UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
(WESTERN DIVISION)

IN RE MERCY HEALTH ERISA LITIGATION	Civil Action No.: 1:16-cv-00441-SJD

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND CASE CONTRIBUTION AWARDS FOR LEAD PLAINTIFFS

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Plaintiffs David Lupp, Janet Whaley, Leslie Beidleman, Patricia Blockus, Charles Bork, Marilyn Gagne, Karl Mauger, Patricia Mauger, Beth Zaworski, Nancy Zink, Mary Alban and Linda Derrick (collectively, the "Named Plaintiffs" or "Plaintiffs"), participants in certain Mercy Health pension plans (the "Plans"),[1] respectfully submit this Memorandum of Law in Support of

[1] There are seven primary Plans at issue, several of which include participants of earlier plans, shown in parenthesis below, which were subsequently merged into one of the seven current plans:

(a) Mercy Health Partners - Northern Region Retirement Plan (St. Charles, St. Vincent, St. Anne) (Toledo) (including the following merged plans: the St. Charles Mercy Hospital Retirement Plan, the St. Vincent Medical Center Defined Benefit Plan, the Riverside Mercy Hospital Retirement Plan (also known as the St. Anne Mercy Hospital Retirement Plan), the Mercy Hospital Plan of Tiffin, Ohio), and the Mercy Health Partners - Northern Region Retirement Plan (Tiffin));

(b) St. Rita's Medical Center Retirement Plan (Lima);

(c) Community Health Partners Regional Medical Center Employees' Defined Benefit Pension Plan (Lorain) (including the following merged plans: the St. Joseph Hospital and Health Center Defined Benefit Pension Plan and the Lakeland Community Hospital Defined Benefit Pension Plan);

(d) Retirement Plan for Employees of Humility of Mary Health Partners (Youngstown) (including the following merged plans: the Retirement Plan for Employees of St. Elizabeth Hospital Medical Center, and the Retirement Plan for Employees of St. Joseph Riverside Hospital);

(e) Mercy Health Partners Pension Plan (Northeast Pennsylvania) (including the following merged plans: Mercy Health Partners Pension Plan (NEPA - Scranton), the Mercy Health System Northeast Region Defined Benefit Plan 1, the Mercy Health System Northeast Region Defined Benefit Plan 2), as well as the Mercy Health Partners Wilkes-Barre Employees' Pension Plan (NEPA - WB));

(f) Mercy Health System - Western Ohio Retirement Plan (Springfield Mercy) (including the following merged plans: the Mercy Memorial Hospital Retirement Plan, the Mercy Medical Center Retirement Plan, the Mercy Health System – Western Ohio Acute Care Facility Retirement Plan, the Mercy Siena Nursing Home Retirement Plan, the McAuley Center Retirement Plan, and the Mercy Health System – Western Ohio Long Term Retirement Plan); and

(g) Mercy Health Partners of Greater Cincinnati Retirement Plan (Cincinnati) (including the following merged plans: the Anderson Mercy Hospital Plan, the Sisters of Mercy of Hamilton, Ohio Retirement Plan, and the Clermont Mercy Hospital Retirement Plan).

The Class Action Settlement Agreement (the "Settlement Agreement"), attached as Exhibit A to the Declaration of Mark P. Kindall in Support of Plaintiffs' Unopposed Motion for Preliminary Approval ("Kindall Decl."), has several exhibits, including the proposed forms of notice of Settlement and proposed forms of the Preliminary and Final Approval Orders. The provisions of the Settlement Agreement, including all definitions

their Motion for an Award of Attorneys' Fees and Expenses and Case Contribution Awards for Lead Plaintiffs.

II. INTRODUCTION

After two and a half years of litigation, during which the legal landscape for cases involving the "church plan" exemption to ERISA has continued to shift, sometimes in dramatic ways, Plaintiffs have presented for the Court's review and approval a proposed settlement that provides valuable protections to Plan Participants for a period of nine years. Prosecution of this litigation on behalf of the Class has required considerable time by both Class Counsel and the Lead Plaintiff Class Representatives, as well as out-of-pocket litigation expenditures. If the Court approves the Settlement, Plaintiffs respectfully request that the Court also order Defendants to pay Plaintiffs' reasonable attorneys' fees and expenses, as well as modest case contribution awards for the Lead Plaintiffs. Approval of the Settlement does not require approval of this motion in whole or in part; the Settlement agreement specifically provides that "no decision by the Court with respect to the award of attorneys' fees and expenses" or case contribution awards "shall provide cause for either Party to withdraw, void, or nullify this Settlement." Settlement Agreement, attached as Exhibit A to the Declaration of Mark P. Kindall in Support of Plaintiffs' Motions for Final Approval of Settlement and Awards of Fees and Expenses ("Kindall Decl."), at ¶ 11.4.

As set forth below, Plaintiffs request an award of $779,531.20 in attorneys' fees, $46,468.80 in litigation expenses, and $2000 for each Lead Plaintiff in recognition for their work on behalf of the Class as a whole. While Defendants do not agree with all of the averments contained herein or in Plaintiffs' supporting declarations or exhibits, they do not oppose the relief requested in this motion.

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and defined terms, are incorporated by reference herein. Thus, all capitalized terms not otherwise defined in this memorandum shall have the same meaning as ascribed to them in the Settlement Agreement.

III. FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background of this litigation are described in detail in the Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of Settlement, Certification of a Class and Approval of Notice ("FA Brief"), Section II. In the interests of brevity, Plaintiffs incorporate that discussion by reference here. Additional facts relevant to the Court's consideration of relevant factors for assessing the requests for fees, expenses and case contribution awards are included in the relevant sections of this brief.

IV. THE COURT SHOULD APPROVE PLAINTIFFS' FEE REQUEST

A. Class Counsel Provided a Substantial Benefit to the Class

Federal Rule 23(h) provides that courts in certified class actions may "award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Here, Section 502(g)(1) of ERISA specifically authorizes the award of attorneys' fees (29 U.S.C. § 1132(g)(1)), and Mercy Health agreed, in the Settlement, not to oppose a request for attorneys' fees, so long as the requested amount, coupled with requested expense reimbursements and case contribution awards for Lead Plaintiffs, did not exceed $850,000. Settlement Agreement, ¶ 8.3.[2] Moreover, the Sixth Circuit has long-recognized the "substantial benefit" doctrine, which provides that counsel who prosecute a class action which confers benefits

[2] As this Court has noted, Rule 23(e):

> . . . expressly authorizes the Court to award "reasonable attorneys fees and nontaxable costs ... by agreement of the parties. . . ." Negotiated and agreed-upon attorneys fees as part of a class-action settlement are encouraged as an "ideal" toward which the parties should strive. *See, e.g., Manners v. American General Life Insurance Company,* 1999 WL 33581944 * 28 (M.D.Tenn.1999): *see also DeHoyos v. Allstate Corporation,* 240 F.R.D. 269, 322-23 (W.D. Texas 2007) (collecting cases).

Bailey v. AK Steel Corp., No. 1:06-CV-468, 2008 WL 553764, at *1 (S.D. Ohio Feb. 28, 2008); *see also Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee").

on a putative class, as here, are entitled to an award of attorneys' fees and costs. *See Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974) (citing *Mills v. Electric Auto-Lite, Co.*, 396 U.S. 375, 396 (1970)). The benefit achieved need not be pecuniary in nature. *Mills*, 396 U.S. at 392 (noting "nothing … indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses").

As discussed below, Class Counsel's efforts secured a settlement for the Class which requires Mercy Health to guarantee full payment of all current pension benefits from the Plans for a period of nine years, conveying an insurance-like benefit to current Plan Participants for years. Additionally, Mercy Health is required to provide important information to Plan Participants about their pension plan and their benefits for the same nine-year period. And finally, Mercy Health is required to pay over 1300 former Plan Participants, whose lump-sum distribution calculations would not have met ERISA standards, with $450 each. Accordingly, the Attorneys' Fees and Expenses are justified under the substantial benefit doctrine, and Plaintiff is entitled to an award of reasonable attorneys' fees.

B. The Requested Fee Is Fair and Reasonable

The Sixth Circuit has held that fees in class action litigation may be awarded based on either the "percentage of fund" method or the lodestar method, depending upon the "'the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them.'" *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 279 (6th Cir. 2016) (quoting *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993)). A court employing the percentage of fund method "calculate[s] the ratio between attorney's fees and benefit to the class" while a lodestar calculation begins by multiplying "the number of hours reasonably expended on the litigation by a reasonable hourly rate." *Gashco*, 822 F.3d at 279 and 282 (internal quotations omitted).

In assessing whether a requested fee is reasonable, courts have discretion to employ either method, but must articulate their "reasons for 'adopting a particular methodology and the factors considered in arriving at the fee.'" *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009). The *Moulton* court identified several factors that courts should generally consider:

> (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides.

Id.; see also Gascho, 822 F.3d at 280 (quoting *Mouton*). '"There is no formula for weighing these factors. Rather, the Court should be mindful that each case presents a unique set of circumstances and arrives at a unique settlement, and thus different factors could predominate depending on the case."' *Ranney v. Am. Airlines*, No. 08-137, 2016 WL 471220, at *2 (S.D. Ohio Feb. 8, 2016) (quoting *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 764 (S.D. Ohio 2007)). A review of these factors suggest that the lodestar method, rather than the percentage of the fund method, is most appropriate in this case, and that the requested fee is reasonable given the circumstances of this case.

1. Value of the Benefit Rendered to the Plaintiff Class

The Settlement provides several key benefits to the Plaintiff Class. Mercy Health, which included language in each of the Plans disclaiming responsibility for funding deficiencies, will guarantee payments for a period of nine years. This is tantamount to Mercy Health serving as an insurer for Plan benefits for the next nine years. Plaintiffs' expert estimates that the PBGC, which effectively provides a reinsurance benefit to covered pension plans (since employers are required to make up shortfalls in the first instance), would charge premiums in excess of $63 million to insure payments for all of the Plans over the nine-year period, based on the size of the Plans and

the number of participants. Serota Decl., ¶ 25. This is a fair estimate of the market value of Mercy Health's nine-year guarantee. *Id.* at ¶¶ 13-24. On top of that, the Settlement Agreement also provides a payment of $450 to over 1,300 Settlement Class members who took lump sum payments between 2011 and February of 2018 – a cash payment totaling $625,500. The Settlement Agreement requires that Defendants provide Plan Participants with information concerning the Plans and their benefits for the next nine years that, while less than ERISA requires, still substantially exceeds what Defendants are currently required to provide under the terms of the Plans themselves. Additionally, the Settlement Agreement requires Defendant to bear the cost of providing the Court-approved Class Notice to over 40,000 class members by first-class mail.

