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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES, AND CASE CONTRIBUTION AWARDS TO PLAINTIFFS

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I. INTRODUCTION

Plaintiffs Shelley Tco, Tanajah Clark, and Zoe R. Jones (collectively "Plaintiffs"), by and through their undersigned counsel on behalf of the Wake Forest Baptist Medical Center 403(b) Retirement Savings Plan (the "Plan"), respectfully submit this Memorandum of Law in support of Plaintiffs' Motion for An Award of Attorneys' Fees and Reimbursement of Expenses and Case Contribution Awards to Plaintiffs. Plaintiffs file this Memorandum of Law at the same time as their Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement[1] (the "Final Approval Memorandum").

Plaintiffs herein request an award of attorneys' fees of thirty-three and one third percent (33 1/3%) of the Settlement Amount (a maximum amount of $1,266,540.00). The Settlement Amount is $3,800,000.00. Courts routinely support counsel fees of 33 1/3% in analogous class actions advanced under ERISA.[2]

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[1] The Settlement Agreement is attached as Exhibit 1 to the Declaration of Mark K. Gyandoh in Support of Plaintiffs' Motions for Final Approval of Settlement, and for Award of Attorneys' Fees and Reimbursement of Expenses, and for Case Contribution Awards to Plaintiffs (the "Gyandoh Declaration" or "Gyandoh Decl.") which further discusses the extensive efforts of Class Counsel in achieving this excellent result. The provisions of the Settlement Agreement, including all definitions and defined terms, are incorporated by reference herein. Thus, all capitalized terms not otherwise defined in this memorandum shall have the same meaning ascribed to them in the Settlement Agreement.

[2] *See e.g. Karpik v. Huntington Bancshares Inc.,* 2019 WL 7482134, at *7 (S.D. Ohio Feb. 18, 2021); *Griffin v. Flagstar Bancorp, Inc.,* 2013 WL 6511860, at *8 (E. D. Mich. Dec. 12, 2013); *Pledger v. Reliance Trust Co.*, No., 2021 WL 2253497 (N.D. Ga. Mar. 8, 2021); *Fernandez v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 2017 WL 7798110, at *4 (S.D. Fla. Dec. 18, 2017); *Kelly v. Johns Hopkins Univ.*, 2020 WL 434473, at *3 (D. Md. Jan. 28, 2020); *Marshall v. Northrop Grumman Corp.*, 2020 WL 5668935, at *3 (C.D. Cal. Sep. 18, 2020); *Tussey v. ABB, Inc.*, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019); *Bell v. Pension Comm. of ATH Holding Co., LLC*, 2019 WL 4193376 (S.D. Ind. Sept. 4, 2019); *Clark v. Duke Univ.*, 2019 WL 2579201 (M.D.N.C. June 24, 2019); *Cates v. Trustees of Columbia Univ.*, 2021 WL 4847890 (S.D.N.Y. Oct. 18, 2021); *Bekker v. Neuberger Berman Grp. 401(k) Plan Inv. Comm.*, 504 F. Supp. 3d 265, 270 (S.D.N.Y. 2020) (listing ERISA cases awarding one-third of settlement fund); *Ramos v. Banner Health*, 2020 WL 6585849, at * 4-5 (D. Colo. Nov. 10, 2020); *Schapker v. Waddell &*

In addition, Plaintiffs request reimbursement of out-of-pocket costs and expenses incurred in connection with the prosecution of this Action in the amount of $27,857.02. Class Counsel also asks the Court to approve the payment of Case Contribution Awards in the amount of $10,000.00 to each Plaintiff in recognition of their contributions to this Action.

II. BACKGROUND[3]

Following several months of investigation, Plaintiffs, participants in the Plan, filed the Complaint on June 4, 2021 (ECF No. 1) against Defendants. Gyandoh Decl. ¶ 3. Plaintiffs then filed their Amended Complaint on October 28, 2021 (ECF No. 18). Gyandoh Decl. ¶ 4. Plaintiffs' claims concerned Defendants' alleged breaches of fiduciary duty as Plan fiduciaries by, *inter alia*, (1) failing to actively monitor the Plan's administrative expenses and pursue reduction in Plan costs to participants; (2) failing to ensure investment funds in the Plan were prudent and in the best interest of Plan participants; (3) failing to monitor and mitigate the excessive total Plan costs; and (4) and the Monitoring Defendants' failure to monitor the performance and processes of the Committee Defendants to ensure the adequate performance of their fiduciary obligations. (Complt. ¶¶ 121-134).

