

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

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U.S. DISTRICT COURT
N.D. OF ALABAMA

ANTONIO LEATHERWOOD, ERIC)
HOWARD, JERRY SANFORD, JOHN)
LEVINS, MICHAEL PATRICK, and,)
individually and on behalf of all present and)
future HIV-positive inmates in the Limestone)
Correctional Facility in Capshaw, Alabama,)

Plaintiffs,)

v.)

CV 02-BE-2812-W

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ENTERED
JUN - 2 2004

DONAL CAMPBELL, Commissioner of the)
Alabama Department of Corrections, RONALD)
CAVANAUGH, Director of Treatment, Alabama)
Department of Corrections, BILLY MITCHEM,)
Warden of Limestone Correctional Facility, and)
DAVID WISE, Deputy Warden,)

Defendants.)

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This class action is before the court following a "fairness hearing" that was conducted on May 26, 2004, by the undersigned magistrate judge. Premised on the applicable law, the record, and the "fairness hearing" proceedings, the court finds that the settlement in this case is due to be approved.

I. BACKGROUND

On November 18, 2002, five HIV prisoners filed this action individually and on behalf of a class of all "present and future HIV-positive inmates confined at Limestone Correctional Facility ("Limestone") in Harvest, Alabama." (Doc. 1).¹ They filed an amended complaint (doc.

¹ References herein to "Doc. ____" are to the document numbers assigned by the Clerk of the Court.

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42) and a second amended complaint (doc. 55).² On January 6, 2003, the plaintiffs filed a motion seeking class certification. (Doc. 13). On January 27, 2004, United States District Judge Karon O. Bowdre entered an order granting the motion. (Doc. 114). Pursuant to Rule 23(e) of the FEDERAL RULES OF CIVIL PROCEDURE, "[T]he court must approve any settlement, voluntary dismissal, or compromise of claims, issues, or defenses of a certified class." FED. R. CIV. P. 23(e)(1)(A).

The proposed settlement agreement was filed on May 6, 2004. (Doc. 151 & 152 at Ex. A). On May 6, 2004, the plaintiffs also filed a motion seeking an order concerning publication and notice of the settlement agreement. (Doc. 149). The court approved the notice for publication and ordered the plaintiffs' counsel to publish the same in accordance with the terms agreed to by the parties and approved by the court. (Doc. 156). Because of the fact that the claimants were all inmates at Limestone, the court required that the settlement notice be published at various locations used to house HIV prisoners. (*Id.*). Publication was done and included notice to any claimants of the proposed settlement, the date and time of the fairness hearing, and that any objections thereto must be filed in writing within ten (10) days of the posting of the notice, which was required to be done within 24 hours of entry of the court's order. (*Id.*). A fairness hearing was conducted as scheduled on May 26, 2004.

On May 7, 2004, the court granted the parties' "Joint Motion to Adopt Settlement Agreement and Provide for a Special Master." (Doc. 153). This order provides that "the Settlement Agreement shall automatically terminate two years after the court has granted final

² The second amended complaint is referenced as document 22 in the "Plaintiffs' Memorandum of Law in Support of Final Entry of the Settlement Agreement," which is found at document 162.

approval of its terms.” (*Id.* at ¶ 3). The court further stated that a Fairness Hearing, pursuant to Rule 23(e) of the FEDERAL RULES OF CIVIL PROCEDURE, must occur before final approval of the Settlement Agreement. Therefore, the order granting the motion to adopt the settlement agreement and to provide for a special master does not constitute a final adoption of the agreement until the Rule 23(e) Fairness Hearing resolves any class objections to the agreement.

II. DISCUSSION

In *Meyer v. Citizens Southern National Bank*, 677 F. Supp. 1196 (M.D. Ga. 1988), the court set forth the applicable standards for the present matter. The court stated:

In deciding whether to approve the settlement of this class action, this Court is guided by established principles set by the appellate courts for the Fifth and Eleventh Circuits. *Bennett v. Behring Corp.*, 737 F.2d 982 (11th Cir. 1984); *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5th Cir. 1981), *cert. denied*, 456 U.S. 998, 102 S. Ct. 2283, 73 L. Ed. 2d 1294 (1982); *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977); and *Miller v. Republic National Life Insurance Company*, 559 F.2d 426 (5th Cir. 1977). In order to approve the settlement the Court must determine that the settlement is fair, adequate, and reasonable and that there has been no fraud or collusion between the parties in reaching the settlement. *Bennett v. Behring Corp.*, *supra*; *Ruiz v. McKaskle*, 724 F.2d 1149 (5th Cir. 1984); and *Cotton v. Hinton*, *supra*.

In applying the established principles to the present case the Court is mindful that each case must be decided on its own facts and that the Court’s task is to essentially balance the applicable principles. *Cotton*, 559 F.2d at 1330. The Court is also aware that there is a strong judicial policy favoring settlement, *Bennett*, 737 F.2d at 986, and that “[p]articularly in class action suits, there is an overriding public interest in favor of settlements.” *Cotton*, 559 F.2d at 1331. “It is often said that litigants should be encouraged to determine their respective rights between themselves.” *Id.* at 1330-31.

In considering whether this settlement is fair, adequate, and reasonable, the Court should address the following factors:

- (1) The likelihood of success at trial and range of potential recovery;
- (2) The terms of the settlement;
- (3) The complexity, expense, and duration of litigation;

- (4) The procedures afforded to notify the class members of the proposed settlement and to allow them to present their views;
- (5) The judgment of experienced counsel;
- (6) The substance and the amount of opposition to the settlement; and
- (7) The stage of the proceedings at which the settlement was achieved.

