UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

LAURIE NICHOLSON, individually and on behalf of herself and all others similarly situated, Plaintiff, vs. Franciscan Missionaries of Our Lady Health System, Franciscan Missionaries of Our Lady Health System Investment Committee, and John Does 1-20, Defendants.	**No.: 3:16-cv-00258-SDD-EWD**

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND OF THE LITIGATION 2

A. Nature of the Claims and Procedural History 2

B. Summary of the Settlement 4

1. Settlement Terms 4

2. The Settlement Class 5

3. The Released Claims 5

4. The Class Notice 6

5. Payments to the Settlement Class Representatives and Class Counsel 6

ARGUMENT 7

A. The Settlement Warrants Preliminary Approval 7

1. There is no reason for the Court to doubt the Settlement's fairness 8

2. Settlement has no "obvious deficiencies" 9

3. The Settlement Does Not Grant Preferential Treatment or Excessive Compensation to Class Counsel 11

4. Settlement is within the range of possible approval 12

B. The Proposed Settlement Class Should be Certified for Settlement Purposes 14

1. Rule 23(a) is Satisfied 15

a. Numerosity 15

b. Commonality 15

c. Typicality 16

d. Adequacy 17

2. The Class Satisfies the Requirements of Rule 23(b)(1) and/or (b)(2) 19

C. The Court should appoint Izard, Kindall & Raabe and Kessler, Topaz, Metzler & Check as Class Counsel and Ms. Nicholson and Ms. Francis as Class Representatives .. 20

D. The Proposed Notice to the Class is Adequate 22

F. Proposed Schedule 23

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 14, 18

AOL Time Warner ERISA Litig., Case No. 02-civ-8853-SWK, 2006 WL 2789862 (S.D.N.Y. 2006) 16

Bach v. Amedisys, Inc., No. 10-cv-395, 2014 WL 12607789 (W.D. La. Apr. 14, 2014) 9

Berger v. Compaq Computer Corp., 257 F.3d 475 (5th Cir. 2001) 18

Berger v. Xerox Corp. Retirement Income Guar. Plan, 338 F.3d 755 (7th Cir. 2003) 20

Camp v. Progressive Corp., 01-cv-2680, 2004 WL 2149079 (E.D. La. Sept. 23, 2004) 11

Cappello v. Franciscan Alliance, et al., No. 16-cv-290, Dkt. No. 106 (N.D. Ind.) 18

DeHoyos v. Allstate Corp., 240 F.R.D. 269 (W.D. Tex. 2007) 11, 12

Everson v. Bunch, No. 14-cv-583, 2016 WL 3255023 (M.D. La. June 13, 2016) 16, 22

Henderson v. Eaton, No. 01-cv-0138, 2002 WL 31415728 (E.D. La. 2002) 7

In re Chicken Antitrust Litig. Am., 669 F.2d 228 (5th Cir. 1982) 7, 12

In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436 (S.D.N.Y. 2004) 20

In re OCA, Inc. Securities and Derivative Litig., No. 05-cv-2165, 2008 WL 4681369 (E.D. La. Oct. 17, 2008) 9, 10, 11, 13

In re Pool Products Distribution Market Antitrust Litig., MDL No. 2328, 2015 WL 4875464 (E.D. La. Aug. 13, 2015) 7, 8, 10, 14, 17

In re Schering Plough ERISA Litig., 589 F.3d 585 (3d Cir. 2009) 19

Jenkins v. Raymark Indus., 782 F.2d 468 (5th Cir. 1986) 16

Jenkins v. Trustmark Nat. Bank, 300 F.R.D. 291 (S.D. Miss. 2014) 7, 9, 12

Jones v. Singing River Health System, No. 14-cv-447, 2016 WL 6106518 (S.D. Miss. Jan. 20, 2016) 7, 12, 13, 16, 17, 19

Kaplan v. Saint Peter's Healthcare System, 810 F.3d 175 (3d Cir. 2015) 14

Kemp v. Unum Life Insurance Company, No. 14-cv-0944, 2015 WL 12564183 (E.D. La. July 6, 2015) 9, 11, 21, 23

Kemp-DeLisser v. St. Francis Hospital, No. 15-cv-1113, 2016 WL 6542707 (D. Conn. Nov. 3, 2016) 18, 21

Lann v. Trinity Health Corp., No. 14-2237 (D. Md.) 13

Lightbourn v. Cnty. of El Paso, Tex., 118 F .3d 421 (5th Cir. 1997) 17

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

Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620 (5th Cir. 1999) 15

Murray v. Auslander, 244 F.3d 807 (11th Cir. 2001) 20

Pederson v. La. State Univ., 213 F.3d 858 (5th Cir. 2000) 15

Reed v. General Motors Corp., 703 F.2d 170 (5th Cir. 1983) 7

Rollins v. Dignity Health, 830 F.3d 900 (9th Cir. 2016) 14

San Antonio Hispanic Police Officers' Org., Inc. v. City of San Antonio, 188 F.R.D. 433 (W.D. Tex. 1999) 8

