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

THOMAS JONES, et al	*	**PLAINTIFFS**
	*	
VS.	*	**CIVIL ACTION NO. 1:14cv447 LG-RHW**
	*	**c/w 1:15-cv1-LG-RHW**
	*	**1:15-cv44-LG-RHW**
	*	
SINGING RIVER HEALTH SERVICES FOUNDATION, et al	*	**DEFENDANTS**

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR APPROVAL OF FINAL SETTLEMENT

Plaintiffs, individually and on behalf of the class they seek to represent, and file this Memorandum in Support of Plaintiffs' Motion for Approval of Final Settlement requesting this Court to approve the settlement of this action pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. In support of this motion, Plaintiffs state as follows:

I. INTRODUCTION

The following parties and/or interested entities have entered into a Stipulation and Agreement of Compromise and Pro Tanto Settlement ("Settlement Agreement"), which is attached as Exhibit 1:

(a) Thomas Jones, Joseph Charles Lohfink, Sue Beavers, Rodolfoa Rel, Hazel Reed Thomas ("Jones Plaintiffs"), Regina Cobb, Susan Creel, Phyllis Denmark ("Cobb Plaintiffs"), and Martha Ezell Lowe ("Lowe Plaintiff"), individually and as representatives of an agreed-upon class of similarly situated persons, who collectively are the plaintiffs ("Federal Plaintiffs" or "Representative Plaintiffs") in the above-captioned federal proceedings, respectively;

(b) 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");

(c) Singing River Health System Employees' Retirement Plan and Trust (hereinafter, the "Plan" or "Trust") and Special Fiduciary;

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

(e) 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

(f) current and former Trustees of the Trust (in their individual and official capacities) ("Plan Trustees").

Jackson County, Mississippi and the Jackson County Board of Supervisors (collectively, "Jackson County") approved the Settlement Agreement as to form and to acknowledge Jackson County's rights and responsibilities under the Settlement Agreement. The Settlement Agreement completely resolves this matter with respect to the claims or potential claims between the signatories.[1]

This litigation centers around SRHS's alleged failure to make actuarially determined Annual Required Contributions ("ARC") to the Singing River Health System Employees' Retirement Plan and Trust between 2009 and 2014. SRHS's failure to contribute to the Trust was challenged by the filing of the initial Complaint in *Jones, et al v. Singing River Health Services Foundation, et al.*, Case No. 1:14-cv-447-LG-RHW, which was later consolidated with *Cobb, et al. v. Singing River Health System, et al.*, Case No. 1:15-cv-1-LG-RHW and *Lowe v.*

[1] Solely for the purposes of the Settlement Agreement, and without any prejudice to the parties to take a contrary position in future litigation, Transamerica Retirement Solutions Corporation ("Transamerica"), KPMG, LLP ("KPMG"), FiduciaryVest, LLC, and Trustmark National Bank (and any of its related affiliates), are not "agents" or "employees" of SRHS as those terms are used in the Settlement Agreement. The signatories to the Settlement Agreement wish to make clear their intent that any claims that have been or could be made against Transamerica, KPMG, FiduciaryVest, LLC, and Trustmark National Bank (and any of its related affiliates) are not released as part of the Settlement Agreement.

Singing River Health System, et al., Case No. 1:15-cv-44-LG-RHW. Parallel state court cases have also proceeded in the Jackson County Chancery Court, including: (1) *Donna B. Broun, et al. v. SRHS, et al.*, Chancery Court Case No. 2015-0027-MLF (filed on January 12, 2015); and (2) *Virginia Lay v. SRHS, et al.*, Chancery Court Cause No. 2015-0060-NH (filed on January 20, 2015).[2]

The parties reached a settlement that requires SRHS to pay $149,950,000 (plus a negotiated amount of attorneys' fees) to the Trust over time for the benefit of Class Members. The $149,950,000 payment to the Trust is equivalent to *Jones* Plaintiffs' Counsels' calculation of the value of the annual required contributions that SRHS failed to make between 2009 and 2014. If this Settlement Agreement is approved: (1) the Class Members will be returned to the same position in which they would have been had SRHS made all of the annual required contributions to the Trust between 2009 and 2014; and (2) the negotiated amount of the attorneys' fees of $6,450,000 and expenses of $125,000 will be paid by SRHS in addition to the $149,950,000 that is required to fully refund the missed annual required contributions to the Trust. Affidavit of Jim Reeves, at ¶ 16, attached as Exhibit 2.[3]

The Court issued preliminary approval of the settlement on January 20, 2016 (Doc. No. 148). Notice was provided to Class members by mail. Pursuant to this Court's Order, the website www.singingriversettlement.com was set up to provide additional information about the settlement to Class members. The deadline for objections will expire on April 25, 2016.

[2] A number of other parties have filed related actions in Jackson County Chancery Court and Jackson County Circuit Court, but they are too numerous to recount individually herein. For a list of those individual actions, see Doc. No. 158-1. The plaintiffs in the state court cases that are specifically described herein (*Broun* and *Lay* matters) are parties to the Settlement Agreement in Exhibit 1.

[3] Co-lead class counsel Steven Nicholas has also submitted an affidavit, attached as Exhibit 28, but to the extent that it is identical to that of the affidavit of Jim Reeves, it is not specifically cited in the text of this brief.

Plaintiffs now seek an order from this Court giving final approval to the settlement and effectuating its terms.

II. FACTUAL AND PROCEDURAL HISTORY

A. Singing River Health System Retirement Plan and Trust

Defendant Singing River Health System is a 501(c)(3) non-profit corporation organized under and governed by Mississippi law, and is headquartered in Jackson County, Mississippi. SRHS created the Singing River Health System Employees' Retirement Plan and Trust in 1983 as a successor to its then existing participation in the Public Employees' Retirement System of Mississippi in order to self-administer a similar Plan available only to SRHS employees. *See* Singing River Hospital System Employees' Retirement Plan and Trust, Exhibit 3 (SRHS-JONES 3670-3773). SRHS is the employer responsible for maintaining the Singing River Health System Employees' Retirement Plan and Trust and is, therefore, the plan sponsor of the SRHS Plan. *See* Exhibit 3. Initially, SRHS was required to "make such contributions from time to time...necessary to provide the benefits of this Plan." *See* Exhibit 3 (SRHS-JONES 3727). SRHS amended the Plan in 1991 and reiterated its obligation to "make such contributions from time to time...necessary to provide the benefits of this Plan." *See* 1991 Plan and Trust, Exhibit 4 (SRHS-JONES 3774-3836) at SRHS00003807. SRHS amended the Plan in December 2008 (to be effective October 1, 2007), and that version of the Plan is applicable to the time period at issue in this lawsuit. *See* 2008 Plan and Trust, attached as Exhibit 5 (SRHS00008846-SRHS00008977). The 2008 Amendment revised the contribution language to require SRHS to "make such contributions from time to time, which...shall be necessary as determined by the Actuary to provide the benefits of

this Plan." *See* Exhibit 5, Singing River Health System Employees' Retirement Plan and Trust, § 9.03 at p. 75 (SRHS00008931).[4]

The Plan is a plan, fund, or program that was established and/or maintained by Singing River Health System and/or the SRHS Defendants. It provides retirement income to employees and/or results in the deferral of income by employees to the termination of their employment or beyond. See Exhibits 3, 4, 5, 6, 7 and 8. The Plan does not provide for an individual account for each participant and does not provide benefits solely upon the amount contributed to a participant's account. *Id.*

The 2008 Plan designates the Health System as the Plan Administrator "to administer the Plan in accordance with its terms." *See* Exhibit 5, § 10.01 (SRHS00008932). The Plan also names the Health System as a fiduciary of the Trust. *See* Exhibit 5, § 10.03 (SRHS00008933). The SRHS Board of Trustees had the responsibility for determining the amount of contributions to be made by the Health System, subject to the advice and recommendations of an actuary, and the employer had the responsibility for actually making the contributions necessary to provide benefits as described under the Plan. *See* Exhibit 5, §§ 10.02 and 10.03 (SRHS00008933).

