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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' SUPPLEMENTAL BRIEF PURSUANT TO COURT'S ORDER

Action Filed: October 12, 2020
Hearing Held: May 25, 2023
Supplemental Briefs Ordered: Sept. 26, 2023

Hon. James Donato

Plaintiffs submit the following responses to the questions posed in the Court's Order Re: Supplemental Briefing (ECF 190).

Question 1. The Plan's conversion factors for JSAs are set forth in Sections 3.1(54)-(56) of the Plan. *See* ECF 119-7, at ATT0000028-35. As shown in the summary chart below, these conversion factors fall into three main categories: (1) a default factor for most programs, (2) a slightly higher alternate factor for the Legacy Bargained and Legacy Management Programs, and (3) an "Actuarial Equivalent" ("AE") factor for the Mobility, Mobility Bargained, and DirecTV programs (which are not at-issue and are excluded from the class definition, *see* ECF 179, at 2):

Component Program	100% JSA	75% JSA	50% JSA
Bargained Cash Balance	.80	.85	.90
Bargained Cash Balance #2	.80	.85	.90
Management Cash Balance	.80	.85	.90
Nonbargained	.80	.85	.90
Southeast Management	.80	.85	.90
Southwest	.80	.85	.90
West	.80	.85	.90
East	.80	.85 subject to § 3.1(55)(g)	.90
Midwest	.80	.85 subject to § 3.1(55)(d)(ii)	.90 subject to § 3.1(54)(d)(ii)
Southeast	.80	.85 subject to § 3.1(55)(h)(ii)	.90 subject to § 3.1(54)(f)(ii)
AT&T Legacy Bargained	.85	.885	.92
AT&T Legacy Management	.85 subject to § 3.1(56)(b)(ii)	.885	.92
Mobility	.80	AE	AE or "greater of" .90 or AE
Mobility Bargained	AE or "greater of" .80 or AE	AE or "greater of" .85 or AE	AE or "greater of" .90 or AE
DirecTV	AE	AE	AE

For the 12 programs at issue, the Plan therefore generally applies the same tabular factors to each participant in a particular program who selects the same type of JSA, and does not make individual benefit calculations based on what is actuarially equivalent. To the extent that there is any variation within an at-issue program, it only operates to ***reduce*** the applicable conversion factors further.[1]

[1] East Program participants who select a 75% JSA may receive a ***lower*** .78 factor if their benefits arise under the former "SNET Pension Plan." *See* ECF 119-7, § 3.1(55)(g). Midwest and Southeast Program participants who elect a 50% JSA or 75% JSA but who do not satisfy the "Rule of 75" are subject to further ***reductions*** based on additional factors specific to those programs. *Id.* §§ 3.1(54)(d)(ii), (f)(ii) & 3.1(55)(d)(ii), (h)(ii). Legacy Management participants who elect a 100% JSA may be subject to an early retirement ***reduction*** if they do not have a Cash Balance Account. *Id.* § 3.1(56)(b)(ii).

If the Court were to order reformation of the Plan to provide for actuarially equivalent JSA benefits for the 12 at-issue programs, the revised criteria (under § 417(e) or as otherwise adopted by the Court) could apply uniformly to all participants within each Program. As noted above, the Plan already applies uniform criteria for participants in the Mobility, Mobility Bargained, and DirecTV Programs that provide for actuarial equivalence. And the definition of "Actuarially Equivalent" in § 3.1(3) of the Plan, *see* ECF 119-7, at ATT0000018, expressly incorporates the "Applicable Mortality Table" and "Applicable Interest Rate" in Supplement 9 of the Plan, which in turn incorporates the "Statutory Applicable Mortality Table" and "Statutory Applicable Interest Rate" in § 417(e) for at least some purposes. *See* ECF 119-7, at ATT0000214 §§ 2.3, 2.4. To the extent that certain Plan participants may fare better under the existing conversion factors than § 417(e) (or any other alternative benchmark for actuarial equivalence that the Court may adopt), their existing benefits will be protected under ERISA's anti-cutback provision. *See infra* at Question 4 (citing 29 U.S.C. § 1054(g)). This is consistent with ERISA, *id.*, and is also consistent with how other programs already operate under the Plan. For example, the Mobility Bargained Program provides for the "greater of" the existing conversion factors or "Actuarial Equivalent" benefits. *See* ECF 119-7, §§ 3.1(54)(e)(i), 55(e)(i), 56(d)(i).

