**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

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| MARY BELL et al.,<br>*Plaintiffs*,<br><br>v.<br><br>ATH HOLDING COMPANY, LLC et al.,<br><br>*Defendants.* | Case No. 1:15-cv-02062-TWP-MPB |

**JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

Under Rule 23(e) of the Federal Rules of Civil Procedure, the Parties respectfully request preliminary approval of a Class Action Settlement.

1. Plaintiffs brought this action against ATH Holding Company, LLC, the Board of Directors of ATH Holding Company, LLC and the Pension Committee of ATH Holding Company, LLC ("Defendants") alleging that Defendants breached their duties under Employee Retirement Income Security Act of 1974 (ERISA) with respect to the Anthem 401(k) Plan (formerly the WellPoint 401(k) Retirement Savings Plan)("the Plan") by, among other things, causing the Plan to pay unreasonable investment management and administrative fees and retaining the Vanguard Prime Money Market Fund as the sole capital preservation investment option.

2. For over three years this case was extensively litigated with discovery and motion practice, including discovery motions, class certification, summary judgment and *Daubert* motions.

3. In July 2018, Plaintiffs and the Defendants began settlement discussions through private mediation with a nationally-recognized mediator. The Parties did not reach agreement during the mediation, but continued discussions thereafter. The Parties reached agreement on the

monetary terms of a potential settlement on February 8, 2019. Thereafter, the Parties continued negotiations regarding non-monetary relief and the terms of this Settlement Agreement. The terms of the Parties' settlement are memorialized in this Settlement Agreement that is attached hereto as Exhibit A.

4. The Settlement Class is defined as:

> All persons who participated in the Plan and who had an Active Account at any time as of the end of any calendar quarter during the Class Period, including any beneficiary of a deceased person who participated in the Plan at any time during the Class Period, and/or Alternate Payee, in the case of a person subject to a Qualified Domestic Relations Order and who: (1) had an account balance greater than $1,000; or (2) invested in the Vanguard Money Market Fund. Excluded from the Settlement Class are Defendants who were participants in the Plan at any time during the Class Period.

5. The Settlement is fundamentally fair, adequate, and reasonable in light of the circumstances of this case and preliminary approval of the Settlement is in the best interests of the Class Members. In return for a release of the Class Representatives', Individual Plaintiffs', and Class Members' claims, Defendants have agreed to pay a sum of $23,650,000 into a Gross Settlement Fund. The Parties have further agreed to certain non-monetary terms, as specified in Article 10 of the Settlement Agreement.

6. The purpose of preliminary approval is merely to determine whether the proposed settlement is "within the range of possible approval." *Gautreaux v. Pierce,* 690 F.2d 616, 621 n.3 (7th Cir. 1982). The preliminary approval hearing is not a fairness hearing. *Id*.

7. The Settlement reached between the Parties here more than satisfies this standard and is clearly "within the range of possible approval" by the Court. Preliminary approval will not foreclose interested persons from objecting to the Settlement and thereby presenting dissenting viewpoints to the Court.

8. Plaintiffs also submit to the Court a Memorandum in Support of this Joint Motion for Preliminary Approval, as well the Declaration of Class Counsel. Defendants are not submitting a Memorandum in Support of the Joint Motion.

WHEREFORE, the Parties request the following:

- That the Court grant the Joint Motion to Modify the Class Definition;
- That the Court enter an Order finding that the Settlement is sufficiently fair, reasonable, and adequate and granting preliminary approval of the Settlement Agreement;
- That the Court schedule a Fairness Hearing for the purpose of receiving evidence, argument, and any objections relating to the Parties' Settlement Agreement. However, and assuming this Court grants preliminary approval within three weeks of the filing of this motion, given the processing and mailing of Settlement Notices, the objection deadline to the Settlement, the review and approval period of the Independent Fiduciary, among other interim milestones and deadlines, Plaintiffs request that a Fairness Hearing **not be scheduled before August 24, 2019**;
- That the Court approve the text of the Settlement Notice and Former Participant Claim Form for mailing to Class Members and Former Participants identified by the Settlement Administrator to notify them (1) of the Fairness Hearing and (2) that notice of changes to the Settlement Agreement, future orders regarding the Settlement, modifications to the Class Notice, changes in the date or timing of the Fairness Hearing, or other modifications to the Settlement, including the Plan of Allocation, may be provided to the Class through the Settlement Website without requiring additional mailed notice;
- That the Court determine that under Rule 23(c)(2) of the Federal Rules of Civil Procedure, the Settlement Notices constitute the best notice practicable under the circumstances,

