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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
)	
Plaintiff,)	No. 2-16cv-02740(JMV) (JBC)
)	
v.)	Honorable John Michael Vazquez
)	United States District Judge
ST. JOSEPH'S HOSPITAL AND)	
MEDICAL CENTER AND)	
SUBSIDIARIES, et al.,)	Honorable James B. Clark
)	United States Magistrate Judge
Defendants.)	
)	CLASS ACTION

MARY LYNN BARKER, ANNE)
MARIE DALIO, AND DOROTHY)
FLAR, individually and on behalf of)
all others similarly situated,)

Plaintiff,)

v.)

ST. JOSEPH'S HOSPITAL AND)
MEDICAL CENTER AND)
SUBSIDIARIES, et al.,)

Defendants. _____

**MEMORANDUM IN SUPPORT
OF PLAINTIFF GARBACCIO'S MOTION TO APPOINT
INTERIM LEAD PLAINTIFF AND INTERIM CO-LEAD COUNSEL**

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Plaintiff Garbaccio, through her counsel Cohen Milstein Sellers & Toll, PLLC (“Cohen Milstein”) and Keller Rohrback, L.L.P. (“Keller Rohrback”) (together “the Firms” or “Garbaccio’s counsel”) submit this Memorandum of Law in Support of Plaintiff Garbaccio’s Motion to Appoint Interim Lead Plaintiff and Interim Co-Lead Counsel. Plaintiff Garbaccio seeks entry of the proposed Order appointing: (a) Ms. Garbaccio as Interim Lead Plaintiff on behalf of Plaintiffs and the proposed class and (b) Ms. Garbaccio’s counsel as Interim Co-Lead Counsel on behalf of Plaintiff and the proposed class. Plaintiff relies on the allegations contained in Plaintiff’s complaint, this memorandum of points and authorities, and declarations filed in support of her motion, including the Declaration of Karen W. Ferguson on behalf of the Pension Rights Center, the Declaration of Mary Ellen Signorille on behalf of AARP, and the declarations of proposed Interim Co-Lead Counsel.

I. INTRODUCTION

This litigation – challenging large non-profit hospitals’ failure to comply with ERISA’s retirement protections through unlawful reliance on the statute’s “Church Plan” exemption – is one of over twenty such cases filed following Plaintiff Garbaccio’s counsel’s success before the Third Circuit. *See Kaplan v. Saint Peter’s Healthcare Sys.*, 810 F.3d 175 (3d Cir. Dec. 29, 2015). In *Kaplan*,

Garbaccio’s counsel, Karen Handorf, persuasively argued that a pension plan meets ERISA’s narrow Church Plan exemption only if it is established and maintained by a *church* – not a religiously affiliated healthcare company. *Id.* In four of these “Church Plan” cases, the law firms seeking Interim Co-Lead counsel here (Cohen Milstein and Keller Rohrback, and Kessler Topaz Meltzer and Check and Izard, Kindall Raabe), filed motions for Interim Co-Lead Counsel.

Two courts have now ruled, both quickly appointing Cohen Milstein and Keller Rohrback as Interim Co-Lead Counsel over Barker’s counsel because “Cohen Milstein and Keller Rohrback have the most experience litigating this complicated issue of statutory and constitutional interpretation” and “are more qualified to serve as interim lead class counsel in this action.”¹ *Hodges v. Bon Secours*, No. 1:16-cv-1079 , at 3, 5 (D. Md. Aug. 24, 2016), attached hereto as Exhibit 2 to the Declaration of Karen L. Handorf (hereinafter “Handorf Decl.”); *see also Sanzone v. Mercy Health*, No. 4:16-cv-923-CDP (E.D. Mo. Aug. 4, 2016) (holding these firms “are *best* able to represent the interests of the class”)(emphasis added), attached hereto as Exhibit 3 to Handorf Decl.

¹ In *Hodges v. Bon Secours*, No. 1:16-cv-1079 (D. Md. August 24, 2016), the Court appointed Cohen Milstein as Interim Lead Counsel after Cohen Milstein and Keller Rohrback represented to the Court that Cohen Milstein would take the lead role in managing the case.

For the reasons stated herein Plaintiff Garbaccio respectfully requests this Court similarly hold that Cohen Milstein and Keller Rohrback are best able to represent the interests of the Class.

II. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Garbaccio initiated this class action on May 13, 2016, against St. Joseph's Hospital and Medical Center and Subsidiaries, St. Joseph's Healthcare System, Inc. (together "St. Joseph's"), members of the committee that administers the St. Joseph's Hospital and Medical Center Pension Plan, and members of the Executive Finance Committee of the Board of Trustees. The complaint challenges St. Joseph's claim that the St. Joseph's Hospital and Medical Center Pension Plan ("the St. Joseph's Plan" or "the Plan") is a Church Plan exempt from the Employee Retirement Income Security Act (ERISA), the federal statute that regulates virtually all private sector pension plans in the United States. Garbaccio Complaint, ECF No. 1. *Id.* This case is brought on behalf of over 5,000 participants and beneficiaries of the Plan who are being deprived of ERISA's protections. *Garbaccio* Complaint ¶ 116, attached hereto as Exhibit 1 to Handorf Decl.

Plaintiff Garbaccio seeks a declaration that the St. Joseph's Plan is an ERISA-governed Plan and an order requiring St. Joseph's to: (i) fund the Plans based on ERISA's minimum funding requirements; (ii) appoint an Independent

Fiduciary to hold the Plan's assets in trust and ensure that participants receive ERISA's protections; (iii) send all ERISA-mandated notices to participants, including disclosures regarding the value of their benefits, the Plans' terms and the funded status of the Plans; (iv) pay PBGC premiums which will give participants the benefit of a government backstop on their pension benefits should the plan not have sufficient assets; and (v) pay penalties for failing to comply with ERISA's reporting and disclosure requirements. Plaintiff Garbaccio alleges nine causes of action stemming from Defendants' failure to provide their pension plan participants with ERISA's protections. *Garbaccio* Complaint ¶¶ 132-215, Counts I-IX.

Shortly after Plaintiff Garbaccio filed her complaint seeking relief on behalf of herself and all participants and beneficiaries in the St. Joseph's Plan, Plaintiffs Barker, Dalio and Flar (the Barker Plaintiffs) filed their complaint bringing *a subset* of the claims in Plaintiff Garbaccio's complaint and seeking to represent the same putative class. *Compare Garbaccio* Complaint ¶ 116, *with Barker* Complaint ¶ 18. On July 12, 2016, Magistrate Judge James B. Clark, III consolidated the *Barker* action with the *Garbaccio* action, struck the Plaintiffs' competing motions for Interim Co-Lead Counsel, and Ordered the parties to work together to file a Master Consolidated Complaint. ECF No. 45.

On August 9, 2016, the parties filed a joint stipulation informing the Court that “Plaintiffs attempted in good faith to comply with the Court’s Order and draft a Master, Consolidated Complaint that satisfied counsel in both actions, but could not reach agreement.” ECF No. 57. Given their inability to file a Master Consolidated Complaint, the parties agreed that the putative class would be best served if the Court chose between Garbaccio’s or Barker’s Counsel before the case moves forward, and accordingly, sought an Order setting a leadership structure pursuant to Federal Rule of Civil Procedure 23(g) as the only avenue to provide effective and orderly management of this case. *Id.* The Court entered the stipulation August 12, 2016, granting leave to file motions for Interim Lead Class Counsel. ECF No. 60.

Plaintiff Garbaccio’s counsel are uniquely positioned to *best* represent the interests of the class because these firms (1) developed the theory of liability at issue in the case, (2) successfully argued before all three circuits to have decided the issue (including the Third Circuit) that religiously-affiliated hospitals cannot establish Church Plans, (3) engaged in extensive discovery in Church Plan cases, (4) have more comprehensive claims against the Defendants here, (5) have a proven track record of success and plan for orderly litigation of this case, and (6) have ample resources to pursue the class’s claims. It was for these reasons, among

others, that the Firms' earned the endorsement of the main advocates for retiree and pension rights – the AARP and the Pension Rights Center,² and were recently appointed co-lead counsel over competing motions by Barker Plaintiffs' counsel in two similar ERISA Church Plan cases.

Accordingly, Plaintiff Garbaccio respectfully submits that it would be in the best interests of the putative class that she be appointed Interim Lead Plaintiff and that in this church plan case too, Cohen Milstein and Keller Rohrback be appointed Interim Co-Lead Counsel.

III. ARGUMENT

A. The Court Should Appoint Plaintiff Garbaccio as Interim Lead Plaintiff

Proposed Interim Lead Plaintiff Donna Garbaccio worked for St. Joseph's Hospital and Medical Center as a registered nurse from June 12, 1978 to 1998. She is a vested participant in the St. Joseph's Hospital and Medical Center Pension Plan. Because the Plan's assets are held in trust for the benefit of all Plan participants, Plaintiff Garbaccio has a right to recover for the Plan to ensure full compliance with ERISA. Plaintiff Garbaccio is represented by attorneys who have developed the successful theory of liability at the heart of this case through their

² See, e.g., Declaration of Mary Ellen Signorille on behalf of AARP ¶¶ 18, 26 (hereinafter "Signorille Decl."); Declaration of Karen Ferguson on behalf of The Pension Rights Center ¶ 22 (hereinafter "Ferguson Decl.>").

pioneering work in Church Plan litigation, and seeks appointment as Interim Lead Plaintiff to represent all of the Plan's participants and beneficiaries to obtain the relief necessary to reform the Plan to comply with ERISA.

