

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)

**PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT AGREEMENT**

Pursuant to New Mexico Rule of Civil Procedure 1-023, Plaintiffs 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" or the "Decedent Settlement Class"), through undersigned counsel, move the Court to grant preliminary approval of the Settlement Agreement, attached hereto as Exhibit A. Specifically, Plaintiffs request the Court to enter an Order, in the form attached to the Settlement Agreement as Exhibit 1: (1) preliminarily certifying a settlement class; (2) appointing Class Counsel; (3) preliminarily approving the Settlement

Agreement; (4) approving the form and manner of the Notice to be sent to Decedent Settlement Class members, attached to the Settlement Agreement as Exhibit 2, and a summary Notice to be published concerning the Settlement Agreement, attached to the Settlement Agreement as Exhibit 3; (5) entering an order compelling Defendants and the Special Master to provide information identifying potential class members, attached to the Settlement Agreement as Exhibit 5; (6) approving the Plan of Allocation and Distribution, attached to the Settlement Agreement as Exhibit 4;¹ (7) setting deadlines for submission of exclusion requests (“opt outs”) and objections; and (8) setting a date for final approval.

Defendants do not oppose the relief sought.²

I. SUMMARY OF THE ACTION AND THE SETTLEMENT

In February 2001, Class Counsel filed this lawsuit on behalf of pediatric cancer patients who had been treated at the University of New Mexico Health Sciences Center (“UNM Hospital” or “HSC”) for allegedly receiving substandard care over a prolonged period spanning back to the mid-to-late 1970s. After nearly twenty years of litigation, the parties have reached a partial settlement that was negotiated at arm’s length by highly experienced counsel with the assistance of a well-respected mediator who had previously served as a Special Master in this case. The parties were fully informed of the significant litigation risks based on an extensive factual record, expert opinions and insights, and previously briefed and argued class and dispositive motions.

The settlement proposes to resolve the claims of the following Rule 1-023(B)(3) settlement class (the Decedent Settlement Class):

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

¹ Defendants take no position at this time as to Plaintiffs’ plan of allocation.

² Defendants do not agree with Plaintiffs’ contentions supporting class certification; rather they stipulate to class certification for purposes of settlement.

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.

Pursuant to the Settlement Agreement and Rule 1-023(C)(2), all members of the Decedent Class have the right to opt out. The Settlement Agreement releases only those claims that arose out of or are related to conduct or acts that were alleged or raised in the operative complaint or that could have been alleged or raised relating to the subject matter of this litigation. The Decedent Settlement Class Plaintiffs and the Decedent Class receive the same benefit – the statutorily mandated distribution of the pro rata share of the net proceeds of the monetary fund distributed through a plan of allocation, attached to the Settlement Agreement as Exhibit 4, and by an Administrator approved by the Court.

Class Plaintiffs have submitted forms of notice that comply with Rule 1-023(C)(2) and a plan for the dissemination of notice that satisfies due process. Thus, the notice of the proposed settlement in the form and manner proposed by Class Counsel should be issued to the Decedent Settlement Class Members and a hearing to consider final approval and related dates should be set.

For the reasons stated below, the proposed Decedent Settlement Class and the proposed settlement should be preliminarily – and ultimately finally – approved by the Court.

II. PROCEDURAL BACKGROUND

The parties have reached an agreement to resolve a significant part of this longstanding and contentious litigation by providing substantial monetary relief to the

Decedent Class. This lawsuit was originally filed on February 27, 2001 by Mr. Jacob Vigil, lead Class Counsel in this case. Mr. Vigil filed the class action lawsuit on behalf of pediatric cancer patients who had not previously brought individual lawsuits against UNM or settled claims with UNM regarding its alleged breach of patient standards of care. Given the complex and novel nature of the claims, it took several years for the parties to conduct discovery, litigate dispositive motions, and obtain and analyze patient records.

In March 2003, the Court appointed a Special Master to locate and review the putative class members' medical records and to identify potential claimants. *See* Court's Order of Reference, dated March 25, 2003. In October 2004, the Court entered an order prohibiting all parties and counsel from initiating communications with putative class members. *See* Order Regarding Communications of Special Master with Putative Class Members, dated October 7, 2004. The Special Master's task and the litigation were complicated because many putative class members' medical records were destroyed in a fire in June 2010 in a warehouse where UNM had stored offsite the only copies of many patient files.³

In September 2011, the Court ordered UNM to produce 101 putative class member records to the Special Master. *See* Order Granting Plaintiffs' Motion in Part to Extend Briefing Deadlines and Produce Medical Information, dated September 1, 2011. In April 2012, the Special Master produced to Plaintiffs 72 redacted medical records belonging to putative class members. *See* Special Master's Second Supplement to Final Report, dated April 6, 2012. In May 2013, the Court granted UNM's motion to search for additional

³ A spoliation motion concerning this destruction of documents is pending. *See* Motion for Spoliation Sanctions, dated March 15, 2013.

patient records. *See* Hearing Transcript for Hearing held on May 21, 2013 (TR-12:1-2, TR-16:13-15). In December 2013, UNM filed a report with the Court indicating that it needed additional time to search for records. *See* Defendant’s Report to the Court on the Pediatric Oncology Record Search, dated December 1, 2013.

On January 14, 2014, Class Plaintiffs moved for class certification. *See* Motion for Class Certification Against Defendant Board of Regents of the University of New Mexico. Between January 2014 and August 2015, the class certification process was continued while UNM searched for additional patient records. An issue also arose as to the withdrawal of out-of-state class counsel.

In August 2015, Plaintiffs renewed their motion for class certification. *See* Corrected Renewed Motion for Class Certification and Memorandum in Support, dated August 4, 2015. In their renewed motion Class Plaintiffs centered the litigation solely on the lost chance claim in order to “show, using class-wide evidence, that each class member suffered some lost chance (causation or ‘common impact’),” and so that Plaintiffs could “establish aggregate damages to the class, on a formulaic basis, using class-wide evidence.” *Id.*, at 4. A class certification evidentiary hearing was scheduled for the week of April 25-28, 2016.

In April 2016, several weeks prior to the scheduled class certification hearing, the Court dismissed Plaintiff Cummings’ claims for lack of subject matter jurisdiction finding that Plaintiff Cummings failed to provide UNM with adequate notice under the Tort Claims Act, NMSA § 41-4-16 (1978). *See* Order on Motion to Dismiss (Partial Dismissal Only), dated April 15, 2016. Class Plaintiffs appealed. On December 28, 2018, the New Mexico Court of Appeals reversed the District Court’s dismissal, holding that Ms. Cummings had

provided timely notice under the Tort Claims Act. *See Cummings v. Bd. of Regents of Univ. of New Mexico*, 2019-NMCA-034, *cert. denied* (Apr. 11, 2019).

After receiving the mandate, this Court scheduled a five-day class certification hearing that was commenced in December 2019 and concluded on January 23, 2020. On November 22, 2019, the Court held a motions hearing to address motions filed by Defendants and sanctions and discovery motions filed by Class Plaintiffs.

Contemporaneous with the commencement of the class certification evidentiary hearing, Class Plaintiffs notified Defendants and the Court that they were limiting the class sought to pediatric cancer patients at UNM HSC who had been treated for ALL during the relevant period. At the class certification hearing Class Plaintiffs presented testimony and evidence from five (5) expert witnesses with specialized knowledge in class actions, economics and econometrics, and the practices and protocols for treating ALL.

Since the inception of this class action lawsuit Class Plaintiffs have taken the depositions of over 40 fact and expert witnesses and analyzed and examined hundreds of thousands of pages of documentary evidence and medical records, including nearly 200 gigabytes of digital content. Class Plaintiffs have also prepared for and participated in a contested evidentiary hearing, multiple motions hearings and an appeal.

In November and December 2019, the parties participated in a lengthy mediation process with the assistance of Mr. Charles Peifer, a well-respected mediator who is well-versed in class action law and who had served as the court-appointed Special Master previously. After tough, arms-length negotiations, the parties agreed to a portion of the “mediator’s proposal,” resulting in the proposed Settlement Agreement that is now before the Court. The “mediator’s proposal” was memorialized in a Memorandum of

Understanding that was approved by the UNM Board of Regents, and the proposed Settlement Agreement was then negotiated by the parties over a period of weeks in the latter half of December 2019 and January 2020.

The Settlement Agreement, which is attached as Exhibit A, provides substantial monetary relief, in the total amount of Thirty-Eight Million, Fifty Thousand Dollars, to the Decedent Settlement Class. If approved, the Class Plaintiffs propose to distribute the net proceeds allocated to the estates of deceased pediatric ALL patients on a pro rata basis and then distribute to Decedent Class Members (the statutory survivors of the deceased pediatric ALL patients) according to the requirements of the Wrongful Death Act, § 41-2-3.

The Settlement Agreement is not contingent on the resolution of the case as a whole and does not release the claims of pediatric cancer patients who were diagnosed with ALL but are still alive, pediatric cancer patients who were treated outside the class period, or pediatric cancer patients who were treated for cancers other than ALL. The Settlement Agreement does not allow for return of any money to the Defendants, except if the Settlement Agreement is not approved or if more than 25 Decedent Class Members elect to opt out of the Decedent Class.

III. ARGUMENT

A. Preliminary approval of the class action settlement is proper

Like its federal counterpart, Rule 1-023 NMRA does not create a particular procedure or standard for the preliminary approval of a class action settlement. *See, e.g., Rubenstein, 4 Newberg on Class Actions* § 13.10 (5th ed.). Rule 1-023(E) states only that “[a] class action shall not be dismissed or compromised without the approval of the court,

and notice of the proposed dismissal or compromise shall be given to all members of the class in the manner as the court directs.” To fill the void, the federal courts have almost uniformly adopted a two-step process leading to final approval of a class action settlement.

See, e.g., Rubenstein, 4 Newberg on Class Actions § 13.25 (5th ed.).

In the first step, the court determines whether the proposed settlement falls within the range of possible approval and whether it is reasonable to issue notification to settlement class members of the settlement's terms. In the second step, after notice to the class and an opportunity for absent settlement class members to object or otherwise be heard, the court will determine whether to grant final approval of the settlement as fair and reasonable.

Stanforth v. Farmers Ins. Co. of Arizona, 2014 WL 11497806, at *3 (internal quotation and citation omitted).

In considering whether to grant a motion for preliminary approval of a proposed settlement agreement, the Court utilizes a “threshold inquiry” intended only to reveal conspicuous defects in the settlement. *See In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 337-38 (N.D. Ohio 2001). Ultimately, before a settlement can be finally approved, the Court must determine that a settlement is fair, reasonable and adequate. *See Rivera-Platte v. First Colony Life Ins. Co.*, 2007-NMCA-158, ¶¶ 41-76, 143 N.M. 158; *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984). That is accomplished at the final approval stage. At the preliminary approval stage, however, the inquiry-- based on the terms of the Settlement Agreement, the contents of the record, the controlling legal authority -- “is at most a determination that there is what might be termed ‘probable cause’ to submit the proposal to class members and hold a full-scale hearing as to its fairness.” *In re Traffic Executive Assoc.-Eastern R.R.*, 627 F.2d 631, 634 (2d Cir. 1980).

