**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF ILLINOIS**

Sheilar Smith, Kasandra Anton, Bonnie Bailey, Peggy Wise, and June Schwierjohn, on behalf of themselves, individually, and on behalf of all others similarly situated, and on behalf of the OSF Plans,

Plaintiffs,

v.

OSF HealthCare System; The Sisters of the Third Order of St. Francis Employees Pension Plan Administrative Committee; and Retirement Committee for the Retirement Plan for Employees of Saint Anthony's Health Center,

Defendants.

No. 3:16-cv-00467-SMY-RJD

**MEMORANDUM IN SUPPORT OF PRELIMINARY APPROVAL OF SETTLEMENT AND FOR CERTIFICATION OF A SETTLEMENT CLASS**

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Plaintiffs Sheilar Smith, Kasandra Anton, Bonnie Bailey, Peggy Wise, and June Schwierjohn ("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"), Ex. 1;[1] (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 and the payment of attorneys' fees and expenses. Defendants do not oppose the relief sought in the Preliminary Approval Motion, but they do not necessarily agree with all the statements in this Memorandum.

## I. INTRODUCTION

This Settlement resolves the claims of Plaintiffs against Defendants OSF HealthCare System, The Sisters of the Third Order of St. Francis Employees Pension Plan Administrative Committee, and the Retirement Committee for the Retirement Plan for Employees of Saint Anthony's Health Center (collectively, the "Defendants"), regarding the Sisters of the Third Order of St. Francis Employees Pension Plan (the "St. Francis Plan") and the Retirement Plan for Employees of the Saint Anthony's Health Center (the "St. Anthony's Plan") (collectively, the "OSF Plans"). The Fourth Amended Class Action Complaint ("FAC"), ECF No. 138, alleges that OSF Healthcare System and the other Defendants impermissibly denied ERISA[2] protections to the participants and beneficiaries of the OSF Plans by incorrectly claiming that the Plans qualify as ERISA-exempt "church plans." *See* 29 U.S.C. § 1002(33); FAC. In short, Plaintiffs' allege that

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[1] All references to "Exhibit" or "Ex." are to the exhibits attached to the Declaration of Laura R. Gerber in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement Agreement ("Gerber Declaration" or "Gerber Decl."), filed concurrently herewith.

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

the Defendants failed to operate the OSF Plans in accordance with ERISA by, among other things, failing to make required contributions to the OSF Plan trusts, and, as a result, the Defendants have left the OSF Plans underfunded and created a risk that the OSF Plans will be unable to pay the accrued pension benefits to which Plaintiffs and the other Class members are entitled. This Settlement was reached after extensive arm's-length negotiations, first with the assistance of the magistrate judge and then with a private mediator. It required a mediator's proposal before the parties could come to agreement on a settlement amount. The Settlement represents the best monetary result for the proposed Settlement Class of participants and beneficiaries of the OSF Plans that could be achieved in light of all legal and practical risks.

As a result of this Settlement, Plaintiffs have agreed to settle all Released Claims against Defendants and other Released Parties in exchange for payments totaling $25 million in cash, with a separate payment of up to $1.75 million for Plaintiffs' attorneys' fees, expenses and incentive awards (the "Fee Award"). The $25 million in payments will be paid into The Sisters of the Third Order of St. Francis Employees Pension Trust ("Master Trust") and used to fund the OSF Plans.

## II. BACKGROUND

### A. Procedural History

Class Counsel Keller Rohrback L.L.P. ("Keller Rohrback") and Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein") 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" exempt from ERISA. Gerber Decl. ¶ 8. 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). *Id.* ¶¶ 8-9. Ultimately, Class Counsel began challenging the contention by a number of religiously affiliated hospitals that their

pension plans were exempt from ERISA. *Id.* ¶ 21. This is one of the cases that arose from that investigation. *Id.* ¶¶ 10-19.

