IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

RONALD TUSSEY, et al., Plaintiffs, v. ABB, INC., et al., Defendants.	Case No.: 06-CV-04305-NKL

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS FOR NAMED PLAINTIFFS

Under Federal Rules of Civil Procedure 23(h) and 54(d)(2), Plaintiffs move that the Court approve an attorneys' fee award to Class Counsel of $18,333,333 (one-third of the monetary recovery), reimburse Class Counsel's reasonable litigation expenses of $2,256,805, and grant incentive awards of $25,000 each to the Named Plaintiffs Ronald Tussey, Charles Fisher and Timothy Pinnell for pursuing this action, which is customary in these types of cases.

This is a historic case which has had a profound effect on not only ABB employees and retirees, but on America's retirement system – the 401(k) Plan. But for Class Counsel's pioneering excessive fee litigation, there had been no enforcement of ERISA's stringent fiduciary responsibilities as it relates to fees charged to defined contribution plan participants. No other law firm or the Department of Labor has been willing to devote the resources necessary to successfully prosecute these types of cases or been willing to endure the risk of nonpayment. This settlement provides an exceptional result for the class and resolves over 12 years of contentious litigation. The $55 million settlement fund will return significant sums to employees and retirees of ABB, Inc. ("ABB"), which, at a class member level, will be able to be estimated after the settlement process moves forward. To achieve this important and substantial relief for the class, Class Counsel incurred immense risk, and massive expenditures of time and expense,

litigating the case without compensation or reimbursement for over 12 years—including 28,000 hours of time and $2,256,805 in advanced costs

In support of this motion, Plaintiffs submit their memorandum in support, along with Declarations of Jerome J. Schlichter and Sheri O'Gorman. For the reasons set forth in the memorandum, Plaintiffs' motion should be granted.

June 14, 2019

Respectfully Submitted,

SCHLICHTER, BOGARD & DENTON LLP

By: /s/ Jerome J. Schlichter

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties of record.

/s/ Jerome J. Schlichter

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

RONALD TUSSEY, et al., Plaintiffs, v. ABB, INC., et al., Defendants.	Case No.: 06-CV-04305-NKL

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS FOR NAMED PLAINTIFFS

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This is a historic case which has had a profound effect on not only ABB employees and retirees, but on America's retirement system – the 401(k) Plan. Prior to Class Counsel's pioneering excessive fee litigation, there had been no enforcement of ERISA's stringent fiduciary responsibilities as it relates to fees charged to defined contribution plan participants. No other law firm or the Department of Labor has been willing to devote the resources necessary to successfully prosecute these types of cases or been willing to endure the risk of nonpayment. This settlement provides an exceptional result for the class and resolves over 12 years of contentious litigation. The $55 million settlement fund will provide significant sums to employees and retirees of ABB, Inc. ("ABB"), which, on a participant basis, will be able to be estimated after the settlement process moves forward. To achieve this important and substantial relief for the class, Class Counsel incurred immense risk, and massive expenditures of time and expense, litigating the case without compensation or reimbursement for over 12 years—including 28,000 hours of time and $2,256,805 in advanced costs.

Under the "common fund" doctrine, Class Counsel is entitled to an award of reasonable attorneys' fees from the settlement proceeds. Fed.R.Civ.P. 23(h); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "Courts utilize two main approaches to analyzing a request for attorney fees"—the "lodestar" approach or the "percentage of the benefit" approach. *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 244 (8th Cir. 1996). While "[i]t is within the discretion of the district court to choose which method to apply" (*id*. at 246), in common fund cases, the percentage of the benefit approach is generally recommended. *Id*. at 245; *see also Koenig v. U.S. Bank N.A.*, 291 F.3d 1035, 1038 (8th Cir. 2002). In such cases, the benefit should be based on both the monetary and the non-monetary value of the settlement. *Beesley v. Int'l Paper Co.*, No. 06-703, 2014 WL 375432, *1 (S.D.Ill. Jan. 31, 2014)(citing MANUAL FOR COMPLEX LITIGATION

(Fourth) §21.71 (2004)); *Principles of the Law of Aggregate Litigation*, A.L.I., §3.13(b)(May 20, 2009)("a percent-of-the-fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and the nonmonetary value of the settlement."); *cf. Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989)(cautioning against an "undesirable emphasis" on monetary "damages" that might "shortchange efforts to seek effective injunctive or declaratory relief").

An award of one-third of the monetary recovery, given the undersigned firm's well-documented, pioneering role in this area of litigation, is appropriate. It is also the amount agreed to by each of the named plaintiffs at the outset of the litigation. Declaration of Jerome Schlichter ("Schlichter Decl.") ¶21. Because the non-monetary relief has real and substantial economic value to class members, Class Counsel's requested fee is actually far lower than one-third of the total value of the settlement. Further, as described below, while the Court is not required to evaluate the requested fee under the "lodestar" method, Class Counsel's requested fee is actually much less than would be appropriate under the lodestar method. For the reasons explained below in Part IIA, the Court should award Class Counsel a fee of $18,333,333 (one-third of the monetary recovery). In addition, the Court should award from the common fund $2,256,805.15 for reimbursement of the costs and expenses Class Counsel have incurred in litigating this matter and an incentive award to each named plaintiff of $25,000 for their service.

I. Background and Procedural History

On December 29, 2006, Plaintiffs filed this case against ABB, Inc. and certain plan fiduciaries (collectively "ABB") on behalf of the Personal Retirement Investment and Savings Management Plan and the Personal Retirement Investment and Savings Management Plan for

Represented Employees of ABB, Inc. (collectively the "Plans").[1] Two Court ordered mediations were held before trial without a settlement. After a month-long trial, in January 2010, the Court issued its Order and Judgment for Plaintiffs on March 31, 2012 – over 7 years ago – finding that ABB breached its fiduciary duties of prudence and loyalty to the Plans by: (1) failing to monitor and ensure the reasonableness of the Plans' recordkeeping fees ($13.4 million in losses) and (2) removing the Vanguard Wellington fund and replacing it with the Fidelity Freedom funds ($21.8 million in losses). *See* Doc. 623. The Court awarded prejudgment interest for the time between the trial and the final judgment—approximately two years. Doc. 730. Injunctive relief was also granted, which the Court found had a value of at least as much as the monetary relief. Doc. 782. Based on the actual reductions in fees and expected growth, the value of the injunctive relief is over $83 million. Doc. 775-01 at ¶13.

ABB appealed to the Eighth Circuit Court of Appeals. On March 19, 2014, the Eighth Circuit upheld the district court's finding that ABB breached its fiduciary duty to monitor Plan recordkeeping fees and its finding of damages on that claim. The Court of Appeals, however, reversed the district court's ruling on the removal and replacement of the Vanguard Wellington fund. In its opinion, the Eighth Circuit included language that ABB argued severely limited the determination and amount of damages should the district court find (for a second time) that ABB breached its fiduciary duty by removing and replacing the Vanguard Wellington fund. *See e.g. Tussey v. ABB, Inc.*, 746 F.3d 327, 338 (8th Cir. 2014).

On remand, the district court again found that ABB breached its fiduciary duty on the Wellington claim; however, following the language from the Eighth Circuit opinion, the district court ruled for ABB on damages. Doc. 771. On remand, the Court granted Plaintiffs' petition for

[1] Two Fidelity entities were also Defendants. At this point in the litigation, there are no surviving claims against Fidelity.

attorney fees and for the reimbursement of costs, under the fee shifting authorized by ERISA, approving almost ninety percent of the total hours submitted here. Doc. 782. The Court also granted each named Plaintiff an award of $25,000.

Plaintiffs appealed the denial of any damages, contending that the language of the Eighth Circuit was dictum and that issues regarding damages must be resolved in the favor of the injured party, rather than benefiting the breaching fiduciary. The Eighth Circuit agreed, reversing and remanding the case to the District Court on March 9, 2017. Upholding the determination that ABB breached its fiduciary duty to the Plans, the Eighth Circuit clarified its guidance on calculating damages. It held open the precise calculation of Plan losses, directing the District Court to resolve the method of loss calculation. *See e.g. Tussey v. ABB, Inc.*, 850 F.3d 951 (8th Cir. 2017).

