IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DR. DEREK MELBY, and DANILO POLICARPIO as individuals and on behalf of all others similarly situated	§	
Plaintiffs,	§	Civil Action No. 3:17-CV-155-M
v.	§	*consolidated with*
AMERICA'S MHT, INC., SCOTT POSTLE, ASCENTIUM CAPITAL, LLC, and CLIFF MCKENZIE	§	Civil Action Nos. 3:17-CV-732-M; 3:17-CV-868-M; and 3:17-CV-963-M
Defendants.	§	

PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF PARTIAL CLASS ACTION SETTLEMENT AND MEMORANDUM OF LAW IN SUPPORT

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF PARTIAL CLASS ACTION SETTLEMENT

Plaintiffs and named representatives, Dr. Derek Melby, Dr. Danilo Policarpio, and Dr. Jaideep Patel, ("Plaintiffs"), by and through their undersigned counsel, hereby file this Motion for Preliminary Approval of Partial Class Action Settlement.

I. INTRODUCTION

Plaintiffs are participants in the America's Medical Home Team ("MHT") Program. This class action asserts claims against MHT (which are now subject to a bankruptcy stay pursuant to this Court's Order R. Doc. 44) as well as the financing companies who offered financing for participation in the Program, including Ascentium Capital, Inc. ("Ascentium" or "Settling Defendant"), Univest Capital, Inc., ("Univest" or "Settling Defendant") and Balboa Capital Corp. ("Balboa"). Scott Postle, the principal at MHT, and Cliff McKenzie (McKenzie or "Settling Defendant"), an individual employed at certain pertinent times by Ascentium, have also been named Defendants. MHT ran a scheme in which it promised physicians vast profits if they would supervise nurse practitioners rendering in-home health care services to patients. MHT sold licenses and equipment to the physicians through LLCs created for them, and the Defendant financing companies provided the financing for such sales with personal guaranties from individual physicians. MHT salespeople signed victims to Installment Payment Agreements, ("IPAs") with Defendant financing companies. Plaintiffs maintain the whole process was fraught with misrepresentations and the Program only sustained itself by hooking new physicians to sign on.

This settlement will resolve claims of all class members against Ascentium, Univest and McKenzie only. The settlement does not resolve claims by class members against any other Defendant ("Non-Settling Defendants").

II. BACKGROUND OF LITIGATION

Commencing in 2012, Defendant MHT and its principals ran a scheme which duped approximately 188 class members (by and large physicians) into participation in its Program. MHT employed a team of salespeople who gave a common sales pitch with use of common materials to induce the physicians into the fraudulent scheme. The class members were induced to apply for and obtain financing from a "financial backer." The class members were told the financing was to be a line of credit for operational costs when what actually took place was a financed purchase of a license and software. The financed purchase was backed by a personal guarantee from the physician with the funds going straight to MHT. MHT utilized three "financial backers": Ascentium, Univest, and Balboa. Most class members were signed to four IPAs calling for payments of $458,000 over five and a half years.

Four suits against MHT, its principal (Postle), Ascentium, Univest, Balboa, and McKenzie have been filed in this Court. The Court consolidated these actions. Prior to doing so the undersigned moved for a temporary restraining order and a preliminary injunction to prevent perpetuation of the scheme and collection efforts against class members. The scheme was effectively ended when MHT was forced to declare bankruptcy. In connection with the briefing in pursuit of the injunction and later in defending against Ascentium's F.R.C.P. 12(b)(6) motion, Plaintiffs presented the Court with substantial evidence and sworn testimony from multiple sources, including many former MHT employees, which established the Ponzi-like scheme and fraud perpetuated by MHT upon the Plaintiffs. Shortly after consolidating the actions, the Court ordered the Plaintiffs to file an amended complaint asserting all claims against all Defendants in the consolidated action. (R. Doc. 40).

Around this time, settlement negotiations between Plaintiffs, Ascentium, and McKenzie began to intensify. These efforts have been long and involved, which one would expect given the complication of multiple defendants, multiple plaintiffs, class members located all across the country, litigation initiated by Univest and by Balboa in different forums, and the bankruptcy of MHT. Plaintiffs and Ascentium and McKenzie employed the services of a mediator in late July and have been in constant contact trying to achieve a resolution. Univest became part of the negotiations and has also agreed to terms. While Plaintiffs and Settling Defendants have attempted to resolve all claims as to all Defendants, they have been unable to confect such an agreement. It should be noted however that Ascentium and Univest represent approximately 90% of the outstanding MHT-related loans at issue in this matter.

