

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF ILLINOIS**

Sheilar Smith, Kasandra Anton, Bonnie  
Bailey, Peggy Wise, and June Schwierjohn,  
on behalf of themselves, individually, and  
on behalf of all other similarly situated, and  
on behalf of the OSF Plans,

Plaintiffs,

v.

OSF HealthCare System; The Sisters of the  
Third Order of St. Francis Employees  
Pension Plan Administrative Committee;  
and Retirement Committee for the  
Retirement Plan for Employees of Saint  
Anthony’s Health Center,

Defendants.

No. 3:16-cv-00467-SMY-RJD

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

Plaintiffs Sheilar Smith, Kasandra Anton, Bonnie Bailey, Peggy Wise, and June Schwierjohn (collectively, “Plaintiffs” or “Named Plaintiffs”), by and through their attorneys, respectfully move the Court for an Order: (1) approving awards of attorneys’ fees and reimbursement of expenses to their attorneys at Keller Rohrback L.L.P. and Cohen Milstein Sellers & Toll PLLC (“Class Counsel”), as well as Local Counsel at Armstrong Law LLC, and Plaintiffs’ Counsel Kessler Topaz Meltzer & Check, LLP and Izard Kindall & Raabe LLP; and (2) granting Incentive Awards to themselves, as class representatives.<sup>1</sup> Defendants do not oppose the ultimate relief sought herein.

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<sup>1</sup> Plaintiffs file the instant Motion contemporaneously with their Unopposed Motion for Final Approval of Settlement Agreement and Certification of Settlement Class.

For the reasons set forth in the accompanying Memorandum, Plaintiffs ask that the Court grant the Motion and approve \$1,750,000 in attorneys' fees and reimbursement of expenses to Class Counsel, Local Counsel and other Plaintiffs' Counsel, including Incentive Awards of \$5,000 to each of the Named Plaintiffs.

DATED this 1st day of December 2020.

**KELLER ROHRBACK L.L.P.**

*/s/ Laura R. Gerber*

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 1, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which in turn sent notice to all counsel of record.

DATED this 1st day of December 2020.

*/s/ Laura R. Gerber*

\_\_\_\_\_  
Laura R. Gerber

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF ILLINOIS**

Sheilar Smith, Kasandra Anton, Bonnie  
Bailey, Peggy Wise, and June Schwierjohn,  
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Anthony’s Health Center,

Defendants.

No. 3:16-cv-00467-SMY-RJD

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’ UNOPPOSED  
MOTION FOR AWARD OF ATTORNEYS’ FEES AND  
REIMBURSEMENT OF EXPENSES, AND FOR INCENTIVE AWARDS**

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Pursuant to Federal Rule of Civil Procedure 23(e), Plaintiffs Sheilar Smith, Kasandra Anton, Bonnie Bailey, Peggy Wise, and June Schwierjohn (collectively, “Plaintiffs” or “Named Plaintiffs”), respectfully move the Court for an Order approving an award of attorneys’ fees and reimbursement of expenses to their attorneys, Keller Rohrback L.L.P. (“Keller Rohrback”) and Cohen Milstein Sellers & Toll PLLC (“Cohen Milstein”) (collectively, “Class Counsel”).<sup>1</sup> Class Counsel also seek approval of proposed incentive awards for Named Plaintiffs, recognizing their contributions to the litigation. While Defendants do not agree with all averments stated in this Memorandum,<sup>2</sup> they do not oppose the ultimate relief sought herein.

## I. INTRODUCTION

After over four years of litigation, the parties to this ERISA<sup>3</sup> Action have entered into a comprehensive Settlement Agreement that provides substantial relief to the Settlement Class. Under the Settlement, OSF HealthCare System (“OSF”) will contribute \$25 million to its two defined benefit pension plans, The Sisters of the Third Order of St. Francis Employees Pension Plan, and the Retirement Plan for Employees of St. Anthony’s Health Center (collectively, the “OSF Plans” or the “Plans”), for the benefit of the participants and beneficiaries. For five fiscal

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<sup>1</sup> Class Counsel’s fee petition includes time and expenses for Local Counsel at Armstrong Law Firm LLC, as well as other Plaintiffs’ Counsel at Kessler Topaz Meltzer & Check, LLP (“Kessler Topaz”) and Izard Kindall & Raabe LLP (“Izard Kindall”) and Class Counsel will distribute attorneys’ fees and reimburse expenses of these firms from any award received, consistent with § 7.1.2 of the Class Action Settlement Agreement (“Settlement Agreement” or “Settlement”). A copy of the Settlement Agreement is attached as Exhibit A to the Memorandum in Support of Plaintiffs’ Unopposed Motion for Final Approval of Settlement Agreement and Certification of Settlement Class (“Final Approval Memorandum”), filed contemporaneously herewith. Referenced Exhibits B through N are also attached to the Final Approval Memorandum.

