

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. )

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**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**

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## I. INTRODUCTION

Named Plaintiff Jeremy Braden (“Braden” or “Named Plaintiff”) respectfully submits these Suggestions in support of his motion for an order (1) granting final approval of the proposed Settlement of this litigation;<sup>1</sup> (2) certifying the Settlement Class under Federal Rule of Civil Procedure 23(b)(1)(A) and (B) for purposes of the Settlement; (3) determining that the forms and methods of notice to the Settlement Class were appropriate and sufficient; (4) approving the proposed Plan of Allocation; and (5) entering a Final Order and Judgment. The proposed Settlement, which the Court preliminarily approved on December 5, 2011, consists of \$13.5 million in cash as well as certain non-monetary considerations that directly target the conduct alleged in this case, comes after nearly four years of intense litigation involving extensive briefing on multiple motions to dismiss, Braden’s successful appeal of the dismissal of this case to the Eighth Circuit, mediation and protracted settlement negotiations, and significant discovery. The Settlement is an excellent result that satisfies the factors set forth in *In re Wireless Telephone Federal Cost Recovery Fees Litigation* (“*Wireless IP*”), 396 F.3d 922, 932 (8th Cir. 2005), which are discussed in detail below and, accordingly, should be approved as fair, reasonable, and adequate.

Since the Court preliminarily approved the Settlement, *see* 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), notice of the Settlement has been issued to Class members pursuant to the terms of the Preliminary Approval Order, and as of this filing, none of the millions of Class members has objected to the Settlement. For the reasons discussed below and in more detail in Plaintiff’s Suggestions in Support of Plaintiff’s Unopposed Motion for an Order Preliminarily Approving Class Action Settlement, Conditionally Certifying Settlement Class, Directing Distribution of

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<sup>1</sup> Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Class Action Settlement Agreement (“Settlement Agreement”) (Dkt. No. 229-1).

Class Notice, Appointing Class Counsel and Class Representative, and Setting Hearing for Final Approval of Class Action Settlement (“Preliminary Approval Memo”) (Dkt. No. 228), Plaintiff respectfully requests that the Court enter an Order (1) granting final approval of the proposed Settlement of this litigation; (2) certifying the Settlement Class under Federal Rule of Civil Procedure 23(b)(1)(A) and (B) for purposes of the Settlement; (3) determining that the forms and methods of notice to the Settlement Class were appropriate and sufficient; (4) approving the proposed Plan of Allocation; and (5) entering a Final Order and Judgment.

## II. BACKGROUND

The facts of this case and the details of the litigation and the Settlement Agreement are discussed at length in the Preliminary Approval Memo, as well as in the Declaration of Lynn Lincoln Sarko<sup>2</sup> and Lead Counsel’s Suggestions in Support of Motion for Attorneys’ Fees, Reimbursement of Costs and Expenses, and Case Contribution Award to Named Plaintiff (“Fee Petition”) filed herewith, and, accordingly, are only summarized here.

### A. Summary of the Action

On March 27, 2008, Braden filed his initial Complaint for Violations of the Employee Retirement Income Security Act (ERISA) against Wal-Mart Stores, Inc. (“Wal-Mart”) and several individual defendants (Dkt. No. 2).<sup>3</sup> The initial complaint alleged that the Plan’s fiduciaries violated fiduciary duties under ERISA by, *inter alia*, (1) failing to prudently and loyally manage the Plan and Plan assets; (2) failing to properly monitor the performance of their fiduciary appointees; (3) failing to provide complete and accurate information; (4) knowing of,

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<sup>2</sup> See Declaration of Lynn Lincoln Sarko in Support of (1) 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 and (2) Named Plaintiff’s Motion for an Award of Attorneys’ Fees, Reimbursement of Expenses, and Case Contribution Award to Named Plaintiff (“Sarko Declaration” or “Sarko Decl.”).

<sup>3</sup> Referred to as “Wal-Mart” or the “Wal-Mart Defendants.” See Settlement Agreement ¶ 1.48. 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.

participating in, and/or enabling breaches of fiduciary duties, thereby assuming liability for co-fiduciaries; and (5) engaging in prohibited transactions. Plaintiff alleged that the Wal-Mart Defendants knew or should have known that the Plan's Investment Options—which included retail mutual funds, funds that pay 12b-1 fees, and funds that provide revenue sharing (as well as other fees, such as per-position or per-participant sub-transfer agent fees, as Braden later learned) to interested parties, including the Plan's trustee and recordkeeper, Merrill Lynch—charged excessive fees, such that the Investment Options were not prudent retirement investments during the Class Period. Braden alleged that the Wal-Mart Defendants acted imprudently by allowing further investment in the Plan's Investment Options instead of replacing them with lower-cost alternatives.

The Wal-Mart Defendants vigorously contested Braden's allegations from the outset, and moved to dismiss the Complaint (Dkt. No. 29). On October 28, 2008, the Court granted the Wal-Mart Defendants' motions to dismiss (Dkt. No. 50). Braden appealed and the Eighth Circuit reversed the dismissal in an opinion issued on November 25, 2009, and the case was reinstated by the Eighth Circuit by a mandate issued on January 14, 2010 (Appeal Dkt. No. 3624641) following that court's denial of the Wal-Mart Defendants' petition for *en banc* review.