B. Establishing a Leadership Structure Will Ensure Efficient Prosecution of the Litigation

Plaintiff Garbaccio follows the guidance found in the *Annotated Manual for Complex Litigation*,³ and submits a proposed order that: (1) appoints an interim lead plaintiff; (2) appoints interim co-lead counsel; and (3) eliminates wasteful and duplicative litigation. As shown by the parties' inability to draft and file a Master, Consolidated Complaint, continued litigation with five firms acting as Plaintiffs' counsel would be unwieldy and inefficient; accordingly, Plaintiff requests the Court enter the proposed order to ensure this litigation proceeds in an orderly and efficient manner. *See In re Digital Domain Media Grp. Inc.*, No. 12-12568 BLS, 2012 WL 6135353, at *1 (Bankr. D. Del. Dec. 7, 2012) (recognizing Rule 23(g)(3) permits a court to designate interim class counsel, which is "encouraged, and indeed is probably essential for efficient case management"); *see also In re Bendectin Litig.*, 857 F.2d 290, 297 (6th Cir. 1988) ("[i]n complex cases . . . it is well established that the court may appoint a leadership structure of plaintiffs' counsel to coordinate the prosecution of the litigation.").

³ David F. Herr, *Annotated Manual for Complex Litigation* (4th ed. 2011).

Plaintiff Garbaccio's proposed order implements the procedures suggested by the Manual and codified in Federal Rule of Civil Procedure 23(g) by designating Interim Co-Lead Counsel for Plaintiff and the proposed Class. *See* Manual § § 10.22, 40.22, Fed. R. Civ. P. 23(g). Plaintiff Garbaccio proposes that her counsel serve as Interim Co-Lead Counsel on behalf of the putative class. As Interim Co-Lead Counsel, Garbaccio's counsel will ensure the litigation proceeds efficiently by acting as the primary point of contact for the Court, Defendants, and Plaintiffs and by being responsible for the day-to-day conduct of the litigation and for carrying out the Court's orders concerning the conduct of the litigation. This includes:

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

Manual § 10.221.

Pursuant to the order, Garbaccio's counsel would also assign work to plaintiffs' counsel, implement a system for communicating with all counsel, and monitor the time and expenses of all counsel to ensure that the litigation is conducted efficiently and without duplication.

As stated in the Manual, in determining lead counsel, the court should “conduct an independent review . . . to ensure that counsel appointed to leading roles are qualified and responsible, that they will fairly and adequately represent all of the parties on their side, and that their charges will be reasonable.” Manual § 10.22. Indeed, the most important factor is “achieving efficiency and economy without jeopardizing fairness to the parties.” *Id.* § 10.221.

In appointing class counsel, the Court must consider the following four factors under Rule 23(g): (1) the work counsel has done in identifying or investigating potential claims in the action, (2) counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel’s knowledge of the applicable law; and (4) resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A); *see In re New Jersey Tax Sales Certificates Antitrust Litig.*, No. 12-1893 MAS TJB, 2012 WL 5214598, at *2 (D.N.J. Oct. 22, 2012). Each of the relevant Rule 23(g) factors supports the appointment of Garbaccio’s counsel as Interim Co-Lead Counsel.

C. Cohen Milstein and Keller Rohrback Are Uniquely Qualified to Best Represent the Class Under 23(g)

Rule 23(g)(3) provides that the Court “may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.” Fed. R. Civ. P. 23(g)(3). When “more than one adequate applicant

seeks appointment as class counsel,” the Court “must appoint the applicant best able to represent the interests of the class.” Fed. R. Civ. P. 23(g)(2); *see Sanzone*, Ex. 3 at 2 (appointing Cohen Milstein and Keller Rohrback as Interim Co-Lead Counsel over Kessler Topaz Meltzer & Check and IZARD Kindall Raabe because though Kessler Topaz & Check and IZARD were “capable,” Cohen Milstein and Keller Rohrback “would *best* represent the interests of the class”).

