

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA**

Case No. 1:23-cv-00032-CCE-JEP

ROBERT CIARCIELLO, Individually and  
on Behalf of All Others Similarly Situated,

Plaintiff,

v.

BIOVENTUS INC., KENNETH M. REALI,  
MARK L. SINGLETON, GREGORY O.  
ANGLUM, and SUSAN M. STALNECKER,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S COUNSEL'S  
MOTION FOR ATTORNEYS' FEES, EXPENSES, AND LEAD PLAINTIFF'S  
REASONABLE COSTS AND EXPENSES**

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## I. INTRODUCTION<sup>1</sup>

The Court has preliminarily approved the proposed Settlement to resolve this securities class action in exchange for a cash payment of \$15,250,000—an outstanding result given Defendant Bioventus’s financial constraints, the realistically recoverable damages, and the risks and delay of continued litigation.

Consistent with the Notice, Lead Plaintiff’s Counsel<sup>2</sup> respectfully seeks (i) an award of attorneys’ fees of \$5,032,500, or 33% of the \$15.25 million Settlement Fund, plus interest at the same rate earned by the Settlement Fund (the “Fee Application”); (ii) reimbursement of \$623,509 in reasonable litigation expenses incurred in connection with the prosecution of the Litigation, plus interest at the same rate earned by the Settlement Fund (the “Expense Application”); and (iii) an award to Lead Plaintiff of its reasonable costs and expenses of \$11,813.94.

*First*, the Fee Application is reasonable in light of the factors considered by Fourth Circuit courts. The “most critical factor in determining the reasonableness of a fee award is the degree of success obtained.” *In re Novant Health, Inc.*, No. 1:22-cv-0697, 2024 WL 3028443, at \*9 (M.D.N.C. June 17, 2024) (Eagles, C.J.). The \$15.25 million Settlement

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<sup>1</sup> Capitalized terms not defined herein have the meanings stated in the Stipulation of Settlement, dated July 12, 2024, as revised on August 7, 2024 (the “Stipulation,” ECF No. 148-1). References to “Bauer Declaration” or “Bauer Decl.” refer to the Declaration of George N. Bauer, dated November 8, 2024, submitted contemporaneously with this brief. Internal citations and quotations omitted unless otherwise stated.

<sup>2</sup> As used herein, Lead Plaintiff’s Counsel means Settlement Class Counsel, Bleichmar Fonti & Auld LLP (“BFA”); Local Counsel for Lead Plaintiff, Tin Fulton Walker & Owen PLLC (“Tin Fulton”); and The Law Offices of Susan R. Podolsky (“Podolsky”), which served as additional counsel working under the direction and supervision of BFA.

Amount here is an outstanding result. It is the second largest recovery in a securities class action in the Middle District of North Carolina in the last 25 years. It also represents a recovery of over 10.8% of the maximum estimated damages of approximately \$140 million, and as much as 27% of potential triable damages of \$56.7 million. This is more than double the 4.5–4.8% average recovery in Section 10(b) cases between 2014-2023, and exceeds or compares favorably to recent securities class action settlements in this Circuit. (*See infra* Sec. II.A.1.)

The requested fee percentage of 33% is also comparable to fee percentages approved in class actions in this Circuit and in this Court. Indeed, “[i]n this jurisdiction, contingent fees of one-third . . . are common.” *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05-CV-00187, 2007 WL 119157, at \*2 (M.D.N.C. Jan. 10, 2007). (*See infra* Sec. II.A.4.)

The other relevant factors further support the Fee Application. Lead Plaintiff’s Counsel achieved the \$15.25 million Settlement by investigating and drafting a complaint that withstood the searching scrutiny of the Private Securities Litigation Reform Act of 1995 (“PSLRA”), prosecuted this action thoroughly and efficiently through discovery, and aggressively leveraged the fulsome factual record to achieve an excellent result through arms-length negotiations. This was not an easy endeavor, as this case revolved around complex rebates in the healthcare industry that are subject to ever-changing government regulations and required the review and assessment of dense and complex data files. Nor was it a risk-free endeavor, as Lead Plaintiff’s Counsel faced a viable and vigorous defense and a financially strapped Defendant all on a fully contingent basis while advancing litigation expenses.



