IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ROBERTO RAMIREZ and THOMAS IHLE,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	**CIVIL ACTION NO. 6:14-CV-601**
J.C. PENNEY CORPORATION, INC., MICHAEL DASTUGUE, JANET DHILLON, KENNETH HANNAH, MICHAEL KRAMER, RONALD JOHNSON, and MYRON E. ULLMAN, III.,	§	
	§	
Defendants.	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Before the Court is Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement, Certification of Settlement Class and Approval of Plan of Allocation (ECF 80). The Court conducted a fairness hearing and heard argument from counsel. Having reviewed the motion and the documents submitted with the motion, and heard the arguments of counsel at the hearing, Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement, Certification of Settlement Class and Approval of Plan of Allocation (ECF 80) should be **GRANTED**.

Background

Plaintiffs filed this ERISA action individually and on behalf of the class of employees and former employees of J.C. Penney Corporation, Inc. ("J.C. Penney") that participated in and were beneficiaries of the J.C. Penney Stock Ownership Plan ("the Plan") between November 1, 2011 and September 27, 2013. The action was brought against the sponsor of the plan, J.C. Penney, as well as members of the J.C. Penney board of directors: Michael Dastugue, Janet Dhillon, Kenneth

Hannah, Ronald Johnson, Michael Kramer, and Myron E. Ullman, III. Plaintiffs assert in the First Amended Complaint that Defendants failed to prudently and loyally manage the Plan's assets.

On August 20, 2014, the Court appointed Zamansky LLC as interim liaison class counsel and Forman Law Firm, P.C. as interim local class counsel. The parties submitted a joint status report on April 4, 2016 stating that mediation resulted in the parties reaching terms of settlement. Plaintiffs then filed an Unopposed Motion for Preliminary Approval of Class Action Settlement seeking preliminary approval of the proposed Class Action Settlement Agreement and Release, preliminary certification of the Settlement Class and approval of the Notice Plan. The Court entered Orders on January 3, 2017 granting the motion and setting the matter for a fairness hearing following notice to the class. The Order Granting Preliminary Approval of Class Action Settlement, Preliminarily Certifying a Class for Settlement Purposes, Approving Form and Manner of Class Notice, Preliminarily Approving Plan of Allocation, and Scheduling a Date for a Fairness Hearing (ECF 76) approved a class for settlement purposes consisting of: All persons who were participants in or beneficiaries of the J.C. Penney Corporation, Inc. Savings, Profit Sharing and Stock Ownership Plan at any time from November 1, 2011 through May 31, 2016, and whose Plan accounts included investments in the J.C. Penney Common Stock Fund. The Order additionally preliminarily determined for settlement purposes that the Settlement Class meets the requirements of FED.R.CIV.P. 23(a)(1), (2), (3), and (4) and (b)(1) and (2), and that Class Counsel is capable of fairly and adequately representing the interests of the Settlement Class in accordance with FED.R.CIV.P. 23(g).

In advance of the fairness hearing, Plaintiffs filed their Unopposed Motion for Final Approval of Class Action Settlement, Certification of Settlement Class and Approval of Plan of Allocation (ECF 80) and Class Counsel submitted a petition seeking attorney's fees, litigation

expenses and case contribution awards (ECF 81). The case was stayed pending resolution of the fairness hearing. No objections were filed to the fairness, adequacy or reasonableness of the settlement. The Court conducted the fairness hearing on July 26, 2017. No Settlement Class members or notice recipients appeared for the hearing. Following the hearing, the parties submitted a non-substantive correction to the proposed Final Approval Order.

Analysis

I. Plaintiffs' Motion for Final Approval of Class Action Settlement, Certification of Settlement Class and Approval of Plan of Allocation (ECF 80)

A. Class Certification

The Court preliminarily approved class certification in this case on January 3, 2017. Even when certification is for settlement purposes, the certification requirements of FED.R.CIV.P. 23 apply. *In re Dell, Inc.*, 2010 WL 2371834, at *2 (W.D.Tex. June 11, 2010) (citing *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231 (1997)). To obtain class certification, "parties must satisfy [Federal Rule of Civil Procedure] 23(a)'s four threshold requirements, as well as the requirements of Rule 23(b)(1), (2), or (3)." *Ludlow v. BP, P.L.C.*, 800 F.3d 674, 682 (5th Cir. 2015). Rule 23(a) requires that: (1) the class be so numerous that joinder of all members is impracticable (numerosity); (2) there be questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties be typical of the claims or defenses of the class (typicality); and (4) the representative parties fairly and adequately protect the interests of the class (adequacy). FED. R. CIV. P. 23(a).

