

UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF NORTH CAROLINA
 Western Division
 Civ. No. 5:11-cv-00273-BO

REBECCA PETTIGREW, <i>et al</i> , individually)
and on behalf of all others similarly situated,)
Plaintiffs)
v.)
RICHARD BRAJER, Secretary, North)
Carolina Department of Health and Human)
Services, in his official capacity,)
Defendant.)
)

JOINT EXPEDITED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT, NOTICE TO CLASS MEMBERS, SCHEDULING OF FAIRNESS HEARING, AND FINAL APPROVAL OF SETTLEMENT AGREEMENT

NOW COME through undersigned counsel all parties, who submit this joint motion, pursuant to Local Rule 17.1, E.D.N.C. and Rule 23(e), Fed.R.Civ.P., for Preliminary Approval of Settlement Agreement, Notice to Class Members, Scheduling of Fairness Hearing, and Final Approval of Settlement Agreement. In support of this motion, the parties respectfully represent the following and respectfully refer the Court to the attached Supporting Memorandum of Law:

1. The parties have reached a Settlement Agreement in this case which is attached hereto. Also attached are a [proposed] Order Preliminarily Approving Settlement Agreement, Requiring Notice to Class Members and Scheduling Fairness Hearing; Proposed Notice to Class Members of Proposed Settlement; Proposed Order of Final Approval of Settlement Agreement; and Proposed Order of Dismissal with Prejudice.

2. The proposed Settlement Agreement was reached through intensive, arm's length negotiations between counsel for plaintiffs and counsel for defendant.

3. The plaintiffs and defendant have not engaged in collusive activity at any time.

4. The settling plaintiffs have not used their class action claims for unfair personal aggrandizement and the proposed settlement is, in the opinion of plaintiffs' counsel, in the best interests of the named plaintiffs and the class. The lawsuit sought no damages for the named plaintiffs, and no monetary recovery to plaintiffs is provided by the Settlement Agreement.

5. The proposed Settlement Agreement is fair and reasonable and furthers the public interest, in light of the alleged violations by defendant of the Americans with Disabilities Act and the Medicaid Act and in light of the defendants' denials of violations thereof.

6. The proposed Settlement Agreement represents an effort by the parties to avoid further litigation of the issues in this case; it does not constitute an admission of wrongdoing or liability by defendant.

7. Counsel represent to this Court that counsel is able, experienced and well-qualified to evaluate the fairness of the proposed Settlement Agreement and that counsel are in favor of this Motion.

8. Because a class has been certified under Rule 23(b)(2), reasonable notice to the class of the proposed settlement and a fairness hearing are required by Rule 23(e), Fed.R.Civ.P. A proposed Notice is attached hereto, which will be sent by United States mail to the last known address of each class member except for those who are now deceased.

9. All of the plaintiffs have executed the Settlement Agreement after being fully informed and advised by class counsel regarding its terms.

10. Section VII of the Settlement Agreement provides for a payment of attorneys' fees in the amount of \$375,000 by defendant to class counsel, contingent upon court approval of the Settlement Agreement and upon the Settlement Agreement not otherwise becoming void prior to final dismissal of this action. The amount of the fee is very reasonable given the amount of time expended by class counsel thus far and class counsel's continuing responsibilities under the Settlement Agreement. The fee agreement does not represent any collusion between class counsel and defendants; nor does the attorneys' fee in anyway diminish the relief provided to the class. Rather, the fee provides funding needed by three non-profit law firms to monitor implementation of the Settlement Agreement and otherwise protect the interests of the class. Therefore, pursuant to Rule 23(h), the parties request approval of the attorney fee provision of the Settlement Agreement.

