UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

CAROL CHESEMORE, DANIEL DONKLE, THOMAS GIECK, MARTIN ROBBINS, and NANNETTE STOFLET, on behalf of themselves, Individually, and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

ALLIANCE HOLDINGS, INC., A.H.I., INC., AH TRANSITION CORPORATION, DAVID B. FENKELL, PAMELA KLUTE, JAMES MASTRANGELO, STEPHEN W. PAGELOW, JEFFREY A. SEEFELDT, ALPHA INVESTMENT CONSULTING GROUP, LLC, and JOHN MICHAEL MAIER

Defendants

and

TRACHTE BUILDING SYSTEMS, INC. EMPLOYEE STOCK OWNERSHIP PLAN and ALLIANCE HOLDINGS, INC. EMPLOYEE STOCK OWNERSHIP PLAN,

Nominal Defendants.

Civil Action No. 09-CV-00413-wmc

Judge William M. Conley

PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS PURSUANT TO ERISA § 502(G)(1) AGAINST DEFENDANT DAVID FENKELL

TABLE OF CONTENTS

Page

INTRODUCTION 8

BACKGROUND 9

I. Discovery of Defendant 10

A. Defendant Resisted Providing Basic Information About His Affirmative Defenses 10

B. Defendant's Production of Documents (or Lack Thereof) 11

C. Discovery of Non-Parties Associated with Defendant Fenkell Required Motions to Compel in Other Jurisdictions 12

II. Defendant Fenkell's Deposition 13

III. Defendant Fenkell Increased the Cost of Expert Discovery 16

IV. Defendant Fenkell Denied Liability Through Class Certification, Summary Judgment, and Two Trials 17

ARGUMENT 18

I. Plaintiffs' Claim for Fees is Distinct From the Award of Fees and Expenses Requested by Class Counsel 19

II. Plaintiffs Are Entitled to Fees Under ERISA § 502(g)(1) 20

A. Plaintiffs Have Achieved Success on the Merits of Their ERISA Claims 21

B. Defendant Fenkell's Litigation Position Was Not Substantially Justified 22

C. The Five-Factor Test Illustrates that Defendant Fenkell's Position Was Not Substantially Justified and that a 502(g) Award is Appropriate Here 24

1. Defendant Fenkell Was "The Most Culpable Party" 24

2. Fenkell Has Access to Funds to Satisfy the Award 26

3. An Award of Fees Would Serve as a Valuable Deterrent 26

4. Plaintiffs Sought to Benefit Other Participants 28

5. The Relative Merits of the Positions Favors Plaintiffs 28

TABLE OF CONTENTS

Page

III. The Requested Fees Are Reasonable 29

A. The Hourly Rates of Class Counsel Are Reasonable 29

1. Class Counsel's Rates for Similar Work Have Been Approved 31

2. Plaintiffs' Counsel's Rates Are Comparable to Other Lawyers Handling Complex ERISA Breach of Fiduciary Duty Litigation 32

3. Plaintiffs' Counsel's Rates Are Comparable to Defense Counsel 33

B. Class Counsel Expended a Reasonable Number of Hours in this Complex, Lengthy Litigation 35

C. The Other *Hensley* Factors Also Support Plaintiffs' Request 36

1. The Degree of Success Obtained 37

2. The Difficulty of the Case & the Skill Required 38

3. Preclusion of Employment 40

4. The Customary Fee & Contingency of the Fee 41

5. The Undesirability of the Case 41

6. Awards in Similar Cases 42

IV. Defendant Fenkell Is Liable For All Unpaid Fees & Expenses 42

V. Plaintiffs Are Entitled To Recover Their Fees Incurred in the Preparation of the Fee Petition 43

VI. Plaintiffs Are Entitled to Recover Their Costs 44

CONCLUSION 46

TABLE OF AUTHORITIES

Page

CASES

Anderson v. AB Painting & Sandblasting Inc.,
578 F.3d 542 (7th Cir. 2009) 31, 38

Beesley v. International Paper Co.,
No. 3:06-cv-703, 2014 WL 375432 (S.D. Ill. Jan. 31, 2014) 32, 34, 37

Bond v. Stanton,
630 F.2d 1231 (7th Cir. 1980) 46

Boos v. AT & T, Inc.,
704 F. Supp. 2d 600 (W.D. Tex. 2010) *aff'd sub nom. Boos v. AT&T, Inc.*, 643 F.3d 127 (5th Cir. 2011).....41

Boyd v. Coventry Health Care Inc.,
Civ. No. DKC 09-2661, 2014 WL 359567 (D. Md. Jan. 31, 2014) 34

Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Cartage Co.,
76 F.3d 114 (7th Cir. 1996) 21

Chesemore v. Alliance Holdings, Inc.,
270 F.R.D. 633 (D. Minn. 2010).....15

Chesemore v. Alliance Holdings, Inc.,
276 F.R.D. 506 (W.D. Wis. 2011).....10, 41

Chesemore v. Alliance Holdings, Inc.,
284 F.R.D. 416 (W.D. Wis. 2012).....28, 37, 41

Chesemore v. Alliance Holdings, Inc.,
886 F. Supp. 2d 1007 (W.D. Wis. 2012) (hereinafter "*Liability Opinion*") ..... passim

Chesemore v. Alliance Holdings, Inc.,
948 F. Supp. 2d 928 (W.D. Wis. 2013) (hereinafter "*Remedies Opinion*") ..... passim

Chesemore v. Alliance Holdings, Inc.,
No. 1:10 MC 46, 2011 WL 2037624 (N.D. Ohio May 24, 2011) 14

Chesemore v. Alliance Holdings, Inc.,
No. 1:11 MC 43, 2011 WL 4458782 (N.D. Ohio Sept. 23, 2011).....14

City of Burlington v. Dague,
505 U.S. 557 (1992).....36

TABLE OF AUTHORITIES

Page

City of Riverside v. Rivera,
477 U.S. 561 (1986).....44

Clarke v. Ford Motor Co.,
No. 01-C-0961, 2006 WL 752902 (E.D. Wis. Mar. 21, 2006).....35, 36, 44

DeBartolo v. Health & Welfare Dep't of the Const. & Gen. Laborers' Dist. Council of Chicago & Vicinity,
09 CV 0039, 2011 WL 1131110 (N.D. Ill. Mar. 28, 2011).....47

Dimensions Med. Ctr., Ltd. v. Aetna Life Ins. Co.,
No. 93 C 6244, 1997 WL 534548 (N.D. Ill. Aug. 26, 1997).....28

Divane v. Krull Elec. Co.,
No. 95 C 2075, 1995 WL 549053 (N.D. Ill. Sept. 14, 1995).....40

Egert v. Connecticut Gen. Life Ins. Co.,
768 F. Supp. 216 (N.D. Ill. 1991).....27

Filipowicz v. Am. Stores Ben. Plans Comm.,
56 F.3d 807 (7th Cir. 1995).....27

Florin v. Nationsbank of Ga., N.A.,
34 F.3d 560 (7th Cir. 1994).....20, 22

Florin v. Nationsbank of Georgia, N.A.,
60 F.3d 1245 (7th Cir. 1995).....40

Freeland v. Unum Life Ins. Co. of Am.,
No. 11-CV-053-WMC, 2014 WL 988761 (W.D. Wis. Mar. 13, 2014) (Conley, J.).....31, 32

Hakim v. Accenture U.S. Pension Plan,
901 F. Supp. 2d 1045 (N.D. Ill. 2012).....46

Hardt v. Reliance Standard Life Ins. Co.,
560 U.S. 242 (2010).....22, 23

Heder v. City of Two Rivers,
255 F. Supp. 2d 947 (E.D. Wis. 2003).....19, 39

Hensley v. Eckerhart,
461 U.S. 424 (1983).....38

Holmstrom v. Metropolitan Life Ins. Co.,
No. 07-CV-6044, 2011 WL 2149353 (N.D. Ill. May 31, 2011).....45

TABLE OF AUTHORITIES

Page

Huss v. IBM Med. & Dental Plan,
418 Fed. Appx. 498 (7th Cir. 2011).....22

In re Continental Illinois Sec. Litig.,
962 F. 2d 566 (7th Cir. 1992).....35, 36

In re IKON Office Solutions, Inc. Sec. Litig.,
209 F.R.D. 94 (E.D. Pa. 2002).....40

In re John Richards Homes Bldg. Co.,
No. 12-2012, 552 Fed. Appx. 401 (6th Cir. 2013).....46

In re Marsh ERISA Litig.,
265 F.R.D. 128 (S.D.N.Y. 2010).....40

In re The Mills Corp. Sec. Litig.,
265 F.R.D. 246 (E.D. Va. 2009).....34

In re Unisys Corp. Retiree Med. Benefits ERISA Litig.,
886 F. Supp. 445 (E.D. Pa. 1995).....32

Laborers' Pension Fund v. Lay-Com, Inc.,
580 F.3d 602 (7th Cir. 2009).....22

LaScala v. Scrufari,
859 F. Supp. 2d 509 (W.D.N.Y. 2012).....23

Leigh v. Engle,
858 F.2d 361 (7th Cir. 1988).....29

Lowe v. McGraw-Hill Cos., Inc.,
361 F.3d 335 (7th Cir. 2004).....26

Marquardt v. N. Am. Car Corp.,
652 F.2d 715 (7th Cir. 1981).....26

Mathur v. Bd. of Trustees of S. Illinois Univ.,
317 F.3d 738 (7th Cir. 2003).....32, 33

Mogck v. Unum Life Ins. Co. of Am.,
289 F.Supp.2d 1181 (S.D. Cal. 2003).....32

Morton v. Am. Capital Strategies Ltd.,
CIV.A. H-13-2558, 2014 WL 2565660 (S.D. Tex. June 6, 2014).....40

TABLE OF AUTHORITIES

Page

Pakovich v. Verizon LTD Plan,
653 F.3d 488 (7th Cir. 2011) 22

Parker v. Dish Network, L.L.C.,
No. 4:11-cv-1457, ECF No. No. 63 (N.D. Cal. Feb. 13, 2012), *granted*, ECF No. 87 (Apr. 17, 2012) 34

Potter v. Blue Cross Blue Shield of Michigan,
10-CV-14981, 2014 WL 1304327 (E.D. Mich. Mar. 31, 2014) 47

Prod. & Maint. Employees' Local 504 v. Roadmaster Corp.,
954 F.2d 1397 (7th Cir. 1992) 24

Raybourne v. Cigna Life Ins. Co. of New York,
700 F.3d 1076 (7th Cir. 2012) ..... passim

Refractory Serv. Corp. v. Shaw Refractories, Inc.,
No. 2:06 CV 44

Schumacher v. AK Steel Corp. Ret. Acc. Pension Plan,
No. 1:09-CV-794, 2014 WL 421312 (S.D. Ohio Feb. 4, 2014) 33, 35, 47

