UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

TODD RAMSEY, *et al.*, *Plaintiffs*, vs. PHILIPS NORTH AMERICA LLC, *Defendant*.	No. 3:18-cv-01099-NJR-RJD

PLAINTIFFS' MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Plaintiffs brought this action alleging that Defendant Philips North America LLC responsible for overseeing the Philips North America 401(k) Plan ("the Plan") breached its duties under Employee Retirement Income Security Act of 1974 (ERISA) by causing the Plan to pay unreasonable investment management and administrative fees, retaining the Vanguard Prime Money Market Fund as the sole capital preservation investment option, and selecting and retaining an investment option, the Principal Diversified Real Asset Fund, that had an insufficient performance and consistently underperformed prior to and after inclusion in the Plan.

After six months of arm's length negotiation with the assistance of a national mediator, the Parties reached the Settlement that provides meaningful monetary and non-monetary relief to each Class member.[1] In light of the litigation risks further prosecution of this action would inevitably entail, it is proper for the Court to: (1) preliminarily approve the proposed Settlement; (2) approve the proposed form

[1] The fully executed settlement agreement, dated May 11, 2018 ("Settlement") is attached hereto as Exhibit A and the Declaration of Class Counsel, Jerome J. Schlichter ("Schlichter Decl."), is attached hereto.

and method of notice to the Classes; and (3) schedule a hearing at which the Court will consider final approval of the Settlement.

BACKGROUND

I. The Action

Plaintiffs filed this action on May 10, 2018. Doc. 1. For over two years prior to filing, the Parties engaged in an adversarial discovery process to investigate the underlying merit of Plaintiffs' claims and Defendant's defenses.[2] On December 4, 2015, on behalf of Named Plaintiff Marta Nelson, Class Counsel requested information and documents from the Plan administrator in accordance with 29 U.S.C. §1024(b)(4) and 29 CFR 2550.404c-1. Defendant promptly responded with substantial documents and information. In February 2016, Class Counsel provided Defendant a draft complaint setting forth the facts and claims that Class Counsel intended to assert against Defendant. Following receipt of the draft complaint, the Parties engaged in an informal discovery process in which they negotiated the scope of Defendant's document production, which included thousands of pages of Plan-related materials, including investment policy statements, data on Plan investments, fiduciary committee minutes and supporting materials, third-party consultant reports, and email correspondence, among other information. Plaintiffs' attorneys reviewed and analyzed these materials over more than 18 months following their production. On September 7, 2017, the Parties then participated in a private mediation before Hunter Hughes, a nationally recognized mediator who has

[2] See Settlement ¶¶1.1–1.5 for an overview of the pre-filing efforts taken by both parties.

extensive experience resolving similar claims involved 401(k) plans.[3] Only after negotiating for an additional six months regarding the terms of the Settlement did the Parties reach an agreement. During this extended dispute resolution process, the Parties agreed to toll the statute of limitations.

Plaintiffs assert five counts in their complaint. In Count I, Plaintiffs allege that Defendant breached its duties under 29 U.S.C. §§1104(a)(1)(A) & (B) and the provisions of the Investment Policy Statement (IPS) in violation of 29 U.S.C. §1104(a)(1)(D) by providing participants the Vanguard Prime Money Market Fund as the sole capital preservation investment option instead of alternatives that were available to the Plan that would have provided participants the same guaranty of principal and accumulated interest but a higher return. In Count II, Plaintiffs allege that Defendant breached its duties under 29 U.S.C. §§1104(a)(1)(A) & (B) and the provisions of the IPS in violation of 29 U.S.C. §1104(a)(1)(D) by providing Plan investments that charged unreasonable annual expenses compared to lower-cost versions of the same investments and alternative funds that were available to the Plan. In Count III, Plaintiff allege that Defendant caused the Plan to pay unreasonable administrative fees to the Plan's recordkeeper in violation of 29 U.S.C. §1104(a)(1)(A) and (B). In Count IV, Plaintiffs allege that Defendant breached its duties under 29 U.S.C. §§1104(a)(1)(A) & (B) and the provisions of the IPS in violation of 29 U.S.C. §1104(a)(1)(D) by providing as a Plan investment option the Principal Diversified Real Asset Fund despite its consistent and dramatic

[3] See http://www.hunteradr.org/cv.html.

underperformance compared to its benchmark, peer group, and similar lower-cost investment alternatives that were available to the Plan. Finally, Count V alleges that Defendant breached its duty to monitor the actions of the Plan fiduciaries.