Because of the nature of these benefits, employing the "percentage of fund" method is complicated. The Sixth Circuit has held that where, as here, a settlement includes both a cash component and a non-cash component, "[c]alculating the ratio between attorney's fees and benefit to the class must include a method for setting the denominator that gives appropriate consideration to ***all*** components that the parties found necessary for settlement." *Gascho*, 822 F.3d at 282 (emphasis added).

If the Court were to approve the Settlement and grant the instant motion for Attorneys' Fees and Expenses and Case Contribution Awards to Lead Plaintiffs, Mercy Health's upfront financial outlay for the Settlement would be approximately $1,475,000 ($625,500 in additional lump-sum payments, $24,000 in case contribution awards, $44,000 in litigation expenses and $782,000 in attorneys' fees), plus an additional amount for notice costs.[3] However, Mercy Health's immediate cash outlays do not properly reflect the primary benefit of the Settlement to

[3] In a percentage of fund analysis, the benefit to the class may include not only money received by the class, but also costs of the litigation and settlement administration such as attorneys' fees and notice costs. *Gascho*, 822 F.3d at 282.

the vast majority of Class Members, who are current Plan Participants. As noted above, the payment guarantees and disclosure requirements to these Class Members continue for a period of nine years, and the market value of the financial guarantee alone is over $63 million.

Percentage of fund awards in class actions are often in the range of 25-30 percent of the settlement. *See, e.g., Palombaro, v. Emery Fed. Credit Union,* No. 1:15-CV-792, 2018 WL 4635973, at *9 (S.D. Ohio Sept. 27, 2018) (finding a 30 percent fee within the range of awards in similar or less complex cases). Here, such an award would produce a windfall if the value of the settlement included, as the Sixth Circuit requires, consideration of both cash- and non-cash elements of the settlement. *Gascho,* 822 F.3d at 282. "A reasonable fee is one which is adequate to attract competent counsel but does not produce a windfall to attorneys." *Palombara,* 2018 WL 4635973, at *9 (citing *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 616 (6th Cir. 2007)).

Moreover, in cases where the benefits of a settlement are non-monetary, courts have often chosen to employ the lodestar method rather than the percentage of fund method. *See, e.g., Gilbert v. Abercrombie & Fitch, Co.,* No. 2:15-CV-2854, 2016 WL 4159682, at *11 (S.D. Ohio Aug. 5, 2016), *report and recommendation adopted,* No. 2:15-CV-2854, 2016 WL 4449709 (S.D. Ohio Aug. 24, 2016) (employing the lodestar method where the settlement did not create a common fund and the "exact value of the resulting benefit . . . cannot be precisely determined"); *City of Plantation Police Officers' Employees' Ret. Sys. v. Jeffries,* No. 2:14-CV-1380, 2014 WL 7404000, at *11 (S.D. Ohio Dec. 30, 2014) (same); *Menowitz v. NCR Corp.,* No. C-3-91-012, 1996 WL 1712776, at *4 (S.D. Ohio Apr. 25, 1996) (employing lodestar method where "a common benefit was conferred, rather than a common fund created, because the absence of a true common fund rendered the percentage of the fund method inapposite"). Here, while there are cash benefits to the Class included in the Settlement, the vast majority of the benefits for the vast majority of the

Class are non-monetary. Thus, while consideration of the benefits to the Class certainly confirms the reasonableness of the requested fees, caselaw also suggests that this type of settlement is better analyzed under the lodestar method, which focuses on the value of counsels' services on an hourly basis.

2. Value of the Services on an Hourly Basis

The value of counsels' services on an hourly basis is normally measured by "lodestar," calculated by multiplying "the number of hours reasonably expended on the litigation by a reasonable hourly rate." *Gascho,* 822 F.3d at 279 (citing *Bldg. Serv. Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway*, 46 F.3d 1392, 1401 (6th Cir. 1995)). While lodestar represents a presumptively reasonable fee, the court has discretion to, "'within limits, adjust the "lodestar" to reflect relevant considerations peculiar to the subject litigation.'" *Id.* (quoting *Adcock–Ladd v. Sec'y of Treasury*, 227 F.3d 343, 349 (6th Cir. 2000)). Some of the factors that may be considered in making a lodestar adjustment are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Barnes v. City of Cincinnati, 401 F.3d 729, 745–46 (6th Cir. 2005) (quoting *Blanchard v. Bergeron,* 489 U.S. 87, 93 (1989), which itself relied upon *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717–19 (5th Cir.1974)). As discussed below, while several of these factors strongly suggest that an upward adjustment to lodestar would be appropriate, Plaintiffs in this case are seeking a fee award that is lower than their lodestar.

a. The Hours Expended by Class Plaintiff's Counsel Are Reasonable

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, Class Counsel Izard, Kindall & Raabe LLP ("IKR") and Kessler Topaz Meltzer & Check, LLP ("KTMC"). In addition, counsel for Plaintiff Alban, Gainey McKenna & Egleston ("GME"), 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' Motion for Final Approval of a Class Action Settlement ("Whaley Pl. Decl.") and the Declaration of Thomas J. McKenna in Support of Plaintiffs' Motion for Final Approval of a Class Action Settlement ("McKenna Decl.").

