



**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

IN RE: MOUNTAIN STATE UNIVERSITY LITIGATION      Civil Action No. 12-C-9000

THIS DOCUMENT APPLIES TO:

JEANETTE BROWN,	Civil Action No.	13-C-110 KAN
DESTANY PETTRY,	Civil Action No.	11-C-1746 KAN
JAMIE WAGNER,	Civil Action No.	12-C-2384 KAN
DALE BURGER, AMANDA BURGER, and JEFF BURGER,	Civil Action No.	12-C-1293 KAN

each individually and, on behalf  
of all other similarly situated,

Plaintiffs

v.

MOUNTAIN STATE UNIVERSITY, INC.

Defendant.

**PRELIMINARY APPROVAL ORDER**

Pending before the Presiding Judges in the Mountain State University Litigation is the Putative Class Representatives' Motion to Preliminarily Approve Class Settlement Agreement (the "Motion"). The Motion, filed pursuant to Rule 23(e) of the West Virginia Rules of Civil Procedure, seeks (1) preliminary approval ("Preliminary Approval") of the Settlement Agreement and Release, with exhibits (the "Agreement") dated September 3, 2014 between and among the Putative Class, by and through the Putative Class Representatives and Putative Class Counsel, and The University of Charleston, Inc. ("Charleston"), Mountain State University, Inc. ("MSU"), and United Educators Insurance Risk Retention Group, Inc. ("United Educators") (collectively "the Parties"); (2) preliminary certification of a limited fund class pursuant to Rule 23(b)(1)(B) of the

West Virginia Rules of Civil Procedure for the purposes of the settlement; (3) approval of the form and manner of providing notice to the Putative Class; (4) a stay of certain litigation; and (5) the setting of a schedule leading to hearing where the Parties will seek Final Approval of the Agreement by the Presiding Judges.

Appearing before the Court in support of the Motion were Anthony J. Majestro of Powell & Majestro, PLLC, Plaintiffs' Liaison Counsel; Sean P. McGinley, of DiTrapano Barrett DiPiero McGinley & Simmons, PLLC, on behalf of the Putative Non-Nursing Subclass; John R. Merinar, Jr. of Steptoe & Johnson, PLLC, on behalf of MSU; Scott L. Winkelman of Crowell & Moring, LLP, on behalf of United Educators; and Samuel Brock, III of Spilman Thomas & Battle, PLLC, on behalf of Intervenor Charleston.

Appearing before the Court in objection to the Motion were Andrew C. Skinner of The Skinner Law Firm, PLLC on behalf of Intervenors Valeri Dillow, *et al.*; and Dean M. Googasian of The Googasian Firm, P.C. and Jonathan W. Price of The Bell Law Firm, PLLC on behalf of Intervenors Lynnetta Martin and Rebecca Mullis. Upon review and consideration of the Motion, the terms and conditions of the Agreement of the Parties, and the arguments of counsel at the hearing held on October 6, 2014, the Presiding Judges find good cause for granting the motion and make the following findings and rulings:

#### **PRELIMINARY MATTERS**

1. The definitions and terms set forth in the Agreement are hereby adopted and incorporated into this Order.
2. This Court has jurisdiction over the subject matter of these proceedings and over all Parties and the members of the Putative Class.

### **LEAVE TO FILE THE LIMITED FUND CLASS COMPLAINT**

3. In accordance with the Agreement, the Court hereby grants the Putative Class Representatives leave to file, and accepts for filing, and deems filed and served on the Parties, for settlement purposes only, the proposed amended complaint captioned Limited Fund Class Complaint. MSU is not required to answer or otherwise respond to the Limited Fund Class Complaint.

### **CERTIFICATION OF THE SETTLEMENT CLASS**

4. The Court hereby certifies, for purposes of preliminary approval of the settlement, a class pursuant to Rule 23(a) and Rule 23(b)(1)(B) of the West Virginia Rules of Civil Procedure (the “Putative Class”). The Putative Class shall be defined as follows:

All persons who, (1) on or after May 27, 2008, attended classes with Mountain State University, Inc. in nursing or any health sciences program, including but not limited to pre-nursing, the Certified Registered Nurse Anesthetist program and/or the Diagnostic Medical Sonography program; or, (2) on or after May 27, 2008, attended classes with Mountain State University, Inc. in any other program not expressly identified in above-referenced part (1) and who did not obtain a degree from The University of Charleston, Inc. or Mountain State University, Inc. with applicable national, regional, and state accreditation in effect prior to program closure, or expiration of teach-out opportunities.

