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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

No. 1:07-cv-10463-MLW

DISABILITY LAW CENTER, INC.,  
Plaintiff

vs.

MASSACHUSETTS DEPARTMENT OF CORRECTION, et al,  
Defendants

\*\*\*\*\*

For Hearing Before:  
Chief Judge Mark L. Wolf

Approval of Settlement

United States District Court  
District of Massachusetts (Boston)  
One Courthouse Way  
Boston, Massachusetts 02210  
Friday, March 9, 2012

\*\*\*\*\*

REPORTER: RICHARD H. ROMANOW, RPR  
Official Court Reporter  
United States District Court  
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1 P R O C E E D I N G S

2 (Begins, 2:15 p.m.)

3 THE CLERK: Civil Action 07-10463, Disability  
4 Law Center, Inc. versus Massachusetts Department of  
5 Corrections, et al. The Court is in session. You may  
6 be seated.

7 THE COURT: Good afternoon. Would counsel  
8 please identify themselves for the court and for the  
9 record.

10 MR. ROLLINS: I'm Jim Rollins of Nelson,  
11 Mullins, Riley & Scarborough for the plaintiff,  
12 Disability Law Center.

13 MR. FLEISCHNER: Good afternoon. Robert  
14 Fleischner for the Center For Public Representation for  
15 the plaintiff, Disability Law Center.

16 MR. PINGEON: Good afternoon, your Honor.  
17 James Pingeon for the Prisoners' Legal Services  
18 representing the plaintiff.

19 MR. GLASSMAN: Good afternoon, your Honor.  
20 Richard Glassman from the Disability Law Center for the  
21 plaintiff.

22 MS. WHITE: Good afternoon, your Honor. Nancy  
23 White for the defendant, Department of Correction.

24 MR. SALTZMAN: Good afternoon, your Honor.  
25 William Saltzman for the defendants.

1 MS. GRANT: Good afternoon, your Honor.  
2 Sheryl Grant for the defendants.

3 MR. ANDERSON: Good afternoon, your Honor.  
4 Charles Anderson for the defendants.

5 (Pause.)

6 THE COURT: Okay. As you know, pursuant to  
7 your consent, this proceeding is being recorded and will  
8 eventually be available on the United States Court's  
9 website.

10 I've reviewed your very helpful joint submission  
11 in response to the February 6th, 2012 order involving  
12 the questions that emerged or evolved at the last  
13 hearing and I continue to commend you for having reached  
14 the agreement that you've reached. I continue, though,  
15 to have some questions under the Prison Litigation  
16 Reform Act and some associated issues. Let me tell you  
17 what my present thinking is and we'll go from there.

18 Your submission caused me to think that it may be  
19 most appropriate to view the settlement agreement in  
20 this case as a private settlement agreement in which the  
21 Court retains jurisdiction, something the Supreme Court  
22 noted a court can do in *Kokkonen*. The remedy would be  
23 the reopening of the case, not reinstatement, because it  
24 wouldn't actually be dismissed, but the functional  
25 equivalent of reinstatement, which is one characteristic

1 of a private settlement agreement as opposed to a  
2 consent decree under 18 United States Code Section  
3 3626(g)(6).

4 As I understand it, under the settlement agreement  
5 the Court is not now being asked to find or finding any  
6 violation of a federal right nor, I think, am I now  
7 ordering any prospective relief or arguably any relief  
8 at all. I am, however, being asked to approve the  
9 settlement. If I'm not granting or approving any  
10 prospective relief, it's not necessary to find that the  
11 remedy in this case is narrowly tailored only to correct  
12 a violation of a federal right, Section 3626(a)(1) would  
13 not apply.

14 Yet the parties assert that the agreement provides  
15 that if the case is reopened, the Court would have to  
16 find a violation of a federal right before it could  
17 enforce the terms of the settlement agreement and then  
18 narrowly tailor the remedy to the violation that's  
19 found. Okay? When I finish this soliloquy I'm going to  
20 want to know if I understand that right, that's the  
21 parties' position, and where that is in the agreement.  
22 I think you're referring to Section 11(b), but I'm not  
23 sure. It was something that you -- just listen to  
24 this. I'll give you a chance to look before you have to  
25 say anything.

1           The settlement agreement provides, in effect, for  
2 a stay of litigation and the administrative closing of  
3 the case and the retention of jurisdiction and the  
4 parties cite authority for the contention that this  
5 isn't a consent decree. It's on Page 13, I think, of  
6 your most recent submission, you note **Stickman, Bryant**  
7 and **Davis**.

8           I have some questions about whether it's proper  
9 for me to reason the way I just did and to say this is a  
10 private settlement agreement and subsection (a) doesn't  
11 have to be satisfied. Here are my questions.

12           The statute 3626(g) says that a consent decree  
13 means any relief entered with the consent of the  
14 parties. So I guess there's the question, "Am I  
15 entering any relief?" And you have educated me to  
16 understand that not everything that may be part of a  
17 court order is relief. But I have that question in this  
18 case, "Is the order I'm being asked to enter or am I  
19 entering any relief?"

20           And then I have a question as to the source of my  
21 authority to approve the settlement and the payment of  
22 fees that you've agreed on? I think last time we were  
23 talking about **Aronov**, which you cited for me as the  
24 standard for approval, but the discussion last time may  
25 have started one step ahead of where I am now. If it's

1 a private settlement agreement, what is -- you know,  
2 what creates my obligation and power to approve the  
3 settlement?

4 In **Aronov**, the First Circuit wrote -- this is 562  
5 F.3d 84 at 90, and 93, essentially, but this is at 90 --  
6 let's see where we're going, actually. It's at 91. It  
7 says: "Court approval of a consent decree must involve  
8 some appraisal of the merits. By contrast, a private  
9 settlement does not ordinarily receive court approval.  
10 A court entering a consent decree must examine its terms  
11 to be sure they're fair and not unlawful."