II. The Terms of the Proposed Settlement

In exchange for the dismissal of the Actions and for entry of the Judgment as provided for in the Settlement Agreement, Defendant will make available to Settlement Class members the benefits described below. Other terms of the Settlement also are outlined.

A. Monetary Relief

Defendant will deposit $17,000,000 (the "Gross Settlement Amount") in an interest-bearing settlement account (the "Gross Settlement Fund"). The Gross Settlement Fund will be used to pay the participants' recoveries as well as Class Counsel's Attorneys' Fees and Costs, Administrative Expenses of the Settlement, and Class Representatives' Compensation as described in the Settlement Agreement.

B. Non-Monetary Terms

In addition to the monetary component of the Settlement, the Parties agreed to certain non-monetary terms. During the first eighteen months (18) following the final approval of the Settlement, the Plan's fiduciaries will conduct a request for proposal process for recordkeeping services to the Plan. Within the first year following final approval of the Settlement, Defendant will publish a communication to then current Plan participants explaining the risks and benefits of the Plan's money market fund investment option. Defendant also will use an independent

consultant familiar with fixed income investment options in defined contribution plans who will review the investment lineup and make recommendations to the Plan's fiduciaries regarding whether to retain the money market fund and whether to add a stable value or comparable fund.

In addition, during the three-year Settlement Period, Defendant will provide Class Counsel a list of the Plan's investment options and fees. In considering investment options for the Plan, the Plan's fiduciaries will consider: (1) the lowest-cost share class available for any particular mutual fund considered for inclusion in the Plan as well as other criteria applicable to different share classes; (2) the availability of revenue sharing rebates on any share class available for any particular mutual fund considered for inclusion in the Plan; and (3) the availability of collective trusts, to the extent such investments are permissible and are otherwise identical to a particular mutual fund considered for inclusion in the Plan.

Class Counsel will both monitor compliance with the settlement for three years and take any necessary enforcement action without cost to the Class.

These benefits represent a significant value to the Plan above and beyond the monetary settlement.

C. Notice and Class Representatives' Compensation

The notice costs and all costs of administration of the Settlement will be paid from the Gross Settlement Fund. Incentive payments to the seven Named Plaintiffs in an amount to be approved by the Court would also be paid out of the Gross Settlement Fund. Plaintiffs will seek $15,000 for each of the Named Plaintiffs. This amount is in line with precedent recognizing the value of individuals stepping

forward to represent classes—particularly in a case, like the present, where the potential benefit to any individual does not outweigh the cost of prosecuting the claim and there are significant risks, including the risk of no recovery, the risk of alienation from their employer and peers, and the risk of uncompensated time and energy devoted to a lawsuit with uncertain prospects for success. *Beesley v. Int'l Paper Co.*, No. 06-703, 2014 U.S.Dist.LEXIS 12037, at *13–14 (S.D.Ill. Jan. 31, 2014)(Herndon, J.)(approving $25,000 each to six surviving named plaintiffs in 401(k) fee settlement and noting that "ERISA litigation against an employee's current or former employer carries unique risks and fortitude, including alienation from employers or peers."). The total award requested for the Named Plaintiffs represents less than two-thirds of one percent of the Gross Settlement Amount.

