

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DIANN M. CURTIS, individually and on behalf
of herself and all others similarly situated,

Plaintiff,

vs.

Wheaton Franciscan Services, Inc. d.b.a.
Wheaton Franciscan Healthcare, Wheaton
Franciscan System Retirement Plan Committee,
and John Does 1-20,

Defendants.

Civil Action No.: 1:16-cv-4232

Honorable Gary Feinerman

BRUCE BOWEN and CHERYL MUELLER,
individually and on behalf of all others similarly
situated, and on behalf of the Wheaton
Franciscan System Retirement Plan,

Plaintiffs,

vs.

WHEATON FRANCISCAN services, Inc.,
d/b/a Wheaton Franciscan Healthcare, an
Illinois Non-Profit Corporation, OPERATIONS
COMMITTEE OF THE BOARD OF
DIRECTORS OF WHEATON FRANCISCAN
SERVICES, INC., JOHN and JANE DOES 1-
20, MEMBERS OF THE OPERATIONS
COMMITTEE, ASCENSION HEALTH, a
Missouri Non-Profit Corporation, ASCENSION
HEALTH ALLIANCE, D/B/A ASCENSION, a
Missouri Non-Profit Corporation, ASCENSION
HEALTH PENSION COMMITTEE, JOHN and
JANE DOES 21-40, MEMBERS OF THE
ASCENSION HEALTH PENSION
COMMITTEE, each an individual, and JOHN
and JANE DOES 41-60, each an individual,

Defendants.

Civil Action No.: 1:16-cv-06782

Honorable John Z. Lee

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF DIANN M. CURTIS'S
MOTION FOR ENTRY OF [PROPOSED] PRETRIAL ORDER NO. 1
CONSOLIDATING CASES, APPOINTING KESSLER TOPAZ MELTZER & CHECK,
LLP AS INTERIM LEAD CLASS COUNSEL, APPOINTING THE COLLINS LAW
FIRM, P.C. AS INTERIM LIAISON CLASS COUNSEL AND ESTABLISHING
PROCEDURES FOR CONSOLIDATION OF FUTURE-FILED CASES**

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Diann M. Curtis (“Plaintiff Curtis”) respectfully submits this memorandum of law in support of her motion for entry of [Proposed] Pretrial Order No. 1 (the “Proposed Order”) consolidating the related ERISA Actions (defined below), appointing Kessler Topaz Meltzer & Check, LLP (“KTMC”) as Interim Lead Class Counsel and The Collins Law Firm, P.C. (“TCLF”) as Interim Liaison Class Counsel, and providing for consolidation of related actions subsequently filed in or transferred to this District.

I. INTRODUCTION

Pending in this District are two (2) actions brought on behalf of all participants and beneficiaries of the Wheaton Franciscan System Retirement Plan (the “Plan”) established and/or maintained by Wheaton Franciscan Services, Inc. (“WFSI”) d.b.a. Wheaton Franciscan Healthcare, Inc. (“Wheaton Franciscan” or “the Company”) against defendant-fiduciaries of the Plan for violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (“ERISA”). Defendants are Wheaton Franciscan, the Wheaton Franciscan System Retirement Plan Committee (the “Committee”), and members of the Committee (collectively “Defendants”). Both actions arise from the same conduct and violation of the same ERISA provisions.¹ The heart of the allegations in both cases is Defendants substantial underfunding of the Plan because they claim the Plan is a “church plan” and therefore exempt from ERISA’s funding and disclosure requirements. *See Curtis Compl.*, Dkt. 1; *Bowen et al. v. Wheaton Franciscan Services, Inc. et al.*, No. 16-cv-06782 (N.D. Ill.) (Lee, J.), Dkt. 1 (“*Bowen Compl.*”).²

Each of the plaintiffs brought their lawsuit on behalf of themselves and all other similarly situated participants of the Plan. Each plaintiff alleges that the Plan is not a “church plan”

¹ Other than the ERISA Actions, Plaintiff Curtis is not aware of any additional related actions filed to date in this District.