provide due and sufficient notice of the Fairness Hearing and of the rights of all Class Members, and comply fully with the requirements of Fed. R. Civ. P. 23, the Constitution of the United States, and any other applicable law;

- That the Court establish a deadline no later than thirty (30) calendar days prior to the fairness hearing by which any interested party must file any objections to the Settlement and any papers submitted in support thereof;

- That the Court order that any such objections and supporting papers be served on counsel as set forth in the proposed Preliminary Approval Order and Class Notice, that any Settling Party may file a response to an objection, and that the Parties have the right to limited discovery from any objector as provided for in the proposed Preliminary Approval Order;

- That the Court set a deadline of no later than ten (10) calendar days prior to the Fairness Hearing by which each Former Participant must file a Former Participant Claim Form with the Settlement Administrator in order to be considered for a distribution in accordance with the Plan of Allocation;

- That the Court order that the Fairness Hearing may, without further direct notice to the Class Members, other than by notice to Class Counsel, be adjourned or continued by order of the Court;

- That the Court order that, pending final determination of whether the Settlement Agreement should be approved, every Class Member is prohibited and enjoined from directly, through representatives, or in any other capacity, commencing any action or proceeding in any court or tribunal asserting any of the Released Claims against any Released Party or the Plan;

- That the Court determine that the information to be provided to the Settlement Administrator in connection with the administration of the Settlement constitutes Confidential Information protected from public disclosure by the Confidentiality Order; and

- That following the Fairness Hearing, the Court enter an Order granting final approval of the Parties' Settlement and dismissing the Complaint in this Action with prejudice.

Dated: April 5, 2019

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the preceding document was caused to be served electronically on April 5, 2019, with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Jerome J. Schlichter

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

**MARY BELL et al.,**

***Plaintiffs*,**

**v.**

**ATH HOLDING COMPANY, LLC et al.,**

***Defendants.***

**Case No. 1:15-cv-02062-TWP-MPB**

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT**

Plaintiffs brought this action alleging that ATH Holding Company, LLC, the Board of Directors of ATH Holding Company, LLC and the Pension Committee of ATH Holding Company, LLC ("Defendants") were responsible for overseeing the Anthem 401(k) Plan (formerly the WellPoint 401(k) Retirement Savings Plan)("the Plan") and that they breached their duties under Employee Retirement Income Security Act of 1974 (ERISA) by, among other things, causing the Plan to pay unreasonable investment management and administrative fees and retaining the Vanguard Prime Money Market Fund as the sole capital preservation investment option.

For over three years this case was extensively litigated with discovery and motion practice, including discovery motions, class certification, summary judgment and Daubert motions. After several months of arm's length negotiation with the assistance of a national mediator, the Parties reached the Settlement that provides meaningful monetary and non-monetary relief to each Class Member.[1] In light of the litigation risks further prosecution of this action would inevitably entail,

[1] The fully executed settlement agreement, dated April 5, 2019 ("Settlement") is attached as Exhibit A to the parties' Joint Motion, and the Declaration of Class Counsel, Jerome J. Schlichter ("Schlichter Decl."), is attached hereto. Defined terms herein are defined as set forth in the Settlement.

it is proper for the Court to: (1) preliminarily approve the proposed Settlement; (2) certify the settlement class; (3) approve the proposed form and method of notice to the Classes; and (4) schedule a hearing wherein the Court will consider final approval of the Settlement.

