

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

LAURIE NICHOLSON, individually and on
behalf of herself and all others similarly situated,

Plaintiff,

vs.

Franciscan Missionaries of Our Lady Health
System, Franciscan Missionaries of Our Lady
Health System Investment Committee, and John
Does 1-20,

Defendants.

No.: 3:16-cv-00258-SDD-EWD

**JOINT DECLARATION OF MARK K. GYANDOH AND MARK P. KINDALL
IN SUPPORT OF PLAINTIFF’S MOTION FOR FINAL
APPROVAL OF CLASS ACTION SETTLEMENT AND MOTION FOR AWARD
OF ATTORNEYS’ FEES, REIMBURSEMENT OF EXPENSES, AND CASE
CONTRIBUTION AWARDS TO THE SETTLEMENT CLASS REPRESENTATIVES**

MARK K. GYANDOH and MARK P. KINDALL, declare as follows:

1. Mark K. Gyandoh, counsel with the law firm of Kessler Topaz Meltzer & Check, LLP (“KTMC”), and Mark P. Kindall, a partner with the law firm of Izard, Kindall & Raabe, LLP (formerly Izard Nobel, LLP) (“IKR”), Class Counsel¹ in the above-captioned litigation, are competent to declare the matters stated herein.

2. We have been actively involved in the prosecution of this Action, are familiar with its proceedings, and have personal knowledge of the matters set forth herein based on our active supervision and participation in all material aspects of the Action and if called to do so, we could and would testify competently thereto. We submit this Joint Declaration in support of Plaintiff’s Motion for Final Approval of Class Action Settlement, Certification of Settlement Class,

¹ The term “Class Counsel” as defined in the Settlement Agreement refers to KTMC and IKR. The term “Plaintiff’s Counsel” is used herein to refer to KTMC, IKR, and Liaison Counsel Tarcza & Associates, LLP (“Tarcza”).

Appointment of Class Representative, and Appointment of Class Counsel, and Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Case Contribution Award to Settlement Class Representatives Named Plaintiff Laurie Nicholson ("Named Plaintiff" or "Plaintiff") and Cynthia Francis (together with Plaintiff, the "Settlement Class Representatives").

I. BACKGROUND AND PROCEDURAL HISTORY

3. The background and procedural history of this Action is more fully set out in the Memorandum of Law in Support of Plaintiff's Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Case Contribution Awards to the Settlement Class Representatives (the "Fee Memorandum").

4. Of note, Defendants filed motions to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) on July 25, 2016. Defendants argued that Plaintiff lacked standing to represent the Plans, and that the statutory text, court opinions, and administrative agency interpretation all support the conclusion that the Plans should be considered church plans and be exempt from ERISA.

5. Additionally, following Defendants' dissemination of a notice dated May 23, 2016 to participants in the Plan regarding the offering of a lump sum buyout, on June 14, 2016, Plaintiff filed a Motion for Curative Notice wherein Plaintiffs argued that the communications sent to members of the Class as part of Defendants' "Lump Sum Window Benefit Program" in 2016 were misleading and were offering Class members lump sum buyouts of their pensions that were less than what ERISA required. *See generally* Dkt. No. 25.

6. While Defendants' two Motions to Dismiss were pending, the Parties recognized that it might be possible to resolve the case. Accordingly, the Parties agreed to early mediation, and asked that any decision on the pending Motions to Dismiss be stayed. *See* Dkt. No. 36.

II. SETTLEMENT NEGOTIATION

7. In anticipation of the mediation, and in addition to the materials Defendants attached to the Motions to Dismiss, Plaintiff requested that Defendants produce specific documents concerning each of the Plans, together with financial information that would permit an evaluation of current funding levels under ERISA's standards. Class Counsel reviewed these materials in advance of the mediation and consulted with an actuary to determine the Plans' funding status under ERISA's requirements and how much more money should be contributed to each Plan.²

8. On September 22, 2016, the Parties participated in an all-day mediation session in Los Angeles, California before Robert Meyer, Esq. of Loeb & Loeb LLP, a highly skilled and experienced mediator who has mediated many complex cases and class actions, including several analogous "church plan" litigations.

9. During mediation, the Parties exchanged their respective views with Mr. Meyer regarding the merits of the case and the various issues with respect to liability, causation, and damages. By the end of the mediation session, the Parties had agreed in principle on many key terms that were ultimately incorporated into the Settlement, including how much money would be contributed to the Plans, over what time period the contributions would be made, and the non-economic relief that Class members would receive.

