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

MARIA STAPLETON, et al., Plaintiffs, v. ADVOCATE HEALTH CARE NETWORK AND SUBSIDIARIES, et al., Defendants.	)	Civil Action No. 1:14-cv-01873 Hon. Edmond E. Chang

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

Plaintiffs Maria Stapleton, Judith Lukas, Sharon Roberts, and Antwain[1] Fox ("Named Plaintiffs"), by and through their attorneys, respectfully move the Court for an Order: (1) approving awards of attorneys' fees and expenses to their attorneys Keller Rohrback L.L.P. and Cohen Milstein Sellers & Toll, PLLC ("Class Counsel") and Local Counsel; and (2) granting incentive awards to themselves, as class representatives.[2] Defendants do not oppose the relief sought herein. For the reasons set forth in the accompanying Memorandum, Plaintiffs ask that the Court grant Plaintiffs' Motion and approve $1,250,000.00 in attorneys' fees and expenses to Plaintiffs' Counsel, and Incentive Awards of $10,000.00 to each of the four named Plaintiffs.

DATED this 11th day of May, 2018

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[1] Antwain Fox was inadvertently named in the Complaint as "Antoine Fox."
[2] Plaintiffs file the instant Motion contemporaneously with their Unopposed Motion for Final Approval of Settlement Agreement and Certification of Settlement Class.

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UNITED STATES DISTRICT COURT
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EASTERN DIVISION

MARIA STAPLETON, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 1:14-cv-01873
v.	)	
	)	Hon. Edmond E. Chang
ADVOCATE HEALTH CARE NETWORK AND SUBSIDIARIES, et al.,	)	
	)	
	)	
Defendants.	)	

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

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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 a guarantee and other provisions that will enhance their retirement security.[1] Specifically, under the Settlement Agreement, Defendant Advocate Health Care Network ("Advocate") guarantees, for a period of ten years, that the Advocate Health Care Network Pension Plan (the "Plan") will have sufficient funds to pay Settlement Class members the level of benefits stated in the Plan. The Settlement further provides that during that time 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.

Additionally, the Settlement provides significant non-monetary equitable consideration, in that it requires that current participants in the Plan will receive access to information and certain other ERISA-like financial and administrative protections for ten years. Finally, certain former participants whose benefits did not vest under the Plan's terms under a vesting schedule that would be inconsistent with ERISA will receive a one-time cash payment of three hundred dollars ($300.00).

After resolving the key Settlement provisions that provide relief to the Settlement Class, the Parties negotiated, based upon a proposal by the third-party mediator (Robert Meyer, Esq.), an agreement for payment of attorneys' fees, expenses, and class representative Incentive Awards to Named Plaintiffs. Joint Decl.[2] ¶¶ 27-28. This compromise provides that, if approved by the Court, Defendants will pay up to $1.25 million in attorneys' fees and expenses to Class Counsel and potential Incentive Awards to Named Plaintiffs. Ex. A

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[1] A copy of the Settlement Agreement ("Settlement" or "Settlement Agreement") is attached to the Memorandum in Support of Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement and Certification of Settlement Class, ("Final Approval Memorandum"), as Exhibit A. Capitalized terms not otherwise defined herein shall have the same meaning ascribed to them in the Settlement Agreement.

[2] The Joint Declaration of Lynn Lincoln Sarko and Karen L. Handorf in Support of (1) Plaintiffs' Unopposed Motion for Final Approval of Settlement and Certification of Settlement Class; and (2) Plaintiffs' Unopposed Motion for Award of Attorneys' Fees and Reimbursement of Expenses, and for Incentive Awards to Named Plaintiffs ("Joint Declaration" or "Joint Decl.") is attached to the Final Approval Memorandum as Exhibit C.

§ 7.1.5. If awarded, these amounts will in no way reduce the guarantee or other Settlement benefits to the Settlement Class. *Id*.

