Scott M. Lempert, NJBN 035281995
(A Member of the Bar of this Court)
Cohen Milstein Sellers & Toll PLLC
1100 New York Ave. NW
Suite 500, West Tower
Washington, DC 20005
Telephone: (202) 408-4600

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DONNA GARBACCIO, individually and on behalf of all others similarly situated, Plaintiff, v. ST. JOSEPH'S HOSPITAL AND MEDICAL CENTER AND SUBSIDIARIES, *et al.*, Defendants.	Civil Action No. 2:16-cv-02740(JMV)(JBC) Honorable John Michael Vazquez United States District Judge Honorable James B. Clark United States Magistrate Judge CLASS ACTION

MEMORANDUM IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF THE CLASS ACTION SETTLEMENT AGREEMENT

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Plaintiff Donna Garbaccio, by and through her attorneys, respectfully submits this memorandum in support of her Unopposed[1] Motion for Preliminary Approval of the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement").[2] In this Motion, Plaintiff seeks an Order preliminarily approving the Settlement described herein; (2) preliminarily certifying the proposed Settlement Class pursuant to Federal Rules of Civil Procedure 23(b)(1) and/or 23(b)(2); (3) approving the form and method of Class Notice; and (4) setting a date and time for a hearing (the "Fairness Hearing") on final approval of the Settlement, payment of attorneys' fees and expenses, and incentive awards to the Named Plaintiffs.[3]

I. INTRODUCTION

This proposed Settlement resolves all claims at issue in this consolidated

[1] Defendants agree with the relief sought in this Motion; however, Defendants do not join in and disagree with many of the averments stated in this pleading.

[2] A copy of the Settlement Agreement is attached as Exhibit 1 ("Ex. 1") to the Declaration of Karen L. Handorf ("Handorf Decl.") filed herewith. Capitalized terms not otherwise defined in this memorandum shall have the same meaning ascribed to them in the Settlement Agreement.

[3] *See* Handorf Decl. at Ex. 2 ([Proposed] Order Preliminarily Approving the Settlement, Certifying the Class, Approving Notice to the Class, and Scheduling Final Approval Hearing ("Preliminary Approval Order")); Ex.3 Draft Notice of Proposed Settlement of ERISA Class Action Litigation, Settlement Fairness Hearing, and Motion for Attorneys' Fees and Reimbursement of Expenses ("Draft Class Notice"); and Ex. 4 [Proposed] Order and Final Judgment ("Final Approval Order").

class action (the "Litigation")[4] and binds all Parties to the Litigation, including Plaintiff Garbaccio, as well as the named plaintiffs in the *Barker* Action, Mary Lynne Barker, Anne Marie Dalio and Dorothy Flar (collectively, "Named Plaintiffs"[5]). Plaintiff alleges that St. Joseph's Healthcare System ("St. Joseph's") denied ERISA[6] protections to the participants and beneficiaries of the St. Joseph's Healthcare System Pension Plan ("Plan") by incorrectly claiming that the Plan qualifies as an ERISA-exempt "church plan." *See* 29 U.S.C. § 1002(33); Complaint, Dkt. 1. This proposed Settlement was reached after extensive legal and factual investigation, informal discovery and arm's-length negotiations supervised by a seasoned mediator. The Settlement is a highly favorable result for the proposed Settlement Class of participants and beneficiaries of the Plan, as it provides for a $42.5 million contribution to the Plan, as well as a corporate

[4] The Court consolidated Plaintiff Garbaccio's action with *Barker v. St. Joseph's Healthcare System, Inc*., No. 2:16-cv-02748 (D.N.J.) (the "*Barker* Action") on July 12, 2016. Dkt. 45.

[5] A Master Consolidated Complaint would have listed Plaintiffs Garbaccio, Barker, Dalio, and Flar as Named Plaintiffs. However, because the Litigation did not progress to a stage where the filing of the contemplated Master Consolidated Complaint was appropriate, the operative pleading remains Plaintiff Garbaccio's complaint filed on May 13, 2016. Dkt. 1. Nonetheless, the proposed Settlement comprehensively resolves the claims of all Named Plaintiffs. Thus the term "Complaint," as used in the Settlement Agreement and in these motion papers, refers collectively to the complaint filed in the Garbaccio Action and to the complaint filed in the Barker Action. Accordingly, Plaintiff seeks herein to have all Named Plaintiffs appointed as Representatives of the proposed Class.

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

guarantee of accrued benefits under the Plan for a period of seven years, significantly enhancing the retirement security of the members of the Settlement Class. The Settlement also provides certain protections which mimic some of ERISA's key provisions; these will enable Plan participants and beneficiaries to receive important notices and disclosures about the Plan and their benefits.

II. BACKGROUND

A. Procedural History

On May 13, 2016, Plaintiff Garbaccio filed a putative class action complaint against St. Joseph's – a large, non-profit healthcare provider – and various other defendants (collectively, Defendants) alleging violations of ERISA. Dkt. 1. Plaintiff Garbaccio was and is represented by Cohen Milstein Sellers &Toll PLLC ("Cohen Milstein"), and Keller Rohrback L.L.P. ("Keller Rohrback"). Three days after Plaintiff Garbaccio filed suit, a similar putative class action complaint was also filed in this District by the named plaintiffs in the Barker Action, represented by Kessler Topaz Metzler & Check, LLP and Izard, Kindall & Raabe, LLP. Both Plaintiff Garbaccio and the Barker Plaintiffs then filed competing motions, on each separate docket, to consolidate the action and to appoint lead plaintiff and lead counsel. *See* Dkt. 14 (Garbaccio's May 27, 2016 Motion), Dkt. 29 (*Barker* Plaintiffs' June 21, 2016 Motion). On July 12, 2016, the Court consolidated the actions on the *Garbaccio* docket, and ordered the counsel for Plaintiff Garbaccio

and the *Barker* Plaintiffs to file a Master Consolidated Complaint. Dkt. 45. ¶¶ 1, 6.[7] At the same time, the Court administratively terminated the competing motions to appoint lead plaintiff and interim lead counsel, with leave to re-file upon the filing of a Master Consolidated Complaint. *Id*. ¶ 6.

