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November 5, 2008

VIA ELECTRONIC FILING

Honorable Jerome B. Simandle
United States District Court
for the District of New Jersey
Mitchell H. Cohen U.S. Courthouse
One John F. Gerry Plaza, Room 2010
Fourth and Cooper Street
Camden, NJ 08101

**RE: Myers, et al. v. MedQuist, Inc.
Civil Action No. 05-cv-4608 (JBS)**

Dear Judge Simandle:

Counsel for Plaintiffs and Defendants in the above noted matter offer this joint letter in further support of Plaintiffs unopposed Motion for Preliminary Approval of Settlement.

During our teleconference on October 30, 2008, Your Honor requested that counsel for the parties address in writing the following two issues: (1) the basis of the Court's jurisdiction in this matter; and (2) legal authority supporting the proposed payment to the Association for Healthcare Documentation Integrity ("AHDI") under the terms of the Settlement.

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I. Jurisdiction

The present case is a consolidation of three putative nationwide class actions.¹ The Myers Action was the first case filed in this Court and properly asserted jurisdiction under the Class Action Fairness Act ("CAFA").² Upon motion by MedQuist, the earlier filed Hoffman Action was subsequently transferred to this Court and consolidated into the Myers Action (as the first-filed case in this District). The later-filed Force Action was subsequently transferred to this Court and consolidated with the Myers Action by stipulation of the parties. On January 31, 2006, Plaintiffs filed a consolidated amended complaint in the Myers Action, again asserting jurisdiction under CAFA. Thereafter, the Court closed the case files originally opened when the Hoffman Action and Force Action were first transferred to the District of New Jersey.

While there is no dispute that the Myers Action properly invoked federal jurisdiction under CAFA, a novel issue arose when that case was consolidated with the earlier filed Hoffman Action. Clearly CAFA did not apply to the Hoffman Action, filed before CAFA was enacted, and the Hoffman Action did not assert jurisdiction under CAFA. While the parties have not found any cases directly on point, it must be recognized that, the Court administratively closed the Hoffman Action and proceeded with the litigation under the Myers Action. Thus, because the Myers Action properly invoked federal jurisdiction under CAFA from its inception, as a practical matter it is not material whether CAFA would provide a separate basis for jurisdiction for the related Hoffman Action. Further, it is important to recognize that had the Court originally dismissed the Hoffman action without prejudice for lack of jurisdiction, the exact same action could then have been refiled immediately in the District of New Jersey under CAFA. Accordingly, under the circumstances, because the Myers Action properly asserted jurisdiction under CAFA, and because the consolidated amended complaint filed in the Myers Action again asserted jurisdiction under CAFA, the parties acknowledge jurisdiction under CAFA and application of CAFA to the proposed settlement.

¹ *Hoffman v. MedQuist Inc.*, Civil Action No. 1:04-CV-3452 (N.D. Ga.) filed November 29, 2004 (the Hoffman Action); *Myers v. MedQuist Inc.*, Civil Action No. 05-cv-4608 (D.N.J.) filed on September 22, 2005 (the Myers Action); and *Force v. MedQuist Inc.*, Civil Action No. 1:05-CV-2608 (N.D. Ga.) filed October 11, 2005 (the Force Action).

² 28 U.S.C. § 1332(d)(2)(A).

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II. Settlement Structure and Payment to AHDI

The Settlement proposed by the parties includes the following three benefits for the settlement class. First, MedQuist has agreed to injunctive relief that is specifically tailored to address the hiring and employment practices that Plaintiffs contend gave rise to this litigation.³ Second, MedQuist has agreed to make a one time payment of \$1.5 million (minus costs but in no event less than \$1 million) to the Association for Healthcare Documentation Integrity (formerly the American Association for Medical Transcription), a not-for-profit professional organization that “works tirelessly to give thousands of medical transcriptionists a voice before legislative and regulatory agencies and to ensure MTs are recognized for their contributions to patient safety and risk management” (“AHDI”).⁴ Finally, under the terms of the proposed Settlement, the AHDI contribution is leveraged such that settlement class members will receive free educational and professional courses provided by AHDI (valued at up to \$200 per class member).

