

The Honorable John C. Coughenour

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

LINDA GRIFFITH and JEANETTE WENZL,
on behalf of themselves, individually, and on
behalf of the Providence Health & Services
Cash Balance Retirement Plan,

Plaintiffs,

v.

PROVIDENCE HEALTH & SERVICES;
RETIREMENT PLANS COMMITTEE;
ELLEN WOLF; JOHN and JANE DOES 1-20,
inclusive, MEMBERS OF THE RETIREMENT
PLANS COMMITTEE; JOHN or JANE DOE
21, PLAN DIRECTOR; HUMAN
RESOURCES COMMITTEE OF THE BOARD
OF DIRECTORS; JOHN and JANE DOES 22-
40, inclusive, MEMBERS OF THE HUMAN
RESOURCES COMMITTEE OF THE BOARD
OF DIRECTORS; ROD HOCHMAN; BOARD
OF DIRECTORS OF PROVIDENCE HEALTH
& SERVICES; MICHAEL HOLCOMB;
CHAUNCEY BOYLE; ISIAAH CRAWFORD;
MARTHA DIAZ ASZKENAZY; PHYLLIS
HUGHES; SALLYE LINER; KIRBY
McDONALD; DAVE OLSEN; AL PARRISH;
CAROLINA REYES; PETER J. SNOW;
MICHAEL A. STEIN; CHARLES WATTS;
BOB WILSON; JOHN and JANE DOES 41-50,
inclusive,

Defendants.

No. 2:14-cv-01720-JCC

PLAINTIFFS' MOTION FOR AWARDS
OF ATTORNEYS' FEES AND
EXPENSES, AND INCENTIVE FEES TO
THE NAMED PLAINTIFFS

NOTE ON MOTION CALENDAR:
MARCH 21, 2017

TIME: 9:00 A.M.

COURTROOM: 16206

PLAINTIFFS' MOTION FOR AWARDS
OF ATTORNEYS' FEES AND
EXPENSES, AND INCENTIVE FEES TO
THE NAMED PLAINTIFFS
(2:14-cv-01720-JCC)

LAW OFFICES OF
KELLER ROHRBACK L.L.P.
1201 THIRD AVENUE, SUITE 3200
SEATTLE, WASHINGTON 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

LAW OFFICES OF
COHEN MILSTEIN SELLERS & TOLL, PLLC.
1100 NEW YORK AVENUE, N.W.
SUITE 500, WEST TOWER
WASHINGTON, DC 20005
TELEPHONE: (202) 408-4600

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

	Page
I. INTRODUCTION	1
II. CLASS COUNSEL’S EFFORTS AND THE RESULTS OBTAINED.....	2
A. Initial Investigation into the ERISA Church Plan Exemption.....	2
B. Class Counsel’s Vigorous Prosecution of this Case.	3
C. The Mediator Oversaw Settlement Negotiations and Made a Mediator’s Proposal on Attorneys’ Fees, to Which the Parties Agreed (Subject to Court Approval).....	4
III. THE COURT SHOULD AWARD THE REQUESTED FEES AS A MEDIATOR-PROPOSED, MARKET-SET FEE AGREEMENT.....	6
IV. THE AWARD IS REASONABLE.....	7
A. The Requested Fees and Expenses Are Reasonable Under the Percentage-of-the-Fund Method.	7
B. The Fee Award Is Reasonable Based on the Lodestar Method.	7
1. The Benefits to the Settlement Class.	8
2. Time and Labor Required.	9
3. The Novelty and Difficulty of the Questions Involved, and the Requisite Legal Skill Required.	10
4. The Preclusion of Other Employment.	10
5. The Customary Fee.	11
6. The Contingent Nature of this Case Supports an Award of Fees.	11
7. Class Counsel’s Experience and Reputation Weighs in Favor of the Award.	11
V. THE COURT SHOULD AWARD THE REQUESTED EXPENSES.....	11
VI. THE COURT SHOULD AWARD THE REQUESTED INCENTIVE AWARDS	12
VII. CONCLUSION.....	12

TABLE OF AUTHORITIES

Page(s)

Federal Cases

In re Bluetooth Headset Prods. Liab. Litig.,
654 F.3d 935 (9th Cir. 2011)7

Blum v. Stenson,
465 U.S. 886 (1984).....9, 11

Chavies v. Catholic Health E.,
No. 13-1645 (E.D. Pa. Mar. 28, 2014).....3

City of Burlington v. Dague,
505 U.S. 557 (1992).....8

In re Continental Illinois Securities Litigation,
962 F.2d 566 (7th Cir. 1992)6

Dennings v. Clearwire Corp.,
No. 10-1859, 2013 WL 1858797 (W.D. Wash. May 3, 2013)5

Dignity Health v. Rollins,
137 S. Ct. 547 (Dec. 2, 2016)3

In re Equity Funding Corp. of Am. Sec. Litig.,
438 F. Supp. 1303 (C.D. Cal. 1977)11

Evans v. Jeff D.,
475 U.S. 717 (1986).....6

Farrell v. OpenTable, Inc.,
No. 11-1785, 2012 WL 1379661 (N.D. Cal. Jan. 30, 2012).....5