"A number of facts other than the actual or estimated number of purported class members may be relevant to the 'numerosity' question." *Ziedman v. J. Ray McDermott and Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir, 1981). "The critical inquiry is not, therefore, whether there are a sufficient number of class members, but whether joinder is impracticable." *Simms v. Jones*, 296

F.R.D. 485, 497 (N.D. Tex. 2013). The numerosity prerequisite is "generally assumed to have been met in class action suits involving nationally traded securities." *Ziedman*, 651 F.2d at 1039. Courts are "quite willing to accept common sense assumptions in order to support findings of numerosity." *Id.* Here, more than 55,000 class members held J.C. Penney common stock in their Plan accounts during the relevant period. Additionally, this matter involves nationally traded securities. As a result, numerosity is satisfied.

To satisfy the commonality requirement, parties must show that there are questions of law or fact common to the class. FED. R. CIV. P. 23(a)(2). *See also James v. City of Dallas*, 254 F.3d 551, 570 (5th Cir. 2001), *cert. denied*, 534 U.S. 1113, 122 S.Ct. 919, 151 L.Ed.2d 884 (2002). "The threshold for commonality is not high" *Simms*, 296 F.R.D. at 497 (N.D. Tex. 2013) (citing *Jenkins v. Raymark Industries, Inc*., 782 F2d 468, 472 (5th Cir. 1986)). "The commonality test is met when there is at least one issue, the resolution of which will affect all or a significant number of the putative class members." *Lightbourn v. County of El Paso, Tex*., 118 F.3d 421, 426 (5th Cir. 1997). There is no dispute that there are common questions of law and fact for all members of the class.

"Like commonality, the test for typicality is not demanding." *James*, 254 F.3d at 571. "The critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *Id.* at 571; *In re Dynegy*, 226 F.R.D. at 269. The named plaintiffs assert that they, like the other members of the Settlement Class, suffered an economic loss arising out of Defendants' alleged ERISA violations. Their interests are aligned with the Settlement Class members and typicality is satisfied.

The adequacy inquiry under Rule 23(a)(4) encompasses the class representative, their counsel, and the relationship between the two. *In re Dynegy*, 226 F.R.D. at 269; *Stirman v. Exxon Corp.*, 280 F.3d 554, 563 (5th Cir. 2002). It "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 US at 625. "[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* at 625-26 (internal quotations omitted). The history of this case shows that the named plaintiffs and counsel have zealously and competently prosecuted this case on behalf of the class. Additionally, the named plaintiffs have the same interests and risks as any other member of the class. There is no indication of any conflicts between the named plaintiffs and the class. The adequacy requirement is satisfied.

Breach of fiduciary duty claims brought pursuant to ERISA typically fall under Rule 23(b)(1)(B). "In light of the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3rd Cir. 2009). As a result, the requirements of Rule 23(b)(1) are met and certification is proper.

Zamansky LLC was appointed to serve as Interim Class Counsel on August 20, 2014. Later, Zamansky LLC was given preliminary approval as Class Counsel for the Settlement Class on January 3, 2017. Rule 23(g) requires representation to be adequate. Here, there has been no showing of inadequacy and no other counsel has sought to replace Zamansky LLC. The Zamansky law firm has extensive experience in complex litigation, including ERISA cases involving large public companies and litigation of financial and investment claims. Accordingly, Zamansky LLC should be appointed to serve as Settlement Class Counsel pursuant to Rule 23(g).

The Settlement Class is a mandatory, non-opt-out class that includes "all persons who were participants in or beneficiaries of J.C. Penney Corporation, Inc. Savings, Profit Sharing and Stock Ownership Plan ("the Plan") at any time from November 1, 2011 through Settlement Stipulation Execution Date, May 31, 2016 (the "Class Period"), and whose Plan accounts included investments in the J.C. Penney Common Stock Fund." Notice was sent to the 55,331 identifiable potential class members through a third-party consultant. All potential class members held J.C. Penney common stock in their Plan accounts during the relevant time period. Notice was additionally published in USA Today and on a dedicated website. The named plaintiffs, like the class members, suffered an economic loss arising out of Defendants' alleged ERISA violations in relation to their retirement plans. The named plaintiffs' interests are aligned with those of other class members and they have zealously prosecuted this case on behalf of the class. Accordingly, class certification is proper pursuant to FED.R.CIV.P. 23.

