

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

OKLAHOMA LAW ENFORCEMENT
RETIREMENT SYSTEM, Individually And
On Behalf Of All Others Similarly Situated,

Plaintiff,

vs.

ADEPTUS HEALTH INC., *et al.*,

Defendants.

Case No. 4:17-CV-0449-ALM

Judge Amos L. Mazzant, III

**PLAINTIFFS' UNOPPOSED MOTION FOR APPROVAL OF
DISTRIBUTION PLAN AND MEMORANDUM IN SUPPORT THEREOF**

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Pursuant to Federal Rule of Civil Procedure 23(e) and this Court’s Order Approving Plan of Allocation of Net Settlement Fund entered May 20, 2020, and upon (a) the accompanying Declaration of Eric J. Miller in Support of Plaintiffs’ Unopposed Motion for Approval of Distribution Plan (the “Miller Declaration”)¹ submitted on behalf of the Court-authorized Claims Administrator, A.B. Data, Ltd. (“A.B. Data”); and (b) all other papers and proceedings herein, Lead Plaintiffs, Alameda County Employees’ Retirement Association (“ACERA”) and Arkansas Teacher Retirement System (“ATRS” and, together with ACERA, “Lead Plaintiffs”), and additional named plaintiff Miami Fire Fighters’ Relief and Pension Fund (“Miami” and, together with Lead Plaintiffs, “Plaintiffs”), on behalf of themselves and the Settlement Class, will and do hereby move this Court for entry of the accompanying [Proposed] Order Approving Distribution Plan (the “Class Distribution Order”), which would, *inter alia*: (i) approve the administrative determinations of A.B. Data accepting and rejecting Claims submitted in connection with the Settlement reached in the above-captioned Action as stated in the Miller Declaration; (ii) direct the Initial Distribution of the Net Settlement Fund to Claimants whose Claims are accepted by A.B. Data as valid and approved by the Court (“Authorized Claimants”), while maintaining a Reserve for any contingencies that may arise following the Initial Distribution; (iii) direct that distribution checks issued in the Initial Distribution state that the check must be cashed within 90 days after the issue date; (iv) direct that Authorized Claimants will forfeit all recovery from the Settlement if they fail to cash their distribution checks in a timely manner; (v) approve the recommended plan for any funds remaining after the Initial Distribution; (vi) approve A.B. Data’s fees and expenses incurred and estimated to be incurred in the administration of the Settlement and the Initial Distribution; (vii) release claims

¹ All terms with initial capitalization not otherwise defined herein have the meanings ascribed to them in the Miller Declaration or in the Stipulation and Agreement of Settlement dated November

related to the administration process; and (viii) authorize the destruction of Claim Forms and supporting documents at an appropriate time.

There are no disputed Claims requiring Court review by any Settlement Class Member. As such, the motion is ripe for determination.

I. PRELIMINARY STATEMENT

In this unopposed motion, Plaintiffs respectfully request that the Court enter an order approving the distribution of the \$44,000,000 in cash (the “Settlement Amount”) to Authorized Claimants in accordance with the proposed distribution plan.

By way of brief background, in accordance with the Court’s Order Preliminarily Approving Settlement and Providing for Notice (ECF No. 277) (the “Preliminary Approval Order”), the Court-approved claims administrator, A.B. Data, mailed the Notice of (I) Pendency of Class Action and Proposed Settlement; (II) Settlement Fairness Hearing; and (III) Motion for Attorneys’ Fees and Litigation Expenses (the “Notice”) and the Proof of Claim and Release Form (the “Claim Form” or “Proof of Claim Form” and, collectively with the Notice, the “Notice Packet”) to potential Settlement Class Members, brokers, and other nominees. Miller Decl. ¶ 2. Indeed, as stated in the accompanying Miller Declaration, A.B. Data has disseminated 62,672 Notice Packets to potential Settlement Class Members and nominees. *Id.* ¶ 4. The Notice informed Settlement Class Members that if they wished to be eligible to participate in the distribution of the Net Settlement Fund, they were required to submit a properly executed Claim so that it would be received or postmarked no later than June 8, 2020. *Id.* ¶ 7.

On May 20, 2020, the Court entered the Order Approving Plan of Allocation of Net Settlement Fund (ECF No. 288) and Judgment Approving Class Action Settlement (ECF No. 287)

26, 2019 (the “Stipulation”) (ECF No. 275-2).

