FAC") ¶¶ 1-2. By employing these outdated and inaccurate mortality assumptions, Defendants have deprived retirees (and their surviving spouses) of tens of millions of dollars of pension payments to which they are legally entitled. *Id.* ¶ 79.

As courts around the country have confirmed, ERISA expressly requires that the pensions paid to married retirees must be the "actuarial equivalent" of pensions paid to unmarried retirees. 29 U.S.C. § 1055(d); *see also infra* at 1-2 (string citation). Yet IBM continues to use an outdated mortality table for calculating spousal pensions—a table that is based on mortality experiences observed from 1965-1970. This illegal practice assumes that married participants will die well before their true expected mortality and has the effect of shortchanging IBM retirees every month in violation of ERISA's actuarial equivalence requirements. *See* FAC ¶¶ 4-14.

Contrary to Defendants' rhetoric, IBM is well aware that the mortality assumptions Plaintiffs challenge are wildly out of date. This is evident from IBM's use of annually-updated mortality tables for calculating the Company's minimum funding requirements for its pension. FAC ¶¶ 83-84. IBM likewise uses updated mortality tables for reporting its pension obligations to shareholders in its SEC filings. *Id.* ¶ 85-87. Most notably, IBM uses updated mortality assumptions when calculating spousal pensions for a ***separate*** group of younger retirees in the same pension plan as the Named Plaintiffs (generally those who joined IBM after 1999). *Id.* ¶¶ 15, 89. In other words, IBM shortchanges the most economically vulnerable retirees—those in their 60s, 70s and 80s—who joined IBM prior to 1999. Meanwhile, IBM tells these married retirees—falsely—that their spousal pensions are actuarially equivalent to the pensions paid to single retirees (those with no spousal payments after the retiree dies). *Id.* ¶¶ 93-106.

While Defendants note that this action is one of "a slate of recent lawsuits" filed against large companies that engage in such illegal conduct, they neglect to mention that in adjudicating those lawsuits, courts have repeatedly rejected the arguments that Defendants now seek to assert through the requested Rule 12 motion. *See Masten v. Metro. Life Ins. Co.*, 543 F. Supp. 3d 25, 36 (S.D.N.Y. 2021) (collecting cases); *accord Urlaub v. CITGO Petroleum Corp.*, No. 1:21-cv-04133, 2022 WL 523129 (N.D. Ill. Feb. 22, 2022); *Scott v. AT&T Inc.*, No. 3:20-cv-07094, ECF No. 45 (N.D. Cal. Apr. 8, 2022) (first order denying motion to dismiss); *Scott*, 2022 WL 2342645 (N.D. Cal. June 29, 2022) (second order denying motion to dismiss as to claims asserted on behalf of plan); *Herndon v. Huntington Ingalls Indus., Inc.*, No. 4:19-cv-52, 2020 WL 3053465 (E.D. Va. Feb. 20, 2020); *Cruz v. Raytheon Co.*, 435 F. Supp. 3d 350 (D. Mass. 2020); *Torres v. Am. Airlines, Inc.*, 416 F. Supp. 3d 640 (N.D. Tex. 2019); *Smith v. U.S. Bancorp*, No. 18-cv-3405, 2019 WL 2644204, at *1 (D. Minn. June 27, 2019).

Defendants' request to file a Rule 12 motion asserting the same shop-worn and meritless arguments should be denied. Plaintiffs briefly address below each of the arguments that Defendants propose to raise in their motion.

First, "[d]ismissal is not warranted based on Defendants' statute of limitations affirmative defense, as it is not clear from the face of the Complaint . . . that Plaintiffs' claims are time barred." *Moreno v. Deutsche Bank Americas Holding Corp.*, 2016 WL 5957307, at *5 (S.D.N.Y. Oct. 13, 2016). For example, Defendants assert that "the Plan disclosed the actuarial assumptions it used to each Plaintiff in pension benefits statements." ECF No. 28 at 2. This is both factually untrue and is not remotely addressed in the complaint's allegations; indeed Defendants do not (and cannot) cite a single paragraph of the FAC that mentions the purported benefits statements. ECF No. 28. They similarly rely on a factual assertion—that "Plaintiff Knight . . . began receiving benefits more than six years ago—which is nowhere in the complaint. *Id*. In any event, when Mr. Knight began *receiving* benefits is irrelevant for Courts I-III. To determine when the statute of limitations begins to run for analogous ERISA claims, the Second Circuit applied a "reasonableness approach" that looks to "when there is enough information available to the pensioner to assure that he knows or reasonably should know of" the claim. *Osberg v. Foot Locker, Inc.*, 862 F.3d 198, 206 (2d Cir. 2017) (applying *Novella v. Westchester Cty.*, 661 F.3d 128 (2d Cir. 2011)). It is not evident from the FAC when any of the named Plaintiffs' claims accrued. Even assuming *arguendo* that a two-year statutory limitations period set forth in the Plan,[1] or under state law were applicable to the statutory claims, it is not appropriate for the Court to make the fact-intensive determination of when Plaintiffs' claims accrued on the pleadings. For these reasons, the court in a similar ERISA case, *Urlaub v. CITGO Petroleum Corporation*, *sua sponte* denied defendants' Rule 12(b)(6) motion as to statute of limitations without even requiring plaintiffs to brief the issue. No. 1:21-cv-04133 (N.D. Ill. Oct. 8, 2021), ECF No. 35.

