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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-1-293 KAN

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

Plaintiffs

v.

MOUNTAIN STATE UNIVERSITY, INC.

Defendant.

FINAL APPROVAL ORDER

Pending before the Court in the Mountain State University Litigation is Plaintiffs' Motion for and Memorandum in Support of Final Approval of Class Settlement (the "Motion") (TID 56349231). The Motion, filed pursuant to Rule 23(e) of the West Virginia Rules of Civil Procedure, seeks:

1) final approval ("Final Approval") of the Settlement Agreement and Release, with exhibits dated September 3, 2014, as revised by the First Amendment to Settlement Agreement and Release, dated January 8, 2015 (collectively the "Agreement") between and among the Class (as defined below), by and through the Class Representatives and Class Counsel; 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) 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 Notice provided to the Class; and

4) an injunction against certain litigation.

Upon review and consideration of the Motion, the terms and conditions of the Agreement of the Parties, the substantial evidentiary record presented to the Court in these proceedings, and presentations of counsel at hearings held on October 6, 2014, January 16, 2015, and February 26, 2015, the Court **FINDS** good cause for granting the Motion and, for settlement purposes only, makes 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. The Court has jurisdiction over the subject matter of these proceedings and over all Parties and the members of the Class.

FINDINGS OF FACT

3. MSU offered higher education in Beckley, West Virginia from 1933 until December 31, 2012. MSU also operated a smaller campus in Martinsburg, West Virginia, and various "cohort programs" across the state and surrounding states.

4. On December 31, 2012, the Higher Learning Commission ("HLC"), the body that provided MSU's university-wide accreditation, withdrew MSU's accreditation. MSU's loss of HLC accreditation came on the heels of, and resulted from many of the same circumstances as, MSU's loss of accreditation for its BSN nursing program from the National League for Nursing Accrediting Commission in 2011 and the West Virginia Board of Examiners for Professional Registered Nurses in 2012.

5. The loss of accreditation precluded MSU from teaching existing students and enrolling new students, rendering MSU all but unable to generate income.

6. Upon MSU's loss of accreditation, the HLC required MSU to select an educational institution to serve as a "teach out" partner by offering educational services to certain students then enrolled at MSU. The University of Charleston, Inc.'s Support of the Plaintiffs' Motion for and Memorandum in Support of Final Approval of Class Settlement and Accompanying Affidavit of Dr. Edwin Welch, February 20, 2015 ("Welch Aff."), ¶ 2. To that end, on October 29, 2012, MSU entered into a Master Agreement with Charleston, which, among other things, provided for a teach-out for certain MSU students at Charleston. *Id.* ¶ 3. As a condition of the teach-out, the Master Agreement allowed Charleston to lease certain MSU properties for 25 years, and to acquire certain MSU facilities in Beckley and Martinsburg following the teach-out, among other things. *Id.* ¶ 3, Exhibit 1.

7. Charleston seeks to enforce its rights under the Master Agreement and Leases against MSU. *See generally* Welch Aff.

8. MSU's loss of accreditation, and the subsequent cessation of its educational programs, prompted hundreds of lawsuits against MSU, its Board of Trustees, and

former personnel. More than 300 of these lawsuits were filed by nursing students claiming that the loss of accreditation for MSU's nursing program caused them financial and career-related harms. *See, e.g.*, *Nunley v. Mountain State University, Inc.*, No. 11-C-1744 (W. Va. Cir. Ct.); *Pettry v. Mountain State University, Inc.*, No. 11-C-1746 (W. Va. Cir. Ct). Non-nursing students filed similar claims, including claims for breach of contract and breach of the covenant of good faith and fair dealing, through a putative class action complaint. *See Burger, et al. v. Mountain State University, Inc., et al.*, No. 12-C-1293 (W. Va. Cir. Ct.). Further lawsuits were filed alleging harm caused by various circumstances that contributed to MSU's loss of accreditation and alleged insufficient delivery of services. *See, e.g.*, *Martin v. Mountain State University, Inc., et al.*, No. 5:12-cv-3937 (S.D. W. Va.); *Mullis v. Mountain State University, Inc.*, No. 5:12-cv-3158 (S.D. W. Va.).

9. In addition, certain plaintiffs brought declaratory judgment actions against United Educators, seeking a determination of the coverage limit of MSU's potentially applicable insurance policies. *See, e.g., Brown v. Mountain State University, Inc., et al.*, 13-C-110 (W. Va. Cir. Ct.). The Court ruled that MSU's insurance policy provided for $10 million in insurance coverage for nursing students' claims. *See Ruling on Motions for Summary Judgment Regarding Declaratory Judgment Actions* (TID 54573748) (Nov. 18, 2013); Order (TID 54718844) (Dec. 17, 2014). United Educators appealed that decision to the West Virginia Supreme Court of Appeals, contending that under the plain language of the applicable insurance policy, MSU is entitled to, at most, $150,000 in insurance coverage. *Notice of Appeal filed with WV Supreme Court of Appeals*, 11-C-1746 KAN; 12-C-2384 KAN; 13-C-110 KAN (TID

54858821). That appeal is pending, and was stayed pending resolution of the limited fund settlement effort. *See* Order of Supreme Court of Appeals, No. 14-0099 (June 16, 2014).

