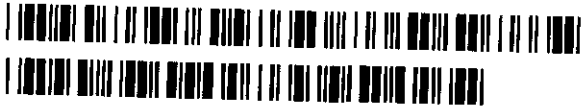
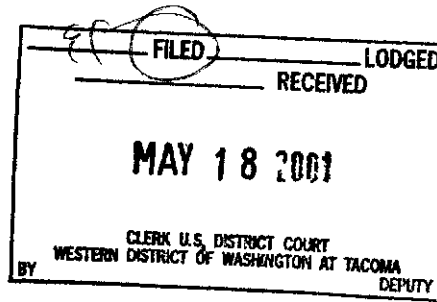


The Honorable Robert J. Bryan

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CV 00 05749 #00000109

In the United States District Court
In and For the Western District for the State of Washington
At Tacoma

Christi Rust, a real person; by and through her
next friend and mother Jane Rust,
et al,

Plaintiffs,

vs.

Western State Hospital and Jan Gregg,
in her official capacity as the Acting
Chief Executive Officer of Western
State Hospital, et al.,

Defendants.

Civil Cause No. 00-5749 (FDB) RJB

Memorandum of Points and
Authorities In Support of Joint Motion
For Approval of Partial Settlement

Introduction

On May 11, 2001, the Court entered an Order preliminarily approving a partial settlement of the claims set forth in plaintiffs' Complaint for Injunctive Relief. This memorandum is submitted in support of the Joint Motion for final approval of the partial settlement agreement.

Background of the Case

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") filed this case on December 20, 2000, as a class action, seeking injunctive and

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1 declaratory relief for alleged violations of the United States Constitution and certain federal laws
 2 The Complaint alleged that defendants failed to provide class members with minimally adequate
 3 protection from harm, dental, medical, and psychiatric care, active treatment, and discharge planning
 4 See generally Complaint The Complaint also alleged overcrowding, under staffing, and failure to
 5 provide treatment to class members in the most integrated setting Id

6 This case was filed following several months of intensive investigation conducted by WPAS
 7 and its expert consultants pursuant to WPAS's federal mandate Declaration of Mark Stroh
 8 ("Stroh"), ¶ 6, Declaration of Henry Dlugacz ("Duglacz"), ¶¶ 4-6, see generally Plaintiffs' Motion
 9 for Preliminary Injunction ("PI Motion") and Reply Brief and the declarations and exhibits attached
 10 thereto

11 On January 22, 2001, the Court certified a class defined as "All individuals 1) who currently
 12 are residents on the Center for Forensic Services at Western State Hospital and 2) will become
 13 residents of the Center for Forensic Services at Western State Hospital in the future " Agreed Order
 14 Certifying Class On January 3, 2001, plaintiffs filed their PI Motion seeking preliminary relief on
 15 virtually all of the claims in the Complaint See PI Motion and Proposed Order Defendants opposed
 16 the PI Motion On February 16, 2001, the Court heard oral argument on the PI Motion

17 In March of this year, the parties began intensive settlement negotiations to resolve the issues
 18 raised in the PI Motion and to attempt to settle the entire case Stroh, ¶10, Declaration of Deborah
 19 Dorfman ("Dorfman"), ¶ 2, Declaration of Pamela H Anderson ("Anderson"), ¶ 2 The proposed
 20 partial settlement agreement resolves claims related to protection from harm, overcrowding,
 21 inadequate medical, dental and psychiatric care, inadequate treatment plans and discharge planning
 22 See Order, 5/11/01, Appendix B, see also, "Summary of the Settlement," Dorfman, ex 4 In
 23 developing the clinical details of settlement, the parties consulted with forensic mental health experts
 24 extensively Dorfman, ¶ 6, Anderson, ¶¶ 3,5 The issues were settled in three phases to address
 25 expeditiously the most exigent problems Dorfman, ¶ 2, Anderson, ¶ 3. A monitoring committee,
 26 comprised of two experts in the area of forensic mental health, has been established to oversee the
 27 implementation of the settlement agreement See Order, 5/11/01 at 2-3, see also Dlugacz, ¶ 15,

1 Declaration of Joel A Dvoskin, Ph D (“Dvoskin”), ¶ 9 In addition, three consultants including a
2 forensic psychiatrist, a forensic physician, and a psychologist specializing in rehabilitative mental
3 health for persons with developmental disabilities have been appointed to assist the monitoring
4 committee Duglacz, ¶ 16, Dvoskin, ¶ 9

