

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

KENNETH A. THOMAS MD, LLC, a
Connecticut limited liability company,
individually and on behalf of all others similarly
situated,

Plaintiff,

v.

BEST DOCTORS, INC.,

Defendant.

Case No. 1:18-cv-10957-DPW

SECOND AMENDED SETTLEMENT AGREEMENT AND RELEASE

Plaintiff Kenneth A. Thomas MD, LLC (“**Plaintiff**” or “**Class Representative**”), individually and in its putative representative capacity as plaintiff on behalf of the **Class Members** (defined below), Best Doctors, Inc. (“**Defendant**”) (Plaintiff and Defendant, collectively, “**Parties**,” or singularly, “**Party**”), Greenberg Traurig, LLP, counsel for Defendant, and Kaufman P.A., counsel for Plaintiff, enter into this agreement as of the last date on which the Parties and their counsel fully execute the agreement below.

SECTION I – RECITALS

1.1 WHEREAS, on May 14, 2018, Plaintiff filed the above-captioned action on behalf of itself and a putative class of recipients of the **Subject Facsimiles** (defined below), pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“**TCPA**”) (“**Action**”).

1.2 WHEREAS, Plaintiff contends that the claims asserted in the **Action** have merit and Plaintiff has engaged in a thorough investigation of the facts and the law. Based on this evaluation and extensive arm’s-length negotiations between the Parties’ counsel, Plaintiff and its counsel have determined that the proposed settlement of the disputed claims, as set forth herein, is fair, reasonable, and adequate, as to the **Class Members** (defined below).

1.3 WHEREAS, Defendant has vigorously denied and continues to vigorously deny the claims and contentions asserted in the **Action**, denies any wrongdoing on its part, and denies any liability to Plaintiff and the **Class Members** (defined below). Defendant has also conducted a thorough investigation and evaluated the risks and potential cost of litigation of the issues raised in the **Action** and the benefits of the proposed settlement. Based on its evaluation, Defendant desires to settle the Parties’ dispute on the terms and conditions contained herein.

1.4 NOW, THEREFORE, for adequate consideration as acknowledged and as set forth herein, it is hereby stipulated and agreed, by and among the Parties, by and through their respective counsel, that: (a) the Parties' dispute shall be finally and fully compromised, settled, and resolved upon final settlement approval by the United States District Court for the District of Massachusetts ("**Court**") after a hearing or hearings as provided for herein; and (b) upon such final approval by the Court, a final order and judgment shall be entered fully and finally resolving the **Action** upon the terms and conditions set forth herein.

SECTION II – DEFINITIONS

In addition to terms defined in the preamble and Section I, as well as in other sections of this agreement, the following terms shall have the following meanings. Some definitions include capitalized terms that are defined later in this section:

2.1 "**Approved Costs**" means the amount of costs and expenses, if any is approved by the Court at, before, or after the **Fairness Hearing**.

2.2 "**Bar Date**" means the final date on which the **Class Members** may file a **Request for Exclusion**, which shall be ninety (90) calendar days from the **Notice Date**, unless otherwise provided by the Court.

2.3 "**Class Counsel**" means Avi R. Kaufman of the law firm of Kaufman P.A.

2.4 "**Class Data**" means data relating to the 7,772 **Class Members** who, according to Defendant's records, received one or more of 13,425 **Subject Facsimiles** from May 14, 2014 to January 16, 2018. The **Class Data** shall be treated as **Confidential Information**.

2.5 "**Class**" and "**Class Members**" mean the 7,772 entities or persons that were sent the **Subject Facsimiles**, as determined through the **Class Data**. The **Class** excludes the following: (1) the trial judge presiding over this case; (2) Defendant, as well as any parent, subsidiary, affiliate, or control person of Defendant, and the officers, directors, agents, servants, or employees of Defendant; (3) any of the **Released Parties** (as defined in Paragraph 10.1); (4) the immediate family of any such person(s); and (5) any **Class Member** who has timely sought exclusion from this **Settlement**.

2.6 "**Confidential Information**" means proprietary or commercially sensitive information or personal information subject to state and federal privacy laws that the Parties agree to protect from disclosure and dissemination to the public or any person or entity other than the **Settlement Administrator**. **Confidential Information** will be provided only to the **Settlement Administrator** unless provided herein.

2.7 "**Defendant's Counsel**" means David G. Thomas of the law firm of Greenberg Traurig, LLP.

2.8 "**Direct-Mail Notice**" means the legal notice summarizing the settlement terms contained herein, as approved by the Court and to be sent to the **Class Members** as set forth herein by regular mail. The form of **Direct-Mail Notice** agreed upon by the Parties, subject to Court approval and/or modification, is attached as **Exhibit A**.

2.9 “Effective Date” means the date on which the **Final Order and Judgment** in the **Action** becomes Final.

2.10 “Fairness Hearing” means the hearing that is to take place after the entry of the **Order Approving Provision of Notice and Setting Fairness Hearing** and after the **Notice Date** for purposes of: (a) entering the **Final Order and Judgment**, as modified by the Court, fully and finally resolving the **Action**; (b) determining whether the **Settlement** should be approved as fair, reasonable, and adequate; and (c) ruling upon any application by **Class Counsel** for an award of costs and expenses.

2.11 “Final” means (a) if no objections to the **Settlement** are filed, or if any objections are filed and voluntarily withdrawn prior to the entry of the **Final Order and Judgment**, the date of the entry of the **Final Order and Judgment**; or (b) if any objections are filed and not voluntarily withdrawn prior to the entry of the **Final Order and Judgment**, the later of (i) the expiration of the time to file or notice any appeal or move for reargument from the Court’s judgment approving this **Settlement Agreement**, or (ii) the date of final affirmance of any appeals therefrom.

