IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

MARGARET E. KELLY, et al., *Plaintiffs*, v. THE JOHNS HOPKINS UNIVERSITY, *Defendant*.	No. 1:16-cv-2835-GLR

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 $4,666,667 (one-third of the monetary recovery), reimburse Class Counsel's reasonable litigation expenses of $53,539.78 and grant incentive awards of $20,000 each for Class Representatives Margaret Kelly, Katrina Allen, Jeremiah Daley, Jr., Treva Boney, Tracy McCracken, Jerrell Baker, Lourdes Cordero, and Francine Lampros-Klein.

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 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 their motion.

November 8, 2019

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2019, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the attorneys of record.

/s/

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MARGARET E. KELLY, et al., *Plaintiffs*, v. THE JOHNS HOPKINS UNIVERSITY, *Defendant*.	No. 1:16-cv-2835-GLR

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES, CLASS REPRESENTATIVE AWARDS AND EXPENSES

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 ensure the reasonableness of plan expenses. 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 ERISA fiduciary breach actions involving 403(b) plans. In fact, similar cases have since been dismissed, another university obtained summary judgment on most claims, 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.

After more than three years of hard-fought litigation, the parties ultimately reached a settlement to resolve the claims at issue. The $14,000,000 settlement in this case is the second largest settlement in any 403(b) fee lawsuit, and only $500,000 less than the largest 403(b)

settlement in *Cassell v. Vanderbilt University*. No. 16-2086, Doc. 174 (M.D. Tenn. Oct. 22, 2019) ($14.5 million). 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 considerable 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 $4,666,667 (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. Such an award is both appropriate and reasonable considering the risk and results in this case and, the standards established by the Fourth Circuit, and is consistent with the fee awards of other courts in similar cases. The Court should also reimburse Class Counsel's reasonable litigation expenses of $53,539.78, and grant incentive awards of $20,000 each for Class Representatives Margaret Kelly, Katrina Allen, Jeremiah Daley, Jr., Treva Boney, Tracy McCracken, Jerrell Baker, Lourdes Cordero, and Francine Lampros-Klein.

BACKGROUND

On August 11, 2016, Plaintiffs filed this action alleging that Defendant breached its fiduciary duties and took part in prohibited transactions in operating the Johns Hopkins University 403(b) Plan. Doc. 1.[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

[1] "Doc." references are to the docket unless otherwise indicated. Capitalized terms not otherwise defined have the meanings ascribed to them in the Settlement Agreement. Doc. 84-2. A detailed discussion of the procedural history of this case is set forth in Plaintiffs' Memorandum in Support of Unopposed Motion for Preliminary Approval (Doc. 84-1 at 2–5) and the Declaration of Kurt C. Struckhoff submitted herewith.

excessive fees and imprudent investments on behalf of a university's 403(b) plan. Schlichter Decl. ¶¶19–20; Sturdevant Decl. ¶¶7–8. Plaintiffs filed an amended complaint on December 2, 2016. Doc. 27. On January 6, 2017, Defendant moved to dismiss the amended complaint. Doc. 29. On September 28, 2017, the Court granted in part and denied in part Defendant's motion to dismiss Plaintiffs' amended complaint. Doc. 45.

Following the dismissal order, the parties proceeded to discovery. The parties negotiated a stipulated confidentiality and seal order (Doc. 65) and a stipulation for discovery of hard copy documents and electronically stored information (or "ESI") (Doc. 67). Plaintiffs delivered their first requests for production of documents (consisting of four requests) on November 16, 2017. Doc. 76-1 ¶1. Plaintiffs issued a second request for production of documents (consisting of 36 requests) on May 18, 2018. *Id.* ¶2. At the time the parties reached a settlement, Defendant had completed its production of all minutes and meeting materials prepared in connection with the fiduciary committee meetings. The parties also were negotiating Defendant's ESI production at the time the case was stayed.

On November 10, 2017, Defendant moved to certify the Court's dismissal order for an immediate interlocutory appeal under 28 U.S.C. §1292(b). Doc. 56. The Court granted Defendant's motion on August 15, 2018 and stayed the case pending appeal. Doc. 81. The Fourth Circuit subsequently granted Defendant's petition for interlocutory appeal. Doc. 82.

ARGUMENT

I. Class Counsel's attorneys' fee request is appropriate and reasonable.

Class Counsel is entitled to a reasonable fee award from the common fund. Fed. R. Civ. P. 23(h); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). In determining the amount of attorneys' fees in common fund cases, "District Courts in the Fourth Circuit, and the majority of courts in other jurisdictions, use the percentage of recovery method[.]" *Decohen v. Abbasi, LLC*,

299 F.R.D. 469, 481 (D. Md. 2014); *see also Archbold v. Wells Fargo Bank, N.A.*, No. 3:13-CV-24599, 2015 WL 2476295, at *5 (S.D. W. Va. July 14, 2015) ("[T]here is a clear consensus among the federal and state courts, consistent with Supreme Court precedent, that the award of attorneys' fees in common fund cases should be based on a percentage of the recovery."). Indeed, "the current trend among the courts of appeal favors the use of a percentage method to calculate an award of attorneys' fees in common fund cases." *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 681 (D. Md. 2013) (citations and internal quotations marks omitted). This is because "the percentage method is more efficient and less burdensome than the traditional lodestar method, and offers a more reasonable measure of compensation for common fund cases." *Strang v. JHM Mortgage Sec. Ltd. Partnership*, 890 F. Supp. 499, 503 (E.D. Va. 1995); *see also Archbold*, 2015 WL 2476295, at *5 (favored percentage-of-the-fund method "derives from the recognition that the percentage of fund approach is the better-reasoned and more equitable method of determining attorneys' fees" in common fund cases).

In this case, the Settlement supports Class Counsel's fee request because, among other things, it provides substantial monetary and affirmative relief to the Class, particularly given the substantial risk of non-recovery. District courts in the Fourth Circuit analyze the following seven factors to determine the reasonableness of a percentage-of-recovery fee award:

> (1) the results obtained for the class; (2) the quality, skill, and efficiency of the attorneys involved; (3) the risk of nonpayment; (4) objections by members of the class to the settlement terms and/or fees requested by counsel; (5) awards in similar cases; (6) the complexity and duration of the case; and (7) public policy..

Singleton, 976 F. Supp. 2d at 682 (citations and quotation omitted). "Importantly, fee award reasonableness factors need not be applied in a formulaic way because each case is different, and in certain cases, one factor may outweigh the rest." *Id*.

A. Results obtained for the Class

The "most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *In re Abrams & Abrams, P.A.*, 605 F.3d 238, 247 (4th Cir. 2010); *McKnight v. Circuit City Stores, Inc.*, 14 F. App'x. 147, 149 (4th Cir. 2001). Here, Class Counsel obtained $14 million in monetary compensation for the Class. This is an excellent result and represents the second-largest settlement in any 403(b) excessive fee case to date. The largest university 403(b) plan settlement, also handled by Class Counsel, settled for $14.5 million. After Plaintiffs filed the instant case, several other firms pursued similar cases against other university 403(b) plan fiduciaries. This settlement is multiples of other 403(b) plan settlements handled by different law firms. *See Short v. Brown Univ.*, No. 17-318, Doc. 55 (D. R.I. Aug. 2, 2019) ($3.5 million); *Daugherty v. Univ. of Chi*., No. 17-3736, Doc. 77 (N.D. Ill. Sept. 12, 2018), *id.*, Doc. 57-1 ($6.5 million).

Rather than "having to wait as long as a decade as other classes in similar 401(k) cases have to do," Class members will receive compensation and be able to invest their proceeds immediately in a tax-deferred vehicle, which adds more value. *Kruger v. Novant Health, Inc.*, No. 14-208, 2016 WL 6769066, at *5 (M.D. N.C. Sep. 29, 2016). The Investment Company Institute estimates that the benefit of the present value of tax deferral for 20 years is an additional 18.6%,[2] so the actual value to the Class of the monetary portion of the settlement is $16,604,000.

The Court also must consider the value of the non-monetary relief when evaluating the overall benefit to the class. *Decohen,* 299 F.R.D. at 481. "Considering the non-monetary benefits and relief created by counsel's efforts is important because it encourages attorneys to obtain

[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).

meaningful affirmative relief." *Kruger,* 2016 WL 6769066, at *3. The affirmative future relief is extensive and provides substantial additional value to the Class. *See* Doc. 84-1 at 24–27 (Art. 10). Defendant has committed to providing this relief over a three-year settlement period, during which it will, among other things, retain an independent consultant to both evaluate the Plan's investment structure and assist the fiduciaries in conducting a competitive bidding process for recordkeeping services. Class Counsel engaged Dr. Stewart Brown, a nationally recognized economist, to provide the Court with an estimate of the economic value of the expected decrease in recordkeeping fees following the competitive bidding process. Dr. Brown estimates that over a five-year period, Plan participants will achieve fee savings of at least $18,162,732 as a result of the competitive bidding process. Brown Decl. ¶¶1–9. The present value of these savings is $16,605,872. *Id*. ¶¶10–11.

The non-monetary relief provisions of the Settlement provide significantly enhanced value beyond the value of the Plan consultant and competitive bidding process. These provisions will, among other things, enable participants to be better informed about their investment options, and will also allow them to avoid undue pressure to purchase investment products outside the plan. Recent publications have noted the significance of the non-monetary relief provision in this case, and have noted that these provisions help protect against potential cross-selling by third-party service providers.[3]

Considering the monetary value of the Settlement, plus the value of tax deferral and anticipated future recordkeeping fee savings resulting from competitive bidding, the Settlement is valued at $34,766,732. Additional non-monetary benefits, including those related to improved

[3] Greg Iacurci, *Cross-selling gaining prominence in retirement-plan lawsuits*, Investment News (Nov. 6, 2019 4:41 PM), https://www.investmentnews.com/article/20190812/FREE/190819996/cross-selling-gaining-prominence-in-retirement-plan-lawsuits; *see also Informed Investor Advisory: Cross-Selling*, North American Securities Administrators Association (Nov. 6, 2019), https://www.nasaa.org/51426/informed-investor-advisory-cross-selling/?qoid=investor-advisories.

investment monitoring practices and restrictions on cross-selling, further increase the value of the Settlement. Class Counsel's requested fee is less than 7.45% of the total benefit to the Class.

B. Quality, skill, and efficiency of the attorneys involved

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." *Abbott v. Lockheed Martin Corp.*, No. 06-701, 2015 WL 4398475, at *1 (S.D. Ill. July 17, 2015). 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." *Nolte v. Cigna Corp.,* No. 07-2046, 2013 WL 12242015, at *3–4 (C.D. Ill Oct. 15, 2013). Class Counsel are "experts in ERISA litigation," *Krueger v. Ameriprise Fin., Inc*., No. 11-2781, 2015 WL 4246879, at *2 (D. Minn. July 13, 2015) (citation omitted), and "highly experienced," *In re Northrop Grumman Corp. ERISA Litig*., No. 06-6213, 2017 WL 9614818, at *4 (C.D. Cal. Oct. 24, 2017). The firm also obtained the only victory for an ERISA excessive fee case 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. *Tibble v. Edison Int'l*, 135 S.Ct. 1823, 1828–29 (2015).

