

**CAUSE NO. 2020-CI-18623**

KENNETH KESLAR, II, individually	§	IN THE DISTRICT COURT
and on behalf of all others similarly	§	
situated,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	BEXAR COUNTY, TEXAS
EMERUS / BHS SA THOUSAND	§	
OAKS, LLC d/b/a BAPTIST	§	
EMERGENCY HOSPITAL -	§	
SHAVANO PARK, EMERUS	§	
HOSPITAL PARTNERS, LLC, and	§	
EMERUS HOLDINGS, INC.,	§	
	§	73rd JUDICIAL DISTRICT
	§	
Defendants.	§	

**PLAINTIFF’S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF  
PROPOSED CLASS ACTION SETTLEMENT AND  
APPROVAL OF NOTICE TO CLASS MEMBERS**

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Kenneth Keslar II (the "Plaintiff"), individually and on behalf of all others similarly situated (Plaintiff and the putative Class members are collectively referred to as the "Class"),<sup>1</sup> files this Unopposed Motion for Preliminary Approval of Proposed Class Settlement and Approval of Notice to Class Members ("Motion") pursuant to Rule 42 of the Texas Rules of Civil Procedure ("TRCP"). Emerus / BHS SA Thousand Oaks, LLC d/b/a Baptist Emergency Hospital - Shavano Park, Emerus Hospital Partners, LLC, and Emerus Holdings, Inc., (the "Defendants"), do not oppose this motion or the relief requested.

## **I. INTRODUCTION**

1. Plaintiff brought this Action on behalf of patients who went to a Baptist Neighborhood Hospital ("BNH")(formerly known as Baptist Emergency Hospital) between September 25, 2016 and January 27, 2023, and for whom certain laboratory panels were ordered and performed, and then received a bill for these panels (*i.e.*, the Class). Plaintiff alleges that Defendants provided insufficient disclosures regarding the cost of two in-house laboratory panels, namely, the BMP (includes CK) and LFT (includes Amylase) ("Current Panels") and the manner in which they billed for these panels, which led to Plaintiff and other patients paying more than what was standard for laboratory panels. As admitted by the Defendants, these panels were billed, not as a single panel, but as individual tests *i.e.* each component test in the panel was unbundled and billed separately, resulting in costing the patient significantly more than what a standard panel, which was capable of being billed as a 'panel,' would have cost. Plaintiff alleges that this practice of billing was misleading, deceptive and calculated to increase payment.

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<sup>1</sup> All capitalized terms not otherwise defined herein have the same meanings as in the Stipulation of Settlement dated January 27, 2023 ("Settlement Agreement").

2. After a substantial review of relevant documents, discovery and numerous discussions between counsel, with substantial involvement of the Plaintiff and Defendants (collectively, the “Parties”), the Parties have reached a settlement, which, if approved by the Court, will end this litigation against the Defendants.

3. The proposed Settlement is an extraordinary result for the Class, offering complete or near-complete monetary relief to every interested Class Member who submits a valid claim<sup>2</sup>—relief that will be worth hundreds, if not thousands, of dollars on average, and nonmonetary benefits to the public at large so that no one else is affected by Defendants’ practices.

4. Defendants have expressly denied and continue to deny all allegations of wrongdoing, negligence, fault, or liability, and assert that their actions have been lawful and proper in all respects and in compliance with all applicable legal duties.

5. Under the proposed Settlement, Defendants have agreed to refund (or forgive) that portion of a Class Member’s payment (or bill) that exceeded the amount their insurance payor would have approved (or which a cash-paying patient would have been billed) for the associated CPT code panels, which Plaintiff alleges to be standard diagnostic panels.<sup>3</sup> The Settlement also provides nonmonetary benefits for the entire Class and the larger public such as requiring additional disclosures in the intake forms to inform patients regarding the Current Panels and the way they will be billed, disclosure of the exact price of the Current Panels in the Pricing Transparency document posted on BNH’s website and mandating BNH to include the associated

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<sup>2</sup> Noting here that, for Class Members eligible for a write-off of outstanding balance, the Settlement does not even require a submission of a claim form.

<sup>3</sup> The associated CPT Code Panel for the BMP (includes CK) is the CPT No. 80048 panel (“CPT 80048 BMP Panel”) and the associated CPT Code Panel for the LFT (includes Amylase) is the CPT No. 80076 panel (“CPT 80076 LFT Panel”).

CPT Code Panels (*viz.* the laboratory panels with panel codes CPT No. 80048 and CPT No. 80076) as options in their in-house laboratory. Thus, the Settlement not only provides eligible Class Members with an opportunity to obtain relief, but also ensures that it benefits patients in avoiding unexpected bills going forward.

6. As shown below, the proposed Settlement was reached through arms-length negotiations over a lengthy time period with the assistance and considerable involvement of experienced counsel. The Settlement will result in financial benefit to all Class Members and is fair and reasonable given the defenses raised to the recovery of damages and the scope of potential damages.

7. In deciding whether to grant preliminary approval and approve sending notice of the proposed Settlement to the Class, the Court must determine: (1) whether it will likely be able to certify the Class for purposes of settlement; (2) whether it will likely be able to approve the proposed Settlement; and (3) whether the Parties' proposed Notice provides the best notice practicable under the circumstances. As discussed below, all requirements for preliminary approval are met. Plaintiff respectfully requests that the Court preliminarily approve the proposed Settlement; certify the Class for purposes of the Settlement only, direct notice of the proposed Settlement to the Class; and set a schedule for settlement proceedings, including a date for the Final Approval Hearing.

## **II. FACTS**

### **A. BACKGROUND**

8. On December 31, 2018, Plaintiff visited the emergency department at Baptist Emergency Hospital – Shavano Park (“BEHSP”) where he was ordered two laboratory panels: the

“BMP (includes CK)” – a metabolic panel and the “LFT (includes amylase)” – a liver function panel.<sup>4</sup>

9. Plaintiff had a health benefit plan through Blue Cross Blue Shield (“BCBS”) and BEHSP was a participating provider in Plaintiff’s health benefit plan’s provider network. Plaintiff ensured he went to an in-network emergency department in order to contain costs.<sup>5</sup>

10. Nine months later, Plaintiff received a bill from BEHSP for his treatment. Over one half of the charges billed before insurance adjustments were for laboratory charges. The bill did not break down what portion was attributable to the laboratory panels.<sup>6</sup>

11. Plaintiff was shocked and promptly sought an explanation of the charges both from his insurer and BEHSP. He also tried to resolve the issue by, *inter alia*, requesting a coding review, submitting a written dispute to BEHSP after it denied his request for a coding review, and following up more than four times about his dispute.<sup>7</sup> After repeated inquiries, BEHSP finally responded through a letter on February 19, 2020 stating that the component tests in the panel were billed individually, and not collectively as a panel.<sup>8</sup> Plaintiff also discovered that about 85% of

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<sup>4</sup> First Amended Petition, ¶ 1.

<sup>5</sup> First Amended Petition, ¶ 1.

<sup>6</sup> First Amended Petition, ¶¶ 2, 33.

<sup>7</sup> First Amended Petition, ¶¶ 35-39.

<sup>8</sup> *See* Declaration of Radha Nagamani Raghavan in Support of Plaintiff’s Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement and approval of Notice to class Members filed concurrently with this Motion (the “Raghavan Decl.”), ¶ 2.



the total laboratory charges before insurance adjustments was derived from the Current Panels that were ordered and performed.<sup>9</sup>

12. Plaintiff and his wife then spent several hours on the phone with the hospital and their insurance company trying to understand further why the listed charges were so high for the two panels. They learned that the Current Panels were not billed using a single billing code (also called a Current Procedure Terminology (“CPT”) code), like a panel is usually billed. Instead, each component test in the panels were unbundled and individually billed.<sup>10</sup> Plaintiff and his wife also spent several hours reviewing their bills and referring to the “Pricing Transparency Document” publicly posted on the Baptist Emergency Hospital website before realizing that Defendants’ practice of billing significantly increased costs to patients was misleading and deceptive.

**BNH’s Current Panels and their associated CPT Code Panels**

13. A basic metabolic panel (“BMP”) and a liver function test (“LFT”), are commonly ordered laboratory panels *viz.* a group of tests ordered and performed using a single blood specimen. The standard versions of both these panels have billing codes or Current Procedural Terminology (“CPT”) codes that can be used to bill the panel as a whole (*i.e.*, a single code for the group of tests). This is important because running tests and billing as “a panel” is typically less expensive than if each test in the panel were performed or billed individually. The reimbursement to a provider for a panel is typically lower than the total reimbursement for every test within the panel billed individually.

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<sup>9</sup> First Amended Petition, ¶ 3.

<sup>10</sup> The practice of “unbundling” of panels was identified as a type of health care fraud by the Office of the Attorney General for Texas. *See also*, First Amended Petition, ¶ 4-6.

14. The Current Panels offered at the BNH Facilities, however do not have a single CPT code by which they could be billed, because they comprise of a group of tests that are slightly different from the group of tests included in a standard BMP or LFT panel that has an associated CPT code.<sup>11</sup> For example, the CPT 80048 BMP Panel comprises of the following group of tests: (1) carbon dioxide (bicarbonate); (2) chloride; (3) creatinine; (4) glucose; (5) potassium; (6) sodium; (7) urea nitrogen (BUN); and (8) calcium, ionized. However, BNH's BMP (includes CK) panel comprises only of the first *seven* tests in the CPT 80048 BMP Panel, but has an additional test, creatine kinase (CK), which is not present in the CPT 80048 BMP Panel. Because of this slight difference in the components of the panel, the BMP (includes CK), even though performed as a 'panel,' cannot be billed as a 'panel' because there is no CPT code for this exact configuration of component tests.

15. The Current Panels that are performed in BNH's in-house laboratories use rapid test machines, manufactured by Abaxis Inc., that use pre-configured cartridges to run tests on a blood sample. Test results are available in a short amount of time, since the tests are performed on-site.<sup>12</sup>

16. The BMP (includes CK) panel is the only type of basic metabolic panel that BNH offers in-house. Similarly, the LFT (includes Amylase) panel is the only type of liver function test that is offered in-house. In the event physicians deemed that the tests in a standard CPT Code

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<sup>11</sup> See Raghavan Decl., ¶ 2.

<sup>12</sup> See Raghavan Decl., ¶¶ 13, 24.

Panel were more beneficial to the patient than the Current Panels and wanted to order those, Defendants' physicians would have had to send the tests out to an outside laboratory.<sup>13</sup>

**BNH's Billing Practice**

17. Unbundling happens when a laboratory bills separately for some or all tests analyzed as part of a panel, rather than billing one price for the entire panel. A variation on unbundling happens when a facility performs some but not all of the tests in a panel in order to justify billing for each individual test, resulting in higher reimbursement to the provider. Plaintiff alleges that this "twist" on unbundling is what happened in this case. Defendants deny this allegation, and contend that the choice of panels to run onsite at its facilities was based on medical considerations.<sup>14</sup>

18. At no point in time during Plaintiff's visit to BEHSP was the Plaintiff or his wife, who accompanied him, informed, either orally or through any intake paperwork, that the Current Panels would not be billed as a panel, and would therefore end up costing significantly more than a standard BMP or LFT panel with a CPT code. Notably, even the "Pricing Transparency" document posted to BEHSP's website did not disclose the chargemaster rates of the Current Panels, nor that BEHSP would bill each test in the panel separately.<sup>15</sup>

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<sup>13</sup> See Raghavan Decl., ¶ 19.

<sup>14</sup> First Amended Petition, ¶ 9.

<sup>15</sup> First Amended Petition, ¶¶ 72-75.

**B. FACTUAL AND PROCEDURAL HISTORY**

19. On or about September 25, 2020, Plaintiff brought the Action against Defendants in this Court.<sup>16</sup>

20. On November 11, 2020, Plaintiff sent written notice to the Defendants regarding the alleged violations of the Texas Deceptive Trade Practices Act (“DTPA”) as contemplated under the statute’s notice provision, § 17.505(a).<sup>17</sup>

21. On December 30, 2020, Plaintiff filed the First Amended Class Action Petition (the “Petition”), alleging that amounts billed to him for the Current Panels and BNH’s disclosures concerning the cost of the Current Panels violated common law and statutory duties under Texas law.<sup>18</sup>

22. On February 17, 2021, Plaintiff served his first set of document requests on all the Defendants.<sup>19</sup>

23. On March 1, 2021, Emerus/BHS SA Thousand Oaks LLC served its first set of interrogatories and first set of document request on the Plaintiff.<sup>20</sup>

24. On July 16, 2021, Plaintiff served his first set of interrogatories and his second set of document requests on the Defendants.<sup>21</sup>

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<sup>16</sup> Raghavan Decl., ¶ 3.

<sup>17</sup> First Amended Petition, ¶ 84.

<sup>18</sup> Raghavan Decl., ¶ 5.

<sup>19</sup> Raghavan Decl., ¶ 6.

<sup>20</sup> Raghavan Decl., ¶ 7.

<sup>21</sup> Raghavan Decl., ¶ 8.

25. On November 12, 2021, Plaintiff served his first set of requests for admission, his second set of interrogatories and third set of document requests on the Defendants.<sup>22</sup>

26. On January 7, 2022, Plaintiff served his fourth set of document requests and third set of interrogatories on the Defendants.<sup>23</sup>

27. On January 17, 2022, Plaintiff served his fifth and final set of document requests and fourth and final set of interrogatories on the Defendants.<sup>24</sup>

28. Throughout, the Parties met and conferred, by phone and in writing, about the adequacy of responses by each Party. In response to Plaintiff's document requests, Defendants produced more than 29,000 pages of documents. And in response to Defendants' document requests, Plaintiff produced more than 1,100 pages of documents.<sup>25</sup>

29. Further Plaintiff also served two third-party subpoenas on Blue Cross Blue Shield of Texas and Abaxis, Inc. (who was the manufacturer of both the testing machines on which the Current Panels were performed and the Current Panel test cartridges). Blue Cross Blue Shield of Texas responded to the subpoena, met and conferred with the Plaintiff to narrow document requests and provided information specific to Plaintiff's claims that Plaintiff had requested.<sup>26</sup>

30. In January 2022, Plaintiff took the depositions of Dr. Dan Middlebrook, owner and Chief Medical Officer of Emerus Holdings Inc and Victor Schmerbeck, CEO of Emerus. Plaintiff

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<sup>22</sup> Raghavan Decl., ¶ 9.

<sup>23</sup> Raghavan Decl., ¶ 10.

<sup>24</sup> Raghavan Decl., ¶ 11.

<sup>25</sup> Raghavan Decl., ¶ 12.

<sup>26</sup> Raghavan Decl., ¶ 13.

had also scheduled three depositions and was in the process of scheduling six more depositions of defendants' witnesses, including the Founding Partner and President, the Vice President of Revenue Cycle Operations and the Chief Medical Information Officer of Emerus Holdings Inc.<sup>27</sup>

31. In February 2022, Defendants took the deposition of the Plaintiff and had scheduled the deposition of Plaintiff's wife.<sup>28</sup>

32. In March 2022, the Parties decided to explore settlement negotiations, due to which all depositions scheduled by both Parties, but not yet taken, were put on hold.<sup>29</sup>

33. From March to September 2022, the Parties negotiated the substantive settlement terms and drew up a settlement term sheet, which would form the basis for the Settlement Agreement. Only after the term sheet was finalized, did the Parties begin negotiating Plaintiff's attorneys' fee and expenses. During this negotiation, Plaintiff's counsel provided Defendants with a detailed list of time entries to support the fee request. The Parties' negotiations ultimately resulted in Defendants agreeing to pay, subject to this Court's approval, a total sum of \$800,000 for both attorneys' fees and reimbursement of expenses. Once the fee was negotiated, the Parties began drafting the Settlement Agreement and its accompanying exhibits. All in all, it took approximately 10 months of intensive arm's-length negotiations to reach all of the terms of the Settlement.<sup>30</sup>

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<sup>27</sup> Raghavan Decl., ¶ 14.

<sup>28</sup> Raghavan Decl., ¶ 15.

<sup>29</sup> Raghavan Decl., ¶ 16.

<sup>30</sup> Raghavan Decl., ¶ 17.

34. On January 27, 2023, the Parties signed the Settlement Agreement.<sup>31</sup>

### **III. TERMS OF THE PROPOSED SETTLEMENT**

#### **A. CLASS DEFINITION**

35. If approved, the Settlement would apply to the following proposed Class:

All patients treated at a facility operated by Baptist Neighborhood Hospital (formerly Baptist Emergency Hospital) between September 25, 2016 and January 27, 2023 for whom one or more of the Current Panels was ordered and performed, and the patient was billed some Patient Responsibility for, at least one of the Current Panels (the “Class”). Excluded from the Class are Defendants and their respective parents, subsidiaries, representatives, officers, directors, partners, and co-ventures and on and after the exercise of opt out rights pursuant to Paragraph 8 of the Settlement Agreement, anyone who timely requested to be excluded from the Settlement.<sup>32</sup>

36. The Baptist Neighborhood Hospital facilities (“BNH Facilities”) covered under the Settlement include:

- (i) Baptist Neighborhood Hospital Hausman, 8230 N 1604 W., San Antonio, TX 78249;
- (ii) Baptist Neighborhood Hospital Kelly, 806 Cupples Rd, San Antonio, TX 78237;
- (iii) Baptist Neighborhood Hospital Overlook, 25615 US-281, San Antonio, TX 78258;
- (iv) Baptist Neighborhood Hospital Schertz, 16977 I-35 N., Schertz, TX 78154;
- (v) Baptist Neighborhood Hospital Shavano Park, 4103 North Loop 1604 W., San Antonio, TX 78249;
- (vi) Baptist Neighborhood Hospital Thousand Oaks, 16088 San Pedro Ave., San Antonio, TX 78232;

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<sup>31</sup> Raghavan Decl., ¶ 18.

<sup>32</sup> Settlement Agreement, pp. 2-3.

- (vii) Baptist Neighborhood Hospital Westover Hills, 10811 Town Center Dr., San Antonio, TX 78251; and
- (viii) Baptist Neighborhood Hospital Zarzamora, 7719 IH 35 S., San Antonio, TX 78224.<sup>33</sup>

**B. MONETARY RELIEF TO THE CLASS**

37. Eligible Class Members may obtain monetary benefits in two forms – refunds of payments made by the Class Member to Defendants or to a third party, such as a collection agency; or write-offs of any outstanding balance with Defendants or a collection agency. The amount of Refund or write-off (or forgiveness) is calculated based on the Panel Cost Difference, which is the difference between (i) the portion of the Patient Responsibility amount that is attributable to the cost of the respective Current Panels and (ii) the portion of the Patient Responsibility amount that would have been attributable to the cost of the CPT Code Panels.<sup>34</sup>

38. The following example illustrates how the Panel Cost Difference could be calculated with respect to a BMP (includes CK) panel that was performed and billed to a patient covered by insurance:<sup>35</sup>

<b>Panel Reimbursement Difference Calculation</b>	<b>Amount</b>	<b>Notes</b>
(1) Approved Panel Reimbursement for BMP (includes	\$50	Hypothetical Figure
(2) Reimbursement for CPT no. 80048 Panel	\$10	Hypothetical Figure
(3) Difference	\$40	Equals (1) minus (2)
<b>Patient Responsibility Percentage Calculation</b>		
(4) Total Insurance Approved Charges	\$100	Hypothetical Figure
(5) Total Charges Billed to Patient	\$70	Hypothetical Figure
(6) Patient Responsibility Percentage	70%	Equals (5) divided by (4)
<b>Panel Cost Difference</b>	<b>\$28</b>	Equals (3) times (6)

<sup>33</sup> Settlement Agreement, Appendix 1.

<sup>34</sup> Settlement Agreement, ¶ 2(b)(1).

<sup>35</sup> Settlement Agreement, ¶¶ 2(b)(2)-2(b)(3).



39. The following Class Members, although a part of the Class, will not be eligible for a Refund:<sup>36</sup>

- Class Members for whom reimbursement payable to BNH was determined pursuant to the terms of an agreement with or coverage provided by a Third Party Payor specifying that BNH would be reimbursed for the Class Members' treatment at a case rate or per diem rate, without any separate or additional reimbursement for clinical laboratory testing;
- Cash-paying Class Members who opted to pay for their visit under Defendants' "prompt pay" option, which specifies a case rate for treatment that does not vary based on the number or types of clinical laboratory tests that are performed;
- Class Members whose treatment was covered by fee-for-service Medicare and Medicaid under fixed copay plans;<sup>37</sup> and
- Class Members whose Panel Cost Difference is less than \$5.00.

40. Further, in order to be eligible for a Refund, Class Members have to timely remit a valid Claim Form to the Settlement Administrator.<sup>38</sup> For forgiveness of any outstanding amount, (*i.e.*, a write-off) Class Members are not required to submit any Claim Form.<sup>39</sup>

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<sup>36</sup> Settlement Agreement, ¶¶ 2(a) and 2(b)(4).

<sup>37</sup> This does not include Class Members covered by any *managed* Medicare or Medicaid plans that separately reimburse clinical laboratory testing performed by BNH and do not have fixed copays. Such Class Members remain eligible for Refunds. Settlement Agreement, ¶ 2(a).

<sup>38</sup> Settlement Agreement, ¶ 2(e).

<sup>39</sup> Settlement Agreement, ¶ 3(d).

41. Defendants will make Refunds within ninety (90) days from the Claim Submission Deadline.<sup>40</sup> Defendants will forgive any eligible outstanding balance within thirty (30) days from the Effective Date of the Settlement.<sup>41</sup>

**C. NONMONETARY RELIEF**

42. Furthermore, the Settlement provides the following important nonmonetary benefits:

**Including CPT Code Panels as a Lab Test Option**

43. No later than sixty (60) days after the Effective Date of the Settlement, Defendants will be required to include the CPT Code Panels as laboratory testing options in all of BNH Facilities' onsite point-of-care laboratories.<sup>42</sup>

**Disclosure of Panel Test Options**

44. Defendants will be required to include the following disclosure in all BNH Facilities' admission consent forms, within sixty (60) days from the Effective Date of the proposed Settlement:

“Depending on your ER physician’s medical judgment, he or she may order you a liver/pancreatic function panel or metabolic panel that can be run for a quick turnaround in our in-house laboratories. Based on the tests included in the panels, certain of those in-house panels could potentially be more expensive to you than other in-house alternatives. Please speak with your physician to determine what option is best for you.

For your information, the available in-house panel options are as follows:

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<sup>40</sup> Settlement Agreement, ¶¶ 7(d), 15, 16.

<sup>41</sup> Settlement Agreement, ¶ 3(b).

<sup>42</sup> Settlement Agreement, ¶ 4(a)

<b>In-House Panel Types</b>	<b>Potentially Less Expensive Options</b>	<b>Potentially More Expensive Options</b>
Metabolic Function Panels	Basic Metabolic Panel (CPT code 80048)	BMP (includes CK)
Liver/Pancreatic Function Panels	Hepatic Function Panel (CPT code 80076)	LFT (includes Amylase)
Combined Panel	Comprehensive Metabolic Panel (CPT code 80053) (combines portions of the Basic Metabolic Panel and Hepatic Function Panel)	None

If any of these tests are required, your doctor will choose a panel for you based on his or her judgment as to what test is medically necessary. For many insured patients the doctor's choice of one panel over the other will result in no cost difference to you. For other patients there may be a difference in cost. If you have insurance coverage, we encourage you to contact your insurance provider to discuss patient payment obligations as defined under your insurance plan.<sup>43</sup>

**Changes to pricing transparency file:**

45. No later than sixty (60) days after the Effective Date of the Settlement, Defendants are required to disclose the price of the Current Panels as the sum of its individual component tests in the Pricing Transparency document, available on its website, for all BNH Facilities.<sup>44</sup>

**IV. NOTICE TO CLASS MEMBERS**

46. Pursuant to the proposed Preliminary Approval Order attached to the Settlement Agreement at Exhibit A, a Summary Notice in the form substantially attached to the Settlement Agreement at Exhibit C, will be sent to Class Members identified by Defendants, by first class

<sup>43</sup> Settlement Agreement, ¶ 4(b).

<sup>44</sup> Settlement Agreement, ¶ 4(c).

mail to their last known address.<sup>45</sup> The Summary Notice is sufficient to inform Class Members about: (i) the definition of the Class; (ii) the terms of the proposed Settlement; (iii) Plaintiff's Counsel's proposed request for attorneys' fees, reimbursement of expenses and Class Representative Service Award;<sup>46</sup> (iv) Class Members' right to opt-out or object to any aspect of the Settlement, and the deadline and procedures for doing so; (v) the date and time of the Final Approval Hearing and Class Members' right to attend the hearing; and (vi) instructions on how to obtain additional information and access the long-form Notice.

47. The Settlement Agreement also provides for the more detailed notice *i.e.*, the long-form Notice, annexed as Exhibit B to the Settlement Agreement, to be made available for download, on the settlement website that will be set up before the Summary Notice is mailed out, to all Class Members. The settlement website will also make available to Class Members the Petition, the Settlement Agreement, the Preliminary Approval Order entered by the Court, and the Claim Form.<sup>47</sup> Additionally, the Notice, Claim Form and the landing page of the settlement website will be made available to Class Members in both English and Spanish.<sup>48</sup>

48. The Parties believe that providing notice as outlined above is calculated to be the best possible notice to all Class Members under the circumstances.

## **V. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL**

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<sup>45</sup> Settlement Agreement, ¶ 6(a).

<sup>46</sup> Pursuant to the Settlement Agreement, Defendants will pay a Class Representative Service Award to the Plaintiff in the amount of \$5,000. Said Award, if approved by the Court, will not result in any diminution in value to the monetary (or non-monetary) benefits being provided to Class Members.

<sup>47</sup> Settlement Agreement, ¶ 6(f).

<sup>48</sup> Settlement Agreement, ¶ 6(g).

49. According to TRCP Rule 42(e), approval of a class action requires:
- (i) preliminary approval of the proposed settlement upon submission to the Court of a written motion for preliminary approval;
  - (ii) dissemination of mailed and/or published notice of settlement to all affected class members; and
  - (iii) a formal fairness hearing, or final settlement approval hearing, at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy and reasonableness of the settlement is presented.<sup>49</sup>

**A. THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE**

50. The fairness determination is guided by consideration of the following six factors set forth by the Texas Supreme Court in *Gen. Motors Corp. v. Bloyed*: (a) whether the settlement was negotiated at arms' length or was a product of fraud or collusion; (b) the complexity, expense, and likely duration of the litigation; (c) the stage of the proceedings, including the status of discovery; (d) the factual and legal obstacles that could prevent the plaintiff from prevailing on the merits; (e) the possible range of recovery and the certainty of damages; (f) the respective opinions of the participants, including class counsel, class representatives, and the absent class members.<sup>50</sup>

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<sup>49</sup> See *In re Chesapeake Energy Corp.*, Civil Action No. H-21-1215, 2021 U.S. Dist. LEXIS 104253 (S.D. Tex. 2021); see also Federal Judicial Center, Manual for Complex Litigation (Fourth) § 21.632 (2004).

<sup>50</sup> *Gen. Motors Corp v. Bloyed*, 916 S.W.2d 949, 955 (Tex. 1996). See also *Hall v. Pedernales Elec. Co-op., Inc.*, 278 S.W.3d 536, 548-549 (Tex. App.—Austin 2009, no pet.) (citing *Bloyed*, 916 S.W.2d at 955) (“The Texas Supreme Court has provided six factors that a trial court must take into account when determining whether a proposed class settlement is fair, adequate, and reasonable.”).

51. As discussed below, all these six factors favor the approval of the proposed Settlement.

**Whether the Settlement Was Negotiated at Arm's Length**

52. First, Plaintiff and Defendants' counsel have engaged in extensive arms-length negotiations to reach the proposed Settlement. As described above, after substantial discovery, the Parties commenced negotiation of a settlement term sheet that would contain all the substantive terms of the Settlement approximately ten months ago. Based on this term sheet, the Settlement Agreement was negotiated and drafted. All Parties entered the negotiations, with full knowledge of the strengths and weaknesses of their respective claims and defenses. Prior to reaching the Settlement, Plaintiff, through his counsel, had conducted an extensive investigation, reviewed thousands of documents produced by Defendants, taken two depositions of key defense witnesses and had consulted with emergency medicine and medical billing experts. Moreover, Plaintiff, himself, had been deposed and had produced numerous documents.

53. After negotiating the substantive terms of the Settlement and reaching an in-principle agreement to settle, the Parties negotiated Plaintiff's attorneys' fees and reimbursement of expenses. Plaintiff's counsel shared detailed time entries with Defendants' counsel during the process of fee negotiation.

**The Complexity, Expense, and Likely Duration of the Litigation**

54. The proposed Settlement reflects the inherent complexity, expense, and delays associated with this complex consumer class action. Given the risks of continued litigation and the time and expense that would be incurred to prosecute the case through trial and appeals, the Settlement is meaningful and, in the Class's best interests.

55. Here, the Defendants have expressly denied and continue to deny all charges of wrongdoing or liability arising out of any of the conduct, acts, or omissions alleged in this litigation. Defendants have also denied and continue to deny that Plaintiff or Class Members have suffered damage or were otherwise harmed by the conduct alleged in this litigation.

56. Though Plaintiff and Plaintiff's Counsel believe they could have succeeded in establishing their alleged claims, Plaintiff's Counsel are cognizant of the significant challenges inherent in consumer class litigation challenging the medical necessity of laboratory tests and the method of billing them. For example, one of the issues that would have been hotly contested by the Parties is the medical necessity of the Current Panels. According to the Defendants, the decision to offer using Current Panels in their on-site laboratories instead of the associated CPT Code Panels stemmed from a clinical judgment that the configuration of tests in the Current Panels were of greater value to treatment of patient in an emergency setting than the ones in the CPT Code Panels. And, if they wanted to, the physicians had the option of ordering the CPT Code Panels from an outside laboratory. On the other hand, Plaintiff's medical experts were of the opinion that the CPT Code Panels were more in-line with current emergency medicine best practices rather than the Current Panels and the option of sending out the CPT Code Panels would not provide best care to patients in an emergency setting because the turnaround time for these test results were much longer than if they were performed in-house.<sup>51</sup>

57. Further, Plaintiff's Counsel are also cognizant of the risks of getting a class certified in a consumer case in Texas state courts, and even if certified, the significant risks of decertification, evident through past precedents. Further even if Plaintiff prevailed at every stage before this Court, there is the very real possibility of multiple lengthy appeals before the Texas

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<sup>51</sup> See Raghavan Decl., ¶ 24.

appellate courts, which would prolong the time before the Class receives the much-needed relief provided by the Settlement.

