

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

MARIA CUMMINGS, INDIVIDUALLY
AND AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF SHAUN MICHAEL
CHAVEZ; JANA VALLEJOS,
INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
DONOVAN VALLEJOS; and LEON
SALAZAR, INDIVIDUALLY, on behalf of
themselves and ALL OTHERS SIMILARLY
SITUATED,

Plaintiffs,

v.

BOARD OF REGENTS OF THE
UNIVERSITY OF NEW MEXICO, et al.,

Defendants.

No. D-202-CV-2001-00579
(As consolidated with
No. D-202-CV-2001-1409)

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement” or “Settlement Agreement”) is entered into by and among the Regents of the University of New Mexico (“UNM” or “Defendants”) and Maria Cummings, individually and as personal representative of the estate of Shaun Michael Chavez and Jana Vallejos, individually and as personal representative of the estate of Donovan Vallejos, (collectively “Plaintiffs” or “Decedent Class Plaintiffs”), on behalf of themselves and on behalf of a class of similarly situated persons (the “Decedent Class”), as defined further in this Agreement.

WHEREAS Decedent Class Plaintiffs have filed complaints alleging, among other things, that UNM systematically failed to administer proper treatment protocols to all Acute Lymphoblastic Leukemia (“ALL”) patients, or Decedent Class Plaintiffs, treated at UNM Health

Sciences Center for a period from approximately January 1, 1977 to approximately March 31, 1997, causing them severe harm and have sought class action status on behalf of persons similarly situated;

WHEREAS UNM denies the allegations, asserts affirmative defenses, has opposed the certification of an adjudicated class and does not admit or concede any liability;

WHEREAS Decedent Class Plaintiffs and UNM have engaged in extensive discovery and motion practice, as well as appellate proceedings, and are well acquainted with relevant facts;

WHEREAS Decedent Class Plaintiffs have thoroughly analyzed the facts and the law and have determined that a Decedent Class settlement with UNM as set forth in this Agreement is in the best interests of the Decedent Class;

WHEREAS UNM has concluded, despite its belief that it has good defenses to the claims alleged, that it is in the best interests of UNM to agree to class certification by the Court for the Decedent Class Members for settlement purposes only and enter into this Agreement in order to avoid the expense and inconvenience of protracted litigation; and

WHEREAS arms-length settlement negotiations between the Parties have taken place, including with the assistance of a mediator, Charles Peifer, and a Memorandum of Understanding has been executed by counsel for the Parties and approved by the Regents of the University of New Mexico, all resulting in this Agreement which embodies all the terms and conditions of settlement between UNM and the Decedent Class, subject to the approval of the Court.

DEFINITIONS

1. "Administrator" means a class administrator as appointed by the Court to disseminate class notice, calculate Decedent Class Member distributions pursuant to this Agreement and the Plan of Allocation (attached as Exhibit 4 to this Agreement), disseminate

Decedent Class Member distributions, and attend to other administrative tasks as necessary and as directed by Class Counsel or the Court.

2. The “Bar Date” is the date established by the Court by which any Class Member who wishes to do so must file his/her objections to this Agreement, or request to be excluded from the class (opt-out).

3. “Class Notice” means the notice in a form substantially similar to that attached hereto as Exhibit 2 (Notice by Mail), and the summary notice in a form substantially similar to the form attached hereto as Exhibit 3, to be published in newspapers per Paragraph 34 herein.

4. The “Decedent Class” means a settlement class, subject to certification by order of the Court, and is defined as: “Statutory beneficiaries, as defined in the New Mexico Wrongful Death Statute, NMSA 1978, §41-2-3 for all pediatric cancer patients with a diagnosis of Acute Lymphoblastic Leukemia who presented for treatment at the University of New Mexico Health Sciences Center from January 1, 1977 through March 31, 1997, and who, by December 1, 2019, were deceased, excluding individuals with whom UNM previously reached settlements, except that also excluded from the Decedent Class are those individuals who received only temporary treatment at UNM Health Sciences Center and whose treatment protocols were principally administered or designed elsewhere and who did not receive initial or relapse induction treatment in New Mexico.”

5. “Decedent Class Counsel” means, collectively, The Vigil Law Firm (Jacob Vigil) and Freedman Boyd Hollander Goldberg Urias & Ward, PA (Joseph Goldberg, Vincent J. Ward and Frank T. Davis) and The Bertram Law Group (Catherine Bertram).

6. “Decedent Class Members” means all members of the Decedent Class, as defined in Paragraph 4, above, except for members of the Decedent Class who Opt Out of this litigation on or before the Bar Date.

