

**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,

v.

WHEATON FRANCISCAN SERVICES, INC.
d.b.a. Wheaton Franciscan Healthcare, Wheaton
Franciscan System Retirement Plan Committee,
and John Does 1-20,
Defendants.

Case No. 16-cv-04232

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,

v.

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.

Case No. 1:16-cv-06782

Honorable Gary Feinerman

***BOWEN* PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO APPOINT
BOWEN'S COUNSEL AS INTERIM CO-LEAD CLASS COUNSEL AND IN
OPPOSITION TO CURTIS PLAINTIFF'S MOTION**

I. INTRODUCTION

This litigation stems from the decision of the *Bowen* Plaintiffs’¹ counsel, Cohen Milstein Sellers & Toll PLLC² and Keller Rohrback, LLP³ (“CMST/KR”), to represent participants of pension plans administered by large non-profit healthcare corporations that erroneously claim that the pension plans they sponsor are “church plans.” By co-opting the “church plan” exemption, these corporations have avoided providing ERISA-mandated protections to their employees and pension plan participants. Since 2015, CMST/KR’s ERISA expertise and work on church plan cases has given rise to three appellate court victories: the Third, Seventh and Ninth Circuit courts have agreed (without dissent) with CMST/KR that only a church may establish a church plan.⁴ Significantly, CMST/KR’s argument before the Seventh Circuit in *Stapleton v. Advocate*, established the law in this jurisdiction that a plan established by religiously affiliated healthcare facility does not qualify for the “church plan” exemption.

Following CMST/KR’s initial success litigating and winning on the threshold question regarding the church plan exemption, in 2016, over twenty cases were filed that challenged religiously-affiliated hospitals’ invalid claim to “church plan” status as a means of avoiding ERISA’s requirements. Some of these cases were filed by Kessler Topaz Meltzer & Check, LLP (“KTMC”), now counsel to Plaintiff in the related *Curtis* Action. In five of these cases,

¹ The *Bowen* Plaintiffs include Bruce Bowen and Cheryl Mueller, individually, and on behalf of all others similarly situated, and on behalf of the Wheaton Franciscan System Retirement Plan.

² In addition to the Washington, D.C. office, Cohen Milstein Sellers & Toll PLLC has an office here in the Northern District of Illinois.

³ CMST/KR have zealously litigated these actions together. Accordingly, CMST/KR’s memorandum references both firms’ history and experience in developing the “church plan” cases. These law firms are referred to herein as “Cohen Milstein” and “Keller Rohrback.”

⁴ *Kaplan v. Saint Peter’s Healthcare Sys.*, 810 F.3d 175 (3d Cir. 2015), *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016), and *Rollins v. Dignity Health*, 830 F.3d 900 (9th Cir. 2016).

CMST/KR and KTMC have filed competing motions for Interim Co-Lead Counsel. Two courts have now ruled on those motions, appointing CMST/KR as Interim Co-Lead Counsel because “Cohen Milstein and Keller Rohrback have the most experience litigating this complicated issue of statutory and constitutional interpretation” and “are more qualified to serve as interim lead class counsel in this action.” *Hodges v. Bon Secours*, No. 1:16-cv-1079, 2016 WL 4447047, at *2 (D. Md. August 24, 2016)⁵; see also *Sanzone v. Mercy Health*, No. 4:16-cv-923-CDP (E.D. Mo. Aug. 4, 2016) (finding these firms are “are best able to represent the interests of the class”).⁶

The *Bowen* Plaintiffs now ask that this Court similarly find here that CMST/KR are best able to represent the interests of the class because they have (1) filed a more robust complaint, with superior factual development, identifying more defendants, pleading more claims, and identifying a broader class of participants; (2) developed the winning arguments which resulted in the favorable appellate decisions regarding the scope of the “church plan” exemption (including the Seventh Circuit); and (3) been endorsed by the AARP and Pension Rights Center⁷ as the counsel who will best protect the interests of the putative class. These strong qualifications, considered alongside the other Rule 23(g) criteria, support appointing CMST/KR as Interim Co-Lead Class Counsel for this consolidated action.⁸

⁵ In *Hodges v. Bon Secours*, the Court appointed Cohen Milstein as Interim Lead Counsel after Cohen Milstein and Keller Rohrback represented to the Court that Cohen Milstein would take the lead role in managing the case.