58. Moreover, it is highly unlikely that Plaintiff would have achieved a better result for the Class had he litigated the case through trial, as the jury could have arrived at a completely different formula resulting in a much lower amount of refunds or write-offs that Class Members would have been eligible for. Of course, if the Plaintiff was unsuccessful, there was always a risk of no recovery.

#### **The Stage of the Proceedings, Including the Status of Discovery**

59. As discussed above, by the time the Settlement was reached, Plaintiff's Counsel had (i) reviewed most of the approximate 29,000 pages of documents that had been produced by the Defendants; (ii) deposed two of Defendants' key witnesses (the CEO and Chief Medical Officer of Emerus); (iii) defended Plaintiff's deposition, and (iv) consulted extensively with two experts (one in medical billing and the other in emergency medicine) on the merits of the case. The resultant accumulation of information permitted Plaintiff and Plaintiff's Counsel to knowledgeably evaluate the merits of their case, and the Settlement.

#### **The Factual and Legal Obstacles That Could Prevent the Plaintiff From Prevailing on the Merits**

60. While Plaintiff and his counsel believe that Plaintiff would have been successful in defeating any summary judgment motion made by Defendants and would be successful at trial, there was a risk that Defendants would be partially or fully successful at summary judgment or at trial in proving that their actions were neither misleading nor deceptive under the Texas DTPA or that they were not unjustly enriched. There was also a preliminary risk that Defendants would have been successful in arguing that the Class was not certifiable on grounds that common issues of law and fact did not exist or did not predominate over individual issues. Further, there was a



risk that Defendants would be successful in proving that the Class was not damaged or that damages were significantly less than what was claimed, or that Defendants would appeal any unfavorable decisions.

**B. PRELIMINARY CLASS CERTIFICATION FOR PURPOSES OF SETTLEMENT IS PROPER**

61. A party seeking class certification must first demonstrate that a class action meets the following four requirements stated in TRCP Rule 42(a): (1) numerosity—the class is so numerous that joinder of all members is impracticable; (2) commonality—there are questions of law or fact common to the class; (3) typicality—the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) adequacy of representation—the representative parties will fairly and adequately protect the interests of the class.<sup>52</sup>

62. A class action must also satisfy at least one requirement of Rule 42(b). Here, the class action satisfies Rule 42(b)(3), which requires that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members” and that class treatment is “superior to other available methods for the fair and efficient adjudication of the controversy.”<sup>53</sup>

63. This Court will likely be able to certify the proposed Class because the four requirements of Rule 42—numerosity, commonality, typicality, and adequacy—are met, as well as the requirements under Rule 42(b).

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<sup>52</sup> *Citizens Ins. Co. of America v. Daccach*, 217 S.W.3d 430, 438 (Tex. 2007) (citing Tex. R. Civ. P. 42(a)).

<sup>53</sup> *Daccach*, 217 S.W.3d at 438–39 (citing Tex. R. Civ. P. 42(b)(3)).

### **The Class Members Are Too Numerous To Be Joined**

64. For numerosity, “[t]he test is whether joinder of all members is practicable in view of the size of the class and such factors as judicial economy, the nature of the action, geographical location of class members, and the likelihood that class members would be unable to prosecute individual lawsuits.”<sup>54</sup> Here, the proposed Class is so numerous that joinder of all members is impracticable. The size of the Class is ascertainable from Defendants’ records, which indicate that tens of thousands of patients were billed some patient responsibility amount for treatment that included one or more of the Current Panels at a BNH Facility between September 24, 2015 and February 7, 2022. Defendants do not contest numerosity.<sup>55</sup> The numerosity requirement is plainly met.

### **Common Questions of Law and Fact Exist**

65. Rule 42(a)(2)’s requirement that “there are questions of law or fact common to the class” is also satisfied. The threshold for showing commonality “is not high.” It is met when class members “have suffered the same injury” and “all of the class members’ claims depend on a common issue of law or fact whose resolution will resolve an issue that is central to the validity of each one of the [] claims in one stroke.”<sup>56</sup>

66. This Action raises numerous questions of law and fact common to the Class, including (i) whether Defendants’ conduct violated the Texas DTPA; (ii) whether Defendants failed to uniformly disclose material information that would have allowed a reasonable

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<sup>54</sup> *Graebel/Houston Movers, Inc. v. Chastain*, 26 S.W.3d 24, 32 (Tex. App.—Houston [1st Dist.] 2000, pet. dismiss’d w.o.j.).

<sup>55</sup> See Raghavan Decl., ¶ 20

<sup>56</sup> See *Wolf v. Wells Fargo Bank, N.A.*, Cause No. 2011-36476, 2013 Tex. Dist. LEXIS 18993, at \*8 (Tex. 2013).

consumer/patient to determine whether the Current Panels would cost more than alternate CPT Code Panels; and (iii) whether Defendants have been unjustly enriched due to their conduct. Additionally, determining the proper measure of damages for any harm caused to the Class and the amount of such damages are also common questions for all Class Members. The burden of demonstrating commonality is thus met.

**Plaintiff's Claims Are Typical of the Class**

67. Rule 42(a)(3) requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” “A 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.”<sup>57</sup> Courts do not require that the injuries of the plaintiff be identical to the injuries of the class. As long as the presented claims are based on the same legal theories and originate from the same course of conduct or event, typicality is met.<sup>58</sup>

68. Here, Plaintiff's claims are typical of the claims of the Class. Like the other Class Members, Plaintiff alleges that he was deprived of full information about the manner in which the Current Panels were billed, which led to him being billed significantly more than what was standard (*i.e.*, had he been billed for the CPT Code Panels rather than individually for each component of the Current Panels). The challenged conduct is not unique to the named Plaintiff; his claims and the claims of the Class Members arise out of the same common course of conduct

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<sup>57</sup> *Southwestern Bell Telephone Co. v. Marketing on Hold Inc.*, 308 S.W.3d 909, 920 (Tex. 2010), quoting *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007).

<sup>58</sup> *Weatherly v. Deloitte & Touche*, 905 S.W.2d 642, 653 (Tex. App.—Houston [14th Dist.] 1995, writ dismissed w.o.j.).

by Defendants, *i.e.*, the alleged failure to provide sufficient information about the pricing and billing of the Current Panels. The typicality requirement is satisfied.

**Plaintiff and Plaintiff's Counsel Will Fairly and Adequately Protect the Interests of the Class**

69. Rule 42(a)(4) requires that class representatives fairly and adequately protect the interests of all class members. In evaluating adequacy of representation, two factors are considered: (a) an absence of antagonism between the class representatives and the class members, and (b) an assurance that the representative parties will vigorously prosecute the class claims and defenses.<sup>59</sup>

70. Here, there is no conflict between Plaintiff and the Class Members. All Class Members, including Plaintiff, went to a BNH Facility and subsequently received bills from BNH for the Current Panels that were provided to them.

71. This Action has been vigorously prosecuted, reaching a resolution that is in the best interest of the Class Members. The Settlement negotiations alone took nearly a year and the outcome of these negotiations are exceptional demonstrating the adequacy of Plaintiff and Plaintiff's Counsel.

**Common Issues of Law and Fact Predominate for Settlement Purposes**

72. When questions of law and fact common to the Class predominate over individual members and a class action is the superior means to fairly and efficiently adjudicate the controversy, certification under Rule 42(b)(3) is appropriate.

73. Predominance is satisfied in this case because key questions as to liability and damages are common to the Class and capable of class-wide resolution. For example, a central

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<sup>59</sup> *E & V Slack, Inc. v. Shell Oil Co.*, 969 S.W.2d 565, 568 (Tex. App.—Austin 1998, no pet.).

issue in this case is whether the provider is entitled to perform and bill for laboratory “panels” without disclosing to patients that the “panels” would not be billed using a single billing code (*i.e.*, the multiple individual tests performed from a single blood sample would be billed separately), making it potentially more expensive to the patient than a similar panel that would be bundled and billed using a single CPT code. As alleged in the Petition, non-disclosure was Defendants’ regular practice. An inference of common reliance is permitted where there is no evidence that any significant part of the class had access to all the information important to their decision to have the service at issue performed. Further, another predominating common issue in this case is whether Defendants’ practice of non-disclosure of its unbundling a “panel” for billing purposes, which Plaintiff alleges was systematic, would be important to reasonable consumers (*i.e.*, whether it would be “material” information.).

74. Furthermore, the calculation of damages involves application of a uniform formula to all Class Members (*i.e.*, the difference between what each Class Member was charged for the Current Panel and what that Class Member would have been charged for the corresponding CPT Code Panel), and hence is capable of class-wide resolution. The fact that each Class Member may be entitled to different amounts of damages after applying the uniform formula, does not necessarily defeat predominance.<sup>60</sup>

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<sup>60</sup> *Southwestern Bell Telephone*, 308 S.W.3d at 923. *See also, Life Partners, Inc. v. McDermott*, No. 05-12-01623-CV, 2014 Tex. App. LEXIS 6756, at \*28 (Tex. App.—Dallas June 23, 2014, no pet.) (affirming class certification where “[t]he trial judge found the primary liability question is the same for all class *members*, and individual damage calculations can be performed easily with basic math.”).

75. Thus, Defendants' alleged liability arises from an alleged common course of conduct; consequently, the central issues in this case are common to the Class and predominate over any individual issue that might arise.

**A Class Action is Superior to Other Available Means of Adjudication**

76. The class action mechanism is superior to any alternatives that might exist for the fair and efficient adjudication of these claims. Rule 42(b)(3) sets forth four different considerations to assist the court in making a superiority decision: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the difficulties likely to be encountered in the management of a class action.<sup>61</sup>

77. Indeed, this case is an example of why we have class actions. The cost of the contested panels comprised only a portion of the \$1,971.49 that Defendants billed the Plaintiff. It would not make economic sense for Plaintiff to bring an individual action as litigation costs, including attorneys' fees, would dwarf any potential recovery. This class action allows for the vindication of important consumer rights that would otherwise go unasserted.<sup>62</sup>

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<sup>61</sup> See, *Dacchah*, 217 S.W.3d at 439 (citing Tex. R. Civ. P. 42(b)(3)).

<sup>62</sup> See *Bozarth v. Envision Healthcare Corp.*, Case No. 5:17-cv-01935-FMO-SHK), Order re: Motion for Preliminary Approval of Class Action Settlement (C.D. Cal., Dec. 30, 2019) (ECF No. 90) at 14 (annexed as Exh. B to Raghavan Decl.) (superiority met where “plaintiffs do not assert any claims for emotional distress, nor is there any indication that the amount of damages any individual class member could recover is significant or substantially greater than the potential recovery of any other class member,” and “[t]he alternative method of resolution—pursuing individual claims for a relatively modest amount of damages—would likely never be brought, as ‘litigation costs would dwarf potential recovery.’” (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998)).

78. Further, there can be no question that litigating this matter as a class action is a more efficient use of judicial resources than litigating hundreds or thousands of smaller claims, especially considering the uniform nature of the conduct at issue.<sup>63</sup> Therefore, superiority is met.

79. As this Court will likely be able to approve the proposed Settlement and certify the proposed Class for purposes of settlement, the sole remaining issue is the adequacy of the Parties' proposed method of giving notice to the Class.

### **C. THE SETTLEMENT PROVIDES ADEQUATE NOTICE TO THE CLASS**

80. Tex. R. Civ. P. 42(e)(1)(B) requires “notice of the material terms of the proposed settlement..., together with an explanation of when and how the members may elect to be excluded from the class, [ ] [to] be given to all members in such manner as the court directs.” Notice need only be given in a manner “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>64</sup> Courts have broad discretion in the kind of notice to be given subject to the “broad reasonableness standards imposed by due process.”<sup>65</sup>

81. Here, the Settlement provides for a Summary Notice to be directly mailed to individual Class Members by first class mail to the Class Member's last known address.<sup>66</sup> Defendants will provide to the Settlement Administrator a notice database, in an electronically

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<sup>63</sup> See *Great S. Life Ins. Co. v. Thibodeau*, No. 05-98-00796-CV, 1999 Tex. App. LEXIS 3295, at \*18 (Tex. App. – Dallas Apr. 30, 1999, no pet.).

<sup>64</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Fontana v. Elrod*, 826 F.2d 729, 732 (7th Cir.1987) (concluding that “[w]hile the notice must be adequate, it is not necessary that each member of the class actually receive the notice”).

<sup>65</sup> *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir 1979).

<sup>66</sup> Settlement Agreement, ¶ 6(a).

searchable and readable format, which will include the names and last known mailing addresses, and, if known or reasonably practicable to obtain, telephone numbers and email addresses, for all Class Members. The Settlement Administrator will then update or confirm the last known address of Class Members by: (i) checking each address against the United States Post Office National Change of Address Database before the initial mailing; (ii) conducting a reasonable search to locate an updated address for any Class Member whose Summary Notice is returned as undeliverable; (iii) updating addresses and re-mailing the Summary Notice based on any forwarding information received from the United States Post Office; and (iv) updating addresses based on any requests received from Class Members.<sup>67</sup>

82. The Summary Notice informs Class Members about: (i) the definition of the Class; (ii) the terms of the proposed Settlement; (iii) whether they are eligible either to claim a Refund or to obtain forgiveness of their unpaid Patient Responsibility and will provide them with login details to the Settlement Administrator's online portal to check how much Refund or forgiveness they are eligible for, if any (iv) Plaintiff's Counsel's proposed request for attorneys' fees, reimbursement of expenses and Class Representative Service Award; (v) Class Members' right to opt-out or object to any aspect of the Settlement, and the deadline and procedures for doing so; (vi) the date and time of the Final Approval Hearing and Class Members' right to attend the hearing; (vii) instructions on how to obtain additional information and access the long-form Notice and (viii) contact information for both the Settlement Administrator and Class Counsel. The Summary Notice also provides Class Members instructions on how to update their mailing address with the Settlement Administrator.<sup>68</sup>

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<sup>67</sup> Settlement Agreement, ¶ 6(b).

<sup>68</sup> Settlement Agreement, ¶ 6(e); Exh. C to Settlement Agreement (Summary Notice).



83. Further, Class Members will also have access to a long-form Notice on the Settlement website, which will provide more detail regarding this Action and the Settlement. The Notice sets out the Class definition in detail and provides Class Members with the Settlement Administrator's contact information if they are unsure whether they are a Class Member. The Notice also explains the terms of the Settlement, including the relief that Class Members may receive and what they need to do in order to obtain each of the available types of relief. It also explains in detail the various options available to Class Members, including how they may elect to exclude themselves from the Settlement or object to it. Finally, the Notice also explains the claims that all Class Members will release against the Defendants.

84. Utilizing this time-honored, traditional means to provide notice to Class Members, the manner of providing Notice is designed to be as effective as possible.

85. This Court should approve the Notice program because the means of providing both the Notice and Summary Notice and the content of both the notices fully comply with the requirements of Rule 42 and due process. The proposed Notice program constitutes the best practicable notice under the circumstances.

## **VI. REQUEST FOR FINAL APPROVAL HEARING**

86. The Parties respectfully request that the Court schedule a settlement hearing ("Final Approval Hearing") after Notice is provided to Class Members. At the Final Approval Hearing, the Parties will ask the Court to (i) determine the fairness, reasonableness and adequacy of the Settlement; (ii) determine whether this action should be certified, for settlement purposes, as a class action on behalf of a class defined at paragraph 35 (and in the proposed Preliminary Approval Order submitted with this Motion, attached as Exhibit A to the Settlement Agreement); (iii) determine whether the Settlement should be finally approved by the Court and enter final judgment

thereon; and (iv) consider any objections to the Settlement. Plaintiff's Counsel will also move for an award of attorneys' fees, reimbursement of expenses and a Class Representative Service Award at the Final Approval Hearing.

**VII. PROPOSED SCHEDULE OF EVENTS**

87. In connection with preliminary approval of the Settlement, Plaintiff respectfully submits the following schedule of events for the Court's review and requests the Court to establish the following deadlines:

Last day for Defendants to provide the Settlement Administrator with the notice database	Ten (10) business days after the Court enters the Preliminary Approval Order
Last day for Summary Notice to be mailed to Class Members	Ten (10) business days from the day Settlement Administrator receives the notice database from Defendants ("Notice Date")
Deadline to set up settlement website	Prior to the Notice Date
Last day for Plaintiff's Counsel to file declarations with the Court confirming that Notice has been provided in compliance with the Preliminary Approval Order	No later than ten (10) calendar days before the Final Approval Hearing
Last day for Class Members to file any objections to the Settlement	No later than twenty-one (21) calendar days before the Final Approval Hearing
Last day for Class Members to opt-out of the Settlement	No later than twenty-one (21) calendar days before the Final Approval Hearing

Last day to file an assented-to Final Approval Motion	No later than ten (10) business days before the Final Approval Hearing
Last day to file reply papers, responding to any objections or Opt Outs, if required	No later than ten (10) business days before the Final Approval Hearing
Final Approval Hearing	_____, 2023

88. This schedule provides due process to Class Members with respect to their rights concerning the Settlement and has been consented to by Defendants.

**VIII. REQUEST FOR RELIEF**

89. For the reasons stated, the Court should conclude, on a preliminary basis, that the proposed Settlement is fair, reasonable, and adequate, and falls within the range of possible final approval in order for notice of the Settlement to go out to Class Members. The Parties therefore ask the Court to enter an order: (1) granting preliminary approval of the proposed Settlement; (2) preliminarily certifying the proposed Class for purposes of the Settlement pursuant to Rule 42 of the Texas Rules of Civil Procedure; (3) directing that the Class be given notice of the pendency of the class action and the Settlement in the form and manner proposed in the Settlement Agreement and herein; and (4) scheduling a Final Approval Hearing to consider the motion for final approval of the Settlement, any objections, and related relief.

Dated: January 30, 2023

Respectfully submitted,

**HILDER & ASSOCIATES, P.C**

By: /s/ Q.Tate Williams

Q. Tate Williams

State Bar No.: 24013760

Philip H. Hilder, Esq.

State Bar No. 09620050

819 Lovett Blvd

Houston, Texas 77006

Telephone: (713) 655-9111  
Facsimile: (713) 655-9112  
philip@hilderlaw.com  
tate@hilderlaw.com

*and*

**WOLF POPPER LLP**

By: /s/ Radha Nagamani Raghavan  
Chet B. Waldman (admitted *pro hac vice*)  
David A. Nicholas (admitted *pro hac vice*)  
Radha Raghavan (admitted *pro hac vice*)  
845 Third Avenue  
New York, New York 10022  
(212) 759-4600  
cwaldman@wolfpopper.com  
dnicholas@wolfpopper.com  
rraghavan@wolfpopper.com

*Counsel for Plaintiff and the Proposed Class*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, on January 30, 2023, true and correct copies of this document is being served via e-service upon all counsel of record.

/s/ Q. Tate Williams  
Q. Tate Williams

CAUSE NO. 2020-CI-18623

KENNETH KESLAR, II, individually	§	IN THE DISTRICT COURT
and on behalf of all others similarly	§	
situated,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	BEXAR COUNTY, TEXAS
EMERUS / BHS SA THOUSAND	§	
OAKS, LLC d/b/a BAPTIST	§	
EMERGENCY HOSPITAL -	§	
SHAVANO PARK, EMERUS	§	
HOSPITAL PARTNERS, LLC, and	§	
EMERUS HOLDINGS, INC.,	§	
	§	73rd JUDICIAL DISTRICT
	§	
Defendants.	§	

**DECLARATION OF RADHA NAGAMANI RAGHAVAN IN SUPPORT OF  
PLAINTIFF’S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF  
PROPOSED CLASS ACTION SETTLEMENT AND  
APPROVAL OF NOTICE TO CLASS MEMBERS**

I, Radha Nagamani Raghavan, hereby declare as follows:

1. I am an attorney duly licensed to practice before the courts of the State of New York and have been admitted *pro hac vice* in the above-captioned action (“Action”). I am an associate with the law firm of Wolf Popper LLP, counsel for Plaintiff Kenneth Keslar II, and proposed “Class Counsel” in this Action.<sup>1</sup> I make this declaration in support of Plaintiff’s unopposed motion for preliminary approval of proposed class action settlement and approval of notice to class members (“Motion”).

2. On February 19, 2020, Plaintiff received a letter from Baptist Emergency Hospital,

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<sup>1</sup> All capitalized terms not otherwise defined herein have the same meanings as defined in the Stipulation of Settlement dated January 27, 2023 (“Settlement Agreement”).

Shavano Park (“BEHSP”) responding to Plaintiff’s letter dated December 4, 2019 regarding laboratory charges for his visit on December 31, 2018. In this letter, BEHSP explained that each component test in each Current Panel was billed individually, and not collectively as a “panel.” Further, from information provided in this letter and subsequent documents from Defendants, Plaintiff learned that the Current Panels offered at the BNH Facilities, did not have a single CPT code by which they could be billed, because they comprised of a group of tests that were slightly different from the group of tests included in a standard BMP or LFT panel that had an associated CPT code.<sup>2</sup>

3. On or about September 25, 2020, Plaintiff brought the Action against Defendants in this Court alleging that Defendants provided insufficient disclosures regarding the cost of two in-house laboratory panels, namely, the BMP (includes CK) and LFT (includes Amylase) (“Current Panels”) and the manner in which they billed for these panels, which led to Plaintiff and other patients paying more than was standard for laboratory panels.

4. On November 11, 2020, Plaintiff sent written notice to the Defendants regarding the alleged violations of the Texas Deceptive Trade Practices Act (“DTPA”) as contemplated under the statute’s notice provision, § 17.505(a).

5. On December 30, 2020, Plaintiff filed the First Amended Class Action Petition (the “Petition”), alleging that amounts billed to him for the Current Panels and Baptist Neighborhood Hospital’s (“BNH”) (formerly known as Baptist Emergency Hospital) inadequate disclosures concerning the cost of the Current Panels violated common law and statutory duties under Texas

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<sup>2</sup> For example, the group of tests in a Basic Metabolic Panel with CPT Code 80047 or CPT Code 80048 is different from those in the BMP (includes CK) panel; similarly, the group of tests in a Liver Function Test with CPT Code 80076 is different from those in the LFT (includes Amylase) panel.

law.

6. On February 17, 2021, Plaintiff served his first set of document requests on all of the Defendants.

7. On March 1, 2021, Emerus/BHS SA Thousand Oaks LLC served its first set of interrogatories and first set of document requests on the Plaintiff.

8. On July 16, 2021, Plaintiff served his first set of interrogatories and his second set of document requests on the Defendants.

9. On November 12, 2021, Plaintiff served his first set of requests for admission, his second set of interrogatories and third set of document requests on the Defendants.

10. On January 7, 2022, Plaintiff served his fourth set of document requests and third set of interrogatories on the Defendants.

11. On January 17, 2022, Plaintiff served his fifth and final set of document requests and fourth and final set of interrogatories on the Defendants.

12. Throughout, the Parties met and conferred, by phone and in writing, about the adequacy of responses by each Party. In response to Plaintiff's document requests, Defendants produced more than 29,000 pages of documents. And in response to Defendants' document requests, Plaintiff produced more than 1,100 pages of documents.

13. Further Plaintiff also served two third-party subpoenas – one on Blue Cross Blue Shield of Texas (Plaintiff's health insurer) and the other on Abaxis, Inc. (the manufacturer of the rapid test machines and cartridges used on-site at BNH's facilities to run the Current Panels). Blue Cross Blue Shield of Texas responded to the subpoena, met and conferred with the Plaintiff to narrow document requests and provided information specific to Plaintiff's claims that Plaintiff had requested.



14. In January 2022, Plaintiff took the depositions of Dr. Dan Middlebrook, owner and Chief Medical Officer of Emerus Holdings Inc and Victor Schmerbeck, CEO of Emerus. Plaintiff had also scheduled three depositions and was in the process of scheduling six more depositions of Defendants' witnesses, including the Founding Partner and President, the Vice President of Revenue Cycle Operations and the Chief Medical Information Officer of Emerus Holdings Inc.

15. In February 2022, Defendants took the deposition of the Plaintiff and had scheduled the deposition of Plaintiff's wife.

16. In March 2022, the "Parties" decided to explore settlement negotiations, due to which all depositions scheduled by both Parties, but not yet taken, were put on hold.

17. From March to September 2022, counsel for the Parties negotiated the substantive settlement terms and drew up a settlement term sheet, which would form the basis for the Settlement Agreement. Only after the term sheet was finalized did the Parties begin negotiating Plaintiff's attorneys' fee and expenses. During this negotiation, Plaintiff's counsel provided Defendants with a detailed list of time entries to support the fee request. The Parties' negotiations through their counsel ultimately resulted in Defendants agreeing to pay, subject to this Court's approval, a total sum of \$800,000 for both attorneys' fees and reimbursement of expenses. Once the fee was negotiated, the Parties began drafting the Settlement Agreement and its accompanying exhibits. All in all, it took approximately 10 months of intensive arm's-length negotiations to reach all of the terms of the Settlement.

18. On January 27, 2023, the Parties signed the Settlement Agreement.

19. From discovery, it was evident that the BMP (includes CK) panel was the only type of basic metabolic panel that BNH offered in-house throughout the Class Period. Similarly, the LFT (includes Amylase) panel was the only type of liver function test that BNH offered in-house

throughout the Class Period. Further, in the event physicians deemed that the tests in a standard CPT Code Panel were more beneficial to the patient than the Current Panels and wanted to order those, Defendants' physicians had the option to order the tests at an outside laboratory.

20. From discovery, it was also evident that tens of thousands of patients were billed some patient responsibility amount for treatment that included one or more of the Current Panels at a BNH Facility between September 24, 2015 and February 7, 2022. Also, Defendants do not contest numerosity.

21. Attached herein are true copies of:

- a. the Stipulation of Settlement dated January 27, 2023 ("Settlement Agreement") (Exhibit A); and
- b. *Bozarth v. Envision Healthcare Corp.*, Case No. 5:17-cv-01935-FMO-SHK), Order re: Motion for Preliminary Approval of Class Action Settlement (C.D. Cal., Dec. 30, 2019) (ECF No. 90) (Exhibit B).

22. The proposed Settlement is an outstanding accomplishment for members of the proposed "Class" given the inherent complexity, expense, and delays associated with this complex consumer class action.

23. Here, the Defendants have expressly denied and continue to deny all charges of wrongdoing or liability arising out of any of the conduct, acts, or omissions alleged in this litigation. Defendants have also denied and continue to deny that Plaintiff or Class Members have suffered damage or were otherwise harmed by the conduct alleged in this litigation.

24. Though Plaintiff and Plaintiff's Counsel believe they could have succeeded in establishing their alleged claims, they are cognizant of the significant challenges inherent in consumer class litigation, especially consumer litigation challenging billing for medical services and the medical necessity of such services. For example, one of the issues that would have been hotly contested by the Parties is the medical necessity of the Current Panels. According to the

Defendants, the decision to offer using Current Panels in their on-site laboratories instead of the associated CPT Code Panels stemmed from a clinical judgment that the configuration of tests in the Current Panels were of greater value to treatment of patients in an emergency setting than the ones in the CPT Code Panels. And, if they wanted to, the physicians had the option of ordering the CPT Code Panels from an outside laboratory. On the other hand, Plaintiff's medical experts were of the opinion that the CPT Code Panels were more in-line with current emergency medicine best practices rather than the Current Panels and the option of sending out the CPT Code Panels would not provide best care to patients in an emergency setting because the turnaround time for these test results were much longer than if they were performed in-house.

25. My name is Radha Nagamani Raghavan, my date of birth is February 15, 1991, and my work address is 845 Third Avenue, 12<sup>th</sup> Floor, New York, NY 10022. I declare under the penalty of perjury that the foregoing is true and correct.

Executed in New York, New York on the 30th day of January, 2023.



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Radha Nagamani Raghavan

# EXHIBIT A

CASE NO. 2020-CI-18623

KENNETH KESLAR II, individually and on behalf of all others similarly situated, Plaintiff,

v.

EMERUS / BHS SA THOUSAND OAKS, LLC d/b/a BAPTIST EMERGENCY HOSPITAL - SHAVANO PARK, EMERUS HOSPITAL PARTNERS, LLC, and EMERUS HOLDINGS INC., Defendants.

IN THE DISTRICT COURT

73<sup>rd</sup> JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

**STIPULATION OF SETTLEMENT**

Plaintiff Kenneth Keslar II (“**Plaintiff**”) and defendants Emerus/BHS SA – Thousand Oaks, LLC d/b/a Baptist Emergency Hospital – Shavano Park (now known as “**Baptist Neighborhood Hospital**” or “**BNH**”), Emerus Hospital Partners, LLC (“**Emerus HP**”), and Emerus Holdings, Inc. (“**Emerus Holdings**”) (collectively, the “**Defendants**,” and together with Plaintiff, the “**Parties**” and each separately a “**Party**” to the above-captioned action (the “**Action**”), by and through their attorneys, have entered into the following Stipulation of Settlement (the “**Settlement Agreement**”), subject to the approval of the Court pursuant to Tex. R. Civ. P. 42(e).