III. THE PROPOSED SETTLEMENT

The proposed "Stipulation of Settlement" is attached hereto as Exhibit A. It defines the "Settlement Class" as consisting of the "MHT Program Class," and "Subclass One" through "Subclass Four." The "MHT Program Class" is defined as every person who is currently listed in Ascentium's, Univest's, and/or MHT's books and records (including without limitation MHT's bankruptcy schedules) as a Guarantor and/or as an owner of a Doctor LLC. "Doctor LLCs" were entities created by MHT for physicians to participate in the Program.

Subclass One is defined as every member of the MHT Program Class who (a) is not a Guarantor of an Univest IPA but (b) is a Guarantor of an Ascentium IPA with (i) a "book date" of January 1, 2016, or later stated in Ascentium's books and records and (ii) a balance outstanding on August 31, 2017. Subclass Two is defined as every member of the MHT Program Class who (a) is a Guarantor of a Univest IPA and (b) is also a Guarantor of an Ascentium IPA with (i) a "book date" of January 1, 2016, or later stated in Ascentium's books and records and (ii) a balance

outstanding on August 31, 2017. Subclass Three is defined as every member of the MHT Program Class who is a Guarantor of an Ascentium IPA with (i) a "book date" of December 31, 2015, or earlier stated in Ascentium's books and records and (ii) a balance outstanding on August 31, 2017. Subclass Four is defined as every member of the MHT Program Class who is a Balboa Guarantor but not a Univest Guarantor or an Ascentium Guarantor.

The consideration to the settling class and subclasses includes the following. There is class-wide injunctive relief by Ascentium's and Univest's agreement to (i) refrain from any negative credit reporting against any Potential Class Member for alleged indebtedness up to Final Judgment; (ii) retract any extant negative credit reporting for anything prior to Final Judgment; and (iii) refrain from any further collection efforts or negative credit reporting against any Potential Class Member which is not based upon the reformed remaining payments. There is a release from all claimed obligations under the Ascentium and Univest IPAs.

The Settlement Consideration due from each member of Subclass One and each member of Subclass Two shall be the lesser of (i) $85,900.50 (75% of the total of all monthly payments due under one Ascentium IPA covering the purchase of one MHT license in 2016: .75 x $114,534.00 = $85,900.50) and (ii) 80% of the total of all payments remaining due under the original terms of all Ascentium and Univest IPAs for which such subclass member is listed as a Guarantor. This is to be paid in sixty (60) monthly installments. Although contested by Plaintiffs, many of the members in this case are on the books as guaranteeing up to four IPAs.

The Settlement Consideration due from each member of Subclass Three shall be the lesser of (i) $114,534.00 (100% of the total of all monthly payments due under one Ascentium IPA covering the purchase of one MHT license in 2016: 1.00 x $114,534.00 = $114,534.00) and (ii) 80% of the total of all payments remaining due under the original terms of all Ascentium and

Univest IPAs for which such subclass member is listed as a Guarantor. This is to be paid in forty-eight (48) monthly installments.

The benefits to these subclasses are substantial as nearly every class member is claimed to have at least two IPAs with outstanding amounts and some with as many as four. Altogether the scale of released contested claims under IPAs is $54,000,000 in exchange for payment obligations of approximately $16,000,000 –a difference of approximately $38,000,000. Moreover, all subclasses have the additional consideration in the form of an early payment option which would result in a 20% discount of the applicable termed settlement amount.

The Balboa doctors are not receiving releases of contested claims in the same manner by virtue of this settlement because none had IPAs with Ascentium or Univest, although they are agreeing to release any claims against the Settling Defendants. However, the Settling Defendants agree to total payments of approximately $364,000, to these doctors who comprise Subclass Four.

In exchange for this consideration the class members agree to release all claims against the Settling Defendants.