Smith v. Tower Loan of Miss., Inc. 216 F.R.D. 338 (S.D. Miss. 2003) 11

Stapleton v. Advocate Health Care Network, 817 F.3d 517 (7th Cir. 2016) 14

Stirman v. Exxon Corp., 280 F.3d 554 (5th Cir. 2002) 17

Tucker v. Baptist Health Sys., Inc., No. 15-cv-382, (N.D. Ala.) 21

Union Asset Mgmt. Holding A.G. v. Dell, Inc., 669 F.3d 632 (5th Cir. 2012) 8

Wal-Mart Stores Inc. v. Visa USA, Inc., 396 F.3d 96 (2d Cir. 2005) 22

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) 16

Rules

28 U.S.C. § 1332(d) 23

28 U.S.C. § 1711 23

28 U.S.C. § 1712 23

28 U.S.C. § 1713 23

28 U.S.C. § 1714 23

28 U.S.C. § 1715 23

29 U.S.C. § 1130 13

29 U.S.C. § 1132(a)(2) 20

29 U.S.C. § 1132(a)(3) 20

Fed. R. Civ. P. 12(b)(1) 2

Fed. R. Civ. P. 12(b)(6) 2

Fed. R. Civ. P. 23 ..... 7, 14, 15, 17, 19

Fed. R. Civ. P. 23(a) 14, 15, 16

Fed. R. Civ. P. 23(a)(1) 15, 16

Fed. R. Civ. P. 23(a)(2) 16

Fed. R. Civ. P. 23(a)(3) 17

Fed. R. Civ. P. 23(a)(4) 17, 18

Fed. R. Civ. P. 23(b) 14

Fed. R. Civ. P. 23(b)(1) 1, 15, 19

Fed. R. Civ. P. 23(b)(1)(A) 19

Fed. R. Civ. P. 23(b)(1)(B) 19, 20

Fed. R. Civ. P. 23(b)(2) 1, 15, 19, 20

Fed. R. Civ. P. 23(e) 7, 22, 23

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

Fed. R. Civ. P. 23(g) 17, 18, 21

Other Authorities

7A Wright & Miller, *Federal Practice and Procedure* (2014) 17

Manual for Complex Litigation (Fourth) 7

INTRODUCTION

Plaintiff Laurie Nicholson ("Plaintiff") brought this class action lawsuit to challenge the Defendants' classification of three pension plans (the "Plans")[1] as "church plans" that were exempt from ERISA and its minimum funding requirements. After nearly a year of litigation and several rounds of hard-fought negotiations, the Parties reached a settlement that: (a) requires Defendants to contribute $125 million to the Plans over the next five years; (b) requires Defendants to pay $450 to each of the 2000+ participants of the Plans who accepted a lump-sum buyout of their pension in 2016; and (c) guarantees participants will be paid the pension benefits they were promised for the next 15 years.

The Settlement[2] is an excellent result for the Class, especially considering the uncertainty in the law applicable to "church plans" and the risks that lay ahead if this litigation continued. Accordingly, Plaintiff asks the Court to: (1) preliminarily approve the Settlement; (2) preliminarily certify the proposed Class pursuant to Federal Rules of Civil Procedure 23(b)(1) and/or (b)(2); (3) approve the form and method of Class Notice; and (4) set a date and time for a hearing (the "Fairness Hearing") for the Court to consider whether to grant final approval of the Settlement, and award attorneys' fees and expenses and Case Contribution Awards to the Settlement Class Representatives.

[1] The Plans are: (1) the "Retirement Plan of Our Lady of the Lake Hospital and Affiliated Organizations"; (b) the "Pension Plan for Employees of Our Lady of Lourdes Regional Medical Center, Inc."; and (c) the "Retirement Plan for Employees of St. Francis Medical Center, Inc."

[2] Capitalized terms used herein but not otherwise defined take the meaning ascribed to them in the Settlement Agreement ("Settlement" or "Settlement Agreement"), which is attached as Exhibit 1 to the Declaration of Mark P. Kindall submitted herewith ("Kindall Decl."). Attached to the Settlement as Ex. 1 is the [Proposed] Preliminary Approval Order; attached to the Preliminary Approval Order as Ex. A. is the Class Notice; attached to the Settlement as Exhibit 2 is the [Proposed] Final Approval Order.

BACKGROUND OF THE LITIGATION

A. Nature of the Claims and Procedural History

On April 21, 2016, Plaintiff filed her Complaint against the Franciscan Missionaries of Our Lady Health System, Inc. ("Franciscan Missionaries") and the Plans' administrators and fiduciaries alleging that they had violated ERISA by improperly classifying the Plans as "church plans." *See* Complaint, Dkt. No. 1. Plaintiff alleged the Plans were not "church plans" because they were not "established" by a church or convention or association of churches and are not "maintained" by a church or an entity whose principal function it is to administer retirement benefits. *See Id.* at ¶¶ 68-76.

On July 26, 2016, Defendants moved to dismiss the Complaint pursuant to FED. R. CIV. P. 12(b)(1) and (6) (Dkt. Nos. 39, 41) (together, the "Motions to Dismiss"). Plaintiff filed Oppositions to the Motions to Dismiss on August 26, 2016 (Dkt. Nos. 48, 49) and on September 9, 2016, Defendants filed Reply Memoranda in further support of their Motions to Dismiss (Dkt. Nos. 51, 52). Defendants also filed Supplemental Authority in further support of their Motions to Dismiss on September 19, 2016 (Dkt. No. 55) to which Plaintiff filed an Opposition (Dkt. No. 56).

Defendants attached more than 45 exhibits to the Motions to Dismiss. *See* Dkt. Nos. 39-1 through 39-19, and 40-1 through 40-27. These documents provided important information about how the Plans were "established" and are "maintained," central issues to whether they are "church plans." Dkt. No. 40-12. Moreover, among the documents Defendants filed were the Plans' actuarial data, key information which helped allow Plaintiff to determine the Plans' current funding levels. Dkt. No. 40-8, 40-9 and 40-10.

While the Motions to Dismiss were pending, the Parties recognized that it might be possible to resolve the case. The central issue is a legal one, revolving around competing interpretations of ERISA's "church plan" exemption that has been litigated over the course of several years, leading

most recently to decisions in the Courts of Appeals for the Third, Seventh and Ninth Circuits. *See* Dkt. No. 48 at p. 2. Moreover, many of the facts bearing on the application of the Church Plan exemption were set forth in the Motions to Dismiss briefing. Accordingly, the Parties agreed to early mediation. *See* Dkt. No. 36.

