UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| IN RE WHEATON FRANCISCAN ERISA LITIGATION | Case No. 16-cv-04232<br><br>Honorable Gary Feinerman |
|---|---|

# PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR UNOPPOSED MOTION FOR FINAL APPROVAL OF THE SETTLEMENT

# TABLE OF CONTENTS

**I. INTRODUCTION .......... 1**

**II. FACTUAL AND PROCEDURAL BACKGROUND .......... 2**

**A. Overview of the Settlement Agreement .......... 5**
1. Settlement Consideration .......... 5
2. Non-Monetary Equitable Consideration .......... 6
3. Certification of a Rule 23 Class .......... 6
4. Releases .......... 7
5. Notice .......... 7
6. Attorneys' Fees, Costs and Incentive Awards .......... 8

**B. Reasons for the Settlement .......... 8**

**III. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL .......... 8**

**A. The Settlement Was Reached After Arm's-Length Negotiations with the Assistance of an Experienced Mediator and Is Procedurally Fair .......... 9**

**B. Application of the *Synfuel* Factors Supports Approval of the Settlement as Fair, Reasonable and Adequate .......... 10**
1. The Strength of Plaintiffs' Case Compared to the Amount of Settlement, As Well As the Complexity, Expense and Likely Duration of the Litigation, Support Approval of the Settlement. .......... 11
2. An Evaluation of the Amount of Opposition to Settlement Among Affected Parties Supports Approval of the Settlement. .......... 13
3. The Stage of the Proceedings and the Amount of Discovery Completed Support Approval of the Settlement, and the Opinion of Class Counsel Is That the Settlement Is Fair and Reasonable. .......... 14

**IV. NOTICE TO THE CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS .......... 17**

**V. THE REQUIREMENTS FOR CLASS CERTIFICATION HAVE BEEN MET AND THE CLASS SHOULD BE CERTIFIED .......... 18**

**A. The Settlement Class Meets the Requirements of Rule 23(a). .......... 18**

**B. The Settlement Class Meets the Requirements of Rule 23(b)(1) and (2). .......... 20**
1. Individual Actions Would Create Inconsistent Adjudications or be Dispositive of the Interests of Absent Members. .......... 20
2. Defendants Have Acted on Grounds Generally Applicable to the Class, and Relief for the Class as a Whole is Appropriate. .......... 21

**C. Class Counsel Meets the Requirements of Rule 23(g). .................................. 22**

**VI. CONCLUSION ........................................................................................................ 22**

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

*Advocate Health Care Network v. Stapleton*,
137 S. Ct. 1652 (2017)....4, 5, 11, 12, 13, 16

*In re Allstate Ins. Co.*,
400 F.3d 505 (7th Cir. 2005)....21

*Amchem Prods. v. Windsor*,
521 U.S. 591 (1997)....19

*Armstrong v. Bd. of Sch. Dirs. of the City of Milwaukee*,
616 F.2d 305 (7th Cir. 1980)....9

*In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*,
789 F. Supp. 2d 935 (N.D. Ill. 2011)....11

*Baker v. Kingsley*,
No. 03 C 1750, 2007 WL 1597654 (N. D. Ill. May 31, 2007)....20

*In re Beef Indus. Antitrust Litig.*,
607 F.2d 167 (5th Cir. 1979)....18

*Berger v. Xerox Corp. Ret. Income Guarantee Plan*,
338 F.3d 755 (7th Cir. 2003)....21, 22

*Brieger v. Tellabs, Inc.*,
245 F.R.D. 345 (N.D. Ill. 2007)....20

*Cannon v. Burge*,
752 F.3d 1079 (7th Cir. 2014)....9

*CE Design v. Beaty Constr., Inc.*,
No. 07 C 3340, 2009 WL 192481 (N.D. Ill. Jan. 26, 2009)....17

*EEOC v. Hiram Walker & Sons, Inc.*,
768 F.2d 884 (7th Cir. 1985)....9

*Gaspar v. Linvatec Corp.*,
167 F.R.D. 51 (N.D. Ill. 1996)....18

*George v. Kraft Foods Glob., Inc.*,
251 F.R.D. 338 (N.D. Ill. 2008)....22

*Hispanics United of DuPage Cty. v. Vill. of Addison, Ill.*,
988 F. Supp. 1130 (N.D. Ill. 1997) ....................9

*Isby v. Bayh*,
75 F.3d 1191 (7th Cir. 1996) ....................8, 9, 11, 14, 18

*Jackson v. Sheriff of Cook Cty.*,
No. 06 C 0493, 2006 WL 3718041 (N.D. Ill. Dec. 14, 2006) ....................18

*Keele v. Wexler*,
149 F.3d 589 (7th Cir. 1998) ....................19

*Loomis v. Exelon Corp.*,
No. 06 C 4900, 2007 WL 2060799 (N. D. Ill. June 26, 2007) ....................20

*Lukas v. Advocate Health Care Network & Subsidiaries*,
No. 1:14-CV-2740, 2015 WL 5006019 (N.D. Ill. Aug. 19, 2015) ....................18

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Adcock*,
176 F.R.D. 539 (N.D. Ill. 1997)....................9

*In re Mex. Money Transfer Litig.*,
164 F. Supp. 2d 1002 (N.D. Ill. 2000) ....................13, 14, 16

*Miksis v. Evanston Twp. High Sch. Dist. # 202*,
No. 12 C 8497, 2017 WL 386652 (N.D. Ill. Jan. 27, 2017), *as amended* (Feb. 2, 2017) ....................9

*Mirfasihi v. Fleet Mortg. Corp.*,
450 F.3d 745 (7th Cir. 2006) ....................10

*Muro v. Target Corp.*,
580 F.3d 485 (7th Cir. 2009) ....................19

*Neil v. Zell*,
275 F.R.D. 256 (N.D. Ill. 2011)....................20, 22

*Noll v. eBay, Inc.*,
309 F.R.D. 593 (N.D. Cal. 2015)....................14

*Oshana v. Coca-Cola Co.*,
472 F.3d 506 (7th Cir. 2006) ....................19

*In re Prudential Sec. Inc. Ltd. P'ships Litig.*,
163 F.R.D. 200 (S.D.N.Y. 1995) ....................18