In re Corrugated Container Antitrust Litigation, 643 F.2d 195; *Bennett v. Behring Corp.*, *supra*; *Ruiz v. McKaskle*, *supra*; *Miller v. Republic National Life*, *supra*; *Petway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978); *Cotton v. Hinton*, *supra*; *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983); and *In re Dennis Greenman Securities Litigation*, 622 F. Supp. 1430 (D.C. Fla. 1985), *rev'd on other grounds*, 829 F.2d 1539 (11th Cir. 1987).

In considering the foregoing factors, an important function of a district court is its consideration of the settlement terms is a comparison of those terms with the likely rewards the class would have received following a successful trial. *In re Corrugated Container Antitrust Litigation*, 643 F.2d at 212. In this regard, "[t]he relief sought in the [C]omplaint may be helpful to establish a benchmark by which to compare the settlement terms." *Cotton*, 559 F.2d at 1330.

Meyer, 677 F. Supp. at 1200-01.

The first issue that the court must evaluate is the "likelihood of success on the merits against the amount and form of relief offered in the settlement." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14, 100 S. Ct. 3009, 65 L. Ed. 2d 1111 (1981). There is a strong judicial policy favoring settlement premised on the "realization that compromise is the essence of settlement." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *see also D.H. Overmyer Co. v. Loflin*, 440 F.2d 1213, 1215 (5th Cir. 1971), *cert. denied*, 404 U.S. 851, 92 S. Ct. 87, 30 L. Ed. 2d 90 (1971) ("Settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving debts and preventing lawsuits."); *Austin v. Hopper*, 28 F. Supp. 2d 1231, 1235 (M.D. Ala. 1998) ("Judicial policy favors voluntary settlement as the means of resolving class-action cases.").

The second amended complaint in this matter asserts that the defendants provided inadequate medical treatment and conditions of confinement that violated the plaintiffs' rights under the Eighth Amendment as applied through the Fourteenth Amendment and enforced through 42 U.S.C. § 1983. (Doc. 55). The plaintiffs seek declaratory and injunctive relief. Specifically, they request that the court enjoin the defendants to adopt new policies and procedures for providing constitutionally adequate medical treatment and conditions of confinement which would prevent the plaintiff class from enduring needless pain, suffering, and in some instances, death. The likelihood of success on the merits is apparent.

A. Claims Related to Excessive Deaths

The plaintiffs claim in their second amended complaint that "an extremely high and constitutionally unacceptable number of AIDS-related inmate deaths occur at Limestone." (Doc. 55 at ¶ 33). In their independent audit of the medical treatment at Limestone conducted on November 8, 2002, Jacqueline Moore and Associates³ found that "the number of AIDS deaths is remarkably high when one compares averages reported by other DOC systems." (*Id.* at Ex. 2, p. 9). Additionally, the plaintiffs' expert, Dr. Stephen Tabet, conducted a detailed mortality review of forty-two (42) HIV and AIDS prisoner deaths at Limestone since 1999.⁴ Such detailed

³ Jacqueline Moore and Associates was an independent auditing company that was hired by the Alabama Department of Corrections to review the quality of medical treatment provided at Limestone Correctional Facility.

⁴ These inmates included the following individuals:

	NAME	AGE AT DEATH	DATE OF DEATH
1.	Russell Batiste	46	12-29-2002
2.	Luis Blanco	44	2-22-2001
3.	John Bolton	39	5-22-2000
4.	Anthony Cox	39	2-4-2001
5.	Andy Crawford	41	5-22-2000
6.	Ezelle Daniels	60	11-24-2002
7.	Larry Davenport	27	1-24-2000
8.	Howard Davis	48	8-9-2000

deceased HIV prisoner mortality reviews had not been conducted previously. In fact, the Alabama Department of Corrections, NaphCare, Inc. (the former contracted healthcare provider for the plaintiffs' class), Prison Health Services (the current contracted healthcare provider for the plaintiffs' class), Dr. Collette Simon, Moore and Associates, nor any other entity or individual had ever conducted detailed deceased HIV prisoner mortality reviews.

The importance of conducting detailed mortality reviews was described in Jacqueline Moore and Associates' Limestone audit report, which states that "Statistics should accurately reflect the cause of death and provide a useful source of statistical information. The reviews also

9.	Andrea Edwards	39	10-16-2001
10.	Michael Elliot	36	3-27-2001
11.	Terrell Grey	41	1-25-2003
12.	Chelsea Hammac	34	11-14-2002
13.	Eddie Harris	44	5-28-2000
14.	Kelvin Harris	44	9-11-2001
15.	Michael Headon	29	9-19-2002
16.	Dennis Hearn	32	6-14-1999
17.	Cletis Johnson	36	5-24-2002
18.	Leslie Johnson	45	12-14-1999
19.	Morris Johnson	30	7-24-1999
20.	Gerald Lewis	35	2-26-2004
21.	Stanley Lillie	47	12-24-2001
22.	Joseph McClure	71	5-6-2002
23.	George McHeard	48	11-12-2001
24.	James Pryor	36	10-13-2001
25.	Willie Robinson	48	11-5-2002
26.	Tony Rowland	30	1-22-1999
27.	Dionicio Salazar	41	9-16-1999
28.	Milton Smiley	43	2-12-2003
29.	Lamar Smith	49	1-21-2002
30.	Robert Strickland	37	1-2-2004
31.	Nathan Sullivan	40	10-13-2003
32.	Timothy Summers	32	3-11-2002
33.	Alfred Thomas	42	10-26-2003
34.	Rickey Thompson	30	9-2-2002
35.	Henry Turner	35	8-3-2002
36.	Robert Walker	46	11-6-2003
37.	Freddie White	51	6-8-1999
38.	Dewayne Wilder	37	4-17-1999
39.	Iverson Williams	36	11-15-2000
40.	John Willis	35	3-29-2002
41.	Ernest Wynn	39	2-16-2002
42.	Marvin Youngblood	39	9-5-2000

