DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	
PLAINTIFFS: ROBERT STERNER, ANGELA THOMAS-GRAVES, AND ADAM HORNING, individually and on behalf of all others similarly situated, v. **DEFENDANTS:** PORTERCARE ADVENTIST HEALTH SYSTEM, d/b/a CENTURA HEALTH-PORTER ADVENTIST HOSPITAL; CENTURA HEALTH CORPORATION; AND PORTER ADVENTIST HOSPITAL.	▲COURT USE ONLY▲
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PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Plaintiffs Robert Sterner, Angela-Thomas Graves, and Adam Horning, by and through their undersigned counsel, file this Unopposed Motion for Preliminary Approval of Class Settlement ("Motion").

I. OVERVIEW

This class action arises out of the alleged failure by Defendants Portercare Adventist Health System, d/b/a Centura Health-Porter Adventist Hospital, Centura Health Corporation, and Porter Adventist Hospital (collectively "Defendants" or "Porter Hospital") to adequately sterilize surgical equipment.

The Court previously certified an unjust enrichment claim for a class of approximately three thousand patients who underwent surgery during the alleged sterilization breach at Porter Hospital. Plaintiffs allege it would be unjust for Defendants to retain profits obtained from surgeries performed during the ongoing sterilization breach. Notice of class certification was previously sent to class members in May 2022, and class members had an opportunity to opt-out.

After extensive discovery, expert disclosures, arm's length negotiations, and multiple mediations conducted by well-respected mediators at JAMS and JAG, the Parties have reached a settlement that is fair, adequate, and reasonable. Plaintiffs strongly believe the settlement is favorable to the class members. Pursuant to Colo. R. Civ. P. 23(e), the following memorandum of points and authorities, and the attached Declaration of Plaintiffs' Counsel Joseph J. Zonies ("Zonies Dec.") (attached as Ex. 1), Plaintiffs respectfully request the Court preliminarily approve the Parties' Settlement Agreement.

II. LEGAL AUTHORITY

Colo. R. Civ. P. Rule 23(e) requires court approval of any class settlement following notice to the class. The preliminary approval stage provides a forum for the initial evaluation of a settlement. 2 Newberg & Conte, Newberg on Class Actions §§ 11.22, 11.27 (3d ed. 1992); *see In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 175 (5th Cir. 1979).[1] "First, the court must preliminarily approve the settlement. Then, the members of the class must be given notice of the proposed settlement, and finally, after a hearing, the court must determine whether the proposed settlement is fair, reasonable, and adequate." *In re Shell Oil Refinery*, 155 F.R.D. 552, 555 (E.D. La. 1993); *see also Reiskin v. Reg'l Transportation Dist. Colorado*, No. 14-CV-03111-CMA-KLM, 2017 WL 5990103, at *2 (D. Colo. July 11, 2017) ("The settlement of a class action may be approved where the Court finds that the settlement is fair, reasonable, and adequate."); *see also Rutter & Wilbanks Corp. v. Shell Oil*, 314 F.3d 1180, 1188-89 (10th Cir. 2002) (affirming approval of class settlement where settlement was fair, reasonable, and adequate).

At this preliminary approval stage, the settling parties bear the burden of demonstrating that the settlement is fair, reasonable, and adequate. *Manual for Complex Litigation (Fourth)* § 21.631 (2004); *see also In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, No. 11-CV-1363, 2012 WL 92498, at *7 (E.D. La. Jan. 10, 2012). "The Court will ordinarily grant preliminary approval where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible

[1] "Because C.R.C.P. 23 is virtually identical to Fed.R.Civ.P. 23, cases applying the federal rule are instructive." *Bruce W. Higley, D.D.S., M.S., P.A. Defined Ben. Annuity Plan v. Kidder, Peabody & Co.*, 920 P.2d 884, 889 (Colo. App. 1996).

approval." *Rhodes v. Olson Assocs., P.C.*, 308 F.R.D. 664, 666 (D. Colo. 2015) (citation omitted); *see also In re Pool Prods. Distrib. Market Antitrust Litig.*, 310 F.R.D. 300, 314-15 (E.D. La. 2015).

Approval of a proposed settlement is within the sound discretion of the Court. *Rutter*, 314 F.3d at 1187. "The purpose at the preliminary approval stage is not to make a final determination of the proposed settlement's fairness." *Nakkhumpun v. Taylor*, No. 12-CV-01038-CMA-CBS, 2015 WL 6689399, at *3 (D. Colo. Nov. 3, 2015). Thus, "the standard that governs the preliminary approval inquiry is less demanding than the standard that applies at the final approval stage." *Id.; see also Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006) ("The purpose of the preliminary approval process is to determine whether there is any reason not to notify the class members of the proposed settlement and to proceed with a [final] fairness hearing.").