Counsel for Plaintiff Garbaccio and the *Barker* Plaintiffs then attempted in good faith to comply with the Court's July 12 Order, and to draft a Master Consolidated Complaint. However, Plaintiffs' respective counsel could not reach agreement on a pleading that satisfied both sets of counsel; accordingly, all Parties sought leave of Court to re-file the competing motions for lead plaintiff and lead counsel. Dkt. 60 ¶¶ 2-4. The Parties stipulated that after the Court appointed a lead plaintiff and lead counsel, they would move the Court to set a deadline to file a Master Consolidated Complaint. *Id*. The Court granted such leave on August 12, 2016. Thereafter, Plaintiff Garbaccio and the *Barker* Plaintiffs re-filed their respective motions for lead plaintiff and lead counsel. Dkt. 64 (Plaintiff Garbaccio's motion); Dkt. 70 (*Barker* Plaintiffs' motion).

On March 13, 2017, Magistrate Judge James B. Clark issued a Report and Recommendation that Cohen Milstein and Keller Rohrback be appointed Interim Lead Class Counsel. Dkt. 94. Judge Clark declined to recommend the appointment

[7] The Court administratively terminated the separate *Barker* Action on July 13, 2017.

of a lead plaintiff at that time *Id*. at 4-5. On March 29, 2017, this Court adopted Judge Clark's Report and Recommendation. Dkt. 96.

On May 2, 2017, Defendants advised the Court that the Parties had agreed to enter mediation, and requested a stay of proceedings to allow the settlement negotiation to proceed. Dkt. 97. The Court, on May 8, 2017, stayed and administratively terminated the Litigation pending mediation. Dkt. 98.

B. Settlement Negotiations

While the case was stayed, the Parties prepared for mediation facilitated by a well-respected third-party mediator, Robert Meyer, Esq. of JAMS, Inc. Mr. Meyer has substantial experience mediating cases involving ERISA and retirement plan issues, including cases involving the Church Plan exemption. Handorf Decl. ¶ 9. In advance of the mediation, both sides spoke with Mr. Meyer regarding their respective positions. *Id*. ¶ 10. Plaintiff supplied a draft term sheet to Defendants setting out the central terms they wanted to be covered in a potential settlement. *Id*. Defendants also produced to Plaintiff actuarial data regarding the Plan's funded status and participants. *Id*.

The negotiations involved one all-day, in-person mediation session on May 24, 2017, at Mr. Meyer's office in Los Angeles. Handorf Decl. ¶ 11. During this session, both sides exchanged proposals and counter-proposals concerning potential settlement terms. *Id*. ¶ 12. By the end of the all-day mediation, the

Parties had reached an agreement to settle the case, and memorialized the key terms of that agreement in a preliminary "term sheet" dated May 24, 2017, with the mutual intention to further supplement that initial term sheet. *Id*. ¶ 13. Following the in-person mediation session, the Parties continued to negotiate regarding several additional aspects of the Settlement. *Id*. ¶ 14. The Parties subsequently agreed upon a supplemental term sheet on June 6, 2017 (the initial and the supplemental term sheet are hereinafter referred to collectively as the "Term Sheet").[8]

The Parties notified the Court of the Settlement the next day. Joint Notice of Settlement, Dkt. No. 99. The Court, at the Parties' request, re-opened the case. Dkt. No. 100. The Parties continued to negotiate key parts of the Settlement Agreement after the term sheet was signed, with both sets of counsel zealously advocating for their clients, up until the Settlement Agreement was executed by both sides on July 20, 2017. Handorf Decl. ¶ 16, 19.

At the time of these negotiations, the United States Supreme Court was considering a set of three consolidated church plan cases that addressed the validity of one of Plaintiff's key theories here: whether a church plan must be established by a church in order to qualify for the statutory exemption. Following oral

[8] On July 5, 2016, the Parties also amended one paragraph of the term sheet; this amendment dealt only with the deadlines to execute the Settlement Agreement and to file the instant Motion. Handorf Decl. ¶ 15. The Parties advised the Court of this change in a Joint Supplemental Notice filed July 6, 2017. Dkt. No. 101.

argument in March of 2017, a decision out of the Supreme Court was pending as the Parties negotiated this Settlement in May and June of 2017. Therefore, the interpretation of the ERISA church plan provision – specifically, whether a church plan claiming an exemption from ERISA must be established by a church – was uncertain when the Parties negotiated the Settlement in late May. Just days after the Term Sheet was signed by all Parties, the Supreme Court issued its decision, holding that church plans need **not** be established by churches in order to qualify as ERISA-exempt plans. *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1663 (2017) (holding "a plan maintained by a principal-purpose organization therefore qualifies as a 'church plan,' regardless of who established it."). That decision effectively eliminated Plaintiff's argument here that only a church may establish a church plan. Though Plaintiff advances other strong arguments and theories not reached by the Supreme Court, it remains true that Plaintiff's case was negatively impacted by the Supreme Court's decision. This Settlement is particularly favorable for the proposed class, in light of this uncertain and high-stakes backdrop.

The Settlement Agreement now before the Court is a detailed, comprehensive agreement based on the term sheet. Handorf Decl. ¶ 19. It is the result of lengthy and contentious arm's-length negotiations between the Parties and

facilitated by a mediator. The Settlement negotiation process was thorough, adversarial, and professional. *Id*. ¶ 20.