12 So I know a contract provides for court approval  
13 before it's effective. A court approval, the First  
14 Circuit is saying, is ordinarily, but not necessarily  
15 always a characteristic of a consent decree as opposed  
16 to a private settlement. And the First Circuit goes on  
17 in the next page to say that: "While a consent decree  
18 begins as a settlement, it's one that includes an  
19 injunction or some other form of specific relief which  
20 may ultimately be enforceable by contempt. This means  
21 that enforcement through an action for breach of  
22 contract which may be available for private settlement  
23 is insufficient to meet the standards for a consent  
24 decree."

25 So the contract provides that, in the first

1 instance, if I were to find the contract -- if the case  
2 were reopened and I were to find the contract violated,  
3 I could issue an order saying "Obey the contract," but I  
4 think I'd have to say, the way you now characterize it,  
5 "You violated a contract that also involves a violation  
6 of federal law in this case," and I could order  
7 compliance with the contract and then if that order  
8 wasn't obeyed, it would be punishable by contempt.

9 But anyway, this suggests -- this is a feature of  
10 your settlement, no enforcement by contempt, that  
11 suggests that it's a private settlement. And one thing  
12 to keep in mind, although I haven't thought it all the  
13 way through is, **Aronov**, and almost all the other cases,  
14 **Kokkonen**, are in the context of trying to determine  
15 whether somebody's a prevailing party for the purposes  
16 of being entitled to attorneys fees, I think. So I  
17 don't know whether that makes a difference.

18 And then I -- I don't know whether this is a  
19 separate question or most appropriately analyzed under  
20 the same question, but what's the source of my authority  
21 to determine whether the attorneys fees are reasonable?  
22 Do you have a private settlement that you've agreed to  
23 pay them? One, do I look at that as just one of the  
24 terms in the settlement and just determine whether it's  
25 reasonable and not unlawful and/or do I make a separate

1 determination? And perhaps more significantly, what's  
2 the source of my authority, outside the contract you've  
3 entered into, to make that determination? Or is the  
4 contract enough? If I think it's in the interests of  
5 the administration of justice and that indeed in the  
6 interests of the prisoners and the Commonwealth, do I  
7 have some inherent authority to just do this? And you  
8 may want to look at the contract and you may want to  
9 think about what I just said for a minute.

10 And you're also free to -- you know, where we left  
11 last time I was looking in this -- perhaps it's a  
12 consent decree, but it doesn't involve prospective  
13 relief. That's also a way to analyze this. But that  
14 statute, that so many courts have noted is circular,  
15 raises similar questions, and we've discussed them  
16 before you briefed them. But, you know, I wonder -- and  
17 do you think it's best to think of this as the private  
18 settlement in which I retain jurisdiction and which  
19 doesn't order any relief and then if so what's my  
20 authority to approve it?

21 Do you want a break to think about this or are you  
22 ready to go?

23 MR. FLEISCHNER: The plaintiff is prepared to  
24 try to respond.

25 THE COURT: Go ahead.

1 MR. FLEISCHNER: First, your Honor, the  
2 section of the settlement agreement is, um, is Section  
3 10(b)(3), which is on Page 18 --

4 THE COURT: Hold on.

5 MR. FLEISCHNER: -- of the settlement  
6 agreement.

7 (Pause.)

8 THE COURT: What page?

9 MR. FLEISCHNER: It's on Page 18, your Honor,  
10 the second paragraph from the bottom, Paragraph  
11 10(b)(3).

12 THE COURT: Wait a second. Maybe I do have  
13 it.

14 (Pause.)

15 MR. FLEISCHNER: We could --

16 THE COURT: Oh, I have it here.

17 (Pause.)

18 THE COURT: Let's see. 18, Paragraph 3.

19 (Pause.)

20 THE COURT: It says: "Any order to achieve  
21 compliance with the provisions of this settlement  
22 agreement shall be subject to the applicable provisions  
23 of the Prison Litigation Reform Act, 18 U.S.C. Section  
24 3626."

25 MR. FLEISCHNER: That's correct.

1 THE COURT: So am I correct in understanding  
2 that that means -- well, that the contract provides two  
3 things -- and you may have explained this to me a while  
4 back but I've done a number of things since then.

5 One, if you come back, the case gets reopened, the  
6 mediation process doesn't work, you have to come back to  
7 court. Um, one, I would be called upon to determine  
8 whether there has been a violation of the contract, not  
9 some other issue, more broadly defined, and, two, if  
10 there was a violation of the contract, did that also  
11 violate, um, the prisoners' federal rights?

12 MR. FLEISCHNER: That's correct.

13 THE COURT: Okay. So it really has those two  
14 parts.

15 MR. FLEISCHNER: It does.

16 THE COURT: On one hand it narrows the claims  
17 that you can make, but it means you still have to prove  
18 a violation of a federal right and not just a breach of  
19 the contract.

20 MR. FLEISCHNER: That's correct, and that's  
21 the intent of this paragraph.

22 And then, at that point, the Court could enter  
23 relief, that would be prospective relief, and you would  
24 have to make a need, narrowness, intrusiveness finding  
25 that the relieve met those criteria.

1 THE COURT: And is that the defendants'  
2 understanding, too?

3 MR. SALTZMAN: Yes, your Honor.

4 THE COURT: Okay.

5 MR. FLEISCHNER: So with that understanding,  
6 your Honor, I think that your description is what the  
7 contract, the settlement agreement was intended to  
8 achieve was entirely correct and it's our  
9 understanding. In other words, we would have to show --  
10 if the case -- we would have to go through the dispute  
11 resolution process, if that failed, we would have to  
12 come back to court, the case would have to be  
13 reactivated or reopened at least on -- and only on the  
14 issues in which we have raised compliance issues, we  
15 would have to show first noncompliance and then, at the  
16 same time, that that was a violation -- that the  
17 noncompliance was a violation of the federal law before  
18 you could enter relief and you could only enter relief  
19 that was -- that met the federal need and was narrowly,  
20 um -- was narrowly tailored and least intrusive on the  
21 Department. So we agree with that.

22 I think your first question, if I understood it,  
23 was "What authority do you have to approve the  
24 settlement?" and you referred to the **Aronov** case.