On April 27, 2016, Sheilar Smith, represented by Keller Rohrback and Cohen Milstein, and Armstrong Law Firm LLC, Local Counsel, filed this case in this district. Class Action Compl., ECF No. 1. The case was amended shortly thereafter to add Plaintiff Kasandra Anton. First Am. Class Action Compl., ECF No. 7. On May 3, 2016, another case, with other plaintiffs, represented by other counsel, Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz") and Izard Kindall & Raabe LLP ("Izard Kindall"), filed a similar case in the Central District. Complaint, *Bailey v. OSF HealthCare Sys.*, No. 16-1137 (C.D. Ill. May 3, 2016), ECF No 1. Eventually, the *Bailey* plaintiffs dismissed their case and were added as plaintiffs to the *Smith* case. *See Bailey*, 2017 WL 4319113 (C.D. Ill. Sept. 28, 2017).

Plaintiffs allege that Defendants denied ERISA protections to the participants and beneficiaries of the pension plans at issue by incorrectly claiming that the plans qualify as ERISA-exempt "church plans." *See* 29 U.S.C. § 1002(33). Among other violations, Plaintiffs allege that Defendants: failed to make contributions in satisfaction of ERISA's minimum funding standards; failed to provide Plaintiffs and members of the Class with Summary Plan Descriptions; failed to file any annual reports with the Secretary of Labor and failed to furnish Plaintiffs or any member of the Class with Summary Annual Reports; and failed to put the OSF Plans' assets in trust in compliance with ERISA. FAC ¶¶ 188-91.

Discovery commenced in the fall of 2016, but was stayed, Order, ECF No. 116, shortly after the Supreme Court's decision in *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 546 (2016). The issue presented to the Supreme Court in *Advocate* was 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 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. *Advocate*, 137 S. Ct. 1652 (2017). This case returned to litigation on the alternative theories of liability unaddressed in *Advocate*.

Plaintiffs thereafter amended their Complaint to reflect the *Advocate* decision, Third Am. Class Action Compl., ECF No. 120, and the parties set a new case schedule and resumed discovery. Order, ECF No. 126. The Fourth Amended Class Action Complaint was filed following voluntary dismissal and transfer of the *Bailey* Action. ECF No. 138. On December 29, 2017, Defendants filed a Motion for Summary Judgment, ECF No. 147, which this Court granted on September 28, 2018. Order, ECF No. 196. Plaintiffs appealed to the Seventh Circuit, which reversed and remanded for further proceedings. *Smith v. OSF HealthCare Sys.*, 933 F.3d 859, 861 (7th Cir. 2019). In September 2019 the case returned to active litigation, and the Court set a new schedule for completing discovery. ECF No. 220.

**B. Settlement Negotiations**

Following the remand, the Parties began settlement discussions. They attended an in-person mediation on October 23, 2019 with Magistrate Judge Daly at the Benton, Illinois courthouse. Settlement was not reached at that time, but after that initial conference Magistrate Judge Daly continued to facilitate settlement and settlement communication between the parties. *See* Order, ECF No. 231. The Parties were unable to settle and the referral to Magistrate Judge Daly for settlement discussions was terminated on February 13, 2020. Notice, ECF No. 232.

Shortly thereafter, the Parties retained nationally known mediator Robert A. Meyer, Esq., of JAMS, to further assist them with resolution of this matter through mediation. Settlement discussions were conducted by Mr. Meyer via teleconference with the Parties. Mr. Meyer has substantial experience mediating cases involving ERISA and retirement plan issues, including

cases involving the church plan exemption. Ex. 1 § 2.3; Gerber Decl. ¶¶ 14, 17. From March 4, 2020 through July 13, 2020, the Parties communicated with Mr. Meyer telephonically to continue pursuing a settlement. Gerber Decl. ¶¶ 17-18. On July 13, 2020, the Parties finally accepted a mediator's proposal. *Id.* ¶ 18. The Parties then prepared and signed a Settlement Term Sheet memorializing the key provisions of the agreement, and subsequently informed the Court on July 30, 2020 that they had reached a settlement and requested that the case be stayed pending the filing of a motion for preliminary approval. *Id.*; Joint Notice of Settlement, ECF No. 235.

