

DISTRICT COURT, CITY AND COUNTY OF  
DENVER, COLORADO

1437 Bannock Street  
Denver, CO 80202

**PLAINTIFFS:**

ROBERT STERNER, ANGELA THOMAS-GRAVES,  
AND ADAM HORNING

v.

**DEFENDANTS:**

PORTERCARE ADVENTIST HEALTH SYSTEM, d/b/a  
CENTURA HEALTH-PORTER ADVENTIST  
HOSPITAL AND CENTURA HEALTH  
CORPORATION

▲ COURT USE ONLY ▲

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Case No. 2018CV34766

Div. Courtroom 209

**MOTION TO APPROVE AND DISSEMINATE CLASS NOTICE**

Plaintiffs Robert Sterner, Angela Thomas-Graves, and Adam Horning, by and through their undersigned counsel, file this Motion to Approve and Disseminate Class Notice (“Motion”) pursuant to Rule 23(c)(2) of the Colorado Rules of Civil Procedure.

### **Certificate of Conferral**

Pursuant to C.R.C.P. 121, § 1-15(8), Class Counsel conferred with counsel for Defendants regarding the relief sought herein. Defendants do not oppose the requested relief.

### **OVERVIEW**

Plaintiffs propose that notice be mailed to the class members in a form substantially identical to Exhibit 1 to this filing, and further request that the Court approve the plan of notice described below. This motion is supported by the Court’s certification order, the points and authorities below, all pleadings and records on file in this matter, and any further argument that Class Counsel may present.

In accordance with Rule 23, the proposed notice is written in plain, easily understood language. The notice satisfies all requirements of the rule, *see* Colo. R. Civ. P. 23(c)(2)(A)-(C), and contains all necessary information necessary “to enable class members to make an informed decision about their participation.” David F. Herr, *Annotated Manual for Complex Litigation, Fourth (“Manual”)* § 21.311 (rev. 2019). The notice accurately describes this Court’s certification order using neutral language and explains the class members’ options and rights at this stage of the litigation. The notice also sets out a procedure for class members to opt out of the Class. The opt-out procedure is straightforward, requiring a letter mailed within 30 days of the notice being sent with minimal information to identify the excluded class member.

Moreover, consistent with the requirement of “the best notice that is practicable under the

circumstances, including individual notice to all members who can be identified through reasonable effort,” see Colo. R. Civ. P 23(c)(2), Plaintiffs propose individual notice by first-class, direct mail using names and addresses provided by Defendants. Plaintiffs also propose creation of a website for the litigation where the notice, pleadings, relevant orders, and additional information about the claims will be posted and made available for review. Plaintiffs have retained Epiq Systems, Inc. to distribute the class notice, maintain the class website, process opt-out requests, and provide follow-up reports to the Court.

### **PROCEDURAL HISTORY**

On July 23, 2020, the Court granted, in part, Plaintiffs’ motion for class certification, certifying the unjust enrichment claim for the following defined class:

All individuals who underwent surgery at Porter between July 21, 2016 and April 5, 2018 and either:

- a. Received written notice dated either April 4, 2018 or April 6, 2018 of the cleaning/sterilization problems at Porter and who subsequently underwent testing for bloodborne pathogens such as Hepatitis B, Hepatitis C, and HIV; or
- b. Otherwise learned of the cleaning/sterilization problems at Porter and underwent testing for bloodborne pathogens such as Hepatitis B, Hepatitis C, and HIV.

Excluded from the Class are (1) persons who suffered from surgical site infections or tested positive for bloodborne pathogens; (2) Porter, its employees, affiliates, legal representatives, officers, and directors; and (3) any judge, justice, or judicial officer presiding over this matter, including their immediate family and judicial staff.

