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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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

	)	Civil Action
MARY LYNNE BARKER, et. al,	)	
	)	No. 16-02748-JLL-JAD
Plaintiffs,	)	
v.	)	Honorable Jose L. Linares
	)	United States District Judge
ST. JOSEPH'S HEALTHCARE	)	
SYSTEM, INC., et al.,	)	Honorable Joseph A. Dickson
	)	United States Magistrate Judge
Defendants.	)	
	)	CLASS ACTION
	)	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF CONSOLIDATION AND APPOINTMENT OF LEAD PLAINTIFF AND CO-LEAD COUNSEL

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Plaintiff, Donna Garbaccio, submits this Memorandum of Law in Support of Plaintiff's Motion to Consolidate ERISA Actions and to Appoint Interim Lead Plaintiff and Interim Co-Lead Counsel.

I. INTRODUCTION

Plaintiff Donna Garbaccio, through her counsel Cohen Milstein Sellers and Toll, PLLC ("Cohen Milstein") and Keller Rohrback L.L.P. ("Keller Rohrback") initiated the present ERISA class action on May 13, 2016, against St. Joseph's Hospital and Medical Center, St. Joseph's Hospital and Medical Center Pension Plan, and St. Joseph's Healthcare System, Inc. ("St. Joseph's") (collectively "Defendants") and other John and Jane Doe defendants. Class Action Compl. ("Garbaccio Compl."), ECF No. 1. The class action is brought on behalf of all participants and beneficiaries of St. Joseph's Hospital and Medical Center Pension Plan (the "Plan"). The Plan purports to be a "Church Plan," which is largely exempt from the Employee Retirement Income Security Act ("ERISA"), the federal statute that regulates virtually all private sector pension plans in the United States. Plaintiff Garbaccio brought this action because, in reality, the Plan does not meet the statutory requirements to be a Church Plan, and thus must be brought into compliance with ERISA.

Garbaccio's complaint seeks declaratory and other relief on behalf of over 5,000 employees of the St. Joseph's Plan who are currently not receiving the many

ERISA protections they are entitled to, including the requirement that Defendants: (i) fund the Plan based on ERISA's minimum funding requirements; (ii) pay PBGC premiums which will give participants the benefit of government backstop should the Plan itself not have sufficient assets to pay benefits; and (iii) send all ERISA mandated notices to participants, including disclosures regarding the value of the participants vested benefits, the terms of the Plan and the funded status of the Plan. In total, Plaintiff Garbaccio's complaint asserts nine causes of action relating to Defendants' treatment of the Plan as a Church Plan.[1]

The week following Plaintiff Garbaccio's filing of her complaint, Plaintiffs Mary Lynne Barker, Anne Marie Dalio, and Dorothy Flar filed a second ERISA class action in this district alleging similar factual and legal allegations as set forth in the Garbaccio Complaint. *Barker v. St. Joseph's Healthcare System, Inc.*, 2:16-cv-02748-JLL-JAD (D.N.J. filed May 16, 2016) (the "Barker Action"). *See* Declaration of Karen L. Handorf in Support of Motion to Consolidate ("Handorf Decl.") at Exhibit 1 (attaching copy of the Barker Complaint).[2] However, the Barker Complaint alleges ***only a subset*** of the causes of action raised by Garbaccio. Barker Compl., Claims I-V at ¶¶ 82-118. In particular, the Barker

[1] *See* Garbaccio Class Action Compl. ¶¶ 132-215, Counts I-IX, ECF No. 1 ("Garbaccio Compl.").

[2] Counsel for Plaintiff Garbaccio has also concurrently filed a copy of this Motion and accompanying papers in the Barker action.

complaint does not include the following claims: (1) a claim for civil money penalties (Garbaccio Compl. ¶¶ 169-175); (2) a claim under 502(a)(1)(B) and 502(a)(3) for clarification of future benefits to ensure that the vested benefits of all participants are accurate despite the failure to administer this Plan in compliance with ERISA (*Id.* ¶¶ 165-168); and (3) a constitutional claim alleging that treatment of the St. Joseph's Plan as a Church Plan would be unconstitutional (*Id.* ¶¶ 212-215).

Plaintiff Garbaccio's more comprehensive pleading is not surprising given that her counsel, Cohen Milstein and Keller Rohrback, have unparalleled expertise in Church Plan Litigation, which is evident from their successful track record in this area and their endorsement by the main advocates for retiree and pension rights, AARP and the Pension Rights Center. *See* Declaration of Mary Ellen Signorille on behalf of AARP in Support of Motion to Consolidate and Appointment of Lead ("Signorille Decl.") ¶¶ 24-26; Declaration of Karen Ferguson on behalf of The Pension Rights Center in Support of Motion to Consolidate and Appointment of Lead ("Ferguson Decl.") ¶¶ 17-20.

Because both these ERISA class actions challenge the Church Plan status of the St. Joseph's Plan and are brought against identical Defendants, Plaintiff Garbaccio, who was first to file, seeks an order consolidating the ERISA actions. Additionally, Plaintiff Garbaccio respectfully requests that she be appointed

Interim Lead Plaintiff and that her counsel, Cohen Milstein and Keller Rohrback, be appointed Interim Co-Lead Counsel.

The appointment of Cohen Milstein and Keller Rohrback as Interim Co-Lead Counsel would best serve the interests of the Class Members. As detailed below, Cohen Milstein and Keller Rohrback are national leaders in ERISA class action litigation – and in particular, Church Plan cases – and possess the expertise, experience, and resources necessary to litigate this case effectively and efficiently.