<sup>2</sup> Capitalized terms not otherwise defined in this Memorandum shall have the same meaning ascribed to them in the Settlement Agreement.

<sup>3</sup> “ERISA” refers to the Federal Employee Retirement Income Security Act of 1974, as amended.

years (2021 through 2025), OSF will make annual cash contributions to the Plans of a minimum of \$5 million per year, for a total contribution of \$25 million. Ex. A § 7.1.

The Settlement also establishes, through Fiscal Year 2025, or until such time as \$25 million is contributed to the Plans, certain equitable provisions that are comparable to provisions of ERISA, including benefits guarantees and restrictions on benefits cutbacks, as well as provision of benefits statements and other plan information. *Id.* § 8. The Settlement's equitable provisions provide enhanced assurance of pension payments to the Plans' participants through Fiscal Year 2025 or such time as the \$25 million is contributed to the Plans.

The settlement negotiations were overseen by two mediators, Magistrate Judge Daly, and JAMS mediator Robert Meyer, Esq. The settlement negotiations were extensive and included an in-person mediation in Benton, Illinois followed by numerous telephone calls. Ultimately, after ten months of settlement negotiations, Mr. Meyer presented the parties with a mediator's proposal as to both the class settlement amount and the attorneys' fees, to which the parties ultimately agreed, subject to the Court's review and approval. Ex. E<sup>4</sup> ¶¶ 27-28. Pursuant to Rule 23(h), the Parties have agreed that Plaintiffs will seek a payment for Class Counsel of up to \$1,750,000, for attorneys' fees and reimbursement of expenses, and also incentive awards to the Named Plaintiffs. Ex. A §§ 1.13, 7.1.2. If awarded, this payment will be made separately by Defendants, and will not reduce the payment to the Plans or other Settlement benefits to the Settlement Class. *Id.* § 7.1.3, 7.1.4.

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<sup>4</sup> Joint Declaration of Laura R. Gerber and Michelle C. Yau in Support of Plaintiffs' Unopposed Motions for Final Approval of Settlement Agreement and Certification of Settlement Class and Award of Attorneys' Fees and Reimbursement of Expenses, and for Incentive Awards ("Joint Declaration").

Plaintiffs request that the Court approve the negotiated \$1,750,000 amount for attorneys' fees, expenses, and incentive awards as a reasonable, market-set fee agreement. These fees will compensate Class Counsel and Named Plaintiffs for the significant time, effort, risk, and expenses they bore in the successful resolution of this Action. The fees and expenses sought are consistent with the benefits that the Settlement confers on the Settlement Class. While this settlement is not structured as a traditional common benefit fund, the \$1.75 million negotiated fee and expense award, if added to the settlement consideration, would yield a common benefit for the class of \$26.75 million. Viewed in this light, Plaintiffs' fee and expense request represents just 6.5% of the settlement value. Further, because the requested fee award of \$1.75 million is less than the total value of the fees recorded by Class Counsel, it results in a fractional multiplier of ".49", for a discount of 51% off the actual lodestar (\$3,274,193.75) that Class Counsel expended litigating and settling this Action. Ex. E ¶ 58. The incentive awards of \$5,000 to each of the Named Plaintiffs are also fair and reasonable in light of their substantial commitment of time and effort to this litigation over the last four years.<sup>5</sup>

## **II. CLASS COUNSEL'S EFFORTS AND THE RESULTS OBTAINED**

Class Counsel committed considerable time and resources to develop and prosecute this matter without any guarantee of payment. Ex. E ¶ 10. This litigation was hard fought and involved extensive research and investigation to develop the legal theories, filing multiple complaint amendments, responding to multiple transfer motions filed by Defendants, developing case management plans for the different phases of the case, propounding and responding to