This settlement comes after hard fought litigation, including Defendants' motion to dismiss the Amended Complaint on December 10, 2021 (ECF No. 21). On January 21, 2022, Plaintiffs

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Reed Fin., Inc., No,. 17-cv-2365 (Final Approval Order and Judgment) (D. Kan. Apr. 8, 2019); *Pinnell v. Teva Pharmaceuticals USA, Inc*., No. 2:19-cv-05738-MAK (E.D. Pa.); *Hay v. Gucci America, Inc.,* No. 17-cv-7148 (D.N.J.); *Spano v. Boeing Co.*, No. 06-cv-0743 (S.D. Ill.); *Troudt et al. v. Oracle Corp., et al.*, No. 1:16-cv-00175 (Order Granting Plaintiffs' Unopposed Motion for Approval of Attorneys' Fees, Expenses, and Incentive Awards) ("Troudt Fee Order") (D. Colo, July 10, 2020); *Donald v. Teachers Insurance and Annuity Insurance Ass'n of America*, No. 15-cv-08040 (S.D.N.Y.).

[3] To avoid unnecessary repetition, Plaintiffs incorporate and refer to Sections II and III of the accompanying Final Approval Memorandum which discusses the negotiations leading to settlement and the proposed terms of settlement. *See also* Gyandoh Decl., ¶¶ 3-17 (detailing the procedural history, discovery practice, settlement negotiations, and settlement terms).

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), and the parties began discovery.

On May 16, 2023, the Parties attended their first 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 adopting the Joint Status Report and Notice of Settlement on June 13, 2023 (ECF No. 51). On July 10, 2023, Plaintiffs submitted their Unopposed Motion for Preliminary Approval of Class Action Settlement, Preliminary Certification of Settlement Class, Approval of Class Notice, Approval of Plan of Allocation, And Scheduling of Fairness Hearing. (ECF No. 54-57.) On February 5, 2023, the Court granted the motion and set a fairness hearing for June 21, 2024. (ECF No.58).

III. STANDARD OF REVIEW

Plaintiffs' attorneys in a class action may petition the court for compensation for any award to the class resulting from the attorneys' efforts. *See e.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). Under FED. R. CIV. P. 23, "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the Parties' agreement." FED. R. CIV. P. 23(h). Although the Fourth Circuit has not expressly listed factors courts must weigh when deciding whether to award fees under the "percentage of recovery" method, "[d]istrict courts in this circuit have analyzed the following seven factors: '(1) the results obtained for the class; (2) the quality, skill, and efficiency of the attorneys involved; (3) the risk of nonpayment; (4) objections by members of the class to

the settlement terms and/or fees requested by counsel; (5) awards in similar cases; (6) the complexity and duration of the case; and (7) public policy[.]'" *Kelly v. Johns Hopkins Univ.*, 2020 WL 434473, at *2 (D. Md. Jan. 28, 2020) (quoting *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 682 (D. Md. 2013)).

IV. ARGUMENT

A. Plaintiffs' Requests for Attorney's Fees Is Reasonable

1. Class Counsel obtained a significant recovery for the class.

Generally, class counsel in ERISA breach of fiduciary duty cases who achieve a settlement provide the class with "an excellent result given the uncertainties of the Plaintiffs' chances of ultimately prevailing on the issue of liability in this very uncertain area of ERISA and also given the challenges they face in establishing the operative date of imprudence." *Griffin v. Flagstar Bancorp, Inc.*, 2013 WL 6511860, at *8 (E. D. Mich. Dec. 12, 2013). This Settlement provides for an instant $3,800,000.00 fund that will benefit at least 48,185 potential Class Members. Gyandoh Decl. ¶ 66. Class Counsel has provided the Class with an excellent result considering that settlement amount equals roughly at least 23% of the $16.5 million plus of potential best-case damages as calculated by Plaintiffs. *See e.g. Sims v. BB&T Corp.*, 2019 WL 1993519, at *2 (M.D.N.C. May 6, 2019) (approving a fee request where "Class Counsel recovered monetary relief reflecting 19% of $124 million in total damages sought by the plaintiffs after summary judgment"). Moreover, the structure of the settlement includes the "additional value, the Settlement provides for current participants to receive their distributions directly into their Plan account tax deferred." *Tussey v. ABB, Inc.*, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019); *see also Kelly*, 2020 WL 434473, at *6.

