UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

LOREN L. CASSELL et al., Plaintiffs, v. VANDERBILT UNIVERSITY et al., Defendants.	Civil Action No. 3:16-cv-02086 Chief Judge Crenshaw Magistrate Judge Brown

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND CASE CONTRIBUTION 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 $4,833,333.33 (one-third of the monetary recovery), reimburse Class Counsel's reasonable litigation expenses of $160,080 and grant incentive awards of $25,000 each to Class Representatives Loren L. Cassell, Pamela M. Steele, John E. Rice, Penelope A. Adgent, Dawn E. Crago, and Lynda Payne.

Class Counsel bore tremendous risk in order to benefit the Class. In spite of this risk, Class Counsel leveraged their experience in excessive fee litigation to achieve an efficient resolution of this matter, thereby avoiding the delay and expense of years of litigation and substantial risk of non-recovery for the Class. The requested percentage of the settlement fund is comparable to attorneys' fees awards in many similar cases. Based on all of the relevant factors, and for the reasons stated in Plaintiffs' supporting memorandum, Plaintiffs respectfully request that the Court grant this motion.[1]

[1] Plaintiffs will submit a proposed order at least 10 days prior to the fairness hearing scheduled for October 22, 2019.

Dated: August 23, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2019 the foregoing document was filed and served electronically on all parties and counsel of record, including the below counsel for Defendants, via the Court's CM/ECF system. Parties may access this filing through the Court's ECF system.

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

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Prior to August 2016, when Class Counsel filed this lawsuit, no law firm or the Department of Labor had ever brought an excessive fee lawsuit involving a university 403(b) plan. 403(b) plans are the non-profit equivalent of 401(k) plans. Class Counsel established this new area of litigation. This followed Class Counsel pioneering excessive fee litigation in 401(k) plans, which likewise no law firm or the Department of Labor had ever brought. In short, there had been no enforcement of the law requiring that fiduciaries of 401(k) and 403(b) plans make sure fees are reasonable. Thus, when this case was filed, no other law firm in the country was willing to devote the resources and endure the tremendous risk of nonpayment inherent in the novel ERISA fiduciary breach actions involving a 403(b) plan. In fact, similar cases have since been dismissed, and the only trial in an excessive fee case involving a university's 403(b) plan resulted in a judgment for the defendant, New York University. Here, after more than two years of hard-fought litigation, the parties ultimately reached a settlement to resolve the claims at issue.

Moreover, the $14,500,000 million settlement in this case is the *largest* settlement in any university excessive 403(b) fee lawsuit. Not only will the settlement fund provide substantial monetary compensation to Plan participants, but the affirmative relief component will provide substantial additional benefit to the Class and ensure that participants have a quality 403(b) plan for years. In achieving this result, Class Counsel leveraged their experience in excessive fee litigation to achieve an efficient resolution of this matter, thereby avoiding the delay and expense of years of litigation and substantial risk of non-recovery.

Under the common fund doctrine, the Court should award Class Counsel a fee of $4,833,333.33 (one-third of the monetary recovery). In ERISA class actions, such as this, a one-third contingency fee is the market rate. A lodestar cross-check analysis further confirms the reasonableness of the fee request. The Court should also reimburse Class Counsel's reasonable

litigation expenses of $160,080, and grant incentive awards of $25,000 each for Class Representatives Loren L. Cassell, Pamela M. Steele, John E. Rice, Penelope A. Adgent, Dawn E. Crago, and Lynda Payne ("Named Plaintiffs").

I. BACKGROUND

On August 10, 2016, Plaintiffs filed *Cassell v. Vanderbilt University,* alleging that Defendants breached their fiduciary duties and committed prohibited transactions in the operation of the Plan. Doc. 1; Doc. 38; Doc. 102.[1] Prior to August 2016, no case had ever been brought by a private law firm, the Department of Labor, or any other party or entity asserting claims of fiduciary breach for excessive fees and imprudent investments on behalf of a university's 403(b) plan. Schlichter Decl. ¶¶ 16–17; Sturdevant Decl. ¶¶ 7–8. Schlichter Bogard & Denton pioneered this ground-breaking area of litigation after having done so in the 401(k) space. Schlichter Decl. ¶¶ 18–21; Sturdevant Decl. ¶¶ 7–8.

On January 5, 2018, the Court denied in part and granted in part Defendants' motion to dismiss. Doc. 48. On October 23, 2018, the Court granted class certification. Doc. 127. While this case has been pending, the parties have engaged in over two years of intense litigation that has included production of over 100,000 pages and fourteen depositions. Braitberg Decl. ¶¶10–21.

On February 25, 2019, the parties notified the Court that they had reached a tentative settlement in principle on some terms after an all-day session with a national mediator and subsequent discussions. Doc. 142. However, Class Counsel demanded that affirmative relief be implemented—besides monetary relief alone—in order to benefit plan participants. After weeks of additional arm's-length negotiations concerning non-monetary terms, on April 18, 2019 the

[1] "Doc." references are to the *Cassell* docket unless otherwise indicated. Capitalized terms not otherwise defined have the meanings ascribed to them in the Settlement Agreement. Doc. 145-1.

parties reached an agreement on monetary and non-monetary terms. Doc. 147-2.

II. ARGUMENT

Class Counsel is entitled to a reasonable fee award from the common fund. In ERISA fee cases, the market rate is a contingency fee of one-third of the monetary recovery. The Settlement provides substantial monetary and affirmative relief to the Class, particularly in light of the substantial risk of non-recovery to the Class. The Court should also reimburse Class Counsel reasonable and necessary costs incurred and grant incentive awards to the Named Plaintiffs.

III. Class Counsel's Requested Attorneys' Fees Are Reasonable

Under the "common fund" doctrine, Class Counsel is entitled to an award of reasonable attorneys' fees from the common fund. Fed. R. Civ. P. 23(h); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); Doc. 147-1 at 2, 20 (§§2.3, 7.1). The percentage-of-the-fund method for determining attorneys' fees "clearly" has "become the preferred method in common fund cases." *In re Se. Milk Antitrust Litig.*, No. 2:07-CV-208, 2013 WL 2155387, at *2 (E.D. Tenn. May 17, 2013); *see also In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 380 (S.D. Ohio 2006) ("Where Counsel's efforts create a substantial common fund for the benefit of the Class, they are, therefore, entitled, to payment from the fund based on a percentage of that fund."); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 910 (S.D. Ohio 2001) ("The preferred method in common fund cases has been to award a reasonable percentage of the fund."). The percentage-of-the-common-fund method is overwhelmingly preferred in part because it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Gokare v. Fed. Express Corp.*, No. 2:11-CV-2131, 2013 WL 12094887, at *3 (W.D. Tenn. Nov. 22, 2013) (citation and internal quotation marks omitted); *see also In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at *2 (noting that the "'vast majority of courts of appeal permit or direct district courts to use the percentage-fee in

common-fund cases'" (citing Manual for Complex Litigation Fourth § 14.212)); *Rotuna v. West Customer Mgmgt. Grp.*, No. 4:09-CV-1608, 2010 WL 2490989, at *7 (N.D. Ohio June 15, 2010) (noting advantages of percentage-of-the-common-fund method).