Courts across the country have recognized the reputation, skill, and determination of Class Counsel in pursuing relief on behalf of retirement plan participants. In addressing the efforts of Class Counsel, Chief Judge Osteen of the Middle District of North Carolina, noted as follows:

> 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. Recently, on June 24, 2019, U.S. District Judge Eagles "recognized the experience, reputation, and ability" of Plaintiffs' counsel and found that the firm "demonstrated diligence, skill, and determination in this matter and, more generally, in an area of

law in which few attorneys and law firms are willing or capable of practicing." *Clark v. Duke Univ.*, No. 16-1044, 2019 WL 2579201, at *3 (M.D. N.C. June 24, 2019). In another ERISA class action from earlier this year, Judge Eagles recognized the "skill and determination" of Class Counsel and noted that "[i]t is unsurprising that only a few firms might invest the considerable resources to ERISA class actions such as this, which require considerable resources and hold uncertain potential for recovery." *Sims v. BB&T Corp.,* No. 15-732, 2019 WL 1993519, at *3 (M.D. N.C. May 6, 2019).

Judge McDade of the Central District of Illinois, speaking of Class Counsel, observed that achieving a favorable result in this type of case required extraordinary efforts because the "litigation entails complicated ERISA claims". *Martin v. Caterpillar, Inc*., No. 07-1009, 2010 WL 3210448, at *2 (C.D. Ill. Aug. 12, 2010). Judge Baker from the same district also found:

> 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).

Numerous other judges have commended the work of Class Counsel in ERISA matters. U.S. District Judge Patrick Murphy stated:

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

Will v. Gen. Dynamics Corp., No. 06-698, 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010). U.S. District Judge David Herndon similarly stated as follows:

> 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). After recognizing "their persistence and skill of [Class Counsel's] attorneys," Judge Nancy Rosenstengel similarly 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 v. Boeing Co., No. 06-743, 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016).

In awarding attorneys' fees to Class Counsel after the first trial of an ERISA 401(k) excessive class action, the district court concluded that "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). The Court later emphasized the significant contributions Class Counsel have made to the field of ERISA litigation, including by 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 WL 8485265, at *2 (W.D. Mo. Dec. 9, 2015). Class Counsel's experience and resources expended in those matters contributed to efficiently litigating and resolving this case. *See Ramsey v. Phillips N. Am. LLC*, No. 18-1099, Doc. 27 at 6–7 (N.D. Ill. Oct. 15, 2018) ("This Court believes that the early settlement in this case was reached due to Schlichter Bogard & Denton's established reputation"). In *Ramsey*, the court cited support

by a nationally recognized expert in pension rights who opined that Class Counsel's record of success and perseverance enabled the class to obtain an early favorable settlement, and that no other private law firm could have obtained the early relief in the case. *Id*. at 6 (*citing* Declaration of Karen Ferguson, Director of non-profit Pension Rights Center [Doc. 21-4 ¶¶20-22, 24]). The same is true here.

C. Risk of nonpayment

Class Counsel litigated this matter on a contingent basis with no guarantee of recovery. 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. ¶33. The Named Plaintiffs would have been unable to pursue this litigation other than on a contingency fee basis. Schlichter Decl. ¶32; Sturdevant Decl. ¶13. As noted above, when this case was filed, no law firm or the Department of Labor had ever brought an excessive fee lawsuit involving a university 403(b) plan. As such, no law firm was willing to devote the resources and endure the risk of nonpayment in novel ERISA fiduciary breach actions involving a 403(b) plan.

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 competitive bidding processes, 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 made in this case.

The difficulty in successfully obtaining a judgment is further illustrated by dismissals of similar excessive fee allegations involving 403(b) plans. *See Divane v. Nw. Univ.,* No. 16-8157,

2018 WL 2388118 (N.D. Ill. May 25, 2018); *Wilcox v. Georgetown Univ.,* No. 18-422, 2019 WL 132281 (D. D.C. Jan. 8, 2019); *Davis v. Wash. Univ. in St. Louis*, No. 17-1641, 2018 WL 4684244 (E.D. Mo. Sept. 28, 2018). The Settlement in this case came at a time when the Fourth Circuit had accepted an interlocutory appeal of the denial of Defendant's motion to dismiss. This was an unprecedented event that dramatically increased the risk that the Class would receive no recovery at all if the dismissal order was reversed.

The risk of non-payment does not end at the dismissal phase, as illustrated by a recent summary judgment ruling in the Southern District of New York. *Cunningham v. Cornell Univ.*, No. 16-6525, 2019 WL 4735876 (S.D. N.Y. Sep. 27, 2019). Moreover, even if a successful judgment is obtained after a trial, recovery is far from certain. In *Tussey v. ABB, Inc.*, Class Counsel tried the first full trial of any 401(k) excessive fee case in January 2010, which resulted in a favorable judgment in March 2012. No. 06-4305, 2012 WL 1113291 (W.D. Mo. Mar. 31, 2012). At the time of the judgment, the case had been pending for over five years. After two separate appeals to the Eighth Circuit Court of Appeals and multiple remands to the district court, after more than twelve years of litigation, the parties reached a settlement on March 28, 2019. *Tussey*, Doc. 859. This came after over 24,000 attorney hours were invested by Class Counsel. *Tussey,* Doc. 860 at 7.

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

before the Supreme Court, a remand to the Ninth Circuit panel, a successful unanimous *en banc* reversal of the panel decision, a remand to the district court, and still another appeal to the Ninth Circuit, which is currently pending approximately twelve years after the case was filed. No. 07-5359, 2017 WL 3523737 (C.D. Cal. Aug. 16, 2017).

Obtaining the $14 million settlement in this case required Class Counsel to remain committed to the litigation and the significant risk of nonpayment following the judgment in *Sacerdote*, other dismissals in similar 403(b) litigation, and the grant of Defendant's interlocutory appeal by the Fourth Circuit. Rather than having to wait as long as a decade, like the class members in other excessive fee cases discussed above, Class members will receive compensation and be able to invest their proceeds immediately in a tax-deferred vehicle and enjoy the future benefits of the non-monetary relief.

D. Objections

On November 1, 2019, notice of the proposed Settlement and Class Counsel's request for attorneys' fees was sent to class members. No objections to the Settlement have been made to date.

E. Awards in similar cases

In complex ERISA class actions, such as this, a one-third contingency fee is routinely awarded in cases handled by Class Counsel.

Case	Fee %
Cassell v. Vanderbilt Univ., No. 16-2086, Doc. 174 (M.D. Tenn. Oct. 22, 2019)	33.33%
Tussey v. ABB, Inc., No. 06-4305-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. 16-1044, 2019 WL 2579201 (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%

Case	Fee %
In re Northrop Grumman Corp. ERISA Litig., No. 06-6213, 2017 WL 9614818 (C.D. Cal. Oct. 24, 2017)	33.33%
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. 14-208, 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%

Courts in this District also routinely approve fee awards of one-third of the common fund or more, even in instances where the class recovery runs into the hundreds of millions of dollars. *See, e.g., Decohen,* 299 F.R.D. at 483 (one-third attorney fee); *In re Titanium Dioxide Antitrust Litig.*, No. 10-318-RDB, 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (awarding one-third fee from $163.5 million common fund); *Muga v. Branch Banking & Trust Co.*, No. 10-890-PWG, Doc. 54 at 6 (D. Md. Aug. 22, 2011) (awarding 40% fee of a common fund); *McDaniels v. Westlake Servs., LLC*, No. 11-1837, 2014 WL 556288, at *13 (D. Md. Feb. 7, 2014) (one-third attorney fee).

ERISA class action litigation is inherently complex. *Kruger*, 2016 WL 6769066, at *2–3; *see also* Sturdevant Decl. ¶10. Cases are considered more complex where the applicable laws are new, changing, or unclear. *See Goldenberg v. Marriott PLP Corp.*, 33 F.Supp.2d 434, 439 (D.

Md. 1998) (finding the case was complex based on a "regulatory climate in flux."). This "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*, 2010 WL 3210448, at *2; *Tussey*, 2012 WL 5386033, at *3. Few firms "are capable of handling this type of national litigation." *Abbott,* 2015 WL 4398475, at *3; Schlichter Decl. ¶¶24, 35–36; Sturdevant Decl. ¶10.

As demonstrated in *Sacerdote*, *Tibble,* and *Cunningham*, 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. ¶¶35–36; Sturdevant Decl. ¶¶10–11. Other cases handled by Class Counsel demonstrate the substantial sums that must be advanced to obtain a successful recovery. *See Spano,* 2016 WL 3791123, at **1, 4 ($1.8 million in expenses); *Abbott,* 2015 WL 4398475, at **1, 4 ($1.6 million in expenses); *Beesley,* 2014 WL 375432, at **1, 3 ($1.6 million in expenses); *In re Northrop Grumman ERISA Litig.,* 2017 WL 9614818, at *6 ($1.2 million in expenses); *George,* 2012 WL 13089487, at **1, 4 ($1.5 million in expenses); *Kanawi v. Bechtel Corp.,* No. 06-5566, Doc. 828 at 4–5 (N.D. Cal. Mar. 1, 2011) ($1.5 million in expenses).

The issues in this case were hotly contested. After Plaintiffs filed their amended complaint (Doc. 27), Defendant moved to dismiss. Doc. 29. After extensive briefing, including multiple supplemental notices of authority, the Court denied in part and granted in part Defendant's motion to dismiss. Doc. 45. Plaintiffs moved for reconsideration of the dismissal order on October 12, 2017 (Doc. 51), which Defendant opposed. Doc. 53. Plaintiffs' motion was denied on August 14, 2018. Doc. 80. Defendant then moved to certify the Court's dismissal order for an

immediate interlocutory appeal. Doc. 56. The Court granted Defendant's motion on August 15, 2018 and stayed the case pending appeal. Doc. 81. The Fourth Circuit subsequently granted Defendant's petition for interlocutory appeal on September 18, 2018. Doc. 82.

Prior to the stay, the parties engaged in significant discovery. *See* Doc. 84-1 at 3–4. These efforts resulted in the production of approximately 10,000 pages of documents. Struckhoff Decl. ¶15. Class Counsel was required to devote the time and resources to analyze these documents to further support their claims. This review resulted in Plaintiffs moving to file a second amended complaint to incorporate additional detail. Doc. 76. In sum, this was a "complex" case, which strongly weighs in favor of granting Class Counsel's fee request.

F. Public policy

Public policy additionally supports Class Counsel's fee. This type of litigation provides a "significant, national contribution" helping to "clarify[y] ERISA standards" and "educate[] 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,* 2015 WL 8485265, at *2. "The public benefits when capable and seasoned counsel undertake private action to enforce [federal] laws." *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 263 (E.D. Va. 2009). Additionally, the non-monetary relief in this case helped draw attention to the issue of cross-selling in retirement plans. *See supra* n.3. As discussed above, Class Counsel devotes substantial time and resources to pursue fiduciary breach claims on behalf of retirement plan participants. These efforts have contributed to billions of dollars in fee savings for plan participants. *Nolte,* 2013 WL 12242015, at *2.

II. A lodestar cross-check confirms the reasonableness of Class Counsel's request.

"Given that courts in the Fourth Circuit approve of the percentage-of-fund method for awarding fees in common fund cases, '[i]t is not necessary for the Court to conduct a lodestar

analysis[.]'" *Kruger*, 2016 WL 6769066, at *4 (citation omitted). However, courts have used a lodestar "cross-check" to confirm that the percentage award is fair and reasonable by determining the hours reasonably expended and then multiplying that amount by the reasonable hourly rate. *Id.* "The hourly rate should be in line with the market rate for 'similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Id.* (citation omitted). The Court does not need to "'exhaustively scrutinize[ ]'" the hours documented by counsel and 'the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case.'" *Krakauer,* 2018 WL 6305785, at *5 (citation 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).

