UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DONNA GARBACCIO, individually and on behalf of all others similarly situated,	)	Civil Action
Plaintiff,	)	No. 2:16-cv-02740(JMV)(JBC)
v.	)	Honorable John Michael Vazquez United States District Judge
ST. JOSEPH'S HOSPITAL AND MEDICAL CENTER AND SUBSIDIARIES, *et al.*,	)	Honorable James B. Clark United States Magistrate Judge
Defendants.	)	CLASS ACTION

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

Plaintiffs Donna Garbaccio, Mary Lynne Barker, Anne Marie Dalio, and Dorothy Flar ("Named Plaintiffs") respectfully move the Court for an Order: (i) approving the negotiated attorneys' fees and expenses to their attorneys Cohen Milstein Sellers & Toll, PLLC and Keller Rohrback, L.L.P. ("Class Counsel"),[1] and (ii) granting incentive awards to themselves as class representatives.

Accordingly, for the reasons fully set forth in the accompanying

[1] The request for attorneys' fees is also made on behalf of other plaintiffs' counsel Kessler Topaz Meltzer & Check, L.L.P., and Izard Kindall & Raabe, L.L.P.

Memorandum, Plaintiffs respectfully ask that the Court GRANT Plaintiffs' Motion and approve $2,500,000 for the payment of attorneys' fees and expenses, and incentive awards of $10,000 to each of the four Named Plaintiffs.

Dated: January 19, 2018

Respectfully submitted,

/s/ Scott M. Lempert

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 19, 2018, I electronically filed the Unopposed Motion For Approval Of Attorneys' Fees, Reimbursement Of Expenses And For Incentive Awards To Named Plaintiffs with the Clerk of Court using the ECF filing system which in turn sent notice to all counsel of record.

/s/ Scott M. Lempert
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PLAINTIFFS' MEMORANDUM IN
SUPPORT OF UNOPPOSED MOTION FOR
AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF
EXPENSES AND FOR INCENTIVE AWARDS TO NAMED PLAINTIFFS

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Plaintiffs Donna Garbaccio, Mary Lynne Barker, Anne Marie Dalio, and Dorothy Flar ("Named Plaintiffs") respectfully file this memorandum in support of their motion for an Order[1] approving awards of attorneys' fees and expenses to attorneys Cohen Milstein Sellers & Toll, PLLC ("Cohen Milstein") and Keller Rohrback L.L.P. ("Keller Rohrback") (collectively, "Class Counsel"), as well as Plaintiffs' Counsel Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz"), and Izard, Kindall and Raabe, LLP ("Izard Kindall"). Class Counsel also seek approval of the proposed incentive awards to Named Plaintiffs[2] as class representatives.

I. INTRODUCTION

The legal theories advanced in this case are the result of seven years of research and investigation into the history and application of the "Church Plan" exemption to the Employee Retirement Income Security Act ("ERISA") by the firms that make up Class Counsel: Cohen Milstein Sellers & Toll, PLLC, and Keller Rohrback L.L.P. After a year of active litigation, Class Counsel negotiated

[1] A proposed order granting the relief sought herein is attached as Exhibit 2 ("Ex.") to Plaintiffs' Memorandum in Support of the Unopposed Motion for Final Approval of Settlement Agreement and Certification of Settlement Class ("Final Approval Motion"), filed contemporaneously herewith.

[2] The Named Plaintiffs include Plaintiff Donna Garbaccio and Plaintiffs Mary Lynne Barker, Anne Marie Dalio, and Dorothy Far, who were plaintiffs in the consolidated action *Barker v. St. Joseph's Healthcare System, Inc.*, No. 2:16-cv-02748 (D.N.J.).

a comprehensive Settlement that provides an excellent result for the Class members.

The Settlement provides for a $42.5 million contribution to the Plan, which is approximately 50% of the Plan's total underfunding at the time of negotiations. After the parties executed the term sheet, St. Joseph's contributed a total of $45 million to the Plan to fulfill their Settlement obligations, surpassing the negotiated amount. This significant monetary contribution will greatly enhance the retirement security of Plan participants and beneficiaries. In addition to the contribution, the Settlement offers equitable protections that mimic ERISA-required protections—including a seven-year guarantee of participants' benefits and mandatory disclosures. The Settlement also prevents the Plan from reducing participants' accrued benefits through any amendments, termination, or merger of the Plan over the next seven years.[3]

Class Counsel negotiated vigorously for the excellent Settlement result through a third-party mediator, Robert Meyer, Esq. After the parties reached agreement on those principal terms of the Settlement, the parties negotiated the amount of attorneys' fees, expenses, and class representative incentive awards to Named Plaintiffs through a proposal made by Mr. Meyer. Defendants will not

[3] The Settlement consideration is described in greater detail in Section I(C) of Plaintiffs' Memorandum in Support of the Motion for Final Approval, filed concurrently with this Motion; Plaintiffs incorporate this section by reference.

oppose a request for up to $2.5 million for attorneys' fees and expenses and incentive awards to Named Plaintiffs, subject to the Court's approval. Settlement Agreement § 7.1.3. If awarded, **these amounts will in no way reduce the $42,500,000 in monetary recovery to the Settlement Class**, or otherwise abridge non-monetary relief. *Id.*

The parties to a class action may negotiate payment of attorneys' fees as part of the settlement. *Evans v. Jeff D.*, 475 U.S. 717, 734-35, 738 n.30 (1986). The fee negotiated by the parties is reasonable under prevailing market standards, as a percentage of a constructive common fund, and under a lodestar cross-check. The total fee is also warranted by factors including (1) the size of the fund and the number of Class members benefitted; (2) the lack of substantive objections; (3) the skill and efficiency of Class Counsel; (4) the complexity of the litigation; (5) the contingent and highly risky nature of the representation; (6) the time and effort Class Counsel expended while litigating this case, and which they will continue to devote in completing the settlement process; and (7) the awards in similar cases.