C. Terms of the Settlement Agreement

The following summarizes the principal terms of the Settlement. *See also* Handorf Decl. ¶ 3, Ex. 1 (Settlement Agreement).

1. Monetary Consideration.

This Settlement provides substantial monetary consideration which will improve the retirement security of all Plan participants and beneficiaries. Specifically, pursuant to the proposed Settlement, Defendants agreed to contribute $42.5 million to the Plan by September 20, 2017. Settlement Agreement at 7.1.1 – 7.1.2. In fact, Defendants have already contributed that amount, *plus an additional $2.5 million*, for a total of $45 million. Handorf Decl. ¶ 22. This is a very significant sum. Based on Interim Class Counsel's investigation, this amount will reduce – more precisely, has already reduced – the underfunding of the Plan by approximately 50%, and it will do so in one fell swoop. Handorf Decl. ¶ 21. As a result of the Litigation, the Plan today is in a vastly improved funded position, and the accrued pension benefits of the Plan's participants are substantially more secure. *Id.*

2. Non-Monetary Equitable Consideration.

In addition to monetary consideration, under the Settlement St. Joseph's also guarantees that, for a period of seven years commencing after the Settlement

Agreement becomes final, if the assets in the Plan's trust are ever insufficient to pay accrued benefits, St. Joseph's will make contributions to the trust fund sufficient to pay participants' accrued benefits as defined by the terms of the Plan as benefits become due. Settlement Agreement ¶ 8.1. The Settlement Agreement also provides that for seven years, any amendment or termination of the Plan cannot reduce participants' accrued benefits as defined in the Plan document. Settlement Agreement ¶ 8.4. Likewise, for the next seven years, if the Plan is ever merged with or into another plan, participants will be entitled to the same or greater accrued benefits under the terms of the Plan than they were before the merger. Settlement Agreement ¶ 8.2.

3. Other Equitable Consideration.

The Settlement also includes equitable provisions which mimic certain provisions of ERISA concerning plan administration, summary plan descriptions, notices (annual summaries, pension benefits statements, current benefit values), and the Plan's claim review procedure. These provisions also are in place for the next seven years. Settlement Agreement ¶¶ 8.5.1 – 8.5.4.

4 . Class.

The Settlement contemplates that the Court will certify a non-opt-out class under Federal Rule of Civil Procedure 23(b)(1) and/or (b)(2). Settlement Agreement ¶ 2.2.2. The Settlement Class is defined as: All present and former

participants (vested or non-vested) or beneficiaries of the Plan as of the Effective Date of Settlement.

5. Released Claims.

Section 3 of the Settlement Agreement defines Released Claims as claims brought by Plaintiffs, or claims that could have been asserted by Plaintiffs based upon the allegations in the Litigation. However, the Released Claims definition contains a significant carve-out, providing that Defendants will not be released from any ERISA claim with respect to the Plan should one of the following events occur: (i) the Internal Revenue Service rules that the Plan does not qualify as a Church Plan; (ii) St. Joseph's, as the Plan sponsor, elects for the Plan to be covered by ERISA; (iii) a court of law issues a definitive ruling that the Plan is not a Church Plan; (iv) the Roman Catholic Church ceases to claim any association with the Plan sponsor; or (v) an amendment to ERISA is enacted and becomes effective as a law of the United States eliminating the Church Plan exemption. Settlement Agreement ¶¶ 3.1.5 – 3.1.9. In the event that any of these five situations occur, Class members retain claims for prospective relief that may arise under ERISA with respect to the Plan.

6. Notice.

The draft [Proposed] Preliminary Approval Order, attached as Exhibit 2 to the Handorf Declaration, provides 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 www.cohenmilstein.com/saintjosephs-settlement and http://www.kellersettlements.com/. Settlement Agreement ¶¶ 2.2.3 – 2.2.4. Interim Class Counsel will pay the cost for the Class Notice program, up to $50,000, and St. Joseph's will pay any amount in excess of $50,000. *See* Handorf Decl. at Ex. 2 (Preliminary Approval Order), Ex. 3 (Draft Class Notice); *see also* Settlement Agreement ¶ 2.2.3.

7. Attorneys' Fees.

By separate application to be filed prior to the Fairness Hearing, Class Counsel will seek an award of attorneys' fees, expenses and incentive awards for Named Plaintiffs, in a total amount not to exceed $2.5 million. Settlement Agreement ¶ 7.1.3. The Settlement Class shall be notified of these details in the Class Notice. The attorneys' fees, expenses and incentive awards for Named Plaintiffs, if awarded, are in addition to the monetary recovery for the Class under the Settlement terms (*i.e.*, the maximum $2.5 million payment will not reduce the $42.5 million contributions to the Plan). *Id.*

D. Reasons for the Settlement

Plaintiff has entered into the Settlement with an understanding of the strengths and weaknesses of her claims. This understanding is based on: (1)

investigation and research regarding St. Joseph's Healthcare System and the Plan; (2) the Plan documents and actuarial reports produced during the mediation process; (3) the likelihood that Plaintiff would prevail at trial; (4) the range of possible recovery; (5) the substantial complexity, expense, and duration of litigation necessary to prosecute this action through trial, post-trial motions, and likely appeal, and the significant uncertainties in predicting the outcome of this complex litigation; and (6) Defendants' determination to fight and contest every aspect of this case. Having undertaken this analysis, Interim Class Counsel and Plaintiff have concluded that the Settlement is fair, reasonable, and adequate, and should be presented to the Court for approval. Moreover, the fact that the Supreme Court rejected one of Plaintiff's primary legal arguments in a related case, serves only to bolster the strength of the Settlement achieved here for Plan participants.

