

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

IN RE MERCY HEALTH ERISA LITIGATION

No.: 1:16-cv-00441-SJD-SKB

District Court Judge Susan J. Dlott
Magistrate Judge Stephanie K. Bowman

**DECLARATION OF MARK P. KINDALL IN SUPPORT OF PLAINTIFF'S MOTION
FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

I, MARK P. KINDALL declare as follows:

1. I am a partner at Izard, Kindall & Raabe, LLP ("IKR"), Interim Co-Lead Class Counsel in this litigation.

2. I submit this Declaration in support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement, Certification of Settlement Class, Appointment of Class Representative, and Appointment of Class Counsel,¹ and Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Case Contribution Award to the Named Plaintiffs ("Named Plaintiff" or "Plaintiff). A true and accurate copy of the proposed Settlement Agreement, and the exhibits thereto, is attached as Exhibit A to this Declaration.

3. I have been actively involved in the prosecution of this Action, am familiar with its proceedings, and have personal knowledge of the matters set forth herein based on my active supervision and participation in all material aspects of the Action and if called to do so, we could and would testify competently thereto.

¹ The term "Class Counsel" as defined in the Settlement Agreement refers to Izard, Kindall & Raabe, LLP ("IKR") and Kessler Topaz Meltzer & Check, LLP ("KTMC"). The term "Plaintiff's Counsel" is used herein to refer to IKR, KTMC, and Liaison Counsel Strauss Troy Co., LPA ("Strauss").

II. History of the Litigation

4. IKR has worked on this case from its inception with co-counsel Kessler Topaz Melzer & Check, LLP (“KTMC”), a firm with which we had worked on numerous cases, including church plan cases, over the course of many years. KTMC took the lead in preparing the initial complaint in this action, which was filed on March 30, 2016, captioned *Lupp v. Mercy Health*, No. 1:16-cv-00441-SJD-SKB.

5. On May 3, 2016, Janet Whaley, a participant in the St. Vincent Retirement Plan, and Leslie Beidleman, a participant in the St. Vincent Retirement Plan and the Mercy Health Partners – Northern Region Retirement Plan (Cash Balance), filed a related case, *Whaley v. Mercy Health*, No. 1:16-cv-00518-SJD-SKB (the “*Whaley* Complaint”), on behalf of themselves and all participants in and beneficiaries of defined pension plans established, maintained, administered and/or sponsored by Mercy Health and its affiliates, which Mercy Health claimed were entitled to ERISA’s church plan exemption. On June 24, 2016, Whaley filed an Amended Complaint, adding as Plaintiffs Patricia Blockus, a participant in the Mercy Health System Wilkes Barre Cash Balance Plan, Charles Bork, Marilyn Gagne and Nancy Zink (like Beidleman, participants in both the St. Vincent Retirement Plan and the Mercy Health Partners – Northern Region Retirement Plan (Cash Balance)), Karl and Patricia Mauger (participants in the Mercy Health Partners Pension Plan/Mercy Health Partners (NEPA) Plan), and Beth Zaworski, a participant in several of the Mercy Health Plans.

6. On June 30, 2016, Mary Alban filed an additional related complaint. *Alban v. Mercy Health*, No. 1:16-cv-00726-SJD-SKB. The Court consolidated the *Lupp* and *Whaley* actions on July 21, 2016 (ECF No. 30), and consolidated the *Alban* action with the prior two actions on August 11, 2016 (ECF No. 38). In accordance with a schedule proposed by the parties (ECF

No. 16) and approved by the Court (ECF No. 20), Plaintiff Lupp and the Whaley Plaintiffs filed competing motions to appoint interim class counsel and liaison counsel pursuant to Federal Rule 23(g) (ECF Nos. 25 and 33). On December 2, 2016, Magistrate Judge Bowman issued a report and recommendation that the Lupp 23(g) motion should be granted, the Whaley 23(g) motion should be denied, that IKR and KTMC should be appointed interim co-lead counsel for the class, and Strauss Troy Co., LPA should be appointed interim liaison counsel (ECF No. 42). The Court confirmed the recommendation (ECF No. 58) after the Whaley Plaintiffs withdrew their objection (ECF Nos. 45 and 57).

