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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Timothy Scott, Patricia Gilchrist, Karen Fisher, Helen Maldonado-Valtierra, John Griffin, Kenneth Rhodes, Judy Dougherty, John Kelly, Richard Walshon, and Dan Koval, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

AT&T Inc., AT&T Services, Inc. and the AT&T Pension Benefit Plan,

Defendants.

Case No. 3:20-cv-07094-JD

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Declarations and proposed order filed concurrently]

Date: August 25, 2022
Time: 10:00 a.m.
Crtrm.: 11

Hon. James Donato

NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION

PLEASE TAKE NOTICE that on August 25, 2022, at 10:00 a.m., in Courtroom 11 of the United States District Court for the Northern District of California, before the Honorable Judge James Donato, Plaintiffs will and hereby do move for class certification.

Plaintiffs seek an order certifying the following classes pursuant to Rule 23 of the Federal Rules of Civil Procedure:

> **Retired Class:** All Plan participants and their beneficiaries who are receiving a Joint and Survivor Annuity that is less than the value of their Single Life Annuity when converted to a Joint and Survivor Annuity using the interest rates and mortality tables set forth in 26 U.S.C. § 417(e) with an annual stability period and November lookback month, excluding those participants and beneficiaries in the Mobility Program, the Mobility Bargained Program, and the DIRECTV Program.
>
> **Pre-Retirement Class:** All Plan participants and their beneficiaries who have not commenced receiving benefits, excluding those participants and beneficiaries in the Mobility Program, the Mobility Bargained Program, and the DIRECTV Program.

Plaintiffs also ask to be appointed as class representatives and to have Cohen Milstein Sellers & Toll PLLC, Stris & Maher LLP, and Feinberg, Jackson, Worthman & Wasow LLP appointed as class counsel for the proposed classes under Fed. R. Civ. P. 23(g).

The grounds for Plaintiffs' motion are set forth in the Memorandum of Points and Authorities below. In further support of the motion, Plaintiffs submit declarations from each of the proposed class representatives and their counsel, as well as certain exhibits attached thereto (including but not limited to expert reports from Plaintiffs' actuarial expert, Ian Altman).

Dated: June 6, 2022

Respectfully submitted,
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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This case arises from the systematic underpayment of pension benefits to married participants in the AT&T Pension Benefit Plan ("Plan"). In summary, Plaintiffs allege that AT&T Inc. (the plan sponsor) and AT&T Services, Inc. (the plan administrator) violate ERISA by paying joint and survivor annuity ("JSA") benefits to married participants that are worth less than single life annuities ("SLAs").

ERISA mandates that JSA benefits for married participants must be "actuarial[ly] equivalent" to a single life annuity. 29 U.S.C. § 1055(d)(1)(B), (2)(A)(ii). While it is permissible to pay lower monthly benefit amounts to married participants (because JSA benefits are payable over the lives of two persons instead of one), the total present value of a JSA must be equivalent to the present value of an SLA. This requires plan sponsors and administrators to convert SLA payments to JSA payments using a formula that employs accurate actuarial assumptions regarding mortality (how long payees will live) and interest rates (how much future benefits should be discounted).

However, Defendants have not done so, and indeed, do not even know what assumptions they adopted in determining JSA benefits. Instead, Defendants use a series of fixed percentage factors (0.80, 0.90, etc.) to convert SLA benefit amounts to JSA benefits, and they have not updated those factors for decades despite dramatic improvements in life expectancy in that time. AT&T's own actuaries admitted that "these factors were probably out of date" and recommended that AT&T "see if changes are warranted." Declaration of Rachana A. Pathak ("Pathak Decl.") Ex. 1 at ATT0020873. Yet, no action was taken. As a result, the playing field has been (and remains) systematically tilted against married participants, and tens of thousands of them have been underpaid relative to the amounts they would have received using current and accurate actuarial assumptions. Based on the class data produced by Defendants, Plaintiffs' actuarial expert (Ian Altman) calculates that 38,340 Plan participants receive JSA benefits that are less than the benefits they would have received if Defendants had used the regularly updated mortality and interest rate tables set forth in § 417(e) of the Internal Revenue Code to calculate benefits, and that the total underpayment exceeds $600 million.

Because AT&T uses fixed factors to determine benefit amounts for married JSA recipients irrespective of their individual situation, and the appropriateness of those factors lies at the heart of Plaintiffs' claims, this case is tailor-made for class adjudication. In one fell swoop this Court can determine what ERISA's "actuarial equivalence" obligation requires, whether AT&T has been and is delivering actuarially equivalent JSA benefits consistent with ERISA's requirements, and the appropriate yardstick for determining future benefits and measuring the amount of past underpayments. Indeed, the common issues are so clearly ripe for class certification that parties in other actuarial equivalence cases have ***stipulated*** to class certification. *See* Stip. Re. Class Certif. and Adjudication of Pl.'s Claims on a Class Basis, *Herndon v. Huntington Ingalls Indus., Inc.*, No. 4:19-cv-00052 (E.D. Va. Jan. 17, 2020), ECF No. 48; *see also Cruz v. Raytheon Co.*, 1:19-cv-11425-PBS (D. Mass. Feb. 12, 2021), ECF No. 77 (unopposed motion for preliminary approval of class settlement in actuarial equivalence case).

Although Defendants stubbornly resist class certification here, they have no reasonable basis for challenging the relevant Rule 23 criteria. As discussed below, in the present case, every one of the 38,340 members of the Retired Class has been underpaid, and no class members are receiving benefits greater than those they would receive using the actuarial assumptions that Plaintiffs' expert determined to be reasonable in accordance with § 417(e) of the Internal Revenue Code. There are accordingly no class conflicts of the type that have proven fatal for broader types of classes that include participants who benefit from the challenged conduct. Similarly, the Pre-Retirement Class is limited to persons who are not yet receiving benefits, and therefore seeks only injunctive and declaratory relief. This two-class structure is consistent with the court's preference in another recent ERISA case in this circuit where class certification was granted. *See Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 15-CV-1614, 2017 WL 2655678, at *9 (C.D. Cal. June 15, 2017). Accordingly, Plaintiffs respectfully request that the Court grant their motion for class certification.

BACKGROUND

I. Statutory Background

Because pension payments normally end once the worker dies, spouses (and their dependent children) may be left penniless after the working spouse dies. *Urlaub v. CITGO Petroleum Corp.*,

No. 21-C-4133, 2022 WL 523129, at *5 (N.D. Ill. Feb. 22, 2022). For this reason, ERISA requires companies that offer pensions to give (by default and unless specifically waived) all married workers a JSA that ensures the worker's surviving spouse will continue to receive pension payments, even after the worker's death. *See* 29 U.S.C. § 1055. Further, to ensure that married participants and their spouses are not shortchanged in the determination of their benefits, Congress required that JSAs must be at least "actuarial[ly] equivalent" to SLAs. *See* 29 U.S.C. § 1055(d)(1)(B), (d)(2)(A)(ii); *see also* 26 U.S.C. § 417 (imposing the same requirements under pension tax rules).

