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*Attorney for Plaintiff;
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

JOEL CLEARY, M.D., individually and
on behalf of all others similarly situated,

Plaintiff,

v.

RETIREMENT PLAN FOR
EMPLOYEES OF NORTHERN
MONTANA HOSPITAL, et al.,

Defendants.

Case No. 4:16-cv-00061-BMM-JCL

**JOINT MEMORANDUM IN SUPPORT OF JOINT MOTION FOR
PRELIMINARY APPROVAL OF SETTLEMENT**

Plaintiff Joel Cleary (“Plaintiff”), Plaintiff’s Counsel, Defendants

Retirement Plan for Employees of Northern Montana Hospital, the Administrative
Committee of the Retirement Plan for Employees of Northern Montana Hospital,
David Henry, Kim Lucke, Bonnie O’Neill and Northern Montana Hospital

(collectively, “Defendants”) and Defendants’ counsel hereby jointly submit this memorandum in support of their motion for preliminary approval of their settlement of this action (the “Settlement”) as set forth in the accompanying Settlement Stipulation and [Proposed Order] (the “Settlement Stipulation”), approving the form, substance and manner of distribution of notice to the Covered Participants;¹ and scheduling a hearing for final approval of the Settlement. The terms of the Settlement are fully set forth in the Settlement Stipulation, filed contemporaneously herewith, and are summarized for the Court’s convenience in this memorandum.

I. THE SETTLEMENT

The Settlement Stipulation provides two forms of substantive relief: monetary relief and injunctions.

A. Monetary Relief

The first claim for relief of Plaintiff’s Third Amended Complaint (“TAC”) (ECF No. 79) (see TAC ¶¶ 52-75), Plaintiff’s extant pleading, as well as the second claim for relief (*id.* ¶¶ 76-80), assert that Plaintiff was improperly denied his pension benefits and that he and other participants in the Plan² have had their

¹ Unless otherwise so stated, capitalized terms have the meanings ascribed to them in the Settlement Stipulation.

² The Plan is an “employee pension benefit plan” within the meaning of ERISA § 3(2), 29 U.S.C. § 1002(2).

pension benefits miscalculated because of Defendants' failure to follow the terms of the Plan and/or certain provisions of ERISA.

While Defendants have denied any wrongdoing or liability, they have agreed to pay Plaintiff his pension benefits and to pay 187 other current or former participants (Covered Participants) the sums set forth on Exhibit 1 to the Settlement Stipulation which total \$297,529. Settlement Stipulation § 10. Those sums were the result of both Plaintiff's and Defendants' extensive review of Plan records and negotiations between the Parties.³

B. Injunctive Relief

1 Plan Documents

The TAC's fifth claim for relief (see TAC ¶¶ 97-104) asserts that the Hospital violated ERISA § 209, 29 U.S.C. § 1059, which requires employers to maintain the records necessary to be able to calculate benefits. Defendants have denied the claim but have agreed to an injunction requiring the Hospital to comply with this provision. Settlement Stipulation ¶ 7.1.

2. Claims Procedure

The TAC's third and fourth claims for relief (TAC ¶¶ 81-96) assert that Defendants failed to maintain a process for deciding benefit claims that comports,

³ During the course of discovery, the Parties have reviewed over 40,000 pages of documents and Plaintiff conducted 10 depositions.

both as written and in practice, with ERISA § 503 and 29 C.F.R. § 2560.503-1. As the Court is aware, Defendants' affirmative defense that Plaintiff failed to exhaust the Plan's claims procedures (ECF No. 90 at ¶ 72) has been the subject of four motions.

While also denying the allegations of these claims, Defendants have agreed to comply with the requirements of ERISA § 503 and 29 C.F.R. § 2560.503-1. Moreover, Defendants have agreed to inform anyone who seeks benefits from the Plan of his/her right to be provided with the data used to calculate the benefit as well as all information necessary to contest the calculation. Settlement Stipulation ¶ 7.2.

II. NOTICE TO THE COVERED PARTICIPANTS AND THE BAR ORDER

The Settlement Stipulation provides relief for 187 Covered Participants who are not parties to the Action and bars them from pursuing the claims asserted in the TAC in return for that relief. Movants propose that the Covered Participants be provided with notice and an opportunity to be heard as follows.

A. The Notice

The Settlement Stipulation provides that a written Notice (Settlement Stipulation ¶ 1.13 and Exhibit 3) will be sent to each Covered Participant. The Notice consists of 2 parts: (1) a generic notice which summarizes the Settlement in some detail and informs the Covered Participants how they may object to the

Settlement and how they may obtain additional information about the Settlement, including a copy of the Settlement Stipulation and other documents filed in the Action; and, (2) an individualized cover letter to each Covered Participant which encloses the generic notice, includes a brief summary of the Settlement, and informs the Covered Participant of the amount of his/her Settlement Payment.

Defendants will mail⁴ the Notice to each Covered Participant for whom they have a last known current address and will make reasonable efforts to determine an address for any Covered Participant for whom no address is currently known. Settlement Stipulation ¶ 3.2.2. Defendants will also use reasonable efforts to determine a current address for any Covered Participant for whom a mailed Notice is returned. *Id.*

In addition, the Notice, as well as the Court's Preliminary Approval Order, and the Motion for Final Approval of the Settlement will be available at www.KellerSettlements.com/currentcases/Northern-Montana-Hospital-Settlement, a web site of Plaintiff's Counsel.

