IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Amanda D., et al., and others similarly situated, Plaintiffs, v. Margaret W. Hassan, Governor, et al., Defendants.	Civ. No. 1:12-cv-53-SM
United States of America, Plaintiff-Intervenor, v. State of New Hampshire, Defendant.	

PLAINTIFFS' AND UNITED STATES' MEMORANDUM IN SUPPORT OF THE PARTIES' JOINT MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT

I. Introduction

Plaintiffs and the United States submit this memorandum of law in support of the Parties' Joint Motion for Final Approval of Proposed Settlement, filed in accordance with Fed. R. Civ. P. 23(e) and Local Rule 23.1, and urge the Court to grant final approval of the Parties' proposed Settlement Agreement ("Agreement"), attached as Exhibit 1. The Agreement should be approved as it is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2).

The Settlement Agreement was the product of arms-length bargaining, after an extensive period of meaningful discovery, including a detailed and comprehensive expert review of New Hampshire's mental health system, and significant pre-trial litigation on class certification. *City*

P'ship Co. v. Atlantic Acquisition Ltd. P'ship, 100 F.3d 1041, 1043 (1st Cir. 1996) ("When sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement"); *In re Tyco Int'l, Ltd. Multidist. Litig.*, 535 F. Supp. 2d 249, 261 (D.N.H. 2007) (after extensive discovery and motions practice the parties have the most crucial facts making them well-positioned to understand the merits of their case).

With this Agreement, Plaintiffs and the United States have secured substantial system-wide relief for the class, including a significant expansion of critical community mental health services and other system changes designed to improve the quality and delivery of mental health services for class members. The scope and terms of the Agreement are consistent with what Plaintiffs and the United States sought in their Complaints. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 207 (D. Me. 2003) (the fundamental question is how the value of the settlement compares to what plaintiffs might recover after trial, discounted for risk, delay, and expense).

Plaintiffs' Counsel, the Named Plaintiffs, and the United States believe that the Settlement Agreement is in the best interests of the class. Notably, as of the date of this filing, not a single class member has submitted any objections or negative comments with regard to the Agreement. To the contrary, there is widespread support for it.

Plaintiffs and the United States have set forth below the procedural history of the case, the central provisions of the Agreement, and the law governing the Court's consideration of the Agreement, and apply the law to the instant case, showing that approval of the Agreement is warranted. Finally, the Plaintiffs and the United States address the provision in the Agreement that requires modification of the Court's class certification order to include claims brought pursuant to the Nursing Home Reform Act ("NHRA"). As referenced in the Parties' Joint

Motion for Final Approval, this modification is requested in order to bring finality to the systemic claims brought by the class members in this matter.

II. Background

On February 9, 2012, six Named Plaintiffs, on behalf of themselves and all others similarly situated, filed this class action lawsuit alleging that the State's failure to provide necessary community mental health services resulted in the needless institutionalization of adults with serious mental illness ("SMI") at the New Hampshire Hospital ("NHH") and the Glencliff Home ("Glencliff"). (Pls.' Redacted Compl., ECF No. 1). New Hampshire's mental health system was in a state of crisis. Many individuals with SMI experienced prolonged or repeated institutionalization, while others were at serious risk of being institutionalized because they lacked access to needed community services. Plaintiffs asserted claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, and 28 C.F.R pt. 35 (Title II integration mandate, and prohibitions on discrimination on the basis of disability and in methods of administration), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 794 *et seq.*, and the NHRA, 42 U.S.C. §§ 1396r *et seq*. (Pls.' Redacted Compl., ECF No. 1).

On March 27, 2012, the United States moved to intervene in the case as Plaintiff-Intervenor. (U.S. Mot. to Intervene, ECF No. 20). On April 4, 2012, the Court granted the United States' motion (Order Granting U.S. Mot. to Intervene, Apr. 4, 2012); later that day, the United States filed a Complaint-in-Intervention, alleging violations of the ADA and the Rehabilitation Act for the State's failure to provided needed mental health services in the most integrated setting. (U.S. Complaint-in-Intervention, ECF No. 21).