Lead Plaintiff's Counsel readily assumed that risk and poured significant resources into the prosecution of the Litigation. In total, Lead Plaintiff's Counsel spent 7,853.40 hours and devoted \$6,145,414 worth of work to this matter. This includes (i) 7,196.50 hours and \$5,656,919 from BFA; (ii) 83.60 hours and \$58,520 from Tin Fulton; and (iii) 573.30 hours and \$429,975 from Podolsky. This is a tremendous commitment on a fully contingent basis. In fact, the Fee Application for \$5,032,500 represents a 0.82 multiplier of this lodestar. Put differently, Lead Plaintiff's Counsel stands to earn less than what it would have earned had it been paid on an hourly basis, even though courts routinely recognize that "it may be necessary to provide a greater return than an hourly fee offers to induce lawyers to take on representation for which they might never be paid." *Phillips v. Triad Guar. Inc.*, No. 1:09CV71, 2016 WL 2636289, at \*6 (M.D.N.C. May 9, 2016).

Not surprisingly, the Lead Plaintiff and the Settlement Class have responded favorably to the Fee Application, which further supports its reasonableness. Lead Plaintiff has explicitly reviewed and approved the Fee Application (*see* Bauer Decl., Ex. 1 ¶¶ 9-11), and no Settlement Class Member has objected to the fee information set forth in the Notice (*Id.* Ex. 5, ¶ 23), which indicated that counsel would seek a fee of no more than 33% plus interest.

**Second**, the Expense Application is reasonable. As detailed in the Bauer Declaration and discussed below, Lead Plaintiff's Counsel incurred \$623,509 in reasonable litigation expenses incurred in connection with the prosecution of the Litigation. These include, but are not limited to, customary fees related to experts, data hosting charges,

litigation support fees, counsel for former Bioventus employees, and other routine expenses. (*See infra* Sec. III.)

**Third**, and finally, the PSLRA, 15 U.S.C. § 78u-4(a)(4), entitles Lead Plaintiff to “reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class.” Here, the Lead Plaintiff played an active and vital role in the prosecution of the Litigation, and incurred \$11,813.94 in reasonable costs and expenses.

## **II. LEAD PLAINTIFF’S COUNSEL’S FEE REQUEST IS REASONABLE**

Lead Plaintiff’s Counsel seeks an award of attorneys’ fees of \$5,032,500, or 33% of the \$15.25 million Settlement Fund plus interest at the same rate earned by the Settlement Fund (the “Fee Application”).

### **A. Lead Plaintiff’s Counsel’s Fee Request is Reasonable Under the Fourth Circuit’s *Barber* Factors**

“Courts in this circuit routinely approve attorneys’ fees using a percentage of the common fund.” *McCord v. PRG Real Estate Management, Inc.*, No. 1:20-cv-854, 2021 WL 7185769, at \*4 (M.D.N.C. Sept. 13, 2021) (Eagles, C.J.) (*citing Phillips v. Triad Guar. Inc.*, No. 1:09-CV-71, 2016 WL 2636289, at \*2 (M.D.N.C. May 9, 2016) (“the percentage of the fund method, supplemented with the lodestar cross-check, is the appropriate means by which to determine an award of attorneys’ fees in this case.”)).

When determining whether the fee percentage requested by counsel is reasonable, courts assess all or some of the factors originally set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), which were adopted by the Fourth

Circuit in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978). See *In re Novant Health, Inc.*, No. 1:22-cv-0697, 2024 WL 3028443, at \*9 (M.D.N.C. June 17, 2024) (Eagles, C.J.); see also *Phillips v. Triad Guar. Inc.*, No. 1:09CV71, 2016 WL 2636289, at \*4 (M.D.N.C. May 9, 2016) (applying *Barber* factors to determine reasonableness of fee in a PSLRA case).

The *Barber* factors include:

(1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation [i.e., contingent nature of the fee]; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

*Barber*, 577 F.2d at 226 n.28.<sup>3</sup> Notably, the *Barber* factors do not all apply to every case, and they are given varying weight on a case-by-case basis. See *Phillips v. Triad Guar. Inc.*, No. 1:09CV71, 2016 WL 2636289, at \*4 n.2 (M.D.N.C. May 9, 2016). Here, the seventh (time limitations imposed by the client or circumstances) and eleventh (nature and

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<sup>3</sup> Some cases refer to the *Barber* factors as the “*Johnson* factors” as they were adopted by the Fourth Circuit from the Fifth Circuit’s *Johnson* case. This brief will refer to the “*Barber* factors,” but references in the case-law to the “*Johnson* factors” are references to the same underlying substantive factors.

length of professional relationship to the client) *Barber* factors do not apply. *See Phillips*, 2016 WL 2636289, at \*4 n. 2 (finding these factors not applicable in a PSLRA case).

The remaining *Barber* factors all support the Fee Application.

