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, 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.

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# THIRD AMENDED COMPLAINT

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Plaintiffs William M. Barrett, Denice E. Batla, Heather L. Coberly, Leland W. Gulley, and Blake A. Umsted (collectively "Plaintiffs"), individually and as representatives of participants and beneficiaries of the Pioneer Natural Resources USA, Inc. 401(k) and Matching Plan (the "Plan"), submit this Third Amended Complaint on behalf of the Plan against the Plan sponsor, Defendant Pioneer Natural Resources USA, Inc. ("Pioneer USA"), the Plan Administrator, Pioneer Natural Resources USA Inc. 401(k) and Matching Plan Committee (the "Committee") and the past and present members of the Pioneer Natural Resources USA Inc. 401(k) and Matching Plan Committee (collectively the "Pioneer Defendants") for breaching their ERISA fiduciary duties in the management, operation and administration of the Plan.

## INTRODUCTION

1. A 401(k) plan is an employer-sponsored defined contribution retirement plan that enables employees to make tax-deferred contributions from their salaries to the plan. Employers also may make contributions into employee accounts. Typically, plan participants direct the investment of their accounts, choosing from the lineup of options offered in the plan.

2. In a defined contribution plan, participants' retirement benefits are limited to the value of their own individual accounts, which is determined solely by employee and employer contributions plus the amount gained through investment in the options made available in the plan less expenses. *See* 29 U.S.C. §1002(34).

3. Because retirement savings in defined contribution plans grow and compound over the course of the employee participants' careers, poor investment performance and excessive fees can dramatically reduce the amount of benefits available when the participant is ready to retire. Over time, even small differences in fees and performance compound and can result in vast differences in the amount of savings available at retirement. As the Supreme Court has explained, "[e]xpenses, such as management or administrative fees, can sometimes significantly reduce the value of an account in a defined-contribution plan." *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1825 (2015).

4. The impact of excessive fees on employees' and retirees' retirement assets is dramatic. The U.S. Department of Labor has noted that a 1% higher level of fees over a 35-year period makes a 28% difference in retirement assets at the end of a participant's career. U.S. Dep't of Labor, A Look at 401(k) Plan Fees, at 1–2 (Aug. 2013).[1]

[1] Available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/401kFeesEmployee.pdf

5. The marketplace for retirement plan services is established and competitive. On October 23, 2017 the Plan had $665,746,623 in assets, which makes it one of the top 0.4% (based on assets) of over 800,000 401(k) plans offered to participants[2]. As a result, the Plan has tremendous bargaining power to demand low-cost administrative and investment management services and well-performing, low cost investment funds.

6. However, instead of leveraging the Plan's bargaining power to benefit participants and beneficiaries, the Pioneer Defendants chose inappropriate, higher cost mutual fund share classes and caused the Plan to pay unreasonable and excessive fees for recordkeeping and other administrative services.

7. ERISA imposes strict fiduciary duties of prudence and loyalty on covered retirement plan fiduciaries. An ERISA fiduciary must discharge his responsibility "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use. 29 U.S.C. § 1104(a)(1). These duties require fiduciaries to act "solely in the interest of [plan] participants and beneficiaries." *Id*.

8. Pioneer USA, as the Plan Sponsor, and the Committee as the Plan Administrator breached their fiduciary duties of prudence and loyalty and mismanaged the Plan by paying excessive recordkeeping fees to the Plan's recordkeeper, Vanguard Group, Inc. by failing to limit Vanguard's asset-based fees to a reasonable amount.

9. Plaintiffs Barrett, Batla, Coberly, Gulley, and Umsted individually and as the representatives of a class consisting of the Plan's participants and beneficiaries, bring this action on behalf of the Plan under 29 U.S.C. §§ 1132(a)(2) and (3), to enforce the Pioneer Defendants' liability under 29 U.S. C. § 1109(a), to make good to the Plan all losses resulting from their breaches of fiduciary duties, and to restore to the Plan any lost profits..

[2] http://www.plansponsor.com/2017-Recordkeeping-Survey/

## PARTIES

### The Plan

10. The Pioneer Natural Resources USA, Inc. 401(k) and Matching Plan is established and maintained by a written plan document as required by 29 U.S. C. §1102(a)(1).

11. The Plan is an "employee pension benefit plan" under 29 U.S.C. §1002(2)(A), and an "individual account plan" or "defined contribution plan" under 29 U.S.C. §1002(34). Employees who are eligible to participate in the Plan contribute to their individual accounts through payroll deductions.

