

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

JEREMY BRADEN, individually and on behalf)
of all others similarly situated,) Case No. 6:08-cv-3109-GAF
)
Plaintiff;) Hon. Gary A. Fenner
)
v.) CLASS ACTION
)
WAL-MART STORES, INC., et al.,)
)
Defendants.)

**LEAD COUNSEL’S SUGGESTIONS IN SUPPORT OF MOTION FOR ATTORNEYS’
FEES, REIMBURSEMENT OF COSTS AND EXPENSES, AND CASE CONTRIBUTION
AWARD TO NAMED PLAINTIFF**

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On December 2, 2011, following nearly four years of litigation, the parties settled this ERISA breach of fiduciary duty class action for \$13.5 million plus injunctive relief. The Settlement,¹ net of fees and costs and other approved expenses, will be paid directly to the Plan to be used by the Plan to pay Plan expenses and administration fees, which will reduce the amount of fees that otherwise would be charged to individual Plan accounts in the future. Accordingly, the Settlement payment will accomplish what Plaintiff set out to achieve when he filed this lawsuit—the reduction of Plan expenses so that participants’ retirement savings are not squandered over time. Further contributing to this goal, the injunctive relief obtained in the Settlement will ensure that the Plan continues to focus on minimizing Plan expenses by, among other things, offering low-cost investment options, and providing participants with clear information regarding the payment of Plan expenses.

On December 5, 2011, this Court issued its Order Preliminarily Approving Class Action Settlement, Conditionally Certifying Settlement Class, Directing Distribution of Class Notice, Appointing Class Counsel and Class Representative, and Setting Hearing for Final Approval of Class Action Settlement (“Preliminary Approval Order”) (Dkt. No. 231). Pursuant to the schedule in the Preliminary Approval Order, Lead Counsel are now filing these Suggestions in support of this Fee Petition, along with Named Plaintiff’s Suggestions of Law in Support of Named Plaintiff’s Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, Approval of Forms and Methods of Notice; Approval of the Plan of Allocation, and Entry of Final Order and Judgment (“Final Approval Memo”), and the Declaration of Lynn Sarko in Support of (1) Named Plaintiff’s Motion for Final Approval of Class Action Settlement,

¹ All capitalized terms not otherwise defined in these Suggestions have the same meaning given them in the Class Action Settlement Agreement filed with the Court on December 2, 2011 (Dkt. No. 229-1).

Certification of Settlement Class, Approval of Forms and Methods of Notice; Approval of the Plan of Allocation, and Entry of Final Order and Judgment and (2) Lead Counsel's Motion for Attorneys' Fees, Reimbursement of Costs and Expenses, and Case Contribution Award to Named Plaintiff ("Sarko Declaration" or "Sarko Decl.").

In the Final Approval Memo, we explain why the Settlement is an excellent result for the Settlement Class and should be approved. In these Suggestions, we address Lead Counsel's request for an award of attorneys' fees in the amount of \$4.05 million (30% of the recovery), well below the current total lodestar in the case, \$4,560,224.75. We also seek reimbursement of total expenses in the amount of \$235,436.68. Finally, we request that the Court grant Named Plaintiff Jeremy Braden a case contribution award of \$20,000 in recognition of his valuable service to the Settlement Class.

As demonstrated below, the record in this case and the case law in the Eighth Circuit fully support these requests based on the risks taken and the results obtained in this litigation. Accordingly, Lead Counsel respectfully request that the Court approve them.

I. THE COURT SHOULD APPROVE LEAD COUNSEL'S REQUEST FOR ATTORNEYS' FEES

A. A Brief History of this Litigation.

The Final Approval Memo and the Sarko Declaration describe in great detail the progress and ultimate success of this nearly four-year litigation. Here, we describe only certain aspects of the litigation particularly relevant to the request for fees and expenses:

1. The Complaints. On March 27, 2008, Braden filed his initial complaint against the Wal-Mart Defendants² (Dkt. No. 2). On July 21, 2010, after substantial discovery and one

² Defendants James W. Breyer, John A. Cooper, Jr., Stanley C. Gault, Frederick S. Humphries, Dawn G. Lepore, Elizabeth A. (Betsy) Sanders, Donald G. Soderquist, and Jose H. Villarreal are referred to collectively as the "Compensation Committee Defendants." Defendants Stephen

mediation session with the then-Wal-Mart Defendants, Braden filed his Amended Complaint for Violations of the Employee Retirement Income Security Act (ERISA) (“Complaint”) (Dkt. No. 107), adding claims against the Merrill Lynch Defendants.³ The Complaint focused on excessive fees collected by the Plan’s trustee, Merrill Lynch, and charged by the Plan’s Investment Options, and alleged that Defendants violated their fiduciary duties under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (“ERISA”) by, *inter alia*, (1) failing to prudently and loyally manage the Plan and Plan assets; (2) failing to provide complete and accurate information; (3) knowing of, participating in, and/or enabling breaches of fiduciary duties, thereby assuming liability for co-fiduciaries; and (4) engaging in prohibited transactions. Further, Braden alleged that the Wal-Mart Defendants violated ERISA by failing to properly monitor the performance of their fiduciary appointees, and that the Merrill Lynch Defendants violated ERISA by committing acts that constitute unjust enrichment under ERISA and the federal common law and, alternatively, knowingly participating in a breach of fiduciary duty. In sum, Braden alleged that Defendants knew or should have known that the excessive fees charged by the Plan’s Investment Options and the millions of dollars in undisclosed fees collected by

R. Hunter, Debbie Davis Campbell, and John or Jane Doe 1 are referred to collectively as the “VP Retirement Plan Defendants.” Defendants Jeff Amos, Bill Ayers, Terry Bertschy, Elizabeth Branigan-Evans, Debbie Davis Campbell, Fred Disch, Larry Duff, Sam Dunn, Don Etheredge, Robin Forbis, Sharon Garmon, Erin Gonzalez (misidentified and named in duplication as Erin Weitzel), Rob Hey, Stephen R. Hunter, Greg Johnston, David McBride, Phyllis Morey, Cliff Parker, Arvetta Powell, Charles Rateliff, Dave Reiff, David Scogin, Donna Spradlin, J.P. Suarez, Jenifer Terrell, Kevin Turner, Jeremy Wilson, Jimmy Wright, and John or Jane Does 2-5 are referred to collectively as the “Retirement Plans Committee Defendants.” Wal-Mart and the Compensation Committee Defendants, the VP Retirement Plan Defendants, and the Retirement Plans Committee Defendants are referred to collectively as “Wal-Mart” or the “Wal-Mart Defendants.” Not all of the Wal-Mart Defendants were named in Braden’s original Complaint. References herein to the “Wal-Mart Defendants” when referring to the original Complaint include only the appropriate subset of the foregoing.

