

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

Karolyn Kruger, M.D., *et al.*

Plaintiffs,

v.

Novant Health, Inc., *et al.*

Defendants.

Case No. 1:14-cv-208

Judge William Osteen, Jr.

Magistrate Judge Joi Elizabeth Peake

**DEFENDANTS' STATEMENT OF NON-OPPOSITION TO PLAINTIFFS'  
FILINGS IN SUPPORT OF THE PROPOSED CLASS ACTION  
SETTLEMENT**

Defendants, Novant Health, Inc., et al. (collectively, "Novant"), respectfully submit this Statement of Non-Opposition to Plaintiffs' Filings in Support of the Proposed Class Action Settlement ("Statement").

**DISCUSSION**

On November 9, 2015, the parties filed their Joint Motion for Preliminary Approval of Class Action Settlement. In support of that Joint Motion, plaintiffs filed a separate Memorandum in Support of Preliminary Approval of Class Action Settlement, which included a number of exhibits reflecting not only the executed settlement agreement itself but also other materials the parties jointly prepared with an eye toward facilitating the settlement of this action on a class-wide basis and in accordance with the protections prescribed in Rule 23. Because the Court has not previously determined whether the claims in this action are properly certified under Rule 23, plaintiffs also filed a motion and

supporting memorandum to certify, provisionally, a proposed settlement class under Rule 23(b)(1).

Defendants naturally do not oppose these requisite filings. Nevertheless, they respectfully request that the Court consider this further Statement in evaluating the parties' request that the Court preliminarily approve the proposed class settlement. As discussed further below, Novant disagrees with the claims asserted against it in this action. But at the same time it agrees with plaintiffs that a fair and reasonable compromise, which provides Novant employees, former employees, and retirees' immediate benefits and protections, is in the best interests of both sides and is preferable to the prospect of years of costly litigation and its attendant uncertainty. Such a compromise is before this Court. Indeed, not only does the proposed class settlement provide that Novant employees, former employees, and retirees will share now in a large monetary payment, but it also provides them with equally important protections designed to strengthen their Novant retirement benefits for years to come.

**A. Defendants Disagree With The Class Action Claims.**

The operative complaint alleges that defendants breached their fiduciary duties under ERISA by (1) maintaining retail-share class investment funds in the Novant-sponsored Retirement Plus Plan (the "RPP"), rather than lower cost institutional-share class investment funds or other less expensive alternatives; (2) causing participants to pay excessive fees to Great-West Life & Annuity Insurance Co. ("Great-West") for plan recordkeeping services; and (3) causing participants to pay excessive fees to D.L. Davis &

Co. (“Davis”) for participant communication and education services related to the RPP. *See, e.g.*, Doc. 1, Compl. ¶¶ 170-81, 191, 197-200.

Novant disagrees with the allegations underlying these claims. For example, Novant maintains that the allegations concerning the RPP’s investment funds fail to account for the RPP’s receipt and use of revenue sharing. Novant contends that this revenue sharing, derived from a portion of the fees paid for those funds, was used to cover the costs of plan administration. Defendants further maintain that, with this revenue sharing arrangement, the “retail” investment funds included in the RPP cost nearly the same as—and in some cases less than—the “institutional” funds the complaint claims Novant should have offered instead. *See* Doc. 39, Memo. Opinion & Order denying Defs.’ MTD, at 18 n.8 (describing this argument as one of the “strong arguments proffered by defendants” in support of dismissal, but concluding that such issues were “better resolved at a later stage of the proceedings”).

Novant likewise disagrees with plaintiffs’ claims against Novant concerning fees paid for services Great-West and Davis provided, as discussed at length in Novant’s briefing in support of its motion to dismiss. *See* Docs. 19, 33, 34. Moreover, Novant maintains that the plan fiduciaries issued an RFP questionnaire for recordkeeping services in 2012 and had placed the plan’s administrative services and fees under further review, engaging the help of an outside consultant, in the months before the complaint was filed in March 2014.

**B. The Proposed Class Settlement Provides Novant Employees And Retirees Immediate Financial Benefits and Affirmative Protections Designed To Strengthen Their Retirement Savings, While Avoiding Years Of Costly Litigation.**

While Novant disagrees with plaintiffs' claims, it recognizes that "ERISA fee" cases of this kind (including many filed by plaintiffs' same counsel here over the past several years) often involve many years of costly, hard-fought litigation and are rife with uncertainty for plaintiffs and defendants alike. Novant likewise recognizes the central importance of retirement benefits to its employees and retirees. With these and other considerations in mind, Novant agrees with plaintiffs and their counsel that a fair and reasonable compromise that eschews the long road of litigation in favor of providing immediate and lasting benefits to Novant employees, former employees, and retirees is in the best interests of both Novant and the putative class members.

