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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

VELMA WALKER, et al.,

Respondents,

v.

HUNTER DONALDSON, LLC, et al.,

Appellants.

On Appeal From Pierce County Superior Court
No. 13-2-08746-0

REPLY BRIEF OF APPELLANTS RALPH WADSWORTH AND
REBECCA ROHLKE

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A. The Trial Court Erred When It Considered Respondents' Motions Without Requiring That They Comply with CR 26(i).

1. This Panel Should Follow Division Two's Decisions in Rudolph, Case, and Clarke.

Respondents argue that the Court should reinterpret CR 26(i) in order to conform to a few (selectively chosen) generalities about Washington law and procedure. But this Court already employed well-established canons of statutory construction when it interpreted CR 26(i) more than a decade ago. In *Rudolph v. Empirical Res. Sys., Inc.*, the Court construed the plain meaning of CR 26(i)'s text¹:

We interpret court rules by reference to rules of statutory construction. In drafting CR 26(i), our Supreme Court selected the words "will not" and "shall." These words are mandatory, as opposed to "may" which is permissive.

...

This argument [that a letter may serve as a CR 26(i) conference] is meritless as it is contrary to the *plain language* of the rule requiring a conference in person or by telephone. The trial court lacked authority to entertain a motion to compel that did not contain a certification that the parties had complied with the conference requirements of CR 26(i).

¹ CR 26(i) provides, in relevant part:

(i) Motions; Conference of Counsel Required. The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone.... Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.

107 Wn. App. 861, 866–67, 28 P.3d 813 (2001) (citations omitted) (emphasis added). A year later, in *Case v. Dundom*, the Court considered the rule again, this time emphasizing its intended purpose and policy:

Rudolph ... demonstrates the strict interpretive approach to the rule. CR 26(i) is designed to facilitate non-judicial solutions to discovery problems by requiring a conference before a court order. The “in person or by telephone” requirement illustrates the policy of contemporaneous, two-way communications.

115 Wn. App. 199, 203–04, 58 P.3d 919 (2002); *see also Clarke v. State Attorney General’s Office*, 133 Wn. App. 767, 138 P.3d 144 (2006).²

Here, Respondents ask the Court to abandon this precedent and hold that the terms “will not” and “shall”, as used in CR 26(i), do not plainly mean *will not* or *shall*. The Court should reject this argument. This Court has held repeatedly that once it has established clear precedent interpreting particular statutory text, it will not overrule that precedent as long as the language remains unchanged. *See, e.g., In re Wheeler*, 188 Wn. App. 613, 621, 354 P.3d 950, 953 (2015) (“[W]here statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language.”) (internal quotations omitted). CR 26(i)’s language has not changed since *Rudolph* and *Case* were issued, and this Division’s interpretations of CR

² Division Three also requires that an in-person or telephonic conference occur before the trial court can hear a motion under CR 37. *Thongchoom v. Graco Children’s Products, Inc.*, 117 Wn. App. 299, 308, 71 P.3d 214 (2003).

26(i) in those cases remain the law. The Court should apply it here.³

As support for their argument, Respondents rely on *Amy v. Kmart of Washington LLC*, 153 Wn. App. 846, 855–56, 223 P.3d 1247 (2009). But contrary to Respondents’ arguments, *Rudolph*, *Case*, and *Clarke* are far better-reasoned opinions, in addition to being the guiding law in this Division. *Amy* is premised almost entirely on a fundamental error of law: the equation of a court’s *subject-matter jurisdiction* with its *authority* to hear a motion and enter an order. The panel that decided *Amy* said that it viewed the “threshold question” before it as being “whether CR 26(i) implicates the trial court’s ‘authority,’” which it “read to mean its *subject matter jurisdiction*.” 153 Wn. App. at 853 (emphasis added). That “reading” was incorrect. As the Washington Supreme Court has observed, “[t]he term ‘subject matter jurisdiction’ often is confused with a court’s ‘authority’ to rule in a particular manner,” and “[t]his has led to improvident and inconsistent use of the term.” *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (internal quotations omitted). One such use occurred in *Amy*.

³ Principles of *stare decisis* also dictate that the Court should not abandon its own precedent unless it finds that the former precedent is “demonstrably incorrect or harmful.” See *State v. Zimmerman*, 130 Wn. App. 170, 175, 121 P.3d 1216 (2005) remanded for reconsideration on other grounds, 157 Wn.2d 1012, 138 P.3d 113 (2006) (citing *Int’l Ass’n of Fire Fighters, Loc. 46 v. City of Everett*, 146 Wn.2d 29, 37 n.9, 42 P.3d 1265 (2002)). Respondents have made no such showing here. Instead, they advocate the same arguments this Court has repeatedly rejected.

In *Marley*, the Court explained that subject-matter jurisdiction refers to a court's "authority to adjudicate [a] *type of controversy*," and that "[a] court or agency does not lack subject matter jurisdiction solely because it may lack authority to enter a given order." *Id.* at 539 (emphasis in original). The court in *Amy*, however, determined that a trial court has discretion to waive a CR 26(i) discovery conference, largely on the grounds that CR 26(i) "does not implicate subject matter jurisdiction." *Amy* at 854–58. But, as *Marley* makes clear, a court may have subject-matter jurisdiction over a type of controversy (like a discovery dispute) but still lack authority to enter a particular order (like compelling production without following the proper procedure).

Amy also relied to a great extent, as do Respondents in this case, on Judge Morgan's dissent in *Case. Amy*, at 857; Brief of Respondents at 48–49. But Respondents provide no persuasive reason to depart from this Division's precedent in favor of a single judge's dissenting opinion in one of the very cases that established this precedent. Nor does Judge Morgan's dissent withstand scrutiny.

Judge Morgan looked to federal precedent interpreting Fed. R. Civ. P. 37(a)—upon which he contended CR 26(i) was indirectly based—and stated that most federal courts construed its language to be permissive. *Case*, 115 Wn. App. at 204-05. But, of the four cases Judge Morgan cited

as examples, two held the requirements to be mandatory. *See Ross v. Citifinancial, Inc.*, 203 F.R.D. 239, 240 (S.D. Miss. 2001) (“[T]he attachment of a Good Faith Certificate, in proper form, is a mandatory prerequisite to the Court's consideration of a motion to compel.”); *Burton v. R.J. Reynolds Tobacco Co.*, 203 F.R.D. 624, 626–27 (D. Kan. 2001) (“[T]he requirement that counsel confer about discovery disputes before filing ... motions [to compel] is mandatory under [Rule] 37(a)(2)(A)...”).⁴

The facts presented in *Amy* also were materially different than those presented here. In *Amy* it was undisputed that the parties had conferred telephonically as required by the rule. 153 Wn. App. at 859 n.35. The sole issue was whether the actual language contained in *Amy*'s CR 26(i) certification was satisfactory, despite not specifically stating that the parties had conferred in person or by telephone, or that she had conferred about the motion as opposed to the “underlying discovery dispute.” *Id.*, at 860–61. *Amy* thus does not stand for the proposition that there is no contemporaneous meet-and-confer requirement. A recent Division One case confirms this:

CR 26(i) requires counsel to meet and confer in an effort to

⁴ Finally, Judge Morgan offered a hypothetical, which Respondents repeat in their brief, supposedly showing that a dishonest litigant could evade discovery by refusing to meet with opposing counsel, making it impossible for opposing counsel to truthfully certify that there had been a meet-and-confer. But the factual predicate for that hypothetical is not implicated here, and the hypothetical was specifically rejected by the majority in *Case* when Judge Morgan first offered it. 115 Wn. App. 203.

resolve discovery disputes before submitting them to the court. The attorneys must meet and confer either in person or by telephone.

Dalsing v. Pierce Cty., 190 Wn. App. 251, 259 n.3, 357 P.3d 80 (2015), (citing *Rudolph*, 107 Wn. App. at 866-67).⁵

Adopting Respondents' position would undermine the primary goals the Supreme Court sought to further in adopting CR 26(i). It would impose on trial courts the burden of deciding not only the discovery issues presented in an underlying motion to compel, but also the inevitable flood of disputes over parties' "substantial" compliance with CR 26(i) itself. This is exactly what the drafters of CR 26(i) sought to avoid by making the conference requirement mandatory.

2. Respondents Did Not Meet and Confer With Appellants Before Filing Their Second Motion to Compel.

On Friday, April 25, 2014, Appellants mailed their discovery responses and objections to Respondents, bringing them into compliance with the trial court's March 28, 2014 order. CP 333-51; 353-370. On May 15, Respondents filed their Second Motion to Compel, which contained the following CR 26(i) certification:

Plaintiffs' attorney Darrell Cochran certifies that he

⁵ As in *Amy*, the *Dalsing* court also found that it had jurisdiction to hear the dispute where the record was clear that the parties had participated in teleconferences on successive days to discuss the parties' positions with respect to the specific discovery issue and the underlying basis for the movant's motion. *See id.*, n.5. No such conferences occurred in this action.

discussed these issues **by email** with the Hunter Donaldson Defendants' attorney Stephen Perisho on May 13, 2014.

CP 287 (emphasis supplied).⁶ The record demonstrates that this May 13 letter was the first time Respondents had raised the issue of filing another motion to compel or had sought to meet and confer after receiving Appellants' discovery responses and objections two weeks earlier. After Appellants opposed Respondents' second motion on the grounds that there had been no CR 26(i) conference, Respondents did not point to any call or in-person meeting between counsel. Instead, they again pointed to counsel's May 13 email, arguing that it satisfied their obligation. CP 394.

The law is clear, however, that an email does not satisfy CR 26(i)'s requirements. *Case*, 115 Wn. App. 204; *Thongchoom*, 117 Wn. App. at 308. Respondents acknowledge this. *E.g.*, Brief of Respondents at 43.

Now, in an effort to avoid this fatal problem, Respondents attempt to characterize a May 2, 2014 phone call as having been a CR 26(i) discovery conference. The record confirms it was not.

