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 FINAL APPROVAL OF SETTLEMENT AGREEMENT AND CERTIFICATION OF SETTLEMENT CLASS

Plaintiffs Sheilar Smith, Kasandra Anton, Bonnie Bailey, Peggy Wise, and June Schwierjohn (collectively, "Named Plaintiffs"), by and through their attorneys, respectfully move the Court for an Order: (1) granting final approval of the Class Action Settlement Agreement preliminarily approved by the Court on October 7, 2020;[1] and (2) granting final certification of the proposed Settlement Class pursuant to Federal Rule of Civil Procedure 23(b)(1) and/or 23(b)(2). Defendants do not oppose the relief sought herein.

For the reasons set forth in the accompanying Memorandum in Support of Plaintiffs' Unopposed Motion for Final Approval of Settlement Agreement and Certification of Settlement

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[1] Order Prelim. Approving the Settlement, Certifying the Class, Approving Notice to the Class, and Scheduling Final Approval Hr'g, ECF No. 244.

Class, Named Plaintiffs respectfully request that the Court grant this Motion and enter the [Proposed] Order and Final Judgment,[2] concluding this case.

DATED this 1st day of December 2020.

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[2] A copy of the [Proposed] Order and Final Judgment is attached as Exhibit N to the Memorandum in Support of Plaintiffs' Unopposed Motion for Final Approval of Settlement Agreement and Certification of Settlement Class, filed contemporaneously herewith.

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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.

/s/ Laura R. Gerber
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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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT AGREEMENT AND CERTIFICATION OF SETTLEMENT CLASS

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Plaintiffs Sheilar Smith, Kasandra Anton, Bonnie Bailey, Peggy Wise, and June Schwierjohn (collectively, "Plaintiffs" or "Named Plaintiffs"), by and through their attorneys, submit this Memorandum in Support of Plaintiffs' Unopposed Motion for Final Approval of Settlement Agreement and Certification of Settlement Class. Defendants do not oppose the relief sought herein, but they do not necessarily agree with all the statements in this Memorandum.

I. INTRODUCTION

This Class Action Settlement Agreement[1] resolves the claims of Plaintiffs against Defendants regarding the Sisters of the Third Order of St. Francis Employees Pension Plan and the Retirement Plan for Employees of the Saint Anthony's Health Center (collectively, the "OSF Plans" or the "Plans"). The Fourth Amended Class Action Complaint ("FAC"), ECF No. 138, alleges that OSF HealthCare System ("OSF") and the other Defendants impermissibly denied ERISA[2] protections to the participants and beneficiaries of the OSF Plans by incorrectly claiming that the Plans qualify as ERISA-exempt "church plans." *See* ERISA § 3(33), 29 U.S.C. § 1002(33); FAC ¶¶ 1-7. Plaintiffs allege that Defendants failed to operate the OSF Plans in accordance with ERISA by, among other things, failing to make required contributions to the OSF Plans' Trust and, due to the resulting underfunding, Defendants have created a risk that the OSF Plans will be unable to pay the accrued pension benefits to which Plaintiffs and the other Class members are entitled, FAC ¶¶ 78-88, allegations that Defendants deny, Answer ¶¶ 78-88, ECF No. 140. This Settlement was reached after extensive arm's-length negotiations, first with the assistance of Magistrate Judge Daly and then with a private mediator. It required a mediator's

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[1] Capitalized terms not otherwise defined in this Memorandum have the meaning ascribed to them in the Class Action Settlement Agreement ("Settlement Agreement" or "Settlement"). A copy of the Settlement Agreement is attached hereto as Exhibit A. Referenced Exhibits B through N are also attached to this Memorandum.

[2] The Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq*.

proposal before the Parties could come to agreement. The Settlement represents the best result for the proposed Settlement Class of participants and beneficiaries of the OSF Plans that could be achieved in light of all legal and practical risks.

Under the terms of the Settlement, Plaintiffs have agreed to settle all Released Claims against Defendants and other Released Parties in exchange for annual payments of a minimum of $5 million to the Plans, for a total of $25 million in cash, over OSF's Fiscal Years 2021 through 2025, or until $25 million has been contributed to the Plans, Ex. A § 7.1.1, with a separate payment of up to $1.75 million[3] for Plaintiffs' attorneys' fees, expenses, and incentive awards (the "Fee Award"). *Id.* § 7.1.2. The $25 million will be paid into The Sisters of the Third Order of St. Francis Employees Pension Trust ("Master Trust") and used to fund the OSF Plans. The Settlement also establishes, through 2025, or until such time as $25 million has been contributed to the Plans, certain equitable provisions that are comparable to provisions of ERISA, *id.* § 8.

