IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE WHEATON FRANCISCAN ERISA LITIGATION	Case No. 16-cv-04232 Honorable Gary Feinerman

PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES AND FOR INCENTIVE AWARDS TO NAMED PLAINTIFFS

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs Bruce Bowen, Cheryl Mueller, and Diann M. Curtis ("Plaintiffs" or "Named Plaintiffs"), by and through their attorneys, respectfully move the Court for an Order approving awards of attorneys' fees and expenses to their attorneys, Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein") and Keller Rohrback L.L.P. ("Keller Rohrback") (collectively, "Class Counsel"), as well as additional Plaintiffs' Counsel, Kessler Topaz Meltzer and Check, LLP ("Kessler Topaz"), and The Collins Law Firm ("Collins"). Class Counsel also seek approval of the proposed Incentive Awards for Named Plaintiffs' contributions to the litigation.[1]

I. INTRODUCTION

The Parties to this Action have entered into a comprehensive Settlement Agreement that provides substantial relief to the Settlement Class members in the form of Plan provisions that will enhance the retirement security of the members of the Settlement Class. Specifically, under the Settlement Agreement, Defendant Ascension Health ("Ascension Health" or "Ascension") guarantees the payment of $29,500,000 to the trust fund to pay for benefits that are distributable from the Plan to Settlement Class Members in the event that trust assets become insufficient to pay such benefits. Any of the Releasees may also satisfy this obligation by making contributions to the Plan Trust that in the aggregate total $25,000,000. Ascension Health also guarantees that, for a period of seven and one-half years, no amendment or termination of the Plan will result in a reduction of a Settlement Class member's accrued benefit, including if the Plan is merged or consolidated with another plan. Finally, effective immediately and as a permanent condition of settlement, the plan administrator will be required to furnish participants with yearly

[1] Plaintiffs file the instant Motion contemporaneously with their Unopposed Motion for Final Approval of the Settlement. Defendants do not agree with all averments stated in this Memorandum, however, Defendants do not oppose the ultimate relief sought herein.

notifications informing participants about the funding status of the Plan, a statement of each participant's individual benefit, the Plan's total income, the assets and liabilities of the Plan, and other information about the Plan's financial health. This settlement term is designed to mimic ERISA's notification requirements; it identifies the Plan's fiduciaries and other information concerning the pension benefits participants have accrued each year, as well as the Plan Trust's assets and liabilities.[2] This Settlement is an excellent result for the Class, particularly in light of the substantial risks the Class would face if the litigation were to continue.

With the assistance of the mediator, Plaintiffs and Defendants also negotiated an agreement for a total payment of $2.25 million for payment of attorneys' fees, litigation expenses of $41,834.46, and incentive awards of $10,000 to each of the Named Plaintiffs. Alongside Named Plaintiffs Diann M. Curtis, Bruce Bowen, and Cheryl Mueller, Class Counsel have worked to achieve this Settlement without compensation of any kind, and their fees and reimbursement of expenses have been wholly contingent on the result achieved (if any). Plaintiffs now request that the Court approve their requests for attorneys' fees, out-of-pocket expenses, and Named Plaintiff awards as a reasonable fee agreement. The fee agreement was negotiated at arm's length between adversarial parties, and therefore reflect market value. The requested fees have the full support of the Named Plaintiffs, and Defendants do not oppose Plaintiffs' application for the requested fees.

The incentive awards are similarly fair and reasonable in light of Named Plaintiffs' contributions to helping develop claims in the litigation, guiding settlement negotiations, and the risks that they bore in agreeing to become the "face" of this litigation. The awards would

[2] Capitalized terms not otherwise defined in this Memorandum have the same meaning as ascribed to them in the Settlement Agreement, attached to the Memorandum in Support of Plaintiffs' Unopposed Motion for Final Approval of the Settlement as Exhibit A.

compensate the Named Plaintiffs for their time, effort, assumption of risk, and active participation in the litigation.

II. HISTORY AND BACKGROUND OF THE CASE

As detailed in the Joint Declaration of Class Counsel ("Joint Decl."), attached to the Memorandum in Support of the Unopposed Motion for Final Approval of the Settlement, Plaintiffs' counsel committed considerable time and resources to develop and prosecute this matter—without any guarantee of payment. *See* Joint Decl. ¶¶ 8-10, submitted contemporaneously herewith. This litigation involved extensive research and innovative investigation into ERISA's "church plan" exemption, investigation of Plaintiffs' claims, review of publicly available financial information and confidential plan documents, and motion practice regarding venue selection, case consolidation and leadership, all culminating in a highly favorable Settlement for Plaintiffs and the Class. *See* Joint Decl. ¶¶ 7-12, 14-22, 32-35.

A. Initial Investigation into the ERISA Church Plan Exemption.

As Plaintiffs detailed in their leadership briefing, ECF No. 62, and in Class Counsel's Joint Declaration, Class Counsel have committed more than seven years of intensive work to the development and litigation of "church plan" cases. Joint Decl. ¶ 8. After extensive research and analysis, including a detailed analysis of the "church plan" exemption and its legislative history, Class Counsel concluded that large hospital systems like the Wheaton Franciscan System ("Wheaton Franciscan" or "Wheaton") and Ascension were improperly claiming the exemption for their defined benefit pension plans. *Id.* ¶ 9.

