IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: Civil Action No.: 1:17-cv-01579-WJM-NYW

WILLIAM M. BARRETT, Individually, and DENICE E. BATLA, HEATHER L. COBERLY, LELAND W. GULLEY, and BLAKE A. UMSTED, Individually and as the representatives of a class consisting of the participants and beneficiaries of the Pioneer Natural Resources USA, Inc. 401(K) and Matching Plan,

Plaintiffs,

v.

PIONEER NATURAL RESOURCES USA, INC.; THE PIONEER NATURAL RESOURCES USA INC. 401(K) AND MATCHING PLAN COMMITTEE; THERESA A. FAIRBROOK; TODD C. ABBOTT; W. PAUL MCDONALD; MARGARET M. MONTEMAYOR; THOMAS J. MURPHY; CHRISTOPHER M. PAULSEN; KERRY D. SCOTT; SUSAN A. SPRATLEN; LARRY N. PAULSEN; MARK KLEINMAN; and RICHARD P. DEALY

Defendants.

UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiffs William Barrett, Denise Batla, Heather Coberly, Leland Gulley, and Blake Umsted move the Court for an Order granting preliminary approval of the settlement of this class action under Fed. R. Civ. P. 23 reached on behalf of the following proposed Settlement Class:

> All current and former participants and beneficiaries of the Pioneer Natural Resources USA, Inc. 401(k) and Matching Plan who maintained a balance of any amount in the Plan at any point from June 28, 2011, through December 10, 2018, excluding Defendants.

As grounds, Plaintiffs state as follows.

I. Introduction

Plaintiffs are past and present participants in the Pioneer Natural Resources USA Inc. 401(k) and Matching Plan (the "Plan"). Plaintiffs brought this Employee Retirement Income Security

Act ("ERISA") action against plan sponsor Pioneer Natural Resources USA, Inc., and individual members of the Plan Committee (collectively "Defendants"), claiming that Defendants breached their ERISA fiduciary duties by causing the Plan to pay excessive recordkeeping fees. Plaintiffs alleged that between 2011 and 2017 the Plan paid recordkeeping fees in excess of a reasonable amount for the services rendered.[1] Plaintiffs alleged this occurred because Plan recordkeeping fees were paid through revenue sharing, and the Defendants failed to monitor or cap recordkeeping fees at a reasonable per-participant level.[2] Plaintiffs also alleged that Plan sponsor Pioneer USA failed to properly monitor the fiduciaries it appointed to manage the Plan. Defendants have denied these allegations and vigorously contested Plaintiffs' claims.

On July 17, 2018, the parties mediated this action with Robert Meyer of JAMS in Los Angeles, California. Although the mediation was unsuccessful, both parties continued to update Meyer regarding the status of the case. On October 5, 2018, after discussing the case with both parties, Meyer made a mediator's proposal, which was accepted by both parties and which forms the basis for this settlement. The Settlement represents 35% of Plaintiffs' recordkeeping damages. Declaration of Paul R. Wood (Exhibit 2), ¶ 14.

For the reasons set forth below, the Settlement meets the requirements of Fed. R. Civ. P. 23. Therefore, Plaintiffs request that the Court:

(1) Grant preliminary approval of the proposed Settlement and enter the proposed Order Preliminarily Approving Class Action Settlement Agreement, approve the form of

[1]Plaintiffs also asserted a claim based on retention of the Vanguard Money Market Fund as a Plan investment option. As part of this settlement, Plaintiffs have agreed to file a Third Amended Complaint that dismisses the Money Market Claim without prejudice (Exhibit 4).

[2] In 2018 Defendants changed the Plan recordkeeping fees from revenue sharing to a flat fee of $66 per person.

Notice, establish objection deadlines, and direct the Notice be sent to Settlement Class Members as provided in the Settlement Agreement;

(2) Certify the Settlement Class defined above and in the proposed Order attached hereto;

(3) Appoint Plaintiffs as Settlement Class Representatives;

(4) Appoint Paul Wood and Keith Scranton of Franklin D. Azar & Associates, P.C. as Class Counsel for purposes of this Settlement; and

(5) Enter a schedule governing the Final Settlement Approval Process.

II. Procedural History and Proposed Terms of Settlement

A. Procedural History

Plaintiff Barrett brought this case on June 28, 2017, alleging ERISA claims against Defendants for causing the Plan to pay excessive recordkeeping fees, improperly offering retail class mutual fund shares when less expensive admiral or institutional class shares were available, and imprudently retaining the Money Market Fund as a Plan investment option. On October 30, 2017, Defendants filed a Motion for Partial Summary Judgment challenging Barrett's standing to bring the money market claim and seeking determination as a matter of law that retention of the Money market Fund was not imprudent. On December 22, 2018, Barrett filed his First Amended Complaint which alleged claims related to recordkeeping fees and the Money Market Fund. On February 23, 2018, Plaintiff Barrett filed his Motion to Certify the Class.