While courts in the Sixth Circuit permit fee awards of up to 50 percent in common fund cases, *Walls v. JPMorgan Chase Bank, N.A.*, No. 3:11-CV-673-DJH, 2016 WL 6078297, at *5 (W.D. Ky. Oct. 14, 2016), a contingent one-third fee of the common fund is common in this Circuit. *In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at *3 (noting that "fee awards in class actions average around one-third of recovery," and approving one-third attorneys' fee in common fund settlement); *see also Johnson v. Midwest Logistics Sys., Ltd.*, No. 2:11–CV–1061, 2013 WL 2295880, at *6 (S.D. Ohio May 24, 2013) (approving one-third fee in common fund settlement); *Rotuna*, 2010 WL 2490989, at *7 (same); *Dallas v. Alcatel-Lucent USA, Inc.*, No. 09-CV-14596, 2013 WL 2197624, at *12 (E.D. Mich. May 20, 2013) (preliminarily approving one-third fee in common fund settlement and noting that "[v]arious courts have expressed approval of attorney fees in common fund cases at similar or higher percentages . . .").

Additionally, in other settlements of excessive fee ERISA class actions, numerous district courts have found that a one-third fee is the market rate for a complex ERISA excessive fee case, and have consistently awarded Class Counsel a one-third fee.

Case	Fee %
Tussey v. ABB, Inc., No. 06-CV-04305-NKL, Doc. 870 (W.D.Mo. August 16, 2019)	33.33%
Sims v. BB&T Corp., No. 15-1705, 2019 WL 1993519 (M.D.N.C. May 6, 2019)	33.33%
Clark v. Duke, No. 1:16-CV-01044, Doc. 166 (M.D.N.C. June 24, 2019)	33.33%
Ramsey v. Philips N.A., No. 18-1099, Doc. 27 (S.D. Ill. Oct. 15, 2018)	33.33%
In re Northrop Grumman Corp. ERISA Litig., No. 06-6213, 2017 WL 9614818 (C.D. Cal. Oct. 24, 2017)	33.33%

Case	Fee %
Gordan v. Mass. Mut. Life Ins. Co., No. 13-30184, 2016 WL 11272044 (D. Mass. Nov. 3, 2016)	33.33%
Kruger v. Novant Health, Inc., No. 1:14-cv-208, 2016 WL 6769066 (M.D.N.C. Sept. 29, 2016)	33.33%
Spano v. Boeing Co., No. 06-743, 2016 WL 3791123 (S.D. Ill. Mar. 31, 2016)	33.33%
Abbott v Lockheed Martin Corp., No. 06-701, 2015 WL 4398475 (S.D. Ill. July 17, 2015)	33.33%
Krueger v. Ameriprise Fin., Inc., No. 11-2781, 2015 WL 4246879 (D. Minn. July 13, 2015)	33.33%
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 determining a reasonable attorney fee in common fund cases, the Sixth Circuit has identified six factors for courts to consider:

> 1) the value of the benefit [to the class] . . . 2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others, 3) whether the services were undertaken on a contingent fee basis, 4) the value of the services on an hourly basis, 5) the complexity of the litigation, and 6) the professional skill and standing of counsel involved on both sides.

Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188, 1196 (6th Cir. 1974); *see also Smillie v. Park Chem. Co.*, 710 F.2d 271, 275 (6th Cir. 1983); *In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at *3. Each of these six factors demonstrates that the requested award is fair, reasonable, and clearly warranted.

A. The Value of the Benefit Rendered to the Plaintiff Class

The "most critical factor in determining a reasonable fee is the result achieved by counsel." *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 517 (6th Cir. 1993) (citing

Hensley v. Eckerhart, 461 U.S. 424, 434–6 (1983)). Courts in this Circuit include the value of both monetary and affirmative relief provided in class action settlements in determining the reasonableness of attorneys' fees. *See, e.g.*, *In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at *3; *Gokare*, 2013 WL 12094887, at *7.

Only one 403(b) excessive fee case has gone to trial in history. *Sacerdote v. New York Univ.*, 328 F.Supp.3d 273 (S.D.N.Y. 2018). That trial, handled by Class Counsel, occurred in April 2018. Judgment was entered on July 31, 2018, finding wholly in favor of New York University and against the plaintiffs. The district court in *Sacerdote* found that the 403(b) plan fiduciaries did not breach their duty of prudence despite failing to consolidate recordkeepers, failing to conduct more frequent RFPs, and maintaining the CREF Stock and TIAA Real Estate Accounts. *Id.* at 297–99, 312–15; Doc. 109 (notice of decision). Similar allegations of imprudence are also alleged herein.

Here, Class Counsel obtained $14.5 million in monetary compensation for the Class. This is an excellent result. As noted above, this is the *largest* settlement in any university 403(b) retirement plan excessive fee case to date. However, any recovery in this case was uncertain, particularly as shown by the adverse findings in *Sacerdote* on similar claims. The *Sacerdote* court rejected the plaintiffs' claims regarding the CREF Stock Account and the TIAA Real Estate Account. In this case, Plaintiffs estimated that the damages from these two funds were tens of millions of dollars, but if the *Sacerdote* result were followed, Plaintiffs might have recovered nothing. Likewise, a recordkeeping claim similar to the one made in this case was rejected by the *Sacerdote* court.

This settlement also "provides tangible relief to class members now and eliminates the risk and uncertainty parties would otherwise incur if this litigation were to continue." *Dillow v.*

Home Care Network, Inc., No. 1:16-CV-612, 2018 WL 4776977, at *6 (S.D. Ohio Oct. 3, 2018). Class members will receive compensation and be able to invest their proceeds immediately in a tax-deferred vehicle, which adds additional value. The Investment Company Institute estimates that the benefit of the present value of tax deferral for 20 years is an additional 18.6%.[2] Using this metric, the actual value to the Class of the monetary portion of the settlement is $16,781,900. The requested fee is just 28.8% of this sum.

In addition, this settlement provides for extensive affirmative future relief which provides *substantial* additional value to the Class. In particular, Defendants have committed to do all of the following during the three-year settlement period: (1) conduct a request for proposals ("RFP") for recordkeeping and administrative services; (2) after conducting the RFP, contractually prohibit the Plan's selected recordkeeper from using information obtained through the course of providing recordkeeping services to the Plan to market or sell products or services to Plan participants that are unrelated to the Plan absent a participant request; (3) inform the Plan's current recordkeeper that it must refrain from using information obtained through the course of providing recordkeeping services to market or sell products or services unrelated to the Plan absent a participant's request; (4) communicate in writing with Plan participants regarding the performance and fees of investment options in frozen annuity accounts, along with information to facilitate a fund transfer from frozen annuity accounts; (5) consider the cost of different share classes available for the Plan's investment options; (6) continue to retain an investment consultant to provide monitoring services; and (7) provide a list of the Plan's

[2] 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; *Abbott v. Lockheed Martin Corp.*, No. 06-701, Doc. 497 at 37 (ECF 47) (S.D. Ill. Apr. 14, 2015) (Report of the Special Master) (citing ICI report).

investment options and fees to Class Counsel, as well as information regarding the bids received in response to the RFP. These non-monetary provisions provide significantly enhanced value above and beyond the monetary compensation. They will enable participants to be better informed about their options and not be subject to undue pressure to purchase investment products outside the plan. Thus, the requested fee is not only lower than one-third of the value of the monetary portion of the settlement after tax deferral (28.8%, as noted above), but is a still-lower percentage of the overall value of the settlement.

Additionally, if the Settlement Agreement is terminated (e.g., if not approved by the Court), Class Counsel will bear half the incurred administrative expenses, and any interest will be returned to the Defendants. Doc. 147-1 at 24–25. Furthermore, Class Counsel will continue to monitor and enforce the terms of the settlement if necessary and will not seek an additional fee for these future services, Schlichter Decl. ¶25, further adding to the benefit rendered to the class.

