IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL WACHALA, et al.,

Plaintiffs,

v.

ASTELLAS US LLC, et al.,

Defendants.

Case No. 1:20-cv-03882

Hon. Martha M. Pacold

CLASS ACTION

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND CASE CONTRIBUTION AWARDS FOR CLASS REPRESENTATIVES

Under Federal Rules of Civil Procedure 23(h) and 54(d)(2), Plaintiffs move that the Court approve an attorneys' fee award of $3,166,666 (one-third of the monetary recovery) and a cost award of $525,586.08 to Class Counsel, Schlichter Bogard LLP, as well as case contribution awards of $20,000 to each of the Class Representatives. Class Counsel bore tremendous risk in order to benefit the Class. In spite of this risk, Class Counsel, leveraging its hard-earned reputation as the foremost attorneys in 401(k) excessive fee litigation, achieved an exceptional result for the class by obtaining a substantial monetary fund and other valuable affirmative relief that will continue to benefit the class for years to come. The requested percentage of the settlement fund is comparable to attorneys' fees awards in similar cases and is **less than one-third** of its lodestar rate. Based on all of the relevant factors, and for the reasons stated in Plaintiffs' supporting memorandum, Plaintiffs respectfully request that the Court grant their motion.

September 1, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on September 1, 2023.

/s/ Troy A. Doles

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

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INTRODUCTION

Class Counsel expended substantial effort, hours, and advanced significant costs in successfully litigating this matter on behalf of the Settlement Class, obtaining not only a $9.5 million settlement fund but also obtaining significant nonmonetary, affirmative relief for the benefit of the Settlement Class. In achieving this result, Class Counsel leveraged its unequaled, decades-long experience in 401(k) litigation by aggressively pursuing this case for over three years without any compensation or guarantee of payment. For this effort, risk taken, and success achieved, Class Counsel requests a market rate percentage of one-third from the Settlement Fund (i.e. a common fund) as an award of attorneys' fees, the reimbursement of reasonable and reimbursable costs, and case contribution awards for the Class Representatives.

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); *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 96 (2013)("Under [the common fund doctrine], 'a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'")(quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)); *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998)("it is commonplace" to award lawyers a percentage of common fund). In the Seventh Circuit, a common-fund attorneys' fee award must reflect "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007). In class actions in this Circuit—and ERISA 401(k) cases in particular—courts have recognized that the appropriate market is a contingent fee market rather than an hourly fee market, and the appropriate market rate for a contingent fee is a one-third percentage of the monetary recovery. E.g., *Bell v. Pension Comm. of Ath Holding Co.*

LLC, No. 15-2062, 2019 U.S. Dist. LEXIS 150302 (S.D. Ind. Sep. 4, 2019); *Ramsey v. Philips North America, LLC*, No. 18-1099- NJR, Doc. 27 (S.D. Ill. Oct. 15, 2018); *Spano v. Boeing Co.*, No. 06-743-NJR, 2016 U.S. Dist. LEXIS 161078, *7 (S.D. Ill. Mar. 31, 2016); *Abbott v. Lockheed Martin Corp.*, No. 06- 701, 2015 U.S. Dist. LEXIS 93206, *7 (S.D. Ill. July 17, 2015); *Will v. General Dynamics Corp.*, No. 06-698, 2010 U.S. Dist. LEXIS 123349, *7–8 (S.D. Ill. Nov. 22, 2010). The Court should award the same percentage here.

While the Court is not required to compare or cross-check the contingency fee award against a "lodestar" fee, Class Counsel's requested percentage fee is ***less than one-third*** of its lodestar fee, thus leaving no doubt as to reasonableness of the contingency fee amount requested here. Moreover, the requested contingency fee percentage does not take into account the additional time Class Counsel will expend in bringing this case to a final conclusion and the additional work monitoring Defendants' compliance with the nonmonetary terms for three more years. For these reasons, the Court should award Class Counsel a contingency fee amount of $3,166,666 (one-third of the monetary recovery). This Court should also award a reimbursement of Class Counsel's reasonable expenses of $525,568.08 and grant case contribution awards to each of the Class Representatives.

BACKGROUND

On July 1, 2020, Plaintiffs brought this action on behalf of the Astellas US Retirement and Savings Plan ("Plan") against Astellas US LLC, The Board of Directors of Astellas US LLC, The Astellas Retirement Plan Administrative Committee, and AON Investments USA, Inc. (fka AON Hewitt Investment Consulting, Inc.)("Aon") ("Defendants") for alleged violations of the Employee Retirement Income Security Act of 1974. Doc. 1. Broadly stated, Plaintiffs alleged that Defendants breached their fiduciary duties by causing the Plan to suffer millions of dollars

in losses resulting from Defendants' retention of Aon as a discretionary fiduciary and the inclusion and retention of Aon's proprietary collective investment trusts in the Plan. *Id.*

For over three years, this case was extensively litigated with substantial discovery and motion practice, including dismissal motions, discovery motions, and class certification. On February 10, 2022, the Court certified this matter as a class action. Doc. 169. In that same class certification order, the Court appointed individuals to serve as class representatives and appointed the law firm of Schlichter Bogard LLP as Class Counsel. *Id*.

This case was set for trial on July 17, 2023. Doc. 190. Leading up to trial, after several months of arm's-length negotiations, the Parties reached a Settlement. As part of the Settlement, and contemporaneous with the parties' request that the Court preliminarily approve the Settlement, the parties agreed to a Settlement Class for settlement purposes only. The Settlement Class is defined as:

> All persons who participated in the Plan at any time during the Class Period, including any Beneficiary of a deceased person who participated in the Plan at any time during the Class Period, and any Alternate Payee of a person subject to a Qualified Domestic Relations Order who participated in the Plan at any time during the Class Period. Excluded from the Settlement Class are each of the individual members of the Committee during the Class Period.

Doc. 231.

On June 29, 2023, the Court preliminarily approved the Settlement and modified the class definition as stated above for settlement purposes only. Doc. 231.

ARGUMENT

Class Counsel is entitled to a reasonable fee award from the Settlement Fund in an amount that reflects "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692. In both ERISA fee cases and class action settlements that involve a common fund recovery, the appropriate

market rate for an award of attorneys' fees is a one-third percentage of the recovery. In this case, Class Counsel achieved an incredible result for the Settlement Class by obtaining a settlement involving a significant monetary common fund and beneficial nonmonetary, affirmative relief. By undertaking this litigation on a contingency fee basis, Class Counsel bore the tremendous risk of not only a non-recovery, but also not being reimbursed for the substantial costs incurred in advancing the litigation. A one-third percentage is often awarded in settlements such as this. A lodestar cross-check analysis, though not necessary in the Seventh Circuit, leaves no doubt that Class Counsel's requested fee is reasonable.

I. Class Counsel's requested fee is a reasonable "market price" that takes into account the substantial risk of non-payment and the exceptional results achieved for the Settlement Class.

