UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

GARY SPANO, *et al.*, *Plaintiffs*, vs. THE BOEING COMPANY, *et al.*, *Defendants*.	No. 06-cv-743-NJR-DGW

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

Pursuant to Rules 23(h) and 54(d)(2), Plaintiffs move that the Court approve a fee award of $19,000,000 and a cost award of $1,821,470.38 to Class Counsel, Schlichter, Bogard & Denton; incentive awards of $25,000 to three Named Plaintiffs and Class Representatives: Gary Spano, John Bunk, and Marlene White; and an incentive award of $10,000 to two Named Plaintiffs and Class Representatives Kenneth Griffin and Douglas Peterman. As shown in Plaintiffs' supporting memorandum, in pursuing this case, Class Counsel devoted massive resources and bore tremendous risk in order to benefit the Class— advancing large sums and working without compensation throughout over nine years of hard-fought litigation, despite the prospect of possible non-payment for those expenses and 21,986 hours of attorney time. The requested percentage of the settlement fund is comparable to attorney's fees awards in similar cases.

Accordingly, based on all of the relevant factors, and for the reasons stated in Plaintiffs' memorandum, the Court should grant this motion in all respects.

Dated: January 29, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2016, I served this document on all parties via the Court's CM/ECF system.

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

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INTRODUCTION

The settlement resolves a very long-standing case involving precedent-setting claims of over 200,000 current and former Boeing employees who allege that Boeing violated ERISA by sponsoring a 401(k) Plan charging excessive fees and maintaining several imprudently selected investment options. This action was filed over nine years ago, at a time when 401(k) excessive fee litigation did not exist. The case was one of a group that was the first of its kind, brought at a time when neither private litigants nor the United States Department of Labor were willing or able to bring such an action due to its staggering resource demands and the uncommon risks associated with litigating in truly uncharted waters. *Abbott v Lockheed Martin Corp*., No. 06-cv-701-MJR, Doc. 525, 2015 U.S.Dist.LEXIS 93206 at 9 (S.D.Ill. July 17, 2015)(observing in the context of a sister case brought by Class Counsel against Lockheed Martin that these were "cases of first impression" that have "had a 'humongous' impact over the entire 401(k) industry, which has benefited employees and retirees throughout the country by bringing sweeping changes to fiduciary practices.").

The $57 million Settlement Fund is the second-largest ever for a case of this nature, returning not only significant money to employees and retirees of The Boeing Company but also ensuring that class members will have a high-quality 401(k) plan for years to come. The settlement recognizes the tremendous improvements made to the Plan since this litigation commenced and requires future oversight and monitoring of the Plan. These changes have reduced administrative fees in the VIP Plan by over 75%, while other changes have lowered investment management fees and improved investment performance. In order to achieve this substantial relief for the class, Class Counsel incurred immense risk, and massive costs in time and expense, litigating the case without compensation for over nine years—including nearly

22,000 hours of attorney time and over $1.8 million in advanced costs carried for years—with no guarantee of payment.

Under the "common fund" doctrine, in a case such as this where class counsel obtains a recovery for the benefit of a class, the class lawyers are entitled to a reasonable award of attorneys' fees from the settlement proceeds. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998)("When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund"). The fee award must reflect "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007).

In ERISA 401(k) fee class actions in this district, the Honorable Judges Reagan, Herndon and Murphy have consistently recognized that "a one-third fee is consistent with the market rate in settlements concerning this particularly complex area of law." *Abbott*, 2015 U.S.Dist.LEXIS 93206 at 7 (approving fee award of one-third of $62 million ERISA settlement); *Beesley v. Int'l Paper Co.*, No. 06-cv-703-DRH, Doc. 560, 2014 U.S.Dist.LEXIS 12037 at 10 (S.D.Ill. Jan. 31, 2014); *Will v. General Dynamics Corp.*, No. 06-cv-698-GPM, Doc. 259, 2010 U.S.Dist.LEXIS 123349 at 7–8 (S.D. Ill. Nov. 22, 2010).

Here, before even considering the value of the significant improvements to the Plan since this litigation, an award of one-third of the monetary recovery would be reasonable, because the normal market price in cases like this is a one-third contingency fee. Moreover, while the Court is not required to evaluate the requested fee under the "lodestar" method, Class Counsel's requested fee is reasonable on that basis as well. Accordingly, the Court should award Class Counsel a fee of $19,000,000 (one-third of the monetary recovery), reimburse Class Counsel's

actual costs and expenses, and award Named Plaintiffs Gary Spano, John Bunk and Marlene White $25,000 and Named Plaintiffs Kenneth Griffin and Douglas Peterman $10,000 for their service in this case.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs filed this action over nine years ago, on September 28, 2006, at a time when ERISA fiduciary breach claims arising from excessive fees in 401(k) plans did not exist. At the time the Plaintiffs retained Class Counsel in 2006, "virtually no cases had ever been filed against large 401(k) plan sponsors involving claims of excessive fees and prohibited transactions under ERISA." *Beesley*, 2014 U.S.Dist.LEXIS 12037 at 8.

For over a year and a half before filing the case, Class Counsel spent hundreds of hours conducting a thorough investigation by obtaining and reviewing documents and financial statements regarding the 401(k) Plan, extensively discussing the issues with experts in the field and participants in the Plan, developing expertise with industry practices, performing comprehensive legal research on numerous complex issues of ERISA and class action law, and analyzing and developing the Plan's potential claims.

Plaintiffs filed this action on September 28, 2006. Over the course of nearly a decade, Class Counsel expended all resources necessary to vigorously and effectively prosecute the case. This has included not only oppositions to Defendants' motions to dismiss (Docs. 49, 201), but a full Rule 23(f) appeal — and subsequent re-briefing — of class certification.

Once discovery commenced, Plaintiffs' counsel obtained, reviewed, and analyzed hundreds of thousands of documents revealing facts which Plaintiffs allege show a fundamental lack of diligence in monitoring the Plan's recordkeeper — who had other corporate relationships with Boeing — and a failure to competitively bid recordkeeping services for a decade. Plaintiffs also allege an imprudent selection and monitoring process for the Plan's investment options, resulting

in the continued offering of a volatile technology sector fund, the underperformance of the Company Stock Fund, and excessive fees in the mutual funds generally and the State Street Small Cap Fund in particular.

Expert discovery was also very extensive. After conducting a nationwide search, Plaintiffs' counsel identified and designated a total of six well-qualified experts with vast industry experience in areas such as investment management, retirement plan administration, and prudent fiduciary practices. Defendants also designated formidable experts, who opined that Defendants had complied with their ERISA fiduciary obligations in all respects and that Plaintiffs' damage calculations were insufficient to justify any recovery to the Class.

On January 1, 2009 — over seven years ago — Defendants filed their first Motion for Summary Judgment. Doc. 213. Plaintiffs filed their response (Doc. 223), but the case was stayed before the Court ruled on the motion. Doc. 286. The stay followed the Seventh Circuit Court of Appeals' granting of Defendants' motion for leave to appeal the Court's prior order granting class certification. Doc. 279. Although Plaintiffs were initially successful at having the stay lifted (Doc. 292), the Seventh Circuit stated proceedings pending appeal on January 21, 2010. Doc. 298. The case remained stayed for one year until the Seventh Circuit vacated the class certification order on January 21, 2011. Doc. 306.

Plaintiffs then filed an Amended Class Certification Motion seeking certification of a more limited class and sub-classes consistent with the Seventh Circuit's guidance. Doc. 309. After additional class certification discovery and expert opinions, Defendants again opposed the motion, using multiple declarations and 43 exhibits. Doc. 349. With that motion pending, the Court ordered the parties to private mediation on December 2, 2011. Doc. 365. In its order, the Court noted that "[t]he attorneys have vigorously represented their clients with all the attendant

zeal expected when seeking to gain advantage during the pretrial process." *Id*. at 1. The parties travelled to Atlanta for a full-day mediation, but the mediation was unsuccessful. Three weeks later, Defendants filed two new separate motions for summary judgment, one general motion and one motion specific to their statute of limitations affirmative defense. Docs. 368, 370. Combined, the two motions were supported by 60 pages of memoranda in support. Docs. 369, 371.

With those dispositive motions pending, the Court granted Plaintiffs' amended motion for class certification. Doc. 397. Again, Defendants sought a Rule 23(f) appeal. This time, the Seventh Circuit denied Defendants' Rule 23(f) petition. Doc. 398. Following class certification, the Court allowed Defendants to submit a third round of motions for summary judgment (Doc. 399) which Defendants did. Docs. 406, 407. With those dispositive motions pending, the Court again ordered mediation, this time with Magistrate Judges Wilkerson and Williams. Doc. 459. That all-day mediation was also unsuccessful. The motion for summary judgment on the merits was denied on December 30, 2014 and the motion for summary judgment based on the statute of limitations was granted in part and denied in part in the same Order. Doc. 466. The case was then set for trial to begin May 20, 2015, although that was subsequently revised to August 26, 2015. Doc. 467. In the interim, the Parties again met for another all-day mediation with private mediator Hunter Hughes. Again, the mediation failed. After expensive trial preparation, on August 26 both sides had moved into the courtroom and were fully prepared for opening statements and a month-long trial. By court order, on the morning of trial, Chief Judge Reagan made one last attempt to resolve the case. Ultimately, these efforts were successful at achieving a settlement, but only at the last hour and only after combative discovery and motion practice requiring 545 separate docket entries over nine years.