B. Society's Stake in Rewarding Attorneys Who Produce Such Benefits in Order to Maintain an Incentive to Others

"Society has a stake in rewarding attorneys who achieve a result that the individual class members probably could not obtain on their own." *Dillow,* 2018 WL 4776977 at *6. "[F]ailing to fully compensate class counsel" where they do "excellent work" and take "substantial risks" would "undermine society's interest in . . . private litigation . . . ." *In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at *5. "Society's interests are clearly furthered by the private prosecution of civil cases which further important public policy goals." *Id.* There "is a benefit to society in ensuring that claimants with smaller claims may pool their claims and resources, and attorneys who take on class action cases enable this." *Arledge v. Domino's Pizza, Inc.*, No. 3:16-CV-386-WHR, 2018 WL 5023950, at *4 (S.D. Ohio Oct. 17, 2018).

Here, Class Counsel "undertook risky litigation" against a large and renowned institution with "substantial resources." *See Gokare*, 2013 WL 12094887, at *8. Class Counsel's ERISA excessive fee litigation has been credited with helping to reduce retirement plan fees industry-wide. Schlichter Decl. ¶11. Multiple district courts have referred to Class Counsel's role in 401(k) excessive fee litigation as that of a "private attorney general." *See, e.g.*, *Will,* 2010 WL 4818174 at *2; *Beesley*, 2014 WL 375432 at *2. The result in this case provides a tangible benefit to society as a whole, not just the members of the Class. This further supports the reasonableness of Class Counsel's fee request.

C. Whether the Services Were Undertaken on a Contingent Fee Basis

When representation is undertaken on a contingent fee basis, a "fee that exceeds the lodestar is also important . . . to compensate [c]ounsel for the risk they undertook of no payment if the case was unsuccessful." *Broadwing*, 252 F.R.D. at 381–82. In contingent fee litigation, plaintiffs' counsel "accept[s] a substantial risk of non-payment for legal work and reimbursement of out-of-pocket expenses advanced." *In re Se. Milk Antitrust Litig.*, 2013 WL 2155387 at *5. Risk taken by class counsel "is a very substantial factor"; the "fee awarded should fully reflect" this risk. *Id.* at *5.

Here, Class Counsel "litigated this matter on a wholly-contingent basis with no guarantee of recovery." *See Arledge*, 2018 WL 5023950, at *5. 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. ¶28. The Named Plaintiffs would have been unable to pursue this litigation other than on a contingency fee basis. Schlichter Decl. ¶27; Sturdevant Decl. ¶13.

Class Counsel devoted over 5,000 hours of attorney and non-attorney time to

prosecute this action, preventing them from pursuing other class actions or devoting additional resources to other matters. Schlichter Decl. ¶34. Class Counsel devoted this time despite the risk that no recovery might be obtained, as occurred in the *Sacerdote, supra,* trial.

D. The Value of the Services on an Hourly Basis

In the Sixth Circuit, a fee based on a percentage of the entire fund is proper. *Gokare*, 2013 WL 12094887, at *4. A "lodestar" method may be used to cross-check the reasonableness of the fee, but this lodestar cross-check is "unnecessary." *Dillow*, 2018 WL 4776977, at *6; *Arledge*, 2018 WL 5023950 at *5; *Mullins v. S. Ohio Pizza, Inc.*, No. 1:17-CV-426, 2019 WL 275711, at *5 (S.D. Ohio Jan. 18, 2019). Using the lodestar method is disfavored in part because in cases with a large number of hours expended, there are "inefficiency concerns that exist with the lodestar method [that] would be significant" because "combing through billing records" for thousands of hours of "law firm work would require a large and unnecessary expenditure of judicial resources." *Gokare*, 2013 WL 120948873 at *3.

If a lodestar method is used, "the Court analyzes all of the work Class Counsel has performed, determines the number of hours reasonably expended on the litigation, determines reasonable hourly rates for each attorney working on the case, and multiplies the reasonably expended hours times the reasonable hourly rates." *Id.* at *2 (citations and internal quotation marks omitted). 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,* 131 S.Ct. 2205, 2216 (2011).

"A trial court, in calculating the 'reasonable hourly rate' component of the lodestar computation, should initially assess the 'prevailing market rate in the relevant community.'"

Adcock-Ladd v. Sec'y of Treasury, 227 F.3d 343, 350 (6th Cir. 2000) (emphasis omitted). "The "prevailing market rate" is that rate which lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Id.*[3]

Complex ERISA class action litigation, such as this, involves a national market given that no one ever filed such a claim before Class Counsel. Even now, few plaintiffs' firms have the necessary expertise and are willing take the risk and devote the resources necessary to litigate these complex ERISA claims. *Abbott*, 2015 WL 4398475 at 3; Schlichter Decl. ¶¶21, 30–32; Sturdevant Decl. ¶¶8-10. Class Counsel has brought actions across the country defended by national firms with ERISA expertise, including this one. Schlichter Decl. ¶¶30-31. Thus, the relevant hourly rate is the "nationwide market rate." *Abbott,* 2015 WL 4398475 at *2; *Tussey,* 2015 WL 8485265 at *7. *See also Patricia L. Amos et al. v. PPG Indus., Inc., et al.*, No. 2:15-cv-70, 2019 WL 3889621, at *13 (S.D. Ohio Aug. 16, 2019)("Absent any objection, the Court will look to the prevailing national market rates for attorneys involved in complex class action ERISA litigation with the amount of experience similar to that of Class Counsel.")

[3] The usual rule in this District is that "when a counselor has voluntarily agreed to represent a plaintiff in an out-of-town lawsuit, thereby necessitating litigation by that lawyer primarily in the alien locale of the court in which the case is pending, the court should deem the 'relevant community' for fee purposes to constitute the legal community within that court's territorial jurisdiction . . . ." *Adcock-Ladd,* 227 F.3d at 350. There are two reasons to depart from this general rule here. First, Class Counsel are unaware of any community of attorneys in this district devoted primarily to this complex ERISA class action practice area, and thus cannot determine what rate "lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record . . . ." Second, the Sixth Circuit has recognized an exception to this general rule where services of out-of-town counsel are "required." *Id*. Here, because Class Counsel have pioneered this area of litigation, without their efforts, this litigation would likely not have occurred; therefore, their services were "required." No such case has previously been filed in this District.

Class Counsel spent approximately 4,571 hours of attorney time and 458 hours of non-attorney time on this matter to date. O'Gorman Decl. ¶3. The time and labor expended is consistent with other ERISA fee cases handled by Class Counsel. *See, e.g., Spano*, 2016 WL 3791123 at 2; *Abbott*, 2015 WL 4398475 at 2.

As recently as 2019, 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. These rates were approved on a lodestar this year in an ERISA excessive fee case handled by Class Counsel. *Clark*, Doc. 165 at 8.

These reasonable hourly rates have been 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 multiple district courts in other ERISA excessive fee cases handled by Class Counsel. *See, e.g.*, *Kruger*, 2016 WL 6769066 at 4 (applying rates from *Spano*); *Ramsey,* Doc. 27 at 8, n. 4 (applying increased rates from *Spano*).

Using these rates, Class Counsel's lodestar in this case is $3,447,826. Class Counsel have requested attorneys' fees in the amount of $4,833,333. This fee would result in a lodestar multiplier of 1.4—well within the range routinely approved in this Circuit. *In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at *4 (approving "a lodestar multiplier of 1.90" as it was

"clearly within, but in the bottom half of, the range of typical lodestar multipliers."); *Dillow*, 2018 WL 4776977, at *7 (approving a multiplier of 2.9 times the lodestar, finding "that this is well within the acceptable range of multipliers for cases such as this."); *Arledge*, 2018 WL 5023950, at *5 (approving a fee award 2.57 times the lodestar); *Lowther v. AK Steel Corp.*, No. 1:11-cv-877, 2012 WL 6676131, at *5 (S.D. Ohio Dec. 21, 2012) (approving a 3.06 multiplier and citing cases that found multipliers ranging from 4.3 to 8.5 to be reasonable). *See also* Newberg on Class Action § 14.6 (4th ed. 2009) ("Multiples ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied."). This demonstrates the reasonableness of the requested fee award.