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed.R.Civ.P. 23(h). The award of attorneys' fees and costs in this case is authorized by both the common fund doctrine, *Boeing*, 444 U.S. at 478, Class Counsel's agreements with the Class Representatives, and per the terms of the Settlement Agreement. Doc. 225-1 at 5, 23 (§§2.29, 7.1). *See Levitt v. Southwest Airlines Co. (In re Sw. Airlines Voucher Litig.),* 898 F.3d 740, 745–747 (7th Cir. 2018). In common fund cases, "the measure of what is reasonable is what an attorney would receive from a paying client in a similar case." *Montgomery v. Aetna Plywood, Inc*., 231 F.3d 399, 408 (7th Cir. 2000); *In re Cont'l Ill. Sec. Litig*., 962 F.2d 566, 572 (7th Cir. 1992). The Court's objective is to "estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed)." *In re Synthroid Marketing Litig*., 264 F.3d 712, 718 (7th Cir. 2001). The fee award must reflect "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692. "When the 'prevailing' method

of compensating lawyers for 'similar services' is a contingent fee, then the contingent fee *is* the 'market rate.'" *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986)(emphasis in original).

A. The market for an attorney fee structure in a common fund settlement is a contingent fee arrangement.

In most class actions, the prevailing, if not exclusive, method of compensating class counsel is by a contingent fee arrangement: "The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent." *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 565 (7th Cir. 1994)(*"Florin I"*)(quoting *In re Cont'l*, 962 F.2d at 569); *Gaskill*, 160 F.3d at 362. In ERISA fiduciary breach litigation such as this matter, while the recovery for the class as a whole may be large, individual class members' past damages may be relatively small. Thus, no class member has an incentive to finance complex, costly, and potentially protracted litigation on an hourly basis. *Carnegie v. Household Int'l, Inc*., 376 F.3d 656, 661 (7th Cir. 2004). Only through retaining counsel on a contingent fee arrangement can the rights of 401(k) participants be advanced and potentially vindicated. Here, each Class Representative signed a one-third contingency fee contract plus costs with Class Counsel, with the understanding that the claims would be brought as a class action. See Declaration of Jerome J. Schlichter ("Schlichter Decl.") at ¶26. Indeed, for ERISA class actions such as the one here, a contingent fee arrangement is the market. Schlichter Decl. at ¶29. For these reasons, the appropriate market for determining Class Counsel's fee is a contingency fee arrangement.

B. A fee of one-third of the recovery from the common fund is the standard market rate for a contingency fee arrangement.

Given that Class Counsel's fees for its services in this case are determined on a contingency basis, the question before the Court is simply whether Class Counsel's requested fee of one-third of the monetary recovery is a reasonable market rate. See *Synthroid*, 264 F.3d at 718. The market rate "depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its

performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *Sutton*, 504 F.3d at 693 (quoting *Synthroid*, 264 F.3d at 721). Courts may also consider factors such as actual fee contracts in similar litigation and data on fees awarded in other class actions in the jurisdiction. *Taubenfeld v. AON Corp*., 415 F.3d 597, 599–600 (7th Cir. 2005). These factors all support the requested award.

1. Having *created* the field of protecting 401(k) participants from ERISA breaches through class action ERISA litigation, Class Counsel took on enormous risk of nonpayment.

"[T]he higher the risk of failure the larger the contingent fee that a client would have to pay in an arm's length negotiation with the lawyer in advance of the suit." *In re Trans Union Corp. Privacy Litig*., 629 F.3d 741, 746 (7th Cir. 2011). ERISA litigation involves substantial risk of loss: "Plaintiffs claiming a breach of fiduciary duty do not often succeed." *Florin v. Nationsbank of Ga., N.A*., 60 F.3d 1245, 1248 (7th Cir. 1995)("*Florin II*").

Before Class Counsel filed the first cases in 2006, there had never been a case brought alleging excessive fees and imprudent investment selection in a 401(k) plan either by private litigation or by the Department of Labor, which is the enforcement agency. Schlichter Decl. at ¶19. In those early cases, the Seventh Circuit rejected ERISA fiduciary breach claims involving allegations such as those here—including two cases handled by Class Counsel. *Hecker v. Deere & Co*., 556 F.3d 575 (7th Cir. 2009); *Loomis v. Exelon Corp*., 658 F.3d 667 (7th Cir. 2011); *see Howell v. Motorola, Inc*., 633 F.3d 552 (7th Cir. 2011)(affirming summary judgment for plan fiduciaries); *Jenkins v. Yager,* 444 F.3d 916, 926 (7th Cir. 2006)(same); see also *Divane v. Northwestern Univ*., No. 16-8157, 2018 U.S. Dist. LEXIS 87645, *20–28 (N.D. Ill. May 25, 2018). Although Class Counsel maintains that their claims in this case are distinguishable, there was a risk that Class Counsel "would receive no fees at all" by pursuing this action. *Trans Union*, 629 F.3d at 746. In this case, this Court noted that Plaintiffs' claims were far from certain

to prevail, and thus the risk of ultimate failure at the District Court level was real. Doc. 169 at 9. "Such uncertainty increases the risk an attorney faces." *Florin II*, 60 F.3d at 1248. These factors presented a significant risk of nonpayment, which mandates an appropriate contingent fee percentage. *Trans Union*, 629 F.3d at 746; *Silverman v. Motorola Solutions, Inc*., 739 F.3d 956, 958 (7th Cir. 2013). This risk was not uncommon. Among the indicia of the riskiness of this case is the very fact that Class Counsel not only created the field but has been virtually alone until recently in their willingness to handle and invest massive resources in ERISA 401(k) cases of this scope. Schlichter Decl. ¶25. "Lack of competition not only implies a higher fee but also suggests that most members of the securities bar saw this litigation as too risky for their practices." *Silverman*, 739 F.3d at 958. Class Counsel has been at the forefront of 401(k) ERISA class action litigation since 2006, as neither private attorneys nor the Department of Labor had brought similar ERISA claims against large 401(k) plan sponsors before that time. Class Counsel's track record of success and willingness to pursue such claims despite significant risk of nonpayment remains unmatched.

2. Resolving the case required a tremendous amount of work.

A second factor in establishing an appropriate market rate is the amount of work necessary to resolve the litigation. *Sutton*, 504 F.3d at 693. The work required to resolve this case was substantial. First, Class Counsel spent a substantial number of hours investigating this case and developing the case claims and theories. See Declaration of Troy Doles ("Doles Decl.") at ¶5. Next, Class Counsel spent hundreds of hours drafting the complaint and fending off the various challenges made by Defendants at the pleadings stages. *Id*. at ¶¶7−9. Thousands of additional hours were spent briefing motions, obtaining and analyzing discovery, and conducting depositions. During this time, the parties were also engaged in class certification battles. *Id*. at ¶¶10−20.