In sum, the first factor is satisfied because Class Counsel achieved a multi-million-dollar Settlement benefiting tens of thousands of Plan participants.

2. The quality, skill, and efficiency of the attorneys involved warrants approval.

Courts around the country "recognize[] that 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. Few law firms have the experience and resources to pursue such litigation." *Savani v. URS Professional Solutions LLC*, 121 F. Supp. 3d 564, 571 (D.S.C. 2015); *see also Pledger v. Reliance Trust Co.*, 2021 WL 2253497, at *7 (N.D. Ga. Mar. 8, 2021) ("[e]ffectively and successfully litigating an ERISA breach of fiduciary action requires a specialized knowledge and expertise that was demonstrated by Class Counsel. This litigation involved highly technical knowledge of investment plans, investment knowledge, and industry practices."). Plaintiffs retained attorneys who are highly qualified, experienced, and able to litigate this matter. Capozzi Adler has been named Lead or Co-Lead interim Class Counsel in numerous breach of fiduciary duty class actions across the nation. Gyandoh Decl., ¶¶ 58-59; *see also Diaz v. BTG Int'l Inc.*, 2021 WL 2414580, at *8 (E.D. Pa. June 14, 2021) (appointing the undersigned as settlement Class Counsel in an ERISA case and stating that we "appear well-qualified to weigh the risks and benefits of continued litigation as compared to the relief provided by the Settlement.").

Furthermore, "[t]he skill required by Class Counsel is also reflected in the quality of opposing counsel. It has been observed that '[a]dditional skill is required when the opponent is a sophisticated corporation with sophisticated counsel.'" *Savani*, 121 F. Supp. at 571 (D.S.C. 2015) (quoting *Smith v. Krispy Kreme Doughnut Corp.*, 2007 WL 119157, at *2 (M.D.N.C. Jan. 10, 2007)). Unquestionably, counsel for Defendants, Morgan, Lewis & Bockius LLP, are one of the

leading ERISA class action defense firms in the Country. *See* www.morganlewis.com/services/erisaemployee-benefits-litigation. In sum, the pedigree and body of work by Class Counsel and Defendants' counsel in this Action weighs in favor of the requested attorneys' fee award, because "Class Counsel's achievement in obtaining a very substantial recovery in this action, defended by such renowned counsel, is a testament to the quality of Class Counsel's representation." *Savani*, 121 F. Supp. 3d at 571-72.

3. Counsel risked nonpayment.

Put simply, "[t]he requested fee of one-third of the monetary recovery is reasonable and appropriate given the 'significant risk of nonpayment' in these types of cases due to 'the novel nature of this case and adverse precedents.'" *Kelly*, 2020 WL 434473, at *3 (quoting *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *4 (M.D.N.C. Sept. 29, 2016)); *see also Id*. at *5 ("[t]he risk of nonpayment in this complex area of the law is tremendous, particularly in light of multiple adverse precedents in similar 403(b) excessive fee lawsuits."); *Sims*, 2019 WL 1993519 at *3 ("It is unsurprising that only a few firms might invest the considerable resources to ERISA class actions such as this, which require considerable resources and hold uncertain potential for recovery. A one-third fee reflects a reasonable attorney's fee in this matter for the attorneys who did assume this risk, diligently advocated on behalf of the class, and obtained significant recovery."). Class Counsel's undertaking of this case is no exception.