B. Approval of Settlement Agreement

There is a strong judicial policy in favor of settlements, particularly in the class action context. *See In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2nd Cir. 1998). Pursuant to Rule 23(e), a class action settlement must be fair, reasonable and adequate. The Fifth Circuit provides six factors to consider: (1) the existence of fraud or collusion behind the settlement; (2) the probability of plaintiffs' success on the merits; (3) the range of possible recovery; (4) the complexity, expense and likely duration of the litigation; (5) the stage of the proceedings and the amount of discovery completed; and (6) the opinions of class counsel, class representatives, and absent class members. *Reed v. General Motors Corp.*, 703 Fed.2d 170, 172 (5th Cir. 1983). Significant weight is given to the opinion of class counsel concerning whether the settlement is in

the best interest of the class and the court is not to substitute its own judgment for that of counsel. *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977).

In addition, the Manual for Complex Litigation (Third) provides the following factors to consider when evaluating a class settlement: (1) the advantages of the proposed settlement versus the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members; (2) the probable time, duration and cost of trial; (3) the probability that the class claims, issues, or defenses could be maintained through trial on a class basis; (4) the maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other factors that bear on the probable outcome of a trial on the merits; (5) the extent of participation in the settlement negotiations by class members or class representatives, and by a judge, a magistrate judge, or a special master; (6) the number and force of objections by class members; (7) the probable resources and ability of the parties to pay, collect, or enforce the settlement compared with enforcement of the probable judgment predicted under above paragraph 1 or 4; (8) the effect of the settlement on other pending actions; (9) similar claims by other classes and subclasses and their probable outcome; (10) the comparison of the results achieved for individual class or subclass members by the settlement or compromise and the results achieved or likely to be achieved for other claimants pressing similar claims; (11) whether class or subclass members have the right to request exclusion from the settlement, and, if so, the number exercising that right; (12) the reasonableness of any provisions for attorney fees, including agreements on the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors; (13) the fairness and reasonableness of the procedure for processing individual claims under the settlement; (14)

whether another court has rejected a substantially similar settlement for a similar class; and (15) the apparent intrinsic fairness of the settlement terms. There is a presumption of fairness, reasonableness, and adequacy when the settlement is the production of arms-length negotiations between experienced, capable counsel after meaningful discovery. *See Manual for Complex Litigation (Third)* § 30.42 (1995).

Plaintiffs filed this case alleging that Defendants violated their ERISA duty of prudence by permitting investments of Plan assets in J.C. Penney stock. Discovery in this case included hundreds of thousands of pages of documents, including over 100,000 pages of trade data. The parties participated in extensive negotiations with the assistance of Robert Meyer (JAMS) and settled this case for $4.5 million. The settlement provides for pro rata distribution of the Net Settlement Fund among Settlement Class members whose Plan included investments in the J.C. Penney Common Stock Fund relative to their net losses on those holdings. Notice was disseminated to the Settlement Class through a third-party consultant. It was also published in USA Today and on a dedicated website. At the fairness hearing, the parties stated that any excess money following distribution will go back into the Plan.

In evaluating the risks of litigation, Plaintiffs could only find four ERISA company stock fund cases that went to trial. All four cases resulted in a defense verdict. Recent court decisions, such as *Fifth Third Bancorp. v. Dudenhoeffer*, 134 S.Ct. 2549, 2473 (2014), which eliminated a presumption of prudence, could affect the class members' ability to obtain any recovery. Additionally, the potential damages in this case are in dispute because Plaintiffs believe that damages would be calculated by looking at the difference between what the Plan earned on the investment in question as compared to what it would have earned on a "prudent" investment. Plaintiffs contend that the out-of-pocket loss due to artificial inflation of the stock would be $20

million. Defendants, on the other hand, assert that there would be no damages even if Plaintiffs establish liability because the Plan was a "net seller" of J.C. Penney common stock, meaning it sells more J.C. Penny common stock than it buys. According to Defendants' theory, the Plan benefitted more than it was harmed. Overall, the parties assert that a recovery of 22.5 percent of recoverable damages is reasonable, particularly in light of the high expense for litigation in a complex case such as this.

The parties reached this settlement after extensive discovery with the assistance of a qualified mediator. The $4.5 million settlement falls within the range of reasonableness in light of the risks and costs associated with this litigation. Class counsel interacted with the named plaintiffs during the course of negotiations and believes the settlement is appropriate in the context of his considerable experience in complex class actions and securities litigation. For all of these reasons, the settlement should be approved.

II. Plan of Allocation

The district court has broad discretion with regard to the allocation of a class action settlement. *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 145 (S.D. NY Jan. 29, 2010). Where, as here, the plan is formulated by competent and experienced class counsel, the plan need only have a reasonable and rational basis. *Id*. A just allocation necessitates that the class members who lost the most should stand to gain the most from a settlement. *See In re Dell, Inc.*, 2010 WL 2371834, slip op. at *10 (W.D.Tex. June 11, 2010).