Plaintiff Garbaccio submits that “Keller Rohrback L.L.P. and . . . Cohen Milstein Sellers & Toll, PLLC, are best able to represent the interests of the class” as her counsel are the only attorneys to have litigated the pivotal issue here – whether St. Joseph’s must provide its pension plan participants with ERISA’s protections rather than skirting its requirements by claiming to be a Church Plan. *Id.* Indeed, it was her counsel who successfully argued that only a church can establish a Church Plan before Judge Shipp in this District – a decision affirmed by the Third Circuit, which “endors[ed] [Cohen Milstein and Keller Rohrback’s] interpretation of the ERISA statute.” *Bon Secours*, Ex 2. at 4 (recognizing that this work significantly favors appointing Garbaccio’s counsel as Interim Lead Counsel) ; *see Kaplan v. Saint Peter’s Healthcare Sys.*, No. 13-02941, 2014 WL 1284854 (D.N.J. 2014) (accepting plaintiff’s interpretation of statute and denying defendants’ motion to dismiss), *aff’d*, 810 F.3d 175 (3d Cir. 2015).

1. Garbaccio’s Counsel Conducted a More Thorough Investigation and Identified More Claims than Barker’s Counsel

Cohen Milstein and Keller Rohrback’s extensive investigation of St. Joseph’s Plan and their years spent originating and litigating the Church Plan issue strongly favors their appointment as Interim Co-Lead Counsel. A substantial investigation into the facts and legal theory is a significant factor in determining interim lead counsel, and weighs heavily in favor of appointing Garbaccio’s counsel as Interim Co-Lead Counsel. *See, e.g., In re Interest Rate Swaps Antitrust Litigation*, No. 1:16-md-02704-PAE (S.D.N.Y. Aug. 3, 2016) (appointing Cohen Milstein and another firm co-lead class counsel because the investigative efforts undertaken by the firms were “more generative and exceeded the investigative work of the other applicants by an order of magnitude”); *Adedipe v. U.S. Bank, Nat’l Ass’n*, No. 13-2687, 2014 WL 835174, at *3 (D. Minn. Mar. 4, 2014) (appointing Cohen Milstein and co-counsel as interim lead counsel in large part because of the “more substantial effort toward pre-suit investigation and identification of claims).

Cohen Milstein and Keller Rohrback spent years investigating the factual and legal issues surrounding improper use of ERISA’s Church Plan exemption. *See generally* Handorf Decl. ¶¶ 10-20; Declaration of Ron Kilgard Decl. ¶¶ 10-20

(hereinafter “Kilgard Decl.”). Their 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. ¶ 15. They also reviewed IRS private letter rulings, DOL Advisory Opinions, and every court decision interpreting the exemption. *Id.* ¶ 14. Their investigation revealed that many non-church entities were claiming an exemption from ERISA based on an affiliation with a church, an overly broad and incorrect interpretation of the statute that was previously endorsed by the IRS and DOL. *Id.* ¶¶ 13, 14, 16, 20; Kilgard Decl. ¶¶ 13-15. They then developed the alternative argument that if the statute permitted non-churches to establish church plans, it was to that extent unconstitutional. Handorf Decl. ¶ 15; Kilgard Decl. ¶ 15.

The *Garbaccio* complaint is a result of this comprehensive investigation of the factual and legal theories underlying the Church Plan exemption and the culmination of an intensive investigation into the St. Joseph’s plan. This included an analysis of many documents, including benefit statements, the Plan’s Summary Plan Description and other Plan-related documents; newspaper articles, St. Joseph’s website, various financial disclosures of St. Joseph’s, reports by ratings agencies, Form 5500 filings, and St. Joseph’s Form 990 returns. Handorf Decl. ¶ 27; Kilgard Decl. ¶ 21. During their factual investigation, the Firms drew on their

own ERISA expertise and legal analysis, including theories developed and honed during “the first wave of these ‘Church Plan’ cases” that they filed “from 2013 through 2014” and subsequent years of litigation. *Bon Secours*, Ex 2. at 3.

As recognized just this week by Judge Bennett in *Bon Secours*, the Firms’ in-depth investigation, as evidenced by the Firms’ complaint, “provide[s] more comprehensive protection for the Plaintiff and class.” *Id.* at 4. In his order appointing Garbaccio’s Counsel, Judge Bennett compared the Firms’ complaint with Barker’s Counsel’s complaint, finding that the Plaintiffs and Class were better protected under Garbaccio’s Counsel’s complaint because the complaint alleges causes of action, claims, as well as additional theories of liability not raised in Barker’s Counsel’s complaint. *Id.*

Specifically, the *Barker* Plaintiffs “do not allege that the plan[] fail[s] to qualify as a ‘Church Plan’ under [an] alternate section of ERISA,” as set forth in section 3(33)(B)(ii). *Id.* Further, the *Barker* complaint pleads only a statutory claim. If the statute is read so that an entity such as St. Joseph’s can establish and maintain a Church Plan, the *Barker* complaint has no alternative theory of liability. In contrast, the *Garbaccio* complaint alleges, in detail, that “allowing Defendant . . . to take advantage of the ‘Church Plan’ exemption would violate the First Amendment’s Establishment Clause.” *Id.*; *Garbaccio*, ¶¶ 212-15 (Count IX).