On its second remand to the District Court, two damages issues remained open: (1) the method the Court would use to calculate the Plans' losses stemming from ABB's breach of fiduciary duties relating to the Wellington claim and (2) the actual calculation of loss. After reviewing submissions from the parties, the Court ruled, as Plaintiffs contended, that the proper method for calculating the Plans' losses included a performance comparison of the Vanguard Wellington fund to the Freedom Funds. As for the actual calculation, the Court took judicial notice of the performance of the Vanguard Wellington fund and the Freedom Funds. In response to ABB's continued argument that Plaintiffs' calculation was speculative and did not account for participant related investment activities, the Court allowed ABB to make an offer of proof related to the actual participant data. Expert analysis and submissions of calculations were presented to the Court by the parties. The actual calculation of Plan losses and bringing them up to date were the primary remaining issues before the Court.

The Court strongly urged the parties to engage in a third mediation. Ultimately, a third mediation was held and resulted in a proposed settlement. The Court preliminary approved the parties' settlement agreement on April 2, 2019. Notices were sent on June 14, 2019 to all members of the potential class, which includes information pertaining to the Class Counsel's requested fee.

II. Argument

Class Counsel is entitled to a reasonable fee award from the common fund. In ERISA common fund cases, the market rate is a contingency fee of one-third of the monetary recovery. Here, the Court's order granting Plaintiffs' request for affirmative relief going forward provided substantial benefits to participants while the appeals and remandments of the last seven years have occurred. The value of this relief is in addition to the monetary recovery and will continue to benefit ABB employees and retirees for many years in the future.

The Court should also reimburse Class Counsel reasonable and necessary costs they incurred and grant incentive awards to the Named Plaintiffs.

A. The customary fee

As set forth above, a one-third contingent fee is common in these cases. "Substantial empirical evidence indicates that a one-third fee is a common benchmark in private contingency fee cases." Theodore Eisenberg and Geoffery P. Miller, *Attorney Fees in Class Action Settlements: an Empirical Study*, 1 J. of Empirical Legal Studies 27, at 35 (2004). Moreover, each of the named plaintiffs in this case agreed to a one-third contingency fee. Schlichter Decl. ¶21. Contingency fee arrangements are consistent with this area of practice. Doc. 650-40 at ¶16. In fact, they are the "key to the courthouse" for individuals taking on a large corporation. Courts in this Circuit and this District have frequently awarded attorney fees of 33 1/3%–36% of a common fund. *See, e.g.*, *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002)(36% fee

award reasonable); *Barfield v. Sho-Me Power Elec. Co-op.,* No. 11-4321, 2015 WL 3460346, *4 (W.D. Mo. 2015)(33% is a reasonable percentage); *Yarrington v. Solvay Pharm., Inc.,* 697 F.Supp.2d 1057, 1061–62 (D. Minn. 2010) (one-third fee reasonable); *Carlson v. C.H. Robinson Worldwide, Inc*., No. 02-3780, 2006 U.S.Dist.LEXIS 67108, *20 (D.Minn. Sept. 18, 2006)(35.5% fee award reasonable); *In re E.W. Blanch Holdings, Inc. Sec. Litig.,* No. 01-258, 2003 U.S.Dist.LEXIS 26402 at 10 (D.Minn. June 16, 2003)(awarding 33.3% of a $20 million settlement); *KK Motors v. Brunswick Corp.,* No. 98-2307, Doc. 67 at 2–3 (D.Minn. March 6, 2000)(awarding 33.3% of a $30 million settlement); *In re Airline Ticket Commission Antitrust Litig.,* 953 F. Supp. 280, 285–86 (D.Minn. 1997)(awarding 33.3% of $86 million fund); *see also In re Xcel Energy, Inc*., 364 F.Supp.2d 980, 996 (D.Minn. 2005)(listing various settlements, including *In re Select Comfort Corp. Secs. Litig*., No. 99-884, 2003 U.S.Dist.LEXIS 26409 (D.Minn. Feb. 28, 2003)(awarding 33.3% of the $5,750,000 settlement), and *In re Control Data Sec. Litig*., No. 85-1341 (D.Minn. Sept. 23, 1994)(awarding 36.96% of $8 million fund)).

B. The requested fee is much less than that available under a lodestar analysis.

A lodestar analysis is unnecessary to justify a percentage award of attorneys' fees but can be used "to double-check the result of the 'percentage of the fund' method[.]" *Petrovic v. AMOCO Oil Co*., 200 F.3d 1140, 1157 (8th Cir. 1999). The hourly rate should be in line with the market rate for "similar services by lawyers of reasonably comparable skill, experience, and reputation." *Jeffboat, L.L.C.¸v. Dir., Office of Workers' Comp. Programs*, 553 F.3d 487, 489 (7th Cir. 2009). The Court does not need to "exhaustively scrutinize[ ]" the hours documented by counsel and 'the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). Class Counsel need only submit documentation appropriate to meet the burden establishing an entitlement to an award,

not to satisfy "green-eyeshade accountants." *Fox v. Vice*, 563 U.S. 826, 838 (2011). Class Counsel's requested fee of $18 million is more than justified under a lodestar analysis.

C. Plaintiffs' request for attorneys' fees is reasonable and appropriate

"To determine the lodestar amount, the Court may consider:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the attorney's preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the 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.

United HealthCare Corp. v. Am. Trade Ins. Co., 88 F.3d 563, 574 n.9 (8th Cir. 1996) (referencing *Hensley v. Eckerhart*, 461 U.S. 424, 428 (1983))." Doc. 782 at p. 5.

As explained below, these factors overwhelmingly support Plaintiffs' request in this historic case.

1. The time and labor required

Class Counsel dedicated over 28,700 hours of attorney and non-attorney time over twelve years. O'Gorman Decl. ¶3. This time and effort easily support the requested fee award, as set forth below.

Further, the attorneys' fees of the two Defendants only through trial in January 2010 demonstrate the effort required by Plaintiffs. It is a matter of public record that the two Defendants' legal fees in this case exceeded $42 million – through the trial in 2010 alone. *Tussey v. ABB Inc.*, No. 06-4305, 2015 WL 8485265, *6 (W.D. Mo. Dec. 9, 2015). That does not include fees paid for experts or other expenses, which were very substantial. In fact, the cost for

just one of ABB's experts, Glenn Hubbard, and his research was $3.2 million. Doc. 650 at 20; Doc. 567 at 172–175 (Tr. 2108–11).

2. The novelty and difficulty of the questions at issue

ERISA fiduciary breach class actions, which did not even exist before this case, have been complex, uncertain, sharply contested, often protracted, and require a willingness by class counsel to risk enormous resources in time and money. Doc. 650-39 at ¶¶8-9, 13, 16. Here, that was even more the case because this was the first full trial of such a case, and would set a precedent for other such cases. As the Court noted in an earlier ruling, "many of the questions involved were novel and most were complex, both factually and legally." Doc. 782 at p. 5. Class Counsel have been virtually alone for years in their willingness to handle ERISA fiduciary breach cases of this scope, which further supports the requested award. Doc. 650-39 at ¶18. "Lack of competition not only implies a higher fee but also suggests that most members of the ... bar saw this litigation as too risky for their practices." *Silverman v. Motorola Solutions, Inc*., 739 F.3d 956, 958 (7th Cir. 2013)(referring to the securities litigation bar, but even more applicable to the ERISA bar in this case). "The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Id*.

Tibble v. Edison Int'l, No. 07-5359 (C.D. Cal.) is another example of a case handled by Class Counsel illustrating the extreme difficulty in obtaining a successful recovery. This case was the first *partial* trial of a 401(k) excessive fee case. Along with the instant case, it was the only other trial of such a case for many years. In 2010, the court entered a limited judgment in favor of plaintiffs on certain claims that survived summary judgment. *Tibble v. Edison Int'l*, No. 07-5359, 2010 WL 2757153 (C.D.Cal. July 8, 2010). Following the bench trial, the case then had an appeal to the Ninth Circuit, a successful certiorari petition by plaintiffs, a unanimous successful

decision before the Supreme Court, a remandment to the Ninth Circuit panel, a successful unanimous *en banc* reversal of the panel decision, a remandment to the district court, and still another appeal to the Ninth Circuit, currently pending more than twelve years later. *Tibble v. Edison Int'l*, No. 07-5359, 2017 WL 3523737 (C.D.Cal. Aug. 16, 2017). This was the first and only 401(k) excessive fee case taken by the Supreme Court. *Tibble v. Edison Int'l*, 135 S.Ct. 1823 (2015).

In granting final approval of a settlement in another case brought by Class Counsel and awarding one-third of the monetary portion of the settlement, the Honorable Joe Billy McDade observed that achieving a favorable result in this type of case required extraordinary efforts:

> This litigation entails complicated ERISA claims that are not only dependent on the statute but also on various regulations that implement ERISA. These claims also are relatively unique with limited case authority in support.

