UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

WESTERN DIVISION

SARAH CONTE, JOANNE TOUCHBERRY, TEKISHA L. NICHOLSON, TOBY BELIVEAU, ALEXANDER CARLISLE, and EARLENE N. HUNTER, Individually and on Behalf of the WakeMed 403(b) Plan and All Others Similarly Situated, Plaintiffs, vs. WAKEMED, Defendant.	CASE NO. 5:21-CV-00190-D CLASS ACTION

DECLARATION OF EVAN J. KAUFMAN IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT, APPROVAL OF PLAN OF ALLOCATION, AND AN AWARD OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

I, Evan J. Kaufman, declare as follows:

1. I am an attorney duly licensed to practice in the State of New York, a partner of the law firm Robbins Geller Rudman & Dowd LLP ("Robbins Geller" or "Lead Counsel"), and I represent plaintiffs Sarah Conte, Joanne Touchberry, Tekisha L. Nicholson, Toby Beliveau, Alexander Carlisle and Earlene N. Hunter ("Plaintiffs") in this action (the "Litigation").[1] I have been actively involved in the prosecution and resolution of the Litigation, am familiar with its proceedings, and have knowledge of the matters set forth herein based upon my involvement in this Litigation and supervision of or communications with other lawyers and staff assigned to this Litigation.

2. I respectfully submit this Declaration in support of: (1) Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation; and (2) Lead Counsel's Application for an Award of Attorneys' Fees and Expenses and Service Awards for Plaintiffs. This Declaration demonstrates why the proposed Settlement and Plan of Allocation are fair, reasonable, adequate, in the best interests of the Settlement Class, and warrant final approval by the Court. This Declaration also demonstrates the basis for Lead Counsel's request for an award of attorneys' fees of one-third of the Settlement Amount and expenses of $21,909.85, and service awards to Plaintiffs of $5,000 each.

I. THE NATURE AND PROCEDURAL HISTORY OF THE LITIGATION

3. This is a putative class action alleging violations of the Employee Retirement Income Security Act of 1974 ("ERISA") on behalf of a proposed settlement class ("Settlement Class") consisting of all participants in the WakeMed Retirement Savings Plan and other

[1] All capitalized terms that are not otherwise defined herein have the same meanings ascribed to them in the Class Action Settlement Agreement, dated April 26, 2021, ECF No. 11-1 ("Settlement Agreement").

WakeMed defined contribution plans (collectively, the "Plan") at any time between August 25, 2014 and May 4, 2021, the date of entry of the Preliminary Approval Order (the "Settlement Class Period").

4. As described in the Complaint for Liability under ERISA ("Complaint"), ECF No. 1, Plaintiffs allege that WakeMed breached its fiduciary duties pursuant to Sections 409 and 502 of ERISA, 29 U.S.C. §§1109 and 1132, by, among other things, failing to establish and maintain a prudent process when selecting and monitoring the investment options in the Plan and when evaluating and establishing Plan expenses.

A. Summary of Plaintiffs' Allegations

5. Plaintiffs allege that Defendant breached its fiduciary duties of prudence and loyalty by engaging in a flawed and imprudent process when selecting and monitoring the Plan's investment options and establishing and evaluating Plan expenses, thus failing to act in the best interest of Plan participants. Plaintiffs allege that the lack of a prudent process or methodology for selecting and monitoring the Plan's investments is demonstrated by, among other things, the following:

(a) Throughout the entire Settlement Class Period, the Plan offered mutual fund share classes that were substantially more expensive than other share classes of the same funds, resulting in higher costs for Plan participants without any additional services or benefits added. ¶¶57-66.[2] For example, in 2018, $73,921,727 of the Plan's assets were invested in the American Funds EuroPacific Growth A fund, and Defendant could have saved Plan participants $243,941.69 in that fund alone by switching to Class R-6. ¶61. Similarly, switching to Class I

[2] Citations to "¶___" refer to the Complaint.

in the T. Rowe Price New America Growth Adv fund would have saved participants $243,544.97 in 2018. *Id.*

(b) Defendant caused a majority of the Plan's investment options to be actively managed mutual funds, which are more expensive but rarely outperform passively managed funds. ¶¶74-81. Despite the recognized benefits of passively managed funds, most of the investment options (other than the target date and money market funds) were actively managed, with expense ratios as high as 1.25% (Eaton Vance Atlanta Capital SMID-Cap A in 2014) and 1.07% (T. Rowe Price New Am. Growth Adv in 2017). ¶74. Plaintiffs allege that by failing to offer passively managed fund choices, Defendant caused Plan participants to incur millions of dollars in excess fees compared to passively managed investment options. ¶81.