Class Counsel also understood from their research that this church plan case--and others--challenged many years of private letter rulings from the IRS and informal Advisory Opinions of the Department of Labor, which determined that hospital systems like Wheaton operated pension plans that met the ERISA definition of "church plan." Joint Decl. ¶ 10; Compl. ¶3. Nevertheless,

based on their interpretation of the "church plan" exemption and understanding of its legislative history, Class Counsel decided to take on this high-stakes, high-risk litigation, and they were the only lawyers to do so at that time. Joint Decl. ¶ 11. The early results in the district courts were mixed,[3] but when the first three cases reached the appellate courts, Cohen Milstein and Keller Rohrback achieved unanimous rulings in favor of plaintiffs in the Third, Seventh, and Ninth Circuit.[4] *Id*. Those courts held that the hospital plans at issue were not Church Plans because they were not established by a church. *Id*. ¶ 12. The defendants sought review in the United States Supreme Court, which was granted in December 2016. *Id.* The Supreme Court reversed the three appellate courts, holding that a religiously-affiliated organization, even if it is not a church, may operate an ERISA-exempted "church plan" so long as it meets the other statutory requirements, about which the Supreme Court took no position. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1657 n.2, 1658 n.3 (2017) ("*Advocate*") (stating that the Court would not reach plaintiffs' arguments regarding whether the plans at issue were maintained by "principal-purpose organizations" or whether the employer was "controlled by or associated with" a church).

In the wake of the *Advocate* decision, Cohen Milstein and Keller Rohrback have pursued these other statutory arguments. Joint Decl. ¶ 12. However, in this particular litigation, the parties had already held one mediation session and instead believed that an additional mediation

[3] *Compare, e.g.*, *Kaplan v. Saint Peter's Healthcare Sys.*, No. 13-2941 (MAS)(TJB), 2014 WL 1284854 (D.N.J. Mar. 31, 2014); *Rollins v. Dignity Health*, 19 F. Supp. 3d 909 (N.D. Cal. 2013); and *Stapleton v. Advocate Health Care Network*, 76 F. Supp. 3d 796 (N.D. Ill. 2014), with *Overall v. Ascension*, 23 F. Supp. 3d 816 (E.D. Mich. 2014); *Medina v. Catholic Health Initiatives*, No. 13- 1249, 2014 WL 4244012 (D. Colo. Aug. 26, 2014).

[4] *See Rollins v. Dignity Health*, 830 F.3d 900 (9th Cir. 2016); *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).

could bridge their differences and justify a resolution of the litigation. The Settlement could not have been achieved without the firms' total immersion in these issues and continual commitment to the participants of these plans. Joint Decl. ¶ 13.

B. Class Counsel's Vigorous Prosecution of This Case

In addition to the efforts set forth above, before filing the Complaint Class Counsel had already been working with Plaintiffs Bruce Bowen and Cheryl Mueller to investigate the facts, circumstances, and legal issues associated with the allegations and defenses in the action. Joint Decl. ¶ 15. This investigation included, *inter alia*: (a) inspecting, reviewing, and analyzing documents produced by or otherwise relating to Defendants, the Plan, and the administration and funding of the Plan; (b) researching the applicable law with respect to the claims asserted in this case and the possible defenses thereto; and (c) researching and analyzing governmental and other publicly-available sources concerning the Defendants, the Plan, and the industry. *Id*. ¶ 16. Cohen Milstein and Keller Rohrback used this research to carefully draft the 100-page Complaint. *Id.* ¶ 17.

While Class Counsel was researching and drafting this Complaint, Plaintiff Diann Curtis, through her Counsel, filed a complaint against Wheaton Franciscan in the Northern District of Illinois for similar ERISA violations. *Curtis v. Wheaton Franciscan et al.* 1:16-cv-4232 (N.D. Ill. *filed* Apr. 11, 2016) ("*Curtis*"). On April 28, 2016, Defendants filed a motion to transfer *Curtis* out of the Northern District of Illinois and into the Eastern District of Missouri. ECF Nos. 12-14. Following six weeks of briefing on Defendants' motion to transfer the *Curtis* action, and before this Court ruled on the motion, Plaintiffs Bowen and Mueller, through Class Counsel, filed their Complaint in the Northern District of Illinois on June 28, 2016. *Bowen v. Wheaton Franciscan, et al.* 1:16-cv-6782 (N.D. Ill. *filed* Jun. 28, 2016) ("*Bowen*"). On July 8, 2016 *Bowen* was

designated as related to *Curtis*, and was reassigned to this Court. ECF No. 44. On July 20, 2016, Defendants filed a supplemental motion to transfer the related cases out of the Northern District of Illinois and into the Eastern District of Missouri. ECF No. 45. Following several months of briefing, on October 31, 2016, this Court denied Defendants' motion. ECF No. 58.