D. Attorneys' Fees and Costs

Class Counsel will request attorneys' fees to be paid out of the Gross Settlement Fund in an amount not more than one-third of the Gross Settlement Amount, or $5,666,666, as well as reimbursement for costs incurred of no more than $35,000. "A one-third fee is consistent with the market rate in settlements concerning this particularly complex area of law." *Abbott v. Lockheed Martin Corp.*, No. 06-701, 2015 U.S.Dist.LEXIS 93206, at *7 (S.D. Ill. July 17, 2015)(Raegan, J.); *Beesley*, 2014 U.S.Dist. LEXIS 12037at *7; *Spano v. Boeing Co.*, No. 06-743, 2016 U.S. Dist. LEXIS 161078, at *7 (S.D. Ill. Mar. 31, 2016)(Raegan, J.); *Will v. General Dynamics Corp.*, No. 06-698, 2010 U.S.Dist.LEXIS 123349, *9 (S.D.Ill. Nov. 22, 2010)(Murphy, J.). Further, none of the settlement amount will be returned to Defendant.

The settlement has a value greater than the monetary amount. Class Counsel

will not seek fees on the interest earned on the Gross Settlement Amount. Class Counsel will seek no further fees or costs for review of compliance, document review, or for communications with Class members or Defendant during the three-year Settlement Period. Class Counsel will not seek fees or costs if mediation or enforcement of the Settlement Agreement is necessary, and bears the risk of half of the costs of pursuing the Settlement if the Settlement is not approved or otherwise terminated. A formal application for attorneys' fees and costs and for Named Plaintiff awards will be made at least 30 days prior to the deadline for Class members to file objections to the Settlement.

ARGUMENT

In determining whether preliminary approval is warranted, the sole issue before the Court is whether the proposed settlement is within the range of what might be found fair, reasonable, and adequate, so that notice of the proposed settlement should be given to Class members and a hearing scheduled to consider final approval. The proposed agreement is viewed "in a light most favorable to settlement." *Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996). The Court reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing. Manual for Complex Litigation, Fourth, §13.14, at 172-73 (Fed. Jud. Ctr. 2004) ("Manual Fourth"). The Court is not required at this point to make a final determination:

> The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the

final fairness hearing.

Id. § 21.632, at 321. Preliminary approval is the first step in a two-step process required before a class action may be finally settled. *Id*. at 320. Courts first make a preliminary evaluation of the fairness of the settlement, prior to notice. *Id*. at 320–21. In some cases this initial assessment can be made on the basis of information already known to the court and then supplemented by briefs, motions and an informal presentation from the settling parties. *Id*.

There is an initial strong presumption that a proposed class action settlement is fair and reasonable when it is the result of arm's-length negotiations. *Great Neck Capital Appreciation Inc. Partnership, L.P. v. PricewaterhouseCoopers, LLP*, 212 F.R.D. 400, 410 (W.D.Wis. 2002); see also *Newberg on Class Actions* §11.41 at 11-88 (3d ed. 1992). The proposed Settlement here is the result of lengthy and complex arm's-length negotiations between the parties. Counsel on both sides are experienced and thoroughly familiar with the factual and legal issues presented. Courts recognize that the opinion of experienced and informed counsel supporting settlement is entitled to considerable weight. *Isby,* 75 F.3d at 1200. Class Counsel is very experienced in class action litigation generally and, in particular, class litigation arising from breaches of fiduciary duties to retirement plans under ERISA, which Class Counsel pioneered. It is Class Counsel's opinion that the proposed Settlement is fair and reasonable. See Schlichter Decl. ¶2. Class Counsel is intimately familiar with this unique and complex area of law, as noted by other Courts considering cases alleging ERISA breaches of fiduciary duty with respect to fees and investments in 401(k) plans. *Beesley*, 2014 U.Dist.LEXIS 12037 at *4–5