Martin v. Caterpillar, Inc., No. 07-1009, 2010 WL 3210448, *2 (C.D.Ill. Aug. 12, 2010).

3. The skill requisite to perform the legal service properly

Courts also commonly consider the quality of class counsel's legal services in determining the market rate. *Yarrington,* 697 F.Supp.2d at 1061–62. Class Counsel has successfully fought for over a decade with well-funded Defendants represented by highly-qualified national attorneys to achieve this significant settlement for the class. Doc. 650-40 at ¶¶12-14. To obtain this settlement, Class Counsel risked millions of dollars in un-reimbursed attorneys' time and over $2 million in out-of-pocket costs. Unless that risk is compensated with a commensurate award, no firm, no matter how large or well-financed, will have the incentive to consider pursuing a case such as this. Doc. 650-40 at ¶16.

This Court is well aware of the scorched earth defense used herein for the last 12 years. Class Counsel successfully opposed Defendants' dispositive motions for dismissal and summary

judgment; succeeded at a one-month trial; handled two appeals resulting in the primary claims being intact, and worked through multiple remandments to the District Court. Class Counsel have exhibited diligence and efficiency throughout the litigation, resulting in a favorable result for the class. This Court has acknowledged Class Counsels' time and favorable result for the class in granting the prior fee petitions. *See* Docs. 718 ("Plaintiffs prevailed overwhelmingly in the overall litigation"); 782 ("Plaintiffs' counsel took unusual risks in uncharted waters against an extraordinarily well-funded defense team.").

Judges in other ERISA fiduciary breach cases litigated by Class Counsel have commented on the quality of Class Counsel's services in successfully pursuing claims and obtaining favorable settlements in this complex area of litigation.[2] Recognizing the work of Class Counsel as exceptional and approving fees of one-third of the monetary recovery in a similar settlement, the U.S. District Court Judge G. Patrick Murphy stated:

> Schlichter, Bogard & Denton's work throughout this litigation illustrates an exceptional example of a private attorney general risking large sums of money and investing many thousands of hours for the benefit of employees and retirees. No case had previously been brought by either the Department of Labor or private attorneys against large employers for excessive fees in a 401(k) plan. Class Counsel performed substantial work…, investigating the facts, examining documents, and consulting and paying experts to determine whether it was viable. This case has been pending since September 11, 2006. Litigating the case required Class Counsel to be of the highest caliber and committed to the interests of the participants and beneficiaries of the General Dynamics 401(k) Plans.

Will v. General Dynamics, No. 06-698, 2010 WL 4818174, *2 (S.D.Ill. Nov. 22, 2010). U.S. District Court Judge David R. Herndon, also approving fees of one-third of the monetary recovery in a similar settlement, echoed those thoughts. *Beesley*, 2014 WL 375432 at 2

[2] Class Counsel is at the forefront of litigation of this type. Doc. 650-39 at ¶13-14. Indeed, unlike most areas of the law, virtually no cases of this type had been brought by private firms before Plaintiffs' attorneys filed these types of cases, including this case. *Id.*

("Litigating this case against formidable defendants and their sophisticated attorneys required Class Counsel to demonstrate extraordinary skill and determination.").

The quality of Class Counsel's services is reflected not only in the recovery to the PRISM Plans, but also lowering costs for workers and retirees throughout the United States. *See, e.g.*, Linda Stern, *Stern Advice- How 401(k) Lawsuits Are Bolstering Your Retirement Plan*, REUTERS (Nov. 5, 2013)(fee litigation brought by Class Counsel has had a "humongous" impact, according to CEO of 401(k) plan analysis firm Brightscope, Inc.).[3]

As another U.S. District Court Judge, Harold A. Baker, observed in approving a settlement and awarding Class Counsel one-third of the monetary portion of the settlement in a similar case:

> Class Counsel's enforcement of ERISA's fiduciary obligations has contributed to rapid reductions in the level of 401(k) recordkeeping fees paid across the country. The law firm Schlichter, Bogard & Denton is the leader in 401(k) fee litigation. One independent investment advisory company, NEPC, has found that 401(k) recordkeeping fees have dropped $38 per account per year since Class counsel filed their first 401(k) fee cases in 2006. They attribute the fee reductions to improved fee disclosure requirements from the Department of Labor and attention brought by 401(k) fee litigation. The Department of Labor reports an estimated 73 million accounts in the United States. Accordingly, the fee reduction attributed to Schlichter, Bogard & Denton's fee litigation and the Department of Labor's fee disclosure regulations approach $2.8 billion in annual savings for American workers and retirees.

Nolte v. Cigna Corp., No. 07-2046, 2013 WL 12242015, *2 (C.D.Ill Oct. 15, 2013)(internal citations omitted). Judge Baker noted that Schlichter, Bogard & Denton, as the "preeminent firm in 401(k) fee litigation", has "invested such massive resources and persevered in the face of the enormous risks of representing employees and retirees in this area." *Id.* at 3–4.

4. The preclusion of other employment due to acceptance of the case

The decision to pursue this case and commit substantial resources and thousands of attorney hours to obtain a successful recovery impacts the firm's ability to handle "other simpler

[3] Available at http://www.reuters.com/article/2013/11/05/us-column-stern-advice-idUSBRE9A40S320131105.

and less risky matters". *Krakauer v. Dish Network*, No. 14-333, 2018 WL 6305785, *4 (M.D.N.C. 2018); Schlichter Decl. ¶¶23, 24, 26, 27. This factor is easily satisfied.

5. Whether the fee is fixed or contingent

Class Counsel entered into contingency fee agreements with each of the Named Plaintiffs for one-third of any monetary recovery plus reimbursement of expenses. Schlichter Decl. ¶30. The Named Plaintiffs simply could not afford to pursue this litigation other than on a contingency fee. Schlichter Decl. ¶20; Doc. 650-39 at ¶23; Doc. 650-40 at ¶16.

In cases like this one, where counsel "had no sure source of compensation for their services," the Court must apply a risk multiplier to compensate the attorneys for the risk of nonpayment in the event the litigation were unsuccessful. *Florin v. Nationsbank of Ga., N.A.,* 34 F.3d 560, 565 (7th Cir. 1994). ("[R]risk multipliers are appropriate in cases that are initiated under ERISA and settled with the creation of a common fund." *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998)(citing *Florin*, 34 F.3d at 564). The purpose of the multiplier is to "compensate[e] in a manner that provides adequate incentive for the attorney to bring this type of case." *Harman v. Lyphomed, Inc*., 945 F.2d 969, 974 (7th Cir. 1991). See *Spano v. Boeing Co.*, No. 06-743, 2016 WL 3791123, *3 (S.D. Ill. Mar. 31, 2016) ("lodestar multiplier can be reasonable in the range between 2 and 5"); Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 272 (Table 14) (2010). Despite the availability of a risk multiplier being unquestionably appropriate, here Class Counsel seeks no multiplier at all.

6. The time limitations imposed by the client or the circumstances

Class Counsel devoted over 28,700 hours of attorney and non-attorney time to prosecute this action, preventing the pursuit of other class actions or devoting additional resources to other matters. Schlichter Decl. ¶27.

7. The amount involved and the results obtained

The $55 million monetary recovery is tremendous for this novel area of litigation and for the class. Adding additional value, the settlement provides for current participants to receive their distributions directly into their Plan account tax deferred and gives former participants the right to direct their distribution into a tax-deferred vehicle, such as an IRA. The Investment Company Institute estimates that the benefit of tax deferral for 20 years is an additional 18.6%, thus the actual value to the class for the monetary part of the settlement is $64,900,000.[4]

This Court has acknowledged the value of the future benefit of the injunctive relief to the Class. Doc. 782 at p. 12. ("There is also the future benefit to Plan participants of having a fiduciary that monitors fee costs. The present value of this relief may in fact exceed the award of actual damages that only reflects six years of damages because of the statute of limitations."). *See also Beesley*, 2014 WL 375432 at 1 (citing MANUAL FOR COMPLEX LITIGATION (Fourth) §21.71 (2004), *Principles of the Law of Aggregate Litigation*, A.L.I., §3.13(b)(May 20, 2009); cf. *Blanchard*, 489 U.S. at 95 (1989).