In anticipation of the mediation, and in addition to the materials provided during the Motions to Dismiss process, Plaintiff requested that Defendants produce specific documents concerning each of the Plans, together with financial information that would permit an evaluation of current funding levels under ERISA's standards. Class Counsel reviewed these materials in advance of the mediation and consulted with an actuary to determine the Plans' funding status under ERISA's requirements and how much more money should be contributed to each Plan.[3]

On September 22, 2016, the Parties participated in an all-day mediation session in Los Angeles, California before Robert Meyer, Esq. of Loeb & Loeb LLP. Mr. Meyer is highly experienced in mediating complex class actions and has successfully mediated at least 5 other church plan cases. The negotiations at the mediation were hard-fought. Defendants adamantly asserted that the Plans were properly classified as "church plans" and thus not subject to ERISA. The issue of how much, if at all, the Plans were underfunded was a hotly contested issue.

By the end of the mediation session, the Parties had agreed in principle on many key terms that were ultimately incorporated into the Settlement, including how much money would be contributed to the Plans, over what time period the contributions would be made and the non-economic relief that Class members would receive.

[3] Prior to the mediation, Cynthia Francis, a participant in the Our Lady of Lourdes Plan, joined the case as a Settlement Class Representative.

The Parties, however, were not able to resolve the claims of Class members who had accepted a buyout of their pensions under the "Lump Sum Window Benefit Program" in 2016 and thus had received less than what they would have if ERISA applied to the Plans. *See* Dkt. No. 25. Defendants subsequently provided Class Counsel with additional information through the mediator, including the number of participants who accepted a lump sum buyout and the aggregate amount they had received. Defendants also previewed the defenses they would assert to claims from these Class members if the litigation were to continue, including that each had signed a release knowing of the pendency of this case and its implications.

Class Counsel again consulted with an actuary and examined the viability of claims from Class members who had accepted a lump sum buyout. After much back-and-forth communications, the Parties agreed on a resolution for these Class members.

After all other terms were negotiated, the Parties then negotiated the amounts of the Case Contribution Awards, the reimbursement of expenses that Class Counsel incurred and the attorneys' fees that Class Counsel would ask the Court to approve. On March 27, 2017, the Parties signed a Term Sheet that summarized the key terms of their agreement. On May 4 and 5, 2017, the Parties signed the Settlement.

B. Summary of the Settlement

1. Settlement Terms

Franciscan Missionaries is the sole member of and has sole voting control over Our Lady of the Lake Hospital, Inc., Our Lady of Lourdes Regional Medical Center, Inc., and St. Francis Medical Center, Inc., the entities that operate the hospitals that employ the Plans' participants (the "Operating Entities") and sponsor the Plans. *See* Settlement at § 1.11.

The Settlement provides that the Operating Entities will aggregately contribute $125 million to the Plans over the next 5 years. *Id.* at § 8.1. Specifically, they will contribute $35

million in each of the next 3 years, and $10 million in both the fourth and fifth years following the Effective Date of Settlement. *Id.* The Operating Entities may pre-pay any portion of the contributions and have discretion in how to allocate them among the Plans. *Id.* The Operating Entities also guaranteed the payment of benefits to the Plans' participants for the next 15 years. *Id.* at § 9.2.

In addition, the Operating Entities will pay $450.00 to each of the 2,087 participants that accepted a lump sum buyout of their accrued benefits under the "Lump Sum Window Benefit Program" in 2016. *Id.* at § 8.1.2.

2. The Settlement Class

The Settlement contemplates that the Court will certify a non-opt-out class comprised of all present or past participants of the Plans (both vested and non-vested) including those participants who accepted a lump sum or annuity benefit under the Lump Sum Window Benefit Program in 2016, and beneficiaries of the Plan as of the Effective Date of Settlement. *Id.* at §§ 1.20, 3.2.2. Because the Plans are frozen, no new participants will join the Plans. However, should a Plan participant add or designate another future beneficiary, that added or designated beneficiary is a member of the Settlement Class and is subject to this Settlement Agreement, including its release of claims and covenant not to sue provisions.

3. The Released Claims

Section 4.1 of the Settlement defines Released Claims, in relevant part, as:

> any and all actual or potential claims, actions, causes of action, demands, obligations, liabilities, attorneys' fees, expenses and costs arising out of the allegations of the Complaint that were brought or could have been brought as of the date of the Settlement Agreement by any member of the Settlement Class, including any current or prospective challenge to the Church Plan status of the Plan, whether or not such claims are accrued, whether already acquired or subsequently acquired, whether known or unknown, in law or equity, brought by way of demand, complaint, cross-claim, counterclaim, third-party claim, or otherwise. "Released Claims" also shall include any claims under federal, state, parish, county, and/or

> municipal or any other law, relevant to the lump sum distribution claims identified in Paragraph 6 of the Term Sheet related to the Lump Sum Window Benefit Program in 2016.

Id. at § 4.1.

The definition of Released Claims does not include claims for individual benefits other than those related to the Lump Sum Window Benefit Program or claims under ERISA that arise prospectively if: (1) the Roman Catholic Church disassociates itself from the Plans' sponsors; (2) the IRS or a court determines that the Plans do not qualify "church plans;" or (3) ERISA is amended to eliminate the "church plan" exemption. *Id*. at § 4.1.4.

4. The Class Notice

A proposed Class Notice is attached to the Settlement and will be distributed on the date and in the manner set by the Court and in the form and manner approved by the Court. *Id.* at § 3.2.3. The Class Notice describes the Settlement's key terms, informs Class members how they can obtain additional information and how, if they desire, they can object to the Settlement. *Id*. at Exhibit 1 at Exhibit A. The Parties contemplate sending the proposed Class Notice to Class members by first class mail and also publishing the notice, as well as the Settlement, on Class Counsel's website. *Id*. at § 3.2.4. Defendants will pay for the cost of sending the Notice. *Id*. at § 3.2.3.

5. Payments to the Settlement Class Representatives and Class Counsel

By separate application to be filed prior to the Fairness Hearing, Class Counsel will seek an award of attorneys' fees not to exceed $1 million. *See* Settlement Agreement at § 8.1.3. Class Counsel will also apply for not more than $35,000 in total for the expenses they incurred and Case Contribution Awards for the Settlement Class Representatives. The Settlement Class will be notified of these details in the Class Notice. *Id*. at Exhibit 1 at Exhibit A.