On July 21, 2010, after significant discovery and one mediation session with the Wal-Mart Defendants, Braden amended the Complaint to allege six new claims against a new set of defendants—the Merrill Lynch Defendants<sup>4</sup>—alleging that they breached their fiduciary duties to the Plan under ERISA by, *inter alia*, (1) failing to prudently and loyally manage the Plan and Plan assets; (2) engaging in prohibited transactions; (3) failing to provide complete and accurate information; (4) assuming liability for co-fiduciaries by knowing of, participating in, and/or enabling breaches of fiduciary duties; (5) committing acts that constitute unjust enrichment under ERISA and the federal common law; and (6) alternatively, knowingly participating in a breach of fiduciary duty (Dkt. No. 107). Plaintiff alleged that the Merrill Lynch Defendants collected

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<sup>4</sup> Referred to as “Merrill Lynch” or the “Merrill Lynch Defendants.” See Settlement Agreement ¶¶ 1.22, 1.23.

millions of dollars of undisclosed fees, unbeknownst to Wal-Mart or Plan participants. Braden also expanded the Class Period and supplemented his allegations against the Wal-Mart Defendants with information gathered in discovery.

Defendants<sup>5</sup> contested Braden's allegations and moved to dismiss the amended Complaint, filing multiple motions to dismiss (Dkt. Nos. 156-159). Defendants' motions were fully briefed when this case was first stayed in March 2011 to facilitate settlement negotiations (Dkt. No. 196). *See Sarko Decl.* ¶¶ 44-51.

During the pendency of this action, and concurrently with briefing the second round of motions to dismiss and for class certification and engaging in mediation discussions, Lead Counsel engaged in and oversaw approximately sixteen months of merits discovery, including reviewing over 550,000 pages of documents produced by Defendants and over 100,000 pages of documents produced by third-parties pursuant to Rule 45 subpoenas, preparing for and taking six depositions, preparing for numerous additional depositions, negotiating and resolving discovery disputes with Defendants and third-parties, and propounding and responding to dozens of discovery requests.

## **B. Settlement Negotiations and Resulting Settlement Agreement**

The Settlement was achieved as a result of hard-fought, arm's-length negotiations assisted by the Honorable Layn R. Phillips, a retired U.S. District Court Judge and experienced mediator. Two mediation sessions occurred—the first in California in June 2010, and the second in New York in November 2010. Following the second mediation session, the parties resumed litigating the case but continued to discuss potential resolution with Judge Phillips and Defendants' counsel. Eventually, Judge Phillips made a mediator's proposal of basic financial terms to settle the case, and the parties accepted the proposal. Thereafter the parties extensively negotiated the injunctive relief provided for in the Settlement. These talks ultimately resulted in the parties coming to terms, and on December 2, 2011, the parties fully executed the Class

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<sup>5</sup> The Wal-Mart Defendants and Merrill Lynch Defendants are collectively referred to as "Defendants."

Action Settlement Agreement (“Settlement Agreement”) (Dkt. No. 229-1). Sarko Decl. ¶¶ 98-108.

The principal terms of the Settlement are described in the Settlement Agreement previously filed with and preliminary approved by the Court (Dkt. Nos. 229-1 and 231). Briefly, the parties have agreed to settle all claims arising out of this excessive fee ERISA action for \$13.5 million in cash as well as certain non-monetary considerations on behalf of a class of participants and beneficiaries in the Plan. Pursuant to the Plan of Allocation, submitted with this motion for the Court’s consideration and approval, *see* Sarko Decl. Ex. C, the Settlement Fund, net of Court-approved attorneys’ fees and expenses, Named Plaintiff’s case contribution award, notice, and other expenses described in ¶ 8.2 of the Settlement Agreement, will be paid 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. Additionally, the Settlement allows for Lead Counsel to request an attorneys’ fee of up to thirty percent (30%) of the Settlement Fund, reimbursement of expenses, and a case contribution award of up to \$20,000 for Named Plaintiff.<sup>6</sup>

**C. Preliminary Approval and Notice to the Class.**

On December 5, 2011, this Court issued the Preliminary Approval Order in which it preliminary approved the Settlement and scheduled the Fairness Hearing for March 7, 2012. Pursuant to the Preliminary Approval Order, notice of the Settlement was provided to the Settlement Class in multiple ways: (1) Defendants published the Class Notice<sup>7</sup> on [www.Walmartbenefits.com](http://www.Walmartbenefits.com) and [www.benefits.ml.com](http://www.benefits.ml.com), web sites utilized by Plan participants in

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<sup>6</sup> A detailed explanation of the requested attorneys’ fees, reimbursement for expenses, and payment of case contribution award to Named Plaintiff is set forth in Lead Counsel’s Suggestions in Support of Motion for Attorneys’ Fees, Reimbursement of Costs and Expenses, and Case Contribution Award to Named Plaintiff, and the accompanying Sarko Declaration.

