IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 17-cv-1579-WJM-NYW

WILLIAM M. BARRETT, individually and as the representative of a class consisting of the participants and beneficiaries of the Pioneer Natural Resources USA, Inc. 401(K) and Matching Plan,

Plaintiff,

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.

ORDER RESERVING RULING ON CLASS CERTIFICATION AND *SUA SPONTE* GRANTING LEAVE TO AMEND COMPLAINT

In this putative class action, Plaintiff William M. Barrett ("Plaintiff") sues various parties involved in the management of a retirement plan in which he previously participated (collectively, "Defendants"). Barrett argues that Defendants breached the fiduciary duties established by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq*. Currently before the Court is Plaintiff's Motion for

Class Certification. (ECF No. 61.) Defendants oppose this motion. (ECF No. 64.)

For the reasons explained below, the Court finds that Defendant's opposition arguments lack merit. Therefore, on the arguments presented by the parties, it appears class certification is appropriate. But the parties' arguments also reveal a serious defect in Plaintiff's ability to serve as an adequate class representative, namely, he has no standing to seek prospective equitable relief on behalf of those who continue to participate in the retirement plan. After considering various ways of handling the situation, the Court deems it most appropriate to reserve ruling on the matter of class certification and *sua sponte* grant Plaintiff leave to amend so that Plaintiff has an opportunity to attempt to cure the defect.

I. BACKGROUND

The Court finds the following allegations from the First Amendment Complaint (ECF No. 57) relevant to the class action analysis.

Plaintiff participated in the Pioneer Natural Resources USA, Inc. 401(k) and Matching Plan ("Plan") from 2011 until September 2017. (ECF No. 57 ¶ 1.) The Plan was a defined contribution plan (as opposed to a defined benefit plan), meaning that each Plan participant's benefits turned on the participant's contributions, the employer's matching contributions (if any), and investment performance. (*Id*. ¶¶ 2–3.)

Administrative and management fees, such as recordkeeping fees, can weigh down investment performance. (*Id*. ¶¶ 4, 7.) With over $665 million in assets, the Plan was large enough to possess the bargaining power needed to negotiate low administrative and management fees, and to negotiate for participation in mutual funds at lower expense ratios. (*Id*. ¶ 6.) The Plan, however, did not take advantage of this

bargaining power. It instead continued to pay management fees to its designated recordkeeper (Vanguard Group Inc.) that were allegedly well above the industry average. (*Id*. ¶¶ 29–56.)

Based on these allegations, Plaintiff asserts two claims for relief that are currently relevant. Claim 1 asserts breaches of the duties of loyalty and prudence based on the unreasonably high recordkeeping fees. (*Id*. ¶¶ 93–101.) Claim 4 accuses Defendant Pioneer Natural Resources USA, Inc. of failure to monitor the fiduciaries responsible for administering the Plan. (*Id*. ¶¶ 120–27.)[1]

II. LEGAL STANDARD

As the party seeking class certification, Plaintiff must first demonstrate that all four prerequisites of Federal Rule of Civil Procedure 23(a) are clearly met. *Shook v. El Paso Cnty.*, 386 F.3d 963, 971 (10th Cir. 2004); *see also Tabor v. Hilti, Inc.*, 703 F.3d 1206 (10th Cir. 2013). These threshold elements are: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative party are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

If Plaintiff proves he has met these threshold requirements, he must then demonstrate that the action falls within one of the three categories set forth in Rule 23(b). *Shook*, 386 F.3d at 971. Here, Plaintiff seeks certification pursuant to Rules

[1] Plaintiff also alleges a Claim 2 and a Claim 3. The Court dismissed Plaintiff's Claim 2 after close of class certification briefing (*see* ECF Nos. 82, 84), so the Court ignores any argument related to class certification involving Claim 2. And, Plaintiff states that he "does not seek certification of his third claim for relief" (ECF No. 69 at 2 n.2), so the Court provides no analysis as to Claim 3.

