IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MINNESOTA

ROGER KRUEGER, et al., *Plaintiffs*, v. AMERIPRISE FINANCIAL, INC., et al., *Defendants*.	No. 11-CV-02781 (SRN/JSM)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

This settlement constitutes a significant recovery for the Ameriprise Financial 401(k) Plan and the employees, retirees and beneficiaries of Ameriprise. The Settlement Agreement achieves, to a significant degree, the relief sought by this litigation — including a $27,500,000 Gross Settlement Amount. In addition, tens of thousands of class members will receive the benefit of meaningful affirmative relief for years into the future.[1]

[1] Under the Settlement's Plan of Allocation, each Class Member who is a Current Participants in the Ameriprise Financial 401(k) Plan or an Authorized Former Participant, will be allocated a portion of the Settlement based upon that Class Member's average account balances in the Plan, including the Retirement Plus Funds and the Disciplined Equity Fund, pursuant to the calculation described in Paragraph 6.4 of the Settlement Agreement. Those Class members who have open accounts in the Plan will have their monetary sum contributed directly in their tax-deferred retirement accounts, while Class

Before Plaintiffs filed this action, few cases had been filed against fiduciaries in large employer 401(k) plans alleging breaches of fiduciary duties resulting in allegedly excessive recordkeeping, administrative and investment management fees, as well as the disloyal selection of Plan investment options. This settlement was the product of years of litigation and numerous months of arms-length negotiation and mediation with multiple mediators. Plaintiffs respectfully submit that in light of the litigation risks further prosecution of this action would inevitably entail for all parties, it would be proper for the Court to grant final approval of the settlement by signing and entering the proposed Final Order and Judgment. The parties' proposed Final Order and Judgment is filed with the Court, concurrently herewith.

I. THE CLAIMS IN THE CASE

Plaintiffs alleged that Defendants were fiduciaries of the Plan and that Defendants engaged in breaches of fiduciary duty under 29 U.S.C. § 1104(a), and prohibited transactions under 29 U.S.C. § 1106(a) and (b). In particular, Plaintiffs alleged that Defendants breached their fiduciary duty to ensure that the fees and expenses paid out of the assets in the Plan were reasonable and that the Plan's fiduciaries breached their duties of prudence and loyalty in selecting and retaining proprietary investment options and engaged in prohibited transactions by receiving compensation from the Plan as a result of those decisions.

These claims include claims of excessive recordkeeping fees, as well as assertions of

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members who are former participants in the Plan were offered the choice of receiving a check or having their distribution rolled over into a qualified retirement account.

imprudent selection and monitoring of the proprietary investment options. Defendants denied and continue to deny any breaches or ERISA violations.

A. The Action

This litigation began on September 28, 2011, with the filing of Plaintiffs' Complaint. The undertaking included contentious discovery that eventually included production of nearly half a million documents — over two million pages of discovery — as well as, designation and deposition of seven experts, and over thirty depositions. Plaintiffs filed their Motion for Class Certification on October 1, 2013, which Defendants opposed. Docs. 215, 217, 230, 244. The Court granted class certification, with a modified class definition, on May 23, 2014. Doc. 384. The class definition was further modified at the time of preliminary approval of the settlement. Doc. 604 at 3.

Meanwhile, the parties filed many non-dispositive and dispositive motions including a Motion to Dismiss (Doc. 10), and two motions for Summary Judgment. Docs. 147 and 509. The Motion to Dismiss was granted in part and denied in part. Doc. 67. Defendants' first Motion for Summary Judgment was likewise granted in part and denied in part. Doc. 323. Defendants' second Motion for Summary Judgment was pending at the time of settlement. Ultimately, on March 20, 2015, with trial less than a month away, the Parties reached this resolution and signed the Settlement Agreement.

II. THE TERMS OF THE PROPOSED SETTLEMENT

In exchange for releases, for the dismissal of the Actions, and for entry of the Judgment as provided for in the Settlement Agreement, Defendants will make available to Settlement Class Members the benefits described below (the "Settlement Benefits").

The parties have consented to the Court's continuing jurisdiction over compliance with the Settlement Agreement. Class Counsel agrees to take any necessary enforcement action without additional cost to the Class.

A. Monetary Relief

Defendants will deposit $27,500,000 (the "Gross Settlement Amount") in an interest-bearing settlement account (the "Gross Settlement Fund"). The Gross Settlement Fund will be used to pay the 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 Agreement.

