



IN THE CIRCUIT COURT OF BULLOCK COUNTY, ALABAMA

LASSETER ANTHONY FRANK,)
 Plaintiff,)
)
 V.) Case No.: CV-2012-900038.00
)
 RITE-AID HDQTRS. CORPORATION,)
 Defendant.)

**ORDER PRELIMINARILY CERTIFYING A CLASS FOR SETTLEMENT PURPOSES
 AND GRANTING PRELIMINARY APPROVAL OF CLASS SETTLEMENT**

This matter is before the Court on Plaintiffs' motion for preliminary approval of the class action settlement they have reached with defendants Rite Aid Hdqtrs. Corp. and Rite Aid Corporation (collectively, "Rite Aid") in this Action. Pursuant to that motion, Plaintiffs seek the preliminary approval of the Parties' Stipulation of Settlement and Release under Alabama Rule of Civil Procedure 23(e); the certification of a proposed Settlement Class under Alabama Rule of Civil Procedure 23(b)(3); and the establishment of a schedule to govern future proceedings concerning the Settlement. On September 2, 2015, the Court held a hearing in which the Parties presented oral argument on the merits of certification of the Settlement Class and the preliminary approval of the proposed Settlement itself. Having fully considered Plaintiffs' motion, and the exhibits thereto (including the Stipulation of Settlement and Release and its own exhibits), and the evidence and argument offered by the Parties in support of the Settlement during the September 2, 2015 hearing, and based upon the totality of the information before the Court, the Court hereby **FINDS, ORDERS AND DECREES** as follows:

1. **Use of Defined Terms.** For purposes of clarity and consistency, the Court hereby adopts the definitions set forth in Section 2 of the Parties' Agreement. Accordingly, unless otherwise defined herein, all capitalized terms and phrases used in this Order shall have the same meanings as given them in the Settlement.

2. **Partial Stay of this Action.** All non-settlement-related proceedings in the Action are hereby stayed and suspended until further Order of the Court.

3. **Jurisdiction.** The Court finds that it has subject matter jurisdiction over this Action, including jurisdiction to approve and enforce the Agreement, all of its exhibits, and all Orders and Decrees that have been entered or which may be entered pursuant thereto. The Court also finds that it has personal jurisdiction over the Parties and, for purposes of consideration of the proposed Settlement, over each of the members of the Settlement Class defined below unless and until they choose to opt out of the Settlement Class, and that venue is proper. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) ('[A] forum State may exercise jurisdiction over the

claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant,” so long as the absent plaintiff “receive[s] notice plus an opportunity to be heard and participate in the litigation, along with “an opportunity to remove himself from the class”).^[1]

4. **Preliminary Class Certification for Settlement Purposes Only.**

Where, as here, the Court is presented with a proposed settlement prior to a litigated decision on class certification, the Court must determine whether the proposed Settlement Class is sufficiently cohesive to warrant settlement certification. In order to find such cohesiveness, “there should be a common nucleus of facts and potential legal remedies among all class members, and that the class . . . must be definable and defined for the judge.” Manual for Complex Litigation (Fourth) § 21.132 at 251 (2004).

In making that determination, the Court also must “analyze all factors required by Ala. R. Civ. P. 23” in light of the evidenced and argument offered by the Parties. Ala. Code § 6-5-641(e). Although reliance upon certification-related stipulations by the parties is permissible, a court must still “independently assess the [Rule 23 factors] to some degree.” *Disch v. Hicks*, 900 So. 2d 399, 406 (Ala. 2004). Within the context of this case, those factors are: (1) numerosity; (2) commonality; (3) typicality; (4) adequacy of representation; and (5) predominance and superiority. See Ala. R. Civ. P. 23(a), 23(b)(3).

5. Based upon a rigorous review of the record, including the evidence offered by Plaintiffs in support of class certification, the Court preliminarily finds and concludes, for settlement purposes only, that:

(a) The Settlement Class, as defined below satisfies the numerosity requirement of Rule 23(a)(1), given that Rite Aid’s business records show that over 4,000 persons and entities nationwide paid Rite Aid or their affiliates a \$50 or \$85 Fixed Records Charge on or after January 1, 2005, and the individual joinder of that many geographically dispersed persons would be impracticable. (Pltfs’ App’x. Ex. 7 at “A-p. 117” and “C”.) See *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) (noting that classes comprised of more than 40 members are generally considered sufficiently numerous to satisfy Rule 23(a)(1)’s numerosity requirement).

(b) The Settlement Class also satisfies Rule 23(a)(2)’s commonality requirement because the claims of the Plaintiffs and the Settlement Class Members present common questions of fact and law concerning whether Rite Aid’s methodology for assessing its Fixed Records Charge was unlawful, unconscionable and unfair, because those Fixed Records Charges allegedly were (1) uniformly misrepresented as charges for services not actually rendered and costs not actually incurred; (2) unreasonable—if not unconscionable—in amount when considered in relation to the *de minimus* costs actually associated with producing the requested records; (3) violative of state and federal statutes that purportedly limit what can be charged for the production of medical records, given the relevant circumstances surrounding each request, such as the number of pages of records that would need to be produced; and (4) so unrelated to the actual costs associated with producing the requested records that the charges supposedly violate the covenant of good faith and fair dealing inherent in every contract. First Am. Compl. ¶ 32 (filed May 7, 2015). Resolution of these questions are “apt to drive the resolution of the litigation” because they are not only common to the