After extensive discovery on class certification, exhaustive briefing by the Parties, and oral argument, the Court certified a class of Plaintiffs on September 17, 2013. (Order on Pls.'

Mot. Class Certification, ECF No. 90). Concurrent with class discovery, the Parties conducted merits discovery, beginning in August 2012 and continuing until November 1, 2013, when the Parties agreed to seek a stay of discovery pending the outcome of negotiations. (J. Mot. for Stay of Proceedings, ECF No. 94).

Throughout the fall of 2013, the Parties engaged in intensive negotiations which ultimately led to the execution of the proposed Agreement, jointly submitted to the Court for preliminary approval on December 19, 2013. (J. Mot. for Prelim. Approval, ECF No. 95). On January 3, 2014, the Court granted preliminary approval of the Agreement, approved the Parties' Notice of Proposed Class Action Settlement, and scheduled a hearing on February 12, 2014, for a determination of whether the Agreement is fair, reasonable, and adequate. (Order Granting J. Mot. for Prelim. Approval of Class Action Settlement, Jan. 3, 2014).

As ordered by the Court, notice of the proposed settlement was posted and distributed beginning on January 6, 2014, with objections or comments to be filed with the Court on or before January 31, 2014. No objections or comments were submitted.

III. Statement of the Agreement

A. Purpose of the Agreement

As set forth in Section IV of the Agreement, the Parties are committed to compliance with the ADA, the Rehabilitation Act, the NHRA, and related laws. According to the United States Department of Justice's regulations, the ADA requires, among other provisions, that, to the extent the State offers services, programs, and activities to qualified individuals with disabilities, such services, programs, and activities will be provided in the most integrated setting appropriate to meet their needs. The Parties recognize and support the purposes of the ADA to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities. Exh. 1, Settlement Agreement ¶¶ IV.A.-C.

Consistent with these objectives, the Agreement requires the State to significantly expand and enhance the community mental health services available to adults within the State who have SMI, and who are institutionalized or at serious risk of institutionalization at NHH or Glencliff. *Id.* at ¶¶ V.B.-G. The Agreement also creates a structured process for individuals at NHH and Glencliff to transition to community living. *Id.* at ¶ VI. The Agreement requires the development of a quality assurance and performance improvement system to ensure that: the services described in the Agreement are properly implemented, system strengths and areas in need of improvement are identified, and measures are taken to ensure individuals have the opportunity to receive services in the most integrated setting. *Id.* at ¶ VII. An independent Expert Reviewer will assess and issue public reports on the State's implementation of and compliance with the Agreement. *Id.* at ¶ VIII.

> The primary beneficiaries of the Agreement are the plaintiff class, defined as:
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> > All persons with serious mental illness who are unnecessarily institutionalized in New Hampshire Hospital or Glencliff or who are at serious risk of unnecessary institutionalization in these facilities. At risk of institutionalization means persons who, within a two year period: (1) had multiple hospitalizations; (2) used crisis or emergency room services for psychiatric reasons; (3) had criminal justice involvement as a result of their mental illness; or (4) were unable to access needed community services.

Order, Sept. 17, 2013, ECF No. 90; *see also* Exh. 1, Settlement Agreement ¶ V.B. (Target Population).[1]

[1] The Target Population in the Agreement, which sets forth a priority system for the allocation of services and supports, also includes "individuals who reside at the Transitional Housing Services programs ("THS") or who have resided at THS within the last two years," as individuals at serious risk of institutionalization. *Id.*at ¶ V.B.3. THS is a transitional housing program for individuals transitioning from NHH back to the community. The THS program is located on the grounds of NHH, and until recently, was operated by NHH.

B. Expanded and Enhanced Community Mental Health Services

Pursuant to the Agreement, the State will expand and improve community mental health services in four key areas: crisis services, Assertive Community Treatment ("ACT"), supported housing, and supported employment. In addition, the State will maintain and improve its system of family and peer support services.