Smith v. Vill. of Maywood,
17 F.3d 219 (7th Cir. 1994) 19

Spear v. Fenkell,
No. 2:13-02391-RK (E.D. Pa. May 1, 2013) 28

Spegon v. Catholic Bishop of Chicago,
175 F.3d 544 (7th Cir. 1999) 31, 38

Stark v. PPM America, Inc.,
354 F.3d 666 (7th Cir. 2004) 24

Starr v. Metro Sys., Inc.,
461 F.3d 1036 (8th Cir. 2006) 22

Staton v. Boeing Co.,
327 F.3d 938 (9th Cir. 2003) 21

Stein v. Colborne Acquisition Co., LLC,
No. 10 C 6861, 2011 WL 3166207 (N.D. Ill. July 27, 2011) 29

Sullivan v. Randolph, Inc.,
504 F.3d 665 (7th Cir. 2007) 22, 30

TABLE OF AUTHORITIES

Page

Torgeson v. Unum Life Ins. Co. of Am.,
C05-3052-MWB, 2007 WL 433540 (N.D. Iowa Feb. 5, 2007).....32

Trustees of Const. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.,
460 F.3d 1253 (9th Cir. 2006) 47

Tussey v. ABB, Inc.,
No. 06-04305-CV-C-NKL, 2012 WL 5386033 (W.D. Mo. Nov. 2, 2012), *vacated and remanded on other grounds*, 746 F.3d 327 (8th Cir. 2014)..... passim

Tuten v. United Airlines, Inc.,
Civ. No. 12-cv-1561-WJM-MEH, 2014 WL 2057769 (D. Colo. May 19, 2014) 34

United States v. Werner,
No. 68-C-58, 1975 WL 672 (E.D. Wis. June 27, 1975) 29

Van Fossan v. Int'l Bhd. of Teamsters Union Local No. 710 Pension Fund,
649 F.2d 1243 (7th Cir. 1981) 40

Venegas v. Mitchell,
495 U.S. 82 (1990).....21

Viera v. Life Ins. Co. of N. Am.,
No. CIV.A. 09-3574, 2013 WL 3199091 (E.D. Pa. June 25, 2013) 23

Williams v. Rohm & Haas Pension Plan,
658 F.3d 629 (7th Cir. 2011) 39

Young v. Verizon's Bell Atlantic Cash Balance Plan,
748 F. Supp. 2d 903 (N.D. Ill. 2010) ..... passim

STATUTES

29 U.S.C. § 1132(g) ..... passim

Rule 54(d) 10, 46, 47

Pursuant to ERISA § 502(g)(1) and in compliance with Federal Rule of Civil Procedure 54, Plaintiffs, by and through counsel, respectfully bring this motion for attorneys' fees and costs against Defendant David Fenkell.[1] Under ERISA § 502(g)(1), the district court may award appropriate attorneys' fees and costs to a party who has achieved "some success on the merits" of an ERISA claim. Plaintiffs easily meet that standard for an award of fees and costs.

INTRODUCTION

As the Court is aware, the litigation arises out of Defendants' violations of ERISA in connection with a 2007 Transaction involving the Alliance ESOP and the Trachte ESOP. *Chesemore v. Alliance Holdings, Inc.*, 276 F.R.D. 506 (W.D. Wis. 2011). Plaintiffs first brought suit in 2009, alleging that Defendant Fenkell, among others, violated ERISA by breaching his fiduciary duty and engaging in prohibited transactions. *Id.* After the conclusion of five years of hard-fought class action litigation, including two trials, this Court determined that Defendant Fenkell violated ERISA when he orchestrated the sale of Trachte to a newly-formed Trachte ESOP using the interests of Trachte employees in the Alliance ESOP as leverage in the 2007 Transaction. *Chesemore v. Alliance Holdings, Inc.*, 886 F. Supp. 2d 1007, 1052 (W.D. Wis. 2012) (hereinafter "*Liability Opinion*") (describing the design of the 2007 Transaction as "a classic example of 'heads I win, tails you lose.'"). On June 4, 2013, this Court entered an order awarding remedies and relief against Defendant David Fenkell, among others, making Fenkell responsible, either individually or jointly and severally, for $17.2 million plus prejudgment

[1] Usually, Plaintiffs' motion for an award of attorneys' fees and costs would not be due until 14 days after the Court entered judgment unless the Court ordered otherwise. Fed. R. Civ. P. Rule 54(d)(2)(B). To avoid any argument by David Fenkell that the order on preliminary approval required the filing of this motion by June 12, 2014, Plaintiffs submit this motion at the same time as Class Counsel's Motion for Fees and Reimbursement of Expenses. *See* Order on Preliminary Approval (ECF No. 913) ¶ 5(d). Plaintiffs will submit a supplemental declaration for additional fees and expenses incurred through final judgment.

interest. *Chesemore v. Alliance Holdings, Inc.*, 948 F. Supp. 2d 928, 950 (W.D. Wis. 2013) (hereinafter "*Remedies Opinion*").

As of the date of this motion, Plaintiffs have successfully negotiated settlement of all claims with every Defendant except Fenkell. Although Plaintiffs have settled with David and Karen Fenkell regarding the phantom stock claims and reached agreement regarding a payment of $375,000 to resolve a claim against Fenkell's Alliance ESOP account, this does not constitute a complete settlement with David Fenkell. The settlement with David Fenkell specifically does not compensate Plaintiffs for their attorneys' fees and costs. By this motion, therefore, Plaintiffs seek an award of the attorneys' fees and costs from Defendant Fenkell which remain unpaid after settlement with the other Defendants. Plaintiffs' motion should be granted because Plaintiffs obtained near-total success on the merits. Moreover, the requested fees are reasonable in light of the work undertaken by Class Counsel throughout this contentious class action litigation, the positive results obtained for the Class and Subclass, and the contingent nature of the representation. Therefore an award of fees and costs against David Fenkell is appropriate.

BACKGROUND

The Court is long-familiar with this case, having presided over extensive motion practice by the parties and two trials over the course of five years and the facts of the case are set forth in multiple published opinions. As the motion concurrently filed by Class Counsel contains a lengthy summary of the efforts of Class Counsel in this litigation, Plaintiffs do not repeat that here. *See* Class Counsel's Motion for an Award of Attorneys' Fees ("Class Counsel Fee Motion") at 2-12. To avoid repetition, the background section of this motion will primarily focus on additional facts specifically related to David Fenkell.

I. DISCOVERY OF DEFENDANT

Discovery in the case was particularly labor-intensive and commensurate with a case arising from a complex ESOP transaction involving multiple defendants.

A. Defendant Resisted Providing Basic Information About His Affirmative Defenses

In their Answer to the Complaint (filed a year after the commencement of discovery), the Alliance Defendants and Defendant Fenkell asserted thirteen affirmative defenses, each presented in not more than a single conclusory sentence without any supporting facts (and sometimes stringing together multiple single-word defenses in a single sentence). Answer (ECF No. 186) ¶ 212-19.[2] When Plaintiffs requested Defendants to either provide more information in their Answer or respond to additional discovery, Defendants refused and, forced Plaintiffs to file a motion. Pls.' Motion for Discovery (ECF No. 205). As each of Defendants' defenses was pled in conclusory terms that set forth no supporting facts or explanation, Plaintiffs simply sought some basic information about the grounds and bases for these defenses. *Id.* at 3. Defendant's refused solely because allowing this number of interrogatories would exceed the presumptive limit of 25. *Id.* At the time that Plaintiffs filed their motion, there were two decisions in this District explaining in unambiguous terms that "in a complex case, 'for either side to invoke the 25 interrogatory limit of Rule 33 is absurd.'" *Id*. at 3-4 (quoting and citing *Frazier v. Layne Christensen Co.*, No. 04-C-315-C, 2005 WL 372253, at *5 (W.D. Wis. Feb. 11, 2005) (Crocker, J.) and *Biewer-Wisconsin Sawmill v. Fremont Indus.*, No. 07-C-016-C, 2007 WL 5731935, at *1 (W.D. Wis. July 27, 2007) (allowing party to serve 150 interrogatories because "[i]t is

[2] The 13 defenses were (1) laches; (2) waiver; (3) estoppel; (4) unclean hands; (5) no relief under ERISA § 502(a)(3); (6) ripeness; (7) standing; (8) failure to join necessary parties; (9) ERISA § 408(e); (10) exemption under ERISA § 408 generally; (11) illegality; (12) honest, good faith compliance with ERISA; and (13) Fenkell was a directed trustee. *Id.*

incomprehensible" that a party in a complex case could "with no discernible irony invoke the presumptive interrogatory limit of Rule 33.")). Defendant Fenkell sought and obtained an extension, without Plaintiffs' consent, because he apparently needed nearly two weeks to formulate a response. Motion for Extension of Time (ECF No. 221); Order (ECF No. 224). Defendants ultimately filed a three-page response. *See* Brief in Opposition (ECF No. 225). Two business days later, Magistrate Judge Crocker granted Plaintiffs' motion for leave to serve 13 extra interrogatories without a hearing and issuing the following text-only order:

> As this court's orders in previous complex cases make pellucid, this court has little patience for a punctilious approach to discovery in sprawling cases involving millions of dollars. Common sense suggests that plaintiffs are entitled to declarations from these defendants on the bases for their recently-stated affirmative defenses without being limited to drawing inferences and making deductions from the discovery already provided. Nor were plaintiffs required to cede their right even to seek leave to pose additional interrogatories later…. Although this dispute is properly before the court, in a situation like this, the ruling was virtually foreordained.

Order (ECF No. 227). This is but one example of the manner in which Defendant Fenkell litigated this case in an uncooperative manner that drove up the costs of the litigation. As such, Defendant cannot now complain that the price, largely imposed by him, is too high.

B. Defendants' Production of Documents (or Lack Thereof)

In addition to discovery of Defendants, Class Counsel issued at least eleven document subpoenas to various non-parties. Declaration of R. Joseph Barton ("Barton Decl.") ¶ 35. Subpoenas to non-parties were issued to entities that provided services to the Defendants involved in the 2007 Transaction, including the banks, valuation firms, law firms, the two ESOP administrators, and the would-be Trachte ESOP potential buyers. *Id.* The importance of these document subpoenas to non-parties was heightened because Defendant Fenkell and the Alliance Entity Defendants claimed not to have retained certain documents, particularly emails, related to the 2007 Transaction. *Id.* ¶ 38. Indeed, Fenkell and Alliance produced only 10,643 pages of

documents. *Id.* It became apparent that substantial and significantly relevant emails were missing from the productions by Fenkell and Alliance when Plaintiffs obtained productions from non-parties such as Stout Risius & Ross, the company performing valuation of Alliance, and William Blair, the investment bank hired to sell Trachte. *Id*. Those non-parties produced emails between them and persons at Alliance, including Fenkell, that were simply not contained in the Alliance/Fenkell productions. *Id.* As a result, Plaintiffs had to obtain the documents elsewhere, for example, via subpoena to Fenkell's accounting firm, RSM McGladrey; to Fenkell's investment banker, William Blair; and to SRR, Fenkell's valuation firm. *Id.* ¶¶ 38-40.