For a number of years, Cohen Milstein and Keller Rohrback have teamed-up to litigate cases challenging the improper use of the Church Plan exemption. Handorf Decl. at ¶¶ 8, 11, 19-20; Declaration of Ron Kilgard in Support of Motion to Consolidate and Appointment of Lead ("Kilgard Decl.") ¶¶ 10, 13. Cohen Milstein and Keller Rohrback alone bore the risk of developing this innovative theory of liability, which was at odds with both private letter rulings of the Internal Revenue Service and advisory opinions of the Department of Labor, and arguably at odds with some older case law. By 2014, the two firms had filed ten cases together, challenging major hospital chains that are improperly claiming the Church Plan exemption for their retirement plans. In the last year, defendants have appealed three of these cases, losing before this Circuit in *Kaplan v. Saint Peter's Healthcare Sys.*, 810 F.3d 175 (3d Cir. 2015) (affirming Judge Shipp's holding that only a church may establish a Church Plan, and denying defendants' motion to

dismiss, *Kaplan v. Saint Peter's Healthcare Sys.*, No. 13-2941, 2014 WL 1284854, at *1 (D.N.J. Mar. 31, 2014)), and in the Seventh Circuit in *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016). Both decisions unanimously affirmed the district courts' adoption of Cohen Milstein's and Keller Rohrback's interpretation of the statute. A third case has been argued in the Ninth Circuit and is awaiting decision. By contrast, Barker's counsel did not begin filing Church Plan cases until 2015 and they have not obtained a single merits decision.

In addition, Cohen Milstein and Keller Rohrback will be handling the issues regarding the Church Plan exemption in the Supreme Court this summer as defendants in *Kaplan* and *Stapleton* will petition for writs of certiorari seeking reversal. Handorf Decl at ¶ 19. Cohen Milstein and Keller Rohrback intend to argue vigorously that certiorari is not warranted given the lack of circuit split on the issue. *Id*.

More to the point, however, Cohen Milstein and Keller Rohrback, *and these firms alone*, pioneered the recent positive developments in the interpretation of the specific law at issue in this case. *See, e.g.,* Signorille Decl. on behalf of AARP at ¶ 25 ("Cohen Milstein and Keller Rohrback together have pioneered all the positive legal developments in church plan litigation"); Ferguson Decl. on behalf of the Pension Rights Center at ¶ 18 ("[Cohen Milstein and Keller Rohrback's] understanding of the ERISA church plan exemption, as well as the broader

landscape in which these cases are being strategically litigated, is unmatched"). Cohen Milstein and Keller Rohrback alone identified, investigated, and filed the first 10 cases that challenged whether religiously affiliated hospital systems could properly claim "Church Plan" status for their pension plans. Cohen Milstein and Keller Rohrback successfully argued before the Third and Seventh Circuit Courts of Appeals that these plans are not Church Plans because only a church may establish a Church Plan.[3] In this action as well, Cohen Milstein and Keller Rohrback invested a substantial amount of time developing the legal and factual predicate for claims against the Defendants before they filed the Garbaccio complaint.

More globally, the attorneys at Cohen Milstein and Keller Rohrback have long been dedicated to the protection of retirement rights and the proper interpretation of ERISA (some for many years in public service). Ferguson Decl. ¶ 14 and Signorille Decl ¶ 25. In fact, Ms. Signorille of the AARP underscored Ms. Handorf's "integrity and concern" for participants (class members). Signorille Decl. ¶ 21.

Given the qualifications and ERISA expertise of Cohen Milstein and Keller Rohrback, coupled with the substantial work they have done to investigate and litigate ERISA Church Plan claims – and the successes they have achieved in these

[3] *See Kaplan*, 810 F.3d 175; *Stapleton*, 817 F.3d 517.

cases – particularly in this District – Plaintiff respectfully submits that it would be in the best interests of the proposed class of participants and beneficiaries of the Plan to consolidate the Barker action with the Garbaccio action, appoint Ms. Garbaccio as Interim Lead Plaintiff, and appoint Cohen Milstein and Keller Rohrback as Interim Co-Lead Counsel.

II. ARGUMENT

Because the Garbaccio and the Barker Complaints seek largely the same relief against identical parties, stemming from identical violations of ERISA, counsel for Plaintiff Garbaccio hereby submits for the Court's approval a proposed order which provides for: (1) the consolidation of these related actions; (2) appointment of an Interim Lead Plaintiff; (3) appointment of Interim Co-Lead Counsel; and (4) the elimination of wasteful and duplicative litigation. Such an order is consistent with the recommendations of the *Annotated Manual for Complex Litigation* (4th ed. 2011) (the "*Manual*") and Plaintiff Garbaccio respectfully submits that the proposed order will promote the orderly and efficient litigation of both actions.

A. Consolidation of Cases

Consolidation of these identical causes of action is appropriate pursuant to Fed. R. Civ. P. 42(a), which provides:

> If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.

This Court, applying Rule 42(a), has broad discretion in determining whether consolidation is appropriate. "[A] court may consolidate cases if, in its discretion, 'consolidation would facilitate the administration of justice.'" *Doug Brady, Inc. v. N.J. Bldg. Laborers Statewide Funds*, 250 F.R.D. 171, 176 (D.N.J. 2008) (*quoting Waste Distillation Tech., Inc. v. Pan Am. Resources*, *Inc.,* 775 F. Supp. 759, 761 (D. Del.1991)). Federal Rule of Civil Procedure 42(a) grants trial courts broad discretion to "streamline and economize pretrial proceedings so as to avoid duplication of effort, and to prevent conflicting outcomes in cases involving similar legal and factual issues" by consolidating related cases. *In re TMI Litig.,* 193 F.3d 613, 724 (3d Cir.1999); *see also Dutton v. Harris Stratex Networks, Inc.,* Civ. Nos. 08–755, 08-815, 2009 WL 1598408, at *1 (D. Del. June 5, 2009). While decisions to consolidate are discretionary, the court should "balance considerations of efficiency, expense, and fairness." *Resnik v. Woertz,* 774 F.Supp.2d 614, 624 (D. Del.2011) (citing *United States v. Dentsply Int'l, Inc.,* 190 F.R.D. 140, 142–43 (D. Del.1999)); *see also* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2385 (3d ed. 2011) (explaining that a court "is responsible for seeing to it that the trial of consolidated actions will be conducted in a manner that is not prejudicial to any of the parties"). Courts look to counterbalance "the

savings of time and effort gained through consolidation ... against the inconvenience, delay or expense that might result from simultaneous disposition of the separate actions." *Waste Distillation Tech.,* 775 F. Supp. at 761.

The above-captioned actions assert similar claims under ERISA against the same defendants based on the same facts, and therefore involve common questions of law and fact *cf.* Garbaccio Compl. ¶ 131 to Barker Compl. ¶ 21. Both actions contend that the Church Plan exemption, as properly construed, does not apply to the St. Joseph's Plan based on a common set of facts. Garbaccio Compl. ¶¶ 89-95; Barker Compl. ¶¶ 63-68. Both actions address common factual and legal issues regarding the injuries suffered by Plan participants as a result of Defendants' erroneous treatment of the Plan as a Church Plan. Garbaccio Compl. ¶¶ 119-122 and Counts; Barker Compl. at ¶¶ 72-81. Since these common factual and legal issues are central to the resolution of these cases, consolidation would save considerable time, money, and resources.

