**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**(WESTERN DIVISION)**

| | |
|---|---|
| IN RE MERCY HEALTH ERISA LITIGATION | Civil Action No.: 1:16-cv-00441-SJD |

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, APPROVAL OF CLASS NOTICE, AND SCHEDULING OF A FAIRNESS HEARING**

## S.D. OHIO RULE 7.2(a)(3) TABLE OF CONTENTS AND SUMMARY

# TABLE OF AUTHORITIES

## CASES

**STATUTES**

**RULES**

**TREATISES**

Plaintiffs David Lupp, Janet Whaley, Leslie Beidleman, Patricia Blockus, Charles Bork, Marilyn Gagne, Karl Mauger, Patricia Mauger, Beth Zaworski, Nancy Zink, Mary Alban and Linda Derrick (collectively, the "Named Plaintiffs" or "Plaintiffs"), participants in certain Mercy Health pension plans (the "Plans"),[1] respectfully submit this Memorandum of Law in Support of

[1] There are seven primary Plans at issue, several of which include participants of earlier plans, shown in parenthesis below, which were subsequently merged into one of the seven current plans:

> **(a) Mercy Health Partners - Northern Region Retirement Plan** (including the following merged plans: the St. Charles Mercy Hospital Retirement Plan, the St. Vincent Medical Center Defined Benefit Plan, the St. Anne Mercy Hospital Retirement Plan (also known as the Riverside Mercy Hospital Retirement Plan), the Mercy Hospital Plan of Tiffin, Ohio), and the Mercy Health Partners - Northern Region Retirement Plan (Tiffin));
>
> **(b) St. Rita's Medical Center Retirement Plan (Lima)**;
>
> **(c) Community Health Partners Regional Medical Center Employees' Defined Benefit Pension Plan (Lorain)** (including the following merged plans: the St. Joseph Hospital and Health Center Defined Benefit Pension Plan and the Lakeland Community Hospital Defined Benefit Pension Plan);
>
> **(d) Retirement Plan for Employees of Humility of Mary Health Partners (Youngstown)** (including the following merged plans: the Retirement Plan for Employees of St. Elizabeth Hospital Medical Center, and the Retirement Plan for Employees of St. Joseph Riverside Hospital);
>
> **(e) Mercy Health Partners Pension Plan (Northeast Pennsylvania)** (including the following merged plans: Mercy Health Partners Pension Plan (NEPA - Scranton), the Mercy Health System Northeast Region Defined Benefit Plan 1, the Mercy Health System Northeast Region Defined Benefit Plan 2, and the Mercy Health Partners Wilkes-Barre Employees' Pension Plan (NEPA - WB));
>
> **(f) Mercy Health System - Western Ohio Retirement Plan (Springfield Mercy)** (including the following merged plans: the Mercy Memorial Hospital Retirement Plan, the Mercy Medical Center Retirement Plan, the Mercy Health System – Western Ohio Acute Care Facility Retirement Plan, the Mercy Siena Nursing Home Retirement Plan, the McAuley Center Retirement Plan, and the Mercy Health System – Western Ohio Long Term Retirement Plan); and
>
> **(g) Mercy Health Partners of Greater Cincinnati Retirement Plan (Cincinnati)** (including the following merged plans: the Anderson Mercy Hospital Plan, the Sisters of Mercy of Hamilton, Ohio Retirement Plan, and the Clermont Mercy Hospital Retirement Plan).

The Class Action Settlement Agreement (the "Settlement Agreement"), attached as Exhibit A to the Declaration of Mark P. Kindall in Support of Plaintiffs' Unopposed Motion for Preliminary Approval ("Kindall Decl."), has several exhibits, including the proposed forms of notice of Settlement and proposed forms of the Preliminary and Final Approval Orders. The provisions of the Settlement Agreement, including all definitions and defined terms, are incorporated by reference herein. Thus, all capitalized terms not otherwise defined in this memorandum shall have the same meaning as ascribed to them in the Settlement Agreement.

their Motion for Preliminary Approval of the proposed Settlement. All Defendants[2] agree with and support the ultimate relief Plaintiffs seek. However, Defendants do not agree with some of the averments set forth in this Memorandum and other papers submitted in support of the Motion for Preliminary Approval of Settlement. Plaintiffs seek an Order (1) granting preliminary approval of the Settlement, (2) preliminarily certifying the below-defined Settlement Class pursuant to FED. R. CIV. P. 23, (3) approving the manner of giving notice of the Settlement to the proposed Settlement Class ("Notice Plan"), and (4) setting a date for a Fairness Hearing.

## I. INTRODUCTION

Plaintiffs' central contention in this litigation was that Defendants were failing to operate the Plans in accordance with ERISA. In particular, Plaintiffs alleged that the Plans did not meet ERISA's minimum funding requirements[3] and did not pay premiums to the Pension Benefit Guarantee Corporation (the "PBGC"), that the fiduciaries failed to provide Plan information to participants as required by ERISA and made lower lump sum payments to participants than ERISA would require as a result of using outdated actuarial assumptions. Defendants filed Motions to Dismiss, arguing that the Plans were properly within ERISA's statutory exemption for "church plans" and the alternative state law claims failed as a matter of law (ECF No. 69); Defendants further argued that Plaintiffs failed to show injury. ECF No. 70. Plaintiffs strongly refute each of these arguments. *See* ECF Nos. 72 and 73. However, Plaintiffs also recognize that the legal questions at the heart of this case are novel and success is far from assured. In consequence, Plaintiffs engaged in settlement discussions with Defendants and reached a proposed agreement (the "Settlement") with the assistance of an

[2] The Defendants in this action are Mercy Health (formerly known as Catholic Health Partners), the Mercy Health Retirement Plan Committee, and the individual members of that Committee and any committee that was responsible for carrying out the provisions of the Plans.

[3] In the alternative, Plaintiffs alleged that the Plans were underfunded as a matter of state law. *See* Master Consolidated Complaint ("MCC"), ECF No. 66, Counts 10 (contract) 11 (unjust enrichment) and 12 (trusts).

experienced JAMS mediator, Robert Meyer. Plaintiffs now seek to present the proposed Settlement to the Class and the Court, and thus request that the Court preliminarily approve the Settlement, certify a Settlement Class, approve the substance and procedure for notifying class members, and set a date for the Fairness Hearing.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. Investigation of Claims, Filing of Initial Complaints & Consolidation

Plaintiff David Lupp filed the initial complaint in this matter (the "Lupp Complaint") on March 30, 2016 concerning the Mercy Health Partners Retirement Plan. *Lupp v. Mercy Health*, No. 1:16-cv-00441-SJD-SKB. The complaint, which was based on an intensive investigation of the plan at issue and its financial condition, described in detail the structure and governance of the plan, identified plan fiduciaries and the facts that established their fiduciary status, and set forth the factual basis for claiming that the plan was not entitled to "church plan" status under ERISA and was otherwise in violation of ERISA's requirements.[4]

On May 3, 2016, Janet Whaley, a participant in the St. Vincent Retirement Plan, and Leslie Beidleman, a participant in the St. Vincent Retirement Plan and the Mercy Health Partners – Northern Region Retirement Plan (Cash Balance), filed a related case, *Whaley v. Mercy Health*, No. 1:16-cv-00518-SJD-SKB (the "*Whaley* Complaint"), on behalf of themselves and all participants in and beneficiaries of defined pension plans established, maintained, administered and/or sponsored by Mercy Health and its affiliates, which Mercy Health claimed were entitled to ERISA's church plan exemption. The *Whaley* Complaint was based on an in-depth independent investigation by Whaley's counsel, and contained additional facts and legal theories that were not in the *Lupp*

[4] *See* Declaration of Mark Gyandoh in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Gyandoh Decl."), filed herewith, at ¶ 3.

complaint.[5] On June 24, 2016, Whaley filed an Amended Complaint, adding as Plaintiffs Patricia Blockus, a participant in the Mercy Health System Wilkes Barre Cash Balance Plan, Charles Bork, Marilyn Gagne and Nancy Zink (like Beidleman, participants in both the St. Vincent Retirement Plan and the Mercy Health Partners – Northern Region Retirement Plan (Cash Balance)), Karl and Patricia Mauger (participants in the Mercy Health Partners Pension Plan/Mercy Health Partners (NEPA) Plan), and Beth Zaworski, a participant in several of the Mercy Health Plans. Whaley Counsel Decl., ¶ 8 and ECF No. 26.

