UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM DIXON, *et al.*	)	
Plaintiffs,	)	
	)	**Civil Action No. 1:74-cv-00285 (TFH)**
v.	)	
	)	
ADRIAN M. GRAY, *et al.*	)	
Defendants.	)	
	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THE PARTIES' JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

INTRODUCTION

Plaintiffs respectfully submit this memorandum in support of the Parties' Joint Motion for Preliminary Approval of a Proposed Class Settlement, the terms of which are set forth in a Settlement Agreement dated September 8, 2011 (the "Settlement Agreement").[1]

The proposed settlement resulted from good faith, arm's-length negotiations among experienced counsel for the parties. Upon final approval by the Court, this settlement will conclude more than 37 years of litigation relating to the provision of community-based mental health services to seriously mentally ill residents of the District of Columbia (the "District"). The settlement represents a fair and reasonable compromise in light of (i) the progress that the District has recently made in the provision of community-based mental health services, (ii) the substantial commitments made by the District in the Settlement Agreement to build upon those efforts, and (iii) the risk that a pending motion by the District to vacate the

[1] The Settlement Agreement is attached hereto as Exhibit A.

consent decree and dismiss this action might be granted. The undersigned counsel for the class strongly believe that the proposed settlement is fair, reasonable and in the best interest of the class.

For the reasons set forth herein, plaintiffs respectfully request that the Court enter an order, substantially in the form attached as Exhibit 2 to the Settlement Agreement, (i) preliminarily approving the proposed settlement; (ii) approving the proposed form and method of providing notice of the proposed settlement to members of the class; and (iii) scheduling a hearing at which the Court can consider the request for final approval of the settlement and entry of a proposed order and final judgment.

STATEMENT OF FACTS

A. Factual Background And Procedural History

This Court is familiar with the long and difficult history of this litigation. Accordingly, plaintiffs provide only a brief summary below, with particular emphasis on the facts and circumstances most germane to the proposed settlement.

1. The Procedural History Of The Litigation

This case began in 1974, when a number of seriously mentally ill individuals confined at Saint Elizabeths Hospital filed this lawsuit in the United States District Court for the District of Columbia against the federal and District of Columbia governments to enforce their rights under the 1964 Hospitalization of the Mentally Ill Act, Pub. L. No. 89-183, ch. 5, 79 Stat. 750 (1965) (codified at D.C. Code §§ 21-501, *et seq*.) (the "Ervin Act"). In 1975, the Court certified a non-opt out class action, pursuant to Federal Rule of Civil Procedure 23(b)(1) and (b)(2), consisting of "all persons who are now or who may be hospitalized in a public hospital pursuant to [the Ervin Act] and who need outplacement assistance from that public hospital . . .

into alternative care facilities . . . in order to receive suitable care and treatment in the least restrictive possible setting." (Order dated Feb. 7, 1975.)

Later that year, the Court granted partial summary judgment in favor of the plaintiff class, holding that members of the class had a statutory right to "treatment which is adequate in light of present knowledge," and that the Ervin Act required that mental health services provided to members of the class "be suited to [each patient's] particular needs as determined by a frequently evaluated, individually tailored program." *Dixon v. Weinberger*, 405 F. Supp. 974, 977 (D.D.C. 1975) (internal quotations marks omitted).

In 1980, the parties entered into a consent order under which defendants agreed to a set of commitments for assuring the rights of all members of the class to adequate community-based residential placements and care and to treatment in the least restrictive settings. This was the first of a series of consent decrees intended to implement the Court's mandate.

Thereafter, Congress transferred control of Saint Elizabeths to the District and mandated that it create "a comprehensive [] mental health system to provide mental health services and programs through community mental health facilities." Pub. L. No. 98-621, 98 Stat. 3369 (codified at 24 U.S.C. §§ 225, *et seq.*). Congress further required that the comprehensive system "be in full compliance with the Federal Court consent decree in [this case]." *Id.*

In 1993, the Court appointed a special master to monitor the District's compliance with the Court's orders. Four years later, the Court placed the District in receivership. *Dixon v. Barry*, 967 F. Supp. 535, 542 (D.D.C. 1997). In 2000, the Court entered an order converting the receivership to a transitional receivership. The following year, the Court (i) returned day-to-day operations of the District's mental health systems to the District, and (ii) approved a plan, developed by the transitional receiver in consultation with the parties, setting forth a path for the

District to satisfy the *Dixon* mandate. *See* Final Court-Ordered Plan, *Dixon, et al. v. Williams*, No. 74-285 (Mar. 28, 2001). In 2002, the Court terminated the transitional receivership and appointed a Court Monitor.