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<sup>5</sup> See Ex. E ¶¶ 41, 84; Ex. I (Declaration of Sheilar Smith in Support of Approval of Settlement Agreement) ¶¶ 3, 5-11, 14-15; Ex. J (Declaration of Kasandra Anton in Support of Approval of Settlement Agreement) ¶¶ 3, 5-11, 14-15; Ex. K (Declaration of Bonnie Bailey in Support of Approval of Settlement Agreement) ¶¶ 3, 5-11, 14-15; Ex. L (Declaration of Peggy Wise in Support of Approval of Settlement Agreement) ¶¶ 3, 5-11, 14-15; Ex. M (Declaration of June Schwierjohn in Support of Approval of Settlement Agreement) ¶¶ 3, 5-11, 14-15.

substantial written discovery, reviewing tens of thousands of pages of documents, resolving discovery disputes, briefing a motion to dismiss, a motion for summary judgment and also class certification, an appeal to the Seventh Circuit, and mediation with two mediators over ten months, all of which were necessary to achieve a positive result for the Settlement Class. *Id.* ¶¶ 9, 10-18, 19-23, 24-30, 40.

The procedural history of the case, and the settlement negotiations are described in detail in the accompanying Final Approval Memorandum and the Joint Declaration (Ex. E). In brief overview, the two original cases were brought by five OSF employees who were concerned that OSF was violating ERISA by operating their two pension plans as church plans, and as a result underfunding the plans by hundreds of millions of dollars. This Action is thus different from the typical class action brought under the securities laws or under ERISA for fiduciary breach. Rather, this case challenges whether hospital systems like OSF are entitled to claim that their pension plans are exempt from ERISA as “church plans” under ERISA § 3(33), 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, ERISA § 3(33), 29 U.S.C. § 1002(33); 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. E ¶ 14. Class Counsel concluded, based on their investigation, that this was a narrow exemption intended for *churches*, and that hospitals like OSF were improperly claiming the exemption. *Id.*; Fourth Am. Class Action Compl. ¶¶ 115-37, ECF No. 138.

When filing the case, Class Counsel 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. Ex. E ¶ 16. And they knew that the major hospitals claiming religious ties, 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. *Id.* ¶ 17.

Between 2013 and 2016, the first three church plan cases reached the appellate courts and Class Counsel achieved major victories. *Id.* Three appellate courts, including the Seventh Circuit, ruled unanimously in favor of plaintiffs. *Id.* & n.7. The fight then moved to the Supreme Court, which reversed these unanimous appellate decisions and remanded the cases for further proceedings on plaintiffs' alternative theories of liability.<sup>6</sup> *Id.* ¶ 18.

This case was filed prior to any petition for certiorari in the Supreme Court and was initially litigated on the theory that the ERISA statute required a church plan to be established by a church. After the Supreme Court accepted certiorari and issued its opinion reversing the three appellate courts, Class Counsel amended their complaint to focus on their alternate statutory arguments and also new state law claims. Following a short period of litigation on the alternative theories, Defendants filed a motion for summary judgment that was granted. Class Counsel appealed to the Seventh Circuit, which reversed and remanded, but the Seventh Circuit opinion further narrowed the remaining issues in the case, principally whether the OSF Committees "maintained" the Plans within the meaning of ERISA. *Id.* ¶¶ 23, 36. Shortly after the case was remanded, the parties began working with two mediators, first Magistrate Judge Daly, and then Robert Meyer of JAMS to resolve the case. *Id.* ¶¶ 24-30. The settlement achieved here, following over four years of litigation, is a direct result of Class Counsel's total immersion in the issue.

The Parties executed the Settlement Agreement on September 17, 2020. Class Counsel then drafted and filed Plaintiffs' Motion for Preliminary Approval of Settlement Agreement,

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<sup>6</sup> *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017).

ECF No. 240, on September 22, 2020. The Court granted preliminary approval of the Settlement on October 7, 2020. ECF No. 244. Pursuant to the Preliminary Approval Order, Class Notice in the form approved by the Court was timely mailed to a total of 19,266 Settlement Class members by the settlement vendor, and also posted on Class Counsels' settlement websites. Ex. E ¶¶ 45-47. Class Counsel has received and responded to thirty-three inquiries (either by phone or e-mail) from Settlement Class members. *Id.* ¶ 49. Class Counsel will continue to devote significant time to responding to inquiries from the Settlement Class. *Id.* ¶ 53.