ERISA litigation, such as this, involves a national market because the number of plaintiff's firms who have the necessary expertise and are willing take the risk and devote the resources to litigate complex claims is small. *Abbott*, 2015 WL 4398475 at 3; Schlichter Decl. ¶¶20, 24; Sturdevant Decl. ¶¶10–11. Class Counsel has brought actions across the country defended by national firms with ERISA expertise, such as opposing counsel in this case. Schlichter Decl. ¶¶17, 37. Thus, the relevant hourly rate is the "nationwide market rate". *Kruger*, 2016 WL 6769066, at *4; *Clark,* No. 16-1044, Doc. 165 at 5, 8; *Sims,* 2019 WL 1993519, at *2; *Ramsey,* Doc. 27 at 8; *Beesley*, 2014 WL 375432, at *3; *Abbott,* 2015 WL 4398475, at *2; *Tussey,* 2015 WL 8485265, at *7.

Class Counsel spent 2,566.10 hours of attorney time and 249.60 hours of non-attorney time on this matter to date. Schlichter Decl. ¶39; Struckhoff Decl ¶6.[4] As recently as October 2019, Class Counsel's reasonable hourly rates have been approved in similar ERISA class action

[4] A detailed summary of Class Counsel's efforts in this litigation are set forth in the Struckhoff Declaration. If the Court deems it necessary, Class Counsel is willing submit their time entries for in camera review, since they reflect sensitive work product of their attorneys.

litigation. *Cassell*, No. 16-2086, Doc. 174. 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. *Id*. at 3. Other district courts in the Fourth Circuit similarly approved these hourly rates. *see also Clark*, No. 16-1044, 2019 WL 2579201, at *3; *Sims,* 2019 WL 1993519, at *3.

These reasonable hourly rates were independently verified by a recognized expert in attorney fee litigation who opined that Class Counsel's requested rates were reasonable based on rates charged by national attorneys of equivalent experience, skill, and expertise in complex class action litigation. *Ramsey,* Doc. 27 at 9 (*citing* Declaration of Sanford Rosen [Doc. 21-3 ¶52]). In light of the close similarities between the fiduciary breach claims in those cases and this one, Class Counsel being the same, and the recency of the decisions, the same rates are appropriate. *See Kruger,* 2016 WL 6769066, at *4.

Using these rates, the lodestar is $1,907,379, creating a multiplier of 2.45. This is well within the range of multipliers approved by district courts in the Fourth Circuit. *See, e.g., Kruger,* 2015 WL 6769066, at *5 (approved 3.69 multiplier and noting that courts have routinely approved multipliers of 4.5 or higher); *Deloach v. Philp Morris Co.*, No. 00-1235, 2003 WL 23094907, at *11 (M.D. N.C. Dec. 19, 2003) (approving 4.45 lodestar multiplier); *Dechoen*, 299 F.R.D. at 483 (approving 3.5 lodestar multiplier); s*ee 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 Court recently approved a common fund fee award with a 3.5 lodestar multiplier. *Freckleton v. Target Corp.*, No. 14-807-GLR, Doc. 149 (D. Md. Dec. 11, 2017) (approving multiplier noted in Doc. 145-1 at 22). This demonstrates the reasonableness of

the requested fee award.

III. Class Counsel's request is additionally reasonable when the twelve *Barber* factors are considered.

Courts in the Fourth Circuit also weigh the twelve factors set forth in *Barber v. Kimbrell's* in evaluating the reasonableness of attorneys' fees. *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 n.28 (4th Cir. 1978). These factors are:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorneys' opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or the circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case within the legal community in which the suite arose; (11) the nature and length of the professional relationship between attorney and clients; and (12) attorney's fees awards in similar cases.

Id. Factors 1–3, 5, 9, and 12 overlap with the seven-factor test and the lodestar discussion. The remaining factors are discussed below.

A. The attorneys' opportunity costs in pressing the instant litigation, the attorneys' expectations at the outset, and the time limitations imposed by the client or circumstances (Factors 4, 6 and 7)

The decision to pursue this case, advance substantial costs and commit substantial resources and thousands of attorney hours to obtain a successful recovery materially impacted Class Counsel's ability to handle "other simpler and less risky matters." *Krakauer,* 2018 WL 6305785, at *4; Schlichter Decl. ¶¶35–36.

At the outset of this litigation, Class Counsel fully expected this case to be vigorously defended by a defendant with sophisticated counsel. Schlichter Decl. ¶¶35–36; *Smith v. Krispy Kreme Doughnut Corp.*, No. 05-187, 2007 WL 119157, at *2 (M.D. N.C. Jan. 10, 2007) ("Additional skill is required when the opponent is a sophisticated corporation with sophisticated counsel"). Complex ERISA class actions, such as this, are generally

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. ¶36. The two defendants' legal fees in that case alone exceeded $42 million through the trial, which ended in January 2010. *Tussey,* 2015 WL 8485265, at *6. Nine more years of attorneys' fees were subsequently incurred by the defendants.

This lawsuit confirmed Class Counsel's expectations of a vigorous defense. Defendant retained a sophisticated global law firm, which filed a comprehensive motion to dismiss, opposed Plaintiffs' notice of supplemental authority, filed its own notices of supplemental authority, opposed Plaintiffs' motion to file a second amended complaint, and successfully moved to certify the motion to dismiss order for immediate appeal. These actions unquestionably demonstrate that Defendant mounted a strong defense at each stage of the litigation.

Class Counsel also knew it would have to incur substantial expenses. Schlichter Decl. ¶¶35–36. In the protracted *Tussey* and *Tibble* litigation, Class Counsel incurred very substantial out-of-pocket expenses for over a decade. *See Tussey,* 2012 WL 5386033, at *1 (over $2 million in expenses); *Tibble*, Doc. 576-1 at 1 (expert witness fees alone of almost $1 million). The same is true here. Class Counsel devoted thousands of hours to litigate the claims and advanced over $50,000 in litigation expenses, all at risk.

The Settlement also came at a time when the Fourth Circuit had accepted an interlocutory appeal of the denial of Defendant's motion to dismiss. Defendant argued that the law related to Plaintiffs' claims was unsettled and conflicting. Doc. 56-1 at 10. Like *Tussey* and *Tibble*, the aggressive defense presented the possibility that Class Members would have to wait over a decade to receive any compensation. Alternatively, the Fourth Circuit may have sided with the

decisions of other courts and found in favor of Defendant.

B. The amount in controversy and the results obtained (Factor 8)

Class Counsel obtained $14 million in monetary compensation for the Class. This is an excellent result and the second-largest 403(b) retirement plan settlement. Any recovery at all was uncertain. This uncertainty is particularly shown by the adverse findings in *Sacerdote* on similar claims, including that court's rejection of the plaintiffs' experts and complete rejection of those plaintiffs' claims on the CREF Stock Account and the TIAA Real Estate Account, which Defendant asserted here were the only investment claims remaining after the motion to dismiss order. Doc. 79. While Plaintiffs disputed that their performance loss claims were limited to these two funds, if the *Sacerdote* result were followed, Plaintiffs' recovery as to these two funds would have been zero. Plaintiffs' recordkeeping fee claim, furthermore, was similar to that in *Sacerdote*, where the court wholly rejected it.

C. The undesirability of the case within the legal community in which the suite arose (Factor 10)

As detailed above, in August 2016 Class Counsel became the first law firm in the country to file an excessive fee lawsuit involving a university's 403(b) plan. No law firm was willing to devote the resources and endure the tremendous risk of nonpayment inherent in this litigation. This followed Class Counsel pioneering ERISA excessive fee litigation involving 401(k) plans, which likewise no law firm or the Department of Labor had ever brought. Indeed, at the time that Class Counsel first filed an excessive fee lawsuit, "no other firm was willing to accept such a daunting challenge on this case at *any* rate[.]" *Nolte,* 2013 WL 12242015, at *3; *Ramsey,* Doc. 27 at 3; *see also* Schlichter Decl. ¶¶20, 24; Sturdevant Decl. ¶¶7–8. Even now, few law firms have the necessary expertise and are willing take the risk and devote the substantial resources necessary, all at risk of nonpayment, to litigate these complex ERISA claims. *Abbott*, 2015 WL

4398475, at *3; Schlichter Decl. ¶¶20, 24; Sturdevant Decl. ¶¶8–10. Class Counsel's willingness to bear the risk of prosecuting this action and the lack of interest by others in the legal community supports the reasonableness of their fee request. *Phillips v. Triad Guar. Inc.,* No. 09-71, 2016 WL 2636289, at *7 (M.D. N.C. May 9, 2016); *Krispy Kreme*, 2007 WL 119157, at *3.

D. The nature and length of the professional relationship between attorney and client (Factor 11)

Class Counsel did not have a professional relationship with any of the Named Plaintiffs prior to this litigation, which supports the requested fee award. Schlichter Decl. ¶34; *Krispy Kreme,* 2007 WL 119157, at *3.

IV. The Court should award reimbursement of Class Counsel's litigation expenses.

Class Counsel is entitled to reimbursement of litigation expenses of $53,539.78 advanced in prosecuting this case. Fed. R. Civ. P. 23(h). Reimbursable expenses include expert fees, travel, conference telephone, postage, delivery services, and computerized legal research. Alba Conte, 1 Attorney Fee Awards §2:19 (3d ed. 2004). That is what the expenses submitted here cover. *See* O'Gorman Decl. ¶2.[5] The expenses incurred in this case were reasonable and necessary. *In re Mid-Atlantic Toyota Antitrust Litig.*, 605 F. Supp. 440, 448 (D. Md. 1984).

Class Counsel brought this case without guarantee of reimbursement or recovery. There was a strong incentive to limit costs. Given the complexity of this case, the costs incurred are much lower with what would be expected in a case of this magnitude that was litigated for years. *See Spano,* 2016 WL 3791123, at **1 4 ($1.8 million in expenses); *Abbott,* 2015 WL 4398475, at **1, 4 ($1.6 million in expenses); *Beesley,* 2014 WL 375432, at **1, 3 ($1.6 million in expenses); *In re Northrop Grumman ERISA Litig.,* 2017 WL 9614818, at *6 ($1.2 million in

[5] Class Counsel is not seeking reimbursement for expenses paid for local counsel's time.

expenses); *George,* 2012 WL 13089487, at **1, 4 ($1.5 million in expenses); *Kanawi*, Doc. 828 at 4–5 ($1.5 million in expenses).

V. The Court should approve case contribution awards for the Named Plaintiffs.

"As part of a class action settlement, named plaintiffs are eligible for reasonable incentive payments." *Decohen*, 299 F.R.D. at 483 (internal citations and quotations omitted). "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 Solutions LLC*, 121 F. Supp.3d 564, 577 (D. S.C. 2015). In this case, the Named Plaintiffs provided invaluable assistance to Class Counsel. *See* Struckhoff Decl. ¶¶9–10. Each Named Plaintiff is a current or former employee of Johns Hopkins University. Doc. 76-3 at ¶¶13–20. They risked their reputation and alienation from employers "in bringing an action against a prominent [university] in their community." *Kruger,* 2016 WL 6769066, at *6; *see also* Struckhoff Decl. ¶9.

A case contribution award of $20,000 each for the eight Class Representatives, which when combined represents just over one percent of the Settlement Fund (and far less than one percent when considering the additional future benefits of the Settlement), is reasonable and appropriate given the contributions of the Class Representatives 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).