III. PROPOSED SCHEDULE

Event	**Time for Compliance**
Deadline for CAFA Notice	10 days after entry of the Preliminary Approval Order
Deadline for mailing of Class Notice and posting Class Notice to settlement websites	30 days after entry of the Preliminary Approval Order
Deadline for filing Plaintiff's motions for final approval, attorneys' fees and expenses, and incentive awards to Named Plaintiffs	45 days prior to the proposed Fairness Hearing
Deadline for the Settlement Class to comment upon or object to the proposed Settlement	28 days prior to the proposed Fairness Hearing

Deadline for filing Plaintiff's reply in support of motions for final approval, attorneys' fees and expenses, and Incentive Awards to Plaintiffs, and for the Parties to respond to any comments or objections	7 days prior to the proposed Fairness Hearing
Proposed Fairness Hearing	No sooner than 100 days after entry of the Preliminary Approval Order[9]

IV. THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL

Class action settlements require district court approval. The Third Circuit has a "strong policy in favor of class action settlement," because settlements "promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("*GM Trucks*") ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."[10]

[9] Pursuant to the U.S. Class Action Fairness Act of 2005, at 28 U.S.C. § 1715(d), the date of the Fairness Hearing must be at least 90 days after notices are served on the appropriate state and federal officials.

[10] 6 James Wm. Moore et al., *Moore's Federal Practice* (3d ed. 1999); *Manual for Complex Litigation* (THIRD) § 30.42 (1995); Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 13.44 (5th ed. 2014) ("The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding lengthy trials and appeals.") and *Newberg on Class Actions* § 13:45 ("[A] court will presume that a proposed class action

Courts must review any proposed settlement of a class action to determine whether it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The court reviews proposed class settlements in two stages. The first stage is preliminary approval, which "is granted unless the proposed settlement is obviously deficient." *Skeen v. BMW of N. Am., LLC*, No. 2:13-CV-1531-WHW-CLW, 2016 WL 70817, at *4 (D.N.J. Jan. 6, 2016); *Gregory v. McCabe, Weisberg & Conway, P.C.,* No. CIV. 13-6962 AMD, 2014 WL 2615534, at *7 (D.N.J. June 12, 2014) **(**granting preliminary approval after examining "whether the proposed settlement demonstrates obvious deficiencies and whether the settlement falls within the range of reason.") (internal citation omitted). In the second stage, after the class notice is issued, a court will hold a final fairness hearing. The Third Circuit has adopted a nine-factor test outlined in the *Girsh v. Jepson* case to evaluate whether a settlement is sufficiently "fair, reasonable, and adequate" for final approval. 521 F.2d 153, 157 (3d Cir.1975).[11] If, after the application of the *Girsh* factors, a court concludes that a proposed settlement is "fair, reasonable, and adequate," it will

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settlement is fair when certain factors are present, particularly evidence that the settlement is the product of arms-length negotiation, untainted by collusion.").

[11] The *Girsh* factors are (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. 521 F.2d at 157.

finally approve the settlement. Fed. R. Civ. P. 23(e)(2); *Skeen*, 2016 WL 70817, at *4.

In conducting the preliminary approval inquiry, courts in the Third Circuit examine: (1) whether the settlement negotiations took place at arm's length; (2) whether sufficient discovery supports the proposed settlement; (3) the breadth of the settlement proponents' experience and expertise in similar litigation; and (4) the quantity of proposed class objections, if any. *GM Trucks*, 55 F.3d at 785 (citation omitted); *Skeen*, 16 WL 70817, at *4 (citing *GM Trucks*). If those factors are met, an "initial presumption of fairness" is established sufficient to warrant preliminary approval of the settlement and conditional certification of the class. *GM Trucks*, 55 F.3d at 785.

A. The Negotiations Occurred At Arm's Length

There is no dispute here that the proposed Settlement is the product of extensive, arm's-length negotiations. As noted above, the Parties negotiated this settlement over the course of nearly three months with the assistance of a highly-regarded, experienced JAMS mediator, Robert Meyer. Mr. Meyer has mediated many ERISA and retirement plan cases, including cases contesting the applicability of the church plan exception. Handorf Decl. ¶ 9. The negotiations were adversarial and thorough, and occurred between experienced attorneys well-versed in class action litigation, litigation concerning the ERISA "church plan"

exemption in particular, and the unique legal and factual issues of this case. *Id*. ¶ 20. During the mediation process, the mediator was in contact with the Parties both orally and in writing, and oversaw the exchange of multiple settlement proposals between the Parties. *Id*. ¶ 17. The participation of an independent mediator, as happened here, "virtually insures that the negotiations were conducted at arm's length and without collusion between the parties." *Mulroy v. Nat'l Water Main Cleaning Co. of New Jersey*, No. CIV.A. 12-3669 WJM, 2014 WL 7051778, at *4 n.4 (D.N.J. Dec. 12, 2014) (quoting *Bredbenner v. Liberty Travel, Inc.,* 09–905, 2011 WL 1344745, at *10 (D.N.J. Apr.8, 2011)).

