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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

Jeffrey Tucker, on behalf of himself and all others similarly situated, Plaintiff, vs. Baptist Health System, Inc., the Baptist Health System, Inc. Benefits Committee and John Does 1-20, Defendants.	Civil Action No. 2:15-cv-00382-MHH

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

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I. INTRODUCTION

Plaintiff Jeffrey Tucker ("Plaintiff"), on behalf of himself and all others similarly situated, submits this Memorandum of Law in support of his unopposed motion for final approval of the proposed settlement of this class action pursuant to Federal Rule of Civil Procedure 23(e). Specifically, Plaintiff asks the Court to: (1) approve the Class Action Settlement Agreement ("Settlement");[1] (2) certify the proposed Class pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(1), and/or (b)(2); and (3) appoint Plaintiff as the Class representative and Izard, Kindall & Raabe, LLP ("IKR") and Kessler Topaz Meltzer & Check, LLP ("KTMC") as Class Counsel.

The Settlement is an excellent result for the Class because it achieves the primary relief sought in the Complaint – protecting the Plan participants' pension benefits. After the suit was filed, Baptist Health System, Inc. ("Baptist Health") contributed $88.9 million to the Plan, which – according to the Plan's actuary – caused the Plan to be ***102.7%*** funded under ERISA's standards. The Settlement requires Baptist Health to contribute an additional $11 million over the next ten years to provide the Class with additional protections. Further, Baptist Health will amend the Plan document so that its future funding obligations will be based on

[1] All capitalized, undefined terms shall have the meaning ascribed to them in the Settlement Agreement, previously filed as Dkt. 44-1, and again being filed herewith as Exhibit 5 to the Joint Declaration of Mark P. Kindall and Edward W. Ciolko in Support of Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement and Motion for Awards of Attorneys' Fees and Expenses, and Incentive Fee to the Named Plaintiff (the "Joint Declaration").

up-to-date mortality tables that account for improved life expectancies. Moreover, the Settlement prohibits the Plan from being terminated for 8 years unless there are sufficient assets to pay outstanding liabilities. Accordingly, Plaintiff and Defendants (collectively, the "Settling Parties") believe the Settlement is fair, reasonable, and adequate and should be given final approval.

The terms of the Settlement are especially favorable considering the risks that would lie ahead. After Plaintiff negotiated the Settlement and filed his motion for preliminary approval, the Supreme Court granted *certiorari* in the three appellate cases that Plaintiff relies on to support his interpretation of ERISA's "church plan" exemption. The Supreme Court has not yet issued a decision, but its ruling could impact, if not foreclose, the claims that Plaintiff brought in his Complaint. 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") notice on August 31, 2016 in accordance with CAFA, and have received no objections to date. *See* Declaration of Lars C. Golumbic, attached to the Joint Declaration as Exhibit 8.

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

On March 3, 2015, Plaintiff filed his Complaint against Baptist Health and other defendants for violations of ERISA. *See* Dkt. No. 1. Before filing the Complaint, IKR[2] and Ragsdale, LLC ("Liaison Counsel") investigated the claims and pertinent legal issues. KTMC later appeared on Plaintiff's behalf (*see* Dkt. Nos. 33 and 34) and, together with IKR, are the proposed Class Counsel.

Plaintiff alleged in the Complaint that Defendants improperly characterized the Plan as a "church plan" to avoid their funding and disclosure obligations under ERISA. As a result, Plaintiff alleged that the Plan was underfunded by approximately $142 million as of December 31, 2012. Plaintiff further alleged that Baptist Health is a healthcare company, not a church or a convention or association of churches. Moreover, because Baptist Health's principal business is healthcare, it is not an organization with the principal purpose or function of providing retirement or welfare benefits. Accordingly, Plaintiff alleged that the Plan is not a

[2] IKR was known as Izard Nobel LLP when it filed this case.