claims of all Settlement Class Members but are also “of a nature that is capable of classwide resolution” because they are susceptible to resolution through common, classwide proof. *Wal-Mart Stores, Inc. v. Dukes*, — U.S. —, 131 S. Ct. 2541, 2551 (2011) (“Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury, ... not ... that they have all suffered a violation of the same provision of law:” what must be shown is that the claims of a class “depend upon a common contention ... that it is capable of classwide resolution ... [and that is] apt to drive the resolution of the litigation.”). Further, these issues are capable of classwide resolution, and are susceptible to classwide proof. The pertinent documents, including the Rite Aid’s billing invoice and customer prescription history reports, are all standard and uniform across state lines. (Pltfs’ App’x. Ex. 7 at “A-pp. 82, 133-134” and “A-1” and “A-3” and “A-17”.) Rite Aid’s records request protocol and billing procedures are also uniform across state lines. (Pltfs’ App’x. Ex. 7 at A-pp. 88-90, 118-119”; “A-3” see *also* Ex. 9.) Rite Aid’s established Fixed Records Charge of \$50 or \$85 was also applied uniformly across state lines. *Id.*

Finally, if Plaintiffs are correct in their theories of recovery, then the Settlement Class Members have incurred a common injury (i.e., paying overcharges for records) that is subject to common relief grounded in the causes of action asserted by Plaintiffs.

(c) The Settlement Class also satisfies the typicality requirement of Rule 23(a)(3) because, pursuant to the terms of their representation agreements with their counsel, Plaintiffs reimbursed their counsel for their counsel’s payment to Rite Aid of Fixed Records Charges on or after January 1, 2005, meaning that they “suffered the same injury as the class members.” *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1356-57 (11th Cir. 2009). The alleged cause of that injury is one common to the Settlement Class as a whole—Rite Aid’s allegedly improper practice of invoicing Fixed Records Charges on a flat-fee methodology, regardless of the time, expense, and number of pages a production actually involved, and regardless of any applicable limits that might apply under state and federal law. *Cheminova Am. Corp. v. Corker*, 779 So. 2d 1175, 1181 (Ala. 2000) (“Where, as here, the party seeking certification alleges that the same unlawful conduct was directed at the class representatives and the class itself, the typicality requirement is usually met irrespective of the varying fact patterns which underlie individual claims”). The claims of the Plaintiffs are also based on the same theories and causes of action as the Settlement Class as a whole, all premised upon the same alleged course of conduct by Rite Aid. The record demonstrates that the transaction involving each Plaintiff’s pharmacy records was typical of how other records transactions were handled, as Rite Aid followed its uniform business protocol in processing and billing for customer records. (Pltfs’ App’x. Ex. 7 at “A-pp. 158-160”; “A-3”; see *also* Ex. 9.)

(d) Plaintiffs and Class Counsel are adequate representatives of the Settlement Class under Rule 23(a)(4). The Plaintiffs are members of the class they seek to represent, and the Court is aware of no antagonistic interests that exist between Plaintiffs and the Settlement Class Members, and the Court is satisfied that Class Counsel have the competence to undertake this litigation. (Pltfs’ App’x. Ex. 7 at “D”.) *Cheminova Am. Corp.*, 779 So. 2d at 1181.

(e) The requirements of Rule 23(b)(3) are also satisfied for purposes of certification of the Settlement Class because the common issues of law and fact that surround the

claims of the Settlement Class predominate over any individual questions associated with the resolution of those claims, and certification of a Rule 23(b)(3) opt-out settlement class is superior to other available means of adjudicating this dispute. As noted previously with respect to commonality and typicality, the claims of the Plaintiffs and the Settlement Class are premised upon the same alleged common methodology and common course of conduct by Rite Aid, which is alleged to have produced a commonly felt injury, and the elements of the causes of action asserted by Plaintiffs on behalf of themselves and the Settlement Class can be predominately resolved at trial through common, uniform evidence and testimony. Although the claims of the Settlement Class are indirectly premised on varying state (as well as federal) laws that purport to limit or cap in different ways the amount that may be charged for the production of medically-related records, “courts have consistently held that such [state law] variations are no impediment to certification of a class for settlement purposes only.” 2 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 6:3 at 32 & n.63 (10th ed. 2013) (collecting cases); *see also In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, No. MDL No. 2328, 2014 WL 7407492, at *9 (E.D. La. Dec. 31, 2014) (collecting cases, and concluding that “state law variations are rightly viewed as creating primarily manageability concerns, which . . . the Court need not consider in the settlement context.”); *accord Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (“Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems.”).

6. Accordingly, for purposes of considering, approving and effectuating the Agreement and to fairly and adequately protect the interests of all concerned, the following class (the “Settlement Class”) is preliminarily certified for settlement purposes only, pursuant to Rules 23(a) and 23(b)(3) of the Alabama Rules of Civil Procedure:

(1) All persons and entities who, at any time on or after January 1, 2005, paid Rite Aid Hdqtrs. Corp. or Rite Aid Corporation a Fixed Records Charge of either \$50 or \$85 invoiced to them for the production of customer pharmacy records, and who were not thereafter reimbursed for the cost of that charge by any client, principal or third party; and (2) all persons and entities who reimbursed such a person or entity for his, her or its payment of such a Fixed Records Charge.

