UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
GREENBELT DIVISION

ANITA LANN, et al.,	)	
	)	
Plaintiffs,	)	Civil Action No.: 14-cv-2237 (PJM)
	)	
v.	)	
	)	
TRINITY HEALTH CORPORATION, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF THE CLASS ACTION SETTLEMENT AGREEMENT

I. INTRODUCTION

Plaintiffs Anita Lann, Jean Atcherson, Albert R. Chavies, and Thomas Holland ("Named Plaintiffs"), by and through their attorneys, respectfully move the Court for an Order: (1) preliminarily approving the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement")[1] described herein; (2) preliminarily certifying the proposed Settlement Class pursuant to Federal Rules of Civil Procedure 23(b)(1) and/or 23(b)(2); (3) approving the form and method of Class Notice; and (4) setting a date and time for a hearing (the "Fairness Hearing") for consideration of final approval of the Settlement, of payment of attorneys' fees and expenses, and

[1] A copy of the Settlement Agreement is attached as Ex. 1 to the Declaration of Michelle C. Yau ("Yau Decl.") filed herewith. Capitalized terms not otherwise defined in this memorandum shall have the same meaning ascribed to them in the Class Action Settlement Agreement.

of a potential Incentive Award to Named Plaintiffs and Plaintiff Mary Beth Henrick[2] (collectively "Plaintiffs").[3]

The Settlement resolves the claims of all Plaintiffs in this consolidated case[4] against all Defendants, and was reached after vigorous motion practice, full briefing on motions to dismiss before the district courts in each case prior to consolidation, and arm's-length negotiations with a mediator (hereinafter, the consolidated cases are referred to as the "Action"). The Settlement is an excellent result for the proposed Settlement Class of participants in and beneficiaries of the Plans:[5] it provides for significant Plan provisions which will enhance the retirement security of the members of the Settlement Class—in essence mimicking some of ERISA's key provisions for the next fifteen years. Additionally, the Settlement provides substantial monetary consideration to the Plans.

II. BACKGROUND

A. Procedural History

[2] The Settlement Agreement defines "Plaintiffs" to include all Named Plaintiffs, as well as Mary Beth Henrick. Ms. Henrick participated actively in the CHE litigation – including by assisting Class Counsel with their investigation of the case, and was deposed by CHE defense counsel. Class Counsel intended to add Ms. Henrick as a Named Plaintiff in the CHE case via amendment had the litigation progressed; that the litigation settled before this became possible should not prevent Ms. Henrick from being eligible for an Incentive Award in recognition of her essential participation in and assistance with the CHE litigation.

[3] *See* Yau Decl. at Ex. 2 ([Proposed] Order Preliminarily Approving Settlement, Notice Procedures and Confirming Final Settlement Hearing ("Preliminary Approval Order")); Ex.3 Draft Notice of Proposed Settlement of ERISA Class Action Litigation, Settlement Fairness Hearing, and Motion for Attorneys' Fees and Reimbursement of Expenses ("Draft Notice of Proposed Settlement"); and Ex. 4 ([Proposed] Order and Final Judgment).

[4] *Chavies, et al. v. Catholic Health East, et al.*, a related action formerly pending in the United States District Court for the Eastern District of Pennsylvania, was transferred to this Court and consolidated with this action solely to effect this Settlement. See *Chavies, et al. v. Catholic Health East, et al.*, Order Granting Motion to Consolidate, No. 16-1417, ECF No. 98; *Trinity*, Order Granting Motion to Consolidate , ECF No. 74.

[5] "Plan" or "Plans" are defined in ¶ 1.14 of the Settlement.

1. *Chavies v. Catholic Health East*

On March 28, 2013, Plaintiffs Chavies and Holland filed a putative class action complaint in the United States District Court for the Eastern District of Pennsylvania against Catholic Health East ("CHE") – a large, non-profit healthcare provider – and various other defendants ("CHE Defendants") alleging violations of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). *Chavies, et al. v. Catholic Health East, et al.,* No. 16-1417, Compl. ("CHE Complaint"), ECF No. 1. Plaintiffs in the CHE case ("CHE Plaintiffs") were and are represented by Cohen Milstein Sellers & Toll, PLLC and Keller Rohrback L.L.P. (collectively, "Class Counsel"). The CHE Complaint alleged that the CHE Defendants denied ERISA protections to the participants in and beneficiaries of certain pension plans sponsored by CHE (the "CHE Plans") by incorrectly claiming that the CHE Plans qualified as ERISA exempt "Church Plans." On July 1, 2014, after the CHE case was filed, CHE merged with Trinity Health Corporation ("Trinity Health"), also a large, non-profit healthcare provider, bringing the Plans at issue in both cases under the same Trinity umbrella. Settlement ¶ 1.22.

On June 17, 2013, the CHE Defendants moved to dismiss the CHE Plaintiffs' claims for lack of subject matter jurisdiction and for failure to state a plausible claim to relief. *CHE,* Mot. to Dismiss Pls.' Compl., ECF No. 33. Following the oral argument, the court denied the motion without prejudice and ordered the parties to engage in jurisdictional discovery on the issue of whether CHE is a "church" within the meaning of ERISA. *CHE,* Order Denying Defs.' Mot. to Dismiss and Pls.' Mot. to Strike, ECF No. 67. For several months thereafter, the parties engaged in fact and expert discovery, and prepared to file *Daubert* and dispositive motions regarding whether CHE is a church. *CHE*, Order Setting Daubert Mots. Deadline, ECF No. 78. On January 1, 2015, the district court in the CHE case stayed the proceedings pending the Third Circuit's decision in a related Church Plan case, *Kaplan v. Saint Peter's Healthcare System*, 810 F.3d 175

(3d Cir. 2015).[6] *CHE,* Order Granting Defs.' Unopposed Mot. to Stay Proceedings, ECF No. 80.