B. Pension Assets from 2003 through 2008

The SRHS audited financial statements show that the Plan had a net pension asset as of September 30, 2003, and had a 100% funded ratio as of the October 1, 2004 actuarial valuation date. *See* SRHS Audited Financial Statements September 30, 2005 and 2004, Note 8(d)

[4] In April 2012 (effective October 1, 2011), the Plan was amended to restrict membership to existing hires as of the effective date so no new employees would receive benefits. However, this version made no changes to the contribution language. *See* 2012 Plan and Trust, attached Exhibit 6 (SRHS00009402-00009412). In May 2013 (effective October 1, 2011), the Plan was amended to change the definitions of the Plan to include part-time employees and re-hired retired employees, but this version similarly made no changes to the contribution language. *See* May 2013 Plan and Trust, attached as Exhibit 7 (SRHS00009413-00009419). In January 2014 (effective October 1, 2013), the Plan was amended again, but again no changes to the contribution language were made. *See* October 2013 Plan and Trust, attached as Exhibit 8 (SRHS00002783-00002919).

"Schedule of Funding Progress – Unaudited Required Supplementary Information" (SRHS-JONES 1584), attached as Exhibit 9.

Actuaries for the Plan estimated that the Annual Required Contributions ("ARC") for years ending September 30, 2005 through September 30, 2008 were $9,557,594 in total. SRHS contributed $10,500,000 to the Plan in total during this same period. *See* SRHS Audited Financial Statements September 30, 2006 and 2005, Note 8(b) "Annual Pension Cost and Net Pension Liability" (SRHS-JONES 1629), attached as Exhibit 10; SRHS Audited Financial Statements September 30, 2008 and 2007, Note 8(b) "Annual Pension Cost and Net Pension Liability" (SRHS-JONES 1719), attached as Exhibit 11.

Thus, SRHS shorted the Plan in some years but made up for it in others between 2005 and 2008. There was no sustained underfunding until 2009.

C. Fiscal Environment Following The 2008 Recession

Understanding this case requires an understanding of the complex fiscal environment surrounding Mississippi's healthcare industry and SRHS's place in it. The recession began in 2008, putting a financial strain on all companies, including SRHS. The financial strain on SRHS was worsened by a number of factors.

First, SRHS expended significant sums for indigent care while receiving no public tax dollars to offset those losses. Mississippi refused to expand Medicaid, leaving SRHS to absorb the cost of that care. *See* Memo from CEO Kevin Holland dated November 10, 2014 (SRHS-JONES 18679), attached as Exhibit 12. For example, SRHS had over $114,000,000 in bad debts[5] in 2014 and absorbed nearly $42.2 million in charity care[6] that same year without the help of any

[5] "Bad debt expense relates to patients with self-pay balances that do not qualify under the charity guidelines…and to those patients of which collection for services cannot be obtained." *See* Exhibit 13.

[6] Charity care is based on certain income and asset qualifications established by the Board of Trustees. *See* Exhibit 13.

taxpayer funds. *See* SRHS Audited Financial Statements September 30, 2014 and 2013, Management's Discussion and Analysis – Bad Debts and Charity Care, (SRHS-JONES 1189), attached as Exhibit 13.

Second, both private and government health insurers reduced the amounts they were willing to reimburse hospitals like SRHS for specific services. *See* SRHS Audited Financial Statements September 30, 2014 and 2013, Management's Discussion and Analysis – Industry Highlights, (SRHS-JONES 1177-79), attached as Exhibit 14.

Third, SRHS made some large capital expenditures for improvements such as the neurology building, the health complex, and federally-mandated improvements to SRHS's medical record information system. *See* SRHS Basic Financial Statements September 30, 2012 and 2011 "Capital [A]ssets" (SRHS-JONES 1899-90) (showing net additions to capital assets of $65,792,107 between 2011 and 2012 and net additions to capital assets of $39,309,006 between 2010 and 2011), attached as Exhibit 15. SRHS took out bonds that were accompanied by covenants relating to cash availability, debt service coverage, and additional indebtedness that put additional financial pressure on the hospital. *See* SRHS Audited Financial Statements September 30, 2014 and 2013 "Debt Administration" (SRHS-JONES 1185), attached as Exhibit 16.

Fourth, SRHS's accounts receivable were overstated by approximately $88 million. While previous estimates stated SRHS could collect $88 million owed to it by patients who had received healthcare services but had not yet paid their bills, those estimates failed to factor in the effect that deaths, bankruptcies and certain government-restricted reimbursements would have on the potential for collectability of those outstanding amounts. *See* SRHS Audited Financial Statements September 30, 2014 and 2013 "Management's Discussion and Analysis" (SRHS-JONES 1181), attached as Exhibit 17; *see also* Deposition of Morris Strickland, page 110, lines 9-25; page 111,

lines 1-13, attached as Exhibit 18. When SRHS discovered the error, it realized that it was in much worse financial condition than it had previously projected.

D. Sustained Underfunding Between 2009 and 2014

The last contribution SRHS made to the Plan was in FY 2009 in the amount of $2,000,000. *See* SRHS Audited Financial Statements September 30, 2009 and 2008, Note 8(b) "Annual Pension Cost and Net Pension Liability" (SRHS-JONES 1766), attached as Exhibit 19. The Annual Required Contribution ("ARC") for FY 2009 was $4,522,625, which made FY 2009 the first year that SRHS fell significantly short of meeting its annual required contribution after being nearly 100% funded. *See* Exhibit 19.

SRHS made no contributions to the Plan between 2010 and 2014. *See* SRHS Basic Financial Statements September 30, 2011 and 2010, Note 8(b) "Annual Pension Cost and Net Pension Liability" (SRHS-JONES 1861), attached as Exhibit 20; SRHS Basic Financial Statements September 30, 2012 and 2011, Note 9(b) "Annual Pension Cost and Net Pension Liability" (SRHS-JONES 1910), attached as Exhibit 21; SRHS Audited Financial Statements September 30, 2014 and 2013, Note 8(b) "Annual Pension Cost and Net Pension Liability) (SRHS-JONES 1216), attached as Exhibit 22; Deposition of Michael Crews, page 45, lines 2-7; page 46, lines 5-8, excerpts attached as Exhibit 23; Memo from CEO Kevin Holland dated November 10, 2014 (SRHS-JONES 18679) ("SRHS has not made employer contributions to the program for several years…"), attached as Exhibit 12.