Excluded from the Settlement Class are: (a) Rite Aid Hdqtrs. Corp., Rite Aid Corporation, and each and all of their respective current or former parent corporations, subsidiaries, divisions, related and affiliated companies and entities, principals, stockholders, directors, officers, employees, representatives and agents; (b) Persons or entities who or which timely and properly exclude themselves from the Settlement Class; (c) Any Settlement Class Members currently in bankruptcy; (d) State governments, the federal government, and agencies and departments of the foregoing; (e) Persons who, as of the date of entry of this Order Preliminarily Certifying a Class for Settlement Purposes and Granting Preliminary Approval of Class Settlement, have previously executed an individual release of all claims within the scope of the Release proposed by this Agreement; (f) Rite Aid’s Counsel, along with those law firms’ attorneys and employees; and (g) All Alabama judges, their spouses, and persons within the third degree of relationship to them.

7. **Appointment of Class Representative and Class Counsel.** The Court hereby appoints Plaintiffs as the representatives of the conditionally certified Settlement Class. The Court further designates and appoints Charles A. McCallum, III and R. Brent Irby of the law firm of McCallum Hoaglund Cook & Irby, LLP, who the Court finds are experienced and adequate counsel, as the legal counsel for the Settlement Class (“Class Counsel”). Class Counsel are authorized to represent Plaintiffs and the Settlement Class Members, to enter into and seek approval of the Agreement on behalf of the Settlement Class, and to bind Plaintiffs, all other Settlement Class Members and themselves to the duties and obligations contained in the Agreement, subject to the final approval by the Court of the Agreement.

8. **Preliminary Settlement Approval.** A class action cannot be dismissed or compromised unless the court finds the settlement to be fair, reasonable and adequate. Ala. R. Civ. P. 23(e); *accord Adams v. Robertson*, 676 So. 2d 1265, 1272 (1995). Such review involves a two-step process, where the settlement is given a preliminary fairness review by the court followed by notice to the class, the opportunity for class members to make their reactions known to the Court, and a fairness hearing. Manual for Complex Litigation (Fourth) § 21.632 at 320-21. Before preliminary approval can be given to a proposed class action settlement, a court must determine whether the settlement appears to be the product of serious, informed and non-collusive negotiations and that its terms fall within the range of reasonableness such that distribution of notice to the settlement class and the scheduling of a fairness hearing are justified. 2 McLaughlin on Class Actions: Law and Practice § 6:7 at 66-67.

9. Upon preliminary review, the Court finds that the Agreement, and the Settlement it proposes, appear sufficiently fair, adequate and reasonable to warrant consideration for final approval, and distribution of notice to the members of the Settlement Class. Manual for Complex Litigation (Fourth) § 21.632, at 320-21.

(a) **The Procedural Fairness of the Settlement.** The Court finds that the Settlement is procedurally fair, being the product of protracted negotiations free of any evidence of collusion, conducted among counsel for both sides who were well informed—through a sufficient exchange of discovery material—regarding the core legal and factual issues associated with the Parties’ claims and defenses.

(b) **The Substantive Fairness of the Settlement.** Although Rite Aid does not admit any fault or liability in the Agreement, the Court recognizes that many of the Settlement’s terms represent compromises by the Parties, but are compromises which have produced terms which appear to the Court—at least at this stage of the inquiry—to be fair, adequate and reasonable. The Settlement offers Settlement Class Members who paid a \$50 Fixed Records Charge relief in the amount of \$15 (representing a recovery of 30.0% of the charge), and for those who paid an \$85 Fixed Records Charge relief in the amount of \$25 (representing a recovery of 29.4% of the charge). Such potential rates of recovery fall well within the range of reasonableness,^[2] particularly in light of the uncertainties faced by the Plaintiffs and Settlement Class Members through continued litigation,^[3] as well as in their possible inability to maintain class certification for purposes of litigation and trial.^[4] Such relief, in other words, appears reasonable because it is offered to the persons who allegedly were directly affected by the challenged conduct, in amounts which appear to be a fair compromise

of disputed damage claims, given the risk that liability may not be found if this Action were fully litigated and given the right of individual Settlement Class Members to opt out if they do not believe the amount of relief offered to them is fair for them.

(c) The Court also recognizes that the Settlement does not anticipate distributing relief in a monetary form, but instead in the form of \$15 and \$25 Rite Aid gift cards. However, the Court finds for present purposes that the form of relief offered by the Settlement is reasonable and fair. The gift cards impose no undue restrictions, and money is not the only form of relief that a class action settlement can offer. See, e.g., *Hill v. Art Rice Realty Co.*, 66 F.R.D. 449, 453 (N.D. Ala. 1974) (“It does not follow as a matter of course that money must be paid to make every settlement a reasonable one.”), *aff’d*, 511 F.2d 1400 (5th Cir. 1975). The question before the Court is not whether “compensation in kind is worth less than cash” but instead “whether the value of relief in the aggregate is a reasonable approximation of the value of plaintiffs’ claims.” *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001); accord 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions (Fourth)* § 11.46 at 134 (2002) (“Cash as well as noncash consideration is appropriate, as long as the total consideration is sufficient.”) (collecting cases). The Court preliminarily finds that the value of the relief is a fair and reasonable approximation of the Settlement Class’s claims, and the Court notes that such relief is hardly uncommon in class settlements.^[5]

(d) Finally, the Court notes that the Settlement does not anticipate distributing relief automatically, but instead through a Claims Process. The Court has reviewed the provisions of the Settlement governing the Claims Process, as well as the proposed Claim Form itself, and finds these provisions to be reasonable. Claim forms are commonplace in class settlements,^[6] and here there is a rational reason to require use of a claim form process. As the Parties explained during the September 2, 2015 Hearing, Rite Aid has records of those entities and persons who paid the Fixed Records Charges, but in some cases those persons or entities were reimbursed for the cost of the charge by their own clients or others. Rite Aid however has no records identifying such reimbursements or the persons or entities who made them. Therefore, it is reasonable to require a Claimant to verify not only that he or she has paid such a charge, but also that he or she has not been reimbursed by another for it.

