

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

DAVID CLARK, *et al.*,
Plaintiffs,

v.

DUKE UNIVERSITY, *et al.*,
Defendants.

KATHI LUCAS, *et al.*,
Plaintiffs,

v.

DUKE UNIVERSITY,
Defendant.

Case No. 1:16-CV-01044-CCE-LPA

Case No. 1:18-CV-00722-CCE-LPA

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF CLASS SETTLEMENT**

Plaintiffs brought two separate but related actions alleging that Defendant Duke University and other individually named defendants breached their duties under the Employee Retirement Income Security Act of 1974 (ERISA) by causing the Duke University Faculty and Staff Retirement Plan (Plan) to pay unreasonable administrative expenses, maintaining underperforming investment options, engaging in prohibited transactions, and failing to remedy the breaches of other Plan fiduciaries.

After protracted litigation, extensive discovery and almost six months of arm's-length negotiations with the assistance of a national mediator, the Settling Parties reached a Settlement that provides meaningful monetary and significant non-monetary relief to each Class Member. In light of the litigation risks further prosecution of the actions would inevitably entail, Plaintiffs request that the Court: (1) preliminarily approve the proposed Settlement; (2) approve the proposed form and method of notice to the

Settlement Class; and (3) schedule a hearing at which the Court will consider final approval of the Settlement.

BACKGROUND

I. The claims in the *Clark* and *Lucas*

Plaintiffs filed *Clark v. Duke University*, No. 16-144, on August 10, 2016. *Clark* Doc. 1; *Clark* Doc. 72 (Second Am. Complaint). Plaintiffs claim: (1) the Duke Defendants breached their duties under ERISA by causing the Duke University 403(b) Plan to incur unreasonable recordkeeping expenses; (2) the Duke Defendants committed prohibited transactions under ERISA by allowing four vendors to provide recordkeeping services to the Plan and receive Plan assets from which they retained unreasonable compensation; and (3) the Duke Defendants failed to prudently monitor Plan investment options resulting in the use of high-cost and low-performing funds compared to alternatives available to the Plan. *Clark* Doc. 72 (Counts III–V); *Clark* Doc. 48 (dismissing Counts I–II, VI, and VIII); *Clark* Doc. 111 (Plaintiffs’ Outline Of Their Claims And Contentions). In each Count, Plaintiffs allege the Duke Defendants failed to remedy the breaches of other Plan fiduciaries.

On May 3, 2018, Plaintiffs moved to amend their Second Amended Complaint to add Count IX asserting claims of prohibited transactions and fiduciary breaches with respect to Duke University using Plan assets to pay for the salaries and fringe benefits of certain Duke University employees. *Clark* Doc. 99. The Court denied Plaintiffs leave to file their Third Amended Complaint on June 11, 2018. *Clark* Doc. 107. Plaintiffs filed *Lucas v.*

Duke University, No. 18-722, on August 20, 2018, against Duke University asserting those prohibited transactions and breaches of fiduciary duty claims that the Court denied Plaintiffs leave to pursue in *Clark*. *Lucas* Doc. 1.

II. The status of the litigation

Since the filing of *Clark*, the parties engaged in over two years of hard-fought litigation that included the production of over 762,000 pages of documents, the designation and deposition of 8 experts, and 20 fact depositions. On May 11, 2017, the Court denied and granted in part the Duke Defendants' motion to dismiss. *Clark* Doc. 48. Over the Duke Defendants' opposition, the Court granted class certification on April 13, 2018. *Clark* Doc. 96. On October 8, 2018, the Duke Defendants filed their motion to exclude the testimony of two of Plaintiffs' experts. *Clark* Doc. 115. And on November 16, 2018, the Duke Defendants filed their motion for summary judgment. *Clark* Doc. 138. At the time the Settling Parties notified the Court that they reached a settlement in principle, the Duke Defendants' motion to strike and motion for summary judgment were pending.

Although Plaintiffs obtained formal discovery related to their claims in *Clark*, *see Clark* Doc. 99, the *Lucas* litigation had yet to proceed to discovery. However, the discovery obtained in *Clark* led to the discovery of the claims asserted in *Lucas*. *See id.* On September 25, 2018, Duke University filed its motion to dismiss. *Lucas* Doc. 9. The motion was fully briefed on November 9, 2018, *see Lucas* Doc. 17, and remained pending at the time the Settling Parties reached the Settlement.

III. The terms of the Proposed Settlement

In exchange for releases and for the dismissal of the actions and for entry of a judgment as provided for in the Settlement, the Duke Defendants will make available to Class Members the benefits described below.

