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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

D'ANGELO SANTANA, SASHA SAMI SHAMON, and ALEXANDRIA N. VANDEN HEUVEL, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

RADY CHILDREN'S HOSPITAL-SAN DIEGO, a California Corporation; and DOES 1 through 100, inclusive,

Defendants.

CASE NO. 37-2014-00022411-CU-MT-CTL
ASSIGNED FOR ALL PURPOSES TO:
The Honorable Joel R. Wohlfeil
Department 73

CONSOLIDATED CLASS ACTION

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Date: January 25, 2019
Time: 9:00 a.m.
Dept.: C-73
Judge: Hon. Joel R. Wohlfeil

Complaint filed: July 8, 2014
Trial date: September 28, 2018

ESTATE OF ABIGAIL MARCELENO, by and through her successor in interest CYNTHIA MARCELENO,

Plaintiff,

vs.

RADY CHILDREN'S HOSPITAL - SAN DIEGO, a California Corporation; RADY CHILDREN'S HEALTH SERVICES - SAN DIEGO, a California Corporation; RADY CHILDREN'S HOSPITAL AND HEALTH CENTER, a California Corporation; DOES 1 through 100, inclusive,

Defendants.

CASE NO. 37-2014-00022652-CU-MC-CTL

Complaint filed: July 9, 2014
Trial date: None set

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I. INTRODUCTION

Pursuant to California Rules of Court, Rule 3.769(d), appointed Class Representative Plaintiffs D'ANGELO SANTANA, SASHA SAMI SHAMON, and ALEXANDRIA N. VANDEN HEUVEL (collectively as "Class Representative Plaintiffs") respectfully submit this Memorandum of Points and Authorities in support of Plaintiffs' Motion for Final Approval of the proposed settlement between Defendant RADY CHILDREN'S HOSPITAL – SAN DIEGO ("Defendant" or "Rady") and the previously certified Class defined as "*all patients (or their parents or guardians) of Defendant Rady Children's Hospital - San Diego who were admitted in-patient to one of Defendant's hospital, satellite or urgent care locations between July 1, 2012 and June 30, 2013,*" (the "Class"). Accompanying this memorandum is a separate motion and memorandum for approval of an award of attorneys' fees and costs to Class Counsel, and an incentive award to the Class Representative Plaintiffs.

II. BACKGROUND

On June 6, 2014, an employee of Defendant sent an electronic file containing individually identifiable medical information of 14,121 of its patients via an email to four (4) job applicants, and that one of the four job applicants forwarded the email to two (2) additional individuals.

A. Summary of the Unauthorized Disclosure of Confidential Medical Information

In a letter mailed to the Class Representative Plaintiffs (and the other members of the Class) dated June 16, 2014 about the incident, Defendant stated in regards to the electronic file emailed to the four job applicants that "[t]he file contained information about patients admitted to Rady Children's between July 1, 2012 and June 30, 2013. Information included patients' names, dates of birth, primary diagnoses, admit/discharge dates, medical record numbers, and other information including insurance carrier and claim information. The email did not contain social security, insurance or credit card numbers, street addresses, or parent and guardian names."

B. Summary of the Litigation to Date

Four separate class actions were filed between June 18, 2014, and July 9, 2014, related to Rady's alleged violation of the Confidentiality of Medical Information Act, California Civil Code

§§ 56, et seq. ("CMIA"). Those cases were deemed complex and subsequently consolidated before the San Diego Superior Court. On January 28, 2015, Class Representative Plaintiffs filed a Consolidated Amended Class Action Complaint for damages and injunctive relief consolidating the four Plaintiffs' cases.

In the lawsuit, Class Representative Plaintiffs allege that Rady's disclosure to the four job applicants was negligent and that Rady's release of Class Members' personal and confidential medical information was a violation of the Confidentiality of Medical Information Act, Civil Code §§ 56, et seq., ("CMIA"). Throughout the litigation, Rady has denied that it violated the CMIA as a result of the incident, and has denied that the Class Representative Plaintiffs or any other member of the Class is entitled to damages under the CMIA.