Importantly, Plaintiff Garbaccio's Complaint has certain claims that the Barker Complaint does not, including a constitutional claim. Garbaccio Compl. ¶¶ 212-215. The Barker complaint does not assert any unique claims. Thus, consolidation of the Barker action into the first-filed Garbaccio action would ensure that all claims will be heard efficiently without causing prejudice. Conversely, litigating these identical claims in separate actions would serve no

compelling interest and would waste valuable time and resources. Further, because the relief sought is plan-wide relief, litigating these cases separately would create a risk of inconsistent judgments or the imposition of incompatible standards of conduct.

In this instance, there is no plausible argument for how consolidation might cause delay, confusion, or prejudice, *see* 9A C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2383 (3d ed. 2008), and because consolidation clearly assists judicial economy and benefits all parties involved, consolidation pursuant to Fed. R. Civ. P. 42(a) is the most sensible course.

B. Proposed Interim Lead Plaintiff Garbaccio

Proposed Interim Lead Plaintiff Donna Garbaccio was an employee of St. Joseph's Hospital and Medical Center in Paterson, New Jersey from 1978 until 1998. Garbaccio Compl. ¶15. Plaintiff Garbaccio is a vested participant in the St. Joseph's Plan because upon retirement she is entitled to receive a Plan benefit. *Id.* Because the assets of the Plan are held in trust for the benefit of all vested participants and beneficiaries, Ms. Garbaccio has a right to recover for the Plan to ensure compliance with ERISA in all respects. Ms. Garbaccio is represented by experienced attorneys who have changed the law in the Third Circuit through their pioneering work in Church Plan litigation. Ms. Garbaccio therefore seeks

appointment as Interim Lead Plaintiff to bring the present action on behalf of the Plan and all of its vested participants and beneficiaries.

C. Establishment of a Leadership Structure

The proposed order further implements the procedures suggested by the *Manual* for complex, multi-party cases such as this by designating Interim Co-Lead Counsel for Plaintiffs. *See Manual* § 10.22. Plaintiff Garbaccio respectfully submits that such designation will (i) promote the orderly progress of this litigation, and (ii) ensure that counsel for Plaintiffs and the Class are able to prosecute this litigation efficiently. Continued litigation, with four firms acting as Plaintiffs' counsel (two for each action) without a leadership structure, would be unwieldy and inefficient.

1. Appointment of Cohen Milstein and Keller Rohrback as Interim Co-Lead Counsel

Plaintiff Garbaccio proposes that Cohen Milstein and Keller Rohrback be charged with the responsibility for the day-to-day conduct of the litigation and for carrying out the orders of the Court concerning the conduct of the litigation. Specifically, as suggested in the *Manual*, Cohen Milstein and Keller Rohrback would be charged with the following duties:

> formulating (in consultation with other counsel) and presenting positions on substantive and procedural issues during the litigation . . . in presenting written and oral arguments and suggestions to the court, working with opposing counsel in developing and implementing a litigation plan, initiating and

> organizing discovery requests and responses, conducting the principal examination of deponents, employing experts, arranging for support services, and seeing that schedules are met.

Manual § 10.221. Cohen Milstein and Keller Rohrback would also be charged with responsibility for monitoring the time and expenses of all Plaintiffs' counsel to ensure that this litigation is conducted efficiently and without duplication of work.

2. Proposed Interim Co-Lead Counsel Are Best Qualified Under the Relevant Standards to Represent the Putative Class

The proposed order implements the procedures suggested by the *Manual* and codified in Fed. R. Civ. P. 23(g) by designating Interim Co-Lead Counsel for Plaintiffs. *See Manual* §§ 10.22, 40.22; Fed. R. Civ. P. 23(g). As stated in the *Manual*, in determining lead counsel, the court should "conduct an independent review (often in conjunction with a hearing) to ensure that counsel appointed to leading roles are qualified and responsible, that they will fairly and adequately represent all of the parties on their side, and that their charges will be reasonable." *Manual* § 10.22. The most important factor is "achieving efficiency and economy without jeopardizing fairness to parties." *Id*. § 10.221.

In appointing class counsel, the court must consider the following four factors:

- work counsel has done in identifying or investigating potential claims in the action;

- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action;
- counsel's knowledge of the applicable law; and
- resources counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A); *Sheinberg v. Sorensen,* 606 F.3d 130, 132 (3d Cir. 2010). When appointing interim class counsel pursuant to Rule 23(g)(3), courts generally apply the same factors used in determining the adequacy of class counsel under Rule 23(g)(1)(A). *See, e.g. Santos v. Carrington Mortgage Servs., LLC*, No. 15-864, 2016 WL 1029268, at *1 (D.N.J. Mar. 15, 2016); *Yaeger v. Subaru of Am., Inc.*, 2014 WL 7883689, at * 1 (D.N.J. Oct. 8, 2014); *see also In re Air Cargo Shipping Servs. Antitrust Litig.*, 240 F.R.D. 56, 57 (E.D.N.Y. 2006)); *Waudby v. Verizon Wireless Services, Inc.,* 248 F.R.D. 173, 175-76 (D.N.J. 2008). Each of the relevant Rule 23(g) factors supports the appointment of Cohen Milstein and Keller Rohrback as Interim Co-Lead Counsel in this case.

3. Substantial Pre- and Post-Filing Work Performed by Cohen Milstein and Keller Rohrback Supports Their Appointment as Interim Co-Lead Counsel

A substantial investigation into the facts and legal theory is often a significant factor in determining interim class counsel, and weighs in favor of appointing Cohen Milstein and Keller Rohrback as Interim Co-Lead Counsel. *See e.g., Waudby,* 248 F.R.D. at 176 (evaluating which counsel performed most work on case, and appointing as interim lead counsel that firm); *Carlin v. DairyAmerica,*

Inc., Nos. 09-0430, 09-0556, 09-0558, 09-0607, 2009 WL 1518058, at *2 (E.D. Cal. May 29, 2009) (appointing the firm that performed more substantial pre-suit investigation as interim class counsel when all other factors were equal); *Brigiotta's Farmland Produce and Garden Ctr, v. United Potato Growers of Idaho, Inc.,* No. 10–307, 2010 WL 3928544, at *2 (D. Idaho Oct. 4, 2010) (weighing as significant, an independent investigation developed over course of nearly a year and a half); *see also, US Airline Pilots Ass'n v. Velez*, No. 14-00577, 2016 WL 1615408, at *3 (W.D.N.C. Apr. 22, 2016) (appointing counsel for settlement class that expended "significant resources investigating the claims").