Respondents' counsel's declarations contain no details regarding

⁶ The May 13 email (CP 372) stated:

Kevin and Stephen:
I'm taking mortar rounds from my own troops for not pushing harder to get discovery from your folks. I would love to hear from you that it is coming today or tomorrow so we can avoid the motion practice I can stave off for only so long.
Let me know.
Darrell

the May 2 call. *See* CP 296; 394. Appellants' counsel stated that the May 2 call concerned only Respondents' desire to receive certain documents from Hunter Donaldson, and that the requested documents were produced later that same day. CP 381; 494-95. As Appellants' counsel further testified, at no point during that call (or otherwise), "did the parties have a conference to discuss any specific objection, or even the objections in general," before Respondents filed their Second Motion to Compel. *Id.*

This Court's opinion in *Clarke* is instructive. There, the parties had conferred telephonically regarding a single issue, after which the respondent made the requested material available for review. The movant never reviewed it, and instead filed a motion to compel seeking both the materials proffered and to compel a deposition. The court held that the trial court lacked authority to entertain the motion because the movant had not complied with CR 26(i). Specifically, the movant had not sought to confer again after the information was made available to determine whether additional issues remained, and it was not clear from the record "when, if ever, the parties discussed or resolved" the deposition issue. *Id.* at 150-51.

Here, similarly, the record demonstrates that the May 2 call was not a discovery conference. The Parties did not discuss any of the issues raised by Appellants' responses and objections to Respondents' discovery

requests. CP 494-95. It cannot have satisfied Respondents' obligations under CR 26(i).

3. Appellants Did Not "Fail to Confer in Good Faith".

Respondents argue that Appellants failed to meet and confer in good faith. Brief of Respondents at 44. But this is a new argument on appeal, and should be rejected on this basis alone. *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001). Moreover, it is wholly unsupported by the record. As Respondents concede (at 45, n.176), Appellants repeatedly attempted to contact Respondents' counsel concerning their responses, and made it clear to the court that Appellants wanted to meet and confer to better understand the scope of Respondents' requests. CP 376; 5/23/14 VRP at 5-7.

Respondents ask the Court to ignore this evidence, and defer to the trial court for "resolving conflicting testimony." Brief of Respondents at 45, n.176. But the testimony does not necessarily conflict. Even Respondents' counsel's statement that "to his knowledge" Appellants did not attempt to contact him between 3:30 pm on May 13, 2014 when he sent his email for the first time raising the potential of motion practice and when Respondents filed their motion to compel at 11:30 am two days later (CP 287), does not establish that Appellants refused to confer in good faith – especially when the burden is on Respondents, not Appellants, "to

arrange for a mutually convenient conference in person or by telephone.”
CR 26(i).

More important, however, is that nothing in the record suggests the trial court resolved any conflicting testimony it might have heard. The court based its ruling on an entirely unrelated ground – that the CR 26(i) requirement was “mooted” by the conference that occurred before Respondents filed their First Motion to Compel. 5/23/2014 VRP at 5. Thus, there is no finding by the trial court to which this Court could defer.⁷

4. Respondents Did Not Satisfy CR 26(i) as to Rohlke.

Respondents’ sole argument that they complied with CR 26(i) as to Rohlke is their contention that the May 2 phone call satisfied their meet-and-confer requirement. But, as discussed above, the record does not support that contention. The call concerned only Respondents’ desire to receive a few specific documents from Hunter Donaldson, which were produced that same day. CP 381; 494-95. The parties did not discuss Rohlke or her responses. *Id.* The call did not satisfy Respondents’ CR 26(i) obligations as to her. *Clarke*, 133 Wn. App. at 780-81.

⁷ Respondents’ assertion that a CR 26(i) conference would “not have served any purpose” in this case is simply wrong. Quoting Judge Morgan’s dissent in *Case*, Respondents assert that CR 26(i) “should be a shield that protects the court from becoming involved in half-baked discovery disputes....” Brief of Respondents at 49. Quite so; but that is precisely what the court failed to prevent by not requiring a conference before hearing Respondents’ Second Motion to Compel. Had the court required a two-way contemporaneous communication on the issues leading up to the filing of Respondents’ May 15, 2014 motion, as Appellants repeatedly requested, unnecessary motions practice could have been avoided and judicial resources conserved.

5. Respondents Were Required to Confer with Wadsworth Before Filing Their Second Motion to Compel.

Respondents argue that by conducting a CR 26(i) conference with Wadsworth's counsel on March 6, 2014, before they filed their First Motion to Compel, they satisfied their obligation under CR 26(i) and did not need to confer again before filing their subsequent motions.

Respondents ignore the plain text of CR 26(i) and Washington case law, instead focusing on cases involving sanctions motions under Federal Rule of Civil Procedure 37(b). But Rule 37(b) differs materially from CR 26(i).

CR 26(i) specifically provides that, “[t]he court will not entertain *any* motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to *the* motion or objection.” *Id.* (emphasis added). Washington courts have uniformly held that the meet and confer requirements apply to both motions to compel and to motions for sanctions brought under CR 37. *Amy*, 153 Wn. App. at 863; *Rudolph*, 107 Wn. App. at 865. Nothing in the plain language of CR 26(i) or the case law relieves a movant of its obligation to meet and confer because they have filed a previous motion. Nor should the rule be construed that way. CR 26(i) is intended to eliminate exactly what occurred here – a party going forward with discovery or sanctions motions on an incomplete record, before the parties have reached impasse, where the parties’

positions have not been fully developed.

In contrast, FRCP 37(b), which deals with sanctions motions and on which Respondents rely, does not contain a meet-and-confer requirement. The only discovery rule meet-and-confer requirement is contained in FRCP 37(a)(1), and applies only to motions to compel. As a result, federal courts have held that there is no meet-and-confer requirement when a party seeks sanctions under FRCP 37(b). For this reason, all of the cases Respondents cite are inapposite. Brief of Respondents at 54.⁸

A separate meet-and-confer also was necessary because the issues had changed. The March 6, 2014 conference in advance of Respondents' First Motion to Compel addressed only whether Respondents' discovery requests were still valid in light of the removal and remand. CP 232. That conference cannot have satisfied Respondents' obligation to confer before filing a second motion to compel, where the subject would have been the sufficiency of Appellants' actual responses and objections. *See Clarke,*

⁸ In *Naviant Marketing Solutions v. Larry Tucker, Inc.*, 339 F.3d 180, 187 (3d Cir. 2003), the court recognized this critical distinction. The court distinguished one of the primary cases on which Respondents rely, *Royal Maccabees Life Ins. Co. v. Malachinski*, No. 96 C 6135, 2001 WL 290308 (N.D. Ill. Mar. 20, 2001), because in *Naviant*, an applicable local rule provided that, "No motion or other application pursuant to the [FRCPs] governing discovery or pursuant to this rule shall be made unless it contains a certification of counsel that the parties, after reasonable effort, are unable to resolve the dispute." 339 F.3 at 186-87 (citing E.D. Pa. R. 26.1(f)). The court recognized that this rule required more than FRCP 37(b), and denied the movant's motion for sanctions, because the movant had not conducted the requisite conference before filing. *Id.*

133 Wn. App. at 151 (requiring that parties confer on the specific discovery dispute at issue before the trial court will hear a motion on that issue); *Cardoza v. Bloomin' Brands, Inc.*, No. 13-cv- 01820, 2015 WL 6123192, *6-7 (D. Nev. Oct. 16, 2015) (same).

6. The Court Erred by Granting Respondents' Sanctions Motions Without Requiring Compliance with CR 26(i).

Respondents do not dispute that they failed to conduct discovery conferences before filing their motions for sanctions in July, September, and December 2014. Nor could they, as no such conferences occurred.

Respondents brought each of their motions under CR 37 (CP 415, 583-84, 940), and, as explained above, CR 26(i) requires that Respondents confer before the court could consider these motions. They did not do so. The trial court erred in considering and granting these motions.⁹

B. The Trial Court Abused Its Discretion When It Sanctioned Appellants for Not Producing Documents.

“An abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.” *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007)

⁹ Appellants raised Respondents' failure to meet-and-confer in opposing Respondents' First Motion for Sanctions, preserving the issue for appeal. CP 486; *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 498-99, 933 P.2d 1036 (1997). At the hearing, the trial court incorrectly ruled that, “we’re beyond that. The order that was entered in May, that was the point at which you talk about 26(i), not now.” 8/1/14 VRP 14-15. Not only did this ruling ignore the plain text of CR 26(i), it also directly contradicted the court’s order in May that the CR 26(i) issue was “moot” at that point, too.

(citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 132 P.3d 115 (2006)).

1. The Trial Court Abused Its Discretion When It Applied the Wrong Legal Standard to the Issue of “Control.”

Appellants’ opening brief includes a detailed and thorough discussion of the case law on the issue of control, and explains how the trial court erred. Respondents’ argument to the contrary is without merit. While the only Washington state court decision on this issue, *Diaz v. Washington State Migrant Council*, 165 Wn. App. 59, 265 P. 3d 956 (2011), looked to federal law, it failed to recognize that the more widely-accepted view is that practical access does not suffice. *See, e.g., In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999) (“[W]e conclude—consistently with all of our sister circuits who have addressed the issue—that the legal control test is the proper standard....”) (citing cases). A party must have a legal right to obtain the documents in question before they can be considered under that party’s control.

The responding party does not need to prove his lack of control, or seek a protective order from the court. Rather, if the party propounding the discovery is unsatisfied with the response, *that party* must carry the burden of proving that the responding party *does* have such control. *See, e.g., United States v. Int’l Union of Petroleum & Indus. Workers, AFL-CIO*, 870 F.2d 1450, 1452 (9th Cir. 1989); *accord Genentech, Inc. v.*

Trustees of Univ. of Pennsylvania, No. 10-cv-2037 PSG, 2011 WL 5373759, *2 (N.D. Cal. Nov. 7, 2011). In meeting its burden, the moving party must offer more than mere speculation contradicting the responding party's position. See *Golden Trade*, 143 F.R.D. 514, 525 n.7 (S.D.N.Y. 1992).

Respondents rely on *Carrillo v. Schneider Logistics, Inc.*, No. 11-cv-8557, 2012 WL 4791614, *10 (C.D. Cal. Oct. 5, 2012), as somehow supporting their position. It does not.¹⁰ *Carrillo* did not address whether an employee or officer could be required to produce company records. In *Carrillo*, the plaintiffs sought responsive emails from the defendant (Schneider Logistics) whose employees' emails were on a server of another company (Wal-Mart) managed by its vendor. Schneider Logistics was expressly granted access to that server by Wal-Mart's vendor, such that Schneider Logistics had "control" over its own company emails on the server. The *Carrillo* decision actually is consistent with the majority view. Schneider had a legal right to obtain the documents; they were its documents. See *Citric Acid*, 191 F.3d at 1107.

Here, the trial court never made findings that Appellants, as officers or employees, had the legal right to obtain documents from Hunter

¹⁰ Notably, Respondents do not address *Noaimi v. Zaid*, 283 F.R.D. 639 (D. Kan. 2012), which Appellants cited at length in their opening brief. There, the court found that, under circumstances very similar to those here, control had not been established.

