EXHIBIT 1

Report of the Independent Fiduciary for the Settlement in *Berry v. FirstGroup America, Inc. et al.*

November 12, 2024

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I. Introduction

Fiduciary Counselors has been appointed as an independent fiduciary for the FirstGroup America, Inc. Retirement Savings Plan, the First Student and First Transit Retirement Savings Plan, and the First Student Inc. Retirement Savings Plan (the "Plan") in connection with the settlement (the "Settlement") reached in *Berry v. FirstGroup America, Inc. et al.*, Case No. 1:18-cv-00326-JPH (the "Litigation" or "Action"), which was brought in the United States District Court for the Southern District of Ohio (the "Court"). Fiduciary Counselors has reviewed over 150 previous settlements involving ERISA plans.

II. Executive Summary of Conclusions

After a review of key pleadings, decisions and orders, selected other materials and interviews with counsel for the parties, Fiduciary Counselors has determined that:

- The Court has certified the Litigation as a class action both during the Litigation and for settlement purposes, and in any event, there is a genuine controversy involving the Plan.
- The Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan and the amount of any attorneys' fee award or any other sums to be paid from the recovery, are reasonable in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims forgone.
- The terms and conditions of the transaction are no less favorable to the Plan than comparable arm's-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances.
- The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest.
- The transaction is not described in Prohibited Transaction Exemption ("PTE") 76-1.
- All terms of the Settlement are specifically described in the written settlement agreement and the plan of allocation.
- The Plan is receiving no consideration other than cash in the Settlement.

Based on these determinations about the Settlement, Fiduciary Counselors hereby approves and authorizes the Settlement on behalf of the Plan in accordance with PTE 2003-39.

III. Procedure

Fiduciary Counselors reviewed key documents, including the Second Amended Complaint, the filings related to the motions discussed below, the Court's Order regarding the motions to dismiss, the Partial Settlement Agreement, the Amended Settlement Agreement, the related filings, the Plaintiffs' and FGA Defendants' mediation statements, the Court's Order

Preliminarily Approving Settlement, the Notice, the Amended Notice, the Plan of Allocation, and the Motion for Attorneys' Fees and Costs, Administrative Expenses, and Class Representative Awards and related papers.

In order to help assess the strengths and weaknesses of the claims and defenses in the Litigation, as well as the process leading to the Settlement, the members of the Fiduciary Counselors Litigation Committee conducted separate telephone interviews with counsel for the FGA Defendants, counsel for Defendant Aon and counsel for the Plaintiffs.

IV. Background

A. Procedural History of Case

***Litigation*.**

Plaintiffs Wendy Berry, Lorri Hulings, and Kathleen Sammons ("Plaintiffs") filed the Action on May 11, 2018, asserting claims against Defendants FirstGroup America, Inc. ("FirstGroup"), FirstGroup America, Inc. Employee Benefits Committee (the "Committee"), and Aon Hewitt Investment Consulting, Inc. ("Aon Hewitt") under ERISA. Plaintiffs brought the Action on behalf of the Plan pursuant to 29 U.S.C. ¶ 1132(a) to recover losses to the Plan under 29 U.S.C. § 1109(a) and to obtain other appropriate relief under ERISA. On August 3, 2018, Plaintiffs filed a First Amended Complaint. On September 7, 2018, FirstGroup and the Committee (collectively, "the FGA Defendants") moved to dismiss the claims asserted against them. The Court denied the motion to dismiss on March 18, 2021, except it dismissed the claim based on plan documents without prejudice. On September 30, 2021, Plaintiffs filed their Second Amended Complaint. In the Second Amended Complaint, Plaintiffs asserted claims against Defendants for breach of their fiduciary duties of loyalty and prudence; breach of their duty to follow the Plan's Investment Policy Statements; and against FirstGroup for failure to monitor fiduciaries. Defendants filed answers to the Second Amended Complaint on October 14, 2021. On February 16, 2022, Plaintiffs moved for Rule 23 class certification. Thereafter, the parties stipulated to class certification, and the Court entered an order certifying the Rule 23 class.