(c) Defendant imprudently allowed: (i) poorly performing mutual funds to be added and maintained in the Plan's investment lineup; (ii) relatively expensive mutual funds to be added and maintained in the Plan's investment lineup; and (iii) mutual funds to remain in the Plan's investment lineup even though their underlying investments did not match their investment profiles, a phenomenon referred to as "style drift." ¶¶67-71. The risk levels and diversification in the funds were not as represented, there was investment overlap among funds, and the style drift increased the concentration risk and volatility. ¶70. For example, (i) the American Funds EuroPacific Growth A fund is listed in the Foreign Large Growth category, but as of September 30, 2020, 43% of the investments in the fund were not growth investments; (ii) the Eaton Vance Atlantic Capital SMID-Cap A fund is listed as Mid-Cap Growth, but as of September 30, 2020, 57% of its investments were not growth investments; and (iii) the Fidelity Low-Priced Stock fund is listed as Mid Cap Value, but as of September 30, 2020, 59% of the

investments were not Mid Cap and 54% were not value investments. ¶69. Plaintiffs allege that a prudent fiduciary would have acted to adjust the Plan's investment lineup. ¶70.

(d) WakeMed failed to prudently monitor and structure the Plan's administrative, recordkeeping, and other expenses, resulting in the payment of unnecessary fees by the Settlement Class. ¶¶8, 82-85. The Plan's Form 5500s during the Settlement Class Period suggest that the Plan directly paid VALIC, the Plan's primary recordkeeper and service provider during the Settlement Class Period, for recordkeeping and other services, and that Plan participants also indirectly paid administrative costs based on a percentage of the assets of Plan participants. ¶84. Since the Plan paid VALIC directly, these indirect payments, which were purportedly rebated back to the Plan at some point, may have been excessive and could have caused the Plan to lose out on the compound growth of the assets eventually rebated. ¶85. There may also have been more prudent investment alternatives or structures available to the Plan that were not selected because of WakeMed's commitment to revenue sharing. *Id*.

B. Procedural History of the Litigation

6. The Complaint was filed on April 26, 2021, but Lead Counsel's efforts on behalf of Plaintiffs began much earlier. Lead Counsel began its investigation of WakeMed and the Plan in December 2019. This investigation included a review of publicly available information, including, among other things, U.S. Department of Labor and U.S. Securities and Exchange Commission filings by WakeMed, defined contribution plan documents, media reports about the Company, and an analysis of available fund and investment information. In April 2020, Lead Counsel requested Plan documents from WakeMed pursuant to ERISA §104(b)(4), and received, among other things, some of the Plaintiffs' account statements, written instruments governing or pertaining to the Plan, the formal Plan Document, Summary Plan Description, annual reports, fund prospectuses, and summaries of the Plan's investment options. The review of these documents

further informed Plaintiffs' allegations, and after months of conducting its thorough pre-suit investigation, Lead Counsel drafted a detailed 38-page, 115-paragraph draft complaint, setting forth claims for violation of ERISA.

7. The draft complaint alleged clear and strong claims so Lead Counsel believed that an opportunity existed for judicial and attorney efficiencies and to minimize expenses incurred by the class by reaching out to WakeMed prior to filing the complaint to determine if it would be interested in potential settlement discussions.

8. On August 25, 2020, Lead Counsel e-mailed WakeMed a letter, attaching a copy of the draft complaint, notifying Defendant that Plaintiffs intended to file suit on September 11, 2020, and inquiring as to whether Defendant would be interested in discussing a potential pre-filing resolution of Plaintiffs' claims. This led to several telephone conversations between Lead Counsel and in-house counsel for WakeMed and prompted WakeMed to conduct an internal investigation to determine how to proceed. Plaintiffs agreed to allow WakeMed 60 days to conduct the internal investigation and respond to Plaintiffs' inquiry about whether WakeMed was interested in engaging in pre-suit settlement talks. Plaintiffs intended to file the complaint if WakeMed was not interested in engaging in settlement discussions at that time.