2.12 “Final Order and Judgment” means the final judgment of the Court approving the **Settlement**. The form of order agreed upon by the Parties, subject to Court approval and/or modification, is attached as **Exhibit B**.

2.13 “Full Notice” means the legal notice of the proposed settlement terms, as approved by the Court, to be provided to the **Class Members** as set forth herein. The form of **Full Notice** agreed upon by the Parties, subject to Court approval and/or modification, is attached as **Exhibit C**.

2.14 “Notice” collectively refers to the **Direct-Mail Notice** and **Settlement Website-based Full Notice**.

2.15 “Notice and Administrative Costs” means the reasonable costs and expenses (authorized by the Court and approved by **Class Counsel** and **Defendant’s Counsel**) of disseminating the **Notice** in accordance with the **Order Approving Provision of Notice and Setting Fairness Hearing**, and all reasonable and authorized costs and expenses incurred by the **Settlement Administrator** in administering the **Settlement**, including, but not limited to, costs and expenses associated with maintaining the **Settlement Fund**, sending **Notice** (including notice under the Class Action Fairness Act), assisting the **Class Members**, **Settlement Class Members** and counsel, escrowing funds, handling **Requests for Exclusion**, issuing and mailing the settlement payments, complying with tax and escheat law and regulations, or otherwise effectuating the terms and conditions of this **Settlement Agreement**.

2.16 “Notice Date” means the date that the **Notice** is sent to the **Class Members** as set forth herein. The **Notice Date** shall be no later than thirty (30) calendar days after the **Order Approving Provision of Notice and Setting Fairness Hearing** enters, unless otherwise provided by the Court.

2.17 “Order Approving Provision of Notice and Setting Fairness Hearing” means the order conditionally certifying the **Class** for purposes of providing notice, authorizing the provision of notice of the **Settlement** to **Class Members**, and setting a **Final Fairness Hearing**,

as approved by the Court. The form of order agreed upon by the Parties, subject to Court approval and/or modification, is attached as **Exhibit D**.

2.18 “Request for Exclusion” means the process by which **Class Members** may elect not to be part of the **Settlement**, as further described in Section VIII.

2.19 “Settlement” means the settlement of this **Action** as described in this **Settlement Agreement**.

2.20 “Settlement Administrator” means Kurtzman Carson Consultants, or another mutually agreeable settlement administrator.

2.21 “Settlement Agreement” means this Settlement Agreement and Release.

2.22 “Settlement Class Member” means any **Class Member** who does not submit a proper **Request for Exclusion** by the **Bar Date**.

2.23 “Settlement Website” means a website established by the **Settlement Administrator** for the purposes of providing the **Class Members** with the **Full Notice** and other information as set forth herein. This website can be found at www.bestdoctorsstepasettlement.com.

2.24 “Subject Facsimile” means the facsimiles sent by or on behalf of Defendant (a) concerning the intended recipient’s potential inclusion or listing in a Best Doctors database or the Best Doctors in America List; (b) concerning the intended recipient’s review of Best Doctors inclusion data; (c) asking the intended recipient to confirm that they are currently seeing patients; and (d) directing the intended recipient to <http://bestdoctors.com/for-physicians> for information concerning Defendant between May 14, 2014 to January 16, 2018. As determined through the **Class Data**, there are 13,425 such facsimiles and 7,772 **Class Members**.

**SECTION III – CHANGE IN PRACTICE; SETTLEMENT AMOUNT;
SETTLEMENT FUND**

3.1 Change in Practice. Defendant shall not send the **Subject Facsimiles** again without obtaining prior express invitation or permission from the facsimile recipients. Should Defendant send the Subject Facsimiles again, Defendant shall include a statement on the facsimiles that the facsimiles are not intended to be an advertisement and only seek to provide notification of a recipient’s nomination as a “Best Doctor” and to confirm certain information. Defendant shall remove any disclosures about contacting “Best Doctors” in the future about other services. Also, Defendant will include an opt-out notice as set forth in the TCPA. The Parties hereby stipulate to the entry of injunctive relief prohibiting Best Doctors from sending the **Subject Facsimiles** to any recipient without prior express invitation or permission, absent a change in the law, which relief shall be included in the **Final Order and Judgment**.

3.2 Settlement Amount. Defendant shall make \$738,375.00 available to fund the **Settlement**, which shall include amounts for (i) all payments to be made to **Settlement Class Members**, (ii) **Notice and Administrative Costs**, and (iii) the **Approved Costs**, if any (“**Settlement Amount**”). The **Settlement Amount** will be deposited in a bank account controlled by the **Settlement Administrator** to be distributed as described in Section V. Except for its own

attorneys' fees, costs, and expenses, Defendant shall not bear any other fees, costs, or expenses arising out of the **Settlement** unless otherwise agreed by the Parties in a written amendment to the **Settlement Agreement**, and approved by the Court. All amounts attributed to **Class Members** who file **Requests for Exclusion** shall be returned to the **Settlement Fund** and re-distributed to **Class Members** who have negotiated their distribution checks in a second or subsequent distribution as provided in Section V.