### **1. The Results Obtained (*Barber* Factor 8)**

The Fourth Circuit has “noted that the most critical factor in determining the reasonableness of a fee award is the degree of success obtained.” *In re Novant Health, Inc.*, 2024 WL 3028443, at \*9 (M.D.N.C. June 17, 2024); *see also Wojcik v. Omega Healthcare Invs., Inc.*, No. 20- CV-3491, 2024 WL 3743081, at \*7 (D. Md. Aug. 8, 2024) (PSLRA case stating that “the most important *Johnson* factor [is] the degree of success obtained by the Plaintiff”).

Here, the \$15.25 million cash Settlement Amount obtained by Lead Plaintiff, through Lead Plaintiff’s Counsel, is a significant result by any measure and supports Lead Plaintiff’s Counsel’s fee request. The Settlement Amount is the second largest recovery in a securities class action in the Middle District of North Carolina in the last 25 years (and the fifth largest in any North Carolina federal court during that time).<sup>4</sup>

Further, the Settlement Amount represents a recovery of over 10.8% of the maximum estimated damages of approximately \$140 million, and as much as 27% of potential triable damages of \$56.7 million in the event Defendants prevailed on certain

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<sup>4</sup> The others are: *Nieman v. Duke Energy Corp.*, No. 3:12-cv-00456 (W.D.N.C. 2015) (\$146.25 million); *In re Krispy Kreme Doughnuts, Inc., Sec. Litig.*, No. 1:04-cv-00416 (M.D.N.C. 2007) (\$75 million); *In re Red Hat, Inc., Sec. Litig.*, No. 5:04-cv-473 (E.D.N.C. 2012) (\$20 million); and *Ollila v. Babcock & Wilcox Enterprises, Inc.*, No. 3:17-cv-00109 (W.D.N.C.) (\$19.5 million). (*See* Bauer Decl., ¶ 78.)

merits related issues. In all circumstances, the recovery is more than double the 4.5–4.8% average recovery in Section 10(b) cases between 2014-2023. *See Cornerstone Research, Securities Class Action Settlements – 2023 Review and Analysis*, available at <https://www.cornerstone.com/wp-content/uploads/2024/03/Securities-Class-Action-Settlements-2023-Review-and-Analysis.pdf>.

The settlement of 10-27% of estimated damages also exceeds or compares very favorably to recent securities class action settlements in this Circuit. *See, e.g., Ollila v. Babcock & Wilcox Enterprises, Inc.*, No. 3:17-CV-00109, ECF No. 90 (W.D.N.C. 2019) (Cogburn, J.) (granting final approval of settlement of approximately 4.8% of estimated recoverable damages); *Caplin v. Trans1, Inc., et al.*, No. 7:12-CV-00023, ECF No. 134 (E.D.N.C. 2018) (Fox, J.) (granting final approval of settlement representing 18% of plaintiff's likely recovery at trial); *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:04-CV-00416, ECF Nos. 193, 203, (M.D.N.C. 2007) (Beaty, J.) (granting final approval of settlement representing 9% of estimated damages).

## **2. The Time and Labor Expended by Counsel (*Barber* Factor 1)**

Lead Plaintiff's Counsel devoted significant time and labor to prosecuting the Litigation, a total of 7,853.40 hours amounting to \$6,145,414 in attorney and staff time. Specifically, BFA spent 7,196.50 hours, amounting to \$5,656,919 in attorney and staff time. (Bauer Decl., ¶ 62 & Ex. 3.) Notably, these totals exclude certain time that BFA determined in its judgment not to charge to the Settlement Class, including all time concerning the Fee and Expense Applications, and all time from nine timekeepers with fewer than 100 hours billed to the matter. (*Id.* ¶ 69.) In addition, Tin Fulton, Lead

Plaintiff's local counsel, spent 83.6 hours, amounting to \$58,520. (Gagan Decl., ¶ 8.) And Podolsky, additional counsel working under BFA's direction and supervision, spent 573 hours, amounting to \$429,975. (Podolsky Decl., ¶ 9.)

This extensive work – described in detail in the Bauer Declaration – included among other things, investigating, drafting, and filing two Amended Complaints; successfully defeating the Defendants' motion to dismiss; aggressively pursuing discovery from the Defendants and third-parties; reviewing and analyzing over 665,000 pages of documents; negotiating numerous discovery disputes and litigating several before the Court; preparing to take depositions; briefing class certification, including taking and defending expert depositions and defending depositions of Lead Plaintiff and its affiliates; preparing experts to provide testimony concerning damages, loss causation, and accounting issues; successfully leveraging the work performed throughout the litigation to secure, through aggressive arms-length negotiations, an extremely favorable resolution for class members; and obtaining preliminary approval of the Settlement. (*Id.* ¶¶ 10-57, 62.) Lead Plaintiff's Counsel's investment of over \$6 million of work on a fully contingent basis supports the Fee Application.