The Plan of Allocation submitted by the parties provides for pro rata distribution of the Net Settlement Fund based on each class member's loss. For current Plan participants, the recovery amount will go directly into that person's Plan account. Former participants will be paid either by check or by the re-opening their Plan account in an effort to defer tax consequences. As stated

above, any amounts left over following allocation will go back into the Plan for the benefit of all Plan participants. The proposed plan has a reasonable and rational basis and should be approved.

III. Plaintiffs' Request for Attorney's Fees and Expenses

Class Counsel seeks to recover attorneys' fees in the amount of 30% of the $4,500,000 Gross Settlement Fund—$1,350,000. In addition, counsel seeks to recover expenses totaling $46,462.41. The expenses are broken down as follows:

Expense Description	Cumulative Total
JAMS (Mediation Fees)	$5,775.00
Lexis, CourtLink, and PACER	$3,533.62
In-Office Copying	$717.54
Court Filing Fees	$720.45
Damages Expert Fee	$29,821.25
Federal Express Overnight Delivery	$90.51
Travel	$5,804.04
TOTAL:	$46,462.41

Pursuant to Rule 23(h), the Court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. It is well established that a common fund can be used to pay attorney's fees in a class action settlement. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745 (1980). In cases involving a common fund, the Fifth Circuit has expressly approved of the use the percentage method to calculate attorney's fees, so long as it is cross-checked with the *Johnson* factors. *See Union Asset Mgmt Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012). The so-called *Johnson* factors include: (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill required to perform the legal service adequately; (4) the preclusion of other employment by the attorney because he accepted this case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount

involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Ga. Highway Express, Inc*., 488 F.2d 714, 717–19 (5th Cir. 1974), *overruled on other grounds*, *Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939 (1989).

Class Counsel asserts that substantial discovery occurred in this case prior to settlement and a lot of time and work was invested in mediation. The parties expended considerable time and labor over a period of two years since this case was filed and before settlement. Counsel also points out that costs related to settlement administration are going to be paid by Defendants, and not from the Gross Settlement Fund. Due to a lack of consistent case law on ERISA stock fund claims, counsel asserts that there was a considerable risk taken in litigating this case. Counsel proceeded with the case on a wholly contingent fee basis.

Class Counsel's request for a fee of 30% is not excessive. It is not unusual for attorney's fees awarded under the percentage method to range between 25% to 30% of the fund or more. *See In re Dell Inc.*, 2010 WL 2371834, at *13 (W.D.Tex. June 11, 2010) (citing *Klein v. O'Neal*, 705 F.Supp.2d 632 (N.D.Tex. June 14, 2010)). Additionally, applying the *Johnson* factors reveals that the requested percentage is appropriate. This was a time-intensive, complex case that required considerable expertise by the counsel involved. The experienced Class Counsel obtained a fair and reasonable settlement on behalf of the Class Members and bore a substantial risk by pursuing the litigation. The fees and expenses requested by Class Counsel are reasonable and should be awarded.

IV. Case Contribution Award

Finally, the settlement includes a case contribution award of $5000 to each of the six named plaintiffs that filed suit, for a total of $30,000. Incentive awards have been approved in other circuits and by district courts in this district to reward class representatives for their work on behalf of the class. *See Humphrey v. United Way of Texas Gulf Coast*, 802 F.Supp.2d 847 (S.D. Tex. July 28, 2011); *McClain v. Lufkin Indus., Inc*., 2010 WL 455351, slip op. at *24 (E.D. Tex Jan. 15, 2010). Considerations may include the amount of work done and any financial or reputational risk in bringing the action. *Rodriguez v. West Publishing Corp*., 563 F.3d 948, 959 (9th Cir. 2009). In addition, an award may compensate for extra burdens undertaken by named plaintiffs, such as great subjection to discovery. *McClain*, 2010 WL 455351, slip op. at *25.

Counsel submitted evidence showing that the named plaintiffs monitored and participated in this legal action throughout the entire process and reviewed documents. The amount of $5,000 per named plaintiff is reasonable.

RECOMMENDATION

It is accordingly recommended that Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement, Certification of Settlement Class and Approval of Plan of Allocation (ECF 80) be **GRANTED.** It is further recommended that the Court enter the proposed Final Approval Order submitted by the parties.

Within fourteen days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b).

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except upon grounds of plain error,

from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto. Assn.*, 79 F.3d 1415, 1430 (5th Cir.1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

So ORDERED and SIGNED this 30th day of November, 2017.

K. NICOLE MITCHELL
UNITED STATES MAGISTRATE JUDGE