10. During the initial mediation session, however, the Parties were not able to resolve the claims of Class members who had accepted a buyout of their pensions under the "Lump Sum Window Benefit Program" in 2016 and thus had received less than what they would have if ERISA applied to the Plans. *See* Dkt. No. 25. Defendants subsequently provided Class Counsel with

² Prior to the mediation, Cynthia Francis, a participant in the Our Lady of Lourdes Plan, agreed to join the litigation. As discussed below, Ms. Francis would have been added as a Named Plaintiff had the case not settled.

additional information through the mediator, including the number of participants who accepted a lump sum buyout and the aggregate amount they had received. Defendants also previewed the defenses they would assert to claims from these Class members if the litigation were to continue, including that each had signed a release knowing of the pendency of this case and its implications.

11. Class Counsel again consulted with an actuary and examined the viability of claims from Class members who had accepted a lump sum buyout. After many back-and-forth communications, the Parties agreed on a resolution for these Class members.

12. The Parties finalized all of the terms and conditions of the Settlement Agreement, which was executed and submitted to the Court for preliminary approval on May 5, 2017. Dkt. No. 69. On May 10, 2017, Plaintiff filed her revised preliminary approval papers. Dkt. No. 76.

13. The Court granted Preliminary Approval of the Settlement by Order dated October 24, 2017. Dkt. No. 83. The Order preliminarily certified the Class, appointed Plaintiff Nicholson and Ms. Francis as Settlement Class Representatives and their counsel as Class Counsel, approved the form and method of providing notice to the Class, and set a date for the Fairness Hearing.

III. CLASS NOTICE

14. The Class Notice describes the provisions of the Settlement related to this motion, specifically including Defendants' agreement to pay amounts awarded by the Court for attorneys' fees and reimbursement of expenses. Notice ¶ 10.

15. In accordance with the Preliminary Approval Order, the approved Class Notice was sent to 9,299 Settlement Class members identified by the Plan's recordkeeper by first-class mail on November 21, 2017. *See* Declaration of Jose C. Fraga, attached hereto as Exhibit 1.

16. In addition, the Settlement and all of its attachments (including the Notice), as well as the Motion for Preliminary Approval and supporting materials, were published on a dedicated

page on the IKR website, <http://ikrlaw.com/file/nicholson-v-franciscan-missionaries-lady-health-system/>, on December 8, 2017.

17. Following issuance and publication of the Settlement, Plaintiff's Counsel have answered several telephone calls from Settlement Class members and provided those individuals with additional information about the case and the Settlement.

IV. SETTLEMENT CLASS RESPONSE TO SETTLEMENT

18. Pursuant to the Court's Preliminary Approval Order, the deadline for filing objections is set for January 23, 2018, which allows Settlement Class members the opportunity to review all of Class Counsel's filings, including the Motions for Final Approval and for Award of Attorneys' Fees, Reimbursement of Expenses, and Case Contribution Awards, before deciding whether or not to lodge an objection.

19. As noted above, on November 21, 2017, the Class Notice was sent to 9,299 Settlement Class Members. Plaintiff's Counsel has spoken with many Settlement Class Members regarding the Settlement, and the vast majority of the callers were pleased with the Settlement. Indeed, Plaintiff's Counsel estimate they have spoken to over two dozen Settlement Class Members regarding the Settlement. To date, no objections have been received.

20. Pursuant to the Preliminary Approval Order, Class Counsel have until January 30, 2018 to respond to any objection filed regarding the Settlement. Accordingly, Class Counsel will submit a supplemental filing to the Court in advance of the February 6, 2018 Fairness Hearing in order to address any objection(s) received regarding the Settlement no later than January 30, 2018.

V. FINAL APPROVAL OF THE SETTLEMENT IS WARRANTED

21. While the Settlement does not resolve Defendant's ERISA status – the issue which lay at the heart of the Action – the Settlement will provide substantial and important protections

for the Class, in the form of both monetary as well as equitable relief, protecting their financial security for years to come, and should be finally approved.

22. As also discussed in the Memorandum of Law in Support of Plaintiff's Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, Appointment of Class Representative, and Appointment of Class Counsel, we believe the Settlement satisfies the six factors often employed by courts in the Fifth Circuit to analyze the fairness, reasonableness, and adequacy of a proposed settlement as announced by the Court in *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983).

23. Given that the Settlement will provide meaningful benefits to the Settlement Class, we believe that it should be finally approved.

VI. REQUESTED ATTORNEYS' FEES AND EXPENSES

24. As detailed in the Fee Memorandum, we believe that Plaintiff's Counsel's request for attorneys' fees readily meets the standards set forth in the United States Court of Appeals for the Fifth Circuit. Moreover, the requested attorneys' fees are in line with awards in ERISA class actions in the Fifth Circuit.

25. Attached hereto as Exhibits 2, 3, and 4 are declarations submitted on behalf of KTMC, IKR, and Tarcza (hereinafter the "Fee Declarations"). These Fee Declarations summarize the lodestar of each firm, including the number of hours, hourly rates, and the expenses reasonably incurred by each firm in connection with the Action. Plaintiff's Counsel sought throughout this litigation to avoid duplication of effort by counsel.