**A. Class Counsel's Experience and the Resources Expended to Represent the Class.**

Class Counsel are lawyers from Keller Rohrback L.L.P., and Cohen Milstein Sellers & Toll, PLLC, both well-established and successful national law firms with a history of leading large-scale class actions. *Id.* ¶ 11. Similarly, Plaintiffs' Counsel at Kessler Topaz and IZard Kindall are also lawyers with substantial experience litigating church plan cases. *Id.* ¶¶ 17 n.5, 19. With their deep background in ERISA litigation, Class Counsel developed this area of the law, and the comprehensive Settlement Agreement now before the Court is the result of Class Counsel's research and analysis, prosecution of this litigation, and extensive arm's-length negotiation between the parties in a thorough, adversarial, and professional process. *Id.* ¶¶ 9, 10-18, 19-23, 24-30, 40.

**1. Class Counsel's Work in this Matter.**

All lawyers and staff who worked on this matter kept files contemporaneously and documented all time spent litigating and settling the claims in this case and were required to record their time worked either to the nearest tenth or quarter of an hour. *Id.* ¶ 55. Class Counsel distributed work to maximize efficiency and minimize the fees in this Action; thus, to the extent practicable, senior attorneys did not do the work that could be accomplished by more junior attorneys, and attorneys did not do the work that could be completed by paralegals. If Class

Counsel had not undertaken these efforts, the lodestar for this case would have been higher. *Id.* ¶ 59.

Ms. Gerber reviewed the Keller Rohrback time records, spanning the time period of April 5, 2016 through November 13, 2020, and exercised billing judgment to reduce time entries. Ex. E ¶ 62. Ten associates and partners at Keller Rohrback billed 2,785.40 hours on this matter, and four paralegals contributed an additional 1,043.20 hours, for a total of 3,828.60 hours. Likewise, Ms. Yau supervised review of time records for Cohen Milstein for the same time period, and Cohen Milstein also exercised billing judgment to reduce time entries. *Id.* ¶ 64. The six associates and partners at Cohen Milstein who billed on this matter billed approximately 380 hours, and the four paralegals contributed an additional 30+ hours. Ms. Siegel Moffa and Mr. Kindall did the same for Kessler Topaz and IZARD Kindall, and those firms billed 672.80 hours and 143.25 hours, respectively. *Id.* ¶¶ 66-68.

The resulting reports, reflecting total lodestar of \$2,515,961 for Keller Rohrback, \$314,937.50 for Cohen Milstein, \$311,451.50 for Kessler Topaz, \$109,418.75 for IZARD Kindall and \$22,425 for Armstrong Law, are attached as Exhibits E-1, E-3, F, G, H to the Final Approval Memorandum.

## **2. Class Counsel's Rates Per Hour.**

Complex ERISA class actions such as this one are nearly always litigated by national law firms with considerable expertise in the subject matter. Ex. E ¶ 71. A reasonable hourly rate is “one that is ‘derived from the market rates for the services rendered.’” *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 640 (7th Cir. 2011). The community of ERISA class action lawyers is a national one and the hourly rates used for the lodestar calculation are thus reasonable in light of the rates used by both plaintiffs’ and defense firms in the national market. *Id.* The Seventh Circuit “presume[s] that an attorney’s actual billing rate for similar litigation is appropriate to use

as the market rate.’” *Id.* “If an attorney uses contingent fee arrangements, the ‘next best evidence’ of the attorney’s market rate is ‘evidence of rates similar experienced attorneys in the community charge paying clients for similar work and evidence of fee awards the attorney has received in similar cases.’” *Reid. v. Unilever United States, Inc.*, No. 12 C 6058, 2015 WL 3653318, at \*14 (N.D. Ill. June 10, 2015) (citation omitted). For the lodestar calculation, Class Counsel have applied their firm’s regular billing rates as of November 13, 2020. Ex. E ¶¶ 62, 64, 66, 67, 68. These rates are the billing rates for these firms’ contingent fee practices, and these rates are similar to rates that have been approved by courts across the country in other church plan cases and other recent class action cases. *Id.*

### **3. Class Counsel’s Expenses.**

Class Counsel’s expense records show that they incurred a total of \$92,881.79 in expenses in litigating the case through November 13, 2020. *See* Ex. E ¶ 79; Exs. E-1, E-3, F, G, H. Class Counsel’s expenses primarily fall into five categories: fees and expenses for travel related to the case; fees and expenses for computer-based research and database services and licensing; fees and expenses for copying, printing, mailing/delivery and telecommunications; mediation expenses; and actuarial consulting expenses. Class Counsel exercised billing judgment and were judicious in maintaining records of all expenses. *Id.* ¶ 80.