In re Fine Paper Antitrust Litig.,
751 F.2d 562 (3d Cir. 1984).....6

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998)8

Hensley v. Eckerhart,
461 U.S. 424 (1983).....6

Herfert v. Crayola LLC,
No. 11-1301 (W.D. Wash. Apr. 27, 2012).....10

1 *In re Immune Response Sec. Litig.*,
497 F. Supp. 2d 1166 (S.D. Cal. 2007).....12

2 *In re Infospace, Inc. Sec. Litig.*,
3 330 F. Supp. 2d 1203 (W.D. Wash. 2004).....11

4 *Kaplan v. Saint Peter’s Healthcare Sys.*,
5 810 F.3d 175 (3d Cir. 2015).....3

6 *Kaplan v. Saint Peter’s Healthcare Sys.*,
No. 13-2941, 2014 WL 1284854 (D.N.J. Mar. 31, 2014)3

7 *Keithly v. Intelius Inc.*,
8 No. 09-1485 (W.D. Wash. Nov. 21, 2013).....10

9 *Kerr v. Screen Extras Guild, Inc.*,
10 526 F.2d 67 (9th Cir. 1975)8

11 *Lann v. Trinity Health Corp.*,
No. 14-2237, 2015 WL 6468197 (D. Md. Feb. 24, 2015)3

12 *M.L. v. Fed. Way Sch. Dist.*,
13 401 F. Supp. 2d 1158 (W.D. Wash. 2005).....8

14 *Medina v. Catholic Health Initiatives*,
No. 13-1249, 2014 WL 4244012 (D. Colo. Aug. 26, 2014).....3

15 *Moomjy v. HQ Sustainable Mar. Indus., Inc.*,
16 No. 11-00726 (W.D. Wash. March 21, 2013)10

17 *Ott v. Mortg. Inv’rs Corp. of Ohio*,
18 No. 14-00645, 2016 WL 54678 (D. Or. Jan. 5, 2016)7

19 *Overall v. Ascension*,
20 23 F. Supp. 3d 816 (E.D. Mich. 2014).....3

21 *Overall v. Ascension Health*,
No. 13-11396 (E.D. Mich. Sept. 17, 2015).....9

22 *Rollins v. Dignity Health*,
23 19 F. Supp. 3d 909 (N.D. Cal. 2013)3, 4

24 *Rollins v. Dignity Health*,
830 F.3d 900 (9th Cir. 2016)3

25 *Rollins v. Dignity Health*,
26 No. 13-1450 (N.D. Cal. filed Apr. 1, 2013).....4

27

1 *Saint Peter’s Healthcare Sys. v. Kaplan,*
137 S. Ct. 546 (Dec. 2, 2016)3

2 *Stapleton v. Advocate Health Care Network,*
3 76 F. Supp. 3d 796 (N.D. Ill. 2014)3

4 *Stapleton v. Advocate Health Care Network,*
5 817 F.3d 517 (7th Cir. 2016)3

6 *Staton v. Boeing Co.,*
327 F.3d 938 (9th Cir. 2003)12

7 *United Steelworkers v. Phelps Dodge Corp.,*
8 896 F.2d 403 (9th Cir. 1990)9

9 *Vizcaino v. Microsoft Corp.,*
10 290 F.3d 1043 (9th Cir. 2002)11

11 *In re Wash. Mut. Mortg. Backed Sec. Litig.,*
No. 09-0037, 2013 WL 12155026 (W.D. Wash. Jan. 11, 2013)10

12 *Wing v. Asarco Inc.,*
13 114 F.3d 986 (9th Cir. 1997)7, 11

14 **Federal Statutes**

15 26 U.S.C. § 414(e)2

16 29 U.S.C. § 1002(33)2

17 **Rules**

18 Fed. R. Civ. P. 23(h)11

19
20
21
22
23
24
25
26
27

1 Plaintiffs Linda Griffith and Jeanette Wenzl (“Named Plaintiffs”) respectfully move the
 2 Court for an Order¹ approving awards of attorneys’ fees and expenses to their attorneys, Keller
 3 Rohrbach L.L.P. and Cohen Milstein Sellers & Toll, PLLC (“Class Counsel”), and an award of
 4 Incentive Fees to themselves as class representatives.

5 I. INTRODUCTION

6 The Parties to this Action have entered into a comprehensive Settlement Agreement that
 7 provides substantial relief to the Settlement Class members, including a total Class Settlement
 8 Amount of **\$351.9 million**, plus other monetary and non-monetary relief.²

9 After resolving the key Settlement provisions that provide relief to the Settlement Class,
 10 the Parties negotiated, based upon a proposal by the third-party mediator (Robert Meyer, Esq.),
 11 an agreement for payment of attorneys’ fees, expenses, and class representative Incentive Fees to
 12 Named Plaintiffs.³ This compromise provides that, if approved by the Court, Defendants will
 13 pay up to \$6.5 million in attorneys’ fees and expenses to Class Counsel and potential Incentive
 14 Fees to Named Plaintiffs. Settlement § 8.1.5. If awarded, these amounts will in no way reduce
 15 the \$351.9 million in monetary recovery to the Settlement Class. *Id.*

16 As discussed below, Plaintiffs request that the Court approve the negotiated attorneys’
 17 fees, expenses, and Named Plaintiff awards as a reasonable, market-set fee agreement. These
 18 fees compensate Class Counsel and Named Plaintiffs for the significant time, effort, risk, and
 19 expenses they expended in the successful resolution of this Action. The fees and expenses are
 20 consistent with the benefits that the Settlement confers on the Settlement Class; the negotiated
 21 award reflects just 1.8% of the readily-quantifiable monetary component of the Settlement
 22

23 ¹ A proposed order granting the relief sought herein is attached as Exhibit 2 to Plaintiffs’ Unopposed Motion for
 Final Approval of Settlement Agreement and Certification of Settlement Class (“Final Approval Motion”), filed
 contemporaneously herewith.