² The *Curtis* and *Bowen* actions are collectively referred to as the “ERISA Actions” herein.

because none of the Defendants are a “church” and that Defendants breached their fiduciary duties under ERISA by: (1) failing to ensure that the Plan is fully funded; and (2) continuing to set an inadequate funding policy that benefits the Company – not the participants of the Plan. *See Curtis* Compl., ¶¶ 40, 97-105; *see Bowen* Compl., ¶¶ 378-413. Each of the plaintiffs also allege that Defendants violated their duties under ERISA by not: (1) filing annual reports with the Secretary of Labor; (2) providing members of the proposed class required notices concerning the Plan’s underfunded status; and (3) failing to provide the full panoply of ERISA information and disclosure obligations of ERISA plan trustees/administrators. *See Curtis* Compl., ¶¶ 69-96; *see Bowen* Compl., ¶¶ 258-377. Plaintiff Curtis now seeks consolidation of the ERISA Actions, and any subsequently filed or transferred related actions, pursuant to Federal Rule of Civil Procedure 42(a). Plaintiff Curtis further seeks appointment of her counsel as Lead Class Counsel to oversee the consolidated ERISA Actions in accordance with Rule 23(g)(3) and the MANUAL FOR COMPLEX LITIGATION (FOURTH) (2014) (the “*Manual*”).

II. PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

On April 11, 2016, Plaintiff Curtis filed this action alleging, *inter alia*, that as of June 30, 2013, the Plan was underfunded by more than \$136.7 million dollars. *See Curtis* Compl., ¶ 2. Defendants justify the severe underfunding on grounds that the Plan is a purported ERISA-exempt “church plan.” *Id.*, ¶¶ 3, 40. The Plan, however, does not meet ERISA’s requirements for the “church plan” exemption, because it was not “established,” and is not “maintained” by a church. *Id.*, ¶¶ 4, 42. Rather, the Plan was established, and is maintained by Wheaton Franciscan, a large healthcare company – not a church or a convention or association of churches. *Id.* As a result of its invalid claim that it is a church, the Company dodges its statutory

obligations to its employees concerning retirement plan funding, and thereby obtains a competitive advantage over other healthcare providers that do meet such obligations. *Id.*, ¶ 40.

On April 28, 2016, Defendants moved to transfer this action under 28 U.S.C. § 1404(a), conceding that this Court has jurisdiction, which Plaintiff Curtis opposed on May 19, 2016. *See* Dkt. 14, at 5; *see also* Dkt Nos. 20, 25. On June 14, 2016, following submission of a joint Rule 26(f) Report by the parties, this Court held a status conference, setting an initial case management schedule to govern discovery and motion practice in this action, which it later modified, to grant Defendants an enlargement of time and pages on forthcoming dispositive motions. *See* Dkt Nos. 26, 28, 31. KTMC has been consistently engaged in this matter, has taken all necessary steps to protect the interests of the putative class, and will continue to do so.

On June 28 2016, Bruce Bowen and Cheryl Mueller (collectively “Plaintiffs Bowen”) filed the *Bowen* action, asserting similar allegations to those plead in *Curtis* Compl. *See generally* *Bowen* Compl. The *Bowen* action also includes a claim for declaratory relief that the Church Plan Exemption of ERISA violates the Establishment Clause of the First Amendment to the Constitution, which arises out of the same alleged wrongdoing set forth in the *Curtis* and *Bowen* Compls. *Id.*, ¶¶ 414-417. On June 29, 2016, Plaintiffs Bowen filed a Motion for Reassignment Based on Relatedness (“Motion for Reassignment”), which was amended and re-filed on the same date, requesting that this Court find that the *Bowen* lawsuit is so “sufficiently related to [the *Curtis* action] that it is appropriate for the *Bowen* case to be assigned to this Court.” *Curtis*, Dkt Nos. 32, 35.

III. ARGUMENT

Approval of the Proposed Order will promote the orderly and efficient conduct of the ERISA Actions in a manner consistent with Rules 23(g) and 42(a), the recommendations of the *Manual*, thus should be entered by the Court.

A. CONSOLIDATION OF THE ERISA ACTIONS ADVANCES EFFICIENCY

Rule 42(a) provides that “if an action before the court involves a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.” *See McNight v. Illinois Cent. R. Co.*, No. 09-cv-201, 2009 WL 1657581, at *1 (S.D. Ill. June 12, 2009) (“The purpose behind a Rule 42(a) consolidation is to promote judicial economy ...”). Here, the ERISA Actions present common questions of law and fact, including whether the fiduciaries of the Plan violated ERISA and/or breached their fiduciary duties to the Plan’s participants by, *inter alia*, failing to fully fund the Plan and failing to provide adequate notice to the Plan participants regarding the Plan. Given the substantial similarities of the parties and claims in the ERISA Actions, as well as Plaintiffs Bowen’s Motion for Reassignment requesting that the ERISA Actions be marked related, consolidation under Rule 42(a) for efficient and effective management of these cases is appropriate. Indeed, consolidation of the ERISA Actions will streamline and simplify discovery, pretrial motions (including class certification), and administrative management, as well as generally prevent waste, confusion, or delay that would inevitably arise from separate prosecution of related actions in the same District.