12. As of December 31, 2017 the Plan had 4,570 participants and $700,501,474 in assets.

### Defendants

13. Pioneer Natural Resources USA, Inc. is a wholly owned subsidiary of Pioneer natural resources, Inc. a large, independent publicly traded (NYSE: PXD) oil and gas exploration and production company incorporated in Delaware and headquartered in Irving, Texas. Pioneer does business in Colorado, where it is the largest oil and gas operator in the Raton Basin in southeastern Colorado with approximately 198,000 gross acres and 2,300 wells.

14. Pioneer USA is the Plan Sponsor as defined under 29 U.S.C § 1002(16)(B). Pioneer is a fiduciary to the Plan under 29 U.S.C. §1002(21)(A)(i) and (iii) because upon information and belief, the Pioneer USA Board of Directors has the sole authority to appoint and remove members of the Pioneer Natural Resources USA Inc. 401(k) and Matching Plan Committee, amend or terminate, in whole or part, the Plan or the Trust, and is designated as a fiduciary under the Plan.

15. The Pioneer Natural Resources USA Inc. 401(k) and Matching Plan Committee is the Plan Administrator under 29 U.S.C § 1002(16)(A)(i). Upon knowledge and belief, the Committee is a fiduciary to the Plan under 29 U.S.C. §1002(21)(A)(i) and (iii) because the Committee has responsibility and discretionary authority to control the operation, management and administration of the Plan, with all powers necessary to enable it to properly carry out such responsibilities, including the selection and compensation of the providers of administrative services to the Plan and the selection, monitoring, and removal of the investment options made available to participants for the investment of their contributions and provision of their retirement income.

16. Defendants 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 (the "Individual Defendants") are current or former members of the Pioneer Natural Resources USA Inc. 401(k) and Matching Plan Committee. The Individual Defendants are fiduciaries to the Plan under 29 U.S.C. §1002(21)(A)(i) and (iii) because as members of the Committee they had responsibility and discretionary authority to control the operation, management and administration of the Plan.

17. Pioneer, the Committee, and the Individual Defendants are collectively referred to as the "Pioneer Defendants."

**Plaintiffs**

18. Plaintiff William Barret is a resident of Trinidad, Colorado. Mr. Barrett was employed by Pioneer in Trinidad, Colorado, as a Fleet Coordinator. Mr. Barrett was a participant in the Plan under 29 U.S.C. §1002(7) from 2011 until September 2017 because he and his beneficiaries were eligible to receive benefits under the Plan.

19. Denice E. Batla is a resident of Midland, Texas. Ms. Batla has been employed by Pioneer since 2012. Ms. Batla is a current participant of the Pioneer Natural Resources USA, Inc. 401(K) and Matching Plan and has been a participant since 2012.

20. Plaintiff Heather L. Coberly is a resident of Trinidad, Colorado. Ms. Coberly's former husband was employed by Pioneer in Trinidad, Colorado starting 2005, and participated in the Plan. Ms. Coberly was a beneficiary of her husband's Plan account. Following her divorce in 2014, Ms. Coberly became a Plan participant. Ms. Coberly is a current Plan participant.

21. Leland W. Gulley is a resident of Aguilar, Colorado. Mr. Gulley is a current participant of the Pioneer Natural Resources USA, Inc. 401(K) and Matching Plan and has been a participant since prior to 2012.

22. Blake A. Umsted is a resident of Midland, Texas. Mr. Umsted is a current participant of the Pioneer Natural Resources USA, Inc. 401(K) and Matching Plan and has been a participant since 2013.

**JURISDICTION AND VENUE**

23. This Court has federal question subject matter jurisdiction under 28 U.S.C. § 1331 because this is an action under 29 U.S.C. §§ 1132(a)(2) and (3) for which federal district courts have exclusive jurisdiction under 29 U.S.C. § 1132(e)(1).

24. This District is the proper venue for this action under 29 U.S.C. §1132(e)(2) and 28 U.S.C. §1391(b), because at the time of filing of the initial Complaint (ECF No. 1), Pioneer USA was authorized to do business in Colorado and could be found in this District, and the alleged breaches of the duties imposed by ERISA occurred in this District.[3]

[3] On July 31, 2018, Pioneer Natural Resources, Inc. sold all of its Raton Basin assets in southeastern Colorado to Evergreen Natural Resources, LLC.