1. Crisis Service System

Mobile crisis services are important clinical interventions that can successfully prevent and reduce institutionalization by providing prompt and effective crisis intervention and treatment in the communities where individuals with SMI reside. These services are designed to divert and provide crisis care to a significant number of persons who otherwise might be admitted to NHH.

Under the Agreement, over the next several years, the State will develop mobile crisis teams in the three most populated regions of the state that will provide community crisis intervention services 24 hours per day, seven days per week. Exh. 1, Settlement Agreement ¶ V.C. Each team will be composed of professionals trained to provide behavioral health emergency services and crisis intervention services. *Id.* Mobile crisis teams will be able to meet people in their homes and other community settings to de-escalate and resolve mental health crises, and reduce or eliminate unnecessary hospitalizations, including emergency room visits, incarceration, or admission to psychiatric facilities or nursing homes. *Id.* Each mobile crisis team will have available to it at least four community crisis apartment beds with sufficient dedicated staff capacity to meet the needs of individuals served at each apartment. *Id.* Individual stays at crisis apartments may last up to seven days. *Id.*

2. Assertive Community Treatment Services

ACT is an evidence-based practice that provides intensive mental health and case management services to individuals with SMI whenever and wherever needed. Each individual is served by a multidisciplinary team. ACT teams offer services that are individualized and client-centered, focusing on the unique strengths, needs, and goals of each person.

Per the Agreement, over the next several years, the State will expand and enhance ACT services so as to ultimately provide team-based interventions to at least 1,500 adults with SMI at any given time. *Id.* at ¶ V.D. ACT will be available in every region of the State and operate 24 hours per day, seven days per week. *Id.* Each ACT team will be staffed with 7-10 professionals and ordinarily will serve no more than 10 people per ACT team staff member. *Id.* Each ACT team will have a psychiatrist, a nurse, a Masters-level clinician (or functional equivalent therapist), a functional support worker, and a peer specialist. *Id.* Each team will also include team members trained in substance abuse services, supported housing, and supported employment. *Id.* The ACT teams will deliver comprehensive, individualized, and flexible services, supports, treatment, and rehabilitation to people onsite in their homes and other community settings. *Id.*

While the State currently provides some ACT services, existing ACT teams often lack features and elements critical to the success of ACT services. Implementation of the Agreement will not only dramatically increase the amount of ACT services, but will also ensure that the critical elements of ACT are provided uniformly throughout the state. *Id.*

3. Supported Housing and Other Community Residential Settings

Supported housing is another evidence-based practice that allows individuals with SMI to live in their own apartments or homes that are integrated in the community. Supported housing

includes flexible support services made available as needed and desired to enable individuals to attain and maintain integrated affordable housing.

Pursuant to the Agreement, over the next few years, the State will expand its supported housing program to provide a minimum of 450 supported housing units, and will make all reasonable efforts to secure funding from the federal Department of Housing and Urban Development for an additional 150 supported housing units. *Id.* at ¶ V.E. In addition, the State will operate a waiting list for supported housing, and whenever there are 25 individuals on the waitlist, each of whom has been on the waitlist for more than two months, it will expand its supported housing program so as to ensure that no one waits longer than six months for supported housing. *Id.* All new supported housing will be integrated and not located in buildings primarily occupied by people with mental illness. *Id.*

In addition, the State will create 16 community residence beds for individuals with SMI who have complex health care needs and cannot cost-effectively be served in supported housing. *Id*. The community home will provide or coordinate the delivery of needed health care and mental health services in a community setting, which may include enhanced family care, supported roommate, or other non-congregate community housing. *Id.* There may be no more than four people in any such setting. *Id.*

4. Supported Employment

Supported employment services provide individualized training, assistance, and ongoing support to obtain and maintain competitive employment. Supported employment services allow individuals with mental illness to work in integrated settings and become productive, gainfully-employed members of the community.