The Settlement is not contingent upon the Court's approval of Class Counsel's application for attorneys' fees and expenses or application for Case Contribution Awards for Plaintiff and the Settlement Class Representative. *Id.* at § 8.1.4.

ARGUMENT

A. The Settlement Warrants Preliminary Approval

Federal Rule of Civil Procedure 23 governs the settlement of class actions. *See Henderson v. Eaton*, No. 01-cv-0138, 2002 WL 31415728, *2 (E.D. La. 2002). "The federal courts have long recognized a strong policy and presumption in favor of class settlements." *Jenkins v. Trustmark Nat. Bank*, 300 F.R.D. 291, 301 (S.D. Miss. 2014). Accordingly, "[t]he Rule 23(e) analysis should be 'informed by the strong judicial policy favoring settlements as well as the realization that compromise is the essence of settlement.'" *Id.* (quoting *In re Chicken Antitrust Litig. Am.*, 669 F.2d 228, 238 (5th Cir. 1982)).

Settlement is a "two-step process" consisting of "preliminary approval and a subsequent final approval after a 'fairness hearing.'" *Jones v. Singing River Health System*, No. 14-cv-447, 2016 WL 6106518, at *5 (S.D. Miss. Jan. 20, 2016). At the final approval stage, courts in the Fifth Circuit consider six factors first identified in *Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983): (1) existence of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the stage of the proceedings; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives and absent class members.

At the preliminary approval stage, however, "the standards are not as stringent as those applied to a motion for final approval." *In re Pool Products Distribution Market Antitrust Litig.*, MDL No. 2328, 2015 WL 4875464, *11 (E.D. La. Aug. 13, 2015). *See also* Manual for Complex Litigation (Fourth) at § 21.63 ("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."). Preliminary approval of a settlement is appropriate if: (1) there is no reason to doubt the settlement's fairness; (2) the settlement does not contain any obvious deficiencies; (3) the settlement does not improperly grant preferential treatment to class representatives or segments of the class or grant excessive compensation to attorneys; and (4) appears to fall within the range of possible approval. *In re Pool Products Distribution Market Antitrust Litig.*, 2015 WL 4875464, at *11. As described below, the Settlement meets this standard and should be preliminarily approved.

1. There is no reason for the Court to doubt the Settlement's fairness

The steps Plaintiff took to litigate and resolve this case are proof of the Settlement's fairness. Before filing this case, Plaintiff thoroughly investigated the facts and legal landscape underpinning her allegations that the Plans did not qualify as "church plans," and accordingly filed a comprehensive, detailed Complaint. *See generally*, Complaint, Dkt. No. 1. The Parties also extensively briefed their positions for the Court on the legal and factual viability of Plaintiff's claims. *See, e.g.*, Dkt. Nos. 39, 41, 48, 49, 55 and 56.

The Parties' respective counsel's experience in "church plan" cases also allowed for a streamlined exchange of information. Through the documents Defendants attached to their Motions to Dismiss and others that they provided before the mediation, Plaintiff was able to fully evaluate the strengths and weaknesses of this case. *See, e.g., Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639 (5th Cir. 2012) ("formal discovery is not a prerequisite to approving a settlement as reasonable"). Plaintiff reviewed these documents, and many others that were publicly available, including the Plans' documents, the Plans' actuarial reports and Franciscan Missionaries' financial statements to determine two issues that are at the crux of this litigation: (1) how the Plans were "established" and "maintained;" and (2) the Plans' funding level. *See San*

Antonio Hispanic Police Officers' Org., Inc. v. City of San Antonio, 188 F.R.D. 433, 459 (W.D. Tex. 1999) (the "[s]ufficiency of information does not depend on the amount of formal discovery which has been taken because other sources of information may be available to show the settlement may be approved even when little or no formal discovery has been completed.").

Plaintiff also consulted with an actuary to determine how much money would need to be contributed to the Plans if they were subject to ERISA's funding requirements. *In re OCA, Inc. Securities and Derivative Litig.*, No. 05-cv-2165, 2008 WL 4681369, *7 (E.D. La. Oct. 17, 2008) (class counsel's consultation with an expert is evidence of fairness).

The Parties' use of mediation is further evidence that the Settlement is fair. Settlement negotiations that involve arm's-length, informed bargaining with experienced counsel who are fully informed support a preliminary finding of fairness. *See Kemp v. Unum Life Insurance Company*, No. 14-cv-0944, 2015 WL 12564183, *8 (E.D. La. July 6, 2015) (process used to reach settlement was fair because the parties took part in "a ten-hour mediation under the supervision of an experienced mediator."); *Jenkins*, 300 F.R.D. at 303 ("[T]here is no evidence that the settlement was obtained by fraud or collusion. On the contrary, this settlement was diligently negotiated after a long and hard-fought process that culminated in ultimately successful mediation.").

This is especially true here where the Parties used Mr. Meyer as a mediator, because he is knowledgeable about church plan litigation, well-respected and has been found by courts in this Circuit to be "an experienced mediator in ERISA and other complex class actions." *Bach v. Amedisys, Inc.*, No. 10-cv-395, 2014 WL 12607789, *2 (W.D. La. Apr. 14, 2014). Accordingly, there can and should be no doubt that the Settlement is fair.

2. Settlement has no "obvious deficiencies"

Courts in the Fifth Circuit have not defined "obvious deficiencies" when reviewing a settlement agreement at the preliminary approval stage. However, courts generally look to whether

the relief provided to the class is congruent with the claims asserted in the case and if the scope of the release is reasonable. *See, e.g., In re OCA, Inc. Securities and Derivative Litig.*, No. 05-cv-2165, 2008 WL 4681369, at *13; *In re Pool Products Distribution Market Antitrust Litig.*, 2015 WL 4875464, *12; *Kemp*, 2015 WL 12564183, at *8.