Based on the foregoing history, it is clear that Class Counsel originated this area of law and vigorously pursued the classes' claims throughout more than nine years of contentious litigation.

ARGUMENT

Class Counsel is entitled to a reasonable fee award from the common fund, in an amount that reflects "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692. The normal rate of compensation in the market is a contingency fee of one-third of the recovery, in both ERISA fee cases and class actions generally. The reasonableness of the fee request is further shown by the enormous risk of nonpayment and excellent result for the class, including significant improvements to the Plan while the case was being litigated and the provision benefits to the Class far beyond the monetary settlement amount. Class Counsel pursued these untested legal theories for nine years against a formidable opponent with substantial defenses, yet obtained the second largest-ever settlement in an ERISA fee case against a single employer.

Numerous other factors support the reasonableness of this request, including: (1) that the Named Plaintiffs agreed to a one-third contingency fee; (2) that Class Counsel are at the forefront of litigation of this type; (3) that, unlike most areas of the law, virtually no cases of this type had been brought by private firms before Plaintiffs' attorneys filed this case; (4) that this litigation entailed tremendous risks that no other plaintiffs' counsel was willing to undertake at any contingency fee; (5) that the regulatory agency involved, the Department of Labor, has not brought such cases; (6) that this litigation required extensive and particularized skill, not only in litigating a complex national class action, but also in navigating ERISA and the Department of Labor's voluminous regulations, comments and advisory opinions relevant to the case; (7) that this litigation required extensive investment, including the retention of expert witnesses, the review of extensive discovery and the investment of thousands of attorney hours, as well as

substantial legal assistant hours, in litigating the case; (8) that these expenses were incurred over the course of more than nine years, during which time Class Counsel has not received compensation for their services to the class or payment of any expenses or the cost of carrying them; (9) that numerous defenses, including statute of limitations and denial of class certification, threatened to create a significant or complete bar to recovery; and (10) that Defendants are adamant in their position that they were entitled to judgment on all claims.

Moreover, a lodestar cross-check analysis confirms that Class Counsel's requested fee is reasonable, as counsel devoted 21,986.8 hours of attorney time to pursuing these claims while facing a significant risk of non-recovery. Declaration of Sheri O'Gorman ("O'Gorman Decl."), ¶2. Class Counsel will incur additional time seeing this case through final approval and over the course of the settlement period. The Court should also award reimbursement of Class Counsel's reasonable and necessary costs incurred in pursuing these claims, which have been carried for many years, again at substantial risk of non-recovery. The Court should also approve case contribution awards to the Named Plaintiffs for their service in this case.

I. Class Counsel's requested fee is reasonable in light of the "market price," the substantial risk of non-payment, and the exceptional results achieved for the Class.

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed.R.Civ.P. 23(h). The award of attorneys' fees and costs in this case is authorized by both the common fund doctrine, *Boeing*, 444 U.S. at 478, and the parties' settlement agreement, Doc. 491-1 at 3, 23 (§§2.4, 7.1). Thus, the issue before the Court is whether Class Counsel's fee request is reasonable.

In common fund cases, "the measure of what is reasonable is what an attorney would receive from a paying client in a similar case." *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 408 (7th Cir. 2000); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992)(counsel is "entitled

to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client."). The Court's objective is to "estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed)." *In re Synthroid Marketing Litig.*, 264 F.3d 712, 718 (7th Cir. 2001). Thus, the fee award must reflect "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692. "When the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee *is* the 'market rate.'" *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986).

A. The market for similar services is set exclusively by contingent fee arrangements.

In most class actions, the prevailing, if not exclusive, method of compensating class counsel is by a contingent fee arrangement: "The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent." *Florin v. Nationsbank, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994)(quoting *In re Cont'l.*, 962 F.2d at 569); see also *Gaskill*, 160 F.3d at 362 ("most suits for damages in this country are handled on the plaintiff's side on a contingent-fee basis" of typically "between 33 and 40 percent"). The use of contingent fee arrangements is dictated by two economic realities. First, in many class actions, while the recovery for the class as a whole may be large, individual class member damages are relatively small, and thus no class member has an incentive to finance complex, costly, and protracted litigation on an hourly basis. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)(In the words of Judge Posner, "only a lunatic or a fanatic sues for $30."). Second, even if the potential recovery would justify such a pursuit, the typical 401(k) participant trying to save for retirement obviously does not have the financial means to pay counsel an hourly fee to engage in multi-year litigation

against a massive corporation, particularly when there is a substantial risk of recovering nothing. Thus, retaining counsel on an hourly basis in these types of cases is plainly not economically feasible. Only through contingent fee arrangements is it possible to vindicate the rights of 401(k) participants victimized by excessive fees and imprudent investments.

That the market for Class Counsel's services universally results in contingent-fee arrangements is confirmed by the experience of Class Counsel and other attorneys who litigate ERISA fiduciary breach class actions. *Abbott*, 2015 U.S.Dist.LEXIS 93206 at 6. In this case, Class Counsel entered into agreements with each of the Named Plaintiffs for a contingency fee of one-third of any recovery plus costs, with the understanding that their claims would be brought as a class action. See e.g., Declaration of Jerome Schlichter ("Schlichter Decl."), ¶¶ 22. Prominent ERISA attorney Thomas Theado has submitted his declaration ("Theado Decl.") stating that he would have insisted upon a similar contingency fee arrangement and that contingent fees are the exclusive method of compensating counsel in comparable ERISA class cases. Theado Decl., ¶11. This is consistent with the view expressed by another prominent ERISA attorney, Garret Wotkyns, in the *Abbott* settlement. *Abbott v. Lockheed Martin Corp.*, Case 06-701, Doc. 502-5 (Declaration of Garret Wotkyns, Decl., ¶¶9–10). Accordingly, based on the experience of class action counsel in similar cases, and the clear impracticality of an hourly arrangement in this type of litigation, a contingent fee *is* the market rate. *Kirchoff*, 786 F.2d at 324 ("When the prevailing method of compensating lawyers for similar services is the contingent fee, then the contingent fee *is* the market rate.").

B. A contingency fee of one-third of the recovery is the standard market rate.

Given the indisputable evidence that the arm's length contract for legal services in this case would have necessarily been on a contingency basis, the question before the Court is simply whether Class Counsel's fee of 33 1/3% of the monetary recovery, or 6.4% of the estimated

value of the benefit to the Class over time, represented the reasonable market rate at the inception of this litigation. See *Synthroid,* 264 F.3d at 718. To make that determination, courts may consider factors such as actual fee contracts, data on fees awarded in other class actions in the jurisdiction, and evidence of the quality of legal services rendered. *Taubenfeld v. AON Corp*., 415 F.3d 597, 599–600 (7th Cir. 2005). These factors all overwhelmingly support the requested award.

1. Plaintiffs in this and other ERISA fee cases agreed to contracts providing for a contingency fee of one-third of the recovery.

Prior to joining this case, each of the Named Plaintiffs signed agreements with Class Counsel calling for a one-third fee plus costs. See e.g., Schlichter Decl. At the time they entered into these arrangements, Class Counsel was the only firm willing to undertake cases of this type. *Beesley*, 2014 U.S.Dist.LEXIS 12037 at 8. In other 401(k) fee cases brought by Class Counsel, the plaintiffs also signed similar agreements calling for a one-third contingency fee. Schlichter Decl. ¶22. Because Class Counsel is the nationwide leader in 401(k) fee litigation, the rates agreed to by their clients are significant evidence of the market price. And the fact that Class Counsel have been virtually alone in their willingness to handle ERISA 401(k) fee cases of this scope further weighs in favor of the requested award. "Lack of competition not only implies a higher fee but also suggests that most members of the securities bar saw this litigation as too risky for their practices." *Silverman v. Motorola Solutions, Inc*., 739 F.3d 956, 958 (7th Cir. 2013). "The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Id*.

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

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

one-third fee is a common benchmark in private contingency fee cases." Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. of Empirical Legal Studies, 27–78, at 35 (March 2004). This standard arrangement applies to cases, unlike this one, where the law is well established and private attorneys have previously brought cases. Courts throughout the Seventh Circuit routinely consider awards in other cases, and conclude that a one-third contingency fee is standard. *Will*, 2010 U.S.Dist.LEXIS 123349 at 7–8 ("Where the market for legal services in a class action is only for contingency fee agreements, and there is a substantial risk of nonpayment for the attorneys, the normal rate of compensation in the market is 33.33% of the common fund recovered.").[1] Fee awards of one-third are standard even when the size of the common fund is large. Judge Gilbert recently granted a fee award of one-third of a $100 million settlement. *City of Greenville v. Syngenta Crop Prot., Inc*., 904 F. Supp. 2d 902, 911 (S.D. Ill. 2012). And the Northern District of Illinois granted a fee award of 33% of a $163.9 million settlement. *Std. Iron Works v. Arcelormittal*, No. 08-cv-5214, Doc. 539, 2014 U.S.Dist.LEXIS 162557 at 13 (N.D. Ill. Oct. 22, 2014).

