**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF WISCONSIN**

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JOAN BZDAWKA, et al.,

Plaintiffs,

v. Case No. 04-C-1093

MILWAUKEE COUNTY, et al.,

Defendants.

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MEMORANDUM OF MILWAUKEE COUNTY
IN SUPPORT OF PROPOSED SETTLEMENT AGREEMENT

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Under Rule 23(e)(1), F.R.C.P., the court must approve any settlement of a class action. Before approving a settlement, the court must be satisfied that notice of the proposed settlement has been directed to class members in a reasonable manner, and that the proposed settlement is fair, reasonable and adequate. Milwaukee County respectfully submits this memorandum in support of the proposition that the procedural and substantive requirements for approval of the proposed settlement are satisfied. In addition to the arguments presented in this memorandum, Milwaukee County joins in the facts[1] and arguments submitted by counsel for the other parties to support approval of the proposed settlement.

[1] Defendant Milwaukee County concurs in the proposed findings of fact and conclusions of law which have been drafted and filed on behalf of the State of Wisconsin defendants and joins those defendants in respectfully urging the court to adopt those findings and conclusions as its own.

**I. Notice has been directed to class members in a reasonable manner.**

The procedure by which notice of the proposed settlement was directed to class members, which process the court has already approved, is described in detail in paragraphs 36 through 40 the State of Wisconsin defendants' proposed findings of fact and documented in the supporting affidavits referenced therein.

In order to comply with Rule 23, and as a matter of constitutional due process, notice of a proposed settlement or compromise of a class action should be directed to class members in the best manner which is practicable under the circumstances, including, in some cases, individual notice to all class members who can be identified through reasonable effort, *DeJulius v. New England Health Care Employees Pension,* 429 F.3d 935, 943-944 (10th Cir.).

The procedure for distribution of the notice in this case certainly meets, and probably exceeds, the minimum standards under Rule 23 and the applicable case law. Individual notice was mailed to all class members who could be identified through reasonable effort: All current Family Care members, which includes all current class members (those currently residing in CBRF's or adult family homes) and some future class members (current Family Care members who do not currently reside in CBRF's or adult family homes but who may in the future be appropriate for such residential facilities). In addition, to assure effective notice to class members and future class members who are, to the knowledge of the defendants, under a disability which could affect their ability to understand the notice, individual notice was mailed to the guardians and agents operating under activated powers of attorney for current Family Care members.

Finally, the notice was posted on the DHFS web site, and it was distributed to a wide variety of agencies and community organizations which provide services to and/or advocate on behalf of persons who are or may in the future be members of the plaintiff class.

In short, every reasonable effort was made to afford effective notice of the proposed settlement to the class members and to others in the community, particularly to those who are best positioned to understand the implications of the proposed settlement and to speak on behalf of the class members.

**II The proposed settlement is fair, reasonable and adequate.**

In order to approve the proposed settlement, the court must determine that the settlement is fair, adequate and reasonable. Factors to be considered by the court in making that determination include: (a) the likelihood of success on the merits weighed against the amount and form of the relief offered in the settlement; (b) the risks, expense, and delay of further litigation; (c) the judgment of experienced counsel who have competently evaluated the strength of their proofs; (d) the amount of discovery completed and the character of the evidence uncovered; (e) whether the settlement is fair to the unnamed class members; (f) objections raised by class members; (g) whether the settlement is the product of arm's length negotiations as opposed to collusive bargaining; and (h) whether the settlement is consistent with the public interest. *See, Granada Invs., Inc. v. DWG* Corp., 962 F.2d 1203, 1205 (6th Cir.1992); *Williams v. Vukovich,* 720 F.2d 909, 922-23 (6th Cir.1983); *Kogan v. AIMCO Fox Chase, L.P.,* 193 F.R.D. 496, 501-02 (E.D.Mich.2000); *Steiner v. Fruehauf Corp.,* 121 F.R.D. 304, 305-06 (E.D.Mich.1988).

**(a) The likelihood of success on the merits weighed against the amount and form of the relief offered in the settlement.**

Because this case does not involve monetary damage claims, the court cannot apply this factor in the typical arithmetical fashion, evaluating the settlement as percentage of the plaintiffs' maximum recovery and comparing the result with the plaintiffs' statistical odds of success, *see*, *In re Cardizem CD Antitrust Litigation, 218 F.R.D. 508* E.D. Mich. 203). Nevertheless, this factor militates in favor of approval of the proposed settlement in this case.