In other words, the present value of the JSA must be the same or higher than the present value of the SLA. "As the Supreme Court stated in *Boggs v. Boggs*, 520 U.S. 833, 843 (1997), '[t]he statutory object of the qualified joint and survivor annuity provisions, along with the rest of § 1055, is to ensure a stream of income to surviving spouses.' 'ERISA's solicitude for the economic security of surviving spouses would be undermined by allowing' employers to give a married worker a lower pension than an otherwise similarly situated unmarried worker.'" *Urlaub*, 2022 WL 523129, at *5.

II. Factual Background

A. The Parties and the Plan

The AT&T Pension Benefit Plan is an "employee pension benefit plan" subject to the requirements of ERISA. *See* Second Amended Complaint ("SAC") ¶ 62, ECF No. 88. As its name implies, the Plan is sponsored by AT&T, Inc. Pathak Decl. Ex. 2 ("Plan Document") § 3.1(88). The administrator of the Plan is AT&T Services, Inc. *Id.* § 3.1(87). As such, AT&T Services, Inc. is a "named fiduciary" of the Plan. *Id.* § 17.1.

The Plan covers employees in fourteen component programs. *Id.* § 1.4 & Supplement 1 (ATT0000108). With the exception of three component programs (the DirecTV Program, Mobility Bargained Program, and Mobility Program) that are not at issue in this action, the Plan uses fixed conversion factors to calculate JSA benefits. *See id.* §§ 3.1(54)-(56).

Each named Plaintiff participates in the Plan and is a member of one of the component programs that uses fixed conversion factors to calculate JSA benefits. *See* Plaintiff Declarations ¶ 2. (The "Plaintiff Declarations" are the Declarations of Timothy Scott, Patricia Gilchrist, Karen Fisher, Helen Maldonado-Valtierra, John Griffin, Kenneth Rhodes, Judy Dougherty, John Kelly, Richard

Walshon, and Dan Koval, submitted herewith.) Nine of the named Plaintiffs are currently receiving benefits, and the tenth (Karen Fisher) has yet to commence receiving benefits because she has not yet retired. *Id.* ¶ 3; Fisher Decl. ¶ 4. Based on the analysis of Plaintiffs' expert, all nine named Plaintiffs who have commenced receiving JSA benefits are receiving lower benefit amounts than they would receive if their JSA benefits were calculated using the statutorily reasonable mortality and interest rate assumptions in Internal Revenue Code § 417(e) with an annual stability period and November lookback month. *See* Pathak Decl. Ex. 3 ("Altman Report") at 19-20; Pathak Decl. Ex. 4 ("Altman Rebuttal") at 43-44; Pathak Decl. Ex. 5 ("Altman Supplemental Report") at 6. The referenced stability period and lookback month are consistent with the stability period and lookback month expressly specified in the Plan for those situations in which the Plan uses § 417(e) factors instead of fixed conversion factors. Plan Document at Supplement 9 § 2.4 (ATT0000214).[1]

B. AT&T's Failure to Provide Actuarially Equivalent JSA Benefits under the Plan

Plaintiffs allege that Defendants have flouted ERISA's actuarial equivalence requirement by using flawed conversion factors that fail to put JSA benefits on equal footing with SLA benefits. *See* SAC ¶¶ 6, 9, 74. Rather than using accurate actuarial assumptions to compute JSA benefits for married participants, the conversion factors set forth in the Plan are simply pre-set percentages by which a married retiree's SLA monthly payment will be reduced if the retiree receives a JSA. Plan Document §§ 3.1(54)-(56). For example, a JSA subject to a 0.80 conversion factor in the Plan means that a JSA recipient will only receive 80% of the monthly payment that is available for an SLA. *See id.* § 3.1(56)(a).[2]

AT&T has been using the same static conversion factors (or "reduction factors") for decades.

[1] The Plan provides that the term "Statutory Applicable Interest Rate: means the annual rate of interest specified in section 417(e)(3)(C) of the Code applied using the Plan Year as the stability period and the November preceding the first day of the stability period as the lookback period." *Id.*

[2] The conversion factor depends on the type of JSA a participant receives upon retirement. *See* SAC at ¶ 74 Table 1; Plan Document § 3.1(54)-(56) (setting forth the conversion factors for each JSA form). A "Joint and 100% Survivor Annuity" provides a surviving spouse with an annuity that is equal in value to the participant's annuity upon the death of the participant. A "Joint and 75% Survivor Annuity" provides a surviving spouse with an annuity that is three-fourths of the value of the participant's annuity upon the death of the participant. A "Joint and 50% Survivor Annuity" provides a surviving spouse with an annuity that is half the value of the participant's annuity upon the death of the participant.

Altman Report at 15; Pathak Decl. Ex. 6 ("Stone Dep.") at 134:8-18. Strikingly, AT&T cannot identify the process or basis for selecting these factors, and claims to have no documentation whatsoever about why or how these particular figures were chosen. Altman Report at 15; Stone Dep. at 79:2-80:1. To the extent they were not pulled out of thin air, they appear to be based on mortality and interest rate assumptions from the 1970s. Altman Report at 16; *see also* Pathak Decl. Ex. 1 at ATT0020873.

Not surprisingly, things have changed in the past half century. Most notably, post-retirement life expectancies have increased by approximately 30%. *See* Altman Report at 17. This increase in life expectancy has a significant impact on actuarial equivalence: as participants live longer, survivor benefits are delayed, and this means that JSA conversion factors must be higher in order to achieve actuarial equivalence. *Id.* at 18. AT&T's conversion factors are outdated and inaccurate and thus do not yield actuarially equivalent benefit amounts. *Id.* at 17-18. Indeed, AT&T's own actuaries in 2014 advised that "these factors were probably out of date," and recommended that AT&T "see if changes are warranted." Pathak Decl. Ex. 1 at ATT0020873. Yet Defendants have not updated their conversion factors or adopted any other method for calculating JSA benefits to reflect current and accurate actuarial assumptions. Altman Report at 15.[3]

Significantly, AT&T knows full well how to calculate JSAs that are, in fact, actuarially equivalent to SLAs, and uses accurate and up-to-date mortality tables in many other contexts:

- When disclosing the value of AT&T's pension obligations to shareholders, AT&T updates its assumed mortality rates on an annual basis to reflect current longevity rates. SAC ¶ 91; Pathak Decl. Ex. 7 ("Annual Report") at 77.
- When valuing its ERISA minimum pension funding obligation and reporting that obligation

[3] While the use of fixed conversion factors may not be per se unlawful, Defendants are under an obligation to periodically review those factors to ensure that they are accurate and ensure actuarial equivalence. Altman Rebuttal at 12. This is required under basic actuarial standards of practice ("ASOPs") published by the Actuarial Standards Board. *Id.* (citing, *inter alia*, ASOP No. 27 at § 3.13 ("Reviewing Assumptions Previously Selected by the Actuary – At each measurement date, the actuary should determine whether the economic assumptions selected by the actuary for a previous measurement date continue to be reasonable. … For each previously selected assumption that the actuary determines is no longer reasonable, the actuary should select a reasonable new assumption."); ASOP No. 35 at § 3.7 (setting same rule for "demographic assumptions selected by the actuary"); ASOP No. 35 at § 3.4.4 (stating that the actuary should "adjust mortality rates" to reflect "mortality improvement")).

to the government, AT&T also uses updated mortality tables. SAC ¶¶ 89-90; Altman Report at 23-24.

