THE HONORABLE JERRY T. COSTELLO

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

VELMA WALKER, individually and as a class representative; JAMES STUTZ, individually and as a class representative; KARL WALTHALL, individually and as a class representative; GINA CICHON, individually and as a class representative, and; MELANIE SMALLWOOD, individually and as class representative,

Plaintiffs,

vs.

HUNTER DONALDSON, LLC, a California limited liability company; MULTICARE HEALTH SYSTEM, a Washington nonprofit corporation; MT. RAINIER EMERGENCY PHYSICIANS, a Washington for-profit corporation; REBECCA A. ROHLKE, individually, on behalf of the marital community and as agent of Hunter Donaldson; JOHN DOE ROHLKE, on behalf of the marital community; RALPH WADSWORTH, individually, on behalf of the marital community, and as agent of Hunter Donaldson, and; JANE DOE WADSWORTH, on behalf of the marital community.

Defendants.

CLASS ACTION

NO. 13-2-08746-0

PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AGREEMENT

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I. RELIEF REQUESTED

Plaintiffs respectfully move for preliminary approval of the settlement agreement ("Settlement Agreement")[1] reached between Plaintiffs and Defendant MultiCare Health System ("MultiCare") in the above-captioned case and the consolidated case *Miesmer v. Hunter Donaldson, LLC, et al.*, Pierce County Cause No. 13-2-12653-8. The Settlement Agreement between Plaintiffs and MultiCare is the result of well over a year and a half of hard-fought litigation, over fifty thousand pages of discovery, eighteen witness depositions, vigorous motion practice, and numerous months of arms-length negotiation, including multiple mediations with Judge Thomas McPhee (Ret.). The Settlement Agreement is fair and reasonable and serves the best interests of the class members. According to discovery received in this case, Plaintiffs believe MultiCare has collected approximately $8 million from putative class members using medical services liens notarized by Rebecca Rohlke. Plaintiffs' efforts have secured a promise to create a **$7.5 million** settlement fund from MultiCare, the only Defendant still available to recover a substantial amount of the putative class's damages, given Defendant Hunter Donaldson, LLC's bankruptcy. Accordingly, Plaintiffs respectfully request that the Court take the following initial steps in the settlement approval process:

(1) Grant preliminary approval of the Settlement Agreement; ☐

(2) Provisionally certify the proposed settlement class ("Settlement Class"); ☐

(3) Appoint as Class Counsel the law firms of Pfau Cochran Vertetis Amala, PLLC, and Watson & Gallagher, P.S.; ☐

[1] Declaration of Darrell L. Cochran in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement Exhibit ("Ex.") 1. The parties are substantially agreed on the essential provisions of the Exhibits to the Settlement Agreement (Notice, Claim Form, Claims Process, and Published Notice) but may make nonmaterial revisions over the course of the next week.

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(4) Approve the proposed notice plan and the notice, claim form, and opt-out letters; ☐

(5) Appoint Gilardi & Co., LLC to serve as the independent claims administrator and to begin providing notice to potential class members; and ☐

(6) Schedule the final fairness hearing for Friday, January 30, 2015, and related dates as proposed by the parties. ☐

Plaintiffs' motion is supported by MultiCare. For the benefit of the thousands of local residents affected and for the benefit of MultiCare Health System, this motion should be granted.

II. BACKGROUND FACTS

A. Factual Background and Plaintiffs' Allegations

MultiCare operates multiple healthcare facilities in Pierce and King Counties and provides medical services to patients. Plaintiffs allege that MultiCare—through its former Vice President of Revenue Cycle, Jason Adams, and other MultiCare employees—conspired with Defendant Hunter Donaldson, LLC; its owner, Defendant Ralph Wadsworth; and Defendant Rebecca Rohlke, Wadsworth's daughter and a corporate officer of Hunter Donaldson, to fraudulently obtain a Washington State notary public commission for Rohlke. Rohlke and Hunter Donaldson—acting as MultiCare's agents—used her fraudulent notary commission to file approximately 5,371 medical services liens against approximately 4,007 patients (the "Rohlke liens"). Plaintiffs further allege that each and every Rohlke lien is invalid as a matter of law and the liens were used to unlawfully collect or encumber a portion of patients' settlement funds received from the third party tortfeasors responsible for their injuries. Plaintiffs also allege that Defendants illegally asserted these liens against patients

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instead of billing their commercial or government-sponsored insurance or allowing uninsured patients to take advantage of MultiCare's "prompt pay" discounts.