The Parties have complied with the terms of the October 7, 2020 Order Preliminarily Approving the Settlement, Certifying the Class, Approving Notice to the Class, and Scheduling Final Approval Hearing ("Preliminary Approval Order" or "Prelim. Approval Order"), ECF No. 244, including mailing the Class Notice to the Settlement Class and mailing the Class Action Fairness Act of 2005 ("CAFA") notices to the requisite officials pursuant to 28 U.S.C. § 1715.[4]

Under the governing standards for evaluating class action settlements in this Circuit and pursuant to Federal Rule of Civil Procedure 23(e)(2), this Settlement is fair, reasonable, and adequate, and Plaintiffs respectfully request that the Court approve it.

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[3] Plaintiffs are separately applying for approval of these fees and expenses, and incentive awards.

[4] *See* Ex. B (Notice of Proposed Settlement of Class Action, Final Approval Hearing, and Motion for Attorneys' Fees, Reimbursement of Litigation Expenses and Incentive Awards to Named Plaintiffs ("Class Notice")); Ex. C (Declaration of Jeffrey J. Mitchell); *see also* Ex. D (Declaration of Abbey M. Glenn).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural History and Settlement Negotiations.

Plaintiffs' counsel Keller Rohrback L.L.P. ("Keller Rohrback") and Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein") (collectively, "Class Counsel") discovered and developed this area of the law. *See* Ex. E (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 for Award of Attorneys' Fees and Reimbursement of Expenses, and for Incentive Awards ("Joint Declaration")) ¶ 13. They 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 in the United States Code, the legislative history of the statute, and agency and court interpretations of the statute. Ex. E ¶ 14. Ultimately, Class Counsel began challenging the exemption claimed by a number of hospitals around the country that maintained pension plans which the hospitals claimed were exempt from ERISA. *Id.* ¶¶ 15-17. This Action arose from that investigation.

Before filing the Class Action Complaint in this Action ("Original Complaint"), ECF No. 1, Class Counsel developed the legal theories outlined above and analyzed the facts relating to OSF and the Plans, including, among other things, reviewing and analyzing OSF's financial statements and also the Named Plaintiffs' documents. Ex. E ¶ 40. This research resulted in the 49-page, nine-count Complaint against numerous Defendants. Original Complaint ¶¶ 123-211.

As detailed in the Joint Declaration, this case was litigated for over four years. Ex. E ¶¶ 19-30. After discovery had commenced, the litigation was stayed while one of the theories in the church plan litigation, in cases also being prosecuted by Class Counsel, was appealed to the Supreme Court. *Id.*; *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017). After

the Supreme Court's adverse decision on that theory, Ex. E ¶ 18, Plaintiffs amended their complaint to assert additional claims and resumed litigation, motion practice, and discovery efforts, *id.* ¶ 21. When the Court granted an early summary judgment motion, *id.* ¶¶ 22-23, Plaintiffs appealed to the Seventh Circuit, which reversed and remanded for further proceedings in 2019, and the case returned to active litigation and discovery. *Id.* ¶ 23.

At the same time, the Parties commenced settlement negotiations, which were extensive and took place over ten months. *Id.* ¶ 24. They were initially mediated in person in Benton, Illinois, by Magistrate Judge Daly, and continued remotely for months until terminated in February 2020. *Id.* ¶ 26. The Parties restarted negotiations a month later, overseen by Robert A. Meyer, Esq., a JAMS mediator highly experienced in ERISA matters, including successful mediation of numerous other church plan cases. *Id.* ¶ 27. After long negotiations, the Parties finally accepted a mediator's proposal on July 13, 2020; memorialized the key terms of the agreement in a Term Sheet dated July 21, 2020; and filed a Joint Notice of Settlement, ECF No. 235, on July 30, 2020. *Id.* ¶ 28. Throughout the mediation process, negotiations were conducted at arm's length and without collusion. *Id.* ¶ 30. The Parties executed a comprehensive Settlement Agreement on September 17, 2020. Ex. E ¶ 29; Ex. A, and moved for preliminary approval on September 21, 2020,[5] which was granted on October 7, 2020. ECF No. 244.

B. Overview of the Settlement Agreement.

1. Settlement Consideration.

The monetary consideration provided under this Settlement is substantial: 25 million dollars. OSF will make annual cash contributions to the Plans of a minimum of $5 million per year for up to five years, Fiscal Years 2021 through 2025, for a total contribution of $25 million.

[5] The unopposed motion for preliminary approval was initially filed on September 21, 2020, ECF No. 237, but was refiled with corrections the following day, ECF No. 240.