The work was also done efficiently and at the expense of other opportunities. Lead Plaintiff's Counsel devoted a small, dedicated team to this matter, which enabled them to centralize knowledge, avoid duplication, and remain coordinated as the team tackled the complex factual and legal issues at play. (Bauer Decl., ¶ 70.) These dedicated attorneys devoted a significant amount of their time to the matter, which precluded them and their firms from pursuing other cases during the pendency of this Litigation. (*Id.* ¶ 82.)

A lodestar cross-check further confirms the reasonableness of the Fee Application. The Fee Application for \$5,032,500 is 0.82 times the \$6,145,414 lodestar. This below-1 multiplier (often called a “negative multiplier”) is well below the range of multipliers approved in this District and Circuit. *See, e.g., McCord v. PRG Real Estate Management, Inc.*, No. 1:20-cv-854, 2021 WL 7185769, at \*4 (M.D.N.C. Sept. 13, 2021) (Eagles, C.J.) (“Class counsel’s requested fee here with a lodestar of 1.16 is therefore comfortably within the reasonable zone.”); *Kruger v. Novant Health, Inc.*, No. 1:14CV208, 2016 WL 6769066, at \*5 (M.D.N.C. Sept. 29, 2016) (approving fee award of “3.69 times the lodestar”); *Nieman v. Duke Energy Corp.*, No. 3:12-cv-00456, ECF No. 112 (W.D.N.C. 2015) (approving multiplier of 6.43); *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05-CV-00187, 2007 WL 119157, at \*3 (M.D.N.C. Jan. 10, 2007) (“multiplier of approximately 1.6 over the lodestar . . . is a modest risk multiplier”); *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246 (E.D. Va. 2009) (approving a multiplier of 1.3); *see also Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 689 (D. Md. 2013) (“Courts have generally held that lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorneys’ fee.”).

Lead Plaintiff’s Counsel’s hourly rates are also appropriate in this complex securities action, “where the market for class action attorneys is nationwide and populated by very experienced attorneys with excellent credentials.” *In re MicroStrategy, Inc.*, 172 F.Supp.2d 778, 788 (E.D. Va. 2001). BFA’s rates range from \$395 for paralegal support; \$550 for discovery administration; \$575 to \$795 for associates; and \$950 to \$1,250 for

partners. (Bauer Decl., Ex. 3.)<sup>5</sup> The blended hourly rate for BFA personnel was \$751. And Tin Fulton’s rate is \$700, (Ex. 8, ¶ 8), and Podolsky’s rate is \$750, (Ex. 9, ¶ 9).

Comparable rates have recently been approved by courts in this Circuit. *See, e.g., Sinnathurai v. Novavax, Inc.*, No. 8:21-cv-02910, ECF No. 135 (D. Md. 2024) (approving rates of \$750 to \$1,325 for partners, \$700 to \$995 for of-counsel attorneys, and \$450 to \$625 for associates); *In re James River Group Holdings, Ltd. Sec. Litig.*, No. 21-cv-00444, ECF No. 125 (E.D. Va. 2024) (approving rates of \$465 to \$1,350 for attorneys and partners, and \$325 to \$425 for paralegals); *In re 2U, Inc. Sec. Class Action*, No. 8:19-cv-03455, ECF No. 243 (D. Md. 2022) (approving rates of \$625 to \$1,300 for partners, \$615 to \$725 for of-counsels/senior counsels, and \$385 to \$665 for associates); *Ollila v. Babcock & Wilcox Enterprises, Inc.*, No. 3:17-cv-00109, ECF No. 87 (W.D.N.C. 2019) (approving rates of \$975 to \$735 for partners in 2019, which adjusted for inflation equates to \$1,190 to \$897).

Moreover, courts across the country have also consistently held that BFA’s hourly rates are reasonable. Indeed, the District of Colorado recently approved rates that are identical to the rates applicable here. *See Bilinsky v. Gatos Silver, Inc., et al.*, No. 1:22-cv-00453-PAB-KAS (D. Colo. Oct. 15, 2024); *see also* Settlement Approval Hearing Transcript, *In re Teva Sec. Litig.*, No. 3:17-cv-00558 (SRU) (D. Conn. June 2, 2022), 28-

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<sup>5</sup> For current attorneys, these are Settlement Class Counsel’s current rates, which is “appropriate to account for the delay in payment to counsel.” *Seaman v. Duke Univ.*, No. 1:15-CV-462, 2019 WL 4674758, at \*5 (M.D.N.C. Sept. 25, 2019). For attorneys and professional support staff who are no longer employed by BFA, the hourly rate used is the hourly rate for such employee in his or her final year of employment by BFA. (Bauer Decl., ¶ 66.)