B. Procedural History

1. Filing of the Complaint and removal to federal court

On April 30, 2013, Plaintiffs filed this proposed class action complaint. On May 1, Plaintiffs served Defendants with their first interrogatories, requests for production, and requests for admission. Plaintiffs claimed that the above acts—and more—rendered Defendants liable for violations of Washington's Consumer Protection Act, conspiracy, fraud, negligence, and other causes of action under Washington law.

On May 30, 2013, Defendants removed this action to federal district court. On September 16, the federal district court entered an order remanding this action back to this Court. On September 30, the Hunter Donaldson Defendants petitioned the Ninth Circuit Court of Appeals for permission to appeal the federal district court's ruling. Plaintiffs contested the petition and, on December 20, the Ninth Circuit denied the petition.

2. The *Miesmer* action

On September 4, 2013, while the federal jurisdictional issues were under review, counsel for Plaintiffs in this action filed a complaint on behalf of Christina Miesmer against the Hunter Donaldson Defendants and MultiCare. Plaintiff Miesmer alleged that a portion of her settlement funds received from a third-party tortfeasor—which were issued by the third party insurer in a check made payable to Plaintiff Miesmer and Hunter Donaldson—were unlawfully encumbered by Rohlke-notarized liens filed by Hunter Donaldson on behalf of MultiCare and that the Hunter Donaldson Defendants had unlawfully filed a lien against her settlement funds in lieu of billing her insurance. In short, Plaintiff Miesmer's allegations and causes of action were materially identical to those of the Plaintiffs in this action. Plaintiff

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Miesmer also alleged that the Hunter Defendants and MultiCare were attempting to collect more than 25 percent of her settlement funds in violation of RCW 60.44.010's statutory cap. Significant discovery and motions practice occurred under the *Miesmer* caption while the putative class action case languished in the jurisdictional battle in federal court. On May 16, 2014, Pierce County Superior Court Judge Susan Serko entered an order consolidating the *Miesmer* action with this action.

3. This action returns to this Court and intense litigation ensues

On January 23, 2014, this Court received the remand order from the federal district court. In the ensuing months, the parties engaged in intensive litigation. For example, Plaintiffs were forced to file seven motions to compel discovery from MultiCare or the Hunter Donaldson Defendants, all of which were granted in part or in their entirety or prompted those Defendants to provide the requested discovery. Moreover, Plaintiffs moved for partial summary judgment regarding the liens' invalidity, while MultiCare and the Hunter Donaldson Defendants themselves twice moved for summary judgment (1) to dismiss the claims of Plaintiff Gina Cichon and (2) to dismiss two claims asserted in Plaintiffs' complaint; this latter summary judgment motion was pending when Plaintiffs and MultiCare reached a settlement agreement.[2]

All told, the parties engaged in extensive discovery leading up to the motion for class certification. MultiCare and the Hunter Donaldson Defendants produced over fifty thousand pages of documents. Plaintiffs learned during discovery that MultiCare's former Vice President of Revenue Cycle, Jason Adams, and Hunter Donaldson's owner Ralph Wadsworth

[2] Defendants also moved for CR 12(b)(6) dismissal of Plaintiffs' claims while this action was before the federal district court; the district court terminated consideration of the motion in remanding this action to this Court. Plaintiff Miesmer also moved for partial summary judgment regarding lien invalidity before her action was consolidated with this one; Defendants, in turn, unsuccessfully moved for summary judgment and CR 12(c) dismissal of all her claims.

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had destroyed or attempted to destroy thousands more documents after the lawsuit was filed. Plaintiffs also deposed eighteen current or former MultiCare executives, board members, and employees in this action and the *Miesmer* action, including a trip to Maine to depose Jason Adams and a trip to California to depose Defendants Wadsworth and Rohlke. Defendants, in turn, received document discovery from or deposed all of the named Plaintiffs in this action.