10. Accordingly, the Court grants preliminary approval to the Agreement under Alabama Rule of Civil Procedure 23(e), subject to further consideration at the Fairness Hearing after notice to the Settlement Class Members.

11. **Fairness Hearing**. A Fairness Hearing shall be held on January 25, 2016 beginning at 9:00 a.m. (CST), at the Circuit Court of Bullock County, Alabama, to determine, among other things, whether: (a) the proposed Settlement of the Action on the terms and conditions provided for in the Agreement is fair, adequate and reasonable as to the Settlement Class, such that the Agreement should be granted final approval by the Court pursuant to Alabama Rule of Civil Procedure 23(e); (b) the certification of the Settlement Class should be made final for settlement purposes pursuant to Rules 23(a) and 23(b)(3) of the Alabama Rules of Civil Procedure; (c) whether Settlement Class Members and related persons should be subject to a permanent injunction against prosecution of claims covered by the Release provisions of the Agreement; (d) whether Attorneys’ Fees and Expenses (including Incentive Awards to the Plaintiffs) should be awarded by the Court, and in what amount; and (e)

whether a Final Order and Judgment should be entered, and this Action thereby dismissed with prejudice, pursuant to the terms of the Agreement. The Court may adjourn the Fairness Hearing on the hearing date and resume it on a subsequent date without further notice to the Settlement Class Members.

12. **Further Submissions by the Parties**. Any application by Class Counsel for Attorneys' Fees and Expenses and Incentive Awards shall be filed with the Court no later than fifteen (15) days prior to the deadline for the submission of objections (as set out in Paragraph 18 below), and may be supplemented by Class Counsel up to ten (10) days prior to the Fairness Hearing. All other submissions of the Parties in support of the proposed Settlement, or in response to any objections submitted by Settlement Class Members, shall be filed no later than ten (10) days before the Fairness Hearing.

13. **Settlement Administration**. In consultation with and with the approval of Class Counsel, Rite Aid is hereby authorized and directed to establish the means necessary to administer the proposed Settlement, and implement the class notification process and Claims Process, in accordance with the terms of the Agreement. The Court hereby authorizes the Parties to retain Garden City Group to serve as the Settlement Administrator, at Rite Aid's expense, to aid in implementing the terms of the Agreement.

14. **Notice to the Settlement Class**. The Court approves, as to both form and content, the Class Notice and Summary Settlement Notice which are attached as Exhibits "B" and "D" to the Agreement, as well as the methodology for distributing those notices to the Settlement Class Members as set forth in Section 5 of the Agreement. The Court finds that the notice dissemination methodology represents a reasonable and adequate approach to affording notice to the Settlement Class based on the information available from Rite Aid's business records. Notice is to be disseminated directly to those persons and entities who, based on Rite Aid's business records, paid a \$50 or \$85 Fixed Records Charge on or after January 1, 2005. The notice directs those persons and entities who were reimbursed for their payment of such charges to either forward the notices to the persons who reimbursed them, or to notify the Settlement Administrator of the name and address of the persons who reimbursed them so notice can be sent to those persons directly by the Settlement Administrator. The notice also explains how recipients of the notice can obtain information on the Fixed Records Charges that Rite Aid's business records show them as having paid on or after January 1, 2005. The Court finds this methodology reasonable and adequate given the nature of the relationships that typically exist between the payors and those that reimbursed them, which most often is in the form of an attorney-client relationship, and given that Rite Aid has no record of the identities of any such reimbursing persons or entities. This notice process is then supplemented by publication notice in a nationally-distributed publication. Under the circumstances, the Court finds this notice program to be not only reasonable and adequate, but the best practical notice available under the circumstances. As a result,

(a) Beginning not later than ten (10) days after entry of this Order and to be substantially completed no later than seventy-five (75) days before the Fairness Hearing, and subject to the requirements of this Order and the Agreement, the Settlement Administrator shall cause the Class Notice to be mailed, by First-Class U.S. Mail, proper postage prepaid, to all those persons and entities who can be reasonably identified from Rite Aid's reasonably accessible business records as having paid a \$50

or \$85 Fixed Records Charge at some point in time on or after January 1, 2005. The distribution of the Class Notice shall otherwise comply with Alabama Rule of Civil Procedure 23 and any other applicable statute, law, or rule, including, but not limited to, the Due Process Clause of the United States Constitution.

(b) The Settlement Administrator shall: (1) promptly re-mail any Class Notices returned by the United States Postal Service with a forwarding address that are received by the Settlement Administrator at least thirty (30) days before the Fairness Hearing; and (2) determine, as soon as practicable, whether a valid address can be located through use of the United States Postal Service's National Change of Address database and/or use of other reasonable means and without undue cost or delay, for those persons and entities for whom Class Notices are returned without a new or forwarding address, and promptly re-mail copies of the Class Notice to those of them for whom the Settlement Administrator is reasonably able to locate valid addresses in accordance herewith, so long as the valid addresses are obtained at least thirty (30) days before the Fairness Hearing.