<sup>7</sup> *See* Class Notice, filed as Exhibit A.1.A to the declaration of Derek W. Loeser in support of preliminary approval (Dkt. No. 229-1), and approved by the Court in the Preliminary Approval Order.

managing their retirement accounts; (2) Lead Counsel published the Summary Notice<sup>8</sup> in *USA Today* and on BusinessWire; and (3) Lead Counsel published the Summary Notice on a dedicated web site created and administered by Lead Counsel to provide current information to Settlement Class members. *See Part V infra.*

#### **D. Objections.**

As of this filing, Lead Counsel have received no objections to the Settlement itself, and no objections to the anticipated request for award of attorneys' fees and expenses and the Named Plaintiff case contribution award set forth in the notice. *See Sarko Decl.* ¶¶ 130, 138-141. Lead Counsel and Defendants' counsel received an inquiry from an attorney representing a Plan participant who requested verification that Merrill Lynch was contributing funds to the Settlement. Lead Counsel provided a response to this attorney and have not received any further inquiry from him. *See Sarko Decl.* ¶ 131. The objection deadline is February 17, 2012, and, therefore, Lead Counsel will address objections, if any, prior to the Fairness Hearing on March 7, 2012, in accordance with the Preliminary Approval Order.

### **III. THE PROPOSED SETTLEMENT MERITS FINAL APPROVAL**

Named Plaintiff presents this Settlement for review under Federal Rule of Civil Procedure 23(e), which requires court approval of class action settlements, issuance of notice in a reasonable manner to class members who would be bound by the settlement, and a finding by the court following a hearing that the settlement was reached through arm's-length negotiations, and is fair, reasonable, and adequate.

Courts favor the settlement of complex class action litigation because it saves time and money and enables the parties to resolve disputes on their own timetable and terms. *Cohn v. Nelson*, 375 F. Supp. 2d 844, 852 (E.D. Mo. 2005) (noting that the judicial policy favoring settlements is particularly strong "in class actions and other complex cases where substantial

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<sup>8</sup> *See* Summary Notice, filed as Exhibit A.1.B to the declaration of Derek W. Loeser in support of preliminary approval (Dkt. No. 229-1), and approved by the Court in the Preliminary Approval Order.

judicial resources can be conserved by avoiding formal litigation”) (internal citations and quotations omitted); *In re Wireless Tel. Fed. Cost Recovery Fees Litig.* (“*Wireless I*”), No. 03-md-015, 2004 WL 3671053, at \*8 (W.D. Mo. Apr. 20, 2004) (“The policy in favor of settlement is so strong that such agreements are ‘presumptively valid.’” (quoting *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist.*, 921 F.2d 1371, 1391 (8th Cir. 1990))). Because settlement is a preferred means of dispute resolution, there is a strong presumption in favor of settlement. 5 JAMES WM. MOORE, ET AL., MOORE’S FEDERAL PRACTICE § 23.161 (3d ed. 2010).

The time-honored standard for reviewing the proposed settlement of a class action in the Eighth Circuit, as in other circuits, is whether the proposed settlement is “fair, reasonable, and adequate.” *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975) (citations omitted), *cert. denied*, 423 U.S. 864 (1975); *see also Wireless II*, 396 F.3d at 932 (citations omitted). In making that determination, the Court should consider that the “surety of settlement that makes it a favored policy in dispute resolution as compared to unknown dangers and unforeseen hazards of litigation.” *In re Charter Commc’ns, Inc., Sec. Litig.*, MDL 1506, 2005 WL 4045741, at \*4 (E.D. Mo. June 30, 2005) (quoting *Wireless I*, 2004 WL 3671053, at \*11 (citation omitted)). Although the Court should not “rubber stamp” a proposed settlement, in applying the standards to evaluate procedural and substantive fairness, it does not have “the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute.” *Grunin*, 513 F.2d at 123 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 456 (2d Cir. 1974)). Rather, it should demonstrate that approval of the settlement is based on “‘well-reasoned conclusions.’” *Wireless II*, 396 F.3d at 932-33 (quoting *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988)).

**A. This Settlement is the Product of a Rigorous and Adversarial Process.**

When evaluating class action settlements, the Court’s task is to “ensure that the agreement is not the product of fraud or collusion and that, taken as a whole, it is fair, adequate, and reasonable to all concerned.” *Wireless II*, 396 F.3d at 934 (citation omitted).

Courts have noted certain factors in the settlement process that demonstrate the absence of fraud or collusion. For example, “the complex and uncharted legal and factual posture of [ERISA] case[s], the extensive discovery conducted, the fact that the settlement was the result of arms-length negotiations in front of a respected and fully-informed mediator, and comparison to similar ERISA settlements support [approval of an ERISA settlement].” *In re Aquila ERISA Litig.*, No. 04-0865, 2007 WL 4244994, at \*2 (W.D. Mo. Nov. 29, 2007); *see also In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, MDL 1967, 2011 WL 1790603, at \*3 (W.D. Mo. May 10, 2011) (noting that “[t]he proposed Settlement was entered into at arm’s-length by experienced counsel and only after extensive arm’s-length negotiations, including through mediation supervised by a retired United States District Judge”); *In re Charter*, 2005 WL 4045741, at \*5 (“[T]here is a presumption of fairness when a settlement is negotiated at arm’s length by well informed counsel.”).