³ Merrill Lynch, Pierce, Fenner & Smith Inc., Merrill Lynch Trust Company of America, and Merrill Lynch & Co. Inc., are collectively referred to as “Merrill Lynch” or the “Merrill Lynch Defendants.”

Merrill Lynch caused the Investment Options to be imprudent retirement investments during the Class Period and that the Defendants acted imprudently by continuing to offer them to participants.

2. The Motions to Dismiss. On July 11, 2008, the Wal-Mart Defendants filed their motion to dismiss Braden's initial complaint (Dkt. No. 29). Braden filed his opposition on August 22, 2008 (Dkt. No. 36), and his corrected opposition on August 26, 2008 (Dkt. No. 37). The Wal-Mart Defendants filed their reply on September 29, 2008 (Dkt. No. 44). On October 28, 2008, the Court granted the Wal-Mart Defendants' motion to dismiss in its entirety (Dkt. No. 50).

On November 28, 2008, Braden appealed the Court's order to the Eighth Circuit Court of Appeals (Dkt. No. 52). The parties fully briefed Plaintiff-Appellant Braden's appeal of the dismissal of the case. Additionally, the Secretary of Labor filed a brief as *amicus curiae* in support of Plaintiff-Appellant, and the ERISA Industry Committee, the Chamber of Commerce of the United States of America, and the American Benefits Council filed their brief as *amici curiae* in support of the Wal-Mart Defendants-Appellees. Thereafter the parties filed and responded to a number of supplemental authorities. *See Sarko Decl.* ¶¶ 18-34. The parties presented oral argument to a panel of the Eighth Circuit on September 24, 2009, and on November 25, 2009, the Eighth Circuit vacated the judgment and remanded the case in full (Dkt. No. 55). The Wal-Mart Defendants filed their answer and affirmative defenses on March 15, 2010 (Dkt. No. 76), and their corrected answer and affirmative defenses on June 11, 2010 (Dkt. No. 95).

After Braden amended his Complaint in July 2010, the Wal-Mart and Merrill Lynch Defendants filed a second round of motions to dismiss on October 1, 2010 (Dkt. Nos. 156-159).

In the midst of conducting discovery and further mediation discussions, Braden filed his opposition to Merrill Lynch's motion to dismiss on December 22, 2010 (Dkt. No. 178), and the Merrill Lynch Defendants filed their reply on January 28, 2011 (Dkt. No. 190). As discovery and mediation discussions continued, Braden filed his opposition to the Wal-Mart Defendants' motion to dismiss on February 4, 2011 (Dkt. No. 191), and the Wal-Mart Defendants filed their reply on March 4, 2011 (Dkt. No. 195).

3. Class Certification Proceedings. On October 17, 2008, Braden filed his first motion for class certification (Dkt. Nos. 48-49), just days before the Court dismissed the case. Following his successful appeal, Braden filed a renewed motion for class certification on April 21, 2010 (Dkt. Nos. 83-86). After Braden filed his amended Complaint in July 2010, the parties conferred and agreed to extend the class certification schedule until after the completion of the second round of motions to dismiss. The Court amended the case schedule (Dkt. No. 112), instructing Braden to file a renewed motion for class certification within thirty days of its decision on Defendants' motions to dismiss, which decision has been stayed to facilitate this Settlement.

4. Merits Discovery—Documents and Written Requests. Document discovery in this case was extensive, including over 550,000 pages of documents produced among the parties, and over 100,000 pages of documents produced by third parties pursuant to Rule 45 subpoenas. The Sarko Declaration ¶¶ 52-93 describes the discovery that occurred in this case, including the preparation of written and document discovery, review of Electronically Stored Information ("ESI") and other documents produced by Defendants, as well as preparation of responses to Defendants' discovery requests. Document review was split between attorneys and non-legal staff, depending on the types of documents and other factors, including deposition preparation

and brief writing. Through our electronic database, managed by our in-house electronic discovery specialists, we were able to comprehensively review and code documents so that they were available as needed for depositions, experts, and mediations and were efficiently processed.

5. Merits Discovery—Depositions. Lead Counsel took the depositions of one individual defendant, two Wal-Mart non-Defendant Plan personnel, and three Merrill Lynch employees. Lead Counsel also noted up and began preparing for the 30(b)(6) deposition of the Plan Trustee, the then-non-party Merrill Lynch. The depositions sought testimony concerning the underlying misconduct supporting Braden’s claim that the Plan’s Investment Options were imprudent retirement investments, and the extent to which Defendants knew of these facts and participated in selecting the Plan’s Investment Options, as well as the circumstances surrounding the collection of millions of dollars in undisclosed fees by Merrill Lynch. Sarko Decl. ¶¶ 86-89. Additional depositions—including a 30(b)(6) deposition of Wal-Mart and the deposition of the Named Plaintiff—were at various stages of preparation when the case was stayed to facilitate settlement negotiations.

6. Retaining and Consulting with Experts. During the course of this litigation, Lead Counsel retained and met with three experts concerning the fees charged by the Plan’s Investment Options, the appropriate level of fees and expenses for a plan of this size, and the measurement of loss to the Plan and available damages theories and calculations. Lead Counsel also consulted with the experts concerning other issues relevant to Braden’s claims, including, without limitation, standards for fiduciary conduct as applied to the conduct at issue in the action and the Defendants’ selection of the Plan’s Investment Options and related disclosures to participants and beneficiaries. Lead Counsel relied in part on the data generated by these experts in drafting and amending the Complaint, opposing Defendants’ motions to dismiss, propounding

discovery, and preparing for and participating in mediation and settlement negotiations. The parties reached the Settlement before expert reports were due to be exchanged. Sarko Decl. ¶¶ 90-92.

7. Mediation. The Parties agreed to engage the Honorable Layn R. Phillips, a retired U.S. District Court Judge and experienced mediator, for a series of mediations. In advance of the mediation sessions, Lead Counsel prepared extensive mediation memoranda which analyzed the law and facts as developed during the litigation. The parties engaged in a full day of mediation on June 15, 2010 with Judge Phillips in Newport Beach, California. The Parties did not reach agreement and continued to litigate the case. The parties—including the newly added Merrill Lynch Defendants—engaged in a second full day of mediation with Judge Phillips at the JAMS offices in New York City on November 10, 2010. Following the second mediation session, the parties continued to confer with the mediator by telephone, and ultimately, Judge Phillips made a mediator’s proposal that was accepted by the parties. The parties thereafter engaged in extensive negotiations regarding the specific terms of the Settlement, including the scope of injunctive relief provided by the Settlement. A detailed account of the mediation and the parties’ negotiations is in the Sarko Declaration, ¶¶ 98-108.