For the reasons discussed below, Plaintiffs request that the Court approve the negotiated attorneys' fees, expenses, and Named Plaintiff awards as a reasonable, market-set fee agreement. These fees compensate Class Counsel and Named Plaintiffs for the significant time, effort, risk, and expenses they expended in the successful resolution of this Action. The fees and expenses are consistent with the benefits that the Settlement confers on the Settlement Class. The negotiated award represents a fractional multiplier of less than 1, for a substantial discount of 65% off of the actual lodestar ($2,927,682.95) that Class Counsel expended developing and pursuing this Action. The Incentive Awards to the Named Plaintiffs are also fair and reasonable in light of Named Plaintiffs' substantial commitment of time and effort to this litigation over the last four years.

II. CLASS COUNSEL'S EFFORTS AND THE RESULTS OBTAINED

As detailed in the Joint Declaration, Class Counsel committed considerable time and resources to develop and prosecute this matter without any guarantee of payment. Ex. C ¶¶ 10-17. This litigation was hard fought and involved extensive investigation, review of documents, and legal research and briefing, all of which were necessary to achieve a positive result for the Class. *Id.* ¶¶ 18-21.

A. Initial Investigation into the ERISA Church Plan Exemption.

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

Class counsel devoted many hours to researching the definition of a "church plan" found in both ERISA and the Internal Revenue Code, 29 U.S.C. § 1002(33) and 26 U.S.C. § 414(e), including analyzing the statutory text, its interaction with other provisions of the

United States Code, the legislative history of the statute, and agency and court interpretations of the statute. Ex. C ¶¶ 11-15. Class Counsel concluded, based on their investigation, that ERISA contained only a narrow exemption for ***churches***, and that hospitals like Advocate were improperly claiming the exemption. *Id.* ¶ 13; Compl. ¶¶ 83-104, ECF No. 1.

Class Counsel understood, based on their research, that filing church plan cases such as this one would challenge many years of private letter rulings from the Internal Revenue Service and informal Advisory Opinions of the Department of Labor. Ex. C ¶ 15. They also knew that the defense would maintain that the small amount of church plan case law then in existence would favor a defense reading of the church plan exemption. *Id.* And they knew that once even a few of the cases were filed, the major hospitals claiming the exemption, which employ hundreds of thousands of people, would be arrayed against them. *Id.*

Nevertheless, Class Counsel decided to take on this high-stakes, high-risk litigation. Class Counsel were the only lawyers to do so. *Id.* ¶ 16. The early results in the district courts were mixed,[3] but when the first three cases—including this case—reached the appellate courts on interlocutory appeal, Class Counsel (the same counsel in this case) achieved major victories: all three courts ruled unanimously in favor of Plaintiffs.[4] The fight then moved to the Supreme Court, which reversed the appellate decisions and remanded for further proceedings on Plaintiffs' additional theories of liability.[5] This case then settled after extensive mediation and negotiation, but Class Counsel continue to litigate their additional theories in other church plan cases throughout the country. The settlement achieved here, following the Supreme Court's decision, is a direct result of Class Counsel's total immersion

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[3] *Compare, e.g.*, Order, *Chavies v. Catholic Health E.*, No. 13-1645 (E.D. Pa. Mar. 28, 2014), ECF No. 67; *Kaplan v. Saint Peter's Healthcare Sys.*, No. 13-2941, 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 & Subsidiaries*, 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); and *Lann v. Trinity Health Corp.*, No. 14-2237, 2015 WL 6468197 (D. Md. Feb. 24, 2015); *see also* Joint Decl. ¶ 16.

[4] *See Rollins v. Dignity Health*, 830 F.3d 900, 905 (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); *see also* Ex. C ¶ 16.

[5] *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017); *see also* Ex. C ¶ 17.

in the issue. *Id.* ¶ 33.

B. Class Counsel's Vigorous Prosecution of this Case.

Before filing the Complaint in this case, Class Counsel developed the legal theories referenced above and analyzed the facts relating to Advocate and the Plan at issue in this case. Class Counsel examined Plan documents, Advocate's public disclosures, financial statements, and information supplied by the Named Plaintiffs themselves. *Id.* ¶ 18. Ultimately, this research resulted in a 56-page Complaint asserting 10 counts against multiple defendants. *Id.* ¶ 19.

