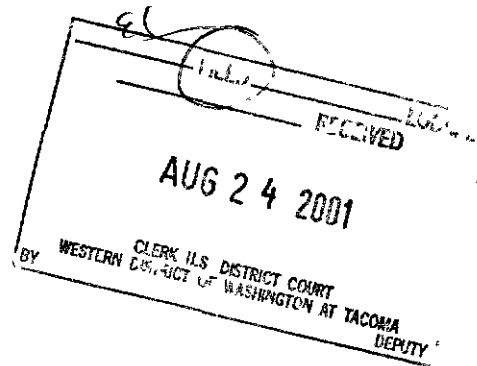




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CV 00-05-49 #00000146

The Honorable ROBERT J. BRYAN

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

CHRISTI RUST, et al ,

Plaintiffs,

v

WESTERN STATE HOSPITAL, et al ,

Defendants.

NO C00-5749RJB

MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF JOINT
MOTION FOR APPROVAL
OF SETTLEMENT

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Introduction

On August 15, 2001, the Court entered an Order preliminarily approving a final settlement of the claims set forth in Plaintiffs' Complaint for Injunctive Relief. The final settlement incorporates the terms of the partial settlement approved by this Court on May 11, 2001 and would supercede that prior partial settlement. A copy of the final settlement with highlighted changes from the partial settlement is attached hereto as Exhibit A. This memorandum is submitted in support of the Joint Motion for approval of the final settlement agreement. It supplements and incorporates by reference the Memorandum of Points and Authorities filed in connection with the Joint Motion for Approval of the Partial Settlement, dated May 17, 2001 and Exhibits thereto.

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MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF JOINT
MOTION FOR APPROVAL OF
SETTLEMENT

1

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Background of the Case

This case was filed on behalf of six individually named Plaintiffs who are admitted to the Center for Forensic Services ("CFS") at Western State Hospital ("WSH") and the Washington Protection and Advocacy System ("WPAS") following several months of intensive investigation conducted by WPAS and its expert consultants pursuant to WPAS's federal mandate. The Complaint alleged that Defendants failed to provide class members with minimally adequate dental, medical, and psychiatric care, active treatment, and discharge planning and protection from harm. See generally Complaint. The Complaint also alleged overcrowding, under staffing, and failure to provide treatment to class members in the most integrated setting. Id. On February 2, 2001, the Court certified a class defined as All individuals 1) who currently are residents on the Center for Forensic Services at Western State Hospital and 2) will become residents of the Center for Forensic Services at Western State Hospital in the future. Agreed Order Certifying Class dated February 2, 2001.

On January 3, 2001, Plaintiffs filed their Preliminary Injunction Motion ("PI Motion") seeking preliminary relief on virtually all of the claims in the Complaint. See PI Motion and Proposed Order attached thereto. Defendants opposed the PI Motion. On February 16, 2001, the Court heard oral argument on the PI Motion and indicated that it intended to grant relief on at least some of the claims.

In March of this year, the parties began intensive settlement negotiations to resolve the issues raised in the PI Motion and to attempt to settle the entire case. A partial settlement was reached in May 2001 and approved by this Court on May 29, 2001. The partial settlement agreement resolved many of the claims related to protection from harm, overcrowding, inadequate medical, dental and psychiatric care, inadequate treatment plans and discharge planning. See Order, May 11, 2001. A monitoring committee, comprised of two experts in the area of forensic mental health, has been established to oversee the implementation of the settlement agreement. See Order, May 11, 2001 at 2-3, Order, August 14, 2001 at 2-3. In addition, three consultants including a

1 forensic psychiatrist, a forensic physician, and a psychologist specializing in habilitative mental
 2 health for persons with developmental disabilities have been appointed to assist the monitoring
 3 committee Id

4 The proposed final settlement addresses the remaining issues related to active individualized
 5 treatment and adequate staffing. In summary, it provides that Defendants will offer at least twenty
 6 hours per week of active treatment to all class members, will hire an additional 33 staff members to
 7 facilitate such treatment and will make special accommodations for the needs of patients with
 8 developmental disabilities or other cognitive impairments. The final agreement was reached as a
 9 result of extensive negotiations, a request by Defendants for additional legislative appropriations,
 10 and consultation with the monitors and other expert consultants.

