UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

SHELLEY R. GARNICK, TANAJAH CLARK and ZOE R. JONES, individually and on behalf of all others similarly situated, Plaintiffs, v. WAKE FOREST UNIVERSITY BAPTIST MEDICAL CENTER, THE BOARD OF DIRECTORS OF WAKE FOREST UNIVERSITY BAPTIST MEDICAL CENTER, THE RETIREMENT BENEFIT COMMITTEE OF WAKE FOREST UNIVERSITY BAPTIST MEDICAL CENTER and JOHN DOES 1-30. Defendants.	)	**CIVIL ACTION NO.:** 1:21-CV-00454-WO-JLW

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

On February 5, 2024, the Court preliminarily approved the Settlement in this Action (ECF No. 57), which provides for the creation of a $3,800,000.00 Settlement Fund.[1] The Court's Preliminary Approval Order also, *inter alia*, conditionally certified a Settlement Class and appointed Plaintiffs as class representatives and Capozzi Adler, P.C ("Capozzi Adler") as Class Counsel. *Id*. Plaintiffs and Class Counsel believe each of these findings in the Preliminary Approval Order should be made final because the proposed Settlement represents an outstanding recovery. In particular, the Settlement represents roughly 23% of Plaintiffs' estimated $16.5 million of potential best-case damages as calculated by Plaintiffs and ***more*** than the amount Defendants would argue Plaintiffs could potentially win at trial. This Settlement was achieved after vigorous arms-length negotiations between counsel experienced in ERISA class actions and under the auspices of David Geronemus, Esq. of JAMS, a third-party private mediator with extensive experience mediating ERISA actions. Additionally, the Independent Fiduciary hired to review the Settlement has approved it. *See* April 23, 2024, Gallagher Fiduciary Advisors, LLC ("Gallagher") Report (attached to the Gyandoh Dec. as Ex.12).

The Settlement Class has received full and fair notice of the terms of the Settlement through individualized direct mail along with a dedicated internet Settlement website, and toll-free number in accordance with the Preliminary Approval Order. After mailing the approved form of Notice of Class Action Settlement to the approximately 48,185 potential Settlement Class members, there

[1] The Settlement Agreement, previously submitted to the Court, is being submitted herein as Exhibit 1 to the Declaration of Mark K. Gyandoh ("Gyandoh Decl.") which is filed contemporaneously with this memorandum. The Settlement Agreement has several exhibits. These exhibits are: A (Settlement Notice); B (Plan of Allocation); C (Preliminary Approval Order); and D (Final Order); and E (CAFA Notice). Undefined capitalized terms herein have the same meaning as in the Settlement Agreement.

has only been one objection thus far which is addressed below.[2] Plaintiffs respectfully request this Court to enter the proposed Final Approval Order and Judgment approving the Settlement.

II. BACKGROUND

Prior to initiating this action Plaintiffs' counsel spent several months investigating this matter and conferred with experts. Gyandoh Decl. at ¶3. Plaintiffs commenced this action by filing an initial complaint on June 4, 2021. (ECF No. 1). On October 28, 2021, Plaintiffs filed their Amended Complaint alleging violations of fiduciary duties of prudence and loyalty imposed by ERISA § 404(a), 29 U.S.C. § 1104(a). (ECF No. 18). Defendants moved to dismiss the Amended Complaint on December 10, 2021 (ECF No. 21). On January 21, 2022, Plaintiffs filed an opposition to Defendants' motion to dismiss, and on February 4, 2022, Defendants filed a reply in support of their motion to dismiss. The Court denied Defendants' motion to dismiss on September 21, 2022. (ECF No. 34). On November 4, 2022, Defendants filed their Answer to the Amended Complaint (ECF No. 39).

On January 11, 2023, Defendants provided Plaintiffs with approximately 151,419 pages of documents. Gyandoh Decl. ¶ 15. These documents aided Plaintiffs' assessment of the extent of potential damages assuming Plaintiffs established liability. On May 16, 2023, the Parties attended a mediation session with David Geronemus of JAMS, who is well-versed and experienced in mediating ERISA matters. Gyandoh Decl., ¶ 9; *see also* curriculum vitae of Mr. Geronemus at www.jamsadr.com/geronemus. On May 31, 2023, this Court received the Report of Mediator (ECF No. 52), informing the Court that a settlement had been reached. This Court issued an Order

[2] Per the Preliminary Approval Order, the objection deadline has not yet elapsed. *See* ECF No. 57 ¶ 11, (setting May 31, 2024, as the objection deadline). To the extent any additional objections are filed regarding any aspect of the Settlement, Class Counsel will address the objection(s) in a supplemental filing to this Court in advance of the Final Approval Hearing no later than June 14, 2024. *Id*. at ¶¶ 11- 12.

adopting the Joint Status Report and Notice of Settlement on June 13, 2023 (ECF No. 51).