There are no "obvious deficiencies" under these – or any – criteria. First and foremost, the Settlement provides relief that is congruent with what is sought in the Complaint. *See generally*, Complaint, Dkt. No. 1. Plaintiff filed this case to remedy the Plans' underfunding and the Settlement addresses that issue. As stated above, the Settlement requires the Operating Entities to contribute $125 million to the Plans over the next 5 years. *See* Settlement at § 8.1. Moreover, the Settlement provides Class members with additional layers of protection because the Operating Entities have guaranteed the payment of benefits to the Plans' participants for the next 15 years. *Id*. at § 9.2

Second, the Settlement's release language is also reasonable. It is limited to the claims in the Complaint concerning whether the Plans are "church plans." *See* Settlement at § 4.1. Moreover, the "unknown claims" that are released are limited to the scope of this case and expressly preserves Class members' ability to assert claims for individual benefits (e.g., how many years of service they have) and to challenge the Plans' "church plan" status if certain specified events occur. *See* Settlement at §§ 4.1. Numerous other courts have preliminarily approved settlements with similar carve-outs to the release language. *See, e.g., In re Pool Products, Distribution Market Antitrust Litig.*, 2015 WL 4875464, *12 ("Because this release applies only to unknown claims arising from the facts related to this Action, the Court does not see any obvious deficiency with the release."); *Kemp*, 2015 WL 12564183, at *8 ("Courts have consistently approved releases in class action settlements that discharge unknown claims relating to the factual

issues in the complaint."). Accordingly, there are no "obvious deficiencies" to prevent the Court from preliminarily approving the Settlement.

3. The Settlement Does Not Grant Preferential Treatment or Excessive Compensation to Class Counsel

The Settlement also does not grant preferential treatment to any Class members. The $125 million contribution from the Operating Entities will be made to the Plans, not to individual Class members. *See* Settlement at § 8.1.1. The only direct payments made to Class members are to the participants who accepted a buyout of their pensions under the "Lump Sum Window Benefit Program" in 2016. *Id*. at § 8.1.2. These participants will not receive a future pension from the Plans and the payments they receive under the Settlement will not diminish the contributions made to the Plans or otherwise affect the Plans' funding level. *See, e.g., In re OCA Securities and Derivative Litig.*, 2008 WL 4681369 at *12 (differential treatment among two groups in class was appropriate based on the damages each had suffered).

The Case Contribution Awards that will be applied for on behalf of the Settlement Class Representatives at the final approval stage also does not create a conflict among Class members. *See* Settlement at § 8.2. Courts "commonly permit payments to class representatives above those received in settlement by class members generally." *Smith v. Tower Loan of Miss., Inc.* 216 F.R.D. 338, 367-8 (S.D. Miss. 2003). Incentive awards are frequently used in class action lawsuits to compensate plaintiffs "for the services they provide and burdens they shoulder during litigation." *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 339 (W.D. Tex. 2007) (citing *Camp v. Progressive Corp.*, 01-cv-2680, 2004 WL 2149079, *8 (E.D. La. Sept. 23, 2004)).

Here, any Case Contribution Award that may be given is wholly at the Court's discretion and the Settlement is not contingent on the Settlement Class Representatives receiving an award

for their service. *See* Settlement at §§ 8.1.3 and 11.4. Moreover, any award(s) that the Court approves will not reduce the Class's financial recovery. *Id*. at § 8.3.

The Settlement also does not provide excessive compensation to Class Counsel. Like the Case Contribution Award(s), any payment to Class Counsel for attorneys' fees will be at the Court's discretion and the Settlement is not contingent upon the approval of fees or expenses in a particular amount. *See* Settlement at §§ 8.1.2 and 11.4. Moreover, and while the Court does not need to consider or approve Class Counsel's attorneys' fees and expenses until the final approval stage, even if Class Counsel requested fees in the full amount provided for in the Settlement ($1 million), the fees would represent less than 1% of the nearly $126 million that is the Class Settlement Amount. *Id*. at 8.1.3. This percentage compares very favorably to amounts that other courts in this Circuit have approved in class actions. *See, e.g.*, *Jenkins*, 2014 WL 1229661, * 13-14 (approving 33.33% and noting "[I]t is not unusual for district courts in the Fifth Circuit to award percentages of approximately one third."); *see also Jones*, 2016 WL 6106518, * 6 (settlement in ERISA case did not favor class counsel when it provided for $6,450,000 in attorneys' fees where nearly $150 million was recovered for retirement plan).

4. Settlement is within the range of possible approval

To assess the reasonableness of a proposed settlement seeking monetary relief, an inquiry "should contrast settlement rewards with likely rewards if the case goes to trial." *In re Chicken Antitrust Litig.*, 669 F.2d at 239. In evaluating a settlement, "[t]he Court should consider all information which has been available to all parties." *DeHoyos*, 240 F.R.D. at 292. "In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Jones v. Singing River Health System*, No. 14-cv-447, 2016 WL 6106521, *10 (S.D. Miss. June 2, 2016).

The Settlement is an excellent result and well within the "range of possible approval." *In re OCA, Inc. Securities and Derivative Litig.*, 2008 WL 4681369, at *7. ERISA's funding requirements for pension plans are complex and impose actuarial funding standards that present a funding level differently than under an accounting basis in financial statements. *See, e.g.*, ERISA § 430, 29 U.S.C. § 1130. Using the Plans' most recent financial information and ERISA's current funding rules, Plaintiff determined that the Plans were collectively underfunded by $119 million. While Plaintiff had arguments that a greater amount needed to be contributed to the Plans, the best relief Plaintiff could obtain at trial was for ERISA to apply, not the imposition of stricter funding standards. Accordingly, Plaintiff believes that the $125 million in contributions made over the next 5 years, with $105 million contributed within 3 years, gives the Plans significant financial stability and is a very favorable result under the circumstances.