For a protracted period of time, the Hunter Donaldson Defendants stymied discovery requested by Plaintiffs and MultiCare that was necessary for the parties to fully evaluate the merits and positions in this case. After the Court imposed running, daily monetary sanctions against the Hunter Donaldson Defendants for failing to provide the needed discovery, Hunter Donaldson declared bankruptcy on June 17. Meanwhile, Defendants Wadsworth and Rohlke continued to stonewall the outstanding discovery requests, attempting to hide behind Hunter Donaldson's bankruptcy proceedings. These dilatory tactics necessitated two more motions by Plaintiffs for sanctions and entry of judgment against Wadsworth and Rohlke—resulting in a total of $121,300 in sanctions reduced to judgments against them—before they finally provided the outstanding discovery.

Finally, on September 25, 2014, Plaintiffs moved for class certification. On October 10—with the motion for class certification set for hearing on October 17—Plaintiffs and MultiCare reached a proposed Settlement Agreement.

4. Plaintiffs and MultiCare reached a settlement through extensive negotiations

The Settlement Agreement reached between Plaintiffs and MultiCare was the result of months of arms-length negotiation. On January 17, 2014, the parties engaged in a full day of mediation with the Honorable Thomas McPhee, a retired and respected Thurston County Superior Court judge with extensive judicial experience with class actions and class settlements. After the January 17 mediation failed to result in a settlement, Plaintiffs

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continued dialogue and meetings with both Hunter Donaldson and MultiCare about the potential for settlement options, including extensive meetings with counsel for the Hunter Donaldson Defendants. MultiCare eventually agreed to another full day of mediation on June 10 without the Hunter Donaldson Defendants. Although Plaintiffs and MultiCare reached an impasse on key settlement terms at the June 10 mediation, they maintained ongoing negotiations facilitated by Judge McPhee for four months afterward, eventually reaching a proposed Settlement Agreement late on the evening of October 10.

C. The Proposed Settlement

The Settlement Agreement's details are contained in the Settlement Agreement signed by the parties, a copy of which is attached as Exhibit 1 to the Cochran Declaration. For purposes of preliminary approval, the following summarizes the Settlement Agreement's terms.

1. The Settlement Class

The Settlement Class consists of individuals (1) on whose accounts MultiCare received payment as the result of a Rohlke-notarized lien or (2) whose personal injury settlement funds were held in trust by their attorneys in order to satisfy a Rohlke-notarized lien but no payment was received by MultiCare. The Settlement Class contains approximately 4,007 individuals. The Settlement Class excludes any such individuals who timely and validly opt to exclude themselves from the settlement class.

2. Stipulated Certification of Settlement Class

For purposes of this Settlement Agreement, Plaintiffs and MultiCare have stipulated to certification of the above class as defined in the Settlement Agreement. Plaintiffs and MultiCare stipulate that the Settlement Class meets the requirements of CR 23(a) and (b)(3).

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2. Plan of Distribution of Payments to the Class Members

In exchange for the comprehensive release of all claims brought against it as well as an assignment of the class's claims against the Hunter Donaldson Defendants arising from Rohlke-notarized liens filed on MultiCare's behalf, MultiCare has agreed to pay $7,500,000 to create a common fund to settle the claims. This includes Settlement Class member payments, class representative incentive awards, and Plaintiffs' attorney fees and costs. The common fund does not include the costs of providing notice to the Settlement Class and administering the settlement; MultiCare has agreed to bear those costs separately.

In order to receive monetary compensation, class members will have to submit a claim form attached as Exhibit B to the Settlement Agreement. If, before the date of this settlement, MultiCare received a payment on a class member's account as a result of a Rohlke-notarized medical services lien, such class members will receive:

> (1) 45 percent of the payment MultiCare received if the class member has no health insurance, either commercial or through the government;
>
> (2) 65 percent of the payment MultiCare received if the class member had government-sponsored insurance (such as Medicare and Medicaid) at the time of treatment;
>
> (3) 150 percent of the payment MultiCare received if the class member had commercial health insurance through an insurer that had a contract with MultiCare at the time of treatment, and if MultiCare's records at the time of treatment indicated such insurance, plus nine percent interest;
>
> (4) 100 percent of the payment received by MultiCare if the class member had commercial health insurance through an insurer with whom MultiCare had a contract at the time of treatment, but MultiCare's records at the time of treatment did not indicate such insurance, plus nine percent interest; and
>
> (5) Where total medical service lien payments exceeded 25 percent of the class member's total settlement amount or award received for their injuries, 150 percent of the amount by which payment to MultiCare exceeded the 25% limit, plus nine percent interest.