**BACKGROUND**

Plaintiffs filed this action on December 29, 2015. Doc. 1. For over three years this case was extensively litigated with discovery and motion practice, including discovery motions, class certification, summary judgment and Daubert motions. On September 14, 2018, the Court certified the following Money Market Fund Class:

> All participants and beneficiaries of the Anthem 401(k) Plan (formerly the WellPoint 401(k) Retirement Savings Plan) who, from December 29, 2009 through the date of judgment, excluding the Defendants, invested in the Vanguard Money Market Fund and whose investment in the Vanguard Money Market Fund underperformed relative to the Hueler Index.

In addition, on January 24, 2019, the Court certified the following Administrative Fee and Investment Management Fee Class with the following subclasses:

> **Flat Fee Subclass**
> All participants and beneficiaries of the Anthem 401(k) Plan (formerly the WellPoint 401(k) Retirement Savings Plan) who had an account balance greater than $1,000.00 at any time from July 22, 2013 through the date of judgment, excluding the Defendants.
>
> **Revenue Sharing Subclass:**
> All participants and beneficiaries of the Anthem 401(k) Plan (formerly the WellPoint 401(k) Retirement Savings Plan) who had a reduction in the value of their account balance at a rate of more than $35.00 per year due to revenue sharing payments to The Vanguard Group at any time from December 29, 2009 through July 21, 2013, excluding the Defendants.

In its class certification orders, the Court appointed Class Representatives and appointed the law firm of Schlichter Bogard & Denton as Class Counsel.[2] On January 30, 2019, the Court

[2] As set forth in the contemporaneously filed joint request to modify the class definition, the parties seek the certification of a modified class definition for settlement purposes only. The Settlement Class is

denied Defendants' motion for summary judgment. This case was set for trial to begin on March 18, 2019. After several months of arm's length negotiation with the assistance of a national mediator, the Parties reached the Settlement.

## I. The Terms of the Proposed Settlement

In exchange for the dismissal of the Class Action and for entry of the Judgment as provided for in the Settlement Agreement, Defendants will make available to Class Members the following benefits:

### A. Monetary Relief

Defendants will deposit $23,650,000 in an interest-bearing settlement account (the "Gross Settlement Amount"). The Gross Settlement Amount will be used to pay the participants' recoveries as well as Class Counsel's Attorneys' Fees and Costs, Administrative Expenses of the Settlement, Class Representatives' Compensation, and Individual Plaintiffs' Compensation as described in the Settlement Agreement.

### B. Non-Monetary Terms

In addition to the monetary component of the Settlement, the Parties agreed to certain non-monetary terms. For instance, within the first year of the agreed upon Settlement Period, the Pension Committee shall cause to be published to then current Plan participants invested in the Plan's money market fund the fund fact sheet or similar disclosure that explains the risks of the Plan's money market fund investment option, the historical returns of the money market fund

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defined as "All persons who participated in the Plan and who had an Active Account at any time as of the end of any calendar quarter during the Class Period, including any beneficiary of a deceased person who participated in the Plan at any time during the Class Period, and/or Alternate Payee, in the case of a person subject to a Qualified Domestic Relations Order and who: (1) had an account balance greater than $1,000; or (2) invested in the Vanguard Money Market Fund. Excluded from the Settlement Class are Defendants who were participants in the Plan at any time during the Class Period."

over the last 10 years, and the benefits of diversification. Further, and by the end of the first year of the Settlement Period, the Pension Committee shall:

- engage an independent Investment Consultant familiar with investment options in defined contribution retirement plans who shall, within a reasonable time after being engaged, review the Plan's fund lineup and make recommendations regarding the investment options offered in the Plan (including, but not limited to the money market fund). The Investment Consultant will make recommendations regarding whether to add a stable value fund to the Plan's investments;
- meet within one hundred fifty (150) days after receipt of the Investment Consultant's report and recommendations to review the Investment Consultant's report and evaluate whether and to what extent to implement the Investment Consultant's recommendations, if any; and,
- consider, with the assistance of the Investment Consultant, among other factors: (1) the lowest-cost share class available to the Plan for any mutual fund considered for inclusion in the Plan as well as other criteria applicable to different share classes; (2) the availability of revenue sharing rebates on any share class available to the Plan for any mutual fund considered for inclusion in the Plan; and (3) the availability of collective trusts and or separately managed accounts, to the extent such investments are permissible and are otherwise have similar risks and features to a mutual fund considered for inclusion in the Plan.