Plaintiffs conducted depositions of two past and present chairmen of the Plan Committee and a Rule 30(b)(6) deposition of the Committee. Plaintiffs also requested and received approximately 15,500 pages of documents from Defendants, 9,600 pages of documents from the Plan investment advisor Lockton Companies, LLC and 11,450 pages of documents from Plan

recordkeeper Vanguard, Inc. Wood Decl., ¶ ¶ 5-6.

On May 29, 2018 Plaintiffs identified experts for fiduciary duty liability, reasonableness of recordkeeping fees, and damages. On June 22, Defendants identified a rebuttal expert for liability and reasonableness of fees. Wood Decl., ¶ 7.

On July 17, 2018, the parties unsuccessfully mediated this action with Meyer. Wood Decl., ¶ 12. On June 29, 2018, the Court granted Defendants Partial Motion for Summary Judgment, finding Barrett lacked standing to assert the Money Market Fund claim. In a separate order, the Court found Barrett was not an adequate class representative, and *sua sponte* ordered Barrett to Amend the Complaint to add additional class representatives. Wood Decl., ¶ ¶ 8-9. On August 24, 2018, the Second Amended Complaint adding Batla, Coberly, Gulley, and Umsted as plaintiffs was filed and the Court declared its July 26 order moot. The Court reopened discovery regarding class certification, ordered Defendants to refile their summary judgment motion regarding the Money Market Fund and ordered Plaintiffs to file a class certification motion by October 31, 2018. Expert discovery was extended to December 15, 2018. Wood Decl., ¶ 10.

The developments of July and August caused both parties to reevaluate settlement. On October 5, 2018, both parties agreed to the Mediator's proposal and sought a stay of the case pending preliminary approval of the settlement. Wood Decl., ¶ 13

B. Proposed Settlement Terms

The terms of the proposed Settlement are set forth in the Settlement Agreement (attached as Exhibit 1). A summary of the material terms is set forth below:

1. Monetary Relief

Defendants will deposit $500,000.00 (the "Settlement Amount") in an interest-bearing

settlement account (the "Escrow Account"). Settlement Agreement, ¶5.1. The Escrow Account will be used to pay the participants' recoveries, Class Counsel's Costs, Administrative costs of the Settlement, and Class Representative Service Awards as described in the Settlement Agreement. *Id*.

The Settlement Agreement and Plan of Allocation provide that the Settlement Administrator will calculate pro rata shares of the Distributable Settlement Amount in proportion to each Settlement Class Member's average year-ending Plan account balance over the Class Period, starting with December 31, 2011 and ending with December 31, 2018. *Id*., ¶ 5.2 and Ex. D. Class Members currently invested in the Plan need not take any action to receive their pro-rata share of the Settlement Amount. *Id*. Class Members who no longer have an active Plan account need only provide a basic claim form confirming their address in order to receive payment. *Id*. After calculation, the Settlement Administrator shall effect a transfer from the Qualified Settlement Fund to the Plan's trustee of the aggregate amount of all Settlement payments payable to Current Participants. The Company (or its designee) shall direct the Plan's trustee to credit the individual Plan account of each Current Participant in an amount equal to his or her Settlement payment, as calculated by the Plan Administrator. *Id*. The Settlement Administrator shall mail settlement checks to former participants who have confirmed their mailing addresses. *Id*. Class Members are anticipated to receive an average of $30 per person ($240,000/8,000 Class members) after attorney's costs, participant awards and administrative expenses are deducted. Wood Decl., ¶ 19.

2. Notice

Rule 23(e)(1) requires the Court "direct notice in a reasonable manner to all class members who would be bound by the propos[ed settlement]." Fed. R. Civ. P. 23(e)(1). The standard for

the settlement notice under Rule 23(e) is that it must 'fairly apprise' the class members of the terms of the proposed settlement and of their options." *In re Integra Realty Res., Inc*., 262 F.3d 1089, 1111 (10th Cir. 2001).

The Proposed Class Notice (attached as Exhibit 3) follows the template approved by the Federal Judicial Center and fairly apprises class members of the settlement and their options. Notice will be e-mailed or mailed to current Plan participants and mailed to former Plan participants at their last known address in Defendants' records, with any notice returned as "undeliverable" subject to further investigation by the Settlement Administrator to find an updated address. Settlement Agreement, ¶3.3.

