UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

HELEN PITTS, KENNETH ROMAN, DENISE HODGES, and RICKII AINEY, on behalf of themselves and all others similarly situated,	**Civil Action No. 3:10-cv-00635-JJB-SCR**
Plaintiffs	**Judge James J. Brady**
v.	**Magistrate Judge Stephen C. Riedlinger**
BRUCE GREENSTEIN, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals, and LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,	**CLASS ACTION**
Defendants.	

JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND TO REDEFINE THE CLASS AND INCORPORATED MEMORANDUM IN SUPPORT

Plaintiffs Rickii Ainey, Kenneth Roman, and Elizabeth Foster ("Plaintiffs"), on behalf of themselves and the unnamed class members, and all Defendants in this action ("Defendants"), have entered into a proposed settlement in the above-captioned class action litigation. Pursuant to Federal Rule of Civil Procedure 23, the Parties hereby move for preliminary approval of the settlement of this action, approval of the notice plan, and the redefinition of the class.

I. Preliminary Approval of the Settlement Agreement

The Parties seek preliminary approval of their proposed Settlement Agreement, a copy of which is being filed as Exhibit 1 to this motion. A brief outline of the most significant terms of the agreement follows; the terms of the attached Settlement Agreement are controlling

in the event of any inconsistency and/or omission. The Parties share the view that the terms of the Settlement Agreement are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

The Settlement Agreement calls for a redefinition of the class so that the class is defined as individuals who were approved for more than 32 hours of LT-PCS when Defendants began applying the 32-hour cap on September 5, 2010, and who are either still approved to receive LT-PCS or have a request for prior authorization pending or in process. This issue is discussed in greater detail below. *See* Part III.

Under the Settlement Agreement, the Department of Health and Hospitals ("DHH") will accept for review a request for an expedited Community Choice waiver slot from any member of the redefined class (hereinafter "class members"). DHH will grant requests for expedited waiver slots if class members show that they will have a decline in mental or physical health and are at serious risk of nursing facility placement in the absence of an expedited waiver offer. Certain class members (those who are not currently approved for exactly 32 hours of LT-PCS a week) must request an expedited waiver slot by June 30, 2012, in order to have the request considered.

The Settlement Agreement describes how class members will be notified of the opportunity to request an expedited waiver slot, describes the standard DHH will apply in determining whether to grant a request, and states that DHH has discretion to provide individuals who request a slot with interim relief on a case-by-case basis. The Settlement Agreement provides that any class member whose request is received before June 30, 2012 and is subsequently denied may administratively appeal the denial, the deadline for appeals, and the showing that the class member must make on appeal. Under the Settlement Agreement, DHH

will provide periodic reports to Plaintiffs' counsel about the sending of notices to class members, and the status and resolution of class members' requests for expedited waiver slots.

The Settlement Agreement further provides that DHH will submit to the Centers for Medicare and Medicaid Services an amendment to increase the number of slots in the Community Choice waiver by 200, to a total of 4,803. Once approved, the new slots will initially be reserved exclusively for class members but will be added to the general pool of slots available to other individuals on the Community Choice waiver's waiting list on December 31, 2012, if not sooner.

Relief is specified in the proposed Settlement Agreement for the named plaintiffs and for other individuals about whom evidence has already been presented in this case. The Settlement Agreement also provides for a payment of $250,000 in attorneys' fees and costs and describes the circumstances in which Class Counsel may collect additional attorneys' fees for obtaining enforcement of the Settlement Agreement.

The Settlement Agreement provides for this Court's enforcement of the Agreement during a defined period and describes the preclusive effect of the Agreement.

II. Notice to Class Members

Rule 23(e)(1) requires that the Court "direct notice in a reasonable manner to all class members who would be bound by the proposal."

The Parties have agreed to cause the Notice—substantially in the form attached hereto as Exhibit 2—to be published in certain Louisiana newspapers no later than fifteen (15) days before the Final Approval Hearing. The Parties shall, at or before the Final Approval Hearing, file with the Court proof of publication of the Notice.

