

1 **I. PROCEDURAL BACKGROUND**

2 On December 7, 2012, Plaintiffs and the [REDACTED] Defendants reached a
3 settlement in this matter. Joint Mot. for Referral to Mag. (Doc. [REDACTED]); Notice of
4 Settlement (Doc. [REDACTED]). On December 20, 2012, a sixty-day order of dismissal was
5 entered without prejudice, and the Court retained jurisdiction over this matter with the
6 right to reopen the case in the event problems arose in relation to the settlement
7 agreement. Order 12/20/2012 (Doc. [REDACTED]).

8 On April 8, 2013, Plaintiffs and the [REDACTED] Defendants filed a Joint Motion
9 for Referral to Magistrate (Doc. [REDACTED]), indicating that they were unable to agree on a
10 collateral issue regarding the Medicare Set Aside (“MSA”) requirement of the settlement
11 agreement. As such, the parties sought referral to a Magistrate Judge for resolution of the
12 same.¹ Joint Mot. for Referral to Mag. (Doc. [REDACTED]) at 1-2. The District Court referred the
13 matter to the undersigned for resolution of the MSA issue. Order 4/25/2013 (Doc. [REDACTED]).

14 On June 13, 2013, a settlement conference was held between the parties.
15 Amended ME 6/13/2013 (Doc. [REDACTED]). Although no resolution was reached regarding the
16 amount required to fully fund Plaintiff [REDACTED]’s MSA, the parties did agree that the
17 bulk of the settlement funds would be paid to Plaintiff, less the amount proposed by the
18 [REDACTED] Defendants required to fully fund [REDACTED] MSA. The parties further agreed to
19 submit simultaneous briefs to the undersigned regarding their respective positions for
20 funding the MSA, and a determination of the MSA amount.² Amended ME 6/13/2013
21 (Doc. [REDACTED]).

22 On August 14, 2013, an evidentiary hearing was held. ME 8/14/2013 (Doc. [REDACTED]).
23 The Court heard testimony from Mr. John V. Cattie, Jr. of Garretson Resolution Group
24 (“GRG”) regarding Plaintiffs’ proposed allocation for the MSA. *See id.* The Court also

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26 ¹In this Order, “parties” refers to Plaintiff [REDACTED] and the [REDACTED] Defendants.

27 ²The Parties’ briefs are filed as Exhibits to this Order. Plaintiff’s brief is attached as Exhibit
28 “1” and the [REDACTED] Defendants’ brief is attached as Exhibit “2.” Additionally, the Court grants Plaintiff’s separately submitted motion to exceed page limit.

1 heard testimony from Ms. Emily Grocoff of Medivest regarding the [REDACTED]
2 Defendants' proposed allocation for the MSA. *See id.* The Court also took into evidence
3 a December 7, 2012 letter from counsel for the [REDACTED] Defendants to Plaintiffs'
4 counsel regarding the settlement agreement (Exh. "A"); the Settlement Agreement and
5 Release (Exh. "B"); a July 19, 2013 report from GRG to Plaintiffs' counsel regarding the
6 allocation amount for funding Plaintiff [REDACTED]'s MSA (Exh. "C"); an August 6, 2013
7 letter from the Centers for Medicare and Medicaid Services ("CMS") to Plaintiff [REDACTED]
8 [REDACTED] regarding the conditional payments associated with [REDACTED] claim (Exh. "D"); and a
9 June 7, 2012 report from Medivest regarding the allocation amount proposed by the
10 [REDACTED] Defendants for fully funding [REDACTED]'s MSA (Exh. "E"). Having
11 considered the pleadings, evidence presented, and the agreement by the parties, the Court
12 makes the following:

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14 **II. FINDINGS OF FACT**

15 1. [REDACTED] is a twenty-three year old [REDACTED] injured in a single-vehicle
16 rollover accident on July 5, 2009. [REDACTED] was nineteen (19) at the time of the accident.
17 Exh. "1" at 2; Exh. "2" at 2; Exh. "C" at 2; Exh. "E" at 3.