On June 30, 2016, Mary Alban filed an additional related complaint. *Alban v. Mercy Health*, No. 1:16-cv-00726-SJD-SKB. The Court consolidated the *Lupp* and *Whaley* actions on July 21, 2016 (ECF No. 30), and consolidated the *Alban* action with the prior two actions on August 11, 2016 (ECF No. 38). In accordance with a schedule proposed by the parties (ECF No. 16) and approved by the Court (ECF No. 20), Plaintiff Lupp and the Whaley Plaintiffs filed competing motions to appoint interim class counsel and liaison counsel pursuant to Federal Rule 23(g) (ECF Nos. 25 and 33). On December 2, 2016, Magistrate Judge Bowman issued a report and recommendation that the Lupp 23(g) motion should be granted, the Whaley 23(g) motion should be denied, and that Izard, Kindall & Raabe, LLP ("IKR") and Kessler Topaz Meltzer & Check, LLP ("KTMC") should be appointed interim co-lead counsel for the class, and Strauss Troy Co., LPA should be appointed interim liaison counsel (ECF No. 42). The Court confirmed the recommendation (ECF No. 58) after the Whaley Plaintiffs withdrew their objection (ECF Nos. 45 and 57).

[5] *See* Joint Declaration of Laura R. Gerber, Michelle C. Yau, and Thomas R. Theado in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement ("Whaley Counsel Decl."), filed herewith, at ¶¶ 4-9.

### B. The Master Consolidated Complaint & Motions to Dismiss

The next step in the litigation was to craft the MCC for the now-combined actions, incorporating the work that all Plaintiffs' counsel had done to that point, as well as additional investigations conducted subsequent to the filing of the earlier complaints. To ensure that the MCC was as complete and accurate as possible, Interim Class Counsel engaged in discussions with counsel for Defendants to expedite responses to certain of the initial discovery requests that had been served on Defendants on January 18, 2017. Kindall Decl., ¶ 7.

While Class Counsel were working to finalize the MCC, the U.S. Supreme Court issued its ruling in *Advocate Health Care Network v. Stapleton*, __ U.S. __, 137 S. Ct. 1652 (June 5, 2017). The Supreme Court had granted certiorari in three cases involving large health care companies that were not operating their pension plans in accordance with ERISA based on a claim, challenged by plaintiffs, that each of the plans qualified as an ERISA-exempt "church plan."[6] The *Advocate* decision was limited to resolving a question of statutory construction central to all three cases: whether a plan that had not been established by a church in the first instance could be considered a church plan. *Advocate*, 137 S. Ct. at 1656. While the Court determined that ERISA imposed no requirement that a church plan be originally established by a church, the Court did not address whether the plans at issue in the three cases otherwise qualified for the statutory exemption. *Id.* at 1657 n.2.

Although the *Advocate* decision was limited to the precise issue of statutory construction considered by the Court, the ruling did foreclose one of the primary arguments Plaintiffs had advanced in their initial complaints as to why the Plans at issue in this case should not be considered

[6] The appellate court rulings reviewed (and overturned) by *Advocate* were *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016), *Kaplan v. Saint Peter's Healthcare Sys.*, 810 F.3d 175 (3d Cir. 2015), and *Rollins v. Dignity Health*, 830 F.3d 900 (9th Cir. 2016).

"church plans." This required Plaintiffs to substantially revise their approach to the MCC, focusing on provisions of the statute that had not been addressed in *Advocate*, and adding state law claims as alternative grounds for relief. Kindall Decl., ¶ 8. The final MCC was 70 pages long and included 402 paragraphs of detailed factual and legal allegations in support of Plaintiffs' claims. Plaintiffs completed and filed the MCC on September 14, 2017 (ECF No. 66).

On November 13, 2017, Defendants filed a lengthy Motion to Dismiss the MCC for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6) together with supporting addenda, declarations and exhibits (*see* ECF Nos. 69 – 69-33). Defendants simultaneously filed a Motion to Dismiss for lack of jurisdiction under FED. R. CIV. P. 12(b)(1) (*see* ECF Nos. 70 – 70-5).

Just over a month after Defendants filed their Motions to Dismiss, and while Plaintiffs were in the midst of preparing their briefs in opposition to both motions, the Tenth Circuit issued its decision in *Medina v. Catholic Health Initiatives*, 877 F.3d 1213 (10th Cir. 2017). Kindall Decl., ¶ 10. *Medina*, like the instant case, was a challenge to a hospital system's claim that its pension plan was entitled to the "church plan" exemption in ERISA. The Tenth Circuit upheld the Colorado District Court's decision granting summary judgment for the defendants on grounds which were applicable to certain of the arguments advanced by Plaintiffs here. Accordingly, in responding to Defendant's Rule 12(b)(6) motion, Plaintiffs had to address an area of law that was both new and subject to shifting interpretations. Plaintiffs filed the briefs in opposition to Defendants' motions to dismiss on January 12, 2018. ECF Nos. 72 & 73.

### C. Mediation and the Proposed Settlement Agreement

Following Plaintiffs' filing of their briefs in opposition to the motions to dismiss, interim Class Counsel and counsel for Defendants discussed the possibility of resolving the case through mediation. In late January, 2018 the parties retained Robert Meyer, an independent JAMS mediator who had successfully mediated several other cases involving ERISA's "church plan" exemption,

and scheduled an in-person mediation session for February 27, 2018 in Chicago. Kindall Decl., ¶ 11; Gyandoh Decl., ¶ 7. The Parties filed a joint motion for a stay of all case deadlines for a period of ninety days to provide time for negotiations, which the Court granted on February 2, 2018. ECF No. 75.

In preparation for the mediation, Interim Class Counsel consulted with an actuarial expert concerning the adequacy of the Plans' current funding levels. Based on current market values, Plaintiffs' expert concluded that the Plans would not be required to make additional contributions to the Plans this year in the event that they were required to meet ERISA standards. Kindall Decl., ¶ 12. As a result, even if Plaintiffs were to prevail on the merits today, given current funding levels and market conditions, it is unlikely that the judgment would have required Defendants to provide additional funding for the Plans this year.[7]

The mediation took place as scheduled on February 27, 2018, and lasted all day, with the parties negotiating back-and-forth on each significant point. At the end of the day, as the Parties had not otherwise been able to reach agreement, Mr. Meyer made a mediator's proposal and gave each Party a week to inform him, on a confidential basis, whether they accepted the proposal. On March 6, 2018, the mediator reported that both sides had accepted his proposal. Kindall Decl., ¶ 13; Gyandoh Decl., ¶ 7; Whaley Counsel Decl, ¶ 12.

Following the successful mediation, the Parties negotiated a term sheet that incorporated the specific proposals discussed during the mediation. Kindall Decl., ¶ 14. The Parties then began the process of negotiating the Settlement Agreement itself, which incorporated the provisions of the term

[7] Of course, if the Court required Defendants to operate the Plans in accordance with ERISA, the statutory minimum funding levels would have had to be maintained indefinitely. Since funding levels depend, in part, on the market performance of the investments made by the Plans' trust funds, there is no guarantee that a plan that meets minimum requirements today will continue to meet them in the future.

sheet as well as other ancillary issues and general terms, as well as the exhibits to the Settlement Agreement, including the class notice of settlement. *Id.* Several of the key terms – first in the term sheet, then in the Settlement Agreement – required significant additional negotiations, both in writing and through conference calls. As a result, the negotiations took longer than the Parties had anticipated, which necessitated requesting an extension of the stay the Court had previously entered. *Id.; see also* ECF Nos. 78 & 79. The Settlement Agreement was finalized and executed by the Parties on July 13, 2018.

### D. The Proposed Settlement

The Settlement provides that Defendants will continue to operate the Plans as "church plans," and Plaintiffs and Settlement Class Members will provide a release of claims. Settlement Agreement, § 4. In exchange, the Settlement provides the following benefits to the Settlement Class:

- ***Benefits Commitment:*** For a period of nine (9) years, if any of the Plans are unable to pay the accrued benefits due to Settlement Class Members, Mercy Health guarantees, and will cause any successor of Mercy Health to guarantee, that the trust funds of each of the Plans shall have sufficient funds to pay the benefits due. Furthermore, if the Plans are merged with or into another plan during that nine-year period, the Plans' participants will be entitled to the same (or greater) benefits post-merger as they enjoyed before the merger. Settlement Agreement, § 9.2.
- ***Additional Information for Plan Participants:*** For a period of nine (9) years, Mercy Health will make a Plan summary available electronically, which will disclose the Plans' fiduciaries, the persons or entities with authority to make Plan amendments, describe the benefits available under the Plans, the distribution options and other general information. Settlement Agreement, § 9.3. Additionally, over the same nine-

year period, Settlement Class Members will be able to obtain up-to-date information about their plan benefits, including information about their accrued benefits and projected benefits, either through a toll-free number, a website or a printed statement. Settlement Agreement, § 9.4.