At almost the same time, on July 1, 2016, the law firm representing Plaintiff Diann Curtis filed a motion asking this Court to appoint it Interim Lead Class Counsel. ECF Nos. 38-40. Class Counsel, on behalf of the *Bowen* Plaintiffs, opposed this motion, arguing that they were the law firms best equipped to helm the two related cases as Interim Co-Lead Class Counsel. ECF Nos. 61-62. The briefing on this issue ran concurrently with the briefing on Defendants' motion to transfer the case. On January 4, 2017, this Court entered an order consolidating the *Bowen* and *Curtis* cases, and appointing Cohen Milstein and Keller Rohrback Interim Co-Lead Class Counsel. ECF No. 77. Throughout this litigation, Class Counsel have worked vigorously to ensure that Plaintiffs were represented by the law firms with the most experience and deepest understanding of the relevant law, and that Plaintiffs retained the right to litigate this case in the forum of their choosing.

Also on January 4, 2017, this Court stayed the above-captioned case pending the Supreme Court's resolution of *Advocate*. During this stay, prior to oral argument in *Advocate*, the parties began engaging in settlement negotiations. Joint Decl. ¶ 21. The parties attended an initial in-person mediation session on February 9, 2017, in Los Angeles, California. *Id*. ¶ 23. The mediation and was overseen by a third-party JAMS mediator, Robert A. Meyer, Esq. Mr. Meyer has substantial experience mediating cases involving ERISA and retirement plan issues, including cases involving the church plan exemption. *Id*. ¶ 24. Both Class Counsel and Defendants' Counsel provided the mediator with their respective confidential mediation

statements and also exchanged multiple proposals and counter-proposals with each other concerning potential settlement terms. *Id*. ¶ 23. The mediator was in constant contact with the parties both orally and in writing. *Id*. Although the matter was not resolved at the February 9, 2017 mediation, the parties made progress and agreed to continue pursuing a settlement agreement. *Id*. ¶ 25. During the stay, the parties remained actively engaged in settlement negotiations. *Id*.

On June 5, 2017, the Supreme Court issued its opinion in *Advocate Health Care*, holding that pension plans need not be established by churches in order to qualify as ERISA-exempt church plans, if they otherwise meet the requirements to be church plans. Joint Decl. ¶ 12. On June 22, 2017, the Court granted the parties' request to postpone an upcoming status conference so that the parties could attend a second mediation session on June 27, 2017. *Id*. ¶ 25. Following this second mediation session, with Mr. Meyer's assistance and after considering all relevant factors, the parties reached an agreement in principle to settle the case. *Id*. ¶ 26. Despite what the parties believed was an agreement in principle, finalizing the Term Sheet required additional and substantial negotiations.

On August 11, 2017, the parties signed a Term Sheet containing the preliminary terms resolving this matter. *Id*. ¶ 26. The Settlement Agreement now before the Court, Exhibit A to Plaintiffs' Unopposed Motion for Final Approval of Settlement Agreement, is a comprehensive agreement based on the Term Sheet. *Id*. ¶ 27. The $29.5 million guarantee provision of the Settlement Agreement, described in detail below, was crafted to provide Plaintiffs with a type of insurance in that it ensures that the Plan will remain sufficiently funded into the future—a type of protection which may not otherwise be available. *Id*. ¶ 34. The Settlement is the result of lengthy

arm's-length negotiations between the parties. *Id*. ¶ 27. The process was thorough, adversarial, and professional. *Id*.

III. PLAINTIFFS ARE ENTITLED TO THE REQUESTED FEES AS A MEDIATOR-PROPOSED, MARKET-SET FEE AGREEMENT.

The parties to a class action properly may negotiate not only the settlement of the action itself, but also the payment of attorneys' fees. *Evans v. Jeff D.*, 475 U.S. 717, 734–35, 738 n.30 (1986). In cases outside the "common fund" context, as is the case here because the attorneys' fees award was negotiated separately and will not reduce the benefit conferred on the Class, the Supreme Court has made clear that settlements of requests for attorneys' fees should be encouraged and respected; indeed, it is only where parties fail to reach agreement on fees that courts should scrutinize fee requests:

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

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

As Judge Posner observed in *In re Continental Illinois Securities Litigation*, 962 F. 2d 566, 570 (7th Cir. 1992), the virtue in the negotiation of attorneys' fees by the adversarial parties to the settlement (the defendants who must pay the fee want to minimize the payment to be made versus the lawyers who wish to receive it) is that the "[m]arkets know market values better than judges do." Thus, "a court can, [generally] assume that the defendants closely scrutinized the [plaintiffs'] fee requests, and agreed to pay no more than was reasonable." *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 582 (3d Cir. 1984)). This is particularly true here because the

negotiations were overseen and assisted by an experienced, neutral, third-party mediator.

IV. THE COURT SHOULD GRANT THE REQUESTED FEES AS REASONABLE

A. Plaintiffs' Request for Attorney's Fees Is Justified by Having Created a Common Benefit for the Class

It is well-established that attorneys are entitled to reasonable compensation for their efforts in creating a common fund for the benefit of a class. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole"). By extension, courts recognize that attorneys' fees are justified where the settlement confers a common benefit to the class.