In accordance with 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, developing arguments concerning the motions to dismiss, and 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. Kindall Decl., ¶ 51. 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.

Plaintiffs' counsel have collectively devoted 2,682.65 hours to the successful prosecution of this litigation though October 10, 2018. *See* Kindall Decl., ¶ 54. From the outset, the inherent complexity of this Action required Plaintiffs' counsel to devote substantial resources to carefully investigating the claims that formed the core of the case. This complexity was magnified by the fact that the case involves over thirty separate plans (that have, over time, been consolidated into seven plans) and a class of over 40,000 people. Moreover, while the case was pending, the legal precedents governing the "church plan" exemption were in a state of flux. When the case was initially filed in March, 2016, the Seventh Circuit had just issued its ruling in *Advocate Health Care Network v. Stapleton*, 817 F.3d 517 (7th Cir. 2016), which followed an earlier favorable ruling by the Third Circuit in December of 2015, *St. Peter's Healthcare System v. Kaplan,* 810 F.3d 175 (3d Cir. 2015). Less than a year later, the Ninth Circuit joined the Third and Seventh Circuits with its ruling in *Dignity Health v. Rollins*, 830 F.3d 900 (9th Cir. 2016). Yet, despite the unanimity in the circuit courts' interpretation of the church plan exemption, the Supreme Court granted certiorari the same month as *Dignity Health* was decided, and unamimously reversed and remanded all three cases. *Advocate Health Care Network v. Stapleton*, __ U.S. __, 137 S. Ct. 1652 (June 5, 2017). This dramatic change in the law required counsel to completely shift focus in the middle of preparing their Master Consolidated Complaint. The continued uncertainties in the legal landscape following *Advocate* further complicated the process of responding to Defendants' two motions to dismiss.

When the briefing on the Motion to Dismiss was complete, Plaintiffs dedicated their resources to efficiently and successfully negotiating the terms of the Settlement on favorable terms for the Class. While this process took considerable time and effort, there can be no question that

it greatly reduced the total number of hours that would otherwise have had to be spent litigating these complicated and contentious issues.

Counsel have provided the Court with detailed summaries of the time spent by each attorney for each firm, broken down by the key tasks that the case entailed: investigation and drafting of the initial complaints, the 23(g) process, the amended complaints, briefing on the motions to dismiss, mediation and settlement, preliminary and final approval, and miscellaneous motions/scheduling. *See Gascho*, 822 F.3d at 281 ("Although counsel need not record in great detail each minute he or she spent on an item, the general subject matter should be identified.") (quoting *Imwalle v. Reliance Med. Prod., Inc.*, 515 F.3d 531, 553 (6th Cir. 2008). If the Court believes additional detail would be useful to assess the reasonableness of the hours dedicated to the case, counsel will file their billing records under seal.[4]

b. The Hourly Rates Charged by Class Plaintiffs' Counsel Are Reasonable

The hourly rates charges by Class Plaintiffs' Counsel are reasonable and should be approved. "'A trial court, in calculating the reasonable hourly rate component of the lodestar computation, should initially assess the prevailing market rate in the relevant community.'" *Jeffries*, 2014 WL 7404000, at *13 (quoting *Adcock-Ladd*, 227 F.3d at 350) (internal quotation marks and emphasis omitted). "'The prevailing market rate is that rate which lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record.'" *Jeffries*, 2014 WL 7404000, at *13 (quoting *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 821 (6th Cir. 2013)) (internal quotation marks and emphasis omitted). Here, two firms

[4] "Documents supporting attorney fees and expenses are often filed under seal because they obviously include matters covered by attorney work-product and attorney-client privilege." *In re: Whirlpool Corp. Front–loading Washer Prod. Liab. Litig.*, No. 1:08-WP-65000, 2016 WL 5338012, at *18 (N.D. Ohio Sept. 23, 2016).

based in Ohio, Class Liaison Counsel Strauss Troy and local counsel for the Whaley Plaintiffs Gary, Naegele & Theado LLC, performed work in the case and submitted lodestar declarations. This Court has often looked at "the 1983 Rubin Committee rates as a basis for comparison, applying a 4% annual cost-of-living allowance to the original rates." *Palombaro*, 2018 WL 4635973, at *10. Here, Thomas Theado, the sole attorney submitting time for Gary, Naegele & Theado, bills at an hourly rate of $510 per hour, which is just above the Rubin Rate for senior partners of $506.28. *Id.* at *11 n.13 (listing Rubin Rates). Notably, the Rubin Rates for senior partners capture all attorneys with 21 years or more of practice (*Id.* at *5 n.7), while Mr. Theado has 37 years of experience. Whaley Pl. Decl., Exh. E. The hourly rates submitted for Liaison Counsel Strauss Troy are well below Rubin rates: between $300-$375 for senior partners, and $140 for a paralegal, compared to the 2018 Rubin Rate of $149.60 (*Id.*). *See* Declaration of Ronald R. Parry in Support of Plaintiffs' Motion for Final Approval of a Class Action Settlement ("Parry Decl."), Exh. 2.