2. *Lann v. Trinity Health*

On July 11, 2014, a substantially similar putative class action complaint was filed in this Court against Trinity Health and various other defendants ("Trinity Defendants") alleging violations of ERISA. *Trinity*, Compl. ("Trinity Compl."), ECF No. 1. The Trinity Complaint alleged that the Trinity Defendants denied the Plans' participants and beneficiaries the protections of ERISA by claiming that certain pension plans sponsored by Trinity Health and its related entities (the "Trinity Plans") qualified as ERISA exempt "Church Plans." The Trinity Complaint also alleged that the Trinity Plans did not qualify as ERISA exempt Church Plans. With respect to the Trinity Complaint, Plaintiffs were and are also represented by Class Counsel.

Trinity Defendants filed a partial motion to dismiss the Trinity Complaint on October 6, 2014, arguing that a Church Plan could be established by a non-church entity and still qualify as an ERISA-exempt Church Plan, which the Court granted. *Trinity*, Mot. to Dismiss for Failure to State Claim, ECF No. 40 & Order Granting Mot. to Dismiss, ECF No. 54. The Trinity Defendants filed a second partial motion to dismiss on April 10, 2015 arguing that Trinity and the Trinity Benefits Committee are associated with and controlled by the Roman Catholic Church as a matter of law and that Plaintiffs' challenge to the constitutionality of the Church Plan exemption fails as a matter of law. *Trinity*, Second Mot. to Dismiss for Failure to State Claim, ECF No. 60. This motion, which was fully briefed and scheduled for argument, was stayed while the Parties negotiated the Settlement.

B. Settlement Negotiations

[6] On December 29, 2015, after the parties reached an agreement in principle settling the CHE and Trinity cases, the Third Circuit issued its decision in *Kaplan v. Saint Peter's Healthcare System*, holding that under the unambiguous terms of ERISA a church exempt plan must be established by a church, as opposed to a qualifying church agency. 810 F.3d 175.

Following motion practice in the separate actions, Trinity (which now includes CHE) participated in settlement negotiations with Class Counsel for the Plaintiffs in both lawsuits, presided over by the experienced JAMS mediator Robert Meyer, Esq. Yau Decl. ¶ 7. There were multiple mediation sessions. As discussed in more detail below, *see infra* Section IV.A.3, following negotiations with the mediator, the Parties orally reached an agreement in principle to settle both cases. Yau Decl. ¶ 10. In the weeks following this oral agreement, the Parties engaged in continued negotiations regarding the key terms of the agreement, and memorialized those terms in a "term sheet." *Id*. ¶ 11. The Parties notified the mediator and the respective district courts of the settlement. *Trinity*, Joint Notice of Settlement, ECF No. 68; *Chavies*, Joint Notice of Settlement, ECF No. 81. The Parties also agreed to jointly move to transfer the CHE case to this Court in order to consolidate the CHE case with the Trinity case for purposes of settlement. *Chavies*, Order Granting Joint Mot. to Transfer, ECF No. 98; *Trinity*, Joint Mot. to Consolidate, ECF No. 73. This Court granted the Parties' motion to consolidate on May 24, 2016. Order Granting Mot. to Consolidate, ECF No. 74.

The Settlement Agreement now before the Court is a detailed comprehensive agreement based on the term sheet. Yau Decl. ¶ 12. It was executed on April 26, 2016. *Id*. The Settlement is the result of lengthy and sometimes contentious arm's-length negotiations between the Parties. *Id*. at ¶ 13. The process was thorough, adversarial, and professional.

C. Terms of the Settlement Agreement

The following summarizes the principal terms of the Settlement: *See* Yau Decl. at ¶ 3, Ex. 1.

1. <u>Non-Monetary Equitable Consideration</u>. The key concept of the Settlement Agreement is that the participants in the Plans will receive certain ERISA-like protections for the next fifteen years. The Plans will remain Church Plans, but, provided that Trinity (or an entity

controlled by Trinity) continues to sponsor the Plans, Trinity will guarantee the Plans have sufficient funds to pay the accrued benefits payable to participants under the terms of the Plans for fifteen years commencing on the Effective Date of Settlement. Settlement ¶ 9.2. Trinity has made similar financial commitments for participants should there be a plan termination or merger within fifteen years commencing on the Effective Date of Settlement and, during this period, Trinity will not amend a Plan to decrease the accrue benefit of any participant in that Plan. *Id*. ¶¶ 9.2 to 9.4. As discussed in more detail below, *see infra* IV.B.3, these commitments are crucial because the Plans, like most Church Plans, are "fund-specific," meaning that the Plans' financial responsibility for benefits is limited *solely* to the amount of assets held in the Plans' trust fund. Now, because of this Settlement, for fifteen years commencing on the Effective Date of Settlement, so long as Trinity (or an entity controlled by Trinity) continues to sponsor a Plan, if the assets in the Plan's trust fund are insufficient to pay the accrued benefits under the Plan, Trinity will supplement the assets of the trust fund.