10. Some of the lawsuits also asserted claims against Charleston and certain of its trustees.

11. The Court is well familiar with the claims, defenses and evidence in these litigations, having presided over this litigation for many months.

12. Parties to these various litigations conducted substantial discovery and engaged in extensive pretrial efforts. Affidavit Anthony J. Majestro in Support of Class Action Settlement, February 23, 2015 ("Majestro Aff. 2"), ¶ 10. This included review of documents; witness interviews; depositions; and preparation and exchange of discovery requests, among other tasks. *Id.*

13. Among other things, discovery revealed that MSU had limited, finite and dwindling assets available to satisfy plaintiffs' claims, and to cover the expenses of its operations and building maintenance. As of February 1, 2015, MSU reports having remaining approximately $85,000 in liquid assets. MSU Monthly Operating Report dated Feb. 1, 2015. MSU's current budget for operating expenses runs through March 2015. Under that budget, which is attached to the Settlement Agreement, MSU's estimated total operating costs for February and March 2015 are approximately $251,000. MSU will continue to bear those costs until it sells its campuses to West Virginia University and Viking Way Holdings, LLC. Moreover, even after MSU sells its campuses, MSU will continue to incur additional operating costs as it satisfies its other obligations under the Settlement Agreement. Thus, as of February 1, 2015, MSU's total liquid assets exceed its estimated operating costs.

14. The value of the claims for all class members is estimated in excess of $70,000,000. *See* Affidavit of John R. Merinar, Jr., ¶¶ 3-5, Exh. C to Plaintiffs' Motion for and Memorandum in Support of Preliminary Approval of Class Settlement ("Merinar Aff."); *see also* Affidavit Anthony J. Majestro, ¶ 8, Exh. B to Plaintiffs' Motion for and Memorandum in Support of Preliminary Approval of Class Settlement ("Majestro Aff. 1"). This far exceeds MSU's available resources.

15. If cases were to proceed individually against MSU, and if early plaintiffs were successful, MSU's assets would be depleted before other claimants had an opportunity to pursue and seek to collect on their claims. MSU assets available to satisfy plaintiffs' claims could also be limited by MSU's claimed obligations to Charleston, and Charleston's lease interests in certain of the properties being sold to West Virginia University and Viking Way Holdings, LLC. *See* Welch Aff.

16. On October 6, 2014, the Court granted Preliminary Approval to a limited fund settlement class under West Virginia Rule of Civil Procedure 23(b)(1)(B), and to the Agreement, which would provide for a more prompt opportunity for recovery for Class Members than otherwise might be forthcoming.

17. Under the Agreement, a pool of funds is to be established out of which compensation can be made to former MSU students. The pooled funds would include:

- The remaining liquid assets of MSU, as specified by the Claims Administrator and approved by the Court;
- New liquid assets, if any, including without limitation rental income, obtained by MSU;
- 77% of Department of Education funds potentially forthcoming to MSU, if and when paid;

- 85% of the proceeds from the $10 million sale of MSU's real and personal property to West Virginia University and Viking Way Holdings, LLC;

- An insurance contribution from United Educators in the total and final amount of $8.5 million;

- Unless otherwise used to encourage potential buyers of MSU's real and personal property, and subject to donor restrictions, assets of the Mountain State University Building Company; Mountain State University Endowment Fund, Inc.; and Mountain State University Foundation, Inc. which remain with the Building Company, the Endowment, or the Foundation as of December 31, 2015;

- Any gifts or bequests received by MSU prior to the time that the Court determines that MSU has satisfied its obligations under the Agreement.

18. The remaining 15% of the proceeds of the sale of MSU's real estate, and 23% of funds received from the Department of Education, if any, are to be paid to Charleston in exchange for its releasing claims against MSU and relinquishing its rights in the properties being sold.[1]

19. Upon confirmation of the Parties' settlement, the only assets that MSU would retain is a life insurance policy on its former president, Dr. Charles Polk, and a lawsuit that MSU has lodged against the HLC, which is not being funded by MSU assets.

20. MSU's available liquid assets may be increased because, per the Agreement, United Educators has offered a contingent $500,000 to subsidize MSU's operating expenses if and when shown to be needed.

21. The Agreement was reached following extensive negotiations among the Parties, including more than ten days of mediation and numerous additional telephonic and

[1] Following Preliminary Approval, Charleston also received from MSU $750,000 and certain contents and equipment to be used in offering its educational programs. *See* Preliminary Approval Order (TID 56245690); Welch Aff. ¶ 22.

in-person negotiation sessions. *See generally* Chaney Affidavit, February 18, 2015 ("Chaney Aff."); Majestro Aff. 2 ¶¶ 4-9.

22. On January 13, 2015, the Parties filed a First Amendment to Settlement Agreement and Release, which revised the allocation formula for distributing settlement funds to Class Members. This revision followed further negotiation among the Parties and their counsel. Majestro Aff. 2 ¶¶ 3-7.

23. Following Preliminary Approval, Class Counsel provided notice of the settlement and the Final Fairness Hearing, originally scheduled for January 16, 2015, in accordance with the Notice Plan this Court approved. Affidavit of John Jenkins CPA, ¶ 5 (Feb. 23, 2015) (TID 56815169) ("Jenkins Aff.").

