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PROCEEDINGS FOLLOWING REMAND TO THE DISTRICT COURT

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INITIAL PROCEEDINGS IN DISTRICT COURT AND ON APPEAL

OPINION OF THE FIFTH CIRCUIT (AUGUST 6, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS JONES, on Behalf of Themselves and Others Similarly Situated; JOSEPH CHARLES LOHFINK, on Behalf of Themselves and Others Similarly Situated; SUE BEAVERS, on Behalf of Themselves and Others Similarly Situated; RODOLFOA REL, on Behalf of Themselves and Others Similarly Situated; HAZEL REED THOMAS, on Behalf of Themselves and Others Similarly Situated,

Plaintiffs-Appellees,

v.

SINGING RIVER HEALTH SERVICES FOUNDATION; SINGING RIVER HEALTH SYSTEM FOUNDATION; SINGING RIVER HOSPITAL SYSTEM FOUNDATION, INCORPORATED; SINGING RIVER HOSPITAL SYSTEM EMPLOYEE BENEFIT FUND, INCORPORATED; SINGING RIVER HOSPITAL SYSTEM; TRANSAMERICA RETIREMENT SOLUTIONS CORPORATION; KPMG, L.L.P.; MICHAEL J. HEIDELBERG; MICHAEL D. TOLLESON; TOMMY LEONARD; LAWRENCE H. COSPER; MORRIS G. STRICKLAND; IRA POLK; STEPHEN NUNENMACHER; HUGO QUINTANA; GARY C. ANDERSON; STEPHANIE BARNES TAYLOR; MICHAEL CREWS; SINGING RIVER

HEALTH SYSTEM; ALLEN CRONIER; MARTIN BYDALEK; WILLIAM DESCHER; JOSEPH VICE; ERIC WASHINGTON; MARVA FAIRLEY-TANNER; GRAYSON CARTER, JR.,

Defendants-Appellees.

v.

CYNTHIA N. ALMOND,

Interested Party-Appellant.

REGINA COBB, on Behalf of Themselves and Others Similarly Situated; ET AL,

Plaintiffs,

v.

SINGING RIVER HEALTH SYSTEM; BOARD OF TRUSTEES FOR THE SINGING RIVER HEALTH SYSTEM; MICHAEL J. HEIDELBERG, in Their Individual and Official Capacities; MICHAEL D. TOLLESON, in Their Individual and Official Capacities; ALLEN L. CRONIER, in Their Individual and Official Capacities; TOMMY L. LEONARD, in Their Individual and Official Capacities; LAWRENCE H. COSPER, in Their Individual and Official Capacities; MORRIS G. STRICKLAND, in Their Individual and Official Capacities; IRA S. POLK, in Their Individual and Official Capacities; STEPHEN NUNENMACHER, in Their Individual and Official Capacities; HUGO QUINTANA, in Their Individual and Official Capacities; MARVA

FAIRLEY-TANNER, in Their Individual and Official Capacities; WILLIAM C. DESCHER, in Their Individual and Official Capacities; JOSEPH P. VICE, in Their Individual and Official Capacities; MARTIN D. BYDALEK, in Their Individual and Official Capacities; ERIC D. WASHINGTON, in Their Individual and Official Capacities; G. CHRIS ANDERSON, in Their Individual and Official Capacities; KEVIN HOLLAND, in Their Individual and Official Capacities,

Defendants-Appellees.

v.

CYNTHIA N. ALMOND,

Interested Party-Appellant.

MARTHA EZELL LOWE, Individually and on Behalf of a Class of Similarly Situated Employees,

Plaintiffs,

v.

SINGING RIVER HEALTH SYSTEM; TRANSAMERICA RETIREMENT SOLUTIONS CORPORATION; KPMG, L.L.P.; GARY ANDERSON; MICHAEL CREWS; MICHAEL TOLLESON; STEPHANIE BARNES TAYLOR; MORRIS STRICKLAND; TOMMY LEONARD,

Defendants-Appellees.

v.

CYNTHIA N. ALMOND,

Interested Party-Appellant.

No. 18-60130

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:14-CV-447

Before: HIGGINBOTHAM, DENNIS,
and COSTA, Circuit Judges.

PER CURIAM*

Singing River Health System (SRHS) is a not-for-profit health system with approximately 2,400 employees.[1] In 1983, SRHS created the Employees' Retirement Plan and Trust (the "Plan"), a defined benefits pension fund.[2] By its own terms, the Plan could be modified or terminated at any time.[3] Since 2008, the Plan has required employees to contribute three per-

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

1 The facts underlying this action are set forth in more detail in this Court's prior opinion in this matter. *See Jones v. Singing River Health Servs. Found.*, 865 F.3d 285 (5th Cir. 2017).

2 The Plan was established as a successor to the Public Employees' Retirement System of Mississippi.

3 *Jones*, 865 F.3d at 289 (noting that "although the Plan states it was established in confidence that it would continue indefinitely," it also contains a provision stating that SRHS "reserve[s] the right to terminate the Plan . . . , in whole or in part, at any time").

cent of their salary, while SRHS has "the sole responsibility for making the [actuarially determined] contributions necessary to provide benefits under the Plan."[4]

From 2009 to 2014, SRHS "failed to make all but one of its contributions needed to maintain the Plan's fiscal integrity."[5] In November 2014, the Board decided to freeze and liquidate the Plan. Certain SRHS retirees immediately sought injunctive relief in the Jackson County Chancery Court, which ordered SRHS not to terminate the Plan. As a result of that order, the Plan was "frozen," meaning that no new contributions came in, but benefit payments continued to go out. In August 2015, the Chancery Court held that, as a matter of law, SRHS was indebted to the Plan for the missed contributions plus lost earnings, a sum exceeding $55 million.

More lawsuits followed, including the three now-consolidated Rule 23 class actions that provide the basis for this appeal, styled as the *Jones*, *Cobb*, and *Lowe* cases. After expedited discovery and several mediation sessions with a court-appointed mediator, the parties developed a settlement agreement. The *Jones* Plaintiffs moved for preliminary approval of the settlement, and the court granted the motion, conditionally certified the class, and approved procedures for notifying class members.

On April 1, 2016, the *Jones* Plaintiffs moved for approval of a final settlement (the "Settlement Agreement"). At its core, the Settlement Agreement requires SRHS to deposit a total of $149,950,000 into the retirement trust under a thirty-five year schedule. This sum

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[4] *Id.*

[5] *Id.*

represents the $55 million sum owed by SRHS to the Plan for missed contributions and lost earnings from 2009-2014, calculated with a six percent discount rate. SRHS also agreed to pay attorneys' fees of $6.45 million and expenses up to $125,000; the payment schedule called for a full payout by September 2018.[6]

On June 2, 2016, the district court concluded that the Settlement Agreement was fair, reasonable, adequate, and not the product of collusion, and entered an order granting final approval of the settlement. A group of Objectors appealed that order to this Court, arguing that the settlement "is illusory, provides no real protection for class members, and lacks any specificity as to how different class members will be treated should the class be certified and the settlement approved."[7]

On July 27, 2017, we issued an opinion considering each of the Objectors' arguments in turn. Though we made several findings in favor of the proposed Settlement Agreement, we also concluded that the district court "focused too narrowly on SRHS's proffered payments," and not enough on "the hospital's ability to sustain the promised settlement payments, how the settlement affects the plaintiffs, and why class counsel should receive their multimillion dollar fees up-front while significant uncertainty surrounds SRHS's future compliance."[8] We did not hold that "the settlement should not be approved, or cannot be approved as

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[6] Additional terms of the Settlement Agreement are discussed at length in our prior opinion. *See id.* at 290-92.

[7] *Id.* at 291.

[8] *Id.* at 296.

modified."[9] Instead, we held only that the settlement's terms "should have been more thoroughly examined prior to the court's approval."[10] Accordingly, we vacated and remanded for further consideration of four "illustrative" questions:

> 1. How, and how much, the future stream of SRHS's payments into the Plan, together with existing Plan assets and prospective earnings, will intersect with future claims of Plan participants, including, but not limited to, what effect the Settlement has on current retirees;
>
> 2. What are SRHS's future revenue projections, showing dollar amounts, assumptions[,] and contingencies, from which a reasonable conclusion is drawn that SRHS has the financial ability to complete performance under the settlement;
>
> 3. Why any payments from litigation involving KPMG, Transamerica or related entities are permitted to defray SRHS's payment obligation rather than supplement the settlement for the benefit of class members;
>
> 4. Why class counsel's fees should not be tailored to align with the uncertainty and risk that class members will bear.[11]

On remand, the district court ordered supplemental briefing and conducted a supplemental fairness hearing aimed at addressing each of our concerns.

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[9] *Id.* at 303.

[10] *Id.*

[11] *Id.*

After considering the new evidence, the district court once again approved the Settlement Agreement after concluding that it was fair, reasonable, and adequate. The Objectors appealed that order, arguing that "the settling parties have failed to sufficiently answer the four questions asked per the [our] mandate."

Our review at this juncture is narrow. Our prior opinion in this matter establishes the law of the case.[12] This means that we must follow our prior decisions on all legal or factual issues, including "not only . . . issues decided explicitly, but also . . . everything decided 'by necessary implication.'"[13] Moreover, "[t]he mandate rule requires a district court to remand to effect [the appellate court's] mandate and nothing else."[14] This "forecloses relitigation of issues expressly or impliedly decided by the appellate court."[15] If an appellant fails

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12 The 'law of the case' doctrine provides that 'a decision of a factual or legal issue by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court. . . . '" *Lyons v. Fisher*, 888 F.2d 1071, 1074 (5th Cir. 1989) (quoting *Goodpasture, Inc. v. M/V Pollux*, 688 F.2d 1003, 1005 (5th Cir. 1982)). *See also Musacchio v. United States*, 136 S. Ct. 709, 716 (2016) ("The law-of-the-case doctrine generally provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.") (internal quotation marks omitted).

13 *In re Felt*, 255 F.3d 220, 225 (5th Cir. 2001).

14 *Gen. Universal Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 453 (5th Cir. 2007) (quoting *United States v. Castillo*, 179 F.3d 321, 329 (5th Cir. 1999)) (internal quotation marks omitted).

15 *Gen. Universal Sys., Inc.*, 500 F.3d at 453 (internal quotation marks omitted).

to brief an issue on the first appeal, that issue is ordinarily waived.[16]

In light of the "strong judicial policy favoring the resolution of disputes through settlement," our appellate review is limited and "an approved settlement will not be upset unless the court clearly abused its discretion."[17] Having reviewed the briefs, the applicable law, and the pertinent portions of the record—and with the benefit of oral argument—we are not persuaded that the district court here abused its discretion. While the Objectors raise a number of issues in their briefing, many of their claims have been waived or merely repackage arguments already raised and rejected in their earlier appeal, and their remaining arguments are without support in the record.

AFFIRMED. The Motion to Strike Appellant's Brief is DENIED AS MOOT.

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16 *See, e.g.*, *id.* at 453-454.

17 *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. Unit A 1982). *See also Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983) ("The teaching of these cases is that the district court's approval of a proposed settlement may not be overturned on appeal absent an abuse of discretion.").

JUDGMENT OF THE FIFTH CIRCUIT (AUGUST 6, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS JONES, on Behalf of Themselves and Others Similarly Situated; JOSEPH CHARLES LOHFINK, on Behalf of Themselves and Others Similarly Situated; SUE BEAVERS, on Behalf of Themselves and Others Similarly Situated; RODOLFOA REL, on Behalf of Themselves and Others Similarly Situated; HAZEL REED THOMAS, on Behalf of Themselves and Others Similarly Situated,

Plaintiffs-Appellees,

v.

SINGING RIVER HEALTH SERVICES FOUNDATION; SINGING RIVER HEALTH SYSTEM FOUNDATION; SINGING RIVER HOSPITAL SYSTEM FOUNDATION, INCORPORATED; SINGING RIVER HOSPITAL SYSTEM EMPLOYEE BENEFIT FUND, INCORPORATED; SINGING RIVER HOSPITAL SYSTEM; TRANSAMERICA RETIREMENT SOLUTIONS CORPORATION; KPMG, L.L.P.; MICHAEL J. HEIDELBERG; MICHAEL D. TOLLESON; TOMMY LEONARD; LAWRENCE H. COSPER; MORRIS G. STRICKLAND; IRA POLK; STEPHEN NUNENMACHER; HUGO QUINTANA; GARY C. ANDERSON; STEPHANIE BARNES TAYLOR; MICHAEL CREWS; SINGING RIVER

HEALTH SYSTEM; ALLEN CRONIER; MARTIN BYDALEK; WILLIAM DESCHER; JOSEPH VICE; ERIC WASHINGTON; MARVA FAIRLEY-TANNER; GRAYSON CARTER, JR.,

Defendants-Appellees.

v.

CYNTHIA N. ALMOND,

Interested Party-Appellant.

REGINA COBB, on Behalf of Themselves and Others Similarly Situated; ET AL,

Plaintiffs,

v.

SINGING RIVER HEALTH SYSTEM; BOARD OF TRUSTEES FOR THE SINGING RIVER HEALTH SYSTEM; MICHAEL J. HEIDELBERG, in Their Individual and Official Capacities; MICHAEL D. TOLLESON, in Their Individual and Official Capacities; ALLEN L. CRONIER, in Their Individual and Official Capacities; TOMMY L. LEONARD, in Their Individual and Official Capacities; LAWRENCE H. COSPER, in Their Individual and Official Capacities; MORRIS G. STRICKLAND, in Their Individual and Official Capacities; IRA S. POLK, in Their Individual and Official Capacities; STEPHEN NUNENMACHER, in Their Individual and Official Capacities; HUGO QUINTANA, in Their Individual and Official Capacities; MARVA FAIRLEY-TANNER, in Their

Individual and Official Capacities; WILLIAM C. DESCHER, in Their Individual and Official Capacities; JOSEPH P. VICE, in Their Individual and Official Capacities; MARTIN D. BYDALEK, in Their Individual and Official Capacities; ERIC D. WASHINGTON, in Their Individual and Official Capacities; G. CHRIS ANDERSON, in Their Individual and Official Capacities; KEVIN HOLLAND, in Their Individual and Official Capacities,

Defendants-Appellees.

v.

CYNTHIA N. ALMOND,

Interested Party-Appellant.

MARTHA EZELL LOWE, Individually and on Behalf of a Class of Similarly Situated Employees,

Plaintiffs,

v.

SINGING RIVER HEALTH SYSTEM; TRANSAMERICA RETIREMENT SOLUTIONS CORPORATION; KPMG, L.L.P.; GARY ANDERSON; MICHAEL CREWS; MICHAEL TOLLESON; STEPHANIE BARNES TAYLOR; MORRIS STRICKLAND; TOMMY LEONARD,

Defendants-Appellees.

v.

CYNTHIA N. ALMOND,

Interested Party-Appellant.

No. 18-60130

D.C. Docket No. 1:14-CV-447
D.C. Docket No. 1:15-CV-1
D.C. Docket No. 1:15-CV-44

Appeal from the United States District Court
for the Southern District of Mississippi

Before: HIGGINBOTHAM, DENNIS,
and COSTA, Circuit Judges.

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

SUPPLEMENTAL MEMORANDUM OPINION AND ORDER APPROVING CLASS ACTION SETTLEMENT (JANUARY 26, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THOMAS JONES, ET AL., On Behalf of Themselves and Others Similarly Situated,

Plaintiffs,

v.

SINGING RIVER HEALTH SYSTEM, ET AL.,

Defendants.

Cause No. 1:14CV447-LG-RHW
Consolidated With 1:15CV1-LG-RHW
Consolidated With 1:15CV44-LG-RHW

Before: Louis GUIROLA, Jr.,
United States District Judge.

THIS MATTER IS BEFORE THE COURT pursuant to the September 14, 2017 mandate of the United States Court of Appeals for the Fifth Circuit, which vacated this Court's decision approving the proposed class action settlement in these consolidated lawsuits and remanded the cases for further proceedings in accordance with its opinion. After remand,

this Court ordered the parties to submit supplemental briefs and evidence and to provide supplemental notice to the class. This Court also conducted a supplemental fairness hearing on January 22, 2018, to address the issues raised by the Fifth Circuit. After thoroughly considering the submissions of the parties and the objectors, as well as the testimony, argument, and evidence presented at the hearing, this Court finds that the proposed class settlement is fair, adequate, and reasonable. The Fifth Circuit previously held that the settlement is not the product of collusion. Therefore, the settlement should be approved.[1]

BACKGROUND

The plaintiffs in these consolidated class action lawsuits allege that Singing River Health System (SRHS) underfunded the self-administered retirement plan—the Singing River Health System Employees' Retirement Plan and Trust ("the Plan")—it established for its employees in 1983.[2] Specifically, SRHS stopped making actuarial-determined contributions to the Plan during fiscal year 2009. SRHS froze the Plan on November 29, 2014; thus, no employee or employer contributions have been made to the Plan since that date. However, Plan participants have continued to receive benefits pursuant to the Plan's terms, and no

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[1] After remand, class counsel filed a supplemental request for attorneys' fees. The Court will address that request in a separate opinion.

[2] Previously, SRHS had participated in the Public Employees' Retirement System of Mississippi (PERS). SRHS employees contributed 3% of their paychecks to the Plan, while the contribution for new employees participating in PERS gradually increased over time.

payments to retirees have been missed as of the date of this Opinion.

After these consolidated lawsuits and numerous state court lawsuits were filed, the parties participated in expedited discovery as well as court-ordered mediation overseen by former Chief United States Bankruptcy Judge for the Northern District of Mississippi, David M. Houston. As a result, the parties entered into a Stipulation and Agreement of Compromise and Pro Tanto Settlement that provided for the creation of the following settlement class:

> All current and former employees of Singing River Health System who participated in the Singing River Health System Employees' Retirement Plan and Trust, including their spouses, alternate payees, death beneficiaries, or any other person to whom a plan benefit may be owed.

(Agreement at 5, ECF No. 163-1). Pursuant to the proposed settlement agreement, SRHS must deposit a total of $156,400,000 into the retirement trust pursuant to a thirty-five-year schedule agreed upon by the parties. (*Id.* at 6). The plaintiffs' expert accountant Allen Carroll has determined that the payment of this amount over thirty-five years will fully compensate the Plan for the 2009 through 2014 missed contributions. In order to assist in the facilitation of the proposed settlement, Jackson County, Mississippi, agreed to pay a total of $13,600,000 to SRHS "[t]o support the indigent care and principally to prevent default on a bond issue by supporting the operations of SRHS" in nine installments beginning upon approval of the settlement and ending on September 30, 2024. (*Id.* at 7 and Ex. B). The parties agreed that Jackson County would be

entitled to a release as a result of its contribution to the settlement. (*Id.* at 2).

SRHS also agreed to pay attorneys' fees and expenses to class counsel, subject to the approval of this Court, "provided that any such award does not exceed $6,450,000 in fees and $125,000 in documented expenses, which may include expenses incurred in connection with administering the settlement." (*Id.* at 13). The proposed attorneys' fees would be paid in four installments, beginning upon approval of the settlement and ending on September 30, 2018. (*Id.* at Ex. C). As an incentive award, Singing River has also agreed to pay $12,500, to be divided among the named plaintiffs to the Jones, Cobb, and Lowe federal lawsuits as well as the plaintiffs in two state court lawsuits. (*Id.* at 7).

The parties further agreed to "jointly petition the Chancery Court of Jackson County, Mississippi for an order requiring that the [Plan] be monitored by the Chancery Court for the duration of the payment schedule." (*Id.* at 14). Singing River's Chief Financial Officer will give quarterly reports to the special fiduciary appointed by the Chancery Court to oversee the Plan. (*Id.*) The fiduciary will also provide quarterly reports to the Chancery Court regarding the financial condition of the Plan, the financial condition of SRHS, and the status of the repayment schedule. (*Id.* at 15). As part of the Chancery Court's authority to oversee and monitor the Plan:

> Any adjustment to the Plan can only be done with Special Fiduciary recommendation and Chancery Court approval after sixty (60) days' notice to the Class Members and opportunity for hearing. If the Chancery

> Court orders any modification and/or termination of the Plan, then the Class Members will be bound by the Court's/Special Fiduciary's findings regarding distribution, Plan restructuring and/or Plan termination, subject to their rights to appeal any order of said court.

(*Id.* at 16). "This Settlement does not change the terms of the Plan distributions that are unrelated to this Settlement, which may be modified or terminated only with the approval of the Special Fiduciary and the Chancery Court." (*Id.* at 17).

The proposed settlement also gives the fiduciary authority to petition the Chancery Court to accelerate SRHS's payments if SRHS recovers money from other entities or individuals, including KPMG or Transamerica, or if additional insurance coverage becomes available to SRHS. (*Id.* at 16). Furthermore, the proposed settlement class has reserved its right to pursue claims against Transamerica, KPMG, FiduciaryVest, LLC, and Trustmark National Bank. (*Id.* at 2).

The proposed settlement provides:

> Payment of the SRHS Consideration, less attorneys' fees and expenses, is SRHS's only obligation to the [Plan]. Should SRHS default on its obligation to make a payment for the SRHS Consideration, there shall be a summary proceeding in the Chancery Court through which the Chancery Court may enter judgment on 10 days' notice in favor of the Trust and against SRHS for the unpaid balance of the SRHS Consideration reduced to present value after applying a 6% discount

> ratio, and Settling Defendants will not raise any substantive defenses on the merits of the underlying claims.

(*Id.* at 7).

The plaintiffs filed a Motion for Preliminary Approval of Class Settlement Agreement [136], which the Court granted. The Court also conditionally certified the proposed class as a mandatory Rule 23(b)(1) class. After Notice was provided to the class, the Court conducted a two-day fairness hearing in May 2016. On June 2, 2016, after determining that the settlement was fair, reasonable, and adequate and not the product of collusion, this Court entered a [283] Memorandum Opinion and Order granting final approval of the class settlement. On June 10, 2016, this Court entered a [287] Memorandum Opinion and Order reducing the request for attorneys' fees made by the plaintiffs to $4,805,772.30. This Court awarded expenses in the amount of $125,000 and approved an incentive award of $12,500 to be divided among the named plaintiffs.

The objectors appealed this Court's decision to approve the class settlement. The Fifth Circuit entered an Opinion vacating this Court's approval of the settlement, and remanded the matter for further consideration of the following issues:

> 1. How and how much, the future stream of SRHS's payments into the Plan, together with existing Plan assets and prospective earnings, will intersect with future claims of Plan participants, including, but not limited to what effect the Settlement has on current retirees;
>
> 2. What are SRHS's future revenue projections, showing dollar amounts, assumptions and

contingencies, from which a reasonable conclusion is drawn that SRHS has the financial ability to complete performance under the settlement;

3. Why any payments from litigation involving KPMG, Transamerica or related entities are permitted to defray SRHS's payment obligation rather than supplement the settlement of class members; and

4. Why class counsel's fees should not be tailored to align with the uncertainty and risk that class members will bear.

Jones v. Singing River Health Servs. Found., 865 F.3d 285, 303 (5th Cir. 2017). The Fifth Circuit stated, "We do not hold that the settlement should not be approved, or cannot be approved as modified. . . . " *Id.* The Fifth Circuit also made the following findings:

(1) the objectors waived any objection to the district court's decision to certify the class under Rule 23(b)(1)(A) as a mandatory settlement class. *Id.* at 296, n.7.

(2) the district court did not err in determining that class counsel and the class representatives gave adequate representation to the class. *Id.* at 294-95.

(3) class counsel's decision to limit the litigation to pre-2014 damages was a "rational calculation" due to "the legal uncertainty whether the class could prevail on claims for additional amounts unpaid by SRHS into the Plan, and the greater practical concern whether SRHS could financially make any additional

commitment . . . beyond restoring the missed payments from 2009 to 2014." *Id.* at 294.

(4) the district court "did not clearly err or abuse its discretion in holding that the proposed settle[ment] was not the product of collusion or fraud." *Id.* at 296. Furthermore, the objectors' request for discovery regarding collusion or fraud was "a fishing expedition that the [district] court justifiably preempted." *Id.* at 295.

(5) "any possible state court irregularities did not influence the class action settlement negotiations overseen by the district court and its experienced mediator." *Id.* at 296, n.6.

(6) The Fifth Circuit rejected the objectors' argument that the settlement agreement was unfair and inadequate because it did not include the value of missed contributions in 2015 and 2016. *Id.* at 299. The Fifth Circuit explained:

> By its terms, the Plan could have been terminated in 2014 and might not have been liable at all for subsequent contributions. . . . Although the Plan is not formally terminated, it is not "open" at this time as the objectors assert; theirs is a litigating position, and a weak one at that. The [district] court's legitimate doubts that the class could prevail on any post-2014 claim, whether in contract or tort, for missed Plan payments support its conclusion that the settlement was fair and adequate.

Id.