(c) The Court orders Rite Aid and/or the Settlement Administrator to cause the Summary Settlement Notice to be published in accordance with the terms of Paragraph 5.3 of the Agreement. The publication of the Summary Settlement Notice should occur no later than sixty (60) days before the Fairness Hearing, or as soon thereafter as the publication schedule of that newspaper will permit.

(d) Following entry of this Order, the Parties, working with the Settlement Administrator, are permitted by mutual agreement to make changes in the font, format and content of the Class Notice and Summary Settlement Notice (or the exhibits thereto) that do not materially alter the substance of those notices. Such changes can only be made before the Class Notice is first mailed to Settlement Class Members. Any material substantive changes to either the Class Notice or the Summary Settlement Notice must be approved by the Court.

(e) The Settlement Administrator is further ordered to establish an Internet website which will inform Settlement Class Members of the terms of the Agreement, their rights, dates and deadlines, and related information. The website shall include, in .pdf format, materials agreed upon by the Parties and/or required by the Court, and should be operational and live by the date of the first publication of the Summary Settlement Notice or mailing of the Class Notice, whichever is earlier. At this time, the Court orders that the website include the following: (1) a complete copy of the operative complaint; (2) a complete copy of the Agreement, and its exhibits; (3) a copy of this Order; (4) a copy of the Class Notice; (5) a copy of the Claim Form; and (6) a disclosure, on the website's "home page," of the deadlines for Settlement Class Members to seek exclusion from the Settlement Class or object to the Agreement, as well as the date, time and location of the Fairness Hearing.

(f) No later than ten (10) days before the date of the Fairness Hearing, the Settlement Administrator shall file with the Court a declaration or declarations, verifying compliance with the aforementioned classwide notice procedures.

15. **Findings Concerning The Notice Program.** The Court finds and concludes that the form, content and method of giving notice to the Settlement Class as described in this Order: (a) will constitute the best practicable notice under the circumstances; (b) is reasonably calculated, under the circumstances, to apprise

Settlement Class Members of the pendency of this Action, the terms of the proposed Settlement, and of their rights under and with respect to the proposed Settlement (including, without limitation, their right to object to or seek exclusion from, the proposed settlement); (c) is reasonable and constitutes due, adequate and sufficient notice, and the best practical notice, to all Settlement Class Members and other persons entitled to receive notice; and (d) satisfies all applicable requirements of law, including, but not limited to, Alabama Rule of Civil Procedure 23(c), and the United States Constitution (including the Due Process Clause).

16. **Communications With Settlement Class Members.** The Court authorizes Rite Aid to communicate with Settlement Class Members, potential Settlement Class Members, and to otherwise engage in any other communications within the normal course of Rite Aid's business. However, Rite Aid is ordered to refer any inquiries by Settlement Class Members or potential Settlement Class Members about the Settlement to the Settlement Administrator or Class Counsel.

17. **Exclusion ("Opting Out") from the Settlement Class.** Unless excluded by separate Order of the Court for good cause shown prior to entry of any Final Order and Judgment the Court may hereafter enter, any Settlement Class Member who wishes to be excluded from the Settlement Class must mail a signed, written request for exclusion to the Settlement Administrator at the address provided in the Class Notice, and deliver copies to Class Counsel and Rite Aid's Counsel at the addresses provided in the Class Notice, postmarked no later than thirty (30) days before the date scheduled in paragraph 11 for the Fairness Hearing. To be considered valid, a written request for exclusion must be personally signed by the Settlement Class Member, and must include the information called for by the instructions contained in the Class Notice. The Settlement Administrator shall file a list reflecting all timely filed requests for exclusion with the Court no later than ten (10) days before the Fairness Hearing. If the proposed Settlement is finally approved, any potential Settlement Class Member who has not submitted a timely written request for exclusion from the Settlement Class shall be deemed to have forever waived his or her right to be excluded from the Settlement Class and from the Settlement, and shall thereafter be bound by all subsequent proceedings, orders and judgments in this Action, including but not limited to the Release contained in the Settlement, even if the potential Settlement Class Member previously initiated or subsequently initiates any litigation against any or all of the Released Parties relating to the Released Claims. No person may exclude any other person besides himself or herself from the Settlement Class, and any attempt to do so shall be invalid. Persons who properly and timely exclude themselves from the Settlement Class shall not be entitled to receive the benefits of the Settlement. Rite Aid shall promptly direct the Settlement Administrator to serve the Class Notice on counsel for any Settlement Class Members who subsequently initiate litigation, arbitration, or other proceedings against the Released Parties relating to claims involving the \$50 or \$85 Fixed Records Charges, and/or otherwise involving claims or causes of action, or the facts and circumstances relating thereto, this Action and/or the Released Claims contemplated by the Agreement. The requirement of such notice shall not alter the injunctions described and entered below, nor shall such notice be deemed to authorize any member of the Settlement Class to commence or prosecute such actions despite those injunctions.

18. **Objections and Appearances.** Any Settlement Class Member or counsel hired at any Settlement Class Member's own expense who does not timely exclude himself or herself from the Settlement Class, and who complies with the requirements of this paragraph and the procedures specified in the Class Notice, may object to any aspect or effect of the proposed Settlement.