### C. Overview of the Settlement Agreement

The principal terms of the Settlement Agreement are summarized below.

#### 1. Monetary Consideration

The Settlement requires Defendants to contribute $25 million in cash contribution to the OSF Plans, with minimum payments of $5 million per year until paid in full. Ex. 1 § 7.1.

#### 2. Non-Monetary Consideration

The Settlement also obligates Defendants to make certain guarantees concerning benefits. Thus, if the funds in the Plans become insufficient to pay benefits as they are due at any point through fiscal year 2025, Defendants will contribute sufficient funds to pay the accrued benefits due Participants under the terms of the Plans. Likewise, the Settlement provides that no amendment to the Plans may apply retroactively to decrease the benefits of any Plan participant that have already accrued, and upon termination, each Plan participant's accrued benefit shall become nonforfeitable.

The Plan Administrator will also put in place certain ERISA-like arrangements concerning the Plans' administration, notices and procedures, including providing pension benefit statements to plan participants upon request twice per year, and providing a plan claim review procedure for participants within each Plan's Summary Plan Description.

### 3. Certification of a Rule 23 Class

The Settlement contemplates that the Court will certify a non-opt-out class under Rule 23(b)(1) and (b)(2). *Id.* § 2.2.2. The Settlement Class is defined as: "All vested or non-vested participants of the OSF Plans (and their beneficiaries) as of the date of the filing of the Complaint (April 27, 2016)." *Id.* § 1.21.

### 4. Releases

The Settlement Agreement provides for releases by and among Plaintiffs, Defendants, and certain other non-parties (such as affiliates, insurers, counsel, and Plan fiduciaries) related to the litigation. *Id*. § 3. The persons to be released by Plaintiffs are defined as the "Releasees" or "Released Parties" and enumerated at Section 1.19 and Section 3.2 of the Settlement Agreement. *Id.* §§ 1.19, 3.2. The Releasees will be released from the "Released Claims," which generally include all claims that could have been asserted by Plaintiffs, arising under federal or state law, related to the sponsorship, funding, maintenance, operation or termination of, or distributions from, the Plan. *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*. § 3.3.

### 5. Notice

The draft [Proposed] Preliminary Approval Order, Ex. 2, provides for the following proposed Class Notice Program: (a) a class notice ("Class Notice"), sent by Defendants to the last known address of members of the Settlement Class and (b) an internet publication of the Settlement Agreement and Class Notice on Keller Rohrback's and Cohen Milstein's websites. *See id.*; *see also* Ex. 3 (Class Notice). Defendants will pay the costs for notice and other distribution expenses to the Settlement Class. Ex. 1 § 2.23.

### 6. Attorneys' Fees, Costs and Incentive Awards

Plaintiffs' Counsel will seek district court approval to receive an award of reasonable out-of-pocket expenses and attorneys' fees. *Id.* § 8.1.4. Class Counsel also intends to ask the Court to award incentive fees to the Named Plaintiffs of $5,000 each, in light of their substantial contributions to the litigation, including: collecting and producing documents; participating in discovery; maintaining regular contact with Class Counsel; reviewing and approving multiple Complaints; staying abreast of settlement negotiations; and advising on the settlement of this litigation. *Id.*; Gerber Decl. ¶ 25. The Settlement Class shall be notified of these details in the Class Notice. *See* Ex. 3. Class Counsel will seek no more than $1,750,000 in total for the award of attorneys' fees, expenses and Incentive Awards.[3] Ex. 1 § 7.1.2. OSF will cause any such award to be paid *in addition to* the other monetary terms set forth in the Settlement Agreement. *Id.* Defendants shall pay Class Counsel the Fee Award, or any lesser amount as ordered by the Court in its discretion, thirty (30) calendar days after the Court's entry of the Final Approval Order, notwithstanding the existence of any timely-filed objections thereto, potential for appeal therefrom, or any collateral attack on the Settlement or any part thereof, subject to the caveats set forth in Section 7.14. *Id.* §§ 7.1.2, 7.1.4.