The proposed class settlement strikes the appropriate balance. Under the proposed settlement, Novant will benefit by resolving now a litigation that could otherwise continue for many years at great cost and distraction. With the settlement, Novant can instead continue to focus on hiring and retaining the best employees in the industry and providing outstanding healthcare to the patients Novant serves.

Meanwhile, the Novant employees, former employees, and retirees who comprise the proposed settlement class will benefit considerably and immediately. First, their retirement accounts will be strengthened based on their individual share in the substantial (\$32 million) monetary payment that Novant will fund. Indeed, those class members who are active participants in the RPP and other Novant retirement plans will receive payments

directly into their retirement accounts, allowing them to benefit on a tax deferred basis. Those who are no longer active participants will receive direct payments from the settlement that, in most instances, will be eligible to be “rolled-over” on a tax-deferred basis into any other qualified retirement account they may hold.

Second, Novant employees, former employees, and retirees will also benefit significantly from the settlement’s non-monetary terms. For example, class members will receive the services of a plan recordkeeper and investment advisor selected by Novant after a robust, competitive RFP process overseen and approved by an independent consultant. In addition, the settlement agreement provides a detailed structure for engaging in a complete review of the investment options available to participants in Novant’s retirement plans, with periodic reviews thereafter overseen by an independent consultant. These reviews will help to provide class members (and future plan participants) with continued access to reasonably priced and appropriately performing investment options. In short, the settlements’ non-monetary terms are designed to help provide Novant employees, former employees, and retirees with a first-class retirement plan that will allow them to strengthen their retirement savings for years to come.

## **CONCLUSION**

Novant submits that the proposed class settlement is fair, reasonable, and adequate. Although Novant disagrees with the claims and allegations against it in this matter, it agrees with plaintiffs and their counsel that the proposed class settlement—which avoids protracted and costly litigation in favor of providing Novant employees, former employees,

and retirees with an immediate and substantial monetary payment combined with additional non-monetary protections designed to help strengthen their retirement savings—is in the best interests of defendants and the proposed settlement class. Novant therefore has no opposition to the certification of the settlement class and joins plaintiffs in their request that the Court preliminarily approve the proposed class settlement.

Dated: November 9, 2015

Respectfully submitted,

By: /s/ Justin N. Outling

Charles C. Jackson  
Ill. State Bar No. 01309374  
Christopher J. Boran  
Ill State Bar No. 6282552  
**Morgan, Lewis & Bockius LLP**  
77 W. Wacker Drive, Suite 500  
Chicago, IL 60601  
Phone: 312.324.1000  
Fax: 312.324.1001  
[charles.jackson@morganlewis.com](mailto:charles.jackson@morganlewis.com)  
[cboran@morganlewis.com](mailto:cboran@morganlewis.com)

Jennifer K. Van Zant  
N.C. State Bar No. 21280  
Justin N. Outling  
N.C. State Bar No. 38409  
**Brooks Pierce McLendon Humphrey & Leonard, LLP**  
2000 Renaissance Plaza  
230 North Elem Street  
Greensboro, NC 27401  
Phone: 336.271.3132  
Fax: 336.232.9132  
[jvanzant@brookspierce.com](mailto:jvanzant@brookspierce.com)  
[joutling@brookspierce.com](mailto:joutling@brookspierce.com)

## CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2015, a copy of the foregoing Defendants' Statement of Non-Opposition to Plaintiffs' Filings in Support of the Proposed Class Settlement was electronically filed using the Court's CM/ECF system, which transmitted service of the same upon the following counsel of record for plaintiffs:

Robert M. Elliot  
**Elliot Morgan Parsonage, P.A.**  
426 Old Salem Road  
Winston-Salem, NC 27101  
Phone: 336.724-2828  
Fax: 336.724.3335  
[melliot@emplawfirm.com](mailto:melliot@emplawfirm.com)

Jerome J. Schlichter  
Michael A. Wolff  
Troy A. Doles  
Heather Lea  
Schlichter, Bogard & Denton  
100 S. Fourth Street, Suite 900  
St. Louis, MO 63102  
Phone: 314.621.6115  
Fax: 314.621.7151  
[jschlichter@uselaws.com](mailto:jschlichter@uselaws.com)  
[mwolff@uselaws.com](mailto:mwolff@uselaws.com)  
[tdoles@uselaws.com](mailto:tdoles@uselaws.com)  
[hlea@uselaws.com](mailto:hlea@uselaws.com)

/s/ Justin N. Outling