In 2003, the Court (i) approved a consent decree (the "Consent Decree") containing 19 Exit Criteria to measure the District's progress towards fulfilling its obligations under the Consent Decree, and (ii) ordered the Court Monitor to provide the Court with reports on the District's progress under the Consent Decree. *See* Dkt. 242. The Consent Decree provided that this action "shall be dismissed" if the District demonstrates "substantial compliance" with the Exit Criteria and that dismissal would be in the "interests of justice." *Id.* at 2.

2. The District's Motion To Vacate The Consent Decree

On September 4, 2009, defendants filed a Motion to Vacate the Consent Decree and to Dismiss this case. *See* Dkt. 346. The District argued that, under a recent Supreme Court decision, continued enforcement of the Consent Decree was "improper" because the District had remedied the "original violation of law" at issue in this litigation. *See Horne v. Flores*, 129 S.Ct. 2579, 2626 (2009). Alternatively, the District argued that it had "substantially complied" with the Exit Criteria and so the case should be dismissed, in the interest of justice, pursuant to the terms of the Consent Decree itself. The District also argued that, because the Saint Elizabeths children's ward had been permanently closed, children were no longer class members, and so a number of Exit Criteria relating to children had become "moot."

Thereafter, plaintiffs filed an opposition to the District's motion. Plaintiffs argued that *Horne* did not support dismissal, that the District's improvements to its mental health system did not rise to the level of "substantial compliance" under the Consent Decree, and that the District remained responsible for satisfying the Exit Criteria relating to children. *See* Dkt. 356.

Over the past two years, the parties have vigorously litigated the District's motion. Briefing on that motion concluded on November 22, 2010, when plaintiffs filed a surreply in opposition. *See* Dkt. 387. This Court has not yet ruled on the District's Motion to Vacate the Consent Decree and to Dismiss this case.

3. The District's Progress Toward Meeting The Exit Criteria

Since the District filed its Motion to Vacate in 2009, it has made notable progress toward satisfying the Exit Criteria set out in the Consent Decree. At the time that the District filed its motion, the Court Monitor had determined that the District was in compliance with only six of the 19 Exit Criteria. The Court Monitor, moreover, reported that "Major Issues Remaine[d]" with respect to 7 of the 13 unsatisfied Exit Criteria. *See* Dkt. 344.

As of the Court Monitor's July 2011 report, the District is now in full compliance with 14 of the 19 Exit Criteria and has made "Notable Progress" with respect to two others (#3 and #10). Thus, as of today, there are only five Exit Criteria with respect to which the District is not in full compliance: #3 (Consumer Service Reviews for Adults), #4 (Consumer Service Reviews for Children/Youth), #9 (Supported Housing), #10 (Supported Employment), and #17 (Continuity of Care). *See* Dkt. 395 at pp. 11-14.[2] With respect to Exit Criterion #3 (Consumer Service Reviews for Adults), the Court Monitor found that 78% of the cases reviewed were found to have acceptable practice performance, just shy of the Exit Criterion's 80% performance target.

[2] The Court Monitor's July 2011 report also noted that proposed cuts to the Department of Mental Health's FY 2012 budget were "of high concern." *See* Dkt. 395 at 4.

B. The Settlement

The terms of the proposed settlement are the result of considerable arm's-length negotiations between counsel for plaintiffs and the District, with substantial input and assistance from the Court Monitor. While the parties have vigorously contested the merits of the District's Motion to Dismiss, they also recognized the substantial risk posed to both sides by judicial resolution of that motion. Accordingly, the parties began discussing the possibility of settlement in October of 2010, and entered into the Settlement Agreement on September __, 2011.