*Rosario v. Livaditis*,
963 F.2d 1013 (7th Cir. 1992) ....................19

*In re Sears, Roebuck and Co. Front-loading Washer Prods. Liab. Litig.*,
No. 06 C 7023, 2016 WL 772785 (N.D. Ill. Feb. 29, 2016) ........................................9

*Smith v. Aon Corp.*,
238 F.R.D. 609 (N. D. Ill. 2006) ........................................20, 21, 22

*Synfuel Techs., Inc. v. DHL Express (USA), Inc.*,
463 F.3d 646 (7th Cir. 2006) ........................................10, 11

*Tucker v. Walgreen Co.*,
No. 05-440-GPM, 2007 WL 2915578 (S.D. Ill. Oct. 5, 2007) ........................................17

*Williams v. Quinn*,
748 F. Supp. 2d 892 (N.D. Ill. 2010) ........................................10

*Williams v. Rohm & Haas Pension Plan*,
658 F.3d 629 (7th Cir. 2011) ........................................8

**STATUTES**

26 U.S.C. § 414(e) ........................................3

Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1711, *et seq* ........................................2, 14

Employee Retirement Income Security Act ("ERISA"),

29 U.S.C. § 1001, *et seq* ........................................1, 2, 3, 4, 6, 9, 11, 12, 14, 18, 19, 20, 21, 22

**OTHER AUTHORITIES**

Fed. R. Civ. P. 23 ........................................1, 2, 6, 7, 8, 17, 18, 19, 20, 21, 22

5 James Wm. Moore, MOORE'S FEDERAL PRACTICE § 23.164[4] (3d ed. 2002) ........................................16

## I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs Bruce Bowen, Cheryl Mueller, and Diann M. Curtis ("Plaintiffs" or "Named Plaintiffs"), by and through their attorneys, respectfully submit this memorandum in support of their Unopposed[1] Motion for Final Approval of Settlement Agreement and Certification of Settlement Class.[2] This Settlement resolves the claims of Plaintiffs in this case against all Defendants. The Complaint alleges that the non-profit healthcare system Wheaton Franciscan Services, Inc. ("Wheaton") and Ascension Health, the company that acquired Wheaton's healthcare subsidiaries in Southeast Wisconsin and became the "sponsor" of the Wheaton Franciscan Retirement Plan ("the Plan") in March 2016, denied ERISA[3] protections to the participants and beneficiaries of the Plan by incorrectly claiming that the Plan qualifies as an ERISA-exempt "church plan." *See* 29 U.S.C. § 1002(33); Complaint – Class Action, ECF No. No. 1 ("Complaint"). Defendants deny these claims.

This Settlement[4] was reached after vigorous arm's-length negotiations by sophisticated counsel with the assistance of a third-party mediator who has had significant experience mediating ERISA and church plan cases. The Settlement represents an excellent result for the proposed Settlement Class of participants and beneficiaries of the Plan. Under the Settlement, Ascension Health hereby guarantees the payment of the first Twenty-Nine Million Five Hundred

---

[1] Defendants dispute many of the averments stated in this pleading but do not oppose the relief sought in this motion paper.

[2] Plaintiffs file the instant Motion contemporaneously with their Motion for Awards of Attorneys' Fees and Expenses and for Incentive Awards to the Named Plaintiffs.

[3] "ERISA" is a reference to the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq*.

[4] Capitalized terms not otherwise defined in this memorandum have the same meaning as ascribed to them in the Settlement Agreement, attached hereto as Ex. A.

Thousand Dollars ($29,500,000) of benefits that are distributable from the Plan to Settlement Class Members in the event trust assets attributable to the Plan become insufficient to pay such benefits (the "Plan Benefit Guarantee"). Ascension Health's guarantee may also be earlier satisfied and extinguished by cash contributions to the Plan that in the aggregate total $25 million. This obligation will continue for as long as the Plan is sponsored by any of the Releasees, as defined in the Class Action Settlement Agreement. Should a corporate transaction occur where Plan assets and liabilities covering Settlement Class Members transfer to a successor, Ascension Health shall cause the successor to honor Ascension Health's commitments under the Plan Benefit Guarantee. Ex. A §§ 7.1.1-4. Significantly, Plan participants will receive notice on an annual basis about the funding status of the Plan and their accrued retirement benefits. This annual notice will include, among other information, a summary of the Plan's funding arrangements, a summary of the Plan's expenses, a statement of the Plan's liabilities and assets, and summary information about the Plan's total income.

The Parties have fully complied with the terms of this Court's Order Preliminarily Approving Class Action Settlement Agreement, including providing notice of the Settlement to the Settlement Class and mailing the Class Action Fairness Act ("CAFA") notices to the requisite officials pursuant to the CAFA statute, 28 U.S.C. § 1715. Under the governing standards for evaluating class action settlements in this Circuit and pursuant to Federal Rule of Civil Procedure 23(e)(2), this Settlement is fair, reasonable, and adequate, and therefore Plaintiffs respectfully ask that the Court approve it.

## II. FACTUAL AND PROCEDURAL BACKGROUND

Class Counsel dedicated several years to developing a line of cases that challenged whether non-church entities could properly maintain their pension plans as "church plans" which are exempt from ERISA. *See* Joint Decl. of Class Counsel ("Joint Decl.") ¶¶ 8-12. They

devoted many hours to researching the definition of a "church plan" found in both ERISA and the Internal Revenue Code, 29 U.S.C. § 1002(33) and 26 U.S.C. § 414(e), including analyzing the statutory text, its interaction with other provisions in the U.S. Code, the legislative history of the statute, and agency and court interpretations of the statute. *Id.* ¶ 9. Ultimately, Class Counsel began challenging a number of hospitals around the country that maintained pension plans which they claimed were exempt from ERISA. *Id*. ¶ 11. This case arises from that investigation.

