

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:16-cv-00175-REB-CBS

DEBORAH TROUDT, *et al.*,

Plaintiffs,

v.

ORACLE CORPORATION, *et al.*,

Defendants.

JOINT MOTION FOR CERTIFICATION OF SETTLEMENT ONLY CLASS

Under Federal Rule of Civil Procedure 23(b)(1), the parties respectfully request that this Court certify a class for settlement purposes only. As a condition of the settlement reached on February 26, 2020, and to resolve this action, the parties defined the Settlement Class as:

All persons who are or were participants or beneficiaries in the Oracle Corporation 401(k) Savings and Investment Plan at any time during the Class Period, including any Beneficiary of a deceased person who participated in the Plan at any time during the Class Period, and/or Alternate Payee, in the case of a person subject to a Qualified Domestic Relations Order who participated in the Plan at any time during the Class Period. Excluded from the Settlement Class are Gayle Fitzpatrick, John Gawkowski, Dan Sharpley, Peter Shott, Mark Sunday and Amit Zavery.

See Settlement Agreement, §2.41 (attached as Ex. A to the Joint Motion for Preliminary Approval of Settlement). The Class Period is defined as January 1, 2009 through December 31, 2019. *Id.* §2.12. As demonstrated herein, the agreed-upon settlement only class satisfies the requirements of Rule 23, and should be certified under the more lenient standard applied to such settlement only classes.

BACKGROUND

On January 22, 2016, Plaintiffs filed this action. [#1]. They alleged that Defendants breached their fiduciary duties and committed prohibited transactions by causing the Plan to pay unreasonable recordkeeping and administrative fees to the Plan's recordkeeper, and breached their duties by selecting and/or retaining three imprudent investment options in the Plan: the Artisan Small Cap Value Fund (Artisan Fund), the TCM Small-Mid Cap Growth Fund (TCM Fund), and the PIMCO Inflation Response Multi-Asset Fund (PIMCO Fund). *Id.* ¶¶81–91, 99–103. Plaintiffs also alleged that Oracle Corporation failed to monitor the performance of the other plan fiduciaries. *Id.* ¶¶92–98.

On January 30, 2018, the Court certified the following classes under Rule 23(b)(1):

(1) **Excessive Fee Class:** All participants and beneficiaries of the Oracle Corporation 401(k) Savings and Investment Plan from January 1, 2009, through the date of judgment, excluding defendants.

(2) **Imprudent Investment Class A (Artisan Fund):** All Plan participants and beneficiaries, excluding defendants, who invested in the Artisan Fund between January 1, 2009, and June 22, 2015, and whose investment in the Fund underperformed relative to the Russell 2000 Index.

(3) **Imprudent Investment Class B (TCM Fund):** All Plan participants and beneficiaries, excluding defendants, who invested in the TCM Fund between January 1, 2009, and April 8, 2013, and whose investment in the Fund underperformed the Russell 2500 Growth Index.

[#119] at 17–18. Because no named class representative invested in the PIMCO Fund, the Court did not certify an imprudent investment class for that fund at the time. *Id.* at 14. The Court appointed the seven named plaintiffs as Class Representatives and Schlichter Bogard & Denton, LLP as Class Counsel. *Id.* at 7, 18.

Following summary judgment, the Court vacated the Excessive Fee Class because Counts I and IV were dismissed, and also modified the start of the class period for the Imprudent Investment Classes from January 1, 2009 to January 22, 2010. [#179] at 31.

On December 3, 2019, the parties reached an agreement in principle on monetary and non-monetary relief. [#211]. Over the next two-plus months, the parties continued discussions on the scope of the non-monetary relief. Ultimately, on February 26, 2020, the parties reached an agreement on all terms. As a condition of the settlement, the parties agreed to a single plan-wide class to resolve this action. The Settlement Class is defined as:

All persons who are or were participants or beneficiaries in the Plan at any time during the Class Period, including any Beneficiary of a deceased person who participated in the Plan at any time during the Class Period, and/or Alternate Payee, in the case of a person subject to a Qualified Domestic Relations Order who participated in the Plan at any time during the Class Period. Excluded from the Settlement Class are Gayle Fitzpatrick, John Gawkowski, Dan Sharpley, Peter Shott, Mark Sunday and Amit Zavery.