24. On January 16, 2015, this Court held a hearing, and (1) ordered additional notice consistent with the Notice Plan to be sent to Class Members regarding the First Amendment to Settlement Agreement and Release, (2) approved the sale of MSU's real estate to West Virginia University and Viking Way Holdings, LLC, and (3) set the Final Fairness Hearing in this matter for February 26, 2015.

25. Additional notice consistent with the Notice Plan, and which accounted for the changes in the allocation methodology set forth in the amended Agreement, was sent to the Class on January 14, 2015. Jenkins Aff. ¶ 7.

26. On February 26, 2015, this Court held a Final Fairness Hearing.

CERTIFICATION OF THE SETTLEMENT CLASS

27. The Court hereby **CERTIFIES** a class pursuant to Rule 23(a) and Rule 23(b)(1)(B) of the West Virginia Rules of Civil Procedure (the "Class"). The 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.

28. Pursuant to W. Va. R. Civ. P. 23(c)(4)(b), the Court hereby **CERTIFIES** for purposes 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").

29. The Court **FINDS**, for the limited purpose of the settlement contemplated by the Agreement, that the 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).

Rule 23(a)

30. There are more than 18,000 students estimated to be members of the Class, some number of them residing outside the State of West Virginia. Merinar Aff. ¶ 3. The Court

FINDS that the class is sufficiently numerous, and that joinder would be sufficiently impracticable, to satisfy W. Va. R. Civ. P. 23(a)(1).

31. Rule 23(a)(2) requires that "there are questions of law or fact common to the class." W. Va. R. Civ. P. 23(a)(2). Commonality is generally satisfied by a common nucleus of operative facts or law. *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 67 (W. Va. 2003); *accord Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997) (Rule 23(a)'s commonality requirement, which has a lower threshold than the "more demanding" predominance requirement of Rule 23(b)(3), "may be satisfied by" the shared experience that all members of the class had been exposed to asbestos products). Commonality "requires only that resolution of the common questions affect all or a substantial number of the class members." *In re W. Va. Rezulin Litig.*, 585 S.E.2d at 67 (quoting *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986)); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (answer to the common question presented must help to "drive the resolution" of the litigation).

32. The Court **FINDS** that the claims here satisfy the commonality requirement. Common questions of fact and law exist on the issue of whether MSU is liable to its former students for the effect of its loss of accreditation and subsequent closure, and for alleged failures to deliver services. Common evidentiary showings, arising from a common nucleus of operative facts, will have to be made to establish MSU's liability to former students and to establish MSU's defenses, including, for instance, what alleged failures occurred, and what representations MSU made to its students before and after its loss of accreditation with respect to the education that was promised and the accreditation status of the University. *See, e.g., In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158, 174 (E.D. Pa. 1997) ("whether

[defendant's] bone screws are defective products, under any product liability theory alleged" was a "common question" establishing commonality under Rule 23(a)(2)).

33. In addition, "[s]ettlement is relevant to a class certification," *Amchem Prods.*, 521 U.S. at 619, and all class members here share a common interest in the determination of whether the proposed limited fund settlement is fair, reasonable, and adequate. *Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. at 174 (the common inquiry as to whether a settlement is fair "is particularly appropriate in a 23(b)(1)([B]) limited fund situation where equity guides the court's decision"); *accord In re Rio Hair Naturalizer Prods. Liab. Litig.*, No. MDL 1055, 1996 WL 780512, at *9 (E.D. Mich. Dec. 20, 1996) (in limited fund settlement, "the Settling Defendants[']financial limitations and the Plaintiffs' common interest in obtaining the maximum amount available for claimants give rise to a further common interest [because] [e]conomic unity of interest among claimants satisfies Rule 23's commonality criteria for settlement purposes"). Rule 23(a)(2) is satisfied.

34. Rule 23(a)(3) requires that the class representatives' claims or defenses be "typical of the claims or defenses of the class." W. Va. R. Civ. P. 23(a)(3). "A representative party's claim or defense 'is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.'" *In re W. Va. Rezulin Litig.*, 585 S.E.2d at 68 (quoting 1 *Newberg on Class Actions*, 4th ed., § 3:13 at 328). The class representatives' claims need not be identical to the other class members' claims. *Id*. Where the class representatives' claims arise out of the "same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment." *Id*.

35. The Court **FINDS** that the claims of each named plaintiff are typical of the claims of the class members she seeks to represent. Each named plaintiff here seeks to hold defendants liable for damages resulting from MSU's loss of relevant accreditations, alleged failure to deliver services, and subsequent program closures. The Court likewise **FINDS** that the legal claims of each member of the relevant Subclass are similar as each member has claims arising from those same liability theories. *See, e.g., Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. at 175 (proposed limited fund settlement class satisfied typicality requirement because the "principal theory of the representative plaintiffs [] that [defendant] marketed an unreasonably dangerous product making them liable to plaintiffs for damages" was typical of the whole class' "products liability-related claims," even though specific causes of action varied).

36. Though there is some individual variation in claims asserted—for instance, as to the fields of study, forms of educational delivery, forms of financial aid available and utilized, and measures of cognizable harm—these differences do not render the named plaintiffs' claims atypical of the other members of the proposed settlement class. *See id*. ("The existence of individual issues such as the extent of each class members' damages do not preclude the typicality requirement from being satisfied."). As such, each named plaintiff has interests that are "sufficiently parallel to ensure a vigorous and full presentation of all potential claims for relief," thus satisfying the typicality requirement of Rule 23(a)(3). *In re W. Va. Rezulin Litig.*, 585 S.E.2d at 68 (internal citations omitted).