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[1] Defendants cite *Heimeshoff v. Hartford Life & Accident Ins. Co*., 571 U.S. 99 (2013), ECF 28 at 2, but that case involved the statute of limitations for a claim for benefits under ERISA § 502(a)(1)(B), not for ERISA statutory and breach of fiduciary duty claims brought under ERISA § 502(a)(2)-(3), 29 U.S.C. § 1132 (a)(2)-(3). *See Falberg v. Goldman Sachs Grp., Inc.*, 2020 WL 3893285 at *5-6 (S.D.N.Y. July 9, 2020) (distinguishing *Heimeshoff* and denying motion to dismiss as to statute of limitations).

Second, Defendants assert that some (but not all) of Plaintiffs' statutory claims lack merit. In other words, they concede that Count I plausibly states a claim for relief. With respect to Counts II and III, Defendants wrongly contend that no plaintiff alleges that they receive less than the actuarial equivalent value of their "age 65" benefit. Not so. The FAC clearly explains that Plaintiff Knight retired after reaching age 65, yet his spousal pension was less than actuarially equivalent to his individual benefit at age 65. FAC ¶¶ 75–77. The Court should therefore disallow this argument, which appears to overlook (or ignore) the FAC's allegations. Moreover, the legal premise of Defendants challenges to Counts II and III are incorrect and previously rejected. *E.g.*, *Urlaub*, 2022 WL 523129, at *7 (rejecting arguments that § 1053 only protects pension benefits at age 65 and that § 1054 permits unreasonable actuarial assumptions).

Third, there is no need (nor legal basis) for a pre-answer Rule 12(b)(6) motion with respect to Plaintiffs' breach of fiduciary duty claim against the Plan Administrator Committee. Contrary to Defendants' assertions, "Plaintiffs' allegations that Defendants administered a plan that did not meet ERISA's [actuarial equivalence] requirements state a viable claim for breach of fiduciary duty pursuant to 29 U.S.C. § 1104(a)." *Masten*, 543 F. Supp. 3d at 37. Whatever discretion Defendants may have had in setting up and administering the Plan does not afford them license to violate ERISA's statutory requirements. *See* 29 U.S.C. § 1104(a)(1)(D) (duty to follow plan documents only applies only "insofar as [they] are consistent with the provisions of [ERISA]"); Fifth *Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014); *Laurent v. PricewaterhouseCoopers LLP*, 794 F.3d 272, 281 (2d Cir. 2015). Moreover, the Committee indisputably has a fiduciary obligation *not* to falsely tell participants that JSA benefits are actuarially equivalent or appropriate when they were not. *See e.g.*, *Sullivan-Mestecky v. Verizon Commc'ns Inc.*, 961 F.3d 91, 104 (2d Cir. 2020); FAC ¶¶ 93-106. The Court certainly cannot conclude, on the face of the complaint, that IBM's representations in this regard were "accurate."

Finally, Defendants' exhaustion argument fails for the plain reason that exhaustion is not an element of the statutory ERISA and breach of fiduciary duty claims alleged in the FAC. *Errico v. Pfizer Consol. Pension Plan*, No. 19-cv-10211, 2021 WL 1565288 at *8 (S.D.N.Y. Apr. 20, 2021) ("Claims for statutory ERISA violations need not be exhausted administratively."); *Falberg*, 2020 WL 3893285 at *6 (S.D.N.Y. July 20, 2020) ("[C]ourts in this Circuit have repeatedly dispensed with any exhaustion requirement for statutory ERISA claims."). Defendants' failure to advise the Court of this authority is disappointing. This Court should follow the rulings of other courts which have declined to entertain exhaustion arguments raised in a Rule 12(b)(6) motion. *See Urlaub*, No. 1:21-cv-04133, ECF No. 35 (denying *sua sponte* Rule 12(b)(6) motion as to exhaustion before deadline for plaintiffs' opposition).

In short, Defendants' arguments are not only wrong as a matter of law, but also rely on facts that not in the pleadings and evidence not yet provided in discovery. Defendants are free to exchange this evidence, have it tested in discovery, and move for summary judgment if they wish. But this would not require—nor should it be delayed—by a meritless pre-answer Rule 12(b)(6) motion. Plaintiffs respectfully ask that Defendants' request be denied.

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Sincerely,

/s/ Michelle C. Yau
Michelle C. Yau

CC: All counsel of record