23(b)(1)(A) and (B).

The party seeking to certify a class bears the strict burden of proving the requirements of Rule 23. *Trevizo v. Adams*, 455 F.3d 1155, 1162 (10th Cir. 2006). In determining the propriety of a class action, the question is not whether a plaintiff has stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met. *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982).[2] The Court should not pass judgment on the merits of the case, but must conduct a "rigorous analysis" to ensure that the requirements of Rule 23 are met. *D.G. ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1194 (10th Cir. 2010).

The decision whether to grant or deny class certification "involves intensely practical considerations and therefore belongs within the discretion of the trial court." *Tabor*, 703 F.3d. at 1227.

III. PROPOSED CLASS

Plaintiff proposes the following class definition: "All current and former participants and beneficiaries of the Pioneer Natural Resources USA, Inc. 401(K) and Matching Plan from July 1, 2011 through the date of judgment, excluding the Defendants." (ECF No. 61 at 2.)

IV. ANALYSIS

A. Rule 23(a)

The Court's first task is to ensure that the proposed class satisfies the Rule 23(a) requirements, *i.e.*, (1) the class is so numerous that joinder of all members is

[2] For this reason, the Court ignores Defendant's argument that Plaintiff is misrepresenting or misinterpreting key documents regarding how Defendant approached the question of administrative fees. (*See* ECF No. 64 at 17–18.)

impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class ("adequacy"). The Court will address each of these considerations in turn.

1. Numerosity

Plaintiff contends that the proposed class comprises at least 2,705 persons, and perhaps more than 4,500. (ECF No. 61 at 8.) Defendants do not contest Plaintiff's numbers nor Plaintiff's argument that those numbers satisfy the numerosity element. (*See* ECF No. 64 at 15.) Given Defendants' failure to contest the point, and because numerosity is otherwise obvious, the Court finds that Plaintiff has satisfied the numerosity requirement.

2. Commonality

Defendants contend that Plaintiff's class definition simultaneously fails the commonality, typicality, and adequacy tests because Plan participants "did not all pay the same fee." (ECF No. 64 at 15.) Defendants thus present a general attack on these three requirements without clearly distinguishing between them. (*Id*. at 15–18.) The Court finds that this attack is best addressed under the typicality heading, below.

Defendants do not deny the existence of any possible "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Such common questions are evident from plaintiff's allegations, including whether Defendants made adequate efforts to negotiate reasonable administrative fees, and whether (apart from Defendants' efforts, if any) those fees were reasonable. (*See* Part I, above.) The commonality requirement is

therefore satisfied.

3. Typicality

Defendants argue that "participants with larger participant account balances generally bore a greater portion of the Plan's recordkeeping expense[s]," and that such expenses varied further based on the specific investments a participant chose. (*Id*. at 15.) "Because of these factual variations," Defendants say, "different participants have very different potential claims concerning the Plan's recordkeeping expenses, and many have no possible claims at all." (*Id*.) So Plaintiff "cannot claim to be . . . [a] typical representative of the many participants" who contributed different amounts to different investments. (*Id*. at 16.)

In a Rule 23(b)(3) analysis of whether common questions would predominate over individual questions, the Court previously rejected similar reasoning in an ERISA class action alleging breach of fiduciary duty regarding an interest rate that was in the defendants' discretion. *See Teets v. Great-West Life & Annuity Ins. Co.*, 315 F.R.D. 362, 371–72 (D. Colo. 2016). There, the Court explained that the plaintiff sought

> to recover the entire pot of ill-gotten gain (*i.e.*, what Defendant should have distributed [to the Plan], minus what it actually distributed) under 29 U.S.C. § 1109(a) and various equitable theories. The amount of that pot then allocated to the various Plans will certainly vary from Plan to Plan, but that is not a matter of Defendant's concern.

Id. at 371 (citations and footnote omitted).