37. Rule 23(a)(4)'s adequacy of representation exists when "the representative parties will fairly and adequately protect the interests of the class." W. Va. R. Civ. P. 23(a)(4). This inquiry has two components. First, the court considers "the qualifications of the counsel to

represent the class." *In re W. Va. Rezulin Litig.*, 585 S.E. 2d at 69 (internal citations omitted). Second, the court evaluates the class representatives' adequacy, and "conflicts of interest between named parties and the class they seek to represent." *Id.*

38. The first component focuses on "the representatives' attorneys' resources to investigate class claims and to contact other class members" and "concerns the competence and experience of class counsel." *Id*. (internal citations omitted). The evidence before the Court demonstrates that plaintiffs' counsel have actively litigated this action, have conducted extensive settlement negotiations with defendants, and have fairly and adequately represented the members of the settlement class and subclasses. Plaintiffs' counsel are also experienced in conducting complex litigation and class action litigation, including nationwide class actions. Majestro Aff. 1 ¶ 5.

39. The second component of adequacy analysis focuses on the adequacy of class representatives and whether they have interests "antagonistic" to those of class members. *In re W. Va. Rezulin Litig.*, 585 S.E. 2d at 69. Each of the class representatives has to date adequately represented the interests of their respective Subclasses. Each of the class representatives claims to have been affected by MSU's loss of accreditation, alleged failure to deliver promised services, and subsequent closure. In pursuing litigation against MSU and (in some instances) United Educators, Subclass Representatives participated in mediations, responded to discovery, and provided liability and damage information for use in mediation statements. *See* TID 56812933, TID 56383261. Class representatives thus have a united interest in establishing MSU's liability and achieving a fair and reasonable distribution of MSU's assets to the Class and their respective Subclasses. Any potential or actual conflict between the interests of nursing and

non-nursing students has been neutralized by the appointment of the Subclasses and their separate and vigorous representation.

40. The Court hereby **APPOINTS** and **APPROVES** Jeanette Brown, Destany Pettry, Jamie Wagner, Dale Burger, Amanda Burger and Jeff Burger as the Class Representatives. The Court hereby **APPOINTS** and **APPROVES** 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.

41. The Court hereby **APPOINTS** and **APPROVES** 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 Class ("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.

42. The Court **FINDS** pursuant to Rule 23(a)(4) of the West Virginia Rules of Civil Procedure that, for limited fund class settlement purposes only, the Class and Subclass Representatives and Class and Subclass Counsel have and will fairly and adequately protect the interests of the Class and respective Subclasses.

Rule 23(b)(1)(B)

43. West Virginia Rule of Civil Procedure 23(b)(1)(B) provides as follows:

> [a]n action may be maintained as a class action if the prerequisites of [Rule 23(a)] are satisfied and, in addition: (1) [t]he prosecution of separate actions by or against individual members of the class would create a risk of (B) [a]djudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the

> adjudications or substantially impair or impede their ability to protect their interests.

44. This provision is invoked when pursuing a limited fund class settlement. The basic concept of a limited fund is that there is a limited amount of capital available to pay the claims of class members, and that such amount is insufficient to cover all claims. In the limited fund setting, "equity require[s] absent parties to be represented, joinder being impractical, where individual claims to be satisfied from the one asset would, as a practical matter, prejudice the rights of absent claimants against a fund inadequate to pay them all." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 836 (1999).

45. Three features must be present for a limited fund class to exist. *Ortiz*, 527 U.S. at 838-39. They are:

> (1) the "totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims";
>
> (2) "the whole of the inadequate fund [i]s to be devoted to the overwhelming claims"; and
>
> (3) the "claimants identified by a common theory of recovery [are] treated equitably among themselves."

46. To determine whether a limited fund is set maximally and is still inadequate to satisfy the claims of all claimants, the reviewing court (1) ascertains the aggregate value of the claims in question, *see, e.g.*, *Stott v. Capital Fin. Servs., Inc.*, 277 F.R.D. 316, 328 (N.D. Tex. 2011), (2) identifies the limits of the fund, *see Ortiz*, 527 U.S. at 850-51, and (3) assesses whether the fund is insufficient, *see, e.g.*, *Stott*, 277 F.R.D. at 329.

47. The limited fund here includes all of MSU's liquid assets, save for those needed to operate and to maintain its facilities until MSU satisfies its obligations under the

Settlement Agreement, any income MSU earns or gifts it receives, the vast majority of funds recovered from the Department of Education or as proceeds from the sale of real estate, and an $8.5 million contribution from United Educators.