25. The Court has specific personal jurisdiction over all Pioneer Defendants because they provided services for the Plan in this district and/or they engaged in the conduct described herein, which took place in and/or was specifically directed towards Plan participants in this District.

## FACTUAL ALLEGATIONS

### A. The Pioneer Defendants Caused the Plan Participants to Pay Excessive Recordkeeping Fees

26. The Pioneer Defendants chose Vanguard Group Inc. ("Vanguard") to serve as the Plan recordkeeper and investment platform. Vanguard is one of the largest investment companies in the world. Vanguard is the recordkeeper for 6,853 plans with 4,186,546 participants and $392 billion in assets.[4]

27. Recordkeeping is a necessary service for every defined contribution plan. Recordkeeping services for a qualified retirement plan, like the Plan, are essentially fixed and largely automated. The cost of recordkeeping and administrative services depends on the number of participants, not the amount of assets in the participant's account.

28. Recordkeeping for 401(k) plans like the Plan and its participants is fundamentally the same as keeping records for a brokerage account with a few additional points of data. It is a system where costs are driven purely by the number of inputs and the number of transactions. In essence, it is a computer-based bookkeeping system.

29. The greatest cost incurred in incorporating a new retirement plan into a recordkeeper's system is for upfront setup costs. After the Plan account is set up, individual accounts are opened by entering the participant's name, age, SSN, date of hire, and marital status. The system also records the amount of a participant's compensation he or she wishes to

[4] http://www.plansponsor.com/2016-Recordkeeping-Survey/?pid=57&pname=Vanguard

contribute each pay period through automated payroll deductions. Participants can go on line and change their contribution rate at any time.

30. The cost of recordkeeping services depends on the number of participants, not on the amount of assets in the participant's account. Thus, the cost of providing recordkeeping services to a participant with a $100,000 account balance is the same for a participant with $1,000 in her retirement account.

31. ERISA, through 29 U.S.C. §1106(a)(1)(C) and 29 U.S.C. §1108(b)(2), requires the Plan to pay "no more than reasonable compensation" for recordkeeping services to a "party in interest" such as Vanguard.

**(i) The Plan Paid Unreasonable Recordkeeping Fees to Vanguard**

32. The Pioneer Defendants chose to pay Vanguard asset-based recordkeeping fees. Those fees were paid in two ways:

a. Vanguard received revenue sharing from at least 10 non-Vanguard mutual funds offered as past or present Plan choices.

b. Vanguard received the difference between the higher operating cost Investor class shares of Vanguard mutual funds offered by the Plan and the lower operating cost Admiral or Institutional class shares of the same funds.

33. A single mutual fund with one portfolio and one investment adviser may offer more than one "class" of its shares to investors. Each class represents a similar interest in the mutual fund's portfolio. The principal difference between the classes is that the mutual fund will charge different fees and expenses depending on the class chosen.

34. For example, an Investor class share in a mutual fund may charge an annual expense ratio of 1%, while the institutional class share in that same fund with the same advisors

and the same investments charges an annual expense ratio of 0.50%. Thus, an investor who purchases an institutional class share will realize a 0.50% greater annual return on his/her investment compared to an investor who owns an Investor class share.

35. In a revenue sharing arrangement, a mutual fund or other investment vehicle directs a portion of the expense ratio—the asset-based fees it charges to investors—to the 401(k) plan's recordkeeper putatively for providing recordkeeping and administrative services for the mutual fund. These revenue sharing fees increase the operating costs of the mutual fund, which are paid by the Plan participants who invest in those funds.

36. Because revenue sharing payments are asset based, they bear no relation to a reasonable recordkeeping fee and can provide excessive compensation. Prudent fiduciaries monitor the total amount of revenue sharing a recordkeeper receives to ensure that the recordkeeper is not receiving unreasonable compensation. A prudent fiduciary ensures that the recordkeeper rebates to the plan all revenue sharing payments that exceed a reasonable per participant recordkeeping fee that can be obtained from the recordkeeping market through competitive bids.

37. The Pioneer Defendants elected to pay for Vanguard's recordkeeping services by offering retail Investor share classes of Vanguard funds rather than lower priced Admiral or Institutional class shares. Vanguard kept the difference between the operating costs of the higher cost Investor class shares and the lower cost Admiral shares.