WHEREFORE, the parties request the following:

1. That this Court determine as a preliminary matter the Settlement appears fair and reasonable;
2. That consistent with the Rule 23(e), Fed.R.Civ.P., this Court order Notice to Class members of the proposed Settlement Agreement in the manner shown in the attachments to this motion;
3. That this Court set this matter for a fairness hearing as soon as the calendar allows but, pursuant to 28 U.S.C. § 1715, *et seq.*, no earlier than 90 days after the Court determines as a preliminary matter the Settlement appears fair and reasonable;

4. That after conducting the hearing, this Court approve this Settlement Agreement pursuant to Fed. R. Civ. P. Rules 23(e) and (h);

5. That this Court remove this matter from the active docket pending the implementation of the approved Settlement Agreement and the contingencies contained in Sections V and VI of the Settlement Agreement; and

6. That this Court, pursuant to the terms of the Settlement Agreement, upon certification of the occurrence of the contingencies outlined in the Settlement Agreement, enter the [proposed] Order of Dismissal with Prejudice at the time specified in Section IX of the Settlement Agreement.

Respectfully submitted this the 2nd day of December, 2015.

ATTORNEYS FOR PLAINTIFFS

/s/ Douglas S. Sea
Douglas Stuart Sea
N.C. State Bar No. 9455
LEGAL SERVICES OF SOUTHERN
PIEDMONT, INC.
1431 Elizabeth Avenue
Charlotte, North Carolina 28204
Telephone: (704) 376-1600
dougs@lssp.org

/s/ John R. Rittelmeyer
John R. Rittelmeyer
N.C. State Bar No. 17204
Jennifer L. Bills
N.C. State Bar No. 37467
DISABILITY RIGHTS NC
3724 National Drive, Suite 100
Raleigh, NC 27612
Phone: (919) 856-2195
Fax: (919) 856-2244
john.rittelmeyer@disabilityrightsn.org
jennifer.bills@disabilityrightsn.org

/s/ Sarah Somers

Sarah Somers
N.C. State Bar No. 33165
Elizabeth Edwards
N.C. State Bar No. 35262
NATIONAL HEALTH LAW PROGRAM
101 E. Weaver Street, Ste. G-7
Carrboro, NC 27510
Telephone: (919) 968-6308
somers@healthlaw.org
edwards@healthlaw.org

Counsel for the Plaintiffs

ROY A. COOPER, III
Attorney General

/s/ Charles G. Whitehead

Charles G. Whitehead
Special Deputy Attorney General
N.C. Bar No. 39222
Thomas J. Campbell
Assistant Attorney General
N.C. Bar No. 43638
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6840
Facsimile: (919) 716-6758
cwhitehead@ncdoj.gov
tcampbell@ncdoj.gov

Counsel for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
Western Division
Civ. No. 5:11-cv-00273-BO

REBECCA PETTIGREW, <i>et al</i> , individually)	MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL, NOTICE TO CLASS MEMBERS, SCHEDULING OF FAIRNESS HEARING, AND FINAL APPROVAL OF SETTLEMENT AGREEMENT
and on behalf of all others similarly situated,)	
Plaintiffs)	
v.)	
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Carolina Department of Health and Human)	
Services, in his official capacity,)	
Defendant.)	
_____)	
)	
)	
)	

STATEMENT OF THE CASE

On May 31, 2011, Plaintiffs filed their Complaint in this case, alleging violations by Defendants of the Medicaid Act and the due process clause of the Fourteenth Amendment to the U.S. Constitution. Also on May 31, 2011, Plaintiffs filed a motion for preliminary injunction. On June 6, 2011, Plaintiffs filed a motion to certify class under Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. On December 8, 2011, the district court entered an Order granting Plaintiffs’ motions to certify class and for preliminary injunction. On December 12, 2011, Defendant filed Notice of Appeal. On March 5, 2013, the Fourth Circuit Court of Appeals issued an opinion mostly affirming the district court’s order.

On April 26, 2013, Defendant filed a motion to dismiss the lawsuit as moot. On the same day, Plaintiffs filed motions to amend their complaint and to amend the class definition. On August 20, 2013 the court entered an order denying Defendant’s motion and granting Plaintiffs’ motion. Thereafter the Parties commenced discovery. Based on the Parties’ productive settlement discussions, the district court extended the deadlines for completing discovery and filing

dispositive motions on multiple occasions. On June 19, 2015, the parties notified the court they had reached a tentative proposed settlement and requested a stay of all deadlines in the case. On June 24, 2015 the court granted this motion. The attached joint motion requests that the court approve the settlement agreement.