E. Value of the Missed Annual Required Contributions Between 2009 and 2014

This lawsuit is about the restoration of the Annual Required Contributions that SRHS failed to pay to the Trust between 2009 and 2014. Thus, Plaintiffs had to determine the value of those missed contributions.

Plaintiff began the calculation of unfunded contributions with the September 30, 2009 fiscal year, and determined from the audited financial statements that from September 30, 2009 – September 30, 2014, SRHS had $55,003,058 in annual required contributions to the Plan. Affidavit of Allen Carroll, at ¶ 6, attached as Exhibit 24.[7] SRHS contributed $2,000,000 to the Plan during this same period, leaving a deficit of $53,003,058. Exhibit 24, at ¶ 6.

The actuarially determined Annual Required Contribution includes an element of amortization of prior year funding shortfalls. Exhibit 24, at ¶ 7. Therefore, the increase in the ARCs due to this amortization had to be removed from the calculation of missed contributions to prevent erroneously duplicating prior year funding shortages. Exhibit 24, at ¶ 7. A total of $6,185,760 was identified as amortization of prior year funding shortfalls, which was subtracted from the $53,003,058 deficit. Exhibit 24, at ¶ 7.

Also included in the development of the actuarially determined ARC is an element of interest that is added to the employer contribution calculated as of the beginning of the year. Exhibit 24, at ¶ 8. Because interest is calculated annually on the amortization of prior year funding shortfalls and included in each year's ARC, an adjustment to remove that interest must be made to prevent erroneously overstating the calculation of missed contributions. Exhibit 24, at ¶ 8. The interest was removed on an annual basis at the same rate that was used in the actuarial reports when calculating the ARC and amounted to $477,567 for the years ending September 30, 2009

[7] Allen Carroll, Stacy Cummings, and Lyndsey Dixon of the accounting firm of Wilkins Miller, LLC were retained by Plaintiffs as experts in this matter. Their CVs are attached to Allen Carroll's affidavit in Exhibit 24. Mr. Carroll's experience with employee benefit plans includes, among other things, auditing plans, reviewing the work of plan actuaries, working with companies that maintain plans, working with companies in the evaluation of, designing, establishing and funding of plans, experience with an organization freezing and ultimately terminating its plan, serving on the board of an organization that maintained a plan, owning and managing a business with a plan, and evaluating the impact of the BP Oil Spill's impact on plan funding. *See* Affidavit of Allen Carroll at ¶ 4, attached as Exhibit 24. Plaintiffs have also included the affidavit of Stacy Cummings as Exhibit 34, but to the extent that it is identical to that of the affidavit of Allen Carroll, it is not specifically cited in the text of this brief.

through September 30, 2014. Exhibit 24, at ¶ 8.

The ARC, net of employer contributions, amortization of prior year funding shortfalls, and interest on the amortization of prior year funding shortfalls is $46,339,731 for the years September 30, 2009 through September 30, 2014. Exhibit 24, at ¶ 9.

The unfunded annual contribution balance for the years ending September 30, 2009 through September 30, 2014 was increased to take into consideration the earnings the Plan would have made each year had the employer contributions actually been invested using the Plan's actual rates of return. The Plan's actual rates of return were calculated on an annual basis by taking the total investment income for the year as a percentage of beginning Plan assets. Total earnings of $9,375,054 were calculated for years 2009 through 2014 on the unfunded contributions and cumulative missed earnings. Exhibit 24, at ¶ 10.

Based on the foregoing calculations, 100% of the missed contributions plus estimated earnings on those contributions amounts to $55,714,784. A summary of this calculation is set forth below. Exhibit 24, at ¶ 11.

SRHS Matter
Analysis of Annual Required Contributions, Amortization and Interest
2009 - 2014

Year ending 9/30	Annual Required Contribution (ARC)	Employer Contributions	Amortization of prior year funding loss included in ARC	Less interest* on Amortized Amounts included in ARC	ARC, net of employer contributions, amortization & interest	Beginning Balance on 10/1 (Including Interest)	Calculated Interest	Interest Rate per LaPorte	Ending Balance on 9/30 (Including Interest)
FY 2009	$ 4,522,625	$ (2,000,000)	$ -		$ 2,522,625	$ -	$ -		$ 2,522,625
FY 2010	$ 4,409,160	$ -	$ (180,705)	$ (16,263)	$ 4,212,192	$ 2,522,625	$ 31,028	1.23%	$ 6,765,845
FY 2011	$ 7,283,090	$ -	$ (518,792)	$ (44,097)	$ 6,720,201	$ 6,765,845	$ 705,001	10.42%	$ 14,191,047
FY 2012	$ 8,964,565	$ -	$ (1,111,830)	$ (94,506)	$ 7,758,229	$ 14,191,047	$ (147,587)	-1.04%	$ 21,801,689
FY 2013	$ 11,434,823	$ -	$ (1,918,149)	$ (163,043)	$ 9,353,631	$ 21,801,689	$ 3,704,107	16.99%	$ 34,859,427
FY 2014	$ 18,388,795	$ -	$ (2,456,284)	$ (159,658)	$ 15,772,853	$ 34,859,427	$ 5,082,505	14.58%	$ 55,714,784
Total	**$ 55,003,058**	**$ (2,000,000)**	**$ (6,185,760)**	**$ (477,567)**	**$ 46,339,731**		**$ 9,375,054**		

* - Interest rate used is the same as used in the calculation of the ARC (see annual actuarial reports)

F. Public Announcement of Funding Shortfall, Filing of Class Action Complaint, and Additional Procedural History

Not having made contributions to the Plan in five years, effective Saturday, November 29, 2014, SRHS froze the Singing River Health System Employees' Retirement Plan and Trust and CEO Kevin Holland announced that it would be "officially liquidated" in the coming months. *See* December 1, 2014 Memo To SRHS Employees, SRHS-JONES 00019125-27, attached as Exhibit 25. Twelve days later, on December 11, 2014, the undersigned filed the first class action complaint related to the pension crisis, *Jones, et al v. Singing River Health Services Foundation, et al.*, Case No. 1:14-cv-447-LG-RHW (Doc. No. 1).

Less than two weeks after filing the *Jones* complaint, Plaintiffs' counsel put an end to the chaotic and unpredictable series of repetitive temporary restraining orders filed in the Jackson County Chancery Court (each removed to and subsequently remanded by this Court) by negotiating an Agreement to Ninety Day Stay with SRHS that required, during the pendency of the stay: (1) that the Trust would continue to pay all retirees and other beneficiaries as set forth in the Plan; (2) that the three percent (3%) deduction to active employees' pay would be eliminated; (3) that all relevant documents would be preserved; (4) that the Plan would not be terminated or dissolved; (5) that no further action would be taken to affect the operation or status of the Plan; and (6) that allowed for the possible extension of the agreed upon stay. (Doc. No. 20). This agreement effectively prohibited Defendants from taking adverse action with respect to the Plan at issue during the pendency of the stay. *See* Affidavit of Jim Reeves, at ¶ 6, attached as Exhibit 2. Following the expiration of the stay, Plaintiffs' counsel helped to secure a vote on the reversal of the proposed termination of the Plan by SRHS, which was memorialized in an SRHS Board of Trustees Resolution dated March 25, 2015. As a result of these efforts, during the pendency of this litigation, not a single SRHS retiree has missed a pension

payment or has received less than what the current terms of the Plan require. *See* Affidavit of Jim Reeves, at ¶ 6, attached as Exhibit 2.