Here, the value of the injunctive relief is very substantial and has been in effect, benefitting class members, for seven years. Defendants have complied with the Court's Order (Doc. 623), having (1) completed a competitive bidding process for recordkeeping services; (2) negotiated a

[4] *Abbott v. Lockheed Martin Corp.*, No. 06-701, Doc. 497 at 47 (S.D.Ill. Apr. 14, 2015)(citing Peter Brady, *Marginal Tax Rates and the Benefits of Tax Deferral,* Investment Company Institute, Sept. 17, 2013, available at http://www.ici.org/viewpoints/view_13_marginal_tax_and_deferral).

market price for the services provided by its recordkeeper; (3) continued to calculate and monitor the dollar amount the Plans are paying for recordkeeping services, leveraging their size to negotiate rebates when possible; (4) for so long as it serves as a fiduciary to the Plan, not used a PRISM recordkeeper to provide any corporate services to ABB; (5) continued to choose the share class of investments for the Plans with the lowest expense ratio; and (6) continued to manage the PRISM Plans for the exclusive benefit of the Plan, its participants, and beneficiaries.

Having conformed to the Court's Order seven years ago, Defendants likely will not discontinue them. The value of the injunctive relief ordered by the Court, based on the resulting changes to the Plans, results in savings of over $83 million for a 15-year period. *See* Doc. 775-01 at ¶13. The settlement's provision for tax-deferred distributions adds an additional 18.6% to the monetary benefit to the class. Adding the benefit of tax deferral to the monetary relief and injunctive relief brings the total value to the class to $149 million. Class Counsel's requested fee constitutes only 12% of this total benefit to the class.

8. The experience, reputation, and ability of the attorneys

Class Counsel is not only highly experienced in handing ERISA class actions involving 401(k) and 403(b) plans, they literally created the field. This Court has found Class Counsel to be competent and able to fairly and adequately represent the class. Doc. 183 at p. 18. The quality of the professional legal services had to be exceptional to navigate this complex area. Doc. 650-39 at ¶29. Schlichter, Bogard & Denton is the "preeminent firm" in excessive fee litigation having "achieved unparalleled results on behalf of its clients" in the face of "enormous risks". *Nolte*, 2013 WL 12242015 at 3–4. They are "experts in ERISA litigation". *Krueger v. Ameriprise Fin., Inc.*, No. 11-2781, 2015 WL 4246879, *2 (D. Minn. July 13, 2015)(citation omitted). The firm also obtained the only victory of an ERISA 401(k) excessive fee Supreme Court case, which

held that an ERISA fiduciary has a continuing duty to monitor plan investments and remove imprudent ones. *Tibble*,135 S.Ct. at 1828–29.

District courts across the country have recognized the reputation and extraordinary skill and determination of Class Counsel. Chief Judge Osteen from the Middle District of North Carolina, speaking of the efforts of Schlichter, Bogard & Denton, noted:

> Class Counsel's efforts have not only resulted in a significant monetary award to the class but have also brought improvement to the manner in which the Plans are operated and managed which will result in participants and retirees receiving significant savings in the coming four years.

Kruger v. Novant Health, Inc., No. 14-208, 2016 WL 6769066, *3 (M.D.N.C. Sept. 29, 2016). Judge McDade of the Central District of Illinois, speaking of the firm, observed that achieving a favorable result in this type of case required extraordinary efforts because the "litigation entails complicated ERISA claims". *Martin*, 2010 WL 3210448 at 2. Judge Murphy of the Southern District of Illinois similarly stated:

> Schlichter, Bogard & Denton's work throughout this litigation illustrates an exceptional example of a private attorney general risking large sums of money and investing many thousands of hours for the benefit of employees and retirees…Litigating the case required Class Counsel to be of the highest caliber and committed to the interests of the participants and beneficiaries of the General Dynamics 401(k) Plans.

Will, 2010 WL 4818174 at 2. Judge Herndon of the Southern District of Illinois echoed those thoughts:

> Litigating this case against formidable defendants and their sophisticated attorneys required Class Counsel to demonstrate extraordinary skill and determination. Schlichter, Bogard & Denton and lead attorney Jerome Schlichter's diligence and perseverance, while risking vast amounts of time
> and money, reflect the finest attributes of a private attorney general.

Beesley, 2014 WL 375432 at 2. Judge Baker observed:

> The law firm Schlichter, Bogard & Denton is the leader in 401(k) fee litigation…[T]he fee reduction attributed to Schlichter, Bogard & Denton's fee litigation and the Department of Labor's fee disclosure regulations approach $2.8 billion in annual savings for American workers and retirees.

Nolte, 2013 WL 12242015 at 2 (internal citations omitted). The firm is the "pioneer and the leader in the field of retirement plan litigation." *Abbott v Lockheed Martin Corp.*, No. 06-701, 2015 WL 4398475, *1 (S.D.Ill. July 17, 2015). After recognizing "their persistence and skill of their attorneys", Judge Rosenstengel of the Southern District of Illinois noted:

> Class Counsel has been committed to the interests of the participants and beneficiaries of Boeing's 401(k) plan in pursuing this case and several other 401(k) fee cases of first impression. The law firm Schlichter, Bogard & Denton has significantly improved 401(k) plans across the country by bringing cases such as this one[.]

Spano, 2016 WL 3791123 at 3. *See also In re Northrop Grumman Corp. ERISA Litig.*, No. 06-6213, 2017 WL 9614818, *4 (C.D.Cal. Oct. 24, 2017)("SBD is highly experienced" in ERISA class actions).

9. The "undesirability" of the case

Class Counsel pioneered excessive fee litigation in 401(k) plans.[5] As noted by senior attorney with the AARP Foundation Litigation, Jay Sushelsky, Class Counsel "is at the forefront of 401(k) excessive fee litigation." Doc. 650-39 at ¶13. ERISA fiduciary breach cases are exceedingly difficult because Courts frequently defer to the decisions of ERISA fiduciaries.[6] Therefore, Defendants win outright in many ERISA cases. *See, e.g.*, *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009); *Loomis v. Exelon Corp.*, 658 F.3d 667 (7th Cir. 2011); *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011). Even after proving a fiduciary breach, the issues of causation

[5] Floyd Norris, *What a 401(k) Plan Really Owes Employees*, New York Times, Oct. 16, 2014, available at http://www.nytimes.com/2014/10/17/business/what-a-401-k-plan-really-owes-employees.html?_r=0.
[6] Doc. 650-40 at ¶¶8-9.

and the proper measure of damages are fervently contested. *See Tussey*, 746 F.3d at 339, cert. denied, 135 S.Ct. 477 (2014)(remanding to the district court to reevaluate its method of calculating damages under ERISA for imprudent selection of proprietary mutual fund and suggesting, in dicta, that the measure be less favorable to the class). That no other firm sought to bring this case indicates that others believed it was too risky. *Silverman v. Motorola Solutions, Inc*., 739 F.3d 956, 958 (7th Cir. 2013). *See Doc.* 782 ("Plaintiffs' counsel took unusual risks in uncharted waters against an extraordinarily well-funded defense team.")

10. The nature and length of the professional relationship with the client

Class Counsel did not have a professional relationship with any of the Named Plaintiffs prior to this litigation, which supports the requested fee award. Schlichter Decl. ¶22; *Smith v. Krispy Kreme Doughnut Corp.*, No. 05-187, 2007 WL 119157, *3 (M.D.N.C. 2007).

11. Awards in similar cases

In a similar ERISA excessive fee settlement, Courts have consistently awarded Class Counsel a one-third fee.