7. Following consolidation and appointment of an interim leadership team, IKR took the lead in drafting a Master Consolidated Complaint for the now-combined actions, incorporating the work that all Plaintiffs' counsel had done to that point, as well as additional investigations conducted subsequent to the filing of the earlier complaints. We worked with Co-Lead Counsel at KTMC, as well as with counsel for the Whaley and Alban Plaintiffs, to ensure that the MCC was comprehensive and complete. In addition, we engaged in discussions with counsel for Defendants to expedite responses to certain of the initial discovery requests that had been served on Defendants on January 18, 2017. One key issue which was a focus of the investigation for the MCC involved the different plans Mercy Health considers to be "church plans." While the MCC includes several Plans (many of which include other plans that had previously been consolidated into them), the investigation determined that the Plans are all materially the same for purposes of the litigation. Each of the Plans are "administered" by an internal committee. Each specifically provides that the plan is a "church plan," and that plan participants have no recourse pursuant to ERISA for benefits against any person or entity other than the plans themselves.

8. While Class Counsel were working to finalize the MCC, the U.S. Supreme Court issued its ruling in *Advocate Health Care Network v. Stapleton*, ___ U.S. ___, 137 S. Ct. 1652 (June 5, 2017). Although the *Advocate* decision was limited to the precise issue of statutory construction considered by the Court, the ruling did foreclose one of the primary arguments Plaintiffs had advanced in their initial complaints as to why the Plans at issue in this case should not be considered “church plans.” This required Plaintiffs to substantially revise their approach to the MCC, focusing on provisions of the statute that had not been addressed in *Advocate*, and adding state law claims as alternative grounds for relief. The final MCC was 70 pages long and included 402 paragraphs of detailed factual and legal allegations in support of Plaintiffs’ claims. Plaintiffs completed and filed the MCC on September 14, 2017 (ECF No. 66).

9. On November 13, 2017, Defendants filed a lengthy Motion to Dismiss the MCC for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) together with supporting addenda, declarations and exhibits (*see* ECF Nos. 69 – 69-33). Defendants simultaneously filed a Motion to Dismiss for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) (*see* ECF Nos. 70 – 70-5).

10. Just over a month after Defendants filed their Motions to Dismiss, and while Plaintiffs were in the midst of preparing their briefs in opposition to both motions, the Tenth Circuit issued its decision in *Medina v. Catholic Health Initiatives*, 877 F.3d 1213 (10th Cir. 2017). *Medina*, like the instant case, was a challenge to a hospital system’s claim that its pension plan was entitled to the “church plan” exemption in ERISA. The Tenth Circuit upheld the District Court’s decision granting summary judgment for the defendants on grounds which had application to some of the arguments advanced by Plaintiffs here. Accordingly, in responding to Defendant’s Rule 12(b)(6) motion, Plaintiffs had to address an area of law that was both new and subject to

shifting interpretations. Plaintiffs filed the briefs in opposition to Defendants' motions to dismiss on January 12, 2018. ECF Nos. 72 & 73.

II. Mediation and the Proposed Settlement Agreement

11. Following Plaintiffs' filing of their briefs in opposition to the motions to dismiss, interim Class Counsel and counsel for Defendants discussed the possibility of resolving the case through mediation. As a result of those discussions, in late January, 2018 the parties retained Robert Meyer of JAMS, an independent mediator who had successfully mediated several other cases involving ERISA's "church plan" exemption, and scheduled an in-person mediation session for February 27, 2018 in Chicago. The Parties filed a joint motion for a stay of all case deadlines for a period of ninety days to provide time for negotiations, which the Court granted on February 2, 2018. ECF No. 75.