After the Complaint was filed, Defendants filed a Motion to Dismiss. ECF No. 34. That motion focused on the issue of whether, in order to claim the church plan exemption, the plan must be established by a church; however, it also raised other nuanced factual and legal issues, such as whether Advocate is "controlled by" or "associated with" a church under ERISA, and constitutional issues. *See* Mem. in Supp. of Defs.' Mot. to Dismiss at 13-15, 25-30, ECF No. 35. Class Counsel invested many hours responding to that motion and Defendants' arguments. *See* Pls.' Opp'n to Defs.' Mot. to Dismiss, ECF No. 46; *see also* Ex. C ¶ 20.

The Court denied Defendants' Motion to Dismiss, ruling as a matter of law that an ERISA-exempt "church plan" must be established by a church. *See* Mem. Op. and Order, ECF No. 64; *see also* Ex. C ¶ 21. Defendants, over Plaintiffs' opposition, obtained leave to file an interlocutory appeal of that ruling, and the Court stayed proceedings pending the appeal. Order, ECF No. 76. After briefing and argument, the Seventh Circuit Court of Appeals affirmed the District Court; however, the Supreme Court then accepted review, and after briefing and oral argument issued its decision that pension plans need not be established by churches in order to qualify as ERISA-exempt church plans, though they still had to satisfy other conditions.[6] Class Counsel kept Named Plaintiffs abreast of these developments.

[6] *Advocate*, 137 S. Ct. 1652 (2017).

C. The Mediator Oversaw Settlement Negotiations and Made a Mediator's Proposal on Attorneys' Fees, to which the Parties Agreed (Subject to Court Approval).

Following the *Advocate* decision, on June 5, 2017, the Parties reported to the Court at a status conference that they were prepared to resume active litigation. Minute Entry, ECF No. 125. Subsequently, before returning to litigation, the Parties agreed to attempt to settle the case through mediation. On August 23, 2017, the Court continued the case for 60 days to allow for mediation, ECF No. 134, and the Parties proceeded to mediation on September 15, 2017, with the assistance of an experienced JAMS mediator in hopes of resolving the case. Ex. C ¶ 24. The Parties appeared before nationally renowned mediator Robert Meyer, Esq., of JAMS in Chicago, Illinois. *Id.* Mr. Meyer has substantial experience mediating cases involving ERISA and retirement plan issues, including cases involving the church plan exemption. *Id.*; *see also* Ex. A §§ 2.7, 10.1.1. The matter was not resolved at the September 15, 2017 mediation, but the Parties agreed to continue settlement discussions, and the Court, at the Parties' request, continued proceedings until early January 2018 to allow for further settlement discussions. Ex. C ¶ 25; Minute Entry, ECF No. 144. The Court simultaneously set a schedule for answering the Complaint and proceeding with discovery should settlement not be reached. *Id.*

After further negotiations with the assistance of Mr. Meyer, the Parties met for an additional mediation session in New York on December 13, 2017. Once again, the Parties were not able to settle the case at that mediation. Ex. C ¶ 26. At the urging of Mr. Meyer, the Parties continued their discussions, with Mr. Meyer continuing to serve as mediator. *Id.* ¶ 27.

Prior to and during these negotiations, Class Counsel investigated the facts, circumstances, and legal issues associated with the allegations and defenses in the action. The investigation included, *inter alia*: (a) analyzing documents and information produced by or relating to the Defendants, the Plan, and the industry; (b) researching the applicable law with respect to the claims and possible defenses; and (c) exploring potential remedies. *Id.* ¶¶ 10-15, 18.

Only ***after*** the Parties reached agreement on the key terms for the Settlement Class did they turn to negotiations concerning attorneys' fees. *Id.* ¶ 28. Those negotiations were overseen by the mediator, who came up with a mediator's proposal, to which the Parties ultimately agreed, *see* Ex. A § 7.1.5, subject to the Court's approval. Ex. C ¶ 27.[7]

Once the Parties reached an agreement in principle to settle the case, the Parties signed a Term Sheet containing the preliminary terms resolving this matter. *Id*. Thereafter, Class Counsel drafted and filed the Settlement Agreement and Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement Agreement. ECF No. 154. The Court preliminarily approved the Settlement on February 26, 2018. Order Prelim. Approving the Settlement, Certifying the Class, Approving Notice to the Class, and Scheduling Final Approval Hr'g ("Preliminary Approval Order"), ECF No. 159.