2. Monetary Consideration. Trinity will make an annual aggregate $25 million contribution to the Plans for three years, totaling a $75 million contribution. Settlement ¶ 8.1.1. In addition to the $75 million total contribution to the Plans, Trinity will also pay $550 each to 219 individuals who were among the participants who elected and received a lump sum distribution during the lump sum window period in 2014 (as defined by the Plans). Settlement ¶ 8.1.3. Finally, Trinity will pay $1,300,000, on a *pro rata* basis, to the 7,371 former participants in the Plans who left covered service under the Plans after completing at least three but less than five years of vesting service and who, as a result, allegedly forfeited a benefit accrued under a cash balance or pension equity formula. Settlement ¶ 8.1.4.

3. Other Equitable Consideration. The Settlement also includes equitable

provisions, mimicking certain provisions of ERISA, concerning plan administration, summary plan descriptions, notices (annual summaries, pension benefits statements, current benefit values), and the Plans' claim review procedure. Settlement ¶¶ 9.5-9.8.

4. **Class.** The Settlement contemplates that the Court will certify a non-opt-out class under Federal Rule of Civil Procedure 23(b)(1) and/or (b)(2). Settlement ¶ 3.2.6. The Settlement Class is defined as: All who were participants (whether vested or non-vested) in or beneficiaries of the Plans identified in Schedule A of the Settlement Agreement on or before the Effective Date of Settlement. Settlement ¶¶ 1.14, 1.19.

5. **Released Claims**. Section 4 of the Settlement generally defines the Released Claims as claims brought by Plaintiffs, or claims that could have been asserted by Plaintiffs based upon the allegations in the instant Action. However, there is a significant carve out from the Released Claims. Recognizing that the law on Church Plans is still in flux, the Settlement Agreement provides that Trinity will not be released prospectively in the event of certain specified developments in the law, such as a decision by the United States Supreme Court, which makes clear that the Plans are not Church Plans. Settlement ¶ 4.1.4.

6. **Notice**. The draft [Proposed] Preliminary Approval Order, attached as Exhibit 2 to the Yau Declaration, provides for the following notices: (a) a mailed notice, to be mailed to the last known address of members of the Settlement Class; (b) for members of Group II and III, an enclosure will accompany the notice stating that the individual is a member of Group II or III (whichever is applicable); and (c) internet publication of the Settlement Agreement and Class Notice at www.cohenmilstein.com/churchplansettlements and www.kellersettlements.com. Defendants will pay the cost for notice. *See* Yau Decl. at Ex. 2 (Preliminary Approval Order), Ex. 3 (Draft Class Notice).

7. **Attorneys' Fees**. By separate application to be filed prior to the Fairness Hearing, Class Counsel will seek an award of attorneys' fees, expenses and Incentive Awards for certain Plaintiffs, in an amount not to exceed $8 million. The Settlement Class shall be notified of these details in the Class Notice. The attorneys' fees are separate from the $75 million dollar contribution to the Plans—the attorneys' fees will not reduce that contribution. Settlement ¶ 8.1.5.

D. Reasons for the Settlement

Plaintiffs have entered into the Settlement with an understanding of the strengths and weaknesses of their claims. This understanding is based on: (1) the motion practice undertaken by the Parties in the district courts in both cases; (2) investigation and research; (3) discovery conducted in the CHE case; (4) the likelihood that Plaintiffs would prevail at trial; (5) the range of possible recovery; (6) the substantial complexity, expense, and duration of litigation necessary to prosecute these actions through trial, post-trial motions, and likely appeal, and the significant uncertainties in predicting the outcome of this complex litigation; and (7) Defendants' determination to fight and contest every aspect of these cases. Having undertaken this analysis, Class Counsel and Plaintiffs have concluded that the Settlement is fair, reasonable, and adequate, and should be presented to the Court for approval.

III. PROPOSED SCHEDULE

The Parties have agreed to the following set of deadlines, the specific dates of which will be determined after the Court enters the Preliminary Approval Order and sets a Fairness Hearing date:

Event	Time for Compliance
Deadline for CAFA Notice	10 days after entry of Preliminary Approval Order

Deadline for mailing of Class Notice and posting Class Notice to website	45 days after entry of the Preliminary Approval Order
Deadline for filing Plaintiffs' motions for final approval, attorneys' fees and expenses, and Incentive Award to Plaintiffs	45 days prior to the proposed Fairness Hearing
Deadline for the Settlement Class to comment upon or object to the proposed Settlement	28 days prior to the proposed Fairness Hearing
Deadline for filing Plaintiffs' reply in support of motions for final approval, attorneys' fees and expenses, and Incentive Award to Plaintiffs, and for the Parties to respond to any comments or objections	7 days prior to the proposed Fairness Hearing
Proposed Fairness Hearing	No sooner than 120 days after entry of the Preliminary Approval Order[7]

IV. THE SETTLEMENT AGREEMENT IS FAIR, REASONABLE AND ADEQUATE AND MERITS PRELIMINARY APPROVAL

Strong judicial policy favors resolution of class action litigation prior to trial. *Case v. Plantation Title Co.*, Nos. 9:12-CV-2518-DCN-BM, 9:12-CV-2804-DCW-BM, 2015 WL 1034461, at *6 (D.S.C. Mar. 5, 2015) (citing *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)); *see also Durm v. Am. Honda Fin. Corp.*, No. WDQ-13-223, 2015 WL 6756040, at *4 (D. Md. Nov. 4, 2015) ("There is a strong presumption in favor of finding a settlement fair." (citing *Lomascolo v. Parsons Brinkerhoff, Inc.*, No. 1:08CV1310 (AJT/JFA)2009 WL 3094955, at *10 (E.D. Va. Sept. 28, 2009)).[8]

[7] Pursuant to the U.S. Class Action Fairness Act of 2005, at 28 U.S.C. § 1715(d), the date of the Fairness Hearing must be at least 90 days after notices are served on the appropriate state and federal officials.