The Supreme Court recognized the concept of treating common benefits and common fund fee analyses similarly in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970) (under the "common benefit" doctrine, there is no requirement "that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses," including attorneys' fees). Thus, the Supreme Court held, "when the benefit conferred is capable of expression in monetary terms," many courts treat the value of the benefit to the class as the basis for awarding attorneys' fees, *Mills*, 396 U.S. at 395. For instance, in a shareholder derivate settlement arising out of a corporation's financial collapse, one court determined that for the purpose of calculating attorneys' fees, the value of the settlement was almost entirely composed of non-cash benefits for the class. *In re M.D.C. Holdings Sec. Litig.*, No. CV89-0090 E (M), 1990 WL 454747, at *2 (S.D. Cal. Aug. 30, 1990) (finding that the settlement's non-pecuniary benefits to the class were worth approximately $100 million). *See also Will v. Gen. Dynamics Corp.*, No. CIV. 06-698-GPM, 2010 WL 4818174, at *1 (S.D. Ill. Nov. 22, 2010) (In calculating the common benefit to the class in an ERISA class action settlement for purposes of awarding

attorneys' fees, "this Court recognizes that it is important to take into account affirmative relief in addition to monetary relief so as to encourage attorneys to obtain effective affirmative relief. While the true value of the affirmative relief is difficult to pinpoint, it will without a doubt materially add to the monetary recovery to the Plans."); *Williams v. Gen. Elec. Capital Auto Lease*, No. 94 C 7410, 1995 WL 765266 at *9 (N.D. Ill. Dec. 19, 1995 *entered* Dec. 26, 1995) ("the approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred on the class," especially where that percentage approximates what the market would yield).

In this settlement, both the monetary guarantee and the non-pecuniary terms of the settlement confer a substantial benefit on the Class. As a result of the guarantee, in the event that the Plan is unable to pay benefits, Defendants will pay up to $29.5 million of outstanding Plan benefits. Ex. A § 7.1.1-2. If Defendants choose the Settlement Agreement's buyout option, Defendants will be required to make contributions that in the aggregate amount to $25 million into the Plan's trust fund. *Id.* § 7.1.4. This guarantee functions as a type of insurance that may not otherwise be available and provides significant value to the Class because of the protection it offers that the Plan will remain sufficiently funded into the future. Joint Decl. ¶ 34.

It is also important to take into account the non-pecuniary affirmative relief provided by the Settlement Agreement. *Will*, 2010 WL 4818174, at *1. For the next seven and a half years, Ascension will be prohibited from cutting back any participant's accrued benefit, as defined in the Settlement Agreement. Ex. A § 8.2. Moreover, effective immediately and as a permanent condition of the Settlement, Ascension must comply with equitable provisions that mimic certain provisions of ERISA. Ex. A § 8.3.1. For instance, Plan participants will receive notice on an annual basis about the funding status of the Plan and the retirement benefits that they have

accrued. *Id.* This annual notice will include, among other information, a summary of the Plan's funding arrangements, a summary of the Plan's expenses, a statement of the Plan's liabilities and assets, information about the increase or decrease in net plan assets for the year, and summary information about the Plan's total income. *Id.* While the "true value" of these provisions is difficult to measure, they were designed to equip Class members with ERISA-like informational protections so that they are able to plan for their retirement. Joint Decl. ¶ 30. These protections will also confer significant value on the class and "materially add[s] to the monetary recovery to the Plan[]."*Will*, 2010 WL 4818174, at *1.

B. The Court Should Assess Class Counsel's Fee Request Using the "Percentage of the Fund" Method.

Here, an award of attorneys' fees is justified both because the fee was negotiated at arms' length by the parties and because fees are warranted under the common benefit doctrine. Next, the Court must determine whether Class Counsel's requested fees are reasonable. *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994). Courts in the Seventh Circuit have the discretion to choose between two methods for calculating reasonable attorneys' fees: the lodestar method (in which a court considers the number of hours expended multiplied by the hourly rate), and the "percentage of the fund" method (where the Court determines whether the attorneys' requested fees are reasonable proportionate to the amount recovered for the class). *See id* at 566 ("We…restate the law of this circuit that in common fund cases, the decision whether to use a percentage method or a lodestar method remains in the discretion of the district court.").

"Ultimately, in the Seventh Circuit, the market controls. Thus, the Seventh Circuit is less concerned with the choice between the lodestar or percentage method than with approaching the determination through the lens of the market." *In re Trans Union Corp. Privacy Litig.*, No. 00 C

4729, 2009 WL 4799954, at *9 (N.D. Ill. Dec. 9, 2009), *order modified and remanded*, 629 F.3d 741 (7th Cir. 2011). Nevertheless, as between the lodestar method and the "percentage of the fund" method, the Seventh Circuit has strongly endorsed the percentage method to conduct the "market transaction" analysis, because it most closely approximates the manner in which attorneys are compensated in the marketplace for contingent work. *See Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) (recognizing that most plaintiffs' counsel work on a contingent fee basis); *see also In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992) (noting it is easier to award a percentage "than it would be to hassle over every item or category of hours and expenses and what multiple to fix and so forth"). And, in fact, the percentage of recovery method has "emerged as the favored method for calculating fees in common fund cases in [the Northern District of Illinois]." *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 844 (N.D. Ill. 2015).