Within thirty (30) business days of the Pension Committee's consideration of the Investment Consultant's evaluation and recommendations, counsel for the Defendants will provide to Class Counsel a written summary of the Investment Consultant's recommendations and the decisions

of the Pension Committee.

Further, during the first eighteen (18) months of the Settlement Period, the Plan's fiduciaries will conduct a request for proposal for recordkeeping services for the Plan. The request for proposal shall request that any proposal provided by a service provider for basic recordkeeping services to the Plan include a fee proposal based on a total fixed fee and on a per participant basis. After conducting the request for proposal ("RFP"), the Plan fiduciaries may decide to keep the Plan's current recordkeeper or retain a new recordkeeper based on the factors, including cost, that the Plan fiduciaries deem appropriate under the circumstances. Within thirty (30) days of making a decision regarding selection of a recordkeeper based upon the RFP, Defendants' Counsel shall provide to Class Counsel a summary of the finalist proposals received, the decision made, and the reasons therefor. This summary shall include the final agreed-upon fee for basic recordkeeping services.

Class Counsel will both monitor compliance with the settlement for three years and take any necessary enforcement action without cost to the Class. These benefits represent a significant value to the Plan above and beyond the monetary settlement.

**C. Notice and Class Representatives' Compensation**

The notice costs and all costs of administration of the Settlement will be paid from the Gross Settlement Amount. Incentive payments to the named Class Representatives in an amount to be approved by the Court would also be paid out of the Gross Settlement Amount. Plaintiffs will seek $20,000 for each of the Class Representatives. This amount is in line with precedent recognizing the value of individuals stepping forward to represent classes—particularly in a case, like the present, where the potential benefit to any individual does not outweigh the cost of prosecuting the claim and there are significant risks, including the risk of no recovery, the risk of alienation from their employer and peers, and the risk of uncompensated time and energy

devoted to a lawsuit with uncertain prospects for success. *Beesley v. Int'l Paper Co*., No. 06-703, 2014 U.S.Dist.LEXIS 12037, at *13–14 (S.D.Ill. Jan. 31, 2014)(Herndon, J.)(approving $25,000 each to six surviving named plaintiffs in 401(k) fee settlement and noting that "ERISA litigation against an employee's current or former employer carries unique risks and fortitude, including alienation from employers or peers."). Separate incentive payments to the Individual Plaintiffs not named as Class Representatives in an amount of $5,000 will also be paid out. The total award requested for the Class Representatives and the Individual Plaintiffs represents a small fraction of the Gross Settlement Amount.

**D. Attorneys' Fees and Costs**

Class Counsel will request attorneys' fees to be paid out of the Gross Settlement Amount in an amount not more than one-third of the Gross Settlement Amount, or $7,882,545, as well as reimbursement for costs incurred of no more than $650,000. "A one-third fee is consistent with the market rate in settlements concerning this particularly complex area of law." *Abbott v. Lockheed Martin Corp*., No. 06-701, 2015 U.S.Dist.LEXIS 93206, at *7 (S.D. Ill. July 17, 2015)(Raegan, J.); *Beesley*, 2014 U.S.Dist. LEXIS 12037at *7; *Spano v. Boeing Co*., No. 06-743, 2016 U.S. Dist. LEXIS 161078, at *7 (S.D. Ill. Mar. 31, 2016)(Raegan, J.); *Will v. General Dynamics Corp*., No. 06-698, 2010 U.S.Dist.LEXIS 123349, *9 (S.D.Ill. Nov. 22, 2010)(Murphy, J.). Further, none of the settlement amount will be returned to Defendants.