As to ERISA fee litigation specifically, a one-third contingency fee is clearly the market rate. In Class Counsel's six prior settlements of 401(k) excessive fee cases in this and other districts in Illinois, Class Counsel had one-third contingency fee agreements, and were awarded one-third of the monetary settlement amount in each case. *Abbott*, 2015 U.S.Dist.LEXIS 93206 at 15; *Beesley*, 2014 U.S.Dist.LEXIS 12037; *Nolte v. Cigna Corp*., No. 07-cv-2046, Doc. 413, 2013

[1] See also *Mansfield v. Air Line Pilots Ass'n Int'l*, No. 06-6869, Doc. 373, 2009 U.S.Dist.LEXIS 132346 at 9 (N.D. Ill. Dec. 14, 2009)("a fee award of 35% of the aggregate settlement fund is consistent with awards in similarly complex cases in this and other jurisdictions and accurately reflects the market rate for class counsel's services..."); *Meyenburg v. Exxon Mobil Corp*., No. 05-cv-15-DGW, Doc. 58, 2006 U.S.Dist.LEXIS 52962 at 2 (S.D. Ill. July 31, 2006)("33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation"); *Teamsters Local Union No. 604 v. Inter–Rail Transp., Inc*., No. 02-cv-1109-DRH, Doc. 71, 2004 U.S.Dist.LEXIS 6363 at 1 (S.D. Ill. Mar. 19, 2004)("In this Circuit, a fee award of thirty-three and one-third (33 1/3%) in a class action in [sic] not uncommon.").

U.S.Dist.LEXIS 184622 at 3–4 (C.D.Ill Oct. 15, 2013); *Martin v. Caterpillar*, No. 07-cv-1009, Doc. 197, 2010 U.S.Dist.LEXIS 145111 (C.D. Ill. Sept. 10, 2010); *Will*, 2010 U.S.Dist.LEXIS 123349 at 7–8; *George v. Kraft Foods Global*, No. 07-cv-1713, Doc. 350, 2012 U.S.Dist.LEXIS 166816 at 2 (N.D.Ill. June 26, 2012). Those cases were all undertaken by Class Counsel concurrently with this case. The fee awards represent a recognition by those courts that one-third of the monetary recovery was the appropriate market rate at the inception of the litigation in cases of this type. This Court should reach the same conclusion here.

Outside of the novel and complex ERISA litigation market, courts within the Seventh Circuit also routinely award attorney's fees of one-third as a standard rate in class action cases. A review of more recent decisions, and fee awards in other districts within the Seventh Circuit, confirms that this continues to represent the market rate. The following table shows twenty-five fee awards in this Circuit since 2000 approving fees of between 33–39%:

Case	**Fee %**
Abbott v Lockheed Martin Corp., No. 06-cv-701-MJR, Doc. 525, 2015 U.S.Dist.LEXIS 93206 at 9 (S.D.Ill. July 17, 2015)	33.3%
In re: Dairy Farmers of America Inc. Cheese Antitrust Litig., No. 09-cv-3690, Doc. 716, 2015 U.S.Dist.LEXIS 20408 at 14–15 (N.D.Ill. Feb. 20, 2015)	33.3%
Standard Iron Works v. Arcelormittal, No. 08-cv-5214, Doc. 539, 2014 U.S.Dist.LEXIS 162557 (N.D.Ill. Oct. 22, 2014)	33%
Beesley v. Int'l Paper Co., No. 06-cv-703-DRH, Doc. 560, 2014 U.S.Dist.LEXIS 12037 (S.D. Ill. Jan. 31, 2014)	33.33%
Fosbinder-Bittorf v. SSM Health Care of Wis., No. 11-cv-592, 2013 U.S.Dist.LEXIS 152087 at 3–4 (W.D. Wis. Oct. 23, 2013)	33.33%
Nolte v. Cigna Corp., No. 07-cv-2046, Doc. 413, 2013 U.S.Dist.LEXIS 184622 (C.D.Ill. Oct. 15, 2013)	33.33%
City of Greenville v. Syngenta Crop Prot., Inc., 904 F. Supp. 2d 902 (S.D. Ill. 2012)	33.33%
George v. Kraft Foods Global, No. 07-cv-1713, Doc. 350, 2012 U.S.Dist.LEXIS 166816 at 2 (N.D.Ill. June 26, 2012)	33.33%

Campbell v. Advantage Sales & Mktg. L.L.C., No. 09-cv-1430, Doc. 212, 2012 U.S.Dist.LEXIS 57218 (S.D. Ind. Apr. 24, 2012)	33.33%
Schulte v. Fifth Third Bank, 805 F. Supp. 2d 560 (N.D. Ill. 2011)	33.33%
Pavlik v. FDIC, No. 10-cv-816, Doc. 67, 2011 U.S.Dist.LEXIS 126016 (N.D. Ill. Nov. 1, 2011)	33.33%
Will v. Gen. Dynamics Corp., No. 06-cv-698-GPM, Doc. 259, 2010 U.S.Dist.LEXIS 123349 (S.D. Ill. Nov. 22, 2010)	33.33%
Burkholder v. City of Ft. Wayne, 750 F. Supp. 2d 990 (N.D. Ind.P 2010)	33.33%
Martin v. Caterpillar, No. 07-cv-1009, Doc. 197, 2010 U.S.Dist.LEXIS 145111 (C.D. Ill. Sept. 10, 2010)	33.33%
Harzewski v. Guidant Corp., No. 05-cv-01009, Doc. 194 (S.D. Ind. Sept. 10 2010)	38%
In re Ready-Mixed Concrete Antitrust Litig., No. 05-cv-979, Doc. 874, 2010 U.S.Dist.LEXIS 85003 (S.D. Ind. Aug. 17, 2010)	33.33%
Kitson v. Bank of Edwardsville, No. 08-cv-507-GPN, Doc. 55, 2010 U.S.Dist.LEXIS (S.D. Ill. Jan. 25, 2010)	33.33%
Mansfield v. Air Line Pilots Ass'n, No. 06-cv-6869, Doc. 373, 2009 U.S.Dist.LEXIS 132346 (N.D. Ill. Dec. 14, 2009)	35%
Kelly v. Bluegreen Corp., No. 08-cv-401, Doc. 151 (W.D. Wis. Oct. 30, 2009)	33%
Perry v. Nat'l City Bank, No. 05-cv-891-DRH, Doc. 81 (S.D. Ill. Mar. 3, 2008)	33%
Alexander v. Phoenix Bond & Indem. Co., No. 98-3234, Doc. 357 (N.D. Ill. Oct. 20, 2003)	39.5%
Retsky Family Ltd. v. Price Waterhouse L.L.P., No. 97-cv-7694, Doc. 151, 2001 U.S.Dist.LEXIS 20397 (N.D. Ill. Dec. 10, 2001)	33.33%
In re Mercury Fin. Co., No. 97-cv-3035, Doc. 175 (N.D. Ill. July 6, 2001)	33.33%
In re Lithotripsy Antitrust Litig., No. 98-cv-8394, Doc. 109, 2000 U.S.Dist.LEXIS 8143 (N.D. Ill. June 9, 2000)	33.3%
In re Spyglass Inc. Securities Litig., No. 99-cv-0512 (N.D. Ill. May 23, 2000)	33%

These fee awards confirm that "the normal rate of compensation in the market" is "33.33% of the common fund recovered." *Will*, 2010 U.S.Dist.LEXIS 123349 at 7–8. One-third of the

common fund—which is actually much less than one-third of the total *value* of the benefit to the class—is also the appropriate attorneys' fee award here.

3. The quality of Class Counsel's services was exceptional.

Courts also commonly consider the quality of class counsel's legal services in determining the market rate. *Taubenfeld*, 415 F.3d at 600. Class Counsel's performance had to be high quality even to simply engage in nine-years of litigation with well-funded Defendants represented by highly qualified national attorneys. In order to pursue the settlement, Class Counsel risked millions of dollars in un-reimbursed attorneys' time, over $1.5 million in out-of-pocket costs, and the possibility of a cost award in favor of Defendants. Unless that risk is compensated with a commensurate award, no firm, no matter how large or well-financed, will have the incentive to even consider such a case as this. Class Counsel believes the quality of its performance fully justifies the requested fee and costs award.

As this Court noted on several occasions, this case was sharply contested throughout. Class Counsel successfully opposed Defendants' motion to dismiss; developed the case through massive discovery, including the review and analysis of nearly 1 million pages of complex documents; retained highly-qualified experts in finance, 401(k) plan recordkeeping, investment management and fiduciary practices; successfully opposed summary judgment in substantial part; handled an interlocutory class certification appeal, and successfully opposed another; and fully prepared the case right up to minutes before trial was to commence. An adverse result at any of those stages could have greatly impaired the possibility of a favorable settlement.

The quality of Class Counsel's service had to be exceptional also to navigate the complex area of ERISA fiduciary breach litigation. In granting final approval of the settlement in another case brought by Class Counsel and awarding one-third of the monetary portion of the settlement,

Judge McDade of the Central District of Illinois observed that achieving a favorable result in this type of case required extraordinary efforts:

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

Martin v. Caterpillar, Inc., No. 07-cv-1009, Doc. 192, 2010 U.S.Dist.LEXIS 82350 at 7 (C.D. Ill. Aug. 12, 2010). As in *Martin*, the class settlement here "represents a significant boon to class members in light of the complexity of this litigation, the potential for protracted litigation, and the strength of the available defenses recognized in *Hecker*." *Id*.