7. The “Effective Date” means the date on which a judgment entered by the Court approving this Agreement becomes final. The judgment will be deemed final only upon expiration of the time to appeal or, if a Notice of Appeal is filed, upon exhaustion of all appeals and petitions for writs of certiorari.

8. “Eligible Decedent Class Members” means those Decedent Class Members who are entitled to receive distributions pursuant to the Plan of Allocation attached hereto as Exhibit 4.

9. An “Opt-Out” is any Class Member who files a timely (on or before the “Bar Date”) request for exclusion as specified in Paragraph 28.

10. “Parties” means Plaintiffs and UNM.

11. “Plaintiffs” or “Decedent Class Plaintiffs” means Maria Cummings, individually and as personal representative of the estate of Shaun Michael Chavez and Jana Vallejos, individually and as personal representative of the estate of Donovan Vallejos.

12. “Released Parties” and “Released Party” means UNM and its affiliates (including, without limitation, University Physicians Associates and its successor-by-merger, UNM Medical Group, Inc.), subsidiaries, predecessors, successors, and/or assigns, including but not limited to its hospital(s), medical center(s), medical school, together with past, present, and future officials, employees, faculty members, family members, independent contractors, medical staff members, members of the Board of Regents, members of the UNM Hospital Board of Trustees (*f/k/a* the UNM Health Sciences Center Clinical Operations Board), members of the UNM Health Sciences

Center Board of Directors, representatives, attorneys and/or agents and insurance carriers, or any of them. In particular, it includes Dr. Marilyn Duncan and her supervisors and/or managers.

13. “Releasers” means the Decedent Class Members and their parents, spouses, siblings, guardians and/or personal representatives of Decedent Class Members.

14. “Settlement Fund” means the interest-bearing qualified settlement fund described in Paragraphs 22 & 24.

15. “This Action” means Maria Cummings, et al. v. Board of Regents of the University of New Mexico, et al., Case No. D-202-2001-00579, pending in the Second Judicial District Court, County of Bernalillo, State of New Mexico.

SETTLEMENT TERMS

16. The Parties agree that if this Agreement fails to be approved, or if twenty-five of Decedent Class Members opt out of the Decedent Class, as certified by the Court, then this Agreement may be withdrawn by Defendants on written notice to Class Counsel, and any moneys paid by Defendants to the Decedent Class, less any amounts approved by the Court to be disbursed to pay for notice to the Decedent Class or other approved administrative expense pursuant to Paragraph 24 of this Agreement, shall be reimbursed to Defendants within five days of written notice of withdrawal.

17. This Agreement, as of the Effective Date, resolves in full all claims against the Released Parties by all of the Decedent Class Members, including the named Decedent Class Plaintiffs, including, but not limited to all claims based in contract or tort, common law or equity, federal, state, or local law, statute, ordinance, or regulation arising from or related to the allegations which are-based on or arise from the facts alleged in This Action. When the Agreement is final, as

of the Effective Date, all Decedent Class Members, including the named Decedent Class Plaintiffs, hereby release, as further described in Paragraph 23, all such claims.

18. Each Decedent Class Member shall be deemed to have submitted to the jurisdiction of the Second Judicial District Court, County of Bernalillo, State of New Mexico (“Court”).

19. No Opt-Out shall share in any monetary benefits provided by this Agreement.

20. This Agreement is subject to and conditioned on the final approval of this Agreement by the Court, the order and judgment being final only on the Effective Date. Such final order and judgment shall:

a. Determine that this Agreement is entered into in good faith, is reasonable, fair and adequate, and in the best interest of the Decedent Class;

b. Dismiss all claims of the Decedent Class Members in the action as to the Released Parties, which dismissal shall become final and with prejudice on the Final Effective Date;

c. Release each Released Party to the full extent, as set forth in Paragraph 23, from the claims which any Decedent Class Member has, had or may have in the future, against such Released Person arising out of the facts alleged in the Third Amended Complaint, effective as of the Effective Date;

d. Order that all Decedent Class Members are enjoined from asserting against any Released Party, any and all claims which the Decedent Class Members had, have, or may have in the future arising out of the facts alleged in the Third Amended Complaint; and

e. Reserve the Court’s continuing and exclusive jurisdiction over the Parties to this Agreement, including Defendants and named Decedent Class Plaintiffs and

Decedent Class Members, to administer, supervise, construe and enforce the Agreement in accordance with the terms for the mutual benefit of all the Parties.

