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**

PLAINTIFF'S MOTION FOR FINAL
APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiff Laurie Nicholson ("Named Plaintiff" or "Plaintiff"), on behalf of herself and all others similarly situated, submits this motion for final approval of the proposed settlement of this class action pursuant to Federal Rule of Civil Procedure 23(e) and the Employee Retirement Income Security Act of 1974 ("ERISA"). Specifically, Plaintiff moves the Court for an Order: (1) granting final approval of the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement") described herein and preliminarily approved by the Court on October 25, 2017 (Dkt. No. 83); and (2) granting final certification of the Class pursuant to Federal Rules of Civil Procedure 23(b)(1) and/or 23(b)(2). While Defendants do not oppose the relief sought in this Motion, Defendants do not agree with all of the averments stated in this Memorandum.

In support of this Motion, Plaintiff has submitted the accompanying Joint Declaration of Mark K. Gyandoh and Mark. P. Kindall (with exhibits) and a Memorandum of Law in support thereof. A copy of a revised [Proposed] Order and Final Judgment is attached hereto.

Dated: January 5, 2018

Respectfully submitted,

/s/ Mark K. Gyandoh
Mark K. Gyandoh
Julie Siebert-Johnson
KESSLER TOPAZ MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087
Tel: (610) 667-7706
Fax: (610) 667-7056
Email: mgyandoh@ktmc.com
Email: jsjohnson@ktmc.com

/s/ Mark P. Kindall
Robert A. Izard
Mark P. Kindall
Douglas P. Needham
IZARD KINDALL & RAABE LLP
29 South Main Street, Suite 305
West Hartford, CT 06107
Tel: (860) 493-6292
Fax: (860) 493-6290
Email: rizard@ikrlaw.com
Email: mkindall@ikrlaw.com
Email: dneedham@ikrlaw.com

/s/ Robert E. Tarcza
Robert E. Tarcza, LSBN 12655
TARCZA & ASSOCIATES
1310 Whitney Bldg.
228 St. Charles Ave.
New Orleans, LA 70130
Tel: (504) 525-6696
Fax: (504) 225-6701
Email: bobt@tglaw.net

Counsel for Plaintiff and the Settlement Class

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

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**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiff Laurie Nicholson ("Plaintiff") and Settlement Class Representative Cynthia Francis[1] (together with Plaintiff, the "Settlement Class Representatives"), on behalf of themselves and all others similarly situated, submit this Memorandum of Law in support of their motion for final approval of the proposed settlement of this class action pursuant to Federal Rule of Civil Procedure 23(e). While Defendants do not oppose the relief sought in this Motion, Defendants do not agree with all of the averments stated in this Memorandum. Specifically, the Settlement Class Representatives ask this Court to: (1) grant final approval of the Class Action Settlement Agreement ("Settlement"); (2) certify the proposed Settlement Class pursuant to FED. R. CIV. P. 23(a), 23(b)(1), and/or (b)(2); (3) appoint them as Settlement Class Representatives; and (4) appoint Kessler Topaz Meltzer & Check, LLP ("KTMC") and Izard, Kindall & Raabe, LLP ("IKR") as Class Counsel for the Settlement Class.

The Settlement is an excellent result for the Class because it achieves the primary relief sought in the Complaint – protecting the Plans'[2] participants' pension benefits. As discussed herein, and also in Plaintiff's 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"), this Action[3] is a challenge to Defendants' claim

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[1] Prior to the mediation which resulted in the Settlement, Cynthia Francis, a participant in the Our Lady of Lourdes Plan, joined the case as a Settlement Class Representative.

[2] The Plans are: (1) the "Retirement Plan of Our Lady of the Lake Hospital and Affiliated Organizations"; (2) the "Pension Plan for Employees of Our Lady of Lourdes Regional Medical Center, Inc."; and (3) the "Retirement Plan for Employees of St. Francis Medical Center, Inc."

[3] Capitalized terms used herein but not otherwise defined take the meaning ascribed to them in the Settlement Agreement ("Settlement" or "Settlement Agreement"), which is attached as Exhibit 7 to the Joint Declaration of Mark K. Gyandoh and Mark P. Kindall in Support of the 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 submitted herewith ("Joint Declaration").

that the Plans are "church plans" that are exempt from ERISA's funding and insurance requirements. After nearly a year of litigation and several rounds of hard-fought negotiations, the Parties reached a settlement that: (a) requires the Operating Entities to contribute $125 million to the Plans over the next five years; (b) requires Defendants to pay $450 to each of the approximately 2,100 participants of the Plans who accepted a lump-sum buyout of their pension in 2016; and (c) guarantees participants will be paid the pension benefits they were promised for the next 15 years. This Settlement is an excellent result as it provides many of the protections that Plaintiff sought.

The Settlement is also an especially good result in light of the risks and uncertainties in the case, especially given the Supreme Court's recent decision in *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017), which foreclosed one of Plaintiff's primary arguments in this case. In addition, the Tenth Circuit recently issued its decision in *Medina v. Catholic Health Initiatives*, No. 16-1005, 2017 WL 6459961 (10th Cir. Dec. 19, 2017), which rejected several other theories of ERISA liability pursued in this and other church plan cases. Although *Medina* is not binding in this case, it increases Plaintiff's litigation risks if she were to continue with the litigation. While there are risks and uncertainties of continuing in every litigation, the ones here strongly support the Court's approval of the Settlement.