24 ² A copy of the Settlement Agreement (“Settlement” or “Settlement Agreement”) is attached to the Final Approval
 Motion as Exhibit 1. Capitalized terms not otherwise defined herein shall have the same meaning ascribed to them in
 25 the Settlement Agreement.

26 ³ Joint Declaration of Lynn Lincoln Sarko and Michelle C. Yau in Support of (1) Plaintiffs’ Unopposed Motion for
 Final Approval of Settlement Agreement and Certification of Settlement Class; and (2) Plaintiffs’ Motion for
 Awards of Attorneys’ Fees and Expenses, and Incentive Fees to the Named Plaintiffs (“Joint Decl.”) ¶¶ 5, 26,
 27 submitted contemporaneously herewith.

1 (\$351.9 million); and the requested award represents a modest multiplier of 1.86 on the actual
 2 lodestar (\$3,445,610.10) that Class Counsel expended developing and pursuing this Action. The
 3 Incentive Fees to the Named Plaintiffs are also fair and reasonable in light of their substantial
 4 commitment of time and effort to this litigation over the last two-plus years.

5 **II. CLASS COUNSEL’S EFFORTS AND THE RESULTS OBTAINED**

6 As detailed in the Joint Declaration, Class Counsel committed considerable time and
 7 resources to develop and prosecute this matter without any guarantee of payment. Joint Decl.
 8 ¶¶ 7-38. This litigation was hard fought and involved extensive investigation, consultation with
 9 experts, review of documents, and legal research and briefing, all of which were necessary to
 10 achieve a positive result for the Class. *Id.* ¶¶ 13-18.

11 **A. Initial Investigation into the ERISA Church Plan Exemption.**

12 This case is very different from the typical class action brought under the securities laws,
 13 consumer protection statutes, or the Employee Retirement Income Security Act of 1974
 14 (“ERISA”) for fiduciary breach. Rather, this case is one of a number of cases pending around
 15 the country that challenge whether hospital systems like Providence are entitled to claim that
 16 their pension plans are exempt from ERISA as “church plans,” defined in 29 U.S.C. § 1002(33).

17 Class Counsel discovered and developed this area of the law with the assistance of the
 18 main public interest organization concerned with pension rights, the Pension Rights Center
 19 (“PRC”). Joint Decl. ¶¶ 8-9. Through the PRC, Class Counsel learned that thousands of hospital
 20 employees were being denied ERISA’s protections, including funding, vesting, and disclosure
 21 rules, because hospitals claimed their pension plans were exempt church plans. *Id.* ¶ 9.

22 Class Counsel devoted many hours to researching the definition of a “church plan” found
 23 in both ERISA and the Internal Revenue Code, 29 U.S.C. § 1002(33) and 26 U.S.C. § 414(e),
 24 including analyzing the statutory text, its interaction with other provisions in the U.S. Code, the
 25 legislative history of the statute, and agency and court interpretations of the statute. Joint Decl.
 26 ¶ 10. Class Counsel concluded, based upon their investigation, that ERISA contained only a
 27

1 narrow exemption intended for *churches*, and that hospitals like Providence were improperly
 2 claiming the exemption. *Id.* ¶ 10; Complaint ¶¶ 151–80, Dkt. # 1.

3 Class Counsel also understood, based upon their research, that filing church plan cases
 4 such as this one would challenge many years of private letter rulings from the IRS and informal
 5 Advisory Opinions of the Department of Labor. Joint Decl. ¶ 11. They also knew that the
 6 defense would maintain that the small amount of church plan case law then in existence would
 7 favor a defense reading of the church plan exemption. *Id.* And they knew that once even a few
 8 of the cases were filed, the major hospitals claiming the exemption, which employ hundreds of
 9 thousands of people, would be arrayed against them. *Id.*

10 Nevertheless, Class Counsel decided to take on this high-stakes, high-risk litigation.
 11 Class Counsel were the only lawyers to do so. *Id.* ¶ 12. The early results in the district courts
 12 were mixed,⁴ but when the first three cases reached the appellate courts, Class Counsel (the very
 13 same counsel in this case) achieved major victories.⁵ All three courts ruled unanimously in favor
 14 of the plaintiffs.⁶ The defendants then sought review in the United States Supreme Court, which
 15 was granted in December.⁷ Class Counsel are now defending those results in the Supreme Court.
 16 *Id.* The settlement achieved here—the largest settlement in any church plan case to date—could
 17 not have been achieved without Class Counsel’s total immersion in the issue. *Id.*

18 **B. Class Counsel’s Vigorous Prosecution of this Case.**

19 Before filing the Complaint in this case, Class Counsel developed the legal theories
 20 outlined above and also analyzed the facts relating to Providence and the Plan at issue in this