12. In preparation for the mediation, Defendants provided Plaintiffs with updated actuarial reports for all the pension plans Mercy Health operates as ERISA-exempt "church plans." Interim Class Counsel also consulted with their own actuarial expert concerning the adequacy of the Plans' current funding levels. Plaintiffs' expert concluded that the Plans' current levels of funding would be sufficient to meet ERISA's minimum guidelines.²

13. The mediation took place as scheduled on February 27, 2018, and lasted all day. Robert IZard from IKR, Mark Gyandoh and Julie Siebert-Johnson from KTMC, and Laura Gerber from Keller Rohrback, LLP, counsel for the Whaley Plaintiffs, attended the mediation for the Plaintiffs. The parties negotiating back-and-forth on each significant point. At the end of the day, as the Parties had not otherwise been able to reach agreement, Mr. Meyer made a mediator's

² Plaintiffs' actuarial expert has provided an updated version of his analysis for purposes of the Court's evaluation of the proposed settlement. *See* Declaration of Mitchell I. Serota ("Serota Decl."), attached as Exhibit B, at ¶¶ 4-12.

proposal addressing all key elements of a proposed settlement, which also proposed an overall cap on the amount that Defendants would be required to pay for Plaintiffs' attorneys' fees, litigation expenses and case contribution awards. Each Party had a week to inform the mediator, on a confidential basis, whether they accepted the proposal; a party that did not accept the proposal would not be told whether the other party had accepted or rejected it (this is sometimes called a "double-blind" proposal). On March 6, 2018, the mediator reported that both sides had accepted his proposal.

14. Following the successful mediation, the Parties negotiated a term sheet that incorporated the specific proposals discussed during the mediation. Once that exercise was complete, the Parties began the process of negotiating the Settlement Agreement itself, which incorporated the provisions of the term sheet as well as other ancillary issues and general terms, as well as the exhibits to the Settlement Agreement, including the class notice of settlement. Several of the key terms – first in the term sheet, then in the Settlement Agreement – required significant additional negotiations, both in writing and through conference calls. As a result, the negotiations took longer than the Parties had anticipated, which necessitated requesting an extension of the stay the Court had previously entered. ECF Nos. 78 & 79. The Settlement Agreement was finalized and executed by the Parties on July 13, 2018.

15. While negotiations to finalize the Settlement Agreement were reaching their conclusion, Plaintiffs' counsel conferred regularly concerning the preliminary approval process in the Southern District of Ohio, and worked on preparing a motion and supporting papers.

III. Counsel's Evaluation of the Proposed Settlement Agreement

16. IKR has substantial experience in class actions, complex litigation and ERISA litigation. Over the course of the past several years, IKR has been appointed as lead counsel or

co-lead counsel in several cases involving application of ERISA's "church plan" exemption to pension plans for employees of hospitals and healthcare systems, including *Kemp-DeLisser v. Saint Francis Hospital and Medical Center*, Civil Action No. 3:15-cv-01113-VAB (D. Conn.), *Tucker v. Baptist Health System, Inc.*, Case No. 2:15-cv-00382-SLB (N.D.AL.), *Brace v. Methodist Le Bonheur Healthcare*, No. 16-cv-2412-SHL-tmp (W.D. Tenn.), and *Nicholson v. Franciscan Missionaries of our Lady Health Systems*, No. 16-CV-258-SDD-EWD (M.D. LA), and are also functioning as co-lead counsel in *Boden v. St. Elizabeth Medical Center*, No. 2:16-cv-00049-DLB-CJS (E.D. Ky.). A copy of the Firm's current resume is attached to this declaration as Exhibit C.

17. Based on its experience, its knowledge of evolving caselaw and its investigation of the facts at issue in this case, IKR strongly supports the proposed Settlement. Several factors are particularly important to this analysis.

18. First, if Plaintiffs prevailed on the merits in full and the Plans were fully subject to ERISA, Defendants would not have to make any "Required Minimum Contributions" to the trust funds to satisfy ERISA's minimum funding requirements, unless the trust fund's financial position deteriorated significantly between now and the date of judgment. *See Serota Decl.*, ¶¶ 4-12.

19. Second, the Settlement provides real and significant protections for participants in the Plans. The current plan documents specifically state that the Plans' trust funds provide the only recourse for payment of promised retirement benefits. The Settlement provides that Mercy Health itself will guarantee payment of benefits for a period of nine years. Plaintiffs' actuarial expert has calculated that the market cost of insuring the payment of the Plans' benefits for nine years would be in excess of \$63 million. *Serota Decl.*, ¶¶ 13-25. Additionally, the Settlement provides that Plan Participants will receive important information about the Plans and their benefits

for the same nine-year period. Finally, approximately 1390 former participants of Plans who received lump sum payments based on calculations that would not have met ERISA standards will each receive \$450.