There is a strong presumption in favor of finding settlement agreements fair, adequate and reasonable, especially when the settlement of a class action results from arm's length negotiations between experienced counsel after significant discovery has occurred. *Lucas*, 234 F.R.D. at 693; *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2nd Cir. 2005), *cert. denied sub nom., Leonardo's Pizza by the Slice, Inc. v. Wal-Mart Stores, Inc.*, 544 U.S. 1044 (2005) (A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." (quoting *Manual for Complex Litigation, Third* § 30.42 (1995)). Compromise is the essence of settlement, and a court may rely on the judgment of experienced counsel for the parties as "settlements are generally favored." *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 284 (D. Colo. 1997). "Colorado public and judicial policies favor voluntary agreements to settle legal disputes." *Gates Corp. v. Bando Chemical Industries, Ltd.*, 4 Fed. Appx. 676, 682 (10th Cir. 2001)

(citing *Colorado Ins. Guar. Ass'n v. Harris*, 827 P.2d 1139, 1142 (Colo. 1992) (en banc)); *see also Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981) ("Particularly in class action suits, there is an overriding public interest in favor of settlement." (internal citation and quotation omitted)). Because the proposed Settlement Agreement falls within the range of possible approval, this Court should grant Plaintiffs' motion and allow notice to be provided to the class. *See* 2 Newberg & Conte, Newberg on Class Actions ("Newberg") § 11.25 (3d ed. 1992).

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs' Claim

The class consists of approximately 3,000 patients who underwent surgery at Porter Hospital, received notice of the sterilization breach that occurred at Porter Hospital, had a blood test, and did not contract a surgical site infection or bloodborne pathogen such as HIV or Hepatitis. *See* Second Amended Class Action Complaint ¶ 180 (April 3, 2020). The class is certified as to an unjust enrichment claim only. *See* Order (July 23, 2020) (District Court Judge Morris B. Hoffman) (the "Certification Order").

Under Colorado law, a claim for unjust enrichment requires three elements: (1) Defendants received a benefit; (2) at Plaintiffs' expense; and (3) under circumstances that would make it unjust for the Defendants to retain the benefit without commensurate compensation. *City of Arvada Ex Rel Arvada Police Dept. v. Denver Health & Hosp. Auth*, 403 P.3d 609, 616 (Colo. 2017).

Regarding the first element, had the case proceeded to trial, Plaintiffs believe they would have established that Defendants received a financial benefit in the form of profits from the class members' surgeries. Defendants produced a spreadsheet with accounting information which confirms the damages "are easily quantified" on a class-wide basis using common evidence. The

spreadsheet contains accounting information for each class member showing the costs, payments, and net margins (profits) for the surgeries. At trial, Plaintiffs' experts would use this spreadsheet (common evidence) to show how Defendants profited from the surgeries.

Regarding the second element, Plaintiffs believe they would have established that these profits were received at Plaintiffs' expense. Plaintiffs would demonstrate that all the class members who underwent surgery during the sterilization breach were at an increased risk of surgical site infection and contracting blood-borne pathogens like HIV and Hepatitis. Plaintiffs intended to prove this through common evidence, including the fact that all class members received a letter from Defendants stating that all class members were at an increased risk for contracting bloodborne pathogens and recommended that class members all undergo testing for the same. Accordingly, Defendants benefitted at the class members' expense, including by subjecting them to an undisclosed increased risk of infection and causing them to undergo blood testing.

Plaintiffs would establish the third element, "unjustness", using, among a plethora of other evidence, the report from the Colorado Department of Public Health & Environment ("CDPHE") and associated documents, which demonstrated a failure by Defendants to properly sterilize surgical instruments and showed demonstrable findings of unsterile instruments before, during. and after class members' surgical dates. In addition, Plaintiffs believe that other evidence demonstrated these failures to properly sterilize surgical equipment resulted in an increased risk of infection for the class. Plaintiffs would also demonstrate Defendants knew, for years, that their infection rates were increased, but Defendants did not inform the class members and improperly reported infection rates to the regulatory authorities. Plaintiffs would have shown that, had Defendants properly warned about what was occurring, no reasonable person would have chosen

to have an invasive surgery at a hospital where blood, bone, and dead bugs were found in purportedly sterilized surgical equipment. Additionally, no reasonable person would choose to unnecessarily subject themselves to an increased risk of HIV and Hepatitis, especially when numerous other hospitals were available in the Denver area without an ongoing sterilization breach.

By definition, common evidence would also demonstrate that all class members were sufficiently concerned about the increased risk of infection that they voluntarily chose to undergo blood testing. Excluded from the class were those persons who were not concerned enough about an increased risk of HIV and Hepatitis to undergo blood testing. Accordingly, if a patient was sufficiently concerned to undergo blood testing to see if they contracted bloodborne pathogens, Plaintiffs believe this objectively demonstrated that the class member would have been sufficiently concerned by the risk to not undergo surgery at Porter during the sterilization breach.

B. Litigation and Procedural History

Plaintiffs filed their Complaint on behalf of themselves and all similarly situated class members on December 28, 2018. *Sterner, et al. v. Centura Health Corporation, et al.*, 2018-cv-34766 (the "Sterner class action"). The complaint alleged eight claims for relief: negligence, negligence per se, negligent misrepresentation, negligent infliction of emotional distress, fraud, fraudulent concealment, unjust enrichment and disgorgement, and negligent hiring and training.