(7) the district court did not err in refusing to allow testimony regarding the alleged shredding of documents. *Id.* at 300-01. The objectors have not demonstrated perjury or discovery violations. *Id.* at 300. The objectors failed to provide evidence (aside from a witness's speculation) that financial documents were shredded or that SRHS committed other misconduct. *Id.* at 301. They also failed to demonstrate how the alleged shredding affected this case. *Id.*

(8) the district court did not abuse its discretion by approving the release of Jackson County. *Id.* at 302. Furthermore, the district court did not err in refusing to delay approval of the settlement agreement due to the objectors' state court appeal of the Jackson County Board of Supervisors' decision to contribute to the proposed settlement. *Id.* at 303, n.14.

After remand, this Court ordered the parties to the settlement to provide briefs concerning the four issues delineated by the Fifth Circuit. The Court also required the parties to provide supplemental notice to the class. The Court conducted a supplemental fairness hearing on January 22, 2018.

DISCUSSION

A more thorough examination of the facts and procedural history of this case, as well as factors and authority supporting approval of the settlement, are contained in this Court's [283] Memorandum Opinion and Order Granting Motion for Final Approval of Class Action Settlement, which is incorporated herein by reference. In accordance with the law of the case doc-

trine and the mandate rule, this Court will not readdress issues outside the Fifth Circuit's mandate but will rely on the analysis set forth in its initial [283] Memorandum Opinion and Order in conjunction with the analysis suggested by the Fifth Circuit, which is included in the present Memorandum Opinion and Order. *See Gen. Univ. Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 453 (5th Cir. 2007) ("Because the mandate rule is a corollary of the law of the case doctrine, it compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court.")

As this Court has previously explained, Fed. R. Civ. P. 23(e) provides that a class action may only be settled with the court's approval. The Fifth Circuit has recognized that there is an "overriding public interest" and a "strong judicial policy favoring the resolution of disputes through settlement" even in the context of class actions. *In re Deepwater Horizon*, 739 F.3d 790, 807 (5th Cir. 2014); *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982). "The gravamen of an approvable proposed settlement is that it be fair, adequate, and reasonable and is not the product of collusion between the parties." *Newby v. Enron Corp.*, 394 F.3d 296, 301 (5th Cir. 2004). The Fifth Circuit has conclusively determined that the SRHS settlement was not the product of collusion, and it has delineated four issues that this Court should consider in order to determine whether the settlement is fair, adequate, and reasonable.

I. How and How Much, the Future Stream of SRHS'S Payments into the Plan, Together with Existing Plan Assets and Prospective Earnings, Will Intersect with Future Claims of Plan Participants, Including, but Not Limited to What Effect the Settlement Has on Current Retirees

The first issue identified by the Fifth Circuit concerns the effect that the settlement will have on class members' benefits under the Plan. The special fiduciary Traci Christian[3] prepared a report addressing this question for the Chancery Court. She also testified at the supplemental fairness hearing regarding her findings. She has over twenty-five years of experience in the pension plan industry. Her role as special fiduciary is to oversee the Plan's investments as well as the administration of the Plan. If the settlement is approved, she will make recommendations to the Chancery Court as to how the Plan should be administered.

Ms. Christian testified that there are currently 725 retirees or spouses receiving benefits from the Plan.[4] There are approximately one thousand Plan participants who remain employed by SRHS. There are just under 200 vested terminated participants. These participants no longer work for SRHS, but they have earned a vested benefit and they are not yet eligible to retire. There are over 900 participants who left

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[3] The Chancery Court replaced the original special fiduciary, Stephen Simpson, with Ms. Christian after Mr. Simpson joined a law firm that had previously represented SRHS.

[4] Ms. Christian explained that spouses are not counted separately. Whether the benefits are paid to the retiree or the retiree's spouse upon the death of the retiree, it is counted as one benefit.

employment with SRHS prior to vesting. These participants are entitled to a return of the contributions they made plus interest.[5] Ms. Christian explained that it is impossible to calculate the amount of benefits each participant will receive, because there is no way to accurately predict how long each participant will live or how the market will perform in the future. The question of whether the proposed settlement will ultimately be approved causes additional uncertainty.

Last year, on average, the Plan paid over $1 million dollars in benefits each month. In December 2017, the month in which retirees receive their additional checks for cost of living adjustments, the plan paid approximately $2.7 million in benefits. The Plan's earnings totaled approximately 9.3% last year. Ms. Christian explained that the Plan must make more conservative investments and Plan assets must be liquidated to pay benefits, because no additional funds are being contributed. Therefore, the Plan earnings are lower than they would be if regular contributions were made.

In her report, Ms. Christian stated that the Plan assets totaled $123.6 million as of December 31, 2017. (Pls.' Hearing Ex. 64). She determined that the Plan was less than 28% funded as of that date. (*Id.*) In other words, for every dollar of benefits that are currently payable under the current terms of the Plan, the Plan has only twenty-eight cents.

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[5] Ms. Christian explained that the current total number of participants is less than the total number at the time that the settlement was initially approved, because some participants have passed away or received a return of their contributions.

Ms. Christian explained the effect that three potential scenarios would have on class members.

Scenario 1

Under Scenario 1, which contemplates what will happen if the settlement is not approved, the Plan will be depleted by 2025. Employees who remain employed by SRHS at that time will receive no benefits, even though they had been paying 3% of their salaries into the Plan up until the Plan was frozen.

Scenario 2

Scenario 2 assumes that the settlement will be approved but that no changes will be made to the Plan. Under this scenario, the Plan receives over $150 million in contributions between settlement approval and the year 2051. This achieves 59% funding.

Scenario 3

Scenario 3 contemplates settlement approval as well as potential special-fiduciary recommended, and Chancery Court-approved modifications to the Plan. Modifications could include extending retirement age by two years to age sixty-seven, eliminating early retirement subsidies, and eliminating the cost of living adjustments. Since these potential changes would not be retroactive, current retirees would only be affected by the loss of the cost of living adjustments. Scenario 3 would result in an estimated 75% to 81% funding of the Plan.

The plaintiffs' exhibit G38, which was produced at the hearing, summarizes the overall benefits of the proposed settlement for Plan participants. If the settlement is not approved and litigation continues,

the Plan will be depleted in as little as seven years, leaving current employees with no return on their contributions. The settlement alone would more than double the Plan's level of funding. In addition, the settlement has established a means by which the benefits of SRHS's settlement contributions can be enhanced by changes to the Plan overseen by Ms. Christian and the Chancery Court. The settlement would also enable Ms. Christian to select an asset allocation for Plan funds that increases the return on Plan investments as opposed to liquidating assets in order to pay retirees. Thus, the Plan can sustain some level of benefits for all participants if the settlement is approved, as opposed to leaving all participants with no benefits after 2025.

The objectors argue that the proposed settlement is flawed because it treats various sub-groups of class members—such as retirees, non-vested terminated employees, vested terminated employees, and current vested employees—the same. They further assert that the class should be divided into various subclasses represented by separate counsel. First, the Fifth Circuit has previously held that this Court did not abuse its discretion by certifying this class as a mandatory Fed. R. Civ. P. 23(b)(1)(A) class. The Fifth Circuit also found no error with the other determinations made by this Court when certifying the class. Therefore, the objectors have waived any argument that the class should be divided into subclasses. *See Gen. Univ. Sys., Inc.*, 500 F.3d at 453-54 (holding that a party could not assert arguments on remand that it had failed to raise on appeal). In addition, contrary to the objectors' assertions, the proposed settlement does not propose to treat all retirees the same. The proposed

settlement merely provides a means of funding for the Plan over the next thirty-five years in order to restore missed contributions. The proposed settlement contains no provisions that specify how the funds should be allocated among the class, but it has established a procedure by which allocation can be made in the future by the special fiduciary with the oversight of the Chancery Court of Jackson County, Mississippi. Therefore, there is no need for subclasses.

The objectors also reassert their argument that the settlement is inadequate, because SRHS employees were promised lifetime benefits. The Fifth Circuit has already rejected this argument. *Jones*, 865 F.3d at 299. This Court also recognizes that SRHS's financial condition has substantially improved since the Fifth Circuit's decision, but this fact does not justify rejection of the settlement. First, while SRHS's financial condition has continued to improve, the Plan's financial situation has deteriorated without additional cash infusion and will continue to worsen as this litigation continues. Furthermore, SRHS's improved financial stability weighs in favor of approval of the settlement, as the risk of SRHS failing to make its payments under the settlement has decreased. Finally, as the Fifth Circuit noted, it is questionable whether the class could recover any additional sums from SRHS, because SRHS clearly had and continues to have the contractual right to terminate the Plan, albeit now with Chancery Court approval.[6] *See id.*

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[6] The objectors argue for the first time that SRHS cannot enforce the termination clause of the Plan, because it is in breach of contract. The objectors waived this argument by not raising it before the Fifth Circuit.

The objectors further assert that the settlement is not fair to the class, "because the class action attorneys have widely published that this settlement will pay the hospital retirees 100% of their benefits." (Objs.' Mem. at 9, ECF No. 379). The objectors claim that more members of the class would have objected to the settlement were it not for these alleged representations.

First, this argument was waived because it was not made before the Fifth Circuit. Second, the objectors only identified two alleged statements and one of the alleged statements was made by the special master appointed in related state court proceedings, not class counsel. Third, the objectors have admitted that the class notice pointed them to a website that revealed that the settlement did not purport to provide a 100% payment. Fourth, the other statement made by class counsel was made after the Fifth Circuit remanded the case to this Court; thus, the statement could not have impacted the number of objections filed prior to that date. Finally, the objectors have not produced any evidence or testimony tending to show that any class member was misled by these statements. Therefore, this argument is likewise without merit.[7]

Allowing the Plan to be depleted would not benefit any of the Plan participants. The proposed settlement provides an equitable means of both funding and

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[7] At the supplemental fairness hearing, counsel for the objectors claimed that the number of plan beneficiaries had been inflated by an assumption that all beneficiaries were married; thus, he argued that a greater percentage of class members objected to the settlement prior to the initial fairness hearing. The testimony of the special fiduciary, Traci Christian, demonstrated that counsel for the objectors' assertion was unfounded.

managing the Plan in a manner that benefits all participants. The record before the Court also demonstrates that time is of the essence. The longer that the Plan continues paying retirees' benefits exceeding $1 million a month with no contributions, the harder it will be for the Plan to survive. This past year, SRHS's settlement contributions were placed in escrow and earned 0.66% interest. Moreover, the Plan participants were unable to take advantage of the ongoing record bull market. (Pls.' Hearing Ex. 49). If those funds had instead been invested in the Plan, they could have earned 9.3% or more. Given that SRHS has placed in escrow $7.6 million toward the settlement thus far, these lost earnings are not only significant, but unrecoverable. As time progresses, these losses will inevitably increase exponentially. In fact, Ms. Christian testified at the supplemental fairness hearing that a mere two-year delay in approval of the settlement would be "detrimental" to the Plan and everyone would get less money than they would if the settlement were approved right away. After receiving the supplemental evidence, testimony, and argument presented, the Court is convinced that the proposed settlement is fair, reasonable, and adequate, and the settlement should be approved as soon as possible.

II. What Are SRHS's Future Revenue Projections, Showing Dollar Amounts, Assumptions and Contingencies, from Which a Reasonable Conclusion Is Drawn That SRHS Has the Financial Ability to Complete Performance Under the Settlement

The second issue identified by the Fifth Circuit focuses on the ability of SRHS to fulfill its obligations under the settlement agreement. Since this Court

approved the settlement in June 2016, SRHS has made all of the payments required under the settlement to date. These payments total $7.6 million. SRHS has accomplished this without receiving the funds that Jackson County has agreed to pay toward the settlement as the County's contributions have been deposited in a separate escrow account.

Allen Carroll, an accountant with experience in reviewing historical and projected financial performance for businesses, including business valuations, testified at the supplemental fairness hearing. After reviewing SRHS's audited financial statements, its audited cash flow analysis, and cash flow projections, he determined that SRHS has the ability to meet it payment obligations under the settlement agreement. He explained that in 2014 SRHS had $19.6 million in cash, but in 2017, SRHS had a little more than $81 million in cash, cash equivalents, and investments. In 2015, SRHS had fifty-one days of cash on hand, but by 2017 it had ninety-one days cash on hand.[8] In 2014, SRHS experienced a $34 million loss, but by 2016 and 2017, SRHS's profits exceeded $5 million. Thus, he determined that SRHS has undergone a "remarkable" financial recovery in the last few years. He also opined that approval of the settlement would improve SRHS's financial situation, including its ability to obtain financing.

While the Fifth Circuit was concerned that there is no collateral to support SRHS's settlement obligations

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[8] Mr. Carroll explained that SRHS's bondholders require SRHS to maintain sixty-five days cash on hand. This means that SRHS must have enough cash to cover sixty-five days of expenses, after excluding noncash items related to depreciation and amortization.

or "incentivize[] payments to the Plan over those of other unsecured creditors," s*ee Jones*, 865 F.3d at 298, Mr. Carroll testified that SRHS does in fact have strong incentives to pay its obligations under the settlement. If SRHS misses a payment, the class can obtain a judgment in Chancery Court which accelerates the present value of all of the future payments under the settlement agreement. Mr. Carroll testified that such a judgment would have "a broad, cascading effect," because bondholders would likely accelerate SRHS's outstanding obligations. Thus, he opined that if SRHS misses a settlement payment and the class obtains a judgment, the result would be "financial chaos," that he characterized as "a disaster."

It is significant to note that at the supplemental fairness hearing, counsel for the objectors conceded that SRHS is sufficiently solvent and fully capable of making all of its payments under the settlement. He argued that SRHS committed a fraud upon this Court when it previously argued that it was experiencing financial difficulties. However, counsel for the objectors has not produced any evidence or testimony, much less expert testimony, to support this claim. The reports, audited financial documentation, and expert testimony presented to this Court reflect a dramatic financial recovery, not fraud. In addition, the Fifth Circuit has previously held that the settlement was not the product of fraud or collusion. Therefore, this assertion is without merit.[9]

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[9] The objectors also argue that SRHS's audits inaccurately reflect pension payments that were not made in order to make SRHS appear impoverished. As class counsel has demonstrated in their reply memorandum, this argument is based on a misunder-

Counsel for the objectors once again argues that the proposed settlement is not fair and adequate, because SRHS has the ability to pay more than the payments required by the Plan. The objectors have failed to provide any support for this assertion and the Fifth Circuit has rejected it. Furthermore, although Mr. Carroll determined that SRHS has the ability to meet its settlement obligations, he opined that SRHS is not "out of the woods" yet, as SRHS's liabilities exceed its assets by $119 million. Mr. Carroll also opined that SRHS is unable to pay the $326 million sought by the objectors. He explained that paying lifetime benefits to all participants would necessitate annual payments of $10 to $20 million. According to Mr. Carroll, payments of that nature would bankrupt SRHS in less than five years. In fact, he testified that the biggest known risk to SRHS's future is the possibility that the settlement may not be approved.

Nothing in the record indicates that SRHS will be unable to meet its settlement obligations. In fact, SRHS's financial condition appears solid and is only expected to improve if the settlement is approved. The financial stability of SRHS is critical to the Plan and its participants. Harming SRHS through expensive, protracted litigation would directly harm the Plan and its participants as well as the community at large, which relies on SRHS for its critical healthcare needs. SRHS's improved financial circumstances is not grounds for disapproving the settlement but instead, provides further support for approving it. As a result, the Court finds that the proposed settlement is fair, adequate, and reasonable.

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standing of the financial documentation produced. (*See* Pls.' Reply at 6-7, ECF No. 380).

III. Why Any Payments from Litigation Involving KPMG, Transamerica or Related Entities Are Permitted to Defray SRHS's Payment Obligation Rather than Supplement the Settlement of Class Members

The third issue indicates that the Fifth Circuit may have been concerned that portions of the settlement related to any recovery SRHS receives from KPMG or others may defray or decrease its settlement obligations. Thus far, SRHS has filed a lawsuit against KPMG but not Transamerica or any other relevant entity. The plaintiffs and the Plan itself have filed their own lawsuits against KPMG and Transamerica.[10]

The settlement agreement provides:

> Excluding defense costs in related actions, if SRHS recovers any money from any other individual or entity, including but not limited to, Transamerica or KPMG, by verdict, judgment, settlement, contract or agreement, related to claims that have or could yet be made for any relief that may exist or be determined to exist for the benefit of Defendants . . . then SRHS must provide written notice of the recovery to the Special Fiduciary and the Special Fiduciary may petition the Chancery Court to accelerate the payment schedule in Exhibit A. Defendants will have an opportunity to oppose the peti-

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[10] This Court severed the plaintiffs' claims against KPMG and Transamerica from the claims pending against SRHS. That case has been assigned cause number 1:17cv319-LG-RHW. The Plan filed its lawsuit against KPMG and Transamerica in the Circuit Court of Jackson County, Mississippi.

> tion at the hearing. If the Chancery Court orders an acceleration of any of the payments, then Defendants will be bound by the Chancery Court's findings, subject to their rights to appeal any order of said court.

(Agreement at 16, ECF No. 163-1). If SRHS makes accelerated payments, it is entitled "to reduce the future stream of payments ratably by the present value of the accelerated payment(s) using a six percent (6%) discount rate." (*Id.* at 15). Class counsel explains that these provisions "permit[] SRHS to use any recovery in its litigation against KPMG to defray its payment obligation rather than supplement the settlement of Class Members because the hospital will only be recovering its own damages (if any) from KPMG." (Pls.' Supplemental Mem. at 16, ECF No. 355). Class counsel further explains that this provision was designed to do two things:

> (1) ensure that if SRHS had an injection of capital after obtaining a recovery from litigation against KPMG, it could be used to benefit the Class by accelerating the payments due under the Settlement Agreement; and (2) allow the Special Fiduciary and the Chancery Court to balance the beneficial acceleration of payments to the Plan with the current financial condition of SRHS, ensuring that the long-term financial health of the hospital remains stable so that settlement obligations continue to be met.

(*Id.* at 17).

This consolidated class action lawsuit was filed to recoup the missed Plan contributions prior to 2014,

and the Fifth Circuit has previously held that class counsel's decision to limit the litigation to pre-2014 damages was a "rational calculation." *Jones*, 865 F.3d at 294. The proposed settlement fully restores those missed contributions but establishes an extended payment schedule. If SRHS recovers damages from KPMG or others, the Chancery Court will be permitted to accelerate that schedule if it deems that acceleration is appropriate. It would be inappropriate to require SRHS to make additional payments over and above the missed contributions, because the settlement already provides a full recovery to the class for the missed contributions between 2009 and 2014. In addition, the class and the Plan itself are seeking their own damages from KPMG and others in separate lawsuits. Any recovery that the class or the Plan receives from KPMG, Transamerica, or others will not benefit SRHS or reduce its payment obligations in any way.

Furthermore, if the Chancery Court requires acceleration, the settlement agreement does not lessen SRHS's actual liability, it merely deducts the interest that was incorporated into SRHS's payments. As class counsel explained at the hearing, when an individual prepays his mortgage, his interest obligations are reduced. The settlement agreement merely provides that SRHS will not be required to pay interest on funds that are no longer outstanding in the event of acceleration. Therefore, the Court finds that the settlement provision permitting the Chancery Court to require acceleration of SRHS's payments upon recovery of funds from KPMG or others does not affect the fairness, reasonableness, or adequacy of the proposed settlement.

IV. Why Class Counsel's Fees Should Not Be Tailored to Align with the Uncertainty and Risk That Class Members Will Bear

The Fifth Circuit's opinion indicates a concern that, while class counsel arranged for "their agreed, complete payout of fees from SRHS before the end of 2018, and thus alleviated any significant future risk of nonpayment," "the Plan participants bear considerable risk and, worse, uncertainty." *Jones*, 865 F.3d at 298.[11]

SRHS's financial records and the testimony of Mr. Carroll should alleviate the concern that SRHS will not meet its settlement obligations. The testimony of the Plan's special fiduciary should alleviate concern that the class faces a great deal of uncertainty as a result of the settlement. Ms. Christian has dedicated her entire career to overseeing pension plans, and her testimony before the Court indicated not only that she is eminently qualified to administer the Plan but also that she intends to ensure that all class members are treated as equitably as possible under the Plan. The possible modifications to the Plan that have been discussed thus far would not substantially affect the benefits of current retirees. Some of the proposed changes would have no effect on retirees' benefits at all. The settlement provides even more protection for the class in that future administration of the Plan must be conducted out in the open, under the oversight of the Jackson County Chancery Court.

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[11] This Court's award of attorneys' fees to class counsel was not appealed by any party. Thus, the Fifth Circuit was apparently unaware that this Court had reduced the award of attorneys' fees to $4,805,772.30 in a separate opinion.

It is significant to note that the agreed class counsel fees and expenses do not come from funds designated for or contributed to the Plan. Instead, they are payable directly from SRHS. The Court finds that class counsel should not be required to structure full payment for legal services that have been rendered to the class. Class counsel has provided valuable services to the class by negotiating a settlement that would inject much-needed funds into the Plan as opposed to engaging in years of expensive and burdensome litigation that would eventually bleed the Plan dry. Class counsel also negotiated the resignation of most of SRHS's Board of Trustees. They have negotiated an oversight protocol of the Plan and settlement payments by a special fiduciary and the Jackson County Chancery Court. This is relief to which the class is otherwise not entitled under the Plan. Thus far, class members have continued to receive benefits from the Plan. Meanwhile, class counsel have used their own funds and resources—including more than $125,000 in expenses and over 10,000 hours of work[12]—to prosecute this lawsuit without yet receiving any compensation for their work or reimbursement of their expenses.

The Plan provides for payment to participants throughout their retirement; thus, Plan benefits are not currently due and owing. In fact, class members are not actually waiting thirty-five years for payment, because they receive benefits on a monthly basis. The

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[12] Class counsel's initial request for attorneys' fees documented over 7000 hours of work, and their supplemental request for attorneys' fees seeks payment for over 3000 hours of work. These figures do not include class counsel's attendance at and preparation for the supplemental fairness hearing.

settlement provides the class with 6% interest on the Plan's missed contributions, but the settlement does not provide for payment of interest to class counsel. It would be substantially inequitable to require class counsel to wait thirty-five years without interest to be paid sums that are currently due and owing. Moreover, attorneys' fees and expenses take nothing away from the Plan participants. There is the false perception of "windfall" among the objectors. But, when the totality of the circumstances is objectively considered, the Court finds that class counsel is entitled to timely payment of attorneys' fees and expenses, and the schedule for payment of those fees does not affect the fairness, reasonableness, and adequacy of the settlement.

CONCLUSION

By 2009 the SRHS was already experiencing financial difficulties.[13] By 2014, the SRHS Board of Trustees was aware that the employee retirement Plan was badly underfunded and they had failed to make employer contributions to the Plan between 2009 and 2014. The Plan had deteriorated to the point that the Board of Trustees decided to terminate the Plan. Public outcries were fueled by decision-making behind closed doors and the perceived absence of transparency further

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[13] From the end of 2007 to the end of 2008, pension plans of the nation's 1500 largest public companies went from having a $60 billion funding surplus to a $409 billion deficit. During the twelve months following the stock market's October 2007 peak, the value of 401(k) and other defined contribution retirement plans fell by a staggering $1 trillion. Heath W. Hoobing, *Repairing the Three-Legged Stool: Guiding New Employers to the Right Retirement Plan*, 78 UMKC L. Rev. 503 (2009).

exacerbated public sentiments of distrust. Plan participants were caught by surprise. Anxiety followed, and soon evolved into panic, anger, and the uncertainty, delay and expense associated with the prospect of protracted litigation.

Plan participants, particularly those retirees who rely on their pension funds for life's necessities, are outraged. Outrage however, while arguably justified, must eventually yield to reasoned problem solving. Underfunded and failing retirement plans leave few good options. The proposed class settlement is not a perfect solution. Instead, it is the best option from a list of bad options. It is however, in the Court's opinion, the best available option to attempt to salvage the employee retirement Plan and secure the continued viability of SRHS.

Based upon the record before it, the Fifth Circuit identified several well-taken issues of concern and remanded the matter to this Court for additional consideration. Those issues have now been addressed and the record has been supplemented by expert testimony and evidence. The objectors have been given their full and fair "day in court." In the opinion of the Court, the parties have demonstrated that the best means of protecting the Plan, the class, and the future financial stability of SRHS is to approve the settlement. For the reasons stated in this opinion as well as the reasons stated in this Court's prior [283] Memorandum Opinion and Order, the settlement is fair, reasonable, and adequate.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the [163-1] Stipulation and Agreement of Compromise and Pro Tanto Settlement is APPROVED as a fair, reasonable, and adequate class

settlement. The Court will enter a separate judgment in accordance with Fed. R. Civ. P. 58.

IT IS, FURTHER, ORDERED AND ADJUDGED that the request for additional attorneys' fees included in the [378] Supplemental Memorandum in Support of Award for Attorneys' Fees filed by the plaintiffs is TAKEN UNDER ADVISEMENT.

SO ORDERED AND ADJUDGED this the 26th day of January, 2018.

/s/ Louis Guirola, Jr.
United States District Judge

ORDER AND FINAL JUDGMENT OF THE DISTRICT COURT OF MISSISSIPPI SOUTHERN DIVISION (JANUARY 26, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THOMAS JONES, ET AL., On Behalf of Themselves and Others Similarly Situated,

Plaintiffs,

v.

SINGING RIVER HEALTH SYSTEM, ET AL.,

Defendants.