⁶ These orders are attached as Exhibits 1 and 2 to the Declaration of Karen Handorf in Support of CMST/KR’s Motion to Appoint Bowen’s Counsel as Interim Co-Lead Class Counsel and in Opposition to *Curtis* Plaintiff’s Motion (“Handorf Decl.”).

⁷ See Declaration of Karen Ferguson in Support of CMST/KR’s Motion to Appoint Bowen’s Counsel as Interim Co-Lead Class Counsel and in Opposition to *Curtis* Plaintiff’s Motion (“Ferguson Decl.”) ¶¶ 20-22; Declaration of Mary Ellen Signorille in Support of CMST/KR’s Motion to Appoint Bowen’s Counsel as Interim Co-Lead Class Counsel and in Opposition to *Curtis* Plaintiff’s Motion (“Signorille Decl.”) ¶ 26.

⁸ All parties agree that the *Bowen* and *Curtis* Actions should be consolidated.

II. BACKGROUND AND PROCEDURAL HISTORY

The *Bowen* Plaintiffs are participants in the Wheaton Franciscan Retirement Plan (the “Plan”), a defined benefit pension plan maintained by Wheaton Franciscan Services, Inc. (“Wheaton Franciscan”). In March 2016, some of Wheaton Franciscan’s operations were transferred to Ascension Health (“Ascension”), a Missouri corporation with headquarters in St. Louis, Missouri. On June 28, 2016, Plaintiffs Bruce Bowen and Cheryl Mueller (the “*Bowen* Plaintiffs”) filed this class action Complaint on behalf of all similarly situated Wheaton Franciscan employees. *Bowen v. Wheaton Franciscan Servs., Inc.*, No. 1:16-cv-06782 (N.D. Ill. filed Jun. 28, 2016) (the “*Bowen* Action” or “*Bowen*”). The *Bowen* Complaint seeks, among other things, a declaration that the Plan is an ERISA-regulated plan, and an order requiring the Plan to be reformed to comply with ERISA, including deeming employees with at least three but less than five years of vesting service fully vested participants, and approximately \$128 million to remedy unlawful reductions in benefits. *Bowen* Compl. ¶¶ 4, 258-62, 263-72, ECF No. 1. Plaintiffs also named Ascension as a defendant in this action. *Id.* at ¶ 4.

Also pending in this District is a similar putative class-action lawsuit brought by Diann M. Curtis against Wheaton Franciscan for the Plan’s non-compliance with certain provisions of ERISA. *Curtis v. Wheaton Franciscan Servs., Inc.*, No. 1:16-cv-04232 (N.D. Ill filed Apr. 11, 2016) (the “*Curtis* Action” or “*Curtis*”). Although *Bowen* and *Curtis* have not been consolidated, all parties agree that they should be.

Like the *Bowen* Action, the *Curtis* Action challenges Wheaton Franciscan’s claim that its pension plan falls under the “church plan” exception. However, *Curtis* advances only a subset of the ERISA violations and represents only a subset of the class members who are represented in the *Bowen* Action. The *Bowen* Complaint alone includes several critical claims that better protect the class, such as: the improper vesting claim, anti-cutback claim, anti-backloading claim,

the improper reduction of future accruals due to the failure to provide appropriate and timely notice claim and the constitutional claim contending that if the law in the Seventh Circuit is reversed, then the treatment of the Plan as an ERISA plan violates the Constitution's Establishment Clause. Curtis's Counsel has not advanced these claims, nor do they seek to represent the entire class that Bowen seeks to represent.⁹ Moreover, the *Bowen* Complaint reflects substantially more factual research and development, resulting in a complaint that is three times the length of the *Curtis* Complaint.

Despite seeking to advance only a subset of the claims in the *Bowen* Action, on July 1, 2016, KTMC moved for consolidation of the two cases and to be named Interim Lead Class Counsel over the consolidated action. *Curtis* Mem. in Supp. of Pl.'s Mot. for Entry of [Proposed] Pretrial Order ("*Curtis* Mem.") No. 1, ECF No. 39, at 4, 6. However, the *Bowen* Plaintiffs respectfully request this Court to appoint their Counsel as Interim Co-Lead Counsel based on their more expansive and robust complaint, derived from their superior breadth of understanding of church plan law and their depth of ERISA analysis. As discussed below, based on the Rule 23(g) factors, CMST/KR are best suited to protect the interests of the putative class and should be appointed Interim Co-Lead Counsel.