Class Counsel has been devoted to this case for three years. In that time, Class Counsel has never been paid for their work on this matter, taking the case on a wholly contingent basis. Instead, Class Counsel faced the very real risk, in the face of staunch opposition from highly qualified defense counsel, that they would receive nothing for their time spent, and the cash outlays they invested in the case. *See Feinberg v. T. Rowe Price Grp.*, 610 F. Supp. 3d 758, 772 (D. Md. 2022)

(an ERISA case holding that "Class Counsel took this case on a wholly contingent basis. (*See* ECF No. 243-1 at 17.) Given the Court's already-described skepticism regarding the likelihood of success at trial, at least to the magnitude proposed by Plaintiffs, the risk of nonpayment was very high."); *Savani*, 121 F. Supp. 3d at 572 ("Class Counsel has worked for years undertaking the risk of walking away with no fee at all. Such burdens are relevant circumstances that support the requested award."). Litigating such a high-risk case justifies awarding Class Counsel's fee request.

4. The near total lack of objections weighs in favor of the fee award.

The Class Notice, which was mailed to over 48,000 potential Settlement Class Members, specified that Class Counsel would request attorneys' fees of up to 33 1/3% of the Class Settlement Amount. To date[4], there has been only one objection to the settlement or requested attorneys' fees. On March 18, 2024, Dr. Jonathan Williams MD filed an objection, and it 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 served if one third of the settlement was not given to an unrelated party." *Id*. Dr. William's objection does not evaluate any of the factors used by courts in the Fourth Circuit, nor does Dr. Williams discuss any of Class Counsel's work. *See 1988 Tr. for Allen Children v. Banner Life Ins. Co.*, 28 F.4th 513, 520 (4th Cir. 2022) (quoting Fed. R. Civ. P. 23(e)(5)(A) advisory committee's note to 2018 amendment) ("Failure to provide needed specificity may be a basis for rejecting an

[4] Per the schedule established by this Court in 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 the requested attorneys' fees or 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.

objection."). Dr. William's general objection should not undermine the overwhelming lack of objections and other factors weighing in favor of awarding the full requested fee award. *McAdams v. Robinson*, 26 F.4th 149, 161 (4th Cir. 2022) (affirming the 43% fee award 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."). In particular, such terms have consistently been upheld in courts within this Circuit and around the nation. *See infra,* subsection 5. Dr. Williams cites no authority for his contrary position.

Courts in this Circuit have found a near total lack of objection indicates a fair and reasonable request for attorney's fees. "The small number of objections and opt-outs favors final approval." *Haney v. Genworth Life Ins. Co.,* 2023 WL 2596845, at *3 (E.D. Va. Feb. 15, 2023), *appeal dismissed sub nom. In re Bos*, 2023 WL 6065881 (4th Cir. Mar. 24, 2023); *In re Neustar, Inc. Sec. Litig.*, 2015 WL 8484438, at *7 (E.D. Va. Dec. 8, 2015) (same); *Boyd v. Coventry Health Care, Inc.*, 299 F.R.D. 451, 464 (D. Md. 2014) ("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."); *In re Zetia (Ezetimibe) Antitrust Litig.*, 2023 WL 6871635, at *5 (E.D. Va. Oct. 18, 2023) (same). Thus, the absence of a significant number of objections further supports the requested attorneys' fees.

5. Class Counsel are requesting an award in line with similar cases.

Plaintiffs are seeking 33 1/3% of the common fund, or $1,266,540.00 to be exact. Indeed, "[i]n similar ERISA excessive fee cases, and in particular those brought by Class Counsel, district courts have consistently recognized that a one-third fee is the market rate." *Kelly*, 2020 WL

434473, at *3 (listing cases); *see also Pledger v. Reliance Trust Co.*, 2021 WL 2253497, at *5,7 (N.D. Ga. Mar. 8, 2021) (awarding attorney's fees of one third the common fund because "[t]he percentage used to calculate the requested fee in this case is consistent with experienced attorneys who handle complex ERISA litigation, and has been found reasonable in numerous cases in federal district courts."); *Boyd*, 299 F.R.D. at 462; *Sims*, 2017 WL 3730552, *2. Furthermore, "[d]istrict courts in the Fourth Circuit have frequently found that a percentage award of one-third of the Settlement Fund is within the range of reasonable percentage of recovery." *In re Zetia (Ezetimibe) Antitrust Litig.*, 2023 WL 6871635, at *7; *see also Temp. Servs., Inc. v. American Intern. Group, Inc.*, 2012 WL 4061537, at 8 (D.S.C. Sept. 14, 2012) ("Counsel's entitlement to payment was entirely dependent upon achieving a good result for Plaintiff and the class. Contingency fee arrangements are customary in class action cases and such arrangements are usually one-third or higher.").

