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' MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND CASE CONTRIBUTION AWARDS FOR NAMED PLAINTIFFS

Under Federal Rules of Civil Procedure 23(h) and 54(d)(2), Plaintiffs move that the Court approve an attorneys' fee award of $7,882,545 (one-third of the monetary recovery) and a cost award of $513,015.32 to Class Counsel, Schlichter Bogard & Denton, LLP, as well as case contribution awards of $20,000 to each of the Named Plaintiffs named as Class Representatives and separate incentive payments to the Individual Plaintiffs not named as Class Representatives in the amount of $5,000. Class Counsel bore tremendous risk in order to benefit the Class. In spite of this risk, Class Counsel, leveraging its hard-earned reputation as the foremost attorneys in 401(k) excessive fee litigation, achieved an exceptional result for the class by obtaining a substantial monetary fund and other valuable affirmative relief that will continue to benefit the class for years to come. The requested percentage of the settlement fund is comparable to attorneys' fees awards in similar cases. Based on all of the relevant factors, and for the reasons stated in Plaintiffs' supporting memorandum, Plaintiffs respectfully request that the Court grant their motion.

July 5, 2019

Respectfully submitted,

s/ Jerome J. Schlichter

Jerome J. Schlichter, *admitted pro hac vice*
Troy A. Doles, *admitted pro hac vice*
Heather Lea, *admitted pro hac vice*
SCHLICHTER, BOGARD & DENTON, LLP
100 South Fourth Street, Suite 1200
St. Louis, Missouri 63102
Phone: (314) 621-6115
Fax: (314) 621-7151
jschlichter@uselaws.com
tdoles@uselaws.com
hlea@uselaws.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

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

Ian H. Morrison
imorrison@seyfarth.com
Ada W. Dolph
Adolph@seyfarth.com
Seyfarth Shaw LLP
131 South Dearborn Street, Ste. 2400
Chicago, Illinois 60603

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.,
***Plaintiffs*,**

v.

ATH HOLDING COMPANY, LLC et al.,

Defendants.

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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND CASE CONTRIBUTION AWARDS FOR NAMED PLAINTIFFS

The settlement in this case provides exceptional relief for the class. The $23,650,000 million settlement fund will provide substantial monetary compensation to the employees and retirees of who participated in the Anthem 401(k) Plan (formerly the WellPoint 401(k) Retirement Savings Plan) ("the Plan") during the class period. Further, the affirmative relief component of the settlement will ensure that the class members and those future participants in the Plan have access to a high-quality, efficiently managed 401(k) plan for years to come. Taking into account the non-monetary relief and benefit of tax deferral, the total benefit to the class exceeds $62 million. To obtain this result, Class Counsel leveraged its unparalleled experience and success in 401(k) fee litigation over the past 13 years to achieve an outstanding result, thereby avoiding a continued delay and expense of potentially years of litigation and a substantial risk of non-recovery for the class.

This outstanding recovery and relief as contained in the Settlement did not arise without a unique history and extraordinary track record. Rather, it was reached because of Class Counsel's hard-earned reputation as the foremost attorneys in 401(k) excessive fee litigation—a field Class

Counsel created—and its diligent and effective investigation in this case as well as vigorous development of the case. Had it not been for Class Counsel's efforts in this case and the track record from other cases it has brought before to establish this area of litigation, the class very likely would not have obtained a settlement anywhere near as valuable, if at all.

Under the "common fund" doctrine, Class Counsel is entitled to an award of reasonable attorneys' fees from the settlement proceeds. Fed.R.Civ.P. 23(h); *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 96 (2013)("Under [the common fund doctrine], 'a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'")(quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)); *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998)("it is commonplace" to award lawyers a percentage of common fund).

In the Seventh Circuit, a common-fund attorney's fee award must reflect "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007). In class actions in this Circuit—and ERISA 401(k) plan fee cases in particular—courts have consistently recognized that the market is a contingent fee market rather than an hourly fee market, and the market rate is one-third of the monetary recovery. E.g., *Ramsey v. Philips North America, LLC*, No. 18-1099-NJR, Doc. 27 (S.D.Ill. Oct. 15, 2018); *Spano v. Boeing Co.*, No. 06-743-NJR, 2016 U.S.Dist.LEXIS 161078, *7 (S.D. Ill. Mar. 31, 2016); *Abbott v. Lockheed Martin Corp.*, No. 06-701, 2015 U.S.Dist.LEXIS 93206, *7 (S.D. Ill. July 17, 2015); *Will v. General Dynamics Corp.*, No. 06-698, 2010 U.S.Dist.LEXIS 123349, *7–8 (S.D. Ill. Nov. 22, 2010).

While the Court is not required to evaluate the requested fee under the "lodestar" method, Class Counsel's requested fee is reasonable on that basis as well, even without taking into

account the additional time needed to bring this case to final approval and Class Counsel's commitment to monitor compliance with the nonmonetary terms for three more years and to bring an enforcement action, if needed, without charge to the class. Accordingly, the Court should award Class Counsel a fee of $7,882,545 (one-third of the monetary recovery), reimburse Class Counsel's expenses of $513,015.32 and grant incentive awards to the Class Representatives and also to the individual Named Plaintiffs for pursuing this action.

BACKGROUND

On December 29, 2015, Plaintiffs brought this action on behalf of the Plan against ATH Holding Company, LLC, the Board of Directors of ATH Holding Company, LLC and the Pension Committee of ATH Holding Company, LLC ("Defendants") for alleged violations of the Employee Retirement Income Security Act of 1974. Doc. 1. Broadly stated, Plaintiffs alleged that Defendants breached their fiduciary duties 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 substantial 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 certain Named Plaintiffs as Class Representatives and appointed the law firm of Schlichter Bogard & Denton as Class Counsel. On January 30, 2019, the Court overwhelmingly denied Defendants' motion for summary judgment. This case was set for trial to begin on March 18, 2019. During that period, and after several months of arm's length negotiation with the assistance of a national mediator, the Parties reached the Settlement. As part of the Settlement, and contemporaneous with the parties' request that the Court preliminarily approve the Settlement, the parties filed a joint motion to modify the class definition for settlement purposes only. 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."

Doc. 369.

On April 8, 2019, the Court preliminarily approved the Settlement and granted the parties' joint request to modify the class definition for settlement purposes only. Doc. 370.

ARGUMENT

Class Counsel is entitled to a reasonable fee award from the common fund, in an amount that reflects "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692. The normal rate of compensation in the market is a contingency fee of one-third of the recovery, in both ERISA fee cases and class actions generally. The Settlement provides substantial monetary and affirmative relief to the class, particularly in light of the significant risk of non-recovery if the case had proceeded. Moreover, a lodestar cross-check analysis, though not necessary in the Seventh Circuit, confirms that Class Counsel's requested fee is reasonable. In addition, the Court should order reimbursement of Class Counsel's reasonable and necessary costs incurred to pursue these claims as well as incentive awards to both the Named Plaintiffs who were named as Class Representatives and also to the Individual Plaintiffs not named as Class Representatives, which are customary in cases of this type.

I. Class Counsel's requested fee is reasonable in light of the "market price," the substantial risk of non-payment, and the exceptional results achieved for the class.

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed.R.Civ.P. 23(h). The award of attorneys' fees and costs in this case is authorized by both the common fund doctrine, *Boeing*, 444 U.S. at 478, and the parties' settlement agreement, Doc. 7-1 at 4, 24 (§§2.4, 7.1). *See Sw. Airlines*, 2018 U.S.App.LEXIS 21417, *6–11. In common fund cases, "the measure of what is reasonable is what an attorney would receive from a paying client in a similar case." *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 408 (7th Cir. 2000); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992). The Court's objective is to "estimate the terms of the

contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed)." *In re Synthroid Marketing Litig.*, 264 F.3d 712, 718 (7th Cir. 2001). The fee award must reflect "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692. "When the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee *is* the 'market rate.'" *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986).

A. The market for similar services is set exclusively by contingent fee arrangements.

In most class actions, the prevailing, if not exclusive, method of compensating class counsel is by a contingent fee arrangement: "The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent." *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 565 (7th Cir. 1994)("*Florin I*", quoting *In re Cont'l*, 962 F.2d at 569); *Gaskill*, 160 F.3d at 362. In ERISA fiduciary breach litigation, while the recovery for the class as a whole may be large, individual class member past damages are relatively small. Thus, no class member has an incentive to finance complex, costly, and potentially protracted litigation on an hourly basis. *Carnegie v. Household Int'l, Inc*., 376 F.3d 656, 661 (7th Cir. 2004). Only through retaining counsel on a contingent fee arrangement can the rights of 401(k) participants be vindicated. Here, each Named Plaintiff signed a one-third contingency fee contract plus costs, with the understanding that the claims would be brought as a class action. See Declaration of Jerome J. Schlichter ("Schlichter Decl.") at ¶¶18−19. Because counsel in cases of this type are nearly exclusively compensated on a contingency basis, "the contingent fee *is* the market rate." *Kirchoff*, 786 F.2d at 324.

B. A contingency fee of one-third of the recovery is the standard market rate.

Given that legal services in this case would have necessarily been provided on a contingency basis, the question before the Court is simply whether Class Counsel's requested fee of 33 1/3% of the monetary recovery, and an even a much smaller percentage of the estimated total value of the benefit to the class, represented the reasonable market rate at the inception of this case. See *Synthroid*, 264 F.3d at 718. The market rate "depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *Sutton*, 504 F.3d at 693 (quoting *Synthroid*, 264 F.3d at 721). Courts may also consider factors such as actual fee contracts in similar litigation and data on fees awarded in other class actions in the jurisdiction. *Taubenfeld v. AON Corp*., 415 F.3d 597, 599–600 (7th Cir. 2005). These factors all support the requested award.

1. Having literally created the field of 401(k) excessive fee litigation, Class Counsel took enormous risk of nonpayment.

"[T]he higher the risk of failure the larger the contingent fee that a client would have to pay in an arm's length negotiation with the lawyer in advance of the suit." *In re Trans Union Corp. Privacy Litig*., 629 F.3d 741, 746 (7th Cir. 2011). ERISA litigation involves substantial risk of loss: "Plaintiffs claiming a breach of fiduciary duty do not often succeed." *Florin v. Nationsbank of Ga., N.A.*, 60 F.3d 1245, 1248 (7th Cir. 1995)("*Florin II*").

