Susan J. Martin (AZ#014226)
E-mail: smartin@martinbonnett.com
Jennifer L. Kroll (AZ#019859)
E-mail: jkroll@martinbonnett.com
MARTIN & BONNETT, P.L.L.C.
4647 N. 32nd Street, Suite 185
Phoenix, AZ 85018
Telephone: (602) 240-6900

Joseph A. Garofolo (admitted *pro hac vice*)
E-mail: jgarofolo@garofololaw.com
GAROFOLO & RAMSDELL, LLP
3443 Golden Gate Way, Suite H
Lafayette, CA 94549
Telephone: (415) 981-8500

Joseph A. Creitz (admitted *pro hac vice*)
E-mail: joe@creitzserebin.com
CREITZ & SEREBIN LLP
100 Pine Street, Suite 1250
San Francisco, CA 94111
Telephone: (415) 466-3090

Attorneys for the Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Spinedex Physical Therapy, U.S.A., Inc., et al., **Plaintiffs,** **vs.** **United Healthcare of Arizona, Inc.,** et al., **Defendants.**	**No. CV 08-457-PHX-ROS** **PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** **(Final Fairness Hearing scheduled for August 1, 2019 at 10:00 a.m.)**

Plaintiffs hereby respectfully move the Court to grant final approval of the Settlement Agreement dated December 20, 2018 (the "Settlement Agreement") (Doc. 814-1)[1] and to enter the proposed Final Approval Order and the Judgment attached as Exhibit A thereto. This motion is made pursuant to the provisions of the Settlement Agreement and the Order of this Court dated January 24, 2019 preliminarily approving the Settlement Agreement and conditionally certifying a settlement class pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure ("Preliminary Approval Order") (Doc. 823). Along with the proposed Final Approval Order and Judgment, filed herewith is the Declaration of Mark Rapazzini of Heffler Claims Group in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Rapazzini Decl.") and the Declaration of Mailing of CAFA Notice of Thalia Rojas ("Rojas Decl.").

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After the Court preliminarily approved this settlement and conditionally certified a settlement class as set forth in the Preliminary Approval Order, the settlement administrator mailed notice of the proposed settlement and claim forms to over 80,000 potential class members, Plaintiffs filed their Motion for Class Counsel's Attorney's Fees, Expenses, and Service Awards ("Fee Petition") (Doc. 831), and the claims submission and objection deadline passed on May 24, 2019.[2] Hundreds of claims and 38 timely exclusions have been received without a single objection. Based on the information currently available, eligible participant and medical provider class members will receive a substantial portion of their claimed amounts.

As evidenced by the lack of objections to the settlement and as discussed in more detail below, this settlement is fair, reasonable, and adequate within the meaning of Rule 23(e)(2) of the Federal Rules of Civil Procedure. Plaintiffs Spinedex Physical Therapy,

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[1] A corrected copy of the Settlement Agreement was submitted and approved as Exhibit 1 to the Joint Notice of Errata (Doc. 814).

[2] The parties have complied with all deadlines established by the Court. (*See* 1/24/19 Order ¶ 11; Proposed Amended Schedule for Settlement Proceedings (Doc. 822-3)).

U.S.A., Inc. ("Spinedex) and Claude Aragon and counsel have vigorously represented the class, the settlement is a product of arm's-length negotiations, and the relief to the class is more than adequate. Indeed, considering the monetary benefit that will be received by eligible claimants and the important policy revisions achieved relating to one of the largest insurance companies in the United States, the settlement—negotiated after more than 10 years of litigation—is an excellent result.

Accordingly, this motion should be granted and the proposed Final Approval Order and Judgment should be entered.

II. BACKGROUND

A. After Lengthy Litigation, Arm's-Length Negotiations Result in Settlement.

Plaintiffs provided a detailed description of the history of this litigation, including claims and defenses of the parties, the arm's-length negotiations resulting in settlement, and the terms of the Settlement Agreement in their memorandum of law in support of preliminary approval ("Preliminary Approval Motion") (Doc. 808). (*See* Preliminary Approval Motion at 2-11). Accordingly, Plaintiffs incorporate that discussion herein and only summarize the same for the Court's convenience because it is equally applicable to this motion.