5. In connection with this proposed settlement, pursuant to W. Va. R. Civ. P. 23(c)(4)(b), the Court hereby certifies for purposes of preliminary approval of the settlement the following two subclasses (“Subclasses”):

- a. All members of the Putative Class who attended classes with Mountain State University, Inc. and were enrolled in (i) any CRNA program or (ii) BSN nursing program pathway, including traditional BSN, BA/BS to BSN, LPN to BSN, RN to BSN, in any pre-nursing curriculum or who have affirmed through prior written documentation that the Putative Class Member enrolled at MSU for the purpose of obtaining a BSN degree (“Nursing Subclass”).

b. All other members of the Putative Class who are not members of the Nursing Sub-Class (“Non-Nursing Subclass”).

6. Neither certification of the Putative Class for settlement purposes only, nor any other act relating to the negotiation, execution or implementation of the Agreement, shall be considered as a factor in connection with any class certification issue(s) if the Agreement terminates or does not become final in its entirety.

7. The Presiding Judges preliminarily find, for the purposes of the settlement contemplated by the Agreement, that the Putative Class and the Subclasses meet the requirements of W. Va. R. Civ. P. 23(a), W. Va. R. Civ. P. 23(b)(1)(B), and W. Va. R. Civ. P. 23(c)(4)(b).

8. The Presiding Judges hereby appoint and approve Jeanette Brown, Destany Pettry, Jamie Wagner, Dale Burger, Amanda Burger and Jeff Burger as the Putative Class Representatives. The Presiding Judges hereby appoint and approve Jeanette Brown, Destany Pettry and Jamie Wagner as Subclass Representatives of the Nursing Subclass, and Dale Burger, Amanda Burger and Jeff Burger as Subclass Representatives of the Non-Nursing Subclass.

9. The Presiding Judges hereby appoint and approve Anthony J. Majestro, Stephen P. New, S. Douglas Adkins, John Fishwick, Matthew Fragile, Lonnie C. Simmons, Sean P. McGinley, and Robert M. Bastress III as counsel to the Putative Class (“Putative Class Counsel”) with Anthony J. Majestro, Stephen P. New, S. Douglas Adkins, John Fishwick, and Matthew Fragile serving as counsel for the Nursing Subclass and Lonnie C. Simmons, Sean P. McGinley, and Robert M. Bastress III as counsel for the Non-Nursing Subclass.

10. The Presiding Judges find pursuant to Rule 23(a)(4) of the West Virginia Rules of Civil Procedure that, for settlement purposes only, the Putative Class Representatives and

Putative Class Counsel have and will fairly and adequately protect the interests of the Putative Class.

### **PRELIMINARY APPROVAL OF THE AGREEMENT**

11. Having reviewed the Limited Fund Class Complaint and the Agreement, and being familiar with underlying proceedings, the Presiding Judges hereby preliminarily approve the Agreement, and the settlement contemplated thereby, as being fair, reasonable, and adequate as to all members of the Putative Class within the meaning of Rule 23 of the West Virginia Rules of Civil Procedure. The Agreement was the product of informed arm's length bargaining by the Parties with the assistance of the Panel's Resolution Judges and a private mediator. The Agreement contains no obvious deficiencies that would prevent Preliminary Approval. The Presiding Judges direct the Parties to proceed with the settlement pursuant to the terms and conditions of the Agreement, subject to the later determination by the Presiding Judges of whether to grant Final Approval of the settlement set forth in the Agreement.

### **NOTICE TO THE PUTATIVE CLASS AND ADMINISTRATION OF THE SETTLEMENT**

12. The Parties have filed a proposed notice plan for effectuating notice to the Putative Class ("Notice Plan"). Included with the Notice Plan is a declaration from Shannon Wheatman, Ph.D., President of Kinsella Media, LLC. In the declaration, Dr. Wheatman sets forth her opinion that the Notice Plan constitutes the best notice practicable in this case, satisfies the requirements of due process and complies with the requirements of W. Va. R. Civ. P. 23. The Presiding Judges agree and find that the form and procedures in the Notice Plan are the best practicable and are reasonably calculated, under all the circumstances, to apprise the Putative Class of the pendency of this litigation and the proposed settlement and to afford any Putative

Class Member an opportunity to present any objections to the settlement. The Presiding Judges have also reviewed the additions and clarifications to the notice forms, which were submitted under a separate Notice of Filing, and the Presiding Judges approve these modified notice forms. The Presiding Judges further find that the notice form and procedures in the Notice Plan and modified notice forms are sufficient to support the exercise of jurisdiction over the Putative Class contemplated by the Settlement. As such, the Presiding Judges find that the Notice Plan complies in all respects with W. Va. R. Civ. P. 23 and all the requirements of due process.

