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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

Mary Holcomb, Mary Grovogel, Holly Mollet, Rhonda Rosenthal, and Donald Schneider, on behalf of themselves, individually, and on behalf of all others similarly situated, and on behalf of the Hospital Sisters Health System Employees' Pension Plan, Plaintiffs, v. Hospital Sisters Health System; Hospital Sisters Health System Retirement Committee; and John and Jane Does 1-20, Defendants.	)	No. 3:16-cv-03282 Judge Sue E. Myerscough Magistrate Judge Tom Schanzle-Haskins

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR <u>PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT</u>

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 2

A. Procedural History. 2

B. Settlement Negotiations. 5

C. Overview of the Settlement Agreement. 6

1. Monetary Consideration. 6

2. Non-Monetary Equitable Consideration. 6

3. Class Definition. 7

4. Released Claims. 8

5. Notice. 8

6. Attorneys' Fees. 8

D. Reasons for the Settlement. 9

III. DISCUSSION 9

A. The Standards for Preliminary Approval. 9

B. This Settlement Is Within the Range of Reasonableness Justifying Preliminary Approval. 12

1. The Proposed Settlement Provides Certain Relief and Eliminates the Uncertainty of Prevailing on the Merits. 12

2. The Proposed Settlement Avoids Lengthy and Protracted Litigation. 14

3. The Proposed Settlement was the Result of Adversarial, Arm's Length Negotiations and There is No Known Opposition to the Settlement. 15

4. Class Counsel Endorse the Settlement. 15

5. The Proposed Settlement is Supported by the Stage of Proceedings. 17

C. The Proposed Settlement Class Satisfies the Requirements for Certification Pursuant to Rule 23 of the Federal Rules of Civil Procedure. 18

1. Provisional Certification of the Settlement Class is Appropriate. 18

2. The Settlement Class Satisfies the Requirements of Rule 23(b)(1) and (b)(2). 20

a. Rule 23(b)(1): Individual Actions Would Create Inconsistent Adjudications or Be Dispositive of the Interests of Absent Members. 20

b. Rule 23(b)(2): Defendants Have Acted on Grounds Generally Applicable to the Settlement Class and Relief for the Settlement Class as a Whole Is Appropriate. 21

D. Rule 23(g) Is Satisfied 22

E. The Proposed Notice Plan Satisfies the Due Process Requirements of Rule 23. 22

F. Proposed Schedule. 23

IV. CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Advocate Health Care Network v. Stapleton,
137 S. Ct. 1652 (2017) 4, 12, 13, 14

Armstrong v. Bd. of Sch. Dirs. of the City of Milwaukee,
616 F.2d 305 (7th Cir. 1980) 10, 11, 17, 18

Brieger v. Tellabs, Inc.,
245 F.R.D. 345 (N.D. Ill. 2007) 19, 20

Butler v. Holy Cross Hosp.,
No. 16-05907 (N.D. Ill. June 29, 2017) 16

Depoister v. Mary M Holloway Found.,
36 F.3d 582 (7th Cir. 1994) 11

E.E.O.C. v. Hiram Walker & Sons, Inc.,
768 F.2d 884 (7th Cir. 1985) 11, 17

Flanagan v. Allstate Ins. Co.,
242 F.R.D. 421 (N.D. Ill. 2007), *modified*, 242 F.R.D. 434 (N.D. Ill. 2007) 18

Garbaccio v. St. Joseph's Hosp. & Med. Ctr. & Subsidiaries,
No. 16-02740 (D.N.J. Mar. 6, 2018) 16

Gautreaux v. Pierce,
690 F.2d 616 (7th Cir. 1982) 15

Griffith v. Providence Health & Servs.,
No. 14-01720 (W.D. Wash. Mar. 21, 2017) 16

Hayes v. Convergent Healthcare Recoveries, Inc.,
No. 14-1467, 2016 WL 5867818 (C.D. Ill. Oct. 7, 2016) 19

Hodges v. Bon Secours Health Sys., Inc.,
No. 16-01079 (D. Md. Dec. 21, 2017) 16, 23

Holcomb v. Hosp. Sisters Health Sys.,
No. 16-cv-03282 (C.D. Ill. Oct. 11, 2016) 3

In re AT & T Mobility Wireless Data Servs. Sales Litig.,
270 F.R.D. 330 (N.D. Ill. 2010) 17

In re Wheaton Franciscan ERISA Litig.,
No. 16-04232 (N.D. Ill. Jan. 16, 2018) 16, 23

Isby v. Bayh,
75 F.3d 1191 (7th Cir. 1996) 11, 12, 14

Koerner v. Copenhaver,
No. 12-1091, 2014 WL 5544051 (C.D. Ill. Nov. 3, 2014) 15

Lann v. Trinity Health Corp.,
No. 14-02237 (D. Md. May 31, 2017) 16

Mangone v. First USA Bank,
206 F.R.D. 222 (S.D. Ill. 2001) 14

Martin v. Caterpillar, Inc.,
No. 07-1009, 2010 WL 3210448 (C.D. Ill. Aug. 12, 2010) 11, 21

Medina v. Catholic Health Initiatives,
877 F.3d 1213 (10th Cir. 2017) 5, 12, 13

Mollet v. Hosp. Sisters Health Sys.,
No. 16-cv-09238 (N.D. Ill.) 3

Mullane v. Cent. Hanover Bank & Tr. Co.,
339 U.S. 306 (1950) 22

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

Nolte v. Cigna Corp.,
No. 07-2046, 2013 WL 3586645 (C.D. Ill. July 3, 2013) 21

Oshana v. Coca-Cola Co.,
472 F.3d 506 (7th Cir. 2006) 18

Overall v. Ascension Health,
No. 13-11396 (E.D. Mich. Sept. 17, 2015) 17

Pettis v. Underwood,
No. 06-2143, 2007 WL 2948400 (C.D. Ill. Oct. 9, 2007) 11

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,
390 U.S. 414 (1968) 11

Pruitt v. City of Chi.,
472 F.3d 925 (7th Cir. 2006) 18

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

Synfuel Tech., Inc. v. DHL Express (USA), Inc.,
463 F.3d 646 (7th Cir. 2006) 12, 17