On March 4, 2015, Rady brought a demurrer seeking to dismiss the Consolidated Amended Class Complaint with prejudice on the grounds that Class Representative Plaintiffs' claims had no legal merit, which was denied by the Court on April 3, 2015. On February 16, 2017, Rady brought a motion for summary judgment and summary adjudication seeking an order to dismiss Class Representative Plaintiffs' individual claims on the grounds that there are no triable issues of material fact and Rady is entitled to summary judgment as a matter of law, which was also denied by the Court on July 13, 2017.

The parties have engaged in extensive discovery, including, but not limited to the depositions of over twenty (20) witnesses, exchanging thirty-one (31) of sets of written discovery, and reviewing over 2,500 pages of documents produced by Defendant. As a result of the Class Counsels' litigation of the Class Representative Plaintiffs' claims, Class Counsel discovered, and it is now undisputed, that on June 6, 2014, a Recruiter in Rady's Human Resources Department sent an email to four job applicants attaching an electronic file (an Excel spreadsheet containing the individually identifiable medical information of patients admitted to one of Rady's facilities between July 1, 2012 and June 30, 2013) at the direction of Rady's Director of Decision Support. None of the four job applicants recipients of the email attaching the Excel spreadsheet were ever employed by Rady and were not authorized to receive under the CMIA (or HIPPA) the medical

information of patients admitted to one of Rady's facilities between July 1, 2012 and June 30, 2013. Nevertheless, Rady contends that the sending of the email attaching the Excel spreadsheet to the four job applicants does not entitle the Class Representative Plaintiffs, or any other member of the Class, to any statutory damages under the CMIA, specifically, Civil Code § 56.36.

On September 29, 2017, Class Representative Plaintiffs brought a motion for Class certification. Thereafter, on November 6, 2017, the Court granted Class Representative Plaintiffs' motion and certified the Class of patients admitted to one of Rady's facilities between July 1, 2012 and June 30, 2013, finding that the Class satisfied all requirements under Code of Civil Procedure Section 382 and Rule of Court 3.764. Specifically, the Court certified the Class defined as follows:

> All patients (or their parents or guardians) of Defendant Rady Children's Hospital - San Diego who were admitted in-patient to one of Defendant's hospital, satellite or urgent care locations between July 1, 2012 and June 30, 2013

The Court appointed COHELAN KHOURY & SINGER, KEEGAN & BAKER, LLP, ADLER LAW GROUP, APLC, KAZEROUNI LAW GROUP, APC, and HYDE & SWIGART as Class Counsel to represent the certified Class (hereinafter "Class Counsel"). *See* Kazerounian Decl. ¶ 8; Keegan Decl. ¶ 18.

On December 1, 2017, pursuant to the November 6, 2017 Order Granting Class Certification, Class Representative Plaintiffs filed a Second Amended Consolidated Class Complaint which limited the damages asserted on behalf of each member of the Class to the statutory damages in the amount of $1,000 under the CMIA (specifically, Civil Code § 56.36).

Pursuant to the Court's order granting Class Representative Plaintiffs' motion for an order approving the Class Notice to be disseminated to Class members on January 5, 2018, all Class members were sent a Class Notice by mail on February 23, 2018 informing them of the Court's Order granting Class Representative Plaintiffs' Motion for Class Certification and informing them of their right to opt out of the Class. *See* Kazerounian Decl. ¶ 18; Keegan Decl. ¶ 19. During the opt out period, only twenty-one (21) members of the Class Members (approximately 0.14%) elected to opt out of the Class, leaving 14,100 members currently in the Class. *Id*.