38. Vanguard also received revenue sharing from non-Vanguard funds offered by the Plan. Vanguard credited a portion of that revenue sharing to Plan recordkeeping costs.

39. As a result of this arrangement, Vanguard was paid an asset-based fee for recordkeeping that was calculated based on the amount of assets invested in Vanguard funds

multiplied by the difference in the cost of the share classes of the funds.

40. Although the percentages appear small, the extra fees cost the Plan participants hundreds of thousands of dollars per year. For example, in 2015 alone the Plan participants paid excess fees totaling $53,251 because they invested in the Vanguard 500 Index Fund Investor share class rather than the Admiral share class.

41. From 2011 through 2016, the Plan paid Vanguard the following recordkeeping fees:

| Year | Amount of Fees | Number of Plan participants | Cost Per Participant |
|---|---|---|---|
| 12/31/2011 | $366,922.00 | 2,705 | $135.00 |
| 12/31/2012 | $397,031.00 | 3,891 | $102.00 |
| 12/31/2013 | $385,914.00 | 4,204 | $92.00 |
| 12/31/2014 | $380,446.00 | 4,582 | $83.00 |
| 11/30/2015 | $319,432.00 | 4,392 | $73.00 |
| 12/31/2016 | $303,865.00 | 4,313 | $70.00 |

42. A reasonable recordkeeping fee for the Pioneer Plan is $40 per plan participant.

43. The Plan paid much higher than a reasonable fee for Vanguard's services, which caused the Plan to pay hundreds of thousands of dollars in excessive recordkeeping fees.

44. In 2012, Vanguard provided the Committee with a proposal in which recordkeeping fees would be charged at a fixed rate of $53.19 per participant, while also offering

Plan participants the lowest cost mutual fund share classes.

45. The Pioneer Defendants rejected this proposal and continued to pay recordkeeping fees based on a percentage of the total amounts invested in the Vanguard funds. As a result, the Plan paid recordkeeping fees of $102 per participant in 2012, almost double the Vanguard proposal.

46. In 2013, Vanguard provided the Committee with a proposal in which recordkeeping fees would be charged at a fixed rate of $58.00 per participant, while also offering Plan participants the lowest cost mutual fund share classes.

47. The Pioneer Defendants rejected this proposal and continued to pay recordkeeping fees based on a percentage of the total amounts invested in the Vanguard funds. As a result, the Plan paid recordkeeping fees of $92 per participant in 2013, $85 per participant in 2014 and $73 per participant in 2015.

48. By rejecting the Vanguard proposals for fixed recordkeeping fees and lower cost share classes, the Pioneer Defendants failed to fulfill their continuing obligation to monitor Plan investment choices for performance and minimize expenses.

49. In November 2015, Vanguard provided the Committee with a proposal in which recordkeeping fees would be charged at a fixed rate of $74.00 per participant, while also offering Plan Participants the lowest cost mutual fund share class.

50. The Pioneer Defendants rejected this proposal and continued to pay recordkeeping fees based on a percentage of the total amounts invested in the Vanguard funds. The recordkeeping costs decreased to $70 per participant in 2016.

51. In 2018, Pioneer negotiated a per participant fee of $66.

52. Had the Pioneer Defendants negotiated with Vanguard to cap the amount of revenue sharing or ensure that any excessive amounts were returned to the Plan, as other loyally and prudently administered plans do, the Plan participants would have benefitted from lower administrative costs and fees.

53. Despite having hundreds of millions of dollars in Plan assets, the Pioneer Defendants failed to negotiate a preferred rate for recordkeeping with Vanguard and rejected Vanguard proposals that would have lowered Plan recordkeeping fees. In doing so, the Pioneer Defendants breached (and continue to breach) their fiduciary duty to the Plan.

**(ii) The Committee Failed to Seek Competitive Bids for Recordkeeping**

54. There are numerous recordkeepers in the marketplace who are capable of providing a high level of service to the Plan, and who will readily respond to a request for proposal. These recordkeepers primarily differentiate themselves based on price, and vigorously compete for business by offering the best price.

55. To ensure that plan administrative and recordkeeping expenses are and remain reasonable for the services provided, prudent fiduciaries of large defined contribution plans put the plan's recordkeeping and administrative services out for competitive bidding at regular intervals of approximately three years, and monitor recordkeeping costs regularly within that period.