The Settlement Agreement will ensure continuity of numerous improvements made by the District government to its community-based mental health system over the last decade, increase the stock of supported housing within the District, and ensure the expansion of numerous evidence-based practices of importance to mental health consumers. In light of the progress made by the District to date and the risk that the District's Motion to Vacate the Consent Decree could be granted by this Court or the Court of Appeals, counsel for the class believe that this settlement represents the best way to ensure that the District's progress to date is durable and that further progress is made in the areas where the need is most acute.

The principal terms of the settlement focus on the four remaining areas where the Court Monitor has noted that the performance levels show that substantial work remains to be done. A summary of these principal terms is set forth below.

1. Supported Housing

Throughout this litigation, the parties have agreed that supported housing is among the most important elements of community-based care for people who suffer from serious

mental illness.[3] The Settlement Agreement obliges the Department of Mental Health ("DMH") to develop 300 net new supported housing vouchers/subsidies and/or capital units by September 30, 2013. Of these, 200 must be net new supported housing vouchers/subsidies, while the remaining 100 may take the form of either net new supported housing vouchers/subsidies or the development of net new capital units. Development of these 300 net new units represents a significant and important financial commitment by the District government.

The Settlement Agreement also commits DMH to supply plaintiffs with the baseline number of vouchers/subsidies and capital units as of September 30, 2011 and the methodology used to calculate the baseline number. The same methodology used to calculate the baseline number will also be used to determine whether DMH has satisfied its obligation to provide 300 net new supported housing vouchers/subsidies and/or capital units by September 30, 2013.

The parties have engaged in painstaking negotiations to reach agreement on these terms, and believe that they represent a solution that will increase the total stock of supported housing in the District while appropriately taking into account the District's resource constraints. The parties recognize, of course, that this proposal will not address all of the need for supported housing in the District. To ensure that those with the greatest need for this important service receive it first, the Settlement Agreement also requires DMH to develop a uniform and objective methodology for evaluating the need for supported housing, establish different levels of priority of need for supported housing, and assign all available supported housing using this

[3] *See, e.g.*, Dkt. 356 at 28-29; Letter from Stephen Baron, Director, Department of Mental Health to Dennis R. Jones, Court Monitor, October 26, 2009, at 5, No. 74-CV-285, Dkt. No. 373-25 (D.D.C. filed 04/01/2010) ("Stable housing is a key element to recovery. . . . Data collected through both national and DMH consumer satisfaction surveys shows that housing is among the top two (2) needs regularly identified by mental health consumers.").

methodology and prioritization. By September 30, 2012, DMH must develop -- in consultation with consumers, consumer advocates, and advocates for the homeless -- a strategic plan that includes resource development to address the identified need for supported housing.

2. Supported Employment

Supported employment is also an indispensable component of an integrated system of community-based care for those with serious mental illness. Exit Criterion 10, by its terms, requires that 70% of those referred to supported employment services receive such services within 120 days. While the District has reached this numerical target, the Court Monitor has declined to move the Criterion to inactive status, citing the District's failure to assure that consumers are being appropriately assessed for the need for such services in the first instance.

The Settlement Agreement directly addresses this issue, by requiring DMH to establish a methodology for Core Service Agencies ("CSAs") to use in assessing the need for supported employment, and ensuring that DMH enforces compliance with this methodology. The methodology must, at a minimum, include a requirement that CSAs ask every adult with a serious mental illness if he or she wishes to be employed. The Settlement Agreement reinforces this assessment requirement with a corresponding referral component: DMH must ensure that at least 60% of all adults with a serious mental illness who express an interest in supported employment are referred to supported employment services.

The parties expect that development and enforcement of this methodology will increase the demand for supported employment services in the District. The Settlement Agreement thus provides that DMH must increase the level of supported employment services in the District as follows: the District must increase the number of consumers who receive at least one supported employment service in FY 2012 by 10% over the total served in FY 2011, and it must increase the number of consumers who receive at least one supported employment service

in FY 2013 by 15% over the total number served in FY 2012. These performance measures, agreed to after a lengthy series of arm's length negotiations, will ensure that the District's supported employment program will continue to grow at a sustained but responsible level.