III. ARGUMENT

A. **Evaluation of FRCP 23(g) Factors Compels the Determination that CMST/KR Will Best Protect the Interests of the Class.**

⁹ Curtis's class definition includes all participants in the Wheaton Franciscan Plan but her complaint nowhere recognizes that the Plan only recognizes participants with five years of vesting service, thus unlawfully denying employees with at least three but less than five years of vesting service from being vested participants in the Plan. By contrast, Bowen alleges a claim requiring reformation of the Plan to recognize these employees with three to five years of vesting service as fully vested participants and thus pleads a broader class of participants than Curtis.

Curtis argues that KTMC should be appointed Interim Lead Class Counsel over these actions because her Counsel “satisfie[s] the requirements of FRCP 23(g),” and is therefore equipped to serve as class counsel. *Curtis Mem.*, ECF No. 39, 7-8. However, Curtis fails to address the fundamental purpose of selecting lead counsel under Federal Rule of Civil Procedure 23(g) – protecting the best interests of the class. Rule 23(g) provides that “When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, *the court must appoint the applicant best able to represent the interests of the class.*” Fed. R. Civ. P. 23(g)(2) (emphasis added). Accordingly, here, where two applicants seek appointment, the standard is not whether counsel is “adequate.” *See Curtis Mem.*, ECF No. 39, at 6. Rather, the Court is required, under Rule 23(g)(2), to determine whether CMST/KR or KTMC are most qualified to represent the class by considering the firms’ relative strengths among the following four factors: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel’s knowledge of the applicable law; and (4) resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv). As explained in more detail below, an analysis of these four factors demonstrates that CMST/KR are best qualified to protect the interests of the consolidated class.

1. CMST/KR Have Done Substantially More Work to Identify and Investigate the Class’s Claims and Thus Better Protects the Class.

One of the most important factors the Court must consider when appointing lead counsel in a putative class action is the work counsel has done in identifying or investigating potential claims. Fed. R. Civ. P. 23(g)(1)(A)(i). For example, in appointing Interim Lead Counsel in *Interest Rate Swaps Antitrust Litigation*, Judge Paul A. Engelmayer wrote: “the efforts

undertaken by [counsel] were more generative and exceeded the investigative work of the other applicants by an order of magnitude.” *In re Interest Rate Swaps Antitrust Litig.*, No. 1:16-md-02704-PAE, 2016 WL 4131846, at *3 (S.D.N.Y. Aug. 3, 2016).¹⁰ Here, even a cursory review of the two complaints and record before the Court demonstrates that CMST/KR have done more to investigate and identify claims that will best protect the class, both with respect to counsels’ in-depth analysis of the Wheaton Franciscan Plan and with respect to CMST/KR’s extensive investigation surrounding the basis for ERISA’s “church plan” exemption more broadly. The investigation and work that CMST/KR have invested in these claims to protect the Class favors their appointment as Interim Co-Lead Counsel.

a. CMST/KR’s Complaint Alleges More Claims Which Are Specifically Tailored to the Plan at Issue.

KTMC submits that, by “closely examining the fiduciaries [sic] alleged wrongdoing” in its investigation of the Wheaton Franciscan Plan Documents, KTMC’s resulting “allegations are detailed and specific, and based on KTMC’s thorough investigation[.]” *Curtis Mem.*, ECF No. 39 at 8. However, the five claims that KTMC alleges in its complaint are the same five allegations it has *pled in every church plan case it has filed*. In each complaint, KTMC alleges (1) that the plan at issue is not a “church plan” under ERISA and seeks declaratory relief thereto; (2) the failure to file required annual reports and to provide required notices and material information to plan participants; (3) the failure to provide minimum funding; (4) the failure to establish the plan at issue with a written instrument and to establish a trust; and (5) a breach of fiduciary duty.¹¹ While the *Bowen* Plaintiffs do not contest any of these claims—in fact, the

¹⁰ The opinion is attached as Exhibit 3 to the Handorf Declaration.