Donaldson and produce them in discovery. Respondents' brief virtually ignores that at the August 1 hearing the trial court simply ordered that Appellants produce "what is in their possession." 08/01/14 VRP at 14:3--4. Though Respondents dub this a "singular misstatement" (Brief of Respondents at 60 n.191), there is no evidence that the court's statement was in error, and Appellants were entitled to rely on it, believing that, consistent with the argument Appellants were making, the court was ordering only that they produce documents within their possession.

At the September 26, 2014 hearing, the trial court made it clear for the first time that it viewed "control" more expansively than do federal appellate courts, and that it was not applying the legal control test. 09/26/2014 VRP at 24-26. The court granted Respondents' motion based on its belief that Appellants had practical access to the documents. *Id.* However, there was no evidence in the record (as opposed to speculation by Respondents' counsel) at the time of the September 26, 2014 hearing to support either a finding that Appellants had legal access to Hunter Donaldson's documents, or even that they had practical access to them.¹¹

¹¹ Respondents attempted to backfill this evidentiary gap in December 2014, by submitting deposition excerpts from the October 2014 depositions of Appellants. But the law is clear that the bases on which a trial court grants sanctions cannot be backfilled later; the court's order must stand or fall based on the evidence before the trial court at the time it makes its ruling. See *Blair v. Ta-Seattle East No. 176*, 171 Wn.2d 342, 350, 254 P.3d 797 (2013) (sanctions order "needed to be supportable *at the time it was entered*, not in hindsight by reference to [a later] order") (italics in original).

By assuming, without any evidence, that Appellants had practical access to Hunter Donaldson's documents, and in ruling that practical access suffices under CR 34, the court applied an incorrect legal standard and ruled based on unsupported facts. The court abused its discretion, and its orders should be vacated.

2. Appellants Did Not Waive Their Arguments on "Control."

Respondents incorrectly suggest that the issue of the correct legal standard for "control" was not raised below. It was. One of Appellants' primary arguments in opposing Respondents' motions for sanctions was that they could not be compelled to produce documents belonging to Hunter Donaldson because those documents did not legally belong to them. *See, e.g.*, CP 485. Further, at the September 26, 2014 hearing on Respondents' Second Motion for Sanctions, the trial court and Appellants' counsel engaged in an extended discussion about the very issue of legal control versus practical access, before the court ultimately ruled that practical access sufficed. 9/26/14 VRP at 23-25.

Respondents also argue that Appellants waived their "objection" that they did not have control over Hunter Donaldson's company documents by not timely asserting it in response to Respondents' discovery requests. But this argument mischaracterizes the record. Appellants did not "object" to Respondents' requests for production on the

basis that they requested documents outside of their control. As Appellants argued in their opening brief (which argument Respondents have not rebutted), it is a proper response to a document request that no responsive documents are within the responding party's "possession, custody, or control." See CR 34. That Appellants lacked possession, custody, or control over those documents was Appellants' answer, which Appellants timely asserted under CR 34 and 26(e).¹² The issue of control is properly before the Court.

3. The Trial Court Abused Its Discretion by Sanctioning Appellants Based on Unclear Orders.

In *Magaña v. Hyundai Motor Am.*, the Washington State Supreme Court held that, "A trial court's reasons for imposing discovery sanctions should 'be clearly stated on the record so that meaningful review can be had on appeal.'" 167 Wn. 2d 570, 583, 220 P.3d 191, 197 (2009) (quoting *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)). Here, as Appellants described in their opening brief, the trial court's reasons were anything but clearly stated.

This confusion began once the court entered its March 28 order. Respondents argue that "[they] made clear that they were seeking

¹² See, e.g., CP 437 (supplemental responses stating: "[Appellant] supplements his response to represent that after conducting a reasonable search, there are no responsive documents within his possession, custody, or control. Without waiving any objection, [Appellant] further represents that any documents responsive to this request would be in the possession, custody, or control of Hunter Donaldson.").

discovery *productions*, not mere responses,” but the order, which Respondents drafted, required only that “discovery *responses*,” not documents, be “produced,” and that the “responses” attempt to “fully *answer*” each request or provide an “*objection* justified in law.” CP 282. CR 34(b)(3) defines the contents of a “response” to a request for production: “[T]he response must either state that inspection and related activities *will be* permitted as requested or state a specific objection to the request, including the reasons.” (emphasis added). The Civil Rules therefore clearly contemplate that a requested inspection or production of documents, if not objected to, will take place *after* the responding party has served an answer agreeing to the production.

Respondents also argue that a brief telephonic colloquy between the trial court and Appellants’ counsel at a hearing on another motion, to which Hunter Donaldson and Appellants were not parties, support for their position. But the interaction belies Respondents’ contention and is anything but clear:

The Court: And is there any reason to believe that Hunter Donaldson will not be producing discovery by April 25th when it is due, Mr. Perisho?

Mr. Perisho: No, it’s our plan to produce the discovery, Your Honor.

4/11/14 VRP at 26. This question-and-answer must be considered in the

context of the court's prior order, which required only that discovery responses and objections be provided, not that all documents be produced by that date. And Hunter Donaldson and Appellants did comply, first by producing their discovery responses (CP 333-351, 353-370), and by Hunter Donaldson's subsequent production of the responsive documents Respondents requested on May 2 and May 6. CP 381; 494.

Further, Respondents' assertion that Appellants gave only vague, boilerplate objections to their document requests before the May 23 order also is untrue. Appellants did make general objections to Respondents' requests, but the majority of Appellants' responses stated either that responsive documents would be produced after a reasonable search, notwithstanding the objections, or that such documents did not exist. CP 333-51, 353-70. And for each document request, with the exception of the request for their tax returns, by May 29, 2014, Appellants either had produced responsive documents or served supplemental responses indicating that they did not have any such documents to produce. *Id.*

Thus, the only documents within their control that Appellants did not produce by the end of May 2014 were their tax returns. Respondents argue that because Appellants did not move for a protective order or produce these documents until September 19, 2014, the trial court's award of sanctions should be upheld in its entirety. But when Appellants raised

their objection to Respondents' request for their tax returns and pointed out that there had never been any substantive ruling on that objection or a meet-and-confer regarding its propriety, the Court incorrectly held that the time for any such discussions had passed. 8/1/14 VRP at 14-15.

Appellants were not required to move for a protective order where the trial court had made it clear that the court would not have granted the motion.

Burnet, 131 Wn.2d at 498-99.

The trial court also never clearly articulated the specific basis on which it was imposing *per diem* sanctions, or whether it would have imposed the same sanctions had the outstanding tax returns been the only issue. As a result, should this Court reverse the trial court's orders on the issue of control, it also should vacate them as to Appellants' delayed production of their tax returns. *Magaña*, 167 Wn. 2d at 583.

C. The Court Erred When It Failed to Consider Lesser Sanctions than the Punitive and Coercive Sanctions It Entered Against Appellants.

Because the monetary sanctions imposed in this matter were not "compensatory," the trial court committed reversible error by failing to consider expressly on the record whether some lesser sanctions might have been adequate. Respondents cannot avoid this issue by arguing that Appellants did not raise it below. The trial court was required to expressly consider lesser sanctions in its order, and it failed to do so. *Burnet v.*

Spokane Ambulance, 131 Wn.2d 484, 933 P. 2d 1036 (1997).¹³

Respondents do not deny the trial court's failure to consider *Burnet*, but argue that it was not necessary. They are mistaken. The Washington Supreme Court's "clarification" of the *Burnet* decision in *Mayer*, 156 Wn.2d at 690, did not hold that application of the *Burnet* factors is limited solely to non-monetary sanctions that affect a party's ability to present its case. The *Mayer* court specifically contrasted the type of "compensatory monetary sanctions" that do not require application of the *Burnet* factors with harsher non-compensatory sanctions that do (particularly where there is a predicate finding of willful misconduct). *Id.* Here, Respondents concede that the sanctions imposed by the trial court were intended to be "coercive," not compensatory. They fall within the category of "harsher" sanctions to which *Burnet* applies. By awarding sanctions against Appellants without analyzing the *Burnet* factors, the trial court abused its discretion. *See Burnet*, 131 Wn.2d at 497.

D. Respondents Are Not Entitled to Their Fees on Appeal.

Respondents ask the Court to enter an order requiring Appellants and their attorneys to pay them their attorneys' fees on appeal. This

¹³ Respondents cite no authority for their assertion that the obligations *Burnet* imposed on trial courts can be waived by litigants. In fact, the majority in *Burnet* rejected exactly that position. Justice Talmadge wrote in dissent that the plaintiffs had failed to preserve any error for review by not moving to modify the trial court's order imposing sanctions. *Id.* at 508-09. The majority rejected this argument. *Id.* at 498-99.

Division's most recent published opinion discussing attorneys' fees on appeal from a discovery order, *Hoover v. Warner*, 189 Wn. App. 509, 358 P.3d 1174 (2015), sets forth the standard for entering such an award. In *Hoover*, the court refused to award fees where the appeal, though ultimately found to be without merit, had not been "frivolous or taken for delay." *Id.*, at 532. Here, one of Respondents' primary arguments or affirmance would require that this Court abandon clear and long-standing precedent on a rule of civil procedure, confirming that Appellants' positions, both in the trial court and in this appeal, are substantially justified and not frivolous.¹⁴

Further, ordering Appellants to pay Respondents' attorneys' fees on appeal also would place an unjust burden on Appellants' right to appellate review of genuinely contested issues of fact and law, and give Respondents and their attorneys an undeserved windfall. Under these circumstances, any further monetary award would not serve the purposes of discovery sanctions, which are "to deter, to punish, to compensate and to educate," and would be excessive.¹⁵ Appellants have produced all the documents that Respondents sought; the case is settled; the Respondents

¹⁴ Respondents cite *Eugster v. City of Spokane*, 121 Wn. App. 799, 91 P.3d 117, 126 (2004), in support of their demand for attorneys' fees. But *Eugster* is inapposite, as there that the party requesting fees on appeal was not a party to the underlying action, but had successfully quashed subpoenas issued to it. See 121 Wn. App. 799 at 814.

¹⁵ *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054, 1085 (1993).

allegedly have recovered over \$7 million for the class; and their attorneys have recovered more than \$2.5 million in fees (CP 1536). Appellants will have been punished severely and incurred substantial sanctions if the Court reaches the attorneys' fees issue.

