THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KEITH RAYMOND, et al.,	)	CASE NO. 1:15-CV-00559-MRB
	)	
Plaintiffs,	)	Judge Michael R. Barrett
	)	
v.	)	
	)	
AVECTUS HEALTHCARE SOLUTIONS, LLC, et al.	)	
	)	
Defendants.	)	

JOINT MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT, CERTIFICATION OF A SETTLEMENT CLASS, APPOINTMENT OF LEAD CLASS COUNSEL & APPOINTMENT OF SETTLEMENT ADMINISTRATOR

Pursuant to Fed. R. Civ. P. 23(e), Class Representatives/Plaintiffs, Keith Raymond and Timothy Strunk, ("Plaintiffs"), and Defendants, Avectus Health Care Solutions, LLC and Mercy Health ("Defendants"), jointly move this Court to enter an Order: (1) preliminarily approving the Settlement Agreement; (2) certifying the settlement class; (3) appointing lead Class Counsel; and (4) appointing a Settlement Administrator.

After fully considering the difficulties associated with this litigation, including the likelihood of ultimate success on the merits and the risks, expense and delay of further litigation, Plaintiffs and Defendants negotiated a Settlement that achieves significant benefits for the Settlement Class. This Settlement was reached only after more than eight (8) years of vigorous litigation and lengthy arm's-length negotiations.

For the reasons set forth more particularly in the Memorandum in Support of this Joint Motion for Preliminary Approval of Settlement Agreement, Certification of a

Settlement Class, Appointment of Lead Class Counsel and Appointment of Settlement Administrator, the Parties respectfully request that the Court grant this Motion. The Parties have agreed to the proposed order of preliminary approval attached to this Motion, for settlement purposes only.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT, CERTIFICATION OF A SETTLEMENT CLASS, APPOINTMENT OF LEAD CLASS COUNSEL AND APPOINTMENT OF CLASS ADMINISTRATOR

I. INTRODUCTION AND SUMMARY

After conducting arm's-length negotiations, Plaintiffs/Class Representatives, Keith Raymond and Timothy Strunk ("Plaintiffs") and Defendants, Avectus Healthcare Solutions, LLC and Mercy Health ("Defendants") respectfully submit this Memorandum in Support of their Joint Motion for Preliminary Approval of Settlement, Certification of a Settlement Class, Appointment of Lead Class Counsel and appointment of Settlement Administrator. Plaintiffs and Defendants (the "Parties"), by counsel, reached a fair, reasonable and adequate settlement in this Lawsuit after eight (8) years of vigorous litigation over the claims and defenses, which fully and finally resolves and settles the case captioned Keith Raymond et al. v. Avectus Healthcare Solutions, et al., Southern District of Ohio No. 1:15-CV-00559-MRB (the "Lawsuit"). The proposed Settlement will avoid further expense, uncertainty, and delay and bring a complete end to this case. The terms of the proposed Settlement are fair, provide substantial benefits to Settlement Class Members, and are uniquely attuned to the issues addressed by the litigation. The proposed Settlement Agreement is subject to this Court's approval and is hereto attached as Exhibit A.

This Settlement remedies allegedly improper practices and provides Class Members with appropriate and equitable monetary relief. Defendants expressly deny any and all fault, wrongdoing, or liability in connection with any of the claims. Before agreeing to the Settlement, the Parties engaged in intense litigation for more than eight (8) years

before the Court and before the 6th Circuit Court of Appeals. The Parties conducted extensive rounds of written discovery, exchanged tens of thousands of documents, took numerous depositions inside and outside of Ohio, litigated the Class Certification Motion, engaged in lengthy motion practice and briefing for or against summary judgment, and engaged in extensive arm's-length negotiations.

The Parties request that the Court grant preliminary approval of the proposed Settlement. Specifically, the Parties respectfully request that the Court enter an Order (1) preliminarily approving the Settlement Agreement attached as Exhibit A as fair, adequate, and reasonable as to the Settlement Class; (2) conditionally certifying the Settlement Class for the purpose of effectuating the Settlement Agreement; (3) appointing Lead Class Counsel; and (4) appointing a Settlement Administrator. For the reasons set forth more particularly below, the Parties request that the Court grant this Motion. The Parties have agreed to the proposed Order granting preliminary approval attached to this Motion, for settlement purposes only.