¹¹ Compare Complaint, *Curtis v. Wheaton Franciscan Services, Inc.*, No. 16-cv-04232 (N.D. Ill. Apr. 11, 2016), ECF No. 1 at ¶¶ 69-73, 74-84, 85-91, 92-96, 97-105 with Complaint, *Tucker v. Baptist Health System, Inc.*, No. 2:15-cv-00382 (N.D. Ala. Mar. 3, 2015), ECF No. 1 at ¶¶ 47-

Bowen Plaintiffs alleged the same ERISA violations in their complaint—CMST/KR conducted a much more thorough and granular analysis, resulting in a set of 13 counts that address the specific deficiencies of the Wheaton Franciscan Plan, and not just the general deficiencies inherent in a defined benefits plan that is operated outside the aegis of ERISA.

The *Bowen* Complaint represents the culmination of a lengthy investigation by CMST/KR and their analysis of Wheaton Franciscan and Ascension, including how they operate this particular plan. CMST/KR analyzed Wheaton Franciscan’s Plan Documents, Summary Plan Descriptions, benefit statements, newspaper articles, Wheaton Franciscan’s website, various financial disclosures by Wheaton Franciscan, reports by ratings agencies, Form 5500 filings, and Wheaton Franciscan’s Form 990 returns. Handorf Decl. ¶ 27; Declaration of Ron Kilgard in Support of CMST/KR’s Motion to Appoint Bowen’s Counsel as Interim Co-Lead Class Counsel and in Opposition to *Curtis* Plaintiff’s Motion (“Kilgard Decl.”) ¶ 21. During their factual investigation, CMST/KR drew upon their own ERISA expertise and legal analysis, including theories developed and honed during “the first wave of these ‘Church Plan’ cases” that they filed

51, 52-63, 64-70, 71-75, 76-83 ; Complaint, *Boden v. St. Elizabeth Med. Center, Inc.*, No. 2:16-cv-00049 (E.D. Ky. Mar. 17, 2016), ECF No. 1 at ¶¶ 86-90, 91-101, 102-108, 109-113, 114-122; Complaint, *Nicholson v. Franciscan Missionaries of Our Lady Health Systems*, No. 3:16-cv-00258 (M.D. La. Apr. 21, 2016), ECF No. 1 at ¶¶ 89-93, 94-104, 105-111, 112-116, 117-125; Complaint, *Bailey v. OSF Healthcare System*, No. 1:16-cv-01137 (C.D. Ill. May 3, 2016), ECF No. 1 at ¶¶ 71-75, 76-86, 87-93, 94-98, 99-107; Complaint, *Grasle v. Mercy Health*, No. 4:16-cv-00651 (E.D. Mo. May 10, 2016), (*consolidated into Sanzone v. Mercy Health*, 4:16-cv-00923 (E.D. Mo. Jun. 21, 2016)), ECF No. 1 at ¶¶ 73-77, 78-88, 89-95, 96-100, 101-109; Complaint, *Barker v. St. Joseph’s Healthcare System, Inc.*, No. 2:16-cv-02748 (D.N.J. May 16, 2016), ECF No. 1 at ¶¶ 82-86, 87-97, 98-104, 105-109, 110-118; Complaint, *Miller v. Bon Secours Health System*, No. 1:16-cv-01150 (D. Md. Apr. 18, 2016) (*consolidated into Hodges v. Bon Secours Health System*, No. 1:16-cv-01079), ECF No. 1 at ¶¶ 69-73, 74-84, 85-91, 92-96, 97-105; Complaint, *Brace v. Methodist Le Bonheur Healthcare*, No. 2:16-cv-02412 (W.D. Tenn. Jun. 11, 2016), ECF No. 1 at ¶¶ 67-71, 72-82, 83-89, 90-94, 95-104; Complaint, *Cappello v. Franciscan Alliance Inc.*, No. 3:16-cv-00290 (N.D. Ind. May 12, 2016), ECF No. 1 at ¶¶ 65-69, 70-80, 81-87, 88-92, 93-101 ; Complaint, *Lupp v. Mercy Health*, No. 1:16-cv-00441 (S.D. Ohio Mar. 30, 2016) (*consolidated as In Re Mercy Health ERISA Litig.*), ECF No. 1 at ¶¶ 56-60, 61-71, 72-78, 79-83, 84-92\.