The Class Notice explains (1) the nature of the Settlement and Release; (2) the terms and provisions of the Settlement Agreement and (3) the method for allocating the Settlement. The Class Notice informs Class Members of the date, time, and place of the final approval hearing and the procedures and deadlines for objecting to the Settlement.[3] Additionally, the proposed Class Notice advises Class Members that Class Counsel will apply to the Court for reimbursement of out-of-pocket litigation costs incurred in the action not to exceed $200,000.[4] The Class Notice also discloses the proposed Service Awards to be paid to the Class Representatives, and that costs for notice and administration will be paid from the Settlement Amount.

The Class Notice is accurate and fully informs Class Members of the Settlement's terms and their rights pertaining to it. The Court should approve the proposed form and method of Class

[3] Because the Class is to be certified pursuant to Fed. R. Civ. P. 23(b)(1)(A), there is no opt-out provision.

[4] This represents approximately 70% of costs advanced by Class Counsel. Class Counsel will not apply for an award of attorneys' fees.

Notice.

3. Service Awards

"Incentive awards are an efficient and productive way to encourage members of a class to become class representatives, and to reward the efforts they make on behalf of the class." *Lucken Family Limited Partnership, LLLP v. Ultra Resources, Inc.*, 2010 WL 5387559, *6 (D. Colo. 2010) (awarding $10,000 service award to class representative). The Settlement provides that Class Counsel may request service awards for each Class Representative not to exceed $10,000 in aggregate. Settlement Agreement, ¶ 9.1. The Class Representatives assisted Class Counsel with the investigation of the Class claims by, among other things, providing documents, participating in meetings and telephone conferences to discuss the litigation, responded to discovery, prepared for depositions, and in the case of Barrett, attended a five-hour deposition. Based on their active efforts and participation in pursuing this action, and the results achieved for the Class, Counsel will request the Court provide Barrett a $4,000 service award, and each other Plaintiff a $1,500 service award.

4. Attorneys' Fees and Costs

Class Counsel will also apply to the Court for an award of attorney's fees and reimbursement of costs advanced on behalf of Plaintiffs and the Settlement Class. Class Counsel spent over 1,000 hours and advanced nearly $300,000 in costs to retain experts, conduct depositions, and manage electronic document production. Wood Decl., ¶ 18. In order to increase the monetary value of the settlement to Class Members, Class Counsel will seek a reduced award of fees and costs not to exceed $200,000.[5] Defendants do not oppose Class Counsels' application for fees

[5] Class Counsel shall file a separate brief establishing their expenses' reasonableness.

and costs so long as it does not exceed $200,000.

III. Argument

1. The Law Favors Settlement

It is well established that settlements are favored, particularly in class actions where substantial resources can be conserved by avoiding the time and cost of prolonged litigation. Newberg on Class Actions, Sec. 11:41 (4th ed. 2002). A class action settlement is approved if it is "fair, reasonable, and adequate." *Tuten v. United Airlines, Inc.*, 41 F.Supp.3d 1003, 1007 (D. Colo. 2014). Courts review proposed class action settlements in a two-step process—Preliminary Approval and Final Fairness Approval. *See In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 158-59 (4th Cir. 1991). ; *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994) (citing *Armstrong v. Board of School Directors*, 616 F.2d 305, 312 (7th Cir. 1980) and *In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp. 1379, 1384 (D. Md. 1983).

2. The Settlement Merits Preliminary Approval

The purpose of the preliminary approval process is to determine whether there is any reason not to notify the class members of the proposed settlement and to proceed with a fairness hearing. *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006). Under F.R.C.P. 23(e)(1)(C), a class action settlement must be "fair, reasonable and adequate." In the Tenth Circuit, the following factors are to be analyzed in determining whether this standard is met: (1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after

protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable. *Rutter & Wilbanks Corp. v. Shell Oil Co*., 314 F.3d 1180, 1188 (10th Cir. 2002). The proposed settlement meets each of these four prongs.

a. The Proposed Settlement Was Fairly and Honestly Negotiated

"A presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery." *Pliego v. Los Arcos Mexican Restaurants, Inc.*, 313 F.R.D. 117, 130 (D. Colo. 2016)). Here, the Settlement was the product of lengthy, arm's length negotiations conducted between experienced counsel with the assistance with a leading ERISA mediator after extensive discovery. Wood Dec., ¶ ¶ 5-13. After an unsuccessful mediation on July 17, 2018, the parties continued to update Meyer regarding the status of the case. Following the Court's rulings in July and August 2018, after discussions with both parties, Meyer made a mediator's proposal which was accepted by both parties. *Id*. at ¶ 12-13.