Judges from this district have made similar observations regarding the quality of Class Counsel's services in successfully pursuing claims and obtaining favorable settlements in this complex area of 401(k) fee litigation. Recognizing the work of Class Counsel as exceptional and approving fees of one-third of the monetary recovery in a similar settlement, 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. No case had previously been brought by either the Department of Labor or private attorneys against large employers for excessive fees in a 401(k) plan. Class Counsel performed substantial work…, investigating the facts, examining documents, and consulting and paying experts to determine whether it was viable. This case has been pending since September 11, 2006. Litigating the case required Class Counsel to be of the highest caliber and committed to the interests of the participants and beneficiaries of the General Dynamics 401(k) Plans.

Will, 2010 U.S.Dist.LEXIS 123349 at 8–9 (emphasis added). Judge Herndon, also approving fees of one-third of the monetary recovery in a similar settlement, echoed those thoughts. *Beesley*, 2014 U.S.Dist.LEXIS 12037 at 8 ("Litigating this case against formidable defendants

and their sophisticated attorneys required Class Counsel to demonstrate extraordinary skill and determination.").

More recently, Chief Judge Reagan noted in last year's settlement of another 401(k) excessive fee case, that "Schlichter, Bogard & Denton demonstrated extraordinary skill and determination in obtaining this result for the Class" and that "careful evaluation of claims, a hallmark of Schlichter, Bogard & Denton, added tremendous value to the Class throughout the litigation." *Abbott*, 2015 U.S.Dist.LEXIS 93206 at 9. Last month, Judge Laughrey in the Western District of Missouri noted that Class Counsel has made "significant, national contribution" through litigation that "clarified ERISA standards in the context of investment fees [and] [t]he 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-cv-4305, Doc. 782, 2015 U.S.Dist.LEXIS 164818 at 7–8 (W.D. Mo. Dec. 9, 2015).

The quality of Class Counsel's services is reflected not only in the recovery to Boeing's VIP Plan, but in the effect of this litigation in lowering costs for workers and retirees throughout the United States. See, e.g., Linda Stern, *Stern Advice- How 401(k) Lawsuits Are Bolstering Your Retirement Plan*, REUTERS (Nov. 5, 2013)(fee litigation brought by Class Counsel has had a "humongous" impact, according to CEO of 401(k) plan analysis firm Brightscope, Inc.). As Judge Baker observed in approving the settlement and awarding Class Counsel one-third of the monetary portion of the settlement in a similar case:

> Class Counsel's enforcement of ERISA's fiduciary obligations has contributed to rapid reductions in the level of 401(k) recordkeeping fees paid across the country. The law firm Schlichter, Bogard & Denton is the leader in 401(k) fee litigation. One independent investment advisory company, NEPC, has found that 401(k) recordkeeping fees have dropped $38 per account per year since Class counsel filed their first 401(k) fee cases in 2006. They attribute the fee reductions to improved fee disclosure requirements from the

> Department of Labor and attention brought by 401(k) fee litigation. The Department of Labor reports an estimated 73 million accounts in the United States. Accordingly, the fee reduction attributed to Schlichter, Bogard & Denton's fee litigation and the Department of Labor's fee disclosure regulations approach $2.8 billion in annual savings for American workers and retirees.

Nolte, 2013 U.S.Dist.LEXIS 184622 at 6 (internal citations omitted). Judge Baker noted that Schlichter, Bogard & Denton, as the "preeminent firm in 401(k) fee litigation[,]" has "invested such massive resources and persevered in the face of the enormous risks of representing employees and retirees in this area." *Id. at* 3–4.

After settlement, Class Counsel will continue to spend substantial time protecting the interests of the Class without receiving additional compensation. Class Counsel: (1) have committed to keeping the class informed at no cost to the class, including through the settlement website and through direct calls with class members; (2) will continue to oversee and monitor compliance with the Settlement Agreement for years; and (3) will bear the risk of paying half the cost of the settlement, including the notice, if the settlement fails for any reason.

A one-third fee is a common benchmark in private contingency fee cases, and this case in particular, with its unique risks, massive outlay of resources, untested theories of recovery, uncertainty of result, and capable representation by nationally recognized class counsel clearly justifies this market rate. This is particularly true since Class Counsel's requested recovery is just 6.5% of the value of the potential benefit to the class when the value of affirmative relief is considered.

C. Accounting for the value of the affirmative relief shows that the requested fee is actually far less than one-third of the recovery.

As Judge Herndon observed in awarding fees in a similar ERISA settlement, the court "must also consider the substantial affirmative relief when evaluating the overall benefit to the class." *Beesley*, 2014 U.S. Dist. LEXIS 12037 at 5 (citing Manual for Complex Litig., Fourth, §21.71, at

337 (2004)); Principles of the Law of Aggregate Litigation, A.L.I., May 20, 2009, §3.13(b)("a percent-of-the-fund approach should be the method utilized in most common-fund cases, *with the percentage being based on both the monetary and the nonmonetary value of the settlement*.")(emphasis added); cf. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989)(cautioning against an "undesirable emphasis" on monetary "damages" that might "shortchange efforts to seek effective injunctive or declaratory relief").

Here, Boeing has not only committed to independent review of the propriety of the Technology Fund, but also has, in the course of this litigation, significantly reduced the recordkeeping fees paid by the Plan through competitive bidding processes like those advocated by Plaintiffs' expert. Plaintiffs have engaged Dr. Stewart Brown, a nationally recognized economist and authority on investment costs, to provide the Court with an estimate of the savings to the Plan as a result of these bidding processes. According to Dr. Brown, the resulting fee savings has already saved the Plan over $139 million in lower administrative costs and continues to save the Plan over $19.1 million per year compared to the fees paid in 2005, the year before this case was filed. Declaration of Stewart Brown ("Brown Decl."), ¶6. These benefits represent a tremendous value to the Plan above and beyond the monetary settlement.

Accordingly, the fee requested by Class Counsel represents a contingency fee of only a small fraction of the total benefit to the Plan. Considering just the monetary recovery and Dr. Brown's calculation of recordkeeping fee savings, Class Counsel's fee request constitutes less than 6.5% percent of the value of benefit to the Class. See *Abbott*, 2015 U.S.Dist.LEXIS 93206 at 7 (33 1/3 % of monetary settlement fund is "actually far less than the market rate in national ERISA litigation such as that practiced by Schlichter, Bogard & Denton" because it only represented 20.4% of the value of the benefit to the Class including savings from Plan

improvements during and after the litigation.)

D. The requested fee is also reasonable under a lodestar analysis.

The Seventh Circuit has never endorsed or required a lodestar cross-check. "[I]f substantially similar results must be reached under the lodestar and percentages approaches, then Harman might as well have eliminated the lodestar altogether." *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998). On numerous occasions, the Seventh Circuit has reiterated that it is not a district court's role to decide what is "fair" or "excessive" "based on nothing more than a subjective judgment regarding Counsel's work." *Sutton*, 504 F.3d at 693 (internal citations omitted). A lodestar cross-check interjects just such subjective judgments into the analysis. *Florin*, 34 F.3d at 565 ("this determination is inevitably somewhat subjective"); see also *Abbott*, 2015 U.S.Dist. LEXIS 93206 at 10 ("The use of a lodestar cross-check is no longer recommended in the Seventh Circuit.").

A lodestar cross-check was not performed in the majority of common fund awards in this Circuit. Theodore Eisenberg and Geoffrey Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 269 (2010). Of the forty-one fee awards in the Seventh Circuit between 1993 and 2008, four were determined using the lodestar method; seven using a percentage-of-the-fund with a lodestar cross-check; and twenty-five using the percentage-of-the-fund alone. *Id*. Table 11. Thus, 78% of fee awards calculated using a percentage-of-the-fund, were calculated without a cross-check. *Id*.

Nevertheless, even if a lodestar analysis were done, a fee award in this case equal to one-third of the common fund is also justified under the lodestar method. To determine the reasonableness of attorneys' fees under the lodestar method, the first step is to "multiply[] a reasonable hourly rate by the number of hours reasonably expended." *Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010)(citing *Hensley v. Eckerhart*, 461 U.S. 424, 433-37 (1983)). A

reasonable hourly rate should be in line with the prevailing rate in the "community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Jeffboat, L.L.C. v. Dir., Office of Workers' Comp. Programs*, 553 F.3d 487, 489 (7th Cir. 2009); see also *Denius v. Dunlap*, 330 F.3d 919, 930 (7th Cir. 2003).

Here, Class Counsel have spent 21,986.8 hours of attorney time and 4,828.2 hours of legal assistant time litigating this case. A breakdown of these hours by attorney experience are attached. O'Gorman Decl., ¶2. Class Counsel works solely on a contingent fee basis, but in 2015, this district found that a fee rate of up to $974 per hour, depending on years of attorney experience, was a reasonable hourly rate for Class Counsel's time because national rates should be used. *Abbott*, 2015 U.S. Dist. LEXIS 93206 at 12 (finding "that the reasonable hourly rate for Class Counsel's services" was $974/hour for attorneys with at least 25 years of experience, $826/hour for attorneys with 15–24 years of experience, $595/hour for attorneys with 5–14 years of experience, $447/hour for attorneys with 2–4 years of experience, $300/hour for Paralegals and Law Clerks, and $186/hour for Legal Assistants).