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 19

Woods v. Club Cabaret, Inc.,
No. 15-1213, 2017 WL 4054523 (C.D. Ill. May 17, 2017) 10, 11, 12

Statutes

26 U.S.C. § 414(e) 2

28 U.S.C. § 1404(a) 3

29 U.S.C. § 1001 1

29 U.S.C. § 1002(33) 2, 3, 4

Rules

Fed. R. Civ. P. 23 .... 18, 19, 20, 21

Fed. R. Civ. P. 23(a) 18, 20

Fed. R. Civ. P. 23(b)(1) .... *passim*

Fed. R. Civ. P. 23(c)(2) 22

Fed. R. Civ. P. 23(e) 9, 10, 11

Fed. R. Civ. P. 23(g) 22

Fed. R. Evid. 408 17

Other Authorities

David F. Herr, *Annotated Manual for Complex Litigation*
(4th ed. May 2018 update) 10

Newberg on Class Actions
Vol. 3 (5th ed. 2014) 23

U.S. Const. amend. I 5

Plaintiffs Mary Holcomb, Mary Grovogel, Holly Mollet, Rhonda Rosenthal, and Donald Schneider, individually and on behalf of all those similarly situated ("Plaintiffs" or "Named Plaintiffs"), by and through their attorneys, respectfully move the Court for an Order: (1) preliminarily approving the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement"),[1] attached hereto as Exhibit 1[2]; (2) preliminarily certifying the proposed Settlement Class pursuant to Federal Rule 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") for consideration of final approval of the Settlement, payment of attorneys' fees and expenses, and grant of Incentive Awards to the Named Plaintiffs. Defendants do not oppose the ultimate relief requested by Plaintiffs. However, Defendants do not agree with all the averments contained in this Preliminary Approval Memorandum and other pleadings filed by Plaintiffs in support of their Motion for Preliminary Approval of Settlement Agreement.

I. INTRODUCTION

This Settlement resolves the claims of Plaintiffs in this case against all Defendants. The Amended Master Consolidated Complaint ("Complaint"), ECF No. 35, alleges that the non-profit healthcare system, Hospital Sisters Health System ("HSHS"), Hospital Sisters Health System Retirement Committee, and John and Jane Does 1-20 (hereinafter "Defendants"), denied ERISA[3] protections to the participants and beneficiaries of The Hospital Sisters Health System Employees Pension Plan (the "Plan" or "HSHS Plan") by claiming that the Plan qualifies as an

[1] *See* Settlement Agreement, attached hereto as Exhibit 1 to this Memorandum in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement Agreement ("Preliminary Approval Memorandum").

[2] All references to "Exhibit" or "Ex." are to the exhibits attached to this Preliminary Approval Memorandum and filed concurrently herewith.

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

ERISA-exempt "church plan." *See* 29 U.S.C. § 1002(33).

This Settlement was reached after full briefing as to the appointment of Interim Co-Lead Counsel; the filing of two amended consolidated complaints; briefing of Defendants' Motions to Dismiss the Complaint; and arm's-length negotiations with an experienced mediator. The Class Settlement Amount is a **$62.5 million contribution to the Plan over four years**.[4] Ex. 1 § 7.1. In addition to the cash payments, the Settlement also provides for significant non-monetary equitable consideration, which will enhance the retirement security of the members of the Settlement Class. Current participants in the Plan will receive certain financial and administrative protections comparable to ERISA through Fiscal Year 2022, or until such time as the $62.5 million is contributed to the Plan.

II. BACKGROUND

A. Procedural History.

Interim Co-Lead Counsel, Keller Rohrback L.L.P. and Cohen Milstein Sellers & Toll PLLC (collectively, "Class Counsel"), discovered and developed this area of the law and dedicated several years to developing the legal theory challenging whether non-church entities could properly maintain their pension plans as "church plans" which are exempt from ERISA. *See* Declaration of Laura R. Gerber in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement Agreement ("Gerber Declaration" or "Gerber Decl.") ¶ 15, attached hereto as Ex. 5. They devoted many hours to researching the definition of a "church plan" found in both ERISA and the Internal Revenue Code, 29 U.S.C. § 1002(33) and 26 U.S.C. § 414(e),

[4] For four fiscal years, HSHS may make the Annual Payment in a lump sum at any point during the Fiscal Year. Ex. 1 § 7.1.1. The Released Parties may also, at their sole discretion, fund the $62.5 million cash contribution at any time, and upon such full funding of the $62.5 million cash contribution, HSHS will be relieved of certain other obligations under the Settlement Agreement. *Id.* § 8.4.

including analyzing the statutory text, its interaction with other provisions in the United States Code, the legislative history of the statute, and agency and court interpretations of the statute. Ex. 5 ¶ 15. Ultimately, Class Counsel began challenging the exemption claimed by a number of hospitals around the country that maintained pension plans which the hospitals claimed were exempt from ERISA. *Id.* This case arose from that investigation.

On September 26, 2016, Plaintiff Mollett filed a putative class action complaint in the Northern District of Illinois against HSHS and various other defendants (collectively, the "Defendants"), alleging violations of ERISA. Compl. for Violations of the Employee Retirement Income Security Act, *Mollet v. Hosp. Sisters Health Sys.* (the "*Mollet* Action"), No. 16-cv-09238 (N.D. Ill.), ECF No. 1.

Plaintiff Mollett was represented by the firms of Heffner Hurst and Harwood Feffer LLP. On October 11, 2016, Plaintiffs Mary Holcomb and Mary Grovogel, represented by Keller Rohrback and Cohen Milstein, filed a separate putative class action in this Court against HSHS and various other defendants, alleging violations of ERISA. Class Action Compl., *Holcomb v. Hosp. Sisters Health Sys.*, No. 16-cv-03282 (C.D. Ill. Oct. 11, 2016), ECF No. 1. Both complaints alleged that Defendants denied ERISA protections to the participants and beneficiaries of the Plan, a defined benefit pension plan sponsored by HSHS, by claiming that the Plan qualified as an ERISA-exempt "church plan." *See* 29 U.S.C. § 1002(33).