56. A competitive bidding process for the Plan's recordkeeping services would have produced a reasonable recordkeeping fee for the Plan. This competitive bidding process would have enabled the Pioneer Defendants to select a recordkeeper charging reasonable fees, or to negotiate a reduction in recordkeeping fees and a rebate of any excess expenses paid by Plan participants for recordkeeping services with Vanguard.

57. The Pioneer Defendants last sought competitive bids for Plan recordkeeping services in September 2008. In February 2016, the Committee elected not to seek competitive bids for recordkeeping for the Plan.

58. The failure by the Committee to seek competitive bids was a breach of their duty of prudence to the Plan and caused the Plan to pay excessive recordkeeping fees.

**ERISA'S FIDUCIARY STANDARDS**

59. ERISA imposes strict fiduciary duties of loyalty and prudence upon the Pioneer Defendants as Plan fiduciaries. Under ERISA, a fiduciary is expected to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries." *See* 29 U.S.C. § 1104(a)(1)(A)(I).

60. A "prudent" fiduciary in discharging his or her duties, also must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims," *see* 29 U.S.C. § 1104(a)(1)(B).

61. ERISA also imposes explicit co-fiduciary liabilities on plan fiduciaries. 29 U.S.C. §1105(a) provides a cause of action against a fiduciary for (1) knowingly participating in a breach by another fiduciary; (2) enabling a breach by another fiduciary; or (3) knows of a breach of duty by another fiduciary and fails to cure such breach of duty.

62. 29 U.S.C. §1132(a)(2) authorizes a plan participant to bring a civil action plan under 29 U.S.C. §1109 to enforce a breaching fiduciary's liability to the Plan.

63. Section 1109(a) provides a breaching fiduciary "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to

such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary," and "shall be subject to such other equitable or remedial relief as the court may deem appropriate."

**CLASS ACTION ALLEGATIONS**

64. 29 U.S.C. §1132(a)(2) authorizes any participant or beneficiary of the Plan to bring an action individually on behalf of the Plan to enforce a breaching fiduciary's liability to the Plan under 29 U.S.C. § 1109(a).

65. Plaintiffs Barrett, Batla, Coberly, Gulley, and Umsted have standing to bring these ERISA claims because there is a causal connection between the Pioneer Defendants' actions and actual harm to an ERISA Plan in which Plaintiffs participate and participated. "A plaintiff may seek relief under § 1132(a)(2) that sweeps beyond his own injury*." Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 592-593 (8th Cir. 2009); *see also DeWolff, Boberg & Associates, Inc*., 552 U.S. 248, 256 (2008) (§1132(a)(2) does not provide a remedy for individual injuries distinct from plan injuries).

66. In acting in this representative capacity and to enhance the due process protections of unnamed participants and beneficiaries of the Plan, as an alternative to direct individual actions on behalf of the Plan under 29 U.S.C. §1132(a)(2), Plaintiffs seek to certify this action as a class action on behalf of all participants and beneficiaries of the Plan. Plaintiffs seek to certify and to be appointed as representatives of a class defined as:

> All current and former participants and beneficiaries of the Pioneer Natural Resources USA, Inc. 401(K) and Matching Plan from June28, 2011 through December 10, 2018, excluding the Defendants.

67. This action meets the requirements of Rule 23 and is certifiable as a class action for the following reasons:

a. The Class includes as many as 8,000 members and is so large that joinder of all members is impracticable.

b. There are questions of law and fact common to these Classes because the Pioneer Defendants owed fiduciary duties to the Plan and to all participants and beneficiaries and took the actions and omissions alleged herein as to the Plan and not as to any individual participant. Thus, common questions of law and fact include the following, without limitation: who are the fiduciaries liable for the remedies provided by 29 U.S.C. §1109(a); whether the fiduciaries of the Plan breached their fiduciary duties to the Plan; what are the losses to the Plan resulting from each breach of fiduciary duty; and what Plan-wide equitable and other relief the court should impose in light of the Pioneer Defendants' breach of duty.

c. Plaintiff Barrett's claims are typical of the claims of the Class because Plaintiff Barrett was a Plan participant between June 28, 2011 and September 30, 2017 and all participants in the Plan during that period were harmed by the Pioneer Defendants' misconduct.

d. Plaintiffs Batla, Coberly, Gulley and Umsted's claims are typical of the claims of the Class because Plaintiffs Batla, Coberly, Gulley and Umsted were Plan participants during the time period at issue in this action and all participants in the Plan were harmed by the Pioneer Defendants' misconduct.