Before Class Counsel filed the first cases in 2006, there had never been a case brought alleging excessive fees in in a 401(k) plan either by private litigation or by the Department of Labor, which is the enforcement agency. In those early cases, the Seventh Circuit rejected ERISA fiduciary breach claims involving allegations of excessive fees and imprudent investments in large 401(k) plans—including two cases handled by Class Counsel. *Hecker v.*

Deere & Co., 556 F.3d 575 (7th Cir. 2009); *Loomis v. Exelon Corp*., 658 F.3d 667 (7th Cir. 2011); *see Howell v. Motorola, Inc*., 633 F.3d 552 (7th Cir. 2011)(affirming summary judgment for plan fiduciaries); *Jenkins v. Yager,* 444 F.3d 916, 926 (7th Cir. 2006)(same). Further, after this action was filed, a district court within the Seventh Circuit recently followed *Hecker* and *Loomis* in dismissing an ERISA 403(b) excessive fee case. *Divane v. Northwestern Univ.*, No. 16-8157, 2018 U.S.Dist.LEXIS 87645, *20–28 (N.D. Ill. May 25, 2018). Although Plaintiffs had strong arguments that their claims are distinguishable, those authorities demonstrate that there was a risk that Class Counsel "would receive no fees at all" by pursuing this action. *Trans Union*, 629 F.3d at 746. "Such uncertainty increases the risk an attorney faces." *Florin II*, 60 F.3d at 1248. These factors presented a significant risk of nonpayment, which mandates a larger contingent fee. *Trans Union*, 629 F.3d at 746; *Silverman v. Motorola Solutions, Inc*., 739 F.3d 956, 958 (7th Cir. 2013).

Among the indicia of the riskiness of this case is the very fact that Class Counsel not only created the field but has been virtually alone until recently in their willingness to handle and invest massive resources in ERISA 401(k) fee cases of this scope. Schlichter Decl. ¶¶15−16. "Lack of competition not only implies a higher fee but also suggests that most members of the securities bar saw this litigation as too risky for their practices." *Silverman*, 739 F.3d at 958. As noted by the Court in other matters, see *infra*, Class Counsel has been at the forefront of 401(k) plan excessive fee litigation since 2006, as neither private attorneys nor the Department of Labor had brought ERISA excessive fee claims against large 401(k) plan sponsors before that time. Class Counsel's track record of success and willingness to pursue such claims despite significant risk of nonpayment remains unmatched.

2. The quality of Class Counsel's performance was exceptional.

The quality of Class Counsel's performance is also relevant to determining the market rate.

Sutton, 504 F.3d at 693; *Taubenfeld*, 415 F.3d at 600. Class Counsel's performance was exceptional, as shown not only by the tenacity they showed in the bringing this litigation but also by the terms of the Settlement. As noted below, Class Counsel investigated this case in depth through massive research based on their vast experience in this space.

The quality of Class Counsel's service also had to be exceptional to navigate the complex area of ERISA fiduciary breach litigation. Judge McDade of the Central District of Illinois, speaking of Class Counsel, observed that achieving a favorable result in this type of case required extraordinary efforts:

> This litigation entails complicated ERISA claims that are not only dependent on the statute but also on various regulations that implement ERISA. These claims also are relatively unique with limited case authority in support.

Martin v. Caterpillar, Inc., No. 07-1009, 2010 U.S.Dist.LEXIS 82350, *7 (C.D. Ill. Aug. 12, 2010). As in *Martin*, the settlement here "represents a significant boon to class members in light of the complexity of this litigation, the potential for protracted litigation, and the strength of the available defenses recognized in *Hecker*." *Id*.

District Court Judges in this Circuit have made similar observations regarding the quality of Class Counsel's services in successfully pursuing claims and obtaining favorable settlements in this complex area of 401(k) fee litigation. Recognizing the work of Class Counsel as exceptional in and approving fees of one-third of the monetary recovery in a similar settlement, the Honorable G. Patrick Murphy, stated:

> Schlichter, Bogard & Denton's work throughout this litigation illustrates an exceptional example of a private attorney general risking large sums of money and investing many thousands of hours for the benefit of employees and retirees. No case had previously been brought by either the Department of Labor or private attorneys against large employers for excessive fees in a 401(k) plan…*Litigating the case required Class Counsel to be of the highest caliber* and committed to the interests of the participants and beneficiaries of the General Dynamics 401(k) Plans.

Will, 2010 U.S.Dist.LEXIS 123349, *8–9 (emphasis added). Judge David Herndon, also approving fees of one-third of the monetary recovery in a similar settlement, echoed those thoughts:

> Schlichter, Bogard & Denton has achieved an extraordinary result on behalf of its clients. Class Counsel's fee request is more than justified in this case given the extraordinary risk counsel accepted in agreeing to represent the Class; Class Counsel's demonstrated willingness to pursue this action over more than seven years of intense, adversarial litigation; and the enormous value of the plan improvements and future relief included in this settlement.
>
> Litigating this case against formidable defendants and their sophisticated attorneys required Class Counsel to demonstrate extraordinary skill and determination. Schlichter, Bogard & Denton and lead attorney Jerome Schlichter's diligence and perseverance, while risking vast amounts of time and money, reflect the finest attributes of a private attorney general. At the time Plaintiffs retained Class Counsel, no other firm was willing to accept such a daunting challenge on this case at **any** rate, and virtually no cases had ever been filed against large 401(k) plan sponsors involving claims of excessive fees and prohibited transactions under ERISA.

Beesley v. Int'l Paper Co., No. 06-703-DRH, 2014 U.S.Dist.LEXIS 12037, *7–8 (S.D. Ill. Jan. 31, 2014).

As Judge Baker of the Central District of Illinois observed in approving the settlement and awarding Class Counsel one-third of the monetary portion of the settlement in a similar case:

> Class Counsel's enforcement of ERISA's fiduciary obligations has contributed to rapid reductions in the level of 401(k) recordkeeping fees paid across the country. The law firm Schlichter, Bogard & Denton is the leader in 401(k) fee litigation…[T]he fee reduction attributed to Schlichter, Bogard & Denton's fee litigation and the Department of Labor's fee disclosure regulations approach $2.8 billion in annual savings for American workers and retirees.

Nolte v. Cigna Corp., No. 07-2046, 2013 U.S.Dist.LEXIS 184622, *6 (C.D. Ill Oct. 15, 2013) (internal citations omitted). Judge Baker noted that Class Counsel is the "preeminent firm in 401(k) fee litigation" that has "invested such massive resources and persevered in the face of the enormous risks of representing employees and retirees in this area." *Id.* at 3–4.

In *Spano,* this Court recognized, in approving the settlement and awarding a one-third fee of

the common fund, that Class Counsel "added great value to [that] Class throughout the litigation through their persistence and skill of their attorneys". *Spano*, 2016 U.S.Dist.LEXIS 161078, *9. The Court then observed:

> This type of litigation over 401(k) fees did not exist until September 2006, when Schlichter, Bogard & Denton began holding employers responsible for alleged fiduciary breaches. Since that time, Class Counsel has been committed to the interests of the participants and beneficiaries of Boeing's 401(k) plan in pursuing this case and several other 401(k) fee cases of first impression. The law firm Schlichter, Bogard & Denton has significantly improved 401(k) plans across the country by bringing cases such as this one[.]

Id. (citation omitted). Class Counsel also obtained the first and only victory of an ERISA 401(k) excessive fee case taken by the United States Supreme Court. In a 9-0 unanimous decision, the Supreme Court held that an ERISA fiduciary has a continuing duty to monitor plan investments and remove imprudent ones regardless of when they were added. *Tibble v. Edison Int'l*, 135 S.Ct. 1823, 1828–29 (2015). This was a landmark and precedent-setting decision.

3. Resolving the case required a tremendous amount of work.

A third factor in assessing the market rate is the amount of work necessary to resolve the litigation. *Sutton*, 504 F.3d at 693. The work required to resolve this case was vast. First, Class Counsel spent many hours investigating this case and developing the case claims and theories. See Declaration of Troy Doles ("Doles Decl.") at ¶8−9. Next, Class Counsel spent hundreds of hours drafting the complaint and fending off the various challenges made by Defendants at the pleadings stages. *Id*. at ¶¶9−11. Thousands of additional hours were spent briefing dispositive motions, obtaining and analyzing discovery, including documents and depositions. During this time, the parties were also engaged in significant class certification battles. *Id*. at ¶¶12−14.

Class Counsel defended five depositions of the Named Plaintiffs and took eleven lengthy depositions of Defendant fact witnesses. *Id*. at ¶20. During the written and produced documents portion of discovery in this case, Class Counsel reviewed in great detail over 76,000 pages of

documents. *Id*. at ¶¶18−19. The parties also disclosed and produced extensive detailed reports of seven expert witnesses, three for Plaintiffs and four for Defendants. *Id.* at ¶22. Class Counsel deposed those defense expert witnesses, and defended their own experts at deposition. *Id.* In addition, Defendants filed extensive *Daubert* challenges on all three of Plaintiffs' experts. *Id*. at ¶23.

In 2018, Defendants filed a massive motion for summary judgment with 126 exhibits and 3 substantive declarations. *Id*. at ¶23. Plaintiffs filed their correspondingly massive opposition attaching 104 exhibits. *Id.* On January 30, 2019, the Court overwhelmingly denied the motion. *Id*. The case was set for trial to begin on March 18, 2019. Doc. 323. With just weeks prior to the trial date, and after several months of arm's length negotiation with the assistance of a national mediator, the Parties reached the Settlement. In total, Class Counsel expended over 9,000 hours on this case. Doles Decl. ¶6−7.

4. Plaintiffs in this and other ERISA fee cases agreed to contracts providing for a contingency fee of one-third of the recovery.

Courts may consider actual fee contracts in similar litigation as evidence of the market rate. *Taubenfeld* , 415 F.3d at 599. Prior to joining this case, each of the five named Plaintiffs signed agreements with Class Counsel calling for a one-third fee, plus costs. Schlichter Decl. ¶¶18–19. In other 401(k) fee cases brought by Class Counsel, the plaintiffs also signed similar agreements calling for a one-third fee. *Id.* Because Class Counsel is the nationwide leader in 401(k) fee litigation, the rates agreed to by their clients are significant evidence of the market price.