[8] 6 James Wm. Moore et al., *Moore's Federal Practice* (3d ed. 1999); *Manual for Complex Litigation* (THIRD) § 30.42 (1995); Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 13.44 (5th ed. 2014) ("The law favors settlement, particularly in class actions and other

Fed.R.Civ.P. 23(e) requires a district court to review the proposed settlement of a class action to determine whether it is "fair, reasonable, and adequate." Fed.R.Civ.P. 23(e)(2); *see Durm*, 2015 WL 6756040, at *3 (citing *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991); *McDaniels v. Westlake Servs., LLC*, No. ELH-11-1837, 2014 WL 556288, at *8 (D. Md. Feb. 7, 2014) (same)). "Review of a proposed class action settlement generally involves two hearings." *In re Am. Cap. S'holder Derivative Litig.*, Nos. 11–2424 PJM, 11-2428 PHM/AW, 11-2459 PJM, 11-2459 RWT, 2013 WL 3322294, at *2 (D.Md. June 28, 2013) (quoting *Manual for Complex Litigation* (Fourth) § 21.632 (2004) (footnote omitted)). The first is a "preliminary fairness" hearing, where the court makes "a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms" and "direct[s] the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." *Id.* The second is the "fairness" hearing, where the court assesses whether the proposed settlement is "fair, reasonable, and adequate" for all class members. *Id.* (quoting *Manual for Complex Litigation* (Fourth) § 21.634).

At this juncture, the Court is concerned with the first hearing. Although the Court's "essential inquiry" for both hearings is the same, i.e., "whether the proposed settlement is fair, adequate, and reasonable," the Court's goal at the preliminary fairness hearing is to assess whether there has been a basic showing that the proposed Settlement Agreement is "sufficiently within the range of reasonableness so that notice ... should be given." *In re Am. Capital S'holder Derivative Litig.*, 2013 WL 3322294 at *3; *see also In re Mid–Atlantic Toyota Antitrust Litig.*, 564 F.Supp. 1379 (D. Md. 1983) (goal at preliminary fairness hearing is to determine whether "probable

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complex cases where substantial resources can be conserved by avoiding lengthy trials and appeals.") and *Newberg on Class Actions* § 13:45 ("[A] court will presume that a proposed class action settlement is fair when certain factors are present, particularly evidence that the settlement is the product of arms-length negotiation, untainted by collusion.").

cause" exists to submit the proposal to members of the class and to hold a full-scale hearing on fairness) (quoting *Manual for Complex Litigation* § 1.46 (5th ed. 1982)). Because a settlement hearing is not a trial, the Court's role is more "balancing of likelihoods rather than an actual determination of the facts and law in passing upon . . . the proposed settlement." *Durm*, 2105 WL 6756040 at *4 (quoting *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975)); *see also Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) (to evaluate the fairness of a proposed settlement the court need not "decide the merits of the case or resolve unsettled legal questions").

In keeping with these principles, the Fourth Circuit has identified a number of factors that are relevant in determining whether a settlement is fair and adequate. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158–59 (4th Cir. 1991); *see also Berry v. Schulman*, 807 F.3d 600, 614 (4th Cir. 2015). The "fairness" evaluation centers on the settlement process, while the "adequacy" evaluation is about the substance of the settlement. *See In re Am. Cap. S'holder Derivative Litig.*, 2013 WL 3322294 at *3; *Whitaker v. Navy Fed. Credit Union*, No. RDB 09-CV-2288, 2010 WL 3928616, at *2 (D. Md. Oct. 4, 2010); *In re Mid–Atlantic Toyota Antitrust Litig.*, 564 F.Supp. at 1385.

A. The Proposed Settlement Is Fair

The fairness analysis is intended primarily to ensure that a "settlement [is] reached as a result of good-faith bargaining at arm's length, without collusion." *Berry v. Schulman*, 807 F.3d at 614 (quoting *In re Jiffy Lube*, 927 F.2d at 159). In making this determination, a court should consider "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of ... class action litigation." *Id.* All of these factors weigh in favor of approving the proposed Settlement in the Action.

1. The Posture of the Cases

At the time the Settlement was proposed, ongoing fact and expert discovery in the CHE case was stayed pending the Third Circuit's decision in *Saint Peter's*. In the Trinity case, this Court had granted Defendants' first motion to dismiss, and the Parties had fully briefed a second motion to dismiss and were awaiting oral argument.

2. The Extent of Discovery

Prior to filing their claims, Class Counsel extensively investigated the publicly available information and investigated the facts, including review and analysis of Plan-related documentation, review of the Defendants' disclosures, analysis of Defendants' publicly available financial statements, and interviews of Plan participants. Yau Decl. ¶ 14. Additionally, in support of their motions to dismiss, Defendants submitted over 710 pages of documents in the CHE case and over 882 pages of documents in the Trinity case, all of which Class Counsel reviewed. *Id*. ¶ 15.