20. Third, while Plaintiffs would have achieved a far better result, especially with respect to future years, had they prevailed on the merits of the case and had Defendants been required to operate the Plans in accordance with ERISA, any Settlement must take into account the real risks that Plaintiffs face in achieving full success on the merits. Here, in the years since the case was initially filed, the legal landscape has shifted against the interests of the Class. In particular, the Supreme Court's ruling in *Advocate Health Care* and the Tenth Circuit's ruling in *Medina* provide support for arguments favorable to Defendants here.

21. Thus, while the Settlement falls short of the primary goal of the litigation – shielding Class Member's pension benefits with the full panoply of protections afforded by ERISA – it nonetheless provides substantial additional protections for current plan participants for a period of nine years, and additional money for former participants who took lump sum payments that were calculated using formulas that would not have passed muster under federal law.

IV. Counsel's Preliminary Lodestar and Expense Calculation

22. In preparation for filing this motion, I reviewed IKR's time and out-of-pocket expenses in connection with the current litigation.

23. The information in this declaration regarding my firm's time and expenses is taken from contemporaneous time and expense printouts prepared and maintained by my firm in the ordinary course of business. I reviewed these printouts to confirm both the accuracy of the entries on the printouts as well as the necessity for and reasonableness of the time and expenses committed to the litigation. Based on these reviews, I believe that the time reflected in my firm's lodestar

calculation and the expenses for which payment is sought are reasonable in amount and were necessary for the effective and efficient prosecution and resolution of the litigation. In addition, I believe that the expenses are all of a type that would normally be charged to a fee-paying client in the private legal marketplace.

24. The total number of hours spent on this litigation by my firm through July 7, 2018 is 408.75. The total lodestar amount for attorney time based on the firm's current rates is \$195,167.81. The hourly rates shown below are IKR's normal rates for both hourly customers and class action work. IKR's class action work, which represents the large majority of its business, is a specialized national practice; we do not charge differential rates based on the location where a lawsuit is filed. Courts have approved IKR's fees in class actions litigated all over the country. A breakdown of IKR's lodestar as of July 7, 2018 is as follows:

Name	Position	Years of Practice	Rate	Hours	Lodestar
Douglas P. Needham	Attorney	11	\$550.00	201.25	\$90,081.51
Mark P. Kindall	Partner	30	\$850.00	138	\$69,888.72
Robert A. Izard	Partner	35	\$925.00	69.5	\$35,197.58
Total				408.75	\$195,167.81

25. Biographical details for the IKR attorneys who worked on the case are included at the end of the Firm's resume, attached as Exhibit C to this declaration.

26. To date, IKR's out-of-pocket expenses for this litigation are \$15,825.75, broken down as follows:

EXPENSE DESCRIPTION	FINAL
Court costs (<i>pro hac vice</i> fees)	\$600.00
Meals, Hotels & Transportation	\$1,691.12
Expert expenses	\$9,689.63
Mediation fees	\$3,725.00
PACER	\$120.50
TOTAL EXPENSES:	\$15,825.75

V. WORK BY OTHER PLAINTIFFS' COUNSEL

27. The firms representing Plaintiffs in this action include all of the firms that have undertaken litigation over the past several years against hospitals and health care systems that have claimed the exemption for their pension plans under ERISA's "church plan" exemption. *See* competing motions for appointment as interim lead counsel, ECF Nos. 23 and 35 (discussing, *inter alia*, background of the Whaley Plaintiffs' counsel, Keller Rohrback, LLP ("Keller Rohrback") and Cohen Milstein Sellers and Toll, PLLC ("CMST"), and counsel for Plaintiff Lupp, IKR and KTMC). In addition, counsel for Plaintiff Alban, Gainey McKenna & Egleston, which did not seek appointment as lead counsel, has substantial experience in class action and ERISA litigation generally. *See* ECF No. 35-7. Each of the firms did substantial work at the outset of the case investigating claims, communicating with Plaintiffs and plan participants and preparing detailed complaints, as shown in the Joint Declaration of Laura R. Gerber, Michelle C. Yau and Thomas R. Theado in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of a Class Action Settlement ("Whaley Plaintiffs' Decl.") and the Declaration of Thomas J. McKenna in Support of Plaintiffs' Motion for Preliminary Approval of a Class Action Settlement ("McKenna Decl.").