On March 21, 2019, Defendants filed a motion to dismiss all eight of Plaintiffs' claims. *See* Defendants' Motion to Dismiss Complaint (Mar. 21, 2019). Plaintiffs responded by explaining the basis for all claims and demonstrating their viability. *See* Plaintiff's Response to Defendants' Motion to Dismiss (April 10, 2019). The Court denied Defendants' motion in its entirety, finding

that all the claims were viable. *See* Order re: Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (July 24, 2019) (District Court Judge Kandace C. Gerdes). On August 21, 2019, the Court entered its first Case Management Order for the *Sterner* class action.

In this same timeframe, other plaintiffs filed lawsuits against Defendants alleging the same sterilization breaches caused their physical injuries. On September 16, 2019, all of the lawsuits alleging sterilization breaches against Defendants were consolidated. On September 27, 2019, the Court held the first case management conference for the consolidated litigation. On October 1, 2019, the Court entered an order on the disputed items from the case management conference, and the Court subsequently entered the first case management order for the consolidated litigation.

On November 25, 2019, Plaintiffs filed their 23-page Motion for Class Certification in which Plaintiffs demonstrated that all Rule 23(a) requirements were satisfied. *See* Plaintiff's Motion for Class Certification, at 11-18 (Nov. 25, 2019). Under Rule 23(b)(3), Plaintiffs demonstrated that questions of law and fact common to class members predominated over questions affecting only individual class members. *Id.* at 18-23. Regarding the unjust enrichment claim specifically, Plaintiffs explained:

> In addition, the class is seeking disgorgement of Defendants' profits earned from the unlawful surgeries. Defendants concealed from the public and members of the class that they were knowingly putting patients at increased risk of life-threatening diseases. Even worse, Defendants were actively and falsely promoting their operating rooms as state-of-the-art and free from infection. Complaint ¶¶ 152, 190. No reasonable person would have agreed to undergo a surgery at Defendants' hospital had they known the truth—that the instruments Defendants used during surgery might be encrusted with dried blood, bone residue, dried cement, hair, and other bioburden from another patient's surgery, or even dead bugs. Therefore, Defendants should disgorge the profits they earned from the surgeries.

Motion for Class Certification, at 8-9. Plaintiffs clarified that, for the unjust enrichment claim, "Plaintiffs seek only Defendants' ill-gotten profits, not the actual costs to Defendants of providing the surgeries for which Plaintiffs and the class likely received some benefit." *Id.* at 9 n. 5.

On June 16, 2020, the Court entered the Third Amended Case Management Order. For purposes of class certification, Defendants took limited depositions of the three class representatives on July 13, 2020. On July 17, 2020, the Court held an hours-long class certification hearing where the Parties presented evidence and argument supporting each of their positions regarding certification.

After full briefing and the hearing, District Court Judge Morris Hoffman concluded that the unjust enrichment claim satisfied the four requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy) and Rule 23(b)(3) as (i) questions of law or fact, common to the members of the class, predominated over questions affecting only individual members (predominance) and (ii) a class action was superior to individual lawsuits (superiority). *See* Certification Order. The Court made detailed factual findings and concluded:

> I will not linger over any of these 23(a) requirements other than numerosity, because Plaintiffs have clearly met their burden as to those requirements. There are unquestionably common issues of law and fact shared by all the claims across the proposed class, including common issues of liability and perhaps even some common issues of causation and damages. I am likewise satisfied that the claims of the three named Plaintiffs are typical of the class claims, and that these three named Plaintiffs and their chosen counsel can more than adequately represent the class.
>
> As for numerosity, I find that Plaintiffs have met their burden of proving the class is so numerous that joinder is impractical.

Id. at 4-5 (footnote omitted and emphasis added). Moreover, the Court concluded that common issues would predominate over individualized issues. *See id.* at 8-9.

The Court determined that class treatment of claims for emotional damages would not be superior to individual cases, but that "unjust enrichment claims are quite a different matter when it comes to predominance and superiority." *Id.* at 8-9. The Court explained:

> Plaintiffs seek liquidated damages on those claims in the form of a return of the profits Defendants enjoyed on each of Plaintiffs' surgeries. These damages, unlike the unliquidated damages for emotional distress, are easily quantified. Even with 1,000 class members, the amounts paid for the surgeries are easily determined, and then some no-doubt-to-be-fought-over profit margin applied to each of those amounts paid, to yield the amount of requested disgorgement for each class member.

Id. (emphasis added). Regarding the unjust enrichment claim, the Court concluded that "class treatment of the disgorgement claim will be superior to 1,000-plus separate trials." *Id.* at 9.

Accordingly, on July 23, 2020, the Court certified an unjust enrichment claim for a class of approximately three thousand patients who underwent surgery during the alleged breach at Porter Hospital. The class was defined as:

> All individuals who underwent surgery at Porter between July 21, 2016 and April 5, 2018 and either:
>
> a. Received written notice dated either April 4, 2018 or April 6, 2018 of the cleaning/sterilization problems at Porter and who subsequently underwent testing for bloodborne pathogens such as Hepatitis B, Hepatitis C, and HIV; or
>
> b. Otherwise learned of the cleaning/sterilization problems at Porter and underwent testing for bloodborne pathogens such as Hepatitis B, Hepatitis C, and HIV.
>
> Excluded from the Class are (1) persons who suffered from surgical site infections or tested positive for bloodborne pathogens; (2) Porter, its employees, affiliates, legal representatives, officers, and directors; and (3) any judge, justice, or judicial officer presiding over this matter, including their immediate family and judicial staff.