Class Counsel also responded to three motions to dismiss in the two cases, and conducted extensive fact and expert discovery in the CHE case. *Id*. ¶ 16. The absence of formal discovery in the Trinity case in no way undermines the integrity of the Settlement given the extensive investigation that occurred as a result of proceedings thus far.

3. The Circumstances Surrounding the Negotiations

As noted above, the Parties reached the Settlement Agreement following negotiations with the assistance of an experienced mediator, Robert A. Meyer, Esq. Yau Decl. ¶ 7. During the mediation process, the Parties met in person with Mr. Meyer on three separate occasions over the course of several months, and were in regular contact with the Mr. Meyer both via telephone and in writing. *Id*. ¶ 8. Prior to the first in-person mediation session, the Parties submitted confidential statements to the mediator and settlement proposals to each other. *Id*. ¶ 9. The negotiations were conducted

at arm's length and without collusion. *Id*. ¶ 13.

4. The Experience of Class Counsel

Class Counsel has extensive experience in handling ERISA Church Plan litigation and other class action ERISA cases. Yau Decl. ¶ 17. Furthermore, Class Counsel has been able to develop the issues in this case to an appropriate point for settlement. They have conducted an extensive investigation; engaged in motion practice, including briefing on the motions to dismiss; and participated in numerous negotiations concerning the issues in this litigation. Yau Decl. ¶¶ 18. While there is much to be done to prepare the cases for trial, Plaintiffs possess a comprehensive understanding of both the strengths and the weaknesses of their claims, and believe that the Settlement is fair, reasonable and is in the best interests of the Plans and the Settlement Class. This factor weighs heavily in favor of both preliminary and final approval of the Settlement.

B. The Proposed Settlement Is Adequate

To evaluate the adequacy of a proposed settlement, the court "weigh[s] the likelihood of the plaintiff's recovery on the merits against the amount offered in settlement." *In re Mid–Atlantic Toyota Antitrust Litig.*, 564 F.Supp. at 1384 (quoting *In re Montgomery Cnty. Real Estate Antitrust Litig.*, 83 F.R.D. 305, 315–16 (D. Md. 1979)). In doing so, a court should consider: "(1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement." *Jiffy Lube*, 927 F.2d at 159; *In re Lupron Mktg. & Sales Litig.*, 345 F.Supp.2d 135, 137–38 (D. Mass 2004); *In re Titanium Dioxide Antitrust Litig.*, No. RDB-10-0318, 2013 WL 5182093, at *3-4 (D. Md. Sept. 12, 2013).

1. On the Merits, the Relative Strength of Plaintiffs' Case Is Uncertain

Plaintiffs believe that pursuant to ERISA only a church can establish a Church Plan, and therefore the Plans are not ERISA-exempt Church Plans because they were established by Trinity (or CHE)— both health care corporations. However, Plaintiffs are aware that the Fourth Circuit could disagree with Plaintiffs (as did this Court) on this threshold statutory argument. Additionally, Plaintiffs recognize that the Fourth Circuit could disagree with Plaintiffs on their alternative arguments, e.g., that Trinity is not controlled by or associated with the Catholic Church.[9]

2. Plaintiffs Would Likely Encounter Multiple Defenses at Trial, Following Extended and Expensive Additional Litigation

A trial on the merits of an ERISA case such as this would be a massive undertaking, presenting substantial risks, expense, and delay. Defendants have forcefully defended their actions with respect to the Plans to date, and there is no reason to believe they would not continue to do so through trial and on appeal if necessary. A favorable decision by this Court (or the CHE court, if the Settlement is not approved) on the merits is not a foregone conclusion sufficient to remove the impetus for settlement. The proposed Settlement Agreement provides immediate and certain monetary and non-monetary consideration to the Plans for the benefit of the Settlement Class, which is more beneficial for the Plans' participants than the mere possibility of a more significant recovery, if any, after an expensive and protracted trial and potential appeal.

[9] As to the Third Circuit, the law was unclear at the time the Parties reached an agreement in principle settling the CHE and Trinity cases. The settlement term sheet was executed on December 7, 2015, and the Third Circuit issued its decision in *Kaplan v. Saint Peter's Healthcare System* on December 29, 2015. 810 F.3d 175 (3d Cir. 2015) (holding that under the unambiguous terms of ERISA a church plan must be established by a church, as opposed to a church agency). Defendants in the *Kaplan* case have filed seeking Supreme Court review of that decision Pet. For Writ of Cert., *St. Peter's Healthcare System v. Kaplan,* No. 16-86 (U.S. July 18, 2016); *see also* Mot. to Stay Proceedings, *Kaplan v. Saint Peter's Healthcare Sys.,*No. 13-2941-MAS-TJB (D.N.J. Apr. 27, 2016), ECF No. 140. Thus, even in the Third Circuit the issue is still under review and a final resolution may be months, or years, away.