Here, Class Counsel respectfully seek a total award of $2.25 million, covering attorneys' fees for the four firms representing the three Named Plaintiffs and the Class; out-of-pocket litigation expenses for all firms; and incentive awards to the three Named Plaintiffs. Thus, the total award to Class Counsel will be $2,178,165.54. Even without counting the value of the non-monetary components of the settlement, and assuming that Ascension immediately bought out the guarantee with a $25 million contribution to the Plan's trust fund, Class Counsel's requested fee award of $2,178,165.54 only represents 8.71% of $25 million. This amount is well below the 25-33% fees that courts in this jurisdiction have awarded using the "percentage of recovery" method in ERISA class action litigation, as set forth below.

C. Class Counsel Would Have Received the Requested Fee in an *Ex Ante* Market Transaction

Although this case is only analogous to a common fund settlement because the award does not reduce the benefits to the Class, it bears noting that district courts "must do their best to

award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*"). Thus, the role of the district court is to "try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys." *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011). *See also In re Cont'l Ill. Sec. Litig.*, 962 F.2d at 572 ("The object in awarding a reasonable attorney's fee…is to give the lawyer what he would have gotten in the way of a fee in arm's length negotiation, had one been feasible. In other words the object is to simulate the market where a direct market determination is infeasible").

In this Circuit, courts consider the following factors (the "*Synthroid* factors") to determine a reasonable *ex ante* market rate: attorneys' fee awards in other class action settlements; any fee agreements between plaintiffs and their counsel; the risk of nonpayment counsel agreed to bear; the quality of Settlement Class Counsel's performance; the amount of work necessary to resolve the litigation; and the stakes of the case. *Taubenfeld v. Aon Corp.*, 415 F.3d 597, 599 (7th Cir. 2005). *See also Synthroid I*, 264 F.3d at 721 ("The market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case."). Each of these factors weighs in favor of awarding Plaintiffs their requested attorneys' fees.

1. The Requested Fee Represents a Much Lower Percentage of the Settlement Fund than Typical Attorneys' Fee Awards in Similar Cases in This Circuit

The fee award requested here, amounting to 8.71% of the $25 million buyout value, is well below fee awards made by courts in this District in similar cases. "Courts routinely hold that one-third of a common fund is an appropriate attorneys' fees award in class action settlement."

Castillo v. Noodles & Co., No. 16-CV-03036, 2016 WL 7451626, at *5 (N.D. Ill. Dec. 23, 2016). Specifically, "the Seventh Circuit has recognized that the market rate for ERISA class actions is a contingency fee between 25% and 33% of the settlement (or award)." *Kaplan v. Houlihan Smith & Co.*, No. 12 C 5134, 2014 WL 2808801, at *3 (N.D. Ill. June 20, 2014) (citing *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011)).[5] As 8.71% falls well below the market rate for an ERISA class action suit, this factor supports Class Counsel's requested award.

2. Named Plaintiffs Agreed *Ex Ante* that Class Counsel Would Seek No More than One-Third of the Monies Recovered

The Court should consider any actual agreement between class members and their attorneys when assessing a fee request. *Synthroid I*, 264 F.3d at 719-20. Here, the client representation agreement between Plaintiffs Curtis, Bowen, Mueller, and Class Counsel states

[5] *See, e.g., Taubenfeld*, 415 F.3d at 598 (affirming award of 30% of $7.25 million); *Gaskill v. Gordon*, 160 F.3d 361, 362-63 (7th Cir. 1998) (affirming award of 38% of the settlement fund, or roughly $8 million); Order and Final Judgment, *Butler v. Holy Cross Hospital*, 1:16-CV-05907 (N.D. Ill. Jun. 29, 2017) (awarding 15% of $4 million settlement amount); *Castillo*, No. 16-CV-03036, 2016 WL 7451626, at *1 (N.D. Ill. Dec. 23, 2016) (33 1/3% of $3 million); *Briggs v. PNC Fin. Servs. Grp., Inc.*, No. 1:15-CV-10447, 2016 WL 7018566, at *3 (N.D. Ill. Nov. 29, 2016) (33 1/3% of $6 million); *Koszyk v. Country Fin. a/k/a CC Servs., Inc.*, No. 16 CIV. 3571, 2016 WL 5109196, at *4 (N.D. Ill. Sept. 16, 2016) (33 1/3% of settlement fund, or $941,666.67); *Wright v. Nationstar Mortage LLC*, No. 14 C 10457, 2016 WL 4505169, at *16 (N.D. Ill. Aug. 29, 2016), appeal dismissed (Oct. 24, 2016), appeal dismissed sub nom. *Wright v. Nationstar Mortg., LLC*, No. 16-3538, 2016 WL 9752125 (7th Cir. Oct. 21, 2016), and appeal dismissed sub nom. *Wright v. Nationstar Mortg., LLC*, No. 16-3537, 2016 WL 9752126 (7th Cir. Oct. 25, 2016) (30% of net settlement fund, or approximately $3,075,000); *Abrams v. Van Kampen Funds, Inc.*, No. 01 C 7538, 2006 WL 163023, at *8 (N.D. Ill. Jan. 18, 2006) (25% of net settlement fund); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856, at *3 (N.D. Ill. Dec. 10, 2001) (33 1/3% of $14 million); *Long v. Trans World Airlines, Inc.*, No. 86-CV- 7521, 1993 U.S. Dist. LEXIS 5063, at *1 (N.D. Ill. Apr. 15, 1993) (32% of $4.075 million settlement or $1.3 million).