Class Counsel have committed over four years of time, energy, and extensive resources successfully litigating and ultimately resolving the claims at issue in this action for the benefit of Class Representative Plaintiffs and the Class. *See* Kazerounian Decl. ¶ 20; Keegan Decl. ¶¶ 21-22. After weighing the substantial, certain, and immediate benefits of this settlement against the uncertainty of trial, the parties and their respective counsel believe that the proposed Settlement is fair, reasonable, adequate, and warrants this Court's preliminary approval. *Id.*

III. SUMMARY OF THE CLAIMS AND DEFENSES

Class Representative Plaintiffs believe the claims asserted in the litigation have merit and that the evidence developed to date supports the claims asserted on behalf of each member of the Class to recover the statutory damages in the amount of $1,000 under the CMIA (specifically, Civil Code § 56.36). However, Class Counsel recognizes and acknowledges the uncertainty of prevailing on their claims due to the defenses that have been or could be asserted by Defendant. Further consideration supporting the decision to enter into the settlement described herein is the expense and length of continued proceedings necessary to prosecute the litigation against Defendant through trial and through appeals. Class Counsel believes that the settlement set forth in the Settlement Agreement confers substantial benefits upon Class Representative Plaintiffs, the Class, and is in the best interests of Class Representative Plaintiffs and the Class. Kazerounian Decl. ¶¶ 13-14 & 20.

The parties have conducted a thorough investigation of the facts through discovery, including, but not limited to the depositions of over twenty (20) witnesses (eight (8) depositions of Defendant's employees and designated experts, seven (7) depositions of non-party witnesses, the depositions of all four (4) named Plaintiffs and their previous Guardians Ad Litem), exchanged written discovery, including thirty-one (31) of sets of interrogatories, requests for admission, and requests for production of documents, reviews of over 2,500 pages of documents produced by Defendant, as well as through Class Counsels' research and private investigations. *See* Cohelan Prelim. Approv. Decl. ¶¶ 8, 9, 12 & 13; Kazerounian Decl. ¶ 13; Keegan Decl. ¶¶ 12-16. The parties have also thoroughly analyzed and extensively litigated the relevant legal issues in regard to the claims and defenses in this action, which include a Class Representation Plaintiffs' contested

motion for class certification and Defendant's contested motion for summary adjudication of the Class Representative Plaintiffs' individual claims. *Id*.

While Class Representative Plaintiffs and their counsel believe that Class Representative Plaintiffs' claims have merit, Defendant believes it has complete defenses to the claims and continues to deny each and all of the claims alleged by Class Representative Plaintiffs in this litigation. Nonetheless, Defendant has concluded that further conduct of the litigation would be protracted, expensive, a distraction to management and a drain on Defendant's resources, and that it is desirable that the litigation be fully and finally settled in the manner and upon the terms and conditions set forth in the Settlement Agreement. Defendant also has taken into account the uncertainty and risks inherent in any litigation, especially in complex cases like this litigation. Having considered the uncertainties of trial and the benefits to be obtained under a proposed settlement and having considered the costs, risks, and delays associated with the continued prosecution of this complex and time-consuming litigation and the likely appeals of any rulings in favor of either party, the parties have determined that it is desirable and beneficial to Class Representative Plaintiffs and the Class that the litigation be settled in the manner and upon the terms and conditions set forth in the Settlement Agreement. *See* Cohelan Prelim. Approv. Decl. ¶ 14; Kazerounian Decl. ¶¶ 13 & 20; Keegan Decl. ¶¶ 22 & 25-30.

IV. SUMMARY OF TERMS OF THE PROPOSED SETTLEMENT

Following extensive arm's-length negotiations during the mediation session before neutral Bruce Friedman, Esq. of JAMS, the parties reached an agreement and entered into a Memorandum of Understanding embodying the material terms of the proposed settlement. *See* Cohelan Prelim. Approv. Decl. ¶ 10; Kazerounian Decl. ¶¶ 12 & 14; Keegan Decl. ¶ 20. In short, the Settlement Agreement confers valuable and substantial benefits upon Class Representative Plaintiffs, members of the Class, and the general public, and is in the best interests of Class Representative Plaintiffs and the Class. *Id*.

After over four hard-fought years of contentious litigation, the parties believe that the proposed Settlement represents a significant but fair compromise of the parties' respective positions

and accomplishes the objectives of Class Representative Plaintiffs' litigation by addressing and remedying the cause of the alleged disclosure at issue in this action, while providing substantial monetary and non-monetary relief to Class Representative Plaintiffs and the Class. *See* Kazerounian Decl. ¶ 16; Keegan Decl. ¶¶ 21-22 & 25-30.