Plaintiffs filed an Unopposed Motion for Preliminary Approval of the Settlement (ECF Nos. 54-57) on July 10, 2023. On February 5, 2024, the Court's Preliminary Approval Order (ECF No. 57) granted Plaintiffs' request and certified a Settlement Class.

III. SETTLEMENT NEGOTIATIONS

Settlement negotiations began in earnest on March 23, 2023, when Plaintiffs sent Defendants an initial settlement demand. Gyandoh Decl., ¶ 8. Subsequently, on May 16, 2023, the Parties attended a voluntary mediation session with Mr. Geronemus of JAMS. Gyandoh Decl., ¶ 9. Throughout this process, Plaintiffs, through counsel, consulted with experts regarding the extent of damages the Plan sustained as a result of Defendants' alleged breaches of fiduciary duty. The Parties reached a settlement after reviewing all of the relevant information, including documents produced by Defendants, and both parties evaluating numerous damages scenarios. Plaintiffs determined maximum potential damages to the Plan to be over $16.5 million before calculation of prejudgment interest. This amount reflected damages from (1) failure to obtain cheaper bundled recordkeeping and administrative services as early as the start of the Class Period, and (2) failure to monitor and rectify the Plan's total plan costs. Defendants did not agree with Plaintiffs' calculation of damages for, among other reasons, that the damages included money paid to an ERISA Expense Budget that did not pay for recordkeeping but investment consulting, Plan auditor, and other expenses. Thus, removing budget account fees would drastically reduce the damages.

The Parties arrived at a settlement in principle of $3,800,000.00 after an ardent, full-day mediation session. The Settlement Agreement, inclusive of exhibits, was finalized and executed as of July 10, 2023. (ECF No. 56-1.) Based on the aforementioned negotiations and exchange of information, the Parties were able to negotiate a fair settlement that they believe to be in their

respective best interests. It is Plaintiffs' counsel's opinion that the proposed settlement is fair and reasonable. Gyandoh Decl. ¶65.

IV. THE PROPOSED SETTLEMENT

The Settlement provides that Wake Forest University Baptist Medical Center. ("Wake Forest") (or its insurers) will pay $3,800,000.00 – the Gross Settlement Amount – to be allocated to participants on a *pro-rata* basis pursuant to the proposed Plan of Allocation. *See* Gyandoh Decl., Exhibit 1, the Settlement Agreement. Additionally, within five years of the date of the Final Order, the Plan's fiduciaries, if they have not already done so, will initiate a request for proposal relating to the Plan's Recordkeeping services. *Id*. Plaintiffs agree to release their claims on behalf of the Class and dismiss this action. *Id*., at Article 7 of the Settlement Agreement. The Gross Settlement Fund will be used to pay the participants' recoveries, administrative expenses to facilitate the Settlement, Class Counsel's attorneys' fees and costs, and Class Representatives' Compensation if awarded by the Court. *Id*., ¶ 33. The Class Members include all individuals in the Settlement Class, or:

> All persons who participated in the Plan at any time during the Class Period (June 4, 2015, through the date of this Order), including any Beneficiary of a deceased Person who participated in the Plan at any time during the Class Period, and any Alternate Payee of a Person subject to a Qualified Domestic Relations Order who participated in the Plan at any time during the Class Period. Excluded from the Settlement Class are the members of the Retirement Benefit Committee of Wake Forest University Baptist Medical Center.

Preliminary Approval Order, (ECF 57) ¶ 1.

V. THE NOTICE PLAN HAS BEEN EFFECTIVELY IMPLEMENTED

Pursuant to the Preliminary Approval Order, Class Counsel has overseen the issuance of the Court-approved Class Notice. Class Counsel retained Analytics Consulting, LLC ("Analytics") to serve as settlement and notice administrator. *See* Declaration of Settlement

Administrator in Support of Plaintiffs' Motion for Final Approval signed by Jeffrey Mitchell ("Mitchell Decl.") (attached as Exhibit 2 to the Gyandoh Declaration). On March 1, 2024, Defendants provided Analytics with spreadsheets containing, among other information, the names, mailing addresses, and social security numbers for a total of 48,185 unique Settlement Class Members. Mitchell Decl., ¶¶ 6,8. Notice was mailed on March 7, 2024. *Id*. Analytics updated the Settlement Class member address information using either forwarding addresses provided by the U.S. Postal Service, or when none was provided, obtaining new addresses through conducting a "skip trace." Mitchell Decl., ¶7. As of May 20, "out of 48,185 Notices, only 1,122 (approximately 2.31%) were ultimately undeliverable." *Id*. at ¶ 11.