Question 2. As a threshold matter, Question 2 appears to rest on a mistaken premise: that each absent member of a class seeking solely injunctive or other equitable relief must have separate individual standing. The "Ninth Circuit recently clarified that in class actions seeking injunctive or other equitable relief, only one plaintiff is required to demonstrate standing." *Swanson v. Nat'l Credit Servs., Inc.*, 2022 WL 1746776, at *2 (W.D. Wash. May 31, 2022) (citing *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 682 n.32 (9th Cir. 2022) (en banc), *cert. denied sub nom. StarKist Co. v. Olean Wholesale Grocery Coop., Inc.*, 143 S. Ct. 424 (2022)).

In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021), the Supreme Court held that "[e]very class member must have Article III standing *in order to recover individual damages*." (emphasis added). But that statement does not apply to a class that seeks only injunctive relief. As the Ninth Circuit explained in its recent *en banc* opinion, "the Supreme Court has long recognized that in cases seeking injunctive or declaratory relief, only one plaintiff need demonstrate standing to satisfy Article III." *Olean*, 31 F.4th at 682 n.32. The Ninth Circuit thus expressly "overrule[d] the statement…

that 'no class may be certified that contains members lacking Article III standing,'" stating that this requirement "does not apply when a court is certifying a class seeking injunctive or other equitable relief." *Id.*; *see also Cabrera v. Google LLC*, 2023 WL 5279463, at *38 (N.D. Cal. Aug. 15, 2023); *Gunaratna v. Dennis Gross Cosmetology LLC*, 2023 WL 5505052, at *9 (C.D. Cal. Apr. 4, 2023).

Even if all members of the injunctive relief class were required to have standing, they do. A party has Article III standing if it (1) is currently harmed, or (2) faces a substantial risk of future harm. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014). Each alternative test is satisfied here.

Retired Subclass. The named Plaintiffs and other members of the Injunction/Equitable Relief Class who are in the Retired SubClass—i.e., participants who are already receiving benefits that are "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)"—indisputably have standing under both tests because they suffered injury from reduced pension payments and will continue to suffer similar injury in the form of ongoing reduced payments absent injunctive and equitable relief.

Pre-Retirement Subclass. The proposed additional named Plaintiffs (Jennifer Fryer and Vince Carabba) and other members of the Injunction/Equitable Relief Class who are in the Pre-Retirement SubClass—i.e., those who have not yet commenced receiving benefits—have standing because they face a substantial risk that upon retirement, without injunctive relief, AT&T will illegally pay them benefits lower than what ERISA requires. *See In re Zappos.com, Inc.*, 888 F.3d 1020, 1024 (9th Cir. 2018) ("A plaintiff threatened with future injury has standing to sue 'if . . . there is a substantial risk that the harm will occur.'") (quoting *Susan B. Anthony List*, 573 U.S. at 158) (cleaned up).[2] Mr. Altman has expressly opined that "the average participant in the Plan who has not yet commenced benefits … will not receive actuarially equivalent [JSA] benefits under the Plan" and will suffer an underpayment. ECF 168-2, at 18. This is more than sufficient to establish a "substantial risk" of future harm.[3]

[2] "Standing depends on the probability of harm, not its temporal proximity." *Pub. Citizen, Inc. v. Trump*, 361 F. Supp. 3d 60, 82 (D.D.C. 2019) (cleaned up) (quoting *Orangeburg, S.C. v. FERC*, 862 F.3d 1071, 1078 (D.C. Cir. 2017)). Standing exists even when the future harm may occur years (or even decades) hence. *See Pub. Citizen*, 361 F. Supp. 3d at 81-82 (finding standing even though injury might never occur and could only happen, at the earliest, 5-7 years hence).

[3] Article III standing has been found to exist in cases involving *much* less certain damage. For example, in both *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010) and *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625 (3d Cir. 2017), standing was found for classes of tens of

Members of the Pre-Retirement SubClass also have standing based on *current* harm for two distinct reasons. First, they are deprived of the ability to choose actuarially equivalent JSA benefits. Although they have not yet commenced pension benefits, they are entitled to do so today if they wish, and ERISA entitles them to the choice of JSA benefits that are actuarially equivalent to a single life annuity. *See* 29 U.S.C. § 1055(d). As numerous courts have held, the deprivation of a choice constitutes sufficient current harm for Article III standing. *See, e.g.*, *Pub. Citizen*, 361 F. Supp. 3d at 80-83 & n.10 (standing exists when market participant is deprived "of his or her choice"); *Ross v. Bank of Am., N.A.*, 524 F.3d 217, 223 (2d Cir. 2008) (allegations of "reduced choice and diminished quality" supported Article III standing); *De la Torre v. CashCall, Inc.*, 2016 WL 6892693, at *8 (N.D. Cal. Nov. 23, 2016) ("lack of choice in using EFT payments" supported Article III standing).[4] In *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72 (1991), the Supreme Court held that the plaintiff had standing to challenge the defendant's removal of a case from state to federal court because the loss of the "choice" to file in state court was a sufficiently concrete harm. *Id.* at 77. So too here. ERISA grants each Plan member the ability to choose, if they wish, to receive JSA benefits that are actuarially equivalent to an SLA. Defendants are depriving them of that choice.