However, to compensate counsel for the long delay in payment, the court must base the attorney fee award on current rates or otherwise adjust the fee based on historical rates to reflect its present value. *Perdue v. Kenny A.*, 559 U.S. 542 (2010)(quoting *Missouri v. Jenkins*, 491 U.S. 274, 282 (1989)). Judge Reagan approved the fee rates in *Abbott* based on the then-current 2015 rates. Although legal billing rates have recently been growing near 4%,[2] even a 3% increase over 2015 rates yields the following 2016 hours rates for Class Counsel:

[2] Clay & Seeger, *2014: Law Firms in Transition, An Altman Weil Flash Survey*, at ii, available at http://www.altmanweil.com/dir_docs/resource/f68236ab-d51f-4d81-8172-96e8d47387e3_document.pdf.

Biller	Hours[3]	Rate	Total
Attorney (25+ years)	7,881.4	$998.00	$7,865,637
Attorney (15–24 years)	698.2	$850.00	$593,470
Attorney (5–14 years)	13,407.2	$612.00	$8,205,206
Attorney (2–4 Years)	---	$460.00	
Paralegal	3,491.9	$309.00	$1,078,997
Law Clerk	581.0	$309.00	$179,529
Legal Assistants	755.3	$190.00	$143,507
Total			$18,066,346

Based on the 2016 rates, Class Counsel would be entitled to a lodestar fee of $18,066,346. However, the lodestar rate is only the first step in determining a reasonable fee under this method. In cases like this one, where counsel "had no sure source of compensation for their services," the Court must apply a risk multiplier to compensate the attorneys for the risk of nonpayment in the event the litigation were unsuccessful. *Florin*, 34 F.3d at 565. In this case, Class Counsel assumed an enormous risk of non-payment, particularly in light of the novel nature of this case at the time it was filed, adverse precedent such as *Hecker*, the protracted length of the litigation, and the massive litigation costs that were carried for years.

If a lodestar analysis were used, the Court must also determine the appropriate multiplier. To do so, a district court must attempt "a retroactive calculation of the probability of success as measured at the beginning of litigation." *Cook*, 142 F.3d at 1013. "The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Silverman*, 739 F.3d at 958 (citing *Kirchoff*, 786 F.2d 320). The multiplier is thus

[3] The lodestar is understated because Class Counsel will have substantial additional time in the case in the future for no fee in order to monitor compliance with the settlement, and have undertaken even further risk of substantial expense if a dispute arises or if the settlement is not finally approved. Class Counsel will also incur additional future expenses without cost to the Class, including expenses related to maintaining a class website and responding to questions from class members.

determined by dividing 1 by the probability of success. *Florin v. Nationsbank of Ga., N.A.*, 60 F.3d 1245, 1248 n.3 (7th Cir. 1995). "Multipliers anywhere between one and four have been approved." *Harman*, 945 F.2d at 976 (citation omitted).

Between 1993 and 2008, the mean multiplier in class actions in the Seventh Circuit was 1.85. Theodore Eisenberg and Geoffrey Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008,* 7 J. Empirical Legal Stud. 248 (2010). Given the extreme difficulty presented by this matter and the attendant risk in investing years of attorney time carrying millions in litigation expenses with no guarantee of recovery, a substantial risk multiplier is warranted. However, the fee sought by counsel uses a multiplier of only 1.05.

Establishing liability for a fiduciary breach is exceedingly difficult. Courts frequently defer to the decisions of ERISA fiduciaries. Therefore, Defendants win outright in many ERISA cases. See, e.g., *Hecker*, *Loomis v. Exelon Corp*., 658 F.3d 667 (7th Cir. 2011); *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011). Even if the plaintiff can prove a fiduciary breach, the issues of causation and the proper measure of damages would also be hotly contested. See *Tatum v. RJR Pension Inv. Comm*., 761 F.3d 346, 364 (4th Cir. 2014)(dispute over causation standard).

Here, Defendants asserted substantial defenses to each of Plaintiffs' claims, only some of which were recognized by the Court in addressing the summary judgment briefing. Doc. 466. Even if liability was established, Defendants had viable arguments that the damages should be limited. Thus, recovery at trial was far from certain. And Defendants only agreed to the settlement at the very commencement of trial, after nine years of litigation, extensive discovery in which Class Counsel unearthed critical evidence, a class certification appeal, a second attempted class certification appeal, denial of multiple motions summary judgment, and huge expenses advanced by counsel to conduct discovery and engage experts. An adverse decision at

any of several different stages could have resulted in nonpayment. The fact that no other firm sought to bring this case indicates that other law firms believed it was too risky. *Silverman*, 739 F.3d at 958. Thus, a multiplier of 1.05 is extremely conservative. See *Abbott*, 2015 U.S.Dist.LEXIS 93206 at 12 (approving one-third fee where lodestar multiplier was 1.33). Accordingly, a fee award of one-third of the common fund is appropriate whether calculated as a percentage of the fund or as a lodestar.

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

Reimbursement of the substantial litigation expenses that Counsel advanced in prosecuting this case is also warranted. As a leading treatise states:

> An attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved. The equitable principle that all reasonable expenses incurred in the creation of a fund for the benefit of a class are reimbursable proportionately by those who accept benefits from the fund authorizes reimbursement of full reasonable litigation expenses as costs of the suit in contrast to the more narrowly defined rules of taxable costs of suit under Fed. R Civ. P. 54 (d).... The prevailing view is that expenses are awarded in addition to the fee percentage.

Alba Conte, 1 Attorney Fee Awards §2:19 (3d ed.); see also *Sprague v. Ticonic*, 307 U.S. 161, 166-67 (1939)(recognizing a federal court's equity power to award costs from a common fund); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991)("In accordance with the well-established common fund exception to the American Rule, …class counsel…are entitled to an award of their…expenses out of the fund that has been created for the class by their efforts"); *In re Ins. Brokerage Antitrust Litig*., MDL 1663, 2012 WL 1071240 (D.N.J. Mar. 30, 2012)("Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action.").

The Seventh Circuit instructs that costs should be awarded based on the types of "expenses

private clients in large class actions (auctions and otherwise) pay." *In re Synthroid Mktg. Litig*., 264 F.3d at 722; *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'"). "Reducing litigation expenses because they are higher than the private market would permit is fine; reducing them because the district judge thinks costs too high in general is not." *In re Synthroid Mktg. Litig*., 264 F.3d at 722. "Likewise, the amount of itemization and detail required is a question for the market. If counsel submits bills with the level of detail that paying clients find satisfactory, a federal court should not require more." *Id*.

Reimbursable expenses include many litigation expenses beyond those narrowly defined "costs" recoverable from an opposing party under Rule 54(d), such as: expert fees; travel; long-distance and conference telephone; postage; delivery services; and computerized legal research. Conte, supra, §2:19; see also *In re Global Crossing Sec. & ERISA Litig*., 225 F.R.D. 436, 468 (S.D.N.Y. 2004)("The expenses incurred-which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review are the type for which 'the paying, arms' length market' reimburses attorneys. For this reason, they are properly chargeable to the Settlement.")(internal citation omitted); *Anwar v. Fairfield Greenwich Ltd*., No. 11-cv-813, 2012 U.S.Dist.LEXIS 78929 (S.D.N.Y. June 1, 2012)("Plaintiffs' Counsel seek reimbursement for expenses such as mediation fees, expert witness fees, electronic legal research, photocopying, postage, and travel expenses, each of which is the type 'the paying, arms' length market' reimburses attorneys.")

Counsel brought this case without guarantee of reimbursement or recovery, so they had a strong incentive to keep costs to a reasonable level. They did so. Given the complexity of this case, the costs incurred were necessarily substantial, but consistent with what would be expected

in a typical case of this size. An empirical study of the costs awarded in class action litigation found that the average cost award was equal to 4% of the relief obtained for the class. See Theodore Eisenberg and Geoffery P. Miller, *Attorney Fees in Class Action Settlements: an Empirical Study*, 1 J. of Empirical Legal Studies 27, 70 (2004). This study suggests that "requests falling within one standard deviation above or below the mean should be viewed as generally reasonable." *Id*. at 74. The total amount of costs here, although substantial, is equal to just 2.6% percent of the total recovery; well within the range to be considered "generally reasonable."

A description of these costs and expenses, broken down by category, is contained in the attached Declaration of Sheri O'Gorman. The costs and expenses are the types of costs and expenses that are routinely reimbursed by paying clients, such as experts' fees, deposition expenses, travel, and photocopying costs. Class Counsel has incurred these expenses over the course of nine years, but do not seek interest to compensate them for the time value of this money or the costs associated with advancing these expenses to the Class. In light of the length and complexity of this litigation, Counsel's request for reimbursement of costs and expenses should be approved as fair and reasonable.

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

Named Plaintiffs Spano, Bunk, White, Griffin and Peterman have been active, hands-on participants in this litigation, expending significant amounts of their own time to benefit the Class. They came forward to initiate this action, took substantial risk, and thereafter remained in contact with Class Counsel. They responded to document requests and interrogatories; reviewed and approved pleadings; assisted with discovery; and were involved in settlement. They prepared for and were extensively questioned during depositions by Defendants' counsel.

Further, as *Hecker* illustrates, the Named Plaintiffs risked a judgment against them for

Defendants' costs to obtain this historic recovery for the Class. In light of their faithful commitment to the Class, Class Counsel request that Named Plaintiffs Spano, Bunk, and White, whose actions since the start of the litigation have benefitted the Class over the course of over nine years, receive an case contribution award of $25,000 from the Settlement Fund and that Named Plaintiffs Griffin and Peterman, who joined more recently but who also engaged in discovery, were deposed, and prepared for trial, receive $10,000 each.