Accordingly, Class Counsel request an award of attorneys’ fees and reimbursement of expenses for the significant time Class Counsel devoted to this Action, as well as incentive awards of \$5,000 to each of the Named Plaintiffs for their services to the Settlement 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, 738 n.30 (1986). Rule 23(h) 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). This is particularly true here because the fee agreement to pay up to \$1,750,000 for attorneys' fees, expenses, and incentive awards, was negotiated with the assistance of a well-respected and neutral mediator, and the fee agreement was based upon the mediator's proposal (subject to the Court's approval). Ex. E ¶¶ 27-28, 51.

### **IV. THE REQUESTED FEE AWARD IS REASONABLE**

#### **A. Class Counsel's Request for Attorneys' Fees Is Justified by Having Created a Common Benefit for the Settlement 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."). A court must also consider any substantial affirmative relief when evaluating the overall benefit to the class. *See Manual for Complex Litigation (Fourth)* § 21.71 (2004).

When determining the reasonableness of a fee, the Seventh Circuit uses the percentage basis rather than a lodestar or other basis. *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998); *In re Synthroid Mktg. Litig. (Synthroid II)*, 325 F.3d 974, 979-80 (7th Cir. 2003) (use of lodestar cross-check has fallen into disfavor). A one-third fee is typical in ERISA cases. *Nolte v. Cigna Corp.*, No. 2:07-cv-2046-HAB-DGB, 2013 WL 12242015, at \*2 (C.D. Ill. Oct. 15, 2013).

While this settlement is not technically structured as a common fund because class members do not have ascertainable claims to portions of the \$25 million payment, *Boeing*, 444 U.S. at 479, it is nevertheless appropriate to treat the settlement as a common benefit fund for the purpose of determining the reasonableness of the requested attorneys' fees because it provides a sum certain common benefit of \$25 million, not including equitable relief. Combined with the separately negotiated fees of up to \$1,750,000 for attorneys' fees, expenses, and incentive awards, the common benefit for the class is \$26,750,000. Accordingly, Plaintiffs' request of \$1,750,000 for attorneys' fees, expenses, and incentive awards represents just 6.5% of the settlement value, which is far below the Seventh Circuit's benchmark of one-third (33%).

**B. Class Counsel's Fee Is Within the Range of Fees That Would Have Been Negotiated in an Arm's-Length Negotiation.**

The Seventh Circuit requires that courts test the reasonableness of a fee by determining whether a requested fee is within the range of fees that would have been negotiated in an arm's-length negotiation given the risk of nonpayment and the normal rate of compensation in the market at the time. *See Nolte*, 2013 WL 12242015, at \*2 (citing *In re Synthroid Mktg. Litig. (Synthroid I)*, 264 F.3d 712, 718 (7th Cir. 2001)). 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 class counsel’s performance; the amount of work necessary to resolve the litigation; and the stakes of the case. *See Taubenfeld v. Aon Corp.*, 415 F.3d 597, 599 (7th Cir. 2005). Each of these factors weighs in favor of awarding Class Counsel 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 6.5% of the contribution to the Plans, 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 settlements. *Nolte*, 2013 WL 12242015, at \*2. 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*, 658 F.3d at 636).<sup>7</sup> As 6.5% falls well below the market rate for an ERISA class action suit, this factor supports Class Counsel’s requested award.

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<sup>7</sup> *See, e.g., Taubenfeld*, 415 F.3d at 598 (affirming fee award of 30% of \$7.25 million settlement); *Gaskill*, 160 F.3d at 362-63 (affirming fee award of 38% of the settlement fund, or roughly \$8 million); Amended Order & Final Judgment ¶ 8, *Owens v. St. Anthony Med. Ctr., Inc.*, No. 14-4068 (N.D. Ill. Aug. 23, 2019), ECF No. 309 (awarding fee award of 25% of \$4 million settlement); Order & Final Judgment ¶ 21, *Butler v. Holy Cross Hosp.*, No. 16-5907 (N.D. Ill. June 29, 2017), ECF No. 52 (awarding fee award of 15% of \$4 million settlement);