Shortly after negotiating the stay, *Jones* Plaintiffs' counsel negotiated an expedited discovery management plan, which hastened the production of thousands of pages of critical documents necessary for a complete understanding of SRHS's current financial position and confirmation of its failure to make the annual required contributions to the Plan between 2009 and 2014. *See* Affidavit of Jim Reeves, at ¶ 7, attached as Exhibit 2.

In the spring of 2015, *Jones* Plaintiffs' counsel negotiated with the Singing River Defendants an agreement related to the proposed appointment of a Special Master in the federal litigation for the purpose of expediting discovery and working toward a fair and efficient resolution of the matter. (Doc. No. 100). On May 10, 2015, this Court entered an order taking the parties' Emergency Motion for Appointment of Special Master under advisement, and instead appointing former Chief United States Bankruptcy Judge for the Northern District of Mississippi, David M. Houston, to serve as a Court appointed mediator pursuant to 28 U.S.C. § 651 and L.U. Civ. R. 83.7 (Doc. No. 102).[8]

Beginning in early June 2015 and continuing through August 2015, SRHS produced 6,397 documents totaling 179,093 pages and it facilitated the production of over 15,000 pages of related documents from the Jackson County Board of Supervisors. Depositions of Michael Crews, the former Chief Financial Officer of SRHS, and Morris Strickland, a member of the SRHS Board

[8] Judge Houston served as the United States Bankruptcy Judge for the Northern District of Mississippi for 30 years. He retired from that position in 2013. Prior to assuming the bench, he was a partner for 11 years in the Aberdeen, Mississippi, law firm of Houston, Chamberlain and Houston. He served as a Special Agent with the Federal Bureau of Investigation (FBI) in Washington, D.C., Tampa, Florida, and New York City. His practice is focused on commercial transactions, commercial litigation, bankruptcy, and creditors' rights. Judge Houston received his Bachelor's degree in accounting from the University of Mississippi in 1966 and his Juris Doctor from the same institution in 1969. Judge Houston currently practices with the law firm of Mitchell McNutt & Sams. *See* biography of David W. Houston, III, attached as Exhibit 26.

Trustees (2008-2015) were taken in June and July 2015, respectively. On July 23, 2015, the undersigned filed a Motion for Declaratory Judgment in the Lay matter in the Jackson County Chancery Court, asking the Court to hold as a matter of law that SRHS owed a debt to the Trust. *See* Affidavit of Jim Reeves, at ¶ 9, attached as Exhibit 2.

G. The Proposed Settlement Is The Product of Rigorous Negotiations Involving A Number of Complex Issues

The parties conducted initial mediation sessions under the guidance of Judge Houston on July 29 and 30, 2015. Affidavit of Jim Reeves, at ¶ 10, attached as Exhibit 2. On August 20, 2015, less than a year after the Complaint was filed, the Jackson County Chancery Court held SRHS owed a debt to the Trust as a matter of law. *See* Affidavit of Jim Reeves, at ¶ 9, attached as Exhibit 2. *See also* Transcript of August 20, 2015 hearing, at page 72 ("At this point in time, the Court is only finding that the contribution required in Article 9 is a debt. The amount of the debt will be determined by additional proof, more specific proof presented to the Court at a later date."), attached as Exhibit 27. The parties mediated the case again on September 23 and 24, 2015. A final mediation session was held on December 17, 2015. *See* Affidavit of Jim Reeves, at ¶ 10, attached as Exhibit 2.

The settlement of this matter is the product of vigorous negotiations that were conducted with the aid of the Court-appointed mediator, the Honorable David Houston, over the course of the last year. The negotiations were complicated because they involved not only the Singing River defendants and certain individual Trustee defendants, but also Jackson County (which has not been named as a party in this litigation). The negotiations were further complicated by the fact that the ultimate settlement involves, among other things: (a) the installation of a Special Fiduciary to manage the pension plan; (b) the oversight of the pension plan by the Jackson County Chancery Court; and (c) the ongoing administration of the settlement in both state and federal courts. *See*

Affidavit of Jim Reeves, at ¶ 11, attached as Exhibit 2.

At all times, the negotiations were both professional and hard fought. At no time was there any attempt to prejudice one group over another. The settlement specifically calls for any adjustments or modifications of the Plan to be made pursuant to the recommendation of a Special Fiduciary and the oversight authority of the Jackson County Chancery Court with 60 days' notice to class members and an opportunity to be heard. *See* Affidavit of Jim Reeves, at ¶ 12, attached as Exhibit 2.

Further, there were no negotiations that created a conflict between the class and the payment of attorneys' fees. The goal of Plaintiffs' counsel was to negotiate an amount for the class that equaled our calculation of 100% of the value of the annual required contributions that should have been made to the Trust by SRHS between 2009 and 2014. The settlement, as agreed, provides that relief. The parties agreed that attorneys' fees were to be paid on top of the refund of the missed payments to the Trust so that the class would not be not burdened with the payment of fees. *See* Affidavit of Jim Reeves, at ¶ 13, attached as Exhibit 2.

A number of systemic changes to SRHS leadership were also part of the negotiations and are included in the non-monetary benefits that this Settlement provides to Class Members. Plaintiffs' counsel negotiated the resignation of a majority of the Board of Trustees who were serving at the time that SRHS failed to make its annual required contributions to the Trust. Affidavit of Jim Reeves, at ¶ 14, attached as Exhibit 2. Moreover, Plaintiffs' counsel participated in the negotiations that resulted in Jackson County agreeing to pay $13,600,000 to SRHS for the purpose of supporting indigent care and preventing bond default. None of that money may be used to pay attorneys' fees in this matter. Affidavit of Jim Reeves, at ¶ 14, attached as Exhibit 2.

Additionally, Jackson County agreed to hire 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 stability of SRHS. Affidavit of Jim Reeves, at ¶ 14, attached as Exhibit 2.

The proposed settlement of this case came only after multiple depositions, the filing of hundreds of pleadings between this Court and the Chancery Court, the review of over 200,000 pages of documents, the involvement of multiple experts, five formal mediation days conducted over the course of six months by a court-appointed mediator, and additional negotiations conducted throughout that time period. Since the settlement was reached, Virginia Lay and her counsel (also counsel for the *Jones* Plaintiffs) have filed three responses to pleadings filed in the Mississippi Supreme Court related to issues that have arisen in the parallel state proceedings. *See* Affidavit of Jim Reeves, at ¶ 15, attached as Exhibit 2.

III. THE SETTLEMENT

A. Principal Features of the Settlement Agreement

The principal features of the Settlement Agreement[9] include all of the following:

- SRHS must deposit $149,950,000 into the Trust over time and pay a negotiated amount of attorneys' fees up to $6,450,000 and $125,000 in expenses (subject to the approval of the Court). The amount to be deposited into the Trust over time is equivalent to the Jones Plaintiffs' Counsels' calculation of the present value of the annual required contributions that SRHS failed to make between 2009 and 2014.

- To support 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 between 2016 and 2024.