Considering the issues, evidence, and nature of the settlement negotiations, preliminary approval of this Settlement Agreement is appropriate. *First*, the proposed settlement is the product of serious, informed, non-collusive negotiations by experienced counsel. The settlement

negotiations were adversarial in nature and involved parties with varying interests. Representatives of the Defendants and a Class Plaintiff were present at the mediation, along with counsel. The settling parties engaged in mediation with the assistance of a highly experienced mediator. Thus, the course of settlement negotiations rises well above the threshold for preliminary approval.

Second, the terms of the Settlement Agreement are fair, reasonable, and adequate to resolve the dispute. Liability was and remains hotly contested. Both sides developed evidence to support their claims and defenses and have presented their evidence at a class certification hearing. Most courts, in considering approval of a class action settlement, note the advantages of avoiding lengthy and expensive litigation. *See, e.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (recognizing “the strong judicial policy that favors settlements, particularly where complex class action litigation is concerned”); *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) (“Complex litigation . . . can occupy a court’s docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive.”). While Class Plaintiffs were and are confident that they have substantial evidence to establish liability and damages, they recognize the risk inherent in all trials. Further, they recognize that any trial would likely result in lengthy appeals; and given the already protracted duration of this litigation, a certain recovery *now*, has value over a potentially larger recovery after even more years of trial and appeal.

The Settlement Agreement provides significant compensation to the Decedent Class. Class Counsel, who are experienced in this type of litigation, believe the Decedent Class members’ chances of obtaining better results by continuing the litigation or by pursuing separate claims are far from certain. *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 69 (D. Mass. 1997) (approving settlement agreement and noting that settlement “provides class members with timely

relief without having to risk the uncertainty of outcome, duration, and expense inherent in continuing the litigation”). Further litigation is not likely to provide Decedent Class Members with substantially more money than what will be available through this Settlement Agreement, in light of the issues presented by the tort claims cap, the nature of the damages claims, and the significant costs associated with proving class-wide claims (because the proof of those claims are dependent on expert testimony).

Defendants benefit from the limitation on recovery under the New Mexico Tort Claims Act. *See* NMSA 1978, §§ 41-4-1 to -27 (1976, as amended through 2019). While a jury might award all of the potential hundreds of millions of dollars of damages estimated by Class Plaintiffs’ experts, the recovery to each of the Decedent Class Members would nonetheless be limited to no more than Four Hundred Thousand Dollars under NMSA 1978, Section 41-4-19. The exact number of decedents in the proposed Decedent Class is not presently known, but the parties estimate that the number is between 90 and 109. Picking a midpoint of 97 decedents, if claimed beneficiaries of every one of those decedents files a claim – something that is highly unlikely – the gross recovery for the estate of each deceased pediatric cancer patient will be approximately \$ 391,000, or nearly 98 percent of the maximum recovery allowed under the Tort Claims Act.⁴ For these reasons, Class Plaintiffs recognize the advantages of settlement over continued litigation.

Third, the Settlement Agreement does not grant unduly preferential treatment of class representatives or segments of the class. *See In re NASDAQ Market-Makers Antitrust Litigation*,

⁴ Decedent Class Members will not receive an amount that is based on a pro rata share of the gross recovery or settlement fund, but rather will receive an amount based on a pro rata share of the net settlement fund. The deductions from the gross settlement fund to reach the net settlement fund to be distributed to class members include, (i) notice costs; (ii) costs of administering the fund and the claims distribution process; (iii) attorneys’ fees awarded to class counsel; and (iv) reimbursement of class counsel’s litigation costs.

176 F.R.D. 99, 102 (S.D. N.Y. 1997). In this instance, through non-collusive negotiation, the parties have agreed that the Settlement Agreement may include incentive awards to the Class Representatives. The proposed incentive awards are reasonable and are intended to recognize the significant time and efforts expended by the Class Representatives on behalf of the Class and the risks that they undertook in bringing the lawsuit and conferring benefits to the class. *See Ingram v. The Coca Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (“Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incurred during the course of the class action litigation” (quoting *In re S. Ohio Corr. Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997))).

The Class Representatives took a risk in bringing this action on behalf of the class and contributed substantial time and energy in support of the action. *See Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (in considering an incentive award, the court may consider the risk to the class representatives, both financial and otherwise; the personal difficulties encountered by the class representatives; the amount of time and effort spent on litigation; the duration of the litigation; and the personal benefit—or lack thereof—enjoyed by the class representative as a result of the litigation). Given their contributions throughout the litigation, these individual payments are reasonable and not excessive. *Id.*

Finally, the proposed Settlement Agreement does not interfere with the ability of the remaining members of the putative class (those putative class members of pediatric ALL patients who have survived) to pursue their claims at trial. Class plaintiffs have presented evidence on their behalf at the Class Certification Hearing. If a class of surviving class members is certified, Class Counsel will vigorously litigate their claims through trial or until a class-wide settlement is

reached. This settlement in no way interferes with the prosecution of the claims of these remaining putative class members.

B. A class should be conditionally certified for settlement purposes

A threshold consideration for approval of any class settlement is whether the class can be certified. *Duhaime v. Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 67 (D. Mass. 1997). Here, the parties have agreed that the case should be certified for settlement purposes only under Rule 1-023. As demonstrated below, with respect to the Decedent Settlement Class, the elements of Rule 1-023(A) and (B)(3), numerosity, commonality, typicality, adequacy, predominance, and superiority, are satisfied. Under the standards set forth in *Amchem Products v. Windsor*, 521 U.S. 591, 619 (1997), manageability concerns, which would be relevant if a case were to be tried, do not prevent certification of a settlement class.

1. The elements of Rule 1-023(A) are met

This action satisfied all four elements of Rule 1-023(A): numerosity, commonality, typicality, and adequacy of representation. *See Tierra Realty Trust, LLC v. Village of Ruidoso*, 2013-NMCA-030, ¶ 5, 296 P.3d 500 (“In order to obtain certification of a class action, Plaintiff must first establish that all four prerequisites of Rule 1-023(A), commonly referred to as numerosity, commonality, typicality, and adequacy, are satisfied.”) (citing *Armijo v. Wal-Mart Stores, Inc.*, 2007-NMCA-120, ¶¶ 25-26, 142 N.M. 557, 168 P.3d 129).

a. *Numerosity*

Numerosity requires that the class be “so numerous that joinder of all members is impracticable[.]” Rule 1-023(A)(1). The test for impracticability of joinder is met if the class is “large.” *Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D. Ill. 1986). Courts generally presume that the numerosity requirement is met when a proposed class has at least forty (40) members. *See*

Hayes v. Wal-Mart Stores, Incorporated, 725 F.3d 349, 357 (3d Cir. 2013) (presuming numerosity at 40); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) (“[W]hile there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate”) (citation and internal quotations omitted). Here, the Decedent Settlement Class is estimated to approach or exceed one hundred pediatric cancer patients and thus the numerosity requirement is clearly satisfied.

b. *Commonality*

Commonality requires that there be “questions of law or fact common to the class[.]” Rule 1-023(A)(2). “The commonality requirement of Rule 1-023(A)(2) is relatively easily met because it is deemed to require only that a single issue be common to the class.” *Berry v. Fed. Kemper Life Assurance Co.*, 2004-NMCA-116, ¶ 42, 136 N.M. 454, 99 P.3d 1166. Class Plaintiffs meet the low “commonality” threshold given the numerous issues common to the class, including but not limited to the following:

- Whether UNM authorized the incorrect treatments for the pediatric cancer patients in the proposed class.
- Whether UNM’s failure to utilize a pediatric tumor board fell below the standard of care.
- Whether UNM’s failure to conduct adequate review of patient treatment and outcomes fell below the standard of care.
- Whether UNM’s failure to review the treatment of the proposed class members by the Institutional Review board fell below the standard of care.
- Whether UNM’s institutional negligence caused the proposed class members some loss of chance.

- The aggregate damages suffered by the proposed class resulted from UNM's institutional negligence.

c. *Typicality*

Typicality requires that “the claims or defenses of the representative parties [be] typical of the claims or defenses of the class.” Rule 1-023(A)(3). “In determining whether the typicality prerequisite is met we ask ‘whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct.’” *Armijo*, 2007-NMCA-120, ¶ 28 (*quoting 1 Newberg on Class Actions* § 3.13, at 327 (4th ed. 2002)). “[F]actual variations do not render the named Plaintiffs’ claims atypical of the class.” *Id.* In evaluating typicality, “the fit between the class representative’s case and the factual allegations and legal theories of the class need not be perfect.” *Id.* ¶ 28, (citing *Berry*, 2004-NMCA-116, ¶ 43).

The lost chance claims of Class Plaintiffs are typical of the lost chance claims of all other members of the Decedent Settlement Class. Class Plaintiffs claim that UNM’s institutional failure to maintain adequate safety processes and procedures by failing to employ, among other things, a pediatric tumor board or an institutional review board, allowed for improper treatment protocols to be administered to pediatric cancer patients for twenty years, and caused them to lose their best chances for recovery. Class Plaintiffs further allege that UNM’s failures impacted all, or nearly all, Decedent Settlement Class members. Class Plaintiffs’ lost chance claims against UNM are typical of the claims for all other class members.

d. *Adequacy of Representation*

This factor requires that the class representatives must “fairly and adequately protect the interests of the class.” Rule 1-023(A)(4). That inquiry focuses on (i) whether the interests of the

Class Plaintiffs are aligned with the interests of the other class members and (ii) whether class counsel have sufficient experience. Here, the Class Plaintiff, Ms. Maria Cummings (who attended multiple days of the class certification hearing), has demonstrated that her interests are aligned with those of the Class. She has been diligent in fulfilling her duties as class representative and has shown remarkable commitment and determination by staying involved in this lawsuit since its filing in 2001. The same is true for Ms. Jana Vallejos.

The class representatives seek common relief due to a common harm on behalf of all of the children allegedly mistreated by UNM. Plaintiffs Cummings and Vallejos have a strong interest in obtaining justice for their children and families, and for those similarly situated by holding UNM HSC accountable for its conduct and the harm it has inflicted. They will more than adequately represent the interests of absent class members.

Likewise, Class Counsel has extensive experience in class action litigation and is well-versed in the issues surrounding the underlying claims. Class Counsel have litigated numerous, complicated cases through trial. Mr. Vigil, co-lead counsel and an experienced New Mexico trial lawyer, filed the instant action on behalf of these children who had no representation in 2001. He has dedicated nearly twenty years to litigating this case on behalf of these children and ensuring they have the highest quality representation.

Mr. Vigil has a long and distinguished career litigating cases involving medical malpractice and serious injuries. Additionally, Mr. Vigil has received the much coveted and highly regarded Martindale-Hubbell "AV" Preeminent rating, reserved for the top 1% of the legal profession and determined by peer review. He is a faculty member and frequent speaker for the American Association for Justice (formerly the American Trial Lawyers Association) and has served on the staff of Gerry Spence's Trial Lawyers College.