Class Counsel defended six depositions of the Named Plaintiffs and took fifteen lengthy depositions of Defendant fact witnesses. *Id*. at ¶15. During the written and produced documents portion of discovery in this case, Class Counsel thoroughly analyzed and reviewed in great detail more than 50,000 documents. *Id*. at ¶12. The parties also disclosed and produced extensive, detailed reports of seven expert witnesses, three for Plaintiffs and four for Defendants. *Id.* at ¶¶17–18. Class Counsel deposed those Defense expert witnesses and defended their own experts at depositions. *Id.* The case was set for trial to begin on July 17, 2023. Doc. 190. Just weeks prior to the trial date, and after several months of arm's length negotiation, the Parties reached the Settlement. In total, Class Counsel spent over 9,000 hours on this case. Doles Decl. ¶5. Needless to say, with over 9,000 hours devoted to this litigation alone, Class Counsel easily devoted more than enough effort and expended more than enough resources to warrant the requested fee.

3. The Class Representatives agreed to contracts with Class Counsel providing for a contingency fee of one-third of any recovery.

Courts may consider actual fee contracts in similar litigation as evidence of the market rate. *Taubenfeld*, 415 F.3d at 599. Prior to joining this case, each Class Representative signed agreements with Class Counsel calling for a one-third fee, plus costs. Schlichter Decl. ¶26. In other 401(k) fee cases brought by Class Counsel, the plaintiffs also signed similar agreements calling for a one-third fee. *Id.* Because Class Counsel is the nationwide leader in 401(k) fee litigation, the rates agreed to by their clients are significant evidence of the market rate.

4. Courts in other cases routinely award one-third of the recovery.

The Seventh Circuit has endorsed the use of data on fee awards in other cases as evidence of an appropriate contingency fee market rate. *Taubenfeld*, 415 F.3d at 600. "Substantial empirical

evidence indicates that a one-third fee is a common benchmark in private contingency fee cases." Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. of Empirical Legal Studies 27, 35 (2004). Courts throughout the Seventh Circuit routinely conclude "that a one-third contingency fee is standard." *City of Greenville v. Syngenta Crop Prot., Inc*., 904 F. Supp. 2d 902, 909 (S.D. Ill. 2012); *Will*, 2010 U.S. Dist. LEXIS 123349, *7–8 ("Where the market for legal services in a class action is only for contingency fee agreements, and there is a substantial risk of nonpayment for the attorneys, the normal rate of compensation in the market is 33.33% of the common fund recovered."); *Teamsters Local Union No. 604 v. Inter–Rail Transp., Inc*., No. 02-1109-DRH, 2004 U.S. Dist. LEXIS 6363, 3 (S.D. Ill. Mar. 19, 2004)("In this Circuit, a fee award of thirty-three and one-third (33 1/3%) in a class action in [sic] not uncommon").[1]

As for ERISA fee litigation specifically, a one-third contingency fee has been consistently approved in District Courts in this Circuit, including the Southern, Central, and Northern Districts of Illinois, and the Southern District of Indiana. In each of their nine settlements of 401(k) cases within the Seventh Circuit, Class Counsel was awarded one-third of the settlements' common fund recovery. *Bell*, 2019 U.S. Dist. LEXIS 150302; *Ramsey*, No. 18-1099- NJR, Doc. 27; *Spano,* 2016 U.S. Dist. LEXIS 161078, *7; *Abbott,* 2015 U.S. Dist. LEXIS 93206, *7; *Beesley v. Int'l Paper Co.*, No. 06-703-DRH, 2014 U.S. Dist. LEXIS 12037 (S.D. Ill. Jan. 31, 2014); *Nolte v. Cigna Corp.*, No. 07-2046-HAB, 2013 U.S. Dist. LEXIS 184622, *3–4 (C.D. Ill. Oct. 15, 2013); *Martin v. Caterpillar, Inc.*, No. 07-1009, 2010 U.S. Dist. LEXIS 145111 (C.D.

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[1] Even higher rates are common. *Gaskill*, 160 F.3d at 363 (affirming award of 38%); *Mansfield v. Air Line Pilots Ass'n Int'l*, No. 06-6869, 2009 U.S. Dist. LEXIS 132346, *13 (N.D. Ill. Dec. 14, 2009) ("a fee award of 35% of the aggregate settlement fund is consistent with awards in similarly complex cases"); *Meyenburg v. Exxon Mobil Corp*., No. 05-15-DGW, 2006 U.S. Dist. LEXIS 52962, *5 (S.D. Ill. July 31, 2006)("33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation").

Ill. Sept. 10, 2010); *Will*, 2010 U.S. Dist. LEXIS 123349, *7–8; *George v. Kraft Foods Global, Inc.*, No. 07-1713, 2012 U.S. Dist. LEXIS 166816, *2 (N.D. Ill. June 26, 2012); see also Schlichter Decl. ¶29. These fee awards represent undeniable recognition that one-third of the monetary recovery was and is the appropriate market rate in cases of this type. This Court should reach the same conclusion here. The support for a one-third award does not end there. Indeed, Class Counsel has obtained court-approved awards of this rate throughout the country on numerous occasions. Schlichter Decl. ¶29.

The reasonableness of the one-third is further confirmed given that this percentage is based solely on the amount of the monetary Settlement Fund and not the additional, valuable affirmative relief provided in the Settlement. Indeed, when evaluating a fee request, courts "must also consider the overall benefit to the class, including non- monetary benefits." *Spano,* 2016 U.S. Dist. LEXIS 151078, *5 (citing Manual for Complex Litig., Fourth, §21.71, at 337 (2004)); *Beesley*, 2014 U.S. Dist. LEXIS 12037, *5 (same); Principles of the Law of Aggregate Litigation, A.L.I. (May 20, 2009), §3.13(b)("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*.")(emphasis added); *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"). Here, the parties engaged in negotiations *after* the agreement on money was reached because Class Counsel insisted on nonmonetary relief as well. Doc. 225-1 at 26 (Article 10). Class Counsel was unquestionably successful in those efforts. As part of the Settlement, and with the assistance of an independent consultant, the Astellas Defendants will conduct a request for proposal ("RFP") for the provision of Plan investment advisory services. Given the allegations

and claims in this case, this relief has the potential of yielding significant value to the Plan through potential fee reductions and/or improved investment options. Further, Astellas Defendants will instruct the Plan's recordkeeper that for the three-year period following the Settlement Effective Date, the recordkeeper may not use information received as a result of providing services to the Plan and/or the Plan participants to solicit current Plan participants to purchase non-Plan products and services. While this non-monetary relief is unquestionably difficult to value, this relief will undoubtedly benefit the Plan for years to come.