Additionally, the Parties' negotiations were informed by numerous documents produced during informal discovery and mediation, a review of publicly-available sources, and extensive legal research into the claims and potential defenses. Handorf Decl. ¶ 18. There are no "obvious deficiencies," such as unduly preferential treatment of class representatives or segments of the class. *In re Aetna UCR Litig*., No. CIV.A. 07-3541, 2013 WL 4697994, at *10 (D.N.J. Aug. 30, 2013). Here, there are no differences in treatment between different class members, as all of the relief will be granted on a Plan-wide basis and will benefit all Plan participants and beneficiaries in the same manner.[12] Accordingly, this

[12] Though Named Plaintiffs will seek incentive awards, "the class representative and class member are not similarly situated in regard to the single piece of differential recovery, the incentive payment: the class representative did

proposed settlement should be preliminarily approved, as it is the product of serious, informed, non-collusive negotiations between experienced, capable counsel, and supervised by a respected mediator. *See In re Aetna UCR Litig*., No. CIV.A. 07-3541, 2013 WL 4697994, at *10 (D.N.J. Aug. 30, 2013) (citing *Manual for Complex Litigation*, Third at § 30.41 (West 1995)).

B. The Parties Had Sufficient Knowledge Regarding the Claims and Defenses to Enter into a Settlement

The absence of formal discovery in this case is not an obstacle to settlement because the Parties have completed a careful investigation and reached this Settlement only after full consideration of the legal and factual issues surrounding the case. Prior to filing the Complaint, Plaintiff and Interim Class Counsel engaged in extensive factual and legal research pertaining to their claims, which ultimately resulted in a 60-page Complaint. Handorf Decl. ¶ 23. Such investigation included, among other things, a review and analysis of the Plan documents, St. Joseph's public disclosures, publicly-available financial statements, governmental filings, and information provided by the Named Plaintiffs and other Plan participants. *Id*.

The Parties' negotiations also benefited from the informal discovery and research that was undertaken in this matter, including Defendants' production of documents and actuarial data concerning the Plan and its administration. *Id.* ¶ 24.

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extra work and took extra risk to earn that." *Newberg on Class Actions* § 13:59 (5th ed.).

The Parties certainly had sufficient information to determine the relative strengths and weaknesses of their respective positions, and thus the absence of formal discovery in this case in no way undermines the integrity of the Settlement. *See Sowers v. Freightcar Am., Inc*., No. CIV. A. 3:2007-201, 2008 WL 4949039, at *3 (W.D. Pa. Nov. 19, 2008) (granting preliminary approval though formal discovery had not commenced where "parties were aware of the nature of their respective claims and defenses and, with this awareness, were well versed to enter into the proposed settlements."); *Gregory*, 2014 WL 2615534, at *9 (approving settlement preliminarily even though formal discovery was not completed).

C. Objections

Another factor identified by the Third Circuit is whether "only a small fraction of the class objected." *GM Trucks*, 55 F.3d at 785. At this time, Interim Class Counsel is not aware of any objections to the proposed Settlement, but will address any objections at the final approval stage. Handorf Decl. ¶ 26. Accordingly this factor may be set aside until the final approval stage. *Marchese v. Cablevision Sys. Corp*., No. CV102190MCAMAH, 2016 WL 7228739, at *3 n.2 (D.N.J. Mar. 9, 2016) (disregarding the class objection factor at preliminary approval).

D. Interim Class Counsel Are Experienced in Similar Litigation

Interim Class Counsel has extensive experience in handling ERISA class action cases and Church Plan cases in particular. Handorf Decl. ¶ 27. Interim

Class Counsel have served as co-counsel in all three of the appellate court cases that went before the Supreme Court, and continued to represent those plaintiffs before the Supreme Court. *Id*. ¶ 28. Furthermore, Interim Class Counsel serve, or have served, as co-counsel in roughly twenty cases pending across the country involving claims by other hospital systems that their plans qualify as Church Plans. *Id*. ¶ 29. Interim Class Counsel's experience litigating and settling cases in this area of ERISA litigation is unparalleled. *Id*. ¶ 30.

Furthermore, Interim Class Counsel has been able to develop the issues in this case to an appropriate point for settlement. They conducted an extensive investigation; engaged in motion practice; and participated in arm's-length settlement negotiations concerning the issues in this litigation. Handorf Decl. ¶¶ 20, 23. Interim Class Counsel possess a comprehensive understanding of both the strengths and the weaknesses of Plaintiff's claims, and believe that the Settlement is fair, reasonable and is in the best interests of the Plans and the Settlement Class. *Id*. ¶ 31. This factor weighs heavily in favor of both preliminary and final approval of the Settlement. *In re Prudential Ins. Co. of Am. Sales Practices Litig*., 962 F. Supp. 450, 543 (D.N.J. 1997), *aff'd sub nom. In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998) ("[T]he Court credits the judgment of Plaintiffs' Counsel, all of whom are active, respected, and accomplished in this type of litigation.")

E. Application of the *Girsh* Factors Shows That the Proposed Settlement Falls Within the Range of Reasonableness

Though the *Girsh* factors set forth the standard for final approval of a settlement, courts in this jurisdiction may also use them to guide the preliminary assessment of class action settlements. *Singleton v. First Student Mgmt. LLC*, No. CIV.A. 13-1744 JEI, 2014 WL 3865853, at *5 (D.N.J. Aug. 6, 2014). However, at the preliminary approval stage the Court need not address all of the *Girsh* factors. *Curiale v. Lenox Grp., Inc*., No. CIV A 07-1432, 2008 WL 4899474, at *9 n. 4 (E.D. Pa. Nov.14, 2008) ("[W]e need not address all of [the *Girsh*] factors, as 'the standard for preliminary approval is far less demanding'") (citation omitted).