See Second Amended Class Action Complaint ¶ 180 (April 3, 2020).

Soon thereafter, on September 21, 2020, Defendants filed a Rule 21 Petition seeking to overturn this Court's rulings regarding documents from the CDPHE. While the Rule 21 Petition was pending before the Colorado Supreme Court, the entire consolidated litigation, including the *Sterner* class action, was stayed. Months later, after full briefing and oral argument, the Colorado Supreme Court denied Defendants' requested relief and the stay for the consolidated litigation was lifted.

On February 1, 2021, Plaintiffs filed a Motion to Amend the Class Definition. Plaintiffs sought to remove the requirement that the class member underwent testing for bloodborne pathogens, which was primarily related to the claims for emotional distress which the Court previously concluded were not appropriate for class treatment. On April 27, 2021, the Court entered an order denying Plaintiffs' request to amend the definition. On January 7, 2022, the Court set the *Sterner* class action for a two-week trial to commence on April 10, 2023.

On March 2, 2022, Plaintiffs filed their Motion to Approve and Disseminate Class Notice pursuant to Rule 23(c)(2)(A). Through this motion, Plaintiffs sought Court approval of the proposed Class Notice and to use Epiq Class Action and Claims Solutions, Inc. ("Epiq") to disseminate and administer class notice. On March 29, 2022, the Court granted Plaintiffs' Motion to Approve and Disseminate Class Notice, approving the proposed Class Notice. *See* Order Granting Plaintiffs' Motion to Approve and Disseminate Class Notice (March 29, 2022). In May 2022, through Epiq, Plaintiffs sent the Class Notice to the members of the certified class. *See* Notice of Class Certification (attached as Ex. 2). Epiq also created and administered a website[2]

[2] Website at https://www.sternervportercarehealth.com/.

containing the Class Notice, a 1-800 number with a live operator to answer questions from class members, and an email address for class members to send inquiries.

On March 29, 2022, Defendants filed a Motion to Amend the Case Management Order, primarily attacking class certification and asking the Court to order the Plaintiffs to disclose experts in support of maintaining class certification. After full briefing, on May 4, 2022, the Court entered an order regarding Defendants' Motion to Amend the Case Management Order, granting in part Defendants' requested relief.

Over the course of several years, the Parties completed extensive discovery in the consolidated litigation and participated in numerous hard-fought discovery battles. As an example of the breadth of discovery, on May 9, 2022, Defendants made their *thirty-first* supplemental disclosures. During the litigation, Plaintiffs served extensive written discovery, including 41 interrogatories, 27 requests for admission, and 92 requests for production, resulting in over a million pages of documents produced by Defendants. The documentary evidence was extensive and required over a year of work to organize and analyze nearly nine years' worth of sterilization data. Additionally, Plaintiffs took 20 depositions of Defendants' employees, ex-employees, and corporate representatives.

On May 31, 2022, the three class representatives responded to Defendants' written discovery requests, which included detailed interrogatories and requests for production. In June 2022, Defendants took depositions of the three class representatives. Each of these three depositions lasted several hours.

On July 6, 2022, the Parties submitted an Amended Proposed Case Management Order, with competing positions on disputed issues. On July 7, 2022, the Court held a discovery hearing

regarding the disputed issues. On July 22, 2022, the Court entered an Amended Case Management Order, which was specific to the *Sterner* class action.

On July 29, 2022, Plaintiffs took the deposition of Defendants' Rule 30(b)(6) corporate representative regarding Defendants' alleged financial benefits gained from the thousands of class member surgeries.

On September 1, 2022, Plaintiffs disclosed four experts in support of maintaining class certification. The disclosures included expert opinions regarding:

(1) hospital standard of care from the perspective of a doctor, Chief Medical Officer, and healthcare executive;
(2) hospital standard of care for infection prevention and reporting from the perspective of a Director of Infection Prevention and Infection Prevention Nurse;
(3) hospital standard of care and infection prevention from the perspective of a Sterile Processing/Central Sterile Services Leader, instructor, and administrator; and
(4) financial damages relating to the alleged enrichment of Defendants as derived from the perspective of a hospital Vice President of Finance and Chief Financial Officer.

Over several months, the Parties participated in multiple days of meditation with multiple distinguished mediators from JAMS and JAG. Zonies Dec. ¶ 1. On October 3, 2022, the parties entered into a Memorandum of Understanding to resolve the *Sterner* class action. *Id.* ¶ 2. On March 10, 2023, the Parties agreed to a Master Settlement Agreement. *See* Master Settlement Agreement ("MSA" or "Settlement Agreement") (attached as Ex. 3). The MSA is the product of arm's length negotiations between the Parties. *Id.* § 11; Zonies Dec. ¶ 3.

Plaintiffs now come before this Honorable Court with their motion to grant preliminary approval of this Class Action Settlement. The proposed settlement is fair, reasonable, and adequate and meets all the criteria for preliminary approval under Colorado law.