On April 11, 2016, Plaintiff Curtis filed a putative class action complaint in this Court against Wheaton and various individual defendants, alleging violations of ERISA. ECF No. 1. At that point, Cohen Milstein Sellers & Toll, PLLC and Keller Rohrback L.L.P. (collectively, "Class Counsel"), had already been working with the Bruce Bowen and Cheryl Mueller to investigate the facts, circumstances, and legal issues associated with the allegations and defenses in the action. Joint Decl. ¶¶ 14-15. This investigation included, *inter alia*: (a) inspecting, reviewing, and analyzing documents produced by or otherwise relating to Defendants, the Plan, and the administration and funding of the Plan; (b) researching the applicable law with respect to the claims asserted in this case and the possible defenses thereto; and (c) researching and analyzing governmental and other publicly-available sources concerning the Defendants, the Plan, and the industry. *Id*. On June 28, 2016, Plaintiffs Bowen and Mueller filed a separate putative class action complaint against Wheaton, Ascension Health, and various other defendants (collectively, the "Defendants") alleging violations of ERISA. Complaint, 16-6782, ECF No. 1.[5]

[5] Throughout this memorandum, the "Complaint" refers to Plaintiffs Bowen and Mueller's Complaint, filed on June 28, 2016, as case number 16-6782, which this Court designated as the operative Complaint. *See* ECF No. 77.

Both Plaintiff Curtis' and Plaintiffs Bowen and Mueller's complaints allege that Defendants denied ERISA protections to the participants and beneficiaries of the Plan, a defined benefit pension plan sponsored by Wheaton and Ascension Health, by incorrectly claiming that the Plan qualifies as an ERISA-exempt "church plan." *See* 29 U.S.C. § 1002(33). The complaints further allege that asserting this exemption caused Defendants to deny Plan participants certain ERISA protections. These allegations include, among others: underfunding the Plan by over $134.5 million; impermissibly requiring participants to complete five years of service before participants became fully vested in their accrued benefits; decreasing accrued benefits by several amendments to the Plan in violation of ERISA's anti-cutback provisions; and failing to furnish Plaintiffs or any member of the Class with required statements and reports. Compl. ¶¶ 120, 129, 137, 169, 177; *see also id.* ¶¶ 332-52. On July 8, 2016, the two cases were designated as "related," and on January 4, 2017, this Court consolidated the two cases for all purposes. ECF Nos. 44, 77.

Also on January 4, 2017, this Court stayed the consolidated case pending the Supreme Court's resolution of *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017) ("*Advocate*"). Joint Decl. ¶ 21. During this stay, on February 9, 2017, the parties attended a mediation session in hopes of resolving the case. *Id.* ¶ 23. The parties appeared before nationally-renowned mediator Robert A. Meyer, Esq., of JAMS in Los Angeles, California. *Id.* ¶ 24. Mr. Meyer has substantial experience mediating cases involving ERISA and retirement plan issues, including cases involving the church plan exemption. *Id.*; *see also* Ex. A §§ 2.7, 10.1.1. Although the matter was not resolved at the February 9, 2017 mediation, the parties made progress and agreed to continue settlement negotiations. Joint Decl. ¶ 25. During the stay, the parties remained actively engaged and organized a second in-person meeting with Mr. Meyer.

*Id*. The Court granted the parties' request to postpone an upcoming status conference, so that the parties could attempt to bring the matter to a final resolution during the second meeting with the mediator. ECF No. 82.

On June 5, 2017, the Supreme Court issued its opinion in *Advocate*, holding that pension plans need not be established by churches in order to qualify as church plans, if they otherwise met the requirements of ERISA-exempt church plans. Following the Supreme Court's ruling, another two months of negotiations were required to reach an agreement in principle to settle the case. Joint Decl. ¶¶ 12, 25-26. On June 27, 2017, the parties held their second in-person mediation before Robert Meyer. *Id*. ¶ 25. After additional negotiations, on August 11, the parties signed a Term Sheet containing the preliminary terms resolving this matter. *Id*. ¶ 26. The Settlement Agreement now before the Court, Ex. A, is a comprehensive agreement based on the Term Sheet. *Id*. ¶ 27. It was executed by all parties on September 1, 2017. *Id.* The Settlement is the result of lengthy arm's-length negotiations between the parties. *Id*. The process was thorough, adversarial, and professional. *Id*.

**A. Overview of the Settlement Agreement**

The principal terms of the Settlement Agreement are summarized below. *See* Ex. A.

**1. Settlement Consideration**

Under the Settlement Agreement, Ascension Health guarantees the payment of the first $29,500,000 of benefits that are distributable from the Plan to Settlement Class Members in the event trust assets attributable to the Plan become insufficient to pay such benefits (the "Plan Benefit Guarantee"). Ex. A at § 7.1.2. Ascension Health's obligation under the Plan Benefit Guarantee shall continue for as long as the Plan is sponsored by any of the Releasees. *Id.* Should a corporate transaction occur where Plan assets and liabilities covering Settlement Class

Members transfer to a successor, Ascension Health shall cause the successor to honor Ascension Health's commitments under the Plan Benefit Guarantee. *Id*. § 7.1.3. Any of the Releasees may satisfy Ascension Health's obligation under the Plan Benefit Guarantee by making contributions to the Plan Trust that in the aggregate total $25,000,000. *Id*. § 7.1.4. In its discretion, Ascension Health may make additional contributions to the Plan at any time. *Id*.

**2. Non-Monetary Equitable Consideration**

The Settlement establishes, for the life of the Plan, equitable provisions comparable to certain provisions of ERISA concerning plan administration, summary plan descriptions, notices, and the Plan's claim review procedure. *Id*. § 8.3. As a result of this provision, Plan participants will receive notice on an annual basis about the funding status of the Plan and the retirement benefits that they have accrued. *Id.* §§ 8.3.3-4. This annual notice will include, among other information, a summary of the Plan's funding arrangements, a summary of the Plan's expenses, a statement of the Plan's liabilities and assets, information about the increase or decrease in net plan assets for the year, and summary information about the Plan's total income. *Id.* § 8.3.3.