(Judge Herndon: "The Court remains impressed with Class Counsel's navigation of the challenging legal issues involved in this trailblazing litigation and Class Counsel's commitment and perseverance in bringing this case to this resolution."); *Will,* 2010 U.S.Dist.LEXIS 123349 at *10 (Judge Murphy: "Counsel's actions have led to dramatic changes in the 401(k) industry, including heightened disclosure and protection of employees' and retirees' retirement assets"); *Spano*, 2016 U.S.Dist.LEXIS 161078 at *7 (Judge Herndon: "The law firm Schlichter, Bogard & Denton has significantly improved 401(k) plans across the country by bringing cases such as this one"); *Abbott,* 2015 U.S.Dist.LEXIS 93206 at *8–9 (Judge Reagan: "Schlichter, Bogard & Denton demonstrated extraordinary skill and determination in obtaining this result for the Class."); *Nolte v. Cigna Corp*., No. 07-2046, 2013 U.S.Dist.LEXIS 184622, *5 (C.D.Ill. Oct. 15, 2013)("The law firm Schlichter, Bogard & Denton is the leader in 401(k) fee litigation."); *Tussey v. ABB, Inc*., No. 06-4305, 2012 U.S.Dist.LEXIS 157428, *10 (W.D.Mo. Nov. 2, 2012) ("Plaintiffs' attorneys are clearly experts in ERISA litigation").

"Once the judge is satisfied as to the certifiability of the class and the results of the initial inquiry into the fairness, reasonableness, and adequacy of the settlement, notice of a formal Rule 23(e) fairness hearing is given to the class members." Manual (Fourth) § 21.633, at 321. Preliminary approval permits notice of the hearing on final settlement approval to be given to the Class members, at which time Class members and the settling parties may be heard with respect to final approval. *Id*. at 322. As explained below, the proposed Settlement now before this

Court and on file herein falls squarely within the range of reasonableness warranting preliminary approval of the Class Notice apprising Class members of the Settlement and setting a hearing on final approval.

In evaluating whether a class action settlement is fair, reasonable and adequate for final approval, under the Seventh Circuit's five-factor test, the district court must consider: "the strength of the plaintiffs' case on the merits measured against the terms of the settlement; the complexity, length and expense of continued litigation; the degree of opposition to the settlement; the presence of collusion in gaining settlement; the opinion of competent counsel as to the reasonableness of the settlement; and the stage of the proceedings and the amount of discovery completed." *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 308 (7th Cir. 1985).

At the preliminary approval stage, the Court is merely asked to determine whether the proposed settlement is within the "range of possible approval." *Gautreaux v. Pierce,* 690 F.2d 616, 621 n.3 (7th Cir. 1982) "The temptation to convert a settlement hearing into a full trial on the merits must be resisted." *Mars Steel Corp. v. Continental Ill/ Nat'l. Bank & Trust Co. of Chicago.*, 834 F.2d 677, 684 (7th Cir. 1987). "The district court should refrain from resolving the merits of the controversy or making a precise determination of the parties' respective legal rights." *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985). "The very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation." *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 426 (7th Cir. 1977).

I. The strength of the Plaintiffs' case on the merits.

Plaintiffs maintain that they have strong underlying claims against Defendant related to its management and administration of the Plan. Plaintiffs contend that Defendant caused the Plan to pay unreasonable administrative fees based on its failure to obtain regular competitive bids for recordkeeping services and failure to monitor and control the administrative fees. These allegations support claims of fiduciary breach. See, e.g., *George v. Kraft Foods Global, Inc.*, 641 F.3d 786, 788–89 (7th Cir. 2011)(if a plan overpays for recordkeeping services due to the fiduciaries' "failure to solicit bids" from other recordkeepers, the fiduciaries have breached their duty of prudence); *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014)(failure to properly "monitor and control" administrative fees is a breach of fiduciary duties).

Plaintiffs' excessive investment management fee claims, based in part on Defendant's selection and retention of higher-cost retail share class mutual funds, likewise support a claim for breach of fiduciary duty. *Tibble v. Edison Int'l*, 135 S.Ct. 1823 (2015); *Tibble v. Edison Int'l*, No. 07-5359, 2017 U.S. Dist. LEXIS 130806, at *40 (C.D. Cal. Aug. 16, 2017); *Tussey,* 2012 U.S.Dist.LEXIS 45240 at *8–9, 109–11, 115–16.

