

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
REPLY MEMORANDUM OF LAW IN
FURTHER SUPPORT OF: (I) PLAINTIFFS’
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT AND
APPROVAL OF PLAN OF ALLOCATION;
AND (II) LEAD COUNSEL’S
APPLICATION FOR AN AWARD OF
ATTORNEYS’ FEES AND EXPENSES,
AND SERVICE AWARDS FOR
PLAINTIFFS

Plaintiffs Sarah Conte, Joanne Touchberry, Tekisha L. Nicholson, Toby Beliveau, Alexander Carlisle and Earlene N. Hunter (“Plaintiffs”) submit this reply memorandum in further support of their motion for: (i) final approval of a proposed Settlement of this class action (“Litigation”) brought on behalf of participants in the WakeMed Retirement Savings Plan and other WakeMed defined contribution plans (collectively, the “Plan”) from August 25, 2014 to May 4, 2021, the date of preliminary approval (“Settlement Class Period”), alleging claims under the Employee Retirement Income Security Act of 1974 (“ERISA”) against WakeMed (“Defendant”), and (ii) approval of the Plan of Allocation.¹ In addition, Lead Counsel submits this reply memorandum in support of its application for an award of attorneys’ fees and expenses and service awards for Plaintiffs.

**THE POSITIVE REACTION OF THE SETTLEMENT CLASS PROVIDES FURTHER
SUPPORT FOR FINAL APPROVAL OF THE SETTLEMENT**

Plaintiffs and Lead Counsel respectfully submit that their opening memoranda and supporting declarations (ECF Nos. 22-23, the “Opening Papers”)² demonstrate that approval of the motions is warranted. In addition, the deadline for Settlement Class Members to object has now passed without a single objection, providing notable additional support for final approval of the Settlement, Plan of Allocation, and Lead Counsel’s request for attorneys’ fees, expenses, and service awards.

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”).

² The Opening Papers were filed on December 1, 2021, as set forth in the Court’s October 6, 2021 Order Granting Joint Motion to Modify the Settlement-Approval Schedule (ECF No. 21) (“Order”).

The proposed Settlement resolves the Litigation in its entirety in exchange for a cash payment of \$975,000.00. As detailed in Plaintiffs' and Lead Counsel's Opening Papers, the Settlement is the product of extended arm's-length settlement negotiations. The Settlement represents an excellent result for the Settlement Class in light of the substantial challenges that Plaintiffs would have faced in first defeating Defendants' anticipated motion to dismiss and then proving liability and establishing damages, as well as the risks and delays of continued litigation, particularly under the circumstances of the COVID-19 pandemic.

Pursuant to the Court's Preliminary Approval Order, the Claims Administrator, under the supervision of Lead Counsel, conducted an extensive notice program, including disseminating the Court-approved Notice to over 23,000 potential Settlement Class Members.³ The Notice apprised Settlement Class Members of their right to object to the Settlement, the Plan of Allocation, and/or to Lead Counsel's application for attorneys' fees and litigation expenses, and service awards of \$5,000 each for Plaintiffs. Notice, ¶15. The deadline to file objections was December 30, 2021, and not one Settlement Class Member objected to the \$975,000.00 Settlement, the Plan of Allocation, or Lead Counsel's request for attorneys' fees, expenses, and service awards.

In class action cases, it is common to have class members object to a settlement. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 1:08-WP-65000, 2016 WL 5338012, at *21 (N.D. Ohio Sep. 23, 2016) (noting objections are filed in "nearly every class

³ See accompanying Supplemental Declaration of Jeffrey Mitchell of Analytics Consulting, LLC Regarding Implementation of Notice Program ("Suppl. Mitchell Decl."); Declaration of Jeffrey Mitchell of Analytics Consulting, LLC Regarding Implementation of Notice Program ("Mitchell Decl.") (ECF No. 23-9). In addition to dissemination of the Notice, Analytics made important documents related to the Settlement, including the Notice and Plaintiffs' and Lead Counsel's Opening Papers, available on the Settlement website, www.WakeMedERISASettlement.com, and created and maintained a toll-free telephone support line (1-888-845-0364) as a resource for Settlement Class Members seeking information about the Settlement. Suppl. Mitchell Decl., ¶¶6-7; Mitchell Decl., ¶¶16-17.

action settlement today”). The reaction of the class is a significant factor in considering a settlement’s adequacy, “for [t]he attitude of the members of the Class, as expressed directly or by failure to object, after notice to the settlement is a proper consideration for the trial court.” *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 668 (E.D. Va. 2001) (quoting *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975)). After all, it is the class members’ recovery, and “[a] lack of objections to settlement by class members and opt-outs from the class demonstrates low opposition and weighs in favor of approving a settlement.” *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 842 (E.D. Va. 2016).

This overwhelmingly positive response from Settlement Class Members strongly supports a finding that the Settlement and Plan of Allocation are fair, reasonable, and adequate, and that Lead Counsel’s fee and expense request warrants approval. *See, e.g., Microstrategy*, 148 F. Supp. 2d at 668 (approving settlement with seven class members who “opt[ed] out of the case”); *see also Genworth*, 210 F. Supp. 3d at 842 (holding lack of objection by potential class members “lends support to approve the Settlement”).

CONCLUSION

For the reasons set forth herein and in the Opening Papers, Plaintiffs respectfully request that the Court approve the Settlement and Plan of Allocation as fair, reasonable, and adequate. Lead Counsel also respectfully submits that the request for attorneys’ fees, expenses, and service awards for Plaintiffs are reasonable and warrant the Court’s approval.

Respectfully submitted: January 3, 2022

/s/ Brian L. Kinsley

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to Local Rule 7.2, the undersigned counsel certifies that the foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used as follows:

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DATED: January 3, 2022

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