Cohen Milstein and Keller Rohrback have been involved in Church Plan litigation for over six years. Handorf Decl. ¶ 8; Kilgard Decl ¶ 6. Keller Rohrback filed the first of a series of cases involving the Church Plan exemption on April 21, 2010. *See Thorkelson v. Publ'g House of Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119 (D. Minn. 2011). Handorf Decl. ¶ 9; Kilgard Decl. ¶ 11. Shortly thereafter, the Pension Rights Center retained Cohen Milstein to draft an amicus curiae brief on its behalf in support of the *Thorkelson* plaintiffs. Handorf Decl. ¶ 10; Kilgard Decl. ¶ 12. In fact, the endorsement of the Pension Right Center is meaningful here because the Pension Rights Center has long been involved in protecting retirees and their pensions, and has been specifically

concerned with misuse of the Church Plan exemption for decades. Ferguson Decl. ¶¶ 6-8.

Through work on the *Thorkelson* case and subsequent investigation, Cohen Milstein and Keller Rohrback learned that a wide range of non-church entities had taken the position that their defined benefit pension plans were ERISA-exempt based on an overly broad and incorrect interpretation of the Church Plan exemption. Handorf Decl. ¶ 11; Kilgard Decl. ¶ 13. Moreover, both the Internal Revenue Service and the Department of Labor appeared to have endorsed this erroneous interpretation. Handorf Decl. ¶ 12; Kilgard Decl. ¶ 14. After extensive research and analysis, including a detailed analysis of the exemption and its legislative history, Cohen Milstein and Keller Rohrback concluded that applying the exemption to entities that were clearly not churches, but that merely claimed some degree of affiliation with a church, was not supported by a plain reading of the statute and was likely unconstitutional. Handorf Decl. ¶ 13; Kilgard Decl. ¶ 15.

Cohen Milstein and Keller Rohrback subsequently launched a broad investigation into non-church entities whose defined benefit plans were not compliant with ERISA based on an overbroad and incorrect interpretation of the Church Plan provision. Handorf Decl. ¶ 14; Kilgard Decl. ¶ 16. The firms devoted substantial time and resources to these efforts. Handorf Decl. ¶ 15; Kilgard Decl. ¶ 17. Through Cohen Milstein's strong, long-standing work relationship with the

Pension Rights Center, Ms. Handorf first learned that individual religiously affiliated hospitals like the Hospital Center at Orange in New Jersey were designating their pension plans as Church Plans, not subject to ERISA-mandated protections. Handorf Decl. ¶ 16; Kilgard Decl. ¶ 18. Delving deeper, the focus of the investigation turned to large hospital systems that compete, often on a national level, with massive for-profit healthcare companies. Handorf Decl. ¶ 17; Kilgard Decl. ¶ 19. Through review of numerous sources of information, the team began to piece together allegations that would ultimately form the basis of lawsuits filed throughout the country against over a dozen different hospital systems. Handorf Decl. ¶ 18; Kilgard Decl. ¶ 20.

Following this exhaustive research, Cohen Milstein and Keller Rohrback filed nine cases in 2013 and 2014[4]. In these cases, Cohen Milstein and Keller Rohrback have retained a variety of expert witnesses – including canon lawyers and actuaries – to testify, if necessary, regarding the definition of a church, pension funding levels, benefit calculations, etc. Handorf Decl. ¶ 21. Cohen Milstein and

[4] *Overall v. Ascension*, No. 13-11396 (E.D. Mich. filed Mar. 28, 2013); *Chavies v. Catholic Health East*, No. 13-1645 (E.D. Pa. filed Mar. 28,. 2013); *Rollins v. Dignity Health*, No. 13-1450 (N.D. Cal. Filed Apr. 1, 2013); *Kaplan v. St. Peter's Healthcare Sys.*, No. 13-2941 (D.N.J. filed May 7, 2013); *Medina v. Catholic Health Initiatives*, No. 13-1249 (D. Colo. filed May 10, 2013); *Stapleton v. Advocate Health Care Network*, No. 14-1873 (N.D. Ill. filed Mar. 17, 2014); *Owens v. St. Anthony Medical Center*, No. 14-4068 (N.D. Ill. filed June 2, 2014); *Lann v. Trinity Health Corp.*, No. 14-2237 (D. Md. filed July 11, 2014); *Griffith v. Providence Health*, No. 14-1720 (W.D. Wash. filed Nov. 7, 2014).

Keller Rohrback have recruited a number of *amicus curiae* to file briefs in support of their statutory construction, including the Pension Rights Center, AARP Foundation Litigation, the National Employment Lawyers Association, and the ACLU. *Id.* ¶ 22.

In December of 2013, plan participants obtained their first victory, as Judge Henderson of the Northern District of California concluded, based upon a thorough analysis of the statutory text and legislative history, that a plan cannot qualify as an exempt Church Plan unless it was established by a church.[5] Two additional district courts followed suit in 2014, including Judge Shipp in this District.[6] Most recently, in December 2015 and March of this year, this Circuit along with the Seventh Circuit adopted the same statutory construction, concluding that pension plans sponsored by religiously-affiliated hospital systems do not qualify as Church Plans because they were not established by churches. *Kaplan,* 810 F.3d 175; *Stapleton*, 817 F.3d 517. In sum, Cohen Milstein and Keller Rohrback have been the architects of the legal theories and litigation strategies in this area of the law, and have paved the way for participants in "faux" Church Plans sponsored by large

[5] *Rollins v. Dignity Health*, 19 F. Supp. 3d 909 (N.D. Cal. 2013).