**D. Reasons for the Settlement**

Plaintiffs have entered into the Settlement Agreement with an understanding of the strengths and weaknesses of their claims. In reaching this agreement, Class Counsel and Plaintiffs have considered, among other things, the risks of litigation; the time necessary to achieve a complete resolution through litigation; the complexity of the claims set forth in the FAC; the ability of Defendants to withstand judgment; and the benefit accruing to the Class members under the

[3] This award will cover the fees, expenses, and incentive awards of both *Smith* and *Bailey* plaintiffs and counsel.

Settlement. Gerber Decl. ¶ 24. They have also considered Defendants' financial condition; reviewed documents produced by Defendants; assessed the range of possible recovery; and considered the significant uncertainties in predicting the outcome of this litigation on the merits of Plaintiffs' claims. *Id.*; *see also* Ex. 1 §§ 5.14, 6. Having weighed these factors, Class Counsel and Plaintiffs have concluded that the Settlement is fair, reasonable, and in the best interests of the Settlement Class, and should be presented to the Court for approval. Gerber Decl. ¶ 24.

## III. DISCUSSION

### A. The Standards for Preliminary Approval

Rule 23(e) governs settlements of class action lawsuits. It provides that "[t]he 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.[4] *See Annotated Manual for Complex Litigation (Fourth)* (the "Manual") § 13.14 (2004). Rule 23(e) further provides that 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

[4] A [Proposed] Order and Final Judgment is attached as Exhibit 4 to the Gerber Declaration.

class members of the proposed settlement and to proceed with a fairness hearing." *Armstrong v. Bd. of Sch. Directors of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds*, *Felsen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). As the Manual 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. *See, e.g.*, *Tenuto v. Transworld Systems, Inc.*, 2001 WL 1347235 (E.D. Pa. 2001) ("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") . . .

Manual § 21.662; *see also Wyms v. Staffing Sols. Se., Inc.*, No. 15-cv-0643-MJR-PMF, 2016 WL 6395740, at *4 (S.D. Ill. Oct. 28, 2016) ("The initial examination is a bit less strenuous than the final fairness assessment—at the early stage, the Court need only determine whether the settlement is 'within the range of possible approval.'") (*quoting Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982).

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); *see also Burnett v. Conseco Life Ins. Co.,* No. 118CV00200JPHDML, 2020 WL 4207787, at *4 (S.D. Ind. July 22, 2020) (citing *Hiram Walker*). As the *Burnett* court noted, "[a]t this stage, Plaintiffs need show only that final approval is likely, not that it is certain." *Id.* (citing Fed. R. Civ. P. 23(e)(1)(B)).[5]

A settlement requires 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.*

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[5] At the Final Approval Hearing, the Court has discretion under Rule 23(e)(2) to finally approve the Settlement if the Court finds it to be "fair, reasonable and adequate" after considering the factors set forth in that section.

*Mary M. Holloway Found.*, 36 F.3d 582, 586 (7th Cir. 1994) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry 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. Indeed, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of S.F.*, 688 F.2d 615, 624 (9th Cir. 1982) (citation omitted).

Finally, it is well-established that there is an overriding public interest in settling litigation, and this is particularly true in class actions. *See Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996).

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

Applying these principles, 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 is appropriate for proceeding to notice the class and setting a final fairness hearing: it was reached after extended and contentious negotiations involving the parties and their counsel, and assisted by a two skilled mediators; it takes into account the risks of litigation and the financial circumstances of the Defendants; it promptly provides valuable benefits to the Settlement Class; it proposes reasonable limits on attorney fees and incentive fees; and it does not prefer any Settlement Class members over others.

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

The FAC alleges that the Plans were significantly underfunded. FAC ¶ 82. The $25 million payment provided for in the Settlement Agreement increases the amount available to the OSF Plans to pay retirement benefits in the face of an economically uncertain near-term, while mitigating the risks and uncertainty of litigation.