The settlement has a value greater than the monetary amount. Class Counsel will not seek fees on the interest earned on the Gross Settlement Amount. Class Counsel will seek no further fees or costs for review of compliance, document review, or for communications with Class Members or Defendants during the two-year Settlement Period. Class Counsel will not seek fees or costs if mediation or enforcement of the Settlement Agreement is necessary, and bears the risk of half of the costs of pursuing the Settlement if the Settlement is not approved or otherwise

terminated. A formal application for attorneys' fees and costs and for Named Plaintiff awards will be made at least 30 days prior to the deadline for Class members to file objections to the Settlement.

**ARGUMENT**

In determining whether preliminary approval is warranted, the sole issue before the Court is whether the proposed settlement is within the range of what might be found fair, reasonable, and adequate, so that notice of the proposed settlement should be given to Class Members and a hearing scheduled to consider final approval. The proposed agreement is viewed "in a light most favorable to settlement." *Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996). The Court reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing. Manual for Complex Litigation, Fourth, §13.14, at 172-73 (Fed. Jud. Ctr. 2004) ("Manual Fourth"). The Court is not required at this point to make a final determination:

> The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.

*Id*. § 21.632, at 321. Preliminary approval is the first step in a two-step process required before a class action may be finally settled. *Id*. at 320. Courts first make a preliminary evaluation of the fairness of the settlement, prior to notice. *Id*. at 320–21. In some instances, this initial assessment can be made on the basis of information already known to the court and then supplemented by briefs, motions and an informal presentation from the settling parties. *Id*.

There is an initial strong presumption that a proposed class action settlement is fair and reasonable when it is the result of arm's-length negotiations. *Great Neck Capital Appreciation Inc. Partnership, L.P. v. PricewaterhouseCoopers, LLP*, 212 F.R.D. 400, 410 (W.D.Wis. 2002); see also *Newberg on Class Actions* §11.41 at 11-88 (3d ed. 1992). The proposed Settlement here

is the result of lengthy and complex arm's-length negotiations between the parties. Counsel on both sides are experienced and thoroughly familiar with the factual and legal issues presented. Courts recognize that the opinion of experienced and informed counsel supporting settlement is entitled to considerable weight. *Isby*, 75 F.3d at 1200. Class Counsel is very experienced in class action litigation generally and, in particular, class litigation arising from breaches of fiduciary duties to retirement plans under ERISA, which Class Counsel pioneered. It is Class Counsel's opinion that the proposed Settlement is fair and reasonable. See Schlichter Decl. ¶2. Class Counsel is intimately familiar with this unique and complex area of law, as noted by other Courts considering cases alleging ERISA breaches of fiduciary duty with respect to fees and investments in 401(k) plans. *Beesley*, 2014 U.S.Dist.LEXIS 12037 at *4–5 (Judge Herndon: "The Court remains impressed with Class Counsel's navigation of the challenging legal issues involved in this trailblazing litigation and Class Counsel's commitment and perseverance in bringing this case to this resolution."); *Will,* 2010 U.S.Dist.LEXIS 123349 at *10 (Judge Murphy: "Counsel's actions have led to dramatic changes in the 401(k) industry, including heightened disclosure and protection of employees' and retirees' retirement assets"); *Spano*, 2016 U.S.Dist.LEXIS 161078 at *7 (Judge Herndon: "The law firm Schlichter, Bogard & Denton has significantly improved 401(k) plans across the country by bringing cases such as this one"); *Abbott,* 2015 U.S.Dist.LEXIS 93206 at *8–9 (Judge Reagan: "Schlichter, Bogard & Denton demonstrated extraordinary skill and determination in obtaining this result for the Class."); *Nolte v. Cigna Corp*., No. 07-2046, 2013 U.S.Dist.LEXIS 184622, *5 (C.D.Ill. Oct. 15, 2013)("The law firm Schlichter, Bogard & Denton is the leader in 401(k) fee litigation."); *Tussey v. ABB, Inc*., No. 06-4305, 2012 U.S.Dist.LEXIS 157428, *10 (W.D.Mo. Nov. 2, 2012) ("Plaintiffs' attorneys are clearly experts in ERISA litigation").

