

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

RODNEY CHOATE, on behalf of the
MRMC ESOP, and on behalf of a class of all
other persons similarly situated,

Plaintiff,

v.

WILMINGTON TRUST, N.A., as successor
to Wilmington Trust Retirement and
Institutional Services Company,

Defendant.

Cons. Case No. 17-250-RGA

DECLARATION OF GREGORY Y. PORTER

I, Gregory Y. Porter, declare as follows:

1. I am a member in good standing of the Bar of the Commonwealth of Virginia and the Bar of the District of Columbia. I am admitted to practice before this Court *pro hac vice*.
2. All the facts stated herein are true and correct within my personal knowledge, and if called as a witness, I could and would testify competently to the facts stated herein
3. I am more than 18 years of age, am capable of making this declaration, and have personal knowledge of the following.
4. I make this declaration in support of Plaintiff's Unopposed Motion for Final Approval of Settlement and Plaintiff's Unopposed Motion for Attorneys' Fees, Costs and Incentive Award.
5. I am a partner of the law firm of Bailey & Glasser LLP, co-counsel to Plaintiff in this lawsuit.

6. I have been actively involved in this lawsuit from the beginning of the investigation to the present.

7. Bailey & Glasser attorneys have been actively involved in all stages of this lawsuit, including but not limited to investigating and preparing the Complaint, meeting and conferring with defense counsel regarding discovery and case management, reviewing Defendant's and third-party document productions, preparing to take depositions, and representing Plaintiff at hearings and case conferences.

8. I have been working on ERISA class actions since 1998. I have served as lead or co-lead counsel for plaintiffs in many important ERISA cases, as described below.

9. I have direct experience in lawsuits under ERISA challenging Employee Stock Ownership Plan (ESOP) transactions. *See Brundle v. Wilmington Trust Ret. & Int'l Servs. Co.*, 241 F. Supp. 3d 610 (E.D. Va. 2017) (\$29.7 million trial judgment); *Allen v. GreatBanc Trust Co.*, 835 F.3d 670 (7th Cir. 2016) (reversing trial court ruling on motion to dismiss in an ESOP class action; lawsuit recently settled for \$2.3 million); *Jessop v. Larsen*, No. 14-cv-00916 (D. Utah) (\$19.8 million settlement secured for ESOP plan participants in 2017); *Swain v. Wilmington Trust, N.A.*, No. 17-071-RGA-MPT (D. Del.) (\$5 million settlement); *Casey v. Reliance Trust Co.*, 18-cv-00424-ALM-CMC (E.D. Tex.) (court granted final approval of \$6.25 million settlement for ESOP plan participants on August 6, 2020); and *Nistra v. Reliance Trust Co.*, No. 16 C 4773 (N.D. Ill.) (\$13.36 million settlement). In December of 2016, I led a team of lawyers in an ERISA case that resulted in a \$30 million judgment. *Brundle*, 241 F. Supp. 3d 610. The Fourth Circuit affirmed the judgment in all respects. *See Brundle v. Wilmington Trust, N.A.*, 919 F.3d 763 (4th Cir. 2019). I argued the appeal for Plaintiffs-Appellees. Bailey & Glasser currently represents plaintiffs in several other ESOP lawsuits.