This risk mitigation is significant, particularly given the Supreme Court's decision in *Advocate.* Gerber Decl. ¶ 24. This Court granted summary judgment against Plaintiffs on their post-*Advocate* claims. Although that decision was reversed by the Seventh Circuit, the issues remaining for litigation are narrow ones, principally whether the OSF Committees "maintained" the Plans within the meaning of ERISA. Class Counsel are very experienced in litigating such claims, and have every confidence that they would ultimately prevail, but they cannot deny that in the face of *Advocate* and the decisions of this Court and the Seventh Circuit there is significant risk in further litigation. Gerber Decl. ¶ 24. The Settlement eliminates that risk.

**2. Class Counsel Endorse the Settlement**

Courts recognize that the opinion of experienced counsel supporting a settlement is entitled to considerable weight. *See, e.g.*, *In re Sears, Roebuck & Co. Front-loading Washer Prods. Liab. Litig.*, No. 06 C 7023, 2016 WL 772785, at *12 (N.D. Ill. Feb. 29, 2016); *Armstrong*, 616 F.2d at 325 (In determining the fairness of a class settlement, "the court is entitled to rely heavily on the opinion of competent counsel."). Here, Class Counsel—two law firms that are nationally recognized for their expertise in employee benefits law and church plan litigation—believe that this Settlement is fair, reasonable, and adequate in light of the circumstances in this case. Gerber Decl. ¶¶ 23-24. Their conclusion is the product of extensive, informed, arm's-length negotiations. Gerber Decl. ¶ 24. The Parties' negotiations were overseen first by Magistrate Judge Daly and then by an experienced private mediator, Robert Meyer, who has mediated many ERISA and retirement plan cases, including cases contesting the applicability of the church plan exemption. *Id.* ¶¶ 14-18. Class Counsel accepted Mr. Meyer's mediator's proposal after considering all relevant factors. *Id.* ¶ 18.

Moreover, Class Counsel has deep familiarity with the factual and legal issues of this case and the risks associated with continued litigation. *Id.* ¶¶ 8-24. Cohen Milstein and Keller

Rohrback, the firms acting as Class Counsel, represented the plaintiffs-respondents before the Supreme Court in *Advocate*, 137 S. Ct. 1652 (2017), as well as the three church plan cases in the Court of Appeals—the Third, Seventh, and Ninth Circuits. *Kaplan v. Saint Peter's Healthcare Sys.*, 810 F.3d 175 (3d Cir. 2015); *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016); *Rollins v. Dignity Health*, 830 F.3d 900 (9th Cir. 2016); Gerber Decl. ¶ 22. Moreover, Class Counsel have handled at least twenty church plan cases nationwide and are familiar with the strength of the cases, the risks, and the particular facts of this case. *Id.* ¶ 21.

Finally, it is well-recognized that named plaintiffs are entitled to an incentive award to induce them to participate in the lawsuit. *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig*., 792 F. Supp. 2d 1028, 1041-42 (N.D. Ill. 2011) (collecting cases) (noting the mean incentive fee is approximately $16,000). Such enhancements compensate class representatives for their time, effort, and willingness to play an active role if the parties continued litigating through trial. *Id.*; *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 503 (N.D. Ill. 2015). Here, each of the Named Plaintiffs made substantial contributions to the litigation, including: collecting and producing documents; maintaining regular contact with Class Counsel; reviewing and approving four complaints; staying abreast of settlement negotiations; and advising on the settlement of this litigation. Gerber Decl. ¶ 25. These actions provided great benefit to the members of the Settlement Class and thus the requested awards to Named Plaintiffs are appropriate.

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 Court should preliminarily approve the Settlement.

**C. The Proposed Class Satisfies the Requirements for Certification Pursuant to Rule 23.**

Plaintiffs request that the Court preliminarily certify the Settlement Class for settlement purposes only, under Rule 23(a), 23(b)(1), and (2). As set forth above, the Settlement Class is defined as "All vested or non-vested participants of the OSF Plans (and their beneficiaries) as of the date of the filing of the Complaint (April 27, 2016)." Ex. 1 § 1.21. Plaintiffs also move the Court to preliminarily appoint Cohen Milstein and Keller Rohrback as Class Counsel.