5. Courts in other cases routinely award one-third of the recovery.

The Seventh Circuit has endorsed the use of data on fee awards in other cases as evidence of the market rate. *Taubenfeld*, 415 F.3d at 600. "Substantial empirical evidence indicates that a one-third fee is a common benchmark in private contingency fee cases." Theodore Eisenberg &

Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. of Empirical Legal Studies 27, 35 (2004). "Courts throughout the Seventh Circuit," and specifically in this District, routinely conclude "that a one-third contingency fee is standard." *City of Greenville v. Syngenta Crop Prot., Inc*., 904 F. Supp. 2d 902, 909 (S.D. Ill. 2012); *Will*, 2010 U.S.Dist.LEXIS 123349, *7–8 ("Where the market for legal services in a class action is only for contingency fee agreements, and there is a substantial risk of nonpayment for the attorneys, the normal rate of compensation in the market is 33.33% of the common fund recovered."); *Teamsters Local Union No. 604 v. Inter–Rail Transp., Inc*., No. 02-1109-DRH, 2004 U.S.Dist.LEXIS 6363, 3 (S.D. Ill. Mar. 19, 2004)("In this Circuit, a fee award of thirty-three and one-third (33 1/3%) in a class action in [sic] not uncommon.").[1]

As to ERISA fee litigation specifically, a one-third contingency fee has been consistently approved in District Courts in this Circuit, including the Southern, Central, and Northern Districts of Illinois. In each of their eight settlements of 401(k) cases within the Seventh Circuit, Class Counsel was awarded one-third of the plans' monetary recovery. *Ramsey*, No. 18-1099-NJR, Doc. 27; *Spano,* 2016 U.S.Dist.LEXIS 161078, *7; *Abbott,* 2015 U.S.Dist.LEXIS 93206, *7; *Beesley*, 2014 U.S.Dist.LEXIS 12037 ; *Nolte,* 2013 U.S.Dist.LEXIS 184622, *3–4; *Martin v. Caterpillar, Inc.*, No. 07-1009, 2010 U.S.Dist.LEXIS 145111 (C.D. Ill. Sept. 10, 2010); *Will*, 2010 U.S.Dist.LEXIS 123349, *7–8; *George v. Kraft Foods Global, Inc*., No. 07-1713, 2012 U.S.Dist.LEXIS 166816, *2 (N.D. Ill. June 26, 2012); see also Schlichter Decl. ¶22. The fee awards represent a recognition by those courts that one-third of the monetary recovery was the

[1] Even higher rates are common. *Gaskill*, 160 F.3d at 363 (affirming award of 38%); *Mansfield v. Air Line Pilots Ass'n Int'l*, No. 06-6869, 2009 U.S.Dist.LEXIS 132346, *13 (N.D. Ill. Dec. 14, 2009) ("a fee award of 35% of the aggregate settlement fund is consistent with awards in similarly complex cases"); *Meyenburg v. Exxon Mobil Corp*., No. 05-cv-15-DGW, 2006 U.S.Dist.LEXIS 52962, *5 (S.D. Ill. July 31, 2006)("33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation").

appropriate market rate in cases of this type. This Court should reach the same conclusion here.

Outside of the novel and complex ERISA litigation field, courts within the Seventh Circuit also routinely award attorney's fees of one-third as a standard rate in class action cases. In the 2005 *Taubenfeld* decision, the district court considered a table of thirteen class actions in the Northern District of Illinois in which fees of 30% to 39% were awarded, as a benchmark to confirm that the requested fee was consistent with awards in similar cases. 415 F.3d at 600. A review of more recent decisions, and fee awards in other districts within the Seventh Circuit, confirms that this continues to represent the market rate.[2] These thirty-two fee awards confirm

[2] *In re Dairy Farmers of America Inc. Cheese Antitrust Litig*., No. 09-3690, 2015 U.S.Dist.LEXIS 20408 (N.D. Ill. Feb. 20, 2015)(33.3%); *Std. Iron Works v. Arcelormittal*, No. 08-5214, 2014 U.S.Dist.LEXIS 162557 (N.D. Ill. Oct. 22, 2014)(33%); *Fosbinder-Bittorf v. SSM Health Care of Wis*., No. 11-592, 2013 U.S.Dist.LEXIS 152087 (W.D. Wis. Oct. 23, 2013)(33.33%); *In re Potash Antitrust Litig.,* No. 08-6910, Doc. 592 (N.D. Ill. June 12, 2013)(33.33%); *City of Greenville v. Syngenta Crop Prot., Inc*., 904 F.Supp.2d 902 (S.D. Ill. 2012)(33.33%); *Campbell v. Advantage Sales & Mktg. L.L.C*., No. 09-1430, 2012 U.S.Dist.LEXIS 57218 (S.D. Ind. Apr. 24, 2012)(FLSA collective action)(33.33%); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560 (N.D. Ill. 2011)(33.33%); *Pavlik v. FDIC*, No. 10-816, 2011 U.S.Dist.LEXIS 126016 (N.D. Ill. Nov. 1, 2011)(33.33%); *Burkholder v. City of Ft. Wayne*, 750 F. Supp. 2d 990 (N.D. Ind. 2010)(FLSA collective action)(33.3*%); In re Guidant Corp. ERISA Litig*., No. 05-1009, Doc. 194 (S.D. Ind. Sept. 10 2010)(38%); *In re BP Propane Direct Purchaser Antitrust Litig.*, No. 06-3541, Doc. 209 (N.D. Ill. June 24, 2010)(33%); *Kitson v. Bank of Edwardsville*, No. 08-507, 2010 U.S.Dist.LEXIS 5462 (S.D. Ill. Jan. 25, 2010) (33.33%); *Mansfield v. Air Line Pilots Ass'n,* No. 06-6869, 2009 U.S.Dist.LEXIS 132346 (N.D. Ill. Dec. 14, 2009)(35%); *Kelly v. Bluegreen Corp*., No. 08-401, Doc. 151 (W.D. Wis. Oct. 30, 2009)(FLSA collective action)(33%); *In re Ready-Mixed Concrete Antitrust Litig*., No. 05-979, 2009 U.S.Dist.LEXIS 132343 (S.D. Ind. March 31, 2009)(33.33%); *Perry v. Nat'l City Bank*, No. 05-891, Doc. 81 (S.D. Ill. Mar. 3, 2008)(FLSA collective action)(33%); *Retsky Family Ltd. v. Price Waterhouse L.L.P*., No. 97-7694, 2001 U.S.Dist.LEXIS 20397 (N.D. Ill. Dec. 10, 2001)(33.33%); *In re Mercury Fin. Co*., No. 97-3035, Doc. 155 (N.D. Ill. July 26, 2000), Doc. 175 (July 6, 2001)(33.33%); *In re Lithotripsy Antitrust Litig*., No. 98-8394, 2000 U.S.Dist.LEXIS 8143 (N.D. Ill. June 9, 2000)(33.3%); *In re Caremark Int'l Sec. Litig*., No. 94-4751 (N.D. Ill. Dec. 15, 1997)(33.33%); *In re Nuveen Fund Litig*., No. 94-360 (N.D. Ill. June 3, 1997)(33.33%); *Gaskill v. Gordon*, 942 F. Supp. 382 (N.D. Ill. 1996), aff'd 160 F.3d 361 (7th Cir. 1998)(38%); *In re Soybean Futures Litig.,* No. 89-7009 (N.D. Ill. Nov. 27, 1996)(33.33%); *Goldsmith v. Tech. Solutions Co*., No. 92-4374, 1995 U.S.Dist.LEXIS 15093 (N.D. Ill. Oct. 10, 1995)(33.33%); *Liebhardp v. Square D Co*., No. 91-1103 (N.D. Ill. June 6, 1993)(33.33%); *Hammond v. Hendrickson*, No. 85-9829 (N.D. Ill. Nov. 20, 1992)(33.33%); *First*

that "the normal rate of compensation in the market" is "33.33% of the common fund recovered." *Will*, 2010 U.S.Dist.LEXIS 123349, *7–8.

C. Accounting for the value of tax deferral and affirmative relief shows that the requested fee is actually far less than one-third of the recovery.

The settlement provides for current participants to receive their payments as contributions to their Plan accounts tax deferred. Doc. 367-01 at 18 (§6.2). The benefit of tax deferral for 20 years is an additional 18.6%. Peter Brady, *Marginal Tax Rates and the Benefits of Tax Deferral*, Investment Company Institute (Sept. 17, 2013).[3] Here, based on this data, the tax deferral would increase the actual value of the cash by $4,398,900, enhancing the value of the monetary portion to $28,048,900.

Moreover, the Court "must also consider the overall benefit to the class, including non-monetary benefits, when evaluating the fee request. *Spano,* 2016 U.S.Dist.LEXIS 151078, *5 (citing Manual for Complex Litig., Fourth, §21.71, at 337 (2004)); *Beesley*, 2014 U.S.Dist.LEXIS 12037, *5 (same); Principles of the Law of Aggregate Litigation, A.L.I. (May 20, 2009), §3.13(b)("a percent-of-the-fund approach should be the method utilized in most common-fund cases, *with the percentage being based on both the monetary and the nonmonetary value of the settlement*.")(emphasis added); *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989)(cautioning against an "undesirable emphasis" on monetary "damages" that might "shortchange efforts to seek effective injunctive or declaratory relief"). Here, the parties engaged in lengthy negotiations *after* the agreement on money was reached because Class Counsel insisted on non-monetary relief as well.

The value of the affirmative relief in this case is substantial.

Interstate Bank of Nevada, N.A. v. Nat'l Republic Bank of Chi., No. 80-6401 (N.D. Ill. Feb. 12, 1988)(39%).

[3] Available at http://www.ici.org/viewpoints/view_13_marginal_tax_and_deferral.

1. Within the first year of the agreed upon three-year Settlement Period, the Plan's 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 over the last 10 years, and the benefits of diversification;
2. 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;
3. The Pension Committee shall 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;
4. The Pension Committee shall consider, with the assistance of the Investment Consultant, among other factors: (a) 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; (b) 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 (c) 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;

5. 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;
6. 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;
7. 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 supporting the decision. This summary shall include the final agreed-upon fee for basic recordkeeping services; and,
8. Class Counsel will both monitor compliance with the settlement for three years and take any necessary enforcement action without cost to the Class.