3.3 Settlement Fund. Within five (5) calendar days after the **Effective Date**, the **Settlement Administrator** shall open a non-interest-bearing account with Defendant for the purpose of paying the **Settlement Amount** as provided in Section V ("**Settlement Fund**"), which shall be held in a trust created pursuant to the laws of the Commonwealth of Massachusetts with Defendant being the settlor and the **Settlement Administrator** acting as trustee. Within five (5) calendar days of the **Settlement Fund** being established and Defendant's receipt of the **Settlement Administrator's** properly completed and executed IRS Form W-9 and any other tax information requested by Defendant, Defendant shall transfer the **Settlement Amount** into the **Settlement Fund**. The **Settlement Administrator** shall not invest any funds from the **Settlement Fund** or take any action to generate income from the **Settlement Fund**, and Defendant shall have no right, entitlement, responsibility, financial obligation, or liability with respect to the use, administration, or distribution of the **Settlement Amount** or with respect to the **Settlement Fund**, except as otherwise expressly provided herein or as required by law. The **Settlement Administrator** will be responsible for all tax withholding and reporting obligations of any payments made from the **Settlement Fund**, including any reporting required on IRS Form 1099, if any, for distributions made from the **Settlement Fund** as provided in Section V.

SECTION IV – COSTS AND EXPENSES

4.1 Arm's-Length and Separate Negotiations. The Parties negotiated and reached full agreement on the material terms of the **Settlement** before reaching agreement regarding **Class Counsel's** attorneys' fees, costs, and expenses and any service award for the **Class Representative**. At no time did the Parties condition the relief afforded herein to **Settlement Class Members** on payment of any fees, costs, or expenses to **Class Counsel** or a service award to the **Class Representative**.

4.2 Approved Costs. **Class Counsel** may apply to the Court for reimbursement of all documented and reasonable costs and expenses of up to \$10,000.00, which shall be subject to Court approval. Defendant retains the express right to oppose any request by **Class Counsel** for costs and expenses. The **Approved Costs**, if any, shall be paid exclusively out of the **Settlement Fund** and be shared pro rata by the **Settlement Class Members**. **Class Members** have the express right to object to any request by **Class Counsel** for costs and expenses in the manner provided in Section VIII. **Class Counsel** shall provide the **Settlement Administrator** with a fully completed and executed IRS Form W-9 and any other required tax information and forms within five (5) calendar days after the **Effective Date**. Payment of the **Approved Costs** shall be made to **Class Counsel** by wire (based on instructions provided by **Class Counsel**) after the **Fairness Hearing**.

4.3 Release by Class Counsel. Upon payment of the **Approved Costs**, if any, the **Released Parties** (defined in Paragraph 10.1(a)) will forever and finally have satisfied any and all of their obligations to **Class Counsel**, if any, concerning payment of attorneys' fees, costs, and

expenses in the **Action** and with respect to the **Settlement**, and the **Released Parties** will forever and finally be absolved, released, and discharged of any liability whatsoever to **Class Counsel**, if any, concerning attorneys' fees, costs, and expenses in the **Action** and with respect to the **Settlement**. Under no circumstances will **Class Counsel** bring any claims against the **Released Parties** for, because of, relating to, concerning, or as a result of any payment or allocation of attorneys' fees, costs, and expenses made in accordance with this **Settlement Agreement**, and **Class Counsel** releases the **Released Parties** from any and all claims because of, relating to, concerning, or as a result of any payment or allocation of attorneys' fees, costs, and expenses made in accordance with this **Settlement Agreement**.

SECTION V—DISTRIBUTIONS FROM THE SETTLEMENT FUND

5.1 Types of Distributions. The Settlement Administrator shall be authorized to make the following distributions from the Settlement Fund:

- (a) Payments by check of the **Net Settlement Amount and any subsequent distribution of the Settlement Amount** to the **Settlement Class Members** as provided in Paragraphs 5.2, 5.3, and 5.4;
- (b) Payment of the **Approved Costs**, as provided in Paragraph 4.2;
- (c) Payment to the United States Treasury Department, as provided in Paragraph 5.4; and
- (d) Payment of **Notice and Administrative Costs**.

5.2 Net Settlement Amount. Within ten (10) business days after the **Effective Date**, the Parties and the **Settlement Administrator** shall jointly determine the **Net Settlement Amount** due to **Settlement Class Members** by subtracting from the **Settlement Amount**, (i) the **Approved Costs Award** and (ii) the **Notice and Administrative Costs** ("**Net Settlement Amount**"). The Parties and the **Settlement Administrator** shall also determine the specific portion of the **Net Settlement Amount** to be paid to each **Settlement Class Member** by dividing the **Net Settlement Amount** by 13,425 and then multiplying that amount by the number of **Subject Facsimiles** received by each **Settlement Class Member** (based on the **Class Data**) ("**Individual Awards**").

5.3 Distribution of the Net Settlement Amount to Settlement Class Members. The **Settlement Administrator** shall distribute the **Settlement Amount** by mailing each **Settlement Class Member** a check in the amount of the respective **Individual Awards** no later than forty-five (45) calendar days after the **Effective Date**. Checks will be mailed by the **Settlement Administrator** to the last known mailing address the **Settlement Administrator** identifies through its standard practices when sending **Notice**. Checks shall be valid for 180 days. If the **Settlement Administrator** receives any checks returned as undeliverable by the United States Postal Service, the **Settlement Administrator** will use reasonable efforts to locate the current address of the **Settlement Class Member** and re-mail the check accordingly. The **Settlement Administrator** shall not be required to send a check by mail to any **Settlement Class Member** whose last known street address, as updated through the National Change of Address registry, is determined to be undeliverable pursuant to one of the following mailing codes: F (foreign move,

no new address available), G (postal box closed, no new address available), or K (move, left no forwarding address).