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If, before the date of this settlement, a class member's payment for their injuries was held in a trust account by his or her attorney in order to pay a Rohlke-notarized lien but no payment was received by MultiCare, the class member will receive a settlement payment of 10 percent of the amount held in the trust account (in addition to the amount held in the trust account).

Payments to class members will be reduced by any amounts owed to MultiCare for medical treatment not related to this case for which MultiCare did not file a Rohlke-notarized lien and any previous payments by MultiCare to a class member in connection with the Rohlke-notarized liens. If the amount of claims submitted by class members exceeds the common fund, class members will receive payments on a pro rata basis. MultiCare will not reopen a class member's closed account to seek further payment because a class member receives payment under this settlement. In exchange for these payments, class members will give up their right to sue MultiCare on any claims relating to the Rohlke-notarized liens and assign any such claims against the Hunter Donaldson Defendants to MultiCare.

3. Class Representative Incentive Awards

Subject to the Court's approval, the Settlement Agreement provides that MultiCare will not contest an award of reasonable compensation of $15,000 to each of the five remaining class representatives (Plaintiffs Walker, Smallwood, Walthall, Stutz, and Miesmer; the Court earlier dismissed Plaintiff Cichon's claims on summary judgment) paid out of the common fund. This compensation to the class representatives is in recognition of their service to and efforts on behalf of the Settlement Class, including participating in discovery, being deposed, and keeping abreast of litigation.[3] They were all prepared to testify at trial.

[3] *See* the Declarations of Velma Walker, Melanie Smallwood, Karl Walthall, James Stutz, and Christina Miesmer.

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This compensation is in addition to the relief the class representatives will be entitled to under the terms of the Settlement Agreement.

4. Attorney Fees and Costs

The Settlement Agreement provides that MultiCare will not contest class counsel's application to this Court for an award of one-third of all amounts recovered for class members, including the common fund of $7,500,000.00 and the amount paid out by MultiCare as part of its mid-litigation mea culpa outreach program[4], for payment of attorney fees in this action. The total amount recovered through the lawsuit and efforts of class counsel is $7,581,117.44 (i.e., the common fund plus $81,117.44 in payments MultiCare made to class members through its outreach program). Class counsel will also seek an award of their litigation costs from the common fund. Class counsel will seek this one-third fee award and cost award in a subsequent motion and mention it at this juncture only to alert the Court to their intention to seek such awards and to expressly state such intention in the notice to the Settlement Class in order to facilitate a fully informed decision by class members regarding their participation in or decision to exclude themselves from the Settlement Class.[5] Class counsel notes that such an award is well within and justified by the parameters and criteria recognized by Washington law. Further, such an award is entirely reasonable, given that class counsel has expended close to 4,000 attorney hours into the case and roughly $100,000 in litigation costs. This devotion of resources from two law firms was necessary given the difficulty, complexity, intensity of this litigation, and risks of pursuing this litigation

[4] In late March 2014, after a year of litigation over the invalidity of the lien practices, MultiCare announced that it had established a toll-free number for persons affected by Rohlke liens to call. MultiCare then provided limited reimbursements to certain individuals who met MultiCare's strict criteria at the time, which criteria were much more restrictive in both scope and the amount than the reimbursement class members will receive under the Settlement Agreement.

[5] The enforceability of the Settlement Agreement is not contingent on the amount of attorney fees or costs awarded.

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on a contingency fee basis. The amount of the fee award sought by class counsel is roughly equivalent to the fees already collected and enjoyed by the defense attorneys representing MultiCare and the Hunter Donaldson Defendants. The Court has the authority to require the defense lawyers to produce this information as part of its lodestar cross check process if it wishes to do so.

5. Settlement Administration and Notice

As set forth in the Settlement Agreement, all notice and administration costs will be paid by MultiCare. The Settlement Agreement provides that the administration of the Settlement shall be done by a third party Settlement Administrator. Plaintiffs and MultiCare have agreed to recommend Gilardi & Co., LLC ("Gilardi" or "Settlement Administrator") as the claims administrator. Gilardi has extensive experience with administering class action settlements and awards.[6] Gilardi's duties include: (1) issuing class notice and claim forms; (2) processing and responding to claims; (3) determining the validity of claims; (4) handling all communications with class members; (5) maintaining, calculating, and issuing settlement payments; and (6) issuing the supplemental publication notice. MultiCare has agreed to cooperate with Gilardi to ensure that it has all of the information that it needs to perform these tasks, including providing contact information for the class members. Gilardi will administer the claims process and adjudicate claims according to the Claims Process agreed upon by the parties, attached as Exhibit C to the Settlement Agreement.