Thus, the Proposed Order establishes a concise protocol for the captioning, filing, and docketing of pleadings in the ERISA Actions, and any related matters against Defendants that

may be filed in, or transferred to, this District in the future.³ For instance, *inter alia*, the Proposed Order sets forth a uniform case caption and master docket for filing documents related to the consolidated ERISA Actions. Such protocol is designed to enhance efficiency, and is particularly necessary and appropriate in complex class action litigation. *See Manual*, § 11.21. Notably, courts in this District frequently utilize this type of consolidation to effectively manage ERISA actions. *See, e.g.*, Declaration of Mark K. Gyandoh (“Gyandoh Decl.”), at Ex. 1 (*Kretsinger et al. v. Amcore Financial, Inc.*, 3:10-cv-50132 (N.D. Ill.) (Dkt. 20) (consolidating cases for all purposes under FRCP 42(a)); Ex. 2 (*In re R.H. Donnelley Corp. ERISA Litig.*, 09-cv-7571 (N.D. Ill.) (Dkt. 23) (consolidating cases and establishing pretrial procedures). Likewise, courts throughout the country have entered similar case consolidation orders.⁴

The Proposed Order further provides a preliminary schedule that permits the filing of a consolidated class action complaint, and submission of a corresponding briefing schedule for dispositive motions. Given that Plaintiff Curtis filed the first of the two pending ERISA Actions, Plaintiff Curtis believes that her case – which has a lower docket number – should be the lead case for the consolidated action moving forward. *See, e.g.*, Dkt. 35, at 1 (Plaintiffs Bowen requesting that this Court find that the *Bowen* case is so “sufficiently related to [the *Curtis* action] that it is appropriate for the *Bowen* case to be assigned to this Court”). As set forth in the

³ It is KTMC’s experience and belief, given the recent spate of “church plan” litigation, additional related or tag-along actions against Defendants may be filed in this District. Indeed, more than fifteen (15) “church plan” lawsuits against healthcare companies, like Wheaton Franciscan, have been filed in judicial districts around the country since mid-May 2016. *See* Wille, Jacklyn, “Hospital Pensions Hammered by ‘Church Plan’ Class Actions,” *Pension and Benefits Daily*, May 13, 2016 (<http://www.bna.com/hospital-pensions-hammered-n57982072416/>) (last visited June 30, 2016)).

⁴ *See, e.g.*, *Borboa v. Chandler, et al.*, No. 13-cv-844, Dkt. 32 (E.D. Va. Sept. 26, 2014) (order consolidating ERISA cases) (Gyandoh Decl., Ex. 3); *In re Level 3 Commc’ns ERISA Litig.*, No. 09-cv-0658, Dkt. 75 (D. Colo. Mar. 18, 2010) (same) (Gyandoh Decl., Ex. 4); *In re Fannie Mae 2008 ERISA Litig.*, No. 09-cv-01350, MDL No. 2013, Dkt. 22 (S.D.N.Y. May 15, 2009) (same) (Gyandoh Decl., Ex. 5); *In re Regions Morgan Keegan ERISA Litig.*, No. 08-cv-2192, Dkt. 47 (W.D. Tenn. Oct. 8, 2008) (same) (Gyandoh Decl., Ex. 6).

Proposed Order, while Plaintiff Curtis, and her counsel, will readily work with Plaintiffs Bowen and their counsel, as well as any other plaintiffs and their counsel who may later join this litigation, Plaintiff Curtis believes that she is capable and well-suited to serve as the Named Plaintiff in the consolidated action and have her counsel, KTMC and TCLF, serve as Interim Lead Class Counsel and Interim Liaison Class Counsel, respectively, for the consolidated action.

B. KTMC SHOULD BE APPOINTED AS INTERIM LEAD CLASS COUNSEL

Pursuant to Rule 23(g)(3), “[t]he court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.” Rule 23(g)(2) provides that an applicant seeking appointment as class counsel must be found to be adequate under Rules 23(g)(1) and 23(g)(4). In determining the adequacy of counsel, Rule 23(g)(1) identifies specific factors the Court must consider (*see* Rule 23(g)(1)(A)(i-iv)), as well as additional factors the Court may consider (*see* Rule 23(g)(1)(B-E)). Specifically, Rule 23(g)(1)(A) provides that the Court, in appointing class counsel, must consider:

(i) the work counsel did in identifying or investigating potential claims in the action;(ii) counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

FED. R. CIV. P. 23(g)(1)(A)(i)-(iv).

