IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT AND APPROVAL OF THE PLAN OF ALLOCATION

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I. INTRODUCTION

The parties have agreed to a proposed Settlement that would resolve this securities class action in exchange for a cash payment of $15,250,000—an outstanding result given Bioventus's financial constraints, the maximum theoretical damages, and the risks and delay of continued litigation.[1] On August 13, 2024, the Court preliminarily approved the Settlement as fair and reasonable, and preliminarily certified the Settlement Class for settlement purposes. (ECF No. 150.) Since then, nothing has occurred to change the Court's conclusions.

Accordingly, Lead Plaintiff Wayne County Employees Retirement System respectfully requests that the Court (i) finally approve the settlement pursuant to Fed. R. Civ. P. 23(e)(2), (ii) finally certify the Settlement Class for purposes of the settlement, (iii) finally approve the Plan of Allocation, and (iv) enter the Final Judgment Approving Settlement, substantially in the form attached to the Stipulation as Exhibit B (ECF No. 137-7.)

The Settlement should be finally approved because it "is fair, reasonable, and adequate." Rule 23(e)(2). The Court has already ruled that it was the result of informed, extensive, arm's length negotiations, and the result is outstanding – a recovery of 10.8%-27% of estimated damages, an amount which eclipses the 4.5–4.8% average recovery in

[1] 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.

Section 10(b) cases between 2014-2023, and which is well above other securities settlements approved in this Circuit. (*See infra* Sec. III.C.) The result is even more outstanding when measured against the real risk of recovering less (or nothing at all). Indeed, the Defendants' merits defenses and Bioventus's financial condition—with limited cash on hand—heightened the risk that Bioventus could not fund a meaningfully larger resolution, much less satisfy any hypothetical judgment Lead Plaintiff might eventually obtain.

The Court should also finalize the preliminary certification of the Settlement Class. With an average of 53.5 million shares of Bioventus Class A common stock outstanding during the Class Period, Rule 23(a)(1)'s numerosity requirement is met, and this action presents common class-wide questions, including falsity, materiality, scienter, and damages, satisfying Rule 23(a)(2). Typicality and adequacy under Rules 23(a)(3) and (4) are present because (i) Lead Plaintiff's interests are aligned with all members of the Settlement Class, who purchased Bioventus Class A common stock at prices affected by alleged misstatements and omissions, and (ii) Lead Plaintiff's Counsel are highly experienced in complex securities litigation and have vigorously litigated this action to achieve the best possible recovery.

Finally, the Plan of Allocation should be approved because it applies standard methodologies and provides for distribution of the Net Settlement Fund among Authorized Claimants on a *pro rata* basis based on a formula tied to liability and damages.

Notably, after the Claims Administrator commenced notice according to the Court-ordered plan, including by mailing over 26,000 notices directly to potential Settlement Class Members and publishing the notice in news outlets and on the settlement website, the Administrator has thus far received no objections to or requests for exclusion from the settlement. (Bauer Decl., Ex. 5, "A.B. Data Decl.," ¶¶ 15-17, 22-23.) This strongly supports approval.

Lead Plaintiff thus respectfully requests that the Court (i) grant final approval of the settlement pursuant to Fed. R. Civ. P. 23(e)(2), (ii) certify the Settlement Class for purposes of the settlement, (iii) finally approve the Plan of Allocation, and (iv) enter the Final Judgment Approving Settlement, substantially in the form attached to the Stipulation as Exhibit B (ECF No. 137-7).

II. PRELIMINARY APPROVAL AND NOTICE

On July 15, 2024, Lead Plaintiff filed for preliminary approval of the settlement pursuant to Fed. R. Civ. P. 23(e)(1). (ECF Nos. 137-139.) On July 31 and August 2, 2024, the Court requested additional information about the preliminary approval motion, including about Lead Plaintiff's involvement in the settlement negotiations, the proposed plan of allocation, Defendants' available insurance coverage, Lead Plaintiff's proposed claim form, and the Parties' releases. (Bauer Decl., ¶ 52-54.)