- When providing so called "relative value" disclosures to plan participants, AT&T uses the mortality table referenced in Internal Revenue Code § 417(e), which is updated annually by the IRS. Altman Report at 21.
- When calculating benefits for employees who take their pension as a lump sum, AT&T also uses the updated § 417(e) mortality table. Altman Report at 6, 23-24; Plan Document Supplement 9 at § 3.1 (ATT0000215).
- When converting certain cash balance pensions to JSAs, AT&T likewise uses the statutory mortality table in § 417(e). Altman Rebuttal at 42; Plan Document Supplement 9 at § 3.4(1) (ATT0000216).

There is no reason why AT&T could not use similarly updated mortality assumptions to determine JSA benefits. Altman Report at 25-26. Indeed, AT&T's actuaries specifically proposed adopting new JSA conversion factors calculated with precisely such updated and accurate § 417(e) assumptions. Altman Rebuttal at 42-43; Pathak Decl. Ex. 1 at ATT0020874; Pathak Decl. Ex. 8 (ATT0020891) at Spreadsheets B-C. But AT&T did not do so. On this record, the only explanation for Defendants' use of outdated conversion factors is that AT&T stood to pay significantly greater monies to JSA recipients if it updated its JSA benefit calculations. *See* Altman Rebuttal at 12; Pathak Decl. Ex. 8 (ATT0020891) at Spreadsheet D.

C. Injury to the Class

To determine the injury to retirees, Plaintiffs' actuarial expert compared the outdated conversion factors used by Defendants to calculate JSA benefits to what a reasonable conversion factor would have been using the statutory mortality and interest rate assumptions in § 417(e).[4] *See* Altman Report at 29-35; Altman Supplemental Report at 6-9. Mr. Altman used a computer algorithm to consistently apply his analysis to all retirees for whom Defendants provided data. *See* Altman Supplemental Report at 3. Based on his analysis, Mr. Altman concludes that 38,340 Plan participants

[4] Although they are not the only assumptions that could yield actuarially equivalent JSA benefits, Plaintiffs contend that the mortality and interest rate assumptions in 29 U.S.C. § 417(e) are the appropriate minimum yardstick of actuarial equivalence here because they are conservative assumptions that plan administrators are already required to use when calculating other types of pension benefits. *See* 29 C.F.R. § 4022.7(d) (requiring lump sum pension benefits to be calculated using assumptions in 29 U.S.C. § 417(e)).

suffered reduced benefits, and the resulting loss to these participants is at least $643,676,910. Altman Supplemental Report at 6, 8.

PLAINTIFFS' CLAIMS AND PROPOSED CLASSES

Each of Plaintiffs' claims in Counts I – IV centers on whether Defendants satisfy ERISA's actuarial equivalence requirement with respect to JSA benefit determinations. *See* SAC ¶¶ 115-21, 128-32, 139-45, 153-56.[5] Pursuant to Fed. R. Civ. P. 23, Plaintiffs assert these claims on behalf of similarly-situated Plan members who either (1) retired and are receiving JSA benefits that are lower than the benefits they would have received using reasonable and current actuarial assumptions under the relevant § 417(e) tables (the "Retired Class"); or (2) have not yet retired but are subject to Defendants' arbitrary and outdated conversion factors for calculating JSA benefits (the "Pre-Retirement Class"). *Id.* ¶ 104.

Specifically, for purposes of this motion, the named Plaintiffs who have retired seek to represent the following class of retired persons:

> **Retired Class:** All Plan participants and their beneficiaries who are receiving a Joint and Survivor Annuity that is less than the value of their Single Life Annuity when converted to a Joint and Survivor Annuity using the interest rates and mortality tables set forth in 26 U.S.C. § 417(e) with an annual stability period and November lookback month, excluding those participants and beneficiaries in the Mobility Program, the Mobility Bargained Program, and the DIRECTV Program.

Plaintiff Karen Fisher, who has not yet retired and has not yet begun receiving her retirement benefits, seeks to represent the following pre-retirement class:

> **Pre-Retirement Class:** All Plan participants and their beneficiaries who have not commenced receiving benefits, excluding those participants and beneficiaries in the Mobility Program, the Mobility Bargained Program, and the DIRECTV Program.

[5] Counts I and III allege non-compliance with the actuarial equivalence requirements in 29 U.S.C. §§ 1054(c)(3) and 1055(d) and related regulatory provisions; Count II alleges an illegal forfeiture under 29 U.S.C. § 1053(a) due to failure to provide actuarially equivalent benefits; and Count IV alleges breaches of fiduciary duties under 29 U.S.C. § 1104(a) based on the same failure.

As set forth below, both classes meet the requirements of Federal Rule of Civil Procedure 23(a) and can be certified under Rule 23(b)(1)(A), (b)(2) or (b)(3).

LEGAL STANDARD

"The standards governing class certification are well established, and the Court has written extensively about them." *Sapan v. Yelp, Inc.*, No. 17-CV-03240, 2021 WL 5302908, at *2 (N.D. Cal. Nov. 15, 2021) (Donato, J.). To be certified, a class must satisfy "all four requirements of Rule 23(a), and at least one of the subsections of Rule 23(b)." *Id.* (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013)). "The Court's class certification analysis 'must be rigorous and may entail some overlap with the merits of the plaintiff's underlying claim,' though the merits questions may be considered to the extent, and only to the extent, that they are 'relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.'" *Id.* (quoting *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465-66 (2013)). A motion for class certification "is decidedly not an alternative form of summary judgment or an occasion to hold a mini-trial on the merits." *Id.* (citing *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1053 (9th Cir. 2015)). "The decision of whether to certify a class is entrusted to the sound discretion of the district court." *Id.* (citing *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001)).

