IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

RONALD TUSSEY, et al., Plaintiffs, v. ABB, INC., et al., Defendants.	Case No.: 06-CV-04305-NKL

JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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

1. Plaintiffs brought this action over twelve years ago alleging, among other things, that ABB Inc., John W. Cutler, Jr., the Pension Review Committee of ABB Inc., the Pension & Thrift Management Group of ABB Inc., and the Employee Benefits Committee of ABB Inc. ("the ABB Defendants") breached their duties under the Employee Retirement Income Security Act of 1974 (ERISA) by causing the Personal Retirement Investment and Savings Management Plan for Employees of ABB Inc. and the Personal Retirement Investment and Savings Management Plan for Represented Employees of ABB Inc. (the "Plan" or "Plans") to pay unreasonable administrative fees and by selecting imprudent investments.

2. This case has been vigorously litigated for well over a decade. After several months of arm's length negotiations with the assistance of a national mediator and a court-appointed mediator, the parties reached a settlement that provides substantial monetary relief in exchange for an end to this long-running case and a release of claims.

3. The Parties request that the Court preliminarily approve the Settlement Agreement that is attached hereto as Exhibit A.

4. The Settlement Class is defined as:

> [A]ll persons who participated in either Plan and had an Active Account at any time during the Class Period, including any Beneficiary of a deceased person who participated in a 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 who participated in a Plan at any time during the Class Period. Excluded from the class are the ABB Defendants and any individual who served on a Committee identified as an ABB Defendant.

5. The Settlement Agreement is fundamentally fair, adequate, and reasonable in light of the circumstances of this case and preliminary approval of the Settlement Agreement is in the best interests of the Class Members. In return for a release of the Class Representatives' and Class Members' claims, ABB Defendants have agreed to pay a sum of $55,000,000 into a Gross Settlement Fund.

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

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

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

WHEREFORE, the Parties request the following:

- That the Court grant preliminary approval to the Settlement Agreement;
- That the Court approve the Class Notices for distribution to the Settlement Class;
- That the Court order any interested party to file any objections to the Settlement Agreement within the time limit set by the Court and contained in the Settlement Agreement, with supporting documentation, order such objections, if any, be served on counsel for both parties as set forth in the proposed Preliminary Approval Order and Class Notice, and permit the Parties the right to limited discovery from any objector as provided for in the proposed Preliminary Approval Order;
- That the Court schedule a Final Fairness Hearing for the purpose of receiving evidence, argument, and any objections relating to the Parties' Settlement Agreement; and,
- That following the Final Fairness Hearing, the Court enter an Order granting final approval of the Parties' Settlement Agreement and dismissing the action with prejudice.

Dated: March 28, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2019, I served this document on all parties via the Court's CM/ECF system.

/s/ Jerome J. Schlichter

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

RONALD TUSSEY, et al., Plaintiffs, v. ABB, INC., et al., Defendants.	Case No.: 06-CV-04305-NKL

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

Plaintiffs brought this action over twelve years ago alleging, among other things, that ABB, Inc., John W. Cutler, Jr., the Pension Review Committee off ABB, Inc., the Pension & Thrift Management Group of ABB Inc., and the Employee Benefits Committee of ABB Inc. (collectively referred to as the "ABB Defendants") breached their duties under the Employee Retirement Income Security Act of 1974 (ERISA) by causing the Personal Retirement Investment and Savings Management Plan for Employees of ABB, Inc., and the Personal Retirement Investment and Savings Management Plan for Represented Employees of ABB, Inc. (the "Plan" or "Plans") to pay unreasonable administrative fees and by selecting imprudent investments for inclusion in the Plans.

This case has been vigorously litigated for well over a decade, including a month long trial, two appeals, two remands, and extensive follow-on proceedings in this Court. This case has also had two prior all-day mediations before trial that were not productive. Ultimately, and after several months of arm's-length negotiations with the assistance of both a national mediator and a court-appointed mediator, the parties reached a Settlement that provides substantial monetary

relief. In light of the litigation risks further prosecution of this action would inevitably entail, it is proper for the Court to: (1) preliminarily approve the proposed Settlement; (2) approve the proposed form and method of notice to the Settlement Class; and (3) schedule a hearing at which time the Court will consider final approval of the Settlement.