(Doc 76 & Doc. 132, Tab F).

provide a window into multiple aspects of the delivery system." (Doc. 55, Ex. 2 at p. 10). Dr. Tabet summarized his findings by stating that "[T]he most egregious medical failure at Limestone is the number of preventable deaths." (Doc. 76 at p. 111). More specifically, he stated as follows:

. . . . In almost all instances the death was preceded by a failure to provide proper medical care or treatment. Consistently, patients died of preventable illness. Patients with serious diseases experienced serious delays in medical care or were not treated at all. Chronic care clinics are unheard of at Limestone. Life-threatening laboratory results were treated routinely instead of urgently. Other tests such as radiographs showing pneumonia were commonly not assessed until many days later. At least one patient had such severe pneumonia that he suffocated in front of the medical staff – despite the patient's requests for treatment, he was not sent to a hospital until his condition was irreversible. CPR was rarely attempted in any critically ill patient. . . .

(*Id.*). In their Petition of Notice of Objections to Settlement Agreement, certain members of the Plaintiff class provide a personal account of the constitutionally inadequate medical treatment provided to HIV prisoners at Limestone. They state that "[b]ecause of these Eighth Amendment violations, many male HIV-positive inmates[,] which was (sic) housed in dormitory 16, warehouse HIV infirmary, died a horrible death, literally standing on their feet." (Doc. 160, p. 1).

Dr. Tabet's deceased HIV prisoner mortality reviews demonstrate that the inadequate medical treatment is unconstitutional. It is evident that lives were lost due to preventable lapses in the medical treatment. Additionally, the evidence demonstrates an absence of efforts to save lives by taking ameliorative actions such as conducting mortality reviews and ascertaining obvious problems in the medical system and then resolving these problems. HIV prisoners died without necessary intervention by the Limestone medical staff or Alabama Department of

Corrections. This lack of ameliorative action on the part of the defendants and others demonstrates a sufficient disregard of human life and therefore provides a likelihood that the plaintiffs would succeed on the merits at a trial on this aspect of their second amended complaint.

B. Emergency Medical System

In addition, the plaintiffs claim that responses to HIV prisoner medical emergencies have been "extremely slow and completely inadequate." (Doc. 55 at p. 12). The difficulty is demonstrated in the mortality review of HIV prisoner Terrell Grey.

While Terrell Grey was critically ill on January 25, 2003, the Limestone medical staff decided to transport him to a hospital. However, a nurse stated "[T]he inmate was sent to a hospital via Department of Corrections van for follow-up care. No indications were present for need of ambulance or emergency van." The correctional officers assigned to drive Terrell Grey to a hospital questioned the emergency medical decision-making of the nurse, stating as follows:

I [Officer Howard] stated to Nurse Smith that the two officers transporting Inmate Grey do not have medical training to be able to transport an inmate with the problem that Inmate Grey was having. Nurse Smith stated, 'He'll be fine. I'll put some oxygen in the vehicle with him and let him roll. He'll be fine.

(Doc. 72 at p. 57 (emphasis in original)). Despite the correctional officer's concerns, Terrell Grey was placed in a Department of Corrections van and transported to a hospital. However, instead of being transported to nearby Athens Limestone Hospital, Terrell Grey was transported on a two hour drive to Birmingham. While in route to Birmingham, Terrell Grey died in the van. (*Id.*).

Dr. Tabet's detailed review of Terrell Grey's death and numerous other inadequate emergency medical responses, reflects a violation of the constitutional rights of HIV prisoners at

Limestone. The evidence is sufficient to show that inadequate emergency medical care contributed to the preventable deaths of HIV prisoners. Dr. Tabet's findings therefore demonstrate a strong likelihood that the plaintiffs would succeed on the merits at a trial.

C. Chronic Care and Infection Control Program

The plaintiffs also claim that chronic care for HIV prisoners is extremely dire. (Doc. 55 at pp. 14-16). The plaintiffs assert that they experience life threatening lapses in the infection control program at Limestone. They argue that these lapses have caused the plaintiff class to be unnecessarily exposed to tuberculosis. The plaintiff class describes the situation as follows:

The whole male HIV-positive inmates population, because of a lack or inadequate infection control system, was exposed to tuberculosis, a disease which is known to be extremely dangerous and deadly to people who are suffering from HIV infections.

This tuberculosis exposure also poses a future threat to the health of those HIV-positive inmates who may have been exposed to this disease.

(Doc. 160 at p. 2 (emphasis in original)). In his supplemental expert report, Dr. Tabet confirmed the life threatening lapses in the Limestone infection control program when he stated:

Unfortunately, infection control policy and practices are virtually nonexistent at Limestone Correctional Facility. Although some infection control policies exist on paper, it seems these practices are not in place at Limestone. In the prior report's summary, a concern about the possibility of an outbreak of tuberculosis was raised. True to the warnings and concerns, because there is no infectious disease prevention protocol in practice, a patient with active tuberculosis was housed in the HIV population. The result is that virtually all of the HIV-infected inmates and possibly some of the staff, were directly exposed to tuberculosis.

(Doc. 132 at p. 47 (emphasis in original)).

The failure in the Limestone infection control policy resulted in the exposure of practically the whole HIV prisoner population, and some correctional staff, to tuberculosis.