"Once the judge is satisfied as to the certifiability of the class and the results of the initial inquiry into the fairness, reasonableness, and adequacy of the settlement, notice of a formal Rule 23(e) fairness hearing is given to the class members." Manual (Fourth) § 21.633, at 321. Preliminary approval permits notice of the hearing on final settlement approval to be given to the Class members, at which time Class members and the settling parties may be heard with respect to final approval. *Id*. at 322. As explained below, the proposed Settlement now before this Court and on file herein falls squarely within the range of reasonableness warranting preliminary approval of the Class Notice apprising Class Members of the Settlement and setting a hearing on final approval.

In evaluating whether a class action settlement is fair, reasonable and adequate for final approval, under the Seventh Circuit's five-factor test, the district court must consider: "the strength of the plaintiffs' case on the merits measured against the terms of the settlement; the complexity, length and expense of continued litigation; the degree of opposition to the settlement; the presence of collusion in gaining settlement; the opinion of competent counsel as to the reasonableness of the settlement; and the stage of the proceedings and the amount of discovery completed." *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 308 (7th Cir. 1985).

At the preliminary approval stage, the Court is merely asked to determine whether the proposed settlement is within the "range of possible approval." *Gautreaux v. Pierce,* 690 F.2d 616, 621 n.3 (7th Cir. 1982) "The temptation to convert a settlement hearing into a full trial on the merits must be resisted." *Mars Steel Corp. v. Continental Ill/ Nat'l. Bank & Trust Co. of Chicago.*, 834 F.2d 677, 684 (7th Cir. 1987). "The district court should refrain from resolving the merits of the controversy or making a precise determination of the parties' respective legal rights." *EEOC v. Hiram Walker & Sons, Inc*., 768 F.2d 884, 889 (7th Cir. 1985). "The very

purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation." *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 426 (7th Cir. 1977).

**I. The strength of the Plaintiffs' case on the merits.**

Plaintiffs maintain that they have strong underlying claims against Defendants related to its management and administration of the Plan. Plaintiffs contend that Defendants caused the Plan to pay unreasonable administrative fees based on their failure to obtain regular competitive bids for recordkeeping services and failure to monitor and control those administrative fees. These allegations support claims of fiduciary breach. See, e.g., *George v. Kraft Foods Global, Inc.*, 641 F.3d 786, 788–89 (7th Cir. 2011)(if a plan overpays for recordkeeping services due to the fiduciaries' "failure to solicit bids" from other recordkeepers, the fiduciaries have breached their duty of prudence); *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014)(failure to properly "monitor and control" administrative fees is a breach of fiduciary duties).

As to Plaintiffs' claims related to the Vanguard Prime Money Market Fund, the Supreme Court recently unanimously held in a case handled by undersigned Class Counsel that ERISA fiduciaries have "a continuing duty to monitor investments and remove imprudent ones[.]" *Tibble,* 135 S. Ct. at 1829. They "ordinarily have a duty to seek . . . the lowest level of risk and cost for a particular level of expected return—or, inversely, the highest return for a given level of risk and cost." *Tatum v. RJR Pension Inv. Comm.*, 855 F.3d 553, 566 (4th Cir. 2017)(quoting RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. f(1)). Plaintiffs contend that the retention of the Vanguard Prime Money Market Fund as the Plan's sole capital preservation investment option in the Plan despite the consistent low returns to Plan participants was in violation of these clear duties.

Although Class Counsel continues to believe in the underlying merits of these claims, there are significant legal obstacles and defenses that render recovery in this case uncertain.