The hourly rates for the out-of-state firms, Class Counsel IKR and KTMC, counsel for the Whaley Plaintiffs (Keller Rohrback and CMST), and counsel for Plaintiff Alban (GME), are higher than rates typically charged by counsel in this District. However, as this Court has recognized, use of Rubin Rates is not always appropriate, since "[i]n recent years, the practice of law has become an increasingly national practice." *Id.* at *10. A court may award higher hourly rates to out-of-town specialists where "(1) hiring the out-of-town specialist was reasonable in the first instance, and (2) if the rates sought by the out-of-town specialist are reasonable for an attorney of his or her degree of skill, experience, and reputation." *Jeffries*, 2014 WL 7404000 at *13 (quoting *Brian A. v. Hattaway*, 83 F. App'x 692, 694 (6th Cir. 1995)). In *Gilbert v. Abercrombie & Fitch, Co.*, for example, this Court determined that it was appropriate to award higher rates to out-of-

town specialists, including, notably, co-lead Class Counsel here, KTMC, in a securities fraud case, for reasons directly applicable here:

> this Court concludes that it was reasonable for plaintiff to hire counsel from outside this forum. ANF is a corporation with an international presence, plaintiff is a shareholder from Florida, and the issues in this case are complex and not limited to those peculiar to this District. It is also significant that, in additional [*sic*] to their local counsel, both plaintiff and defendants are represented in this action by national counsel with substantial experience in securities litigation. Given Class counsel's skill, experience, and reputation, and considering the specialized issues presented in this case, it was reasonable for Plaintiff to hire out of district specialists.

Gilbert, 2016 WL 4159682, at *14–15. Here, Mercy Health has facilities in multiple states and Class Members reside in many more. Both Plaintiffs and Defendants are represented by national counsel with directly relevant experience litigating the scope of ERISA's "church plan" exemption as it relates to health service corporations.[5] It was entirely reasonable for Plaintiffs to entrust this important litigation to national class action firms that had developed much of the caselaw in this particular area, even though their rates are higher than those of attorneys who primarily practice in this District. *Lonardo v. Travelers Indem. Co.,* 706 F. Supp. 2d 766, 794 (N.D. Ohio 2010) (where "Class Counsel consists of experienced attorneys with expertise specific to complex class actions on a national scale," their hourly rates were reasonable compared to "attorneys' fees in complex civil litigation and multi-district litigation").

[5] The experience of Plaintiffs' counsel in "church plan" litigation is extensively discussed in the competing motions for appointment as interim lead counsel, ECF Nos. 23 and 35. Counsel for Defendant Mercy Health, Howard Shapiro of Proskauer Rose LLP, has likewise represented many of the defendants in these same cases. *See, e.g., Griffith v. Providence Health & Servs.,* No. C14-1720-JCC, 2017 WL 1064392, at *1 (W.D. Wash. Mar. 21, 2017), *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.,* No. 15-CV-1113 (VAB), 2016 WL 6542707 (D. Conn. Nov. 3, 2016), *Lann v. Trinity Health Corp.,* No. CV PJM 14-2237, 2015 WL 6468197, at *1 (D. Md. Feb. 24, 2015), and *Overall v. Ascension,* 23 F. Supp. 3d 816, 818 (E.D. Mich. 2014).

Here, as set forth in the declarations of plaintiffs' counsel, their hourly rates are their customary hourly rates. *See* Kindall Decl., ¶ 42; Gyandoh Decl, ¶ 15; Whaley Pl. Decl. ¶ 20; McKenna Decl., ¶ 11. *Compare Jeffries*, 2014 WL 7404000, at *13 (finding lack of reasonableness of plaintiff's counsel rates because, *inter* alia, "there [was] . . . no evidence that the rates charged are plaintiff's counsel's standard hourly rates."); *see also Dowling v. Litton Loan Servicing, LP*, No. 05-098, 2008 WL 906042, at *1-2 (S.D. Ohio Mar. 31, 2008) (citing *Blum v. Stenson*, 465 U.S 886, 893 (1984)) (acknowledging attorneys' customary billing rate as indicia of reasonableness).[6]

Second, the hourly rates charged by KTMC, IKR, CMST, GME and Keller Rohrback are commensurate with each firms' respective degrees of skill, experience, and reputation. As demonstrated by their firm resumes, each of the firms has deep experience in complex class action litigation as well as specific experience in ERISA cases generally and the specific provisions of ERISA at issue here. Indeed, this Court has already specifically found that all of the out-of-state counsel in this action "have excellent ERISA class action credentials." ECF No. 42, at 4.

In the course of their nationwide practice, attorneys at these firms have worked together (as they are doing in this case) with many if not most firms that have a national ERISA class action practice. In their experience, while there are invariably differences in rates between different firms – and even between rates for lawyers within the same firm with the same number of years of practice – each firm's rates are broadly in line with rates of other firms with nationwide class action practices, and have been the basis for awards of fees in courts around the country. Kindall Decl.,

[6] The listed rates are current rates for each firm. *See* Kindall Decl., ¶ 45; Gyandoh Decl, ¶ 15; Joint Decl. ¶ 20; McKenna Decl., ¶ 11. As this court has recognized, the use of current rates in calculating lodestar "is a reasonable way to account for the delay in payment to plaintiff's attorneys while this case has been pending." *Lankford v. Reladyne, LLC*, No. 1:14-CV-682, 2016 WL 3640691, at *3 (S.D. Ohio June 29, 2016); *accord, In re Nationwide Fin. Servs. Litig.*, No. 2:08-CV-00249, 2009 WL 8747486, at *13 (S.D. Ohio Aug. 19, 2009) (citing *Missouri v. Jenkins*, 491 U.S. 174, 283–84 (1989); *Basile v. Merrill Lynch*, 640 F. Supp. 697, 703 & n. 7 (S.D. Ohio 1986).