Ms. Catherine Bertram chairs the DC Bar Continuing Legal Education Committee and also holds a Martindale-Hubbell “AV” Preeminent rating. She served as the Director of Risk Management at Georgetown University Hospital. Ms. Bertram currently represents individuals and families in cases involving medical malpractice and wrongful death. She has lectured nationally in the field of medical malpractice and is currently an adjunct law professor at American University Law School.

Finally, Joseph Goldberg, also a Martindale-Hubbell “AV” rated lawyer, has served as lead trial counsel in multiple nationwide class actions, including *In re Urethane Antitrust Litigation*, No. 04-md-1616, Doc. No. 2797 (D. Kan Feb. 20, 2013), and is recognized nationwide for his work with economic and statistical experts. “The fact that proposed counsel has been found adequate in other class actions is persuasive evidence that the attorney will be adequate in the present action.” 1 Newberg on Class Actions § 3:72, at 395-96 (5th ed.). The current team has and will continue to adequately represent the proposed classes.

2. The requirements of Rule 1-023(B)(3) are also met

In addition to satisfying the requirements of Rule 1-023(A), the Decedent Settlement Class also satisfies the requirements of Rule 1-023(B)(3) that: (1) common issues predominate over individual issues; and (2) a class action is the superior method of adjudicating this controversy.

a. *Common Questions of Law and Fact Predominate*

Much like other aspects of the Rule 1-023 standards for certification, the “predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem*, 521 U.S. at 623. This analysis differs depending on whether the certification is sought for litigation or settlement purposes. In the former, the Court must determine whether litigating the class claims will pose “intractable management problems,” but in the latter,

as is the case here, these management concerns “drop out” because with settlement the “proposal is that there be no trial.” *In re American Intern. Group, Inc., Sec. Litig.*, 689 F.3d 229, 240 (2nd Cir. 2012). In the settlement context, the predominance “inquiry turns on the legal or factual questions that qualify each class member’s case as a genuine controversy, questions that preexist any settlement.” *Amchem*, 521 U.S. at 623.

As the Supreme Court has noted, in a settlement context “the predominance requirement of Rule 23(B)(3) is similar to the requirement of Rule 23(A)(3) that ‘claims or defenses’ of the named representatives must be ‘typical of the claims or defenses of the class.’” *Id.* at n.18. As explained at pages 14-15, *supra*, both the (A)(3) and (B)(3) requirements are satisfied here because the claims of the Decedent Class Plaintiffs and the Decedent Settlement Class focus on the same operative set of facts and legal theories. Because the claims of all of the Decedent Settlement Class members arise out of Defendants’ uniform course of conduct and because all members of the Decedent Settlement Class suffered a like harm – the lost chance for a better outcome – the proposed class is sufficiently cohesive to satisfy the Rule 1-023(B)(3) predominance requirement for settlement purposes. *See Armijo*, 2007-NMCA-120, ¶ 29 (finding that typicality standard is met when “the basic factual elements of the named Plaintiffs’ claims were similar to that of the rest of the class.”); *see also In re Crocs, Inc. Sec. Litig.*, 306 F.R.D. 672, 689 (D. Colo. 2014) (finding that predominance standard was met in a class action settlement because “common questions of fact and law depended entirely upon the conduct of defendants” and were “unaffected by the conduct of individual class members.”).

b. *A class action is the superior method for resolving this case*

In contrast to predominance, “[s]uperiority...compares the fairness and efficiency of the class action to alternative methods of litigation.” *Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶

32, 136 N.M. 599. “Once predominance is determined, the superiority and manageability issues ‘fall into their logical place.’” *Id.*, ¶ 33 (quoting *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1044) (N.D. Miss. 1993)). Here, the superiority requirement is satisfied, particularly given the context of this being a Settlement Class, offering a common benefit to numerous pediatric cancer patients while leaving those who wish to continue to pursue their own individual actions free to do so. A class action would be the only possible means of resolving these claims—the vast majority of which would likely never be brought if a class were not certified—while at the same time avoiding the potential for “repetitious litigation” and “inconsistent adjudications” if the claims were brought separately. *Bourlas v. Davis Law Associates*, 237 F.R.D. 345, 354 (E.D.N.Y. 2006).

Also, the overwhelming majority of the Decedent Settlement Class members who have neither the incentive nor the means to litigate their claims individually may pursue those claims only via the class device. See *In re Sony SXRDRear Projection TV Class Action Litig.*, 2008 WL1956267, at *14 (S.D.N.Y. May 1, 2008). Certifying the proposed Settlement Class therefore represents “an efficient means of resolving the claims at issue[.]” See *Bourlas*, 237 F.R.D. at 354.

C. The Court should approve the proposed settlement notices and authorize their dissemination

Rule 1-023 requires that “a class action shall not be dismissed or compromised without approval of the court and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.” Both Rule 1-023 and due process require that interested parties be provided with “notice reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The notice must be reasonably calculated to reach interested parties and where the names and address of the

interested parties are known, due process requires mailed notices. *Id.* at 318-19; *DeJulius v. Sprint Corp.*, 429 F.3d 935, 944-46 (10th Cir. 2005).

The contents of class notice must “fairly apprise the . . . members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings.” *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995) (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982)). Class notice is sufficient if it “may be understood by the average . . . class member.” *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104 (5th Cir. 1997); *see also Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (“Notice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.” (internal quotation omitted)).

Here, the proposed notices and their method of dissemination meet these requirements. If the Court preliminarily approves the settlement, Decedent Class Members whose mailing addresses are reasonably known will be mailed a Notice of Class Action of Class Action Settlement (“Notice”), a copy of which is attached to the Settlement Agreement as Exhibit 2. Additionally, the Class Administrator will cause notice to be published in a newspaper or newspapers, or through other appropriate media,⁵ in consultation with Class Counsel. A copy of that notice for publication is attached to the Settlement Agreement as Exhibit 3.

The proposed notices clearly and concisely inform Decedent Settlement Class members of all the relevant aspects of the litigation: (a) the Class definition and statement of claims; (b) the

⁵ Class Counsel presently intend to employ, in addition to newspaper notice, electronic notice in social media. In addition, Class Counsel will create a website for this litigation, that will be referenced in the notices and will be a source of information to potential class members, including the Settlement Agreement, the notices and pertinent orders and other pleadings in this case.

litigation history; (c) the terms of the Settlement Agreement; (d) the binding effect of any judgment approving the Settlement on those who do not opt out; (e) the right to exclude themselves or object to the settlement and the procedure for doing so; (f) whom to contact to obtain additional information regarding the settlement or the litigation; (g) the amount of compensation requested for the Class Representatives to compensate them for their services to the Class; and (h) the amount requested for reasonable attorneys' fees and costs.

Thus, the notices provide all the information necessary for Decedent Settlement Class members to make an informed decision with respect to whether to remain in or opt out of the Class or whether to object to the proposed settlement. Further, delivery by first class mail to the Class members' last known addresses is designed to reach the members in the most expeditious and economical way. In addition, summary notice of the settlement will be published in order to notify Decedent Settlement Class members who are not notified of the settlement through other means.

D. This Court should enter the order requiring the production of all information identifying members of the Decedent Settlement Class

Rule 1-023 grants broad powers to the Court to manage the class action process, including the power to issue any orders that may be necessary to effectuate notice to absent class members. *See, e.g., Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 354-56 (1978) (holding that Rule 23 Fed. R. Civ. Pro., rather than Rule 26, was the appropriate source of authority to address issues related to the production of information that would help class plaintiffs facilitate effective notice). Consistent with this authority, Rule 1-023(D) "authorizes [the Court] to order a defendant to provide information needed to identify class members to whom notice must be sent[.]" *Id.*, at 355-56.

Here, UNM is in possession of patient files, lists, and other information that would help facilitate notice to the absent class members. In addition, the Special Master in this case, Charles

Peifer, is also in possession of information identifying potential members of the Decedent Settlement Class. These records likely include the names of deceased pediatric cancer patients, the names of parents or guardians, and contact information (addresses, phone numbers, etc.). This information will help the Class Administrator identify absent class members. This will ensure a more robust and effective notice program and increase the chances of broad participation in the settlement.

Thus, Decedent Class Plaintiffs respectfully request that the Court enter the order, attached as Exhibit 5 to the Settlement Agreement, directing the production of information that will help identify the Decedent Settlement Class.

E. The plan of allocation is reasonable

Class Counsel have also prepared a plan (the “Plan of Allocation and Distribution”) to equitably and fairly distribute the settlement fund to Settlement Class members. *See* Exhibit 4 to the Settlement Agreement. A plan for distribution need only “have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.” *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667 (S.D.N.Y. 2015). The proposed plan meets this standard.

The Class Administrator (appointed with the approval of the Court) will distribute the settlement fund in the manner specified in the Plan of Allocation and Distribution. First, the Administrator will ensure that a claim form is available to Decedent Settlement Class members by including the claim form in mailed notices to all potential Decedent Class Members who can be identified. The Administrator will also include the claim form on a dedicated website, and will furnish a claim form to anyone who makes a request. Second, the Administrator will review the claim forms submitted by or on behalf of Decedent Settlement Class members to determine their eligibility for compensation, including:

- Is the claimant a statutory beneficiary, under the Wrongful Death Act section 41-2-3, of the decedent pediatric cancer patient?
- Did the pediatric cancer patient present for treatment at UNM HSC for ALL during the class period?
- Did the claimant previously settle with UNM?
- Were the pediatric cancer patient's treatment protocols principally administered or designed elsewhere or did not receive initial or relapse induction treatment at UNM? and
- Was the pediatric cancer patient deceased by December 1, 2019?

The Administrator will then consult with persons who filed claim forms to determine if there are other potential statutory beneficiaries and will send out another round of notices to inform other possible beneficiaries of the settlement. On the basis of the results of these two rounds of notices, the Administrator will make a final list of Eligible Settlement Class Members to present to the Court for approval.

The Administrator will allocate the net settlement fund *pro rata* to the estates of those deceased pediatric cancer patients with respect to whose death claims have been filed. That *pro rata* share reflects that each decedent's estate for whom a claim or claims are made receives that percentage of the net settlement fund as calculated by the product of the net settlement fund divided by the number of decedents' estates for whom a claim or claims are made. Those *pro rata* shares will then be divided up among all legitimate claimants as determined under the Wrongful Death Act.

In sum, the proposed Plan of Allocation and Distribution provides two notices to potential class members, encouraging the greatest possible participation in the settlement fund and will

distribute the net proceeds of the settlement in a reasonable and fair manner, treating each Decedent Settlement Class member's claim equitably, and consistent with the Wrongful Death Act's requirements and Rule 1-105, NMRA. Therefore, the Court should preliminarily approve the Plan of Allocation and Distribution, the settlement and authorize notice to the Settlement Class.