I. THE ACTION

Plaintiffs filed this action on December 29, 2006. After a month-long trial in January of 2010, the Court issued an Order and Judgment on March 31, 2012, finding, among other things, that the Plan's fiduciaries breached their duties to the Plan participants: (1) when they failed to monitor recordkeeping costs, causing losses of $13.4 million (herein "Claim 1"); and, (2) when they removed the Vanguard Wellington Fund and replaced it with the Fidelity Freedom Funds, causing losses of $21.8 million (herein "Claim 2"). In addition, the Court awarded injunctive relief in favor of the Plaintiffs and the Plans' participants. The Court also ordered that the issue of an award of attorney fees to Plaintiffs and any other remaining issues, including the award of costs, be determined at a later date.

On June 15, 2012, the Court granted Plaintiffs' request to approve a notice plan apprising class members of Plaintiffs' motion for attorneys' fees; Plaintiffs' request that costs and expenses be recovered from the Defendants; and, that the costs for Plaintiffs' experts be recovered from the damages award. Defendants paid for the dissemination of these notices. In response to these notices, no class member submitted an objection. On November 2, 2012, the Court granted Plaintiffs' motion for attorney's fees and costs. Doc. 718. In that same order, the Court granted Plaintiffs' request that certain costs, including Plaintiffs' expert costs and the named Plaintiffs' incentive awards be paid out of the Class damages award. *Id*.

Since the entry of the above orders and over the last six years, this matter has been appealed to the Eighth Circuit Court of Appeals on two separate occasions and remanded to this Court. On the first appeal, the Court of Appeals upheld the Court's excessive recordkeeping judgment against ABB Defendants related to Claim 1 but vacated the damages award related to Claim 2. ABB Defendants dispute the remaining claims and allegations and deny liability for any alleged fiduciary breaches or ERISA violations.

II. THE TERMS OF THE PROPOSED SETTLEMENT

A. Relief to Class Members.

In exchange for releases and for the dismissal of the action and for entry of a judgment as provided in the Settlement, ABB Defendants will make available to Class Members[1] a $55 million settlement fund, compensating current and former participants in the Plans. All of the money will be paid out; ABB Defendants will not receive anything back. The Gross Settlement Amount will be used to pay the Plan participants' recoveries as well as Class Counsel's Attorneys' Fees and Costs, Administrative Expenses of the Settlement, and Class Representatives' Compensation as described in the Settlement.

Many Class Members will automatically receive their distributions directly into their tax-deferred retirement account. Those who left the Plan and no longer have an account with a balance will be given the option to receive their distributions in the form of a check made out to them individually or as a roll-over into another tax-deferred account. As a result, most Class Members will receive their distributions tax-deferred, further enhancing the significant monetary recovery.

[1] Unless stated otherwise, defined terms have the same definition as described in the Settlement Agreement.

As noted above, in its Order and Judgment, the Court previously required significant affirmative relief relating to the future administration of the Plans. Among other relief, this affirmative relief included conducting a request for proposal for the provision of recordkeeping services, the rebating of revenue sharing back to participants, and the loyal selection of investments for inclusion in the Plans. ABB Defendants maintain that they have implemented all Court-ordered affirmative relief.