48. The available assets of the settling defendants are set maximally and establish a limited fund.

49. A defendant may in appropriate limited fund circumstances retain certain assets for good cause—for instance, to satisfy operational business expenses. *See Stott*, 277 F.R.D. at 329, 334 (approving limited fund settlement that did not include all of limited fund defendant's assets because it was the "absolute maximum amount that FINRA ha[d] determined [defendant] c[ould] contribute while maintaining the amount of assets necessary to maintain operations" and "without violating SEC regulations"); *Williams v. Nat'l Sec. Ins. Co.*, 237 F.R.D. 685, 692-93 (M.D. Ala. 2006) (approving limited fund settlement reducing defendant's surplus capital by about 35% where there was concern "over the company's continuing solvency"). MSU is retaining minimal assets to satisfy its operational business expenses, including certain costs of Notice to the Class, only until it is able to dispose of its assets and transfer the proceeds to the limited fund. Further, certain of MSU's expenses will be paid by the $500,000 contingent contribution provided by United Educators.

50. A limited fund may likewise include a risk-discounted portion of a contested insurance policy limit as opposed to full limits, thereby providing potentially swifter recovery to claimants and avoiding the costs, risks, and delays of coverage litigation. *See, e.g.*, *Edgerton v. Dewaay Fin. Network LLC*, Nos. LACV6033, LACV6034, 2013 WL 4404708, at *11 (Iowa Dist. Apr. 15, 2013) (approving limited fund settlement agreement with insurance proceeds

capped by agreement of parties where "[s]ettlement in this amount without the costs and delays of coverage litigation appear[s] to be in the best interests of the class"); *Stott*, 277 F.R.D. at 330 (engaging in "value discounted by risk" analysis to approve a limited fund settlement including the remainder of a $2 million sublimit of defendant's applicable insurance policy—about $1.4 million—even though $5 million aggregate policy limit potentially applied); *In re Rio Hair Naturalizer*, 1996 WL 780512, at *9 n.11 (noting insurance proceeds included in limited fund settlement were $1.5 million less than limit of policies, and finding this outcome warranted "in order to prevent further depletion of the available insurance proceeds through individual settlements and the risk of the insurance carrier's success in a declaratory relief action to disclaim coverage thereby leaving no insurance proceeds at all for distribution to injured claimants").

51. The Court **FINDS** that the $8.5 million insurance contribution from United Educators is set maximally, and is appropriate here. This amount represents 85% of the $10 million insurance policy said to be in play (potentially 90% when United Educators' contingent contribution of $500,000 is considered). The offset accounts, among other considerations, for the risk that United Educators could prevail on a pending appeal in which it argued that MSU's available insurance coverage of plaintiffs' claims is zero, or at most, $150,000. If United Educators were to prevail, the fund available to satisfy plaintiffs' claims would be substantially diminished. An $8.5 million contribution is warranted to avoid the risks, costs, and delays of coverage litigation and as such, is in the best interests of the class.

52. A limited fund need not include the personal assets of individual defendants released through a class settlement. *See, e.g.*, *Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. at 181 (approving release of claims against treating physicians—notwithstanding that their

assets were not part of the limited fund—because claims against them had "the same underlying factual predicate as the products liability claims of the settlement class"). The Court **FINDS**, in the circumstances of this proceeding, that it is proper for the Agreement to release former MSU trustees and other personnel.

53. The second *Ortiz* factor is likewise satisfied here, as evidence indicates that the entire fund, with modest recognized exceptions, will be used to pay claimants. *See, e.g.*, *Stott*, 277 F.R.D. at 327 ("Regarding the second *Ortiz* factor, it is clear that the whole of the settlement fund [less costs and attorneys' fees] will be devoted to paying claimants."); *In re Rio Hair Naturalizer*, 1996 WL 780512, at **18-20, *22 (attorneys' fees and costs, fees for experts, costs and expenses of administering the settlement fund paid out of limited fund).

54. As set forth in the Agreement, the vast majority of the fund will be used to satisfy class members' claims. The small percentage of the fund that will serve to satisfy Charleston's claims against MSU is offered in exchange for Charleston's relinquishing of its claimed contractual rights, and rights to considerable real estate, enabling these otherwise unavailable assets to enter the limited fund, and further allowing these assets to be sold collectively. *See generally* Welch Aff., and *id.* ¶ 7. Thus, rather than decrease the funds available to satisfy class members' claims, Charleston's involvement in the overall resolution substantially increases the recovery for eligible class members. The remainder of the fund in its entirety, save for certain funds allocated if and as appropriate for claims administration, notice, attorneys' fees, and ancillary costs, will be devoted to satisfying the claims of eligible members of the Class.

55. The third *Ortiz* factor requires a showing that claimants will be treated in a fair and equitable manner. *See, e.g., In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 193-94 (5th Cir. 2010) (vacating limited fund class certification where class members "suffered a wide variety of injuries . . . and no method [wa]s specified for how these different claimants will be treated vis-à-vis each other"); *Ortiz*, 527 U.S. at 855-56 ("at the least such a settlement must seek equity by providing for procedures to resolve the difficult issues of treating such differently situated claimants with fairness as among themselves"). "In approving an allocation plan, the Court must ensure that the distribution of funds is fair and reasonable." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004). "When formulated by competent and experienced class counsel, an allocation plan need have only a 'reasonable, rational basis.'" *Id.* (quoting *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001)). "A reasonable plan may consider the relative strength and values of different categories of claims." *In re Global Crossing*, 225 F.R.D. at 462 (citing *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 2002 WL 31663577 (S.D.N.Y. Nov. 26, 2002)).