E. The Complexity of the Litigation

ERISA class action litigation is inherently complex. *See Broadwing*, 252 F.R.D.at 382 (discussing class counsel's expertise in "complex ERISA, class action" litigation); *see also* Sturdevant Decl. ¶10. The "rapidly evolving" area of law places demands on counsel that are "complex and require the devotion of significant resources." *In re Wachovia Corp. ERISA Litig.*, No. 09-262, 2011 WL 5037183, at *4 (W.D.N.C. Oct. 24, 2011). Excessive fee litigation "entails complicated ERISA claims" and "novel questions of law." *Martin v. Caterpillar, Inc.*, No. 07-1009, 2010 WL 3210448, at *2 (C.D.Ill. Aug. 12, 2010); *Tussey v. ABB, Inc.*, No. 06-4305, 2012 WL 5386033, at *3 (W.D. Mo. Nov. 2, 2012). Successfully obtaining a judgment in these actions is extraordinarily difficult. It requires counsel to risk very significant amounts of time and money "in the face of vigorous resistance by employers." *Ramsey*, Doc. 27 at 2 . *See also* Schlichter Decl. ¶¶30–31; Sturdevant Decl. ¶¶10–11.

The number of hours spent by counsel may be considered an indicium of a case's complexity. *Gokare.*, 2013 WL 12094887, at *9. The novelty of the legal issues is also a factor

in assessing the complexity of a case for purposes of evaluating a fee request, *Dillow,* 2018 WL 4776977, at *7, as is the extent to which the issues in the case are contested. *In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at *4.

ERISA excessive fee litigation did not exist until Class Counsel first entered this space. In September 2006, "Schlichter, Bogard & Denton began holding employers responsible for alleged fiduciary breaches" involving 401(k) plans. *Spano*, 2016 WL 3791123, at *3. In August 2016, the firm became the first law firm in the country to file an excessive fee lawsuit involving a university's 403(b) plan. Schlichter Decl. ¶¶15–17; Sturdevant Decl. ¶¶7–8.[4] Few firms "are capable of handling this type of national litigation." *Abbott,* 2015 WL 4398475, at *3; Schlichter Decl. ¶¶21, 30–31; Sturdevant Decl. ¶10.

The issues in this case were hotly contested, as evidence by the procedural history. After Plaintiffs filed their Complaint on August 10, 2016, Defendants filed a Motion to Dismiss on October 11, 2016 (Doc. 30). Plaintiffs then filed an Amended Complaint on December 12, 2016 (Doc. 38), which Defendants also moved to dismiss (Doc. 42). After extensive briefing, including multiple supplemental notices of authority, the Court on January 5, 2018, denied in part and granted in part Defendants' motion to dismiss. Doc. 66. Plaintiffs filed a Second Amended Complaint on June 6, 2018 (Doc. 102). Defendants filed a motion to strike Plaintiffs' jury demand, which, after extensive briefing, the Magistrate Judge recommended be granted on October 22, 2018. Doc. 124. Plaintiffs then filed objections to this recommendation on November 5, 2018 (Doc. 128); Defendants' motion was ultimately denied as moot based on the

[4] *See also* Greg Iacurci, *Duke, Johns Hopins, UPenn and Vanderbilt latest schools under fire for excessive 403(b) fees*, InvestmentNews, Aug. 11, 2016, https://www.investmentnews.com/article/20160811/FREE/160819980/duke-johns-hopkins-upenn-and-vanderbilt-latest-schools-under-fire.

parties reaching a settlement in principle. Doc. 144. Plaintiffs filed the Motion for Class Certification on May 18, 2018 (Doc 93); after extensive briefing, including multiple filings of supplemental authority, the motion was granted on October 23, 2018. Doc. 127.

Discovery in this case was also intensive, involving extensive negotiations regarding, and production of, electronically stored information (ESI). Braitberg Decl. ¶¶ 14. These efforts resulted in the production of over 100,000 pages of documents. Braitberg Decl. ¶¶ 18. Fourteen depositions were taken in this case, including eight lengthy depositions taken by Class Counsel. Braitberg Decl. ¶ 20.

In sum, this was a "complex" case, which strongly weighs in favor of granting Class Counsel's fee request.

F. The Professional Skill and Standing of Counsel on Both Sides

It is "well established that complex ERISA litigation," such as this, requires "special expertise," *Tussey,* 2012 WL 5386033 at 3, and class counsel of the "the highest caliber," *Nolte,* 2013 WL 12242015 at *3. This is particularly true here, with an opponent that is a "sophisticated [private university] with sophisticated counsel." *Id.; see also Gokare,* 2013 WL 12094887, at *9 ("The declarations of Class Counsel and their conduct of this litigation demonstrate their professional skill, their extensive experience in class action litigation, and their standing in the legal community.").

Few law firms are capable of successfully prosecuting these lawsuits. *Abbott*, 2015 WL 4398475 at 3; Schlichter Decl. ¶¶21, 30–31; Sturdevant Decl. ¶10. "Schlichter, Bogard & Denton has been virtually alone in its willingness to fully pursue ERISA fiduciary breach claims against large employers for excessive fees, imprudent investment options, and the types of breaches." *George*, 2012 WL 13089487 at *4. Only through Class Counsel's zealous

prosecution of this case and their reputation as "experts in ERISA litigation" was any recovery possible. *See Tussey,* 2012 WL 5386033 at 3; *Abbott*, 2015 WL 4398475 at 3.

Class Counsel is not only highly experienced in handing ERISA class actions involving 401(k) and 403(b) plans, but pioneered the field. This Court has found Class Counsel to be "qualified and experienced in ERISA fiduciary duty cases." Doc. 126 at 11. 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 2. They are "experts in ERISA litigation." *Krueger,* 2015 WL 4246879 at 2 (citation omitted). The firm also handled the only 401(k) excessive fee case taken by the Supreme Court, which, in a landmark ruling, held that an ERISA fiduciary has a continuing duty to monitor plan investments and remove imprudent ones. *Tibble v. Edison,* 135 S.Ct. 1823, 1828–29 (2015).

District courts across the country have recognized the reputation, extraordinary skill and determination of Class Counsel. Chief Judge Osteen of 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, 2016 WL 6769066 at *3. Judge McDade of the Central District of Illinois, again 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,* 2015 WL 4398475, at *1. 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; *In re Northrop Grumman*, 2017 WL 9614818 at *4 ("SBD is highly experienced" in ERISA class actions). Judge Laughrey of the Western District of Missouri wrote:

> Class Counsel has successfully fought for over a decade to achieve this result and has shown a high degree of competence. This Court previously noted and reiterates here that Class Counsel "are clearly experts in ERISA litigation." As noted above, this kind of litigation has made a "national contribution" in the clarification and refinement of a fiduciary's responsibilities and duties. Indeed, this litigation not only educated plan administrators throughout the country, it educated the Department of Labor.

Tussey, Doc. 870 at 6. From the outset of this litigation, Class Counsel fully expected this case to be vigorously defended by defendants with sophisticated counsel. Schlichter Decl. ¶30. Complex ERISA class actions, such as this, are often defended with a "blank check" for defense costs. Sturdevant Decl. ¶11. *Tussey v. ABB, Inc.* represents a prime example of this. In that case, the two corporate defendants had 15 or more lawyers present in the courtroom throughout the month-long trial. Schlichter Decl. ¶33. The two defendants' legal fees in that case alone exceeded $42 million through the trial, which ended in January 2010. *Tussey v. ABB Inc.*, No. 06-4305, 2015 WL 8485265, at *6 (W.D.Mo. Dec. 9, 2015). Moreover, nine more years of attorneys' fees were incurred by the defendants.

