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**

SUPPLEMENTAL MEMORANDUM OPINION AND ORDER
APPROVING CLASS ACTION SETTLEMENT

THIS MATTER IS BEFORE THE COURT pursuant to the September 14, 2017 mandate of the United States Court of Appeals for the Fifth Circuit, which vacated this Court's decision approving the proposed class action settlement in these consolidated lawsuits and remanded the cases for further proceedings in accordance with its opinion. After remand, this Court ordered the parties to submit supplemental briefs and evidence and to provide supplemental notice to the class. This Court also conducted a supplemental fairness hearing on January 22, 2018, to address the issues raised by the Fifth Circuit. After thoroughly considering the submissions of the parties and the objectors, as well as the testimony, argument, and evidence presented at the hearing, this Court finds that the proposed class settlement is fair, adequate, and reasonable. The Fifth Circuit previously held that

the settlement is not the product of collusion. Therefore, the settlement should be approved.[1]

BACKGROUND

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

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

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

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

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

(Agreement at 5, ECF No. 163-1). Pursuant to the proposed settlement agreement, SRHS must deposit a total of $156,400,000 into the retirement trust pursuant to a thirty-five-year schedule agreed upon by the parties. (*Id.* at 6). The plaintiffs' expert accountant Allen Carroll has determined that the payment of this amount over thirty-five years will fully compensate the Plan for the 2009 through 2014 missed contributions. In order to assist in the facilitation of the proposed settlement, Jackson County, Mississippi, agreed to pay a total of $13,600,000 to SRHS "[t]o support the indigent care and principally to prevent default on a bond issue by supporting the operations of SRHS" in nine installments beginning upon approval of the settlement and ending on September 30, 2024. (*Id.* at 7 and Ex. B). The parties agreed that Jackson County would be entitled to a release as a result of its contribution to the settlement. (*Id.* at 2).

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

the named plaintiffs to the Jones, Cobb, and Lowe federal lawsuits as well as the plaintiffs in two state court lawsuits. (*Id.* at 7).

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

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

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

The proposed settlement also gives the fiduciary authority to petition the Chancery Court to accelerate SRHS's payments if SRHS recovers money from other entities or individuals, including KPMG or Transamerica, or if additional insurance coverage becomes available to SRHS. (*Id.* at 16). Furthermore, the proposed

settlement class has reserved its right to pursue claims against Transamerica, KPMG, FiduciaryVest, LLC, and Trustmark National Bank. (*Id.* at 2).

The proposed settlement provides:

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

(*Id.* at 7).

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

The objectors appealed this Court's decision to approve the class settlement. The Fifth Circuit entered an Opinion vacating this Court's approval of the

settlement, and remanded the matter for further consideration of the following issues:

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

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

> (1) the objectors waived any objection to the district court's decision to certify the class under Rule23(b)(1)(A) as a mandatory settlement class. *Id.* at 296, n.7.
>
> (2) the district court did not err in determining that class counsel and the class representatives gave adequate representation to the class. *Id.* at 294-95.
>
> (3) class counsel's decision to limit the litigation to pre-2014 damages was a "rational calculation" due to "the legal uncertainty whether the class could prevail on claims for additional amounts unpaid by SRHS into the Plan, and the greater practical concern whether SRHS could financially make any additional commitment . . . beyond restoring the missed payments from 2009 to 2014." *Id.* at 294.

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

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

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

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

Id.

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

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

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

DISCUSSION

A more thorough examination of the facts and procedural history of this case, as well as factors and authority supporting approval of the settlement, are contained in this Court's [283] Memorandum Opinion and Order Granting Motion for Final Approval of Class Action Settlement, which is incorporated herein by reference. In accordance with the law of the case doctrine and the mandate rule, this Court will not readdress issues outside the Fifth Circuit's mandate but will rely on the analysis set forth in its initial [283] Memorandum Opinion and Order in conjunction with the analysis suggested by the Fifth Circuit, which is included in the present Memorandum Opinion and Order. *See Gen. Univ. Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 453 (5th Cir. 2007) ("Because the mandate rule is a corollary of the law of the case doctrine, it compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court.")

As this Court has previously explained, Fed. R. Civ. P. 23(e) provides that a class action may only be settled with the court's approval. The Fifth Circuit has recognized that there is an "overriding public interest" and a "strong judicial policy favoring the resolution of disputes through settlement" even in the context of class

actions. *In re Deepwater Horizon*, 739 F.3d 790, 807 (5th Cir. 2014); *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982). "The gravamen of an approvable proposed settlement is that it be fair, adequate, and reasonable and is not the product of collusion between the parties." *Newby v. Enron Corp.*, 394 F.3d 296, 301 (5th Cir. 2004). The Fifth Circuit has conclusively determined that the SRHS settlement was not the product of collusion, and it has delineated four issues that this Court should consider in order to determine whether the settlement is fair, adequate, and reasonable.