9. On November 18, 2020, WakeMed notified Plaintiffs that its outside counsel (hereinafter "WakeMed's counsel") would contact Lead Counsel. On December 1, 2020, Lead Counsel participated on the first of several telephone calls with WakeMed's counsel. Lead Counsel and WakeMed's counsel discussed Plaintiffs' claims and WakeMed's anticipated arguments in response to Plaintiffs' claims. Lead Counsel responded to the arguments made by WakeMed's counsel in a letter on December 11, 2020. Plaintiffs developed a greater understanding of the strengths and weaknesses of their claims through this process.

10. During the time period of these discussions, plaintiffs Tekisha L. Nicholson, Toby Beliveau, Alexander Carlisle and Earlene N. Hunter filed a complaint with substantially similar allegations on December 8, 2020 in the action captioned: *Nicholson, et al. v. WakeMed, et al.*, No. 5:20-cv-00662-FL (E.D.N.C.). At that time, the plaintiffs in the *Nicholson* action had no affiliation with Lead Counsel. Ultimately, those plaintiffs voluntarily dismissed the *Nicholson* action on April 12, 2021, without prejudice, and are now plaintiffs in this Litigation, supporting the Settlement.

11. The Settling Parties' ongoing discussions and negotiations culminated in a private mediation over Zoom on January 21, 2021, with a nationally recognized mediator, David Geronemus, who has substantial experience with similar ERISA class actions. The Settling Parties prepared and exchanged detailed mediation statements setting forth their respective arguments prior to the mediation. During the mediation, Lead Counsel sought to obtain a resolution beneficial to the class but was prepared to walk away if a strong result could not be achieved. During the mediation, the Settling Parties reached agreement on the monetary terms of the Settlement. Lead Counsel insisted that any settlement also include remedial changes to the process followed by WakeMed with respect to the Plan. The Settling Parties, however, did not resolve the non-monetary relief during the mediation and agreed to continue discussions after the mediation. After additional negotiations after the mediation, the Settling Parties agreed on the non-monetary terms, discussed in more detail below. After agreeing to the cash settlement value and structural changes to the process for the Plan, the Settling Parties engaged in further negotiations related to memorializing the terms of the Settlement in a written agreement and associated exhibits, which resulted in the Settlement Agreement.

12. Prior to entering into the Settlement Agreement, as discussed below, Plaintiffs engaged in confirmatory discovery with WakeMed, including the review and analysis of additional documents and a lengthy Zoom presentation by WakeMed's counsel about additional facts. The information learned in connection with confirmatory discovery supported the reasonableness and adequacy of the Settlement. The Settling Parties entered into the Settlement Agreement on April 26, 2021.

13. Plaintiffs filed a Motion for Preliminary Approval of Class Action Settlement, with an accompanying memorandum of law and exhibits, on April 26, 2021. ECF Nos. 10-11. The Court granted Plaintiffs' motion in its Order Granting Motion for Preliminary Approval of Class Action Settlement, dated May 4, 2021 (the "Notice Order"). ECF No 12. Pursuant to the Notice Order and the Order Granting Joint Motion to Modify the Settlement-Approval Schedule, the Notice was e-mailed and mailed to Settlement Class Members. The Notice apprised Settlement Class Members of their right to object to the Settlement, the Plan of Allocation or to Lead Counsel's application for an award of attorneys' fees of one-third of the Settlement Amount, litigation expenses, and service awards of up to $5,000 for each Plaintiff. The updated Settlement Website states that objections to any aspect of the Settlement must be filed on or before December 30, 2021. To date, there have been no objections from any Settlement Class Member.

14. Lead Counsel supervised the efforts of the Settlement Administrator, Analytics Consulting, LLC, to disseminate the Notice. Lead Counsel also reviewed and approved the information made available to Settlement Class Members on the Settlement Website and toll-free telephone support line (1-888-845-0364).

15. Submitted herewith is the Declaration of Jeffrey Mitchell of Analytics Consulting, LLC, the Settlement Administrator, which attests that Notices have been e-mailed to over 20,600 Settlement Class Members and mailed to over 2,300 Settlement Class Members.