Appointment of interim class counsel is helpful in clarifying the “responsibility for protecting the interest of the class during precertification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement.” *Manual* § 21.11; *see also* WRIGHT & MILLER, 6a Fed. Proc., L. Ed. § 12:293 (same). As stated in the *Manual*, in appointing lead counsel, a court should “conduct an independent review [] to ensure that counsel appointed to leading roles are qualified and

responsible, that they will fairly and adequately represent all of the parties on their side, and that their charges will be responsible.” *Id.*, § 10.22. The most important factor to the court’s analysis is whether the appointment will help “achiev[e] efficiency and economy without jeopardizing fairness to parties.” *Id.*, § 10.221.

Here, Plaintiff Curtis proposes the following Interim Lead Class Counsel and Interim Liaison Class Counsel structure pursuant to FRCP 23(g)(3) and the *Manual* to act on behalf of the putative class:

Proposed Interim Lead Class Counsel

Edward W. Ciolko
Mark K. Gyandoh
Kessler Topaz Meltzer & Check, LLP

Proposed Interim Liaison Class Counsel

Robert L. Dawidiuk
Jeffrey Cisowski
The Collins Law Firm, P.C.

Under this structure, KTMC would be charged with responsibility for the day-to-day conduct of the litigation and for carrying out the orders of the Court concerning the conduct of the litigation.

Specifically, as suggested in the *Manual* KTMC would be charged with the following duties:

[F]ormulating (in consultation with other counsel) and presenting positions on substantive and procedural issues during the litigation ... in presenting written and oral arguments and suggestions to the court, working with opposing counsel in developing and implementing a litigation plan, initiating and organizing discovery requests and responses, conducting the principal examination of deponents, employing experts, arranging for support services, and seeing that schedules are met.

Manual § 10.221. Further, per the *Manual*, TCLF would be “[c]harged with essentially administrative matters, such as communications between the court and other counsel (including receiving and distributing notices, orders, motions, and briefs on behalf of the group).” *Id.*

Plaintiff Curtis’s proposed designation of interim class counsel and interim liaison counsel will promote the orderly progress of the ERISA Actions, and ensure prosecution of this litigation in an efficient and coordinated manner. As detailed below, numerous courts across the country have determined in analogous cases that KTMC satisfied the requirements of FRCP

23(g), and was therefore well-qualified to serve as class counsel in complex ERISA matters. Plaintiff Curtis respectfully suggests that a similar determination is warranted here.

1. KTMC Has Demonstrated Commitment to Identifying and Investigating Potential Claims in This, and Similar Actions

The first Rule 23(g)(1)(A)(i) factor, which focuses on the work counsel has done to advance the litigation, strongly favors the appointment of KTMC as Interim Lead Class Counsel here. As an initial matter, KTMC conducted extensive investigation before filing the *Curtis* Compl., and has dedicated (and continues to do so) substantial resources to advance this case by, *inter alia*, closely examining the fiduciaries alleged wrongdoing. Such investigation and analyses includes a comprehensive review of the law concerning “church plans” documents related to the Plan, including those related to the Plan’s financial condition, and other materials concerning Defendants’ alleged wrongdoing.

The result of this investigation was the *Curtis* Complaint, which describes in detail why the Plan is not a “church plan” under ERISA, thus subject to ERISA’s funding requirements. The *Curtis* Compl. also details the structure of governance for the Plan, the fiduciaries of the Plan, and descriptions of fiduciary status under ERISA. The allegations are detailed and specific, and based on KTMC’s thorough investigation and significant experience in analogous actions. *See generally* *Curtis* Compl. Additionally, pursuant to ERISA § 502(h), on April 21, 2016, KTMC mailed copies of the *Curtis* Complaint to both the Department of Labor (“DOL”) and the U.S. Department of Treasury (“Treasury”) by certified mail. *See* Gyandoh Decl., Ex. 7 (DOL Letter) and Ex. 8 (Treasury Letter), respectively. To date, KTMC continues to investigate, develop, and pursue the class members’ claims against Defendants in this and analogous actions. For instance, KTMC is vigorously defending against Defendants’ efforts to steer the ERISA

Actions away from this Court in opposition to Defendants' motion to transfer under Section 1404(a). *See* Dkt Nos. 14, 20, 25.⁵

In short, KTMC has already engaged in substantial work in this matter and analogous litigation, in efforts to protect the interests of the putative class, and will continue to do so. Based on KTMC's prior experience in bringing and pursuing ERISA claims such as those asserted here (*see* discussion *infra*), KTMC understands the substantial investment of time and resources necessary to properly pursue and lead this action, and is committed to making such investments in this case. Accordingly, the first Rule 23(g) factor is satisfied.