As discussed in greater detail herein, the Settlement Agreement readily meets the standard for final approval—that is, it is fair and reasonable in light of the parties' respective legal positions. *See Wershba v. Apple Computers, Inc*. (2001) 91 Cal.App.4th 224, 246, 250. A copy of the Settlement Agreement was previously attached as Exhibit A to the Declaration of Mona Amini in Support of Motion for Preliminary Approval of Class Action Settlement, filed on October 23, 2018.

A. <u>The Settlement Class</u>

Based on the discovery conducted and the best information available to the parties, there were a total of 14,121 putative members of the Class. Pursuant to the Court's order granting Class Representative Plaintiffs' motion for an order approving the Class Notice to be disseminated to Class members on January 5, 2018, all members of the Class were sent, by U.S. mail, notice of the Court's Order and informing Class members of their right to "opt out" or exclude themselves from the certified Class. During the "opt out" or excluion period, only twenty-one (21) members of the Class (approximately 0.14%) elected to opt out of the Class, leaving 14,100 members currently in the Class. *See* Keegan Decl. ¶ 19; Molina Decl. ¶¶ 5-6. Thus, the Class refers to those 14,100 persons defined as follows who did not previously opt out of the Class:

> All patients (or their parents or guardians) of Defendant Rady Children's Hospital - San Diego who were admitted in-patient to one of Defendant's hospital, satellite or urgent care locations between July 1, 2012 and June 30, 2013.

See the November 6, 2017 Order Granting Class Certification (ROA # 463); and the January 5, 2018 Order Approving The Class Notice to Be Disseminated to Class Members (ROA # 521). Pursuant to the terms of the Settlement Agreement (Agr. §§ II.P. and VIII), the October 26, 2018 Order Granting Preliminary Approval of Class Action Settlement (¶¶ 7-8, 18), and the Notice of Class Action Settlement (¶ 13), members of the Class are permitted a second opportunity to "opt out" or exclude themselves from the certified Class, through and including December 10, 2018. A

Final Settlement Class member refers to any member of the Class who does not timely and validly exclude himself or herself from the Class.

B. <u>Settlement Notice to the Class</u>

On October 26, 2018, the Court approved the form and manner of giving notice of the Settlement to the Class and appointed ILYM Group, Inc. as the Settlement Administrator to supervise and administer the procedure of delivery and publishing of the Notice of Class Action Settlement to the Class members. *See*, the October 26, 2018 Order Granting Preliminary Approval of Class Action Settlement, ¶¶ 3, 5 & 18.

Pursuant to the Court's prior order granting certification of the Class, the Settlement Administrator had previously received a list of all Class members that includes their names, addresses, and telephone numbers ("Class List"). Molina Decl., ¶ 5. As part of preparation for mailing of the Notice of Class Action Settlement, all 14,100 names and addresses contained in the Class List were then processed against the National Change of Address ("NCOA") database maintained by the United States Postal Service ("USPS"), for purposes of updating and confirming the mailing addresses of the Class members before mailing of the Class Notice. *Id.*, ¶6. In order to ensure the most accurate mailing possible, the addresses were certified via the Coding Accuracy Support System ("CASS"), which appends ZIP +4 and postal codes to records, verified through the Delivery Point Validation ("DPV"), which verifies the addresses to the actual point of delivery and can also identify the address location, and through the Locatable Address Correction System ("LACS"), which updates business and residential rural route addresses to a street style address. To the extent that an updated address for a Class member was ascertained in the NCOA, CASS, DPV, or LACS databases, the updated address was used for the mailing of the Class Notice. *Id.*, ¶6.

Pursuant to the October 26, 2018 Order Granting Preliminary Approval of Class Action Settlement (¶¶ 5 & 18), the Notice of Class Action Settlement was mailed via U.S. First Class mail to all 14,100 Class members on November 5, 2018, (Molina Decl., ¶8, & Ex. A), and a copy of the Notice of Class Action Settlement and a copy of the Settlement Agreement was up loaded to the dedicated website, www.radyprivacyclassaction.com, to provide Class members with information

1 pertaining to the proposed Settlement. *Id.*, ¶ 9. The dedicated website also provides Class members
2 with additional information regarding the case, the contact information for Class Counsel, other
3 relevant court documents, and an 800 number to provide answers to frequently asked questions
4 regarding the Settlement. Thereafter, the Settlement Administrator skip traced returned mailed
5 Notices of Class Action Settlement and re-mailed returned Notices of Class Action Settlement,
6 which resulted in an actual delivery rate of 99.28% for the Notices of Class Action Settlement. *Id.*,
7 ¶¶ 8, 10-12.