b. Serious Questions of Law and Fact Exist, Placing the Ultimate Outcome of the Litigation in Doubt

The main issues in the case were (1) whether the recordkeeping fees were reasonable; and (2) whether Defendants followed a prudent process in continuing to offer the Money Market Fund as a Plan option.

i. The Recordkeeping Claim

Serious questions of fact exist that put the ultimate outcome of the recordkeeping claim in question. To prevail on the recordkeeping claim, Plaintiffs must prove both that the fees paid for recordkeeping services were excessive and that Defendants' process for permitting the Plan to pay such fees was imprudent. Plaintiffs deposed three defendants and reviewed extensive

documents from Defendants, Lockton Advisors and Vanguard. Wood Dec., ¶¶ 5-6. Plaintiffs retained Marcia Wagner, a recognized ERISA expert, who opined the process followed by Defendants was flawed, Francis Vitagliano, who opined a reasonable recordkeeping fee would be $40 per participant, and Pacey Economics, who calculated $1.4 million in damages for recordkeeping. *Id*., ¶ 7. Defendants deposed Barrett and retained as rebuttal expert Steven Gissiner to opine the fees were reasonable under the circumstances, that Vitagliano's methodology was flawed, and that it is impossible to calculate a blanket "reasonable fee." *Id*., ¶¶ 6-7. Discovery was complete except for expert depositions scheduled for December 10-14 in Boston Massachusetts. *Id*., ¶ 11.

The primary issue is whether the recordkeeping fee was reasonable. The only way to resolve that issue is through expert testimony at trial, and it is virtually impossible to predict with any certainty whose testimony would be credited. This claim's outcome is unclear, and resolution would require further costly litigation.

ii. The Money Market Claim

The Money Market Claim presented a novel theory; whether it was imprudent to concurrently offer both a money market fund and a stable value fund as plan investment options where the stable value fund consistently outperformed the Money Market Fund. Defendants claimed in their early Motion for Partial Summary Judgment that the Money Market Fund claim failed as a matter of law. The court did not reach this argument, instead ruling that Plaintiff Barrett lacked standing on this claim because it found Barrett had no standing to bring the claim but invited Defendants to resubmit their motion by October 31, 2018. Given the uncertainty, the parties assigned no settlement value to the Money Market Claim and elected to dismiss the

money market claim without prejudice to allow other Plan members to pursue the claim if they elect to do so.

c. An Immediate Recovery Significantly Outweighs the Mere Possibility of Future Relief After Protracted and Expensive Litigation

The third factor the court must consider is "whether the value of an immediate recovery outweighs the possibility of future relief after protracted and expensive litigation." *Gottlieb v. Wiles*, 11 F.3d 1004, 1014 (10th Cir.1993). The value of the settlement must be weighed against "the possibility of some greater relief at a later time, taking into consideration the additional risks and costs that go hand in hand with protracted litigation." *Id*. at 1015.

As described above, there was a serious question regarding what a reasonable recordkeeping fee would be. As a result, if plaintiffs were to proceed with this litigation through a trial on the merits, there is a substantial risk that the amount of damages ultimately awarded may have been less than the amounts guaranteed by the settlement. Meanwhile, the size of the recovery would be reduced by additional costs incurred by Plaintiffs' Counsel in taking this case through trial and likely appeals. Expert depositions, *Daubert* and summary judgment motions would likely have been required, as well as preparing parties and experts for trial. Thus, the value of an immediate recovery of $500,000, 35% of the total recordkeeping damages calculated by Plaintiffs' expert, outweighs the possibility of future relief after protracted and expensive litigation. *See In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1261 (D. Kan. 2006)

d. The Parties believe the Settlement is Fair and Reasonable

"Counsels' judgment as to the fairness of the agreement is entitled to considerable weight." Marcus v. Kansas Dept. of Revenue, 209 F.Supp.2d 1179, 1183 (D.Kan.2002). Here, the parties' counsel, who are attorneys with substantial experience in complex litigation and ERISA class

actions, support this settlement. They believe it provides significant benefits to the class members, particularly when measured against the significant risks to any recovery if the action were to proceed to summary judgment and/or trial. Counsel believe that the settlement confers significant benefits on the class of plaintiffs compared to what they probably would have received in the absence of settlement.

4. Class Certification

Plaintiffs seek conditional certification of the following settlement class:

> All current and former participants and beneficiaries of the Pioneer Natural Resources USA, Inc. 401(k) and Matching Plan who maintained a balance of any amount in the Plan at any point from June 28, 2011 through December 10, 2018, excluding Defendants.