B. Notice and Class Representatives' Compensation

The notice costs and all appropriate costs related to the administration of the Settlement will come out of the $55,000,000 Gross Settlement Amount. In addition, the award of incentive payments in the amount of $25,000 for each of the Class Representatives will also be paid from the Gross Settlement Amount. This amount is well in line with closely-related precedent recognizing the value of individuals stepping forward to represent classes — particularly in a case like this one, where the potential benefit to any individual does not outweigh the cost of prosecuting the claim along with significant risks, including the risk of no recovery and the risk of alienation from their employers and peers, and the risk of uncompensated time and energy devoted to a lawsuit with uncertain prospects for success. *Kruger v. Novant Health, Inc.*, 2016 2016 U.S. Dist. LEXIS 193107, *17−18 (M.D.N.C. Sept. 29, 2016); *Krueger v. Ameriprise Fin.,* Inc., 2015 U.S. Dist. LEXIS 91385, *10−11 (D. Minn. July 13, 2015)(approving awards of $25,000 to each of the named plaintiffs); *Beesley v. Int'l Paper Co*., 2014 U.S. Dist. LEXIS 12037, *13–14 (S.D. Ill. Jan. 31, 2014)(J. Herndon)(approving $25,000 to each of six surviving named plaintiffs in 401(k) fee settlement and noting that "ERISA litigation against an employee's current or former employer carries unique risks and fortitude, including alienation

from employers or peers."). Moreover, in its previous order, this Court awarded the Class Representatives this amount to be paid out of the damage recovery. *Tussey v. ABB, Inc.*, 2012 U.S. Dist. LEXIS 157428, *33−34 (W.D.Mo. Nov. 2, 2012). Thus, the award of this amount from the Gross Settlement Amount is appropriate. The total award requested for the Class Representative represents a tiny fraction of Gross Settlement Amount.

C. Attorneys' Fees and Costs

Class Counsel will request attorneys' fees to be paid out of the Gross Settlement Amount in an amount not more than thirty-three and a third percent (33 1/3%) of the Gross Settlement Amount, or $18,331,500, as well as reimbursement for costs incurred of no more than $2,510,000. A one-third fee is consistent with the market rate in settlements concerning this particularly complex area of law. *Ramsey et al v. Philips North America LLC*, Case No. 18-cv-1099-NJR, Doc. 27, *5 (S.D. Ill Oct. 15, 2018); *Kruger*, 2016 U.S. Dist. LEXIS 193107, *7−8; *Krueger,* 2015 U.S. Dist. LEXIS 91385 at *3−9; *Beesley v. Int'l Paper Co*., 2014 U.S.Dist. LEXIS 12037, *7 citing *Will v. General Dynamics Corp*., 2010 U.S.Dist. LEXIS 123349, *9 (S.D.Ill. Nov. 22, 2010); see also *In re Airline Ticket Comm'n Antitrust Litig.*, 953 F.Supp. 280 (D. Minn 1997)(J. Rosenbaum) (approving one-third fee of $86 million class settlement). This case was the first full trial of 401(k) excessive fee case in history. It is also the most protracted of any 401(k) fee-related case filed and is the only case of its kinds that has had a successful trial for plan members and multiple appeals. In addition, a one-third fee to Class Counsel is also provided for in the contract with the Class Representatives. Schlichter Decl. ¶4.

IV. ARGUMENT

In determining whether preliminary approval is warranted, the sole issue before the Court is whether the proposed settlement is within the range of what might be found fair, reasonable, and

adequate, so that notice of the proposed settlement should be given to class members and a hearing scheduled to consider final approval. The "'fair, reasonable, and adequate' standard is lowered, with emphasis only on whether the settlement is within the range of possible approval due to an absence of any glaring substantive or procedural deficiencies." *Schoenbaum v. E.I. Dupont De Nemours & Co.*, 2009 U.S. Dist. LEXIS 114080, *13 (E.D.Mo. Dec. 8, 2009). The proposed agreement is viewed "in a light most favorable to settlement." *Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996).

The Court must only review the proposed settlement to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing. Manual for Complex Litigation, Fourth, §13.14, at 172-73 (Fed. Jud. Ctr. 2004) ("Manual Fourth"). The Court is not required at the preliminary stage to make any final determinations:

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

Id. § 21.632, at 321. As stated above, preliminary approval is only the first step in a two-step process required before a class action may be finally settled. *Id*. at 320. In some cases, this initial assessment can be made on the basis of information already known to the court and then supplemented by briefs, motions and an informal presentation from the settling parties. *Id*.