II. THE SETTLEMENT

A. The Settlement Was Fairly, Honestly, and Aggressively Negotiated by Counsel Who Endorse the Settlement

16. The terms of the Settlement were negotiated by the Settling Parties at arm's length through adversarial, good faith negotiations. The Settlement was reached only after extensive settlement negotiations during a full-day Zoom mediation session before an experienced mediator, David Geronemus, and after additional negotiations over the remedial process changes after the mediation.

17. Robbins Geller is actively engaged in complex federal civil litigation, including the litigation of ERISA class actions, and has extensive experience litigating and settling class actions. Additionally, I personally have served as counsel in numerous ERISA class actions resulting in favorable settlements, including: *Orellana v. JPMorgan Chase & Co. et al*, No. 1:17-cv-01575 (S.D.N.Y.), *In re Gen. Elec. Co. ERISA Litig.*, No. 1:06-CV-00315 (N.D.N.Y.), and *Cervantes v. Invesco Holding Company (US), Inc., et al.*, No. 1:18-cv-02551-AT (N.D. Ga.). I am also serving as co-lead Class Counsel in *In re GE ERISA Litig.*, No. 1:17-cv-12123-IT (D. Mass.).

18. Defendant's counsel are experienced lawyers from Morgan, Lewis & Bockius LLP, a well-respected defense firm, with a reputation for vigorous advocacy in the defense of complex ERISA class actions. They continue to maintain that WakeMed would not have faced liability, and provided a lengthy presentation to Lead Counsel after reaching the Settlement supporting their contentions.

19. The volume and substance of Lead Counsel's knowledge of the merits and potential weaknesses of Plaintiffs' claims are adequate to support the Settlement. It took hard and diligent work by skilled counsel to develop the facts and theories which persuaded Defendant to enter into serious settlement negotiations before Plaintiffs even filed their Complaint. As discussed above, Lead Counsel conducted an extensive factual investigation, including an analysis of the Plan's fee structure and investment options based on a review of the Plan documents produced by WakeMed. Lead Counsel also thoroughly researched the law applicable to the Settlement Class' claims and applicable defenses thereto, and developed a robust Complaint. Lead Counsel gained even greater knowledge of the merits of Plaintiffs' claims as a result of the extensive initial discussions with Defendant. The accumulation of these efforts permitted Plaintiffs and Lead Counsel to be well-informed on the strengths and weaknesses of their case and to engage in effective settlement discussions with Defendant.

20. In connection with the mediation, Lead Counsel prepared a mediation submission which included detailed legal analysis of the claims and defenses in the Litigation. Lead Counsel also reviewed and analyzed Defendant's mediation statement, and the Settling Parties vigorously addressed each other's arguments during mediation. During these negotiations, Lead Counsel made it clear that it would continue to litigate rather than settle the case for less than fair value, and that Defendant's agreement to make structural changes to its process for certain Plan services would be a necessary component to the Settlement.

21. In deciding to enter into the Settlement, Plaintiffs and Lead Counsel considered, among other things, the substantial immediate benefit to Settlement Class Members under the monetary and non-monetary terms of the Settlement Agreement, and the risks of continued litigation, including the legal hurdles and risks involved in opposing an upcoming motion to

dismiss and motion for summary judgment, as well as the further risk, delay, and expense in ultimately proving liability and damages.

22. After reaching an agreement in principle, but before executing the Settlement Agreement, Plaintiffs requested confirmatory discovery to ensure the Settlement would be in the best interests of the Plaintiffs and the class. In connection with confirmatory discovery, WakeMed produced additional documents to Plaintiffs, including: (1) the Plan's Form 5500s and the annual fee and performance disclosures to Plan participants pursuant to 29 C.F.R. §2550.404a-5 for each year from 2014-2019; and (2) internal documents deemed confidential by WakeMed, including samples of service provider quarterly reports and presentations, service provider fund search reports and analyses, recordkeeper fee disclosures to WakeMed pursuant to 29 C.F.R. §2550.408b-2, a recordkeeper "fee analysis," and other related materials. Lead Counsel reviewed those documents.