Second, and independently, the Pre-Retirement Class has standing because it suffers harm from Defendants' deceptively false statements that the JSA benefits in the Plan are actuarially equivalent to SLA benefits. *See* Second Am. Compl., ECF 88, ¶¶ 94-102 (describing false representations). The Ninth Circuit has expressly held that receipt of deceptive statements gives rise to an injury sufficient to confer Article III standing to request injunctive relief, regardless of whether the recipient now knows those statements to be false. *See Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969 (9th Cir. 2018)

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thousands of employees whose data was contained on laptops stolen from their employer despite the fact that the employees did not yet have their identities stolen—the risk that their identities *might* perhaps be stolen in the future was sufficient. *Krottner*, 628 F.3d at 1142-44; *Horizon*, 846 F.3d at 634-37. Similarly, in *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012), the Ninth Circuit held that plaintiffs demonstrated a sufficient risk that the Maricopa County Sheriff's Office might conduct a traffic stop based solely on their race sufficient for Article III standing, even though the probability that these plaintiffs would actually be pulled over in the future was markedly low. *Id.* at 997-99.

[4] *See also Competitive Enter. Inst. v. NTSA*, 901 F.2d 107, 113 (D.C. Cir. 1990) ("[A] lost opportunity to purchase vehicles of choice is sufficiently personal and concrete to satisfy Article III...."); *Falberg v. Goldman Sachs Grp., Inc.*, 2022 WL 538146, at *6 (S.D.N.Y. Feb. 14, 2022) ("[W]hile not every member of the class participated in the challenged fund options, the alleged foregone opportunities from funds that were not included and the alleged reduction in choice … is an alleged injury in fact."); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2017 WL 2655678, at *3-4 (C.D. Cal. June 15, 2017).

("We resolve this district court split in favor of plaintiffs seeking injunctive relief."); *see also Lundstrom v. Young*, 2022 WL 15524624, at *15 (S.D. Cal. Oct. 27, 2022) ("*TransUnion* leaves untouched, and in effect reaffirms, the possibility of a purely informational injury…."). The mere fact that the recipient is no longer able to rely on the defendants' representations is itself a form of injury. *See Davidson*, 889 F.3d at 969-70. Indeed, this Court has certified a class alleging similar injuries, rejecting defendants' argument that individualized evidence of reliance was required. *See Milan v. Clif Bar & Co.*, 340 F.R.D. 591 (N.D. Cal. 2021) (Donato, J.); *accord Moyle v. Liberty Mut. Ret. Plan*, 2012 WL 13149097, at *4 (S.D. Cal. Apr. 10, 2012) (reaching same result as to ERISA claims).

Other Class Members. Finally, there is a small subset of the Injunction/Equitable Relief Class who have already retired and are currently receiving JSAs that are equal to or greater than the value of an SLA based on the interest rates and mortality tables set forth in 26 U.S.C. § 417(e).[5] Although these individuals may not be monetarily harmed by Defendants' tabular factors, their interests could be impaired by a court order that fails to incorporate ERISA's anti-cutback provisions. Indeed, the risk that this lawsuit, absent class certification, could "substantially impair or impede their ability to protect their interests" is one reason why it is appropriate to certify a mandatory class under Fed. R. Civ. P. 23(b)(1)(B). Their standing is analogous to that of intervenors who may not themselves have claims, but who have an interest in shaping the injunctive relief ordered by a court. *Cf. Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1399 (9th Cir. 1995); *Cal. Dep't of Toxic Substances Control v. Jim Dobbas, Inc.*, 54 F.4th 1078, 1085 (9th Cir. 2022). If, however, the Court believes that this subset of Class members lacks standing and that all absent class members must have standing to pursue injunctive relief (which is not necessary as noted *supra* at 2-3), the Court can simply carve these individuals out of the Class by defining the Class to include only members of the SubClasses.