In this case, the Court should preliminarily approve the Settlement for the reasons that: (a) the proposed Settlement was the product of extensive arm's-length negotiations; (b) the Settlement was executed only after Class Counsel conducted over a decade of extremely hard-fought litigation, including two failed, all-day mediations and investment of significant time and resources which have been risked and carried since 2006; (c) Class Counsel have concluded that

the Settlement is fair, reasonable, and adequate; and, (d) the Settlement is sufficiently fair, reasonable, and adequate to warrant sending notice of the Settlement to the Class Members.

A. The Settlement is the product of extensive arm's-length negotiations

There is an initial strong presumption that a proposed class action settlement is fair and reasonable when it is the result of arm's-length negotiations. *Great Neck Capital Appreciation Inc. Partnership, L.P. v. Pricewaterhouse Coopers, LLP*, 212 F.R.D. 400, 410 (W.D.Wis. 2002); see also *Newberg on Class Actions* §11.41 at 11-88 (3d ed. 1992). As described above, the Settlement here is the result of lengthy, contentious and complex arm's-length negotiations between the parties. These negotiations extended over a period of several months and included the involvement of both an independent mediator and a court-appointed mediator. Counsel on both sides are experienced and thoroughly familiar with the factual and legal issues presented. It is recognized that the opinion of experienced and informed counsel supporting settlement is entitled to considerable weight. *EEOC v. Faribault Foods, Inc.*, 2008 U.S.Dist. LEXIS 29132, *12 (D. Minn. March 28, 2008) (J. Kyle); Schlichter Decl. ¶2.

B. The Settlement was executed only after hard-fought and extensive litigation

As explained above, Class Counsel conducted over a decade of hard-fought litigation in this matter. Class Counsel is intimately familiar with this case and all the pertinent issues surrounding the claims in this case. As this Court is well aware, Class Counsel conducted substantial investigation and analysis of hundreds of thousands of pages of documents that occurred over many years. Indeed, as of 2012, Class Counsel submitted substantial documentation and detail for over 24,000 hours of work on this case. Doc. 650 at 26−31.[2] This

[2] Page Number references are to the CM/ECF page number headers.

has been followed by thousands of additional hours of work. In preparing this case for trial, multiple appeals and during settlement negotiations, Class Counsel extensively developed the facts supporting the Plaintiffs' claims in tremendous detail. *Id*., *In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 157−158 (4th Cir. 1991).

C. Class Counsel believe the Settlement is fair, reasonable, and adequate

Class Counsel is very experienced in class action litigation generally and, in particular, class litigation arising from breaches of fiduciary duties to retirement plans under ERISA. *Tussey v. ABB, Inc*., 2012 U.S.Dist. LEXIS 157428, *10 (W.D.Mo. Nov. 2, 2012) ("Plaintiffs' attorneys are clearly experts in ERISA litigation"). Class Counsel pioneered this area of litigation and is intimately familiar with this unique and complex area of law, as noted by other courts considering cases alleging ERISA breaches of fiduciary duty with respect to fees and investments in 401(k) plans. *Kruger*, 2016 U.S. Dist. LEXIS 193107, *16−17; *Beesley v. Int'l Paper Co*., 2014 U.S.Dist. LEXIS 12037, *4–5 (S.D.Ill. Jan 31, 2014)(J.Herndon)("The Court remains impressed with Class Counsel's navigation of the challenging legal issues involved in this trailblazing litigation and Class Counsel's commitment and perseverance in bringing this case to this resolution."); *Will v. Gen. Dynamics Corp*., 2010 U.S.Dist. LEXIS 123349, *10 (S.D.Ill. Nov. 22, 2010)(J. Murphy)("Counsel's actions have led to dramatic changes in the 401(k) industry, including heightened disclosure and protection of employees' and retirees' retirement assets"); *Nolte v. Cigna Corp*., 2013 U.S.Dist. LEXIS 184622, *5 (C.D.Ill. Oct. 15, 2013)(J. Baker)("The law firm Schlichter, Bogard & Denton is the leader in 401(k) fee litigation"); *Ramsey*, Case No. 18-cv-1099-NJR, Doc. 27, *2 (Schlichter, Bogard & Denton "have demonstrated an unwavering commitment and ability to zealously represent American workers and retirees"). It is Class Counsel's opinion that the Settlement is fair and reasonable.