(the “Judgment”). The Effective Date of the Settlement has occurred. Accordingly, the Net Settlement Fund may be distributed to Authorized Claimants.

In accordance with paragraph 27 of the Court-approved Stipulation and Agreement of Settlement (the “Stipulation”), Plaintiffs respectfully request the Court to enter the Class Distribution Order approving the Distribution Plan.²

II. CLAIMS ADMINISTRATION

As detailed in the accompanying Miller Declaration, through January 12, 2021, A.B. Data has received 13,974 Claims. Miller Decl. ¶ 7. All Claims received through January 12, 2021, have been fully processed in accordance with the Stipulation and the Court-approved Plan of Allocation included in the Notice (*id.*), and A.B. Data has worked with Claimants to help them perfect their Claims (*see id.* ¶¶ 19-26).

As discussed in the Miller Declaration, many of the Claims submitted in the Settlement were initially deficient or ineligible for one or more reasons, including being incomplete, not signed, not properly documented, or otherwise deficient, which required substantial follow-up work by A.B. Data. *Id.* ¶¶ 19, 22.

If A.B. Data determined a Claim to be defective or ineligible, it sent the Claimant or filer a letter (if the Claimant filed a paper or online Claim) or an email (if the Claimant filed an electronic Claim) describing the defect(s) or condition(s) of ineligibility in the Claim and the steps necessary to cure any curable defect(s) in the Claim (“Deficiency Notices”). *Id.* ¶¶ 20, 22. The Deficiency Notices advised the Claimant or filer that the appropriate information or documentary evidence to complete the Claim had to be sent within 20 days from the date of the Deficiency Notice, or A.B.

² The Court retained continuing and exclusive jurisdiction over, among other things, implementing the Settlement, including the disposition of the Settlement Fund and any motion to approve the Class

Data would recommend the Claim for rejection to the extent the deficiency or condition of ineligibility was not cured. *Id.* ¶¶ 20, 23. Sample Deficiency Notices are attached as Exhibits A, B and C to the Miller Declaration.

A. No Disputed Claims

A.B. Data carefully reviewed Claimants' and filers' responses to the Deficiency Notices and worked with them to resolve deficiencies where possible. *Id.* ¶¶ 21, 26. Consistent with paragraph 25(e) of the Stipulation, the Deficiency Notices specifically advised Claimants and filers of their right, within 20 days after the mailing or emailing of the Deficiency Notice, to contest the rejection of the Claim and request Court review of the administrative determination of the Claim. *Id.* ¶¶ 20, 23. There are no outstanding requests for Court review by any Claimants. *Id.* ¶ 28.

B. Late Claims – and Final Cut-Off Date

The 13,974 Claims received through January 12, 2021, include 615 Claims that were postmarked or received after the Court-approved Claim-submission deadline of June 8, 2020, but that were received through January 12, 2021. *Id.* ¶¶ 29, 35. Those late Claims have been fully processed, and 180 of them are, but for the late submission, otherwise eligible. *Id.* Although these 180 Claims were late, they were received while the processing of timely Claims was ongoing. Due to the amount of time needed to process the timely Claims received, the processing of these late Claims did not delay the completion of the Claims administration process or the distribution of the Net Settlement Fund. The Court has discretion to accept Claims received after the Claim-submission deadline.³ Plaintiffs respectfully submit that, when the equities are balanced, it would be unfair to

Distribution Order. *See* Judgment ¶ 15.

³ *See* Notice ¶ 46 (“*Unless the Court otherwise orders, any Settlement Class Member who fails to submit a Claim Form postmarked (if mailed), or online, on or before June 8, 2020 shall be fully and forever barred from receiving payments pursuant to the Settlement . . .*”) (emphasis added). *See also*

prevent an otherwise eligible Claim from participating in the distribution of the Net Settlement Fund solely because it was received after the Court-approved Claim-submission deadline, if it was submitted while timely Claims were still being processed.

To facilitate the efficient distribution of the Net Settlement Fund, however, there must be a final cut-off date after which no other Claims may be accepted. Accordingly, Plaintiffs respectfully request that this Court order that any new Claims and any adjustments to previously filed Claims that would result in an increased Recognized Claim amount received after January 12, 2021, be barred, subject to the provisions of paragraph 39(f) of the Miller Declaration.⁴ Paragraph 39(f) applies to any Claims received or modified after January 12, 2021, that would have been eligible for payment or additional payment under the Court-approved Plan of Allocation if timely received. At the time when Lead Counsel, in consultation with A.B. Data, determine that a further distribution is not cost-effective as provided in paragraph 39(e) of the Miller Declaration, the post-January 12, 2021 Claimants, after payment of fees and expenses as provided in paragraph 39(f) of the Miller Declaration, at the discretion of Lead Counsel and to the extent possible, may be paid their distribution amounts or additional distribution amounts on a *pro rata* basis that would bring them into parity with other Authorized Claimants who have cashed all their prior distribution checks.