Two days after Plaintiffs notified the Court that they had reached a settlement-in-principle with Aon Hewitt, the FGA Defendants filed a Motion for Summary Judgment (October 14, 2022). In connection with the FGA Defendants' summary judgment motion, the FGA Defendants and Plaintiffs collectively filed more than 120 exhibits, as well as a 120-page document of Plaintiffs' Response to the FGA Defendants' Statement of Proposed Undisputed Facts and Plaintiffs' Statement of Proposed Disputed Issues of Material Fact. The FGA Defendants subsequently filed a Motion to Exclude Opinions of Plaintiffs' Expert Brian C. Becker, Ph.D., which Plaintiffs opposed, and to which the FGA Defendants replied. These motions, and related motions to seal, remain pending. Prior to the Action's reassignment to Judge Hopkins on December 22, 2022, a trial date was set for May 30, 2023. During a telephone status conference with the parties on April 19, 2023, the Court postponed the final pretrial conference and trial dates. A new trial

date had not been scheduled when the parties reached the comprehensive Amended Settlement.

The parties have engaged in extensive fact and expert discovery. Defendants produced more than 312,000 pages of documents, and the Class Representatives produced over 7,000 pages of documents. Plaintiffs also subpoenaed several third parties and received over 300 documents as a result of the subpoenas. Class Counsel took fourteen (14) fact witness depositions, and Defendants deposed each of the Class Representatives. Following fact discovery, the parties completed expert discovery, which entailed exchanging expert reports and rebuttal reports and conducting depositions of eight expert witnesses.

Settlement and Preliminary Approval.

From approximately August 2022 until October 2022, Aon Hewitt's counsel and Class Counsel engaged in arm's-length negotiations, culminating in the original Settlement Agreement filed with the Court on December 12, 2022 along with their Preliminary Approval Motion. The FGA Defendants filed a response in opposition to preliminary approval on December 27, 2022, arguing that they were unfairly prejudiced by the terms of the Partial Settlement Agreement's proposed Bar Order provision and requesting a fairness hearing on this issue. In response to the FGA Defendants' objections to the Partial Settlement Agreement, the parties met and conferred in an effort to address the FGA Defendants' concerns. Plaintiffs and Aon Hewitt agreed in principle to clarify the definition of "Barred Claims," but the parties reached an impasse in their efforts to draft language that would resolve the FGA Defendants' objections. During a telephone status conference with the parties on April 19, 2023, the Court scheduled a hearing to address the fairness of the bar order provision for June 13, 2023. The June 13, 2023 hearing was subsequently postponed by the Court and was not rescheduled before it was mooted by the comprehensive Amended Settlement.

After reaching a settlement-in-principle with Aon Hewitt, Plaintiffs provided an initial demand to resolve all claims against the FGA Defendants. Plaintiffs and the FGA Defendants engaged in a series of negotiations with regard to monetary terms before Plaintiffs requested that the parties engage a private mediator to assist with further negotiations. Plaintiffs and the FGA Defendants attended a full-day in-person mediation on April 13, 2023, in Connecticut before Mr. David Geronemus of JAMS. Despite the good faith efforts of the involved parties, the mediation was unsuccessful at that time. Arm's-length settlement negotiations between the parties resumed after a request for preliminary approval of a partial settlement with a similar bar order provision was denied in a separate, unrelated matter involving Aon Hewitt and a third party. These negotiations were successful, and the parties notified the Court that they reached a global settlement-in-principle on February 8, 2024.

Plaintiffs filed a supplemental motion seeking approval of the Amended Settlement (representing a settlement with all the parties) on February 29, 2024. The Court granted Plaintiffs' supplemental motion on August 1, 2024. The Court (1) preliminarily approved

the settlement; (2) approved the form and method of class notice; (3) set December 12, 2024 as the date for a Fairness Hearing; (4) approved November 21, 2024 as the deadline for objections; (5) preliminarily approved the terms of the Bar Order; and (6) approved Analytics Consulting as Settlement Administrator.

Objections.

November 21, 2024 is the deadline for Class Members to file objections to the Settlement. As of the date of this report, no Class Members filed an objection.

V. Settlement

A. Settlement Consideration

The Settlement provides for a Gross Settlement Amount of $9,000,000, with Aon Hewitt and the FGA Defendants contributing $4,500,000 each. After deducting (a) all attorneys' fees and costs approved by the Court; (b) any service awards approved by the Court; (c) all administrative expenses approved by the Court and tax-related administrative expenses; and (d) any contingency reserve not to exceed an amount to be mutually agreed upon by the Settling Parties and approved by the Court that is set aside by the Settlement Administrator for (1) administrative expenses incurred before the Settlement Effective Date but not yet paid, and (2) administrative expenses estimated to be incurred after the Settlement Effective Date but before the end of the Settlement Period, the remainder (known as the "Net Settlement Amount") will be distributed to the Class Members in accordance with the Plan of Allocation.