Finally, the Settlement Class has received full and fair notice of the terms of the Settlement through individualized direct mail and internet publication, in accordance with the Preliminary Approval Order, with no objections to date. Additionally, Defendants mailed the Class Action Fairness Act ("CAFA") notices on May 17, 2017in accordance with CAFA, and have received no objections to date. *See* Declaration of Madeline Rea, attached to the Joint Declaration at Exhibit 12.

In light of the foregoing, Plaintiff submits it is in the Class members' best interests to settle this Action on the terms set forth in the Settlement and respectfully asks the Court to grant the relief sought herein.

II. BACKGROUND OF THE LITIGATION

A. Nature of the Claims and Procedural History

In order to avoid duplication, the discussion of the procedural history and Class Counsel's efforts during the litigation is set forth in the Fee Memorandum. *See* Fee Memorandum, Background. Class Counsel also is filing a revised [Proposed] Final Order with this motion. The changes to the earlier [Proposed] Final Order submitted in connection with Plaintiff's Motion for Preliminary Approval (*see* Dkt. No. 82-1) are primarily to conform the revised [Proposed] Final Order to the terms of the Settlement Agreement. In addition, following entry of the Preliminary Approval Order, counsel for Plaintiff began discussing the effectuation of the Settlement with Defendants, and in particular the distribution of the $450 award to those participants who received a benefit under the Lump Sum Window Benefit Program. In order to maximize the benefit to the participants in the Lump Sum Window Benefit Program, counsel for the Parties and Defendants agreed that the distribution should be done through the Plans, which would maintain the tax-exempt status of the distribution. Additionally, payment through the Plans is consistent with the fact that the Lump Sum amounts represent settlement of a claim for a benefit based on the Lump Sum Program recipients' participation in the Plans. Accordingly, Plaintiff submits a revised [Proposed] Final Order and Judgment, which includes language in paragraph 13(b) that the payment will be made from the Plans.

B. Summary of the Proposed Settlement

The following is a summary of the principle terms of the Settlement.

1. The Class Settlement Amount

Franciscan Missionaries is the sole member of and has sole control over Our Lady of the Lake Hospital, Inc., Our Lady of Lourdes Regional Medical Center, Inc., and St. Francis Medical Center, Inc., the entities that operate the hospitals that employ the Plans' participants (the "Operating Entities") and sponsor the Plans. *See* Settlement at § 1.11.

The Settlement requires the Operating Entities to aggregately contribute $125 million to the Plans over the next 5 years. *Id*. at § 8.1. Specifically, they will contribute $35 million in each of the next 3 years, and $10 million in both the fourth and fifth years following the Effective Date of Settlement. *Id*. The Operating Entities may pre-pay any portion of the contributions and have discretion in how to allocate them among the Plans. *Id*. The Operating Entities also guaranteed the payment of accrued benefits to the Plans' participants for the next 15 years. *Id*. at § 9.2.

In addition, the Defendants will pay $450.00 to each of the approximately 2,100 participants that accepted a lump sum buyout of their accrued benefits under the "Lump Sum Window Benefit Program" in 2016. *Id*. at § 8.1.2.

2. Agreed Upon Plan Provisions

In addition to the Class Settlement Amount, Defendants agree that for a period of fifteen (15) years commencing on the Effective Date of the Settlement, and provided that the Plans continue to be maintained and established by the Operating Entities, the Plans will pay the due benefits to participants under the terms of the Plans. *Id.* at § 9.2. Further, should the Plans be unable to pay the accrued benefits specified in the paragraph, the Operating Entities guarantee

those benefit payments for fifteen (15) years beginning on the Effective Date of the Settlement. *Id*.

3. The Settlement Class

The Settlement contemplates that the Court will certify a non-opt-out class comprised of all present or past participants of the Plans (both vested and non-vested) including those participants who accepted a lump sum or annuity benefit under the Lump Sum Window Benefit Program in 2016, and beneficiaries of the Plan as of the Effective Date of Settlement. *Id*. at §§ 1.19, 3.2.2. Because the Plans are frozen, no new participants will join the Plans in the future. However, should a Plan participant add or designate another future beneficiary, that added or designated beneficiary is a member of the Settlement Class and is subject to this Settlement Agreement, including its release of claims and covenant not to sue provisions.

4. The Released Claims

Section 4.1 of the Settlement defines Released Claims, in relevant part, as:

> any and all actual or potential claims, actions, causes of action, demands, obligations, liabilities, attorneys' fees, expenses and costs arising out of the allegations of the Complaint that were brought or could have been brought as of the date of the Settlement Agreement by any member of the Settlement Class, including any current or prospective challenge to the Church Plan status of the Plan, whether or not such claims are accrued, whether already acquired or subsequently acquired, whether known or unknown, in law or equity, brought by way of demand, complaint, cross-claim, counterclaim, third-party claim, or otherwise. "Released Claims" also shall include any claims under federal, state, parish, county, and/or municipal or any other law, relevant to the lump sum distribution claims identified in Paragraph 6 of the Term Sheet related to the Lump Sum Window Benefit Program in 2016.

Id. at § 4.1.

The definition of Released Claims does not include claims for individual benefits other than those related to the Lump Sum Window Benefit Program or claims under ERISA that arise prospectively if: (1) the Roman Catholic Church disassociates itself from the Plans' sponsors; (2)

the IRS or a court determines that the Plans do not qualify "church plans;" or (3) ERISA is amended to eliminate the "church plan" exemption. *Id*. at § 4.1.4.

