UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

RONALD TUSSEY, et al., Plaintiffs, v. ABB, INC., et al., Defendants.	: : : : : : :	Case No. 06-04305-CV-C-NKL **DECLARATION OF THOMAS R. THEADO**

TUSSEY v. ABB – THOMAS R. THEADO DECLARATION

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

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

2. I have served, or I am currently serving, as a Lead Counsel in a number of class actions asserting ERISA pension-benefit claims, including *Costantino v. TRW, Inc.*, N.D. Ohio No. C86-3368; *Rybarczyk v. TRW, Inc.*, N.D. Ohio No. 1:95CV21800; *West v. AK Steel Corp. Ret. Accumulation Pension Plan*, S.D. Ohio No. 1:02-CV-0001; *Walker v. Asea Brown Boveri Inc. Cash Balance Pension Plan*, D. Conn. No. 3:02-CV-0550; *Pikas v. The Williams*

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

3. In addition to ERISA cases, my office and I have litigated to a successful conclusion many class actions of national or regional scope. These include *Elbert v. White Ready Mix Concrete*, N.D. Ohio No. C76-0445; *Rosen v. Fisher Foods, Inc.*, N.D. Ohio No. C80-0079; *Lowe v. Sun Refining & Marketing*, Lucas Cty. [Ohio] C.P. No.88-0630; *DeMarco v. Akron Coca Cola Bottling*, N.D. Ohio No. C88-6702; *Marx v. Copper Kettle Marina, Inc.*, Lorain Cty. [Ohio] C.P. No. 88CV100809; *Brandmeier v. Copper Kettle Marina, Inc.*, Lorain Cty. [Ohio] C.P. No. 89CV102320; *DeSario v. Industrial Excess Landfill*, Stark Cty. [Ohio] C.P. No. 89-0570; *Davidson v. U.S. Air, Inc.*, N.D. Ohio No. 1:90CV2071; *Taylor v. Amerifoods Companies*, N.D. Ohio No. 1:92CV1715; *White v. Aztec Catalyst Co.*, Lorain Cty. [Ohio] C.P. No. 93CV111025; *Murdocco v. Marathon Oil Co.*, Summit Cty. [Ohio] C.P. No. CV-95-06-2283; *Murray v. Sunset Mortgage Co.*, L.P., Lorain Cty. [Ohio] C.P. No. 07CV152784; *Insalaco v. Ben Venue Laboratories, Inc.*, Cuyahoga Cty. [Ohio] C.P. No. CV-01-450549; *Streety v. Garfield Alloys, Inc.*, Cuyahoga Cty. [Ohio] No. CV-04-519385; *Redington v. Goodyear Tire & Rubber Co.*, N.D. Ohio No. 5:07-CV-1999; *Pelletz v. Weyerhaeuser Co.*, W.D. Wash. No. 2:08-CV-0334; and *Ross v. TREX Co., Inc.*, Santa Cruz Cty. [CA] Superior Ct. No. 161553. In the course of our complex-litigation practice, we have participated in multi-district litigation proceedings, such as *In re Silicone Breast Implant Litigation*, M.D.L. No. 926; *In re Orthopedic Bone Screw Litigation*, M.D.L. No. 1014; *In re Medtronic, Inc., Sprint Fidelis Leads Products Liability Litigation*, M.D.L.

No. 1905; and *In re Chinese-Manufactured Drywall Products Liability Litigation*, M.D.L. No. 2047.

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

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

6. I am currently litigating, as a lead counsel for plaintiffs, a number of suits asserting class claims, including *McClendon v. Challenge Financial Investors Corp.*, Lorain Cty. [Ohio] C.P. No. 07CV153497; *Mikulski v. Centerior Energy Corp.*, Cuyahoga Cty. [Ohio] C.P. No. CV-01-457866; *Mikulski v. The Cleveland Electric Illuminating Co.*, Cuyahoga Cty. [Ohio] C.P. No. CV-02-490019; *Mikulski v. Centerior Energy Corp.*,