Doc. 367-1 at pp. 26–27.

These benefits represent a significant value to the Plan above and beyond the monetary settlement. Class Counsel engaged Dr. Stewart Brown, a nationally recognized economist and

authority on investment costs, to provide the Court with an estimate of the present value on just a portion of these provisions. As for the stable value relief, and based on the expected difference in returns using the ten-year average spread between the Vanguard Stable Value Fund and the Plan's Vanguard Federal Money Market Fund investment, Plan participants are expected to obtain discounted savings of an additional $31,775,413 in enhanced returns. See Declaration of Stewart L. Brown ("Brown Decl.") at ¶¶8–12. Dr. Brown also estimated the fee savings associated with a reduction in the Plan's recordkeeping fees as a result of a competitive bidding process are $2,223,195. *Id.* at ¶¶5–7. Dr. Brown concludes that the affirmative relief under the terms of the settlement will provide a combined present value to the class up to $33,998,608. *Id.* at 5−12.

When combined with the tax-deferred value of the monetary portion, the total value of the benefit to the Class exceeds $62 million. Class Counsel's fee request is just under 13% of that amount. Accordingly, the fee requested by Class Counsel is significantly less than one-third of the value of the total benefit to the class.

D. A lodestar cross-check confirms that the fee is reasonable.

The Seventh Circuit has never required a lodestar cross-check. *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998)("[W]e have never ordered the district judge to ensure that the lodestar result mimics that of the percentage approach."). The Seventh Circuit reiterated that it is not a district court's role to decide what is "fair" or "excessive" "based on nothing more than a subjective judgment regarding Counsel's work." *Sutton*, 504 F.3d at 693. A lodestar cross-check requires just such subjective judgments. *Florin I*, 34 F.3d at 565. It also was not performed in the majority of common fund fee awards in this Circuit. Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 269, Table 11 (2010) (not used in 78% of the fee awards between 1993 and 2008).

Nevertheless, a fee award in this case equal to one-third of the common fund is also amply justified under the lodestar method. To determine the reasonableness of attorneys' fees under the lodestar method, the first step is to "multiply[] a reasonable hourly rate by the number of hours reasonably expended." *Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010)(citing *Hensley v. Eckerhart*, 461 U.S. 424, 433–37 (1983)). A reasonable hourly rate should be in line with the prevailing rate in the "community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Jeffboat, L.L.C. v. Dir., Office of Workers' Comp. Programs*, 553 F.3d 487, 489 (7th Cir. 2009); see also *Denius v. Dunlap*, 330 F.3d 919, 930 (7th Cir. 2003).

ERISA litigation involves a national market, because the number of plaintiff's firms who have the necessary expertise and are willing to take the risk and devote the resources to litigate complex ERISA fiduciary breach claims is small. *Beesley*, 2014 U.S.Dist.LEXIS 12037, *11 ("Schlichter, Bogard & Denton are one of the few firms handling ERISA class actions such as this."); *Abbott*, 2015 U.S.Dist.LEXIS 93206, *11–12; Schlichter Decl. ¶¶15–17. The cases are defended by national firms with ERISA expertise. Class Counsel has brought ERISA fee class actions in district courts within the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. Schlichter Decl. ¶13. Thus, the relevant community for determining the hourly market rate for ERISA class actions "is a national one." *Beesley*, 2014 U.S.Dist.LEXIS 12037, 11; see also *Tussey v. ABB, Inc*., No. 06-4305, 2012 U.S.Dist.LEXIS 157428, 9–10 (W.D. Mo. Nov. 2, 2012)(" complex ERISA litigation involves a national standard"); *Spano*, 2016 U.S.Dist.LEXIS 161078, *11 n.2.

Class Counsel have spent 7,820.6 hours of attorney time and 1,354.2 hours of non-attorney time on this matter to date for a total of 9,174.8 hours. See Declaration of Sheri O'Gorman ("O'Gorman Decl.") at ¶¶3–4. Class Counsel works solely on a contingent fee basis, but within

the last 30 days, another Court twice found that a fee rate of up to $1,060 per hour, depending on years of attorney experience, was a reasonable national hourly rate for Class Counsel's time. *Sims v. BB&T Corp.,* No. 15-cv-00732, Doc. 450 at 7−8, (M.D.N.C. May 6, 2019) and *Clark v. Duke University*, 16-cv-1044, Doc. 166 at 8−9 (M.D.N.C. Jun. 24, 2019) (finding that the reasonable hourly rate was $1,060/hour for attorneys with at least 25 years of experience, $900/hour for attorneys with 15–24 years of experience, $650/hour for attorneys with 5–14 years of experience, $490/hour for attorneys with 2–4 years of experience, $330 for paralegals and law clerks); Doles Decl. at ¶5.[4]

Based on these 2018 rates and actual hours incurred to date, a straight lodestar fee would be $5,905,851. Doles Decl. At ¶6. However, in cases like this one, where counsel "had no sure source of compensation for their services," the Court must apply a risk multiplier to compensate the attorneys for the risk of nonpayment in the event the litigation was unsuccessful. *Florin I*, 34 F.3d at 565. The Seventh Circuit has specifically "held that risk multipliers are appropriate in cases that are initiated under ERISA and settled with the creation of a common fund." *Cook*, 142 F.3d at 1014 (citing *Florin I*, 34 F.3d at 564). The purpose of the multiplier is to "compensate[e] in a manner that provides adequate incentive for the attorney to bring this type of case." *Harman v. Lyphomed, Inc*., 945 F.2d 969, 974 (7th Cir. 1991); *Silverman*, 739 F.3d at 958.

The fee sought by Class Counsel, without even accounting for the significant value from the nonmonetary relief, would result in a multiplier of only 1.33. Class Counsel assumed an enormous risk of non-payment, particularly in light of the adverse precedent such as *Hecker*, *Loomis,* and *Divane*, the protracted length of the litigation, and the fact that very few ERISA fiduciary breach cases have been successfully resolved on the merits in favor of the plaintiffs.

[4] These hourly figures were based on 2018 rates.

Establishing liability for a fiduciary breach is risky and difficult. *Florin II*, 60 F.3d at 1248 ("breach of fiduciary duty [claims] do not often succeed."). In risky litigation, such as this, Class Counsel's lodestar of 1.33 is undeniably reasonable. See *Spano*, 2016 U.S.Dist.LEXIS 161078, *11 ("lodestar multiplier can be reasonable in the range between 2 and 5"); Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 272 (Table 14) (2010)(from 1993–2008, the mean multiplier in class actions in the Seventh Circuit was 1.85). Again, apart from any lodestar multiplier, Class Counsel's requested attorney fee award is only less than *13%* of the total benefit to the class.

II. The Court should also award reimbursement of Class Counsel's costs.

Reimbursement of $513,015.32 in litigation expenses that Class Counsel advanced in prosecuting this case is warranted. Fed.R.Civ.P. 23(h). A cost award is authorized by both the parties' settlement agreement and the common fund doctrine. Doc. 7-1 at 4, 24 (§§2.4, 7.1); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391–92 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166–67 (1939). "It is well established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses". *Spano*, 2016 U.S.Dist.LEXIS 161078, *11 (quoting *Beesley*, 2014 U.S.Dist.LEXIS 12037, *12); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991); Alba Conte, 1 Attorney Fee Awards §2:19 (3d ed. 2004). Costs should be awarded based on the types of "expenses private clients in large class actions (auctions and otherwise) pay." *Synthroid*, 264 F.3d at 722; *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). Reimbursable expenses include expert fees, travel, long-distance and conference telephone, postage, delivery services, and computerized legal research. Conte, *supra*, § 2:19; *Spano*, 2016 U.S.Dist.LEXIS 161078, *11.

Given the efficient resolution of this case, Class Counsel was able to incur only reasonable expenses in the amount of $513,015.32. Indeed, this final expense item is significantly below the

anticipated submitted expense of $650,000. Doc. 368 at 6. An empirical study of the costs awarded in class action litigation found that the average cost award was equal to 4% of the relief obtained for the class. See Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: an Empirical Study*, 1 J. of Empirical Legal Studies 27, 70 (2004). The total amount requested is less than 2.2% of the monetary recovery, well within the range to be considered reasonable. Of these total fees, a significant portion was spent on necessary and vital expert witness fees. These expenses are of the types that are routinely reimbursed by paying clients. O'Gorman Decl. ¶2 (itemizing expenses).

III. The Court should approve incentive awards for the named Plaintiffs.

In coming forward to initiate this action, the named Plaintiffs were willing to and did devote significant personal time to pursuing these claims on behalf of their fellow Anthem employees and Plan participants, and exposed themselves to potential financial and career risk. As *Hecker* illustrates, the named Plaintiffs risked a judgment against them for Defendants' costs. 556 F.3d at 591. By suing their employer, each risked "alienation from employees or peers". *Beesley*, 2014 U.S.Dist.LEXIS 12037, *13. Each Plaintiff remained in contact with Class Counsel throughout the lengthy pre-filing investigation. Named Plaintiffs Mary Bell, John Hoffman, and Pamela Leinonen were successfully appointed by the Court to serve as Class Representatives in this action and for these reasons, a case contribution award of $20,000 is appropriate. Named Plaintiffs Janice Grider and Cindy Prokish were not named a Class Representatives but remained in the case in their individual capacity such that an award of $5,000 is appropriate. Without their commitment to pursuing these claims, the successful recovery for the settlement class would not have been possible. Class Counsel request that each of the five Named Plaintiffs receive these respective incentive awards from the Settlement Fund.

The total award for all named plaintiffs represents just 0.3% of the total Settlement Fund.

Awards of $20,000 for a Class Representatives are well within the ranges that are typically awarded in comparable cases. See, e.g., *Cook*, 142 F.3d at 1016 (upholding award of $25,000); *Beesley*, 2014 U.S.Dist.LEXIS 12037, *8 (awarding $25,000 to each of the three named plaintiffs); *Nolte*, 2013 U.S.Dist.LEXIS 184622, *14–15 (same); *Spano*, 2016 U.S.Dist.LEXIS 161078, *11 (same).

CONCLUSION

For these reasons, Plaintiffs request that the Court grant their motion.