13. The Agreement contemplates the appointment of a Claims Administrator to effectuate the Notice Plan and administer the claims process once the Agreement becomes final. The Parties have proposed Chuck Smith, CPA and the firm of Smith, Cochran, and Hicks, PLLC (“Smith”) to serve as Claims Administrator. Mr. Smith was present at the hearing and presented his qualifications and experience to serve as Claims Administrator. The Presiding Judges approve the appointment of Mr. Smith as Claims Administrator. Mr. Smith shall be responsible for implementing the Notice Plan as set forth therein, and the claims process as contemplated and set forth in the Agreement and this Order.

14. The Claims Administrator shall commence implementation of the notice contemplated by the Notice Plan within fourteen (14) days of the date of this Order.

#### **FINAL FAIRNESS HEARING**

15. The Court’s Preliminary Approval of the Agreement shall be subject to further consideration at a hearing to be held before the Presiding Judges on **January 16, 2015, at 10:00 a.m. in the Ceremonial Courtroom in the Kanawha County Courthouse located at Kanawha County Judicial Building, 111 Court Street, Charleston, West Virginia 25301** (the “Fairness

Hearing”). The Court will determine at or following the Fairness Hearing whether the proposed settlement set forth in the Agreement is fair, reasonable, and adequate and should be finally approved by the Presiding Judges, and the amount of attorney’s fees, costs, and expenses that should be awarded to Putative Class Counsel and any other eligible attorneys representing Putative Class members. The date and time of the Fairness Hearing shall be set forth in the Notice Plan to be implemented by the Claims Administrator. The Presiding Judges will retain jurisdiction to consider all further applications arising out of or in connection with the Agreement.

16. By **no later than November 17, 2014**, Putative Class Counsel and counsel for the other Parties shall file with the Presiding Judges any papers in support of final approval of the Agreement.

17. By **no later than November 17, 2014**, Putative Class Counsel and any other attorney seeking fees and costs for representing any individual Putative Class Member(s) shall file an application for attorney’s fees and reimbursement of costs and expenses, as contemplated in the Agreement. Copies of all papers shall also be served upon all persons or their counsel who file a valid and timely objection (as described below).

18. Any Putative Class Member may appear at the Fairness Hearing, in person or by counsel, and be heard to the extent allowed by the Presiding Judges in support of or in opposition to class certification, the fairness, reasonableness, and adequacy of the settlement set forth in the Agreement, and any applications for an award of attorney’s fees, costs, and expenses. Unless such requirement is excused by the Court, no person shall be heard in opposition to the settlement, or the application for an award of attorney’s fees, costs, and expenses, unless, **on or before December 1, 2014**, such person files with the Clerk of the Court a notice of an intention to

appear and provides a written statement that indicates all bases for objection; all documentation in support of the objection; legal authority, if any, supporting the objection; and a list of any witnesses the person may call for live testimony. Copies of such notice, statement, and documentation, together with copies of any other papers or briefs filed with the clerk, must be simultaneously served on the Presiding Judges, Counsel for the Parties and the Mass Litigation Manager. Any Putative Class Member who does not object in the foregoing manner shall be deemed to have waived all objections and shall be foreclosed from making any objections to class certification, any attorney fee and cost award, and the settlement set forth in the Agreement.

19. The Presiding Judges reserve the right to adjourn and/or reschedule the Fairness Hearing without further notice of any kind; therefore, any Putative Class Member intending to attend the Fairness Hearing should (in addition to complying with all instructions and requirements above) confirm the date, time, and location of the Fairness Hearing with Putative Class Counsel.

#### **STAY OF AND INJUNCTION AGAINST LITIGATION**

20. Pending the final determination of whether the Agreement should become Final, all pre-trial proceedings and briefing schedules in the proceedings before the Presiding Judges, including discovery obligations, are stayed, except as specifically provided for in this Order. If the Agreement is not finally approved by the Court, the Agreement does not become Final or the Agreement otherwise terminates, the stay shall be immediately terminated. The Parties shall, as soon thereafter as possible, request a new Scheduling Order from the Court.

21. Pending final determination of whether the Agreement should be finally approved, each of the Putative Class Representatives and each Putative Class Member is hereby

enjoined from commencing or prosecuting, either directly or indirectly, any action in any other court concerning or relating to any of the Released Claims. Such injunction shall remain in force unless the Agreement fails to become Final or until such time as the Parties notify the Court that the Agreement has been terminated. Nothing herein shall prevent any Putative Class Member, or any Person actually or purportedly acting on behalf of any Putative Class Member, from taking any actions to stay and/or dismiss any Released Claim(s). This injunction is necessary to protect and effectuate the Agreement, and the settlement contemplated thereby, this Preliminary Approval Order, and the Presiding Judges' flexibility and authority to effectuate the settlement set forth in the Agreement and to enter Final Judgment, if and when appropriate, and is ordered in aid of this Court's jurisdiction and to protect its judgments.