1. This case has a lengthy history prior to settlement.

This lawsuit was filed in March of 2008. The operative complaint at the time of settlement, the Second Amended Complaint ("SAC") (Doc. 38), alleges that United[3] systematically violates the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), when processing and denying physical therapy and nonsurgical spinal decompression therapy ("Decompression Therapy") claims submitted under health plans sponsored by employers. Beyond the alleged improper benefit denials, the ERISA violations asserted against United include the following: i) failure to consider terms of the formal plan document and reliance on summaries of that document; ii)

[3] Collectively, United Healthcare of Arizona, Inc., United Healthcare, Inc., United HealthCare Insurance Company, United HealthCare Services, Inc., UnitedHealth Group Inc., and Ingenix, Inc. are referred to as "United."

description of denials of benefit claims in a manner that cannot reasonably be understood by plan participants; iii) inhibition of claims by failing to properly process appeals; and iv) failure to compile and preserve administrative records in compliance with ERISA. (*See* SAC ¶¶ 110-119).

Notwithstanding the fact that the Court had ruled on three summary judgment motions and the parties had taken substantial discovery (including the production of over 60,000 pages of documents by the Defendants and multiple depositions),[4] there was still significant uncertainty relating to legal issues at the time the settlement was reached. Although the remaining uncertainty of this litigation in the absence of settlement is discussed in more detail below, *see infra* at 9, it merits emphasis that additional appeals were likely, even as to issues that had been addressed in the Court's ruling on Defendants' third summary judgment motion. This is particularly so because the issues were complex. For example, in answering a fundamental question raised by the Ninth Circuit, this Court ruled in Plaintiffs' favor holding that Mr. Aragon has standing to assert his claims for injunctive and declaratory relief. (*See* Order dated December 15, 2017 ("12/15/17 Order") (Doc. 768) at 1-9). Plaintiffs believe that Defendants were likely to appeal.

2. The settlement is a result of arm's length negotiations.

Due to unsettled issues and the parties' positions, no headway was made regarding settlement until after the Court's ruling on Defendants' third summary judgment motion. After the 12/15/17 Order ruling on summary judgment, the parties engaged in further discussions with the assistance of JAMS mediator Elliot Gordon, an attorney with experience in ERISA, health care, and complex litigation. The parties could not reach settlement after a full day of mediation with Mr. Gordon on May 22, 2018, but continued to exchange settlement proposals thereafter.

Ultimately, with substantial ongoing assistance from Mr. Gordon, the parties

[4] Plaintiffs' appeal and United's petition for a writ of certiorari had also been ruled on by the Ninth Circuit and the Supreme Court, respectively.

agreed upon a settlement structure in early June of 2018, executed a nonbinding term sheet on July 3, and negotiated terms resulting in a final settlement agreement in December of 2018.

In sum, all of the negotiations and the resulting settlement were at arm's length and throughout the litigation, including during settlement negotiations, both counsel and Plaintiffs Spinedex and Aragon diligently and vigorously represented the class. (*See* Declaration of Joseph A. Garofolo ("Garofolo Decl.") (Doc. 809) ¶¶ 3-5; Declaration of Thomas E. Blankenbaker in Support of Plaintiffs' Motion for Class Counsel's Attorney's Fees, Expenses, and Service Awards (Doc. 834) ¶¶ 3-5; Declaration of Claude Aragon in Support of Plaintiffs' Motion for Class Counsel's Attorney's Fees, Expenses, and Service Awards (Doc. 835) ¶¶ 2-4). Plaintiffs' lead counsel alone has devoted over 5,000 hours to this case, excluding time spent on appellate work. (*See* Declaration of Joseph A. Garofolo in Support of Plaintiffs' Motion for Class Counsel's Attorney's Fees, Expenses, and Service Awards ("Garofolo Fee Declaration") (Doc. 832) ¶ 25).

3. The relief provided by the settlement is an excellent result.

Plaintiffs provided a detailed description of the settlement on pages 7-11 of the Preliminary Approval Motion and the Court recognized that the settlement is "fair, reasonable, and adequate within the meaning of Rule 23 of the Federal Rules of Procedure." (Preliminary Approval Order ¶ 1). As summarized below, the same analysis applies to the settlement for purposes of final approval.