5. The Payments to Settlement Class Representatives and Class Counsel

The Settlement also provides that Class Counsel may seek an award of attorneys' fees not to exceed $1 million and reimbursement of actually incurred litigation expenses and Case Contribution Awards for the Settlement Class Representatives of up to $35,000. *See* Settlement Agreement at § 8.1.4. Defendants will pay the attorneys' fees, expenses, and Case Contribution Awards separately from the Class Settlement Amount. *Id.* at § 8.1.4. The Settlement is not contingent upon the Court's approval of applications for attorneys' fees, expenses or the Case Contribution Awards. *Id*.

The Settlement Class was notified of these details in the Class Notice. *See* Exhibit 7 at Exhibit A. As noted above, Class Counsel is separately filing the Fee Memorandum wherein they detail these requests.

III. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A. The Settlement Should Be Finally Approved

"A class action may not be dismissed or compromised without the approval of the Court." *Everson v. Bunch*, No. 14-cv-583, 2016 WL 3255023, at *2 (M.D. La. June 13, 2016) (Dick, J.) (citing FED. R. CIV. P. 23(e)). Courts recognize that there is a "strong judicial policy favoring the resolution of disputes through settlement." *Smith v. Crystian*, 91 F. App'x 952, 955 (5th Cir. 2004). This is particularly true in the class action context. *See, e.g.*, *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 145-46 (E.D. La. 2013) ("The Court evaluates the proposed Settlement in light of the general federal policy favoring the settlement of class actions.") (citing

Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement.")).

"Before the Court approves a settlement, the Court must find that the proposed settlement is 'fair, reasonable, and adequate.'" *Everson*, 2016 WL 3255023, at *4 (quoting FED. R. CIV. P. 23(e)(2)). As this Court recognized, "the Fifth Circuit has identified six factors, known as the *Reed* factors, that the Court should consider in assessing whether a settlement is fair, reasonable, and adequate: (1) the assurance that there is no fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members." *Everson*, 2016 WL 3255023 (citing *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983)). As discussed below, all six *Reed* factors support final approval of the Settlement.

1. There is no Fraud or Collusion

"In the absence of evidence to the contrary, the court may presume that no fraud or collusion occurred between counsel." *Santinac v. Worldwide Labor Support of Illinois, Inc.*, No. 15-cv-25, 2017 WL 1098828, at *2 (S.D. Miss. Mar. 23, 2017). Here, there is no evidence of fraud or collusion. Rather, the Settlement was reached after Plaintiff had obtained and evaluated substantial information relevant to her claims, the Parties fully briefed two motions to dismiss, and the Parties engaged in a mediation process involving detailed mediation submissions, a full-day, formal mediation session before an experienced, independent mediator and numerous follow-up discussions and exchanges of drafts of the Settlement documents. That Class Counsel litigated the action for over a year before reaching the Settlement supports Final Approval of the Settlement.

See, e.g., *In re Train Derailment Near Amite, La.*, MDL 1531, 2006 WL 1561470, at *19 (E.D. La. May 24, 2006) ("that a class action settlement is reached after arms' length negotiations by experienced counsel generally gives rise to a presumption that the settlement is fair, reasonable, and adequate").

The Parties' use of mediation is further evidence that the Settlement is absent any fraud or collusion. Settlement negotiations that involve arm's-length, informed bargaining with experienced counsel who are fully informed support a preliminary finding of fairness. *See Kemp v. Unum Life Insurance Company*, No. 14-cv-0944, 2015 WL 12564183, at *8 (E.D. La. July 6, 2015) (process used to reach settlement was fair because the parties took part in "a ten-hour mediation under the supervision of an experienced mediator."); *Jenkins*, 300 F.R.D. at 303 ("[T]here is no evidence that the settlement was obtained by fraud or collusion. On the contrary, this settlement was diligently negotiated after a long and hard-fought process that culminated in ultimately successful mediation."). This is especially true here because the Parties used Mr. Meyer who has been found by courts in this Circuit to be "an experienced mediator in ERISA and other complex class actions" (*see Bach v. Amedisys, Inc.*, No. 10-cv-395, 2014 WL 12607789, *2 (W.D. La. Apr. 14, 2014)) as their mediator.

In addition, as mentioned above, the Parties did not negotiate attorneys' fees for Class Counsel until after they agreed on the relief given to the Class. This further confirms there was fraud or collusion. *See, e.g.*, *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. at 146-47 ("Because the parties have not agreed to an amount or even a range of attorney' fees, there is no threat of the issue explicitly tainting the fairness of settlement bargaining."); *In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1064 (S.D. Tex. 2012) (same). This factor thus supports final approval of the Settlement.

2. The Complexity, Expense and Likely Duration of the Litigation

"In assessing this factor, courts consider the uncertainties of litigation and compare the settlement to potential future relief." *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. at 147. As the Fifth Circuit reasoned, "[w]hen the prospect of ongoing litigation threatens to impose high costs of time and money on the parties, the reasonableness of approving a mutually-agreeable settlement is strengthened." *Ayers v. Thompson*, 358 F.3d 356, 373 (5th Cir. 2004).

Here, absent the Settlement, the Parties would face extended litigation; indeed Defendants' two motions to dismiss were fully briefed and pending before the Court when the Parties began their settlement discussions. Thus, fact and expert discovery, class certification, summary judgment and trial all lie ahead.