II. BACKGROUND OF LITIGATION AND SUMMARY OF BENEFITS IN SETTLEMENT AGREEMENT

A. The Parties Reached a Settlement After Significant Litigation

The within cause of action commenced with the filing of Plaintiffs', Keith Raymond and Timothy Strunk (hereinafter "Plaintiffs"), Class Action Complaint on August 27, 2015. Doc. 1. Plaintiffs' claims arise from, among other things, the alleged violation of Ohio R.C. §1751.60 and the Fair Debt Collection Practices Act. Plaintiffs allege that under Ohio law, Class Members who were insured with Mercy's contracted health insuring corporations (HICs) could not be subjected to attempts to collect, nor collection, by the Defendants, other than for applicable co-payments or deductibles.

Specifically, Plaintiffs allege that Plaintiffs/Class Representatives, Raymond and Strunk, sustained injury in separate incidents. Doc. 75, Page ID # 1700 and Doc. 77, Page ID # 2266. Raymond and Strunk both received medical care at Mercy as a result of their injuries. Doc. 27, Page ID # 279 and Doc. 27, Page ID # 281. During admission to Mercy's hospitals, Plaintiffs informed Mercy's admitting staff/registration clerk(s) that they had health insurance coverage. Doc. 27, Page ID # 280, 281.

After Plaintiffs received their medical treatment, Defendant, Avectus, contacted Plaintiffs, sent written correspondence to Plaintiffs and Plaintiffs' legal counsel requesting that legal counsel sign a letter of protection against any settlement or judgement which would then "prevent your client's account from being sent to collections." Doc. 10-3, Page ID # 125 and Doc. 10-4, Page ID 126. Despite having Raymond and Strunk's health insurance information, Defendants' agents, servants and/or employees contacted Plaintiffs relative to payment of Mercy's bill. Doc. 75-1, Page ID # 2115-2154 Doc. 79-1, Page ID 2599-2600. On February 1, 2014, Defendants received a check from Strunk's attorney in the amount of $2,816.70, made payable to Avectus Healthcare Solutions. Doc. 79-1, Page ID # 2661.

The Complaint asserts claims for (1) breach of contract; (2) violations of the Ohio Consumer Sales Practices Act; (3) violations of the Fair Debt Collection Practices Act; (4) fraud; (5) conversion; (6) unjust enrichment; (7) punitive damages; and (8) breach of third-party beneficiary contract. Throughout this litigation, Defendants have maintained that they complied with all applicable statutes, regulations, and laws; they have asserted many defenses; and they have denied any and all wrongdoing or liability. Defendants, Avectus and Mercy, moved to dismiss Plaintiffs' Complaint. Doc. 5 and Doc. 10. The trial court

granted Defendants' Motions to Dismiss on September 30, 2016. Doc. 21. The Plaintiffs appealed the dismissal to the 6th Circuit Court of Appeals. Doc. 23. The 6th Circuit reversed the trial court's judgment, issued an opinion and remanded the case for further proceedings. Doc. 24. The parties then engaged in extensive discovery, including numerous depositions and the exchange of more than Forty Thousand (40,000) documents. On June 5, 2019, Plaintiffs filed a motion to certify the within action as a class action. Doc. 92. After extensive briefing, on March 27, 2020, the Court granted Plaintiffs' motion for class certification under Rule 23(b)(3). Doc. 127. The Court denied Plaintiffs' motion for class certification under Rule 23(b)(2) and Plaintiffs' Ohio Consumer Sales Practices Act claims. Doc. 127. Avectus and Mercy sought leave to appeal the class certification pursuant to Rule 23(f). On March 31, 2021, the 6th Circuit denied Defendants' Rule 23(f) petitions. Doc. 137.

Following the second trip to the 6th Circuit, the Parties continued with vigorous discovery and litigation, including motions and hearings relative to contested discovery. Plaintiffs and Defendants engaged in extensive motion practice and filed cross Motions for Summary Judgment. Doc. 190, 193 and 216. With the cross Motions for Summary Judgment pending, on May 11, 2023, the Court conducted an all day Settlement Conference/Mediation session. The Parties engaged in good faith, arm's-length negotiation and reached a tentative agreement. The Parties have thoroughly reviewed and analyzed this case, including but not limited to the claims and defenses that have been asserted, formal and informal discovery, consultation with experts, and review of applicable nationwide and Ohio law. The Parties believe the Settlement is fair, adequate, reasonable, and in the best interests of the Class Members, taking into account the

benefits provided to the Class Members through the terms of the Settlement, the risks to all Parties of continued litigation, the uncertainty attendant with possible trial and appeals, and the length of time and the costs that would be required to complete the litigation.