25 THE COURT: Actually I think I had one before

1 that you address in your papers. But if I approved the  
2 settlement, am I ordering any relief?

3 MR. FLEISCHNER: In our view you are not  
4 ordering any relief by approving this settlement.

5 THE COURT: Because?

6 MR. FLEISCHNER: Because there is no order --  
7 there is no provision in the settlement, um, that is  
8 injunctive in nature or that can be enforced by  
9 contempt, absent returning and going through the process  
10 which we just described.

11 THE COURT: So does that mean there's no  
12 prospective relief or does that mean there's no relief  
13 at all in this circular setting?

14 MR. FLEISCHNER: In the circular wording and  
15 the way that we read the statute - I'm sorry, in the way  
16 we read the cases which are consistent with our  
17 position, um, there is no relief, there is a consent  
18 decree and the consent decree is a method or a means of  
19 obtaining relief which will come later. I mean, it's  
20 not a consent decree. Excuse me.

21 THE COURT: Yes.

22 MR. FLEISCHNER: That was not a Freudian slip,  
23 um, it's a settlement agreement. And the settlement  
24 agreement is a means of obtaining relief and to the  
25 extent that relief is ever obtained, it's obtained later

1 and only after the need, narrowness, intrusiveness  
2 findings. You are not ordering any relief in this -- if  
3 you approve the settlement agreement.

4 THE COURT: And if it's just a private  
5 settlement agreement in which I retain jurisdiction,  
6 what is my authority to approve it?

7 MR. FLEISCHNER: I think that the authority is  
8 that -- there are a number of factors.

9 First, is that the parties have bargained that the  
10 agreement is not effective unless you approve it, which  
11 of course doesn't mandate that you approve it, but  
12 that's part of our bargain. Secondly, that this is a  
13 settlement agreement that is in -- that affects public  
14 policy and the public interest. But this is not like  
15 the kind of settlement in a damage case where the  
16 parties might enter into a private settlement agreement  
17 for money, um, where there's no class action involved,  
18 the public interest isn't involved, in this case it is,  
19 and we think the case law that we've cited to you --

20 THE COURT: Well, lets look at that case law.  
21 I may have misunderstood some of it, but I thought the  
22 primary case you were citing for that was a District  
23 Court case from Virginia.

24 (Pause.)

25 THE COURT: Is it addressed on Page 12 of your

1 joint submission where it says: "In the public system  
2 reform litigation" -- it's the first full paragraph, "--  
3 such as this case, it is not unusual for courts to  
4 approve private settlement agreements and, in the  
5 Court's discretion, which will retain limited  
6 jurisdiction. 'Such continuing power may also arise in  
7 the context of orders and decrees issued in  
8 institutional reform litigation, where the public  
9 interest is significantly implicated because such  
10 decrees reach beyond the parties involved directly in  
11 the suit and impact on the public's right to the sound  
12 and efficient operation of its institutions'." This is  
13 a quote from **Perry-Bey**.

14 I thought -- although I may have misread it, that  
15 that case related to retaining jurisdiction and not  
16 proving -- approving settlements?

17 (Pause.)

18 MR. FLEISCHNER: I'm sorry, your Honor?

19 THE COURT: I thought that the case you cited  
20 was dealing with, you know, the fact that a court can  
21 retain jurisdiction, if there's a consent decree, but  
22 also if there's a private settlement. I didn't  
23 understand it, although I may not have studied it  
24 careful enough, to be addressing the question of the  
25 Court's authority to approve a private settlement.

1 MR. FLEISCHNER: We think there are actually  
2 two steps involved. First, is that in order to retain  
3 jurisdiction, under **Kokkonen**, we read **Kokkonen** to  
4 require that you examine -- and actually there's  
5 language in **Aronov**, but to the same point, that the  
6 judge has to do something more than just dismiss the  
7 case or make some sort of a -- some sort of an  
8 administrative finding, that the judge has to have been  
9 involved in the case, have studied it carefully, and we  
10 believe that under **Kokkonen**, in order to retain  
11 jurisdiction, you have to approve the settlement.

12 If this were a class action, which it is not, um,  
13 we could have settled a class action -- were it a class  
14 action, we could settle it by a private settlement  
15 agreement and under Rule 23 you would have had to  
16 approve it, and we think that the same sort of public  
17 interest rules that apply to a Rule 23 approval under a  
18 class action also apply in the case of a private  
19 settlement agreement that affects the public interest.

20 THE COURT: Let's -- I have -- can you point  
21 me to the language in **Kokkonen** that you have in mind?

22 (Pause.)

23 MR. FLEISCHNER: I don't have a copy of  
24 **Kokkonen**, your Honor, sorry, nor do the defendant, I'm  
25 told.

1 THE COURT: Well, I may be able to help you.

2 In fact, do we have a printer here?

3 THE CLERK: I think so, Judge.

4 THE COURT: Okay. Print a couple of copies of  
5 511 U.S. 375.

6 (Prints copies of case.)

7 THE COURT: The language might be -- this  
8 somewhat engaged my attention.

9 "If the parties wish to provide for the Court's  
10 enforcement of a dismissal-producing settlement  
11 agreement, they can do so when the dismissal is pursuant  
12 to Federal Rule of Civil Procedure 41(a)(2), which  
13 specifies that the action shall not be dismissed at the  
14 plaintiff's instant save-upon order of the Court and on  
15 such terms and conditions as the Court deems proper.  
16 The parties' compliance with the terms of the settlement  
17 contract or the Court's retention of jurisdiction over  
18 the settlement contract may, in the Court's discretion,  
19 be one of the terms set forth in the order."

20 So I think -- is that the language you had in  
21 mind?

22 MR. FLEISCHNER: Yes, it is, your Honor. I  
23 think we quoted that, in part, in a quote from **Brass**  
24 **Smith** on Page 12 of our brief, where we started this  
25 discussion. But that is the process and the language --

1           THE COURT: So the idea would be you, in  
2 effect, want to dismiss this case, although it's only  
3 going to be administratively closed, but that's the  
4 functional equivalent of a dismissal. I have the  
5 authority to impose conditions. And, at your request I  
6 should say "I'm not going to do this unless I'm  
7 satisfied it's fair. I have to make sure that the  
8 plaintiffs haven't sold out the prisoners they  
9 represent."

