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 PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT

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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] Lead Plaintiff Wayne County Employees Retirement System seeks the Court's preliminary approval of the proposed Settlement under Rule 23(e)(1) so that notice can be disseminated and a hearing for final approval (the "Settlement Hearing") can be scheduled.

Under Rule 23(e)(1)(B), preliminary approval should be granted upon the Court's finding that it "will likely be able" to (i) grant final approval of the Settlement under Rule 23(e)(2), and (ii) certify the proposed Settlement Class. The proposed Settlement readily satisfies this standard.

First, the Court "will likely be able" to grant final approval because the proposed Settlement is procedurally fair and provides adequate relief, satisfying Rule 23(e)(2). The parties reached the proposed Settlement after arm's-length mediation under the auspices of a respected mediator, Jed Melnick of JAMS. After exchanging detailed written submissions and conducting a full-day mediation session, the parties accepted Mr. Melnick's recommendation that the parties settle the action for $15.25 million.

[1] Capitalized terms not defined herein have the meanings stated in the Stipulation of Settlement, dated July 12, 2024 (the "Stipulation"), filed herewith. Emphasis is added, and citations omitted, unless otherwise noted.

The $15.25 million settlement is fair, reasonable, and adequate, particularly when measured against the real risk of recovering less—or nothing at all. Defendants have argued that the Amended Complaint fails to state any viable claim, and that the challenged statements about Bioventus's internal controls and rebate accounting were made in good faith. Had litigation continued, Defendants would have continued to press these and other arguments to drastically reduce or eliminate any recovery.

In addition to the risks on the merits, 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 risk of delay further favors a prompt resolution, rather than leaving the Settlement Class with no recovery through years of further litigation and appeal. Lead Plaintiff, represented by Lead Counsel Bleichmar Fonti & Auld LLP ("BFA") and local counsel Tin Fulton Walker & Owen PLLC, successfully navigated these risks to achieve the proposed Settlement, which provides the Settlement Class with a prompt, certain, and substantial recovery that is a meaningful proportion of recoverable damages and well within the range of reasonableness, as Lead Plaintiff will further demonstrate at final approval.

Second, the Court will be able to certify the proposed 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. The proposed notice program will ensure that Settlement Class Members are promptly apprised of the proposed Settlement so they can participate, exclude themselves, or object before the Settlement Hearing.

Lead Plaintiff thus respectfully requests that the Court grant this unopposed motion and enter the proposed Preliminary Approval Order.

II. RELEVANT BACKGROUND

A. Summary of Litigation

The initial complaint in this Litigation was filed on January 12, 2023. (ECF No. 1.) On April 12, 2023, the Court appointed Wayne County Employees' Retirement System as Lead Plaintiff and BFA as Lead Counsel. (ECF No. 44.)

Following an extensive investigation involving, among other things, reviews of Bioventus's SEC filings, earnings announcements, and other public statements, reviews of dozens of analyst reports, interviews with numerous former employees, and expert analysis on accounting and related issues, Lead Plaintiff filed an Amended Complaint on June 12, 2023 (ECF No. 48), and the operative Second Amended Complaint (the

"Complaint") on July 31, 2023 (ECF No. 58). The Second Amended Complaint alleges, among other things, three categories of false and misleading statements and omissions:

- First, it alleges that Defendants misled investors about the impact of the rebates it was required to pay to third-party insurers, which resulted in $12.4 million in inflated revenue that did not exist.
- Second, it alleges that Defendants misled investors about the effectiveness of Bioventus's internal controls concerning rebates.
- Third, it alleges that Defendants falsely assured investors that Bioventus was fully prepared for the implementation of new Medicare regulations in 2022 that reduced pricing and reimbursement on Bioventus's key products.

On August 21, 2023, Defendants moved to dismiss. (ECF No. 63.) On November 6, 2023, the Court dismissed Lead Plaintiff's Section 11 claims, but allowed the Section 10(b) claims to proceed in their entirety. (ECF No. 75.) Defendants filed their answers on December 11, 2023, which denied all claims alleged in the Complaint and asserted multiple defenses thereto. (ECF No. 81.)