56. The Court **FINDS** that the distribution model set forth in the Agreement as modified by the First Amendment is fair to all members of the Class and each Subclass. In particular, the Court **FINDS** that the settlement subfund distribution allocation formula was arrived at as part of a lengthy, sometimes contentious, arms' length negotiation between counsel for the two subclasses—negotiations that were overseen and guided by the Resolution Judges and a private mediator. *See, e.g.*, Majestro Aff. 2 ¶ 8. It is undisputed that experienced Class Counsel analyzed the likelihood of success of the claims of the two subclasses and the strength of MSU's defenses to the claims of the two subclasses on issues of both liability and damages, as well as the

availability of insurance coverage. This valuation analysis necessarily involved some exercise of judgment by all Class Counsel.

57. The Court agrees with Class Counsel that the differences in the manner different class members are treated are based on evaluations of liability, damages, and availability of insurance coverage. In addition, the Court is persuaded that because the limited fund available to compensate the Class will bear some of the administration expenses in this case, proper consideration was also given to creation of a distribution model that balanced fairness with efficient administrative application. The Court **FINDS** that the factors used in the distribution model appropriately balance fairness among similar and different claims with administrative workability.

58. Therefore, the Court **FINDS** and **CONCLUDES** that the allocation formula is fair and reasonable and the objections to the model are overruled.

APPROVAL OF THE AGREEMENT

59. A proposed class settlement is entitled to an initial presumption of fairness when "sufficiency of discovery ha[s] been provided and the parties have bargained at arms-length." *Bibb v. Monsanto*, No. 04-C-465, 2013 WL 358886, at *136 (W. Va. Cir. Ct. 2013) (quotes and citations omitted). As discussed throughout this Order, the settlement negotiations were undertaken at arms' length by experienced counsel after substantial discovery, *see, e.g.*, Chaney Aff., and the settlement is entitled to an initial presumption of fairness.

60. "[A]pproval of a class action settlement is committed to the sound discretion of the [trial] courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in light of the relevant circumstances." *In re MicroStrategy, Inc. Sec.*

Litig., 148 F. Supp. 2d 654, 663 (E.D. Va. 2001). The Supreme Court of Appeals of West Virginia has recognized that in deciding whether to finally approve a class settlement, a trial court must determine whether the settlement is "fair, reasonable, and adequate." *Bd. of Educ. of Monongalia Cnty. v. Starcher*, 343 S.E.2d 673, 677 (W. Va. 1986).

61. To guide the trial court's review, multiple factors are considered. *See Newberg on Class Actions* § 13:39. Though courts articulate and organize these factors variously, at least one West Virginia court has applied the factors utilized in the federal Fourth Circuit. *Bibb*, 2013 WL 358886, at *133. No one of these factors is controlling; the below "ten factors, collectively, should be used to determine if the proposed settlements are fair, adequate, and reasonable, without attributing whether a specific factor falls under one of these three categories." *Id.*

(1) The posture of the case at the time settlement was proposed;

(2) The extent of discovery that had been conducted;

(3) The circumstances surrounding the negotiations;

(4) The experience of counsel in the area of class action litigation;

(5) The relative strength of the Plaintiff's case on the merits;

(6) The existence of any difficulties of proof or strong defenses the Plaintiffs are likely to encounter if the case goes to trial;

(7) The anticipated duration and expense of additional litigation;

(8) The solvency of the Defendants and the likelihood of recovery on a litigated judgment;

(9) The degree of opposition to the settlement; and

(10) Other factors which are unique to this action.

Bibb, 2013 WL 358886, at **134-35.

62. The first two factors assess the "stage of the current litigation" and the amount and quality of discovery that had been completed when the parties began discussing settlement. *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 243 (S.D. W. Va. 2005). The discovery taken should be sufficient "to give counsel an informed view of the strengths and weaknesses of the plaintiffs' case." *Id.* at 244. There is no minimum or definitive amount of discovery that must be undertaken. *Id.*

63. Prior to and continuing throughout the year-long negotiation of this settlement, this matter was actively litigated for more than three years. Substantial factual investigation and discovery was completed, including discovery on liability issues, damages issues, insurance coverage and MSU's assets. Prior to entering into the Agreement, plaintiffs' counsel and counsel for certain other settling parties engaged in extensive review of documents, witness interviews, depositions, and preparation and exchange of discovery requests. At the time the cases were consolidated before this Court, various of the individual cases were nearing trial. *See, e.g.*, *Kay Co. v. Equitable Prod. Co.*, No. 2:06-CV-00612, 2010 WL 1734869, at *7 (S.D. W. Va. Apr. 28, 2010) (favorably noting that during litigation, including "months of intensive settlement negotiations, Class Counsel . . . have been able to determine the nature and strength of the Class Members' claims and to make reasonable damages calculations."). The Court **FINDS** that these facts weigh heavily in favor of final approval.

64. The Agreement is the product of hard-fought, arms' length negotiation. *See, e.g.*, Chaney Aff., Majestro Aff. 2. These negotiations led to concessions made by all

involved, *id.*, which supports the arms' length nature of the settlement. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991) (affirming lower court finding that "any inference of collusion was offset by other factors, including the plaintiffs' informal discovery, substantial concessions made by both sides, and the parties' common interest in preventing [defendant's] bankruptcy"); *see also Bibb*, 2013 WL 358886, at *162. Moreover, the settlement negotiations in this case occurred under the auspices of respected mediators (including three sitting circuit judges) and as the result of court-ordered settlement negotiations. The Court **FINDS** that this factor supports final approval.

