KELLER ROHRBACK L.L.P.
Gary A. Gotto
3255 Bending Tree Ln.
Missoula, MT 59808
Tel.: (406) 215-9100
Fax: (206) 623-3384
Email: ggotto@kellerrohrback.com

Attorney for Plaintiff;
Additional Counsel on Signature Page

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

PLAINTIFF'S MEMORANDUM IN SUPPORT OF UNOPPOSED[1] MOTION FOR FINAL APPROVAL OF SETTLEMENT

[1] Defendants were previously provided with all the papers being filed in support of this Motion. While Defendants do not necessarily agree with all contentions made herein, they support final approval of the Settlement.

Plaintiff Joel Cleary ("Plaintiff") and Plaintiff's Counsel hereby submit this memorandum in support of their motion for final approval of the settlement of this action (the "Settlement") as set forth in the preliminarily approved Settlement Stipulation and Order (the "Settlement Stipulation") (ECF No. 147). Plaintiff seeks entry of the Final Order[2] approving the form, substance and manner of distribution of notice to the Covered Participants, finding the Settlement to be fair, reasonable and adequate, approving the Bar Order and directing the Parties to proceed to implement the provisions of the Settlement Stipulation.

I. STANDARD FOR APPROVAL

While this case has not been settled pursuant to Rule 23 of the Federal Rules of Civil Procedure, and therefore is not a class action, it is being settled on behalf of a defined group of 175 individuals in addition to Plaintiff and contains a Bar Order. Accordingly, Plaintiff submits the Settlement to the Court for its consideration and approval as the functional equivalent of a class action.

In granting preliminary approval of the Settlement, the Court considered 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

[2] Unless otherwise so stated, hereinafter capitalized terms have the meanings ascribed to them in the Settlement Stipulation.

> or overreaching by, or collusion between, the negotiating parties.

In re Galena Biopharma, Inc. Derivative Litig., No. 3:14-cv-382-SI, 2016 WL 10843665, at *1 (D. Or. Jan. 28, 2016) (internal citation and ellipsis omitted).

In determining whether to grant final approval of the Settlement, the Court must consider:

> the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; . . . the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction . . . to the proposed settlement.

Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

1. The Strength of Plaintiff's Case

Plaintiff is confident that if this case were to proceed to a disposition on the merits, whether by summary judgment or trial, he would succeed on his claim for his benefits as well as on his claims for injunctive relief with respect to the issues raised concerning the Plan's claims procedures and the Hospital's recordkeeping.

Plaintiff is also confident that he would have been able to prove the damages owed to the Covered Participants.

These issues have been briefed on the merits in several motions all but two of which have been argued and all of which are *sub judice*. The Court is aware of

the underpinnings of Plaintiff's position on the strengths of his claims as well as Defendants' opposition.

2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

While Plaintiff believes that it would be appropriate to certify a class of persons whose benefits have been miscalculated so that the monetary relief which is provided by the Settlement could have been obtained for the Covered Participants, Defendants are equally of the view that no such class would be appropriate and that absent settlement the only monetary relief possible would be Plaintiff's own pension benefit, which Defendants have conceded is owed. Plaintiff views this as the only substantial risk in the event the Settlement is not approved.[3]

However, if the Settlement is not approved, there remains some discovery to be done after which it is expected that the Parties would file motions for summary judgment in addition to the already fully briefed motions which the Court will need to decide absent a settlement. Given the discovery record, summary judgment motions would be extensive and expensive. Absent issues being decided on summary judgment (or even if only liability is found), there would have to be, e.g., individualized hearings on the damages claims of each Covered Participant. This

[3] Although if litigated to judgment, because the Plan does not provide for lump sum payments of benefits, Plaintiff could only obtain an annuity rather than the lump sum agreed to in the Settlement.

process would consume a great deal of time and resources, both for the Court and the Parties.

Lastly, Plaintiff expects that appeals would follow any disposition on the merits thereby further delaying an enforceable final judgment.

3. The Amount Offered in Settlement

The Settlement provides, in essence, complete relief. Plaintiff will retain his full, lump sum pension benefit unless the Settlement is not approved. Settlement Stipulation ¶¶ 10.1.1, 11.2.2. Also, the Settlement Payments to Covered Participants were calculated in accordance with the Plan's terms and represent the Parties' agreement as to the maximum amount by which any Covered Participant's benefits were miscalculated based on all available records. The total monetary value of the Settlement is $293,946.63.[4]

The Settlement also provides injunctive relief requiring the Plan to have a claims procedure which insures claimants will be able to verify the calculation of their benefit amounts and be able to appeal if they disagree with the Plan's calculation. Further injunctive relief requires that the Hospital maintain all records

[4] The total monetary value of the Settlement as initially set forth on Exhibit 1 (ECF No. 144-1) was $297,529.11. Due to the deaths of certain individuals who would have been Covered Participants and others who could not be located, as well as the addition of two individuals who had been inadvertently omitted, the total has changed slightly.

necessary to calculate any participant's benefits regardless of when that may be necessary.