The *Barker* complaint ignores many other important causes of action and theories of liability. Unlike the *Garbaccio* complaint, the *Barker* complaint does not contain: (1) a claim under ERISA section 403 for failing to establish a trust meeting § 403's requirements, Ex. 1 at ¶¶ 161-64 (Count V); (2) a claim under ERISA sections 502(a)(1)(B) and 502(a)(3) for clarification of future benefits to ensure that the vested benefits of all participants are accurate despite the failure to administer the Plan in compliance with ERISA, *id.* at ¶¶ 165-68 (Count VI); (3) certain "claims for civil penalties" for failing to provide ERISA-required notices and disclosures, *id.* at ¶¶ 160-175 (Count VII); *Bon Secours*, Ex 2. at 5; and (4) fiduciary breach sub-counts alleging violations of ERISA sections 406(a)(1)(B) & (D) and 406(b)(1) concerning fiduciaries' extension of credit and use of the Plan's assets for the benefit of St. Joseph's while failing to fund the Plan; fiduciary breach sub-counts for failure to monitor other fiduciaries; and fiduciary breach sub-counts for co-fiduciary liability, Ex. 1 at ¶¶ 184-211 (Count VIII).

Finally, the more comprehensive *Garbaccio* complaint names defendants that the *Barker* Complaint does not: members of the executive finance committee of the Board of Trustees, who oversee the Plan's investments, are thus fiduciaries of the Plan. Here again then, the *Garbaccio* complaint "provides more comprehensive protection for the Plaintiff and the class" by ensuring all

individuals are held accountable for the Plan’s failure to comply with ERISA and the resulting harm – putting its 5,000 employees’ pensions at risk. *Bon Secours*, Ex 2. at 4.

2. Cohen Milstein and Keller Rohrback Have Extensive Experience in ERISA Class Action Litigation and Unparalleled Experience in Church Plan Litigation

Cohen Milstein and Keller Rohrback’s knowledge of the applicable law and experience are unparalleled - further supporting their appointment as Interim Co-Lead Counsel. *See* F. R. Civ. P. 23(g)(1)(ii) & (iii) (experience handling class actions and complex litigation and counsel’s knowledge of claims asserted are all factors for the Court to weigh in appointing lead counsel). *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.”); *Thomas v. Gerber Prod. Co.*, No. CIV.A. 12-1098 JLL, 2012 WL 1606627, at *2 (D.N.J. May 8, 2012) (appointing firm that had extensive experience in applicable law).

a. The Firms’ Knowledge of the Applicable Law Is Unmatched

Keller Rohrback and Cohen Milstein “have the most experience litigating this complicated issue of statutory and constitutional interpretation. They filed the first wave of these “‘Church Plan’ cases.” *Bon Secours*, Ex 2. at 3. The Firms’

deep knowledge of Church Plan litigation stems from pioneering this legal theory, which has culminated in three appellate victories on this key threshold issue. *Bon Secours*, Ex 2. at 3-4 (recognizing that Garbaccio’s counsel were the first to challenge a hospital’s claim its pension plan was a “church plan” and “prevail[ed] on appeal”).

In 2010 Keller Rohrback filed the case that would, a few years hence, lead to the current wave of Church Plan litigation. *Thorkelson v. Publ’g House of Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119 (D. Minn. 2011). Cohen Milstein was retained by the Pension Rights Center to draft an amicus curiae brief on Plaintiffs’ behalf in that case. Handorf Decl. ¶¶ 11-12; Kilgard Decl. ¶¶ 11-12; Ferguson Decl. ¶ 19 . Through their work together, the Firms learned that many non-church entities claimed that their pension plans were exempt from ERISA based on an overly broad interpretation of the Church Plan exemption. Handorf Decl. ¶ 13; Kilgard Decl. ¶ 13. After extensive research, the Firms concluded that applying the Church Plan exemption to entities that were not churches, but that claimed an affiliation with a church, was not supported by a plain reading of ERISA’s narrow Church Plan exemption and was likely unconstitutional. *See supra*, Part II.C.1 As a result of this initial investigation into