- ***Additional Payment to Certain Settlement Class Members Who Took Lump Sum Distributions from January 1, 2011 Through and Including February 27, 2018:*** The MCC included allegations that the St. Anne, St. Charles and St. Vincent Plans (which are all part of the Mercy Health Partners – Northern Region Retirement Plan) made distributions to participants who elected to take a lump sum payment that were less than they would have been, had ERISA's mandated actuarial assumptions been used to calculate the payments. MCC ¶¶ 71-82, 236 and 237. As determined through discovery, during the period from January 1, 2011 through the date of the mediation, approximately 1,390 participants in the Mercy Health Partners-Northern Region Retirement Plan, the Mercy Health Partners of Greater Cincinnati Retirement Plan or the St. Rita's Medical Center Retirement Plan received voluntary lump sum payments that would have been higher had ERISA's rules been applied. Under the Settlement, each of these Settlement Class Members will receive an additional $450 as a lump sum payment. Settlement Agreement, §§ 8.1 and 8.2.
- ***Notice to the Settlement Class:*** The Settlement Agreement provides that Defendants will pay for the cost of providing the Court-approved notice to Settlement Class Members by first-class mail. Settlement Agreement, § 8.5.
- ***Payment of attorneys' fees and expenses and case contribution awards:*** Defendants have agreed to pay Plaintiffs' reasonable attorneys' fees and expenses as well as Case

> Contribution Awards to the Named Plaintiffs in recognition of their efforts on behalf of the Settlement Class. Settlement Agreement, § 8.3 and 8.4. The Settlement Agreement provides that the amounts to be paid for attorneys' fees and expenses and for Named Plaintiff Case Contribution Awards will be determined by the Court at its discretion, but that the total amount Defendants will be required to pay for all of these items combined will not exceed $850,000. *Id.* Any such payment will not reduce the amount of the guarantee, the amount of the lump sum payments, or otherwise affect any other benefit received by the Class under the Settlement. The Settlement Agreement is not contingent upon the Court's award of attorneys' fees or expenses or Case Contribution Awards for the Named Plaintiffs. Settlement Agreement, § 11.4.

Under the proposed Settlement, Plaintiffs and Settlement Class Members will fully, finally, and forever release any and all actual or potential claims, actions, causes of action, demands, obligations, liabilities, attorneys' fees, expenses and costs under federal or state laws arising out of the allegations of the Complaint that were brought or could have been brought as of the date of the Settlement Agreement, including the distributions to the Lump Sum Class Members, any current or prospective challenge to the "Church Plan" status of the Plans.[8]

The claims released in the Settlement Agreement do not include:

(a) any rights or duties arising out of the Settlement Agreement;

[8] Settlement Agreement, § 4. The Settlement Agreement also provides that Plaintiffs and the Settlement Class will expressly waive and relinquish, to the fullest extent permitted by law, the provisions, rights and benefits of § 1542 of the California Civil Code, which provides:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor and any and all provisions, rights and benefits of any similar statute, law or principle or common law of the United States, any state thereof, or any other jurisdiction.

(b) individual claims for benefits brought under state law (provided that no Settlement Class member shall challenge the Plan's status as a church plan exempt from ERISA in any such claim);

(c) claims related to any other plan that is merged into or consolidated with any of the Plans after April 26, 2018;

(d) claims that might arise if the Roman Catholic Church ever disassociates itself from the Plans' sponsors, unless the Plans' sponsors promptly associate with another church, any claim arising prospectively under ERISA; and

(e) any claim arising under ERISA with respect to any event occurring after: (i) the Internal Revenue Service issues a written ruling that the Plan(s), or any of them, do not qualify as a church plan (limited only to claims by members of the Plan or Plans covered by such a ruling), (ii) a Plan makes an election under IRC § 410(d) to be covered by ERISA (limited on to claims by members of the Plan or Plans that make such an election); (iii) an amendment to ERISA is enacted and becomes effective as a law of the United States eliminating the Church Plan exemption in ERISA; or (iv) the Roman Catholic Church claims no association with the Plans' Sponsor. Settlement Agreement, § 4.

## III. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT

### A. The Law Favors and Encourages Settlements

There are three steps which must be taken by the court in order to approve a settlement: "(1) the court must preliminarily approve the proposed settlement, (2) members of the class must be given notice of the proposed settlement, and (3) after holding a hearing, the court must give its final approval of the settlement." *Amos v. PPG Indus., Inc.*, No. 05-cv-70, 2015 WL 4881459, at *1 (S.D. Ohio Aug. 13, 2015) (citing FED. R. CIV. P. 23(e)). The district court may determine preliminary approval based upon "its familiarity with the issues and evidence of the case as well

as the arms-length nature of the negotiations prior to the settlement." *Mayborg v. City of St. Bernard*, No. 04-cv-00249, 2007 WL 3047235, at *3 (S.D. Ohio Oct. 18, 2007).

Settlement of class actions "is generally favored and encouraged." *Connectivity Sys. Inc. v. Nat'l City Bank*, No. 08-cv-1119, 2011 WL 292008, at *1 (S.D. Ohio Jan. 26, 2011) (citing *Franks v. Kroger Co.*, 649 F.2d 1216, 1224 (6th Cir. 1981)); *In re Nationwide Fin. Servs. Litig.*, No. 08-cv-249, 2009 WL 8747486, at *1 (S.D. Ohio Aug. 19, 2009) (finding the law generally favors and encourages the settlement of class actions); *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369 (S.D. Ohio 2006) (same).

The Sixth Circuit has directed courts to consider the following factors in evaluating the fairness, adequacy and reasonableness of a proposed settlement:

> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

*UAW v. Gen. Motors Corp.*, 497 F.3d 615, 630 (6th Cir. 2007); *see also Pelzer v. Vassalle*, 655 F. App'x 352, 359 (6th Cir. 2016) (quoting *UAW*). "'The district court enjoys wide discretion in assessing the weight and applicability of these factors.'" *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 496 (E.D. Mich. 2008) (quoting *Granada Inv. v. DWG Corp.*, 962 F.2d 1203, 1205-06 (6th Cir. 1992)).

**B. <u>The Proposed Settlement Should be Preliminarily Approved</u>**

At this stage of the proceedings – prior to notification of the Settlement Class – it is too soon to evaluate the reaction of absent class members. The remainder of the factors set out in *UAW*, however, support the conclusion that the proposed Settlement is fair, reasonable and adequate, and should at a minimum be preliminarily approved.

### 1. The Proposed Settlement Was the Product of Arms-Length Negotiations and Was Not Procured by Any Fraud or Collusion

"Courts presume the absence of fraud or collusion in class action settlements unless there is evidence to the contrary." *Johnson v. W2007 Grace Acquisition I, Inc.*, No. 13-2777, 2015 WL 12001269, at *5 (W.D. Tenn. Dec. 4, 2015). Here, there is no evidence of fraud or collusion. Rather, the Settlement was reached after Plaintiffs had: (1) thoroughly investigated the factual and legal basis for their claims, in the course of preparing their initial complaints and the MCC; (2) obtained and evaluated substantial information concerning the current financial condition of the Plans and consulted with an actuarial expert; (3) fully briefed two motions to dismiss; (4) participated in a mediation process involving a full-day, formal mediation session before a highly-respected independent mediator, which resulted in the issuance of a mediator's proposal for settlement; (5) conducted lengthy and numerous follow-up discussions and exchanges of drafts. The litigation has already lasted over two years.

As this Court has noted, "[t]he involvement of two different plaintiffs' firms, two different defense firms, and an independent mediator greatly decrease the risk of fraud or collusion." *Michel v. WM Healthcare Solutions, Inc.*, No. 10-cv-638, 2014 WL 497031, at * 9 (S.D. Ohio Feb. 7, 2014) (citing *Hainey v. Parrott*, 617 F. Supp. 2d 668, 673 (S.D. Ohio 2007)); *see also Gokare v. Fed. Express Corp.*, No. 11-cv-2131, 2013 WL 12094870, at *3 (W.D. Tenn. Nov. 22, 2013) ("The participation of an independent mediator in the settlement negotiations virtually assures that the negotiations were conducted at arm's length and without collusion between the parties."). Here, Defendants were represented by Howard Shapiro, co-chair of the ERISA litigation group at Proskauer Rose LLP, a prominent defense firm with an international reputation. Plaintiffs were represented at the mediation by co-lead counsel from Izard, Kindall & Raabe and Kessler Topaz Meltzer & Check, joined by plaintiffs' counsel from Keller Rohrback. All three firms have

extensive experience in class actions, complex litigation, ERISA and – in particular – the ERISA "church plan" litigation. *See, e.g.*, ECF Nos. 25 & 35. Moreover, the involvement of the independent JAMS mediator was critical to reaching the Settlement.