As the Supreme Court recently unanimously held in a case handled by undersigned Class Counsel, ERISA fiduciaries have "a continuing duty to monitor investments and remove imprudent ones[.]" *Tibble,* 135 S. Ct. at 1829. They "ordinarily have a duty to seek . . . the lowest level of risk and cost for a particular level of expected return—or, inversely, the highest return for a given level of risk and cost." *Tatum v. RJR Pension Inv. Comm.*, 855 F.3d 553, 566 (4th Cir.

2017)(quoting RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. f(1)). Despite these duties, since 2010, Plaintiffs allege Defendant provided the Vanguard Prime Money Market Fund as the Plan's sole capital preservation investment option in the Plan and allege the fund provided low returns to Plan participants. Plaintiffs allege that a stable value fund, in contrast, would have provided enhanced returns without an increase in risk.

Although Class Counsel continues to believe in the underlying merits of these claims, there are significant legal obstacles and defenses that render recovery in this case uncertain. Defendant denies Plaintiffs' allegations, denies that the Plan's fiduciaries committed or participated in any fiduciary breaches, and would vigorously contest Plaintiffs' allegations. Defendant would argue that the compensation paid to the Plan's recordkeeper was reasonable, and that the Plan's fiduciaries acted prudently and in the best interest of Plan participants in monitoring fees assessed to Plan participants and selecting and monitoring the Plan's investments. Defendant would argue that the use of a money market fund as the Plan's conservative, capital-preservation investment option in a 401(k) plan is not a violation of their fiduciary obligations under ERISA.

In particular, Defendant likely would rely on the Seventh Circuit's decisions in *Hecker v. Deere*, 556 F.3d 575 (7th Cir. 2009), *reh'g denied*, 569 F.3d 708 (7th Cir. 2009), and *Loomis v. Exelon Corp.* 658 F.3d 667 (7th Cir. 2011) granting motions to dismiss 401(k) excessive fee claims to support the reasonableness of the Plan's fees based on the mix of investment options offered in the Plan. Defendant also may

direct the Court to another district court decision, *White v. Chevron Corp.*, No. 16-793, 2017 U.S.Dist.LEXIS 83474, at *27–34 (N.D. Cal. May 31, 2017), which dismissed the plaintiffs' excessive fee claims and their claim based on the defendants' retention of the Vanguard Prime Money Market Fund.

II. The complexity, length and expense of continued litigation.

As with many ERISA 401(k) fiduciary breach actions, this lawsuit is quite complex in multiple respects. In Class Counsel's experience, these types of cases are hard fought at each stage of the case, e.g., motion to dismiss, class certification, discovery, summary judgment, and trial. Even after a successful trial on the merits, further delay in recovery through years of appeal would be likely. This has been the experience of other plaintiffs who have succeeded at trial on similar claims. For instance, in *Tussey v. ABB*, Case No. 06-4305 (W.D.Mo.), a case filed in 2006, the plaintiffs tried the case in a four-week trial in January 2010, and judgment was entered in March 2012. After two separate appeals to the Eighth Circuit Court of Appeals and remands to the district court, the case is back again before the district court where the parties are engaged in additional discovery related to the proper damages methodology. This case also would require a complex trial with numerous highly experienced testifying expert witnesses with extensive reports, as well as the dedication of tremendous resources. Recovery of damages at all is not certain as discussed above.

III. The absence of collusion.

The Settlement with Defendant was the result of over two years of engaging in an adversarial informal discovery process, review and analysis of thousands of

pages of documents, analysis of evolving law, and over six months of arm's-length negotiation with the assistance of a nationally recognized private mediator. The Parties negotiated on many occasions in attempts to resolve differences on settlement terms. Settlement discussions between the parties were fully informed because of detailed factual discovery and ongoing legal developments in similar ERISA fiduciary breach litigation. The negotiations were vigorous and both sides argued their respective positions strenuously. The resulting Settlement was undeniably the product of arm's-length bargaining.