21. The Parties will cooperate in good faith and take all necessary and appropriate steps to obtain preliminary and final approval of this Agreement, and dismissal of the action as to UNM with prejudice against Decedent Class Members. If the Court finally approves this Agreement, and if there is an appeal from such decision, Defendant will not oppose Decedent Class Plaintiffs' efforts to defend this Agreement.

22. Upon preliminary approval by the Court of this Agreement, UNM shall promptly pay to the Decedent Settlement Class the sum of Thirty-Eight Million Dollars (\$38,000,000.00) ("Settlement Fund") to be placed in a trust account and administered as authorized by the Court. In addition, UNM shall promptly pay Fifty Thousand Dollars (\$ 50,000) upon preliminary approval of this Agreement, to be placed in escrow by Decedent Class Counsel to fund initial costs of notice as authorized by the Court.

23. In addition to the effect of any final judgment entered in accordance with this Agreement, upon occurrence of the Effective Date and in consideration of the payments made by UNM pursuant to this Agreement, the Releasees, consistent with the provisions of Paragraphs 12, 13 and 17 above, shall be completely released, acquitted, and forever discharged by Releasors from any or all claims, demands, causes of actions, or lawsuits, whether class, individual or otherwise in any nature whatsoever, including costs, expenses, penalties, lawyers' fees that Releasors, or any of them, ever had, now have or hereafter may have, whether directly, derivatively, or in any other capacity, against Releasees, whether known or unknown, in any way arising from or relating to the facts, occurrences, transactions, claims or other matters alleged in the Third Amended Complaint in This Action ("Released Claims"). The Releasors agree that they

shall not, after the Effective Date, assert any claim or commence any proceeding seeking to recover against Releasees for any Released Claim. This Agreement does not settle or compromise any claim other than the Released Claims; and this Release and the Released Claims do not apply and have no effect on individuals who may be potential members of any class other than the Decedent Class that may be certified pursuant to claims made under the Third Amended Complaint, or any successor complaint, in this lawsuit.

24. The Settlement Fund and/or the additional \$ 50,000 payment, if applicable, shall be used to pay all costs of notice, all administration expenses, attorneys' fees and expenses, incentive awards to the Decedent Class Plaintiffs, and payments to all eligible Decedent Class Members, all as set forth below. The costs of notice and claims administration may be distributed to Decedent Class Counsel or the Claims Administrator, upon the approval of the Court, prior to the Effective Date. No other distributions of the Settlement Fund shall be made until after the Effective Date. Other than the Settlement Fund and the additional \$ 50,000 payment, the Defendants shall have no liability whatsoever for any costs, expenses, fees or awards referred to in this paragraph.

25. Plaintiffs shall recommend an Administrator to the Court for appointment as an officer of the Court for the purpose of implementing the terms of this Agreement. The Administrator shall be subject to judicial immunity to the fullest extent permitted by law. The Administrator shall be subject to the jurisdiction of the Court with respect to any dispute arising between the Administrator and the Parties or Members of the Decedent Class regarding the implementation of the terms and conditions of the administration agreement or this Agreement.

26. The Administrator will be instructed to use commercially reasonable efforts to distribute the proceeds of the Settlement Fund, if applicable, to eligible Decedent Class Members in a manner that will neither constitute a taxable distribution nor otherwise create a tax liability.

However, the Parties acknowledge that, despite the commercially reasonable efforts of the Administrator, a tax liability could be created solely because of other factors, including the actions of the Decedent Class Members. Any such tax liability shall be the sole responsibility of the Deceased Class Member and neither the Parties, Parties' Counsel, the Administrator nor the Court shall be liable for any such tax liabilities. This Settlement Agreement contemplates and intends that all payments distributed to Decedent Class Members constitute damages received on account of personal injuries or physical sickness within the meaning of § 104(a)(2) of the Internal revenue Code of 1986, as amended.

27. The Settlement Fund and/or the additional \$ 50,000 payment will be distributed as follows, subject to approval of the Court, but only after the Effective Date, except for payments allowed under paragraph 24 of this Agreement:

a. Plaintiffs will request that up to 35% of the Settlement Fund will be allocated for payment of Plaintiffs' attorneys' fees and gross receipts tax on Plaintiffs' attorneys' fees, to be paid within ten (10) days of the Effective Date. Plaintiffs also will request reimbursement of Class Counsel's litigation expenses and costs through the date that this Agreement becomes final, to be paid within ten (10) days of the Effective Date. Plaintiffs will request that up to \$ 50,000 will be allocated for payment to Decedent Class Plaintiffs to acknowledge their special efforts in this lawsuit. This amount is separate and apart from any payment due for their individual claims as Eligible Class Members and shall be paid within ten (10) days of the Effective Date. Defendants agree not to contest Plaintiffs' request for fees, gross receipts tax, litigation expenses, and Decedent Class Plaintiff participation awards.