Pursuant to the Preliminary Approval Order, Class Notice was mailed on March 28, 2018, to more than 61,642 current and former Plan participants. Class Counsel posted the Notice on their websites by March 28, 2018. Ex. C ¶¶ 40-41. Class Notice was mailed to an additional approximately 4,000 current or former Plan participants on or before April 12, 2018. *Id.* ¶ 43. Class Counsel has received and responded to phone calls and emails from approximately 107 Class members. *Id.* ¶¶ 44-45. Class Counsel will continue to devote significant time to responding to inquiries from the Class and answering questions concerning the Settlement. *Id.* ¶¶ 47. Accordingly, Class Counsel request an award of attorneys' fees and expenses for the significant time they have devoted to this case and also an award to the Named Plaintiffs for their services to the Class over the past four years.

III. THE COURT SHOULD AWARD 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,

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[7] *See In re Sw. Airlines Voucher Litig.*, No. 11 C 8176, 2013 WL 4510197, at *8 (N.D. Ill. Aug. 26, 2013) (noting absence of collusion where agreement to attorneys' fees were only discussed in mediator's presence after agreement to terms of settlement for class members).

738 n.30 (1986). In cases outside the "common fund" context, 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." Fed. R. Civ. P. 23(h).

The virtue in the negotiation of attorneys' fees by the adversarial parties to the settlement is that the "[m]arkets know market values better than judges do." *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 570 (7th Cir. 1992). Thus, "the 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).

Here, the fees were negotiated ***after*** agreement was reached on the key terms of the Settlement for the Class; a well-respected and neutral mediator oversaw the negotiations; and the fees were based upon the mediator's proposal, to which the Parties ultimately agreed (subject to Court approval). Given that this agreement has been closely scrutinized by all sides—Plaintiffs, Defendants, and the mediator—the fee agreement should be respected and awarded.

IV. THE AWARD IS REASONABLE

Even if there had not been agreement between the Parties, the requested award would be amply justified under a lodestar or percentage analysis. *See Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 565-66 (7th Cir. 1994).

In this case, the percentage method is difficult to apply, because the primary benefit to the Class of a ten-year guarantee in an unlimited amount and equitable ERISA-like

protections cannot be easily quantified monetarily. This is not an impediment to the award of fees—indeed, for the purposes of awarding fees, the Supreme Court has likened the award of fees for achieving a common *benefit* to those for creating a common *fund*. *Mills v. Elec. 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). And the benefit here is substantial. The Plan is guaranteed to have sufficient funds to pay benefits at the level stated in the Plan, as it is amended from time to time, for ten years, Ex. A § 7.1.2, which functions as a kind of insurance to the Settlement Class not otherwise available, Ex. C ¶¶ 5-6; during those ten years, Advocate cannot cut back any Settlement Class member's Accrued Benefit, Ex. A § 8.2, and must comply with certain equitable provisions that function similarly to ERISA in providing notices regarding pension funding and benefits to Settlement Class members, *id.* § 8.4. Advocate will also provide a onetime payment to certain non-vested former participants. *Id.* § 7.1.4. However, because the separate "lodestar" analysis fully supports the award of fees and expenses set out in the Settlement, the Court need not engage in an attempt to put a dollar value on these substantial benefits for purposes of the award.

A. The Fee Award Is Reasonable Based on the Lodestar Method.

The lodestar method provides courts an objective basis upon which to determine the value of the services provided by counsel. *Hensley*, 461 U.S. at 433. Multiplying the number of hours counsel worked by a reasonable hourly rate establishes the lodestar. After examining the time and labor required, the Court may apply a multiplier to the lodestar, taking into account relevant factors such as the novelty of the questions involved, the skill required, and

in contingent fee cases, the risk to the attorneys.[8] In this motion, Plaintiffs' counsel seeks no multiplier.