July 5, 2019

Respectfully submitted,

/s/ Jerome J. Schlichter

Jerome J. Schlichter
Troy A. Doles
Heather Lea
SCHLICHTER BOGARD & DENTON LLP
100 South Fourth Street, Suite 1200
St. Louis, MO 63102
Tel: 314-621-6115
Fax: 314-621-5934
jschlichter@uselaws.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

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

Ian H. Morrison
imorrison@seyfarth.com
Ada W. Dolph
Adolph@seyfarth.com
Seyfarth Shaw LLP
131 South Dearborn Street, Ste. 2400
Chicago, Illinois 60603

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.,
***Plaintiffs*,**

v.

ATH HOLDING COMPANY, LLC et al.,

Defendants.

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

DECLARATION OF JEROME J. SCHLICHTER

I, Jerome J. Schlichter, declare as follows:

1. I am the founding and managing partner of the law firm of Schlichter, Bogard & Denton, LLP, counsel for Plaintiffs in this case. This declaration is submitted in support of Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Case Contribution Awards for Named Plaintiffs. I am familiar with the facts set forth below and able to testify to them.

2. I received my Bachelor's degree in Business Administration from the University of Illinois in 1969, with honors and was a James Scholar. I received my Juris Doctorate from the University of California at Los Angeles (UCLA) Law School in 1972, where I was an Associate Editor of UCLA Law Review. I am licensed to practice law in the states of Illinois, Missouri, and California and am admitted to practice before the Supreme Court of the United States, the Third, Fifth, Seventh, Eighth and Ninth Circuit Courts of Appeals and numerous U.S. District Courts. I have also been an Adjunct Professor teaching trial practice at Washington University School of Law, and repeatedly selected by my peers for the list of The Best Lawyers in America.

3. Through over 40 years of practice, I have handled, on behalf of plaintiffs, substantial personal injury, civil rights class actions, mass torts and class action fiduciary breach litigation under the Employee Retirement Income Security Act (ERISA), on behalf of participants in large 401(k) plans. In 2014, I was ranked number 4 in a list of the 100 most influential people nationally in the 401(k) industry in the industry publication 401(k) Wire. Examples of class action cases I have successfully handled include: *Brown v. Terminal Railroad Association*, a race discrimination case in the Southern District of Illinois on behalf of all African-American and Hispanic employees at a railroad; *Mister v. Illinois Central Gulf Railroad*, 832 F.2d 1427 (7th Cir. 1987), a failure-to-hire class action brought on behalf of hundreds of African-American applicants from East St. Louis, Illinois at a major railroad which was tried to conclusion and successfully appealed to the Seventh Circuit Court of Appeals and finally concluded with more than $10 million for the class after 12-and-a-half years of litigation; *Wilfong v. Rent-A-Center*, No. 00-680-DRH (S.D.Ill. 2002), a nationwide gender discrimination in employment case on behalf of women, which was successfully settled for $47 million and substantial affirmative relief to the class of thousands, after defeating the defendant's attempt to conduct a reverse auction.

4. My firm has been named Class Counsel in numerous cases involving claims of fiduciary breaches in large 401(k) and 403(b) plans. *See* S*acerdote v. New York University*, No. 16-6284, 2018 U.S.Dist.LEXIS 23540, 16 (S.D.N.Y. Feb. 13, 2018); *Clark v. Duke Univ.*, No. 16-1044, 2018 U.S.Dist.LEXIS 62532 (M.D.N.C. Apr. 13, 2018); *Ramos. v. Banner Health*, No. 15-2556, Doc. 296 (D. Colo. Mar. 23, 2018); *Troudt v. Oracle Corp.*, No. 16-175, 2018 U.S.Dist.LEXIS 15151 (D. Colo. Jan. 30, 2018); *Pledger v. Reliance Trust*, No. 15-4444, Doc. 101 (N.D. Ga. Nov. 7, 2017); *Marshall v. Northrop Grumman Corp.*, No. 16-6794, Doc. 130

(C.D. Cal. Nov. 3, 2017); *Sims v. BB&T Corp*., No. 15-732, 2017 U.S. Dist. LEXIS 137738, 20 (M.D.N.C. Aug. 28, 2017); *Gordan v. Massachusetts Mutual Life Insurance Co*., No. 13-30184, Doc. 112 (D. Mass. June 22, 2016); *Kruger v. Novant Health*, No. 14-208, Doc. 53 (M.D.N.C. May 17, 2016); *Krueger v. Ameriprise Financial*, Inc., 304. F.R.D. 559 (D. Minn. 2014); *Abbott v. Lockheed Martin Corp*., 286 F.R.D. 388, 405 (S.D. Ill. 2012), and *Abbott*, No. 06-701, Doc. 403 at 3–6, 12 (S.D. Ill. Aug. 1, 2014); *Beesley v. Int'l Paper Co*., No. 06-703, Doc. 240 (S.D. Ill. Sept. 30, 2008), and Doc. 543 (S.D. Ill. Oct. 10, 2013); *Nolte v. Cigna Corp*., No. 07-2046, 2013 U.S.Dist.LEXIS 101165, 6–7 (C.D. Ill. July 3, 2013); *Spano v. Boeing Co*., 294 F.R.D. 114 (S.D. Ill. 2013); *George v. Kraft Foods Global Inc*., No. 08-3799, 2012 U.S.Dist.LEXIS 26536, 6 (N.D. Ill. Feb. 29, 2012)(George II); *In re Northrop Grumman Corp. ERISA Litig*., No. 06-6213, 2011 U.S. 94451, 71 (C.D. Cal. Mar. 29, 2011); *Will v. General Dynamics Corp*., No. 06-698, 2010 U.S.Dist.LEXIS 95630, 5–6 (S.D. Ill. Nov. 22, 2010); *Martin v. Caterpillar Inc*., No. 07-1009, Doc. 173 (C.D. Ill. April 21, 2010); *Tibble v. Edison Int*'l, No. 07-5359, 2009 U.S. Dist. LEXIS 120939, 20, 29 (C.D. Cal. June 30, 2009); *George v. Kraft Foods Global Inc*., 251 F.R.D. 338, 351–52 (N.D. Ill. 2008)(George I); *Taylor v. United Tech. Corp*., No. 06-1494, 2008 U.S.Dist.LEXIS 43655, 15 (D. Conn. June 3, 2008); *Kanawi v. Bechtel Corp*., 254 F.R.D. 102, 111–12 (N.D. Cal. 2008); *Tussey v. ABB Inc*., No. 06-4305, 2007 U.S.Dist.LEXIS 88668, 32 (W.D. Mo. Dec. 3, 2007); *Loomis v. Exelon Corp*., No. 06-4900, 2007 U.S.Dist.LEXIS 46893, 11 (N.D. Ill. June 26, 2007).

5. My work in plaintiffs' class action cases has been taken note of by federal judges. U.S. District Judge James Foreman, in the *Mister* case, *supra*, speaking of my efforts, stated:

> "This Court is unaware of any comparable achievement of public good by a private lawyer in the face of such obstacles and enormous demand of resources and finance."

Order on Attorney's Fees, *Mister v. Illinois Central Gulf R.R.*, No. 81-3006 (S.D. Ill. 1993).

6. District Judge David R. Herndon wrote, regarding my and the firm's handling of the *Wilfong* class action, *supra*:

> Class counsel has appeared in this court and has been known to this Court for approximately 20 years. This Court finds that Mr. Schlichter's experience, reputation and ability are of the highest caliber. Mr. Schlichter is known well to the District Court Judge and this Court agrees with Judge Foreman's review of Mr. Schlichter's experience, reputation and ability.

Order on Attorney's Fees, *Wilfong v. Rent-A-Center*, No. 0068-DRH (S.D. Ill. 2002). Judge Herndon also noted in *Wilfong* that I "performed the role of a 'private attorney general' contemplated under the common fund doctrine, a role viewed with great favor in this Court" and described my action as "an example of advocacy at its highest and noblest purpose." *Id.*

7. In *Beesley v. International Paper*, a similar ERISA excessive fee case that resulted in a settlement of $30 million plus substantial affirmative relief following seven years of litigation, Judge David Herndon observed: "Litigating this case against formidable defendants and their sophisticated attorneys required Class Counsel to demonstrate extraordinary skill and determination. Schlichter, Bogard & Denton and lead attorney Jerome Schlichter's diligence and perseverance, while risking vast amounts of time and money, reflect the finest attributes of a private attorney general." *Beesley v. Int'l Paper Co.*, No. 06-703-DRH, 2014 U.S.Dist.LEXIS 12037, 8 (S.D. Ill. Jan. 31, 2014). Similarly, in *Abbot v. Lockheed Martin*, Chief Judge Reagan observed that "[t] the law firm Schlichter, Bogard & Denton has had a humongous impact over the entire 401(k) industry, which has benefitted employees and retirees throughout the country by bringing sweeping changes to fiduciary practices." *Abbott v. Lockheed Martin Corp.*, 2015 U.S.Dist.LEXIS 93206, at *9 (S.D.Ill. July 17, 2015).

8. In *Will v. General Dynamics*, another ERISA excessive fee case that settled for $16.5 million plus significant affirmative relief after four years of litigation, U.S. District Judge Patrick Murphy found that litigating the case and achieving a successful result for the class

"required Class Counsel to be of the highest caliber and committed to the interests of the participants and beneficiaries of the General Dynamics 401(k) Plans." *Will v. General Dynamics Corp.*, No. 06-698-GPM, 2010 U.S.Dist.LEXIS 123349, at 9 (S.D. Ill. Nov. 22, 2010).

9. Judge Baker, in *Nolte v. Cigna*, commented that Schlichter, Bogard & Denton is the "preeminent firm in 401(k) fee litigation" and has "persevered in the face of the enormous risks of representing employees and retirees in this area." *Nolte v. Cigna Corp.*, No. 07-2046, Doc. 413 at 1, 5 (C.D.Ill. Oct. 15, 2013).

10. In approving a settlement including $32 million plus significant affirmative relief, Chief Judge William Osteen in *Kruger v. Novant Health, Inc.*, No. 14-208, Doc. 61, at 7–8 (M.D.N.C. Sept. 29, 2016) found that "Class Counsel's efforts have not only resulted in a significant monetary award to the class but have also brought improvement to the manner in which the Plans are operated and managed which will result in participants and retirees receiving significant savings[.]"