b. In addition, Plaintiffs may request of the Court additional fees, gross receipts tax, litigation expenses incurred in administering this Agreement.

c. Actual costs of claims administration, providing notice to the Class, and processing and administering the Settlement will be paid from the Settlement Fund and/or the additional \$ 50,000 payment. Invoices for services provided by the Administrator shall be approved first by Decedent Class Counsel, and then paid by check from the Settlement Fund upon approval of the Court.

d. The balance of the Settlement Fund, after payment of all amounts enumerated above, will be distributed among Eligible Decedent Class Members pursuant to the Plan of Allocation.

28. Any Decedent Class Member who wishes to be excluded from the Decedent Class must submit a request to be excluded from the Decedent Class in writing to the Administrator, so that it is postmarked or otherwise delivered on or before the Bar Date or as the Court may otherwise direct.

29. Any Decedent Class Member who does not timely file a Request for Exclusion shall conclusively be deemed to be bound by this Agreement and all subsequent proceedings, orders and judgments herein.

30. Any Decedent Class Member who does not elect to be excluded from the Decedent Class may, but need not, enter an appearance through his or her own attorney.

31. The Administrator will report all Opt-Out elections to all counsel upon receipt, and will determine and report to counsel for the Parties not later than ten (10) days after the Bar Date the total number of timely and valid Opt-Out elections.

32. Any Decedent Class Member who does not elect to be excluded from the Decedent Class may, but need not, submit objections to the proposed settlement. The Court will enter an appropriate order setting forth the procedure for Decedent Class Members to submit objections to the proposed settlement.

33. Class Notice to Decedent Class Members shall be in a form substantially similar to that attached as Exhibit 2 to this Agreement, and as approved by the Court, shall be sent by first class mail, postage prepaid, to all individuals whose addresses are reasonably known to the Administrator and by publication as set forth below. UNM and Decedent Class Plaintiffs shall provide to the Administrator all information reasonably available to them that will assist the Administrator in identifying and providing notice to Decedent Class Members, including all lists of names, addresses or other identifying information currently held by or reasonably available to UNM or Decedent Class Plaintiffs, the Court or their agents.

34. In addition to the Class Notice described in Paragraph 3, the Administrator shall cause to be published in a newspaper or newspapers to be determined by the Administrator, or through other appropriate media, in consultation with Decedent Class Counsel, notice of this Agreement and of the certified settlement Decedent Class to potential members of the Decedent Class. The plan of published notice shall be developed by the Administrator in consultation with Class Counsel, and the form of published notice shall be substantially similar to that attached as Exhibit 3 to this Agreement, all subject to the approval of the Court.

35. All reasonable costs incurred in the administration of this Agreement, including but not limited to the fees of the Administrator, costs of disseminating notice, costs of receiving and evaluating claims, and any additional administration fees, will be paid from the Settlement Fund and/or the additional \$ 50,000 payment. Following preliminary Court approval of this Agreement,

the Administrator shall submit monthly invoices to Class Counsel for services rendered and for expense reimbursement. All invoices will indicate the dates upon which services were performed, the titles of the employees performing the services, the number of hours worked by each such employee for each date, the hourly rate for each such employee, and the total fee for the services performed. The hourly rates shall be in accordance with the agreement between the Decedent Class Plaintiffs and the Class Administrator.

36. The Parties may bring an issue directly before the Court when exigent facts or circumstances require immediate Court action to prevent a serious violation of the terms of this Agreement, which otherwise would be without meaningful remedy.

37. This Agreement will be subject to, governed by, and construed and enforced pursuant to the laws of New Mexico.

38. The terms of this Agreement and its attachments are the exclusive and final expression of all agreements by Decedent Class Plaintiffs and Defendants with respect to full and final settlement of this matter. The Parties have entered into this Agreement based solely on its terms and not in reliance on any representations or promises other than those contained in this Agreement. The terms of this Agreement may not be contradicted either by evidence of any prior or contemporaneous agreement or by the use of any form of extrinsic evidence whatsoever in any judicial, administrative, or other legal proceeding involving this Agreement.

39. This Agreement may be executed in counterparts and a facsimile signature shall be deemed an original signature for purposes of executing this Agreement.

40. Each of the undersigned attorneys represents that he or she is authorized to execute this Agreement.

By: 

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