Question 3. The Rules Enabling Act allows the Supreme Court to prescribe "general rules of practice and procedure" for cases in U.S. district courts, 28 U.S.C. § 2072(a), subject to the limitation that "[s]uch rules shall not abridge, enlarge or modify any substantive right." *Id.* § 2072(b). Contrary to Defendants' assertions, there is no risk of a violation of the Act here.

First, as both parties agreed in their class certification briefing, any potential issues relating to

[5] The vast majority of retirees who are receiving JSA benefits (approximately 4 out of 5) are receiving a ***lower*** level of benefits than they would under § 417(e). *See* ECF 168-2, at 18.

a purported enlargement of substantive rights do not arise from Rule 23 or class certification, but rather from the question of *remedies*. *See* Defs.' Class Cert. Opp'n, ECF 121, at 17 ("Plaintiffs' requested remedies … are extra-legal."); Pls.' Class Cert. Reply, ECF 131, at 10 ("[T]his argument has nothing to do with class certification. It is relevant only to the remedies stage."). The Court's framing of the issue is also consistent with this. *See* ECF 190, at 2 ("[W]ould the Court impermissibly enlarge … substantive rights … by ordering reformation of the[] Programs to increase JSA benefits?"). The Rules Enabling Act, as its name implies, pertains to the adoption of rules, not remedies. And Plaintiffs are entitled to seek reformation as an equitable remedy regardless of whether a Rule 23 class is certified.

Second, even if the Act could be fashioned to apply to remedies rather than rules, the potential remedy about which Defendants express concern – reformation of the Plan to provide for "the § 417(e) actuarial formula" (Defs.' Class Cert Opp'n. at 18) with grandfathering of existing benefits for those who are already receiving benefits in excess of that floor – is consistent with substantive law. In that circumstance, benefits would only increase for persons who are *not* receiving actuarially equivalent benefits under § 417(e), and the fact that persons currently receiving higher benefits would be able to keep their benefits is on all fours with ERISA's anti-cutback provision. *See infra* at Question 4.

Third, Defendants may argue that participants hypothetically could receive actuarially equivalent JSA benefits even if their benefits are less than what they would be entitled to receive under § 417(e), but this argument is dubious because "the § 417(e) criteria are conservative and yield conversion factors that actually fall at the low end of a reasonable range." ECF 122-3, at 6. Regardless, if the Court were to determine that there is a lower appropriate measure of actuarial equivalence than § 417(e), it can tailor its reformation remedy accordingly and provide for that methodology to set the floor for benefits in a reformed plan, such that nobody who is already receiving that level of benefits will be entitled to more. There is no reason to presume, at the class certification stage, that the Court will order an excessive or improper remedy. *See Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1156 (9th Cir. 2016) ("We … note that Defendants' [Rules Enabling Act] concerns are hypothetical at this stage of the litigation. The district court has discretion to shape the proceedings.").[6]

[6] *See also Richards v. FleetBoston Fin. Corp.*, 235 F.R.D. 165, 172 (D. Conn. 2006) (certifying ERISA class under Rule 23(b)(2), reasoning that "[t]he question of remedies is not appropriate for resolution at this stage in the litigation, and the court is not required to impose the particular remedy requested by [plaintiff] even if she prevails on the merits of her claims.").

Finally, even if the Court were to adopt a standard of actuarial equivalence in a reformed plan that would provide some participants with a purported "windfall", this still would not constitute a violation of the Rules Enabling Act. *See Laurent v. PricewaterhouseCoopers LLP*, 565 F. Supp. 3d 543, 551 (S.D.N.Y. 2021) (citing *U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88, 97 (2013)).[7] For example, the Court could order that the Plan be reformed to provide actuarially equivalent benefits under § 417(e) with an annual stability period and November lookback month, even though there may be other possible ways of calculating benefits under § 417(e) that could produce lower benefits for some persons in some cases. This would simply be a function of the Plan's own preference for a November lookback month and annual stability period when calculating benefits under § 417(e), *see* ECF 119-7, at ATT0000214, not an enlargement of substantive rights.

Question 4. Defendants' conflict argument is meritless. As the Court suggests, the Plan can be reformed to use up-to-date conversion factors (such as those prescribed by § 417(e)) that yield actuarially equivalent JSA benefits, without harming the small minority of Plan members who happen by luck to do better under the existing tabular factors, because ERISA contains an anti-cutback provision. *See* 29 U.S.C. § 1054(g). Under this provision, "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." *Id.*; *see also Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 739 (2004) (citing § 1054(g)).