On October 27, 2016, Plaintiff Mollet and Defendants requested transfer of the *Mollet* Action to the Central District of Illinois pursuant to 28 U.S.C. § 1404(a), where the *Holcomb* matter was already pending. *Mollet* Action, ECF No. 21. The transfer motion was granted on October 31, 2016, *Mollet* Action, ECF No. 23. On November 18, 2016, this Court consolidated the two cases. ECF Nos. 15-1, 16. Following full briefing on contested motions for the

appointment of interim lead counsel, on January 18, 2017, the Court appointed Keller Rohrback and Cohen Milstein as Interim Co-Lead Counsel, Matthew H. Armstrong as Interim Liaison Counsel, and Plaintiffs Mary Holcomb and Mary Grovogel as Interim Lead Plaintiffs. ECF No. 29. The Court also ordered Plaintiffs to file a Master Consolidated Class Action Complaint (which they filed on February 16, 2017, ECF No. 32), and then it stayed the case pending the Supreme Court's decision in another church plan case, *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017), ECF No. 29.

The *Advocate* appeal addressed whether, as Plaintiffs alleged here, a church plan must be established by a church in order to qualify as an ERISA-exempt church plan. The Supreme Court held argument in that case on March 27, 2017, and issued its decision on June 5, 2017, holding that pension plans need not be established by churches in order to qualify as ERISA-exempt church plans so long as other conditions necessary for church plan status are satisfied. While Plaintiffs advance other strong arguments and theories not decided by the Supreme Court's opinion, arguably, Plaintiffs' case was negatively impacted by that decision.

Following the expiration of the stay, Plaintiffs filed an Amended Master Consolidated Complaint ("Complaint") on August 15, 2017. ECF No. 35. The Complaint alleges that Defendants denied ERISA protections to the participants and beneficiaries of the Plan, a defined benefit pension plan sponsored by HSHS, by claiming that the Plan qualifies as an ERISA-exempt "church plan." *See* 29 U.S.C. § 1002(33). The Complaint further alleges that asserting this exemption caused Defendants to deny Plan participants the protections of ERISA. These included, among other violations: underfunding the Plan by over $514 million; offering eligible participants lump sum distribution values that were less than what they should have been if the lump sums had been calculated in accordance with ERISA; and failing to furnish Plaintiffs or

any member of the class with required statements and reports. The Complaint also alleged that the church plan exemption, as applied to HSHS, violated the Establishment Clause of the First Amendment, and lodged alternative claims for breach of contract, promissory estoppel, unjust enrichment, and breach of fiduciary duty pursuant to state law. Compl. ¶¶ 83-84; 94-99; 170-184; 247-323. Defendants filed Motions to Dismiss on October 16, 2017, ECF Nos. 41-45; Plaintiffs filed their Opposition to the Defendants' Motions to Dismiss the Complaint on December 15, 2017, ECF No. 48; and Defendants filed their Reply Brief in Support of Defendants' Motions to Dismiss on January 12, 2018, ECF No. 49. The Parties then filed a Joint Stipulation, ECF No. 50, subject to the Court's approval, authorizing Plaintiffs to file a sur-reply memorandum addressing *Medina v. Catholic Health Initiatives*, 877 F.3d 1213 (10th Cir. 2017) (which had been decided on December 19, 2017, after Plaintiffs had filed their Opposition to Defendants' Motions to Dismiss), and responding to Defendants' arguments based on *Medina* in their Reply brief. ECF No. 50. The Parties also stipulated to a further sur-reply memorandum by Defendants. Plaintiffs' filed their Sur-Reply in Opposition to Defendants' Motions to Dismiss the Complaint on January 30, 2018. ECF No. 51.

B. Settlement Negotiations.

On February 2, 2018, shortly before briefing was complete on Defendants' Motions to Dismiss, the Parties filed a Joint Motion to stay all proceedings in the case for a period of 90 days so that the Parties could engage in settlement negotiations and schedule a mediation before a JAMS Mediator, Robert Meyer, Esq. The Court granted the motion on February 6, 2018. ECF No. 53. During March of 2018, the Parties prepared for mediation with Mr. Meyer. Mr. Meyer has substantial experience mediating cases involving ERISA and retirement plan issues, including cases involving the church plan exemption. Ex. 5 ¶ 8. The settlement negotiations included exchange of confidential documents and an in-person mediation session on

April 4, 2018 in Los Angeles, California. *Id.* ¶¶ 7, 9. Both sides exchanged proposals and counter-proposals concerning potential settlement terms. *Id.* ¶ 9. By the end of the all-day mediation, the Parties reached an agreement to preliminarily resolve the case, and memorialized the key terms of the agreement in the HSHS Settlement Term Sheet ("Term Sheet") dated April 4, 2018. *Id.* ¶ 10. The Term Sheet was subject to approval by the HSHS Board, the Hospital Sisters Ministries Board, and the individual Plaintiffs, with such approval to be communicated to the mediator by May 1, 2018. *Id.* The Parties notified the Court of the Settlement on May 1, 2018. ECF No. 53. The Parties requested that the stay remain in force pending the filing of the Motion for Preliminary Approval of the Settlement on or before June 1, 2018. Ex. 5 ¶ 10. On May 2, 2018, the Court entered the Order extending the stay in the Action until June 1, 2018. Text Order, May 2, 2018. The stay was later extended to June 8, 2018. Text Order, June 1, 2018.

C. Overview of the Settlement Agreement.

The following section summarizes the principal terms of the Settlement. *See* Ex. 1.

Monetary Consideration.

The monetary consideration provided under this Settlement is substantial, totaling $62.5 million. For four fiscal years, Fiscal Years 2019 through 2022, HSHS will make annual cash contributions to the Plan of a minimum of $15.625 million per year, for a total contribution of $62.5 million. Ex. 1 § 7.1. Under the terms of the Settlement, HSHS may make the Annual Payment in a lump sum at any point during the Fiscal Year, or may split the payment into a number of payments. *Id.* §7.1.1. HSHS may also fund the $62.5 million contribution in full at any time after April 4, 2018. *Id.* § 8.4.

Non-Monetary Equitable Consideration.