The parties then engaged in extensive discovery. Lead Plaintiff served 66 document requests, 29 interrogatories, and 27 requests for admission on Defendants. Lead Plaintiff also requested documents from 14 third parties, including, but not limited to Bioventus's auditors, insurance companies that contracted with Bioventus, certain Bioventus consultants, and other third parties. In all, Lead Plaintiff received and analyzed over 70,000

documents in discovery, consisting of over 665,000 pages. Lead Plaintiff litigated dozens of discovery disputes, requiring the exchange of dozens of letters and emails and numerous meet-and-confers with counsel. Several of these issues were litigated before the Court.

Lead Plaintiff also defended against substantial discovery requests received from Defendants. Lead Plaintiff responded to 38 document requests (producing over 5,300 pages of documents), and 30 interrogatories, and was deposed pursuant to Rule 30(b)(6). Lead Plaintiff also moved for class certification, which was fully briefed at the time of the Settlement.

B. Settlement Negotiations

The parties engaged in private mediation before Jed Melnick of JAMS. A full-day mediation session occurred on May 29, 2024. Before the session, the parties exchanged detailed mediation statements addressing issues of liability and the strength of the evidence uncovered to date. During the May 29 session, the parties exchanged multiple demands and counteroffers under Mr. Melnick's auspices. At the conclusion of the session, Mr. Melnick made a recommendation to settle the case for $15.25 million. The parties accepted this recommendation, advised the Court on June 4, 2024 of their agreement in principle, and subsequently negotiated the Stipulation.

C. The Proposed Settlement

As set forth in the Stipulation and supporting documents, following preliminary approval of the settlement, $15,250,000 in cash (the "Settlement Amount") will be paid into interest-bearing escrow accounts. (*See* Stipulation ¶¶1.32, 2.) The Net Settlement

Fund (*i.e.*, the Settlement Amount, plus accrued interest, minus Notice and Administration Costs, Taxes and Tax Expenses, and any Court approved attorneys' fees, expenses, awards or other Court-approved deductions) will then be distributed to Settlement Class Members who submit valid Proof of Claim forms ("Authorized Claimants"), in accordance with a plan of allocation to be approved by the Court (discussed below). The parties also agreed to a mutual release of claims related to the conduct alleged in the case, as well as the prosecution and defense of the case. (*See* Stipulation ¶¶4.1–4.5, 5.7.)

III. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

A. The Standard for Preliminary Approval

Rule 23(e) of the Federal Rules of Civil Procedure provides that the Court should approve a class action settlement if the Court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). There is a "strong judicial policy in favor of settlements, particularly in the class action context." *West v. Cont'l Auto., Inc*., 2018 WL 1146642, at *3 (W.D.N.C. Feb. 5, 2018).

Judicial approval of a class action settlement is a two-step process. First, the Court performs a preliminary review of the terms of the proposed settlement to determine whether to send notice of the proposed settlement to the class. *See* Fed. R. Civ. P. 23(e)(1). Second, after notice is provided and a hearing is held, the Court determines whether to grant final approval of the settlement. *See* Fed. R. Civ. P. 23(e)(2).

Under Rule 23(e)(1)(B), a court should grant preliminary approval upon a finding that it "will likely be able" to (i) grant final approval of the settlement under Rule 23(e)(2), and (ii) certify the proposed settlement class. As discussed below, the proposed Settlement readily satisfies both of Rule 23(e)(1)(B)'s requirements.