Cause No. 1:14CV447-LG-RHW
Consolidated With 1:15CV1-LG-RHW
Consolidated With 1:15CV44-LG-RHW

Before: Louis GUIROLA, Jr.,
United States District Judge.

This cause came to be heard upon the parties' request for approval of the [163-1] Stipulation and Agreement of Compromise and Pro Tanto Settlement. The Court conducted its initial fairness hearing on May 16-17, 2016. After the United States Court of Appeals for the Fifth Circuit remanded this case for additional consideration, this Court conducted a sup-

plemental fairness hearing on January 22, 2018. Having read the parties' briefs, the briefs of the objectors, and having reviewed the evidence submitted in the case, as well as having heard and considered all of the arguments made at the two fairness hearings, the Court hereby orders and adjudges as follows:

(a) The settlement, as appears in Document [163-1], incorporated herein by reference, is fair, reasonable, and adequate, is ordered finally approved, and shall be consummated in accordance with its terms and provisions.

(b) The consolidated actions *Jones, et al. v. Singing River Health Services Foundation, et al.*, Case No. 1:14-cv-447-LG-RHW, *Cobb, et al. v. Singing River Health System, et al.*, Case No. 1:15-cv-1-LG-RHW, and *Lowe v. Singing River Health System, et al.*, Case No. 1:15-cv-44-LG-RHW (collectively, "Federal Action") are proper class actions for purposes of settlement under Fed. R. Civ. P. 23, and the following mandatory settlement class is certified pursuant to Fed. R. Civ. P. 23(b)(1)(A):

> All current and former employees of Singing River Health System who participated in the Singing River Health System Employees' Retirement Plan and Trust, including their spouses, alternate payees, death beneficiaries, or any other person to whom a plan benefit may be owed.

(c) The Court finds and determines that the notice procedure afforded adequate protections to the Settlement Class Members and provided the basis for the Court to make an informed decision regarding approval of the Settlement based on the response of

Settlement Class Members. The Court finds and determines that the notices provided in this case satisfied the requirements of law and due process.

(d) The Court directs entry of final judgment as to the consolidated plaintiffs' claims against Defendants Singing River Health System ("SRHS"), Singing River Health Services Foundation, Singing River Health System Foundation (f/k/a Coastal Mississippi Healthcare Fund, Inc.), Singing River Hospital System Foundation, Inc., Singing River Hospital System Employee Benefit Fund, Inc., Board of Trustees for the Singing River Health System, and Singing River Hospital System ("Other Singing River Defendants"), and Defendants Michael J. Heidelberg, Morris G. Strickland, Ira S. Polk, Michael Crews, Tommy L. Leonard, Michael D. Tolleson, Lawrence H. Cosper, Allen L. Cronier, Marva Fairley-Tanner, Grayson Carter, Jr., Gary C. Anderson, G. Chris Anderson, Gary Anderson, Kevin Holland, Martin D. Bydalek, William C. Descher, Stephen Nunenmacher, Joseph P. Vice, Eric D. Washington, Hugo Quintana, and Stephanie Barnes Taylor.

(e) All claims, rights and causes of action, damages, losses, liabilities and demands of any nature whatsoever, whether known or unknown, that are, could have been or might in the future be asserted by the Trust, any Plaintiffs or any member of the Settlement Class (whether directly, representatively or in any other capacity), against the following Released Persons, in connection with or that arise out of any acts, conduct, facts, transactions or occurrences, alleged or otherwise asserted or that could have been asserted in the Actions related to the failure to fund the Trust and/or management or administration of the Plan shall

be compromised, settled, released and discharged with prejudice:

1. the Jackson County Board of Supervisors, Jackson County as a political subdivision of the State of Mississippi, the individual members of the Board of Supervisors in their official capacities and in their individual capacities and for the agents and employees of Jackson County, Mississippi;

2. Singing River Health System, its current and former Board of Trustees (individually and in their official capacities), agents, servants and/or employees;

3. Singing River Health Services Foundation, Singing River Health System Foundation f/k/a Coastal Mississippi Healthcare Fund, Inc., Singing River Hospital System Foundation, Inc., Singing River Hospital System Benefit Fund, Inc., and Singing River Hospital System and all of their current and former employees, agents, and inside and outside counsel and their firms; and

4. current and former Trustees of the Trust (in their individual and official capacities).

(f) The Plaintiffs and/or members of the Settlement Class are hereby permanently barred and enjoined from instituting or prosecuting, either directly or in any other capacity, any action that asserts any claims released under the terms of the Settlement Agreement.

(g) Without affecting the finality of this Order and Judgment in any way, this Court grants continuing authority and exclusive jurisdiction over implementa-

tion of the Settlement, and over enforcement, construction and interpretation of the Stipulation to the Jackson County Chancery Court in Cause No. 2015-0060-NH.

(h) The Court approves the award of attorneys' fees and expenses as well as incentive fees as set forth in its order regarding same, Document [287], and grants continuing jurisdiction over the payment of those fees to the Jackson County Chancery Court in Cause No. 2015-0060-NH. The Court will consider class counsel's supplemental request for attorneys' fees, Document [378], at a later time.

SO ORDERED AND ADJUDGED this the 26th day of January, 2018.

/s/ Louis Guirola, Jr.
United States District Judge

ORDER OF THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING (SEPTEMBER 18, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS JONES, on Behalf of Themselves and Others Similarly Situated; JOSEPH CHARLES LOHFINK, on Behalf of Themselves and Others Similarly Situated; SUE BEAVERS, on Behalf of Themselves and Others Similarly Situated; RODOLFOA REL, on Behalf of Themselves and Others Similarly Situated; HAZEL REED THOMAS, on Behalf of Themselves and Others Similarly Situated,

Plaintiffs-Appellees,

v.

SINGING RIVER HEALTH SERVICES FOUNDATION; SINGING RIVER HEALTH SYSTEM FOUNDATION; SINGING RIVER HOSPITAL SYSTEM FOUNDATION, INCORPORATED; SINGING RIVER HOSPITAL SYSTEM EMPLOYEE BENEFIT FUND, INCORPORATED; SINGING RIVER HOSPITAL SYSTEM; TRANSAMERICA RETIREMENT SOLUTIONS CORPORATION; KPMG, L.L.P.; MICHAEL J. HEIDELBERG; MICHAEL D. TOLLESON; TOMMY LEONARD; LAWRENCE H. COSPER; MORRIS G. STRICKLAND; IRA POLK; STEPHEN NUNENMACHER; HUGO QUINTANA; GARY C. ANDERSON; STEPHANIE BARNES

TAYLOR; MICHAEL CREWS; SINGING RIVER HEALTH SYSTEM; ALLEN CRONIER; MARTIN BYDALEK; WILLIAM DESCHER; JOSEPH VICE; ERIC WASHINGTON; MARVA FAIRLEY-TANNER; GRAYSON CARTER, JR.,

Defendants-Appellees.

v.

CYNTHIA N. ALMOND,

Interested Party-Appellant.

REGINA COBB, on Behalf of Themselves and Others Similarly Situated; ET AL,

Plaintiffs,

v.

SINGING RIVER HEALTH SYSTEM; BOARD OF TRUSTEES FOR THE SINGING RIVER HEALTH SYSTEM; MICHAEL J. HEIDELBERG, in Their Individual and Official Capacities; MICHAEL D. TOLLESON, in Their Individual and Official Capacities; ALLEN L. CRONIER, in Their Individual and Official Capacities; TOMMY L. LEONARD, in Their Individual and Official Capacities; LAWRENCE H. COSPER, in Their Individual and Official Capacities; MORRIS G. STRICKLAND, in Their Individual and Official Capacities; IRA S. POLK, in Their Individual and Official Capacities; STEPHEN NUNENMACHER, in Their Individual and Official Capacities; HUGO QUINTANA, in Their Individual and Official

Capacities; MARVA FAIRLEY-TANNER, in Their Individual and Official Capacities; WILLIAM C. DESCHER, in Their Individual and Official Capacities; JOSEPH P. VICE, in Their Individual and Official Capacities; MARTIN D. BYDALEK, in Their Individual and Official Capacities; ERIC D. WASHINGTON, in Their Individual and Official Capacities; G. CHRIS ANDERSON, in Their Individual and Official Capacities; KEVIN HOLLAND, in Their Individual and Official Capacities,

Defendants-Appellees.

v.

CYNTHIA N. ALMOND,

Interested Party-Appellant.

MARTHA EZELL LOWE, Individually and on Behalf of a Class of Similarly Situated Employees,

Plaintiffs,

v.

SINGING RIVER HEALTH SYSTEM; TRANSAMERICA RETIREMENT SOLUTIONS CORPORATION; KPMG, L.L.P.; GARY ANDERSON; MICHAEL CREWS; MICHAEL TOLLESON; STEPHANIE BARNES TAYLOR; MORRIS STRICKLAND; TOMMY LEONARD,

Defendants-Appellees.

v.

CYNTHIA N. ALMOND,

Interested Party-Appellant.

No. 18-60130

Appeal from the United States District Court
for the Southern District of Mississippi

Before: HIGGINBOTHAM, DENNIS,
and COSTA, Circuit Judges.

PER CURIAM

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

OPINION OF THE FIFTH CIRCUIT (JULY 27, 2017)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS JONES, on Behalf of Themselves and Others Similarly Situated; JOSEPH CHARLES LOHFINK, on Behalf of Themselves and Others Similarly Situated; SUE BEAVERS, on Behalf of Themselves and Others Similarly Situated; RODOLFOA REL, on Behalf of Themselves and Others Similarly Situated; HAZEL REED THOMAS, on Behalf of Themselves and Others Similarly Situated,

Plaintiffs-Appellees,

v.

SINGING RIVER HEALTH SERVICES FOUNDATION; SINGING RIVER HEALTH SYSTEM FOUNDATION; SINGING RIVER HOSPITAL SYSTEM FOUNDATION, INCORPORATED; SINGING RIVER HOSPITAL SYSTEM EMPLOYEE BENEFIT FUND, INCORPORATED; SINGING RIVER HOSPITAL SYSTEM; MICHAEL J. HEIDELBERG; MICHAEL D. TOLLESON; TOMMY LEONARD; LAWRENCE H. COSPER; MORRIS G. STRICKLAND; IRA POLK; STEPHEN NUNENMACHER; HUGO QUINTANA; GARY C. ANDERSON; STEPHANIE BARNES TAYLOR; MICHAEL CREWS; SINGING RIVER HEALTH SYSTEM; ALLEN CRONIER; MARTIN BYDALEK; WILLIAM DESCHER; JOSEPH VICE;

ERIC WASHINGTON; MARVA FAIRLEY-TANNER; GRAYSON CARTER, JR.,

Defendants-Appellees

v.

CYNTHIA N. ALMOND; FRANCISCO C. AGUILAR; KITTY PATRICIA AGUILAR; TANYA R. ARDOIN; RAY J. BARBOUR, ET AL.,

Appellants

REGINA COBB, on Behalf of Themselves and Others Similarly Situated, ET AL.,

Plaintiffs

v.

SINGING RIVER HEALTH SYSTEM; BOARD OF TRUSTEES FOR THE SINGING RIVER HEALTH SYSTEM; MICHAEL J. HEIDELBERG, in Their Individual and Official Capacities; MICHAEL D. TOLLESON, in Their Individual and Official Capacities; ALLEN L. CRONIER, in Their Individual and Official Capacities; TOMMY L. LEONARD, in Their Individual and Official Capacities; LAWRENCE H. COSPER, in Their Individual and Official Capacities; MORRIS G. STRICKLAND, in Their Individual and Official Capacities; IRA S. POLK, in Their Individual and Official Capacities; STEPHEN NUNENMACHER, in Their Individual and Official Capacities; HUGO QUINTANA, in Their Individual and Official Capacities; MARVA FAIRLEY-TANNER, in Their Individual and Official Capacities; WILLIAM C. DESCHER, in Their Indi-

vidual and Official Capacities; JOSEPH P. VICE, in Their Individual and Official Capacities; MARTIN D. BYDALEK, in Their Individual and Official Capacities; ERIC D. WASHINGTON, in Their Individual and Official Capacities; G. CHRIS ANDERSON, in Their Individual and Official Capacities; KEVIN HOLLAND, in Their Individual and Official Capacities,

Defendants-Appellees

v.

CYNTHIA N. ALMOND; FRANCISCO C. AGUILAR; KITTY PATRICIA AGUILAR; TANYA R. ARDOIN; RAY J. BARBOUR, ET AL.,

Appellants

No. 16-60550

Appeal from the United States District Court for the Southern District of Mississippi

Before: HIGGINBOTHAM, JONES, and HAYNES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

The Singing River Health System (SRHS), a community hospital owned by Jackson County, Mississippi, created a defined benefits pension fund into which employees have recently been paying three percent of their paychecks and to which SRHS was obliged to contribute whatever additional amounts were actuarially required to fund the Plan's promised benefits. From 2009-14, however, the hospital fell into serious

financial difficulties and made only one plan contribution. The Plan was "frozen" in late November 2014. This appeal considers objections to the settlement of class actions that arose in the wake of the financial crisis. The most troubling issues center on the extraordinarily long-term, unsecured, and unpredictable proposed payout of the settlement amount and the release of the County, a non-party, from liability. We vacate and remand for further consideration of issues concerning the settlement's consequences for Plan beneficiaries.

Background

As described by its CEO, SRHS "is a community-owned not-for-profit health system owned by Jackson County. [Miss. Code Ann. § 41-13-10(c).] It consists of two hospitals . . . [and] five primary care clinics . . . , [and] [i]t employs about 2,400 people." SRHS is the largest employer in Jackson County. County Supervisors appoint seven of the nine members of the SRHS Board; the Chief of Staff and Chief-elect of SRHS occupy the other two seats. *See* Miss. Code. Ann. § 41-13-29. SRHS created the Employees' Retirement Plan and Trust (the "Plan") in 1983 as a successor to the Public Employees' Retirement System of Mississippi.

Since 2008, the most recent version of the Plan has required employees to contribute three percent of their salaries to the Plan. Further, SRHS "shall have the sole responsibility for making the [actuarially determined] contributions necessary to provide benefits under the Plan, as administered by the Board of Trustees of [SRHS]." Finally, although the Plan states that it was established in confidence that it would continue indefinitely, SRHS "reserve[s] the right to

terminate the Plan . . . , in whole or in part, at any time."

SRHS's finances became increasingly imperiled during the 2008 recession and with the reduction of federal assistance. Consequently, and without informing the employees, SRHS failed to make all but one of its contributions needed to maintain the Plan's fiscal integrity from 2009 to 2014. In late November 2014, the hospital Board, together with executives and counsel, decided to liquidate the Plan. On December 1, 2014, SRHS announced it was freezing the Plan and, "[i]n the coming months, the Plan will be officially liquidated." At that point, there were over three thousand Plan participants, both current and past employees, of whom approximately 600 were retirees receiving monthly payments.

Counsel for retirees, many of whom have become Objectors to the proposed settlement, immediately sought injunctive relief in the Jackson County Chancery Court, which ordered SRHS not to terminate the Plan. Since that date, however, the Plan has remained "frozen" in that no contributions have been made by employees or SRHS. Plan assets are being steadily depleted, however, because benefit payments to retirees have continued without interruption. In August 2015, the Chancery court held SRHS indebted as a matter of law to the Plan for the missed contributions plus lost earnings, a sum exceeding $55 million.

Numerous lawsuits were soon filed in state and federal court after the announced termination of the Plan. Pertinent here are three Rule 23 class actions commenced and later consolidated in the federal district

court, styled as the *Jones*, *Cobb*, and *Lowe* cases.[1] The operative complaint in the lead case, *Jones*, names as defendants the Singing River Health Services Foundation, Singing River Health System Foundation, Singing River Hospital System Foundation, Inc., Singing River Hospital System Employee Benefit Fund, Inc., and Singing River Hospital System (collectively, "SRHS Defendants"), along with various individual SRHS executives and members of SRHS's Board of Trustees. KPMG, LLP, and Transamerica Retirement Solutions Corporation, advisers and administrators of the Plan, also were joined as defendants. *See Jones v. Singing River Health Sys.*, No. 1:14-CV-447, 2016 WL 6106521 (S.D. Miss. June 2, 2016).[2] The *Jones* complaint alleged multiple causes of action for, *inter alia*, state and federal constitutional violations, federal law breaches of ERISA, and state law claims for breach of contract, fraud, and breach of fiduciary duty. *See id.*

Expedited discovery led to the production of "thousands of pages of SRHS financial documents" that enabled the plaintiffs' retained CPA expert to calculate the missed contributions and associated lost Plan earnings. The district court appointed former Chief United States Bankruptcy Judge for the Northern District of Mississippi, David M. Houston, as a media-

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[1] A fourth class putative action was stayed pending resolution of this settlement.

[2] Claims against KPMG, LLP and Transamerica Retirement Solutions Corporations remain pending in the district court. The district court did not err in denying KPMG's motion to compel arbitration as to the *Lowe* plaintiffs. *See Jones v. Singing River Health Servs. Found.*, 674 F. App'x 382 (5th Cir. 2017) (affirming the district court judgment).

tor, and several mediation sessions, open to various counsel including those of the Objectors, occurred over the next several months.

When the *Jones* Plaintiffs moved for preliminary approval of a settlement, the court granted the motion, conditionally certified the class, and approved procedures for notifying class members, who include all current and former employee Plan participants, their spouses, alternate payees, death beneficiaries, or "any other person to whom a plan benefit may be owed."

On April 1, 2016, the Plaintiffs moved for approval of the final settlement (the "Settlement Agreement"). The Settlement Agreement contains the following terms specifically touted in the district court opinion:

- SRHS must deposit a total of $149,950,000 into the retirement trust under a thirty-five year schedule. According to the testimony of the Plaintiff's accountant, the present value of this sum equals the $55 million sum owed by SRHS to the Plan for missed contributions and lost earnings from 2009-14, calculated with a six percent discount rate.
- Jackson County, Mississippi, will pay SRHS $13,600,000 over eight years "[t]o support the indigent care and principally to prevent default on a bond issue by supporting the operations of SRHS." Jackson County earlier guaranteed the bond issue;
- SRHS will pay attorneys' fees of $6.45 million and expenses up to $125,000 of all Plaintiffs' counsel;

- SRHS will pay incentive awards to the individual class representatives in an amount totaling $12,500;
- The parties will jointly petition the Chancery Court of Jackson County for an order that requires the Plan to be monitored by that court for the duration of the payment schedule;
- SRHS's CFO will give quarterly reports to Stephen Simpson, the Special Fiduciary appointed by the Chancery Court to oversee the Plan;
- Any adjustment to the Plan can only be made with the recommendation of the Special Fiduciary and approval of the Chancery Court after 60 days' notice to Class Members and an opportunity for hearing;
- Plan distributions can only be changed or terminated with the approval of Simpson and the Chancery Court;
- If SRHS recovers money from other entities or individuals, e.g., KPMG or Transamerica, Simpson can petition the Chancery Court to accelerate SRHS's payments;
- In the event of SRHS's default on its payment obligations, there will be a proceeding in the Chancery Court, and that court can enter judgment on ten days' notice for the unpaid balance.

See Jones, 2016 WL 6106521, at *3-5 (district court opinion summarizing the Settlement Agreement). The Settlement Agreement preserves the rights of "all parties," the plaintiffs and SRHS, to pursue claims against corporate entities like KPMG and Trans-

america. However, the SRHS entities, all individual defendants associated with those entities, and Jackson County (although not a party to the lawsuits) are released broadly from any possible claims. *Jones*, 2016 WL 6106521, at *5. Further, as a result of the settlement negotiations, a majority of the SRHS Board resigned, and Jackson County retained a turnaround firm to improve SRHS operations and long term financial stability.

Additional important features of the Settlement Agreement not mentioned in the court's opinion are the following:

- There is no collateral or security for the payments owed the Plan by either SRHS or Jackson County; these are wholly unsecured promises to pay.
- The schedule of payments, Ex. A to the settlement agreement, calls for SRHS to make full payout of the Plaintiffs' attorney fees and expenses (over $6.5 million) by the end of September 2018.
- According to the Ex. A payment schedule, SRHS must pay the Plan $6.4 million by September 2017. Then SRHS commits to pay annual amounts totaling $2.4 million for the next two years (through 2019), escalating to $4.2 million from 2020 to 2023. Payments totaling $5.7 million are due in 2024, and annual payments of $4.5 million follow until completion of the payout in 2051. *Id.*
- Jackson County owes, under Ex. A, $5.2 million through September 2017, followed by annual payments of $1.2 million through 2024.

- If SRHS obtains payments in litigation against KPMG, Transamerica, or insurers in connection with these matters, Simpson "may petition the Chancery Court to accelerate the payment schedule," and SRHS may oppose that request. Any such recoveries, in other words, do not automatically accrue to the benefit of the Plan, nor will they benefit the Plan in addition to the amounts SRHS must pay.
- Although approval of any changes in distribution, Plan restructuring and/or Plan termination require approval of Simpson and the Chancery Court, that paragraph of the settlement agreement begins by stating: "The payment of the SRHS Consideration may require modification of the Plan to equitably distribute the benefits paid."

Attorneys Earl L. Denham and W. Harvey Barton represent 245 Objectors to the settlement agreement, about 200 of whom are retirees currently receiving benefits under the Plan and, in many cases, substantially depending on those benefits. Their clients comprise about one-third of the Plan's current beneficiaries. The Objectors argued the "settlement is illusory, provides no real protection for class members, and lacks any specificity as to how different class members will be treated should the class be certified and the settlement approved." They also maintained the class did not meet the requirements for certification, and a release of Jackson County was improper. The SRHS Defendants and Plaintiffs supported the Settlement Agreement as the only alternative to lengthy, costly litigation; the only vehicle for obtaining a contribution from Jackson County; and the only feasible way to

obtain some reimbursement from the still-financially precarious SRHS.

The district court held a fairness hearing on the Settlement Agreement on May 16-17, 2016 ("Fairness Hearing"), at which thirteen live witnesses testified. Lee Bond, CFO of SRHS, testified about the financial stability of SRHS, the Settlement Agreement, and how the settlement will affect the Singing River hospital system. Wayne Allen Carroll, Jr., an accountant with experience auditing employee benefit plans, testified about how he calculated the value of the missed annual required contributions between 2009 and 2014. Carroll valued the missed contributions at $55,714,784. Because the hospital did not have the present ability to make that payment, the settlement sets forth a payment schedule over a thirty-five year period. Accordingly, the total amount to be paid was adjusted to $149,950,000 to account for the present value of the missed contributions.

Three of the five class representatives, Joseph Lohfink, Hazel Thomas, and Sue Beavers, also testified in support of the settlement at the Fairness Hearing. The Objectors offered testimony of members of their group in opposition. Attorney Stephen Simpson, the Special Fiduciary in the Chancery Court proceeding, was permitted to make a brief statement supporting the Settlement Agreement. In so doing, he noted that he had "requested and reviewed preliminary benefit payout models, based upon certain assumptions, including the consideration proposed in the settlement." The court denied Objectors' request to cross-examine Simpson, and it rejected the request to recall Bond as an adverse witness and to call SRHS Comptroller Craig Summerlin.

On June 2, 2016, the district court entered a memorandum opinion and order granting the motion for final approval of the class action settlement. *See Jones*, 2016 WL 6106521. After carefully considering the issues, the court determined that the settlement "is fair, reasonable and adequate, is ordered finally approved, and shall be consummated in accordance with its terms and provisions." The class was certified pursuant to Fed. Rule Civ. Pro. 23(b)(1)(A), which authorizes non-opt-out class actions where "prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications . . . that would establish incompatible standards of conduct for the party opposing the class . . . ." Determining that there was no just reason for delay, the district court entered partial final judgment under Rule 54(b) as to the claims against the settling defendants. The Objectors timely appealed.[3]

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[3] This court has appellate jurisdiction under 28 U.S.C. § 1291. The district court properly exercised subject matter jurisdiction over this dispute. *See* 28 U.S.C. §§ 1331, 1332(d)(2), 1367(a). The *Jones* complaint alleged federal claims under the United States Constitution, 42 U.S.C. § 1983, and ERISA. The *Cobb* complaint alleged federal claims under 42 U.S.C. § 1983 and ERISA. Despite allegations under ERISA, the plan is a governmental plan, and thus is exempt from ERISA. 29 U.S.C. § 1003(b)(1); The *Lowe* complaint, however, alleged jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d). The amount in controversy exceeds $5 million, one or more of the Defendants are non-residents of the State of Mississippi, and members of the class are also non-residents of the State or Mississippi. 28 U.S.C. § 1332 (Diversity-CAFA). *See Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 546-47 (5th Cir. 2006) (holding the state action bar to CAFA jurisdiction applies only where all primary defendants are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief).

STANDARD OF REVIEW

"The abuse-of-discretion standard governs this court's review of both the district court's certification of the class and its approval of the settlement under Rule 23." *In re Deepwater Horizon*, 739 F.3d 790, 798 (5th Cir. 2014). *See also Newby v. Enron Corp.*, 394 F.3d 296, 300 (5th Cir. 2004) ("A district court's approval of a class action settlement may be set aside only for abuse of discretion."). "Implicit in this deferential standard is a recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation." *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 408 (5th Cir. 1998). Whether the district court applied the correct legal standard in its consideration of the settlement is reviewed de novo. *Deepwater Horizon*, 739 F.3d at 798.