CONCLUSION

This Court should grant Plaintiffs' Motion.

November 8, 2019

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2019, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the attorneys of record.

/s/

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

MARGARET E. KELLY, et al., *Plaintiffs*, v. THE JOHNS HOPKINS UNIVERSITY, *Defendant*.	No. 1:16-cv-2835-GLR

DECLARATION OF JEROME J. SCHLICHTER

I, Jerome J. Schlichter, declare as follows:

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

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

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

4. My firm has been named class counsel in many cases involving claims of fiduciary breaches in large 401(k) and 403(b) plans. *See Vellali v. Yale University,* No. 16-1345, 2019 WL 5204456 (S.D.N.Y. Sept. 24, 2019); *Bell v. Pension Cmte. of ATH Holding Co.*, No. 15-2062, 2018 WL 4385025 (S.D. Ind. Sept. 14, 2018); *Cunningham v. Cornell Univ.*, No. 16-6525, Doc. 219 (S.D.N.Y. Jan. 22, 2019); *Cassell v. Vanderbilt Univ.*, No. 16-2086, Doc. 126 (M.D.Tenn. Oct. 23, 2018); *Cates v. Trustees of Columbia Univ.*, No. 16-6524, Doc. 218 (S.D.N.Y. Nov. 8, 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). A brief biography of my firm, including summaries of our professional experience, is attached to my prior declaration filed in this case at Doc. 85-2.

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

10. In approving a settlement including $32 million plus significant affirmative relief, in a 403(b) excessive fee case in this Circuit, Honorable Chief Judge William Osteen in *Kruger v. Novant Health, Inc.*, No. 14-208, Doc. 61 at 7–8 (M.D.N.C. Sept. 29, 2016) found that "Class Counsel's efforts have not only resulted in a significant monetary award to the class but have

also brought improvement to the manner in which the Plans are operated and managed which will result in participants and retirees receiving significant savings[.]"

11. In awarding attorney's fees after the first 401(k) excessive fee trial, Judge Nanette Laughrey concluded that "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). Following remand, the district court again awarded Plaintiffs' attorney's fees, emphasizing the significant contribution 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 WL 8485265, at *2 (W.D. Mo. Dec. 9, 2015).

12. After recognizing "their persistence and skill of their attorneys", Judge Nancy Rosenstengel similarly 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.

13. Recently, Judge Catherine Eagles noted that "these [ERISA] cases require a high level of skill on behalf of plaintiffs to achieve any recovery." *Clark v. Duke*, No. 1:16-CV-01044, Doc. 165 at 6 (M.D.N.C. June 24, 2019). In approving attorneys' fees, Judge Eagles concluded that "Class Counsel has demonstrated diligence, skill, and determination in this matter

and, more generally, in an area of law in which few attorneys and law firms are willing or capable of practicing." *Id*. at 7.

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

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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). That case involved two appeal, lasted twelve and a half years, and was only recently settled.

22. 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.

23. 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.

24. 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.

25. 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); *Cunningham v. Cornell Univ.*, 16-6525, 2019 WL 4735876 (S.D.N.Y. Sep. 27, 2019).

26. 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).

27. Prior to the filing the *Kelly* lawsuit in August 2016, my firm began researching the Johns Hopkins University 403(b) 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.

28. On behalf of one of the named plaintiffs in this lawsuit, my firm also requested from the Plan administrator under 29 U.S.C. §1024(b) documents and other information related to the administration of the Plan, which included plan documents, custodial account agreements, recordkeeping services agreements, the summary plan description, and fee disclosures, among

other documents. We also analyzed documents obtained from the named plaintiffs and other material obtained from publicly available sources related to the administration of the Plan.

29. 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 39,000 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.

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

31. In my opinion, the affirmative relief obtained herein has substantial value beyond the monetary value of the settlement of $14 million due to the substantial changes that the Johns Hopkins University will make to the Plan as a result of this lawsuit and other reforms required by the terms of the settlement.

32. As a practical matter, litigants such as named Plaintiffs Margaret E. Kelly, Katrina Allen, Jeremiah M. Daley, Jr., Treva N. Boney, Tracy L. McCracken, Jerrell Baker, Lourdes Cordero, and Francine Lampros-Klein, 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 the Johns Hopkins 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.

33. The contingency fee agreements entered into between my firm and each of the named Plaintiffs David Clark, Thomas Mehen, Kathi Lucas, Jorge Lopez, and Keith Feather 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.

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

35. 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.

36. 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, and carried the expense without reimbursement for more than twelve years. That case has continued after being tried almost ten years ago, followed by two appeals to the Eighth Circuit, and multiple remandments to the

district court. *Tibble v. Edison Int'l*, *supra*, is also still pending in its twelfth year with another appeal in the Ninth Circuit.

37. 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);
- *Cassell v. Vanderbilt Univ.*, No. 3:16-CV-02086, Doc. 174 (M.D.Tenn. Oct. 22, 2019);
- *Bell v. Pension Comm. Of ATH Holding Co., LLC*, No. 1:15-CV-02062, Doc. 380 (S.D.Ind. Sept. 4, 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).

38. 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.

39. My firm devoted 2,566.1 hours of attorney and non-attorney time to date to prosecute the ERISA claims on behalf of the John Hopkins participants and beneficiaries. The summary of time expended attached hereto as **Exhibit A** is a summary indicating the amount of time, by work category, spent by each attorney and paralegal who was involved in this litigation. More time will be spent handling responses from participants who receive notice, preparing for the final approval hearing, and traveling to the final approval hearing in January. In addition, there will be substantial attorney time spent after the settlement effective date. 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.

40. My firm will also monitor the settlement agreement for a three-year period without seeking any reimbursement. This includes reviewing a list of the Plan's investment options, fees

charged by those investments, and a copy of the Investment Policy Statement (if any) each year; reviewing final bid amounts that were submitted in response to a request for proposals for recordkeeping vendors; handle any enforcement actions if necessary; respond to calls from class members; and bear half the expense if the settlement is not approved.

41. 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.

42. Schlichter, Bogard & Denton does not bill clients on an hourly basis. In October 2019, based on the national market for complex ERISA fiduciary breach litigation, the following hourly rates for my firm were approved: $1,060/hour 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. *Cassell*, Doc. 174 at 3.

43. These rates were brought up to date based on 2016 hourly rates for Schlichter, Bogard & Denton that were previously approved by Chief Judge Osteen in this Circuit. *Kruger*, 2016 WL 6769066 at 4. Judge Osteen adopted the 2016 hourly rates that were previously approved by the Southern District of Illinois 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 8th day of November, 2019, in St. Louis, Missouri.

/s/ Jerome J. Schlichter
Jerome J. Schlichter

EXHIBIT A

HOURS EXPENDED BY WORK CATEGORY

Billing Attorney or Paralegal	Position	Year Licensed	Years in Practice	Total Hours	Case Development	Motion Practice	Pleadings	Discovery	Depositions	ADR
Jerry Schlichter	Attorney	1972	47	255.5	30.9	14.4	9.1	28.3	0	172.8
Michael Wolff	Attorney	1990	29	93.1	2.9	0.2	24.6	62.9	0	2.5
Mary Edwards	Attorney	1995	24	108	0	0	0	4.2	0	103.8
Matthew Siegler	Attorney	1999	20	142.2	0	0	0	0	0	142.2
Heather Lea	Attorney	2001	18	46.6	42	0	1.8	0.6	0	2.2
Sean Soyars	Attorney	2005	14	138.5	4.7	97.7	28.9	0.8	0	6.4
Sean Stewart	Attorney	2006	13	292.7	2	16	0	2.9	16.3	255.5
Gary Drag	Attorney	2007	12	205.5	81.3	0	39.8	0	0	84.4
Crystal Hopkins	Attorney	2007	12	62.9	0	0	0	0	0	62.9
Kurt Struckhoff	Attorney	2009	10	311.8	30.7	5.7	32.1	76.2	0	167.1
Jim Casagrand	Attorney	2010	9	276.3	276.3	0	0	0	0	0
Scott Bumb	Attorney	2012	7	124	46.8	0	2.3	72.5	0	2.4
Jay Redd	Attorney	2013	6	96.4	96.2	0	0	0.2	0	0
Scott Apking	Attorney	2014	5	37.1	0	0	0	0.4	0	36.7
Ethan Hatch	Attorney	2015	4	104.1	12.1	28.6	55.5	3.8	0	4.1
William Avery	Attorney	2016	3	45.7	0	0	0.2	0	0	45.5
Phil Abbott	Attorney	2016	3	225.7	0	0	0	0	0	225.7
Charlotte Mabus	Paralegal			99	33.9	2.9	4.2	57.8	0	0.2
Kevin Martin	Paralegal			23.6	23.6	0	0	0	0	0
Rebekah Freisinger	Paralegal			41.6	31.3	2.2	2.5	3.1	0	2.5
Shelby Gray	Paralegal			55.4	45	9.7	0.7	0	0	0
Olga Stojanovic	Paralegal			30	1.6	0	3	0	0	25.4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

MARGARET E. KELLY, et al., *Plaintiffs*, v. THE JOHNS HOPKINS UNIVERSITY, *Defendant*.	No. 1:16-cv-2835-GLR

DECLARATION OF KURT C. STRUCKHOFF

I, Kurt C. Struckhoff, 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. I am admitted to practice in the United States Supreme Court and numerous district courts across the country.

4. I received my Bachelor of Science in Finance and Accounting from Saint Louis University in 2006 and my Juris Doctorate from Saint Louis University in 2009. Since that time, I have been employed as an attorney at Schlichter, Bogard & Denton, LLP, Class Counsel in this

matter. I have been actively engaged in complex class actions since I began my career. During that time, I have been exclusively dedicated to ERISA fiduciary breach class actions concerning 401(k) and 403(b) plans.

5. As set for the in the Memorandum in Support of Plaintiffs' Motion for Attorneys' Fees, and the Declaration of Jerome Schlichter, the Middle District of Tennessee recently approved hourly rates for Schlichter, Bogard & Denton when the court approved a one-third attorney fee of the common fund in an ERISA excessive fee class action settlement. *Cassell v. Vanderbilt Univ.*, No. 16-2086, Doc. 174 at 3 (M.D.Tenn. Oct. 22, 2019). 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 also have been approved for the firm by other district courts, including within the Fourth Circuit. *See, e.g., Clark v. Duke Univ.*, No. 16-1044, Doc. 165 at 8 (M.D.N.C. June 24, 2019); *Sims v. BB&T Corp.*, No. 15-732, Doc. 450 at 7–8 (M.D.N.C. May 6, 2019); *Bell v. ATH Holding Co.*, No. 15-2062, Doc. 380 at 10 (S.D.Ind. Sept. 4, 2019); *Ramsey v. Philips N. Am. LLC,* No. 18-1099, Doc. 27 at 8 (S.D.Ill. Oct. 15, 2018).

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

Experience	Hours	Rate	Total
25 Years +	348.60	$1,060	$369,516
15–24 Years	296.80	$900	$267,120
5–14 Years	1,545.20	$650	$1,004,380
2–4 Years	375.50	$490	$183,995
Attorney Total	**2,566.10**		$1,825,011
Paralegals Total	**249.60**	$330	$82,368
Total of All Hours	**2,815.70**		$1,907,379

7. As set forth in the above table, based on the firm's billing records, Schlichter, Bogard & Denton expended to date 2,566.10 hours of attorney time and 249.6 hours of paralegal time.