C. Discovery of Non-Parties Associated with Defendant Fenkell Required Motions to Compel in Other Jurisdictions

Two of the document subpoenas prompted parallel litigation in other jurisdictions. First, Plaintiffs subpoenaed Squire, Sanders & Dempsey, LLP ("SSD"), which represented Defendant Fenkell and the Alliance Entity Defendants in the 2007 Transaction. *Id.* ¶ 39.[3] Plaintiffs first sought documents concerning SSD's advice related to the 2007 Transaction. Defendant Fenkell and SSD opposed this subpoena, which prompted two separate motions to compel – one for the documents requested and then for production of a privilege log. *See Chesemore v. Alliance Holdings, Inc.*, No. 1:10 MC 46, 2011 WL 2037624, at *1 (N.D. Ohio May 24, 2011). Once Plaintiffs received documents, Plaintiffs issued deposition subpoenas to the two SSD attorneys who advised Defendant Fenkell in the 2007 Transaction. Again, SSD and Defendant Fenkell fought Plaintiffs' efforts to discover relevant facts, leading to yet another motion to compel, and the Court in the Northern District of Ohio granted Plaintiffs' motion. *See Chesemore v. Alliance*

[3] SSD attempted to use its representation of Fenkell in this litigation as a shield to provent production of documents. After the trial on remedies, Defendant Fenkell discharged SSD, and retained new counsel, Jackson Lewis.

Holdings, Inc., No. 1:11 MC 43, 2011 WL 4458782, at *2 (N.D. Ohio Sept. 23, 2011).[4] Second, Plaintiffs subpoenaed Alliance's auditor McGladrey & Pullen to obtain work papers underlying the audited financial statements of Alliance Holdings, Inc. and Trachte and when McGladrey refused to produce documents, Plaintiffs filed a successful motion to compel. *Chesemore v. Alliance Holdings, Inc.*, 270 F.R.D. 633, 634 (D. Minn. 2010) (ordering M&P to produce the work papers). Barton Decl. ¶ 40. This subpoena ultimately produced several helpful documents admitted at trial.

II. DEFENDANT FENKELL'S DEPOSITION

Discovery involved more than twenty-seven fact witness depositions in eight different states. *Id*. ¶ 44. While most of the fact witnesses were adverse to the Plaintiffs (and some hostile), Defendant Fenkell stood apart for his obstreperous behavior at deposition. For example, he repeatedly asked for clarification as to words like "you," "understanding," "accurate," "concern," and "significant." *E..g.*, Depositions of David Fenkell (ECF Nos. 273 & 341) 37:23-39:10 ("When you say 'you,' who are you referring to?"); 74:8-75:21 ("The term 'understanding,' … is not a concrete term. It's an amorphous idea. And, therefore, I don't know what amorphous idea you're trying to get at."); 308:17-309:5 ("It would depend on how you're defining the word 'accurate.'"); 309:13-24 ("What do you mean by 'concerned'? There are degrees of concern."); 319:9-320:21 ("define for me how you believe the word 'significant' is being used here?"); 162:19-22 ("Just by way of example, if I believe the grass is blue and you ask me what color the grass is, I should categorically say blue without qualification?").

[4] Despite this success, Class Counsel made the strategic decision to forego the two depositions compelled because the date of the order – September 23, 2011 – was too close in time to the Phase One trial date of October 11, 2011.

A simple question at the heart of one of Fenkell's primary defenses – that he was acting as a directed trustee – provoked a lengthy exchange (and another clarification of the term "you"):

> **Q:** In connection with the 2007 transaction involving Trachte, were you acting at the direction of some other person?
>
> **MR. WEDEL:** Objection; form and foundation, vague.
>
> **A:** When you use the word "you," I wore several hats in that transaction. I have to ask you to clarify who "you" is.
>
> **Q:** You is David Fenkell.
>
> **A:** Does -- is that -- is that answer meant to include regardless of the hat I was wearing or only acting in my individual capacity as -- as a resident of the State of Pennsylvania, Commonwealth of Pennsylvania, rather than as an officer of Alliance Holdings or as trustee to the Alliance ESOP?
>
> **Q:** Well, let's just be clear. As a resident of the State of Pennsylvania, or the Commonwealth of Pennsylvania, and leaving aside whatever corporate or fiduciary parts you had, you didn't act as an individual, is that correct, in the 2007 transaction?
>
> **A:** That is correct.
>
> **Q:** Okay. So either as an officer, a director of Alliance or any of its related entities, or as a fiduciary of the Alliance ESOP, did you act at the direction of some other person?
>
> **MR. WEDEL:** Objection; form, compound, vague.
>
> **A:** By "person" if you mean -- do you mean individual person or entity?
>
> **Q:** Well, let's start with individual or entity at this point.
>
> **A:** Yes.

Fenkell Dep. 80:4-81:15. Defendant Fenkell's answers to deposition questions were frequently lengthy, obfuscatory, or outright non-responsive, as illustrated by the following:

> **Q**: Did you have any understanding in terms of what the value of the assets of the Trachte ESOP were or would have been if the Trachte ESOP had been terminated after completing Step No. 2?

> **[Objection by Defense counsel]**
>
> **A**: I think it's important to note here that -- and, to the best of my knowledge, regardless of what capacity or what hat I was wearing in this transaction, whether it was as a corporate officer of Alliance Holdings or in the sole role of the Alliance Holdings ESOP Trustee, which was carrying out the settlor function and accomplishing the spinoff at the direction of its corporate sponsor, I never had any role or was ever given access to anything whatsoever to do with the Trachte ESOP. So, no, I don't believe I had any understanding or any knowledge of what their assets would or would not be. Nor have I ever read, to the best of my recollection, the Trachte -- and, when we're referring to the Trachte ESOP, let me be clear because there was an original Trachte ESOP at the time we acquired Alliance Holdings. I have been using for purposes of this discussion and I assume what you're referring to is the new Trachte ESOP, if you will, the one that was formed in connection with these transactions. I don't recall ever having reviewed or read their plan documents.

Id. 36:22-25, 37:1-22. Another example is this extended back and forth:

> **Q**: … Do you understand the term "directed trustee"?
>
> **A**: The difficulty I'm having in answering your last series of questions is you are using very, very broad terms. I don't know exactly what "understanding" means. Do I have an idea? Do I know with certainty? Do I know all facets of? So my hesitation in answering your questions is I want to answer them accurately and truthfully, but because of the broadness of your questions, terms like "awareness, understanding," it's difficult for me to formulate an answer in my mind.
>
> **Q**: Your general understanding of what the term "directed trustee" means, if you have any.
>
> **A**: The use of the term "directed trustee" may be used in a great many of situations extending far beyond ESOPs. So when I ask in what context do you mean, if there's such a context of direct trustee in banking, in a bank trustee, I have absolutely no idea. I have never heard of the term. If your question is specifically in the ESOP context, then, yes, I have. So while I appreciate your reasoning for asking broad questions, please appreciate my inability often to answer them.

Id. 77:10-79:14. As a result of Defendant Fenkell's approach to his deposition, it took two days to obtain the equivalent of half a day's worth of substantive testimony. Barton Decl. ¶ 44. Fenkell's approach to his deposition was emblematic of his approach to the litigation as a whole,

in that he relied on highly technical defenses and refused to admit that he directed himself in the 2007 Transaction.

> **Q**: And is it fair to say, then, that on behalf of Alliance Holdings, you directed -- gave the direction to yourself as the Alliance ESOP trustee?
> **A:** I don't believe it is.
> **Q**: What is inaccurate?
> **A:** I gave the Alliance Holdings' trustee direction. I did not give myself direction.
> **Q:** And you were the Alliance ESOP trustee?
> **A:** Yes, I was.

Fenkell Dep. 86:23-87:10. He also repeatedly claimed to have no recollection of certain key events underlying the 2007 Transaction. *E.g.*, *id*. 333:21-335:5 (testifying that he had no recollection as to whether he knew the Alliance ESOP had the ability to undo the transfer of accounts to the Trachte ESOP).

III. DEFENDANT FENKELL INCREASED THE COST OF EXPERT DISCOVERY

Plaintiffs initially identified just two affirmative experts – a valuation expert and a fiduciary expert. Class Counsel Fee Motion at 8. Notably, the expert proffered by Defendant Fenkell – Shannon Pratt – did not testify at trial, and was not even listed on Defendant Fenkell's pre-trial witness list. Witness List (ECF No. 489). At his deposition, it was apparent that Mr. Pratt was in extremely poor physical condition at the time that he submitted an expert report. *See* Declaration of Bruce Rinaldi ¶¶ 6-7. Prior to filing his trial witness list, Defendant Fenkell did not disclose to Plaintiffs that Mr. Pratt would not testify at any trial of this matter (and, as a practical matter, likely was in too poor physical condition to travel from Beaverton, Oregon to Madison, Wisconsin). As a result, Plaintiffs incurred the expense of having Plaintiffs' valuation expert, Kevin Kreitzman, respond to the Pratt report, and incurred the time and expense of Mr. Rinaldi preparing for and traveling to Beaverton, Oregon, to depose Mr. Pratt about the substance and scope of his expert opinion. *Id*. ¶¶ 3-4.

IV. DEFENDANT FENKELL DENIED LIABILITY THROUGH CLASS CERTIFICATION, SUMMARY JUDGMENT, AND TWO TRIALS

As set forth in Class Counsel's Fee Motion, Fenkell filed motions to dismiss, opposed Plaintiffs' motion for class certification, filed motions for summary judgment, and denied liability through two trials. Class Counsel Fee Motion at 3-12. On July 24, 2012, the Court issued its decision on liability, finding among other things that Defendant Fenkell breached his fiduciary duty and engaged in prohibited transactions in connection with the 2007 Transaction. *See Liability Opinion*, 886 F. Supp. 2d at 1060. On June 4, 2013, the Court issued its determination in the Phase Two Relief Trial, ordering, among other things: (1) the Alliance Defendants to restore to the Alliance ESOP $7,803,543 plus prejudgment interest; (2) Defendant Fenkell to restore to Trachte the $2,896,000 he received in connection with the 2007 Transaction; (3) the Trustee Defendants to pay to the Trachte ESOP $6,473,856.82 plus prejudgment interest; and (4) the Alliance Defendants to indemnify the Trustee Defendants for any compensatory relief they are required to pay. *Remedies Opinion*, 948 F. Supp. 2d at 950.