B. The Settlement Provides Substantial Benefits to Settlement Class Members

Pursuant to Fed. R. Civ. P. 23, the Settlement provides the certification, for settlement purposes only, of the following Settlement Class:

> "Settlement Class" means all heath insured persons, with a health insurance plan accepted by Mercy Health: (1) who were patients at any Mercy Health facility in the State of Ohio between August 27, 2009, and August 31, 2023; (2) who presented evidence of health insurance to Mercy Health; and (3) who thereafter paid, or were requested to pay, any amount of money for the treatment received at any Mercy Health operated facility, other than for co-pays and deductibles.

The parties have also agreed to a Sub Class for Class Members contacted by Defendant Mercy, and not by Defendant Avectus.

> "Mercy Only Settlement Subclass" means all heath insured persons, with a health insurance plan accepted by Mercy Health: (1) who were patients at any Mercy Health facility in the State of Ohio between August 27, 2009, and August 31, 2023; (2) who presented evidence of health insurance to Mercy Health; and (3) who thereafter paid, or were requested to pay, any amount of money for the treatment received at any Mercy Health operated facility, other than for co-pays and deductibles; and (4) who were not contacted by Avectus on Mercy Health's behalf.

While Defendants continue to vigorously deny any and all wrongdoing or liability, they jointly agreed to a Gross Settlement Amount of Three Million Five Hundred Thousand Dollars ($3,500,000.00), with Avectus to pay Three Million Dollars ($3,000,000) and Mercy Health to pay Five Hundred Thousand Dollars ($500,000). Subject to the terms and conditions of the Settlement Agreement, each Approved Claimant who

received a Qualifying Communication (as defined in the Settlement Agreement) shall receive a cash payment of $25.00 ("Base Settlement Payment"), regardless of whether the Approved Claimant submitted a payment to Mercy Health. If the total payments provided for under this subparagraph exceed $500,000, the amount of each Base Settlement Payment shall be reduced pro rata so that the total Base Settlement Payments do not exceed Five Hundred Thousand Dollars ($500,000.00). Further, each Approved Claimant who himself, herself, or through an attorney, actually made a Medical Bill Payment to Mercy Health shall receive a cash payment equal to 50% of the Medical Bill Payment. If the payments to the Settlement Class Members would exceed the Net Settlement Fund (as defined in the Settlement Agreement), the payments to the Settlement Class Members shall be reduced on a pro rata basis so that the settlement payments to the Settlement Class Members do not exceed the Net Settlement Fund.

The Parties agree that payments to Class Members shall be made on a claims-made basis. The Parties further agree that all claims must be submitted within Forty-Five (45) days of the settlement approval being sent to the Class Member. Any portion of the Settlement Fund that is not distributed as part of payment to the Class Members, costs of administration, incentive awards and attorneys' fees shall be returned to Defendants based upon a proportional share of their contribution to the Settlement Fund. This settlement provides real benefit to Class Members and the payment of Class Member claims.

In exchange for the above benefits, Settlement Class Members have agreed to release all claims against Defendants and their affiliates which relate to the matters alleged in the Complaint, including, but not limited to the billing practices of Defendants.

C. Notice Provisions

Pursuant to Fed. R. Civ. P. 23(c)(2)(B), "[f]or any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The parties have agreed to utilize regular mail notice to provide direct notice to all class members for whom Defendants have an address and to also utilize internet notice. The regular mail notice shall be mailed no later than 30 days following Preliminary Approval, first-class U.S. Mail, postage prepaid, requesting either forwarding service or change service. Following the mailing of these notices, the Settlement Administrator will re-mail one time only the notices via standard U.S. Mail, postage prepaid, to updated addresses of Settlement Class Members to the extent that the Settlement Administrator receives address change notifications from the U.S. Postal Service.