8. 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 Johns Hopkins University 403(b) Plan Forms 5500 filed with the Department of Labor, among other sources. Class Counsel requested documents from the Plan administrator on behalf of a current participant under 29 U.S.C. §1024(b), which included the production of the plan document, fee disclosures, custodial account agreements, recordkeeping services agreements, and other related documents.

9. Involvement of Named Plaintiffs: Class Counsel's investigation included meetings with the Named Plaintiffs, which occurred both in-person and on the phone. The in-person meetings required attorneys to travel to various locations in Maryland where the named Plaintiffs reside. These meetings provided valuable insight and additional understanding of the operation and administration of the Plan, the Plan's investment structure, as well as fee and performance disclosures concerning the Plan's investments and expenses. Each Named Plaintiff

provided Class Counsel with critical documents prior to preparing the Complaint. It has also been my experience that university employees are hesitant to bring suit against their employer for fear of alienation. Each Named Plaintiff also stayed apprised of the proceedings at each stage of the case, including the mediation process and submitting declarations in support of class certification.

10. On November 28, 2017, Defendant issued 18 interrogatories and 17 requests for production to each Named Plaintiff. Schlichter, Bogard & Denton then engaged in extensive discussions with each client. The attorneys reviewed and analyzed all materials provided by each clients and prepared responsive documents for production. In total, the Named Plaintiffs collected nearly 3,000 pages of documents for production, which included Plan disclosures, Plan-related communications, email communications, and account statements from multiple recordkeepers.

11. On August 11, 2016, Plaintiffs filed their complaint in *Kelly v. The Johns Hopkins Univ.*, No. 16-2835 (D.Md). Doc. 1.[1] After Defendant filed its motion to dismiss, Class Counsel reviewed and analyzed Defendant's 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 2, 2016. Doc. 27. The amended complaint provided additional detail regarding Plaintiffs' claims.

12. Motion to Dismiss: Defendant filed its motion to dismiss the amended complaint on January 6, 2017. Doc. 34. Defendant's 35-page memorandum was extensive and raised complex legal arguments that addressed all of Plaintiffs' claims. Doc. 29-1. Over the course of

[1] Unless otherwise indicated, "Doc." citations are to the *Kelly* docket.

approximately two months, Plaintiffs' attorneys spent extensive time responding to their arguments, which included conducting research and analysis of relevant authority. Plaintiffs filed their opposition on February 24, 2017. Doc. 32. The Court granted in part and denied in part Defendant's motion on September 28, 2017. Doc. 45. Plaintiffs also moved for partial reconsideration of the dismissal order on October 12, 2017. Doc. 51.

13. Motion to Certify for Immediate Appeal: Defendant filed its motion to certify the dismissal order for immediate appeal on November 10, 2017. Doc. 56. Defendant's memorandum argued there were substantial grounds for difference of opinion on controlling questions of law. Doc. 56-1. The Court granted Defendant's motion on August 15, 2018 and stayed the proceedings. Doc. 81. The Fourth Circuit granted Defendant permission to appeal on September 18, 2018. Doc. 82.

14. Discovery: Following the Court's denial of Defendant's motion to dismiss, Plaintiffs proceeded with discovery. In November 2017, the Court filed a scheduling order (Doc. 54), the parties filed a joint stipulation on ESI discovery (Doc. 66), as well as a stipulated confidential and seal order (Doc. 64). Apart from efforts involved in drafting these joint documents, their preparation required numerous meet-and-confer discussions with Defendant's attorneys. Plaintiffs prepared their initial requests for production and interrogatories directed to Defendant on November 16, 2017. At the time the case was stayed pending Defendant's interlocutory appeal, the parties were negotiating the scope of Defendant's ESI productions, including the relevant time period, search terms, and key records custodians.

15. Throughout the course of discovery, Class Counsel diligently reviewed and analyzed approximately 10,000 pages of documents that were produced. A detailed review and analysis of the document production was crucial for Plaintiffs to prove their claims.

16. 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.

17. 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.

18. Proposed Second Amended Complaint: After Defendant responded to discovery, Class Counsel reviewed and analyzed Defendant's production and evaluated whether to amend their complaint to incorporate newly discovery information. After additional investigation and research, Plaintiffs moved for leave to file a second amended complaint on July 13, 2018. Doc. 76. The second amended complaint provided additional detail regarding Plaintiffs' claims. Doc. 76-3. Plaintiffs' motion was pending at the time the Court stayed the proceedings pending Defendant's interlocutory appeal.

19. Mediation and Settlement: In December 2018, the parties engaged in mediation with Fourth Circuit mediator Cynthia Mabry-King. Class Counsel prepared extensively for this process, which included time devoted to the preparation of a detailed mediation statement and further calculations of potential losses to the Plan. They also requested that Defendant supplement its prior document productions with additional fee and performance data. The parties did not reach agreement during the mediation session, but continued discussions. On April 11,

2019, the parties met for an in-person private mediation before a nationally recognized mediator, David Geronemus. Class Counsel prepared extensively for this mediation, which included time devoted to the preparation of a detailed mediation statement, further analysis of potential losses to the Plan, and the preparation of a responsive memorandum to Defendant's mediation statement. The parties reached agreement on the monetary terms during the all-day mediation session. However, Class Counsel required that the settlement provide additional non-monetary and affirmative relief for the benefit of Class members. After continued discussions over several months, on July 22, 2019, the parties reached an agreement on all terms. Doc. 84-2.

20. 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, 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.

21. 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 case. 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 pursue Plaintiffs' claims, 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 November 8, 2019 in St. Louis, Missouri.

/s/ Kurt C. Struckhoff
Kurt C. Struckhoff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARGARET E. KELLY, ET AL.,

Plaintiffs,

v.

THE JOHNS HOPKINS UNIVERSITY,

Defendant.

No. 1:16-cv-2835-GLR

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.

2. The firm in this case fronted all of the litigation costs and expenses.

3. I have examined the records and we have incurred case expenses totaling $53,539.78 as of October 31, 2019.

4. The expenses incurred in this action are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records and other source materials and are an accurate recordation of the expenses.

5. The total costs and expenses of Class Counsel in this case are summarized as follows:

Description	Total
Experts and Consultants	$13,559.44
Filing, Transcripts, Subpoena Services and Related Costs	$1,152.00
Mediation and Settlement Costs	$13,180.89
Copies and Postage	$9,704.08

Description	Total
Data Development and Document Organization	$2,848.96
Research and Investigation	$3,612.76
Travel, Lodging, and Parking	$9,481.65
Total	**$53,539.78**

6. Class Counsel retain receipts for litigation expenses. All such material is available for submission to or inspection by the Court upon request.

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

Executed on November 7, 2019.

Sheri O'Gorman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

MARGARET E. KELLY, et al., *Plaintiffs*, v. THE JOHNS HOPKINS UNIVERSITY, *Defendant*.	No. 1:16-cv-2835-GLR

DECLARATION OF STEWART BROWN, PHD., CFA

1. I hold a PhD. in finance from the University of Florida (1974) and the professional designation of Chartered Financial Analyst. I am currently Professor Emeritus of Finance at Florida State University. I am author or co-author of six law review articles on mutual fund investment advisory fees. My vita is included at Appendix A.

2. I have reviewed the Settlement Agreement ("Settlement") between Plaintiffs and The Johns Hopkins University ("Johns Hopkins") in the above-referenced litigation and it provides for substantial monetary benefits to participants and beneficiaries of the Johns Hopkins University 403(b) Plan ("Plan"). The Settlement also provides for significant affirmative relief over the three-year settlement period.

3. My assignment was to calculate the economic value of certain changes to the operation and administration of the Plan. In particular, I understand from my review of the Settlement and from discussions with Class Counsel that Johns Hopkins will be required to, in relevant part, conduct a competitive bidding process for the provision of recordkeeping and administrative services provided to the Plan. *See* Settlement §§10.5 – 10.8 (Doc. 84-2).

4. My analysis considers the fee savings to participants from a decrease in

recordkeeping fees following the competitive bidding process for recordkeeping services outlined in the Settlement. I used a period of five years to calculate the fee savings as a result of the Settlement because it is highly likely that the reduced recordkeeping fee will continue after the three-year settlement period and it also represents a reasonable period to determine the value of the Settlement for current and future participants in the Plan.

5. In valuing the fee savings over a five-year period, I compared the fee paid by the Plan as of June 30, 2017 (approx. $137 per participant) and the reasonable fee alleged in the Amended Complaint that the Plan could obtain through a competitive process ($35 per participant). *See* Doc. 27 at 62 (¶132). I used 28,538 as the number of current participants with account balances based on the Form 5500 for the year ending June 30, 2017. Although the number of participants in the Plan have increased each year since 2010, I used the same number of participants over the five-year examination period. Because I held the number of participants constant despite an annual growth rate of 11.5% from 2010 to 2017, my analysis of the estimated fee savings is conservative.

6. I relied on Class Counsel to determine the annual recordkeeping fee paid by the Plan as of June 30, 2017. I understand that Class Counsel determined the amount by calculating the revenue sharing paid by the Plan's investment options to each of the Plan's five recordkeepers: TIAA, Fidelity, Vanguard, American Century, and VALIC. That amount was then reduced to account for any rebates or credits provided by the Plan's recordkeepers.

7. For purposes of my analysis, I assumed that all revenue sharing paid by the Plan's mutual fund and annuity investments would be made available to Johns Hopkins to offset the Plan's recordkeeping expenses.

8. Based on the methodology set forth above, over a five-year period from 2020

through 2024, I determined that the Plan will achieve fee savings of at least $18,162,738.

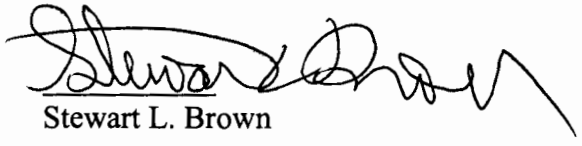
9. In determining these fee savings, I accounted for lost investment opportunity because these amounts would have reinvested in the Plan on an annual basis and appreciate in value through investment gains. I used the rolling 5-year return as of October 30, 2019 for the Vanguard Institutional Index (VIIIX), which is an S&P 500 index fund. The S&P 500 index is a recognized proxy for the U.S. stock market and is the most widely used benchmarks among investors.

10. Calculating the exact amount the Plan would have gained is difficult to calculate accurately because the Plan's total return is not readily available and the Plan maintained over 400 separate investment options since 2010. I also understand that Plaintiffs allege that Johns Hopkins imprudently maintained hundreds of investment options in the Plan that caused well over $100 million in performance losses. Thus, according to Plaintiffs' claims, the Plan's investments did not provide as much of a return to the Plan as they could have under prudent management. As a result, the S&P 500 index fund more fairly approximates the Plan's lost investment returns.

11. Using the U.S. Government bond yields over the corresponding period as discount rates, I also determined that the present value of the fee savings would be $16,605,872.

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

Executed on November 8, 2019 at Tallahassee, Florida.



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EDUCATION

Ph.D., Business Administration, Major; Finance; Minors Economics, Quantitative Analysis, University of Florida, December, 1974

MBA, Finance Concentration, University of Florida, June 1971

BSBA, Finance Major, Cum Laude, University of Florida, June 1970

EMPLOYMENT

January 2005 to Present: Professor Emeritus, Florida State University

January 2000 to December 2004: **Service Professor of Finance**, Florida State University.