Class and Class Period

The Amended Settlement defines the Settlement Class as follows:

> all participants and beneficiaries of the FirstGroup America, Inc. Retirement Savings Plan at any time on or after October 1, 2013 through the date of preliminary approval, who had any portion of their account invested in the Aon Hewitt Funds, excluding Defendants, any of their directors, and current or former members of the Employee Benefits Committee or Employee Retirement Benefits Committee who served on such committee since October 1, 2013.

The Settlement Class is consistent with the class certified by the Court on September 8, 2022.

The Settlement defines Class Period as October 1, 2013, through the date of the Preliminary Approval Order, inclusive [August 1, 2024].

B. The Release

The Amended Settlement defines "Released Claims" as follows:

subject to the exclusions in Article VII [Releases and Covenant Not to Sue] and Section 9.2 of the Settlement Agreement [Reversion to Previous Positions if Amended Settlement Agreement is Terminated], any and all Claims, actions, demands, rights, obligations, liabilities, damages, attorneys' fees, expenses, costs, and causes of action against any of the Released Parties with respect to the Plan arising on or before the date of preliminary approval of the Settlement:

(a) that were asserted in the Action or could have been asserted in the Action or any other court, forum, or proceeding based on or arising from any of the allegations, acts, omissions, purported conflicts, representations, misrepresentations, facts, events, matters, transactions, or occurrences asserted in the Action (including any assertion set forth in any of the Complaints, and in any submissions made by Plaintiffs in connection with the Action or any other submission made by the Plaintiffs, Settlement Class Members, or their expert witnesses or Class Counsel in connection with the Action), whether or not pleaded in the Complaints, including but not limited to those based on: (1) the selection, retention, oversight, or monitoring of the Aon Hewitt Funds or other Plan investment options; (2) the selection, retention, oversight, or monitoring of Aon Hewitt; (3) the performance, fees, expenses, share classes, and other characteristics of the Aon Hewitt Funds or other Plan investment options; (4) Aon Hewitt's performance as a delegated fiduciary to the Plan or its fees charged to the Plan, or the services provided by Aon Hewitt to the Plan; (5) the restructuring or modification of the Plan's investment lineup; (6) alleged self-dealing, conflicts of interest, or prohibited transactions in relation to the Aon Hewitt Funds or other Plan investment options, or in relation to the selection, monitoring, oversight or retention of Aon as a Plan service provider; (7) the overall structure, management, or monitoring of the Plan's investment menu; (8) the compliance with the Plan's governing documents and investment policy statements with respect to the selection, retention, oversight, and monitoring of Aon Hewitt as a Plan service provider or the selection, retention, oversight, and monitoring of the Aon Hewitt Funds or other Plan investment options; (9) disclosures or failures to disclose information concerning Aon Hewitt as a Plan service provider, the Aon Hewitt Funds, or other Plan investment options; and (10) any assertions with respect to any fiduciaries of the Plans (or the selection or monitoring of those fiduciaries) in connection with the foregoing;

(b) that would be barred by *res judicata* based on the Court's entry of the Final Approval Order;

(c) that arise from the direction to calculate, the calculation of, and/or the method or manner of the allocation of the Net Settlement Fund pursuant to the Plan of Allocation; or

(d) that arise from the approval by the Independent Fiduciary of the Amended Settlement Agreement.

Notwithstanding anything herein, the following shall not be included in the definition of Plaintiffs' Released Claims: (i) Claims to enforce the Amended Settlement Agreement and (ii) Claims for individual vested benefits brought pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) that are otherwise due under the terms of the Plan.

The terms of the release, including the provision for the Independent Fiduciary to provide a release of claims by the Plan, are reasonable.

C. The Plan of Allocation

Payments to each Participant Class Member (defined as any Settlement Class Member who had a Plan account with a balance greater than $0.00 at any point during the Class Period, and, as of the date of the Final Approval Order, had a Plan account with a balance greater than $0.00) and Former Participant Class Member (defined as any Settlement Class Member who had a Plan account with a balance greater than $0.00 at any point during the Class Period but who does not have a Plan account with a balance greater than $0.00 as of the date of the Final Approval Order) shall be calculated by the Settlement Administrator as follows, based on information provided by the Plan's recordkeeper:

(a) For each Participant Class Member and Former Participant Class Member, the Settlement Administrator shall determine an Average Settlement Score, defined as follows:

Each Participant Class Member's and Former Participant Class Member's average, aggregate Plan balance invested in the Aon Hewitt Funds at the beginning of each quarter for the period from October 1, 2013 to October 1, 2022[1].