ERISA's Church Plan exemption, Cohen Milstein and Keller Rohrback filed nine cases in 2013-2014:

- *Overall v. Ascension Health*, No. 13-11396 (E.D. Mich. Mar. 28, 2013);
- *Chavies v. Catholic Health East*, No. 13-01645 (E.D. Pa. Mar. 28, 2013);
- *Rollins v. Dignity Health*, No. 13-01450 (N.D. Cal. Apr. 1, 2013);
- *Kaplan v. Saint Peter's Healthcare Sys.*, No. 13-02941 (D.N.J. May 7, 2013);
- *Medina v. Catholic Health Initiatives*, No. 13-01249 (D. Colo. May 10, 2013);
- *Stapleton v. Advocate Health Care Network & Subsidiaries*, No. 14-01873 (N.D. Ill. Mar. 17, 2014);
- *Owens v. St. Anthony Med. Ctr., Inc.*, No. 14-04068 (N.D. Ill. June 2, 2014);
- *Lann v. Trinity Health Corp.*, No. 14-02237 (D. Md. July 11, 2014);
- *Griffith v. Providence Health & Servs.*, No. 14-01720 (W.D. Wash. Nov. 7, 2014).

Handorf Decl. ¶ 20.

In December 2013, the Firms obtained their first victory, when a district court concluded, based upon a thorough analysis of the statutory text, that a plan cannot qualify as an exempt Church Plan unless it was established by a church. *Rollins v. Dignity Health*, 19 F. Supp. 3d 909 (N.D. Cal. 2013). Two additional district courts followed suit in 2014, including Judge Shipp in *Kaplan v. Saint Peter's Healthcare Sys.*, which “issued its opinion . . . endorsing [Cohen Milstein’s and Keller Rohrback’s] interpretation of the ERISA statute.”⁴ *Bon*

⁴ *Kaplan v. Saint Peter's Healthcare Sys.*, No. 13-02941, 2014 WL 1284854 (D.N.J. 2014) (accepting Plaintiff’s interpretation of statute and denying Defendants’ motion to dismiss); *Stapleton v. Advocate Health Care Network*, 76 F.

Secours, Ex 2. at 4. Most recently, the Third, Seventh, and Ninth Circuits adopted the same statutory construction – that pension plans sponsored by hospital systems do not qualify as Church Plans because they were not established by churches. *Kaplan*, 810 F.3d at 175 (affirming Judge Shipp’s denial of defendants’ motion to dismiss); *Stapleton*, 817 F.3d at 517; *Rollins*, No. 13-1450, 2016 WL 3997259.

In the district courts, in nine cases, the Firms have briefed motions to dismiss or for summary judgment. Kilgard Decl. ¶ 20. Taken as a whole this body of work, amounting to hundreds of pages, covers virtually all the church plan issues.⁵ They have also briefed the statutory and constitutional issues in five appellate courts, have argued them in three appellate courts, and are “now defending those appellate decisions in opposing the petitions for a writ of certiorari to the United States Supreme Court,” in *Kaplan* and *Stapleton*. *Bon Secours*, Ex 2. at 4.

The Firms have not only briefed these legal issues, but have also litigated the facts relating to the Church Plan cases when the courts held that factual

Supp. 3d 796 (N.D. Ill. 2014) (same); *see also Rollins v. Dignity*, No. 13-01450, 2014 WL 6693891 (N.D. Cal Nov. 26, 2014) (granting plaintiff’s motion for partial summary judgment).

⁵ These issues include: the interpretation of the statute defining a church plan; the legislative history of the statute; the agency private letter rulings; the constitutional argument; the definition of a church; the meaning of “controlled by or associated with” as used in the statute; the requirements for establishing or maintaining a plan; standing; and the statute of limitations.

development was required. In *Medina v. Catholic Health Initiatives*, No. 13-01249 (D. Colo.), the parties had completed fact and expert discovery and the case was within a few weeks of trial when the court granted summary judgment to the defense. *Medina v. Catholic Health Initiatives*, 147 F.Supp.3d 1190 (D. Colo. 2015).⁶ The Firms also developed a factual record in *Chavies v. Catholic Health East*, No. 13-01645 (E.D. Pa.), *Owens v. St. Anthony Med. Ctr., Inc.*, No. 14-04068 (N.D. Ill.) and are doing so again, now in *Carver v. Presence Health Network*, No. 15-02905 (N.D. Ill.).