that "counsel may seek an award of up to 33 1/3 % of any recovery." Joint Decl. ¶ 57. The Northern District of Illinois has found that an *ex ante* agreement between plaintiffs' counsel and named plaintiffs that counsel will not seek more than one-third of any future recovery constitutes evidence of "what private plaintiffs 'would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed),' because the Named Plaintiffs contracted for Plaintiffs' Counsel to be compensated with the amount Plaintiffs' Counsel now seek." *Koszyk v. Country Fin. a/k/a CC Servs., Inc.*, No. 16 CIV. 3571, 2016 WL 5109196, at *4 (N.D. Ill. Sept. 16, 2016) (quoting *Synthroid I*, 264 F.3d at 718 and citing *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 844-45 (N.D. Ill. 2015)). In this case, even though Class Counsel bargained *ex ante* to seek an award of up to one-third of Plaintiffs' recovery, Class Counsel now seeks an award of only 8.71% of Defendants' minimum liability. This factor therefore supports the reasonableness of Class Counsel's fee request.

3. Class Counsel Assumed Significant Risk in Bringing This Case, and the Stakes of this Litigation Are Significant for Plaintiffs

The contingent nature of this case strongly favors the award of fees. *See Taubenfeld*, 415 F.3d at 600 ("the contingent nature of the case" and "that lead counsel was taking on a significant degree of risk of nonpayment with the case" should be considered in making a fee award decision); *In re Trans Union Corp. Priv. Litig.*, 629 F.3d 741, 746 (7th Cir. 2011) (stating that "within the set of colorable legal claims, a higher risk of loss does argue for a higher fee"); *Sutton v. Bernard*, 504 F.3d 688, 694 (7th Cir.2007) ("there is generally some degree of risk that attorneys will receive no fee (or at least not the fee that reflects their efforts) when representing a class because their fee is linked to the success of the suit"). From the outset, Plaintiffs' Counsel litigated this matter on a contingent basis and placed their own resources at risk to do so. As discussed in more detail in Plaintiffs' Memorandum in Support of Plaintiffs' Unopposed Motion

for Final Approval of the Proposed Settlement (filed contemporaneously with this memorandum), absent this Settlement, Plaintiffs and the Settlement Class risked obtaining no recovery at all. Specifically, just before the Parties settled this action, the Supreme Court ruled on the question central to this litigation, holding that a hospital *may* claim ERISA's "church plan" exemption, just as Wheaton Franciscan and Ascension did here. *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1663 (2017). Though Plaintiffs advance other arguments and theories not reached by the Supreme Court, Plaintiffs' case was negatively impacted by the Supreme Court's decision. Joint Decl. ¶ 67. The possibility that the ruling in *Advocate* could have hampered Plaintiffs' ability to recover anything at all for the Class if this litigation proceeded therefore weighs in favor of an award of fees.

4. Class Counsel's Quality of Performance and the Amount of Work Performed Support the Award of the Requested Fee.

Class Counsel are among the leading ERISA plaintiffs' firms and possess unparalleled expertise in the specific types of ERISA claims brought in this lawsuit. *See* Joint Decl. ¶¶ 7-13. As set forth in detail in Section II.A., above, they are only law firms in the country that commenced Church Plan litigation six years ago and have been vigorously litigating those claims ever since. As a result of this extensive experience, they have a deep knowledge of the applicable law. As this Court noted when appointing Class Counsel as lead counsel over competing counsel, "[G]iven their active and ongoing involvement in the consolidated church-plan ERISA cases now before the Supreme Court, [Class Counsel] have more intimate knowledge of the applicable law. That involvement will put counsel in the best position to guide this litigation after the Supreme Court rules, whatever that ruling might be." ECF No. 77 at 2 (internal citation omitted).

As detailed in Section II.B., above, Class Counsel expended significant time and

resources in the investigation and litigation of this case. Joint Decl. ¶ 6. For instance, Class Counsel reviewed and analyzed Plan documents, public disclosures, publicly-available financial statements, governmental filings, and information provided by Plaintiffs, prior to filing the Complaint. *Id.* ¶ 16. The Settlement negotiations were similarly extensive and took place over the course of five months, including two in-person mediation sessions in Los Angeles, California, as well as numerous calls and meetings. *Id.* ¶¶ 23, 25. During the course of these negotiations, Class Counsel investigated the facts, circumstances, and legal issues associated with the allegations and defenses in this action. *See id.* ¶¶ 28-35. Even while this case was stayed, Class Counsel monitored the developments in the other pending Church Plan cases, informed the Named Plaintiffs of those developments, and assessed the impact of those developments on the instant case. *Id.* ¶ 76. Because the Settlement is the culmination of Class Counsel's substantial factual and legal investigations, a thorough mediation process with an experienced mediator and sophisticated opposing counsel, and extensive negotiations, this factor weighs in favor of granting Class Counsel's request.