5.4. Unclaimed Monies. Any funds associated with (i) checks made payable to **Settlement Class Members** returned as undeliverable and (ii) checks never sent because the **Settlement Class Member's** last known street address, as updated through the National Change of Address registry, was determined to be undeliverable, as described in Paragraph 5.3 or Paragraph 7.3(b), respectively, (iii) intended payments for **Class Members** that opted-out, or (iv) initial **Net Settlement Amount** distribution checks that are not negotiated within 180 days as provided herein, shall be distributed by the **Settlement Administrator** to the **Settlement Class Members** who received and negotiated their initial **Net Settlement Amount** distribution checks on a pro rata basis based on the number of facsimiles the **Settlement Class Members** received as determined in the same manner as provided above in Section 5.2. Any funds remaining after the second or any subsequent distribution will be distributed in the same manner to **Settlement Class Members** who received and negotiated their distribution checks for the immediately prior distribution. If at any point the amount of unclaimed funds to be distributed after accounting for the costs of distribution is less than \$1 on a per facsimile basis, any remaining funds shall be given to the United States Treasury.

5.5. Exclusion Requests. Any pro rata amounts that were to be paid to **Class Members** who properly sought exclusion from the Settlement pursuant to Paragraph 8.1 shall be returned to the **Settlement Fund** for a second or subsequent distribution to the **Settlement Class Members** as provided in Section V.

5.6. Anti-Waiver/Release. Nothing contained herein shall in any way affect any obligation owed by the **Settlement Class Members** to Defendant pursuant to the terms and conditions of any prior or existing relationships between the **Settlement Class Members** and Defendant.

SECTION VI – VERIFICATION OF CLASS MEMBERS AND CONFIRMATORY DISCOVERY

6.1 Class Member List and Class Data. Within seven (7) business days after the **Order Approving Provision of Notice and Setting Fairness Hearing**, Defendant shall provide the **Settlement Administrator** with a list of the **Class Members** and their last known addresses as well as the number of **Subject Facsimiles** each **Class Member** received, as determined through the **Class Data**. The **Settlement Administrator** will maintain this as **Confidential Information**. **Class Counsel** shall have access to the information contained on this list should **Class Counsel** have a need to know the information in the context of administering the settlement, *e.g.*, should a **Class Member** contact **Class Counsel** with questions about the **Settlement** or an **Individual Award**. The **Settlement Administrator** shall provide **Class Counsel** with any such information no later than two (2) business days of **Class Counsel's** written request. Any such information provided to **Class Counsel** by the **Settlement Administrator** shall be used only for implementation of this **Settlement**.

6.2 Confirmatory Discovery. Within thirty (30) calendar days after the Court's entry of the **Order Approving Provision of Notice and Setting Fairness Hearing**, Defendant will produce documents and a sworn declaration to support its contention that whether **Class Members**

gave prior permission or invitation to receive information by facsimile is subject to individualized inquiries, as well as case law in support of same.

**SECTION VII – PRELIMINARY REQUESTS,
SETTLEMENT ADMINISTRATION, AND NOTICE**

7.1 Order Approving Provision of Notice and Setting Fairness Hearing . As soon as practicable after this **Settlement Agreement** is fully executed, for settlement purposes only, the Parties agree that the Plaintiff and **Class Counsel** should request the Court to enter the **Order Approving Provision of Notice and Setting Fairness Hearing** granting conditional certification of the **Class**, subject to final findings and ratification in the **Final Order and Judgment**, and appoint the Plaintiff as **Class Representative** and **Class Counsel** as counsel for the **Class**. Such requests will be filed with the Court no later than August 30, 2021. Defendant retains the express right to object to these requests. As set forth in the draft **Order Approving Provision of Notice and Setting Fairness Hearing**, the Plaintiff shall request the Court to enter an order:

- (a) conditionally certifying the **Action** as a settlement class action under Rule 23(b)(3) and (e) of the Federal Rules of Civil Procedure;
- (b) appointing Plaintiff as class representative and **Class Counsel** as counsel for the Class;
- (c) preliminarily approving the form, manner, and content of the **Direct-Mail Notice** and **Full Notice**, and finding that **Notice** is fair, reasonable, and the best notice practicable under the circumstances in connection with notifying the **Class Members** of their rights and responsibilities under the **Settlement Agreement** and satisfying due process and Rule 23 of the Federal Rules of Civil Procedure;
- (d) directing **Class Counsel** to submit any application for payment of attorneys' fees, costs, expenses, or a service award to Plaintiff no later than fifteen (15) calendar days before the **Bar Date**;
- (e) appointing the **Settlement Administrator** as settlement administrator to send **Notice** and administer the **Settlement**;
- (f) providing that **Class Members** will have until the **Bar Date** to object to the **Settlement and/or any request for Approved Costs**, or file a request for exclusion from the **Settlement**;
- (g) establishing dates by which all papers in support of the motion for final approval of the **Settlement** and/or any response to any valid and timely objections shall be filed and served;
- (h) staying all proceedings against Defendant until the Court renders a final decision on approval of the **Settlement**;
- (i) enjoining **Settlement Class Members** from commencing or prosecuting, either directly or indirectly, any action asserting any of the **Released Claims** (defined in

Paragraph 10.1(a)) until the Court rules as to whether the **Settlement** is fair, reasonable, or adequate; and

- (j) setting the date and time of the **Fairness Hearing**, subject to the availability of the Court, Plaintiff, Class Counsel, and Defendant's Counsel, which date may be continued without necessity of further mailed notice to the **Class Members**.