¶ 43; Whaley Pl. Decl., ¶ 21. Furthermore, their rates generally compare favorably to the large, sophisticated firms that typically represent defendants in these types of cases. *Gilbert,* 2016 WL 4159682, at * 6 (noting that "counsel's hourly rates are commensurate with those of counsel for some of the defendants, who also likewise possess extensive expertise with national reputations in . . . class action litigation."). For example, papers filed in 2016 to support an award for attorneys' fees in *Ruben Daniel Chorny v. The Republic of Argentina,* No. 1:04-cv-00400-LAP (S.D.N.Y. 2016), shows partner rates that range from $615-$975 per hour, senior counsel rates that range from $755-850 per hour, and associate rates that range from $170-$900 per hour. Kindall Decl. ¶ 44 & Exh. F.

Third, the hourly rates charged by out-of-state counsel are within the range of those approved by this Court. *See Amos v. PPG Indus., Inc.*, No. 05-70, 2015 WL 4881459, at *10 (S.D. Ohio Aug. 13, 2015) (citing *Hagy v. Demers & Adams, LLC,* No. 11-530, 2013 WL 5728345, at *13 (S.D. Ohio Oct. 22, 2013) (noting that courts may rely on awards in analogous cases when determining whether plaintiff's hourly rates are reasonable). For example, in *Gilbert,* which was decided two years ago, the Court approved rates for KTMC that ranged from $350-850 for attorneys. *See, e.g., Gilbert,* 2016 WL 4159682, at *16 (citing *In re Porsche Cars North America, Inc. Plastic Coolant Tubes Products Liability,* S.D. Ohio Case No. 2:11-md-2233, and finding these rates "consistent with the rates for similar services by lawyers of reasonably comparable skill, experience, and national reputation"). Accordingly, counsel's hourly rates, as reflected in their declarations, are reasonable.

c. Plaintiffs' Requested Fee, Which is Less Than Their Lodestar, Is Reasonable

Plaintiffs' lodestar in this case -- the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate -- is over $1.4 million. This constitutes the "presumptively

reasonable fee." *Gascho*, 822 F.3d at 279 (citing *Grandview Raceway*, 46 F.3d at 1401). Several of the factors that Courts consider when awarding fees in excess of lodestar, such as the novelty and difficulty of the questions, the skill required to properly perform the legal services, and the experience, reputation and ability of the attorneys (*see, e.g.*, *Barnes*, 401 F.3d at 745–46), apply equally here. As discussed elsewhere in this brief and in the memorandum of law supporting final approval of the settlement, the case involved a novel legal theory where the law was very unsettled and changed substantially and the firms involved were highly skilled in complex class action litigation, ERISA, and the "church plan" exemption at issue in this case.

However, the fee sought by Plaintiffs here – $779,531.20 – is far below the "presumptively reasonable fee" of $1.4 million, and represents a "negative" lodestar multiplier of 0.53. Indeed, even if the Court were to apply Rubin Rates to the time dedicated to the case by out-of-state specialists, the requested fee would *still* be substantially less than the lodestar, representing a negative lodestar multiplier of 0.82. Kindall Decl., at ¶ 56 and Exh. I (calculating lodestar based on 2018 Rubin Rates). Accordingly, there can be no question that the requested fee is amply supported by "the value of the services on an hourly basis." *Gascho*, 822 F.3d at 280 (quoting *Mouton*).

3. Counsel Prosecuted This Action on a Wholly Contingent Basis

Another *Mouton* factor that supports the reasonableness of Plaintiffs' fee request is that Plaintiffs' Counsel undertook the prosecution of the action on a wholly contingent basis. *See* Kindall Decl., ¶ 39; Gyandoh Decl, ¶ 15; Parry Decl. ¶ 6; Whaley Pl. Decl. ¶ 19. This factor weighs heavily in favor of finding the requested fee to be reasonable. *See, e.g.*, *Graybill v. Petta Enterprises, LLC*, No. 2:17-CV-418, 2018 WL 4573289, at *8 (S.D. Ohio Sept. 25, 2018) (counsel that takes case on contingency is "assuming real risk with no guarantee of recovery, which weighs

in favor of finding the fee request reasonable"); *Wright v. Premier Courier, Inc.*, No. 2:16-CV-420, 2018 WL 3966253, at *7 (S.D. Ohio Aug. 17, 2018) ("Class Counsel assumed a real risk in taking on this case, preparing to invest time, effort, and money over a period of years with no guarantee of recovery"); *Gascho v. Glob. Fitness Holdings, LLC*, No. 2:11-CV-436, 2014 WL 1350509, at *34 (S.D. Ohio Apr. 4, 2014) ("Class Counsel should be awarded for the risk of undertaking representation on a contingent basis, especially considering the complexity of this action and the professional skill of opposing counsel"). Thus, this factor strongly supports award of the requested fee.