In addition to the foregoing, the Settlement Agreement provides that DHH will send a copy of Attachment B to the Settlement Agreement to all class members to whom DHH has not already mailed a copy of Attachment A to the Settlement Agreement.

III. Modification of the Class Definition

Contingent upon the Court's preliminary approval of the proposed Settlement Agreement, the Parties additionally request a modification of the class definition. An order certifying a class may be altered or amended before final judgment. *See* Fed. R. Civ. P. 23(c)(1)(C). "[T]his rule vests significant discretion in the district court," *Gene & Gene, L.L.C. v. BioPay, L.L.C.*, 624 F.3d 698, 703 (5th Cir. 2010). "[A] district court is free to reconsider its class certification ruling as often as necessary before judgment," *McNamara v. Felderhof*, 410 F.3d 277, 280 (5th Cir. 2005), and indeed, is "required to reassess [its] class rulings as the case develops," *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999), *quoted in id.* at 280 n.8. Notification of unnamed class members excluded from the new definition is not required. *See Bernard v. Gulf Oil Corp.*, 890 F.2d 735 (5th Cir. 1989).

On June 6, 2011, the Court certified a class and adopted the following class definition:

> Louisiana residents with disabilities who have been receiving Medicaid-funded services through the LT-PCS program; who desire to reside in the community instead of a nursing facility; who require more than 32 hours of Medicaid-funded personal care services per week in order to avoid entering a nursing facility, and who do not have available (including through family supports, shared living arrangements, or enrollment in the ADHC waiver) other means of receiving personal care services.

(Doc. 58, at 5-6)

As part of the proposed Settlement Agreement, the Parties are requesting that the Court modify the definition of the class to read as follows:

> All persons who were approved to receive more than 32 hours of services through Louisiana's Long-Term Personal Case Services (LT-PCS) program as of September 5, 2010, and who are still approved to receive LT-PCS or who have a request for prior authorization pending or in process.

The parties' proposed definition likely includes some individuals who would not be considered class members under the June 6 definition of the class (*e.g.*, LT-PCS recipients who used to receive over 32 hours of Medicaid-funded personal care services per week but do not require that level of services in order to avoid entering a nursing facility). At the same time, the proposed definition likely excludes some individuals who would be considered class members under the June 6 definition (*e.g.*, future class members and individuals who have never received more than 32 hours per week of LT-PCS).

Extending the scope of the class in the manner contemplated by the Settlement Agreement holds no possibility of prejudice for the additional individuals included. These are, by definition, individuals who do *not* require more than 32 hours of Medicaid-funded personal care services per week in order to avoid entering a nursing facility. They cannot be prejudiced by inclusion in the class settlement, which provides relief, and encompasses claims for additional services, for people who can show that they *do* require services in excess of 32 hours per week.

Similarly, restricting the scope of the class does not prejudice the rights of persons who were formerly members of the class, because their claims have not been affected and are in no way precluded by the Settlement Agreement.

The Parties agree that redefining the class will facilitate settlement and implementation of the Settlement Agreement. The new definition makes the membership of the class determinate and finite. With the new definition, the Parties will have greater certainty about the composition of the class for purposes of ensuring that class members benefit from the relief provided under the settlement agreement.

IV. Conclusion

For these reasons, the Parties respectfully request that the Court grant this Motion in full.

Dated: January 11, 2012

Respectfully submitted,

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CERTIFICATE OF OPPOSING PARTY'S CONSENT

I certify on this 11th day of January, 2011, that Plaintiffs and Defendants have agreed to jointly file the foregoing motion.

/s/ Kimberly Humbles
Kimberly Humbles

/s/ Nell Hahn
Nell Hahn

CERTIFICATE OF SERVICE

I certify on this 11th day of January, 2011, that a true and correct copy of the foregoing **Joint Motion for Preliminary Approval of Class Settlement and to Redefine the Class** was filed electronically using the CM/ECF system. Notice of this filing will be sent via operation of the Court's electronic filing system to the following:

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