Ex. A § 7.1.1. The Settlement also establishes, through Fiscal Year 2025, or until such time as the $25 million has been contributed to the Plans, certain equitable provisions that are comparable to provisions of ERISA, including benefits guarantees for participants and protection against cutbacks of accrued benefits, as well as provisions concerning plan administration, such as imposing requirements to provide pension benefit statements, and disclosures required within summary plan descriptions ("SPDs"). *Id.* § 8. As a result of these provisions, Plan participants may request pension benefit statements twice per year, and OSF will update and distribute a Summary of Material Modifications or Summary Plan Description to include information regarding the Plans' claim review procedures. *Id.* § 8.5.1-2. For the same period, OSF also guarantees that the accrued benefits of participants and beneficiaries will not be reduced on account of a merger, consolidation, or adoption by additional employers. *Id.* § 8.2.

2. Certification of a Rule 23 Class.

The Settlement contemplates, *id.* 2.2.2, that the Court will certify the following non-opt-out class under Rule 23(b)(1) or (b)(2): "All vested or non-vested participants of the OSF Plans (and their beneficiaries) as of the date of the filing of the Complaint (April 27, 2016)." *Id.* § 1.21.

3. Released Claims.

The Settlement Agreement provides for releases by and among the Parties. *Id.* § 3. The persons to be released by Plaintiffs and the Settlement Class are defined as the "Releasees" and are enumerated at section 1.19 of the Settlement Agreement. *Id.* § 1.19. The Releasees will be released from the "Released Claims," which generally include all claims that could have been asserted by Plaintiffs under federal or state law, arising out of the allegations of the FAC. *Id.* § 3.1. Named Plaintiffs, the Settlement Class, and Class Counsel will be released from claims relating to the institution and prosecution of the Action. *Id.* § 3.3.

4. Notice.

The Court required, by November 16, 2020: (a) the Court-approved form of Class Notice to be mailed to the last known address of members of the Settlement Class; and (b) internet publication of the Settlement Agreement and Class Notice at www.kellersettlements.com and www.cohenmilstein.com/OSFsettlement. Prelim. Approval Order ¶ 5; Ex. A § 2.2.3, 2.2.4. On November 16, 2020, Analytics Consulting, LLC ("Analytics"), at OSF's expense (Ex. A §§ 2.2.3, 7.2), mailed 18,773 Class Notices, and mailed 493 additional Notices on November 17. Ex. C ¶¶ 10-11. Analytics also coordinated the publication of Summary Notice in thirteen newspapers near OSF facilities. *Id.* ¶ 12. Class Counsel published the Settlement Agreement and the Class Notice online by November 16, 2020. Ex. E ¶¶ 45-46.

5. Attorneys' Fees, Expenses, and Incentive Awards.

By separate application, Class Counsel seek an award of attorneys' fees and reimbursement of expenses, as well as incentive awards to Named Plaintiffs. The Settlement Class was notified of these details in the Class Notice. Ex. B § 11. Any award of attorneys' fees, expenses, and incentive awards, not to exceed $1,750,000, will be paid by OSF in addition to the other monetary terms of the Settlement Agreement. Ex. A § 7.1.2.

C. Reasons for the Settlement.

Plaintiffs have entered into the Settlement with an understanding of the strengths and weaknesses of their claims. This understanding is based on: (1) the dialogue in mediation sessions; (2) investigation and research; (3) the likelihood that Plaintiffs would prevail at trial; (4) the range of possible recovery; and (5) the substantial complexity, expense, and duration of litigation necessary to prosecute this Action through trial, post-trial motions, and likely appeal, and the significant uncertainties in predicting the outcome of this complex litigation. *See* Ex. E ¶¶ 10-18, 24-30, 35; Ex. I ¶ 11; Ex. J ¶ 11; Ex. K ¶ 11; Ex. L ¶ 11; Ex. M ¶ 11. Having

undertaken this analysis, Class Counsel and Named Plaintiffs have concluded that the Settlement is fair, reasonable, and adequate and should be approved.

III. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Rule 23(e) of the Federal Rules of Civil Procedure governs settlements of class action lawsuits. It provides that "[t]he claims, issues, or defenses of a certified class . . . may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). This Court has already preliminarily approved the settlement (*see* Prelim. Approval Order) and notice of the proposed settlement has been provided to the class (*see supra* Section II.B.4); what remains to be accomplished is a final hearing and judicial approval. Fed. R. Civ. P. 23(e).

The Seventh Circuit favors settlements of class action litigation. *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888-89 (7th Cir. 1985). "Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources." *In re Sears, Roebuck & Co. Front-Loading Washer Prods. Liab. Litig.*, No. 06 C 7023, 2016 WL 772785, at *6 (N.D. Ill. Feb. 29, 2016) (quoting *Armstrong v. Bd. of Sch. Dirs. Milwaukee*, 616 F.2d 305, 313 (7th Cir. 1980)).[6] As a result, "[c]ourts do not easily disturb settlement agreements[.]" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Adcock*, 176 F.R.D. 539, 544 (N.D. Ill. 1997).