(a) Any Settlement Class Member who has not filed a timely and proper written request for exclusion and who wishes to object to the fairness, reasonableness, or adequacy of the Settlement, or to the certification of the Settlement Class, or to the award of Attorneys' Fees and Expenses, or to the Incentive Awards, or to any other aspect or effect of the Settlement, or to the Court's jurisdiction, must file with the Court, and deliver copies to Class Counsel and Rite Aid's Counsel at the addresses provided in the Class Notice, no later than thirty (30) days before the date scheduled in paragraph 11 above for the Fairness Hearing a written statement of objection, that (1) contains a caption or title that identifies it as "Objection to Class Settlement in *Anthony Frank Lasseter & Amber Osborne v. Rite-Aid Hdqtrs. Corp., et al.*, No. 09-cv-2013-900031 (Circuit Court of Bullock County, Alabama);" (2) sets forth the specific reason(s), if any, for each objection, including all legal support the Settlement Class Member wishes to bring to the Court's attention and all factual evidence the Settlement Class Member wishes to introduce in support of the objection; (3) contains a list of all of the Fixed Records Charges paid by the Settlement Class Member, indicating which of those charges were reimbursed by any client or principal of the Settlement Class Member or reimbursed by a third party and which of the charges were not reimbursed at all; (4) includes an identification, by case style and number, of any other class settlements the objector or the objector's attorney(s) have asserted an objection; (5) includes an identification of all attorneys having a financial interest or stake in the objection; and (6) states whether the Settlement Class Member intends to appear and argue at the Fairness Hearing. The written statement of objection must be personally signed by the Settlement Class Member and provide his or her full name and mailing address. Settlement Class Members may submit a written statement of objection on their own or through an attorney retained at their own sole expense. Any Settlement Class Member filing an objection may be required to sit for deposition regarding matters concerning the objection.

(b) Any Settlement Class Member who files and serves a written objection, in accordance with the requirements and deadlines of this Order, *and who states in that objection that he wishes to appear at the Fairness Hearing*, may so appear at the Settlement Class Member's own expense. However, attorneys personally retained by a Settlement Class Member who intend to make an appearance at the Fairness Hearing must file with the Court, and deliver copies to Class Counsel and Rite Aid's Counsel at the addresses provided in the Class Notice, no later than thirty (30) days before the date scheduled in paragraph 11 for the Fairness Hearing, a notice of intention to appear.

(c) Any Settlement Class Member who fails to comply with the provisions in this Order for the submission of written statements of objection shall thereby forever waive and forfeit any and all rights he or she may have to appear separately and/or to object, and will be deemed to have consented to the jurisdiction of the Court, consented to the Settlement, consented to be part of the Settlement Class, and consented to be bound

by all the terms of the Agreement, this Order, and by all proceedings, orders, and judgments that have been entered or may be entered in the Action, including, but not limited to, the Release described in the Agreement.

19. **Preliminary Injunction.** Pursuant to the terms of the Agreement, Plaintiffs have moved for entry of an injunction that would enjoin all Settlement Class Members from instituting, maintaining or prosecuting any action asserting any claims that would be Released Claims under the terms of the Settlement pending the Court's consideration of whether final approval should be given to the Settlement (which would become permanent in nature upon final approval, should such relief be awarded following the Fairness Hearing). The Court finds that issuance of the requested preliminary injunction is necessary and appropriate in aid of the Court's continuing jurisdiction and authority over this Action, to preserve its ability and jurisdiction to consider and fully effectuate the Settlement and in order to prevent the potential for inconsistent orders, confusion and disruption that would be caused by the simultaneous litigation of other litigation (whether individual or class action in nature) regarding the Released Claims during the Court's consideration of the Settlement. *Ex parte Liberty Nat'l Life Ins. Co.*, 631 So. 2d 865, 867 (Ala. 1993) (A "circuit court in which jurisdiction over a controversy is first invoked has exclusive jurisdiction over that controversy until that controversy is concluded."); *Glitsch, Inc. v. Harbert Constr. Co.*, 628 So. 2d 401, 403 (Ala. 1993) (affirming entry of injunction against prosecution of later-filed foreign action involving "substantially the same" issues and parties); accord William B. Rubenstein, et al., *Newberg on Class Actions* (Fifth) § 10:49 (on-line ed.) (noting the permissibility of anti-suit injunctions designed to preclude "litigants from [simultaneously] pursuing litigation in the courts of other states" because of "concerns about interference with the court's jurisdiction" and to avoid "duplicative suits"); 43A C.J.S. *Injunctions* § 107 (on-line ed.) ("In the exercise of its jurisdiction to prevent a multiplicity of suits, a court of equity may determine the rights of all the parties in one proceeding and enjoin all the pending or threatened actions at law relating to the same subject matter or cause of action."). Cf. *Adams*, 676 So. 2d at 1306 (affirming final approval of class action settlement that among other things permanently enjoined class members from pursuing released claims through individual or representative litigation).