[1] Mathematically stated, the *Average Settlement Score* shall be calculated as follows:

(Q4 2013 Aon Hewitt Funds balance) + (Q1 2014 Aon Hewitt Funds balance) + (Q2 2014 Aon Hewitt Funds balance) + (Q3 2014 Aon Hewitt Funds balance) + (Q4 2014 Aon Hewitt Funds balance) + (Q1 2015 Aon Hewitt Funds balance) + (Q2 2015 Aon Hewitt Funds balance) + (Q3 2015 Aon Hewitt Funds balance) + (Q4 2015 Aon Hewitt Funds balance) + (Q1 2016 Aon Hewitt Funds balance) + (Q2 2016 Aon Hewitt Funds balance) + (Q3 2016 Aon Hewitt Funds balance) + (Q4 2016 Aon Hewitt Funds balance) + (Q1 2017 Aon Hewitt Funds balance) + (Q2 2017 Aon Hewitt Funds balance) + (Q3 2017 Aon Hewitt Funds balance) + (Q4 2017 Aon Hewitt Funds balance) + (Q1 2018 Aon Hewitt Funds balance) + (Q2 2018 Aon Hewitt Funds balance) + (Q3 2018 Aon Hewitt Funds balance) + (Q4 2018 Aon Hewitt Funds balance) + (Q1 2019 Aon Hewitt Funds balance) + (Q2 2019 Aon Hewitt Funds balance) + (Q3 2019 Aon Hewitt Funds balance) + (Q4 2019 Aon Hewitt Funds balance) + (Q1 2020 Aon Hewitt Funds balance) + (Q2 2020 Aon Hewitt Funds balance) + (Q3 2020 Aon Hewitt Funds balance) + (Q4 2020 Aon Hewitt Funds balance) + (Q1 2021 Aon Hewitt Funds balance) + (Q2 2021 Aon Hewitt Funds balance) + (Q3 2021 Aon Hewitt Funds balance) + (Q4 2021 Aon Hewitt Funds balance) + (Q1 2022 Aon Hewitt Funds balance) + (Q2 2022 Aon Hewitt Funds balance) + (Q3 2022 Aon Hewitt Funds balance) + (Q4 2022 Aon Hewitt Funds balance)

Divided by

37 quarters during the Class Period.

The Aon funds were removed from the Plan as of July 1, 2022. In theory, the Plan of Allocation could have used that date as the cutoff since everyone in the plan should have the same $0 balance in Aon funds after that date. Class Counsel added the extra 90 days in an abundance of caution, just in case there were any sort of issues in the transactions being recorded to participant accounts when the funds were removed or anything else that needed to be accounted for. As far as Class Counsel know, there were no such issues in the actual data.

(b) The Settlement Administrator shall determine each Participant Class Member's and Former Participant Class Member's Entitlement Amount by calculating each individual's pro rata share of the Net Settlement Amount, based on his or her Average Settlement Score compared to the sum of all Participant Class Members' and Former Participant Class Members' Average Settlement Scores. If the dollar amount of the settlement payment to a Former Participant Class Member is calculated by the Settlement Administrator to be less than $5.00, then that Former Participant Class Member's pro-rata share shall be zero for all purposes, and his or her share shall be reallocated amongst the other Settlement Class Members on a pro rata basis.

Each Participant Class Member's Entitlement Amount shall be invested in accordance with and in proportion to such Participant Class Member's investment elections then on file for new contributions to his or her Plan account. If the Participant Class Member does not have an investment election on file, then such individual shall be deemed to have directed payment of his or her Entitlement Amount to be invested in the Plan's qualified default investment alternative, as defined in 29 C.F.R. § 2550.404c-5. If, as of the date on which the Recordkeeper credits the individual Plan account of each Participant Class Member with his or her Entitlement Amount, an individual believed to be a Participant Class Member no longer has a Plan account balance greater than $0.00, he or she will be treated as a Non-Rollover-Electing Former Participant Class Member for purposes of the settlement distribution only and will receive his or her payment from the Settlement Administrator in the form of a check.