One benefit of the percentage-of-recovery method is that it "better aligns the interests of class counsel and class members because it ties to the attorneys' award to the overall result achieved rather than the hours expended by the attorneys." *In re Zetia (Ezetimibe) Antitrust Litig.*, 2023 WL 6871635, at *7 (quoting *Kay Co. v. Equitable Prod. Co.*, 749 F.Supp.2d 455, 462 (S.D. W.Va. 2010)). "However, the lodestar method can still be used as a comparison tool to check the reasonableness of the percentage-of-recovery award." *Id*. When comparing the percentage fee request to the submitted lodestar, the requested fee award is clearly reasonable as it results in a multiplier of 4.7. *See* Gyandoh Decl., ¶¶ 36-40 (attesting to 417.50 hours of time to date, resulting in a total lodestar of $267,935.50. This is well within the range endorsed by courts in ERISA cases. *See e.g., In re Broadwing*, 252 F.R.D. at 381 ("A multiplier of between approximately 2.0 and 5.0 existed in the fee awards in this District"); *Griffin* , 2013 WL 6511860, at *8 (noting many ERISA

cases award fees with multipliers above 1%); *Shaw v. Interthinx, Inc*., 2015 WL 1867861, at * 8 (D. Colo. April 21, 2015) (collecting cases approving multipliers ranging from 1.87 to 4.6). Indeed, multipliers in class actions between 5x and 6x are frequently approved. *In re RJR Nabisco Sec. Litig*., 1992 WL 210138 (S.D.N.Y. Aug. 24, 1992) (multiplier of 6x); *Davis v. J.P. Morgan Chase & Co*., 827 F. Supp. 2d 172 (W.D.N.Y. 2011) (5.3x multiplier); *In re Beverly Hills Fire Litig*., 639 F. Supp. 915 (E.D. Ky. 1986) (5x multiplier); *In re Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A*., 778 F.2d 890 (1st Cir. 1985) (6x multiplier)); *New Eng. Carpenters Health Benefits Fund v. First Databank*, 2009 WL 2408560 (D. Mass. Aug. 3, 2009) (awarding a fee representing a multiplier of approximately 8.3 times the lodestar); *Kruge*r, 2016 WL 6769066, at *5 (collecting cases reflecting lodestar multipliers of 2.5 to 8.9).

6. This case's complexity and duration weigh in favor of the fee request

"Various courts have recognized that 'ERISA law is a highly complex and quickly-evolving area of the law.'" *Savani*, 121 F. Supp. 3d at 571 (quoting *Smith,* 2007 WL 119157, at *2, and listing cases); *see also Kelly*, 2020 WL 434473, at *3 (noting the same and listing cases). To summarize, the original complaint was filed on June 4, 2021, after months of pretrial investigation. For three years, Class Counsel has litigated this case, including litigating Defendants' Motion to Dismiss, before ultimately obtaining the Settlement. Each claim in this case has involved challenges and complexities, with defense counsel remaining adamant in their total deniability of all claims, including Plaintiffs' calculation of damages.

In pursuit of this Action, Class Counsel dedicated very substantial time and effort, expending 417.50 hours of time to date, resulting in a total lodestar of $267,935.50. Gyandoh Decl., ¶ 36-40. These hours do not include time to be spent in preparation for and attendance at the Fairness Hearing, communications with Settlement Class members, and monitoring of

Defendants' compliance with the Settlement. Gyandoh Decl., ¶ 41. The hours spent were reasonable and necessary for the prosecution of the litigation. Courts in this Circuit have found this factor was satisfied under similar circumstances. *See e.g. Savani*, 121 F. Supp. 3d at 572 ("The attorney time committed to representing these cases/class action lawsuits is not insignificant given the total attorney time available for his firm to pursue all cases that it had or could have had over this time period.").