As evidenced by the vigor with which they have prosecuted the actions and the substantial amount of time and money they have expended to that end, Plaintiffs and Class Counsel believe strongly in Plaintiffs' claims and the legal basis for them. But risk is inherent in any litigation, especially here, where this Court granted the Trinity Defendants' first motion to dismiss and the CHE court ordered discovery to inform its decision on the CHE Defendants' motion to dismiss. Moreover, the area of the law—ERISA Church Plan litigation—is one of the most nuanced, unpredictable, and rapidly developing in ERISA jurisprudence. Indeed, three such cases have gone before courts of appeal on interlocutory appeals.[10] Thus far, though the Third and the Seventh Circuits have ruled in favor of Plaintiffs' interpretation of ERISA's Church Plan exemption, defendants in those cases have filed Petitions for *Certiorari* seeking Supreme Court review.[11] *See also* Mot. to Stay Proceedings, *Kaplan v. Saint Peter's Healthcare Sys.,*No. 13-2941-MAS-TJB; Order Granting Stay of Mandate Pending Cert. Pet., *Stapleton v. Advocate Health Care Network,* No. 15-1368 (7th Cir. Apr. 26, 2016), ECF No. 68. Set against this legal landscape, there is sufficient uncertainty to warrant settlement.[12]

If this Settlement is not approved, a substantial amount of work will need to be completed in both cases, including completion of fact and expert discovery, class certification, designation of witnesses and exhibits, preparation of pre-trial memoranda and proposed findings of fact and

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[10] *Kaplan*, 810 F.3d 175, *Stapleton v. Advocate Health Care Network & Subsidiaries*, 817 F.3d 517 (7th Cir. 2016); and *Rollins v. Dignity Health*, No. 15-15351 (9th Cir. filed Feb. 26, 2015).

[11] Pet. For Writ of Cert., *St. Peter's Healthcare System v. Kaplan,* No. 16-86 (U.S. July 18, 2016); Pet. For Writ of Cert., *Advocate Health Care Network, et al. v. Stapleton, et al.,* No. 16-74 (U.S., July 15, 2016).

[12] *Compare, e.g.*, *Kaplan,* 810 F.3d 175; *Stapleton*, 817 F.3d 517; *Chavies v. Catholic Health East* (E.D. Pa. Mar. 28, 2014); and *Rollins v. Dignity*, 19 F. Supp. 3d 909 (N.D. Cal. 2013); *with Overall v. Ascension*, 23 F. Supp. 3d 816 (E.D. Mich. 2014); *Medina v. Catholic Health Initiatives*, No. 13-cv-01249-REB-KLM, 2014 WL 4244012 (D. Colo. Aug. 26, 2014); *and Lann v. Trinity Health Corp.* (D. Md. Feb. 24, 2015).

conclusions of law, presentation of witnesses and evidence at trial, and, depending on the trial court's ruling on the merits, briefing of the losing party's almost-certain appeal. Again, though Plaintiffs believe that their claims would be successful, they nonetheless are aware of the risks associated with proceeding to trial. In this case, Defendants have forcefully defended their actions with respect to the Plans, and have shown they will not hesitate to litigate this matter fully through trial and appeal, should Plaintiffs be successful at trial. Moreover, Defendants are represented by highly experienced and competent counsel.

3. While Plaintiffs Could Recover In Further Litigation, the Settlement Offers Similar Protections

In view of the potential obstacles to recovery outlined above, the Settlement payment of over $75 million to the Plans and certain members of the Settlement Class who were participants in or beneficiaries under the Plans is a highly favorable recovery. It should further be stressed that the non-monetary consideration provided by Defendants provides substantial benefits to the Plans' participants and beneficiaries. Provided that Trinity (or an entity controlled by Trinity) continues to sponsor the Plans, Trinity has guaranteed in the Settlement that the Plans will have sufficient funds to pay the accrued benefits payable to participants under the terms of the Plans for fifteen years commencing on the Effective Date of Settlement. Settlement ¶ 9.2. Trinity has made similar financial commitments for participants should there be a plan termination or merger within fifteen years commencing on the Effective Date of Settlement and, during this period, Trinity will not amend a Plan to decrease the accrue benefit of any participant in that Plan. Specifically, Trinity has guaranteed for fifteen years commencing on the Effective Date of Settlement: (1) none of the Plans may be terminated unless there are sufficient assets to meet the accrued benefits (as defined by the relevant Plan), earned by participants at the time of Plan termination or benefit annuitization; (2) if any Plan is amended, the amendment will not decrease any participant's accrued benefit under the Plan; and (3)

if any Plan is merged into another Plan, participants will be entitled to the same (or greater) benefits post-merger as they enjoyed before the merger. *Id*. ¶¶ 9.2 to 9.4.

These commitments are significant, as the liabilities of the Plans are "fund-specific." Prior to the enactment of ERISA, the sponsor of a defined benefit plan could limit its responsibility for benefit levels to whatever assets were contained in the trust fund, i.e., a "fund-specific plan." John Langbein *et al.*, Pension and Employee Benefit Law 187-88 (6th ed. 2015). As explained in the *Lann v. Trinity* Complaint, among the factors that led to the enactment of ERISA were the widely publicized failures of certain defined benefit pension plans, especially the fund-specific plan for employees of Studebaker Corporation, an automobile manufacturing company which defaulted on its pension obligations in 1965. Trinity Compl. ¶ 25 (citing John Langbein *et al.*, Pension and Employee Benefit Law 78-83, (5th ed. 2010)). ERISA was enacted, in part, to prohibit the fund-specific defined benefit promise which failed the Studebaker employees. *Id.* Plaintiffs allege that in claiming the Church Plan exemption, the Plan is, in essence, a Studebaker-esque pre-ERISA plan. Accordingly, the Settlement's non-monetary, equitable consideration provides the Plans' participants and beneficiaries with several important ERISA-like protections for the next fifteen years that they otherwise would lack.