B. Additional Terms

In addition to the monetary component of the Settlement, the parties to the Settlement have agreed to certain additional terms. Defendants have agreed, during the three-year Settlement Period to: (1) conduct a RFP competitive bidding process for recordkeeping services to begin within one-year after the Settlement Effective Date; (2) conduct a RFP competitive bidding process for investment consulting services to begin within one-year after the Settlement Effective Date; (3) continue to refrain from receiving compensation for administrative services provided to the Plan other than reimbursement of direct expenses from the Plan as permitted by ERISA; (4) continue to pay fees to the Plan recordkeeper on a flat fee or fee per participant basis; (5) continue to provide participant statements that comply with all applicable DOL participant disclosure regulations and that include: a disclosure of all Plan expenses paid by the participant, directly or through investment options; a list of all transaction fees paid by the participant; benchmarks for

each fund; and statements, in dollar terms, of the money paid by the participant in administrative recordkeeping costs and for each investment option; and (6) continue to consider the use of Collective Investment Trusts or Separately Managed Accounts and, if affiliated collective trusts are used, continue to secure the lowest cost of participation offered to any other investor with the same or less assets to invest, and seek the lowest cost of participation offered for non-affiliated collective trusts. In addition, the Plan's fiduciary committee for investment selection ("KIC") will continue not to include any member who is an executive of Columbia Management Investment Advisors, LLC or its investment management affiliates, or any member who reports, directly or indirectly, to such an executive. KIC shall continue to have exclusive authority for the selection, monitoring, and retention of all investment options in the Plan, and consistent with its current practices, any input received from sources outside of the KIC shall be considered advisory only. The terms of the Settlement have been reviewed and approved by an Independent Fiduciary.

These terms provide value to the Plan in addition to the monetary settlement.

III. ARGUMENT

The Settlement Agreement satisfies all applicable criteria for approval, including the well-established factors frequently cited by District Courts in the Eighth Circuit. The Settlement Agreement should be approved as fair, reasonable, and adequate in all respects.

A. The Applicable Legal Standards

"The policy in federal court favoring the voluntary resolution of litigation through

settlement is particularly strong in the class action context." *White v. NFL*, 822 F.Supp. 1389, 1416 (D.Minn. 1993) (Doty, J.). "[T]he district court's primary responsibility is to ensure that the settlement is 'fair, reasonable, and adequate.'" *Id*. (quoting *Van Horn v. Trickey,* 840 F.2d 604, 606 (8th Cir. 1988)). *See also* Fed. R. Civ. P. 23(e)(2) ("If the [proposed settlement] would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.").

There is an initial strong presumption that a proposed class action settlement is fair and reasonable when it is the result of arms-length negotiations. *Great Neck Capital Appreciation Inc. Partnership, L.P. v. PricewaterhouseCoopers, LLP*, 212 F.R.D. 400, 410 (W.D.Wis. 2002); see also *Newberg on Class Actions* §11.41 at 11-88 (3d ed. 1992). The proposed Settlement here is the result of lengthy, contentious and complex arms-length negotiations between the parties. Counsel on both sides are experienced and thoroughly familiar with the factual and legal issues presented. Courts recognize that the opinion of experienced and informed counsel supporting settlement is entitled to considerable weight. *EEOC v. Faribault Foods, Inc.*, 2008 U.S.Dist. LEXIS 29132, *12 (D. Minn. March 28, 2008) (J. Kyle). 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. Class Counsel is intimately familiar with this unique and complex area of law, as noted by other Courts considering cases alleging ERISA breaches of fiduciary duty with respect to fees and investments in 401(k) plans. *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"); *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."). It is Class Counsel's opinion that the proposed Settlement is fair and reasonable. Doc. 597, ¶ 2.

B. The Settlement Is Fair, Reasonable, and Adequate Under the Relevant Factors

District Courts consider various factors in determining whether a settlement is "fair, reasonable, and adequate." *White*, 836 F.Supp. at 1477. "[T]he most important" factor is "the strength of plaintiffs' case on the merits balanced against the benefits to the class provided by the settlement. *Id*. Other factors include:

> 1) the opinions of the participants, including class counsel, class representatives, and class members; 2) the complexity, expense, and likely duration of further litigation; 3) the extent of discovery completed and the stage of the proceedings; and 4) the evidence, if any, that the proposed settlement is the product of fraud and collusion.

Id. See also *Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640,

648 (8th Cir. 2012) quoting *In re Wireless Tel. Fed. Cost Recovery Fees Litig*., 396 F.3d 922, 932 (8th Cir. 2005). Plaintiffs respectfully submit that the relevant factors decisively and overwhelmingly favor approval of the Settlement Agreement.

1. The strength of the plaintiffs' case on the merits balanced against the benefits to the class provided by the settlement.