**2. The Complexity, Expense and Likely Duration of the Litigation**

"In evaluating a proposed class settlement, the court must weigh the risks, expense, and delay plaintiffs would face if they continued to prosecute the litigation through trial and appeal." *Johnson*, 2015 WL 12001269, at *6. Here, absent the Settlement, the Parties would face extended litigation. Although the case has been litigated over two years, Defendants' motions to dismiss are still pending.[9] Assuming the MCC survived the motions to dismiss, additional fact and expert discovery, class certification, summary judgment, trial and possible appeals all lie ahead.

The history of the litigation to date demonstrates that the issues are both novel and complicated. When the *Lupp* action was filed on March 30, 2016, appellate panels of the Third and Seventh Circuits had just unanimously determined that pension plans not initially established by a church could not qualify for the church plan exemption, and a panel of the Ninth Circuit, again without dissent, agreed on July 26, 2016. Despite the absence of a circuit split – indeed, there was not even a split among circuit court ***judges***, since all three decisions were unanimous – the Supreme Court granted certiorari and unanimously reversed all three rulings in June of 2017, while Plaintiffs were preparing the MCC. While Plaintiffs were briefing the motions to dismiss, the Tenth Circuit issued *Medina*, the first appellate court ruling addressing the issues left unresolved by the Supreme Court in *Advocate*.

The Sixth Circuit has not had occasion to address any of the issues of statutory construction involved in the ERISA church plan exemption cases. Thus, this factor supports approval because

[9] This Action was stayed prior to Defendants filing replies in support of their motions to dismiss.

the Settlement "secures a substantial benefit for the Class in a highly complex action, undiminished by further expenses, and without delay, costs, and uncertainty of protracted litigation." *Gokare*, 2013 WL 12094870, at *4.

**3. The Litigation Efforts Including Discovery**

As described in detail above, the case has been litigated for two years. Before filing their original complaints, counsel for Plaintiffs thoroughly investigated the facts and legal landscape underpinning the allegations. Further investigation, coupled with information obtained in discovery, went into crafting the MCC, which is the operative complaint in the action. More factual information was provided in the course of the briefing on the motions to dismiss, and in preparation for mediation, Plaintiffs also obtained up-to-date information concerning current funding levels for the Plans. Thus, while Plaintiffs did not conduct extensive discovery, their efforts provided more than sufficient information to assess the strengths and weakness of their case and confirm the appropriateness of the Settlement. *Johnson*, 2015 WL 12001269, at *6 ("The parties' discovery must enable them to evaluate frankly the merits of the case and determine an appropriate settlement value.") (citing *Olden v. Gardner*, 294 Fed. Appx. 210, 218 (6th Cir. 2008)); *see also Michel*, 2014 WL 497031, at *9 (discovery need not be substantial so long as it is adequate). Accordingly, this factor is satisfied.

**4. The Settlement Considered In Light of the Likelihood of Success on the Merits**

"The most important of the factors to be considered in reviewing a settlement is the probability of success on the merits. The likelihood of success, in turn, provides a gauge from which the benefits of the settlement must be measured." *Johnson*, 2015 WL 12001269, at *7 (quoting *Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235, 245 (6th Cir. 2011)). "A plaintiff's likelihood of success should be weighed against the amount and form of

relief offered in the settlement." *Johnson*, 2015 WL 12001269, at *7. "[The court's] task is not to decide whether one side is right or even whether one side has the better of these arguments. Otherwise, [the court] would be compelled to defeat the purpose of a settlement in order to approve a settlement." *Id.*

The Supreme Court's *Advocate* decision does not affect ERISA's requirement that a church plan be "maintained by" either a church, or "an organization . . . the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits . . . if such organization is controlled by or associated with a church or a convention or association of churches. *See* ERISA § 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i). Thus, in crafting the MCC, Plaintiffs focused on these statutory provisions as the primary basis for the suit. Plaintiffs believe that their arguments are correct, as set forth at length in their opposition to Defendants' 12(b)(6) Motion to Dismiss. *See* ECF No. 73, at pp. 4-13 (arguing that Mercy Health itself, rather than the Plan Committee, "maintained" the Plans), at 13-14 (arguing that Mercy Health is neither a church nor an organization the principal purpose of which is the administration or funding of a retirement plan (a "principal purpose organization")), at 14-16 (arguing that, even if the Plan Committee "maintained" the Plans, it could not be considered a "principal purpose organization"), and at pp. 19-24 (arguing that neither Mercy Health nor the Plan Committee are controlled by or associated with a church). Moreover, Plaintiffs argued that the "church plan" exemption would violate the Establishment Clause if it were applied so broadly as to include the Plans at issue here. *Id.* at pages 24-28. Plaintiffs recognize, however, that there is a risk that the Court would not be persuaded by these arguments, which were most recently rejected by the Tenth Circuit in *Medina*.[10]

[10] Plaintiffs have no similar concerns about the jurisdictional arguments Defendants have presented in their Rule 12(b)(1) motion. While some courts, as discussed above, have been sympathetic to defendants' views

Plaintiffs' state law claims, pled in the alternative, focus on causes of action Plaintiffs might have under state contract, quasi-contract and trust law to address underfunding of the Plans in the event the Court were to determine that the Plans are exempt from ERISA. Again, Plaintiffs believe that these claims are valid, as discussed in detail in their opposition to the motion to dismiss. *See* ECF No. 73, at pp. 29-35. However, Plaintiffs again recognize that the Court might disagree with Plaintiffs' analysis. In *Smith v. OSF HealthCare Sys.*, No. 16-CV-467-SMY-RJD, 2017 WL 6021625, at *4 (S.D. Ill. Dec. 5, 2017), for example, the District Court declined to exercise supplemental jurisdiction over similar state-law claims.

Had Plaintiffs obtained a complete victory at trial and further succeeded in defending that judgment on appeal, Defendants would have been compelled to operate the Plans in accordance with all of the requirements of ERISA. Assuming that the Plans' funding levels did not deteriorate between the time of the mediation and the time of trial, it is unlikely that a judgment for Plaintiffs would have required Mercy Health to make additional payments to the Plans for that year, as current funding levels appear to meet ERISA's minimum requirements.[11] Nonetheless, the value of a Plaintiffs' judgment in this case would have been both high and very difficult to quantify.[12]

---

concerning the scope of the church plan exemption, Defendants' jurisdictional arguments are, in Plaintiffs' estimation, unsupported and contrary to law. *See* ECF No. 72.

[11] As noted above, this conclusion was based on an analysis by Plaintiffs' actuarial expert concerning the current funding status of the Plans. *See also* Declaration of Mitchell I. Serota, attached to the Kindall Declaration as Exhibit B, at ¶¶ 4-12.

[12] Plaintiffs recognize that the Court is properly concerned with comparing the result achieved in the proposed Settlement to what the Settlement Class might reasonably have achieved had Plaintiffs prevailed at trial. *Roland v. Convergys Customer Mgmt. Group, Inc.*, No. 15-cv-00325, 2017 WL 4873343 (S.D. Ohio, Jan. 10, 2017). Here, however, the litigation primarily sought injunctive relief that would require Defendants to operate the Plans in accordance with ERISA. This would not have been a one-time only effort, but an obligation that would have continued so long as the Plans and the law remained unchanged. It is possible to estimate what the Plans would have had to pay for PBGC premiums (*see* Serota Decl., ¶¶ 13-25). However, it is not possible to quantify how even that obligation would have changed over time. Mercy Health would have been required to continue meeting ERISA's minimum funding requirements indefinitely, but the cost of doing so would depend on the performance of the Plans' investments, changes in the demographic profile of plan participants over time, and other factors. The costs and benefits of other

As described in the MCC, ERISA establishes numerous protections, both substantive and procedural, for participants in covered retirement plans. ERISA plans must meet certain minimum funding requirements, not just on a particular date, but consistently. Employers must make good any funding shortfalls (ERISA § 302, 29 U.S.C. § 1082), and moreover must pay insurance premiums to the federal Pension Benefit Guarantee Corporation. Lump sum payments must be the "actuarial equivalent" of normal retirement benefits, based on established mortality tables and interest rates. ERISA §§ 204(c)(3), 203(e)(2) and 205(g)(3) (29 U.S.C. §§ 1054(c)(3), 1053(e)(2) and 1055(g)(3)). Employers are required to file annual reports with the Secretary of Labor (ERISA § 103, 29 U.S.C. § 1023), and must notify participants and beneficiaries if the plans are not meeting minimum funding levels (ERISA § 101(d)(1), 29 U.S.C. § 1021(d)(1)). Participants are also entitled to annual funding notices (ERISA § 101(f), 29 U.S.C. § 1021(f)), pension benefit statements (ERISA § 105(a)(1) 29 U.S.C. § 1025(a)(1)) and summary plan descriptions (ERISA § 102, 29 U.S.C. § 1022).