The $450 paid to each of the 2,087 participants who accepted a lump-sum buyout under the "Lump Sum Window Benefit Program" is also reasonable. The per-participant amount is close to the amount approved in *Lann v. Trinity Health Corp.*, No. 14-2237 (D. Md.), an analogous "church plan" case where participants that accepted a buyout of their pensions were paid $550. *Id.* at Dkt. No. 75-3 (Settlement Agreement at § 8.1.3) and Dkt. No. 101 (preliminary approval Order dated Feb. 6, 2017). A lower amount is justified here because, unlike in *Lann*, the participants accepted a lump sum after being provided with information about this lawsuit and the potential impact to the amount of their distribution if ERISA applied, and signed a release. *See* Dkt. No. 25-2 at Exhibits A and B. Indeed, Class Counsel responded to hundreds of telephone inquiries from class members after Defendants had provided that notice to participants. *Id.*

The entirety of the Settlement is especially "within the range of reason" when the state of the law governing "church plans" is considered. During the middle of settlement negotiations, the

Supreme Court granted certiorari in *Kaplan v. Saint Peter's Healthcare System*, 810 F.3d 175 (3d Cir. 2015), *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016), and *Rollins v. Dignity Health*, 830 F.3d 900 (9th Cir. 2016), the three Circuit Court decisions that Plaintiff relies on to support her interpretation of the "church plan" exemption in ERISA. *See generally*, Dkt. No. 48. While Plaintiff believes *Kaplan*, *Stapleton*, and *Rollins* will be upheld, the Supreme Court's decision could affect, if not eliminate outright, the claims Plaintiff brought in this lawsuit. *See In re Pool Products Distribution Market Antitrust Litig.*, 2015 WL 4875464 at *13 (preliminarily approving proposed settlement, finding that monetary component reasonable when considering "the substantial risk of nonrecovery"). Indeed, the U.S. Department of Justice and the Office of the Solicitor General filed *amicus* briefs supporting the reversal of all three appellate decisions. On balance, the benefits to the Class provided by this Settlement outweigh the uncertainty of continued, costly and time-consuming litigation and are well "within the range of possible approval."

B. The Proposed Settlement Class Should be Certified for Settlement Purposes

"The certification requirements of Federal Rule of Civil Procedure 23 generally apply when certification is for settlement purposes." *In re Pool Prod. Distribution Mkt. Antitrust Litig.*, 2015 WL 4875464, at *5 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). A district court does not need to consider "whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." *In re Pool Prod. Distribution Mkt. Antitrust Litig.*, 2015 WL 4875464, at *5 (citing FED. R. CIV. P. 23(b)(3)(D)). But the Court must consider the other factors in Rule 23 and may only certify a class if the requirements of Rule 23(a) and at least one subsection of Rule 23(b) are met. *Amchem Prods.*, 521 U.S. at 619-29.

The proposed Settlement Class meets all four prerequisites of Rule 23(a): numerosity, commonality, typicality, and adequacy. Rule 23(b)(1) and/or (b)(2) are also satisfied, making the

Settlement Class appropriate for class certification. Plaintiff respectfully requests the Court make appropriate findings and certify the Settlement Class, *see supra* Background of the Litigation, B.2 (defining settlement class).

1. Rule 23(a) is Satisfied

a. Numerosity

To warrant certification under Rule 23(a)(1), a proposed class must be "so numerous that joinder of all class members is impracticable." FED. R. CIV. P. 23 (a)(1). To satisfy the numerosity requirement, "a plaintiff must ordinarily demonstrate some evidence or reasonable estimate of the number of purported class members." *Pederson v. La. State Univ.*, 213 F.3d 858, 868 (5th Cir. 2000). The Fifth Circuit has held that while the number of members in a proposed class is not determinative, a class of more than 40 members "should raise a presumption that joinder is impractical" and that a class with 100 to 150 members is "within the range that generally satisfies the numerosity requirement." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999).

Here, Defendants' actuarial disclosures show that there were over 10,000 participants in the Plans as of July 1, 2015. *See* Dkt. Nos. 40-8 (5,838 participants in Retirement Plan of Our Lady of the Lake Hospital), 40-9 (1,785 participants in the Pension Plan of Our Lady of Lourdes Regional Medical Center), and 40-10 (2,550 participants in the Retirement Plan for Employees of St. Francis Medical Center, Inc.). Thus, the Settlement Class is too large for joinder to be practicable under Rule 23(a)(1).

b. Commonality

"[T]he threshold for commonality is not high." *Everson v. Bunch*, No. 14-cv-583, 2016 WL 3255023, *2 (M.D. La. June 13, 2016) (citing *Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986)). The Supreme Court has held that proposed class members' claims must depend

on a "common contention…of such a nature that it is capable of class wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 389 (2011). "Even a single common question of law or fact can suffice." *Everson*, 2016 WL 3255023, at *2 (citing *Wal-Mart Stores, Inc*., 564 U.S. at 359).

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.*, *Jones*, 2016 WL 6106521, at *6 (finding common question concerning "whether the Plan is governed by ERISA"); *AOL Time Warner ERISA Litig.*, Case No. 02-civ-8853-SWK, 2006 WL 2789862, at *2 (S.D.N.Y. 2006) ("In the context of an ERISA action claiming breach of fiduciary duty, class members are related by virtue of their common membership in a retirement plan.").

Here, there are common questions concerning whether the Plans qualify as "church plans" to make them exempt from ERISA and if the Defendants breached their fiduciary duties by improperly funding and administering the Plans. *See, e.g.*, Complaint, Dkt. No. 1, at ¶¶ 1-4. These issues are common to the Settlement Class, satisfying Rule 23(a)(2).

c. Typicality

Typicality is established when "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *See* FED. R. CIV. P. 23 (a)(3). It does not require a complete identity of claims. The critical inquiry is "whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arose from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002). "The test for typicality is not demanding, and it focuses on the general similarity of the legal and remedial theories behind

plaintiffs' claims." *In re Pool Prod. Distribution Mkt. Antitrust Litig.*, 2015 WL 4875464, at *8 (citing *Lightbourn v. Cnty. of El Paso, Tex.*, 118 F .3d 421, 426 (5th Cir. 1997)).