e. Plaintiffs will adequately represent the Class because they were participants in the Plan, have no interests that conflict with the Class, are committed to the vigorous representation of the Class, and have engaged experienced and

competent attorneys to represent the Class.

f. Prosecution of separate actions for these breaches of fiduciary duties by individual participants and beneficiaries would create the risk of (A) inconsistent or varying adjudications that would establish incompatible standards of conduct for the Pioneer Defendants with respect to the discharge of their fiduciary duties to the Plan and personal liability to the Plan under 29 U.S.C. §1109(a), and (B) adjudications by individual participants and beneficiaries regarding these breaches of fiduciary duties and remedies for the Plan would, as a practical matter, be dispositive of the interests of the participants and beneficiaries not parties to the adjudication or would substantially impair or impede those participants' and beneficiaries' ability to protect their interests. Therefore, this action should be certified as a class action under Rule 23(b)(1)(A) or (B) or (b)(3).

68. A class action is the superior method for the fair and efficient adjudication of this controversy because joinder of all participants and beneficiaries is impracticable, the losses suffered by individual participants and beneficiaries may be small and impracticable for individual members to enforce their rights through individual actions, and the common questions of law and fact predominate over individual questions. Given the nature of the allegations, no class member has an interest in individually controlling the prosecution of this matter, and Plaintiffs are aware of no difficulties likely to be encountered in the management of this matter as a class action. Alternatively, then, this action may be certified as a class under Rule 23(b)(3) if it is not certified under Rule 23(b)(1)(A) or (B).

69. Plaintiffs' counsel, Franklin D. Azar & Associates, P.C., will fairly and adequately represent the interests of the Classes and is best able to represent the interests of the Classes under Rule 23(g).

**FIRST CLAIM FOR RELIEF**

**Breach of Duties of Loyalty and Prudence—Unreasonable recordkeeping Fees Against the Committee and the Individual Defendants**

70. Plaintiffs, individually and on behalf of the Class, incorporate the prior allegations of the Amended Complaint.

71. The scope of the fiduciary duties and responsibilities of the Committee and the Individual Defendants includes defraying reasonable expenses of administering the Plan for the sole and exclusive benefit of Plan participants and beneficiaries, and acting with the care, skill, diligence, and prudence required by ERISA.

72. ERISA imposes strict fiduciary duties of prudence and loyalty on covered retirement plan fiduciaries. An ERISA fiduciary must discharge his responsibility "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use. 29 U.S.C. § 1104(a)(1). These duties require fiduciaries to act "solely in the interest of [plan] participants and beneficiaries." *Id*.

73. Similarly, "us[ing] revenue sharing to benefit [the plan sponsor and recordkeeper] at the Plan's expense" while "failing to monitor and control recordkeeping fees" and "paying excessive revenue sharing" is a breach of fiduciary duties. *Tussey v. ABB, Inc.,* 746 F.3d 327, 336 (8th Cir. 2014).

74. The Committee and the Individual Defendants breached their fiduciary duties to the Plan by, among other things, (1) paying Vanguard unreasonable recordkeeping fees; (2) failing to accept Vanguard's proposals to reduce recordkeeping fees and lower fund operating

expenses; (3) failing to adequately leverage the Plan's size to reduce fees; and (4) failing to seek competitive bids for recordkeeping services at any time between 2009 and 2017.

75. The Plan participants were damaged as a result of the Committee and the Individual Defendants' breach of their fiduciary duties because they paid excessive recordkeeping costs and realized a lower return on their Plan investments.

76. Each Individual Defendant is personally liable under 29 U.S.C. §1109(a) to make good to the Plan any losses to the Plan resulting from the breaches of fiduciary duties alleged in this Count and is subject to other equitable or remedial relief as appropriate.

77. Total Plan losses will be determined at trial after complete discovery in this case and are illustrated herein based upon the limited information that has been made available to Plan participants to date.

78. Each Pioneer Defendant also knowingly participated in each of the other Pioneer Defendants' breaches, knowing that such acts were a breach, enabled the other Pioneer Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Pioneer Defendants, and failed to make any reasonable effort under the circumstances to remedy the breach. Thus, each Pioneer Defendant is liable for the losses caused by the breach of its co-fiduciary under 29 U.S.C. §1105(a).