Under the terms of the Settlement Agreement, Ascension Health also guarantees that, for a period of seven and one-half years after the Effective Date, if the Plan is merged or consolidated with another plan, participants and beneficiaries who are Settlement Class members will be entitled to the same or a greater Accrued Benefit post-merger or after a consolidation event as they enjoyed before the merger or consolidation. Ex. A at § 8.1. Likewise, for the next seven and one-half years, Ascension Health guarantees that no amendment or termination of the Plan will result in a reduction of a Settlement Class member's Accrued Benefit. *Id*. § 8.2.

**3. Certification of a Rule 23 Class**

The Settlement contemplates that the Court will certify a non-opt-out class under Federal Rule of Civil Procedure 23(b)(1) or (b)(2). Ex. A at § 2.2.2. The Settlement Class is defined as: "All persons who, as of July 31, 2017, are former and/or current Plan participants, whether vested or non-vested, and their beneficiaries." *Id.* at § 1.25.

**4. Releases**

The Settlement Agreement provides for releases by and among Plaintiffs, Defendants, and certain other non-parties related to the litigation. *Id*. § 3. The persons to be released by Plaintiffs are defined as the "Releasees" and are enumerated at § 3.1 of the Settlement Agreement. The Releasees will be released from the "Released Claims," which generally include all claims that could have been asserted by Plaintiffs, arising under federal or state law, related to the sponsorship, funding, maintenance, operation or termination of, or distributions from, the Plan. *Id*. § 3.1. Plaintiffs, the Settlement Class, and Class Counsel will be released from claims relating to the institution and prosecution of this case. *Id*. § 3.2.

**5. Notice**

The Settlement Agreement and Preliminary Approval Order provided for the following notices: (a) a mailed Class Notice, to be mailed to the last known address of members of the Settlement Class; and (b) internet publication of the Settlement Agreement and Class Notice at cohenmilstein.com/wheaton-settlement and http://www.kellersettlements.com. *See* ECF 91; *see also* Ex. A § 2.2.3-4. Ascension paid the cost of notice to the Settlement Class, which was sent out on October 13, 2017. *See* Decl. of Jose C. Fraga ("Fraga Decl.") ¶ 8, attached. *See also* Ex. A § 7.2. Consistent with this Court's Preliminary Approval Order, Class Counsel published the Settlement Agreement and Class notice to the two websites listed above prior to the October 13, 2017 mailing. *See* Preliminary Approval Order, ECF No. 91; Joint Decl. ¶¶ 41-43.

#### 6. Attorneys' Fees, Costs and Incentive Awards

By separate application, Class Counsel seek an award of attorneys' fees, expenses, and incentive fees to the Named Plaintiffs. The Settlement Class was notified of these details in the Class Notice. *See* Fraga Decl. at Ex. A. Any award of attorneys' fees, expenses and incentive payments will be paid ***in addition to*** the other monetary terms set forth in the Settlement Agreement. Additional support for these requests is set forth in the attached Declarations from Class Counsel and the Named Plaintiffs themselves. Joint Decl. Sections II-IV; Bowen Decl. 2-3; Mueller Decl. ¶¶ 11-14; Curtis Decl. ¶¶ 2, 13-16.

### B. Reasons for the Settlement

Plaintiffs have entered into the Settlement with an understanding of the strengths and weaknesses of their claims. This understanding is based on: (1) the dialog concerning litigation risks in multiple mediation sessions; (2) investigation and research related to the Complaint's the factual allegations; (3) the likelihood that Plaintiffs would prevail at trial; (4) the range of possible recovery; and (5) the substantial complexity, expense, and duration of litigation necessary to prosecute these actions through trial, post-trial motions, and likely appeal, and the significant uncertainties in predicting the outcome of this complex litigation. *See* Joint Decl. ¶¶ 11-12, 15-16, 24-26, 32-35, 56. Having undertaken this analysis, Class Counsel, after extensive discussions with the Named Plaintiffs, have concluded that the Settlement is fair, reasonable, and adequate, and should be presented to the Court for approval. *Id*. at 21.

## III. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Under Rule 23(e) of the Federal Rules of Civil Procedure, the Settlement should be approved if the Court finds it "fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(2); *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 634 (7th Cir. 2011) (citing Fed. R. Civ. P. 23(e)(2)); *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996)). In general, federal courts favor

settlement of class action litigation. *Isby*, 75 F.3d at 1196; *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888-89 (7th Cir. 1985). "In the class action context in particular, there is an overriding public interest in favor of settlement. Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources." *In re Sears, Roebuck and Co. Front-loading Washer Prods. Liab. Litig.*, No. 06 C 7023, 2016 WL 772785, at *6 (N.D. Ill. Feb. 29, 2016) (citing *Armstrong v. Bd. of Sch. Dirs. of the City of Milwaukee*, 616 F.2d 305, 313 (7th Cir. 1980)) (internal quotations omitted). As a result, "[c]ourts do not easily disturb settlement agreements." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Adcock*, 176 F.R.D. 539, 544 (N.D. Ill. 1997); *see also Miksis v. Evanston Twp. High Sch. Dist. # 202*, No. 12 C 8497, 2017 WL 386652, at *17 (N.D. Ill. Jan. 27, 2017), *as amended* (Feb. 2, 2017) (approving a settlement agreement and noting that "the Court also cannot ignore the strong federal policy favoring the voluntary resolution of disputes"); *Cannon v. Burge*, 752 F.3d 1079, 1104 (7th Cir. 2014) ("Public policy in Illinois favors settlements") (citation omitted).

### A. The Settlement Was Reached After Arm's-Length Negotiations with the Assistance of an Experienced Mediator and Is Procedurally Fair

"A strong initial presumption of fairness attaches to the proposed settlement when it is shown to be the result of [an arm's-length] negotiating process." *Hispanics United of DuPage Cty. v. Vill. of Addison, Ill.*, 988 F. Supp. 1130, 1150, n. 6 (N.D. Ill. 1997). The Settlement here is entitled to this strong presumption of fairness because the Settling Parties in this action are represented by counsel experienced in litigating the ERISA "church plan" exemption; the Settlement was the result of arm's-length negotiations before an experienced mediator; and the Settling Parties understood the strengths and weaknesses of the claims and defenses before settlement was reached. Joint Decl. ¶¶ 7-12, 15-16, 33-35. As described in detail above and in

the Joint Declaration, throughout the development of the case, Class Counsel conducted extensive research concerning Defendants' business structure, financial condition, and Plan administration. The latter category was particularly important in light of Ascension's recent acquisition of Wheaton. *See* Section II., *supra*. Class Counsel also researched and analyzed applicable law and potential defenses as they argued these same issues before the Supreme Court this term. *Id.; see also* Joint Decl. ¶ 12.