The Court finds this reasoning equally persuasive in the Rule 23(a)(3) context as applied to Defendant's arguments. Here, Plaintiff seeks to recover on behalf of the Plan the difference between the administrative expenses the Plan actually paid and the expenses it allegedly should have paid had the Plan trustees carried out their fiduciary

duties. That recovery would likely then need to be distributed to Plan participants, but Defendants do not argue that distribution is something more than a ministerial, arithmetic exercise applied to existing data.[3] The Court thus rejects Defendant's argument that typicality does not exist.

The Court further finds that Plaintiff is a typical representative of the Proposed Class. He was a Plan participant who allegedly saw lower returns due to Defendants' actions or omissions concerning administrative fees. He was allegedly "subjected to the same harmful practices" as other Proposed Class members, thus establishing typicality. *D.G.*, 594 F.3d at 1199.

4. Adequacy

The adequacy analysis asks, "(1) do the named plaintiffs . . . have any conflicts of interest with other class members and (2) will the named plaintiffs . . . 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). Defendants do not present any challenge in this regard beyond the argument already described and rejected above. As noted, however, the Court itself sees a fundamental flaw in Plaintiff's adequacy. For simplicity, the Court will address that flaw in Part IV.C, below, after explaining why the remainder of Defendant's arguments against class certification lack merit.

B. Rule 23(b)

Assuming a proposed class representative can satisfy the Rule 23(a) requirements, the representative must also establish that the proposed class action fits

[3] Indeed, there is some question whether such a distribution could be considered a part of this lawsuit. Presumably the Plan requires apportionment and distribution of this sort of income, apart from any order of this Court, and refusal to distribute would be a separate contractual or fiduciary breach.

within one of the class action types described in Rule 23(b). Here, Plaintiff argues that the class should be certified under Rules 23(b)(1)(A) or (B).

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

A Rule 23(b)(1)(A) class 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." "The 23(b)(1) class action is . . . the least utilized" form of class action as compared to Rules 23(b)(2) and (3). 2 William B. Rubenstein, *Newberg on Class Actions* § 4:2 (5th ed., June 2018 update) ("*Newberg*"). But "ERISA cases have become a primary form of Rule 23(b)(1)(A) class actions." *Id*. § 4:7.

Defendant argues that a Rule 23(b)(1)(A) class action is inappropriate because, according to certain extra-circuit cases, the "incompatible standards of conduct" referenced in the Rule primarily refer to standards of conduct imposed by prospective injunctive relief, yet Plaintiff has no standing to seek prospective relief because he no longer participates in the Plan. (ECF No. 64 at 19.) Defendant is correct that Plaintiff exclusively seeks retrospective monetary relief, at least according to his current Prayer for Relief. (*See* ECF No. 57 at 31.) However, the Court is persuaded by the *Newberg* treatise and cases cited therein that Rule 23(b)(1)(A) is still appropriate when retrospective monetary relief predominates—or in other words, varying orders concerning such retrospective relief can potentially create incompatible standards of conduct, particularly given that ERISA fiduciaries are required to treat all plan participants equally. *See* 2 *Newberg* §§ 4:12 & 4:14. Thus, certification under Rule

23(b)(1)(A) appears appropriate.

2. Rule 23(b)(1)(B)

A Rule 23(b)(1)(B) class is appropriate where

> prosecuting separate actions by or against individual class members would create a risk of * * * adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests[.]

Plaintiff's opening brief provides no argument as to why it is appropriate to certify the proposed class under Rule 23(b)(1)(B). Plaintiff only quotes the rule and asserts (in a section heading) that it should apply. (*Id*.) Then, in his reply brief, he finally provides a page-and-a-half of argument in favor of Rule 23(b)(1)(B) certification. (ECF No. 69 at 2–3.)