8. Counsel’s Investment of Time and Money in the Case. Lead Counsel have expended substantial time and money on a contingent basis in the litigation of this action. Through February 3, 2012, Lead Counsel have devoted more than 8,787 professional hours to this case, representing \$3,954,922.25 in dollars-times-hours “lodestar,” and have incurred \$229,952.80 in out-of-pocket expenses. Liaison Counsel, Aleshire Robb P.C., and additional Plaintiff’s Counsel, Edward H. Siedle, collectively contributed more than 1,297 additional professional hours, or \$605,302.50 in lodestar, and incurred \$5,483.88 in out-of-pocket expenses.

The total lodestar for the case is \$4,560,224.75 and total out-of-pocket expenses are \$235,436.68.

Lead Counsel's work on this case has not ended, nor will it end any time soon. We will continue to incur additional hours in connection with approval of the Settlement, including responding to participant questions and objections, if any, and preparing for the Fairness Hearing. Beyond that, past experience teaches us that we will spend a substantial amount of additional time over the next year or more responding to inquiries from the Settlement Class and interacting with Defendants with respect to technical matters concerning administration of the Settlement. We will not be seeking additional reimbursement for this time. *See Sarko Decl.* ¶ 163.

B. The Legal Standard Governing Awards of Attorneys' Fees in ERISA Breach of Fiduciary Duty Class Actions.

“[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.” *In re Seizure of \$5,200,000 in U.S. Funds*, No. 97-3357, 2000 WL 306771, at *1 (W.D. Mo. Feb. 23, 2000) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)) (internal quotation marks omitted). “The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense.” *Id.* (citation omitted) (quoting *Boeing*, 444 U.S. at 478). Awarding a percent of the common fund as attorneys' fees “allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.” *Id.* (citation omitted) (quoting *Boeing*, 444 U.S. at 478). Here, Lead Counsel created a common fund of \$13.5 million and, accordingly, are entitled to a reasonable share of that fund as a fee. Moreover, the parties have agreed that Court-approved attorneys' fees are to be paid out of the

Settlement Amount, Settlement Agreement ¶ 11.1, which is not unusual in common fund cases. See section II.C *infra*.

The Eighth Circuit endorses two methods for determining reasonable attorneys' fees in common fund cases: the "percentage of recovery" method, also known as the "percentage of benefit" method, and the "lodestar" method. *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 244-45 (8th Cir. 1996). The district court has discretion to choose whether to implement the percentage of recovery or the lodestar method of awarding attorneys' fees. See, e.g., *Johnston*, 83 F.3d at 246 (citations omitted).

Under the percentage of recovery method, fees awarded are "equal to some fraction of the common fund that the attorneys were successful in gathering during the course of the litigation." *Id.* at 244-45 (citations and footnote omitted). The court's task is to determine an appropriate percentage given the facts and circumstances. Both the Eighth Circuit and the Western District of Missouri have held that "in 'common fund' cases, where attorney fees and class members' benefits are distributed from one fund a percentage of the benefit method may be preferable to the lodestar method." *Wiles v. Sw. Bill Tel. Co.*, No. 09-4236, 2011 WL 2416291, at *4 (W.D. Mo. June 9, 2011) (noting that the lodestar method is "not the preferred method in a common fund case") (emphasis added) (quoting *In re Texas Prison Litig.*, 191 F.R.D. 164, 176 (W.D. Mo. 1999) (citing *Johnston*, 83 F.3d at 245)); *Sanderson v. Unilever Supply Chain, Inc.*, No. 10-0775, 2011 WL 6369395, at *1 (W.D. Mo. Dec. 19, 2011) (same) (citation omitted); see *In re Texas Prison Litig.*, 191 F.R.D. at 177 ("Because this is a common fund case, the percentage of benefit method should be applied."); see also *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (in *dicta*, endorsing the percentage of recovery method in common fund cases); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (approving use of the "percentage-of-

recovery methodology to evaluate attorneys' fees in a common-fund settlement"); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) ("It is well established in this circuit that a district court may use the 'percentage of the fund' methodology to evaluate attorney fees in a common-fund settlement . . .") (quoting *Johnston*, 83 F.3d at 244-45).⁴

In excessive fee cases such as this one, the common fund method of recovery is the norm. *See, e.g., Kanawi v. Bechtel Corp.*, No. 06-5566, 2011 WL 782244, at *1 (N.D. Cal. Mar. 1, 2011) (awarding 30% of the settlement fund); *Will v. Gen. Dynamics Corp.*, No. 06-698, 2010 WL 4818174, at *1, 4 (S.D. Ill. Nov. 22, 2010) (awarding 33 1/3% of the settlement fund); *Martin v. Caterpillar Inc.*, No. 07-1009, slip op. at 12 (C.D. Ill. Sept. 10, 2010) (Opinion and Order) (awarding one third of the settlement fund).

The same approach has been applied in other types of ERISA breach of fiduciary duty cases, as well as class action cases generally in the Eighth Circuit. *See In re Aquila ERISA Litig.*, No. 04-0865, 2007 WL 4244994, at *2 (W.D. Mo. Nov. 29, 2007) (in ERISA breach of fiduciary duty case, awarding 33% of the settlement fund as "fair and reasonable"); *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 998 (D. Minn. 2005) (summarizing cases); *see also In re U.S. Bancorp*, 291 F.3d at 1038 (in consumer class action against bank, upholding award of 36% of the settlement fund); *Yarrington v. Solvay Pharm.*,

⁴ Other district courts within this Circuit have held that the percentage of the recovery method is preferable in a common fund situation. *See, e.g., In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 997 (D. Minn. 2005) (denying, among other things, class member's objection that the court must use "a lodestar 'measuring stick'" to determine fees instead of the percentage of the recovery method, noting that the "[lodestar] method is not the approved and 'well established [method] in this circuit.'") (quoting *Petrovic*, 200 F.3d at 1157); *In re Iowa Ready-Mix Concrete Antitrust Litig.*, No. 10-4038, 2011 WL 5547159, at *1 (N.D. Iowa Nov. 9, 2011) (recognizing that "[a]s to the appropriate method for determining fees after a class action settlement, '[i]t is well established in [the Eighth] Circuit that a district court may use the "percentage of the fund" methodology to evaluate attorney fees in a common-fund settlement.'"); *Petrovic*, 200 F.3d at 1157.

Inc., 697 F. Supp. 2d 1057, 1061 (D. Minn. 2010) (in consumer class action against drug manufacturer, awarding 33% of settlement fund) (citation omitted).