A judgment for Defendants, on the other hand, would have left in place a very unsatisfactory status quo. Under the terms of the Plans, Plan Participants have no recourse in the event that the Plan trust funds become insolvent. Kindall Decl, ¶ 19. Nor are Plan Participants presently entitled to receive any information about the Plans, the Plan fiduciaries, distribution options, or their accrued and projected benefits. Lump sum payments, already made, would be left undisturbed in the event Defendants prevailed.

---

ERISA requirements, like providing benefits statements and summary plan descriptions, is even more difficult to quantify. But the fact that these benefits, collectively, are impossible to quantify does not diminish the fact that they are real, concrete, and highly valuable. ERISA was passed to protect retirees from having their pensions wiped out by insolvency; the protections of the statute are very important to workers. *See Advocate Health Care*, 137 S. Ct. at 1663 (concurring opinion of Sotomayor, *J.*) (noting that ERISA was designed to ensure that workers who have been promised pensions and fulfilled all vesting requirements would actually receive them upon retirement, and acknowledging that the failure of unregulated "church plans" had spurred litigation to limit the scope of the exemption).

In light of the substantial risks involved in the case – risks that continued to grow in light of *Advocate* and cases that have been decided subsequently – the proposed Settlement is a very good result for the Settlement Class. Mercy Health, which included language in each of the Plans disclaiming responsibility for funding deficiencies, will guarantee payments for a period of nine years. This is tantamount to Mercy Health serving as an insurer for Plan benefits for the next nine years. Plaintiffs' expert estimates that the PBGC, which effectively provides a reinsurance benefit to covered pension plans (since employers are required to make up shortfalls in the first instance), would charge premiums in excess of $63 million to insure payments for all of the Plans over the nine-year period, based on the size of the Plans and the number of participants. Serota Decl., ¶ 25. This is a fair estimate of the market value of Mercy Health's nine-year guarantee. *Id.* at ¶¶ 13-24. On top of that, the Settlement Agreement also provides a payment of $450 to approximately 1,390 Settlement Class members who took lump sum payments between 2011 and February of 2018 – a hard-dollar payment of $625,500. Finally, the Settlement Agreement requires that Defendants provide Plan Participants with information concerning the Plans and their benefits for the next nine years that, while less than ERISA requires, is still substantially in excess of what Defendants are currently required to provide under the terms of the Plans themselves. The Settlement thus provides substantial benefits to the Settlement Class, and is a meaningful result when viewed against the significant hurdles Plaintiffs and Class Counsel faced. This factor is thus satisfied.

**5. Both Plaintiffs and Their Counsel Support the Settlement**

"In deciding whether a proposed settlement warrants approval, the informed and reasoned judgment of plaintiffs' counsel and their weighing of the relative risks and benefits of protracted litigation are entitled to great deference." *Johnson*, 2015 WL 12001269, at *8. "Class counsel's judgment that settlement is in the best interests of the class is entitled to significant weight, and supports the fairness of the class settlement." *Gokare*, 2013 WL 12094870, at *6.

Here, Class Counsel KTMC and IKR have extensive ERISA class action experience, including "church plan" litigation experience. This Court recognized as much in appointing KTMC and IKR as Interim Co-Lead Class Counsel (Dkt. Nos. 42 & 58). Indeed, this is the fourth "church plan" settlement that KTMC and IKR worked on together and IKR's fifth settlement of a "church plan" action. Recognizing the very real risks that Defendants might prevail either at trial or on appeal, leaving the Plans' status quo in place, Plaintiffs' Counsel endeavored to obtain the greatest possible amount of protection for Plans and Participants on a forward-looking basis. The Settlement secures a nine-year funding guarantee and additional benefits described above. Class Counsel believe this is a very good result for the Settlement Class given the facts and circumstances of this particular Action. Kindall Decl., ¶ 17; Gyandoh Decl., ¶ 7. Interim Liaison Class Counsel and counsel for the Whaley and Alban Plaintiffs likewise support the proposed settlement. *See* Declaration of Ronald R. Parry in Support of Plaintiffs' Motion for Preliminary Approval of a Class Action Settlement ("Parry Decl."), at ¶ 5; Whaley Counsel Decl., ¶ 14; Declaration of Thomas J. McKenna in Support of Plaintiffs' Motion for Preliminary Approval of a Class Action Settlement ("McKenna Decl."), ¶ 9. Accordingly, this factor is satisfied. *See, e.g.*, *Gokare*, 2013 WL 12094870, at *6 ("It is well settled that, in approving a class action settlement, the court 'should defer to the judgment of experienced counsel who has competently evaluated the strength of [its] proofs.'").

Plaintiffs have been involved in this litigation since its inception, meeting in-person with counsel and/or participating in numerous telephonic conversations with both their own counsel and Class Counsel, including with respect to the Settlement. After discussing all the relevant considerations, Plaintiffs approved the Settlement. Gyandoh Decl., ¶ 7; Whaley Counsel Decl., ¶ 14; McKenna Decl., ¶8.

**6. The Settlement is Consistent With Public Interest**

"The law favors the settlement of class action litigation." *Johnson*, 2015 WL 12001269, at *12. "Further, approval of a settlement that provides substantial benefits to a class serves the public interest by eliminating substantial burdens on the court system that would result from continued litigation." *Gokare*, 2013 WL 12094870, at *13. This is particularly true in the class action context. *See id.* ("[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are notoriously difficult and unpredictable and settlement conserves judicial resources"). Given that the Settlement will provide meaningful benefits to the Settlement Class and fully resolve the Action without further burdening the Court, the Settlement is in the public interest, satisfying this factor.

**7. Additional Considerations**

In last year's *Roland* decision, this Court considered two additional factors in ruling on a motion for preliminary approval of a class action settlement: attorneys' fees and an incentive payment to the named plaintiff. While the proposed Settlement contains provisions that address both attorneys' fees and Case Contribution Awards for Named Plaintiffs, neither present any basis to withhold preliminary approval. First, and most importantly, the Settlement Agreement clearly provides that the Court will decide whether to award any amounts for payment of plaintiffs' attorneys' fees and expenses or Case Contribution Awards, and the proposed Settlement is in no way conditioned on any such awards being made. Settlement Agreement, at ¶¶ 8.3 & 11.4. All that the Settlement provides is that Defendants will not oppose a request for attorneys' fees, expenses and Named Plaintiffs Case Contribution Awards that does not require them to pay more than $850,000 in the aggregate. *Id.*, ¶ 8.3.

Courts have recognized that a "clear sailing" provision requires scrutiny, since the possibility exists that class counsel might bargain away something of value in exchange for such

a provision. *See, e.g.*, *In re: Whirlpool Corp. Front–loading Washer Prod. Liab. Litig.*, No. 08-WP-65000, 2016 WL 5338012, at *19 (N.D. Ohio Sept. 23, 2016) (discussing Judge Newman's dissenting opinion in *Malchman v. Davis*, 761 F.2d 893, 908 (2nd Cir. 1985)). At the same time, however, courts have also recognized that defendants have a legitimate interest in quantifying the maximum cost associated with a settlement before agreeing to it:

> [C]lear-sailing clauses can serve perfectly legitimate purposes: a defendant wants to know its exposure in the context of attorney fees, and a clear-sailing provision accomplishes just that. *See Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 425 (6th Cir. 2012) ("where . . . the amount of the fees is important to the party paying them, as well as to the attorney recipient, it seems . . . that an agreement 'not to oppose' an application for fees up to a point is essential to the completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged") (quoting *Malchman*, 761 F.2d at 905 n.5)

*Whirlpool*, 2016 WL 5338012, at *20. Here, as discussed in *Whirlpool*, Defendants sought, at the conclusion of the mediation, to quantify their potential attorneys' fee exposure under the proposed settlement. As noted above, the key terms of the Settlement Agreement were the result of a mediator's proposal. Moreover, as in *Whirlpool*, this is not a case where the fee cap discussed in the Settlement Agreement is disproportionate to the value of the settlement, or would result in a windfall to plaintiffs' counsel. *Id.* As discussed above, the market value of the 9-year guarantee alone is over $63 million; thus, "the Settlement Agreement wins the class substantial benefits." *Id.* Furthermore, Plaintiffs' Counsel in this action have devoted over 2,660 hours to this litigation over the course of two years. *See* Kindall Decl., ¶¶ 24 & 30; Gyandoh Decl, ¶ 10; Parry Decl. Exh. 2; Whaley Counsel Decl. Exh. C; McKenna Decl. Exh. 2. Taking into account the $850,000 cap, current litigation expenses and the intended motion for case contribution awards, the fees that Plaintiffs' counsel will request are unlikely to exceed $781,000. Kindall Decl., ¶ 31. Even if