B. The Court "Will Likely Be Able to" Approve the Proposed Settlement, Satisfying Rule 23(e)(1)(B)(i)

In determining whether to approve a settlement, Rule 23(e)(2) provides that the Court should consider whether the proposed settlement "is fair, reasonable, and adequate after considering 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 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.[2]

[2] These factors enumerated in the 2018 amendments to Rule 23 correspond to the factors historically considered by Fourth Circuit courts, which apply a two-part test to determine whether a proposed settlement meets the requirements of Rule 23(e) by considering (1) the fairness of the settlement, which focuses on whether the proposed settlement was negotiated at arm's-length; and (2) the adequacy of the settlement, which focuses on whether the consideration provided to the class members is sufficient. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158–59 (4th Cir. 1991); *see also In re Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Pracs. & Prod. Liab. Litig.*, 952 F.3d 471, 484 n.8 (4th Cir. 2020) ("[B]ecause our factors for assessing class-action settlements almost completely overlap with the new Rule 23(e)(2) factors, the outcome of these appeals would be the same under both our factors and the Rule's factors.").

At the preliminary approval stage, the Court need only find that the settlement is within "the range of possible approval." *Scott v. Fam. Dollar Stores, Inc.*, 2018 WL 1321048, at *3 (W.D.N.C. Mar. 14, 2018).

1. Lead Counsel and Lead Plaintiff Have Adequately Represented the Class – Rule 23(a)(2)(A)

Rule 23(a)(2)(A)'s "adequacy of representation requirement involves two inquiries: 1) whether the plaintiff has any interest antagonistic to the rest of the class; and 2) whether plaintiff's counsel is qualified, experienced and generally able to conduct the proposed litigation." *Donaldson v. Primary Residential Mortg., Inc.*, 2021 WL 2187013, at *6 (D. Md. May 28, 2021). That standard is easily met here.

Lead Plaintiff's interest in obtaining the largest possible recovery is fully aligned with the rest of the Settlement Class. Lead Plaintiff is precisely the type of institutional investor contemplated by the PSLRA and has a successful track record as lead plaintiff protecting investors' rights, having recovered over $108 million in four PSLRA securities class actions.[3] Here, Lead Plaintiff suffered over $600,000 in losses on its investments in Bioventus Class A common stock during the Class Period. (*See* ECF No. 21-3 & ECF No. 58 at Ex. A, Schedule A.) And it has vigorously pursued the Settlement Class's claims by,

[3] *See Chun v. Fluor Corp.*, No. 3:18-cv-01338 (N.D. Tex. Nov. 8, 2022) ($33 million settlement); *In re Uniti Grp. Inc. Sec. Litig.*, No. 4:19-cv-00756 (E.D. Ark. Nov. 7, 2022) ($38.875 million settlement); *In re Willbros Grp., Inc. Sec. Litig.*, No. 4:14-cv-03084 (S.D. Tex. Aug. 2, 2018) ($10 million settlement); *In re Cooper Co., Inc. Sec. Litig.*, No. 8:06-cv-00169 (C.D. Cal. Dec. 13, 2010) ($27 million settlement).

among other things, overseeing counsel's pursuit of key discovery, responding to discovery requests from Defendants, producing thousands of pages of documents, sitting for a deposition, and attending and participating in the mediation that led to the Proposed Settlement.

Moreover, Lead Plaintiff has protected the Class's interests by retaining and overseeing qualified and experienced Lead Counsel. BFA is highly experienced in litigating securities class actions, and local counsel Tin Fulton is also highly experienced in complex litigation. (*See* Bauer Decl. Ex. A (Class Counsel Resume).) In appointing Lead Counsel, the Court noted BFA's "global experience in securities fraud class actions" in which it has "represented lead plaintiffs in over a dozen of such cases," as well as Tin Fulton's "positive reputation" as a "well-known North Carolina law firm." (ECF No. 44 at 6.)

2. The Proposed Settlement Was Negotiated at Arm's-Length – Rule 23(a)(2)(B)

Rule 23(a)(2)(B) requires the Court to consider whether the settlement "was negotiated at arm's length." This analysis addresses the following four factors: "(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 securities class actions litigation." *Donaldson*, 2021 WL 2187013, at *4 (quoting *Lumber Liquidators*, 952 F.3d at 484). Each factor supports approval.

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[.]").