Here, the first factor – the complexity, expense and likely duration of the litigation – supports approval. "Where the complexity, expense, and duration of litigation are significant," this factor favors settlement. *Bredbenner*, 2011 WL 1344745, at *11; *Sullivan v. DB Investments, Inc*., No. CIV.A. 04-2819 SRC, 2008 WL 8747721, at *16 (D.N.J. May 22, 2008). As the Third Circuit has recognized, "ERISA is an enormously complicated statute." *Wachtel v. Health Net, Inc*., 482 F.3d 225, 237 (3d Cir. 2007). This class action in particular presents complex statutory interpretation questions regarding the ERISA church plan exemption, one of which was ultimately resolved by the United States Supreme Court this last term. *Advocate*, 137 S.Ct. at 1663 (reversing decisions from the Third, Seventh and Ninth Circuits holding that only churches may establish exempt church plans).

The Supreme Court recognized, however, that resolving the sole legal issue before it did not resolve the litigation, because novel legal and factual issues concerning other requirements of the exemption were not before the Court. *Id*. at 1657 n.2 (expressly declining to rule on plaintiffs' alternative arguments). Litigation of Plaintiff's claims that the Plan did not meet other requirements of the church plan exemption would be time and resource intensive and would involve extended discovery and protracted, contentious litigation, all with no guarantee of success. Defendants have forcefully defended their position from the start of this case and through the settlement negotiation process, and they would likely continue to do so through trial and on appeal if necessary. The road to success on the merits therefore would undoubtedly be long and costly.

The proposed Settlement instead provides certain and immediate relief to the Class, removing the inherent uncertainty of litigation and improving the retirement security of all Plan participants. The Settlement Agreement provides the Class with both significant monetary and equitable consideration for their claims, commensurate with the remedies Plaintiffs would seek if this case proceeded to trial. In light of these considerations, the first factor weighs heavily in favor of approval of the Settlement.

The third factor – addressing the stage of the proceedings and the amount of discovery completed – likewise supports approval. As discussed above, though

formal discovery did not commence prior to Settlement, Plaintiff conducted an extensive pre-suit investigation of the legal and factual issues in the case. Moreover, Plaintiff also consulted with an actuarial expert to assist with the evaluation of the actuarial and Plan data provided by Defendants in connection with the mediation process. Handorf Decl. ¶ 25. The Parties have exchanged sufficient information to allow them a clear understanding of the relative strengths and weaknesses of the claims and potential defenses in this case. *Cf. In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981) ("formal discovery [is not] a necessary ticket to the bargaining table.").

The fourth and fifth factors, regarding the risks of establishing liability and damages, likewise support preliminary approval of the proposed Settlement. Because damages are contingent on establishing liability, "the same concerns animate both of these elements" and the Court may consider them together. *Bredbenner*, 2011 WL 1344745, at *13 (internal quotation omitted). In weighing these considerations, the Court need "not press into the merits of the case" but instead may "rely to a certain extent on the estimation provided by class counsel, who is experienced with the intricacies of the underlying case." *Id*. As noted above, the Supreme Court has already rejected one of Plaintiff's central legal theories. *Advocate Health Care Network v. Stapleton*, 137 S.Ct. 1652 (2017). On the remaining theories, Plaintiff would face several risks in proceeding with the

Litigation, including the possibility that Plaintiff may not be successful in proving at trial that the Plan is an ERISA-covered plan and that Defendants breached their fiduciary obligations; that summary judgment could be granted in Defendants' favor; and/or that class certification could be denied or any certified class may be decertified before a trial. Liability remains completely disputed. Ultimately, there is no guarantee that Plaintiff would prevail here. Plaintiff and Interim Class Counsel weighed these risks while negotiating, and the Settlement is a reasonable compromise in light of such risks. *Mulroy*, 2014 WL 7051778, at *5 (applying *Girsh* factors). Because the risks of this Litigation are high, these factors weigh in favor of the Settlement.

The remaining pertinent *Girsh* factors also favor preliminary approval.[13] The seventh factor, an analysis of Defendants' ability to withstand a greater judgment, does not weigh heavily here. It is conceivable that Defendants could have paid more had a judgment on the merits been rendered in Plaintiff's favor. However, that fact does not diminish the material significance of the monetary and non-monetary consideration provided under the Settlement, and a court evaluating

[13] The sixth factor, examining the risks of maintaining a class action, "is of negligible importance." *In re Schering-Plough/Merck Merger Litig.*, No. CIVA09-CV-1099DMC, 2010 WL 1257722, at *11 (D.N.J. Mar. 26, 2010) (noting that the Third Circuit has explained "Because the district court always possesses the authority to decertify or modify a class that proves unmanageable, examination of this factor in the standard class action would appear to be perfunctory."). Accordingly, Plaintiff does not address it at the preliminary approval stage.

settlements must "guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *GM Trucks,* 55 F.3d at 806. Moreover, "courts in this district regularly find a settlement to be fair even though the defendant has the practical ability to pay greater amounts." *Bredbenner*, 2011 WL 1344745, at *15 (citing cases).

The eighth and ninth factors, related to the reasonableness of the settlement, collectively "evaluate whether the settlement represents a good value for a weak case or a poor value for a strong case." *Mulroy*, 2014 WL 7051778, at *5 (quoting *In re Warfarin Antitrust Litig*., 391 F.3d at 538). These factors test "reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *Id*. Here, the Settlement – which provides a significant portion of the relief sought in the Complaint – represents certainty and resolution for Named Plaintiffs and the proposed Class, who otherwise would face an uncertain future regarding establishing liability and damages. In light of the attendant risks, this proposed Settlement falls within the range of reasonableness for preliminary approval.