Plaintiff's claims are typical to those of the Class because they arise from the same conduct of the Defendants. Plaintiff alleges the Class suffered harm because Defendants improperly classified the Plans as "church plans" and did not comply with ERISA when administering the Plans. Defendants' conduct caused the Plans to be underfunded and participants who accepted a lump sum buyout of their pensions received less than they would under ERISA. Based on these facts and allegations, Plaintiff satisfies the typicality requirement. *See*, *e.g.*, *Jones*, 2016 WL 6106521, at *7 (typicality requirement met where claims involving retirement plan "arose from the same nucleus of facts"); *In re Pool Prod. Distribution Mkt. Antitrust Litig.*, 2015 WL 4875464, at *8 ("many courts have found typicality if the claims or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory.") (citing 7A Wright & Miller, *Federal Practice and Procedure* § 1764 (2014)).

d. Adequacy

Rule 23's Advisory Committee Notes specify that the adequacy of a named plaintiff is governed by Rule 23(a)(4) while the adequacy of counsel is governed by Rule 23(g). *See* FED. R. CIV. P. 23 Advisory Committee's Notes. Class Representatives and Class Counsel satisfy the requisite requirements of these rules.[4] With respect to a plaintiff, the purpose of the inquiry is to "uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc.*, 521 U.S. at 2250.

[4] Proposed Class Counsel's adequacy is discussed in greater detail *infra* in Section C.

Rule 23(a)(4)'s adequacy requirement is met here. The Settlement Class Representatives' interests are fully aligned with those of absent Class members because their claims all derive from Defendants' conduct in classifying the Plans as "church plans." The $125 million in total contributions will be made to the Plans, not to individual participants. The only direct payments will be made to those participants that accepted a lump sum buyout of their future pension payments from the Plans and thus would not benefit from the $125 million contributions called for in the Settlement. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 480 (5th Cir. 2001) ("Differences between named plaintiffs and class members render the named plaintiff inadequate representatives only where those differences create conflicts of interest between the named plaintiffs' and the class members' interests.").

There is also no conflict between the Class and Class Counsel. As discussed with respect to Rule 23(g) in § C, below, Plaintiff retained qualified counsel with extensive experience in ERISA class actions. *See* Kindall Decl. at Exhibits 2 and 3; *see also Kemp-DeLisser v. St. Francis Hospital*, No. 15-cv-1113, 2016 WL 6542707, *16 (D. Conn. Nov. 3, 2016) (granting final approval of settlement in "church plan" case, describing Izard, Kindall & Raabe as "national leaders in class action litigation and ERISA matters."); *Cappello v. Franciscan Alliance, et al.*, No. 16-cv-290, Dkt. No. 106 (N.D. Ind.) (appointing Kessler Topaz Meltzer & Check, LLP as Co-Interim Class Counsel in "church plan" case, referencing its "strong history in ERISA and other types of class actions" and noting "the Court is satisfied that [Kessler Topaz] has mastered the law applicable in the instant case and that they are more than sufficiently equipped to protect the interests of the putative class"). Class Counsel accordingly know the applicable law and support the Settlement. *See* Kindall Decl. at ¶ 4. Moreover, any money that Class Counsel receives will be paid separately by the Defendants and will not reduce the Class's financial recovery. The

Settlement is also not contingent on an attorneys' fee award in any particular amount. *See* Settlement at § 8.1.6. Accordingly, the adequacy requirement is met.

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

A class may be certified under 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). This subsection is "often utilized to certify class actions arising out of the alleged improper administration of retirement plans." *Jones*, at *9. This is because:

> one Plan participant's claim necessarily implicates issues relevant to the adjudication of other participants' claims. Claims brought by more than one plan participant therefore might place incompatible demands on the defendants, requiring them to compensate the Plan under one ruling but not another.

Id.; *see also In re Schering Plough ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) ("the derivative nature of ERISA §502(a)(2) claims are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class.").

Because Plaintiff pursues claims in a representative capacity in accordance with ERISA's remedial provisions, this Action is particularly appropriate for class action treatment under Rule 23(b)(1). 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 Class may also be certified under Rule 23(b)(2). A class may be certified under Federal Rule of Civil Procedure 23(b)(2) if the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate the final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FED. R. CIV. P. 23 (b)(2). Here, Plaintiff 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. *See* Complaint at ¶¶ 2-3. Plaintiff also contends that Defendants failed to comply with ERISA across each of the Plans and seeks monetary and equitable relief to the Plans as a whole. *Id*. at ¶ 4. As such, the remedy sought is one for equitable relief and is authorized under ERISA. *See* ERISA §§ 502(a)(2) and (3), 29 U.S.C. § 1132(a)(2) and (3).

Although the Settlement includes monetary consideration to the Plans, that consideration is incidental to, and flows directly from, Plaintiff's request for equitable relief and is still appropriate for certification under Rule 23(b)(2). *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) ("Where monetary relief would flow automatically to the class as a whole from a grant of equitable relief for breach of fiduciary duty, certification under Rule 23(b)(2) is appropriate."); *see also Berger v. Xerox Corp. Retirement Income Guar. Plan*, 338 F.3d 755, 763-64 (7th Cir. 2003) (same). Indeed, "[m]onetary relief may be obtained in a Rule 23(b)(2) class action so long as the predominant relief sought is injunctive or declaratory." *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001). Accordingly, Plaintiff's claims are also properly satisfied under Rule 23(b)(2).