21 ⁴ Compare, e.g., *Chavies v. Catholic Health E.*, No. 13-1645 (E.D. Pa. Mar. 28, 2014); *Kaplan v. Saint Peter’s*
 22 *Healthcare Sys.*, No. 13-2941, 2014 WL 1284854 (D.N.J. Mar. 31, 2014); *Rollins v. Dignity Health*, 19 F. Supp. 3d
 23 909 (N.D. Cal. 2013); and *Stapleton v. Advocate Health Care Network*, 76 F. Supp. 3d 796 (N.D. Ill. 2014), with
 24 *Overall v. Ascension*, 23 F. Supp. 3d 816 (E.D. Mich. 2014); *Medina v. Catholic Health Initiatives*, No. 13-1249,
 25 2014 WL 4244012 (D. Colo. Aug. 26, 2014); and *Lann v. Trinity Health Corp.*, No. 14-2237, 2015 WL 6468197
 (D. Md. Feb. 24, 2015); see also Joint Decl. ¶ 12 n.3.

26 ⁵ See *Rollins v. Dignity Health*, 830 F.3d 900, 905 (9th Cir. 2016); *Stapleton v. Advocate Health Care Network*, 817
 27 F.3d 517 (7th Cir. 2016); *Kaplan v. Saint Peter’s Healthcare Sys.*, 810 F.3d 175 (3d Cir. 2015); see also Joint Decl.
 ¶ 12 n.4.

⁶ See *supra* note 5; see also Joint Decl. ¶ 12 n.6.

⁷ *Dignity Health v. Rollins*, 137 S. Ct. 547 (Dec. 2, 2016); *Saint Peter’s Healthcare Sys. v. Kaplan*, 137 S. Ct. 546
 (Dec. 2, 2016); *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 546 (Dec. 2, 2016); *Saint Peter’s Healthcare*
Sys. v. Kaplan, 137 S. Ct. 546 (Dec. 2, 2016) (consolidated with *Saint Peter’s*).

1 case. Class Counsel examined Plan documents, Providence’s public disclosures, financial
 2 statements, and information supplied by the Plaintiffs themselves. Joint Decl. ¶ 13. Ultimately,
 3 this research resulted in a carefully drafted 70-page Complaint asserting 10 counts against 20
 4 Defendants (not including John Doe defendants). *Id.* ¶ 14.

5 After the Complaint was filed, Defendants filed a motion to dismiss. Dkt. # 32. That
 6 motion focused on the issue of whether, in order to claim the church plan exemption, the plan
 7 must be established by a church; however, it also raised other nuanced factual and legal issues,
 8 such as whether Providence is “controlled by” or “associated with” a church under ERISA, and
 9 constitutional issues. *See* Dkt. ## 32, 37. Class Counsel invested many hours responding to that
 10 motion and Defendants’ arguments. *See* Dkt. # 35; *see also* Joint Decl. ¶ 15.

11 While the motion to dismiss briefing was in progress, the Parties engaged in informal
 12 discovery. Class Counsel propounded discovery requests on Defendants and then received and
 13 reviewed approximately 2,100 pages of documents. Joint Decl. ¶ 16.

14 This case was stayed shortly after Defendants’ motion to dismiss was fully briefed,
 15 pending the outcome of the proceedings in a related church plan lawsuit, *Rollins v. Dignity*
 16 *Health* (“*Dignity*”), No. 13-1450 (N.D. Cal. filed Apr. 1, 2013). Although this case was stayed,
 17 Class Counsel, which is also counsel in *Dignity* and the other church plan cases now pending in
 18 the Supreme Court, continued to monitor the developments in those appellate court cases and the
 19 import of such developments on this particular matter. Joint Decl. ¶¶ 17-18. Class Counsel also
 20 kept the Named Plaintiffs informed of those developments. *Id.* ¶ 18.

21 **C. The Mediator Oversaw Settlement Negotiations and Made a Mediator’s Proposal on**
 22 **Attorneys’ Fees, to Which the Parties Agreed (Subject to Court Approval).**

23 The Parties prepared for, and participated in, their first formal mediation on July 22,
 24 2016. Joint Decl. ¶ 19. Shortly after that meeting, the Ninth Circuit issued its ruling that only a
 25 church may establish a church plan, *Rollins*, 830 F.3d at . The Parties continued mediating after
 26 that decision, taking into account the Ninth Circuit’s ruling and the *Dignity* defendants’ petition
 27 for certiorari to the Supreme Court (which has since been granted). Joint Decl. ¶ 20. These

1 negotiations were overseen by a third party mediator, Robert Meyer, Esq. *Id.* ¶ 22. The
 2 negotiations took place over the course of several months and included an in-person session in
 3 Seattle, Washington, as well as numerous calls and meetings. *Id.* ¶¶ 22-23. Both sides drafted
 4 multiple mediation statements and also exchanged proposals and counter-proposals with the
 5 Defendants concerning potential settlement terms. *Id.* ¶ 23.