IV. PRELIMINARY SETTLEMENT APPROVAL

A. The Role Of The Court

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval for any compromise of claims brought on a class basis. Approval of a proposed settlement is a matter within the broad discretion of the district court. See *Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983). "Approval of a class action settlement involves a two-step process. First, the Court makes a preliminary fairness evaluation of the proposed terms of settlement submitted by counsel." *McNamara v. Bre-X Minerals Ltd.*, 214 F.R.D. 424, 426 (E.D. Tex.

2002). "Second, if the Court determines that the settlement is fair, the Court directs that notice pursuant to Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement." *Id.*; see also *Manual for Complex Litigation, Fourth* ("*Manual 4th*") § 13.14 (2010).

B. The Proposed Settlement Class May Be Certified.

Prior to granting preliminary approval of a settlement, the Court should determine that the proposed Settlement Class is a proper class for settlement purposes. See *Manual 4th* § 21.632; *McNamara*, 214 F.R.D. at 426-27. The Court has great discretion in determining whether to certify a class. See *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 624 (1997). The Court may certify a class where the plaintiff demonstrates that the proposed class and proposed class representatives meet the four prerequisites in Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—and one of the three requirements of Rule 23(b). Representative Plaintiffs request that the Court certify the Settlement Class under 23(b)(3) because all of the requisites are present.

1. The Proposed Settlement Class Satisfies Rule 23(a).

a. The Class is too numerous to join all members.

The class is so numerous that joinder of all members is impracticable. Ascentium and Univest financed amounts in MHT "Installment Payment Plans" which currently stand at approximately $54,000,000 outstanding. The class members at issue number 170. See, e.g., *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (finding a class of 100 to 150 members satisfies numerosity and any more than 40 members should raise a presumption that joinder is impracticable). In addition, the Settlement Class Members are too geographically dispersed to be easily joined into one action as MHT ran a nationwide program. See, e.g.,

Eatmon v. Palisades Collection, LLC, No. 2:08-CV-306-DF-CE, 2010 WL 1189571, at *4 (E.D. Tex. 3/5/2010).

b. There are common questions of law or fact.

The commonality requirement under Rule 23(a)(2) is met where, as here, "there is at least one issue, the resolution of which will affect all or a significant number of the putative class members." *Lightbourn v. County of El Paso,* 118 F.3d 421, 426 (5th Cir. 1997). Issues common to all Settlement Class Members include: whether the Settling Defendants are liable for deceptive trade practices, RICO violations, and/or misrepresentations in connection with the IPAs; whether MHT sales people represented to doctors that they were getting, at most, a line of credit for the LLC, that MHT would be primarily responsible, that the doctors would never have to make a payment, and that no more than one line of credit would be drawn upon until a nurse practitioner team was fully operational; whether MHT sought and Ascentium or Univest sent full payments for four IPAs; whether the Settling Defendants are liable for the actions of MHT salespeople who were utilized to sign Settlement Class Members to IPAs; whether the MHT, Univest, or Ascentium brochures and written materials contained untrue statements or omissions of material fact; whether the Ascentium or Univest IPAs are legally enforceable; and whether Settlement Class Members are entitled to rescission or damages.

c. The representative plaintiffs' claims are typical.

The typicality requirement is satisfied because Representative Plaintiffs' claims arise from the same course of conduct and assert the same legal theories as the claims of all Settlement Class Members. See *James v. City of Dallas,* 254 F.3d 551, 571 (5th Cir. 2001) (typicality requires only that "the class representative's claims have the same essential characteristics of those of the putative class."); *Eatmon*, 2010 WL 1189571, at *6 ("If the claims arise from a

similar course of conduct and share the same legal theory, factual differences will not defeat typicality."). Like every Settlement Class Member, Representative Plaintiffs were duped into participation in the MHT Program and Ascentium and/or Univest IPAs by means of untrue statements and omissions of material fact. To succeed on the merits, Representative Plaintiffs and Settlement Class Members would have to prove the same or similar untrue statements and omissions of material fact. See, e.g*., Longden v. Sunderman*, 123 F.R.D. 547, 553, 556-57 (N.D. Tex. 1988) (investors in seven partnerships could represent a class of investors in 121 partnerships where defendants engaged in a "common course of conduct through a uniform sales plan involving PPMs that were the same or very similar in their misleading or omitted information").

d. The representative plaintiffs will adequately represent the class.