Accordingly, the notice program was extremely successful. The notice program apprised Settlement Class members of the terms of the Settlement, and of their right to object to any or all of the terms of the Settlement, Plan of Allocation, Case Contribution Awards, or to Class Counsel's motion for award of attorneys' fees and reimbursement of litigation expenses. The Class Notice was also posted on a dedicated website – www.WakeForestBaptistERISASettlement.com (launched on March 7, 2024) – through which the public and the Plan's current and former participants could view essential case information. *See* Mitchell Decl., ¶ 12. On March 7, 2024, Analytics also established a case-specific toll-free number for Settlement Class members to call to obtain information regarding the Settlement. Mitchell Decl., ¶ 13.

The Fourth Circuit has explained that "[t]o bind an absent class member, notice to the class must provide 'minimal procedural due process protection.'" *McAdams v. Robinson*, 26 F.4th 149, 157-58 (4th Cir. 2022) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). Fed. R. Civ. P. 23(e)(1)(B) "doesn't specify what the notice must say. Rather, the notice need only 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of

the options that are open to them in connection with the proceedings.'" *Id*. (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005)). The instant notice program satisfies due process requirements. The notice program includes direct mail notice to absent class members, reaching close to a 100% success rate, and is supplemented by a settlement website and a toll-free telephone number, thus constituting the "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23. *See e.g Pledger v. Reliance Trust Co.*, 2021 WL 2253497, at *4 (N.D. Ga. Mar. 8, 2021) (an ERISA case finding the notice program to satisfied due process because the notice "was timely distributed by electronic or first-class mail to all Class Members who could be identified with reasonable effort, and Settlement Notice was published on the Settlement Website maintained by Class Counsel."); *Diaz v. BTG Int'l Inc.*, 2021 WL 2414580, at *5 (E.D. Pa. June 14, 2021) (granting final approval in an analogous ERISA matter where notice was administered via mail and a designated website was created to inform participants of pertinent information); *Boyd v. Coventry Health Care, Inc.*, 299 F.R.D. 451, 461 (D. Md. 2014) (approving that "[t]he notice forms informed each class member, in clear and concise language, of the basis for this lawsuit; the definition of the Settlement Class; the key terms of the Settlement Agreement; the process for objecting to the Settlement Agreement; and the date, time, and place of the final fairness hearing."). Indeed, the Court previously found the combination of the direct-mail Class Notice and dedicated Settlement website and phone number was adequate to inform Settlement Class members of the terms of the proposed Settlement, how to lodge an objection, and how to obtain additional information. *See* Preliminary Approval Order.

VI. THE PROPOSED SETTLEMENT SHOULD BE APPROVED

A. Legal Standards

When assessing whether a proposed settlement is fair, reasonable, and adequate, courts in

the Fourth Circuit evaluate "four factors for determining a settlement's fairness, which are:

> (1) the posture of the case at the time settlement was proposed;
> (2) the extent of discovery that had been conducted;
> (3) the circumstances surrounding the negotiations; and
> (4) the experience of counsel in the area of [the] class action litigation.

In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig., 952 F.3d 471, 484 (4th Cir. 2020) (citing *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991)). Courts in the Fourth Circuit use five additional factors to assess the adequacy of a settlement:

> (1) the relative strength of the plaintiffs' case on the merits;
> (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial;
> (3) the anticipated duration and expense of additional litigation;
> (4) the solvency of the defendant[ ] and the likelihood of recovery on a litigated judgment; and
> (5) the degree of opposition to the settlement.
>
> *Id.*

An analysis of these factors weighs in favor of approving the settlement.

i. The posture of the case at the time settlement was proposed and the extent of discovery completed indicate the Settlement is fair.