Under the terms of the Agreement, the State will increase its capacity to provide supported employment services to individuals with SMI and ensure that supported employment

services are delivered in accordance with the Dartmouth evidence-based model. *Id.* at ¶ V.F. Consistent with this model, services offered include job development, job customization, co-worker and peer supports, self-employment supports, re-employments supports, time management training, benefits counseling, job coaching, transportation, workplace accommodation, assistive technology assistance, and case management and supervision. *Id.* Over the next few years, the State will increase its penetration rate of adults with SMI receiving supported employment services, which will increase the availability of supported employment to hundreds of individuals at any given time. *Id.*

5. Family and Peer Support Programs

Family and peer support programs offer uniquely effective and creative approaches to supporting individuals with SMI and their families in the community. These programs offer support from those with first-hand experience and skills in addressing the challenges of mental illness. The State's family support program works with families to teach skills and strategies to support their family member's treatment and recovery in the community. The peer support program helps people develop skills in managing symptoms of mental illness, self advocacy, and accessing natural supports.

Under the Agreement, the State will maintain its family support program and provide an enhanced system of peer support services, offered through peer support centers, open at least eight hours per day, five-and-a-half days per week, or an hourly equivalent. *Id.* at ¶ V.G.

C. Structured Transition Planning Process

The Agreement creates a structured process to identify class members' needs and preferences, and to plan for their successful transition from NHH and Glencliff to the community. *Id.* at ¶ VI. The planning process will be person-centered, promoting individuals' freedom of choice and self-determination. *Id.* Written transition plans will detail the services and

supports necessary for each person's move to the community, and identify the organizations responsible for providing their services and supports. *Id.* The written plans will also identify barriers to discharge, if any, and how to overcome them, and develop a post-transition monitoring schedule to ensure individual needs are met. *Id.*

The Agreement also includes a requirement that any individual referred to Glencliff will be reviewed pursuant to Pre-Admission Screening and Resident Review (PASRR) for a determination as to whether their needs could be met in the community with adequate services and supports. For those who could be served in the community, the State will refer them to community providers for the development of community options. *Id.* at ¶ VI.A.10. In addition, the State will make all reasonable efforts to avoid placing individuals in nursing homes or other institutional settings. *Id.* at ¶ VI.A.4.

D. Quality Assurance and Improvement

The State will implement a quality assurance and performance improvement system to ensure that the required community services: (1) are offered in accordance with the terms of the Agreement; (2) are sufficient to provide reasonable opportunities to help individuals achieve increased independence, gain greater integration into the community, obtain and maintain stable housing, and avoid harms; and (3) decrease the incidence of hospital contacts and institutionalization. *Id.* at ¶ VII. A central feature of this quality assurance system will be annual Quality Service Reviews ("QSR") through which the State will collect and analyze data on the delivery of services to individual class members and the outcomes of that service provision. *Id.* The QSR will identify strengths and areas for improvement in the service system, and provide information for comprehensive planning and resource development, including whether additional community-based services are necessary. *Id.* The State will use this information to develop and

implement prompt and effective measures to ensure individuals have the opportunity to receive services in the most integrated setting. *Id.*

E. Independent Expert Reviewer

Pursuant to the Agreement, the Parties will jointly identify an Expert Reviewer. *Id.* at ¶ VIII.A. The Expert Reviewer will have a number of primary functions, which include: (1) assessing and issuing public reports on the State's implementation of and compliance with the terms of the Agreement; and (2) mediating disputes between the Parties. *Id.* at ¶VIII.B. The Expert Reviewer may also provide technical assistance as requested by the State with regard to its implementation of the provisions of the Agreement and its efforts to improve the State's mental health care system. *Id.* The Expert Reviewer may communicate with the Court at the Court's request, either *ex parte* or with any of the Parties or counsel present. *Id.* at ¶ VIII.H.

The Expert Reviewer will independently observe, assess, review, and evaluate the State's implementation of and compliance with the Agreement. *Id.* at ¶¶ VIII.D., F. This evaluation may include: onsite inspection of facilities and programs responsible for delivering services; interviews with staff, class members, guardians, and other stakeholders; and document and record review and other data collection. The Expert Reviewer's evaluations are to be conducted at the individual, program, and system levels, and will include a review of individual transition plans to assess their adequacy, as well as the quality of the services provided. *Id.* at ¶ VIII.