The Settlement Administrator will also establish an internet website containing information about the Settlement. The Settlement Website will be accessible no later than 25 days after entry of the Preliminary Approval Order. The Settlement Website will contain the following information: (a) the full text of the Settlement Agreement; (b) the Mail Notice; (c) the Preliminary Approval Order and other relevant orders of the Court; and (d) contact information for Settlement Class Counsel and the Settlement Administrator. The parties have agreed to use Atticus Administration LLC as the Settlement Administrator, subject to approval by the Court. If the Settlement Administrator requires a portion of the administration fees to be paid on or around the Notice Date (the "Initial Payment"), then within 30 days of Preliminary Approval, Mercy

Health shall cause to be paid one-seventh of the Initial Payment into the Escrow Account and Avectus shall cause to be paid six-sevenths of the Initial Payment into the Escrow Account.

Therefore, in providing traditional mail notice and modern internet notice, the notice provided is clearly adequate and in full compliance with Fed. R. Civ. P. 23.

III. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

Class action suits filed in federal court may be settled only with the court's approval. *See* Fed. R. Civ. P. 23(e). Settlement of class actions is generally favored and encouraged. *Franks v. Kroger Co.*, 649 F.2d 1216, 1224 (6th Cir. 1981). Federal Rule 23(e) provides three steps for the final approval of a proposed class action settlement: "(1) the court must preliminarily approve the proposed settlement, (2) members of the class must be given notice of the proposed settlement, and (3) after holding a hearing, the court must give its final approval of the settlement." *Bailey v. Verso Corp.*, 337 F.R.D. 500, 505 (S.D. Ohio 2021) *citing In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1026 (S.D. Ohio 2001); see also *Williams v. Vokovich*, 720 F.2d 909, 921 (6th Cir. 1983). Courts review class settlements to protect the interests of absent parties by ensuring 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." *Clark Equip. Co. v. Int'l Union, Allied Indus. Workers of Am., AFL-CIO*, 803 F.2d 878, 880 (6th Cir. 1986) (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)).

District courts in the Sixth Circuit balance the following factors to determine whether the proposed settlement is "fair, reasonable, and adequate":

> (1) the risk of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the amount of discovery completed; (4) the likelihood of success on the merits; (5) the opinion of class counsel and representatives; (6) the reaction of absent class members; and (7) public interest in the settlement.

Bailey v. Verso Corp., 337 F.R.D. 500, 505 (S.D. Ohio Fed. 22, 2021) citing *Ostendorf v. Grange Indem. Ins. Co.*, No. 2:19-cv-1147, 2020 LEXIS 163391, at *2 (S.D. Ohio Sept. 8, 2020) (quoting *Vigna v. Emery Fed. Credit Union*, No. 1:15-cv-51, 2016 LEXIS 166605, at *3 (S.D. Ohio Dec. 2, 2016)). The court need not make an affirmative determination of each factor but, rather, should grant preliminary approval if "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 approval." *Id*. (*quoting In re Telectronics Pacing Sys.*, 137 F. Supp. 2d at 1015). The Court "enjoys wide discretion in assessing the weight and applicability of these factors." *Granada Invest., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205-06 (6th Cir. 1992).

A. The Likelihood of Ultimate Success on the Merits Balanced Against the Amount and Form of Relief Offered Supports Approval of the Settlement

"The most important of the factors to be considered in reviewing a settlement is the probability of success on the merits." *In re Gen. Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1086 (6th Cir. 1984). "The ultimate question . . . is whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." *Bailey v. AK Steel Corp.*, No, 1:06-CV-468 2008 U.S. Dist. LEXIS 16704 at *4 (S.D. Ohio Feb. 21, 2008), aff'd, 320 Fed. Appx. 364 (6th Cir. 2009) (quoting *UAW*

v. Gen. Motors Corp., No. 05-CV-73991, 2006 U.S. Dist. LEXIS 14890, at *46 (E.D. Mich. 2006), aff'd 497 F.3d 615 (6th Cir. 2007)).

"It is neither required, nor is it possible for a court to determine the settlement is the fairest possible resolution of the claims of every individual class member; rather, the settlement, taken as a whole, must be fair, adequate, and reasonable." *Id.* (citation omitted). In assessing the settlement, "the Court should balance the benefits afforded to members of the Class, and the immediacy and certainty of a substantial recovery for them, against Plaintiff's likelihood for success on the merits." *In re Nationwide Fin. Servs. Litig.*, No. 2:08-CV-00249, U.S. Dist. LEXIS 126962 *5-6 (S.D. Ohio Aug. 18, 2009) (quoting *In re Telectronics*, 137 F. Supp. 2d at 1010) and (citing *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 319 (3d Cir. 1998); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974).