Based on this analysis, Class Counsel concluded that the Settlement reached here is the best result that could be obtained under the circumstances. *Id.* ¶ 35.

### B. Application of the *Synfuel* Factors Supports Approval of the Settlement as Fair, Reasonable and Adequate

Now that this Court has preliminarily approved the settlement and caused notice to issue to Settlement Class members consistent with Federal Rule of Civil Prcedure 23(e)(1), the Court must decide whether final approval is warranted. While Seventh Circuit standards require that a court closely scrutinize class counsel's fiduciary duties to obtain the best settlement for the class, "[t]he purpose of a fairness hearing is not to resolve the merits of the case, but to determine whether the settlement is fair, reasonable, and adequate when viewed in its entirety, and not a product of collusion." *Williams v. Quinn*, 748 F. Supp. 2d 892, 897 (N.D. Ill. 2010) (citing *Mirfasihi v. Fleet Mortg. Corp.*, 450 F.3d 745, 748 (7th Cir. 2006)).

Courts in the Seventh Circuit consider five factors (the "*Synfuel* factors") to evaluate whether a class action settlement meets this fairness requirement:

a. "the strength of plaintiffs' case compared to the amount of defendants' settlement offer";

b. "an assessment of the likely complexity, length and expense of the litigation";

c. "an evaluation of the amount of opposition to settlement among affected parties";

d. "the opinion of competent counsel"; and

e. "the stage of the proceedings and the amount of discovery completed at the time of settlement."

*Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) ("*Synfuel*") (citation omitted). In reviewing these factors, courts view the facts "in the light most favorable to the settlement." *Isby*, 75 F.3d at 1199. As discussed in detail below, each of these factors strongly favors approval of the Settlement.

**1. The Strength of Plaintiffs' Case Compared to the Amount of Settlement, As Well As the Complexity, Expense and Likely Duration of the Litigation, Support Approval of the Settlement.**

The "most important factor relevant to the fairness of a class action settlement" is "the strength of plaintiff's case on the merits balanced against the amount offered in the settlement."' *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 958 (N.D. Ill. 2011) (citation and quotation marks omitted). Under this factor, courts consider whether the proposed settlement is reasonable in light of the risks of proceeding with the litigation. *Id*. at 959, 961-63. Plaintiffs' case is strong and they have pursued it vigorously, but the litigation is not without risk or uncertainty—particularly because the legal landscape of the "church plan" exemption has changed significantly since Plaintiffs first brought this case. In early June, before the Parties reached this settlement, the Supreme Court ruled in *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1663 (2017). *Advocate* involved three consolidated church plan cases where the United States Courts of Appeals for the Third, Seventh and Ninth Circuits determined that, to qualify as a "church plan" under the ERISA church plan exemption, a retirement plan needed to be established by a church. *Advocate* reversed those holdings, finding that a retirement plan may still be able to otherwise satisfy the exemption if it is established by an entity other than a church. *Id.* at 1663. This church plan case is unique in that the Parties' settlement discussions began after the Supreme Court granted *certiorari* in *Advocate* but before

oral argument, and the Parties ultimately settled just after the Supreme Court ruled in that case. Both sides were aware of the risks of either outcome and approached the negotiations in the context of a quickly-changing legal setting.

The Supreme Court's ruling in *Advocate* has not resolved all the issues in this litigation. The Parties would still need to litigate how the Supreme Court's ruling applies to the facts of the case, in addition to class certification and summary judgment briefing, trial preparation and presentation, and appeals of any judgment. Furthermore, the expense of taking this case through trial would be considerable. It would require, among other things, a substantial amount of formal discovery (including many important depositions) and extensive motions practice. *See* Joint Decl. ¶ 35. Trial preparation would require great effort, both by the Parties and the Court. *See id.*

Though Class Counsel remain confident in the merits of Plaintiffs' claims, there is significant risk in light of the Supreme Court's decision, which arguably negatively impacted Plaintiffs' case. Additionally, Defendants would undoubtedly otherwise continue to defend their actions vigorously through trial and on appeal if necessary. This Settlement is therefore particularly favorable for the proposed class, in light of this uncertain and high-stakes backdrop. Moreover, the Settlement establishes, for the life of the Plan, equitable provisions that are comparable to certain provisions of ERISA. Ex. A, § 8.3.1. For instance, Plan participants will receive notice on an annual basis about the funding status of the Plan and the retirement benefits that they have accrued. *Id.* This annual notice will include, among other information, a summary of the Plan's funding arrangements, a summary of the Plan's expenses, a statement of the Plan's liabilities and assets, information about the increase or decrease in net plan assets for the year, and summary information about the Plan's total income. *Id.* § 8.3.3.

**2. An Evaluation of the Amount of Opposition to Settlement Among Affected Parties Supports Approval of the Settlement.**

The reaction of Class Members to the Settlement strongly favors approval. First, the Settlement has the full support of Plaintiffs Curtis, Bowen, and Mueller, all of whom provided documents during the investigation phase, kept abreast of the different phases of litigation (including the progression of *Advocate* through the Supreme Court), reviewed mediation statements and supporting materials during settlement, and held Class Counsel accountable for Counsel's decision-making throughout the settlement process. Curtis Decl. ¶¶ 5-7, 9, 10-12; Bowen Decl. 1-2; Mueller Decl. ¶¶ 4-10, 13. After analyzing the agreement, all Named Plaintiffs came to the conclusion that this Settlement provides the best outcome that the Class was likely to achieve. Curtis Decl. ¶ 12; Bowen Decl. 2-3; Mueller Decl. ¶ 10.