The details of the litigation and the mediation process are described in the Sarko Declaration. Eighteen months passed between the parties’ first mediation session in June of 2010 and their execution of the Settlement Agreement in December of 2011, during which the parties rigorously debated the merits of their claims, continued to conduct discovery, and engaged in ongoing mediation talks with experienced mediator and former federal District Court Judge Layn Phillips. Under these circumstances, the Settlement is entitled to a presumption of fairness.

**B. The Settlement is Fair, Reasonable, and Adequate Under the Eighth Circuit’s *Wireless* Factors.**

As previously discussed in the Preliminary Approval Memo, in *Wireless II*, the Eighth Circuit identified four factors, the “*Wireless* factors,” that courts should consider in deciding whether a proposed class action settlement is fair, reasonable, and adequate: “(1) the merits of the plaintiff’s case, weighed against the terms of the settlement; (2) the defendant’s financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition

to the settlement.” 396 F.3d at 932 (citing *Grunin*, 513 F.2d at 124); *see also Van Horn*, 840 F.2d at 607.

The Eighth Circuit has held that in applying the *Wireless* factors, “judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel.” *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148-49 (8th Cir. 1999) (citation omitted). The purpose of the settlement hearing is not to “try the case [but] to avoid the delay and expense of such a trial.” *Grunin*, 513 F.2d at 123-24 (citations omitted); *see also In re Charter*, 2005 WL 4045741, at \*4 (noting that while the court may “weigh[] plaintiff’s likelihood of success on the merits against the amount of the relief offered in the settlement . . . in determining whether to approve a settlement, courts should ‘not decide the merits of the case or resolve unsettled legal questions’”) (quoting *Carson v. Am. Brands Inc.*, 450 U.S. 79, 88 n.14 (1981)). For the reasons set forth previously in the Preliminary Approval Memo, and as summarized below, the Settlement satisfies the first three *Wireless* factors. Other than noting Braden’s strong support for the Settlement and the absence of any objections to date, Lead Counsel will address in full the fourth factor—the reaction of Class members—after the February 17, 2012 objection deadline has passed.

**1. *Wireless* Factor One: The merits of the plaintiff’s case, weighed against the terms of the settlement.**

“The most important consideration in deciding whether a settlement is fair, reasonable, and adequate is ‘the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.’” *Wireless II*, 396 F.3d at 933 (quoting *Petrovic*, 200 F.3d at 1150 (internal quotations omitted)). The fairness and adequacy of the Settlement are further underscored by taking into account the many hurdles and risks that the Settlement Class would have to overcome in order to obtain class certification, defeat summary judgment, prove liability and damages at trial and, potentially, brief post-trial motions, appeals, and even a petition for a *writ of certiorari*, as well as the risks inherent in the delays such proceedings might occasion. Braden believes that his claims are well founded and that he ought to prevail on the merits and in

his efforts to prove causation and damages. Nonetheless, as Braden explained in his Preliminary Approval Memo, this case is fraught with risk at every turn.

First, ERISA excessive fee cases involving 401(k) plans are relatively new. While a substantial body of opinions has been issued on motions to dismiss in the past few years,<sup>9</sup> and motions on class certification have been decided, the results of these cases at summary judgment and trial are mixed.<sup>10</sup> Results on appeal are mixed as well.<sup>11</sup>

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<sup>9</sup> *E.g.*, *Tussey v. ABB, Inc.* (“*Tussey II*”), 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).

<sup>10</sup> *Compare* Transcript of Summ. J. Arg. at 3, *Tussey v. ABB, Inc.*, 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”); *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*, *Taylor v. United Techs. Corp.* (“*Taylor III*”) 354 F. App’x 525 (2d Cir. 2009).

<sup>11</sup> *Compare 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); *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, 578 (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 III*, 354 F. App’x 525 (summarily affirming summary judgment for defendants).

Second, Defendants have raised and can be expected to raise a host of defenses—for example, whether the fees associated with the Plan Investment Options or compensation to Merrill Lynch were unreasonable, whether Braden’s claims are barred by statutes of limitations, whether Defendants were in fact fiduciaries, and whether Defendants violated ERISA in the discharge of their fiduciary duties—any one of which, if successful, might end or severely limit Braden’s case. The Court need accept only one of Defendants’ merits-based arguments for the case to be lost, or lost in very substantial part. *See* Preliminary Approval Memo at 13-15; Sarko Decl. ¶¶ 117-127.

Third, the relief provided in the Settlement, combined with the changes to the Plan since the lawsuit began, target exactly the problems presented by high-cost mutual funds and their impact on long-term retirement savings that Braden set out to redress when he filed suit. These changes have also targeted the problems identified by Braden with asset-based fee structures in a plan the size of Wal-Mart’s, as well as the undisclosed fees collected by Merrill Lynch. As explained more fully in the Sarko Decl. ¶¶ 119-121, 169, and the Preliminary Approval Memo at 2-3, the Plan today looks very different than the one that existed almost four years ago when Braden filed his original Complaint. Thus, notwithstanding his dispute with Defendants about whether those changes were instigated or at least hastened by this lawsuit, Braden’s goals have been largely achieved.