On top of that, through their experienced counsel at BFA and Tin Fulton (on Lead Plaintiff's side) and Latham & Watkins (one of the world's most prestigious and experienced law firms, on the Defendants' side), the parties were vigorously litigating the case at the time of the proposed Settlement. As noted above, the parties had produced hundreds of thousands of pages of documents; exchanged various written discovery; met and conferred dozens of times on dozens of different discovery disputes, including, but not limited to, the timing and scope of each sides' productions, interrogatory responses, and document preservation; raised several issues before the court; negotiated deposition scheduling; fully briefed Lead Plaintiff's motion for class certification; and pursued extensive third-party discovery.

3. The Proposed Settlement Provides Adequate Relief – Rule 23(e)(2)(C)

Rule 23(e)(2)(C) provides that the adequacy of relief should be assessed "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)." All Rule 23(e)(2)(C) factors are satisfied here.

a. The Costs, Risks, and Delay of Trial and Appeal

To determine whether a proposed settlement is adequate, 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 maximum theoretical damages, and Defendants' financial constraints and limited ability to withstand a larger judgment. Indeed, 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.

Merits Risks: Although Lead Plaintiff and Lead Counsel believe that the claims asserted are meritorious, Lead Plaintiff and the broader Class faced numerous risks in

proving Defendants' liability. For example, Defendants deny 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.

Defendants would also likely have challenged the Class's damages. Specifically, Defendants are 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).

Defendants also opposed class certification on various grounds, including that Lead Plaintiff is not an adequate class representative, that Lead Plaintiff is not typical, and that common issues do not predominate. (*See* ECF No. 111.) Although Lead Plaintiff believes that these arguments are meritless (*see* ECF No. 123), the proposed Settlement avoids the risk that Defendant can defeat certification.

Risk of Financial Condition: 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 of as of March 30, 2024.[4] 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.

Risk of Delay: 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.

b. The Proposed Method for Distributing Relief Is Effective

As demonstrated below and in the supporting Declaration of Eric Nordskog, the proposed method of distributing relief to the Settlement Class is effective. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii).

The notice process includes direct mail notice to all those who can be identified with reasonable effort, including through nominees. The Notice (Ex. A-1 to the Stipulation) is a postcard that contains all of the information required under the PSLRA and satisfies Rule

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

23 (*see infra* at IV). Because recent experience in large securities settlements indicates that about the majority of claims are filed electronically, the postcard does not include a paper Proof of Claim form (Ex. A-3 to the Stipulation), but directs potential Settlement Class members (in bold on the first page) to a case-specific website where they can submit claims electronically or request a paper copy of the Proof of Claim.[5] (Declaration of Eric Nordskog at ¶6.) The postcard also provides a toll-free phone number to contact the Claims Administrator and request a paper copy of the Proof of Claim. (*Id.*) The website also provides a Long-Form Notice (Ex. A-2 to the Stipulation) with additional detailed information, including in question-and-answer format, as well as copies of the Stipulation and other relevant documents. (Declaration of Eric Nordskog at ¶17.) Finally, in addition to direct mailing and the website, the notice program will include publication of the Summary Notice (Ex. A-4 to the Stipulation) in *The Wall Street Journal* and *PR Newswire*. (Declaration of Eric Nordskog at ¶14.)

[5] Providing the long-form notice and claim form online (with direct mail notice provided by postcard) has been approved under the PSLRA and Rule 23 in other securities class settlements in this Circuit and elsewhere. *See, e.g.*, *Klein v. Altria Group, Inc.*, No. 3:20-cv-00075 (E.D. Va. Dec. 16, 2021), ECF No. 303 ¶¶7–8 (approving notice through "mailing of the Postcard Notice," with the "Notice and the Claim Form . . . to be posted on a website to be developed for the Settlement, from which copies of the Notice and Claim Form can be downloaded"); *see also In re Banco Bradesco S.A. Sec. Litig.*, No. 1:16-cv-04155 (S.D.N.Y. July 24, 2019), ECF No. 197 ¶9 (approving notice through "mailing and distribution of the Postcard Notice, the posting of the Notice and Claim Form on the Settlement Website, and the publication of the Summary Notice").