Under Rule 23(e), the Settlement should be approved if the Court finds it fair, reasonable, and adequate after considering certain factors. Fed. R. Civ. P. 23(e)(2). The December 2018 amendments to Rule 23(e) do not displace existing law on the settlement approval process, but

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[6] *See also Miksis v. Evanston Twp. High Sch. Dist. # 202*, 235 F. Supp. 3d 960, 987 (N.D. Ill. 2017), *as amended* (Feb. 2, 2017) ("strong federal policy favoring the voluntary resolution of disputes"); *Cannon v. Burge*, 752 F.3d 1079, 1104 (7th Cir. 2014) ("'Public policy in Illinois favors settlements[.]'") (citation omitted).

"focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment. Thus, *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646 (7th Cir. 2006), continues to govern approval in the Seventh Circuit.

A. Rule 23(e)(2)(A): Named Plaintiffs and Class Counsel Adequately Represented the Class.

There is no question that the Class has been adequately represented. Class Counsel spent years developing this area of law; thoroughly researched the claims; for four years vigorously litigated these claims before this Court and the Seventh Circuit; and spent ten months in settlement negotiations before two separate mediators to arrive at a settlement. Ex. E ¶¶ 10-30, 40. The Named Plaintiffs, whose claims are congruent with those of other Class members (*see* Rule 23(a)(4) discussion *infra* Section V.A), collected documents, contributed to the factual development of the cases, reviewed and approved the complaints, reviewed and responded to discovery, reviewed and approved other major filings in the Action, maintained contact with Class Counsel, stayed abreast of settlement negotiations, and advised on the settlement of this Action. Ex. E ¶ 41. Rule 23(e)(2)(A) is satisfied.

B. Rule 23(e)(2)(B): The Settlement Was Reached After Arm's-Length Negotiations with the Assistance of an Experienced Mediator and Is Procedurally Fair.

"A strong initial presumption of fairness attaches to the proposed settlement when it is shown to be the result of [an arm's-length] negotiating process." *Hispanics United v. Vill. of Addison*, 988 F. Supp. 1130, 1150 n.6 (N.D. Ill. 1997). The Settlement here is entitled to this strong presumption of fairness because the settling parties in this Action are represented by counsel experienced in litigating ERISA "church plan" exemption cases; the Settlement was the result of extensive arm's-length negotiations with the assistance of an experienced magistrate judge and a nationally renowned mediator; and the settling parties understood the strengths and

weaknesses of the claims and defenses before settlement was reached. Ex. E ¶¶ 10-18, 24-30, 35-38. Rule 23(e)(2)(B) has been satisfied.

C. Rule 23(e)(2)(C): The Relief Provided for the Class is Adequate.

While Seventh Circuit standards require that a court closely scrutinize class counsel's fiduciary duties to obtain the best settlement for the class, "[t]he purpose of a fairness hearing is not to resolve the merits of the case, but to determine whether the settlement is fair, reasonable, and adequate when viewed in its entirety, and not a product of collusion." *Williams v. Quinn*, 748 F. Supp. 2d 892, 897 (N.D. Ill. 2010) (citing *Mirfasihi v. Fleet Mortg. Corp.*, 450 F.3d 745, 748 (7th Cir. 2006)). In determining adequacy of the proposed classwide relief, Rule 23(e)(2)(C) directs the Court to include consideration of "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)[.]" Fed. R. Civ. P. 23(e)(2)(C). Some of these factors are subsumed within the Seventh Circuit's *Synfuel* analysis, which requires consideration of:

a. "the strength of plaintiffs' case compared to the amount of defendants' settlement offer";
b. "an assessment of the likely complexity, length and expense of the litigation";
c. "an evaluation of the amount of opposition to settlement among affected parties";
d. "the opinion of competent counsel"; and
e. "the stage of the proceedings and the amount of discovery completed at the time of settlement."

Synfuel, 463 F.3d at 653 (citation omitted). In reviewing these factors, courts view the facts "in the light most favorable to the settlement." *Isby*, 75 F.3d at 1199 (citation omitted). As discussed in detail below, each of these factors strongly favors approval of the Settlement.

1. The Strength of Plaintiffs' Case Compared to the Amount of Settlement, as Well As the Complexity, Expense, and Likely Duration of the Litigation, Support Approval of the Settlement.