20. Accordingly, in order to preserve the Court's jurisdiction pending consideration of whether final approval should be given to the Agreement, and to avoid irreparable harm to the settlement process, and after balancing the equities and concluding that the Agreement is sufficiently fair, reasonable and adequate that it is due to be preliminarily approved and should be protected from collateral attack during the notice and final approval process, the Court hereby preliminarily bars and enjoins all Settlement Class Members: (a) from instituting, maintaining, prosecuting, intervening in, participating as a party or class member in, or otherwise pursuing or receiving any benefits from any action asserting any class action claims that would be Released Claims under the terms of the Settlement; and (b) unless they first exclude themselves from the Settlement Class in accordance with the terms of this Order, from instituting, maintaining, prosecuting, intervening in, participating as a party or class member in, or otherwise pursuing or receiving any benefits from any action asserting individual claims that are within the scope of the proposed Release set forth in the Settlement. For purposes of these injunctions, the Agreement proposes that the following Release[7]

shall become effective upon the final approval of the Settlement:

In consideration for the Settlement benefits described in this Agreement, Plaintiffs and the other members of the Settlement Class who do not timely and validly exclude themselves in accordance with the procedures set forth in the Class Notice, on behalf of themselves and on behalf their heirs, guardians, assigns, executors, administrators, predecessors, and/or successors, will, by virtue of this Agreement and by virtue of the Court's Final Order and Judgment, be deemed to have fully, finally and forever released, remised, relinquished, acquitted, and forever discharged each and all of the Released Parties of and from, and shall not now or hereafter institute, maintain, or assert on their own behalf, on behalf of the Settlement Class or on behalf of any other person or entity, any claims, actions, causes of action, suits, rights, debts, obligations, reckonings, contracts, agreements, executions, promises, damages, liens, judgments and demands of whatever kind, type or nature whatsoever, both at law and in equity, whether past, present or future, mature or not yet mature, known or unknown, suspected or unsuspected, contingent or non-contingent, whether based on federal, state or local law, statute, ordinance, regulation, code, contract, common law, or any other source, or any claim that Plaintiffs or Settlement Class Members ever had, now have, may have, or hereafter can, shall or may ever have against the Released Parties that were or reasonably could have been alleged in the Action or in any other court, tribunal, arbitration panel, commission, agency, or before any governmental and/or administrative body, or any other adjudicatory body, on the basis of, connected with, arising from or in any way whatsoever relating to claims that were or reasonably could have been alleged in the Action, including, but without in any way limiting the generality of the foregoing, (1) the claims alleged in the Action; (2) any claims for breach of contract, rescission, restitution, fraud, concealment, suppression or unjust enrichment arising from, or directly or indirectly, or in any way whatsoever, pertaining to or relating to any pharmacy records charge invoiced by Rite Aid; (3) any violation of state or federal statutes that limit, purport to limit, or otherwise regulate or restrict the amount that can be charged for the production or duplication of medical and/or pharmacy records.[8]

21. **Termination of Settlement.** This Order shall become null and void and shall be without prejudice to the rights of the Parties or Settlement Class Members, all of whom shall be restored to their respective positions existing immediately before this Court entered this Order, if: (a) the Settlement is not finally approved by the Court, or does not become final pursuant to the terms of the Agreement; (b) the Settlement is terminated in accordance with the Agreement; or (c) the Settlement does not become effective for any other reason.

22. **Use of This Order.** In the event the Settlement does not reach the Final Settlement Date or fails to become final for any other reason: (a) the Settlement and the Agreement shall become null and void and be of no further force and effect, and neither the Agreement nor the Court's Orders, including this Order, relating to the Settlement shall be used or referred to for any purpose whatsoever by any person; (b) the certification of the Settlement Class pursuant to this Order shall be vacated automatically, without prejudice to any Party or Settlement Class Member to any legal argument that any of them might have asserted but for the Agreement; (c) this Action

shall proceed pursuant to further Orders of this Court; and (d) nothing contained in this Order or in any filing relating to the Settlement shall be construed or used as an admission, concession, or declaration by or against any Party of any fault, wrongdoing, breach or liability in this Action or in any other lawsuit or proceeding, nor as the basis for any claim of collateral estoppel, *res judicata*, or judicial estoppel. This paragraph shall survive termination of the Settlement and shall remain applicable to the Parties and the Settlement Class Members whether or not they submit a written request for exclusion.

23. **Continuing Jurisdiction.** This Court shall maintain continuing exclusive jurisdiction over all matters relating in any way to the Settlement, including but not limited to the implementation of the Settlement (including but not limited to the Claims Process) and the interpretation, administration, supervision, enforcement and/or modification of the Agreement, to ensure the effectuation thereof of the benefit of the Settlement Class.

24. **Continuance of Fairness Hearing.** The Court reserves the right to adjourn or continue the Fairness Hearing without further written notice to the Settlement Class Members.

IT IS SO ORDERED.

[1] Federal authority is considered persuasive in interpreting Rule 23 of the Alabama Rules of Civil Procedure. See, e.g., *CIT Commc'n Fin. Corp. v. McFadden, Lyon & Rouse, L.L.C.*, 37 So. 3d 114, 123 (2009).

[2] See, e.g., *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 325 (N.D. Ga. 1993) (approving settlement offering between 12.7% to 15.3% of “best possible recovery”); see also *In re Elan*, No. 02-cv-0865, 2005 WL 911444, at *6 (S.D.N.Y. Apr. 20, 2005) (settlement recovery of approximately “21% of Lead Plaintiffs’ estimate of damages” was within the range of reasonableness); *In re Newbridge Networks Sec. Litig.*, No. CIV. A. 94–1678–LFO, 1998 WL 765724, at *2 (D.D.C. Oct. 22, 1998) (“an agreement that secures roughly six to twelve percent of a potential trial recovery ... seems to be within the targeted range of reasonableness.”); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 323-24 (E.D.N.Y. 1993) (6% - 10%); *Chatelain v. Prudential Bache Sec., Inc.*, 805 F. Supp. 209, 211, 215 (S.D.N.Y. 1992) (approximately 8%); *Behrens v. Wometco Enter., Inc.*, 118 F.R.D. 534, 542-43 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990) (5.7%); *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 833 (E.D.N.C. 1994) (approximately 5%).