C. The Settlement Agreement

Under the Settlement Agreement, Defendants have agreed to pay cash in the amount of $6,500,000.00 to create a Common Fund for the benefit of class members. MSA § 1.7. Class members will receive a pro rata payment (as discussed in section IV(B) below), after the deduction of settlement-related costs, including the expenses of the settlement administrator and the costs of notice to the Class, any service awards, litigation expenses, any fee award, and any other administrative fees and expenses which may be approved by the Court. *Id.* §§ 1.7, 2. Defendants will fund the settlement within 15 days after entry of the Preliminary Approval Order. *Id.* at § 4.2.2.1. No portion of the Common Fund will be returned to Defendants. *Id.* at §§ 2.2, 4.3.1.

As discussed above, the Court previously approved Plaintiffs' request to send class notice and employ the settlement administration firm Epiq to distribute the class notice. Plaintiffs now request to continue Epiq's employment to administer and distribute the Notice of Preliminary Settlement Approval and any other communications, including distribution of settlement funds to class members. Epiq's relevant qualifications are outlined in the resume for Hilsoft Notifications. (attached as Ex. 4 and previously attached as Ex. 2 to Plaintiffs' Motion to Approve and Disseminate Class Notice (March 25, 2022)).[3]

1. Notice of settlement

Within thirty days after entry of the Preliminary Approval Order, Plaintiffs will mail a settlement notice (proposed Notice of Settlement attached as Ex. 5) to all class members. MSA at § 4.2.2.2. Notice will be provided via individual notice, which will be sent by U.S. mail to the

[3] The attached resume is for Hilsoft Notifications ("Hilsoft"). Hilsoft is a business unit of Epiq that specializes in designing, developing, analyzing, and implementing large-scale legal notification plans.

addresses previously used in the original Notice (less the individuals who opted-out). The notice will also be posted on the class website (https://www.sternervportercarehealth.com/) along with other important documents such as the MSA, this Motion, and the motions for final approval and for attorneys' fees and expenses when filed. Epiq will provide hardcopies of the settlement notice as well as the MSA upon request to settlement class members. Furthermore, a toll-free number with interactive voice response, FAQs, and an option to speak to a live operator will be made available to address inquiries by class members.

2. Release

Upon entry of the Final Approval Order, Plaintiffs and all Settlement Class Members who did not previously exclude themselves from the Settlement Class agree to forever release and discharge the Releasees for the Settled Claim. *Id.* §§ 4.3.1, 7. "Releasees" is defined as

> [A]ll Defendants and Advent Health, their officers and executives, including but not limited to their past, present and direct or indirect parent organizations, holding companies, subsidiaries, divisions, affiliated entities, and their present members, managers, partners, owners, officers, shareholders, directors, trustees, administrators, executors, attorneys, representatives, employees, insurers, reinsurers, agents and/or independent contractors, and each of their successors and assigns individually and in their official capacities.

Id. § 1.16. "Settled Claim" is defined as:

> [A]ny claims, causes of action, demands, damages, costs, expenses, liabilities or other losses, whether in law or in equity, including assigned claims, whether known or unknown, asserted or unasserted, regardless of the legal theory, existing now or arising in the future that each Settlement Class Member or any of the Settlement Class Member's children, parents, spouses, domestic partners, heirs, beneficiaries, wards, successors, representatives or assigns, has, claims to have, or may have now or in the future, arising out of or in any way relating to the Class Members' surgeries provided at or through the Hospital between July 21, 2016 and April 5, 2018, and related care received at or through the Hospital, as alleged in the Lawsuit, with the exception of any claim for emotional distress for individuals identified on Amended Exhibit A and Exhibit B to the May 31, 2022 Addendum to the Tolling Agreement dated October 27, 2021 or any amendments thereto.

Id. § 1.18.

3. Service Awards to Named Plaintiffs, Attorneys' Fees, and Reimbursement of Class Costs

The three Named Plaintiffs in this case have been vital in litigating this matter, including by participating in the thorough vetting process undertaken by the undersigned counsel, providing their medical and other personal information in support of the class claims, responding to extensive written discovery, and preparing for and testifying in two separate depositions. *See* Zonies Dec. ¶ 4. Plaintiffs will separately petition the Court for service awards for each Named Plaintiff in recognition of the substantial time, effort, and expense they incurred pursuing claims that benefited the Settlement Class. *See* M.S.A. § 4.3.2. The amount requested will be reasonable and well within commonly awarded amounts in settled class action cases. *See* Zonies Dec. ¶ 5. Should the Court award less than any amount requested as a Service Award, the difference in the amount sought and the amount ultimately awarded shall remain in the Common Fund for the benefit of the Class. M.S.A. § 2.2(d).