Exposing the HIV prisoner population to tuberculosis under the circumstances in this case is unconstitutional. This exposure to tuberculosis and other inadequate chronic care treatment therefore demonstrates that the plaintiffs would likely succeed on the merits at a trial.

D. Relief and Enforcement

The Settlement Agreement provides relief for the plaintiffs' claims. Under the Agreement, a system for providing constitutionally adequate medical treatment and housing for HIV prisoners confined at Limestone will be established. Additionally, a renowned HIV prisoner medical consultant -- Dr. Joseph Bick -- has been selected by the parties to ascertain any improvements and evaluate compliance with the provisions of the Settlement Agreement.⁵ Magistrate Judge John Ott has been appointed a Special Master to ensure compliance and the United States District Court will retain jurisdiction to enforce the terms of the Settlement Agreement and protect the Constitutional rights of the Plaintiff class. The comprehensive relief provided in this Settlement Agreement would be difficult to achieve at trial.

E. Limitations on Relief at a Trial, Imposed by the Prison Litigation Reform Act

Despite the strength of the plaintiffs' case, if this litigation were to go to trial, comprehensive relief similar to this Settlement Agreement would be difficult to achieve. The Prison Litigation Reform Act ("PLRA") limits the ability of the court to fashion comprehensive relief in prison conditions cases. Under the PLRA, the court can only grant prospective relief upon a finding that "such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the

⁵ The court notes that certain final arrangements concerning Dr. Bick remained to be resolved. The court anticipates no difficulties in this area that would warrant any change in the court's assessment of the present matters.

violation of the Federal right.” 18 U.S.C. § 3626(a)(1)(A). Additionally, the PLRA was intended to prevent judicial micro-management of prisons. *See, e.g., Benjamin v. Fraser*, 343 F.3d 35, 53 (2d Cir. 2003) (the PLRA was intended to prevent the judicial micro-management of prisons). Thus, at a trial, the court may not have been in as an advantageous position in being able to fashion the comprehensive relief provided for in the Settlement Agreement.

The undersigned finds that under the present circumstances, the likelihood of success on the merits and the range of possible recovery requirement is satisfied.

III. FAIRNESS, ADEQUACY, AND REASONABLENESS REQUIREMENT ARE SATISFIED BY THE SETTLEMENT AGREEMENT

The criteria for determining the “reasonableness” of a settlement agreement is uncertain and imprecise. As the plaintiffs’ counsel notes, “it is recognized that there is a range of reasonableness, ‘a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion’” *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir.), *cert. denied*, 409 U.S. 1039, 93 S. Ct. 321, 34 L. Ed. 2d 488 (1972).

A. The Details

The Settlement Agreement provides the plaintiffs with substantial benefits which will have a profound impact upon the adequacy of the medical treatment and living conditions received. The following details the more significant changes as a consequence of the settlement.

1. A Full-Time HIV Specialist

The parties recognize that the complexity of the medical care and treatment for HIV prisoners requires the attention of a full-time HIV Specialist. Therefore, the defendants agree to

have a physician with more than three years of experience in inpatient and outpatient management of HIV patients to provide medical care and treatment to the HIV prisoners confined at Limestone. (Settlement Agreement at §§ 3.1-3.2). In addition, thirty hours per week have been allocated in which the HIV Specialist will provide medical treatment only to HIV prisoners at Limestone. (*Id.*). This will ensure that the complex medical needs of the HIV prisoners at Limestone will be adequately addressed by a qualified physician.

2. Hiring an "HIV Coordinator"

The parties also recognize the importance of better organizing timely visits to specialists to address HIV prisoners' needs; to assure that follow-up care is being provided in a timely manner; to monitor the progress of HIV prisoners to avoid drastic declines in health; and to organize educational sessions and programs for HIV prisoners. (Agreement at § 3.3). To satisfy these concerns, the defendants agree to hire an additional nurse at Limestone. This nurse will act as an "HIV Coordinator" and will coordinate the provision of medical treatment to the HIV prisoners at Limestone. Additionally, in the event of a medical emergency, a nurse will be stationed in the HIV prisoner housing units sixteen hours per day to implement emergency medical procedures. (Agreement at § 3.5). These provisions will ensure that the medical delivery system for HIV prisoners is coordinated and operates in an efficient manner.

3. Healthcare Staff Training

The parties recognize the importance of adequate healthcare staff training. Therefore, the defendants have agreed that all staff -- medical staff and correctional staff -- will receive current cardiopulmonary resuscitation ("CPR") training; all registered nurses and licensed practical nurses will not make medical decisions outside the scope of their license; all medical staff will

attend continuing medical educational programs; HIV prisoners will be sent to an outside specialist if Limestone lacks the resources to provide for the medical treatment; and that copies of an HIV prisoner's Kijby Correctional Facility medical records will follow the prisoner to Limestone. (Agreement at §§ 4.1-4.5). Such training will ensure that the medical and correctional staff at Limestone will have adequate resources to address medical emergencies that arise in the HIV prisoner population. Importantly, if Limestone is not equipped with the resources to adequately address a medical concern, this provision ensures that the HIV prisoner will be seen in a timely manner by an outside specialist.

4. Periodic Evaluations for HIV and AIDS Prisoners

The parties have agreed that HIV prisoners should be provided a medical history, physical examination, and evaluation of their "CD4+" and viral load at least quarterly. Prisoners infected with AIDS will receive periodic evaluations every sixty days. (Agreement at §§ 5.1-5.2). This will ensure that HIV prisoners will be provided physical examinations which will occur more frequently based upon the advanced stage of the prisoner's illness.