6 Prior to and during these negotiations, Class Counsel investigated the facts,
 7 circumstances, and legal issues associated with the allegations and defenses in the action. The
 8 investigation included, *inter alia*: (a) analyzing documents and information produced by or
 9 relating to the Defendants, the Plan, and the industry; (b) researching the applicable law with
 10 respect to the claims and possible defenses; (c) consulting with experts; and (d) exploring
 11 potential remedies. Joint Decl. ¶ 24. As part of this process, Class Counsel reviewed
 12 information from Providence’s actuary to verify the schedule of former participants who were
 13 entitled to the \$500 payment set forth in the Settlement Agreement, § 8.1.3. *See* Joint Decl. ¶ 25.

14 Only *after* the Parties reached agreement on the key terms for the Settlement Class did
 15 they turn to negotiations concerning attorneys’ fees. *Id.* ¶ 26. Those negotiations were overseen
 16 by the mediator, who came up with a mediator’s proposal, to which the Parties ultimately agreed
 17 (*see* Settlement § 8.1.5), subject to the Court’s approval. *Id.*⁸

18 Once the parties reached an agreement in principle to settle the case, they executed a
 19 Term Sheet and asked the Court to lift the stay of this matter in order to carry out settlement
 20 approval proceedings, Dkt. # 48, which the court granted on September 29, 2016. Dkt. # 49.
 21 Thereafter, Class Counsel drafted and filed the Settlement Agreement and Plaintiffs’ Unopposed
 22 Motion for Preliminary Approval of the Settlement. Dkt. # 50. The Court preliminarily approved
 23 the Settlement on December 6, 2016 (“Preliminary Approval Order”). Dkt. # 52.

24 Pursuant to the Preliminary Approval Order, Class Notice was mailed on January 19,
 25

26 ⁸ *See Dennings v. Clearwire Corp.*, No. 10-1859, 2013 WL 1858797, at *8–9 (W.D. Wash. May 3, 2013) (noting
 27 absence of collusion where agreement to attorneys’ fees was based on mediator’s proposal); *see also Farrell v.*
OpenTable, Inc., No. 11-1785, 2012 WL 1379661, at *4 (N.D. Cal. Jan. 30, 2012) (same).

1 2017 to 75,505 current and former Plan participants, and Class Counsel posted the Notice on
 2 their websites. *See* Joint Decl. ¶¶ 33-35. Class Counsel has received and responded to phone
 3 calls and e-mails from approximately 110 Settlement Class members. *Id.* ¶ 36. Class Counsel
 4 will continue to devote significant time to responding to inquiries from the Class and answering
 5 questions concerning the Settlement. *Id.* ¶ 38. Accordingly, Class Counsel request an award of
 6 attorneys' fees and expenses for the significant time they have devoted to this case, and also an
 7 award to the Named Plaintiffs for their services to the Class over the past two-plus years.

8 **III. THE COURT SHOULD AWARD THE REQUESTED FEES AS A MEDIATOR- 9 PROPOSED, MARKET-SET FEE AGREEMENT**

10 The parties to a class action properly may negotiate not only the settlement of the action
 11 itself, but also the payment of attorneys' fees. *Evans v. Jeff D.*, 475 U.S. 717, 734–35, 738 n.30
 12 (1986). In cases outside the “common fund” context, the Supreme Court has made clear that
 13 settlements of requests for attorneys' fees should be encouraged and respected; indeed, it is only
 14 where parties *fail* to reach agreement on fees that courts should scrutinize fee requests:

15 A request for attorney's fees should not result in a second major litigation.
 16 Ideally, of course, litigants will settle the amount of a fee. Where settlement is
 17 not possible, the fee applicant bears the burden of establishing entitlement to an
 18 award and documenting the appropriate hours expended and hourly rates.

19 *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Rule 23(h) of the Federal Rules of Civil
 20 Procedure specifically authorizes the Court to award “reasonable attorney's fees and nontaxable
 21 costs . . . by the parties' agreement.”

22 The virtue in the negotiation of attorneys' fees by the adversarial parties to the settlement
 23 is that the “[m]arkets know market values better than judges do.” *In re Continental Illinois
 24 Securities Litigation*, 962 F.2d 566, 570 (7th Cir. 1992). Thus, “the court can, [generally]
 25 assume that the defendants closely scrutinized the [plaintiffs'] fee requests, and agreed to pay no
 26 more than was reasonable.” *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 582 (3d Cir. 1984).

27 Here, the fees were negotiated *after* agreement was reached on the key terms of the
 Settlement for the class; a well-respected and neutral mediator oversaw the negotiations; and the

1 fees were based upon the mediator's proposal, to which the Parties ultimately agreed (subject to
 2 Court approval). Given that this agreement has been closely scrutinized by all sides—Plaintiffs,
 3 Defendants, and the mediator—the fee agreement should be respected and awarded.

4 **IV. THE AWARD IS REASONABLE**

5 Even if there had not been agreement between the Parties, the requested award would be
 6 amply justified under the Ninth Circuit's standards. In this jurisdiction, courts may use two
 7 methods to determine whether a request is reasonable: (1) percentage of the fund; or (2) lodestar
 8 plus a risk multiplier. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir.
 9 2011); *see also Wing v. Asarco Inc.*, 114 F.3d 986, 988–90 (9th Cir. 1997). Under either
 10 method, the requested fees and expenses are reasonable and should be awarded.