Preliminary Approval Order ¶ 11 (“*Unless the Court orders otherwise*, all Claim Forms must be postmarked no later than one hundred twenty (120) calendar days after the Notice Date. Notwithstanding the foregoing, Lead Counsel may, at their discretion, accept for processing late Claims provided such acceptance does not delay the distribution of the Net Settlement Fund to the Settlement Class.”) (emphasis added).

⁴ Should an adjustment be received that results in a lower Recognized Claim amount, that adjustment will be made, and the Recognized Claim amount will be reduced accordingly before a distribution to that Claimant. Miller Decl. ¶ 30.

III. FEES AND EXPENSES OF CLAIMS ADMINISTRATOR

In accordance with A.B. Data's agreement with Lead Counsel to act as the Claims Administrator for the Settlement, A.B. Data was responsible for, among other things, disseminating notice of the Settlement to the Settlement Class, creating and maintaining a website and toll-free telephone helpline, processing Claims, and allocating and distributing the Net Settlement Fund to Authorized Claimants. Miller Decl. ¶ 2. As stated in the accompanying Miller Declaration, A.B. Data's fees and expenses for its work performed through December 31, 2020, are \$178,217.73 and its estimated fees and expenses for work to be performed on behalf of the Settlement Class in connection with the Initial Distribution are \$20,897.68.⁵ *Id.* ¶ 38. To date, A.B. Data has received payment in the amount of \$166,887.98 for its fees and expenses. *Id.* Accordingly, there is an outstanding balance of \$32,227.43 payable to A.B. Data, which amount includes the estimated fees and expenses to be incurred by A.B. Data in connection with the Initial Distribution. *Id.* Lead Counsel reviewed A.B. Data's invoices and respectfully request on behalf of Plaintiffs that the Court approve all of A.B. Data's fees and expenses.

IV. DISTRIBUTION PLAN FOR THE NET SETTLEMENT FUND

The Net Settlement Fund is ready to be distributed. Plaintiffs respectfully move the Court for entry of an order approving A.B. Data's determinations concerning acceptance and rejection of the Claims that are included in the present motion and approving the proposed plan for the distribution of the Net Settlement Fund as stated in the Miller Declaration (the "Distribution Plan").⁶

⁵ Should the estimate of fees and expenses to conduct the Initial Distribution exceed the actual cost to conduct the Initial Distribution, the excess will be returned to the Settlement Fund and will be available for subsequent distributions to Authorized Claimants. Miller Decl. ¶ 38 n.2.

⁶ Under the Stipulation, Defendants have no role in or responsibility for the administration of the Settlement Fund or processing of Claims, including determinations as to the validity of Claims or the distribution of the Net Settlement Fund. *See* Stipulation ¶¶ 18, 22, 24.

A. Distribution of the Net Settlement Fund

Under the proposed Distribution Plan, A.B. Data will distribute approximately 95% of the Net Settlement Fund, after deducting all payments previously allowed and the payments approved by the Court on this motion, and after deducting payment of any estimated taxes, the costs of preparing appropriate tax returns, and any escrow fees (i.e., the Initial Distribution). *See* Miller Decl. ¶ 39(a). In the Initial Distribution, A.B. Data will calculate award amounts for all Authorized Claimants as if the entire Net Settlement Fund were to be distributed now. *Id.* ¶ 39(a)(1). A.B. Data will first determine each Authorized Claimant's *pro rata* share of the total Net Settlement Fund based on the Claimant's Recognized Claim in comparison to the total Recognized Claims of all Authorized Claimants. *Id.* In accordance with the Court-approved Plan of Allocation, A.B. Data will eliminate from the Initial Distribution any Authorized Claimant whose *pro rata* share calculates to less than \$10.00, as these Claimants will not receive any payment from the Net Settlement Fund and will be so notified by A.B. Data. *Id.* ¶ 39(a)(2). A.B. Data will then recalculate the *pro rata* share of the Net Settlement Fund for Authorized Claimants who would have received \$10.00 or more based on the amount of the Authorized Claimant's Recognized Claim in comparison to the total Recognized Claims of all Authorized Claimants who would have received \$10.00 or more. *Id.* ¶ 39(a)(3). This *pro rata* share is the Authorized Claimant's "Distribution Amount." *Id.* Authorized Claimants whose Distribution Amount calculates to less than \$200.00 will be paid their full Distribution Amount in the Initial Distribution ("Claims Paid in Full"). *Id.* ¶ 39(a)(4). These Authorized Claimants will receive no additional funds in subsequent distributions. *Id.* After deducting the payments to the Claims Paid in Full, 95% of the remaining balance of the Net Settlement Fund will be distributed *pro rata* to Authorized Claimants whose Distribution Amount calculates to \$200.00 or more. *Id.* ¶ 39(a)(5). The remaining 5% of the Net Settlement Fund will be held in reserve (the "Reserve") to