8 As of the date of Ms. Molina's declaration, the Settlement Administrator has not received
9 any requests to "opt out" or to be excluded from the Class, or any written objections to the
10 Settlement. *Id.*, ¶¶ 13-14. The deadline to request exclusion from the Class or object to the
11 Settlement is December 10, 2018. *Id.*

12 **C. <u>Settlement Benefits</u>**

13 In short, the Settlement Agreement provides multiple components of monetary relief and
14 non-monetary relief and protection to Class Representative Plaintiffs and the Class, including:

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- Cash payment of $5,000,000 into a non-reversionary Common Fund, which will result in cash payments to each Class member in addition to paying for the cost of the identity theft protection and credit monitoring offered to all Class members, the Class Representative Plaintiffs' incentive awards, the costs of notice, settlement administration, as well as Plaintiffs' attorneys' fees and costs incurred in litigation of this matter through final approval of the Settlement.

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- Two (2) years of Experian identity theft protection and credit monitoring, including $1 Million identity theft insurance, provided to all Class members. This benefit confers a value to Class Representative Plaintiffs and the Class of up to approximately $6,764,616; and

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- Remedial measures by Rady, including enhanced preventative technology measures incorporated throughout the hospital, revised medical information training and security-related remedial measures taken and continuing to be implemented by Rady as a result of Class Representative Plaintiffs' successful litigation of this action. This benefit confers a value to Class Representative Plaintiffs and the Class of approximately $1,800,000.

25 *See* Agr. § VI; Kazerounian Decl. ¶ 17; Keegan Decl. ¶ 22. Therefore, if the Settlement receives
26 final approval of the Court, the Class will receive **total Settlement Benefits of $13,083,345.95**. In
27 turn, if all 14,100 Class members remain in the Final Settlement Class, **each Class member will**
28 **individually receive approximately $642.44 in Settlement Benefits** in the form of a pro rata cash

payment, two (2) years of the Identity Theft Protection Package, and the remedial measures implemented by Rady as a result of Plaintiffs' successful litigation of this action.[1] Kazerounian Decl. ¶ 25; Keegan Decl. ¶¶ 30.

1. Monetary Award to Class Members

Defendant will pay $5 Million to the Settlement Administrator to fund the Settlement Fund no later than thirty (30) days after the Effective Date. *See* Agr. § IV.A. Defendant shall have no reversionary interest in any portion of the total Settlement Fund of $5 Million cash, and any unclaimed portion of the Common Fund shall be paid to one or more *cy pres* recipients approved by the Court. [*See* Agr. § V.G]. The Settlement Administrator shall calculate the pro rata Settlement Share to Final Settlement Class members by taking the Settlement Fund less the amount to be paid for identity theft protection, attorneys' fees, reimbursed expenses, settlement administration costs, and incentive award to the Class Representatives (Z) and dividing it by the number of Final Settlement Class members who do not opt out of the Settlement (X), as represented in the following formula:

$$\text{Settlement Share} = \frac{\text{Settlement Fund} - Z}{X}$$

Each Class Member shall be entitled to a pro rata cash distribution payment from the Settlement Fund equal to the Settlement Share amount. If all 14,100 Class members remain in the Final Settlement Class, the Identity Theft Protection Package is fully utilized, and all such payments are approved by the Court, the Net Settlement Fund will be $493,730.00. Thus, it is estimated that **each Class member will receive a cash payment of no less than $35.02** from the Settlement