The Settlement Agreement calls for a comprehensive notice campaign to reach the class members and educate them about the settlement and claims process. This will include

- Direct, mailed notice to class members
- Publication of notice in major Puget Sound and Washington State news and legal periodicals

[6] Cochran Decl. Ex. 2.

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- A settlement website

First, Gilardi will send the Mailed Notice of Class Settlement, attached as Exhibit A to the Settlement Agreement, through First Class mail to all Settlement Class members within five days following the Court's preliminary approval of the Settlement Agreement. Claim forms will be included with the notice. The notice describes the litigation, summarizes the terms of the Settlement Agreement, explains the claims process and exclusion process, and advises class members of their right to object to the Settlement Agreement and the process by which such objections must be made. The notice also assures the class members that they will not be retaliated against for participating in the settlement. The parties anticipate that the direct mailing program will reach the vast majority of class members. Plaintiffs and MultiCare have previously sent direct mailings to the class members during the course of this litigation; only 828 of Plaintiffs' mailings and 500-600 of MultiCare's mailings out of approximately 4,000 potential class members were returned as undeliverable. Plaintiffs and MultiCare have agreed to merge their mailing lists and provide them to the Settlement Administrator.

In addition to direct mailings, notice will be provided to the Settlement Class by publication in The Seattle Times, The News Tribune, The Olympian, and The Federal Way Mirror. Additionally, notice will be published in the Washington State Association for Justice's Trial News and the Washington State Bar Association's NWLawyer magazines, as many of the class members were represented by attorneys in their underlying injury cases (and, indeed, many of these attorneys are still holding client funds in trust pending the resolution of this case). It is also anticipated that major Washington State media outlets will run stories about the case and the settlement independently of the formal process in place.

III. ISSUES PRESENTED

1. Should preliminary approval of the Settlement Agreement be granted?

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2. Should the settlement class be provisionally certified?

3. Should Pfau Cochran Vertetis Amala, PLLC and Watson & Gallagher, P.S., be appointed as class counsel?

4. Should the notice plan, claim form, and forms of notice be approved?

5. Should Gilardi & Co., LLC, be appointed as claims administrator?

6. Should the final fairness hearing and related dates proposed by the parties be scheduled?

IV. EVIDENCE RELIED UPON

This motion relies upon the declaration of Darrell Cochran, the Declarations of Melanie Smallwood, Velma Walker, Karl Walthall, James Stutz, and Christina Miesmer, and the pleadings, filings, and other portions of the record already existing in this case.

V. LEGAL ARGUMENT

A. Settlement and the Class Action Approval Process

As a matter of "express public policy," Washington courts strongly favor and encourage settlements. *City of Seattle v. Blume*, 134 Wn.2d 243, 258, 947 P.2d 223 (1997); *see also Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 190, 35 P.3d 351 (2001), *recon. denied*, *cert*, *denied*, 536 U.S. 941, 122 S. Ct. 2624, 153 L. Ed. 2d 806 (2002) ("voluntary conciliation and settlement are the preferred means of dispute resolution."). This is particularly true in class actions and other complex matters where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (acknowledging that a "strong judicial policy... favors settlements, particularly where complex class action litigation is concerned"); *see also* 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 11:41 (3d ed. 1992) (citing cases) ("Newberg"). The traditional means for handling claims like those at issue here - individual litigation - would unduly tax the court system, require a massive expenditure of public and private resources, and, given the

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relatively small value of the claims of the individual class members, would be wholly impracticable. The proposed Settlement here is the best vehicle for class members to receive the relief to which they are entitled in a prompt and efficient manner.

The *Manual for Complex Litigation* describes a three-step procedure for approval of class action settlements:

(1) Preliminary approval of the proposed settlement at an informal hearing;

(2) Dissemination of mailed and/or published notice of the settlement to all affected class members; and

(3) A "formal fairness hearing" or final settlement approval hearing, at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented.

Manual for Complex Litigation (Fourth) ("MCL 4th") at § 21.63. This procedure, used by Washington state courts and endorsed by Newberg on Class Actions, safeguards class members' due process rights and enables the court to fulfill its role as the guardian of class interests. 4 *Newberg* § 11:25.