Each Former Participant Class Member (or the Beneficiaries or Alternate Payees of Former Participant Class Members) will have the opportunity to elect a tax-qualified rollover of his or her Entitlement Amount to an individual retirement account or other eligible employer plan, which he or she has identified on the Former Participant Rollover Form, provided that the Former Participant Class Member supplies adequate information to the Settlement Administrator to effect the rollover. Upon completing the calculation of each Participant Class Member and Former Participant Class Member's Entitlement Amount and no later than sixty (60) calendar days following the Settlement Effective Date, the Settlement Administrator shall effect a rollover from the Qualified Settlement Fund to the individual retirement account or other eligible employer plan elected by each Rollover-Electing Former Participant Class Member in his or her Former Participant Rollover Form, if the (i) conditions for such rollover are satisfied and any associated paperwork necessary to transfer such Entitlement Amount by rollover have been provided and (ii) the Entitlement Amount is not less than $5.00. If the Settlement Administrator is unable to effectuate the rollover instructions of any Rollover-Electing Former Participant Class Member as provided in his or her Former Participant Rollover Form, he or she will be treated as a Non-Rollover-Electing Former Participant Class Member. Upon completing the calculation of each Participant Class Member and Former Participant Class Member's Entitlement Amount and no later than sixty (60) calendar days following the Settlement Effective Date, the Settlement Administrator shall issue a check from the Qualified Settlement Fund to each Non-Rollover-Electing Former Participant Class Member, in the amount of each Former Participant Class Member's

Entitlement Amount (less any withholdings) so long as the Entitlement Amount is not less than $5.00.

Beneficiaries of Participant Class Members that are entitled to receive all or a portion of a Participant Class Member's Entitlement Allocation shall receive such settlement payments pursuant to the terms of the Plan. Beneficiaries of Former Participant Class Members that are entitled to receive all or a portion of a Former Participant Class Member's Entitlement Allocation will receive such settlement payments under the methods for Former Participant Class Members. Alternate Payees of Participant Class Members that are entitled to receive all or a portion of a Participant Class Member's Entitlement Allocation shall receive such settlement payments pursuant to the terms of the applicable QDRO. Alternate Payees of Former Participant Class Members that are entitled to receive all or a portion of a Former Participant Class Member's Entitlement Allocation will receive such settlement payments under the methods for Former Participant Class Members.

All checks issued in accordance with the Plan of Allocation that are not cashed within one hundred twenty (120) calendar days of issuance shall be void and shall revert to the Qualified Settlement Fund. The voidance of checks shall have no effect on Settlement Class Members' release of Claims, obligations, representations, or warranties as provided herein, which shall remain in full effect. Any amounts that revert to the Qualified Settlement Fund, and any funds that cannot be distributed to Settlement Class Members for any other reason, together with any interest earned on them, and after the payment of any applicable taxes by the Escrow Agent, shall be paid to the Plan for the purpose of defraying administrative fees and expenses of the Plan.

We find the Plan of Allocation to be reasonable, including:

1. the *pro rata* distribution of the Net Settlement Amount, based on an individual's Average Settlement Score compared to the sum of all Participant Class Members' and Former Participant Class Members' Average Settlement Scores;

2. the provision that "If the dollar amount of the settlement payment to a Former Participant Class Member is calculated by the Settlement Administrator to be less than $5.00, then that Former Participant Class Member's pro-rata share shall be zero for all purposes, and his or her share shall be reallocated amongst the other Settlement Class Members on a pro rata basis"; and

3. the provisions for payments into Plan accounts for Participant Class Member when possible and by check or rollover for Former Participant Class Members.

The allocation and the provisions are cost-effective and fair to Class Members in terms of both calculation and distribution.

D. Attorneys' Fees, Litigation Expenses and Case Contribution Awards

Class Counsel seek an award of attorneys' fees in the amount of $3,000,000, which represents one-third of the Settlement Amount of $9,000,000. Class Counsel's lodestar was $3,501,735[2] as of November 7, 2024, when Class Counsel filed the Motion for Attorneys' Fees and Costs, Administrative Expenses, and Class Representative Awards and related papers. The lodestar multiplier would be 0.86 if the requested $3,000,000 were awarded. In our experience, the percentage requested and the lodestar multiplier are within the range of attorney fee awards for similar ERISA cases, with the most common award in similar cases equaling one-third of the settlement amount. In light of the work performed, the result achieved, the litigation risk assumed by Class Counsel, and the combination of the percentage and the lodestar multiplier, Fiduciary Counselors finds the requested attorneys' fees to be reasonable.