4. The Extent of Discovery Completed and the Stage of the Proceedings

Plaintiff's discovery in this action was extensive. Plaintiff served three sets of interrogatories and five sets of document requests on Defendants as well as subpoenaing documents from three (two former and one current) of the Plan's Third Party Administrators ("TPA") – Mercer, Wells Fargo and Principal.[5] In addition to reviewing the more than 45,000 pages of documents produced, Plaintiff conducted depositions of the three individual Defendants and James B. Dexter, a former actuary for BDS&M, as well as drafting subpoenas and topics for Rule 30(b)(6) depositions of the Hospital, the Plan, Mercer and Principal, and conducting those depositions.[6]

While Defendants conceded during the litigation that Plaintiff was entitled to a pension, they declined to answer an interrogatory asking how much the pension was and how that amount was calculated. Plaintiff then filed a motion to compel (ECF No. 61) Defendants to provide that calculation. This motion, which was the subject of oral argument (the "Argument"), is *sub judice*.

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[5] Defendants subpoenaed documents from another TPA, BPS&M.
[6] Principal produced three individuals for its Rule 30(b)(6) deposition which was conducted over two days.

Plaintiff also moved to file a third amended complaint (ECF No. 50) to incorporate new matter learned in discovery and to adjust his claims for relief accordingly. This motion was granted at oral argument (the "Argument") and the third amended complaint ("TAC") (ECF No. 79) is Plaintiff's extant pleading. The TAC asserts class claims for injunctive relief concerning the Plan's allegedly noncompliant claims procedures (as did the initial complaint). It also asserts class claims for alleged miscalculation of benefits and for injunctive relief for the Hospital's alleged failure to maintain records as required by ERISA.

While discovery is not complete, Plaintiff believed there had been sufficient discovery to support his claims so that settlement discussions might prove fruitful. Plaintiff thus moved for mediation. (ECF No. 56). The Court granted this motion and referred the matter to the Honorable Jeremiah C. Lynch, U.S.M.J., for mediation. (ECF No. 80).

In order to prepare for mediation, Magistrate Judge Lynch required Plaintiff to identify all individuals whom Plaintiff asserted may have had their benefits miscalculated and by how much. (ECF No. 84). Plaintiff identified approximately 350 such people. Alleged errors in calculation included: having been put in the Plan too late and thus having lost service credit; having the incorrect number of hours used to calculate accrual; having had the incorrect compensation used to calculate the benefit; records not having been maintained.

After calculating each identified person's benefit amount, Plaintiff determined that the benefits of 209 of the people identified had been miscalculated.[7] Identifying the approximately 350 people and calculating their benefits required substantial effort. This information, including a list of the documents (from discovery) which were used to calculate individual damage amounts and the basis asserted for damages, were required to be provided to Defendants. (ECF Nos. 84, 94).

The Court is aware of the extensive motion practice and discovery disputes that have transpired. There were four motions addressed solely to whether Plaintiff needed to exhaust the Plan's administrative procedures or was exempt from doing so, three of which were a subject of the Argument. All four are *sub judice*.

While discovery would continue if the Settlement is not approved, the vast amount of pretrial work (other than dispositive motions) has been completed, thereby allowing the Parties to fully evaluate the strengths and weaknesses of their respective cases.

[7] Some peoples' benefits were not adversely affected even though mistakes had been made in their regard. For example, a person may have put into the Plan a year too late but because s/he had not worked at least 1,000 hours in that year, s/he was not entitled to credit in any event.

5. The Experience and Views of Counsel

The Settlement was the result of both Plaintiff's and Defendants' extensive review of Plan records and negotiations between the Parties after hard fought litigation. The Settlement was reached as a result of arms-length negotiations between the Parties and experienced counsel with the significant assistance of a one-day mediation conducted by the Honorable Jeremiah C. Lynch. Preparation for the mediation was significant. Plaintiff reviewed Plan records back to 1994[8] and noted possible discrepancies in benefit calculations for approximately 350 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, together with a list of supporting documentation. Defendants then provided a counter-list and after substantial communications, both before and after the mediation, the Parties were able to agree on the calculations for Plaintiff and the 187 Covered Participants initially included in the Settlement as well as injunctive relief which inures to the benefit of all Plan participants. Each Covered Participant is to receive the maximum amount that could be determined to be owed.

[8] Earlier records are not available.

Thus, the Settlement is the result of arms-length negotiations between experienced counsel. That the Settlement is fair and not collusive "is bolstered by the fact that the Settlement was negotiated with the assistance of a . . . magistrate judge and experienced mediator, who reported no evidence of collusion."[9] *Gallucci v. Gonzales*, 603 F. App'x 533, 534 (9th Cir. 2015).

> Counsel on both sides of this issue are experienced litigators. . . . The negotiations were hard-fought and extensive, including a full day session with the mediator that informed, but did not produce, the settlement." . . . "[T]he fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight."