In total, Class Counsel expended over 16,000 hours through April 30, 2014 litigating this case behalf of the Class and Subclass. Barton Decl. ¶ 68; Declaration of Andrew W. Erlandson ("Erlandson Decl.") ¶ 19 (892.1 hours). At current hourly rates, Class Counsel's time spent working on this litigation amounts to $7,948,619.50. Barton Decl. ¶ 69.[5] Class Counsel also has

[5] Courts have held that the use of current rates is appropriate to compensate counsel for the loss of use of funds. *Heder v. City of Two Rivers*, 255 F. Supp. 2d 947, 958 (E.D. Wis. 2003) ("awarding fees at the current rate … is an accepted method"). A court may either "calculate the fee award using the attorney's current rates" or "base the award on the rates the lawyers charged when they rendered the services to the [client] and to add interest on that amount to the present." *See Smith v. Vill. of Maywood*, 17 F.3d 219, 221 (7th Cir. 1994); *Remedies Opinion*, 948 F. Supp. 2d at 948 (finding plaintiffs "entitled to quarterly compounding interest at the current prime rate[,]" in addition to their judgment award). Class Counsel provides the Court with a calculation of the professional time billed to date, at current rates and also at historical rates, with

advanced $1,061,266.48 in expenses for litigation costs, including filing and service of process costs, expert witness fees, document discovery and deposition expenses, and the cost of travel and legal research. Barton Decl. ¶ 78; Erlandson Decl. 24. Pursuant to ERISA § 502(g), Plaintiffs are entitled to seek their attorneys' fees and expenses from Defendant Fenkell.

ARGUMENT

Under § 502(g)(1), ERISA's fee-shifting provision, a district court may award "a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). Fee-shifting statutes like ERISA § 502(g) encourage "the private prosecution of certain favored actions, by requiring defendants who have violated plaintiffs' rights to compensate plaintiffs for the costs they incurred to enforce those rights." *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 562-63 (7th Cir. 1994); *Young v. Verizon's Bell Atlantic Cash Balance Plan*, 748 F. Supp. 2d 903, 911 (N.D. Ill. 2010) (noting Congress' "intent that meritorious claims should be pursued and violations of [ERISA] redressed."). Plaintiffs are entitled to an award of attorneys' fees and reimbursement of costs under the two-prong standard in this Circuit, which requires that (1) the party requesting fees have some success on the merits and (2) that the fee award is appropriate. Here, Plaintiffs clearly achieved success on the merits in a highly complex and protracted litigation and Defendant Fenkell's position was not "substantially justified." As Plaintiffs meet these standards and the settlement with Defendant Fenkell does not resolve Plaintiffs' statutory claim for attorneys' fees and costs, an order awarding such fees and costs should be entered.

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the addition of prejudgment interest calculated at the current prime rate. Barton Decl., Exs. G & H.

I. PLAINTIFFS' CLAIM FOR FEES IS DISTINCT FROM THE AWARD OF FEES AND EXPENSES REQUESTED BY CLASS COUNSEL

The Seventh Circuit has unambiguously and repeatedly concluded that an award of attorneys' fees and costs under fee-shifting statutes such as ERISA § 502(g) belongs to the litigant, not the attorney:

> Most fee-shifting statutes, including ERISA, direct the award to the *litigant* rather than the lawyer. The litigant may compromise the claim over the lawyer's objection, or may elect not to petition for fees.

Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Cartage Co., 76 F.3d 114, 116 (7th Cir. 1996) (concluding an award under ERISA § 502(g) belonged to the litigant). The Supreme Court has similarly explained that, under fee-shifting statutes, "it is the party, rather than the lawyer, who is so eligible" for an award of fees and attorneys' "fees may be awarded . . . even to those plaintiffs who did not need [the award]." *Venegas v. Mitchell*, 495 U.S. 82, 87-88 (1990). As the Ninth Circuit has explained, in a class action case, plaintiff may seek an award of attorneys' fees under a fee-shifting provision, but class counsel applies to the court to have its fees approved by the Court. *Staton v. Boeing Co.*, 327 F.3d 938, 972 (9th Cir. 2003). At the least, Plaintiffs are entitled to seek to recover pursuant to ERISA § 502(g) the fees incurred by or awarded to Class Counsel.

Here, Plaintiffs have not compromised their claim for fees under ERISA § 502(g) against David Fenkell and instead have expressly reserved their ability to seek fees and costs under the settlement agreements with Fenkell. Partial Settlement Term Sheet with David B. Fenkell (ECF No. 854) ¶ 5; Partial Settlement Term Sheet with David B. Fenkell Regarding Fenkell's Alliance ESOP Account (ECF No. 908) ¶ 3(a). As such, Plaintiffs have the right to an award of fees against Fenkell to reimburse Plaintiffs for fees that were incurred by Plaintiffs' counsel in prosecuting this litigation.

II. PLAINTIFFS ARE ENTITLED TO FEES UNDER ERISA § 502(G)(1)

In order for a party to be eligible for fees under ERISA § 502(g), a party must show "some degree of success on the merits." *Hardt v. Reliance Standard Life Ins. Co*., 560 U.S. 242, 254 (2010) (concluding eligibility for fees under § 502(g) does not require status as a prevailing party). After concluding that a party is eligible for fees based on "some degree of success on the merits," a court must determine whether fees are appropriate. *Pakovich v. Verizon LTD Plan*, 653 F.3d 488, 494 (7th Cir. 2011) (citing *Huss v. IBM Med. & Dental Plan*, 418 Fed. Appx. 498, 511-12 (7th Cir. 2011)). The Seventh Circuit has repeatedly recognized that the ERISA fee-shifting statute is designed primarily to benefit winning plaintiffs. *Florin*, 34 F.3d at 563 (quoting multiple cases). As such, "[t]here is a 'modest presumption' in favor of awarding fees to the prevailing party, but that presumption may be rebutted." *Laborers' Pension Fund v. Lay-Com, Inc.*, 580 F.3d 602, 615 (7th Cir. 2009) (quoting *Senese v. Chicago Area I.B. of Teamsters Pension Fund*, 237 F.3d 819, 826 (7th Cir. 2001). Even in circuits without such a presumption, "a prevailing plaintiff rarely fails to receive fees." *Starr v. Metro Sys., Inc*., 461 F.3d 1036, 1041 (8th Cir. 2006). There is no reason to deny Plaintiffs an award of fees and costs here.

To determine whether attorneys' fees should be awarded in an ERISA case, the Seventh Circuit recognizes two alternative tests: "the so-called five-factor test," as well as "the substantial justification test." *Raybourne v. Cigna Life Ins. Co. of New York*, 700 F.3d 1076, 1089 (7th Cir. 2012). Ultimately, whether a party's litigation position is substantially justified is the "'bottom-line' question to be answered." *Huss*, 418 Fed. Appx. at 512 (quoting *Lowe v. McGraw-Hill Cos., Inc.*, 361 F.3d 335, 339 (7th Cir. 2004)); *see also Sullivan v. Randolph, Inc.*, 504 F.3d 665, 671-72 (7th Cir. 2007) (explaining that "[a]t most the five-factor test is a checklist of factors for the district judge to consider to make sure he hasn't overlooked anything that might be relevant to the appropriateness or size of the award."). Under both of these alternative tests,

Plaintiffs are eligible for and entitled to an award of attorneys' fees and costs.

A. Plaintiffs Have Achieved Success on the Merits of Their ERISA Claims

As illustrated by *Hardt* itself, "some success on the merits" requires only more than a "trivial success on the merits" or a "purely procedural victory." *Hardt*, 560 U.S. at 255-56. A plaintiff who "successfully established an ERISA violation" at trial, but "even without a monetary judgment" has achieved "some degree of success." *Young*, 748 F. Supp. 2d at 910-12 (awarding fees to plaintiffs whose trial successfully established an ERISA violation but no entitlement to monetary relief). Success at trial – in fact, at two trials, on liability and remedies – is the epitome of success on the merits. *See Viera v. Life Ins. Co. of N. Am.*, No. CIV.A. 09-3574, 2013 WL 3199091, at *2 (E.D. Pa. June 25, 2013) (finding that where ERISA plaintiff prevailed after a bench trial, "there is no question that Plaintiff has achieved success on the merits"); *LaScala v. Scrufari*, 859 F. Supp. 2d 509, 512-13 (W.D.N.Y. 2012) (finding "it is beyond dispute that plaintiffs have achieved a substantial measure of success on the merits" in ERISA breach of fiduciary duty case after a successful bench trial). The Seventh Circuit concluded that a plaintiff was entitled to his fees for the entire litigation, even when he lost a few "skirmishes along the way," where "in the end, his victory was complete." *Raybourne*, 700 F.3d at 1091 (affirming award of fees where plaintiff achieved that goal in its entirety). At the Phase One trial, Plaintiffs established that Fenkell and his co-Defendants violated ERISA. *Liability Opinion*, 886 F. Supp. 2d at 1060. At the Phase Two trial, Plaintiffs again prevailed. The Court granted substantial relief to the Class and Subclass. *Remedies Opinion*, 948 F. Supp. 2d at 950 (awarding $17.2 million plus prejudgment interest in remedies against Defendant Fenkell and his Alliance co-defendants). In short, there can be no question that Plaintiffs are eligible for an award of attorneys' fees under ERISA § 502(g)(1).

B. Defendant Fenkell's Litigation Position Was Not Substantially Justified

"[A] party who pursues a position that is not substantially justified—that is, a position without a 'solid basis'—has, in an objective sense, really done nothing more than harass his opponent by putting him through the expense and bother of litigation for no good reason." *Prod. & Maint. Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1405 (7th Cir. 1992). Substantial justification means "something more than nonfrivolous, but something less than meritorious." *Stark v. PPM America, Inc.*, 354 F.3d 666, 673 (7th Cir. 2004). In *Raybourne*, the Seventh Circuit concluded there was no substantial justification where defendant took at position to its "financial advantage," disregarded "inconvenient finding[s]" and, when required to explain its rationale, "drew distinctions that failed adequately to explain" its rationale. *Raybourne*, 700 F.3d at 1091. Similarly, a district court in this Circuit concluded that a party that takes a position contrary to the facts or law to justify its actions lacks substantial justification. *Young*, 748 F. Supp. 2d at 913 (finding no substantial justification by defendant that ignored plain language of the plan when precedent dictated that administrator must follow the plan terms).

Fenkell was undisputedly the sole fiduciary of the Alliance ESOP (in his role as Trustee as well as member of the Board) and was also a fiduciary through his effective control of, and by nature of occupying every position of power at, Alliance. *Liability Opinion*, 886 F. Supp. 2d at 1051-52. Fenkell "hoped to avoid liability" not based on any argument that he had done anything to fulfill his fiduciary duties, but in an attempt to claim that he was not "acting in [a] fiduciary capacity when [he] negotiated and executed the 2007 Transaction." *Id.* His argument was based on the erection of a Potemkin-village style "fiction" in attempt to insulate himself from liability. *Id.* at 1056. One such fiction was the attempt to "parse" the multi-step transaction as if it was separate transactions. *Id.* Another was to pretend that, acting in his corporate

capacity, he could direct himself acting in a fiduciary capacity, and by such actions he would therefore insulate himself from acting in a fiduciary capacity. Fenkell Dep. 342:24-344:1. As this Court explained, this was simply wrong. *Liability Opinion*, 886 F. Supp. 2d at 1053-54. Defendant Fenkell claimed that he received no legal advice to support that conclusion other than what he found himself online. Fenkell Dep. 379:15-380:16. Thus, this was no action take in any reasonable good faith.