Optional forms of benefits, such as 50%, 75%, and 100% JSAs, fall within this anti-cutback rule. *See Cooper v. Willis Towers Watson Pension Plan for U.S. Emps.*, 562 F. Supp. 3d 890, 895 (C.D. Cal. 2022) (confirming that optional form of benefit under I.R.C. § 411(d)(6) cannot be eliminated or reduced by plan amendment). *Cf. McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1122 (9th Cir. 2000) (plan amendment that reduced participant's JSA value would violate anti-cutback rule). Thus, to the extent that the existing conversion factors, as applied, result in higher JSA benefits for

[7] *Wit v. United Behav. Health*, 79 F.4th 1068 (9th Cir. 2023) is not to the contrary. That case involved participants in 3,000 different plans who challenged the defendant's denial of mental health care coverage based on its allegedly flawed guidelines. *Id.* at 1077. The district court certified classes that included not only participants who were denied coverage based on the allegedly flawed guidelines *but also* participants who were denied coverage based on *unchallenged* guidelines or potions thereof, which the Ninth Circuit deemed to enlarge the plaintiffs' substantive rights. *Id.* at 1086. Here, there is only one plan (not thousands), and all members of the proposed class are subject to AT&T's outdated tabular factors. It is not necessary to show that all class members are or would be harmed by those factors; a "risk" of harm to the named Plaintiffs is sufficient. *Id.* at 1083; *see also supra* at Question 2.

anyone, their existing benefit amounts will be "grandfathered" as the Court noted. *See* ECF 190, at 2.

Other large corporate pension plans have adopted the precise change that Plaintiffs seek here. These plans amended their JSA provisions to use § 417(e) assumptions for determining JSA values, subject to a grandfathering clause that uses the old JSA conversion method for any participant whose JSA would be lower using the § 417(e) assumptions. For example, CITGO sponsors two large pension plans which, until 2018, used a 1970s-era mortality table and 8% interest rate to calculate JSAs. In 2018, CITGO amended its "actuarial equivalent" definition as follows:

> [T]he actuarial present value . . . shall be determined by application of the applicable mortality table and the applicable interest rate prescribed by the Commissioner of Internal Revenue for the determination of present values under Code Sections 417(e)(3)(B) and (C), respectively . . . Notwithstanding the foregoing, in any case where the use of the actuarial assumptions prescribed above would result in the commencement on or after January 1, 2018 of a lower benefit or less valuable optional form of benefit for a [participant], beneficiary or Alternate Payee … than would be determined by use of the actuarial assumptions prescribed in subsection 1.02(b), the greater benefit (and/or selected option form) shall be paid.

Urlaub v. Citgo Petroleum Corp., No. 1:21-cv-04133 (N.D. Ill. Oct. 5, 2021), ECF 31-1, at p.18 § 1.02(a) (CITGO Hourly Pension Plan) & ECF 31-1, at p.164 § 1.01(b) (Salaried Pension Plan). The ADP Plan, as another example, contains similar "Greater of" language.[8]

The language of the AT&T Plan itself incorporates ERISA's anti-cutback rule in Section 2.5.1, entitled "PRESERVATION OF ACCRUED BENEFIT." *See* ECF 119-7, at ATT0000016 § 2.5.1 ("**[**E]ach … Participant's Accrued Benefit will not be less under the terms of the restated Plan than such Participant's Accrued Benefit … prior to the Restatement Effective Date"). Indeed, the Mobility Bargained Program within the Plan (which is not among the 12 programs at issue) explicitly includes "greater of" provisions with respect to JSA benefit determinations. *See id.* at ATT0000029 § 54(e)(i) ("greater of" .90 conversion factor or actuarial equivalent benefits for 50% JSA); *id.* at ATT0000032 § 55(e)(i) ("greater of" .85 factor or actuarial equivalent benefits for 75% JSA); *id.* at ATT0000035 § 56(d)(i) ("greater of" .80 factor or actuarial equivalent benefits for 100% JSA). It would be entirely appropriate for the Court to adopt the same approach here as to the at-issue programs.

[8] *See* Automatic Data Processing Inc. (ADP) Pension Retirement Plan Form 5500 for 2019, (available at https://www.efast.dol.gov/5500Search/), showing at page 66 (Schedule SB, Part V) that JSAs are calculated using the "**Greater of**" 1971 Group Annuity Tables and 7.5% interest rates or the mortality table and interest rate prescribed under § 417(e).

Dated: October 27, 2023

Respectfully submitted,

/s/ Kai Richter

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