Initially, the class covers claims for Decompression Therapy for which a complete denial was received from March 7, 2002 through April 24, 2019 (the "Class") as specified in more detail in paragraph 2 of the proposed Final Approval Order filed herewith. The Class includes participants and beneficiaries of ERISA plans and providers with assignments. Importantly, the release in the Settlement Agreement does not cover physical therapy claims of members of the Class that do not involve Decompression Therapy. As previously discussed, however, Plaintiffs Spinedex and

Aragon do generally release claims that were or could have been asserted (including physical therapy claims not involving Decompression Therapy) through the date of execution for no additional consideration because this was required in order to achieve the settlement. (*See* Preliminary Approval Motion at 11; Settlement Agreement, Exs. 12-13).[5]

The settlement requires revisions to United's policies corresponding to some of the most important allegations made by Plaintiff Aragon for declaratory and injunctive relief and provides for a gross monetary settlement fund of $1,475,000. The policy revisions require United to do the following: i) request the plan document from employers under appropriate circumstances and recognize that medical providers may be deemed authorized representatives of participants; and ii) provide all "relevant" documents within the meaning of ERISA's claims regulation, 29 C.F.R. § 2560.503-1(m)(8), when requested by participants. (*See* Preliminary Approval Motion at 8-9).

Further, the settlement requires United to consider post-2010 medical literature relating to Decompression Therapy and hold a meeting with stakeholders to be selected by Plaintiffs to discuss Decompression Therapy's medical efficacy. (*See id.*). Plaintiffs believe that this is also a valuable component of the settlement because they believe that covering Decompression Therapy would ultimately reduce medical costs and create savings for United and the ERISA plans that it administers because costly spinal surgery frequently could be avoided.

As to the $1,475,000 monetary portion of the settlement,[6] Plaintiffs' counsel, with extensive ERISA and class-action experience, investigated this case, carefully considered the claims and defenses involved and the proportional recovery that the monetary settlement amount represented (out of United's total potential liability), and all

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[5] Because the Settlement Agreement broadly defines "Spinedex" to include its principal, Thomas E. Blankenbaker, D.C., a separate agreement and release were independently negotiated between Dr. Blankenbaker and United. *See infra* at 14.

[6] This is actually an understatement because the Settlement Agreement also requires United to pay mediation costs of $9,168.60 that counsel would otherwise have sought from the settlement fund.

other relevant issues relating to the amount of the settlement. (*See* Garofolo Decl. ¶¶ 7-10; Preliminary Approval Motion at 9, 19-23).

According to the settlement administrator, there have been 38 timely opt-out requests. (*See* Rapazzini Decl. ¶ 15). For those members of the Class that did not opt out, the settlement releases claims against United and related parties and ERISA employee welfare benefit plans and related parties through April 24, 2019 that Class members did assert or could have asserted "based on, by reason of, arising from, in connection with, or relating to . . . administration and/or determination of" out-of-network benefits for Decompression Therapy. (*See* Settlement Agreement, Art. XIII). As explained in the mailed notice to the Class "[t]hese claims include claims that the Settlement Class Members may not know or suspect to exist in their favor through April 24, 2019." (*See* Rapazzini Decl., Ex. A at 4). This is an appropriate release in light of the claims asserted and, as discussed earlier, does not extend to physical therapy or other medical claims that do not involve Decompression Therapy. (*See* Preliminary Approval Motion at 21).

B. <u>After Preliminary Approval, Timely Notice to the Class Was Provided and Claims Have Been Properly Processed</u>.

In connection with preliminary approval, the Court approved of the designation of Heffler Claims Group ("Heffler") as settlement administrator and of notice to the class. (Preliminary Approval Order ¶¶ 10, 13). Heffler complied with the Preliminary Approval Order and due process, including by mailing over 80,000 notices and claim forms to potential class members, causing published notice to appear in USA Today on March 25, 2019, setting up a toll-free number, and creating a dedicated website. Submitted herewith is a description by Heffler of the activities of the settlement administrator to comply with the Preliminary Approval Order and process claims. (*See* Rapazzini Decl. ¶¶ 4-18). The information provided by Heffler demonstrates that it has effectively processed claims, including by handling 635 live calls. (*Id.*). Heffler, under the supervision of counsel for both sides pursuant to the terms of the Settlement

Agreement, also continues to review claims for eligibility, including claims postmarked after May 29, 2019 and other potentially deficient claims. (*Id.* at ¶ 18). Heffler confirms that no objections have been received and indicates that a total of 366 claim forms (paper and electronic) have been submitted. (*Id.* at ¶¶ 16, 18).