"church plan" and thus is subject to the requirements of ERISA. *See* Dkt. No. 1 at ¶¶ 1-4.

On October 19, 2015, Defendants moved to dismiss the Complaint. *See* Dkt. No. 32. Defendants argued that ERISA's text, court opinions, and administrative agency interpretation supported the Plan's classification as an ERISA exempt "church plan." *Id*. Plaintiff filed a memorandum in opposition and the Settling Parties thereafter both submitted supplemental briefing. *See* Dkt. Nos. 20, 21, 28, 29 and 30. On February 9, 2016, the Court held oral argument.

Before the Court decided Defendants' motion to dismiss, the Settling Parties agreed to mediation. The Settling Parties' desire to avoid the burden, expense, and uncertainty of continued litigation and to settle any and all claims that have been or could have been asserted against the Defendants arising out of the conduct described in the Complaint prompted settlement discussions. The Settling Parties selected Mr. Meyer as a mediator. Mr. Meyer is a highly skilled and experienced mediator who has mediated many complex cases and ERISA class actions.

As part of the mediation process, Defendants provided Plaintiff with an actuarial report that was prepared by AON Hewitt that showed the Plan's funding status as of January 1, 2016, and the current version of the Plan document that showed Baptist Health's funding obligation. Plaintiff retained his own actuarial expert to review these materials and opine on the Plan's current financial status.

The mediation took place in Los Angeles on May 31, 2016. During the mediation, the Settling 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. The negotiations were hard fought, and at all times, the Settling Parties took into account the strengths and weaknesses of the case, the risks involved with further litigation, the likely recovery at trial and on any subsequent appeal, and the burden and expenses of protracted litigation. The Settling Parties reached an agreement-in-principle during the mediation session and thereafter continued to negotiate many of the agreement's finer terms. Ultimately, the Settling Parties signed the Settlement Agreement on August 25, 2016, and submitted to the Court for preliminary approval on August 26, 2016. Dkt. Nos. 43, 47.

The Court granted Preliminary Approval on February 10, 2017 (Dkt. No. 51). The Preliminary Approval Order preliminarily approved the Settlement, certified the Class, appointed Plaintiff as Class Representative, and IKR and KTMC as Class Counsel, approved the form and method of providing notice to the Class, and set a date for the Final Approval Hearing.

In accordance with the Preliminary Approval Order, the approved Class Notice was sent by first-class mail to each person within the Settlement Class who could be identified by the Plan's recordkeeper. Joint Declaration, at ¶ 6.

Additionally, the Settlement and all of its attachments (including the Class Notice), as well as the Motion for Preliminary Approval and supporting materials, were published on a dedicated page on the IKR's website (http://ikrlaw.com/file/tucker-v-baptist-health-system-inc/).

B. Summary of the Proposed Settlement

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

1. The Class Settlement Amount

Defendants will fund the Settlement through contributions to the Plan totaling eleven million dollars ($11,000,000) over a ten-year period. *See* Settlement § 8.1. Specifically, Defendants will make ten (10) annual contributions to the Plan, each in the amount of $1.1 million. *Id*. Defendants will make the first contribution within sixty (60) days of when the Final Approval Order becomes Final. *Id*. Thereafter, Defendants will contribute $1.1 million to the Plan in each of the nine (9) subsequent calendar years provided however, that Defendants may pre-pay any portion of the contributions. *Id*. These contributions constitute the Class Settlement Amount. *Id*.

2. Agreed Upon Plan Provisions

In the Settlement, Defendants also agree to amend the Plan so that Baptist Health's funding contributions will be based on the most recent mortality tables and projection scale published by the Society of Actuaries. *Id*. at § 9.4.

In addition to the Class Settlement Amount, Defendants agree to make all other contributions that are required under the Plan Document as amended by the Settlement. *Id*. at § 9.2. Accordingly, the $1.1 million annual payments that the Defendants will make are the minimum contributions they must make to the Plan during the next ten (10) years.