Cuyahoga Cty. [Ohio] C.P. No. CV-02-449020; *Mikulski v. The Toledo Edison Co.,* Lucas Cty. [Ohio] C.P. No. G-4801-CI-200206364; *Pikas v. The Williams Cos., Inc.*, N.D. Okla No. 4:08CV0101; *Rogers v. Credit Acceptance Corp.*, N.D. Ohio No. 1:08CV0363; *Satterfield v. Ameritech Mobile Communications Inc.*, Cuyahoga Cty. [Ohio] C.P. No. CV-03-517318; *Smith v. Allied Home Mortgage Capital Corp.*, Lorain Cty. [Ohio] C.P. No. 07CV153202; and *Strickler v. First Ohio Banc & Lending, Inc.*, Lorain Cty. [Ohio] C.P. No. 07CV151964.

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

8. ERISA-benefits litigation is difficult and challenging, involving highly complicated issues and the application of often complex accounting to a prolix and arcane regulatory schema mixed with a collection of decisional law which often is opaque and occasionally inadequate. Those combinations—in tandem with a defense bar which is uniformly well-versed, well-prepared, and well-funded—require of attorneys practicing plaintiff-class ERISA law a level of sophistication and expertise that, candidly, few lawyers possess. As a result, there is only a small number of attorneys—somewhere around a couple of dozen nationwide—who regularly bring class actions seeking ERISA benefits on behalf of plan participants. Every member of that group with whom I have ever communicated, to a person, recognizes the heavy burdens they undertake when they accept the challenge of bringing a class action for ERISA benefits.

9. Being an ERISA plaintiff-class litigator is very often a situation where the successful plaintiffs' counsel has done good more than done well. While the media may fixate on the size of some recoveries in this area of the law, the real facts are that an ERISA plaintiff class litigator regularly represents groups of individuals whose claims are terribly difficult to communicate succinctly and convincingly, and whose understanding of the difficult and complex work being done in their behalf is often marked by misunderstanding and suspicion. These all-too-often-unavoidable complications make the acceptance of an ERISA class case a weighty decision, in which there must be balanced not merely the prospects of success on the merits but also the prospects for a legitimately sufficient remuneration after years and years of very often hammer-and-tongs adversarial opposition.

10. There is a national bar of ERISA plaintiff-class litigators who regularly bring actions in every circuit. The expertise, knowledge, training, and experience these lawyers bring to their role as an ERISA plaintiff-class litigators is quite singular. As a result of there being so few able attorneys from which to choose a lawyer who is competent in conducting a class action for ERISA benefits and the consequent nationwide scope of their practice, these lawyers constitute a valuable national market. I know of no such attorneys in the Kansas City, Missouri, area.

11. In the Summer of 2004 I commenced a focused, professional consideration of the potentially actionable nature of the disturbing attributes of some 401(k) retirement plans, such as where a mutual fund makes revenue-sharing payments to vendors who sell the fund families' product, and the resulting conflicts of interest or other fiduciary concerns arising

from such arrangements. In tandem with these efforts, I have attentively followed the ERISA litigation practice of Jerry Schlichter since mid-September 2006. I have never met Mr. Schlichter, but I have paid careful attention to the cases he has brought, the theories of recovery he has developed and pursued, and the developments in his ERISA cases. To my knowledge, no one (including the Department of Labor) had brought suit on fiduciary-based excessive-fee claims against the plans of large employers prior to Mr. Schlichter. Mr. Schlichter's efforts have benefitted not only the thousands of participants in the ABB PRISM Plans, but plan participants across the United States as well as the entire ERISA bar as his cases have been instrumental in shaping the emerging case law pertaining to claims premised on averments of faultful revenue-sharing arrangements in 401(k) retirement plans. As such, Mr. Schlichter's firm has been seen as the pioneer in the field, serving a public good as a "private attorney general." I do not know that, but for Mr. Schlichter and his firm, it is unlikely any attorney would have accepted representation of the participants in ABB's plans. I do not know of another firm anywhere that has the depth and experience in litigating excessive-fee cases as does the firm of Schlichter, Bogard & Denton.