29 (granting fee request and accepting BFA's rates); *Police Ret. Sys. of St. Louis v. Granite Constr. Inc.*, No. C 19-04744 WHA, 2022 WL 816473, at \*9 (N.D. Cal. Mar. 17, 2022) ("This order accepts [BFA's] claimed rates as generally tracking the going rate for those with the same levels of skill and experience in our geographic region.").

Notably, BFA's rates are less than the rates charged by Defendants' attorneys at Latham & Watkins. For instance, in 2024 filings in the United States Bankruptcy Court for the Southern District of New York, Latham & Watkins sought and received fees based on rates ranging from \$1,660 to \$1,265 for partners and \$1,305 to \$655 for associates (with \$655 applied for an associate who joined the bar in 2022). *See In re Celsius Network LLC*, No. 22-mg-10964 (Bank. S.D.N.Y. 2024), ECF No. 4249.

### **3. The Novelty and Difficulty of the Questions Presented, and the Skill Required to Represent the Class (*Barber* Factors 2 and 3)**

The complexity of this securities class action demanded exceptional skill from counsel and supports the requested fee. Securities fraud cases are by their "very nature" exceedingly complex. As courts in this Circuit have explained:

The very nature of a securities fraud case demands a difficult level of proof to establish liability. Elements such as scienter, reliance, and materiality of misrepresentation are notoriously difficult to establish. Proving damages further implicate[s] complex economic modeling at the hands of sophisticated experts who, in order to ascertain the fluid and shifting effects of alleged widespread fraudulent reporting, necessarily engage[ ] in complex measurements of stock valuation and price movement.

*Phillips v. Triad Guar. Inc.*, No. 1:09CV71, 2016 WL 2636289, at \*5 (M.D.N.C. May 9, 2016) (quoting *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 263 (E.D. Va. 2009)).

This case is no different. In fact, the inherent difficulty of pleading a PSLRA case, which requires, among other things, particularized facts giving rise to a “strong inference” of scienter, was magnified by the complex subject matter and accounting issues at issue in the Litigation. This case involved false and misleading statements about rebates and reimbursements of insurance claims in the healthcare industry, requiring Lead Plaintiff’s Counsel at the outset to educate itself on the labyrinthine world of healthcare benefits, and in discovery to analyze a factual record dense with complex insurance agreements, rebate calculation spreadsheets and data files, and technical discussions in emails, chats, and other sources about healthcare benefits. (Bauer Decl., ¶¶ 71-75.)

Lead Plaintiff’s Counsel not only identified and developed the theories of liability in an efficient and effective manner, it also did so through independent effort. Although they admitted certain control weaknesses, Defendants did not admit to their alleged false statements or issue any restatements. Nor did Lead Plaintiff’s Counsel “tag-along” to any government investigation. Lead Plaintiff’s Counsel’s independent and thorough prosecution in this difficult case further supports the Fee Application. *See In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 845 (E.D. Va. 2016) (“complexity of the litigation and the fact that the plaintiffs did not bring this case as a tag-along suit to a government investigation” justified “the substantial attorneys’ fees award”).

**4. The “Customary Fee” and Fee Awards in Similar Cases (*Barber Factors 5 and 12*)**

Lead Plaintiff’s Counsel’s Fee Application for 33% of the Settlement Fund is reasonable in light of the customary fees in this Circuit because “[i]n this jurisdiction,

contingent fees of one-third . . . are common.” *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05-CV-00187, 2007 WL 119157, at \*2 (M.D.N.C. Jan. 10, 2007); *see also Savani v. URS Pro. Sols. LLC*, 121 F. Supp. 3d 564, 572 (D.S.C. 2015) (explaining that “it is customary to charge one-third (33.3%) or more of any amount recovered for the client”).!

Accordingly, Courts in this Circuit have awarded fees of 33% or more in securities class action cases under the PSLRA. *See, e.g., In re 2U, Inc. Sec. Class Action*, No. 19-cv-3455, 2022 WL 22839218, at \*3 (D. Md. Dec. 9, 2022) (Chuang, J.) (awarding 33.4% in a \$37 million PSLRA settlement); *Plymouth Cnty. Ret. Sys. v. GTT Comm., Inc.*, No. 1:19-cv-00982, 2021 WL 1659848, at \*5 (E.D. Va. Apr. 23, 2021) (Hilton, J.) (awarding one-third of the settlement fund in a \$25 million PSLRA settlement); *McIntyre v. Chelsea Therapeutics International, Ltd.*, No. 12-cv-00213, ECF No. 146 (W.D.N.C. 2016) (Cogburn, J.) (awarding 33.3% in a \$5.5 million PSLRA settlement); *Gooden v. Smart Online*, No. 1:07-cv-00785, ECF No. 148 (M.D.N.C. 2015) (Osteen, J.) (awarding 33% in PSLRA settlement for \$1.09 million plus 1.5 million shares).