10. I have direct experience in lawsuits under ERISA involving complex financial products and services and fiduciary decision making about investments, including, and directly relevant to this case. *Diebold v. Northern Trust*, No. 09-1934 (N.D. Ill.) (\$34 million cash settlement in 2015); *Anderson v. Principal Life Ins. Co.*, No. 15-0119 (S.D. Iowa) (\$3 million cash and \$8.5 million in prospective relief in 2015); *Glass Dimensions, Inc. v. State Street Bank & Trust Co.*, No. 10-10588 (D. Mass.) (\$10 million cash settlement in 2014); *In re CMS Energy ERISA Litig.*, No. 02-CV-72834 (E.D. Mich.) (\$28 million recovered); *Sherrill v. Federal-Mogul Corp. Retirement Programs Committee*, No. 04-CV-72949 (E.D. Mich.) (\$14 million recovered); *Bilewicz v. FMR LLC*, No. 13-10636 (D. Mass.) (\$12 million cash and substantial prospective relief in 2014); *Figas v. Wells Fargo*, No. 08-04546 (D. Minn.) (\$17.5 million settlement in 2011). All of the cases listed above were about retirement plan fiduciaries making imprudent investment decisions. The *Northern Trust* and *Glass Dimensions* cases involved complex securities lending transactions involving hundreds of retirement plans. In those cases, I was the chief architect of the complaints, led the expert discovery for the plaintiffs, and successfully argued several key motions. The *Principal*, *Wells Fargo* and *FMR* cases involved very similar allegations, namely that conflicted fiduciaries selected proprietary investment offerings for employee benefit plans to benefit the employer, not the employees. I developed the key concepts, supervised the investigation and preparation of the complaints, directed the experts and consultants, and drafted the key motions filings.

11. I also have represented defendants in complex ERISA cases. I was part of the defense trial team in an ERISA class action against Prudential Life Insurance Company, which resulted in a verdict for the defendants. *See Dupree v. The Prudential Ins. Co. of Am.*, 2007 WL2263892 (S.D. Fla. Aug. 7, 2007). In addition, I represented defendants in several of the earliest cases

involving imprudent investments in employer stock, including *Koch v. Dwyer*, No. 98-5519 (S.D.N.Y.); *Tittle v. Enron*, No. 01-3913 (S.D. Tex.); and *Rankin v. Rots*, No. 02-CV-71045 (E.D. Mich.).

12. Ryan T. Jenny is a partner at Bailey & Glasser who joined the firm in 2015 after more than fifteen years representing ERISA defendants while at large corporate firms in the District of Columbia and New York. Mr. Jenny has represented plaintiffs in many fiduciary duty actions involving employee benefit plan investments in employer stock, such as *Brundle v. Wilmington Trust Ret. & Int'l Servs. Co.*, 241 F.Supp.3d 610 (E.D. Va. 2017) (\$30 million recovered for breach of fiduciary duty); *Nistra v. Reliance Trust Co.*, No. 16 C 4773 (N.D. Ill.) (\$13.36 million settlement); *Swain v. Wilmington Trust, N.A.*, No. 17-071-RGA-MPT (D. Del.) (\$5 million settlement); *Casey v. Reliance Trust Co.*, 18-cv-00424-ALM-CMC (E.D. Tex.) (court granted final approval of \$6.25 million settlement for ESOP plan participants on August 6, 2020); *Crowley v. Corning, Inc.*, 02- CV-6172 (W.D.N.Y.); *Holtzcher v. Dynegy, Inc.*, No. H-05-3293 (S.D. Tex.); *Crocker v. KV Pharm. Co.*, No. 09-cv-198 (E.D. Mo.); *In re BP p.l.c. ERISA Litig.*, MDL No. 10-md-2185 (S.D. Tex.); and *Knight v. Lavine*, 12- CV-611 (E.D. Va.), as well as in actions involving various other ERISA fee, funding and fiduciary issues, such as *Alexander-Jones v. Wal-Mart Stores, Inc.*, No. C 10-03005 (N.D. Cal.); *In re Honda of Am. Mfg.*, No. 08-cv-1059 (S.D. Ohio); and *Sara Lee Corp. v. American Bakers Ass'n Ret. Plan*, No. 106CV00819 (D.D.C.). Mr. Jenny is a member of the firm's ERISA team and works on all of our ESOP cases.

13. Patrick Muench is a partner with Bailey & Glasser LLP who has specialized in complex litigation since 2009. Mr. Muench has served as counsel on ERISA cases involving breach of fiduciary claims, including *Brundle v. Wilmington Trust Ret. & Int'l Servs. Co.*, 241 F. Supp. 3d 610 (E.D. Va. 2017), which recovered \$30 million on behalf of the ESOP, and *Nistra v. Reliance*

Trust Co., No. 16 C 4773 (N.D. Ill.) (\$13.36 million settlement); *Swain v. Wilmington Trust, N.A.*, No. 17-071-RGA-MPT (D. Del.) (\$5 million settlement); *Casey v. Reliance Trust Co.*, 18-cv-00424-ALM-CMC (E.D. Tex.) (court granted final approval of \$6.25 million settlement for ESOP plan participants on August 6, 2020). Mr. Muench is a member of the firm's ERISA team and works on all of our ESOP cases.