While not the preferred method in a case such as this, the “lodestar” method is sometimes used as a cross check of the reasonableness of the requested percentage fee award. Under the “lodestar” method, “the hours expended by an attorney are multiplied by a reasonable hourly rate of compensation so as to produce a fee amount which can be adjusted, up or down, to reflect the individualized characteristics of a given action.” *Johnston*, 83 F.3d at 244 (citations omitted). When used as a cross check, the court calculates the lodestar, and then calculates the “multiplier” of the lodestar that the requested percentage fee would provide. In the Eighth Circuit, multipliers above 2 are commonplace. *Nelson v. Wal-Mart Stores, Inc.*, No. 04-171, 2009 WL 2486888, at *2 (E.D. Ark. Aug. 12, 2009) (cross checking a 33 1/3% fee award of a \$17.5 million settlement fund and finding that a multiplier of 2.5 is reasonable in light of Eighth Circuit cases reflecting multipliers of between 2 to 5.6). Likewise, in class action ERISA cases, courts typically approve multipliers in the 2 to 4 range. *See, e.g., In re Xerox ERISA Litig.*, No. 02-1138, slip op. (D. Conn. Apr. 14, 2009) (1.6 multiplier); *In re Household Int’l Inc. ERISA Litig.*, No. 02-7921, slip op. (N.D. III. Nov. 22, 2004) (Order Granting Plaintiffs’ Motion for an Award of Attorneys’ Fees, Reimbursement of Litigation Costs and Expenses, and for Named Plaintiffs’ Compensation) (4.8 multiplier); *In re HealthSouth ERISA Litig.*, No. 03-1700, slip op. (N.D. Ala. June 28, 2006) (Order and Final Judgment) (2.2 multiplier); *In re Dynegy ERISA Litig.*, No. 02-3076, slip op. (S.D. Tex. Nov. 24, 2004) (Final Order) (4.4 multiplier).

Here, as discussed below, the requested percentage fee is well within the range typically accepted by courts in cases of this type, and the reasonableness of the percentage award is confirmed by the lodestar method. Indeed, a 30% fee would result in no true multiplier at all,

and instead results in a fraction of the fees incurred, since the percentage-of-common-fund fee sought here is substantially below the lodestar—as sometimes occurs in a hard-fought case that spans over several years. If the requested fee is approved, Class Counsel will receive 88.8% percent of the lodestar—approximately a “multiplier” of 0.89—strong evidence that the fee is not excessive.

C. The Requested Fees of 30% of the Common Fund are Reasonable under the *Westerhaus* Factors and Other Relevant Considerations.

1. The *Westerhaus* Factors Support a 30% Fee Award.

In *Lawrence v. Westerhaus*, the Eighth Circuit set forth “five nonexclusive factors that district courts are to consider when deciding whether to award attorneys’ fees under ERISA.” *First Nat’l Bank & Trust Co. of Mountain Home v. Stonebridge Life Ins. Co.*, 619 F.3d 951, 956 (8th Cir. 2010) (citing *Lawrence v. Westerhaus*, 749 F.2d 494, 496 (8th Cir. 1984) (per curiam)); see also *Martin v. Ark. Blue Cross & Blue Shield*, 299 F.3d 966, 969-72 (8th Cir. 2002) (discussing the evolution of the *Westerhaus* factors). The *Westerhaus* factors include:

(1) the degree of the opposing parties’ culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorney’s fees; (3) whether an award of attorney’s fees against the opposing parties could deter other persons acting under similar circumstances; (4) whether the parties requesting attorney’s fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question [sic] regarding ERISA itself; and (5) the relative merits of the parties’ positions.

First Nat’l Bank & Trust, 619 F.3d at 956 (quoting *Westerhaus*, 749 F.2d at 496). These factors “are by no means exclusive or to be mechanically applied”; instead, they are to be used in conjunction with “other relevant considerations as general guidelines for determining when a fee is appropriate.” *Ark. Blue Cross & Blue Shield*, 299 F.3d at 972. Each of the *Westerhaus* factors, as well as factors the Eighth Circuit applies to determine awards of attorneys’ fees in non-ERISA cases, are discussed below.

a. *Westerhaus* Factor One: The degree of the opposing parties' culpability or bad faith.

As discussed in section II.A above, Braden's Complaint is based on allegations that Defendants breached their fiduciary duties under ERISA by, among other things, offering Plan Investment Options that charged excessive fees to the Plan and Plan participants and that Merrill Lynch collected millions of dollars in undisclosed fees from the funds.

In this case, there has been no judicial determination by any court that Defendants violated their fiduciary duties under ERISA, and Defendants vigorously dispute that any fiduciary breach occurred. However, the Eighth Circuit has held that the allegations in Braden's initial Complaint are not without merit. *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009) (reversing dismissal of the case, holding that Braden stated claims for violation of fiduciary duties under ERISA including, duties of prudence, loyalty, disclosure, and prohibited transactions).

At the time the parties agreed to resolve the litigation, substantial discovery had been completed, and motions to dismiss were once again pending. Plaintiff believed he had strong evidence to support his claims that Merrill Lynch had received undisclosed fees, and that the Wal-Mart fiduciaries had fallen short of their responsibility to prudently manage the Plan and ensure that Plan fees were reasonable and appropriate. Defendants denied these allegations, and Plaintiff recognized that a showing of culpability or bad faith was far from a foregone conclusion. Plaintiff also recognized that cases of this type tend not to be big "damages" cases—instead, the impact of excessive fees is exacerbated by time. While in any given year, the total amount squandered is relatively small, over time, unnecessary expense can significantly reduce participants' retirement savings. Therefore, the amount of the Settlement, in Plaintiff's view,

indicates the possibility of establishing culpability and bad faith, and, thus, strongly supports the requested fee. *See* Sarko Decl. ¶ 167.

b. *Westerhaus* Factor Two: The ability of the opposing parties to satisfy an award of attorney's fees.

This factor is not relevant in the present case.

c. *Westerhaus* Factor Three: Whether an award of attorney's fees against the opposing parties could deter other persons acting under similar circumstances.

In this case, Lead Counsel has established a common fund, and agreed with Defendants that attorneys' fees will be awarded out of the common fund itself. Settlement Agreement ¶ 11.1. The payment of the requested attorneys' fees will have the effect of deterring similar conduct because it demonstrates that counsel who vigorously pursue meritorious claims of this type will be reasonably compensated for their efforts. ERISA was passed by Congress as a means of promoting an essential and important public policy—protecting and preserving American workers' retirement savings. Private enforcement of ERISA is specifically encouraged in the statute itself. *See, e.g.*, ERISA § 502(a), 20 U.S.C. § 1132(a) (specifically empowering participants and beneficiaries to bring civil actions to redress violations and/or enforce provisions of ERISA). Without the efforts undertaken here, participants in the Wal-Mart Plan likely would not have obtained any relief at all. That the Department of Labor filed an *amicus* brief in support of Braden's appeal underscores the significance of the efforts in this litigation. Payment of reasonable fees, such as Class Counsel's here, serves the fundamental purpose of ERISA of deterring waste and abuse of participants' retirement savings. Hence, this factor strongly supports the requested fee in this case. *See* Sarko Decl. ¶ 168.

d. *Westerhaus* Factor Four: Whether the parties requesting attorney’s fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself.