10           MR. FLEISCHNER: That's correct. And that by  
11 your approval you can retain jurisdiction under the  
12 terms we've just discussed and we can enforce it under  
13 the terms of the settlement agreement. We think that  
14 that's -- that's what we understand the **Kokkonen** process  
15 to be.

16           THE COURT: All right. And do you think  
17 there's something in **Aronov** that supports that, too?

18           MR. FLEISCHNER: Well, in **Aronov**, as the Court  
19 noted a few minutes ago, the **Aronov** case is a fees case  
20 and it had to do with a prevailing party and in that  
21 case there was an agreement, I think, to remand the  
22 immigration status of the plaintiff to the immigration  
23 agency. And, um, it was Judge Gertner who just signed  
24 that agreement, and I don't know whether she approved it  
25 or anything in that language, with the First Circuit.

1 And then the plaintiff came back for fees and the First  
2 Circuit, which the Court ordered -- the Court of Appeals  
3 said that wasn't enough involvement by the Court. The  
4 Court didn't play any part in the negotiation of the  
5 settlement, it didn't have a hearing on it, other than  
6 just to be told what it was, it wasn't at all involved,  
7 and therefore, um, the immigrant or the person subject  
8 to the immigration proceeding was not a prevailing party  
9 for purposes of the attorney fees.

10 It's not directly on point, but there's some of  
11 the same language, at least about the Court's need to --  
12 at least for fees, need to do some inquiry into the  
13 settlement and to have been involved in some way, which  
14 we think this court has very clearly been.

15 THE COURT: That's true.

16 (Laughter.)

17 THE COURT: And then how should I analyze the  
18 request to approve the fees, as part of the overall  
19 fairness of the settlement, I suppose?

20 MR. FLEISCHNER: That would be our position.  
21 That we've given you in, I think, our first  
22 submission -- oh, perhaps the second -- well, the first  
23 supplemental submission, um, in response to your  
24 question about the fees, um, we gave you a certain  
25 amount of -- several pages of information and some

1       briefs -- or some affidavits attesting to the  
2       reasonableness of the fees. This is nowhere near the  
3       kind of inquiry the Court would have to make if this  
4       were a contested fee petition, um, which it is not.

5               We also think that the parties have, um, as part  
6       of its bargain, have agreed to the fees and that the  
7       extent of your inquiry need only be whether they were  
8       reasonable and we think we've shown you that they are.  
9       There is also a case --

10               THE COURT: I'm also interested in whether  
11       they're at arm's length and I'm actually going to have  
12       you address this later. But it wouldn't just be the  
13       amount. But as I understand it -- and you can do it  
14       now, you negotiated the settlement and then you  
15       negotiated the fees afterwards and separately, is that  
16       right?

17               MR. FLEISCHNER: That's correct.

18               THE COURT: Because otherwise, you know, if  
19       they said to you, you know, "We'll give you x dollars if  
20       you sell out your clients," um, the amount of the fees  
21       might be a fraction of the time you've invested, but it  
22       still wouldn't be reasonable.

23               MR. FLEISCHNER: Yeah. But the fees -- as you  
24       know, that the fees were negotiated after the substance  
25       -- the amount of the fees negotiated after the substance

1 of that settlement agreement was fully negotiated.

2 THE COURT: And what do the defendants say  
3 with regard to the series of questions I've asked?

4 MR. SALTZMAN: We're certainly in agreement  
5 with the plaintiffs in the characterization of the  
6 decree as a private settlement and it certainly has  
7 public importance and interest.

8 Now, in thinking about it, I think what we're  
9 asking the court to do, when we ask the Court to approve  
10 it, is really to approve the process, to approve the  
11 blueprint, and we have set out a blueprint and a road  
12 map of how the parties are going to proceed privately  
13 from this point on. We think it's reasonable. We think  
14 it's consistent with the intent of the PLRA. And we  
15 also built in, um -- and, you know, a process in the  
16 event that there's a bump down the road of  
17 constitutional significance and the parties need to  
18 return to court. But, to me, approval of the settlement  
19 agreement is really approval of the process that the  
20 parties have endeavored to engage in together, your  
21 Honor.

22 THE COURT: You mean, to establish for the  
23 future?

24 MR. SALTZMAN: Yes, your Honor.

25 THE COURT: And is it the Department's

1 position essentially that it just commits you to doing  
2 what you're doing anyway but letting them monitor it?

3 MR. SALTZMAN: Much of what's in there we are  
4 doing now, um, there are a few things that are in the  
5 initiation stage, and certainly, um, data collection and  
6 monitoring is very important for the period.

7 THE COURT: But I think the cases that were  
8 cited in the joint submission indicate that monitoring  
9 is not relief, monitoring is a way of getting  
10 information to determine, for the parties, whether  
11 they're going to seek relief and for the Court to  
12 determine later whether relief's appropriate. Do I  
13 understand that argument correctly?

14 MR. SALTZMAN: Yes. In fact, all of the data  
15 collection that's attached as an appendix to the  
16 agreement is specifically related to provisions of the  
17 agreement and calculated to show the plaintiffs whether  
18 or not defendants are doing what they're supposed to be  
19 doing in the agreement. Ideally we will provide this  
20 information and it will show the plaintiff that we are  
21 doing what we are supposed to be doing, that there's no  
22 issue, there's no need to negotiate or to come back to  
23 court. The worst case scenario, it will require that we  
24 sit down and attempt to resolve it before we come back  
25 to court.

1           THE COURT: And what would you say is the  
2 source of my authority -- well, let me ask you this.  
3 The same question.