Representative Plaintiffs have adequately represented the interests of the class and have retained counsel qualified to pursue the litigation.[1] See *Unger v. Amedisys, Inc.*, 401 F.3d 316, 320 (5th Cir. 2005) ("[C]lass representatives, their counsel, and the relationship between the two are adequate to protect the interests of absent class members."). The adequacy requirement is met where "(1) the named plaintiffs' counsel will prosecute the action zealously and competently; (2) the named plaintiffs possess a sufficient level of knowledge about the litigation to be capable of taking an active role in and exerting control over the prosecution of the litigation; and (3) there are no conflicts of interest between the named plaintiffs and the absent class members." *Hamilton v. First Am. Title Ins. Co.*, 266 F.R.D. 153, 163-64 (N.D. Tex. 2010).

Representative Plaintiffs and counsel have fairly and adequately represented and protected the interests of all Settlement Class Members, as demonstrated by the record showing

[1] See Class Counsel CVs, attached hereto as Exhibit B.

vigorous prosecution of this litigation. Counsel have committed significant resources to represent the Settlement Class and have zealously prosecuted this case, seeking a class wide restraining order to put an end to the MHT scheme and victimization, opposing a motion to dismiss, engaging in substantial fact finding that included hundreds of hours of interviews, reviewing thousands of pages of documents, and communicating regularly with Plaintiffs, class members and for those putative class members who have retained individual counsel, communications with those lawyers. Representative Plaintiffs have also demonstrated that they are capable of directing the prosecution of the class claims, and have "an adequate layperson's understanding of the factual and legal bases of this action." *Id.* at 164.

2. The Proposed Settlement Class Satisfies Rule 23(b)(3).

This class settlement can be effectively managed. The proposed relief is readily ascertainable as to each class member and may be administered without difficulty. Discrete and finite injunctive relief has been agreed upon, and the individual details of the contested claims being released as to each class member will be clearly set out in attached schedules.

However, before certifying a class under Rule 23(b)(3), a court must determine that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Madison v. Chalmette Refining, L.C.C.*, 637 F.3d 551, 555 (5th Cir. 2011). This Court may affirmatively make such determinations here.

a. The Proposed Settlement Class satisfies Rule 23(b)(3)'s predominance requirement.

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "In order to 'predominate,' common questions must constitute a significant part of the individual cases."

Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5th Cir. 1986). "The predominance inquiry is 'more demanding than the commonality requirement of Rule 23(a)' and requires courts 'to consider how a trial on the merits would be conducted if a class were certified.'" *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 525 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. AT & T Corp.*, 339 F.3d 294, 301, 302 (5th Cir. 2003)). "Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem*, 521 U.S. at 625. Regarding the predominance requirement, the Fifth Circuit recently wrote:

> Determining whether the plaintiffs can clear the predominance hurdle set by Rule 23(b)(3) requires district courts to consider how a trial on the merits would be conducted if a class were certified. This, in turn, entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class, a process that ultimately prevents the class from degenerating into a series of individual trials.

Madison, 637 F.3d at 555. The Fifth Circuit has found predominance in a fraudulent scheme context in the RICO case of *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 646 (5th Cir. Tex. 9/30/2016) ("In sum, we conclude that if the Plaintiffs prove that the Defendants operated a fraudulent pyramid scheme, a jury may reasonably infer from the Plaintiffs' payments to join [] that they relied on [] implicit representation of legitimacy, when in fact it was a fraudulent pyramid scheme.")

In *Billitteri v. Sec. Am., Inc.*, 2011 U.S. Dist. LEXIS 92713, 32-33 (N.D. Tex. 8/4/2011), this District Court dealt with securities fraud case and was "convinced that there are sufficient common class-wide issues and questions that are prevalent" since all of the class members "invested in either Provident or Medical Capital through Securities America, which utilized much of the same materials from Provident and Medical Capital entities. At trial, the class members would be faced with common questions of fact, such as the conduct of Securities America and the representations that the company and the Provident and Medical Capital entities

made, that would apply to each of their claims." *Id.* The Court noted the "case involves misrepresentations or omissions made regarding the same investments and similar PPMs issued by those organizations. These identical or near-identical alleged misrepresentations or omissions 'are not only significant but pivotal' to the class members' claims." *Id.* (citing *Eatmon*, 2010 WL 1189571, at *8 (noting that it is proper to allow a class action where a defendant is alleged to have acted in the "same basic manner" towards an entire class) and *In re Dell, Inc*., No. A-06-CA-726-SS, 2010 U.S. Dist. LEXIS 58281, 2010 WL 2371834, at *7 (W.D. Tex. 7/11/2010) (holding predominance requirement to be met when analysis of fraudulent misrepresentation or omission and other questions would be similar for each class member)).