[6] *Kaplan v. Saint Peter's Healthcare Sys.*, 2014 WL 1284854 (accepting Plaintiff's interpretation of statute and denying defendants' motion to dismiss); *Stapleton v. Advocate Health Care Network*, 76 F. Supp. 3d 796 (N.D. Ill. 2014) (same); *see also Rollins v. Dignity*, No. 13-cv-01450-TEH, 2014 WL 6693891 (N.D. Cal 2014) (granting plaintiff's motion for partial summary judgment).

hospital conglomerates to pursue substantially similar actions in order to secure the ERISA protections to which they are entitled.

In this particular action, Cohen Milstein and Keller Rohrback reviewed a considerable number of documents preparing the Garbaccio Complaint, including benefits statements and other plan-related documents, newspaper articles, St. Joseph's website, various financial disclosures and statements of St. Joseph's, reports by ratings agencies, Form 5500 filings, and St. Joseph's Form 990 returns. Handorf Decl. ¶ 24; Kilgard Decl. ¶ 21. Cohen Milstein and Keller Rohrback drafted the Garbaccio Complaint based upon their own legal and factual analysis, including the review of thousands of pages of relevant documents, relying on theories developed and honed during six years of litigating Church Plan cases. *Id*. This included investigation of facts that support alternative theories of liability that are not in the Barker complaint, such as the claim that allowing the St. Joseph's Plan to be a Church Plan, exempt from ERISA, is unconstitutional.

Performance of exhaustive pre-litigation investigation and development of pertinent legal theories underlying plaintiffs' claims weigh heavily in favor of appointing firms as interim lead counsel in class actions. *See In re Shop-Vac Mktg. & Sales Pracs. Litig.,* No. 12-MD-2380, 2013 WL 183855, at *2 (M.D. Pa. Jan. 17, 2013) (awarding interim lead counsel status, reasoning that firm had "conducted a comprehensive investigation, and made a significant investment in time and

resources such that its commitment to this litigation is unquestioned. The [law firm] [retained multiple experts and] has conducted more significant work in investigating and identifying potential claims in this action"). *See also In re Protected Vehicles, Inc.*, 397 B.R. 339, 347 (Bankr. D.S.C. 2008) (appointing as lead class counsel firm that had "done extensive work involving personal contact with over 150 claimants"); *see also In re Mun. Derivatives Antitrust Litig.*, 252 F.R.D. 184, 186 (S.D.N.Y. 2008) (appointing as interim co-lead counsel firms that "expended substantially more effort and resources and obtained more substantial and more valuable and reliable information"); *Brigiotta's*, 2010 WL 3928544, at *2 (explaining that because firm "expended substantial attorney time . . . in the course of investigation and development of legal theories, and are extremely well-versed in the relevant legal issues . . . weighs in favor of appointing interim counsel as proposed").

Moreover, where, as here, the firms seeking appointment as interim co-lead class counsel based their allegations upon substantial pre-filing investigation and a second firm followed thereafter, courts overwhelmingly favor appointment to those that conducted exhaustive pre-filing litigation and filed first. *See, e.g.*, *In re Shop-Vac Mktg. & Sales Pracs. Litig.*, 2013 WL 183855, at *3 (appointing class counsel who had "conducted thorough and extensive pre-filing investigation and testing of

the potential claims and initiated legal action months in advance of other applicants").[7]

Accordingly, Plaintiff Garbaccio and her counsel's considerable pre-filing investigation into the facts and legal theories in this litigation, as well as her counsel's demonstrated post-filing commitment to the efficient and expeditious litigation of the ERISA claims, weigh heavily in favor of the appointment of Cohen Milstein and Keller Rohrback as Interim Co-Lead Counsel.

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[7] *In re Oreck Corp. Halo Vacuum and Air Purifiers Mktg. and Sales Pracs. Litig.,* 282 F.R.D. 486, 492 (C.D. Cal. 2012) (interim lead class counsel appointed to counsel with extensive experience in litigation at issue and had researched, prepared and filed first); *Kaminske v. JP Morgan Chase Bank N.A.*, Nos. 09-00918, 09-6352, 2011 WL 521338 at *3 (C.D. Cal. Jan. 3, 2011) (appointing counsel for first-filed plaintiffs over objection of later-filed plaintiffs, concluding that firm representing first-filed plaintiffs were in best position to represent the class "in light of the extensive amount of research and discovery [it] has conducted…"); *Walker v. Discover Fin. Servs.*, No. 10-06994, 2011 WL 2160889, at *3-4 (N.D. Ill. May 26, 2011) (appointing as interim class counsel firms that were the first to file class action complaints after having performed the most work in identifying and investigating the claims); *Miller v. Beazer Homes USA, Inc.*, Nos. 07-00952, 07-1079, 07-1098, 07-1401, 2007 WL 3005332, at *2 (N.D. Ga. Oct. 11, 2007) (appointing lead counsel "based upon the work counsel have performed in identifying and investigating potential claims in the action as well as their knowledge and experience in this area of law"); *In re Mun. Derivatives Antitrust Litig.*, 252 F.R.D. at 186 (interim lead counsel appointed to firm that did most pre-filing work and filed first. Court found that subsequent complaints filed by other firms "substantially similar to [ ] initial filings"). *See also* 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.120 [3][a] (3d ed. 2007) (attorneys who completed the first investigation and filed the first complaint are "in a better position to represent the class fairly and adequately than attorneys who have not undertaken those tasks").

4. Counsel for Plaintiff Garbaccio Have the ERISA Experience and Knowledge to Litigate These Actions

The second and third Rule 23(g) factors also weigh in favor of appointing Cohen Milstein and Keller Rohrback as the best qualified to serve as Interim Co-Lead Counsel in this ERISA class action. *See, e.g., Outten v. Wilmington Tr. Corp.,* 281 F.R.D. 193, 200 (D. Del. 2012) ("Experience and knowledge of the law is of the utmost importance when determining lead counsel.")*; see also In re Terazosin Hydrochloride Antitrust Litig.,* 220 F.R.D. 672, 702 (S.D. Fla. 2004) ("The consideration that the Court finds to be most persuasive, however, relates to [counsel's] experience in, and knowledge of, the applicable law in this field.")); *see also Foltz v. Delaware St. Univ.,* 269 F.R.D. 419, 426 (D. Del. 2010) (finding that counsel is qualified to "fairly and adequately represent the interests of the class as required by Rule 23(g)" based on experience and qualifications extracted from Counsel Memorandum); *see also In re Luxottica Group, S.p.A. Sec. Litig.* No. 01-3285*,* 2004 WL 2370650, at * 5 (E.D.N.Y. October 22, 2004) (selecting a firm as lead class counsel based on the firm's "experience and expertise"). Indeed, these two factors are really implicit in the first factor. The only reason Cohen Milstein and Keller Rohrback could so successfully mount a challenge to the misuse of the relatively esoteric ERISA exemption was precisely because of their deep experience in and knowledge of ERISA.