During the teleconference on October 30, 2008, the Court requested that the parties present authority supporting the proposed settlement structure, including the proposed payment to AHDI. While the proposed Settlement does not include a direct payment to the settlement class, the Settlement structure, including the payment to AHDI, is not unique and has solid precedent in this Circuit. For example, the Settlement structure proposed by the parties is substantially similar to the framework approved by the court in *Perry v. FleetBoston Financial Corp.*, 229 F.R.D. 105 (E.D. Pa. 2005). In that case, plaintiffs filed suit on behalf of a class of individuals alleging violations of the Fair Credit Reporting Act (“FCRA”). The court approved a class settlement that included injunctive relief for a period of one year, a “*cy pres*” donation of \$50,000 to non-profit

³ The proposed injunctive relief requires that MedQuist (a) implement and disseminate a formal written policy that expressly discloses all definitions of payroll lines used by MedQuist transcription platforms for compensating medical transcriptionists; (b) make all definitions of payroll lines used by MedQuist transcription platforms available to MedQuist employees, candidates for employment, and the general public by including it within MedQuist's internet website; (c) make all definitions of payroll lines used by MedQuist transcription platforms available to MedQuist employees, including managers, recruiters, and medical transcriptionists by including it in MedQuist's employee handbook or other materials distributed to medical transcriptionists for their ongoing reference; (d) make available all definitions of payroll lines used by MedQuist transcription platforms to candidates for employment as a medical transcriptionist prior to or in connection with any verbal or written offer of employment; (e) identify for all medical transcriptionists who are to be paid based on a payroll line unit of measure, prior to or in connection with any verbal or written offer of employment, the payroll line definition that will be used to calculate their pay; and (f) provide written notice to the affected transcriptionist employees in the event that MedQuist alters the definition of a payroll line or otherwise causes transcription work to be calculated for payroll purposes according to a different payroll line definition. Stipulation of Settlement at ¶ 4.4.

⁴ www.ahdionline.org/scriptcontent/about.cfm.

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organizations whose aims included educating the public regarding the responsible use of credit, and free credit reports and scores for each class member who submitted a claim form. The *Perry* court also awarded incentive payments of \$5,000 to each of the named class representatives and attorneys' fees of approximately \$300,000. Applying the nine-factor test set forth by the Third Circuit in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), and after special examination of the proposed *cy pres* donation, the *Perry* court granted final certification of the settlement class and held that the settlement was fair, adequate and reasonable. *Perry*, 229 F.R.D. at 124. The court recognized that the class members' claims might be too small to justify individual litigation and that, under such circumstances, "a *cy pres* distribution, as part of the overall settlement, is a creative and useful means of achieving a fair and reasonable resolution." *Id.* at 118. *See also Vista Healthplan, Inc. v. Warner Holdings Co.*, 246 F.R.D. 349, 363 (D.D.C. 2007) (approving class action settlement that provided for distribution of products to third party physicians, clinics, and charitable organizations where defendants could credibly argue plaintiffs suffered little to no damages).⁵

While adopting the same general structure approved by the court in *Perry*, the proposed Settlement in the present case both offers greater benefit to the settlement class and avoids any possible taint of collusion based on incentive awards or large legal fees. First, Plaintiffs have secured injunctive relief that specifically addresses the allegations that they contend gave rise to their claims to continue in place for a minimum of two years – twice the period of injunctive relief approved in *Perry*. Second, the proposed *cy pres* donation is guaranteed to be at least twenty times greater than the \$50,000 sum paid in *Perry*. Third, the value of the AHDI programs to be offered settlement class members is roughly four to five times greater than the value of the services provided for under the settlement approved in *Perry*. Finally, to maximize the overall benefit of the settlement to the class, Plaintiffs' Counsel have agreed to forgo any request for attorneys' fees in connection with the prosecution of this action, and the Settlement does not include any incentive payments to the named class representatives. The proposed Settlement structure is not only supported in the case law, but the Settlement itself represents a clear benefit to the settlement class.