Braden’s Complaint alleges violations of fiduciary duty under ERISA pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), which provides that any participant in or beneficiary of an ERISA plan may sue for breach of fiduciary duties, which action is, by statutory definition, brought “in a representative capacity on behalf of the plan as a whole.” *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985); *see also* ERISA § 409(a), 29 U.S.C. § 1109(a) (liability for breach of fiduciary duty is “to the plan”); ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (authorizing plan participant to sue for breach of fiduciary duty under § 409(a)). Thus, “to the extent that losses may be recovered from Defendants, such recovery would be on behalf of the Plan.” *In re Aquila*, 237 F.R.D. at 210.

As described in the Plan of Allocation submitted to the Court for approval, the Settlement in this case provides for a \$13.5 million cash payment, net of items described in ¶ 8.2 of the Settlement Agreement, directly to the Plan to be used by the Plan to pay certain Plan expenses and administration fees, which will reduce the amount of fees that otherwise would be charged to individual Plan accounts in the future. If the Settlement Fund is not exhausted within the timeframe set forth in the Plan of Allocation, the remaining amount will be allocated to existing individual Plan participant accounts on a per capita basis, unless that is not feasible, in which case the Plan fiduciaries will decide how any remaining funds are used. There will be no reverter to Defendants. By reducing and offsetting Plan expenses and administration fees purely on a going-forward basis, the Plan of Allocation provides the greatest benefit to the greatest number of Plan participants. Additionally, the Settlement provides significant Non-Monetary Considerations, including continued improvements in the Plan so that low-cost investment

options are—and continue to be—available, along with new information about fees and continued improvements to participant education about saving for retirement.

Thus, as Lead Counsel seeks attorneys' fees in conjunction with achieving a Settlement that benefits on a Plan-wide basis all participants eligible under the Plan of Allocation, this factor also weighs in favor of awarding the attorneys' fees requested herein. *See* Sarko Decl. ¶ 169.

e. Westerhaus Factor Five: The relative merits of the parties' positions.

The merits of the parties' positions are vigorously disputed in this action. Defendants obtained dismissal of the case, but Plaintiff prevailed on appeal. Following extensive discovery, Plaintiff filed his amended Complaint, which Defendants moved to dismiss. The motions to dismiss were pending at the time the parties resolved the litigation. Plaintiff strongly believes that the motions to dismiss would be denied. However, he has no doubt that Defendants would continue to press arguments, defenses, and alternative damages theories that, if accepted by the Court, could significantly reduce or eliminate recovery to Braden and the Settlement Class. *See* Final Approval Memo, Section III.B.1; Sarko Decl. ¶¶ 117-133, 170.

On the merits, the law is in many respects unsettled. Courts in similar cases alleging breach of fiduciary duties under ERISA relating to excessive fees charged to ERISA retirement plans have sustained plaintiffs' allegations on motions to dismiss,⁵ although results at summary judgment and trial are mixed, with defendants prevailing in several cases.⁶ Results on appeal

⁵ *See, e.g., Tussey v. ABB, Inc.*, No. 06-4305, 2008 WL 379666 (W.D. Mo. Feb. 11, 2008) (denying motion to dismiss); *Taylor v. United Techs. Corp. ("Taylor I")*, No. 06-1494, 2007 WL 2302284 (D. Conn. Aug. 9, 2007) (same).

⁶ *Compare* Transcript of Summ. J. Argument at 3, *Tussey v. ABB*, No. 06-4305 (W.D. Mo. Dec. 7, 2009), filed as Ex. F to the declaration of Derek W. Loeser in support of preliminary approval (Dkt. No. 229-6) (finding ABB defendants were "fiduciaries with respect to the selection of the plan's investment options . . . even though ABB is the settlor of the plan"); *id.* at 11 (finding lack of information about fees precludes fiduciary from assessing reasonableness); *id.* at 13 (finding market rates not a defense); *id.* at 18 (finding factual issues preclude summary judgment on question of whether indirect transfers involve "plan assets");

also are mixed as well.⁷ Thus, both sides have authority supporting their positions on the law, and faced risk going forward. Under the circumstances, the Settlement is an excellent result, and, hence, this factor also strongly supports the requested fee.

2. Other relevant considerations: The *Allen* Factors Support a 30% Fee Award.

The Eighth Circuit has identified twelve additional factors that a court may consider in determining a fee award. *Wiles*, 2011 WL 2416291, at *4 (citing *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 944 n.3 (8th Cir. 2007) (citation omitted)). These factors include:

(1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the

Tibble v. Edison Int'l (“*Tibble I*”), 639 F. Supp. 2d 1074, 1122 (C.D. Cal. 2009) (granting in part and denying in part summary judgment); *Tibble v. Edison Int'l* (“*Tibble II*”), No. 07-5359, 2010 WL 2757153, at *26 (C.D. Cal. July 8, 2010) (findings of fact and conclusions of law holding that fiduciaries should have asked for fee waivers and failure to do so caused participants to pay “wholly unnecessary fees”); *George v. Kraft Foods Global, Inc.*, 641 F.3d 786, 796-97, 800 (7th Cir. 2011) (reversing summary judgment on two fiduciary breach claims because of issues of fact regarding timing of fiduciary decisionmaking and because “a trier of fact could reasonably conclude that defendants did not satisfy their duty to ensure that Hewitt’s fees were reasonable”), with *Tibble II*, 2010 WL 2757153; see also *Tibble v. Edison Int'l* (“*Tibble III*”), No. 07-5359, 2010 WL 3239443, at *1 (C.D. Cal. Aug. 9, 2010) (only \$371,000 in damages despite breach finding with respect to four funds); *Taylor v. United Techs. Corp.* (“*Taylor II*”), No. 06-1494, 2009 WL 535779, at *10 (D. Conn. Mar. 3, 2009) (granting summary judgment and finding fees not unreasonable and that revenue sharing payments were immaterial to participant decisionmaking), summarily *aff’d*, No. 09-1343, 2009 WL 4255159 (2d Cir. Dec. 1, 2009).

⁷ *Compare Braden*, 588 F.3d 585 (reversing dismissal of the case, holding that Braden stated claims for violation of fiduciary duties under ERISA including, duties of prudence, loyalty, disclosure, and prohibited transactions); *George*, 641 F.3d 786 (reversing in part and affirming in part summary judgment; affirming denial of leave to amend complaint and exclusion of expert testimony), with *Renfro v. Unisys Corp.*, No. 10-2447, 2011 WL 3630121 (3d Cir. Aug. 19, 2011) (affirming dismissal); *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009) (affirming dismissal), *reh’g en banc denied*, 569 F.3d 708 (7th Cir. 2009); *Young v. Gen. Motors Inv. Mgmt. Corp.*, 325 F. App’x 31 (2d Cir. 2009) (affirming dismissal); *Taylor v. United Techs. Corp.* (“*Taylor III*”), 354 Fed. App’x 525 (2d Cir. 2009) (summarily affirming summary judgment for defendants).

attorneys; (10) the ‘undesirability’ of the case; (11) the nature and the length of the professional relationship with the client; and (12) awards in similar cases.