ARGUMENT

I. THE COURT SHOULD PRELIMINARILY APPROVE THE PROPOSED SETTLEMENT.

Rule 23(e) envisions two different orders by the court in reviewing a proposed settlement of a certified class action. Preliminary approval is the first step. *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1999). In its first order, the court must determine that, on its initial review, the settlement appears fair and reasonable, schedule a fairness hearing, and order notice of that hearing and of the proposed settlement to class members. The second order, in which the court determines whether to finally approve the proposed settlement, is issued after the fairness hearing. In this case the Court should enter the initial order, proceed with the fairness hearing, and then finally approve the parties' agreement because the proposed settlement is free of collusion, was negotiated at arms-length, and is fair to all class members.

Before approving a class settlement, the Court must determine whether the settlement is fair, adequate, and reasonable. Fed. R. Civ. P. (23)(e)(2). For preliminary approval the court considers "whether the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. at 102 (citing Manual for Complex Litigation (Third) § 30.41 (1995)); accord, *In re Initial Public Offering Securities*

Litig., 226 F.R.D. 186, 191 (S.D.N.Y. 2005). *See also, Bourlas v. Davis Law Associates*, 237 F.R.D. 345, 355 & n.7 (E.D.N.Y. 2006).

Judicial policy favors voluntary settlement as the means of resolving class-action cases. *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir.1977). However, "the settlement process is more susceptible than the adversarial process to certain types of abuse and, as a result, a court has a heavy, independent duty to ensure that the settlement is `fair, adequate, and reasonable.'" *Paradise v. Wells*, 686 F.Supp. 1442, 1444 (M.D.Ala.1988) (Thompson, J.) (quoting *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1214 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979)). This abuse can occur when, for example, "the interests of the class lawyer and the class may diverge, or a majority of the class may wrongfully compromise, betray or `sell-out' the interests of the minority." *Id.* Besides evaluating the fairness of the settlement agreement, the court has the duty to make sure that the settlement is not illegal or against public policy. *See Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169, 106 S.Ct. 2889, 90 L.Ed.2d 976 (1986).

In determining whether a proposed class action settlement is fair, adequate, and reasonable, the district court has great discretion. *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956 (3d Cir.1983). As one court stated,

Great weight is accorded [the] views [of the trial judge] because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.

Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 34 (3d Cir.1971).The trial judge knows the litigants and the strengths and weaknesses of their contentions and is in the best position to evaluate whether the settlement constitutes a reasonable compromise. *TBK Partners, Ltd. v. Western Union Corp.*, 675F.2d 456, 463 (2d Cir.1982); *In re Traffic Executive*

Association-Eastern Railroads, 627 F.2d at 633-34. The district court must, of course, ensure that the settlement is fair and not a product of collusion, and that class members' interests were represented adequately. *Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir.1982). If the court then approves a settlement based upon well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, *see City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir.1974), the settlement should be upheld on review. *Plummer v. Chemical Bank*, 668 F.2d at 659. The district court may compare "the terms of the compromise with the likely rewards of litigation." *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25, 88 S.Ct. 1157, 1163-64, 20 L.Ed.2d 1 (1968), and then judge whether the proposed settlement is a fair resolution of the parties' differences. "In addressing whether a settlement is fair, adequate, and reasonable, a court should also consider the judgment of experienced counsel for the parties." *Paradise*, 686 F.Supp. at 1446. "Finally, with the above considerations in mind, the court should itself assess whether the consent decree is fair, adequate, and reasonable," *Paradise*, 686 F.Supp. at 1446, as well as legal. *See id.* at 1448.