Nguyen v. Radient Pharm. Corp., No. SACV 11-00406 DOC (MLGx), 2014 WL 1802293, at *3 (C.D. Cal. May 6, 2014) (alteration in original) (quoting *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) *aff'd*, 661 F.2d 939 (9th Cir. 1981)).

6. The Presence of a Governmental Participant

No governmental entity was a party to the Action nor was there any governmental track record to assist Plaintiff.[10] Because "there were no government

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[9] The Parties did not collude and would expect that Magistrate Judge Lynch either has so reported to the Court or would so if asked.

[10] "The class in this case does not have the benefit, like some other antitrust classes, of previous litigation between the defendants and the government." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009).

coattails . . . to ride[,] [c]ounting this factor in favor of settlement [would not be] a clear abuse of discretion." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 964 (9th Cir. 2009).

7. The Reaction to the Proposed Settlement

As set forth in the previously filed Declaration of David S. Preminger (ECF No. 154), there have been no objections to the Settlement and the time for objecting has passed.

The Notice (ECF No. 144-3) informed Covered Participants of their right to object to the Settlement Stipulation and the method and deadline (October 1, 2018) for doing so. "The fact that the settlement has received no opposition . . . is valuable evidence of fairness. There have been no objections to the Settlement itself, and so the Court finds this factor weighs in favor of the Settlement." *Nguyen*, 2014 WL 1802293, at *4 (internal citation omitted). *See also Burton v. Trinity Universal Ins. Co.*, CV 14-242-M-DWM, 2016 WL 8229780, at *1 (D. Mont. Mar. 2, 2016) ("Most importantly, no class members objected to the settlement during the objection period[.]")

While Exhibit 1 to the Settlement Agreement provided for Settlement Payments to 187 Covered Participants, the Court has now granted (ECF No. 156) the Parties' motion to amend Exhibit 1 ("Amended Exhibit 1" (ECF No. 151)) so that the number of Covered Participants is 175. (*See* ECF No. 153). As set forth in

the October 15, 2018, Declaration of Traci Berlinger (ECF No. 149), Notice was timely mailed to the initial 187 Covered Participants and, of those, all appear to have been delivered except for nine (9) who are deceased without beneficiaries[11] and five (5) to whom Notice could not be successfully mailed.[12] In addition, two (2) who had been inadvertently omitted were added and Notice was mailed to them.[13]

The Settlement Stipulation required Notice to be sent by first class mail and that mailing has achieved almost 100% success.[14] *See, e.g., Silber v. Mabon*, 18 F.3d 1449, 1453-54 (9th Cir. 1994) (it is not required that all class members receive actual notice, only that "best practicable notice" was given). In addition, as set forth in the Notice, Plaintiff's Counsel established a website[15] containing a description of the Settlement and copies of the Settlement Stipulation, the Notice and the Joint Motion for Preliminary Approval of Settlement, as well as providing a toll-free telephone number. As set forth in the accompanying Declaration of

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[11] *See* Amended Exhibit 1 numbers 8, 14, 26, 29, 102, 146, 152, 194, and 204.
[12] *Id*. numbers 18, 27, 118, 134, and 141.
[13] *Id*. numbers 210 and 211.
[14] Of the 180 Covered Participants (excluding the ones who are deceased without beneficiaries) entitled to a Settlement Payment, Notice was successfully mailed to 175, a success rate of 97.2%.
[15] *Northern Montana Hospital Settlement*, http://www.kellersettlements.com/currentcases/Northern-Montana-Hospital-Settlement/ (last visited Nov. 1, 2018).

Mary K. Montgomery, Plaintiff received only twenty (20) telephone calls. None of the calls concerned an objection to the Settlement. *Id*.

As such, the Notice was highly successful and conformed in all respects to due process. *See Seifi v. Mercedes-Benz USA, LLC*, No. 12-cv-05493 (TEH), 2015 WL 12964340, at *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*, No. 2:15-cv-01161 JWS, 2015 WL 9258448, at *3 (D. Ariz. Dec. 18, 2015) (first class mail is often the best form of notice).

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 fourteen (14) days after entry of Judgment herein, 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.

IV. FINAL APPROVAL SHOULD BE GRANTED

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

CONCLUSION

For the foregoing reasons, the Plaintiff respectfully requests that the Court grant final approval of the Settlement and enter the Final Order filed contemporaneously herewith.

Dated the 1st day of November, 2018.

Respectfully submitted,

KELLER ROHRBACK L.L.P.

By: */s/ Gary A. Gotto*

Gary A. Gotto
3255 Bending Tree Ln.
Missoula, MT 59808
Tel.: (406) 215-9100
Fax: (206) 623-3384
Email: ggotto@kellerrohrback.com

David S. Preminger (admitted *pro hac vice*)
KELLER ROHRBACK L.L.P.
1140 Avenue of the Americas
Ninth Floor
New York, NY 10036
Tel.: (646) 380-6690
Fax: (646) 380-6692
Email: dpreminger@kellerrohrback.com

Plaintiff's Counsel

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 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