23. Additionally, during a lengthy Zoom video conference, Defendant's counsel provided a thorough and detailed presentation of documents and other information which Defendant would have used to support its defenses in this action. Lead Counsel learned additional facts concerning WakeMed's share class selection, process for and involvement in structuring the Plan, and administrative and recordkeeping expenses for the Plan. The information learned during the Zoom presentation and through the documents reinforced to Lead Counsel that the Settlement is fair, reasonable and adequate and extremely beneficial to the Settlement Class.

B. The Terms of the Settlement

24. The Settlement includes both a $975,000.00 monetary component, which WakeMed has agreed to pay into a settlement fund, and a non-monetary component, providing for Defendant to take certain actions with respect to the Plan's process of selecting service providers. The non-monetary terms are particularly notable, as they ensure that WakeMed will test the market

to guarantee that the Plan is retaining the best service providers at the best price. This will help ensure that the excessive fees alleged in the Complaint will not occur again in the future.

1. The Settlement's Monetary Terms

25. Under the Settlement, Settlement Class Members are eligible to receive a pro rata share of the Net Settlement Amount, $975,000, less notice and administrative expenses, taxes and tax expenses, attorneys' fees and expenses that the Court awards to Lead Counsel, and any service awards to Plaintiffs.

26. As Plaintiffs calculated maximum recoverable damages in the Litigation to be approximately $4.5 million, the Settlement represents approximately 21.6% of estimated recoverable damages. This is a highly favorable result, particularly in light of the early stage of the Litigation, the possibility of failing to establish liability under ERISA and to recover damages if the case proceeded. The Settlement at this early stage resulted in judicial and attorney efficiencies and a substantial reduction in expenses that could have been incurred by the class had the case been litigated through summary judgment, trial or appeal. In addition, any recovery would surely be delayed by the COVID-19 pandemic.

27. The amount of each Settlement Class Member's payment is based on his or her Plan account balance. After the Settlement Effective Date, the Settlement Administrator will cause the Net Settlement Amount to be allocated and distributed to Current Participants, Authorized Former Participants, and their Beneficiaries or Alternate Payees, in accordance with the Plan of Allocation set forth in Article 6 of the Settlement Agreement and as ordered by the Court. The Settlement Administrator will utilize the quarter-ending account balances invested in the Plan for each Settlement Class Member during the Settlement Class Period to calculate payments to Settlement Class Members.

28. Payments to Settlement Class Members will be calculated as follows:

(i) The end-of-quarter balances for the Settlement Class Period of each Current Participant and each Authorized Former Participant are identified for each quarter.

(ii) All end-of-quarter balances identified in step 1 are summed together for each Settlement Class Member.

(iii) An average end-of-quarter balance for each Settlement Class Member is calculated for the Settlement Class Period.

(iv) For each Settlement Class Member, the average end-of-quarter balance of step 3 is divided by the sum of all of the average end-of-quarter balances of all Settlement Class Members for the Settlement Class Period.

(v) Each Settlement Class Member will receive the fraction of the total Net Settlement Amount which is calculated in step 4.

(vi) For purposes of these calculations, a zero should be included as the balance for any quarter during which an individual had no account balance, or did not participate in the Plan, at the quarter-end.

29. Payments to current Plan participants will be deposited into their respective Plan accounts. Payments to former Plan participants will be made directly to former Plan participants by check, or former Plan participants can instead elect to receive their payment through a rollover to a qualified retirement account.

2. The Settlement's Non-Monetary Terms

30. The Settlement requires WakeMed to take certain actions with respect to its procedures for evaluating and selecting service providers for the Plan. Specifically, the Plan fiduciaries will conduct a request for proposals ("RFP") for investment advisory services for the Plan within eighteen (18) months of the Settlement Agreement Execution Date, and will initiate RFPs for recordkeeping and administrative services for the Plan on two occasions, the first within

thirty-six (36) months of the Settlement Effective Date, and the second within seventy-two (72) months of the Settlement Effective Date. All RFPs will be issued to at least three qualified service providers. After each RFP, the Plan fiduciaries may decide to retain their then existing service providers for recordkeeping and administrative services or may select different service providers for such services.