Plaintiffs hereby request the reimbursement of expenses in the amount of $34,136.05 and $2,425,863.95 in attorneys' fees, which are consistent with the benefits the Settlement confers on the Settlement Class. The requested fee equals just 5.7% of the monetary component of the Settlement ($42,500,000) and represents a modest multiplier of 2.07 on the $1,169,336.05 lodestar that Class

Counsel, Kessler Topaz, and Izard Kindall expended developing and pursuing this action against Defendants. The requested incentive awards of $10,000 to each of the four Named Plaintiffs are also fair and reasonable in light of their substantial commitment of time and effort to the litigation, which made the Settlement possible.

II. CLASS COUNSEL'S EFFORTS AND THE RESULTS OBTAINED

This Settlement was only possible through the work of Class Counsel, who dedicated significant time and resources to investigate and litigate this matter, without a guarantee of payment. *See* Joint Declaration of Michelle Yau and Lynn Sarko in Support of (1) Plaintiffs' Unopposed Motion for Final Approval of Settlement Agreement and Certification of Settlement Class; and (2) Plaintiffs' Motion for Awards of Attorneys' Fees and Expenses, and Incentive Awards to the Named Plaintiffs ¶ 6 ("Joint Decl."), submitted contemporaneously herewith. The litigation involved extensive investigation of Plaintiffs' claims, review of publicly available financial information and confidential plan documents, motions practice for case consolidation and leadership, drafting of the complaints in both actions, and negotiations on behalf of the Settlement Class, culminating in a highly favorable Settlement. *Id.*

A. Initial Investigation into the ERISA Church Plan Exemption.

As detailed in the Joint Declaration and the briefing on appointment of

interim lead class counsel filed earlier in this case, Class Counsel (with the Pension Rights Center) committed over seven years of intensive work to the development of the legal theories behind "Church Plan" cases and the subsequent litigation against the hospital systems claiming the exemption. Joint Decl. ¶ 8. Class Counsel first learned of the extensive use of the Church Plan exemption by religiously affiliated hospitals from the Pension Rights Center. *Id.* This use of the exemption left thousands of hospital employees without ERISA's protections, such as funding, vesting, and required disclosures, because hospitals claimed their defined benefit pension plans were ERISA-exempt Church Plans. *Id.*

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 in the U.S. Code, the legislative history of the statute, and agency and court interpretations of the statute. Joint Decl. ¶ 9. Based on this investigation, Class Counsel concluded that large hospital systems like St. Joseph's Hospital and Medical Center were improperly claiming the exemption for their defined benefit pension plans. *Id.* Specifically, the firms concluded that there were three independent and alternative statutory prerequisites for a plan to be a Church Plan—that it be "established" by a church, that it be "maintained" by either a church or a so-called "principal-purpose organization," and that the

participants be employed by either a church or an entity "controlled by or associated with" a church, as those terms were defined under ERISA. *Id*. The firms concluded that with respect to a typical hospital pension plan, *none* of these requirements were met. *Id*.; *see also* Complaint ¶¶ 37–112, ECF No. 1 ("Compl.").

Class Counsel knew that this 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 the pension plans of these hospital systems met the ERISA definition of "Church Plan." Joint Decl. ¶ 10; Compl. ¶ 36. They also knew that Defendants would argue that the limited Church Plan case law then in existence would favor their reading of the Church Plan exemption. Joint Decl. ¶ 10. And Class Counsel knew that once several cases were filed, the major hospitals claiming the exemption would be arrayed against them. *Id*.

Nevertheless, Class Counsel pursued this high-stakes, high-risk litigation; moreover, they were the only lawyers to do so at that time. Joint Decl. ¶ 11. The early results in the district courts were mixed,[4] but Class Counsel achieved unanimous rulings in favor of plaintiffs in three appellate courts—the Third, Seventh, and Ninth Circuit, which held that the hospital plans at issue were not

[4] *Compare, e.g.*, *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*, 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).

Church Plans because they were not established by a church.[5] *Id*. The courts did not reach plaintiffs' alternative statutory arguments. *Id*. The defendants sought review in the United States Supreme Court, which was granted in December 2016.[6] The Supreme Court reversed the holding of the three appellate courts, holding that a plan maintained by a "principal-purpose organization" qualifies as a "Church Plan," regardless of who established it. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1663 (2017) ("*Advocate*"); Joint Decl. ¶ 12.

After *Advocate*, Class Counsel is zealously pursuing plaintiffs' remaining arguments—which were expressly not reached by the Supreme Court—that the pension plans of hospital systems like St. Joseph's are not Church Plans. *See Advocate*, 137 S. Ct. at 1657 n.2, 1658 n.3 (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); Joint Decl. ¶ 12. This Settlement was only possible due to Class Counsel's total immersion in these issues and continual commitment to the participants of these plans. Joint Decl. ¶ 13.

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[5] *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).

[6] *Dignity Health v. Rollins*, 137 S. Ct. 547 (Dec. 2, 2016); *Saint Peter's Healthcare Sys. v. Kaplan*, 137 S. Ct. 546 (Dec. 2, 2016); *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 546 (Dec. 2, 2016).