On August 5, 2024, Lead Plaintiff, through BFA, provided additional information as requested by the Court, including, but not limited to, (i) a declaration from Lead Plaintiff's Deputy Executive Director, attesting to Lead Plaintiff's oversight of the litigation, involvement in the settlement negotiations, and approval of the Settlement terms;

(ii) a declaration from Chad Coffman, Lead Plaintiff's damages expert, concerning the design and nature of the proposed plan of allocation; (iii) additional information about analogous plans of allocation and settlement papers submitted and approved in other matters; (iv) information about available insurance coverage; and (v) proposed edits to the claim form, Notice, and Stipulation. (*Id.* ¶ 55; ECF Nos. 141-144.)

On August 7, 2024, the Court held a hearing on Plaintiff's motion for preliminary approval. On August 13, 2024, the Court issued an Order Preliminarily Approving Settlement and Providing for Class Notice, (ECF No. 150) (the "Preliminary Approval Order"), in which it, among other things:

- Preliminarily approved the settlement, finding that (i) it was the result of informed, extensive, arm's length negotiations, (ii) eliminates risks to the Parties of continued litigation, (ii) falls within a range of reasonableness, (iii) has no obvious deficiencies, (iv) treats Settlement Class Members equitably under the proposed Plan of Allocation, and (v) warrants Notice to the Settlement Class. (*Id*. ¶¶ 1-2.)
- Preliminarily certified the Settlement Class for purposes of effectuating the Settlement only, preliminarily finding, among other things, that (i) the Settlement Class is so numerous that joinder is impracticable, (ii) there are common questions of law and fact that predominate over any individual questions, (iii) Lead Plaintiff's claims are typical, (iv) Lead Plaintiff and Lead Plaintiff's Counsel have fairly and adequately represented the

Settlement Class, and (v) a class action is superior to other available methods. (*Id*. ¶¶ 5-6.)

- Approved the form and content of Lead Plaintiff's proposed notice papers, finding that they, among other things, constitute the best notice practicable under the circumstances, are reasonably calculated to apprise Settlement Class Members of the pertinent characteristics of the settlement, and comply with all applicable legal requirements. (*Id*. ¶ 7.)
- Approved the retention of the Claims Administrator and approved Lead Plaintiff's proposed notice plan. (*Id*. ¶ 8.)
- Set a schedule for administration of the settlement. (*Id*. at 18.)

The Claims Administrator, A.B. Data, subsequently commenced notice to Settlement Class Members. Specifically, on August 27, 2024, A.B. Data published the Summary Notice in *The Wall Street Journal* and *PR Newswire*. (A.B. Data Decl., ¶ 16.) In addition, on September 3, 2024, A.B. Data commenced mailing of the Notice to Settlement Class Members who can be identified with reasonable effort and brokers and nominees on A.B. Data's proprietary list. (*Id*. ¶¶ 7-15.) A.B. Data also posted all relevant notice papers to the settlement website: https://bioventussecuritieslitigation.com. (*Id*. ¶ 17.)

The deadline for Settlement Class Members to exclude themselves from the settlement was October 18, 2024. (ECF No. 150, at 18.) Neither A.B. Data nor Settlement Class Counsel received any requests for exclusion. (Bauer Decl., ¶ 59; A.B. Data Decl., ¶ 22.) In addition, the deadline for Settlement Class Members to object to

any aspect of the settlement is November 22, 2024. (ECF No. 150, at 18.) To date, neither A.B. Data nor Settlement Class Counsel have received any objections, (Bauer Decl., ¶ 59; A.B. Data Decl., ¶ 23), nor have any been filed to the public docket.[2] And to date, A.B. Data has received 463 claims. (A.B. Data Decl., ¶ 24.)

III. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

A. Legal Standard

"It has long been clear that the law favors settlement." *United States v. Manning Coal Corp*., 977 F.2d 117, 120 (4th Cir. 1992). "That preference is especially true in class actions" like this one. *All. Ophthalmology, PLLC v. ECL Grp., LLC*, No. 1:22-cv-296, 2024 WL 3203226, at *10 (M.D.N.C. June 27, 2024) (Eagles, C.J.).

Rule 23(e)(2) provides that a Court may approve a class settlement only if it "is fair, reasonable, and adequate." "In applying this standard, the Fourth Circuit has bifurcated the analysis into consideration of [1] fairness, which focuses on whether the proposed settlement was negotiated at arm's length, and [2] adequacy, which focuses on whether the consideration provided the class members is sufficient." *Glymph-Dozier v. Grapevine of N. Carolina, Inc.*, No. 1:21-cv-748, 2023 WL 3020877, at *4 (M.D.N.C. Apr. 20, 2023) (Eagles, C.J.)