11. I have also spoken on ERISA litigation breach of fiduciary duty claims at national ERISA seminars as well as other national bar seminars.

12. In the decades of my private practice, I have never been reprimanded sanctioned or otherwise disciplined with respect to any aspect of the practice of law.

13. Since 2005, my firm and I have been investigating, preparing and handling, on behalf of plan participants, numerous cases against fiduciaries of large 401(k) plans alleging fiduciary breaches including excessive fees, conflicts of interests and prohibited transactions under ERISA. My firm has filed these cases in numerous judicial districts throughout the United States, including districts within the First, Second, Third, Fourth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits.

14. No law firm had ever brought such a case before my firm did, and no other law firm has brought the number of cases our firm has brought, one of which was the first full trial of such a case, resulting in a judgment for the plaintiffs that was affirmed in part by the Eighth Circuit. *Tussey v. ABB, Inc.*, No. 06-4305, 2012 U.S.Dist.LEXIS 45240 (W.D. Mo. Mar. 31, 2012), aff'd in part, rev'd in part, 746 F.3d 327 (8th Cir. 2014). As Judge Laughrey noted in that case, "[i]t is well established that complex ERISA litigation involves a national standard and special expertise. Plaintiffs' attorneys are clearly experts in ERISA litigation." *Tussey v. ABB, Inc.*, No. 06-4305, 2012 U.S.Dist.LEXIS 157428, at *9–10 (W.D. Mo. Nov. 2, 2012)(citations omitted).

15. Before my firm brought ERISA 401(k) excessive fee cases, virtually no firm was willing to bring such a case, and I know of no other firm that has made the financial and attorney commitment to such cases to this date.

16. Several of the 401(k) cases my office filed were dismissed and the dismissals upheld by the Courts of Appeals. *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009); *Loomis v. Exelon Corp.*, 658 F.3d 667 (7th Cir. 2011); *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011). Others had summary judgment granted against the plaintiffs in whole or in part. *Kanawi v. Bechtel Corp.*, 590 F. Supp. 2d 1213 (N.D. Cal. 2008); *Taylor v. United Techs. Corp.*, No. 06-3194, 2009 U.S.Dist.LEXIS 19059 (D. Conn. Mar. 3, 2009), aff'd, 354 Fed. Appx. 525 (2d Cir. 2009); *George v. Kraft Foods Global, Inc.*, 684 F.Supp. 2d 992 (N.D. Ill. 2010), rev'd in part, 641 F.3d 786 (7th Cir. 2011); *Tibble v. Edison Int'l*, 639 F. Supp. 2d 1074 (C.D. Cal. 2009), aff'd, 729 F.3d 1110 (9th Cir. 2013), vacated, 135 S. Ct. 1823 (2015), aff'd on remand, 820 F.3d 1041 (9th Cir. 2016).

17. My firm also successfully petitioned the United States Supreme Court in the first and only ERISA 401(k) excessive fee case taken by the Supreme Court in *Tibble v. Edison International*. In a 9-0 unanimous decision, the Supreme Court vacated the Ninth Circuit's affirmance of the summary judgment order and held that an ERISA fiduciary has a continuing duty to monitor plan investments and remove imprudent ones regardless of when they were added. *Tibble v. Edison Int'l*, 135 S.Ct. 1823 (2015). This was a watershed and landmark decision in ERISA 401(k) litigation. Sitting *en banc*, ten judges of the Ninth Circuit on remand unanimously vacated the district court's summary judgment ruling and remanded to the district court to determine whether the defendants violated their continuing duty to monitor the 401(k) plan's investments. *Tibble v. Edison Int'l*, 843 F.3d 1187, 1199 (9th Cir. 2016). Following remand, in August 2017, the plaintiffs obtained a judgment of $13.4 million in plan losses and investment opportunity. *Tibble,* No. 07-5359, 2017 U.S.Dist.LEXIS 130806 (C.D. Cal. Aug. 16, 2017); *Tibble,* Docs. 570, 572.

18. As a practical matter, litigants such as Mary Bell, John Hoffman, Pamela Leinonen, Janice Grider and Cindy Prokish could not afford to pursue litigation against well-funded fiduciaries of a multi-billion dollar plan sponsored by a large employer such as Anthem in federal court on any basis other than a contingent fee. I know of no law firm in the United States, of the very few firms which would even consider handling such a case as this or that would handle any ERISA class action, with an expectation of anything but a percentage of the common fund created.

19. The contingency fee agreements entered into between my firm and each of the five named Plaintiffs in this case provide for our fee to be one-third of any recovery plus

expenses. The plaintiffs in other ERISA fiduciary breach cases brought by my firm have also signed similar agreements calling for a one-third contingency fee plus expenses.

20. These kinds of cases involve tremendous risk, require finding and obtaining opinions from expensive, unconflicted, consulting and testifying experts in finance, investment management, fiduciary practices, and related fields, and are extremely hard fought and well-defended.

21. A law firm that brings a putative class action such as this must be prepared to finance the case through a trial and appeals, all at substantial expense. For example, in *Tussey v. ABB*, *supra,* seven experts testified at trial, and the two Defendant groups therein had 15 or more lawyers present in the courtroom throughout the month long trial. In addition, all parties, including plaintiffs, had a technology team present throughout. In addition, our firm expended over $2,000,000 in expenses by the conclusion of the trial therein, and continue to carry them today. That case continues on appeal after being tried almost 8 and a half years ago. My firm has to this date received nothing in fees or expense reimbursements.

22. Based on my experience, the market for experienced and competent lawyers willing to pursue 401(k) ERISA Fee Litigation is a national market, and the rate of 33 1/3% of any recovery, plus costs is necessary to bring such cases. This is the rate that a qualified and experienced attorney would negotiate at the beginning of the litigation, and the rate found reasonable in similar 401(k) ERISA fee cases in numerous Federal District Courts.

- *Gordan v. Mass. Mutual Life Ins. Co.*, No. 13-30184, Doc. 144 at 4 (D. Mass. Nov. 3, 2016);
- *Kruger v. Novant Health, Inc.*, No. 14-208, Doc. 61 (M.D.N.C. Sept. 29, 2016);
- *Spano v. Boeing Co.*, No. 06-743, Doc. 587 (S.D.Ill. Mar. 31, 2016)(Rosenstengel, J.);

- *Abbott v. Lockheed Martin Corp.*, 2015 U.S.Dist.LEXIS 93206, at *7 (S.D.Ill. July 17, 2015)(Reagan, J.)

- *Krueger v. Ameriprise Financial Inc.*, No. 11-2781, 2015 U.S.Dist.LEXIS 91385, at *8–9 (D.Minn. July 13, 2015);

- *Beesley v. Int'l Paper Co.,* No. 06-703, 2014 U.S.Dist.LEXIS 12037, at *7 (S.D.Ill. Jan. 31, 2014)(Herndon, J.);

- *Nolte v. Cigna Corp.*, No. 07-2046, 2013 U.S.Dist.LEXIS 184622, at *3–4 (C.D.Ill Oct. 15, 2013);

- *George v. Kraft Foods Global*, No. 07-1713, 2012 U.S.Dist.LEXIS 166816, at *2 (N.D.Ill. June 26, 2012);

- *Will v. General Dynamics*, No. 06-698, 2010 U.S.Dist.LEXIS 123349, at *7–8 (S.D.Ill. Nov. 22, 2010)(Murphy, J.); and

- *Martin v. Caterpillar, Inc.*, No. 07-1009, 2010 U.S.Dist.LEXIS 145111, at *9–11 (C.D.Ill. Sept. 10, 2010).

23. The kind of long-term expensive commitment of time and resources is needed if plan participants are to receive full compensation for their losses in such cases. Because my firm has committed to doing this in each case we pursue, it is my opinion that defendants take into account this firm's long-term commitment to these cases in assessing their costs and the likelihood of success.

24. Schlichter, Bogard & Denton does not bill clients on an hourly basis.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and that this declaration was executed this 5th day of July, 2019, in St. Louis, Missouri.

/s/ Jerome J. Schlichter
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**

DECLARATION OF TROY A. DOLES

I, Troy A. Doles, declare as follows:

1. I am a partner at the law firm of Schlichter Bogard & Denton, LLP. I am one of the attorneys representing the Plaintiffs in this matter. This declaration is submitted in support of Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Case Contribution Awards for Named Plaintiffs.

2. I have been active in all aspects of this litigation. I am familiar with the facts set forth below and able to testify to them based on my personal knowledge or review of the records and files maintained by this firm in the regular course of its representation of Plaintiffs in this case.

3. I am licensed to practice in the States of Missouri and Illinois. I am admitted to practice in the United States Supreme Court, the Seventh and Eighth Circuit Courts of Appeal, and numerous district courts across the country.

4. I received my Bachelor of Arts from Indiana University in 1992 and my Juris Doctorate from Saint Louis University in 1996. I have been in the private practice of law for over

22 years. I have been actively engaged in complex litigation, including class actions, since 1999. I have been exclusively involved in national ERISA excessive fee class actions involving 401(k) plans and other defined contribution plans since 2006.

5. As set for the in the Memorandum in Support of Plaintiffs' Motion, the Middle District of North Carolina recently approved hourly rates for Schlichter, Bogard & Denton when approving attorneys' fees of one-third of the settlement proceeds in an ERISA excessive fee class action. *Sims v. BB&T Corp.,* No. 15-cv-00732, Doc. 450 at 7−8, (M.D.N.C. May 6, 2019) and *Clark v. Duke University*, 16-cv-1044, Doc. 166 at 8−9 (M.D.N.C. Jun. 24, 2019). These hourly rates are as follows: for attorneys with at least 25 years of experience, $1,060 per hour; for attorneys with 15–24 years of experience, $900 per hour; for attorneys with 5–14 years of experience, $650 per hour; for attorneys with 2–4 years of experience, $490 per hour; and for Paralegals and Law Clerks, $330 per hour.

6. To calculate the lodestar, Schlichter, Bogard & Denton applied these rates to the number of hours incurred by attorneys and non-attorneys during this litigation. This calculation is shown in the following table.