I. HOW AND HOW MUCH, THE FUTURE STREAM OF SRHS'S PAYMENTS INTO THE PLAN, TOGETHER WITH EXISTING PLAN ASSETS AND PROSPECTIVE EARNINGS, WILL INTERSECT WITH FUTURE CLAIMS OF PLAN PARTICIPANTS, INCLUDING, BUT NOT LIMITED TO WHAT EFFECT THE SETTLEMENT HAS ON CURRENT RETIREES:

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

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

Ms. Christian testified that there are currently 725 retirees or spouses receiving benefits from the Plan.[4] There are approximately one thousand Plan participants who remain employed by SRHS. There are just under 200 vested terminated participants. These participants no longer work for SRHS, but they have earned a vested benefit and they are not yet eligible to retire. There are over 900 participants who left employment with SRHS prior to vesting. These participants are entitled to a return of the contributions they made plus interest.[5] Ms. Christian explained that it is impossible to calculate the amount of benefits each participant will receive, because there is no way to accurately predict how long each participant will live or how the market will perform in the future. The question of whether the proposed settlement will ultimately be approved causes additional uncertainty.

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

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

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

contributed. Therefore, the Plan earnings are lower than they would be if regular contributions were made.

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

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

SCENARIO 1

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

SCENARIO 2

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

SCENARIO 3

Scenario 3 contemplates settlement approval as well as potential special-fiduciary recommended, and Chancery Court-approved modifications to the Plan.

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

The plaintiffs' exhibit G38, which was produced at the hearing, summarizes the overall benefits of the proposed settlement for Plan participants. If the settlement is not approved and litigation continues, the Plan will be depleted in as little as seven years, leaving current employees with no return on their contributions. The settlement alone would more than double the Plan's level of funding. In addition, the settlement has established a means by which the benefits of SRHS's settlement contributions can be enhanced by changes to the Plan overseen by Ms. Christian and the Chancery Court. The settlement would also enable Ms. Christian to select an asset allocation for Plan funds that increases the return on Plan investments as opposed to liquidating assets in order to pay retirees. Thus, the Plan can sustain some level of benefits for all participants if the settlement is approved, as opposed to leaving all participants with no benefits after 2025.

The objectors argue that the proposed settlement is flawed because it treats various sub-groups of class members — such as retirees, non-vested terminated employees, vested terminated employees, and current vested employees — the same. They further assert that the class should be divided into various subclasses

represented by separate counsel. First, the Fifth Circuit has previously held that this Court did not abuse its discretion by certifying this class as a mandatory Fed. R. Civ. P. 23(b)(1)(A) class. The Fifth Circuit also found no error with the other determinations made by this Court when certifying the class. Therefore, the objectors have waived any argument that the class should be divided into subclasses. *See Gen. Univ. Sys., Inc.*, 500 F.3d at 453-54 (holding that a party could not assert arguments on remand that it had failed to raise on appeal). In addition, contrary to the objectors' assertions, the proposed settlement does not propose to treat all retirees the same. The proposed settlement merely provides a means of funding for the Plan over the next thirty-five years in order to restore missed contributions. The proposed settlement contains no provisions that specify how the funds should be allocated among the class, but it has established a procedure by which allocation can be made in the future by the special fiduciary with the oversight of the Chancery Court of Jackson County, Mississippi. Therefore, there is no need for subclasses.

The objectors also reassert their argument that the settlement is inadequate, because SRHS employees were promised lifetime benefits. The Fifth Circuit has already rejected this argument. *Jones*, 865 F.3d at 299. This Court also recognizes that SRHS's financial condition has substantially improved since the Fifth Circuit's decision, but this fact does not justify rejection of the settlement. First, while SRHS's financial condition has continued to improve, the Plan's financial situation has deteriorated without additional cash infusion and will continue to worsen as

this litigation continues. Furthermore, SRHS's improved financial stability weighs in favor of approval of the settlement, as the risk of SRHS failing to make its payments under the settlement has decreased. Finally, as the Fifth Circuit noted, it is questionable whether the class could recover any additional sums from SRHS, because SRHS clearly had and continues to have the contractual right to terminate the Plan, albeit now with Chancery Court approval.[6] *See id.*

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

First, this argument was waived because it was not made before the Fifth Circuit. Second, the objectors only identified two alleged statements and one of the alleged statements was made by the special master appointed in related state court proceedings, not class counsel. Third, the objectors have admitted that the class notice pointed them to a website that revealed that the settlement did not purport to provide a 100% payment. Fourth, the other statement made by class counsel was made after the Fifth Circuit remanded the case to this Court; thus, the statement could not have impacted the number of objections filed prior to that date. Finally, the objectors have not produced any evidence or testimony tending to show that any

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

class member was misled by these statements. Therefore, this argument is likewise without merit.[7]

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

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

testimony, and argument presented, the Court is convinced that the proposed settlement is fair, reasonable, and adequate, and the settlement should be approved as soon as possible.