Ultimately, this factor is satisfied because Class Counsel dedicated several years and 417.50 hours and counting, to this especially complex ERISA case.

7. Public policy weighs in favor of awarding the fee request.

Class Counsel's pursuit of this litigation also benefits society as a whole, because "Congress passed ERISA to promote the important goals of protecting and preserving the retirement savings of American workers", and "such lawsuits create incentives for fiduciaries to comply with ERISA." *In re Marsh Erisa Litigation*, 265 F.R.D. 128, 149-50 (S.D.N.Y. 2010); *see also In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 381-82 (S.D. Ohio 2006) ("[p]rotecting retirement funds of workers is of genuine public interest and, thus, supports a fully compensatory fee award.").

Generally, class actions are an important societal benefit because they deter misdeeds that would otherwise be cost prohibitive for individual plaintiffs to pursue. *See Hutton v.Nat'l Bd. of Exam'rs in Optometry, Inc.*, 2019 WL 3183651, at *7 (D. Md. July 15, 2019) (public policy "supports compensating attorneys for their efforts in prosecuting cases to remedy large-scale problems that would not be financially practicable to litigate on an individual basis."); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003) (same); *In re Zetia (Ezetimibe) Antitrust Litig.*, 2023 WL 6871635, at *7 ("The court finds that the one-third percentage of the fund is not

excessive so as to undermine public trust in class action litigation."). Thus, awarding attorney's fees incentivizes the pursuit of future ERISA cases to society's benefit.

Accordingly, all factors weigh in favor of awarding Plaintiffs' Counsel 33 1/3% in attorney's fees.

B. The Independent Fiduciary Approves the Settlement and Fee Request.

Per the terms of the Settlement, Defendants selected an independent fiduciary, Gallagher Fiduciary Advisors, LLC ("Gallagher"), to review the terms of the Settlement and the circumstances surrounding the Settlement. *See* April 23, 2024, Gallagher Fiduciary Advisors, LLC Report (attached to the Gyandoh Dec. as Ex.12). Gallagher conducted a diligent investigation, including interviews with counsel for both Parties and the mediator, as well as reviewing the terms of the Settlement and pre-settlement documents filed with the Court. *Id*. at 1. Gallagher ultimately concluded that "The settlement terms, including the scope of the release of claims; the amount of cash received by the plan; the proposed attorney's fee award; any non-monetary relief included in the Settlement, and any other sums to be paid from the recoveries, are reasonable in light of the plan's likelihood of full recovery, the value of claims foregone and the risks and costs of litigation." *Id*. at 2.

Gallagher's approval of both the Settlement and fee request further demonstrates that Class Counsel achieved a great result for the Class, litigated this settlement with skill, and the fee award request is reasonable. *See e.g. Kruger*, 2016 WL 6769066 at *4 ("Finally, the Independent Fiduciary for the Plans previously conducted a detailed review and assessment of the Settlement terms, including Class Counsel's request for attorneys' fees and costs, and determined that Class Counsel's fee award and costs were reasonable in light of the Settlement achieved."); *In re Marsh ERISA Litigation*, 265 F.R.D. at 151 (denying fee objections because the independent fiduciary

provided an additional "oversight other than by the 'Judicial system.'"); *Feinberg*, 610 F. Supp. 3d at 769 (similar).

C. The Court Should Reimburse Plaintiffs' Counsel for Expenses Incurred

Class Counsel should also be reimbursed the $27,857.02 in litigation expenses they advanced in prosecuting this case under FED. R. CIV. P. 23(h). As a leading treatise states:

> An attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved. The equitable principle that all reasonable expenses incurred in the creation of a fund for the benefit of a class are reimbursable proportionately by those who accept benefits from the fund authorizes reimbursement of full reasonable litigation expenses as costs of the suit in contrast to the more narrowly defined rules of taxable costs of suit under Fed. R Civ. P. 54 (d). . . . The prevailing view is that expenses are awarded in addition to the fee percentage.