### **LEGAL STANDARD**

Rule 23(c)(2) requires that “[i]n any class maintained under subsection (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances,

including individual notice to all members who can be identified through reasonable effort.” Colo. R. Civ. P. 23(c)(2); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (holding that the Due Process Clause requires notice and an opt-out opportunity in (b)(3) cases);<sup>1</sup> *see generally* Wright & Miller, 7AA Fed. Prac. & Proc. Civ. § 1786 (3d ed.). A court has “wide discretion” as to the form and content of the notice, subject to the requirements of due process. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th Cir. 2015) (quoting *Mendoza v. Tucson School Dist. No. 1*, 623 F.2d 1338, 1350-51 (9th Cir. 1980)). The contents of the notice should be clear and concise and must advise each class member that:

- (A) The court will exclude them from the class if he so requests by a specified date;
- (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and
- (C) any member who does not request exclusion may, if they desire, enter an appearance through his counsel.

Colo. R. Civ. P. 23(c)(2). In addition to these textual requirements, a proposed notice should contain relevant information necessary “to enable class members to make an informed decision about their participation.” Manual § 21.311; *accord In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104-05 (5th Cir. 1977) (“Not only must the substantive claims be adequately described but the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action.”). The notice should therefore include “information that a reasonable person would consider to be

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<sup>1</sup> Federal caselaw under Fed. R. Civ. P. 23 is persuasive because Colo. R. Civ. P. 23 is nearly identical to the federal rule. *Medina v. Conseco Annuity Assur. Co.*, 121 P.3d 345, 348 (Colo. App. 2005).

material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment.” *Id.* at 1105.

## ARGUMENT

### **I. Plaintiffs’ Proposed Notice Satisfies the Requirements of Rule 23 and Provides Necessary Information for Class Members to Make an Informed Decision.**

Plaintiffs’ proposed notice meets all requirements of Rule 23(c)(2) and is written in easy-to-understand language, eschewing legal jargon. First, under subsection (A), the notice explains that the Court will exclude anyone who makes a proper request for exclusion and describes the steps necessary for exclusion from the Class and the applicable deadline. Second, under subsection (B), the notice explains that by staying in the Class, any judgment will bind the class member, whether that judgment is favorable or unfavorable to the Class. Third, under subsection (C), the notice states that a class member can retain a lawyer at his or her own expense, but that he or she is not required to do so and will be represented by Class Counsel. Thus, the proposed notice satisfies each of the textual requirements of Rule 23(c)(2).

Further, the proposed notice provides class members with other relevant information to aid in their decision whether to remain in the Class. The notice describes, in general terms, what a class action is and why the Court certified this case as a class action. The notice describes the nature of Plaintiffs’ action against Defendants. The class definition is presented in plain language in terms such that any recipient or reader can understand. The notice refers to the class website where Plaintiffs’ Complaint and Defendants’ Answer will be available. It discloses that Plaintiffs are seeking monetary relief in the form of damages.

The proposed notice is written from a neutral standpoint and “emphasiz[es] that the court has not ruled on the merits.” Manual § 21.311. It also provides neutral, objectively accurate

information about the consequences of opting out of or remaining in the Class. Importantly, the notice “explain[s] [the] risks and benefits of retaining class membership and opting out” so that class members can make an informed decision. Manual § 21.311. It describes the consequences of doing nothing and of opting out. It also explains why a class member may seek exclusion, including if the class member wishes to sue Defendants individually.

In addition, the proposed notice explains on the first page that this is a notice approved by the Court and is not a solicitation, so that class members do not discard the notice believing it to be an advertisement. And, as class members may also wish to know about the payment of attorneys’ fees if they remain in the Class, the notice also states it will be up to the Court to decide the amount of attorneys’ fees. For these reasons, the proposed notice meets all the requirements of Rule 23 and due process.

## **II. The Opt-Out Process Contains Proper Safeguards Without Burdening Class Members.**

Plaintiffs propose a simple and non-burdensome procedure for opting out of the Class. To opt out, a class member need only send a written request to the Notice Administrator including:

- Their name, address, and telephone number;
- A statement confirming that they want to opt out of the Class; and
- The case name and number “Sternier, et al. v. Portercare Adventist Health System, et al., Case No. 18-cv-34766.”