Finally, Respondents offer no legitimate and reasoned basis why counsel for Appellants should be required to pay Respondents' attorneys' fees on appeal. Respondents cite no evidence in the record (because it contains none) that any of Appellants' attorneys engaged in misconduct.¹⁶ In fact, the trial court specifically denied Respondents' single attempt to obtain sanctions against counsel (Mr. Perisho) (08/01/14 VRP at 16). Calfo Harrigan did not appear until September 2, 2014 (CP 1266), after most of the underlying orders had been entered. In later hearings, the trial court remarked on the propriety of counsel's argument of Appellants' positions. (09/26/2014 VRP at 31) (noting that Mr. Cramer had "respectfully and appropriately argued...the positions here....").

Respondents concede that the only reason they seek to hold counsel liable is to obtain an insurance policy in the event Appellants

¹⁶ See, e.g., *Ortiz v. Donatelle Associates, LLC*, No. 06-4825, 2008 WL 169810, *3 (D. Minn. Jan. 16, 2008) (observing that "Rule 37(a)(4) *permits* the Court to assess the expenses against an attorney if it was the attorney's conduct that was responsible for the motion" but refusing to do so where the evidence in the record was "not clear enough ... for the Court to second-guess the determination of the Magistrate Judge.") (emphasis added); *Humphreys Exterminating Co., Inc. v. Poulter*, 62 F.R.D. 392, 395 (D. Md. 1974) (award of attorney fees under Rule 37 "ought to be made against the attorney only when it is clear that discovery was unjustifiably opposed principally at his instigation.").

declare bankruptcy. This is not a valid basis on which to award fees against an attorney.¹⁷ Allowing it as such would cause precisely the same chilling effect on zealous legal advocacy courts caution against in considering sanctions awards against attorneys in under other rules.¹⁸

E. Conclusion.

For these reasons, Appellants request that the Court vacate the judgments and orders against them, and deny Respondents' fee request.

Respectfully submitted this 22nd day of January, 2016.

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¹⁷ See Advisory Committee Note to the 1970 amendment of FRCP 37, 48 F.R.D. at 540 ("it is not contemplated that expenses will be imposed upon the attorney merely because the party is indigent").

¹⁸ As the Washington Supreme Court has warned, attorneys will cease to offer their services when they can reasonably expect to be sanctioned simply for losing, and thus "wrongs will go uncompensated." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099, 1104 (1992) (quoting *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363-64 (9th Cir.1990))

FILED
COURT OF APPEALS
DIVISION II

2016 JAN 22 PM 4: 14

STATE OF WASHINGTON

CERTIFICATE OF SERVICE

BY _____
DEPUTY

I, Florine Fujita, declare that I am employed by the law firm of Calfo Harrigan Leyh & Eakes LLP, a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On January 22, 2016, I caused a true and correct copy of the foregoing document to be served on counsel listed below in the manner indicated:

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DATED this 22nd day of January, 2016.

s/ Florine Fujita
Florine Fujita

HONORABLE JERRY COSTELLO

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IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

VELMA WALKER, individually and as a class representative; JAMES STUTZ individually and as a class representative; KARL WALTHALL, individually and as a class representative; GINA CICHON, individually and as a class representative, and; MELANIE SMALLWOOD, individually and as a class representative,

Plaintiffs,

v.

HUNTER DONALDSON, LLC, a California limited liability company; MULTICARE HEALTH SYSTEM, a Washington nonprofit corporation; MT. RAINIER EMERGENCY PHYSICIANS, a Washington for-profit corporation; REBECCA A. ROHLKE, individually, on behalf of the marital community and as agent of Hunter Donaldson; JOHN DOE ROHLKE, on behalf of the marital community; RALPH WADSWORTH, individually, on behalf of the marital community, and as agent of Hunter Donaldson, and; JANE DOE WADSWORTH, on behalf of the marital community,

Defendants.

NO. 13-2-08746-0
COURT OF APPEALS No. 46814-0-II

**SUPPLEMENTAL DESIGNATION OF
CLERK'S PAPERS**

(CLERK'S ACTION REQUIRED)

1 TO: CLERK OF THE COURT

2 Please prepare and transmit to the Court of Appeals, Division Two, the following clerk's
3 papers.

Document Title	Date Filed
Agreed Final Order and Judgment	01/30/2015

6 DATED this 22nd day of January, 2016.

8 CALFO HARRIGAN LEYH & EAKES LLP

9 By /s/ Shane P. Cramer
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18 *Attorneys for Defendants Rebecca A. Rohlke*
19 *and Ralph Wadsworth*

CERTIFICATE OF SERVICE

I, Florine Fujita, declare that I am employed by the law firm of Calfo Harrigan Leyh & Eakes LLP, a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On January 22, 2016, I caused a true and correct copy of the foregoing document to be served on counsel listed below in the manner indicated:

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s/ Florine Fujita

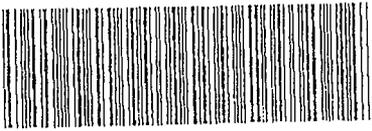
Florine Fujita

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13-2-08746-0 44054637 JD 02-02-15

THE HONORABLE BRYAN E. CHUSHCOFF

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

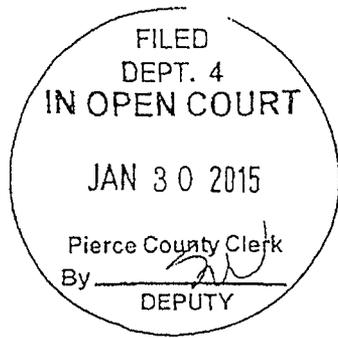
VELMA WALKER, individually and as a class representative; JAMES STUTZ, individually and as a class representative; KARL WALTHALL, individually and as a class representative; GINA CICHON, individually and as a class representative, and; MELANIE SMALLWOOD, individually and as class representative,

Plaintiffs,

vs.

HUNTER DONALDSON, LLC, a California limited liability company; MULTICARE HEALTH SYSTEM, a Washington nonprofit corporation; MT. RAINIER EMERGENCY PHYSICIANS, a Washington for-profit corporation; REBECCA A. ROHLKE, individually, on behalf of the marital community and as agent of Hunter Donaldson; JOHN DOE ROHLKE, on behalf of the marital community; RALPH WADSWORTH, individually, on behalf of the marital community, and as agent of Hunter Donaldson, and; JANE DOE WADSWORTH, on behalf of the marital community.

Defendants.



CLASS ACTION
NO. 13-2-08746-0

AGREED FINAL ORDER AND JUDGMENT

AGREED FINAL ORDER AND JUDGMENT
1 of 8



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THIS MATTER having come before the Court upon on January 30, 2015 on Plaintiffs' Amended Motion for Final Approval of Class Settlement Agreement as set forth in the Settlement Agreement between the parties, attached hereto as Exhibit A ("Settlement Agreement"), pursuant to the Court's Preliminary Approval Order of November 21, 2014. Defendant MultiCare Health System ("MultiCare") supports this motion for final approval as to its basic terms.

In compliance with the Court's Preliminary Approval Order, a broad and extensive notice campaign commenced on December 1, 2014, to inform the class of: (1) the settlement; (2) the January 30, 2015 final approval hearing; (3) class members' rights to object or comment on the settlement; (4) the Plaintiffs' request for compensation ("incentive awards") for Class Representatives Velma Walker, Melanie Smallwood, Karl Walthall, James Stutz, and Christina Miesmer to be paid out of the settlement common fund; and (5) Class Counsel's request for an award of attorney fees and expenses to be paid out of the recoveries made in this case. Individual notice was mailed to 4,066 potential class members with known addresses. In addition, a toll-free information line was established. The settlement administrator and/or class counsel responded to all written and telephone inquiries from class members.

The parties appeared at the hearing through their respective attorneys of record. An opportunity to be heard was given to all persons requesting to be heard in accordance with the Preliminary Approval Order, whether represented by counsel or not. The Court heard, read, and considered presentations and evidence in support of the proposed settlement.

Only one individual, Jumapili Ikuseghan, has filed an objection to the proposed settlement. After full and due consideration of Ms. Ikuseghan's objection and MultiCare's response thereto, the Court finds and concludes that Ms. Ikuseghan is not a member of the settlement class and, thus, lacks standing to object to the proposed settlement. Even if Ms.



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Ikuseghan had standing, her "objection" merely requests clarification that the Settlement Agreement's terms do not preclude or affect the claims in her proposed "robocall" class action filed in the United States District Court for the Western District of Washington, *Ikuseghan v. MultiCare Health System*, Case No. 3:14-cv-05539. It is undisputed by Plaintiffs or MultiCare that the Settlement Agreement's terms in no way preclude or affect the claims in the *Ikuseghan* action. Ms. Ikuseghan's objection presents no reason for the Court to deny final approval of the proposed settlement and is overruled.

The entire matter of the proposed settlement having been duly noticed, heard, and considered by the Court, and for all of the reasons set forth below,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that

1. This Court has jurisdiction over the claims of class members asserted in this action and over all parties to the action. The settlement class is defined as:

Persons (1) on whose accounts MultiCare received a payment as the result of a Rohlke Lien or (2) whose personal injury settlement funds were held in trust by their attorneys in order to satisfy a Rohlke Lien [as defined by the Settlement Agreement] but no payment was received by MultiCare.

Excluded from the class are persons who properly executed and filed a timely request for exclusion from the class in accordance with the terms of the Settlement Agreement.

2. The notice given to the members of the class fully and accurately informed the class members of all material elements of the proposed settlement and their opportunity to participate in it; was the best notice practicable under the circumstances; was valid, due, and sufficient notice to all class members; and complied fully with CR 23, the United States Constitution, due process, and other applicable law. The class was afforded a full opportunity to participate in this hearing, and only Ms. Ikuseghan's comment was received. All class members and other persons wishing to be heard have been heard. Seven class members opted out. Accordingly, the Court determines that all other members of the settlement class are



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included in the class, and all members of the settlement class who have not timely elected to opt-out in the manner prescribed in the Notice of Proposed Class Action Settlement are bound by this Final Order and Judgment.

3. *Rule 23(a) and (b)*: The Court finds that the following requirements of CR 23(a) are met with respect to the class and the settlement of its claims. The settlement class is too numerous to be joined individually. This action presents common questions of law and fact. The claims of the proposed class representatives are typical of those of the settlement class. The Class Representatives and Class Counsel identified in the proposed Settlement Agreement will adequately protect the interests of the settlement class. Plaintiffs have also satisfied the predominance and superiority requirements of CR 23(b)(3) for the purposes of this settlement. Accordingly, pursuant to CR 23, the Court affirms its preliminary certification of the settlement class for purposes of final approval of the settlement.