3. Continuity of Care

Exit Criterion 17 of the Consent Decree provides that the District must ensure that at least 80% of children and adults who are discharged from inpatient psychiatric care receive a non-crisis service in a non-emergency setting within seven days of discharge. The District has steadily improved its performance, but -- despite its best efforts -- has been unable to meet this benchmark.

The District has strenuously insisted throughout this litigation that the current target exceeds national performance benchmarks and is not realistically obtainable. *See, e.g.*, Dkt. 346-8 at 11. The parties have shared data regarding the District's arduous and good faith efforts in this area and have agreed to a slight modification of the District's obligation. Under the proposed settlement, DMH must ensure that 70% of eligible children and adults receive at least one non-crisis service in a non-emergency setting within 7 days of discharge, and it must ensure that 80% of both children and adults receive at least one non-crisis service in a non-emergency setting within 30 days of discharge.

4. Children/Youth Services

The parties have agreed to a comprehensive set of reforms designed to improve mental health services for children and youth within the District. At the center of these reforms is a commitment by the District to decrease reliance on psychiatric residential treatment facilities ("PRTFs") and effect a corresponding increase in community-based services. As the Court is aware, PRTFs are the most restrictive conditions in which a child can be housed and treated. Placement of children in these facilities is also quite expensive; indeed, evidence shows that the

cost of children's community-based mental health treatment is roughly half the cost of treatment in PRTFs.[4] Accordingly, the Settlement Agreement requires the District to reduce the number of total bed days in PRTFs by 30% by September 30, 2013.

To ensure the transition of children/youth class members from PRTFs to community-based treatment, the Settlement Agreement obligates the District to increase the provision of certain evidence-based practices. Under the Agreement, the District will increase the provision of Multi-Systemic Therapy and Family Functional Therapy by 20% in FY 2012 and 20% in FY 2013. The District will also increase the provision of "Intensive Wraparound" services to children/youth by 10% in FY 2012 and 20% in FY 2013.

In addition to these agreed-to reforms, the Settlement Agreement obligates the District to continue conducting consumer service reviews for children/youth mental health consumers during FY 2012 and FY 2013, and to achieve a 70% system performance level by September 30, 2013. The District will contract with the management consulting organization Human Systems and Outcomes, Inc. to provide support for the consumer service reviews, as well as continuing consultation. This consultation will include, without limitation, targeted interventions with low-performing children and youth providers.

* * *

In addition to the commitments that are specifically related to community-based mental health services, the parties have agreed to several important safeguards to ensure that the obligations set forth in the Settlement Agreement are satisfied. For instance, the Agreement obligates the District to provide quarterly reports to class counsel demonstrating its progress on

[4] *Deficit Reduction Act Fact Sheet*, National Council for Community Behavioral Healthcare, Oct. 2008 at 3, available at http://www.thenationalcouncil.org/galleries/policy-file/Medicaid%20Services%20for%20Children%20Under%20the%20DRA.pdf.

each of the agreed-to provisions. The purpose of this provision is to ensure steady progress in fulfilling the obligations in the Agreement and that the parties have the opportunity promptly to address any challenges that may arise. To further secure the sustainability of the progress made, the Agreement is contingent upon the restoration of the $3,500,000 cut to DMH's FY 2012 budget. [5] Finally, the Agreement provides that this Court will retain jurisdiction over any proceeding or dispute relating to the Agreement or its enforcement.

ARGUMENT

I. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT.

Approval of a class action settlement is a two-step process. *See* MANUAL FOR COMPLEX LITIGATION (Fourth) § 13.14, § 21.632. The Court should first review the terms of the proposed settlement to determine whether they are "within the range of possible judicial approval." *In re Vitamins Antitrust Litig.*, MDL 1285, 2001 WL 856292, at *4 (July 25, 2001) (Hogan, J.). So long as this measure is satisfied, the Court should preliminarily approve the settlement, order notice of the proposed settlement to class members, and set a fairness hearing. *See* Fed. R. Civ. P. 23(e); *see also In re Traffic Executive Ass'n,* 627 F.2d 631, 634 (2d Cir. 1980) (preliminary approval "is at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness").