A. Monetary Relief

The Duke Defendants will deposit \$10,650,000 in an interest-bearing settlement account (the “Gross Settlement Fund”). The Gross Settlement Fund will be used to pay the recoveries to Class Members, as well as Class Counsel’s attorneys’ fees and expenses, Administrative Expenses of the Settlement, and the Class Representatives’ Compensation as described in the Settlement. All amounts deposited in the Gross Settlement Fund will be distributed in accordance the terms of the Settlement. No residual monies remaining in the Gross Settlement Fund will be reverted back to Duke University or any individually named defendant.

The majority of Class Members will automatically receive their distributions directly into their tax-deferred retirement account. Those who already left the Plan and no longer have an active account will be given the option to receive their distributions in the form of a check made out to them individually or as a roll-over into another tax-deferred account. As a result, most Class Members will receive their distributions tax-deferred, further enhancing the significant monetary recovery.

B. Additional Terms

In addition to the monetary component of the Settlement, the Settling Parties agreed

to certain non-monetary terms that provide additional value to the Plan and Class Members above and beyond the monetary recovery.

These additional terms include: (1) within 30 calendar days after the end of the first and second year of the Settlement Period, Duke will provide to Class Counsel a list of the Plan's investment options and fees, and a copy of the Plan's Investment Policy Statement (if any); (2) no later than January 1, 2020, Duke shall communicate, in writing, with current Plan participants and inform them of the investment options available in the new lineup, including the annuity option, and provide a link to a webpage containing the fees and performance information for the new investment options and the contact information for the individual or entity that can facilitate a fund transfer for participants who seek to transfer their investments in frozen annuity accounts to another fund in the Plan; (3) during the third year of the Settlement Period, the Plan's fiduciaries shall retain an independent consultant to provide a recommendation regarding whether the Plan fiduciaries should issue Requests for Proposals for recordkeeping and administrative services provided to the Plan; (4) during the Settlement Period, in considering Plan investment options, the Plan's fiduciaries shall consider, among other factors: (a) the cost of different share classes available for any particular mutual fund considered for inclusion in the Plan as well as other criteria applicable to different share classes; and (b) the availability of revenue sharing rebates on any share class available for any investment option considered for inclusion in the Plan; (c) other factors that the Plan fiduciaries deem appropriate under the circumstances; and (5) during the Settlement Period, Duke

shall not cause Plan assets or assets held in the Plan's ERISA revenue credit or reimbursement account to be used to pay salaries and fringe benefits and other expenses incurred by Duke for services performed by Duke employees.

C. Notice and Class Representatives' Compensation

The costs to administer the Settlement, including those associated with providing notice to Class Members, will be paid from the Gross Settlement Amount. Incentive payments in an amount approved by the Court also will be paid from the Gross Settlement Amount.

For the costs associated with the Independent Fiduciary and the Settlement Administrator, Plaintiffs received proposals from candidates to provide these services. After consideration of the proposed fees and the quality of the services to be provided by each candidate, the Newport Trust Company was selected as the Independent Fiduciary at a cost of \$30,000, and Analytics LLC was selected as the Settlement Administrator at an estimated cost of \$142,120 to provide notices electronically for those Class Members for whom a current e-mail address is available.¹

For Class Representatives Clark and Mehen, Plaintiffs will seek \$25,000 for each of them, and for Class Representatives Kathi Lucas, Jorge Lopez, and Keith A. Feather, Plaintiffs will seek \$30,000 for each of them because these individuals were also class representatives in *Lucas*. This amount is consistent with precedent recognizing the value

¹ The proposed fees for the Settlement Administrator to provide notice to Class Members and other related services to facilitate the settlement is estimated based on information presently available to the parties and is subject to change once the number of Class Members and those with available e-mail addresses is determined.

of individuals stepping forward to represent a class, particularly in contested litigation like this where the potential benefit to any individual does not outweigh the cost of prosecuting class-wide claims and there are significant risks of no recovery and the risk of alienation from their employers and peers. *Kruger v. Novant Health, Inc.*, No. 14-208, 2016 U.S.Dist.LEXIS 193107, *17–18 (M.D.N.C. Sept. 29, 2016)(Osteen, J.); *Krueger v. Ameriprise Fin., Inc.*, No. 11-2781, 2015 U.S.Dist.LEXIS 91385, *10–11 (D. Minn. July 13, 2015); *Tussey v. ABB, Inc.*, No. 06-4305, 2012 U.S.Dist.LEXIS 157428, *33–34 (W.D. Mo. Nov. 2, 2012); *Beesley v. Int’l Paper Co.*, No. 06-703, 2014 U.S.Dist.LEXIS 12037, *13–14 (S.D. Ill. Jan. 31, 2014). The total award requested for the Class Representatives represents a small fraction of Gross Settlement Fund.