The "most important factor relevant to the fairness of a class action settlement" is "the strength of plaintiff's case on the merits balanced against the amount offered in the settlement." *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 958 (N.D. Ill. 2011) (citation omitted). For this factor, courts consider whether the proposed settlement is reasonable in light of the risks of proceeding with the litigation. *Id.* at 959, 961-63. Plaintiffs' case is strong, and they have pursued it vigorously, but the litigation is not without risk or uncertainty—particularly because the legal landscape of the "church plan" exemption has changed significantly since Plaintiffs first brought this case. In early June 2017, the Supreme Court issued its ruling in *Advocate*. That case involved an interlocutory appeal of the ruling in *Stapleton v. Advocate Health Care Network & Subsidiaries*, No. 14-1873 (N.D. Ill.), which had been affirmed by the United States Court of Appeals for the Seventh Circuit, consolidated with appeals from similar rulings by the Third and Ninth Circuits, all of which had determined unanimously that, in order to qualify as a "church plan" under the ERISA church plan exemption, a *church* had to establish a retirement plan. The Supreme Court reversed those holdings, finding that a retirement plan may still be able to satisfy the exemption if it was established by an entity other than a church. *Advocate*, 137 S. Ct. at 1663.

The Supreme Court's ruling did not resolve all the issues in this litigation. If the Settlement had not been reached, the Parties would still need to litigate how the Supreme Court's ruling applies to the facts of this Action, and the Parties would still need to proceed with discovery, summary judgment briefing, trial preparation and presentation, and anticipated appeals of any judgment (whether for Plaintiffs or Defendants). Furthermore, the expense of taking this case through trial would be considerable. It would require, among other things,

additional formal discovery (including document discovery and many depositions), expert witness testimony, and extensive motion practice. *See* Ex. E ¶ 38. Trial preparation would require great effort, both by the Parties and the Court. *See id.*

Though Class Counsel remain confident in the merits of Plaintiffs' claims, there is significant risk in light of the Supreme Court's decision, decisions in "church plan" cases in other jurisdictions, such as *Medina v. Catholic Health Initiatives*, 877 F.3d 1213 (10th Cir. 2017), the District Court's summary judgment decision in this case, and despite its remand, the Seventh Circuit's further narrowing of the remaining issues for litigation in *Smith v. OSF HealthCare System*, 933 F.3d 859, 861 (7th Cir. 2019). Additionally, Defendants would undoubtedly otherwise continue to defend their actions vigorously through trial, and on appeal if necessary. The Settlement is therefore particularly favorable for the Settlement Class members in light of this uncertain and high-stakes backdrop.

2. An Evaluation of the Amount of Opposition to the Settlement Supports Approval of the Settlement.

The reaction of Settlement Class members to the Settlement strongly favors approval. First, the Settlement has the full support of Named Plaintiffs, all of whom provided documents during the investigation, kept abreast of the different phases of litigation, including mediation and settlement negotiations, and supervised Class Counsel's decision-making throughout the litigation and settlement process. *See* Ex. E ¶ 41. After analyzing the agreement, all Named Plaintiffs came to the conclusion that this Settlement provides the best outcome that the Settlement Class was likely to achieve. Ex. I ¶ 11; Ex. J ¶ 11; Ex. K ¶ 11; Ex. L ¶ 11; Ex. M ¶ 11.

The Court approved a Class Notice that set out the terms of the Settlement and informed Settlement Class members of the date of the Final Hearing, where they could find relevant documents, how to object, and the December 18, 2020 deadline for doing so. Ex. B. The Class

Notice and other documents were published on Class Counsels' dedicated settlement websites, and Analytics mailed a total of 19,266 copies of the Class Notice to Settlement Class members. Ex. C ¶¶ 10-11. As of November 30, 2020, Class Counsel have received thirty-three (33) inquiries about the Settlement through the dedicated phone line and email address published in the Class Notice, and have responded to all of them. Ex. E ¶ 49. Class Counsel believe that their responses have adequately addressed all inquiries, and they do not anticipate any objections on account of those inquiries.

In this Circuit, where only a relatively small number of class members object, it suggests that class members deem the settlement to be fair. *In re Mex. Money Transfer Litig*., 164 F. Supp. 2d 1002, 1020-21 (N.D. Ill. 2000). The reaction of the Settlement Class to date—with no filed objections—strongly supports approval of the Settlement.

Finally, Defendants' counsel timely served CAFA Notices upon the Attorney General for each state in which a Settlement Class member resides, and the Attorney General of the United States of America, on September 30, 2020, within ten days of the filing of the Settlement Agreement and more than ninety days prior to the Fairness Hearing. Ex. D ¶ 3. No objections have been received in response to the CAFA Notice, which further indicates the reasonableness and adequacy of the Settlement. *See also Noll v. eBay, Inc*., 309 F.R.D. 593, 608 (N.D. Cal. 2015) (no response to CAFA notice "indicat[es] that such officials [] do not object to the [s]ettlement. Thus, this factor favors the settlement.") (citation omitted).