Defendants deny Plaintiffs' allegations, deny that the Plan's fiduciaries committed or participated in any fiduciary breaches, and vigorously contested Plaintiffs' allegations. As this Court is aware, Defendants maintain that the compensation paid to the Plan's recordkeeper was reasonable, and that the Plan's fiduciaries acted prudently and in the best interest of Plan participants in monitoring fees assessed to Plan participants. Defendants also maintain that that the use of a money market fund as the Plan's sole conservative, capital-preservation investment option in a 401(k) plan is not a violation of their fiduciary obligations under ERISA. *White v. Chevron Corp*., No. 16-793, 2017 U.S.Dist.LEXIS 83474, at *27–34 (N.D. Cal. May 31, 2017), (dismissed plaintiffs' excessive fee claims and their claim based on the defendants' retention of the Vanguard Prime Money Market Fund).

**II. The complexity, length and expense of continued litigation.**

As with many ERISA 401(k) fiduciary breach actions, this lawsuit is quite complex in multiple respects. In Class Counsel's experience, these types of cases are hard fought at each stage of the case, e.g., motion to dismiss, class certification, discovery, summary judgment, and trial. As this Court is aware, other than trial, Defendants aggressively challenged Plaintiffs at all these stages.

Even assuming a successful trial on the merits, further delay in recovery through years of appeal would be likely. This has been the experience of other plaintiffs who have succeeded at trial on similar claims. For instance, in *Tussey v. ABB*, Case No. 06-4305 (W.D.Mo.), a case filed in 2006, the plaintiffs tried the case in a four-week trial in January 2010, and judgment was entered in March 2012. After two separate appeals to the Eighth Circuit Court of Appeals and remands to the district court, the case was sent back again before the district court where the parties engaged in additional discovery related to the proper damages methodology. Only in March of this year (2019) did the parties in that case announce a settlement.

As with *Tussey*, this case also would require a complex trial with numerous highly experienced testifying expert witnesses with extensive reports, as well as the dedication of tremendous resources. For these reasons, recovery of damages at all is not certain as discussed above.

**III. The absence of collusion.**

The Settlement with Defendants was the result of several months of arm's-length negotiation with the assistance of a nationally recognized private mediator. The Parties negotiated on many occasions in attempts to resolve differences on settlement terms. Settlement discussions between the parties were fully informed because of detailed factual discovery and ongoing legal developments in similar ERISA fiduciary breach litigation. The negotiations were vigorous and both sides argued their respective positions strenuously. The resulting Settlement was undeniably the product of arm's-length bargaining.

**IV. The opinion of competent counsel as to the reasonableness of the settlement.**

As described above, Class Counsel are not only experienced and competent, but have been described as the leading firm in this complex area of law. Class Counsel believe the Settlement to be fair and reasonable in light of the procedural and substantive risks Plaintiffs would face if litigation were to continue. See Schlichter Decl. ¶2. The Parties also will submit the term of the Settlement to an independent fiduciary, who will provide an opinion on its fairness before the final approval hearing.

**V. The stage of the proceedings and the amount of discovery completed.**

As this Court is well aware, after years of discovery, *Daubert* challenges, and a decision on Defendants' motion for summary judgment, the parties were on the eve of trial in this matter. Only after that extensive litigation history did this matter settle. In sum, Class Counsel extensively developed the facts supporting their claims and were prepared to try those claims.

## VI. The Proposed Notice Plan is adequate.

Due process and Rule 23(e) do not require that each Class Member receive notice, but do require that the class notice be "reasonably calculated to reach most interested parties." *In re AT&T Mobility Wireless Data Services Sales Tax Litig.*, 789 F.Supp.2d 935, 968 (N.D.Ill. 2011)(internal quotations omitted). "Notice is adequate if it may be understood by the average class member." *Wal-Mart Stores Inc. v. Visa Usa Inc.*, 396 F.3d 96, 114 (2d Cir. 2005)(internal quotations and citations omitted). "Notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 172 (1974). "Individual notice must be provided to those class members who are identifiable through reasonable effort." *Id*. at 175.