In this case, the above considerations all favor approval of the proposed settlement. The complaint and amended complaint raised claims alleging violations of the Americans with Disabilities Act and the Medicaid Act based on discrimination between class members living in their own homes and others living in institutional settings in Defendant's policies and practices for determining eligibility for coverage of personal care services in the North Carolina Medicaid program. The proposed settlement agreement, which was negotiated at arms-length by experienced counsel over many months, addresses all of the allegations in the amended complaint and requires Defendant to implement procedures which treat the two populations

comparably. The agreement also protects the due process rights of applicants and recipients of personal care services.

The Agreement does not grant preferential treatment to class representatives. Because this class was certified under Rule 23(b)(2) and no damages were either sought or obtained, there are no issues regarding the division of funds between class members or between the class and its attorneys. While only specified subgroups of class members are eligible for reinstatement of their personal care services under the terms of the settlement, the targeting of this relief was negotiated at arms-length and was based on the evidence obtained in discovery. Moreover, many other class members were previously offered reinstatement under the court's May 3, 2013 Order and all class members have the opportunity to obtain an assessment of their eligibility for personal care services under the new procedures. The settlement is therefore fair to all class members.

II. THE PARTIES PROPOSED MEANS OF PROVIDING NOTICE TO THE CLASS OF THE PROPOSED SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED.

Rule 23(e) requires notice to be provided "in a reasonable manner" to class members of the proposed settlement. Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), and must express no opinion on the merits of the settlement, *In re Traffic Executive Association-Eastern Railroads*, 627 F.2d 631, 634 (2d Cir.1980). Subject to these requirements, the district court has virtually complete discretion as to the manner of giving notice to class members. *See* 7A C. Wright & A. Miller § 1797 at 237; *Grunin v International*

House of Pancakes (1975, CA8 Mo) 513 F2d 114, 1975-1 CCH Trade Cases P 60222, 19 FR Serv 2d 1245, *cert den* (1975) 423 US 864, 96 S Ct 124, 46 L Ed 2d 93.

This class action was certified under Fed. R. Civ. P. 23(b)(1) and (b)(2), not under Rule 23(b)(3). Order (Mar. 29, 2012). Thus, the stringent requirement of Rule 23(c)(2) that members of the class receive "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable efforts," Fed.R.Civ.P. 23(c)(2), is inapplicable. *Walsh*, 726 F.2d at 962. Rather,

the only notices required by the Federal Rules are those provided for in Rules 23(d) and (e)... The discretion appropriate to Rule 23(b)(1) and (b)(2) classes derives from the nature of the relief sought in these actions. Rules 23(b)(1) and (b)(2) classes are cohesive in nature.... Rule 23(e) mandates some form of notice of a proposed dismissal or compromise, but the form of notice of settlement of a Rule 23(b)(1) or (b)(2) class action need only be such as to bring the proposed settlement to the attention of representative class members who may alert the court to inadequacies in representation, or conflicts in interest among subclasses, which might bear upon the fairness of the settlement.

Id. at 962-63. "Reasonable" notice is most commonly notice by mail. *Handschu v. Special Serv. Div.*, 787 F.2d 828, 832-33 (2d Cir. 1986).

In this case, the parties propose that notice will be sent by United States mail to the last known address of each class member except for those who are now deceased. Access to the full settlement agreement and other court documents will be easily available. A toll free number will be included in the notice for class members to obtain answers to their questions about the settlement. In these circumstances, there is sufficient evidence that a substantial portion of the class to be bound by the settlement will be reached through the proposed notice plan, which is more than adequate under Rule 23(e).

III. THE PARTIES' PROPOSED CONTENT FOR THE CLASS NOTICE SHOULD BE APPROVED.

In addition to being distributed in a manner likely to reach class members, the content of the notice must be adequate. The class notice should set forth: (1) a summary of the proposed settlement agreement or a copy of the agreement, (2) the time, date and place of the fairness hearing; and (3) the procedure by which objections to the settlement may be made. *See Manual for Complex Litigation, Third* § 30.41 (1997). The notice need not include the entire text of the proposed settlement but may describe it in general terms. *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir.1982), *cert. denied*, 464 U.S. 818, 104 S.Ct. 77, 78 L.Ed.2d 89 (1983); *Grunin v. International House of Pancakes*, 513 F.2d 114, 122 (8th Cir.), *cert. denied*, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975).