Significantly, what can be valued is that the settlement provides for current participants to receive their payments as contributions to their Plan accounts tax-deferred. Doc. 225-01 at 17 (§6.2.1). The benefit of tax deferral over 20 years yields an additional 18.6%. Peter Brady, *Marginal Tax Rates and the Benefits of Tax Deferral*, Investment Company Institute (Sept. 17, 2013).[2] With this additional value, Class Counsel's fee request is **only 28%** of the Settlement Fund. Unquestionably, this percentage of fee requested is reasonable.

C. A lodestar cross-check confirms that the fee is reasonable.

As noted above, in settlements involving a common fund, the Seventh Circuit requires the aforementioned "market-based approach" to be followed when awarding attorneys' fees. *Sutton*, 504 F.3d at 692. As explained in detail above, the most common method of determining a market-based fee in an ERISA class action common fund settlement is the percentage method. That is the approach that should be followed here given that the percentage approach best approximates the market rate at the time of the commencement of the action. *Synthroid*, 264 F.3d at 718. Nevertheless, given that the Court has discretion in selecting the method of arriving at a market-based fee, Class Counsel's requested one-third of the common fund is amply justified

[2] Available at http://www.ici.org/viewpoints/view_13_marginal_tax_and_deferral.

under the lodestar method. Indeed, the lodestar comparison reveals that the Class Counsel's requested contingency fee from the Settlement Fund **is less than one-third** of its lodestar rate.

To determine attorneys' fees under the lodestar method, the first step is to "multiply[] a reasonable hourly rate by the number of hours reasonably expended." *Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010)(citing *Hensley v. Eckerhart*, 461 U.S. 424, 433–37 (1983)). A reasonable hourly rate should be in line with the prevailing rate in the "community 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); see also *Denius v. Dunlap*, 330 F.3d 919, 930 (7th Cir. 2003).

Here, the relevant community is a national community. ERISA litigation involves a national market because the number of plaintiff's firms who have the necessary expertise and are willing to take the risk and devote the resources to litigate complex ERISA fiduciary breach claims is incredibly small. *Beesley*, 2014 U.S. Dist. LEXIS 12037, *11 ("Schlichter, Bogard & Denton are one of the few firms handling ERISA class actions such as this."); *Abbott,* 2015 U.S. Dist. LEXIS 93206, *11–12; Schlichter Decl. ¶19. Further, Class Counsel has brought ERISA class actions in district courts within the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. Schlichter Decl. ¶18. Thus, the relevant community for determining the hourly market rate for ERISA class actions "is a national one." *Beesley*, 2014 U.S. Dist. LEXIS 12037, 11; see also *Tussey v. ABB, Inc*., No. 06-4305, 2012 U.S. Dist. LEXIS 157428, *9–10 (W.D. Mo. Nov. 2, 2012)(" complex ERISA litigation involves a national standard"); *Spano*, 2016 U.S. Dist. LEXIS 161078, *11 n.2. Similarly, all of these case were defended by national defense firms with extensive ERISA expertise.

In this matter, Class Counsel spent 9,385.4 hours of attorney time and 2,341.3 hours of non-

attorney time on this matter to date for a total of 11,726.7 hours. See Doles Decl. at ¶5. Although Class Counsel works exclusively on a contingent fee basis, within the last year another federal court found that Class Counsel's submitted hourly rates were reasonable national hourly rates for Class Counsel's time. *Ford v. Takeda Pharm. U.S.A., Inc.,* No. 21-10090, 2023 U.S. Dist. LEXIS 93286 (D. Mass. Mar. 31, 2023) (finding that the reasonable hourly rate was $1,370/hour for attorneys with at least 25 years of experience, $1,165/hour for attorneys with 15–24 years of experience, $840/hour for attorneys with 5–14 years of experience, $635/hour for attorneys with 2–4 years of experience, $425 for paralegals and law clerks); Doles Decl. at ¶4. Based on these 2023 rates and actual hours incurred to date, a straight lodestar fee calculation is $9,730,467. Doles Decl. at ¶5. This lodestar amount is **over three times** the requested contingency fee, thus assuring this Court that Class Counsel's request is reasonable.[3]

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

Reimbursement of $525,586.08 in litigation expenses that Class Counsel advanced in prosecuting this case is warranted. Fed.R.Civ.P. 23(h). A cost award is authorized by both the parties' Settlement Agreement and the common fund doctrine. Doc. 7-1 at 4, 24 (§§2.4, 7.1); *Mills v. Elec. Auto-Lite Co*., 396 U.S. 375, 391–92 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166–67 (1939). "It is well established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses". *Spano*, 2016 U.S. Dist. LEXIS 161078, *11 (quoting *Beesley*, 2014 U.S. Dist. LEXIS 12037, *12). Costs should be awarded based on the types of "expenses private clients in large class actions (auctions and otherwise) pay." *Synthroid*, 264 F.3d at 722; *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). Reimbursable expenses include expert fees, travel, long-distance and conference telephone calls,

[3] This lodestar does not even take into account a multiplier which would increase the lodestar amount. *Harman v. Lyphomed, Inc*., 945 F.2d 969, 974 (7th Cir. 1991).

postage, delivery services, and computerized legal research. Conte, *supra*, § 2:19; *Spano*, 2016 U.S. Dist. LEXIS 161078, *11.

After a thorough review of Class Counsel's necessary expenses incurred in this litigation, Class Counsel requests the reimbursement of $525,586.08. This final expense amount is significantly below the anticipated submitted expense of $650,000. Doc. 368 at 6. 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 & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: an Empirical Study*, 1 J. of Empirical Legal Studies 27, 70 (2004). Here, the total amount requested is 5% of the monetary recovery, well within the range to be considered reasonable. Moreover, this percentage would be below the average if the value of the nonmonetary relief were included.

As noted in the Doles Declaration, a significant portion of these requested fees were spent on necessary and vital expert witness fees. Doles Decl. at ¶24. These expenses are costs that are routinely reimbursed by paying clients and should be reimbursed here. Doles Decl. at ¶25 (itemizing expenses).

III. The Court should approve contribution awards for the Class Representatives.

In coming forward to initiate this action, the Class Representatives were willing to and did devote significant personal time pursuing these claims on behalf of their fellow Plan participants. In stepping forward, Class Representatives exposed themselves to potential financial and career risk. *Hecker* 556 F.3d at 591. By suing their current or former employer, each Class Representative risked "alienation from employees or peers". *Beesley*, 2014 U.S. Dist. LEXIS 12037, *13. That risk should be acknowledged and rewarded. In terms of their involvement, each Class Representative remained in frequent contact with Class Counsel throughout this litigation,

providing pre-filing investigation assistance, attending depositions, and preparing for trial. Doles Decl. at ¶8. Given the length of this case, an award of $20,000 for each Class Representative is well within the range of other awards. See, e.g., *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)(upholding award of $25,000); *Beesley*, 2014 U.S. Dist. LEXIS 12037, *8 (awarding $25,000 to each of the named plaintiffs); *Nolte*, 2013 U.S. Dist. LEXIS 184622, *14–15 (same); *Spano*, 2016 U.S. Dist. LEXIS 161078, *11 (same). The contribution awards to the Class Representatives are appropriate and reasonable.