The Parties believe that this form and method of providing notice will provide the best notice practicable and comport with due process. *Seifi v. Mercedes-Benz USA, LLC*, Case No. 12-CV-05493 (TEH), 2015 WL 12964340, at

⁴ Unless the Court orders a different means of providing the Notice.

*1-*2 (N.D. Cal. Aug. 18, 2015) (providing notice by first class mail and establishing informational web site was best practicable notice and satisfied law and due process); *Poehler v. Fenwick*, 2:15-cv-01161 JWS, 2015 WL 9258448, at *3 (D. AZ Dec. 18, 2015) (first class mail is often the best form of notice).

B. THE BAR ORDER

As stated, the Settlement provides relief for the 187 Covered Participants. However, neither does Plaintiff's Counsel represent any of these people nor have they communicated with any of them. Because Plaintiff's Counsel does not formally represent the Covered Participants, they cannot agree to a release of claims on their behalves. Not unreasonably, Defendants wish to ensure that the Settlement finally resolves the claims asserted in the TAC. The Settlement Stipulation therefore contains a Bar Order that, once the Settlement is approved, will bar Covered Participants from pursuing any claims they may have against any of the Defendants arising out of the facts alleged in the TAC, Settlement Stipulation at ¶¶ 1.2 and 6.1(c), i.e. any claim for any miscalculation of benefits or violation of ERISA §§ 209 or 503 and 29 C.F.R. § 2560.503-1 which may have occurred prior to the Effective Date of Settlement. Such bar orders are permissible as long as the person barred is, as here, participating in the recovery. *Renfrew v. Toms*, 109 Fed.Appx. 143, 146 (9th Cir. 2004).

Importantly, Barred Claims do not encompass any claim for Vested Benefits from the Plan. Thus, any Covered Participant who receives a Settlement Payment⁵ and is currently receiving benefits will continue to receive them and any Covered Participant who is entitled to commence receiving benefits in the future will receive them – unaffected by the Settlement.

III. THE MEDIATION

The Settlement was reached as a result of arms-length negotiations between the Parties with the significant assistance of a mediation conducted by the Honorable Jeremiah C. Lynch, U.S.M.J. Preparation for the mediation was significant. Plaintiff reviewed Plan records back to 1994⁶ and noted possible discrepancies in benefit calculations for over 300 Plan participants. After calculating benefits for these individuals, Plaintiff asserted that 209 had had their benefits miscalculated and provided Defendants with a list of their names, the monthly difference in benefits for each one, and a present value figure of that monthly difference for each. Plaintiff also provided a list of documents (by Bates number) for each such individual so that Defendants could follow Plaintiff's reasoning. Defendants then provided a counter-list and after a good deal of back

⁵ Any Covered Participant who cannot be located and thus does not receive a Settlement Payment will not be subject to the Bar Order. Settlement Stipulation ¶ 6.1(c).

⁶ Earlier records are not available.

and forth, both before and after the mediation, the Parties were able to agree on the calculations for the 187 Covered Participants included in the Settlement as well as injunctive relief which inures to the benefit of all Plan participants.

IV. ATTORNEY'S FEES, COSTS AND EXPENSES

ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), provides that “[i]n any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney’s fee and costs of action to either party.” The Settlement Stipulation at section 4 provides that within 14 days after entry of Judgment, Plaintiff shall file his motion for attorney’s fees, costs and expenses to be paid by one or more Defendants.

Because attorney’s fees are not being paid out of a negotiated settlement fund nor have the Defendants agreed to pay any amount at all, any fees, costs or expenses which may be awarded by the Court have had and will have no impact whatsoever on the amounts paid to Plaintiff and the Covered Participants.

V. PRELIMINARY APPROVAL SHOULD BE GRANTED

In considering whether to grant preliminary approval of a settlement, courts consider whether the settlement of the claims is within the range of possible approval, *i.e.*, whether the settlement is fair, reasonable, and adequate and is not the product of fraud or overreaching by, or collusion between, the negotiating parties.

In re Galena Biopharma, Inc. Derivative Litig., Case No. 3:14-cv-382-SI , 2016 WL 10843665, at *1 (D. OR Jan. 28, 2016) (internal citations, ellipsis and quotation marks deleted).

Because the settlement (1) is a result of arms-length negotiations, (2) was not collusive, (3) provides substantial benefit to Plaintiff and the Plan's participants including the Covered Participants, (4) was reached with the assistance of an experienced United States Magistrate Judge as mediator,⁷ and (5) provides for appropriate notice to the Covered Participants, it is respectfully submitted that it satisfies the requirements for preliminary approval.

VI. THE SETTLEMENT SCHEDULE

The Settlement Stipulation at section 5 sets a schedule for mailing the Notice, objections by Covered Participants, etc., all geared to the date of entry of an Order granting preliminary approval. While the Court is, of course, free to alter the proposed schedule, whether or not it does, the Parties would nonetheless request that the Court enter a specific time and date for the Final Hearing in paragraph 5.5.

⁷ That the settlement is fair and not collusive "is bolstered by the fact that the Settlement was negotiated with the aid of a ... magistrate judge and experienced mediator, who reported no evidence of collusion." *Gallucci v. Gonzales*, 603 Fed.Appx. 533, 535 (9th Cir. 2015).

CONCLUSION

For the foregoing reasons, the Parties jointly request that the Court grant preliminary approval of the settlement.

Dated the 30th day of July, 2018.

Respectfully submitted,

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Dated the 30th day of July, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2018, a true and correct copy of the foregoing document was filed with the Court utilizing its CM/ECF system, which will send notice of such filing to all counsel of record.

/s/ Gary A. Gotto

Gary A. Gotto