Fourth, Defendants’ vigorous dispute of the damage aspects of the case creates risk for Braden. Defendants deny both that excessive fees were ever paid and the accuracy of Braden’s damages calculations. Additionally, Defendants have raised and can be expected to raise their own damages theories or defenses—for example, prevailing on statutes of limitations challenges or convincing the Court that fees charged were reasonable or were reduced sufficiently over time to decrease losses—that could drastically reduce the amount of damages and number of funds at issue. Defendants’ other arguments might also reduce damages to Braden and the Settlement Class, including convincing the Court to use different benchmark alternative index funds for calculating losses, or that Braden and the Settlement Class are not entitled to losses, or only

greatly reduced losses, for unjust enrichment. Braden, of course, disputes Defendants' arguments, defenses, and alternative damage theories, and would strenuously resist any effort to decrease his recovery in this case. Nonetheless, Braden recognizes that his ability to recover in this case is far from certain and that if Defendants' arguments were accepted, potential recovery flowing to the Settlement Class could be reduced significantly or even eliminated. *See* Preliminary Approval Memo at 13-15; Sarko Decl. ¶¶ 117-127.

The risk in proving damages resides primarily in the complexity of the calculation. In the Eighth Circuit, damages calculations for breaches of fiduciary duty under ERISA seek to “restor[e] plan participants to the position in which they would have occupied but for the breach of trust,” *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992) (citation omitted), with “ambiguities in determining loss, [] resolve[d] against the trustee in breach,” *Roth v. Sawyer-Cleator Lumber Co.*, 61 F.3d 599, 602 (8th Cir. 1995) (citations omitted). “[T]he measure [of recovery] will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.” *Martin*, 965 F.2d at 672 (citation omitted).

Damages calculations in this case would be expert-intensive, requiring comparison of a number of variables, including the individual holdings of each Plan participant in the Investment Options, and a comparison of the performance of alternative index funds for each Plan Investment Option, subject to various additional factors and assumptions. And the range of potentially recoverable damages in this case would be driven, among other factors, by the Court's determination of statute of limitations concerning the Class Period and Investment Options, as well as a selection of an appropriate damages model. *See* Preliminary Approval Memo at 13-14.

Given the foregoing complexities of proving liability and damages in a way that would result in any payment to the Plan after judgment, the Settlement provides a substantial benefit to participants. As explained in the Preliminary Approval Memo, in cases of this type, there are two categories of alleged loss—those that have occurred already, and those that will continue to

occur and have a compounding effect over time, with the latter generally being much larger than the former. The Settlement here addresses both types of loss. The cash payment of \$13.5 million directly to the Plan will offset Plan expenses on a going-forward basis, which represents a significant portion of the total potential recovery of losses to date. Additionally, the Settlement's injunctive relief will ensure continued improvements in the Plan so that low-cost investment options are—and continue to be—available and participants receive better information about fees and saving for retirement. *See* Preliminary Approval Memo at 13-15; Sarko Decl. ¶ 120.

Fifth, the Settlement in this case is in the public interest, in that publicity about the Settlement likely has raised awareness concerning excessive fee issues of which other plan participants and fiduciaries should be aware. *Roberts v. Source for Pub. Data LP*, No. 08-4167, 2010 WL 4008347, at \*2 (W.D. Mo. Oct. 12, 2010) (“The public interest is also a factor that should be considered in evaluating a class action settlement.”) (citing *Angela R. by Hesselbein v. Clinton*, 999 F.2d 320, 324 (8th Cir. 1993)). *See also* Sarko Decl. ¶ 168.

In sum, the merits of Plaintiff's case weighed against the terms of the Settlement compel approval. Lead Counsel's and Braden's negotiations and ultimate settlement of this case were informed by their comprehensive understanding of the key legal issues based on their investigation, research, review of voluminous documents produced by Defendants and third parties, depositions, written discovery, and extensive briefing on Defendants' motions to dismiss. While Braden is confident that he has pleaded a case that could ultimately be proven, the risks of the case being lost, delayed, or its value diminished, when weighed against the substantial immediate benefits of Settlement, compel the conclusion that the Settlement is in the best interest of the Settlement Class. Moreover, considering the rapidly evolving nature of ERISA excessive fee case law—evidenced in part by the dismissal, appeal, and reinstatement of Braden's own case—the present and time value of money, the probability of lengthy litigation, the risk that the Settlement Class would not succeed in proving liability against Defendants, and the range of

possible recovery at trial, this factor, like the others, militates in favor of a sum-certain settlement, and Braden believes that the Settlement is well within the range of reasonableness.

**2. Wireless Factor Two: The defendant's financial condition.**

Lead Counsel do not believe this factor is relevant to this case.

**3. Wireless Factor Three: The complexity and expense of further litigation.**

As noted in Plaintiff's Preliminary Approval Memo, many courts have recognized the complexity of ERISA breach of fiduciary duty claims. *See, e.g., In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 228 F.R.D. 541, 565 (S.D. Tex. 2005) (finding that the "complexity, expense and likely duration of the litigation . . . are self-evident and exceptional"); *In re IKON Office Solutions, Inc. Sec. Litig.*, 209 F.R.D. 94, 104-07 (E.D. Pa. 2002) (finding that the complexity and duration of litigation of breach of fiduciary duty claims, as well as the expense of litigation and risks of establishing liability and damages, weighed heavily in favor of settlement); *Will v. Gen. Dynamics Corp.*, No. 06-698, 2010 WL 4818174, at \*2 (S.D. Ill. Nov. 22, 2010) (noting that that this ERISA excessive fee case is among the "first of [its] kind"); *Martin v. Caterpillar Inc.*, No. 07-1009, slip op. at 5 (C.D. Ill. Sept. 10, 2010) (Opinion and Order) (noting the "complexity and novel nature of [ERISA excessive fee] litigation").