5. Implementation of an Infection Control Plan

The parties have agreed that an infection control program must be implemented addressing airborne and blood borne pathogen control plans. (Agreement at §§ 6.1-6.3). These infection control plans will follow Center for Disease Control guidelines. Additionally, all prisoners suspected of having contagious tuberculosis will be placed in respiratory isolation until they no longer pose a risk to HIV prisoners and the public health. Protocols will also be adopted to minimize, control, and treat the spread of Methicillin Resistant Staphylococcus Aureus ("MRSA") infections. This infection control plan will ensure the protection of HIV prisoners

from exposure to airborne and blood borne pathogens. Moreover, it will ensure that correctional staff and medical staff are adequately protected from exposure to airborne and blood borne pathogens.

6. Adoption of Protocols for the Administration of Medication to HIV Prisoners

Protocols for the administration of medication to HIV infected prisoners will be implemented. (Agreement at §§ 7.1-7.8). Medication will be administered forty-eight hours after being prescribed by the HIV Specialist. Dosage and times for administering medication will be in accordance with Food and Drug Administration guidelines. HIV prisoners refusing a dose of medication will be seen by the prescribing physician and counseled. A "self-medication" program will also be developed and written instructions will be provided to HIV prisoners qualifying for the program. This will permit HIV prisoners more flexibility to coordinate doses of medication with meals and consistent with Food and Drug Administration recommendations. Also, medication will be hand delivered to acutely ill HIV infected prisoners. Hand delivery of medication to acutely ill HIV prisoners will prevent missed medication doses caused by a prisoner's inability to stand in the pill line due to illness.

7. Providing Medical Treatment to HIV Prisoners with Diabetes Mellitus or Hepatitis A, B, or C

The parties have recognized the importance of providing treatment to HIV prisoners with diabetes mellitus or Hepatitis A, B, or C. (Agreement at §§ 8.1-8.3). Because the defendants have recently entered settlement agreements addressing chronic care treatment for these illnesses, the Settlement Agreement in this case will conform to the standards adopted in these settlement agreements. Conforming the medical care to these recently entered settlement agreements will

ensure that HIV prisoners will not endure unnecessary pain, suffering, and in some instances death caused by the inadequate treatment of diabetes and Hepatitis A, B, or C.

8. Food for HIV Prisoners

HIV infected prisoners will receive three meals a day, six days a week. On Sundays and holidays, HIV prisoners will receive a food sack. (Agreement §§ 9.1-9.5). The food sack will enable HIV prisoners to take their medication with meals rather than on an empty stomach. This will decrease the severity or prevent HIV prisoners from experiencing medication side-effects associated with medication dosage on an empty stomach.

9. Implementing an Effective Emergency Plan

The parties recognize the importance of implementing an effective emergency plan. (Agreement at §§ 10.1-10.5). Therefore, the defendants agree to provide a wireless intercom system in five cells used to house acutely ill HIV prisoners. This intercom system will be linked to the dormitory officer station enabling an acutely ill HIV prisoner to have immediate access to correctional and medical assistance in the event of an emergency. Emergency drills will also be conducted periodically to assure Limestone staff readiness in the event of an emergency. In addition, the emergency medical equipment will be kept in good working order to quickly effectuate the emergency protocols. These provisions will ensure that the medical and correctional staff are well-prepared to effectively respond in the event of an emergency.

10. Implementation of New Intake Protocols

The parties agree to new intake protocols that will require that HIV prisoners arriving at Limestone receive an intake assessment and screening within twenty-four hours of arrival. (Agreement §§ 11.1-11.5). Within forty-eight hours, an HIV prisoner will be seen by the HIV

Specialist. Within two weeks of arriving at Limestone, an HIV prisoner will be seen by the HIV Specialist or a mid-level practitioner. This process will ensure that HIV prisoners newly arriving at Limestone will begin receiving medical treatment and be screened for other infectious diseases or conditions within a reasonable amount of time. In addition, HIV prisoners arriving at Limestone will be permitted to continue their prescribed medication, upon verification. This will prevent interruptions in an HIV prisoner's continuity of medical care which could cause resistance to life-saving HIV medications.

11. The Provision of Appropriate Palliative Care to Terminally Ill HIV Prisoners

The parties recognize the importance of providing appropriate palliative care to terminally ill HIV infected prisoners. (Agreement §§ 12.1-12.3). Terminally ill HIV prisoners will be provided counseling addressing end-of-life treatment which includes: continued vigorous treatment or signing an Advanced Medical Directive consistent with Alabama state law describing the HIV prisoner's choice of end-of-life treatment. This provision will ensure that terminally ill HIV prisoners will receive important counseling addressing options for end-of-life treatment.

12. Accommodations for Physically Disabled HIV Prisoners

The parties recognize that some HIV positive prisoners are physically disabled and need accommodations addressing their disability. (Agreement §§ 13.1-13.2). The defendants have agreed to install adequate hand-railing in cells used to confine physically disabled HIV prisoners. Also, a shower in the HIV prisoner unit will be equipped with adequate hand-railing, ramp entry, and seating. This will ensure that physically disabled HIV prisoners will be able to use basic

amenities -- showers, toilets, and beds -- safely and the risk of unnecessarily falling and injuring themselves will be diminished.

13. Adopting Time Frames for the Re-fitting of Prosthesis and Dentures for HIV Prisoners

The parties agree to adopt time frames addressing the re-fitting of HIV prisoner prosthesis and dentures. (Agreement at §§ 13.3, 14.1). This provision will ensure that HIV prisoners with prosthesis or dentures will not endure unnecessary pain and suffering.