This Action's complexity was magnified by the Supreme Court's grant of *certiorari* in three "church plan" cases and subsequent decision in *Advocate*, which held that an employee benefit plan does not need to be established by a church to qualify for ERISA's "church plan" exemption and that plans maintained by certain organizations controlled by or associated with a church may qualify. *Advocate*, 137 S. Ct. at 1663. And, while *Advocate* did not resolve all issues in this case, the decision undercut one of the primary arguments Plaintiff pled in the Complaint for why the Plans do not qualify for the church plan exemption. In addition, the Tenth Circuit recently issued its decision in *Medina v. Catholic Health Initiatives*, No. 16-1005, 2017 WL 6459961 (10th Cir. Dec. 19, 2017), which rejected several other theories of ERISA liability urged by Plaintiff here. Although *Medina* is not binding in this case, it increases Plaintiff's litigation risks if she were to continue with the litigation. As the court recognized in *In re Oil Spill by Oil Rig Deepwater Horizon*, "[b]ecause many of the most controversial and hard-fought of all the issues in this case remain to be litigated, the Settlement eliminates the transaction costs that further proceedings

would impose and provides relief for the class sooner than continued litigation would." 295 F.R.D. at 147 (internal citations omitted). Thus, this factor supports final approval because the Settlement.

3. The Stage of the Proceedings and Amount of Discovery Completed

"This factor asks whether the parties have obtained sufficient information to evaluate the merits of the competing positions." *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. at 148. "Thus, the question is not whether the parties have completed a particular amount of discovery, but whether the parties have obtained sufficient information about the strengths and weaknesses of their respective cases to make a reasoned judgment about the desirability of settling the case on the terms proposed...." *Id.*

As discussed in the Fee Memorandum and accompanying Joint Declaration, Class Counsel thoroughly investigated the claims that were ultimately pled in the Complaint and continued to develop these arguments by opposing Defendants' two motions to dismiss and filing the Motion for Curative Notice. Moreover, Class Counsel also diligently reviewed the more than five hundred and seventy pages of material that Defendants submitted with their motions to dismiss. These documents, including key information about the Plans' funding levels and how they were "established" and are "maintained," allowed Plaintiff and Class Counsel to fully evaluate the strengths and weaknesses of this case, which is all that is needed. *See*, *e.g.*, *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639 (5th Cir. 2012) ("formal discovery is not a prerequisite to approving a settlement as reasonable"). *See also San Antonio Hispanic Police Officers' Org., Inc. v. City of San Antonio*, 188 F.R.D. 433, 459 (W.D. Tex. 1999) (the "[s]ufficiency of information does not depend on the amount of formal discovery which has been taken because other sources of information may be available to show the settlement may be approved even when little or no formal discovery has been completed.").

Before the mediation, Plaintiff also consulted with an actuarial expert to review the Plans' funding status to guide their settlement negotiations, a factor which supports approval. *See, e.g.*, *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. at 148 (noting that counsel's "use of experts and consultants" supported the conclusion that "there can be no doubt that the Parties have the necessary information to evaluate all aspects of the case and the merits of the Settlement."). Thus, while Plaintiff did not conduct extensive discovery or litigate this Action for years, her efforts provided her with more than sufficient information to assess the strengths and weakness of her case and confirm the appropriateness of the Settlement. Accordingly, this factor is satisfied.

4. The Likelihood of Success on the Merits

"The fourth factor, which is the most important factor absent fraud and collusion, considers the probability of the plaintiffs' success on the merits." *Santinac*, 2017 WL 1098828, at *3 (citing *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982)). "Under this factor, the Court must compare the Settlement terms with the likely rewards the Class would receive at trial." *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. at 149 (citing *Reed*, 703 F.2d at 172). "If further litigation is unlikely to lead to greater relief for the Class, then this factor weighs in favor of settlement." *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. at 149.

Plaintiff and the Class would face substantial risks if they continued to litigate this case on the merits. As discussed in § III.A.2, above, *Advocate* foreclosed Plaintiff's primary argument why the Plans were not "church plans." *Advocate*, 137 S. Ct. at 1663. While Plaintiff has other arguments why the Plans are not "church plans," *Advocate* certainly reduced the likelihood of Plaintiff succeeding on the merits. The Tenth Circuit's *Medina* decision rejected the theories underlying several of these other arguments. Although *Medina* is not binding in this case, it

increases Plaintiff's litigation risks. And, Plaintiff's arguments would be a matter of first impression for this Court and for any court in this Circuit.

Plaintiff would face challenges beyond those presented by *Advocate* in prevailing on the merits. Plaintiff's primary goal is to protect the pension benefits that were promised to the members of the Class. An important part of achieving this goal would involve proving that the Plans are underfunded and would involve expert discovery on the actuarial assumptions used to calculate the Plans' long-term liabilities. This inevitable "battle of the experts" presents risks on both sides. But for Plaintiff, whose goal was to achieve security rather than to "win," the risks associated with continued litigation are outweighed by the Settlement's benefits. Accordingly, this factor weighs strongly in favor of final approval.

5. The Range of Possible Recovery

"The fifth factor examines the range of possible recovery by the class, and primarily concerns the adequacy of the proposed settlement." *Santinac*, 2017 WL 1098828, at *3 (citing *Ayers*, 358 F.3d at 370). "To merit approval, the Settlement need only represent a fair, reasonable, and adequate estimation of the value of the case." *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. at 149.