**2. Named Plaintiffs Agreed *Ex Ante* that Class Counsel Would Cap Fees at a Reasonable Amount of 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 agreements with Named Plaintiffs cap fees at one-third of the recovery. Ex. E ¶ 77. An *ex ante* agreement between 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 Class Counsel to be compensated with the amount Class Counsel now seek.” *Koszyk v. Country Fin.*, No. 16 Civ. 3571, 2016 WL 5109196, at \*4 (N.D. Ill. Sept. 16, 2016) (quoting *Synthroid I*, 264 F.3d at 718, 720) (citing *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 844-45 (N.D. Ill. 2015)). In this Action, 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 just 6.5% 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 Action, 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. Privacy 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

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and *Castillo v. Noodles & Co.*, No. 16-cv-3036, 2016 WL 7451626, at \*1, 4 (N.D. Ill. Dec. 23, 2016) (awarding fee award of one-third of \$3 million settlement).

higher fee”); *Sutton v. Bernard*, 504 F.3d 688, 694 (7th Cir. 2007) (“[T]here 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, Class 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’ Final Approval Memorandum, absent this Settlement, Plaintiffs and the Settlement Class risked obtaining no recovery at all. Prior to the Parties beginning mediation, the Supreme Court had ruled on a question central to this litigation, *Advocate*, 137 S. Ct. at 1663, the District Court had dismissed Plaintiffs’ claims at summary judgment, *Smith v. OSF HealthCare Sys.*, 349 F. Supp. 3d 733 (S.D. Ill. 2018), and while the Seventh Circuit reversed and remanded the case, *Smith v. OSF HealthCare Sys.*, 933 F.3d 859, 861 (7th Cir. 2019), the opinion further narrowed the issues remaining for litigation on Plaintiffs’ alternative statutory theories. Given the development of the law, there is a substantial possibility that Plaintiffs would have been unable to recover anything at all for the Settlement Class if this litigation had proceeded, a factor which 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 Fees.**

Class Counsel are among the leading ERISA plaintiffs’ firms and possess unparalleled expertise in the specific types of ERISA claims brought in this Action. *See* Ex. E ¶¶ 11, 13; Ex. E-2 (Keller Rohrback résumé), Ex. E-4 (Cohen Milstein résumé). As set forth in detail in Section II, *supra*, these two firms commenced church plan litigation over seven 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 detailed in Section II, *supra*, Class Counsel expended significant time and resources in the investigation and litigation of this Action. Ex. E ¶ 10. The Settlement negotiations were also extensive, including over ten months of mediation with two different mediators. Class Counsel also successfully moved for preliminary approval of the Settlement, drafted the Class Notice materials, and posted them on two dedicated settlement websites; and individually responded to thirty-three inquiries from Settlement Class members concerning the Class Notice, the Settlement, and this litigation. *See id.* ¶¶ 42, 44-46, 49. Moreover, Class Counsel's work is not yet done. Class Counsel still need to complete the final approval process, assist Settlement Class members with inquiries, respond to any potential objections, and handle any resulting appeal. *Id.* ¶ 53. Because the Settlement is the culmination of Class Counsel's substantial litigation and a thorough mediation process with experienced mediators and sophisticated opposing counsel, this factor weighs in favor of granting Class Counsel's request.

**C. Alternatively, a Separate Lodestar Analysis Also Supports the Reasonableness of the Requested Fees.**

A lodestar analysis also confirms the reasonableness of the requested fees. *See Synthroid II*, 325 F.3d at 979-80. The lodestar method provides courts an objective basis upon which to determine the value of the services provided by counsel. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

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.<sup>8</sup> In this motion, Class Counsel seeks no multiplier.

Class Counsel and the other counsel expended a total of 5,098.90 hours litigating and settling this litigation. Ex. E ¶¶ 52, 56. At Class Counsel's hourly rates, which are comparable to those of other class action attorneys, this amounts to a lodestar of \$3,274,193.75. *Id.* ¶ 57. *See also supra* Section II(A)(1). Plaintiffs' total requested award of \$1,750,000 is inclusive of unreimbursed litigation costs totaling \$92,881.79, plus the requested incentive awards for the five Named Plaintiffs in the amount of \$5,000 each (discussed *infra*). *Id.* ¶¶ 79-82, 85-86. After reimbursement of costs and the requested incentive awards for the Named Plaintiffs, the requested attorneys' fees are less than the amount expended; they amount to a 51% discount on Class Counsel's combined lodestar of \$3,274,193.75. *Id.* ¶¶ 57-58.