With this motion, Plaintiffs request that the Court take the first step in the settlement approval process by granting preliminary approval of the proposed Settlement. The purpose of preliminary evaluation of proposed class action settlements is to determine whether the Settlement is within the "range of reasonableness," and thus whether notice to the class of the settlement's terms and the scheduling of a formal fairness hearing is worthwhile. *Id.* The decision to approve or reject a proposed settlement is committed to the Court's sound discretion. *See Pickett*, 145 Wn.2d at 190 (an appellate court will "intervene in a judicially approved settlement of a class action only when the objectors to that settlement have made a clear showing that the [trial court] has abused its discretion").

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The Court's grant of preliminary approval will allow all class members to receive notice of the terms of the proposed Settlement, and the date and time of the "formal fairness hearing" or final settlement approval hearing, at which class members may be heard regarding the Settlement, and at which further evidence and argument concerning the fairness, adequacy, and reasonableness of the Settlement may be presented. *See MCL 4th* §§ 13.14, 21.632. At the preliminary approval/provisional class certification stage, the Court may grant the requested relief upon an informal application by the settling parties, and may conduct any necessary hearing in court or in chambers, at the Court's discretion. *MCL 4th* § 13.14.

B. The Settlement Meets the Criteria for Preliminary Approval

The purpose of preliminary evaluation of proposed class action settlements is to determine whether the settlement is within the "range of reasonableness" and whether notice to the class of the terms and conditions of the Settlement, and the scheduling of a final approval hearing, is worthwhile. 4 *Newberg* § 11:25; *see also Pickett*, 145 Wn.2d at 188 ("a proposed settlement may be approved by the trial court if it is determined to be 'fair, adequate, and reasonable' "). While consideration of the requirements for *final* approval is unnecessary at this stage, all of the relevant factors weigh in favor of the Settlement proposed here.

1. <u>The Settlement is the Product of Serious, Informed, and Arms-Length Negotiations</u>

Courts recognize that arms-length negotiations conducted by competent counsel are prima facie evidence of fair settlements. As the United States Supreme Court has held, "[o]ne may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining . . . ." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999); *see also Hughes v. Microsoft Corp.*, No. C98-1646C, 2001 WL

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34089697, at *7 (W.D. Wash. Mar. 26, 2001) ("A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced capable counsel after meaningful discovery.*"); see, e.g, In re Phenylpropanolamine (PPA) Products Liability Litigation*, 227 F.R.D. 553, 567 (W.D. Wash. 2004) (approving settlement entered into in good faith, following arms-length and non-collusive negotiations).

Here, the Settlement is the result of intensive, arms-length negotiations between experienced attorneys who are highly familiar with class action litigation in general and with the legal and factual issues of this case in particular. The path to this Settlement led through and over a year and a half of litigation and at least five motions either completely dispositive of the case or partially dispositive of key issues and claims. It also led through a full-day mediation session with the Honorable Thomas McPhee—who also possess extensive judicial experience with class action litigation and class action settlements—in January 2014; an in-person settlement conference with Hunter Donaldson's current counsel Kevin Smith and former counsel Thomas Boeder on February 17; subsequent relentless—almost daily at times—email and phone call negotiations with Hunter Donaldson's counsel; a second, full-day mediation session with Judge McPhee, Plaintiffs, and MultiCare in June 2014, with the parties exchanging term sheets after this latter mediation session. Facilitated by Judge McPhee, the parties continued to negotiate the details of the settlement through almost weekly emails and phone calls, including the common fund amount, the plan of distribution, the settlement administrator, and notice over the course of four months. These in-depth negotiations culminated in the detailed CR 2A Stipulation executed on October 10, as well as the resulting Settlement Agreement submitted with this motion. Plaintiffs' counsel supports the resulting Settlement as fair, and as providing reasonable relief to the class members.