September 1988 to December 1999: **Professor of Finance**, Florida State University.

August 1985 to March 1986: **Executive Director**, (Florida) Comptroller's Task Force on Securities Regulation.

September 1979 to August 1988: **Associate Professor of Finance**, Florida State University.

September 1974 to August 1979: **Assistant Professor of Finance**
Florida State University

Other Significant Experience

Developed an Internet Course on Investment Planning for the FSU Center for Professional Development. The course is part of a very successful series offered to candidates seeking the Certified Financial Planner professional designation.

Advisor to Florida State Board of Administration, Sept. 1983 to June 2006. The SBA is a 100 billion dollar public pension fund.

Academic Intern, Chicago Board of Trade, June 1980.

Conducted several two-week courses on hydrocarbon project evaluation for the Petroleum Training Institute (Nigeria) and Roy M. Huffington & Co. (Indonesia).

Also conducted 2 week courses for Arnoco and Unocal

lectured on real options for British Petroleum in Aberdeen, Scotland.

Awarded Professional Designation - **Chartered Financial Analyst**, September,1979.(Charter # 5831)

Retained by the Securities and Exchange Commission to represent the Commission in administrative hearings against stockbrokers accused of mishandling retail securities accounts. Testified twice for the Commission.

Presentations in the Broker Dealer Training Program jointly offered by the Florida Office of the Comptroller and the North American Securities Administrators Association, annually 1992-98. Lecture on churning, suitability, collateralized mortgage obligations, institutional suitability, options and micro cap fraud. Trained securities examiners on computer analysis of retail securities accounts.

Conducted several one-day training seminars on computer evaluation of retail brokerage accounts for the Florida Division of Securities.

Member of Derivatives Task Force sponsored by Florida Association of Court Clerks & Comptrollers, 1995.

Instructor, Florida School of Banking, 1971 to 1991.

AFFILIATIONS:

Financial Analysts Federation, Jacksonville Financial Analysts Society

PUBLICATIONS:

“Mutual Fund Advisory Fees: An Objective Fiduciary Standard”, University of Pennsylvania Journal of Business Law 21,477-532

“Some Clarity on Mutual Fund Fees,” with Steven Pomerantz, University of Pennsylvania Journal of Business Law 20, 767-814.

“Mutual Funds and the Regulatory Capture of the SEC”, University of Pennsylvania Journal of Business Law 19, 701-749.

“Mutual Fund Advisory Fee Litigation: Some Analytical Clarity,” Journal of Business and Securities Law, Spring, 2016.

“Mutual Fund Advisory Fees: New Evidence and a Fair Fiduciary Duty Test,” co-authors, Oklahoma Law Journal, Spring, 2008.

“Mutual Fund Advisory Fees: The Cost of Conflicts of Interest,” co-author, Journal of Corporation Law, Spring 2001.

"On the Existence of Sub-Standard Securities Markets," co-author in Advances in Financial Economics, Hershey, M., John,K., and Makhija, A., eds., London, Elsevier Sciences Inc., Spring 2001.

"Design Considerations for Large Public Sector Defined Contribution Plans," co-author, Financial Services Review, Fall 2000.

"Measuring Strategic Investment Value." co-author, Papers and Proceedings of The Society of Petroleum Engineers, October, 2000.

Fundamentals of Energy Futures and Options, with Steven Errera, Pennwell Press, September, 1999.

"Churning: Excessive Trading in Retail Securities Accounts" Fall-1996, Financial Services Review.

"Limited Partnerships and the Emerging Tort of Suitability Under the Florida Securities and Investor Protection Act," Florida Bar Journal, co-authors, January 1992.Reprinted in Securities Arbitration 1992, Practising Law Institute, July 1992.

"Investment Aspects Relating to the Suitability of Limited Partnership Interests," co-authors, in Securities Arbitration1991, Practising Law Institute, New York, July 1991.

"Calculating Damages in Churning and Suitability Cases," in Securities Arbitration 1991, co-author, Practising Law Institute, New York, July 1991.

"Quantitative Measures and Standards of Excessive Trading Activity," in Securities Arbitration 1991, Practising Law Institute, New York, July 1991.

"Interest Rate Sensitivity and Maturity Gap (Mis)Management: A Critique", The Review of Research in Banking and Finance, co-author,(Fall 1988).

"Using Stock Index Futures to Adjust Portfolio Betas," Akron Business Review, co-author, (Fall 1987).

"A Reformulation of the Portfolio Model of Hedging:Reply" American Journal of Agricultural Economics, (November 1986),

Trading Energy Futures.QUORUM Books (Westport,CT) with Steven Errera, March 1987.

"A Reformulation of the Portfolio Model of Hedging," American Journal of Agricultural Economics, (August 1985),

"Petroleum Futures Trading: Some Practical Applications of the Trade; Discussion," Review of Research in Futures Markets, Vol.3,#2, 1984, co-author.

"Trading the Palm Kernel," Commodities, (July 1983), co-author

"How Bank Bond Traders Use Financial Futures: Discussion," Review of Research in Futures Markets, Vol. 1, 1982 co-author

"Assimilating Earnings and Split Information - Is the Capital Market Becoming More Efficient?," co-author, Journal of Financial Economics, (December 1981),.

"Heating Oil Spreads Ignite in U.S.,U.K.," Commodities, (September 1981) co-author.

"Federal Regulation of Currency Futures Trading, "co-author, Florida State University Law Review, (Spring 1981)

"Biased Estimates and Unstable Betas," co-author, Journal of Finance, (March,1980),.

"Earnings Announcements and Auto-Correlation: An Empirical Test," Journal of Financial Research, (Fall 1979).

"Auto-Correlation, Market Imperfections, and the Capital Asset Pricing Model," Journal of Financial and Quantitative Analysis, (December 1979).

"Earnings Changes, Stock Prices and Market Efficiency," Journal of Finance, (March 1978).

"Choice Dilemma as a Predictor of Group Risk Behavior," co-author, Decision Sciences, (November 1976).

EXPERT WITNESS EXPERIENCE

Testified in excess of seventy times, largely in proceedings related to retail securities and stockbroker mis-conduct, e.g., churning, suitability and associated damages. Testified in state (Florida) and federal court as well as in arbitration hearings conducted by The American Arbitration Association, The National Association of Securities Dealers and The New York Stock Exchange. Testified for the Securities & Exchange Commission, the Florida Division of Securities and the Iowa Securities Department in administrative hearings related to stockbroker licensing. Grand Jury testimony for the US Justice Department (Middle District of Florida) in the only known criminal churning case. Worked with the FBI (Tampa Office) on screening for micro-cap fraud. Extensive experience in options and penny stock cases. Institutional investments experience including mutual funds, bank trust departments, exchange funds and money management cases.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

MARGARET E. KELLY, et al., *Plaintiffs*, v. THE JOHNS HOPKINS UNIVERSITY, *Defendant*.	No. 1:16-cv-2835-GLR

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 November 4, 2019 in San Rafael, California.

/s/ James C. Sturdevant
James C. Sturdevant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

MARGARET E. KELLY, et al., *Plaintiffs*, v. THE JOHNS HOPKINS UNIVERSITY, *Defendant*.	No. 1:16-cv-2835-GLR

[PROPOSED] MEMORANDUM AND ORDER

George L. Russell, III, District Judge.

Class Counsel for Plaintiffs seek an award of attorneys' fees, reimbursement of reasonable expenses, and compensation for class representatives from a common fund created from the class action settlement. The Court has reviewed Class Counsel's request and supporting evidence, as well as attorney-fee and class-representative awards from similar cases. For the reasons stated herein, the Court will grant the motion.

BACKGROUND

On August 11, 2016, Plaintiffs filed *Kelly v. The Johns Hopkins University,* No. 16-2835-GLR. Doc. 1.[1] Plaintiffs assert seven counts against Defendant. In Counts I and II, Plaintiffs allege Defendant breached its duty of loyalty and prudence under 29 U.S.C. § 1104(a)(1)(A)–(B) and committed prohibited transactions under §1106(a)(1) by locking the Plan into providing the CREF Stock Account, regardless of its performance or fees, and locking the Plan into TIAA's recordkeeping services. In Counts III and IV, Plaintiffs allege that Defendant breached its duties

[1] All "Doc." references are to the *Kelly* docket unless otherwise indicated.

of loyalty and prudence under 29 U.S.C. §1104(a)(1)(A)–(B) and committed prohibited transactions under §1106(a)(1) by using five vendors instead of a single recordkeeper, allowing those recordkeepers to receive unreasonable compensation, failing to prudently monitor and control recordkeeping expenses, and failing to solicit bids from other recordkeepers. Under Counts V and VI, Plaintiffs assert that Defendant breached its duties of loyalty and prudence under 29 U.S.C. §1104(a)(1)(A)–(B) and committed prohibited transactions under §1106(a)(1) by failing to prudently monitor Plan investment options, resulting in the use of high-cost and underperforming funds compared to alternatives available to the Plan. Under Count VII, to the extent Defendant delegated any of its fiduciary duties, Plaintiffs allege that Defendant failed to prudently monitor the actions of those individuals.[2]

On January 6, 2017, Defendant moved to dismiss the amended complaint. Doc. 29. On September 29, 2017, the Court granted in part and denied in part Defendant's motion to dismiss Plaintiffs' amended complaint. Doc. 45. The motion was granted to the extent Plaintiffs allege under Counts I, III, and V that "Johns Hopkins acted imprudently by offering too many investment options or higher-cost share classes in the Plan", and for Counts II, IV, and VI, to the extent that Plaintiffs allege that maintaining "mutual funds or that revenue sharing from a mutual fund is a prohibited transaction." *Id.* at 3. The motion was denied in all other respects.

The parties have engaged in over two years of hard-fought litigation. On August 6, 2019, Plaintiffs then moved for preliminary approval of the settlement, Doc. 84, which was granted on August 16, 2019. Doc. 153. On October 23, 2018, the Court granted Plaintiffs' motion to certify the settlement class under Rule 23(b)(1) and appointed Schlichter Bogard & Denton Class Counsel. Doc. 84. The Court appointed Named Plaintiffs Margaret E. Kelly, Katrina Allen,

[2] Count VII labeled as Count VIII in the amended complaint.

Jeremiah M. Daley, Jr., Treva N. Boney, Tracy L. McCracken, Jerrell Baker, Lourdes Cordero, and Francine Lampros-Klein class representatives.

Class Counsel has filed the first cases in history claiming excessive fees in 403(b) plans. Prior thereto, no case had ever been brought by a private law firm or the Department of Labor asserting claims of fiduciary breach for excessive fees and imprudent investments involving a 403(b) plan. Schlichter Bogard & Denton pioneered this ground-breaking and novel area of litigation. More than a decade prior, Schlichter Bogard & Denton similarly pioneered excessive fee litigation involving 401(k) plans. As has been repeatedly recognized, Schlichter Bogard & Denton's work on behalf of participants in large 401(k) and 403(b) plans has significantly improved these plans, brought to light fiduciary misconduct that has detrimentally impacted the retirement savings of American workers, and dramatically brought down fees in defined contribution plans.

Class Counsel filed the pending motion for attorneys' fees on August 23, 2019. Doc. 154. Counsel requests $4,666,667 in attorneys' fees (one-third of the monetary recovery), reimbursement of $53,539.78 in litigation-advanced expenses, and case contribution awards of $20,000 each for Named Plaintiffs Margaret E. Kelly, Katrina Allen, Jeremiah M. Daley, Jr., Treva N. Boney, Tracy L. McCracken, Jerrell Baker, Lourdes Cordero, and Francine Lampros-Klein. Defendant has not opposed the motion.