The expense of this complex ERISA excessive fee litigation is reflected by the parties' extensive briefing before this Court and the Eighth Circuit Court of Appeals, multiple rounds of mediation, substantial document discovery, and lengthy settlement negotiations. *See Sarko Decl.* ¶¶ 147-163, 195-196. Despite all this, considerable discovery, including all expert discovery, remains to be conducted, and the parties have yet to engage in substantial additional briefing on class certification, all of which must be completed before summary judgment or trial.

As in the other similar cases noted above, the remaining litigation would be costly and time-consuming to complete. Thus, this Settlement conserves significant judicial resources, reduces the expense associated with the remaining work required to prepare the case for trial, and provides immediate resolution to Braden and the Settlement Class.

**4. Wireless Factor Four: The amount of opposition to the settlement.**

Named Plaintiff was kept informed of the settlement negotiations with Defendants throughout the negotiating process and supports the Settlement without qualification. 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, previously filed with the Court on December 2, 2011 (Dkt. No. 230).

Not only does Named Plaintiff support the Settlement, the Independent Fiduciary appointed to review the Settlement, Lance Studdard of Reliance Trust, will also be reviewing the case and the Settlement and opining on its fairness—a task of particular importance. *See* Settlement Agreement ¶¶ 2.2.3. Under well-settled ERISA law, an ERISA plan that gives a litigation release to a “party of interest,” such as the company itself or its employees, engages in a prohibited transaction under ERISA § 406, 29 U.S.C. § 1106. In 2003, the U.S. Department of Labor promulgated a Prohibited Transaction Exemption permitting such releases, but only if an independent fiduciary approves the terms of the settlement that include the release. Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632-01 (Dec. 31, 2003). In other words, the independent fiduciary must determine that the Plan received fair value for the release.

As described below, no objections have been filed to date and any objections will be addressed before the Fairness Hearing. *See* Sarko Decl. ¶¶ 138-141.

**IV. CERTIFICATION OF THE SETTLEMENT CLASS SHOULD BE CONFIRMED**

In its Preliminary Approval Order, this Court conditionally certified the following Settlement Class:

- (a) all Persons, except Defendants, who are or were participants in the Wal-Mart Stores, Inc. Profit Sharing and 401(k) Plan, or the predecessors or successors thereto, who have held assets in the Plan Investment Options at any time between July 1, 1997 to the Agreement Execution Date, inclusive, and (b) as to each Person within the scope of subsection (a) of [Settlement Agreement] Section 1.44,

his, her, or its beneficiaries, alternate payees, Representatives and Successors in Interest.

Preliminary Approval Order ¶ 4. While the parties have stipulated to conditional certification of the Settlement Class for settlement purposes, it is, of course, subject to review and, ultimately, final certification by the Court. *See* David H. Herr, ANNOTATED MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.632 author's cmts. (2011) (explaining that a court's approval of a proposed class action settlement involves (1) a preliminary approval hearing at which the court, among other things, preliminarily certifies a class for purposes of settlement, and (2) a final hearing at which the court determines, among other things, whether to certify the class for settlement purposes); *see, e.g., Roberts v. Source for Pub. Data, LP*, No. 08-04167, 2010 WL 2195523 (W.D. Mo. May 28, 2010) (preliminary approval of class action settlement); *Roberts*, 2010 WL 4008347 (final approval of class action settlement); *Wireless I*, 2004 WL 3671053, at \*3, 19 (granting final approval of class action settlement after having granted preliminarily approval months before). The Court should assure itself that certification is proper under Rules 23(a) and (b). *See, e.g., Wiles v. Sw. Bill Tel. Co.*, No. 09-4236, 2011 WL 2416291, at \*2 (W.D. Mo. June 9, 2011).

Braden's ERISA claims charge Defendants with breaches of fiduciary duty which are exactly the kinds of claims that lie at the core of Rule 23 jurisprudence. *See, e.g., Tussey v. ABB, Inc.* ("*Tussey I*"), No. 06-4305, 2007 WL 4289694, at \*1-2 (W.D. Mo. Dec. 3, 2007) (certifying for class treatment virtually identical ERISA claims). Indeed, the Advisory Committee Notes to the 1996 Amendment of Rule 23(b)(1)(B) specifically state that certification under Rule 23 is especially appropriate in cases charging breach of trust by a fiduciary to a large class of beneficiaries. *Id.* Moreover, Congress specifically embraced the principle that ERISA claims should be brought in a representative capacity. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134,

142 n.9 (1985) (noting Congress expressed intent that ERISA “actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole”).

Nothing has changed about the Class since this Court conditionally certified the Settlement Class, and, to date, no Class Member has objected to the certification. As described in Plaintiff’s Preliminary Approval Memo at 17-25, this Settlement is particularly well-suited for certification under Rule 23(a) and 23(b)(1) and, accordingly, should be confirmed for purposes of final approval of the Settlement.