31. These non-monetary terms provided by the Settlement are a notable achievement. RFPs are a recognized benefit to retirement plans, allowing plan fiduciaries to test the market to attain, or ensure that they are continuing to receive, comparably good service at a reasonable cost. Recordkeeping pricing in particular is highly competitive, and the RFP process is often the best way to obtain a particular recordkeeper's best pricing. Thus, requiring WakeMed to conduct future RFPs ensures that it will have the opportunity to select a better and cheaper service provider on behalf of Plan participants, if one presents itself during the RFP process.

C. The Settlement Eliminates the Risks and Any Potential Delay of Recovery for Plaintiffs and the Settlement Class

32. During the Settling Parties' preliminary discussions, Defendant previewed many of its forthcoming arguments at various stages of the Litigation, including the motion to dismiss and summary judgment stages. Defendant would attempt to refute Plaintiffs' allegations concerning the Plan's excessive fees resulting from share class selection and actively managed funds, as well as the Plan's fee structure for recordkeeping and administrative fees. While Plaintiffs believe that they have strong counterarguments, they cannot be certain that the Court would reject all of Defendant's arguments, and as a result Plaintiffs face the risk of failing to obtain a meaningful recovery for the Settlement Class. Even if Plaintiffs were to prevail on their arguments concerning excessive fees and imprudence, damages issues would be costly and hotly contested if the

Litigation continued. The Settlement, therefore, eliminates this risk and provides substantial, immediate benefits to the Settlement Class.

33. The process of ultimately proving liability and damages requires retaining one or more experts to perform an economic and fiduciary analysis, exchanging expert reports and rebuttal reports, taking expert depositions, briefing *Daubert* motions and/or holding *Daubert* hearings, briefing summary judgment, and prevailing at trial. This is a costly and time-consuming process that is not guaranteed to increase the amount of compensation the Settlement Class is currently expected to receive or to result in the non-monetary terms described above.

34. Based on its experience in ERISA class action litigation and in this case, and after weighing the substantial benefits of the Settlement against the numerous obstacles to recovery after continued litigation, Lead Counsel maintains that the Settlement is fair, reasonable, and in the best interest of the Settlement Class.

III. THE OPINION OF THE INDEPENDENT FIDUCIARY

35. Fiduciary Counselors Inc., appointed as an independent fiduciary to review the Settlement, is conducting an analysis of the Litigation's key pleadings and selected other materials, and interviewed counsel for both Plaintiffs and Defendant to assess the strengths and weaknesses of the claims and defenses at issue in the Litigation. Fiduciary Counselors will submit a report with the Court prior to the Fairness Hearing for consideration by the Court.

IV. LEAD COUNSEL'S REQUESTED AWARD OF ATTORNEYS' FEES AND EXPENSES IS REASONABLE

36. Lead Counsel has substantial experience representing investors in ERISA and other complex cases, including in this District. As described above, Robbins Geller brought its substantial experience to bear, working efficiently and diligently to obtain a very good result for the Settlement Class on a wholly contingent basis. It serves the public interest to have experienced

and able counsel enforce ERISA violations, as ERISA was enacted in recognition of the importance of protecting the country's retirement savings from mismanagement. Lead Counsel's experience and advocacy were required in presenting the strengths of the case from inception to the mediation and thereafter, in an effort to achieve the best possible settlement and convince Defendant, its insurers, defense counsel, and the mediator of the risks Defendant faced from litigating Plaintiffs' claims. The Settlement represents a substantial recovery for the Settlement Class, attributable to the diligence, determination, hard work, and reputation of Robbins Geller. In light of Lead Counsel's significant efforts in the face of numerous risks, I respectfully submit that our fee request is reasonable and warrants approval.

V. CONCLUSION

37. Given that the Settlement recovers a significant percentage of estimated damages for the Settlement Class, as well as the beneficial, prospective non-monetary terms concerning the Plan's administration, and the uncertainty surrounding whether Plaintiffs would have ultimately prevailed, Lead Counsel respectfully submits that the Settlement and Plan of Allocation are fair, reasonable, and adequate, and warrant final approval. Lead Counsel also submits that its request for an award of attorneys' fees of one-third of the Settlement Amount and an award of expenses of $21,909.85 is reasonable and warrants this Court's approval.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Melville, New York, this 1st day of December, 2021.

EVAN J. KAUFMAN