“from 2013 through 2014” and subsequent years of litigation. *Hodges v. Bon Secours Health System*, No. 1:16-cv-1079 at 3.

Because pension plans, such as the Wheaton Franciscan Plan, are highly regulated by ERISA and the parallel tax code, CMST/KR’s technical expertise with ERISA and in particular with the type of plan at issue here, a cash balance plan, sets them apart. CMST/KR *alone* have the expertise that allowed them to analyze and assess this Plan’s compliance with ERISA’s requirements--such as funding levels, actuarial equivalence rules, vesting rules, the anti-backloading requirements, and the anti-cutback rules--which is necessary to ensure the Class’s interests are best protected.¹² Accordingly, CMST/KR’s sophisticated investigation and analysis of how this Plan is operated culminated in a superior complaint, which identifies several claims (which KTMC failed to identify and plead) that will provide greater protections and monetary recovery for the class, should plaintiffs prevail.¹³

For example, both CMST/KR and KTMC alleged that Defendants failed to make sufficient contributions to the Plan to satisfy ERISA’s minimum funding requirements, in

¹² See Handorf Decl. ¶ 25.

¹³ The *Curtis* Complaint comparatively falls short in protecting the class for failure to advance the following claims alleged in the *Bowen* Complaint: (1) a claim under ERISA section 203 for failing to vest participants who completed three years of Service, *Bowen* Compl. ¶¶ 263-72 (Count II); (2) claims under ERISA section 204(b) alleging backloading violations, *id.* at ¶¶ 273-95 (Count III); (3) claims under ERISA section 204(h) alleging the failure to notify participants of a reduction in accrued benefits, *id.* at ¶¶ 296-312 (Count IV); (4) claims under ERISA section 204(g) alleging the illegal cutback of certain participants benefits, *id.* at ¶¶ 313-330 (Count V); (5) a claim under ERISA sections 502(a)(1)(B) and 502(a)(3) for clarification of future benefits to ensure that the vested benefits of all participants are accurate despite the failure to administer the Plan in compliance with ERISA, *id.* at ¶¶ 367-70 (Count X); (6) certain claims for civil monetary penalties for failing to provide ERISA-required notices and disclosures, *id.* at ¶¶ 371 - 77 (Count XI); and (7) fiduciary breach sub-counts alleging violations of ERISA sections 406(a)(1)(B) & (D) and 406(b)(1) concerning fiduciaries’ use of the Plan’s assets for business expenses while failing to fund the Plan; fiduciary breach sub-counts for failure to monitor other fiduciaries; and fiduciary breach sub-counts for co-fiduciary liability, *see id.* at ¶¶ 378-413 (Count XII).

violation of ERISA § 302. *Bowen* Compl. ¶¶ 353-58; *Curtis* Compl. ¶¶ 85-91. However, CMST/KR additionally identified vesting, anti-cutback and anti-backloading claims, all of which are unique to the Wheaton Franciscan Plan. *See Bowen* Compl. ¶¶ 263-72, 273-95, 313-330.

Similarly, while KTMC only identified Wheaton Franciscan as a defendant in the *Curtis* action, CMST/KR identified Ascension Health and the Ascension Pension Committee as co-defendants, as well. *Id.* at ¶ 4. This is critical because, effective March 1, 2016, the Plan sponsor was changed to Ascension Health and the Plan Administrator was changed to the Ascension Health Pension Committee. *Id.* at ¶ 24. As a result, any prospective relief (such as declaratory or injunctive relief) requiring the Plan be brought into compliance with ERISA can only be obtained against the current Plan Sponsor and Administrator, Ascension Health and the Ascension Pension Committee respectively.

Finally, the *Bowen* Complaint, unlike the *Curtis* Complaint, does not rely solely on a statutory claim. If ERISA is read so that an entity such as Wheaton Franciscan can establish and maintain a church plan, the *Curtis* Complaint has no alternative theory of liability. In contrast, the *Bowen* Complaint alleges, in detail, that “the Church Plan exemption, as claimed by Wheaton Franciscan and Ascension Health, is unconstitutional because it violates the Establishment Clause of the First Amendment.” *Bowen* Compl. ¶ 12.