Here the proposed notice is directed to "persons who have been denied or terminated from receiving Medicaid covered in-home personal care services in North Carolina." The notice advises class members that the settlement agreement would resolve the pending lawsuit and who would be bound by the settlement. The notice also summarizes the substantive protections for class members provided by the settlement. Most importantly, the notice details alternative means for reviewing and securing copies of the complete agreement, identifies official class representatives to answer questions who will be available through a toll free number, specifies the process for making objections, states the date, time, and place for the fairness hearing, and authorizes discretionary attendance or participation in the fairness hearing. This notice thus adequately serves the purposes of Rule 23(e).

CONCLUSION

For the reasons stated above, the parties jointly request the court to grant the motions to preliminarily approve the proposed settlement and notice to the class, and, following a fairness hearing, finally approve the settlement.

This the 2nd day of December, 2015.

By: /s/ Douglas Stuart Sea
Douglas Stuart Sea
Legal Services of Southern Piedmont, Inc.
1431 Elizabeth Avenue
Charlotte, North Carolina 28204
Telephone: (704) 376-1600
Facsimile: (704) 376-8627
dougs@lssp.org

By: /s/ Sarah Somers
Sarah Somers
Elizabeth Edwards
National Health Law Program
101 E. Weaver St., Suite G07
Carrboro, North Carolina 27510
Telephone: (919) 968-6308
somers@healthlaw.org
edwards@healthlaw.org

By: /s/ John R. Rittelmeyer
John R. Rittelmeyer
N.C. State Bar No. 17204
Jennifer L. Bills
N.C. State Bar No. 37467
DISABILITY RIGHTS NC
3724 National Drive, Suite 100
Raleigh, NC 27612
Phone: (919) 856-2195
Fax: (919) 856-2244
john.rittelmeyer@disabilityrightsn.org
jennifer.bills@disabilityrightsn.org

Attorneys for the Plaintiffs

ROY A. COOPER, III
Attorney General

By: /s/ Charles G. Whitehead
Charles G. Whitehead
Special Deputy Attorney General
N.C. Bar No. 39222
Thomas J. Campbell
Assistant Attorney General
N.C. Bar No. 43638
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6840
Facsimile: (919) 716-6758
cwhitehead@ncdoj.gov
tcampbell@ncdoj.gov

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true copy of the foregoing Joint Motion and Memorandum of Law in Support of Joint Motion for Preliminary Approval, Notice to Class Members, Scheduling of Fairness Hearing, and Final Approval of Settlement Agreement in this matter by electronically filing same with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Douglas S. Sea (dougs@lssp.org)
Sarah Somers (somers@healthlaw.org)
M. Jane Perkins (perkins@healthlaw.org)
John R. Rittelmeyer (john.rittelmeyer@disabilityrightsnc.org)
Jennifer L. Bills (jennifer.bills@disabilityrightsnc.org)

Attorneys for Plaintiffs

Charles G. Whitehead (cwhitehead@ncdoj.gov)
Thomas J. Campbell (tcampbell@ncdoj.gov)
Lisa G. Corbett (lisa.corbett@dhhs.nc.gov)
Ellen A. Newby (enewby@ncdoj.gov)
Olga E. Vysotskaya de Brito (ovysotskaya@ncdoj.gov)

Attorneys for Defendant

This the 2nd day of December, 2015.

/s/ Elizabeth Edwards
Elizabeth Edwards
NATIONAL HEALTH LAW PROGRAM
101 E. Weaver Street, Ste. G-7
Carrboro, NC 27510
Telephone: (919) 968-6308
edwards@healthlaw.org

Attorney for Plaintiffs