As discussed above, a significant theory for recovery alleged by Plaintiffs is based on Defendants' selection and retention of proprietary investment products in the Plan. Class Counsel continue to believe in the merits of these claims. However, there are significant legal obstacles and defenses which render recovery in this case uncertain, and, if there is a recovery, that affect the amount. Defendants deny all of Plaintiffs' allegations, deny that they committed or participated in any fiduciary breaches or other wrongdoing, vigorously contested Plaintiffs' allegations, and would continue to do so. Defendants would argue that the Plan fiduciaries inherited the investment lineup from American Express, took steps to review each of the investment options offered in the Plan, further evaluated each of the Plan's investment options periodically, and increased the number of non-proprietary options offered in the Plan before and during the course of the class period while adhering to fiduciary best practices. Defendants would also argue that the Plan's recordkeepers received only reasonable compensation given the services that were provided, and that the relevant fiduciaries acted reasonably in negotiating and monitoring the recordkeepers' compensation.

2. The amount offered in settlement

The $27.5 million settlement amount is consistent with the amount to which

Plaintiffs referred to in their Second Amended Complaint. Doc. 228 at ¶115 ("As a consequence of their breach of fiduciary duties alleged herein, Defendants caused the Plan to suffer over $20 million in losses".). Using benchmarks, which Defendants contested, Plaintiffs' experts opined that the damages from the inclusion of the challenged investment options totaled slightly less than $44 million compared to index benchmarks, and the damages from the alleged excessive recordkeeping fees, most of which are included in the proprietary funds damages, totaled $6.9 million. Docs 561-1 and 567-1. Defendants' experts vigorously contested plaintiffs' benchmarks for both investment-related and recordkeeping claims, and opined that, under governing Eighth Circuit precedent, investment damages were negative. Thus, the monetary portion of the settlement itself constitutes a significant portion of the damages allegedly available to the Class, adjusted for litigation risk.

Additionally, Defendants have committed to a number of additional provisions, which further increase the Settlement's value. Defendants have agreed, during the three-year Settlement Period to:(1) conduct a RFP competitive bidding process for recordkeeping services to begin within one-year after the Settlement Effective Date; (2) conduct a RFP competitive bidding process for investment consulting services to begin within one-year after the Settlement Effective Date; (3) continue to refrain from receiving compensation for administrative services provided to the Plan other than reimbursement of direct expenses from the Plan as permitted by ERISA; (4) continue to pay fees to the Plan recordkeeper set on a flat fee per participant; (5) continue to provide participant statements that comply with all applicable DOL participant disclosure regulations and

that include: a disclosure of all Plan expenses paid by the participant, directly or through investment options; a list of all transaction fees paid by the participant; benchmarks for each fund; and statements, in dollar terms, of the money paid by the participant in administrative recordkeeping costs and for each investment option; and (6) continue to consider the use of Collective Investment Trusts or Separately Managed Accounts and, if affiliated collective trusts are used, continue to secure the lowest cost of participation offered to any other investor with the same or less assets to invest, and seek the lowest cost of participation offered for non-affiliated collective trusts. In addition, the Plan's fiduciary committee for investment selection ("KIC") will continue not to include any member who is an executive of Columbia Management Investment Advisors, LLC or its investment management affiliates, or any member who reports, directly or indirectly, so such an executive. KIC shall continue to have exclusive authority for the selection, monitoring, and retention of all investment options in the Plan, and consistent with its current practices, any input received from sources outside of the KIC shall be considered advisory only. The terms of the Settlement have been reviewed and approved by an Independent Fiduciary. As mentioned above, these provisions provide value to the Plan in addition to the monetary settlement.

In sum, findings of liability and damages in this action are uncertain. The first factor supports the Court's granting final approval of the Settlement Agreement.

3. The opinions of the participants, including class counsel, class representatives and class members.

Pursuant to this Court's Order preliminarily approving the settlement (Doc. 604),

notice of the Settlement Agreement was mailed to 46,098 individuals believed to be Settlement Class Members. Boyko Decl. ¶3, Ex. 1. In addition, the Notice was distributed electronically and made available over the Internet via the Settlement website. This notice complies with the requirements of Fed. R. Civ. P. 23 and due process, as it was calculated to ensure individual notice to each of the class members.

After having received notice and an opportunity to object, not one out of over 46,000 Settlement Class Members filed timely objections with the Court. *Not one*. If only one percent of the class had objected, the Court would have received over 460 objections; If one tenth of one percent of the class had objected, there would have been 46. The lack of *any* objection is a telling sign of overwhelming support for the settlement by the members of the class.