The Settlement Agreement permits Plaintiffs' counsel to apply to the Court seeking a reasonable portion of the Common Fund as payment of reasonable attorneys' fees and costs (the "Fee Award"). *Id.* § 6.1. Class Counsel intends to make an application to the Court for a reasonable Attorneys' Fee Award in an amount not to exceed 33.33% of the Common Fund, plus reasonable expenses incurred, in keeping with the attorneys' contracts with the class representatives, and Colorado and Tenth Circuit precedent. *See e.g. Fager v. CenturyLink Communications, LLC*, 854 F.3d 1167, 1177 (10th Cir. 2016) (affirming district court's final approval of settlement agreement where attorney fee would "represent more than double the amount paid to the class and constitute 68% of the total fund."); *see also In re: Motor Fuel Temperature Sales Practice Litig.*, 872 F.3d

1094, 1120-21 (10th Cir. 2017) (rejecting presumption that attorney fees should not exceed 50% of the total amount of money going to class members because class actions "have value to society more broadly, both as deterrents to unlawful behavior — particularly when the individual injuries are too small to justify the time and expense of litigation — and as private law enforcement regimes that free public sector resources."); *see also Brody v. Hellman*, 167 P.3d 192, 200-01 (Colo. App. 2007) (noting that 30% is reasonable and "not an extreme fee, considering lead counsel worked for five years with the risk of getting nothing.").

The Settlement Agreement is neither dependent nor conditioned upon the Court approving the aforementioned payments, nor upon the Court awarding the particular amounts sought.

IV. DISCUSSION

Plaintiffs seek preliminary approval of the class action settlement for approximately 3,000 class members who were provided notice and did not opt-out. *See* Zonies Dec. ¶ 6. As noted above, in evaluating a proposed settlement under C.R.C.P. 23(e), the trial court must determine whether the settlement is fundamentally fair, adequate, and reasonable. *Higley*, 920 P.2d at 891. Some of the numerous factors that may govern the fairness inquiry include: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed; (6) the experience and views of counsel; and (7) the reaction of the class members to the proposed settlement. *Id.* (citing *Helen G. Bonfils Foundation v. Denver Post Employees Stock Trust*, 674 P.2d 997, 999 (Colo. App. 1983)).

Here, because the Settlement Agreement is fair, reasonable, and adequate under both the Rule 23 criteria and the *Bonfils* factors, the Court should grant preliminary approval and allow

notice of the settlement to issue to the class. *See* 2 McLaughlin on Class Actions § 6:7 (15th ed. 2018) (explaining that a proposed settlement "will be preliminarily approved unless there are obvious defects in the notice or other technical flaws, or the settlement is outside the range of reasonableness or appears to be the product of collusion, rather than arms-length negotiation.").

A. The Settlement provides substantial relief to the Class, particularly given the risks posed by continued litigation.

"The most important factor relevant to the fairness of a class action settlement is . . . the strength of the plaintiff's case on the merits balanced against the amount offered in the settlement." *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (internal quotation and citations omitted). And, "[b]ecause the essence of settlement is compromise, courts should not reject a settlement solely because it does not provide a complete victory to the plaintiffs." *In re AT&T Mobility Wireless Data Services Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010) (citations omitted).

Plaintiffs continue to believe that their claims against Defendants have substantial merit. However, it is clear that legal uncertainties associated with continued litigation would pose substantial risk of non-recovery to the Class. *See In re Southwest Airlines Voucher Litig.*, No. 11-cv-8176, 2013 WL 4510197, at *7 (N.D. Ill. Aug. 26, 2013) ("In considering the strength of plaintiffs' case, legal uncertainties at the time of settlement favor approval."). Given the significant litigation risks here, the $6.5 million common fund provides a substantial recovery for class members. Defendants have raised two categories of defenses, both of which pose substantial risks to the case. Due to these risks to Plaintiffs and the class, Plaintiffs believe the settlement is favorable to the class.

First, Defendants indicated their intent to file a motion seeking decertification of the class. At Defendants' request, the Court established a discovery and briefing schedule, including expert disclosures, for filing of a motion seeking decertification. Defendants argued that the class was improperly certified because, Defendants alleged, Plaintiffs could not establish the elements for an unjust enrichment claim on a class-wide basis. In earlier briefing, Defendants argued that discovery has shown that whether any given Plaintiff or class member's surgical procedure conferred a financial benefit on Defendants, and if so, how much, is an "extraordinarily complicated question" that varies widely by patient depending on the type of surgery, the reimbursement rates paid by a given payor for that procedure at that time (e.g., Medicaid, Medicare, private health insurers, self-pay patients, indigent patients, etc.), and other factors.

Thus, for example, while the amounts charged for services and supplies are set by a common formula (i.e., a charge master), there is significant variation in the amounts paid or reimbursed for a given patient and procedure depending on the identity of the payor, whether there are agreements between a patient's insurer and the hospital, and what copays or co-insurance is applicable. In this matter, there are seventeen different payor sources at issue. *See* Defs.' Joint Resp. In Opp'n To Pls.' Mot. to Amend Class Def., at 9-15 (Mar. 8, 2021) and Ex. A thereto (Aff. of Mark Carley, V. P. of Managed Care and Payor Relations for Centura Health) ¶¶ 6-11. Among several other factors, the "profit" analysis is impacted by whether the patient is a Medicare or Medicaid recipient, has private insurance (and the contractual reimbursement rates that insurer negotiated), whether the care was in network or out of network, or whether a patient is covered by workers' compensation insurance. *Id.* Based upon these circumstances, Defendants contended that

the "benefit" element could not be established through common evidence and instead would require individualized inquiries for each class member.