See Settlement Agreement, §2.41 (attached as Ex. A to the Joint Motion for Preliminary Approval of Settlement). The Class Period is defined as January 1, 2009 through December 31, 2019. *Id.* §2.12; *see also* [#84] at 27 (seeking a class period of January 1, 2009 through the date of judgment); [#104] at 6 (same).

ARGUMENT

A settlement-only class must meet the requirements of Rule 23. Fed. R. Civ. P. 23. The standard for certifying a class for settlement purposes is more lenient than applied in certifying a class for trial. The court need not inquire into whether the class would be manageable for trial purposes because “the proposal is that there be no trial”. *Amchem*

Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997). The proposed settlement-only class must satisfy numerosity, common questions of law or fact, typicality of claims or defenses, and adequacy of representation under Rule 23(a), and one of the categories under Rule 23(b). Fed. R. Civ. P. 23(a), (b).

The parties acknowledge that the Court previously declined to certify a plan-wide class for all claims, and vacated certification of the Excessive Fee Class after dismissing Counts I and IV at summary judgment. [# 179] at 31. However, “Courts ... regularly certify settlement classes that might not have been certifiable for trial purposes.” William B. Rubenstein, *NEWBERG ON CLASS ACTIONS* § 4:63 (5th ed. 2016). Indeed, the Ninth Circuit recently upheld a settlement-only class despite the district court declining to certify the class for purposes of trial, explaining that the “criteria for class certification are applied differently in litigation classes and settlement classes.” *In re Hyundai & Kia Fuel Economy Litig.*, 926 F.3d 539, 556 (9th Cir. 2019) (en banc).

I. The settlement-only class satisfies Rule 23(a).

A. Numerosity

The proposed settlement class of over 70,000 current and former participants satisfies the numerosity requirement under Rule 23(a)(1) because joinder of all class members is impracticable. [#119] at 5–6.

B. Commonality and typicality.

The settlement class satisfies commonality and typicality under Rule 23(a)(2) and (3) because there are “questions of law or fact common to the class”, including whether the Plan suffered losses, and the claims of the named plaintiffs are “typical of the claims ...

of the class” because they arise from the same course of conduct and are based on the same legal theories as the absent class members. Fed. R. Civ. P. 23(a)(2), (3); *cf.* [#119] at 6. Although the Court declined to certify a plan-wide class concerning Plaintiffs’ imprudent investment claims because the “relief is measured by the extent of the injury of the individual putative class members who suffered damages as a result of their investment in a particular fund”, *id.* at 14, the Plan of Allocation set forth in the Settlement Agreement addresses these concerns. The Plan of Allocation will reasonably and equitably allocate the settlement proceeds to individual class members who suffered damages as a result of their investment in the Artisan and TCM Funds. It also will compensate Class members who paid recordkeeping fees through the revenue sharing applied to certain Plan investment options during the Class Period.

Even though the Court declined to certify a single plan-wide class for trial purposes, that ruling should not bar certification of a settlement only class. *See supra In re Hyundai & Kia Fuel Economy Litig.*, 926 F.3d at 556. For example, in *In re Diebold ERISA Litig.*, the court denied certification on adequacy grounds, finding that there were “potential conflicts...likely to undermine the adequacy of representation of class members.” No. 06-170, 2009 WL 9120614, at *5 (N.D. Ohio Mar. 11, 2009). However, the court later certified a settlement only class “[s]olely for purposes of the Settlement”. *In re Diebold ERISA Litig.*, No. 06-170, [#98] at 1–2 (¶1) (N.D. Ohio Aug. 25, 2010); *see also Da Silva Moore v. Publicis Groupe SA*, No. 11-1279, 2013 WL 5951903 (S.D. N.Y. Oct. 30, 2013) (denying class certification), and *Da Silva Moore*, [#612] at 1–2 (¶2) (S.D. N.Y. Jan. 13, 2016) (certifying settlement only classes). Within the Seventh Circuit

where *Spano v. Boeing Co.*, 633 F.3d 574 (7th Cir. 2011) is controlling on district courts, a single omnibus settlement class has been certified solely for settlement purposes despite the existence of separate imprudent investment claims. See *Ramsey v. Philips North America LLC*, No. 18-1099, [#19] at 1–4 (S.D. Ill. Oct. 15, 2018). (Notably, the parties in that ERISA action were represented by the same counsel as here.)