IV. The opinion of competent counsel as to the reasonableness of the settlement.

Class Counsel are not only experienced and competent, but have been described as the leading firm in this complex area of law. Class Counsel believe the Settlement to be fair and reasonable in light of the procedural and substantive risks Plaintiffs would face if litigation were to continue. See Schlichter Decl. ¶2. The Parties also will submit the settlement terms to an independent fiduciary, who will provide an opinion on its fairness before the final approval hearing.

V. The stage of the proceedings and the amount of discovery completed.

Plaintiffs conducted substantial discovery prior to filing this action. On December 4, 2015, on behalf of Named Plaintiff Marta Nelson, Class Counsel requested information and documents from the Plan administrator in accordance with 29 U.S.C. §1024(b)(4) and 29 CFR 2550.404c-1. Defendant promptly responded. Following receipt of the draft complaint from Class Counsel in February 2016, the Parties engaged in an informal discovery process where they negotiated the scope of

Defendant's document production, which included Plan-related materials, such as investment policy statements, data on Plan investments, and fiduciary committee minutes and supporting materials, and email correspondence, among other information. Class Counsel engaged in a detail and thorough review of these materials and analyzed additional and voluminous documents obtained from public filings with the Department of Labor to support their claims in this case. The adversarial discovery process documented the Plan's fiduciaries' decision-making process with respect to Plan investments, and the actions they took regarding the administrative fees charged to the Plan. In sum, Class Counsel extensively developed the facts supporting their claims.

VI. The Proposed Notice Plan is adequate.

Due process and Rule 23(e) do not require that each Class Member receives notice, but do require that the class notice be "reasonably calculated to reach most interested parties." *In re AT&T Mobility Wireless Data Services Sales Tax Litig.*, 789 F.Supp.2d 935, 968 (N.D.Ill. 2011)(internal quotations omitted). "Notice is adequate if it may be understood by the average class member." *Wal-Mart Stores Inc. v. Visa Usa Inc.*, 396 F.3d 96, 114 (2d Cir. 2005)(internal quotations and citations omitted). "Notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 172 (1974). "Individual notice must be provided to those class members who are identifiable through reasonable effort." *Id.* at 175.

Here, the proposed form and method of notice of proposed settlement agreed to

by the parties satisfy all due process considerations and meet the requirements of Fed. R. Civ. P. 23(e)(1). Plaintiffs' proposed forms of Notices are attached as Exhibits 3 and 4 to the Settlement. The proposed Notice will fully apprise Class members of the existence of the lawsuit, the proposed Settlement, and the information they need to make informed decisions about their rights, including: (i) the terms and operation of the Settlement; (ii) the nature and extent of the release; (iii) the maximum counsel fees that will be sought; (iv) the procedure and timing for objecting to the Settlement and the right of parties to seek limited discovery from objectors; (v) the date and place of the fairness hearing; and (vi) the website on which the full settlement documents, and any modifications to those documents, will be posted.

The Notice Plan consists of multiple components designed to reach Class members. First, the Individual Notice will be sent by first-class mail to the address of current Plan Participants and the last known address of former Plan Participants shortly after entry of the Preliminary Approval Order. Addresses of Class members are maintained by the Plan's personnel, who use this information for, *inter alia*, mailing Plan notices, participant communications, and other Plan-related information. Participants include both current and former employees of Philips. In addition to the Individual Notice, Class Counsel will develop a dedicated website solely for the settlement, and a link to that website will appear on Class Counsel's website, www.uselaws.com. The Notice Plan also includes a follow-up requirement for the Settlement Administrator for those Class members whose notice letters are

returned because they no longer reside at such address. Class members may also receive notice of the settlement by reading published articles likely to mention the settlement. Thus, the form of notice and proposed procedures for notice satisfy the requirements of due process and the Court should approve the Notice Plan as adequate. See Newberg on Class Actions, § 8.34

CONCLUSION

The Joint Motion for Preliminary Approval of Class Settlement should be granted.

Dated: May 11, 2018

Respectfully submitted,

/s/ Jerome J. Schlichter

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2018, I served this document on all parties via the Court's CM/ECF system.

/s/ Jerome J. Schlichter