Case	Fee %
Sims v. BB&T, No. 15-732, Doc. 450 (M.D.N.C. May 6, 2019)	33.3%
Ramsey v. Philips N.A., No. 18-1099, Doc. 27 (S.D.Ill. Oct. 15, 2018)	33.3%
In re Northrop Grumman Corp. ERISA Litig., No. 06-6213, 2017 WL 9614818 (C.D.Cal. Oct. 24, 2017)	33.3%
Gordan v. Mass. Mut. Life Ins. Co., No. 13-30184, 2016 WL 11272044 (D.Mass. Nov. 3, 2016)	33.3%
Kruger v. Novant Health, Inc., No. 14-208, 2016 WL 6769066, 1-2 (M.D.N.C. Sept. 29, 2016)	33.3%
Spano v. Boeing Co., No. 06-743, 2016 WL 3791123 (S.D.Ill. Mar. 31, 2016)	33.3%
Abbott v Lockheed Martin Corp., No. 06-701, 2015 WL 4398475 (S.D.Ill. July 17, 2015)	33.3%
Krueger v. Ameriprise Fin., Inc., No. 11-2781, 2015 WL 4246879 (D.Minn. July 13, 2015)	33.3%

Case	Fee %
Beesley v. Int'l Paper Co., No. 06-703, 2014 WL 375432 (S.D.Ill. Jan. 31, 2014)	33.33%
Nolte v. Cigna Corp., No. 07-2046, 2013 WL 12242015 (C.D.Ill. Oct. 15, 2013)	33.33%
George v. Kraft Foods Global, Inc., Nos. 08-3899, 07-1713, 2012 WL 13089487 (N.D.Ill. June 26, 2012)	33.33%
Will v. Gen. Dynamics Corp., No. 06-698, 2010 WL 4818174 (S.D.Ill. Nov. 22, 2010)	33.33%
Martin v. Caterpillar Inc., No. 07-1009, 2010 WL 11614985 (C.D.Ill. Sept. 10, 2010)	33.33%

In this Circuit, district courts have frequently awarded a one-third fee of the settlement common fund. *See, e.g.*, *In re U.S. Bancorp Litig.*, 291 F.3d at 1038 (36% fee award reasonable); *Barfield*, 2015 WL 3460346 at 4 (33% is a reasonable percentage); *Yarrington,* 697 F.Supp.2d at 1061–62 (one-third fee reasonable); *Carlson*, 2006 U.S.Dist.LEXIS 67108 at 20 (35.5% fee award reasonable); *In re E.W. Blanch Holdings,* 2003 U.S.Dist.LEXIS 26402 at 10 (awarding 33.3% of a $20 million settlement); *KK Motors,* Doc. 67 at 2–3 (awarding 33.3% of $30 million settlement); *In re Airline Ticket Commission,* 953 F. Supp. at 285–86 (awarding 33.3% of $86 million fund); *see also In re Xcel Energy*, 364 F.Supp.2d at 996 (listing various settlements, including *In re Select Comfort*, 2003 U.S.Dist.LEXIS 26409 (awarding 33.3% of the $5,750,000 settlement), and *In re Control Data Sec. Litig.*, No. 85-1341 (D.Minn. Sept. 23, 1994)(awarding 36.96% of $8 million fund)).

ERISA litigation, such as this, involves a national market because the number of plaintiff's firms who have the necessary expertise and are willing take the risk and devote the resources to litigate complex claims is small. *Abbott*, 2015 WL 4398475 at 3; Schlichter Decl. ¶¶25, 28; Doc. 650-40 at ¶¶8, 10. Class Counsel has brought actions across the country defended by national firms with ERISA expertise. Schlichter Decl. ¶25. Thus, the relevant hourly rate is the

"nationwide market rate". *Kruger*, 2016 WL 6769066 at 4; *Ramsey*, Doc. 27 at 8; *Beesley*, 2014 WL 375432 at 3; *Abbott*, 2015 WL 4398475 at 2.

"The starting point in determining an attorneys' fee award. . . is the lodestar, which is calculated by multiplying the number of hours reasonably expended by reasonable hourly rates." *Snider v. City of Cape Girardeau*, 752 F. 3d 1149, 1159 (8th Cir. 2014). Class Counsel spent 28,754.20 hours of attorney and non-attorney time litigating this case. O'Gorman Decl. ¶3. Without question, this litigation is national in scope with national law firms defending the case and other similar cases, making a national rate the appropriate rate. Doc. 782 at p. 2 (*Tussey*, 746 F.3d at 340-41). This Court has twice approved national rates for Class Counsel. Docs. 718 at p. 5; 782 at pp. 4-6.

Compensating counsel for the long delay in payment, the court must base the attorney fee award on current rates or otherwise adjust the fee based on historical rates to reflect its present value. *Perdue v. Kenny A.*, 559 U.S. 542 (2010) (quoting *Missouri v. Jenkins*, 491 U.S. 274, 282 (1989)). As recent as 2018, Class Counsel's reasonable hourly rates have been approved in similar ERISA class action litigation. The approved hourly rates are as follows: for attorneys with at least 25 years of experience, $1,060 per hour; for attorneys with 15–24 years of experience, $900 per hour; for attorneys with 5–14 years of experience, $650 per hour; for attorneys with 2–4 years of experience, $490 per hour; and for Paralegals and Law Clerks, $330 per hour. *Ramsey v. Philips N.A.*, No. 18-1099, Doc. 27 at 2 (S.D.Ill. Oct. 15, 2018); *Sims v. BB&T Corporation*, No. 15-1705, 2019 WL 1993519, *3 (M.D.N.C. 2019).

These reasonable hourly rates were independently verified by a recognized expert in attorney fee litigation who opined that Class Counsel's requested rates were reasonable based on rates charged by national attorneys of equivalent experience, skill, and expertise in complex class

action litigation. *Ramsey*, Doc. 27 at 9 (citing Declaration of Sanford Rosen (Doc. 21-3 ¶52)). These rates reflect a modest increase (3% annually) from those previously approved by this Court for Class Counsel in 2016. *See also Kruger*, 2016 WL 6769066 at 4 (applying rates from *Spano*); *Ramsey*, Doc. 27 at 8 n. 4 (applying increased rates from *Spano*). In light of the close similarities between the fiduciary breach claims in these cases and this one, Class Counsel being the same, and the recency of the decisions, the same rates are appropriate. *See Kruger*, 2016 WL 6769066 at 4.

Using these rates, the lodestar alone is $20,352,883, which is over 10% higher than the requested, one-third fee of 18.3 million, without taking into account the value of the affirmative relief that has been in place for the last seven years and, which will continue into the indefinite future. If instead of 2018 rates, the Court applies the rates approved in 2015 (Doc. 782), roughly halfway through the case, the lodestar is $18,648,236.

In view of the fact that rates for national attorneys litigating large, complex cases are rising in 2019 and that Class Counsel will not be compensated until August 2019, applying a three-percent increase raises the lodestar to $21 million and $19 million respectively. If a multiplier were applied, the fee would be higher than all the amounts.

D. The Court should also award reimbursement of Class Counsel's costs.

Reimbursement of the very substantial litigation expenses that Class Counsel advanced and has occurred in prosecuting this case is also warranted. Fed.R.Civ.P. 23(h). As a leading treatise states:

> An attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved. The equitable principle that all reasonable expenses incurred in the creation of a fund for the benefit of a class are reimbursable proportionately by those who accept benefits from the fund authorizes reimbursement of full reasonable litigation expenses as costs of the suit in contrast to the more narrowly defined rules of taxable costs of suit

> under Fed. R Civ. P. 54 (d).... The prevailing view is that expenses are awarded in addition to the fee percentage.

Alba Conte, 1 Attorney Fee Awards § 2:19 (3d ed.); *see also Sprague v. Ticonic*, 307 U.S. 161, 166–67 (1939)(recognizing a federal court's equity power to award costs from a common fund).

"Counsel in common fund cases may recover those expenses that would normally be charged to a fee-paying client." *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. 05-1708, 2008 U.S.Dist.LEXIS 17535, *16 (D.Minn. Mar 7, 2008)(quoting *In re Infospace, Inc.*, 330 F.Supp.2d 1203, 1216 (W.D.Wash. 2004)); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'"). "[R]educing [litigation expenses] because the district judge thinks costs too high in general is not" permissible. *In re Synthroid Marketing Litig.*, 264 F.3d 712, 722 (7th Cir. 2001).

Reimbursable expenses include many litigation expenses beyond those narrowly defined "costs" recoverable from an opposing party under Rule 54(d), and includes: expert fees; travel; long-distance and conference telephone; postage; delivery services; and computerized legal research. Alba Conte, 1 Attorney Fee Awards § 2:19 (3d ed.); *see also In re BankAmerica Corp. Sec. Litig.,* 228 F.Supp.2d 1061, 1066 (E.D.Mo. 2002)(approving reimbursement to class counsel of: "expert witness costs; computerized research; court reporters; travel expenses; copy, phone and facsimile expenses; mediation; and class notification"); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004)("The expenses incurred—which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review are the type for which 'the paying, arms' length market' reimburses attorneys. They are properly chargeable to the Settlement."); *Anwar v. Fairfield Greenwich Ltd.*, No. 09-118, 2012 U.S.Dist.LEXIS 78929, *9 (S.D.N.Y. June 1,

2012)("Plaintiffs' Counsel seek reimbursement for expenses such as mediation fees, expert witness fees, electronic legal research, photocopying, postage, and travel expenses, each of which is the type 'the paying, arms' length market' reimburses attorneys.").