2. KTMC Has Substantial Experience in ERISA and Complex Class Action Litigation, Experience With Claims Asserted In This Case, and Knowledge of the Relevant Law

The second and third Rule 23(g) factors – the most persuasive factors – also demonstrate that KTMC is more than qualified to serve as Interim Lead Class Counsel here. A true and correct copy of KTMC's resume is attached to Gyandoh Decl., Ex. 9. Indeed, courts in this District have readily recognized KMTC's significant experience and success in ERISA litigation, and appointed the firm as class counsel. *See* Gyandoh Decl., Ex. 10 (*Dalton et al. v. Old Second Bancorp, Inc. et al.*, No. 11-cv-1112 (N.D. Ill.) (Dkts. 68-1, 79) (granting plaintiffs' motion for class certification and appointing KTMC as Class Counsel and TCLF as Liaison Counsel for the certified class); Ex. 2 (*In re R.H. Donnelley Corp. ERISA Litig.*, No. 09-cv-7571 (N.D. Ill.) (Dkt. 23) (appointing KTMC (then Barroway Topaz Kessler Meltzer & Check, LLP) as Interim Class Counsel).

⁵ Additionally, on June 22, 2016, KTMC, also serving as co-counsel in the analogous action captioned *Barker v. St. Joseph's Healthcare System, Inc et al*, 2:16-cv-02748 (D. N.J.), filed a motion seeking an order to compel the healthcare defendants in that case to send a curative notice to all retirement plan participants (e.g., putative class members) to correct misstatements made in a prior notice sent to the plan participants after plaintiffs' filed suit. *See Barker*, 16-cv-02748, Dkt. 30.

Courts outside this Circuit have likewise appointed KTMC as class counsel without hesitation. For instance, in an ERISA action with competing motions for appointment as interim lead counsel, a district court in the Western District of Oklahoma stated:

[T]he Court finds that KTMC is one of the most experienced ERISA litigation firms in the country, with particular expertise in the area of ERISA breach of fiduciary class actions. Further, KTMC’s litigation efforts have resulted in favorable court opinions in a number of ERISA decisions denying motions to dismiss and motions for summary judgment. KTMC has also prevailed in appeals before the First, Third, Sixth, and Ninth Circuits resulting in seminal decisions that have helped shape this relatively new area of ERISA jurisprudence. Moreover, KTMC is one of only a very few firms in the country with trial experience in ERISA “company stock” fiduciary breach class actions. Finally, in addition to its extensive litigation experience, KTMC has also successfully engaged in extensive, intricate and successful settlement negotiations and mediations involving complex legal and factual issues involving ERISA claims, resulting in large recoveries for affected classes.

In re Chesapeake Energy Corp. 2012 ERISA Class Litig., 286 F.R.D. 621, 624 (W.D. Okla. 2012) (emphasis added).

Similarly, a district court in Southern District of New York selected KTMC as co-lead class counsel, noting that the firm’s “expertise in the area of ERISA breach of fiduciary class actions has been recognized by courts throughout the country who have appointed them lead or co-lead class action counsel in many cases alleging causes of action similar to those claimed here.” *In re Bear Stearns Cos., Inc. Secs., Derivative, & ERISA Litig.*, MDL No. 1963, 2009 WL 50132, at *11-12 (S.D.N.Y. Jan. 5, 2009). Likewise, in *Nowak v. Ford Motor Company*, the district court in the Eastern District of Michigan, when deciding competing motions for appointment as interim lead counsel in an ERISA class action, selected KTMC (then known as Schriffirin & Barroway) as interim co-lead counsel, noting that the firm “has extensive experience litigating ERISA breach of fiduciary duty class actions,” and that “[i]n addition to its extensive litigation experience, the firm has also successfully engaged in extensive, intricate and

successful settlement negotiations and mediations involving ERISA claims.” *Nowak v. Ford Motor Company*, 240 F.R.D. 355, 361-62 (E.D. Mich. 2006).