The Settlement Agreement also provides that if Defendants terminate the Plan within the next eight (8) years, Defendants agree to ensure that the Plan's assets will be sufficient to pay the Plan's liabilities. *Id*. at § 9.2. If the Plan is merged with or into another plan within the next eight (8) years, Plan participants will be entitled to the same (or greater) benefits post-merger as they enjoyed before the merger. *Id*. at § 9.3.

3. Settlement Class

The Settlement contemplates that the Court will certify a non-opt-out class comprised of all present and past (vested or non-vested) Plan participants or beneficiaries under Federal Rules of Civil Procedure 23(a) and 23(b)(1) and/or (b)(2). *Id*. at § 3.2.2

4. Released Claims

The Settlement defines the Released Claims as those arising out of the allegations in the Complaint that either a Plaintiff or a Class member brought as of the date of the Settlement Agreement. *Id*. at § 4.1. It expressly excludes any

prospective claims that could be brought if the Birmingham Baptist Association disassociates itself from the Plan's sponsor or there is a change in the law that clearly provides that the Plan is not a church plan. *Id*. at §§ 4.1.2, 4.1.3, 4.1.4.

5. Payments to Class Counsel and Plaintiff

The Settlement Agreement provides that Class Counsel may seek an award of attorneys' fees not to exceed $820,000, *id*. at § 8.1.2, and request up to $50,000 in total for expenses incurred and an Incentive Fee for Plaintiff. *Id*. Defendants will pay the attorneys' fees, expenses, and Incentive Fee separate from the Class Settlement Amount. *Id*. The Settlement is not contingent upon the Court's approval of Class Counsel's application for attorneys' fees and expenses or Plaintiff's application for an Incentive Fee. *Id*. at § 11.4.

III. ARGUMENT

A. The Settlement Should Be Approved

Federal Rules of Civil Procedure Rule 23(e) requires court approval of any class action settlement. *See Camp v. City of Pelham*, No. 10-cv-01270, 2014 WL 1764919, at *2 (N.D. Ala. May 1, 2014) (Haikala, J.); FED. R. CIV. P. 23(e). "'If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.'" *Camp*, 2014 WL 1764919, at *2 (quoting Federal Rules of Civil Procedure Rule 23(e)(2)).

The trial court has the discretion to determine the fairness of the settlement. *See Camp*, 2014 WL 1764919, at *3 (quoting *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)). In exercising this discretion, courts are mindful that "[s]ettlement is generally favored because it conserves scarce judicial resources." *Id.* (quoting *In re Smith*, 926 F.2d 1027, 1029 (11th Cir.1991)). The Eleventh Circuit has identified six factors that courts should consider at the final approval stage when analyzing the fairness, reasonableness, and adequacy of a class action settlement under Rule 23(e):

> (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which the settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved.

See id. (citing *Bennet*, 737 F.2d at 986). This Court has already preliminarily approved the Settlement (*see* Dkt. No. 51) and because the *Bennet* factors are satisfied here, the Court should grant final approval.

1. The Likelihood of Success at Trial

"There is nothing unfair, unreasonable, or inadequate about the settlement of a case with an uncertain outcome." *See Beaty v. Cont'l Auto. Sys. U.S., Inc.*, No. 10-cv-2440-, 2012 WL 1886134, at *7 (N.D. Ala. May 21, 2012). While Plaintiff is optimistic that he will prevail at trial, he acknowledges that he would have to travel a tough road to get there. *See Lipuma v. American Express Co.*, 406 F.

Supp. 2d 1298, 1319 (S.D. Fla. 2005) (likelihood of success on the merits is weighed against the amount and form of relief contained in the settlement).

