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17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
18 **FOR THE COUNTY OF HUMBOLDT**

19
20 VINNIE LAVENDER by and through her
Conservator, WANDA BAKER; WALTER
21 SIMON; JACQUELYN VILCHINSKY,
22 Plaintiffs,
23 v.
24 SKILLED HEALTHCARE GROUP, INC., et
al.,
25 Defendants.

Case No. DR060264

**NOTICE OF MOTION AND MOTION
FOR AN ORDER GRANTING
PRELIMINARY APPROVAL OF
SETTLEMENT AGREEMENT, AND
CONDITIONAL APPROVAL OF
SETTLEMENT CLASS**

Dept.: Courtroom 1

Complaint Filed: May 4, 2006
Trial Date: November 30, 2009

FILED

SEP - 8 2010

SUPERIOR COURT OF CALIFORNIA
COUNTY OF HUMBOLDT

1 TO: ALL PARTIES AND THEIR COUNSEL, on September 10, 2010 at 8:30 a.m. in
2 Courtroom 1 of the above-referenced Court, Class Plaintiffs and Intervenor, the Humboldt County
3 District Attorneys' Office, will move for preliminary approval of the settlements entered into between
4 Defendants and Class Plaintiffs ("Plaintiffs' Settlement Agreement") and Intervenor ("Intervenor
5 Settlement Agreement"), respectively. Collectively, those two settlement agreements are referred to
6 as the "Settlement."
7

8 **I. INTRODUCTION**

9 This motion seeks preliminary approval of a Settlement that resolves class action and other
10 claims asserted in a lawsuit that has been pending for over four years, in which the Court recently
11 concluded a six-month jury trial. The Settlement is the product of extensive negotiations and
12 mediation efforts before Judge Daniel Weinstein (Ret.) and his JAMS mediation team. As
13 detailed below, the Defendants have agreed to a stipulated injunction that requires compliance
14 with California's nurse staffing laws and to pay \$50 million to cover all claims asserted by the
15 Class and Intervenor, including litigation expenses and attorneys' fees. The estimated value of the
16 Settlement, including the cash payment and the injunctive relief valued at \$12.8 million, is \$62.8
17 million. The proposed settlement avoids the risks of a lengthy and costly appeal, potential
18 bankruptcy proceedings by Defendants, or both.

19 **II. KEY SETTLEMENT TERMS**

20 Fully executed Settlement Agreements between the Defendants and the Class Plaintiffs
21 and Intervenor, respectively, have been lodged with the Court. (Declaration of Timothy Needham
22 ("Needham Decl"), Exs. 1 and 2.). The key provisions of the Settlement are as follows:

23 **A. Injunctive Relief**

24 Pursuant to a Court-ordered injunction, the terms of which were negotiated by the Parties
25 to the Settlement Agreements, Defendants will ensure that nurse staffing levels at the skilled
26 nursing facilities meet or exceed the minimum staffing requirements under California law. The
27 Injunction shall become effective on the Effective Date of the Settlement Agreements, if it occurs,
28

1 and remain in place thereafter for at least 18 months. The Injunction also provides for a Court-
2 approved auditor to monitor Facility Defendants' compliance with the law. The estimated costs of
3 compliance with the terms of the Injunction are approximately \$12.8 million, which will be
4 supported by a declaration filed by the Defendants in advance of Final Approval.

5 Defendants have agreed that if the actual costs of compliance with the terms of the
6 Injunction do not meet or exceed \$9.6 million, the difference between the actual costs of
7 compliance with the terms of the Injunction and \$9.6 million shall be paid by Defendants into the
8 Cy Pres Fund (described below). The \$9.6 million figure is subject to adjustment, if for example,
9 Defendants shut down a facility.

10 **B. Settlement Payment**

11 Defendants will make "Settlement Payments" in an aggregate amount of \$50 million in
12 cash, which includes a \$45 million "Class Settlement Payment" and a \$5.0 million "Additional
13 Settlement Payment." From the Settlement Payments, an estimated amount of at least \$25 million
14 will be available for settlement payments to qualifying Class Members who make timely claims in
15 response to this Notice ("Class Settlement Amount"). The Class Settlement Amount will be
16 divided approximately 91.5% to the Facility Resident Class Members and 8.5% to Family
17 Member and Private Pay Class Members. The balance of the Settlement Payments will be used to
18 pay the Initial Additional Payment, the Service Payments, the Attorneys' Fees and Costs, the
19 Administration Costs, and a contingent Final Additional Payment.