In order to fulfill these responsibilities, the State will provide the Expert Reviewer with a budget of $175,000 per calendar year. With these funds, the Expert Reviewer may retain other specialists and experts to aid in the assessment process, as necessary. *Id.* at ¶ VIII.E.

IV. Argument

A. The Settlement of a Class Action Must Be Fair, Reasonable, and Adequate

Rule 23(e) provides that the "claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). When a proposed settlement would bind class members, "the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In making this determination, the First Circuit requires "a wide-ranging review of the overall reasonableness of the settlement." *In re Tyco*, 535 F. Supp. 2d at 259.

The ultimate determination regarding the reasonableness of a settlement "involves balancing the advantages and disadvantages of the proposed settlement as against the consequences of going to trial or other possible but perhaps unattainable variations on the proffered settlement." *National Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009). A court's discretion, in making this determination, "is restrained by 'the clear policy in favor of encouraging settlements.'" *Durrett v. Housing Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990) (noting that the policy in favor of settlements is especially applicable in broad-based public interest litigation). Further, "[w]hen sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement." *City P'ship*, 100 F.3d at 1043; *see also New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, 602 F. Supp. 2d 277, 280 (D. Mass 2009) (citing *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 72 (D. Mass. 1999)). A court must either approve or reject a settlement in its entirety; it is not authorized to require parties to accept terms other than that which have been negotiated. *Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986) (concluding settlements must be approved or rejected in their entirety).

B. Criteria for Assessing the Reasonableness of a Class Action Settlement

Assessing whether a settlement is fair, reasonable, and adequate requires a "review of the overall reasonableness of the settlement that relies on neither a fixed checklist of factors nor any specific litmus test." *In re Tyco*, 535 F. Supp. 2d at 259; *see also National Ass'n of Chain Drug Stores*, 582 F.3d at 44 (noting that case law has created "laundry lists of factors, most of them intuitively obvious and dependent largely on variables that are hard to quantify"); *In re Lupron*, 228 F.R.D. at 93.

While the First Circuit does not apply a fixed set of factors to assess reasonableness, a number of courts within the Circuit, including this Court, have adopted a set of criteria for evaluating reasonableness.[2] *In re Tyco*, 535 F. Supp. 2d at 259 (Judge Barbadoro); *see also In re Lupron*, 228 F.R.D. at 95-98; *In re Compact Disc*, 216 F.R.D. 197 at 206-07; *New England Carpenters Health Benefits Fund*, 602 F. Supp. 2d at 280-282. This District Court recently applied five criteria: "(1) risk, complexity, expense and duration of the case; (2) comparison of the proposed settlement with the likely result of continued litigation; (3) reaction of the class to the settlement; (4) stage of the litigation and the amount of discovery completed; and (5) quality of counsel and conduct during litigation and settlement negotiations." *In re Tyco*, 535 F. Supp. 2d at 259-260.

One additional factor relevant here is the participation and support of the United States. The United States Department of Justice is the agency directed by Congress to enforce the ADA's integration mandate. Specifically, the United States is charged with ensuring that laws are enforced to vindicate the right of individuals with disabilities to live lives in integrated

[2] The criteria for evaluating reasonableness utilized by courts in the First Circuit have been derived from a broader list of nine factors outlined by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).

settings pursuant to the ADA, and to enable them to interact with non-disabled persons to the fullest extent possible. As a result, the United States' active participation in negotiating the terms of this Agreement, which provides systemwide relief, is a strong indication that the settlement is fair, reasonable, and adequate to resolve the legal clams of the plaintiff class. *United States v. City of Miami*, 614 F.2d 1322, 1332 (5th Cir. 1980) *on reh'g*, 664 F.2d 435 (5th Cir. 1981); *Ayers v. Thompson*, 358 F.3d 356, 374 (5th Cir. 2004); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).