Id. (citation omitted). Because the *Westerhaus* factors set forth in subsection II.C.1 above are “are by no means exclusive or to be mechanically applied,” but are to be used in conjunction with “other relevant considerations as general guidelines for determining when a fee is appropriate,” *Ark. Blue Cross & Blue Shield*, 299 F.3d at 972, the relevant *Allen* factors are briefly addressed below.

a. *Allen* Factor One: The time and labor required.

As detailed at length in the Sarko Declaration ¶¶ 147-163, 172, and as summarized above, this is a complex case, and Lead Counsel have dedicated enormous effort to this case since it was filed in March of 2008, nearly four years ago. Lead Counsel vigorously litigated this case—through extensive motions practice, appeal, discovery, and mediation sessions—all on a contingent basis, with costs advanced by Lead Counsel. This was not a fast, simple, or inexpensive case. Thus, this factor supports the requested fee award.

b. *Allen* Factor Two: The novelty and difficulty of the questions involved.

Excessive fee ERISA claims of the type asserted in this case are both novel and complex. Only a handful of cases have gone to judgment, and all in the past few years. The case law is thin in comparison with other areas of the law, such as securities and antitrust jurisprudence, with only a very few appellate decisions on most issues, *see supra* notes 5-7, and no Supreme Court decisions. District courts have reached different conclusions as to fundamental legal issues—even disagreeing on whether claims of this type can survive motions to dismiss. Moreover, ERISA law—both as it pertains to excessive fee cases, and more generally to breach of fiduciary claims—is still developing, in part because ERISA is a specialized and complex area of the law. *See In re Enron Corp. Sec., Derivative & “ERISA” Litig.*, 228 F.R.D. 541, 565 (S.D.

Tex. 2005) (the “complexity, expense and likely duration of the litigation . . . are self evident and exceptional”); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (finding “numerous legal issues concerning fiduciary liability in connection with company stock in 401(k) plans remain unresolved” and “[t]hese uncertainties would substantially increase the ERISA cases’ complexity, duration, and expense—and thus militate in favor of settlement approval”). Indeed, countless courts have recognized the complexity of ERISA cases. *See, e.g., Van Natta v. Sara Lee Corp.*, 439 F. Supp. 2d 911, 940 (N.D. Iowa 2006) (noting “the rising judicial chorus urging that Congress . . . revisit what is an unjust and increasingly tangled ERISA regime” (quoting *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsberg & Breyer, J.J., concurring) (citation omitted))).

Complexity and novelty significantly raised the risk for all parties going forward here—and the attendant risk has been noted by other courts overseeing ERISA cases that raise relatively new claims related to excessive fees similar to those alleged here. *See, e.g., Caterpillar*, slip op. at 5 (noting the “complexity and novel nature of [ERISA excessive fee] litigation” in decision awarding a 33 1/3% fee in ERISA excessive fee case); *Kanawi*, 2011 WL 782244, at *2 (in ERISA excessive fee case, noting that counsel “assumed a good deal of risk in bringing this suit against highly sophisticated parties,” and that “[u]ncertainty loomed throughout the litigation”); *Will*, 2010 WL 4818174, at *2 (noting that that this ERISA excessive fee case is among the “first of [its] kind”). Thus, this factor supports the award of attorneys’ fees requested in this case. *See Sarko Decl.* ¶¶ 173-174.

c. Allen Factors Three and Nine: The skill requisite to perform the legal service properly and the experience, reputation, and ability of the attorneys.

Lead Counsel is a national leader in ERISA breach of fiduciary duty and related litigation. As detailed in the Sarko Declaration ¶¶ 176-185, Keller Rohrback L.L.P. has led

numerous ERISA breach of fiduciary duty cases. As lead or co-lead counsel, Lead Counsel have recovered over \$1 billion for participants in ERISA breach of fiduciary duty litigation. Sarko Decl. ¶ 178. Lead Counsel's efforts were supported as well by additional Class Counsel, including Edward H. Siedle and the Aleshire Robb, P.C. firm, who performed tasks as requested by Lead Counsel.

The extraordinarily high quality of the defense counsel opposing Lead Counsel's efforts bears further witness to the caliber of representation that was necessary to achieve the Settlement. The ERISA litigation groups at Steptoe & Johnson LLP and O'Melveny & Myers, LLP representing the Wal-Mart and Merrill Lynch Defendants, respectively, are recognized leaders in ERISA fiduciary breach litigation and fought this case from its beginning. Lead Counsel's ability to obtain a favorable Settlement in the face of such formidable legal opposition confirms the quality of their representation. *See* Sarko Decl. ¶¶ 187-188. Lead Counsel possessed and effectively utilized the requisite skill to provide excellent legal services for Braden and the Settlement Class, and, thus, this factor also supports the fee award requested.

d. Allen Factor Four: The preclusion of other employment by the attorney due to acceptance of the case.

As detailed in the Sarko Declaration ¶¶ 147-163 (fees), ¶¶ 195-196 (costs), the litigation of this case consumed 10,084 total hours of attorneys and professional staff, most of which were at Lead Counsel's firm, as well as considerable financial resources advanced by Lead Counsel. Lead Counsel's litigation of this case necessarily precluded their involvement in other complex, class action cases. Thus, this factor supports the award requested.

e. Allen Factors Five and Six: The customary fee and whether the fee is fixed or contingent.

There is a long list of ERISA cases establishing acceptable fees. *See, e.g., In re Xerox ERISA Litig.*, slip op. at 2-3 (in ERISA fiduciary breach case, awarding 30%); *In re Household*

Int'l, slip op. at 2 (in ERISA fiduciary breach case, awarding 30%); *Kanawi*, 2011 WL 782244, at *1 (in ERISA excessive fee case, awarding 30%); *Will*, 2010 WL 4818174, at *1, 4 (in ERISA excessive fee case, awarding 33 1/3%); *Caterpillar*, slip op. at 12 (in ERISA excessive fee case, awarding one third of the settlement fund). The fees requested here are squarely within this range.

In addition, the fee sought by Lead Counsel is contingent. If no recovery had been obtained, Plaintiff's Counsel would not receive any fee. Generally, when compensating counsel for contingent litigation, courts take into account the risk undertaken by counsel in the matter. *See, e.g., Blum*, 465 U.S. at 902 (Brennan, J., concurring) (“[T]he risk of not prevailing, and therefore the risk of not recovering any attorney’s fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee.”). While, as the Second Circuit points out, there may not be “a substantial contingency risk in every common fund case,” *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000), in this case, however, there was—indeed Braden’s case was dismissed in its entirety—and Lead Counsel should be rewarded for having borne and successfully overcome the risks of the case.