Experience	Hours	Rate	Total
25 Years +	365.80	$1,060.00	387,748.00
15–24 Years	1,494.90	$900.00	1,345,410.00
5–14 Years	5,034.10	$650.00	3,272,165.00
2–4 Years	925.80	$490.00	453,642.00
Attorney Total	**7,820.60**		**$5,458,965.00**
Paralegals and Law Clerks Total	**1,354.20**	**$330.00**	**$446,886.00**
Total of All Hours	**9,174.80**		**$5,905,851.00**

7. As set forth in the above table, based on the firm's billing records, Schlichter, Bogard & Denton expended to date 7,820.60 hours of attorney time and 1,354.20 hours of paralegals and law clerks.

8. Investigation and Preparation of Complaint: Starting in 2014, Schlichter, Bogard & Denton began their investigation of the claims at issue in this lawsuit. The attorneys conducted in-depth investigative analysis and research of publicly available documents, including summary plan descriptions, prospectuses, and the Anthem 401(k) Plan Forms 5500 filed with the Department of Labor, among other sources. The investigation included many meetings, both in-person and on the phone with Plan participants. The in-person meetings with Plan participants required attorneys to travel to multiple locations across the country where the participants reside. These meetings were invaluable to the attorneys in gaining additional understanding relating to the operation and administration of the Plan, as well as fee and performance disclosures concerning the Plan's investments and expenses.

9. During the investigation, Schlichter, Bogard & Denton conducted extensive research and legal analysis of potential claims and performed financial analyses of the Plan's estimated losses. This required an evaluation of all expenses paid by the Plan for investment and administrative services, and a performance analysis of the Plan's investments, in particular the Plan's investment in a money market fund. Once a decision was made to pursue an action against the Anthem Defendants, Schlichter, Bogard & Denton then began their preparation and drafting of the complaint. The complaint was filed on December 29, 2015.

10. As described in additional detail below, Class Counsel's time devoted to this category also includes hours associated with the research, analysis, and preparation of the second and proposed third amended complaints in this action. *E.g.,* Doc. 87 (second amended); Doc. 105

(third amended). In all, Class Counsel expended hundreds of hours drafting the complaints in this case.

11. Motion to Dismiss: Defendants filed their motion to dismiss on April 8, 2016. Doc. 37. Their 30-page memorandum was extensive and detailed. Doc. 38. Defendants raised complex legal arguments that addressed all of Plaintiffs' claims. Plaintiffs' attorneys spent extensive time responding to their arguments, which included conducting research and analysis of relevant authority. Plaintiffs filed their opposition on May 9, 2016. Doc. 42. The Court denied Defendants' motion in its entirety on March 23, 2017. Doc. 80.

12. Motion for Class Certification: Plaintiffs filed their motion for class certification on November 10, 2017. Doc. 117. The briefing, accompanied by declarations and deposition testimony, was extensive and took significant time to prepare. Class certification was vigorously contested by Defendants. Defendants retained an expert witness who authored a report in opposition to class certification. Plaintiffs' attorneys expended time and effort to analyze his opinions.

13. 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.

14. After additional briefing, 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.

Doc. 347.

15. In its class certification orders, the Court appointed Class Representatives and appointed the law firm of Schlichter Bogard & Denton as Class Counsel.

16. Discovery: Following the Court's denial of Defendants' motion to dismiss, Plaintiffs proceeded with discovery. At the outset, the parties initially disputed the terms of a protective order and the extent of redactions Defendants could make to responsive documents. The Court entered its order in favor of Plaintiffs on that issue. Doc. 73.

17. Plaintiffs also served their written discovery on the Defendants and responded to the Defendants' discovery requests issued to all of the Named Plaintiffs. Apart from extensive discussions with their clients, Schlichter, Bogard & Denton also reviewed and analyzed all materials provided by their clients, including participant communications received by them from Defendants, in response to the discovery requests, and prepared responsive documents for production. In all, thousands of hours were spent during these phases of the case.

18. Throughout the course of discovery, Class Counsel diligently reviewed and analyzed over 76,000 pages of documents that were produced by Defendants and third parties. A detailed review and analysis of the document production was crucial for Plaintiffs to prove their

claims. Without a firm understanding of the core materials to support their claims, Plaintiffs would have been unable to successfully prosecute this action.

19. To support those efforts, Schlichter, Bogard & Denton developed a document review and analysis protocol for systematically and methodically evaluating the document production. It was incumbent on Plaintiffs' attorneys to review each and every document produced in this litigation. The ongoing review and analysis of the document production was aided by numerous internal discussions and meetings to ensure a proper and efficient evaluation process, as well as to inform the litigation strategy when responding to particular motions and other challenges presented by Defendants over the course of the litigation.

20. Apart from ongoing tasks related to the document production, Class Counsel defended 5 depositions of the Named Plaintiffs and took 11 depositions of fact witnesses from Defendants and Vanguard. Each of the fact witness depositions required extensive preparation and ongoing coordination among the litigation team to ensure an effective examination.

21. Throughout all stages of the case, including discovery, the attorneys at Schlichter, Bogard & Denton met internally, both in large and small groups, to thoroughly discuss the legal theories at issue, the development of the case, and other issues that arose during the litigation. Those internal meetings were critical to obtaining a successful recovery on behalf of the Class.

22. Experts: The parties disclosed 7 expert witnesses, 3 for Plaintiffs and 4 for Defendants. Plaintiffs initially disclosed their experts on May 15, 2018. Class Counsel took 4 expert depositions, and defended their experts in each of their 3 separate depositions. These experts were in fields of investment management, fiduciary practices, recordkeeping, and costs of 401(k) plans. Their depositions required familiarity with these fields. Plaintiffs' attorneys expended significant time and effort in working with their experts to prepare their reports and in

preparation for their depositions, particularly due to the complex issues these experts addressed in their reports. Plaintiffs' attorneys also conducted thorough research and analysis concerning the expert opinions and bases for such opinions offered by Defendants' experts.

23. *Daubert* Challenges and Motion for Summary Judgment: On September 13, 2018, Defendants moved for summary judgment. Doc. 214. The briefing on summary judgment was extensive and voluminous. In order to successfully oppose Defendants' motion, Plaintiffs' attorneys devoted substantial time to prepare their legal arguments in response. Given the volume of evidence submitted by Defendants, including 126 exhibits and 3 declarations, Plaintiffs' attorneys also devoted extensive time to analyze those facts and develop contrary and undisputed facts to demonstrate a genuine issue of material fact. In opposing summary judgment, Plaintiffs relied on an additional 104 filed exhibits. Doc. 268. On January 30, 2019, the Court overwhelmingly denied Defendants' motion. Doc. 348.

24. Because Plaintiffs relied on their experts in establishing their claims for breach of fiduciary duty, Defendants moved to exclude their opinions in connection with their summary judgment briefing. Docs. 256, 258, 260. Plaintiffs opposed those motions. Docs. 288, 290, 291.

25. Pre-Trial Preparations: The Court set this case for trial beginning on March 18, 2019. Doc. 323.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on July 5, 2019 in St. Louis, Missouri.

/s/ Troy A. Doles
Troy A. Doles

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**

DECLARATION OF STEWART BROWN, PHD., CFA

1. I hold a PhD. in finance from the University of Florida (1974) and the professional designation of Chartered Financial Analyst. I am currently Professor Emeritus of Finance at Florida State University. I am author or co-author of six law review articles on mutual fund investment advisory fees. My vita is included at Appendix A.

2. I have reviewed the Settlement Agreement ("Settlement") between Plaintiffs and ATH Holding Company, LLC, the Board of Directors of ATH Holding Company, LLC and the Pension Committee of ATH Holding Company, LLC ("Anthem") and it provides for substantial monetary benefits to participants and beneficiaries of the Anthem 401(k) Plan (formerly the WellPoint 401(k) Retirement Savings Plan)("the Plan"). The Settlement also provides for significant affirmative relief over the three-year settlement period.

3. My assignment was to calculate the economic value of certain changes to the operation and administration of the Plan. In particular, I understand from my review of the Settlement and from discussions with Class Counsel that Anthem will be required to, in relevant part: (1) conduct a competitive bidding process for

the provision of recordkeeping and administrative services provided to the Plan; and (2) utilize an independent consultant familiar with fixed income investments who will make a recommendation on whether to retain the Plan's money market fund, or add a stable value or comparable fund. *See generally* Settlement, §§10.3 – 10.6 [Doc. 367-01].

4. My analysis considers the savings from a decrease in recordkeeping fees, and the growth of Plan participants' retirement savings assuming that the Plan's fiduciaries replace the money market fund in favor of a stable value alternative.

I. Savings from decrease in recordkeeping fees

5. Under the terms of the Settlement, Philips is required to conduct a request for proposal for basic recordkeeping services. Fee proposals for these services will include fixed fee and per participant proposals.

6. In valuing the cost savings obtained through the competitive bidding process, I compared the fee currently paid by the Plan ($37 per participant) as noted in Plaintiffs' expert report and the reasonable fee proposed by the same expert that the Plan should have paid ($25 per participant). Doc. 267-69 at 36 of 62. I assumed the participant counts as reported in this report to remain the same.

7. In 2016 there were 63,952 plan participants and a saving of $12 per participant per year would generate annual savings of $767,424 under the assumption that the number of Plan participants does not grow over the next three years. Over a three-year period, I determined that the Plan will achieve fee savings

of at least $2,302,272. Using the current one, two and three-year government bond yields as discount rates, I determined that the present value of that amount would be $2,223,195. This value is conservative because the number of Plan participants is likely to grow somewhat as it did from the end of 2008 to the present

II. Estimated growth of Plan assets through a stable value investment

8. Under the terms of the Settlement, Anthems will publish a communication to current Plan participants explaining the risks and benefits of the Plan's money market fund. It shall also utilize an independent consultant to review the Plan lineup and recommend whether to retain a money market fund or whether to add a stable value or comparable fund.

9. Due to the benefits of offering a stable value fund in comparison to a money market fund, as alleged in the complaint, there is a reasonable basis to conclude that the consultant will recommend to the Plan fiduciaries that a stable value fund be added as the Plan's capital preservation investment option.

10. Assuming that a stable value fund replaced the Plan's money market fund, which is the Vanguard Prime Money Market Fund, I calculated the additional growth that could be achieved by Plan participants invested in the money market fund if their retirement savings are invested in a stable value fund over a three-year period.