Moreover, each of the ERISA fiduciary breach cases cited *supra*, which granted a one-third attorneys' fee out of the common fund, also reimbursed class counsel for these expenses. *See* p. 17. Counsel brought this case without guarantee of reimbursement or recovery, so they had a strong incentive to keep costs to a reasonable level, and they did so. *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150 (S.D.N.Y. 2010)(recognizing that counsel with contingent fee agreement has a "strong incentive to keep expenses at a reasonable level"). However, given the complexity, the costs incurred were substantial, and consistent with what would be expected in a typical case of this size. An empirical study of the costs awarded in class action litigation found that the average cost award was equal to 4% of the relief obtained for the class. *See* Theodore Eisenberg and Geoffery P. Miller, *Attorney Fees in Class Action Settlements: an Empirical Study*, 1 J. of Empirical Legal Studies 27, 70 (2004). This study suggests that "requests falling within one standard deviation above or below the mean should be viewed as generally reasonable." *Id*. at 74. The total costs here is less than 3% of the total recovery, well within the range to be considered "generally reasonable."

A description of these costs and expenses, broken down by category, is contained in the attached Declaration of Sheri O'Gorman. The costs and expenses, totaling $2,256,805, are the costs and expenses routinely reimbursed by paying clients, such as experts' fees, deposition expenses, travel, and photocopying costs. O'Gorman Decl. ¶2. Class Counsel have incurred these expenses over the course of the past 12 years, but do not seek interest to compensate them for the significant time value of this money.

Uniquely in this case, the class has already been given notice of requested attorneys' fees and costs totaling $16,420,228.75 consisting of $14,356,09 in attorney fees, and $2,064,019.75 in costs, together with the right to file an objection. Docs. 647-3, 649. The motion for these fees and costs was filed May 11, 2012. Importantly, *not a single class member*, voiced an objection to these requested fees and costs in 2012. Seven more years of hotly contested litigation have followed, encompassing two appeals, two remandments, and more than half of the time this case had been pending. The requested attorneys' fees in 2019 are less than 30% greater than the unobjected to fees of seven years ago, and the requested costs are less than 10% greater than the unobjected to costs. Furthermore, this Court previously approved the prior amount of costs of $2,202,819.85. Doc. 718.

The Class will benefit from interest earned on deposited money under the settlement agreement. Apart from the above, ABB has already deposited $12 million in an account invested in U.S. Treasury Notes and will deposit the remainder of the settlement funds in the account after final approval. An estimate of the amount earned on these sums before distribution of payments is approximately $240,000, all of which will benefit the class. Class Counsel will receive none of the earnings.

Because of the length and complexity of this case, Class Counsel's request for reimbursement of costs and expenses should be approved as fair and reasonable.

E. The Court should approve incentive awards for the class representatives.

The Court previously awarded an incentive award of $25,000 to Mr. Tussey, Mr. Fisher, and Mr. Pinnell, finding them actively involved in the litigation for the benefit of the entire Class. Doc. 718 at p. 21. Class Counsel requests that the Court grant the payment of these named Plaintiff incentive awards from the common fund, which is appropriate under Eighth Circuit law.

Doc. 718 at p. 21 (citing *In re U.S. Bancorp Litig*., 291 F.3d at 1038 ; *In re Charter Communications, Inc., Sec. Litig.*, 2005 WL 4045741, *25 (E.D. Mo. June 30, 2005); *Zilhaver v. UnitedHealth Group, Inc*., 646 F. Supp. 2d 1075, 1085 (D. Minn. 2009). Without their involvement and willingness to pursue this litigation for the past 12 years, the Class would have received no remuneration for the Defendants' breaches of fiduciary duty, which would likely have continued to this day. The total award for all named plaintiffs represents just 0.14% of the total settlement fund.

III. Conclusion

Plaintiffs request that the Court approve a fee award of $18,333,333 and a cost award of $2,256,805 to Class Counsel, and incentive awards of $25,000 to each of the following named plaintiffs and class representatives: Mr. Tussey, Mr. Fisher, and Mr. Pinnell.

Respectfully submitted,

June 14, 2019

s/Jerome J. Schlichter

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

RONALD TUSSEY, et al., Plaintiffs, v. ABB, INC., et al., Defendants.	Case No.: 06-CV-04305-NKL

DECLARATION OF JEROME J. SCHLICHTER

I, Jerome J. Schlichter, declare as follows:

1. I am the founding and managing partner of the law firm of Schlichter, Bogard & Denton, LLP, Class Counsel for Plaintiffs in the above-referenced matters. This declaration is submitted in support of Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Case Contribution Awards for Named Plaintiffs. I am familiar with the facts set forth below and able to testify to them.

2. I received my Bachelor's degree in Business Administration from the University of Illinois in 1969, with honors and was a James Scholar. I received my Juris Doctorate from the University of California at Los Angeles (UCLA) Law School in 1972, where I was an Associate Editor of UCLA Law Review. I am licensed to practice law in the states of Illinois, Missouri, and California and am admitted to practice before the Supreme Court of the United States, the Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth Circuit Courts of Appeals and numerous U.S. District Courts. I have also been an Adjunct Professor teaching trial practice at Washington University School of Law, and repeatedly selected by my peers for the list of The Best Lawyers in America.

3. Through over 40 years of practice, I have handled, on behalf of plaintiffs, substantial personal injury, civil rights class actions, mass torts and class action fiduciary breach litigation under the Employee Retirement Income Security Act (ERISA), on behalf of participants in large 401(k) and 403(b) plans. In 2014, I was ranked number 4 in a list of the 100 most influential people nationally in the 401(k) industry in the industry publication 401(k) Wire. Examples of class action cases I have successfully handled include: *Brown v. Terminal Railroad Association*, a race discrimination case in the Southern District of Illinois on behalf of all African-American and Hispanic employees at a railroad; *Mister v. Illinois Central Gulf Railroad*, 832 F.2d 1427 (7th Cir. 1987), a failure-to-hire class action brought on behalf of hundreds of African-American applicants from East St. Louis, Illinois at a major railroad which was tried to conclusion and successfully appealed to the Seventh Circuit Court of Appeals and finally concluded with more than $10 million for the class over twelve years of litigation; *Wilfong v. Rent-A-Center*, No. 00-680-DRH (S.D.Ill. 2002), a nationwide gender discrimination in employment case on behalf of women, which was successfully settled for $47 million and substantial affirmative relief to the class of thousands, after defeating the defendant's attempt to conduct a reverse auction.

4. My firm has been named class counsel in many cases involving claims of fiduciary breaches in large 401(k) and 403(b) plans. *See Bell v. Pension Cmte. of ATH Holding Co.*, No. 15-2062, Doc. 347 (S.D.Ind. Jan. 24, 2019); *Cunningham v. Cornell Univ.*, No. 16-6525, Doc. 219 (S.D.N.Y. Jan. 22, 2019); *Cassell v. Vanderbilt Univ.*, No. 16-2086, Doc. 126 (M.D.Tenn. Oct. 23, 2018); *Cates v. Trustees of Columbia Univ.*, No.

16-6524, Doc. 218 (S.D.N.Y. Nov. 15, 2018); *Henderson v. Emory Univ.*, No. 16-2920, Doc. 167 (N.D.Ga. Sept. 13, 2018); *Tracey v. MIT*, No. 16-11620, Doc. 157 (D.Mass. Oct. 19, 2018); S*acerdote v. New York University*, No. 16-6284, 2018 U.S.Dist.LEXIS 23540, 16 (S.D.N.Y. Feb. 13, 2018); *Clark v. Duke Univ.*, No. 16-1044, 2018 U.S.Dist.LEXIS 62532 (M.D.N.C. Apr. 13, 2018); *Ramos v. Banner Health*, No. 15-2556, Doc. 296 (D.Colo. Mar. 23, 2018); *Troudt v. Oracle Corp.*, No. 16-175, 2018 U.S.Dist.LEXIS 15151 (D.Colo. Jan. 30, 2018); *Pledger v. Reliance Trust*, No. 15-4444, Doc. 101 (N.D.Ga. Nov. 7, 2017); *Marshall v. Northrop Grumman Corp.*, No. 16-6794, Doc. 130 (C.D.Cal. Nov. 3, 2017); *Sims v. BB&T Corp.*, No. 15-732, 2017 U.S. Dist. LEXIS 137738 (M.D.N.C. Aug. 28, 2017); *Gordan v. Massachusetts Mutual Life Insurance Co.*, No. 13-30184, Doc. 112 (D.Mass. June 22, 2016); *Kruger v. Novant Health*, No. 14-208, Doc. 53 (M.D.N.C. May 17, 2016); *Krueger v. Ameriprise Financial*, Inc., 304. F.R.D. 559 (D.Minn. 2014); *Abbott v. Lockheed Martin Corp.*, 286 F.R.D. 388 (S.D.Ill. 2012), and *Abbott*, No. 06-701, Doc. 403 (S.D.Ill. Aug. 1, 2014); *Beesley v. Int'l Paper Co.*, No. 06-703, Doc. 240 (S.D.Ill. Sept. 30, 2008), and Doc. 543 (S.D.Ill. Oct. 10, 2013); *Nolte v. Cigna Corp.*, No. 07-2046, 2013 U.S.Dist.LEXIS 101165 (C.D.Ill. July 3, 2013); *Spano v. Boeing Co.*, 294 F.R.D. 114 (S.D.Ill. 2013); *George v. Kraft Foods Global Inc.*, No. 08-3799, 2012 U.S.Dist.LEXIS 26536 (N.D.Ill. Feb. 29, 2012)(*George II*); *In re Northrop Grumman Corp. ERISA Litig.*, No. 06-6213, 2011 U.S. 94451 (C.D.Cal. Mar. 29, 2011); *Will v. General Dynamics Corp.*, No. 06-698, 2010 U.S.Dist.LEXIS 95630 (S.D.Ill. Nov. 22, 2010); *Martin v. Caterpillar Inc.*, No. 07-1009, Doc. 173 (C.D.Ill. April 21, 2010); *Tibble v. Edison Int*'l, No. 07-5359, 2009 U.S.