IV. THE COURT MAY PRELIMINARILY APPROVE THE SETTLEMENT AND PRELIMINARILY CERTIFY A SETTLEMENT CLASS WITHOUT A HEARING

Courts generally recognize that a settlement may be preliminarily approved without a hearing. *See, e.g., Harris v. U.S. Physical Therapy, Inc.*, 2012 WL 4181367 (D. Nev. September 18, 2012) (citing to the Federal Manual for Complex Litigation (FOURTH) § 13.14 for the proposition that the court may grant an unopposed motion to preliminarily approve a settlement upon a request from the parties without holding a formal hearing); *In re Prudential Ins. Co. of America Sales Practices Litig.*, 962 F. Supp. 450 (D.N.J. 1997) (hearing not required before preliminary approval). The parties have provided the Court with all of the documents and information necessary to make a determination about whether notice should be given to members of the Decedent Settlement Class, including the Settlement Agreement, proposed plan of allocation, and draft notices. The Court held a weeklong evidentiary hearing to consider class certification, and is therefore knowledgeable about the issues in the case and whether the proposed settlement appears sufficiently fair and adequate to justify the cost and expense of sending notice to the class and whether a settlement class is preliminarily appropriate for certification. Finally, interested parties will have the opportunity to voice their views about the settlement at a final fairness hearing.

If the Court determines it would desire a hearing, the parties, of course, are prepared to be present to argue in favor of preliminary approval of the Settlement Agreement and preliminary certification of a settlement class.

V. CONCLUSION

For all of the reasons stated above, Class Counsel respectfully submit that both preliminary approval of the Settlement Agreement and certification of the proposed Settlement Decedent Class are appropriate.

Respectfully submitted,

/s/ Jacob G. Vigil

Jacob G. Vigil, Esq.
VIGIL LAW FIRM, P.A.
2014 Central Avenue, S.W.
Albuquerque, M 87104
(505) 243-1706

-and-

Joseph Goldberg
Vincent J. Ward
Frank T. Davis
FREEMAN BOYD HOLLANDER GOLDBERG
URIAS & WARD, P.A.
20 First Plaza NW, Suite 700
Albuquerque, NM 87102
(505) 842-9960

-and-

Catherine D. Bertram
BERTRAM LAW GROUP
700 Pennsylvania Avenue SE, Suite 450
Washington, D.C. 20003
(202) 803-5800

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2020, a copy of the foregoing was served to all counsel of record via email and the Odyssey file and serve system.

R. Nelson Franse
Leslie McCarthy Apodaca
Andrew G. Schultz
Rodey, Dickason, Sloan Akin & Robb, P.A.
P.O. Box 1888
Albuquerque, NM 87103
(505) 765-5900

Thomas Ryan
Gregory Jones
McDermott Will & Emery LLP
2049 Century Park East
Suite 3200
Los Angeles, CA 90067
(310) 551-9395

*Attorneys for Defendant Board of Regents
of the University of New Mexico*

By: /s/ Jacob G. Vigil
Jacob G. Vigil

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: 

Jacob G. Vigil, Esq.
VIGIL LAW FIRM
2014 Central Avenue SW, Suite A
Albuquerque, NM 87104

Attorney for Plaintiffs

By: 

Thomas Ryan, Esq.
McDermott Will & Emery LLP
2049 Century Park East
Suite 3200
Los Angeles, CA 90067

Attorney for Defendants

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)

**ORDER PRELIMINARILY APPROVING SETTLEMENT, APPROVING NOTICE
TO SETTLEMENT CLASS MEMBERS, AND SETTING DATE FOR
FINAL APPROVAL HEARING**

Class Plaintiffs by and through their respective counsel have moved for an order granting preliminary approval of a Settlement Agreement (“Agreement”) reached in the above-captioned action (the “Lawsuit”) on the terms and conditions in the Agreement (the “Settlement”). The Court having read and considered the Agreement and the accompanying documents submitted by Class Plaintiffs and Defendant Board of Regents of the University of New Mexico, finds and ORDERS as follows:

IT IS HEREBY ORDERED THAT:

1. The Agreement is hereby incorporated by reference in this Order and, in addition to the terms defined in this Order, all terms defined in the Agreement will have the same meanings in this Order.

2. The Parties include Plaintiffs 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, and Defendant Board of Regents of the University of New Mexico, a body corporate of the State of New Mexico, for itself and its public operations including University of New Mexico Health Sciences Center, and its components the University of New Mexico Hospital and University of New Mexico School of Medicine.

3. For purposes of determining whether the terms of the Agreement should be preliminarily approved, the following Settlement Class is conditionally certified, for purposes of this Settlement only:

Statutory beneficiaries of 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.

4. The Court expressly reserves the right to determine, should the occasion arise, whether the Lawsuit may be certified as a class action for purposes other than settlement, and Defendant retains all rights to assert that the Lawsuit may not be certified as a class action except for purposes of settlement only. This Preliminary Order is not intended to be a final order on certification of the class for settlement purposes.

5. The Court finds that (i) the Settlement resulted from extensive arms-length negotiations; (ii) the Settlement was concluded after counsel for the Parties had conducted adequate investigation; and (iii) the Settlement terms are well within the range of being sufficiently fair, reasonable, adequate and in the best interests of the Settlement Class so as to warrant sending notice and claim forms to the Settlement Class preliminarily certified for settlement purposes in accordance with Paragraph 33 of the Agreement and thereafter holding a hearing regarding, *inter alia*, (a) final approval of the Settlement and certification of a Settlement Class for settlement purposes only, (b) whether the Notice Procedures comply with the New Mexico Rules of Civil Procedure and due process; and (c) whether Class Counsel's request for attorneys' fees should be approved (the "Final Approval Hearing"). Accordingly, the Court grants preliminary approval of the Settlement and finds that it is sufficiently fair and reasonable to warrant sending notice to Persons who may be members of the Settlement Class preliminarily certified for settlement purposes in accordance with the Class Notice procedures set forth in the Agreement.

6. Solely for the purposes of the Settlement, the Court preliminarily finds that the prerequisites for a class action under Rule 1-023(A) and (B)(2) and (B)(3) NMRA have been satisfied in that: (i) the Class Members are so numerous that joinder of all Class Members is impracticable; (ii) there are questions of law and fact common to the Settlement Class; (iii) the claims of the Plaintiff are typical of the claims of the Class Members; (iv) the Plaintiff will fairly and adequately represent the interests of the Settlement Class; (v) the questions of law and fact common to the Class Members predominate over any questions affecting only individual Class Members; and (vi) certifying the Settlement Class is superior to other available methods for the fair and efficient adjudication of the controversy.

7. Plaintiffs are preliminarily found qualified to act as representatives of the Settlement Class and preliminarily appointed as Settlement Class Representatives; and the following Plaintiffs' Counsel are preliminarily appointed as Counsel for the Settlement Class ("Class Counsel"), based on the Court's determination that the requirements of Rule 1-023(G) are satisfied by this appointment:

Jacob G. Vigil
Vigil Law Firm, P.A.
2014 Central Avenue SW
Suite A
Albuquerque, NM 87104
(505) 243-1706
jake@zlaws.com

Joseph Goldberg
Vincent J. Ward
Frank T. Davis
Freedman Boyd Hollander
Goldberg Urias & Ward, P.A.
20 First Plaza NW
Suite 700
Albuquerque, NM 87102
(505) 842-9960
jg@fbdlaw.com
vjw@fbdlaw.com
ftd@fbdlaw.com

Catherine D. Bertram
Bertram Law Group
700 Pennsylvania Avenue
SE, Suite 450
Washington, D.C. 20003
(202) 803-5800
katie@blg-dc.com

8. If final approval of the Settlement is not obtained or the events set forth in the Agreement are not satisfied, this preliminary certification order, including the above description of the Settlement Class, shall be vacated *ab initio*. Preliminary certification of the Settlement Class, appointment of Class Counsel and of the Class Representatives, and all actions associated therewith, are binding only with respect to the Settlement and are undertaken on the condition that the certification and designations may be vacated if the Agreement is terminated or is disapproved in whole or in material part by the Court, any appellate court and/or any other court of review, or, at the discretion of Defendant, if 25 or more class members elect to exclude themselves from the class, in which event: (i) the Agreement and any obligations of Defendant thereunder shall be null and void, except as otherwise expressly provided in the Agreement; (ii) the Court shall vacate the preliminary certification of the Settlement Class; (iii) Defendant and the Released Parties shall retain the right to object to the maintenance of the Lawsuit and/or any other case on any grounds;

and (iv) the Lawsuit shall proceed as if the Agreement had never been entered and the Settlement Class had never been certified, without prejudice or relevance to the Court's consideration on the merits of any arguments for or against a properly submitted motion for class certification.

9. The Settlement and its preliminary approval are not to be deemed an admission of liability or fault by Defendant or a finding of the validity of any claims asserted in the Lawsuit, or of any wrongdoing or of any violation of law by Defendant, or an admission by Defendant or Released Parties as to the certifiability of a litigation class in the Lawsuit, or any other case. Neither the preliminary certification of this Settlement Class, nor the Agreement, nor the fact that it was entered into, nor any of its terms, provisions or exhibits, nor any of the negotiations or proceedings connected with it, nor any filings or arguments made to the Court in support of preliminary approval of the Settlement, may be offered, received or construed, in any pending or future civil, criminal or administrative action, as: (i) an admission of or evidence of liability or fault by Defendant or a finding of the validity of any claims asserted in the Lawsuit or of any wrongdoing or of any violation of New Mexico law or; (ii) an admission of or evidence of the appropriateness of certification of a litigation class; or (iii) as evidence for any purpose in this or any other proceeding, including as to the certification of any class, except that such materials may be offered or received in proceedings to enforce the Agreement or if Defendant, at its sole discretion, stipulates to the admission of such evidence. Notwithstanding the foregoing, Defendant may file the Agreement, or any judgment or order of the Court related to it, in any other action that may be brought against them, to support any defenses based on *res judicata*, collateral estoppel, release, or any other theory of claim preclusion or issue preclusion.

10. Class Counsel shall present to the Court for preliminary approval a third-party class administrator ("Class Administrator") within ten days of entry of this Order. The Court

will determine whether the Class Administrator should be appointed at the Final Approval Hearing.

11. The Administrator shall cause the Class Notice submitted to the Court as Exhibit 2 to the Agreement to be distributed in accordance with the procedures set forth in Paragraph 33 of the Agreement within sixty (60) days after the entry of this Order.

12. The Court has reviewed the Class Notice, the Plan of Allocation and Distribution and Claim Form, each of which it approves in form and substance. The Court finds that the form and methods of notice set forth in the Agreement: (i) are reasonable and the best practicable notice under the circumstances; (ii) are reasonably calculated to apprise Settlement Class Members of the pendency of the Lawsuit, of their rights to object to or opt-out of the Settlement, and of the Final Approval Hearing; (iii) constitute due, adequate, and sufficient notice to all persons entitled to receive notice; and (iv) meet the requirements of the New Mexico Rules of Civil Procedure, the requirements of due process under the New Mexico and United States Constitutions, and the requirements of any other applicable rules or laws. In addition, the Court finds that the Plan of Allocation and Distribution, including the claim submission procedures and Claim Form are fair, reasonable and adequate. Those procedures allow sufficient time and are simple and straightforward so that any Class Member who chooses to submit a Claim Form has ample opportunity to do so. The Claim Form and claim submission procedures assist the Class Members in making informed decisions as whether to submit a Claim Form. The Court also finds that the Plan of Allocation and Submission promotes participation of potential Settlement Class Members in the settlement and complies with the requirements of the Wrongful Death Act and Rule 1-105, NMRA. These findings do not prejudice the rights of any Settlement Class Member to object to the notice procedures at the Settlement Final Approval Hearing.