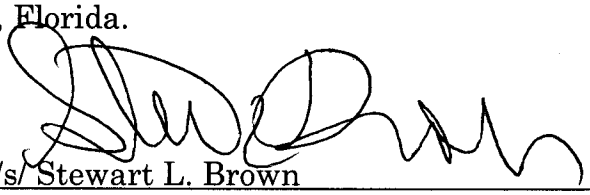
11. Given that the Plan is currently heavily invested in Vanguard mutual funds which have lower than average expense ratios, it is reasonable to assume that the consultant will look closely at Vanguard stable value funds. Accordingly, I

looked at current and historical rates on these Vanguard funds in order to calculate projected growth over a three-year period. The average spread in yield of the Vanguard Stable Value Fund over the Vanguard Prime Money Market (Admiral) Fund over the past ten years has been 2.25 percent. However, these spreads have narrowed recently. The spread over the last year has been .67 percent. It is likely that this spread will widen in the future and interest rates return to historical norms.

12. In order to bracket an expected growth over the next three years I used both the current one-year spread and the average ten-year spread. Undiscounted three-year savings using the one year spread of .67 percent and the balance in the Vanguard Prime Money Market Fund as of December 31, 2017 yields additional growth of $9,848,646 and discounted savings of $9,474,645 using the one, two and three year government bond yield as a discount rate. This is likely to be a conservative number as Plan assets are likely to grow over the next three years and spreads are likely to widen to historical norms. Using the ten-year average spread I calculate additional growth of $33,029,712 and discounted savings of $31,775,413.

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

Executed on July 5, 2019 at Tallahassee, Florida.



/s/ Stewart L. Brown
Stewart L. Brown

Stewart L. Brown Ph. D, CFA

2364 Cypress Cove Dr.
Tallahassee, Florida 32306
E-Mail:profbrown@comcast.net

Telephone:(850) 576-6329
Cell : (850) 445-3458

EDUCATION

Ph.D., Business Administration, Major; Finance; Minors Economics, Quantitative Analysis, University of Florida, December, 1974

MBA, Finance Concentration, University of Florida, June 1971

BSBA, Finance Major, Cum Laude, University of Florida, June 1970

EMPLOYMENT

January 2005 to Present: Professor Emeritus, Florida State University

January 2000 to December 2004: **Service Professor of Finance**, Florida State University.

September 1988 to December 1999: **Professor of Finance**, Florida State University.

August 1985 to March 1986: **Executive Director**, (Florida) Comptroller's Task Force on Securities Regulation.

September 1979 to August 1988: **Associate Professor of Finance**, Florida State University.

September 1974 to August 1979: **Assistant Professor of Finance**
Florida State University

Other Significant Experience

Developed an Internet Course on Investment Planning for the FSU Center for Professional Development. The course is part of a very successful series offered to candidates seeking the Certified Financial Planner professional designation.

Advisor to Florida State Board of Administration, Sept. 1983 to June 2006. The SBA is a 100 billion dollar public pension fund.

Academic Intern, Chicago Board of Trade, June 1980.

Conducted several two-week courses on hydrocarbon project evaluation for the Petroleum Training Institute (Nigeria) and Roy M. Huffington & Co. (Indonesia). Also conducted one week courses for Amoco and Citgo and
lectured on real options for British Petroleum in Aberdeen, Scotland.

Awarded Professional Designation - **Chartered Financial Analyst**, September,1979.(Charter # 5831)

Retained by the Securities and Exchange Commission to represent the Commission in administrative hearings against stockbrokers accused of mishandling retail securities accounts. Testified twice for the Commission.

Presentations in the Broker Dealer Training Program jointly offered by the Florida Office of the Comptroller and the North American Securities Administrators Association, annually 1992-98. Lecture on churning, suitability, collateralized mortgage obligations, institutional suitability, options and micro cap fraud. Trained securities examiners on computer analysis of retail securities accounts.

Conducted several one-day training seminars on computer evaluation of retail brokerage accounts for the Florida Division of Securities.

Member of Derivatives Task Force sponsored by Florida Association of Court Clerks & Comptrollers, 1995.

Instructor, Florida School of Banking, 1971 to 1991.

AFFILIATIONS:

Financial Analysts Federation, Jacksonville Financial Analysts Society

PUBLICATIONS:

“Mutual Fund Advisory Fees: An Objective Fiduciary Standard”, University of Pennsylvania Journal of Business Law 21,477-532

“Some Clarity on Mutual Fund Fees,” with Steven Pomerantz, University of Pennsylvania Journal of Business Law 20, 767-814.

“Mutual Funds and the Regulatory Capture of the SEC”, University of Pennsylvania Journal of Business Law 19, 701-749.

"Mutual Fund Advisory Fee Litigation: Some Analytical Clarity," Journal of Business and Securities Law, Spring, 2016.

"Mutual Fund Advisory Fees: New Evidence and a Fair Fiduciary Duty Test," co-authors, Oklahoma Law Journal, Spring, 2008.

"Mutual Fund Advisory Fees: The Cost of Conflicts of Interest," co-author, Journal of Corporation Law, Spring 2001.

"On the Existence of Sub-Standard Securities Markets," co-author in Advances in Financial Economics, Hershey, M., John,K., and Makhija, A., eds., London, Elsevier Sciences Inc., Spring 2001.

"Design Considerations for Large Public Sector Defined Contribution Plans," co-author, Financial Services Review, Fall 2000.

"Measuring Strategic Investment Value." co-author, Papers and Proceedings of The Society of Petroleum Engineers, October, 2000.

Fundamentals of Energy Futures and Options, with Steven Errera, Pennwell Press, September, 1999.

"Churning: Excessive Trading in Retail Securities Accounts" Fall-1996, Financial Services Review.

"Limited Partnerships and the Emerging Tort of Suitability Under the Florida Securities and Investor Protection Act," Florida Bar Journal, co-authors, January 1992.Reprinted in Securities Arbitration 1992, Practising Law Institute, July 1992.

"Investment Aspects Relating to the Suitability of Limited Partnership Interests," co-authors, in Securities Arbitration1991, Practising Law Institute, New York, July 1991.

"Calculating Damages in Churning and Suitability Cases," in Securities Arbitration 1991, co-author, Practising Law Institute, New York, July 1991.

"Quantitative Measures and Standards of Excessive Trading Activity," in Securities Arbitration 1991, Practising Law Institute, New York, July 1991.

"Interest Rate Sensitivity and Maturity Gap (Mis)Management: A Critique", The Review of Research in Banking and Finance, co-author,(Fall 1988).

"Using Stock Index Futures to Adjust Portfolio Betas," Akron Business Review, co-author, (Fall 1987).

"A Reformulation of the Portfolio Model of Hedging:Reply" American Journal of Agricultural Economics, (November 1986),

Trading Energy Futures.QUORUM Books (Westport,CT) with Steven Errera, March 1987.

"A Reformulation of the Portfolio Model of Hedging," American Journal of Agricultural Economics, (August 1985),

"Petroleum Futures Trading: Some Practical Applications of the Trade; Discussion," Review of Research in Futures Markets, Vol.3,#2, 1984, co-author.

"Trading the Paper Refinery," Commodities,(July 1983),co-author.

"How Bank Bond Traders Use Financial Futures: Discussion," Review of Research in Futures Markets, Vol. 1, 1982 co-author

"Assimilating Earnings and Split Information - Is the Capital Market Becoming More Efficient?," co-author, Journal of Financial Economics, (December 1981),.

"Heating Oil Spreads Ignite in U.S.,U.K.," Commodities, (September 1981) co-author.

"Federal Regulation of Currency Futures Trading, "co-author, Florida State University Law Review, (Spring 1981)

"Biased Estimates and Unstable Betas," co-author, Journal of Finance, (March,1980),.

"Earnings Announcements and Auto-Correlation: An Empirical Test," Journal of Financial Research, (Fall 1979).

"Auto-Correlation, Market Imperfections, and the Capital Asset Pricing Model," Journal of Financial and Quantitative Analysis, (December 1979).

"Earnings Changes, Stock Prices and Market Efficiency," Journal of Finance, (March 1978).

"Choice Dilemma as a Predictor of Group Risk Behavior," co-author, Decision Sciences, (November 1976).

EXPERT WITNESS EXPERIENCE

Testified in excess of seventy times, largely in proceedings related to retail securities and stockbroker mis-conduct, e.g., churning, suitability and associated damages. Testified in state (Florida) and federal court as well as in arbitration hearings conducted by The American Arbitration Association, The National Association of Securities Dealers and The New York Stock Exchange. Testified for the Securities & Exchange Commission, the Florida Division of Securities and the Iowa Securities Department in administrative hearings related to stockbroker licensing. Grand Jury testimony for the US Justice Department (Middle District of Florida) in the only known criminal churning case. Worked with the FBI (Tampa Office) on screening for micro-cap fraud. Extensive experience in options and penny stock cases. Institutional investments experience including mutual funds, bank trust departments, exchange funds and money management cases.

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

DECLARATION OF SHERI O'GORMAN

I, Sheri O'Gorman, under penalty of perjury pursuant to 28 U.S.C. §1746, declare as follows:

1. I am the Office Administrator of Schlichter, Bogard, & Denton, LLP and the Custodian of Records, in charge of payment of expenses in this matter. I have examined the records and we have incurred case expenses totaling $513,015.32 as of June 30, 2019.

2. Below is a list of expenses according to their categories:

Description	Total
Depositions	$93,341.38
Experts and Consultants	$334,120.72
Filing, Transcripts, Subpoena Services and Related Costs	$3,286.10
Mediation and Settlement Costs	$8,873.94
Copies and Postage	$18,950.85
Data Development and Document Organization	$6,902.77
Research and Investigation	$8,521.10
Travel, Lodging, and Parking	$39,018.46
Total	**$513,015.32**

3. I am also in charge of monitoring attorney and staff time billed. During the litigation in this case the following chart shows the amount of hours spent by attorneys broken down by experience:

Description	Total Hours
2-4 Years	365.80
5-14 Years	1,494.90
15-24 Years	5,034.10
25 and Above	925.80
Total Attorney Hours	**7,820.60**

The following chart shows the amount of hours spent by Paralegals and Law Clerks:

Description	Total Hours
Paralegal	1,320.00
Law Clerk	34.20
Total Non-Attorney Hours	**1,354.20**

4. More detailed billing records can be made available for the Court's review upon request.

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

Executed on July 5, 2019.

Sheri O'Gorman