5
6 **Legal Argument**

7 **I. The Proposed Settlement Meets the Legal Standard for Court Approval**

8 **A. The Legal Standard**

9 Fed R Civ Proc 23(e) provides that “[a] class action shall not be dismissed or
10 compromised without approval of the court, and notice of the proposed dismissal or compromise
11 shall be given to all members of the class in such a manner as the court directs ” Before a court can
12 approve dismissal or compromise, it must evaluate whether the proposed settlement is
13 “fundamentally fair, adequate, and reasonable ” Officers for Justice v Civil Service Comm’n, 688 F
14 2d 615, 625 (9th Cir 1982), cert den 459 U S 1217 (1983) In making this determination, courts
15 must balance some or all of the following factors 1) the strength of plaintiffs’ case, 2) the risk,
16 expense, complexity, and duration of any further litigation in the case, 3) the risk involved in
17 maintaining class action status throughout the trial, 4) the amount offered in settlement, 5) the extent
18 of discovery completed in the case, 6) the experience and views of counsel, 7) whether there is a
19 governmental participant in the case, and 8) the reaction of the class members to the proposed
20 settlement Id Other factors that are considered include whether the settlement was reached through
21 arm’s length bargaining and whether the number of objectors or interests that they represent is large
22 when compared to the class as a whole Newberg, Newberg on Class Actions, § 11 41 (3d ed 1992)

23 Assessment of the proposed settlement ensures that it is “not the product of fraud or
24 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
25 whole is fair, reasonable, and adequate to all concerned ” Officers for Justice, 688 F 2d at 625
26 There is a strong presumption favoring settlement v City of Seattle, 955 F 2d

1 1268, 1276 (9th Cir 1992)

2 **B. The Proposed Settlement Is Fair, Reasonable, and Adequate**

3 The relevant factors are discussed in the following sections

4
5 **1. Settlement Negotiations Were Conducted at Arm's Length**

6 Settlements in class actions must be done in good faith and without any collusion
7 between the parties In re Pac Sec Litig, 47 F 3d 373, 378 (9th Cir 1993) (citations
8 omitted) To determine whether such negotiations occurred, courts look at the length of the
9 settlement process, the nature of the process, the timing of discussion and the settlement of
10 attorneys' fees

11 Settlements conducted over a period of time, at arm's length, support "a strong
12 presumption" of the settlement's substantive fairness Bussie v Am Fin Corp, 50 F Supp
13 2d 59, 77 (D Mass 1999). The settlement here was conducted at arm's length and there was
14 no collusion between the parties or their counsel Dorfman, ¶ 29 The settlement negotiations
15 took place over approximately two months Id, ¶ 2 Additionally, the settlement was
16 negotiated in three phases to first address the issues that were most imminent, particularly the
17 issues of protection from harm including allegations of sexual and physical assaults Stroh, ¶
18 10, Dorfman, ¶ 2 The fact that the settlement was negotiated in phases with extensive expert
19 involvement indicates that the process used to reach this proposed agreement was not rushed
20 and was proper See Dorfman, ¶ 2

21 Finally, the parties did not address counsels' remuneration until after reaching
22 consensus on the terms of the partial settlement At the conclusion of the first phase of
23 settlement negotiations, the parties agreed that defendants would pay plaintiffs' attorneys'
24 fees and costs, but did not negotiate an amount Dorfman, ¶ 30, see also Order 5/11/01 at 7
25 The fact that the amount of fees to be paid will be resolved separately from the settlement
26 suggests that the settlement was fair See Bussie, 50 F Supp 2d at 77, Duhaime v John
27 Hancock Mut Life Ins Co, 177 F R D 54, 67 (D Mass 1997) (approving settlement of

1 insurance sales practices class action where “attorneys’ fees were negotiated after and
2 separate from the proposed settlement ”)

3
4 **2. Sufficient Discovery Was Conducted in the Case**

5 The amount of discovery conducted is a factor to be considered in determining
6 whether a proposed class settlement is fair, adequate, and reasonable. However, “formal
7 discovery is not a necessary ticket to the bargaining table where the parties have sufficient
8 information to make an informed decision about settlement.” In re Mego Fin. Corp. Sec.
9 Litig., 213 F.3d 454 (9th Cir. 2000) (quoting Linney v. Cellular Alaska Partnership, 151 F.3d
10 1234 (9th Cir. 1998)).