II. WHAT ARE SRHS'S FUTURE REVENUE PROJECTIONS, SHOWING DOLLAR AMOUNTS, ASSUMPTIONS AND CONTINGENCIES, FROM WHICH A REASONABLE CONCLUSION IS DRAWN THAT SRHS HAS THE FINANCIAL ABILITY TO COMPLETE PERFORMANCE UNDER THE SETTLEMENT:

The second issue identified by the Fifth Circuit focuses on the ability of SRHS to fulfill its obligations under the settlement agreement. Since this Court approved the settlement in June 2016, SRHS has made all of the payments required under the settlement to date. These payments total $7.6 million. SRHS has accomplished this without receiving the funds that Jackson County has agreed to pay toward the settlement as the County's contributions have been deposited in a separate escrow account.

Allen Carroll, an accountant with experience in reviewing historical and projected financial performance for businesses, including business valuations, testified at the supplemental fairness hearing. After reviewing SRHS's audited financial statements, its audited cash flow analysis, and cash flow projections, he determined that SRHS has the ability to meet it payment obligations under the settlement agreement. He explained that in 2014 SRHS had $19.6 million in cash, but in 2017, SRHS had a little more than $81 million in cash, cash equivalents, and investments. In 2015, SRHS had fifty-one days of cash on hand, but by 2017 it had

ninety-one days cash on hand.[8] In 2014, SRHS experienced a $34 million loss, but by 2016 and 2017, SRHS's profits exceeded $5 million. Thus, he determined that SRHS has undergone a "remarkable" financial recovery in the last few years. He also opined that approval of the settlement would improve SRHS's financial situation, including its ability to obtain financing.

While the Fifth Circuit was concerned that there is no collateral to support SRHS's settlement obligations or "incentivize[ ] payments to the Plan over those of other unsecured creditors," s*ee Jones*, 865 F.3d at 298, Mr. Carroll testified that SRHS does in fact have strong incentives to pay its obligations under the settlement. If SRHS misses a payment, the class can obtain a judgment in Chancery Court which accelerates the present value of all of the future payments under the settlement agreement. Mr. Carroll testified that such a judgment would have "a broad, cascading effect," because bondholders would likely accelerate SRHS's outstanding obligations. Thus, he opined that if SRHS misses a settlement payment and the class obtains a judgment, the result would be "financial chaos," that he characterized as "a disaster."

It is significant to note that at the supplemental fairness hearing, counsel for the objectors conceded that SRHS is sufficiently solvent and fully capable of making all of its payments under the settlement. He argued that SRHS committed a fraud

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

upon this Court when it previously argued that it was experiencing financial difficulties. However, counsel for the objectors has not produced any evidence or testimony, much less expert testimony, to support this claim. The reports, audited financial documentation, and expert testimony presented to this Court reflect a dramatic financial recovery, not fraud. In addition, the Fifth Circuit has previously held that the settlement was not the product of fraud or collusion. Therefore, this assertion is without merit.[9]

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

[9] The objectors also argue that SRHS's audits inaccurately reflect pension payments that were not made in order to make SRHS appear impoverished. As class counsel has demonstrated in their reply memorandum, this argument is based on a misunderstanding of the financial documentation produced. (*See* Pls.' Reply at 6-7, ECF No. 380).

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

III. WHY ANY PAYMENTS FROM LITIGATION INVOLVING KPMG, TRANSAMERICA OR RELATED ENTITIES ARE PERMITTED TO DEFRAY SRHS'S PAYMENT OBLIGATION RATHER THAN SUPPLEMENT THE SETTLEMENT OF CLASS MEMBERS:

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

The settlement agreement provides:

> Excluding defense costs in related actions, if SRHS recovers any money from any other individual or entity, including but not limited to,

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

> Transamerica or KPMG, by verdict, judgment, settlement, contract or agreement, related to claims that have or could yet be made for any relief that may exist or be determined to exist for the benefit of Defendants . . . then SRHS must provide written notice of the recovery to the Special Fiduciary and the Special Fiduciary may petition the Chancery Court to accelerate the payment schedule in Exhibit A. Defendants will have an opportunity to oppose the petition at the hearing. If the Chancery Court orders an acceleration of any of the payments, then Defendants will be bound by the Chancery Court's findings, subject to their rights to appeal any order of said court.

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

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

(*Id.* at 17).

This consolidated class action lawsuit was filed to recoup the missed Plan contributions prior to 2014, and the Fifth Circuit has previously held that class

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

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

IV. WHY CLASS COUNSEL'S FEES SHOULD NOT BE TAILORED TO ALIGN WITH THE UNCERTAINTY AND RISK THAT CLASS MEMBERS WILL BEAR:

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

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

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

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

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

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

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

CONCLUSION

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

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

surprise. Anxiety followed, and soon evolved into panic, anger, and the uncertainty, delay and expense associated with the prospect of protracted litigation.

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

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

IT IS, THEREFORE, ORDERED AND ADJUDGED that the [163-1] Stipulation and Agreement of Compromise and Pro Tanto Settlement is **APPROVED** as a fair, reasonable, and adequate class settlement. The Court will enter a separate judgment in accordance with Fed. R. Civ. P. 58.

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

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

s/ *Louis Guirola, Jr.*
LOUIS GUIROLA, JR.
UNITED STATES DISTRICT JUDGE