This factor, then strongly supports the requested fee. *See Sarko Decl.* ¶ 190.

f. *Allen Factor Seven: Time limitations imposed by the client or the circumstances.*

This factor was not relevant in this case.

g. *Allen Factors Eight and Twelve: The amount involved and the results obtained and awards in similar cases.*

As described in the Sarko Declaration, ¶¶ 117-127, 191, the range of recoverable damages in this case is uncertain. First, liability itself is uncertain. In the one trial that has proceeded to judgment following a bench order, the plaintiffs prevailed but the damages were modest. *See Tibble v. Edison Int'l* (“*Tibble III*”), No. 07-5359, 2010 WL 3239443, at *1 (C.D.

Cal. Aug. 9, 2010) (only \$371,000 in damages despite breach finding with respect to four funds). If Plaintiff were able to establish liability in this case, the calculation of losses would no doubt be a battle of experts. Plaintiff believes that if he were to prevail on liability, and also persuade the court that his damages methodology is correct, losses could be somewhere between \$29 million and \$97 million. *See* Preliminary Approval Memo at 13-15. The range itself indicates the lack of clarity under the law, and the parties' disputes about the cost of administering a plan as large as Wal-Mart's with relatively small individual account balances, and high employee turnover. With this range in mind, the Settlement represents between 14% and 46% of the potentially provable losses to the Plan—not discounting for risk—certainly above the norm in high-risk class action cases. *See, e.g., In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 701-02 (E.D. Mo. 2002) (approving settlement comprising one-tenth of plaintiffs' potential recovery and collecting cases approving settlements comprising 2-8% of desired or potential recovery (citations omitted)); *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement with all defendants that comprised one-sixth of plaintiffs' potential recovery); *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 624 (9th Cir. 1982) (“[T]he very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes.” (citations and internal quotations omitted)).

There are only a handful of ERISA excessive fee cases that have settled. *See, e.g., Kanawi*, 2011 WL 782244, at *1 (\$18.5 million settlement fund and non-monetary relief); *Will*, 2010 WL 4818174, at *1 (\$15.15 million settlement fund and affirmative relief); *Caterpillar*, slip op. at 7 (\$16.5 million settlement fund and non-monetary relief). The allegations and the facts developed to support them, of course, differ, as do, no doubt, the reasons the parties chose to settle. This \$13.5 million Settlement is on par with other settlements, taking into account, the

particular risks Plaintiff faced. Moreover, the Settlement achieved here protects against the risk of a substantially reduced recovery if the case were to proceed to trial. *See Tibble III*, 2010 WL 3239443, at *1.

The requested 30% fee of \$4.05 million is fair and reasonable in relation to the recovery and, as described above, compares favorably to fee awards in other risky ERISA excessive fee cases. *See, e.g., Kanawi*, 2011 WL 782244, at *1 (awarding nearly \$4.9 million, or 30% of the settlement fund); *Will*, 2010 WL 4818174, at *1, 4 (awarding \$5.05 million or approximately 33% of the settlement fund); *Caterpillar*, slip op. at 2, 12 (awarding \$5.5 million or 33 1/3% of the settlement fund).

Moreover, the requested fee also compares favorably with attorneys' fees awarded in class action cases within the Eighth Circuit. *In re Xcel Energy, Inc.*, 364 F. Supp. 2d at 998 (summarizing cases).

Given the risk of this type of litigation generally and this case in particular, a 30% fee is well warranted here.

h. Allen Factor Ten: The “undesirability” of the case.

As discussed above, this was a complex, expensive, and risky case. The law is rapidly developing and in many respects unsettled. The Defendants are well known for their dogged defense of claims against them. Despite these obstacles, and the undesirable circumstances they presented, Lead Counsel undertook this case and vigorously pursued it through motions practice, appeal, discovery, and contentious negotiations. Accordingly, this factor supports the requested fee. *See Sarko Decl.* ¶ 194.

i. Allen Factor Eleven: The nature and the length of the professional relationship with the client.

This factor is not relevant in this case.

D. The Lodestar Calculation Supports the Reasonableness of the 30% Fee Requested.

While, as discussed above, the percentage-of-common-fund method is preferred in cases of this type, the lodestar method further supports the requested fee. Here, the hourly rates charged by Lead Counsel and the firms that performed approved work at the request of Lead Counsel range from \$147 for paralegals and other professional legal staff to \$785 for the most senior partner. Sarko Decl. ¶ 160 and Exs. A, B, E & F. Lead Counsel's rates have been approved by numerous other courts when evaluating Lead Counsel's fee requests in ERISA class action cases. *See* Sarko Decl. ¶¶ 157-159. The total hours billed by Lead Counsel and additional Class Counsel are 10,084, which is reasonable given the extensive motions practice, appeal, discovery and negotiations. Sarko Decl. ¶¶ 147-163. Based on the rates charged and hours billed, the total lodestar is \$4,560,224.75. Thus, the 30% fee request would result in a recovery of 88.8% of the lodestar, approximately representing a fractional 0.89 multiplier, rather than the customary multiplier above 1, and typically 2-4 in complex ERISA matters. *See supra* section II.B. Indeed, a multiplier is applied to compensate class counsel for the risk undertaken in prosecuting the action. *Sanderson*, 2011 WL 6369395 at *2 (awarding attorneys' fees representing 33.78% of class action common fund, recognizing that "the lodestar method of calculating fees is sometimes used as a method of double-checking the reasonableness of the percentage-of-fund fee request," and that here, "the percentage-of-fund request is actually *lower* than the lodestar check") (emphasis added); *Cohn v. Nelson*, 375 F. Supp. 2d 844, 862 (E.D. Mo. 2005) ("In using a lodestar calculation for determining fees, courts often multiply the lodestar amount by a risk premium factor or 'multiplier' based on the risk of recovery and other considerations, to arrive at a reasonable fee.") (citing *Blum*, 465 U.S. 886).

Finally, Lead Counsel do not intend to apply for reimbursement of additional fees, substantial as they may be, incurred after final approval of the Settlement. Lead Counsel

conservatively estimates that, at a minimum, additional fees incurred will be \$100,000. Thus, whereas the current lodestar is \$4,560,224.75, the estimated final lodestar will be at least \$4,660,224.75. Thus, Lead Counsel's total fee request of \$4.05 million represents a final "multiplier" of .87 or 86.9% of the dollar value of the final time invested in the case. *See Sarko Decl.* ¶ 163.

The lodestar method, thus, demonstrates that Plaintiff's Counsel are not receiving a windfall in this case, and, far from it, are seeking a fee that is only a fraction of the lodestar they incurred litigating the case. This strongly supports the reasonableness of the fee.