C. Adequacy of representation.

The named plaintiffs satisfy the requirements of Rule 23(a)(4) because they “will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4); *cf.* [#119] at 7; see also [#104-1 – 104-7] (declarations of named plaintiffs). Class Counsel, Schlichter Bogard & Denton, LLP are competent and able to fairly and adequately represent the interests of the proposed settlement class. Fed. R. Civ. P. 23(g); [#119] at 7, 16–17.

II. The requirements of Rule 23(b)(1) are met.

“Rule 23(b)(1)(A)“takes in cases where the party is obliged by law to treat the members of the class alike[.]” *Amchem*, 521 U.S. at 614; [#119] at 15–16. Defendants owed fiduciary duties to all members of the settlement class. Because the “fiduciary duties implicated are owed to all members” of the class, certification under Rule 23(b)(1)(A) is appropriate. [#119] at 16. As this Court previously recognized, certification under this rule is consistent with numerous other courts in the Tenth Circuit that certified ERISA breach of fiduciary duty class actions. *Id.* at 16 (citing cases).

CONCLUSION

The parties respectfully request that the Court certify the Settlement Class solely for settlement purposes.

Dated: February 26, 2020

Respectfully Submitted,

by: /s/ Jerome J. Schlichter
Jerome J. Schlichter
Michael A. Wolff
Kurt C. Struckhoff
SCHLICHTER BOGARD AND DENTON, LLP
100 South 4th Street, Suite 1200
St. Louis, MO 63102
Phone: (314) 621-6115
Fax: (314) 621-5934
jschlichter@uselaws.com
mwolff@uselaws.com
kstruckhoff@uselaws.com

Attorneys for Plaintiffs

by: /s/ Christopher J. Boran
Christopher J. Boran
Matthew A. Russell
MORGAN, LEWIS & BOCKIUS LLP
77 W. Wacker Dr., Fifth Floor
Chicago, IL 60601
Phone: (312) 324-1000
Fax: (312) 324-1001
christopher.boran@morganlewis.com
matthew.russell@morganlewis.com

Brian T. Ortelere
Jeremy P. Blumenfeld
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921
Phone: (215) 963-5150
Fax: (215) 963-5000
jeremy.blumenfeld@morganlewis.com
brian.ortelere@morganlewis.com

William C. Berger
Sarah M. Stettner
BROWNSTEIN HYATT FARBER
SCHRECK, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202
Phone: (303) 223-1100
Fax: (303) 223-1111
bberger@bhfs.com
sstettner@bhfs.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2020, a copy of the foregoing was filed electronically using the Court's CM/ECF system, which will provide notice of the filing to all counsel of record.

/s/ Jerome J. Schlichter

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:16-cv-00175-REB-CBS

DEBORAH TROUDT, *et al.*,

Plaintiffs,

v.

ORACLE CORPORATION, *et al.*,

Defendants.

**[PROPOSED] ORDER GRANTING JOINT MOTION FOR CERTIFICATION OF
SETTLEMENT ONLY CLASS**

Now before the Court is the Joint Motion for Certification of Settlement Only Class. After due consideration, the Court finds this Motion should be **GRANTED**.

Solely for the purposes of Settlement, the Court finds that the requirements of Rule 23 of the Federal Rules of Civil Procedure have been met as to the Settlement Class, which is defined as:

All persons who are or were participants or beneficiaries in the Oracle Corporation 401(k) Savings and Investment Plan at any time during the Class Period, including any Beneficiary of a deceased person who participated in the Plan at any time during the Class Period, and/or Alternate Payee, in the case of a person subject to a Qualified Domestic Relations Order who participated in the Plan at any time during the Class Period. Excluded from the Settlement Class are Gayle Fitzpatrick, John Gawkowski, Dan Sharpley, Peter Shott, Mark Sunday and Amit Zavery.

The Class Period is defined as January 1, 2009 through December 31, 2019.

IT IS SO ORDERED.

DATED this _____ day of _____, 2020.

THE HONORABLE ROBERT E. BLACKBURN
UNITED STATES DISTRICT JUDGE