65. The fourth factor, experience of counsel in the area of class action litigation, focuses on whether settlement negotiations were "conducted by counsel with the 'experience and ability . . . necessary to effective representation of the class's interests.'" *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d at 665 (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982)).

66. Here, the Parties have been effectively represented throughout this process by seasoned litigators who have substantial experience litigating similar types of claims. *See* Majestro Affidavit 1 at ¶ 5; *see also Bibb*, 2013 WL 358886, at *162 (finding fact that "Class Counsel has great experience in handling class actions and complex litigation . . . weighs in favor of finding that the settlements are fair, adequate, and reasonable"). Class Counsel recommend this limited fund settlement without reservation as being in the best interest of class members. "Significant weight should be given to the judgment of experienced counsel that the settlement and any proposed plan of allocation is in the best interest of the class." *Bibb*, 2013 WL 358886, at *136; *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d at 665 (noting that in light of competent

and experienced counsel, "it is appropriate for the court to give significant weight to the judgment of class counsel that the proposed settlement is in the interest of their clients and the class as a whole") (internal quotes omitted). The Court **FINDS** that this factor counsels in favor of final approval.

67. In assessing the relative strength of the plaintiffs' cases on the merits, this Court must balance "the likelihood of success if 'the case were taken to trial against the benefits of immediate settlement.'" *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 89 (D.N.J. 2001) (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 319 (3d Cir. 1998)). While Class Counsel believe in the merits of their clients' claims, and that they would prevail at trial, they recognize that litigation like this comes with inherent risk, and that "[a] trial necessarily involves the risk that Plaintiffs and the Class would obtain little or no recovery." *In re Serzone*, 231 F.R.D. at 245; *Kay Co.*, 2010 WL 1734869, at *7 ("Although Plaintiff Class Representatives believe they have strong claims against [defendant], there is obviously no certainty that they will prevail if the settlement is not approved and the litigation continues."). That risk is particularly potent here given MSU's insufficient and eroding funds. The Court **FINDS** this factor weighs in favor of approving the settlement.

68. Similarly, the existence of "substantial defenses that create uncertainties about liabilities and damages" militates in favor of approving the settlement. *In re Serzone*, 231 F.R.D. at 245.

69. The Court **FINDS** that the seventh factor, which evaluates the likelihood of additional litigation and the duration and costs associated with that litigation, also strongly favors final approval. Trials on the merits of the underlying cases would entail considerable time

and expense, including expert testimony, pre-trial motions and thousands of additional hours of attorney time when one aggregates the hundreds of separate lawsuits in play. Even after trials conclude, lengthy appeals can be expected. *See In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d at 667.

70. Through class settlement, Class Members avoid these significant expenses and delays and ensure expeditious recovery to eligible claimants. By settling, Class Members also avoid the risk that continued insurance coverage litigation would result in a holding allocating substantially less than $8.5 million in insurance proceeds, or that Charleston's contractual and leasehold rights would greatly limit any recovery available to Class Members.

71. The Court **FINDS** that the eighth factor militates strongly in favor of final approval. *See Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. at 186 (finding it "inherent" in holding a limited fund exists that defendant would not be able to satisfy a greater aggregation of judgments than the proposed settlement amount, which "weighs heavily in favor" of final approval). MSU's dire financial circumstances are what originally inspired the settlement now before this Court. Those circumstances render the settlement the most feasible and fair vehicle of recovery for Class Members and for Charleston. The settlement avoids the possibility that, if cases proceed individually against MSU, and if early plaintiffs are successful in their cases, MSU's assets will be depleted before all claimants have an opportunity to pursue and collect on their claims.

72. Ninth, "[t]he attitude of the members of the class, as expressed directly or by failure to object, after notice, to the settlement, is a proper consideration for the trial court." *In re Serzone*, 231 F.R.D. at 245 (quoting *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir.

1976)). The Court **FINDS** that class members overwhelmingly favor this settlement, which counsels in favor of Final Approval.

73. Class members received ample notice of this settlement and its terms. Individual notice by mail was sent to 19,679 known Class Members on November 6, 2014. Jenkins Aff. ¶ 5. Simultaneously, an informational and interactive website was established at www.MSUsettlement.com to serve as a key distribution channel of information regarding the limited fund settlement. *Id.* ¶ 10. On November 7, 2014, a call center was established, allowing claimants to call and ask questions and/or request a Long Form Class Notice or Claim Form. *Id.* ¶ 11. On January 13, 2015, additional Notice was sent to all known Class Members to inform them of a revision to the allocation formula. *Id.* ¶ 7. As of February 20, 2015, the call center has received calls from 1,082 Class Members, and 1,071 Claim Forms have been returned to the Claims Administrator. *Id.* ¶¶ 11, 13

74. Six Class Members have filed declarations in strong support of the settlement. *See* TID 56812933, TID 56383261. Only four Class Members now object to the settlement. This relatively small percentage of objectors suggests a decisively positive response to the Agreement and weighs in favor of approving this class settlement. *See, e.g.*, *Bibb*, 2013 WL 358886, at *170.