The Firms have also retained a variety of expert witnesses – including canon lawyers and actuaries – to testify, if necessary, regarding, *inter alia*, the definition of a church, pension funding levels and benefit calculations. Among the expert witnesses engaged by the Firms is Daniel Halperin, an emeritus professor at Harvard Law School, who in 1980 testified for the U.S. Department of Treasury about the Church Plan legislation at issue in these cases. *Medina, supra*, ECF No. 285-1 at 5-26; Handorf Decl. ¶ 23. Additionally, Cohen Milstein and Keller Rohrback recruited amicus curiae to file briefs in support of their statutory construction, including the Pension Rights Center, AARP, the National Employment Lawyers Association, and the American Civil Liberties Union.

⁶ That decision, explicitly rejected by the Third and Seventh Circuits in their opinions, is now on appeal to the Tenth Circuit.

Cohen Milstein and Keller Rohrback are the architects of the legal theories and litigation strategies in this area of the law. The Firms have paved the way for thousands of participants in plans sponsored by hospital corporations to pursue similar actions. They identified the abuse in claiming Church Plan status, developed it, and invested millions of dollars in attorney time and out of pocket expenses in the effort. Since 2014, they have filed eight additional cases, (including this one) involving the improper application of the ERISA Church Plan exemption. *See* Handorf Decl. ¶ 22. As the only firms to achieve such significant victories on the merits in the district and appellate courts, their ability to “*best* represent the interests of the Class” are unparalleled. *Sanzone*, Ex. 3 at 1 (emphasis added); *Bon Secours*, Ex 2. at 5 (appointing Garbaccio’s counsel lead because they are “more qualified to serve as interim lead class counsel”).

Garbaccio’s Counsel’s work on this important pension plan issue has garnered them the endorsement of two of the most prominent organizations concerned with protecting retirement benefits: the AARP and the Pension Rights Center. Both have gone so far as to offer sworn statements on behalf of the Firms, attesting to the organizations’ belief that Garbaccio’s Counsel will best represent the interests of the participants in the St. Joseph’s Plan. Signorille Decl. ¶ 26; Ferguson Decl. ¶¶ 15, 21-22. Specifically, Mary Ellen Signorille, of the AARP,

stated that Garbaccio’s counsel “together have the most competence, dedication, and resources to effectively litigate the church plan cases in a way that furthers the interests of the participants and advances the development of the law.” Signorille Decl. ¶ 26. Similarly, Karen Ferguson, the director of the Pension Rights Center, stated that Garbaccio’s counsel “have achieved unparalleled expertise in the numerous ERISA issues implicated by the church plan exemption.” Ferguson Decl. ¶ 22.

b. Both Firms Are Premier Plaintiffs’ ERISA Class Action Firms

Cohen Milstein and Keller Rohrback’s experience handling class actions and other complex litigation further supports their appointment as Interim Co-Lead Counsel. *See, e.g., Crocker v. KV Pharmaceutical Co.*, 2009 WL 1297684 at *2 (E.D. Mo. May 7, 2009) (interim lead counsel selected due to “extensive knowledge of ERISA through speaking engagements, writing, and serving on the ERISA committees of various bar groups”); *Adedipe*, 2014 WL 835174, at *3 (“Cohen Milstein has also established that the firm has significant experience in class action litigation and ERISA actions. . . .”); *Nowak v. Ford Motors Co.*, 240 F.R.D. 355 (E.D. Mich. 2006) (appointing Keller Rohrback as Interim Co-lead Counsel “because of their extensive experience”). The Firms are national leaders in

class action litigation generally and have premier ERISA class action practices.

Signorille Decl. ¶¶ 18, 20, 23; Ferguson Decl. ¶¶ 15, 22.

Both Cohen Milstein and Keller Rohrback 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. ¶¶ 47-48; Kilgard Decl. ¶ 23. Each firm has litigated numerous ERISA class cases and served as lead or co-lead counsel in ERISA class action cases where contested leadership petitions were filed. *See* Handorf Decl. ¶ 48; Kilgard Decl. ¶ 23.

Cohen Milstein has over 90 lawyers in seven U.S. cities and has a group of eight attorneys —with a combined 75+ years of ERISA litigation experience. Handorf Decl. ¶ 28. Under Karen Handorf’s leadership, Cohen Milstein’s Employee Benefits Practice Group has been devoted exclusively to litigating complex ERISA class actions. *Id.* Before joining Cohen Milstein in 2007, Ms. Handorf spent more than 25 years enforcing all aspects of ERISA litigation issues at the DOL. Handorf Decl. ¶ 30. Moreover, she served as the second-highest ranking lawyer for enforcement of the provisions of ERISA at issue there. *Id.*; Ferguson Decl. ¶ 15. Ms. Handorf’s breadth and depth of ERISA knowledge is unparalleled in the plaintiff’s bar and she is a frequently requested to speak on ERISA issues. Signorille Decl. ¶ 21; Ferguson Decl. ¶¶ 15-16, 18. She is one of

the few plaintiffs' lawyers in the country elected to the College of Employee Benefits Counsel, based on her significant contributions to the advancement of the employee benefits field. Handorf Decl. ¶ 32.