D. A Lodestar Cross-Check Supports the Award of the Requested Fees

A lodestar cross-check compares counsel's request for fees to the actual hours and resultant fees spent on a case. A district court is under no obligation to cross-check the requested fees against the lodestar, *see Williams*, 658 F.3d at 636 ("consideration of a lodestar check is not an issue of required methodology"), and in fact, courts in this district have found that "[t]he use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive." *Kaufman v. Am. Express Travel Related Servs., Co.*, No. 07-CV-1707, 2016 WL 806546, at *13 n.9 (N.D. Ill. Mar. 2, 2016) (quoting *Will v. Gen. Dynamics Corp.*, No. 06-

698-GPM, 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010)). Nevertheless, Class Counsel's requested fee is supported by a lodestar crosscheck here.[6]

Class Counsel and the other firms expended a total of 2,045.5 hours developing and prosecuting this case.[7] Joint Decl. ¶ 48. At Class Counsel's and the other firms' hourly rates, which are comparable to those of other class action attorneys, this amounts to a combined lodestar of $1,232,092.65. Joint Decl. ¶ 53. Plaintiffs' requested fee of $2,178,165.54 (the total request of $2.25 million, less expenses and incentive awards for named Plaintiffs) amounts to a modest 1.77 multiplier on the combined lodestar. As detailed in Section IV.B.3, above, Class Counsel litigated this case on a contingency basis, thereby facing a significant risk of non-payment. As a result, Class Counsel is entitled to a reasonable multiplier. *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998) (When calculating an award of attorneys' fees under the lodestar method, "the district court ***must*** award a multiplier when attorney's fees are contingent upon the outcome of the case (*i.e.*, there is the possibility that the attorney will not receive any fee)) (emphasis added). *See also Florin*, 34 F.3d at 565 ("[A] risk multiplier is not merely available in a common fund case but mandated, if the court finds that counsel had no sure source of compensation for their services."); *Wright*, 2016 WL 4505169, at *15 ("When a court uses the lodestar approach, a risk multiplier is necessary because the lodestar does not adequately

[6] Class Counsel's lodestar data are attached to the Final Approval Brief as Exhibits C and D. The data show that, collectively, Class Counsel and the other Plaintiff's firms devoted 1,212.75 professional hours to this case. Joint Decl. ¶ 52. Valued at the professionals' customary hourly rates, this time produces a base lodestar of $1,232,092.65. *Id.* ¶ 53.

[7] Per this Court's instructions of January 4, 2017, ECF No. 77, Class Counsel have been contemporaneously gathering Kessler Topaz's and Collins' time and expense records to submit for compensation for their work. Kessler Topaz and Collins have each provided a declaration in support of their request (attached to the Final Approval Brief as Exhibits E and F).

compensate an attorney for the risks of taking on a consumer class action on a contingency basis.").

In the Seventh Circuit, "multipliers anywhere between one and four…have been approved." *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991) (internal citation omitted). *See also In re Cenco Inc. Sec. Litig.*, 519 F. Supp. 322, 327 (N.D. Ill. 1981) (approving a multiplier of 4); *Dutchak v. Cent. States, Se. & Sw. Areas Pension Fund*, 932 F.2d 591, 596 (7th Cir. 1991) (affirming an award with a multiplier of 2); *In re Brand Name Prescription Drugs Antitrust Litig.*, 2000 WL 204112 at *3 (N.D. Ill. Feb. 10, 2000) ("An award of more than two times the lodestar calculation is believed to be fair and just in these circumstances"); Theodore Eisenberg & Geoffrey Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 *J. Empirical Legal Stud*. 248, 272 (Table 14) (2010) (between 1993 and 2008, the mean multiplier in class actions in the Seventh Circuit was 1.85). Here, Class Counsel requests a multiplier of 1.77—less than the mean multiplier in this Circuit. This is well within the range of multipliers regularly awarded in this District and should be approved.

V. THE COURT SHOULD AWARD THE REQUESTED EXPENSES

This Court may award reasonable out-of-pocket litigation expenses authorized by the parties' agreement. Fed. R. Civ. P. 23(h). Courts in this District regularly award reimbursement of the expenses that counsel incur in prosecuting litigation. *See, e.g.*, Order and Final Judgment *Butler et al. v. Holy Cross Hospital et al.*, 1:16-cv-05907 (N.D. Ill. June 29, 2017), ECF No. 52 (granting expenses incurred during litigation); *Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1256 (N.D. Ill. 1993) (detailing and awarding various expenses incurred during litigation); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1041 (N.D. Ill. 2011) (awarding expenses incurred during litigation).

Here, Class Counsel requests reimbursement for common and routinely reimbursed

litigation expenses in the amount of $41,834.46. Joint Decl. ¶ 73, Exs. E, F, G, H (summaries of expenses). These expenses include filing fees; travel expenses for court appearances and mediation; copying, delivery and telecommunications charges; mediator's charges; and similar litigation expenses. *Id* ¶ 74. These expenses are typically billed by attorneys to paying clients, and are calculated based on the actual expenses of these services in the markets in which they have been provided. *Spicer,* 844 F. Supp. at 1256 (finding costs such as those sought here necessary in class litigation). These fees were necessary for the litigation and resolution of this action, and Class Counsel have provided bills of costs for the amount sought. Joint Decl. ¶ 73, Exs. F, F, G, H (summaries of expenses).