Rule 23(e)(2) further requires consideration of whether:

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the

[2] Should Settlement Class Members lodge any objections between now and November 22, Lead Plaintiff will address them in its reply papers, which are due to be filed with the Court on December 6, 2024.

> class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

These factors enumerated in the 2018 amendments to Rule 23 "almost completely overlap" with the Fourth Circuit's factors for assessing class action settlements, and therefore the outcome of the Court's analysis will typically be the same under either set of factors. *In re Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Pracs. & Prod. Liab. Litig.*, 952 F.3d 471, 484 n.8 (4th Cir. 2020). Here, the settlement satisfies all the Fourth Circuit and Rule 23(e) requirements.

B. The Settlement is Fair Under Fourth Circuit Standards

The fairness analysis aims "to ensure that a settlement is reached as a result of good faith bargaining at arm's length, without collusion." *All. Ophthalmology, PLLC* 2024 WL 3203226, at *10 (*quoting Berry v. Schulman*, 807 F.3d 600, 614 (4th Cir. 2015)). Courts apply a four-factor test to determine the fairness of a proposed settlement: "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area [of the law at issue]." *Id.* (*quoting In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158–59 (4th Cir. 1991)). All these factors support approval of the settlement.

To begin, the proposed Settlement was "reached with the assistance of a respected and experienced mediator" which by itself supports approval. *In re LandAmerica 1031*

Exch. Servs., Inc. Internal Revenue Serv. § 1031 Tax Deferred Exch. Litig., 2012 WL 13124593, at *3 (D.S.C. July 12, 2012); *see also In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 352 (E.D.N.Y. 2000) ("Most significantly, the settlements were reached only after arduous settlement discussions…with the assistance of a highly experienced neutral mediator[.]"). Specifically, the Parties mediated before Jed Melnick of JAMS, who oversaw a hard-fought, arm's length negotiation that resulted in a mediator's recommendation to resolve the litigation under the terms presented here for approval. (Bauer Decl., ¶ 50; Melnick Decl., ¶¶ 7-9.)

What's more, as explained more fully in the Bauer Declaration, the Parties had been vigorously litigating the case for a year at the time of the settlement. Among other things, Lead Plaintiff had pursued extensive document discovery from both Defendants and relevant third parties, ultimately obtaining 70,000 documents totaling over 665,000 pages. (Bauer Decl., ¶¶ 23-28.) Lead Plaintiff had also pursued written discovery, was preparing to take depositions at the time of the settlement, had litigated several discovery issues before the Court, and had fully briefed a motion for class certification. (*Id*. ¶¶ 22-40.)

In short, the settlement is "the result of informed, extensive, arm's length and non-collusive negotiations between experienced counsel, including mediation under the direction of an experienced mediator," (ECF No. 150 ¶ 2), as this Court has already found, and should be approved.

C. The Settlement is Adequate Under Fourth Circuit Standards

To assess the adequacy of a proposed settlement, courts consider: "(1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof

or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement." *All. Ophthalmology, PLLC v. ECL Grp., LLC*, No. 1:22-CV-296, 2024 WL 3203226, at *11 (M.D.N.C. June 27, 2024). Typically, "[t]he most important factors in this analysis are the relative strength of the plaintiffs' claims on the merits and the existence of any difficulties of proof or strong defenses." *Id*. Put simply, courts "weigh[] the likelihood of the plaintiff's recovery on the merits against the amount offered in settlement." *In re NeuStar Inc. Sec. Litig*., 2015 WL 5674798, at *11 (E.D. Va. Sept. 23, 2015).

Here, the proposed Settlement provides for a cash recovery of $15.25 million—an outstanding result for the Settlement Class given the risks and delay of continued litigation. The Settlement 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 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. It also exceeds the 3.9% average recoveries in both Fourth Circuit and pharmaceutical-related class action settlements during the same period. *Id*.

The recovery is also well above recoveries previously approved in this Circuit. *See, e.g., Sinnauthurai v. Novavax*, No. 8:21-cv-02910, ECF Nos. 132, 150 (D. Md. 2024) (approving settlement representing 5.12% of estimated damages); *Boger v. Citrix Sys., Inc*., No. 19-cv-01234-LKG, 2023 WL 3763974, at *11 & n. 7 (D. Md. June 1, 2023) (approving settlement representing 8.8% of maximum potential damages because "it is well settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery"); *Ollila v. Babcock & Wilcox Enterprises, Inc*., No. 3:17-cv-00109, ECF Nos. 84, 90 (W.D.N.C. 2019) (approving settlement representing 4.8-6.9% of estimated damages).