11 **A. The Requested Fees and Expenses Are Reasonable Under the Percentage-of-the-** 12 **Fund Method.**

13 Courts in the Ninth Circuit may choose to cross-check a negotiated fee by evaluating it in
 14 relation to settlement benefits to the class. *See Wing*, 114 F.3d at 990; *Ott v. Mortg. Inv'rs Corp.*
 15 *of Ohio*, No. 14-00645, 2016 WL 54678, at *3 (D. Or. Jan. 5, 2016). Typically, this is done by
 16 evaluating the award as a percentage of the fund. *Wing*, 114 F.3d at 990. Here, the Class
 17 Settlement Amount is \$351.9 million, not including equitable and other relief. Accordingly,
 18 Plaintiffs' request of a total of \$6.5 million total for attorneys' fees, expenses, and incentive fees
 19 represents just 1.8% of the settlement value, which is far below the Ninth Circuit's benchmark of
 20 25%. *In re Bluetooth*, 654 F.3d at 942.

21 **B. The Fee Award Is Reasonable Based on the Lodestar Method.**

22 The lodestar method can also be used to cross-check a negotiated fee amount. *Wing*, 114
 23 F.3d at 988–89. After examining the time and labor required, the Court may apply a multiplier
 24 to the lodestar in light of certain factors, including:

- 25 (1) the time and labor required, (2) the novelty and difficulty of the questions
 26 involved, (3) the skill requisite to perform the legal service properly, (4) the
 27 preclusion of other employment by the attorney due to acceptance of the case,
 (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time

1 limitations imposed by the client or the circumstances, (8) the amount involved
 2 and the results obtained, (9) the experience, reputation, and ability of the
 attorneys, (10) the “undesirability” of the case, (11) the nature and length of the
 professional relationship with the client, and (12) awards in similar cases.

3 *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975);⁹ *see also Hanlon v. Chrysler*
 4 *Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (lodestar figures may be adjusted based on “quality
 5 of the representation, the benefit obtained for the class, the complexity and novelty of the issues
 6 presented, and the risk of nonpayment”). In conducting this analysis, a court “need not discuss
 7 each of the guidelines, so long as it discusses those most relevant to the particular case.” *M.L. v.*
 8 *Fed. Way Sch. Dist.*, 401 F. Supp. 2d 1158, 1169 (W.D. Wash. 2005) (citation omitted).

9 The lodestar method confirms the reasonableness of Plaintiffs’ fee request. Class
 10 Counsel expended a total of 6,207.6 hours developing and prosecuting this litigation. Joint Decl.
 11 ¶ 52. At Class Counsel’s hourly rates, which are comparable to those of other class action
 12 attorneys, this amounts to a lodestar of \$3,445,610.10. *Id.* ¶ 60. Plaintiffs’ total requested award
 13 of \$6.5 million is inclusive of unreimbursed litigation costs totaling \$54,122.73, plus the
 14 requested awards for Plaintiffs in the amount of \$20,000 (discussed below). *Id.* ¶ 72. After
 15 reimbursement of expenses and awards for Plaintiffs, the requested attorneys’ fees amount to a
 16 modest 1.86 multiplier on the combined lodestar of \$3,445,610.10. *Id.* ¶ 51. This multiplier is
 17 warranted under the pertinent *Kerr* and *Hanlon* factors, as discussed below.

18 **1. The Benefits to the Settlement Class.**

19 As discussed in detail in the Final Approval Motion, the Settlement provides substantial
 20 benefits to the Class. First, the Settlement provides for **\$351.9 million** in monetary relief. In
 21 addition to these payments, Providence will continue to make minimum contributions to the Plan
 22 with the present intent to fully fund the Plan by December 31, 2029. Providence will also ensure
 23 the Plan’s trust has sufficient assets to pay vested benefits as they come due. The Settlement also
 24 includes many protections comparable to some of ERISA’s key provisions. For example, Plan
 25 participants and beneficiaries will receive important notices, disclosures, and claims procedures.
 26

27 ⁹ Abrogated on other grounds by *City of Burlington v. Dague*, 505 U.S. 557 (1992).

2. Time and Labor Required.

The 6,207 hours Class Counsel collectively expended on this case were reasonably spent, especially given the high-stakes, high-risk nature of this litigation and the excellent results obtained. Joint Decl. ¶ 52, Exs. C, E. Class Counsel: (1) learned of the widespread use of the church plan exemption by major hospital chains to avoid compliance with ERISA; (2) researched the law bearing on the church plan exemption and concluded hospitals were not entitled to the exemption; (3) investigated the non-profit hospital business as it bore on liability and defenses; (4) investigated the facts of this case and filed the Complaint in this action; (5) reviewed thousands of pages of documents; (6) conducted factual and legal research to oppose the motion to dismiss and negotiate this Settlement; (7) consulted with experts; (8) monitored developments in all the church plan cases in order to determine the impact on this particular case; (9) crafted a comprehensive Settlement after arm's-length negotiations overseen by a third-party mediator; (10) successfully moved for preliminary approval of the Settlement; (11) played a major role in developing the Class Notice materials and posting them on the websites identified in the Notices; and (12) responded to Class member inquiries concerning the Class Notices, the Settlement, and this litigation. *See Id.* ¶¶ 7-38, 55-56. Moreover, Class Counsel's work is not yet done. Class Counsel still need to complete the final approval process, assist Class members with inquiries, respond to any potential objections, and handle any resulting appeal. *Id.* ¶ 38.