The claims administration process will follow established procedures in securities class actions. Settlement Class Members will be required to complete the Proof of Claim form to provide the transaction information and documentation necessary to calculate their Recognized Loss Amounts and Recognized Claims pursuant to the Plan of Allocation (set forth in full in the Long-Form Notice). Once the Claims Administrator has processed all submitted claims, notified claimants of deficiencies or ineligibility, processed responses, and made claim determinations, the Claims Administrator will make distributions to Authorized Claimants. If any monies remain in the Net Settlement Fund after the initial distributions, the Claims Administrator will conduct re-distributions until it is no longer cost-effective to do so. At such time, any remaining balance will be contributed to a non-profit, charitable organization, which Lead Plaintiff will propose for Court approval if and when it seeks final approval of the Settlement.

c. The Terms and Timing of Payment of Attorneys' Fees and Expenses Are Reasonable

The proposed Settlement does not contemplate any specific fee and expense award, but rather recognizes that Lead Counsel will make a separate application for fees and expenses to be paid from the Settlement Fund in an amount to be approved by the Court. Lead Counsel's fee and expense application will be fully briefed and justified upon filing of a formal motion in accordance with the Preliminary Approval Order.

As stated in the proposed Notice, Lead Counsel will seek total fees of no more than 33% of the Settlement Fund. This amount is consistent with the percentages that courts

have regularly approved in this District in other class actions, including complex securities class actions. *See, e.g.*, *McIntyre v. Chelsea Therapeutics International, Ltd*., No. 3:12-cv-00213 (W.D.N.C. Sept. 19, 2016), ECF No. 146 (awarding 33.3%); *Caplin v. Trans1, Inc.*, No. 7:12-cv-00023 (E.D.N.C. Nov. 19, 2018), ECF No. 129 (awarding 30%); *Phillips v. Triad Guar. Inc*., 2016 WL 2636289 (M.D.N.C. Dec. 8, 2015), ECF No. 123 (awarding 30%). Lead Counsel will also seek an award of litigation expenses in an amount not to exceed $800,000, and an award to Lead Plaintiff pursuant to 15 U.S.C. § 78u-4(a)(4) of no more than $15,000.

d. Lead Plaintiff Has Identified All Agreements Made in Connection with the Proposed Settlement

In addition to the Stipulation, the parties have entered into a confidential Supplemental Agreement providing specified options to terminate the settlement if Persons who otherwise would be Members of the Settlement Class, 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.) As is standard in securities class action settlements, such agreements are not made public in order to avoid incentivizing individual class members to leverage the opt-out threshold to seek disproportionate individual settlements at the expense of the broader class.[6] Pursuant to its terms, the Supplemental Agreement may be submitted to the Court for in camera review.

[6] *See, e.g.*, *In re HealthSouth Corp. Sec. Litig*., 334 F. App'x 248, 250 n.4 (11th Cir. 2009) ("The threshold number of opt outs required to trigger the blow provision is

4. The Plan of Allocation Treats Class Members Equitably – Rule 23(e)(2)(D)

The proposed Plan of Allocation, as set forth in the Notice, "treats class members equitably relative to each other." Rule 23(e)(2)(D). Specifically, the Plan of Allocation, which was prepared with the assistance of experts from Peregrine Economics, satisfies this requirement because it allocates each Authorized Claimant their *pro rata* share of the Net Settlement Fund based on their recognized losses in transactions in Bioventus Class A common stock. Those recognized losses are calculated under the Plan of Allocation using estimates of artificial inflation at the time of purchase and sale for the Exchange Act claims.