7.2 Settlement Administrator. The **Settlement Administrator** shall administer the **Settlement** as described herein and as approved by the Court, and perform such other functions as ordered by the Court or approved by mutual agreement of the Parties, including the following: (i) sending **Notice**; (ii) establishing and maintaining the **Settlement Website** (described in Paragraph 7.3(a)); (iii) establishing and maintaining a post office box for objections and exclusion requests; (iv) establishing and maintaining an automated toll-free telephone line for **Class Members** to call with settlement-related inquires and answering questions **Class Members** may have about the **Settlement** or directing questions to **Class Counsel**, as appropriate; (v) responding to mailed inquiries about the **Settlement** or directing inquiries to **Class Counsel** for a response, as appropriate; (vi) providing weekly reports to **Class Counsel** and Defendant's Counsel summarizing objections and requests for exclusion received, which reports may be disclosed by **Class Counsel** to the Court; (vii) providing the identity of **Class Members** who objected to or properly excluded themselves from the **Settlement**; (viii) working with Defendant to establish the **Settlement Fund** and providing distributions to **Settlement Class Members**; (ix) providing Defendant with properly completed and executed tax forms or other appropriate tax information; (x) timely making all necessary elections, withholdings, and reporting to comply with any federal or state law governing taxes or unclaimed property; and (xi) performing any other or additional functions as set forth herein or as requested by the mutual agreement of the Parties.

7.3 Notice. Prior to sending **Direct-Mail Notice**, the **Settlement Administrator** shall conduct a National Change of Address Update to verify the mailing addresses for the **Class Members**. Thereafter, the **Settlement Administrator** will provide the **Class Members** with notice of the Settlement as follows:

- (a) **Settlement Website.** By the **Notice Date** (or after submission to the Court as to (v) and (vi) below), the **Settlement Administrator** will have created and then will maintain the **Settlement Website** to contain (i) the Complaint, (ii) the **Settlement Agreement**, (iii) the **Order Approving Provision of Notice and Setting Fairness Hearing**, (iv) the **Full Notice**, (v) **Class Counsel's** application for attorneys' fees, costs, and expenses, (vi) **Class Counsel's** application for a service award for the Plaintiff, and (vii) any other information to which the Parties may mutually agree. Defendant will also include a link to the **Settlement Website** on its own website page www.bestdoctors/for-physicians.com as of the **Notice Date**. The **Settlement Website** and link contained on Defendant's website shall be disabled thirty (30) days after the **Net Settlement Amount** is distributed.
- (b) **Direct-Mail Notice.** On the **Notice Date**, the **Settlement Administrator** shall send the **Direct-Mail Notice**. The **Settlement Administrator** shall not be required to send such **Direct-Mail Notice** to any **Class Member** whose last known street address, as updated through the National Change of Address registry, is determined

to be undeliverable pursuant to one of the following mailing codes: F (foreign move, no new address available), G (postal box closed, no new address available), or K (move, left no forwarding address).

- (c) **Full Notice.** On the **Notice Date**, the **Settlement Administrator** will publish the **Full Notice** on the **Settlement Website**.

7.5. Class Action Fairness Act Notice. The **Settlement Administrator** will provide the notice required by 28 U.S.C. § 1715 within ten (10) calendar days of **Class Counsel's** submission of the **Settlement Agreement** to the Court for preliminary approval.

SECTION VIII – EXCLUSIONS/OBJECTIONS

8.1 Requests for Exclusion. **Class Members** may elect not to be part of the **Settlement** and not to be bound by the **Settlement Agreement** as follows:

- (a) **Election.** To make this election, a **Class Member** must send a letter to the **Settlement Administrator** postmarked no later than the **Bar Date**, which is signed personally by the **Class Member** and provides: (i) the name and case number that has been assigned to this **Action**; (ii) the full name, e-mail and mailing address, and telephone number of the person requesting exclusion; (iii) the facsimile number to which the **Subject Facsimile** was sent; and (iv) a statement that he, she, or it does not wish to participate in the **Settlement**.
- (b) **Exclusion List.** The **Settlement Administrator** shall serve on **Class Counsel** and **Defendant's Counsel** a list of **Class Members** who have timely and validly excluded themselves from the **Settlement** no later than ten (10) calendar days after the **Bar Date**.
- (c) **Termination.** If more than ten percent (10%) of **Class Members** request exclusion, Defendant may, in its sole discretion, within fifteen (15) calendar days after the **Bar Date**, notify **Class Counsel** and the Court in writing that Defendant has elected to terminate this **Settlement Agreement**. If this **Settlement Agreement** is terminated, the **Action** will revert to the status described in Paragraph 9.3 below.

8.2 Objections. Any **Settlement Class Member** who wishes to object to the fairness, reasonableness, or adequacy of the **Settlement**, or any request for costs and expenses must file on or before the **Bar Date** a written objection with the Court and deliver the objection to the **Settlement Administrator** as follows:

- (a) **Form and Notice.** A written objection must include: (i) the name and case number of the **Action**; (ii) the full name, address, and telephone number of the person objecting; (iii) the facsimile number to which the **Subject Facsimile** was sent; (iv) a statement of each objection, including the specific reasons, if any, for each objection, including any legal and factual support the objector wishes to bring to the Court's attention and any evidence the objector wishes to introduce in support of the objection(s); and (vi) the objector's signature.

- (b) **Appearance at Fairness Hearing.** Any **Settlement Class Member** who submits a timely objection as set forth above in Paragraph 8.2(a) may appear at the **Fairness Hearing** with or without counsel at the **Settlement Class Member's** own expense. If a **Settlement Class Member** is represented by counsel, such counsel must file a Notice of Appearance with the Court and serve a copy of the Notice of Appearance on the **Settlement Administrator, Class Counsel, and Defendant's Counsel** no later than fifteen (15) calendar days before the **Fairness Hearing**.

SECTION IX— FINAL APPROVAL

9.1 Motion for Final Approval. The Plaintiff must apply for Court approval of the **Final Order and Judgment** no later than fifteen (15) calendar days before the **Fairness Hearing**, which application shall request final approval of the **Settlement Agreement** and include any request for costs and expenses. Defendant retains the express right to oppose the request for costs and expenses.