ARGUMENT

I. Both Classes Meet All Requirements of Rule 23(a).

A. The Classes Are Sufficiently Numerous.

Rule 23(a)(1) requires that a proposed class be "so numerous that joinder of all members is impracticable." *Id*. This requirement is easily satisfied here. Although "satisfaction of the numerosity requirement is not dependent upon any specific number of proposed class members, [] 'where the number of class members exceeds forty, and particularly where class members number in excess of one hundred, the numerosity requirement will generally be found to be met.'" *Noll v. eBay, Inc.*, 309 F.R.D. 593, 602 (N.D. Cal. 2015).

Mr. Altman has identified with specificity each of the 38,340 individual participants in the Retired Class (i.e., those who have already retired and are currently receiving benefits that are less than the actuarially equivalent value of the participant's SLA). Altman Supplemental Report at 6. In

addition, there are at least 260,000 active plan participants in the Pre-Retirement Class who have not yet commenced receiving benefits. *Id.* at 35. The 38,000+ Retired Class members and 260,000+ Pre-Retirement Class members clearly satisfy the numerosity requirement of Rule 23(a).

B. The Classes Satisfy the Commonality Requirement.

"The commonality requirement under Rule 23(a)(2) is satisfied when 'there are questions of law or fact common to the class.'" *Sapan*, 2021 WL 5302908, at *4. This requirement is construed "permissively." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *see also Ballas v. Anthem Blue Cross Life & Health Ins. Co.*, No. 12-CV-0604, 2013 WL 12119569, at *7 (C.D. Cal. April 29, 2013) (commonality is "construed liberally"). As the Ninth Circuit explained in *Hanlon*:

> All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.

Hanlon, 150 F.3d at 1019; *accord Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1041 (9th Cir. 2012).

"[A]ll that Rule 23(a)(2) requires is 'a single significant question of law or fact." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (quoting *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012)); *accord Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) ("even a single common question" satisfies commonality requirement). Thus, commonality is satisfied where, *inter alia*, there is a common question as to "whether a defendant's course of conduct is in its broad outlines actionable." *Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975).

A common question is one that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Alcantar*, 800 F.3d at 1052 (internal quotations and citations omitted). Here, the central question in this litigation is precisely such a common question: whether the reduction factors that AT&T uses to convert an SLA to a JSA violate ERISA's requirement that JSAs must be "the actuarial equivalent of a single annuity for the life of the participant." 29 U.S.C. §§ 1055(d)(1)(B), (d)(2)(A)(ii). Moreover, in answering this common question, the Court will be called upon to answer several related common questions. For instance, as a threshold matter, the Court must decide on all counts whether ERISA's actuarial equivalence obligation is a legal standard

subject to independent judicial determination, or whether a plan sponsor's definition of actuarial equivalence is entitled to deference. The Court will also need to determine for all class members whether ERISA requires pension benefits to be actuarially equivalent when actually paid (as Plaintiffs contend) or (as Defendants contend) only when hypothetically but not actually paid at the class member's normal retirement age (e.g., 65). Most critically, the Court must also decide whether the reduction factors that AT&T established decades ago comport with current and accurate actuarial assumptions, or are systematically skewed against married class members receiving JSAs because they fail to account for increases in life expectancy over time. Determining whether a policy or practice of the defendant is lawful is a classic common question that satisfies Rule 23(a)(2). *See J.L. v. Cissna*, No. 18-cv-04914, 2019 WL 415579, at *8 (N.D. Cal. Feb. 1, 2019); *Perez v. Wells Fargo Co.*, No. 14-cv-0989, 2016 WL 4180190, at *6 (N.D. Cal. Aug. 8, 2016); *Angell v. City of Oakland*, No. 13-cv-00190, 2015 WL 65501, at *5 (N.D. Cal. Jan. 5, 2015).

These common liability questions will apply to all four causes of action in the SAC, as each claim centers on whether Defendants' reduction factors satisfy ERISA's actuarial equivalence requirement. *See supra* at 7 & n.5.[6] Moreover, in determining the degree to which Retired Class members have been injured and in crafting an appropriate remedy for Defendants' ERISA violations, the Court will be presented with other common questions regarding whether the statutory criteria in § 417(e) are consistent with ERISA's actuarial equivalence standard and provide a yardstick against which AT&T's reduction factors can be measured. Accordingly, the commonality requirement is easily satisfied in this case.

The fact that the Plan encompasses multiple component programs does not alter the existence of these common questions. There is a single AT&T Benefit Pension Plan—the Plan—and the

[6] There are several additional common questions that apply to specific claims. For example, with respect to Counts I and III, the Court will need to determine whether § 1054 imposes the same actuarial equivalence requirement as § 1055. With regard to Count II, the Court will need to decide whether failure to satisfy ERISA's actuarial equivalence requirement gives rise to a violation of § 1053 because it results in an illegal forfeiture of vested pension benefits. Finally, with regard to Count IV, the Court will need to determine whether AT&T Services prudently monitored whether the Plan's reduction factors provided for actuarially equivalent benefits, and whether it acted solely in the interest of Plan participants or improperly considered the potential cost to AT&T, Inc. of updating those factors.

components of the Plan at issue in this case all violate ERISA's actuarial equivalence requirement in an identical fashion by using outdated and inaccurate reduction factors for converting SLAs to JSAs. The three component programs that do not utilize fixed conversion factors are not at issue in this litigation, *see supra* at 3, and the eleven remaining component programs operate in effectively the same manner as one another. Similarly, although the different component programs sometimes use slightly different conversion factors (e.g., one program might use a .82 reduction and another a .85 reduction), this is also true within component programs (e.g., the conversion factor for a participant receiving a 50% JSA might be .90, and .85 if the participant were receiving a 75% JSA), and the methodology underlying all the factors is the same. None of Plaintiffs' claims turns on individualized practices unique to a particular program; to the contrary, all eleven challenged programs utilize the same illegal practices to calculate JSA benefits. Accordingly, any differences relating to the underlying component programs are immaterial and do not defeat commonality. *See, e.g.*, *Allen v. Similasan Corp.*, No. 12-cv-00376, 2017 WL 1346404, at *3 (S.D. Cal. April 12, 2017) (certifying class across multiple products despite differences in labeling because labels all related to same general topic of product efficacy); *National Seating & Mobility, Inc. v. Parry*, No. 10-02782, 2012 WL 2911923, at *8 (N.D. Cal. July 16, 2012) ("[M]inor differences in the percentage of commissions owed to class members . . . . does not defeat class action treatment."); *see also Bell v. PNC Bank Nat. Ass'n*, 800 F.3d 360, 379 (7th Cir. 2015) ("Rule 23(b) requires only common evidence and common methodology, not common results."); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 818-22 (7th Cir. 2012) (reversing district court's failure to certify class because commonality existed despite different figures applicable to class members since common methodology applied by expert provided answer for each class member). Indeed, even if the component programs were entirely separate plans (which they are not), that would present no impediment to certification.[7]