Class Counsel also request reimbursement of $614,047.43 for litigation costs incurred to date, including expert fees ($481,886.51), transcripts ($53,089.60), financial data charges ($31,747.52), mediation ($15,146.35), database hosting ($10,509.31), travel ($9,214.18), online research ($5,870.76) and court fees ($3,403.35). Fiduciary Counselors finds the request for expenses to be reasonable.

Class Counsel also seek service awards in the amount of $10,000 each for Class Representatives Ms. Berry, Ms. Hulings, and Ms. Sammons for a total of $30,000. Plaintiffs invested significant time reviewing pleadings, providing information and documents to assist with the investigation and prosecution of the action, reviewing and signing answers to interrogatories, appearing for their depositions, making themselves available to answer questions from Class Counsel, and staying informed on the status of the action. Fiduciary Counselors finds the request for a case contribution award to be reasonable.

In sum, although the Court ultimately will decide what fees, expenses and service awards to approve, we find that the requested amounts are reasonable under ERISA.

VI. PTE 2003-39 Determination

As required by PTE 2003-39, Fiduciary Counselors has determined that:

[2] Nichols Kaster's current billing rates for ERISA actions range from $675 to $975 per hour for attorneys with ten or more years of experience, $475 to $575 per hour for attorneys with less than ten years of experience, and $250 per hour for paralegals and clerks. *See Third Specht Decl. Ex. 1.* These rates are consistent with the rates approved for other experienced ERISA litigators. *See, e.g., Kruger v. Novant Health, Inc.*, No. 1:14CV208, 2016 WL 6769066, at *4 (M.D.N.C. Sept. 29, 2016) (adopting rates of $460 to $998 per hour for attorneys based on years of experience); *Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016) (same); *Abbott v. Lockheed Martin Corp.*, No. 06-CV-701-MJR-DGW, 2015 WL 4398475, at *3 (S.D. Ill. July 17, 2015) (adopting rates of $447 to $974 per hour for attorneys based on years of experience).

- **The Court has certified the Litigation as a class action both during the Litigation and for settlement purposes.** Thus, the requirement of a determination by counsel regarding the existence of a genuine controversy does not apply. Nevertheless, we have determined that there is a genuine controversy involving the Plan. Based on the documents we reviewed and our calls with counsel, we find that there is a genuine controversy involving the Plan within the meaning of the Department of Labor Class Exemption, which the Settlement will resolve.

- **The Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan, and the amount of any attorneys' fee award or any other sums to be paid from the recovery, are reasonable in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone.** In the Action, the Class Representatives claimed that the Defendants improperly selected and retained the Aon Hewitt Funds for the Plan, and that it was not prudent or in the best interest of participants for them to do so. The Class Representatives also claimed that Aon Hewitt had a conflict of interest in selecting and retaining these funds. The Defendants denied all claims and asserted that they have always acted prudently and in the best interests of participants and beneficiaries. The FGA Defendants asserted, among other things, that they prudently selected and monitored Aon Hewitt as the Plan's investment manager and that Plaintiffs' damages expert's analysis of damages was fatally inconsistent with the theory set forth by Plaintiffs' liability expert. When the parties reached the Amended Settlement, those issues, among others, were pending before the Court on the FGA Defendants' Motion for Summary Judgment and Motion to Exclude Opinions of Plaintiffs' Expert Brian C. Becker, Ph.D. The Aon Defendants settled before motions for summary judgment were due, but in the absence of a settlement, likely would have filed its own motions for summary judgment and to exclude testimony and would have cited Aon Hewitt's successful defense against similar claims on summary judgment in *Turner et al. vs. Schneider Electric Holdings Inc. et al*., Civil Action 20-11006-NMG, (D. Mass. 01-24-2023) and after trial in *Reetz v. Lowe's Cos.*, 2021 WL 4771535 (W.D.N.C. Oct. 12, 2021), *affirmed*, No. 21-2267 (4th Cir. July 17, 2023).