3. The Stage of the Proceedings Supports Approval of the Settlement, and the Opinion of Class Counsel Is That the Settlement Is Fair and Reasonable.

The next factor is the stage of proceedings and the amount of discovery completed. *Synfuel*, 463 F.3d at 653. This aspect of the case considers "how fully the district court and

counsel are able to evaluate the merits of plaintiffs' claims." *Armstrong*, 616 F.2d at 325. Thus, the inquiry is whether the claims' merits may be adequately evaluated.

Here, the merits of Plaintiffs' claims were thoroughly vetted through four years of litigation, including a trip to the Seventh Circuit; four amended complaints; discovery; motion practice; and many months of mediation. Consideration of this factor thus supports a finding that the Settlement is fair and adequate.

That Class Counsel, who are primarily responsible for the development of this area of ERISA law, strongly endorse the Settlement as fair and reasonable also supports final approval. *See, e.g.*, *Isby*, 75 F.3d at 1200; *In re Mex. Money Transfer Litig*., 164 F. Supp. 2d at 1020. This case has been litigated by experienced and well-respected counsel on both sides, all of whom have considerable experience in the area of ERISA litigation—and, more specifically, in litigation concerning ERISA's "church plan" exemption. Ex. E ¶¶ 11-13, 50, 71; Exs. E-2, E-4. Class Counsel are well known for their success in complex ERISA class action litigation and have many years of experience in litigating church plan cases. *See id*. ¶ 50 (referencing firm résumés of Class Counsel, *see* Exs. E-2, E-4).

As a result of this expertise, Class Counsel were able to craft a Settlement that takes into account the Plans' funding levels, the financial condition of OSF, and the desire of the Plans' participants for both security and transparency with respect to their interests in the Plans. The $25 million contribution to the Plans contributes significantly to increasing the funded levels of the Plans. OSF also agreed, for a period of time until that funding is completed, to provide a form of guarantee of benefits, as well as important information and notices. These features of the Settlement all enhance Settlement Class members' pension security.

Based on their extensive experience and expertise, and for all the reasons articulated herein, Class Counsel believe the Settlement is in the best interests of the Settlement Class and

recommend its approval. Their opinion should be granted substantial weight, as the recommendations of experienced and qualified counsel favor approval of a settlement. *In re Mex. Money Transfer Litig.*, 164 F. Supp. 2d at 1020 ("The court places significant weight on the unanimously strong endorsement of these settlements by Plaintiffs' well-respected attorneys.").

For all these reasons, the *Synfuel* factors, and thus Rule 23(e)(2)(C)(i), are satisfied; the Settlement is in all respects fair, reasonable, and adequate, and should be approved.

4. Rule 23(e)(2)(C)(ii): Distribution of Relief to the Class

The Settlement provides classwide relief to all Class members equally through the deposit of funds in the Plans and through equitable relief applicable to all Class members, without need for any processing of claims. Ex. A §§ 7, 8. Since there is neither a direct distribution nor any claims processing, the concerns of Rule 23(e)(2)(C)(ii) are fully met here.

5. Rule 23(e)(2)(C)(iii): Attorneys' Fees

The Settlement provides that Class Counsel will apply for an aggregate of no more than $1.75 million in attorneys' fees, expenses, and incentive awards, to be paid by Defendants *in addition to* the monetary relief granted to the Class under the Settlement. *Id.* § 7.1.2. Payment, to the extent approved by the Court, will be made thirty days after entry of the Final Approval Order, subject to a refund obligation if approval is reversed or reduced on appeal or other proceeding. *Id.* § 7.1.4. As the proposed fees are subject to Court approval, and do not in any way impact the relief to the Class, Rule 23(e)(2)(C)(iii) is satisfied.

6. Rule 23(e)(2)(C)(iv): Other Agreements. There are no agreements required to be identified under Rule 23(e)(3). Rule 23(e)(2)(C)(iv) is satisfied.

7. Rule 23(e)(2)(D): Relative Treatment of Settlement Class Members. As described in Section III.C.4 above, Settlement Class members are all being treated equally under the Settlement, and thus Rule 23(e)(2)(D) is satisfied.

IV. NOTICE TO THE CLASS SATISFIED RULE 23 AND DUE PROCESS

While Rule 23(c)(2)(A) leaves to the Court the type of notice required for a Rule 23(b)(1) or (b)(2) class, the Class Notice in this case, Exhibit B hereto, easily satisfies even the express requirements under Rule 23(b)(3)—that is, "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," and that "clearly and concisely state[s] in plain, easily understood language" the specific disclosures required by the Rule. Fed. R. Civ. P. 23(c)(2)(B). The Class Notice describes the nature of the Action (Ex. B at 6-7); the Settlement Class (*id.* at 2); the Settlement Class's claims, issues, or defenses (*id.* at 6-7); a Class member's right to appear through an attorney (*id.* at 8); that Class members cannot exclude themselves (*id.* at 9); and that Class members will be bound by the Court's judgment (*id.* at 9-10). Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii).