4. *Rule 23(e)*: Pursuant to CR 23(e), and for the reasons set forth herein, the Court hereby grants final approval to the settlement and finds that it is fair, reasonable, and adequate and in the best interests of the class as a whole. In making this determination, the Court is to consider factors that include “the likelihood of success by plaintiffs; the amount of discovery or evidence; the settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation; recommendation of neutral parties, if any; number of objectors and nature of objections; and the presence of good faith and absence of collusion.” *Pickett v. Holland America Lines-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001). A court’s scrutiny is limited to the extent necessary to reach a reasoned judgment that the settlement agreement is not the product of fraud or overreaching by, or collusion between, the parties, or that the settlement does not treat class members differently. *Id.* at 189.



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The terms of the settlement provide significant relief to the class. The formula for recovery here is consistent with the various types of harm alleged by Plaintiffs in this action. The formula also provides the injunctive relief sought by Plaintiffs for all class members who timely submit a claim. Finally, the terms of the settlement prevent MultiCare from attempting to recoup payments to class members by reopening accounts which have been paid in full or otherwise closed by MultiCare.

The settlement also avoids the risk, uncertainty, cost, and delay inherent in any continued litigation, trial, and any appeals. Even had Plaintiffs successfully certified a litigation class and prevailed at trial, the Court finds it highly likely that Defendants would have appealed, given the hotly-contested and novel nature of the issues in this case.

In arriving at the settlement, the parties were represented by experienced counsel well-versed in class action litigation. Discovery included review and analysis of a significant volume of document discovery and electronic databases that allowed the parties to identify the scope and size of the class, and documents addressing the amounts collected from the class members. Settlement was reached after arm's-length negotiations by experienced counsel and at the recommendation of a neutral, third-party mediator. There is no evidence of collusion in reaching the settlement.

The class has overwhelmingly supported the settlement. Only seven class members opted out and will not be able to take advantage of the settlement claims process.

The Court finds that the Settlement Agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned. Accordingly, the Court grants final approval to the Settlement Agreement.

The Court's approval is strictly limited to the Settlement Agreement entered into between Plaintiffs and MultiCare, as the only settlement reached by any of the parties in this

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case. The terms of the Settlement Agreement approved by the Court are binding only on Plaintiffs, the Class Members, and MultiCare, and are not binding upon any other Defendant in this case. Accordingly, neither the terms of the Settlement Agreement nor any of the findings or conclusions made by the Court in connection with this Final Order and Judgment or Plaintiffs' attorneys fee request shall constitute the "law of the case," "res judicata," "collateral estoppel," or bind in any manner whatsoever any party other than Plaintiffs, the Class Members, and MultiCare. In approving this settlement, the Court is not ruling whether it is appropriate or not for other classes involving other Defendants to be certified.

5. Pursuant to the Court's final approval, the Court directs that the Settlement Agreement be implemented in accordance with its terms and conditions, including but not limited to:

MultiCare shall deposit \$7.5 million into the Escrow Account established by the Settlement Administrator within seven days after entry of this Order.

The Court-approved attorney fee award of \$2,524,512.11 and cost award of \$117,131.17 to Class Counsel and the Court-approved Class Representative incentive awards of \$15,000 per Class Representative shall be paid by the Settlement Administrator to Class Counsel and Class Representatives Velma Walker, Melanie Smallwood, Karl Walthall, James Stutz, and Christina Miesmer within 10 days after the Final Settlement Date (as defined by the Settlement Agreement).

All payments due to class members shall be mailed to class members by the Settlement Administrator 45 days after the end of the Claim Period or the Final Settlement Date, whichever is later, except where there is an unresolved dispute as to a Class Member's claim, in which case payment shall be mailed within ten days after resolution of the dispute.

In the event that the common fund is insufficient to make the specified payments to class members after payments to Class Counsel, payments to the above Class Representatives,



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and submission of all class members' claims, the Settlement Administrator shall reduce all payments to class members *pro rata*.

6. **Rule 54(b):** Plaintiffs and MultiCare have also asked that this Judgment and Order be deemed a final judgment under CR 54(b). With respect to that request, the Court finds and concludes:

The Settlement Agreement provides for payment to class members, Class Representatives and Class Counsel only after the Judgment and Order becomes final.

Although the Settlement Agreement affects a complete and final resolution of all claims between the class members and MultiCare relating to Rohlke Liens, it does not resolve parallel claims against Defendant Mount Rainier Emergency Physicians and Defendants Hunter Donaldson, LLC, Ralph Wadsworth, and Rebecca Rohlke ("Hunter Donaldson Defendants"). So long as the latter claims are alive, this Judgment and Order will be not become final absent direction for entry of judgment under CR 54(b).

The remaining claims against Mount Rainier and the Hunter Donaldson Defendants are separate from and severable from the Settled Claims. Class members, Class Representatives, Class Counsel and MultiCare will be prejudiced if payments under the Settlement Agreement are delayed while the remainder of the case is resolved. Mount Rainier Emergency Physicians and the Hunter Donaldson Defendants will suffer no prejudice if final judgment is entered with the respect to the Settled Claims. Accordingly, there is no just reason for delay in entering final judgment with respect to the Settled Claims and the Court therefore directs that this Judgment and Order shall constitute a final judgment pursuant to CR 54(b).

7. All notices of medical service lien claims filed on behalf of MultiCare, which were signed by Ralph Wadsworth and notarized by Rebecca Rohlke, are hereby declared invalid and are hereby released, provided that this declaration shall not preclude assertion of a



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medical service lien claim where another notice of lien claim was filed with the appropriate county auditor in the form prescribed by and within the time limit prescribed by law.

8. Plaintiff Class Representatives and all members of the settlement class who have not filed timely and properly executed notices of exclusion in response to the Notice of Proposed Class Action Settlement, are deemed to have forever released and discharged MultiCare from any "Settled Claims" (as defined in the Settlement Agreement"), which release is effective as any person claiming through the Plaintiff Class Representative or class member, whether as an heir, administrator, devisee, predecessor, successor, attorney, representative of any kind, shareholder, partner, director, owner or co-tenant of any kind, affiliate, subrogee, assignee, or insurer. A list of class members who properly and timely excluded themselves from the litigation class shall be filed by Class Counsel with the Clerk within 30 days of entry of this Order.

9. Without affecting the finality of this Judgment and Order, this Court shall retain exclusive and continuing jurisdiction over this action and the parties, including all class members, for purposes of supervising, administering, implementing, enforcing, constructing, and interpreting the Settlement Agreement, and the claims process thereunder. Disputes or controversies arising with respect to the interpretation of the Settlement Agreement may be presented by motion to the Court.

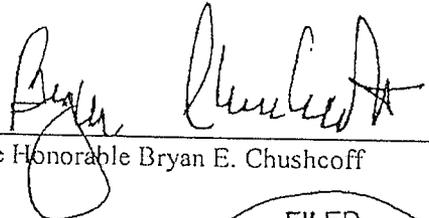
10. Plaintiffs' Motion for Final Approval of Class Action Settlement is GRANTED. Pursuant to the terms of the Settlement Agreement, all claims in the above-captioned action against MultiCare and all claims in any consolidated actions against MultiCare are hereby DISMISSED WITH PREJUDICE.



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DONE IN OPEN COURT this 30 day of January, 2015.


The Honorable Bryan E. Chushcoff

Presented By:
PFAU COCHRAN VERTETIS AMALA, PLLC

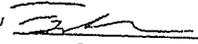
By _____
Darrell L. Cochran, WSBA No. 22851
darrell@pcvalaw.com
Loren A. Cochran, WSBA No. 32773
loren@pcvalaw.com
Christopher E. Love, WSBA No. 42832
Attorneys for Plaintiffs

FILED
DEPT. 4
IN OPEN COURT

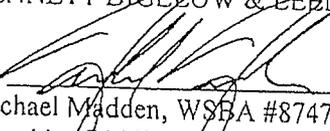
JAN 30 2015

Pierce County Clerk
By 
DEPUTY

THE LAW OFFICES OF WATSON & GALLAGHER, P.S

By 
Thomas F. Gallagher, WSBA #24199
Attorneys for Plaintiffs

Approved as to form:
BENNETT BIGELOW & LEEDOM P.S.

By 
Michael Madden, WSBA #8747
mmadden@bblaw.com
Attorney for Defendant MultiCare

No objection:
VANDEBERG, JOHNSON & GANDARA, LLP

By _____
James A. Krueger, WSBA #3408

AGREED FINAL ORDER AND JUDGMENT
9 of 8


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A Professional Limited Liability Company
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Phone: (253) 777-0799 Facsimile: (253) 627-0654
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Lucy R. Clifthorne, WSBA #27287
Attorneys for Defendant Mt. Rainier Emergency Physicians

CALFO HARRIGAN LEYH & EAKES LLP

By _____
Patricia A. Eakes, WSBA #18888
Shane P. Cramer, WSBA #35099
999 Third Avenue, Suite 4400
Seattle, WA 98104
Attorneys for Defendants Ralph Wadsworth and Rebecca Rohlke

HUNTER DONALDSON, LLC

By _____
Stephen L. Perisho, WSBA #44673
Hunter Donaldson, LLC
3060 Saturn St.
Brea, CA 92821
Attorney for Defendant Hunter Donaldson, LLC

4849-8007-3761, v. 2

AGREED FINAL ORDER AND JUDGMENT
10 of 8



911 Pacific Avenue, Suite 200
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EXHIBIT A

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The Honorable Jerry Costello
Trial Date: February 17, 2015

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

VELMA WALKER, individually and as a class representative; JAMES STUTZ, individually and as a class representative; KARL WALTHALL, individually and as a class representative; GINA CICHON, individually and as a class representative; and MELANIE SMALLWOOD, individually and as class representative,

Plaintiffs,

vs.

HUNTER DONALDSON, LLC, a California limited liability company; MULTICARE HEALTH SYSTEM, a Washington nonprofit corporation; REBECCA A. ROHLKE, individually, on behalf of the marital community and as agent of Hunter Donaldson; JOHN DOE ROHLKE, on behalf of the marital community; RALPH WADSWORTH, individually, on behalf of the martial community, and as agent of Hunter Donaldson; and JANE DOE WADSWORTH, on behalf of the martial community,

Defendants.

Case No. 13-2-08746-0

consolidated with

Case No. 13-2-12653-8

CLASS ACTION SETTLEMENT AGREEMENT

I. BACKGROUND

1.1 The Plaintiff Class Representatives have asserted a number of claims on behalf of themselves and others similarly situated for monetary, injunctive and declaratory relief based

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1 on allegations that in their preparation, filing, and recovery on medical service liens,
2 Defendants violated certain provisions of Ch. 60.44 RCW and RCW 42.44.020, and
3 Washington's Consumer Protection Act, RCW 19.86.