In short, where KTMC has pled the exact same five claims they plead in all their church plan cases, and by contrast, CMST/KR uncovered 12 ERISA violations, many of which were unique to the operation of the Wheaton Franciscan Plan here, it is clear that CMST/KR has done substantially more to protect the Class’s interest. It is this ability to identify the specific effect of the Plan’s deficiencies on the Plan’s participants and to seek the appropriate relief for these

deficiencies that differentiates CMST/KR from KTMC.¹⁴ Under a Rule 23(g)(2) analysis, this Court must decide whether KTMC is more qualified to lead a class action that includes a constitutional law claim and highly technical violations of ERISA’s vesting, anti-cutback and anti-backloading provisions despite the fact that KTMC has never pled such claims, either here or in any other litigation. The opposite outcome, that because CMST/KR identified these claims, they are more qualified to advance them, is a far easier conclusion to draw.

b. CMST/KR Are Unsurpassed in Their Work Investigating the “Church Plan” Exemption More Broadly.

CMST/KR have been involved in Church Plan litigation for over six years. Keller Rohrback filed the first of a series of Church Plan cases on April 21, 2010. *See Thorkelson v. Publ’g House of Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119 (D. Minn. 2011).¹⁵ Shortly thereafter, the Pension Rights Center – which has for decades worked to protect retirees and pensions against ERISA violations, including (more recently) misuse of the “church plan” exemption – retained Cohen Milstein to draft an amicus curiae brief on its behalf in support of the *Thorkelson* plaintiffs.¹⁶

Through their work on *Thorkelson*, CMST/KR learned that a wide range of non-church entities had taken the position that their defined benefit pension plans were ERISA-exempt based on an overly broad and incorrect interpretation of the Church Plan exemption. Moreover, both the IRS and the DOL appeared to have endorsed this erroneous interpretation. After extensive research and analysis, including a detailed analysis of the exemption and its legislative history,

¹⁴ *See Hodges v. Bon Secours*, No. 1:16-cv-1079 at 4 (explaining the basis for its leadership appointment on the fact that CMST/KR had alleged additional causes of action and raised additional theories of liability, including that the defendant plan did not meet the statutory definition of a church plan pursuant to ERISA section 3(33)(B)(ii)).

¹⁵ Handorf Decl. ¶¶ 10-13; Kilgard Decl ¶¶ 10-13.

¹⁶ Handorf Decl. ¶ 12; Kilgard Decl. ¶ 12; Ferguson Decl. ¶ 19.

Cohen Milstein and Keller Rohrback concluded that applying the exemption to Plan established by entities that were clearly not churches, but that merely claimed some degree of affiliation with a church, was not supported by a plain reading of the statute and was likely unconstitutional.¹⁷

Cohen Milstein and Keller Rohrback subsequently devoted substantial time and resources to a broad investigation of non-church entities whose defined benefit plans relied on an incorrect interpretation of the Church Plan provision to evade compliance with ERISA. The firms alone analyzed the text of the Church Plan exemption, and reviewed IRS private letter rulings, DOL Advisory Opinions, and every court decision interpreting the exemption since it was enacted. They alone developed the factual basis for claiming that plans established by non-churches did not meet the statute's requirements, even based on the Government's erroneous interpretation of the Church Plan exemption. And they alone developed the argument that application of the Church Plan exemption to plans established by non-churches would be unconstitutional.¹⁸

2. CMST/KR Have Unsurpassed Knowledge of the Applicable Law and Experience Handling the Type of Claims Asserted in the Action.

The second and third Rule 23(g)(1)(A) factors also weigh in favor of appointing CMST/KR as the best qualified to serve as Interim Co-Lead Counsel in this ERISA class action. *See, e.g., Smith v. State Farm Mut. Auto. Ins. Co.*, 301 F.R.D. 284 (N.D. Ill. 2014) (appointing as interim lead counsel the firm with substantial prior experience in litigating same type of case). Under these two factors, the Court must consider "(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action," and "(iii) counsel's knowledge of the applicable law." *Id.* at 288. Indeed, these two factors are really implicit in the first factor. The only reason CMST/KR could so successfully mount a challenge to

¹⁷ Handorf Decl. ¶¶ 14-15; Kilgard Decl. ¶¶ 14-15.