13. The Final Approval Hearing shall be held before this Court, in Courtroom ____ of this Courthouse, at ___ a.m., on _____, 2020, or such alternate date as the Court may set as close to 60 days after the date that the Class Notice is required to be disseminated, *i.e.*, 90 days from the date of entry of this Order, as is convenient with the Court's schedule. At that hearing, the Court shall consider and/or determine, among other things: (i) whether the Settlement should be finally approved as fair, reasonable, and adequate; (ii) whether to finally certify a Settlement Class for settlement purposes only; (iii) whether the notice procedures comply with the New Mexico Rules and due process; (iv) the amount of attorneys' fees to be awarded to Class Counsel and the amount of any service awards to be paid to Class Representative; (v) whether Settlement Class Members should be bound by the Releases set forth in the Agreement; (vi) whether the Final Judgment and Order approving the Settlement and dismissing all claims asserted in this Lawsuit on the merits, with prejudice and without leave to amend, should be entered; and (vii) other actions, if any, to be enjoined or dismissed. The Final Approval Hearing may be postponed, adjourned or rescheduled by order of the Court without further notice to the Members of the Settlement Class, other than that which may be posted at the Court and on the Court's website. The Court may approve the Settlement at or after the Final Approval Hearing with such modifications as may be consented to by the Parties and without further notice to the Class Members.

14. Any potential Settlement Class Member who wishes to exclude himself, herself, or itself from the Settlement Class must submit to the Class Administrator a written request for exclusion postmarked not later than _____ [twenty (20) days before the date set by this Order for the Final Approval Hearing].

15. The Class Administrator shall promptly log each request for exclusion that it receives and provide copies of the log and all such requests for exclusion to Defense Counsel and Class Counsel as requested. Within ten days after the deadline for Settlement Class Members to request exclusion, Class Counsel and Defense Counsel shall exchange a complete list of all timely and valid requests for exclusion received by the Class Administrator as of that date. Any Settlement Class Member who does not timely and validly request to be excluded from the Settlement Class before the deadline waives the right to do so in the future.

16. Any Settlement Class Member who does not submit a timely, written request for exclusion will be bound by all proceedings, orders and judgments in the Lawsuit, including the terms of the Settlement, if approved. All members of the Settlement Class who do not timely request exclusion in the manner set forth in the Class Notice and the Agreement shall be bound by any Final Judgment entered pursuant to the Agreement, and shall be barred and enjoined, now and in the future, from asserting any claims arising out of the facts alleges in the Second Amended Complaint against any Released Parties, as defined in the Agreement. Upon entry of a Final Judgment approving the Settlement, all members of the Settlement Class shall be conclusively deemed to have fully and finally released all of the Released Parties from any and all Released Claims.

17. Settlement Class Members who do not file a timely request for exclusion, may file a Notice of Intent to Object to the Settlement, or to Intervene in the Lawsuit to contest the Settlement, in accordance with Paragraph 32 of the Agreement. Any such notice of intent to object and/or intervene must be: (a) filed with the Clerk of the Court not later than _____ [twenty (20) days before the date set by this Order for the Final Approval

Hearing], and (b) sent by first-class mail to designated counsel such that they will be received by that date by:

Decedent Class Counsel:

Jacob G. Vigil
Vigil Law Firm, P.A.
2014 Central Avenue SW
Suite A
Albuquerque, NM 87104
(505) 243-1706
jake@zlaws.com

Joseph Goldberg
Vincent J. Ward
Frank T. Davis
Freedman Boyd Hollander
Goldberg Urias & Ward, P.A.
20 First Plaza NW
Suite 700
Albuquerque, NM 87102
(505) 842-9960
jg@fbdlaw.com
vjw@fbdlaw.com
ftd@fbdlaw.com

Catherine D. Bertram
Bertram Law Group
700 Pennsylvania Avenue
SE, Suite 450
Washington, D.C. 20003
(202) 803-5800
katie@blg-dc.com

Designated Defendants' Counsel:

R. Nelson Franse
Leslie McCarthy Apodaca
Andrew G. Schultz
Rodey, Dickason, Sloan Akin & Robb, P.A.
P.O. Box 1888
Albuquerque, NM 87103
(505) 765-5900
nfranse@rodey.com
lapodaca@rodey.com
aschultz@rodey.com

Thomas Ryan
Gregory Jones
McDermott Will & Emery LLP
2049 Century Park East
Suite 3200
Los Angeles, CA 90067
(310) 551-9395
tryan@mwe.com
gjones@mwe.com

18. Any Notice of Intent to Object or Intervene must contain: (a) a heading which refers to the Lawsuit; (b) the name, address, telephone number and signature of the Settlement Class Member filing the objection or intervention request; (c) a statement whether the objector or intervenor intends to appear at the Final Approval Hearing, either in person or through counsel, and, if through counsel, identifying counsel by name, address and phone number; (d) a detailed statement of the specific legal and factual bases for intervention and/or each and every objection, and, if through counsel, a legal memorandum in support of the objection or intervention; and (e) a

list of any witnesses, along with the expected testimony of each such witness, and photocopies of exhibits which the objector intends to introduce at the Final Approval Hearing. Any Settlement Class Member who fails to object or seek to intervene in accordance with this Order will be deemed to have waived the right to object or intervene and shall be barred from raising their objections to the Settlement or Final Judgment in this or any other proceeding, including in an appeal.

19. Plaintiff's Motion for Final Approval of Class Action Settlement, and for attorneys' fees and on behalf of the Class Representative for a service award, as set forth in the Settlement Agreement shall be filed on or before _____ [ten (10) days before the date set by this Order for the Final Approval Hearing].

20. Class Counsel and/or Defense Counsel may file and serve a written response to any Notice of Intent to Object or to Intervene not later than 10 days before the Final Approval Hearing. Objections to the Settlement shall be heard, and any papers or briefs submitted in support of said objections shall be considered by the Court (unless the Court in its discretion shall otherwise direct), only if they comply with the objection procedures set forth herein.

21. The Court further preliminarily finds that neither Defendants, Defense Counsel nor Class Counsel, shall be responsible in any way for any attorneys' lien(s) or medical lien(s) submitted for any of the Settlement Class Members, nor shall any such liens be created by any of the efforts of the Parties to effectuate any of the terms of the Settlement Agreement.

22. Pending final determination of whether the Settlement should be approved, Plaintiffs and all Settlement Class Members are preliminarily enjoined from bringing any new action, including a new alleged class action, or attempting to amend an existing action, against Defendant, to assert any claims that would be released pursuant to the Settlement, and Plaintiffs and all Settlement Class Members are also enjoined from proceeding with any pending action

which asserts against Defendant claims, including putative class claims, arising out of or related to the claims and allegations asserted in the Lawsuit or that would otherwise fall within the scope of the Agreement and be released pursuant to the Settlement. The Court finds that no bond is necessary for issuance of this injunction.

23. If final approval of the Settlement is not obtained or the events set forth in the Agreement are not satisfied, this preliminary certification order, any final certification of a Settlement Class, and Final Judgment approving the Settlement shall be vacated *ab initio*. In that circumstance, the Settlement and any obligations Defendant may have under the Settlement (including, but not limited to, any obligation to pay attorneys' fees), and any order or judgment hereon (including, but not limited to, any preliminary or final certification of a Settlement Class) will be null and void and of no force and effect.

24. Upon motion of any party, the Court may, for good cause, extend any of the deadlines set forth in this Order without further notice to the Settlement Class.

25. If any deadline in this order falls on a non-business day, then the deadline is extended until the next business day.

IT IS SO ORDERED.

Dated: _____, 2020

The Honorable Carl Butkus
Second Judicial District Court Judge

NOTICE OF CLASS ACTION SETTLEMENT
AUTHORIZED BY STATE OF NEW MEXICO, COUNTY OF BERNALILLO,
SECOND JUDICIAL DISTRICT COURT

A \$38 Million class action settlement has been reached on behalf of beneficiaries of deceased pediatric cancer patients who received treatment for Acute Lymphoblastic Leukemia (also known as “ALL”) at the University of New Mexico Health Sciences Center or Hospital between January 1, 1977, and March 31, 1997.

The settlement covers pediatric cancer patients who died as recently as December 1, 2019.

Certain beneficiaries of the deceased pediatric cancer patients such as parents, siblings, spouses, children, or other family members may be entitled to compensation under the settlement.

If you believe you may be entitled to compensation, please read this Notice carefully.

A New Mexico state court directed this Notice. This is not a solicitation from a lawyer.

- The Court has preliminarily approved a \$38.05 million settlement in a class action lawsuit entitled *Cummings v. Board of Regents of the University of New Mexico, et al.*, Cause No. CV 2001-00579 (as consolidated with Cause No CV 2001-01409).
- The lawsuit alleges that the University of New Mexico failed to administer proper treatment protocols to Acute Lymphoblastic Leukemia patients treated at the University of New Mexico Health Sciences Center or Hospital (“UNM”) between January 1, 1977, and March 31, 1997.
- The proposed settlement provides compensation to the statutory beneficiaries of pediatric cancer patients who were treated for Acute Lymphoblastic Leukemia by UNM between January 1, 1977, and March 31, 1997 and who died on or before December 1, 2019.
- The settlement creates the following Settlement Class (referred to throughout as the Decedent Class):

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.

- This Notice has important information for the personal representatives and statutory beneficiaries of the deceased pediatric cancer patients, including parents, siblings, children or other family members who may be eligible for compensation under the settlement.
- The full Settlement Agreement is available at Acute Lymphoblastic Leukemia Settlement Class Website (“Website”) at www._____.com, or you may call _____ to receive a copy.
- In the event of any conflict between the terms of this Notice and the Class Settlement Agreement, the terms of the Class Settlement Agreement shall control.

LEGAL RIGHTS AND OPTIONS

The legal rights and options for personal representatives and/or statutory beneficiaries who are members of the class are described in this section.

If you believe you are or may be an appropriate personal representative and/or statutory beneficiary of a deceased pediatric cancer patient as defined above, you may:

File a Claim: You **should** file a Claim Form if you want to participate in the settlement. If you do not file a Claim Form, you may not receive any compensation, even if you are eligible. If the Court grants final approval of this settlement, a Claim Form will be mailed to you if you received this notice in the mail or requested one on the Website.

Exclude Yourself: If you do not wish to participate in the settlement, you **must** file a notice with the Court excluding yourself the settlement.

Object: If you do not agree with any part of this settlement, including the plan to distribute money to class members, or the requested award of attorneys’ fees and expenses, or the service awards for the named Deceased Class Plaintiffs, you may:

- Write to the court explaining why you do not agree (*See* Questions 15 and 19); and
- Ask to speak at the Court Hearing about either the fairness of this settlement or about the requested attorneys’ fees or service awards. (*See* Question 22).