The settlement appears even greater in light of the significant risks of continued litigation. On the merits, although Lead Plaintiff and Lead Counsel believe that the claims asserted are meritorious, Defendants denied that they made any false and misleading statements and contend that the reversals recorded in 3Q22 were the result of "surprise" invoices that Bioventus in good faith did not anticipate; that Bioventus has never issued a restatement concerning its alleged accounting misstatements; and that Bioventus's internal controls weaknesses were limited to 3Q22, not the entirety of the Class Period. These are meaningful factual defenses. Defendants would also likely have challenged the Class's damages. Specifically, Defendants were likely to argue that the corrective disclosures that caused Bioventus's stock drops were comprehensive and addressed issues that were not reflected in Defendants' alleged misstatements. As a result, Defendants could have argued that the Class's damages were significantly lower than $140 million. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342–43 (2005) (to establish loss causation, plaintiffs must

disaggregate the losses caused by the corrective disclosures from those caused by other factors).

Even if Lead Plaintiff prevailed on the merits, Bioventus's financial position greatly diminishes the prospect of any cash recovery meaningfully larger than the proposed Settlement. Prior to the Settlement, Bioventus had reported that it had a cash balance of $25 million and over $355 million in outstanding long-term debt as of March 30, 2024.[3] That cash balance had decreased significantly from $36 million as of December 31, 2023. Bioventus's diminishing cash reserves presented a serious risk that the Class could not recover more than the $15.25 million achieved in the proposed Settlement.

Finally, the inherent delay in obtaining and collecting any judgment is also relevant. If the litigation had continued, Lead Plaintiff would have had to complete discovery, exchange expert reports, prevail at summary judgment, win at trial, and win the appeals that would likely follow before any funds would be distributed to the Class. These developments could deprive the Class of any recovery for years, magnifying the risk that Bioventus's financial condition could further decline over the intervening period.

D. The Settlement Satisfies the Additional Rule 23(e)(2) Factors

First, as the Court has preliminarily found, "Lead Plaintiff and Lead Plaintiff's Counsel have fairly and adequately represented and protected the interests of all Settlement Class Members," (ECF No. 150 ¶ 6), satisfying Rule 23(e)(2)(A). Indeed, Lead Plaintiff has no "interest antagonistic to the rest of the class," *Donaldson v. Primary*

[3] *See* Bioventus Form 10-Q, dated May 7, 2024, available at https://ir.bioventus.com/static-files/b3d3dfdf-e95c-4682-96df-d8a83ae6a919.

Residential Mortg., Inc., 2021 WL 2187013, at *6 (D. Md. May 28, 2021), because its interest in obtaining the largest possible recovery is fully aligned with the rest of the Settlement Class. Likewise, Lead Plaintiff's Counsel "is qualified, experienced and generally able to conduct the proposed litigation," *id.*, as proven by counsel's history of successful securities litigation and its robust efforts to litigate this complex Litigation and secure this outstanding settlement. (*See generally* Bauer Decl., ¶¶ 22-50, 86-87.)

Second, as discussed above, and as the Court has already preliminarily found, the settlement was negotiated at arm's-length, satisfying Rule 23(a)(2)(B). (ECF No. 150 ¶ 6; *see supra* Sec. III.B.)

Third, the relief sought is adequate under Rule 23(e)(2)(C).

Rule 23(e)(2)(C)(i) is satisfied because the proposed settlement provides adequate relief in light of the costs, risks, and delay of trial, as discussed above. (*See supra* Section III.C.)

Rule 23(e)(2)(C)(ii) is satisfied because the proposed method of distributing relief to the class, including the method of processing class-member claims, is fair and adequate. As the Court previously concluded, the form and content of the Notice and accompanying papers constitute the best notice practicable under the circumstances and are reasonably calculated to describe the terms and effect of the Settlement and to apprise Settlement Class Members of their rights. (ECF No. 150 ¶ 7.) A.B. Data has issued notice in accordance with the steps approved by the Court. (*See id.* ¶ 8; *see supra* Sec. II.)