Indeed, KTMC has a nationwide reputation for excellence and is able to manage all aspects of complex class action litigation with particular expertise in ERISA and securities litigation. *See* Gyandoh Decl., Ex. 9. KTMC is comprised of over 100 attorneys and a support staff consisting of nearly one hundred paralegals, secretaries, file clerks, summer interns, and administrative personnel, with a presence on both coasts of the United States, *i.e.*, Radnor, Pennsylvania and San Francisco, California, providing the abundant resources necessary to litigate any case. The firm’s ERISA litigation department is one of the foremost in the country. Acknowledging the firm’s history and track record of impressive results, courts across the country for more than a decade, in addition to the appointments mentioned above, have not hesitated to appoint KTMC as class counsel in ERISA breach of fiduciary class actions.⁶

⁶ KTMC’s appointments outside the Seventh Circuit within just the last ten years include, but are not limited to: *In re 2014 RadioShack ERISA Litig.*, No. 14-cv-959, Dkt. 29 (N.D. Tex. Jan. 9, 2015); *Borboa*, No. 13-cv-844, Dkt. 32 (order appointing KTMC interim class counsel); *Harris v. First Regional Bancorp*, No. 10-cv-07164 (C.D. Cal. Jan. 6, 2011) (order appointing KTMC interim class counsel); *In re Advanta Corp. ERISA Litig.*, No. 09-cv-04974 (E.D. Pa. June 4, 2010) (appointing KTMC interim class counsel); *In re Level 3 Commc’ns ERISA Litig.*, No. 09-cv-0658, Dkt. 75 (D. Colo. Mar. 18, 2010) (appointing KTMC as Interim Lead Class Counsel Committee Chair); *In re YRC Worldwide, Inc. ERISA Litig.*, No. 09-cv-02593, Dkt. No. 18 (D. Kan. Mar. 2, 2010) (order appointing KTMC as Interim Co-Lead Class Counsel for the putative plaintiff class pursuant to Rule 23(g) of the Federal Rules of Civil Procedure); *In re Fannie Mae 2008 ERISA Litig.*, No. 09-cv-1350 (S.D.N.Y. May 15, 2009); *In re SunTrust Banks, Inc. ERISA Litig.*, No. 08-cv-3384 (N.D. Ga. Oct. 5, 2009) (appointing KTMC Interim Co-Lead Class Counsel); *In re Constellation Energy, Inc. ERISA Litig.*, No. 08-cv-2662 (Dkt. No. 46-2) (D. Md. Jan. 23, 2009) (order consolidating cases, appointing KTMC Interim Co-Lead Class Counsel); *In re Huntington Bancshares Inc., ERISA Litig.*, No. 08-cv-165 (S.D. Ohio May 22, 2008) (appointing KTMC interim co-lead counsel for plaintiffs); *In re Nat’l City Corp. Sec., Derivative & ERISA Litig.*, No. 08-cv-7000, Non-Document Dkt. Entry (N.D. Ohio May 12, 2008) (appointing KTMC interim co-lead counsel for the consolidated ERISA action); *In re Beazer Homes USA, Inc. ERISA Litig.*, No. 07-cv-00952 (N.D. Ga. Nov. 11, 2007); *In re Diebold ERISA Litig.*, No. 06-cv-0170, Dkt. No. 29, Order at 3 (N.D. Ohio Nov. 16, 2006) (appointing KTMC co-lead class counsel); *In re Lear Corp. ERISA Litig.*, No. 06-cv-11735, Dkt. No. 8, Stipulated Case Management Order at 7 (E.D. Mich. June 30, 2006) (appointing KTMC lead counsel for the class).

The firm's ERISA litigation department, headed by name partner Joseph H. Meltzer and his partner Edward W. Ciolko, is widely recognized as one of the most preeminent in the country. The Honorable Richard W. Story remarked about KTMC during a final approval settlement hearing in *In re Mirant Corp. ERISA* action that "Class Counsel . . . are obviously eminently qualified to bring and pursue this litigation." See Gyandoh Decl., Ex. 11 (*In re Mirant Corp. ERISA et al.*, No. 03-cv-1027, Dkt. 120, at 13 (N.D. Ga. Nov. 16, 2006)). Indeed, the firm's litigation efforts resulted in favorable court opinions in a number of ERISA decisions denying defendants' motions to dismiss and motions for summary judgment, both in this Circuit and throughout the country.⁷