11 Legal Argument

12 **I. The Proposed Settlement Meets The Legal Standard For Court Approval**

13 **A. The Legal Standard**

14 Fed R Civ Proc 23(e) provides that “[a] class action shall not be dismissed or
 15 compromised without approval of the court, and notice of the proposed dismissal or compromise
 16 shall be given to all members of the class in such a manner as the court directs.” Before a court can
 17 approve dismissal or compromise, it must evaluate whether the proposed settlement is
 18 “fundamentally fair, adequate, and reasonable.” Officers for Justice v Civil Service Comm’n, 688
 19 F 2d 615, 625 (9th Cir 1982), cert den 459 U S 1217 (1983). In making this determination, courts
 20 must balance some or all of the following factors: 1) the strength of plaintiffs’ case, 2) the risk,
 21 expense, complexity, and duration of any further litigation in the case, 3) the risk involved in
 22 maintaining class action status throughout the trial, 4) the amount offered in settlement, 5) the
 23 extent of discovery completed in the case, 6) the experience and views of counsel, 7) whether there
 24 is a governmental participant in the case, and 8) the reaction of the class members to the proposed
 25 settlement. Id. Other factors that are considered include whether the settlement was reached
 26 through arm’s length bargaining and whether the number of objections or interests that they

1 represent is large when compared to the class as a whole. Herbert B Newberg, Newberg on Class
 2 Actions, § 11 41 (3d ed 1992)

3 Assessment of the proposed settlement ensures that it is “not the product of fraud or
 4 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
 5 whole is fair, reasonable, and adequate to all concerned ” Officers of Justice, 688 F 2d at 625.

6 There is a strong presumption favoring settlement Class Plaintiffs v City of Seattle, 955 F.2d
 7 1268, 1276 (9th Cir 1992)

8 **B. The Proposed Settlement Is Fair, Reasonable And Adequate**

9 The relevant factors are discussed in the following sections

10 **1. Settlement Negotiations Were Conducted At Arm’s Length**

11 Settlements in class actions must be reached in good faith and without any collusion
 12 between the parties In re Pac. Sec Litig., 47 F 3d 373, 378 (9th Cir 1993) (citations omitted) To
 13 determine whether such negotiations occurred, courts look at the length of the settlement process,
 14 the nature of the process, the timing of discussion and the settlement of attorney’s fees

15 Settlements conducted over a period of time, at arm’s length, support “a strong
 16 presumption” of the settlement’s substantive fairness. Bussie v Am Fin Corp., 50 F Supp. 2d 59,
 17 77 (D Mass 1999) The settlement here was conducted at arm’s length and there was no collusion
 18 between the parties or their counsel. The settlement negotiations on all terms of the agreement took
 19 place over approximately five months After the partial settlement agreement was entered in May,
 20 the parties negotiated for an additional three months before reaching agreement on the remaining
 21 terms One key component of these negotiations was consultation with the monitors and other
 22 experts over the active treatment provisions and over the requirements for additional staffing
 23 Declaration of Henry Dlugacz (“Dlugacz Declaration”), attached hereto as Exhibit B at ¶7,
 24 Declaration of Joel Dvoskin (“Dvoskin Declaration”), attached hereto as Exhibit C at ¶5. The fact
 25 that the settlement was negotiated in phases with extensive expert involvement indicates that the
 26 process used to reach this proposed agreement was not rushed and was proper See generally

1 Memorandum of Points and Authorities dated May 17, 2001 and Declarations of Deborah Dorfman
2 and Pamela H. Anderson attached thereto

3 Finally, the parties did not address counsels' remuneration until after reaching consensus on
4 the terms of the settlement. The parties have agreed that Defendants will pay Plaintiffs' attorneys'
5 fees and costs, but have not negotiated an amount. Order, August 15, 2001 at 8. The fact that the
6 amount of fees to be paid will be resolved separately from the settlement suggests that the
7 settlement was fair. See Bussie, 50 F. Supp. 2d at 77, Duhaime v. John Hancock Mut. Life Ins. Co.,
8 177 F.R.D. 54, 67 (D. Mass. 1997) (approving settlement of insurance sales practices class action
9 where "attorneys' fees were negotiated after and separate from the proposed settlement.")