At this time, Class counsel and Defendants' counsel do not anticipate any issues with Heffler making distributions to eligible claimants promptly after United funds the settlement. United is required to fund the full $1,475,000 monetary consideration within 20 days after the "Effective Date," defined as the 11th calendar day after the expiration of the deadline for a notice of appeal. (*See* Settlement Agreement at 12, 28).

Finally, the original settlement administrator (replaced by Heffler consistent with the Preliminary Approval Order) has demonstrated compliance with the notice required by the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715, and paragraphs 10-11 of the Preliminary Approval Order. (*See* Thalia Decl. ¶¶ 2-6). As of July 8, 2019, no inquiries have been received from the recipients of the CAFA notice. (*See id.* at ¶ 7).

III. ARGUMENT

In the Ninth Circuit, courts consider the same eight factors discussed in Plaintiffs' Preliminary Approval Motion to determine whether a class action settlement should be finally approved. Those factors are used to determine whether a settlement is fair, adequate, and reasonable, and consist of the following:

> [i] the strength of the plaintiffs' case; [ii] the risk, expense, complexity, and likely duration of further litigation; [iii] the risk of maintaining class action status throughout the trial; [iv] the amount offered in settlement; [v] the extent of discovery completed and the state of the proceedings; [vi] the experience and views of counsel; [vii] the presence of a governmental participant; and [viii] the reaction of the class members to the proposed settlement.

Resnick v. Frank, 779 F.3d 934, 944 (9th Cir. 2015) (internal quotations and citations omitted).

Moreover, Rule 23(e)(2) of the Federal Rules of Civil Procedure lists several factors that are largely addressed by the Ninth Circuit's eight-factor test. Below,

Plaintiffs discuss all of the factors, with particular emphasis on additional information that was not available at the time of preliminary approval, and separately discuss all factors not encompassed by the eight factors.

A. The Settlement is Fair, Adequate, and Reasonable.

1. The reaction of the members of the Class strongly supports final approval.

"It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms . . . are favorable to the class members." *Nat'l Rural Telecoms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004)*; see, e.g.*, *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 577 (9th Cir. 2004) (concluding that the lack of objections supported final approval where "only 45 of the approximately 90,000 notified class members objected to the settlement").

Based on the sheer number of potential class members who were provided with mailed notice, it was reasonable to expect a few objections. But not one objection was received. The complete absence of objections is remarkable and strongly supports final approval.

2. Final approval is supported by the strength of the case, the risk, expense, and likely duration of the litigation, the settlement amount offered, and counsel's views.

The first, second, fourth, and sixth Ninth Circuit factors were analyzed extensively in connection with preliminary approval and that analysis remains applicable to the Court's consideration of final approval. (*See* Motion for Preliminary Approval at 19-23). With regard to all of the foregoing, Plaintiffs were able to meaningfully evaluate each because of the lengthy history of this case. The long procedural history of this litigation, with numerous rulings by this Court and the Ninth Circuit, was particularly helpful in evaluating the strength of the case and the risk, complexity, and likely duration of continued litigation. This Court's rulings against Plaintiffs on important issues supports the conclusion that settlement is the best result in light of these factors. (*See* 12/15/17 Order at 9-17) (statute of limitations for ERISA benefit denial claims is

one year and anti-assignment provisions for five employee benefit plans were enforceable).

And, notwithstanding the length of this case, multiple new complex issues were virtually certain to be raised if the litigation continued, such as Defendants' exhaustion defense and the standard of review applicable to denied claims involving Decompression Therapy. Monetary claims of the Class would have been affected greatly by a potential ruling in Defendants' favor. *See Day v. AT&T Disability Income Plan*, 698 F.3d 1091, 1096 (9th Cir. 2012) ("plan administrator's interpretation of the plan will not be disturbed if reasonable" under abuse of discretion review).