- Should SRHS default on its obligation to make a payment to the Trust at any time over the next 35 years pursuant to the schedule outlined in the Settlement, there shall be a summary proceeding in the Jackson County Chancery Court ("Chancery Court") through which the Chancery Court may enter judgment on 10 days' notice in favor of

[9] The Settlement Agreement is attached in its entirety as Exhibit 1.

the Trust and against SRHS for the unpaid balance of the Settlement Payment.

- 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 settlement provides that the Special Fiduciary will 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 Settlement Payment may require modification of the Plan to equitably distribute the benefits paid. The settlement provides that 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, subject to their rights to appeal any order of said court.

- 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 the Settlement, the current status of the Plan shall remain unchanged until the Chancery Court orders otherwise.

- SRHS also agreed to pay incentive rewards totaling $12,500, to be split between the Representative Plaintiffs in the federal court actions and some of the plaintiffs in the Jackson County Chancery Court actions.[10]

B. The Value of the Amount to be Deposited into the Trust Pursuant to the Settlement Agreement Is Greater Than the Amount that SRHS Failed to Contribute to the Trust Between 2009 and 2014

Plaintiffs' Counsels' calculation of the value of the missed contributions between 2009 and 2014 is $55,714,784. *See* Section II(E). Plaintiffs' counsel retained financial and accounting experts who confirmed these calculations. *See* Affidavit of Jim Reeves, at ¶ 18, attached as Exhibit 2; *see also* Affidavit of Allen Carroll, at ¶¶ 11-12, attached as Exhibit 24.

The scheduled payments are in the future. Therefore, they must be discounted to determine

[10] See *Smith v. Tower Loan of Mississippi, Inc.*, 216 F.R.D. 338, 367-68 (S.D. Miss. 2003) (approving special payments totaling $45,500 to Class Members other than the Class Representatives of the present action, including class representatives in other related federal class actions and individual plaintiffs in related state court actions, given that those other plaintiffs "contributed to the settlement.").

the value of those dollars. Affidavit of Allen Carroll, at ¶ 13, attached as Exhibit 24. Assuming a 6% interest rate, the future deposits into the Trust, less the payments to the attorneys, have been discounted to reflect the current value of those payments ($55,950,876). Exhibit 24, at ¶ 13.

The value of those future payments ($55,950,876) is greater than the value of the missed contributions between 2009 and 2014 ($55,714,784). Exhibit 24, at ¶ 14. Thus, although SRHS is paying over time, 100% of the missed contributions is being refunded to the Trust. Exhibit 24, at ¶ 14.

The negotiated amount of the attorneys' fees of $6,450,000 and expenses of $125,000 will be paid by SRHS in addition to the $149,950,000 that is required to fully refund the missed annual required contributions to the Trust. *See* Exhibit 1 (Settlement Agreement); *see also* Exhibit 24, at ¶ 15.

IV. ARGUMENT

A. The Proposed Settlement Satisfies the Requirement of Rule 23(e) of the Federal Rules of Civil Procedure

Rule 23(e) of the Federal Rules of Civil Procedure requires the parties to obtain judicial approval of all class action settlements, but does not provide the standards for the approval of a settlement. In determining whether to give final approval to the proposed settlement, the cardinal rule is that the Court must find that the settlement is fair, adequate and reasonable, and is not the product of collusion. In determining whether the settlement meets these goals, the Court will examine six criteria, described below. *Newby v. Enron Corp.*, 394 F.3d 296, 301 (5th Cir. 2004) (citing *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir.1983); *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir.1982)).

B. Consideration of Final Approval Criteria Supports Approval of Settlement

In deciding whether there is good cause to approve a settlement, the Court must determine that the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls with the range of possible recovery.

In order to aid the trial court in its determination, the Fifth Circuit has outlined several factors useful in making the determination of fairness in approving a settlement. In determining whether the settlement meets this goal at a fairness hearing, a court must examine the following: (i) the existence of fraud or collusion behind the settlement; (ii) the complexity, expense and duration of the litigation; (iii) the stage of proceedings and the amount of discovery completed; (iv) the probability of plaintiffs' success on the merits; (v) the range of possible recovery; and (vi) the opinions of class counsel, class representatives, and absent class members. *Newby v. Enron Corp.*, 394 F.3d 296, 301 (5th Cir. 2004); *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 213 (5th Cir. 1981).

Judicial evaluation is guided by public policy, which strongly favors the pretrial settlement of class action lawsuits. *In re U.S. Oil and Gas Litigation*, 967 F.2d 489, 493 (11th Cir. 1992). The Court's "judgment is informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *United States v. City of Miami*, 614 F.2d 1322, 1344 (5th Cir. 1980)). This judicial policy favoring settlements is particularly important in the context of class actions. *In re Oil and Gas Litigation*, 967 F.2d 489, 493 (11th Cir. 1992).

Examination of the pertinent factors supports the approval of the present settlement. The court may rely on the opinions of class counsel about the agreement's fairness and adequacy. *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). Class counsel fully supports the settlement reached herein.

1. The Existence of Fraud or Collusion

There is no evidence before the Court that fraud or collusion is a factor in this settlement.[11] To the contrary, counsel has candidly described the settlement negotiations in hearings before the Court. The settlement was the result of rigorous arms-length bargaining among multiple interested parties and other interested entities that took place over many months. Additionally, the settlement negotiations were conducted under the direction of an experienced and neutral mediator, former Chief United States Bankruptcy Judge for the North District of Mississippi, David M. Houston, who was appointed by this Court. *See* Doc. No. 102. The issue of attorneys' fees was negotiated after the class benefits were finalized, and those fees are to be paid in addition to (rather than out of) class relief, subject to this Court's approval. *See In re Ford Motor Co. Bronco II Lit.*, 1995 WL 222177 (E.D. La. 1995) ("Separate negotiation of the class settlement before an agreement on fees is generally preferable to avoid conflicts of interest between the attorneys and the class."). *See* Affidavit of Jim Reeves, at ¶ 13, attached as Exhibit 2.

Moreover, the outstanding result for the Class – 100% of the missed annual required

[11] While there have been unsubstantiated allegations of collusion in collateral attacks of this settlement in series of repetitive petitions filed with the Mississippi Supreme Court in the parallel state proceedings, that Court has twice dismissed those petitions without granting the relief requested. Another petition, which seeks the same relief on the same grounds as the first two, remains pending at the time this motion was filed. More importantly, aside from the fact that the allegations contained in those petitions were categorically false and entirely unsubstantiated, the basis of the allegation of collusion was a meeting that took place in mid-January 2016, which was after the Settlement Agreement was finalized.

contributions being restored to the Trust over time – is evidence that Plaintiffs' counsel was clearly acting in the best interests of the Class and that the settlement was not the product of fraud or collusion.

2. Complexity, Expense and Duration of the Case

Complex litigation -- like the instant case -- can occupy a court's docket for years, depleting the resources of the parties. *Cotton v. Hinton*, 559 F. 2d 1326, 1331 (5th Cir. 1977). For this reason, "public policy strongly favors the pretrial settlement of class action lawsuits." *In re Oil and Gas Litigation*, 967 F.2d 489, 493 (11th Cir. 1992).

This settlement is the result of over a year of litigation. The length of time necessary to reach a final result would have occupied many more years of judicial resources and vast amounts of attorney time. The pleadings and briefs already filed in this Court and the parallel state proceedings demonstrate that this case has been, and would have continued to be, very difficult and expensive to resolve. Settlement of this action is in the best interests of judicial economy and the Settlement Class. *See* Affidavit of Jim Reeves, at ¶ 17, attached as Exhibit 2.