**1. Provisional Certification of the Settlement Class Is Appropriate**

Settlement classes are subject to the same certification criteria as litigation classes. *Martin v. Reid*, 818 F.3d 302, 308 (7th Cir. 2016); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619-22 (1997). To be entitled to class certification, a plaintiff must satisfy each requirement of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—and at least one subsection of Rule 23(b). *Harper v. Sheriff of Cook Cty.*, 581 F.3d 511, 513 (7th Cir. 2009). 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." *Kolinek*, 311 F.R.D. at 491; *see also Cima v. WellPoint Health Networks, Inc.*, 250 F.R.D. 374, 378 (S.D. Ill. 2008) ("A class of more than 40 individuals raises a presumption that joinder is impracticable.") (quoting *Carrier v. JPB Enters., Inc.*, 206 F.R.D. 332, 334 (D. Me. 2002)). Here, at the time the FAC was filed on October 12, 2017, the OSF Plans had more than 19,300 participants (FAC ¶¶ 58, 59; *see also* Answer to Pls.' FAC ¶¶ 58, 59, ECF No. 140), making it is so numerous that joinder of all members is impracticable.

***Commonality.*** With respect to commonality, under Rule 23(a), "questions of law or fact common to the class" must exist before a class may be certified. *Cima*, 250 F.R.D. 374 at 378 (quoting Fed. R. Civ. P. 23(a)(2)). "[T]he commonality requirement has been characterized as a .

. . . low hurdle . . . [that is] easily surmounted," because, a plaintiff need only show that there is "at least one question of law or fact common to the class." *Id.* at 378. Commonality is generally satisfied when there is "[a] common nucleus of operative fact[s]" relevant to the class members' claims. *Id.* (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)).

There are many common questions of law and fact here, all arising from a common nucleus of operative facts: (1) whether the OSF Plans are subject to ERISA, and, if so; (2) whether the fiduciaries of the OSF Plans have failed to administer and failed to enforce the funding obligations of the OSF Plans in accordance with ERISA; (3) whether the fiduciaries of the OSF Plans failed to provide notices consistent with the requirements of ERISA; and (4) whether OSF would be required to reform the OSF Plans to bring them into compliance with ERISA and to have the OSF Plans comply with ERISA.

***Typicality.*** "[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." *Rosario*, 963 F.2d at 1018; *see also Cima*, 250 F.R.D. at 379 ("The Court should concentrate on the defendants' alleged conduct and the plaintiffs' legal theory to satisfy [typicality].") (alteration in original) (quoting *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 491 (S.D. Ill. 1999)). Here, Plaintiffs' claims are typical of Class Members' claims because all claims are based on Defendants' alleged wrongful conduct, and all members of the Class were similarly affected by such conduct. The requirement of typicality is therefore satisfied.

***Adequacy.*** For purposes of Rule 23(a)'s adequacy requirement, a plaintiff is adequate and thus qualified to represent a class when interest in proving their own claim will lead them to prove the claims of the rest of the class. *Cima*, 250 F.R.D. at 379. Here, the Named Plaintiffs and proposed representatives of the Settlement Class adequately represent the Settlement Class as their

claims are typical of the claims of the other members of the Settlement Class. The Named Plaintiffs' claims, like the claims of the other Settlement Class members, arise from the same event, practice and/or course of conduct—namely, Defendants' failure to maintain the Plans in accordance with ERISA. The Named Plaintiffs' claims are also typical because all of the Settlement Class members are similarly affected by Defendants' conduct, and all Settlement Class members seek the same relief on behalf of the plans. *See Lively v. Dynegy, Inc.*, No. 05-CV-00063-MJR, 2007 WL 685861, at *11 (S.D. Ill. Mar. 2, 2007) (Adequacy is met when the class representatives "possess the same interest and suffer the same injury as the class members.") (quoting *Uhl v. Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 985 (7th Cir. 2002).