Rule 23(e)(2)(C)(iii), which considers the terms of the proposed award of attorneys' fees, is also satisfied. Lead Plaintiff's Counsel request for attorneys' fees and expenses

were disclosed in the Notice, are subject to approval by the Court separate and apart from the approval of the Settlement, and are discussed in detail in the separate motion filed herewith.

Rule 23(e)(2)(C)(iv) is satisfied because Lead Plaintiff identified a confidential Supplemental Agreement providing specified options to terminate the settlement if persons who otherwise would be Settlement Class Members, and timely choose to exclude themselves from the Settlement Class, purchased more than a certain number of shares of Bioventus Class A common stock. (Stipulation ¶7.7.) This Supplemental Agreement was provided to the Court for review under seal (*see* ECF No. 147), and the Court has already determined that it "is standard and has no negative impact on the fairness of the Settlement." (ECF No. 150 ¶ 2.)

Fourth, and finally, the Plan of Allocation treats Settlement Class Members equitably under Rule 23(e)(2)(D), as explained more fully below. (*See infra* Sec. V.)

IV. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

As noted above, the Court has preliminary certified the Settlement Class for purposes of the Settlement. (*See supra* Sec. II; *see also* ECF No. 150 ¶¶ 5-6.) Nothing since then has cast doubt on the propriety of class certification for settlement purposes, and no objections to certification have been received. (Bauer Decl., ¶ 59; A.B. Data Decl., ¶ 23.) For the reasons stated in the Preliminary Approval Order (*id.*), and in Lead Plaintiff's Motion for Preliminary Approval (ECF No. 138, at 18-21), Lead Plaintiff respectfully requests that the Court grant final certification of the Settlement Class under Rules 23(a) and (b)(3). In short:

A. Numerosity – Rule 23(a)(1)

The Settlement Class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Several thousand persons 'is so numerous that joinder of all members is impracticable.'" *Seaman v. Duke Univ.*, 2018 WL 671239, at *9 (M.D.N.C. Feb. 1, 2018) (Eagles, J.) (citing *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 183 (4th Cir. 1993)). Here, Bioventus Class A common stock was actively traded on the NASDAQ national exchange, with between 11 million and 28 million shares publicly traded and an average weekly trading volume of 1.18 million shares. (ECF No. 99-1, Coffman Report ¶¶27, 30.) Accordingly, joinder of this vast number of investors would be impractical, and numerosity is satisfied. *See, e.g.*, *In re Mills Corp. Sec. Litig.*, 257 F.R.D. 101, 105 (E.D. Va. 2009) (defendant had "millions of shares outstanding").

B. Commonality – Rule 23(a)(2)

Rule 23(a)(2) is satisfied because this action presents "questions of law or fact common to" the Settlement Class. "In general, members of a proposed class in a securities case are especially likely to share common claims and defenses." *Mills Corp.*, 257 F.R.D. at 105 (cleaned up). That is certainly the case here, where the common questions include, but are not limited to: whether Defendants violated the federal securities laws; whether Defendants made any untrue statements of material fact or material omissions; whether the Defendants acted with scienter; whether the price of Bioventus Class A common stock was artificially inflated; whether reliance may be presumed under the fraud-on-the-market doctrine; and whether Settlement Class members suffered damages.

C. Typicality – Rule 23(a)(3)

Rule 23(a)(3) is satisfied because Lead Plaintiff's claims "are typical of the claims" of the Settlement Class. Here, like all other members of the Settlement Class, Lead Plaintiff purchased or acquired Bioventus Class A common stock and asserts the same claims under the Exchange Act. *See In re Under Armour Sec. Litig.*, 631 F. Supp. 3d 285, 302 (D. Md. 2022) (typicality met where class representative "possess[es] the same securities fraud claims as the class").

D. Adequacy – Rule 23(a)(4)

Rule 23(a)(4)'s "adequacy" requirement is met when the proposed class representative "will fairly and adequately protect the interests of the class." Lead Plaintiff and Lead Plaintiff's Counsel easily meet this standard for the reasons set forth above. (*See supra* Sec. III.D.)

E. Predominance and Superiority – Rule 23(b)(3)

As is typical in securities class actions, "[p]redominance is a test readily met in certain cases alleging . . . securities fraud," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997), as is "the Superiority Requirement of Rule 23(b)(3) because the alternatives are either no recourse for thousands of stockholders or a multiplicity and scattering of suits with the inefficient administration of litigation which follows in its wake." *Deluca v. Instadose Pharma Corp.*, 2023 WL 5489032, at *9 (E.D. Va. Aug. 24, 2023).