**Recitals**

**WHEREAS**, on December 31, 2018, Plaintiff was treated at BNH’s Shavano Park facility; and

**WHEREAS**, in connection with Plaintiff’s treatment by BNH, two diagnostic laboratory test panels, referred to by BNH as the “**BMP (includes CK)**” and the “**LFT (includes Amylase)**” panels (as those terms are defined in Appendix 1) (together, the “**Current Panels**”) were ordered and performed for Plaintiff at the facility’s onsite point-of-care clinical laboratory; and

**WHEREAS**, after Plaintiff’s visit, BNH billed Plaintiff for his **Patient Responsibility** (as that term is defined in Appendix 1) in the amount specified by his health insurer; and

**WHEREAS**, on or about September 25, 2020, Plaintiff brought the Action against Defendants in Texas District Court (Bexar County), alleging, as set forth in the operative First Amended Class Action Petition filed in the Action (the “**Petition**”), that amounts billed to him for the Current Panels and BNH’s disclosures concerning the cost of the Current Panels violated common law and statutory duties under Texas law; and

**WHEREAS**, Plaintiff asserts his claims in the Action on behalf of himself and a putative class of similarly situated patients treated at facilities operated by Baptist Neighborhood Hospital; and

**WHEREAS**, Defendants deny and have vigorously contested Plaintiff's allegations; and

**WHEREAS**, after highly-contested litigation of the Parties' claims and defenses in the Action, the Parties have agreed to settle and resolve, as detailed herein, all claims advanced in the Action on behalf of Plaintiff and a class of all patients treated at any facility operated by Baptist Neighborhood Hospital (formerly Baptist Emergency Hospital) between September 25, 2016 and the date of this Settlement Agreement (the "**Class Period**") for whom one or more of the Current Panels was ordered and performed, and the patient was billed some Patient Responsibility for, at least, one of the Current Panels, but excluding Defendants and their respective parents, subsidiaries, representatives, officers, directors, partners, and co-ventures and on and after the exercise of opt out rights pursuant to Paragraph 8 below, anyone who requests to be excluded from the Settlement (subject to Paragraph 2(a) below, all such persons to be, collectively, the "**Class**," and each person who is included within the Class to be, individually, a "**Class Member**"); and

**WHEREAS**, based upon their investigation and the pretrial discovery and motion practice in the Action, counsel for Plaintiff, as well as Plaintiff, have concluded that the terms and conditions of this Settlement Agreement are fair, reasonable, and adequate as to Plaintiff and the Class, and in the best interests of Plaintiff and the Class, after considering (1) the substantial benefits that Plaintiff and the Class Members will receive from settlement of the Action, (2) the attendant risks of continued litigation and the uncertainty of the outcome of the Action, and (3) the desirability of permitting a settlement to be consummated as provided by the terms of this Settlement Agreement; and

**WHEREAS**, Defendants have at all times denied, and continue to deny, all allegations whatsoever of any wrongdoing, negligence, fault, or liability, and assert that their actions have been lawful and proper in all respects and in compliance with all applicable legal duties, but in order to avoid the uncertainties, risks and expense of further litigation, Defendants have agreed to settle and terminate all existing or potential claims against them pursuant to the terms and provisions of this Settlement Agreement; provided, however, that in agreeing to settle this Action, Defendants in no way acknowledge or admit any wrongdoing, negligence, fault or liability to the Plaintiff or Class Members, and no inference of any such liability is to be drawn from the participation in this settlement by Defendants, which have raised a number of specific defenses to the claims asserted in the Action and assert their intention, absent a settlement, to continue to oppose certification of the Class, and otherwise to continue with a vigorous defense and proceed to further litigation of this Action;

**NOW, THEREFORE, IT IS STIPULATED AND AGREED**, by and among the Parties, through their respective attorneys, subject to approval of the Court pursuant to Tex. R. Civ. P. 42(e) (1) through (3), that in consideration of the benefits flowing to the Parties, all **Settled Class Claims** as against all **Defendants' Released Parties**, and all **Settled Defendant Claims** as against all **Plaintiff's Released Parties**, (as each of those terms are defined below), shall be compromised, settled, released and dismissed with prejudice, upon and subject to the terms and conditions stated below (collectively hereinafter referred to as the "**Settlement**").

**Definitions**

1. **Definitions.** As used in this Settlement Agreement, capitalized terms will have the meanings set forth below in Appendix 1.

**Settlement Consideration**

2. **Refunds of amounts paid for Current Panels.** Class Members who satisfy the specific terms, conditions, and requirements stated in Paragraphs 2(b)-(c) below will be eligible for repayment of amounts that they actually paid to Defendants in connection with the Current Panels, inclusive of any amounts paid to a collection agency. The amount payable to an eligible Class Member under this Paragraph 2 will constitute a “**Refund.**” Class Members eligible to claim Refunds based on the determinations made under this Paragraph 2 (subject to Paragraph 2(b)(4)) below) will be “**Refund Eligible Class Members.**” Refunds will not include any amounts that were billed to Class Members for the Current Panels, but were not paid to Defendants.

(a) **Patients not eligible to claim a Refund.** For avoidance of doubt, the following patients treated at BNH facilities during the Class Period will not be considered Class Members for purposes of this Settlement and are not eligible for Refunds:

(1) Class Members for whom reimbursement payable to BNH was determined pursuant to the terms of an agreement with or coverage provided by a **Third Party Payor** specifying that BNH would be reimbursed for the Class Members’ treatment at a case rate or per diem rate, without any separate or additional reimbursement for clinical laboratory testing;

(2) Cash-paying Class Members who opted to pay for their visit under Defendants’ “prompt pay” option, which specifies a case rate for treatment that does not vary based on the number or types of clinical laboratory tests that are performed; and

(3) Class Members whose treatment was covered by fee-for-service Medicare and Medicaid under fixed copay plans.

Notwithstanding Paragraph 2(a)(3), patients covered by any managed Medicare or Medicaid plans that separately reimburse clinical laboratory testing performed by BNH and do not have fixed copays would be Class Members and are entitled to claim Refunds to the extent that the determination required under Paragraph 2(b) indicates that they are entitled to claim one.

(b) **Determining Refund amounts.**

(1) **Refunds to be based on Panel Cost Difference.** Refunds will be based on the “**Panel Cost Difference**” which, as more fully described in Paragraphs 2(b)(2)-(3) below, is equal to the difference between (i) the portion of the Patient Responsibility amount that is attributable to the cost of the respective Current Panels (the “**Current Panel Cost**”); and (ii) the portion of the Patient Responsibility amount that would have been attributable to the cost of certain

diagnostic panels with assigned panel codes **CPT no. 80048** and **CPT no. 80076** (as defined in Appendix 1) (together, the “**CPT Code Panels**”), had those CPT Code Panels been performed instead (the Patient Responsibility amount attributable with the CPT Code Panels to be the “**But-For Panel Cost**”). More specifically:

(A) For the BMP (includes CK) panel, the Panel Cost Difference will be equal to the difference between Current Panel Cost for the BMP (includes CK) panel and the But-For Panel Cost of the CPT no. 80048 panel.

(B) For the LFT (includes Amylase) panel, the Panel Cost Difference will be equal to the difference between Current Panel Cost for the LFT (includes Amylase) panel and the But-For Panel Cost of the CPT no. 80076 panel.

(2) **Determining Panel Cost Difference for insured patients.** For each Class Member entitled to claim a Refund whose treatment was covered by a Third Party Payor, Panel Cost Difference will be determined as follows:

(A) Using the applicable Third Party Payor’s contract rates and fee schedules in effect on the Class Member’s **Date of Service**, determine (x) the total reimbursement amount payable to BNH that the payor approved for the Current Panels (the “**Approved Panel Reimbursement**”) ordered and performed for the Class Member; and (y) the total reimbursement amount payable to BNH that the payor would have approved for the associated CPT Code Panels identified in Paragraph 2(b)(1)(A) and (B) (the “**But-For Panel Reimbursement**”).

(B) Subtract the But-For Panel Reimbursement from the Approved Panel Reimbursement to derive the “**Panel Reimbursement Difference.**”

(C) Divide the Patient Responsibility amount that BNH billed to the Class Member by the total reimbursement amount payable to BNH for the Class Member’s visit (inclusive of the Patient Responsibility) that was approved by the Third Party Payor to derive the “**Patient Responsibility Percentage.**”

(D) Multiply the Panel Reimbursement Difference times the Patient Responsibility Percentage to determine the Panel Cost Difference.

Table 2(b)(2) illustrates how the Panel Cost Difference could be calculated with respect to a BMP (includes CK) panel that was performed and billed to a patient covered by a Third Party Payor:



**Table 2(b)(2)**

<b>Panel Reimbursement Difference Calculation</b>	<b>Amount</b>	<b>Notes</b>
(1) Approved Panel Reimbursement for BMP (includes CK)	\$50	Hypothetical Figure
(2) But-For Panel Reimbursement for CPT no. 80048 Panel	<u>\$10</u>	Hypothetical Figure
(3) Panel Reimbursement Difference	\$40	Equals (1) minus (2)
 <b>Patient Responsibility Percentage Calculation</b>		
(4) Total Payor Approved Charges	\$100	Hypothetical Figure
(5) Total Charges Billed to Patient	<u>\$70</u>	Hypothetical Figure
(6) Patient Responsibility Percentage	70%	Equals (5) divided by (4)
 <b>Panel Cost Difference</b>	 <u>\$28</u>	 Equals (3) times (6)

(3) **Cash-paying patients:** For Class Members entitled to receive refunds whose treatment was not covered by a Third Party Payor, Panel Cost Difference will be determined by:

(A) Using the Class Member’s billing record and the prices in effect on the Class Member’s Date of Service in the BNH **Chargemaster** (as that term is defined in Appendix 1), determine (x) the amount that BNH billed for the Current Panels (the “**Actual Panel Billed Amount**”) ordered and performed for the Class Member (before any adjustments); and (y) the amount that BNH would have billed for the associated CPT Code Panels set forth in Paragraphs 2(b)(1)(A) and (B) (before any adjustments) (the “**But-For Panel Billed Amount**”).

(B) Subtract the But-For Panel Billed Amount from the Actual Panel Billed Amount to derive the panel billed amount difference (the “**Panel Billed Amount Difference**”).

(C) Divide the Patient Responsibility amount that BNH billed to the Class Member by the total amount billed for the Class Member’s visit (inclusive of the Patient Responsibility, and before any adjustments made to derive the Patient Responsibility) to derive the Patient Responsibility Percentage.

(D) Multiply the Panel Billed Amount Difference times the Patient Responsibility Percentage to determine the Panel Cost Difference.

Calculation of the Panel Cost Difference for cash-paying patients would be consistent with the illustration set out below in Table 2(b)(3).

**Table 2(b)(3)**

<b>Panel Reimbursement Difference Calculation</b>	<b>Amount</b>	<b>Notes</b>
(1) Actual Panel Billed Amount for BMP (includes CK)	\$50	Hypothetical Figure
(2) But-For Panel Billed Amount for CPT 80048 Panel	\$10	Hypothetical Figure
(3) Panel Billed Amount Difference	\$40	Equals (1) minus (2)
<b>Patient Responsibility Percentage Calculation</b>		
(4) Total Billed Amount by BNH	\$100	Hypothetical Figure
(5) Total Patient Responsibility after adjustments, if any, by BNH	\$35	Hypothetical Figure
(6) Patient Responsibility Percentage	35%	Equals (5) divided by (4)
<b>Panel Cost Difference</b>	\$14	Equals (3) times (6)

(4) **Treatment of Class Members with de minimis Panel Cost Difference amounts.** In the interests of administrative efficiency, Class Members whose Panel Cost Difference is less than \$5.00 will not be eligible to receive payment of Refunds under Paragraphs 2(e), or to be refunded amounts paid to BNH pursuant to Paragraph 3(c). For the avoidance of doubt, Class Members whose Panel Cost Difference is less than \$5.00 will remain a part of the Class and may, as described in Paragraph 3, be eligible for forgiveness of their Unpaid Panel Balance (as that term is defined in Paragraph 3) and will be subject to the release of claims against the Released Parties as described in Paragraphs 23 and 25 below.

(c) **Offsets for unpaid balances owed by Class Members.** Class Members' entitlement to any Refund will be reduced, dollar for dollar, by the amount of their unpaid portion of the Panel Cost Difference. If the total unpaid portion of any Class Member's Patient Responsibility equals or exceeds the Panel Cost Difference, the Class Member will not be a Refund Eligible Class Member, but will be treated subject to Paragraph 3 below.

(d) **Determining Refund Eligible Class Members.** Based on the billing records for the Class, Defendants will make the determinations required under Paragraphs 2(a)-(c) and compile a list that identifies the Refund Eligible Class Members, including last known contact information, and the Refund amounts that they are entitled to claim (the "**Refund Eligible Class Member List**"). Defendants will provide the Refund Eligible Class Member List to the Settlement Administrator no later than ten (10) business days after entry of an order preliminarily approving the Settlement, as contemplated in Paragraph 5 below.

(e) **Requirements for payment of Refunds:** Defendants will pay Refunds in the amounts set forth on the Refund Eligible Class Member List to Refund Eligible Class Members who timely submit a valid **Claim Form** (as that term is defined in Paragraph 5(d) below) when and as specified under this Settlement Agreement. Defendants will not be obligated to pay any amounts to or on behalf of any Refund Eligible Class Member who fails to submit a timely and valid claim in the manner required under this Settlement Agreement. Refund amounts not timely and validly claimed by any Refund Eligible Class

Members will be retained by Defendants, and Defendants will not be obligated to make any payments or distributions to or for the benefit of the Class or any Class Members (whether by *cy pres* distribution or otherwise) of any unclaimed Refund amounts. The failure of any Refund Eligible Class Member to submit a valid and timely Refund claim shall not impair or in any respect limit the releases to be given by and on behalf of such Refund Eligible Class Member to or for the benefit of Defendants in connection with the Settlement. Payments to Refund Eligible Class Members of amounts timely and validly claimed will be made according to Paragraph 16 below.

### 3. Non-retention and forgiveness of unpaid Panel Cost Difference

(a) If the total unpaid portion of any Class Member's Patient Responsibility equals or exceeds the Panel Cost Difference, the unpaid portion of the Panel Cost Difference (the "**Unpaid Panel Balance**") will be forgiven from the Class Member's Patient Responsibility. For avoidance of doubt, the Panel Cost Difference for the purposes of this paragraph will be calculated as described in Paragraphs 2(b)(2)-(3) above. Class Members eligible to get their Unpaid Panel Balance forgiven based on the determinations made under this Paragraph will be referred to as "**Forgiveness Eligible Class Members.**"

(b) The **Summary Notice** (as defined below) will inform Class Members that their Unpaid Panel Balance is eligible to be forgiven, in accordance with Paragraph 6(e). Within thirty (30) days of the Settlement Effective Date, Defendants shall forgive the Unpaid Panel Balance and the accounts of the Forgiveness Eligible Class Members shall reflect this adjustment. After the settlement Effective Date, Defendants and any collection agencies with which they contract will cease any actions to collect any Unpaid Panel Balance from Class Members; provided, however, that Defendants will not be required to issue new bills or statements that deduct the Unpaid Panel Balance from amounts otherwise owed, or to cease any activities to collect other balances owed by Class Members for their treatment at BNH. Class Members may however contact the Settlement Administrator to inquire about the amount of the Unpaid Panel Balance, if any, that has been forgiven.

(c) If, nonetheless, subject to Paragraph 2(b)(4), BNH receives any payments from Class Members that include any portion of the Unpaid Panel Balance, BNH will refund the portion of such payments that is allocable to the Unpaid Panel Balance within fifteen (15) business days after the conclusion of the calendar quarter during which BNH receives such payment. The obligation to identify and make refunds pursuant to this Paragraph 3(c) terminates after the conclusion of the calendar quarter during which the two-year anniversary of the Effective Date occurs.

(d) The non-retention and forgiveness of unpaid Unpaid Panel Balances will apply to all Class Members, and not be limited to Refund Eligible Class Members who submit Claim Forms.

(e) Based on the billing records for the Class, Defendants will make the determinations required under Paragraph 3(a) and compile a list that identifies the Forgiveness Eligible Class Members and the Unpaid Panel Balances for each such Forgiveness Eligible Class Member (the "**Forgiveness Eligible Class Member List**").

Defendants will provide the Forgiveness Eligible Class Member List to the Settlement Administrator no later than ten (10) business days after entry of an order preliminarily approving the Settlement, as contemplated in Paragraph 5 below.

**4. Changing the practice going forward**

(a) **Including CPT Code Panels as a lab test option.** No later than sixty (60) days after the Effective Date of the Settlement, the Baptist Neighborhood Hospital will include the CPT Code Panels as laboratory testing options that will be available in all of its facilities' onsite point-of-care laboratories. The CPT Code Panels will be included in all menus for in-house lab options available to clinicians in whatever form they are available, whether on paper or through the electronic medical record. Nothing in the Settlement will forbid BNH from ceasing to provide the Current Panels at its facilities' onsite point-of-care laboratories. Further, nothing in the Settlement will forbid BNH from ceasing to provide the CPT Code Panels at its facilities' onsite point-of-care laboratories only under the following circumstances:

(1) In BNH's reasonable clinical judgment, the CPT Code Panels are inconsistent with current standards of practice recommended by any medical professional organization or any state or federal regulatory authority concerning the use of clinical laboratory testing in emergency medicine; provided, however, that BNH is not currently aware of any such recommendations for the applicable standards of practice and has no current intention to decline to use the CPT Code Panels in its onsite point-of-care laboratories on that basis; or

(2) BNH cannot source the CPT Code Panels from the market, on account of them no longer being manufactured or widely available.

(b) **Disclosure of panel test options:** No later than sixty (60) days after the Effective Date of the Settlement, so long as Baptist Neighborhood Hospital continues to utilize the Current Panels as available testing options in its facilities' on-site laboratories, Baptist Neighborhood Hospital will include the following disclosure in its facilities' admissions consent forms:

“Depending on your ER physician's medical judgment, he or she may order you a liver/pancreatic function panel or metabolic panel that can be run for a quick turnaround in our in-house laboratories. Based on the tests included in the panels, certain of those in-house panels could potentially be more expensive to you than other in-house alternatives. Please speak with your physician to determine what option is best for you.

For your information, the available in-house panel options are as follows:

In-House Panel Types	Potentially Less Expensive Options	Potentially More Expensive Options
Metabolic Function Panels	Basic Metabolic Panel (CPT code 80048)	BMP (includes CK)
Liver/Pancreatic Function Panels	Hepatic Function Panel (CPT code 80076)	LFT (includes Amylase)
Combined Panel	Comprehensive Metabolic Panel (CPT code 80053) (combines portions of the Basic Metabolic Panel and Hepatic Function Panel)	None

If any of these tests are required, your doctor will choose a panel for you based on his or her judgment as to what test is medically necessary. For many insured patients the doctor’s choice of one panel over the other will result in no cost difference to you. For other patients there may be a difference in cost. If you have insurance coverage, we encourage you to contact your insurance provider to discuss patient payment obligations as defined under your insurance plan.”

(c) **Changes to pricing transparency file:** No later than sixty (60) days after the Effective Date of the Settlement, so long as BNH continues to utilize the Current Panels as available testing options in its facilities’ on-site laboratories, BNH will disclose the price of the Current Panel as the sum of its individual component tests in the **Pricing Transparency** (as that term is defined in Appendix 1) available on its website.

(d) **No change to billing practices:** Nothing in this Settlement will prohibit BNH from continuing to bill the Current Panels in such amounts and in such manner as may be required by patients’ insurers or under BNH billing policies, as applicable.

**Notice, Claims, Opt Outs, Objections, and Settlement Approval**

5. **Preliminary approval proceedings.** Promptly after execution of this Settlement Agreement, Plaintiff’s Counsel (as defined in Paragraph 10(a) below) will submit this Settlement Agreement together with its Exhibits to the Court, and will file an assented-to motion seeking entry of an order substantially in the form attached hereto as Exhibit A (the “**Preliminary Approval Order**”), requesting, among other things:

- (a) Preliminary approval of the Settlement;
- (b) Approval of **Notice** in the form attached hereto as Exhibit B;
- (c) Approval of the **Summary Notice** in the form attached hereto as Exhibit C;
- (d) Approval of the **Claim Form** in the form attached hereto as Exhibit D;

(e) Establishment of (1) a deadline for the Settlement Administrator to deliver Summary Notice to Class Members; (2) a deadline for the Settlement Administrator to create and maintain a website with the Notice; (3), a deadline for Class Members to lodge an objection to the Settlement pursuant to Tex. R. Civ. P. 42(e)(4), or opt out of the Class pursuant to Tex. R. Civ. P. 42(c)(2)(v) (the “**Response Deadline**”); and (4) the date (the “**Final Approval Hearing Date**”) on which to conduct a hearing (the “**Final Approval Hearing**”) to determine whether to approve the Settlement and other related matters pursuant to Tex. R. Civ. P. 42;

(f) Establishment of a deadline for Class Members to submit a Claim Form in the manner and form provided for in this Agreement (“**Claim Submission Deadline**”);

(g) Appointment of the **Settlement Administrator**; and

(h) Entry of a **Qualified Protective Order** in the form attached hereto as Exhibit E.

**6. Requirements for delivery of Notice.**

(a) In order to enable the Settlement Administrator to send out notices, the Defendants agree to provide to the Settlement Administrator, within ten (10) business days after the Court enters the Preliminary Approval Order, a notice database in an electronically searchable and readable format, which includes the names and last known mailing addresses, and, if known or reasonably practicable to obtain, telephone numbers and email addresses, for all Class Members. Any personal information relating to Class Members provided to the Settlement Administrator pursuant to this Settlement will be provided solely for the purpose of providing Notice and Summary Notice to Class Members; will be kept in strict confidence and subject to the Qualified Protective Order entered in this Action; and, will not be used for any other purpose.

(b) Within ten (10) business days after the Settlement Administrator’s receipt of the Notice database from Defendants, the Settlement Administrator will, by first class mail, send the Summary Notice to each Class Member. The last known address of Class Members will be subject to confirmation or updating as follows: (i) the Settlement Administrator will check each address against the United States Post Office National Change of Address Database before the initial mailing; (ii) the Settlement Administrator will conduct a reasonable search to locate an updated address for any Class Member whose Summary Notice is returned as undeliverable; (iii) the Settlement Administrator will update addresses and re-mail the Summary Notice based on any forwarding information received from the United States Post Office; and (iv) the Settlement Administrator will update addresses based on any requests received from Class Members. The Parties agree to cooperate in good faith in connection with the Settlement Administrator’s reasonable efforts to locate Class Members for whom Summary Notice is returned as undeliverable.

(c) The Notice and Summary Notice shall conform to all applicable requirements of the Texas Rules of Civil Procedure, specifically Tex. R. Civ. P. 42(e)(B),

and any other applicable law, and shall otherwise be in the manner and form agreed upon by the Parties and approved by the Court.

(d) Notice shall consist of the Notice substantially in the form attached hereto as Exhibit B. Summary Notice shall consist of the notice substantially in the form attached hereto as Exhibit C. The Settlement Administrator may make non-substantive changes to the formatting of the Notice and Summary Notice for purposes of printing and/or display on the Settlement website.

(e) Summary Notices provided to Class Members (i) will inform them that they may be eligible either to claim a Refund or to obtain forgiveness of their unpaid Patient Responsibility; (ii) will provide them with login details to the Settlement Administrator's online portal to check how much Refund or forgiveness they are eligible for, if any; (iii) will instruct them when and how to submit a Claim Form to obtain a Refund if they are eligible to receive one; and (iv) provide them with a telephone number should Class Members want to call and inquire about the amount of Refund or forgiveness, if any.

(f) Before Summary Notice is mailed to the Class Members, the Settlement Administrator shall create and maintain a settlement website which will contain, at a minimum, the Petition, this Settlement Agreement, a complete copy of the Notice, the Preliminary Approval Order, and the Claim Form. The Settlement Administrator may make non-substantive changes to the formatting of the Claim Form for purposes of printing and/or display on the Settlement website. The settlement website shall remain active until ninety (90) days after the Claim Submission Deadline.

(g) The Settlement Administrator shall ensure that the Notice, Claim Form and the landing page of the settlement website be made available to Class Members in both English and Spanish, and shall ensure that their call-center representatives assigned to this Action are bilingual in English and Spanish.

**7. Settlement Administration.**

(a) The Settlement Administrator shall be responsible for (1) sending the Summary Notice to Class Members as set forth herein and in the Preliminary Approval Order; (2) creating and maintaining a settlement website in accordance with Paragraphs 6(f) and (g); (3) responding to inquiries from Class Members; (4) identifying and mailing Refunds to Refund Payment Class Members; (5) filing any required reports with the Court; (6) sending out deficiency letters as described in Paragraph 7(c) below; and (7) such other tasks as the Parties mutually agree or that the Court orders the Settlement Administrator to perform. If any Class Member contacts the Settlement Administrator and inquires or complains about having been sent to collections, the Settlement Administrator shall liaise with the Class Member and Defendants to ensure no further steps are taken by the collections agency to collect the Unpaid Panel Balance.

(b) The Settlement Administrator shall prepare declarations confirming that the Notice and Summary Notice have been provided to the Class Members in accordance with this Settlement Agreement and that the Settlement Administrator has complied with the

provisions of the Preliminary Approval Order. Such declarations shall be provided to Class Counsel and Defendants' Counsel and filed with the Court by Plaintiff's Counsel no later than ten (10) days prior to the Final Approval Hearing.

(c) Only Refund Eligible Class Members will be entitled to submit a Claim Form to seek a Refund under the Settlement. Any Refund Eligible Class Member who wishes to claim a Refund must, no later than the Claim Submission Deadline, submit a Claim Form to the Settlement Administrator in the manner specified in the Notice. Refund Eligible Class Members who fail to submit a timely Claim Form will not be entitled to receive Refunds under the Settlement. No later than ten (10) business days after the Claim Submission Deadline, the Settlement Administrator shall send out a deficiency letter to any Class Member who has submitted a Claim Form that is in any respect deficient or otherwise insufficient to permit the Class Member to receive a Refund. This letter shall inform the Class Member about the deficiency in the Claim, inform the Class Member what needs to be done to correct the deficiency and make them eligible for a Refund, and inform the Class Member that the deadline to correct such deficiencies shall be no later than fifteen (15) business days from the receipt of the deficiency letter.

(d) No later than thirty (30) business days after the Claim Submission Deadline, the Settlement Administrator will provide to the Parties (i) a list of all Refund Eligible Class Members who have timely submitted a valid Claim Form (the "**Refund Payment Class Members**"); (ii) the Refund amounts to which each Refund Payment Class Member is entitled; and (iii) the sum of the Refunds to be paid to the Refund Payment Class Members (the "**Total Refund Payment Amount**"). Payment of the Total Refund Payment Amount and distribution of Refunds to Refund Payment Class Members shall occur when and as specified below in Paragraph 16.

(e) The Parties will have the responsibility for determining and resolving all disputes that arise during the Settlement administration process, including without limitation, disputes regarding whether a Class Member fully completed and timely submitted a valid Claim Form. In making such determinations and resolutions, the information provided by Defendants at Paragraphs 2(d) and 3(e) to the Settlement Administrator shall be presumed to be accurate and correct, and shall be final and binding, unless information voluntarily submitted by the Class Member (e.g., EOBs, proofs of payment, etc.) proves otherwise. In the event that the Parties cannot determine and resolve a dispute based upon a review of the information provided by Defendants at Paragraphs 2(d) and 3(e), the Parties will request a teleconference with the Court to discuss the dispute. After such teleconference, the Court will determine and resolve the dispute and such decision of the Court shall be final and binding on the Class Member. This provision is not intended to bar any Party from bringing a motion to enforce this Settlement Agreement or initiating an action for breach of this Settlement Agreement.

(f) No Class Member shall have any claim against Defendants' Released Parties (as defined at Paragraph 23(a) below), Plaintiff's Released Parties (as defined at Paragraph 25 below) or the Settlement Administrator, or any other person designated by Plaintiff's Counsel based on the determination or distributions made in accordance with this Settlement Agreement, this Settlement or any order of the Court.



8. **Opt Outs.** Any Class Member who wishes to be excluded from the Settlement pursuant to Tex. R. Civ. P. 42(c)(2)(v) (to “**Opt Out**”) may do so by submitting a written notice to Opt Out to the Court, Class Counsel (defined in Paragraph 10(a) below), Defendants, and the Settlement Administrator in the manner prescribed in the Notice. No request to Opt Out will be valid unless submitted on or before the Response Deadline. In the event that the Court approves the Settlement and the Settlement becomes Final, Class Members who fail to submit any request to Opt Out, or who submit a request to Opt Out after the Response Deadline, will be bound by the terms of the Settlement, including the Releases of claims against Defendants that are set forth in this Settlement Agreement. The Settlement Administrator will keep and maintain a list of all Class Members who timely Opt Out from the Class (including the dollar value of any Refunds to which they may be entitled), and will provide the final list of such Class Members to Class Counsel and Defendants no later than five (5) business days after the Response Deadline. Any Class Member who timely Opts Out will cease to be a Class Member and for the avoidance of doubt, will not receive any payment of any kind from the Settlement and will not be eligible for the benefits available under Paragraphs 2 and 3 of this Settlement Agreement by virtue of not being a Class Member but will not be releasing any claims against the Released Parties pursuant to Paragraphs 23 and 25 below.

9. **Objections.** Any Class Member who does not Opt Out from the Class may object to the Settlement pursuant to Tex. R. Civ. P. 42(e)(4) by submitting a written objection to the Court, Class Counsel, and the Defendants’ Counsel on or before the Response Deadline in the manner and to the addressees specified in the Notice. Class Members who object to the Settlement may appear and speak at the Final Approval Hearing, either individually through the Class Member appearing on her or his own behalf, or through counsel retained and compensated individually by the objecting Class Member.

10. **Motions for final approval and for attorneys’ fees, expenses and class representative service award:** No later than ten (10) business days before the Final Approval Hearing Date, Plaintiff will file with the Court an assented-to motion (the “**Final Approval Motion**”) requesting entry of an order substantially in the form attached hereto as Exhibit F (the “**Proposed Final Order and Judgment**”); seeking, among other things, the following relief:

(a) Appointment of Wolf Popper LLP as class counsel (the “**Class Counsel**”) and Hilder & Associates P.C. as liaison counsel (“**Liaison Counsel**”) (together referred to as “**Plaintiff’s Counsel**”) pursuant to Tex. R. Civ. P. 42(g);

(b) Certification of the Class solely for purposes of this Settlement pursuant to Tex. R. Civ. P. 42(b)(3) and (c)(1)(A);

(c) Final approval of the Settlement, as set forth in this Settlement Agreement, pursuant to Tex. R. Civ. P. 42(e);

(d) An award of fees and expenses to Plaintiff’s Counsel pursuant to Tex. R. Civ. P. 42(i) (“**Plaintiff’s Counsel Fees and Expenses**”) in the amount of, and not to exceed, Eight Hundred Thousand Dollars (\$800,000.00);

(e) A “**Class Representative Service Award**,” payable to Plaintiff, of up to \$5,000 from the Court; and

(f) Dismissal, with prejudice, of the Action.

11. **The Final Approval Hearing.** The Final Approval Hearing shall consist of such proceedings as the Court shall deem appropriate to determine whether to allow, in whole or in part, the Final Approval Motion. Class Members may participate in the Final Approval Hearing in the manner and to the extent permitted under Tex. R. Civ. P. 42(e)(4) and as may otherwise be ordered or directed by the Court.

12. **Defendants’ obligations with respect to Plaintiff’s Counsel Fees and Expenses.** Defendants agree not to oppose, object to, or seek appellate review of Plaintiff’s request for or the Court’s award of Plaintiff’s Counsel Fees and Expenses in an amount not to exceed \$800,000.00. As specified in Paragraph 18 below, Defendants agree to pay Plaintiff’s Counsel Fees and Expenses in any amount ordered by the Court in connection with the Settlement not exceeding \$800,000.00. Defendants reserve the right to appeal any award of Plaintiff’s Counsel Fees and Expenses that exceeds the \$800,000.00 award requested in the Final Approval Motion. To the extent that any final order of the Court, or any appellate court, orders or approves payment of Plaintiff’s Counsel Fees and Expenses in an amount that is less than \$800,000.00, neither the Class, nor Defendants, nor any of the **Defendants’ Released Parties** (as defined in Paragraph 23(a) below) shall have any obligation or liability to compensate Plaintiff’s Counsel or Plaintiff for the difference between the amount so ordered or approved and the \$800,000.00 award requested by Plaintiff in the Proposed Final Order and Judgment.