Similarly, the strength of the case and risk of the litigation are impacted by the fact that Defendants had resources and would have appealed rulings of the Court in Plaintiffs' favor. As mentioned above, perhaps the biggest issue that Plaintiffs believe United was almost certain to appeal was Mr. Aragon's standing to bring claims on behalf of himself and the Class for injunctive and declaratory relief. (*See* 12/15/17 Order at 1-9). Moreover, as with the monetary claims at issue in this case, Defendants also likely would have raised issues that had not been addressed, including whether United's ERISA deviations were anything more than *de minimis* and whether the injunctive relief sought on behalf of the Class would have been "draconian" as applied to United. (*See* Joint Proposed Case Management Plan (Doc. 617) at 16:17-17:22).

In sum, the strength of the case, the risk involved in continuing to litigate, and likely appeals absent settlement all weigh heavily in favor of final approval. Settlement with important policy revisions and a not insubstantial monetary component is an excellent result for the Class.

Additionally, it should not be overlooked that the costs of continuing to litigate would have been significant. Plaintiffs' counsel had already spent well over $100,000 and expert deadlines and discovery remained at the time of settlement. Thus, the expense of continued litigation likely would have been substantial.

Consistent with the factors just discussed, the amount offered in settlement and

the experience and views of counsel further support final approval. As discussed during preliminary approval, Defendants provided information relating to the total amount of unpaid claims that was sufficient for counsel to determine a reasonable estimate of the maximum recovery pursuant to a judgment that could be obtained for Decompression Therapy. (*See* Preliminary Approval Motion at 21-22). Using this information, Plaintiffs' counsel, experienced ERISA and class action litigators, concluded that the settlement amount was a good result. (*See* Garofolo Decl. ¶ 10). Likewise, counsel concluded that the dismissal of claims for physical therapy (not involving Decompression Therapy) was the best result because this Court suggested that those claims could not be certified (*see* Order dated March 30, 2011 at 18:12-14), colorable defenses remained, and because Defendants would not agree to stipulate to a settlement class for physical therapy claims. And, as discussed above, *supra* at 3-4, the fact that counsel's views and the amount of the settlement are appropriate is supported by the arm's length nature of the settlement negotiations.

Notably, the foregoing discussion addresses the factors considered by the Ninth Circuit and factors explicitly stated in Rule 23(e)(2). *See* Fed. R. Civ. P. 23(e)(2)(B) & (C)(i).

3. The risk of maintaining a class action through trial supports final approval.

In contrast to a contested class, a settlement class is not required to meet the manageability requirement of Rule 23(b)(3) of the Federal Rules of Civil Procedure. *See, e.g.*, *Brown v. 22nd Dist. Agric. Ass'n*, 2016 U.S. Dist. LEXIS 173739, at *9 (S.D. Cal. Dec. 13, 2016); *Espinosa v. Ahearn*, 2019 U.S. App. LEXIS 17047, at *16 (9th Cir. June 6, 2019) (unpublished) ("[M]anageability is not a concern in certifying a settlement class where, by definition, there will be no trial."). While Plaintiffs believe that it was reasonably possible to certify the Class over any objections by Defendants, Defendants nonetheless had colorable arguments against certification, including that their exhaustion defense precludes a manageable class.

This factor also supports final approval of the dismissal without a release of the

physical therapy claims not involving Decompression Therapy because the Court had suggested in its ruling on Defendants' first summary judgment motion that such a class was not certifiable. (*See* Sealed Order dated March 30, 2011 at 18:12-14).

4. Final approval is supported by the extent of discovery completed and the state of the proceedings.

As discussed above, *supra* at 3, and during preliminary approval (*see* Preliminary Approval Motion at 24), the extent of discovery, including multiple depositions and the production of voluminous documents by Defendants, strongly supports approval of the settlement. The same is true with regard to the state of the proceedings. The long history of this case supports the conclusion that Plaintiffs and counsel had sufficient information to evaluate settlement. At the same time, however, the litigation would have continued for years had a settlement not been reached, especially because of the likelihood of appeals.

Finally, because there is no governmental participant, the seventh factor is neutral.

B. The Remaining Considerations Set Forth in Rule 23(e)(2) Support Final Approval.

1. The plan of allocation is effective and equitable to Class members.

The plan of allocation called for under the Settlement Agreement is relevant to final approval under Rules 23(e)(2)(C)(ii) and (D), which respectively require consideration of the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims" and whether the settlement "treats class members equitably relative to each other." The plan of allocation easily passes muster.