The proposed findings of fact submitted by the State of Wisconsin defendants include a description of the plaintiffs' claims as they have evolved through the history of this action. That description is as clear and precise as the nature of those claims will allow. Under the court's prior decisions, some of the plaintiffs' claims have survived dismissal motions as abstract legal propositions. Nevertheless, it is fair to state that the plaintiffs would experience difficulty in proving facts sufficient to withstand summary judgment motions or to support those claims at trial.

The crux of the plaintiffs claims against Milwaukee County is that the County is not paying CBRF operators enough to guarantee Family Care members a stable network of providers sufficient to meet their needs and avoid the deleterious consequences of transfer from one provider to another or, even worse, transfer to a "less integrated" residential setting. The plaintiffs identify a few providers who complain, unsurprisingly, that their businesses are insufficiently profitable at the rates they have negotiated with the County. Also, plaintiffs' experts have offered guarded preliminary opinions, based on a review of financial statements submitted to Milwaukee County, that some smaller

residential providers were experiencing financial distress (*see*, *e.g.,* R. 120). However, thus far the plaintiffs have been unable to identify any members of plaintiff class for whom the threatened harms postulated in their complaint have actually come to pass. Moreover, the County's actual experience has been that CBRF operators and other residential providers are *not* leaving the Family Care program due to inadequate reimbursement rates, and that there is no shortage of new residential providers who want to become part of the program, *see*, Aff. of James Hennen, submitted in support of State Defendants' Opposing Motions for Class Certification (R-115). Therefore, there is at least a reasonable basis to doubt that the plaintiffs can prove the essential factual premise for their claims against Milwaukee County. The same may be said for the plaintiffs' claims against the State of Wisconsin defendants, for the reasons explained in their submissions.

Especially when weighed against the plaintiffs' likelihood of succeeding on the merits in this action, the commitments of Milwaukee County which are part of the proposed settlement will provide significant benefits to the plaintiff class. They effectively address the plaintiffs' concerns about the availability of appropriate residential services by addressing the legitimate concerns of the CBRF and adult family home operators who provide those services with respect to the rate-setting process. Milwaukee County has agreed to substantial refinements to the process by which reimbursement rates for Family Care residential providers are set. Those refinements, which require Milwaukee County to solicit and utilize a broader range of information about the providers' true costs to provide services to Family Care members, will make the rate-setting process more transparent and equitable for the providers while preserving the

ability of Milwaukee County to administer Family Care on a cost-efficient managed care model, which is critical to the survival of the program.

**(b) The risks, expense and delay of further litigation**.

From the perspective of members of the plaintiff class, the primary risk of further litigation is that, for the reasons discussed above as well as the reasons documented in the proposed findings of fact and conclusions of law submitted by the State of Wisconsin defendants, ultimately they will be unable to prove the facts necessary to support their remaining claims. Those claims could be dismissed on summary judgment or at trial, in which case this lawsuit will avail them naught. The proposed settlement avoids that risk by providing immediate and significant improvements in the administration of the Family Care program.

Also, continued prosecution of this action through trial (and, in all likelihood, appeal) would cause significant additional cost and delay. Although substantial discovery, primarily in the form of document production and interrogatories, has already occurred, considerable additional time and effort would be required to complete discovery from both fact and expert witnesses, prepare and brief dispositive motions, and prepare for trial.

Besides occupying counsel, those activities would consume an enormous amount of the time and attention of administrators and other personnel of both the Wisconsin Department of Health and Family Services and the Milwaukee County Department on Aging for discovery, trial preparation and other litigation-related tasks. The resources of both those agencies are not unlimited. The interests of the plaintiff class will be better served if those resources are devoted to improving the administration of the Family Care

program (including, but not limited to, implementing the terms of the proposed settlement agreement) and providing services to its members, rather than to additional depositions, document discovery and the like.

**(c) The judgment of experienced counsel who have competently evaluated the strength of their proofs**.

Counsel for the plaintiffs can certainly speak for themselves with regard to this factor. However, defendant Milwaukee County is satisfied that plaintiffs' local counsel, Mr. Pledl, has extensive experience in litigating the rights of persons with disabilities in actions against state and municipal agencies. The court can reasonably trust his judgment in evaluating the strength of his clients' case and negotiating a settlement based on that evaluation. In this case, the reliability of that judgment is reinforced by his decision to obtain the assistance of the National Health Law Program, Inc., a national public interest law firm which specializes in services to, among other groups, the elderly and people with disabilities, and the concurrence of that firm in the proposed settlement agreement.