Here, the prospect of any recovery, had the Parties proceeded further to litigate the matter, was "not overwhelming." *Bailey v. AK Steel Corp.*, No, 1:06-CV-468 2008 U.S. Dist. LEXIS 16704, at * 2 (S.D. Ohio Feb. 21, 2008). Questions about whether Plaintiffs could have prevailed on the merits of the case persist. Before the Settlement Agreement was reached, both Defendants had filed extensive motions for summary judgment asserting numerous factual and legal defenses, Doc. 193 and 216, which were fully briefed on each of Plaintiffs' claims. If Plaintiffs' claims survived those motions, there was still a substantial risk that Plaintiffs would not have ultimately prevailed on the merits of the case. Settlement Class Members were able to avoid these risks.

Notwithstanding questions and uncertainty about whether Plaintiffs would eventually prevail on the merits, this Settlement provides substantial benefits to

Settlement Class Members. The Settlement provides certain and immediate relief, as opposed to the uncertainties associated with protracted litigation. The negotiated settlement is fair, adequate, and reasonable and directly remedies the harms alleged in the Complaint. Plaintiffs allege that Defendants intentionally and systematically refused, failed, and/or avoided submitting medical bills to Health Insuring Corporations. Plaintiffs further allege that Defendants sought compensation for covered services from the enrollees or subscribers, instead of the Health Insurance Corporations, as required by law. Defendants maintain that they fully complied with all applicable statutes, regulations, and laws; they asserted many defenses in the litigation; and they expressly deny all liability. The Parties' settlement provides monetary relief to Class Members allegedly harmed by Defendants' billing practices. When balanced against the possibility that Settlement Class Members might have received less or no relief by proceeding to trial, this factor weighs heavily in favor of approving the proposed Settlement.

B. The Risks, Expense and Delay of Further Litigation All Support Approval of the Settlement

In determining the fairness of the settlement, courts also consider "[t]he complexity, expense and likely duration of the litigation." *In re Telectronics*, 137 F. Supp. 2d at 1013; *In re Art Materials Antitrust Litig.,* 100 F.R.D. 367, 370 (N.D. Ohio 1983). This case, like "most class actions," is "inherently complex[,] and settlement avoids the costs, delays, and multitude of other problems associated with them." *In re Telectronics*, 137 F. Supp. 2d at 1013 (quoting *In re Austrian & German Bank Holocaust Litig.,* 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000)). "[A]voiding the delay, risks, and costs of continued litigation against a defendant is a valid reason for counsel to recommend and for the court to approve a settlement." *In re Nationwide*, 2009 U.S. Dist. LEXIS 126962, at *10 (quoting *Ayers v.*

Haley Barbour, 358 F.3d 356, 369 (5th Cir. 2004) ("settling now avoids the risks and burdens of potentially protracted litigation"). The difficulty Plaintiffs would encounter in proving their claims, the substantial litigation expenses, and a possible delay in recovery due to the appellate process, all justify this Court's approval of the Settlement. *Id*. at *7.

Absent settlement, Plaintiffs would be required to engage in further motion practice and, if successful, time-consuming trial preparation which would be a massive endeavor and require considerable additional time and resources. Counsel on both sides would be compelled to expend hundreds of hours preparing for direct and cross-examination, identifying and preparing the exhibits intended for use at trial, and filing and responding to pre-trial motion practice, including motions in limine. The trial itself would take six (6) weeks, if not longer.

These efforts and costs must be considered in connection with the instant motion to approve the Settlement. In complex class action litigation, these expenses will burden any recovery obtained for the Settlement Class, even if Plaintiffs were to succeed. Moreover, even a victory at trial could be lost through post-trial motions or likely appeals. All of this work would result in the expenditure of many additional hours (and years) of effort, and great additional expense. This factor also weighs heavily in favor of approval because the Settlement secures a substantial benefit in a complex action, undiminished by further expenses, and without delay, costs, and the uncertainty of protracted litigation.