4 1.2 Defendant MultiCare Health System ("MultiCare") has denied and continues to deny
5 any liability to Plaintiffs Class Representatives or the Class they would represent.

6 1.3 Class Counsel have analyzed and evaluated the merits of all Parties' contentions and
7 the impact of this Agreement on the members of the Class. Based on that analysis and
8 evaluation, and recognizing the risks of continued litigation and the likelihood that the Action,
9 if not settled now, may be protracted and will further delay any relief to the proposed classes,
10 Plaintiff Class Representatives and Class Counsel are satisfied that the terms and conditions
11 of this Agreement are fair, reasonable, adequate, and equitable, and that a settlement of the
12 Action on the terms described herein is in the best interests of the Class.

13 1.4 In order to put to rest all controversy and to avoid further burdensome, protracted, and
14 costly litigation, Class Counsel, Plaintiff Class Representatives and MultiCare have agreed,
15 subject to preliminary and final court approval, to compromise and settle the Action between
16 the Plaintiff Class and MultiCare on the terms set forth herein.

17 **II. DEFINITIONS**

18 2.1 In addition to any definitions elsewhere in this Agreement, the following terms below,
19 when capitalized, shall be defined as follows:

20 (a) "Action" means the above-captioned action, *Walker, et al v. Hunter*
21 *Donaldson, LLC, et al.*, Pierce County Superior Court No. 13-2-08746-0 and the consolidated
22 individual case, *Miesmer v. Hunter Donaldson, LLC, et al*, Pierce County Superior Court No.
23 13-2-12653-8.

24 (b) "Agreement" means this Agreement, including all Exhibits hereto.

25 (c) "Claimant" means a Class Member who submits a Claim under this
26 Agreement.

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- 1 (d) "Claim Period" means the 90-day period commencing on the Initial Notice
- 2 Date, except that the Claim Period shall be extended if necessary so that it ends not less than
- 3 30 days after the Settlement Date.
- 4 (e) "Claim Form" means the claim form attached hereto as Exhibit B.
- 5 (f) "Class" means persons:
- 6 i. on whose accounts MultiCare received a payment as the result of a Rohlke
- 7 Lien; or
- 8 ii. whose personal injury settlement funds were held in trust by their attorneys in
- 9 order to satisfy a Rohlke Lien but no payment was received by MultiCare.
- 10 (g) "Class Counsel" means Pfau Cochran Vertitis Amala, PLLC and Watson &
- 11 Gallagher, P.S.
- 12 (h) "Class Member" means a member of the Class who does not opt out.
- 13 ~~(i) "Common Fund" means the funds available in the Escrow Account for Court-~~
- 14 approved payments by the Settlement Administrator to Class Members, Plaintiff Class
- 15 Representatives, and Class Counsel.
- 16 (j) "Commercial Health Insurance" means health insurance provided by a
- 17 health care service carrier, health management organization, disability insurer, or employer
- 18 sponsored health plan, excluding government-sponsored programs such as Medicare,
- 19 Medicaid, or TriCare.
- 20 (k) "Court" means the Superior Court of Washington for Pierce County, in which
- 21 this Action is pending.
- 22 (l) "Corrected Notice of Lien" shall mean a lien subscribed by a MultiCare
- 23 employee and recorded with the King or Pierce County Auditors on or after December 1,
- 24 2013.
- 25 (m) "Escrow Account" means a bank account established by the Settlement
- 26 Administrator into which MultiCare shall deposit \$7.5 million within seven days after the

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1 Fairness Hearing, provided that the Court at that hearing enters the Judgment and Order
2 without material modifications.

3 (n) "Fairness Hearing" means the settlement approval hearing to be conducted by
4 the Court in connection with the determination of the fairness, adequacy, and reasonableness
5 of this Agreement in accordance with Civil Rule 23(e). It is the intention of the Parties that
6 the Fairness Hearing will be scheduled at the earliest date that is at least sixty days after the
7 Initial Notice Date that the Court is available to hear the matter.

8 (o) "Final Settlement Date" means the date on which all of the following have
9 occurred:

- 10 i. Entry of the Order and Judgment without material modification; and
- 11 ii. Finality of the Judgment and Order by virtue of that order having become
12 final and nonappealable through:

13 (1) the expiration of all allowable appeal periods without an appeal
14 having been filed or,

15 (2) if an appeal is filed, final affirmance of the Judgment and Order on
16 appeal or final dismissal or denial of all such appeals, including petitions for
17 review, rehearing, reargument, or certiorari; or

18 (3) final disposition of any proceedings, including any appeals,
19 following any appeal from entry of the Order and Judgment. However, an
20 appeal or petition for discretionary review pertaining solely to the Plaintiffs'
21 Class Representative's incentive awards, or the award of attorneys' fees, costs
22 or expenses to Class Counsel, shall not in any way delay the Final Settlement
23 Date, except with respect to the appealed items.

24 (p) "Initial Notice Date" means the date upon which the Notice of Proposed Class
25 Action Settlement is first mailed to Class Members pursuant to Part VI of this Agreement.

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1 (q) "Judgment and Order" means the order to be entered by the Court, in a form
2 that is mutually agreeable to the Parties, approving this Agreement as fair, adequate, and
3 reasonable and in the best interests of the Class as a whole in accordance with Civil Rule
4 23(e) and making such other findings and determinations necessary and appropriate to
5 effectuate the terms of this Agreement.

6 (r) "MultiCare" means MultiCare Health System.

7 (s) "Notice of Proposed Class Action Settlement" or "Notice" means the Court-
8 approved notice to Class Members of proposed settlement substantially in the form attached
9 as Exhibit A to this Agreement.

10 (t) "Opt-Out Period" means the 45-day period commencing on the Initial Notice
11 Date.

12 (u) "Party" or "Parties" means Plaintiffs Class Representatives and MultiCare, as
13 represented by their counsel.

14 (v) "Person" without regard to capitalization, means any individual or legal entity,
15 including associations, and their successors or assigns.

16 (w) "Plaintiffs' Class Representatives" means Velma Walker, James Stutz, Karl
17 Walthall, Melanie Smallwood, and Christina Miesmer.

18 (x) "Preliminary Approval" means the Court's entry of an order preliminarily
19 approving this Agreement pursuant to Civil Rule 23(e).

20 (y) "Published Notice of Proposed Class Action Settlement" or "Published Notice"
21 means the short form notice of proposed settlement disseminated by the Settlement
22 Administrator for publication substantially in the form attached as Exhibit D to this
23 agreement;

24 (z) "Rohlke Lien" means a notice of medical service lien submitted to the Pierce
25 or King County Auditor pursuant to Ch. 60.44 RCW on behalf of MultiCare, bearing a
26 signature or facsimile of a signature of Ralph Wadsworth and notarized by Rebecca Rohlke.

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1 (aa) "Settled Claim" means a claim which has been resolved under this
2 Agreement; as set forth in Part III.

3 (bb) "Settlement Administrator" means Gilardi & Co., LLC.

4 (cc) "Settlement Date" means the date on which the Court enters Preliminary
5 Approval.

6 **III. SETTLED CLAIMS**

7 3.1 It is the intent of the Parties to resolve any and all claims by Class Members against
8 MultiCare relating to Rohlke Liens, including all claims against MultiCare based on
9 preparation, submission, enforcement, or attempted enforcement of a Rohlke Lien. A Settled
10 Claim includes any claim, cause of action, loss, damage, or right, known or unknown,
11 asserted or unasserted, whether based in tort, contract, or any other theory of legal recovery
12 that Class Members have against MultiCare and its affiliated corporations, including but not
13 limited MultiCare Consulting, LLC, Medis Corporation, Inc., or their directors, officers,
14 employees, attorneys or agents relating in any way, directly or indirectly, to a Rohlke Lien.
15 Without limiting the scope of the foregoing, a Settled Claim shall include claims:

16 (a) for breach or violation of, or for benefits conferred by, any federal or state law
17 or statute, regulation, or ordinance;

18 (b) based on principles of tort law or other kind of liability, including without
19 limitation those based on principles of, negligence, reliance, racketeering, fraud, conspiracy,
20 concerted action, aiding and abetting, veil-piercing liability, alter-ego or successor liability,
21 consumer fraud, negligent misrepresentation, intentional misrepresentation, or other direct or
22 derivative liability;

23 (c) for breach of any duty imposed by common law, by contract, or otherwise,
24 including, without limitation express or implied, promissory or equitable estoppel or
25 principles of unjust enrichment;

26 (d) for declaratory or injunctive relief; and

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1 (e) for penalties, punitive damages, exemplary damages, or any claim for damages
2 based upon a multiplication of compensatory damages associated with the above.

3 3.2 The Parties also agree that all claims by Plaintiff Class Representatives and the Class
4 against Hunter Donaldson, LLC, its members, directors, owners, officers, employees, agents,
5 or attorneys, including but not limited to Ralph Wadsworth and Rebecca Rohlke, shall be
6 assigned to MultiCare insofar as such claims are based, directly or indirectly, on preparation,
7 submission, enforcement, or attempted enforcement of a Rohlke Lien by or on behalf of
8 Multicare. This assignment of claims shall not include claims against Hunter Donaldson,
9 LLC, and its members, directors, owners, officers, employees, agents, or attorneys, including
10 Ralph Wadsworth and Rebecca Rohlke, arising out of or in any way related to their assertion
11 of liens, collection activities, or other tortious or wrongful acts either directly or by or on
12 behalf of persons or entities other than MultiCare.

13 **IV. SETTLEMENT PURPOSES ONLY**

14 4.1 This Agreement is for settlement purposes only and neither the fact of, nor any
15 provision contained in this Agreement or its Exhibits, nor any action taken hereunder, shall
16 constitute, be construed as, or be admissible in evidence as an admission of the validity of any
17 claim or any fact alleged by Plaintiffs' Class Representatives in this Action or in any other
18 pending or subsequently filed action, or of any wrongdoing, fault, violation of law, or liability
19 of any kind on the part of MultiCare or admission by MultiCare of any claim or allegation
20 made in this Action or in any action, nor as an admission by Plaintiffs' Class Representatives,
21 Class Members, or Class Counsel of the validity of any fact or defense asserted against them
22 in this Action or in any action.