The central question in this case—whether the Plan qualifies as a "church plan" under ERISA—has been the subject of relatively few cases, which have reached different results, and, even when favorable to Plaintiff's position here, relied upon conflicting rationales. *Compare Stapleton v. Advocate Health Care Network*, No. 14-cv-01873, 2014 WL 7525481 (N.D. Ill. Dec. 31, 2014) (finding that the church plan exemption did not apply to plan that was not established by a church in the first instance) *with Medina v. Catholic Health Initiatives*, No. 13-cv-01249, 2014 WL 4244012 (D. Colo. Aug. 26, 2014) (finding that the church plan exception did apply). Moreover, neither the Eleventh Circuit, nor any of the District Courts within the Circuit, have addressed the issue. And, longstanding agency interpretations by the Internal Revenue Service favor Defendant's position.

The uncertainty and thus the difficulty of litigating this Action have only been magnified of late. As noted above, the Supreme Court granted *certiorari* in three "church plan" cases, which makes it possible that the governing law will change during the litigation. Given that Defendants' Motion to Dismiss was pending at the time the Settling Parties mediated the Action, the Supreme Court's decisions, which are expected before the end of the current term this June, could

materially impact this case and potentially foreclose the claims that Plaintiff has asserted. Accordingly, likelihood of success at trial is not assured.

Assuming Plaintiff prevailed at the motion to dismiss and class certification stages, he would also face challenges in proving damages at trial. As a result of their $88.9 million contribution to the Plan, the Plan is now fully funded under ERISA's standards. This level, if it remains through trial, would limit, if not eliminate, the amount of damages that Plaintiff could recover. There is also a risk that changes in market interest rates and investment performance could affect the Plan's funding level by the time the case went to trial.

The Plan, at the time of the Settlement, was 102.7% funded under ERISA's standards and will hopefully only improve given the monetary contributions and funding obligations set forth in the Settlement. There are many unknowns that neither the Settling Parties nor their experts can predict with absolute certainty. In light of the potential risk of the likelihood of success at trial, the Settlement is as an excellent result.

2. The Range of Possible Recovery and the Point on or Below the Range of Possible Recovery at which the Settlement is Fair, Adequate, and Reasonable

The second and third *Bennet Factors*: "the range of possible recovery"; and "the point on or below the range of possible recovery at which the settlement is fair, adequate, and reasonable" are "easily combined and normally considered in

concert." *Camp*, 2014 WL 1764919, at *3 (internal citation on quotation marks omitted). Moreover, "[i]n considering the question of possible recovery, the focus is on the possible recovery at trial." *Id.* (quoting *Lipuma*, 406 F.Supp.2d at 1323).

The Settlement is an excellent result for the Class and is well within a good range of possible recovery that warrants final approval. After Defendants contributed $88.9 million to the Plan in October, 2015, Plaintiff's "best case" recovery at trial was potentially significantly reduced as Defendant's actuary claimed that the Plan was over 100% funded as a result of the contribution. While Plaintiff had arguments for a greater level of minimum funding under ERISA of up to $20 million based on different actuarial assumptions, the $11 million that the Defendants will contribute to the Plan represents a substantial amount to cover any future funding requirements that might arise.[3]

The Class also receives significant equitable relief under the Settlement. The Settlement requires Baptist Health to amend the Plan document so that its future funding obligations will be based on up-to-date mortality tables. *See* Settlement at § 9.4. This accounts for the fact that people, on average, are living longer than they were when the actuarial tables currently in the Plan document were published and the change will have the net result of increasing the

[3] The contributions mandated by the Settlement, in combination with Defendant's October, 2015 contribution to the Plan (which came many months after this litigation was commenced) together capture approximately 90 percent of what Defendants could have been required to pay to make up the shortfall that existed as of the end of 2012. The investment performance of the Plan also affected the current funding obligation as compared to 2012.