Finally, Federal Rule of Civil Procedure 23(g) requires the Court to examine the capabilities and resources of counsel to determine whether they will provide adequate representation to the Class. Here, the Court appointed Lead Counsel and Liaison Counsel in its Preliminary Approval Order. As described above and in the Sarko Declaration, the Settlement was achieved by Lead Counsel who include some of the preeminent ERISA class action attorneys in the country and who have years of experience in ERISA law and in prosecuting and trying complex actions. Lead Counsel’s experience and skill were demonstrated by the effective prosecution of this action and excellent settlement achieved.

#### **V. THE FORMS AND METHODS OF NOTICE EMPLOYED SATISFY RULE 23 AND DUE PROCESS**

In accordance with the Preliminary Approval Order, the Settlement Class was provided with ample and sufficient notice of this Settlement, including an appropriate opportunity to voice objections. The notice plan approved by the Court in the Preliminary Approval Order fully informed Settlement Class members of the lawsuit and the proposed Settlement, enabling them to make informed decisions about their rights. Notice to class members satisfies due process when it is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Petrovic*, 200 F.3d at 1153 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

To satisfy Rule 23, “[n]otice of a settlement proposal need only be as directed by the district court . . . .” *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1176 (8th Cir. 1995) (citing Rule 23(e) and *Grunin*, 513 F.2d at 120-22). Here, the forms and methods of notice of the proposed Settlement that were agreed to by the parties and provided with the Court’s approval pursuant to the Preliminary Approval Order satisfy all due process considerations and meet the requirements of Rule 23(c)(2) & (e)(1). The following notice was accomplished:

- Pursuant to the notice plan approved by the Court in the Preliminary Approval Order and implemented by counsel, on January 4, 2012, Class Notice was published by Defendants on [www.Walmartbenefits.com](http://www.Walmartbenefits.com) and [www.benefits.ml.com](http://www.benefits.ml.com), web sites utilized by Plan participants in managing their retirement accounts.<sup>12</sup>
- Class Notice was published by Lead Counsel on a dedicated web site created and administered by Lead Counsel to provide information to Settlement Class members.<sup>13</sup>
- The Summary Notice was published in *USA Today* on January 5, 2012,<sup>14</sup> and on BusinessWire on January 4, 2012.<sup>15</sup>

*See Sarko Decl.* ¶ 138-141.

The notices describe the material terms of the Settlement. The Class Notice provided detailed information about the Settlement, including (1) a comprehensive summary of its terms; (2) detailed information about the Released Claims, and (3) Lead Counsel’s intent to request attorneys’ fees, reimbursement of expenses, and a case contribution award for Named Plaintiff. In addition, the Class Notice provided information about the Fairness Hearing, the Settlement Class members’ rights to object (and deadlines and procedures for objecting), and the procedure

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<sup>12</sup> *See Plaintiff’s Notice Regarding Publication of Notice of Class Action Settlement* ¶ 3 (Dkt. No. 232).

<sup>13</sup> *See Plaintiff’s Notice Regarding Publication of Notice of Class Action Settlement* ¶ 3.

<sup>14</sup> The one-day delay in publication of the Summary Notice in *USA Today* was the result of error by the publication’s staff. *See Declaration of Toussaint Hutchison re Publication of Notice of Class Action Settlement* ¶¶ 4-7 (Dkt. No. 232-2), filed as Exhibit B to Plaintiff’s Notice Regarding Publication of Notice of Class Action Settlement.

<sup>15</sup> *See Declaration of Lindsay Pearson re Publication of Notice of Class Action Settlement* ¶¶ 2-3 (Dkt. No. 232-1), and *Verification of Publication* (Dkt. No. 232-3), filed as Exhibits A and C, respectively, to Plaintiff’s Notice Regarding Publication of Notice of Class Action Settlement.

to receive additional information. The Class Notice further provided Settlement Class members with contact information for Lead Counsel, information on a toll-free phone number and e-mail address for inquiries, and a web site for further information. The Summary Notice summarized the above information for purposes of publication.

To date, Lead Counsel have received no objections to the Settlement itself, and no objections to the request for attorneys' fees, reimbursement of expenses, and Named Plaintiff case contribution award. As noted *supra*, Lead Counsel already responded to questions posed by one participant's attorney regarding Merrill Lynch's contribution to the Settlement Fund. See Sarko Decl. ¶ 131. Under the provisions of the Preliminary Approval Order, the deadline for filing and serving objections is February 17, 2012. Lead Counsel will respond to all objections that are filed and served by this deadline, by March 2, 2012, and will post these responses on the Settlement web site, [www.WalMartERISASettlement.com](http://www.WalMartERISASettlement.com).

#### **VI. THE PLAN OF ALLOCATION MAXIMIZES THE BENEFIT TO THE SETTLEMENT CLASS AND SHOULD BE APPROVED**

In connection with Final Approval of the Settlement, Braden also requests that the Court approve his proposed Plan of Allocation for the Settlement Fund.