14. Adoption of a Timely Triage System

The parties recognize the importance of a timely triage system. (Agreement at § 15.1). Therefore, the defendants agree to adopt a triage system in which sick call slips submitted by HIV prisoners will be triaged daily according to degree of urgency. Additionally, formal and informal grievance forms from HIV prisoners will be triaged every five days according to degree of urgency. This timely triage system will ensure that HIV prisoners with urgent medical concerns will be treated in a timely manner.

15. Locating a Translator When an HIV Prisoner Does Not Speak English

The parties recognize the importance of locating a translator when an HIV prisoner does not speak English. (Agreement at § 18.1). Thus, they agree one will be located in such cases. This will ensure that HIV prisoners will not be prevented from receiving adequate medical treatment because they do not speak English.

16. Housing

The parties recognize the importance of clean, disinfected, and good working order housing used to confine prisoners with compromised immune systems. (Agreement at §§

19.1-19.2). Therefore, the Settlement Agreement provides that no dormitory or open-bay housing or triple celling of HIV prisoners will be used. Rodent and pest control will also be conducted monthly. These conditions will ensure that the HIV prisoners confined at Limestone will live in housing that does not promote or facilitate the spread of infectious diseases.

17. Access to an HIV Counselor

The parties recognize the importance of providing HIV prisoners access to an HIV counselor with training and experience in the area of HIV. (Agreement at §§ 20.1-21.2). Additionally, the Settlement Agreement will permit HIV prisoners to have access to up-to-date educational materials addressing HIV. This will facilitate that any questions or concerns that any HIV prisoners have addressing their illness will be answered by a knowledgeable HIV counselor.

18. Adopting New Release Protocols for HIV Prisoners

The parties recognize the importance of release protocols. Accordingly, the agreement addresses HIV prisoner access to Limestone medical records; arrangements for appropriate discharge planning for HIV prisoners upon release; thirty day supplies of medication upon release from Limestone; and that Limestone will be registered in the Social Security Administration's Prerelease Program for Institutionalized Persons. (Agreement at §§ 22.1-22.5). These provisions will ensure a continuity of medical treatment for HIV prisoners between the time of being released from Limestone and beginning HIV treatment outside Limestone.

19. Protocols Addressing the Mortality of HIV Prisoners

The parties recognize the importance of conducting timely mortality reviews for deceased HIV infected prisoners; that documentation be kept addressing the number of deceased HIV prisoners; and that full internal and external autopsies be performed on deceased HIV infected

prisoners. (Agreement at §§ 24.1-24.4). This system, addressing deceased HIV prisoners, will reveal any lapses in the medical treatment provided at Limestone. Revealing the lapses in medical care will permit the Limestone medical staff to make changes to ensure that adequate medical treatment is provided to HIV prisoners confined at Limestone.

20. Implementation of a Quality Improvement Program at Limestone

The parties lastly recognize that a quality improvement program at Limestone will ensure that any inadequacies or lapses in the Limestone medical system will be assessed, corrective plans addressing the lapse will be implemented, and the outcome of the corrective plan will be monitored. (Agreement at §§ 25.1-25.4). Therefore, the defendants will implement a quality improvement committee which will identify HIV medical treatment problems and implement timely remedies to solve the problems.

B. Enforcement of the Settlement Agreement

The Settlement Agreement provides relief addressing the claims made by the plaintiffs in the Second Amended Complaint. Consistent with the terms of the Agreement, the class members will receive medical treatment under a medical system that is efficient, attends to the needs of HIV infected people, and is more accountable. Indeed, the living conditions for HIV prisoners will also improve. To ensure that the terms of the Agreement are adhered, the parties have agreed to provide three enforcement measures.

1. Neutral Medical Consultant

The parties have agreed to hire a neutral medical consultant. (Agreement at §§ 26.1-26.5). The medical consultant will conduct periodic visits to Limestone to assess compliance with the terms of the Agreement. It is the job of the medical consultant to ensure that

the terms of the Agreement are adhered by the medical staff and correctional staff at Limestone. In addition, the medical consultant will be available to provide suggestions to the Limestone medical or correctional staff addressing any lapses in complying with the terms of the Settlement Agreement.

2. Appointment of a Special Master

Because the remedial phase of this litigation is sufficiently complex, the parties have agreed to the appointment of a Special Master. (Agreement at §§ 28.2, 28.4-28.6; *see also* Prison Litigation Reform Act, 18 U.S.C. § 3626(f)(1)(B) ("The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.")). They further agree that the undersigned will serve in that capacity. The Special Master will administer factual inquiries addressing compliance with provisions of the Agreement. *See Benjamin v. Fraser*, 343 F.3d 35, 45 (2d Cir. 2003) ("They [the powers of the Special Master] include the ability to convene and to regulate hearings, to rule on the admissibility of evidence, to subpoena and swear witnesses, and to hold non-cooperating witnesses in contempt.") (changes to original); *see also* FED. R. CIV. P. 53 (same). These inquiries will culminate in a report that will be submitted to District Court Judge Karon Bowdre. Based upon the Special Master's factual findings, the District Court will render a decision addressing compliance with the provisions of the Agreement.

3. United States District Court Jurisdiction is Retained

Throughout the two year remedial phase of this litigation, the parties have agreed that the United States District Court will retain jurisdiction for enforcement of the Agreement provisions.

(Agreement at § 1.1). The District Court will provide the class members with an optimal venue to enforce compliance with the provisions of the Agreement that is knowledgeable about the facts and history of this civil rights action.