The Settlement also establishes, through Fiscal Year 2022, or until such time as the

$62.5 million is contributed to the Plan, certain equitable provisions that are comparable to provisions of ERISA concerning plan administration, protection against cutbacks of accrued benefits, summary plan descriptions, notices and the Plan's claim review procedure. Ex. 1 § 8. As a result of this provision, Plan participants will receive access to Summary Plan Descriptions that include a description of how benefits are paid, the pension formula, the vesting requirements, and the claims and review procedures. *Id.* § 8.5.1. Participants will also receive Pension Benefit Statements via electronic delivery once every three years that include the retirement benefits participants have accrued. *Id.* § 8.5.2. Plan participants will have access to notices on an annual basis about the funding status of the Plan. *Id.* § 8.5.3. This annual notice will include, among other information, a summary of the Plan's funding arrangements, and value of net assets at the beginning and end of each Plan year. *Id.*

Under the terms of the Settlement Agreement, HSHS also guarantees that, through Fiscal Year 2022, or such time as the $62.5 million is contributed to the Plan, if the funds in the Plan's Master Trust become insufficient to pay benefits as they are due, HSHS will contribute sufficient funds to pay the accrued benefits payable to Participants as they are due. Ex. 1 § 8.1. If the Plan is merged or consolidated with another plan, participants and beneficiaries who are Settlement Class members will be entitled to an accrued benefit post-merger, adoption, or after a consolidation event that is no less than they enjoyed before that event. *Id.* § 8.2. Likewise, for the same time period, HSHS guarantees that no amendment or termination of the Plan will result in a reduction of a Settlement Class Member's accrued benefit. *Id.* § 8.3.

Class Definition.

The Settlement contemplates that the Court will certify a non-opt-out class under Federal Rule of Civil Procedure 23(b)(1) or (b)(2). Ex. 1 § 2.2.2. The definition of the Settlement Class is: "As of May 31, 2018, all present and former participants (vested or non-vested) or

beneficiaries of the Plan." *Id.* § 1.20.

Released Claims.

The Settlement Agreement provides for releases by and among Plaintiffs, Defendants, and certain other non-parties related to the litigation. *Id.* § 3. The persons to be released by Plaintiffs are defined as the "Releasees" and are enumerated at section 3.2 of the Settlement Agreement. The Releasees will be released from the "Released Claims," which generally include all claims under state or federal law that could have been asserted by Plaintiffs or the Settlement Class, arising out of the allegations of the Complaint. *Id.* § 3.1. Plaintiffs, the Settlement Class, and Class Counsel will be released from claims relating to the institution and prosecution of this case. *Id.* § 3.4.

Notice.

The draft [Proposed] Order Preliminarily Approving the Settlement, Certifying the Settlement Class, Approving Notice to the Settlement Class, and Scheduling Fairness Hearing ("Preliminary Approval Order"), attached hereto as Exhibit 2, provides for the following notices: (a) the Notice of Proposed Settlement of Class Action, Fairness Hearing, and Motion for Attorneys' Fees and Reimbursement of Litigation Expenses, and Incentive Awards ("Class Notice"), attached hereto as Exhibit 3, 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.kellersettlements.com and www.cohenmilstein.com/hshs-settlement. Ex. 1 § 2.2.4; *see also* Ex. 3. HSHS will pay the cost of notice to the Settlement Class. *See* Ex. 2 ([Proposed] Preliminary Approval Order), Ex. 3 (Draft Class Notice); *see also* Ex. 1 § 7.2 (Settlement Agreement).

Attorneys' Fees.

Class Counsel will seek district Court approval to receive an award of reasonable out-of-

pocket expenses and attorneys' fees. Ex. 1 § 7.1.4. Class Counsel also intends to ask the Court to approve Incentive Awards (to be deducted from the award of attorney's fees) to the Named Plaintiffs of $5,000 each, in light of their substantial contributions to the litigation, including: collecting and producing documents; maintaining regular contact with Class Counsel; reviewing and approving the Complaints, staying abreast of settlement negotiations; and advising on the settlement of this litigation. *Id.* §§ 7.1.2; 7.1.4; Ex. 5 ¶¶ 11-12. The Settlement Class shall be notified of these details in the Class Notice. *See* Ex. 3. Class Counsel will seek no more than $850,000 in total for the award of attorneys' fees, expenses and Incentive Awards. Ex. 1 §§ 7.1.2; 7.1.4. HSHS will cause any such award to be paid *in addition to* the other monetary terms set forth in the Settlement Agreement. *Id.*

D. Reasons for the Settlement.

Plaintiffs have entered into the Settlement with an understanding of the strengths and weaknesses of their claims. This understanding is based on: (1) the dialogue in the mediation process; (2) investigation and research; (3) the likelihood that Plaintiffs would prevail at trial; (4) the range of possible recovery; and (5) the substantial complexity, expense, and duration of litigation necessary to prosecute this Action through trial, post-trial motions, and likely appeal, and the significant uncertainties in predicting the outcome of this complex litigation. *See* Ex. 5 ¶¶ 7-9, 11-17. Having undertaken this analysis, Class Counsel and Plaintiffs have concluded that the Settlement is fair, reasonable, and adequate, and should be presented to the Court for approval. *Id.* ¶ 20.

III. DISCUSSION

A. The Standards for Preliminary Approval.

Rule 23(e) of the Federal Rules of Civil Procedure governs settlements of class action lawsuits. It provides that "the claims, issues, or defenses of a certified class may be settled,

voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). Approval under Rule 23(e) involves a two-step process: first, a "preliminary approval" order; and second, after notice of the proposed settlement has been provided to the class and a hearing has been held to consider the fairness, reasonableness, and adequacy of the proposed settlement, a "final approval" order or judgment.[5] *See Manual for Complex Litigation (Fourth)* § 13.14 (2004). Before a class action may be dismissed or compromised, notice of the proposed dismissal or compromise must be given to class members in the manner directed by the court, a hearing must be held, and judicial approval must be obtained. Fed. R. Civ. P. 23(e).