The Settlement is an excellent result for the Class and is well within a good range of possible recovery that warrants final approval. ERISA's funding requirements for pension plans are complex and impose actuarial funding standards that present a funding level differently than under an accounting basis in financial statements. *See*, *e.g.*, ERISA § 430, 29 U.S.C. § 1130. Using the Plans' most recent financial information and ERISA's current funding rules, Plaintiff determined that the Plans were collectively underfunded by $119 million. While Plaintiff had arguments that a greater amount needed to be contributed to the Plans, the best relief Plaintiff could

obtain at trial was for ERISA to apply, not the imposition of stricter funding standards. Accordingly, Plaintiff believes that the $125 million in contributions made over the next 5 years, with $105 million contributed within 3 years, gives the Plans significant financial stability and is a very favorable result under the circumstances.

The $450 paid to each of the approximately 2,100 participants who accepted a lump-sum buyout under the "Lump Sum Window Benefit Program" is also well within the range of possible recovery and reasonable. The per-participant amount is close to the amount approved in *Lann v. Trinity Health Corp.*, No. 14-cv-2237 (D. Md.), an analogous "church plan" case where participants that accepted a buyout of their pensions were paid $550. *Id.* at Dkt. No. 75-3 (Settlement Agreement at § 8.1.3) and Dkt. No. 101 (preliminary approval Order dated Feb. 6, 2017). A lower amount is justified here because, unlike in *Lann*, the participants accepted a lump sum after being provided with information about this lawsuit and the potential impact to the amount of their distribution if ERISA applied, and signed a release. *See* Dkt. No. 25-2 at Exhibits A and B. Indeed, Class Counsel responded to hundreds of telephone inquiries from class members after Defendants provided that notice to participants. *Id.* In sum, the Settlement compares favorably with the range of possible recovery through litigation, weighing in favor of final approval.

6. Both Class Counsel and the Settlement Class Representatives Support the Settlement and Reaction by the Absent Settlement Class Members

"In evaluating a settlement, the Court should rely on counsel who know the strengths and weaknesses of their cases." *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. at 150. *See also Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 852 (E.D. La. 2007) ("Counsel are the Court's main source of information about the settlement, ... and therefore the Court will give weight to class counsel's opinion regarding the fairness of settlement."). "Class counsel's opinion

should be presumed reasonable because they are in the best position to evaluate fairness due to an intimate familiarity with the lawsuit." *Id*. *See also Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In performing this balancing task, the trial court is entitled to rely upon the judgment of experienced counsel for the parties."); *Manual for Complex Litigation (Fourth)* § 21.641 (noting counsel are the court's "main source of information about the settlement").

Here, KTMC and IKR have extensive ERISA class action experience, including in "church plan" cases. This Court recognized this when it preliminarily appointed the firms as Class Counsel for the Settlement Class (Dkt. No. 83) and this is the third settlement that KTMC and IKR worked on together and IKR's fourth settlement of a "church plan" action. As discussed in greater detail in the Fee Memorandum and the Joint Declaration, Class Counsel extensively litigated this Action from start to finish, and believe this Settlement is an excellent result for the Settlement Class. The $125 million contribution to the Plans and the $450 to the more than 2,000 individuals who participated in the Lump Sum Window Program provides meaningful benefits to the Plans' participants and the fifteen year guarantee of benefits goes beyond many of the other "church plan" settlements. In Class Counsel's experienced opinion, this Settlement is an excellent result, and their determination warrants deference. *See* Joint Declaration at ¶¶ 21-22. *See, e.g.*, *Slipchenko v. Brunel Energy, Inc.*, No. 11-cv-1465, 2015 WL 338358, at *12 (S.D. Tex. Jan. 23, 2015) ("The endorsement of class counsel is entitled to deference, especially in light of class counsel's significant experience in complex civil litigation and their lengthy opportunity to evaluate the merits of the claims.").

Moreover, Plaintiff Nicholson and Settlement Class Representative Francis also support the Settlement. Both have been actively involved in the case through gathering their personal documents related to the Plans, in-person meetings and telephone calls. *See* Declaration of Named

Plaintiff Laurie Nicholson, attached to the Joint Declaration as Exhibit 5 at ¶¶ 5-11. Similarly, Settlement Class Representative Francis met with counsel in-person in September 2016 and provided documents to her counsel, and subsequently speaking with counsel on several occasions including with respect to the Settlement. *See* Declaration of Settlement Class Representative Cynthia Francis, attached to the Joint Declaration as Exhibit 6 at ¶¶ 5-11. They were both well informed and, after discussing the relevant terms with Class Counsel, both approved the Settlement. Their ratification supports the final approval of the Settlement by this Court. *See, e.g.*, *Spillman v. RPM Pizza, LLC*, No. 10-cv-349, 2013 WL 2286076, at *5 (M.D. La. May 23, 2013) (finding factor satisfied, noting "[c]lass representative [] also submitted an affidavit in support of the settlement"); *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. at 150 (finding factor satisfied, noting "the Class Representatives uniformly believe that the Settlement Agreement is a fair, reasonable, and adequate resolution of this litigation" referencing their declarations).

Lastly, as some courts have noted, "[t]he attitude of absent class members, expressed either directly or indirectly by their failure to object after notice or high level of participation in the proposed settlement program, is an additional factor on which district courts generally place heavy emphasis." *Turner*, 472 F. Supp. 2d at 852-53. As noted above, the Settlement Administrator mailed the Court-approved Class Notice to 9,299 Settlement Class members on November 21, 2017. To date, no objections have been received. While the deadline for objections has not yet elapsed,[4] Class Counsel believe the reaction of the absent Settlement Class Members further confirms the fairness, reasonableness, and adequacy of the Settlement.