This lawsuit confirmed Class Counsel's expectations of a vigorous defense. Defendants filed comprehensive dispositive motions, strongly opposed class certification, and opposed Plaintiffs' motion for a jury trial. These actions unquestionably demonstrate that Defendants mounted a strong defense at each stage of the litigation.

Class Counsel devoted thousands of hours to litigate the claims and advanced $160,080 in litigation expenses, all with the risk that they would recover nothing.

IV. The Court Should Award Reimbursement of Class Counsel's Litigation Expenses

Class Counsel are entitled to reimbursement of litigation expenses of $160,080 advanced in prosecuting this case. Fed. R. Civ. P. 23(h). "Expense awards are customary when litigants have created a common settlement fund for the benefit of a class." *In re Se. Milk Antitrust Litig.*, 2013 WL 2155387 at * (citation and internal quotation marks omitted). *See also Dillow*, 2018 WL 4776977, at *7 (same). Reasonable and necessary expenses may include such items as "photocopying, postage, travel, lodging, filing fees and Pacer expenses, long distance telephone,

telecopier, computer database research, depositions expenses, and expert fees and expenses." *Broadwing*, 252 F.R.D. at 382.

Class Counsel here seek reimbursement for these categories of expenses. *See* O'Gorman Decl. ¶2. Class Counsel brought this case without guarantee of reimbursement or recovery. They had a strong incentive to limit costs. Given the complexity of this case, the costs incurred are consistent with what would be expected in a case of this magnitude that was litigated for years.

V. The Court Should Approve Case Contribution Awards for the Named Plaintiffs

"Courts typically authorize contribution (or 'incentive' awards) to class representatives for their often-extensive involvement with a lawsuit." *Dillow*, 2018 WL 4776977, at *7. "It is appropriate to reward plaintiffs . . . who obtain excellent, tangible benefits for their fellow workers." *Id*. at *8. Class representative contributions to the litigation may include "providing information and documents to [class] counsel, remaining informed and involved throughout the litigation, contacting and consulting [class] counsel concerning the litigation, reviewing documents and settlement proposals, and [being] willing to testify at a trial." *Id*.

"A substantial incentive award is appropriate in [a] complex ERISA case given the benefits accruing to the entire class in part resulting from [named plaintiff's] efforts." *Savani v. URS Prof'l Sols., LLC*, 121 F.Supp.3d 564, 577 (D.S.C. 2015).

In this case, the Named Plaintiffs provided invaluable assistance to Class Counsel. *See* Docs. 94-1–94-6; *see also* Braitberg Decl. ¶¶13, 16, 20. They also risked their reputation and alienation from employers "in bringing an action against a prominent [university] in their community." *Kruger,* 2016 WL 6769066 at *6.

A case contribution award of $25,000 each for Class Representatives Loren L. Cassell, Pamela M. Steele, John E. Rice, Penelope A. Adgent, Dawn E. Crago, and Lynda Payne, which collectively represents approximately one percent of the Settlement Fund, is reasonable and appropriate given the Class Representatives' contributions to the case. This amount is consistent with awards in similar excessive fee settlements. *See Kruger*, 2016 WL 6769066 at 6; *Abbott*, 2015 WL 4398475 at 4; *Krueger*, 2015 WL 4246879 at 4; *Beesley*, 2014 WL 375432 at 4; *Will*, 2010 WL 4818174 at 4 (all awarding $25,000 to each named plaintiff). *See also Hainey v. Parrott*, No. 1:02-cv-733, 2007 WL 3308027, at *3 (S. D. Ohio Nov. 6, 2007) (approving four $50,000 incentive awards); *Brotherton*, 141 F. Supp. 2d at 914 (approving $50,000 incentive award).

VI. CONCLUSION

This Court should grant Plaintiffs' Motion.

Dated: August 23, 2019

Respectfully Submitted,

SCHLICHTER BOGARD & DENTON, LLP

/s/ Andrew D. Schlichter

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2019 the foregoing document was filed and served electronically on all parties and counsel of record, including the below counsel for Defendants, via the Court's CM/ECF system. Parties may access this filing through the Court's ECF system.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

LOREN L. CASSELL et al., Plaintiffs, v. VANDERBILT UNIVERSITY et al., Defendants.	Civil Action No. 3:16-cv-02086 Chief Judge Crenshaw Magistrate Judge Brown

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 matter. 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); *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 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 of the Middle District of North Carolina 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. My firm's ERISA excessive fee litigation has been credited with helping to reduce retirement plan fees industry-wide. *See, e.g.*, David Nicklaus, *After 40 Years, 401(k) Is A Success That Still Needs Tweaking*, St. Louis Post-Dispatch (Nov., 30, 2018), https://www.stltoday.com/business/columns/david-nicklaus/after-years-k-is-a-success-that-still-

needs-tweaking/article_344af387-fb3e-56b1-ae3c-00d7871e05bb.html; Greg Edwards, *St. Louis' Schlichter Explains How Retirement Plans Have Changed Since He Challenged Them*, St. Louis Business Journal (Feb. 1, 2019), https://www.bizjournals.com/stlouis/news/2019/02/01/st-louis-schlichter-explains-how-retirement-plans.html; George S. Mellmanand and Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What Are the Causes and Consequences?,* Center for Retirement Research at Boston College, (May 2018), https://crr.bc.edu/briefs/401k-lawsuits-what-are-the-causes-and-consequences. 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. After close to a decade of handling excessive 401(k) fee cases, my firm and I began investigating similar claims for excessive fees and imprudent investments involving large 403(b) plans sponsored by private universities. This investigation was extensive, lasting well over one year prior to the filing of a 403(b) university plan lawsuit. My firm and I thoroughly researched legal and factual issues concerning 403(b) plans in general, as well as conducted specific analyses pertaining to each 403(b) plan under investigation. We also were assisted by

experienced industry professionals knowledgeable about prudent fiduciary practices governing 403(b) plans, the market rate for 403(b) plan services, and other issues pertaining to the administration of 403(b) plans.

16. Beginning in August 2016, after more than one year of diligently investigating potential fiduciary breach claims involving 403(b) plans, my firm expanded its national ERISA practice by filing excessive 403(b) fee cases against private universities. These lawsuits were similar to the 401(k) excessive fee cases previously handled by my firm. This lawsuit was one of a number of lawsuits that were filed in 2016 alleging breaches of fiduciary duty and prohibited transactions concerning excessive fees charged to 403(b) plan participants and imprudent investments included in their plans.

17. No law firm had ever brought an excessive 401(k) or 403(b) 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 excessive 401(k) fee cases;
- the first and only 401(k) case in the United States Supreme Court; and
- the first and only trial of a 403(b) excessive fee case.

18. The first full trial of such a 401(k) case resulted in a judgment for the plaintiffs that was affirmed in part by the Eighth Circuit. *Tussey v. ABB, Inc.*, No. 06-4305, 2012 WL 1113291 (W.D.Mo. Mar. 31, 2012), aff'd in part, rev'd in part, 746 F.3d 327 (8th Cir. 2014). As Judge Laughrey noted in that case, "[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).

19. 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 watershed and landmark decision in ERISA litigation. Sitting *en banc*, ten judges of the Ninth Circuit on remand 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.

20. My firm also handled the first excessive 403(b) case in history to go to trial. *Sacerdote v. New York Univ.*, 328 F.Supp.3d 273 (S.D.N.Y. 2018). That trial occurred in April 2018, and judgment was entered on July 31, 2018, finding in favor of New York University and against the plaintiffs. Plaintiffs have filed a notice of appeal.