Defendants' contributions. Thus, the $11 million in contributions under the Settlement are a ***minimum*** that Defendants must contribute over the next 10 years. This change to the Plan document will help ensure that the Plan does not incur a funding deficit in the future. *Diakos v. HSS Systems, LLC*, 137 F. Supp. 3d 1300, 1312 (S.D. Fla. 2015) (value of equitable relief considered when determining if settlement within range of reason). Moreover, the Settlement provides that if the Plan is terminated over the next 8 years, Defendants will ensure that the Plan has sufficient assets to pay benefit liabilities to Plan participants. *See* Settlement at § 9.2.

3. The Complexity, Expense, and Duration of Litigation

Plaintiff recognizes that there is a risk that the ultimate outcome of the litigation will not be favorable. ERISA breach of fiduciary duty cases are highly complex, involve a comprehensive statutory scheme and involve evolving and developing jurisprudence. That complexity is increased here, where the underlying claims concern the Plan's alleged misclassification as a church plan and consequently involve an area of law that is still developing. While Defendants disagree vigorously, Class Counsel believe that pursuant to ERISA, only a church can establish a "church plan" and that the Plan at issue here is not maintained or administered by a church, but rather by Baptist Health, a hospital. Plaintiff believes that Baptist Health improperly classified the Plan as a church plan in an

effort to make it exempt from the requirements of ERISA, which was enacted for "the interest of participants in employee benefit plan and their beneficiaries by setting out substantive regulatory requirements." *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 208 (2004) (internal quotation marks and citations omitted). However, Plaintiff is aware that this Court, the Eleventh Circuit, or the Supreme Court might have reached a different conclusion at any stage of the litigation.

Litigation of this case would have no doubt been lengthy and expensive on account of extensive briefing and potential appeals of resulting opinions, a complex discovery program and related discovery disputes, the use and examination of experts, preparation for and engagement in trial, and potential post-trial motions. While Plaintiff continues to believe that the action has merit and would ultimately prevail at trial, continued litigation would last for an extensive period of time before a final judgment might be entered in favor of the class. Moreover, since the Supreme Court is currently reviewing the legal issue at the heart of the case, it is likely that there would be conflicting interpretations of how the decision applies to Defendant and the Plan, necessitating this Court's involvement in a matter of first impression. A lengthy appeal of any judgment would be extremely likely. Approval of the Settlement, however, ensures that the Plan and Settlement Class will receive guaranteed monetary and non-monetary consideration now, without further delay or risk.

Plaintiff would also face significant challenges and expenses in the discovery phase. Discovery would involve the depositions of numerous fact witnesses to understand how the Plan was "established" and is "maintained" to determine whether the Plan is a "church plan" under ERISA. *See* ERISA § 3(33)(A), 29 U.S.C. § 1002(33)(A). There would also be substantial expert discovery, including the disclosure and depositions of actuarial experts. It would be necessary to test the assumptions each party's actuary relied on, including the discount rate used to calculate the Plan's long-term liabilities and how long the expert expects Plan participants to receive benefits. This discovery would involve substantial costs and would take months to complete, if not longer. Complex litigation such as this "can occupy a court's docket for years on end, depleting the resources of the parties and taxpayers while rendering meaningful relief increasingly elusive." *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992).

4. The Substance and Amount of Opposition to the Settlement

"In determining whether a proposed settlement is fair, reasonable, and adequate, the reaction of the class is an important factor." *Lipuma*, 406 F. Supp. 2d at 1324 (internal citation omitted). Class members' reaction to the Settlement has been overwhelmingly positive. IKR received approximately 200 telephone calls from Class members who received the Notice, indicating a high level of

awareness and interest in the Settlement. A vast majority of the callers were pleased with the Settlement and, as of May 5, 2017, no class member has filed a written objection. *See* Joint Declaration at ¶ 9. The lack of objections "points to the reasonableness of [the] proposed settlement and supports its approval." *Lipuma*, 406 F. Supp.2 d at 1324.