By ensuring that there was no truly independent fiduciary looking out for the interests of the Trachte employee participants, Fenkell created "a classic example of 'heads I win, tails you lose.'" *Liability Opinion*, 886 F. Supp. 2d at 1052. He had multiple reasons to do so. First, the lure of $2.89 million dollars of phantom stock. Second, the prospect of his bonus and other compensation. Finally, his own interest in Alliance stock through his Alliance ESOP account.

By attempting to evade responsibility for his misconduct, at the least, David Fenkell's position was not substantially justified. An experienced businessman and a University of Michigan-trained lawyer, David Fenkell is a licensed, but inactive, member of the Pennsylvania Bar. Fenkell Dep. 46:10-13. Of all the players in this transaction, the Court noted that Fenkell was the "smartest person in the room." *Remedies Opinion*, 948 F. Supp. 2d at 946. The Court also found that Fenkell possessed "complete recall of minor details and [a] sophisticated understanding of ERISA transactions [and] the law governing those transactions." *Id.* But at the same time, the Court found some of "his testimony was not credible." *Id.* And Fenkell was "the unquestioned conductor" in the "orchestration of the 2007 Transaction." *Id.* at 949. Not only did the Court find that he held a strong self-interest in the 2007 Transaction which conflicted with his fiduciary duty to act in the interest of Alliance and the Alliance ESOP, but the Court concluded that "Fenkell knew his interest in the phantom stock plan potentially conflicted with

his obligation to act in the interests of Alliance and the Alliance ESOP." *Id.* at 946.

In short, Defendant Fenkell was the most culpable party and he knowingly engaged in misconduct in the 2007 Transaction but attempted to evade responsibility by erecting facades to deflect his liability. Despite having a sophisticated understanding of the Transaction, the scope of his fiduciary responsibilities, the law and the economics of the Transaction, and orchestrating all of it, David Fenkell persisted for five years in attempting to avoid and escape liability by evasive and non-credible testimony. Such positions are not substantially justified. *Cf. Lowe*, 361 F.3d at 339 (finding defendant's position lacked substantial justification, just like a "dog ate my homework" defense). As a result of this defense and his obfuscation, Plaintiffs were forced to pursue the vindication of their rights through five years of complex litigation encompassing multiple dispositive motions, voluminous discovery and numerous discovery disputes, and two trials, in order to protect their rights. Having successfully established their rights, Plaintiffs are also entitled to an award of fees and costs for the expense that Fenkell required them to incur in doing so.

C. The Five-Factor Test Illustrates that Defendant Fenkell's Position Was Not Substantially Justified and that a 502(g) Award is Appropriate Here

In conducting the substantial justification inquiry, courts in this circuit may also employ a five-factor test, which examines: (1) the degree of the losing party's culpability; (2) the losing party's ability to satisfy an award; (3) whether an award of attorneys' fees would deter other persons acting under similar circumstances; (4) the amount of benefit conferred on members of the plan as a whole; and (5) the relative merits of the parties' positions. *Raybourne*, 700 F.3d at 1090. All of these factors support an award of fees and costs to Plaintiffs against Fenkell.

1. Defendant Fenkell Was "The Most Culpable Party"

"[A] defendant's culpability is determined by actions prior to suit." *Marquardt v. N. Am.*

Car Corp., 652 F.2d 715, 720 (7th Cir. 1981) (explaining that a losing defendant is necessarily culpable because he "must have violated ERISA, thereby depriving plaintiffs of rights under a pension plan and violating a Congressional mandate."). This factor does not require a finding that defendant's positions were frivolous or in bad faith, but rather simple culpability. *Filipowicz v. Am. Stores Ben. Plans Comm*., 56 F.3d 807, 816 (7th Cir. 1995) (affirming award under 502(g) where "defendants' position was not frivolous, [but] it was less than meritorious"); *Egert v. Connecticut Gen. Life Ins. Co*., 768 F. Supp. 216, 218 (N.D. Ill. 1991) (finding defendant was culpable "even though its culpability may not rise to a legal standard of bad faith" and awarding fees); *see Raybourne*, 700 F.3d at 1090 n.6 (noting the Seventh Circuit has "abandoned the idea that a finding of bad faith is vital to an award of fees."). Here, there can be little question of Defendant Fenkell's culpability.

Of the multiple Defendants determined to be liable for misconduct in the 2007 Transaction, the Court found that "Fenkell is far and away the most culpable party." *Remedies Opinion*, 948 F. Supp. 2d at 946. As this Court explained, "Fenkell, used [his] position[] of authority over the Trachte Trustees and their control of the Alliance ESOP plan assets to orchestrate a transaction at an inflated price" whereby "Fenkell was the unquestioned conductor and the Trachte Trustees mere musicians." *Id.* at 949. Even though bad faith is not required, Fenkell acted in bad faith in the performance of his fiduciary duties because he stood to gain the most from the 2007 Transaction – including receipt of between $2.5 and $3 million dollars in phantom stock payments. (By contrast, "the only benefit the Trachte Trustee Defendants derived from the 2007 Transaction was to keep their jobs, having lost the value of their retirement accounts along with the other Trachte employees.") *Id*. Finally, Fenkell's bad faith is further evidenced by his conduct in this litigation, including his efforts to obstruct discovery, his evasive

testimony at his deposition and trial, where he "testified largely unconvincingly" in his attempt to evade responsibility for his actions. *Id*. at 946. This factor supports an award of fees.

2. Fenkell Has Access to Funds to Satisfy the Award

The second factor examines the "offending party's ability to satisfy an award" and such a factor weighs heavier when the plaintiffs are individuals less able to afford counsel by the hour. *Dimensions Med. Ctr., Ltd. v. Aetna Life Ins. Co.*, No. 93 C 6244, 1997 WL 534548, at *1 (N.D. Ill. Aug. 26, 1997). Although Defendant Fenkell may plead poverty, he is no indigent litigant.[6] According to documents attached to an ERISA complaint filed against Defendant Fenkell by a trustee and a named fiduciary of the Alliance Holdings, Inc.'s ESOP, Fenkell has in the past earned significant amounts of money in his role as an executive at Alliance Holdings, Inc. ("AHI") and through his consulting firm, DBF Consulting. *Spear v. Fenkell*, No. 2:13-02391-RK (E.D. Pa. May 1, 2013) Complaint at ¶ 1, The *Spear* Complaint attaches a contract for services by DBF Consulting (of which Fenkell was the sole member) where Fenkell earned $240,000 per month for six years from one contract alone. *Id*. at Ex. 4, §4. At the same time, the employment agreements between Fenkell and AHI show that between 2003 and 2012, Defendant Fenkell earned an annual base salary of between $459,637.50 and $560,000.00 from Alliance . *Id*. at Ex. 5, ¶ 3; Ex. 6 at ¶ 3. During that time, Defendant Fenkell was also eligible for annual and incentive bonuses above and beyond such salary. *Id.*

Despite any arguments he may make to the contrary, Defendant Fenkell has assets within his control with which he could satisfy an award of fees. Fenkell himself concedes that he gratuitously transfers money to wife "for estate-planning purposes." *Chesemore v. Alliance Holdings, Inc*., 284 F.R.D. 416, 418 (W.D. Wis. 2012) (reciting that Fenkell's counsel admitted

[6] If Defendant Fenkell now intends to claim an inability to satisfy a judgment for fees, Plaintiffs would seek discovery as to the extent and location of his assets.

that "the transfers were made for estate-planning purposes"). Such strategic maneuvering – likely done with the intent of being judgment proof – should not be permitted to prevent an award of fees as it would have the effect of encouraging defendants to hide their assets in order to evade an otherwise-enforceable judgment. The law discourages such a result. *United States v. Werner*, No. 68-C-58, 1975 WL 672, at *7 (E.D. Wis. June 27, 1975) ("[W]hen a person … conveys his property in order to hinder, delay and defraud either present or future creditors, that conveyance is fraudulent as to both present and future creditors."); *Stein v. Colborne Acquisition Co., LLC*, No. 10 C 6861, 2011 WL 3166207, at *2 (N.D. Ill. July 27, 2011) (describing alleged transfer of assets made "with the intent to make [the defendant] judgment-proof" "a fraudulent or at least unjust consequence."). Moreover, the settlement with Fenkell – particularly the one concerning his Alliance ESOP account – illustrates his ability to use the assets held by his wife when he wants. ECF No. 908 Fenkell Settlement ¶ 2(a). This factor favors an award of fees.

3. <u>An Award of Fees Would Serve as a Valuable Deterrent</u>

The third factor examines whether an award of attorney's fees here would deter other persons acting under similar circumstances from abusing their fiduciary power. *Leigh v. Engle*, 858 F.2d 361, 370 (7th Cir. 1988) (finding "[a] fee award is one small way to impress upon [the breaching fiduciaries] the gravity of their conduct, and to deter such action in the future."); *Young*, 748 F. Supp. 2d at 914 (finding fee award would deter similar conduct and "send the message" that fiduciaries may not "flout" ERISA requirements). As in *Engle* and *Young*, a fee award against Fenkell will send a message to fiduciaries not to flout their fiduciary duties by creating a "fiction" to narrowly construe and then abdicate their fiduciary responsibilities. *See Liability Opinion*, 886 F. Supp. 2d at 1056. Or worse, take "calculated steps to insure no one would" take any fiduciary responsibility. *Id.* at 1012. Absent an award of fees, Fenkell, the

"most culpable party" may escape with merely having to return his ill-gotten phantom stock gains and most of his ESOP account as Alliance has agreed to bear most of the other liability. As such, the third factor supports an award of fees as a deterrent against other fiduciaries – including his successor cronies at Alliance (and other companies employing similar investment strategies) – who may employ similar strategies involving the sale of other ESOP-owned companies.

4. Plaintiffs Sought to & Did Benefit Other Participants (and Trachte)

The fourth factor is satisfied where "[p]laintiff sought to benefit all beneficiaries covered by the relevant portions of this Plan by bringing a class-action lawsuit." *Young*, 748 F. Supp. 2d at 914. In bringing this lawsuit, Plaintiffs sought to benefit all participants in the ESOP. Declaration of Carol Chesemore ("Chesemore Decl.") ¶ 23; Declaration of Daniel Donkle ("Donkle Decl.") ¶ 24; Declaration of Thomas Gieck ("Gieck Decl.") ¶ 18; Declaration of Martin Robbins ("Robbins Decl.") ¶ 25; Declaration of Nannette Stoflet ("Stoflet Decl.") ¶ 31. Plaintiffs obtained an award of $17.2 million (plus prejudgment interest), a significant benefit conferred by the litigation on the Class, Subclass and Trachte. *Remedies Opinion*, 948 F. Supp. 2d at 950. This factor favors an award of fees.