Dist. LEXIS 120939 (C.D.Cal. June 30, 2009); *George v. Kraft Foods Global Inc*., 251 F.R.D. 338 (N.D.Ill. 2008)(*George I*); *Taylor v. United Tech. Corp*., No. 06-1494, 2008 U.S.Dist.LEXIS 43655 (D.Conn. June 3, 2008); *Kanawi v. Bechtel Corp*., 254 F.R.D. 102 (N.D.Cal. 2008); *Tussey v. ABB Inc*., No. 06-4305, 2007 U.S.Dist.LEXIS 88668 (W.D. Mo. Dec. 3, 2007); *Loomis v. Exelon Corp*., No. 06-4900, 2007 U.S.Dist.LEXIS 46893 (N.D.Ill. June 26, 2007).

5. My work in plaintiffs' class action cases has been noted by federal judges. Honorable Judge James Foreman, in the *Mister* case, *supra*, speaking of my efforts, stated:

> This Court is unaware of any comparable achievement of public good by a private lawyer in the face of such obstacles and enormous demand of resources and finance.

Order on Attorney's Fees, *Mister v. Illinois Central Gulf R.R.*, No. 81-3006 (S.D.Ill. 1993).

6. Honorable Judge David R. Herndon wrote, regarding my and the firm's handling of the *Wilfong* class action, *supra*:

> Class counsel has appeared in this court and has been known to this Court for approximately 20 years. This Court finds that Mr. Schlichter's experience, reputation and ability are of the highest caliber. Mr. Schlichter is known well to the District Court Judge and this Court agrees with Judge Foreman's review of Mr. Schlichter's experience, reputation and ability.

Order on Attorney's Fees, *Wilfong v. Rent-A-Center*, No. 0068-DRH (S.D.Ill. 2002). Judge Herndon also noted in *Wilfong* that I "performed the role of a 'private attorney general' contemplated under the common fund doctrine, a role viewed with great favor in

this Court" and described my action as "an example of advocacy at its highest and noblest purpose." *Id.*

7. In *Beesley v. International Paper*, a 401(k) ERISA excessive fee case that resulted in a settlement of $30 million plus substantial affirmative relief following seven years of litigation, Judge David Herndon observed: "Litigating this case against formidable defendants and their sophisticated attorneys required Class Counsel to demonstrate extraordinary skill and determination. Schlichter, Bogard & Denton and lead attorney Jerome Schlichter's diligence and perseverance, while risking vast amounts of time and money, reflect the finest attributes of a private attorney general." *Beesley v. Int'l Paper Co.*, No. 06-703, 2014 WL 375432, at 2 (S.D.Ill. Jan. 31, 2014). Similarly, in *Abbot v. Lockheed Martin*, a 401(k) excessive fee case that took over nine years, Honorable Chief Judge Reagan observed that "[t]he law firm Schlichter, Bogard & Denton has had a humongous impact over the entire 401(k) industry, which has benefitted employees and retirees throughout the country by bringing sweeping changes to fiduciary practices." *Abbott v. Lockheed Martin Corp.*, No. 06-701, 2015 WL 4398475, at 3 (S.D.Ill. July 17, 2015).

8. In *Will v. General Dynamics*, another ERISA excessive fee case, Honorable Judge Patrick Murphy found that litigating the case and achieving a successful result for the class "required Class Counsel to be of the highest caliber and committed to the interests of the participants and beneficiaries of the General Dynamics 401(k) Plans." *Will v. General Dynamics Corp.*, No. 06-698, 2010 WL 4818174, at 2 (S.D. Ill. Nov. 22, 2010).

9. Honorable Judge Harold Baker, in *Nolte v. Cigna*, commented that Schlichter, Bogard & Denton is the "preeminent firm in 401(k) fee litigation" and has "persevered in the face of the enormous risks of representing employees and retirees in this area." *Nolte v. Cigna Corp.,* No. 07-2046, 2013 WL 12242015, at 2 (C.D.Ill. Oct. 15, 2013).

10. In approving a settlement including $32 million plus significant affirmative relief, in a 403(b) excessive fee case, Honorable Chief Judge William Osteen in *Kruger v. Novant Health, Inc.*, No. 14-208, Doc. 61 at 7–8 (M.D.N.C. Sept. 29, 2016) found that "Class Counsel's efforts have not only resulted in a significant monetary award to the class but have also brought improvement to the manner in which the Plans are operated and managed which will result in participants and retirees receiving significant savings[.]"

11. I have also spoken on ERISA litigation breach of fiduciary duty claims at national ERISA seminars as well as other national bar seminars.

12. In the decades of my private practice, I have never been reprimanded sanctioned or otherwise disciplined with respect to any aspect of the practice of law.

13. Since 2005, my firm and I have been investigating, preparing and handling, on behalf of plan participants, numerous cases against fiduciaries of large 401(k) plans alleging fiduciary breaches including excessive fees, conflicts of interests and prohibited transactions under ERISA.

14. My firm has filed ERISA fiduciary breach class actions in numerous judicial districts throughout the United States, including districts within the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits.

15. No law firm had ever brought an excessive 401(k) fee case before my firm did, and no other law firm has brought the number of cases our firm has brought, including:

- the first two trials of 401(k) excessive fee cases, one of which was this case of *Tussey v. ABB*, and;
- the first and only 401(k) case in the United States Supreme Court.

16. The first full trial of such a 401(k) case was the case herein. As this Court noted, "[i]t is well established that complex ERISA litigation involves a national standard and special expertise. Plaintiffs' attorneys are clearly experts in ERISA litigation." *Tussey v. ABB, Inc.*, No. 06-4305, 2012 WL 5386033, at 3 (W.D.Mo. Nov. 2, 2012)(citations omitted).

17. In the other 401(k) excessive fee trial, *Tibble v. Edison Int'l,* the United States Supreme Court granted our petition for writ of certiorari in the first and only ERISA 401(k) excessive fee case taken by the Supreme Court. In a 9-0 unanimous decision, the Supreme Court vacated the Ninth Circuit's affirmance of the summary judgment order and held that an ERISA fiduciary has a continuing duty to monitor plan investments and remove imprudent ones regardless of when they were added. *Tibble v. Edison Int'l*, 135 S.Ct. 1823 (2015). This was a landmark decision in ERISA litigation. Sitting *en banc*, ten judges of the Ninth Circuit on remand thereafter unanimously

vacated a Ninth Circuit panel decision and remanded to the district court to determine whether the defendants violated their continuing duty to monitor the 401(k) plan's investments, stating that "cost-conscious management is fundamental to prudence in the investment function". *Tibble v. Edison Int'l*, 843 F.3d 1187, 1199 (9th Cir. 2016)(citation omitted). Following remand, in August 2017, the plaintiffs obtained a judgment of $13.4 million in plan losses and investment opportunity. *Tibble,* No. 07-5359, 2017 WL 3523737 (C.D.Cal. Aug. 16, 2017); *Tibble,* Docs. 570, 572. A portion of the case is still on appeal.