20 **C. Cash Payments to Eligible Class Members**

21 The amount of each Class Member's payment (each, a "Cash Payment") will be based on
22 an estimate of the understaffed days during the year (or years) of a resident's stay at a Facility
23 Defendant skilled nursing facility, multiplied by a per understaffed day amount. The estimated
24 understaffed day amount is approximately \$20 per day for persons who are members of both the
25 Facility Resident and Private Pay Classes. For example, if a Class Member resided at the Facility
26 for 100 days in a particular year and made private payments during that time, and the Facility was
27 understaffed 30% of that year, the Class Member would be eligible to receive approximately \$600
28 (100 days x 30% x \$20). In connection with the Final Approval hearing, plaintiffs will submit and

1 seek approval of a Distribution Plan that further details how Cash Payments to qualified Class
2 Members will be calculated and distributed.

3 Payments to eligible Class Members will be made through a claims process administered
4 by Gilardi & Company, LLC ("Settlement Administrator"). Gilardi handled the litigation class
5 notice that was sent after the Court initially granted class certification. The class notice, claims
6 administration, escrow fees and costs of settlement administration are estimated to be not more
7 than \$400,000 (the "Administration Costs").

8 **D. Service Payments to Named Plaintiffs**

9 In recognition of their contribution to the Lawsuit and service to the Class, Named
10 Plaintiffs Vinnie Lavender by and through her Conservator, Wanda Baker; Walter Simon and
11 Jacquelyn Vilchinsky will apply to the Court for the approval of Service Payments in the amount
12 of \$10,000 each for a total of \$30,000. The actual amount of all Service Payments paid from the
13 Settlement Fund shall be the total amount awarded by the Court (the "Service Payments").

14 **E. Additional Payments.**

15 From the Additional Settlement Payment, \$1.0 million shall be paid to the Humboldt
16 County Treasurer-Tax Collector on behalf of the People of the State of California. This payment
17 shall cover litigation expenses and civil penalties recovered by the Intervenor, the Humboldt
18 County District Attorney's Office. If not required to pay claims asserted by Class Members, the
19 remaining \$4.0 million of the Additional Settlement Payment shall be used for the contingent
20 Final Additional Payment.

21 Specifically, on the second anniversary of the Effective Date, if it occurs, and subject to
22 other conditions specified in the Plaintiffs' Settlement Agreement, the Final Additional Payment
23 will be distributed as follows: (i) an additional \$1.0 million to the Intervenor Humboldt County
24 District Attorney's Office, pursuant to Bus. and Prof. Code section 17206(b); (ii) \$500,000 to the
25 Office of the Attorney General of the State of California; (iii) \$500,000 (plus interest accumulated
26 on the Final Additional Payment, if any) to the California District Attorney's Association; and (iv)
27 \$400,000 to each of the District Attorney's Offices for the Counties of Orange, Riverside, Los
28 Angeles, Fresno and Santa Barbara. Under certain circumstances outlined in the Plaintiffs'

1 Settlement Agreement, the Final Additional Payment can be made prior to the second anniversary
2 of the Effective Date.

3 In the event, however, the Office of the Attorney General of the State of California, or any
4 of the District Attorney's Offices for the Counties of Orange, Riverside, Los Angeles, Fresno or
5 Santa Barbara institute a separate action(s) seeking restitution and other civil remedies for
6 violations under Health & Safety Code section 1430, subdivision (b) (subsuming theories of
7 liability under sections 1276.5 and 1599.1) based on claims or allegations that occurred during the
8 Class Period under Bus. & Prof. Code sections 17200, et seq., for alleged unlawful business
9 practices, including, but not limited to, relief under Bus. & Prof. Code sections 17203, 17206 and
10 17206.1 (except for matters involving the conduct at Eureka Healthcare and Rehabilitation Center,
11 LLC, which was the subject of a search warrant by the Department of Justice served on the
12 Northern California regional offices of Skilled Healthcare, LLC, on or about April 14, 2009), then
13 the full amount of the Final Additional Payment shall be paid to the Defendants to be used to
14 defend or settle such action(s). Any amounts not used to settle or defend any such action(s) shall
15 revert back and be treated as Unused Funds.

16 **F. Cy Pres Funds.**

17 Any amounts from the Class Settlement Fund remaining after distribution to the Class and
18 the other payments described herein ("Unused Funds") shall be distributed as cy pres payments,
19 donated to one or more charitable or non-profit organizations, trusts or other entities, to be
20 selected in accordance with the procedure set forth in the Plaintiffs' Settlement Agreement.

21 **G. Attorneys Fees and Litigation Costs**

22 Subject to Court approval, Class Counsel will apply for attorneys' fees not to exceed 40%
23 of the estimated settlement value of \$62.8 million. Class Counsel will also apply for
24 reimbursement of litigation costs (including expert fees) which are estimated to be approximately
25 \$2.0 million. The attorneys' fees and costs actually approved by the Court will be paid from the
26 Class Settlement Account.