Cohen Milstein's litigation team also includes Michelle Yau, who began her career in the Honors Program of the Department of Labor and has litigated solely ERISA class actions at Cohen Milstein for almost a decade. *See* Handorf Decl. ¶ 38. 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 a demonstrated commitment to federal public service. *Id.* ¶ 39. Ms. Yau graduated Phi Beta Kappa with a B.A. in Mathematics from the University of Virginia. *Id.* ¶ 40. Ms. Yau has litigated some of the most significant ERISA lawsuits since she started at the Department of Labor. *Id.* ¶ 42.

Keller Rohrback has been at the forefront of many favorable and groundbreaking decisions in many ERISA class action cases. Keller Rohrback's strength lies in its people, including 70 attorneys who include accountants, economists, computer technology experts, and former prosecuting attorneys. Kilgard Decl. ¶ 3. Among its ranks, Keller Rohrback boasts attorneys who have litigated ERISA cases since the Act's passage in 1974, have testified before Congress and Congressional committees on ERISA amendments and pension

issues, and have served as editors and authors of ERISA's most preeminent publications. *See, e.g., Jeffrey Lewis, et al., Employee Benefits Law* (Jeffrey Lewis et al. eds. 3d ed.) (2012 and Supp. 2015) (Co-Chair of the Board of Senior Editors Jeffrey Lewis; Senior Editor David Preminger; Chapter Editor and Contributing Author Erin Riley); Kilgard Decl. ¶ 24.

Lynn Sarko, who leads the firm's complex litigation group, is a nationally-recognized leader in complex litigation, having been selected by federal courts nationwide to serve as lead or co-lead counsel in a wide variety of ERISA cases. *Id.* ¶ 22. Ron Kilgard, a member of Keller Rohrback's complex litigation team, graduated *cum laude* from Harvard College in 1973 and *magna cum laude* from Arizona State University College of Law. *Id.* ¶ 5 fn.2. Significantly as it relates to the issues at bar, Mr. Kilgard is also a 1975 graduate of Harvard Divinity School. *Id.* The combined experience between Cohen Milstein and Keller Rohrback results in a group well-versed in ERISA complex litigation. The Firms are well suited to lead the putative class. *Id.* ¶ 26.

3. Cohen Milstein and Keller Rohrback Have Abundant Resources to Adequately Represent the Class

Cohen Milstein and Keller Rohrback have more than sufficient financial resources to litigate large cases, easily satisfying the fourth factor – resources available to represent the class. Each firm has litigated numerous large-scale class

actions. *See* Kilgard Decl. ¶ 26; Handorf Decl. ¶ 50. Cohen Milstein's ample financial resources has enabled it to litigate complex class actions without reimbursement of fees and expenses for years, including in the *Dukes v. Wal-Mart*, No. 01-02252 (N.D. Cal.) employment discrimination class action, pending since 2001, and a securities fraud action against BP related to the Deepwater Horizon oil spill. Handorf Decl. ¶ 47. Likewise, Keller Rohrback litigated cases involving the 1989 oil spill of the Exxon Valdez and the Enron 401(k) for years without recovering fees and expenses. Kilgard Decl. ¶ 25.

Both Firms pride themselves on the quality of their legal work and their ability to litigate zealously and creatively with the highest ethical standards. Together, the Firms possess extensive in-house document hosting capabilities and are well-versed in conducting discovery on a nationwide scale. The Firms' combined experience and resources will allow them to streamline the litigation and create efficiencies unavailable to other firms. Thus, this factor under Rule 23(g) also weighs in favor of appointment of Garbaccio's counsel.

IV. CONCLUSION

For these reasons, Plaintiff Garbaccio respectfully requests that the Court: (a) appoint Plaintiff Garbaccio as Interim Lead Plaintiff and (b) appoint Cohen Milstein and Keller Rohrback as Interim Co-Lead Counsel.

Respectfully submitted,

/s/ Scott Lempert

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2016, I electronically filed *Plaintiff Garbaccio's Motion To Appoint Interim Lead Counsel and Interim Lead Plaintiff* with the Clerk of the Court using the ECF system.

/s/ Scott Lempert

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