The hourly rates Class Counsel charged to perform this work, which range from \$190 to \$945, are reasonable. Joint Decl. ¶¶ 62-70. These rates are "prevailing market rates," for similar services by lawyers of "reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 & n.11 (1984). The reasonableness of these rates is evidenced by other cases approving similar rates. *United Steelworkers v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). Class Counsel recently submitted a fee petition in another church plan case in which they reported hourly rates at amounts comparable to those sought herein, and the court approved the fee award. *See Order and Final Judgment* ¶ 8, *Overall v. Ascension Health*, No. 13-

1 11396 (E.D. Mich. Sept. 17, 2015), Dkt. # 115 (attached to Joint Decl. as Ex. G).¹⁰

2 **3. The Novelty and Difficulty of the Questions Involved, and the Requisite**
 3 **Legal Skill Required.**

4 As noted above, this is not a garden variety ERISA class action; indeed, this area of law
 5 is perhaps the most unpredictable and rapidly developing area of ERISA jurisprudence. The first
 6 cases were filed in March 2013 and are being argued in the Supreme Court only four years later.
 7 District courts reached opposite findings on the threshold issue in this case: whether a church
 8 plan must be established by a church. Joint Decl. ¶ 12 (citing cases). In three such cases, the
 9 plaintiffs prevailed and the Third, Seventh, and Ninth Courts of Appeals held that only churches
 10 may establish church plans. *Id.* These are the cases now pending before the Supreme Court, and
 11 the plaintiffs are represented by Class Counsel. *Id.* The long-standing use of the church plan
 12 exemption by hospitals, the supportive private letter rulings many of them obtained from the IRS
 13 and/or the DOL, the diversity of outcomes in the lower courts, and the fact that the Supreme
 14 Court recently granted certiorari on the fundamental issues in this case were among the
 15 challenges faced by Class Counsel. This action demanded a high degree of legal skill, both to
 16 settle the matter and to be prepared to litigate the issues through trial and on appeal.

17 **4. The Preclusion of Other Employment.**

18 As noted above, this case has been demanding. Even while this case was stayed, Class
 19 Counsel monitored the developments in their other church plan cases pending in the appellate
 20 courts (and now the Supreme Court) for their impact on this case, and informed the Named
 21 Plaintiffs of those developments. *Id.* ¶¶ 17-18. Once the Ninth Circuit ruled, Class Counsel
 22 devoted time to contentious Settlement negotiations and crafting a Settlement Agreement that

23 ¹⁰ Other examples of cases in which Class Counsel submitted fee petitions reporting similar hourly rates, and the
 24 courts approved them, include: *Keithly v. Intelius Inc.*, No. 09-1485 (W.D. Wash. Nov. 21, 2013), Dkt. # 314 (court
 25 approving percentage-of-the-fund award cross-checked against Keller Rohrback's hourly rates); *Herfert v. Crayola*
 26 *LLC*, No. 11-1301 (W.D. Wash. Apr. 27, 2012), Dkt. # 51 (approving Keller Rohrback's hourly rates as reasonable);
 27 *In re Wash. Mut. Mortg. Backed Sec. Litig.*, No. 09-0037, 2013 WL 12155026, at *1 (W.D. Wash. Jan. 11, 2013)
 (order approving Cohen Milstein's fee request as reasonable based in part on Cohen Milstein's hourly rates
 submitted to court); *Moomjy v. HQ Sustainable Mar. Indus., Inc.*, No. 11-00726 (W.D. Wash. March 21, 2013), Dkt.
 # 156 (order approving Cohen Milstein's fee request as fair and reasonable based in part on Cohen Milstein's
 hourly rates submitted to court). Additional examples can be found in the Joint Declaration at ¶¶ 65-68.

1 was fair and reasonable for the Class. *Id.* ¶¶ 19-30. Over the course of the last two-plus years,
 2 this litigation precluded Class Counsel from accepting other potentially profitable work.

3 **5. The Customary Fee.**

4 The modest multiplier of 1.86 requested by Class Counsel falls well within the range of
 5 multipliers approved by Ninth Circuit courts. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043,
 6 1051–52 (9th Cir. 2002) (approving multiplier of 3.65 and citing a survey indicating that most
 7 multipliers range from 1.0–4.0); *Wing*, 114 F.3d at 989 (approving multiplier of 2.0).

8 **6. The Contingent Nature of this Case Supports an Award of Fees.**

9 From the outset, Class Counsel litigated this matter on a contingent basis and placed at
 10 risk their own resources to do so. Absent this Settlement, the Settlement Class and their counsel
 11 risked obtaining no recovery at all. The contingent nature of this case therefore favors the award
 12 of fees. *See In re Infospace, Inc. Sec. Litig.*, 330 F. Supp. 2d 1203, 1216 (W.D. Wash. 2004)
 13 (awarding 3.5 multiplier to account for “counsel’s risk of nonpayment”).