5. The Stage of the Proceedings at which the Settlement was Achieved

"The stage of the proceedings at which a settlement is achieved is evaluated to ensure that Plaintiffs had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation." *Camp*, 2014 WL 1764919, at *4 (quoting *Lipuma*, 406 F.Supp.2d at 1324). "Early settlements are favored however, and vast formal discovery need not be taken." *Lee v. Ocwen Loan Servicing*, No. 14-cv-60649, 2015 WL 5449813, *9 (S.D. Fla. Sept. 14, 2015) (citing *Saccoccio v. JP Morgan Chase Bank, NA*, 297 F.R.D. 683, 697 (S.D. Fla. 2014)).

Here, although here formal discovery had not commenced at the time of the settlement negotiations, Class Counsel had conducted an extensive investigation into the facts, circumstances and legal issues associated with the allegations made in the Action.

This investigation ensured that Plaintiff had sufficient information to adequately evaluate the merits of the case and the benefits of Settlement and

included, *inter alia*: (a) inspecting, reviewing and analyzing documents relating to Defendants and the Plan; (b) researching the applicable law with respect to the claims asserted in the Action and the defenses and potential defenses thereto; (c) inspecting, reviewing and analyzing documents concerning administration of the Plan, including the Plan's actuarial report; (d) consulting with an expert actuary concerning the Plan's funding status and potential funding remedies that could be achieved through this litigation and (e) participating in lengthy settlement negotiations with Defendants' counsel, presided over by mediator Robert A. Meyer, Esq. Thus, Plaintiff made a fully-informed decision, one that is very favorable for the Class.

Class Counsel also used its considerable experience in other ERISA cases generally, and church plan cases, specifically to help them evaluate the Settlement. *See, e.g.*, *Lee*, 2015 WL 5449813, at * 9 ("Information obtained from other cases may be used to assist in evaluating the merits of a proposed settlement."). This know-how about ERISA and actuarial issues and work in prior church plan cases to reach resolutions that are "extremely favorable to the class" (*Kemp-DeLisser v. St. Francis Hospital and Medical Center*, No. 15-cv-1113, 2016 WL 6542707, *10, 15 and 16 (D. Conn. Nov. 3, 2016)) to evaluate the strengths and weaknesses of this case and negotiate the Settlement.

B. Final Certification of a 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* Preliminary Approval Order at ¶¶ 2-3. Nothing has changed to compel the Court to now reach a different conclusion at the final approval stage. The proposed Settlement Class meets all four prerequisites of Rule 23(a)

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

i. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all class members is impracticable." FED. R. CIV. P. 23(a)(1). Here, Plaintiff alleges that the Defendants have thousands of employees and many if not all of them are likely to be members of the Class (*see* Complaint ¶ 12) and Defendants' actuarial disclosures state that there were 1,096 participants in the Plan as of January 1, 2015. Moreover, Defendants sent the Class Notice to 17,500 Settlement Class members. *See* Joint Declaration at Ex. 1. Thus, the Settlement Class is too large for joinder to be practicable.

ii. Commonality

Rule 23(a)(2) requires that a proposed class action raise "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). Actions for breach of fiduciary duties under ERISA often present common questions of law and fact. *See In re AOL Time Warner ERISA Litig.*, No. 02-cv-8853, 2006 WL 2789862, at *2 (S.D.N.Y. 2006) ("In the context of an ERISA action claiming breach of fiduciary duty, class members are related by virtue of their common membership in a retirement plan.").[4] Here, there are common questions concerning whether the Plan qualifies as a "church plan" which would make it exempt from ERISA and whether the Defendants have breached their duties under ERISA by improperly funding and administering the Plan. *See*, *e.g.*, Complaint at ¶¶ 1-4. These issues are common to the Settlement Class.

iii. Typicality

Under Rule 23(a)(3), Plaintiff's claims must be "typical" of those of the Class. FED. R. CIV. P. 23(a)(3). The Eleventh Circuit has clarified that "claims do not need to be identical to satisfy the typicality requirement." *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012).