**SECOND CLAIM FOR RELIEF**

**Failure to Monitor Fiduciaries Against Pioneer USA**

79. Plaintiffs Barrett, Batla, Coberly, Gulley, and Umsted, individually and on behalf of the Class, incorporate the prior allegations of the Complaint.

80. Pioneer USA is responsible for the appointment and removal of the Committee to serve as Plan Administrator, with sole responsibility for the administration of the Plan.

81. Because Pioneer USA had explicit fiduciary responsibility to appoint and remove the Committee members, Pioneer USA had a fiduciary responsibility to monitor the performance of the other fiduciaries, including the Committee.

82. A monitoring fiduciary must ensure that the monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment and holding of plan assets, and must take prompt and effective action to protect the plan and participants when they are not doing so.

83. To the extent any of Pioneer USA's fiduciary responsibilities were delegated to another fiduciary, Pioneer USA's monitoring duty included an obligation to ensure that any delegated tasks were being performed prudently and loyally.

84. Pioneer USA breached its fiduciary monitoring duties by, among other things:

a. failing to monitor its appointees' fiduciary process, which would have alerted any prudent fiduciary to the potential breach because of the excessive recordkeeping fees in violation of ERISA; and

b. failing to remove appointees whose performance was inadequate in that they continued to make imprudent decisions, all to the detriment of Plan participants' retirement savings.

85. Pioneer USA failed to implement or follow any rational process for monitoring the performance of the Committee and the Individual Defendants or determining whether the Committee and the Individual Defendants were fulfilling their fiduciary duties.

86. As a consequence of Pioneer USA's breaches of its fiduciary duty to monitor, the Plan suffered substantial losses. Had Pioneer USA discharged its fiduciary monitoring duties prudently as described above, the losses suffered by the Plan would have been avoided.

Therefore, as a direct result of the breaches of fiduciary duty alleged herein, the Plan, and the Plaintiff and the other Class members, lost millions of dollars in their retirement savings.

**PRAYER FOR RELIEF**

Plaintiffs, on behalf of the Plan and all similarly situated Plan participants and beneficiaries, respectfully request the Court:

- certify the Class; appoint Plaintiffs as class representatives of the Class; and appoint Franklin D. Azar & Associates, P.C. as Counsel for the Classes;
- find and declare that the Pioneer Defendants have breached their fiduciary duties as described above;
- find and adjudge that Pioneer Defendants are liable to make good to the Plan all losses to the Plan resulting from each breach of fiduciary duties, and to otherwise restore the Plan to the position it would have occupied but for the breaches of fiduciary duty;
- determine the method by which Plan losses under 29 U.S.C. §1109(a) should be calculated;
- order the Pioneer Defendants to provide an accounting necessary to determine the amounts Defendants must make good the Plan under §1109(a);
- award to the Plaintiffs and the Classes their attorney's fees and costs under 29 U.S.C. §1132(g)(1) and the common fund doctrine;
- order the payment of interest to the extent it is allowed by law; and
- grant other injunctive or equitable, or remedial, relief as the Court deems appropriate.

Dated this 10th day of December, 2018.

Franklin D. Azar & Associates, P.C.

By: */s/ Paul R. Wood*

Paul R. Wood
Keith Scranton
Devyn Glass
14426 East Evans Avenue
Aurora, CO 80014
Telephone: (303) 757-3300
Facsimile: (303) 757-3206
woodp@fdzar.com
scrantonk@fdazar.com
glassd@fdazar.com

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 2018, I electronically filed and served the foregoing **THIRD AMENDED COMPLAINT** 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 |
| Los Angeles, CA 90071-2899 | □ | by Overnight Mail |
| cvergara@omm.com | ■ | by CM/ECF system |
| Shannon Barrett | □ | by First-Class U.S. Mail |
| O'MELVENY & MYERS, LLP | □ | by e-mail |
| 1625 Eye Street NW | □ | by Share File |
| Washington, DC 20006-4061 | □ | by Overnight Mail |
| sbarrett@omm.com | ■ | by CM/ECF system |
| Michael J. Hofmann | □ | by First-Class U.S. Mail |
| Bryan Cave LLP | □ | by e-mail |
| 1700 Lincoln St., Ste. 4100 | □ | by Share File |
| Denver, CO 80203 | □ | by Overnight Mail |
| Michael.hofmann@bryancave.com | ■ | by CM/ECF system |

/s/ *Colette L. Foote*
Colette L. Foote