13. **Defendants’ obligations with respect to Class Representative Service Award.**

(a) Defendants agree not to oppose, object to, or seek appellate review of Plaintiff’s request to the Court to approve a Class Representative Service Award in an amount not to exceed \$5,000. As specified in Paragraph 18 below, Defendants agree to pay the amount of the Class Representative Service Award ordered by the Court not exceeding \$5,000.

(b) Defendants agree that Plaintiff’s individual claim as a Class Member will be treated in parity with the other Class Members, as described in Paragraphs 2 or 3 above, as applicable.

14. **Effective Date.** The Effective Date of the Settlement shall be the first business day following (a) entry of a final order of the Court approving the Settlement substantially in the form of the Proposed Final Order and Judgment (the “**Court-Approved Final Order and Judgment**”); and (b) the expiration of the period in which to appeal from the Court-Approved Final Order and Judgment (thirty days after the Judgment is signed) without an appeal having been filed. In the event an appeal is filed, the Parties will cooperate in seeking to have any such appeal(s) resolved as promptly as possible, and the Effective Date shall become the first business day following the expiration of the time for further appellate review of any appellate order affirming the Court-Approved Final Order and Judgment.

**Settlement Funding and Distribution**

15. **Settlement funding.** Defendants will pay the Total Refund Payment Amount to the Settlement Administrator no later than thirty (30) days upon receipt from the Settlement Administrator of the list of Refund Payment Class Members and the Total Refund Payment Amount as specified in Paragraph 7(d) above.

16. **Payment of Refunds to Refund Payment Class Members.** No later than thirty (30) days after receipt of the Total Refund Payment Amount from Defendants (the “**Refund Issue Date**”), the Settlement Administrator will pay the Refund amounts due to each of the Refund Payment Class Members by check or electronic transfer, as may be elected by such Refund Payment Class Members when submitting their Claim Forms to the Settlement Administrator.

17. **Uncashed checks.** No later than one hundred and twenty (120) days after the Refund Issue Date, the Settlement Administrator shall send a reminder to Refund Payment Class Members who have not yet cashed their checks issued under this Settlement Agreement. Should any checks issued to such Class Members remain uncashed for more than 365 days after the Refund Issue Date, despite a reminder from the Settlement Administrator, the amount of the uncashed checks will be returned to Defendants.

18. **Payment of Plaintiff’s Counsel Fees and Expenses and Class Representative Service Award.** No later than thirty (30) days after the Effective Date, Defendants will pay the Plaintiff’s Counsel Fees and Expenses and the Class Representative Service Award in the amount ordered pursuant to Paragraph 12 and 13 of this Settlement Agreement.

19. **Payment of Settlement Administration Costs.** Defendants will promptly pay all Settlement Administration Costs, as that term is defined in Appendix 1.

20. **Effect of Defendants’ payments.** Upon Defendants’ fulfillment of their payment and forgiveness obligations under Paragraphs 3(b), 16, 18 and 19 the Settlement shall become final and binding (“**Final**”) as to all Parties and all Class Members.

**Termination of the Settlement**

21. **Termination of the Settlement.**

(a) Either Plaintiff or Defendants may terminate the Settlement and this Settlement Agreement by providing written notice of their election to do so (“**Termination Notice**”) to all other Parties, through their counsel, no later than ten (10) days after the occurrence of any of the following:

(1) The refusal of the Court to enter the Preliminary Approval Order in any material respect;

(2) The refusal of the Court to approve this Settlement Agreement or any material part of it;

(3) The refusal of the Court to enter the Proposed Final Order and Judgment in any material respect; or

(4) The modification or reversal of the Court-Approved Final Order and Judgment in any material respect by any appellate court of competent jurisdiction (other than any adjustment to Plaintiff's Counsel Fees and Expenses that might be ordered by an appellate court).

(b) No later than ten (10) business days after Defendants' receipt from the Settlement Administrator pursuant to Paragraph 8 above of the list of Opt-Outs, Defendants may terminate the Settlement by directing a Termination Notice to Class Counsel if the aggregate Panel Cost Difference for Opt-Outs equals or exceeds the greater of 10% of the aggregate Panel Cost Difference for all Refund Eligible Class Members or \$100,000.

22. **Effect of termination.** In the event the Settlement is terminated pursuant to Paragraph 21, the Parties will revert to their respective status in the Action immediately prior to the execution of the Settlement Agreement and the Parties shall proceed in all respects as if this Settlement Agreement and any related orders had not been entered.

### **Release and Compromise of Disputed Claims**

23. **Release of Settled Class Claims.** Upon the Effective Date, all Class Members shall be deemed to have given the following release of all claims relating to or arising out of the Action:

(a) The parties released shall consist of Defendants and their past and present shareholders, principals, parent corporations, affiliates, subsidiaries, predecessors and successors, and each of their past and present officers, directors, owners, shareholders, principals, members, partners, employees, contractors, agents, attorneys, insurers, assigns of any of the foregoing, and all persons acting for, by or through any of the foregoing, past or present (collectively, the "**Defendants' Released Parties**").

(b) The Class Members, together with any of their heirs, agents, attorneys, or assigns, will forever release and discharge the Defendants' Released Parties of and from any and all claims in law or in equity, of whatever kind or nature including, without limitation, claims for monetary damages, equitable, declaratory, and injunctive relief, restitution and disgorgement, and attorneys' fees, including those claims asserted or which could have been asserted in the Action including, without limitation, claims arising from, concerning, or in any way relating to the (i) billing of the Current Panels during the Class Period that is the basis of the litigation; and (ii) pricing transparency and disclosure or non-disclosure concerning billing for the Current Panels (all such claims that are released by the Class Members as to Defendants' Released Parties to be the "**Settled Class Claims**"). For avoidance of doubt, Settled Class Claims include any and all claims, demands, actions, causes of action, obligations, damages, liabilities, loss, restitution, fines, costs, penalties or expenses including attorneys' fees of any kind or nature whatsoever, past or present, ascertained or unascertained, whether or not known, suspected or claimed from the beginning of the Class Period through and including the Effective Date arising from or in

any way related to the billing of the Current Panels and the sufficiency of disclosures concerning such costs or charges.

(c) The Class Members shall forever be enjoined from prosecuting any Settled Class Claims against any of the Defendants' Released Parties, provided however that nothing herein shall in any way restrict or impair any Parties' right to enforce the terms of the Settlement Agreement and the Settlement. The Class Members and Defendants consent to jurisdiction and venue in the Texas District Court in Bexar County for purposes of enforcing such injunction. As used in this Paragraph, the terms Class Members and Defendants shall include the past or present respective executors, administrators, personal representatives, agents, heirs, beneficiaries, legatees, attorneys and all persons acting for Class Members and Defendants.

24. **Acknowledgement of effect of release of Settled Class Claims.** With respect to the claims released in this Settlement Agreement, Defendants, Plaintiff, and all Class Members agree that they are expressly waiving and relinquishing to the fullest extent permitted by law:

(a) The provisions rights and benefits conferred by Section 1542 of the California Civil Code, which provides:

A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party;

and

(b) Any law of any state of the United States, federal law or principle of common law which is similar, comparable or equivalent to Section 1542 of the California Civil Code.

25. **Release of claims against Plaintiff's Released Parties.** Upon the Effective Date, each of Defendants' Released Parties shall be deemed to have fully, finally, and forever released, relinquished, and discharged Plaintiff, Plaintiff's Counsel and Class Members ("**Plaintiff's Released Parties**") from all claims (including, without limitation, unknown claims), which arise out of or relate to the initiation, litigation, prosecution, or settlement of this Action including (but not limited to) any claims of bad faith or abuse of process against Plaintiff's Released Parties relating to their initiation, litigation, prosecution, or settlement of the Action and they shall forever be barred and enjoined from commencing, instituting, or prosecuting any of the claims against Plaintiff's Released Parties (all such claims that are released by the Defendants' Released Parties as to Plaintiff's Released Parties to be the "**Settled Defendant Claims**").

26. **Scope of Settlement.** The obligations incurred pursuant to this Settlement Agreement shall be in full and final disposition of the Action and any and all Settled Class Claims as against all Parties to this Settlement Agreement and all Class Members.

27. **Effect of Settlement as to Class Members' claims and liabilities.**

(a) Upon becoming Final, this Settlement shall be deemed final and conclusive against all Class Members. Whether or not a Class Member receives a Refund under this Settlement, each Class Member shall be bound by all of the terms of this Settlement Agreement and the Settlement, including the terms of any order and final judgment to be entered in the Action and the releases provided for therein.

(b) The failure of any Class Member to claim or obtain any monetary relief made available under this Settlement Agreement shall not affect the validity, scope, or enforcement of the releases herein, and all Class Members shall remain bound by said releases whether or not they submit a Claim Form pursuant to Paragraph 7(c) of this Settlement Agreement. As to any Class Member who otherwise would be entitled to submit a Claim Form under this Settlement Agreement and who for any reason fails to submit a timely Claim Form, all rights of such Class Member to receive a cash distribution in this Action or under this Settlement Agreement shall lapse and shall be deemed voluntarily, irrevocably, and permanently waived and forfeited. Defendants shall not be required to remit any additional consideration to any Class Members following or on account of such forfeiture by any Class Member.

(c) Plaintiff and Class Members will be permanently barred and enjoined from filing, commencing, prosecuting, intervening in, participating in as class members or otherwise, or receiving any benefits or other relief from any other lawsuit in any state, territorial or federal court, or any arbitration or administrative or regulatory or other proceeding in any jurisdiction, which asserts claims based on or in any way related to the Settled Class Claims, and the Court shall retain exclusive continuing jurisdiction to enforce said injunction.

(d) Plaintiff and Defendants hereby expressly agree that all provisions of this Paragraph, together and separately, constitute essential terms of this Settlement Agreement.

**Miscellaneous Provisions**

28. **No admission of wrongdoing.** This Settlement, whether or not consummated, and any proceedings taken pursuant to it:

(a) Shall not be offered or received against Defendants as evidence of or construed as or deemed to be evidence of any presumption, concession, or admission by Defendants with respect to the truth of any fact alleged by Plaintiff or the validity of any claim that has been or could have been asserted in the Action or in any litigation, or the deficiency of any defense that has been or could have been asserted in the Action in any litigation, or of any liability, negligence, fault, or wrongdoing of Defendants;

(b) Shall not be offered or received against Defendants as evidence of a presumption, concession or admission of any fault, misrepresentation or omission with respect to any statement or written document approved or made by Defendants;

(c) Shall not be offered or received against Defendants as evidence of a presumption, concession or admission with respect to any liability, negligence, fault or wrongdoing, or in any way referred to for any other reason as against Defendants, in any other civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of this Settlement; provided, however, that if this Settlement is approved by the Court, Defendants may refer to it to effectuate the liability protection granted them hereunder;

(d) Shall not be offered or received against Defendants as evidence of a presumption, concession or admission that the Class is appropriately certified for trial;

(e) Shall not be construed against Defendants as an admission or concession that the consideration to be given hereunder represents the amount which could be or would have been recovered after trial; and

(f) Shall not be construed as or received in evidence as an admission, concession or presumption against Plaintiff or any of the Class Members that any of their claims are without merit, or that any defense asserted by Defendants has any merit, or that damages recoverable under the Petition would not have exceeded the Settlement Consideration.

This Settlement Agreement shall in no event be construed or deemed to be evidence of or an admission or concession on the part of Defendants with respect to any claim or of any fault or liability or wrongdoing or damage whatsoever, or any infirmity in the defenses that Defendants has asserted. The Parties to this Settlement Agreement recognize that the Action has been filed by Plaintiff and defended by Defendants in good faith and with adequate basis in fact under Tex. R. Civ. P. 13, that the Action is being voluntarily settled after advice of counsel, and that the terms of the Settlement are fair, adequate and reasonable. This Settlement Agreement shall not be construed or deemed to be a concession by Plaintiff of any infirmity in the claims asserted in the Action.

29. **Non-disparagement.** The Parties and, insofar as is consistent with Tex. R. Prof Conduct 1.01 and 1.02, Plaintiff's Counsel and Defendants' Counsel, agree that they will not publish or utter in any print, audio, video, online, or any other media (including social media) any statements that accuse any Party of wrongdoing or disparage the competency, qualifications, character, honesty, business reputation, trustworthiness, or integrity of any Party.

30. **Exhibits incorporated by reference.** All of the exhibits listed in Appendix 2 and attached to this Settlement Agreement as Exhibits A-F are hereby incorporated by reference as though fully set forth herein.

31. **Authorization.** Each Party represents and warrants that execution and delivery of this Settlement Agreement has been duly authorized by all necessary actions and that the execution and delivery of this Settlement Agreement constitutes a legal, valid and binding obligation of that Party. The persons signing this Settlement Agreement represent and warrant by their signatures that they have authority to sign the Settlement Agreement on behalf of the Party for whom they are signing.

32. **Parties Bound.** This Settlement Agreement shall be binding upon and inure to the benefit of Defendants and the Class Members and their respective present and former officers, directors and employees, shareholders, any parent or subsidiary corporations of Defendants and the Class Members, and their respective heirs, successors, assigns and transferees.

33. **Representation by counsel.** Each Party has been represented in the negotiation of this Settlement Agreement by independent counsel and has had the Settlement Agreement fully explained by its own counsel and are aware that the Settlement set forth in the Settlement Agreement (a) provides for payment of Settlement Consideration to and on behalf of the Class only as set forth in this Settlement Agreement; (b) will terminate any and all rights of Plaintiff and the Class Members to pursue the Settled Class Claims and (c) will terminate any and all rights of Defendants to pursue Settled Defendant Claims.

34. **No reliance; independent investigation.** Each Party in entering into this Settlement Agreement relies upon its own investigation and judgment in regard to all matters herein contained and has not relied on any representations made by other Parties. This Settlement Agreement is made and entered into by each of the Parties of its own volition and each of the Parties warrants that this Settlement Agreement was made and entered into free of any duress, coercion, or undue influence from any source whatsoever.

35. **Jointly drafted.** Each Party has participated in the drafting and negotiation of this Settlement Agreement. For all purposes, this Settlement Agreement shall be deemed to have been drafted jointly by the Parties. Accordingly, any rule of law or any legal decision that would require interpretation of any claimed ambiguities in this Settlement Agreement against the party that drafted it has no application and is expressly waived. The provisions of this Settlement Agreement shall be interpreted in a reasonable manner so as to effectuate the intent of the Parties, and no rule of strict construction shall be applied against any Party to this Settlement Agreement.

36. **Entire agreement; amendments; construction with other agreements.** This Settlement Agreement constitutes the only existing and binding agreement between the Parties concerning the Settlement and supersedes any prior oral or written agreements concerning the Settlement including, without limitation, the Final Settlement Term Sheet dated September 27, 2022. The Parties acknowledge that there are no other warranties, promises, assurances or representations of any kind, express or implied, upon which the Parties have relied in entering into this Settlement Agreement, unless expressly set forth herein. This Settlement Agreement, including the provisions of this Paragraph, may not be modified, amended or altered in any way except by written agreement signed by each of the Parties.

37. **Counterparts.** This Settlement Agreement may be executed in any number of counterparts, all of which taken together shall constitute one and the same instrument. Any of the Parties may execute this Settlement Agreement by signing any such counterpart.



38. **Notices.** Any notices required under this Settlement Agreement may be transmitted by email to the following designated individuals:

**To Plaintiff:**

Chet Waldman  
David Nicholas  
Radha Raghavan  
Wolf Popper LLP  
*cwaldman@wolffopper.com*  
*dnicholas@wolffopper.com*  
*rraghavan@wolffopper.com*  
Counsel for Plaintiff

**To Defendants:**

Kevin McGinty  
Evelyn Limon  
Mintz, Levin, Cohn, Ferris,  
Glovsky and Popeo, P.C.  
*kmcginty@mintz.com*  
*elimon@mintz.com*  
Counsel for Defendants

Unless the sender receives email notification that the sent message is undeliverable, notice shall be deemed to have been delivered as of the date and time when the email is sent. In the event of an undeliverable email notice, counsel for the Parties agree to cooperate to facilitate delivery of any required notice.

39. **Effect of headings.** The headings herein are used for the purpose of convenience only and are not meant to have legal effect.

40. **Settlement subject to judicial supervision and approval.** The administration and consummation of the Settlement as embodied in this Settlement Agreement shall be under the authority of the Court and the Court shall retain jurisdiction for the purpose of enforcing the terms of this Settlement Agreement.

41. **Non-waiver.** The waiver by any Party of any breach of this Settlement Agreement by any other Party shall not be deemed a waiver of any other prior or subsequent breach of this Settlement Agreement.

42. **Governing law.** The construction, interpretation, operation, effect and validity of this Settlement Agreement, and all documents necessary to effectuate it, shall be governed by the internal laws of the State of Texas without regard to conflicts of laws, except to the extent that federal law requires that federal law governs.

43. **Cooperation.** Plaintiff's Counsel and Defendants' Counsel agree to cooperate fully with one another in seeking Court approval of (a) the Preliminary Approval Order; and (b) the

Settlement Agreement and the Settlement, and to promptly agree upon and execute all such other documentation as may be reasonably required to obtain Final approval of the Settlement.

44. **Computation of deadlines.** For purposes of determining deadlines under this Settlement Agreement, any interval measured in “business days” shall exclude (a) weekend days; and (b) federal or Texas state holidays. All other intervals shall be measured in calendar days. In the event that an interval specified for performance of any action or obligation required under this Settlement Agreement results in a deadline that falls on a weekend or a federal, or Texas state holiday, that deadline will be deemed to fall on the next business day.

[Signatures appear on next page]

Stipulated and agreed to this 27th day of January, 2023

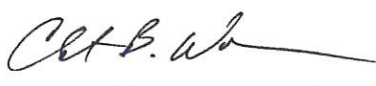
PLAINTIFF KENNETH KESLAR II,

By: \_\_\_\_\_

  
Philip H. Hilder  
[philip@hilderlaw.com](mailto:philip@hilderlaw.com)  
Q. Tate Williams  
[tate@hilderlaw.com](mailto:tate@hilderlaw.com)  
**HILDER & ASSOCIATES**  
819 Lovett Blvd.  
Houston, Texas 77006  
Telephone: (713) 655-9111  
Facsimile: (713) 655-9112

and

By: \_\_\_\_\_

  
Chet B. Waldman  
David A. Nicholas  
Radha Raghavan  
**WOLF POPPER LLP**  
845 Third Avenue, 12th Floor  
New York, NY 10022  
  
**ATTORNEYS FOR PLAINTIFF**

DEFENDANTS, EMERUS / BHS SA  
THOUSAND OAKS, LLC d/b/a BAPTIST-  
EMERGENCY HOSPITAL - SHAVANO  
PARK, EMERUS HOSPITAL PARTNERS,  
LLC, and EMERUS HOLDINGS, INC.,

**dc&m** | **Davis, Cedillo & Mendoza, INC.**  
ATTORNEYS AT LAW

McCombs Plaza, Suite 500  
755 E. Mulberry Avenue  
San Antonio, Texas 78212  
Telephone No.: (210) 822-6666  
Facsimile No.: (210) 822-1151

By: \_\_\_\_\_

Ricardo G. Cedillo  
Texas Bar No. 04043600  
E-Mail: [rcedillo@lawdcm.com](mailto:rcedillo@lawdcm.com)

and

By: \_\_\_\_\_

Kevin M. McGinty  
**MINTZ, LEVIN, COHN, FERRIS,  
GLOVSKY AND POPEO, P.C.**  
One Financial Center  
Boston, MA 02111  
Telephone: (617) 542-6000  
Fax: (617) 542-2241  
Email: [kmcginty@mintz.com](mailto:kmcginty@mintz.com)

**ATTORNEYS FOR DEFENDANTS,  
EMERUS / BHS SA THOUSAND  
OAKS, LLC d/b/a BAPTIST-  
EMERGENCY HOSPITAL -  
SHAVANO PARK, EMERUS  
HOSPITAL PARTNERS, LLC, and  
EMERUS HOLDINGS, INC.**

Stipulated and agreed to this 27th day of January, 2023

PLAINTIFF KENNETH KESLAR II,

DEFENDANTS, EMERUS / BHS SA  
THOUSAND OAKS, LLC d/b/a BAPTIST-  
EMERGENCY HOSPITAL - SHAVANO  
PARK, EMERUS HOSPITAL PARTNERS,  
LLC, and EMERUS HOLDINGS, INC.,

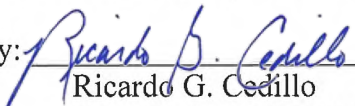
By: \_\_\_\_\_

Philip H. Hilder  
[philip@hilderlaw.com](mailto:philip@hilderlaw.com)  
Q. Tate Williams  
[tate@hilderlaw.com](mailto:tate@hilderlaw.com)  
**HILDER & ASSOCIATES**  
819 Lovett Blvd.  
Houston, Texas 77006  
Telephone: (713) 655-9111  
Facsimile: (713) 655-9112

**dc&m | Davis, Cedillo & Mendoza, INC.**  
ATTORNEYS AT LAW

McCombs Plaza, Suite 500  
755 E. Mulberry Avenue  
San Antonio, Texas 78212  
Telephone No.: (210) 822-6666  
Facsimile No.: (210) 822-1151

and

By:  \_\_\_\_\_  
Ricardo G. Cedillo  
Texas Bar No. 04043600  
E-Mail: [rcedillo@lawdcm.com](mailto:rcedillo@lawdcm.com)

By: \_\_\_\_\_

Chet B. Waldman  
David A. Nicholas  
Radha Raghavan  
**WOLF POPPER LLP**  
845 Third Avenue, 12th Floor  
New York, NY 10022

and

By:  \_\_\_\_\_  
Kevin M. McGinty  
**MINTZ, LEVIN, COHN, FERRIS,  
GLOVSKY AND POPEO, P.C.**  
One Financial Center  
Boston, MA 02111  
Telephone: (617) 542-6000  
Fax: (617) 542-2241  
Email: [kmcginty@mintz.com](mailto:kmcginty@mintz.com)

**ATTORNEYS FOR PLAINTIFF**

**ATTORNEYS FOR DEFENDANTS,  
EMERUS / BHS SA THOUSAND  
OAKS, LLC d/b/a BAPTIST-  
EMERGENCY HOSPITAL -  
SHAVANO PARK, EMERUS  
HOSPITAL PARTNERS, LLC, and  
EMERUS HOLDINGS, INC.**

**APPENDIX 1**  
**DEFINITIONS**

As used in this Settlement Agreement, the following terms shall have the following meanings:

“**Action**” has the meaning set forth in the introductory Paragraph of this Settlement Agreement.

“**Actual Panel Billed Amount**” has the meaning set forth in Paragraph 2(b)(3)(A) of this Settlement Agreement.

“**Approved Panel Reimbursement**” has the meaning set forth in Paragraph 2(b)(2)(A) of this Settlement Agreement.

“**Baptist Neighborhood Hospital**” or “**BNH**” means Emerus/BHS SA – Thousand Oaks, LLC, formerly doing business as “Baptist Emergency Hospital,” and the following facilities operated under its license:

- (1) Baptist Neighborhood Hospital Hausman, 8230 N 1604 W., San Antonio, TX 78249;
- (2) Baptist Neighborhood Hospital Kelly, 806 Cupples Rd, San Antonio, TX 78237;
- (3) Baptist Neighborhood Hospital Overlook, 25615 US-281, San Antonio, TX 78258;
- (4) Baptist Neighborhood Hospital Schertz, 16977 I-35 N., Schertz, TX 78154;
- (5) Baptist Neighborhood Hospital Shavano Park, 4103 North Loop 1604 W., San Antonio, TX 78249;
- (6) Baptist Neighborhood Hospital Thousand Oaks, 16088 San Pedro Ave., San Antonio, TX 78232;
- (7) Baptist Neighborhood Hospital Westover Hills, 10811 Town Center Dr., San Antonio, TX 78251; and
- (8) Baptist Neighborhood Hospital Zarzamora, 7719 IH 35 S., San Antonio, TX 78224.

“**BMP (includes CK)**” means a diagnostic laboratory test panel consisting of the following eight assays: carbon dioxide (bicarbonate) (CPT no. 82374); chloride (CPT no. 82435); potassium (CPT no. 84132); sodium (CPT no. 84295); creatine kinase (cpk) (CPT no. 82550); creatinine (CPT no. 82565); glucose (CPT no. 82947); and urea nitrogen (CPT no. 84250).

“**But-For Panel Billed Amount**” has the meaning set forth in Paragraph 2(b)(3)(A) of this Settlement Agreement.

“**But-For Panel Cost**” has the meaning set forth in Paragraph 2(b)(1) of this Settlement Agreement.

“**But-For Panel Reimbursement**” has the meaning set forth in Paragraph 2(b)(2)(A) of this Settlement Agreement.

“**Chargemaster**” means a list of the amounts that BNH charges for items and services provided to patients, as that list may be revised from time-to-time.

“**Claim Form**” means a Court-approved form to make a claim to obtain a Refund in substantially the form attached hereto as Exhibit D.

“**Claim Submission Deadline**” has the meaning set forth in Paragraph 5(f) of this Settlement Agreement.

“**Class**” has the meaning set forth in the seventh Paragraph of the Recitals.

“**Class Counsel**” has the meaning set forth in Paragraph 10(a) of this Settlement Agreement.

“**Class Member**” has the meaning set forth in the seventh Paragraph of the Recitals.

“**Class Period**” has the meaning set forth in the seventh Paragraph of the Recitals.

“**Class Representative Service Award**” has the meaning set forth in Paragraph 10(e) of this Settlement Agreement.

“**CPT Code Panels**” has the meaning set forth in Paragraph 2(b)(1) of this Settlement Agreement.

“**CPT no. 80048**” means a diagnostic laboratory test panel consisting of the following eight assays: carbon dioxide (bicarbonate) (CPT no. 82374); chloride (CPT no. 82435); potassium (CPT no. 84132); sodium (CPT no. 84295); calcium (total) (CPT no. 82310); creatinine (CPT no. 82565); glucose (CPT no. 82947); and urea nitrogen (CPT no. 84250).

“**CPT no. 80076**” means a diagnostic laboratory test panel consisting of the following seven assays: serum albumin (CPT no. 82040); bilirubin (total) (CPT no. 82247); bilirubin (direct) (CPT no. 82248); alkaline phosphatase (CPT no. 84075); protein (serum) (CPT no. 84155); transferase (AST) (SGOT) (CPT no. 84450); and alanine amino (ALT) (SGPT) (CPT no. 84460).

“**Current Panels**” has the meaning set forth in the second paragraph of the Recitals to this Settlement Agreement.

“**Court**” means the Texas District Court, 73rd Judicial District, Bexar County.

“**Current Panel Cost**” has the meaning set forth in Paragraph 2(b)(1) of this Settlement Agreement.

“**Court-Approved Final Order and Judgment**” has the meaning set forth in Paragraph 14 of this Settlement Agreement.

“**Date of Service**” means the date on which a Class Member was treated at a BNH facility.

“**Defendants**” has the meaning set forth in the introductory Paragraph to this Settlement Agreement.

“**Defendants’ Released Parties**” has the meaning set forth in Paragraph 23(a) of this Settlement Agreement.

“**DTPA**” means the Texas Deceptive Trade Practices Act, Tex. Bus. & Comm. Code, § 17.01, *et seq.*

“**Effective Date**” has the meaning set forth in Paragraph 14 of this Settlement Agreement.

“**Emerus HP**” means Emerus Hospital Partners.

“**Emerus Holdings**” means Emerus Holdings, Inc.

“**Final**” has the meaning set forth in Paragraph 20 of this Settlement Agreement.

“**Final Approval Hearing**” has the meaning set forth in Paragraph 5(e) of this Settlement Agreement.

“**Final Approval Hearing Date**” has the meaning set forth in Paragraph 5(e) of this Settlement Agreement.

“**Forgiveness Eligible Class Members**” has the meaning set forth in Paragraph 3(a) of this Settlement Agreement.

“**Forgiveness Eligible Class Member List**” has the meaning set forth in Paragraph 3(e) of this Settlement Agreement.

“**Liaison Counsel**” has the meaning set forth in Paragraph 10(a) of the Settlement Agreement.

“**LFT (includes Amylase)**” means a diagnostic laboratory test panel consisting of the following eight assays: serum albumin (CPT no. 82040); bilirubin (total) (CPT no. 82247); alkaline phosphatase (CPT no. 84075); protein (serum)(CPT no. 84155); transferase (AST) (SGOT) (CPT no. 84450); alanine amino (ALT) (SGPT) (CPT no. 84460); amylase (CPT no. 82150); and GGT (CPT no. 82977).

“**Notice**” means a Court-approved long-form notice to the Class pursuant to Tex. R. Civ. P. 42(c)(2)(A) and (c)(3), in substantially the form attached hereto as Exhibit B.

“**Opt Out**” means a Class Member’s exercise, as provided in Paragraph 8 of this Settlement Agreement, of her or his right under Tex. R. Civ. P. 42(c)(2)(A)(v) to be excluded from the Class.

“**Panel Billed Amount Difference**” has the meaning set forth in Paragraph 2(b)(3)(B) of this Settlement Agreement.

“**Panel Cost Difference**” has the meaning set forth in Paragraph 2(b)(1) of this Settlement Agreement.

“**Panel Reimbursement Difference**” has the meaning set forth in Paragraph 2(b)(2)(B) of this Settlement Agreement.

“**Parties**” has the meaning set forth in the introductory Paragraph of this Settlement Agreement.

“**Party**” has the meaning set forth in the introductory Paragraph of this Settlement Agreement.

“**Patient Responsibility**” means the total amount that BNH bills or billed to a patient for the cost of that patient’s treatment at BNH, net of any payments by a Third-Party Payor or any other adjustments that BNH makes or made to the amount due.

“**Patient Responsibility Percentage**” has the meaning set forth in Paragraph 2(b)(2)(C) of this Settlement Agreement.

“**Plaintiff**” has the meaning set forth in the introductory Paragraph to this Settlement Agreement.

“**Plaintiff’s Counsel**” has the meaning as defined in Paragraph 10(a) of this Settlement Agreement.

“**Plaintiff’s Counsel Fees and Expenses**” has the meaning set forth in Paragraph 10(d) of this Settlement Agreement.