21. Before my firm brought ERISA 401(k) or 403(b) 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 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.

22. 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); *Tibble v. Edison Int'l*, 639 F.Supp.2d 1074 (C.D.Cal. 2009), aff'd, 729 F.3d 1110 (9th Cir. 2013), vacated, 135 S. Ct. 1823 (2015), aff'd on remand, 820 F.3d 1041 (9th Cir. 2016). One of the 403(b) cases handled by my office also was dismissed and is pending on appeal. *Divane v. Northwestern Univ.*, No. 16-8157, 2018 WL 2388118 (N.D.Ill. May 25, 2018).

23. Prior to the filing the *Cassell* lawsuit in August 2016, my firm began researching the Vanderbilt University Retirement Plan and Vanderbilt University New Faculty Plan, investigating claims, and consulting with experts in the field of 403(b) administration and investment management. The investigation began with obtaining and reviewing each of the Plan's Annual Reports since 2009 (Forms 5500), which are publicly available documents filed with the United States Department of Labor in which the Plan discloses its investment holdings and financial statements. Using this data, we conducted an extensive analysis of the Plan's administrative fees and investment performance based on our knowledge of industry practices. We also analyzed documents obtained from the named plaintiffs and other material obtained from publicly available sources related to the administration of the Plan.

24. In this case, my firm will likely spend significant future time and additional expenses without additional compensation both before and after final approval and during the three-year settlement period. For instance, with over 50,000 current and former participants who are sent notices, in my experience, the firm will receive a high volume of calls from Class members to address questions related to the settlement. The firm also will work with the settlement administrator to facilitate the settlement during the settlement period.

25. The Settlement Agreement provides—as part of its comprehensive affirmative relief—that Class Counsel will continue to monitor and enforce the terms of the agreement if necessary. Class Counsel will not request an additional award of fee for any of these future services to the Plan.

26. In my opinion, the affirmative relief obtained herein has substantial value beyond the monetary value of the settlement of $14.5 million due to the substantial reforms required by the terms of the settlement.

27. As a practical matter, litigants such as named Plaintiffs Loren Cassell, Pamela Steele, John Rice, Penelope Adgent, Dawn Crago, and Lynda Payne, could not afford to pursue litigation against well-funded fiduciaries of a multi-billion dollar 403(b) plan sponsored by a large employer such as Vanderbilt University 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.

28. The contingency fee agreements entered into between my firm and each of the named Plaintiffs Loren Cassell, Pamela Steele, John Rice, Penelope Adgent, Dawn Crago, and Lynda Payne 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.

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

30. 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 by national firms with ERISA expertise.

31. 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. For example, in *Tussey v. ABB, supra,* 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. In addition, our firm expended over $2,000,000 in out-of-pocket expenses by the conclusion of the trial therein. That case continued after being tried almost nine years ago, followed by two appeals to the Eighth Circuit, and multiple remandments to the district court. On August 16, 2019, the Court, after more than a decade of hard-fought litigation, entered its final order and judgment.

32. 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.

- *Tussey v. ABB, Inc.,* No. 06-CV-04305-NKL, Doc. 869 (W.D.Mo. August 16, 2019);
- *Sims v. BB&T Corp.,* No. 15-1705, 2019 WL 1993519 (M.D.N.C. May 6, 2019);
- *Clark v. Duke*, No. 1:16-CV-01044, Doc. 166 (M.D.N.C. June 24, 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).

33. The kind of long-term expensive commitment of time and resources is needed if plan participants are to receive full compensation for their losses in such cases. Because my firm has committed to doing this in each case we pursue, it is my opinion that defendants take into

account this firm's long-term commitment to these cases in assessing their costs and the likelihood of success.

34. My firm devoted over 5,000 hours of attorney and non-attorney time to prosecuting the ERISA claims on behalf of the Vanderbilt 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 to obtain a successful recovery on behalf of the class through potentially years of litigation impacted the firm's ability to handle other class actions or pursue other less risky matters.

35. By my firm obtaining this settlement for the Class without further delay, the Class members will benefit by not only avoiding risk but also avoiding what would have been substantial costs and delay for trial and potential appeals. In addition, they will benefit by being able to invest their recoveries and benefit from the earnings much earlier than if there had been years of delay. Likewise, the non-monetary relief will benefit them much earlier than if they had obtained the same relief after years more of litigation.

36. Schlichter, Bogard & Denton does not bill clients on an hourly basis. In June 2019, 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. *Clark*, Doc. 166 at 8.

37. These rates were brought up to date in *Ramsey*, Doc. 27 at 8, based on 2016 hourly rates for Schlichter, Bogard & Denton that were previously approved in *Kruger*, 2016 WL

6769066 at 4. The court in *Kruger* adopted the 2016 hourly rates that were previously approved in *Spano,* 2016 WL 3791123 at 3. The rates were: $998/hour for attorneys with at least 25 years of experience, $850/hour for attorneys with 15–24 years of experience, $612/hour for attorneys with 5–14 years of experience, $460/hour for attorneys with 2–4 years of experience, $309/hour for Paralegals and Law Clerks, and $190/hour for Legal Assistants.

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 23rd day of August, 2019, in St. Louis, Missouri.

/s/ Jerome J. Schlichter
Jerome J. Schlichter

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

LOREN L. CASSELL *et al*., *Plaintiffs*, v. VANDERBILT UNIVERSITY *et al*., *Defendants*.	Civil Action No.16-cv-2086 Chief Judge Crenshaw Magistrate Judge Brown

DECLARATION OF JAMES C. STURDEVANT

I, James C. Sturdevant, declare as follows:

1. I am an attorney admitted to the practice of law in all courts of the State of California and Connecticut. I am admitted to practice in all federal district courts in California and Connecticut, the Second, Fourth, and Ninth Circuit Courts of Appeals, and the United States Supreme Court. I am a graduate of Boston College School of Law where I received my J.D. in 1972, and of Trinity College, where I received a B.A. in 1969. A complete recitation of my experience and background is included in my current personal resume, which is attached hereto as Exhibit A.

2. I have concentrated on litigation, both at the trial and appellate levels, throughout my forty-five plus year legal career. From 1972 through May, 1978, I was employed with the Tolland-Windham Legal Assistance Program, Inc., and Connecticut Legal Services, Inc., where I concentrated on significant housing, food and unemployment compensation litigation primarily in federal courts, legislation and administrative advocacy. Beginning in October, 1978, I initiated and directed all major litigation for the San Fernando Valley Neighborhood Legal Services, Inc. program in

Southern California. In 1980, I formed my own private practice, The Sturdevant Law Firm, focusing on unfair business practices and civil rights cases. Since 1986, I have concentrated on lender liability, consumer protection class actions, complex employment discrimination cases, disability access, and unlawful/unfair business practice cases.

3. I have had extensive experience in representing consumers and low-income and other individuals in consumer class actions, employment discrimination cases, environmental litigation, disability access, unfair business practices litigation, and other public interest actions in both state and federal courts. I have handled the pre-trial, trial, and most of the appellate work for cases in my firm in which I was lead or co-counsel. A summary of examples of recent significant litigation in which I am or have been involved is described in my firm's resume, Exhibit B.

4. I have been regarded as one of the nation's most respected consumer rights and class action attorneys. I just received the 2019 CLAY Award with my team of attorneys for securing a unanimous decision from the California Supreme Court in *De La Torre v. CashCall, Inc.*, 5 Cal. 5th 966 (2018). In that case, which has lasted more than ten years, the Court held that interest rates between 96% and 135% on $2,600 loans payable over three and one-half years may be determined unconscionable in isolation from other loan terms and circumstances. The Court also held that borrowers may seek affirmative relief from unconscionable loans under California's Unfair Competition Law. I was nominated for Trial Lawyer of the Year by Trial Lawyers for Public Justice (now Public Justice) in 2004 for my work in *Miller v. Bank of America* which is described in some detail in my firm resume. I was named 2004 Trial Lawyer of the Year by the

Consumer Attorneys of California for work in that same case, 2002 Trial Lawyer of the Year by the San Francisco Trial Lawyers Association for my work in *Ting v. AT&T* which is also described in my firm resume, and have received numerous other awards for outstanding advocacy on behalf of consumers and workers.