B. Class Counsel's Vigorous Prosecution of the Consolidated Garbaccio Case.

Years before this Complaint was filed, Class Counsel developed the legal theories advanced by consulting with constitutional experts, researching the history of the Church Plan exemption, and analyzing the facts related to this Plan. Joint Decl. ¶¶ 6, 14–16. Class Counsel examined documents related to the Plan, financial statements, and information supplied by the Plaintiffs themselves. *Id*. Class Counsel used this research to carefully draft the sixty-page Complaint filed in the District of New Jersey against St. Joseph's Hospital and Medical Center, asserting nine counts against two Defendants (not including the Doe defendants). *Id*. ¶ 17.

Just after this Complaint was filed, a similar class action was filed in this district against the same Defendants; the plaintiffs in that case were represented by firms Kessler Topaz and Izard Kindall. *See Barker v. St. Joseph's Hospital and Medical Center*, No. 2:16-cv-2748-JLL-JAD (D.N.J. May 16, 2016). That complaint alleged an identical cause of action—that the Plan was improperly operating as a Church Plan exempt from ERISA. *Id.* Class Counsel subsequently moved, on behalf of Plaintiff Garbaccio, to consolidate the two cases and appoint Plaintiff Garbaccio as Interim Lead Plaintiff and Cohen Milstein and Keller Rohrback as Interim Co-Lead Counsel. ECF No. 15. The issue was briefed in both this action and the *Barker* Action.

On July 12, 2016, the Court consolidated the two actions into the *Garbaccio* action. ECF No. 45. In the same Order, the Court terminated both motions for appointment of interim lead counsel and lead plaintiffs, and directed the plaintiffs to file a master consolidated complaint before interim leadership motions were decided. *Id*. After attempted collaboration, both sets of counsel filed a stipulation representing that counsel were unable to reach agreement on the master consolidated complaint and requested leave to refile interim leadership motions. ECF No. 57. The Court granted counsel's request on August 12, 2016, and the plaintiffs refiled their competing motions to appoint interim lead counsel and lead plaintiffs. ECF Nos. 60, 64–69, 70–74, 77, 78–79.

On March 13, 2017, Magistrate Judge James B. Clark issued a Report and Recommendation that Cohen Milstein and Keller Rohrback be appointed lead counsel, and declined to recommend appointment of an interim lead plaintiff. ECF No. 94. The Court adopted the Report and Recommendation in full on March 29, 2017. ECF No. 96. Shortly thereafter, the parties agreed to attempt to resolve the case through a third party mediator. The parties requested that the Court stay the case proceedings while they engaged in settlement negotiations. ECF No. 97. In response, on May 8, 2017, the Court administratively terminated the case while the parties attempted to resolve it through mediation. ECF No. 98.

C. The Mediator Supervised Settlement Negotiations and Made a Mediator's Proposal on Attorneys' Fees.

The parties prepared for and participated in a formal mediation in Los Angeles on May 24, 2017, in front of a third-party JAMS mediator, Robert Meyer, Esq. Joint Decl. ¶ 21. Mr. Meyer is an experienced mediator in ERISA cases and has mediated several cases involving the Church Plan exemption. *Id*. The mediation date was after the oral argument in *Advocate* (Class Counsel in this case are also Class Counsel in *Advocate*), but before the release of the *Advocate* decision. *Id*. Prior to the formal mediation, both parties spoke with Mr. Meyer about their positions. *Id.* Plaintiffs provided Defendants with a draft term sheet containing the central terms to any potential settlement, and Defendants provided Plaintiffs with actuarial data concerning the Plan's funded status and participants. Joint Decl. ¶ 20. Also prior to negotiations, Class Counsel undertook a thorough investigation of the facts and relevant law, as well as the broader Church Plan litigation ongoing in federal courts across the country. *Id.* Accordingly, Class Counsel was well informed about the strengths and weaknesses of the case prior to mediation.

During the May 24, 2017 mediation, the parties exchanged proposals and counter proposals. Joint Decl. ¶ 22. At the end of the day, the parties reached an agreement and signed a term sheet including principal terms, with the intention of further supplementing the term sheet. *Id.* After further negotiations, the parties

signed a supplemental term sheet on June 6, 2017 and filed a notice of settlement with the Court the next day. Joint Decl. ¶ 23; ECF No. 100. The parties continued to negotiate key parts of the settlement after they signed the term sheet, and the parties executed the Settlement Agreement on July 20, 2017. Joint Decl. ¶ 23.

Notably, it was only after the parties reached agreement on the key terms for the Settlement Class that they negotiated attorneys' fees. Joint Decl. ¶ 24. These negotiations were overseen by the mediator, Mr. Meyer. *Id.* Ultimately, Mr. Meyer assisted the parties in reaching an agreement on attorneys' fees through a mediator's proposal. *Id*. The parties accepted this proposal, subject to the Court's approval. *Id*.

After memorializing the central provisions of the Settlement in a Term Sheet, Class Counsel drafted and filed the Settlement Agreement and Plaintiffs' Unopposed Motion for Preliminary Approval of the Settlement, which was preliminarily approved by the Court on October 5, 2017. ECF Nos. 102, 108. Pursuant to the Preliminary Approval Order, the settlement administrator Dahl Administration LLC mailed the Class Notice on November 3, 2017 to 10,798 current and former Plan participants, and Class Counsel posted the Notice on their website. Joint Decl. ¶ 34; Dahl Affidavit ("Dahl Aff.") ¶ 6. As of January 19, 2018, Class Counsel has received and responded to phone calls and e-mails from 56 Class members. Joint Decl. ¶ 35. Class Counsel will continue to devote

substantial time to answering inquiries from Class members about the Settlement. Accordingly, Class Counsel request an award of attorneys' fees and expenses for the significant time they have devoted to this case, and an award of $10,000 to each of the Named Plaintiffs for their services to the Class in pursuing this case.