26. As discussed in greater detail in the Fee Declarations, in total, Plaintiff's Counsel have expended over 1,000 hours in the prosecution of this Action, with a resulting lodestar of \$624,867.50. The requested award of \$1 million in attorneys' fees is fair and reasonable

considering the risks that Plaintiff's Counsel took in prosecuting this Action under the applicable standards in this and other circuits in similar cases.

27. Additionally, as discussed in greater detail in the Fee Declarations, Plaintiff's Counsel have incurred \$28,115.08 in out-of-pocket litigation expenses. The expenses requested are also reasonable in amount and were necessarily incurred for the successful prosecution of the Action.

VII. CASE CONTRIBUTION AWARDS

28. The Settlement could not have been achieved without the substantial and continuing efforts of the Settlement Class Representatives.

29. In recognition of her efforts as Named Plaintiff in this Action, Class Counsel respectfully request the Court award Plaintiff Laurie Nicholson a Case Contribution Award in the amount of \$3,500.

30. In April 2016, Plaintiff Nicholson met in-person with her counsel and provided documents and information to her counsel that helped inform the allegations in the Complaint, especially with respect to the Our Lady of the Lake Pension Plan, the Plan she participated in. Plaintiff Nicholson then diligently reviewed the Complaint before it was filed. Thereafter, Plaintiff Nicholson regularly communicated with her counsel, and also was involved in the settlement discussions. All told, from April 2016 when Plaintiff Nicholson filed her Complaint until December 31, 2017, a week before the Final Approval Motion was due to be filed, Class Counsel's records indicate nineteen (19) separate conversations with Plaintiff Nicholson.

31. Plaintiff Nicholson has submitted a Declaration attesting to her efforts in the Action. *See* Declaration of Named Plaintiff Laurie Nicholson, attached hereto as Exhibit 5.

32. In recognition of her efforts as Settlement Class Representative, Class Counsel also respectfully request the Court award Cynthia Francis a Case Contribution Award in the amount of \$1,500.

33. As noted above, Settlement Class Representative Francis joined the Action prior to the mediation. Although Plaintiff and Class Counsel believe they had a strong stance in opposition to Defendants' arguments in their Rule 12(b)(1) Partial Motion to Dismiss (Dkt. No. 41), Class Counsel added Ms. Francis, a participant in the Our Lady of Lourdes Plan, in the event the litigation continued. From the time she joined the Action, including meeting in-person with her counsel in September 2016, Ms. Francis regularly communicated with her counsel and was committed to serving as a Named Plaintiff if the mediation was unsuccessful. All told, from November 2016 when Ms. Francis joined the litigation until December 31, 2017, a week before the Final Approval Motion was due to be filed, Class Counsel's records indicate eleven (11) separate conversations with Settlement Class Representative Francis.

34. Settlement Class Representative Francis has submitted a Declaration attesting to her efforts in the Action. *See* Declaration of Settlement Class Representative Francis, attached hereto as Exhibit 6.

VIII. EXHIBITS REFERNCED IN THE FINAL APPROVAL AND FEE MEMORANDA

35. Attached hereto as Exhibit 7 is a true and accurate copy of the Class Action Settlement Agreement.

36. Attached hereto as Exhibit 8 is a true and accurate copy of the Firm Resume of Kessler Topaz Meltzer & Check, LLP.

37. Attached hereto as Exhibit 9 is a true and accurate copy of the Firm Resume of Izard, Kindall & Raabe, LLP.

38. Attached hereto as Exhibit 10 is a true and accurate copy of the Firm Resume of Tarcza & Associates, LLC.

39. Attached hereto as Exhibit 11 is the Declaration of actuary Mitchell I. Serota regarding the present value of the instant Settlement.

40. Attached hereto as Exhibit 12 is the Declaration of Madeline Rea regarding dissemination of CAFA Notice.

41. Attached as Exhibits 13A - 13E are Orders in support of the requested award of attorneys' fees, reimbursement of expenses and Case Contribution Awards to the Class Representatives.

I, Mark K. Gyandoh, declare under penalty of perjury that the foregoing is true and correct.
Executed this 5th day of January 2018, in Radnor, Pennsylvania.

/s/ Mark K. Gyandoh
Mark K. Gyandoh

I, Mark P. Kindall, declare under penalty of perjury that the foregoing is true and correct.
Executed this 5th day of January 2018, in West Hartford, Connecticut.

/s/ Mark P. Kindall
Mark P. Kindall

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2018, a true and correct copy of the foregoing document was filed with the Court utilizing its ECF system, which will send notice of such filing to all counsel of record.

/s/ Mark K. Gyandoh _____
Mark K. Gyandoh