27 Plaintiffs are not seeking approval of these applications now. Rather, in connection with
28 the Final Approval hearing, plaintiffs will submit a separate application for approval of any

1 requested fees and reimbursement of litigation expenses. Plaintiffs' application will include
2 supporting documentation for the pre-settlement "lodestar" attorneys' fees incurred to date , which
3 to date are in excess of \$9.85 million. (Needham Decl ¶3). Class Counsel will seek a multiplier
4 on the lodestar fee amount, based on among other things, the time and effort incurred, the
5 complexity and importance of the legal issues presented and the results obtained. *See Wershba v.*
6 *Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255 ("multipliers can range from 2 to 4 or even
7 higher"); *Sternwest Corp. v. Ash* (1986) 183 Cal. App. 3d 74, 76 (remanding for a lodestar
8 enhancement of "2, 3, 4 or otherwise").¹

9 The fee application will include a request for fees and expenses not to exceed \$750,000 for
10 anticipated post-settlement work, including claims administration and monitoring Defendants'
11 compliance. The total of requested fees for pre and post settlement work will not exceed 40% of
12 the estimated settlement value.

13 **III. THE REQUIREMENTS FOR PRELIMINARY APPROVAL ARE MET**

14 Approval of a class action settlement involves a three-step process. First, the court holds a
15 hearing to preliminarily approve the settlement. Second, notice of the settlement and its terms are
16 provided to the class members, who are given a period of time to comment on the settlement or
17 object. Third, the Court holds a final approval hearing. *See* Cal. Rule of Court 3.769(c)-(g).
18 The basic test for approval of a class settlement is whether the settlement is "fair, adequate and
19 reasonable." *See Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996). Factors that may
20 be relevant to this determination include:

21 [T]he strength of plaintiffs' case, the risk, expense, complexity and likely duration of
22 further litigation, the risk of maintaining class action status through trial, the amount
23 offered in settlement, the extent of discovery completed and the stage of the proceedings,
24 the experience and views of counsel, the presence of a governmental participant, the
25 reaction of the class members to the settlement. *Id.*

26 ¹ The three firms designated as Class Counsel have worked on the case since at least May
27 2006, taken or defended over 107 depositions, reviewed over 1 million documents, briefed and
28 argued over 140 motions (including 12 writs or applications to the appellate courts) and
successfully represented the Plaintiffs in a six-month jury trial. During these 4.5 years of
litigation, Class Counsel have received no compensation for their services and have incurred
approximately \$2.0 million in litigation expenses. (Needham Decl., ¶5).

1 These factors are considered in the context of the strong public policy in California that
2 favors settlements. *Dunk*, 48 Cal.App.4th at 1801 (“Due regard should be given to what is
3 otherwise a private consensual agreement between the parties. The inquiry must be limited to the
4 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
5 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
6 whole, is fair, reasonable and adequate to all concerned....”).

7 At the preliminary approval stage, the Court need only decide whether the proposed
8 settlement is “within the range of possible judicial approval.” *Newberg on Class Actions*, § 11:25
9 (Preliminary Court Approval) at p.38 (2002). The purpose for preliminary approval is to ensure
10 that there is a sufficient likelihood that the settlement will ultimately pass muster (at the final
11 approval stage) to warrant notice of the settlement to the class. *See Manual for Complex*
12 *Litigation*, Fourth Ed., § 21.632.

13 Trial courts have broad discretion in determining whether or not a class action settlement
14 should be approved. *Dunk*, 48 Cal.App.4th at 1801; *Mallick v. Superior Court* 89 Cal.App.3d 434,
15 438 (1979). Here, there is ample support for an order preliminarily approving the parties’
16 settlement.

17 **A. Risk From Further Proceedings**

18 If approved, the Settlement will avoid the substantial risks presented to Class Members
19 from further proceedings. The issues litigated in this case were complex and, as the Court well
20 knows, often presented questions of first impression. If given the opportunity, Defendants will
21 pursue every avenue of appeal for most if not all of the issues decided at the trial level. As a
22 practical matter, the large verdict amount makes it very likely that Defendants would first initiate
23 bankruptcy proceedings to protect themselves against the entry of a judgment based on the jury
24 verdict. Thus, absent the Settlement, the Class is faced with the double-edged risk of both an
25 extended bankruptcy proceeding and the risk of appellate reversal (in whole or in part) of the jury
26 verdict.

27 ///

28 ///

1 claims and defenses asserted. The case was filed over four and a half years ago in May 2006.
2 During the course of discovery, plaintiffs took or defended over 100 depositions and reviewed
3 over 1 million documents. Multiple sets of written discovery (including interrogatories and
4 requests for admissions) were propounded and responded to. There has been extensive law and
5 motion practice, with over 140 motions filed, including 12 writs or applications to the appellate
6 courts. Numerous legal issues were briefed and argued to the Court, many of them raising issues
7 of first impression. The parties participated in court proceedings that commenced on
8 November 30, 2009, proceeded through a jury trial that lasted approximately six months and
9 continued with a multiple week, post-verdict court trial. (Needham Decl, ¶6).