"Preliminary approval of a proposed settlement to a class action lies within the sound discretion of the Court." *In re Vitamins Antitrust Litig.*, 2001 WL 856292, at *4. "The Court should grant preliminary approval of a class action settlement 'if the preliminary

[5] As part of the settlement, counsel for the class have agreed to waive their right to attorneys' fees and costs for the period between June 1, 2010 through the Effective Date of the Settlement Agreement.

evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval.'" *Id.* (quoting MANUAL FOR COMPLEX LITIGATION (Third), § 30.41 (1999)). While the Court's scrutiny at the preliminary approval stage is "less demanding," *see Gates v. Rohm and Haas Co.*, 248 F.R.D. 434, 444 n.7 (E.D. Pa. 2008), the same criteria that apply at the final approval stage also guide the Court's preliminary approval decision.

In order finally to approve a settlement, the Court "must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Thomas v. Albright*, 139 F.3d 227, 231 (D.C. Cir. 1998) (internal quotation marks omitted). In determining whether to approve a settlement, the Court should be mindful of the "'principle of preference' favoring and encouraging settlements." *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d 100, 103 (D.D.C. 2004). The Court, moreover, should not reject a settlement merely because class members *might* obtain greater relief through continued litigation. *See Thomas*, 139 F.3d at 231; *Armstrong v. Board of School Directors of City of Milwaukee*, 616 F.2d 305, 315 (7th Cir. 1980) ("Whether the lawsuit being settled is a civil rights class action or a simple two-party contract suit, the essence of a settlement is compromise -- an abandonment of the usual total-win versus total-loss philosophy of litigation in favor of a solution somewhere between the two extremes.").

"There is no single test in this Circuit for determining whether a proposed class action settlement should be approved." *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d at 103. However, courts in this Circuit have generally considered the following factors in determining whether to approve a settlement: (i) "whether the settlement is the result of arm's length

negotiations"; (ii) "the terms of the settlement in relation to the strength of plaintiffs' case"; (iii) "the status of the litigation at the time of settlement"; and (iv) "the opinion of experienced counsel." *Id.* at 104 (collecting cases).[6] Here, for the reasons explained below, each of these factors strongly counsels in favor of approval of the proposed settlement.

A. The Settlement Is The Result Of Arm's Length Negotiations.

A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms' length negotiations between experienced, capable counsel." *In re Vitamins Antitrust Litig*., 305 F. Supp. 2d at 104 (internal quotation marks omitted); *accord Freeport Partners, LLC v. Allbritton*, No. 04-2030(GK), 2006 WL 627140, at *8 (D.D.C. Mar. 13, 2006). Here, the Settlement Agreement was executed after more than eight months of extensive, often contentious, negotiations among experienced counsel, all of whom have devoted considerable time and effort to this litigation and settlement.[7] During the settlement negotiations, plaintiffs requested and defendants provided detailed data. These data were reviewed by an expert retained by the plaintiffs, supplemented with independent research, and used to formulate and negotiate the terms to which the parties ultimately agreed. The parties were also aided in their settlement negotiations by the Court Monitor, who facilitated discussions between the parties and mediated disputes regarding particularly contentious issues. Accordingly, this Court should apply a presumption that the settlement reached by the parties is fair and reasonable. *See Equal Rights Center v. Washington Metropolitan Area Transit*

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[6] At the final approval stage, courts also consider "the reaction of the class" to the proposed settlement. *In re Vitamins Antitrust Litig*., 305 F. Supp. 2d at 104.

[7] Plaintiffs' counsel further represent that, consistent with controlling law and the ethical standards promulgated by the District of Columbia Bar, no plaintiffs' attorney has requested or been offered any compensation, appointment, or benefit by defendants during negotiations related to the settlement or this case. Indeed, to the contrary, plaintiffs' counsel have agreed to waive its right to fees and costs beginning June 1, 2010, as part of the settlement of this action.

Authority, 573 F. Supp. 2d 205, 212 (D.D.C. 2008) (class action settlement presumed reasonable where the parties engaged in six months of vigorous negotiations and the litigation was contentious).