10 2. Sufficient Discovery Was Conducted In The Case

11 The amount of discovery conducted is a factor to be considered in determining whether a
12 proposed class settlement is fair, adequate, and reasonable. However, "formal discovery is not a
13 necessary ticket to the bargaining table where the parties have sufficient information to make an
14 informed decision about settlement." In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454 (9th Cir.
15 2000) (quoting Linney v. Cellular Alaska Partnership, 151 F.3d 1234 (9th Cir. 1998)).

16 This settlement was reached eight months after the case was filed and prior to the
17 completion of any formal discovery, other than the initial disclosures required by the Federal Rules
18 of Civil Procedure. While formal discovery was not done, Plaintiffs conducted extensive informal
19 discovery both before and after filing the lawsuit. The informal discovery conducted by Plaintiff
20 WPAS was much more extensive than is done in most cases because WPAS has a federal mandate
21 to investigate allegations of abuse and neglect of individuals with disabilities such as the class
22 members. See 42 U.S.C. § 10801, et seq., 42 C.F.R. § 51, and RCW 71A.10.080. Under its federal
23 mandate WPAS and its expert consultants have access to records, investigations, notes from
24 investigations, policies, other documents, and witnesses, that would normally not be available prior
25 to formal discovery. 42 C.F.R. §§ 51.41 and 51.42

Moreover, the parties reached a settlement in the case after five months of intensive settlement negotiations that involved extensive use of experts in psychiatry, social work, forensic psychology, and medicine. The experts had extensive knowledge of the issues raised in the lawsuit, had an opportunity to review patient records and, in some cases, had an opportunity to tour the facility and speak with patients and hospital staff. See Dvoskin Declaration at ¶4, Dlugacz Declaration at ¶4, 5. The experts believe that the provisions of the settlement appropriately address the issues raised in Plaintiffs' Complaint and PI Motion. See Dlugacz Declaration at ¶8, Dvoskin Declaration at ¶7. Plaintiffs had ample information to adequately evaluate the case, determine what was needed in a settlement and to ensure that the settlement was fair, adequate, and reasonable.

3. Counsel Proposing The Settlement Are Experienced In Similar Cases

The Court should determine the proper weight to place on the judgment of the parties' respective counsel. When counsel are experienced attorneys who are knowledgeable about the facts and claims, their representation to the Court that the settlement provided to the class is fair, reasonable, and adequate should be given significant weight. See San Francisco NAACP v. San Francisco Unified Sch. Dist., 59 F. Supp. 2d 1021 (N.D. Cal. 1999).

In the present matter, Plaintiffs' counsel has extensive experience litigating similar mental disability cases. See Declarations of Plaintiffs' counsel in Support of Motion for Class Certification, filed December 20, 2000. Plaintiffs' counsel were well qualified to make, and did make, a comprehensive assessment of the settlement agreement to ensure that it was fair, reasonable and adequate.

4. Reaction Of The Class Members To The Proposed Settlement

In assessing a class settlement, courts must also consider the reaction of the class members to the proposed settlement. Hanlon v. Chrysler Corp., 150 F.3d at 1026 (citations omitted). A relatively small number of objectors indicates fairness and supports judicial approval. Duhaime, 177 F.R.D. at 70, Giusti Bravo v. U.S. Veterans Admin., 853 F. Supp. 34, 40 (D.P.R. 1993).