Do Nothing: If you do not file a claim, you will not get money from this settlement. You will give up your rights to sue for damages about the claims in this case. (See Questions 11 and 14).

Deadlines: If you wish to exclude yourself from the settlement, or if you wish to be included in the settlement but want to object to the settlement, you must do so by _____. See Questions 11-25 for more information about rights and options and all deadlines.

WHAT THIS NOTICE CONTAINS

Question No.	Topic	Page No.
	BASIC INFORMATION	
1.	Why did I get this notice?	
2.	What is this lawsuit about?	
3.	Why is this a class action?	
4.	Why is there a settlement?	
5.	Am I part of the settlement?	
	SETTLEMENT BENEFITS	
6.	How much money will be provided for in the settlement?	
7.	How do I ask for money from this settlement?	
	HOW TO FILE A CLAIM	
8.	How do I file a claim?	
9.	Who decides the value of my claim?	
10.	How will the class administrator determine the value of my claim?	
11.	Am I giving up anything by filing a claim or not filing a claim?	
12.	How do I opt-out of the Settlement Class?	
13.	If I exclude myself from the Settlement Class, can I still get money from this settlement?	
14.	If I do not exclude myself from the Settlement Class, can I individually sue the UNM?	
	HOW TO DISAGREE WITH THE SETTLEMENT	
15.	What if I disagree with the settlement?	
16.	Is objecting to the settlement the same thing as being excluded?	
	THE LAWYERS REPRESENTING YOU	
17.	Who are the lawyers that represent the Settlement Class?	
18.	How much will the lawyers and Class Plaintiffs be paid?	
19.	How do I disagree with the requested attorneys' fees, expenses or service awards to the Settlement Class Plaintiffs?	
	THE COURT'S FAIRNESS HEARING	
20.	When and where will the Court decide whether to approve the settlement?	
21.	Do I have to come to the hearing to get my money?	
22.	What if I want to speak at the hearing?	
	IF YOU DO NOTHING	
23.	What happens if I do nothing?	

	GET MORE INFORMATION	
24.	How do I get more information?	
	THE FULL TEXT OF THE RELEASE	
25.	What is the full text of the Release for the Settlement Class?	

BASIC INFORMATION

1. Why did I get this Notice?

You are receiving this Notice because case records indicate that you may be a statutory beneficiary of a pediatric cancer patient who was treated for Acute Lymphoblastic Leukemia by the UNM Defendants between January 1, 1977, and March 31, 1997, who is now deceased. A “statutory beneficiary” may include parents, siblings, spouses or children of the pediatric cancer patient.

This Notice tells you about your rights and options in a class action lawsuit in the Second Judicial District Court in Albuquerque, Bernalillo County, New Mexico. Judge Carl Butkus is overseeing this class action, which is entitled *Cummings v. Board of Regents of the University of New Mexico*, et al., Cause No. CV 2001-00579 (As consolidated with Cause No. CV 2001-01409). This Notice explains the lawsuit, the proposed settlement, the benefits available, eligibility for those benefits, and how to get them.

The people who started this lawsuit are the “Decedent Class Plaintiffs.” The government entities they are suing are the “UNM Defendants.”

This case has been brought by the parents of deceased pediatric cancer patients. They are the “Decedent Class Plaintiffs” and the Court has authorized them to act on behalf of all deceased pediatric cancer patients in the class described below in connection with the proposed settlement of this case. The Decedent Class Plaintiffs are:

- 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

The governmental entities the Deceased Class Plaintiffs are suing are the “UNM Defendants.” The UNM Defendants are:

- Board of Regents of the University of New Mexico
- University of New Mexico Health Sciences Center
- University of New Mexico Hospital
- University of New Mexico School of Medicine

2. What is this lawsuit about?

This lawsuit is principally about whether pediatric cancer patients who were treated for Acute Lymphoblastic Leukemia at the University of New Mexico Health Science Center between January 1, 1977 and March 31, 1997 were given proper care.

3. Why is this a class action?

In a class action, people sue not only for themselves, but also on behalf of other people with similar legal claims and interests. Together all of these people with similar claims and interests form a class and are class members.

When a court decides a case or approves a settlement, it is applicable to all members of the class (except class members who exclude themselves). In this case, the Court has given preliminary approval to the class as it is defined below in Question 5, and the settlement for that defined class, and the mailing of this Notice.

4. Why is there a settlement?

The Court has not decided which side was right or wrong or if any laws were violated. Instead, both sides agreed to settle the case and avoid the costs and risks of trial and potential appeals following trial.¹

In this case, the settlement is the product of extensive negotiations, including mediation before an experienced mediator who was familiar with the facts of the case, chosen by the parties. Settling this case allows class members, or their statutory beneficiaries, to receive payments.

The Decedent Class Plaintiffs and their lawyers believe the settlement is best for all class members.

The parties agreed to settle the case after nineteen years of litigation. During discovery, Class Counsel reviewed and analyzed thousands of pages of documents and medical records, and participated in more than 40 depositions, including fact and expert depositions. Also, earlier in the litigation, motions to dismiss, motions for summary judgment and the motion for class certification had been fully briefed and argued, but not decided by the Court.

5. Am I part of this settlement?

If this Notice was mailed to you, the records show that your family member was treated for Acute Lymphoblastic Leukemia by the UNM Defendants during the class period and is now deceased. You, and possibly other beneficiaries, may be entitled to compensation from the settlement. The Decedent Class specifically consists of:

¹ The case also involves claims by pediatric cancer patients who are still alive. These claims have not been settled and are still being litigated.

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.

If you are not sure whether you are part of this settlement, contact the Class Administrator at:

[INSERT CONTACT INFORMATION FOR CLASS ADMINISTRATOR]

SETTLEMENT BENEFITS

6. How much money will I be provided in this settlement?

At this point it is unknown how much each eligible Decedent Class member will receive. Your compensation, if any, depends on several factors, including:

- The number of valid claims that are submitted;
- The total amount of administration expenses, taxes, service awards to Decedent Class Plaintiffs, and attorneys' fees and expenses, all of which will be determined by the Court; and
- Whether a deceased pediatric cancer patient has more than one statutory beneficiary entitled to compensation.

The money in this settlement fund will only be distributed if the Court finally approves the settlement.

7. How do I ask for money from the settlement?

You should submit a Claim Form if you believe you are entitled to compensation under the settlement.

You should have received a claim form with this mailed notice, if this notice was mailed to you. If you have not received a claim form and believe you may be a member of the decedent Class, you may obtain a claim form on the settlement website www._____.com or you may contact the Class Administrator:

[INSERT CONTACT INFORMATION FOR CLASS ADMINISTRATOR]

HOW TO FILE A CLAIM

8. How do I file a claim?

If you received this Notice in the mail, a Claim Form should have been included in the mailing. The Claim Form is also available on the website and is available by calling the toll-free number shown below. Decedent Class members will be able to submit claims by using this website, email or returning a paper Claim Form.

Some companies or attorneys may offer to help you file your Claim Form in exchange for a portion of your recovery from the settlement. While you may choose to use such companies, you should know that you can file your Claim Form with the Class Administrator on your own, free of charge. Additionally, you are entitled to contact the Class Administrator or Class Counsel for assistance in understanding and filing your Claim Form. You may also contact the Class Administrator or Class Counsel if you have any questions about whether you need additional counsel or help in filing a claim. Again, these communications are at no cost to you.

9. Who decides the value of my claim?

The Class Administrator will calculate the payment to each eligible Decedent Class member under the procedures approved by the Court.

10. How will the Class Administrator determine the value of my claim?

The Class Administrator will follow the process outlined in the Plan of Allocation and Distribution (Allocation Plan) approved by the Court. The Allocation Plan is attached to the Settlement Agreement as Exhibit 4 and is available for review on the Website.

The Allocation Plan requires the Class Administrator to evaluate Claim Forms filed on behalf of Decedent Class members to determine whether the claimant is: (1) a statutory beneficiary of (2) a pediatric cancer patient diagnosed with Acute Lymphoblastic Leukemia who presented for treatment at the University of New Mexico Health Sciences Center or Hospital from January 1, 1977 through March 31, 1997, (3) whose claim was not previously settled with the UNM Defendants, (4) whose treatment protocols were not principally administered or designed elsewhere and who did not receive initial or relapse induction treatment in New Mexico, and (5) who by December 1, 2019, was deceased. Claimants who satisfy all five conditions are Eligible Decedent Class members.

The net Settlement Fund will be determined by subtracting the total amount of payments associated with the costs of notice and claims administration, taxes, service awards to Decedent Class Plaintiffs, and attorneys' fees and expenses, all of which will be determined by the Court.

The Class Administrator will then preliminarily calculate the pro rata share of the net settlement fund that will be allocated to the estate of each deceased pediatric cancer patient who is identified during the claims process.

After the preliminary pro rata shares are determined, a second notice will be provided (by mail and publication) to any known or reasonably ascertainable statutory beneficiaries, allowing persons to make claims as statutory beneficiaries.

The Class Administrator will then determine who are statutory beneficiaries and present those determinations to the Court for approval.

Finally, the Class Administrator will distribute the pro rata settlement proceeds allocated to the estates of the deceased pediatric cancer patients to the appropriate statutory beneficiaries under the New Mexico's wrongful death statute, NMSA 1978, § 41-2-3.

The wrongful death statute requires that the settlement proceeds be distributed as follows:

- If the deceased is a minor, childless and unmarried, then to the father and mother who shall have an equal interest, or if either of them is dead, then to the survivor;
- If there is a surviving spouse and no child, then to the spouse;
- If there is a surviving spouse and a child or grandchild, then one-half to the surviving spouse and the remaining one-half to the children and grandchildren, the grandchildren taking by right of representation; or
- If there is no father, mother, husband, wife, child or grandchild, then to a surviving brother or sister if there are any.

**[INSERT CONTACT INFORMATION FOR CLASS ADMINISTRATOR
(INCLUDING NUMBER TO CALL)]**

11. Am I giving up anything by filing a claim or not filing a claim?

Members of the Decedent Class who do not exclude themselves by the deadline will be bound by the terms of the Settlement Agreement, including the release of claims against the Defendants and other Released Parties identified in Paragraph 12 of the Settlement Agreement, whether or not the members file a claim for payment.

The settlement will resolve and release claims by class members for monetary compensation against Defendants. The release bars class members from bringing claims based on conduct that was alleged or raised in the litigation, or that could have been alleged or raised in the litigation relating to its subject matter.

The release does *not* extinguish the following claims:

- Claims based on conduct that was not alleged or raised in the litigation.
- Claims of pediatric cancer patients who received treatment at the University of New Mexico Health Sciences Center (or Hospital) for cancers other than Acute Lymphoblastic Leukemia.
- Claims of pediatric cancer patients who were treated for Acute Lymphoblastic Leukemia at the University of New Mexico Health Sciences Center (or Hospital) but are still alive.