Settlement Agreement ¶ 1.40. The Tenth Circuit requires that plaintiffs demonstrate "under a strict burden of proof" that the requirements of Rule 23 are clearly satisfied. *See Trevizo v. Adams,* 455 F.3d 1155, 1162 (10th Cir. 2006).

a. Rule 23(a)(1) Numerosity

In order to meet this element, "[t]he burden is upon plaintiffs seeking to represent a class to establish that the class is so numerous as to make joinder impracticable." *Peterson v. Okla. City Housing Auth.,* 545 F.2d 1270, 1273 (10th Cir.1976). Here, the proposed Settlement Class includes more than 8,000 members. Wood Dec., ¶ 20. Thus, joinder of every potential class member is impractical.

b. Rule 23(a)(2) Commonality

The inquiry under Fed.R.Civ.P. 23(a)(2) is not whether common questions of law and fact predominate, but only whether such questions exist. *Adamson v. Bowen,* 855 F.2d 668, 676 (10th Cir.1988). "A finding of commonality requires only a single question of law or fact common to

the entire class." *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 914 (10th Cir. 2018).

The Settlement Class satisfies the commonality requirement because there is a single question of law common to every member of the class; whether Defendants breached their fiduciary by permitting the Plan to pay excessive recordkeeping fees. There is also a single issue of fact common to every member: the amount of a reasonable recordkeeping fee.

c. Rule 23(a)(3) Typicality

The element of typicality requires that the representative possess the same interest and suffer the same injury as the class members. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156, (1982); The claims of the representative, however, need not be identical to those of other class members. *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417, 423–24 (D.N.M. 1988). The court should determine whether the claims of the representative are significantly antagonistic to those of the class members. *Id.*

Here, all Plaintiffs have claims that are similar to the class. All Plaintiffs were participants in the Plan and suffered the same harm, excessive recordkeeping fees, as other Plan participants. Because the Settlement Proceeds will be distributed based on the number of months a class member was a participant in the Plan, the Plaintiffs have no interest antagonistic to the class members. Thus, the typicality requirement is met.

d. Rule 23(a)(4) Adequacy

The adequacy inquiry asks whether the named class representatives "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel

prosecute the action vigorously on behalf of the class?" *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187-88 (10th Cir. 2002)).

Plaintiffs' Counsel is knowledgeable and experienced in matters relating to both the law governing ERISA and the conduct of class actions. Wood Dec., ¶ 23. Plaintiffs and their Counsel have demonstrated their willingness to prosecute the action vigorously. There is no conflict between Plaintiffs' interests and the interests of the class.

e. Rule 23(b)(1)(A)

Class certification under Rule 23(b)(1)(A) is appropriate 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). Rule 23(b)(1)(A) certification is appropriate when varying orders concerning retrospective monetary relief predominates because such orders can potentially create incompatible standards of conduct where ERISA fiduciaries are required to treat all plan participants equally. *See* 2 Newberg §§ 4:12 & 4:14. "ERISA cases have become a primary form of Rule 23(b)(1)(A) class actions." 2 William B. Rubenstein, *Newberg on Class Actions* § 4:7 (5th ed., June 2018 update).

Here, the question presented for the Settlement Class is whether Defendants breached their fiduciary duties by permitting the Plan to pay excessive recordkeeping fees. Varying orders considering the retrospective monetary relief flowing from the answer to this question would create incompatible standards of conduct for Defendants. For example, if a court found a breach with respect to one plaintiff and not another, Defendants would face incompatible findings regarding their standards of conduct toward the Plan. Similarly, if a court found breach, but

evaluated the reasonableness of fees differently in different cases, Defendants would face incompatible standards with respect to the calculation and repayment of fees to Plan members. Thus, Rule 23(b)(1)(A) certification is appropriate.

IV. Conclusion

For the foregoing reasons, the parties respectfully request the Court grant their Joint Motion for Preliminary Approval of Rule 23 Class Action Settlement, enter the proposed order attached hereto, and grant any other relief that the Court deems just and proper.

Dated this 10th day of December 2018.

Franklin D. Azar & Associates, P.C.

By: /s/ Paul R. Wood

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December 2018, I electronically filed and served the foregoing **UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record:

Catalina J. Vergara	□	by First-Class U.S. Mail
O'MELVENY & MYERS, LLP	□	by e-mail
400 S. Hope Street	□	by Share File
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cvergara@omm.com	■	by CM/ECF system
Shannon Barrett	□	by First-Class U.S. Mail
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/s/ *Colette L. Foote*
Colette L. Foote