C. The Court should appoint Izard, Kindall & Raabe and Kessler, Topaz, Metzler & Check as Class Counsel and Ms. Nicholson and Ms. Francis as Class Representatives

"Certifying a settlement class also requires appointing class counsel." *Kemp*, 2015 WL 125641833, at *7. Federal Rule of Civil Procedure 23(g) requires the Court to examine the

capabilities and resources of class counsel. Here, Class Counsel developed the claims in the Complaint and have expended significant time and effort to litigate the Action thus far. *See, e.g.*, Dkt. Nos. 1 (Complaint), 48 and 49 (oppositions to Defendants' Motions to Dismiss), 56 (Plaintiff's opposition to Defendants' supplemental authority). If the Parties did not agree to the Settlement, Class Counsel would have continued to dedicate the necessary time and resources to litigate the Action to conclusion. Each firm has extensive experience in ERISA class actions and expertise in the claims brought here. *See* Firm Resumes of Izard, Kindall & Raabe, LLP and Kessler, Topaz, Meltzer & Check, LLP, attached to the Kindall Declaration as Exhibits 2 and 3, respectively; *see also Kemp-DeLisser*, 2016 WL 6542707 (granting final approval in "church plan" case with IKR as class counsel); *Tucker v. Baptist Health Sys., Inc.*, No. 15-cv-382, Dkt. No. 51 (N.D. Ala.) (Order granting preliminary approval of "church plan" case where IKR and KTMC both represent plaintiff). Class Counsel thus satisfy the requirements of Rule 23(g) to be preliminarily appointed as Co-Lead Counsel.

The Court should also preliminarily appoint Laurie Nicholson and Cynthia Francis as Class Representatives. Both are members of the Settlement Class they seek to represent, as they are participants in the Plans. Moreover, they have been injured by Defendants' conduct with respect to the Plans. Further, Ms. Nicholson has been involved in the litigation since the inception, regularly keeping in contact with her counsel and assisting Class Counsel during the litigation and mediation, whereas Ms. Francis joined the litigation in advance of the mediation and provided valuable assistance. In light of their involvement in the litigation and the fact they have represented the Class well, Class Counsel respectfully submit that Ms. Nicholson and Ms. Francis should be appointed as Settlement Class Representatives for the Settlement Class.

D. The Proposed Notice to the Class is Adequate

Federal Rule of Civil Procedure 23(e)(2) requires that class members receive notice of any proposed settlement before final approval by the Court. *See, e.g., Wal-Mart Stores Inc. v. Visa USA, Inc.*, 396 F.3d 96, 113 (2d Cir. 2005) (Due process and Rule 23(e) require that class members receive notice of a pending settlement that meets the test of "reasonableness."). The content of a settlement notice need only be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The Notice Plan agreed to by the Parties satisfies all due process considerations and meets the requirements of FED. R. CIV. P. 23 (e). The proposed Notice describes in plain English: (a) the terms of the Settlement and what they mean; (b) the nature and extent of the release of claims; (c) the maximum attorneys' fees, expenses and Case Contribution Awards that may be sought; (d) the procedure and timing for objecting to the Settlement; and (e) the date and place for the Fairness Hearing. *See* Settlement Agreement at Exhibit A to Exhibit 1. This is sufficient to satisfy Rule 23(e) and Due Process. *See, e.g., Everson*, 2016 WL 3255023, at *4.

The way the Class Notice will be disseminated also meets Rule 23(e)'s requirements. 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 delivered to the Settlement Class in the form and manner approved by the Court. Notice will be sent via first class mail to the last known addresses for members of the Settlement Class in the possession of the Plans' 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 (www.ikrlaw.com). *See* Settlement Agreement § 3.2.4.

These proposed forms will fairly apprise members of the Class of the Settlement Agreement and their rights as members of the Settlement Class. *See, e.g., Kemp*, 2015 WL 12564183, at *10. Thus, the form of notice and proposed procedures for notice satisfy the requirements of Rule 23(e) due process and should be approved by the Court.

F. Proposed Schedule

The schedule the Parties are proposing for final approval of the Settlement is based on the need to give fair notice to the Class, as well as to give 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

The Settlement Agreement requires that notice be given to Class Members by first class mail no later than 30 days after the Court enters a Preliminary Approval Order. The parties propose that this notice be given at least 70 days before the proposed Fairness Hearing, with objections due 14 days before the Fairness Hearing and responses to objections due 7 days before the Fairness Hearing. Accordingly, Class Members will have 55 days to review and respond to the settlement if they so desire, including two weeks to review the papers that Plaintiff will submit in support of final approval and awards to Class Counsel and the Class Representatives. Below is the proposed schedule in chart form.

Event	Time for Compliance
Date of CAFA Notice	10 days after entry of the Preliminary Approval Order
Deadline for mailing of Class Notice and posting Notice to website	30 days after entry of the Preliminary Approval Order
Deadline for filing Plaintiff's motions for final approval, attorneys' fees and costs, and Incentive Fee to the Settlement Class Representatives	31 days prior to the proposed Fairness Hearing
Deadline for the Settlement Class to comment upon or object to the proposed Settlement	14 court days prior to the proposed Fairness Hearing

Additional briefs the parties wish to file in support of the Settlement	7 court days prior to the proposed Fairness Hearing
Proposed Fairness Hearing	No sooner than 90 days after mailing of the CAFA Notice or 60 days after mailing and posting of Class Notice, whichever later occurs.

CONCLUSION

Plaintiff respectfully moves the Court to preliminarily approve the Settlement, appoint IKR and KTMC as Class Counsel for the Settlement Class and Ms. Nicholson and Ms. Francis as Class Representatives for the Settlement Class, approve the form and manner of the Class Notice and direct the class notice be sent to all members of the Settlement Class, and set a date for the Fairness Hearing as soon after the 120th day after entry of the Preliminary Approval Order.

Dated: May 5, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2017, a true and correct copy of the foregoing document was filed with the Court utilizing its ECF system, which will send notice of such filing to all counsel of record.

/s/ Mark P. Kindall
Mark P. Kindall