75. Of the "other factors unique to this action," one appears particularly relevant to the instant class settlement: the public interest. *Bibb*, 2013 WL 358886, at *170. This factor, which evaluates whether "it is in everyone's interest, including the public's, that this matter be resolved," weighs powerfully in favor of final approval. *Id.* at *171. It is squarely in the public interest for former MSU students to cease needing to litigate, and instead to receive

compensation and move on with their lives. It is likewise in the public interest for MSU to wind down its affairs in a way that delivers fair outcomes to all concerned—including, with the sale of its Beckley campus to West Virginia University, continuation of higher education in Beckley.

76. Having reviewed the Limited Fund Class Complaint and the Agreement, and being familiar with the underlying proceedings, the Court hereby **APPROVES** the Agreement, including its Releases, and the settlement contemplated thereby, as being fair, reasonable, and adequate as to all members of the Class within the meaning of Rule 23 of the West Virginia Rules of Civil Procedure.

NOTICE TO THE PUTATIVE CLASS AND ADMINISTRATION OF THE SETTLEMENT

77. On October 6, 2014, this Court directed Class Counsel to implement the plan they proposed for notifying Putative Class Members of this then-proposed settlement ("Notice Plan"). On November 6, 2014, 19,591 postcard notices were mailed to Putative Class members and an additional 88 notices were mailed on November 7, 2014. A website (www.msusettlement.com) was launched on November 6, 2014 for purposes of this limited fund class settlement and included general information about the settlement and contact information for the Claims Administrator, contact information for Class and Subclass Counsel, the date and time of the fairness hearing, a link to the Claim Form with filing instructions, a link to the Long Form Class Notice, and a link to the Settlement Agreement. *See* Jenkins Aff. ¶ 10. Then, on January 13, 2015, additional Notice consistent with the Notice Plan and accounting for the changes in the allocation methodology reflected in the First Amendment to Settlement Agreement and Release was sent to Putative Class Members. *See id.* ¶ 7.

78. This Court hereby **FINDS** and **CONCLUDES** that the Notice was disseminated to members of the Settlement Class in accordance with the terms of the Notice Plan, and was in compliance with this Court's Preliminary Approval Order. The Court further **FINDS** and **CONCLUDES** that the Notice fully satisfies Rule 23 of the West Virginia Rules of Civil Procedure and the requirements of due process, was the best notice practicable under the circumstances to members of the Settlement Class, provided individual notice to those members of the Settlement Class who could be identified through reasonable effort, and supports the Court's exercise of jurisdiction over the Settlement Class as contemplated in the Settlement and this Order.

OBJECTIONS

79. The Court has received, reviewed and considered the oral and written objections by class members to the settlement. The Court **FINDS** that they are each without merit and are each therefore **OVERRULED**. In addition, an objection to the settlement was filed by a non-class member pertaining to the MSU Endowment Fund. The Court **FINDS** such matter is not properly before this Court and therefore **OVERRULES** the same.

80. Four of the five written objections filed are premised on a challenge to the allocation formula for distributing settlement funds. As articulated elsewhere in this Order, the Court **CONCLUDES** that the allocation formula is fair and equitable, and was negotiated at arms' length. *See Bibb*, 2013 WL 358886, at *136 ("Objections based on class members' preference or class members' preferred terms have no relevance to whether a settlement is fair, reasonable, or adequate.").

81. Two of the five objectors, Julio Medina and Hanah Atassi, additionally challenge the timeliness of Notice. Because these objectors received Notice months earlier than

their objections indicate, and in accordance with this Court's Preliminary Approval Order, the Court **OVERRULES** these objections. Jenkins Aff. ¶ 14.

82. On February 26, 2015, objector Julio Medina filed an additional objection to the valuation and sale of MSU's Martinsburg, West Virginia property and Beckley, West Virginia campus (TID 56835370). The Court granted MSU's motion to approve the proposed sale of MSU's Martinsburg, West Virginia property and MSU's Beckley, West Virginia Campus on January 16, 2015. *Order Memorializing Rulings During January 16, 2015 Hearing* (TID 56656128). Having reviewed and considered the additional objection of Julio Medina, the Court **FINDS** the objection is without merit and is **OVERRULED**.

83. All other objections which were not timely filed are expressly **OVERRULED.**

INJUNCTION AGAINST LITIGATION

84. The Court **ORDERS** that each of the Class Representatives and each 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 Class Member, or any Person actually or purportedly acting on behalf of any 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 Order, and the Court's 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

85. If the Agreement becomes Final, the Court shall retain exclusive and continuing jurisdiction over the Parties and the 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 Court may approve the Agreement, with such modifications as may be agreed to by the Parties, without further notice to Class Members.

EFFECT OF DENIAL OF FINAL APPROVAL OR TERMINATION OF SETTLEMENT AGREEMENT

86. If 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 certification of the Class shall be deemed vacated, including this Order and all related findings of fact and conclusions of law, 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 Court 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 Class for settlement purposes shall not be considered a factor entitled to any weight in connection with any subsequent class certification issues. Furthermore, if the Agreement fails to 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 Court.

87. 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 in this matter.

ENTER: March 9, 2015

Alan D. Moats
Lead Presiding Judge
Mountain State University Litigation