28. As directed in the Manual for Complex Litigation, after their appointment as Interim Class Counsel, IKR and KTMC consulted with other plaintiffs' counsel in the formulation and drafting of the MCC, the development of arguments concerning the motions to dismiss and with respect to settlement negotiations. Manual of Complex Litig., § 10.221. Interim Co-Lead Class Counsel worked to minimize duplication of effort, while maximizing input from plaintiffs' counsel. At the request of Interim Co-Lead Class Counsel, counsel for Plaintiff Alban and the Whaley Plaintiffs provided a breakdown of their time in the case before and after appointment of Interim Co-Lead Counsel to demonstrate counsels' collective efforts to work together efficiently

on behalf of the class as a whole. This is reflected in the Whaley Plaintiffs' Declaration at Exhibits C, D and E, and in the McKenna Declaration at Exhibit 2.

29. The contributions of Plaintiffs' counsel, both before and after appointment of Interim Co-Lead Counsel, were substantive and important to the successful prosecution of the litigation.

30. Based on the declarations of Plaintiffs' counsel submitted in support of the Motion for Preliminary Approval, counsel for all Plaintiffs have collectively spent 2,660.25 hours prosecuting this litigation to date. Their collectively lodestar, based on the firms' regular rates, is slightly more than \$1.44 million. Class Counsel believe that the firms' regular rates, which have been approved as the bases for lodestar analysis in numerous cases around the country, are the correct basis for the lodestar analysis here. This case required expertise in both class action litigation and a very specialized area of ERISA law, and Plaintiffs' counsel were uniquely qualified to provide that expertise. That said, however, Class Counsel recognize that this Court has also looked to rates developed by the Rubin Committee in 1983, modified by a cost-of-living adjustment of 4% per year, in lodestar analysis. *Michel v. WM Healthcare Solutions*, 2014 WL 497031 (S.D. Ohio Feb. 7, 2014); *Planned Parenthood Sw. Ohio Region v. DeWine*, No. 1:04-CV-00493, 2017 WL 3115306, at *8 (S.D. Ohio July 21, 2017). Based on the description of Rubin Rates in *Michel* and *Planned Parenthood*, as well as on the information provided in the declarations of Plaintiffs' counsel, it appears that lodestar for Plaintiffs' counsel to date would be over \$945,000 if Rubin Rates are substituted for the regular hourly rates of Plaintiffs' counsel. An analysis of the lodestar for all Plaintiffs' counsel, using the Rubin Rates in the *Michel* and *Planned Parenthood* decisions, modified to account for a 4% per year COLA, is attached to this Declaration as Exhibit D.

31. The Settlement Agreement provides that Defendants will not oppose a request for an award of attorneys' fees and expenses and payment of case contribution awards to Lead Plaintiffs that do not, in the aggregate, exceed \$850,000. Plaintiffs intend to request case contribution awards of \$2,000 each (for a total of \$24,000), and litigation expenses for all Plaintiffs' counsel to date exceed \$45,000. Accordingly, the total amount that Plaintiffs will seek for attorneys' fees will necessarily be less than \$781,000. This represents a negative lodestar multiplier of 0.83 using Rubin Rates, and a negative lodestar multiplier of 0.54 using the regular billing rates of Plaintiffs' counsel. An award of attorneys' fees in the amount of \$781,000 would yield a blended hourly rate for all counsel of approximately \$294 per hour.

I, Mark P. Kindall, declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of July, 2018, in West Hartford, Connecticut.

/s/ Mark P. Kindall

Mark P. Kindall

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2017, a true and correct copy of the foregoing document was filed with the Court utilizing its ECF system.

/draft/ Mark P. Kindall _____

Mark P. Kindall