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[4] Pursuant to the schedule ordered by the Court in the Preliminary Approval Order, the objection deadline is January 23, 2018. Accordingly, Class Counsel will file a supplemental submission to the Court addressing any objection(s) in advance of the Fairness Hearing no later than January 30, 2018.

B. Final Certification of the Settlement Class is Appropriate

Certification of the Settlement Class in this Action is warranted for numerous reasons. As an initial matter, before entering the Preliminary Approval Order, this Court examined the record and preliminarily certified the Settlement Class pursuant to FED. R. CIV. P. 23(b)(1) and (b)(2). *See* Dkt. No. 83 at ¶¶ 1-2. Nothing has changed to compel the Court to now reach a different conclusion at the final approval stage. *See, e.g.*, *Lane v. Campus Fed. Credit Union*, No. 16-cv-37, 2017 WL 3719976, at *3 (M.D. La. May 16, 2017) ("The certification requirements of Rule 23 generally apply when certification is for settlement purposes.") (citing *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997)).

Also, and as discussed below, the proposed Settlement Class meets all four prerequisites of Rule 23(a) and satisfies Rules 23(b)(1) and/or (b)(2), making the Settlement Class appropriate for final class certification.

1. The Proposed Class Satisfies the Requirements of Federal Rule 23(a)

a. Numerosity

"To demonstrate numerosity sufficient to support the certification of a Rule 23(b) class, the proponents must establish that "the class is so numerous that joinder of all members is impracticable." *Everson*, 2016 WL 3255023, at *2 (citing FED. R. CIV. P. 23(a)(1)). The Fifth Circuit has stated that "100 to 150 members ... is within the range that generally satisfies the numerosity requirement." *Cobb v. Bukaty*, No. 15-cv-00335, 2017 WL 424904, at *2 (M.D. La. Jan. 30, 2017) (quoting *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999)). *See also Everson*, 2016 WL 3255023, at *2 ("it has been noted that any class consisting of more than 40 members 'should raise a presumption that joinder is impracticable.'") (quoting *Mullen*, 186 F.3d at 624).

Here, the mail list for Plan participants provided by Defendants included over 9,300 members. *See* Declaration of Jose C. Fraga ("Fraga Decl."), attached as Exhibit 1 to the Joint Declaration. Thus, the Settlement Class is sufficiently numerous for joinder to be impracticable satisfying Rule 23(a)(1).

b. Commonality

The Supreme Court recently clarified that "[c]ommonality is demonstrated when the claims of all class members 'depend upon a common contention ... that is capable of class wide resolution.'" *Lane*, 2017 WL 3719976, at *4 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)). However, the "threshold for commonality is not high." *See, e.g.*, *Everson*, 2016 WL 3255023, at *2. "Even a single common question of law or fact can suffice." *Id.* (quoting *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2556).

There are often many common questions in ERISA breach of fiduciary duty cases because plaintiffs and class members are likely to be similarly affected by defendants' plan-wide conduct. In ERISA cases, courts routinely find that Rule 23(a)'s commonality requirement is satisfied. *See, e.g.*, *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 228 F.R.D. 541, 555 (S.D. Tex. 2005) (in ERISA breach of fiduciary duty action, court noted "[t]here is easily more than one question of law or fact common to the class here."). Here, there are common questions concerning whether the Plans qualify as "church plans" which would render them exempt from ERISA, and whether the Defendants have breached their duties under ERISA by allegedly improperly funding and administering the Plans. *See*, *e.g.*, Complaint at ¶¶ 1-6. *See also id.* at ¶ 17 (identifying four common legal and factual questions at issue in this Action). These issues are common to the Settlement Class satisfying Rule 23(a)(2).

c. Typicality

"Rule 23(a) requires that "claims or defense of the representative parties [be] typical of the claims or defenses of the class." *Everson*, 2016 WL 3255023, at *3. "In other words, the Court must determine 'whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Id.* (quoting *Wal-Mart Stores, Inc.*, 131 S. Ct. at n.5). "The test for typicality is not demanding, and it focuses on the general similarity of the legal and remedial theories behind plaintiff['s] claims." *Lane*, 2017 WL 3719976, at *5 (citing *Lightbourn v. Cty. of El Paso, Tex.*, 118 F.3d 421, 426 (5th Cir. 1997)). "The typicality requirement may be met if the representative's claim arises from the same events or practices or course of conduct that gives rise to the claims of other class members and the named plaintiff's claims are based on the same legal theory." *Lane*, 2017 WL 3719976, at *5. "As long as the claims of the named plaintiffs are consistent with those of the class, the claims need not be identical." *Id.*

The Settlement Class Representatives' claims here are typical to those of the Settlement Class under Rule 23(a)(3) because they arise from the same conduct of the Defendants. The Settlement Class Representatives claim harm to the Plans due to Defendants' alleged failure to adequately fund the Plans in accordance with ERISA. *See* Complaint at ¶¶ 89-93. Based on these facts and allegations, the typicality requirement of Rule 23(a)(3) is satisfied. *See, e.g.*, *Lane*, 2017 WL 3719976, at *5 ("[M]any courts have found typicality if the claims or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory.") (citing 7A Wright & Miller, Federal Practice and Procedure, Section 1764 (2017)).

d. Adequacy

"The adequacy of representation factor requires that the Court consider whether the representative parties[5] will "fairly and adequately protect the interests of the class." *Everson*, 2016 WL 3255023, at *3 (quoting Fed. R. Civ. P. 23(a)(4)). "The purpose of this inquiry is 'to uncover conflicts of interest between named parties and the class they seek to represent.'" *Everson*, 2016 WL 3255023, at *3 (quoting *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997)). As the *Lane* court explained, "this is to ensure that the named plaintiffs are aligned with class members such that the representatives have an incentive to pursue and protect the claims of the absent class members." *Lane*, 2017 WL 3719976, at *5 (citing *Amchem*, 521 U.S. at 626 n.20).