C. Other Matters

The plaintiffs recognize that the defendants have made numerous concessions in the settlement of this action, including hiring a medical consultant, contracting to perform internal autopsies on all deceased HIV infected prisoners, and hiring additional Limestone medical staff. The defendants also recognize that as a result of this process, the plaintiffs have made numerous concessions.

By way of example, the plaintiffs recognize that the hiring of additional medical staff constitutes a substantial cost for the defendants. Thus, the plaintiffs and the defendants have agreed upon policies and protocols that would effectively address the concerns of the HIV prisoners at Limestone without the need to hire new medical staff.

The plaintiffs were also informed of the substantial costs that would be incurred if all the dorms used to house HIV prisoners were refurbished with ADA accommodations. Therefore, the plaintiffs and defendants agreed that only cells used to house physically disabled HIV prisoners would be refurbished for ADA compliance. Also, rather than installing ADA accommodations in all of the showers used by HIV prisoners, only one shower will be re-fitted for physically disabled HIV prisoner use.

In view of the foregoing, the court finds that the fairness, adequacy, and reasonableness requirements are satisfied by the Agreement entered into by the parties.

IV. THE COMPLEXITY, EXPENSE, AND DURATION REQUIREMENT IS SATISFIED BY THE SETTLEMENT AGREEMENT

The plaintiffs correctly note that this litigation is extremely complex. The complexity of HIV medical treatment is well documented. The medical treatment of HIV and AIDS infection, opportunistic infections, Hepatitis C co-infection with HIV, and other concerns is documented in detail by the Centers for Disease Control, the National Institutes of Health, and many other organizations and committees. The delivery of HIV medical treatment requires the expertise of a specialist. HIV Specialists must remain well versed on recent changes, addressing the constantly evolving HIV medical treatment standards. Due to the complexity of HIV medical treatment, the plaintiffs assert that they sought the expertise of one of the leading HIV physicians in the country -- Dr. Stephen Tabet. His extensive reports have been reviewed and evaluated by the court and have contributed greatly to the court's determination in this matter. (Doc. 76 and 132).

A trial on the merits of this case would be a substantial expense. Preparation for trial would also require additional, substantial expenses. Continued litigation in this case would require the plaintiffs to complete outstanding depositions, prepare thousands of pages of medical records for presentation at trial, and many other expensive endeavors in preparation for trial. Absent a settlement agreement, the class of HIV prisoners at Limestone may not receive any assistance for a very, very long time. During this time, more HIV prisoners could die and many will endure needless pain and suffering. Expenditure of the additional time and money would not guarantee any better result than that proposed by the parties. To the contrary, this Agreement clearly encompasses a full and complete means to address the present situation.

Premised on the foregoing, the complexity, expense, and duration requirements are

satisfied by the Settlement Agreement.

V. THE SUBSTANCE AND AMOUNT OF OPPOSITION TO THE SETTLEMENT AGREEMENT REQUIREMENT IS SATISFIED IN THIS CASE

A. Generally

As noted by counsel for the plaintiffs, "When considering the objections of class members addressing a proposed settlement agreement, 'the court must look beyond the numbers to the totality of the circumstances presented and from those circumstances attempt to extrapolate some picture of the true support for the [settlement].'" (Doc. 162 at p. 24), citing *Reynolds v. King*, 790 F. Supp. 1101, 1109 (M.D. Ala. 1990) (Thompson, J.)). The plaintiffs further note that the present litigation involves prison conditions. Therefore, this court must also consider if the agreement satisfies the requirements of 18 U.S.C. § 3626 of PLRA. See *Austin v. Hopper*, 28 F. Supp. 2d 1231, 1235 (M.D. Ala. 1998) (Thompson, J.) ("Not only must this court approve the settlement agreement, it must also determine whether the agreement meets the requirements of the Prison Litigation Reform Act, 18 U.S.C. § 3626, as well as whether the putative class to which the agreement applies meets the criteria for class certification under Rule 23.").

According to the plaintiffs, "Because the settlement agreement provides a comprehensive resolution of the claims raised in the complaint and satisfies the strictures of the PLRA, this Court should approve the *Settlement Agreement*." (*Id.* at 25). The court agrees. Although there are objections signed by a number of inmates, which will be addressed below, at least three inmates wrote the court indicating their satisfaction and approval of the Agreement. (See Letters Dated May 20-21, 2004).

B. Objections

The objectors have two general complaints: First, there is a lack of cooperation. Second, desegregation is not addressed. Specifically, in the "Petition of Notice of Objections to Settlement Agreement," one hundred thirty-six members of the plaintiff class object to the Settlement Agreement asserting that:

A summary of plaintiffs' proposed final settlement proposal, dated September 17, 2003, was presented to the male HIV-positive inmate population by their Attorney, and this settlement proposal in its entirety was agreed to by all class members as being adequate compensation for their pain and suffering.

The crowning jewel of this proposed settlement was provision nineteen (19) on page nine (9), access to institutional programs.

(Doc. 160 at p. 4).

The plaintiffs' counsel is correct that one of the plaintiffs' initial claims is not addressed in the Settlement Agreement. The segregation of HIV prisoners and restricting HIV prisoner access to supervised release, education, and training programs, which are provided to general population prisoners, is not resolved by the Settlement Agreement. (Doc. 162 at p. 25).

Counsel for the plaintiffs' assertion in their response that one of the portions of the objection is misplaced is a correct statement. Monetary compensation was never sought in this litigation. However, the other portions of the objection require more attention because access to institutional programs was a claim in the Second Amended Complaint. It was also an issue of contention raised in the settlement negotiations. (Doc. 162 at 26).