This Court has also awarded 33% or more in class action cases. *See, e.g., Alliance Ophthalmology, PLLC v. ECL Group, LLC*, No. 1:22-CV-296, 2024 WL 3203226 (M.D.N.C. June 27, 2024) (Eagles, C.J.) (finding request for one-third of common fund “reasonable and fair”); *In re Novant Health, Inc.*, No. 1:22-cv-0697, 2024 WL 3028443, at \*9 (M.D.N.C. June 17, 2024) (Eagles, C.J.) (finding request for one-third of common fund reasonable); *Reynolds v. Fidelity Investments*, No. 1:18-cv-423, 2020 WL 92092, at \*3 (M.D.N.C. Jan. 8, 2020) (Eagles, C.J.) (“And a one-third share is a reasonable expectation

where Class Counsel took on a risk of nonpayment even as they advanced significant costs to pursue the litigation”).

**5. The Preclusion of Other Opportunities and the Contingent Nature of the Fee (*Barber* Factors 4 and 6)<sup>6</sup>**

“In complex and multi-year class action cases, the risks of the litigation are immense and the risk of receiving little or no recovery is a major factor in awarding attorney’s fees.” *Savani v. URS Pro. Sols. LLC*, 121 F. Supp. 3d 564, 572 (D.S.C. 2015)

That is precisely the case here. Lead Plaintiff’s Counsel undertook representation of the Lead Plaintiff and the Settlement Class in this Litigation on a fully contingent basis. Lead Plaintiff’s Counsel did so knowing that the Litigation could last for years, provided no guarantee of any compensation, and would require the substantial investment of time that would otherwise have been devoted to other cases. (Bauer Decl., ¶ 82.) Lead Plaintiff’s Counsel also assumed the risk of advancing all costs and expenses necessary to successfully prosecute the Litigation with no guarantee of any reimbursement. (*Id.*)

And the risks were not insignificant. Litigating any case under the PSLRA’s exacting standards presents risks, and in fact nearly half of all securities class actions are dismissed within three years of filing. *See Cornerstone Research, Securities Class Action Filings – 2022 Year in Review*, available at <https://www.dwt.com/-/media/files/2023/03/securitiesclassactionfilings2022yearinreview.pdf?rev=7e1d5978789>

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<sup>6</sup> The *Barber* court referred to the sixth factor as “the attorney’s expectations at the outset of the litigation,” *Barber*, 577 F.2d at 266 n.28, but the *Johnson* court, which first articulated the relevant factors, described it as “[w]hether the fee is fixed or contingent,” *Johnson*, 488 F.2d at 718.

34c028b5c301a7bef3f2b&hash=C8B70DD2EB3F761A89843F5FB48B8EE1. Here, those risks were amplified. As explained in the Bauer Declaration, the Litigation faced real risks on the merits, including Defendants’ factual defenses and their challenges to the Class’s damages, as well as the risk that Bioventus’s precarious financial position would diminish the prospect of any cash recovery meaningfully larger than the proposed Settlement. (*Id.* ¶¶ 82-85.)

But by assuming the significant risk of no recovery at the expense of other opportunities, Lead Plaintiff’s Counsel “afford[ed] access to the courts that some plaintiffs would otherwise find difficult” and therefore “it may be necessary to provide a greater return than an hourly fee offers to induce lawyers to take on representation for which they might never be paid.” *Phillips*, 2016 WL 2636289, at \*6. Accordingly, “[t]he risk borne by Lead Counsel in this complex case supports a finding of reasonableness” particularly as the Fee Application seeks a *lesser* return than Lead Plaintiff’s Counsel normal hourly fees. *Id.*

**6. The Experience, Reputation, and Ability of Counsel (*Barber* Factor 9)**

Prosecuting and managing “a complex national class action requires unique legal skills and abilities . . . particularly securities fraud cases.” *Phillips*, 2016 WL 2636289, at \*5. BFA has brought its considerable experience, knowledge, and skills to successfully prosecuting this Litigation, as have Tin Fulton and Podolsky. (*See* Gagan Decl., ¶ 3; Podolsky Decl., ¶¶ 3-4).