Alba Conte, 1 *Attorney Fee Awards* § 2:19 (3d ed.); *see also Savani*, 121 F.Supp.3d at 576 ("Reimbursement of reasonable costs and expenses to counsel who create a common fund is both necessary and routine.")

Counsel in common fund cases may recover those expenses that would normally be charged to a fee-paying client. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'"). "Reimbursable expenses include expert fees, travel, long-distance and conference telephone, postage, delivery services, settlement costs, and computerized legal research." *Sims*, 2017 WL 3730552, at *4. Plaintiffs' counsel incurred expenses of $27,857.02 including costs related to traveling, filing fees, and legal research. Gyandoh Decl., at ¶¶ 34,35. Counsel brought this case without guarantee of reimbursement or recovery, so they had a strong incentive to keep costs at a reasonable level, and they did so.

Moreover, "[b]ecause these expenses were incurred with no guarantee of recovery, Class Counsel had a strong incentive to keep them to a reasonable level." *Savani*, 121 F. Supp. 3d at 576. For example, Class Counsel minimized expenses by utilizing its own ERISA expertise, where necessary, controlling costs by eliminating travel expenses without sacrificing the national expertise they brought to benefit the Class. The expenses are reasonable and should be rewarded. The costs Counsel expended to provide a benefit to the Class should be reimbursed.

D. The Requested Case Contribution Awards For the Named Plaintiffs Are Reasonable

Plaintiffs request Class Representatives, Ms. Tco, Ms. Clark, and Ms. Jones, be granted a Case Contribution Award in compensation for the time and effort they expended in successfully prosecuting this case to a successful resolution. Such awards acknowledge representative plaintiffs' hard work and sacrifices in support of the class, as well as their promotion of the public interest. "A substantial incentive award is appropriate in [a] complex ERISA case given the benefits accruing to the entire class in part resulting from [named plaintiff's] efforts." *Savani*, 121 F. Supp. 3d at 577; *see also, Dover v. Yanfeng US Automotive Interior Systems I LLC,* 2023 WL 2309762, at *6 (E.D. Mich. Mar. 1, 2023) (an ERISA case awarding a $10,000 to each named plaintiff and noting that "the Court finds that plaintiffs' concerns regarding their future employment prospects are understandable."); *Feinberg*, 610 F. Supp. 3d at 774 (same).

Here, Plaintiffs seek an award of $10,000 for each class representative, amounts that are well-deserved. Each of the Class Representatives has been closely involved in this litigation since its inception. They provided documents, reviewed the Complaint, and monitored Class Counsel and the progress of the litigation, including discussions about the terms of the Settlement. Gyandoh Decl., ¶ 69. All three of the Plaintiffs have submitted declarations in support of their requests for case contribution awards. The declarations are attached to the Gyandoh Declaration

as Exhibits 8 (Tco Declaration) 9 (Clark Declaration), and 10 (Jones Declaration). Courts also routinely find incentive awards fair when neither Defendants nor individual class members have opposed the awards after receiving notice. *See e.g., Dover*, 2023 WL 2309762, at *6.

Lastly, substantially larger awards have been approved as well within the ranges typically awarded in comparable cases. *See e.g., Kruger*, 2016 WL 6769066, at *6 (awarding 25,000 for each representative and listing cases awarding the same); *Feinberg*, 610 F. Supp. 3d at 774 (awarding $10,000, $12,500, and $15,000 to the named plaintiffs); *Kelly* , 2020 WL 434473, at **7–8 (awarding $20,000 to eight named plaintiffs); *Clark v. Duke Univ.*, 2019 WL 2579201, at *4 (M.D.N.C. June 24, 2019) (granting awards of awarding of $25,000 and $30,000 to the named plaintiffs). In sum, the circumstances of this case justify a $10,000 award for each Plaintiff.

V. CONCLUSION

Plaintiffs respectfully request that the Court award attorneys' fees in the amount of $1,266,540.00, approve the reimbursement of litigation expenses in the amount of $27,857.02, and approve Case Contribution Awards in the amount of $10,000 to each of the three Plaintiffs.

Dated: May 21, 2024

Respectfully submitted,

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*