According to the plaintiffs' counsel, a summary of the plaintiffs' proposed settlement agreement was presented by their attorneys' to the plaintiff class in September 1993. This proposed settlement agreement, dated September 17, 2003, addressed the issue of permitting the

HIV prisoners access to SIR programs, Pre-discretionary Leave programs, eligibility for Community Corrections programs, work release programs, vocational programs, educational programs, and job or other training programs. (*Id.*) However, desegregating institutional programs remained an issue until March 2004. The plaintiffs' counsel asserts the following:

During the lengthy mediation session on March 23, 2004, the defendants informed the plaintiffs that desegregating institutional programs could not be a provision of a final settlement agreement. Defendants assured the plaintiffs that Donal Campbell, the Commissioner of the Alabama Department of Corrections, was currently working to desegregate the institutional programs at Limestone. The defendants insisted that desegregating institutional programs could be resolved upon the good faith unilateral action of Commissioner Campbell. Plaintiffs' counsel decided to yield on this issue. Plaintiffs counsel did not want to jeopardize the parties' ability to construct a comprehensive *Settlement Agreement* addressing the constitutionally inadequate medical treatment and housing issues. Thus, one of the plaintiffs' claims went unresolved to achieve comprehensive medical treatment and housing conditions relief. See Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977) ("The trial court should not make a proponent of a proposed settlement 'justify each term of the settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of high hopes.'" (quoting Milstein v. Werner, 57 F.R.D. 515, 524-25 (S.D.N.Y. 1972))).

(Doc. 162 at pp. 26-27). The plaintiffs' counsel concludes, that "despite the objections by class members, the *Settlement Agreement* should be approved." (*Id.*) The defendants agree.

Following an extensive examination of the record and the serious issues presented by these proceedings, the court finds that the failure of the settlement to address this one aspect of their initial claims is insufficient to warrant a rejection of the Agreement. To the contrary, the Agreement is a comprehensive, inclusive means for addressing critical life and death issues in a complex environment. To reject the Agreement for failing to deliver on this issue would be imprudent. Accordingly, the court finds that despite the objections of certain class members, the Agreement should be approved by the court.

VI. THE STAGE OF THE PROCEEDINGS IN WHICH THIS SETTLEMENT WAS ACHIEVED IS SATISFIED BY THE SETTLEMENT AGREEMENT

The stage of the proceedings in which the Settlement Agreement was achieved must be assessed to determine if the class members were provided sufficient information to determine the adequacy of a settlement proposal with the strengths and weaknesses of their case. *See In re: The Prudential Life Insurance Company of America Sales Practices Litigation*, 148 F.3d 283, 319 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114, 119 S. Ct. 890, 142 L. Ed. 2d 789 (1999) ("To ensure that a proposed settlement is the product of informed negotiations, there should be an inquiry into the type and amount of discovery the parties have undertaken."). The plaintiffs' counsel argues that the substantial amount of discovery conducted in this case more than satisfies this requirement. The court again agrees.

Due to the role that the undersigned played in this matter, it is evident to the court that substantial time, effort, and money was expended in the discovery process. It was more than adequate to test the strengths and weaknesses of the plaintiffs' case. For instance, there has been substantial discovery. Many depositions were taken. Several comprehensive expert reports have been issued.⁶ The parties have filed extensive witness lists and exhibit lists in preparation for trial. Since May 2003, the parties have engaged in intensive mediation sessions to negotiate the terms of the Settlement Agreement in this case. These mediation sessions have afforded the plaintiffs' counsel outstanding insight into whether or not to accept and recommend the terms of the Agreement to the plaintiff class. According to counsel for the plaintiffs, the plaintiffs, through the mediation process, have been aware of the strengths and weaknesses of their legal

⁶ Dr. Taber's reports are excellent examples of such. (See Doc. 76 and 132).

claims and negotiated the terms of the Agreement.

The court is thus satisfied that the settlement of this matter comes at an appropriate stage of the proceedings. Additionally, the court finds a total absence of any allegations, much less any evidence, of fraud or collusion between the parties in reaching the settlement in this matter.

VII. CONCLUSION

Premised on the request of counsel for the parties and the foregoing analysis, the court finds that the terms of the Settlement Agreement are due to be adopted.⁷

Any party, including individual plaintiffs, may file specific written objections to this report and recommendation within fifteen (15) days from the date it is filed in the office of the Clerk. Failure to file written objections to the proposed findings and recommendations contained in this report and recommendation within fifteen (15) days from the date it is filed shall bar an aggrieved party from attacking the factual findings on appeal. Written objections shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection. A copy of the objections must be served upon all other parties to the action.

The Clerk is **DIRECTED** to serve a copy of this report and recommendation upon counsel or record and the objecting plaintiffs. The objecting plaintiffs are to be served by posting the "Magistrate Judge's Report and Recommendation" in accordance with the notification

⁷ The court also notes, as did counsel for the plaintiffs, that "[a]doption of the *Settlement Agreement* does not dismiss this case from the District Court's jurisdiction. Rather, the District Court will retain jurisdiction to enforce compliance with the *Settlement Agreement*, this Court will act as a Special Master, and the District Court will retain jurisdiction to address attorney's fees." (Doc. 162 at p. 28).

process previously issued in this case. (See Doc. 156).⁴ The defendants are hereby **DIRECTED** to post the report and recommendation in the same manner as was done with regard to the Settlement Notice.

DONE, this the ~~22~~ day of June, 2004.



JOHN E. OTT
United States Magistrate Judge

⁴ The report and recommendation shall be posted in Dorm 6, Dorm 7, the Health Care Unit, and all other facilities used to house HIV prisoners at Limestone Correctional Facility within twenty-four hours from the date it is entered.