The net settlement fund (*i.e.*, the gross settlement after reduction of attorney's fees, expenses, service awards and the costs and fees of the settlement administrator), if insufficient to fully reimburse the "Recognized Loss" of all eligible claims, is allocated to Class members *pro rata*. (*See* Settlement Agreement, Ex. 8). The Recognized Loss

of each claimant is the amount of the fully denied eligible claim less 20% to approximate copyaments, coinsurance, and deductibles that ordinarily would be payable by the participant or beneficiary of the health plan. (*Id.*). Since the net settlement fund likely will be insufficient to pay all eligible claims (*see* Rapazzini Decl. ¶ 18), distributions will made on a *pro rata* basis. This is an extremely effective and equitable method of distribution because the settlement administrator should have no calculation difficulties and the method factors in the amount of each claimant's monetary loss as set forth on the claim form. The latter is particularly important because the Class consists of participants and beneficiaries and medical providers with claim amounts that vary significantly.

The method of processing claims by the settlement administrator, also relevant to Rule 23(e)(2)(C)(ii), is discussed above, *supra* at 6.

2. The requested award of attorney's fees is reasonable.

Rule 23(e)(2)(C)(iii) provides that the "terms of any proposed award of attorney's fees, including timing of payment" must be considered in determining whether to grant final approval. Plaintiffs seek an attorney's fee award of one-third of the $1,475,000 monetary recovery and reimbursement of $126,000 in counsel's costs and expenses. (*See* Fee Petition at 1-23). As Plaintiffs have previously discussed in detail, these requests are eminently reasonable, *inter alia*, because Plaintiffs requested award of attorney's fees is less than one-tenth of the lodestar cross-check and Plaintiffs merely seek reimbursement of reasonable costs and expenses. *See, e.g.*, *Dudum v. Carter's Retail, Inc.*, 2016 U.S. Dist. LEXIS 166881, at *24-25 (N.D. Cal. Dec. 2, 2016) ("This unusual negative multiplier supports the reasonableness of the fee request."); (Fee Petition at 15, 22-23) (collecting cases where one-third of the common fund awarded with a negative lodestar multiplier and describing supporting information for claimed costs and expenses).

The timing of the distribution of attorney's fees also supports final approval. *See* Fed. R. Civ. P. 23(e)(2)(C)(iii). Reimbursement for attorney's fees and costs and

expenses is to be made at the same time as distributions to claimants from the settlement fund. (*See* Settlement Agreement at 22, 26-27).[7]

C. No Other Agreement Alters the Conclusion That the Settlement is Fair, Reasonable, and Adequate.

Rule 23(e)(3) of the Federal Rules of Civil Procedure requires the "parties seeking approval [to] file a statement identifying any agreement made in connection with the proposal." The Court is to consider such statement in evaluating whether the relief under the settlement is adequate. *See* Fed. R. Civ. P. 23(e)(2)(C)(iv).

Other than the Settlement Agreement (including its exhibits) that has been filed with the Court, the following may fall within the scope of the Rule 23(e)(3): i) attorney engagement agreements between Plaintiffs and counsel; ii) the blow agreement executed contemporaneously with the Settlement Agreement; iii) Heffler's Fees & Costs Proposal (confirmed by Plaintiffs' counsel as an agreement) (the "Heffler Agreement"); and iv) the agreement whereby Thomas E. Blankenbaker, D.C. (also, the owner of Spinedex's claims) generally releases all of his claims, including claims associated with his current clinic that are outside the scope of the pleadings in this action.

Each of the foregoing has been discussed in some form before this motion and none alters the conclusion that settlement is fair, reasonable, and adequate. Plaintiffs submitted copies of their fee agreements with their Fee Petition. (*See* Garofolo Fee Decl. ¶ 27, Ex. C). As explained when requesting attorney's fees, Plaintiffs' counsel accepted this case on a contingent basis and advanced costs and expenses. (*See* Fee Petition at 15-16).

The blow agreement, executed on December 21, 2018, was required pursuant to Article XI of the Settlement Agreement and was a condition of settlement by United. Its existence was disclosed to class members in the mailed noticed. (*See* Rapazzini Decl., Ex. A at 4) ("[I]f enough Settlement Class Members opt out or if the value of opt outs

[7] Mediation costs of $9,168.60, which are not to be reimbursed from the settlement fund and are to be paid separately by United, are to be paid to counsel 10 days after the Effective Date. (*See* Settlement Agreement, Art. XV).

exceeds a certain dollar value, the United Defendants may cancel the settlement."). The blow agreement permits termination of the Settlement Agreement, prior to the August 1, 2019 fairness hearing under certain limited circumstances.