The total award for all Named Plaintiffs represents just 0.17% of the total Settlement Fund. Awards of $25,000 for a named plaintiff award and total named plaintiff awards of less than one percent of the fund are well within the ranges that are typically awarded in comparable cases. See, e.g., *Cook*, 142 F.3d at 1016 (upholding award of $25,000 to class representative); *Cook v. McCarron*, No. 92-cv-7042, 1997 U.S.Dist.LEXIS 1090 at 61 (N.D. Ill. Jan. 22, 1997)(awarding $25,000 case contribution award); *Beesley*, 2014 U.S. Dist. LEXIS 12037 at 8 (awarding $25,000 to each of the three named plaintiffs); *Nolte v. Cigna Corp*., Case No. 07-cv-2046, Doc. 413 at 9 (C.D.Ill. Oct. 15, 2013)(same); *Will*, 2010 U.S.Dist.LEXIS 123349 at 7–8 (same); *Abbott*, 2015 U.S.Dist.LEXIS 93206 at 14 (awarding $25,000 to six class representatives and $10,000 to one additional named plaintiff).

CONCLUSION

For these reasons, Plaintiffs request that the Court approve a fee award of $19,000,000 and a cost award of $1,821,470.38 to Class Counsel, Schlichter, Bogard & Denton, and case contribution awards of $25,000 to Named Plaintiffs and Class Representatives Gary Spano, John Bunk, and Marlene White and case contribution awards of $10,000 to Named Plaintiffs and Class Representatives Kenneth Griffin and Douglas Peterman.

Dated: January 29, 2016

Respectfully submitted,

/s/ Jerome J. Schlichter
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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2016, I served this document on all parties via the Court's CM/ECF system.

/s/ Jerome J. Schlichter

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

GARY SPANO, *et al.*, *Plaintiffs*, vs. THE BOEING COMPANY, *et al.*, *Defendants*.	No. 06-cv-743-NJR-DGW

DECLARATION OF JEROME J. SCHLICHTER

I, Jerome J. Schlichter, under penalty of perjury pursuant to 28 U.S.C. §1746, declare as follows:

1. I am founding partner of the law firm of Schlichter, Bogard & Denton LLP, counsel for the Plaintiffs. This declaration is submitted in support of Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Expenses and for 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 Third, Fifth, Seventh, Eighth and Ninth Circuit Courts of Appeal and numerous U.S. District Courts. I have also been an Adjunct Professor teaching trials at Washington University Law School, and been repeatedly selected by my peers for the list of The Best Lawyers in America.

3. Through over 35 years of practice, I have handled, on behalf of plaintiffs, substantial personal injury, civil rights class actions, mass torts and fiduciary breach litigation under the Employee Retirement Income Security Act (ERISA). 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 cases I have successfully handled include: *Brown v. Terminal Railroad Association,* a race discrimination case in the Southern District of Illinois on behalf of all African-American and Hispanic employees at a railroad; *Mister v. Illinois Central Gulf Railroad,* 832 F.2d 1427 (7th Cir. 1987), a failure-to-hire class action brought on behalf of hundreds of African-American applicants from East St. Louis, Illinois at a major railroad which was tried to conclusion and successfully appealed to the Seventh Circuit Court of Appeals and finally concluded with more than $10 million for the class after 12-and-a-half years of litigation; *Wilfong v. Rent-A-Center,* No. 00-680-DRH (S.D.Ill. 2002), a nationwide gender discrimination in employment case on behalf of women, which was successfully settled for $47 million and substantial affirmative relief to the class of thousands, after defeating the defendant's attempt to conduct a reverse auction.

4. My firm has been named Class Counsel in numerous cases involving claims of fiduciary breaches in large 401(k) plans. See, e.g. *Beesley v. Int'l Paper Co.*, No. 06-703, Doc. 542 (S.D.Ill. Oct. 10, 2013); *Nolte v. Cigna Corp.*, No. 07-2046, 2013 U.S.Dist.LEXIS 101165 at 6–7 (C.D.Ill. July 3, 2013); *Martin v. Caterpillar Inc.*, No. 07-1009, Doc. 173 (C.D.Ill. April 21, 2010); *George v. Kraft Foods Global Inc.*, 251 F.R.D. 338, 351–52 (N.D.Ill. 2008); *Taylor v. United Tech. Corp.*, No. 06-1494, 2008 U.S.Dist.LEXIS 43655 at 15 (D.Conn. June 3, 2008); *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111–12 (N.D.Cal. 2008); *Tussey v. ABB Inc.*, No. 06-4305, 2007 U.S.Dist.LEXIS 88668 at 32 (W.D.Mo. Dec. 3, 2007); *Loomis v. Exelon Corp.*, No. 06-4900, 2007 U.S.Dist.LEXIS 46893 at 11 (N.D.Ill. June 26, 2007); *Will v. General Dynamics*, No. 06-698, 2010 U.S.Dist.LEXIS 95630 at 5–6 (S.D.Ill. Nov. 22, 2010); *Abbott v. Lockheed*

Martin, No. 06-701, Doc. 403 (S.D. Ill. Aug. 1, 2014); *Kreuger v. Ameriprise Fin., Inc.*, 304 F.R.D. 559 (D. Minn. 2014).

5. My work in plaintiffs' class action cases has been taken note of by federal judges. U.S. District Judge James Foreman, in the *Mister* case, *supra*, speaking of my efforts, stated: "This Court is unaware of any comparable achievement of public good by a private lawyer in the face of such obstacles and enormous demand of resources and finance." Order on Attorney's Fees, *Mister v. Illinois Central Gulf R.R.*, No. 81-3006 (S.D. Ill. 1993). District Judge David R. Herndon wrote, regarding my handling of the *Wilfong* class action *supra*:

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

Order on Attorney's Fees, *Wilfong v. Rent-A-Center*, No. 0068-DRH (S.D. Ill. 2002).

6. Judge Herndon also noted in *Wilfong* that I "performed the role of a 'private attorney general' contemplated under the common fund doctrine, a role viewed with great favor in this Court" and described my action as "an example of advocacy at its highest and noblest purpose." *Id.*

7. In *Beesley v. International Paper*, an ERISA excessive fee case similar to this one, Judge Herndon observed: "Litigating this case against formidable defendants and their sophisticated attorneys required Class Counsel to demonstrate extraordinary skill and determination. Schlichter, Bogard & Denton and lead attorney Jerome Schlichter's diligence and perseverance, while risking vast amounts of time and money, reflect the finest attributes of a private attorney general." *Beesley v. Int'l Paper Co.*, No. 06-703-DRH, 2014 U.S.Dist.LEXIS 12037 at 8 (S.D. Ill. Jan. 31, 2014). Similarly, in *Abbott v. Lockheed Martin* Chief Judge Reagan

observed that "[t]he law firm Schlichter, Bogard & Denton has had a humongous impact over the entire 401(k) industry, which has benefitted employees and retirees throughout the country by bringing sweeping changes to fiduciary practices." *Abbott v. Lockheed Martin Corp.*, 2015 U.S.Dist.LEXIS 93206 at 9 (S.D. Ill. July 17, 2015).

8. In *Will v. General Dynamics*, another ERISA excessive fee case in this district, Judge Murphy found that the litigating the case and achieving a successful result for the class "*required Class Counsel to be of the highest caliber* and committed to the interests of the participants and beneficiaries of the General Dynamics 401(k) Plans." *Will v. General Dynamics Corp.*, No. 06-698-GPM, 2010 U.S.Dist.LEXIS 123349 at 9 (S.D. Ill. Nov. 22, 2010).

9. 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.*, Case No. 07-2046, Doc. 413 at 5 (C.D.Ill. Oct. 15, 2013).

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

11. 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.

12. Since 2005, my firm and I have been investigating, preparing and handling, on behalf of plan participants, numerous cases against fiduciaries in large 401(k) cases alleging fiduciary breaches including excessive fees, conflicts of interests and prohibited transactions under ERISA. My firm has filed these cases in numerous judicial districts throughout the United States, including districts within the First, Second, Third, Fourth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits.

13. In the six prior 401(k) excessive fee cases brought by my firm and settled within courts in the Seventh Circuit, *Beesley v. International Paper*, *Martin v. Caterpillar*, *Will v. General Dynamics*, *George v. Kraft*, *Nolte v. Cigna*, *and Abbott v. Lockheed Martin*, the presiding judges have found that my firm earned a one-third contingency fee.

14. Very few law firms nationally have brought such cases, and no other law firm has brought the number of cases our firm has brought, one of which was the first full trial of such a case, resulting in a judgment for the plaintiffs that was affirmed in part by the Eighth Circuit. *Tussey v. ABB*, Inc., No. 06-4305, 2012 U.S.Dist.LEXIS 45240 (W.D. Mo. Mar. 31, 2012), aff'd in part, rev'd in part, 746 F.3d 327 (8th Cir. 2014). As Judge Laughrey noted in that case, "[i]t is well established that complex ERISA litigation involves a national standard and specialized expertise. Plaintiffs' attorneys are clearly experts in ERISA litigation." *Tussey v. ABB, Inc*., No. 06-04305, 2012 U.S.Dist.LEXIS 157428 at 9–10 (W.D. Mo. Nov. 2, 2012)(citations omitted).

15. 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), cert. granted, 135 S. Ct. 43 (2014) (argued Feb. 24, 2015).

