

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION**

RUSSELL GEISSLER, BERNARD BAGLEY, AND WILLIE JAMES JACKSON, *individually and on behalf of others similarly situated,*

Plaintiff,

VS.

BRYAN P. STIRLING, Director of the South Carolina Department of Corrections (SCDC), *in his official capacity*; and **JOHN B. MCREE, M.D.**, Division Director of Health and Professional Services for SCDC, *in his individual capacity*,

Defendants.

Case No.: 4:17-cv-01746-MBS

**JOINT MOTION FOR FINAL APPROVAL
OF REVISED PARTIAL CONSENT
DECREE**

(Testing for Chronic Hepatitis C)

Plaintiffs Russell Geissler and Bernard Bagley (the “Testing Class Representatives”), and Defendant Bryan Stirling (collectively, the “Parties”) have entered into a Revised Partial Consent Decree, ECF No. 141-1, that resolves, subject to Court approval, all claims for injunctive and declaratory relief regarding South Carolina Department of Corrections (“SCDC”) policies and practices related to testing inmates for chronic Hepatitis C (“HCV”) (the “Testing Claims”).¹ This partial consent decree would resolve all of the Testing Claims for the Federal Rule of Civil Procedure 23(b)(2) class of all current and future inmates in SCDC custody, with the exception of inmates who have already been diagnosed with chronic HCV (the “Testing Class”). Specifically, the Parties’ agreement provides that each member of the Testing Class will be offered testing for Chronic HCV

¹ Plaintiffs' claims related to SCDC's policies and practices related to treating inmates with HCV (the "Treatment Claims") and Plaintiff Geissler's individual damages claim have not been resolved by the Parties, although they are in active settlement negotiations.

in accordance with CDC guidelines within eighteen months of the Court's approval. The Parties have stipulated to certification of the Testing Class, (ECF No. 125), which the Court So Ordered, (ECF No. 140). The Court also preliminarily approved a Revised Partial Consent Decree and a form of notice. (ECF No. 142). The Court has scheduled a fairness hearing for February 12, 2019. (*Id.*).

The Revised Partial Consent Decree is the product of arms-length negotiations. It is substantively fair and reasonable and is in the best interests of the Testing Class and the public. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Parties now respectfully request that the Court enter an order granting final approval of the proposed Revised Partial Consent Decree.

PROCEDURAL BACKGROUND

On June 30, 2017, Plaintiff Russell Geissler filed a pro se complaint seeking, among other things, (1) treatment for his chronic HCV and (2) treatment for all SCDC inmates with chronic HCV. (ECF No. 1 at 6). The Court appointed counsel for Plaintiff Geissler on January 9, 2018, in light of "the state of the law regarding the issue." (ECF No. 72 at 2). The parties were unable to negotiate a settlement for Plaintiff Geissler's individual claims, and appointed counsel associated additional counsel and filed the Second Amended Class Complaint seeking, in part, comprehensive testing of all SCDC inmates for chronic HCV. (ECF No. 88).

Since May 2013, the Centers for Disease Control ("CDC") has recommended that testing for chronic HCV should be done in a two-step process to confirm chronic HCV. CDC, *Testing for HCV Infection: An Update of Guidance for Clinicians and Laboratorians*, Morbidity and Mortality Weekly Report (May 10, 2013), available at <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6218a5.htm>. In the first step, it is determined whether the HCV antibody is present. *Id.* If the HCV antibody is present, the second step is to determine whether the HCV infection is current by conducting nucleic acid testing. *Id.*

At the time the Second Amended Complaint was filed, all counsel were aware that SCDC did not have a comprehensive testing program that screened inmates for chronic HCV. The parties subsequently engaged in extensive written and some oral discovery. Through this process, SCDC has acknowledged that the two-step process has not been completed in all cases where an inmate has been tested for HCV antibodies.

On August 21, 2018, Plaintiffs' counsel filed the Third Amended Complaint, in part to reflect this new information. (ECF No. 108 at ¶ 1). In addition, Plaintiffs added Bernard Bagley as a plaintiff to the action to include allegations that SCDC had refused his requests to have testing for chronic HCV, despite the fact that he was (a) born between 1945 and 1965, and (b) received a blood transfusion before 1992. The CDC recommends testing for both groups of individuals. CDC, *Testing Recommendations for Hepatitis C Virus Infection*, <https://www.cdc.gov/hepatitis/hcv/guidelinesc.htm> (last visited Dec. 3, 2018).