address any tax liability and claims administration-related contingencies that may arise. *Id.* To the extent the Reserve is not depleted, the remainder will be distributed in the “Second Distribution” described in subparagraph 39(d) of the Miller Declaration.

In order to encourage Authorized Claimants to promptly cash their checks, Plaintiffs propose that all distribution checks in the Initial Distribution bear the notation, “CASH PROMPTLY. VOID AND SUBJECT TO REDISTRIBUTION IF NOT CASHED BY [DATE 90 DAYS AFTER ISSUE DATE].” *Id.* ¶ 39(b). Authorized Claimants who do not cash their checks within the time allotted or on the conditions stated in paragraph 39(b) footnote 3 of the Miller Declaration will irrevocably forfeit all recovery from the Settlement, and the funds allocated to all of these stale-dated checks will be available to be redistributed to other Authorized Claimants in a subsequent distribution, as described below. *Id.* ¶ 39(c).

B. Additional Distribution(s) of the Net Settlement Fund

After A.B. Data has made reasonable and diligent efforts to have Authorized Claimants cash their Initial Distribution checks, but not earlier than seven (7) months after the Initial Distribution and if Lead Counsel, in consultation with A.B. Data, determine that it is cost-effective to do so, A.B. Data will conduct a second distribution of the Net Settlement Fund (the “Second Distribution”). In the Second Distribution, any amounts remaining in the Net Settlement Fund after the Initial Distribution, including from the Reserve and the funds for all void stale-dated checks, after deducting A.B. Data’s fees and expenses incurred in connection with administering the Settlement for which it has not yet been paid, including the estimated costs of conducting the Second Distribution, and after deducting payment of any estimated taxes, the costs of preparing appropriate tax returns, and any escrow fees, will be distributed to all Authorized Claimants in the Initial Distribution (other than Claims Paid in Full) who cashed their Initial Distribution checks and would

receive at least \$10.00 from the Second Distribution based on their *pro rata* share of the remaining funds. *Id.* ¶ 39(d). If, after the Second Distribution, any funds remain in the Net Settlement Fund because of uncashed checks or otherwise, then after A.B. Data has made reasonable and diligent efforts to have Authorized Claimants cash their distribution checks, and if cost-effective, subsequent distributions of the funds remaining in the Net Settlement Fund, after deduction of costs and expenses as described above and subject to the same conditions, will take place at six-month intervals thereafter. *Id.* When Lead Counsel, in consultation with A.B. Data, determine that further distribution is not cost-effective, if sufficient funds remain to warrant the processing of Claims received after January 12, 2021, A.B. Data will process those Claims. Any of these Claims that are otherwise valid, as well as any earlier received Claims for which an adjustment was received after January 12, 2021, which resulted in an increased Recognized Claim, may be paid in accordance with paragraph 39(f) of the Miller Declaration. *Id.* ¶ 39(e). If any funds remain in the Net Settlement Fund after payment of these late or late-adjusted Claims, the remaining balance of the Net Settlement Fund, after payment of any unpaid fees or expenses incurred in administering the Net Settlement Fund and after the payment of any estimated taxes, the costs of preparing appropriate tax returns, and any escrow fees, will be contributed to non-sectarian, not-for-profit 501(c)(3) organization(s) to be recommended by Lead Counsel and approved by the Court. *Id.*