D. Attorneys’ Fees and Costs

“[I]n a common fund case such as this, a reasonable fee is normally a percentage of the Class recovery.” *Smith v. Krispy Kreme Doughnut Corp.*, No. 05-187, 2007 U.S.Dist.LEXIS 2392, *3–4 (M.D.N.C. Jan. 10, 2007)(Osteen, J.); *see also Boeing Co. v. VanGemert*, 444 U.S. 472, 478 (1980). In this case, Class Counsel will request attorneys’ fees to be paid out of the Gross Settlement Fund in an amount not more than one-third of the Gross Settlement Amount, or \$3,550,000, as well as reimbursement for costs incurred of no more than \$825,000. “A one-third fee is consistent with the market rate in settlements concerning this particularly complex area of law.” *Kruger*, 2016 U.S.Dist.LEXIS 193107, *7–8; *Krueger*, 2015 U.S.Dist.LEXIS 91385, *3–9; *Beesley*, 2014 U.S.Dist. LEXIS 12037, *7. In addition, a one-third fee to Class Counsel also is

provided for in the contract with the Class Representatives. Declaration of Jerome J. Schlichter (Schlichter Decl.), ¶4.

Although Class Counsel will not request a fee greater than one-third of the monetary recovery, the additional terms of the Settlement provide meaningful value in addition to the monetary amount. This results in the requested fee being lower than a one-third award. In addition, Class Counsel will not seek attorneys' fees: (1) from the interest earned on the Gross Settlement Amount; (2) for time associated with communicating with Class Members or the Duke Defendants during the Settlement Period; and (3) for work required to enforce the Settlement, if necessary. Class Counsel will submit a formal application for attorneys' fees and costs and for the Class Representatives' incentive awards at least 30 days prior to the deadline for Class Members to file objections to the Settlement.

ARGUMENT

The first step in approving any proposed settlement in a class action is preliminary approval. *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F.Supp. 825, 827 (E.D. N.C. 1994). At this stage, the Court reviews the proposed settlement to determine whether it is sufficient to warrant public notice and a hearing. *Id.* If so, the final decision on approval is made after a "fairness" hearing. *Id.*; *see also* Manual for Complex Litigation, Fourth, §13.14, at 172–73 (Fed. Jud. Ctr. 2004). The Court is not required at this preliminary stage to make any final determinations:

The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the

preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.

Id. §21.632, at 321. The initial assessment can be made on the basis of information already known to the Court and then supplemented by briefs, motions and an informal presentation from the settling parties. *Id.* at 320.

The Court should preliminarily approve the Settlement because: (a) the proposed Settlement was the product of extensive arm's-length negotiations; (b) the Settlement was executed only after Class Counsel conducted extensive discovery and engaged in extensive negotiations; (c) Class Counsel concluded that the Settlement is fair, reasonable, and adequate; and (d) the Settlement is sufficiently fair, reasonable, and adequate to warrant sending notice of the Settlement to Class Members. *Kruger*, No. 14-208, Doc. 54 at 2–3 (M.D. N.C. May 18, 2016); *Smith*, No. 05-187, Doc. 71 at 4–5 (M.D.N.C. Sept. 27, 2006).

I. The Settlement is the product of extensive arm's-length negotiations.

There is a strong initial presumption that a proposed class action settlement is fair and reasonable when it is the result of arm's-length negotiations. *Horton*, 855 F.Supp. at 830; *In re MicroStrategy, Inc. Sec. Litig.*, 148 F.Supp.2d 654, 663 (E.D. Va. 2001); *see also Newberg on Class Actions* §11.41 at 11-88 (3d ed. 1992). As described above, the Settlement is the result of lengthy and complex arm's-length negotiations between the parties. These negotiations extended over an extended period and included the involvement of an independent mediator. Counsel on both sides are experienced and thoroughly familiar with the factual and legal issues presented. It is recognized that the

opinion of experienced and informed counsel supporting the settlement is entitled to considerable weight. *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975); *In re MicroStrategy, Inc. Sec. Litig.*, 148 F.Supp.2d at 665.

II. The Settlement was reached only after significant investigation and extensive litigation in *Clark*.

Class Counsel conducted substantial investigation and analysis of hundreds of thousands of pages of documents that occurred over a period of years. Although this discovery was formally conducted in *Clark*, the facts discovered through that process led to the claims later asserted in *Lucas*. As part of their normal discovery practice in preparing the case for depositions and summary judgment in *Clark*, the majority of these documents were electronically indexed and sorted, and thereafter individually examined, analyzed and cataloged by an attorney. Class Counsel also thoroughly reviewed and analyzed voluminous materials provided by the Class Representatives and third party service providers. Class Counsel retained experts intimately familiar with the retirement plan industry, including recordkeeping and investment management, and the prudent practices of defined contribution plan fiduciaries, to analyze relevant materials and provide their opinions based on the record and their experience. Accordingly, Class Counsel extensively developed the facts supporting Plaintiffs' claims in both *Clark* and *Lucas*. *Horton*, 855 F.Supp. at 829–830; *see also In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 157–158 (4th Cir. 1991).