In determining whether to *preliminarily* approve a settlement, the Court is not charged with engaging in the rigorous analysis of the Settlement Agreement required for *final* approval, but rather conducts a preliminary review to "ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Armstrong v. Bd. of Sch. Dirs. of the City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds*, *Felzsen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). As a prominent treatise explains:

> At the stage of preliminary approval, the questions are simpler, and the court is not expected to, and probably should not, engage in analysis as rigorous as is appropriate for final approval.... In evaluating a settlement for preliminary approval, the court determines whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval.... After a preliminary determination as to the fairness of a proposed settlement, the court must direct notice to class members and hold a final fairness hearing before formally approving the settlement.

David F. Herr, *Annotated Manual for Complex Litigation* § 21.662 (4th ed. May 2018 update) (citations omitted); *see also Woods v. Club Cabaret, Inc.*, No. 15-1213, 2017 WL 4054523, at *5 (C.D. Ill. May 17, 2017). This preliminary approval threshold acknowledges that the final

[5] *See* [Proposed] Order and Final Judgment, attached hereto as Exhibit 4.

approval hearing is the stage at which courts "adduce all information necessary to enable [them] intelligently to rule on whether the proposed settlement is 'fair, reasonable, and adequate.' *Armstrong*, 616 F.2d at 314 (citation omitted).[6] At preliminary approval, a court's role does not entail "resolving the merits of the controversy or making a precise determination of the parties' respective legal rights." *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985) (collecting cases). A settlement does necessarily require a judgment and evaluation by the attorneys for the parties based upon a comparison of "the terms of the compromise with the likely rewards of litigation." *Depoister v. Mary M Holloway Found.*, 36 F.3d 582, 586 (7th Cir. 1994) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)). An evaluation of the costs and benefits of settlement must also be tempered by the recognition that any compromise involves concessions on the part of all of the settling parties.

Finally, it is well-established that there is an overriding public interest in settling litigation, and this is particularly true in class actions. *See Woods*, 2017 WL 4054523, at *5 ("Federal courts naturally favor the settlement of class action litigation.") (quoting *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996)).

[6] At the Fairness Hearing, the Court has the discretion under Rule 23(e) to finally approve the Settlement if the Court finds it to be fair, adequate, and reasonable to the Class. The Seventh Circuit has set forth an eight-factor test to determine the fairness of a class action settlement: (1) the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement; (2) the defendant's ability to pay; (3) the complexity, length and expense of further litigation; (4) the degree of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of members of the class to the settlement; (7) the opinion of competent counsel; and (8) the stage of the proceedings and the amount of discovery completed. *See Armstrong*, 616 F.2d at 314 (citation omitted); *see also Martin v. Caterpillar, Inc.*, No. 07-1009, 2010 WL 3210448, at *3 (C.D. Ill. Aug. 12, 2010); *Pettis v. Underwood*, No. 06-2143, 2007 WL 2948400, at *1 (C.D. Ill. Oct. 9, 2007).

B. This Settlement Is Within the Range of Reasonableness Justifying Preliminary Approval.

At the preliminary approval stage, courts consider five factors: "(1) the strength of plaintiffs' case compared to the terms of the proposed settlement; (2) the likely complexity, length and expense of continued litigation; (3) the amount of opposition to settlement among effected parties; (4) the opinion of competent counsel; and (5) the stage of the proceedings and amount of discovery completed." *See Woods*, 2017 WL 4054523, at *5 (citing *Synfuel Tech., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) and *Isby*, 75 F.3d at 1199).

Review of these factors confirms that the Settlement Agreement easily meets the "range of reasonableness" test for preliminary approval, particularly in light of the strong public policy in favor of settling class actions. The Settlement Agreement presents a strong case for sending out notice and proceeding with a final fairness hearing: it takes into account the risks of litigation in light of the Supreme Court's ruling in *Advocate* and the Tenth Circuit's subsequent decision in *Medina* (discussed *infra* at p. 14); it was reached after extended and contentious negotiations involving the Parties and their counsel with the assistance of a skilled mediator; it provides for a substantial cash contribution to the Plan, and valuable protections including reporting and disclosure information for the Settlement Class; it proposes reasonable limits on attorney compensation and class representative Incentive Awards; and it does not prefer any Settlement Class members over others.

The Proposed Settlement Provides Certain Relief and Eliminates the Uncertainty of Prevailing on the Merits.

The strength of Plaintiffs' claims has been viewed as "the most important factor" when determining whether to approve the terms of a proposed settlement. *Woods*, 2017 WL 4054523, at *6 (citations omitted). The Complaint alleges that Defendants violated ERISA by, among other things, underfunding the Plan by at least $514 million. While the Action has been pending,

Defendants have made substantial contributions to the Plan's Trust. Ex. 5 ¶ 7. In combination with the favorable investing environment, the Plan's funding level has improved. In light of the reduction in underfunding levels, the Settlement Agreement's required additional contribution of $62.5 million provides additional funding of the trust fund which benefits the Settlement Class members by providing enhanced security for their pension benefits. Ex. 1 § 7.1.1. This Settlement thus eliminates at least $62.5 million of risk to Plan participants, while mitigating the risks and uncertainty of ongoing litigation. Moreover, the Settlement enhances the retirement security of Plan participants by providing certain reporting and disclosure information to participants regarding their retirement benefits, and also by protecting accrued benefits through equitable provisions of the Settlement that are comparable to certain provisions of ERISA, for a period of four Fiscal Years (through Fiscal Year 2022) or until the $62.5 million obligation is satisfied. Ex. 1 § 8.

This risk mitigation is particularly significant in light of the fact that the United States Supreme Court ruled in 2017 on an important issue in this Action—namely, that pension plans need not be established by churches in order to qualify as ERISA-exempt church plans, as long as they meet all other qualifications for the exemption. *Advocate*, 137 S. Ct. at 1663. Though Plaintiffs advance other strong arguments and theories not reached by the Supreme Court, Plaintiffs' case arguably was negatively impacted by the Supreme Court's decision. In addition, late last year the Tenth Circuit Court of Appeals decided *Medina v. Catholic Health Initiatives*, 877 F.3d 1213 (10th Cir. 2017), rejecting several other theories of ERISA liability in a different "church plan" case. *Medina* was decided on different facts than those before this Court; Plaintiffs believe its legal analysis was flawed; and in any event it is not binding on this Court in this Action. It does, however, illustrate the litigation risk that this Settlement avoids. Given the

uncertain and high-stakes backdrop, this Settlement is particularly favorable for the proposed class. *See* Ex. 5 ¶ 20.