4           Am I ordering or entering any relief if I approve  
5 this settlement within the meaning of the PLRA?

6           MR. SALTZMAN: No. In my view you'd be  
7 looking at the settlement as a road map and a process  
8 and saying "This is sound." At this point the parties  
9 can administer this settlement as a private contract.  
10 You have the authority to close the case  
11 administratively. The PLRA doesn't impact the authority  
12 of a federal judge to manage a docket. It seems to mesh  
13 nicely with the particular circumstances of the  
14 settlement where no one is asking for orders up front,  
15 no one believes this is really a consent decree. In  
16 fact, looking at how others have grappled with  
17 settlement issues under the PLRA, I think we have  
18 proposed a model that may be helpful to other attorneys  
19 in other jurisdictions trying to resolve institutional  
20 cases of constitutional significance.

21           THE COURT: And what is -- well, what do you  
22 say is the source of my authority to approve the  
23 settlement and, as part of that, approve the attorneys  
24 fees?

25           MR. SALTZMAN: If you look at the substantive

1 provisions as really falling on the side of a private  
2 settlement agreement, um, in the first instance isn't it  
3 up to the parties to negotiate that? And we've done  
4 that.

5 THE COURT: Well, you can negotiate what you  
6 want with regard to your resources, but, for example,  
7 ordinarily parties cannot confer jurisdiction on the  
8 Court by agreement. You know, if the District of  
9 Massachusetts doesn't have jurisdiction, the fact that  
10 all the parties want to litigate here doesn't mean that  
11 I would have the power to do it. So I don't think, at  
12 the moment, the contract enough is sufficient. But the  
13 idea that I treat this as the functional equivalent of a  
14 dismissal and I can condition it, you know, try to make  
15 sure that there was no collusion here, for example, um,  
16 that engages me. Um, but I don't know, I mean, is there  
17 more you'd like to say on that?

18 I mean, and the other thing is that it may be -- I  
19 think something else has to be the source of the  
20 authority, but the fact that in this long and hotly-  
21 contested litigation, you know, the parties have made  
22 that a condition counts for something, if I have the  
23 authority.

24 What's the importance of approval from the  
25 defendants' perspective?

1 MR. SALTZMAN: From the defendants? I think  
2 it's the same from the plaintiffs' perspective, um,  
3 having the judicial imprimatur on this contract that has  
4 great public importance is a good thing. It shows that  
5 this is a matter of great importance. We are  
6 acknowledging it. The plaintiffs acknowledge it. It  
7 raises it above and beyond a mere contract, a mere  
8 settlement. It gives it appropriate stature. And what  
9 we're asking for is for the Court to look at the process  
10 and say that the Court is satisfied that the parties can  
11 manage it under these terms.

12 THE COURT: All right. So let's, you know,  
13 for present purposes, assume -- well, let me ask you  
14 this. And as you wrote the joint submission, did you  
15 come to the -- and you answered the question -- you  
16 know, you answered my questions from last time about the  
17 consent decree first in the memo. But did you come to  
18 the view that this is most appropriately regarded as a  
19 private settlement agreement with retained jurisdiction  
20 or do you think it's better viewed as a consent decree  
21 but not one that's subject to Paragraph (a)?

22 MR. FLEISCHNER: We -- I think we said to you  
23 the last time we were here that -- and, in fact, we said  
24 it in our initial submission, that this was not a  
25 private settlement agreement. The -- I think that your

1 questions helped to focus our thinking about this, um,  
2 and the more that we thought about what a private  
3 settlement agreement is, um, the more it became clear  
4 that even though we had -- that there were parts of the  
5 usual private settlement agreement process that we  
6 wanted to avoid, particularly enforcement in the state  
7 court through specific performance, we had, in fact,  
8 negotiated something that looks like a private  
9 settlement agreement.

10 THE COURT: And that's about -- is that the  
11 defendants' view at the moment, too?

12 MR. SALTZMAN: Well, our thinking has evolved  
13 together on this, your Honor.

14 THE COURT: Because -- I mean, one of the  
15 things I think none of us focused on before is, you  
16 know, the idea that retaining jurisdiction and even some  
17 monitoring is not relief and, um -- and, you know, as I  
18 pointed out, under **Aronov**, they say, for the purposes of  
19 fees, ordinarily, um, you know, approval -- you know, a  
20 private settlement agreement doesn't require approval.  
21 But that doesn't communicate to me that it never can.  
22 And there are some other cases that -- also fee cases  
23 that may weigh -- you know, could complicate this if you  
24 just took the language and mechanically applied it.

25 But I think you've got a private settlement, that

1 it's analogous to a motion to dismiss, but because of  
2 the public interest that's implicated, I can require  
3 that that be conditional. I ought to look at Rule 41.  
4 I really haven't, but -- and it makes sense because it  
5 is analogous to a class action, there's an institutional  
6 representative. But I should satisfy myself that, you  
7 know, I'm doing this hypothetically and hyperbolically,  
8 you know, that you haven't agreed on the settlement so  
9 you could get some attorneys fees and abandon the poor  
10 prisoners.

11 Okay. So, you know, assume you've persuaded me --  
12 although until I write it down, I don't think this is  
13 going to be an order, um, but that this is a private  
14 settlement, I have the authority to approve it, I should  
15 exercise that authority to consider the merits,  
16 including reasonable attorneys fees, so why is it fair,  
17 reasonable and not unlawful?

18 MR. FLEISCHNER: On the attorneys fees, your  
19 Honor?

20 THE COURT: No, on the whole thing.

21 MR. FLEISCHNER: Oh, on the whole thing.

22 THE COURT: Remind me.

23 MR. FLEISCHNER: Why is it fair and  
24 reasonable?

25 THE COURT: So, yeah, I've read all of this

1 closely at different times and today I've sort of  
2 focused on the legal issues. So now we're going to get  
3 more global.

4 MR. FLEISCHNER: Okay. We believe that the  
5 agreement -- and I think the defendants share this  
6 belief, is fair and reasonable for a number of reasons.  
7 The first is that it settles and resolves the issues  
8 raised in the complaint. And this case is five years  
9 old this month, I believe. So those issues, the  
10 constitutional and statutory issues are resolved by this  
11 settlement.

12 The resolution itself is reasonable.

13 THE COURT: I don't know that it resolves the  
14 constitutional and statutory issues, but it moots them  
15 for the moment.