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[1] This settlement compares favorably and is superior to other settlements which were granted final approval in class actions involving unauthorized disclosure of medical information. In *Springer v. Stanford Hospital and Clinics*, No. BC470522, (Super. Ct. Cal. 2014) (Los Angeles Cty.), the court approved a settlement which anticipated payments of approximately $100 going to each of the 19,500 class members. In *Rice v. lnSync, et al*., No. 30-2014-00701147-CU-NP-CJC, (Super Ct Cal. Apr. 15, 2015) (Orange Cty.), the court approved a settlement which provided a common fund of $4,125,000 for 50,036 class members, with anticipated payments of $51.71 to each class member after accounting for attorneys' fees and costs. In *Smith v. Regents of the University of California*, No. RGOS-410004 (Super Ct. Cal. 2010) (Alameda Cty.), a similar class action brought by patients against a medical facility for its unauthorized disclosure of medical records, the trial court approved a settlement that provided for injunctive relief, payment of a $1.3 million *cy pres* fund, costs and an incentive award to the named plaintiff, and attorneys' fees, ***but no cash payment to class***.

Fund. *Id.*; *see also* Kazerounian Decl. ¶¶ 21-22; Keegan Decl. ¶ 27.

2. Identity Theft Protection Package

In addition to their cash payment, each Class member will receive **free of charge** two (2) years of the Experian Identity Theft Protection Package (as defined in Section IV.B of the Settlement Agreement), from the date of activation. Within thirty (30) days of the Effective Date, the Settlement Administrator will mail a letter to each Settlement Class Member giving each of them ninety (90) days to activate their Experian Identity Theft Protection and Credit Monitoring package, which will include $1 Million identity theft insurance. *See* Agr. § IV.B. Within thirty (30) days after the Effective Date of the settlement, each Class member will be sent (via U.S. mail) a code to allow them to activate their subscription to the Experian Identity Theft Protection Package. *Id*. Class members will have ninety (90) days after the code is sent to activate their Experian Identity Theft Protection and Credit Monitoring subscription. The total value of free of charge two (2) years of the Identity Theft Protection Package to the Class is approximately **$6,764,616.00**. This total value was estimated by multiplying the retail value to consumers of approximately $19.99 per month for the identity theft and credit monitoring package for the 24 month period by the number of Class members (14,100 x $19.99 x 24). Thus, the Identity Theft Protection Package will confer an additional value of approximately **$479.76 to each Class member** who remains in the Final Settlement Class. *Id.*; *see also* Kazerounian Decl. ¶ 23; Keegan Decl. ¶ 28.

3. Defendant's Revised Medical Information Training and Security-Related Remedial Measures

As part of the Settlement Agreement, Defendant declares that significant remedial measures were taken as a result of this litigation and settlement. While not as tangible as identity theft protection or the cash portion of the settlement, Rady's remedial measures, including revised policies, security and data loss prevention measures, and additional training for new and existing staff and physicians working at Rady will, at the very least, allow the members of the Class to be assured that Rady has taken steps to prevent their medical information from breached or unlawfully disclosed in the future.

More specifically, the remedial measures by Defendant, which are valued by Defendant at approximately $1.8 million, include:

- $210,000.00 in estimated expenses for notifying members of Class of the disclosure and credit monitoring costs.
- $400,000.00 in estimated expenses for Zix and data loss protection ("DLP") software for 10 years
- $195,000.00 in estimated expenses for startup costs for the Zix and DLP.
- $54,776.00 in estimated expenses for refresher privacy training costs.
- $297,265.00 in estimated expenses for new employee privacy training costs.
- $348,500.00 in estimated expenses for existing employee privacy training costs.
- $41,000.00 in estimated expenses for costs of privacy training for independent contractors.
- $50,000.00 in estimated expenses for training for medical staff physicians working at Rady.

See Settlement Agreement § IV.G; and Kohrumel Decl., ¶¶ 3-4. Thus, if allocated amongst all 14,100 Class members, these remedial measures by Rady will confer an additional value of approximately **$127.66 to each Class member**. *Id.*; *see also* Kazerounian Decl. ¶ 24; Keegan Decl. ¶ 29.