As explained in the Bauer Declaration, BFA partners have litigated dozens of securities actions that have contributed to the recovery of more than \$11 billion for investors, including nearly \$2 billion since the founding of the firm in 2014. (Bauer Decl., ¶ 86.) Securities class actions that BFA has prosecuted and successfully resolved include a \$420 million recovery in *In re Teva Securities Litigation*, No. 17-cv-0558 (D. Conn.); a \$234 million recovery in *In re MF Global Holdings Securities Litigation*, 11-cv-07866-VM (S.D.N.Y.); a \$219 million recovery in *In re Genworth Financial Inc. Securities Litigation*, 14-cv-00682-JAG (E.D. Va.); a \$129 million recovery in *Police Retirement System of St. Louis v. Granite Construction Inc.*, No. 19-cv-04744 (N.D. Cal.); a \$120 million recovery in *Freedman v. Weatherford Int'l, Ltd.*, 12-cv-02121-LAK (S.D.N.Y.); and a \$21 million recovery in *Bilinsky v. Gatos Silver, Inc., et al.*, No. 1:22-cv-00453-PAB-KAS (D. Colo.). (*Id.*)

BFA also serves as lead counsel in a number of high-profile securities class action lawsuits pending in federal district courts throughout the country, including *Lozada v. TaskUs, Inc.*, No. 22-cv-01479 (S.D.N.Y.); *In re Talis Biomedical Securities Litigation*, No. 22-cv-00105 (N.D. Cal.); *Peters v. Twist Bioscience Corp.*, No. 22-cv08168 (N.D. Cal.); *Chow v. Enochian Biosciences Inc.*, No. 22-cv-01374 (C.D. Cal.); and *In re UiPath, Inc., Securities Litigation*, No. 1:24-cv-04702 (S.D.N.Y.). (*Id.* ¶ 87.)

Here, BFA's skill and sophistication was "fundamental to any success because Defendants were represented by equally sophisticated attorneys." *Phillips*, 2016 WL 2636289, at \*5. Indeed, Defendants' counsel, Latham & Watkins LLP, is one of the foremost litigation firms in the world, and, among other accolades, was named the Top

Litigation Department of the Year by the New York Law Journal in 2023. See <https://www.lw.com/en/news/top-litigation-department-of-the-year-honors-awarded-to-new-york-team>.

## 7. The Undesirability of the Case (*Barber* Factor 10)

Contingent representation in a class action case has often been recognized as “undesirable” due to the financial burdens on counsel and the risk of obtaining no recovery. *Millsap v. McDonnell Douglas Corp.*, No. 94-CV-633-H(M), 2003 WL 21277124, at \*12 (N.D. Okla. May 28, 2003) (“This case is also undesirable, in the way that all contingent fee cases are undesirable, because it produced no income, but has required significant expenditures, for nine year.”). In fact, Lead Plaintiff was the only institutional investor to seek appointment as a Lead Plaintiff, (*see* Bauer Decl., ¶ 5), in part because of the challenges and risks associated with the case. In that regard, this factor further supports the Fee Application.

### **B. The Reaction of the Lead Plaintiff and the Settlement Class Further Support the Fee Application**

The Settlement Class’s reaction further supports the Fee Application. As noted in Lead Plaintiff’s Declaration, it has reviewed and fully supports the Fee Application. (Bauer Decl., Ex 1, ¶¶ 9-11.) Further, the Claims Administrator, A.B. Data has to date delivered notice to over 26,000 potential Settlement Class Members, published notice in *The Wall Street Journal* and via *PR Newswire*, and posted the Notice to its website. (*Id.*, Ex. 5, ¶¶ 15-17.) The Notice specifically states that “Lead Plaintiff’s Counsel will ask the Court for attorneys’ fees not to exceed 33% of the Settlement Amount and expenses in an amount

not to exceed \$800,000, plus interest, to be paid from the Settlement Fund.” (ECF No. 148-2, at 4.) Thus far, no Settlement Class Member has objected to this fee request. (Bauer Decl., Ex 1, ¶ 23.)<sup>7</sup> “[T]he lack of objections supports finding the fee request reasonable.” *In re Neustar, Inc. Sec. Litig.*, No. 1:14-cv-885, 2015 WL 8484438, at \*7 (E.D. Va. Dec. 8, 2015).