Plaintiffs' Counsel were awarded this entire amount, the resulting fee would equate to a blended hourly rate of $294. *Id.*[13]

Class Counsel will also request a Case Contribution Award of $2,000 to each of the Named Plaintiffs for their efforts on behalf of the Settlement Class. As discussed more fully in the declarations of Plaintiffs' Counsel, the individual Plaintiffs have been critical to this litigation from the start. They provided valuable information about the numerous Plans at issue in the case, permitting counsel to draft individual complaints – and, ultimately, the MCC – that contained detailed allegations. Plaintiffs met with counsel in person and had numerous telephone calls, provided documents, reviewed filings, and discussed the terms of the proposed settlement with counsel. Gyandoh Decl., ¶¶ 3, 5, 7, and 14; Whaley Plaintiffs' Decl., ¶¶ 6, 8, 11, 13, and 14; McKenna Decl., ¶¶ 2, 4, 5, 6 and 8. Moreover, the amounts requested are at or below awards made by this court in similar cases. *See, e.g.*, *Michel*, at *12 (noting "[t]here is precedent for incentive awards in the neighborhood of $1,000 to $5,000 in consumer protection class actions" and awarding each class representative $3,000). In light of the modest amounts at issue, the substantial benefits provided by the Settlement, and the fact that the Settlement is not contingent upon the Court granting any such payments at all, the Settlement Agreement's provisions concerning Named Plaintiff Case Contribution Awards should not be an impediment to preliminary approval.

[13] This analysis is preliminary and is not, in any event, intended as a substitute for the attorneys' fee analysis that the Court must conduct prior to approving any award of attorneys' fees. *See Ramey v. Cincinnati Enquirer, Inc.,* 508 F.2d 1188, 1196 (6th Cir.1974) (courts awarding attorneys' fees in a class action should consider (1) the value of the benefit to the class, (2) society's stake in rewarding attorneys who produce such benefits, (3) whether the services were undertaken on a contingent fee basis, (4) the value of the services on an hourly basis, (5) the complexity of the litigation, and (6) the professional skill and standing of counsel involved on both sides.). Plaintiffs will address the *Ramey* factors in detail when they file their motion for attorneys' fees and expenses and for the Named Plaintiff Case Contribution Awards. Plaintiffs present this preliminary analysis, however, to demonstrate that there is nothing in the Settlement Agreement's provisions relating to attorneys' fees that should give the Court pause in preliminarily approving the Settlement and authorizing notice to the Settlement Class.

## IV. PRELIMINARY CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE

For settlement purposes only, Plaintiffs seek certification of a Settlement Class comprised of all present or past participants (vested or non-vested) or beneficiaries of the Plans as of the Effective Date of the Settlement.[14] Plaintiffs' claims for breach of fiduciary duty under ERISA are well-suited for certification.

Class certification for settlement purposes under Rule 23 of the Federal Rules of Civil Procedure entails a two-step analysis. First, the Court must determine whether Rule 23(a)'s prerequisites are met, which are: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Next, the court must determine whether Plaintiffs have met the requirements of Rule 23(b). *See In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 517 (E.D. Mich. 2003). Here, Plaintiffs satisfy the prerequisites of Rule 23(a) as well as the requirements of Rule 23(b)(1).

### A. The Proposed Class Meets the Prerequisites for Class Certification Under Rule 23(a)

#### 1. Numerosity

To warrant certification under Rule 23(a)(1), a proposed class must be "so numerous that joinder of all class members is impracticable." *Meyers v. Dtna Trucks North America, LLC*, No. 14-2361, 2014 WL 12531121, *5 (W.D. Tenn. Oct. 8, 2014) (quoting FED. R. CIV. P. 23(a)(1)). "While the Sixth Circuit has not established a strict numerical test for the satisfaction of the numerosity requirement, it has held that "substantial" numbers usually satisfy the requirement. *Michel*, 2014 WL 497031, at *6 (quoting *Daffin v. Ford Motor Co.*, 458 F.3d 549, 553 (6th Cir. 2006)). As the *Michel* Court further reasoned, "[a] proposed class of thousands of individuals is

[14] The Supreme Court has acknowledged the propriety of certifying a class solely for settlement purposes. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 618 (1997). In conducting this task, the court's "dominant concern" is "whether a proposed class has sufficient unity so that absent members can fairly be bound by the decisions of class representatives." *Id.* at 621.

'substantial.'" *Michel*, 2014 WL 497031, at *6. The Settlement Class consists of over 36,000 persons. Serota Decl., ¶ 19. Thus the Settlement Class is sufficiently numerous for joinder to be impracticable, satisfying Rule 23(a)(1).

**2. Commonality**

The threshold for commonality under Rule 23(a)(2) is not high. As the Supreme Court explained in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011), that "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Id.* However, "[f]or purposes of Rule 23(a)(2), even a single [common] question will do." *Id*. at 2556; *see also Ledford ex rel. Epperson v. Colbert*, No. 10-cv-706, 2012 WL 1207211, at *4 (S.D. Ohio Apr. 11, 2012) ("Rule 23(a)(2)'s commonality requirement is satisfied if the resolution of at least one common issue will affect the class as a whole.") (citing *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 424 (6th Cir. 1998)). "A 'perfect fit' of all issues is not required," "[r]ather, the commonality required by Rule 23(a)(2) is 'qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class.'" *Ledford*, 2012 WL 1207211, at *4 (quoting *In re Am. Med. Sys. Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996)). "The resolution of the common issue should advance the litigation." *Ledford*, 2012 WL 1207211, at *4 (citing *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998)).

Common questions abound in ERISA breach of fiduciary duty cases because plaintiffs and class members are similarly affected by defendants' plan-wide conduct. In ERISA cases, courts routinely find that Rule 23(a)'s commonality requirement is satisfied. *See, e.g.*, *Yost v. First Horizon Nat. Corp.*, No. 08-cv-2293, 2011 WL 2182262, at *7 (W.D. Tenn. June 3, 2011) (commonality satisfied where plaintiffs identified numerous legal issues which affected the class in common way). Here, there are common questions concerning whether the Plan qualifies as a "church plan" which would make it exempt from ERISA, and whether the Defendants have

breached their duties under ERISA by improperly funding and administering the Plan. *See, e.g.*, MCC ¶¶ 1-7. These issues are common to the Settlement Class satisfying Rule 23(a)(2). Although the members of the Settlement Class are not all participants or beneficiaries of the ***same*** plan, there are no differences between the Plans that are material to Plaintiffs' claims. Each of the Plans is funded by Mercy Health. Each is "administered" by an internal committee. Each specifically provides that the plan is a "church plan," and that plan participants have no recourse pursuant to ERISA for benefits against any person or entity other than the plans themselves. Kindall Decl., ¶ 7. Thus, Defendants' policy and practice of treating the Plans as being exempt from ERISA under the "church plan" exemption, and the legal claims that flow from that treatment, are common to the Settlement Class.

**3. Typicality**

In *Amos*, the court noted that:

> Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to the class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiffs 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 if his or her claims are based on the same legal theory.

*Amos*, 2015 WL 4881459, at *6-*7 (citing *In re Am. Med. Sys. Inc.*, 75 F.3d at 1082) (quoting Newberg on Class Actions, § 3-13 at 3-76 (footnote omitted)). "If there is a strong similarity of legal theories, the requirement [of typicality] is met, even if there are factual distinctions among named and absent class members." *Griffin v. Flagstar Bancorp, Inc.*, No. 10-cv-10610, 2013 WL 6511860, at *6 (E.D. Mich. Dec. 12, 2013).

Typicality is often met in putative class actions brought for on behalf of a plan under ERISA. *See, e.g., Griffin*, 2013 WL 6511860, at *6 ("Plaintiffs allege that all Class Members

suffered the same type of injury from the Defendants' breaches of their fiduciary duties. The typicality requirement is met."); *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 378 (ERISA plaintiff's claims concerning the retirement account were based on the same legal theories, and "the same events, practices and course of conduct" as the claims of the other class members); *In re CMS Energy ERISA Litig.*, 225 F.R.D. 539, 543-44 (E.D. Mich. 2004) (typicality exists where plaintiffs' and the putative class claims stem from the same alleged facts and circumstances).