The Plan of Allocation is comparable to plans of allocation approved in other securities class actions, including in this Court. *See, e.g.*, *Phillips v. Triad Guar. Inc.*, 2016 WL 1175152, at *4 (M.D.N.C. Mar. 23, 2016) (approving plan of allocation that (i) was "prepared in consultation with Lead Counsel's internal economic consultants," (ii) was set forth fully in the Notice, (iii) provides that a Class Member will be eligible to participate in the distribution of the Net Settlement Fund only if that Class Member has a net loss on all transactions in the relevant common stock, after all profits from transactions in the relevant common stock during the Class Period are subtracted from all losses, and (iv) awards a *pro rata* share).

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typically not disclosed and is kept confidential to encourage settlement and discourage third parties from soliciting class members to opt out.").

C. The Court "Will Likely Be Able to" Certify the Proposed Settlement Class, Satisfying Rule 23(e)(1)(B)(ii)

The proposed Settlement Class, which has been stipulated to by the Parties, consists of all persons and entities who purchased or otherwise acquired Bioventus Class A common stock between February 11, 2021, and November 21, 2022, both inclusive, and were damaged thereby. (Stipulation ¶ 1.28.)[7] The Court will be able to certify the proposed Settlement Class because it meets each requirement under Rules 23(a) and (b)(3).

1. 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, the proposed Class consists of at least thousands of members. During the Class Period, Bioventus Class A common stock was actively traded on the NASDAQ

[7] Excluded from the Settlement Class are (i) Defendants and any affiliates or subsidiaries thereof; (ii) present and former officers and directors of Bioventus and their immediate family members (as defined in Item 404 of SEC Regulation S-K, 17 C.F.R. § 229.404, Instructions (1)(a)(iii) & (1)(b)(ii)); (iii) Defendants' liability insurance carriers, and any affiliates or subsidiaries thereof; (iv) any entity in which any Defendant had or has had a controlling interest; (v) Bioventus's employee retirement benefit plan(s); and (vi) the legal representatives, heirs, estates, agents, successors, or assigns of any person or entity described in the preceding five categories. Also excluded from the Settlement Class are any Settlement Class Members that validly and timely request exclusion in accordance with the requirements set by the Court in the Notice of Pendency and Proposed Settlement of Class Action. (Stipulation ¶ 1.28.)

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").

2. 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. In securities actions, courts have repeatedly found that these types of common questions satisfy commonality. *See, e.g.*, *In re Under Armour Sec. Litig.*, 631 F. Supp. 3d 285, 301 (D. Md. 2022) (common questions included falsity, scienter, materiality, and damages); *In re NII Holdings, Inc. Sec. Litig.*, 311 F.R.D. 401, 406 (E.D. Va. 2015) (same).

3. 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. Typicality is "met where the claims asserted by the named plaintiffs arise from the same course of conduct and are based on the same legal theories as the claims of the unnamed class members." *Clark v. Duke Univ.*, 2018 WL 1801946, at *5 (M.D.N.C. Apr. 13, 2018). 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 Under Armour*, 631 F. Supp. 3d at 302 (typicality met where class representative "possess[es] the same securities fraud claims as the class").

4. 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." "Rule 23(a)(4) has two components: (1) the interests of the proposed class representatives and class members must coincide; and (2) the plaintiffs' attorneys must be qualified, experienced, and able to conduct the litigation." *Under Armour*, 631 F. Supp. 3d at 308. Lead Plaintiff and Lead Counsel easily meet this standard for the reasons set forth above at pages 8–10.

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

As is typical in securities class actions, "questions of law and fact common to class members predominate over any questions affecting only individual members." Rule 23(b)(3). Indeed, "[p]redominance is a test readily met in certain cases alleging . . . securities fraud." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). And

Courts have explained that "[s]ecurities fraud actions typically meet the Rule 23(b)(3) requirement because the claims relate to acts or omissions of the same defendants and damages of individual class members might be too small to provide incentive for the individuals to sue." *Mills Corp.*, 257 F.R.D. at 109. This case is no different.

Also, "[s]ecurities suits easily satisfy 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. The Class consists of a large number of investors who are geographically dispersed and may have small individual damages; Plaintiff is not aware of any related actions seeking recovery for Class members; and concentrating the litigation in this Court has numerous benefits, including eliminating the risk of inconsistent adjudications.