As discussed, the Plaintiffs in this case were subject to the same scripted sales pitch by MHT salespeople including the following misrepresentations and omissions that: (1) no doctor would be bound to pay anything back; (2) financing companies would provide lines of credit to be available for start-up costs and drawn upon only after the assignment of a nurse practitioner; (3) that only one line would be drawn upon until a second nurse practitioner team was established; (4) a "license" for each "practice" can be returned at any time through a "novation" in which it is resold to another willing participant; (5) MHT handles everything other than supervising the medical treatment; (6) the cost of proprietary software and the "practice" is included in the license fee due to CMS requirements; and (7) there are NO fees or interest associated with the acquisition of the license/software/practice. Identical and deceptive written materials and pro formas were employed for use by MHT salespeople. MHT salespeople also used uniform, dodgy tactics to induce class members to sign IPAs by misrepresenting the nature, extent, enforceability, and applicability of the terms of these documents.

b. The Proposed Settlement Class satisfies Rule 23(b)(3)'s superiority requirement.

As to superiority under Rule 23(b)(3), that requirement is met when a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "[T]he superiority analysis requires an understanding of the relevant claims, defenses, facts, and substantive law presented in the case." *In re Wilborn*, 609 F.3d 748, 755 (5th Cir. 2010). "Among the interests that the Court must consider are the interests of class members in individually controlling the prosecution and defense of separate actions, the extent and nature of any litigation concerning the controversy already begun by or against class members, the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and the likely difficulties in managing a class action." *Billitteri*, 2011 U.S. Dist. LEXIS 92713 (*citing* Fed. R. Civ. P. 23(b)(3)). When "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, … for the proposal is that there be no trial." *Id.* (*citing Amchem*, 521 U.S. at 620).

The superiority requirement allows certification when it is reasonably thought to be the most practical and sensible manner of proceeding. The Court considers: (i) the interest, if any, that class members have in controlling the prosecution of separate actions; (ii) the pendency of other litigation involving class members; (iii) the desirability of concentrating the litigation in a single forum; and (iv) the ease or difficulty of managing a class action. *Shaw v. Toshiba Am. Info. Sys*., 91 F.Supp.2d 942, 958 (E.D. Tex. 1/28/2000) (*citing* Fed. R. Civ. P. 23(b)(3)(A)-(D)).

This case also meets the superiority test of Rule 23(b)(3). The case involves a national fraudulent scheme perpetrated by MHT and its principals. Ascentium, Univest, and Balboa are three financing companies MHT used to fund its fraudulent sale of software and licenses. Univest and Balboa have initiated lawsuits in Pennsylvania and California respectively to collect

on personal guaranties against Class Members. There is also pending litigation against Defendants by class members in different forums. The present case is the first and only class action. The case as a class is readily manageable given the cohesiveness of the victims of the scheme who form the class and the identical sales pitch and misrepresentations employed in binding the victims to IPAs.

3. The Court Should Appoint Couhig Partners, LLC, Carter, Scholer, PLLC, and The Crouch Firm, PLLC As Settlement Class Counsel Under Rule 23(g).

Under Rule 23, "a court that certifies a class must appoint class counsel … [who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(A), (B). In making this determination, the Court must consider counsel's: (1) work in identifying or investigating potential claims; (2) experience in handling class actions or other complex litigation, and the types of claims asserted in the case; (3) knowledge of the applicable law; and (4) resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A). Couhig Partners, LLC, Carter, Scholer, PLLC, and The Crouch Firm, PLLC have significant experience in litigating class actions and deceptive trade practices cases and, over the last year, have diligently litigated this action, dedicated substantial resources to the investigation and prosecution of these claims, and demonstrated their knowledge of the laws at issue.[2] Therefore, the Court should appoint Couhig Partners, LLC, Carter, Scholer, PLLC, and The Crouch Firm, PLLC to serve as Settlement Class Counsel pursuant to Rule 23(g).