CONCLUSION

For these reasons, Plaintiffs request that the Court grant their motion.

September 1, 2023

Respectfully submitted,

SCHLICHTER BOGARD LLP

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on September 1, 2023.

/s/ Troy A. Doles

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL WACHALA, et al., *Plaintiffs*, v. ASTELLAS US LLC, et al., *Defendants*.	Case No. 1:20-cv-03882 Hon. Martha M. Pacold CLASS ACTION

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 LLP, counsel for Plaintiffs in this case. This declaration is submitted in support of Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Case Contribution Awards for Class Representatives. 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, Seventh, Eighth, Ninth, and Tenth 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 45 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) 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 after 12-and-a-half 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 numerous cases involving claims of fiduciary breaches in large 401(k) and 403(b) plans. *See e.g. Turner v. Schneider Elec. Holdings, LLC*, No. 20-11006, Doc 212 (D. Mass May 5, 2023); *Ford v. Takeda Pharms. U.S.A., Inc.,* No. 21-11090, Doc. 101 (D. Mass. Nov. 21, 2022); *Ahmed v. Liberty Mutual Group, Inc., et al.,* No. 20-30056, Doc. 72 (D. Mass. June 8, 2023); *Williams v. Centerra Group, LLC*, No. 20-4220, Doc. 175 (D.S.C. June 20, 2023); *Binder v. PPL, Corp., et al.*, No. 22-133, Doc. 60 (E.D. Pa. May 5, 2023); *Mills v. Molina Healthcare, Inc., et al.*, No. 22-1813, Doc. 127 (C.D. Cal. Jan. 17,

2023); *Wachala v. Astellas US LLC*, No. 20-3882, 2022 U.S. Dist. LEXIS 24052 (N.D. Ill. Feb. 10, 2022); *Lauderdale v. NFP Ret., Inc.*, No. 21-301, 2022 U.S. Dist. LEXIS 95857 (C.D. Cal. Feb. 16, 2022); *Sweda v. Univ. of Pa.*, No. 16-4329, 2021 U.S. Dist. LEXIS 121336 (E.D. Pa. June 28, 2021); *Munro v. Univ. of S. Calif.*, No. 16-6191, 2019 U.S. Dist. LEXIS 226682 (C.D. Cal. Dec. 20, 2019); *Vellali v. Yale Univ.*, 333 F.R.D. 10 (D. Conn. 2019); *Kelly v. The Johns Hopkins Univ.*, No. 16-2835, Doc. 87 (D. Md. Aug. 16, 2019); *Bell v. Pension Comm. of ATH Holding Co., LLC*, No. 15-2062, 2019 U.S. Dist. LEXIS 11369 (S.D. Ind. Jan. 24, 2019); *Cunningham v. Cornell Univ.*, No. 16-6525, 2019 U.S. Dist. LEXIS 10357 (S.D. N.Y. Jan. 22, 2019); *Cassell v. Vanderbilt Univ.*, No. 16-2086, 2018 U.S. Dist. LEXIS 181850 (M.D. Tenn. Oct. 23, 2018); *Cates v. Trs. of Columbia Univ.*, No. 16-6524, Doc. 218 (S.D. N.Y. Nov. 15, 2018); *Henderson v. Emory Univ.*, No. 16-2920, 2018 U.S. Dist. LEXIS 180349 (N.D. Ga. Sept. 13, 2018); *Tracey v. MIT*, No. 16-11620, 2018 U.S. Dist. LEXIS 179945 (D. Mass. Oct. 19, 2018); *Ramsey v. Philips N. Am.*, No. 18-1099, Doc. 19 (S.D. Ill. June 12, 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, 20 (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, 405 (S.D. Ill. 2012),

and *Abbott*, No. 06-701, Doc. 403 at 3–6, 12 (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, 6–7 (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, 6 (N.D. Ill. Feb. 29, 2012)(George II); *In re Northrop Grumman Corp. ERISA Litig*., No. 06-6213, 2011 U.S. 94451, 71 (C.D. Cal. Mar. 29, 2011); *Will v. General Dynamics Corp*., No. 06-698, 2010 U.S. Dist. LEXIS 95630, 5–6 (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, 20, 29 (C.D. Cal. June 30, 2009); *George v. Kraft Foods Global Inc*., 251 F.R.D. 338, 351–52 (N.D. Ill. 2008)(George I); *Taylor v. United Tech. Corp*., No. 06-1494, 2008 U.S. Dist. LEXIS 43655, 15 (D. Conn. June 3, 2008); *Kanawi v. Bechtel Corp*., 254 F.R.D. 102, 111–12 (N.D. Cal. 2008); *Tussey v. ABB Inc*., No. 06-4305, 2007 U.S. Dist. LEXIS 88668, 32 (W.D. Mo. Dec. 3, 2007); *Loomis v. Exelon Corp*., No. 06-4900, 2007 U.S. Dist. LEXIS 46893, 11 (N.D. Ill. June 26, 2007).

5. My work in plaintiffs' class action cases has been noted by federal judges. U.S. District 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 Cent. Gulf R.R.*, No. 81-3006 (S.D. Ill. 1993). District Judge David R. Herndon wrote, regarding my 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, *Mister v. Illinois Central Gulf R.R.*, No. 81-3006 (S.D. Ill. 1993).

6. 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 *Ford v. Takeda Pharms. U.S.A., Inc.*, U.S. District Court Judge William G. Young acknowledged that Schlichter Bogard "is a recognized leader in ERISA excessive fee litigation, having pioneered the field." No. 21-10090, 2023 U.S. Dist. LEXIS 93286, at *4 (D. Mass. Mar. 31, 2023). Further, in *Cates v. Trs. of Columbia University*, U.S. District Judge George B. Daniels recognized and repeated several accolades my firm had received from other judges:

> Class Counsel is not only highly experienced in handing ERISA class actions involving 401(k) and 403(b) plans, but "pioneer[ed] . . . the field of retirement plan litigation." Class Counsel is the "preeminent firm" in excessive fee litigation, having "achieved unparalleled results on behalf of its clients" in the face of "enormous risks." Class Counsel are "experts in ERISA litigation," and "highly experienced." The firm also obtained a significant victory in the Supreme Court, which in 2015 unanimously held that an ERISA fiduciary has a continuing duty to monitor plan investments and remove imprudent ones. Courts across the country have recognized the reputation, skill, and determination of Class Counsel in pursuing relief on behalf of retirement plan participants. Recently, Judge Blackburn of the District of Colorado wrote that Class Counsel "have shown their ability by achieving the excellent result obtained for the class" and "admirably served as private attorneys general in this instance, fulfilling one of the purposes of ERISA.