The first two Fourth Circuit factors weigh in favor of final approval. The Complaint was filed in June of 2021, after months of pretrial investigation and the support of a consulting expert. The motion to dismiss stage was hotly contested, with Defendants moving for complete dismissal of all accounts and both Parties submitting several rounds of supplemental authority. Nearly two years after the Complaint was filed, a settlement was reached. Settlements achieved during the early stages of complex litigation are routinely approved. *See e.g. Boyd*, 299 F.R.D. at 460; *In re Sprint Corp. ERISA Litig.*, 443 F.Supp.2d 1249, 1260 (D. Kan. 2006); *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 573 (E.D. Va. 2016). In fact, this stage of settlement "allows a class to

achieve substantial savings and be able to invest those savings immediately – enjoying years' worth of returns that would not otherwise be available." *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, *3 (M.D.N.C. Sept. 29, 2016).

Plaintiffs obtained ample informal discovery during the pretrial investigation, and the Parties began exchanging formal discovery before the settlement conference, including Defendants' production of 151,419 pages of documents. *See* Gyandoh Decl., ¶¶ 3, 13-17. Though expert discovery did not commence, Plaintiffs consulted with experts on damages before attending the mediation session. Hence, the Parties had sufficient information to perfect their assessment of the strengths and weaknesses of the case before attending the mediation session, and before expending unnecessary time and resources. In *Kruger*, an ERISA case from this Circuit, the court granted final approval in a case that settled before entering formal discovery. The court lauded the amount of informal discovery work that ERISA class counsel undertakes in cases such as this, "Class Counsel worked for over six months before filing suit […] Class Counsel's work included meeting with the Plans' participants, obtaining documents from public sources and the Retirement Plus Plan administrator, reviewing and analyzing plan documents and financial statements, building on expertise regarding industry practices, conducting extensive legal research, and fashioning the causes of action." 2016 WL 6769066, at *3; *see also Boyd*, 299 F.R.D. at 460; *In re Neustar, Inc. Sec. Litig.*, 2015 WL 8484438, at *3 (E.D. Va. Dec. 8, 2015). The same in-depth pretrial investigation occurred here, and like in *Kruger*, the stage at which the Settlement was reached supports final approval.

ii. The circumstances surrounding the negotiations demonstrate fairness.

The proposed Settlement was fairly and honestly negotiated. As discussed above, each side entered the negotiations with a full understanding of the issues and potential pitfalls related to

litigation of the claims. Critically, the settlement negotiations occurred under the auspices of David Geronemus, Esq. of JAMS, a third-party private mediator with extensive experience mediating ERISA actions. During their negotiations, the Parties exchanged settlement demands and counteroffers, and consulted with experts regarding the extent of damages the Plan sustained as a result of Defendants' alleged breaches of fiduciary duty. Gyandoh Decl. ¶¶ 9. Thus, the circumstances surrounding the settlement negotiations were ideal for securing a fair, reasonable, and adequate settlement. *See Herrera v. Charlotte Sch. Of Law, LLC*, 818 Fed. App'x. 165, 177 (4th Cir. 2020) (the district court did not abuse its discretion in finding fairness where the "mediation was led by an experienced class action mediator" after a year and a half of litigation) (internal citations omitted); *see also Jones v. Coca-Cola Consolidated, Inc.*, 2022 WL 703605, at *2 (W.D.N.C. Mar. 8, 2022) (same); *In re Zetia (Ezetimibe) Antitrust Litig.*, 2023 WL 6871635, at *4 (E.D. Va. Oct. 18, 2023) (same).

iii. The Settlement is the product of Experienced ERISA Counsel.

Both Plaintiffs' counsel and Defendants' counsel are experienced in ERISA class actions of this type. As discussed in section VIII.B. *infra*, Plaintiffs' Counsel are highly experienced and knowledgeable in ERISA breach of fiduciary duty class actions, thus ensuring that the terms of the settlement were fair, reasonable, and adequate. As other courts have expressly found, the undersigned is "well-qualified to weigh the risks and benefits of continued litigation as compared to the relief provided by the Settlement." *Diaz*, 2021 WL 2414580, at *8. Throughout the litigation, Class Counsel has used its experience and access to resources to investigate and litigate Plaintiffs' underlying allegations, which ultimately led to the Settlement in this Action. Indeed, "it takes skilled counsel to manage any class action, to analyze complicated legal claims and defenses under ERISA, and to synthesize technical pension plan-related issues that were presented in this

case." *Savani v. URS Professional Solutions LLC*, 121 F. Supp. 3d 564, 571 (D.S.C. 2015).