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

This settlement was reached and proposed after lengthy formal and informal discovery. Numerous consulting experts were retained to thoroughly and independently examine and evaluate thousands of financial documents produced in this case. The parties were in a good position to assess the respective weaknesses and strengths of the claims, and this Court has a sound basis to judge whether the settlement is fair at this stage in the proceedings. *See* Affidavit of Jim Reeves, at ¶ 15, attached as Exhibit 2.

4. Probability of Plaintiff's Success on the Merits

Probability of success and the range of possible recovery are the most important factors in determining whether a settlement is reasonable. *Campos v. I.N.S.*, 1999 WL 1044233 (S.D. Fla. 1999). In weighing this factor, the trial court does not have "the right or duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute." *Cotton*, 559 F.2d at 1330.

> The Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, "It has been held proper to take the bird in the hand instead of a prospective bird in the bush."

Oppenlander v. Standard Oil Co., 64 F.R.D. 597, 624 (D. Colo. 1974). In most situations, unless the settlement is "clearly inadequate, its acceptance and approval are preferable to a lengthy and expensive litigation with uncertain results." Conte and Newberg, *Newberg on Class Actions (Fourth)* § 11.50 (2002).

Plaintiffs firmly stand behind their Complaint and assert that their claims in this action are meritorious. However, Plaintiffs recognize the complexities and uncertainties characteristic of this type of litigation, and, perhaps more importantly, acknowledge the financial challenges currently faced by Singing River Health System. The proposed settlement resolves these uncertainties for the Settlement Class members and for SRHS. The parties properly elected to quantify their risks and benefits by this settlement. The settlement provides substantial relief to the Class and vindicates the Court process.

5. The Range of Possible Recovery

Settlements, by definition, are compromises which "need not satisfy every concern of [the] plaintiff class, but may fall anywhere within a broad range of upper and lower limits." *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 548 (N.D. Ill. 1982).

The $149,950,000 that SRHS must pay to the Trust pursuant to the Settlement Agreement is equivalent to Plaintiffs' Counsels' calculation of the value of the annual required contributions that SRHS failed to make between 2009 and 2014. *See* Section III(B). The Class Members will be returned to the same position in which they would have been had SRHS made all of the annual required contributions to the Trust between 2009 and 2014. *Id.* In the event of a default on any of the scheduled deposits to the Trust by SRHS, the Settlement protects Class Members by outlining a process for a summary proceeding through which the Jackson County Chancery Court may enter judgment on 10 days' notice in favor of the Trust and against SRHS for the unpaid balance of the Settlement Payment – a powerful incentive for SRHS to avoid default and for Jackson County to remedy the default if it occurs. *See* Exhibit 1, at ¶ 2.0. The Settlement also takes the administration of the Plan out of the control of SRHS and places it under the control of a Special Fiduciary, whose sole loyalty is to the Trust and its beneficiaries. *See* Exhibit 1, at ¶ 12.1. The Settlement empowers the Special Fiduciary to obtain information and 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. *Id.*

What this settlement does is restore Class Members to the same position in which they would have been had SRHS fulfilled all of its obligations to the Plan over the last six years. If this settlement is approved, what happens to the Plan going forward will be safely in the hands of the independent Special Fiduciary and under the careful watch of the Jackson County Chancery

Court, as any adjustment to the Plan can now only be made with Special Fiduciary recommendation and Chancery Court approval after sixty (60) days' notice to the Class Members and an opportunity for a hearing. *See* Exhibit 1, at ¶ 12.4. These sweeping procedural protections were not available to Class Members under the original terms of the Plan, but are instead an added benefit that they will receive if the settlement is approved.

Given the restoration of the missed contributions between 2009 and 2014 as well as the additional safeguards built into this agreement, the settlement provides substantial relief to Class Members, particularly when weighed against the expense and uncertainty of litigation, which, if pursued to the end, would result in a substantial depletion of remaining Trust assets.

6. The Opinions of the Class Counsel, Class Representatives and Absent Class Members

Based on documents obtained from Transamerica and SRHS, there are currently 3,080 individuals who are members of the Plan. *See* Affidavit of Jim Reeves, at ¶ 19, attached as Exhibit 2. Class counsel fully endorse the settlement as being fair and reasonable for the class. The settlement provides meaningful relief to the Class and is due to be approved. *See* Affidavit of Jim Reeves, at ¶ 19, attached as Exhibit 2.

The deadline for objections has not yet passed. A settlement can be fair even when there are a large number of objectors. *Reed v. General Motors Corp.*, 703 F.2d 170, 174-75 (5th Cir. 1983). This section will be supplemented following the receipt of any objections that are filed on or before April 25, 2016.

V. THE SETTLEMENT CLASS AND THE REQUIREMENTS OF RULE 23

A district court "has wide discretion in deciding whether to certify a proposed class." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 630 (5th Cir. 1999) (quoting *Lightbourn v. County of El Paso*, 118 F.3d 421, 425 (5th Cir. 1997)). The Settlement Agreement is based upon the certification of the following proposed 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.

Exhibit 1, at ¶ 1.0.

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

Federal Civil Procedure Rule 23(a) enumerates the following four basic prerequisites that must be established before any action may be maintained as a class action: (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims of the representative parties must be typical of the claims of the class; and (4) the representative parties must be able to fairly and adequately protect the interests of the class.

1. Numerosity

Rule 23(a)(1) requires that the Class be so numerous that joinder of all class members is "impracticable." Fifth Circuit law on the question of numerosity has been well summarized by the United States District Court for the Eastern District of Texas:

> This Court "must not focus on sheer numbers alone but must instead focus on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors." *Pederson* [*v. Louisiana State University*], 213 F.3d [858,] 868 [5th Cir. 2000] (internal citations omitted). Other relevant factors the Court must consider 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); *Smith* [*v. Texaco, Inc.*], 88 F.Supp.2d [663,] 674 [E.D. Tex. 2000]. The Fifth Circuit has held that though the number of class members alone is not determinative of whether joinder is impracticable, a class consisting 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).[12] In support of this conclusion, the Court cited a treatise on class actions suggesting that any class consisting of more than forty members should raise a presumption that joinder is impracticable. *Id.* (citing 1 Newberg on Class Actions § 3.05, at 3–25 (3d ed. 1992)). In the absence of any definitive pattern for numerosity in terms of the number of purported class members, the Fifth Circuit has left the numerosity determination to the sound discretion of the district court in controlling its litigation. *Zeidman*, 651 F.2d at 1038–39.

Bywaters v. United States, 196 F.R.D. 458, 465 (E.D. Tex. 2000).

There are 3,080 individuals who are members of the Plan.[13] *See* Affidavit of Jim Reeves, at ¶ 19, attached as Exhibit 2. These class members live in forty-one different states and territories. (Doc. No. 145-1, Affidavit of Andrea Kimball). Furthermore, the prosecution of this many separate actions would be a substantial drain on the resources of the courts and of the defendants, as is evidenced by the fact that more than 150 individual actions were recently filed in the Jackson County Circuit Court. *See also* Doc. No. 158.