Cates v. Trs. of Columbia Univ., No. 16-06524, 2021 U.S. Dist. LEXIS 200890, at *13–14 (S.D. N.Y. Oct. 18, 2021) (internal citations omitted).

8. In *Sweda v. University of Pennsylvania*, No. 16-4329, 2021 U.S. Dist. LEXIS 121336, at *10 (E.D. Pa. June 28, 2021), U.S. District Judge Gene E.K. Pratter, appointing the firm class counsel, wrote that the firm's work "has been acknowledged as leading to fee reductions in the

industry that total almost $2.8 billion in annual savings for American workers and retirees." *Id.* (cleaned up). Numerous other cases have noted this impact as well. *See, e.g.*, *Kelly v. Johns Hopkins Univ.*, No. 16-2835, 2020 U.S. Dist. LEXIS 14772, at *12 (D. Md. Jan. 28, 2020); *Spano v. Boeing Co.*, No. 06-743, 2016 U.S. Dist. LEXIS 161078, at *9 (S.D. Ill. Mar. 31, 2016); *Beesley v. Int'l Paper Co.*, No. 06-703, 2014 U.S. Dist. LEXIS 12037, at *10 (S.D. Ill. Jan. 31, 2014) (noting savings approaching "$2.8 billion in annual savings for American workers and retirees").

9. U.S. District Judge Michael Ponsor has also commended this firm's "extraordinary resourcefulness, skill, efficiency, and determination" crediting the "exceptional result in the[e] case" to "Class Counsel's unique expertise and outstanding effort." *Gordan*, 2016 U.S. Dist. LEXIS 195935, at *7–8.

10. U.S. District Judge Tanya Walton Pratt said of the firm:

> For over a decade, Class Counsel, in pioneering a new area of the law, have continuously demonstrated an unwavering and zealous commitment to represent American employees and retirees seeking to recover losses incurred due to alleged retirement plan mismanagement. Jerome Schlichter and Schlichter Bogard & Denton actually created the field of 401(k) excessive fee litigation which did not exist before. Before Jerome Schlichter and the firm of Schlichter Bogard & Denton filed a series of cases in 2006 regarding excessive fees in 401(k) plans, there had never been a case brought for excessive fees in a 401(k) plan by any lawyer in the United States. Class Counsel is firmly established as the "pioneer and the leader in the field of retirement Plan litigation."

Bell v. Pension Comm. Of ATH Holding Co. LLC, No. 15-02062, 2019 U.S. Dist. LEXIS 150302, at *3–4 (S.D. Ind. Sept. 4, 2019) (internal citations omitted).

11. United States District Judge Nancy Rosenstengel emphasized the firm's impact on the Department of Labor and the retirement industry:

> The law firm Schlichter Bogard & Denton has significantly improved 401(k) plans across the country by bringing cases such as this one, which

> have "educated plan administrators, the Department of Labor, the courts and retirement plan participants about the importance of monitoring recordkeeping fees. 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. Schlichter Bogard & Denton has left an indelible mark on the 401(k) industry by bringing comprehensive changes to fiduciary practices in order to ensure that employees and retirees have the opportunity to save for retirement through prudently administered retirement programs."

Ramsey v. Philips N. Am. LLC, No. 18-1099, 2018 U.S. Dist. LEXIS 22667, at *9–10 (S. D. Ill. Oct. 18, 2018).

12. Judge Rosenstengel, considering the settlement in *Spano v. Boeing Co.,* also commented that "Schlichter, Bogard & Denton added great value to the Class throughout the litigation through the persistence and skill of their attorneys." No. 06-743, 2016 U.S. Dist. LEXIS 161078, at *9 (S. D. Ill. Mar. 31, 2016).

13. In *Beesley v. International Paper*, an ERISA excessive fee case similar to this one, Judge 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 U.S. Dist. LEXIS 12037 at 8 (S.D. Ill. Jan. 31, 2014). Similarly, in *Abbott v. Lockheed Martin*, 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.*, 2015 U.S. Dist. LEXIS 93206, at *9 (S.D. Ill. July 17, 2015).

14. United States District Judge Nanette Laughrey, of the Western District of Missouri, emphasized the significant contribution that Plaintiffs' attorneys have made to ERISA litigation, including educating the Department of Labor and federal courts about the importance of monitoring fees in retirement plans:

> Of special importance is the significant, national contribution made by the Plaintiffs whose litigation clarified ERISA standards in the context of investment fees. The litigation educated plan administrators, the Department of Labor, the courts and retirement plan participants about the importance of monitoring recordkeeping fees and separating a fiduciary's corporate interest from its fiduciary obligations.

Tussey v. ABB, Inc., No. 06-4305, 2015 U.S. Dist. LEXIS 164818 at 7–8 (W.D. Mo. Dec. 9, 2015).

15. U.S. District Judge Harold Baker, in *Nolte v. Cigna*, commented that Schlichter, Bogard 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 U.S. Dist. LEXIS 184622, at *8 (C.D. Ill. Oct. 15, 2013).

16. In *Will v. General Dynamics*, another ERISA excessive fee case, Judge Patrick Murphy, U.S. District Judge for the Southern District of Illinois, found that the 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. Gen. Dynamics Corp.*, No. 06-698, 2010 U.S. Dist. LEXIS 123349, at *9 (S.D. Ill. Nov. 22, 2010).

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

18. 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. My firm has filed these cases in numerous judicial districts throughout the United States, including districts within the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.

19. Our firm pioneered 401(k) excessive fee cases. Before we filed the first cases in 2006, and to my knowledge, no law firm in the United States had ever filed such a case, and the Department of Labor, which regulates 401(k) plans, had never brought an excessive fee case or imprudent investment selection case. The firm handled the first full trial of such a case, resulting in a judgment for the plaintiffs that was affirmed in part by the Eighth Circuit. *Tussey v. ABB, Inc.*, No. 06-4305, 2012 U.S. Dist. LEXIS 45240 (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 U.S. Dist. LEXIS 157428, at *9–10 (W.D. Mo. Nov. 2, 2012), *rev'd on other grounds*, 746 F.3d 327 (8th Cir. 2014) (citations omitted).

20. 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).

21. My firm also successfully petitioned the United States Supreme Court in the first ERISA 401(k) excessive fee case taken by the Supreme Court in *Tibble v. Edison International*. 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 401(k) litigation. Sitting *en banc*, ten judges of the Ninth Circuit on remand unanimously vacated the district court's summary judgment ruling and remanded to the district court to determine whether the defendants violated their continuing duty to monitor the 401(k) plan's investments. *Tibble v. Edison Int'l*, 843 F.3d 1187, 1199 (9th Cir. 2016). 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 U.S. Dist. LEXIS 130806 (C.D. Cal. Aug. 16, 2017); *Tibble,* Docs. 570, 572.

22. The non-profit equivalent of a 401(k) plan is a 403(b) plan. After close to a decade of handling excessive 401(k) fee cases, in 2016, my firm and I filed similar claims for excessive fees and imprudent investments involving large 403(b) plans sponsored by private universities, another new, ground-breaking area of law that no other firm had then brought.