Plaintiffs' counsels' experience are further detailed in the simultaneously filed Fee Memo and Gyandoh Declaration. Defendants' representation, Morgan, Lewis & Bockius LLP, is one of the preeminent ERISA defense firms[3]. Undoubtedly, "[a]dditional skill is required when the opponent is a sophisticated corporation with sophisticated counsel." *Smith v. Krispy Kreme Doughnut Corp., 2007 WL 119157*, at *2 (M.D.N.C. Jan. 10, 2007). The Agreement was reached by skilled adversaries, thereby warranting its approval.

iv. The Settlement adequately reflects the relative strength of Plaintiffs' case on the merits and the existence of any difficulties of proof or strong defenses that Plaintiffs are likely to encounter if the case goes to trial.

"The most important factors in this analysis are the relative strength of the plaintiffs' claims on the merits and the existence of any difficulties of proof or strong defenses." *Sharp Farms v. Speaks*, 917 F.3d 276, 299 (4th Cir. 2019). "The Fourth Circuit has 'never required [ ] an estimate' of what the class members would have received had they prevailed at trial. *McAdams*, 26 F.4th at 160. Further, the Court is not required to 'decide the merits of the case nor substitute its judgment of what the case might be worth for that of class counsel,' rather 'the court must at least satisfy itself that the class settlement is within the 'ballpark' of reasonableness.' *Id.*" *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 2024 WL 1341122, at *10 (D.S.C. Mar. 29, 2024). The Settlement, guaranteeing recovery to the Class, is an excellent result in light of the risks of further litigation.

Although Plaintiffs are confident in their case, the summary judgment stage and a potential trial involve real uncertainties for both sides. Although a trial on the merits in any case always entails some risk, in the context of ERISA breach of fiduciary duty class actions, the risk is even

[3] *See* www.morganlewis.com/services/erisaemployee-benefits-litigation

more considerable. *See, e.g., In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 496–97 (E.D. Mich. 2008) ("Plaintiffs admit that risk is inherent in any litigation, particularly class actions. The risk is even more acute in the complex areas of ERISA law."); *In re BellSouth Corp. ERISA Litig.*, 2006 WL 431178, at *5 (N.D. Ga. Dec. 5, 2006) ("the rapid influx of new [ERISA] precedents presents an ever changing legal landscape, and there is a constant risk that the law will change before judgment."); *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 2024 WL 1341122, at *10 (noting that both parties were equally confident in their case, but "[a]s all serious counsel must admit, '[p]laintiff' ability to prevail on the merits is uncertain. The Settlement confers relief that might well not be achievable through continued litigation.'") (quoting *Gray v. Talking Phone Book*, 2012 WL 12978113 (D.S.C. Aug 20, 2012)).

"Even if Plaintiffs were to overcome the liability obstacles, moreover, there are also risks in proving damages at trial." *Boyd*, 299 F.R.D. at 461. Critically, "the legal and factual complexities and uncertainties of the ERISA damages case also militate in favor of settlement." *In re Global Crossing Securities and ERISA Litigation*, 225 F.R.D. 225 F.R.D. 436, 460 (S.D.N.Y. 2004). This is because, "[e]ven if Plaintiffs established a fiduciary breach, it is 'difficult' to measure damages in cases alleging imprudent or otherwise improper investments." *Karpik v. Huntington Bancshares Inc.*, 2021 WL 757123, at *5 (S.D. Ohio Feb. 18, 2021) (quoting Restatement (Third) of Trusts § 100 cmt. b (1)). Without this Settlement, Plaintiffs would endure lengthy and expensive litigation at the risk of less or no recovery at all.

Lastly, the undersigned is particularly qualified to realistically evaluate the risks of continued litigation, as he tried an analogous case to an unfavorable verdict for plaintiffs in *Nunez v. B. Braun Medical Inc.*, No. 5:20-cv-04195 (E.D. Pa. July 13, 2023).

v. The anticipated duration and expense of additional litigation supports approval.

Here, the probable costs of continued litigation with respect to both time and money are high. Summary judgment and other dispositive motions would occur before the case would proceed to trial, and an appeal would likely follow a trial. Additionally, this Settlement avoids costly depositions and expert discovery. *See e.g.*, *Boyd*, 299 F.R.D. at 461 (finding this factor satisfied where "the likely next steps in this case - *e.g.*, additional discovery and dispositive motions - would require substantial time by the parties' attorneys."). *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 2024 WL 1341122, at *10 (approving a settlement that avoids the costs of expert trial witnesses and noting that "any judgment for a Class Member would be subject to lengthy appeals while the Settlement Agreement provides immediate results and benefits to Settlement Class Members.") This Settlement grants an immediate recovery to the Class, whereas continued litigation would likely delay and diminish any recovery achieved after a trial and appeals. *See e.g. Kruger*, 2016 WL 6769066 at *5. Thus, the Settlement in this Action comes at an opportune time.