VI. THE COURT SHOULD AWARD THE REQUESTED INCENTIVE AWARDS

Finally—and perhaps most importantly—Class Counsel respectfully request that the Court approve an award of $10,000 to each of the three named representative plaintiffs. It is well-recognized that "Plaintiffs in class and collective actions play a crucial role in bringing justice to those who would otherwise be hidden from judicial scrutiny." *Castillo*, 2016 WL 7451626, at *2. "Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook*, 142 F.3d at 1016. As the Northern District of Illinois has observed, "[t]his is especially true in employment litigation," where "'the plaintiff is often a former or current employee of the defendant, and thus, by lending his name to the litigation, he has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or co-workers.'" *Castillo*, 2016 WL 7451626, at *2 (quoting *Velez v. Majik Cleaning Serv., Inc.*, No. 03 Civ. 8698 (SAS)(KNF), 2007 WL 7232783, at *7 (S.D.N.Y. June 25, 2007)). As a result, courts in this District consider three factors in their examination of the reasonableness of a requested service award: (1) the actions the plaintiffs have taken to protect the interests of the class; (2) the degree to which the

class has benefited from those actions; and (3) the amount of time and effort the plaintiffs expended in pursuing the litigation. *Castillo*, 2016 WL 7451626, at *3, citing *Cook*, 142 F.3d at 1016; *Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, No. 07 Civ. 2898, 2012 WL 651727, at *16 (N.D. Ill. Feb. 28, 2012).

Here, each of the Named Plaintiffs made substantial contributions to the litigation. Throughout the course of the litigation, Plaintiffs collected and produced documents; regularly engaged in thorough discussions regarding Class Counsel's litigation decisions, including through email and phone calls; reviewed and approved the Complaint; stayed abreast of the pleadings, motions, and settlement negotiations; and involved themselves in the mediation and settlement of this litigation. Bowen Decl. 2-3; Mueller Decl. ¶¶ 5, 8, 9; Curtis Decl. ¶¶ 5, 10, 11.

Moreover, the requested $10,000 incentive award to each plaintiff is typical for ERISA church plan cases. *See, e.g.*, Order and Final Judgment, *Holy Cross*, 1:16-cv-05907 (N.D. Ill. June 29, 2017), ECF No. 52 ("Named Plaintiffs … are hereby awarded Incentive Payment Awards in the amount of $10,000 each, which the Court finds to be fair and reasonable."); *Griffith v. Providence Health & Servs.*, No. C14-1720-JCC, 2017 WL 1064392, at *2 (W.D. Wash. Mar. 21, 2017) ("Class Representatives are each awarded an incentive fee of $10,000.00"); "); Order and Final Judgement, *Overall v. Ascension Health*, No. 13-cv-11396-AC-LJM (E.D. Mich. Sep. 17, 2015), ECF No. 115 (awarding named plaintiff a $15,000 incentive award). It is also well within the range of incentive payments made by other courts in the Seventh Circuit. *See, e.g., In re Sw. Airlines Voucher Litig.*, No. 11-CV-8176, 2013 WL 4510197, at *11 (N.D. Ill. Aug. 26, 2013), *aff'd as modified*, 799 F.3d 701 (7th Cir. 2015) ("Awards of $15,000 for each plaintiff are well within the ranges that are typically awarded in comparable cases"); *Chesemore v. All. Holdings, Inc.*, No. 09-CV-413-WMC, 2014 WL

4415919, at *5 (W. D. Wis. Sept. 5, 2014), *aff'd sub nom. Chesemore v. Fenkell*, 829 F.3d 803 (7th Cir. 2016); *Cook*, 142 F.3d at 1015 (affirming $25,000 incentive award where named plaintiff reasonably feared workplace retaliation); *Spicer*, 844 F. Supp. at 1233 ($10,000 awards where class representatives, *inter alia*, participated in discovery).

As the Court no doubt appreciates, the activities of these Plaintiffs required a considerable investment of time. But, even more importantly, this responsibility demanded attention and anxiety that no other class members had to shoulder. By stepping forward, each Named Plaintiff greatly benefitted the members of the Settlement Class and thus the requested awards to Named Plaintiffs are appropriate. Accordingly, the requested incentive payments to Plaintiffs Curtis, Bowen, and Mueller are reasonable, appropriate, and should be awarded.

VII. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that the Court grant Plaintiffs' motion for an award of attorneys' fees, reimbursement of expenses, and incentive awards for Plaintiffs Diann Curtis, Bruce Bowen, and Cheryl Mueller, together with such other and further relief as the Court may deem just and proper. A proposed order granting the relief sought herein is attached as Exhibit B to the Final Approval Brief.

Dated: November 28, 2017

By: __/s/ *Carol V. Gilden*_

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Interim Co-Lead Class Counsel

CERTIFICATE OF SERVICE

I certify that on November 28, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ Julia Horwitz