V. THE SETTLEMENT IS FAIR, REASONABLE AND MERITS FINAL APPROVAL

California courts have held that voluntary conciliation and settlement are the preferred means of dispute resolution and that is especially true in complex class action litigation. *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1150 (citing *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983)). California Rules of Court, Rule 3.769(a) provides that settlement of a class action lawsuit requires approval of the trial court. The trial court's discretion is broad, and is to be exercised through the application of several well-recognized factors. *Clarke v. American Residential Servs. LLC* (2009) 175 Cal.App.4th 785, 799.

Among the well-recognized factors that the trial court should consider in evaluating the reasonableness of a class action settlement agreement include "the strength of plaintiffs' case, the

risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.

"Due regard," the *Dunk* court continued, "should be given to what is otherwise a private consensual agreement between the parties. The inquiry 'must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.' [Citation.]" *Dunk, supra,* 48 Cal.App.4th at 1801.

As stated by *Dunk*, "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Dunk, supra,* 48 Cal.App.4th at 1802. As explained below, applying these factors demonstrates that this Settlement warrants the Court's final approval.[2] " 'The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.' [Citation.]" *7–Eleven*, *supra*, 85 Cal.App.4th at 1150. "The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs

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[2] The California decisions upholding settlements in class actions applying these factors, including *Dunk* and *7–Eleven,* are fully consistent with a finding that the settlement here is fair, adequate and reasonable. In *Dunk,* the voluminous record before the trial court was deemed "ideal for the trial court to make a rational and educated determination the settlement was fair, adequate and reasonable." *Id.* at p. 1803. Specifically, *Dunk* noted that "[t]he case was over three years old when it settled. Extensive discovery and pretrial litigation, including a demurrer and motion for summary judgment, had been conducted…. No instance of personal injury was found.... The maximum damages to each member of the plaintiff class was $600 (the highest repair estimate), and the settlement coupons represented two-thirds of that amount, or $400. Although several people objected, their numbers were small in comparison to the entire class of over 65,000." *Id.* at 1802. In upholding the trial court's approval of the settlement, the *Dunk* "h[e]ld that the trial court's scrutiny ..., particularly in light of the substantial questions raised and information presented, was adequate to support its conclusion." *Id.* at 1805; *see also*, e.g., *Wershba, supra,* 91 Cal.App.4th at 245 ("The court must ... scrutinize the proposed settlement agreement to the extent necessary to ' "reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned" ' ".)

prevailed at trial." *Wershba*, *supra*, 91 Cal.App.4th at 246. Moreover, the Ninth Circuit has made clear, "the very essence of a settlement agreement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, *supra*, 688 F.2d at 624 (citation omitted).

A. <u>The Strength of the Case, and Risk, Expense, Complexity and Likely Duration of Further Litigation Favors Final Approval of the Settlement</u>

Had the Class Representative Plaintiff been successful at a trial on the merits, Class Counsel would have requested a $1,000 statutory penalty under the CMIA for each Class member. However, Class Counsel recognize and acknowledge the uncertainty of prevailing on their claims at trial due to the defenses that have been or could be asserted by Rady were the litigation to go forward. Here, the proposed settlement is both fair and reasonable in light of Rady's available legal and factual grounds for defending against the asserted claims. For example, absent the Settlement, Rady would have continued to assert a defense to the Plaintiffs' and the Class' claim for $1,000 in statutory penalties under the CMIA arguing that there has not been a requisite "release" of their "medical information" as defined under the CMIA.

If not for this Settlement, the case would have continued to be fiercely contested by Rady. Rady has demonstrated a willingness to defend the case through and beyond trial, and are represented by well-respected and capable counsel. Such a trial would occupy several attorneys on both sides for many weeks, and would require substantial expert testimony on behalf of the Class. While Class Counsel believes that Class Representative Plaintiffs could ultimately prevail on the merits, the incursion of additional and very substantial expenses due to a trial would severely impact any eventual recovery by the Class. Moreover, even a judgement favorable to Plaintiffs could be the subject of post-trial motions and appeal, which could prolong the case even further. *See, e.g., In re Warner Communications Securities Litigation*, 618 F.Supp. 735, 745 (S.D.N.Y 1985), aff'd, 798 F.2d 35 (2nd Cir. 1986) (delay from appeals is a factor to be considered). Therefore, delay, not just at the trial stage but through post-trial motions and the appellate process as well, could force members of the class to wait years for any recovery, further reducing its value. Accordingly, where the relative strengths of the parties' claims and defenses have been recognized,

pre-trial settlement of this litigation before significant additional resources have been expended will benefit the Class.