Moreover, notice was sent to the Attorneys General of all states where Settlement Class Members reside, as well as the United States Attorney General, as required under the Class Action Fairness Act, 28 U.S.C. § 1715. No objection or opposition was received from an Attorney General.

Meanwhile, the Class Representatives attended the mediation that ultimately led to this settlement. All agree with the settlement. These factors overwhelmingly support the Court's granting final approval of the Settlement Agreement.

Class counsel is very experienced in class action litigation generally and, in particular, the most experienced firm in the country with respect to class actions alleging ERISA breaches for excessive fees in 401(k) plans. It is also Class Counsel's opinion that the proposed Settlement is fair and reasonable. Doc. 597, ¶2.

Additionally, the entire settlement was reviewed by an independent fiduciary, Arthur J. Gallagher & Co., who evaluated the extensive record in this case, interviewed counsel, and reviewed and analyzed the entire settlement, including the release, plan of allocation, and Plaintiffs' Memorandum in Support of the Motion for Attorneys' Fees and Expenses. Boyko Decl. ¶4, Ex. 2. This review is unique to ERISA cases and done in accordance with Prohibited Transaction Exemption 2003-39. Boyko Decl. ¶4, Ex. 2. Gallagher concluded that "the settlement terms, including the scope of the release of claims; the amount of cash and the value of non-cash assets received by the plan; and the amount of any attorney's fee award or other sums to be paid from the recoveries, are reasonable in light of the plan's likelihood of full recovery, the risks and costs of the litigation, and the value of the claims foregone." *Id*. at 2.

This factor supports the Court's granting final approval of the Settlement Agreement.

4. The complexity, expense, and likely duration of further litigation.

The instant lawsuit is, as with many ERISA cases, highly complex in multiple respects. First, it is one of only a small number of cases ever brought alleging violations of ERISA for inclusion of proprietary mutual funds. In Class Counsel's experience, these cases have been more hard fought than other cases because they are rare, and the defendants have sought to prevent similar litigation from developing in the future. The case also presents novel legal issues. This is epitomized by the recent Supreme Court oral argument in *Tibble v. Edison Int'l*, a 401(k) ERISA case whose Ninth Circuit holding was cited by Defendants throughout this litigation, including, most recently, in their pending Motion for Partial Summary Judgment. Doc. 512 at 12. Class Counsel here also represent

the Plaintiffs in *Tibble* and obtained a unanimous Supreme Court decision in favor of the plaintiffs on May 18, 2015. *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (U.S. 2015).

This combative litigation has been the experience of other plaintiffs who have succeeded at trial on similar claims. The Plaintiffs in *Tussey v. ABB*, Case No. 06-4305 (W.D.Mo.) was filed in 2006, and presented their case at trial in January 2010. Currently, after an appeal and a partial vacatur, the case is back before the trial court and a timeline for the ultimate resolution of that action has not yet been set. *Tussey v. ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014). A similar delay here would mean the case would still be unresolved until at least 2020.

Second, this case would require a complex trial with no fewer than seven highly experienced testifying expert witnesses with extensive reports, as well as the dedication of tremendous resources. Recovery of damages at all is not certain as discussed above. Given these facts, the complexity, expense and likely duration of the litigation support approval of the settlement.

5. The extent of discovery completed and the state of the proceedings

Plaintiffs conducted very substantial discovery. Defendants produced to Plaintiffs' Counsel nearly half a million documents — over two million pages of discovery, seven experts were designated and deposed, over thirty depositions we taken. Each document was electronically indexed and sorted, and thereafter individually examined, analyzed and cataloged by an attorney. Plaintiffs' Counsel also painstakingly reviewed and analyzed additional and voluminous documents provided by Named Plaintiffs and other documents obtained from public filings with the Department of Labor and third parties.

Plaintiffs' Counsel had experts intimately familiar with financial services industry practices, retirement industry practices, stable-value investments, as well as industry fiduciary practices examine and analyze these and other documents and provide opinions based on the record and their experience. This discovery documented the practices described above, the participants' disclosures that were made, the history of the Plan and the recordkeeping, administrative and investment management fees charged to the Plans. Thus, Plaintiffs' Counsel extensively developed the facts supporting their claims in tremendous detail, and the extent of discovery was massive.

Finally, there is no evidence that the settlement is the product of fraud or collusion. Rather, all evidence is that it came following heated litigation and extensive mediations between adversarial parties.

IV. CONCLUSION

Plaintiffs respectfully request that the Court finally approve the proposed Settlement Agreement as fair, reasonable, and adequate, and enter the proposed Final Order and Judgment.

Respectfully submitted,

June 26, 2015

s/Jerome J. Schlichter

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