[3] Contrary to Plaintiffs’ theory, it appears that not every state’s medical records laws regulate the amount that Rite Aid could charge for the production of pharmacy records. See, e.g., *Landay v. Rite Aid of Pa., Inc.*, 104 A.3d 1272 (Pa. 2014). Moreover, Rite Aid has raised a number of affirmative defenses to the Plaintiffs’ claims, including the voluntary payment doctrine, which—depending on the nature and quantum of evidence that might be offered at trial—could be dispositive of the claims of the Plaintiffs and the Settlement Class. *U-Haul Co. of Ala., Inc. v. Johnson*, 893 So.2d 307, 312-13 (Ala. 2004).

[4] For example, if the Settlement Class was to be certified for purposes other than

settlement, it would have to satisfy the additional Rule 23(b)(3) requirement of manageability, which involves consideration of, among other things, “the potential difficulties in . . . calculation of individual damages, and distribution of damages.” *National Sec. Fire & Cas. Co. v. DeWitt*, 85 So. 3d 355, 379 (Ala. 2011). The damages sought by the Settlement Class are not the full amount of the Fixed Records Charges paid by them, but instead the amounts charged to them that are supposedly above and beyond what could have been legally and reasonably charged for the production of their records under the various states’ medical records laws. However, the allowable rates set by those state laws almost universally depend on the number of pages of medical records actually produced in response to a request. See, e.g., Tex. (Health & Safety) Code Ann. § 241.154; Or. Rev. Stat. § 192.563; N.M. Code R. 16.10.17.8; La. Rev. Stat. Ann. § 40:1299.96; Mo. Rev. Stat. § 191.227; Miss. Code Ann. § 11-1-52; Ga. Code Ann. § 31-33-3; Mich. Comp. Laws Ann. § 333.26269; Neb. Rev. Stat. § 71-8404. As a result, unless the Plaintiffs were able to offer a viable classwide damages model, it is not clear that certification could ultimately be maintained through final judgment. See, e.g., *Eufaula Hosp. Corp. v. Lawrence*, 32 So. 3d 30, 46 (Ala. 2009).

[5] See, e.g., *O’Keefe v. Mercedes-Benz*, 214 F.R.D. 266 (E.D. Pa. 2003) (approving consumer class action settlement in which vouchers valued by the parties at \$12.3 million were provided to class members entitling them to a \$35 discount off of an oil change); *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1334 (N.D. Ga. 2001) (approving settlement providing “a total value of \$11.4 million in benefits: \$5.6 million in cash and \$5.7 million in coupons.”); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 313-15 (approving settlement in a price-fixing suit against a group of domestic air carriers in which \$408 million of the \$458 million settlement consideration was in discount certificates applicable toward future air travel); *States of N.Y. and Md. v. Nintendo of Am., Inc.*, 775 F. Supp. 676, 679-82 (S.D.N.Y. 1991) (approving \$25 million in \$5.00 coupons to five million purchasers); *Ohio Pub. Interest Campaign v. Fisher Foods, Inc.*, 546 F. Supp. 1, 5 (N.D. Ohio 1982) (approving settlement of class action where relief consisted of \$20 million in \$1 coupons). *Accord Faught v. Am. Home Shield Corp.*, No. 2:07-CV-1928-RDP, 2010 WL 10959223 (N.D. Ala. Apr. 27, 2010) (approving national class action settlement that offered class members a process for the re-review of previously submitted warranty claims), *aff’d*, 668 F.3d 1233 (11th Cir. 2012).

[6] As one court recently explained, “[t]here is nothing inherently suspect about requiring class members to submit claim forms in order to receive payment.” *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 696 (S.D. Fla. 2014) (quoting *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 593 (N.D. Ill. 2011)). *Accord* William B. Rubenstein, et al., *Newberg on Class Actions (Fifth)* § 12:21 (on-line ed.) (“Absent class members who have not opted out of a class action and who wish to participate in the settlement fund typically—though not invariably—have to file a proof of claim.”).

[7] For purposes of preliminary approval, the Court finds the proposed Release reasonable in both scope and nature. See *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 377 (1996) (“[A] court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class

action.”) (quotation omitted); *Wal-Mart Stores, Inc v. Visa USA, Inc.*, 396 F.3d 96, 109 (2d Cir. 2005) (class action settlement may release persons or entities not named as defendants in the action, so long as the release is “based on the same underlying factual predicate as the claims asserted against the parties to the action being settled.”).

[8] The phrase “Released Parties” is defined as “RAHC and Rite Aid Corporation, and each and all of its current or former parent corporations, subsidiaries, divisions, related and affiliated companies and entities, principals, stockholders, directors, officers, employees, attorneys, representatives and agents, and all individuals or entities acting by, through, under or in concert with any of them.”

DONE this 16th day of September, 2015.

/s/ HON. BURT SMITHART

CIRCUIT JUDGE