Moreover, in this Circuit, where only a relatively small number of class members (or, as here, none) object, it suggests that Class Members deem the settlement to be fair. *In re Mex. Money Transfer Litig*., 164 F. Supp. 2d 1002, 1020 (N.D. Ill. 2000). Pursuant to the Preliminary Approval Order dated September 13, 2017 (ECF No. 91), the Court-appointed Claims Administrator, Garden City Group, began mailing copies of the Notice to class members on October 13, 2017. Fraga Decl. ¶ 8. As of today, over 28,000 copies of the Notice have been disseminated. *Id.* ¶ 13. The Notice set out the terms of the Settlement and informed Class Members where they could find all relevant preliminary approval documents. It also explained how to object to the settlement. Fraga Decl. at Ex. A. The deadline to object to the Settlement is December 19, 2017. Preliminary Approval Order, ECF No. 91. Here, despite targeted notice of the Settlement, no Class Member objects. Fraga Decl. ¶ 16; Joint Decl. ¶ 44. This reaction of the Class to date strongly supports approval of the Settlement.

Finally, pursuant to the Settlement, Defendants' Counsel also served the CAFA Notice upon the appropriate state official of each state and the Attorney General of the United States on September 7, 2017, within the statutory limit of ten days from Plaintiffs' filing of the request for preliminary approval of the Settlement. Decl. of Howard Shapiro ("Shapiro Decl.") ¶ 3, attached. No objections from any of these officials have been received in response to the CAFA Notice, which further indicates the reasonableness and adequacy of the Settlement. *Id.* ¶ 6; *Noll v. eBay, Inc.*, 309 F.R.D. 593, 608 (N.D. Cal. 2015) (no response to CAFA Notice "indicat[es] that such officials [] do not object to the Settlement. . . .Thus, this factor favors the settlement.").

**3. The Stage of the Proceedings and the Amount of Discovery Completed Support Approval of the Settlement, and the Opinion of Class Counsel Is That the Settlement Is Fair and Reasonable.**

That Class Counsel, who are solely responsible for the development of this area of ERISA law, strongly endorse the Settlement as fair and reasonable also supports final approval. *See, e.g.*, *Isby*, 75 F.3d at 1200; *In re Mex. Money Transfer Litig.*, 164 F. Supp. 2d at 1020. This case has been litigated by experienced and well-respected counsel on both sides, all of whom specialize in the area of ERISA litigation—and, more specifically, in litigation concerning ERISA's "church plan" exemption. Joint Decl. ¶¶ 7-13; 56. Class Counsel are well known for their success in complex ERISA class action litigation and have many years of experience in litigating church plan cases. *See* Exs. J and K (firm resumes of Class Counsel).

As a result of this expertise, Class Counsel were able to craft a settlement that took into account the frozen status of the Plan, the Plan's funding level, the financial condition of Ascension, and the desire of Plan participants to understand the amount of pension benefits they had accrued as well as the general financial status of the Plan.

For the next seven and one-half years, Ascension cannot reduce any participant's accrued benefit. Ex. A at §§ 8.1-8.2. Also during this time, effective immediately and as a permanent condition of settlement, the plan administrator for the Plan will be required to furnish participants with yearly notifications informing participants about the funded status of the Plan, a statement of each participant's individual benefit, the Plan's total income, the assets and liabilities of the Plan, and other information about the Plan's financial health. *Id.* § 8.3. This provision of the settlement is comparable to ERISA's notification requirements and was designed to provide Class members with ERISA-like informational protections so that they are able to plan for their retirement. Joint Decl. ¶¶ 5, 30. The absence of these protections meant that previously, Plan participants may have been unaware of the benefits they had accrued or the resources available to meet those obligations. Plaintiffs allege the Plan's opacity is illustrated by the dozens of calls that Class Counsel have received, since the Class Notice was sent on October 13, from Class members seeking basic information about the Plan and their benefits. *Id*. ¶ 31. For instance, Class Counsel have received calls from Class members asking for an account of the Plan's assets and liabilities, and even calls from Class members asking if they are participants in the Plan. *Id*. This is all information that participants will receive each year under the settlement. Ex. A at § 8.3.

In negotiating the Settlement, Class Counsel also remained cognizant of the Plan's funding level, which has more than sufficient assets to pay actuarially estimated liabilities. Joint Decl. ¶ 32. Further, because Wheaton was purchased by Ascension—an organization with $22 billion in net assets, over $500 million of which is net cash—Class Counsel and the Class have every reason to believe that a future inability to pay Plan benefits is unlikely. Joint Decl. ¶ 33. Nevertheless, if the Plan's funding ever drops, such that it cannot pay its liabilities, Ascension

guarantees the first $29.5 million of any outstanding benefit payments. Ex. A at § 7.1.2. This guarantee functions as a type of insurance that may not otherwise be available. Joint Decl. ¶ 34.

This guarantee provides significant value to the Class because of the protection it offers that the Plan will remain sufficiently funded into the future. Moreover, Class members will receive annual updates on the funding status of the Plan relative to actuarially estimated liabilities through the Settlement's notice program. In Class Counsel's opinion, especially given the Supreme Court's recent decision in *Advocate*, this settlement represents a particularly strong result for the Class. Joint Decl. ¶ 35.

Based on their extensive experience and expertise, and for all of the reasons articulated herein, Class Counsel believe the Settlement is in the best interests of the Class and recommend its approval. This opinion should be granted substantial weight, as the recommendations of experienced and qualified counsel favor approval of a settlement. *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1020 ("The court places significant weight on the unanimously strong endorsement of these settlements by Plaintiffs' well-respected attorneys"); *see also* 5 James Wm. Moore, MOORE'S FEDERAL PRACTICE § 23.164[4] (3d ed. 2002) ("The more experience that class counsel possesses, the greater weight a court tends to attach to counsel's opinions on fairness, reasonableness, and adequacy").

Moreover, Class Counsel's intensive investigation before filing suit and during the negotiation process strongly favors approval of the settlement, because it demonstrates that the Settlement was derived only after Plaintiffs procured the information that Class Counsel needed to intelligently evaluate the risks and benefits of continued litigation, drawing from their extensive experience and best judgment. For all of these reasons, the Settlement is in all respects fair, reasonable and adequate, and should be approved.