C. The Settlement Warrants Preliminary Approval.

In determining whether to preliminarily approve the settlement, the Court must "make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." *Manual 4th*, § 21.633. If the preliminary evaluation of the proposed settlement does not

[2] See CVs attached as Exhibit B.

disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement. *McNamara*, 214 F.R.D. at 430 (quoting *Manual for Complex Litigation, Third* § 30.41).

The primary question raised by a request for preliminary approval is whether the proposed settlement is "within the range of reasonableness." *Manual 4th* § 40.42. The opinion of experienced counsel supporting the settlement is entitled to considerable weight. See *Reed*, 703 F.2d at 175 ("[T]he value of the assessment of able counsel negotiating at arm's length cannot be gainsaid. Lawyers know their strengths and they know where the bones are buried."). "The court … must not try the case in the settlement hearings because 'the very purpose of the compromise is to avoid the delay and expense of such a trial." *Id.* at 172 (citation omitted); see also *Shaw v. Toshiba America Information Sys., Inc.*, 91 F. Supp. 2d 942, 959 (E.D. Tex. 2000). "A district court faced with a proposed settlement must compare its terms with the likely rewards the class would have received following a successful trial of the case." *Reed*, 703 F.2d at 172; see also *In re Combustion, Inc.*, 968 F. Supp. 1116, 1129 (W.D. La. 1997) ("The proposed settlement need only reflect a fair, reasonable, and adequate estimation of the value of the case in view of what might happen at trial."). The courts should also consider "the complexity, expense, and likely duration of the litigation." *Reed v. Gen. Motors Cor*p., 703 F.2d 170, 172 (5th Cir. 1983).

1. There Are No Grounds To Doubt The Fairness Of The Settlement, Which Is The Product Of Extensive, Arm's-Length Negotiations.

The first consideration in the analysis is whether "'the proposed settlement appears to be the product of serious, informed, non-collusive negotiations.'" *In re Shell Oil Refinery*,

155 F.R.D. 552, 555 (E.D. La. 1993). Courts give substantial weight to the experience of the attorneys who prosecuted the case and negotiated the settlement. See *Reed*, 703 F.2d at 175; *McNamara*, 214 F.R.D. at 430-31 ("Counsel on all sides have proved to the Court their knowledge of the facts and law relevant to this case. Settlement was reached by knowledgeable counsel, and it was arrived at after much negotiation as is evidenced by the time it took the parties to reach an agreement.").

When a settlement is negotiated at arm's length by experienced counsel, there is a presumption that it is fair and reasonable. See *In re the Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 255 (E.D. Va. 2009) ("Negotiations were sufficiently thorough, contentious, and at arm's length to ensure the propriety of Class Counsel's decision to enter into the settlement and the proceedings leading thereto."); *Shell Oil Refinery*, 155 F.R.D. at 556 (citing evidence of counsel demonstrating "their conviction that the settlement amount was well within the range of possible approval and was the result of arms-length, non-collusive bargaining"). Courts may also consider whether settlement was reached with the assistance of an experienced mediator. See *Sandoval v. Tharaldson Employee Mgmt.*, No. 08-482-VAP, 2010 WL 2486346, at *6 (C.D. Cal. 6/15/2010); *Neff v. Via Metro. Transit Auth.*, 179 F.R.D. 185, 211 (W.D. Tex. 1998).

This proposed settlement is the product of extensive, arm's length negotiations that included a mediation session in Dallas before mediator, Christopher M. Nolland, and numerous telephonic sessions. Counsel for the parties met on other occasions, had numerous phone calls, and multiple email exchanges. The negotiations were informed by knowledge that Representative Plaintiffs and their counsel gained by several hundred hours of interviewing potential witnesses and reviewing hundreds of thousands of pages of documents obtained from public sources, Ascentium, the Non-Setting Defendants, and third parties. Based on their

familiarity with the factual and legal issues, the parties were able to negotiate a fair settlement that took into account the costs and risks of continued litigation.