23. The firm's work in the 403(b) space again brought it to the Supreme Court, this time in *Hughes v. Northwestern Univ.*, 142 S. Ct. 737 (2022). For the second time, the Supreme Court agreed with us, reversing a dismissal that had been upheld on appeal, and did so unanimously, holding that the inclusion of prudent options in a plan does not offset the inclusion of imprudent options, and that a plan sponsor must monitor each fund in a plan and remove those

that are imprudent. *Id.* No law firm has anything like this record in both 401(k) and 403(b) litigation.

24. Prior to the filing this lawsuit, my firm spent months researching the Astellas US Retirement and Savings Plan, investigating claims, and consulting with experts in the field of 401(k) administration and investment management. On July 1, 2020, we filed this action. The complaint contains detailed allegations laying out a variety of fiduciary breaches and prohibited transactions.

25. As a practical matter, litigants such as Michael Wachala, Mary Beth Preuss, Patricia Walsh, Sade Adeneye, Michael Bickle, and Jacqueline Gough could not afford to pursue litigation against well-funded fiduciaries of a multi-billion dollar plan sponsored by a large employer such as Astellas 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.

26. The contingency fee agreements entered into between my firm and each of the named Plaintiffs 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.

27. These kinds of cases involve tremendous risk, require 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.

28. A law firm that brings a putative class action such as this must be prepared to finance the case through a trial and appeals, all at substantial expense. 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. Our firm expended over $2,000,000 in expenses by the conclusion of the trial therein, and carried them until recovery 12 years after litigation began.

29. Based on my experience, the market for experienced and competent lawyers willing to pursue 401(k) ERISA 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 401(k) ERISA fee cases in numerous Federal District Courts.

- *Sweda v. Univ. of Pa.*, No. 16-4329, 2021 U.S. Dist. LEXIS 239990 (E.D. Pa. Dec. 14, 2021);
- *Cates v. Trs. of Columbia Univ.*, No. 16-06524, 2021 U.S. Dist. LEXIS 200890 (S.D. N.Y. Oct. 18, 2021);
- *Pledger v. Reliance Tr. Co.*, No. 15-4444, 2021 WL 2253497 (N.D. Ga. Mar. 8, 2021);
- *Henderson v. Emory University*, No. 16-2920, 2020 WL 9848978 (N.D. Ga. Nov. 4, 2020);
- *Marshall v. Northrop Grumman Corp.*, No. 16-6794, 2020 WL 5668935 (C.D. Cal. Sept. 18, 2020);
- *Troudt v. Oracle Corp*, No. 16-00175-REB-SKC, ECF No. 236 (D. Col. July 10, 2020);
- *Kelly v. Johns Hopkins Univ.*, No. 16-2835-GLR, 2020 WL 434473, at *2 (D. Md. Jan. 28, 2020);
- *Tussey v. ABB, Inc.,* No. 06-04305-NKL, ECF No. 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. 16-01044, ECF No. 166 (M.D.N.C. June 24, 2019);
- *Cassell v. Vanderbilt Univ.*, No. 16-02086, ECF No. 174 (M.D. Tenn. Oct. 22, 2019);
- *Bell v. Pension Comm. Of ATH Holding Co., LLC*, No. 15-02062, ECF No. 380 (S.D. Ind. Sept. 4, 2019);
- *Ramsey v. Philips,* No. 18-1099, ECF No. 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).

30. 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.

31. Schlichter Bogard does not bill clients on an hourly basis. However, in March 2023, based on the national market for complex ERISA fiduciary breach litigation, Judge Young of the District of Massachusetts found that a fee rate of up to $1,370 per hour, depending on years of attorney experience, was a reasonable national hourly rate for Class Counsel's time. *Ford v. Takeda Pharm. U.S.A., Inc.,* No. 21-10090, 2023 U.S. Dist. LEXIS 93286 (D. Mass. Mar. 31, 2023) (approving as reasonable at that time a rate of $1,370/hour for attorneys with at least 25 years of experience, $1,165/hour for attorneys with 15–24 years of experience, $840/hour for attorneys with 5–14 years of experience, $635/hour for attorneys with 0–4 years of experience, $425/hour for paralegals and law clerks).

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 1st day of September, 2023, in St. Louis, Missouri.

/s/ Jerome J. Schlichter
Jerome J. Schlichter

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL WACHALA, et al., *Plaintiffs*, v. ASTELLAS US LLC, et al., *Defendants*.	Case No. 1:20-cv-03882 Hon. Martha M. Pacold CLASS ACTION

DECLARATION OF TROY A. DOLES

1. I am a partner at the law firm of Schlichter Bogard LLP. I am one of the attorneys representing Plaintiffs in this matter. This declaration is submitted in support of Plaintiffs' Motion For Attorneys' Fees, Reimbursement Of Expenses, And Case Contributions Awards For Class Representatives.

2. I have been involved in all aspects of this litigation. I am familiar with the facts set forth below and am 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. I am admitted to practice in the United States Supreme Court and numerous district courts across the country. I received my Bachelor of Arts from Indiana University in 1992 and my Juris Doctorate from Saint Louis University in 1996. I have been in the private practice of law for well over 25 years. I have been actively engaged in complex litigation, including class actions, since 1999. I have been

exclusively involved in national ERISA class action cases involving 401(k) plans and other defined contribution plans since 2006.

4. As set forth in the Memorandum in Support of Plaintiffs' Motion, the District of Massachusetts recently approved Schlichter Bogard's hourly rates in confirming the reasonableness of the awarded one-third contingency fee in an ERISA class action. *Ford v. Takeda Pharm. U.S.A., Inc., No. 21-10090, 2023 U.S. Dist. LEXIS 93286 (D. Mass. Mar. 31, 2023).* These hourly rates are as follows: for attorneys with at least 25 years of experience, $1,370. per hour; for attorneys with 15-24 years of experience, $1,165 per hour; for attorneys with 5-14 years of experience, $840 per hour; for attorneys with 0-4 years of experience, $635 per hour; and for paralegals and law clerks, $425 per hour.

5. Over the course of litigation, Class Counsel has expended 9,385.40 attorney hours and 2,341.30 non-attorney hours on this case, for a total attorney and staff expenditure of 11,726.7 hours. The chart below shows the amount of hours spent by attorneys and staff broken down by experience:

Attorneys	Hours	Rate	Total
25 Years +	1,479.70	$ 1,370.00	$ 2,027,189.00
15-24 Years	1,552.30	$ 1,165.00	$ 1,808,429.50
5-14 Years	4,221.40	$ 840.00	$ 3,545,976.00
0-4 Years	2,132.00	$ 635.00	$ 1,353,820.00
	9,385.40		$ 8,735,414.50

Paralegal	2,341.30	$ 425.00	995,052.50
Staff	2,341.30		$ 995,052.50

Total	11,726.70		$ 9,730,467.00

6. The above chart provides a lodestar cross check for Class Counsel's request for a one-third fee of $3,166,666.

7. Investigation and Preparation of Complaint: In 2020, Schlichter Bogard 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 Astellas US Retirement and Savings Plan Form 5500s filed with the Department of Labor, among other sources.