Discussion

Under Rule 23, a court must hold a hearing to consider whether a proposed class action settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). At the fairness hearing, "[o]bjectors have a right to be heard, but a fairness hearing is not a full trial proceeding." *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 641 (5th Cir. 2012). Nevertheless, "district judges must . . . exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions to consider whether the settlement is fair, adequate, and reasonable, and not a product of collusion." *Mirfasihi v. Fleet Mortg. Corp.*, 450 F.3d 745, 748 (7th Cir. 2006) (internal quotation marks omitted). This court has set forth a six-factor

test (the "*Reed* Test"), to determine the appropriateness of a proposed settlement:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members.

Reed v. Gen. Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983) (citation omitted).

The district court considered each of the elements of class certification as well as the *Reed* factors, all of which, it found, weigh in favor of approving the proposed settlement. The court's treatment of the individual *Reed* factors will be discussed *infra* as pertinent to the issues on appeal.

On appeal, the Objectors challenge the class certification and the court's approval of the settlement. Specifically, they assert that the district court abused its discretion by (1) ignoring evidence of collusion and by failing to order further discovery; (2) finding the Settlement Agreement was fair, reasonable, and adequate although its future payments to Plan participants are uncertain, SRHS was not required to reimburse contributions owed to the Plan through 2016, and a large number of class members object; (3) overlooking perjury and the alleged destruction of documents; (4) approving the release of Jackson County; (5) approving the settlement where "there is known pending litigation" against Jackson County; and (6)

admitting "testimony" of Simpson at the fairness hearing without cross-examination. Each issue will be discussed in turn.

I.

The Objectors maintain that the district court improperly certified the class under Rule 23. Class certification under Rule 23 has four requirements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Fed. R. Civ. P. 23(a); *see also Ibe v. Jones*, 836 F.3d 516, 528 (5th Cir. 2016). The burden is on the party seeking certification to satisfy these requirements. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345, 131 S.Ct. 2548 (2011).

The Objectors challenge only the fourth requirement: the adequacy of both class counsel and class representatives. The Objectors challenge the zeal and competence of class counsel by questioning many of the decisions made by class counsel, including the fact that counsel did not pursue damages beyond 2014.[4] The Objectors also argue there was no evidence that class counsel met with class representatives to explain the settlement, no evidence that counsel produced any detailed documentation that would allow class members to understand the settlement, and no evidence provided to the district court on how or how much the settlement will pay out to each class member.

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[4] Objectors also argue the fact that one of the class representative's names (Rodolfo A. Rel) was misspelled in some of the pleadings shows counsel's inadequacy, but as the district held, "a typographical error is insufficient evidence that the attorney-class representative relationship was lacking."

The district court explained that the class counsel were experienced in complex litigation and qualified to represent the interests of the proposed class. In regard to the representatives themselves, the district court found that the class representatives have the same interest and desire as the rest of the proposed class to receive retirement benefits as promised by the Plan, and there was no evidence that the class representatives suffer from a conflict of interest. The court concluded the representatives would adequately represent the interests of the class.

Under Rule 23(a)(4), "the representative parties [must] fairly and adequately protect the interest of the class." Fed. R. Civ. P. 23(a)(4). Rule 23(a)(4) involves examination of both the representatives' counsel and the representatives themselves. *See Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982). More specifically, "[t]he adequacy requirement mandates an inquiry into the zeal and competence of the representative's counsel and into the willingness and ability of the representative to take an active role in and control the litigation and to protect the interests of absentees." *Id.* "The adequacy inquiry also 'serves to uncover conflicts of interest between the named plaintiffs and the class they seek to represent.'" *Berger v. Compaq Comput. Corp.*, 257 F.3d 475, 479-80 (5th Cir. 2001) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 2251 (1997)).

Class counsels' decision not to pursue damages after 2014 was based on the legal uncertainty whether the class could prevail on claims for additional amounts unpaid by SRHS into the Plan, and the greater practical concern whether SRHS could financially make any

additional commitment (discussed *infra*) beyond restoring the missed payments from 2009 to 2014. In the face of this rational calculation, the Objectors are incorrect that limiting the litigation in this way demonstrates class counsel's inadequacy.

The Objectors' contention that there was no evidence that class counsel met with class representatives is refuted by their testimony at the fairness hearing, as is the contention that the representatives did not understand the Settlement Agreement. Objectors' third contention, which concerns the production of documents to the district court, is not relevant to the issue of adequacy of representation. Accordingly, this case is distinguishable from those in which class representatives were inadequate. *See Amchem*, 521 U.S. at 626-28, 117 S.Ct. at 2251 (class members were inadequate where they had diverse, conflicting interests in receiving medical payments). The district court did not abuse its discretion in determining that class representation was adequate for certification.

II.

Pertinent to the first *Reed* factor concerning the settlement, the Objectors argue that there was evidence of collusion between class counsel and the defendants sufficient to warrant disapproving the Settlement Agreement. Without citing the state court record, the Objectors emphasize numerous curious events in the state court proceedings—*ex parte* meetings, one judge's refusal to recuse, denied discovery requests, alleged improper handling of signed orders, and alleged conflicts. Positing a *quid pro quo* for counsels' less than zealous negotiations, they also

question the circumstances that led to a stipulation of class counsel fees within the Settlement Agreement.

The district court found no evidence of collusion or fraud under *Reed.* The time to present evidence regarding collusion would have been at the fairness hearing. *See Reed*, 703 F.2d at 172. Despite the court's admonishing Objectors' counsel to substantiate their allegations with competent evidence at least four times during the fairness hearing, the Objectors presented none. Their request for additional discovery was thus a fishing expedition that the court justifiably preempted.

Moreover, the district court, rightly concerned about the implications of the "clear sailing" fee agreement[5] between class counsel and the SRHS defendants, applied a heightened standard of care in examining the allegations of collusion. *In re Bluetooth Headset Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). After careful review of these contentions, the court found that none of the allegations presented proved collusion. State court discovery decisions, and an allegedly *ex parte* meeting among SRHS counsel, class counsel and the state court that postdated the Settlement

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[5] The district court cited the following definition of a clear sailing clause: "A compromise in which the defendant agrees not to contest the amount awarded by the court presiding over the settlement as long as the award falls beneath a negotiated ceiling." *William D. Henderson, Clear Sailing Agreements: A Special Form of Collusion in Class Settlements*, 77 Tul. L. Rev. 813, 813 (Mar. 2003). The use of a clear sailing provision is recognized as a red flag regarding arms-length class action settlement negotiations, but it does not automatically justify a finding of collusion. *See, e.g.*, *Gooch v. Life Ins. Co. of Am.*, 672 F.3d 402, 426 (6th Cir. 2012).

Agreement do not raise a fact issue regarding collusion. The court also rejected Objectors' contention that the settlement was collusively produced because an attorney for SRHS represented a former member of the SRHS Board of Trustees during a state court deposition; Objectors failed to show that, even if a conflict of interest existed, the settlement negotiations themselves were unfair or collusive.

To the contrary, the district court relied heavily on the fact that a well-recognized neutral mediator oversaw settlement negotiations of the federal cases to ensure they were conducted at arms' length. That mediator's affidavit affirmed that, "[a]t all times, the participating parties' negotiations were civil, professional, but hard fought. The negotiations were conducted at arm's length without collusion." The involvement of "an experienced and well-known" mediator "is also a strong indicator of procedural fairness." *Morris v. Affinity Health Plan, Inc.*, 859 F.Supp.2d 611, 618 (S.D.N.Y. 2012*). See also La Fleur v. Med. Mgmt. Int'l, Inc.*, 2014 WL 2967475, at *4 (C.D. Cal. June 25, 2014) ("Settlements reached with the help of a mediator are likely non-collusive").

"Because Appellants have pointed to no record evidence that contradicts this finding . . . [,] we reject their contention that collusion was present in the settlement negotiations." *Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004). The district court did not clearly err or abuse its discretion in holding that the proposed settled was not the product of collusion or fraud.[6]

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[6] In upholding the district court's ruling on this point, we neither comment on nor affirm the integrity of the state proceedings.

III.

The Objectors next argue that the Settlement Agreement is not fair, reasonable, or adequate. Their contentions embrace several of the *Reed* factors, including the court's estimate of the complexity and expense of ongoing litigation (factor 2); the probability of plaintiffs' success on the merits (factor 3); and the range of possible recovery (factor 5). Numerous individual points are made, a number of which are articulated for the first time in this court. One of their principal propositions is that the court evaluated only the terms of SRHS's reimbursing the Plan without considering how the settlement would affect individual beneficiaries. A second proposition is that no evidence at the fairness hearing demonstrated how SRHS will comply with its payment obligations in the future or how the Plan's inevitable termination will affect the class members.[7] Objectors also claim that the Settlement Agreement lacks adequate safeguards for future declines in the financial health of SRHS. These are serious arguments that go to the heart of

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Some of the Objectors' allegations about those proceedings are provocative, to be sure, and raise issues that may potentially bear on the status of the Plan and SRHS payments in the future. But any possible state court irregularities did not influence the class action settlement negotiations overseen by the district court and its experienced mediator.

[7] The Objectors also claim that the district court's preliminary certification of the class action as a "limited fund" under Rule 23(b)(1) was in error. Similarly, Objectors argue without citing any authority that the Settlement Agreement is not fair because it did not contain an opt-out provision. However, the District Court ultimately certified this class under, Rule 23(b)(1)(A), as "a mandatory settlement class," Objectors have not briefed the propriety of this legal determination, and it is waived.

the settlement's consequences for the plaintiffs and thus to its fairness and adequacy.

Because the district court's discussion focused too narrowly on SRHS's proffered payments, we will vacate and remand for further elucidation of points relevant to the hospital's ability to sustain the promised settlement payments, how the settlement affects the plaintiffs, and why class counsel should receive their multimillion dollar fees up-front while significant uncertainty surrounds SRHS's future compliance. In this section, we also reject other complaints objectors make against the settlement.

A.

"The court must be assured that the settlement secures an adequate advantage for the class in return for the surrender of litigation rights against the defendants." *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 195 (5th Cir. 2010). "A district court faced with a proposed settlement must compare its terms with the likely rewards the class would have received following a successful trial of the case." *Reed*, 703 F.2d at 172. This inquiry may also involve whether or not the defendant had the financial means to pay a greater judgment than the settlement agreement. Settlements have been considered fair when "there would be almost insurmountable problems collecting any judgment against the Settling Defendants" due to their "financial insolvency." *Newby*, 394 F.3d at 302. The Objectors take issue with the district court's opening comment at the fairness hearing that, "even bad settlements are better than protracted litigation."

Objectors initially challenge the fairness and adequacy of the Settlement Agreement because the settling parties concededly provided no information regarding the actual payments retirees would receive in the future under the agreement. Appealing on behalf of their clients, many of whom currently rely on the Plan's retirement payments, the Objectors urge that SRHS and the class counsel had a duty to inform the class members transparently about how the settlement would affect their individual financial positions in the future. How much could they expect to receive compared with the implicit promise of lifetime guaranteed payments embodied in the defined benefits Plan? This is a legitimate question, albeit one that is fraught with contingencies and could not readily have been answered for each of over three thousand Plan participants. Instead, the settlement proponents' testimony assured that given SRHS's desperate financial straits, whatever the hospital could promise simply to make up its contribution shortfalls from 2009-14 was all that class members, individually or collectively, could expect. The district court accepted this bit-of-a-loaf-is-better-than-none approach and rejected Objectors' contention that more disclosure was required concerning the Settlement's impact on Plan participants.

In addition, the testimony taken as a whole was remarkably vague about SRHS's future ability to fund its share of payments as well as the results to retirees and other class members if it did not. The court's very brief treatment of these issues in its opinion chose to credit boilerplate summations by the hospitals' CFO Lee Bond that SRHS "should be able" to make its scheduled settlement payments, and "[a]pproval of the

settlement would result in an immediate contribution to the Plan and subsequent scheduled contributions that would have the potential to generate earnings for the Plan." *Jones*, 2016 WL 6106521 at *15. The court balanced this "potential" against the ongoing litigation costs for "over 150 lawsuits," the present inability of SRHS to pay its judgment of over $55 million, and the resulting uncertainty of any recovery absent a settlement. *Id.* The court concluded that the "proposed settlement recovery . . . replaces one hundred percent of the missed 2009 through 2014 contributions." *Id.* The court should have noted, and required the proponents to address, the significant qualifications to this "one hundred percent" forecast.

According to Bond, SRHS's financial condition, as of the date of the fairness opinion, had moved from unsustainable (losing $39 million annually) in 2014 to a very small positive margin (a few hundred thousand) in mid-2016. Under Bond's stewardship over two years, SRHS had built up a necessary 65-day cash operating reserve of $51 million, whereas it had less than 30 days cash on hand when he arrived. In favor of the settlement, SRHS was incurring over a hundred thousand in attorneys' fees every month, and the Plan, as frozen, will run out of money to pay claims in 2024. Against this improving picture, however, cross-examination elicited that without Jackson County's contribution SRHS "probably [can]not" pay even the $6.5 million class counsel fees as scheduled and approved by the court. As to the settlement, he opined that "those payments or some form of payments can be made" by SRHS to reimburse the Plan. The hospital had negative equity exceeding $136 million at that time. Further, the most recent auditor's report for

SRHS, covering fiscal year 2015 and introduced for the hearing, showed that the Plan had about $137 million in assets, but approximately $441 million in projected liabilities, and had been paying out over $1 million each month in benefits.

These facts tend to support the necessity of some settlement, but they do not address whether over the extraordinarily lengthy 35-year contemplated term, SRHS, still in precarious shape, will be able to handle the escalating annual installment payments.[8] The Settlement Agreement's payment obligations are no more than unsecured contractual obligations of SRHS (and Jackson County); there is no collateral to support them or incentivize payments to the Plan over those to other unsecured creditors. Multimillion dollar payments for attorneys' fees (over $6.5 million) and installments to the Plan ($6.4 million) are due from SRHS by September 2018, but the system's net operating revenue was recently less than a million dollars. In 2024, SRHS owes the Plan $5.7 million and thereafter until 2051 $4.5 million annually. Jackson County's initial contribution to the settlement and annual $1.2 million payments raise additional doubts, as these were variously explained to support either indigent care (running at $40 million annually according to Bond) or municipal bond obligations that had been guaranteed by the County. Either way, this is not much of a "contribution."

Perhaps the most intriguing fact is that class counsel arranged for their agreed, complete payout of fees from SRHS before the end of 2018, and thus

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8 The court refused Objectors' request to recall Bond for additional testimony about the Settlement.

alleviated any significant future risk of nonpayment. Meanwhile, the Plan participants bear considerable risk and, worse, uncertainty. As the record stands, SRHS's future ability to make escalating annual payments to the Plan over thirty-five years is arguable, and that question compounds with demographic reality as more plaintiffs approach eligibility for retirement benefits. That counsel assured themselves a multi-million-dollar bird in hand, while leaving the class members two in the bush, is disturbing. If they were confident about SRHS's ability to comply with the settlement, they could have accepted payments over its prescribed duration. Doing so would also have freed up more cash for an up-front contribution by SRHS to the Plan and, thus, the class members. This situation is reminiscent of justly derided class action settlements where counsel take home substantial fees while the class members receive worthless coupons. Without more information about the viability and nature of payout prospects for class members under the settlement's terms, class counsel's agreed payout is dubious.

Another factor bearing on the financial fairness of the settlement is that SRHS's recoveries, if any, from SRHS from KPMG and Transamerica are not treated as sums owed directly to the Plan but may be petitioned to be used to reduce SRHS's Plan payments. Also, rather than enable class members to share in any improvement in SRHS's financial fortunes, the Settlement Agreement allows SRHS to reduce its obligated payments ahead of schedule, if it is able, with a very favorable discount rate. In essence, SRHS's accelerated payments would reduce its overall liability and thus the amounts payable to class members as

returns on the Plan's assets would accrue at a lower rate. Perhaps these provisions were regarded as safeguards with little potential impact on the settlement, or perhaps they were intended as indirect means of forestalling SRHS's longer-term payment defaults, but they were not explored at the hearing.

The fiscal doubts about payments even in the relatively near term heightened the need for an inquiry into the sufficiency of Plan assets to make promised payments to Plan beneficiaries because they come due over, say, the coming ten to fifteen years. There is no assurance in the record that the Plan will not run out of money to pay the class members' claims well before 2051. The class members, especially current retirees, were owed something more than legal provisions enabling a speedy Chancery Court judgment for failed SRHS Settlement payments and a vague statement that changes in Plan distribution terms would be subject to notice and hearing. Money judgments are worthless if they cannot be enforced. Without foreknowledge of the possible timing of payment crises, and the possible results in the event of payment defaults, class members have no way to plan their futures. Finally, as Objectors point out, the confirmed settlement dispenses with SRHS's significant ongoing litigation costs, but because of the clear possibility that future litigation will occur in the Chancery Court over a missed payment, or changes in distributions, or formal termination and liquidation of the Plan, the class members will continue to need representation. Even though the Settlement may have been justified as a matter of necessity, the class members were entitled to greater transparency about its weaknesses.

For the foregoing reasons, we vacate and remand for the development of further information in regard to the settlement.

B.

The Objectors also argue that the Settlement Agreement was unfair and inadequate because it did not include the value of missed contributions in 2015, 2016, and at least to the conclusion of the fairness hearing. The district court held that the tenuous possibilities that the class would receive, or SRHS would be able to pay, a larger verdict were not sufficient grounds for rejecting the proposed settlement. By its terms, the Plan could have been terminated in 2014 and might not have been liable at all for subsequent contributions. On the other hand, a judgment required SRHS to reimburse the Plan for contributions missed from 2009-14. Although the Plan is not formally terminated, it is not "open" at this time as the Objectors assert; theirs is a litigating position, and a weak one at that. The court's legitimate doubts that the class could prevail on any post-2014 claim, whether in contract or tort, for missed Plan payments support its conclusion that the settlement was fair and adequate. *See Ayers*, 358 F.3d at 370-73 (discussing the probability of success on the merits); *Parker v. Anderson*, 667 F.2d 1204, 1209-10 (5th Cir. 1982). The court's skepticism that these additional amounts could hardly be paid anyway is borne out by the record and further justified approval of this aspect of the settlement.

C.

The Objectors also contend that the number of Objectors to the settlement warrants its disapproval. "[V]ast class dissatisfaction with the settlement" can require a district court to withhold approval of the agreement. *Reed*, 703 F.2d at 174 (citing *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1214-19 (5th Cir. 1978) (disapproving settlement agreement to which 70 percent of class members objected). However, "[a] settlement can be fair notwithstanding a large number of class members who oppose it." *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). At the end of the day, it is not the number of Objectors but the quality of their objections that should guide the court's review. "[A] settlement is not fair where all the cash goes to expenses and lawyers, and the [class] members receive only discounts of dubious value." *In re Katrina Canal Breaches Litig.*, 628 F.3d at 195 (citing *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 221 (D. Me. 2003)) (alterations in original).

According to the district court, roughly 205 individuals objected, from among 3,076 class members. The Objectors comprise only 6.66% of the class although they constitute about one-third of the retirees currently receiving Plan payments. Regardless, courts have approved of settlements with much higher percentages of Objectors. *Salinas v. Roadway Express, Inc.*, 802 F.2d 787, 790 (5th Cir. 1986) (34% of known class members objected); *Reed*, 703 F.2d at 174 (number of objections nearly 40%). Therefore, the number of Objectors to the Settlement Agreement does not demonstrate unfairness.

IV.

Contrary to their concerns about SRHS's ability to make future payments, the Objectors complain that the district court refused to invoke stern sanctions, up to and including dismissal of the class actions, because of alleged perjury by Bond about financial documents the Objectors claim were shredded. Such documents, they claim, would have revealed that SRHS is now returned to fiscal solvency and therefore able to bear a verdict for its missed contributions. Yet the district court thwarted their attempt to thoroughly cross-examine Bond about shredding documents, and they were not allowed to offer witness Rachel Thompson, an SRHS employee, who claimed to have witnessed a unique event in which locked boxes of SRHS financial documents were delivered for shredding.

Extensive discovery assures the court the parties have a good understanding of the likely outcomes and their expected value, while reinforcing adversarial bona fides against collusion or conspiracy. This issue pertains to *Reed* factors 1 and 3. *Reed*, 703 F.2d at 172. Thus, "if the record points unmistakably toward the conclusion that the settlement was the product of uneducated guesswork, a court may be acting within its discretion in disapproving the agreement without ever considering whether the agreement's terms are adequate." *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981). But the lack of discovery is not necessarily fatal to a settlement agreement, provided the parties demonstrate the case "cannot be characterized as an instance of the unscrupulous leading the blind." *Cotton*, 559 F.2d at 1332. "[T]he trial court is entitled to rely upon the judgment of experienced counsel for the parties." *Id.*

at 1330. The quality and experience of the lawyering is thus "something of a proxy for both 'trustworthiness' and 'reasonableness'—that is, if experienced counsel reached this settlement, the court may trust that the terms are reasonable in ways that it might not had the settlement been reached by lawyers with less experience in class action litigation." Newberg on Class Actions, § 13:53 (5th ed., updated Dec. 2016).

The Objectors have not made out a case for perjury or discovery violations. The district court asked Bond directly whether he had shredded financial documents, and Bond testified unequivocally that neither he nor anyone under his direction shredded any documents. At the fairness hearing, Carroll, the expert CPA, testified that he had reviewed the financial information of SRHS when assessing the loss to the Plan, up to and including SRHS audited financial statements for the years ending September 30, 2003-2014. Objectors challenge the information he relied on as potentially incomplete, but they do not have any supporting evidence for their suspicion.

"[T]he trial court may limit its proceeding to whatever is necessary to aid it in reaching an informed, just and reasoned decision." *Cotton*, 559 F.2d at 1331. As the settlement proponents note, nearly two hundred thousand pages of financial information were produced during discovery. Without some evidence of such alleged misconduct beyond Thompson's speculation, and some showing of how shredding affected the case, the district court did not abuse its discretion by refusing Thompson's testimony.[9]

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[9] The Objectors complain that their counsel were not permitted to cross-examine Special Fiduciary Steve Simpson after he read

V.

Throughout their appellate brief, the Objectors contend that the district court erred in approving the settlement because it released Jackson County, Mississippi, a non-party to the class actions, from liability.[10] They argue that Jackson County has a continuing duty to cover any shortfall in the Plan and guarantee payment of the pension to retirees under the Mississippi Code, which states in pertinent part:

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his statement at the fairness hearing. "[N]o court of appeals, to our knowledge, has demanded that district courts invariably conduct a full evidentiary hearing with live testimony and cross-examination before approving a settlement." *Union Asset Mgmt.*, 669 F.3d at 641-42 (5th Cir. 2012) (quoting *Int'l Union v. Gen. Motors Corp.*, 497 F.3d 615, 636 (6th Cir. 2007)). The court's opinion approving the settlement did not cite to or rely on Simpson's statement, which was largely conclusional in any event. Any error was harmless.

[10] Procedurally, they object that while the district court verbally expressed skepticism that a non-party to the case could be released, the court reversed its position when approving the settlement. A court, however, is entitled to change its mind after deliberating on a legal point.

The Objectors also contend the district court erred in accepting an unsolicited, post-hearing letter from class counsel regarding the release of Jackson County because they had no opportunity to respond. This argument is without merit. The release of Jackson County was discussed at length during the fairness hearing, and the very points made by Reeves's letter were addressed when the Objectors raised them. More importantly, the Objectors did not object to the submission of the letter in the district court and did not seek the opportunity to respond to it at that time. This argument is therefore waived on appeal. *See F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994) (arguments not preserved for appeal are waived and cannot be addressed in the first instance by the court of appeals).

> The board of supervisors acting for a county . . . are hereby authorized and empowered to levy ad valorem taxes on all the taxable property of such counties . . . for the purposes of raising funds for the maintenance and operation of hospitals.

Miss. Code Ann. § 41-13-25. Further, one of the reasons for the Plan's exemption (as the retirement plan of a government entity) from ERISA is that government entities can fulfill their obligations through their taxing power. They also argue that public policy should abjure releasing Jackson County because doing so blesses past official malfeasance and provides a "judicially created blueprint" for other government entities to default on their retiree obligations and escape liability. Objectors chide the mediator and the court for not looking into Jackson County's ability to pay for SRHS's Plan obligation and, in short, for not forcing the County to assume liability for its wholly-owned community hospital system. *See* Miss. Code. Ann. § 41-13-10(c), (d) (definition of community hospitals). *See also* § 41-13-15 (county authority to acquire community hospital).