B. The Terms Of Settlement Reflect The Strength Of The Parties' Positions And The Risks Of Continued Litigation.

"The most important factor in the Court's evaluation of a proposed class action settlement is how the relief secured by the settlement compares to the class members' likely recovery had the case gone to trial." *Blackman v. District of Columbia*, 454 F. Supp. 2d 1, 9-10 (D.D.C. 2006). Here, the settlement should be approved because the relief secured by the Settlement Agreement is substantial and there is a material risk that continued litigation would result in a less favorable outcome for the class (*i.e.*, dissolution of the Consent Decree).

Plaintiffs continue to believe that the District's Motion to Vacate the Consent Decree and Dismiss the Case should be denied. Specifically, plaintiffs disagree with the District's sweeping interpretation of the Supreme Court's decision in *Horne v. Flores*, 129 S. Ct. 2579 (2009), and with the District's assertion that some of the Exit Criteria have become "moot." Moreover, while plaintiffs acknowledge the progress that has been made by the District in satisfying the Exit Criteria, plaintiffs do not agree that the District has substantially complied with each of the 19 criteria, as is required for dismissal under the terms of the Consent Decree. Nevertheless, plaintiffs recognize that continued litigation "entails substantial risks," and that victory "certainly cannot be assumed." *In re Lorazepam & Clorazepate Antitrust Litig.*, No. MDL 1290, 2003 WL 22037741, at *4 (D.D.C. June 16, 2003) (Hogan, J.); *see also In re Ampicillin Antitrust Litig.*, 82 F.R.D. 652, 654 (D.D.C. 1979). For instance, if the D.C. Circuit were to adopt plaintiffs' reading of *Horne*, or if this Court were to agree that the District has

substantially complied with the Exit Criteria, this litigation would end without members of the settlement class receiving any further relief whatsoever.

At the same time, plaintiffs cannot ignore the fact that the District has made significant progress during the two years since it filed its motion to dismiss. As of today, the District is in full or substantial compliance with 15 of the 19 Exit Criteria. And the terms of the Settlement Agreement are focused on ensuring continued, substantial progress in the four areas where the District has been unable to meet the targets. *See* pp. 6-10, *supra*. Accordingly, the settlement guarantees a significant benefit to the class.

In sum, in light of the significant settlement benefits obtained for the class and the risk that continued litigation would result in a less favorable outcome, the terms of the settlement are fair and reasonable. *See, e.g., Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 64 (D.D.C. 2010) (finding settlement fair in light of "the significant recovery that the settlement affords the members of the settlement class, the difficulties faced by the Plaintiffs in litigating this class action, the inherent risks, costs, and time associated with continued litigation, and [defendant]'s financial condition"); *see also Thomas v. Albright*, 139 F.3d at 231 (D.C. Cir. 1998) ("A settlement necessitates compromise.").

C. The Settlement Is Not Premature.

Settlement should come at a time when counsel have "sufficient information to adequately assess the risks of [continued] litigation." *In re Lorazepam*, 2003 WL 22037741, at *5; *see also Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 565 F. Supp. 2d 49, 57-58 (D.D.C. 2008). Here, given that this settlement was reached only after nearly thirty-seven years of vigorously contested litigation, this factor too plainly counsels in favor of approval.

Defendants filed their motion to dismiss and vacate nearly two years ago. Since that time, the legal issues raised in that motion have been thoroughly aired, through four separate

briefs, related motions practice, and two depositions. During that time-period, plaintiffs' counsel have also sought and received extensive data from the District regarding its provision of services in connection with these settlement negotiations. Plaintiffs' counsel retained a highly qualified expert to assist in reviewing and responding to these data. Moreover, counsel have had the benefit of the Court Monitor's continued oversight of the District and its bi-annual reports relating thereto. Under these circumstances, there can be no reasonable doubt that class counsel have sufficient information adequately to assess the risks of continued litigation and the merits of the proposed settlement. *See In re Lorazepam*, 2003 WL 22037741, at *5 (preliminary approval appropriate where the parties had engaged in "substantial and vigorous litigation").[8]

D. Plaintiffs' Counsel Believe That The Settlement Is Fair And Reasonable.

The opinion of experienced counsel "should be afforded substantial consideration by a court in evaluating the reasonableness of a proposed settlement." *In re Lorazepam*, 2003 WL 22037741 at *6; *see also Radosti*, 717 F. Supp. 2d at 57. Counsel for the class have substantial experience litigating public interest and institutional reform cases, including a senior litigation partner with roughly six years involvement in this case. Covington and Burling lawyers have been representing the plaintiff class throughout most of the 37-year history of this case. Counsel strongly believe that, given the risks attendant to further litigation, the terms of the proposed settlement are fair and reasonable and in the best interest of the class. *See Equal Rights Center*, 573 F. Supp. 2d at 213 (crediting opinion of counsel as to the fairness of the settlement given their over three years of experience litigating the matter before the court).