8. Involvement of Class Representatives: Class Counsel's investigation included meetings with Plan participants, which occurred both via Zoom and on the phone. These meetings provided valuable insight and additional understanding of the Plan's operation and administration, as well as fee and performance disclosures concerning the Plan's investments and expenses. The Class Representatives provided Class Counsel with critical documents prior to preparing the Complaint. It has been my experience that participants are hesitant to bring these large, complex suits against their employer for fear of alienation. The Class Representatives also stayed apprised of the proceedings at each stage of the case, including document discovery, sitting for depositions, and the initial preparation for Trial.

9. Complaints and Motions to Dismiss: On July 1, 2020, Plaintiffs filed their complaint in the above-captioned matter. Doc. 1. On August 31, 2021, Defendants moved to dismiss the Complaint. Docs. 32, 38. Plaintiffs' attorneys spent extensive time responding to their arguments, which included conducting research and analysis of relevant authority. Plaintiffs opposed the motions on October 30, 2020. Docs. 55, 56. On April 13, 2021, the Court dismissed Count III as to Defendant AON Hewitt, and dismissed Count I as to Defendant Astellas, and partially dismissed Count III as to Defendant Astellas. Doc. 99. Plaintiffs filed an Amended Complaint ("AC") on February 28, 2022. Doc. 173. The Amended Complaint substituted named plaintiffs.

10. Discovery: The parties met and conferred regarding a proposed discovery plan in early September 2020 and filed a Joint Discovery Plan with this Court on September 15, 2020. Doc. 46. The Court set the initial schedule on September 17, 2020. Doc. 47. On September 25, 2020, the parties filed a Joint Proposed Amendment to Discovery Plan (Doc. 51) which the Court adopted on September 28, 2020 (Doc. 52). Following extensive discussions regarding electronically stored information (ESI) and search terms, the parties moved for entry of a protective order and ESI stipulation on November 6, 2020, which the Court granted. Docs. 59, 60. On July 16, 2021, the parties jointly proposed an expert discovery scheduled and moved for a five-week extension of the remaining fact discovery deadlines, Doc. 121, which the Court granted on July 20, 2021. Doc. 122.

11. Defendants issued discovery requests to the Named Plaintiffs on January 8, 2021, May 6, 2021, and August 26, 2021. Schlichter Bogard engaged in extensive discussions with their clients. The attorneys reviewed and analyzed all materials provided by their clients and prepared responsive documents for production.

12. Plaintiffs prepared and served discovery requests directed to Defendants on November 17, 2020, February 26, 2021, and July 9, 2021. Throughout the course of discovery, Class Counsel diligently reviewed and analyzed over 50,000 documents produced by Defendants in 38 separate productions in response to those requests. 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.

13. To support those efforts, Schlichter Bogard developed a document review and analysis protocol for systematically and methodically evaluating the document production. It was incumbent on Class Counsel 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. This produced many documents that helped to build the case presented.

14. Plaintiffs also issued two subpoenas to third parties to identify further relevant documents to support their case.

15. Apart from the ongoing tasks related to the document production, Class Counsel defended depositions of six Named Plaintiffs and took fifteen depositions of Defendant fact witnesses.

16. Throughout all stages of the case, including discovery, the attorneys at Schlichter Bogard 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.

17. Expert Witnesses: ERISA litigation is highly technical, including facts about prudent investment practices, industry best practices, fiduciary practices, and complex financial matters, requiring use of multiple experts for all parties. Plaintiffs disclosed three expert witnesses and Defendants disclosed four expert witnesses, who provided extensive written reports on November 5, 2021 and rebuttal reports on December 20, 2021.

18. All seven disclosed experts were deposed in lengthy depositions in between November 2021 and February 2022.

19. Motion to Strike Jury Demand: On March 1, 2022, Defendants moved to strike Plaintiffs' jury demand. Doc. 174. Plaintiffs filed an opposition on March 23, 2022, Doc. 184, and Defendants replied on April 7, 2022. Doc. 187. On April 21, 2022, the Court granted Defendants' motion. Doc. 188.

20. Motion for Class Certification: Plaintiffs filed their motion for class certification on October 15, 2021. Doc. 140. The briefing, accompanied by declarations from the Class Representatives, was extensive and took significant time to prepare. *See* Docs. 140-142. Defendants filed their opposition on December 13, 2021, Doc. 147, and Plaintiffs filed a reply on January 10, 2022. Doc. 151. On February 10, 2022, the Court granted Plaintiffs' motion. Doc. 169.

21. Settlement: The parties reached a settlement in principle and informed the Court of their tentative agreement (Doc. 217), Plaintiffs filed an unopposed motion for preliminary approval of the class settlement on June 23, 2023, and moved to certify a settlement only class and appoint Schlichter Bogard as class counsel. Doc. 225. On June 29, 2023, the motion was granted. Doc. 231.

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, 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. Based on experience in other cases, I anticipate Class Counsel will spend an additional 100–150 hours before the settlement and final hearing are concluded, and then substantial hours administering the settlement over the upcoming years.

24. 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 has developed in creating this area of litigation, a favorable recovery that benefits tens of thousands of Class members would not have been possible. [1]

25. I have examined the records, and we have incurred case expenses totaling $525,586.08 as of September 1, 2023. Based on my and the firm's experience, we anticipate an additional $2,000 in expenses related to the final settlement hearing, which is reflected in the following chart:

Depositions	$	98,315.27
Experts and Consultants	$	354,599.50
Filing Fees, Hearing Transcripts, Subpoena Services and Related Costs	$	3,030.10
Copies and Postage	$	2,844.37
Data Development and Document Organization	$	54,038.56
Research and Investigation	$	322.50
Travel, Lodging, and Parking	$	12,435.78
Total Expenses	**$**	**525,586.08**

26. The Class Representatives were not promised in this case a "bonus" for their

[1] The settlement provides for current participants to receive tax-deferred distributions in the form of direct deposits to their existing accounts, Doc. 225-1 §6.4, and gives former participants the right to direct their distribution from the common fund into a tax-deferred vehicle, such as an IRA. *Id.* §§6.6–6.7. The Investment Company Institute estimates the benefit of tax deferral for 20 years is an additional 18.6%. *See* 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.

participation and were not asked to keep records for time spent devoted to this case. The Class Representatives have no hourly rate for time spent on this case and they were not promised any payment for their services by Class Counsel.

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

Executed on September 1, 2023, in St. Louis, Missouri.

/s/ Troy A. Doles
Troy A. Doles