UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

RONALD TUSSEY, *et al.*,	)	
	)	
Plaintiffs;	)	
	)	
v.	)	Case No. 06-04305-CV-C-NKL
	)	
ABB, INC., *et al.*,	)	
	)	
Defendants.	)	

DECLARATION OF JAY E. SUSHELSKY IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEY FEES

I, JAY E. SUSHELSKY, hereby declare that:

1. I make this declaration of my personal knowledge, and if called as a witness, I could and would testify competently to the facts stated herein.

2. I am a senior attorney with AARP Foundation Litigation, located in Washington, D.C. I graduated from Washington University School of Law in 1980.

3. I am a member in good standing of the Bars of the District of Columbia, the State of Missouri, and the State of Illinois. I have been an attorney licensed to practice law in the District of Columbia since 2006, the State of Missouri since 1980, and in the State of Illinois since 1981. In addition to these state bar memberships, I am admitted to practice before the U.S. District Courts for the Eastern District of Missouri and the District of Columbia, as well as the First, Second, Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuit Courts of Appeals and the United States Supreme Court.

4. I serve as a co-chair of the American Bar Association Joint Committee on Employee Benefits Employee Welfare Benefits Subcommittee. I have made presentations to numerous groups of attorneys and lay persons on various topics related to ERISA.

5. Since June 2005, I have worked at AARP Foundation Litigation (AFL), practicing almost exclusively in the area of pension and employee benefit litigation under the Employee Retirement Income Security Act (ERISA). From 1980 through June 2005, I was in private practice in St. Louis, Missouri, and I regularly handled ERISA and other employee benefits litigation.

6. Since becoming a senior attorney at AFL, I have been responsible for AARP's judicial advocacy on issues related to employee benefits and retirement security. I have appeared as counsel of record for AARP in several *amicus curiae* briefs filed before the Supreme Court presenting AARP's views on the interpretation of ERISA. I have prepared numerous *amicus curiae* briefs on pension and employee benefits laws on behalf of AARP in cases before the U.S. Courts of Appeals, federal district courts, and state courts.

7. My duties at AARP Foundation Litigation include keeping apprised of current issues in ERISA litigation, acting as a clearinghouse for counsel handling ERISA cases, and providing my expertise to attorneys litigating these cases.

8. During the past seven years at AFL, I have fielded numerous phone calls and correspondence from private practice attorneys seeking assistance with ERISA cases. Unfortunately, in far too many such instances, counsel initiating contact with me about cases have lacked the requisite expertise, did not know the nuances in the law, or were unaware of actual and potential changes in the law. It is extraordinarily difficult to find counsel with the necessary expertise, and additionally extraordinarily difficult to find expert counsel with the necessary resources to expend tens of thousands of attorney hours and millions of dollars in expenses in this extremely risky area of the law.

9. My legal work in the pension and employee benefit plan area has included the litigation of a broad spectrum of employee benefits and ERISA issues. This has included litigation regarding preemption, benefit claims, breaches of fiduciary duty, and the scope of relief available under the different subsections of ERISA's civil enforcement provisions.

10. A majority of U.S. workers now rely on 401(k) plans as the predominant investment mechanism for their retirement savings. Unlike traditional pension plans, which are required to provide a lifetime annuity as a distribution option, 401(k) plans do not provide a guaranteed benefit. Rather, the ultimate benefit received is dependent upon whether plan assets experience investment growth or suffer losses during the life of the account. Consequently, the protections provided by ERISA are more important than ever to the retirement security of millions of Americans.

11. Charging unreasonable and excessive fees for services offered to 401(k) plan participants is a significant problem faced by American workers who depend on their company's 401(k) plan to provide for a secure retirement. In fact, a respected publication has referred to excessive fees as "the silent killer of retirement security."

12. It is well known, and the Department of Labor has recognized, that even a one percent increase in investment fees can, after 35 years of work and regular retirement plan contributions, reduce a plan participant's ultimate retirement accumulation by 28 percent. Employee Benefits Security Administration, U.S. Dept. Of Labor, *A Look At 401(k) Plan Fees*, *available at* http://www.dol.gov/ebsa/publications/401k_employee.html. This statistic illustrates how important it is to control fees, as excessive fees in a 401(k) plan force employees to delay their retirement and/or sacrifice their financial stability.

13. Schlichter, Bogard & Denton is at the forefront of 401(k) excessive-fee litigation.

14. Before Schlichter, Bogard & Denton filed a series of cases in 2006, there were no 401(k) excessive fee cases in the country. The Department of Labor relies on cases like this, brought by plaintiffs as private attorney general, to enforce ERISA's strict fiduciary requirements. Furthermore, the Department has brought no case with respect to enforcing ERISA's fiduciary obligations regarding the selection and monitoring of 401(k) plan service providers, selection of imprudent investment based on an employer's economic interest, and the reasonableness of those fees charged to a 401(k) plan.

15. Accordingly, in filing this case, Schlichter, Bogard & Denton accepted an enormous amount of risk based upon the lack of established authority under ERISA to rectify fiduciary breaches for excessive and unreasonable fees charged to plan participants and the tremendous amount of time and resources devoted to this kind of complex class action. In addition, and noteworthy, no other firm has accepted this staggering risk in this area of litigation.