“**Plaintiff’s Released Parties**” has the meaning as defined in Paragraph 25 of this Settlement Agreement.

“**Petition**” has the meaning set forth in the fourth Paragraph of the Recitals to this Settlement Agreement.

“**Pricing Transparency**” means the pricing transparency disclosure by BNH that may be found at <https://www.baptistneighborhoodhospital.com/pricing-transparency/>.

“**Preliminary Approval Order**” means an order to be entered by the Court in substantially the form attached hereto as Exhibit A for purposes of addressing the items set forth in Paragraph 5 of the Settlement Agreement.

“**Proposed Final Order and Judgment**” means the proposed order in the form attached hereto as Exhibit F.



“**Qualified Protective Order**” means the proposed order in the form attached hereto as Exhibit E.

“**Refund**” has the meaning set forth in Paragraph 2 of this Settlement Agreement.

“**Refund Eligible Class Members.**” has the meaning set forth in Paragraph 2 of this Settlement Agreement.

“**Refund Eligible Class Member List.**” has the meaning set forth in Paragraph 2(d) of this Settlement Agreement.

“**Refund Issue Date**” has the meaning set forth in Paragraph 16 of this Settlement Agreement.

“**Refund Payment Class Members**” has the meaning set forth in Paragraph 7(d) of this Settlement Agreement.

“**Released Parties**” means each and any of Plaintiff’s Released Parties and Defendants’ Released Parties.

“**Response Deadline**” has the meaning set forth in Paragraph 5(e) of this Settlement Agreement.

“**Settled Class Claims**” has the meaning set forth in Paragraph 23(b) of this Settlement Agreement.

“**Settled Defendant Claims**” has the meaning set forth in Paragraph 25 of this Settlement Agreement.

“**Settlement**” means the mutually agreed upon undertakings, terms, and conditions contemplated by this Settlement Agreement.

“**Settlement Administrator**” means RG/2 Claims Administration LLC, P.O. Box 59479 Philadelphia, PA 19102-9479.

“**Settlement Administration Costs**” means all costs, fees, and expenses, other than fees or expenses of counsel for any Party to this Action or their insurers, associated with or arising out of the administration of the Settlement including, without limitation: (1) the delivery of the Notice to the Class; (2) the processing of Claim Forms submitted by Class Members; (3) the calculation and payment of Settlement Distributions to Class Members; (4) establishment, maintenance, and administration of any accounts established for purposes of receiving and making payments specified in this Settlement Agreement; (5) reasonable costs, fees, and expenses of the Settlement Administrator; (6) sending out deficiency letters to Class Members who have timely submitted a Claim Submission Form improperly; (7) establishing and maintaining a settlement website; and (8) any other duties described under the Settlement Agreement or required by the Court. These notice and administration costs include the reasonable costs and expenses associated with identifying Class Members and effecting delivery of notice to the Class, and the administration of the Settlement, including, without limitation, the actual costs of delivering the notice,

communication with Class Members, administrative expenses incurred, and fees charged by the Settlement Administrator in connection with delivering the Notice and Claims Forms, processing the Class Members' allocations and distributing the Settlement proceeds to Class Members that have filed timely Claim Forms.

**"Settlement Agreement"** has the meaning set forth in the introductory Paragraph above, and includes this document and all attached Exhibits.

**"Settlement Consideration"** means Defendants' cash and non-cash obligations and performances pursuant to Paragraphs 2-4 of this Settlement Agreement.

**"Summary Notice"** means a Court-approved short-form postcard notice to the Class, in substantially the form attached hereto as Exhibit C, which will notify Class Members about the Settlement and provide instructions on how to access or obtain the Notice.

**"Termination Notice"** has the meaning set forth in Paragraph 21(a) of this Settlement Agreement.

**"Third Party Payor"** means any health insurer, managed care organization, third party administrator, governmental program, or any other entity that contracts with BNH to establish the requirements applicable to reimbursement and payment to BNH for treatment of patients who are covered by or members of any health insurance policy, plan, or coverage arrangement provided by such entity.

**"Total Refund Payment Amount"** has the meaning set forth in Paragraph 7(d) of this Settlement Agreement.

**"Unpaid Panel Balance"** as defined in Paragraph 3(a) of this Settlement Agreement, means the unpaid amount of Panel Cost Difference that is forgiven from a Class Member's Patient Responsibility.

**Appendix 2**  
**Schedule of Exhibits to Settlement Agreement**

**Exhibit A:** Form of Preliminary Approval Order

**Exhibit B:** Form of Notice

**Exhibit C:** Form of Summary Notice

**Exhibit D:** Form of Claim Form

**Exhibit E:** Form of Qualified Protective Order

**Exhibit F:** Form of Proposed Final Order and Judgment

**Exhibit A**  
**Form of Preliminary Approval Order**

**CASE NO. 2020-CI-18623**

KENNETH KESLAR, II, individually	§	IN THE DISTRICT COURT
and on behalf of all others similarly	§	
situated,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	BEXAR COUNTY, TEXAS
EMERUS / BHS SA THOUSAND	§	
OAKS, LLC d/b/a BAPTIST	§	
EMERGENCY HOSPITAL -	§	
SHAVANO PARK, EMERUS	§	
HOSPITAL PARTNERS, LLC, and	§	
EMERUS HOLDINGS, INC.,	§	
	§	
	§	
Defendants.	§	73RD JUDICIAL DISTRICT

**ORDER PRELIMINARILY CERTIFYING CLASS FOR SETTLEMENT PURPOSES,  
GRANTING PRELIMINARY APPROVAL OF SETTLEMENT,  
AND APPROVING CLASS NOTICE**

WHEREAS, a class action is pending before the Court captioned *Keslar v. Emerus/BHS Thousand Oaks, LLC d/b/a Baptist Emergency Hospital – Shavano Park, et al.* (the “Action”);

WHEREAS, the Parties have applied for an order preliminarily approving the proposed Settlement in accordance with the Stipulation of Settlement dated January 27, 2023 (“Settlement Agreement”), which together with the exhibits annexed thereto, sets forth the terms and conditions for a proposed settlement of the Action (the “Settlement”), and for dismissal of the case with prejudice upon the terms and conditions set forth therein;

WHEREAS, the Court having: (1) read and considered the Plaintiffs’ Unopposed Motion for Preliminary Approval of Settlement together with the accompanying Memorandum of Law

**Exhibit A**  
**Form of Preliminary Approval Order**

and all exhibits; (2) read and considered the Settlement Agreement, as well as all of the exhibits attached thereto; and (3) heard and considered arguments by counsel for the Parties in favor of preliminary approval of the Settlement and preliminary certification of the Class (defined below) for purposes of the Settlement;

WHEREAS, the Court finds, upon a preliminary evaluation, that the proposed Settlement falls within the range of possible approval criteria, as it provides a beneficial result for the Class and appears to be the product of good-faith, informed, and non-collusive negotiations between experienced and able counsel for the Parties; and

WHEREAS, the Court also finds, upon a preliminary evaluation, that the Class should be apprised of the Settlement through the proposed form of Notice and Summary Notice, allowed to (i) file objections, if any, thereto, (ii) opt-out of the Class if any member so desires, and (iii) appear at the Final Approval Hearing (defined below).

NOW, THEREFORE, UPON GOOD CAUSE SHOWN, IT IS HEREBY ORDERED as follows:

All capitalized terms used in this Order that are not otherwise defined herein have the meanings defined in the Settlement Agreement.

1. Pursuant to Rule 42(b)(1) of the Texas Rules of Civil Procedure, the Court certifies, for the purposes of this Settlement only, the following class comprising of:

All patients treated at a facility operated by Baptist Neighborhood Hospital (formerly Baptist Emergency Hospital) between September 25, 2016 and January 27, 2023 for whom one or more of the Current Panels was ordered and performed, and the patient was billed some Patient Responsibility for, at least one of the Current Panels (the “**Class**”).

The following are excluded from the Class:

- (i) Defendants and their respective parents, subsidiaries, representatives, officers, directors, partners, and co-ventures;

**Exhibit A**  
**Form of Preliminary Approval Order**

(ii) Persons who have validly exercised their right to Opt Out pursuant to Paragraph 8 of the Settlement Agreement.

2. The Court preliminarily approves Plaintiff Kenneth Keslar II as the representative for the Class (“Class Representative”).

3. Having considered the factors described in Rule 42(g)(1) of the Texas Rules of Civil Procedure, the Court hereby preliminarily appoints Wolf Popper LLP as “Class Counsel” and Hilder & Associates P.C. as “Liaison Counsel” for the Class (together referred to as “Plaintiff’s Counsel”).

4. With respect to the Class, this Court finds and concludes that: (i) the members of the Class contemplated in the Action are so numerous that joinder of all members is impracticable; (ii) questions of law and fact are common to the Class; (iii) the claims and defenses of the proposed Class Representative, Mr. Keslar, are typical of the claims and defenses of the Class; and (iv) the Class Representative will fairly and adequately represent the interests of the Class.

5. The Court finds that that the prerequisites for maintaining a class action under Rule 42(b)(3) of the Texas Rules of Civil Procedure have been preliminarily satisfied for the Class.

6. The Court finds that the Settlement appears to be within a range of fairness, reasonableness, and adequacy that is sufficient to warrant (i) sending out notice thereof to the Class Members as set forth below; and (ii) a full hearing on the Settlement. Accordingly, the Court hereby preliminarily approves the Settlement subject to further consideration at the Final Approval Hearing described below.

7. This Court will hold a settlement hearing (“Final Approval Hearing”) at \_\_\_\_\_:\_\_\_\_\_.m., on \_\_\_\_\_, 2023, at the District Court, Bexar Country, 73rd Judicial District, Bexar County Courthouse, 100 Dolorosa, San Antonio, Texas 78205, to determine whether (i) the proposed Settlement is fair, reasonable and adequate to the Class and should be approved by the Court; (ii) Plaintiff’s Counsel Fees and Expenses and the payment of a Class Representative Award, as contemplated in the Settlement Agreement, should be approved; and (iii) a Final Order

**Exhibit A**  
**Form of Preliminary Approval Order**

and Judgment should be entered into. The Final Approval Hearing may be adjourned, from time to time, by order of this Court without further notice to the Class.

8. The Court approves, as to form and content, the Notice of Proposed Class Action Settlement (“Notice”), annexed as Exhibit B to the Settlement Agreement, and finds that the mailing and distribution of the Summary Notice, substantially in the form attached as Exhibit C to the Settlement Agreement, which will direct Class Members to a settlement website which will have the Notice and other important documents available for view by Class Members, meets the requirements of Rule 42 of the Texas Rules of Civil Procedure and due process, and is the best notice practicable under the circumstances and shall constitute due and sufficient notice to all Persons entitled thereto.

9. Defendants are authorized to retain RG/2 Claims Administration LLC (“Settlement Administrator”), to supervise and administer the notice procedure in connection with the proposed Settlement as well as the processing of Class Member claims for payment as more fully set forth below:

- a. Within ten (10) business days after the Court enters the Preliminary Approval Order, Defendants will provide a notice database in an electronically searchable and readable format to the Settlement Administrator, which includes the names and last known mailing addresses, and, if known or reasonably practicable to obtain, telephone numbers and email addresses, for all Class Members;
- b. Within ten (10) business days after the Settlement Administrator’s receipt of the Notice database from Defendants, the Settlement Administrator will, by first class mail, send the Summary Notice to each Class Member;
- c. Before Summary Notice is mailed to the Class Members, the Settlement Administrator shall create and maintain a settlement website which will contain, at a minimum, the Petition, the Settlement Agreement, a complete copy of the Notice, this Preliminary Approval Order, and the Claim Form. The

**Exhibit A**  
**Form of Preliminary Approval Order**

settlement website shall remain active until ninety (90) days after the Claim Submission Deadline;

- d. No later than ten (10) days prior to the Final Approval Hearing, Plaintiff's Counsel shall file with the Court declarations prepared by the Settlement Administrator confirming that Notice has been provided to the Class Members in accordance with the Settlement Agreement and that the Settlement Administrator has complied with the provisions of this Preliminary Approval Order.

10. Defendants shall pay all reasonable costs and expenses in providing notice to the Class.

11. All Class Members shall be bound by all determinations and judgments in this Action concerning the Settlement, whether favorable or not to the Class.

12. Any Class Member can, but does not have to, enter an appearance in this Action, at their own expense, individually, or through counsel of their choice. If they do not enter an appearance, they will be represented by Plaintiff's Counsel.

13. All proceedings in this Action, other than those necessary to effectuate the Settlement, shall hereby be stayed until the Effective Date of the Settlement.

14. The Court will consider any objections to the Settlement including the Plaintiff's Counsel Fees and Expenses and the Class Representative Service Award only if such objections are in writing and delivered to the Court, on or before                     , 2023. The objections must contain the following information: the name and case number of this lawsuit (*Kenneth Keslar II v. Emerus / BHS Thousand Oaks LLC et. al.*, Case No. 2020-CI-18623); full name of the Class Member objecting, and that Class Member's mailing address, and email address or telephone number; what specifically the Class Member does not like about the Settlement or any part of it and reasons why; and a copy of the Class Member's bill that demonstrates that he/she is a member



**Exhibit A**  
**Form of Preliminary Approval Order**

of the Class. Copies of any such objections and accompanying documentation must also be mailed by first-class mail, no later than           , 2023, to:

**Class Counsel:** Chet Waldman, Esq., Wolf Popper LLP, 845 Third Avenue, New York, NY 10022

**Defendants' Counsel:** Kevin McGinty, Esq., Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., One Financial Center, Boston, MA 02111

15. Any Class Member who does not make his/her objection in the manner provided shall be deemed to have waived such objection and shall forever be barred from making any objection to the fairness or adequacy of the proposed Settlement as incorporated in the Settlement Agreement unless otherwise ordered by the Court.

16. No later than ten (10) business days before the Final Approval Hearing, Plaintiff will file with the Court an assented-to Final Approval Motion in Support of the Settlement, Plaintiff's Counsel Fees and Expenses, and Class Representative Award; and a reply brief responding to any objections or Opt Outs, if any.

17. Neither the Settlement Agreement, nor any of its terms or provisions, nor any of the negotiations or proceedings connected with it, shall be construed as an admission or concession by Defendants of the truth of any of the allegations in the Action, or of any liability, fault or wrongdoing of any kind, in this case or in any litigation in any jurisdiction, or against Plaintiff or any Class Member that their claims are without merit.

18. The Court retains exclusive jurisdiction over this Action, the Plaintiff, and Defendants to consider all further matters arising out of or connected with the proposed Settlement. The Court may approve the Settlement, with modifications, as may be agreed to by the Parties, if appropriate, without further notice to the Class.

19. The Court reserves the authority to enter its Final Order and Judgment approving the Settlement and dismiss the Action with prejudice regardless of whether it has awarded attorneys' fees and expenses.

**Exhibit A**  
**Form of Preliminary Approval Order**

20. If the Settlement provided for in the Settlement Agreement is not approved by the Court for any reason or if the Final Order and Judgment is not entered for any reason, the Settlement Agreement shall be null and void and of no force and effect. In such an event, the Settlement Agreement shall not be deemed to prejudice in any way the respective positions of the Parties with respect to the Action, and neither the existence of the Settlement Agreement nor its contents shall be admissible in evidence or shall be referred to for any purpose in the Action or in any other litigation proceeding.

IT IS SO ORDERED

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 2023.

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**Exhibit B  
Form of Notice**

**CASE NO. 2020-CI-18623**

KENNETH KESLAR II, individually and on behalf of all others similarly situated,  
Plaintiff,

v.

EMERUS / BHS SA THOUSAND OAKS, LLC d/b/a BAPTIST EMERGENCY HOSPITAL - SHAVANO PARK, EMERUS HOSPITAL PARTNERS, LLC, and EMERUS HOLDINGS INC.,  
Defendants.

IN THE DISTRICT COURT

73<sup>rd</sup> JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

**NOTICE OF PROPOSED CLASS ACTION SETTLEMENT<sup>1</sup>**

**(This is a court-ordered notice. You are not being sued. This is not a solicitation from a lawyer.)**

**YOU MAY BE ELIGIBLE TO HAVE YOUR LABORATORY PANEL BILL REDUCED, REFUNDED, OR BALANCE FORGIVEN IN A CLASS ACTION SETTLEMENT.**

This Notice tells you about a proposed “Settlement” in a case against Baptist Neighborhood Hospital (“BNH”) (previously known as Baptist Emergency Hospital) and the related Emerus entities listed below.

The Settlement has not yet been approved by the Court. If it is approved, you may qualify:

- to have money refunded to you, or
- the amount you owe BNH forgiven or written off, in whole or in part.

To get a refund, you must send in a Claim Form by **[claim submission deadline]**. You do not have to submit a claim form or do anything else to get a debt relating to the laboratory panels forgiven.

Please read further for more information on the Settlement and how to get benefits under the Settlement:

**Your legal rights will be affected by the Settlement whether you file a claim or do nothing. Please read this Notice carefully for more information about your options and rights.**

**YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT**

<b>YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT</b>		
<b>YOU MAY</b>		<b>DUE DATE</b>

<sup>1</sup> This Notice incorporates, by reference, the definitions in the Stipulation of Settlement dated January 27, 2023 (the “Settlement Agreement”), **available on this Website: [www. .com](http://www. .com)**. All capitalized terms used, but not defined herein, shall have the same meaning as in the Settlement Agreement.

**Exhibit B  
Form of Notice**

<b>SUBMIT A CLAIM FORM</b>	You must submit a Claim Form, either by mail or online, pursuant to the instructions below, to be considered for a refund under the Settlement. If you submit a Claim Form, the Settlement Administrator – RG/2 Claims Administration LLC - will determine if you are entitled to a Refund under the Settlement.	<b>BY: [redacted], 2023</b>
<b>OBJECT TO THE SETTLEMENT</b>	If you do not like the proposed Settlement or anything related to it discussed below, you may write to the Court and explain why. Even if you object to the Settlement, you can still submit a Claim Form as long as you do not opt out.	<b>BY: [redacted], 2023</b>
<b>OPT OUT OF THE SETTLEMENT</b>	If you exclude yourself ( <i>i.e.</i> “opt out”) from this Settlement, you will not get any of the benefits of the Settlement ( <i>i.e.</i> , no refund or forgiveness of your balance). But you will retain the right to sue Defendants on your own, at your own expense, relating to their billing practices during the Class Period.	<b>BY: [redacted], 2023</b>
<b>DO NOTHING</b>	If you do nothing, you will not get any refund from the Settlement, BUT you will be considered for forgiveness of your balance, if eligible. Should you do nothing, you will also give up all your rights to sue Defendants on your own about the legal issues in this case.	<b>N/A</b>

If you have any questions about this Notice or the Settlement, you may:

- Call RG/2 Claims Administration at 1-866-742-4955 or call the lawyers who brought this lawsuit on behalf of you and others like you (called "Class Counsel") at [number]; or
- Email the RG/2 Claims Administration at info@rg2claims.com or the Class Counsel at [email].

**1. What are laboratory panels?**

A laboratory panel is a group of blood tests that are requested with a single testing order and completed with a single patient specimen, for example, a basic metabolic panel or a liver function panel. In other words, it is a test wherein a medical professional takes blood from you and that blood is analyzed using different tests for different things like blood sugar, potassium, sodium and chloride levels, among others. Often, laboratory panels can be billed using a single code, known as the Current Procedure Terminology (“CPT”) code. When billed using a single CPT code, a laboratory panel may be less expensive than if each test in the panel were billed separately.

**2. What are the BMP (includes CK) and LFT (includes Amylase) laboratory panels?**

The BMP (includes CK) panel is a basic metabolic panel that comprises 8 separate tests on a single blood specimen offered at the BNH facilities that does not have a single billing code, meaning that each of the 8 tests are billed separately. It is slightly different from, and can be more expensive than, a basic metabolic panel that has a single

## Exhibit B Form of Notice

billing code for the entire group of tests.<sup>2</sup>

The LFT (includes Amylase) panel is a liver function panel offered at the BNH facilities that is comprised of 8 separate tests on a single blood specimen, each of which is billed separately. It is slightly different from, and can be more expensive than, a liver function panel that has a single billing code for the entire group of tests.<sup>3</sup>

### 3. What is this lawsuit about?

This class action lawsuit alleges that Defendants deceptively unbundled laboratory panels by charging for them as separate tests rather than as a single panel of tests.

This lawsuit was brought by Kenneth Keslar II (the “**Plaintiff**”) against Emerus / BHS SA Thousand Oaks LLC d/b/a Baptist Emergency Hospital – Shavano Park, Emerus Hospital Partners LLC, and Emerus Holdings, Inc. (the “**Defendants**”) for alleged violations of the Texas Deceptive Trade Practices Act (“DTPA”) (§§17.46(b)(24) and 17.50(a)(3)), and the common law. Plaintiff alleges that Defendants provided insufficient disclosures regarding the cost of two in-house laboratory panels, namely, the BMP (includes CK) and LFT (includes Amylase) (“**Current Panels**”) and the manner in which they billed for these panels, which led to Plaintiff and other patients paying more for laboratory panels than was standard.

Plaintiff alleges that Defendants failed to disclose to patients that they were using a type of metabolic or liver function panel that could not be billed as a ‘panel’ using a single billing code, making it more expensive than a similar panel that could be billed using a single CPT code.

Plaintiff filed his class action petition (“**Petition**”) on September 25, 2020 and subsequently filed an amended petition (“**Amended Petition**”) on December 30, 2020.

The name of the case is *Keslar v. Emerus/BHS SA Thousand Oaks, LLC*, Cause No. 2020-CI-18623 (the “**Action**”) and the court in charge of the case is the Texas State Court, Bexar County, 73rd Judicial District. The Action is overseen by Honorable Judge David A. Canales.

Defendants have expressly denied and continue to deny all allegations of wrongdoing, negligence, fault, or liability, and assert that their actions have been lawful and proper in all respects and in compliance with all applicable legal duties.

### 4. Why is there a Settlement?

The Court has not decided in favor of either Plaintiff or Defendants. Both sides believe they would win if there were a trial in this case, but it might take a long time to resolve the case. In order to avoid the risks and cost of lengthy and uncertain litigation, trial, and appeals, the parties for both sides have negotiated a Settlement that they believe is in their best interests. Accordingly, on January 27, 2023, the Plaintiff and Defendants entered into a Stipulation of Settlement (“**Settlement Agreement**”), which sets forth the terms and conditions of the Settlement. The Settlement Agreement can be viewed, and a copy may be downloaded, on the Settlement Website: [[website address](#)].

### 5. How do I know if I am a Class Member and part of the Settlement?

You are a Class Member and part of the Settlement if:

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<sup>2</sup> The BMP (includes CK) panel comprises the following group of tests: (1) carbon dioxide (bicarbonate); (2) chloride; (3) creatinine; (4) glucose; (5) potassium; (6) sodium; (7) urea nitrogen (BUN); and (8) creatine kinase (ck). The standard basic metabolic panel that is billed at a single CPT code has 7 out of 8 of the same tests as the BMP (includes CK) panel, but as for the 8<sup>th</sup> test it does not contain the creatine kinase test, but rather includes a calcium test.

<sup>3</sup> The LFT (includes Amylase) panel comprises the following group of tests: (1) albumin; (2) bilirubin, total; (3) phosphatase, alkaline; (4) protein, total; (5) transferase, alanine amino (ALT) (SGPT); (6) transferase, aspartate amino (AST) (SGOT); (7) glutamyltransferase, gamma (GGT); and (8) amylase. The standard liver function panel with a single CPT code contains the same group of tests, with the exception that it does not include the GGT and Amylase tests, but includes a bilirubin (direct) test.

**Exhibit B**  
**Form of Notice**

- (i) you were treated at any Baptist Neighborhood Hospital (formerly Baptist Emergency Hospital) facility between September 25, 2016 and January 27, 2023 (see Q. 6 for the entire list of BNH facilities), **and**
- (ii) one or more of the Current Panels was ordered and performed for you, **and**
- (iii) you were subsequently billed for, at least, one of the Current Panels **and**
- (iv) you do not fall within the categories listed at Q. 8.

**You would have received a Summary Notice in the mail if Defendants’ records indicate that you are a member of the Class.**

If you are still not sure whether you are a part of the Settlement, you can ask for free help. You may contact the Settlement Administrator or Class Counsel at the information provided on p. 2.

**6. Which are the BNH facilities covered under this lawsuit?**

All BNH facilities in Texas are covered under this lawsuit. For the sake of clarity, they are listed below:

- (1) Baptist Neighborhood Hospital Hausman, 8230 N 1604 W., San Antonio, TX 78249;
- (2) Baptist Neighborhood Hospital Kelly, 806 Cupples Rd, San Antonio, TX 78237;
- (3) Baptist Neighborhood Hospital Overlook, 25615 US-281, San Antonio, TX 78258;
- (4) Baptist Neighborhood Hospital Schertz, 16977 I-35 N., Schertz, TX 78154;
- (5) Baptist Neighborhood Hospital Shavano Park, 4103 North Loop 1604 W., San Antonio, TX 78249;
- (6) Baptist Neighborhood Hospital Thousand Oaks, 16088 San Pedro Ave., San Antonio, TX 78232;
- (7) Baptist Neighborhood Hospital Westover Hills, 10811 Town Center Dr., San Antonio, TX 78251; and
- (8) Baptist Neighborhood Hospital Zarzamora, 7719 IH 35 S., San Antonio, TX 78224.

**Note: Baptist Neighborhood Hospital was previously known as Baptist Emergency Hospital. So, if you went to a Baptist Emergency Hospital in any of the above locations, and you satisfy the other conditions at Q.5, you are a Class Member.**

**7. I believe I am part of the Class, but have not received a Summary Notice. What should I do?**

The Summary Notice is only mailed to those who are members of the Class, per Defendants’ records. If you have not received a Summary Notice, that means either it has been lost in the mail (you can contact your Post Office) or that you are not part of the Class per Defendants’ records and are therefore, not part of this Settlement. However, if you believe you are a Class Member based on Q. 3 of this Notice, you may contact the Settlement Administrator or Class Counsel at the information provided on page 2 of this Notice to inquire further.

**8. Are there any exceptions to being included as a Class Member?**

Yes. Defendants’ parents, subsidiaries, representatives, officers, directors, partners, and co-ventures are **not** Class Members and hence **not part** of the Settlement. Also, anyone who requests to be excluded (*i.e.*, “opts out”) from the Class in accordance with the instructions provided in this Notice and set forth by the Court (*see* Q. 16 below), will **not** be a Class Member and hence **not part** of the Settlement.

**9. What does the Settlement provide?**

**Refunds:** For any Current Panel ordered and performed at a BNH Facility, if you paid more than the reimbursement amount that your insurance payor would have approved (or, for cash-paying patients, the amount BNH would have billed) for the associated CPT Code Panel, Defendants will refund that portion of the payment that exceeded the

**Exhibit B  
Form of Notice**

approved reimbursement (or billed amount), including any payments you made to a third party, such as a collection agency.

**Write-Offs or Forgiveness:** For any Current Panel ordered and performed at a BNH Facility, if you were billed more than the reimbursement amount that your insurance payor would have approved (or, for cash-paying patients, the amount BNH would have billed) for the associated CPT Code Panel and you have not paid any portion of that, Defendants will forgive the portion of payment you owed that exceeded the approved reimbursement (or billed amount).

**Changing the practice going forward:**

- (i) **Including CPT Code Panels as a laboratory test option:** Defendants have agreed to start offering the associated CPT Code Panels, *i.e.*, CPT 80047, CPT 80048 and CPT 80076 Panels, as laboratory testing options in-house at all their facilities' onsite point-of-care laboratories. The CPT Code Panels will be included as an option in all of BNH Facilities' in-house laboratory test menus so that they are available to the clinicians to order.
- (ii) **Disclosures in intake forms:** Defendants have agreed to include a disclosure in their admission consent forms, which will inform patients that they have three in-house options for metabolic or liver/pancreatic panels – (1) the Current Panel that may potentially be more expensive; (2) the associated CPT Code Panel, which, though slightly different, may be less expensive or (3) a combined metabolic and liver panel.  
The disclosure encourages patients to discuss these options with their clinicians to determine which option is best for them and check with their insurance provider to discuss patient payment obligations for each of these laboratory panels.
- (iii) **Disclosures in pricing transparency file on website:** Defendants have agreed to disclose the chargemaster price of the Current Panels, in each of the BNH Facilities, down to the exact dollar figure, in the “Standard Charge Description File” available for download in the Pricing Transparency section of BNH’s website at <https://www.baptistneighborhoodhospital.com/pricing-transparency/>.

**10. I am an insured patient. How will my refund, if any, be calculated?**

Refunds for insured patients are calculated based on “**Panel Cost Difference**,” which is the difference between (i) the portion of the Patient Responsibility amount that is attributable to the cost of the respective Current Panels (the “**Current Panel Cost**”); and (ii) the portion of the Patient Responsibility amount that would have been attributable to the cost of the associated CPT Code Panel (CPT No. 80048 or CPT No. 80076) (the “**But-For Panel Cost**”).<sup>4</sup>

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<sup>4</sup> More specifically, refunds for insured patients are calculated by following the four steps below:

- (A) The applicable Third Party Payor’s contract rates and fee schedules in effect as on the Class Member’s Date of Service is used to determine (x) the total reimbursement amount payable to BNH that the payor approved for the Current Panels (the “**Approved Panel Reimbursement**”) ordered and performed for the Class Member; and (y) the total reimbursement amount payable to BNH that the payor would have approved for the associated CPT Code Panel (the “**But-For Panel Reimbursement**”);
- (B) The But-For Panel Reimbursement is subtracted from the Approved Panel Reimbursement to derive the “Panel Reimbursement Difference”;
- (C) The Patient Responsibility amount that BNH billed to the Class Member is divided by the total reimbursement amount payable to BNH for the Class Member’s visit that was approved by the Third Party Payor to derive the “Patient Responsibility Percentage”;
- (D) The Panel Reimbursement Difference is multiplied by the Patient Responsibility Percentage to determine the Panel Cost Difference.

The table below illustrates how refunds are calculated using the above four steps for a BMP (includes CK) panel performed and billed to an insured patient :

**Exhibit B  
Form of Notice**

If the Panel Cost Difference for a Class Member is less than or equal to the amount owed, the Class Member will not be eligible for a Refund, but will be eligible to get the portion of the Panel Cost Difference forgiven by BNH.

**Note:** any Class Member (i) whose insurance plan reimburses BNH at a case rate or per diem rate, without any separate additional reimbursement for clinical laboratory testing, or (ii) who has a fee-for-service Medicare or Medicaid insurance plan with fixed copay plans will be ineligible for Refunds, but will still remain a Class Member for all other purposes.