  In the absence of a global settlement, Plaintiffs would have faced uncertainty and risk in connection with their claims. Although fact and expert discovery was closed, substantial litigation expenses would have arisen before Plaintiffs' claims were resolved, including dispositive motion practice and trial. *See Bailey v. Verso Corp.*, 337 F.R.D. at 506 (S.D. Ohio 2021) (finding that the expense of briefing summary judgment but for the proposed settlement weighed in favor of preliminary approval). While Class Counsel have expressed confidence in the strength of Plaintiffs' claims, this case also entails real and significant risk. *See In re Nationwide*, 2009 WL 8747486, at *4 (noting that the risk of continued litigation includes the risk of no recovery at all); *Shanechian*, 2013 WL 12178108, at *4 (noting difficulty of proving both liability and damages at trial even where the plaintiffs prevailed on previous motion to dismiss and class certification rulings). This is illustrated by three recent trial judgments in favor of the defendants in ERISA breach of fiduciary duty cases involving defined contribution plans, including one involving Aon Hewitt. *See Reetz v. Lowe's Cos.*, 2021 WL 4771535 (W.D.N.C. Oct. 12, 2021), *affirmed*, No. 21-2267 (4th Cir. July 17, 2023); *Wildman v. Am. Century Servs.*,

LLC, 362 F. Supp. 3d 685 (W.D. Mo. 2019); *Sacerdote v. New York Univ.*, 2018 WL 3629598 (S.D.N.Y. July 31, 2018). Moreover, even if Plaintiffs established a fiduciary breach, it is "difficult" to measure damages in cases alleging imprudent or otherwise improper investments. *See* Restatement (Third) of Trusts § 100 cmt. b(1). Thus, significant issues would have remained regarding proof of loss. *See Sacerdote*, 328 F. Supp. 3d at 280 ("while there were deficiencies in the Committee's [fiduciary] processes—including that several members displayed a concerning lack of knowledge relevant to the Committee's mandate—plaintiffs have not proven that . . . the Plan suffered losses as a result").

According to Plaintiffs' expert, aggregate damages to the Plan had a present value between $40,800,000 and $65,000,000 as of February 28, 2022. Based on these values, the Settlement recovers approximately 14% to 22% of the total claimed damages.

The $9,000,000 Settlement Amount is a fair and reasonable recovery given the results in similar cases in the last several years, the defenses the Defendants would have asserted, the potential damages, the risks involved in proceeding to trial and the possibility of reversal on appeal of any favorable judgment.

Fiduciary Counselors also finds the other terms of the Settlement to be reasonable, including the scope of the release, attorneys' expenses, the requested service awards to the Class Representatives and the Plan of Allocation.

- **The terms and conditions of the transaction are no less favorable to the Plan than comparable arm's-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances.** As indicated in the finding above, Fiduciary Counselors determined that Class Counsel obtained a favorable agreement from Defendants in light of the challenges in proving the underlying claims and damages. The agreement also was reached after arm's-length negotiations, including negotiations supervised by Mr. David Geronemus of JAMS with respect to the settlement with the FGA Defendants.

- **The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest.** Fiduciary Counselors found no indication the Settlement is part of any broader agreement between Defendants and the Plan.

- **The transaction is not described in PTE 76-1.** The Settlement did not relate to delinquent employer contributions to multiple employer plans and multiple employer collectively bargained plans, the subject of PTE 76-1.

- **All terms of the Settlement are specifically described in the written settlement agreement and the plan of allocation.**

- **The Plan is receiving no consideration other than cash in the Settlement.** Therefore, conditions in PTE 2003-39 relating to non-cash consideration do not apply.

- **Acknowledgement of fiduciary status.** Fiduciary Counselors has acknowledged in its engagement letter that it is a fiduciary with respect to the settlement of the Litigation on behalf of the Plan.

- **Recordkeeping**. Fiduciary Counselors will keep records related to this decision and make them available for inspection by the Plan's participants and beneficiaries as required by PTE 2003-39.

- **Fiduciary Counselors' independence**. Fiduciary Counselors has no relationship to, or interest in, any of the parties involved in the litigation, other than the Plan, that might affect the exercise of our best judgment as a fiduciary.

Based on these determinations about the Settlement, Fiduciary Counselors (i) authorizes the Settlement in accordance with PTE 2003-39; and (ii) gives a release in its capacity as a fiduciary of the Plan, for and on behalf of the Plan. Fiduciary Counselors also has determined not to object to any aspect of the Settlement.

Sincerely,

Stephen Caflisch
Senior Vice President & General Counsel