Cohen Milstein and Keller Rohrback are national leaders in class action litigation generally and have premier ERISA class action practices that are nationally recognized. *See* Handorf Decl. ¶¶ 25-26; Kilgard Decl. ¶¶ 22-23. Both Cohen Milstein's Employee Benefits Practice Group and Keller Rohrback's ERISA practice have extensive experience with a broad array of ERISA cases and have achieved considerable recoveries on behalf of ERISA plan participants and beneficiaries. Handorf Decl. ¶26; Kilgard Decl. ¶ 23. Because of Cohen Milstein's and Keller Rohrback's ERISA expertise and the successful results these firms have achieved for ERISA classes, each firm has litigated numerous ERISA class cases and been appointed lead or co-lead counsel in several ERISA class action cases where contested leadership petitions were filed. Handorf Decl. ¶ 45 Kilgard Decl. ¶ 23.

Cohen Milstein's ERISA Expertise

Cohen Milstein's Employee Benefits Practice Group has been devoted exclusively to litigating complex ERISA class actions for over 15 years. Handorf Decl. ¶ 25. The group, led by Karen L. Handorf, has played a significant role in the development of employee benefits law. Handorf Decl. ¶ 26. Under Ms. Handorf's leadership, Cohen Milstein maintains a leading ERISA practice that successfully represents ERISA participants throughout the country. Handorf Decl. ¶ 26; Ferguson Decl. on behalf of The Pension Rights Center at ¶ 13.

Before joining Cohen Milstein in 2007, Ms. Handorf spent more than 25 years enforcing ERISA at the U.S. Department of Labor (DOL). At the DOL, she was responsible for supervising ERISA litigation brought by the Secretary of Labor nation-wide covering a broad array of ERISA issues, including fiduciary breaches, prohibited transactions, diversification, remedies, coverage, preemption, fiduciary status, plan terminations, retiree health, benefit claims and ESOPs. She also developed and supervised an amicus brief writing program which addressed complex and novel ERISA issues that arose in private litigation in the appellate courts and the Supreme Court. As Deputy Associate Solicitor of the Plan Benefits Security Division, Ms. Handorf served as the second-highest ranking lawyer for enforcement of the provisions of ERISA at issue here. Handorf Decl. ¶ 27. While at DOL, she was awarded the Department's Distinguished Career Service Award and Exceptional Achievement Awards for her work on ERISA remedies, employer stock issues, retiree health care, defined benefit pension plan terminations and the amicus brief writing program. *Id.* ¶ 28. Because of her long career at DOL, she has a deep understanding of the Department's policies and procedures and has maintained strong working relationships with Department and other government officials.

Ms. Handorf is a fellow of the American College of Employee Benefits Counsel, an organization dedicated to elevating the standards and advancing the

public's understanding of the practice of employee benefits law. Handorf Decl. ¶ 29. Ms. Handorf is one of fewer than ten lawyers regularly representing participants and beneficiaries to receive that honor. Handorf Decl. ¶ 30. Ms. Handorf has served as plaintiff's co-chair of ABA subcommittees on ERISA civil enforcement and preemption and for more than two decades, has been a frequent national speaker on ERISA issues. Handorf Decl. ¶ 31. In 2016, she was selected for inclusion in Best Lawyers in America for ERISA practice. *Id.* ¶ 32. Ms. Handorf's breadth and depth of ERISA knowledge is unparalleled in the plaintiff's bar and provides a significant asset to the Cohen Milstein team. *See* Ferguson Decl. on behalf of the Pension Rights Center at ¶ 13; Signorille Decl. on behalf of AARP at ¶ 20.

Cohen Milstein's litigation team for this matter also includes Michelle C. Yau. Ms. Yau received her law degree from Harvard Law School in 2003, where she was awarded several public interest fellowships, including the Heyman Fellowship for academic excellence and demonstrated commitment to federal public service. Handorf Decl. ¶ 36. Ms. Yau graduated Phi Beta Kappa with a B.A. in Mathematics from the University of Virginia. *Id.* ¶ 37. Before law school, she worked as a financial analyst at Goldman, Sachs & Co. in the Financial Institutions Group of the Investment Banking Division. *Id.* ¶ 38. Ms. Yau has litigated some of the most significant ERISA lawsuits since she started in the

Department of Labor Honors Program. In 2014, *Law360* named Ms. Yau a "Rising Star Under 40." *Id.* ¶ 39.

Keller Rohrback's ERISA Expertise

Keller Rohrback has obtained many favorable and groundbreaking decisions in the area of company stock and other ERISA class action cases. The firm's work as lead counsel in ERISA cases has been widely praised. For example, in *WorldCom*, Judge Denise Cote found that:

> Lead Counsel [Keller Rohrback] has performed an important public service in this action and has done so efficiently and with integrity. It has cooperated completely and in novel ways with Lead Counsel for the Securities Litigation and in doing so all of them have worked to reduce legal expenses and maximize recovery for class members. Lead Counsel . . . has also worked creatively and diligently to obtain a settlement from WorldCom in the context of complex and difficult legal questions. . . . Lead Counsel should be appropriately rewarded as an incentive for the further protection of employees and their pension plans not only in this litigation but in all ERISA actions.

In re WorldCom, Inc. ERISA Litig., No. 02-4816, 2004 WL 2338151, at *10 (S.D.N.Y. Oct. 18, 2004).