ANALYSIS

I. Attorney's Fees

In a class action, the court may award reasonable attorney's fees and nontaxable costs as authorized by law or by agreement. Fed. R. Civ. P. 23(h). In a common fund case, such as this, "a reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*,

465 U.S. 886, 900 n.16 (1984). Within the Fourth Circuit, district courts prefer the percentage method in common-fund cases. *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 481 (D. Md. 2014) ("District Courts in the Fourth Circuit, and the majority of courts in other jurisdictions, use the percentage of recovery method in common fund cases."). It is "overwhelmingly" preferred. *Krakauer v. Dish Network, L.L.C.*, No. 14-333, 2018 WL 6305785, at *2 (M.D.N.C. Dec. 3, 2018); *Archbold v. Wells Fargo Bank, N.A.*, No. 13-24599, 2015 WL 4276295, at *5 (S.D.W. Va. July 14, 2015) ("[T]he Court concludes that there is a clear consensus …that the award of attorneys' fees in common fund cases should be based on a percentage of the recovery.").

The Fourth Circuit has not identified the factors for district courts to apply when determining the reasonableness of a fee award using the "percentage of recovery" method. District courts in this circuit have analyzed the following seven factors: "(1) the results obtained for the class; (2) the quality, skill, and efficiency of the attorneys involved; (3) the risk of nonpayment; (4) objections by members of the class to the settlement terms and/or fees requested by counsel; (5) awards in similar cases; (6) the complexity and duration of the case; and (7) public policy[.]" *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 682 (D. Md. 2013).

Other district courts have used the twelve factors identified in *Barber v. Kimbrell's, Inc.*: "(1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and

(12) attorney's fees awards in similar cases." 577 F.2d 216, 226 & n.28 (4th Cir. 1978) (adopting factors from *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87, 92–93 (1989)). Under either test, the Court finds that Class Counsel's attorneys' fees request is reasonable and appropriate in this case.

The Court also conducted a lodestar cross-check that compares the requested contingent fee award against a fee calculated based on hours spent at prevailing market rates. *See Boyd v. Coventry Health Care, Inc.*, 299 F.R.D. 451, 467 (D. Md. 2014) ("The purpose of a lodestar cross-check is to determine whether a proposed fee award is excessive relative to the hours reportedly worked by counsel, or whether the fee is within some reasonable multiplier of the lodestar.").

A. Relevant Factors

Class Counsel requests attorney's fees of one-third of the settlement proceeds, or $4,666,667. The requested fee of one-third of the monetary recovery is reasonable and appropriate given the "significant risk of nonpayment" in these types of cases due to "the novel nature of this case and adverse precedents". *Kruger v. Novant Health, Inc*., No. 14-208, 2016 WL 6769066, at *4 (M.D.N.C. Sept. 29, 2016). In particular, for this case, and 403(b) excessive fee cases in general, the risk of nonpayment was tremendous. No other excessive 403(b) fee lawsuit had been filed before Class Counsel did, and no other law firm had been willing to devote the necessary resources to prosecute this type of action. Without question, this case required a willingness by counsel to risk very significant amounts of time and money "in the face of vigorous resistance" by the defendants. *Ramsey v. Philips N.A.,* No. 18-1099, Doc. 27 at 2 (S.D.Ill. Oct. 15, 2018).

Contingent fees of up to one-third are common in this circuit. *Decohen,* 299 F.R.D. at 483; *In re Titanium Dioxide Antitrust Litig.*, No. 10-318, 2013 WL 6577029, at *1 (D.Md. Dec. 13, 2013); *Clark v. Duke Univ.*, No. 16-1044, 2019 WL 2579201, at *3 (M.D.N.C. June 24, 2019); *Sims v. BB&T Corp.,* No. 15-1705, 2019 WL 1993519, at *2 (M.D.N.C. May 6, 2019); *Krakauer,* 2018 WL 6305785, at *2; *Kruger,* 2016 WL 6769066, at *5. In similar ERISA excessive fee cases, and in particular those brought by Class Counsel, district courts have consistently recognized that a one-third fee is the market rate. *Clark*, 2019 WL 2579201, at *3; *Sims,* 2019 WL 1993519, at *2 ; *Kruger,* 2016 WL 6769066, at *2 (*citing Spano v. Boeing Co.*, No. 06-743, 2016 WL 3791123, at *2 (S.D.Ill. Mar. 31, 2016), *Abbott v Lockheed Martin Corp.*, No. 06-701, 2015 WL 4398475, at *2 (S.D.Ill. July 17, 2015), *Beesley v. Int'l Paper Co*., No. 06-703, 2014 WL 375432, at *2 (S.D.Ill. Jan. 31, 2014), *Nolte v. Cigna Corp.*, No. 07-2046, 2013 WL 12242015, at *3 (C.D.Ill. Oct. 15, 2013), *George v. Kraft Foods Global, Inc.*, Nos. 08-3899, 07-1713, 2012 WL 13089487, at *3 (N.D.Ill. June 26, 2012), *Will v. Gen. Dynamics Corp*., No. 06-698, 2010 WL 4818174, at *3 (S.D.Ill. Nov. 22, 2010), *Martin v. Caterpillar Inc.*, No. 07-1009, 2010 WL 11614985, at *2 (C.D.Ill. Sept. 10, 2010)); *see also Cassell v. Vanderbilt Univ.*, No. 16-2086, Doc. 174 (M.D. Tenn. Oct. 22, 2019); *Tussey v. ABB, Inc.,* No. 06-4305-NKL, Doc. 870 (W.D. Mo. August 16, 2019); *Gordan v. Mass. Mut. Life. Ins. Co.*, No. 13-30184, 2016 WL 11272044, at *2 (D.Mass. Nov. 3, 2016); *Ramsey*, Doc. 27 at 5. In each of those cases, the district courts awarded one-third of the settlement to cover attorney's fees. This great weight of authority more than demonstrates that a one-third fee is justified in this case.

This is a highly complex case with numerous issues that were vigorously contested. *Smith v. Krispy Kreme Doughnut Corp*., No. 05-187, 2007 WL 119157, at *2 (M.D.N.C. Jan. 10, 2007) (noting "ERISA law is highly complex"); *see Goldenberg v. Marriott PLP Corp.*, 33 F.Supp.2d

434, 439 (D. Md. 1998) (finding the case was complex based on a "regulatory climate in flux."). The "rapidly evolving" area of law places demands on counsel and the Court 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 that are not only dependent on the statute but also on various regulations that implement ERISA." *Martin*, 2010 WL 3210448, at *2. It also involves "novel questions of law". *Tussey v. ABB, Inc*., No. 06-4305, 2012 WL 5386033, at *3 (W.D.Mo. Nov. 2, 2012).

The size and complexity of the issues before the Court, and the novelty of the litigated claims involving a 403(b) plan, are more than sufficient reasons to support a one-third contingent fee. Indeed, the fact that excessive 403(b) litigation did not exist until Schlichter, Bogard & Denton began "holding employers responsible" for their misconduct exemplifies the difficulty and uncertainty in obtaining any recovery in this litigation. *Cf. Spano v. Boeing Co*., No. 06-743, 2016 WL 3791123, at *3 (S.D.Ill. Mar. 31, 2016).

In light of the complexity of this ERISA class action, "it takes skilled counsel to manage a nationwide class action, carefully analyze the facts and legal claims and defenses under ERISA, and bring a complex case to the point at which settlement is a realistic possibility." *Krispy Kreme,* 2007 WL 119157, at *2. 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. With an opponent that is a "sophisticated corporation with sophisticated counsel", such as here, additional skill is necessary, *Nolte,* 2013 WL 12242015, at *3, as Class Counsel herein has been found to be. This Court agrees that Schlichter, Bogard & Denton are Class Counsel of the highest caliber.

Class Counsel displayed extraordinary skill and determination throughout this litigation. Schlichter, Bogard & Denton has been recognized by federal courts throughout the country as having pioneered similar ERISA excessive fee litigation. Schlichter, Bogard & Denton brought the first two trials of 401(k) excessive fee cases and is the only firm to have successfully handled a 401(k) excessive fee case in the Supreme Court. *Tibble v. Edison, Int'l,* 135 S.Ct. 1823 (2015); *Tussey v. ABB, Inc*., 746 F.3d 327 (8th Cir. 2014).

The ground-breaking nature of the work of Schlichter, Bogard & Denton is further illustrated in this litigation. Schlichter, Bogard & Denton was the first law firm in the country to bring an ERISA excessive fee lawsuit involving a 403(b) plan. The firm also is the only law firm to have tried such a case. Schlichter, Bogard & Denton's steadfast perseverance to this case after adverse precedents is highly admirable and commendable. The Court would expect no less from this law firm based on its reputation as the foremost authority in ERISA excessive fee litigation. Without the unique and unparalleled foresight for this novel area of litigation by Schlichter, Bogard & Denton, the class would not have obtained any recovery for the alleged fiduciary breaches that affected the Johns Hopkins University 403(b) plan for years prior.

Over the last twelve years, Schlichter, Bogard & Denton has demonstrated an unequaled commitment and ability to represent employees and retirees to recover losses they suffered through the mismanagement of their retirement plans. District courts across the country have universally recognized the well-earned reputation and ability of Schlichter, Bogard & Denton. In this litigation, Schlichter, Bogard & Denton has thoroughly demonstrated why it is regarded as the "pioneer and the leader in the field of retirement plan litigation," *Abbott,* 2015 WL 4398475, at *1, and "experts in ERISA litigation", *Krueger,* 2015 WL 4246879, at *2 (citation omitted).

It is further undisputed that Schlichter, Bogard & Denton has greatly benefitted participants and beneficiaries of defined contribution plans through their devotion to this area of complex litigation. The firm has "educated plan administrators, the Department of Labor, the courts and retirement plan participants about the importance of monitoring recordkeeping fees." *Tussey v. ABB Inc*., No. 06-4305, 2015 WL 8485265, at *6 (W.D.Mo. Dec. 9, 2015). As one district court emphasized, "the fee reduction attributed to Schlichter, Bogard & Denton's fee litigation and the Department of Labor's fee disclosure regulations approach $2.8 billion in annual savings for American workers and retirees." *Nolte,* 2013 WL 12242015, at *2 (internal citations omitted). The Court is convinced that the successful, efficient recovery for the class in this case was only obtained as a result of Schlichter, Bogard & Denton's record of success and risking substantial sums of money and investing thousands of hours of attorney time for the benefit of Johns Hopkins University employees and retirees. Schlichter, Bogard & Denton made this commitment to the class without any guarantee that any recovery in this new area of litigation was possible. It is important that Class Counsel not be penalized where its record of success produces an early settlement and a very favorable result for the class.

Class Counsel achieved an excellent result on behalf of the class. The result obtained is "the most critical factor in determining the reasonableness of a fee award" and further supports finding the requested fee reasonable. *In re Abrams & Abrams, P.A*., 605 F.3d 238, 247 (4th Cir. 2010) (internal quotation omitted). The risk of nonpayment in this complex area of the law is tremendous, particularly in light of multiple adverse precedents in similar 403(b) excessive fee lawsuits. *See, e.g., Cunningham v. Cornell Univ.*, 16-6525, 2019 WL 4735876 (S.D.N.Y. Sep. 27, 2019); *Divane v. Northwestern Univ.,* No. 16-8157, 2018 WL 2388118 (N.D.Ill. May 25, 2018); *Wilcox v. Georgetown Univ.,* No. 18-422, 2019 WL 132281 (D.D.C. Jan. 8, 2019); *Davis*

v. Wash. Univ. in St. Louis, No. 17-1641, 2018 WL 4684244 (E.D. Mo. Sept. 28, 2018); *see also Kruger,* 2016 WL 6769066, at *4 (noting adverse precedent).