Additionally, the Settlement provides: should ERISA's Church Plan provision be amended to provide that a Church Plan must be established by a church or a convention or association of churches, or if the IRS determines that a Plan does not qualify as a Church Plan, or if the United States Supreme Court holds that Church Plans must be established by churches, the Parties prospectively will not have released claims derived therefrom. Settlement ¶ 4.1.4. The Settlement also includes other equitable provisions which mimic the provisions of ERISA, concerning plan

administration, summary plan descriptions, notices (annual summaries, pension benefits statements, current benefit values), and the Plans' claim review procedure. *Id*. ¶¶ 9.5-9.8.

4. The Degree of Opposition to the Settlement

Class Counsel is not aware at this time of any objections to the proposed Settlement, and will address any objections at the final approval hearing.

V. CERTIFICATION OF THE CLASS IS APPROPRIATE

Class certification is governed by Federal Rule of Civil Procedure 23, regardless of whether certification is sought pursuant to a contested motion or, as here, pursuant to a settlement. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 619-20 (1997). Thus the Court may certify the proposed class at this time upon finding that the action satisfies the four prerequisites of Rule 23(a) and one or more of the three subdivisions of Rule 23(b). *Id.*

Courts in this jurisdiction have consistently found that class certification is appropriate in ERISA cases. *See Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 459 (D. Md. 2014); *see also* Fed. R. Civ. P. 23(b)(1)(B) Advisory Committee's Note (1966 Amendment) (certification under Fed. R. Civ. P. 23(b)(1) is appropriate in cases charging breach of trust by a fiduciary to a large class of beneficiaries). Congress has similarly embraced the use of representative actions to enforce ERISA. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985) (noting Congress' clearly expressed intent that ERISA "actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole"). Thus this Action, which seeks relief on behalf of the Plans, is precisely the type of case that Federal Rule of Civil Procedure 23 was enacted to address.

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

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Here, Plaintiffs allege that Defendants collectively

employ approximately 116,000 individuals, and many if not all of those persons are likely members of the Class. *See* Trinity Compl. ¶ 42 (alleging that, prior to the merger with CHE, Trinity employed approximately 56,000 individuals); *Chavies* Compl. ¶ 83 (alleging that CHE employs approximately 60,000 individuals). The Settlement Class is thus too large for joinder to be practicable. *See, e.g., Boyd*, 299 F.R.D. at 458 (certifying an ERISA class of more than 20,000 individuals and noting that the class was substantially larger than other classes that have been certified in the Fourth Circuit (citing cases)).

Rule 23(a)(2) requires that a proposed class action raise "questions of law or fact common to the class." "A common question is one that can be resolved for each class member in a single hearing," and does not "turn[ ] on a consideration of the individual circumstances of each class member." *Boyd*, 299 F.R.D. at 458 (citing *Thorn v. Jefferson–Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006)). Plaintiffs have identified a series of common questions of law and fact, including: (1) whether the Plans are exempt from ERISA as Church Plans, and, if not (2) whether the fiduciaries of the Plans have failed to administer and fund the Plans in accordance with ERISA. All of these questions and issues are common to the Settlement Class. *See, e.g., Boyd*, 299 F.R.D. at 458 (identifying similar common issues in an ERISA breach of fiduciary duty case) (citing *Tatum v. R.J. Reynolds Tobacco Co.*, 254 F.R.D. 59, 64 (M.D.N.C. 2008) (same); *Banyai v. Mazur*, 205 F.R.D. 160, 163 (S.D.N.Y. 2002) (same)).

Rule 23(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. To show typicality, the plaintiff "must be part of the class and possess the same interest and suffer the same injury as the class members." *Boyd*, 299 F.R.D. at 458 (citing *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982)). The typicality requirement focuses on "whether a sufficient relationship exists between the injury to the named plaintiff and

the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Boyd*, 299 F.R.D. at 458 (citing *Hewlett v. Premier Salons Int'l, Inc.*, 185 F.R.D. 211, 217 (D. Md. 1997)). Plaintiffs' claims arise from the same course of events as the claims of the Class – Defendants' alleged failure to maintain the Plans in accordance with ERISA. Moreover, with each member of the Settlement Class asserting the same claims arising from the same conduct by Defendants and seeking the same relief on behalf of the Plans, there can be no fair dispute that the claims asserted by Plaintiffs are typical for purposes of Rule 23(a)(3).

Finally, Rule 23(a)(4) requires "representative parties [who] will fairly and adequately protect the interests of the class." Representation is adequate where "(1) the named plaintiff's interests are not opposed to those of other class members, and (2) the plaintiff's attorneys are qualified, experienced, and capable." *Boyd*, 299 F.R.D. at 459 (citing *Mitchell–Tracey v. United Gen. Title Ins. Co.*, 237 F.R.D. 551, 558 (D. Md. 2006)).

These requirements are easily met in the case at bar. Plaintiffs' interests are the same as those of the absentee members of the Class: all seek to increase the retirement security of the Plans, through monetary and non-monetary relief. There can be no question that the Named Plaintiffs' interests are aligned with those of the Class. Moreover, Plaintiffs have retained qualified counsel with extensive experience in representing plaintiffs in class litigation, specializing in ERISA cases. Yau Decl. at ¶¶ 17.