16. To date, *Tussey* represents the first trial of its kind to evaluate, in depth, a plan sponsor's and fiduciaries' administration of a 401(k) plan involving allegations of breaches of fiduciary duty for imprudent investment decisions, imposition of excessive administrative fees and other self-dealing conduct.

17. Based on the favorable result obtained for the ABB 401(k) plans, which represents the largest recovery of its kind, this case has significantly increased awareness of excessive fees and imprudent investment options. It has also heightened compliance with the strict fiduciary obligations imposed on ERISA fiduciaries. Due to the widespread attention throughout the industry, it is likely that measurable reductions in fees charged to 401(k) plans across the country will occur after participants become fully aware of how much they are paying for plan-related services. *See, e.g.,* Anne Tergesen, *Will 401(k)s Abandon Revenue Sharing?*, SMARTMONEY

BLOGS, May 2, 2012, *available at* http://blogs.smartmoney.com/encore/2012/05/02/will-401ks-abandon-revenue-sharing/?link=SM_home_blogsum; W. Scott Simon, *Revenue Sharing on Trial*, MORNINGSTARADVISOR, May 3, 2012, *available at* http://www.morningstar.com/advisor/t/55908443/revenue-sharing-on-trial.htm.

18. Complex ERISA fiduciary legal services, like those performed by Schlichter, Bogard & Denton in *Tussey*, are so specialized that very few firms in the country are capable of engaging in such work, and almost no firm is willing to undertake such representation in light of the high risk and significant out-of-pocket costs required to competently represent the class.

19. In addition, the magnitude of time commitment it takes to fully understand these highly-complex issues, the ERISA statute and regulations, advisory opinions and constantly developing case law, is unique and profound.

20. Likewise, the amount of out-of-pocket expense incurred, particularly with experts who are at times the only arbiter of these highly specialized issues, are a necessary part of the litigation.

21. This national litigation requires extraordinarily large sums (*i.e.,* millions of dollars). Taking into account the very minimal number of firms who can undertake this litigation, no one to my knowledge, besides Schlichter, Bogard & Denton, has made such investment in cases of this type.

22. Based on these considerations, there is no market for compensating class counsel in these types of cases without ensuring that counsel would be compensated for this enormous level of risk.

23. The standard agreement between class counsel and their named plaintiffs is 1/3 (33 1/3%) contingent fee plus reimbursement for costs and expenses incurred during the litigation. Cases of

this complexity and magnitude could never be fully funded by individual participants (much less retirees) and would never be accepted by plaintiff's counsel if the only option for compensation was a flat billing rate upon success at trial.

24. A ruling by a court that class counsel should not be compensated for risk or reimbursed expert witness costs would provide a chilling effect on the enforcement of retiree rights under ERISA and could cause attorneys to settle 401(k) participants' meritorious claims cheaply in order to avoid both the expense of trial and, if successful, a reduced fee under a fee-shifting statute.

25. In addition to the historic monetary judgment, the affirmative relief awarded by the Court will set a new standard for the industry on several fronts, including prudent monitoring of revenue-sharing payments used to compensate a retirement plan's recordkeeper for services performed and the appropriate handling of float income derived from plan participants' contributions to and disbursements from their 401(k) plan.

26. Excessive fee cases brought by Schlichter, Bogard & Dention have provided an enormous benefit for workers and retirees nationally.

27. In connection with my work as a plaintiffs' ERISA class action attorney and my *amicus* work on behalf of AARP, I have been engaged in litigation in cases in courts in many judicial districts. Because of the highly specialized and technical nature of this practice and the dearth of attorneys who possess the requisite skills, experience, and willingness to undertake this type of work, every plaintiff-side ERISA class action firm with whom I have worked extends its practice beyond its forum state to courts throughout the United States. Therefore, the unique nature of this practice area makes the relevant market for determining reasonable attorney's rates in these cases a national one.

28. I have reviewed the proposed hourly rates submitted by the Schlichter Bogard & Denton Firm in connection with the firm's representation of the plaintiff class in the *Tussey* case. I find these hourly rates reasonable for the legal services provided. Based on my experience both in private practice and as an AFL senior attorney, and my knowledge of typical fee arrangements and hourly rates for ERISA attorneys who represent plans, employers and individuals (especially through my work with various bar associations), as well as legal review of hourly rates for persons of similar experience, expertise and years of practice around the country, I believe I am sufficiently well informed to render an opinion on the reasonableness of fees for representation of a variety of clients in ERISA matters.

29. In my considered opinion, the *Tussey* judgment is an exceptional circumstance warranting fees for exceptional trial results, due to the exceptional monetary amount and affirmative relief achieved, the expenditure of over 20,000 attorney hours, over thousands of legal assistant hours, and millions of dollars, as well as the enormous amount of risk involved.

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

Executed on May 8, 2012 at Washington, D.C.

Jay E. Sushelsky

Jay E. Sushelsky - D.C. Bar No. 496378
IL. Bar No. 3128981
MO Bar No. 30934
AARP FOUNDATION LITIGATION
601 E Street, N.W.
Washington, D.C. 20049
Telephone: (202) 434-2060
Facsimile: (202) 434-6424