The Summary Notice that you received by mail will tell you whether you are eligible for any refund and if so, how much. You may also contact the Settlement Administrator or Class Counsel at the information provided on page 2 of this Notice to inquire further.

**11. I am a cash-paying patient. How will my refund, if any, be calculated?**

Refunds for cash paying patients are calculated based on “**Panel Cost Difference**,” which is the difference between (i) the portion of the Patient Responsibility amount that is attributable to the cost of the respective Current Panels (the “**Current Panel Cost**”); and (ii) the portion of the Patient Responsibility amount that would have been attributable to the cost of the associated CPT Code Panel (CPT No. 80048 or CPT No. 80076) (the “**But-For Panel Cost**”).<sup>5</sup>

<b>Panel Reimbursement Difference Calculation</b>	<b>Amount</b>	<b>Notes</b>
(1) Approved Panel Reimbursement for BMP (includes CK)	\$50	Hypothetical Figure
<b>(2) But-For Panel Reimbursement for CPT no. 80048 Panel</b>	\$10	Hypothetical Figure
(3) Panel Reimbursement Difference	\$40	Equals (1) minus (2)
<b>Patient Responsibility Percentage Calculation</b>		
(4) Total Payor Approved Charges	\$100	Hypothetical Figure
<b>(5) Total Charges Billed to Patient</b>	\$70	Hypothetical Figure
<b>(6) Patient Responsibility Percentage</b>	70%	Equals (5) divided by (4)
<b>Panel Cost Difference</b>	\$28	Equals (3) times (6)

<sup>5</sup> More specifically, Refunds for eligible cash-paying patients are calculated by following the four steps below:

- (A) The Class Member’s billing record and the prices in effect on the Class Member’s Date of Service in the BNH Chargemaster is used to determine (x) the amount that BNH billed for the Current Panels (the “**Actual Panel Billed Amount**”) ordered and performed for the Class Member (before any adjustments); and (y) the amount that BNH would have billed for the associated CPT Code Panel (the “**But-For Panel Billed Amount**”);
- (B) The But-For Panel Billed Amount is subtracted from the Actual Panel Billed Amount to derive the panel billed amount difference (the “**Panel Billed Amount Difference**”);
- (C) The amount that BNH billed to the Class Member is divided by the total amount billed for the Class Member’s visit to derive the Patient Responsibility Percentage;
- (D) The Panel Billed Amount Difference is multiplied by the Patient Responsibility Percentage to determine the Panel Cost Difference.

The table below illustrates how Refunds are calculated using the above four steps for a BMP (includes CK) panel performed and billed to a cash-paying patient:



**Exhibit B**  
**Form of Notice**

If the Panel Cost Difference for a Class Member is less than or equal to the amount owed to BNH, the Class Member will not be eligible for a refund, but may be eligible to get the portion of the Panel Cost Difference forgiven by BNH.

**Note:** Any Class Member who opted to pay for their BNH visit in cash under Defendants’ “prompt-pay” option, which specifies a case rate for treatment that does not vary based on the number or types of clinical laboratory tests that are performed, will be ineligible for refunds, but will still remain a Class Member for all other purposes.

The Summary Notice that you received by mail will tell you whether you are eligible for any refund and if so, how much. You may also contact the Settlement Administrator or Class Counsel at the information provided on page 2 of this Notice to inquire further.

**12. What do I need to do to receive a refund?**

In order to receive a refund, you must be eligible under the terms of the Settlement, and you must submit a valid and timely **Claim Form** to the Settlement Administrator, RG/2 Claims Administration LLC. You may download the Claim Form from the Settlement Website, [website address], or by contacting the Settlement Administrator at the contact information on page 2 of this Notice. Read the instructions carefully, fill out the Claim Form, sign it, and mail it so it is postmarked no later than [redacted], 2023 or submit it online no later than [same date]. Any Class Member who fails to submit a Claim Form by such date shall be forever barred from receiving any refund from Defendants (unless by order of the Court the deadline is extended or such Class Member’s Claim Form is accepted), but otherwise may be eligible for forgiveness of any amount per Q. 13 below and shall be bound by all the terms of the Settlement and the Final Judgment, including the Releases therein, and will be permanently barred and enjoined from asserting any of the Settled Class Claims against any of the Released Defendants’ Parties.

**You cannot submit your Claim Form by telephone, fax, or email.** You do not need to submit any medical records or medical information beyond billing-related information related to your blood tests, which is specified in the Claim Form.

**13. How will the forgiveness/write-off amounts be calculated?**

The forgiveness/write-off amount, if any, is calculated based on the Panel Cost Difference calculated using the formula described at Q. 10 or Q. 11, as the case may be. If the Panel Cost Difference owed to you is less than or equal to the amount you owe BNH, you will be eligible to get that portion of the Panel Cost Difference forgiven by BNH and your outstanding amount will be reduced dollar for dollar by the amount of the Panel Cost Difference.

The Summary Notice that you received by mail will tell you whether you are eligible for any forgiveness/write-off amount and if so, how much. You may also contact the Settlement Administrator or Class Counsel at the information provided on page 2 of this Notice to inquire further.

<b>Panel Reimbursement Difference Calculation</b>	<b>Amount</b>	<b>Notes</b>
(1) Actual Panel Billed Amount for BMP (includes CK)	\$50	-Hypothetical Figure
<b>(2) But-For Panel Billed Amount for CPT 80048 Panel</b>	\$10	-Hypothetical Figure
(3) Panel Billed Amount Difference	\$40	Equals (1) minus (2)
<b>Patient Responsibility Percentage Calculation</b>		
(4) Total Billed Amount by BNH	\$100	-Hypothetical Figure
<b>(5) Total Patient Responsibility after adjustments, if any, by BNH</b>	\$35	-Hypothetical Figure
<b>(6) Patient Responsibility Percentage</b>	35%	Equals (5) divided by (4)
<b>Panel Cost Difference</b>	\$14	Equals (3) times (6)

**Exhibit B**  
**Form of Notice**

**14. When would I get my payment?**

The Court will hold a hearing on [REDACTED], 2023, to decide whether to approve the Settlement. The Court may change the date and time of the Settlement Hearing without notice or hold the Settlement Hearing by telephonic or video conference. Any change to the Settlement Hearing will be posted on the Settlement Website. If the Settlement is approved, the Settlement Administrator will complete the claims review process and then make the refunds. Defendants will also simultaneously adjust patient balances to reflect the forgiveness/write-off amounts. This is necessarily a long process.

**15. What am I giving up as a Class Member?**

You will be giving up your right to bring your own, individual lawsuit against Defendants challenging (i) the billing of the Current Panels during the period between September 25, 2016 and January 27, 2023 that is the basis of the litigation; and (ii) pricing transparency and disclosure or non-disclosure concerning billing for the Current Panels. These are called the “Settled Class Claims.” **Any claims you may have related to your actual medical treatment will not be released.**

If you want to preserve your right to bring an individual lawsuit against Defendants relating to the Settled Class Claims, you must “opt out” of the Settlement.

**16. What if I do not want to be part of the Settlement?**

If you do not want to be part of the Settlement, you can “opt out.” If you opt out, you will not get a write-off or refund, but you will preserve your right to sue Defendants on your own. If a substantial number of Class Members opt out, the Defendants have the right to terminate the Settlement.

To opt out, you must mail your request for exclusion to the Settlement Administrator so that it is received no later than [REDACTED], 2023 at the following address:

RG/2 Claims Administration LLC  
P.O. Box 59479  
Philadelphia, PA 19102-9479.

You bear the risk of delivery of the request. Your request must clearly state the full name, address, and telephone number of the Class Member seeking exclusion, that the Class Member requests to be excluded from the Class, and must be signed by the Class Member. All persons requesting exclusion must also state: the name of the BNH Facility they visited, the date of service(s), the date of the bill(s), the bill amount(s), and which Current Panel(s) was/were performed. Requests for exclusion must comply with these requirements in order to be valid and effective. If you opt out, you **cannot** object to the proposed Settlement, because it does not affect you.

Copies of any such requests for exclusions must also be mailed by first-class mail, no later than [REDACTED], 2023, to:

Chet Waldman, Esq., Wolf Popper LLP, 845 Third Avenue, New York, NY 10022 (Class Counsel)

Kevin McGinty, Esq., Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Financial Center, Boston, MA 02111 (Defendants’ Counsel)

**17. Do I have other options if I do not like the Settlement?**

If you do not like the Settlement or some part of it like the fee application by Plaintiff’s attorneys or the Class Representative Service Award, and you do not opt out, you can tell the Court by submitting a written objection. If you want to object to the Settlement, you must mail a letter containing the following information: the name and case number of this lawsuit (*Kenneth Keslar II v. Emerus / BHS Thousand Oaks LLC et. al.*, Case No. 2020-CI-18623); your full name, mailing address, and email address or telephone number; what specifically you do not like about the

**Exhibit B  
Form of Notice**

Settlement or any part of it and your reasons why. You must also provide a copy of your BNH bill for any Current Panel performed on you during the Class Period or any other document(s) that demonstrates you are a member of the Class. Your objection, including the document(s) showing you are a member of the Class, must be mailed, postmarked no later than [redacted], 2023, to the Clerk of the Court, 73rd Civil District Court, Bexar County Courthouse, 100 Dolorosa, 4th Floor, San Antonio, TX 78205.

Copies of any such objections and accompanying documentation must also be mailed by first-class mail, no later than [redacted], 2023, to:

Chet Waldman, Esq., Wolf Popper LLP, 845 Third Avenue, New York, NY 10022 (Class Counsel)

Kevin McGinty, Esq., Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., One Financial Center, Boston, MA 02111 (Defendants' Counsel)

**18. What is the difference between opting out of the Settlement and objecting?**

Opting out means getting out of the Settlement altogether: you do not receive any benefits, but you are not bound by the terms of the Settlement. Objecting means remaining part of the Settlement, but complaining about some aspect of the Settlement you do not like. You can still receive benefits under the Settlement if you object, but if you want a refund, you must submit a Claim Form. You will also be bound by the Settlement if it is approved by the Court and you will not be able to sue the Defendants relating to any of the Settled Class Claims.

**19. Do I have a lawyer in this case?**

Yes, Plaintiff's attorneys (*i.e.*, Plaintiff's Counsel) represent the Plaintiff and the entire Class. You do not have to pay for these lawyers. The Court will decide how much Plaintiff's Counsel should be paid by Defendants. Defendants have agreed not to oppose Plaintiff's Counsel's application for attorneys' fees and expenses not to exceed \$800,000 to cover their work and expenses incurred in this case, but the Court will determine the amount of reasonable fees and expenses to be awarded. Any award of attorneys' fees and expenses will **not** reduce the amount of refunds or forgiveness amounts available to eligible Class Members. If you would like to be represented by your own lawyer, you may hire one at your own expense.

**20. What does the Plaintiff get from the Settlement?**

Defendants have agreed not to oppose Plaintiff's request to the Court for a \$5,000 Class Representative Service Award to the Plaintiff for his work in prosecuting this lawsuit. Any award to the Plaintiff will **not** reduce the amount of write-offs or refunds available to the Class. Like other members of the Class, the named Plaintiff may receive write-offs and/or refunds if eligible.

**21. When and where will the Court decide whether to approve the Settlement?**

The Court will hold a "Final Approval Hearing" before deciding whether to approve the Settlement. The Final Approval Hearing is scheduled for [redacted], 2023, in Courtroom [xx] of the 73rd Civil District Court, Bexar County Courthouse, 100 Dolorosa, 4th Floor, San Antonio, TX 78205. You do not need to attend the Final Approval hearing, but you are welcome to do so. At the Final Approval Hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. If there are objections, the Court will consider them. The Court will also consider Plaintiff's Counsel's application for attorneys' fees, reimbursement of expenses and class representative service award at the Final Approval Hearing.

**22. Where can I get more information?**

This Notice contains only a summary of the lawsuit and Settlement. More information is available at [website address]. If you have any questions about this Notice or the Settlement, you may also contact the Settlement

**Exhibit B**  
**Form of Notice**

Administrator or Class Counsel using the contact information identified on p.2. The pleadings and some of the other important court filings in the Action are available on the settlement website as well.

**DO NOT TELEPHONE THE COURT, DEFENDANTS, OR DEFENDANTS' COUNSEL REGARDING THIS NOTICE.**

Dated: [REDACTED], 2023

BY ORDER OF THE COURT  
73<sup>RD</sup> JUDICIAL DISTRICT  
DISTRICT COURT, BEXAR COUNTY, TEXAS

## Exhibit C -- Form of Summary Notice

Baptist Emergency Hospital Settlement  
c/o RG/2 Claims Administration LLC  
P.O. Box 59479  
Philadelphia, PA 19102-9479

PRESORTED  
FIRST-CLASS  
MAIL  
U.S. POSTAGE  
PAID  
[City, ST]

**Court-Ordered Legal Notice of Proposed Class Action Settlement**  
(This is not a solicitation from a lawyer)

Este mensaje no es una solicitud de abogado. Usted puede ser elegible para un reembolso o una condonación de su deuda médica como resultado de un acuerdo de demanda colectiva. Para obtener más información, visite [SETTLEMENT WEBSITE] o llame a 1-866-742-4955.

**Electronic Service Requested**

-----Barcode-----  
(Postal Service: Please Do Not Mark or Cover Barcode)

[NAME1]  
[ADDR1]  
[CITY] [ST] [ZIP]  
[COUNTRY]

**Court-Ordered Legal Notice of  
Proposed Class Action Settlement**  
(This is not a solicitation from a lawyer)  
In the District Court, 73rd Judicial District  
Bexar County, Texas

KENNETH KESLAR II, v. EMERUS / BHS SA THOUSAND OAKS, LLC d/b/a BAPTIST EMERGENCY HOSPITAL - SHAVANO PARK, EMERUS HOSPITAL PARTNERS, LLC, and EMERUS HOLDINGS INC.  
Case No. 2020-CI-18623

**To: All persons who went to a Baptist Emergency Hospital (now called Baptist Neighborhood Hospital (“BNH”)) facility, got certain blood tests performed (namely, the BMP (includes CK) or LFT (includes Amylase) laboratory panels) and were billed for those panels.**

IMPORTANT NOTICE ABOUT A CLASS ACTION SETTLEMENT

YOU MAY BE ENTITLED TO A REFUND OR FORGIVENESS ON YOUR MEDICAL BILL

PLEASE READ THIS NOTICE CAREFULLY

Capitalized terms used in this notice that are not otherwise defined are defined in the Stipulation of Settlement, available at the Settlement Website.

A settlement has been reached in a class action lawsuit against Emerus / BHS SA Thousand Oaks LLC d/b/a Baptist Emergency Hospital – Shavano Park (now called “Baptist Neighborhood Hospital” or “BNH”), Emerus Hospital Partners LLC, and Emerus Holdings, Inc. (collectively the “Defendants”) relating to the billing of certain metabolic and hepatic function laboratory panels (i.e., the BMP (includes CK) and LFT (includes Amylase)). Defendants deny all allegations of wrongdoing, negligence, fault, or liability and assert that their actions have been lawful and proper in all respects and in compliance with all applicable legal duties.

This Postcard Settlement Notice (“Summary Notice”) provides only limited information about the Settlement. For more information, i) go to the Settlement Website [Settlement website URL] which contains the Long-form Notice of Settlement of Class Action (“Notice”), ii) contact the Settlement Administrator, RG/2 Claims Administration LLC, whose information is also on the front of this Postcard, or contact Class Counsel as detailed in the Notice. **Please do not contact the Court, Defendants, or their counsel.**

**Who is Included?** Any person who was treated at any BNH facility between September 25, 2016 and January 27, 2023, and one or more of the relevant laboratory panels was ordered and performed for that individual, and that person was subsequently billed for, at least, one of these panels, is included. *Note:* Please refer to Question 8 in the long-form Notice, for any exceptions. **If you are receiving this Summary Notice, that means BNH’s records indicated that you are included in this Settlement.** If you think there has been a mistake, please contact the Settlement Administrator or Class Counsel as described in the Notice.

**Settlement Benefits.** Settlement Class Members may be eligible to have their laboratory panel bill refunded, and those who are not entitled to a refund are entitled to have any remaining laboratory panel balance that they owe forgiven. You may find out the amount of any refund or forgiveness you are eligible for, if any, on the Settlement Website by logging in with your unique Login ID and password:

Login: [...]  
Password: [...]

For the other benefits and details of the Settlement, please read the Long-form Notice on the Settlement Website.

## Exhibit C – Form of Summary Notice

**To be eligible for a refund** (if you are entitled to receive one), you are required to complete and submit a Claim Form postmarked or submitted online no later than [date]. When you log onto the settlement website with your unique login and password you will learn whether you are entitled to claim a refund. The Claim Form is available at [website address] and may be mailed or submitted online. You may also request a form be mailed to you by contacting the Settlement Administrator at [info@rg2claims.com](mailto:info@rg2claims.com) or 1-866-742-4955. If you are not eligible for a refund you do not have to fill out a Claim Form to be eligible for any potential forgiveness of an outstanding amount, but may contact the Settlement Administrator at [info@rg2claims.com](mailto:info@rg2claims.com) or 1-866-742-4955 to determine the amount of your forgiven laboratory panel balance.

**Other Options.** If you do nothing, you will not get any refund from the Settlement, but you will still be considered for forgiveness of your balance, if eligible. Should you do nothing, you will also give up all your rights to sue Defendants on your own about the legal issues in this case. If you do not want to be bound by the Settlement, you must exclude yourself from the Class by [date]. Note, however, you will not get any refund that you may be entitled to receive, or forgiveness of your laboratory panel balance, if you choose to exclude yourself. If you choose to stay in the Class, but you do not like some aspect of the Settlement, you may object by [date]. Please refer to the Notice for a detailed explanation on how you may exclude yourself or object. On [date], the Court will hold a Final Approval Hearing to decide whether to approve the Settlement, Plaintiff's Counsel's request for attorneys' fees, reimbursement of expenses and a class representative incentive award. You may appear at that Hearing at your own cost but you do not have to.

If you would like to correct our address information for you, please complete and return the enclosed Address Change Form (postage required) or contact the Settlement Administrator at the email address or phone number shown above.

### THIS IS NOT A CLAIM FORM

Carefully separate this Address Change Form at the perforation

Name: \_\_\_\_\_

Current Address: \_\_\_\_\_

\_\_\_\_\_

Place  
Stamp  
Here

### Address Change Form

To make sure your information remains up to date in our records, if your current address is different from the address where your notice was mailed please confirm your current address by filling in the above information and depositing this postcard in the U.S. Mail

BAPTIST EMERGENCY HOSPITAL SETTLEMENT  
C/O RG/2 CLAIMS ADMINISTRATION LLC  
PO BOX 59479  
PHILADELPHIA, PA 19102-9479

**Exhibit D**  
**Form of Claim Form**

**CLAIM FORM**

*Kenneth Keslar II v. Emerus / BHS Thousand Oaks LLC et. al.*, Case No. 2020-CI-18623  
District Court of Texas, 73rd Judicial District, Bexar Country, Texas

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**IF YOU DO NOT FOLLOW THESE INSTRUCTIONS, YOUR CLAIM COULD BE DELAYED OR REJECTED.**

**I. INSTRUCTIONS FOR MAKING A CLAIM**

**TO MAKE A CLAIM FOR A REFUND:**

**1. Complete and sign this Claim Form.**

- Make sure this form is filled out completely and accurately.
- You must sign and date the RELEASE AND SWORN VERIFICATION STATEMENT (Part **IV**).

**2. Mail the completed Claim Form and supporting documentation to the Settlement Administrator at the address shown on the last page of this form, postmarked no later than **[INSERT CLAIM SUBMISSION DEADLINE]**.**

**You should include information for each visit for which you are seeking a refund in the Service Information Page included in this Claim Form.** If you need additional copies of the Service Information Page or need a new Claim Form, you may contact the Settlement Administrator, RG/2 Claims Administration LLC by phone at 1-866-742-4955 or by email at info@rg2claims.com.

**(NOTE: YOU DO NOT NEED TO COMPLETE THIS FORM TO GET A WRITE-OFF)**

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**II. PATIENT INFORMATION**

Patient Full Name

Street Address (P.O. BOX ADDRESSES AND POSTAL OFFICE ADDRESSES ARE NOT VALID)

City

State

Zip Code

Telephone Number

Date of Birth (MM/DD/YYYY)

E-mail Address

Guardian Full Name (If Patient Is under the Age of 18)

- Is the person completing and submitting this Claim Form the Patient or Guardian identified above?

Yes

No

**Exhibit D  
Form of Claim Form**

If no, what is your name and relation to the Patient?

Submitter Full Name

Submitter Relation to the Patient (*e.g.*, Sibling, Spouse, *etc.*):

(Note: Refund checks will be sent to the mailing address provided on this Claim Form. It is **your** responsibility to send the Settlement Administrator your new contact information if it changes to ensure receipt of Refund check and/or further notices.)

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**III. SERVICE INFORMATION**

Please identify on the following Service Information Page details regarding the Baptist Emergency Hospital (now known as Baptist Neighborhood Hospital), date of service, and bill you received for a BMP (includes CK) and LFT (includes Amylase) laboratory panel tests performed between September 25, 2016 and January 27, 2023. **You must complete a section of the Service Information Page for each date of service for which you are seeking a refund. If you are submitting this Claim Form for more than three dates of service, you may print additional copies of the Service Information section of this Claim Form at [\[insert settlement website address\]](#).**

NOTE: If you do not know whether the Texas hospital you went to was a Baptist Emergency Hospital, you may call the Settlement Administrator at the following toll-free number: 1-866-742-4955.

**Service Information Page**

Date of Service (MM/DD/YYYY)

Hospital Name

Hospital Address

Hospital City

State

Zip Code

The laboratory test panels, performed at this visit, that you are seeking a Refund for ( **Check all that apply**):

BMP (includes CK)

LFT (includes Amylase)

**Insurance details**

Name of Insurance Company



**Exhibit D**  
**Form of Claim Form**

Type of Insurance Plan

Bill and payment details (if known)

Date of the Bill

Bill Amount

Amount paid (if any)

---

Additional Date of Service (MM/DD/YYYY)

Hospital Name

Hospital Address

Hospital City

State

Zip Code

The laboratory test panels, performed at this visit, that you are seeking a Refund for ( **Check all that apply**):

BMP (includes CK)

LFT (includes Amylase)

Insurance details

Name of Insurance Company

Type of Insurance Plan

Bill and payment details (if known)

Date of the Bill

Bill Amount

Amount paid (if any)

---

Additional Date of Service (MM/DD/YYYY)

**Exhibit D  
Form of Claim Form**

Hospital Name

Hospital Address

Hospital City State Zip Code

The laboratory test panels, performed at this visit, that you are seeking a Refund for (**Check all that apply**):

- BMP (includes CK)
- LFT (includes Amylase)

**Insurance details**

Name of Insurance Company

Type of Insurance Plan

**Bill and payment details (if known)**

--   
Date of the Bill Bill Amount

Amount paid (if any)

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**IV. RELEASE AND SWORN VERIFICATION STATEMENT**

**PLEASE READ THE BELOW CAREFULLY AS IT WILL AFFECT YOUR LEGAL RIGHTS.**

With full awareness and understanding of this release, I hereby acknowledge I have received the Notice of Settlement (“Notice”). I submit this Claim Form to participate in the settlement reached in this Lawsuit, and submit to the jurisdiction of the District Court of Texas, 76th District, Bexar County, with respect to my claim asserted herein, and for purposes of enforcing the release of claims stated in this Claim Form and in the Notice. I further agree and acknowledge that I am bound by the terms of the Order and Judgment that may be entered by the Court in this Lawsuit, and the terms of the Settlement Agreement, including the release of claims set forth therein.

I, \_\_\_\_\_, (**PRINT PATIENT NAME OR GUARDIAN NAME IF PATIENT IS UNDER THE AGE OF 18**), swear under penalty of perjury of the laws of Texas that the information I have supplied in this Claim Form is accurate, truthful, and complete in all respects. I understand that the above information will be reviewed and verified by a representative from the Settlement Administrator, and that I may be contacted for more information, if needed. I understand that my claim will be reviewed by the Settlement Administrator and may be approved or denied, and pursuant to the Texas Medical Records

**Exhibit D**  
**Form of Claim Form**

Privacy Act and the Health Insurance Portability and Accountability Act ("HIPAA"), I consent to and authorize the Settlement Administrator, the Defendants, and the Parties' counsel to review my billing records and any related medical information on the billing records for the purpose of determining whether or not I am entitled to a Refund.

\_\_\_\_\_  
Patient Signature (Or Guardian If Patient Is Under the Age of 18)

\_\_\_\_\_  
Date

**You do NOT need to submit any medical records with this Claim Form. If you do include medical information, you expressly acknowledge that it may be reviewed by the Parties' counsel and/or the Settlement Administrator and consent to such review.**

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**V. MAILING INSTRUCTIONS**

Please mail your completed claim form no later than **[INSERT CLAIM SUBMISSION DEADLINE]** to:

By U.S. Mail:

**[insert address]**

**YOU ARE STRONGLY ENCOURAGED TO KEEP A COPY OF YOUR COMPLETED CLAIM FORM FOR YOUR RECORDS AND TO ENSURE CONFIRMATION OF DELIVERY USING A TRACKING ENABLED METHOD OF MAIL (E.G., USPS PROOF OF MAILING) OR BY CALLING THE SETTLEMENT ADMINISTRATOR AT 877-522-0019. NEITHER DEFENDANTS (NOR ANY OF THEIR SUBSIDIARIES OR AFFILIATES), PLAINTIFF, THEIR ATTORNEYS, NOR THE SETTLEMENT ADMINISTRATOR ARE RESPONSIBLE FOR LOST, MISDIRECTED, OR DELAYED MAIL SHIPMENTS.**

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**VI. WHAT HAPPENS NEXT?**

When your Claim Form is received, it will be reviewed and processed by the Settlement Administrator to determine if you are eligible and have satisfied the requirements for a Refund. If your Claim Form has a defect, and that is curable, the Settlement Administrator will contact you and give you a chance to fix the defect. If you are deemed eligible for a Refund, it will be processed in a reasonable amount of time, as approved by the Court.

**Exhibit E**  
**Form of Qualified Protective Order**

**CASE NO. 2020-CI-18623**

KENNETH KESLAR II, individually and on behalf of all others similarly situated,  
Plaintiff,

v.

EMERUS / BHS SA THOUSAND OAKS,  
LLC d/b/a BAPTIST EMERGENCY  
HOSPITAL - SHAVANO PARK, EMERUS  
HOSPITAL PARTNERS, LLC, and  
EMERUS HOLDINGS INC.,  
Defendants.

IN THE DISTRICT COURT

73<sup>rd</sup> JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

**QUALIFIED PROTECTIVE ORDER**

Pursuant to the Settlement Agreement in the above-captioned action (the “Action”), the Parties have stipulated and agreed, through their respective counsel, to the entry of an Order pursuant to the Tex. Health & Safety Code § 241.153(19) to protect and preserve the confidentiality of protected health information that may be produced or otherwise disclosed during the course of this Settlement. All capitalized terms, unless otherwise defined herein, have the meanings set forth in the Settlement Agreement.

Pursuant to Tex. Health & Safety Code § 241.153(19), the Court finds good cause for the issuance of a qualified protective order and ORDERS as follows:

1. RG/2 Claims Administration LLC is serving as the Settlement Administrator under the Settlement Agreement. The Settlement Administrator’s duties and functions include delivery of Notice to Class Members, receipt of Claim Forms submitted by Refund Eligible Class Members, and payment of Refunds to Refund Payment Class Members. In order to perform its duties and functions, the Settlement Administrator will need to obtain from Defendants (a) Class Members’

**Exhibit E**  
**Form of Qualified Protective Order**

names, addresses, telephone number and email addresses; (b) Refund amounts payable to Refund Eligible Class Members and (c) Panel Cost Balances that are eligible to be forgiven pursuant to the Settlement Agreement (all information described in Paragraph 1(a) and (b) to be referred to as the “Class Member Information”).

2. This Order shall govern the delivery, handling, access to, and the use of (a) Class Member Information provided to the Settlement Administrator; (b) all information utilizing or derived from the Class Member Information that the Settlement Administrator receives, creates, or uses; and (c) any information contained in or derived from the Class Member Information that may be protected under applicable federal or state law (including, without limitation, any Protected Health Information, as defined in 45 C.F.R. § 160.103, or any information protected from disclosure pursuant to Tex. Health & Safety Code § 181) (all information described in Paragraph 2(a)-(c) to be referred to as “Protected Information”).

3. The Settlement Administrator is specifically authorized to receive, obtain, create, and utilize Protected Information. Pursuant to Tex. Health & Safety Code § 241.153(19), and consistent with 45 C.F.R. § 164.512(e)(1)(i), individual Class Member authorizations are not required for any disclosure, receipt, or use of Protected Information by the Settlement Administrator pursuant to this Order. The Settlement Administrator shall keep the Protected Information secure and confidential, may only use Protected Information for the purposes specified in the Settlement Agreement, and may not use or disclose Protected Information in any manner or for any purpose not permitted under this Order.

4. Protected Information obtained or used by the Settlement Administrator under this Order may only be accessed by or disclosed to the following persons: (a) employees of the Settlement Administrator necessary to perform the obligations of the Settlement Administrator

**Exhibit E**  
**Form of Qualified Protective Order**

under the Settlement Agreement; (b) court officials involved in this Action (including court reporters, persons operating video recording equipment at court hearings, and any special master appointed by the Court); (c) any person designated by the Court in the interest of justice, upon such terms as the Court may deem proper; (d) a Party, or an officer, director, or employee of a Party deemed necessary by counsel to aid in the prosecution, defense, or settlement of this Action; (e) general counsel for a Party to this Action who are acting in a legal capacity and who are actively engaged in the conduct of this Action, and the secretary and paralegal assistants of such counsel to the extent reasonably necessary; or (f) outside counsel of record for the Parties in this Action, and the partners, associates, secretaries, paralegal assistants, and employees of such counsel to the extent reasonably necessary to render professional services in the Action.

5. At the conclusion of the Settlement Administrator's performance of its duties under the Settlement Agreement, the Settlement Administrator shall permanently and irretrievably destroy all data or documents in its possession, custody, or control (whether held or stored in paper or electronic form) containing any Protected Information.

6. This Order shall take effect when entered and shall be binding upon the Settlement Administrator and all of its employees; counsel of record and their law firms; the Parties; and persons and entities made subject to this Order by its terms.