Plaintiffs are all participants in one or more of the Plans.[15] As noted above, the provisions of the Plans that are relevant to this litigation are the same: each is funded by Mercy Health and "administered" by an internal committee; each specifically provides that the plan is a "church plan," and that plan participants have no recourse for benefits against any person or entity other than the plans themselves. Thus, Plaintiffs' claims are typical of the claims of all participants in the Plans because they arise from the Defendants' policy and practice of refusing to operating the Plans in accordance with the requirements of ERISA, based on the common assertion that the Plans qualify for the church plan exemption. Based on these facts and allegations, Plaintiffs satisfies the typicality requirement of Rule 23(a)(3). *See, e.g.*, *Meyers*, 2014 WL 12531121, at *6 (finding typicality satisfied, noting "[t]he Class Representatives' claims arise from the same course of conduct that gives rise to the other Proposed Class members' claims and are based on the same legal theory.").

[15] Plaintiffs Lupp, Alban and Derrick are participants in the Mercy Health Partners of Greater Cincinnati Retirement Plan, Plaintiffs Whaley, Beidleman, Bork, Gagne and Zink are participants in the Mercy Health Partners – Northern Region Retirement Plan and/or the merged St. Vincent Retirement Plan, Plaintiffs Karl and Patricia Mauger are participants in the Mercy Health Partners Pension Plan/Mercy Health Partners (NEPA) Plan, Plaintiff Blockus is a participant in the Mercy Health Partners Wilkes-Barre Employees' Pension Plan, and Plaintiff Zaworski is a participant in the Community Health Partners Regional Medical Center Employees' Defined Benefit Pension Plan (Lorain). MCC, ¶¶ 17-28.

**4. Adequacy**

Rule 23(a)(4) requires that "the representative parties[16] will fairly and adequately protect the interests of the class." "The Sixth Circuit uses a two-prong test to determine whether a class representative satisfies the adequacy of representation factor under Rule 23(a)(4): '1) [T]he representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel.'" *Michel*, 2014 WL 497031, at *7 (citing *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 757 (6th Cir. 2013)).

Plaintiffs here meet both criteria. The first prong of the "adequacy" requirement largely overlaps with the commonality and typicality requirements of Rule 23(a)(2)-(3) and, as discussed above, Plaintiffs' interests are squarely in line with those of the proposed Settlement Class. Moreover, Plaintiffs have contributed to the efficient prosecution of this litigation evidenced by providing documents and information to Plaintiffs' counsel for preparation of the complaints, their regular communications with counsel and their participation in the settlement process. Plaintiffs were prepared to make themselves available for a deposition by Defendants if the case proceeded into discovery and to appear at trial. Plaintiffs thus satisfy Rule 23(a)(4).

**5. Implicit Requirements**

As the *Meyers* court noted, there are two additional "implicit requirements" – the Proposed Class must be definite and the Class Representatives must be members of the Proposed Class. *Meyers*, 2014 WL 12531121, at *5. With respect to the first prong, the "class definition must be

[16] While the adequacy of the named plaintiffs is governed by Rule 23(a)(4), the adequacy of counsel is governed by Rule 23(g). *See* FED. R. CIV. P. 23 Advisory Committee Notes. Accordingly, Class Counsel's adequacy is discussed *infra* in Section IV.C.

sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." *Id.*

These requirements are amply met here because the proposed Settlement Class is all participants (vested or non-vested) or beneficiaries of the Plan as of the Effective Date of the Settlement, which is easily determinable from the records of Defendants. Defendants' records will readily determine Plan participation and thus membership in the Settlement Class. Moreover, there is no dispute that each of the Plaintiffs is a member of the Settlement Class. *See supra* n.15.

**B. The Proposed Class Meets the Prerequisites for Class Certification Under Rule 23(b)(1) and/or (b)(2)**

A class may be certified pursuant to Federal Rule of Civil Procedure 23(b)(1) if 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 interests of absent members. FED. R. CIV. P. 23(b)(1)(A) and (B). As the *Meyers* court explained, "[t]he purpose of this rule is primarily to prevent a defendant from being caught in a classic 'Catch 22' situation where one court orders a defendant to take certain action which another court orders the same defendant not to take." *Meyers*, 2014 WL 12531121, at *7.

Many decisions recognize that "in light of the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held." *Griffin*, 2013 WL 6511860, at *6 (citing *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) (collecting cases)); *Yost*, 2011 WL 2182262, at *13 (same); *Shanehchian v. Macy's Inc.*, No. 07-cv-828, 2011 WL 883659, at *10 (S.D. Ohio Mar. 10, 2011) (same). Because Plaintiffs pursue claims in a representative capacity in accordance with ERISA's remedial provisions, this case is

particularly appropriate for class action treatment under Rule 23(b)(1). *Smith v. Aon*, 238 F.R.D. 609, 617 (N.D. Ill. 2006). Indeed, the Advisory Committee Notes to Rule 23 instruct that certification under Rule 23(b)(1)(B) is appropriate in "***an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust***." FED. R. CIV. P. 23(b)(1)(B) Advisory Committee's Note (1966 Amendment) (emphasis added).

The Settlement Class may also be certified pursuant to Rule 23(b)(2). "Rule 23(b)(2) authorizes a class action 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." *Meyers*, 2014 WL 12531121, at *7 (citing FED. R. CIV. P. 23(b)(2)). As the Supreme Court explained in *Wal-Mart Stores, Inc.*:

> The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.

*Wal-Mart Stores, Inc.*, 131 S. Ct. at 2557. Here, Plaintiffs alleges that Defendants breached their fiduciary duties to the Plans and their participants by improperly relying on the "church plan" exemption rather than complying with ERISA and seek equitable relief on behalf of the Plan as a whole. Such equitable remedies are specifically authorized by ERISA. *See* ERISA §§ 502(a)(2) and (3), 29 U.S.C. § 1132(a)(2) and (3).

Accordingly, Plaintiffs' claims are properly certified under either subsection of Rule 23(b)(1), under Rule 23(b)(2), or under both.[17]

[17] It is not uncommon for courts to certify ERISA class actions under both subsections of Rule 23(b)(1). *See, e.g.*, *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 379 ("Here, Plaintiffs' ERISA claims will, as a

### C. The Court Should Appoint IKR and KTMC as Class Counsel and Plaintiffs as Class Representative for the Settlement Class

Rule 23(g) governs the appointment of class counsel. The rule identifies four specific factors that should be considered, together with any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. FED. R. CIV. P. 23(g)(1). The four specific factors are: (i) the work counsel did in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. FED. R. CIV. P. 23(g)(1)(A)(i)-(iv).

In this case, the Court appointed interim class counsel after extensive briefing on March 21, 2017. ECF No. 58; *see also* ECF No. 42 (Report and Recommendation of Magistrate Judge Bowman). Taking into account all of the 23(g)(1) factors, the Court appointed IKR and KTMC as Interim Co-Lead Class Counsel, and Strauss Troy Company, LPA as Interim Liaison Class Counsel. In the interests of brevity, Plaintiffs rely on the prior findings of the Court as well as their prior briefing on the Rule 23(g)(1) factors, ECF Nos. 25, 40 and 49, since the standards for appointment of interim class counsel and the standards for appointment of class counsel at the time of certification are the same. It is worth noting, however, that since their appointment, Interim Class Counsel have, as promised, committed significant resources to the litigation of the case, filed an MCC based on further investigation of potential claims, briefed the adequacy of the allegations

---

practical matter, adjudicate the interests of all plan participants. If this case was adjudicated individually and relief was granted in some actions but denied in others, the conflicting declaratory and injunctive relief could make compliance impossible for Defendants. Thus, certification under Rules 23(b)(1)(A) and (B) is appropriate."); *Yost*, 2011 WL 2182262, at *13-14 (certifying class under Rule 23(b)(1)(A) and 23(b)(1)(B)); *Smith*, 238 F.R.D. at 617; *Rankin v. Rots*, 220 F.R.D. 511, 522 (E.D. Mich. Apr. 16, 2004); *Stanford v. Foamex L.P.*, 263 F.R.D. 156, 173-74 (E.D. Pa. 2009); *Nortel Networks Corp. ERISA Litig.*, 2009 WL 3294827, at *16 (M.D. Tenn. Sept. 2, 2009); *Jones v. Novastar Fin., Inc.*, 257 F.R.D. 181, 193-94 (W.D. Mo. 2009).

of the Complaint, participated in a successful mediation, and negotiated the terms of a proposed settlement for consideration by the Court and the Settlement Class. Accordingly, the Court should confirm is prior appointment of IKR and KTMC as Co-Lead counsel for the Settlement Class, and Strauss Troy Company, LPA as Interim Liaison Class Counsel.