Like the Settlement itself, the Plan of Allocation should be fair, reasonable and adequate. *Desert Orchid Partners, L.L.C. v. Transaction Sys. Architects, Inc.*, No. 02-0553, 2007 WL 703515, at \*1 (D. Neb. Mar. 2, 2007) (citing *Wireless II*, 396 F.3d at 932). Moreover, the Plan of Allocation "need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel." *In re Charter*, 2005 WL 4045741, at \*10 (quoting *In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001) (citation omitted)). Similar to the Court's final approval of the Settlement, judicial approval of the Plan of Allocation will be upheld unless there has been an abuse of discretion. *Grunin*, 513 F.2d at 123 (citing *In re Int'l House of Pancakes Franchise Litig.*, 487 F.2d 303, 304 (8th Cir. 1973)).

Here, the Plan of Allocation was designed by experienced Lead Counsel who have prepared plans of allocation for numerous other cases, including ERISA breach of fiduciary duty

cases. The Plan of Allocation reflects Lead Counsel's informed consideration of the relevant legal and factual matters pertaining to the Settlement Class members' claims. It provides recovery directly to the Plan—net of Court-approved attorneys' fees and expenses, Named Plaintiff compensation award, notice, and other expenses described in ¶ 8.2 of the Settlement Agreement—to reduce and offset expenses and administration fees.

The Plan of Allocation was described in the Class Notice and Summary Notice approved by the Court on December 5, 2011, which were published on January 4 and 5, 2012, pursuant to the Preliminary Approval Order. As stated in the notices, the Settlement Fund will provide for payment 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. The Settlement Fund will be used by the Plan to pay Plan expenses and administration fees in the Plan Year in which it is deposited or in the immediately succeeding Plan Year until the Settlement Fund is exhausted, whichever is later. If the Settlement Fund is not exhausted within that timeframe, 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.

The Settlement Fund will be applied to Plan expenses and administration fees charged to the Plan on a going-forward basis, will not be applied to reduce and offset fees already charged to any individual participant accounts, and no cash payments will be made to the members of the Settlement Class. 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 while targeting the core issue in this case—maximizing future savings by reducing fees and expenses. Indeed, the administrative costs associated with identifying, locating, and distributing payments to over two million former participants, in addition to over one million current participants, would likely consume most or all of the Net Proceeds. *See In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1268 (D. Kan. 2006) (approving plan of allocation excluding plan participants and former participants who would receive *de minimis*

distributions from participating in the settlement as “fair and reasonable in order to preserve the Cash Settlement Fund from excessive and unnecessary expenses in the overall interests of the class as a whole”) (citing in comparison *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 463 (S.D.N.Y. 2004) (approving plan of allocation’s *de minimis* threshold to be reasonable and noting that “[c]lass counsel are entitled to use their discretion to conclude that, at some point, the need to avoid excessive expense to the class as a whole outweighs the minimal loss to the claimants who are not receiving their *de minimis* amounts of relief”).

Additionally, the Settlement also provides significant Non-Monetary Considerations. Beginning on the Effective Date of Settlement, for a two-year period, the Settlement provides for continued improvements in the Plan so that low-cost investment options are—and continue to be—available, as well as new information about fees and continued improvements to participant education about saving for retirement.

As of this filing, February 3, 2012, Lead Counsel note that they have received no objections to this method of allocating the Settlement Fund.

Lead Counsel believes that the proposed Plan of Allocation is fair, reasonable and not unduly complicated or expensive and accordingly urge the Court to adopt and approve it.

## **VII. CONCLUSION**

For the reasons set forth above, Named Plaintiff respectfully requests that the Court enter an order (1) granting final approval of the proposed Settlement of this litigation; (2) certifying the Settlement Class under Federal Rule of Civil Procedure 23(b)(1)(A) and (B) for purposes of the Settlement; (3) determining that the forms and methods of notice to the Settlement Class were appropriate and sufficient; (4) approving of the proposed Plan of Allocation; and (5) entering a Final Order and Judgment.

RESPECTFULLY SUBMITTED this 3rd day of February, 2012.

KELLER ROHRBACK L.L.P.

/s/ Lynn Lincoln Sarko

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Lynn Lincoln Sarko (*pro hac vice*)  
Michael Woerner (*pro hac vice*)  
Derek W. Loeser (*pro hac vice*)  
Gretchen Freeman Cappio (*pro hac vice*)  
Gretchen S. Obrist (*pro hac vice*)  
1201 Third Avenue, Suite 3200  
Seattle, WA 98101-3052  
Phone: (206) 623-1900  
Fax: (206) 623-3384  
lsarko@kellerrohrback.com  
mwoerner@kellerrohrback.com  
dloeser@kellerrohrback.com  
gcappio@kellerrohrback.com  
gobrist@kellerrohrback.com

ALESHIRE ROBB P.C.

Gregory W. Aleshire, MO #38691  
William R. Robb, MO #43322  
2847 S. Ingram Mill Rd., Suite A-102  
Springfield, MO 65804  
Phone: (417) 869-3737  
Fax: (417) 869-5678  
arslaw@arslaw.com

EDWARD H. SIEDLE LAW OFFICES

Edward H. Siedle (*pro hac vice*)  
79 Island Dr., South  
Ocean Ridge, FL 33435  
Phone: (561) 202-0919  
Fax: (561) 202-0191  
esiedle@aol.com

*Attorneys for Plaintiff*

**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

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Lynn Lincoln Sarko