18. Before my firm brought ERISA 401(k) excessive fee cases, virtually no firm was willing to bring such a case, and I know of no other firm that has made anything close to the financial and attorney time commitment to such cases to this date. Given that no other private law firm or the Department of Labor brought these cases before my firm entered this space, the ERISA fiduciary breach actions brought by my firm were novel and certainly groundbreaking.

19. Several of the 401(k) cases my office filed were dismissed and the dismissals upheld by the Courts of Appeals. *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009); *Loomis v. Exelon Corp.*, 658 F.3d 667 (7th Cir. 2011); *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011). Others had summary judgment granted against the plaintiffs in whole or in part. *Kanawi v. Bechtel Corp.*, 590 F.Supp.2d 1213 (N.D. Cal. 2008); *Taylor v. United Techs. Corp.*, No. 06-3194, 2009 U.S.Dist.LEXIS 19059 (D. Conn. Mar. 3, 2009), aff'd, 354 Fed. Appx. 525 (2d Cir. 2009); *George v. Kraft Foods*

Global, Inc., 684 F.Supp. 2d 992 (N.D.Ill. 2010), rev'd in part, 641 F.3d 786 (7th Cir. 2011).

20. As a practical matter, individual litigants such as the Named Plaintiffs in this case, Ronald Tussey, Charles Fisher, and Timothy Pinnell could not afford to pursue litigation against well-funded fiduciaries of a multi-billion dollar 401(k) plan sponsored by a large employer such as ABB in federal court on any basis other than a contingent fee. I know of no law firm in the United States, of the very few firms which would even consider handling such a case as this or that would handle any ERISA class action, with an expectation of anything but a percentage of the common fund created.

21. The contingency fee agreements entered into between my firm and each of the named Plaintiffs Tussey, Fisher, and Pinnell in this case provide for our fee to be one-third of any recovery plus expenses. The plaintiffs in other ERISA fiduciary breach cases brought by my firm have also signed similar agreements calling for a one-third contingency fee plus expenses.

22. Prior to this lawsuit, my firm did not have a professional relationship with any of the Named Plaintiffs.

23. These kinds of excessive fee cases involve tremendous risk, require review and analysis of thousands of documents, finding and obtaining opinions from expensive, unconflicted, consulting and testifying experts in finance, investment management, fiduciary practices, and related fields, and are extremely hard fought and well-defended.

24. A law firm that brings a putative class action such as this must be prepared to finance the case for years through a trial and appeals, all at substantial expense. This

has been my experience in handling these types of cases. In this case of *Tussey v. ABB*, seven experts testified at trial, and the two defendant groups therein had 15 or more lawyers present in the courtroom throughout the month long trial. In addition, all parties, including plaintiffs, had a technology team present throughout. During this litigation our firm expended $2,256,805 in out-of-pocket expenses and have continued to carry them today. After being tried almost nine years ago, followed by two appeals to the Eighth Circuit, and multiple remandments to the district court. My firm has to this date received nothing in fees or expense reimbursements. *Tibble v. Edison Int'l*, *supra*, is also still pending in its twelfth year with another appeal in the Ninth Circuit.

25. Based on my experience, the market for experienced and competent lawyers willing to pursue ERISA excessive fee litigation is a national market, and the rate of 33 1/3% of any recovery, plus costs is necessary to bring such cases. This is the rate that a qualified and experienced attorney would negotiate at the beginning of the litigation, and the rate found reasonable in similar ERISA fee cases in numerous federal district courts.

- *Sims v. BB&T*, No. 15-732, Doc. 450 (M.D.N.C. May 6, 2019);
- *Ramsey v. Philips,* No. 18-1099, Doc. 27 (S.D.Ill. Oct. 15, 2018);
- *In re Northrop Grumman Corp. ERISA Litig.,* No. 06-6213, 2017 WL 9614818 (C.D.Cal. Oct. 24, 2017);
- *Gordan v. Mass. Mutual Life Ins. Co.*, No. 13-30184, 2016 WL 11272044 (D. Mass. Nov. 3, 2016);
- *Kruger v. Novant Health, Inc.*, No. 14-208, 2016 WL 6769066 (M.D.N.C. Sept. 29, 2016);

- *Spano v. Boeing Co.*, No. 06-743, 2016 WL 3791123 (S.D.Ill. Mar. 31, 2016);
- *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475 (S.D.Ill. July 17, 2015);
- *Krueger v. Ameriprise Financial Inc.*, No. 11-2781, 2015 WL 4246879 (D.Minn. July 13, 2015);
- *Beesley v. Int'l Paper Co.*, No. 06-703, 2014 WL 375432 (S.D.Ill. Jan. 31, 2014);
- *Nolte v. Cigna Corp.*, No. 07-2046, 2013 WL 12242015 (C.D.Ill Oct. 15, 2013);
- *George v. Kraft Foods Global*, No. 07-1713, 2012 WL 13089487 (N.D.Ill. June 26, 2012);
- *Will v. General Dynamics*, No. 06-698, 2010 WL 4818174 (S.D.Ill. Nov. 22, 2010); and
- *Martin v. Caterpillar, Inc.*, No. 07-1009, 2010 WL 11614985 (C.D.Ill. Sept. 10, 2010).

26. A long-term expensive commitment of time and resources is needed if plan participants are to receive full compensation for their losses in these cases. That has certainly been true in this case. My firm committed to committing whatever time and resources were necessary for however long it took for this case to be pursued to conclusion.

27. My firm devoted well over 28,750 hours of attorney and non-attorney time to prosecuting the ERISA claims on behalf of the ABB participants and beneficiaries. Because my firm works solely on a contingency fee basis, and there is a limited number of active cases it can handle at any given point, the decision to pursue this class action and commit significant resources over many years in order to obtain a successful

recovery on behalf of the class impacted the firm's ability to handle other cases or pursue other less risky matters.

28. Schlichter, Bogard & Denton does not bill clients on an hourly basis. In October 2018, based on the national market for complex ERISA fiduciary breach litigation, the following hourly rates for my firm were approved: $1,060 for attorneys with at least 25 years of experience, $900/hour for attorneys with 15–24 years of experience, $650/hour for attorneys with 5–14 years of experience, $490/hour for attorneys with 2–4 years of experience, and $330/hour for Paralegals and Law Clerks. *Ramsey*, Doc. 27 at 8.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and that this declaration was executed this 14th day of June, 2019, in St. Louis, Missouri.

/s/ Jerome J. Schlichter
Jerome J. Schlichter

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

RONALD TUSSEY, et al.,

Plaintiffs,

v.

ABB, INC., et al.,

Defendants.

Case No.: 06-CV-04305-NKL

DECLARATION OF SHERI O'GORMAN

I, Sheri O'Gorman, under penalty of perjury pursuant to 28 U.S.C. §1746, declare as follows:

1. I am the Office Administrator of Schlichter, Bogard, & Denton, LLP and the Custodian of Records, in charge of payment of expenses in this matter. I have examined the records and we have incurred case expenses totaling $2,256,805.15 as of June 14, 2019.

2. Below is a list of expenses according to their categories:

Description	Total
Depositions	$93,324.02
Experts and Consultants	$1,739,662.35
Filing, Transcripts, Subpoena Services and Related Costs	$107,638.79
Mediation and Settlement Costs	$10,769.14
Copies and Postage	$132,369.56
Data Development and Document Organization	$59,185.38
Research and Investigation	$57,065.00
Trial Expenses	56,790.91
Total	**$2,256,805.15**

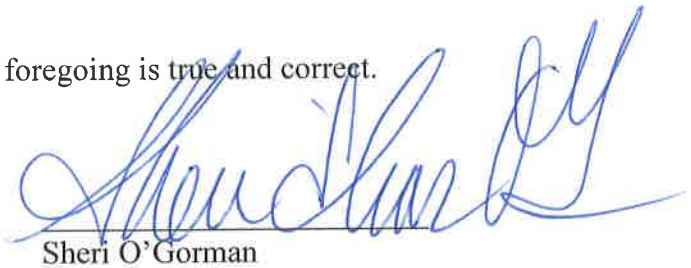
3. I am also in charge of monitoring attorney and staff time billed. During the litigation in this case the following chart shows the amount of hours spent by attorneys and staff.

Description	Total Hours
Attorney 25+ years experience	2,921.25
Attorney 15-24 years experience	8,160.40
Attorney 5-14 years experience	12,132.10
Attorney 2-4 years experience	1,236.15
Paralegals/Law Interns	4,304.30
Total	28,754.20

4. More detailed billing records can be made available for the Court's review upon request.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 14, 2019.



Sheri O'Gorman