## V. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED

If the Court grants preliminary approval to the proposed Settlement, the Settlement Class must receive due and adequate notice and an opportunity to be heard. *Kinder v. Meredith Corp.*, No. 14-cr-11284, 2016 WL 454441, at *3 (E.D. Mich. Feb. 5, 2016) ("Following preliminary approval, putative class members must be notified of the settlement.") (citing FED. R. CIV. P. 23(e)(1)). "The court must direct notice in a reasonable manner to all class members who would be bound by the proposal." *Id.* "Notice must . . . fairly apprise . . . prospective members of the class of the terms of the proposed settlement so that class members may come to their own conclusion about whether the settlement serves their interests." *Id.* (citing *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 423 (6th Cir. 2012)). "To meet this standard, a class notice should 'inform the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, and that any class member may appear and be heard at the hearing.'" *Kinder*, 2016 WL 454441, at *3 (quoting Newberg on Class Actions § 8:17 (5th ed.)).

Here, the Notice agreed to by the Settling Parties describes in plain English: (i) the terms and operations of the Settlement; (ii) the nature and extent of the release of claims; (iii) the maximum attorneys' fees, expenses and Named Plaintiff Case Contribution Awards that may be sought; (iv) the procedure and timing for objecting to the Settlement; and (v) the date and place for the Fairness Hearing. *See* Settlement Agreement, Exhibit 2. The Parties request further that

they be allowed to make non-substantive changes to the content of the Class Notice as circumstances warrant prior to mailing.

The manner of dissemination of the proposed Class Notice meets the requirements of Fed. R. Civ. P. 23(e). According to the Settlement Agreement, on the date and in the manner set by the Court in its Preliminary Approval Order, Defendants will cause notice of the Preliminary Approval Order to be sent by first class mail to the last known addresses for members of the Settlement Class in the possession of the Plan's current record-keeper. *See* Settlement Agreement § 3.2.3. In addition, Class Counsel will also provide Notice by publishing the Settlement Agreement and Class Notice on IKR's website. *See* Settlement Agreement § 3.2.4. These proposed forms of Notice will fairly apprise members of the Class of the Settlement Agreement and their rights as members of the Settlement Class. Thus, the form of notice and proposed procedures for notice meet the requirements of Rule 23(e), satisfy all due process considerations, and should be approved. *See, e.g.*, *Johnson*, 2015 WL 12001268, at *9-10 (finding notice that provided "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)" was both "substantively adequate" and "formally adequate").

## VI. PROPOSED SCHEDULE

The following schedule that the Parties propose for final approval of the Settlement is based on the need to provide the Settlement Class with fair notice and the opportunity to be heard, as

well as to provide notice to appropriate federal and state officials as required by the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332(d), 1453, and 1711-1715.[18]

The Settlement Agreement requires that notice be given to Class Members by first class mail after the Court enters a Preliminary Approval Order. Class Members should have at least forty-five days following notice to decide whether or not to object to the Settlement, and should have the ability to review Plaintiffs' motion for final approval and supporting papers prior to that date. Accordingly, the Parties propose that the Fairness Hearing be scheduled at least 100 days after the issuance of the Preliminary Approval Order, with Plaintiffs' motions for final approval and for the award of attorneys' fees and expenses due 30 days prior to the Fairness Hearing, objections due 14 days before the Fairness Hearing and responses to objections due seven days before the Fairness Hearing. The Parties propose that the Fairness Hearing occur as soon after the 100th day from entry of the Preliminary Approval Order as the Court can accommodate. Below is the proposed schedule in chart form.

| Event | Time for Compliance |
|---|---|
| Deadline for Mailing of Class Notice to members of the Settlement Class (the "Notice Date"). | 30 calendar days after entry of the Preliminary Approval Order. |
| Deadline for Publishing Notice on the dedicated Settlement website. | 30 calendar days after entry of the Preliminary Approval Order. |
| Filing of Motion for Counsel Fees, Reimbursement of Expenses, and Named Plaintiff Case Contribution Awards | 30 calendar days prior to the date of the Fairness Hearing. |
| Filing of Motion in Support of Final Approval of Settlement | 30 calendar days prior to the date of the Fairness Hearing. |

[18] CAFA requires that Defendants give notice of the Settlement to the correct officials within ten days after the filing of the Settlement Agreement and at least 90 days prior to a final approval hearing. Under the proposed schedule, Defendants will send the notice by July 26, 2018. Accordingly, for CAFA purposes, the proposed Fairness Hearing could occur as early as Wednesday, October 24, 2018. Since this date is earlier than the date that the Parties propose for the Fairness Hearing here, CAFA should present no scheduling issues.

| Event | Time for Compliance |
|---|---|
| Deadline for filing of Objections and appearance of counsel regarding objections | 14 calendar days prior to the date of the Fairness Hearing. |
| Deadline for Filing a Response to Any Objections and submitting any additional materials for the Court's consideration | 7 calendar days prior to the date of the Fairness Hearing. |
| Fairness Hearing Date. | On or after October 29, 2018, which is more than 100 days after the filing of the Preliminary Approval Motion, at the Court's convenience. |

## VII. CONCLUSION

Based on the foregoing, Plaintiffs respectfully move this Court to grant their Motion for Preliminary Approval of Settlement, Preliminary Certification of the Settlement Class and approval of Class Notice, and request that the Court schedule a Fairness Hearing.

Dated: July 16, 2018

Respectfully submitted,

By: */s/ Mark P. Kindall*

**IZARD KINDALL & RAABE LLP**
Robert A. Izard (admitted *pro hac vice*)
Mark P. Kindall (admitted *pro hac vice*)
Douglas P. Needham
(admitted *pro hac vice*)
29 South Main Street, Suite 305
West Hartford, CT 06107
Tel: (860) 493-6292
Fax: (860) 493-6290
Email: rizard@ikrlaw.com
Email: mkindall@ikrlaw.com
Email: dneedham@ikrlaw.com

*/s/ Mark K. Gyandoh*
**KESSLER TOPAZ MELTZER & CHECK, LLP**
Mark K. Gyandoh (admitted *pro hac vice*)
Julie Siebert-Johnson (admitted *pro hac vice*)
280 King of Prussia Road
Radnor, PA 19087
Tel: (610) 667-7706
Fax: (610) 667-7056
Email: mgyandoh@ktmc.com
Email: jsjohnson@ktmc.com

***Interim Co-Lead Class Counsel***

Ronald R. Parry
**STRAUSS TROY**
The Federal Reserve Building
150 East Fourth Street
Cincinnati, OH 45202-4018
Tel: (513) 621-2120
Fax: (513) 241-8259
Email: rrparry@strausstroy.com

***Interim Class Liaison Counsel***

**KELLER ROHRBACK L.L.P.**
Laura R. Gerber (admitted *pro hac vice*)
Lynn Lincoln Sarko (admitted *pro hac vice*)
Havila Unrein (admitted *pro hac vice*)
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
Tel.: (206) 623-1900
Fax: (206) 623-3384
Email: lgerber@kellerrohrback.com
Email: lsarko@kellerrohrback.com
Email: hunrein@kellerrohrback.com

**KELLER ROHRBACK L.L.P.**
Ron Kilgard (admitted *pro hac vice*)
3101 North Central Avenue, Suite 1400
Phoenix, AZ 85012
Tel.: (602) 248-0088
Fax: (602) 248-2822
Email: rkilgard@kellerrohrback.com

**COHEN MILSTEIN SELLERS & TOLL, PLLC**
Karen L. Handorf (admitted *pro hac vice*)
Michelle Yau (admitted *pro hac vice*)
Scott Lempert (admitted *pro hac vice*)
1100 New York Avenue, N.W.
Suite 500, West Tower
Washington, DC 20005
Tel: (202) 408-4600
Fax: (202) 408-4699
Email: khandorf@cohenmilstein.com
Email: myau@cohenmilstein.com
Email: slempert@cohenmilstein.com

**GARY, NAEGELE & THEADO, LLC**
Thomas R. Theado, Esq.
401 Broadway Avenue, Unit 104
Lorain, Ohio 44052-1745
Tel.: (440) 320-8652
Fax: (440) 244-3462
Email: ttheado@GNTLaw.com

***Attorneys for Plaintiffs Janet Whaley, Leslie Beidleman, Patricia K. Blockus, Charles Bork, Marilyn Gagne, Karl Mauger, Patricia Mauger, Beth Zaworski,***

***Nancy Zink, Mary Alban, and Linda Derrick***

**GAINEY MCKENNA & EGLESTON**
Thomas J. McKenna, Esq.
440 Park Ave. South, 5th Floor
New York, NY 10016
Tel: (212) 983-1300
Fax: (212) 983-0383

***Attorneys for Plaintiffs Mary Alban and Linda Derrick***

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on July 16, 2018, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system.

*/s/ Mark P. Kindall*
Mark P. Kindall