The proposed Class clearly satisfies the numerosity requirement.

2. Commonality

Rule 23(a)(2) requires that the Plaintiff establish that there are questions of law or fact common to the class. "Rule 23(a)(2) requires that all of the class member's claims depend on a common issue of law or fact whose resolution 'will resolve an issue that is central to the

[12] Since *Bywaters* was published, *Mullen* was abrogated in part on other grounds by *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 131 S.Ct. 2541, 2551, 180 L.Ed. 2d 374 (2011).

[13] To protect the privacy of Class Members, the comprehensive list of names, contact information, and retirement status of each class member is not attached to this Motion. If the Court desires a copy of this list, the undersigned would be happy to submit it for *in camera* review.

validity of each one of the [class member's] claims in one stroke.'" *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 840 (5th Cir. 2012).

There are numerous questions of law or fact common to the Class, including, for example: (a) whether Singing River Health System was, in fact, required to make the actuarially determined required contributions to the Trust each year; (b) the amount of the annual required contributions that should have been made; (c) the rate at which the money in the Trust would have grown had it been deposited as required; and (d) whether those missed contributions were debts owed to the Plan, among many others.

The Representative Plaintiffs have satisfied the commonality requirement of Rule 23(a)(2).

3. Typicality

The typicality inquiry focuses on the similarity between the named Plaintiffs' legal and remedial theories and the theories of those whom they purport to represent. *Mullen,* 186 F.3d at 625, *abrogated in part on other grounds by, Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011). The *Jones* Plaintiffs' claims are typical of the claims of the Class because they all arise from the common course of conduct of SRHS failing to make the annual required contributions to the Plan between 2009 and 2014. The interests of the representative Plaintiffs are coextensive with, and typical of, the claims of the proposed class members. The representative Plaintiffs are comprised of both active employees and retirees. *See* Affidavit of Jim Reeves, at ¶ 20, attached as Exhibit 2.

4. Adequacy

Rule 23(a)(4) requires that the named Plaintiffs and their counsel "fairly and adequately protect the interests of the class." Two elements must be satisfied for the purpose of addressing

adequacy: (1) concerns regarding the qualifications of counsel; and (2) concerns regarding the relationship between interests of the class representative and the interests of other class members. *Jenkins v. Raymark Industries, Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985).

i. Qualifications of Counsel

The *Jones* Plaintiffs have assembled a unique and highly qualified litigation team with extensive class action experience, as described at length in Doc. No. 45, which is incorporated by reference herein. Moreover, the proposed settlement and the benefits that it provides to the Class are evidence that Jones Plaintiffs' counsel have vigorously pursued the interest of the class. *See also* Affidavit of Jim Reeves, at ¶¶ 1-5, attached as Exhibit 2 and Affidavit of Steve Nicholas, at ¶¶ 1-6, attached as Exhibit 28.

ii. Plaintiffs' Interests Aligned With Those of the Class

The Fifth Circuit has held that differences between named Plaintiffs and class members render the named Plaintiffs inadequate representatives "only if those differences create conflicts between the named plaintiffs' interests and the class members' interests." *Mullen*, 186 F.3d at 625–26. The *Jones* Plaintiffs' interests are sufficiently aligned with those of other class members because they all seek the restoration of the annual missed contributions to the Trust between 2009 and 2014. The *Jones* Plaintiffs represent both active employees and retirees. There are no defenses that apply uniquely to them and not to other members of the Class.

B. The Class Satisfies The Requirements of Rule 23(b)(1)

In addition to satisfying Rule 23(a)'s prerequisites, a class must satisfy one of the requirements of Rule 23(b). As often has been noted, the additional requirements of Rule 23(b) overlap considerably with those of Rule 23(a), and with each other. 2 Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 4.1 (4th ed. 1992). Plaintiffs seek certification under

Rule 23(b)(1)(A) or (B).

1. Certification Is Appropriate Under Rule 23(b)(1)

Under Rule 23(b)(1), a class may be certified if:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of:
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

"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, while 23(b)(1)(B) addresses possible prejudice to the putative class members." McLaughlin on Class Actions: Law and Practice (Eleventh) § 5.2 (2014).

i. Subsection (b)(1)(A)

Because most of the claims asserted by the Plaintiffs would result in plan-wide relief, there is a risk that failure to certify the class would result in prejudice to the defendants should there be contradictory rulings on issues of whether they acted as fiduciaries or whether the annual contributions were required to be deposited each year in accordance with the actuary's determination.

> 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 owner using water as against downriver owners)." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), quoted in *Robinson v. Wal-Mart Stores, Inc.*, 253 F.R.D. 396, 401 (S.D. Miss. 2008).

> Thus, in order to justify certification under Rule 23(b)(1)(A), the party seeking certification must show that inconsistent adjudications would cause the defendants to be unable to satisfy the judgments entered in some of the claims filed against them without contradicting the terms of other judgments entered with respect to the remaining claims. *See Corley v. Orangefield Indep. Sch. Dist*, 152 Fed. App'x 350, 354 (5th Cir. Oct.13, 2005). The possibility that the parties opposing class certification might be found liable to some of the claimants but not liable to others is insufficient to justify Rule 23(b)(1)(A) certification. *See Robinson*, 253 F.R.D. at 401 (citing *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1192 (9th Cir.2001)).

Blades v. Countrywide Home Loans, Inc., 2009 WL 903589, *2 (S.D. Miss. 2009). Examples of classic Rule 23(b)(1)(A) class actions are based on situations "in which different results in separate actions would impair the opposing party's ability to pursue a uniform course of conduct." C.WRIGHT, A. MILLER, & M.KANE, 7A FEDERAL PRACTICE & PROCEDURE § 1773, at 16 (2005 ed.).

Courts in the Fifth Circuit have held that the issue of whether or not a Plan was governed by ERISA created a risk of inconsistent adjudications sufficient to warrant class certification under Rule 23(b)(1)(A):

> The Court finds that prosecution of separate actions concerning members of this class would, as a practical matter, create the risks of inconsistent adjudications, resulting in incompatible standards. If separate suits were brought in different courts, a risk is created that one court would find that the voucher plan was an ERISA plan, whereas another court would not. This would have the effect of creating incompatible standards of conduct for SGSM by requiring SGSM to maintain some form of the food voucher plan in the former scenario for some class members but allowing SGSM to legally forego the plan in the latter scenario. *See, e.g., Specialty Cabinets & Fixtures, Inc., v. American Equitable Life Ins. Co.*, 140 F.R.D. 474 (S.D.Ga.1991) (certifying a class under Rule 23(b)(1) in an action to recover insurance loss due to breach of fiduciary duties).

Musmeci v. Schwegmann Giant Super Markets, 2000 WL 1010254, *4 (E.D. La. 2000) (emphasis added).

In considering Rule 23(b)(1)(A) certification, the issue in the present case is how SRHS could act prospectively if confronted with conflicting findings, including conflicting court orders

determining whether this is an ERISA plan, whether the trustees were fiduciaries, whether the trustees breached their fiduciary duties, whether the annual contributions were required to be made each year, or whether the missed contributions were debts owed to the plan. The risk is not limited to the prospect of different damages verdicts based on the same conduct or that SRHS may be found liable to some plaintiffs but not to others. In the present case, the nature of Plaintiffs' claims relate to a common course of conduct by SRHS (failure to make the annual required contributions the Trust) that applies to the class as a whole, because the restoration of the annual required contributions is effectively a single recovery of the Plan.