Likewise, KTMC's advocacy in appeals before the Supreme Court of the United States, the First, Third, Sixth, and Ninth Circuits, has also resulted in seminal ERISA breach of fiduciary duty decisions. Most recently, in *Fifth Third Bancorp, et al. v. Dudenhoeffer, et al.*, 134 S. Ct. 2459 (2014), the Supreme Court was called upon to consider whether, when a company retirement plan's fiduciary's decision to buy or hold the employer's stock in the plan is challenged in court, the fiduciary is entitled to a "fiduciary-friendly" pleading standard that the lower courts have called a "presumption of prudence." This presumption had existed for close to twenty years in every federal Circuit that considered the issue. KTMC was successful in convincing the Supreme Court to reject such presumption thereby, creating new significant law

⁷ See, e.g., *In re SunTrust Banks, Inc. ERISA Litig.*, No. 08-cv-3384 Dkt. 194 (N.D. Ga. June 18, 2015); *Gedek v. Perez, et al.*, No. 12-cv-6051, Dkt. 75 (W.D.N.Y. Dec. 17, 2014); *Morrison, et al. v. Citizens Republic Bancorp, Inc., et al.*, No. 11-cv-11709, Dkt. 72 (E.D. Mich. Apr. 10, 2014); *In re Advanta Corp. ERISA Litig.*, No. 09-cv-4974, 2011 WL 4528341 (E.D. Pa. Sept. 30, 2011); *In re R.H. Donnelley Corp. ERISA Litig.*, No. 09-cv-7571 (N.D. Ill. Jan. 10, 2011); *In re YRC Worldwide, Inc. ERISA Litig.*, No. 09-cv-2593 (D. Kan. Oct. 29, 2010) (Gyandoh Decl. Ex. 12); *In re Hartford Fin. Svcs. Grp., Inc. ERISA Litig.*, 2010 WL 135186 (D. Conn. Jan. 13, 2010); *In re First American Corp. ERISA Litig.*, No. 07-cv-01357 (C.D. Cal. Nov. 16, 2007); *Brieger v. Tellabs, Inc.*, 473 F. Supp. 2d 878 (N.D. Ill. 2007); *In re Sears, Roebuck & Co. ERISA Litig.*, No. 02-cv-8324, 2004 WL 407007 (N.D. Ill. Mar. 3, 2004).

in this area of practice.⁸ *Id.*, at 2463. *See also Evans v. Akers*, 534 F.3d 65 (1st Cir. 2008) (KTMC successfully argued that former employees who received lump sum distributions of the entire balance of their retirement plan have standing to sue under ERISA for fiduciary mismanagement of plan assets during the time period before they received their lump sum distributions); *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 242 (3d Cir. 2005) (finding that a subset of participants in a defined contribution plan had standing to sue on behalf of the plan pursuant to ERISA § 502(a)(2)); *In re Syncor ERISA Litig.*, 516 F.3d 1095 (9th Cir. 2008) (overturning the district court’s grant of summary judgment).

Further, KTMC is one of very few firms in the country with trial experience in ERISA “company stock” fiduciary breach class actions. In May of 2009, KTMC, as co-lead class counsel, completed a trial in this District that spanned several weeks before the Honorable Matthew F. Kennelly in *Brieger v. Tellabs, Inc.*, No. 06-cv-01882 (N.D. Ill.), an ERISA company stock breach of fiduciary duty class action analogous to the instant matter. To the best of KTMC’s knowledge, this was only the fourth such ERISA case to go to trial.

In addition to its extensive litigation experience, KTMC has successfully engaged in intricate and successful settlement negotiations and mediations involving complex legal and factual issues. Specific to ERISA matters, KTMC’s mediation experience has also resulted in large recoveries for class members. *See, e.g., In re Colgate-Palmolive Co. ERISA Litig.*, No. 07-cv-9515 (S.D.N.Y. July 8, 2014) (KTMC as Co-Lead Counsel, helped obtain a \$45.9 million settlement on behalf of retirement plan participants); *In re Honeywell Int’l ERISA Litig.*, No. 03-

⁸ In *Dudenhoefer v. Fifth Third Bancorp*, 692 F.3d 410 (6th Cir. 2012), KTMC successfully argued before the Sixth Circuit that defendants’ express incorporation of SEC filings into a retirement plan’s summary plan description was sufficient to support an allegation that defendants conveyed misleading information to plan participants (the Supreme Court decision did not address this ruling by the Sixth Circuit). It was this successful appeal before the Sixth Circuit that resulted in the petition for *certiorari* that was granted by the Supreme Court.

cv-1214 (D.N.J. 2004) (as Lead Counsel, achieved a \$14 million recovery to a defined contribution plan and its participants, as well as significant structural relief regarding the plan's administration and investment of its assets).⁹ Moreover, KTMC is also currently litigating multiple ERISA cases nationwide concerning purported "church plans" similar to the Plan at issue here.¹⁰ Thus, KTMC is not only knowledgeable about ERISA class actions generally; it is also well-versed in the ultimate issue that will be determined by the Court here.