5. The Relative Merits of the Positions Favors Plaintiffs

The Seventh Circuit has explained that the fifth factor, which evaluates the "relative merits of the parties' positions," is simply "an oblique way of asking whether the losing party was substantially justified in contesting his opponent's claim or defense." *Sullivan*, 504 F.3d at 672. Not only was Fenkell found to be "far and away the most culpable party," but his defense – like his deposition – was primarily focused on creating "fiction" and highly technical excuses. *Supra*. The Court is therefore not even faced with a close question: Defendant Fenkell's position – denying liability throughout this litigation – was not substantially justified. Thus, this

factor also favors an award of fees.

III. THE REQUESTED FEES ARE REASONABLE

In calculating reasonable attorneys' fees, the starting point is the "lodestar" – the number of hours reasonably expended by Plaintiffs' attorneys multiplied by their reasonable hourly rates. *Anderson v. AB Painting & Sandblasting Inc*., 578 F.3d 542, 544 (7th Cir. 2009) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The party seeking fees must prove both the reasonableness of the hours worked and the hourly rates claimed. *Freeland v. Unum Life Ins. Co. of Am*., No. 11-CV-053-WMC, 2014 WL 988761, at *2 (W.D. Wis. Mar. 13, 2014) (Conley, J.). After calculating the lodestar, a court may adjust the rate up or down "by considering a variety of factors, the most important of which is the 'degree of success obtained.'" *Id*. (quoting *Hensley*, 461 U.S. at 434).

A. The Hourly Rates of Class Counsel Are Reasonable

"The lawyer's regular rate is strongly presumed to be the market rate for his or her services." *Moriarty ex rel. Local Union No. 727*, 429 F.3d 710, 718 (7th Cir. 2005) (citing *Cent. States*, 76 F.3d at 116-17). Based on the hourly rates that Class Counsel customarily charge their clients, the lodestar of Class Counsel is approximately $7.9 million. Barton Decl. ¶ 69 & Exs. G & H (charts of counsel's rates).

To assess the reasonableness of an attorney's rates, courts will look at the "market rate" for the work performed, which is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question. *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 554-55 (7th Cir. 1999); *Freeland*, 2014 WL 988761, at *2 (defining reasonable hourly rate as "one that is derived from the market rate for the services rendered."). Reasonable billing rates can be established through evidence of actual billing rates

for similar litigation or by "proof that the requested rates are in line with those prevailing in the community." *Freeland*, 2014 WL 988761, at *2.

An out of town attorney may charge an hourly rate that is "higher than the community's average" if that attorney possesses an unusual amount of skill, such as a particular expertise not found locally. *See Mathur v. Bd. of Trustees of S. Illinois Univ.*, 317 F.3d 738, 743 (7th Cir. 2003). Complex class actions arising under ERISA, such as this one, "demand[] a quality of service for which relatively expensive representation is to be expected." *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 886 F. Supp. 445, 477 (E.D. Pa. 1995) (approving the requested rate for attorney's fees in a "complex and difficult" ERISA class action). Courts have concluded that "the market for legal services" by plaintiffs' firms handling ERISA breach of fiduciary duty cases "is a national one." *Beesley v. International Paper Co.*, No. 3:06-cv-703, 2014 WL 375432, at *3 (S.D. Ill. Jan. 31, 2014); *Torgeson v. Unum Life Ins. Co. of Am.*, C05-3052-MWB, 2007 WL 433540 (N.D. Iowa Feb. 5, 2007) (finding out-of-town counsel's rate was reasonable because "ERISA cases involve a national standard"); *Mogck v. Unum Life Ins. Co. of Am.,* 289 F.Supp.2d 1181, 1191 (S.D. Cal. 2003) (finding attorneys' rates were reasonable because ERISA cases involve a national standard). Further evidence that the market for complex ERISA fiduciary duty actions is a national one is demonstrated by the fact that *every* lead defense counsel was from outside of Wisconsin: Alliance/Fenkell: Squire Sanders (Cleveland), and then Morgan Lewis (Chicago) and Jackson Lewis (California); Trachte Trustees: Vedder Price (Chicago); Pagelow: Bassford Remele (Minneapolis); and Alpha: Laner Muchin (Chicago).

As demonstrated by the affidavits of Mr. Greenwald and Mr. Feinberg, ERISA class action litigators specializing in ESOP transactions who represent plaintiffs are few and far

between. Declaration of Gary Greenwald ¶¶ 10-11; Declaration of Daniel Feinberg ¶ 14. When Plaintiffs first became aware of the implications of the 2007 Transaction, they tried to find legal counsel. Ms. Nannette Stoflet first looked in the Madison, Wisconsin area for legal counsel to represent her and potentially other employees. Stoflet Decl. ¶ 8. She sought a referral from an attorney she knew and was referred to Mr. Brian Anderson, who she was told was "the only in Madison with significant experience with ESOPs." *Id*. But Ms. Stoflet knew that she could not retain Mr. Anderson because he represented the Trachte ESOP (and he would have been conflicted out of any representation of Ms. Stoflet). *Id*. After unsuccessfully looking for experienced ESOP attorneys in the Madison area, Plaintiffs turned to the national market for competent counsel. *Id*. ¶ 9.

"A potential litigant's search for counsel need not be meticulously comprehensive before attorneys from other areas are considered." *Mathur*, 317 F.3d at 744; *Schumacher v. AK Steel Corp. Ret. Acc. Pension Plan*, No. 1:09-CV-794, 2014 WL 421312, at *9 (S.D. Ohio Feb. 4, 2014) ("A plaintiff need not demonstrate that he was turned down by every lawyer in [their area] before agreeing to representation by out-of-town lawyers."). Even so, Wisconsin-based attorneys with ERISA expertise would not necessarily have charged significantly lower rates to Plaintiffs and Class Members; the only two Milwaukee-based firms included in the 2013 NLJ Survey have similar rates: Michael Best & Friedrich's partners billed between $260.00 and $650.00 per hour, and $190.00-$350.00 per hour for associates; Foley & Lardner's partners billed between $405.00 and $860.00 per hour, and $210.00-$470.00 per hour for associates. NLJ 2013 Billing Survey. Thus, Plaintiffs should not be penalized because they were unable to find counsel locally, or because the nature of their grievance required special expertise.

1. Class Counsel's Rates for Similar Work Have Been Approved

Class Counsel's hourly rates for professional services have been regularly approved by

courts. Less than a month ago, in a pension class action on behalf employees, a court approved Cohen Milstein's rates, including Mr. Barton's rate. *Tuten v. United Airlines, Inc*., Civ. No. 12-cv-1561-WJM-MEH, 2014 WL 2057769, at *4 (D. Colo. May 19, 2014) (granting motion for attorney's fees, finding the rates charged were "reasonable when compared to attorneys in the relevant market."). Courts across the country have approved Cohen Milstein's rates. *E.g.*, *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 260 (E.D. Va. 2009) (approving as reasonable rates ranging from $440 to $775 for partners and $295 to $525 for associates at Cohen Milstein); *Parker v. Dish Network, L.L.C.*, No. 4:11-cv-1457, ECF No. No. 63 (N.D. Cal. Feb. 13, 2012), *granted*, ECF No. 87 (Apr. 17, 2012) ($530 to $710 for partners and $350 for associates).

2. Plaintiffs' Counsel's Rates Are Comparable to Other Lawyers Handling Complex ERISA Breach of Fiduciary Duty Litigation

The current hourly rates charged by Class Counsel working on this matter – between $575 and $775 an hour for partners and $395 and $530 an hour for associates[7] – are comparable to the rates approved for other plaintiffs' lawyers representing participants in ERISA class action fiduciary breach litigation. *E.g.*, *Beesely*, 2014 WL 375432, at *3 (finding rates ranging from $394 per hour for junior attorneys to $892 per hour for senior attorneys reasonable); *Tussey v. ABB, Inc.*, No. 06-04305-CV-C-NKL, 2012 WL 5386033, at *3 (W.D. Mo. Nov. 2, 2012), ("For attorneys with 25 years or more experience, $800 per hour; for attorneys with 15–24 years of experience, $625 per hour; 5–15 years of experience, $450 per hour; 2–4 years of experience, $325 per hour; and for professional support staff, $125 per hour.") *vacated and remanded on other grounds*, 746 F.3d 327 (8th Cir. 2014); *Boyd v. Coventry Health Care Inc*., Civ. No. DKC 09-2661, 2014 WL 359567, at *14 (D. Md. Jan. 31, 2014) (approving class counsel's rates

[7] This makes for an average or blended 2014 rate for the case of $705/hour for partners and $464/hour for associates.

ranging from $325 to $700 per hour, with professional support staff billing at between $175 and $250 per hour).

The relevant market in this case – an ERISA class action arising out of an ESOP transaction – is a national market. *Supra* Argument § III(A). ESOP class action litigation is a highly-technical area of the law with a very small plaintiffs' bar. The number of law firms that have ESOP class action expertise is extraordinarily small, as approximately three firms nationwide routinely prosecute ESOP class action cases on behalf of plaintiffs: Keller Rohrback, LLP (based in Seattle, Washington); Lewis Feinberg Lee Renaker & Jackson (based in Oakland, California); and Cohen Milstein (based in Washington, DC). Greenwald Decl. ¶ 11 (declaring that 3 firms, including Cohen Milstein, are ESOP class action specialists); Feinberg Decl. ¶ 14 (same). Cohen Milstein's rates are in line with the rates of their competitors who handle a significant amount of ERISA fiduciary breach litigation, ERISA class actions, and ESOP valuation litigation. Barton Decl. ¶ 74; Greenwald Decl. ¶ 16; Feinberg Decl. ¶ 19.

3. Plaintiffs' Counsel's Rates Are Comparable to Defense Counsel

That the fees charged by Class Counsel are in line with the "market rate" for services provided is reinforced by the fact that Defendants hired counsel who billed at similar rates to defend their interests in this matter. *In re Continental Illinois Sec. Litig*., 962 F. 2d 566, 568 (7th Cir. 1992) (reversing district court order imposing a rate "ceiling" for class counsel, noting that "defendants hired a crowd of pricey lawyers to defend the case"); *Schumacher*, 2014 WL 421312, at *8. In fact, the "prevailing hourly rates of the defense counsel are usually lower than those charged by the plaintiffs' counsel" for a variety of reasons. *Clarke v. Ford Motor Co.*, No. 01-C-0961, 2006 WL 752902, at *6 (E.D. Wis. Mar. 21, 2006). Defendants' counsel tend to have an ongoing client relationship and can adjust rates in expectation of future work and, even

when retained on a one-time basis, "are in a much better position than the plaintiffs' counsel to anticipate the level of time expenditure that will be required for the case." *Id.*; *see In re Cont'l Ill.*, 962 F. 2d at 568 (recognizing that contingency rates are higher than hourly rates because of a risk factor); *cf. City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) (commenting on the "higher hourly rate of the attorney" working on a contingency-fee basis)

According to the most recent National Law Journal Billing Rate Survey, Class Counsel's rates are comparable to the rates charged by Defendants' counsel as summarized below:

Client	**Law Firm**	**Associate Rate Range**	**Partner Rate Range**
Plaintiffs	Cohen Milstein[8]	$330 - $480	$505 - $835
David Fenkell & Alliance Entities (until May 2013)	Squire Sanders	$250 - $530	$350 - $950
David Fenkell (May 2013-present)	Jackson Lewis	$275 - $315	$310 - $440
Alliance Entities (May 2013-present)	Morgan Lewis & Bockius	$270 - $580	$430 - $765

See 2013 National Law Journal Billing Survey.[9]

[8] Plaintiffs seek an award of attorneys' fees at Class Counsel's current 2014 rates, but they provide 2013 rates here for ease of comparison with Defense counsel's rates. *See* Barton Decl., Exs. G & H (providing Cohen Milstein billing rates for 2013).