11 This partial settlement was reached three months after the case was filed and prior to
12 any formal discovery, other than the initial disclosures required by the Federal Rules of Civil
13 Procedure. Dorfman, ¶ 2. While formal discovery was not done, plaintiffs conducted
14 extensive informal discovery both before and after filing the lawsuit. See Stroh, ¶ 8. The
15 informal discovery conducted by plaintiff WPAS was much more extensive than is done in
16 most cases because WPAS has a federal mandate to investigate allegations of abuse and
17 neglect of individuals with disabilities such as the class members. See 42 U.S.C. § 10801, et
18 seq., 42 C.F.R. § 51, and RCW 71A.10.080. Under its federal mandate WPAS and its expert
19 consultants have access to records, investigations, notes from investigations, policies, other
20 documents, and witnesses, that would normally not be available prior to formal discovery.
21 42 C.F.R. §§ 51.41 and 51.42.

22 Moreover, the parties reached a partial settlement in the case after two months of
23 intensive settlement negotiations that involved extensive use of experts in psychiatry, social
24 work, forensic psychology, and medicine. See Dorfman, ¶ 6; Dlugacz ¶¶ 7, 13; Anderson, ¶¶
25 2-5. The experts had extensive knowledge of the issues raised in the lawsuit, had an
26 opportunity to review patient records and in some cases, had an opportunity to tour the
27 facility and speak with patients and hospital staff. See Dorfman, ¶ 7; Anderson, ¶ 6; Dvoskin,

1 ¶ 4 With the exception of the unresolved issues in the case, the experts believe that the
2 clinical provisions of the settlement appropriately address the issues raised in plaintiffs'
3 Complaint and PI Motion See id., ¶ 8; see also Dlugacz, ¶14, Dvoskin, ¶ 8 Plaintiffs had
4 ample information to adequately evaluate the case, determine what was needed in a
5 settlement and to ensure that it was fair, adequate, and reasonable

6
7 **3. Counsel Proposing the Settlement Are Experienced In Similar Cases**

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

13 In the present matter, plaintiffs' counsel have extensive experience litigating similar
14 mental disability cases See Decls. of plaintiffs' counsel in Support of Motion for Class
15 Certification, filed 12/20/00 Plaintiffs' counsel were well qualified to make, and did make, a
16 comprehensive assessment of the partial settlement agreement to ensure that it was fair,
17 reasonable and adequate See Dorfman, ¶¶ 9-11

18
19 **4. Reaction of the Class Members to the Proposed Settlement**

20 In assessing a class settlement, courts must also consider the reaction of the class
21 members to the proposed settlement Hanlon v. Chrysler Corp., 150 F 3d at 1026 (citations
22 omitted) A relatively small number of objectors indicates fairness and supports judicial
23 approval Duhamel, 177 F R D at 70, Giusti Bravo v. U S Veterans Admin., 853 F Supp
24 34, 40 (D P R 1993) Additionally, Courts must examine the proposed settlement as a whole
25 for overall fairness, rather than looking at individual components of the agreement Id.
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1 Counsel are not aware of any formal objections filed with the Court¹ Stroh, ¶ 15;
 2 Anderson, ¶ 8 Counsel are only aware of approximately 44 potential objectors to discrete
 3 parts of the settlement Dorfman, ¶ 13² Eighteen of these individuals have advised plaintiffs'
 4 counsel that they disagree with the part of the settlement that calls for the creation of an all-
 5 female ward for long-term treatment patients Id., ex 1³

6 Prior to deciding upon an all-female unit to resolve the protection from harm issues,
 7 including the ongoing sexual assaults, plaintiffs' counsel considered other options and
 8 consulted with four experts Id., ¶¶ 14-17 All four experts agreed that given the
 9 circumstances and high incidence of sexual assault at CFS, the only way to adequately
 10 protect the female patients was to establish an all-female ward Id., ¶ 16, see also Dlugacz, ¶
 11 13, Dvoskin ¶ 6

12 Additionally, plaintiffs' counsel met with three female class members who allegedly
 13 had been sexually assaulted at CFS to find out how they felt about an all-female ward
 14 Dorfman, ¶ 17 One woman wanted an all-male ward for aggressive male patients and co-ed
 15 wards for the other patients Id. Defendants could not agree to this option because, due to the
 16 small and fluctuating proportion of women at CFS, that could have resulted in small numbers
 17 of women being placed on wards that were virtually all male The other two women strongly
 18 desired an all-female ward because they felt unsafe on a co-ed ward Id. After the all-female
 19 ward was opened, all three women reported to plaintiffs' counsel that they were happy on the
 20 new ward