The district court rejected these arguments for good legal reasons. It held that no statute cited by the Objectors requires the County to levy taxes to fund hospital pensions; § 41-13-25 merely provides that the County is authorized to use revenues for hospital funding, not that it is mandated to do so. Neither Objectors nor this court has found definitive legal authority holding a Mississippi county responsible

for the debts of its "independent" entities.[11] The district court held that the policy behind granting ERISA exemptions for public entities' plans is an insufficient basis for imposing a legal duty on Jackson County. The district court noted that the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1-23, governs any lawsuit against Jackson County, thus limiting any available recovery against the County even if it were not released from liability.[12]

The district court did not abuse its discretion by approving the release of Jackson County. Although it must carefully consider the consequences, a court

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[11] The FY 2015 audited financial report for SRHS states: "While the County may appropriate money from its general fund and levy property taxes to support the operations of the Health System, the Health System has been self-supporting and receives no County appropriations for its operations, nor has it received any such financial support from the County in over twenty-six years." There is no suggestion from the auditors that the County is a payor of last resort.

[12] The Mississippi Tort Claims Act limits recovery against a political subdivision for tort law to $500,000, providing: "In any claim or suit for damages against a governmental entity or its employee brought under the provisions of this chapter, the liability shall not exceed the following for all claims arising out of a single occurrence for all damages permitted under this chapter: . . . (c) For claims or causes of action arising from acts or omissions occurring on or after July 1, 2001, the sum of Five Hundred Thousand Dollars ($500,000.00)." Miss. Code. Ann. § 11-46-15. Similarly, political subdivisions are immune from claims arising from breach of an implied contractual term. *City of Jackson v. Estate of Stewart ex rel. Womack*, 908 So.2d 703, 711 (Miss. 2005) ("Miss.Code Ann. § 11-46-3 grants immunity to the state and its political subdivisions for breach of implied term or condition of any warranty or contract.") (internal quotation omitted).

may approve a class action settlement that releases non-parties if "the claims against the non-party being released were based on the same underlying factual predicate as the claims asserted against the parties to the action being settled." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 109 (2d Cir. 2005) (citing *In re Lloyd's Am. Trust Fund Litig.*, 2002 WL 31663577, at *11 (S.D.N.Y. Nov. 26, 2002)).[13]

Here, Jackson County agreed to make a $13.6 million contribution to SRHS for the stated purpose of assisting with indigent care and to prevent bond default, in exchange for a release of liability for claims that the district court found to have little support or be limited by statute. Whatever liability Jackson County may have had, or however much more it could have contributed to benefit the class than what amounts to approximately 22% of the Plan's liability for missed contributions from 2009-14, the Objectors have not demonstrated that this release renders the Settlement Agreement inadequate.[14]

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[13] "[T]he rationale behind approving releases of non-parties turns on the courts' interest in the settlement of disputes. A defendant may be unlikely to settle a class action if class members can later pursue unasserted claims, or claims against non-parties, that may have the effect of re-opening the litigation." Newberg on Class Actions § 18:20.

Curiously, Objectors make no argument concerning the court's simultaneous release of individual SRHS defendants from whatever claims may have been asserted based on their ineptitude or malfeasance, and which claims would not necessarily have been "based on the same underlying factual predicate." *See Wal-Mart*, 396 F.3d at 109.

[14] The Objectors argue, in a single paragraph, that the district court erred by approving a settlement when additional lawsuits are pending in state court. In specific, the Objectors appealed

CONCLUSION

The terms of the Settlement Agreement as they affect Plan participants should have been more thoroughly examined prior to the court's approval. It was improper for the court to limit its consideration to the hospital's ability to pay while ignoring a transparent explanation of the settlement's consequences for the class members. We do not hold that the settlement should not be approved, or cannot be approved as modified, but we Vacate and Remand for further consideration of the following illustrative issues:

1. How, and how much, the future stream of SRHS's payments into the Plan, together with existing Plan assets and prospective earnings, will intersect with future claims of Plan participants, including, but not limited to, what effect the Settlement has on current retirees;

2. What are SRHS's future revenue projections, showing dollar amounts, assumptions and contingencies, from which a reasonable conclusion is drawn that SRHS has the financial ability to complete performance under the settlement;

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the Jackson County Board of Supervisors' decision to contribute to the proposed settlement. The district court considered this argument but held that no authority supports the Objectors' position and that nothing requires the district court to delay approval of the Settlement Agreement until the Objectors' state court appeal has been concluded. The Objectors have not adequately briefed this argument to show the district court abused its discretion in so holding. *See Mijalis*, 15 F.3d at 1327.

3. Why any payments from litigation involving KPMG, Transamerica or related entities are permitted to defray SRHS's payment obligation rather than supplement the settlement for the benefit of class members;

4. Why class counsel's fees should not be tailored to align with the uncertainty and risk that class members will bear.

The judgment of the district court is VACATED and REMANDED with Instructions.

ORDER AND FINAL JUDGMENT OF THE DISTRICT COURT (JUNE 16, 2016)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THOMAS JONES, ET AL.,

Plaintiffs,

v.

SINGING RIVER HEALTH SERVICES FOUNDATION, ET AL.,

Defendants.

Cause No. 1:14cv447-LG-RHW consolidated with 1:15cv1-LG-RHW, 1:15cv44-LG-RHW

Before: Louis GUIROLA, JR.,
Chief U.S. District Judge

This cause came to be heard upon the *Jones* Plaintiffs' Motion for Final Approval of Class Action Settlement [162]. Numerous written responses and objections to Plaintiffs' Motion for Final Approval were filed and the Court conducted a two-day Final Fairness Hearing on May 16-17, 2016. Having read the parties' briefs, the briefs of the objectors, and having reviewed the evidence submitted in the case, as well as having heard and considered all of the arguments

made at the Final Fairness Hearing, the Court hereby orders and adjudges as follows:

(a) The settlement, as appears in Document 163-1, incorporated herein by this reference, is fair, reasonable and adequate, is ordered finally approved, and shall be consummated in accordance with its terms and provisions.

(b) The consolidated actions *Jones, et al. v. Singing River Health Services Foundation, et al.*, Case No. 1:14-cv-447-LG-RHW, *Cobb, et al. v. Singing River Health System, et al.*, Case No. 1:15-cv-1-LG-RHW, and *Lowe v. Singing River Health System, et al.*, Case No. 1:15-cv-44-LG-RHW (collectively, "Federal Action") are proper class actions for purposes of settlement under Fed. R. Civ. P. 23, and the following mandatory settlement class is certified pursuant to Fed. R. Civ. P. 23(b)(1)(A):

> All current and former employees of Singing River Health System who participated in the Singing River Health System Employees' Retirement Plan and Trust, including their spouses, alternate payees, death beneficiaries, or any other person to whom a plan benefit may be owed.

(c) The Court finds and determines that the notice procedure afforded adequate protections to the Settlement Class Members and provided the basis for the Court to make an informed decision regarding approval of the Settlement based on the response of Settlement Class Members. The Court finds and determines that the notice provided in this case satisfied the requirements of law and due process.

(d) The Court expressly determines that there is no just reason for delay, and therefore expressly directs entry of final judgment pursuant to Fed. R. Civ. P. 54(b) as to the claims against Defendants Singing River Health System ("SRHS"), Singing River Health Services Foundation, Singing River Health System Foundation (f/k/a Coastal Mississippi Healthcare Fund, Inc.), Singing River Hospital System Foundation, Inc., Singing River Hospital System Employee Benefit Fund, Inc., Board of Trustees for the Singing River Health System, and Singing River Hospital System ("Other Singing River Defendants"), and Defendants Michael J. Heidelberg, Morris G. Strickland, Ira S. Polk, Michael Crews, Tommy L. Leonard, Michael D. Tolleson, Lawrence H. Cosper, Allen L. Cronier, Marva Fairley-Tanner, Grayson Carter, Jr., Gary C. Anderson, G. Chris Anderson, Gary Anderson, Kevin Holland, Martin D. Bydalek, William C. Descher, Stephen Nunenmacher, Joseph P. Vice, Eric D. Washington, Hugo Quintana, and Stephanie Barnes Taylor ("Individual Defendants"). The Plaintiffs' claims against KPMG, LLP, and Transamerica Retirement Solutions Corporation shall remain pending.

(e) All claims, rights and causes of action, damages, losses, liabilities and demands of any nature whatsoever, whether known or unknown, that are, could have been or might in the future be asserted by the Trust, any Plaintiffs or any member of the Settlement Class (whether directly, representatively or in any other capacity), against the following Released Persons, in connection with or that arise out of any acts, conduct, facts, transactions or occurrences, alleged or otherwise asserted or that could have been asserted in the Actions related to the failure to fund the

Trust and/or management or administration of the Plan (collectively referred to as the "Settled Claims") shall be compromised, settled, released and discharged with prejudice:

(1) Jackson County, Mississippi and the Jackson County Board of Supervisors;

(2) Singing River Health System, its current and former Board of Trustees (individually and in their official capacities), agents, servants and/or employees;

(3) Singing River Health Services Foundation, Singing River Health System Foundation f/k/a Coastal Mississippi Healthcare Fund, Inc., Singing River Hospital System Foundation, Inc., Singing River Hospital System Benefit Fund, Inc., and Singing River Hospital System and all of their current and former employees, agents, and inside and outside counsel and their firms; and

(4) current and former Trustees of the Trust (in their individual and official capacities).

(f) The Plaintiffs and/or members of the Settlement Class are hereby permanently barred and enjoined from instituting or prosecuting, either directly or in any other capacity, any action that asserts any claims released under the terms of the Settlement Agreement.

(g) Without affecting the finality of this Order and Judgment in any way, this Court grants continuing authority and exclusive jurisdiction over implementation of the Settlement, and over enforcement, construc-

tion and interpretation of the Stipulation to the Jackson County Chancery Court in Cause No. 2015-0060-NH.

(h) This Court approves the award of attorneys' fees and expenses as well as incentive fees as set forth in its order regarding same [Doc. #287] and grants continuing jurisdiction over the payment of those fees to the Jackson County Chancery Court in Cause No. 2015-0060-NH.

SO ORDERED AND ADJUDGED this the 16th day of June, 2016.

/s/ Louis Guirola, Jr.
Chief U.S. District Judge

MEMORANDUM OPINION AND ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT (JUNE 2, 2016)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THOMAS JONES, ET AL., on Behalf of Themselves and Others Similarly Situated,

Plaintiffs,

v.

SINGING RIVER HEALTH SYSTEM, ET AL.,

Defendants.

Cause No. 1:14CV447-LG-RHW
Consolidated With 1:15CV1-LG-RHW
Consolidated With 1:15CV44-LG-RHW

Before: Louis GUIROLA, JR.,
Chief U.S. District Judge

BEFORE THE COURT is the Motion for Final Approval of Class Action Settlement [162] filed by the plaintiffs in these consolidated, putative class action lawsuits.[1] Now, having conducted a comprehen-

[1] The following defendants have filed responses stating that they have no objection to the settlement: Singing River Health

sive two-day fairness hearing, having heard and considered evidence from lay and expert witnesses, and having considered arguments and comments of counsel for proponents as well as objectors, the Court must decide whether the proposed settlement is fair, reasonable, and adequate.

In the context of a fairness hearing, the role of the Court is a delicate one. The hearing must not turn into a trial or a rehearsal of the trial. Instead, as noted by the United States Supreme Court, the lower court must reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and "form an educated estimate of the complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968).

The purpose of settlement is to avoid the trial of sharply contested issues of fact. It also dispenses with wasteful, prolonged and often expensive litigation. A fair class action settlement is not a settlement that is perfect or that the judge would necessarily have personally determined acceptable. Neither is settlement

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Services Foundation, Singing River Health System, Singing River Hospital System, Singing River Hospital System Employee Benefit Fund, Inc., Singing River Hospital System Foundation, Inc., Chris Anderson, and Michael Crews. Approximately 204 members of the proposed class who are represented by counsel filed a joint objection [177] to the proposed settlement. One additional pro se objection [169] was also filed. The plaintiffs and some of the defendants filed replies in support of the Motion for Approval.

fairness measured by demands that are unattainable and clearly outside the range of relief reasonably available to the class members. A settlement is fair if it reaches a result that fits within a range of rational outcomes. A fair settlement is not just fair, but is also reasonable and adequate. A settlement is reasonable if the class claims and allegations are responsive to it. It is adequate, when compared to what class members would have obtained in non-class action litigation. And finally a settlement is fair when it is in harmony with class action law by providing efficient and economical access to justice while ensuring that the parties respect and live up to their obligations.

After weighing all of these considerations, the Court finds that the Motion for Final Approval of the Settlement should be granted. In this Memorandum Opinion and Order, the Court provides its findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a)(1).

Background

The defendant Singing River Health System (SRHS) operates two hospitals in Jackson County, Mississippi—Singing River Hospital in Pascagoula, Mississippi, and Ocean Springs Hospital in Ocean Springs, Mississippi. SRHS constitutes a "community hospital," pursuant to Miss. Code Ann. § 41-13-10(c) and a nonprofit organization pursuant to 26 U.S.C. § 501(c)(3). It is operated by a board of trustees.

Initially, SRHS participated in the Public Employees' Retirement System of Mississippi in order to provide retirement benefits to its employees. However, in 1983 SRHS withdrew from the PERS and created the Singing River Hospital System Employees' Retire-

ment Plan and Trust ("the Plan"), a self-administered retirement plan for its employees. The Plan was amended several times, and, in 2009, the title of the Plan was changed to Singing River Health System Employees' Retirement Plan and Trust.

It is undisputed that the version of the Plan that went into effect on October 1, 2007, is at issue in this case. That version of the Plan states in part that employees are required to contribute 3 percent of their pay to the Plan. (Pls.' Mem., Ex. 5 at 74, ECF No. 163-5). Furthermore, the Plan required SRHS to "make such contributions from time to time, which in addition to contributions made by [employees] pursuant to Section 9.02, shall be necessary as determined by the Actuary to provide the benefits of this Plan." (*Id.* at 75). The Plan does not provide for individual retirement accounts but provides a formula by which each employee's retirement benefit is calculated, based on a percentage of the employee's average compensation multiplied by his or her years of credited service. (*Id.* at 26). The Plan also allows for disability retirement and a death benefit. (*Id.* at 49-50). The Plan states that SRHS, acting through its Chief Executive Officer, is the Plan Administrator and a fiduciary of the retirement trust. (*Id.* at 76-77). SRHS's Board of Trustees was assigned "the sole responsibility for determining the amount . . . , subject to the advice and recommendation of the Actuary, of contributions to be made by [SRHS], and the Employees, if any, to provide benefits under the Plan." (*Id.* at 77). The Plan further provides that SRHS could amend or terminate the Plan at any time. (*Id.* at 83, 98).

SRHS stopped making actuarial-determined contributions to the Plan during fiscal year 2009. Accord-

ing to these plaintiffs, several events led to the alleged under funding of the Plan, including the 2008 fiscal recession, reductions in Medicaid and insurer reimbursements, large capital expenditures, and accounting errors. (Pls.' Mem. at 6-7, ECF No. 163). As a result, SRHS's Chief Executive Officer issued a Memorandum to SRHS employees on December 1, 2014, announcing that SRHS had frozen the Plan on November 29, 2014. According to the Memorandum, no additional contributions from employees or from SRHS would be deposited to the Plan. (Pls.' Mem., Ex. 25, ECF No. 163-25). The Memorandum also advised that the Plan would be terminated and liquidated in the following months. (*Id.*)

A plethora of lawsuits, naming multiple defendants in the federal and state courts, soon followed the announced intention of the SRHS to cancel and liquidate the Plan. Three of those lawsuits are putative federal class action cases that have been consolidated by this Court: *Jones, et al. v. Singing River Health System, et al.*, 1:14cv447-LG-RHW; *Cobb, et al. v. Singing River Health System, et al.*, 1:15cv1-LG-RHW; and *Lowe v. Singing River Health System, et al.*, 1:15cv44-LG-RHW. A fourth putative class action lawsuit, *Montgomery v. Singing River Health System, et al.*, 1:16cv17-LG-RHW, was also filed on January 19, 2016, but has been stayed by the Court pending consideration of the proposed settlement.

The Third Amended Complaint [151] filed in the lead class action case, Jones, raises the following claims against SRHS, several SRHS officers, and members of the SRHS Board of Trustees: (1) violation of the Contract Clause of the United States Constitution; (2) violation of the Takings Clause of the United

States Constitution; (3) violations of 42 U.S.C. § 1983; (4) violation of the Contract Clause of the Mississippi Constitution; (5) violation of the Takings Clause of the Mississippi Constitution; (6) breach of contract; (7) fraud, intentional fraudulent misrepresentations, and deceit; (8) violation of reporting and disclosure provisions of ERISA; (9) failure to provide minimum funding required by ERISA; (10) breach of fiduciary duty; (11) violation of the Mississippi Uniform Trust Code; (12) violation of the due process clause of the United States Constitution; (13) equitable estoppel; (14) promissory estoppel; (15) a conspiracy to violate civil rights; (16) negligence; (17) wantonness; and (18) negligent misrepresentations. The Third Amended Complaint also seeks an accounting, specific performance, a constructive trust, a declaratory judgment, equitable relief pursuant to Section 502(a)(3) of ERISA, an injunction, payment of civil penalties, attorneys' fees, expenses, prejudgement interests, and costs. The plaintiffs claim for relief requests a judgment requiring the SRHS defendants to fund the Plan in accordance with ERISA's funding requirements and to make the Plan whole for any losses. (See 3d Am. Compl. at 64-65, ECF No. 151). The plaintiffs have also sued Transamerica Retirement Solutions Corporation and KPMG, LLP, two entities that were allegedly employed by SRHS to provide advice and to administer the Plan. (*Id.* at 10). The plaintiffs' claims against KPMG and Transamerica are excluded from the proposed settlement, as explained in further detail below.

After these consolidated lawsuits were filed, the plaintiffs and the defendants negotiated An Agreement to Ninety Day Stay [20] in which the parties agreed,

inter alia, that SRHS retirees would continue to receive benefits pursuant to the Plan's terms and that the Plan would not be terminated or dissolved. After the stay expired, the SRHS Board of Trustees resolved to reverse the proposed termination on May 25, 2015. Nevertheless, the Plan remains frozen, and no employee or employer contributions have been made to the Plan since November 29, 2014.

The parties participated in expedited discovery, which included the production of thousands of pages of SRHS financial documents to the plaintiffs in both state and federal court. The plaintiffs retained Allen Carroll, an expert certified public accountant from the Mobile, Alabama firm Wilkins Miller, to review these documents and calculate the amount of contribution that should have been made to the Plan from 2009 through 2014. Calculations also included the estimated earnings that the missing contributions would have earned. According to Carroll the missed contributions totaled $46,339,731 for the period September 30, 2009, through September 30, 2014. (Pls.' Mem., Ex. 24 at 4, ECF No. 163-24). He also determined that had timely contributions been made they would have yielded $9,375,054 in earnings. (*Id.* at 5). Thus, Carroll concluded that the Plan was in arrears a total of $55,714,784 for the period 2009-2014. (*Id.*)

On May 10, 2015, this Court entered an Order [102] appointing former Chief United States Bankruptcy Judge for the Northern District of Mississippi, David M. Houston, to serve as a mediator for the consolidated federal cases. In addition, some of the attorneys representing plaintiffs in the state court cases voluntarily agreed to participate in mediation.

Over the next few months several mediation sessions were conducted.

The Proposed Settlement Agreement

As a result of these mediation sessions, the following parties entered into a Stipulation and Agreement of Compromise and Pro Tanto Settlement:

> (a)(i) Thomas Jones, Joseph Charles Lohfink, Sue Beavers, [Rodolfo A. Rel], Hazel Reed Thomas, Regina Cobb, Susan Creel, Phyllis Denmark, and Martha Ezell Lowe, individually and as representatives of an agreed-upon class of similarly situated persons, who collectively are the plaintiffs . . . in the above-captioned federal consolidated proceedings, and (ii) Donna B. Broun, Alisha Dawn Smith, Johnys Bradley, Cabrina Bates, Vanessa Watkins, Bart Walker, Linda D. Walley, and Virginia Lay, individually [and] as beneficiaries of and derivatively for and on behalf of Singing River Health System Employee's Retirement Plan and Trust . . . ; (b) Singing River Health System Employees' [Retirement] Plan and Trust and Special Fiduciary . . . ; (c) Singing River Health System, its current and former Board of Trustees (individually and in their official capacities), agents, servants and/or employees; (d) Singing River Health Services Foundation, Singing River Health System Foundation f/k/a Coastal Mississippi Healthcare Fund, Inc., Singing River Hospital System Foundation, Inc., Singing River Hospital System Benefit Fund, Inc., and Singing River Hospital System and all of their

> current and former employees, agents, and inside and outside counsel and their firms . . . ; and (e) current and former Trustees of the Trust (in their individual and official capacities). . . .

(Pls.' Mem., Ex. 1 at 1-2, ECF No. 163-1).[2] The proposed settlement agreement provides for the creation of the following settlement class, subject to the approval of this Court:

> All current and former employees of Singing River Health System who participated in the Singing River Health System Employees' Retirement Plan and Trust, including their spouses, alternate payees, death beneficiaries, or any other person to whom a plan benefit may be owed.

(*Id.* at 5).

Pursuant to the proposed settlement agreement, SRHS must deposit a total of $149,950,000 into the retirement trust pursuant to a thirty-five-year schedule agreed upon by the parties. (Pls.' Mem., Ex. 1 at 7, ECF No. 163-1). The plaintiffs' expert accountant Allen Carroll has determined that the payment of this amount over thirty-five years will fully compensate the Plan for the 2009 through 2014 missed contributions. (Pls.' Mem., Ex. 24 at 6, ECF No. 163-24).

In order to facilitate the proposed settlement, Jackson County, Mississippi, has agreed to pay a total of $13,600,000 to SRHS "[t]o support the indigent

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[2] As explained infra, Rodolfo A. Rel's name was misspelled "Rodolfoa Rel" in pleadings filed with this Court. The Court will utilize the correct spelling of his name in this opinion.

care and principally to prevent default on a bond issue by supporting the operations of SRHS" in nine installments beginning upon approval of the settlement and ending on September 30, 2024. (Pls.' Mem., Ex. 1 at 6, ECF No. 163-1; Pls.' Mem., Ex. B to Ex. 1, ECF No. 163-1). During the fairness hearing held in this matter, SRHS's Chief Financial Officer Lee Bond testified that SRHS is required to treat patients regardless of their ability to pay. He explained that Jackson County's payment to SRHS will provide SRHS with more capital to pay its employees and vendors. Mr. Bond opined that it is unlikely that SRHS could make its settlement payments to the Plan if Jackson County does not contribute to SRHS's indigent care and bond payments. As a result of Jackson County's contribution, the County would be entitled to a release pursuant to the proposed settlement. (Pls.' Mem., Ex. 1 at 3, ECF No. 163-1).

As part of the settlement negotiations, the majority of the SRHS Board of Trustees resigned their positions and Jackson County agreed to retain a "Turnaround Firm dedicated to improving the performance, efficiency, and economics of ongoing SRHS operations, the purpose of which is to help ensure the long-term financial security and stability of SRHS." (Pls.' Mem., Ex. 2 at 7, ECF No. 163-2). Mr. Bond testified during the fairness hearing that this Turnaround Firm has helped SRHS attain financial stability, which should in turn help SRHS fulfill its obligations pursuant to the proposed settlement.

SRHS has also agreed to pay attorneys' fees and expenses subject to the approval of this Court, "provided that any such award does not exceed $6,450,000 in fees and $125,000 in documented expenses, which

may include expenses incurred in connection with administering the settlement." (Pls.' Mem., Ex. 1 at 14, ECF No. 163-1). The proposed attorneys' fees would be paid in four installments, beginning upon approval of the settlement and ending on September 30, 2018. (Pls.' Mem., Ex. C to Ex. 1, ECF No. 163-1). As an incentive award, Singing River has also agreed to pay $12,500, to be divided among the named plaintiffs to the *Jones*, *Cobb*, and *Lowe* federal lawsuits as well as the *Broun* and *Lay* state court lawsuits. (Pls.' Mem., Ex. 1 at 8, ECF No. 163-1).[3]

The proposed settlement also provides for injunctive relief, in that the parties have agreed to "jointly petition the Chancery Court of Jackson County, Mississippi for an order requiring that the [Plan] be monitored by the Chancery Court for the duration of the payment schedule." (*Id.* at 14). Singing River's Chief Financial Officer will give quarterly reports to Stephen Simpson, the special fiduciary who has been appointed by the Chancery Court to oversee the Plan. (*Id.*) Simpson will also provide quarterly reports to the Chancery Court regarding the financial condition of the Plan and the status of the repayment schedule. (*Id.* at 16). As part of the Chancery Court's authority to oversee and monitor the SRHS retirement Plan:

> Any adjustment to the Plan can only be done with Special Fiduciary recommendation and Chancery Court approval after sixty (60) days' notice to the Class Members and

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[3] The plaintiffs have filed a separate Motion [164] for Award of Attorneys' Fees and Reimbursement of Costs and Award of Incentive Fee. Therefore, the Court will consider the proposed incentive fee, attorneys' fees, and costs, in a separate opinion.

> opportunity for hearing. If the Chancery Court orders any modification and/or termination of the Plan, then the Class Members will be bound by the Court's/Special Fiduciary's findings regarding distribution, Plan restructuring and/or Plan termination, subject to their rights to appeal any order of said court.