12. The decision and judgment rendered in this case has engendered a good deal of commentary and discussion among the ERISA community and, thereby, has had a significant impact in calling further attention to potential conflicts of interest and fiduciary breaches largely ignored, when not completely misunderstood, in 401(k) plans throughout the country.

13. In a significant number of the excessive-fees cases which Mr. Schlichter's firm has brought, the court has dismissed the case or granted summary judgment in favor of the defendants, thereby making the assertion of such claims an extremely risky proposition for Mr. Schlichter's firm to accept and pursue. Nevertheless, Mr. Schlichter's firm has overcome challenging opposition brought by well-funded opponents in causing judicial officers to understand industry practices and potential fiduciary breaches associated with the fees charged in various retirement programs. Litigation, such as that of the instant action, can require the incurring and paying of very large amounts in expenses for document review, expert witnesses, and depositions—which must be advanced by Class Counsel—as well as massive amounts of attorney and professional time being committed to the tasks. A multiplier of a standard lodestar rate is required in order to compensate for Class Counsel undertaking and bearing such a daunting risk.

14. Mr. Schlichter's firm has overcome challenging opposition brought by well-funded opponents in causing judicial officers to understand industry practices and potential fiduciary breaches associated with the fees charged in various retirement programs.

15. Our Supreme Court has expressly found that a common-fund award is appropriate where "each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980). Indeed, "the percentage of the fund method more accurately reflects the results achieved." *Rawlings v. Prudential Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). The typical percentage has been quantified. In *Shaw v. Toshiba*

America Information Systems, Inc., 91 F. Supp. 2d 942 (E.D. Tex. 2000), the court found that:

> The most complete analysis of fee awards in class actions conducted to date was conducted by the National Economic Research Associates, an economics consulting firm. The data is reported at Frederick C. Dunbar, Todd S. Foster, Vinita M. Juneja, Denise N. Martin, RECENT TRENDS III: WHAT EXPLAINS SETTLEMENTS IN SHAREHOLDER CLASS ACTIONS? (NERA, June 1995) (hereinafter "NERA Study"). This data indicates that regardless of size, attorneys' fees average approximately 32% of the settlement.

Shaw, 91 F. Supp. 2d at 988 (citations omitted). The court added that "[t]he attorneys' fees information in the NERA Study is consistent with the information found in other studies." *Shaw*, 91 F. Supp. 2d at 988.

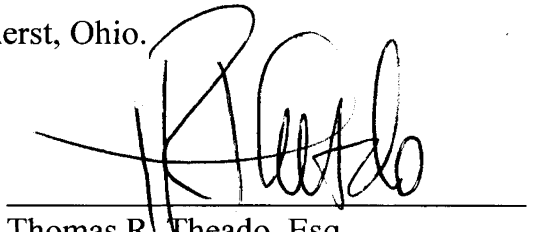
16. My firm typically accepts representation of a named plaintiff in a putative class action on the basis of the prospective client acknowledging that a fee award that is equivalent to one-third of the gross recovery is a fair and reasonable attorney fee. If such an acknowledgment is not forthcoming, we must consider whether entry into the inevitably time-consuming and difficult litigation is warranted vis-a-vis our alternative opportunities. This is because a fee award in an ERISA-benefits class action, in my opinion, must acknowledge, and compensate for, the risk inherent in taking on such a difficult and time-consuming piece of litigation, the sometimes awfully lengthy period of time which intervenes between the action's commencement and its conclusion, and the alternative work which the plaintiff' counsel forewent during that period as a result of having signed-on to the ERISA action. The alternative would require "lawyers to work for nothing if they did not succeed, and be paid only for their time, if they did. … It is difficult to envision any lawyer agreeing

to such a bad bargain." *McClendon v. Continental Group. Inc.*, 872 F. Supp. 142, 146 (D.N.J. 1994) (opinion by Circuit Judge Sarokin, sitting by designation).

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

I do solemnly declare that all of the foregoing is true and correct to the best of my knowledge and belief.

Executed on May 8, 2012, at Amherst, Ohio.



Thomas R. Theado, Esq.