B. The Settlement Was Negotiated at Arm's Length

There is no doubt that the Settlement in this case is the result of non-collusive, arms-length, and informed negotiations. The settlement was the product of four (4) years of contentious, extensive and hard-fought adversarial proceedings, conducted before the occurrence of settlement negotiations between the parties during a full-day before a respected neutral mediator, Bruce Friedman, Esq. of JAMS. *See* Agr. § I, Recitals; Cohelan Prelim. Approv. Decl. ¶ 10; Kazerounian Decl. ¶ 12; Keegan Decl. ¶ 11. The court undoubtedly should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's-length transaction entered without self-dealing or other potential misconduct.

C. Investigation and Discovery Conducted in This Matter Are Sufficient to Allow Class Counsel and the Court to Act Intelligently

Throughout the four (4) years of contentious and adversarial litigation of this action, Plaintiffs have requested, compelled, and obtained extensive discovery, which has enabled Class Counsel to defeat Rady's motion for summary judgment, to certify the Class, and to evaluate the strengths and weaknesses of the claims and the risks of this litigation. Specifically, Class Counsel has conducted a thorough investigation of the facts through discovery, including, but not limited to the depositions of over twenty (20) witnesses, exchanging thirty-one (31) sets of written discovery, and reviewing of over 2,500 pages of documents produced by Rady. Since the Settlement was reach on the eve of trial, Class Counsel have thoroughly analyzed the strengths and weaknesses of Plaintiffs' and the Class' claims and the risks of further litigation in order to weigh the factors relevant to a full and fair assessment of the wisdom of the proposed settlement. *Dunk*, *supra*, 48 Cal.App.4th at 1802 (" 'such an assessment is nearly assured when all discovery has been completed and the case is ready for trial. [Citations.]' ") Additionally, the Court, by issuing orders denying Rady's motion for summary judgment and certifying the Class, is in a position to independently satisfy for itself that the consideration being received for the release of the Class

members' claims is reasonable in light of the strengths and weaknesses of Plaintiffs' and the Class' claims and the risks of further litigation. Accordingly the investigation and discovery conducted in this matter to date is sufficient to allow Class Counsel and the Court to be well informed and act intelligently.

D. No Objections or Requests for Exclusion Have Been Received from Class Members

On November 5, 2018, Notice of Class Action Settlement was mailed and published on the dedicated website informing Class members of their right to object to the Settlement or to request, for a second time, exclusion from the Class. Molina Decl., ¶ 8, & Ex. A. As set forth in the Notice of Class Action Settlement, the deadline to object to the Settlement or to request exclusion from the Class is December 10, 2018. *Id.*, ¶¶ 13-14. To date, the Settlement Administrator has not received any objections to the Settlement or any requests for exclusion. *Id.*

Given the significant monetary and non-monetary benefits of this Settlement to the Class, Class Counsel do not anticipate many objections, if any, from the Class. Also, given the extremely low number of requests for exclusion (21) when Class members were given their first opportunity to request exclusion, Class Counsel believe that there will be few, if any, secondary requests for exclusion in response to the Notice of Class Action Settlement. Plaintiffs and Class Counsel firmly believe that the Class members will be pleased with the Settlement and that the Notice of Class Action Settlement will result in very few, if any, objections, given the fact that the Settlement is valued at over **$13 Million dollars**. *See* Agr. § IV, Kazerounian Decl. ¶ 17; Keegan Decl. ¶ 22.

In any event, the Court will be in a position to fully evaluate the *Dunk* factors at the final settlement hearing, where it can consider the submissions by any future opponents of the settlement, if any, and the reaction of the members of the Class.

VI. CONCLUSION

Based upon the foregoing, the Class Representative Plaintiffs respectfully requests that the Court grant this motion for *final* approval of the Settlement and for an Order and entry of Judgment approving the Settlement on behalf of the Class.

Dated: November 26, 2018

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