(*Id.* at 16). Plan distributions can only be changed or terminated with the approval of Mr. Simpson and the Chancery Court. (*Id.* at 17).

The proposed settlement also gives Mr. Simpson the authority to petition the Chancery Court to accelerate SRHS's payments if SRHS recovers money from other entities or individuals, including KPMG or Transamerica, or if additional insurance coverage becomes available to SRHS. (*Id.* at 17). Furthermore, the proposed settlement class has reserved its right to pursue claims against Transamerica, KPMG, FiduciaryVest, LLC, and Trustmark National Bank. (*Id.* at 2).

The proposed settlement provides:

> Payment of the SRHS Consideration, less attorneys' fees and expenses, is SRHS's only obligation to the [Plan]. Should SRHS default on its obligation to make a payment for the SRHS Consideration, there shall be a summary proceeding in the Chancery Court through which the Chancery Court may enter judgment on 10 days' notice in favor of the Trust and against SRHS for the unpaid balance of the SRHS Consideration reduced to present value after applying a 6% discount ratio, and Settling Defendants will not raise

> any substantive defenses on the merits of the underlying claims.

(*Id.* at 8). Furthermore, the plaintiffs covenant not to sue the released persons and entities, and that the released persons and entities "shall have no other or further liability or obligation to any member of the Settlement Class in any court or forum (including state or federal courts) with respect to the Settled Claims or to contribute any amount to the [Plan]," other than the schedule of payments provided in the settlement agreement. (*Id.* at 9). The term "Settled Claims" is defined in the settlement agreement to include:

> all claims, rights and causes of action, damages, losses, liabilities and demands of any nature whatsoever, whether known or unknown, that are, could have been or might in the future be asserted by the [Plan], any Plaintiffs or any member of the Settlement Class . . . against Released Persons, in connection with or that arise out of any acts, conduct, facts, transactions or occurrences, alleged or otherwise asserted or that could have been asserted in the Actions related to the failure to fund the [Plan] and/or management or administration of the Plan.

(*Id.* at 6.)

The plaintiffs filed a Motion for Preliminary Approval of Class Settlement Agreement [136], which after a public hearing, the Court granted. The Court also conditionally certified the proposed class as a mandatory Rule 23(b)(1) class. Notice of the proposed settlement was mailed to all members of the condi-

tionally-certified class, (Aff. of ALCS, ECF No. 279-1), and deadlines were established for the filing of motions and objections related to the proposed settlement. Two separate written objections to the proposed settlement were filed.[4] On May 16 and May 17, 2016, the Court conducted a fairness hearing at which the parties to the settlement and the objectors were permitted to present arguments, witnesses, and evidence in support of their respective positions.

Discussion

I. Class Certification

Before considering the merits of the proposed settlement, this Court must determine whether the proposed settlement class should be certified pursuant to the requirements of Fed. R. Civ. P. 23. The requirements of Rule 23(a) and at least one subsection of Rule 23(b) must be satisfied before a class can be certified. Fed. R. Civ. P. 23(b); *see also* McLaughlin on Class Actions: Law and Practice (Eleventh) § 5.1 (2014). A request for certification of a proposed settlement class should be subjected to heightened scrutiny, because "a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

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[4] A third objection was also filed but was withdrawn after the parties stipulated that the person who filed that objection was not a member of the conditionally-certified class.

A. Fed. R. Civ. P. 23(a) Requirements

The requirements of Fed. R. Civ. P. 23(a) are: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. See Amchem Prods. Inc., 521 U.S. at 613. The Court will separately address all four of these requirements in order to ensure that certification is proper.

1. Numerosity

Numerosity is present if the proposed class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. of the Nw., Inc. v. Equal Emp't Opportunity Comm'n*, 446 U.S. 318, 330 (1980). The Fifth Circuit has held that the number of members in a proposed class is not determinative of whether joinder is impracticable, but a class of 100 to 150 members "is within the range that generally satisfies the numerosity requirement." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999), *abrogated on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Additional factors that may be relevant for determining whether joinder is impracticable include "the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim." *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981). Furthermore, the possibility that some class members may be hesitant to assert claims due to a fear of retaliation can indicate that joinder would be impracticable. *Mullen*, 186 F.3d at 625.

SRHS's records indicate that there are 3076 distinct class members. (Aff. of ALCS at 1, ECF No. 279-1). Counsel for SRHS has previously testified that the class members live in forty-one different states and territories. (Aff. of Andrea Kimball, ECF No. 145-1). Furthermore, it is undisputed that numerous class members are still employed by SRHS and may be fearful of asserting claims. As a result, the Court finds that the numerosity requirement is satisfied.

2. Commonality

Fed. R. Civ. P. 23(a)(2) requires a demonstration that "there are questions of law or fact common to the class." The United States Supreme Court has held that the proposed class members' claims must depend upon a "common contention . . . of such a nature that it is capable of class wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc.*, 564 U.S. at 389.

There are numerous questions of law and fact common to the class. For example, what are the duties owed by SRHS under the Plan, whether the Plan is governed by ERISA, and the amount of funds that should have been deposited in the retirement trust pursuant to the Plan documents. As a result, the commonality requirement is also satisfied.

3. Typicality

Typicality is established when "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3).

> Typicality does not require a complete identity of claims. Rather, the critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality.

Stirman v. Exxon Corp., 280 F.3d 554, 562 (5th Cir. 2002). The United States Supreme Court has explained that "[t]he commonality and typicality requirements . . . serve as guideposts for determining whether under particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Wal-Mart Stores, Inc.*, 564 U.S. at 389 n.5.

Here the claims asserted by the class representatives are typical of those raised in nearly all of the state court lawsuits. These claims arose from the same nucleus of facts and the plaintiffs are seeking the same relief—full restoration of the amounts SRHS failed to deposit into the retirement trust and interest earnings. Therefore, the typicality requirement is satisfied.

4. Adequacy of Representation

A court considering class certification must also ensure that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Rule 23(a)'s adequacy requirement encompasses class representatives, their counsel, and the relationship between the two." *Stirman*, 280

F.3d at 563. Furthermore, this requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc.*, 521 U.S. at 2250. "A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* However, "[d]ifferences between named plaintiffs and class members render the named plaintiff inadequate representatives only where those differences create conflicts between the named plaintiffs' and the class members' interests." *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 480 (5th Cir. 2001) (discussing the traditional Rule 23(a) adequacy requirement).

During the fairness hearing the objectors argued that the class representatives were not adequately informed of the settlement and have an inadequate relationship with their attorneys. As proof, they contend that class representatives do not have an adequate relationship with class counsel because the name of one of the class representatives, Rodolfo A. Rel, has been misspelled in some of the pleadings. The Court finds that a typographical error is insufficient evidence that the attorney-class representative relationship was lacking. Furthermore, one of the other class representatives testified that Mr. Rel was present during meetings with class counsel and with the class representatives and that the nature of the litigation, the duties of class representatives, and the terms of the proposed settlement were fully explained during these meetings.

The objectors also argue that the class representatives are inadequate representatives because this litigation has been directed by class counsel, not the class representatives. In support of this assertion, the

objectors rely on *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479-80 (5th Cir. 2001). However, the portion of the *Berger* decision cited by the objectors concerns the effect that the Private Securities Litigation Reform Act (PSLRA) had on the class certification requirements. In *Berger*, the Fifth Circuit held that the PSLRA imposes a more stringent standard than the traditional Rule 23 adequacy of representation requirement. *Berger*, 257 F.3d at 483. Specifically, the PLSRA requires that "securities class actions be managed by active, able class representatives who are informed and can demonstrate they are directing the litigation." *Id.* The present lawsuits are not governed by the PLSRA, and thus, the more stringent standard advocated by the objectors does not apply. Furthermore, as the *Berger* court noted, class representatives are not required to be legal scholars, as the objectors seem to contend. *See id.*

All of the class representatives have provided affidavits in which they testify that they understand and agree with the terms of the proposed settlement. Three of the class representatives—Sue Beavers, Joseph Charles Lohfink, and Hazel Reed Thomas—also testified at the fairness hearing and were subjected to cross-examination by counsel for the objectors. Each of these class representatives testified that class counsel had kept them informed throughout the litigation. They also stated that they called class counsel when they had questions about the litigation and that class counsel answered their questions and alleviated all of their concerns. The testimony of these individuals demonstrated that they were well-informed as to the terms of the settlement, including the amount of funds that would be paid to the Plan

and what the class would be giving up in exchange for the payment. They also testified that they understood they had to act in the best interests of the entire class. All of the class representatives who testified receive retirement benefits pursuant to the Plan, but one of these individuals resumed working at SRHS post retirement. As a result, the class representatives have the same interest and desire as the remainder of the proposed class to receive retirement benefits for the rest of their lives. They would also suffer the same injury—a loss or decrease in pension payments—as the other proposed class members if the Plan were terminated or altered to decrease benefits. Furthermore, there is no evidence or indication that the class representatives have a conflict of interest. As a result, the Court finds that the class representatives will fairly and adequately protect the interests of the class.

The objectors have also contested the adequacy of proposed class counsel – Jim Reeves and Stephen Nicholas. They state that "[t]he court has previously admonished class counsel Jim Reeves for his unwillingness to participate in hearings before this court and felt it necessary to remind him of his duties to the class." (Obj. at 10, ECF No. 177). This is a gross mischaracterization of the Court's statements during a hearing that was held concerning the conduct of another attorney that has made an appearance in this case. The Court is unaware of any unwillingness on the part of Reeves or other attorneys nominated as class counsel to participate in hearings before this Court. The objectors do not dispute that Mr. Reeves and Mr. Nicholas have extensive experience. As this Court previously held in its Memorandum Opinion and

Order Granting Plaintiffs' Motion for Preliminary Approval of Settlement [148], both Mr. Reeves and Mr. Nicholas are experienced in handling complex litigation, and they are qualified to represent the interests of the proposed class. The Court has also witnessed their representation of the plaintiffs throughout this contentious and complicated litigation and finds that they have provided and will continue to provide more than adequate representation of the class.

After the fairness hearing, the plaintiffs filed a Motion [280] asking the Court to appoint Lucy E. Tufts as additional class counsel. Ms. Tufts, like Mr. Nicholas, is a partner in the Cunningham Bounds, LLC, law firm in Mobile, Alabama. She has been a member of the Alabama Bar since 2008, and she has been representing the plaintiffs since the initial *Jones* Complaint was filed. She has provided the Court with biographical information including an impressive educational background and experience in handling complex litigation and obtaining large verdicts and settlements on behalf of her clients. Ms. Tufts has also demonstrated her aptitude in representing her clients at both the hearing on the plaintiffs' Motion for Preliminary Approval of the Settlement and the fairness hearing. As a result, the Court finds that Ms. Tufts should be appointed as additional class counsel and that she has and will continue to adequately represent the interests of the class.

For the reasons stated supra, the adequacy of representation requirement and the other Rule 23(a) requirements have been satisfied. This Court will next consider whether certification pursuant to Rule 23(b) is appropriate.

B. Fed. R. Civ. P. 23(b) Requirements

The plaintiffs seek certification of a mandatory settlement class pursuant to Fed. R. Civ. P. 23(b)(1), which applies where:

> prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

Class members do not have the right to opt out of class actions maintained under Fed. R. Civ. P. 23(b)(1). *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 n.13 (5th Cir. 1999).

"Rule 23(b)(1)(A) is satisfied only in the event that inconsistent judgments in separate suits would trap the party opposing the class in the inescapable legal quagmire of not being able to comply with one such judgment without violating the terms of another." *McBirney v. Autrey*, 106 F.R.D. 240, 245 (N.D. Tex. 1985). Thus, "Rule 23(b)(1)(A) considers possible prejudice to the defendant arising from incompatible judicial determinations that would interfere with its ability to pursue a uniform course of conduct . . . ." McLaughlin, § 5.2.

> Rule 23(b)(1)(A) takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owners using water as against downriver owners).

Amchem Prods., Inc., 521 U.S. at 614. This subsection is often utilized to certify class actions arising out of the alleged improper administration of retirement plans. This is because "one Plan participant's claim necessarily implicates issues relevant to the adjudication of other participants' claims. Claims brought by more than one plan participant therefore might place incompatible demands on the defendants, requiring them to compensate the Plan under one ruling but not another." *Rogers v. Baxter Int'l Inc.*, No. 04 C 6476, 2006 WL 794734, at *10 (N.D. Ill. Mar. 22, 2006) (discussing certification of a class action brought pursuant to ERISA section 502(a)(2)); *see also Specialty Cabinets & Fixtures, Inc. v. Amer. Equitable Life Ins. Co.*, 140 F.R.D. 474, 479 (S.D. Ga. 1991) ("Because individuals may bring class actions to remedy breaches of fiduciary duty only on behalf of the retirement plan, rather than themselves, the court cannot allow absent participants or beneficiaries to opt out of this class.").

Over 150 lawsuits alleging that SRHS failed to properly fund the Plan have been filed in three different courts. Most of the claims seek relief on behalf of the Plan. One of the asserted claims is for a breach of fiduciary duty. Some of the lawsuits seek recovery pursuant to ERISA, while others argue that the Plan is not governed by ERISA. If a class were not certified

in the present matter, SRHS and the other settling defendants could be bound by conflicting judgments concerning whether SRHS and others breached fiduciary duties, whether ERISA governs the Plan, and the amount of funds, if any, needed to make the Plan whole. *See, e.g.*, *Musmeci v. Schwegmann Giant Supermarkets*, No. 97-2757, 2000 WL 1010254, at *4 (E.D. La. July 20, 2000) (holding that the risk of inconsistent decisions concerning whether a plan is governed by ERISA is grounds for Rule 23(b)(1) certification).

The Objectors have not disputed that there is a strong possibility that SRHS and the other settling defendants would be subjected to differing and incompatible judgments and legal standards if a mandatory class is not certified. However, they argue that Rule 23(b)(1) certification is inappropriate here, because they contend that class members will not be treated equally by the proposed settlement and monetary damages are being awarded as a result of the settlement.

The United States Supreme Court has stated that it is "at least a substantial possibility" that class actions seeking money damages can only be certified under Rule 23(b)(3) as a result of due process and other constitutional concerns. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 120 (1994). However, Rule 23(b)(1) certification does not offend due process where a class action primarily seeks monetary relief for a retirement plan, not the individual plaintiffs or class members. *See Colesberry v. Ruiz Food Prods., Inc.*, No. CV F 04-5516 AWI SMS, 2006 WL 1875444, at *5 (E.D. Cal. June 30, 2006).

In the present case, the proposed settlement provides Plan-wide relief. No specific monetary damages are awarded to any individual.[5] The objectors' arguments that the proposed settlement will not treat class members equally are therefore without merit. Furthermore, although changes to benefits may be made upon approval by the chancery court, the proposed settlement does not directly affect the individual benefits provided to employees or retirees. Thus, approval of a mandatory settlement class will not violate the due process rights of the class members. The Court finds that certification of a mandatory settlement class is proper under Rule 23(b)(1)(A). Since certification is proper pursuant to Rule 23(b)(1)(A), it is not necessary to address certification pursuant to Rule 23(b)(1)(B).

II. Analysis of the Fairness, Adequacy, and Reasonableness of the Proposed Settlement

Fed. R. Civ. P. 23(e) provides that a class action may only be settled with the court's approval. The Fifth Circuit has recognized that there is an "overriding public interest" and a "strong judicial policy favoring the resolution of disputes through settlement" even in the context of class actions. *In re Deepwater Horizon*, 739 F.3d 790, 807 (5th Cir. 2014); *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982).

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[5] The proposed incentive award for class representatives is not an award of monetary damages but an award to compensate the class representatives for the time and effort they expended on behalf of the class. *Savani v. URS Prof'l Sol. LLC*, 121 F.Supp.3d 564, 576 (D.S.C. 2015). The Court will address the proposed award in its opinion concerning the plaintiffs' Motion [164] for Award of Attorneys' Fees and Reimbursement of Costs and Award of Incentive Fee.

"In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004).

"The gravamen of an approvable proposed settlement is that it be fair, adequate, and reasonable and is not the product of collusion between the parties." *Newby v. Enron Corp.*, 394 F.3d 296, 301 (5th Cir. 2004). When determining whether to approve a class action settlement, courts serve in a "fiduciary role," with "a special duty to act as guardian for the interest of the absent class members because they are not present but will be bound by the disposition of the case." McLaughlin, § 6:4. The court must "ensure that the settlement is in the interest of the class, does not unfairly impinge on the rights and interests of dissenters, and does not merely mantle oppression." *Reed v. Gen'l Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983).

> There are six focal facets: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members.

Id. "[W]hen considering the *Reed* factors, the court should keep in mind the strong presumption in favor of finding a settlement fair." *Klein v. O'Neal, Inc.*, 705 F.Supp.2d 632, 650 (N.D. Tex. 2010).

A. Existence of Fraud or Collusion

The first Reed factor requires courts to look for the existence of fraud or collusion behind the settlement. Where, as here, the settlement was reached before a class was certified, courts are required to subject the proposed settlement to a heightened standard of scrutiny to ensure that no collusion or other improprieties are present. McLaughlin, § 6:4. The following elements are considered "warning signs" that collusion may be present:

> (1) when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded; (2) when the parties negotiate a "clear sailing" agreement providing for the payment of attorneys' fees separate and apart from class funds, which carries excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class; and (3) when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund.

Id. (internal quotation marks omitted). It is only necessary to consider the first two warning signs because there is no reversion clause in the proposed settlement agreement.

The Court will first consider whether the proposed settlement provides a disproportionate distribution of the settlement. The proposed settlement provides for a $149,950,000 recovery over a thirty-five-year period on behalf of the Plan. The proposed settlement agreement also provides:

> [SRHS has] agreed to pay attorneys' fees and expenses, provided that any such award does not exceed $6,450,000 in fees and $125,000 in documented expenses, which may include expenses incurred in connection with administering the settlement. Plaintiffs' Counsel will not apply for a larger award of attorney fees unless Defendants oppose the request for the sum set forth in Exhibit C [to the Stipulation].

(Pls.' Mot., Ex. 1 at 14, ECF No. 163-1).[6] This Court will analyze the amount of attorneys' fees that should be awarded in a separate opinion, but the proposed $6,450,000 award, to be paid in installments, is not disproportionate to the $149,950,000 total Plan recovery. Therefore, the amount of attorneys' fees sought is not evidence of collusion or fraud.

It is important to note that individual class members are not receiving an individual recovery while attorneys are receiving a recovery. However, the present lawsuits were primarily filed in order to achieve a recovery on behalf of all of the Plan beneficiaries collectively. Awards to certain individual members of the Plan would likely prejudice the ability of other members of the Plan to recover. Thus, the nature of the award does not indicate that the settlement is the product of collusion.

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[6] Exhibit C to the settlement agreement provides that the attorneys' fees shall be paid in four installments, subject to approval by this Court: (1) a $2,000,000 payment upon approval of the settlement; (2) a $1,200,000 payment on September 30, 2016; (3) a $1,750,000 payment on September 30, 2017; and (4) a $1,500,000 payment on September 30, 2018. (Pls.' Mot., Ex. C to Ex. 1, ECF No. 163-1).

As for the second potential warning sign, the parties dispute whether the proposed settlement agreement contains a clear sailing clause. "A clear sailing agreement (or clause) is a compromise in which the defendant agrees not to contest the amount awarded by the court presiding over the settlement as long as the award falls beneath a negotiated ceiling." William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Settlements*, 77 Tul. L. Rev. 813, 813 (Mar. 2003). Thus, the clause at issue in the present case does appear to be a clear sailing clause.

"Clear sailing provisions carry the risk of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class." *In re Bluetooth Headset Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). "[W]hen confronted with a clear sailing provision, the district court has a heightened duty to peer into the provision and scrutinize carefully the relationship between attorneys' fees and benefit to the class, being careful to avoid awarding unreasonably high fees simply because they are uncontested." *Id.* Although the use of a clear sailing clause is a red flag, such a clause does not automatically justify a finding of collusion. *See, e.g.*, *Gooch v. Life Ins. Co. of Am.*, 672 F.3d 402, 426 (6th Cir. 2012); *In re Nat'l Football League Players Concussion Injury Litig.*, No. 15-2206, 2016 WL 1552205, at *28 (3d Cir. Apr. 18, 2016).

The existence of the clear sailing clause is not sufficient, in and of itself, to demonstrate that the settlement was the product of collusion or fraud. This is particularly true since class counsel has testified that attorneys' fees were negotiated separately from

the award to the Plan. (Pls.' Mot., Ex. 2 at 7, ECF No. 163-2). Furthermore, there is no indication that class counsel accepted an unfair settlement on behalf of the class in order to obtain an award of attorneys' fees; rather all of the evidence before the Court indicates that the settlement provides a full recovery for the period of time in question and the proposed attorneys' fees are a small percentage of the amount recovered by the Plan. These class action lawsuits, as well as the state court lawsuits, were filed in 2014 due to the absence of employer contributions to the Plan since 2009. A certified public accountant has testified that the proposed settlement would restore 100 percent of the contributions missing from the Plan, including interest and earnings. No expert testimony has been presented that disputes this opinion. Thus, the clear sailing clause in the proposed settlement agreement is not indicative of collusion in this circumstance.

The objectors argue that the settlement was the product of collusion, because the attorney for SRHS represented a former member of the SRHS Board of Trustees during a deposition that was taken in state court. However, counsel for the objectors have not explained how this alleged conflict of interest demonstrates that the settlement negotiations were unfair or collusive in nature.

The objectors also take issue with several decisions and events that occurred in state court. For example, they allege that a state court judge prevented them from conducting discovery, but it is unclear how discovery decisions made in state court would indicate the presence of collusion or fraud during settlement negotiations. The objectors also claim that the state

court judge conducted an ex parte meeting with counsel for SRHS and class counsel on January 12, 2016. Importantly, this meeting was held after the settlement was reached. In addition, the objectors have not demonstrated that the meeting was ex parte, because neither the objectors nor their attorneys were parties to the lawsuit that was discussed at the meeting at issue. The objectors also mention "approval of payments from the retirement fund without proper documentation," but they do not explain how this would indicate fraud or collusion were present.

The objectors also seek discovery concerning the settlement negotiations in order to determine whether collusion or fraud were present. Several courts have held that objectors do not have an absolute right to discovery concerning a settlement and that "a court may, in its discretion, limit the discovery . . . to that which may assist it in determining the fairness and adequacy of the settlement." *See Hemphill v. San Diego Ass'n of Realtors, Inc.*, 225 F.R.D. 616, 619 (S.D. Cal. 2005) (collecting cases). "Because settlement negotiations involve sensitive matters, the courts have consistently applied the principle that discovery of settlement negotiations is proper only where the party seeking it lays a foundation by adducing from other sources evidence indicating that the settlement may be collusive." *Id.* at 620. The objectors are not entitled to discovery, because the objectors have provided no evidence of collusion in the present case.

Finally, it is significant to note that the proposed settlement at issue was the product of multiple mediation sessions that were conducted by an experienced mediator appointed by the Court. The use of a mediator during settlement negotiations is an indica-

tion that the settlement negotiations were fair and non-collusive. *See, e.g.*, *Morris v. Affinity Health Plan, Inc.*, 859 F.Supp.2d 611, 618 (S.D.N.Y. 2012) (noting that the parties' use of a mediator was a factor indicating that the settlement negotiations were fair); *La Fleur v. Med. Mgmt. Int'l Inc.*, No. EDCV 13-00398-VAP, 2014 WL 2967475, at *4 (C.D. Cal. June 25, 2014) ("Settlements reached with the help of a mediator are likely non-collusive."). The mediator, David W. Houston, III, has testified by affidavit that "[a]t all times, the participating parties' negotiations were civil, professional, but hard fought. The negotiations were conducted at arm's length without collusion." (Pls.' Reply, Ex. F at 4, ECF No. 222-6). Furthermore, Stephen Simpson, the special fiduciary appointed by the chancery court, stated during the fairness hearing that the settlement negotiations were contentious and hard-fought, resulting in a fair and reasonable settlement.

While, at first glance, the clear-sailing clause is cause for concern, the entire record before the Court indicates that the proposed settlement was not the product of collusion or fraud but was negotiated through arms-length negotiations supervised by an experienced mediator. Therefore, the first *Reed* factor supports a finding that the settlement is fair, adequate, and reasonable.

B. Complexity, Expense, and Likely Duration of the Litigation

The second Reed factor pertains to the complexity, expense, and likely duration of the litigation should the settlement not be approved. "When the prospect of ongoing litigation threatens to impose high costs of

time and money on the parties, the reasonableness of approving a mutually-agreeable settlement is strengthened." *Klein*, 705 F.Supp.2d at 651 (citing *Ayers v. Thompson*, 358 F.3d 356, 373 (5th Cir. 2004)). The simultaneous federal and state court litigation has already been extremely expensive, complicated, and time-consuming. SRHS's insurer has claimed in insurance litigation currently pending before the Fifth Circuit that defense costs in the state and federal lawsuit have already exceeded $2 million. (Federal Ins. Mot. at 12 n.6, ECF No. 158-2). It is clear that continuing to litigate these matters will expend far more resources, particularly since the 152 Jackson County, Mississippi Circuit Court cases are in their infancy, with little or no motion practice or discovery conducted thus far. The litigation would also be very complicated given that the litigation would proceed in three different jurisdictions before at least three different judges. An appeal of any decision reached by any of these judges would inevitably further prolong a resolution. presented. Accordingly, the Court finds that the complexity, expense, and likely duration of this litigation weighs in favor of approving the proposed settlement.