Schlichter Decl. ¶2. In addition, the parties will submit the terms of the Settlement to an Independent Fiduciary which will provide an opinion on the Settlement's fairness before the final approval hearing.

D. The Settlement is fair, reasonable, and adequate to warrant sending notice to the Settlement Class

After this Court determines that the Settlement is appropriate for preliminary approval, notice must be sent to the Class Members. Due process and Rule 23(e) do not require that each Class Member receive notice, but do require that class notice be "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank and Trust Co*., 339 U.S. 306, 314 (1950). "Individual notice must be provided to those class members who are identifiable through reasonable effort." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 175 (1974).

Here, the proposed form and method of notice of proposed settlement agreed to by the parties satisfy all due process considerations and meet the requirements of Fed. R. Civ. P. 23(e)(1). Plaintiffs' proposed forms of Settlement Notice are attached to the Settlement. The proposed notices will fully apprise Class Members of the existence of the lawsuit, the Settlement, and the information they need to make informed decisions about their rights, including (i) the terms and operation of the Settlement; (ii) the nature and extent of the release, (iii) the maximum fee and award of costs Class Counsel will seek; (iv) the procedure and timing for objecting to the Settlement and the right of parties to seek limited discovery from objectors; (v) the date and place of the final fairness hearing; and, (vi) the website which all pertinent settlement documents, and any modifications to those documents, will be posted.

The notice plan consists of multiple components designed to reach Class Members. Indeed, the parties successfully implemented a notice program in 2012 after this Court's Judgment and Order and not a single class member objected. First, the Settlement Notices will be sent via first-class mail to the current or last known address of all Class Members shortly after entry of the Preliminary Order. Addresses of the Class Members are maintained by the Plans' recordkeepers and/or ABB Defendants, who use this information for, *inter alia*, mailing plan notices, participant communications, and other plan-related information. Class Members include both current and former employees of ABB, Inc. In addition to the Settlement Notice, Class Counsel will ensure that a dedicated website, www.ABB401ksettlement.com, is maintained solely for the settlement, and a link to that website will appear on Class Counsel's website.

The notice plan also includes a requirement for follow-up by the Settlement Administrator for those Class Members whose notices are returned because they no longer reside at such mailing address. Class Members may also receive notice of the Settlement by reading published articles likely to mention the settlement.

Thus, the form of notice and proposed procedures for notice satisfy the requirements of due process and the Court should approve the notice plan as adequate. *See* Newberg on Class Actions, § 8.34.

V. CONCLUSION

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

March 28, 2019

Respectfully submitted,

SCHLICHTER, BOGARD & DENTON LLP

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties of record.

/s/ Jerome J. Schlichter

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FOR THE WESTERN DISTRICT OF MISSOURI

RONALD TUSSEY, et al., Plaintiffs, v. ABB, INC., et al., Defendants.	Case No.: 06-CV-04305-NKL

DECLARATION OF JEROME J. SCHLICHTER

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

2. There has been no collusion or complicity of any kind in connection with the negotiations or agreement to settle this class action. As illustrated in Plaintiffs' Memorandum in Support of Joint Motion for Preliminary Approval of Class Settlement, all settlement negotiations in this case were conducted at arm's-length by adverse, represented parties. The negotiations were extensive and adversarial, and the parties engaged a highly experienced national mediator and a court-appointed mediator with whom the parties met in person and via telephonic mediation sessions, as well as conducting calls between the parties to negotiate a settlement. It is my opinion that the proposed settlement is not only within the range of reasonableness, but also is fair,

reasonable, adequate, and in the best interests of the Plan and the participants in light of the procedural and substantive risks Plaintiffs would face if litigation were to continue.

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

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

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 28, 2019.

SCHLICHTER, BOGARD & DENTON

/s/ Jerome J. Schlichter
Jerome J. Schlichter