14. Class Counsel believe that the Settlement Agreement between the parties is fair and reasonable and in the best interests of the Settlement Class. Counsel's reasons for this belief are set forth in the Motion for Preliminary Approval and Motion for Final Approval.

15. Before commencing settlement negotiations, Class Counsel conducted an extensive investigation and the litigation was sufficiently advanced, such that counsel had sufficient information about the nature and extent of the challenged practices, and the merits of the legal claims and factual allegations. The parties exchanged and responded to Interrogatories and Requests for Documents. The Parties' counsel received and reviewed over 30,000 documents, produced by Wilmington Trust and various non-parties. Multiple expert reports were exchanged by both sides and depositions of the five experts were taken. Fifteen fact depositions were taken.

16. The Parties conducted extensive arm's-length negotiations, both on their own and with the assistance of a highly experienced and well-respected neutral mediator, Robert A. Meyer, Esq. of JAMS. The Parties met in Washington, D.C., in October 2017 to conduct an early discussion of settlement which included a presentation by MRMC management. In the first quarter of 2018, the parties exchanged blind expert reports, after which the mediation efforts were suspended as the Parties were too far apart in their settlement positions. After completing all discovery and briefing summary judgment motions, the Parties scheduled a mediation with Mr. Meyer in September 2019 and provided comprehensive mediation reports and made

presentations to him. The Parties did not agree to settlement terms at that time, but the Mediator continued to have follow-up discussions with the Parties and presented a Mediator's Proposal to the Parties in January 2020, which both accepted. The process of documenting the Settlement continued in the weeks following agreement to the mediator's proposal and the Parties ultimately executed the Settlement Agreement on April 15, 2020.

17. On average, each Class Member's benefit before the deduction of Court approved fees, costs, and Service Awards, will be almost \$6,100, which is greater than recoveries in many other ERISA class actions.

18. The Settlement also provides for the payment of attorneys' fees, costs and expenses to Class Counsel following application for and Court approval of such an award. The compensation for the services Class Counsel rendered to the class is wholly contingent. Class Counsel has worked without compensation or reimbursement for their time and out-of-pocket expenses necessary to position this case for settlement. Any fees and reimbursement of expenses will be limited to the amount awarded by the Court. In light of the complexity and scope of this action, Class Counsel had to forego other cases once they had agreed to represent the Class Representatives and Class in this action.

19. Class Counsel also agreed to advance all costs of this litigation.

20. Class Counsel has collectively expended approximately 4,100 hours litigating this case since its inception. The total requested fee of \$4,800,000 represents less than 25 percent of the Settlement Amount. The total lodestar as of this date for Class Counsel is approximately \$2,625,000. Thus, Class Counsel seeks a fee multiplier of approximately 1.8.

21. The below summary of time and expenses was taken from computer-based timekeeping programs, in which Bailey & Glasser maintained their fees and expense records. The summary of

time and expenses for co-counsel, Feinberg Jackson Worthman & Wasow LLP, is set forth in the accompanying Declaration of Daniel Feinberg.

22. Bailey & Glasser's fee summaries demonstrate the amount of time spent on this litigation and how Bailey & Glasser's lodestar was calculated. Given the market where Class Counsel litigated the case, and the skills and experience required to litigate, Bailey & Glasser is using the following rates in determining the lodestar:

Name	Position	Hours	Rate	Amount
Porter, Gregory Y.	Partner	464.40	\$850	\$394,740.00
Glasser, Brian A.	Partner	38.60	\$850	\$32,810.00
Ryan, Elizabeth A.	Partner	13.20	\$715	\$9,438.00
Jenny, Ryan T.	Partner	212.70	\$650	\$138,255.00
Felice, David A.	Partner	81.20	\$650	\$52,780.00
Kauffman, James L.	Partner	101.60	\$575	\$58,420.00
Muench, Patrick O.	Partner	504.70	\$575	\$290,202.50
Serber, Alex L.	Attorney	449.50	\$350	\$157,325.00
Lajoie, Benjamin P.	Attorney	14.30	\$350	\$5,005.00
Rios, Manuel R.	Paralegal	84.30	\$265	\$22,339.50
Kittinger, Jason E.	Paralegal	28.90	\$265	\$7,658.50
Kestner-Clay, Melissa C.	Paralegal	443.90	\$200	\$88,780.00
Holman, Angela H.	Paralegal	36.40	\$265	\$9,646.00
Pullman, Troy M.	Paralegal	29.90	\$265	\$7,7923.50
McClay, Mary E.	Paralegal	10.30	\$265	\$2,729.50
Grand Total		2,513.90		\$1,278,052.50

23. Before submitting the request for fees, Class Counsel exercised billing judgment. Specifically, we deleted time records for employees with less than 10 hours and deleted 68 hours from entries that reflected administrative tasks or work performed by summer associates.

24. Class Counsel also anticipates contributing additional time and effort to this case, including continuing to oversee settlement administration.

25. Class Counsel have incurred \$1,205,939.81 in litigation expenses, the bulk of those expenses were fees for Plaintiff's experts on valuation and due diligence. All of the expenses were necessary and appropriate for the prosecution of this action, and all are of the type that are

customarily incurred in litigation and routinely charged to clients billed by the hour. Specifically, by far the largest category of expense, 83% of all expenses, was for experts. Here, Class Counsel retained two experts: a valuation expert, Marc Brown; and a due diligence expert, Barry Pearl. In Class Counsel's experience, two experts are necessary to prosecute a complex ESOP lawsuit. Wilmington Trust's counsel retained and consulted with three testifying experts who prepared reports on similar topics. The expert expenses in this case ran all the way through the depositions of Plaintiff's experts. The next largest categories of expenses were for the data hosting platform (approximately 6%) and deposition transcripts (approximately 4%) of expenses, was for deposition transcripts. After that, travel represents another 3% of expenses. Travel expenses, which do not include meals incurred during travel, were necessary as most witnesses resided outside this district. Expenses for internal copying were also not included.

26. Bailey & Glasser's litigation expenses are:

Description	Total
Arbitrators/Mediators	\$1,258.14
Court Fees	\$1,423.20
Data Hosting Platform	\$70,411.77
Deposition Transcripts	\$42,787.19
Experts/Consultants	\$702,505.70
Online Research	\$2,224.70
Outside Delivery Services	\$5,653.25
Other Expenses	\$119.90
Outside Printing	\$22,455.44
Subpoena Fees	\$7,978.75
Travel	\$17,052.41
Grand Total	\$873,870.45

27. Class Counsel's depth of experience with ESOP and ERISA claims and class action litigation allowed Class Counsel to pursue the case and negotiate a settlement that capitalized on the claims' strengths while taking into account the risks of continued litigation.

28. In my opinion, the time expended and expenses incurred in prosecuting this action were reasonable and necessary for the diligent litigation and fair resolution of this matter. The lodestar reflected in the extract does not include all of the time to be devoted to preparing for and appearing at the final approval hearing, or dealing with post-hearing matters. The lodestar does not include timekeepers who billed less than 10 hours.

29. The Named Plaintiff, Capt. Rodney Choate, took steps to protect the interests of the class and spent time pursuing the claims underlying this matter. The Named Plaintiff's decision to pursue this case as a class action, and not simply seek individual damages, directly benefited the class. The Named Plaintiff prepared for and sat for deposition, maintained contact with Class Counsel, and assisted with settlement discussions. Accordingly, Class Counsel requests that the Court approve the requested case contribution award of \$20,000 for the Named Plaintiff.

I declare, pursuant to 28 U.S.C. § 1746 and under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed at Washington, D.C. this 17th day of August 2020.

By: /s/ Gregory Y. Porter

GREGORY Y. PORTER