III. THE COURT SHOULD AWARD THE REQUESTED FEES AS A MEDIATOR-PROPOSED, MARKET-SET FEE AGREEMENT

The requested fee in this case of $2,425,863.95 was reached as a result of a third-party mediator's proposal. Parties to a class action are permitted to negotiate not only a settlement, but also payment of attorneys' fees. *Evans v. Jeff D.*, 475 U.S. 717, 734–35, 738 n.30 (1986). The Supreme Court clarified that settlement of attorneys' fees should be encouraged and respected, and that "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("Ideally, of course, litigants will settle the amount of a fee."). 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."

The Third Circuit also recognizes reduced judicial scrutiny of attorneys' fees when the fees are negotiated separately from the other terms of the settlement. *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 582 (3d Cir. 1984). The court explained that "[i]n cases where settlements of fee requests are made with the defendants after prior approval of damage claim settlements, the court can, in most

instances, assume that the defendants closely scrutinized the fee requests, and agreed to pay no more than was reasonable." *In re Fine Paper*, 751 F.2d at 582.

Other circuits also acknowledge reduced scrutiny of a negotiated attorneys' fee. The Seventh Circuit recognizes a presumption of reasonableness for an adversarial negotiation of attorneys' fees (by defendants who pay the fee and want to minimize the payment and on behalf of lawyers who wish to receive it) because the negotiated amount acts as a market check on the propriety of the fee. *In re Cont'l Illinois Sec. Litig.*, 962 F. 2d 566, 573 (7th Cir. 1992). The Fourth Circuit recently explained that when "class counsel's fee is to be paid entirely by [defendant]," a court's scrutiny of a fee award is diminished because the requested fees do not reduce the class's overall recovery. *Berry v. Schulman*, 807 F.3d 600, 618, n.10 (4th Cir. 2015).

Here, the attorney fees were negotiated after agreement was reached on the key terms of the Settlement for the Class; a well-respected, neutral mediator oversaw the negotiations; and the fees were based upon the mediator's proposal. *See In re Fine Paper*, 751 F.2d at 582 (approving attorneys' fees negotiated after the principal terms of the settlement). Moreover, the requested fees in no way reduce the overall recovery of the Class. Given that this agreement has been closely scrutinized by all sides—Plaintiffs, Defendants, and the mediator—the requested fee should be approved.

IV. THE AWARD IS REASONABLE

Moreover, the requested fee award in this case is reasonable under both methods that the Third Circuit uses to assess reasonableness of fees: (1) percentage of the fund; and (2) lodestar plus a risk multiplier. *In re Cendants Corp. PRIDES Litig.,* 243 F.3d 722, 732 (3d Cir. 2001) (stating that the percentage-of-the-fund and lodestar methods are the two primary methods of calculating attorneys' fees). Because the requested fees and expenses are reasonable under either method, Class Counsel's petition should be granted.

A. The Requested Fees and Expenses Are Reasonable Under the Percentage-of-the-Fund Method.

The Third Circuit recognizes that when counsel creates a "common fund" to benefit a class, counsel is entitled to payment from that common fund. *P. Van Hove BVBA v. Universal Travel Grp., Inc.,* No. 11-cv-2164, 2017 WL 2734714, at *10 (D.N.J. June 26, 2017) ("*BVBA*") (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005)). This method of payment awards attorneys' fees as a "reasonable percentage" of the common fund. *Id.* This case is not a typical "common fund" case because the fee award was negotiated separately from the class settlement and the fee award is not taken from the class's recovery. *See Dewey v. Volkswagen Aktiengesellschaft*, 558 F. App'x 191, 197 (3d Cir. 2014). However, the attorneys' fees and settlement fund constitute a "constructive common fund" because they are paid by the same source—Defendants. *Id.*

Accordingly, the percentage-of-the-fund is an appropriate method to assess the reasonableness of the fee award in this case.

The requested fee award of $2,425,863.95 represents 5.7% of $42.5 million, which is the readily-quantifiable monetary component of the settlement. A 5.7% fee award is far below fees typically awarded in the Third Circuit. For example, in *BVBA*, this Court awarded attorneys' fees of one-third (33.33%) of the $4.075 million settlement fund. 2017 WL 2734714, at *14; *see also Yedlowski v. Roka Bioscience, Inc*., No. 14-cv-8020, 2016 WL 6661336, at *18 (D.N.J. Nov. 10, 2016) (awarding attorneys' fees of 30% of the common fund); *Rite Aid*, 396 F.3d 294, 296 (3d Cir. 2005) (affirming an award of 25% of the settlement fund).

In addition, when analyzing a fee award under the percentage-of-recovery method, courts in this Circuit consider several factors, including: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases. *Gunter v. Ridgewood Energy Corp.,* 223 F.3d 190, 195 n.1 (3d Cir. 2000) (citations omitted).

The Third Circuit in *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998), identified three additional factors that may be relevant: (1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups (such as government investigations); (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (3) any "innovative" terms of settlement. *Prudential*, 148 F.3d at 338–40. While district courts rely on the *Gunter* and *Prudential* factors to assess whether a fee is reasonable, a court need not apply the factors in a formulaic way because each case is different. *Dartell v. Tibet Pharmaceuticals, Inc.*, No. 14-cv-3620, 2017 WL 2815073, at *8 (D.N.J. June 29, 2017) (Vazquez, J.). Here, an analysis of the above factors supports the requested 5.7% fee award.