10 Based on these and other proceedings, Class Counsel have a detailed understanding of
11 factual and legal issues presented, as well as the risks presented to the Class from further
12 litigation. That includes the risks presented from appellate proceedings. It also includes the very
13 substantial risk presented by the reality that the large verdict substantially exceeded the financial
14 resources of the collective defendants. In that regard, bankruptcy counsel were added to plaintiffs'
15 legal team and plaintiffs' counsel retained outside financial consultants with specialized expertise
16 in corporate reorganization and liquidation matters. This expertise was utilized to assess a key
17 factor in the settlement analysis, namely, defendants' ability to pay a settlement even close to the
18 jury verdict amount. (Needham Decl ¶7).

19 Class Counsel have substantial expertise in class litigation, both from the plaintiff and
20 defense perspective. Based on that experience and a careful consideration of the litigation risks,
21 the potential insolvency of defendants, the need for near-term injunctive relief, and other factors,
22 Class Counsel has concluded that the settlement is fair and appropriate. (Needham Decl, ¶8).

23 **IV. THE SETTLEMENT CLASS HAS BEEN EXPANDED TO REFLECT POST-APRIL**
24 **2009 STAFFING DATA AND SHOULD BE APPROVED**

25 Previously, the Court certified a litigation class of facility residents (and family members)
26 that resided in the 22 defendant Facilities from September 1, 2003 through April 1, 2009 (except
27 the St. Luke Healthcare and Rehabilitation Center, LLC, as to which the Class Period runs from
28 December 15, 2003.)

1 During trial, defendants produced staffing data from April 2, 2009 through December
2 2009. As a condition of the Settlement, Defendants have agreed to update their staffing data
3 through September 2010.³ Accordingly, the Settlement Class Period runs and including the
4 September 7, 2010 and covers the following classes and subclass: (1) Facility Residents Class,
5 consisting of all persons who resided at one or more skilled nursing facilities operated by Facility
6 Defendants during the Class Period, including a subclass of residents who made private payments
7 to Defendants; and (2) Family Member Class, consisting of all persons who are related to any
8 Facility Resident Class Member by blood, marriage or legal relationship and paid monies to any
9 Defendant, for services rendered to a Facility Resident Class Member at a Facility during the
10 Class Period.

11 **V. THE FORM AND MANNER OF CLASS NOTICE MEETS ALL LEGAL**
12 **REQUIREMENTS**

13 Notice of a proposed class settlement must fairly advise class members “of the terms of the
14 proposed compromise and of the options open to dissenting class members.” *Wershba v. Apple*
15 *Computer, Inc.* 91 Cal.App.4th 224, 251 (2001) (citation omitted). The method and the content of
16 the notice must also apprise class members of the procedures to opt-out or object to the settlement.
17 Cal. Rule of Court 3.769(f).

18 The form and manner of notice proposed here meets these requirements. The proposed
19 notice describes the key terms of the Settlement Agreement, including the payments that the
20 Defendants have agreed to make to Class Members and Class Counsel. *See* Pls. Settlement
21 Agreement, Exs. E, J. The notice also contains clear instructions on the procedures for opting out
22 of or objecting to the settlement. *Id.* As such, the notice provides sufficient detail to allow Class
23 Members to make an informed decision to accept or reject the settlement.

24 As for the manner of notice will be issued, the parties have agreed to provide first-class
25 mailing to the last known addresses to the Class Members (updated by a forwarding address

26
27 ³ With this application, plaintiffs seek approval to amend their Second Amended Complaint to
28 extend the end of the Class Period to the Settlement Date, which is the September 7, 2010. (See Proposed Preliminary Approval Order, ¶16).

1 search). Further, the parties have agreed to provide notice by publication, consisting of a
2 publication in a statewide publication such as the USA Today. (Declaration of Daniel Burke
3 (Gilardi & Co. LLC), ¶¶ 6-9). The combination of the mailed and publication notice meets
4 California law and general due process requirements. *See Cartt v. Superior Court*, 50 Cal.App.3d
5 960, 974 (1975) (approving notice that has reasonable chance of reaching a substantial percentage
6 of the class members).

7 **VI. CONCLUSION**

8 For the reasons set forth therein, plaintiffs respectfully request that the Court grant
9 preliminary approval of the settlement, approve the proposed Settlement Class and approve the
10 proposed form and content of Class Notice. A proposed Preliminary Approval Order, approved as
11 to form by all parties, has been submitted for the Court's convenience.

12
13 DATED: September 8, 2010

By: 

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