1 Additionally, Courts must examine the proposed settlement as a whole for overall fairness, rather
 2 than looking at individual components of the agreement. Id

3 Counsel will be conducting training sessions for all class members at CFS on August 24 and
 4 29, 2001. It is not anticipated that the Plaintiff class members will object to any terms of the
 5 settlement, as the final settlement provisions will result in great improvements in individualized
 6 active treatment.¹

7 Counsel is unaware of any other potential objectors to the settlement

8 5. Strength of Plaintiffs' Case

9 Courts also look to the strength of the Plaintiffs' case in determining the fairness of a class
 10 settlement. Hanlon, 150 F.3d at 1026. Here, Plaintiffs' case was strong, and it is likely, that had
 11 this case gone to trial, plaintiffs would have prevailed on all or most of the claims that have now
 12 been resolved in the partial settlement agreement. The PI Motion sets forth fully the strength of the
 13 case. The PI Motion was revised after the partial settlement. The revised PI Motion was opposed
 14 by Defendants, but granted by the Court on July 10, 2001. Defendants moved to modify the time
 15 for compliance with the preliminary injunction because they had obtained legislative appropriation
 16 for additional staff, but believed it to be impossible to hire staff as quickly as the Court Order would
 17 require. See Defendants' Motion to Modify Order Granting Preliminary Injunction, dated July 23,
 18 2001.

19 In the settlement agreement, Plaintiffs have obtained virtually all of the relief sought
 20 regarding issues argued in their revised PI Motion. Thus, litigation would only delay the
 21 implementation of the immediate necessary relief. See D.M., et al. v. Jack Terhune Comm'r of
 22 DOC, 67 F. Supp. 2d 401, 410-411 (D.N.J. 1999) (settlement was fair, reasonable and adequate in
 23 class action brought against prison officials for failure to provide adequate mental health care,
 24
 25

26 ¹ There may be objections filed with the Court after the filing of this Motion and Memorandum. The deadline
 for filing such objections is September 4, 2001.

1 where plaintiffs had achieved most of their ultimate goals in bringing the lawsuit through
2 settlement)

3 **6. Risk, Expense, Complexity, And Probable Duration Of Litigation**
4 **Absent A Settlement In The Case**

5 In determining whether a proposed class settlement is reasonable, the courts balance what
6 the Plaintiffs were able to obtain through the proposed settlement agreement with what they would
7 likely have achieved at trial. In looking at the reasonableness of the settlement, the central question
8 to be answered is whether the settlement is reasonable in light of the uncertainty of litigation. See
9 id. at 409-411 (citation omitted). Through the settlement, Plaintiffs have obtained a commitment
10 that Defendants will hire 33 staff members of specified job descriptions and provide at least 20
11 hours a week of individualized, active treatment to all class members. Plaintiffs cannot be sure of a
12 result that favorable after trial. Moreover, relief would be delayed as a result of litigation.

13 **II. The Procedural Requirements Of Rule 23(e) Have Been Satisfied**

14 Fed. R. Civ. P. 23(e) establishes procedural requirements regarding notice of any proposed
15 settlement to ensure that the rights of the named and unnamed class members are protected and
16 fully considered in the negotiation of the settlement agreement. Officers for Justice, 688 F.2d at
17 624. The rule requires that 1) members of the class be notified of the settlement in a manner that
18 ensures that all members received adequate notice, 2) the notice clearly state that any dissidents can
19 object to the proposed settlement; 3) each objection must be part of the record, 4) those members
20 raising objections be afforded an opportunity to be heard with the assistance of privately retained
21 counsel, 5) a reasoned response to the objectors be provided by the Court on the record, except for
22 frivolous objections which require only a statement by the Court on the record of the reasons
23 finding the objection frivolous. Id.

24 The Court Order of August 10, 2001 set forth the precise procedure that was to be followed
25 in complying with these requirements. Prior to the fairness hearing each provision of that Order
26 will have been accomplished.

WASHINGTON PROTECTION &
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