[7] *See, e.g.*, *Wit v. United Behav. Health*, 317 F.R.D. 106, 128 (N.D. Cal. 2016) (certifying class challenging practice of thousands of different plans); *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993), *abrogated on other grounds by Dukes*, 564 U.S. at 2541 (finding, in case alleging employer had violated ERISA's nonforfeiture provisions by incorrectly estimating their Social Security benefits, that "[Plaintiff] has met the commonality requirement, despite the fact that

C. The Class Representatives' Claims Are Typical of Those of the Entire Class.

The typicality requirement "tend[s] to merge" with the commonality requirement. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). "Like commonality, typicality is a 'permissive' standard and 'the focus should be on the defendants' conduct and plaintiff's legal theory, not the injury caused to the plaintiff.'" *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 110 (N.D. Cal. 2008) (quoting *Simpson v. Fireman's Fund Ins. Co.*, 231 F.R.D. 391, 396 (N.D. Cal. 2005)). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *DZ Rsrv. v. Meta Platforms, Inc.*, No. 18-cv-04978, 2022 WL 912890, at *3 (N.D. Cal. Mar. 29, 2002) (Donato, J.) (quoting *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010)).

The named plaintiffs' claims need only be "reasonably coextensive with those of absent class members; they need not be substantially identical." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (internal citations and quotations omitted). Thus, typicality is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendants' liability." *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (citations omitted).

Here, the Class Representatives' claims are typical of the class members they seek to represent. First, the Retired Class Representatives' claims "arise from the same course of events" as those of the Retired Class. The Class Representatives and Class members alike are all currently receiving pensions in the form of a JSA that was calculated using outdated reduction factors that are inconsistent with current and accurate actuarial assumptions. In addition, each Class Representative and Class member makes the same "legal arguments to prove the defendants' liability." *Id.* Each

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four different pension plans are involved"); *Wachtel v. Guardian Life Ins. Co.*, 223 F.R.D. 196, 213 (D.N.J. 2004), *vacated and remanded on other grounds sub nom. Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179 (3d Cir. 2006) ("The existence of different plans does not outweigh the predominance of the common questions."); *cf Meek v. SkyWest, Inc.*, 562 F. Supp. 3d 488, 493 (N.D. Cal. 2021) (holding that plaintiffs' claims were typical of entire class that included "12 formal job classifications" even though Plaintiffs were only employed in one of those job classifications) (Donato, J.).

alleges that the benefits they are receiving are less than the benefits they are entitled to under ERISA's actuarial equivalence requirement, that AT&T illegally caused them to forfeit benefits, and that AT&T's conduct was a breach of its fiduciary duties.

The same arguments apply to the Pre-Retirement Class. Karen Fisher, like all other members of the Pre-Retirement Class, has not yet begun receiving the pension benefits she is entitled to under the Plan. Fisher Decl. ¶ 4. And, like all Pre-Retirement Class members, under the AT&T Plan, Mrs. Fisher cannot choose to receive her pension benefits in the form of a JSA without having her SLA converted to a JSA using outdated and inaccurate fixed conversion factors. *Id*. Thus, like the Retired Class, the Pre-Retirement Class Representative and Class members' claims are all based on the same factual circumstances and legal theories.[8]

D. The Class Representatives and Class Counsel Will Adequately Represent the Interests of Both Classes.

The fourth and final 23(a) requirement is adequacy of representation, which requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In assessing adequacy of representation, courts ask two questions: "(1) Do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003); *DZ Rsrv.*, 2022 WL 912890, at *4.

1. The Class Representatives and Class Counsel Have Vigorously Prosecuted This Action on Behalf of Both Classes and Will Continue to Do So.

The second of the two operative questions is easily resolved. The proposed Class Representatives have actively participated in this litigation to protect the interests of their fellow Class members. Each reviewed the complaints filed in this case, knows the theory of the case and

[8] That a class representative might suffer more (or less) injury than other class members is no barrier to certification; "at [the] class certification stage, [the] court's role is to 'discern only whether plaintiffs have advanced a *plausible* methodology to demonstrate that injury can be proven on a class-wide basis.'" *Ang v. Bimbo Bakeries USA, Inc.*, No. 13-cv-01196, 2018 WL 4181896, at *12 (N.D. Cal. Aug. 31, 2018) (quoting *Cal. v. Infineon Techs. AG*, No. 06-4333, 2008 WL 4155665, at *9 (N.D. Cal. Sept. 5, 2008)).

understands their role as class representative, gathered documents to respond to Defendants' document requests, and sat for a deposition. Plaintiff Declarations ¶¶ 4-8 & Ex. 1; Pathak Decl. Ex. 9 (deposition transcript excerpts). This involvement and understanding of the case is more than sufficient to serve as a class representative. *See In re Facebook Biometric Info. Priv. Litig.*, 326 F.R.D. 535, 543 (N.D. Cal. 2018), *aff'd sub nom. Patel v. Facebook, Inc.*, 932 F.3d 1264 (9th Cir. 2019) ("The deposition testimony by the named plaintiffs shows a perfectly adequate understanding of the case[.]"). "Courts have approved class representatives in other [ERISA] class actions based on similar evidence." *Urakhchin*, 2017 WL 2655678, at *6 (citing *In re Northrop Grumman Corp., ERISA Litig.*, No. 06-CV-06213, 2011 WL 3505264, at *14-15 (C.D. Cal. Mar. 29, 2011); *Tibble v. Edison Int'l*, No. 07-CV-5359, 2009 WL 6764541, at *6 (C.D. Cal. June 30, 2009)).

Likewise, Plaintiffs' counsel easily satisfy the requirements of Federal Rule of Civil Procedure 23(g), which sets forth the standards and requirements for appointing class counsel. Plaintiffs propose to have the class represented by attorneys from the law firms of Cohen Milstein Sellers & Toll PLLC, Stris & Maher LLP, and Feinberg, Jackson, Worthman & Wasow, LLP. Plaintiffs' counsel have extensive experience handling class actions around the country and have deep knowledge of the statutory and regulatory landscape of ERISA. Declaration of Michelle Yau in Support of Plaintiffs' Motion for Class Certification (outlining Cohen Milstein Sellers & Toll PLLC's qualifications to serve as co-class counsel); Declaration of Peter K. Stris in Support of Plaintiffs' Motion for Class Certification (outlining Stris & Maher LLP's qualifications to serve as co-class counsel); Declaration of Nina Wasow in Support of Plaintiffs' Motion for Class Certification (outlining Feinberg, Jackson, Worthman & Wasow, LLP's qualifications to serve as co-class counsel). Plaintiffs' counsel have vigorously prosecuted this action on behalf of the proposed classes thus far, and will continue to do so through the rest of this litigation.