¹⁸ Handorf Decl. ¶¶ 15, 26, 44; Kilgard Decl. ¶¶ 15, 20, 21.

the misuse of the esoteric ERISA exemption was precisely because of their extensive experience in and knowledge of ERISA and church plan law.

CMST/KR have unparalleled knowledge of the “church plan” exemption, becoming the architects of the legal theories and litigation strategies in this area of the law, and paving the way for participants in plans sponsored by large hospital conglomerates to ensure they are provided ERISA’s protections. CMST/KR alone have survived numerous motions to dismiss and obtained favorable decisions from three Courts of Appeals on the statutory question of Church Plan status. In contrast, KTMC have achieved none of those victories to date and, instead have largely been able to file these actions because of CMST/KR’s successes.

Unlike KTMC, who have never received a decision on a motion to dismiss or completed discovery in a church plan case, CMST/KR have completed significant fact and expert discovery and obtained a judgment that a plan similar to the one here is not a valid church plan. Thus, CMST/KR’s greater expertise in litigating these actions through discovery and beyond will inure to the benefit of this class as the action proceeds.¹⁹

CMST/KR has also garnered the endorsement of two of the most prominent organizations concerned with protecting retirement benefits: the AARP and the Pension Rights Center. Both have provided sworn statements in support of CMST/KR, attesting to the organizations’ belief that CMST/KR will best represent the interests of the Wheaton Franciscan Plan participants.

¹⁹ In addition to successfully litigating the statutory interpretation issue, CMST/KR have completed fact and expert discovery in *Medina v. Catholic Health Initiatives*, 147 F. Supp. 3d 1190, 1191 (D. Colo. 2015), conducted fact and expert discovery in *Chavies v. Catholic Health East*, No. 2:13-cv-01645-CDJ (E.D. Pa. Mar. 28, 2013), completed class discovery and significant merits discovery and fully briefed class certification in *Owens v. St. Anthony’s Med. Ctr.*, No. 14-cv-4068, 2015 WL 3819086 (N.D. Ill. June 18, 2015), and are developing a factual record in *Carver v. Presence Health Network*, No. 1:15-cv-02905 (N.D. Ill. Apr. 2, 2015).

Cohen Milstein's ERISA Expertise

Cohen Milstein's Employee Benefits Practice Group has been devoted exclusively to litigating complex ERISA class actions for over 15 years. The group, led by Karen L. Handorf, has played a significant role in the development of employee benefits law. Under Ms. Handorf's leadership, Cohen Milstein maintains a leading ERISA practice that successfully represents ERISA participants throughout the country.²⁰

Before joining Cohen Milstein in 2007, Ms. Handorf spent more than 25 years enforcing all aspects of ERISA litigation issues at the Department Of Labor, where she served as the second-highest ranking lawyer for enforcement of the provisions of ERISA at issue here.²¹ Ms. Handorf's breadth and depth of ERISA knowledge is unparalleled in the plaintiff's bar.²² Similarly, Michelle Yau, began her career at the Department of Labor as an honor attorney and has spent most of her legal career specializing in ERISA litigation. Ms. Yau received her J.D. from Harvard Law School in 2003, where she was awarded several public interest fellowships. In 2014, *Law360* named Ms. Yau a "Rising Star Under 40."²³

Keller Rohrback's ERISA Expertise

Keller Rohrback has obtained many favorable and groundbreaking decisions in the area of company stock and other ERISA class action cases. The firm's work as lead counsel in ERISA cases has been widely praised. *See, e.g., In re WorldCom, Inc. ERISA Litig.*, No. 02 Civ. 4816 (DLC), 2004 WL 2338151, at *10 (S.D.N.Y. Oct. 18, 2004).

²⁰ Handorf Decl. ¶ 29; Ferguson Decl. ¶¶ 15-17

²¹ Handorf Decl. ¶ 30. In addition, Ms. Handorf has served as plaintiff's co-chair of ABA subcommittees on ERISA civil enforcement and preemption and for more than two decades, has been a frequent national speaker on ERISA issues. In 2016 and 2017, she was selected for inclusion in Best Lawyers in America for ERISA practice. *Id.* ¶¶ 34-35.