vi. The solvency of the defendant and the likelihood of recovery on a litigated judgment

The solvency of the defendant and the likelihood of recovery on a litigated judgment weigh slightly in favor of approval when, like here, the defendant's solvency is undisputed. *See Good v. W. Virginia-Am. Water Co.*, 2017 WL 2884535, at *17 (S.D.W. Va. July 6, 2017) (also noting that "insolvent defendants presumably would not agree to a $151 million settlement proposal."); *see also Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 573 (E.D. Va. 2016) (same). Defendants are not insolvent and there is no risk that the Class will not recover on a litigated judgment. Moreover, the Court need not closely scrutinize Defendants' ability to withstand a greater judgement, because all other Fourth Circuit factors weigh in favor of final approval of the Settlement.

vii. The degree of opposition to the settlement weighs in favor of approval.

"One of the factors most courts consider is the reaction of the absent class members, specifically the quality and quantity of any objections and the quantity of class members who opt out." 4 Newberg and Rubenstein on Class Actions § 13:54 (6th ed.). Courts consider two types of reactions: opt-outs and objections (although the former does not apply here as the Settlement Class was certified as a mandatory class under Rule 23(b)(1)). *See id*. Courts have found this factor satisfied when "the degree of opposition to the Settlement Agreement small." *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 2024 WL 1341122, at *10 (listing cases); *see also McAdams*, 26 F.4th at 160 (affirming the lower courts finding that the settlement was fair where "about 0.04 percent of the settlement class" objected); *In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, 952 F.3d at 485 (affirming the district court's reasoning that the objection rate of only "about 0.006%" of class members indicated a fair settlement). Thus far, only one potential Settlement Class Member has raised an objection (to the requested fee award) thereby indicating the Class overwhelmingly approves of the Settlement. *See 1988 Tr. for Allen Children v. Banner Life Ins. Co.*, 28 F.4th 513, 527 (4th Cir. 2022) ("The district court also properly noted that the Allen Trust's concerns, however strongly held, were apparently not widespread.").

Class Notice was mailed to over 47,000 potential Settlement Class Members on March 7, 2024, and there has been only a single objection to date[4]. Mr. Jonathan Williams MD filed an objection dated March 18, 2024, which was docketed the same day (ECF No. 59). Dr. Williams's primary objection is that Class Counsel's fee award request is too high, whereas he believes a 10% contingency fee ("not to exceed $380,000") is appropriate because "The named plaintiffs in this case are the ones due this settlement and justice would be serviced if one third of the settlement

[4] As noted above, May 31, 2024, is the objection deadline

was not given to an unrelated party." *Id*. The reasons for Plaintiffs' counsel's request of one third of the Settlement is fully addressed in Plaintiffs' contemporaneously filed Fee Memo. Dr. Williams does not cite any case law in support of his position.

In short, Plaintiffs' Counsel are seeking attorney's fees in line with market rates, and commensurate with the risk and workload of this case. Under similar circumstances, the Fourth Circuit has affirmed the district court's overruling of an objection against a fee request for 43% of the common fund, because "Ms. McAdams herself only presents general arguments about the fee award. She doesn't cite to any work that counsel performed that was unwarranted or unnecessary or duplicative or provide evidence that the rates charged by counsel are unreasonable" and "Class counsel has supported their request of [sic] billing records and other competent evidence to support their request." *McAdams,* 26 F.4th at 161. Likewise, here, "Plaintiffs attorneys' [provided] substantially uncontradicted evidence and arguments that the requested fees are justified by their work on the case", thus, Dr. Williams's objection should respectfully be disregarded. *Id*. at 162 (alterations added).

Furthermore, the Independent Fiduciary hired to review the Settlement, Gallagher, has reviewed the terms of settlement, inclusive of the fee requests, and has approved it. Among other things, Gallagher stated:

> After a thorough review of the pleadings and interviews with the parties' counsel and the mediator, Gallagher has concluded that an arm's-length Settlement was achieved after hard-fought negotiations between the parties and is reasonable, given the uncertainties of a larger recovery for the Class at trial and the value of claims foregone. The fee request is also reasonable in light of the effort expended by Plaintiffs' counsel in the Litigation.