16. Prior to the filing of these lawsuits, my firm spent over one year researching the Boeing Voluntary Investment Plan, investigating claims, and consulting with experts in the field

of 401(k) administration and investment management. On September 28, 2006, we filed this action. Plaintiffs specifically alleged that Defendants violated ERISA by causing the Boeing Voluntary Investment Plan to pay excessive fees to the Plan's recordkeeper by imprudently including excessively-expensive mutual funds, including the Small Cap Fund, as well as including the excessively-volatile Technology Sector Fund and by holding excessive cash positions within the Company Stock Fund, reducing the returns of the Fund.

17. In this case, my firm has spent and will likely spend significant time and additional expenses without additional compensation both before and after final approval and before the end of the three-year settlement period.

18. The Settlement Agreement provides—as part of its comprehensive affirmative relief—that Class Counsel will continue to monitor and enforce the terms of the agreement. Class Counsel will request no additional fee for its future services to the Plan.

19. The parties engaged in over nine years of intense and hard-fought litigation and numerous failed settlement attempts before finally agreeing to the proposed settlement on the literal day of trial.

20. In my opinion, the affirmative relief obtained herein is substantial and of great value beyond the monetary value of the settlement. The affidavit of Dr. Stewart Brown, calculates the benefits to the Plan since this action was filed in fee reductions have already benefited the Plan by over $139 million. In total from 2006–2020 the fee savings could potential be more than $239 million.

21. As a practical matter, litigants such as Gary Spano, John Bunk, James and Marlene White, Kenneth Griffin, and Douglas Peterman could not afford to pursue litigation against well-funded fiduciaries of a multi-billion dollar plan sponsored by a large employer such

as Boeing 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 such an ERISA class action, with an expectation of anything but a percentage of the common fund created.

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

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

24. Before we filed this case, virtually no firm was willing to bring such a case, and I know of no other firm that has made the financial and attorney commitment to such cases to this date.

25. A law firm which brings a putative class action such as this must be prepared to finance the case through a trial and appeals, all at substantial expense. For example, in *Tussey v. ABB, supra*, seven experts testified at trial and the two Defendant groups therein had 15 or more lawyers present in the courtroom throughout the month long trial. In addition, all parties, including plaintiffs, had a technology team present throughout. In addition, our firm expended over $2,000,000 in expenses by the conclusion of the trial therein, and continue to carry them today.

26. Based on my experience, the market for experienced and competent lawyers willing to pursue 401(k) ERISA Fee Litigation is a national market, and the rate of 33 1/3% of

any recovery, plus costs is necessary to bring such cases. This is the rate that a qualified and experienced attorney would negotiate at the beginning of the litigation, and the rate found reasonable in the Central, Southern, and Northern Districts of Illinois. *Beesley v. Int'l Paper Co.*, No. 06-703-DRH, 2014 U.S.Dist.LEXIS 12037 (S.D. Ill. Jan. 31, 2014); *Nolte v. Cigna Corp.*, No. 07-2046, 2013 U.S.Dist.LEXIS 184622 at 3–4 (C.D. Ill Oct. 15, 2013); *Martin v. Caterpillar, Inc.*, No. 07-1009, 2010 U.S.Dist.LEXIS 145111 (C.D. Ill. Sept. 10, 2010); *Will v. General Dynamics*, No. 06-698, 2010 U.S.Dist.LEXIS 123349 at 7–8 (S.D.Ill. Nov. 22, 2010); *George v. Kraft Foods Global*, No. 07-1713, 2012 U.S.Dist.LEXIS 166816 at 2 (N.D. Ill. June 26, 2012); *Abbott v. Lockheed Martin Corp.*, 2015 U.S.Dist.LEXIS 93206 (S.D. Ill. July 17, 2015).

27. Schlichter, Bogard & Denton does not bill clients on an hourly basis. However, in July 2015, based on the national market for complex ERISA fiduciary breach litigation, Judge Reagan found that a fee rate of up to $974 per hour, depending on years of attorney experience, was a reasonable national hourly rate for Class Counsel's time. *Abbott v. Lockheed Martin Corp.*, 2015 U.S.Dist.LEXIS 93206 (S.D. Ill. July 17, 2015)(finding "that the reasonable hourly rate for Class Counsel's services" was $974/hour for attorneys with at least 25 years of experience, $826/hour for attorneys with 15–24 years of experience, $595/hour for attorneys with 5–14 years of experience, $447/hour for attorneys with 2–4 years of experience, $300/hour for Paralegals and Law Clerks, and $186/hour for Legal Assistants).

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

Executed on January 29, 2016.

SCHLICHTER, BOGARD & DENTON

/s/ Jerome J. Schlichter
Jerome J. Schlichter

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

GARY SPANO, et al. Plaintiffs, vs. THE BOEING CO., et al. Defendants.	Case No.: 06-cv-743-NJR-DGW

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 (charter # 5831). I am currently Professor Emeritus of Finance at Florida State University. I am the author or co-author of three law review articles on mutual fund investment advisory fees. My vita is included at Appendix A.

2. I have reviewed the settlement agreement between the parties and it provides for substantial monetary benefits to plan participants.

3. My assignment was to calculate the potential savings going forward in the Boeing Voluntary Investment Plan (the "Plan") resulting from the reduction in recordkeeping fees experienced after the Plan engaged in competitive bidding processes as compared to the recordkeeping fees paid by the Plan in the year prior to Plaintiffs' filing this action.

4. The chart below calculates the benefit to the Plan from these reductions in recordkeeping fees. I used the 2005 recordkeeping fees calculated by Plaintiffs'

expert, Al Otto, and compared them to fees paid by the Plan in the years following the investigation and filing of this case. I used Plan participant numbers from the Form 5500s submitted by the Plan to the U.S. Department of Labor. I used invoices paid to the Plan's recordkeeper to estimate recordkeeping fees for the years 2006 and 2007. PX500. For 2008–2010, I conservatively used the testimony of Defendant Scott Buchanan that fees in 2008 were $38 per participant per year, and for 2011–2014 I reviewed the Plan's Form 5500s, which disclosed compensation to the recordkeeper. I relied on Class Counsel for the negotiated recordkeeping fee under that new contract.

	Cost	Savings Per Participant	Average Number of Participants	Cost Savings
2005	$103.11		183,816	
2006	$48.00	$55.11	193,336	$10,654,747
2007	$48.00	$55.11	190,776	$10,513,665
2008	$38.00	$65.11	197,598	$12,865,573
2009	$38.00	$65.11	194,774	$12,681,703
2010	$38.00	$65.11	198,332	$12,913,397
2011	$32.00	$71.11	206,504	$14,684,464
2012	$32.00	$71.11	214,896	$15,281,255
2013	$32.00	$71.11	222,649	$15,832,570
2014	$32.00	$71.11	221,986	$15,785,424
2015	$18.00	$85.11	220,435 (est.)	$18,761,221
2016	$18.00	$85.11	224,513 (est.)	$19,108,303

2017	$18.00	$85.11	228,667 (est.)	$19,461,807
2018	$18.00	$85.11	232,897 (est.)	$19,821,850
2019	$18.00	$85.11	237,205 (est.)	$20,188,554
2020	$18.00	$85.11	241,594 (est.)	$20,562,043

6. As reflected in the chart, since Plaintiffs filed this action, the reduction in recordkeeping fees has already benefited the Plan by $139,974,019 from 2006 to 2015. This number is very conservative because it does not factor the market returns of the past fee savings. Additionally, assuming the Plan's historical participant growth rate continues, the benefit to the Plan in 2016 was over $19.1 million and will reach $99,142,557 over the five-year period of 2016–2020. Class Counsel informs that the current recordkeeping contract will be in force during that entire period. This means the total fee savings to the Plan compared with the year prior to this litigation is $239,116,576 for the period 2006–2020.

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

Executed on January 13, 2016.

Dr. Stewart Brown

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

GARY SPANO, et al. Plaintiffs, vs. THE BOEING CO., et al., Defendants.	Case No.: 06-cv-743-NJR-DGW

I, Thomas R. Theado, for my declaration pursuant to 28 U.S.C. § 1746 in the above-captioned action, state the following on my own personal knowledge thereof, except for those matters set forth on information and belief, and as to those matters I am informed and believe them to be true.

1. The attorneys of my firm, Gary, Naegele & Theado, LLC, have represented the interests of millions of injured individuals in state and federal cases nationwide. The cases have involved various areas of substantive law, including pension benefit law, consumer fraud, environmental injuries, personal property damage, real estate value diminution, and contract damages.

2. I have served, or I am currently serving, as a Lead Counsel in a number of class actions asserting ERISA pension-benefit claims, including *Costantino v. TRW, Inc.,* N.D. Ohio No. C86-3368; *Rybarczyk v. TRW, Inc.,* N.D. Ohio No. 1:95CV21800; *West v. AK Steel Corp. Ret. Accumulation Pension Plan,* S.D. Ohio No. 1:02-CV-0001; *Walker v. Asea Brown Boveri Inc. Cash Balance*

Pension Plan, D. Conn. No 3:02-CV-0550; *Pikas v. The Williams Cos., Inc.,* N.D. Okla No. 4:08CV0101; and *Lintner v. AK Steel Corp. Ret. Accumulation Pension Plan* S.D. Ohio No. 1:09-CV-0231.