[9] The National Law Journal lacked firm-wide rates for the Alliance ESOP's counsel, the Groom Law Group, and Alpha's counsel, Laner Muchin, but had select rates for certain attorneys. In 2012, the Groom Group charged $640/hour for principal Lars Golumbic, and $545/hour for associate Julia Zuckerman. Laner Muchin's Jeffrey P. Carren charged $435/hour in 2008. Barton Decl. at ¶ 74.

B. Class Counsel Expended a Reasonable Number of Hours in this Complex, Lengthy Litigation

The amount of time and labor that Class Counsel spent to prosecute this action on behalf of Plaintiffs and Class Members weighs in favor of the requested fee. This was no simple case; the more than 16,000 hours Class Counsel spent investigating, developing, and trying Plaintiffs' claims in this complex area of the law were reasonably incurred in light of the work required. Barton Decl. ¶ 68. By way of comparison, in an ERISA breach of fiduciary case that did *not* proceed to trial, class counsel expended 18,000 attorneys hours and over 4,000 non-attorney professional hours (or 22,000 hours total), generating a lodestar of more than $12 million. *Beesley*, 2014 WL 375432, at *3. In the other most recently reported ERISA fiduciary duty class action to proceed to trial successfully on behalf of plaintiffs, class counsel expended over 25,000 hours over six years, thereby generating a lodestar of over $14 million. *Tussey*, 2012 WL 5386033, at *5 (concluding that "the claimed number of hours, 25,160.8, is reasonable given the complexity" of the ERISA breach of fiduciary duty case). This Court has noted the complexity of this case and this particular ESOP transaction. *E.g.*, *Chesemore*, 284 F.R.D. at 418 & 420 (describing the case as "complicated" and noting "the complexity of the transaction involved"). The comparison to these other cases illustrates the reasonableness of the time that Class Counsel expended in prosecuting this case.

The time expended on these other cases illustrates the efficiency with which Class Counsel litigated this case. Where appropriate, Plaintiffs' counsel assigned work to attorneys most familiar with the relevant issues, assigned significant portions of work to attorneys with lower billing rates, and avoided duplication of work through diligent case management. Barton Decl. ¶ 75. For example, Bruce Rinaldi, who has substantial prior experience examining valuation experts, was assigned to depose all four of Defendants' valuation experts to promote

efficiency and to defend the deposition of Plaintiffs' valuation expert, Kevin Kreitzman. *Id.* While multiple attorneys at Cohen Milstein were assigned to the case over its five-plus year history, four lawyers performed 81% of the work done by attorneys: R. Joseph Barton, Karen L. Handorf, Monya Bunch, and Robyn Swanson. Of those four, half of the work was done by the attorneys with lower billing rates, the associates Ms. Bunch and Ms. Swanson. *See id.* ¶ 75 & Ex. G.[10] And the time records submitted here have been reviewed to remove time entries for duplicative or unnecessary work that would not ordinarily be billed to a fee-paying client. *Spegon*, 175 F.3d at 552 (emphasizing that counsel seeking fees should "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.")

C. The Other *Hensley* Factors Also Support Plaintiffs' Request

The lodestar calculation may be adjusted based on the following factors: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the amount involved and the results obtained; (8) the experience, reputation, and ability of the attorneys; (9) the 'undesirability' of the case; and (10) awards in similar cases. *Hensley*, 461 U.S. at 430 n. 3. A number of the *Hensley* factors "are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Anderson*, 578 F.3d at 544. A number of these factors are also addressed in Class Counsel's Fee Motion. Consideration of the factors further demonstrates that Plaintiffs' fee request is reasonable and warranted.

[10] In September 2012, Ms. Swanson left Cohen Milstein. The other associate who performed a substantial amount of work on the case, Ms. Bunch, has been out on maternity leave since January 2014. As a result, two other associates were assigned to handle the settlement notice issued to Class Members and the instant fee briefing.

1. The Degree of Success Obtained

"The most important *Hensley* factor, which may not be subsumed within the lodestar,[11] is the 'degree of success obtained.'" *Heder*, 255 F. Supp. 2d at 953 (quoting *Spegon*, 175 F.3d at 550). It is beyond dispute that Plaintiffs were successful in this litigation, prevailing at trial on liability, obtaining an order on relief for over $17 million (plus prejudgment interest), and obtaining an order to use Fenkell's Alliance ESOP account to satisfy the award to the Subclass. The quality of the settlement and of the $12.5 million in cash and stock (leaving alone the Sellers' Notes and other relief) represents more than 50% recovery (and depending on whether prejudgment interest is factored in between a 64% and 75% recovery). By contrast, in *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629 (7th Cir. 2011), an ERISA case, the plaintiffs settled for only 24.3% of their recovery even where summary judgment on liability had been entered in their favor *and affirmed* on appeal. *Id.* at 632-33, 634.

Even if Defendant Fenkell were to challenge the attorney time spent in furtherance of individual arguments that were unsuccessful at the district court, this time is compensable because "an attorney can recover fully for losing arguments, if raised in support of successful claims, and for losing claims, if raised in tandem with successful ones." *Heder*, 255 F. Supp. 2d at 954. In a similar situation, the Seventh Circuit concluded that a plaintiff was entitled to his fees for the entire litigation, even when he lost a few "skirmishes along the way," where "in the end, his victory was complete." *Raybourne*, 700 F.3d at 1091 (affirming award of fees where plaintiff achieved that goal in its entirety). Here, Plaintiffs succeeded far more than they failed, particularly against Defendant Fenkell.

[11] The time and labor required is subsumed in the discussion above as well is in Class Counsel's Fee Motion.

2. The Difficulty of the Case & the Skill Required

The second factor (the novelty and difficulty of the case), the third *Hensley* factor (the skill requisite to perform the legal service properly), and the eighth factor (the experience, reputation, and ability of the attorneys) are related. ERISA is widely regarded as "a complex, constantly changing statute which presents a formidable challenge even to seasoned attorneys." *Divane v. Krull Elec. Co.*, No. 95 C 2075, 1995 WL 549053, at *5 (N.D. Ill. Sept. 14, 1995); *see Van Fossan v. Int'l Bhd. of Teamsters Union Local No. 710 Pension Fund*, 649 F.2d 1243, 1246 (7th Cir. 1981) ("ERISA is, of course, a complex statutory scheme"). "Many courts have recognized the complexity of ERISA breach of fiduciary duty company stock claims." *In re Marsh ERISA Litig*., 265 F.R.D. 128, 138 (S.D.N.Y. 2010); *In re IKON Office Solutions, Inc. Sec. Litig.*, 209 F.R.D. 94, 104-07 (E.D. Pa. 2002) (noting the complexity, expense and length of litigating breach of fiduciary duty claims). Plaintiffs claiming a breach of fiduciary duty do not often succeed. *Florin v. Nationsbank of Georgia, N.A*., 60 F.3d 1245, 1248 (7th Cir. 1995). And within this complicated and risky area of the law, the Seventh Circuit has observed that "very few areas of the law are as unsettled and complex as ESOP valuation." *Id*. (quoting Robert J. Gross, *ESOP Valuation Issues*, 3 J. of Employee Ownership L. & Fin. 53 (Winter 1991)). The continuing validity of this statement is illustrated by a district court's recent reiteration of the Fifth Circuit's observation 30 years ago: "ESOPs are subject to an impressive and somewhat bewildering array of rules and regulations governing their substance and administration, as well as their eligibility for favorable tax treatment." *Morton v. Am. Capital Strategies Ltd*., CIV.A. H-13-2558, 2014 WL 2565660, at *4 (S.D. Tex. June 6, 2014) (quoting *Donovan v. Cunningham*, 716 F.2d 1455, 1458 (5th Cir. 1983)). In this complicated area of the law and the even more complex world of ESOP valuation, this case was unusually complex (probably by

design of its mastermind): The case presented a range of complex and challenging issues, unraveling a multi-step ESOP transaction which involved more than ten different key actors. *Chesemore*, 284 F.R.D. at 418, 420 (describing the "complicated" nature of the case and noting "the complexity of the transaction involved").

The case was made more complicated and difficult as a result of not only strong opposition from Defendants, but Defendant Fenkell's attempts to obfuscate and resist discovery. *Supra* Background. The case required significant pre-suit investigation, extensive discovery involving more than twenty-seven depositions, numerous motions to compel (both in this Court and in other jurisdictions), briefing on multiple motions to dismiss, briefing on multiple motions for summary judgment, the eventual retention of five experts, the review, rebuttal and discovery of at least eight defense experts, two trials, multiple post-trial motions, multiple mediations, and the execution of multiple settlement agreements. Barton Decl. ¶¶ 30-50. Over more than five years, Plaintiffs' counsel doggedly pursued the litigation involving a tremendously complicated transaction governed by a notoriously intricate body of law. In the end, Plaintiffs' counsel achieved an excellent result for the Class.

This Court previously recognized Plaintiffs' counsel's skill and expertise in appointing Cohen Milstein and Hurley Burish as Class Counsel, by concluding that the attorneys were "capable of handling the complex nature of this case and properly presenting the case to the court." *Chesemore*, 276 F.R.D. at 516. On account of these skills and the experience that honed them, Lead Class Counsel has a reputation for providing excellent representation to plaintiffs in ERISA class actions. Barton Decl. ¶¶ 3-8. Even courts ruling against Cohen Milstein's clients have recognized counsel's ability in this area. *E.g.*, *Boos v. AT & T, Inc*., 704 F. Supp. 2d 600, 612 n.13 (W.D. Tex. 2010) *aff'd sub nom. Boos v. AT&T, Inc*., 643 F.3d 127 (5th Cir. 2011)

(commenting that Cohen Milstein, led by Joseph Barton "presented a cogent argument, well supported by facts and legal authority, in an area repeatedly referred to as complex and difficult."). Thus, the fact that Class Counsel had the experience and skill necessary to prosecute this case is borne out by the successful result.