18 2. As a result of the accident, [REDACTED] sustained significant injuries,
19 including left T2-6 transverse process fractures; right parietal lobe hematoma; right
20 pulmonary contusion; right adrenal cyst; hypotension; and loss of bilateral lower
21 extremity function. Exh. "1" at 2; Exh. "2" at 2; Exh. "C" at 2; Exh. "E" at 3. On July 5,
22 2009, [REDACTED] underwent a T1-T9 fusion surgery, and was diagnosed with T6
23 paraplegia. *Id.* On July 14, 2009, [REDACTED] was discharged to an inpatient rehabilitation
24 facility. Exh. "C" at 2; Exh. "E" at 6. As of May 2012, [REDACTED] continued to participate
25 in outpatient physical therapy, and it is anticipated that [REDACTED] will require ongoing medical
26 care, including medical supplies, prescription medications, diagnostics, possible
27 hospitalizations, durable medical equipment, and therapy for the remainder of [REDACTED] life.
28 Exh. "C" at 3; Exh. "E" at 7-8.

1 3. On May 21, 2010, Plaintiffs filed suit against the [REDACTED] Defendants
2 and [REDACTED] in the [REDACTED] in and for the County of [REDACTED]
3 seeking to recover for damages they allegedly sustained as a result of the accident.
4 Compl. (Doc. 1-3). On August 9, 2010, Defendant [REDACTED] removed the cause of action
5 to federal court based on diversity of citizenship under 28 U.S.C. § 1332. Notice of
6 Removal (Doc. 1). at 1. The [REDACTED] Defendants agreed to pay Plaintiffs
7 \$2,625,000.00, in consideration for a release of all claims. See Exh. "B" at 7. Plaintiff
8 [REDACTED]'s total recovery was designated as \$1,922,799.42. *Id.* at 8. Part of the
9 consideration for the settlement was that Plaintiffs would be responsible for protecting
10 Medicare's interest under the Medicare Secondary Payer Act ("MSP"), 42 U.S.C. §
11 1395y. Exh. "B" at 9.

12 4. The settlement agreement provides that [REDACTED]'s MSA will be
13 professionally administered. Exh. "B" at 11.

14 5. Based upon information from [REDACTED]'s medical records; the amount of
15 [REDACTED] claims, subsequent recovery during settlement and future medicals derived therefrom;
16 and anticipated future cost of care, a MSA was prepared by GRG. See Exh. "C"; Hr'g Tr.
17 8/14/2013 at [REDACTED]. GRG determined that the amount of proceeds
18 available for [REDACTED]'s future potential medical expenses that would be covered by
19 Medicare is \$95,708.10. Exh. "C" at 6; see Hr'g Tr. 8/14/2013 at [REDACTED].

20 6. Based upon information from [REDACTED]'s medical records, life expectancy
21 according to the CDC, the national vital statistics report, and "some other information that
22 should be included based on CMS's sample and recommendation" a MSA was prepared
23 by Medivest. Hr'g Tr. [REDACTED]; see also Exh. "E." Medivest relies on the same
24 methodology, derived from "memos and guidelines that CMS has put out over the
25 years[,] to compute an allocation in Workers' Compensation case, as it does in a liability
26 case. *Id.* at [REDACTED]. Medivest determined that \$973,122.67 was required to fully fund
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1 [REDACTED]'s MSA.³ Exh. "E" at 9. Medivest's analysis projects payments reflecting one
2 hundred (100) percent of the [REDACTED] usual and customary fees for service. Hr'g Tr.
3 8/14/2013 at [REDACTED]

4 7. At this time, CMS does not require approval for a MSA when personal
5 injury lawsuits are settled. Furthermore, CMS does not have any policies or procedures
6 in effect for reviewing or providing an opinion regarding the adequacy of the allocation
7 for future medical expenses in a liability case.