Keller Rohrback's strength lies in its people, including 70 attorneys who are accountants, economists, computer technology experts, and former U.S. Department of Justice prosecuting attorneys, as documented in the firm's resume. Kilgard Decl. ¶ 3. Keller Rohrback's Complex Litigation and ERISA team is led by the firm's Managing Partner, Lynn Lincoln Sarko. *Id.* ¶ 22. Mr. Sarko received both his M.B.A. in accounting and law degree from the University of Wisconsin,

where he served as Editor-in-Chief of the *Wisconsin Law Review* and was selected by faculty as the outstanding graduate of his law school class. *Id*. He is a former Assistant United States Attorney and Ninth Circuit judicial law clerk (Hon. Jerome Farris). He has actively engaged in the prosecution of complex litigation for more than two decades. *Id.*

Mr. Sarko has worked closely with the Department of Labor on numerous issues, has established relationships with many of the key experts in the field, and has worked extensively with plaintiff and defense counsel in related cases. *Id.* He is a frequent commentator on ERISA litigation and regularly speaks at national ERISA conferences. *Id.*

The Keller Rohrback Complex Litigation and ERISA team that Mr. Sarko leads is also highly accomplished, and includes numerous lawyers whose practices focus primarily on ERISA class action cases. These attorneys include Ron Kilgard, who practices in the firm's Phoenix office. Mr. Kilgard graduated *cum laude* with a B.A. in History from Harvard College in 1973 and received his Master of Theological Studies from Harvard Divinity School in 1975. Kilgard Decl. at ¶ 5, n. 2. He then graduated *magna cum laude* from Arizona State University College of Law, where he was the Editor-in-Chief of the *Arizona State Law Journal* and where he received the Armstrong Award (outstanding graduate). *Id.*

Since joining Keller Rohrback in 2002, Mr. Kilgard has been extensively involved in pension plan class action litigation, involving both ERISA and non-ERISA plans. *Id.* ¶ 5. In 2012 he was selected for inclusion in Best Lawyers in America (19th ed.) for ERISA practice. Mr. Kilgard has published on a variety of topics, and has spoken at a number of conferences regarding pertinent issues. *Id.* Mr. Kilgard has played leading roles in numerous ERISA cases.

Both Firms' Church Plan Expertise

Cohen Milstein and Keller Rohrback spotted the Church Plan issue, investigated it, developed it, and invested millions of dollars in attorney time and out of pocket expenses in the effort. And they are the *only* firms to have achieved significant victories in the district and appellate courts. To be sure, it has not always been easy. Early cases were mixed, and recently, a District of Colorado court ruled against Cohen Milstein and Keller Rohrback. *See Medina v. Catholic Health Initiativ*es, No. 13-01249, 2015 WL 8144956 (D. Colo. 2015). However, that decision was specifically repudiated by the Third and Seventh Circuits. *See Stapleton,* 817 F.3d at 523; *Kaplan,* 810 F.3d at 183 . Since 2013, Cohen Milstein and Keller Rohrback have filed seventeen cases against hospitals and healthcare systems involving the improper application of the ERISA Church Plan exemption. They have survived numerous motions to dismiss and obtained favorable decisions from two Courts of Appeals on the statutory question of Church Plan status.

Specifically, Cohen Milstein and Keller Rohrback acted or are acting as class counsel in the following Church Plan (in addition to this case):[8]

- *Overall v. Ascension Health*, No. 13-11396 (E.D. Mich. March 28, 2013);
- *Chavies v. Catholic Health East*, No. 13-1645 (E.D. Pa. March 28, 2013);
- *Rollins v. Dignity Health, et al*., No. 13-1450 (N.D. Cal. April 1, 2013);
- *Medina v. Catholic Health Initiatives*, No. 13-1249 (D. Colo. May 10, 2013);
- *Kaplan v. Saint Peter's Healthcare System,* No. 13-2941 (D.N.J. May 7, 2013);
- *Stapleton v. Advocate Health Care Network,* No. 14-1873 (N.D. Ill. March 7, 2014);
- *Owens v. St. Anthony Medical Center,* No. 14-4068 (N.D. Ill. June 2, 2014);
- *Lann v. Trinity Health Corp.,* No. 14-2237 (D. Md. July 11, 2014);
- *Griffith v. Providence Health*, No. 14-1720 (W.D. Wash. November 7, 2014);
- *Carver v. Presence Health Network*, No. 15-2905 (N.D. Ill. April 2, 2015);
- *Feather v. SSM Health,* No. 16-393 (S.D. Ill. April 8, 2016);
- *Jewett v. Franciscan Alliance, Inc.,* No. 16-4589 (N.D. Ill. April 22, 2016);
- *Smith v. OSF Healthcare System,* No. 16-467 (S.D. Ill. April 27, 2016);
- *Whaley v. Mercy Health,* No. 16-518 (S.D. Ohio May 3, 2016);
- *Sanzone v. Mercy Health,* No. 16-478 (W.D. Okla. May 6, 2016); and
- *Garbaccio v. St. Joseph's Hospital,* No. 16-2740 (D.N.J. May 13, 2016)

Through investigating and litigating these cases, Cohen Milstein and Keller Rohrback have gained extensive, unparalleled knowledge of the Church Plan exemption. Attorneys performed a detailed analysis of the text of the Church Plan exemption, researching prior versions of the exemption, its legislative history, and related regulations. Handorf Decl. ¶ 40; Kilgard Decl. ¶ 15. They also reviewed IRS private letter rulings, DOL Advisory Opinions, and every court decision

[8] Handorf Decl. ¶ 20. (Dates indicate filing of complaint)

interpreting the exemption since it was enacted. Handorf Decl. ¶ 12, 41; Kilgard Decl. ¶ 14. They developed and analyzed the factual basis for claiming that plans established by non-churches did not meet the statutory requirements even based on the Government's erroneous interpretation of the Church Plan exemption. *Id.* And they developed the argument that application of the Church Plan exemption to plans established by non-churches would be unconstitutional. Handorf Decl. ¶ 13; Kilgard Decl. ¶ 15. Based on this meticulous and exhaustive approach, Cohen Milstein and Keller Rohrback have capably challenged years of contrary agency pronouncements and an assortment of ill-considered lower court decisions.