The same is true here. Indeed, the Court has already concluded that "a class action is superior to other available methods for the fair and efficient adjudication of the

controversy, considering that: the claims of Settlement Class Members in the Litigation are substantially similar and would, if tried, involve substantially identical proofs and may therefore be efficiently litigated and resolved on an aggregate basis as a class action; the amounts of the claims of many of the Settlement Class Members are too small to justify the expense of individual actions; and it does not appear that there is significant interest among Settlement Class Members in individually controlling the litigation of their claims." (*See* ECF No. 150 ¶ 6.)

V. THE PLAN OF ALLOCATION SHOULD BE APPROVED

Like the settlement, the plan of allocation of settlement proceeds in a class action must be fair and adequate. *See In re Neustar, Inc. Sec. Litig*., No. 14cv885, 2015 WL 8484438, at *5 (E.D. Va. Dec. 8, 2015) (*citing In re MicroStrategy, Inc. Sec. Litig*., 148 F. Supp. 2d 654, 668 (E.D. Va. 2001)). In evaluating a proposed allocation plan, courts give considerable weight to the opinion of experienced class counsel. *See Mills*, 265 F.R.D. at 258 ("given that qualified counsel endorses the proposed allocation, the allocation need only have a reasonable and rational basis").

Here, the Plan of Allocation, which was developed in consultation with Lead Plaintiff's damages expert and is set forth in the Long Form Notice (ECF No. 148-2, at 29 of 37), provides for distribution of the Net Settlement Fund among Authorized Claimants on a *pro rata* basis based on a formula tied to liability and damages.

As explained more fully in the Declaration of Chad Coffman, dated August 5, 2024 (ECF No. 143) (the "Coffman Declaration"), the Plan of Allocation was designed using industry standard methodologies consistent with the requirements of the Securities

Exchange Act and the Private Securities Litigation Reform Act to determine how Settlement Class Members' Recognized Loss Amounts will be calculated, and those methodologies were applied in a consistent manner across the duration of the Class Period. Specifically, Mr. Coffman used an "event study" to establish a causal connection between the corrective disclosures and movements in Bioventus's Class A common stock. (Coffman Decl., ¶ 7.) He then estimated artificial inflation using the standard "constant dollar" method, which assumes that the amount of artificial stock inflation that dissipated on each alleged corrective disclosure event was present in the stock price going back to the beginning of the Class Period. (*Id.*, ¶ 9.) He then used the artificial inflation per share as an input to the standard and well-settled "out-of-pocket" damages formula, which specifies that damages are equal to (i) the artificial inflation per share at the time of purchase minus (ii) the artificial inflation per share at the time of sale, provided Class Members held the security through at least one corrective disclosure. (*Id.*, ¶ 10.)

This methodology is reflected in the proposed Plan of Allocation and is typical of Plans of Allocation in securities class actions alleging violations of Section 10(b), including those approved in other cases within the Fourth Circuit. *See, e.g.*, *In re James River Group Holdings, LTD. Securities Litigation*, No. 3:21-cv-444-DJN (E.D. Va.) (ECF No. 144, Declaration of George N. Bauer, dated August 5, 2024, Ex. 1); *Sinnathurai v. Novavax, Inc., et al.*, No. 8:21-cv-02910-TDC (D. Md.) (*Id.*, Ex. 2); *KBC Asset Management NV, et al. v. 3D Systems Corp.*, No. 15-cv-02393-MGL (D.S.C.) (*Id.*, Ex. 3); *In re Genworth Financial Inc. Securities Litigation*, No. 14-cv-00682 (E.D. Va.) (*Id.*, Ex. 4); *In re Computer Sciences Corp. Securities Litigation*, No. 11-cv-00610 (E.D. Va.) (*Id.*, Ex. 5)

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests that the Court (i) grant final approval of the settlement pursuant to Fed. R. Civ. P. 23(e)(2), (ii) certify the Settlement Class for purposes of the settlement, (iii) finally approve the Plan of Allocation, and (iv) enter the Final Judgment Approving Settlement, substantially in the form attached to the Stipulation as Exhibit B (ECF No. 137-7).

Dated: November 8, 2024

By: */s/ Joseph A. Fonti*

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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 4,516 words.

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