2. No Conflict Prevents Certification.

Class certification in some actuarial equivalence cases has faltered due to purported conflicts between class members as defined in those other cases—because some class members were better off under their plan's existing assumptions, the argument went, the interests of the class members were fundamentally at odds and no class could be certified. *See Torres v. American Airlines*, No. 18-

CV-0983, 2020 WL 3485580, at *11-12 (N.D. Tex. May 22, 2020); *Thorne v. U.S. Bancorp*, No. 18-CV-3405, 2021 WL 1977126 (D. Minn. May 18, 2021). Defendants may perhaps make the same argument here, but it is inapt.

(a) For one thing, this argument is contrary to case law. "Courts generally reject the argument that an intra-class conflict exists when divergent theories of liability would benefit different groups within the class," including where "different class members desir[e] different methods of calculating damages." Newberg on Class Actions § 3:62 (5th ed.); *see also Blackie*, 524 F.2d at 909 (explaining "courts have generally declined to consider conflicts, particularly as they regard [the method of calculating] damages, sufficient to defeat class action status"); *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 768 (8th Cir. 2020) (in case challenging use of different mortality tables, explaining "even if there are slightly divergent theories that maximize damages for certain members of the class, 'this slight divergence is greatly outweighed by shared interests in establishing [defendant's] liability'"); *Bally v. State Farm Life Ins. Co.*, 335 F.R.D. 288, 303 (N.D. Cal. 2020) (finding no intra-class conflict where actuarial model might benefit some class members more than others depending on mortality rates used and, to the extent plaintiff's expert's actuarial model indicates "some class members are found to have suffered no damages at all," "that justifies excluding said members from the Class, not refusing class certification *ab initio*"); *Alexander v. Azar*, 396 F. Supp. 3d 242, 249 (D. Conn. 2019) (possibility that class members' interests "may diverge, particularly at the remedy stage" was not a "fundamental" conflict requiring subclassing or denial of class certification). Defendants thus cannot defeat certification by arguing that some number of class members might be better or worse off under slightly different actuarial assumptions.

(b) In any event, no "fundamental conflict" (*Torres*, 2020 WL 3485580, at *12) exists here because no class member will be harmed by Plaintiffs' requested relief. Unlike in *Torres* and *Thorne*, Plaintiffs' proposed Retired Class does not include all Plan participants. Rather, the Retired Class is defined with reference to an objective and conservative benchmark of actuarial equivalence, and includes *only* those Plan participants who are not currently receiving JSA benefits that are actuarially equivalent to SLA benefits when calculated under § 417(e) with the Plan's preferred annual stability period and November lookback. There are a limited number of other Plan participants who, by

happenstance, may already receive benefits that are greater than or equal to SLA benefits as compared to the conservative § 417(e) benchmark. But these Plan participants are not members of the class. That distinction in class definition makes this case fundamentally different from the proposed classes in *Torres* and *Thorne*.

To be clear, the Court need not make a legal determination as to Defendants' liability under ERISA's actuarial equivalence requirement before identifying the members of the Retired Class.[9] Plaintiffs' proposed class definition properly presents "a reasonably close fit between the class definition and the chosen theory of liability." *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 n.7 (9th Cir. 2016).

(c) Because Plaintiffs' proposed Retired Class is limited to persons who are receiving lower benefits under the Plan than they would receive using reasonable and current actuarial assumptions under the relevant § 417(e) factors, Defendants may argue that there is a "conflict" between the class, on the one hand, and a limited number of individuals *outside* the class who may happen to currently receive slightly higher benefits under the Plan's outdated conversion factors. However, any such argument would fail, as Rule 23's adequacy requirement focuses on whether there are *intra*-class conflicts between the named Plaintiffs and the class members they seek to represent, not whether there are extra-class conflicts between the named Plaintiffs and persons *outside* of the class who are not part of the case. It is black letter law that conflicts between class members and non-class members are irrelevant to class certification. *See Dirks v. Clayton Brokerage Co. of St. Louis Inc.*, 105 F.R.D. 125, 134-35 (D. Minn. 1985) ("[T]he issue . . . is not whether a conflict exists between [the class representative] and nonclass members, but whether [the class representative] has conflicting interests with the other members of the class.") (certifying class); *City of Huntington Park v. Landscape Structures*, No. 14-00419, 2015 WL 3948411, at *10 (C.D. Cal. June 27, 2015) ("Neither of these alleged conflicts bar class certification because they are not conflicts between

[9] Although ascertainability "is not a requirement of certification," *Bumpus v. Realogy Brokerage Grp. LLC*, No. 19-CV-03309, 2022 WL 867256, at *4 (N.D. Cal. Mar. 23, 2022) (Donato, J.), the Appendix to the Altman Supplemental Report has already identified all Retired Class members. Altman Supplemental Report at 6.

proposed class members. Defendants have not provided any authority, binding or otherwise that would require the Court to deny class certification because of conflicts between the proposed class as a whole and other non-class member plaintiffs.") (certifying class); *Custom Hair Designs by Sandy v. Cent. Payment Co., LLC*, 984 F.3d 595, 604-05 (8th Cir. 2020) (certifying ERISA class). Classes are routinely and properly certified to include employees harmed by illegal conduct, even if some other employees might benefit from that illegality.[10] So too here.

II. Class Certification Is Appropriate Under All Three Subsections of Rule 23(b).

In addition to meeting the requirements of Rule 23(a), Plaintiffs also must "show that the action is maintainable under" at least one of the subsections of Rule 23(b). *Amchem Prod. Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Here, certification is appropriate under not only one subsection, but all three.[11]

A. Class Certification Is Appropriate Under Rule 23(b)(1).

"Most ERISA class action cases are certified under Rule 23(b)(1)." *Kanawi*, 254 F.R.D. at

[10] *See, e.g.*, *Berry v. Wells Fargo & Co*., 2018 WL 9989754, at *10 (D.S.C. Oct. 9, 2018) (certifying ERISA class of "participants who lost retirement benefits" despite fact that other participants in the Plan not included in the class definition might benefit from the challenged practice and holding that Rule 23 does not require class representatives "to represent the interest of [benefitting participants] since they are outside the Class"); *Ruggles v. WellPoint, Inc.*, 272 F.R.D. 320, 338 (N.D.N.Y. 2011) ("Adequacy is not undermined where the opposed class members' position requires continuation of an allegedly unlawful practice."); *Alaniz v. Cal. Processors, Inc*., 73 F.R.D. 269, 275-77, 286 (N.D. Cal. 1976) (certifying class of minority and female employees even though requested relief might harm non-class male and white employees); *In re Iomega Securities Litigation*, 1987 WL 43391, at *2, 9 (D. Conn. Oct 1, 1987) (certifying class even though the $6 million settlement would be paid by the "non-class shareholders" excluded from the class definition); *accord Franks v. Bowman Transp. Co*., 424 U.S. 747, 774 (1976) ("[C]onflicting interests of other employees will of course always be present in instances where some scarce employment benefit is distributed among employees . . . . [W]e find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected.").