1. The $42.5 million Fund Created for the Class Is Significant and Benefits Many Class Members

The first *Gunter* factor requires courts to "consider the fee request in comparison to the size of the fund created and the number of class members to be benefitted." *BVBA*, 2017 WL 2734714, at *11 (citations omitted). The fund here is $42.5 million, which represents half of the Plan's level of underfunding at the time of negotiations.[7] The monetary contribution will benefit over 10,000 class

[7] As discussed *supra*, after a settlement was reached in principle, St. Joseph's contributed an extra $2.5 million in excess of the negotiated amount to the Plan to

members by increasing the security of their accrued pension benefits and reducing the current underfunding of the Plan by half. Joint Decl. ¶ 26. The settlement also includes equitable protections that benefit each class member outside of the fund. Joint Decl. ¶¶ 27–29. The fund is large and benefits a substantial number of class members by securing their retirement benefits—accordingly, this factor weighs in support of the requested award, which is just 5.7 % of the fund created for the Class and importantly does not reduce the $42.5 million fund.

2. No Class Members Have Objected to the Fee Request

Class Counsel notified over 10,000 class members of the terms of the settlement, including the total $2.5 million award for attorney's fees, incentive awards, and expenses. Joint Decl. ¶¶ 31–34; Dahl Aff. ¶ 7. The notice also advised class members that they could object to the settlement, the attorneys' fees, reimbursement of expenses, or incentive awards, and instructed class members on the proper procedures for objecting. Joint Decl. ¶ 32. To date, not a single class member has objected to the requested award for fees, expenses, and incentive awards.[8] *Id.* ¶¶ 36, 64, 70. This signals overall satisfaction and approval of the settlement and its terms, including the requested fee award, and weighs in favor of

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fulfill their obligations under the Settlement Agreement, for a total contribution of $45 million.

[8] The objections deadline has not yet run, as Class members have until February 6, 2018 to file objections to the settlement or to the requested fee award. Consequently, Class Counsel will update the analysis of this factor in the Reply in support of this motion in the event necessary.

approval of both the Settlement and the fee award. *See BVBA*, 2017 WL 2734714, at *11 (finding that lack of objections to the fee request and only one opt-out weighed in favor of the requested fee).

3. Class Counsel Litigated this Action in a Skilled and Efficient Manner

Cohen Milstein and Keller Rohrback are among the leading ERISA plaintiffs' firms and possess unparalleled expertise in the specific types of ERISA claims brought in this lawsuit. Joint Decl. ¶¶ 7–13; Exs. A & B to Joint Decl. (firm resumes of Cohen Milstein and Keller Rohrback). They achieved appellate victories in favor of participants in Church Plan cases in three circuit courts and represented participants in the Supreme Court. Joint Decl. ¶¶ 11–12. The Court noted Class Counsel's extensive experience and skill when appointing the firms as interim lead counsel, recognizing that Class Counsel's complaint "provid[ed] … comprehensive protection for plaintiffs and the class," that Class Counsel was "more experienced" than competitor firms, and that Class Counsel was "in the best position to move [the consolidated] actions forward." ECF No. 94 at 5–6. Class Counsel are at the forefront of cases involving the proper use of the Church Plan exemption, and they used their experience and skill to obtain an excellent result in this case.

Moreover, Class Counsel litigated this action efficiently. Class Counsel were able to negotiate a Settlement with protections similar to what the Class

would receive following a favorable judgment and a contribution to the Plan that cut the underfunding level in half. The Settlement was reached quickly, as the Settlement Agreement was executed slightly over a year after the case was filed. This swift resolution benefits the Class and demonstrates the skill and efficiency of Class Counsel; accordingly, this factor favors approval of the requested fee.

4. The Complexity, Expense, and Likely Duration of the Case Weigh in Favor of the Requested Fee

The interpretation and application of the Church Plan exemption is a rapidly developing area of ERISA jurisprudence. Class Counsel filed the first Church Plan cases in March 2013 and three of those cases reached the Supreme Court only four years later. Joint Decl. ¶¶ 11–12. The Supreme Court reversed the holdings of the Third, Seventh and Ninth Circuit Courts, holding that plan that is maintained by a so-called "principal-purpose" organization qualifies as a Church Plan, regardless of who established the Plan. *Id.* ¶ 12. The Supreme Court expressly did not address the plaintiffs' remaining arguments; those theories are currently being litigated in multiple district courts and in the Tenth Circuit Court of Appeals.[9]

Because of the continuously developing law around the Church Plan

[9] The Tenth Circuit released its decision in *Medina v. Catholic Health Initiatives* on December 19, 2017, holding that CHI's Plan qualified as a Church Plan because it met the requirements of 29 U.S.C. § 1002(33)(C)(i). *Medina*, No. 16-1005 (10th Cir. Dec. 19, 2017). *Medina* is not binding on the Court in this case and was also released after preliminary approval was granted. Furthermore, Plaintiffs believe that the theory of liability addressed in *Medina* remains viable. Nevertheless, the outcome illustrates the litigation risk that this Settlement avoids.

exemption and the uncertainty that existed throughout litigation of this action, Class Counsel needed a high degree of skill, both to settle the matter and to be prepared to litigate the issues through trial and on appeal, if necessary. Class Counsel's experience handling the most prominent Church Plan cases and their complete immersion in this issue helped them successfully advance this case and obtain a beneficial result for the Class. The complex nature of this case warrants approval of the requested fee award.

Moreover, litigation would likely have been lengthy had this case not settled. While the Supreme Court ruled on the threshold interpretation of the exemption, Plaintiffs have remaining arguments as to why St. Joseph's is improperly claiming the Church Plan exemption that they would have advanced in this Court. Defendants have defended this case vigorously and would have likely done so if this case did not settle, which would result in increased expenses for both parties. Accordingly, the expected duration of litigation—which likely would have been lengthy— and expenses also weigh in favor of the requested fee award.