4. Granting the Attorneys' Fees and Expenses Will Further Important Societal Interests

As this Court has observed, "the purpose of fee shifting statutes" such as ERISA "and the goal of class actions – *i.e.*, to provide a vehicle for collective action to pursue redress for tortious conduct that it is not feasible for an individual litigant to pursue" demonstrate "a substantial public interest in compensating Class Counsel" for their work. *Gascho*, 2014 WL 1350509, at *34 (internal citations and quotations omitted). "'Absent this class action, most individual claimants would lack the resources to litigate a case of this magnitude.'" *Wright*, 2018 WL 3966253, at *7 (quoting *In re Sulzer Hip Prosthesis and Knee Prosthesis Liability Litig.*, 268 F. Supp. 2d 907, 936 (N.D. Ohio 2003)). Accordingly, this factor supports the award of the requested fee.

5. The Litigation Was Complex

"Most class actions are inherently complex and settlement avoids the costs, delays, and multitude of other problems associated with them.'" *Gascho*, 2014 WL 1350509, at *18 (internal quotations and citations omitted). That is certainly true here, in a case that involved over 40,000 class members, numerous different plans, and claims under both ERISA and state law. Moreover, the central question involved in the case – whether the Plans qualify for ERISA's "church plan"

exemption – has been the subject of relatively few cases, which reached different results, and, even when favorable to Plaintiffs' position here, relied upon conflicting rationales. Moreover, the Sixth Circuit has not addressed the issue. Thus, the legal landscape governing the central issue in this litigation was uncertain at the time that the case was filed. The uncertainty was further magnified by the Supreme Court's decision in *Advocate* reversing three Circuit Court decisions which had ruled in the plaintiffs' favor in similar cases. Specifically, the Supreme Court held that an employee benefit plan does not need to be established by a church to qualify for ERISA's "church plan" exemption, but instead plans maintained by certain organizations controlled by or associated with a church may qualify as "church plans." *Advocate,* 137 S. Ct. at 1662-63. The progress of the *Advocate* litigation highlights the complexity of the legal issues, since the Supreme Court's unanimous ruling reversed what had, to that point, been the unanimous *contrary* view of the only appeals courts to have considered the question. Thus, this factor supports the requested fee.

6. The Parties Are Represented by Experienced, Highly-Qualified Counsel

As noted above in connection with consideration of hourly rates, Plaintiffs are represented by highly qualified counsel with national reputations for their expertise in the ERISA class action litigation. *See supra* Section III-B(2)(b). Defendants, in turn, are represented by Proskauer Rose, LLP, a firm with offices on four continents, over 700 attorneys, and an international reputation. https://www.proskauer.com/about. Moreover, Proskauer's Howard Shapiro, representing Defendants in this case, has specific expertise in class action litigation concerning application of ERISA's church plan exemption to health care organizations. *See supra* n. 5. "Courts have often recognized that the skill and abilities of defense counsel is a factor that may be considered when evaluating a fee request." *Nationwide,* 2009 WL 8747486, at *15. Accordingly, this factor as well supports the requested fee award.

In summary, Plaintiffs' counsel, who have nationwide experience in ERISA class action, have invested over 2,600 hours litigating this highly complex case for over two years on a wholly contingent basis against well-funded Defendants with experienced and well-regarded counsel, and have successfully negotiated a settlement that provides valuable benefits to a class of over 40,000 people. The requested fee is substantially less than their lodestar, and the Court should have no hesitation in awarding it.

V. PLAINTIFFS' COUNSEL'S EXPENSES SHOULD BE REIMBURSED

ERISA specifically authorizes reimbursement of reasonable and necessary litigation expenses that are "typically billed to clients under prevailing practice in the jurisdiction." *Schumacher v. AK Steel Corp. Ret. Acc. Pension Plan*, 995 F. Supp. 2d 835, 853 (S.D. Ohio 2014) (citing *Northcross v. Board of Educ.*, 611 F.2d 624, 639–640 (6th Cir.1979)). Fee shifting provisions like ERISA permit reimbursement of "'incidental and necessary expenses incurred in furnishing effective and competent representation'" that are "'reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services.'" *Lankford*, 2016 WL 3640691, at *5 (quoting *Northcross*, 611 F.2d at 639). As examples of such expenses, the *Lankford* court cited travel (including hotels and meals, parking and mileage), postage, copying and printing costs, costs related to mediation, as well as "docket fees, investigation expenses, deposition expenses, [and] witness expenses . . . ." *Id.* (citing cases); *see also NorCal Tea Party Patriots v. Internal Revenue Serv.*, No. 1:13CV341, 2018 WL 3957364, at *2 (S.D. Ohio Aug. 17, 2018) (approving reimbursement of class counsel's expenses for "legal research, printing and copying charges, telephone fees, postal fees, airline and travel costs, filing and service of process fees, food and hotel accommodations, and deposition costs."); *see also Rikos v. Proctor & Gamble Co.*, No. 1:11-CV-226, 2018 WL 2009681, at *10 (S.D. Ohio Apr. 30, 2018); *Graybill*, 2018 WL 4573289, at *8.