On November 12, 2018, the Parties filed a stipulation as to class certification of the Testing Class. (ECF No. 125). Plaintiffs Geissler and Bagley are the proposed representatives for the Testing Class. (*Id.*). The Court So Ordered the stipulation on December 12, 2018. (ECF No. 140).

In November 2018, following extensive settlement discussions, the Testing Class Representatives and Defendant Stirling agreed to terms to resolve all of the Testing Claims. Pursuant to their agreement, the Parties filed a joint motion for Preliminary Approval of a Partial Consent Decree on December 4, 2018. (ECF No. 136).

Following a Telephone Status Hearing held on December 6, 2018 (ECF No. 138), the Parties filed a Revised Partial Consent Decree pursuant to the Court's direction. (ECF 141-1). On December 19, 2018, the Court preliminarily approved the Revised Partial Consent Decree and the form of notice (the "Notice") to be provided to the Testing Class. (ECF 142). The Court set February 12, 2019 as

the date for a hearing on the fairness, reasonableness, and adequacy of the Revised Partial Consent Decree pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. (*Id.*).

The Parties have already initiated their compliance with the Revised Partial Consent Decree. As of February 5, 2019, SCDC has

- A. provided notice of the terms of the Revised Partial Consent Decree to current SCDC inmates by posting the Court-approved notice in each prison (§ 14);
- B. implemented the CDC’s recommended two-step process for diagnosing chronic HCV (§§ 30-31);
- C. tested Plaintiffs Geissler and Bagley for chronic HCV according to the CDC guidelines (§ 32);
- D. completed the preliminary round of testing by offering 533 inmates Opt-Out testing and testing 442 inmates, 52 (11.76%) of whom tested positive for chronic HCV (§ 33);
- E. provided Plaintiffs’ counsel with information about the opt-out process used as well as the test results and opt-out forms (§§ 34-35);
- F. provided Governor McMaster and the legislature with accurate estimates regarding the scope of chronic HCV in South Carolina’s prison system (§ 37), *see* Exhibit 1;

ARGUMENT

I. LEGAL STANDARD

Rule 23(e) of the Federal Rules of Civil Procedure provides, in part, that the claims of a certified class can only be settled with the court’s approval. To grant approval of a settlement, the court must determine that it is “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2);

Rule 23(e)’s settlement approval process ensures that Rule 23(b)(2) “class members receive notice of a proposed settlement and an opportunity to object, and that a settlement will not take effect unless the trial judge — after analyzing the facts and law of the case and considering all objections to the proposed settlement — determines it to be fair, adequate, and reasonable.” *Berry v. Schulman*, 807 F.3d 600, 612 (4th Cir. 2015).

Similarly, “before entering a consent decree,” the Court must be satisfied that the agreement is “not illegal, a product of collusion, or against the public interest” and “is fair, adequate, and reasonable.” *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (quoting *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991) (internal quotation marks omitted)). Although “this assessment does not require the court to conduct ‘a trial or a rehearsal of the trial,’ the court must take the necessary steps to ensure that it is able to reach ‘an informed, just and reasoned decision.’” *Id.* (quoting *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172–73 (4th Cir. 1975)).

Further, the Court’s review is conducted against the backdrop of the strong judicial policy favoring settlement of class actions: when “considering whether to enter a proposed consent decree, a district court should be guided by the general principle that settlements are encouraged.” *United States v. North Carolina*, 180 F.3d at 581; *United States v. CSX Transp., Inc.*, No. 2:18-CV-01175, 2019 WL 97820, at *1 (S.D.W. Va. Jan. 3, 2019) (same); *see also Petty v. Timken Corp.*, 849 F.2d 130, 133 (4th Cir. 1988) (holding that “unless the ... settlement is substantially unfair, judicial economy commands that a party be held to the terms of a voluntary agreement”). Settlement in this case will avoid the consumption of a significant amount of time and expense by the parties, including the public fisc, and will allow for the efficient use of judicial resources.

II. NOTICE TO CLASS MEMBERS WAS ADEQUATE

Federal Rule of Civil Procedure 23(e) requires some form of notice of the settlement to class members. In class actions involving prisons and other institutions, it is frequently impractical to provide individual notice to class members. The Notice approved by the Court here was appropriately distributed and class members were given the opportunity to submit objections to the Revised Partial Consent Decree. Specifically, Class Counsel posted the Revised Partial Consent Decree on www.SCHepC.com on December 19, 2018 and provided all Circuit Public Defenders with Notice of the Revised Partial Consent Decree on January 11, 2019. Ex. 2, Affidavit of Christopher J. Bryant.