In accordance with the Preliminary Approval Order, Analytics has mailed a total of 19,266 copies of the Class Notice to Settlement Class members. Ex. C ¶¶ 10-11. Mailing to all Settlement Class members with known addresses, local publication, and two dedicated Settlement websites containing all of the relevant Settlement documents (*see supra* Section II.B.4) constitutes the least costly and best notice that is practicable under the circumstances. It therefore satisfied the requirements of due process and Rule 23. *See, e.g.*, *CE Design v. Beaty Constr., Inc.*, No. 07 C 3340, 2009 WL 192481, at *10 (N.D. Ill. Jan. 26, 2009) ("The Federal Rules, however, require the best notice that is 'practicable' not perfect notice.").

V. THE REQUIREMENTS FOR CLASS CERTIFICATION HAVE BEEN MET AND THE SETTLEMENT CLASS SHOULD BE CERTIFIED

Named Plaintiffs also respectfully request that the Settlement Class be certified finally for purposes of settlement. The Seventh Circuit has long acknowledged the propriety of certifying a class solely for purposes of a class action settlement. "Federal courts naturally favor the settlement of class action litigation" and certification of a settlement class is a necessary part of approving a class action settlement. *Isby*, 75 F.3d at 1196. It "has been recognized throughout the country as the best, most practical way to effectuate" settlements of a large number of small claims. *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995). "'[S]ettlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge.'" *Id.* (citation omitted). The settlement class here easily satisfies all the requirements of Rule 23(a) and (b).

A. The Settlement Class Meets the Requirements of Rule 23(a).

Numerosity. The class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Here, at the time the FAC was filed on October 12, 2017, the OSF Plans had more than 19,300 participants. FAC ¶¶ 58, 59; Answer ¶¶ 58, 59, ECF No. 140. Thus, the element of numerosity is met. *See, e.g.*, *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 491 (N.D. Ill. 2015) (numerosity "typically satisfied where there are at least forty members of a putative class"); *Cima v. Wellpoint Health Networks, Inc.*, 250 F.R.D. 374, 378 (S.D. Ill. 2008) (class of more than forty individuals raises presumption that joinder is impracticable).

Commonality. Rule 23(a)(2) requires that there be "questions of law or fact common to the class,'" Fed. R. Civ. P. 23(a)(2), and "'[a] common nucleus of operative fact is usually enough to satisfy'" this requirement. *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998) (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)). In the instant Action, issues of law

and fact common to the Class include whether the Plans are exempt from ERISA; if not, whether the fiduciaries of the Plans failed to administer and fund the Plans in accordance with ERISA; and whether OSF will be required to bring the Plans into compliance with ERISA. The core questions and issues are common to the Settlement Class. Commonality is thus satisfied.

Typicality. The typicality element broadly requires "that the claims or defenses of the representative part[y] [be] typical of the claims or defenses of the class." *Muro v. Target Corp.*, 580 F.3d 485, 492 (7th Cir. 2009) (alterations in original) (citation omitted). "A claim is typical if it 'arises from the same event or practice or course of conduct that gives rise to the claims of other class members and . . . [the] claims are based on the same legal theory.'" *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (citation omitted). Here, all Plaintiffs' claims are based on Defendants' alleged failure to operate the Plans in accordance with ERISA, and all members of the Class were similarly affected by such conduct. Typicality is satisfied.

Adequacy. Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class," which "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 607 n.13, 625 (1997). A plaintiff is adequate, and thus qualified to represent a class, when the plaintiff's interest in proving their own claim will lead them to prove the claims of the rest of the class. *Cima*, 250 F.R.D. at 379. Here, the claims and interests of the Named Plaintiffs are congruent with those of the other members of the Settlement Class. All seek the same relief to enhance their retirement security under the Plans. Named Plaintiffs also have retained qualified counsel with extensive experience representing plaintiffs in class litigation, including ERISA cases and church plan cases specifically. Ex. E ¶¶ 11-14, 50, 71; Ex. E-2 (Keller Rohrback résumé); Ex. E-4 (Cohen Milstein résumé). Accordingly, this Action satisfies all the requirements of Rule 23(a).

B. The Settlement Class Satisfies the Requirements of Rule 23(b)(1) and (b)(2).

1. Individual Actions Would Create Inconsistent Adjudications or Be Dispositive of the Interests of Absent Members.

A class may be certified under Rule 23(b)(1) if, in addition to meeting the requirements of Rule 23(a), the prosecution of separate actions by individual class members would create the risk of inconsistent adjudications, which would create incompatible standards of conduct for the defendant or would as a practical matter be dispositive of the interest of absent members. Fed. R. Civ. P. 23(b)(1)(A), (B).