21 ¹ There may be objections filed with the Court after the filing of this Motion and Memorandum
 22 The deadline for filing such objections is May 22, 2001

23 ² At any given time there are approximately 250 class members in this case However, since the class
 24 definition includes individuals currently at CFS or who are admitted there in the future, a large number
 of individuals enter in and leave the class as they are admitted to and discharged from CFS, particularly
 those who are there for competency evaluation and restoration

25 ³ There was some initial confusion regarding the all female ward, as some of the female patients
 26 incorrectly believed that by moving to an all female ward, they would never see or interact with any of
 27 the male patients This is not true as female and male patients have regular and reasonable opportunities
 to socialize with each other during classes, outdoor breaks, and scheduled social activities such as dances
 and parties

1 Based upon the opinions of the experts and the women interviewed, it was determined
2 that an all-female ward was in the best interests of the class Id., ¶¶ 15-16. Plaintiffs' counsel
3 believe that the all-female ward is fair, adequate and reasonable as it is necessary to provide
4 minimally adequate protection from harm Id. ¶ 15

5 There is also some disagreement by patients in the Conditional Release ("CR")
6 program regarding their placement pending the opening of the new CFS building Id., ¶ 18
7 The matter of their physical placement resulted from their displacement following the
8 earthquake that occurred on February 28, 2001 Id., ¶ 19 In order to provide space for other
9 patients at the hospital who needed a more secure setting, the CR patients were placed in the
10 gym where they have been residing ever since Id., ¶ 20

11 Because of this placement, plaintiffs' counsel were concerned about privacy and
12 safety in the gym as well as overcrowding on the South Hall if the CR patients were placed
13 with the other CFS patients Therefore, the parties agreed that the defendants would present a
14 list of options to plaintiffs' counsel with alternative arrangements for the CR patients Id., ¶¶
15 21-22, see also Order, 5/11/01, Appendix A at 14 It was further agreed that if plaintiffs did
16 not find these options satisfactory, they could amend their complaint or pursue any necessary
17 litigation to resolve the issue See Dorfman, ¶ 22; see also Order, 5/11/01, Appendix A at 14

18 It was subsequently discovered that one of the rooms in the gymnasium for the CR
19 patients did not meet the fire code requirements, thus leaving no option, but to find an
20 alternative placement Dorfman, ¶ 23, Anderson ¶ 7 Defendants presented a list of options
21 to plaintiffs which plaintiffs' counsel presented to the CR patients on May 1, 2001
22 Dorfman, ¶ 24, Anderson, ¶ 7 The CR patients advised plaintiffs' counsel that they, for the
23 most part, wanted to stay in the gym if some improvements were made Dorfman, ¶ 25,
24 Anderson, ¶ 7 Plaintiffs' counsel informed defendants and their counsel of the CR patients'
25 wishes and negotiated a solution which plaintiffs' counsel believe is the best possible
26 resolution to meet the desires of as many of the CR patients as possible while ensuring that
27 their safety is not compromised See id., ex 2

1 On May 11, 2001, plaintiffs' counsel met with CR patients to discuss the agreement
2 Id. The Court may receive objections from some of these patients. See Id., ¶ 26 Counsel for
3 plaintiffs and defendants agree that all of the CR patients cannot remain in the gym Counsel
4 also agree that the negotiated alternative does not contribute to any of the concerns raised in
5 the Complaint or PI Motion Therefore, any objections to the settlement with regard to the
6 moving the CR patients out of the gym is not relevant to the determination of the fairness of
7 the proposed settlement in this case

8 Counsel is unaware of any other potential objectors to the settlement Id., ¶ 28 Even
9 if all of the above-mentioned individuals file objections to the settlement, it should be
10 approved, as it is fair, adequate and reasonable and it will enormously improve the care and
11 protection of the patients at CFS