The hourly rates Class Counsel charged to perform this work, which range from \$250 to \$1,035, are also reasonable. *Id.* ¶ 70. 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). Only a handful of law firms are capable of handling this type of national litigation, therefore, the relevant market for legal services in cases such as this one is a national market. *See Nolte*, 2013 WL 12242015, at \*3. The reasonableness of these rates is therefore evidenced by comparison to fee awards Class Counsel has received in similar

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<sup>8</sup> *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.

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 similar to those sought herein that have all been approved. Ex. E ¶ 72.

**V. THE COURT SHOULD AWARD THE REQUESTED REIMBURSEMENT OF EXPENSES**

This Court may award reasonable litigation 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 Declarations filed contemporaneously herewith, Class Counsel requests reimbursement for common and routinely reimbursed litigation expenses in the amount of \$92,881.79. Ex. E ¶¶ 79-81; Ex. E-1, E-3, F, G, H. This request is reasonable and should be approved.

These expenses include filing fees; service fees; travel expenses (air fare, ground travel, meals, parking, and lodging); copying; postage and express delivery; telecommunications charges; computer-based research, Relativity database services and licensing and other research services; transcripts; actuarial expert witness fees; and mediator's charges. Ex. E ¶ 80. 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 v. Chi. Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1256-66 (N.D. Ill. 1993) (finding costs such as those sought here necessary in class litigation). These expenses were necessary for the litigation and resolution of this Action, and Class Counsel has documentation for the amounts sought upon request. Ex. E ¶¶ 79-80; Exs. E-1, E-3, F, G, H (summaries of expenses).

## VI. THE COURT SHOULD AWARD THE REQUESTED INCENTIVE AWARDS

Class Counsel respectfully requests that the Court approve an incentive award of \$5,000 for each of the five Named Plaintiffs. These awards do not affect or reduce the benefits to the Class in any way and will be paid solely out of the \$1.75 million being sought in this motion.

“[A] named plaintiff is an essential ingredient of any class action.” *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 834 (7th Cir. 2018) (alteration in original) (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)). Courts routinely find service awards to be effective ways to encourage members of a class to become class representatives. “[A]n incentive award is appropriate if it is necessary to induce an individual to participate in the suit.” *Cook*, 142 F.3d at 1016. “To determine if an incentive award is warranted, a district court evaluates ‘the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.’” *Camp Drug Store, Inc.*, 897 F.3d at 834 (quoting *Cook*, 142 F.3d at 1016). The amount of awards can vary widely, depending on the extent of class representatives’ participation in the litigation. *See Spicer*, 844 F. Supp. at 1267-68 (collecting cases approving service awards ranging from \$5,000 to \$100,000).

Here, each of the Named Plaintiffs are former employees who worked at various OSF facilities, and each of them made substantial contributions to the litigation, including by collecting and producing documents to counsel; contributing to the factual development of the case, maintaining regular contact with counsel; meeting either in person or telephonically with counsel; reviewing and approving the complaints, and other major filings; reviewing and responding to discovery requests, staying abreast of the pleadings, motions, and settlement negotiations in this case, including the mediation and ultimate settlement of this Action. Ex. E ¶¶ 41, 84. These actions provided great benefit to the Settlement Class and thus the proposed

incentive awards to the Named Plaintiffs Sheilar Smith, Kasandra Anton, Bonnie Bailey, Peggy Wise, and June Schwierjohn of \$5,000 each, for a total of \$25,000, are reasonable, appropriate, and should be awarded.

## VII. CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests that the Court grant Plaintiffs' Unopposed Motion for Award of Attorneys' Fees and Reimbursement of Expenses, and for Incentive Awards, in the total amount of \$1,750,000, together with such other and further relief as to the Court may deem just and proper. A [Proposed] Order and Final Judgment granting the relief sought herein is attached as Exhibit N to the Final Approval Memorandum.

DATED this 1st day of December 2020.

### **KELLER ROHRBACK L.L.P.**

*/s/ Laura R. Gerber*

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 1, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which in turn sent notice to all counsel of record.

DATED this 1st day of December 2020.

*/s/ Laura R. Gerber*

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Laura R. Gerber