**2. The 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 Rule 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); *see also Spano v. Boeing Co.*, 294 F.R.D. 114, 119 (S.D. Ill. 2013) (discussing a Seventh Circuit holding that for class certification in ERISA cases courts must: "distinguish between an injury to one person's retirement account that affects only that person, and an injury to one account that qualifies as a plan injury. The latter kind of injury would be appropriate for class treatment, while the former would not.")

The situation here is undoubtedly the latter; if the Plaintiffs' were injured, then so was the Settlement Class, and a remedy that addresses the harm to one Plaintiff would address the harm to

the entire Settlement Class. 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.*, *Cooper v. IBM Pers. Pension Plan*, No. 99-829-GPM, 2001 WL 36412295, at *6 (S.D. Ill. Sept. 17, 2001), *order corrected*, No. 99-CV-829, 2001 WL 1772736 (S.D. Ill. Oct. 3, 2001) (finding certification appropriate under Rule 23(b)(1)(A) and 23(b)(1)(B), in a case where, like here, "[t]he question presented . . . is whether [d]efendants' pension plan violates ERISA.") The *Cooper* court determined that if certification was not granted, and numerous pension participants filed separate lawsuits to challenge the plan, inconsistent and varying adjudications of the legality of the plan would inevitably result and furthermore, lawsuits with individual members of the class would substantially impair or impede the ability of other members of the class to protect their interests. *Id.*

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

Certification of a class is warranted under Rule 23(b)(2) when all of the prerequisites of Rule 23(a) are satisfied and "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[.]" *Cima*, 250 F.R.D. at 380 (alteration in original) (quoting Fed. R. Civ. P. 23(b)(2)). Here, Plaintiffs allege that Defendants failed to comply with ERISA in the OSF Plans on a plan-wide basis; the Plans are either exempt from ERISA for all participants or for none of them.

In summary, Plaintiffs allege in the FAC that the Defendants: (a) breached their fiduciary duties by operating of the OSF Plans as non-ERISA Plans, for which Plaintiffs seek Plan-wide equitable and remedial relief under ERISA section 502(a)(2); (b) violated 29 U.S.C. § 1024 by

failing to provide Plaintiffs and members of the Settlement Class with adequate summary plan descriptions; (c) violated 29 U.S.C. § 1023 by failing to file annual reports with the Secretary of Labor or Form 5500s and the associated schedules and attachments; (d) violated 29 U.S.C. § 1024(b)(3) by failing to furnish Plaintiffs or any member of the Settlement Class with summary annual reports; (e) violated 29 U.S.C. § 1025(a)(1) by failing to provide Plaintiffs and members of the Settlement Class with pension benefit statements; (f) violated 29 U.S.C. § 1082 by failing to make the required contributions to the OSF Plans in satisfaction of the minimum funding requirements established by ERISA section 302; (g) violated 29 U.S.C. § 1102 by failing to establish the OSF Plans pursuant to written instruments meeting the requirements of ERISA section 402; and (h) violated 29 U.S.C. § 1103 by failing to put the OSF Plans' assets in trust in compliance with ERISA section 403.

Plaintiffs seek to clarify their rights under the terms of the OSF Plans and to require the Defendants to provide Plaintiffs and the Settlement Class with ERISA-compliant benefit statements pursuant to ERISA sections 502(a)(1)(B), 502(a)(3), 29 U.S.C. § 1132(a)(1)(B), 1132(a)(3). Plaintiffs also seek the imposition of civil penalties for the failures described above under ERISA section 502(c), 29 U.S.C. § 1132(c); ERISA section 101(d), 29 U.S.C. § 1021(d); ERISA section 101(f), 29 U.S.C. § 1021(f); and ERISA section 105(a), 29 U.S.C. § 1025(a).

Plaintiffs allege that Defendants breached fiduciary duties owed to the Plans' participants and beneficiaries, including Plaintiffs, pursuant to ERISA sections 502(a)(2), 402(a)(1), 404(a)(1), 405(a), 406(a)(1), and 406(b)(1). Plaintiffs further allege that the Church Plan exemption, as claimed by Defendants, violates the Establishment Clause of the United States Constitution. Although Defendants deny the allegations of the FAC and contend that defenses exist for every claim, each of Plaintiffs' allegations, if proven, would establish harm to the entire class as a whole.