²² *See* Ferguson Decl. ¶¶ 15-17; Signorille Decl. ¶¶ 20-21, 23.

²³ Handorf Decl. ¶¶ 38-39, 42.

Keller Rohrback's Complex Litigation and ERISA team is led by the firm's Managing Partner, Lynn Lincoln Sarko, a former Assistant United States Attorney and Ninth Circuit judicial law clerk (Hon. Jerome Farris) who has actively engaged in the prosecution of complex litigation for more than two decades. Mr. Sarko has worked closely with the DOL on numerous issues, has established relationships with many of the key experts in the field, and has worked extensively with plaintiff and defense counsel in related cases. He is a frequent commentator on ERISA litigation and regularly speaks at national ERISA conferences.²⁴ Similarly, Ron Kilgard, who practices in the firm's Phoenix office, graduated *cum laude* with a B.A. in History from Harvard College in 1973 and received his Master of Theological Studies from Harvard Divinity School in 1975. He graduated *magna cum laude* from Arizona State University College of Law, where he was the Editor-in-Chief of the *Arizona State Law Journal* and where he received the Armstrong Award (outstanding graduate).²⁵ In 2012 he was selected for inclusion in Best Lawyers in America (19th ed.) for ERISA practice.²⁶

3. CMST/KR Have the Resources Necessary to Represent the Class

As to the fourth factor – the resources available to represent the Class – Cohen Milstein and Keller Rohrback are well-established and successful law firms²⁷ that have the financial resources and personnel necessary to pursue a case of this magnitude, as each has demonstrated in numerous large-scale class actions.²⁸ Cohen Milstein has over 90 lawyers in seven U.S. cities

²⁴ Kilgard Decl. ¶ 22.

²⁵ Kilgard Decl. at ¶ 5 n.2 .

²⁶ Kilgard Decl. at ¶ 5.

²⁷ See *About Cohen Milstein*, Cohen Milstein, <http://www.cohenmilstein.com/about-us> (last visited November 9, 2016); *Employee Benefits/ERISA*, Cohen Milstein, <http://www.cohenmilstein.com/practice-area/employee-benefits-erisa> (last visited November 9, 2016).

²⁸ See Handorf Decl. ¶ 45; Kilgard Decl. ¶ 26.

and has a group of eight attorneys – with a combined 40+ years of ERISA litigation experience – whose practice consists exclusively of ERISA class actions.

Both firms have the financial resources to litigate complex class actions without reimbursement of significant fees and expenses for years, having done so many times.²⁹ Both firms pride themselves on the quality of legal work and their ability to litigate zealously and creatively with the highest ethical standards – attributes that courts across the country have recognized. For example, in 2015, Cohen Milstein was named as one of the ten “Most Feared Plaintiffs Firms” for the third year in a row.³⁰ Together, the firms possess extensive in-house document hosting and management capabilities and conduct discovery on a nationwide scale, including negotiating and developing discovery protocols for the production of electronic and other documents, in-house database development, document processing, hosting, and review.

CMST/KR’s combined experience and resources will allow them to streamline the litigation and create efficiencies unavailable to other firms. Thus, the resource factor under Rule 23(g) also favors appointment of CMST/KR’s as Interim Co-Lead Counsel. Finally, Cohen Milstein and Keller Rohrback have a long-standing, cohesive relationship working together on complex matters, including ERISA cases. They have demonstrated an ability to work together efficiently, effectively, and collaboratively in these cases, which assures the highest level of representation for Plaintiffs and the Class.

CONCLUSION

The *Bowen* Plaintiffs respectfully submit that, based on the four factors of Rule 23(g), CMST/KR are best able to represent the interests of Plaintiffs and the Class and should therefore be appointed Interim Co-Lead Counsel.

²⁹ Kilgard Decl. at ¶ 25.

³⁰ Handorf Decl. ¶ 46.

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Respectfully,

/s/ Carol V. Gilden

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2016, I electronically filed the above notice with the Clerk of the Court using the Court's ECF system, which in turn sent notice to all attorneys of record.

/s/ Julie G. Reiser