[8] In reaching the conclusion that the settlement is in the best interests of the class, and in light of class counsel's inability to consult with the named plaintiffs in this case, counsel have regularly consulted with members of the class, as well as such secondary sources as public interest organizations and caregivers who have day-to-day contact with class members.

II. THE COURT SHOULD APPROVE THE PROPOSED FORM AND MANNER OF NOTICE TO THE CLASS.

"The court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). "Because of the binding effect of the settlement of a Rule 23(b)(2) class action on the members of the class, due process requires that class members be given the 'best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.'" *Luevano v. Campbell*, 93 F.R.D. 68, 85 (D.D.C. 1981). However, "[n]either Rule 23 nor the requirements of due process require actual notice to each and every possible class member." *In re Prudential Insurance Co. of America Sales Practices Litig.*, 177 F.R.D. 216, 233 (D.N.J. 1997); *see also Pigford v. Veneman*, 208 F.R.D. 21, 23 (D.D.C. 2002).

When all class members cannot be identified, other methods of providing notice -- such as publication in newspapers and periodicals -- are deemed sufficient. *See, e.g., In re Lorazepam*, 2003 WL 22037741 at *5; *Collins v. Pension Benefit Guar. Corp.*, 1996 WL 335346, *2 (D.D.C. June 7, 1996). Where "members of the plaintiff class face barriers to advocating effectively on their own behalf," the notice program must also ensure that "guardians, advocates, and other interested persons [a]re notified of the proposed settlement." *Wyatt ex rel Rawlins v. Sawyer*, 219 F.R.D. 529, 533-34 (M.D. Ala. 2004). Here, the proposed notice program fully complies with these requirements and provides the best notice practicable in the circumstances of this case.

A. The Proposed Notice Is Reasonable And Tailored To The Needs of Class Members.

Class counsel have carefully considered various options for providing reasonable notice of the proposed settlement to class members. In doing so, counsel recognize that, to varying degrees and by nature of their serious mental health illnesses, individual class members

require clear and concise notice. Counsel for the class believe that the proposed notice clearly and concisely informs potential class members of the nature and scope of the Agreement and of their rights to object and be heard. The proposed notice provides a clear explanation of (i) the lawsuit, its history, and current procedural posture, (ii) how to determine if one is a member of the class, (iii) the reasons for settlement, (iv) the key provisions of the Settlement Agreement, and (v) the procedure for making objections and being heard at a final fairness hearing. Accordingly, the Court should approve the form of notice attached as Exhibit 1 to the Settlement Agreement.

B. The Manner Of Notice Is The Best Practicable Notice Under the Circumstances.

The Court should also approve the notice plan set forth in the Settlement Agreement. In formulating the notice plan, the parties have given considerable thought to the difficulties involved in reaching many class members (whether due to homelessness, the nature of their illness, or other causes), and have developed a multi-faceted, comprehensive notice plan in order to reach as many class members as possible. In addition to providing individual notice to class members (and/or their legal representatives) where practicable, the notice plan calls for publication notice, posting of settlement information on the Department of Mental Health's website, and outreach to numerous advocacy or service groups. Accordingly, the Court should approve the notice plan set forth in the Settlement Agreement as providing the best notice practicable under the circumstances of this case.

CONCLUSION

For the foregoing reasons, the Court should grant the Parties' Joint Motion for Preliminary Approval, approve the manner and form of notice to be furnished to the class, and schedule a Fairness Hearing under Fed. R. Civ. P. 23(e)(1)(C) for the purpose of determining whether the settlement is fair, reasonable, and adequate.

Dated: September 8, 2011.

Respectfully Submitted,

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