16 MR. FLEISCHNER: It resolves the litigation  
17 for the moment. And it's reasonable because it  
18 establishes, through processes that the Department, as  
19 Mr. Saltzman has already described, has either begun,  
20 has in process, or is beginning, um, to provide  
21 alternatives to long-term segregation for individuals  
22 with serious mental illness in the Department of  
23 Correction in a manner that will provide them with  
24 treatment, that will increase the chances of they're  
25 being able to exist in the penal system without

1 difficulties caused by their mental illness, and will  
2 protect the public by increasing the likelihood that  
3 when they're released they will be more able to conform  
4 to what's expected within society.

5 It is narrowly drawn because it meets, um -- it at  
6 least addresses the issues raised in the complaint  
7 through the establishment of units -- of specialized  
8 treatment units that are highly secure so they meet the  
9 needs of the Department of Correction and of the  
10 prisoners and provide a needed security and yet provide  
11 a therapeutic environment which will work with their  
12 mental illness and help them improve their conditions  
13 and improve their conditions in the Department.

14 It is reasonable because it is, um, within the  
15 context of a prison setting. These kinds of units are  
16 now recognized in many jurisdictions and in some cases  
17 as viable, workable alternatives to long-term  
18 segregation. It's reasonable and fair because it allows  
19 the prisoners to not be in their cells -- these  
20 particular prisoners not to be in their cells 23 hours a  
21 day, um, but they have less time in their cell and more  
22 time in counseling programs in a way that does not  
23 extend or overburden the Department of Correction and  
24 does not involve the Court in the administration of the  
25 programs that have been established.

1 THE COURT: And why are the fees reasonable?  
2 At the moment are they a matter of public record? Maybe  
3 not.

4 MR. FLEISCHNER: It is public record that  
5 there is an agreement on fees because that's in the  
6 motion that we filed originally in the support of the  
7 agreement. The figure is only in the agreement itself,  
8 which is still under seal. So the figure of \$1.25  
9 million is not in the public domain.

10 THE COURT: It is now.

11 MR. FLEISCHNER: I guess it is.

12 (Laughter.)

13 THE COURT: Why is that reasonable? And I  
14 would like it to be. You know I had concerns about  
15 sealing the settlement agreement even though you talked  
16 a lot about it, um, in your public submission and then I  
17 kept it under seal because I had these legal questions  
18 about whether I would approve the settlement, as much as  
19 I commend it, whether the law, you know, how the law  
20 operated here, so.

21 MR. FLEISCHNER: The fees, we believe, are  
22 reasonable. Within the case law in this circuit, um,  
23 they're very reasonable. The -- for a number of  
24 reasons. The lodestar figure, which we gave to the  
25 Department in the course of negotiation, was

1 considerably higher than the actual fee we agreed on.  
2 The lodestar was arrived at through careful review of  
3 contemporaneous time records, including reductions for,  
4 um, duplication, including reductions for travel time,  
5 including the elimination of time for a number of  
6 attorneys who worked on the case for the plaintiffs and  
7 some support people and paralegals at the private  
8 firms.

9 The hourly rate charged by or asked for by the  
10 private firms was less than -- less than their usual  
11 hourly rate as an indication -- in the case called **Rosey**  
12 **D vs. Patrick**, that there isn't necessarily what's known  
13 as a "white-hat discount" for public interests or for  
14 private lawyers doing this kind of work, but the private  
15 firms have, in fact, taken away that discount. And even  
16 with that, um, we negotiated a fee agreement was  
17 considerably under our lodestar.

18 In addition, since the agreement, as the Court  
19 knows, there's been a considerable amount of time in  
20 filing the -- in responding to the legitimate and  
21 necessary questions of the Court and the fee for it does  
22 not reflect that time at all and we -- we won't be  
23 seeking that.

24 THE COURT: Okay.

25 MR. FLEISCHNER: And so far there's no fees

1 for monitoring.

2 THE COURT: So far there's no what?

3 MR. FLEISCHNER: We also -- the plaintiff is  
4 also paying the monitor, so the fees will be used in  
5 part to pay the cost of our designated expert who will  
6 be monitoring the case over the next three years. It's  
7 not unusual in these kinds of settlements for the  
8 defendants to pay the cost of the monitoring, but we'll  
9 be applying those fees to them.

10 Also, as the Court knows, three of the  
11 organizations here are public interest organizations,  
12 the fees will be -- these fees do not accrue to the  
13 individual attorneys, but rather to the organizations  
14 and will be used to further the mission of the  
15 Disability Law Center, the Center for Public  
16 Representation, and Prisoners' Legal Services.

17 THE COURT: And there's a process by which  
18 these fees -- just to clarify it again, one, the fees  
19 were not negotiated until the other elements of the  
20 settlement agreement were --

21 MR. FLEISCHNER: That's correct.

22 THE COURT: And, two, it appeared from the  
23 submission that there was some real negotiation with the  
24 defendants about the amount of the fees. Is that  
25 right?

1 MR. FLEISCHNER: There was. This entire --

2 THE COURT: Didn't you agree to less than you  
3 originally asked for?

4 MR. FLEISCHNER: We agreed to considerably  
5 less than we asked for. Significantly less. But we  
6 think the figure is fair and we're anxious to settle  
7 this case.

8 THE COURT: All right. And how about the  
9 Commonwealth's perspective, the defendants' perspective,  
10 why is this agreement reasonable, fair and not  
11 unlawful?

12 MR. SALTZMAN: Well, we agree with everything  
13 that Mr. Fleischner said about the content of the  
14 agreement and the nature of the agreement, but what I  
15 would add to it is that both sides have had the  
16 opportunity to see these initiatives in effect, see  
17 people who are very sick getting well, um, and actually  
18 test out what we're doing, and we continue to do this.  
19 And we are very, very proud of these initiatives and the  
20 impact they're having on individuals with very serious  
21 mental illness. We're very pleased with the impact it's  
22 having on the security within the facilities, um, the  
23 daily lives of the people who work there. So that has  
24 to go into the mix here, your Honor.