B. The Proposed Class Satisfies the Requirements of Rule 23(b)(1) and (b)(2)

1. Individual Actions Would Create Inconsistent Adjudications Or Be Dispositive of the Interests of Absent Members

A class may be certified under Federal Rule of Civil Procedure 23(b)(1) if, in addition to meeting the requirements of Federal Rule of Civil Procedure 23(a), 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). Courts have certified classes under Federal Rule of Civil Procedure 23(b)(1) in ERISA cases for those very reasons. *See Boyd*, 299 F.R.D. at 459 (citing *In re Schering Plough Corp. ERISA Litig*., 589 F.3d 585, 604 (3rd Cir. 2009) ("In light of the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class."); *Di Felice v. U.S. Airways*, 235 F.R.D. 70, 80 (E.D.Va. 2006) ("Alleged breaches by a fiduciary to a large class of beneficiaries present an especially appropriate instance for treatment under Rule 23(b)(1).... [G]iven the derivative nature of suits brought pursuant to § 502(a)(2) on behalf of the Plan, ERISA litigation of this nature presents a paradigmatic example of a(b)(1) class."); *In re Global Crossing Sec. & ERISA Litig*., 225 F.R.D. 436, 453 (S.D.N.Y. 2004) (granting class certification under Rule 23(b)(1)(B) in a suit alleging breach of ERISA fiduciary duties)).

Moreover, the Advisory Committee on Rule 23 specifically noted that actions that "charge[] a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of . . . beneficiaries" – i.e., an action like the present action – "should ordinarily be conducted as class actions" under Rule 23(b)(1)(B). *See* Fed. R. Civ. P. 23(b)(1)(B) Advisory Committee's Note (1966 Amendment). As a result, certification of the proposed class under Rule 23(b)(1) is appropriate in this ERISA Action.

2. Defendants Have Acted on Grounds Generally Applicable to the Class and Relief for the Class as a Whole Is Appropriate

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 that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a

whole." Fed. R. Civ. P. 23(b)(2). Here, Plaintiffs allege that Defendants failed to comply with ERISA on a Plan-wide basis. The available remedies include monetary relief and remedial equitable relief to the Plans as a whole. ERISA §§ 502(a)(2) & (3).

Remedies under ERISA § 502(a)(2) are by definition plan-wide, a classic example of equitable relief. *See Massachusetts Mut. Life Ins. Co*., 473 U.S. at 140-41. While the Settlement includes monetary consideration to the Plans, that consideration is incidental to, and flows directly from, Plaintiffs' prayer for injunctive and declaratory relief. B*erger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 763-64 (7th Cir. 2003) (certifying Fed. R. Civ. P. 23(b)(2) class where ERISA plaintiffs sought declaratory relief); *see also In re Mut. Funds Inv. Litig*., MDL No. 1586, 2010 WL 2307568, at *4 (D. Md. May 19, 2010) (same); *In re Glob. Crossing Sec. & ERISA Litig*., 225 F.R.D. at 453 (same). Accordingly, Plaintiffs' claims are also properly certified under Rule 23(b)(2).

C. Rule 23(g) Is Satisfied

Federal Rule of Civil Procedure 23(g) requires the Court to examine the capabilities and resources of class counsel. Class Counsel has explained the claims brought in this action, and the time and effort already expended in connection with this litigation. Moreover, Class Counsel are among the leading litigators of ERISA actions on behalf of plaintiffs, and possess unparalleled expertise in the specific types of ERISA claims brought in this lawsuit. Yau Decl. ¶ 17. Class Counsel thus satisfy the requirements of Rule 23(g).

D. The Proposed Notice Satisfies Rule 23 and Due Process Requirements

In order to satisfy due process considerations, notice to class members must 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." *Mullane v. Cent. Hanover Bank & Tr. Co*., 339 U.S. 306, 314 (1950). Here, the proposed Class Notice describes in

plain English the Settlement; the considerations that caused Plaintiffs and Class Counsel to conclude that the Settlement is fair and adequate; the maximum attorneys' fees and Incentive Awards that may be sought; the procedure for objecting to the Settlement; and the date and place of the Fairness Hearing. In addition, for Class members in Group II and III, an enclosure will accompany the Notice stating that the individual is a member of Group II or III (whichever is applicable).

With the Court's approval, the Class Notice will be mailed to each member of the Settlement Class, no later than 45 days after entry of the Preliminary Approval Order. Last known addresses of members of the Class are available from the Plans' record-keepers. In addition, the Settlement Agreement and Class Notice will be published online at www.cohenmilstein.com/churchplansettlements and www.kellersettlements.com. These proposed forms of notice will fairly apprise members of the Class of the Settlement Agreement and their options with respect thereto, and therefore fully satisfy due process requirements. *See Newberg on Class Actions*, §§ 8.12, 8:15, 8:17, 8:28, 8:33 (5th ed. 2014). Similar Notice Plans in ERISA settlements have been approved. *Boyd*, 299 F.R.D. at 457.

VI. CONCLUSION

Class Counsel respectfully request that the Court grant Plaintiffs' motion and (i) enter the proposed Preliminary Approval Order, which provides for notice to the Class as described herein, and (ii) set a Final Fairness Hearing, along with deadlines for Plaintiffs to (a) file and serve the motion for award of attorneys' fees and expenses and for Incentive Awards for Plaintiffs; and (b) file their motion for final approval of the proposed Settlement.

Dated: August 1, 2016

Respectfully submitted,

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