5. Class Counsel Risked Nonpayment

The contingent nature of this case strongly favors the requested fee. *See In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744, at *28 (D.N.J. Oct. 1, 2013) (recognizing that class counsel's risk in litigating the case on a contingent basis favors award of attorneys' fees); *BVBA*,

2017 WL 2734714, at *12 (same). Class Counsel initiated this case on a contingent basis and advanced their resources with no guarantee of repayment. As explained more fully in the accompanying Unopposed Motion for Final Approval of the Settlement, without this Settlement, Plaintiffs and the Class risked no recovery at all.

During settlement negotiations, the Supreme Court decided an issue directly binding on this case in favor of Defendants, not Plaintiffs. *Advocate*, 137 S. Ct. 1652 (2017) (holding that a Church Plan need not be established by a church, provided it met the other requirements of the exemption). Plaintiffs have remaining arguments as to why St. Joseph's is not a Church Plan that were expressly not reached by the Supreme Court; however, the Supreme Court decision did negatively impact Plaintiffs' case. Joint Decl. ¶ 58. The ruling in *Advocate,* which came down just 12 days after the parties reached agreement on the monetary terms of the settlement, would have affected Plaintiffs' ability to recover if not for the Settlement. Moreover, while the Tenth Circuit decision in *Medina* did not eliminate Plaintiffs' alternative theories of liability, it demonstrates the inherent risks for Plaintiffs in litigating those claims. Therefore, this factor weighs in favor of the requested fees.

6. Class Counsel Dedicated Significant Time Towards Investigating and Litigating Plaintiffs' Claims

The 2,091.25 hours Class Counsel and other Plaintiffs' counsel collectively

expended on these cases were reasonably spent, especially given the high-stakes, high-risk nature of this litigation and the excellent results obtained. Joint Decl. ¶ 43. Class Counsel: (1) learned of the widespread use of the Church Plan exemption by major hospital chains to avoid compliance with ERISA; (2) researched the law bearing on the Church Plan exemption and concluded large hospital systems were not entitled to the exemption; (3) investigated the non-profit hospital business as it bore on liability and defenses; (4) investigated the facts of this case, and drafted and filed the Complaint; (5) reviewed hundreds of pages of documents, including publicly available information about the plans and confidential production from Defendants; (6) conducted factual and legal research; (7) engaged in motion practice to consolidate the *Garbaccio* action with the *Barker* action, appoint interim lead counsel, and appoint interim lead plaintiffs; (8) monitored developments in all the Church Plan cases to determine the impact on this case; (9) negotiated and crafted a comprehensive Settlement Agreement after arm's-length negotiations overseen by a third-party mediator; (10) successfully moved for preliminary approval of the Settlement; (11) drafted the Class Notice materials and posted them on a dedicated settlement website; and (12) responded to class member inquiries concerning the Class Notices, the Settlement, and this litigation. *See* Joint Decl. ¶ 39. 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.* ¶ 40. Class Counsel and other Plaintiffs' counsel have spent significant time and effort to litigating Plaintiffs' claims, and the time spent favors the requested fee award.

7. The Requested Award Is On Par with Awards Granted in Similar Cases

Courts have approved fee requests in other Church Plan settlements similar to the award requested here. In *Hodges v. Bon Secours Health System, Inc.*, the court approved a fee award of $3.5 million for expenses, attorneys' fees, and incentive payments, in addition to a monetary fund of $98.3 million to the Class and similar ERISA-like protections for Class members as the Class in this case. *Bon Secours*, No. 1:16-cv-1079, ECF No. 117, Ex. E to Joint Decl., ¶¶ 9–10. In *Trinity*, the Court approved a fee award of $7.885 million for expenses, attorneys' fees, and incentive payments. *Trinity*, No. 8:14-cv-2237, ECF No. 111. The total monetary consideration to the *Trinity* class was $76.7 million and the class members received the same ERISA-like protections as the Class in this case. *See* Ex. F to Joint Decl., ¶ 15. In *Griffith v. Providence Health & Servs.*, No. C14-1720-JCC, ECF No. 69 (W.D. Wash. Mar. 21, 2017) ("*Providence*"), the Western District of Washington approved a $6.5 million award to compensate Class Counsel for expenses, work performed, and an award for Named Plaintiffs. The Settlement consisted of $351.9 million in monetary relief and similar equitable

ERISA-like protections to the protections received in this case. *See* Ex. G to Joint Decl., ¶ 18. Finally, in *Overall v. Ascension Health*, No. 2:13-cv-11396, ECF No. 115 (E.D. Mich. September 17, 2015), the Eastern District of Michigan approved a $8 million settlement and $2 million in attorneys' fees, expenses and incentive awards. *See* Ex. H to Joint Decl., ¶ 8. The requested fee award in this case is on par with the fee awards approved in other Church Plan cases.

8. The Class Recovery Is Solely Due to the Efforts of Class Counsel

The Settlement in this case is solely attributable to the efforts of Plaintiffs and Class Counsel. This factor is meant to ascertain whether the recovery is due to the work of Class Counsel or other groups, such as government agencies and their investigations. *BVBA*, 2017 WL 2734714, at *12 (discussing the lack of government actions when the case was initiated). This is not a case where the government or any other group filed an action—Class Counsel (and competing firms) were the only groups pursuing a recovery for the Class members in this case. In fact, the government took a less participant protective position than Plaintiffs' position on the issue before the Supreme Court in *Advocate*.[10] Because the result achieved is attributable to Class Counsel's efforts, this *Prudential* factor

[10] The Solicitor General filed an amicus brief in *Advocate* arguing that the Church Plan exemption did not require a Church Plan to be established by a church, but expressly did not take a position on whether the Plan met all of the other statutory requirements. *See* Br. for the United States as Amicus Curiae Supporting Pet'rs, *Advocate Health Care Network v. Stapleton*, Nos. 16-74, 16-86, 16-258 (U.S. Jan. 24, 2017).

favors the requested fee award.