[11] If the requirements of more than one provision are satisfied, the court may certify under each subsection that is satisfied. 2 Newberg on Class Actions § 4:1 (5th ed.) (explaining "a single case may be certified under more than one part of" Rule 23(b) and different classes or claims for relief may be certified under different subsections of 23(b)). While certification is clearly appropriate under all three subsections, Rule 23(b)(3) is "[f]ramed for situations in which 'class-action treatment is not as clearly called for' as it is in Rule 23(b)(1) and (b)(2) situations[.]" *Amchem Prod. Inc.*, 521 U.S. at 615 (quoting advisory committee notes). Accordingly, Plaintiffs propose that certification is most appropriate under 23(b)(1) or (b)(2).

111. Indeed, "ERISA fiduciary litigation . . . presents a paradigmatic example of a (b)(1) class." *Id.* at 112 (internal brackets and ellipses omitted); *see also Tussey v. ABB, Inc.*, No. 06-04305, 2007 WL 4289694, at *8 (W.D. Mo. Dec. 3, 2007) ("Alleged breaches by a fiduciary to a large class of beneficiaries present an especially appropriate instance for treatment under Rule 23(b)(1).").

Class certification is appropriate under (b)(1) where "prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class[.]" Fed. R. Civ. P. 23(b)(1)(A). That is certainly true here. Absent certification of the proposed classes, tens of thousands of potential plaintiffs could individually file suit challenging Defendants' use of the reduction factors to calculate their JSA benefits. These separate actions "would create a risk of 'inconsistent and varying' adjudications" regarding, *inter alia*, how Defendants should calculate JSA benefits for Plan participants. Fed. R. Civ. P. 23(b)(1). This risk of multiple, inconsistent orders if class members were to proceed individually supports certification of both classes under 23(b)(1)(A). *See, e.g.*, *Norris v. Mazzola*, No. 15-CV-04962, 2017 WL 6493091, at *5 (N.D. Cal. Dec. 19, 2017) (outlining numerous different and conflicting orders ERISA plan administrator might receive if multiple suits were permitted); *accord Shanehchian v. Macy's, Inc.*, No. 07-CV-00828, 2011 WL 883659, at *9 (S.D. Ohio Mar. 10, 2011) ("If liability is found in one court but not in another, Defendants would be left in limbo, having been vindicated with respect to their duties to the Plans in one court but subject to judgment that would vitiate that vindication in another, thus making compliance impossible."); *Harris v. Koenig*, 271 F.R.D. 383, 394 (D.D.C. 2010) ("[T]his Court could enter a ruling to restore Plan assets, remove Plan fiduciaries, or reform Plan investigative practices and monitoring practices that would directly contradict another Court's ruling on the very same issues. In that event, Defendants would be faced with incompatible standards of conduct with respect to their duties and obligations toward the Plan.").

Defendants may perhaps "oppose[] [Plaintiffs'] arguments for certification under Rule 23(b)(1) by attempting to characterize [their] suit as one for money damages, as opposed to a suit for injunctive and declaratory relief," as they have in other cases. *See Barnes v. AT & T Pension Benefit Plan-Nonbargained Program*, 270 F.R.D. 488, 496 (N.D. Cal. 2010), *modified sub nom.*

Barnes v. AT & T Pension Ben. Plan-NonBargained Program, 273 F.R.D. 562 (N.D. Cal. 2011). However, just as in *Barnes* (where the class was certified), so too the primary relief sought in the present case is declaratory or injunctive and "any monetary relief that would flow to the class members would be ancillary to injunctive relief sought." *Id.* Plaintiffs in both classes seek a declaration that Defendants' use of outdated and inaccurate conversion factors to calculate JSA benefits violates ERISA and an injunction to prevent their application to reduce benefits to class members. *See infra* at Part II.B. This relief is of critical importance because it affects ongoing benefit payments for members of the Retired Class and future payments for members of the Pre-Retirement Class. Thus, the suit cannot be characterized as one principally for money damages. *See McCluskey v. Trustees of Red Dot Corp. Emp. Stock Ownership Plan & Tr.*, 268 F.R.D. 670, 678 (W.D. Wash. 2010) (holding that, where the primary relief sought by plaintiffs was a declaration from the court regarding the permissible application of the plan under ERISA, the suit was not primarily for money damages and was therefore certifiable under Rule 23(b)(1)). That the members of the Retired Class also want Defendants to recalculate and repay past benefits due does not foreclose certification under Rule 23(b)(1). Numerous "[o]ther courts have certified 23(b)(1) classes in similar cases where the plaintiffs sought monetary relief [.]" *Urakhchin*, 2017 WL 2655678, at *8 (citing *In re Northrop Grumman*, 2011 WL 3505264, at *11, *18; *Kanawi*, 254 F.R.D. at 109, 111).

B. Class Certification Is Appropriate Under Rule 23(b)(2).

Rule 23(b)(2) independently allows a class action to be maintained where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The Court may additionally certify both the Pre-Retirement Class and the Retired Class under this subdivision.

The Ninth Circuit has made clear that "'it is sufficient' to meet the requirements of Rule 23(b)(2) that 'class members complain of a pattern or practice that is generally applicable to the class as a whole.'" *Rodriguez*, 591 F.3d at 1125. That is exactly what Plaintiffs challenge here: Defendants' practice, common to all members of both classes, of using outdated and inaccurate conversion factors to calculate JSA benefits.

Further, to remedy this unlawful practice, Plaintiffs seek declaratory and injunctive relief that would provide relief to the classes as a whole. Specifically, Plaintiffs seek (among other things) an order (1) declaring Defendants' sole reliance on the existing conversion factors unlawful under ERISA, (2) prohibiting Defendants from using only those conversion factors to calculate JSA benefits for class members in the future, and (3) requiring Defendants to calculate JSA benefits using formulas that render JSA benefits that are at least actuarially equivalent to the SLA benefits that participants would receive as a default if they were single. Plaintiffs advocate for the actuarial formula and assumptions outlined in § 417(e), but it is not necessary to determine whether Plaintiffs are right or wrong on this point at the class certification stage. Rather, at this juncture, Plaintiffs need only "describe[] the general contours of an injunction that would provide relief to the whole class, that is more specific than a bare injunction to follow the law, and that can be given greater substance and specificity at an appropriate stage in the litigation through fact-finding, negotiations, and expert testimony." *B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 972 (9th Cir. 2019) (affirming certification of (b)(2) class seeking injunction to enjoin state agency's actions to abate unconstitutional policies) (citation omitted)). Plaintiffs have more than met this standard.