9.2 Final Order and Judgment. Among other terms mutually agreed by the Parties, Plaintiff shall request that the Court enter a final judgment:

- (a) determining that the **Settlement** is fair, reasonable, and adequate;
- (b) certifying the **Action** as a settlement class action under Rule 23(b)(3) and (e) of the Federal Rules of Civil Procedure;
- (c) determining that the **Notice** provided by the **Settlement Administrator** satisfied due process and Rule 23 of the Federal Rules of Civil Procedure so as to bind the **Settlement Class Members** and fully and finally resolve the **Action**;
- (d) permanently enjoining **Settlement Class Members** from commencing or prosecuting, either directly or indirectly, any action asserting any of the **Released Claims** (as defined in Paragraph 10.1(a));
- (e) retaining exclusive jurisdiction over the Parties, the **Settlement Fund**, the **Settlement Class Members**, and all objectors to enforce the **Settlement Agreement** and **Final Order and Judgment** according to their terms; and
- (f) closing the **Action** according to the Court's standard procedures.

9.3 Status if Settlement is Not Approved. This **Settlement Agreement** is being entered into for settlement purposes only. If the Court denies the **Motion for Order Approving Provision of Notice and Setting Fairness Hearing** or the **Motion for Final Approval of the Settlement Agreement** or declines to enter the **Final Order and Judgment**, or if the **Effective Date** does not occur for any reason (including any reversal of the **Final Order and Judgment** by an appellate court or remand wherein the material terms herein are not reinstated), then this **Settlement Agreement** and the **Settlement** will be deemed null and void *ab initio*. In that event: (a) the **Order Approving Provision of Notice and Setting Fairness Hearing, Final Order and Judgment**, and any other order post-dating preliminary approval of the **Settlement** and all of their provisions will be vacated including, but not limited to, the conditional certification of the **Class**,

conditional appointment of Plaintiff as **Class Representatives**, and conditional appointment of Plaintiff's counsel as **Class Counsel**; (b) the **Action** will revert to the status that existed before the **Settlement Agreement's** execution date, subject to entry of a modified scheduling order (wherein the Parties will consent to afford the Parties sufficient time to complete discovery and for Defendant to move for summary judgment), and the Parties shall not have waived any of their claims or defenses; (c) no term or draft of this **Settlement Agreement** or any part of the Parties' settlement discussions, negotiations, or documentation will have any effect, be admissible into evidence, or be subject to discovery for any purpose in the **Action** or any other proceeding; (d) Defendant shall retain all of its rights to object to the maintenance of the **Action** as a class action; and (e) all amounts provided by Defendant to the **Settlement Administrator** to create the **Settlement Fund** will be returned to Defendant within five (5) calendar days of the **Settlement Agreement** being deemed null and void (except for Notice and Administrative Costs incurred to date).

**SECTION X— RELEASES,
ACKNOWLEDGMENTS, AND WAIVERS**

10.1 Releases and Acknowledgments. Upon entry of the **Final Order and Judgment**, Plaintiff and the **Settlement Class Members**, and each of their respective present, future, and former advisors, agents, affiliates, assigns, attorneys, directors, consultants, contractors, divisions, distributors, employees, independent contractors, insurers, joint ventures, managers, members, officers, parents, partners, personal representatives, predecessors, predecessors-in-interest, privities, related entities, representatives, resellers, shareholders, subsidiaries, successors, successors-in-interest, retailers, and wholesalers, or heirs, legatees, next-of-kin, representatives, beneficiaries, successors, and assigns, as applicable ("**Releasing Parties**") hereby:

- (a) release, acquit, and forever discharge Defendant, and each of its respective present, future, and former advisors, agents, affiliates, assigns, attorneys, directors, consultants, contractors, divisions, distributors, employees, independent contractors, insurers, joint ventures, managers, members, officers, parents, partners, personal representatives, predecessors, predecessors-in-interest, privities, related entities, representatives, resellers, shareholders, subsidiaries, successors, successors-in-interest, retailers, and wholesalers ("**Released Parties**"), from any and all manner of accounts, actions, agreements, attorneys' fees, bills, bonds, causes of action, charges, claims, contracts, controversies, costs, covenants, damages, debts, demands, dues, executions, expenses, extents, interest, judgments, losses, liabilities, obligations, penalties, promises, reckonings, remedies, rights, suits, sums of money, trespasses, and variances, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent, common law or statutory (such as any violations of the TCPA or any state or federal analogy or unfair or deceptive practices act) which they have or may have from the beginning of the world to the **Effective Date** arising out of or relating to the claims that are alleged in the **Action** (and for the avoidance of doubt, the **Action** and this **Settlement** concern claims arising out of or relating to the **Subject Facsimiles** and not any other aspect of Defendant's interactions with the **Class Members**) ("**Released Claims**" or "**Defendant Release**");

- (b) acknowledge, represent, covenant, and warrant that the obligations imposed by the **Defendant Release** shall be forever binding, and that the **Defendant Release** may not be modified, amended, annulled, rescinded, or otherwise changed unless in writing signed and notarized by duly authorized representative of Defendant to which the modification, amendment, annulment, rescission, or change applies, and which writing expressly refers to the **Defendant Release** and this **Settlement Agreement**;
- (c) acknowledge, represent, covenant, and warrant that they have not made any assignment of any right, claim, or cause of action covered by the **Defendant Release** to any individual, corporation, or any other legal entity whatsoever;
- (d) acknowledge, represent, covenant, and warrant that they have full power, competence, and authority to execute and deliver the **Defendant Release**; and
- (e) acknowledge, represent, covenant, and warrant, to the extent the **Defendant Release** may be deemed a general release, that the **Releasing Parties** waive and release any and all provisions, rights, and benefits conferred by Section 1542 of the California Civil Code which provides that “A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS A CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS [OR HER] FAVOR AT THE TIME OF EXECUTING A RELEASE, WHICH IF KNOWN BY HIM [OR HER] MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR” or any other similar federal or state law.