#### **JURISDICTION TO ENFORCE SETTLEMENT AGREEMENT**

22. If the Agreement is finally approved by the Presiding Judges and becomes Final, the Court shall retain exclusive and continuing jurisdiction over the Parties and the Putative Class Members with respect to matters arising out of or relating to the Agreement, and may issue such orders as necessary to implement the terms of the Agreement. The Presiding Judges may approve the Agreement, with such modifications as may be agreed to by the Parties, without further notice to the Putative Class Members.

#### **EFFECT OF DENIAL OF FINAL APPROVAL OR TERMINATION OF SETTLEMENT AGREEMENT**

23. If the Agreement is not finally approved by the Court, the Agreement does not become final or the Agreement otherwise terminates, the Parties will revert to the position they occupied prior to the execution of the Agreement as provided by the Agreement's terms. In such an event, the Limited Fund Class Complaint and the preliminary certification of the Putative Class

shall be deemed vacated, and the operative complaints shall be returned to the state of the pleadings as of the date of the Agreement. The foregoing is without prejudice to the Parties' rights to move the Presiding Judges for an order, and to oppose any such motion, to file amended pleadings and/or to certify a putative class or classes. Any certification of the Putative Class for settlement purposes shall not be considered as a factor in connection with any subsequent class certification issues. Furthermore, if the Agreement fails to receive Final Approval by the Court, the Agreement does not become final, or the Agreement otherwise terminates, the Parties shall return to the status quo ante in the Litigation, without prejudice to the rights of any of them to assert any right or position that could have been asserted if the Agreement had never been reached or proposed to the Presiding Judges.

24. The Agreement including, without limitation, its attachments, and any and all negotiations, documents and discussions associated with it, shall not be deemed or construed to be an admission or evidence of any violation of any statute, law, rule, regulation or principle of common law or equity; of any liability or wrongdoing by the Parties; or of the truth of any of the claims. Evidence relating to the Agreement shall not be discoverable or used, directly or indirectly, in any way, in any action or proceeding, except for purposes of demonstrating, describing, implementing or enforcing the terms and conditions of the Agreement, this Order and/or any final judgment entered following the Final Fairness Hearing.

25. Notwithstanding any of the forgoing, the Presiding Judges acknowledge that, upon the entry of this Preliminary Approval Order, MSU will pay \$750,000 to Charleston and transfer title to certain building contents and equipment to Charleston that are needed to teach and continue teaching students in Southern West Virginia, and that Charleston is to surrender, *inter*

*alia*, most of the properties covered by the Master Agreement and Leases between MSU and Charleston so that those properties can be used to satisfy the financial terms of the settlement as more particularly set forth in the Agreement. The Presiding Judges further acknowledge that, pursuant to the Agreement, the transactions referenced in this Paragraph will be final and binding and will not be undone or reversed in the event that the Agreement does not receive Final Approval by this Court or the Agreement otherwise fails to become Final for any other reason, as specified in the Agreement itself. Accordingly, the Court orders that MSU and Charleston perform these obligations as set forth more fully in the Agreement and that MSU and Charleston execute the necessary documents, if they have not already done so, to effectuate these transactions contemplated by the Agreement as soon as possible.

#### **INTERVENORS**

26. The Presiding Judges grant the motion for *pro hac vice* admission of Mr. Googasian.

27. The Presiding Judges grant the Motion to Intervene filed by Intervenors Mullis and Martin.

28. The Presiding Judges note the objections made by Mr. Googasian on behalf of Intervenors Mullis and Martin and overrule said objections, without prejudice to their right to raise said objections at the Fairness Hearing.

29. The Presiding Judges note the objections made by Mr. Skinner on behalf of Intervenors Valeri Dillow, *et al.*, and overrule said objections without prejudice to their right to raise said objections at the Fairness Hearing

30. The Presiding Judges grant the Motion to Intervene for the Limited Purpose of Supporting and Obtaining Approval of the Proposed Limited Fund Class Action Settlement filed by Mr. Brock on behalf of Intervenor Charleston.

It is so ORDERED.

ENTER: October 24, 2014

/s/ Alan D. Moats  
Lead Presiding Judge  
Mountain State University Litigation