II. THE COURT SHOULD ALLOW LEAD COUNSEL'S REQUEST FOR REIMBURSEMENT OF EXPENSES

Litigating complex contingent cases such as this one requires counsel to incur significant expenses. The need to pay these expenses on an ongoing basis places significant demands on counsel and increases their overall level of litigation risk. Plaintiff's Counsel have thus far advanced \$235,436.68 in total expenses, and they are entitled to reimbursement of these expenses out of the common fund. *See In re U.S. Bancorp*, 291 F.3d at 1038 (finding out-of-pocket costs awards to class counsel appropriate); *Missouri v. Jenkins*, 491 U.S. 274, 295 (1989) (finding out-of-pocket costs routinely billed to fee-paying clients appropriate and, thus, compensable as part of a reasonable attorney's fee). The expenses that may be reimbursed from the common fund are not limited to those taxed in a judgment against an opponent, but instead, encompass "all reasonable expenses and counsel fees." *Trustees v. Greenough*, 105 U.S. 527, 533 (1882).

Awarding expenses and costs of litigation to counsel who create a common fund like this one is necessary and commonplace. *See In re Aquila*, 2007 WL 4244994, at *2 (in ERISA breach of fiduciary duty case, reimbursing attorneys' "reasonable expenses incurred in

prosecuting the Action” from the settlement fund); *see also Kanawi*, 2011 WL 782244, at *3 (in ERISA excessive fee case awarding costs requested out of the settlement fund); *Will*, 2010 WL 4818174, at *4 (same); *Caterpillar*, slip op. at 12 (same).

Because the expenses incurred here were incurred with no guarantee of recovery, Lead Counsel had a strong incentive to keep them at a reasonable level, and did so. Lead Counsel made a concerted effort to avoid unnecessary expenditures and economized whenever possible. These expenses were largely attributable to ordinary and necessary items such as court reporters, expert fees, mediation, computer-assisted document organization, travel, and copying, and are itemized in detail in the Sarko Declaration (¶¶ 195-196). They were essential to the successful development and prosecution of the case, and amount to less than 1.75% of the recovery of the Settlement Class.

III. A CASE CONTRIBUTION AWARD FOR NAMED PLAINTIFF IS WELL-DESERVED

The Class Notice and Summary Notice disclosed that Lead Counsel would seek a case contribution award for Braden of up to \$20,000 for his initiative and efforts in the litigation. Braden has been an active, hands-on participant in this litigation, expending significant amounts of his own time to benefit the Settlement Class. Braden was exceptionally well-suited to the task. Aware of the potential risk of retaliation from his employer and co-workers, he nonetheless came forward to initiate this action, and thereafter remained in frequent contact with Lead Counsel. *See* Declaration of Jeremy Braden in Support of Plaintiff’s Unopposed Motion for an Order Preliminarily Approving Class Action Settlement, Conditionally Certifying Settlement Class, Directing Distribution of Class Notice, Appointing Class Counsel and Class Representative, and Setting Hearing for Final Approval of Class Action Settlement ¶ 12, previously filed with the Court on December 2, 2011 (Dkt. No. 230). He provided relevant facts;

reviewed all pleadings and briefs; attended the appellate hearing before the Eighth Circuit; reviewed and responded to many discovery requests, including producing documents and assisting in answering written discovery requests directed to him; participated in two separate full-day mediation sessions by phone, consulting frequently with Lead Counsel in connection with the many subsequent discussions that were necessary to negotiate with Defendants the substantial injunctive relief obtained in the Settlement; reviewed various drafts of the proposed settlement terms and discussed the terms and conditions with Lead Counsel attorneys before ultimately consenting to the Settlement; and maintained close contact with Lead Counsel to stay informed of the status and progress of the case, participated in case strategy and decision-making, and contributed substantial creative ideas and research. *Id.* at ¶ 13. In light of all these factors, Braden should be amply rewarded for his willingness to step forward to ensure that the interests of the Settlement Class were vindicated.

Case law within this Circuit fully supports compensating class representatives for their work on behalf of the class which has benefited from them. *In re Aquila*, 2007 WL 4244994, at *3 (in ERISA breach of fiduciary duty case, awarding one named plaintiff \$25,000 and seven named plaintiffs \$5,000 each); *In re U.S. Bancorp*, 291 F.3d at 1038 (awarding \$2,000 to each of five class representatives, noting that “factors in deciding whether incentive award to named plaintiff is warranted include actions plaintiff took to protect class’s interests, degree to which class has benefitted from those actions, and amount of time and effort plaintiff expended in pursuing litigation”) (citing *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (upholding \$25,000 incentive award to class representative in ERISA action “that resulted in structural reforms to the [plan] as well as a cash recovery of more than \$13 million”)). Courts reason that such awards are compensatory in nature, reimbursing class representatives for the assuming risk

and completing tasks related to representing the class. *See In re Iowa Ready-Mix Concrete Antitrust Litig.*, No. 10-4038, 2011 WL 5547159, at *4 (N.D. Iowa Nov. 9, 2011) (approving incentive awards to named plaintiffs who “bore the risks of counterclaim . . . and consulted with class counsel throughout the suit”) (citation and internal quotation marks omitted).

Over nearly four years of contentious and very active litigation, Braden has served as the sole representative of the interests of the Settlement Class and, as described above, invested many hours in assisting Lead Counsel with the litigation and ultimately, the settlement, of this case. In view of his tireless efforts on behalf of the Settlement Class, Braden requests a payment of a case contribution award out of the Settlement fund in the amount of \$20,000. This award is well within the range, if not below, awards granted in ERISA excessive fee litigation of this type. *See Will*, 2010 WL 4818174, at *4 (in ERISA excessive fee case, awarding \$25,000 to each of three named plaintiffs); *Caterpillar*, slip op. at 12 (in ERISA excessive fee case awarding \$37,500 among three class representatives).

IV. CONCLUSION

The attorneys’ fees and expenses requested will reasonably compensate Plaintiff’s Counsel for the risks they assumed and the time and resources they committed over nearly four years to obtain the excellent result achieved here. Lead Counsel respectfully request that the Court: (1) award attorneys’ fees in the amount of \$4.05 million from the Settlement Fund; (2) order reimbursement of \$235,436.68 in expenses advanced by them; and (3) award \$20,000 to Named Plaintiff in recognition of his efforts on behalf of the Settlement Class.

RESPECTFULLY SUBMITTED this 3rd day of February, 2012.

KELLER ROHRBACK L.L.P.

/s/ Lynn Lincoln Sarko

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following: Paul Ondrasik, Morgan D. Hodgson, Eric Serron, Katherine R. Sinatra, William C. Martucci, Richard N. Bien, James Moloney, Robyn L. Anderson, Shannon Barrett, Kristen A. Page, William R. Robb, Edward H. Siedle and Robert N. Eccles. There are no non CM/ECF participants.

DATED this 3rd day of February, 2012.

/s/ Lynn Lincoln Sarko

Lynn Lincoln Sarko