2. <u>The Settlement Provides Substantial Relief for All Class Members</u>

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The proposed Settlement provides significant monetary relief in the amount of up to $7.5 million dollars, less attorney fees and costs, for all class members who submit timely qualified claims. Class members are entitled to compensation on a claims-made basis. In order to simplify the claims process for class members and improve response rates, the parties have agreed on a single claim form, attached as Exhibit B to the Settlement Agreement. Class members who answer more questions on the claim form may be eligible to receive more money based on the information that the class member provides. Overall, class members are entitled to receive up to 150 percent of funds paid to MultiCare as a result of a Rohlke-notarized medical services lien, plus interest, depending on whether they had commercial, governmental, or no insurance ("self-pay" patients) at the time they received medical services from MultiCare, whether MultiCare was made aware of any insurance coverage at the time of treatment, and whether payments to MultiCare based on Rohlke-notarized liens exceeded RCW 60.44.010's 25 percent statutory cap. Class members who did not make payments to MultiCare, but who have had part of their funds received from third-party tortfeasors held in trust as a result of Rohlke-notarized liens will receive a payment of 10 percent of the amount held in trust in addition to any monies they are entitled to out of those trust funds.

In addition to monetary compensation, the proposed Settlement provides highly sought-after injunctive relief in that the Rohlke liens must be officially declared as "invalid" and that MultiCare will provide to the Settlement Administrator a release of lien form to send to class members who submit a claim form. This relief will benefit class members, all of whom still have Rohlke-notarized liens recorded against them in the Pierce and King County Auditor's Offices, by removing these liens from public record and relieving class members of any negative consequences of having liens against them in the public record.

3. The Settlement's Plan of Distribution Treats All Class Members Fairly

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All qualifying class members who made payments to MultiCare or Hunter Donaldson based on Rohlke-notarized liens or class members who held third-party settlement funds in trust as a result of Rohlke-notarized liens benefit under the proposed Settlement. No segment of the class is excluded from relief or consigned to inferior benefits. Relief is based on standards that will be applied fairly and in the same way by the Settlement Administrator. In addition, allocation formulae are recognized as an appropriate means to reflect the comparative strength and value of different categories of claims. *In re: NASDAQ Market-Makers Antitrust Litigation*, 2000 U.S. Dist. LEXIS at *6. Allocation formulae "need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Id.* Here, the allocation formulae reflect an extensive consideration of the comparative strength and value of the categories of claimants (commercially insured, government-sponsored insurance, or self-pay) and the parties' ongoing dispute and respective positions regarding whether MultiCare unlawfully filed liens against each category. Moreover, because the value of the Settlement payments is to be based on the same standardized formulae, all class members will receive the same value for the same types of claims. Accordingly, class members are not treated differently or unfairly.

4. Class Counsel will Request an Award of Attorney Fees and Costs Later

Class counsel shall submit a request for an award of one-third of all funds recovered for the class, including the common fund and payments MultiCare made as a result of its mid-litigation outreach program, as well as litigation costs pursuant to Washington law. At this time, Class Counsel simply seek permission to inform the Class, in the notice given to class members, that they will be requesting an award of fees in this amount and costs from the Court. If the Court grants preliminary approval, Class Counsel will file a fee petition for

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provisional award of fees and costs, to be made final if the Court finally approves the Settlement.

5. The Settlement's Timing Weighs in Favor of Preliminary Approval

Finally, the timing of the Settlement is a significant factor weighing in favor of preliminary approval. Frequently, a class action is settled after class certification, notice is provided to class members, and the time period for class members to exclude themselves from the class has expired. Here, that is not the case because class members have not yet received notice and given an opportunity to exclude themselves from the class. Thus, class members will have the option of simply opting out of the Settlement class if they are unhappy with the settlement amount or other settlement terms.

In sum, the foregoing factors demonstrate that the proposed Settlement is fair, adequate, within the "range of reasonableness" of potential outcomes, and should be submitted to class members for their consideration. Accordingly, the Court should preliminarily approve the settlement through entry of the proposed order.

C. Provisional Certification of the Settlement Class is Appropriate

As part of the Settlement Agreement, Plaintiffs and MultiCare have stipulated that the class specified by the Settlement Agreement meets the criteria for class certification under CR 23(a) and CR 23(b)(3). This settlement not only meets the criteria, but represents an outstanding settlement for the class members. Accordingly, the Court should provisionally certify the settlement class pending final approval of the settlement agreement. Additionally, because the settlement class does not materially differ from the class Plaintiffs asked to be certified in their motion for class certification, Plaintiffs refer the Court to that briefing. Class counsel, of course, will be happy to provide additional briefing at the Court's request.

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D. The Proposed Notice Program is Sound

In order to protect the rights of absent class members, the Court must provide the best notice practicable under the circumstances to class members of a potential class action settlement. *See* CR 23(c)(2); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-175, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 2d 865 (1950). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314.

