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.

CAUSE NO. 1:14CV447-LG-RHW
CONSOLIDATED WITH 1:15CV1-LG-RHW
CONSOLIDATED WITH 1:15CV44-LG-RHW

SINGING RIVER HEALTH SYSTEM, et al. — **DEFENDANTS**

MEMORANDUM OPINION AND ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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 comprehensive 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

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

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 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' Retirement 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. According 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

[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.

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 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

[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.

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 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 conditionally-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

[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

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).

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.

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conditionally-certified class.

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

[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.

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). "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

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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).

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.

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 indication 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

[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).

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 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.*
LOUIS GUIROLA, JR.
CHIEF U.S. DISTRICT JUDGE