IV. THE COURT SHOULD APPROVE THE PROPOSED FORM OF NOTICE AND PLAN FOR PROVIDING NOTICE TO THE SETTLEMENT CLASS

Finally, the form and content of the Notice should be approved because they meet the requirements of due process, the Federal Rules of Civil Procedure, and the PSLRA. Rule 23(e)(1) requires the court to "direct notice in a reasonable manner to all class members who would be bound" by a proposed settlement. In addition, Rule 23(c)(2)(B) requires the Court to direct to a class certified under Rule 23(b)(3) "the best notice that is

practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

Here, the Notice and Long-Form Notice (Exs. A-1 and A-2 to the Stipulation) are written in plain language and apprise Settlement Class members of the nature of the litigation, including the claims and issues involved; the definition of the Settlement Class; the terms of the proposed Settlement; that the Court will exclude any Settlement Class member who requests exclusion; the procedures and deadlines for exclusion requests and objections; and the binding effect of a class judgment on Settlement Class members under Rule 23(c)(3)(B), among other disclosures.

The Notice and Long-Form Notice also satisfy the disclosure requirements for securities class settlements imposed by the PSLRA. *See* 15 U.S.C. § 78u-4(a)(7). Specifically, they disclose:

1. the amount of the settlement on an aggregate and per-security basis (Notice at pages 1-2; Long-Form Notice at pages 4, 10), satisfying 15 U.S.C. § 78u-4(a)(7)(A);
2. the issues about which the parties disagree (Notice at page 2; Long-Form Notice at pages 6-7), satisfying 15 U.S.C. § 78u-4(a)(7)(B)(ii);
3. the maximum amount of attorneys' fees and litigation expenses that Lead Counsel will seek (including on a per-share basis) (Notice at page 2; Long-Form Notice at pages 3–4), satisfying 15 U.S.C. § 78u-4(a)(7)(C);

4. the name, mailing address, and telephone number of the Claims Administrator and/or Lead Counsel, who will be reasonably available to answer questions from Settlement Class members (Notice at 1; Long-Form Notice at page 4), satisfying 15 U.S.C. § 78u-4(a)(7)(D); and

5. a brief statement explaining the reasons why the parties are proposing the settlement (Notice at page 2; Long-Form Notice at pages 8-9), satisfying 15 U.S.C. § 78u-4(a)(7)(E).

The Notice plan should also be approved. Lead Counsel proposes that A.B. Data Ltd., a leading independent settlement and claims administrator, administer the notice and claims process. If the Court preliminarily approves the settlement, the administrator will disseminate the Notice to all identified potential Settlement Class Members. To do so, it will utilize a list from Defendants' securities transfer agent of all persons who purchased or otherwise acquired Bioventus common stock during the class period, as well as all persons on the administrator's proprietary list of U.S. banks, brokerage firms, and nominees that purchase securities on behalf of beneficial owners. In addition, the administrator will publish the Summary Notice in *The Wall Street Journal* and across *PR Newswire*, and will publish it electronically over PR Newswire's and AB Data's X accounts. AB Data will also post the Notice, Long-Form Notice, Proof of Claim, and other materials on the case-specific website for the settlement.

The proposed combination of mail, publication, and electronic notice satisfies Rule 23(c)(2)(B), which provides that "notice may be by one or more of the following: United States mail, electronic means, or other appropriate means." This Court, and others in this Circuit, have approved class notice plans, like that proposed here, that utilize direct mail, press releases, and posting of notice information on a dedicated website. *See, e.g.*, *Phillips v. Triad Guar. Inc.*, No. 1:09-cv-00071 (M.D.N.C. Dec. 8, 2015), ECF No. 123; *In re Pozen Sec. Litig.*, No. 1:04-cv-00505 (M.D.N.C. Oct. 2, 2007), ECF No. 102; *Klein*, No. 3:20-cv-00075, ECF No. 303.