In the history of ERISA 403(b) litigation, there has only been one trial. *Sacerdote v. New York Univ*., 328 F.Supp.3d 273 (S.D.N.Y. 2018). This trial occurred in April 2018, which resulted in judgment in July 2018 in favor of New York University and against the plaintiffs. The district court's rejection of similar fiduciary breach claims therein further underscores the difficulties and challenges that Class Counsel faced in securing a successful recovery for the class.

Rather than "having to wait as long as a decade" before receiving any recovery, class members will receive compensation and be able to invest their proceeds immediately that adds more value to the settlement. *Kruger,* 2016 WL 6769066, at *5. Current participants will receive their distributions directly into their accounts tax deferred and former participants have the right to direct their distribution into a tax-deferred vehicle, such as an Individual Retirement Account. The Investment Company Institute estimates that the present value of the benefit of tax deferral for 20 years is an additional 18.6%,[3] and this Court adopts that value. This Court finds that the actual value to the class of the monetary portion of the settlement is $16,604,000, when this tax-deferred benefit is taken into account.

Although the $14 million monetary component alone would support the requested fee award, the Court must also consider the value of the non-monetary relief when evaluating the overall benefit to the class. *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 481 (D.Md. 2014).

[3] Peter Brady, *Marginal Tax Rates and the Benefits of Tax Deferral,* Investment Company Institute, Sept. 17, 2013, 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).

"Considering the non-monetary benefits and relief created by counsel's efforts is important because it encourages attorneys to obtain meaningful affirmative relief." *Kruger*, 2016 WL 6769066, at *3. The affirmative relief herein is extensive and provides substantial additional value to the class.

In particular, Defendant agreed to the following: (1) comply with the non-monetary terms for a three-year Settlement Period, during which time Plaintiffs' counsel will stay involved to monitor compliance with the settlement terms and bring an enforcement action if needed; (2) after the end of each year of the Settlement Period provide Plaintiffs' counsel a list of the Plan's investment options, fees charged by those investments, and a copy of the Investment Policy Statement (if any); (3) retain an independent consultant with expertise in designing investment structures for large defined contribution plans who will thereafter assist the fiduciaries in reviewing the Plan's existing investment structure and to develop a recommendation for the Plan's investment structure; (4) issue requests for proposals for recordkeeping and administrative services; (5) the independent consultant shall provide a recommendation to the Plan's fiduciaries regarding whether the Plan should use a single recordkeeper or more than one recordkeeper; (6) the Plan's fiduciaries shall provide to Plaintiffs' counsel the final bid amounts that were submitted in response to the request for proposals and shall identify the selected recordkeeper(s), which shall be accompanied by the final agreed upon contract(s); (7) contractually prohibit the Plan's recordkeeper(s) from soliciting current Plan participants for the purpose of cross-selling proprietary non-Plan products and services, including, but not limited to, Individual Retirement Accounts (IRAs), non-Plan managed account services, life or disability insurance, investment products, and wealth management services, unless a request is initiated by a Plan participant; and (8) provide Plan participants with a link to a webpage containing the fees and the 1-, 5-, and 10-

year historical performance of the frozen accounts and the investment options that are in the Plan's approved investment structure and the contact information for the individual or entity that can facilitate a fund transfer for participants who seek to transfer their investments in frozen annuity accounts to another fund in the Plan. Doc. 84-2 (§§10.1–10.13).

Class Counsel engaged Dr. Stewart Brown, a nationally recognized economist, to provide the Court with an estimate of the economic benefits that will be achieved by the above non-monetary relief. Dr. Brown determined that the reduction in recordkeeping fees through the competitive bidding process for recordkeeping services provides an additional benefit to the class of $18,162,738, with a present value of $16,605,872. The Court finds that Dr. Brown provides a reliable analysis of the estimated economic benefits the class will achieve through the settlement. As a result, the Court will consider these benefits included in the economic value of the common fund that Class Counsel created through their diligent efforts.

Taking into account the benefit of tax deferral and fee savings, the settlement is valued at $34,766,732. Thus, Class Counsel's requested fee is less than 7.45% of the total benefit to the class. This is a conservative estimate because it does not take into account additional benefits that are provided through other non-monetary terms.

B. Lodestar Cross-Check

"Given that courts in the Fourth Circuit approve of the percentage-of-fund method for awarding fees in common fund cases, '[i]t is not necessary for the Court to conduct a lodestar analysis[.]'" *Kruger*, 2016 WL 6769066, at *4 (citation omitted). However, the Court conducted a lodestar cross-check to confirm that the percentage award is fair and reasonable by determining the hours reasonably expended and then multiplying that amount by the reasonable hourly rate. *Jones v. Dominion Res. Servs., Inc*., 601 F.Supp.2d 756, 759 (S.D.W. Va. 2009) (collecting

cases). "The hourly rate should be in line with the market rate for 'similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Kruger*, 2016 WL 6769066, at *4 (citation omitted). The Court does not need to "'exhaustively scrutinize[ ]' the hours documented by counsel and 'the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case.'" *Krakauer*, 2018 WL 6305785, at *5 (*quoting Goldberger v. Integrated Res., Inc*., 209 F.3d 43, 50 (2d Cir. 2000)).

As courts have repeatedly recognized, complex ERISA class action litigation, such as this, involves a national market, particularly given that no attorney or law firm ever filed an excessive fee ERISA case before Class Counsel. The Court therefore finds that the relevant market rate for cases such as this is a nationwide market rate. This is consistent with the findings of numerous other district courts in similar excessive fee cases handled by Class Counsel. *Kruger*, 2016 WL 6769066, at *4 (collecting cases).

Class Counsel Schlichter, Bogard & Denton has spent approximately 2,566.10 hours of attorney time and 249.60 hours of non-attorney time on this matter to date. Based on the documentation submitted by Class Counsel, the Court finds that the time spent by Class Counsel on the case is reasonable considering the complexity and number of contested issues throughout the litigation.

The Court approves the following hourly rates for Schlichter, Bogard & Denton: 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. Within the last several months, Class Counsel's reasonable hourly rates were approved by district courts in similar ERISA class action litigation, including courts in this circuit. *Cassell*

v. Vanderbilt Univ., No. 16-2086, Doc. 174 at 3 (M.D. Tenn. Oct. 22, 2019); *Clark*, 2019 WL 2579201, at *4; *Sims*, 2019 WL 1993519, at *3.

These reasonable hourly rates were independently verified by a recognized expert in attorney fee litigation who opined that Class Counsel's requested rates were reasonable based on rates charged by national attorneys of equivalent experience, skill, and expertise in complex class action litigation. *Ramsey,* Doc. 27, at 9 (S.D. Ill. Oct. 15, 2018) (*citing* Declaration of Sanford Rosen [Doc. 21-3 ¶52]). These rates reflect a modest increase (3% annually) from those previously approved for Class Counsel in 2016. *Kruger,* 2016 WL 6769066, at *4 (applying rates from *Spano*); *Ramsey,* Doc. 27 at 8 n. 4 (applying increased rates from *Spano*). In light of the close similarities between the fiduciary breach claims in these cases and this one, Class Counsel being the same, and the recency of the decisions, the Court finds that these hourly rates are reasonable for the services provided.

Using the approved rates set forth above, the lodestar is $1,907,379. The requested fee would result in a lodestar multiplier of 2.45—well within the range routinely approved in this Circuit. *Freckleton v. Target Corp.*, No. 14-cv-00807, Doc. 145-1 at 22, 149 (D.Md. Dec. 11, 2017) (approving attorneys' fee award with a lodestar multiplier of 3.5); *Kruger,* 2015 WL 6769066, at *5 (approving 3.69 lodestar multiplier in similar ERISA case and noting that courts have routinely approved multipliers of 4.5 or higher); *Deloach v. Philip Morris Co.*, No. 00-1235, 2003 WL 23094907, at *11 (M.D.N.C. Dec. 19, 2003) (approving 4.45 lodestar multiplier); *Dechoen*, 299 F.R.D. at 483 (approving 3.5 lodestar multiplier). Given the substantial risks involved in ERISA excessive fee cases, a risk multiplier is appropriate for this case. This demonstrates the reasonableness of the requested fee award.

II. Expenses

Under Rule 23(h), a trial court may award nontaxable costs that are authorized by law or the parties' agreement. Fed. R. Civ. P. 23(h). A cost award is authorized by both the parties' settlement agreement and the common fund doctrine. Doc. 84-2 at 3, 22 (§§2.4, 7.1); *Kruger,* 2016 WL 6769066, at *6. "Reimbursement of reasonable costs and expenses to counsel who create a common fund is both necessary and routine." *Savani v. URS Prof'l Solutions LLC*, 121 F.Supp.3d 564, 576 (D.S.C. 2015). "The prevailing view is that expenses are awarded in addition to the fee percentage." *Krispy Kreme*, 2007 WL 119157, at *3 (citation and internal quotation marks omitted). Reimbursable expenses include court costs, transcripts, travel, contractual personnel, document duplication, expert witness fees, photocopying, long distance telephone charges, postal fees, and expert witness fees. *In re Mid-Atlantic Toyota Antitrust Litig.*, 605 F. Supp. 440, 448 (D. Md. 1984). Here, Class Counsel requests reimbursement of expenses in the amount of $53,539.78. The requested expenses are all for legitimate costs associated with prosecuting the case and the amounts are reasonable. The Court finds that Class Counsel's request is fair and reasonable and will approve it.

III. Class Representatives

"As part of a class action settlement, named plaintiffs are eligible for reasonable incentive payments." *Decohen*, 299 F.R.D. at 483 (internal citations and quotations omitted). "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 Solutions LLC*, 121 F.Supp.3d 564, 577 (D.S.C. 2015). Here, Class Counsel requests a case contribution award of $20,000 each for Class Representative. The class representatives provided invaluable assistance to Class Counsel in prosecuting the case. They also risked their reputation

and alienation from employers or peers "in bringing an action against a prominent company [university] in their community." *Kruger,* 2016 WL 6769066, at *6.

The Court finds that the requested case contribution award for the class representatives is reasonable and appropriate given their contributions to the action. This amount is consistent with awards in similar excessive fee settlements. *See Kruger,* 2016 WL 6769066, at *6 (collecting cases awarding $25,000 to each named plaintiff).

It is **ORDERED** that:

1. Class Counsel's motion for attorneys' fees, reimbursement of expenses, and case contribution awards for named plaintiffs is **GRANTED**.
2. The Court awards Class Counsel an attorney's fee of $4,666,667, to be paid from the settlement amount.
3. The Court awards Class Counsel expenses of $53,539.78, which are to be paid from the settlement amount.
4. The Court awards a case contribution award of $20,000 each for Class Representatives Margaret E. Kelly, Katrina Allen, Jeremiah M. Daley, Jr., Treva N. Boney, Tracy L. McCracken, Jerrell Baker, Lourdes Cordero, and Francine Lampros-Klein, also to be paid from the settlement amount.

This is the _____ day of _____, 2020.

_____
UNITED STATES DISTRICT JUDGE