25 THE COURT: Let me -- okay, go ahead. Go

1 ahead.

2 MR. SALTZMAN: I was going to add a couple of  
3 things about the fees.

4 THE COURT: Please do.

5 MR. SALTZMAN: We also think we reached a fair  
6 and reasonable fee agreement. You know, we recognize  
7 that the case has been going on for several years.  
8 There were two private law firms and three public  
9 nonprofit organizations and people have spent a lot of  
10 time on this. And, you know, taking that all into  
11 account, um, plus what we know they have expended on  
12 their experts, um, we think it's reasonable.

13 We did go through with counsel, as we are obliged  
14 to do, line by line, looked at the billing records, um,  
15 and they've done our offer.

16 We are very pleased with the fact that both  
17 parties will pick up their expert fees going forward.  
18 We think this is a benefit to the Commonwealth having  
19 examined, um, what ongoing costs have been incurred in  
20 settlements in other jurisdictions. So all together we  
21 think, given the nature and breathe of this case, the  
22 fees are very responsible from the Commonwealth's  
23 perspective.

24 THE COURT: And let me ask you this. I'd like  
25 to understand it better. And this is a matter of

1 legitimate public interest.

2 You said you're already seeing benefits from  
3 having implemented these reforms that are now embedded  
4 in the contract, right?

5 MR. SALTZMAN: Yes, your Honor.

6 THE COURT: So -- in fact, I'll stop.  
7 Ms. White can talk to you, if she wants. You can tell  
8 him what you want to tell him.

9 (Pause.)

10 MR. SALTZMAN: Okay. I did want to mention  
11 that, um, we've seen the level of assaultiveness go  
12 down, among this population, the industrial accidents of  
13 officers, and the improvements in the population have  
14 been presented by health services staff and clinicians  
15 at national conferences. So the proof is in the  
16 pudding, your Honor.

17 THE COURT: And how long have you been doing  
18 this?

19 MR. SALTZMAN: Um, things have been  
20 implemented over the period of the litigation. The  
21 secured treatment program at Souza-Baranowski has been  
22 in effect since -- well, at least three years. The  
23 behavior management unit for over a year. The maximum  
24 security residential treatment unit, um, probably over  
25 two years.

1           And it was necessary to do this, um,  
2           sequentially. It is not possible to do everything at  
3           once. And as you do things, it determines what you need  
4           to do next. When we started this, and at the time we  
5           had first broached settlement with the other side, um,  
6           nobody was thinking about mental health classification,  
7           which is one of our initiatives, nobody was thinking  
8           about the conversion of an entire correctional facility  
9           to become a mental health prison. Um, that's not part  
10          of the agreement, but it certainly impacts it. And when  
11          we looked at it, we're looking at improvement of mental  
12          health overall and when you do that it certainly reduces  
13          -- it certainly has an impact on the issues in this  
14          case, which are segregation.

15          We didn't litigate this in a vacuum, we didn't,  
16          um, narrowly improve our system, we did quite a bit,  
17          your Honor, and we're very proud to say that we did it  
18          with diminishing budgetary resources. And we're proud  
19          that we did it with the full support of the  
20          administration, the Executive Office of Safety and  
21          Security, the Governor's Office, um, and the Executive  
22          Office of Administrative & Finance. So we've come a  
23          long way and we're very proud of it.

24                 MR. FLEISCHNER: Your Honor, may I make just  
25          one more point on the fees, which I neglected to make?

1 And that is on the reasonableness. The agreement on the  
2 fees also includes our costs. So not all of that number  
3 is going to the attorneys or the organizations. We had  
4 three experts in this case, we did 45 days of tours, we  
5 paid for dozens of depositions, um, we have travel  
6 costs, all of which, if this had gone to trial and we  
7 had been the prevailing party, we would have been  
8 entitled to have reimbursed even the experts fees under  
9 the ADA.

10 THE COURT: Well, let me say the following. I  
11 regard this case as very important. And you made your  
12 filings last Friday and I rearranged my schedule so I  
13 can see you today, um, and I hoped I was going to write  
14 something quite quickly, including over the weekend,  
15 because I'm going to Washington on Monday on judicial  
16 business and I'm going out of the country a week from  
17 tomorrow on judicial business for a while. My law  
18 clerk, who has helped me a lot on this, is away on a  
19 family emergency, so I don't know when I'll see her  
20 again.

21 Is there anything that you would do under the  
22 agreement that's being delayed because you don't have  
23 final approval from me, other than the payment of the  
24 attorneys fees?

25 (Pause.)

1 MR. SALTZMAN: We need to post some new  
2 positions, we need funding for the positions, the  
3 funding is certainly contingent upon being able to  
4 settle the case. Um, we need to move forward and having  
5 the settlement approved would make it easier for us,  
6 your Honor.

7 THE COURT: Because --

8 MR. FLEISCHNER: Your Honor, I have a  
9 suggestion and this might be helpful. If this were a  
10 class action, when the settlement was filed, the Court  
11 would have to make a determination of whether to give  
12 preliminary approval to the class action settlement and  
13 then would approve it afterwards, perhaps a preliminary  
14 approval. And I don't if that would be enough for the  
15 Department. But it might be something that you can do  
16 to --

17 THE COURT: No, I think -- I mean, I intend to  
18 give this high priority and I actually had hoped to have  
19 it done by the end of next week. I -- you know, as  
20 Mr. Saltzman said, the way you've described it, I hope  
21 what you've done will become a national monument. You  
22 know, it's just -- you know, the way you've described  
23 this process, and I've observed it or I did observe it  
24 for a period of time before it went to the magistrate  
25 judge when the original efforts to settle, arduous

1 efforts to settle fell short, um, you know, have been  
2 impressive. They've manifested a shared concern about a  
3 very serious problem, problems that are, in some  
4 respects, issues of life and death.

5 It does have its legal complications and I'd like  
6 to write something -- I would like to write something  
7 that makes clear what the legal framework for doing this  
8 is.

9 (Pause.)

10 THE COURT: I guess I'd say the following, if  
11 it's of any help to you. And this is not final. I'll  
12 have to write it and make sure it all connects and I'll  
13 have to issue a written order.