Gallagher Report, ¶ 3, p. 3, attached as Exhibit 12 to the Gyandoh Declaration. The finding by Gallagher provides an extra layer of protection for absent class members. Courts routinely find that the approval of independent fiduciary weighs heavily in approving an ERISA settlement. *See*

e.g. In re Wachovia Corp. ERISA Litig., 2011 WL 13262040, at *4 (W.D.N.C. Oct. 24, 2011) ("The independent fiduciary offers an objective and highly sophisticated perspective concerning the fairness and adequacy of the proposed Settlement. Non-opposition by the independent fiduciary is strong evidence in favor of the Settlement's adequacy."); *Boyd*, 299 F.R.D. at 461 (same); *In re Marsh ERISA Litigation*, 265 F.R.D. 128, 151 (S.D.N.Y. 2010) (denying fee objections because the independent fiduciary provided an additional "oversight other than by the 'Judicial system.'").

"A certain number of ... objections are to be expected in a class action.... If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 527 (E.D. Mich. 2003). Indeed, here the overwhelming "lack of objections tends to show that at least from the class members' perspective, the requested fee is reasonable for the services provided and the benefits achieved by class counsel." *Boyd*, 299 F.R.D. at 464. Thus, this factor, and all of the Fourth Circuit factors, weigh in favor of final approval of the Settlement.

VII. THE PLAN OF ALLOCATION SHOULD BE FINALLY APPROVED

"The proposed allocation need not meet standards of scientific precision, and given that qualified counsel endorses the proposed allocation, the allocation need only have a reasonable and rational basis." *Boyd*, 299 F.R.D. at 461. The proposed Plan of Allocation here, attached to the Settlement Agreement as Exhibit B, is premised on calculating a Settlement Class member's distribution on a *pro rata* basis based on account balances, a proxy for the alleged losses. No payment to any Settlement Class member shall be smaller than ten dollars ($10.00). Any Settlement Class Member whose payment pursuant to Section D of the Plan of Allocation is less than ten dollars ($10.00) shall receive a distribution of ten dollars ($10.00). *See* Plan of Allocation at Section D. Further, current participants will receive their share of the Settlement Fund through

a distribution to their Plan account. *Id*. at Section E. In general, courts have approved settlements that provide for recovery to class members on a *pro rata* basis." *Feinberg v. T. Rowe Price Grp.*, 610 F. Supp. 3d 758, 769-70 (D. Md. 2022) (listing cases). Therefore, the Plan of Allocation is fair, reasonable, and warrants approval.

VIII. FINAL CERTIFICATION OF THE SETTLEMENT CLASS IS WARRANTED

A. The Proposed Class Meets the Requirements of Rule 23(b)(1) of the Federal Rules of Civil Procedure

Before entering the Preliminary Approval Order, this Court examined the record and conditionally certified the Settlement Class pursuant to FED. R. CIV. P. 23(b)(1). *See* Preliminary Approval Order. Nothing has changed in the record to compel the Court to now reach a different conclusion with respect to the final approval of the Settlement Class. Indeed, courts across the country have determined breach of fiduciary duty claims under ERISA analogous to those at issue in this action are uniquely appropriate for class treatment.[5] To avoid unnecessary repetition,

[5] *See, e.g., Boyd*, 299 F.R.D. at 459 ("Several courts have held that the type of ERISA claims raised here are particularly appropriate for Rule 23(b)(1) certification."); *Sacerdote v. New York Univ*., 2018 WL 840364, *6 (S.D.N.Y. Feb. 13, 2018) ("Most ERISA class action cases are certified under Rule 23(b)(1)."); *Wachala et al. v. Astella US LLC et al*., 2022 WL 408108, at * 1 (N.D. Ill. Feb. 10, 2022) (certifying claims brought pursuant to ERISA § 502(a)(2); *Nunez, et al., v. B. Braun Medical, Inc., et al*., No. 5:20-cv-04195 (E.D. Pa. June 30, 2022) (same); *Stengl et al. v. L3Harris Technologies, et al.*, No. 6:22-cv-572 (M.D. Fla. June 5, 2023) (same); *Pizarro v. Home Depot, Inc*., 2020 WL 6939810 (N.D. Ga. Sept. 21, 2020) (same); *Boley v. Universal Health Servs., Inc*., 36 F.4th 124 (3d Cir. 2022) (same); *In re Suntrust Banks, Inc. ERISA Litig*., 2016 WL 4377131, at *8 (N.D. Ga. Aug. 17, 2016) (same); *Iannone et al., v. Autozone, Inc., et al.*, No. 2:19-cv-02779-MSN-tmp (W.D. Tenn. Dec. 07, 2022) (same); *Jacobs v. Verizon Communications, Inc. et al.*, 2020 WL 5796165 (S.D.N.Y. Sept. 29, 2020) (same); *Karg v. Transamerica Corp.*, 2020 WL 3400199 (N.D. Iowa Mar. 25, 2020) (certifying class alleging defendants breached fiduciary duties by selecting poorly performing investment options); *Vellali v. Yale Univ*., 33 F.R.D. 10 (D. Conn. 2019) (certifying class in case alleging fiduciaries saddled retirement plan with investment options that charged excessive management fees); *Cunningham et al. v. Cornell Univ*., 2019 WL 275827 (S.D.N.Y. Jan. 22, 2019) (same*); Beach v. JPMorgan Chase Bank, N.A.*, 2019 WL 2428631 (S.D.N.Y. June 11, 2019) (same); *Cassell v. Vanderbilt Univ*., 2018 WL 5264640 (M.D. Tenn. Oct. 23, 2018) (same).