The Proposed Settlement Avoids Lengthy and Protracted Litigation.

ERISA cases are complex, expensive, and unpredictable, especially in view of the fact that this is a church plan case and the law on Plaintiffs' alternate theories is unsettled. In this action, the Parties briefed motions to dismiss, and engaged in mediation discovery. Further, the Action was stayed while the United States Supreme Court considered a threshold issue in the case, and after the *Advocate* decision, the Plaintiffs amended the complaint and the Parties extensively briefed Defendants' motions to dismiss. Had this Action not settled, the Parties would have continued to engage in significant fact and expert discovery, including substantial document productions, and depositions. Plaintiffs would have moved for class certification, Defendants would have contested class certification, and the Parties would likely have filed cross-motions for summary judgment. These pre-trial litigation steps would have been expensive, complex, and protracted, and may have been a precursor to a full trial. Moreover, if Plaintiffs were to prevail on liability, and on damages at trial, Defendants would likely appeal. If Plaintiffs did not prevail on liability on their ERISA claim, there would still remain for decision their alternative state law claims. This settlement avoids these expenditures of resources for all Parties and the Court, and provides significant benefits that Settlement Class members would not receive at this time if the case proceeded—including a substantial cash contribution to the Plan of $62.5 million. Review of this factor therefore supports preliminary approval of the Settlement. *See Mangone v. First USA Bank*, 206 F.R.D. 222, 226 (S.D. Ill. 2001) (citing *Isby*, 75 F.3d at 1199 (where the "continuation of the litigation would require the resolution of many different and complex issues, would entail considerable additional expense, and would likely involve weeks, perhaps months of trial time," the Seventh Circuit upheld trial court's conclusion

that "the settlement represented an outcome at least comparable, if not superior, to that which plaintiffs might achieve by proceeding to trial[]")).

The Proposed Settlement was the Result of Adversarial, Arm's Length Negotiations and There is No Known Opposition to the Settlement.

The Parties' settlement negotiations in this matter were extensive and were overseen by an experienced mediator, Mr. Meyer, who has mediated many ERISA and retirement plan cases, including cases contesting the applicability of the church plan exemption. Ex. 5 ¶¶ 6-8. In fact, Class Counsel relied on Mr. Meyer's Mediator's proposal for achieving settlement after considering all relevant factors. *Id.* ¶ 9.

The Named Plaintiffs all support the Settlement and have entered into the Settlement with an understanding of the strengths and weaknesses of their claims. This understanding is based on: (1) the dialogue in mediation sessions and other settlement discussions; (2) investigation and research; (3) documents exchanged in the mediation process; (4) the likelihood that Plaintiffs would prevail at trial; (5) the range of possible recovery; and (6) 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.

Finally, because the Parties have not yet sent Class Notice to affected Plan participants, it is premature to consider this factor further. *See Koerner v. Copenhaver*, No. 12-1091, 2014 WL 5544051, at *5 (C.D. Ill. Nov. 3, 2014).

Class Counsel Endorse the Settlement.

Courts are "entitled to rely heavily on the opinion of competent counsel." *Gautreaux v. Pierce*, 690 F.2d 616, 634 (7th Cir. 1982) (citation omitted). Here, Class Counsel—two law firms that are nationally recognized for their expertise in employee benefits law and church plan

litigation and were selected by this Court as Interim Co-Lead Counsel—believe that this Settlement is fair, reasonable, and adequate in light of the circumstances in this case. Ex. 5 ¶¶ 18-20.

Finally, comparison of this Settlement with other recent church plan settlements provides an additional basis for finding the Settlement is reasonable and should be approved. This Settlement will provide a cash contribution of $62.5 million to the Plan's Trust, along with certain other equitable provisions concerning benefits security and required notice that are similar to ERISA's requirements for pension plans. This Settlement compares favorably to other church plan settlements that have been approved. *See* Order and Final Judgment ¶ 21, *Garbaccio v. St. Joseph's Hosp. & Med. Ctr. & Subsidiaries*, No. 16-02740 (D.N.J. Mar. 6, 2018), ECF No. 116 (providing for payment of $42.5 million to the plan's trust in addition to certain equitable provisions); Order and Final Judgment ¶ 21, *In re Wheaton Franciscan ERISA Litig.*, No. 16-04232 (N.D. Ill. Jan. 16, 2018), ECF No. 107 (providing for a $29.5 million plan benefit guarantee in addition to certain equitable provisions); Order and Final Judgment ¶ 9, *Hodges v. Bon Secours Health Sys., Inc.*, No. 16-01079 (D. Md. Dec. 21, 2017), ECF No. 117 (providing for payment of $98 million to the plans' trust in addition to certain equitable provisions); Order and Final Judgment ¶ 21, *Butler v. Holy Cross Hosp.*, No. 16-05907 (N.D. Ill. June 29, 2017), ECF No. 52 (providing for payment of $3 million to terminated plan participants); Order and Final Judgment ¶ 10, *Lann v. Trinity Health Corp.*, No. 14-02237 (D. Md. May 31, 2017), ECF No. 111 (providing for payment of $75 million over three years to the plans' trust in addition to certain equitable provisions); Order Finally Approving Class Settlement ¶ 10, *Griffith v. Providence Health & Servs.*, No. 14-01720 (W.D. Wash. Mar. 21, 2017), ECF No. 69 (providing for payment of $350 million to the plan's trust over seven years in

addition to certain equitable provisions); Order and Final Judgment ¶ 8, *Overall v. Ascension Health*, No. 13-11396 (E.D. Mich. Sept. 17, 2015), ECF No. 115 (providing for payment of $8 million to the plan's trust in addition to certain equitable provisions).