The lodestar method confirms the reasonableness of Plaintiffs' fee request. Class Counsel expended a total of 4,358.48 hours developing and prosecuting this litigation. Ex. C ¶ 50. At Class Counsel's hourly rates, which are comparable to those of other class action attorneys, this amounts to a lodestar of $2,927,682.95. Plaintiffs' total requested award of $1.25 million is inclusive of unreimbursed litigation costs totaling $187,273.39, plus the requested Incentive Awards for the four Named Plaintiffs in the amount of $10,000 each (discussed below). *Id.* ¶ 76. After reimbursement of costs and the requested Incentive Awards for the Named Plaintiffs, the requested attorneys' fees are only a fraction of the amount expended; they amount to a 0.35 multiplier on Class Counsel's combined lodestar of $2,927,682.95. *Id.* ¶ 57.

1. The Results Obtained and the Benefits to the Settlement Class.

As discussed in detail in the Memorandum in Support of Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement and Certification of Settlement Class, the Settlement provides substantial benefits to the Class. The Settlement provides for a ten-year guarantee of the funds to pay Class members' accrued benefits, and prohibits any reductions in Accrued Benefits during that period. The Settlement also includes important provisions that will enhance the retirement security of the members of the Settlement Class. These protections are comparable to some of ERISA's key provisions and will enable Plan participants and beneficiaries to have access to important information about the Plan and their benefits.

[8] *Hensley,* in a different context, identifies twelve possible factors: "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Id.* at 429-30 n.3 (citation omitted).

2. Time and Labor Required.

The 4,358.48 hours Class Counsel collectively expended on this case were reasonably spent, especially given the high-stakes, high-risk nature of this litigation and the results obtained. This includes time spent on the following: (1) researching the law bearing on the church plan exemption and concluding large hospital systems were not entitled to the exemption, and investigating the non-profit hospital business as it bore on liability and defenses; (2) investigating the facts of this case, and drafting and filing the Complaint; (3) reviewing hundreds of pages of documents, including publicly available information about the Plan; (4) conducting factual and legal research; (5) opposing Defendants' Motion to Dismiss and obtaining a decision as a matter of law on a central issue in the case; (6) researching, briefing, and arguing an appeal to the Seventh Circuit; (7) researching, briefing, and arguing an appeal to the Supreme Court; (8) negotiating and crafting a comprehensive Settlement Agreement after arm's-length negotiations overseen by a third-party mediator; (9) successfully moving for preliminary approval of the Settlement; (10) drafting the Class Notice materials and posting them on two dedicated settlement websites; and (11) individually responding to over one hundred inquiries from Class members concerning the Class Notices, the Settlement, and this litigation. *See id.* ¶¶ 9-44. Moreover, Class Counsel's work is not yet done. Class Counsel still need to complete the final approval process, assist Class members with inquiries, respond to any potential objections, and handle any resulting appeal. *Id.* ¶ 47.

The hourly rates Class Counsel charged to perform this work, which range from $175 to $995, are reasonable. *Id.* ¶¶ 67-68. These rates are "prevailing market rates," for similar services by lawyers of "reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 & n.11 (1984). The reasonableness of these rates is evidenced by comparison to fee awards Class Counsel has received in similar cases. *See Johnson v. GDF, Inc.*, 668 F.3d 927, 933 (7th Cir. 2012). Class Counsel have submitted fee petitions in a number of other church plan cases in which they reported hourly rates at amounts

comparable to those sought herein. Ex. C ¶ 70. The other church plan cases include two church plan cases from the Northern District of Illinois. Order and Final Judgment ¶ 21, *In re Wheaton Franciscan ERISA Litig.*, No. 16-4232 (N.D. Ill. Jan. 16, 2018), ECF No. 107; Order and Final Judgment ¶ 21, *Butler v. Holy Cross Hosp.*, No. 16-5907 (N.D. Ill. Jun. 29, 2017), ECF No. 52. The courts approved the fee awards in these cases and all the other church plan cases. *Id.*[9]

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

As is evident from the discussion above, this was not a garden variety ERISA class action; indeed, this area of law has been one of the most unpredictable and rapidly changing in ERISA jurisprudence. The first cases were filed in March 2013, and they were being argued at the Supreme Court only four years later. District courts reached opposite findings on a threshold issue in this case, Ex. C ¶ 16 (citing cases), and Class Counsel argued three of them in which they had prevailed—including this case—through the Courts of Appeals and to the Supreme Court. *Id.* ¶¶ 16-17. When the Supreme Court reversed, Plaintiffs continued to have strong claims because they had developed a number of alternative theories on which to proceed with the litigation. *Id.* ¶ 17.