The Manual for Complex Litigation further prescribes the features that the settlement notice should contain. According to the *Manual for Complex Litigation* § 21.312, the notice should:

• Define the class;

• Describe clearly the options open to the class members and the deadlines for taking action;

• Describe the essential terms of the proposed settlement;

• Provide information regarding attorneys fees;

• Indicate the time and place of the hearing to consider approval of the settlement, and the method for objecting to or opting out of the settlement;

• Explain the procedures for allocating and distributing settlement funds, and, if the settlement provides different kinds of relief for different categories of class members, clearly set out those variations;

• Provide information that will enable class members to calculate or at least estimate their individual recoveries; and

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• Prominently display the address and phone number of class counsel and the procedure for making inquiries.

Here, the notice program and proposed forms of notice satisfy these criteria. Class members can be specifically identified through MultiCare's own records and the liens filed with the Pierce and King County Auditor's Offices, as those records contains the address of the individuals against whom Rohlke-notarized liens were filed. Plaintiffs propose sending notice in the form attached as Exhibit A to the Settlement Agreement directly via First Class mail to the class member addresses listed on the liens and within MultiCare's records. If any notices are returned as undeliverable, Gilardi will make reasonable attempts to determine a current mailing address and will promptly remail the notice to any addresses disclosed through such efforts. This approach will ensure that direct notice reaches as many class members as possible. The mailed notice contains all of the elements required by the *Manual for Complex Litigation*. Class members with questions may call Gilardi which will establish a response system that will provide answers to frequently asked questions. Class members will also be able to speak to a live operator or may call class counsel. Toll free numbers will be available for class members to use.

In addition to the notice that is mailed directly to class members, Plaintiffs will disseminate a notice for publication—attached as Exhibit D to the Settlement Agreement—in The Seattle Times, The News Tribune, The Olympian, the Federal Way Mirror, the Washington State Association for Justice Trial News, and the Washington State Bar Association's NWLawyer Magazine. Publication within these outlets is reasonably calculated to reach the vast majority of class members, as the addresses on the liens and the fact that they received emergency medical treatment in Pierce and King Counties demonstrates that most are likely Puget Sound residents, and many of the class members were represented by attorneys in their personal injury suits. The publication notice will provide the salient

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information about the Settlement Agreement and will prominently the settlement website's address. Copies of the Settlement Agreement in its entirety will be available to class members upon request and at the settlement website.

Finally, it is anticipated that, outside of the formal notice program, major Washington State media outlets will run stories on the lawsuit and settlement, further extending notice to class members. Thus, the notice program outlined in the Settlement Agreement is the best practicable notice under the circumstances of this case, and, indeed, will be highly effective.

E. The Scheduling of a Final Fairness Hearing is Appropriate

The last step in the settlement approval process is a final fairness hearing at which the Court may hear all evidence and argument necessary to make its settlement evaluation. Proponents of the Settlement may explain and describe the terms and conditions of the Settlement, and offer argument in support of final approval. In addition, Settlement Class Members, or their counsel, may be heard in support of or in opposition to the Settlement Agreement. After this hearing, the Court will determine whether the Settlement should be finally approved, and whether to enter a final order and judgment under CR 23(e). Plaintiffs request that the Court set a date for a hearing on final approval at the Court's convenience at least 60 days from the date of the initial mailing of the settlement notice. Plaintiffs propose January 30, 2015, the first Friday after the 60-day period expires.

VI. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court (1) grant preliminary approval of the proposed Settlement Agreement, including the settlement payment to the Class and the fees and costs payment to Class Counsel; (2) appoint as Class Counsel Pfau Cochran Vertetis Amala, PLLC, and Watson & Gallagher, PS; (3) provisionally

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certify the proposed Settlement Class; (4) approve the proposed notice plan and forms of notice; (5) appoint Gilardi & Co., LLC, as the Settlement Administrator; and (6) schedule a formal fairness hearing on final approval for January 30, 2015, or as the Court's calendar permits.

DATED this 17th day of November, 2014.

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CERTIFICATE OF SERVICE

I, **Laura Neal**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed at Pfau Cochran Vertetis Amala PLLC and that on today's date, I served the foregoing to the following individuals via Email per agreement:

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DATED this 17th day of November, 2014.

Laura Neal
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