Plaintiffs incorporate their arguments from their memorandum in support of preliminary approval (ECF 55; pp. 5-9) and request the Court make the same findings it did in preliminarily certifying a settlement class and certify the following Class for settlement purposes only:

> All persons who participated in the Plan at any time during the Class Period (June 4, 2015, through February 5, 2024), including any Beneficiary of a deceased Person who participated in the Plan at any time during the Class Period, and any Alternate Payee of a Person subject to a Qualified Domestic Relations Order who participated in the Plan at any time during the Class Period. Excluded from the Settlement Class are the members of the Retirement Benefit Committee of Wake Forest University Baptist Medical Center.

B. Adequacy of Named Plaintiffs and Class Counsel

"Generally, to satisfy Rule 23(a)(4), (1) counsel must be qualified, experienced, and generally able to conduct the proposed litigation; and (2) plaintiffs' claims must be sufficiently interrelated with and not antagonistic to the class claims." *Pearce v. PaineWebber, Inc.*, 2004 WL 5282962, *7 (D.S.C. Aug. 13, 2004). Here both prongs of the adequacy test are met. In its Preliminary Approval Order, the Court found both Plaintiffs and Capozzi Adler to be adequate. *See* Preliminary Approval Order. In connection with the instant motion for final approval, each of the Plaintiffs have submitted declarations and Class Counsel has also submitted a declaration to attest to their adequacy. Plaintiffs dedicated a lot of their time to the prosecution of this action and have no interests antagonistic to the Class. *See* Declarations of Plaintiffs Shelley Tco, Tanajah Clark, and Zoe R. Jones (attached as Exhibits 8, 9, and 10, respectively, to the Gyandoh Declaration).

Plaintiffs also retained attorneys who are highly qualified, experienced, and able to litigate this matter. Mark K. Gyandoh, Chair of the Fiduciary Practice Group at Capozzi Adler and his team are highly qualified ERISA class action attorneys. Mark K. Gyandoh, is currently serving as Lead or Co-Lead Counsel in numerous breach of fiduciary duty class actions in this District and

across the nation. Gyandoh Decl., ¶¶ 58-59.

Throughout the litigation, Class Counsel has used its experience and access to resources to investigate and litigate Plaintiffs' underlying allegations, which ultimately led to the Settlement in this Action. Class Counsel, with its expansive experience in complex class actions, recommend this Settlement as the best resolution for Settlement Class members. The retention of highly qualified counsel, coupled with the alignment of interests between Plaintiffs and the Settlement Class Members, satisfies the requirements of Rules 23(a)(4) and 23(g).

IX. CONCLUSION

For the reasons set forth above, the Settlement meets the standard for final approval under Rule 23. Accordingly, Plaintiffs seek an Order: (1) approving the Class Action Settlement Agreement under FED. R. CIV. P. 23(e); (2) certifying the above-defined Settlement Class; (3) appointing Plaintiffs as Class Representatives and Plaintiffs' Counsel as Class Counsel under FED. R. CIV. P. 23(g); (4) finding the manner in which the Settlement Class was notified of the Settlement was the best practicable under the circumstances and fair and adequate; and (5) approving the Plan of Allocation.

Dated: May 21, 2024

CAPOZZI ADLER, P.C.

/s/ Mark K. Gyandoh

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2024, a true and correct copy of the foregoing document was filed with the Court utilizing its ECF system, which will send notice of such filing to all counsel of record.

By: /s/ *Mark K. Gyandoh*
Mark K. Gyandoh, Esq.