Moreover, the filing of similar lawsuits against defendants is a certainty should this class be denied. There are dozens of individual actions pending in the Jackson County Chancery Court. *See, e.g.* Complaint, *Cynthia N. Almond v. Singing River Health System*, Chancery Court Cause No. 2014-2653-NH, attached as Exhibit 29. In cases pending before it, the Jackson County Chancery Court has already ruled that the missed annual required contributions between 2009 and 2014 are a debt owed to the Trust. *See* Exhibit 27. Additionally, there are over 150 separate actions pending in the Jackson County Circuit Court, with largely identical allegations. *See, e.g.*, Complaint, *Delores M. Gowder v. Singing River Health System*, CI-2016-001-SR, attached as Exhibit 30; *see also* Doc. No. 158-1. Unlike the Chancery Court, the Circuit Court has not yet ruled on the issue of whether the missed annual required contributions between 2009 and 2014 are a debt owed to the Trust.

Because the state court actions have been filed in both Chancery and Circuit courts, more than one judge has been appointed by the Mississippi Supreme Court to preside over them. The Honorable L. Breland Hilburn presides over a number of the Jackson County Chancery cases. *See* Order of the Mississippi Supreme Court appointing Judge Breland Hilburn, Serial 198043,

No. 2015-AP-00568 (April 10, 2015), attached as Exhibit 31. The Honorable James D. Bell has been appointed to preside over more than 150 individual actions in the Jackson County Circuit Court. *See* Order of the Mississippi Supreme Court appointing Judge James Bell, Serial 204845, No. 2016-AP-00384 (March 22, 2016), attached as Exhibit 32. Additionally, as a result of Judge Hilburn's recusal in a select number of the Chancery Court cases[14], Judge Bell also presides over some of the Chancery Court cases. *See* Order of the Mississippi Supreme Court appointing Judge James Bell, Serial 204192, No. 2015-AP-00559 (February 19, 2016), attached as Exhibit 33.

Given that there are over 150 nearly identical parallel state proceedings pending before two different judges (*see* Doc. No. 158-1), the risk of inconsistent judgments concerning, for example, how the Plan should be interpreted or whether SRHS owes a debt to the Trust, would result in substantial prejudice to the defendants. If relief is granted in some actions but not in others, the conflicting judgments could make compliance impossible for the defendants. Similarly, different or contradictory rulings would also make it virtually impossible for the defendants to implement any one result. For all of these reasons, certification pursuant to Rule 23(b)(1)(A) is appropriate.

ii. Subsection (b)(1)(B)

Failure to certify the class would also create a risk of "adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of other members not parties to the individual adjudications or would substantially impair or impede their

[14] Judge Breland Hilburn decided that he could no longer be impartial in some of the Chancery Court cases in which certain counsel (not involved in the proceedings before this Court) engaged in protracted unfair, misleading, and shameless attacks upon his character. He therefore recused himself from presiding over the cases in which those attorneys were involved on February 4, 2016. Judge Hilburn has not recused himself from the cases that are a part of the proposed settlement in this case: (1) Virginia Lay v. SRHS, et al., Chancery Court Cause No. 2015-0060-NH; and (2) Donna B. Broun, et al. v. SRHS et. al., Chancery Court Cause No. 2015-0027-NH.

ability to protect their interests." Rule 23(b)(1)(B), Fed. R. Civ. P.

In an ERISA case, a district court in Texas analyzed whether 23(b)(1)(B) certification of a class was appropriate:

> The Advisory Committee Note states that certification under Rule 23(b)(1)(B) is appropriate in "an action which charges breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust." *See, e.g., Godschall v. The Franklin Mint*, No. 01-CV-6539, 2004 WL 2745890, *3 (E.D.Pa. Dec.1, 2004) ("When a breach of fiduciary duty is at issue, any individual adjudication regarding the breach would necessarily affect the interests of others" and "[t]herefore it is appropriate to certify the class pursuant to Rule 23(b)(1)(B).").
>
> This Court previously approved a settlement class in *Tittle* under Rule 23(b)(1)(B) for a settlement with the foreign Arthur Andersen entities because prosecution of separate actions by individual class members would pose a risk of inconsistent or disparate adjudications and because adjudication of the *Tittle* Plaintiffs' claims would, as a practical matter, be dispositive of the interests of other class members not parties to *Tittle* or would substantially impede their ability to protect their interests. "Because individuals may bring class action to remedy breaches of fiduciary duty only on behalf of the plan, rather than themselves, the Court cannot allow participants or beneficiaries to opt out of this class." *Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins. Co.*, 140 F.R.D. 474, 479 (S.D.Ga.1991). *See also In re WorldCom, Inc. ERISA Litig.*, No. 02 Civ. 4816(DLC), 2004 WL 2338151, *8 (S.D.N.Y. Oct.18, 2004) ("There is no opportunity under any Rule 23(b)(1)(B) class action to opt out ...."), *clarified*, 2004 WL 2922083 (S.D.N.Y. Dec.17, 2004). Nevertheless, absent class members must be given notice of the proposed settlement and may move to intervene and file objections to it.

In re Enron Corp. Sec., Derivative & "ERISA" Litig., 228 F.R.D. 541, 544 (S.D. Tex. 2005).

If individual lawsuits were allowed to supplement or augment the class recovery, the Plan fiduciary, who by law is obligated to treat all Plan members fairly in accordance with the terms of the Plan, Miss. Code §§ 91-8-106 and 91-8-801, would be faced with a situation in which one plaintiff may obtain a judgment that permits a recovery to the Plan, while another may obtain a judgment that precludes a recovery for the Plan. The Plan fiduciary would then be put in the impossible position of discriminating against members of the Plan, which the Plan fiduciary

cannot do under the law. Additionally, the basic claim in this lawsuit is that the Plan was not funded by SRHS. No class member had an individual, self-directed account with its own investment risks and objectives. *See* Exhibit 5. Therefore, the recovery must go to the Plan. If individual lawsuits are filed, the first plaintiffs to receive awards may deprive other employees or retirees of their benefits.

For all of these reasons, a mandatory class pursuant to Rule 23(b)(1)(B) is necessary to ensure that all class members are treated fairly and are similarly bound by the benefits and burdens of the settlement.

VI. CONCLUSION

When applying the factors approved by the Fifth Circuit to the proposed settlement, it is clear that the settlement is within the possible range of recovery, the risks of continued litigation are outweighed by the benefits of the settlement, and the best notice practicable under the circumstances was given to the class. Further, the proposed Settlement Class meets the requirements of Rule 23. For these reasons, the Court should approve the Settlement Agreement as fair, reasonable, adequate and in the best interests of the class.

RESPECTFULLY SUBMITTED, this the 1st day of April, 2016.

/s Jim Reeves
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CERTIFICATE OF SERVICE

The undersigned resident attorney certifies that on this 1st day of April, 2016, a copy of the foregoing pleading has been mailed, filed via the ECF system, and/or otherwise served on all parties and/or their counsel who have appeared in this case. Documents to additional defendants named in this pleading may be served according to the law.

/s Jim Reeves
James R. Reeves, Jr.