Based on the claims data, Plaintiffs do not expect the Settlement Agreement to be terminated.

The Heffler Agreement was disclosed and discussed when Plaintiffs provided notice to the Court of their amended designation of a settlement administrator. (*See* Plaintiffs' and Class Counsel's Unopposed Motion for Approval of Amended Settlement Administrator and Partial Response to the Court's Order Dated January 16, 2019 (Doc. 820) at 1:17-2:10). The Heffler Agreement estimates fees and costs of $175,801 and, through June 30, 2019, "Heffler's notice and claims administration fees and costs total approximately $153,780." (Rapazzini Decl. ¶ 19). In the proposed Final Approval Order, the Court, subject to scrutiny by counsel for both sides, would approve $153,780 to be paid from the settlement fund and additional fees, costs, and expenses so that the total paid to Heffler does not materially exceed $175,801, also subject to review by counsel.

The last agreement mentioned above is between Dr. Blankenbaker and United and was described before preliminary approval. (*See* Preliminary Approval Motion at 11 n. 6). He was not represented by Plaintiffs' counsel in connection with this agreement. Dr. Blankenbaker owns a clinic that currently provides neck and back pain treatment. He releases all of his claims, including claims associated with his current practice, in exchange for $20,000. (*See id.*). Plaintiffs believe that this is more than reasonable and Plaintiffs' counsel was careful to avoid any potential conflicts by not representing Dr. Blankenbaker.

D. <u>For the Same Reasons Discussed in Plaintiffs' Preliminary Approval Motion, the Court Should Confirm Its Rulings Relating to Settlement Class Certification</u>.

The Court previously conditionally certified the Class for settlement purposes and provisionally designated Plaintiffs Spinedex and Aragon as representatives of the Class

and Plaintiffs' counsel as settlement class counsel. For the reasons discussed above, *supra* at 4, and the reasons set forth in detail in connection with preliminary approval, the Court should grant final approval and confirm such designations as set forth in the proposed Final Approval Order filed herewith. (*See* Preliminary Approval Motion at 12-19); Fed. R. Civ. P. 23(e)(2)(A) & (C). The Class meets all of the requirements of Rules 23(a)(1)-(4) and (b)(3) of the Federal Rules of Civil Procedure for settlement purposes, Plaintiffs (as Class representatives) and Plaintiffs' attorneys (as Class counsel) have vigorously represented the Class, and the settlement is fair, reasonable, and adequate.

IV. CONCLUSION

For the foregoing reasons, after the hearing on August 1, 2019, final approval of the class action settlement should be granted and the Court should enter the proposed Final Approval Order and the Judgment attached as Exhibit A thereto.

DATED this 12th day of July, 2019.

Respectfully submitted,

MARTIN & BONNETT, P.L.L.C.

By: /s/ Susan J. Martin
Susan J. Martin
Jennifer L. Kroll
1850 N. Central Avenue, Suite 2010
Phoenix, AZ 85004

GAROFOLO & RAMSDELL, LLP

By: /s/ Joseph A. Garofolo
Joseph A. Garofolo
3443 Golden Gate Way, Suite H
Lafayette, CA 94549

CREITZ & SEREBIN LLP

By: /s/ Joseph A. Creitz
Joseph A. Creitz
100 Pine Street, Suite 1250
San Francisco, CA 94111

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on this date I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing and transmittal of a notice of Electronic Filing to the following CM/ECF registrants:

John C. West
jwest@lrrc.com
LEWIS ROCA ROTHGERBER CHRISTIE LLP
201 East Washington St., Suite 1200
Phoenix, AZ 85004

Attorney for the Defendants

Jeffrey S. Klein
jeffrey.klein@weil.com
Nicholas J. Pappas
nicholas.pappas@weil.com
Jared R. Friedmann
jared.friedmann@weil.com
Reed L. Collins
reed.collins@weil.com
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153

Attorneys for the Defendants

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on this 12th day of July, 2019, at Lafayette, California.

/s/ Joseph A. Garofolo
Joseph A. Garofolo