- Claims of pediatric cancer patients who were treated for Acute Lymphoblastic Leukemia at the University of New Mexico Health Sciences Center (or Hospital) outside the class period of January 1, 1977, to March 31, 1997.

The full text of the Release can be found in paragraph 23 of the Settlement, which is available for review on the Website. You should carefully read the Release and if you have any questions about the Release you may:

- Call Class Counsel listed at Question 17 at no charge; or
- Talk to a lawyer, at your own expense, about the Release and what it means to you.

Important! If you want to keep your right to be part of any other lawsuit based on similar claims, you must opt-out (exclude yourself) from the settlement. Instructions for excluding yourself from the settlement are discussed in response to Question 12.

12. How do I exclude myself (or opt out) from the Settlement?

To opt-out (exclude yourself) from the Decedent Class, send a letter to:

[INSERT CONTACT INFORMATION FOR CLASS ADMINISTRATOR]

Your letter must be postmarked by _____. You cannot exclude yourself by phone, fax, email or online.

How should I send my letter?

You may send your letter by first-class mail and pay for the postage. You also may send your letter by overnight delivery. Keep a copy for your records.

What should my letter say?

Your letter must be signed by a person authorized to do so and state as follows:

- I want to exclude [name of person] from the Decedent Class in the case called *Cummings v. Board of Regents of the University of New Mexico, et al.*
- My personal information is:
 - Your Name (first, middle, last):
 - Name of deceased pediatric patient (i.e., the name of your child, sibling, etc.):
 - Your relationship to the deceased pediatric patient:
 - Your address:
 - Your phone number

- **Warning!** If your letter is sent after the deadline it will be considered invalid. If this happens, you won't be excluded from the Decedent Class, and you will still be part of the settlement and will be bound by all of its terms.

13. If I exclude myself from the Decedent Class, can I still get money from this Settlement?

No. If you exclude yourself from Decedent Class:

- You cannot get money from this settlement; and
- You cannot object to the settlement.

The deadline to exclude yourself is _____. To do this, see response to Question No. 12 or visit www._____.com.

Important! If you exclude yourself, do not file a Claim Form asking for payment.

14. If I do not exclude myself from the Decedent Class, can I individually sue these Defendants for damages?

No. If you do not exclude yourself, you give up your right to sue any of the Released Parties described in the Settlement Agreement.

HOW TO DISAGREE WITH THE SETTLEMENT

15. What if I disagree with the Settlement?

You may object to the settlement for the Decedent Class if you do not exclude yourself from the class. The Court will consider your objection(s) when it decides whether to finally approve the settlement.

How do I tell the Court I disagree with the settlement?

You must file a Statement of Objections with the Court at this address:

**Second Judicial District
Bernalillo County Courthouse
400 Lomas NW
Albuquerque, NM 87102**

You must also send a copy of your Statement of Objections to Decedent Class Counsel and Counsel for the Defendants at the following addresses:

Designated Decedent Class Counsel:

Jacob G. Vigil
Vigil Law Firm, P.A.
2014 Central Avenue SW
Suite A
Albuquerque, NM 87104
(505) 243-1706
jake@zlaws.com

Joseph Goldberg
Vincent J. Ward
Frank T. Davis
Freedman Boyd Hollander
Goldberg Urias & Ward, P.A.
20 First Plaza NW
Suite 700
Albuquerque, NM 87102
(505) 842-9960
jg@fbdlaw.com
vjw@fbdlaw.com
ftd@fbdlaw.com

Catherine D. Bertram
Bertram Law Group
700 Pennsylvania Avenue SE,
Suite 450
Washington, D.C. 20003
(202) 803-5800
katie@blg-dc.com

Designated Defendants' Counsel:

R. Nelson Franse
Leslie McCarthy Apodaca
Andrew G. Schultz
Rodey, Dickason, Sloan Akin & Robb, P.A.
P.O. Box 1888
Albuquerque, NM 87103
(505) 765-5900
nfranse@rodey.com
lapodaca@rodey.com
aschultz@rodey.com

Thomas Ryan
Gregory Jones
McDermott Will & Emery LLP
2049 Century Park East
Suite 3200
Los Angeles, CA 90067
(310) 551-9395
tryan@mwe.com
gjones@mwe.com

You must send your Statement of Objections postmarked no later than _____.

What should my Statement of Objections say?

Your Statement of Objections must contain the following information:

I am a member of the Decedent Class in the case called *Cummings v. Board of Regents of the University of New Mexico, et al.*

I am a class member because: [identify the deceased pediatric cancer patient and your relationship to that patient].

My reasons for objection are:

State whether you wish to speak at the hearing (see Question 21, below).

My personal information is:

- Your Name (first, middle, last):
- Name of deceased pediatric patient (i.e., the name of your child, sibling, etc.):
- Your relationship to the deceased pediatric patient:
- Your address:
- Your phone number:

The contact information for my lawyer (if any) is:

Can I call the Court or the Judge's office about my objections?

No. If you have questions, you may visit the website for the Settlement or call the Class Administrator.

16. Is objecting the same thing as being excluded?

No. **Objecting** means you tell the Court which part(s) of the Settlement you disagree with (including the plan for distributing the settlement fund, request for attorneys' fees and expenses, or service awards for the named Decedent Class Plaintiffs).

Being **excluded** (also called opting-out) means you tell the Court you do not want to be part of the Decedent Class.

THE LAWYERS REPRESENTING YOU

17. Who are the lawyers that represented the Decedent Class?

The Court has appointed the lawyers listed below to represent you. These lawyers are called Class Counsel. Other lawyers have also worked with Class Counsel to represent you in this case. Because you are a class member, you do not have to pay any of these lawyers. They will be paid from the settlement funds.

Jacob G. Vigil
Vigil Law Firm, P.A.
2014 Central Avenue SW
Suite A
Albuquerque, NM 87104
(505) 243-1706
jake@zlaws.com

Joseph Goldberg
Vincent J. Ward
Frank T. Davis
Freedman Boyd Hollander
Goldberg Urias & Ward, P.A.
20 First Plaza NW
Suite 700
Albuquerque, NM 87102
(505) 842-9960
jg@fbdlaw.com
vjw@fbdlaw.com
ftd@fbdlaw.com

Catherine D. Bertram
Bertram Law Group
700 Pennsylvania Avenue SE,
Suite 450
Washington, D.C. 20003
(202) 803-5800
katie@blg-dc.com

18. How much will the lawyers and the Decedent Class Plaintiffs be paid?

For work done through final approval of the settlement by the district court, Class Counsel will ask the Court for an amount that is a reasonable proportion of the settlement fund, not to exceed 35% of the settlement fund to compensate all of the lawyers and their law firms that have worked on the class case.

Class Counsel will also request an award of their reasonable litigation expenses (not including the administrative costs of settlement or notice).

The Decedent Class Plaintiffs may receive a service award for each of them up to \$50,000.00 for their representation of the members of the Deceased Class, which culminated in the Settlement Agreement.

The amounts to be awarded as attorneys' fees, expenses, and Decedent Class Plaintiffs' service awards **must** be approved by the Court. Class Counsel must file their requests for fees, expenses, and service awards with the Court by _____. You can object to the requests for attorneys' fees, expenses, and service awards in compliance with the instructions in Question 19 below.

Copies of the lawyers' requests for fees, expenses, and service awards can be obtained from the Class Administrator or on the class website.

19. How do I disagree with the requested attorneys' fees, expenses or service awards to the Decedent Class Plaintiffs?

You may tell the Court you object to (disagree with) any request for attorneys' fees and expenses or service awards to the Decedent Class Plaintiffs. You may do so if you do not exclude yourself from the Decedent Class. The Court will consider your objection(s) when it evaluates any request for attorneys' fees and expenses and/or service awards to the Decedent Class Plaintiffs in connection with its decision on final approval of the settlement.

To file an objection, you must file a Statement of Objections with the Court at this address:

**Second Judicial District
Bernalillo County Courthouse
400 Lomas NW
Albuquerque, NM 87102**

You must also send a copy of your Statement of Objections to Class Counsel and Counsel for the Defendants at the following addresses:

Class Counsel:

Jacob G. Vigil
Vigil Law Firm, P.A.
2014 Central Avenue SW
Suite A
Albuquerque, NM 87104
(505) 243-1706
jake@zlaws.com

Joseph Goldberg
Vincent J. Ward
Frank T. Davis
Freedman Boyd Hollander
Goldberg Urias & Ward, P.A.
20 First Plaza NW
Suite 700
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jg@fbdlaw.com
vjw@fbdlaw.com
ftd@fbdlaw.com

Catherine D. Bertram
Bertram Law Group
700 Pennsylvania Avenue SE,
Suite 450
Washington, D.C. 20003
(202) 803-5800
katie@blg-dc.com

Counsel for the Defendants:

R. Nelson Franse
Leslie McCarthy Apodaca
Andrew G. Schultz
Rodey, Dickason, Sloan Akin & Robb, P.A.
P.O. Box 1888
Albuquerque, NM 87103
(505) 765-5900
nfranse@rodey.com
lapodaca@rodey.com
aschultz@rodey.com

The Clerk of Court, the attorneys for the class and defendants must receive your letter by _____.

What should my Statement of Objections say?

Your Statement of Objections must contain the following information:

I am a member of the Decedent Class in the case called *Cummings v. Board of Regents of the University of New Mexico, et al.*

I am a class member because: [identify the deceased pediatric cancer patient and your relationship to that patient].

I object to Class Counsel's request for attorneys' fees and expenses and/or to the request for service awards to the Decedent Class Plaintiffs.

My reasons for objection are:

State whether you wish to speak at the hearing (see Question 21, below).

My personal information is:

- Your Name (first, middle, last):
- Name of deceased pediatric patient (i.e., the name of your child, sibling, etc.):
- Your relationship to the deceased pediatric patient:
- Your address:
- Your phone number:

The contact information for my lawyer (if any) is:

Can I call the Court or the Judge’s office about my objections?

No. If you have questions, you may visit the website for the Settlement or call the Class Administrator.

20. Do I have to go to the hearing to get my money?

No. You do not have to go to the hearing, even if you sent an objection to the Court. But you can go to the hearing or hire a lawyer to go the hearing if you want to, at your own expense.

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

There will be a Fairness Hearing at _____. The hearing will take place at:

**Second Judicial District
Bernalillo County Courthouse
400 Lomas NW
Albuquerque, NM 87102**

We do not know how long the Court will take to make its decision.

Important! The time and date of this hearing may change without additional mailed or published notice. For updated information on the hearing, contact the Class Administrator or visit [insert website address].

Why is there a hearing?

The hearing is about whether or not the settlement should be finally approved as fair, adequate, and reasonable.

The Court will consider any objections and listen to class members who have asked to speak at the hearing.

The Court will also decide whether it should give its final approval of Class Counsel's requests for attorneys' fees and expenses, service awards to Decedent Class Plaintiffs, and other costs.