8 8. Plaintiff [REDACTED] will not obtain the age of sixty-five (65) within thirty
9 (30) months of the date of settlement. Exh. "1" at 2; Exh. "2" at 2; Exh. "C" at 2; Exh.
10 "E" at 3. [REDACTED] is currently a Medicare beneficiary. See Exh. "C" at 5. In an August
11 6, 2013 letter, CMS informed [REDACTED] that [REDACTED] total conditional payments at that time
12 were \$4,525.00. Exh. "D" at 2. This conditional payment amount is not disputed by the
13 parties.

14 9. Had this lawsuit been tried and a verdict obtained in favor of the plaintiffs,
15 [REDACTED] would have been entitled to recover pecuniary and non-pecuniary damages.
16 Since the July 5, 2009 accident, [REDACTED] has been permanently disabled, having been
17 rendered a paraplegic. [REDACTED] has incurred past medical expenses in the amount of
18 \$52,651.00. Exh. "1" at 21. [REDACTED] future economic losses are estimated by Plaintiff's
19 experts to total \$12,025,958.00, and [REDACTED] non-economic losses are estimated to be
20 \$36,702,237.00, for a total damages amount of \$48,728,195.00. Exh. "C" at 4.

21 10. Mr. John V. Cattie, Jr. testified regarding GRG's methodology for
22 determining the amount necessary for allocation to the MSA. Hr'g Tr. 8/14/2013 at
23 [REDACTED]. Mr. Cattie testified that GRG's analysis included "determining how many
24 dollars that injured person is being compensated for their future medicals, as compared to
25 past medicals, as compared to wage loss, future loss of earning, pain and suffering and

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27 ³This sum would be funded by an annuity, which at the time of briefing was proposed to cost
28 \$439,900.00. Exh. "2" at 6, Exh. "5." The final amount would be determined based on rates
available after the Order of this Court.

1 other non-economic damages.” *Id.* at [REDACTED]. Mr. Cattie further testified that the
2 amount of future medicals are then bifurcated between Medicare covered expenses and
3 non-Medicare covered expenses. *Id.* at [REDACTED]. Ultimately, Mr. Cattie testified that
4 “the future medical allocation figure that [was] derived in step two, [is] compare[d] . . .
5 against the future cost of care figure derived in step three and we conclude that the lower
6 of the two numbers is the appropriate Medicare set-aside figure.” *Id.* at [REDACTED].

7 11. Ms. Emily Grocoff testified regarding Medivest’s analysis. Hr’g Tr. [REDACTED]
8 [REDACTED]. Medivest uses the same analysis in both Workers’ Compensation and liability
9 cases. *Id.* at [REDACTED]. Although Workers’ Compensation relies on its own fee schedules,
10 in the liability context the result is allocation of payments reflecting one hundred (100)
11 percent of the [REDACTED] usual and customary fees for service. Hr’g Tr. 8/14/2013 at
12 [REDACTED].

13 12. The Court finds that Mr. Cattie’s analysis is more credible in the liability
14 context. GRG’s use of the ratio of [REDACTED]’s net proceeds versus the total damages
15 figure is consistent with the measure of damages in a liability context. This resulted in an
16 allocation of \$95,708.10 to be set aside in trust for future medical expenses. The Court
17 finds this amount to be reasonable and reliable. The Court further finds this amount
18 adequately protects Medicare’s interests and should be available to provide funding for
19 future medical items or services related to what was claimed and released in this lawsuit
20 that would otherwise be covered or reimbursable by Medicare. Additionally, the Court
21 finds that on a third-party liability claim, forcing Plaintiff to allocate seventy-four percent
22 (74%) of [REDACTED] net proceeds to a MSA, as Medivest’s analysis suggests, is inequitable.

23 13. [REDACTED] and [REDACTED] attorneys are aware of [REDACTED] obligation to reimburse
24 Medicare for all conditional payments made by Medicare for medical expenses incurred
25 and related to this lawsuit.

26 14. There is no evidence that [REDACTED], [REDACTED] attorneys, any other party or any
27 other party’s representative, is attempting to maximize other aspects of the settlement to
28 Medicare’s detriment.