In reaching the proposed settlement, all legal and factual issues were evaluated, and all alternatives were considered. The negotiations were at all times hard-fought and arm's-length, and have produced a result that the Settling Parties believe to be in their respective best interests. Furthermore, the proposed Settlement provides no preferential treatment for Representative Plaintiffs. Those receiving releases of their contested claims will receive those releases in levels equal to all other Settlement Class Members who fall into three broad Subclasses. The settlement does not mandate excessive compensation for Representative Plaintiffs' counsel since any award of fees and expenses is subject to this Court's approval.

If the Court grants final approval and the proposed settlement becomes binding on all Settlement Class Members, the claims against the Released Parties will be released and dismissed. Because the proposed settlement does not resolve claims against other Defendants in the case, the class action will continue against the Non- Settling Defendants, and the Court will retain continuing jurisdiction over the implementation, enforcement, administration, and construction of the Settlement Agreement.

2. The Complexity, Expense, And Likely Duration Of The Litigation

This consideration weighs heavily in favor of approving the settlement. As mentioned MHT perpetuated a national scheme to defraud the approximately 188 class members. Other Defendant financing companies have collection claims based on personal guarantees. The duration of litigation is further protracted by MHT's Chapter 7 bankruptcy proceeding. Numerous depositions and extensive discovery would have to be undertaken along with considerable motion practice, all involving considerable expense. The Scheme spanned from

California to the Carolinas, from the Mexican border in McAllen, Texas to Michigan and all points in between.

3. The Settlement Falls Within The Range Of Possible Approval.

The proposed Settlement also falls within the range of possible approval. Ascentium will effectively forego on collection of over $32,000,000 of claimed debt allegedly secured by personal guaranty of the Settlement Class Members. This represents approximately 70% of the amounts it considers due and outstanding from the Settlement Class Members. Univest will forego on over 70% of the amounts it considers due and outstanding from the Settlement Class Members. Representative Plaintiffs' counsel, who have a great deal of experience in the prosecution and resolution of complex class action litigation, have carefully evaluated the merits of this case and the proposed settlement. Even if the matter were to proceed to trial, Representative Plaintiffs' counsel know from experience that the apparent strength of their case is no guarantee against a defense verdict. Furthermore, the Settlement involves only the Release of Univest, Ascentium, and McKenzie with Plaintiffs reserving all claims as to Non-Settling Defendants. The Settlement further includes certain injunctive relief.

The proposed plan of settlement for purposes of preliminary approval is also undoubtedly fair. At the final approval stage, "[a]n allocation formula need only have a reasonable, rational basis [to warrant approval], particularly if recommended by 'experienced and competent' class counsel." *In re Am. Bank Note Holographics, Inc., Sec. Litig.*, 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001). The Settlement Agreement provides for the release of contested claims pursuant to three Subclasses. The payments in favor of Members with Balboa IPAs will be subject to approval by the Court after Settlement Class Members have the opportunity to comment. The proposed Settlement falls within the range of possible final approval, and the

Court should therefore grant preliminary approval of the Settlement and direct that notice be given to the Settlement Class.

V. THE PROPOSED PLAN OF CLASS NOTICE

Rule 23(e)(1) requires the Court "to direct notice in a reasonable manner to all class members who would be bound by the [settlement] proposal." Fed. R. Civ. P. 23(e)(1). The parties propose to mail an individual notice, submitted with this motion, to all persons who fall within the definition of the Settlement Class, and who can be identified. (Settlement Agreement ¶ IV) The proposed method of notice comports with the requirements of due process and the heightened standards for notice for Rule 23(b)(3) classes. *See* Fed. R. Civ. P. 23(c)(2)(B) (for a Rule 23(b)(3) class, "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). The notice provision provides gold standard mail notice with multiple protections and due diligence efforts so as to be considered a model notice effort.