Here, the Settlement Class Representatives' interests are fully aligned with those of absent Settlement Class members because they bring the same claims for the same remedies under the same legal theories. There is no antagonism between the Settlement Class Representatives and the Settlement Class. *See* §§ III.B.1.c, *supra*; *see also* III.A.6, *supra*.

Moreover, as discussed with respect to Rule 23(g) in Section III.C, below, Plaintiff retained qualified counsel with extensive experience in class actions, including ERISA cases. Class Counsel know the facts of this case and the applicable law and support the Settlement. Accordingly, the adequacy requirement of Rule 23(a)(4) is met.

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

A class may be certified pursuant to Federal Rule of Civil Procedure 23(b)(1) if the prosecution of separate actions by individual class members would create the risk of inconsistent

[5] Rule 23's Advisory Committee Notes specify that the adequacy of a named plaintiff is governed by Rule 23(a)(4) while the adequacy of counsel is governed by Rule 23(g). *See* FED. R. CIV. P. 23 Advisory Committee's Notes. Accordingly, the adequacy of proposed Class Counsel for the Settlement Class is discussed *infra* in Section III.C.

adjudications, which would create incompatible standards of conduct for the defendant, or would as a practical matter be dispositive of the interests of absent members. FED. R. CIV. P. 23(b)(1)(A) and (B).

Because Plaintiff pursues claims in a representative capacity in accordance with ERISA's remedial provisions, this Action is particularly appropriate for class action treatment under Rule 23(b)(1). Indeed, the Advisory Committee Notes to Rule 23 instruct that certification under Rule 23(b)(1)(B) is appropriate in "***an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust***." FED. R. CIV. P. 23 (b)(1)(B) Advisory Committee's Note (1966 Amendment) (emphasis added).

The Class may also be certified under Rule 23(b)(2). A 23(b)(2) class may be certified if the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate the final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FED. R. CIV. P. 23 (b)(2). Here, Plaintiff alleged that Defendants breached their fiduciary duties to the Plans and their participants by improperly relying on the "church plan" exemption rather than complying with ERISA. *See* Complaint at ¶¶ 2-3. Plaintiff also contends that Defendants failed to comply with ERISA across each of the Plans and seeks monetary and equitable relief to the Plans as a whole. *Id*. at ¶ 4. As such, the remedy sought is one for equitable relief and is authorized under ERISA. *See* ERISA §§ 502(a)(2) and (3), 29 U.S.C. § 1132(a)(2) and (3).

Although the Settlement includes monetary consideration to the Plans, that consideration is incidental to, and flows directly from, Plaintiff's request for equitable relief and is still

appropriate for certification under Rule 23(b)(2). *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) ("Where monetary relief would flow automatically to the class as a whole from a grant of equitable relief for breach of fiduciary duty, certification under Rule 23(b)(2) is appropriate."); *see also Berger v. Xerox Corp. Retirement Income Guar. Plan*, 338 F.3d 755, 763-64 (7th Cir. 2003) (same). Indeed, "[m]onetary relief may be obtained in a Rule 23(b)(2) class action so long as the predominant relief sought is injunctive or declaratory." *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001). Accordingly, Plaintiff's claims are also properly satisfied under Rule 23(b)(2).

C. The Court Should Appoint KTMC and IKR as Class Counsel and Ms. Nicholson and Ms. Francis as Class Representatives

Rule 23(g) governs the analysis of the adequacy of the class counsel. Here, proposed Class Counsel diligently investigated the facts and law to develop arguments that were ultimately pled in the Complaint. Class Counsel spent more than 1,000 hours litigating this Action, including opposing Defendants' two motions to dismiss (*see* Dkt. Nos. 48, 49) and the attached exhibits (*see* Dkt. Nos. 39-1 through 39-19, and 40-1 through 40-27) and analyzed the Plans' actuarial reports and funding levels (Dkt. Nos. 40-8, 40-9 and 40-10) with the assistance of an actuary. .

Class Counsel's vigorous litigation and representation of the Class in this Action is further demonstrated by their filings with respect to the "Lump Sum Window Program" offered by Defendants in May 2016. *See* Dkt. Nos. 25, 31-2, 33-1. The result of these efforts is the portion of the instant Settlement providing an additional $450 to individuals who elected to participate in the Lump Sum Window Program, a meaningful benefit which these individuals otherwise would not have received.

Class Counsel also prepared for and participated in the mediation and subsequent negotiations which resulted in this Settlement. Had a settlement not been reached, Class Counsel

would have continued to dedicate the necessary time and resources to litigate the Action to conclusion.