The long-standing use of the church plan exemption by hospitals, the supportive private letter rulings many of them obtained from the Internal Revenue Service and/or the Department of Labor, the diversity of outcomes in the lower courts, the decisions of the

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[9] Other examples of cases in which Class Counsel submitted fee petitions in the district reporting similar hourly rates, and the courts approved them, include: Order Approving Attorney's Fees, Expenses and Incentive Awards at 3, *Diebold v. N. Tr. Invs., N.A.*, No. 09-1934 (N.D. Ill. Aug. 10, 2015), ECF No. 285 (awarding then-current Keller Rohrback attorneys' rates between $395 and $895); Order Awarding Attorneys' Fees and Litigation Expenses at 3, *La. Firefighters Ret. Sys. v. N. Tr. Invs., N.A.*, No. 09-7203 (N.D. Ill. Aug. 5, 2015), ECF No. 499 (approving then-current Keller Rohrback attorneys' rates between $475 and $945); Order on Lead Counsel's Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses and Reimbursement of Lead Plaintiff's Costs and Expenses at 2, *Constr. Workers Pension Tr. Fund v. Navistar Int'l Corp.*, No. 13-2111 (N.D. Ill. Nov. 1, 2016), ECF No. 183 (approving then-current attorneys' rates between $475 and $945 on a lodestar cross-check); Order Granting Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses at 2, *Hughes v. Huron Consulting Grp. Inc.*, No. 09-4734 (N.D. Ill. May 6, 2011), ECF No. 145-1 (awarding then-current attorneys' rates between $475 and $795). *See also* Ex. C ¶¶ 70-72 (listing additional examples).

appellate courts and the reversal by the Supreme Court on a fundamental issue in this case, necessitating further litigation on independent theories developed by Class Counsel, were among the challenges faced by Class Counsel. *Id.* ¶¶ 12-17. This action demanded a high degree of legal skill, both to settle the matter and to be prepared to litigate the issues through trial and on appeal.

4. The Preclusion of Other Employment.

As noted above, this action has been demanding. Even while this case was stayed in this Court, Class Counsel were litigating it in the appellate courts and the Supreme Court; they also necessarily stayed abreast of developments in other church plan proceedings, and kept Plaintiffs in this action informed. *Id.* ¶¶ 16-17, 20-21. Once the Supreme Court ruled, Class Counsel prepared for further litigation and then devoted considerable time to contentious settlement negotiations and crafting a Settlement Agreement that was fair and reasonable for the Class. *Id.* ¶¶ 22-33. Over the course of the last four years, the present litigation precluded Class Counsel from accepting other potentially profitable work. *Id.* ¶¶ 18-21, 29.

5. The Customary Fee.

The fractional multiplier of 0.35 requested by Class Counsel falls well below the usual range of multipliers approved by Seventh Circuit courts. In the Seventh Circuit, "[m]ultipliers anywhere between one and four . . . have been approved." *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991) (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.*, No. 94 C 897, 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, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 272 (Table 14) (June 2010)

(between 1993 and 2008, the mean multiplier in class actions in the Seventh Circuit was 1.85).

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

From the outset, Class Counsel litigated this matter on a contingent basis and placed at risk their own resources to do so. Ex. C ¶ 16, 59, 69. Absent this Settlement, the Settlement Class and their Counsel risked obtaining no recovery at all. The contingent nature of this case favors the award of fees. *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)."). *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.'") (citation omitted); *Wright v. Nationstar Mortg. LLC*, No. 14 C 10457, 2016 WL 4505169, at *15 (N.D. Ill. Aug. 29, 2016) ("When a court uses the lodestar approach, a risk multiplier is necessary because the lodestar does not adequately compensate an attorney for the risks of taking on a consumer class action on a contingency basis."). Thus, applicable case law *a fortiori* supports the award of a fraction of Plaintiffs' Counsel's lodestar.