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

Under the third Reed factor, courts must consider the stage of the proceedings and the amount of discovery completed. The goal of this factor is to "evaluate[] whether 'the parties and the district court possess ample information with which to evaluate the merits of the competing positions.'" *Klein*, 705 F.Supp. 2d at 653 (quoting *Ayers*, 358 F.3d at 369). "A settlement can be approved under this factor even if

the parties have not conducted much formal discovery." *Id.*

Although no discovery was conducted in the federal class actions, class counsel conducted discovery in state court. Two depositions were taken and thousands of pages of financial documents were exchanged. (Pls.' Mem., Ex. 2 at 5-6, ECF No. 163-2). SRHS's financial records were also reviewed by a certified public accountant. There is no indication that additional discovery would have assisted the parties in determining the amount of funds necessary to compensate the Plan for actuarial-determined contributions that should have been made by SRHS.

Although counsel for the objectors argue that additional discovery is necessary to understand why contributions were not made or who made the decision not to make contributions, these facts would not assist the parties or the Court in determining the adequacy of the proposed settlement. This is particularly true because class counsel was able to negotiate the resignation of several members of the SRHS Board of Trustees. In addition, the proposed settlement provides an oversight and monitoring process by a special fiduciary and the Chancery Court to further protect the future solvency and management of the Plan. Thus, the proposed settlement provides a new and additional increased layer of protection to from mismanagement of the Plant to the class members.

A review of the record in this matter demonstrates that the parties had sufficient information to evaluate the strengths and weaknesses of their respective positions. They were also able to determine the amount of funds necessary to compensate the Plan and to verify those figures with an expert. As a result, sufficient

discovery has been conducted and the lawsuits are ripe for a determination of the merits of the proposed settlement. Therefore, this factor weighs in favor of approval of the proposed settlement.

D. The Probability of Plaintiffs' Success on the Merits

The fourth *Reed* factor, which is the most important factor absent fraud and collusion, considers the probability of the plaintiffs' success on the merits. *Parker*, 667 F.2d at 1209. When analyzing this factor, the court must judge the terms of the proposed settlement against the probability that the class will succeed in obtaining a judgment following a trial on the merits. *Reed*, 703 F.2d at 172. However, the court "must not try the case in the settlement hearings because the very purpose of the compromise is to avoid the delay and expense of such a trial." *Id.*

In the present case, the Court finds that it is likely that the plaintiffs would be successful if the case went to trial, but it is questionable that the plaintiffs would be able to recover any judgment awarded. SRHS's Chief Financial Officer Lee Bond testified during the fairness hearing that SRHS's debts exceed its assets, and SRHS does not have the capital necessary to pay the entire alleged Plan deficiency at this time. Furthermore, SRHS's insurer has appealed this Court's decision in a separate lawsuit that the insurer is required to fund SRHS's defense as well as the defense of individual defendants employed by SRHS. (*See Fed. Ins. Co. v. SRHS*, Cause No. 1:15cv236-LG-RHW). As a result, the expenses required to pursue lengthy litigation of over 150 lawsuits pending in three courts may fall on SRHS

and the individual SRHS defendants if the insurer's appeal is successful. Under those circumstances, litigation costs would further deplete the resources of SRHS and the individual defendants, causing recovery of any judgment to be even less likely. Finally, it must be recognized that as long as this litigation continues, no funds will be contributed to the Plan but retirement benefits will continue to be paid to retirees on a monthly basis.

Meanwhile, the proposed settlement contemplates a Plan recovery of $149,950,000 over a thirty-five-year period. Mr. Bond has opined that SRHS should be able to make those scheduled payments, given SRHS's current financial condition. Approval of the settlement would result in an immediate contribution to the Plan and subsequent scheduled contributions that would have the potential to generate earnings for the Plan.

After comparing the uncertainty that would be generated by protracted, complicated litigation with the proposed settlement recovery that replaces one hundred percent of the missed 2009 through 2014 contributions, the Court finds that the fourth *Reed* factor supports a finding that the proposed settlement is fair, reasonable, and adequate.

E. The Range of Possible Recovery

The fifth *Reed* factor examines the range of possible recovery by the class. This factor primarily concerns the adequacy of the proposed settlement. *See Ayers*, 358 F.3d at 370.

In the present case, the objectors have not provided evidence or expert testimony that disputes the assertion

that the proposed settlement provides a one hundred percent recovery of the alleged missing contributions for the period 2009 through 2014. However, the objectors are concerned that no contributions are provided for 2015 or subsequent years pursuant to the proposed settlement. The objectors also argue that the proposed settlement should not provide a release to Jackson County, Mississippi.[7]

The Court will address the arguments concerning Jackson County first. The objectors claim that the County "is an implicit guarantor of the Plan under the law through its taxing authority." (Obj. at 15, ECF No. 177). However, the statute cited by the objectors, Miss. Code Ann. § 41-13-25, merely provides that the County is authorized to levy taxes for the maintenance and operation of county hospitals; the statute does not require the County to do so. The objectors also argue that the SRHS Plan is a governmental plan that is exempted from the requirements of ERISA. The objectors argue that one of the reasons behind this exemption was the belief that "the ability of the governmental entities to fulfill their obligations to employees through their taxing powers was an adequate substitute for both minimum funding standards and plan termination insurance." *See Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910, 914 (2d Cir. 1987). However, this statement of legislative history does not provide that the County is required to utilize its taxing authority to fund the Plan. Finally, any lawsuit against the County may be

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[7] The objectors also argue that the proposed settlement does not contemplate the earnings that the 2009 through 2014 contributions would have made, but this contention is incorrect. (*See* Pls.' Mot., Ex. 24 at 5 (¶10), ECF No. 163-24).

governed by the Mississippi Tort Claims Act, which limits the recovery available for torts committed by governmental entities. *See* Miss. Code Ann. 11-46-1, et seq. Therefore, the proposed settlement's release of the County does not justify a finding that the settlement is inadequate.

As explained previously, the class may succeed in obtaining a judgment against SRHS and the other released defendants, but the class's ability to enforce that judgment is extremely questionable. It is also questionable whether the class could recover for 2015 or subsequent missed contributions, because SRHS arguably had the right to freeze and terminate the Plan in 2014. While the proposed settlement does not provide for a recovery of the alleged 2015 required contribution or future contributions, the proposed settlement provides a one hundred percent recovery for the years 2009 through 2014 without the necessity of protracted litigation. The possibility of obtaining a larger but likely unrecoverable verdict is not sufficient grounds for rejecting the proposed settlement. As a result, the fifth *Reed* factor supports approving the settlement.

F. The Opinions of Class Counsel, Class Representatives, and Absent Class Members

The sixth *Reed* factor requires consideration of the opinions of class counsel, class representatives, and absent class members, because:

> in reviewing a proposed class settlement, a trial judge is dependent upon a match of adversary talent because he cannot obtain the ultimate answers without trying the case. Indeed that uncertainty is a catalyst of

> settlement. Because the trial judge must predict, the value of the assessment of able counsel negotiating at arm's length cannot be gainsaid. Lawyers know their strengths and they know where the bones are buried.

Reed, 703 F.2d at 175.

In the present case, the opinions of the class representatives and class counsel support approval of the proposed settlement. At the fairness hearing, class counsel explained that they felt they could obtain a large verdict in this case, but SRHS's negative net worth caused them to worry that the class members may end up with no recovery whatsoever. They analyzed their ability to sue the County but determined that the County's obligation did not exist prior to the settlement. In addition, in exchange for a release, the County will make much-needed payments for indigent care that will assist SRHS in making its scheduled payments pursuant to the settlement agreement.

The class representatives have testified at the fairness hearing and/or by affidavit that they support the settlement and understand it. For example, class representative Sue Beavers explained that she did not want to be in court another ten years; she wanted her attorneys to find the funds that were missing from the Plan and make sure the funds were put back in the Plan. She testified that she believed the settlement would accomplish this goal.

The Court has also considered the opinions of the objectors. Approximately 6.7 percent (or 205) of the proposed class of approximately 3076 individuals have filed objections to the proposed settlement. One pro se objection expressed concern that the proposed

settlement would favor retirees over current employees of SRHS who are Plan members. However, the proposed settlement does not address the amount of benefits that will be recovered by current or future retirees. Benefits are not changed by the proposed settlement, and any future changes must be approved by the special fiduciary and Chancery Court.

The other 204 objectors, several of whom testified at the fairness hearing, are chiefly concerned that the proposed settlement does not guarantee them retirement benefits for life. Although they recognize that the Plan had a termination clause and a clause that permitted changes to be made to the Plan, they claim that oral and implicit guarantees of lifetime benefits were made to all SRHS employees who participated in the Plan. The objectors also argue that the settlement provides them with little value, because they are uncertain whether their benefits will change in the future.

The Court is sympathetic to the concerns of the objectors. Nevertheless, the Plan's viability and ability to provide lifetime benefits, not unlike most private retirement or 401(k) plans, have always been in question. The objectors essentially seek to unilaterally amend or reform the Plan agreement. This Court would not have the authority to change the terms of the Plan even if the settlement were rejected. In other words, the guarantee of future lifetime benefits would be unattainable whether through class action or individual litigation. Moreover, given the financial condition of SRHS and of the Plan itself, the Court is concerned that rejection of the proposed settlement and protracted litigation would only further imperil the financial stability of SRHS, the Plan, and SRHS's current and

future retirees. Therefore, the sixth *Reed* factor supports approval of the proposed settlement.

G. Other Objections

Although the Court has found that all of the *Reed* factors weigh in favor of approving the proposed settlement, the Court will address additional objections that have been made concerning the settlement. The objectors argue that the "side agreement" between SRHS and Jackson County was not produced, but this agreement has since been produced, and the Court has reviewed it while considering whether to approve the proposed settlement.

The objectors also claim that Jackson County is actually paying the proposed attorneys' fees in this matter because the objectors claim that "a review of the payment schedule [in the settlement agreement] shows that Jackson County is to remit funds to SRHS on the same date, in the same amount, as the schedule of payments for attorneys' fees." (Obj. at 17, ECF No. 177). The Court has thoroughly reviewed the payment schedules pertaining to County contributions and attorneys' fees. These schedules provide for payments on different dates and in different amounts, thus providing no support for the objectors' assertion. (*See* Pls.' Mot., Ex. B, C to Ex. 1, ECF No. 163-1). The County Contribution Agreement also specifically provides that the funds contributed by Jackson County cannot be used to pay class counsel. (Pls.' Reply, Ex. H, ECF No. 222-8).

The objectors further assert that they have appealed the Jackson County Board of Supervisors' decision to contribute to the proposed settlement agreement. The objectors have not cited any authority

supporting their position that this Court should delay approval of the settlement until the appeal has been concluded and the Court has located none. Therefore, the Court sees no reason to stay consideration of the proposed settlement on this basis.

Some of the objectors have also argued that the individuals or entities who were responsible for the alleged Plan deficit should be criminally penalized. However, this Court has no authority to seek criminal prosecutions. That authority is vested with the Executive Branch of the United States Government. In addition, the proposed settlement does not necessarily foreclose criminal prosecution in the event that the proper authority chooses to proceed.

Finally, the objectors contend that the proposed settlement will not provide the class members with a final result and will only lead to additional litigation. This argument refers to the Chancery Court proceedings that the settlement requires before changes can be made to the Plan. During the fairness hearing, several class members and class representatives expressed distrust of SRHS and its past handling of the Plan. The Court finds that the Chancery Court's involvement in administering proposed changes to the Plan is an important element of the settlement that will provide an additional layer of protection against to the class members. Thus, this argument is without merit.

Conclusion

While some members of the class vigorously oppose the proposed settlement, the Court finds that the proposed settlement provides the best hope of providing continuing benefits to current and future SRHS retirees, particularly since SRHS will be required to

fully compensate the Plan for all missed contributions prior to the decision to freeze the Plan. Additionally, any attempts to alter the Plan would be subject to Chancery Court review and approval with prior notice to affected class members.

Settlements are balancing acts. "Parties give and take to achieve settlements. Typically neither Plaintiffs nor Defendants end up with exactly the remedy they would have asked the Court to enter absent the settlement." *Klein*, 705 F.Supp.2d at 656 (quoting *Frew v. Hawkins*, No. 3:93CA065-WWJ, 2007 WL 2667985, at *6 (E.D. Tex. Sept. 5, 2007)). Here, the parities have achieved the best result that could be expected given the difficult circumstances and poor alternatives. It is significant to note and worth remembering that to date, not a single Plan member or beneficiary has missed a scheduled retirement benefit payment. If the settlement were not approved, the continuing litigation would be costly, complex, and time-consuming. Future judgments would be inconsistent. Some class members could be treated more favorably than others and any future judgment may be unenforceable. Finally, the Court can not ignore the overall impact of protracted and costly litigation on the community. The Singing River Hospital System is the primary health care provider in Jackson County, Mississippi. It is in the best interest of all–proponents as well as objectors, elected and appointed officials, and importantly, all the citizens of Jackson County, to make every reasonable effort to protect and nurture the hospital system upon which they depend for their critical health care needs.

Therefore, after considering all of the evidence, testimony, arguments, and objections, the Court finds

that there is no evidence that the settlement is the product of fraud or collusion. The Court also finds that the settlement is fair, reasonable, and adequate and should be approved.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the following class is certified as a mandatory settlement class pursuant to Fed. R. Civ. P. 23(b)(1)(A):

> All current and former employees of Singing River Health System who participated in the Singing River Health System Employees' Retirement Plan and Trust, including their spouses, alternate payees, death beneficiaries, or any other person to whom a plan benefit may be owed.

IT IS, FURTHER, ORDERED AND ADJUDGED that the Motion for Final Approval of Class Action Settlement [162] filed by the plaintiffs is GRANTED.

IT IS, FURTHER, ORDERED AND ADJUDGED that the Court will consider the pending Motion [164] for Award of Attorneys' Fees and Reimbursement of Costs and Award of Incentive Fee in a separate opinion. Thus, the Motion [164] for Award of Attorneys' Fees and Reimbursement of Costs and Award of Incentive Fee filed by the plaintiffs is TAKEN UNDER ADVISEMENT.

SO ORDERED AND ADJUDGED this the 2nd day of June, 2016.

/s/ Louis Guirola, Jr.
Chief U.S. District Judge

ORDER OF THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING (SEPTEMBER 6, 2017)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS JONES, on Behalf of Themselves and Others Similarly Situated; JOSEPH CHARLES LOHFINK, on Behalf of Themselves and Others Similarly Situated; SUE BEAVERS, on Behalf of Themselves and Others Similarly Situated; RODOLFOA REL, on Behalf of Themselves and Others Similarly Situated; HAZEL REED THOMAS, on Behalf of Themselves and Others Similarly Situated,

Plaintiffs-Appellees,

v.

SINGING RIVER HEALTH SERVICES FOUNDATION; SINGING RIVER HEALTH SYSTEM FOUNDATION; SINGING RIVER HOSPITAL SYSTEM FOUNDATION, INCORPORATED; SINGING RIVER HOSPITAL SYSTEM EMPLOYEE BENEFIT FUND, INCORPORATED; SINGING RIVER HOSPITAL SYSTEM; MICHAEL J. HEIDELBERG; MICHAEL D. TOLLESON; TOMMY LEONARD; LAWRENCE H. COSPER; MORRIS G. STRICKLAND; IRA POLK; STEPHEN NUNENMACHER; HUGO QUINTANA; GARY C. ANDERSON; STEPHANIE BARNES TAYLOR; MICHAEL CREWS; SINGING RIVER HEALTH SYSTEM; ALLEN CRONIER; MARTIN

BYDALEK; WILLIAM DESCHER; JOSEPH VICE; ERIC WASHINGTON; MARVA FAIRLEY-TANNER; GRAYSON CARTER, JR,

Defendants-Appellees

v.

CYNTHIA N. ALMOND; FRANCISCO C. AGUILAR; KITTY PATRICIA AGUILAR; TANYA R. ARDOIN; RAY J. BARBOUR, ET AL.,

Appellant

REGINA COBB, on Behalf of Themselves and Others Similarly Situated, ET AL.,

Plaintiffs

v.

SINGING RIVER HEALTH SYSTEM; BOARD OF TRUSTEES FOR THE SINGING RIVER HEALTH SYSTEM; MICHAEL J. HEIDELBERG, in Their Individual and Official Capacities; MICHAEL D. TOLLESON, in Their Individual and Official Capacities; ALLEN L. CRONIER, in Their Individual and Official Capacities; TOMMY L. LEONARD, in Their Individual and Official Capacities; LAWRENCE H. COSPER, in Their Individual and Official Capacities; MORRIS G. STRICKLAND, in Their Individual and Official Capacities; IRA S. POLK, in Their Individual and Official Capacities; STEPHEN NUNENMACHER, in Their Individual and Official Capacities; HUGO QUINTANA, in Their Individual and Official Capacities; MARVA FAIRLEY-TANNER, in Their Individual and Official

Capacities; WILLIAM C. DESCHER, in Their Individual and Official Capacities; JOSEPH P. VICE, in Their Individual and Official Capacities; MARTIN D. BYDALEK, in Their Individual and Official Capacities; ERIC D. WASHINGTON, in Their Individual and Official Capacities; G. CHRIS ANDERSON, in Their Individual and Official Capacities; KEVIN HOLLAND, in Their Individual and Official Capacities,

Defendants-Appellees

v.

CYNTHIA N. ALMOND; FRANCISCO C. AGUILAR; KITTY PATRICIA AGUILAR; TANYA R. ARDOIN; RAY J. BARBOUR, ET AL.,

Appellants

No. 16-60550

Appeal from the United States District Court for the Southern District of Mississippi, Gulfport

Before: HIGGINBOTHAM, JONES, and HAYNES, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

STIPULATION AND AGREEMENT OF COMPROMISE AND PRO TANTO SETTLEMENT (JANUARY 3, 2016)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JONES, ET AL,

v.

SINGING RIVER HEALTH SYSTEM, ET AL.

Case No. 1:14-cv-00447-LG-RHW

COBB, ET AL,

v.

SINGING RIVER HEALTH SYSTEM, ET AL.

Case No. 1:15-cv-00001-LG-RHW

LOWE, ET AL,

v.

SINGING RIVER HEALTH SYSTEM, ET AL.

Case No. 1:15-cv-00044-LG-RHW

IN THE CHANCERY COURT OF JACKSON COUNTY, MISSISSIPPI

DONNA B. BROUN, ET AL.,

Plaintiffs.

Cause No. 2015-0027-NH

VIRGINIA LAY,

Plaintiff.

Cause No. 20 15-0060-NH

This Stipulation and Agreement of Compromise and Pro Tanto Settlement (the "Stipulation" or "Settlement") is entered into this 22nd day of December, 2015, by (a)(i) Thomas Jones, Joseph Charles Lohfink, Sue Beavers, Rodolfoa Rei, Hazel Reed Thomas, Regina Cobb, Susan Creel, Phyllis Denmark, and Martha Ezell Lowe, individually and as representatives of an agreed-upon class of similarly situated persons, who collectively are the plaintiffs ("Federal Plaintiff" or "Representative Plaintiffs") in the above-captioned federal consolidated proceedings, and (ii) Donna B. Broun, Alisha Dawn Smith, Johnys Bradley, Cabrina Bates, Vanessa Watkins, Bart Walker, Linda D. Walley, and Virginia Lay, individually as beneficiaries of and derivatively for and on behalf of Singing River

Health System Employee's Retirement Plan and Trust ("State Plaintiffs") (State Plaintiffs and Federal Plaintiffs are collectively referred to as "Plaintiffs"); (b) Singing River Health System Employees' Retirement Plan and Trust and Special Fiduciary (as defined below) (collectively, the "Plan" or "Trust"); (c) Singing River Health System, its current and former Board of Trustees (individually and in their official capacities), agents, servants and/or employees ("SRHS"); (d) Singing River Health Services Foundation, Singing River Health System Foundation f/k/a Coastal Mississippi Healthcare Fund, Inc., Singing River Hospital System Foundation, Inc., Singing River Hospital System Benefit Fund, Inc., and Singing River Hospital System and all of their current and former employees, agents, and inside and outside counsel and their firms (the "Other SRHS Defendants"); and (e) current and former Trustees of the Trust (in their individual and official capacities) ("Plan Trustees"), subject to the approval of the United States District Court for the Southern District of Mississippi (the "District Court") as provided for below. SRHS, the Other SRHS Defendants, and Plan Trustees are collectively referred to as "Defendants" or "Settling Defendants." All individuals or entities listed in (a)-(e) shall be collectively referred to as the "Parties." Jackson County Board of Supervisors, Jackson County as a political subdivision of the State of Mississippi, the individual members of the Board of Supervisors in their official capacities and in their individual capacities and for the agents and employers of Jackson County, MS, are collectively referred to as "Jackson County". Jackson County and Settling Defendants are collectively referred to as "Released Persons."

Solely for the purposes of this Settlement, and without any prejudice- to the parties to take a contrary position in future litigation, Transamerica Retirement Solutions Corporation ("Transamerica"), KPMG, LLP ("KPMG"), Fiduciary Vest, LLC, and Trustmark National Bank (and any of its related affiliates), are not "agents" or "employees" of SRHS as those terms are used in this Stipulation. The purpose of this paragraph is to make clear the Parties' intent that any claims that have been or could be made against Transamerica, KPMG, Fiduciary Vest, LLC, and Trustmark National Bank (and any of its related affiliates) are not released as part of this Settlement.

WHEREAS:

A. The original action filed in the District Court related to the alleged inadequate funding of the Trust was *Jones, et al. v. Singing River Health Services Foundation, et al.* Case No. 1:14-cv-447-LG-RHW. On June 15, 2015, the District Court consolidated the *Jones* matter with *Cobb, et al. v. Singing River Health System, et al.*, Case No: 15-cv- 1-LG-RHW and *Lowe v. Singing River Health System, et al.*, Case No. 1:15-cv-44-LG-RHW (the consolidated cases are collectively referred to as the "Federal Action" and include allegations made in any of the three consolidated cases). On January 12, 2015, the case of *Donna Broun, et al. v. Singing River Health System, et al.*, Cause No. 2015-0027-NH was filed in the Jackson County Chancery Court ("Chancery Court"). On January 20, 2015, the case of *Virginia Lay, et al. v. Singing River Health System, et al.*, Cause No. 2015-0060-NH was also filed in the Jackson County Chancery Court (the *Broun* and *Lay* cases shall be referred to as the

"State Actions") (collectively, the Federal Action and State Actions will be referred to as "State and Federal Actions" or "Actions").

B. The Federal Action was commenced with the filing of the complaint and proceeded on behalf of a putative class of all current and former employees of Singing River Health System who participated in the Singing River Health System Employees' Retirement Plan and Trust. The Class definition shall be amended to include spouses, alternate payees, death beneficiaries, or any other person to whom a plan benefit may be owed.

C. Plaintiffs' Counsel obtained substantial formal and informal discovery from Defendants in the State and Federal Actions. In addition, counsel for the putative class conducted their own investigation into Settling Defendants' conduct.

D. The Federal Action alleged and asserted claims arising from alleged actions that occurred during each year from 2008 forward.

E. Nothing in this Stipulation is to be construed in any way contrary to any prior or subsequent rulings of the District Court regarding the scope, nature and validity of any claims made in any suits related to the SRHS pension plan.

F. Based on an extensive review and analysis of the relevant facts and legal principles, Plaintiffs' Counsel believe that the terms and conditions of the Settlement are fair, reasonable and adequate, and beneficial to and in the best interests of Plaintiffs and the proposed Settlement Class (as defined below). Plaintiffs' Counsel have determined to execute this Stipulation and urge approval by the Courts of the

settlement after considering that the settlement provides for members of the Settlement Class to receive relief in the most expeditious and efficient manner practicable, and thus much sooner than would be possible were the claims asserted to continue to be litigated.

G. Defendants deny that their actions violate applicable law in any respect. Defendants enter into this Stipulation and agree to the certification of the defined class only for purposes of this settlement so that Defendants can avoid the significant cost and uncertainty associated with ongoing litigation of the Actions.

H. Among others, the purpose of this Stipulation is to define the obligation of SRHS to make payments to the Trust.

In the light of the foregoing, the Parties propose to settle the Actions in accordance with the terms, provisions and conditions of this Stipulation as set forth below.