14 **7. Class Counsel’s Experience and Reputation Weighs in Favor of the Award.**

15 Class Counsel are among the leading ERISA plaintiffs’ firms, and possess unparalleled
 16 expertise in the specific types of ERISA claims brought in this lawsuit. Joint Decl. ¶¶ 39-48.
 17 Defense counsel are similarly highly respected and experienced.¹¹ Given this formidable
 18 opposition, a high level of experience was required for success.¹²

19 **V. THE COURT SHOULD AWARD THE REQUESTED EXPENSES**

20 This Court may award reasonable expenses authorized by the parties’ agreement. Fed. R.
 21 Civ. P. 23(h). Trial courts may determine what is reasonable based on an objective standard of
 22 reasonableness, *i.e.*, the prevailing market value of services rendered. *Blum*, 465 U.S. at 895.
 23 Here, based on the Declaration filed contemporaneously herewith, Class Counsel requests
 24 reimbursement for common and routinely reimbursed litigation expenses incurred by Class
 25

26 ¹¹ *See, e.g.*, Proskauer Employee Benefits & Executive Compensation Blog, <http://www.ERISAPracticeCenter.com>.

27 ¹² *See In re Equity Funding Corp. of Am. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977) (Class counsel “have been up against established and skillful defense lawyers, and should be compensated accordingly.”).

1 Counsel in the amount of \$54,122.73. Joint Decl. ¶¶ 71-76, Exs. D, F.¹³ This request is
 2 reasonable and should be approved. *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166,
 3 1177–78 (S.D. Cal. 2007) (finding costs such as those sought here necessary in class litigation).

4 **VI. THE COURT SHOULD AWARD THE REQUESTED INCENTIVE AWARDS**

5 Class Counsel respectfully requests that the Court approve an award of \$10,000 for each
 6 of the Named Plaintiffs. These stipends do not affect or reduce the benefits to the Class in any
 7 way, and will be paid solely out of the allocation of \$6.5 million total that Defendants have
 8 agreed to pay for attorneys' fees, expenses and Incentive Fees. *See* Settlement § 8.1.5.

9 It is well-recognized that “named plaintiffs . . . are eligible for reasonable incentive
 10 payments” as part of a class action settlement. *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir.
 11 2003). Such enhancements compensate class representatives for their time, effort, and
 12 inconvenience. *Id.* at 976–77. Here, each of the Named Plaintiffs made substantial contributions
 13 to the litigation, including: collecting and producing documents; maintaining regular contact with
 14 Class Counsel; reviewing and approving the Complaint; staying abreast of the pleadings,
 15 motions, and settlement negotiations; and involving themselves in the mediation and settlement
 16 of this litigation. Joint Decl. ¶¶ 77-80. These actions provided great benefit to the members of
 17 the Settlement Class and thus the requested awards to Named Plaintiffs are appropriate.

18 **VII. CONCLUSION**

19 For the foregoing reasons, Class Counsel respectfully request that the Court grant
 20 Plaintiffs' motion for an award of attorneys' fees, reimbursement of expenses, and Incentive
 21 Fees for the Named Plaintiffs, together with such other and further relief as the Court may deem
 22 just and proper. A proposed order granting the relief sought herein is attached as Exhibit 2 to the
 23 Final Approval Motion.

24
 25 ¹³ The expenses incurred prosecuting this complex class action include filing fees; travel fees, court appearances and
 26 mediation; copying, delivery and telecommunications charges; legal research charges; mediator's charges; and
 27 similar litigation expenses. These expenses are typically billed by attorneys to paying clients, and are calculated
 based on the actual expenses of these services in the markets in which they have been provided. Class Counsel
 maintains appropriate back-up documentation for each expense. Joint Decl. ¶¶ 71-76.

1 DATED this 3rd day of February, 2017.

2
3 KELLER ROHRBACK L.L.P.

4 By: s/ Lynn Lincoln Sarko
5 s/ Erin M. Riley
6 s/ Laura Gerber
7 s/ Gretchen S. Obrist
8 s/ Havila C. Unrein
9 Lynn Lincoln Sarko, WSBA #16569
10 Erin M. Riley, WSBA #30401
11 Laura Gerber, WSBA #34981
12 Gretchen S. Obrist, WSBA #37071
13 Havila C. Unrein, WSBA #40881
14 1201 Third Avenue, Suite 3200
15 Seattle, WA 98101
16 Tel: (206) 623-1900
17 Fax: (206) 623-3384
18 Email: lsarko@kellerrohrback.com
19 Email: eriley@kellerrohrback.com
20 Email: lgerber@kellerrohrback.com
21 Email: gobrist@kellerrohrback.com
22 Email: hunrein@kellerrohrback.com

23 KELLER ROHRBACK L.L.P.

24 By: s/ Ron Kilgard
25 Ron Kilgard, Pro Hac Vice
26 3101 North Central Avenue, Suite 1400
27 Phoenix, AZ 85012
Tel: (602) 248-0088
Fax: (602) 248- 2822
Email: rkilgard@kellerrohrback.com

COHEN MILSTEIN SELLERS & TOLL,
PLLC

By: s/ Karen L. Handorf
s/ Michelle Yau
Karen Handorf, Pro Hac Vice
Michelle Yau, Pro Hac Vice
1100 New York Avenue, N.W.
Suite 500, West Tower
Washington, D.C. 20005
Tel: (202) 408-4600
Fax: (202) 408-4699

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Email: khandorf@cohenmilstein.com
Email: myau@cohenmilstein.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on February 3, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ Lynn Lincoln Sarko
Lynn Lincoln Sarko

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27