In prosecuting this Action, Plaintiffs' Counsel incurred $46,468.80 in litigation-related expenses for which they respectfully seek reimbursement. These expenses are itemized in further detail in the declarations and exhibits submitted by counsel. *See* Kindall Decl., ¶¶ 49 & 53; Gyandoh Decl, ¶ 17; Parry Decl. ¶ 9 & Exh. 3; Whaley Pl. Decl. ¶ 22 & Exhs. C, D and E; McKenna Decl. ¶ 12 & Exh. 3. The expenses were incidental to and necessary for the prosecution of this litigation, and are of the type that this Court has recognized would normally be charged to fee-paying clients, including filing fees, service of process, mediation fees, costs for experts, computer-based research, travel, postage and delivery. Plaintiffs' Counsel respectfully submit that their request for reimbursement of expenses is reasonable and should be approved.

VI. THE REQUESTED CASE CONTRIBUTION AWARDS ARE REASONABLE

The Settlement could not have been achieved without Plaintiffs' substantial and continuing efforts. As discussed more fully in the declarations of Plaintiffs' Counsel, the individual Plaintiffs have been critical to this litigation from the start. They provided valuable information about the numerous Plans at issue in the case, permitting counsel to draft individual complaints – and, ultimately, the MCC – that contained detailed allegations. Plaintiffs met with counsel and had numerous telephone calls, provided documents, reviewed filings, and discussed the terms of the proposed settlement with counsel. Gyandoh Decl., ¶ 18; Whaley Pl. Decl., ¶ 13; McKenna Decl., ¶ 8. Since their work benefited the class as a whole, they should in fairness receive some compensation for their time and effort.

This Court has recognized that case contribution awards for class representatives "'are efficacious ways of encouraging members of a class to become class representatives and rewarding individual efforts taken on behalf of the class.'" *Graybill*, 2018 WL 4573289, at *8 (quoting *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003)); *accord, Wright*, 2018 WL 3966253, at *7 ("courts

routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.") (internal quotation marks and citations omitted); *Shanechian v. Macy's, Inc.*, No. 1:07-CV-828, 2013 WL 12178108, at *7 (S.D. Ohio June 25, 2013).

Plaintiffs request an award of $2,000 for each of the named plaintiff class representatives, David Lupp, Janet Whaley, Leslie Beidleman, Patricia Blockus, Charles Bork, Marilyn Gagne, Karl Mauger, Patricia Mauger, Beth Zaworski, Nancy Zink, Mary Alban and Linda Derrick. Importantly, the Settlement Agreement clearly provides that the proposed Settlement is in no way conditioned on any such awards being made. Settlement Agreement, at ¶¶ 8.3 & 11.4.

The requested amounts are at or below awards made by this court in similar cases. *See, e.g.*, *Graybill*, 2018 WL 4573289, at *8 ($5,500); *Wright*, 2018 WL 3966253, at *8 ($5000); *Shanechian*, 2013 WL 12178108, at *7 ($5000); *Palombaro*, 2018 WL 4635973, at *13 ($5000); *Michel v. WM Healthcare Solutions, Inc.*, No. 10-cv-638, 2014 WL 497031, at * 12 (S.D. Ohio Feb. 7, 2014) (awarding $3,000 and noting precedent for awards of between $1,000-$5,000); *Dudenhoeffer v. Fifth Third Bancorp*, No. 08-538 (S.D. Ohio July 11, 2016) ($10,000). The requested amounts are also reasonable when compared with awards in other "church plan" actions. *See, e.g., Butler v. Holy Cross Hospital, et al.*, No. 16-cv-5907 (N.D. Ill. June 29, 2017) (awarding $10,000 to each named plaintiff as incentive award); *Griffith*, 2017 WL 1064392, at *2 (same). Additionally, this award is below other case contribution amounts awarded in ERISA class actions within this Circuit. *See, e.g.*, *In re Regions Morgan Keegan Securities, Derivative and ERISA Litig.*, No. 08-2192 (W.D. Tenn. Dec. 24, 2014) ($10,000); *In re: Diebold ERISA Litig.*, No. 06-0170 (N.D. Ohio Feb. 11, 2011) ($10,000); *In re: National City Corp. Securities, Derivative and ERISA Litig.*, No. 08-nc-07000 (N.D. Ohio Nov. 30, 2010) (awarding $7,500 to each of the co-

lead named plaintiffs and $2,000 to the remaining named plaintiffs); *In re The Goodyear Tire & Rubber Co. ERISA Litig*, No. 03-02182 (N.D. Ohio Oct. 22, 2008) ($5,000).

In sum, the modest awards requested for the class representatives were "well-earned because they provided important documents and information through the litigation, which were instrumental in achieving a settlement." *Wright*, 2018 WL 3966253, at *8. Accordingly, Plaintiffs respectfully request that the Court approve $2,000 case contribution awards for each of the twelve class representatives.

VII. CONCLUSION

Plaintiffs respectfully request the Court approve Class Counsel's request for an award of attorneys' fees in the amount of $779,531.20, reimbursement of out-of-pocket litigation expenses in the amount of $46,468.80, and payment of $2,000 case contribution awards to each of the twelve class representatives.

Dated: October 29, 2018

Respectfully submitted,

By: */s/ Mark P. Kindall*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 29, 2018, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system.

/s/ Mark P. Kindall
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