There is a clear risk of inconsistent adjudication and incompatible standards here: in the absence of certification, the Plans' participants could bring identical actions and achieve different results, with one court holding that the Plans are ERISA-regulated, and the other holding that they are ERISA-exempt. *See, e.g.*, *Neil v. Zell*, 275 F.R.D. 256, 267 (N.D. Ill. 2011) ("ERISA class actions are commonly certified under either or both subsections of [Rule] 23(b)(1) because recovery for a breach of the fiduciary duty owed to an ERISA plan, as is the predominant claim here, will inure to the plan as a whole, and because defendant-fiduciaries are entitled to consistent rulings regarding operation of the plan."); *see also Brieger v. Tellabs, Inc.*, 245 F.R.D. 345, 357 (N.D. Ill. 2007) (certifying a Rule 23(b)(1) class in an ERISA case alleging breach of fiduciary duty for imprudent investment decisions); *Baker v. Kingsley*, No. 03 C 1750, 2007 WL 1597654, at *5 (N.D. Ill. May 31, 2007) ("Because the relief sought by plaintiffs involves the recovery and distribution of plan assets, separate actions by individual plaintiffs would impair the ability of other class members to protect their interests. Plaintiffs therefore meet the requirements of Rule 23(b)[(1)]."). Certification of the proposed class under Rule 23(b)(1) is therefore appropriate in this ERISA Action.

2. Defendants Have Acted on Grounds Generally Applicable to the Settlement Class, and Relief for the Settlement Class as a Whole Is Appropriate.

A class may be certified under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Here, Plaintiffs allege that Defendants failed to comply with ERISA on Plan-wide bases and seek declaratory relief that the Plans are not church plans, as well as injunctive relief requiring that the Plans comply with ERISA. The available remedies include monetary relief and equitable relief to the Plans as a whole. ERISA § 502(a)(2), (3), 29 U.S.C. § 1132(a)(2), (3).

Remedies under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2), are by definition plan-wide—a classic example of equitable relief. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-41 (1985). While the Settlement includes consideration to the Plans, that consideration is incidental to, and flows directly from, Plaintiffs' prayer for injunctive and declaratory relief. "The operational meaning of 'incidental' damages in this setting is that the computation of damages is mechanical, 'without the need for individual calculation,' so that a separate damages suit by individual class members would be a waste of resources." *In re Allstate Ins. Co.*, 400 F.3d 505, 507 (7th Cir. 2005) (quoting *Manual for Complex Litigation (Fourth)* § 21.221 (2004)). As courts in this District have found, "[m]onetary relief in a plan-wide action brought under ERISA section 502 is incidental, and flows from relief to the plan." *Smith v. Aon Corp.*, 238 F.R.D. 609, 618 (N.D. Ill. 2006); *see also Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 763-64 (7th Cir. 2003) (where "concrete follow-on relief" is "the direct, anticipated consequence of the declaration, rather than something unrelated to it, the suit can be maintained under Rule 23(b)(2)").

For this reason, courts in this Circuit have frequently found that ERISA classes seeking relief for a plan as a whole, like the proposed class here, are certifiable under Rule 23(b)(2). *See, e.g.*, Order & Final Judgment ¶ 2, *Carver v. Presence Health Network*, No. 15-2905 (N.D. Ill. July 10, 2018), ECF No. 137 (certifying ERISA settlement class Rule 23(b)(1) and/or (b)(2)); Order & Final Judgment ¶ 2, *In re Wheaton Franciscan ERISA Litig.*, No. 16-4232 (N.D. Ill. Jan. 16, 2018), ECF No. 107 (same).

C. Class Counsel Meets the Requirements of Rule 23(g).

Rule 23(g) requires the Court to examine the capabilities and resources of Class Counsel. *See* Fed. R. Civ. P. 23(g). Keller Rohrback and Cohen Milstein have detailed the claims brought in this Action, and the time and effort already expended in connection with this Action. *See* Ex. E ¶¶ 10-30. Moreover, Class Counsel are among the leading ERISA plaintiffs' firms and possess unparalleled expertise in the specific types of church plan ERISA claims brought in this Action. *Id.* ¶ 71; Exs. E-2, E-4. Class Counsel thus satisfy the requirements of Rule 23(g).

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court: (a) grant final approval of the Settlement because it is fair and reasonable in light of the governing standard; (b) grant final certification of the Settlement Class because it meets all the requirements of Rule 23; and (c) grant such other and further relief as the Court deems appropriate.

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