In class actions of a commercial nature arising under anti-trust and consumer protection laws, courts have adverted to the participation of attorneys general as factor in favor of the fairness and adequacy of a settlement, *New York v. Reebok Int'l, Ltd.,* 96 F.3d 44, 48 (2d Cir. 1996). In those cases the attorney general participates on the plaintiffs' side in a *parens patriae* capacity rather than, as in this case, representing defendants. Even in this case, however, the participation of the attorney weighs in favor of the conclusion that the proposed settlement is fair, adequate and reasonable. Certainly the attorney general and, for that matter, the Milwaukee County corporation counsel, have considerable experience in defending cases involving both medical assistance and

other entitlement programs and federal disability law. Both those offices have the experience and sophistication required to competently assess the merits of such a case and to reach a reasonable judgment that a stipulated resolution is reasonable and prudent.

**(d) The amount of discovery completed and the character of the evidence uncovered.**

The amount of discovery completed and the character of the evidence uncovered in this action is sufficient to allow counsel for the parties to make a competent assessment of the strengths and weaknesses of their respective claims and defenses.

Although substantial additional discovery would be necessary to prepare for summary judgment motions and for trial if this case was not settled, the amount of discovery completed to date is not inconsiderable. As noted in the State of Wisconsin defendants' proposed findings of fact, thousands of pages of documents have been exchanged.

In addition, experts retained by plaintiffs' counsel availed themselves of the opportunity to review the files maintained by Milwaukee County for each CBRF operator under contract to provide services of Family Care members. Those experts reviewed and analyzed the financial statements submitted by those operators. By that means they were able to assess the viability of plaintiffs' claims against Milwaukee County to the extent that those claims depended upon the assertion that Milwaukee County's reimbursement rates for residential providers were so inadequate as to violate the rights of Family Care members under the ADA and the Rehabilitation Act.

(e) **Whether the settlement is fair to the unnamed class members;**

The relief provided under the proposed settlement agreement will redound equally to the benefit of all current and future Family Care members who are receiving or will receive residential services in a CBRF or adult family home. It does not provide any benefits to the named plaintiffs exclusively. Therefore, fairness to the unnamed class members relative to the named plaintiffs is not an issue.

**(f) Objections raised by class members**.

This factor poses no impediment to approval of the proposed settlement agreement because thus far no cogent objections have been raised.

Each Family Care member, and each person operating as an agent of a member under an order for guardianship or an activated power of attorney, received individual mail notice of the proposed settlement agreement. As of the date of this writing, we are aware of only three responses from class members or their agents in response to the notice of proposed settlement (R. 168, 169 and 170). While those responses express some dissatisfaction with various aspects of the administration of the Family Care program, their complaints are not directly related to the substantive provisions of the proposed settlement agreement or to the claims raised on behalf of the plaintiff class in this lawsuit.

**(g) Whether the settlement is the product of arm's length negotiations as opposed to collusive bargaining.**

The process of mediation and negotiation that led to the proposed settlement agreement in this action is described in detail in the proposed findings of fact submitted by the State of Wisconsin Defendants. The nature of the settlement process in this case as described in those proposed findings, particularly the highly structured mediation

procedure which was directed and supervised by Magistrate Judge Gorence, clearly shows genuine arm's length bargaining and effectively precludes the possibility of collusion.

With specific regard to the role of Milwaukee County as a party defendant in this action, the fact that the proposed settlement was subject to review and approval by the Health and Human Needs Committee of the Milwaukee County Board of Supervisors and by the full Board of Supervisors after the conclusion of the negotiations among counsel parties provides additional assurance that the proposed agreement was the product of genuine negotiation and compromise among the parties.

Finally, as documented in the proposed findings of fact, the parties were careful to separate the negotiation of the substantive terms of the settlement agreement from negotiation of the plaintiffs' attorney fees, which were not discussed until agreement had been reached on the substantive terms of the agreement.

**(h) Whether the settlement is consistent with the public interest.**

From the perspective of Milwaukee County, and doubtless of the other parties as well, the predominant interest at stake in the settlement of this action is enhancing the ability of the Family Care program to serve all program members in a fashion which meets their various needs and conforms to all applicable laws while preserving the fiscal viability of the program. The proposed settlement agreement is reasonably calculated to serve that interest and that interest only. Therefore, it is manifestly consistent with the public interest.

## CONCLUSION

For reasons set forth in this memorandum, together with those set forth in the submissions of the other parties, the proposed settlement agreement in this action is fair, adequate and reasonable and it is consistent with the public interest. Milwaukee County respectfully asks the court to approve that settlement agreement.

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