SCDC posted Notice of the Revised Partial Consent Decree (1) in every housing unit of every SCDC institution, (2) in SCDC's intake facilities, and (3) made information regarding the Revised Partial Consent Decree available on the SCDC website and in the prison libraries. Ex. 3, Affidavit of Barton J. Vincent.

The Notice has informed class members and their family members of the proposed settlement; as of February 5, 2018, the Parties have received more than 30 responses to the Notices.² Most of these responses have sought additional information or raised concerns regarding treatment. Inasmuch as the Revised Partial Consent Decree addresses only the Testing Claims, these responses are not being interpreted by counsel for either side as objections to the proposed settlement of the Testing Claims. However, counsel have noted the concerns stated in the numerous letters submitted and are responding to all correspondence in an effort to further inform the concerned individuals that settlement discussions regarding the Treatment Issue have commenced and are ongoing.

III. THE REVISED PARTIAL CONSENT DECREE IS FAIR, REASONABLE, AND ADEQUATE

The Fourth Circuit “requires a two-step process for evaluating a class action settlement's compliance with 23(e)'s fair, reasonable, and adequate requirement: first, courts must consider factors bearing upon the settlement's fairness, then factors relating to its adequacy.” *Smith v. Res-Care, Inc.*, No. CV 3:13-5211, 2015 WL 6479658, at *5 (S.D.W. Va. Oct. 27, 2015).

A. The Revised Partial Consent Decree Is Fair

To determine whether the agreement is fair, the court must consider (i) the posture of the case at the time of settlement, (ii) the extent of discovery that has been conducted, (iii) the circumstances

² Because many of these letters contain personally identifying information and/or protected health information, Counsel for the parties will provide the Court with scanned copies of these letters separately. Plaintiffs' counsel received one email and one phone call from relatives of current SCDC inmates, neither of which contained an objection.

surrounding the negotiations, and (iv) the experience of counsel. *See In re Jiffy Lube Securities Litig.*, 927 F.2d 155, 158-59 (4th Cir. 1991).

The Parties have exchanged information and engaged in substantial discovery. Although some discovery remains regarding the unresolved claims related to treatment for chronic HCV and Plaintiff Geissler's individual damages claim, the parties have fully exhausted discovery on the Testing Claims. Class Counsel was provided sufficient opportunity to examine the facts and issues with respect to the testing of SCDC inmates for chronic HCV and the standards of care and to retain and consult expert witnesses to aid in analyzing the case.

The purpose of the proposed settlement is to provide Plaintiffs with the injunctive relief they requested: providing SCDC inmates with testing for chronic HCV that meets the medical standard of care³ asserted by Plaintiffs. Plaintiffs, however, will be foregoing any declarative relief related to the Testing Claims.

"The fairness analysis is intended primarily to ensure that a settlement [is] reached as a result of good-faith bargaining at arm's length, without collusion." *Berry v. Schulman*, 807 F.3d 600, 614 (4th Cir. 2015) (quotation marks omitted). The agreement reached here, is neither illegal nor the product of collusion. Class Counsel are all experienced attorneys, and there has been considerable arm's length bargaining leading to the Revised Partial Consent Decree. *See Harris v. McCrackin*, No. 2:03-3845-23, 2006 WL 1897038, at *5 (D.S.C. July 10, 2006). "A proposed class action settlement is considered presumptively fair where there is no evidence of collusion and the parties, through capable counsel, have engaged in arm's length negotiations." *Id.*

³ Dr. James Aaron Grubbs, M.D. and Dr. Ansal Shah, M.D. have both submitted affidavits averring to the CDC guidelines establish the standard of care for HCV testing and that "SCDC's [current] policies and practices regarding HCV testing deviate from the standard of care." (ECF No. 104-2 at 1-3, 8-10). Both doctors are infectious disease specialists, board certified in internal medicine, and have worked as infectious disease physicians within SCDC.

B. The Revised Partial Consent Decree is Adequate

To determine the adequacy of a class settlement, the court must consider (i) the relative strength of the plaintiffs' case on the merits; (ii) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (iii) the anticipated duration and expense of additional litigation; (iv) the solvency of the defendants and the likelihood of recovery of a litigated judgment; and (v) the degree of opposition to the settlement.