12 13 **5. Strength of Plaintiffs' Case**

14 Courts also look to the strength of the plaintiffs' case in determining the fairness of a
15 class settlement Hanlon, 150 F.3d at 1026 Here, plaintiffs' case was strong and it is likely
16 that had this case gone to trial, plaintiffs would have prevailed on all or most of the claims
17 which have now been resolved in the partial settlement agreement The PI Motion sets forth
18 fully the strength of the case Additionally, while not ruling on the PI Motion, the Court
19 stated, during a telephone conference on March 6, 2001, that plaintiffs had made a showing
20 that preliminary relief on certain issues was warranted At that point, the parties entered into
21 settlement negotiations Plaintiffs have obtained virtually all of the relief they sought
22 regarding issues argued in their PI Motion Thus, litigation would only delay the
23 implementation of the immediate necessary relief See D.M., et al. v. Jack Terhune, Comm'r
24 of DOC, 67 F. Supp. 2d 401, 410 - 411 (D.N.J. 1999) (settlement was fair, reasonable and
25 adequate in class action brought against prison officials for failure to provide adequate
26 mental health care, where plaintiffs had achieved most of their ultimate goals in bringing the
27 lawsuit through settlement)

1 **6. Risk, Expense, Complexity, and Probable Duration of Litigation absent a**
2 **Settlement in the Case**

3 In determining whether a proposed class settlement is reasonable, the courts balance what the
4 plaintiffs were able to obtain through the proposed settlement agreement with what they would likely
5 have achieved at trial. In looking at reasonableness of the settlement, the central question to be
6 answered is whether the settlement is reasonable in light of the uncertainty of litigation. See id. at
7 409-411 (citations omitted).

8 The partial settlement provides relief for many of the claims raised in the Complaint and
9 issues in the PI Motion. See Appendix B to Order, May 11, 2001. As this settlement is partial, the
10 parties are continuing to negotiate a resolution regarding the remaining issues. Plaintiffs' counsel
11 will litigate any unresolved issues. Dorfman, ¶ 2.

12 The complexity and duration of the litigation weigh in favor of settlement. See Class
13 Plaintiffs, 955 F. 2d at 1292. Absent the partial settlement, the scope of discovery and trial would be
14 far broader and the costs substantially greater. Prior to settlement, the parties requested twenty days
15 for trial and requested an extraordinary number of depositions. After the parties reached the proposed
16 settlement agreement, they agreed that only five days for trial would be needed and that the scope of
17 discovery was greatly narrowed. Agreed Order Amending Pretrial Schedule, 5/11/01.

18
19 **II. The Procedural Requirements of Rule 23(e) Have Been Satisfied**

20 Fed. R. Civ. P. 23(e) establishes procedural requirements regarding notice of any proposed
21 settlement to ensure that the rights of the named and unnamed class members are protected and fully
22 considered in the negotiation of the settlement agreement. Officers for Justice, 688 F. 2d at 624. The
23 rule requires that: 1) members of the class be notified of the settlement that ensures that all members
24 received adequate notice, 2) the notice clearly state that any dissidents can object to the proposed
25 settlement, 3) each objection must be made part of the record, 4) those members raising objections
26 be afforded an opportunity to be heard with the assistance of privately retained counsel, 5) a
27

1 reasoned response to the objectors by the Court on the record, except for frivolous objections which
2 require only a statement by the Court on the record of the reasons finding the objection frivolous Id


3 The Court Order of May 11, 2001 set forth the precise procedure that was to be followed in
4 complying with these requirements Prior to the fairness hearing each provision of that Order will
5 have been accomplished See Dorfman, ¶¶ 31-35

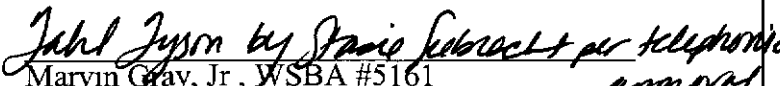
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7 **Conclusion**


8 For the foregoing reasons, the Joint Motion to Approve the Partial Settlement Agreement
9 should be granted

10 DATED this day of May, 2001

11 Respectfully submitted,
12 Christi Rust, et al ,
13 Plaintiffs,

14 
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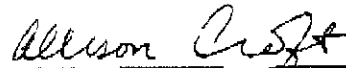
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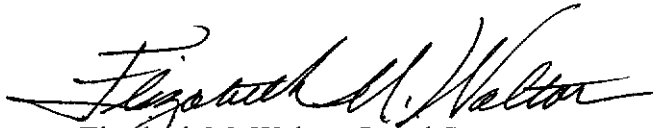
Attorneys for Defendants

1 serve a conformed copy of the above stated documents by U S mail, postage prepaid, upon their counsel
2 of record at the address set forth below

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8 I certify under the penalty of perjury under the laws of the State of Washington that the foregoing
9 is true and correct

10
11 Executed on this *18th* day of May, 2001 in Edmonds, Washington

12
13 
14 Elizabeth M. Walton, Legal Secretary
Washington Protection & Advocacy System