IT IS SO ORDERED

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**Exhibit F**  
**Form of Proposed Final Order and Judgment**

**CAUSE NO. 2020-CI-18623**

KENNETH KESLAR, II, individually	§	IN THE DISTRICT COURT
and on behalf of all others similarly	§	
situated,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
EMERUS / BHS SA THOUSAND	§	BEXAR COUNTY, TEXAS
OAKS, LLC d/b/a BAPTIST	§	
EMERGENCY HOSPITAL -	§	
SHAVANO PARK, EMERUS	§	
HOSPITAL PARTNERS, LLC, and	§	
EMERUS HOLDINGS, INC.,	§	
	§	
Defendants.	§	73 <sup>rd</sup> JUDICIAL DISTRICT

**[PROPOSED] FINAL ORDER AND JUDGMENT GRANTING  
FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

This matter came before the Court for hearing on \_\_\_\_\_, 2023 in the Courtroom of the 73rd Judicial District of Bexar County, Texas on application of the Parties for approval of the proposed Settlement. The Court has considered the Parties’ Stipulation of Settlement dated January 27, 2023 (“Settlement Agreement”) and its exhibits; the Motion in Support of Final Approval of the Settlement, Attorneys’ Fee and Expenses, and Class Representative Award filed on \_\_\_\_\_, 2023 (“Final Approval Motion”); the Order Preliminary Certifying Class for Settlement Purposes, Granting Preliminary Approval of Settlement and Approving Class Notice dated \_\_\_\_\_, 2023 (“Preliminary Approval Order”); and other documents filed related to the Settlement, all matters raised and evidence presented at the time of the hearing, any objections or

**Exhibit F**  
**Form of Proposed Final Order and Judgment**

comments received regarding the Settlement, if any, the record in the Action, and all oral arguments presented to the Court.

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:**

1. This Order incorporates and makes a part hereof: (i) the Settlement Agreement (attached as Exhibit [ ] to the Preliminary Approval Motion); (ii) the Notice (attached as Exhibit [ ] to the Preliminary Approval Motion) and (iii) the Summary Notice (attached as Exhibit [ ] to the Preliminary Approval Motion). All capitalized terms used herein shall have the same meanings as set forth in the Settlement Agreement.

2. The Court has jurisdiction over the subject matter of the Action, including all matters necessary to effectuate the Settlement, and over all Parties to the Action, including all Class Members.

3. The Court fully and final approves the Settlement as set forth in the Settlement Agreement and finds that the Settlement is fair, reasonable, and adequate in all respects; meets all of the requirements under Rule 42 of the Texas Rule of Civil Procedure; and was reached in good faith following arms-length negotiations between the Parties.

4. Neither the Settlement Agreement, this Order, nor any part of the Settlement are admissions of liability or fault by Defendants or the Released Parties, nor are they findings of the validity of any claims in the Action or any wrongdoing or violation of law by Defendants or the Released Parties. Neither this Order, nor any of its terms or provisions, nor any of the negotiations or proceedings connected with it, shall be offered as evidence, or received in evidence in any pending or future civil, criminal, or administrative action or proceeding to establish any liability of, or admission by, any of the Defendants or the Released Parties. Notwithstanding the foregoing, nothing in this Order shall be interpreted to prohibit the use of this Order in a proceeding to consummate or enforce the Settlement Agreement or this Order, to defend against the assertion of Released Claims in any other proceeding, or as otherwise required by law.

5. No objections to the Settlement and Settlement Agreement have been made.



**Exhibit F**  
**Form of Proposed Final Order and Judgment**

6. Pursuant to Rule 42(c) of the Texas Rule of Civil Procedure, the Court certifies the following Class:

All patients treated at a facility operated by Baptist Neighborhood Hospital (formerly Baptist Emergency Hospital) between September 25, 2016 and January 27, 2023 for whom one or more of the Current Panels was ordered and performed, and the patient was billed some Patient Responsibility for, at least one of the Current Panels (the "Class"). Excluded from the Class are Defendants and their respective parents, subsidiaries, representatives, officers, directors, partners, and co-ventures and on and after the exercise of opt out rights pursuant to Paragraph 8 of the Settlement Agreement, anyone who timely requested to be excluded from the Settlement.

7. Pursuant to Rule 42(c)(3) of the Texas Rules of Civil Procedure, the Class shall consist of all Class Members who did not timely and validly exclude themselves from the Settlement and are thereby bound by this Order. The evidence presented shows that there are        Class Members who have excluded themselves from this Settlement. Those persons are listed on Ex. A to this Order.

8. The distribution of the Summary Notice and posting of Notice on the Settlement Website, constituted the best notice practicable under the circumstances and fully satisfied the requirements of Rule 42 of the Texas Rule of Civil Procedure, due process, and all other applicable laws.

9. In accordance with the terms of the Settlement Agreement, Defendants shall pay the Settlement Administrator the Total Refund Payment Amount, an amount sufficient to cover all Refunds to eligible Class Members within thirty (30) days upon receiving the list of Refund Payment Class Members from the Settlement Administrator. The Settlement Administrator shall then remit, electronically or through checks, refunds to all eligible Class Members in accordance with the Settlement Agreement.

10. In accordance with the terms of the Settlement Agreement, Defendants shall pay the Settlement Administration Costs.

11. The Court approves Plaintiff Kenneth Keslar II as the Class Representative.

**Exhibit F**  
**Form of Proposed Final Order and Judgment**

12. In accordance with the terms of the Preliminary Approval Order and the Settlement Agreement, a Class Representative Award of \$5,000 will be paid to the Plaintiff in recognition of the time and effort spent as a class representative in this Action and for serving the interests of the Class Members.

13. Having considered the factors set forth in Rule 42(g) of the Texas Rules of Civil Procedure, the Court finds that Plaintiff's Counsel are properly appointed to represent the Class Members and have fairly and adequately represented the Class Members for purposes of entering into and implementing the Settlement.

14. In accordance with the Settlement Agreement, an attorneys' fee award of \$800,000 to be paid to Class Counsel by Defendants is reasonable, fair, and appropriate to compensate Plaintiff's Counsel for the time and effort spent to investigate, file, litigate, and settle the Action. Such an award meets the requirements of Rules 42(h) and (i) of the Texas Rules of Civil Procedure.

15. In accordance with the Settlement Agreement, the Plaintiff and all Class Members together with any of their heirs, agents, attorneys, or assigns, will forever release and discharge the Defendants' Released Parties of and from any and all claims in law or in equity, of whatever kind or nature including, without limitation, claims for monetary damages, equitable, declaratory, and injunctive relief, restitution and disgorgement, and attorneys' fees, including those claims asserted or which could have been asserted in the Action including, without limitation, claims arising from, concerning, or in any way relating to the (i) billing of the Current Panels during the Class Period that is the basis of the litigation; and (ii) pricing transparency and disclosure or non-disclosure concerning billing for the Current Panels (all such claims that are released by the Class Members as to Defendants' Released Parties to be the "Settled Class Claims"). Upon the Effective Date, Plaintiff and all Class Members are permanently barred and enjoined from initiating, asserting, or prosecuting any Settled Class Claims against Defendants' Released Parties in any court or any forum.

**Exhibit F**  
**Form of Proposed Final Order and Judgment**

16. In accordance with the Settlement Agreement, Defendants' Released Parties shall be deemed to have fully, finally, and forever released, relinquished, and discharged Plaintiff, Plaintiff's Counsel and Class Members ("Plaintiff's Released Parties") from all claims (including, without limitation, unknown claims), which arise out of or relate to the initiation, litigation, prosecution, or settlement of this Action including (but not limited to) any claims of bad faith or abuse of process against Plaintiff's Released Parties relating to their initiation, litigation, prosecution, or settlement of the Action and they shall forever be barred and enjoined from commencing, instituting, or prosecuting any of the claims against Plaintiff's Released Parties (all such claims that are released by the Defendants' Released Parties as to Plaintiff's Released Parties to be the "Settled Defendant Claims").

17. The Court hereby dismisses with prejudice the Action, and all released claims against any and all Released Parties and without costs to any of the Parties as against the others (other than set forth above in this Order).

18. Without affecting the finality of this Order, the Court reserves jurisdiction over the implementation, administration and enforcement of the Settlement Agreement, this Order, and all matters ancillary thereto.

19. The Court finds that no reason exists for delay in ordering final approval. And the clerk is hereby directed to enter this Order forthwith. This is a Final Order and Judgment and is final for purposes of appeal.

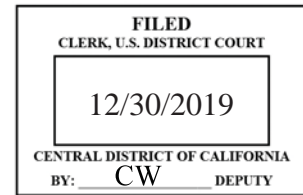
20. The Parties are hereby authorized, without further approval from the Court, to agree to and adopt such modifications and expansions of the Settlement Agreement, including without limitation, the forms to be used in the process of distributing settlement payments, which are consistent with this Order and do not limit the rights of the Class Members under the Settlement Agreement.

**Exhibit F**  
**Form of Proposed Final Order and Judgment**

Signed on this \_\_\_\_ day of \_\_\_\_\_, 2023.

\_\_\_\_\_  
Judge \_\_\_\_\_  
73rd JUDICIAL DISTRICT COURT

# EXHIBIT B



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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

RENEE MACLAUGHLAN BOZARTH and )  
STELLA BELL, individually and on behalf )  
of all others similarly situated, )  
Plaintiffs, )  
v. )  
ENVISION HEALTHCARE )  
CORPORATION, et al., )  
Defendants. )

Case No. ED CV 17-1935 FMO (SHKx)

**ORDER RE: MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT**

Having reviewed and considered all the briefing filed with respect to plaintiff’s unopposed Motion for Preliminary Approval of Class Action Settlement (Dkt. 85, “Motion”) and the oral argument presented at the hearing on July 25, 2019, the court concludes as follows.

**BACKGROUND**

On August 22, 2017, Renee MacLaughlan Bozarth (“Bozarth”) filed a class action complaint in state court against Anthem Inc., Anthem Blue Cross and Blue Shield, and Blue Cross of California d/b/a Anthem Blue Cross (collectively, “Anthem”), Envision Healthcare Corporation (“Envision”), EmCare Holdings, Inc. (“EmCare”), and EDS-I Practitioners of California (“EPC”), asserting claims for (1) violations of the California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200, et seq.; (2) violations of the California Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750, et seq.; (3) breach of implied contract or quasi-contract; and

1 (4) breach of the covenant of good faith and fair dealing. (See Dkt. 1-1, Complaint). On  
2 September 22, 2017, Anthem removed the action to this court based on federal question  
3 jurisdiction. (See Dkt. 1, Notice of Removal).

4 On November 11, 2017, Bozarth filed a first amended complaint (“FAC”) asserting the first  
5 three claims and dropping Anthem as a defendant. (See Dkt. 23, FAC; see also Dkt. 24, Notice  
6 of Dismissal). The remaining claims revolve around “‘surprise billing,’ which occurs when [an  
7 insured] patient goes to a hospital that is ‘in-network’ with his/her health insurance, only to find out  
8 weeks later that the doctors are ‘out-of-network’ and their services are not covered by the patient’s  
9 insurance.” (Dkt. 23, FAC at ¶¶ 1-2). According to Bozarth, “[u]nconstrained by any negotiated  
10 agreement, the out-of-network provider’s services are billed at rates in excess of the reasonable  
11 fair market value of the services provided[, which] can be financially disastrous for consumers who  
12 reasonably thought they had nothing to worry about since they had obtained health insurance  
13 coverage and went to an n-network facility for treatment.” (Id. at ¶ 2). Bozarth alleges that the  
14 surprise billing is “especially common in emergency rooms, where patients must act quickly under  
15 stress.” (Id. at ¶ 3). For example, when “EmCare contracts to manage a hospital’s emergency  
16 department, insured patients are treated by out-of-network physicians staffed by EmCare[.]” (Id.  
17 at ¶ 4). That fact is not disclosed by EmCare, nor is it reasonably possible for patients to ascertain  
18 which insurance is accepted by the hospital’s emergency department. (See id.). According to  
19 plaintiff, “[w]hen EmCare enters the picture, the incidence of surprise billing increases.” (Id.).

20 On April 27, 2019, plaintiff filed the operative Second Amended Complaint (“SAC”), which  
21 added Stella Bell as an additional plaintiff. (Dkt. 82, SAC).

22 After engaging in extensive discovery, motion practice, an all-day mediation before the Hon.  
23 Dickran Tervizian (Ret.), followed by months-long mediation efforts among the parties and Judge  
24 Tervizian, the parties entered into a Settlement Memorandum of Understanding (“MOU”) on  
25 November 29, 2018. (See Dkt. 86, Declaration of Chet B. Waldman (“Waldman Decl.”) at ¶¶ 6-9).  
26 Following the MOU, the parties participated in two additional mediation sessions with Judge  
27 Tervizian (the second mediation also involved the Hon. Michael Dollinger (Ret.)) regarding  
28

1 attorney's fees and expenses. (See id. at ¶ 10). On May 31, 2019, the parties finalized their  
2 settlement. (See id. at ¶ 11).

3 The settlement class is defined as “all out-of-network patients who were provided  
4 emergency department medical service(s) by an affiliated physician practice at a hospital in  
5 California between August 22, 2013, and the date of execution of [the] Settlement Agreement.”  
6 (Dkt. 86-1, Stipulation and Agreement of Class Action Settlement (“Settlement Agreement”) at ¶  
7 1.9). Affiliated physician practice means “a physician practice (e.g., EDS-I Practice of California)  
8 that provides emergency department medical services at hospitals in California and either:  
9 contracts with EmCare, Inc., Envision Healthcare Corporation, Envision Physician Services, LLC  
10 (or any of their subsidiaries); or otherwise affiliates with Envision Healthcare Corporation to  
11 manage the non-medical aspects of the provision of Emergency Department Medical Services by  
12 the physician practice.”<sup>1</sup> (Id. at ¶ 1.2).

13 Pursuant to the settlement, eligible class members can obtain monetary relief in two forms.  
14 First, class members may get a write-off of any outstanding balances for emergency department  
15 services by timely submitting a claim that includes: (1) an explanation of benefits from his or her  
16 out-of-network payor indicating the allowable charges (i.e., the maximum allowed reimbursement  
17 for the out-of-network emergency services); and (2) payment or proof of payment for the services  
18 amounting to the allowable charges. (See Dkt. 86-1, Settlement Agreement at ¶¶ 1.4, 1.18, 4.2).  
19 Payments made by the benefit plan, including payments made to defendants, will be credited  
20 toward payment for the allowable charges. (See id. at ¶ 4.2.1 n. 2; Dkt. 85, Motion at 7).

21 Second, class members can obtain a refund of any payments made to defendants or to a  
22 third party, such as a collection agency in excess of the allowable charges, provided that they  
23 timely submit a claim form that includes: (1) an EOB<sup>2</sup> from the class member's benefit plan

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24  
25 <sup>1</sup> An “out-of-network patient” is defined as “a patient that receives coverage for emergency  
26 department medical services through an out-of-network payor.” (Dkt. 86-1, Settlement Agreement  
at ¶ 1.28).

27 <sup>2</sup> EOB means Explanation of Benefits, which the Settlement Agreement defines as “the  
28 explanation of benefits statement sent by an out-of network payor to an individual who obtained  
coverage for emergency department medical service(s) from the out-of-network payor which



1 indicating the allowable charges for the emergency department services; and (2) proof that the  
2 class member made payments for the services exceeding the allowable charges. (See Dkt. 86-1,  
3 Settlement Agreement at ¶ 4.3; Dkt. 85, Motion at 7). “Payments made by the [c]lass [m]ember’s  
4 benefit plan will be credited toward payment amounting to the [a]llowable [c]harge(s).” (See Dkt.  
5 85, Motion at 7; Dkt. 86-1, Settlement Agreement at ¶ 4.2.1 n. 2).

6 In addition to monetary relief, the settlement provides nonmonetary relief in the form of  
7 disclosure requests made by defendants to California facilities. (See Dkt. 86-1, Settlement  
8 Agreement at ¶ 4.1; Dkt. 85, Motion at 8). Specifically, defendants will request that all California  
9 facilities with emergency departments staffed by defendants include the following disclosures in  
10 both a document provided to patients and in a prominent posting in the emergency department:  
11 (i) the name of the physician practice that contracts with the hospital; (ii) that the emergency  
12 department physicians are not employed by the hospital; (iii) that the emergency department  
13 physicians bill separately for emergency department medical services; (iv) that the emergency  
14 department physicians may not have the same network status as the hospital and may be  
15 out-of-network; (v) that patients should check with their health insurer to determine the network  
16 status of the physician practice; and (vi) that patients may call a specified number provided by  
17 defendants for information regarding payment and coverage for emergency department medical  
18 services provided by the physician group. (See *id.*).

19 Pursuant to the settlement, defendants will not oppose an application for an award of  
20 attorney’s fees, expenses, and costs of not more than \$1,850,000, (Dkt. 86-1, Settlement  
21 Agreement at ¶ 9.1), or oppose service awards in the amount of \$2,500 for Bozarth and \$1,250  
22 for Bell. (*Id.* at ¶ 8.1). Finally, “[a]ll costs and expenses of the notice program . . . and of  
23 administering the settlement shall be paid by defendants.” (*Id.* at ¶ 5.1). The parties propose that  
24 Rust Consulting (“Rust”) serve as the claims administrator. (*Id.* at ¶ 5.2).

25  
26 \_\_\_\_\_  
27 explains how the covered individual’s benefits were applied to a claim for emergency department  
28 medical service(s) provided by the affiliated physician practice.” (Dkt. 86-1, Settlement Agreement  
at ¶ 1.18).

1 Plaintiffs now seek an order: (1) preliminarily approving the proposed settlement; (2)  
2 certifying the proposed settlement class; (3) approving and ordering dissemination of the proposed  
3 class notice; and (4) scheduling a final approval hearing. (Dkt. 85, Motion at 1-2).

4 **LEGAL STANDARD**

5 “[I]n the context of a case in which the parties reach a settlement agreement prior to class  
6 certification, courts must peruse the proposed compromise to ratify both the propriety of the  
7 certification and the fairness of the settlement.” Staton v. Boeing Co., 327 F.3d 938, 952 (9th Cir.  
8 2003).

9 I. CLASS CERTIFICATION.

10 At the preliminary approval stage, the court “may make either a preliminary determination  
11 that the proposed class action satisfies the criteria set out in Rule 23 . . . or render a final decision  
12 as to the appropriateness of class certification.”<sup>3</sup> Smith v. Wm. Wrigley Jr. Co., 2010 WL 2401149,  
13 \*3 (S.D. Fla. 2010) (internal citation and footnote omitted); see also Sandoval v. Roadlink USA  
14 Pac., Inc., 2011 WL 5443777, \*2 (C.D. Cal. 2011) (citing Amchem Prods., Inc. v. Windsor, 521  
15 U.S. 591, 620, 117 S.Ct. 2231, 2248 (1997)) (“Parties seeking class certification for settlement  
16 purposes must satisfy the requirements of Federal Rule of Civil Procedure 23[.]”). “A court  
17 considering such a request should give the Rule 23 certification factors ‘undiluted, even  
18 heightened, attention in the settlement context.” Sandoval, 2011 WL 5443777, at \*2 (quoting  
19 Amchem, 521 U.S. at 620, 117 S.Ct. at 2248). “Such attention is of vital importance, for a court  
20 asked to certify a settlement class will lack the opportunity, present when a case is litigated, to  
21 adjust the class, informed by the proceedings as they unfold.” Amchem, 521 U.S. at 620, 117  
22 S.Ct. at 2248.

23 A party seeking class certification must first demonstrate that: “(1) the class is so numerous  
24 that joinder of all members is impracticable; (2) there are questions of law or fact common to the  
25 class; (3) the claims or defenses of the representative parties are typical of the claims or defenses  
26 of the class; and (4) the representative parties will fairly and adequately protect the interests of the  
27

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28 <sup>3</sup> All “Rule” references are to the Federal Rules of Civil Procedure.

1 class.” Fed. R. Civ. P. 23(a).

2 “Second, the proposed class must satisfy at least one of the three requirements listed in  
3 Rule 23(b).” Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 345, 131 S.Ct. 2541, 2548 (2011).

4 Rule 23(b) is satisfied if:

5 (1) prosecuting separate actions by or against individual class members  
6 would create a risk of:

7 (A) inconsistent or varying adjudications with respect to individual  
8 class members that would establish incompatible standards of  
9 conduct for the party opposing the class; or

10 (B) adjudications with respect to individual class members that, as a  
11 practical matter, would be dispositive of the interests of the other  
12 members not parties to the individual adjudications or would  
13 substantially impair or impede their ability to protect their interests;

14 (2) the party opposing the class has acted or refused to act on grounds that  
15 apply generally to the class, so that final injunctive relief or corresponding  
16 declaratory relief is appropriate respecting the class as a whole; or

17 (3) the court finds that the questions of law or fact common to class members  
18 predominate over any questions affecting only individual members, and that  
19 a class action is superior to other available methods for fairly and efficiently  
20 adjudicating the controversy. The matters pertinent to these findings include:

21 (A) the class members’ interests in individually controlling the  
22 prosecution or defense of separate actions;

23 (B) the extent and nature of any litigation concerning the controversy  
24 already begun by or against class members;

25 (C) the desirability or undesirability of concentrating the litigation of the  
26 claims in the particular forum; and

27 (D) the likely difficulties in managing a class action.

28 Fed. R. Civ. P. 23(b)(1)-(3).

1           The party seeking class certification bears the burden of demonstrating that the proposed  
2 class meets the requirements of Rule 23. See Dukes, 564 U.S. at 350, 131 S.Ct. at 2551 (“A party  
3 seeking class certification must affirmatively demonstrate his compliance with the Rule – that is,  
4 he must be prepared to prove that there are in fact sufficiently numerous parties, common  
5 questions of law or fact, etc.”) (emphasis in original). However, courts need not consider the Rule  
6 23(b)(3) issues regarding manageability of the class action, as settlement obviates the need for  
7 a manageable trial. See In re Hyundai and Kia Fuel Econ. Litig., 926 F.3d 539, 556-57 (9th Cir.  
8 2019) (“The criteria for class certification are applied differently in litigation classes and settlement  
9 classes. In deciding whether to certify a litigation class, a district court must be concerned with  
10 manageability at trial. However, such manageability is not a concern in certifying a settlement  
11 class where, by definition, there will be no trial.”).

## 12 II. FAIRNESS OF CLASS ACTION SETTLEMENT.

13           Rule 23 provides that “[t]he claims, issues, or defenses of a certified class may be settled  
14 . . . only with the court’s approval.” Fed. R. Civ. P. 23(e). “The primary concern of [Rule 23(e)]  
15 is the protection of th[e] class members, including the named plaintiffs, whose rights may not have  
16 been given due regard by the negotiating parties.” Officers for Justice v. Civil Serv. Comm’n of  
17 the City & Cty. of S.F., 688 F.2d 615, 624 (9th Cir. 1982). Accordingly, a district court must  
18 determine whether a proposed class action settlement is “fundamentally fair, adequate, and  
19 reasonable.” Staton, 327 F.3d at 959 (internal quotation marks omitted); see Fed. R. Civ. Proc.  
20 23(e). Whether to approve a class action settlement is “committed to the sound discretion of the  
21 trial judge.” Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992) (internal  
22 quotation marks and citation omitted).

23           “If the [settlement] proposal would bind class members, the court may approve it only after  
24 a hearing and on finding that it is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2).  
25 “[S]ettlement approval that takes place prior to formal class certification requires a higher standard  
26 of fairness [given t]he dangers of collusion between class counsel and the defendant, as well as  
27 the need for additional protections when the settlement is not negotiated by a court designated  
28 class representative[.]” Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998). As the

1 Ninth Circuit has observed, “[p]rior to formal class certification, there is an even greater potential  
2 for a breach of fiduciary duty owed the class during settlement. Accordingly, such agreements  
3 must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of  
4 interest than is ordinarily required under Rule 23(e) before securing the court’s approval as fair.”  
5 In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011).

6 Approval of a class action settlement requires a two-step process – a preliminary approval  
7 followed by a later final approval. See Tijero v. Aaron Bros., Inc., 2013 WL 60464, \*6 (N.D. Cal.  
8 2013) (“The decision of whether to approve a proposed class action settlement entails a two-step  
9 process.”); West v. Circle K Stores, Inc., 2006 WL 1652598, \*2 (E.D. Cal. 2006) (“[A]pproval of a  
10 class action settlement takes place in two stages.”). At the preliminary approval stage, the court  
11 “evaluate[s] the terms of the settlement to determine whether they are within a range of possible  
12 judicial approval.” Wright v. Linkus Enters., Inc., 259 F.R.D. 468, 472 (E.D. Cal. 2009). Although  
13 “[c]loser scrutiny is reserved for the final approval hearing[.]” Harris v. Vector Mktg. Corp., 2011  
14 WL 1627973, \*7 (N.D. Cal. 2011), “the showing at the preliminary approval stage – given the  
15 amount of time, money and resources involved in, for example, sending out new class notices –  
16 should be good enough for final approval.” Spann v. J.C. Penney Corp., 314 F.R.D. 312, 319  
17 (C.D. Cal. 2016). “At this stage, the court may grant preliminary approval of a settlement and  
18 direct notice to the class if the settlement: (1) appears to be the product of serious, informed,  
19 non-collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly grant  
20 preferential treatment to class representatives or segments of the class; and (4) falls within the  
21 range of possible approval.” Id. (internal quotation marks omitted); see Harris, 2011 WL 1627973,  
22 at \*7 (same); Cordy v. USS-Posco Indus., 2013 WL 4028627, \*3 (N.D. Cal. 2013) (“Preliminary  
23 approval of a settlement and notice to the proposed class is appropriate if the proposed settlement  
24 appears to be the product of serious, informed, non-collusive negotiations, has no obvious  
25 deficiencies, does not improperly grant preferential treatment to class representatives or segments  
26 of the class, and falls within the range of possible approval.”) (internal quotation marks omitted).

27

28

## DISCUSSION

### I. CLASS CERTIFICATION.

#### A. Rule 23(a) Requirements.

##### 1. **Numerosity.**

The first prerequisite of class certification requires that the class be “so numerous that joinder of all members is impracticable[.]” Fed. R. Civ. P. 23(a)(1). Although impracticability does not hinge only on the number of members in the putative class, joinder is usually impracticable if a class is “large in numbers.” See Jordan v. Cty. of Los Angeles, 669 F.2d 1311, 1319 (9th Cir.), vacated on other grounds, 459 U.S. 810 (1982) (class sizes of 39, 64, and 71 are sufficient to satisfy the numerosity requirement). “As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members, but not satisfied when membership dips below 21.” Slaven v. BP Am., Inc., 190 F.R.D. 649, 654 (C.D. Cal. 2000); see Tait v. BSH Home Appliances Corp., 289 F.R.D. 466, 473 (C.D. Cal. 2012) (“A proposed class of at least forty members presumptively satisfies the numerosity requirement.”).

Here, the class is so numerous that joinder is impracticable. The settlement class includes approximately 327,677 members, (see Dkt. 85, Motion at 18), which easily exceeds the minimum threshold for numerosity.

##### 2. **Commonality.**

The commonality requirement is satisfied if “there are questions of law or fact common to the class[.]” Fed. R. Civ. P. 23(a)(2). Commonality requires plaintiffs to demonstrate that their claims “depend upon a common contention . . . [whose] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” Dukes, 564 U.S. at 350, 131 S.Ct. at 2551; see Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1172 (9th Cir. 2010) (The commonality requirement demands that “class members’ situations share a common issue of law or fact, and are sufficiently parallel to insure a vigorous and full presentation of all claims for relief.”) (internal quotation marks omitted). “The plaintiff must demonstrate the capacity of classwide proceedings to generate common answers to common questions of law or fact that are apt to drive the resolution of the litigation.” Mazza v. Am. Honda Motor Co., 666 F.3d 581, 588

1 (9th Cir. 2012) (internal quotation marks omitted). “This does not, however, mean that every  
2 question of law or fact must be common to the class; all that Rule 23(a)(2) requires is a single  
3 significant question of law or fact.” Abdullah v. U.S. Sec. Assocs., Inc., 731 F.3d 952, 957 (9th  
4 Cir. 2013) (emphasis and internal quotation marks omitted); see Mazza, 666 F.3d at 589  
5 (characterizing commonality as a “limited burden[,]” stating that it “only requires a single significant  
6 question of law or fact”). Proof of commonality under Rule 23(a) is “less rigorous” than the related  
7 preponderance standard under Rule 23(b)(3). See Mazza, 666 F.3d at 589; Hanlon, 150 F.3d at  
8 1019. “The existence of shared legal issues with divergent factual predicates is sufficient, as is  
9 a common core of salient facts coupled with disparate legal remedies within the class.” Hanlon,  
10 150 F.3d at 1019.

11 This case involves common class-wide issues that are apt to drive the resolution of  
12 plaintiff’s claims. The common questions include whether defendants failed to disclose material  
13 information to patients receiving emergency services, and whether defendants were obligated to  
14 charge only for the reasonable value of their services. (See Dkt. 85, Motion at 19).

### 15 3. Typicality.

16 “Typicality refers to the nature of the claim or defense of the class representative, and not  
17 to the specific facts from which it arose or the relief sought.” Ellis v. Costco Wholesale Corp., 657  
18 F.3d 970, 984 (9th Cir. 2011) (internal quotation marks and citation omitted). To demonstrate  
19 typicality, plaintiff’s claims must be “reasonably co-extensive with those of absent class  
20 members[,]” although “they need not be substantially identical.” Hanlon, 150 F.3d at 1020; see  
21 Ellis, 657 F.3d at 984 (“Plaintiffs must show that the named parties’ claims are typical of the  
22 class.”). “The test of typicality is whether other members have the same or similar injury, whether  
23 the action is based on conduct which is not unique to the named plaintiffs, and whether other class  
24 members have been injured by the same course of conduct.” Ellis, 657 F.3d at 984 (internal  
25 quotation marks and citation omitted).

26 Here, the claims of the named plaintiffs are typical of the claims of the class. (See Dkt. 82,  
27 SAC). Plaintiffs, like the putative class members, allege they were not provided the information  
28

1 they needed to make an informed decision, and then were billed at standard chargemaster rates<sup>4</sup>  
 2 unilaterally set by defendants – rates plaintiffs contend exceeded the fair market value defendants  
 3 were entitled to in the absence of an express agreement governing the emergency services  
 4 provided. (See *id.*; see also Dkt. 85, Motion at 19-20). Thus, their claims arise from the same  
 5 factual basis and are based on the same legal theory. Finally, the court is not aware of any facts  
 6 that would subject the class representatives “to unique defenses which threaten to become the  
 7 focus of the litigation.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (internal  
 8 quotation marks omitted).