NOW, THEREFORE, IT IS STIPULATED AND AGREED, subject to approval by the Courts as provided herein and pursuant to Rule 23, Federal Rules of Civil Procedure (the "Federal Rules"), by and between Released Persons, the Trust and Plaintiffs (for themselves and for the Settlement Class (defined below)), that all claims, rights and causes of action, damages, losses, liabilities and demands of any nature whatsoever, whether known or unknown, that are, could have been or might in the future be asserted by the Trust, any Plaintiffs or any member of the Settlement Class (whether directly, representatively or in any other capacity), against Released Persons,

in connection with or that arise out of any acts, conduct, facts, transactions or occurrences, alleged or otherwise asserted or that could have been asserted in the Actions related to the failure to fund the Trust and/or management or administration of the Plan (collectively referred to as the "Settled Claims") shall be compromised, settled, released and discharged with prejudice, upon and subject to the following terms and conditions:

1.0 Settlement Class. For settlement purposes only and subject to approval by the Courts, the Federal Action shall proceed on behalf of a settlement class (the "Settlement Class") defined as follows:

> All current and former employees of Singing River Health System who participated in the Singing River Health System Employees' Retirement Plan and Trust, including their spouses, alternate payees, death beneficiaries, or any other person to whom a plan benefit may be owed.

Solely for the purposes of this Settlement and its implementation, the Federal Action shall proceed as a class action on behalf of the Settlement Class as defined above. if, and only if, such settlement fails to be approved or otherwise fails to be consummated, this class definition is not binding.

1.1 Exclusions. if the District Court denies the request for a non-opt out class, any individuals who validly request exclusion in accordance with the procedures in paragraphs 6.0 to 6.4 shall be excluded.

1.2 Settlement Class Counsel. The firms of Reeves & Mestayer and Cunningham Bounds, LLC shall be appointed as "Settlement Class Counsel."

1.3 Class Member List. Defendants and Settlement Class Counsel shall reach an agreement as to which members are in the Settlement Class ("Class Members"), all of whom are identifiable (the "Class Member List") and the last known address for each Class Member from Defendants' internal files. If the Parties do not agree on the inclusion of any putative individual on the Class Member List, the matter shall be submitted to the District Court for decision, and its decision shall be final and not appealable. Prior to the Fairness Hearing (defined in Paragraph 4.0), the Parties shall file a list of the Class Members. If the District Court requires an opt-out class, the Parties shall file a list of any persons who have requested exclusion from the Settlement Class.

2.0 Settlement Consideration. Within fifteen (15) days of the date of the Final Settlement (defined below), the payment schedules set forth in Exhibits A and B shall become effective. SRHS will pay $156, 400,000 to the Trust over time for the benefit of Class Members, as set forth in Exhibit A ("SRHS Consideration"), less any amounts required to pay attorney fees and expenses (*see* Paragraph 8.0). To support the indigent care and principally to prevent default on a bond issue by supporting the operations of SRHS, Jackson County will pay $13,600,000 to SRHS over time, as set forth in Exhibit B ("County Support"), pursuant to separate written agreement (attached as an addendum to this Stipulation). No individual person(s) will be responsible for, nor have any obligation to pay, the SRHS Consideration or County Support. Payment of the SRHS Consideration, less attorneys' fees and expenses, is SRHS's only obligation to the Trust. Should SRHS default on its obligation

to make a payment for the SRHS Consideration, there shall be a summary proceeding in the Chancery Court through which the Chancery Court may enter judgment on 10 days' notice in favor of the Trust and against SRHS for the unpaid balance of the SRHS Consideration reduced to present value after applying a 6% discount ratio, and Settling Defendants will not raise any substantive defenses on the merits of the underlying claims.

2.1 Representative Plaintiffs. In addition to the compensation described above, upon the Settlement becoming final, Defendants shall pay $2,500 in each of the *Jones, et al. v. Singing River Health Services Foundation, et al.*, Case No. 1:14-cv-447-LG-RHW, *Cobb, et al. v. Singing River Health System, et al.*, Case No. 1:15-cv-1-LG-RHW, *Lowe v. Singing River Health System, et al.*, Case No. 1:15-cv-44-LG-RHW, *Donna Broun, et al. v. Singing River Health System, et al.*, Cause No. 2015-0027-NH and *Virginia Lay, et al. v. Singing River Health System, et al.*, Cause No. 2015-0060-NH cases, to be split evenly between the respective State Plaintiffs and Federal Plaintiffs in all five actions, for serving in the capacity of a representative, subject to approval of the Courts. Each respective State Plaintiff and Federal Plaintiff will not seek an amount in excess of their share of the $2,500 per case as a service fee award to be paid, and Defendants will not oppose any motion filed in conjunction with this Settlement that such an award be allowed, such amount to be paid in addition to, and not out of, the total consideration to be paid to Class Members. Defendants shall not be obligated to pay any incentive award in excess of $2,500 per case (or $12,500 total).

2.2 Class Notice-Mailing. The best notice practicable of this Action, proposed Settlement, and pendency of the Settlement Class, pursuant to Rule 23(c)(2) of the Federal Rules, consists of direct notice by mail to the individual Class Members all of whom are identifiable, consistent with Rule 23(e) of the Federal Rules of Civil Procedure. The Settlement Administrator shall be responsible for the mailing, and Defendants shall be responsible for all of the associated costs.

2.3 Affidavit or Report. Before the Fairness Hearing (defined in Paragraph 4.0), Defendants shall file an affidavit or report evidencing compliance with Paragraph 22.

3.0 Full Settlement. The obligations of Released Persons under this Stipulation shall be in full settlement, compromise, release and discharge of the Settled Claims, Plaintiffs, through their designated agents, covenant not to sue the Released Persons. Upon approval of the Settlement, the Released Persons shall have no other or further liability or obligation to any member of the Settlement Class in any court or forum (including state or federal courts) with respect to the Settled Claims or to contribute any amount to the Trust, other than as provided in Paragraph 2.0.

4.0 Approval. As soon as possible after the execution of this Stipulation and after notice to the Chancery Court, Settlement Class Counsel shall move the District Court for an order (a) preliminarily approving the Settlement memorialized in this Stipulation as fair, reasonable and adequate, including the material terms of this Stipulation; (b) setting a date for a final approval hearing ("Fairness Hearing"); (c)

approving the proposed class notice ("Class Notice") and authorizing its dissemination to the Settlement Class; and (d) setting deadlines consistent with this Stipulation for mailing of the Class Notice, filing of objections, filing of motions to intervene, and filing papers in connection with the Fairness Hearing and the consideration of the approval or disapproval of the Settlement ("Preliminary Approval Order"). Defendants will not oppose the entry of the Preliminary Approval Order. The Parties shall request the District Court to schedule a hearing on said motion.

5.0 Order and Final Judgment. If the District Court approves the Settlement following a Fairness Hearing, the Parties shall jointly request that the District Court enter an Order and Final Judgment ("Final Order") that includes, among other provisions determined by the District Court, the following:

(a) approving the settlement as fair, reasonable and adequate and directing consummation of the settlement in accordance with its terms and provisions;

(b) entering a final judgment declaring the Federal Action to be a proper class action for settlement purposes pursuant to Rule 23 of the Federal Rules and dismissing all claims in the Federal Action with prejudice as against all Released Persons and all members of the Settlement Class, without costs except as provided, subject only to compliance by the Parties with the terms and conditions of the Stipulation and any order of the Courts with reference to the Stipulation;

(c) permanently barring and enjoining the institution or prosecution by Plaintiffs or any member of the Settlement Class, either directly or in any other capacity, of any action asserting claims that are Settled Claims;

(d) releasing and discharging, on behalf of the Settlement Class and Plaintiffs, the Released Persons from all Settled Claims;

(e) granting continuing authority and exclusive jurisdiction over implementation of the Settlement, and over enforcement, construction and interpretation of this Stipulation to the Chancery Court; and

(f) approving the award of attorneys' fees and granting continuing jurisdiction over the payment of those fees to the Chancery Court.

5.1 Cooperation on Final Dismissal. Upon or before the execution of this Stipulation, all current and former trustees on the SRHS Board of Trustees will be dismissed, in their individual capacities, from the above-styled litigation without prejudice, subject to a tolling agreement. Notwithstanding the preceding sentence, the Parties will cooperate in seeking approval from the Courts for the establishment of a mutually satisfactory procedure to secure the complete and final dismissal of Defendants from the Federal and State Actions in accordance with the terms of this Settlement. The Parties shall jointly take such steps that may be necessary or requested by the Courts and otherwise use their best efforts to effectuate this settlement.

5.2 After the District Court issues its Fairness Hearing ruling, the Parties will jointly petition the Chancery Court to formally approve the Settlement.

6.0 Requests for Exclusion from the Settlement Class. Paragraphs 6.0 through 6.4 apply only if the District Court declines to certify a non-opt out class. Requests for exclusion from the Settlement Class shall contain an explicit statement of the Settlement Class Member's desire to be excluded, list the name and address of the person seeking exclusion ("Request for Exclusion"), be signed by the Settlement Class member and not by his or her representative or counsel, and be postmarked and mailed no later than fourteen (14) days prior to the date of the first setting of the Fairness Hearing on this Settlement, scheduled pursuant to the Preliminary Approval Order. Requests for Exclusion shall be signed by each Class Member requesting exclusion and submitted by mailing them to the P.O. Box address referred to in the Class Notice.

6.1 Each potential Settlement Class member who does not submit a properly completed Request for Exclusion no later than fourteen (14) days prior to the date of the first setting of the Fairness Hearing on this Settlement, scheduled pursuant to the Preliminary Approval Order, shall be included in the Settlement Class. For purposes of determining timeliness, a Request for Exclusion shall be deemed to have been submitted when postmarked and mailed, with postage prepaid and the envelope addressed in accordance with the instructions in the Class Notice. If the envelope does not reflect a postmark, the Request for Exclusion shall he deemed to have been submitted

when received at the address provided for in the instructions in the Class Notice.

6.2 If a Request for Exclusion does not include all of the information specified in Paragraph 6.0 or if it is not timely submitted under Paragraph 6.1, it shall not be a valid Request for Exclusion, and the person filing such an invalid Request for Exclusion shall remain a member of the Settlement Class. All persons who properly file Requests for Exclusion from the Settlement Class shall not be members of the Settlement Class and shall have no rights with respect to the Settlement.

6.3 Requests for Exclusion may be filed only by individual Class Members. Any individuals who purport to opt-out of the Settlement as a group, aggregate or class of more than one person or on whose behalf such a purported opt-out is attempted (including an attempt by any bankruptcy trustee, whether a standing Chapter 13 trustee or otherwise, that attempts to or purports to opt-out of the Settlement on behalf of more than two persons or estates), shall be ineffective and have no force and effect. In such event, those individuals shall be deemed Class Members for all purposes of the Settlement.

6.4 This Stipulation shall not be valid if more than a certain percentage of Class Members request exclusion pursuant to the opt-out class process outlined above. This agreed-upon percentage has been placed in writing by separate agreement and shall be delivered to the District Court under seal and shall not be made public.

7.0 Definition of Finality. The approval by the District Court and Chancery Court of the Settlement

proposed in this Stipulation shall be considered final, and the Settlement shall be considered final, and Defendants' payment obligations shall arise, for purposes of this Stipulation: (a) following the entry by the Court of the Final Order and expiration of any applicable periods for the appeal of such Final Order, provided that no appeal is filed; (b) if an appeal is taken, following the entry of an order by an appellate court affirming the Final Order and expiration of any applicable period for the further appeal or review of the appellate court's affirmance of the Final Order (provided that no further appeal or review is sought), or upon entry of any stipulation dismissing any such appeal or further review with no right of further prosecution of the appeal; or (c) if an appeal or discretionary review is taken from any appellate court's decision affirming the Final Order, upon entry of an order in such appeal or review proceeding finally affirming the Final Order without right of further appeal or upon entry of any stipulation dismissing any such appeal with no right of further prosecution of the appeal (collectively, the "Final Settlement"). None of Defendants' obligations under this settlement shall become effective until the Final Settlement. Pursuant to a separate written agreement, the SRHS Consideration and the County Support shall be paid into escrow pending Final Settlement.

8.0 Attorneys' Fees and Expenses. Defendants acknowledge that Plaintiffs' counsel have asserted claims that allow for the payment of attorneys' fees, expenses, and costs in addition to Settlement Class relief. Plaintiffs' Counsel shall apply for approval of an award of attorneys' fees, plus reimbursement of specified expenses. Plaintiffs' Counsels' application

for attorneys' fees and expenses shall be filed at least fourteen (14) days prior to the Fairness Hearing. Any attorneys' fees and expenses so awarded to Plaintiffs' Counsel shall not be payable unless and until the Final Order and Final Settlement, but shall be paid into an escrow account (consistent with the schedule set forth in Exhibit C) during the pendency of the proceedings described in Paragraph 7.0 following the award of attorneys' fees and expenses. Defendants have agreed to pay attorneys' fees and expenses, provided that any such award does not exceed $6,450,000 in fees and $125,000 in documented expenses, which may include expenses incurred in connection with administering the settlement. Plaintiffs' Counsel will not apply for a larger award of attorney fees unless Defendants oppose the request for the sum set forth in Exhibit C.

8.1 Defendants agree to pay the awarded fees and expenses to Plaintiffs' Counsel without reduction in any consideration in the form of a settlement payment to Class Members.

9.0 Cost of Administration. Defendants will advance the costs incurred in connection with the Class Notice and be responsible for its administration, including mailing. Except as provided in this Stipulation, Defendants shall bear no other expenses, costs, damages or fees incurred by any Plaintiffs, any member of the Settlement Class, or Settlement Class Counsel in connection with the Class Notice.

10.0 Effect of Settlement Not Becoming Final. If the Settlement does not become a Final Settlement, or does not become effective for any reason other than the failure of Plaintiffs or Defendants to perform their respective obligations, then the Stipu-

lation shall become null and void and of no further force and effect; all negotiations, proceedings, and statements relating thereto shall be without prejudice as to the rights of any and all Parties and their respective predecessors and successors; and all Parties and their respective predecessors and successors shall be restored to their respective positions existing before execution of this Stipulation.

11.0 No Admissions. This Stipulation and all related negotiations, statements and proceedings shall not in any event be construed as, or deemed to be evidence of, an admission or concession on the part of Defendants of any liability or wrongdoing; shall not be offered or received in evidence in any action or proceeding, or used in any way as an admission, concession or evidence of any liability or wrongdoing of any nature on the part of Defendants; shall not be construed as, or deemed to be evidence of, an admission or concession that Plaintiffs or any member of the Settlement Class have suffered any damage; and shall not be construed as, or deemed to be evidence of, an admission or concession on the part of Plaintiffs or any member of the Settlement Class that any of their claims asserted in the Action are without merit or that damages recoverable in the Actions do not exceed the aggregate of the amounts payable pursuant to this settlement.

12.0 Injunctive Relief. Following the entry of the Final Order, the Parties agree to jointly petition the Chancery Court for an order requiring that the Trust be monitored by the Chancery Court for the duration of the payment schedule. This monitoring will include quarterly reports given under oath to the Special Fiduciary by the SRHS CFO regarding all

aspects of the financial condition of the hospital, the pension plan, and the status of the repayment schedule.

12.1 The Chancery Court has appointed a Special Fiduciary for the Trust ("Special Fiduciary") whose sole fiduciary responsibility is and shall be to the Trust. The Special Fiduciary will also report to the Chancery Court on a quarterly basis regarding the financial condition of SRHS, the pension plan and the status of the repayment schedule. The Special Fiduciary will establish some reporting means such as a website or email distribution so that the Trust balance can be reported on a day certain each month to the Plan members.

12.2 Depending upon its future financial condition, SRHS may elect to accelerate the payment schedule set forth in Exhibit A, if this election occur, SRHS shall be entitled to reduce the future stream of payments ratably by the present value of the accelerated payment(s) using a six percent (6%) discount rate. It is specifically determined that nothing in this Stipulation constitutes any waiver, compromise or release of any claims for contractual, extra contractual claims, including punitive damages, attorney's fees, expenses and costs that are or may be pursued by or on behalf of SRHS and any Defendants against Federal Insurance Company, Burlington Insurance Company, Chubb & Son, Inc., The Chubb Group of Insurance Company, and any "Chubb" company or company in privity with Chubb, including Stewart, Sneed and Hewes, and/or Bancorp South Insurance Services or any other person or firm involved in providing insurance to any of Defendants, without limitation. All such claims are reserved,

including the right to pursue full reimbursement of all moneys paid by or on behalf of Defendants as part of this settlement. Defendants do not waive any claims that have or could yet be made for any relief from any accounting or actuarial firm that may exist or be determined to exist for the benefit of Defendants. Any recovery by SRHS or any other Defendant against any party or insurer who may be responsible for the repayment of (i) defense costs, expenses and/or fees; (ii) expenses and costs associated with the pursuit of relief against any party that should be required to pay indemnity; and/or (iii) defense costs for or on behalf of any Defendant (collectively, "Defense Costs in Related Actions"), shall not be included in the calculation of any funds available to accelerate payment under this paragraph.

12.3 Excluding Defense Costs in Related Actions, if SRHS recovers any money from any other individual or entity, including, but not limited to, Transamerica or KPMG, by verdict, judgment, settlement, contract or agreement related to claims that have or could yet be made for any relief that may exist or be determined to exist for the benefit of Defendants associated with the facts and circumstances giving rise to the State Actions or Federal Action, or if additional insurance coverage for the claims in the above-captioned cases is or becomes available, then SRHS must provide written notice of the recovery to the Special Fiduciary and the Special Fiduciary may petition the Chancery Court to accelerate the payment schedule in Exhibit A. Defendants will have an opportunity to oppose the petition at a hearing. If the Chancery Court orders an acceleration of any of the payments, then Defendants will be bound by the

Chancery Court's findings, subject to their rights to appeal any order of said court.

12.4 The payment of the SRHS Consideration may require modification of the Plan to equitably distribute the benefits paid. Any adjustment to the Plan can only be done with Special Fiduciary recommendation and Chancery Court approval after sixty (60) days' notice to the Class Members and opportunity for hearing. If the Chancery Court orders any modification and/or termination of the Plan, then the Class Members will be bound by the Court's/Special Fiduciary's findings regarding distribution, plan restructuring and/or Plan termination, subject to their rights to appeal any order of said court.

12.5 This Settlement does not change the terms of the Plan distributions that are unrelated to this Settlement, which may be modified or terminated only with the approval of the Special Fiduciary and the Chancery Court. Except as provided in this Stipulation, the current status of the Plan shall remain unchanged until the Chancery Court orders otherwise.

13.0 Court Procedures. Plaintiffs in the State Actions shall notify the Chancery Court of the Settlement and seek approval of the settlement process and attorneys' fees and expenses outlined in this Stipulation. The Representative Plaintiffs shall then move the District Court for approval of the Settlement with the implementation and oversight of the Settlement to be performed by the Chancery Court.

14.0 Due Authority of Attorneys. Each of the attorneys executing this Stipulation on behalf of one or more Parties warrants and represents that he or

she has been duly authorized and empowered to execute this Stipulation on behalf of his or her respective clients.

15.0 Entire Agreement and Interpretation. This Stipulation, including all attached Exhibits, constitutes the entire agreement among the Parties with regard to this subject matter. This Stipulation may not be modified or amended except in writing signed by all signatories or their successors in interest. Change to this Stipulation can occur only with the stipulation of the Parties. The Parties acknowledge that the Courts cannot unilaterally modify the rights or obligations of the Parties under this Stipulation. This Stipulation shall be interpreted as if and deemed to have been drafted jointly by the undersigned counsel, and any rule that a writing shall be interpreted against the drafter shall not apply to this Stipulation.

16.0 Successors. This Stipulation, upon becoming operative through a Final Settlement, shall be binding upon and inure to the benefit of the settling Parties (including the Settlement Class) and their respective heirs, executors, administrators, successors and assigns and upon any corporation, partnership or other entity into or with which any settling party may merge or consolidate.

17.0 Counterparts. This Stipulation may be executed in any number of actual or telecopied counterparts and by the different Parties on separate counterparts, each of which when so executed and delivered shall be an original. The executed signature pages from each actual or telecopied counterpart may be joined together and attached to one such original and shall constitute one and the same instrument.

18.0 Waivers. The waiver by any party of any breach of this Stipulation shall not be deemed or construed as a waiver of any other breach, whether prior, subsequent, or contemporaneous, of this Stipulation.

19.0 Governing law. This Stipulation shall be construed and enforced in accordance with the internal laws of the State of Mississippi.

20.0 Retention of jurisdiction. The administration and consummation of the Settlement shall be under the authority of the Chancery Court, which shall retain jurisdiction to administer this Settlement, subject to ordinary review by the Appellate Courts.

AGREED, THIS THE 3rd DAY OF JANUARY, A.D., 2016.

/s/ Jim Reeves
Mathew G. Mestayer
Reeves & Mestayer, PLLC
Attorneys or Virginia Lay,
Cause No. 2015-0060-NH

/s/ J. Cal mayo, Jr.
Nape S. Mallette
Mayo Mallette, PLLC
Attorneys for Donna B. Broun, et al.,
Cause No. 2015-0027-NH

/s/ Brett k. Williams
A. Kelly Kessoms, III
Hanson D. Horn
Dogan & Wilkinson, PLLC
Attorneys for Singing River Hospital System, Singing River Health Services Foundation, Singing River Health System Foundation, Singing River Hospital System Foundation, Inc., Singing River Hospital System Benefit Fund, Inc., Singing River Hospital System, Kevin Holland, Singing River Health System Board of Trustees, Michael J, Heidelberg, Allen L. Cronier, Tommy Leonard, Lawrence H. Cosper, Morris G. Strickland and Ira Polk

/s/
Stephen B. Simpson
Deutsch, Kerrigan & Stiles, LLP
Special Fiduciary, Singing River Health System Employees' Retirement Plan and Trust

/s/ Roy D. Campbell, III
Bradley, Arant, Boult & Cummings, LLP
Attorney for Gary Christopher Anderson

/s/ Donald C. Dornan, JR
Donald C. Dornan, Jr.
Lauren R. Hillery
DORNAN LAW OFFICE, PLLC

Attorney for Michael Crews

/s/ Pieter Teeuwissen
Simon & Teeuwissen, PLLC
Attorney for Stephanie Barnes Taylor

/s/ John L. Hunter
Cumbest, Hunter & Mccormick, PA
Attorney for Michael Tolleson

/s/ John A. Banahan
Jessica B. Mcneel
Calen J. Wills
Bryan, Nelson, Schroeder, Castigliola & Banahan, PLLC
Attorneys for Stephen Nunenmacher, MD., Martin Bydalek, MD., William Descher, MD., Joseph Vice, MD., and Eric Washington, MD

/s/ Stephen G. Peresich
Mary Vanslyke
Page, Mannino, Peresich & Mcdermott, PLLC
Attorneys for Hugo Quintana, MD

Approved as to form and to acknowledge Jackson County's rights and responsibilities under this Stipulation (subject to separate written agreement with SRHS) and not as a party to the Actions

/s/ William Guice
Rushing & Guice
Attorney for Jackson County

SRHS CONSIDERATION CHART

Date	SRHS Consideration
Upon District Court Approval of Settlement	$4,000,000
September 30, 2016	$1,200,000
September 30, 2017	$1,200,000
October 7, 2017	$1,200,000
September 30, 2018	$1,200,000
October 7, 2018	$1,200,000
September 30, 2019	$1,200,000
October 7, 2019	$1,200,000
September 30, 2020	$3,000,000
October 7, 2020	$1,200,000
September 30, 2021	$3,000,000
October 7, 2021	$1,200,000
September 30, 2022	$3,000,000
October 7, 2022	$1,200,000
September 30, 2023	$3,000,000
October 7, 2023	$1,200,000
September 30, 2024	$4,500,000
October 7, 2024	$1,200,000
September 30, 2025	$4,500,000
September 30, 2026	$4,500,000

September 30, 2027	$4,500,000
September 30, 2028	$4,500,000
September 30, 2029	$4,500,000
September 30, 2030	$4,500,000
September 30, 2031	$4,500,000
September 30, 2032	$4,500,000
September 30, 2033	$4,500,000
September 30, 2034	$4,500,000
September 30, 2035	$4,500,000
September 30, 2036	$4,500,000
September 30, 2037	$4,500,000
September 30, 2038	$4,500,000
September 30, 2039	$4,500,000
September 30, 2040	$4,500,000
September 30, 2041	$4,500,000
September 30, 2042	$4,500,000
September 30, 2043	$4,500,000
September 30, 2044	$4,500,000
September 30, 2045	$4,500,000
September 30, 2046	$4,500,000
September 30, 2047	$4,500,000
September 30, 2048	$4,500,000
September 30, 2049	$4,500,000
September 30, 2050	$4,500,000

September 30, 2051	$4,500,000
Total	**$156,400,000**

COUNTY SUPPORT CHART

Date	County Support
Upon District Court Approval of Settlement	$4,000,000
September 30, 2017	$1,200,000
September 30, 2018	$1,200,000
September 30, 2019	$1,200,000
September 30, 2020	$1,200,000
September 30, 2021	$1,200,000
September 30, 2022	$1,200,000
September 30, 2023	$1,200,000
September 30, 2024	$1,200,000
Total	**$13,600,000**

ATTORNEYS' FEES CHART

Date	Attorneys' Fees
Upon District Court Approval of Settlement	$2,000,000
September 30, 2016	$1,200,000
September 30, 2017	$1,750,000
September 30, 2018	$1,500,000
Total	**$6,450,000**