5. I serve and have served on numerous national, state and local boards and committees concerned with civil litigation and amicus curiae work, and I and my firm have authored a significant number of briefs and amicus briefs on the issues of mandatory arbitration, federal preemption, the interpretation of consumer protection statutes and attorneys' fees, among many other subjects.

6. I am well acquainted with the reputation and practice of Jerome J. Schlichter, founding partner of Schlichter Bogard & Denton, which prosecuted this case as Class Counsel prior to the class action settlement. I have known Mr. Schlichter for many years and am familiar with the fact that he and his firm have done excellent work over the last three decades in advancing the rights of workers and individuals in a variety of class action cases in the employment discrimination field and in recent years national class actions involving fiduciary breaches and excessive fees in 401(k) and 403(b) plans.

7. Schlichter Bogard & Denton has been at the forefront of ERISA fiduciary breach class actions brought on behalf of employees in 401(k) and 403(b) plans. The firm first filed excessive fee cases involving 401(k) plans in 2006. Starting in 2016, Schlichter Bogard & Denton expanded their national ERISA practice by filing similar excessive fee cases involving 403(b) plans sponsored by private universities.

8. To my knowledge, Schlichter, Bogard & Denton was the first in the country to bring excessive fee lawsuits involving 401(k) and 403(b) plans. Prior to Schlichter, Bogard & Denton filing these lawsuits, there were no lawyers or law firms in the country handling such cases. Consequently, no law firm has developed the expertise in these types of cases that Schlichter Bogard & Denton has over the last 12 years, and no other law firm in the country, to my knowledge, has taken an ERISA 401(k) or 403(b) excessive fee case to trial prior to Schlichter Bogard & Denton.

9. I am also aware of no other law firm that has achieved the success that Schlichter Bogard & Denton has in bringing ERISA class actions for excessive fees. The public has been well served by the actions of these attorneys. Schlichter, Bogard & Denton has indeed functioned as private attorneys general.

10. Complex class actions, such as those brought by Schlichter, Bogard & Denton, require representation of the class at a very high level throughout the matter. My firm and I have been involved in several ERISA class actions. In my experience, ERISA class actions and other complex class actions are national in scope, involve complex federal laws and regulations, and typically encompass parties, discovery, and attorneys from all over the United States. A plaintiff's ERISA practice is therefore complex, highly specialized, time-consuming, and expensive to pursue. To my knowledge, there are very few attorneys and law firms willing and capable of handling large ERISA cases representing plaintiffs on a contingent basis. For these reasons, ERISA fiduciary breach litigation in any federal judicial district should be considered both very risky and national in scope.

11. In my personal experience and opinion, ERISA cases and other complex class actions are defended with a "blank check" for defense costs, meaning that defendants are willing to devote massive resources and spend substantial sums for defense costs and expert witnesses. In my experience, defense firms often spend multiples more in time and expenses to defend these cases, and are paid on a monthly basis, as compared to the plaintiffs' lawyers representing the participants and beneficiaries who typically work on a contingency fee basis.

12. I understand for complex class actions outside the Ninth Circuit, the market rate for plaintiffs' lawyers who handle these class actions is 33 1/3% of any monetary recovery.

13. In my experience and opinion, because of the significant cost and extensive resources required to pursue ERISA class actions through judgment, individual named plaintiffs could not afford to hire a lawyer unless it was on a contingency fee basis. I am personally not aware of any plaintiffs' lawyer or law firm that would be willing to handle an ERISA class action other than for a percentage of any monetary recovery.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on August 19, 2019 in San Rafael, California.

/s/ James C. Sturdevant
James C. Sturdevant

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

LOREN L. CASSELL et al., Plaintiffs, v. VANDERBILT UNIVERSITY et al., Defendants.	Civil Action No. 3:16-cv-02086 Chief Judge Crenshaw Magistrate Judge Brown

DECLARATION OF ALEXANDER L. BRAITBERG

I, Alexander L. Braitberg, declare as follows:

1. I am an attorney at the law firm of Schlichter Bogard & Denton, LLP. I am one of the attorneys representing the Plaintiffs in this matter. This declaration is submitted in support of Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Case Contribution Awards for Named Plaintiffs.

2. I have been involved in all aspects of this litigation. I am familiar with the facts set forth below and able to testify to them based on my personal knowledge or review of the records and files maintained by this firm in the regular course of its representation of Plaintiffs in this case.

3. I am licensed to practice in the States of Missouri and Illinois.

4. I received my Bachelor of Arts from Cornell University in 2007 and my Juris Doctorate from Saint Louis University School of Law in 2014. I am employed as an attorney at Schlichter, Bogard & Denton, LLP, which is Class Counsel in this matter. I have been actively engaged in complex class action and mass tort litigation throughout my career. Since July 2018, I

have focused my practice primarily on ERISA fiduciary breach class actions concerning 401(k) and 403(b) plans.

5. As set forth in the Memorandum in Support of Plaintiffs' Motion, and the Declaration of Jerome Schlichter, the Southern District of Illinois and the Middle District of North Carolina recently approved hourly rates for Schlichter, Bogard & Denton when approving attorneys' fees of one-third of the settlement proceeds in an ERISA excessive fee class action. *Clark v. Duke*, No. 1:16-CV-01044, Doc. 166 at 8 (M.D.N.C. June 24, 2019); *Ramsey v. Philips N.A.*, No. 18-1099, Doc. 27 at 8 (S.D.Ill. Oct. 15, 2018). These 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.

6. To calculate lodestar, Schlichter, Bogard & Denton applied these rates to the number of hours incurred by attorneys and non-attorneys during the above-captioned action. This calculation is shown in the following table:

Experience	Hours	Rate	Total
25 Years +	262.70	$1,060	$278,462.00
15–24 Years	1,096.10	$900	$986,490.00
5–14 Years	2,864.90	$650	$1,862,185.00
2–4 Years	347.60	$490	$170,324.00
Attorney Total	**4,571.30**		**$3,297,461.00**
Law Clerks	20.40	$330	$6,732.00
Paralegals	432.20	$330	$142, 626.00
Legal Assistants	5.30	$190	$1,007.00
Staff Total	**457.90**		**$150,365.00**
Totals	**5,029.20**		**$3,447,826**

7. Investigation and Preparation of Complaint: Starting in 2015, Schlichter, Bogard & Denton began their investigation of the claims at issue in this lawsuit. The attorneys conducted in-depth investigative analysis and research of publicly available documents, including summary plan descriptions, participant statements, prospectuses, and the Vanderbilt University Retirement and New Faculty Plan Forms 5500 filed with the Department of Labor, among other sources.

8. Class Counsel's investigation included meetings with Plan participants, which occurred both in-person and on the phone. The in-person meetings required attorneys to travel to multiple locations across the country where the participants reside. These meetings provided valuable insight and additional understanding of the operation and administration of the Plan, as well as fee and performance disclosures concerning the Plan's investments and expenses.

9. On August 10, 2016, Plaintiffs filed their complaint in the above-captioned matter. Doc. 1. After Defendants filed their motion to dismiss, Class Counsel reviewed and analyzed Defendants' briefing and evaluated whether to amend their complaint. After additional investigation and research was conducted related to their claims, Plaintiffs amended their complaint as of right under Fed. R. Civ. P. 15(a) on December 12, 2016. Doc. 28. [1] The amended complaint provided additional detail regarding Plaintiffs' claims.