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V. STIPULATION TO CERTIFICATION OF A SETTLEMENT CLASS AND SUBMISSION FOR PRELIMINARY APPROVAL

5.1 The Parties shall jointly submit this Agreement, including the Exhibits hereto, through their respective attorneys, to the Court for Preliminary Approval as soon as possible after its execution.

5.2 The issue of class certification has not yet been adjudicated by the Court. For purposes of this Settlement only, therefore, the Parties stipulate and agree to the certification of the plaintiff Class defined in this Agreement by Part II, 2.1(f), and that: (i) the proposed Class meets the requirements of Civil Rule 23(a) and (b)(3); (ii) the proposed notice is the best and most practicable under the circumstances, and satisfies the requirements of Civil Rule 23 and Due Process; and (iii) the terms of the Settlement are fair and reasonable. For purposes of the Settlement, Plaintiff Class Representatives are designated and agreed to be suitable class representatives.

VI. NOTICE

6.1 Notice will be sent by mail to all persons named in medical service lien claim notices filed with the King County or Pierce County Auditors on behalf of MultiCare, which bear the signature or a facsimile of the signature of Ralph Wadsworth and were notarized by Rebecca Rohlke. The Parties have compiled a list of such persons and their addresses, which will be furnished to the Settlement Administrator by the Preliminary Approval Date.

6.2 The notice process will be as follows:

6.3 (a) On the Initial Notice Date, which shall be December __, 2014, the Settlement Administrator will transmit the Mailed Notice of Class Action Settlement, attached to this Settlement Agreement as Exhibit A and the Claim Form (with copies of any and all Rohlke Liens filed against the recipient class member), attached to this Settlement Agreement as Exhibit B, via First Class mail. If any mailed notices are returned as undeliverable to their recipient class members, the Settlement Administrator will make reasonable attempts to determine a current mailing address for such class members and will promptly remail the

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1 notices to any addresses disclosed through such efforts; (b) On the Initial Notice Date, the
2 Settlement Administrator also shall establish and maintain a website through which this
3 Agreement, Notice, and Claim Form shall be available until the close of the Claim Period (90
4 days after the Initial Notice Date), and shall publish a Published Notice of Proposed Class
5 Action Settlement in The Seattle Times, The News Tribune, The Olympian, the Federal Way
6 Mirror, the Washington State Association for Justice Trial News, and the Washington State
7 Bar Association's NWLawyer Magazine.

8 6.4 MultiCare will pay the reasonable costs of providing the Notice, regardless of whether
9 the settlement is finally approved.

10 VII. CLASS MEMBERS' RIGHT OF EXCLUSION

11 7.1. A Class Member may opt out of the Class during the Opt-Out Period. Any person
12 who elects to opt out of the Class pursuant to this Section shall not be entitled to relief under
13 or be affected by this Agreement. Except for those persons who have properly opted out, all
14 Class Members will be deemed Class Members for all purposes under this Agreement.

15 7.2 To opt out, the Class Member must complete, sign, and mail to the Settlement
16 Administrator a request for exclusion by the end of the Opt-Out Period. The request must be
17 signed by the Class Member and must state the Class Member's name, address, and telephone
18 number. To be effective, the request must be postmarked on or before the end of the Opt-Out
19 Period. The Settlement Administrator shall provide counsel for the Parties with copies of all
20 exclusion requests.

21 7.3. The Parties shall have the right to challenge the timeliness and validity of any
22 exclusion request and Class Counsel shall also have the right to effectuate the withdrawal of
23 any exclusion filed in error, or to seek to have the Class Member withdraw his or her opt out
24 request. The Court shall determine whether any contested exclusion request is valid.

25 7.4 With respect to any Class Member who elects to opt out, to the extent that the statutes
26 of limitations and/or repose or any defenses of lapse of time are tolled by operation of law,

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1 they will continue to be tolled until 90 days after receipt of the request to opt out or for such
2 longer period as the law may provide without reference to this Agreement.

3 **VIII. SETTLEMENT TERMS**

4 8.1 **Generally.** This Agreement provides Class Members with two kinds of relief: (a)
5 monetary relief to Class Members who timely submit a Claim Form to the Settlement
6 Administration containing the specified information showing that they are entitled to a
7 payment; and (b) a judicial decree that any future medical service lien claim by MultiCare
8 based on a Rohlke Lien is invalid, unless another lien claim notice in the form specified by
9 statute was filed with the appropriate county auditor before the Class Member's third party
10 personal injury claim was settled and paid to the Class Member or the Class Member's
11 attorney.

12 8.2 **Monetary Relief.** MultiCare will pay \$7.5 million into the Escrow Account to be
13 available as a Common Fund to be administered by the Settlement Administrator.

14 (a) The Settlement Administrator will make payments to Class Members who
15 timely submit a Claim Form and provide the required information, as follows:

16 i. If, prior to the Settlement Date, MultiCare received a payment on a Class
17 Member's account as a result of a Rohlke Lien from a tortfeasor, the tortfeasor's
18 insurer, or from funds received by the Class Member as a result of a third party
19 personal injury claim:

20 (1) 45 percent of the amount MultiCare received if the Class Member had no
21 health insurance and was not enrolled in a government-sponsored health care
22 program at the time of service;

23 (2) 65 percent of the amount MultiCare received if the Class Member was
24 enrolled in a government-sponsored health care program at the time of service;

25 (3) 150 percent of the amount MultiCare received if the Class Member had
26 Commercial Health Insurance through a health insurer with which MultiCare had

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1 a provider contract in effect at the time of service, if MultiCare's records so
2 indicated at the time of service, plus nine percent simple interest from the date
3 payment was received by MultiCare to the date of payment by Settlement
4 Administrator;

5 (4) 100 percent of the amount MultiCare received if the Class Member had
6 Commercial Health Insurance through a health insurer with which MultiCare had
7 a provider contract in effect at the time of service, if MultiCare's records did not
8 so indicate at the time of service, plus nine percent simple interest from the date
9 payment was received by MultiCare to the date of payment by Settlement
10 Administrator; and

11 (5) Where total medical service lien payments exceeded 25 percent of the total
12 settlement amount or award for a Class Member's personal injury damages, and
13 MultiCare received payment as a result of a Rohlke Lien, 150 percent of the
14 amount by which MultiCare's lien recoveries exceeded the 25% limit, plus nine
15 percent simple interest from the date payment was received by MultiCare to the
16 date of payment by Settlement Administrator. If there were multiple lien
17 recoveries that, when combined, exceeded the 25% cap, MultiCare's payment will
18 be pro-rated based on the total recoveries.

19 ii. Where, prior to the Settlement Date, a Class Member's personal injury
20 settlement funds were held in trust by his or her attorney in order to satisfy a Rohlke Lien but
21 no payment was received by MultiCare, ten percent of the amount held in trust to satisfy
22 MultiCare's lien claim.

23 iii. Where, prior to the Settlement Date, a Class Member has received a
24 payment from MultiCare as reimbursement for amounts previously recovered by MultiCare
25 on account of a Rohlke lien, then the Class Member shall receive the net difference between
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1 the amount to be paid to the Class Member under this Settlement Agreement and the amount
2 previously paid to the Class Member by MultiCare.

3 iv. Payments to Class Members under ¶8.2 (A) will be reduced by any
4 amounts owed to MultiCare for services not forming the basis for a Rohlke Lien claim.

5 iv. MultiCare will not re-open a Class Member's previously closed account
6 because the Class Member receives a payment under this Agreement.

7 (b) For purposes of this Agreement:

8 i. A payment to MultiCare will be deemed to have been received as a
9 result of a Rohlke Lien if MultiCare received the payment from a tortfeasor or insurer,
10 from a Class Member or the Class Member's attorney, or otherwise as the result of a
11 personal injury settlement or award in favor of the Class Member after a Rohlke Lien
12 was on file with the King or Pierce county auditors, and no Corrected Notice of Lien
13 claim was filed before the payment was issued to MultiCare. Payments received by
14 MultiCare as a result of first party insurance covering the Class Member, including
15 personal injury protection, premises medical payments, or medical protection
16 payments, are not payments received as a result of a Rohlke lien for purposes of this
17 agreement, regardless of how the payment was transmitted to MultiCare; and

18 ii. Personal injury settlement funds will be deemed to have been held in
19 trust in order to satisfy a Rohlke Lien if, (1) prior to the Settlement Date and at a time
20 when a Rohlke lien was on file with the Pierce or King County auditor and no
21 Corrected Notice of Lien was on file; (2) a Class Member's attorney deposited into his
22 or her trust account funds received as a result of the personal injury claim that formed
23 the basis for the Rohlke lien or liens; (3) in an amount equal to or greater than the
24 amount of the Rohlke lien or 25% of the total settlement, whichever is less; or (4) the
25 Class Member demonstrates by contemporaneous documentation, such as a
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1 distribution letter from his/her attorney, that an amount was deposited specifically to
2 satisfy a Rohlke lien.

3 8.3 **Payments to Class Representatives.** Class Counsel will seek, and MultiCare will not
4 oppose, incentive awards to the Plaintiff Class Representatives in the amount of \$15,000 each.
5 The Settlement Administrator will pay the amounts authorized by the Court to the Plaintiff
6 Class Representatives from the Common Fund.

7 8.4 **Payments to Class Counsel.** Class Counsel will seek, and MultiCare will not oppose,
8 an attorney fee award of up to 33 1/3 percent of the Common Fund plus the amount
9 voluntarily paid by MultiCare to Class Members on account of Rohlke Liens, which is
10 stipulated to be \$ 81,117.44. Class Counsel will also seek reimbursement of their reasonable
11 litigation expenses. The Settlement Administrator will pay the amounts authorized by the
12 Court to Class Counsel from the Common Fund.

13 8.5 **Common Fund Limitations.** Monies deposited into the Escrow Account and
14 available for payment from Common Fund are and shall remain the property of MultiCare
15 until paid out by the Settlement Administrator in accordance with this Agreement. If the
16 Common Fund is not sufficient to make the specified payments to Class Members, the
17 Settlement Administrator shall so inform Class Counsel, who must seek the Court's approval
18 to reduce all payments to Class Members *pro rata*. If the Common Fund is not exhausted by
19 payments under this Agreement, the Settlement Administrator shall remit the balance in the
20 Escrow Account to MultiCare within seven days after all payments to Class Members have
21 been made.

22 8.6 **Declaration of Invalidity.** The Parties will jointly request the Court to include the
23 following language in its judgment and order:

24 All notices of medical service lien claims filed on behalf of MultiCare Health
25 System, which were signed by Ralph Wadsworth and notarized by Rebecca
26 Rohlke, are hereby declared invalid and are hereby released, provided that this
declaration shall not preclude assertion of a medical service lien claim where

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another notice of lien claim was filed with the appropriate county auditor in the form prescribed by and within the time limit prescribed by law.