V. CERTIFICATION OF THE CLASS IS APPROPRIATE

Class certification is governed by Federal Rule of Civil Procedure 23, both pursuant to a contested motion and pursuant to a settlement, as is sought in this

case. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 619–20 (1997). The Court may certify the proposed class in this case upon finding that the action satisfies the four prerequisites of Rule 23(a) and one or more of the three subdivisions of Rule 23(b). *Id.*

Courts frequently grant class certification in ERISA cases. *See In re Schering Plough Corp. ERISA Litig.,* 589 F.3d 585, 604 (3d Cir. 2009) (listing ERISA class certification decisions); *see also Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 459 (D. Md. 2014) (same); *see also* Fed. R. Civ. P. 23(b)(1)(B) Advisory Committee's Note (1966 Amendment) (certification under Fed. R. Civ. P. 23(b)(1) is appropriate in cases charging breach of trust by a fiduciary to a large class of beneficiaries). Congress has similarly embraced the use of representative actions to enforce ERISA. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985) (noting Congress' clearly expressed intent that ERISA "actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole"). Thus this Litigation, which seeks relief on behalf of the Plan, is precisely the type of case that warrants certification under Federal Rule of Civil Procedure 23.

A. The Proposed Class Satisfies 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). "No minimum

number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Bvba v. Universal Travel Grp.*, Inc., No. CV 11-2164, 2017 WL 2734714, at *4 (D.N.J. June 26, 2017) (Vazquez, J.) (quoting *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001)). Here, there are nearly 8,000 current or former participants in the Plan. Handorf Decl. ¶ 32. The Settlement Class is thus too large for joinder to be practicable. *Bvba*, 2017 WL 2734714, at *4 (finding numerosity requirement met where class included at least 996 people); *In re Schering-Plough/Merck Merger Litig*., No. CIVA09-CV-1099DMC, 2010 WL 1257722, at *6 (D.N.J. Mar. 26, 2010) (numerosity met where "the size of the prospective class far exceeds the threshold number of [at least 40] constituents recognized by the Third Circuit").

Commonality. Rule 23(a)(2) requires that a proposed class action raise "questions of law or fact common to the class." The commonality requirement is met "if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Bvba*, 2017 WL 2734714, at *4 (quoting *In re Schering Plough Corp. ERISA Litig*., 589 F.3d 585, 596-97 (3d Cir. 2009)). Here, Named Plaintiffs have identified a series of common questions of law and fact, including whether the Plan is exempt from ERISA as a Church Plan, and, if not, whether the fiduciaries of the Plan have failed to administer and fund the Plan in

accordance with ERISA. All of these questions and issues are common to the Settlement Class. *See Kolar v. Rite Aid Corp*., No. CIV.A. 01-1229, 2003 WL 1257272, at *2 (E.D. Pa. Mar. 11, 2003) (certifying settlement class where common questions included "whether the individual defendants violated their ERISA fiduciary duties"); *Banyai v. Mazur*, 205 F.R.D. 160, 163 (S.D.N.Y. 2002) (same)).

Typicality. Rule 23(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the Class. This requirement "evaluates the sufficiency of the named plaintiff." *Bvba*, 2017 WL 2734714, at *4 (internal citation omitted). It is satisfied if the claims of the representatives and the class "arise from the same event or practice or course of conduct and are based on the same legal theory." *Id*. Here, Named Plaintiffs' claims arise from the same course of events as the claims of the Class – Defendants' alleged failure to maintain the Plan in accordance with ERISA. Moreover, with each member of the Settlement Class asserting the same claims arising from the same conduct by Defendants and seeking the same relief on behalf of the Plan, it follows that Named Plaintiffs' claims are typical for purposes of Rule 23(a)(3).

Adequacy. Finally, Rule 23(a)(4) requires "representative parties [who] will fairly and adequately protect the interests of the class." To satisfy the

adequacy requirement, "the named plaintiff's interests must be sufficiently aligned with the interests of the absentees; and [ ] the plaintiff's counsel must be qualified to represent the class." *Bvba*, 2017 WL 2734714, at *4 (quoting *GM Trucks*, 55 F.3d at 800. These requirements are readily satisfied here. Named Plaintiffs' interests are the same as those of the absentee members of the Class: all participants seek to increase the retirement security of the Plan, through monetary and non-monetary relief. The Named Plaintiffs' interests are directly aligned with those of the Class. Moreover, the Named Plaintiffs have retained qualified counsel with extensive experience in representing plaintiffs in class litigation, specializing in ERISA cases. Handorf Decl. ¶¶ 7, 8, Ex. 5 (Cohen Milstein firm resume) and Ex. 6 (Keller Rohrback firm resume).

B. The Proposed Class Satisfies the Requirements of Rule 23(b)(1) and (b)(2)

1. Individual actions would create inconsistent adjudications or be dispositive of the interests of absent class 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) and (B). Courts have

certified classes under Federal Rule of Civil Procedure 23(b)(1) in ERISA cases for those very reasons. *In re Schering Plough Corp. ERISA Litig*., 589 F.3d 585, 604 (3rd Cir. 2009) ("In light of the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class"); *Kolar*, 2003 WL 1257272, at *3 ("Palpably, 'inconsistent or varying adjudications' would be intolerable for the employees of the same employee benefit plans [and] one member's claim would indeed 'as a practical matter be dispositive of the interests' of fellow members of those Plans").

Moreover, the Advisory Committee on Rule 23 specifically noted that actions that "charge[] a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of . . . beneficiaries"—i.e., an action like the present action—"should ordinarily be conducted as class actions" under Rule 23(b)(1)(B). *See* Fed. R. Civ. P. 23(b)(1)(B) Advisory Committee's Note (1966 Amendment). A Rule 23(b)(1) class therefore is a perfect vehicle for resolving complex ERISA issues such as those involved here.

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, Plaintiff alleges that Defendants failed to comply with ERISA on a Plan-wide basis. The available remedies include monetary relief and remedial equitable relief to the Plan as a whole. ERISA §§ 502(a)(2) and (3).