10.2 Acknowledgment and Waiver of Unknown or Different Facts. Upon entry of the **Final Order and Judgment**, the **Releasing Parties** acknowledge, represent, covenant, and warrant that (i) they fully understand the facts on which the **Settlement Agreement** is executed may be different from the facts now believed by them and their counsel to be true and expressly accept and assume the risk of this possible difference in facts and agree that this **Settlement Agreement** remains effective despite any difference in facts that later may be discovered; and (ii) they hereby waive any right or ability to challenge the **Settlement** upon the discovery of any new facts, any additional **Released Claims**, or a change in the law regardless of why or how such facts, claims, or law was/were not otherwise known to them prior to executing and agreeing to this **Settlement Agreement**.

SECTION XI – BEST EFFORTS

11.1 The Parties and their counsel agree to cooperate fully with one another and to use their best efforts to effectuate the **Settlement** and administration of the claims hereunder, including, without limitation, by carrying out the terms of this **Settlement Agreement**, and by promptly agreeing upon and executing all such other documentation as may be reasonably required to obtain final approval by the Court of the **Settlement**.

11.2 The Parties and their counsel understand and agree that the administration of a class action lawsuit can be complex and that, from time to time after the entry of the **Final Order and Judgment**, unique, non-material issues with respect to individual **Class Members** may arise that

are not directly covered by the terms of this **Settlement Agreement**. In the event any such non-material issues arise, the Parties and their counsel agree to cooperate fully with one another and to use their respective best efforts to come to agreement, which agreement shall not be unreasonably withheld.

11.3 Any requests for cooperation shall be narrowly-tailored and reasonably necessary for the requesting party to recommend the **Settlement** to the Court and to carry out its terms.

SECTION XII– ADDITIONAL PROVISIONS

12.1 Compromise of Disputed Claims; Defendant’s Denial of Wrongdoing. This **Settlement Agreement** reflects the Parties’ compromise and settlement of disputed claims. Its provisions and all related drafts, communications, discussions, and any material provided by Defendant during the Parties’ negotiations cannot be construed as or deemed to be evidence of an admission or concession of any point of fact or law (including, but not limited to, matters respecting class certification) by any person or entity and cannot be offered or received into evidence in any other action or proceeding as evidence of an admission or concession, except as necessary to enforce the **Settlement Agreement**. Defendant expressly denies (a) all liability, culpability, and wrongdoing with respect to the **Action** and matters alleged therein and (b) that the **Action** could be certified and maintained as a class action under Federal Rule of Civil Procedure 23 or other state rule of procedure or law other than by way of settlement.

12.2 Change of Time Periods. All time periods and dates described in this **Settlement Agreement** are subject to the Court’s approval. These time periods and dates may be changed by the Court without further mailed notice to the **Class Members**.

12.3 Real Parties-in-Interest. In executing this **Settlement Agreement**, the Parties warrant and represent that they, including Plaintiff in its representative capacity on behalf of the **Class Members**, and, to the best of its knowledge, the **Class Members**, are the only persons having any interest in the claims asserted in the **Action**, including the **Released Claims**.

12.4 Voluntary Agreement. The Parties execute this **Settlement Agreement** voluntarily and without duress or undue influence. The Parties warrant and represent that they are agreeing to the terms of this **Settlement Agreement** based upon the legal advice of their respective counsel, that they have been afforded the opportunity to discuss the contents of this **Settlement Agreement** with their counsel, and that the terms and conditions of this document are fully understood and voluntarily accepted.

12.5 Entire Agreement. This **Settlement Agreement** and attached exhibits contain the entire agreement between the Parties and constitute the complete, final, and exclusive embodiment of their agreement with respect to the **Action**. This **Settlement Agreement** is executed without reliance on any promise, representation, or warranty by any Party or any Party’s representative other than those expressly set forth in this **Settlement Agreement**.

12.6 Construction and Interpretation. Neither Party nor any of the Parties’ respective counsel will be deemed the drafter of this **Settlement Agreement** for purposes of interpreting any provision in this **Settlement Agreement** in any judicial or other proceeding that may arise between them. This **Settlement Agreement** has been, and must be construed to have been, drafted by all

the Parties to it, so that any rule that construes ambiguities against the drafter will have no force or effect.

12.7 Headings and Formatting of Definitions. The various headings used in this **Settlement Agreement** are solely for the Parties' convenience and may not be used to interpret this **Settlement Agreement**. Similarly, bolding and italicizing of definitional words and phrases is solely for the Parties' convenience and may not be used to interpret this **Settlement Agreement**. The headings and the formatting of the text in the definitions do not define, limit, extend, or describe the Parties' intent or with respect to the scope of this **Settlement Agreement**.

12.8 Exhibits. The exhibits to this **Settlement Agreement** are integral parts of the **Settlement Agreement** and the **Settlement** and are incorporated into this **Settlement Agreement** as though fully set forth in the **Settlement Agreement**.

12.9 Modifications and Amendments. No amendment, change, or modification to this **Settlement Agreement** will be valid unless in writing and signed by the Parties or their respective counsel.

12.10 Governing Law. This **Settlement Agreement** is governed by the law of the Commonwealth of Massachusetts and must be interpreted under the state law and without regard to conflict of laws principles.

12.11 Further Assurances. The Parties must execute and deliver any additional papers, documents, and other assurances, and must do any other acts reasonably necessary, to perform their obligations under this **Settlement Agreement** and to carry out this **Settlement Agreement's** expressed intent.