C. The Stage of Proceedings and Amount of Discovery Support Approval of the Settlement

To ensure that Plaintiffs have had access to sufficient information to evaluate their case and to assess the adequacy of the Settlement, the stage of the proceedings and the discovery taken must be considered. *In re Telectronics*, 137 F. Supp. 2d at 1015; *Kogan*

v. AIMCO Fox Chase, L.P., 193 F.R.D. 496, 502 (E.D. Mich. 2000). Substantial discovery in the within case has occurred. Plaintiffs have had the opportunity to depose witnesses from both Mercy and Avectus. Plaintiffs have also received and reviewed in excess of Forty Thousand (40,000) documents from the Defendants responsive to discovery requests. The Parties have engaged in extensive discovery practice, including fully briefed Motions to Compel additional discovery, that required Court intervention.

More than eight (8) years have now elapsed since the filing of the Complaint. Class Counsel has had the opportunity to evaluate documents produced by Defendants and to depose numerous employees and former employees of the Defendants both inside and outside of Ohio. The Settlement occurred after Plaintiffs' counsel had the opportunity assess the documents produced by Defendants, the facts supporting their claims, the legal and factual defenses raised by the Defendants, and the risks of continued litigation. All of the Parties had a "clear view of the strengths and weaknesses of their cases." *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). This factor weighs in favor of approving the proposed Settlement. Both sides were fully apprised of the legal and factual issues presented, as well as the strengths and weaknesses of their cases, and both sides have made a well-informed decision to enter into the Settlement.

D. The Judgment of Experienced Counsel Who Have Competently Evaluated the Strength of the Case Supports Approval of the Settlement

The view of experienced counsel favoring the settlement is entitled to great weight. *In re Telectronics*, 137 F. Supp. 2d at 1015-16; *In re Art Materials*, 100 F.R.D. at 371. It is well settled that, in approving a class action settlement, the courts should "defer to the judgment of experienced counsel who has competently evaluated the strength of his

proofs." *Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. 1983); accord: Kogan, 193 F.R.D. at 501 (citing *Bronson v. Bd. of Educ.,* 604 F. Supp. 68, 73 (S.D. Ohio 1984)).

Both Plaintiffs' and Defendants' counsel are experienced practitioners in the field of complex class actions. Lead counsel for the Class have decades of class action litigation experience. Lead counsel for Defendants similarly have decades of experience in class action litigation. Counsel for the parties urge preliminary approval of the Settlement based upon their class action experience, their knowledge of the strengths and weaknesses of the case, their analysis of the discovery taken in the case, the risks associated with this type of litigation, the likely recovery at trial and on appeal, and other factors considered in evaluating the Settlement. The Settlement has been negotiated vigorously over an extended period of time and at arm's-length. At all times, Plaintiffs and Lead Class Counsel acted independently and their interests coincide with the interests of the Settlement Class. Plaintiffs and Defendants, along with their respective counsel, made a well-informed decision to enter into the Settlement.

E. The Settlement is Consistent With the Public Interest

"There is a strong public interest in encouraging settlement of complex litigation and class-action suits because they are notoriously difficult and unpredictable and settlement conserves judicial resources." *A.K. Steel*, 2008 U.S. Dist. LEXIS 16704, at *11 (citing *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508 (E.D. Mich. 2003) (citing *Granada Invs., Inc. v. DWG Corp.*, 962 F2d 1203, 1205 (6th Cir. 1992)). As the Sixth Circuit has stated:

> "Settlement agreements should . . . be upheld whenever equitable and policy considerations so permit. By such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before over-burdened courts, and to the citizens whose taxes support the latter. An

> amicable compromise provides the more speedy and reasonable remedy for the dispute. "

Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir.), cert. denied 429 U.S. 862, 97 S. Ct. 165, 50 L. Ed. 2d 140 (1976); accord: *In re Telectronics*, 137 F. Supp. 2d at 1025; *In re Dun & Bradstreet*, 130 F.R.D. at 372. The public has a significant interest in settlement of disputed claims that require substantial federal judicial resources to supervise and resolve. The Settlement ends potentially longer and more protracted litigation and frees the Court's valuable judicial resources. Although the Parties could have litigated the case to judgment and taxed the resources of the litigants and the Court, they chose instead to forgo the expense and uncertainty of continued litigation and focus their efforts on achieving a fair and adequate settlement that took the risks of further litigation into account rationally and reasonably. The Settlement confers immediate benefits on Settlement Class members, avoids the risks and expense of further litigation, and conserves judicial resources. Accordingly, the Court should find that the public interest favors preliminarily approving the settlement.