Lead Counsel request that the Court approve the National Consumer Law Center (“NCLC”) to be the recipient of the remaining balance of the Net Settlement Fund. NCLC is a private, non-sectarian, not-for-profit organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. NCLC was founded in 1969 through a federal grant to provide legal services addressed to two main goals: improving the access of low-income people to the legal system and enabling advocates to seek remedies where needed. Today, NCLC continues to advocate for low-

income consumers and provides many resources to civil legal aid and private attorneys representing low-income consumers. NCLC's lawyers provide policy analysis, advocacy, litigation, expert-witness services, and training for consumer advocates throughout the United States. *See* <https://www.nclc.org/about-us/our-story.html>. As NCLC states on its website, it "works to ensure a fair marketplace and access to justice for all consumers, including low-income people, older Americans, students, military service members and veterans," and its "work covers a broad range of consumer issues, including consumer protection, fair credit, debt collection, student loans, mortgages and foreclosures, financial services, bankruptcy, [and] unfair and deceptive acts and practices. . . ." <https://www.nclc.org/about-us/cy-pres-awards.html>.

Federal courts have approved NCLC as a *cy pres* recipient of residual balances of net settlement funds in other settlements. *See, e.g., In re Nu Skin Enters., Inc., Sec. Litig.*, Master File No. 2:14-cv-00033-JNP-BCW, ECF Nos. 152-154 (D. Utah Aug. 30, 2018); *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1261 (C.D. Cal. 2016), *appeal dismissed*, 2016 WL 9778633 (9th Cir. Nov. 7, 2016); *Perkins v. Am. Nat'l Ins. Co.*, No. 3:05-CV-100 (CDL), 2012 WL 2839788, at *5 (M.D. Ga. July 10, 2012) ("The Court is also satisfied that The National Consumer Law Center's mission, reputation and established track record will ensure that it will be a good steward of the grant award made to it.").

V. RELEASE OF CLAIMS

In order to allow the full and final distribution of the Net Settlement Fund, it is necessary to bar any further claims against the Net Settlement Fund beyond the amounts allocated to Authorized Claimants, and to provide that all persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the Claims submitted in connection with the Settlement, or who are otherwise involved in the administration or taxation of the Settlement Fund or

the Net Settlement Fund, be released and discharged from all claims arising out of that involvement. Accordingly, Plaintiffs respectfully request that the Court release and discharge all persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the Claims submitted in connection with the Settlement, or who are otherwise involved in the administration or taxation of the Settlement Fund or the Net Settlement Fund from all claims arising out of that involvement, and bar all Settlement Class Members and other Claimants, whether or not they receive payment from the Net Settlement Fund, from making any further claims against the Net Settlement Fund, Plaintiffs, Lead Counsel, the Claims Administrator, the Escrow Agent or any other agent retained by Plaintiffs or Lead Counsel in connection with the administration or taxation of the Settlement Fund or the Net Settlement Fund, or any other person released under the Settlement beyond the amounts allocated to Authorized Claimants.⁷

⁷ Similar language has been routinely approved by courts in connection with the distribution of settlement proceeds. *See, e.g., In re Cobalt Int'l Energy, Inc. Sec. Litig.*, Lead Case No. 1:14-cv-3428 (NFA), ECF No. 384, at *7 (S.D. Tex. Nov. 17, 2020) (“All persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the Claims submitted, or who are otherwise involved in the administration or taxation of the Settlements, are hereby released and discharged from any and all claims arising out of that involvement, and all Settlement Class Members and other Claimants, whether or not they receive payment from the Net Settlement Fund, are hereby barred from making any further claims against the Net Settlement Fund, Lead Plaintiffs, Lead Counsel, the Claims Administrator, the Escrow Agent, or any other agent retained by Lead Plaintiffs or Lead Counsel in connection with the administration or taxation of the Settlement Fund or the Net Settlement Fund, or any other person released under the Settlements beyond the amounts allocated to Authorized Claimants;”); *In re Eletrobras Sec. Litig.*, 467 F.Supp.3d 149, 151 (S.D.N.Y. 2020) (approving substantially similar language in order authorizing distribution of settlement proceeds); *Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd. Co.*, No. 12-3824, 2015 WL 12839121, at *1-2 (E.D. Pa. Jan. 21, 2015) (same); *Romero v. US Unwired, Inc.*, Civil Action No. 04-2312, 2012 WL 12995289, at *2 (E.D. La. Mar. 8, 2012) (same).

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that Plaintiffs' Unopposed Motion for Approval of Distribution Plan should be granted, and the [Proposed] Order Approving Distribution Plan should be entered.

Dated: February 22, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2021, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF Filing System.

/s/ Clyde M. Siebman
Clyde M. Siebman