Remedies under ERISA § 502(a)(2) are by definition plan-wide, a classic example of equitable relief. *See Mass. Mut. Life Ins. Co*., 473 U.S. at 140–41. While the Settlement includes monetary consideration to the Plans, that consideration is incidental to, and flows directly from, Plaintiff's prayer for injunctive and declaratory relief. *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 763–64 (7th Cir. 2003) (certifying Fed. R. Civ. P. 23(b)(2) class where ERISA plaintiffs sought declaratory relief); *see also In re Mut. Funds Inv. Litig*., MDL No. 1586, 2010 WL 2307568, at *4 (D. Md. May 19, 2010) (same); *In re Glob. Crossing Sec. & ERISA Litig*., 225 F.R.D 436, 453 (S.D.N.Y. 2004) (same). Accordingly, Plaintiff's claims are also properly certified under Rule 23(b)(2).

C. Rule 23(g) Is Satisfied

Federal Rule of Civil Procedure 23(g) requires the Court to examine the capabilities and resources of class counsel. The Court undertook this analysis when it appointed Cohen Milstein and Keller Rohrback as Interim Class Counsel in March of 2017. As Judge Clark found and as this Court adopted, Interim Class

Counsel "spent years researching the legislative history of the 'church plan' exemption" and sought "comprehensive protection for plaintiffs and the class" under ERISA. Dkt. 94 at 5, Dkt. 96. Moreover, Interim Class Counsel are experienced in handling class actions and other complex litigation, particularly in developing and litigating Church Plan cases. *Id*. (noting Interim Class Counsel have been "litigating 'church plan' matters since 2013" and have an "intimate knowledge of the applicable law."). Interim Class Counsel also possess sufficient resources to diligently prosecute this case on behalf of the Class. Handorf Decl. ¶ 33. Since being appointed Interim Class Counsel, Cohen Milstein and Keller Rohrback have handled all proceedings in this case, including filing the Complaint, preparing a Master Consolidated Complaint, seeking informal discovery of Plan documents and actuarial data, and mediating the case with Defendants' counsel. Interim Class Counsel manifestly satisfy the requirements of Rule 23(g) and should be named Class Counsel for the Settlement Class.

D. The Proposed Notice Satisfies Rules 23 and Due Process Requirements

In order to satisfy due process considerations, notice to class members must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co*., 339 U.S. 306, 314 (1950). The proposed Class Notice attached as Exhibit 3 to the Handorf Declaration

describes clearly and in plain English the terms of the proposed Settlement; the considerations that caused Plaintiff and Interim Class Counsel to conclude that the Settlement is fair and adequate; the maximum attorneys' fees, expenses, and incentive awards that may be sought; the procedure for objecting to the Settlement; and the date and place of the Fairness Hearing.

With the Court's approval, the Class Notice will be mailed to each member of the Settlement Class no later than 30 days after entry of the Preliminary Approval Order. The last known addresses of members of the Class will be available from the Plan's record-keeper. In addition, the Settlement Agreement and Class Notice will be published online at www.cohenmilstein.com/saintjosephs-settlement and http://www.kellersettlements.com/. These proposed forms of notice will fairly apprise members of the Class of the Settlement Agreement and their options with respect thereto, and therefore fully satisfy due process requirements. *See* Newberg on Class Actions, §§ 8.12, 8:15, 8:17, 8:28, 8:33 (5th ed. 2014). Similar Notice Plans in ERISA church settlements have been approved. Order and Final Judgment, *Lann, et al. v. Trinity Health Corp., et al.*, No. 14-CV-2237 (PJM) (D. Md. May 31, 2017), ECF No. 111; Order Finally Approving Class Settlement, *Griffith, et al. v. Providence Health & Servs., et al.*, No. C14-1720-JCC (W.D. Wash. Mar. 21, 2017), ECF No. 69.

VI. CONCLUSION

Interim Class Counsel respectfully request that the Court grant Plaintiff's motion and (i) enter the proposed Preliminary Approval Order, which provides for notice to the Class as described herein, and (ii) set a Final Fairness Hearing, along with deadlines for Plaintiff to (a) file and serve the motion for award of attorneys' fees and expenses, and for incentive awards for Named Plaintiffs; and (b) file the motion for final approval of the proposed Settlement.

Dated: August 3, 2017

Respectfully submitted,

/s/ Scott M. Lempert

Scott M. Lempert, NJBN 035281995
Karen L. Handorf, *admitted pro hac vice*
Michelle C. Yau, *admitted pro hac vice*
Mary J. Bortscheller, *admitted pro hac vice*
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue, N.W., Suite 500
Washington, DC 20005
Tel.: (202) 408-4600
Fax: (202) 408-4699
Email: slempert@cohenmilstein.com
khandorf@cohenmilstein.com
myau@cohenmilstein.com
mbortscheller@cohenmilstein.com

Laura R. Gerber, *admitted pro hac vice*
Lynn Lincoln Sarko, *admitted pro hac vice*
Havila C. Unrein, *admitted pro hac vice*
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
Tel.: (206) 623-1900

Fax: (206) 623-3384
Email: lgerber@kellerrohrback.com
lsarko@kellerrohrback.com
hunrein@kellerrohrback.com

Ron Kilgard, *admitted pro hac vice*
KELLER ROHRBACK L.L.P.
3101 North Central Avenue, Suite 1400
Phoenix, AZ 85012
Tel.: (602) 248-0088
Fax: (602) 248-2822
Email: rkilgard@kellerrohrback.com

Counsel for Plaintiff Garbaccio

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2017, I electronically filed the above-referenced Memorandum with the Clerk of the Court using the ECF system, which in turn sent notice to all counsel of record.

Dated: August 3, 2017

/s/ Scott M. Lempert
Scott M. Lempert