IV. A SETTLEMENT CLASS SHOULD BE CERTIFIED

The Supreme Court has recognized that at times the benefits of a proposed settlement of a class action can be realized only through the certification of a settlement class. See *Amchem Prods. v. Windsor*, 521 U.S 591, 620 (1997); *Wess v. Storey*, No. 2:08-cv-623, 2011 U.S. Dist. LEXIS 41050, at *17 (S.D. Ohio Apr. 14, 2011) (final approval of a class settlement under Rule 23(b)(1) and (b)(2) involving claims under the Fair Debt Collection Practices Act and the Ohio Consumer Sales Practices Act). For a settlement class to be certified, all four requirements of Rule 23(a) must be satisfied, along with one of the three categories in Rule 23(b). *Pelzer v. Vassalle*, 655 F. App'x

352, 363 (6th Cir. 2016). For purposes of settlement only, the requirements of Fed. R. Civ. P. 23(a) and (b)(3) have been met. Accordingly, the Parties seek the conditional certification of the Settlement Class set forth above and in the Agreement.

A. Rule 23(a) Requirements Are Satisfied for Purposes of Certifying a Settlement Class

"The four requirements of Rule 23(a), numerosity, commonality, typicality and adequacy, are well recognized and defined by the courts." *Wess*, 2011 U.S. Dist. LEXIS 41050, at *17 (citing *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 522 (6th Cir. 1976)). "A class may be certified 'solely for purposes of settlement where a settlement is reached before a litigated determination of the class certification issue.'" *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1313-1314 (S.D. Fla. 2005) (citation omitted). In certifying a class for settlement purposes only, the Court need not determine "whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial." *Amchem Prods.*,521 U.S. at, 620, 117 S. Ct. at 2248. These four requirements are satisfied for purposes of certifying a settlement class in this case.

B. Numerosity is Satisfied

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). This requirement is not amenable to a strict numerical test. *In re Am. Med. Sys.,* 75 F.3d 1069, 1079 (6th Cir. 1996). The Court must examine this factor in light of the specific facts of the case. *Id.* While there is no strict test to determine when the class is sufficiently numerous to be joined under Rule 23, a "substantial" number of class members satisfies the element. *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006). Courts routinely approve classes with forty or more members. See, e.g., *Ganci v. MBF Inspection Servs., Inc.*, 323 F.R.D. 249, 255 (S.D.

Ohio 2017). The proposed class consists of approximately Twelve Thousand (12,000) members, which is large enough to establish the presumption of impracticality of joinder and satisfies the requirement of Rule 23(a)(1). For this reason, the instant case easily satisfies the numerosity requirement under Fed. R. Civ. P. 23(a)(1).

C. Commonality is Satisfied

Rule 23(a)(2) requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). To satisfy Rule 23(a)(2), the case must present a common issue the resolution of which will advance the litigation. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). Commonality asks whether the class members suffered the same injury. See, e.g., *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d at 852. Class claims must depend on a common contention "capable of class wide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Bailey*, 337 F.R.D. at 505 citing *Davis v. Cintas Corp.*, 717 F.3d 476, 487 (6th Cir. 2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

Here, each Settlement Class Member's claim raises questions of law or fact, the resolution of which are common to the Settlement Class. More specifically, the Settlement Class presents the common question of whether Defendants engaged in improper billing practices in violation of Ohio R.C. §1751.60 and the FDCPA. These are common questions, among others detailed in the Complaint. Doc. 1. Rule 23(a)(2) is satisfied because the resolution of these questions of law and fact is common to the Settlement Class.

D. Typicality is Satisfied

"Typicality is met if the class members' claims are 'fairly encompassed by the named plaintiff's claims.'" *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d at 852 (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (en banc)). "This requirement [e]nsures that the representatives' interests are aligned with the interests of the represented class members so that, by pursuing their own interests, the class representatives also advocate the interests of the class members." *Id.* at 852-53

The claims or defenses of the representative parties are typical of the claims or defenses of the Settlement Class. To satisfy the typicality requirement of Rule 23(a)(3), the claims of the class representatives must be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *In re Am. Med. Sys.*, 75 F.3d at 1082 (citation omitted) ("a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory").