Although a contribution of $62,500,000 will not provide a complete victory to Plaintiffs, it does not need to do so. *See E.E.O.C.*, 768 F.2d at 889. Instead, the Settlement provides Plaintiffs with a present victory, meaning they will not need to await a result of uncertain and potentially lengthy litigation. *See In re AT & T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 346 (N.D. Ill. 2010) (noting that "[c]ontinued litigation carries with it a decrease in the time value of money ..."). As such, this factor weighs in favor of settlement approval.

The Proposed Settlement is Supported by the Stage of Proceedings.

The final factor is the stage of proceedings and the amount of discovery completed. *Synfuel Techs., Inc.*, 463 F.3d at 653. This aspect of the case considers "how fully the district court and counsel are able to evaluate the merits of plaintiffs' claims." *Armstrong*, 616 F.2d at 325. Thus, the inquiry is whether the claims' merits may be adequately evaluated.

Here, while there had been no ruling yet on Defendants' motions to dismiss and formal discovery had not commenced, Class Counsel obtained sufficient information through the case investigation, Federal Rule of Evidence 408 mediation discovery, and the motion to dismiss briefing (including 336 pages of exhibits submitted by Defendants in support of their motions) to properly assess the claims and defenses, and the negotiations with the mediator were informed by these considerations. Ex. 5 ¶¶ 4-12. This information allowed the Parties to consider available legal arguments, and to view the strengths and weaknesses of the Action. Consideration of this factor thus supports a finding that the Settlement is fair and adequate.

At this juncture, the Court need not consider the ultimate question: whether the proposed Settlement is fair, reasonable, and adequate. However, preliminary consideration of factors

considered by courts in this Circuit in granting final approval lends support to Plaintiffs' belief that this Settlement is well "within the range of possible approval." *Armstrong*, 616 F.2d at 310. For this and all the foregoing reasons, the Settlement deserves the Court's approval.

C. The Proposed Settlement Class Satisfies the Requirements for Certification Pursuant to Rule 23 of the Federal Rules of Civil Procedure.

Plaintiffs request that the Court preliminarily certify the Class for settlement purposes only, under Federal Rules of Civil Procedure 23(a) and 23(b)(1) and/or (2). As set forth above, the Class definition is "As of May 31, 2018, all present and former participants (vested or non-vested) or beneficiaries of the Plan." Ex. 1 § 1.20. Plaintiffs also move the Court to preliminarily appoint Keller Rohrback L.L.P. and Cohen Milstein Sellers & Toll PLLC as Class Counsel.

Provisional Certification of the Settlement Class is Appropriate.

A settlement class must meet the requirements for class certification under Rule 23(a) (numerosity, commonality, typicality, and adequacy). *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006). These requirements are readily satisfied here.

Numerosity. The first requirement, numerosity, is typically satisfied where there are at least forty members of a putative class. *See, e.g., Pruitt v. City of Chi.*, 472 F.3d 925, 926-27 (7th Cir. 2006); *see also, e.g., Flanagan v. Allstate Ins. Co.*, 242 F.R.D. 421, 427 (N.D. Ill. 2007), *modified*, 242 F.R.D. 434 (N.D. Ill. 2007) (citation omitted) ("permissive joinder is usually deemed impractical where the class members number 40 or more"). Here, Plaintiffs are informed and believe that the proposed Settlement Class (Plan participants and beneficiaries) has more than 62,000 members. The Class is therefore so numerous that joinder of all members is impracticable.

Commonality. The commonality requirement set forth in Rule 23(a)(2) requires that a

proposed class action "demonstrate that the class members have suffered the same injury." *Hayes v. Convergent Healthcare Recoveries, Inc.*, No. 14-1467, 2016 WL 5867818, at *6 (C.D. Ill. Oct. 7, 2016) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)). "Commonality requires that there be at least one question of law or fact common to the class." *Rosario v. Livaditis*, 963 F.2d 1013, 1017 (7th Cir. 1992). The common questions of law and fact include, for example: (1) whether the Plan is subject to ERISA, and, if so, (2) whether the fiduciaries of the Plan have failed to administer and failed to enforce the funding obligations of the Plan in accordance with ERISA. *Brieger v. Tellabs, Inc.*, 245 F.R.D. 345, 350 (N.D. Ill. 2007) (citation omitted) (finding that "because plaintiffs' claims derive from defendants' actions (or inactions) with respect to the Plan, plaintiffs have demonstrated that their claims involve a common nucleus of operative fact" and therefore that the putative ERISA class met the commonality requirement).

Typicality. Moreover, Plaintiffs' claims are typical of Settlement Class members' claims because all claims are based on Defendants' alleged wrongful conduct and all members of the Settlement Class were similarly affected by such conduct. The requirement of typicality is therefore satisfied. *See Rosario*, 963 F.2d at 1018 ("[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.") (internal quotation marks omitted); *see also Brieger*, 245 F.R.D. at 350 (finding that typicality is met where a putative ERISA class "seek[s] relief on behalf of the plan . . . for alleged fiduciary violations as to the Plan").

Adequacy. Rule 23 also "requires that the representative parties fairly and adequately represent the class. A class is not fairly and adequately represented if class members have

antagonistic or conflicting claims." *Id.* Here, Plaintiffs Holcomb, Grovogel, Mollet, Rosenthal, and Schneider, as the proposed class representatives, are adequate, as their claims are typical of the claims of the other members of the Settlement Class. Their claims, like the claims of the other Class members, arise from the same event, practice and/or course of conduct—namely, Defendants' failure to maintain the Plan in accordance with ERISA. Plaintiffs' claims are also typical because all Settlement Class members are similarly affected by Defendants' conduct, and all Class members seek the same relief on behalf of the plan. *Brieger*, 245 F.R.D. at 356 (where a putative ERISA class "bring[s] claims on behalf of the Plan, not for individual relief . . . . there is no inherent conflict between the claims of the named plaintiffs and those of the putative class" and the named plaintiffs satisfy the "adequacy" requirement).

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

a. Rule 23(b)(1): Individual Actions Would Create Inconsistent Adjudications or Be Dispositive of the Interests of Absent Members.

A class may be certified under Federal Rule of Civil Procedure 23(b)(1) if, in addition to meeting the requirements of Rule 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 interest of absent members. Fed. R. Civ. P. 23(b)(1)(A)-(B).