III. Class Counsel believes the Settlement is fair, reasonable, and adequate.

Class Counsel is very experienced in class action litigation generally and, in

particular, class litigation arising from breaches of fiduciary duty under ERISA. Class Counsel pioneered this area of litigation in both 401(k) and 403(b) retirement plans, and is intimately familiar with this unique and complex area of law. *See Kruger*, 2016 U.S. Dist. LEXIS 193107, *16–17 (noting “endorsements from the AARP and the Pension Rights Center” for Class Counsel’s efforts in retirement plan litigation); *Ramsey v. Philips N. Am. LLC*, No. 18-1099, Doc. 27 at 7 (S.D. Ill. Oct. 15, 2018) (“Schlichter Bogard & Denton has left an indelible mark on the 401(k) industry by bringing comprehensive changes to fiduciary practices in order to ensure that employees and retirees have the opportunity to save for retirement through prudently administered retirement programs.”); *Tussey*, 2012 U.S. Dist. LEXIS 157428, *10 (“Plaintiffs’ attorneys are clearly experts in ERISA litigation”); *Beesley*, 2014 U.S. Dist. LEXIS 12037, *4–5 (“The Court remains impressed with Class Counsel’s navigation of the challenging legal issues involved in this trailblazing litigation and Class Counsel’s commitment and perseverance in bringing this case to this resolution.”). It is Class Counsel’s opinion that the Settlement is fair and reasonable. Schlichter Decl. ¶2.

As set forth above, the Settlement provides a substantial monetary relief component in the amount of \$10,650,000. In addition, the Settlement provides substantial and comprehensive non-monetary and additional relief. Finally, independent of Class Counsel’s opinion as to the reasonableness of the Settlement, the Settling Parties will submit the Settlement to an Independent Fiduciary, which will provide an opinion on the Settlement’s fairness before the final fairness hearing.

IV. The Settlement is fair, reasonable, and adequate to warrant sending notice to the Settlement Class.

Due process and Federal Rule of Civil Procedure 23(e) do not require that each Class Member receive notice, but do require that the class notice be “reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950). “Individual notice must be provided to those class members who are identifiable through reasonable effort.” *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 175 (1974).

The proposed form and method of notice of the proposed Settlement satisfy all due process considerations and meet the requirements under Rule 23(e)(1). Plaintiffs’ proposed forms of settlement notices are attached to the Settlement Agreement. The proposed settlement notices will fully apprise Class Members of the existence of the lawsuits, the Settlement, and the information they need to make informed decisions about their rights, including: (i) the terms of the Settlement; (ii) the nature and extent of the Release; (iii) the maximum attorneys’ fees and expenses that will be sought by Class Counsel; (iv) the procedure and timing for objecting to the Settlement and the right of the Settling Parties to seek limited discovery from objectors; (v) the date and place of the final fairness hearing; and (vi) the website on which the full settlement documents, and any modifications to those documents, will be posted.

The notice plan consists of multiple components designed to reach Class Members. First, the Settlement Notice will be sent by electronic email to all Class Members who

have a current email address known to Duke University and/or the Plan's recordkeeper(s) and by first-class mail to the current or last known address of all Class Members for whom there is no current email address shortly after entry of the Preliminary Approval Order. Addresses of the Class Members are maintained by the Plan's recordkeepers and/or Duke University personnel, who use this information for, *inter alia*, mailing plan notices and other plan-related information. Class Members include both current and former employees of Duke University. In addition to the Settlement Notice, Class Counsel will develop a dedicated website solely for the Settlement, and a link to that website will appear on Class Counsel's website [www.uselaws.com]. The notice plan also includes a follow-up requirement for the Settlement Administrator to take additional action to reach those Class Members whose notice letters are returned as undeliverable. Thus, the form of notice and proposed procedures for notice satisfy the requirements of due process and the Court should approve the notice plan as adequate.

CONCLUSION

The Motion for Preliminary Approval of Class Settlement should be granted.

January 16, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with the Civil Local Rules of Practice for the United States District Court for the Middle District of North Carolina, this is to certify that the foregoing document complies with the font and point selections approved by the Court in Local Rule 7.3(d)(1). The foregoing was prepared on computer using Times New Roman font (13 point). I certify that the above-referenced Memorandum contains 3,176 words.

/s/ Jerome J. Schlichter

CERTIFICATE OF SERVICE

I certify that on January 16, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically send notification of filing to all counsel of record.

/s/ Jerome J. Schlichter