10. During the discovery phase, Schlichter, Bogard & Denton investigated additional claims. Based on their analysis of Defendants' document production, they determined it was necessary to add claims relating to the Plan's recordkeepers' use of confidential information to sell products and services outside the Plan to the Plan's participants. Therefore, on May 9, 2018,

[1] Unless otherwise indicated, "Doc." references are citations to the docket in the above-captioned matter.

Plaintiffs moved for leave to file their Second Amended Complaint to add two additional counts relating to this non-plan marketing. Doc. 85.

11. Motion to Dismiss: Defendants filed their motion to dismiss the amended complaint on January 16, 2017. Doc. 42. Their 25-page memorandum was extensive and raised complex legal arguments. Doc. 43. Over the course of approximately three months, Plaintiffs' attorneys spent extensive time responding to their arguments, which included conducting research and analysis of relevant authority. Plaintiffs filed their opposition on April 10, 2017. Doc. 49. See also Docs. 50 (Plaintiffs' first notice of supplemental authority supporting denial of motion to dismiss); 53 (second notice of supplemental authority); 55 (Plaintiffs' response to Defendants' notice of supplemental authority); 58 (Plaintiffs' third notice of supplemental authority); 61 (Plaintiffs' response to Defendants' second notice of supplemental authority), 64 (Plaintiffs' fourth notice of supplemental authority). The Court granted in part and denied in part Defendants' motion to dismiss on January 5, 2018. Doc. 66.

12. Motion for Class Certification: Plaintiffs filed their motion for class certification on May 18, 2018. Doc. 93. The briefing, accompanied by declarations of the Named Plaintiffs and deposition testimony, was extensive and took significant time to prepare. Docs. 93, 94-1–16. *See also* Doc. 114 (Plaintiffs' reply); Doc. 122 (Plaintiffs' notice of supplemental authority in support of class certification). Class certification was vigorously contested by Defendants. *See* Docs. 106, 106-1–13. The Court granted class certification on October 23, 2018. Doc. 127.

13. Discovery: In October 2016, the parties filed a joint proposed initial case management order. Doc. 36. Following the Court's denial of Defendants' motion to dismiss, in February 2018, the parties filed a proposed first amended case management order. Apart from efforts involved in drafting these joint documents, their preparation required multiple meet-and-

confer discussions with Defendants' attorneys. Plaintiffs prepared and served their initial disclosures on November 23, 2016 and their initial requests for production and interrogatories directed to Defendants on January 24, 2017. Counsel for the parties engaged in extensive discussions regarding electronically stored information (ESI) and search terms over the months from February to August 2018. Plaintiffs issued their second set of requests for production and interrogatories to Defendants on November 20, 2018.

14. In July and August of 2018, Plaintiffs prepared and served document subpoenas on seven non-party entities: Fidelity, Vanguard, TIAA, VALIC, Aon Hewitt, Cammack Larhette, and Morningstar. Schlichter Bogard & Denton met and conferred extensively with counsel for these entities regarding their document productions.

15. In February 2018, Defendants issued discovery requests to each of the Named Plaintiffs. Schlichter, Bogard & Denton engaged in extensive discussions with their clients. The attorneys reviewed and analyzed all materials provided by their clients and prepared responsive documents for production. Over the course of the litigation, Plaintiffs made three separate document productions totaling over 2,000 pages.

16. Given the complex nature of the litigation and volume of documents produced, on December 3, 2018, Plaintiffs filed an unopposed motion for extension of time to complete third-party discovery.

17. Throughout the course of discovery, Class Counsel diligently reviewed and analyzed over 100,000 pages of documents (over 24,000 documents) that were produced. Defendants alone made 11 separate productions. A detailed review and analysis of the document production was crucial for Plaintiffs to prove their claims. Without a firm understanding of the

core materials to support their claims, including a significant email production with attachments, Plaintiffs would have been unable to successfully prosecute this action.

18. To support those efforts, Schlichter, Bogard & Denton developed a document review and analysis protocol for systematically and methodically evaluating the document production. It was incumbent on Plaintiffs' attorneys to review each and every document produced in this litigation. The ongoing review and analysis of the document production was aided by numerous internal discussions and meetings to ensure a proper and efficient evaluation process, as well as to inform their litigation strategy.

19. Apart from the ongoing tasks related to the document production, Class Counsel defended six depositions of the Named Plaintiffs and took eight lengthy depositions of fact witnesses from Vanderbilt University. Each of the fact witness depositions required extensive preparation and ongoing coordination among the litigation team to ensure an effective examination.

20. Throughout all stages of the case, including discovery, the attorneys at Schlichter, Bogard & Denton met internally, both in large and small groups, to thoroughly discuss the legal theories at issue, the development of the case, and other issues that arose during the litigation. Those internal meetings were critical to obtaining a successful recovery on behalf of the Class.

21. Mediation and Settlement: On February 1, 2019, the parties engaged in private mediation before a nationally recognized mediator, Hunter R. Hughes III. Class Counsel prepared extensively for this mediation, which included time devoted to the preparation of a detailed mediation statement. The parties did not reach agreement during the mediation session, but continued discussions through the mediator over the course of the next several weeks. On February 25, 2019, the parties notified the court that they reached an agreement in principle.

Doc. 142. However, Class Counsel required that the settlement provide additional non-monetary and affirmative relief for the benefit of Class members. After continued discussions, on April 18, 2019, the parties reached an agreement on all terms. Doc. 147-1.

22. Prior to seeking preliminary approval of the class action settlement, Class Counsel was engaged in the preparation of numerous supporting settlement documents, including the class action notices, claim forms, their motion and memorandum in support of preliminary approval, their motion and memorandum in support of class certification, their motion and memorandum in support of consolidation, and related proposed orders. They also prepared requests for proposals sent to settlement administrators and independent fiduciaries, who were necessary parties to facilitate the settlement.

23. The description of the time and effort that Class Counsel expended during this litigation illustrates the determination that these attorneys displayed through all aspects of this litigation. The attorney and non-attorney hours were reasonably and efficiently expended to obtain a successful recovery on behalf of the Class. Without committing the necessary resources to diligently pursue Plaintiffs' claims, and utilizing the national expertise Class Counsel have developed in creating this area of litigation, a favorable recovery that benefits tens of thousands of Class members would not have been possible.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on August 23, 2019 in St. Louis, Missouri.

/s/ Alexander L. Braitberg
Alexander L. Braitberg

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

LOREN L. CASSELL *et al.*, Plaintiffs, v. VANDERBILT UNIVERSITY *et al.*, Defendants.	Case No. 3:16-CV-02086

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 $160,080.05 as of August 1, 2019.

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

Description	Total
Depositions	$52,350.97
Experts and Consultants	$53,102.53
Filing, Transcripts, Subpoena Services and Related Costs	$1,989.10
Mediation and Settlement Costs	$7,692.69
Copies and Postage	$9,574.45
Data Development and Document Organization	$8,378.41
Research and Investigation	$3,396.21
Travel, Lodging, and Parking	$23,595.69
Total	**$160,080.05**

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 broken down by experience:

Description	Total Hours
2-4 Years	347.60
5-14 Years	2,864.90
15-24 Years	1,096.10
25 and Above	262.70
Total Attorney Hours	**4,571.30**

The following chart shows the amount of hours spent by Paralegals and Law Clerks:

Description	Total Hours
Paralegal	432.20
Law Clerk	20.40
Total Non-Attorney Hours	**457.90**

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 August 20, 2019.

Sheri O'Gorman