## IV. NOTICE TO THE CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The Notice provided to the Class satisfied the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The Notice also satisfied Rule 23(e)(1), which requires that notice of a settlement be "reasonable." Fed. R. Civ. P. 23(e)(1). Notice of a settlement is reasonable if it "fairly and adequately advises the class of the terms of the proposed settlement and the process available to class members to obtain monetary relief provided by the settlement, the rights of class members to object to the settlement and/or to opt-out of the monetary relief provided by the settlement, and the rights of class members to appear before the Court at the Final Fairness Hearing." *Tucker v. Walgreen Co.*, No. 05-440-GPM, 2007 WL 2915578, at *4 (S.D. Ill. Oct. 5, 2007). Both the substance of the Notice and the method of its dissemination to potential class members satisfied these standards. Class Notice also defined the class and the class claims, issues, or defenses, and appointed class counsel, as required by Rule 23(c)(2)(B). *See* Fraga Decl at Ex. A.

In accordance with the Court's Preliminary Approval Order, the Settlement Administrator has disseminated over 28,000 copies of the Notice to Class Members. Fraga Decl. ¶ 13. This combination of individual mail to all Class Members and two dedicated settlement websites containing all of the relevant settlement documents constitutes the least costly and "best notice practicable under the circumstances." It therefore satisfies the requirements of due process and Rule 23. Fed. R. Civ. P. 23(c)(2)(B). *See, e.g., CE Design v. Beaty Constr., Inc.*, No. 07 C 3340, 2009 WL 192481, at *10 (N.D. Ill. Jan. 26, 2009) ("The Federal Rules, however, require the best notice that is 'practicable,' not perfect notice.").

## V. THE REQUIREMENTS FOR CLASS CERTIFICATION HAVE BEEN MET AND THE CLASS SHOULD BE CERTIFIED

Named Plaintiffs also respectfully request that the Class be finally certified for the purposes of settlement. The Seventh Circuit has long acknowledged the propriety of certifying a class solely for purposes of a class action settlement. "Federal courts naturally favor the settlement of class action litigation" and certification of a settlement class is a necessary part of approving a class action settlement. *Isby*, 75 F.3d at 1196. Indeed, the certification of a settlement class "has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants." *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995). "[S]ettlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge." *Id.* (quoting *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 174 (5th Cir. 1979)). A settlement class, like other certified classes, must satisfy all the requirements of Rule 23(a) and (b). Here, those requirements are easily met.

### A. The Settlement Class Meets the Requirements of Rule 23(a).

***Numerosity***. Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Defendants have identified, and the Class Notice has been sent to in excess of 28,000 members of the Settlement Class. Fraga Decl. ¶ 13. Thus, the element of numerosity is met. *See, e.g., Jackson v. Sheriff of Cook Cty.,* No. 06 C 0493, 2006 WL 3718041, at *3 (N.D. Ill. Dec. 14, 2006) ("While there is no set minimum number of plaintiffs required for class certification, Courts have generally recognized that joinder is impracticable where a class contains more than 40 members."); *Lukas v. Advocate Health Care Network & Subsidiaries,* No. 1:14-CV-2740, 2015 WL 5006019, at *4 (N.D. Ill. Aug. 19, 2015) (certifying an ERISA class of 282 members); *c.f. Gaspar v. Linvatec Corp.,* 167 F.R.D. 51, 56 (N.D. Ill. 1996) (certifying an ERISA class of 18 members).

***Commonality***. Rule 23(a)(2) requires that there be "questions of law or fact common to the class," and "'[a] common nucleus of operative fact is usually enough to satisfy'" this requirement. *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998) (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)). In the instant case, members of the Settlement Class share multiple issues of law and fact, such as whether the Plan is exempt from ERISA as a church plan, and, if not, whether the fiduciaries of the Plan failed to administer and fund the Plans in accordance with ERISA. The core questions and issues are common to the Settlement Class. Thus, commonality is satisfied.

***Typicality.*** The typicality element broadly requires "'that the claims or defenses of the representative party be typical of the claims or defenses of the class.'" *Muro v. Target Corp*., 580 F.3d 485, 492 (7th Cir. 2009). "A claim is typical if it 'arises from the same event or practice or course of conduct that gives rise to the claims of other class members and ... [the] claims are based on the same legal theory.'" *Oshana v. Coca-Cola Co.,* 472 F.3d 506, 514 (7th Cir. 2006) (internal citations omitted). Here, Plaintiffs' claims arise from the same course of events as the claims of the Settlement Class—Defendants' alleged failure to maintain and terminate the Plan in accordance with ERISA. Accordingly, typicality is met.

***Adequacy***. Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class," which "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997). The "adequacy" test is easily met in this case. The claims and interests of the Named Plaintiffs were congruent with those of the other members of the Settlement Class: all seek to enhance their retirement security under this Plan. There can be no question that the Named Plaintiffs' interests are aligned with those of the Settlement Class and that they have retained qualified counsel with extensive experience representing plaintiffs in class litigation, including ERISA cases and church plan cases specifically. Joint Decl. ¶¶ 7-13, Exs. J and K (firm resumes of Class Counsel). Accordingly, this class action satisfies all the requirements of Rule 23(a).