Moreover, because of their substantial ERISA expertise in general and work on Church Plan litigation in particular, Cohen Milstein and Keller Rohrback are best able to handle the difficult legal and factual issues that arise once the coverage issues are resolved. Ferguson Decl. ¶¶ 19-20 ("The reputations of Cohen Milstein and Keller Rohrback in the ERISA community are excellent and their expertise with respect to Church Plan cases is unmatched by any other firm…. I would not hesitate to recommend those firms to participants seeking representation in litigation involving the ERISA Church Plan exemption. There is no question that they have achieved unparalleled expertise in the numerous ERISA issues implicated by the church plan exemption"); Signorille Decl. ¶ 18 ("Together Cohen Milstein and Keller Rohrback are an ideal team for a major pension plan

litigation initiative such as the church plan cases, as indeed, they have proved themselves"). Defined benefit pension plans, such as the St. Joseph's Plan, are highly regulated by ERISA and the parallel tax code. Cohen Milstein and Keller Rohrback have significant substantive knowledge of ERISA and tax code provisions – including funding, actuarial assumptions, lump sum calculations, mergers and terminations – that are involved in assuring that once coverage is established, these plans come into compliance with ERISA. For example, a member of our legal team, Ms. Yau, has particular expertise related to understanding the various actuarial assumptions mandated by ERISA due to the fact that she graduated Phi Beta Kappa with a degree in Mathematics. Handorf Decl. ¶ 37.

5. Counsel for Plaintiff Garbaccio Have the Resources Necessary to Represent the Class

As to the fourth factor – the resources available to represent the Class – Cohen Milstein and Keller Rohrback are well-established and successful law firms that have the financial resources and personnel necessary to pursue a case of this magnitude, as each has demonstrated in numerous large-scale class actions. *See* Handorf Decl. ¶ 42; Kilgard Decl. ¶ 26. Cohen Milstein has over 90 lawyers in six U.S. cities[9] and has a group of five attorneys – with a combined 40+ years of

[9] *See About Cohen Milstein,* Cohen Milstein, http://www.cohenmilstein.com/about-us (last visited May 27, 2016).

ERISA litigation experience – whose practice consists exclusively of ERISA class actions.[10]

Cohen Milstein also has the financial resources to litigate complex class actions for years, and it has done so many times. The firm commenced the Wal-Mart employment discrimination class action in 2001 and has continued litigating the matter even after the U.S. Supreme Court's reversal of class certification in 2011. Similarly, in a securities fraud action against BP plc related to the *Deepwater Horizon* oil spill, the firm litigated for six years – through a Fifth Circuit appeal and a summary judgment hearing – without reimbursement for fees and expenses. In each of these cases, the Firm has paid for significant e-discovery costs, including the costs of different document management systems and the costs of various experts, among other costs of litigation. Likewise, in mortgage-backed securities litigation, the firm has been involved in approximately nine class actions against most of the largest financial institutions on behalf of investors who were misled by the quality of the underlying mortgages. Cohen Milstein has secured nearly $2 billion in recoveries for investors, and financed those class actions simultaneously through settlement and final approval.

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[10] *See Employee Benefits/ERISA*, Cohen Milstein, http://www.cohenmilstein.com/practice-area/employee-benefits-erisa (last visited May 27, 2016).

Similarly, Keller Rohrback L.L.P. is a seventy-lawyer firm with a national reputation as a go-to plaintiffs' firm for large-scale, complex individual and class action cases. Keller Rohrback's nationwide ERISA litigation practice has a broad geographic footprint, with offices in Seattle, Phoenix, New York, two offices in California and one in Montana. Keller Rohrback has attorneys admitted in every United States Court of Appeals, numerous federal district courts, and the United States Supreme Court. *See Our Firm*, Keller Rohrback Law Offices, L.L.P. http://krcomplexlit.com/firm/ (last visited May 27, 2016).

Keller Rohrback also has the financial resources to litigate large cases for years, and it has done so many times. For example, in the Enron 401(k) litigation, Keller Rohrback litigated the case for over six years, incurring hundreds of thousands of dollars in expenses and millions of dollars of attorney time, before the court awarded any fees or expenses. Similarly in an antitrust action involving the wages of nurses in Detroit, the firm litigated the case for over seven years before receiving any court-awarded fees or expenses. And in litigation arising out of the 1989 oil spill of the Exxon Valdez, Keller Rohrback was one of the firms representing the plaintiffs in litigation which lasted nearly 20 years, culminating finally in the Supreme Court's decision in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). Keller Rohrback did not receive any payments, for fees or expenses, in

connection with its services as class counsel until the following year, a full 20 years after the spill. Kilgard Decl. ¶ 25.

Both Cohen Milstein and Keller Rohrback have the personnel and resources necessary to pursue a case of this magnitude, as they have demonstrated in numerous large-scale class actions and other complex cases. Both firms pride themselves on the quality of legal work and their ability to litigate zealously and creatively with the highest ethical standards – attributes that courts across the country have recognized. For example, in 2015, Cohen Milstein was named as one of the ten "Most Feared Plaintiffs Firms" for the third year in a row. Handorf Decl. ¶ 43. Together, the firms possess extensive in-house document hosting and management capabilities and are well-versed in conducting discovery on a nationwide scale, including negotiating and developing discovery protocols for the production of electronic and other documents, in-house database development, document processing, hosting, and review. They use cutting-edge technology and case management techniques in the preparation and trial of complex cases.

Cohen Milstein and Keller Rohrback's combined experience and resources will allow them to streamline the litigation and create efficiencies unavailable to other firms. Thus, the resource factor under Rule 23(g) also favors appointment of Plaintiff Garbaccio's proposed Interim Co-Lead Counsel. Finally, Cohen Milstein and Keller Rohrback have a long-standing, cohesive relationship working together

on complex matters, including ERISA cases. They have demonstrated an ability to work together efficiently, effectively, and collaboratively in these cases, which assures the highest level of representation for Plaintiffs and the Class.

In sum, Plaintiff Garbaccio respectfully submits that, based on the four factors of Rule 23(g), Cohen Milstein and Keller Rohrback are best able to represent the interests of Plaintiffs and the Class and should therefore be appointed Interim Co- Lead Counsel.

III. CONCLUSION

For the foregoing reasons, Plaintiff Garbaccio, though her counsel, respectfully requests that the Court: (a) consolidate the above-captioned actions; (b) appoint Donna Garbaccio as Interim Lead Plaintiff; and (c) appoint Cohen Milstein and Keller Rohrback as Interim Co-Lead Counsel as set forth in Plaintiff's proposed Order.

RESPECTFULLY SUBMITTED this 27th day of May, 2016.

/s/ Scott Lempert
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