9. The Requested Fee Percentage Is Similar to a Privately Negotiated Contingency Fee

Fee awards in class action lawsuits should be governed by "what the market pays in similar cases." *In re RJR Nabisco, Inc. Sec. Litig.*, No. 818 (MBM), 1992 WL 210138, at *7 (S.D.N.Y. Aug. 24, 1992). The requested fee is only 5.7% of the total fund, which is much less than typical private (i.e., non-class) contingent fee arrangements. *See BVBA*, 2017 WL 2734714, at *13 ("A one-third fee is consistent with fee awards in non-class cases."); *Yedlowski*, 2016 WL 6661336, at *23 (stating that the customary contingency fee in non-class cases is generally between 30 and 40 percent). The requested fee is much less here, and thus this factor supports the requested award.

10. The Settlement Contains "Innovative" Protections Developed by Class Counsel

The Settlement Agreement contains protections that mimic the protections that participants would receive in an ERISA-governed Plan. For example, the Settlement contains a provision that guarantees payment of accrued benefits for seven years, which mimics the insurance requirement in ERISA plans. Settlement Agreement § 8.1. The Settlement Agreement also requires that Defendants provide the Class with information about their benefits through pension benefit statements, and summary plan descriptions, which mimics the ERISA reporting and disclosure

provisions. Settlement Agreement §§ 8.5.1–8.5.4. Class Counsel developed these protections for participants in Church Plans to provide the retirement security that they would have if their pension plan were governed by ERISA. Class Counsel's negotiation of these unique protections supports the requested fee award.

B. The Fee Award Is Reasonable Under the Lodestar Method.

In the Third Circuit, district courts use the lodestar method to cross-check a negotiated fee amount. The purpose of the cross-check is to "ensure[] that the proposed fee award does not result in counsel being paid a rate vastly in excess of what any lawyer could reasonably charge per hour, thus avoiding a 'windfall' to lead counsel." *BVBA*, 2017 WL 2734714, at *13 (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201,285 (3d Cir. 1992)). The cross-check consists of dividing the proposed fee award by the lodestar expended by attorneys prosecuting the case, producing a multiplier. *Id.* Acceptable multipliers in the Third Circuit range between 1.0 and 4.0. *Id.* (citing *Yedlowski*, 2016 WL 6661336, at *19).

The lodestar cross-check confirms the reasonableness of Plaintiffs' fee request. Class Counsel and other Plaintiffs' counsel expended a total of 2,091.25 hours developing and prosecuting the consolidated cases. Joint Decl. ¶¶ 39–41, Exs. C & D to Joint Decl. (summary of Cohen Milstein and Keller Rohrback attorney hours); Declaration of Mark Gyandoh ¶ 4 ("Gyandoh Decl.") (summary of Kessler Topaz attorney hours); Declaration of Mark Kindall ¶ 4 ("Kindall Decl.")

(summary of Izard Kindall attorney hours).[11] The 2,091.25 hours spent includes time developing the legal theories and arguments, researching publically available information about the hospital and its pension plan, drafting the complaints, corresponding with clients, engaging in motion practice regarding consolidation of the two actions and appointment of interim lead counsel and plaintiff, and negotiating with Defendants to reach a Settlement beneficial to the Class. Class Counsel also spent many hours preparing papers in connection with the Settlement, including the Settlement Agreement, the Class Notice, and the motion and accompanying papers in support of preliminary and final approval. Class Counsel has also answered 56 inquiries from Class members regarding the Settlement.

The hourly rates charged by the attorneys and other professionals for this work range from $250 to $995, which is reasonable and comparable to the rates of other class action attorneys. *See* Joint Decl. ¶¶ 44, 49–56, Exs. C & D to Joint Decl.; Gyandoh Decl. ¶ 4; Kindall Decl. ¶ 4. 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 cases in this District approving

[11] The firms have submitted summaries of time based on the Third Circuit's instruction that a lodestar cross-check does not "entail mathematical precision nor bean-counting," and that district courts may rely on summaries of time and fees instead of detailed billing records. *Rite Aid*, 396 F.3d at 306–07 (footnote omitted).

similar rates. *See, e.g.*, *BVBA*, 2017 WL 2734714, at *13 (approving a blended rate of $644); *Yedloski* 2016 WL 6661336, at *18 (approving a blended rate of $610); *In re Schering-Plough Corp.*, 2013 WL 12174570, at *28 & n.27 (D.N.J. 2013) (approving a top billing rate of $975). Furthermore, the reasonableness of these hourly rates is apparent by other courts' approval of these rates for Class Counsel in Church Plan cases.[12] Accordingly, the same rates are reasonable here.