22. What if I want to speak at the final approval hearing?

You must state in your objections that you want to speak at the hearing, or you can file a Notice of Intention to Appear with the Court at this address:

**Second Judicial District
Bernalillo County Courthouse
400 Lomas NW
Albuquerque, NM 87102**

Your Notice of Intention to Appear must be filed by _____. You must also mail a copy of your letter to Class Counsel and Counsel for the Defendants at the addresses listed in Question 19.

What should my Notice of Intention to Appear say?

Your Notice of Intention to Appear must be signed and contain the following information:

I want to speak at the Fairness Hearing for the case called *Cummings v. Board of Regents of the University of New Mexico, et al.*

My personal information is:

- Name (first, middle, last):
- Address:
- Phone No.:
- I am a class member because: [identify the deceased pediatric cancer patient and your relationship to that patient]
- I wish to speak about: [fill in]

IF YOU DO NOTHING

23. What happens if I do nothing?

If you do not file a claim, you cannot get money from this settlement.

If you do not exclude yourself from the Deceased Class, you cannot be part of any other lawsuit against Defendants and other released parties listed in the Settlement Agreement for released conduct. You will be bound by the Release.

GETTING MORE INFORMATION

24. How do I get more information?

There are several ways to get more information about the Settlement.

You may write, email, or call the Class Administrator. The Class Administrator's contact information is as follows.

[INSERT CONTACT INFORMATION FOR CLASS ADMINISTRATOR]

You will find information at the following website address: _____.

If you do not get a Claim Form in the mail or by email, you may download one at: _____, or call: _____.

Please do not attempt to contact Judge Butkus or the Clerk of Court with any questions.

A \$38 Million class action settlement has been reached on behalf of beneficiaries of deceased pediatric cancer patients who received treatment for Acute Lymphoblastic Leukemia (also known as “ALL”) at the University of New Mexico Health Sciences Center or Hospital between January 1, 1977 and March 31, 1997

Para una notificación en Español, llamar o visitar nuestro website.

Notice of a class action settlement authorized by State of New Mexico, County of Bernalillo, Second Judicial District Court

This notice is authorized by the Court to inform you about an agreement to settle a class action lawsuit that may affect you. The lawsuit alleges that the University of New Mexico failed to administer proper treatment protocols to pediatric Acute Lymphoblastic Leukemia patients treated at the University of New Mexico Health Sciences Center or Hospital (“UNM”) between January 1, 1977, and March 31, 1997. The settlement covers pediatric cancer patients who died as recently as December 1, 2019.

The Defendant UNM says that it has done nothing wrong. The Court has not decided who is right because the parties agreed to a settlement. The Court has given preliminary approval to this settlement. The Court will have a hearing to decide whether to finally approve the settlement.

Who is included in the settlement?

You may be a Class Member if you are a family member or beneficiary of a deceased pediatric cancer patient diagnosed with Acute Lymphoblastic Leukemia who was treated at UNM between January 1, 1977 and March 31, 1997 and who died on or before December 1, 2019.

What is the case about?

This lawsuit is principally about whether pediatric cancer patients who were treated for Acute Lymphoblastic Leukemia at the UNM between January 1, 1977, and March 31, 1997, were given proper care.

What does the settlement provide?

The University of New Mexico has agreed to create a fund of \$38,050,000.00 to be divided among all Class members. The Settlement Agreement, available at the website below, describes all the details of the proposed settlement.

Your share of the fund will depend on the number of valid claims that are submitted by eligible Class members, whether a deceased pediatric cancer patient has more than one statutory beneficiary entitled to compensation, the total amount of

claims administration expenses, taxes, service awards to the named Plaintiffs in the case, and attorneys’ fees and expenses.

How do you ask for a payment?

A detailed notice contains all available information. Just call the number below or visit the website listed below to get one.

You should submit a Claim Form if you believe you are entitled to compensation under the settlement. You may learn how to receive a claim form by consulting the website described below.

What are your other options?

If you do not want to be legally bound by the settlement, you must exclude yourself by _____ or you will not be able to sue, or continue to sue, UNM about the legal claims in this case. If you exclude yourself, you cannot get money from this settlement.

If you stay in the settlement you may object to it by filing an objection by _____. The detailed notice explains how to exclude yourself or object.

The Court will hold a hearing in this case (*Cummings v. Board of Regents of the University of New Mexico, et al.*, Cause No. CV 2001-00579 (as consolidated with Cause No CV 2001-01409)) on _____, to consider whether to approve: (1) the settlement, (2) the awards to the Class Plaintiffs, and (3) the request by the lawyers, representing all Class members, for up to 35 percent of the settlement fund as fees and the reimbursement of reasonable expenses.

You may ask to appear at the hearing, either on behalf of yourself or through a representative, but it is not required. The hearing will take place at:

Insert Court Information

If you have questions, call the number or visit the website address listed below.

TELEPHONE NUMBER

WEBSITE ADDRESS

Plan of Allocation and Distribution

1. **Class Administrator:** The Administrator will direct the distribution of the Settlement Fund consistent with this Plan of Allocation and Distribution and shall be compensated for its services from the Settlement Fund pursuant to approval of the Court. The Court will appoint the Administrator to be the legal representative, pursuant to section 41-2-3, NMSA, of the estate of each decedent pediatric cancer patient with respect to whose death any claimants filed claim forms.

2. **Determination of Eligible Decedent Class Members:** The Administrator shall determine the identities of Eligible Decedent Class Members in the following manner:

a. The Administrator shall: (i) include claim forms in all mailed notices pursuant to paragraph 33 of the Settlement Agreement, (ii) make available claim forms on the Decedent Class website, and (iii) furnish claim forms to all persons who request them or to any other persons who the Administrator has reason to believe may be a potential Decedent Class Member.

b. The Administrator shall review all claims forms filed on behalf of Decedent Class Members to determine whether the claimant (i) is a statutory beneficiary, pursuant to section 41-2-3, NMSA, of (ii) a pediatric cancer patient with a diagnosis of Acute Lymphoblastic Leukemia who presented for treatment at University of New Mexico Hospital (“UNMH”) from January 1, 1977 through March 31, 1997, (iii) whose claim was not previously settled with UNMH, (iv) whose treatment protocols were not principally administered or designed elsewhere and who did not receive initial or relapse induction treatment in New Mexico, and (v) who by

December 1, 2019, was deceased. Claimants who satisfy all five conditions are Eligible Decedent Class Members.

3. Determination of Pro Rata Share of Settlement Fund:

- a. The Administrator shall determine the net Settlement Fund available for distribution to Eligible Decedent Class Members after payments made pursuant to paragraph 27(a) – (c) of the Settlement Agreement.
- b. The Administrator shall determine the number of decedent cancer patients for whom claim forms have been filed.
- c. The pro rata shares of the Settlement Fund to be allocated to each of the estates of decedent cancer patients for whom claim forms have been filed shall be the product of the net Settlement Fund, determined under 3(a), above, divided by the number of the estates of decedent cancer patients for whom claim forms have been filed , determined under 3(c), above.

4. Distribution of Net Settlement Proceeds to Eligible Decedent Class Members:

- a. The Administrator shall solicit information from Eligible Decedent Class Members about identities of other statutory beneficiaries who may not have filed claim forms. The Administrator then shall make mailed notice (where possible) and publication notice pursuant to NMRA Rule 1-105 to all potential statutory beneficiaries as defined by section 41-2-3, NMSA, who have not previously filed claim forms with the Administrator, providing information of this Settlement and soliciting persons to file claim forms as statutory beneficiaries.

- b. After the deadline for return of claim forms pursuant to the notice described in 4(a), the Administrator shall determine, pursuant to the criteria described in 2(b), all Eligible Decedent Class Members and the amounts of their statutory shares, under section 41-2-3, NMSA, of the pro rata allocations of the net settlement fund to the estates of the decedent pediatric cancer patient relevant to each Eligible Decedent Class Member.
- c. The Administrator shall provide to the Court, Decedent Class Counsel, UNM Counsel and all persons who have filed claim forms with a report detailing the identities of Eligible Decedent Class Members, pro rata share amounts attributed to the estates of decedent cancer patients for whom claim forms have been filed and the amounts proposed to be distributed to each Eligible Decedent Class Members within thirty days of the deadline for returning claim forms pursuant to the notice described in 4(a). Eligible Class Members shall also be informed of their right to dispute the Administrator's determinations and how to make their objections, if any.
- d. Any dispute regarding the Administrator's determination as to whether a claimant is or is not an Eligible Decedent Class Member or the amounts of the net settlement fund to be distributed to each Eligible Decedent Class Member shall be resolved by the Court.
- e. The Administrator shall distribute their shares to Eligible Decedent Class members, according to the schedule of payments as approved by the Court within forty-five days of entry of the Court's approval of the schedule of distributions.

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

MARIA CUMMINGS, INDIVIDUALLY AND
AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF SHAUN MICHAEL CHAVEZ;
JANA V ALLEJOS 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.

No. D-202-CV-2001-00579
(As consolidated with
No. D-202-CV-2001-01409

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

Defendants.

**ORDER REGARDING PRODUCTION OF RECORDS RELEVANT TO THE
IDENTIFICATION OF ABSENT DECEDENT SETTLEMENT CLASS MEMBERS**

This matter, having come before the Court as part of Class Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement Agreement, and the Court having considered the arguments of counsel and being sufficiently advised;

The Court finds that it has jurisdiction and that Class Plaintiffs' motion is well taken and should be granted;

WHEREFORE, it is Ordered:

Not later than ___ days after entry of this Order, Defendants and the former Special Master, Charles Peifer, shall provide true, correct, unredacted and legible copies of any and all documents and materials that will assist the Class Administrator and Class Plaintiffs with the identification of Decedent Settlement Class members, including but not limited to patient files,

treatment records, lists or other compilations, memorandum, letters, or any other documents that contain contact or other personally identifying information for (1) deceased pediatric patients who were treated for Acute Lymphoblastic Leukemia during the class period and (2) their parents, guardians, or other family members to Class Plaintiffs' counsel.

HONORABLE CARL J. BUTKUS
District Court Judge

SUBMITTED BY:

VIGIL LAW FIRM, P.A.
/s/ Jacob G. Vigil
Jacob G. Vigil, Esq.
2014 Central Ave. SW
Albuquerque, New Mexico 87104
(505) 243-1706
jake@zlaws.com

and

FREEMAN BOYD HOLLANDER
GOLDBERG URIAS & WARD, P.A.
Joseph Goldberg
Vincent J. Ward
Frank T. Davis
20 First Plaza NW, Suite 700
Albuquerque, NM 87102
(505) 842-9960
Attorneys for Plaintiffs

APPROVED:

/s/ R. Nelson Franse
R. Nelson Franse
Leslie McCarthy Apodaca

Andrew G. Schultz
Rodey, Dickason, Sloan Akin & Robb, P.A.
Post Office Box 1888
Albuquerque, New Mexico 87103
(505) 765-5900
nfranse@rodey.com
lapodaca@rodey.com
aschultz@rodey.com

and

Thomas Ryan
Gregory Jones
McDermott Will & Emery LLP
2049 Century Park East, Suite 3200
Los Angeles, CA 90067-3206
(310) 551-9395

Attorneys for Defendants