A party forfeits those arguments not meaningfully developed in the party's opening brief. *See, e.g.*, *United States v. Hunter*, 739 F.3d 492, 495 (10th Cir. 2013); *Thompson R2-J Sch. Dist. v. Luke P., ex rel. Jeff P.*, 540 F.3d 1143, 1148 n.3 (10th Cir. 2008). Plaintiff has thus forfeited his Rule 23(b)(1)(B) argument and the Court will not examine it further.

C. The Adequacy Problem

Defendants assert, and Plaintiff does not dispute, that Plaintiff cannot seek prospective equitable relief because he is a former Plan participant with no intent to rejoin the Plan. (ECF No. 64 at 19.) Defendants frame this as a flaw in Plaintiff's ability to certify a Rule 23(b)(1)(A) class, but the Court views it as a more basic flaw in Plaintiff's adequacy to serve as a class representative under Rule 23(a)(4). Indeed, it appears Plaintiff has framed his current Prayer for Relief with the knowledge that he

cannot seek prospective relief. (*See* ECF No. 57 at 31.) As a result, the proverbial tail (Plaintiff's limitations as a class representative) is wagging the dog (the Court's remedial powers), likely to the disadvantage of current Plan participants.

The Court agrees with those courts holding that "a class representative with no stake in a prospective injunction has no incentive to vigorously pursue those claims," and is therefore an inadequate representative. 1 *Newberg* § 3:59; *see also id*. at nn.6 & 11 (citing cases). On the current record, then, the Court cannot grant the Motion for Class Certification.

If the Court were to refuse class certification on this basis, nothing in the Federal Rules of Civil Procedure, nor any other authority of which the Court is aware, would prevent Plaintiff from filing a new motion for class certification, should Plaintiff be able to cure the adequacy defect. *Cf*. Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants *or denies* class certification may be altered or amended before final judgment." (emphasis added)). The Court predicts Plaintiff would search for a new or additional class representative; file a motion to amend the complaint to add that person as a named plaintiff; and, if that motion is granted, file a renewed motion for class certification. Upon consideration, the Court concludes that this multi-stage process be a waste of the parties' and the Court's time and resources. Given the Court's inherent authority to manage its docket to minimize such a waste of scarce judicial resources, the Court will *sua sponte* grant Plaintiff leave to amend the complaint to add a co-representative plaintiff (or substitute representative) who is a current participant in the Plan.

The Court recognizes that granting leave to amend in these circumstances implicates questions of Plaintiff's counsel's diligence in seeking the proper persons to

represent the class. The Court further recognizes that it recently denied leave to amend, given lack of diligence, when Plaintiff sought to cure a different standing defect (Plaintiff's ability to bring a claim based on a fund in which he had never invested) by adding current Plan participant Heather L. Coberly as an additional Plaintiff. (*See* ECF Nos. 79, 82, 84.) However, briefing on the Motion for Class Certification demonstrates that a class could be certified in these circumstances but for Plaintiff's inadequacy. It would not be in the interest of justice to deny certification solely on this basis and force the parties through the inevitable procedural hoops that would follow as Plaintiff attempted to revive the class action posture of the lawsuit. Accordingly, the Court will grant leave to amend.

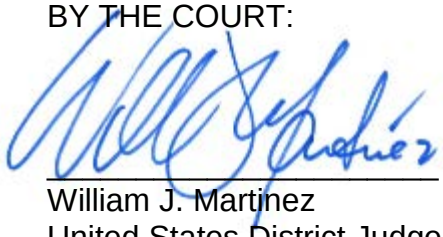
V. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. Plaintiff is *sua sponte* GRANTED LEAVE to file a second amended complaint naming a current participant in the Pioneer Natural Resources USA, Inc. 401(k) and Matching Plan as a co-plaintiff or substitute plaintiff, on or before **August 24, 2018**; and
2. Should Plaintiff timely file such an amended complaint, the Court will enter further orders regarding supplemental discovery, if needed, and supplemental briefing on the Motion for Class Certification, which remains under advisement.

Dated this 26th day of July, 2018.

BY THE COURT:



William J. Martínez
United States District Judge