Harris, 2006 WL 1897038, at *7.

First, the Court must review the record and consider the strength of the Plaintiffs' case. *Flinn*, 528 F.2d at 1173. "So long as the record before [the Court] is adequate to reach an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated and form an educated estimate of the complexity, expense and likely duration of such litigation, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise, it is sufficient." *Id.*

Here, the suit focuses on access to medical care in SCDC. The Testing Class Representatives assert, *inter alia*, that SCDC has violated the Eighth Amendment rights of the Testing Class by failing to provide all inmates with an opportunity to be tested for chronic HCV pursuant to CDC guidelines. SCDC denies any constitutional violations with respect to the Testing Claims, and Plaintiffs would bear the burden of proving SCDC's violations. Like many prison civil rights cases, this creates some uncertainty, and courts have found that any uncertainty can increase the risk for plaintiffs to establish liability for their claims.

The Revised Partial Consent Decree, however, provides Plaintiffs with the injunctive relief they sought—opt-out testing of all inmates for chronic HCV. The duration and expense of continuing the litigation would be substantial. The court and the parties would benefit by avoiding what could be an enormous expenditure of time and resources. Further, continued litigation would delay the time for inmates to receive relief without any corresponding benefit.

Because Plaintiffs are seeking injunctive relief, the solvency of SCDC and the likelihood of recovery of a litigated judgment are not at issue.

Only one issue has emerged regarding the terms of the Revised Partial Consent Decree. Two inmates who are scheduled to be released in March and December 2019 have expressed concern that they will not be tested before they leave prison. Because of the logistical difficulties involved with testing more than 18,000 individuals in the correctional setting, SCDC tests inmates facility by facility instead of in a piecemeal fashion by release date. That being said, SCDC has set an aggressive testing schedule and is hopeful that it will be able to complete the testing for all currently incarcerated inmates by September 2019, which would be well ahead of schedule. Assuming this goal is met, the concerns of the inmate scheduled to be released in December, but not the inmate scheduled to be released in March. At the Fairness Hearing, counsel for SCDC will be able to more fully address this issue.

Finally, the agreement provides substantial benefit to the public. An estimated 1% of the non-inmate population has chronic HCV; that number rises to an estimated 17% for the inmate population. ECF No. 136-2, Teianhua He, M.D. et al., *Prevention of Hepatitis C by Screening and Treatment in U.S. Prisons*, *Annals of Internal Medicine* (Nov. 24, 2015) (SCDC Documents for Informal Discovery Response 000001). As individuals move in and out of the prison system and are unaware of their HCV status, they can transmit the disease to others. *Id.* at 3 (identifying a model for how the disease spreads vis-à-vis individuals moving in and out of the prison system). Studies have suggested that providing opt-out testing to inmates can help reduce the transmission of the disease—and deaths related to the disease—*outside* of the prison. *Id.* at 4 (finding that 80% of the “liver-related deaths” averted by testing and treating for chronic HCV would have occurred outside of prisons); *see also* Caitlyn Fitzpatrick, *Prisons: The Problem and Solution of Hepatitis C?*, *MD Magazine* (Sep. 21, 2016) (“One of the findings indicated that presenting prevention programs within the prisons, as well

as to those who are being released back into the community, could significantly cut infections.”), available at <https://www.mdmag.com/medical-news/prisons-the-problem-and-solution-of-hepatitis-c>.

Based on the sample of 442 inmates that have already been tested, SCDC estimates that approximately 2,182 inmates are likely to have HCV. See Ex. 1, Jan. 24, 2019 Ltr. from B. Stirling to H.S. Peeler, Senate President. The Revised Partial Consent Decree will allow SCDC to ascertain the precise number of inmates with chronic HCV and hopefully help prevent the spread of the disease in the prison population and the general public.

For all the foregoing reasons, Counsel for the Parties believe that this result is fair, adequate, and reasonable.

CONCLUSION

In sum, the parties have reached a negotiated agreement that SCDC will provide opt-out testing for chronic HCV to all inmates in a logistically manageable fashion. Notice of the negotiated agreement has been prominently posted throughout SCDC facilities. No objections to the agreement have been received.

For the foregoing reasons, the parties respectfully request that the Court approve the Revised Partial Consent Decree pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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* admitted *pro hac vice*

** unopposed *pro hac vice* application forthcoming