3. KTMC Will Commit the Resources Necessary to Represent the Class

The final FRCP 23(g)(1)(A) factor concerning the resources that counsel will commit to a case also strongly supports the appointment of KTMC as Interim Lead Class Counsel here. As demonstrated above, KTMC is well-established, successful, and has the resources and personnel necessary to manage a case of this like the instant one. KTMC possesses the wherewithal and willingness to expend financial and human resources necessary to prosecute this action on behalf of the proposed class. Indeed, as is clear from its track record, there is no question that KTMC

⁹ In approving the *In re Honeywell* settlement, the Honorable Dickinson R. Debevoise stated the following with regard to KTMC's representation of the ERISA class:

Plaintiffs' counsel undoubtedly possess[es] great skill and experience in this kind of case and have exhibited that experience during the course of these proceedings.

* * *

[C]ounsel had to engage in extensive factual explorations and address legal problems both in the context of class certification and during the course of the motion to dismiss.

Final Fairness Hr'g Tr., *In re Honeywell ERISA Litig.*, No. 03-cv-01214-DRD at 40 (D.N.J. July 19, 2005) (attached to the Gyandoh Decl. as Ex. 13).

¹⁰ Specifically, KTMC is co-counsel in *Bailey et al. v. OSF Healthcare System, et al.*, No. 1:16-cv-01137 (C.D. Ill.); *Barker, et al. v. St. Joseph's Healthcare System, Inc., et al.*, No. 2:16-cv-02748 (D. N.J.); *Boden et al. v. St. Elizabeth Medical Center, Inc., et al.*, No. 2:16-cv-00049 (ED Ky.); *Brace v. Methodist Le Bonheur Healthcare, et al.*, No. 2:16-cv-02412 (W.D. Tenn.); *Cappello, et al. v. Franciscan Alliance, Inc. et al.*, No. 3:16-cv-00290 (N.D. Ind.); *Grasle v. Mercy Health, et al.*, No. 4:16-cv-0651 (E.D. Mo.); *Lupp v. Mercy Health et al.*, No. 1:16-cv-0-441 (S.D. Ohio); *Miller v. Bon Secours Health System*, No. 1:16-cv-01150 (D. Md.); *Nicholson v. Franciscan Missionaries of Our Lady Health Systems, et al.*, No. 3:16-cv-00258 (M.D. La.); *Tucker v. Baptist Health System, Inc. et al.*, No. 2:15-cv-00382 (N.D. Ala.), in addition to an action against SSM Healthcare in which KTMC is working together with two additional firms, with KTMC serving as effective co-lead counsel, *Feather v. SSM Health et al.*, No. 3:16-cv-393 (S.D. Ill.).

would devote the resources necessary for the prosecution of this case to trial, and if necessary, every level of appellate review.

C. TCLF SHOULD BE APPOINTED INTERIM LIAISON CLASS COUNSEL

TCLF is a Naperville, Illinois based law firm that concentrates its practice in the areas of complex personal injury, environmental and business class action litigation throughout the Chicago area and around the country. Since first opening its doors nearly twenty-five years ago, TCLF has established a superior reputation for experienced and innovative representation of its clients, having recovered more than \$100 million for their clients through jury verdicts and settlements combined. A copy of TCLF's resume is attached to Gyandoh Decl., Ex. 14. TCLF is both capable and qualified to fulfill the role of Interim Liaison Class Counsel in this action as articulated in the *Manual*.

IV. CONCLUSION

Accordingly, Plaintiff Curtis respectfully requests that the Court enter [Proposed] Pretrial Order No. 1, consolidating the ERISA Actions, establishing procedures for the consolidation of any related future-filed or transferred cases in this District, and appointing KTMC as Interim Lead Class Counsel and TCLF as Interim Liaison Class Counsel.

Dated: July 1, 2016

Respectfully submitted,

s/ Mark K. Gyandoh
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CERTIFICATE OF SERVICE

On July 1, 2016, I caused to be electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Illinois, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Mark K. Gyandoh
Mark K. Gyandoh