1 Based upon the foregoing findings of fact, the undersigned makes the following:

2 **III. CONCLUSIONS OF LAW**

3 1. Jurisdiction over the underlying litigation is based on 28 U.S.C. § 1332.
4 The parties consented to have the undersigned decide this issue, and the District Court
5 referred the matter to the undersigned to conduct all proceedings and enter judgment
6 pursuant to 28 U.S.C. § 636.

7 2. Medicare may obtain secondary payer status under the MSP if payment has
8 been made, or can reasonably be expected to be made, under a workers' compensation
9 law of a State or under an automobile or liability insurance policy or plan (including a
10 self-insured plan), which are defined in the statute as a "primary plan." 42 U.S.C. §
11 1395y(b)(2)(A)(ii). A primary plan's responsibility for payment can be determined by
12 judgment or settlement. 42 U.S.C. § 1395y(b)(2)(B)(ii), 42 C.F.R. § 411.22(b)(1-3).

13 3. By virtue of the terms and obligations in the settlement of [REDACTED] claims, and
14 [REDACTED] receipt of the settlement funds in conjunction therewith, [REDACTED] has become an
15 "entity [who] receives payment from a primary plan," and is therefore responsible as a
16 primary payer for future medical items or services which would otherwise be covered by
17 Medicare that are related to what was claimed and released in this lawsuit in the amount
18 of \$95,708.10. To the extent that there are items or services incurred by [REDACTED] in the
19 future that would otherwise be covered or reimbursable by Medicare, that are related to
20 what was claimed and released in this lawsuit, Medicare shall not be billed for those items
21 or services until the funds received by [REDACTED] for that purpose through the settlement
22 are exhausted.

23 4. [REDACTED] is obligated to reimburse Medicare for conditional payments
24 made by Medicare prior to the time of the settlement and for all medical expenses
25 submitted to Medicare prior to the date of this Order, even if such conditional payments
26 are asserted by Medicare subsequent to the effective date of this Order.

27 5. The sum of \$95,708.10, to be utilized by [REDACTED] out of the settlement
28 proceeds to pay for future items or services that would otherwise be covered by Medicare,

1 reasonably and fairly takes Medicare's interests into account in that the figures are based
2 on reasonably foreseeable medical needs (as opposed to the standard of proof required by
3 the substantive law that would be applicable if the case were tried on the merits), based
4 on the most recent information from the treating physicians, utilizing fee schedules that
5 would be acceptable to CMS according to the expert who provided the MSA evaluation.
6 The Court further finds that this amount represents the most equitable result, and will
7 fulfill the Parties' obligations pursuant to their June 25, 2013 Settlement Agreement.

8 6. Since CMS provides no other procedure by which to determine the
9 adequacy of protecting Medicare's interests for future medical needs and/or expenses in
10 conjunction with the settlement of third-party claims, and since there is a strong public
11 interest in resolving lawsuits through settlement, the Court finds that Medicare's interests
12 have been adequately protected in this settlement within the meaning of the MSP.

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14 Based upon the foregoing conclusions of law, the Court makes the following order,
15 **IT IS HEREBY ORDERED** that:

16 1. [REDACTED] shall promptly reimburse Medicare for any and all
17 conditional payments for services provided prior to the date of this Order.

18 2. [REDACTED] shall allocate \$95,708.10 out of the settlement proceeds for
19 payment of future medical items or services, which would otherwise be covered or
20 reimbursable by Medicare, related to what was claimed and released in this lawsuit.

21 3. The funds set forth in the MSA shall be administered by a third-party
22 pursuant to the June 25, 2013 Settlement Agreement, for the purpose of paying any future
23 medical items or services that would otherwise be covered or reimbursable by Medicare
24 that are related to what was claimed and released in this lawsuit.

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4. The balance of the settlement funds currently held in escrow by the [REDACTED] Defendants shall be released to [REDACTED] pursuant to the June 25, 2013 Settlement Agreement.

DATED this [REDACTED] day of [REDACTED].

[REDACTED]

United States Magistrate Judge

cc: [REDACTED]