II. PROPOSED SCHEDULE OF SETTLEMENT EVENTS

In the event the Court grants preliminary approval of the proposed Settlement, Lead Plaintiff respectfully proposes the schedule below for settlement-related events. The timing of each event is determined by the date the Preliminary Approval Order is entered and the date of the Settlement Hearing.

EVENT	DEADLINE
Deadline for Claims Administrator to publish the Summary Notice in a national news publication and over a national newswire service	14 calendar days from entry of the Preliminary Approval Order (Proposed Order at ¶8)
Deadline for Claims Administrator to commence mailing of the Notice to Settlement Class members (the "Notice Date") and to post copies of the Notice, Long-Form Notice, Proof of Claim, Stipulation, and its exhibits to a website for the Litigation (www.BioventusSecuritiesLitigation.com)	21 calendar days from entry of the Preliminary Approval Order (Proposed Order at ¶8)

EVENT	DEADLINE
Deadline to submit written requests for exclusion	45 calendar days from Notice Date (Proposed Order at ¶12)
Deadline to submit Proof of Claim	90 calendar days from Notice Date (Proposed Order at ¶10)
Deadline for motions for final approval of the Settlement, Plan of Allocation, and for attorneys' fees and expenses	35 calendar days prior to the Settlement Hearing (Proposed Order at ¶15)
Deadline for objections and statements of intention to appear at the Settlement Hearing	21 calendar days prior to the Settlement Hearing (Proposed Order at ¶13)
Deadline for replies to any Objections	7 calendar days prior to the Settlement Hearing (Proposed Order at ¶15)
Deadline for Lead Counsel to file with the Court proof of mailing and publication of the Notice, Long-Form Notice, Proof of Claim, Summary Notice, and Stipulation and its exhibits	No later than 7 calendar days prior to the Settlement Hearing (Proposed Order at ¶8)
Settlement Hearing	No earlier than 120 days from the entry of the Preliminary Approval Order

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests that the Court grant this unopposed motion and enter the agreed-upon proposed Preliminary Approval Order.

Dated: July 15, 2024

By: */s/ Joseph A. Fonti*

BLEICHMAR FONTI & AULD LLP
Joseph A. Fonti*
George N. Bauer*
300 Park Avenue, Suite 1301
New York, NY 10022
Telephone: (212) 789-1340
Facsimile: (212) 205-3960
jfonti@bfalaw.com

gbauer@bfalaw.com

Nancy A. Kulesa*
75 Virginia Road
White Plains, NY 10603
Telephone: (914) 265-2991
Facsimile: (212) 205-3960
nkulesa@bfalaw.com

* reflects attorneys appearing pursuant to LR 83.1(d)

Counsel for Lead Plaintiff Wayne County Employees' Retirement System and Lead Counsel for the Proposed Class

By: */s/ Gagan Gupta*

TIN FULTON WALKER & OWEN PLLC
Gagan Gupta (NCSB #: 53119)
115 East Main Street
Durham, NC 27701
Telephone: (919) 370-8807
ggupta@tinfulton.com

Local Counsel for Lead Plaintiff Wayne County Employees' Retirement System

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 6,201 words.

/s/ Joseph A. Fonti
Joseph A. Fonti*
BLEICHMAR FONTI & AULD LLP
7 Times Square, 27th Floor
New York, NY 10036
Telephone: (212) 789-1340
Facsimile: (212) 205-3960
jfonti@bfalaw.com

* reflects attorneys appearing pursuant to LR 83.1(d)

Counsel for Lead Plaintiff Wayne County Employees' Retirement System and Lead Counsel for the Proposed Class

/s/ Gagan Gupta
Gagan Gupta (NCSB #: 53119)
TIN FULTON WALKER & OWEN PLLC
119 Orange Street, Floor 2
Durham, NC 27701
Telephone: (919) 307-8400
ggupta@tinfulton.com

Local Counsel for Lead Plaintiff Wayne County Employees' Retirement System