14 But my present intention is to regard this as a  
15 private settlement agreement in which the Court retains  
16 jurisdiction. Recognize that the remedy will be the  
17 reopening of the case, which contributes to the  
18 conclusion that it is a private settlement agreement.  
19 Note that I'm not -- I have not been asked to find and  
20 I'm not finding that there has been any violation of a  
21 federal right nor am I ordering any prospective relief,  
22 and by approving the settlement, in my present  
23 conception, I'm not entering any relief at all. I'm  
24 essentially staying the litigation so the parties can  
25 perform their agreement and reopen it, the litigation,

1 if there's an alleged breach by the defendants.

2 Since I'm not granting or approving any  
3 prospective relief, the requirements of Section  
4 3626(a)(1) do not apply. Therefore it's not necessary  
5 or appropriate for me to find that the relief being  
6 granted is narrowly tailored to only cure the violation  
7 of a federal right. As I said, I haven't been asked to  
8 make any such finding and I haven't made one.

9 The parties have clarified, in the last several  
10 proceedings, in their submissions and again today, that  
11 if this matter is reopened, in order to grant  
12 prospective relief the Court will have to find not only  
13 a violation of the agreement, but one that violates --  
14 is sufficiently substantial to also violate a federal  
15 right. So I view this, as I think I just said, as a  
16 contract that in effect -- a settlement agreement that  
17 in effect calls for a stay, an administrative closing of  
18 the case and retention of jurisdiction, which the  
19 Supreme Court in **Kokkonen**, among other courts, has  
20 recognized is appropriate.

21 Other arrangements with some features  
22 substantially similar to this have not been regarded as  
23 consent decrees for PLRA purposes, **Stickman**, **Bryant** and  
24 **Davis**, I think, are three such cases. You've heard me  
25 question my authority to approve the settlement of which

1 the attorneys fees are an element, but my present  
2 understanding is that, as **Kokkonen** explained, if I were  
3 being asked to dismiss this case essentially subject to  
4 retaining jurisdiction to reopen it if the settlement  
5 agreement were allegedly violated, um, I could do that  
6 on the terms and conditions I deem proper. This is the  
7 functional equivalent of dismissing the case. And I  
8 think it is proper before I decide to permit this  
9 private settlement agreement and retain jurisdiction --  
10 if I wasn't being asked to retain jurisdiction, then I  
11 think the parties could do whatever they want, but  
12 because I'm being asked to retain jurisdiction, I think  
13 I have the authority and, under the circumstances of  
14 this case, the obligation to decide whether this is a  
15 fair resolution and a lawful resolution. And it's my  
16 view on that -- and it's only the legal questions I have  
17 a question about, but I believe this is fair,  
18 reasonable, and lawful, but certainly fair and  
19 reasonable.

20 This is a settlement that emerged from arm's-  
21 length negotiations over many years, um, between  
22 experienced, capable counsel, committed on both sides,  
23 but not -- but sharing actually some common interests  
24 and common interests in the welfare of inmates who are  
25 seriously mentally ill. And this case could have

1       been -- but the plaintiffs' counsel, as I said, are  
2       experienced, they've been industrious, they've had very  
3       substantial discovery, so they're in a position to make  
4       informed decisions, and they negotiated very hard and  
5       well, particularly in the current fiscal climate, um, to  
6       advance and protect the interests of the inmates they  
7       represent. Certainly the Department of Corrections, um,  
8       energetically and ably represented the interests of the  
9       Commonwealth. Neither side sold out. But they did, as  
10      I say, share a common concern for mentally ill people  
11      who were in prison and, um, for the safety of those that  
12      disturbed people in prison threaten, and it seems to me  
13      that they've come up with a very reasonable result.

14             It does provide for the payment of -- well, what  
15      to any layman or the general public might seem like very  
16      substantial attorneys fees, over a million dollars, but  
17      they're less than the plaintiffs would have been awarded  
18      evidently if they won this case and charged the going  
19      rate for their services. It's even a discount from a  
20      very conservative calculation of what those fees would  
21      be. And the settlement means that the possible exposure  
22      of the Commonwealth to paying much higher attorneys fees  
23      is ended. Now the money can go to taking care of the  
24      inmates and paying for the experts who will monitor  
25      this.

1           In the circumstances, the settlement is fair and  
2 reasonable and at the moment I believe it's also lawful,  
3 and the fees as an element of the settlement are lawful.

4           So it's my intention to write something that both  
5 tests the legal analysis I just did, and memorialize it  
6 and refine it, and enter an order consistent with it.  
7 I'll get it done as soon as I can. It will be my goal  
8 to have that entered, I would say, before April 1st. I  
9 don't always meet my goals, but then I'll get my law  
10 clerk back and be able to do it.

11           Is there anything further in this -- is there  
12 anything further we ought to discuss?

13           MR. FLEISCHNER: I don't think so, your  
14 Honor.

15           Also, I would just like to say that I think a  
16 written opinion on this will be extraordinarily helpful  
17 given the confusion in the body of law.

18           THE COURT: Yeah, I think so.

19           One thing would help is -- and you did it last  
20 time. Will you order the transcript again, please?

21           MR. SALTZMAN: Yes, your Honor.

22           THE COURT: Okay. And I'm going to ask the  
23 able stenographer to prepare the transcript as quickly  
24 as possible. It's going to be about 40 pages. Ideally  
25 before next Wednesday. But he and I will talk about

1 that. He's doing 7 weeks of **DiMasi** still, I think. 7  
2 weeks and several months before that.

3 All right. The Court is in recess.

4 (Ends, 3:00 p.m.)

5

6 C E R T I F I C A T E

7

8 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,  
9 do hereby certify that the foregoing record is a true  
10 and accurate transcription of my stenographic notes,  
11 before Chief Judge Mark L. Wolf, on Friday, March 9,  
12 2012, to the best of my skill and ability.

13

14

15 /s/ Richard H. Romanow 03-12-12

16 \_\_\_\_\_  
RICHARD H. ROMANOW Date

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