As a result, certification of the proposed class under Rule 23(b)(2) is also appropriate in this action.

**D. Rule 23(g) Is Satisfied.**

Rule 23(g) requires that the Court examine the capabilities and resources of class counsel. Class Counsel has detailed the claims that they developed and brought, and the more than four years of time and effort already expended in this litigation. 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. Gerber Decl. ¶¶ 8-9, 11, 21-23. Class Counsel have handled numerous church plan cases, including before multiple Circuit Courts and the Supreme Court. *Id*. ¶¶ 21-22. Class Counsel thus satisfies the requirements of Rule 23(g).

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

To satisfy due process considerations, Rule 23(c)(2) requires that 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); *see also Kaufman v. Am. Express Travel Related Servs. Co., Inc.*, 877 F.3d 276, 284 (7th Cir. 2017) (Notice of a proposed settlement "should provide class members with all the information they need to make an informed decision" regarding whether or not to object.). Here, the proposed Class Notice Program describes in plain English the Settlement; the considerations that caused Plaintiffs and Class Counsel to conclude that the Settlement is fair and adequate; the maximum Fee Award, a combination of legal fees, costs, and Incentive Awards, that may be paid, the procedure for objecting to the Settlement; and the date and place of the Fairness Hearing. *See* Ex. 3.

With the Court's approval, the Class Notice, Exhibit 3, will be mailed to each member of the Settlement Class by first class mail, no later than sixty (60) days prior to the Fairness Hearing.

The Class Notice is designed to command the attention of Settlement Class, provides summarized information about the Settlement, and directs members of the Settlement Class to two websites (www.cohenmilstein.com/OSFsettlement and/or www.kellersettlements.com) where the Settlement Agreement may be viewed and downloaded. This Notice Program will fairly apprise members of the Settlement Class of the Settlement Agreement and their options with respect thereto, therefore fully satisfying due process requirements. *See id.*; *see also Newberg on Class Actions*, Vol. 3, §§ 8:12, 8:15, 8:28, 8:33 (5th ed. 2014).

The proposed Notice Program fulfills the requirements of due process because it alerts and informs those Settlement Class members who can be identified through reasonable efforts of all of the information set forth above. Courts routinely find that comparable notice programs meet the requirements of due process and Rule 23. *See Mangone v. First USA Bank*, 206 F.R.D. 222, 232 (S.D. Ill. 2001) (mailing notice to the class was sufficient); *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 665 (7th Cir. 2015) (same).

**F. Proposed Schedule**

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

| Event | Time for Compliance |
|---|---|
| Deadline for CAFA Notice | No later than XX days after the Settlement Agreement is filed with the Court |
| Deadline for Mailing of Class Notice and Posting Class Notice to Website | No later than 60 days prior to the Proposed Fairness Hearing |
| Deadline for Filing Plaintiffs' Motion for Final Approval, Attorneys' Fees and Expenses, and Incentive Fees for Plaintiffs | 45 days prior to the Proposed Fairness Hearing |
| Deadline for the Settlement Class to Comment upon or Object to the Proposed Settlement | 28 days prior to the Proposed Fairness Hearing |
| Deadline for Filing Plaintiffs' Reply in Support of Motion for Final Approval, Attorneys' Fees and Expenses, and Incentive | 7 days prior to the Proposed Fairness Hearing |

| Fees for Named Plaintiffs, and for the Parties to Respond to Any Comments or Objections | |
|---|---|
| Proposed Fairness Hearing | 100 days from entry of the Preliminary Approval Order[6] |

## 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 Named Plaintiffs; and (b) file their motion for final approval of the proposed Settlement.

DATED this 21st day of September, 2020.

By: /s/ *Laura R. Gerber*

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

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**CERTIFICATE OF SERVICE**

I certify that on September 21, 2020, 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/ Laura R. Gerber*