At these hourly rates, the work performed by Class Counsel and the other firms amounts to a total lodestar of $1,169,336.05. Joint Decl. ¶ 44. Plaintiffs' requested fee of $2,425,863.95 (the total request of $2.5 million less expenses and incentive awards for Named Plaintiffs) amounts to a modest 2.07 multiplier on the total lodestar of $1,169,336.05, which is well within the range of multipliers approved in the Third Circuit. Joint Decl. ¶ 45; *Yedlowski*, 2016 WL 6661336, at

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[12] *See Hodges v. Bon Secours Health System, Inc.* ("*Bon Secours*"), Pls.' Mem. in Supp. of Mot. for Att'y Fees and Expenses, and Incentive Awards to Named Pls., No. 1:16-cv-1079, ECF No. 113-1 (D. Md. Oct. 13, 2017); Ex. E to Joint Decl. (*Bon Secours* Order Finally Approving Class Settlement ¶ 9 (approving attorneys' fees at identical rates as sought here); *Lann v. Trinity Health Corp.* ("*Trinity*"), Pls.' Mem. in Supp. of Mot. for Att'y Fees and Expenses, and Incentive Fees to Named Pls., No. 8:14-cv-2237, ECF No. 103-1 (D. Md. May 31, 2017); Ex. F to Joint Decl. (*Trinity* Order Finally Approving Class Settlement ¶ 10 (approving attorneys' fees at identical rates as sought here)); *Griffth v. Providence Health & Servs.* ("*Providence*"), Pls.' Mot. for Att'y Fees and Expenses, and Incentive Fees to Named Pls., No. 14-01720, ECF No. 57 (W.D. Wash. Feb. 3, 2017); Ex. G to Joint Decl. (*Providence* Order Finally Approving Class Settlement ¶ 10 (approving attorneys' fees at identical rates as sought here)); *see also Overall v. Ascension Health,* Pl.'s Mot. for Awards of Att'ys' Fees, Expenses & Incentive Fee, No. 13-11396, ECF No. 97 (E.D. Mich. Aug. 17, 2015); Ex. H to Joint Decl. (Order and Final Judgment ¶ 8 (approving fees at similar rates)).

*16 (stating that multipliers between one and four are reasonable). As such, here, the lodestar cross-check analysis produces a multiplier of 2.07, which is acknowledged as reasonable within the Third Circuit. Accordingly, the attorneys' fees award should be approved.

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); *BVBA*, 2017 WL 2734714, at *13 (citing *In re Cendant Corp.*, 232 F. Supp. 2d 327, 343 (D.N.J. 2002) and awarding requested reasonable expenses). 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.

The expenses incurred prosecuting this complex class action to date total $34,136.05. These expenses include filing fees; travel expenses, court appearances and mediation; copying, delivery and telecommunications charges; computer legal research charges; mediator's charges; settlement administration costs, and similar litigation expenses. Joint Decl. ¶ 66, Exs. C & D to Joint Decl.; Gyandoh Decl. ¶ 5; Kindall Decl. ¶ 5. Class Counsel and additional plaintiffs' counsel all maintain appropriate back-up documentation for each expense. Joint Decl. ¶ 66. Because these types of expenses are routinely 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, they should be approved. *See BVBA*, 2017 WL 2734714, at *13 (approving reimbursement of $67,552.15 for litigation expenses involving expert fees, private investigation, mediation, legal research, press releases, translation, and miscellaneous fees).

VI. THE COURT SHOULD AWARD THE REQUESTED INCENTIVE AWARDS

Class Counsel respectfully requests approval of a $10,000 award to each of the four Named Plaintiffs in the two actions which were consolidated here. These awards do not reduce the benefits to the Class in any way and will be paid solely out of the allocation of $2.5 million for attorneys' fees, expenses and incentive awards. Settlement Agreement §§ 7.1.3–7.1.4.

Incentive awards are appropriate to "encourage[] class representatives, by appropriate means, to create common funds and to enforce laws[.]" *BVBA*, 2017 WL 2734714, at *14 (quoting *In re Schering-Plough Corp.*, 2013 WL 5505744, at *56). "[C]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *In re Remeron Direct Purchaser Antitrust Litig.*, No. Civ. 03-0085 FSH, 2005 WL 3008808, at *18 (D.N.J. 2005) (citing *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002)).

Here, each of the Named Plaintiffs made substantial contributions to the litigation, including: collecting and producing documents; maintaining regular

contact with Class Counsel and additional plaintiffs' counsel; reviewing and approving the Complaints in both actions; staying abreast of the pleadings and motions; and involving themselves in the mediation and settlement of this litigation. Joint Decl. ¶ 69. The requested $10,000 incentive award to each Named Plaintiff is consistent with awards approved by other courts in the Third Circuit. *See, e.g.*, *In re Remeron*, 2005 WL 3008808, at *18 (granting a total $60,000 incentive award for two named plaintiffs for their time and expense litigating the action); *Dewey v. Volkswagen of America*, 909 F. Supp. 2d 373 (D.N.J. 2012) (approving incentive award of $10,000 to class representatives). Moreover, courts have approved similar incentive awards in Church Plan cases litigated by Class Counsel. *Trinity*, No. 8:14-cv-2237, ECF No. 111 ¶ 11 (order finally approving the settlement and approving a $10,000 incentive award to each Named Plaintiff); *Bon Secours*, No. 1:16-cv-1079, ECF No. 117 ¶ 10 (order finally approving the settlement and approving a $10,000 incentive award to each Named Plaintiff).

Not only did the Named Plaintiffs invest considerable amounts of their time into this case, but they uniquely shouldered the responsibility of this litigation on behalf of all Class members. By stepping forward to represent this Class, each Named Plaintiff greatly benefitted the members of the Settlement Class; thus, the requested awards to Named Plaintiffs are appropriate.

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 the Named Plaintiffs. A proposed order granting the relief sought herein is attached as Exhibit 2 to the Final Approval Motion.

Dated: January 19, 2018

Respectfully submitted,

/s/ Scott M. Lempert

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CERTIFICATE OF SERVICE

I certify that on January 19, 2018, 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/ Scott Lempert
Scott Lempert