In summary, Class Counsel, through their prior experience and the work they did in this case, have demonstrated that they are qualified to represent the Class and satisfy Rule 23(g)'s requirements. *See* Firm Resumes of KTMC and IKR, attached to the Joint Declaration as Exhibits 8 and 9, respectively. IKR and KTMC satisfy the requirements of Rule 23(g) to be finally appointed as Class Counsel for the Settlement Class. Indeed, this Court's preliminary appointment as Class Counsel (Dkt. No. 83) underscores their appropriateness as Class Counsel for the Settlement Class. *See also Brace v. Methodist Le Bonheur Healthcare*, No. 16-cv-2412, Dkt. No. 77 (W.D. Tenn. Oct. 17, 2017) (order granting final approval of "church plan" case appointing IKR and KTMC as counsel for the settlement class); *Tucker v. Baptist Health Sys., Inc.*, No. 15-cv-382, Dkt. No. 62 (N.D. Ala. June 26, 2017) (same).

Additionally, Class Counsel respectfully request that the Court appoint Tarcza & Associates as Liaison Counsel for the Settlement Class. Tarcza is eminently qualified (*see* Tarcza Firm Resume attached as Exhibit 10 to the Joint Declaration), and has diligently served as Liaison Counsel throughout this litigation (*see* Tarcza Fee Decl. attached as Exhbit 4 to the Joint Declaration). This Court preliminarily appointed Tarcza as Liaison Counsel for the Settlement Class in the Preliminary Approval Order (Dkt. No. 83 at ¶ 2). Class Counsel respectfully request that this Court now make the appointment final.

Moreover, Class Counsel respectfully request that the Court appoint Ms. Nicholson and Ms. Francis as Settlement Class Representatives. In the Preliminary Approval Order, this Court preliminarily appointed Ms. Nicholson and Ms. Francis as Settlement Class Representatives (Dkt. No. 83). As discussed above and in the Fee Memorandum, Plaintiff Nicholson and Settlement

Class Representative Francis have each adequately represented the Class through their participation in this case and their prosecution of claims that benefit the Class as a whole. *See generally* Nicholson Declaration and Francis Declaration. Accordingly, the Court should appoint Ms. Nicholson and Ms. Francis as Class Representatives.

D. The Notice Plan Has Been Effectively Implemented

Pursuant to the Preliminary Approval Order (Dkt. No. 83), Franciscan Missionaries has directed issuance of the Court-approved Class Notice. The January 2, 2018 Fraga Decl. of the notice administrator, Garden City Group, LLC ("GCG"), filed contemporaneously herewith, demonstrates compliance with this Court's Order for Class Notice. Among other things, the Fraga Decl. attests to the mailing of 9,299 individual Class Notices to Settlement Class members on November 21, 2017, wherein January 23, 2018 was established as the deadline for objecting to the proposed Settlement and the motion for attorneys' fees and other relief. To date, Class Counsel has received zero objections.[6]

Class Counsel also provided Notice by publishing the Settlement Agreement and Class Notice, as well as other Court documents and a brief description of both the litigation and Settlement on IKR's website (http://ikrlaw.com/file/nicholson-v-franciscan-missionaries-lady-health-system/). *See* Settlement Agreement § 3.2.4. These proposed forms of Notice have fairly apprised members of the Settlement Class of the Settlement Agreement and their rights as members of the Settlement Class. Thus, the form of notice and proposed procedures for notice meets the requirements of Rule 23(e) and satisfies all due process considerations. *See, e.g.*, *Everson*, 2016 WL 3255023, at *4 (finding notice that "(1) informed the class members of the

[6] Given that the objection deadline has not passed, to the extent any objection is filed, Class Counsel will address them in a subsequent Court filing in advance of the February 6, 2018 Fairness Hearing.

nature of the action and the general terms of the settlement; (2) provided several addresses of Plaintiff's class counsel where class members could write to review the settlement agreement, obtain a claim form, and request additional information; (3) provided the street address and location of the East Feliciana Work Release Facility where class members could also obtain the Settlement Agreement, Notice, and Proof of Claim Form; (4) contained the date, time, and place of the final fairness hearing; and (5) contained information regarding class members' ability to 'opt-out' of or to object to the Settlement" was adequate, noting "[t]he Court finds that the Notice complies with and satisfies the requirements of Rule 23 and Due Process.").

IV. CONCLUSION

The Settlement is an excellent result for the Settlement Class. Accordingly, the Court should approve the Settlement, certify the Settlement Class, appoint the Settlement Class Representatives as the Class Representatives, and appoint KTMC and IKR as Class Counsel for the Settlement Class.

Dated: January 5, 2018

Respectfully submitted,

<u>/s/ Mark K. Gyandoh</u>
Mark K. Gyandoh
Julie Siebert-Johnson
KESSLER TOPAZ MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087
Tel: (610) 667-7706
Fax: (610) 667-7056
Email: mgyandoh@ktmc.com
Email: jsjohnson@ktmc.com

<u>/s/ Mark P. Kindall</u>
Robert A. Izard
Mark P. Kindall
Douglas P. Needham
IZARD KINDALL & RAABE LLP
29 South Main Street, Suite 305

West Hartford, CT 06107
Tel: (860) 493-6292
Fax: (860) 493-6290
Email: rizard@ikrlaw.com
Email: mkindall@ikrlaw.com
Email: dneedham@ikrlaw.com

/s/ Robert E. Tarcza
Robert E. Tarcza, LSBN 12655
TARCZA & ASSOCIATES
1310 Whitney Bldg.
228 St. Charles Ave.
New Orleans, LA 70130
Tel: (504) 525-6696
Fax: (504) 225-6701
Email: bobt@tglaw.net

Counsel for Plaintiff and the Settlement Class

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