⁵ This case law demonstrates that *cy pres* or fluid recovery distributions are not limited to disbursing the remainder of a settlement fund after individual distribution, but also comprise an important tool for adding value to a proposed settlement even in the absence of direct payments to individual class members. *Perry*, 229 F.R.D. at 118 ("Therefore, a *cy pres* distribution, as part of the overall settlement, is a creative and useful means of achieving a fair and reasonable resolution."). *See generally* 4 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 11.20 (4th ed. 2002) ("Experience to date dictates that fluid class and *cy pres* settlement distributions are important tools that should not be overlooked by the plaintiff or defense counsel in considering settlement possibilities for a large class with small individual claims."). Importantly, the specific label applied to the AHDI payment is not material; the question is what benefit the overall proposed Settlement confers on the settlement class and, ultimately, whether the overall Settlement is fair, reasonable, and adequate.

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In reviewing the structure of the proposed Settlement, it is also important to bear in mind that courts can and have approved class action settlements that are limited to injunctive relief only and include no direct or indirect payment to or for the benefit of the settlement class. For example, in *First State Orthopaedics v. Concentra, Inc.*, 534 F. Supp. 2d 500 (E.D. Pa. 2007), the court approved settlement of a class action suit by medical providers against Concentra, a healthcare management provider, alleging, among other things, breach of contract. The settlement agreement “consist[ed] entirely of prospective injunctive relief, with no monetary payments to the plaintiff class. In exchange for a release of claims, Concentra . . . committed to change the disclosure and business practices challenged in this action.” *Id.* at 507. The court held that “the absence of monetary relief does not automatically render a settlement unfair.” *Id.* at 521. Rather, “nonpecuniary benefits may support a class action settlement.” *Id.* Indeed, there is long standing precedent for settlements that only provide injunctive relief, even where plaintiffs initially sought monetary damages. *See, e.g., Hanlon v. Chrysler Corporation*, 150 F.3d 1011 (9th Cir. 1998) (affirming injunctive relief only settlement where class plaintiffs had sought monetary damages stemming from alleged product defect with Chrysler minivans); *George v. Parry*, 77 F.R.D. 421 (S.D.N.Y. 1978) (approving injunctive relief only settlement where, although class plaintiffs had initially sought monetary damages for alleged violations of 42 U.S.C. § 1983).⁶ *See also In re Mexico Money Transfer Litigation*, 267 F.3d 743 (7th Cir. 2001) (Easterbrook, J.) (concluding that plaintiffs’ claims had only nuisance value and approving class settlement that provided for \$6 coupons for each claim, injunctive relief, and a *cy pres* payment of \$4.6 million where plaintiffs initially sought class-wide damages of billions of dollars).

In the present case, Defendants’ Counsel initially resisted making any monetary payment, and Defendants continue to strongly believe that the settlement would fair, reasonable and adequate based on the agreed to injunctive relief standing alone. However, through protracted arms’ length negotiations, Plaintiffs’ Counsel was ultimately able to persuade Defendants to agree to the proposed AHDI payment as well as additional benefits offered to the settlement class by AHDI. As discussed in prior communications with the Court, Plaintiffs did not lightly reach the decision to settle this matter. Nonetheless, after multiple years of active litigation involving an exhaustive investigation, dozens of depositions, multiple rounds of written discovery, and review of hundreds of thousands of documents, Plaintiffs have concluded that, as in *Perry*, “[t]he risks of litigation are particularly weighty here, on the issues of both liability and damages.” *Perry*, 229 F.R.D. at 117. Accordingly, Plaintiffs have negotiated what they believe to be the best settlement terms possible, including injunctive relief that – as in *Perry* and *First State Orthopaedics* – is carefully tailored to

⁶ “Courts evaluating such settlements [*i.e.*, where no monetary payment is made to the class] need to be particularly cautious about collusion and concealment, particularly where large attorneys’ fee awards are proposed.” *First State Orthopaedics*, 534 F. Supp. 2d at 521. Here, where Plaintiffs have not sought any fees whatsoever, there should be no concerns that the Settlement is the result of collusion.

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address the behavior that prompted this litigation. Plaintiffs also negotiated for additional “creative and useful” benefits to the class that, although they do not include a direct payment, do provide for a “fair and reasonable resolution” to this matter. *Id.*

Respectfully submitted,

s/ Lisa J. Rodriguez

Lisa J. Rodriguez

cc: All Counsel (*via e-filing*)