#### 9 4. Adequacy of Representation.

10 “The named Plaintiffs must fairly and adequately protect the interests of the class.” *Ellis*,  
 11 657 F.3d at 985 (citing Fed. R. Civ. P. 23(a)(4)). “To determine whether [the] named plaintiffs will  
 12 adequately represent a class, courts must resolve two questions: (1) do the named plaintiffs and  
 13 their counsel have any conflicts of interest with other class members and (2) will the named  
 14 plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Id.* (internal  
 15 quotation marks omitted). “Adequate representation depends on, among other factors, an  
 16 absence of antagonism between representatives and absentees, and a sharing of interest  
 17 between representatives and absentees.” *Id.*

18 Here, the proposed class representatives do not appear to have any conflicts of interest  
 19 with the absent class members. (See Dkt. 85, Motion at 20). The class representatives have no  
 20 individual claims separate from the class claims. (See, generally, Dkt. 82, SAC); see, e.g.,  
 21 *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 442 (E.D. Cal. 2013) (“[T]here is no apparent  
 22 conflict of interest between the named Plaintiff[’s] claims and those of the other Class Members’  
 23 – particularly because the named Plaintiff[] ha[s] no separate and individual claims apart from the  
 24 Class.”). Moreover, plaintiff Bozarth states that her goal in pursuing this action “was to ensure that  
 25 [she] and the members of the Class would receive refunds of the amounts [they] overpaid and/or  
 26

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27 <sup>4</sup> A chargemaster “is a uniform schedule of charges represented by [a] hospital as its  
 28 gross billed charge for a given service or item, regardless of payer type.” *Moore v. Mercer*, 4  
 Cal.App.5th 424, 428 (2016) (internal quotation marks omitted).



1 that they would not have to pay the amounts that they were overcharged for their emergency room  
2 visits.” (Dkt. 86-3, Declaration of Plaintiff and Proposed Class Representative Renee  
3 MacLaughlan Bozarth (“Bozarth Decl.”) at ¶ 4). She additionally sought disclosures about the  
4 identity of the physicians regarding their in-network status. (See *id.*). Plaintiff Bell relays the  
5 same sentiments. (See Dkt. 86-4, Declaration of Plaintiff and Proposed Class Representative  
6 Stella Bell (“Bell Decl.”) at ¶ 4 (“I sought to become a plaintiff in this lawsuit because I thought that  
7 Defendants were overcharging for emergency department physician services [and] that they were  
8 being misleading by not clearly informing emergency department patients that they would definitely  
9 be billed for the physician’s services and that the bill would be much higher than an in-network  
10 rate.”)). In short, “[t]he adequacy-of-representation requirement is met here because Plaintiff[]  
11 ha[s] the same interests as the absent Class Members[.]” *Barbosa*, 297 F.R.D. at 442.

12 Finally, as noted earlier, adequacy “also factors in competency and conflicts of class  
13 counsel.” *Amchem*, 521 U.S. at 626 n. 20, 117 S.Ct. at 2251. Here, the Settlement Agreement  
14 provides that the court appoint Wolf Popper LLP (“Wolf Popper”) and Glancy Prongay & Murray  
15 LLP (“Glancy”) as class counsel. (See Dkt. 86-1, Settlement Agreement at ¶ 1.10 (defining class  
16 counsel)). Chet Waldman states that “Plaintiffs’ Counsel, collectively and independently, has  
17 significant experience in complex class action litigation[.]” (See Dkt. 86, Waldman Decl. at ¶ 18;  
18 see also Exhs. E & F (firm resumes of Wolf Popper LLP and Glancy Prongay & Murray LLP)). He  
19 adds that counsel “has negotiated numerous other class action settlements throughout the  
20 country.” (Dkt. 86, Waldman Decl. at ¶ 18). Based on counsel’s representations and a review of  
21 the firm resumes, and having observed their diligence in litigating this case, the court finds that  
22 plaintiffs’ counsel are competent, and there are no issues as to the adequacy of representation.  
23 See *Barbosa*, 297 F.R.D. at 443 (“There is no challenge to the competency of the Class Counsel,  
24 and the Court finds that Plaintiffs are represented by experienced and competent counsel who  
25 have litigated numerous class action cases.”).

26 B. Rule 23(b) Requirements.

27 Certification under Rule 23(b)(3) is proper “whenever the actual interests of the parties can  
28 be served best by settling their differences in a single action.” *Hanlon*, 150 F.3d at 1022 (internal

1 quotation marks omitted). The rule requires two different inquiries, specifically a determination as  
2 to whether: (1) “questions of law or fact common to class members predominate over any  
3 questions affecting only individual members[;]” and (2) “a class action is superior to other available  
4 methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3); see  
5 Spann, 314 F.R.D. at 321-22.

6 **1. Predominance.**

7 “The Rule 23(b)(3) predominance inquiry tests whether [the] proposed classes are  
8 sufficiently cohesive to warrant adjudication by representation.” Amchem, 521 U.S. at 623, 117  
9 S.Ct. at 2249. “Rule 23(b)(3) focuses on the relationship between the common and individual  
10 issues. When common questions present a significant aspect of the case and they can be  
11 resolved for all members of the class in a single adjudication, there is clear justification for  
12 handling the dispute on a representative rather than on an individual basis.” Hanlon, 150 F.3d at  
13 1022 (internal quotation marks and citations omitted); see In re Wells Fargo Home Mortg.  
14 Overtime Pay Litig., 571 F.3d 953, 959 (9th Cir. 2009) (“[T]he main concern in the predominance  
15 inquiry . . . [is] the balance between individual and common issues.”). Additionally, the class  
16 damages must be sufficiently traceable to plaintiff’s liability case. See Comcast Corp. v. Behrend,  
17 569 U.S. 27, 35, 133 S.Ct. 1426, 1433 (2013).

18 Here, the court is persuaded that “[a] common nucleus of facts and potential legal remedies  
19 dominates this litigation.” Hanlon, 150 F.3d at 1022. A predominant question in this case is  
20 whether, in the absence of an express contract between a patient and a provider of emergency  
21 services, the provider is entitled to charge whatever it wishes or must instead charge only the fair  
22 market value of the services rendered. (See Dkt. 85, Motion at 20-21). The determination of that  
23 question would establish defendants’ liability on a class-wide basis. Another predominant question  
24 is whether the billed standard chargemaster rates for the five CPT codes primarily at issue in this  
25 case were above the fair market value rate for such services. (See Dkt. 85, Motion at 21). This  
26 question can be answered using common proof in the form of a formula for determining fair market  
27 value that is consistent with the applicable standards. (See id.; see also Dkt. 86-2, Declaration  
28 of Ge Bai (“Bai Decl.”) at ¶¶ 4-9) (plaintiffs’ expert stating that in her expert opinion “that fair

1 market value of emergency medical services can be determined using uniform methodologies for  
2 all patients that presented at in-network emergency rooms in . . . California” and setting forth  
3 proposed methodology). Additionally, plaintiffs allege that it is defendants’ regular practice not to  
4 disclose to patients what insurance they accept or to provide them with no way to find out this  
5 information. (See Dkt. 82, SAC at ¶¶ 2-4). In short, “despite the existence of minor factual  
6 differences between the potential class members,” Clesceri, 2011 WL 320998, \*7 (internal  
7 quotation marks omitted), the answers to these questions would drive the resolution of the  
8 litigation, “as the common issues predominate over varying factual predicates[.]” Id. (internal  
9 quotation marks omitted); see Tyson Foods, Inc. v. Bouaphakeo, 136 S.Ct. 1036, 1045 (2016)  
10 (“When one or more of the central issues in the action are common to the class and can be said  
11 to predominate, the action may be considered proper under Rule 23(b)(3) even though other  
12 important matters will have to be tried separately, such as damages or some affirmative defenses  
13 peculiar to some individual class members.”) (internal quotation marks omitted).

## 14 2. **Superiority.**

15 “The superiority inquiry under Rule 23(b)(3) requires determination of whether the  
16 objectives of the particular class action procedure will be achieved in the particular case” and  
17 “necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution.”  
18 Hanlon, 150 F.3d at 1023. Rule 23(b)(3) provides a list of four non-exhaustive factors relevant to  
19 superiority. See Fed. R. Civ. P. 23(b)(3)(A)-(D).

20 The first factor considers “the class members’ interests in individually controlling the  
21 prosecution or defense of separate actions.” Fed. R. Civ. P. 23(b)(3)(A). “This factor weighs  
22 against class certification where each class member has suffered sizeable damages or has an  
23 emotional stake in the litigation.” Barbosa, 297 F.R.D. at 444. Here, plaintiffs do not assert any  
24 claims for emotional distress, nor is there any indication that the amount of damages any individual  
25 class member could recover is significant or substantially greater than the potential recovery of  
26 any other class member. (See, generally, Dkt. 82, SAC). The alternative method of resolution –  
27 pursuing individual claims for a relatively modest amount of damages – would likely never be  
28 brought, as “litigation costs would dwarf potential recovery.” Hanlon, 150 F.3d at 1023; see Leyva

1 v. Medline Indus., Inc., 716 F.3d 510, 515 (9th Cir. 2013) (“In light of the small size of the putative  
2 class members’ potential individual monetary recovery, class certification may be the only feasible  
3 means for them to adjudicate their claims. Thus, class certification is also the superior method  
4 of adjudication.”); Bruno v. Quten Research Inst., LLC, 280 F.R.D. 524, 537 (C.D. Cal. 2011)  
5 (“Given the small size of each class member’s claim, class treatment is not merely the superior,  
6 but the only manner in which to ensure fair and efficient adjudication of the present action.”). In  
7 short, “there is no evidence that Class members have any interest in controlling prosecution of  
8 their claims separately nor would they likely have the resources to do so.” Munoz v. PHH Corp.,  
9 2013 WL 2146925, \*26 (E.D. Cal. 2013).

10 The second factor is “the extent and nature of any litigation concerning the controversy  
11 already begun by or against class members[.]” Fed. R. Civ. P. 23(b)(3)(B). While any class  
12 member who wishes to control his or her own case may opt out of the class, see Fed. R. Civ. P.  
13 23(c)(2)(B)(v), “other pending litigation is evidence that individuals have an interest in controlling  
14 their own litigation[.]” 2 Newberg on Class Actions, § 4:70 at p. 277 (5th ed. 2012) (emphasis  
15 omitted). Here, the parties have not directed the court to, and the court is otherwise unaware of,  
16 any related pending litigation. (See, generally, Dkt. 85, Motion).

17 The third factor is “the desirability or undesirability of concentrating the litigation of the  
18 claims in the particular forum,” and the fourth factor is “the likely difficulties in managing a class  
19 action.” Fed. R. Civ. P. 23(b)(3)(C)-(D). As noted above, “[i]n the context of settlement . . . the  
20 third and fourth factors are rendered moot and are irrelevant.” Barbosa, 297 F.R.D. at 444; see  
21 Amchem, 521 U.S. at 620, 117 S.Ct. at 2248 (“Confronted with a request for settlement-only class  
22 certification, a district court need not inquire whether the case, if tried, would present intractable  
23 management problems, . . . for the proposal is that there be no trial.”) (citation omitted).

24 The only factors in play here weigh in favor of class treatment. Further, the filing of  
25 separate suits by thousands of other class members “would create an unnecessary burden on  
26 judicial resources.” Barbosa, 297 F.R.D. at 445. Under the circumstances, the court finds that  
27 the superiority requirement is satisfied.  
28

1 II. FAIRNESS, REASONABLENESS, AND ADEQUACY OF THE PROPOSED  
2 SETTLEMENT.

3 A. The Settlement is the Product of Arm's-Length Negotiations.

4 "This circuit has long deferred to the private consensual decision of the parties." Rodriguez  
5 v. W. Publ'g Corp., 563 F.3d 948, 965 (9th Cir. 2009). The Ninth Circuit has "emphasized" that  
6 "the court's intrusion upon what is otherwise a private consensual agreement negotiated between  
7 the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that  
8 the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating  
9 parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all  
10 concerned." Id. (internal quotation marks omitted). When the settlement is "the product of an  
11 arms-length, non-collusive, negotiated resolution[,]" id., courts afford the parties the presumption  
12 that the settlement is fair and reasonable. See Spann, 314 F.R.D. at 324 ("A presumption of  
13 correctness is said to attach to a class settlement reached in arm's-length negotiations between  
14 experienced capable counsel after meaningful discovery.") (internal quotation marks and citation  
15 omitted); In re Netflix Privacy Litig., 2013 WL 1120801, \*4 (N.D. Cal. 2013) ("Courts have afforded  
16 a presumption of fairness and reasonableness of a settlement agreement where that agreement  
17 was the product of non-collusive arms' length negotiations conducted by capable and experienced  
18 counsel.").

19 Here, the parties engaged in extensive discovery, including third-party discovery, (see Dkt.  
20 86, Waldman Decl. at ¶ 7), and motion practice. (See id. at ¶ 4). The parties participated in three  
21 mediation sessions before Judge Tevrizian and consulted with him in the months between the first  
22 and final sessions. (See id. at ¶¶ 9-10; Dkt. 85, Motion at 4-5). As plaintiffs note, the settlement  
23 "is the result of hard-fought, comprehensive, informed, adversarial negotiations that spanned  
24 almost a year." (Dkt. 85, Motion at 14).

25 Based on the evidence and record before the court, the court is persuaded that the parties  
26 thoroughly investigated and considered their own and the opposing parties' positions. The parties  
27 had a sound basis for measuring the terms of the settlement against the risks of continued  
28 litigation, and there is no evidence that the settlement is "the product of fraud or overreaching by,

1 or collusion between, the negotiating parties[.]” Rodriguez, 563 F.3d at 965 (quoting Officers for  
2 Justice, 688 F.2d at 625).

3 B. The Amount Offered In Settlement Falls Within a Range of Possible Judicial  
4 Approval and is a Fair and Reasonable Outcome for Class Members.

5 1. **Recovery for Class Members.**

6 As described above, a class member will be able to submit a claim form for either a refund  
7 or a write-off based on their respective bills and what their health benefit plans determined to be  
8 allowable charges for the emergency room services, and whether the class member paid an  
9 amount in excess of the allowable charges. (Dkt. 86-1, Settlement Agreement at ¶¶ 4.2-4.3; see  
10 also Dkt. 85, Motion at 15). Although the exact dollar amount of the settlement is unknown at this  
11 time since the amounts of the refunds and write-offs will vary among class members based on  
12 their respective services and what their health benefit plans determined to be allowable charges,  
13 and whether the class member paid an amount in excess of the allowable charges, “[c]lass  
14 recovery is potentially 100%, as it reimburses (or writes off) the charges above the amounts  
15 allowed by the [c]lass [m]ember’s health benefit plan, and is only limited by a [c]lass [m]ember’s  
16 failure to timely file a Claim Form with the appropriate documentation[.]” (Dkt. 85, Motion at 15).

17 Plaintiffs characterize the settlement as “an excellent result for the Class given the risks of  
18 continued litigation” and note that the “potential monetary recovery under the Settlement is likely  
19 greater than the potential damages that may have been recovered for the Class at trial, as the jury  
20 could have found the reasonable value of the services to be somewhere between the [a]llowed  
21 [c]harges and Defendants’ charges.” (Dkt. 85, Motion at 16). Indeed, plaintiffs’ counsel are  
22 “cognizant of the significant challenges inherent in consumer class litigation challenging the  
23 reasonableness of rates charged for health care services, especially at the class certification  
24 stage.” (Id. at 15). They recognize that even if they “prevailed at every stage, there is the very  
25 real possibility of multiple lengthy appeals before the Ninth Circuit, which would prolong the time  
26 before the Class receives any relief.” (Id.).

27 Under the circumstances, the court finds the settlement is fair, reasonable, and adequate,  
28 particularly when viewed in light of the litigation risks in this case. Even putting aside defendants’

1 defenses and, assuming class certification was granted and upheld on appeal, defeating summary  
 2 judgment, winning the case at trial, and then sustaining the final judgment on appeal would be very  
 3 difficult. In short, given the significant risks and delay of continued litigation in this case, the court  
 4 is persuaded that the benefits to the class fall within the range of reasonableness. See, e.g., Low  
 5 v. Trump University, LLC, 2016 WL 7387292, \*2 (S.D. Cal. 2016) (granting preliminary approval  
 6 where class members were to “receive payments estimated to amount to 50% of what they spent  
 7 on the Trump University Live Events, less any refunds received”).

## 8 2. Release of Claims.

9 The court also considers whether a class action settlement contains an overly broad  
 10 release of liability. See 4 Newberg on Class Actions § 13:15, at p. 326-27 (5th ed. 2014) (“Beyond  
 11 the value of the settlement, courts have rejected preliminary approval when the proposed  
 12 settlement contains obvious substantive defects such as . . . overly broad releases of liability.”);  
 13 see, e.g., Fraser v. Asus Computer Int’l, 2012 WL 6680142, \*3 (N.D. Cal. 2012) (denying  
 14 preliminary approval of proposed settlement that provided defendant a “nationwide blanket  
 15 release” in exchange for payment “only on a claims-made basis,” without the establishment of a  
 16 settlement fund or any other benefit to the class).

17 Here, class members who do not exclude themselves from the settlement will release all  
 18 claims, “whether known or unknown, which have been asserted or could have been asserted” by  
 19 the named plaintiffs or any class members “relating to: (1) the pricing of emergency department  
 20 medical services in California; or (ii) the sufficiency of disclosures by defendants to emergency  
 21 department patients in California[.]”<sup>5</sup> (See Dkt. 86-1, Settlement Agreement at ¶¶ 1.32, 6). With  
 22 the understanding that, under the Release, the settlement class members are not giving up claims  
 23 unrelated to the pricing and disclosure issues alleged in the operative complaint, the court finds  
 24 that the release adequately balances fairness to absent class members with defendants’ business  
 25 interest in ending this litigation. See, e.g., Fraser, 2012 WL 6680142, at \*4 (recognizing

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26  
 27 <sup>5</sup> The named plaintiffs and any other class members that may become class  
 28 representatives prior to judgment will also be subject to a waiver of rights under California Civil  
 Code § 1542. (See Dkt. 86-1, Settlement Agreement at ¶ 6.2).

1 defendant's "legitimate business interest in 'buying peace' and moving on to its next challenge"  
2 as well as the need to prioritize "[f]airness to absent class member[s]").

3 C. The Settlement Agreement Does Not Improperly Grant Preferential Treatment to the  
4 Class Representatives.

5 "Incentive awards are payments to class representatives for their service to the class in  
6 bringing the lawsuit." Radcliffe v. Experian Info. Sols. Inc., 715 F.3d 1157, 1163 (9th Cir. 2013).  
7 The Ninth Circuit has instructed "district courts to scrutinize carefully the awards so that they do  
8 not undermine the adequacy of the class representatives." Id. The court must examine whether  
9 there is a "significant disparity between the incentive awards and the payments to the rest of the  
10 class members" such that it creates a conflict of interest. See id. at 1165. "In deciding whether  
11 [an incentive] award is warranted, relevant factors include the actions the plaintiff has taken to  
12 protect the interests of the class, the degree to which the class has benefitted from those actions,  
13 and the amount of time and effort the plaintiff expended in pursuing the litigation." Cook v. Niedert,  
14 142 F.3d 1004, 1016 (7th Cir. 1998).

15 The Settlement Agreement provides that class counsel shall apply to the court for an  
16 incentive award of \$2,500 for Bozarth and \$1,250 for Bell, (Dkt. 86-1, Settlement Agreement at  
17 ¶ 8.1), "in recognition of their efforts on behalf of the class." (Id.). As an initial matter, the  
18 incentive award for each named plaintiff is presumptively reasonable. See, e.g., Dyer v. Wells  
19 Fargo Bank, N.A., 303 F.R.D. 326, 335 (N.D. Cal. 2014) (finding an incentive award of \$5,000  
20 presumptively reasonable). Moreover, because the parties agree that the Settlement Agreement  
21 shall remain in force regardless of any incentive award, (see Dkt. 86-1, Settlement Agreement at  
22 ¶ 8.1), the awards here are unlikely to create a conflict of interest between the named plaintiffs and  
23 absent class members. In short, the court is persuaded that there is no conflict of interest  
24 between the named plaintiffs and absent class members. See, e.g., In re Online DVD-Rental, 779  
25 F.3d 934, 947-48 (9th Cir. 2015) (upholding reasonableness of \$5,000 incentive awards that were  
26 roughly 417 times larger than \$12 individual awards because the number of representatives was  
27 relatively small, and the total amount of incentive awards "ma[d]e up a mere .17% of the total  
28 settlement fund").



1 D. Class Notice and Notification Procedures.

2 Upon settlement of a certified class, “[t]he court must direct notice in a reasonable manner  
3 to all class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1). Federal  
4 Rule of Civil Procedure 23(c)(2) requires the “best notice that is practicable under the  
5 circumstances, including individual notice” of particular information. See Fed. R. Civ. P.  
6 23(c)(2)(B) (enumerating notice requirements for classes certified under Rule 23(b)(3)).

7 A class action settlement “[n]otice is satisfactory if it generally describes the terms of the  
8 settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come  
9 forward and be heard.” In re Hyundai, 926 F.3d at 567 (internal quotation marks omitted). “The  
10 standard for the adequacy of a settlement notice in a class action under either the Due Process  
11 Clause or the Federal Rules is measured by reasonableness.” Wal-Mart Stores, Inc. v. Visa  
12 U.S.A., Inc., 396 F.3d 96, 113 (2d Cir. 2005); Low v. Trump University, LLC, 881 F.3d 1111, 1117  
13 (9th Cir. 2018) (“The yardstick against which we measure the sufficiency of notices in class action  
14 proceedings is one of reasonableness.”) (internal quotation marks omitted). Settlement notices  
15 “are sufficient if they inform the class members of the nature of the pending action, the general  
16 terms of the settlement, that complete and detailed information is available from the court files,  
17 and that any class member may appear and be heard at the hearing[.]” Gooch v. Life Inv’rs Ins.  
18 Co. of Am., 672 F.3d 402, 423 (6th Cir. 2012) (internal quotation marks omitted); see Wershba v.  
19 Apple Comput., Inc., 91 Cal.App.4th 224, 252 (2001), disapproved of on other grounds by  
20 Hernandez v. Restoration Hardware, Inc., 4 Cal.5th 260, 269 (2018) (“As a general rule, class  
21 notice must strike a balance between thoroughness and the need to avoid unduly complicating  
22 the content of the notice and confusing class members.”). The notice should provide sufficient  
23 information to allow class members to decide whether they should accept the benefits of the  
24 settlement, opt out and pursue their own remedies, or object to its terms. See In re Integra Realty  
25 Res., Inc., 262 F.3d 1089, 1111 (10th Cir. 2001) (“The standard for the settlement notice under  
26 Rule 23(e) is that it must ‘fairly apprise’ the class members of the terms of the proposed settlement  
27 and of their options.”).

28 Here, the parties have selected Rust as the settlement administrator. (See Dkt. 86-1,

1 Settlement Agreement at ¶ 5.2.1). Class members will receive notice by first class mail, (see id.  
2 at § 5.2.3.2), which will consist of the Notice of Proposed Class Action Settlement (“Notice”). (See  
3 id. at Exh. B (Notice)). Additionally, Rust will establish a settlement website that will enable class  
4 members to access the claim form, opt-out form, and relevant case documents. (See id. at ¶  
5 5.2.3.3 & Exhs. A (Claim Form) & C (Opt-Out/Exclusion Form)).

6 The Notice describes the nature of the action and the claims for relief. (See Dkt. 86-1,  
7 Settlement Agreement, Exh. B (Notice) at 1); see also Fed. R. Civ. P. 23(c)(2)(B)(i) & (iii). It  
8 provides the definition of the class, (see Dkt. 86-1, Settlement Agreement, Exh. B (Notice) at 1-2);  
9 see also Fed. R. Civ. P. 23(c)(2)(B)(ii), and explains the terms of the settlement, including the  
10 monetary and nonmonetary benefits, the claims process, and the release of claims. (See Dkt. 86-  
11 1, Settlement Agreement, Exh. B (Notice) at 2-4). It includes an explanation that lays out the class  
12 members’ options under the settlement: they may remain in the class, object to the settlement but  
13 still remain in the class, or exclude themselves from the settlement and pursue their claims  
14 separately against defendants. (See id. at 2, 4-5); see also Fed. R. Civ. P. 23(c)(2)(B)(v)-(vi).  
15 Finally, the Notice provides information about the Final Fairness Hearing. (See Dkt. 86-1,  
16 Settlement Agreement, Exh. B (Notice) at 5).

17 Based on the foregoing, the court finds there is no alternative method of distribution that  
18 would be more practicable here, or any more reasonably likely to notify the class members. Under  
19 the circumstances, the court finds that the procedure for providing notice and the content of the  
20 class notice constitute the best practicable notice to class members and complies with the  
21 requirements of due process.

22 E. Summary.

23 In short, the court’s preliminary evaluation of the settlement does not disclose grounds to  
24 doubt its fairness “such as unduly preferential treatment of class representatives or segments of  
25 the class, inadequate compensation or harms to the classes, . . . or excessive compensation for  
26 attorneys[.]” Manual for Complex Litigation § 21.632 (4th ed. 2004); see also Spann, 314 F.R.D.  
27 at 323.

**CONCLUSION**

Based on the foregoing, IT IS ORDERED THAT:

1. Plaintiff's Motion for Preliminary Approval of Class Action Settlement (**Document No. 85**) is granted upon the terms and conditions set forth in this Order.

2. The court preliminarily certifies the class, as defined in ¶ 1.9 of the Stipulation and Agreement of Class Action Settlement ("Settlement Agreement") (Dkt. 86-1) for the purposes of settlement.

3. The court preliminarily appoints plaintiffs Renee MacLaughlan Bozarth and Stella Bell as class representatives for settlement purposes.

4. The court preliminarily appoints Wolf Popper LLP and Glancy Prongay & Murray LLP as class counsel for settlement purposes.

5. The court preliminarily finds that the terms of the settlement are fair, reasonable and adequate, and comply with Rule 23(e) of the Federal Rules of Civil Procedure.

6. The court approves the form, substance, and requirements of the class Notice, (Dkt. 86-1, Exh. B), the Claim Form, (*id.* at Exh. A), and the Opt-Out Form. (*id.* at Exh. C). The proposed manner of notice of the settlement set forth in the Settlement Agreement constitutes the best notice practicable under the circumstances and complies with the requirements of due process.

7. Rust shall complete dissemination of class notice, in accordance with the Settlement Agreement, no later than **January 24, 2020**.

8. Plaintiffs shall file a motion for an award of class representative incentive payments and attorney's fees and costs no later than **February 24, 2020**, and notice it for hearing for the date of the final approval hearing set forth below.

9. Any class member who wishes to: (a) object to the settlement, including the requested attorney's fees, costs and incentive awards; or (b) exclude him or herself from the settlement must file his or her objection to the settlement or request for exclusion no later than **March 24, 2020**, in accordance with the Notice.

10. Plaintiffs shall, no later than **April 30, 2020**, file and serve a motion for final approval of the settlement and a response to any objections to the settlement. The motion shall be noticed

1 for hearing for the date of the final approval hearing set forth below.

2 11. Defendants may file and serve a memorandum in support of final approval of the  
3 Settlement Agreement and/or in response to objections no later than **May 7, 2020**.

4 12. Any class member who wishes to appear at the final approval (fairness) hearing, either  
5 on his or her own behalf or through an attorney, to object to the settlement, including the  
6 requested attorney's fees, costs or incentive award, shall, no later than **May 12, 2020**, file with the  
7 court a Notice of Intent to Appear at Fairness Hearing.

8 13. A final approval (fairness) hearing is hereby set for **May 21, 2020**, at **10:00 a.m.** in  
9 Courtroom 6D of the First Street Courthouse, to consider the fairness, reasonableness, and  
10 adequacy of the Settlement as well as the award of attorney's fees and costs to class counsel, and  
11 service award to the class representative.

12 14. All proceedings in the Action, other than proceedings necessary to carry out or enforce  
13 the Settlement Agreement or this Order, are stayed pending the final fairness hearing and the  
14 court's decision whether to grant final approval of the settlement.

15 Dated this 30th day of December, 2019.

16  
17 /s/

18 \_\_\_\_\_  
Fernando M. Olguin  
United States District Judge

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Bar No. 24013760  
tate@hilderlaw.com  
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Associated Case Party: KENNETHKESLAR

Name	BarNumber	Email	TimestampSubmitted	Status
Philip H. Hilder	9620050	philip@hilderlaw.com	1/30/2023 6:38:37 PM	SENT
Quentin Tate Williams	24013760	tate@hilderlaw.com	1/30/2023 6:38:37 PM	SENT
Radha Raghavan		RRaghavan@wolfpopper.com	1/30/2023 6:38:37 PM	SENT
David Nicholas		DNicholas@wolfpopper.com	1/30/2023 6:38:37 PM	SENT
Chet Waldman		CWaldman@wolfpopper.com	1/30/2023 6:38:37 PM	SENT

Associated Case Party: EMERUS / BHS SA THOUSAND OAKS LLC

Name	BarNumber	Email	TimestampSubmitted	Status
Debra AnnArriola		darriola@lawdcm.com	1/30/2023 6:38:37 PM	SENT
Kevin McGinty		KMcGinty@mintz.com	1/30/2023 6:38:37 PM	SENT

Associated Case Party: EMERUS HOSPITAL PARTNERS LLC

Name	BarNumber	Email	TimestampSubmitted	Status
Kevin McGinty		KMcGinty@mintz.com	1/30/2023 6:38:37 PM	SENT

Associated Case Party: EMERUS HOLDINGS INC

Name	BarNumber	Email	TimestampSubmitted	Status
Kevin McGinty		KMcGinty@mintz.com	1/30/2023 6:38:37 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
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Q. Williams  
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#### Case Contacts

Andrew F.MacRae		andrew@lpfirm.com	1/30/2023 6:38:37 PM	SENT
Ricardo G.Cedillo		rcedillo@lawdcm.com	1/30/2023 6:38:37 PM	SENT
Donna Shodrock		dshodrock@lawdcm.com	1/30/2023 6:38:37 PM	SENT
Kevin McGinty		KMcGinty@mintz.com	1/30/2023 6:38:37 PM	SENT
Jason Burrell		jlburrell@mintz.com	1/30/2023 6:38:37 PM	SENT
Natalie Prescott		nprescott@mintz.com	1/30/2023 6:38:37 PM	ERROR
Kevin McGinty		KMcGinty@mintz.com	1/30/2023 6:38:37 PM	SENT
Andrew MacRae		afmacrae@gmail.com	1/30/2023 6:38:37 PM	SENT