In addition to the declaratory and injunctive relief described above, Plaintiffs seek recalculation and repayment of past pension benefits due under the law. Numerous courts have determined that requests for recalculation and repayment of benefits due under ERISA are requests for injunctive, rather than monetary, relief. *See Buus v. WAMU Pension Plan*, 251 F.R.D. 578, 588 (W.D. Wash. 2008) (certifying 23(b)(2) class where plaintiffs sought "equitable relief in the form of an injunction prohibiting enforcement of the Plan's unlawful provisions" and "recalculation of the accrued benefits of class members based upon the old, pre cash balance formula for calculating benefits"); *Richards v. FleetBoston Fin. Corp.*, 235 F.R.D. 165, 174 (D. Conn. 2006) ("For purposes of subsection (b)(2), an injunction requiring the payment of monies unlawfully withheld in the past may be considered injunctive relief.") (certifying (b)(2) class seeking recalculation and repayment of benefits due).

Moreover, even if the Retired Class's request to have their pension benefits recalculated and repaid were found to be "monetary" rather than injunctive, (b)(2) certification would still be

appropriate because that is not the primary relief Plaintiffs seek. *See Zinser*, 253 F.3d at 1195 ("Class certification under Rule 23(b)(2) is appropriate … where the *primary relief* sought is declaratory or injunctive.") (emphasis added). As in *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir. 1986), Plaintiffs' request for monetary relief "is merely incidental to their primary claim for injunctive relief to prohibit the use of [outdated] mortality tables" in calculating pension benefits. *See also Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 763 (7th Cir. 2003) (affirming certification of class under (b)(2) and explaining primary relief sought was "declaratory" because plaintiffs sought "a declaration that [Defendant's] method of computing the [ERISA benefits] to which withdrawing employees are entitled is unlawful," even though the "declaration sought" was "a prelude to a request for damages"); *In re Citigroup Pension Plan ERISA Litig.*, 241 F.R.D. 172, 181 (S.D.N.Y. 2006) (certifying (b)(2) class seeking "reformation of the Plan to comply with ERISA[]" and repayment of "monies prescribed by the recalculation of benefits under a statutorily compliant formula," noting that damages requested were secondary because plan participants would still bring suit to enjoin illegal activity even if "precluded from monetary recovery"). Such relief is ancillary to the primary declaratory and injunctive relief outlined above. *See supra* at 19-20. Thus, certification under Rule 23(b)(2) is appropriate.

C. Class Certification Is Appropriate Under Rule 23(b)(3).

Rule 23(b)(3) allows a class action to be maintained where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Both requirements are satisfied under this subdivision of Rule 23 as well.

1. Common Questions Predominate.

The predominance inquiry focuses on whether common questions present a "significant aspect of the case" that "can be resolved for all members of the class in a single adjudication." *Hanlon*, 150 F.3d at 1022. This criterion is "more demanding" than the commonality requirement of Rule 23(a)(2), *Comcast*, 569 U.S. at 35, but is closely related. *See Brickman v. Fitbit, Inc.*, No. 15-CV-02077, 2017 WL 5569827, at *5 (N.D. Cal. Nov. 20, 2017) (Donato, J.) ("Determining where

Rule 23(a)(2) ends and Rule 23(b)(3) begins is no easy task."). Accordingly, commonality and predominance can be, and often are, "assessed in tandem." *McCarty v. SMG Holdings, I, LLC*, No. 17-CV-06232, 2022 WL 913092, at *3 (N.D. Cal. Mar. 29, 2022) (Donato, J.)

To satisfy Rule 23(b)(3), each element of a claim need not be susceptible to class-wide proof. *DZ Rsrv.*, 2022 WL 912890, at *5 (citing *Amgen*, 568 U.S. at 468-69). Rule 23(b)(3) permits certification when "one or more of the central issues in the action are common to the class and can be said to predominate, . . . even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). In this regard, the "important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class." *DZ Rsrv.*, 2022 WL 912890, at *5 (quoting *Ruiz Torres*, 835 F.3d at 1134).

Here, the central inquiry is whether the reduction factors that Defendants use to convert an SLA to a JSA in fact provide for actuarially equivalent benefits. This common question—and the others identified in Part I.B, *supra*—will predominate over any individualized defenses or arguments that Defendants might raise. Accordingly, the predominance requirement is satisfied. *See DZ Rsrv.*, 2022 WL 912890, at *6 (finding predominance where "the main liability question is the same for all class members").

"Plaintiffs have also established that proof of injury is susceptible to common evidence." *See id.* at *7. Although Defendants may quibble with the analysis of Plaintiffs' expert for the Retired Class, any such criticisms regarding the calculation of past due benefits are to be resolved at trial and "cannot defeat [class] certification." *See Just Film*, 847 F.3d at 1120. At this stage, Plaintiffs need only come forward with a methodology showing that past due benefits "'are capable of measurement on a classwide basis,' in the sense that the whole class suffered damages traceable to the same injurious course of conduct underlying the plaintiffs' legal theory." *Id.* (citing *Comcast*, 569 U.S. at 34-38). Plaintiffs have done so here.

Plaintiffs' expert presents a standard and conservative benchmark to calculate the amount of benefits that members of the Retired Class should have received from Defendants. Specifically, he

calculates the underpayment to each Retired Class member by measuring the difference between what Retired Class Members receive under the Plan's fixed conversion factors versus what they should have received using the statutorily-acceptable actuarial assumptions in § 417(e). This methodology allows Plaintiffs to calculate past due benefits for each individual member of the Retired Class, as well as in the aggregate, and is more than sufficient to satisfy Plaintiffs' burden to present a class-wide model of injury that reflects the claims and evidence in the case.

2. Class Adjudication is the Superior Method of Resolving This Dispute.

"The final certification question" under 23(b)(3) "is whether the ends of justice and efficiency are served by certification" in light of the alternative "ways of adjudicating the controversy, which in this case would mean individual actions by each putative class member." *Bumpus*, 2022 WL 867256, at *9. As this Court recently explained in *Bumpus*:

> There can be no doubt here that a class is the superior method of handling these [ERISA] claims. The recovery for each violation is relatively small, and it is not likely for class members to recover large amounts individually if they prevailed. No reasonable person is likely to pursue these claims on their own, especially given the cost and other resources required to litigate against a company like [AT&T], which has already retained . . . experts and shown that it is committed to strongly defending this case. This all "vividly points to the need for class treatment."

Id. (quoting *Just Film*, 847 F.3d at 1123). All of these reasons apply here with equal force. As in *Bumpus*, class certification under 23(b)(3) is necessary in this case to efficiently resolve this controversy and serve the ends of justice.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Class Certification.

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Respectfully submitted,
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