[4] Indeed, meeting the commonality factors requires a minimal showing as noted by a district court within this Circuit: "[p]laintiffs face a 'low hurdle' in bearing this 'light' burden, as commonality 'does not require that all questions of law and fact raised be common.'" *Sanchez-Knutson v. Ford Motor Co.*, No. 14-cv-61344, 2015 WL 6395040, at *5 (S.D. Fla. Oct. 6, 2015) (quoting *Williams v. Mohawk Industries, Inc.*, 568 F.3d 1350, 1356 (11th Cir. 2009)).

Plaintiff's claims are typical to those of the Class under Rule 23(a)(3) because they arise from the same conduct of the Defendants. Plaintiff alleges harm to the Plan as a whole due to Defendants' failure to adequately fund the Plan in accordance with ERISA. *See* Complaint at ¶¶ 47-51. Based on these facts and allegations, Plaintiff satisfies the typicality requirement.

iv. Adequacy

Rule 23(a)(4) requires the representative party in a class action to "adequately protect the interests of those he purports to represent." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003)); FED. R. CIV. P. 23(a)(4). "The adequacy-of-representation requirement 'encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action.'" *Waters v. Cook's Pest Control, Inc.*, No. 07-cv-394, 2012 WL 2923542, at *10 (N.D. Ala. July 17, 2012) (citing *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1323 (11th Cir. 2008)).

Both prongs of the adequacy requirement are met. Plaintiff's interests are fully aligned with those of absent Class members because he brings the same claims for the same remedies under the same legal theories. There is no antagonism between the Plaintiff and the Class. Moreover, as discussed with respect to Rule 23(g) in § III.C., below, Plaintiff retained qualified counsel with

extensive experience in class actions, including those based on alleged ERISA violations. *See* Joint Declaration at Exhibits 6 and 7. Class Counsel accordingly have sufficient knowledge about the applicable law of both class actions in general and ERISA cases in particular and support the Settlement. *Id*. at § C and Exhibits 6 and 7. Accordingly, the adequacy requirement is met.

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

A class may be certified under Federal Rule of Civil Procedure 23(b)(1) if 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 interests of absent members. FED. R. CIV. P. 23(b)(1)(A) and (B). *See, e.g.*, *In re Schering Plough ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) (finding that "the derivative nature of ERISA §502(a)(2) claims are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class."); *Eslava v. Gulf Telephone Company, et al*., No. 04-cv-00297, 2007 WL 2298222, at *6 (S.D. Ala. Aug. 7, 2007) (certifying ERISA class under Rule 23(b)(1)(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 class may be certified under Federal Rule of Civil Procedure 23(b)(2) 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 alleges that Defendants breached their fiduciary duties to the Plan and its 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 on a Plan-wide basis and seeks monetary and equitable relief to the Plan 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 Plan, 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 at 812. Accordingly, Plaintiff's claims are also properly satisfied under Rule 23(b)(2).

C. The Court Should Appoint IKR and KTMC as Class Counsel and Plaintiff as Class Representative

Federal Rule of Civil Procedure 23(g) requires the Court to examine the capabilities and resources of class counsel. Here, Class Counsel developed the claims in the Complaint and has expended time and effort to litigate the action thus far. *See*, *e.g.*, Dkt. Nos. 1 (Complaint), 20 (opposition to Defendants' motion to dismiss), 29 (response to Defendants' notice of supplemental authority), and 30 (Plaintiff's notice of supplemental authority). If a settlement had not been reached, Class Counsel would have continued to dedicate the necessary time and resources to litigate the Action to conclusion.

Class Counsel is also qualified to represent the Class. IKR and KTMC have been involved in many class action and ERISA cases and each possess expertise in the ERISA claims brought in this lawsuit. *See* Firm Resumes of IKR and KTMC,

attached to the Joint Declaration as Exhibits 6 and 7, respectively. Class Counsel thus satisfy the requirements of Rule 23(g) to be appointed as Co-Lead Counsel.