"The fairness hearing notice should alert the class that the hearing will provide class members with an opportunity to present their views on the proposed settlement and to hear arguments and evidence for and against the terms." *Manual 4th* § 21.633. The notice "should tell objectors to file written statements of their objections with the clerk of court by a specified date in advance of the hearing and to give notice if they intend to appear." *Id.* The notice must "contain an adequate description of the proceedings written in objective, neutral terms that, insofar as possible, may be understood by the average absentee class member." *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104 (5th Cir. 1977). The notice must also "contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the

final judgment." *Id.* at 1105; *see also In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 197-98 (5th Cir. 2010) ("Notice of a mandatory class settlement, which will deprive class members of their claims, therefore requires that class members be given information reasonably necessary for them to make a decision whether to object to the settlement.").

Within 7 days after the preliminary approval of this Stipulation and the Settlement, the Settling Parties intend to submit to the Court for approval a proposed form of the Individual Notice and a proposed form of the Detailed Notice. Such notices shall comply with the recommendations regarding class notice published by the Federal Judicial Center.

The proposed form of mailed notice will satisfy the requirements because it will describe the nature, history, and status of the litigation; set forth the definition of the Settlement Class; describes the Settlement Class; state the class claims and issues; says that Settlement Class Members may enter an appearance through their own counsel; and advise of the binding effect of the settlement approval proceedings on Settlement Class Members. Because the notice will satisfy all of the requisites, this Court should approve it.

VI. ATTORNEY FEES

The proposed Stipulation of Settlement includes a request for (a) an award of attorneys' fees, costs, and expenses to be paid to Class Counsel in a total amount between $2,000,000 and $4,500,000. At the Fairness Hearing, Class Counsel will ask the Court to award an amount within that range. In no event shall Class Counsel request an award of attorneys' fees, costs, and expenses in excess of $4,500,000; and in no event shall the Settling Defendants be required to pay an award of attorneys' fees, costs, and/or expenses totaling more than $4,500,000. The Settling Defendants will not object to a request by Class Counsel for an award of attorneys' fees, costs, and expenses in a total amount less than or equal to $2,000,000; however, the Settling

Defendants may object to any request for an award of attorneys' fees, costs, and expenses in a total amount greater than $2,000,000.

The above fees were in no way negotiated until an agreement in principal had been reached regarding the merits of the settlement among class members and Settling Defendants. The negotiations were arm's length, and meet all requisites of the F.R.C.P. and accompanying jurisprudence.

The determination of the amount awarded as attorneys' fees is entrusted to the sound discretion of the trial court. *Wolf v. Frank*, 555 F.2d 1213, 1214 (5th Cir. 1977). The Manual for Complex Litigation provides the following guidance for awarding attorney's fees: In determining awards of attorneys' fees, the guiding principles should be to provide compensation sufficient to stimulate the motive for representation of classes and to ensure that the fees awarded are consistent with the benefits bestowed upon the class, insofar as the bestowing of those benefits can be shown to be the product of the lawyers' work. The numerous exacting standards that have been set down by the court should be strictly applied to ensure that this aspect of the class action is not subject to abuse. *Garza v. Sporting Goods Properties*, 1996 U.S. Dist. LEXIS 2009 (W.D. Tex. 2/6/1996).

Class counsel will have expended thousands of hours in prosecuting this case and have done so at no cost to any member of the Plaintiff Class. The result achieved is the release of contested claims of approximately $54,000,000 in exchange for payments of approximately $16,000,000, considerable injunctive relief, and $364,000 for the benefit of Balboa class members. Class counsel request of fees is certainly reasonable in light of this consideration and the effort expended to obtain it.

VII. ` CONCLUSION

For the foregoing reasons, Representative Plaintiffs respectfully ask that the Court grant preliminary approval of the proposed Settlement and enter the proposed Order: (1) Certifying the Class for Settlement Purposes (2) Granting Preliminary Approval Of Settlement, and (3) Approving Class Notice, to be submitted. To conserve party and judicial resources and to protect the jurisdiction of the Court to award complete and effective relief through the proposed Settlement, Plaintiffs further request that the Court stay all proceedings on claims asserted by any Potential Class Members against any Settling Defendants in the Action or in any other proceeding, pending further order of the Court.

Date: September 26, 2017

Respectfully submitted,

/s/ E. Leon Carter

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2017, a true and correct copy of the foregoing motion and its attachments was served on all counsel of record through the Court's electronic filing system.

/s/ Joshua J. Bennett
Joshua J. Bennett