There is a clear risk of inconsistent adjudication and incompatible standards here: in the absence of certification, two participants could bring identical actions and achieve different results, with one court holding that the Plan is an ERISA-regulated plan and the other holding that it is not. *See, e.g., Neil v. Zell*, 275 F.R.D. 256, 267 (N.D. Ill. 2011) ("ERISA class actions are commonly certified under either or both subsections of 23(b)(1) because recovery for a breach of the fiduciary duty owed to an ERISA plan, as is the predominant claim here, will inure

to the plan as a whole, and because defendant-fiduciaries are entitled to consistent rulings regarding operation of the plan. Essentially, in an ERISA action in which relief is being sought on behalf of the plan as a whole (as it is here), a plaintiff's victory would necessarily settle the issue for all other prospective plaintiffs."). Courts in this District have certified classes under Federal Rule of Civil Procedure 23(b)(1) in ERISA cases for those very reasons. *Nolte v. Cigna Corp.*, No. 07-2046, 2013 WL 3586645, at *2 (C.D. Ill. July 3, 2013) (preliminarily certifying class and finding that prosecution of separate actions would create a risk of inconsistent or varying adjudications); Proposed Findings and Order, *Martin v. Caterpillar, Inc.*, No. 07-1009 (C.D. Ill. Apr. 21, 2010), ECF No. 173 (preliminarily approving certification of non-opt-out ERISA class pursuant to Rule 23(b)(1)).

Moreover, the Advisory Committee Notes on Rule 23 specifically acknowledge that actions which "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 to 1966 amendment. As a result, certification of the proposed class under Rule 23(b)(1) is appropriate in this ERISA action.

b. Rule 23(b)(2): Defendants Have Acted on Grounds Generally Applicable to the Settlement Class and Relief for the Settlement Class as a Whole Is Appropriate.

A class may be certified under Federal Rule of Civil Procedure 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2). Here, Plaintiffs allege that Defendants failed to comply with ERISA on a Plan-wide basis. Specifically, Plaintiffs allege that Defendants underfunded the Plan, offering eligible participants lump sum distribution values that are less than what it should

have been if the lump sum had been calculated in accordance with ERISA; and failing to furnish Plaintiffs or any member of the class with required statements and reports. Compl. ¶¶ 83-84; 94-99; 170-84.

Although Defendants deny each allegation of the Complaint and contend that defenses exist for every claim, each of Plaintiffs' allegations, if proven, would harm the entire class as a group. This is further underscored by the fact that Plaintiffs not only seek to represent themselves and all others similarly situated, but also seek to represent the Plan itself. As a result, certification of the proposed class under Rule 23(b)(2) is also appropriate in this ERISA action.

D. Rule 23(g) Is Satisfied

Federal Rule of Civil Procedure 23(g) requires that the Court examine the capabilities and resources of class counsel. This Court has already preliminarily assessed, in detail, the qualifications of Class Counsel in the context of contested class leadership motions pursuant to Rule 23(g)(3) and has designated Class Counsel as Interim Co-Lead Counsel. *See* Order 4, ECF No. 29. Moreover, Class Counsel are among the leading litigators of ERISA actions on behalf of plaintiffs, and possess unparalleled expertise in the specific types of ERISA claims brought in this lawsuit. Ex. 5 ¶¶ 14-19. Class Counsel thus satisfy the requirements of Rule 23(g).

E. The Proposed Notice Plan Satisfies the Due Process Requirements of Rule 23.

In order to satisfy due process considerations, and pursuant to Rule 23(c)(2), 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) (citations omitted). Here, the proposed Class Notice describes the Settlement in plain English; the considerations that caused Plaintiffs and Class Counsel to conclude that the Settlement is fair and adequate; the

maximum attorneys' fees and expenses and Incentive Awards for the Named Plaintiffs 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. Last known addresses of the members of the Settlement Class are available from the Plan's record-keepers. In addition, the Settlement Agreement and Class Notice will be published online at www.kellersettlements.com and www.cohenmilstein.com/hshs-settlement. 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*, Vol. 3, §§ 8:12, 8:15, 8:28, 8:33 (5th ed. 2014). Similar notice plans in ERISA settlements have been approved. Order Preliminarily Approving the Settlement, Certifying the Class, Approving Notice to the Class, and Scheduling Final Approval Hearing, *In re Wheaton Franciscan ERISA Litig.*, No. 16-04232 (N.D. Ill. Sept. 13, 2017), ECF No. 91; Order Preliminarily Approving the Settlement, Certifying the Class, Approving Notice to the Class, and Scheduling Final Approval Hearing, *Hodges v. Bon Secours Health Sys., Inc.*, No. 16-01079 (D. Md. July 10, 2017), ECF No. 107.

F. Proposed Schedule.

The Parties have agreed to the following set of deadlines, the specific dates of which will be determined after the Court enters the Preliminary Approval Order and sets a Fairness Hearing date:

Event	Time for Compliance
Deadline for Mailing of Class Notice and Posting Class Notice to Websites	30 days after entry of the Preliminary Approval Order

Deadline for Filing Plaintiffs' Motion for Final Approval, Attorneys' Fees and Expenses, and Incentive Awards for Plaintiffs	46 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 Plaintiffs' Reply in Support of Motion for Final Approval, Attorneys' Fees and Expenses, and Incentive Awards for Plaintiffs, and for the Parties to Respond to Any Comments or Objections	7 days prior to the Proposed Fairness Hearing
Proposed Fairness Hearing	On or after September 25, 2018

IV. CONCLUSION

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

Dated: June 8, 2018

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which in turn sent notice to all counsel of record.

/s/ Laura R. Gerber
Laura R. Gerber

CERTIFICATE OF COMPLIANCE

1. On June 8, 2018, Plaintiffs filed their Motion for Leave to File Memorandum in Support of Plaintiffs' Motion for Preliminary Approval of Settlement Agreement Exceeding the Page and Words Limitation.

2. This Memorandum contains 7,265 words.

3. I relied on the word count of Microsoft Word 2013 in preparing this certificate.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Laura R. Gerber
Laura R. Gerber