The Court should also appoint Jeffrey Tucker as Class Representative. He has prosecuted the claims in the Complaint for over 2 years and has represented the Class well.

D. The Class Notice Is Adequate

Federal Rule of Civil Procedure 23(e)(2) requires that class members receive notice of any proposed settlement before final approval by the Court. *See, e.g.*, *Wal-Mart Stores Inc. v. Visa USA, Inc.*, 396 F.3d 96, 113 (2d Cir. 2005) (Due process and Rule 23(e) require that class members receive notice of a pending settlement that meets the test of "reasonableness."). (quoting *Juris v. Inamed Corp.*, 685 F.3d 1294, 1317 (11th Cir. 2012)). The notice should be "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Camp*, 2014 WL 1764919, at *5 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985)). The Notice distributed to Class Members, which this Court previously approved for distribution (Dkt. No. 51), contains sufficient information to satisfy Rule 23(e)'s requirements.

The Notice Plan agreed to by the Parties satisfies all due process considerations and meets the requirements of FED. R. CIV. P. 23(e). The Class

Notice described in plain English: (i) the terms and operations of the Settlement; (ii) the nature and extent of the release of claims; (iii) the maximum attorneys' fees, expenses and Incentive Fee that may be sought; (iv) the procedure and timing for objecting to the Settlement; and (v) the date and place for the Final Approval Hearing. *See* Joint Declaration Exhibit 1; *Camp*, 2014 WL 1764919, at *5 (finding that the notice was adequate because it contained similar types of information).

Additionally, the manner of dissemination of the Class Notice met the requirements of FED. R. CIV. P. 23(e). Baptist Health mailed the Notice via first class mail to individual Class Members and the Class Notice and Settlement Agreement were published on IKR's website at the address (http://ikrlaw.com/file/tucker-v-baptist-health-system-inc/). And, as noted above, Class Counsel received 200 telephone calls from Class members after the Class Notice was sent, an indication that the Class Members received the mailing.

IV. CONCLUSION

The Settlement is an excellent result for the Class. Accordingly, Plaintiff respectfully asks this Court to approve the Settlement, certify the Class, appoint Plaintiff as the Class Representative and IKR and KTMC as Class Counsel.

Dated: May 5, 2017

Respectfully submitted,

/s/ Edward W. Ciolko
Edward W. Ciolko
KESSLER TOPAZ
MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087
Tel: (610) 667-7706
Email: eciolko@ktmc.com

Mark P. Kindall
IZARD, KINDALL & RAABE, LLP
29 South Main Street, Suite 305
West Hartford, CT 06107
Tel: (860) 493-6292
E-mail: mkindall@ikrlaw.com

M. Clay Ragsdale
Allison L. Riley
RAGSDALE LLC
517 Beacon Parkway West
Birmingham, AL 35209
Tel: (205) 290-6800
E-mail: clay@ragsdalellc.com
allison@ragsdalellc.com

Charles E. Robinson
THE ROBINSON LAW FIRM
Sixth Avenue Court Street West
P.O. Box 370
Ashville, AL 35125
Tel: (205) 594-5133
E-mail: crobjr@tlflaw.net

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2017, a copy of the foregoing was sent via the CM/ECF system to the following counsel of record:

William B Wahlheim
John David Collins
MAYNARD COOPER & GALE PC
1901 6th Avenue North, Suite 2400
Birmingham, AL 35203-2618
205-254-1000
Fax: 205-254-1999
Email: wwahlheim@maynardcooper.com
jcollins@maynardcooper.com

Lars C Golumbic
Sarah Adams Zumwalt
GROOM LAW GROUP CHARTERED
1701 Pennsylvania Ave NW Suite 1200
Washigton, DC 20006
202-857-0620
Fax: 202-659-4503
Email: lgolumbic@groom.com
szumwalt@groom.com

/s/ Edward W. Ciolko
Edward W. Ciolko