(a) MultiCare will provide the Settlement Administrator with a release of lien to be sent to each Class Member who returns a Claim Form, except in those cases where MultiCare has re-filed a Corrected Notice of Lien claim.

8.7 Release of Claims against MultiCare. On the Final Settlement Date, each Plaintiff Class Representative, Class Counsel, and each Class Member who has not opted out shall – on behalf of himself or herself and any person claiming by or through him or her as an heir, administrator, devisee, predecessor, successor, attorney, representative of any kind, shareholder, partner, director, owner or co-tenant of any kind, affiliate, subrogee, assignee, or insurer (the “Releasing Parties”), and regardless of whether any Class Member executes and delivers a written release – be deemed to and does hereby release and forever discharge MultiCare, and each of its successors and assigns and each of their respective directors, officers, employees, attorneys, or agents, of and from any and all Settled Claims, provided that all claims against Hunter Donaldson, LLC, Ralph Wadsworth, Rebecca Rohlke, and any persons or entities affiliated with them are not released.

8.8 Assignment of Claims against Hunter Donaldson, etc. On the Final Settlement Date, all claims by Plaintiff Class Representatives and any Class Member against Hunter Donaldson, LLC, and its owners, officer, agents or attorneys, including Ralph Wadsworth and Rebecca Rohlke related to Rohlke Liens and efforts to collect on Rohlke Liens on behalf of MultiCare, except for claims based on discovery sanctions against Hunter Donaldson, LLC, Ralph Wadsworth and Rebecca Rohlke shall be deemed assigned to MultiCare Health System. This Assignment of Claims shall not include claims against Hunter Donaldson, LLC, and its owners, officers, agents or attorneys, including Ralph Wadsworth and Rebecca Rohlke arising out of or in any way related to their assertion of liens, collection activities, or other tortious or wrongful acts either directly or by or on behalf of persons or entities other than MultiCare.

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IX. CLAIM PROCESS

9.1 **Class Member's Responsibility.** In order to receive a payment from the Common Fund, a Class Member must complete and timely transmit a Claim Form with the specified supporting documentation to the Settlement Administrator.

9.2 **Settlement Administrator's Responsibility.** The Settlement Administrator will administer the Claims Process in accordance with the terms of Exhibit C to this Agreement.

X. PAYMENT

10.1 **Payments to Class Members.** All payments due shall be mailed to Class Members by the Settlement Administrator not later than 45 days after the end of the Claim Period or the Final Settlement Date, whichever is later, except where there is an unresolved dispute as to a Class Member's claim, in which case payment shall be mailed within ten days after resolution of the dispute. The check (or stub) shall include remarks stating that endorsement of the check represents satisfaction of any claim that the Class Member has against MultiCare based on a Rohlke Lien.

10.2 **Payments to Plaintiff Class Representatives and Class Counsel.** Court-approved payments to Plaintiff Class Representatives and Class Counsel shall be made by the Settlement Administrator within ten days after the Final Settlement Date, provided that they have provided IRS W-9 forms to the Settlement Administrator.

XI. ADMINISTRATIVE PROVISIONS

11.1 The Settlement Administrator shall maintain records of its activities under this Agreement sufficient to resolve any concerns about its implementation, which shall be subject to review on reasonable notice by the Court or counsel for the Parties. The expense of any review initiated by a Party shall be borne by that Party.

11.2 MultiCare shall be responsible to pay the Settlement Administrator's reasonable fees and expenses. Any dispute regarding the same shall be submitted to the Court for resolution.

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1 11.3 The Parties and their counsel shall have the duty to cooperate with the Settlement
2 Administrator in resolving issues that may arise concerning the claims process in a rational,
3 responsive, and timely manner. The Parties shall confer in person or by telephone
4 periodically to discuss the implementation of this Agreement and to attempt to resolve any
5 concerns that may arise among the Parties. In the event that any Party reasonably believes
6 that the other Party is not properly implementing or applying any of the terms of this
7 Agreement, or in the event there is a question concerning the application of the terms of this
8 Agreement by any Party, then:

- 9 (b) Counsel for that Party shall notify counsel for the other Party;
- 10 (c) Counsel for the Parties shall meet within seven days of receipt of the written
11 notification to resolve the concern; and
- 12 (d) In the event that Counsel for the Parties cannot resolve the matter, then the
13 matter shall be submitted to the Court.

14 11.4 Until the Final Settlement Date, the Parties agree to use reasonable efforts to preserve
15 all records and evidence which are or could be relevant to, or could lead to the discovery of,
16 relevant evidence concerning the matters at issue in the Action.

17 11.5 The Judgment and Order shall provide for the Court's exclusive and continuing
18 jurisdiction over the Action, all Parties, and Class Members to interpret and enforce the terms,
19 conditions, and obligations of this Agreement. In the event any Party fails to perform under
20 the Agreement or to make a payment due and owing under the terms of this Agreement,
21 counsel for the other Party shall so notify the Court and simultaneously notify the other Party.
22 If a breach is not cured within a reasonable period of time, the other Party may apply to the
23 Court for relief.

24 **XII. JUDGMENT & RELEASE**

25 12.1 The relief provided under this Agreement shall be the sole and exclusive remedy for
26 Plaintiff Class Representatives, Class Members and Class Counsel with respect to Settled

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1 Claims. The Judgment and Order shall provide that Action is dismissed with prejudice and
2 that Plaintiff Class Representatives and each Class Member who has not opted out of the
3 Class are barred from initiating, asserting, or prosecuting any Settled Claims against
4 MultiCare.

5 12.2 The Judgment and Order shall also provide that, in consideration of MultiCare's
6 undertakings in this Agreement, Plaintiff Class Representatives, and each Class Member who
7 has not opted out, shall be deemed to have forever released and discharged MultiCare from
8 any Settled Claims, which release shall be effective as any person claiming through the
9 Plaintiff Class Representative or Class Member, whether as an heir, administrator, devisee,
10 predecessor, successor, attorney, representative of any kind, shareholder, partner, director,
11 owner or co-tenant of any kind, affiliate, subrogee, assignee, or insurer.

12 **XIII. TERMINATION OF THE AGREEMENT**

13 13.1. This Agreement is expressly contingent upon the Court's preliminary and final
14 approval of its terms as stated herein. If the Court fails to approve the Agreement, either
15 preliminarily or finally, the Agreement will be terminated, having no force or effect
16 whatsoever, and shall be considered null and void, *ab initio*, and not admissible as evidence
17 for any purpose in any pending or future litigation (in any jurisdiction) involving any of the
18 Parties.

19 **XIV. MISCELLANEOUS PROVISIONS**

20 14.1 This Agreement, including all attached Exhibits hereto, shall constitute the entire
21 agreement among the Parties with regard to the subject matter of this Agreement and shall
22 supersede any previous agreements and understandings between the Parties. This Agreement
23 or Exhibits may not be changed, modified, or amended except in writing signed by Class
24 Counsel and MultiCare, and subject to Court approval.

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1 14.2 This Agreement may be executed by the Parties in one or more counterparts; each of
2 which shall be deemed an original but all of which together shall constitute one and the same
3 instrument.

4 14.3 This Agreement, if approved by the Court, shall be binding upon and inure to the
5 benefit of the Class, the Parties, and their representatives, heirs, successors, attorneys, and
6 assigns.

7 14.4 The headings of the Sections of this Agreement are included for convenience only and
8 shall not be deemed to constitute part of this Agreement or to affect its construction. The
9 decimal numbering of provisions herein is intended to designate Subsections where
10 applicable.

11 14.5 Any notice, instruction, application for Court approval, or application for Court order
12 sought in connection with this Agreement or other document to be given by any Party to any
13 other Party shall be in writing and delivered to counsel of record for MultiCare and Class
14 Counsel.

15 14.6. This Agreement has been negotiated at arm's length by Class Counsel and
16 MultiCare's counsel. In the event of any dispute arising out of this Agreement, or in any
17 proceeding to enforce any of the terms of this Agreement, no Party shall be deemed to be the
18 drafter of this Agreement or of any particular provision or provisions, and no part of this
19 Agreement shall be construed against any Party on the basis of that Party's identity as the
20 drafter of any part of this Agreement. The Parties further acknowledge that the obligations
21 and releases herein described are in good faith and are reasonable in the context of the matters
22 released.

23 14.7 The Parties represent, warrant, and agree that no promise or agreement not expressed
24 herein has been made to them, that this Agreement contains the entire agreement between the
25 Parties, that the Agreement supersedes any and all prior agreements or understandings
26 between the Parties with respect to the matters herein, and that the terms of this Agreement

1 are contractual and not a mere recital; that in executing this Agreement, no Party is relying on
 2 any statement or representation made by the other Party, or any other Party's agents or
 3 attorneys concerning the subject matter, basis or effect of this Agreement other than as set
 4 forth herein; and that each Party is relying solely on its own judgment and knowledge.

5 14.8 This Agreement shall be construed according to the laws of the State of Washington.

6 14.9 Waiver by one party of any provision or breach of this Agreement shall not be deemed
 7 a waiver of any other provision or breach of this Agreement.

8 14.10 Each individual signing this Agreement warrants that he or she has the authority to
 9 enter into this Agreement on behalf of the party for which that individual signs.

10 DATED this 17th day of November 2014.

11 PFAU COCHRAN VERTETIS AMALA, BENNETT BIGELOW & LEEDOM, P.S.
 12 PLLC

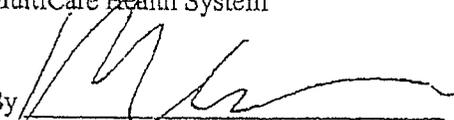
13 
 14 By Darrell L. Cochran
 15 Darrell L. Cochran, WSBA #22851
 16 Loren A. Cochran, WSBA #32773
 17 Christopher E. Love, WSBA #42832
 18 Attorneys for Plaintiffs

13 
 14 By Michael Madden
 15 Michael Madden, WSBA #8747
 16 Amy M. Magnano, WSBA #38484
 17 Attorneys for Defendant MultiCare Health
 18 System

17 WATSON & GALLAGHER

MultiCare Health System

19 By /s/Thomas F. Gallagher
 20 Thomas F. Gallagher, WSBA #24199
 21 Attorneys for Plaintiffs

19 
 20 By Mark C. Gary
 21 Senior Vice President & General Counsel

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