### B. The Settlement Class Meets the Requirements of Rule 23(b)(1) and (2).

#### 1. Individual Actions Would Create Inconsistent Adjudications or be Dispositive of the Interests of Absent Members.

A class may be certified under Federal Rule of Civil Procedure 23(b)(1) if, in addition to meeting the requirements of Federal Rule of Civil Procedure 23(a), the prosecution of separate actions by individual class members would create the risk of inconsistent adjudications, which would create incompatible standards of conduct for the defendant, or would as a practical matter be dispositive of the interests of absent members. Fed. R. Civ. P. 23(b)(1)(A) & (B). Here, the risk of inconsistent adjudications and incompatible standards is obvious: in the absence of certification, two participants could bring identical actions and achieve different results, with one court holding that the Plans are ERISA-regulated and the other holding that they are not. As this Court has noted, "ERISA class actions are commonly certified under either or both subsections of 23(b)(1) because recovery for a breach of the fiduciary duty owed to an ERISA plan, as is the predominant claim here, will inure to the plan as a whole, and because defendant-fiduciaries are entitled to consistent rulings regarding operation of the plan." *Neil v. Zell*, 275 F.R.D. 256, 267 (N.D. Ill. 2011); *see also Brieger v. Tellabs, Inc.*, 245 F.R.D. 345, 357 (N.D. Ill. 2007) (certifying a 23(b)(1) class in an ERISA case alleging breach of fiduciary duty for imprudent investment decisions); *Loomis v. Exelon Corp.*, No. 06 C 4900, 2007 WL 2060799, at *2, 5 (N. D. Ill. June 26, 2007) (certifying a 23(b)(1) class alleging breach of fiduciary duty for charging excessive fees and making imprudent investment decisions); *Baker v. Kingsley*, No. 03 C 1750, 2007 WL 1597654, at *5 (N. D. Ill. May 31, 2007) ("Because the relief sought by plaintiffs involves the recovery and distribution of plan assets, separate actions by individual plaintiffs would impair the ability of other class members to protect their interests. Plaintiffs therefore meet the requirements of 23(b)[(1)]."); *Smith v. Aon Corp.*, 238 F.R.D. 609, 618 (N. D. Ill. 2006)

(certifying ESOP class action under 23(b)(1)). As a result, certification of the proposed class under Rule 23(b)(1) is appropriate in this ERISA action.

**2. Defendants Have Acted on Grounds Generally Applicable to the Class, and Relief for the Class as a Whole is Appropriate.**

A class may be certified under Federal Rule of Civil Procedure 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Here, Plaintiffs allege that Defendants failed to comply withERISA on a Plan-wide basis and seek declaratory relief that the Plan is not a church plan as well as injunctive relief requiring that the Plan comply with ERISA. The available remedies include monetary relief and remedial equitable relief to the Plan as a whole. ERISA §§ 502(a)(2) & (3), 29 U.S.C. §§ 1132(a)(2) & (3).

Remedies under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2), are by definition plan-wide—a classic example of equitable relief. *See Mass. Mut. Life Ins. Co*., 473 U.S. 134, at 140–41 (1985). While the Settlement includes consideration to the Plan, that consideration is "incidental" to, and flows directly from, Plaintiffs' prayer for injunctive and declaratory relief. *See Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 763–64 (7th Cir. 2003). "The operational meaning of 'incidental' damages in this setting is that the computation of damages is mechanical, 'without the need for individual calculation,' so that a separate damages suit by individual class members would be a waste of resources." *In re Allstate Ins. Co.*, 400 F.3d 505, 507 (7th Cir. 2005) (quoting *Manual for Complex Litigation (Fourth)* § 21.221 (2004)) (internal citation omitted). As courts in this District have found, "Monetary relief in a plan-wide action brought under ERISA section 502 is incidental, and flows from relief to the plan." *Aon Corp.*, 238 F.R.D. at 618.

For this reason, courts in this Circuit have frequently found that ERISA classes seeking relief for the Plan as a whole, like the proposed class here, are certifiable under Federal Rule of Civil Procedure 23(b)(2). *See, e.g., Berger,* 338 F.3d at 763-64 (ERISA class certified under Rule 23(b)(2); *Neil*, 275 F.R.D. at 267 (ERISA class certifiable under Rule 23(b)(2)); *George v. Kraft Foods Glob., Inc.*, 251 F.R.D. 338, 352-53 (N.D. Ill. 2008) (ERISA class certifiable under Rule 23(b)(2) and certified under Rule 23(b)(1) and (b)(2)); *Aon Corp.*, 238 F.R.D. at 617-18 (ERISA class certifiable under Rule 23(b)(2) and certified under Rule 23(b)(1) and (b)(2)).

### C. Class Counsel Meets the Requirements of Rule 23(g).

Federal Rule of Civil Procedure 23(g) requires the Court to examine the capabilities and resources of Class Counsel. Class Counsel have detailed the claims brought in this action, and the time and effort already expended in connection with this litigation. *See* Section II, *supra*. Moreover, Class Counsel are among the leading ERISA plaintiffs' firms, and possess unparalleled expertise in the specific types of ERISA claims brought in this lawsuit. Joint Decl. ¶¶ 7-13; Exs. J and K (firm resumes of Class Counsel). Class Counsel thus satisfy the requirements of Rule 23(g).

## VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the Settlement should be granted final approval because it is a fair and reasonable result when viewed against the governing standard. Moreover, the Settlement Class meets all the requirements of Rule 23 and should be finally certified.

Dated: November 28, 2017

By: */s/ Carol V. Gilden*

COHEN MILSTEIN SELLERS & TOLL, PLLC
Carol V. Gilden
Illinois Bar No.: 6185530
190 South LaSalle Street, Suite 1705
Chicago, IL 60603

Tel. (312) 357-0370
Fax: (312) 357-0369
Email: cgilden@cohenmilstein.com

Karen Handorf
Michelle C. Yau
Julie Goldsmith Reiser
Julia Horwitz
1100 New York Ave., NW, Suite 500 West
Washington, DC 20005
Tel.: (202) 408-4600
Fax: (202) 408-4699
Email: khandorf@cohenmilstein.com
myau@cohenmilstein.com
jreiser@cohenmilstein.com
jhorwitz@cohenmilstein.com

KELLER ROHRBACK L.L.P.
Lynn Lincoln Sarko
Laura R. Gerber
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Tel.: (206) 623-1900
Fax: (206) 623-3384
Email: lsarko@kellerrohrback.com
lgerber@kellerrohrback.com
Ron Kilgard
Chris Graver
3101 North Central Avenue, Suite 1400
Phoenix, AZ 85012
Tel: (602) 248-0088
Fax: (602) 248-2822
Email: rkilgard@kellerrohrback.com

***Interim Co-Lead Class Counsel***

**CERTIFICATE OF SERVICE**

I certify that on November 28, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ Julia Horwitz