### **III. LEAD PLAINTIFF’S COUNSEL’S EXPENSE APPLICATION IS REASONABLE**

Pursuant to Rule 23(h), “[c]ourts in the Fourth Circuit will allow reasonable, litigation-related expenses in addition to the fee award.” *In re Novant Health, Inc.*, No. 1:22-cv-0697, 2024 WL 3028443, at \*12 (M.D.N.C. June 17, 2024) (Eagles, C.J.); *see also In re MicroStrategy, Inc.*, 172 F. Supp. 2d at 791 (“There is no doubt that costs, if reasonable in nature and amount, may appropriately be reimbursed from the common fund.”).

Lead Plaintiff’s Counsel requests reimbursement of \$623,509 in reasonable litigation expenses incurred in connection with the prosecution of the Litigation. The largest expenses related to the retention of experts (\$291,533) and fees for litigation vendor support, such as data hosting and investigative services (\$191,758). (Bauer Decl., ¶¶ 90-95 & Ex. 6.) Other fees include, but are not limited to, counsel for former Bioventus employees, mediation costs, service and filing fees, and other routine expenses. These

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<sup>7</sup> The deadline for Settlement Class Members to object is November 22, 2024. (ECF No. 150, at 18.) If any objections are received by then, Lead Plaintiff’s Counsel will address them in its reply due on December 6, 2024. (*Id.*)



costs and expenses are explained in more detail in the Bauer Declaration. (Bauer Decl., ¶¶ 90-95 & Ex. 6.)

Notably, Lead Plaintiff has reviewed and supports the Expense Application. (Bauer Decl., Ex 1, ¶¶ 12-13.) In addition, the Expense Application is over \$160,000 less than what was indicated in the Notice, which states that Lead Plaintiff's Counsel will seek "expenses in an amount not to exceed \$800,000," (ECF No. 148-2, at 4), and to which no Settlement Class Member has objected. *See Voulgaris v. Array Biopharma Inc.*, No. 17-cv-02789-KLM, 2021 WL 6331178, at \*15 (D. Colo. Dec. 3, 2021), *aff'd*, 60 F.4th 1259 (10th Cir. 2023) ("[s]ignificantly, the requested amount . . . is notably less than the amount stated in the notice").

#### **IV. LEAD PLAINTIFF'S COSTS AND EXPENSES ARE REASONABLE**

Finally, pursuant to 15 U.S.C. §78u-4(a)(4), Lead Plaintiff seeks an "award[] of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" in the amount of \$11,813.94. The requested award reflects the time that Lead Plaintiff devoted to overseeing this Litigation at reasonable hourly rates, including the time spent overseeing Lead Plaintiff's Counsel; reviewing major motions and pleadings; assisting in the collection and preservation of potentially relevant data; responding to discovery requests; preparing and sitting for a Rule 30(b)(6) deposition; and preparing for and participating in the mediation. (Bauer Decl., ¶ 98 & Ex. 1; *see also* ECF No. 142, ¶ 5.)

Lead Plaintiff's request is reasonable given its active role in the Litigation and the risks it assumed as the only institutional investor willing to serve as lead plaintiff. *See*,

*e.g., In re 2U, Inc. Sec. Class Action*, No. 19-cv-3455, 2022 WL 22839218, at \*3 (D. Md. Dec. 9, 2022) (Chuang, J.) (granting lead plaintiff \$30,000 in costs and expenses); *Sinnathurai v. Novavax, Inc.*, No. 8:21-cv-02910, ECF No. 149 (D. Md. May 24, 2024) (granting two lead plaintiffs \$30,000 each in costs and expenses); *Knurr v. Orbital ATK, Inc.*, No. 1:16-CV-01031-TSE-MSN, 2019 WL 3317976, at \*2 (E.D. Va. June 7, 2019) (granting lead plaintiff Wayne County Employees' Retirement System \$9,397.26 for "reasonable costs and expenses directly relating to their representation of the class").

## V. CONCLUSION

For the foregoing reasons, Lead Plaintiff's Counsel respectfully requests that the Court: (1) grant the Fee Application for \$5,032,500, or 33% of the \$15.25 million Settlement Fund, plus interest at the same rate earned by the Settlement Fund; (2) grant the Expense Application for \$623,509 in reasonable litigation expenses incurred in connection with the prosecution of the Litigation, plus interest at the same rate earned by the Settlement Fund; and (3) grant Lead Plaintiff its reasonable costs and expenses of \$11,813.94.

DATED: November 8, 2024

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH LR 7.3(d)(1)**

Pursuant to Local Rule 7.3(d)(1) of the Rules of Practice and Procedure of the United States District Court for the Middle District of North Carolina, counsel for Lead Plaintiff Wayne County Employees' Retirement System certify that the foregoing brief, which was prepared using Times New Roman 13-point proportional font, is 5,357 words.

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