Here, the proposed form and method of notice of the proposed Settlement agreed to by the parties satisfies all due process considerations and meets the requirements of Fed. R. Civ. P. 23(e)(1). Plaintiffs' proposed forms of Settlement Notice are attached as Exhibits 3 and 4 to the Settlement Agreement. The proposed Settlement Notices will fully apprise Class Members of the existence of the lawsuit, the proposed Settlement, and the information they need to make informed decisions about their rights, including: (i) the terms and operation of the Settlement; (ii) the nature and extent of the release; (iii) the maximum counsel fees that will be sought; (iv) the procedure and timing for objecting to the Settlement and the right of parties to seek limited discovery from objectors; (v) the date and place of the fairness hearing; and (vi) the website on which the full settlement documents, and any modifications to those documents, will be posted.

The notice plan consists of multiple components designed to reach Class Members. First, the Settlement Notices will be sent by first-class mail to the address of current Plan Participants and the last known address of former Plan Participants shortly after entry of the Preliminary

Approval Order. Addresses of Class Members are maintained by the Plan's personnel, who use this information for, *inter alia*, mailing Plan notices, participant communications, and other Plan-related information. Participants include both current and former employees of Defendants. In addition to the Settlement Notices, Class Counsel will develop a dedicated website solely for the settlement, and a link to that website will appear on Class Counsel's website, www.uselaws.com. The notice plan also includes a follow-up requirement for the Settlement Administrator for those Class Members whose notice letters are returned because they no longer reside at such address. Class Members may also receive notice of the settlement by reading published articles likely to mention the settlement. Thus, the form of notice and proposed procedures for notice satisfy the requirements of due process and the Court should approve the Notice Plan as adequate. See Newberg on Class Actions, § 8.34

**CONCLUSION**

For these reasons, the Joint Motion for Preliminary Approval of Class Settlement should be granted.

Dated: April 5, 2019

Respectfully submitted,

/s/ Jerome J. Schlichter

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 5, 2019, this document was filed through the ECF system and will be sent electronically to the following registered participants:

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and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: None.

/s/ Jerome J. Schlichter

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | |
|---|---|
| **MARY BELL et al.,**<br>***Plaintiffs*,**<br>**v.**<br>**ATH HOLDING COMPANY, LLC et al.,**<br>***Defendants.*** | **Case No. 1:15-cv-02062-TWP-MPB** |

**DECLARATION OF JEROME J. SCHLICHTER**

1. I am the founding partner of the law firm Schlichter, Bogard & Denton LLP, Lead Class Counsel for the Plaintiffs. This declaration is submitted in support of Plaintiffs' Consent Motion for Preliminary Approval of Class Settlement. I am familiar with the facts set forth below and able to testify to them.

2. There has been no collusion or complicity of any kind in connection with the negotiations or agreement to settle this class action. As illustrated in Plaintiffs' Memorandum in Support of Joint Motion for Preliminary Approval of Class Settlement, all settlement negotiations in this case were conducted at arm's-length by adverse, represented parties. The negotiations were extensive and adversarial, and the parties engaged a highly experienced mediator with whom the parties met in person and via telephonic mediation sessions, as well as conducting long calls between the parties to negotiate a settlement. Apart from the monetary amount, these discussions also involved extensive negotiations for non-monetary relief regarding the Plan provisions, oversight, and administration going forward resulting in substantial changes to the Plan and monitoring for years. It is my opinion that the proposed settlement is not only within the

range of reasonableness, but also is fair, reasonable, adequate, and in the best interests of the Plan and the participants in light of the procedural and substantive risks Plaintiffs would face if litigation were to continue

3. Attached hereto as Exhibit A is a true and accurate copy of the Settlement Agreement between Plaintiffs and Anthem Defendants.

4. Each of the Class Representatives represented by this firm has a legal services agreement with this firm agreeing to a one-third fee to Schlichter, Bogard & Denton LLP, in the event of any recovery.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 5, 2019.

SCHLICHTER, BOGARD & DENTON

/s/ Jerome J. Schlichter
Jerome J. Schlichter