7. Class Counsel's Experience and Reputation Weighs in Favor of the Award.

Class Counsel are among the leading ERISA plaintiffs' firms, and possess unparalleled expertise in the specific types of ERISA claims brought in this lawsuit. Ex. C ¶¶ 11-21. Class Counsel not only committed considerable time and expertise to developing the church plan case theory, but also litigated the case in three appellate courts and the Supreme Court and continue to litigate church plan cases around the country. *Id.* ¶¶ 10-19. Defense counsel are similarly highly respected and experienced.[10]

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[10] *See, e.g.*, Greensfelder, *Employee Benefits Litigation*, https://www.greensfelder.com/practices-areas-Employee-Benefits-Litigation.html (last visited May 11, 2018).

V. THE COURT SHOULD AWARD THE REQUESTED EXPENSES

This Court may award reasonable expenses authorized by the parties' agreement. Fed. R. Civ. P. 23(h). Trial courts may determine what is reasonable based on an objective standard of reasonableness, *i.e.*, the prevailing market value of services rendered. *Blum*, 465 U.S. at 895. Here, based on the Joint Declaration filed contemporaneously herewith, Class Counsel requests reimbursement for common and routinely reimbursed litigation expenses incurred by Class Counsel in the amount of $187,273.39. Ex. C ¶¶ 76-79. This request is reasonable and should be approved. *See, e.g.*, Order and Final Judgment ¶ 21, *In re Wheaton Franciscan ERISA Litig.*, No. 16-4232 (N.D. Ill. Jan. 16, 2018), ECF No. 107 (granting expenses incurred during litigation); Order and Final Judgment ¶ 21,), ECF No. 52 (*Butler v. Holy Cross Hosp.*, No. 16-5907 (N.D. Ill. June 29, 2017granting expenses incurred during litigation); *Spicer v. Chi. Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1256-66 (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, 1040-41 (N.D. Ill. 2011) (awarding expenses incurred during litigation).

VI. THE COURT SHOULD AWARD THE REQUESTED INCENTIVE AWARDS

Class Counsel respectfully requests that the Court approve an Incentive Award of $10,000 for each of the Named Plaintiffs. These stipends do not affect or reduce the benefits to the Class in any way and will be paid solely out of the total $1.25 million being sought in this motion to cover attorneys' fees, expenses, and incentive awards.

It is well-recognized that "[p]laintiffs in class and collective actions play a crucial role in bringing justice to those who would otherwise be hidden from judicial scrutiny." *Castillo v. Noodles & Co.*, No. 16-cv-03036, 2016 WL 7451626, at *2 (N.D. Ill. Dec. 23, 2016). "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.*, Nos. 07 CV 2898, 09 C 2026, 2012 WL 651727, at *16 (N.D. Ill. Feb. 28, 2012)).

Here, each of the Named Plaintiffs made substantial contributions to the litigation, including by collecting documents; maintaining regular contact with Class Counsel; reviewing and approving the Complaint and other major filings; staying abreast of the pleadings, motions, and settlement negotiations in this case; in some cases attending hearings, including traveling to Washington, D.C. for the Supreme Court oral argument; and staying abreast of the mediation and ultimate settlement of this litigation. Ex. C ¶ 36. These actions provided great benefit to the members of the Settlement Class and thus the Incentive Awards to the Named Plaintiffs are appropriate.

VII. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that the Court grant Plaintiffs' Unopposed Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and for Incentive Awards to Named Plaintiffs, together with such other and further relief as to the Court may deem just and proper.

DATED this 11th day of May, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2018, I electronically filed the above with the Clerk of the Court using the CM/ECF system, which in turn sent notice to all counsel of record.

Dated: May 11, 2018 *_/s/ Christopher Graver_*
Christopher Graver