3. In addition to ERISA cases, my office and I have litigated to a successful conclusion many class actions of national or regional scope. These include *Elbert v. White Ready Mix Concrete,* N.D. Ohio No. C76-0445; *Rosen v. Fisher Foods, Inc.,* N.D. Ohio No. C80-0079; *Lowe v. Sun Refining & Marketing,* Lucas Cty. [Ohio] C.P. No 88-0630; *DeMarco v. Akron Coca Cola Bottling*, N.D. Ohio No. C88-6702; *Marx v. Copper Kettle Marina, Inc.,* Lorain Cty. [Ohio] C.P. No. 88CV100809; *Brandmeier v. Copper Kettle Marina, Inc.,* Lorain Cty. [Ohio] C.P. No. 89CV102320; *DeSario v. Industrial Excess Landfill,* Stark Cty. [Ohio] C.P. No. 89-0570; *Davidson v. U.S. Air, Inc.,* N.D. Ohio No 1:90CV2071; *Taylor v. Amerifoods Companies,* N.D. Ohio No. 1:92CV1715; *White v. Aztec Catalyst Co.,* Lorain Cty. [Ohio] C.P. No. 93CV111025; *Murdocco v. Marathon Oil Co.,* Summit Cty. [Ohio] C.P. No. CV-95-06-2283; *Murray v. Sunset Mortgage Co.,* L.P., Lorain Cty. [Ohio] C.P. No. 07CV152784; *Insalaco v. Ben Venue Laboratories, Inc.,* Cuyahoga Cty. [Ohio] C.P. No. CV-01-450549; *Streety v. Garfield Alloys, Inc.,* Cuyahoga Cty. [Ohio] No. CV-04-519385; *Redington v. Goodyear Tire & Rubber Co.,* N.D. Ohio No. 5:07-CV-1999; *Pelletz v. Weyerhaeuser Co.,* W.D. Wash, No. 2:08-CV-0334; *Ross v. TREX Co., Inc.,* Santa Cruz Cty. [CA] Superior Ct. No. 161553; *Hill v. Moneytree of Ohio, Inc.*, Lorain Cty. [Ohio] C.P. No. 06CV148815; and *McClendon v. EquiFirst, Corp.*, Lorain Cty. [Ohio] C.P. No. 07CV153497.

4. In the course of our complex-litigation practice, we have participated in multi-district litigation proceedings, such as *In re Silicone Breast Implant Litigation,* M.D.L. No. 926; *In re Orthopedic Bone Screw Litigation,* M.D.L. No. 1014; *In re Medtronic, Inc., Sprint Fidelis Leads Products Liability Litigation,* M.D.L. No. 1905; and *In re Chinese-Manufactured Drywall Products Liability Litigation,* M.D.L. No. 2047.

5. I am a graduate, with honors in economics, from Oberlin College, and I received my law degree with honors from Case Western Reserve University, where I earned the American Jurisprudence award in business organization, the Phi Delta Phi award for my graduating class, and membership in the Order of Barristers and the Order of the Coif. The national publication Lawyers Weekly included me in its 1995 series of articles featuring the country's top trial lawyers.

6. I was admitted to the practice of law on November 2, 1979. I have been admitted to permanent practice throughout the courts and agencies of the State of Ohio, and in the Northern and Southern Districts of Ohio, the Court of Appeals for the Sixth and Tenth Circuit, and the United States Supreme Court. In addition, I have been admitted *pro hac vice* in various United States District Courts. I have never been reprimanded, sanctioned or otherwise disciplines with respect to any aspect of my uninterrupted practice of law since November 2, 1979. My practice focuses on the management of class actions and other complex litigation.

7. I am currently litigating, as a lead counsel for plaintiffs, a number of suits asserting class claims, including *Mikulski v. Centerior Energy Corp.,* Cuyahoga Cty. [Ohio] C.P. No CV-01-457866; *Mikulski v. The Cleveland Electric Illuminating Co.,* Cuyahoga Cty. [Ohio] C.P. No. CV-02-490019; *Mikulski v. The Toledo Edison Co.,* Lucas Cty. [Ohio] C.P. No. G-4801-CI-200206364; *Satterfield v. Ameritech Mobile Communications Inc.,* Cuyahoga Cty. [Ohio] C.P. No CV-03-517318; *Smith v. Allied Home Mortgage Capital Corp.,* Lorain Cty. [Ohio] C.P. No 07CV153202; *Strickler v. First Ohio Banc & Lending, Inc.,* Lorain Cty. [Ohio] C.P. No. 07CV151964; *US Bank NA v. Schubert*, Lorain Cty. [Ohio] C.P. No. 10CV170414; and *CMAF, Inc. v. Thomas*, Lorain [Ohio] C.P. No. 14CV184498.

8. In summary, my firm and I have broad experience in ERISA litigation and other class actions, having litigated major class actions on behalf of hundreds of thousands of claimants, resulting in substantial compensation to those claimants through both settlements and judgments.

9. Being an ERISA plaintiff-class litigator is very often a situation where the successful plaintiffs' counsel has done good more than done well. While the media may fixate on the size of some recoveries in this area of the law, the real facts are that an ERISA plaintiff class litigator regularly represents groups of individuals whose claims are terribly difficult to communicate succinctly and convincingly, and whose understanding of the difficult and complex work being done in their behalf is often marked by misunderstanding and suspicion. These all-too-often-unavoidable complications make the acceptance of an ERISA class case a weighty decision, in

which there must be balanced not merely the prospects of success on the merits but also the prospects for a legitimately sufficient remuneration after years and years of very often hammer-and-tongs adversarial opposition. As a result of there being so few able attorneys from which to choose a lawyer who is competent in conducting a class action for ERISA benefits and the consequent nationwide scope of their practice, these lawyers constitute a valuable national market.

10. In the Summer of 2004 I commenced a focused, professional consideration of the potentially actionable nature of the disturbing attributes of some 401(k) retirement plans, such as where a mutual fund makes revenue-sharing payments to vendors who sell the fund families' product, and the resulting conflicts of interest or other fiduciary concerns arising from such arrangements, In tandem with these efforts, I have attentively followed the ERISA litigation practice of Jerry Schlichter since mid-September 2006. I have never met Mr. Schlichter, but I have paid careful attention to the cases he has brought, the theories of recovery he has developed and pursued, and the developments in his ERISA cases. To my knowledge, no one (including the Department of Labor) had brought suit on fiduciary-based excessive-fee claims against the plans of large employers prior to Mr. Schlichter. Mr. Schlichter's efforts have benefitted not only the thousands of participants in the Boeing 401(k) Plan, but plan participants across the United States as well as the entire ERISA bar as his cases have been instrumental in shaping the emerging case law pertaining to claims premised on averments of faultful revenue-sharing arrangements in 401(k) retirement plans. As such, Mr.

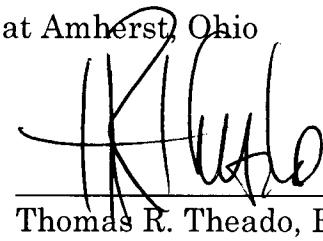
Schlichter's firm has been seen as the pioneer in the field, serving a public good as a "private attorney general." But for Mr. Schlichter's firm, it is unlikely another attorney would have accepted representation of the participants in Boeing's VIP plan and obtain the results Mr. Schlichter's firm has as, to my knowledge, no other firm in the United States has the experience in excessive-fee cases as does Schlichter, Bogard & Denton.

11. My firm typically accepts representation of a named plaintiff in a putative class action on the basis of the prospective client acknowledging that a fee award that is equivalent to one-third of the gross recovery is a fair and reasonable attorney fee.

12. My experience in litigating ERISA-benefits class actions further confirms that the prior success, and the consequent *gravitas,* of plaintiffs' counsel is an important element in the probability of a successful conclusion for the class. It thus makes no sense to award a seasoned and successful attorney less than a novice on the ground that the experienced lawyer's tasks are made easier due to his prior successes.

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

Executed on January 25, 2016, at Amherst, Ohio



Thomas R. Theado, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

GARY SPANO, *et al.*,

Plaintiffs,

vs.

THE BOEING COMPANY, *et al.*,

Defendants.

No. 06-cv-743-NJR-DGW

DECLARATION OF SHERI O'GORMAN

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

1. I am the Office Administrator of Schlichter, Bogard, & Denton, LLP and the Custodian of Records, in charge of payment of expenses in this matter. I have examined the records and we have incurred case expenses totaling $1,820,570.38 in *Spano, et al. v. The Boeing Company, et al.* as of January 28, 2016.

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

Description	Total Hours
5-14 Years	13,407.2
15-24 Years	698.2
25 and Above	7,881.4
Total Attorney Hours	**21,986.8**

The following chart shows the amount of hours spent by staff:

Description	Total Hours
Paralegal	3,491.9
Law Clerk	581.0
Legal Assistant	755.3
Total Non-Attorney Hours	**4,828.2**

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

Description	Total
Depositions	$121,348.80
Experts and Consultants	$1,318,086.95
Filing, Transcripts, Subpoena Services and Related Costs	$11,579.45
Mediation and Settlement Costs	$12,332.00
Copies, Postage, Phone and Fax	$143,870.60
Data Development and Document Organization	$71,970.20
Research and Investigation	$26,465.51
Travel, Lodging, and Parking	$92,316.12
Trial Expenses	$15,228.72
Total	**$1,813,198.85**

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

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

Executed on January 29, 2016.

Sheri O'Gorman