These are minimal requirements necessary to ensure authenticity and avoid ambiguity. *See. e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig.*, MDL No. 1061, 1999 WL 496491, at \*4 (D.N.J. May 6, 1999) (describing similar requirements to the ones proposed here as “simple steps”). Courts have, for example, required much more information than is being requested in this

case. *See, e.g., In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 118 (D.N.J. 2012) (requiring name, address, telephone number and information about the opt-out's purchases, including policy number, premium paid, and policy dates); *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1032 (N.D. Ill. 2000) (requiring approximate number of transactions), *aff'd sub nom. In re Mexico Money Transfer Litig.*, 267 F.3d 743 (7th Cir. 2001); *In re Chipcom Corp.*, No. Civ. A. 95-11114-DPW, 1997 WL 1102329, at \*20 (D. Mass. June 26, 1997) (requiring number of shares purchased or sold, date of transaction, and price).

Consistent with their due process rights, the class members will have 30 days to request exclusion. *See Torrasi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993) (approving 31-day opt-out period); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) (approving notice mailed 26 days before the deadline for opting out of a settlement); *see also In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 708 (E.D. Mo. 2002) (four weeks to object to class settlement consistent with due process); *Geiger v. Sisters of Charity of Leavenworth Health Sys., Inc.*, No. 14-2378, 2015 WL 4523806, at \*5 (D. Kan. July 27, 2015) (approving schedule giving class members 28 days to opt-out or object to class action settlement).

### **III. Notice Administration**

Plaintiffs have engaged Epiq Systems, Inc. ("Epiq") to disseminate the class notice and to maintain a website and toll-free support number for class members. As the attached resume shows, Epiq has extensive experience managing the dissemination of class notice. *See Exhibit 2.*<sup>2</sup>

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<sup>2</sup> The attached resume is for Hilsoft Notifications ("Hilsoft"). Hilsoft is a business unit of Epiq that specializes in designing, developing, analyzing and implementing large-scale legal notification plans.

Epiq will distribute the class notice via first class U.S. mail using HIPAA compliant procedures. To do so, Epiq will use the mailing addresses Defendants provide for the class members. Epiq will make a reasonable effort to update the addresses by cross-checking the addresses against the National Change of Address database. Next, for all individual notices that are returned as undeliverable, Epiq will make reasonable efforts to obtain a current mailing address, including through a “skip trace” search, and re-mail the class notice to the class member’s last known physical address. Epiq will use customary search protocols to attempt to obtain current addresses for class members whose notices are returned to sender. These efforts will ensure that individual notice is mailed to a high percentage of class members.

Epiq also will coordinate with counsel to develop a website providing detailed information about this litigation. This website will include copies of the class notice and relevant pleadings and orders, and class members will be able to ask questions about the case via email, using links prominently displayed on the website. Epiq will also implement a dedicated toll-free telephone number at which class members can listen to recorded information or speak with a live agent about the case. This notice plan will provide the best notice practicable under the circumstances.

### **CONCLUSION**

Based on the foregoing, Plaintiffs respectfully request that the Court grant this motion and approve the proposed class notice, attached as Exhibit 1, together with the notice plan affording class members 30 days to opt out. Plaintiffs further request that the Court appoint Epiq to supervise and administer the notice procedure, directing Epiq to, among other things, compile a list of names and addresses of potential class members from Defendants’ current records, to be provided by Defendants within 3 days of the order; ensure the distribution of the class notice via first class U.S.

mail; create a website posting copies of the notice and relevant pleadings and orders; and compile any timely requests for exclusion, which Class Counsel will promptly file with the Court after the opt-out deadline has expired.

Dated this 25<sup>th</sup> day of March, 2022.

Respectfully submitted,

ZONIES LAW LLC

*s/ Joseph Zonies*

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Attorneys for Plaintiffs

*In accordance with C.R.C.P. 121 § 1-26(7) a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the court upon request.*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 25, 2022, a true and correct copy of the foregoing **MOTION TO APPROVE AND DISSEMINATE CLASS NOTICE** was filed and served via Colorado Courts E-Filing on all counsel of record.

*s/ Joseph Zonies* \_\_\_\_\_  
Joseph Zonies