With respect to this litigation, there is a nexus between the Parties' claims and defenses and the common questions of fact and law (i.e., whether Defendants improperly billed enrollees or subscribers directly in violation of Ohio R.C. §1751.60). Rule 23(a)(3) is satisfied in this case.

E. Adequacy is Satisfied

Finally, to satisfy the adequacy of representation element "(1) the representatives must have common interests with unnamed members of the class, and (2) it must appear

that the representatives will vigorously prosecute the interests of the class through qualified counsel." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 721 (6th Cir. 2013) (quoting *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 757 (6th Cir. 2013)). "The court reviews the adequacy of class representation to determine whether class counsel are qualified, experienced and generally able to conduct the litigation, and to consider whether the class members have interests that are not antagonistic to one another." *Stout v. J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000).

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To establish adequacy of representation, Plaintiffs must satisfy two elements. First, Plaintiffs must have interests in common with the unnamed members of the Settlement Class. *In re Am. Med. Sys.*, 75 F.3d at 1083. Second, it must be shown that Plaintiffs -- through qualified counsel -- will vigorously prosecute the interests of the Settlement Class. *Id*.

Here, Plaintiffs are adequate Settlement Class representatives. With respect to the class claims, Plaintiffs do not have interests that are adverse or antagonistic to the interests of the Settlement Class. Both Raymond and Strunk have followed the litigation closely and actively worked with counsel to provide discovery responses and deposition testimony. Doc. 75, 77 and 79. Plaintiffs have served as exemplary class representatives and are appropriate class representatives for the Settlement Class.

Lead Class Counsel are also adequate. Lead Class Counsel have extensive experience handling complex class actions and have demonstrated a willingness to vigorously prosecute the class claims. In this action, the team of lawyers assembled to represent the Class is knowledgeable and possesses extensive experience in complex

class action and commercial litigation involving medical records, medical billing, collections, contract law and insurance. The efforts of Plaintiffs' counsel thus far in this case show that they are committed to the vigorous prosecution of this action and possess the skills necessary for such efforts.

Plaintiffs' counsel has worked well over Six Thousand (6,000) hours on this matter over the past Eight (8) years. Over the course of this litigation, Class Counsel has taken numerous depositions, obtained over Forty Thousand (40,000) documents in discovery, briefed and researched key issues for the Court's consideration, represented Plaintiffs in numerous hearings before the Court; litigated in the 6th Circuit twice and represented the interests of the Settlement Class in motion practice and in contested negotiations. Further, Class Counsel litigated this matter against highly competent, experienced and aggressive defense Counsel who zealously represented Avectus and Mercy. Lead Class Counsel are clearly qualified counsel and have vigorously prosecuted the interests of the Settlement Class.

V. APPOINTMENT OF SETTLEMENT ADMINISTRATOR

The Parties have agreed that the Court should appoint Atticus Administration LLC as Settlement Administrator. Founded in August 2016, Atticus has administered over 900 settlements and has distributed more than $1.14 billion in award payments. Collectively, the Atticus team has over 125 years of industry experience, has managed over 3,000 settlements, and has distributed more than $3 billion. Atticus Administration LLC has been appointed as Settlement Administrator numerous times in the 6th Circuit

and is clearly qualified to administer the within Settlement Class. The Parties therefore request that the Court appoint Atticus Administration LLC as Settlement Administrator.

VI. CONCLUSION

For the foregoing reasons, the Settlement is fair, adequate, and reasonable. The parties respectfully request the following:

(a) conditionally certify the Settlement Classes under Rule 23 of the Federal Rules of Civil Procedure, appointing the named Plaintiffs as the Class Representatives, and Plaintiffs' Counsel as Class Counsel pursuant to Rule 23(g);

(b) preliminarily approve the proposed Settlement Agreement attached hereto as Exhibit A;

(c) approve the proposed Notices to the Settlement Classes and Claim Forms in a form substantially similar to those attached hereto as Exhibits B, C and D; and

(d) appoint Atticus Administration LLC as Settlement Administrator.

The Parties respectfully request that the Court grant preliminary approval and enter the proposed Order attached hereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed through the Court's CM/ECF filing system, which shall serve a copy of the document upon all registered counsel of record.

/ s / Gary F. Franke
Gary F. Franke
Attorney at Law