3. Preclusion of Employment

The fourth enumerated *Hensley* factor, the preclusion of employment by the lawyers due to acceptance of the case, also supports Plaintiffs' request. When Cohen Milstein accepted the representation of Plaintiffs in this case, the firm did so with the understanding that it would have to expend many thousands of hours of work and advance significant litigation expenses, out of pocket, all without any guarantee of payment. Barton Decl. ¶ 27. Having litigated other ESOP valuation cases, Cohen Milstein understood that the case would likely be expensive and time-consuming, but would not be a mega-case. *Id*. For Cohen Milstein, this case is considered a small to medium-sized case. *Id*. Given the expense and time-consuming nature of ESOP cases, Cohen Milstein only accepts a limited number of those cases at a time; as such, Class Counsel's acceptance of this case meant that it could not take on certain other potential cases. *Id*. While Cohen Milstein is a significant-sized firm, its Employee Benefits Practice Group generally has consisted of 5-6 lawyers, all of whom, at one time or another, have worked on some aspect of this case. The trials themselves precluded other employment: Cohen Milstein had one partner, two associates, and two paralegals in Madison for the entirety of the liability trial (and the better part of two weeks), plus an of counsel (Bruce Rinaldi) to handle the valuation experts; Hurley Burish partner Andrew Erlandson worked full time on the liability trial as well. As such, Class Counsel's commitment to this litigation certainly precluded other employment.

4. The Customary Fee & Contingency of the Fee

The fifth and sixth *Henley* factors – the customary fee and whether the fee is fixed or contingent – also support Plaintiffs' request. Plaintiffs' counsel agreed to accept this litigation and the risks attendant to it with the understanding that it would need to advance all expenses and accept the case on contingency. *Id*. Both Plaintiffs and Class Counsel understood and agreed that Class Counsel would accept representation on a contingency basis, but would be entitled to obtain a fee through a common fund recovery or statutory fee-shifting or some combination thereof. *Id*. The arrangement here is typical and customary and, in fact, more generous than in other contingency cases where the firm is retained by sophisticated fiduciaries to bring fiduciary breach cases. *Id*. ¶ 5; Class Counsel's Fee Motion § III(A)(4) (citing example of contingency agreement). The rates at which Plaintiffs' counsel's fees are calculated are its customary rates that it charges paying clients. Barton Decl. ¶ 69; Erlandson Decl. ¶ 18. For Cohen Milstein, those are rates that the firm charges, and has been paid by, both participants and fiduciaries who hire the firm on an hourly rate. Barton Decl. ¶ 69. Hurley Burish charges and is paid by clients on an hourly basis, but adds a 10-20% increase for contingency fee cases. Erlandson Decl. ¶ 18.

5. The Undesirability of the Case

The ninth *Hensley* factor looks at the "undesirability" of the case. A number of issues related to the subject matter and risk made this case "undesirable." First, the underlying 2007 Transaction was highly complex and unraveling the steps involved presented a daunting task. *Supra* Argument § III(C)(2). Second, litigation of ESOP valuation class actions is very expensive because it requires multiple experts and extensive discovery. *Supra* Background § III. Third, the size of the Transaction was relatively small (for example, compared to the $500

million Tharaldson case or the billion dollar Tribune ESOP case). Perhaps most tellingly, despite the excellent result ultimately achieved, no other lawyers stepped forward to join Cohen Milstein in pursuing this case.

6. Awards in Similar Cases

In the most recent award under ERISA § 502(g)(1) in an ERISA breach of fiduciary duty class action of which Plaintiffs' counsel is aware, the Court, after a trial in an ERISA breach of fiduciary duty case, determined that a fee of $12,947,747.68 (plus an award of $1.7 million in costs) was reasonable where underlying the monetary relief awarded was $36.9 million. *Tussey*, 2012 WL 5386033, at *11. Under ERISA § 502(g), "proportionality between fees and damages is not required." *Clarke*, 2006 WL 752902, at *8 (citing *Spegon*, 175 F.3d at 558).

IV. DEFENDANT FENKELL IS LIABLE FOR ALL UNPAID FEES & EXPENSES

Fenkell should be held liable for all outstanding attorneys' fees, subject to an offset for whatever Alliance pays in fees. In awarding fees and costs, courts "err on the side of compensating [the] Plaintiff" because the "primary concern is that plaintiff, an innocent party, is made whole" in the face of intentional misconduct by defendants. *Refractory Serv. Corp. v. Shaw Refractories, Inc.*, No. 2:06 CV 073 PS, 2007 WL 118780, at *4-5 (N.D. Ind. Jan. 9, 2007) (awarding all fees against non-settling defendants because these fees would have been incurred whether there were one defendant or four."); *see Raybourne*, 700 F.3d at 1091 (concluding plaintiff was entitled to his fees for the entire litigation, even when he lost a few "skirmishes along the way," because "in the end, his victory was complete."). "Where the claims against multiple defendants are so intertwined that hours spent developing a claim against one cannot be easily distinguished from those spent developing a claim against the other, a court is not required to separate out each successful claim in determining the award." *Tussey*, 2012 WL 5386033, at *5(granting plaintiffs' motion for fees); *see City of Riverside v. Rivera*, 477 U.S. 561, 571 (1986)

(downward adjustment in fees was not appropriate where there was "a common core of facts" and much of the case was spent ferreting out relative liability). In an ERISA breach of fiduciary duty case, the *Tussey* court found the plaintiffs' claims against the defendants "shared a common core of facts" and that the hours spent litigating the various claims against each were "too enmeshed to be easily distinguishable." *Tussey,* 2012 WL 5386033, at *5. The same applies here, because even if Fenkell had been the *sole* defendant, the document discovery, the witnesses deposed and the trial would have looked much the same. The fact that Fenkell relied at trial on the valuation and fiduciary experts of other defendants further illustrates that.

Moreover, non-prevailing defendants are generally held jointly and severally liable for attorneys' fees and costs, regardless of an individual defendant's degree of culpability. Tussey, 2012 WL 5386033 at *6 (citing cases); *e.g.* McCormick v. Zero, 134 F. Supp. 2d 978, 980 (N.D. Ill. 2001) (making award of attorneys' fees, expenses and costs "to provide the maximum assurance of collectibility by plaintiffs"). Not only did the Court hold Defendant Fenkell jointly and severally liable with his co-fiduciaries and further ordered Fenkell to indemnify certain co-Defendants, but the Court determined that Fenkell was the most culpable party. *Remedies Opinion*, 948 F. Supp. 2d at 650. As Fenkell is the only defendant who has refused to settle all claims against him and is the one who is most culpable for the 2007 Transaction, Fenkell should be forced to bear any fees and costs that Alliance has not paid.

V. PLAINTIFFS ARE ENTITLED TO RECOVER THEIR FEES INCURRED IN THE PREPARATION OF THE FEE PETITION

In the Seventh Circuit, "attorney's fees incurred in litigating and establishing an attorney's entitlement to fees are generally compensable." *Holmstrom v. Metropolitan Life Ins. Co*., No. 07-CV-6044, 2011 WL 2149353, at *8 (N.D. Ill. May 31, 2011) (approving request for fees incurred in litigating a §502(g)(1) fee petition). Such fees are allowed because "unless the

efforts of successful plaintiffs to obtain fees are includable in a fee award, the award will be subject to potential dilution from the necessary engagement in extensive and uncompensated litigation to defend it, thus undermining the incentive system established" by fee-shifting statutes. *Bond v. Stanton*, 630 F.2d 1231, 1236 (7th Cir. 1980); *accord In re John Richards Homes Bldg. Co*., No. 12-2012, 552 Fed. Appx. 401, 410-11 (6th Cir. 2013) (affirming award of fees for services rendered in enforcing a judgment). Included in the lodestar is time that Plaintiffs' Counsel spent preparing the fee petitions now before the Court through at least April 30, 2014.[12] This includes time that Plaintiffs' counsel spent compiling records and obtaining declarations from several sources, providing a detailed and comprehensive fee request to the Court, as well as drafting this motion. As this is compensable time, this time should be included in the fees awarded against Defendant Fenkell.

VI. PLAINTIFFS ARE ENTITLED TO RECOVER THEIR COSTS

Under ERISA § 502(g), Plaintiffs are also entitled to recover costs of suit. 29 U.S.C. § 1132(g), Cohen Milstein has incurred costs of $ 1,054,550.37 and Hurley Burish has incurred costs of $ 6,716.11 in connection with this litigation. Barton Decl. ¶ 78, Erlandson Decl. ¶ 24.

"[A] split exists among district judges [within the Seventh Circuit] as to whether… costs in an ERISA action are governed by [ERISA § 502(g)(1)] or whether Rule 54(d)(1) supplies the relevant standard in the ERISA context as well." *Hakim v. Accenture U.S. Pension Plan*, 901 F. Supp. 2d 1045, 1050 (N.D. Ill. 2012). Regardless of whether the more generous standard of Rule 54(d)(1) governs or the discretionary standards of ERISA § 502(g)(1) applies to Plaintiffs' taxable costs, Plaintiffs are at least entitled to their taxable costs. *See id.* (concluding that the

[12] Plaintiffs will file a supplemental declaration regarding additional time spent on the litigation and the preparation of fee briefing.

substantially justified standard does not apply to costs under ERISA § 502(g)(1)). Plaintiffs should be awarded their taxable costs, as shown on Exhibit N.

Courts inside and outside this Circuit have concluded that ERISA § 502(g) permits an "award of non-taxable costs as part of a reasonable attorney's fee under ERISA's fee-shifting statute, if such expenses are reasonable and necessary, and are typically billed to clients under prevailing practice in the jurisdiction." *Schumacher v. AK Steel Corp. Ret. Acc. Pension Plan*, 1:09-CV-794, 2014 WL 421312 (S.D. Ohio Feb. 4, 2014); *DeBartolo v. Health & Welfare Dep't of the Const. & Gen. Laborers' Dist. Council of Chicago & Vicinity*, 09 CV 0039, 2011 WL 1131110 (N.D. Ill. Mar. 28, 2011) (concluding expenses "that are ordinarily billed separately to the client but are not included in attorney's fees as overhead are also compensable in ERISA fee petitions"); *see Trustees of Const. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.,* 460 F.3d 1253, 1259 (9th Cir. 2006) (concluding non-taxable costs may be recovered as "attorney's fees" under ERISA § 502(g) "if separate billing for such expenses is "the prevailing practice in the local community."); *Potter v. Blue Cross Blue Shield of Michigan*, 10-CV-14981, 2014 WL 1304327 (E.D. Mich. Mar. 31, 2014) (reaching same conclusion after surveying cases). The costs sought by Plaintiffs are those that are customarily passed on to clients in this jurisdiction as costs separate from payment for hourly rates. Erlandson Decl. ¶ 23. Plaintiffs should also be awarded their non-taxable costs. *See* Ex. N..

As discussed in Class Counsel's Fee Motion, the portion of the costs not allocated to the amounts that the Alliance Entities have agreed to pay, should be assessed against Fenkell. Class Counsel Fee Motion § VIII.

CONCLUSION

For the foregoing reason, Plaintiffs' motion for an award of attorneys' fees and costs pursuant to ERISA § 502(g)(1) and an award of taxable costs pursuant to Rule 54(d) against Defendant Fenkell should be granted.

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Respectfully submitted,

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