12.12 Agreement Constitutes a Complete Defense. To the extent permitted by law, this **Settlement Agreement** may be pled as a full and complete defense to, and may be used as the basis for an injunction against, any action, suit, or other proceedings that may be instituted, prosecuted, or attempted in breach of or contrary to this **Settlement Agreement** or the **Final Order and Judgment** entered in the **Action**.

12.13 No Waiver. The waiver by a Party of any breach of this **Settlement Agreement** by the other Party shall not be deemed or construed as a waiver of any other breach, whether prior to, after, or contemporaneous with the execution of this **Settlement Agreement** or during administration of the **Settlement**, as approved by the Court.

12.14 Jurisdiction. The Court shall retain jurisdiction over the implementation, enforcement, and performance of this **Settlement Agreement**, and shall have exclusive jurisdiction over any suit, action, proceeding or dispute arising out of or relating to this **Settlement Agreement** that cannot be resolved by negotiation and agreement by counsel for the Parties. The Court shall retain jurisdiction with respect to the administration, consummation and enforcement of the **Settlement Agreement** and shall retain jurisdiction for the purpose of enforcing all terms of the **Settlement Agreement**. The Court shall also retain jurisdiction over all questions and/or disputes related to the **Notice** program and the **Settlement Administrator**. As part of their respective agreements to render services in connection with this **Settlement**, the **Settlement Administrator** shall consent to the jurisdiction of the Court for this purpose.

12.15 Independent Investigation. The Parties understand and acknowledge that they: (a) have performed an independent investigation of the allegations of fact and law made in connection with this **Action**; and (b) that even if they may hereafter discover facts in addition to, or different from, those that they now know or believe to be true with respect to the subject matter of the **Action** as reflected in this **Settlement Agreement**, that will not affect or in any respect limit the binding nature of this **Settlement Agreement**. It is the Parties' intention to resolve their disputes in connection with this **Action** pursuant to the terms of this **Settlement Agreement** now and thus, in furtherance of their intentions, the **Settlement Agreement** shall remain in full force and effect notwithstanding the discovery of any additional facts or law, or changes in law, and this **Settlement Agreement** shall not be subject to rescission or modification by reason of any changes or differences in facts or law, subsequently occurring or otherwise.

12.16 Advice of Counsel. Each Party acknowledges, agrees, and specifically warrants that he, she or it has fully read this **Settlement Agreement** and the Release, received independent legal advice with respect to the advisability of entering into this **Settlement Agreement** and the Release and the legal effects of this **Settlement Agreement** and the Release, and fully understands the effect of this **Settlement Agreement** and the Release.

12.17 Execution Date. This **Settlement Agreement** is deemed executed on the last date the **Settlement Agreement** is signed by all the undersigned.

12.18 No Conflict Intended. Any inconsistency between this **Settlement Agreement** and the attached exhibits will be resolved in favor of this **Settlement Agreement**.

12.18 Counterparts. This **Settlement Agreement** may be executed in counterparts, each of which constitutes an original, but all of which together constitute one and the same instrument. Several signature pages may be collected and annexed to one or more documents to form a complete counterpart. Photocopies or electronic versions of executed copies of this **Settlement Agreement** may be treated as originals.

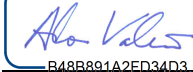
12.19 Recitals. The Recitals are incorporated by this reference and are part of the Settlement Agreement.

12.20 Severability. If any provision of this **Settlement Agreement** is declared by the Court to be invalid, void, or unenforceable, the remaining provisions of this **Settlement Agreement** will continue in full force and effect, unless the provision declared to be invalid, void, or unenforceable is material, at which point the Parties shall attempt in good faith to renegotiate the **Settlement Agreement** or, if that proves unavailing, either Party may terminate the **Settlement Agreement** without prejudice to any Party.

IN WITNESS WHEREOF, the Parties hereto, by and through their respective counsel, and intending to be legally bound hereby, have duly executed this **Settlement Agreement** as of the dates set forth below.

BEST DOCTORS, INC.

DocuSigned by:



B48B891A2ED34D3

By: Adam Vandervoort

Title: Authorized Signatory

Date: 6/16/2021

KENNETH A. THOMAS MD, LLC, individually and in its representative capacity for the Class Members

By: Kenneth A. Thomas

Title: Managing Member

Date:

GREENBERG TRAURIG, LLP, as Defendant's Counsel

By: David G. Thomas

Title: Shareholder

Date:

KAUFMAN P.A., as Class Counsel and counsel for the Plaintiff

By: Avi R. Kaufman

Title: _____

Date:

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BEST DOCTORS, INC.

By:
Title:
Date:

KENNETH A. THOMAS MD, LLC, individually and in its representative capacity for the Class Members

By: Kenneth A. Thomas
Title: Managing Member
Date:

GREENBERG TRAURIG, LLP, as Defendant's Counsel



By: David G. Thomas
Title: Shareholder
Date: **June 16, 2021**

KAUFMAN P.A., as Class Counsel and counsel for the Plaintiff

By: Avi R. Kaufman
Title: _____
Date:

IN WITNESS WHEREOF, the Parties hereto, by and through their respective counsel, and intending to be legally bound hereby, have duly executed this **Settlement Agreement** as of the dates set forth below.

BEST DOCTORS, INC.

By:
Title:
Date:

KENNETH A. THOMAS MD, LLC, individually and in its representative capacity for the Class Members

By: Kenneth A. Thomas
Title: Managing Member
Date:

GREENBERG TRAURIG, LLP, as Defendant's Counsel

By: David G. Thomas
Title: Shareholder
Date:

KAUFMAN P.A., as Class Counsel and counsel for the Plaintiff

Avi Kaufman

By: Avi R. Kaufman
Title: Managing Partner
Date: 6/16/2021