Defendants further alleged that discovery revealed that the hospital derived no "profit" from the surgeries of a large percentage of class members and that there was no evidence to suggest Defendants "profited" from individual surgeries at all. For example, Defendants asserted that some payors, such as Medicare, set reimbursement rates that are typically less than the actual costs associated with providing hospital services, meaning that the hospital provided those services at a loss. Defendants pointed to an accounting spreadsheet which purportedly showed that Porter provided services to about half of the 3,011 class members at a loss, meaning those surgeries allegedly conferred no "profit" or benefit. Defendants contended this "variability" did not reflect a "difference[] in damages" but instead showed that about half of the class would lose on the merits.

Defendants have also alleged that the second liability element—that any benefit conferred on Defendants came at Plaintiffs' and class members' expense—is not susceptible to common proof. Defendants assert that Plaintiffs have never explained their legal theory of "expense" nor how it could be established with common proof. Defendants dispute that mere exposure to an allegedly increased risk of infection is a legally sufficient "expense" given that any person who was actually infected as a result of such exposure is excluded from the class. Defendants argued that Plaintiffs could not rely on their alleged emotional distress to satisfy the "expense" element, because Judge Hoffman already found that issue to be predominantly individualized. Additionally, Defendants asserted that using a claimed pecuniary harm to provide the "expense" would overwhelm the case with individual issues given the role of third-party payors. Defendants further

asserted that using the nondisclosure theory (i.e., not disclosing the ongoing sterilization breach) as an informational injury to establish "at plaintiff's expense" would also raise individual questions about causation.

Defendants also contended that Plaintiffs must show that they and every member of the class would not have had their surgeries at the hospital had there been some disclosure. Defendants asserted this would require that Plaintiffs first establish what disclosure "should have" occurred, and then contend with the possibility, recognized by Judge Hoffman, that some class members "may have had their surgery no matter what they knew about Defendants' infection rates." *See* Certification Order at 8 (July 23, 2020). Although Judge Hoffman assumed causation issues would be limited to relatively discreet groups, such as "emergency room referrals," Defendants likely would have argued that expert opinion would show that the causation questions would arise with respect to virtually every member of the class and could not be resolved without individual inquiry.

Defendants have indicated they will rely in part on expert testimony for many of the issues above to show that the elements of Plaintiffs' unjust enrichment claim and their disgorgement remedy are not susceptible to common proof. As noted, at Defendants' request, the Court entered a Case Management Order by which the parties were to disclose experts and file briefing on these class decertification issues. The possibility of Defendants winning a motion to decertify is a significant risk to the class which weighs in favor of approving the settlement here.

In addition to these issues threatening the continued certification of the class, Defendants have raised numerous defenses to the merits of the underlying unjust enrichment claim. As discussed above, Defendants indicated they would attempt to demonstrate that they did not receive a benefit from the class members' surgeries. Plaintiffs also anticipate that Defendants would seek

to broadly establish there was not an ongoing sterilization breach and that the hospital was already taking corrective measures to resolve any potential issues. Defendants would likely seek to show that, even if there were some limited sterilization issues, those issues did not directly affect patient safety or were not out of line with safe hospital practices. In addition, Defendants likely would argue that Plaintiffs would have to demonstrate that alternative venues (i.e., other hospitals) were "safer," and Plaintiffs would not be able to do so.

Finally, Defendants have asserted that even if Plaintiffs obtain a favorable verdict at trial, Plaintiffs would be unable to collect the judgment because Porter Hospital is a Colorado nonprofit organization. Colorado law provides that the assets of a nonprofit organization shall "be immune from levy and execution on any judgment" except to the extent that the organization would be reimbursed by proceeds from liability insurance policies. C.R.S. § 7-123-105. Based upon review of Defendants' applicable insurance policies, Plaintiffs acknowledge there is at least an issue as to whether Defendants' insurance policies would cover the unjust enrichment claim, such that Colorado law may prevent Plaintiffs from collecting a judgment against Defendants.

Though Plaintiffs believe they have strong arguments to maintain class certification, Defendants' success on decertification would render it highly unlikely Plaintiffs and the Class would recover anything given the prohibitive time and expense of pursuing thousands of individual cases. Furthermore, Defendants have articulated numerous arguments demonstrating a possibility that they would prevail at trial. Plaintiffs maintain that Defendants have more to lose at trial and face more risks, warranting the material recovery Plaintiffs have achieved in this proposed settlement, but nonetheless acknowledge that settling now reduces very real risks of recovering nothing.

B. The Settlement value is well within the range of reasonableness.

The Settlement provides a $6.5 million Common Fund for the approximately three thousand class members. After accounting for litigating expenses (including a reasonable portion of the overall costs incurred by undersigned counsel litigating general liability against Defendants in the consolidated litigation), the costs of administering class notice and settlement, and attorneys' fees of 33%, Plaintiffs anticipate that each class member will receive a pro rata distribution of at least $1,250.00. Zonies Dec. ¶ 7. Plaintiffs believe that a recovery of $1,250.00 per class member for an unjust enrichment claim, where none of the class members suffered a physical injury, such as an infection or blood-borne pathogen, is reasonable here. *See Thomas v. Rahmani-Azar*, 217 P.3d 945, 949-50 (Colo. App. 2009) (affirming "trial court's determination that a *zero dollar settlement* was not unreasonable considering the weaknesses of the claims and the possibility of significant additional expense, including payment of attorney fees, for pursuing the case to trial." (emphasis added)).

C. Continued litigation would be complex, costly, and lengthy

Preliminary approval is also favored because "[s]ettlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011). As explained above, there is risk that this class may be decertified. Moreover, even if Plaintiffs defeat Defendants' request for decertification and this litigation were to continue on the merits, it would be lengthy, very expensive, and involve extensive motions practice, likely including motions for summary judgment and various pretrial motions, as well as extensive fact and expert discovery including the preparation of expert reports, expert depositions, and Rule 702 motions. *See Cotton v. Hinton*,

559 F.2d 1326, 1331 (5th Cir. 1977) ("[C]lass action suits have a well-deserved reputation as being most complex.").

Even if the Class recovered a judgment at trial in excess of the $6.5 million provided by the Settlement, post-trial motions and the appellate process would deprive them of any recovery for years, and possibly forever in the event of a reversal. Moreover, the Colorado Charitable Immunity Doctrine, Colo. Rev. Stat. § 7-123-105, may preclude collecting any judgment against Defendants because of their nonprofit status.

D. Class Counsel are competent, well-informed, and experienced, and they strongly endorse the Settlement.

The fourth factor examines the opinion of competent counsel as to whether a proposed settlement is fair, reasonable, and adequate. *Isby v. Bayh*, 75 F.3d 1191, 1200 (7th Cir. 1996). In assessing the qualifications of counsel under this factor, a court may rely upon declarations submitted by class counsel as well as its own observations of class counsel during the litigation. *See id.*; *see also In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995) ("Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation."). In its order certifying the class, the Court previously found that the class "counsel can more than adequately represent the class." Certification Order at 5 (July 23, 2020). In recognition of their significant experience in class action and complex litigation and good judgment, the Court appointed as class counsel the five attorneys requesting class certification: Daniel Sloane, David Woodruff, and Megan Matthews of Wahlberg, Woodruff, Nimmo & Sloane, LLP and Joseph Zonies and Greg Bentley of Zonies Law LLC. These class counsel endorse this settlement and strongly recommend its approval. Zonies Dec. ¶ 8.

Accordingly, this factor also weighs in favor of preliminarily finding the settlement fair, reasonable, and adequate. *See, e.g., McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 812 (E.D. Wis. 2009) (That "counsel endorses the settlement and it was achieved after arms-length negotiations facilitated by a mediator . . . suggest[s] that the settlement is fair and merits final approval."); *see also In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1020 (N.D. Ill. 2000) (placing "significant weight on the . . . strong endorsement of [this] settlement" by a "well-respected" attorney).

E. The Settlement was reached after significant analysis and arm's-length negotiation.

The last factor concerns the stage of the proceedings and amount of discovery completed at the time the settlement is reached. *Synfuel*, 463 F.3d at 653. This factor "indicates how fully the district court and counsel are able to evaluate the merits of plaintiffs' claims." *Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, No. 07 C 2898, 2011 WL 3290302, *8 (N.D. Ill. July 26, 2011) (quoting *Armstrong*, 616 F.2d at 325); *see also Thomas*, 217 P.3d at 950 (explaining that after meaningful discovery, "it was reasonable to infer that the parties possessed sufficient knowledge to enable them to engage in meaningful and informed negotiations of the settlement agreement.").

The proposed Settlement was reached after approximately four years of litigation on multiple tracks (hundreds of individual infection cases and the class action) that were ultimately consolidated before this Court, and it is informed by counsel's thorough investigation and Plaintiffs' experts' analysis of the issues at the heart of this case. Armed with this information, Plaintiffs and their counsel had "a clear view of the strengths and weaknesses" of the case and were in a strong position to negotiate a fair, reasonable, and adequate settlement. *See In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), aff'd 798 F.2d 35 (2d Cir. 1986).

Mediation was also hard-fought. The parties engaged in multiple rounds of mediation spanning almost a year to reach the Settlement Agreement now before the Court. The parties were able to reach an agreement in principle after extensive negotiations across multiple mediations assisted by Judge Downes and Judge Caschette. The Settlement Agreement was only possible because it was based on a robust and fully informed factual background. In addition, class counsel continued their in-depth analysis of this case as negotiations continued even after the initial agreement in principle.

Because the Settlement "is the product of arm's length negotiations, sufficient discovery has been taken to allow the parties and the court to act intelligently, and counsel involved are competent and experienced," the Court may presume the settlement to be fair, adequate, and reasonable. H. Newberg, A. Conte, Newberg on Class Actions § 11.41 (4th ed. 2002).

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant this motion in its entirety and enter an order (i) granting preliminary approval of the Settlement Agreement; (ii) approving the Notice of Settlement; and (iii) approving the proposed schedule leading up to and culminating in the fairness hearing.

Dated this 13th day of March, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 13, 2023, a true and correct copy of the foregoing **PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT** was filed and served via Colorado Courts E-Filing on all counsel of record.

s/ Joseph Zonies
Joseph Zonies