C. The Settlement in this Case Is Fair, Reasonable, and Adequate

Application of the five criteria for assessing whether a settlement is fair, reasonable, and adequate to the facts of this case clearly demonstrate that the Court should approve the Agreement.

1. Risk, Complexity, Expense, and Duration of the Case

The reasonableness of a settlement "ultimately depend[s] on the strength of the plaintiffs' case and the opposing defenses." *In re Compact Disc*, 216 F.R.D. at 212. In assessing the strength of a case, courts look to the risk, complexity, expense, and duration of the case. *Id.*; *In re Tyco*, 535 F. Supp. 2d at 260; *Giusti-Bravo v. United States Veterans Admin.*, 853 F. Supp. 34, 37 (D.P.R. 1993). Cases can be risky or complex because of the type and number of legal issues presented, or because of the type and amount of discovery that must be obtained and analyzed to prove the claims. With respect to the type and number of legal issues presented, courts have examined the technical difficulty and novelty of the legal issues, as well as the vigor and skill with which defendants respond, including whether defendants advance "every non-frivolous legal argument" in opposing plaintiffs. *In re Tyco*, 535 F. Supp. 2d at 260; *In re Compact Disc*, 216 F.R.D. at 212. The amount of discovery, and the difficulty collecting and analyzing the

discovery, also drives the risk and expense of litigation. *In re Compact Disc*, 216 F.R.D. at 212. The need for and number of experts also creates complexity and risk, including the uncertainty that can result from a "battle of the experts." *In re Tyco*, 535 F. Supp. 2d at 260-261; *see also In re Compact Disc*, 216 F.R.D. at 212. Finally, the duration of the litigation is also considered because it affects the cost of the litigation and because prolonged litigation and possible appeals delay any benefit to the plaintiff class from a favorable decision. *In re Tyco*, 535 F. Supp. 2d at 261.

In this case, the risk, complexity, expense, and duration of the litigation favor a finding of reasonableness. This case is inherently complex, involving multiple class and systemic claims, brought on behalf of thousands of individuals with SMI, located across the state. Within the class are individuals who cycle in and out of hospitals, emergency rooms, jails, and homeless shelters due to a lack of community services. As a result, this case seeks to resolve a number of systemic deficiencies, involving the actions of a wide array of providers, including community mental health centers, private providers, and State- and privately-operated facilities.

Discovery in this case has been daunting and has required protracted negotiation between the Parties on a number of issues. Class discovery alone required the review of hundreds of thousands of pages of documents. Merits discovery, not yet completed at the time settlement was reached, had already resulted in the production of over one million documents. The case required the involvement of multiple experts early in the litigation process. As part of class-based discovery, and in support of class certification, a team of Plaintiffs' experts conducted detailed reviews of individual class members at two institutions, as well as those at risk of institutionalization in the community. Another expert examined the adequacy of available community programs. A number of additional experts had been retained by the United States and would be utilized were the matter to

proceed to trial. Similarly, Defendants employed medical and other professionals in the class discovery process and were expected to engage experts for trial as well. This volume of expert discovery certainly would have increased the complexity of the litigation, as well as the time and costs expended by all of the Parties.

In addition to the litigation's inherent complexity, Defendants vigorously defended this matter. They filed exhaustive opposition papers on every aspect of class certification, as well as a request for an interlocutory appeal on the issue. It is also clear from Defendants' submissions that they intended to assert a robust fundamental alteration defense. This case was, and would have continued to be, hard fought on both sides. Further litigation would be long in duration and accompanied by the inherent risks and delays associated with a trial and appeals. As such, these factors strongly favor a finding of reasonableness.

2. Comparison of the Proposed Settlement with the Likely Result of Continued Litigation

A "fundamental question" in any determination of reasonableness is "how the value of the settlement compares to the relief the plaintiffs might recover after a successful trial and appeal, discounted for risk, delay and expense." *In re Compact Disc*, 216 F.R.D. at 207. In determining reasonableness, however, a court may not resolve unsettled legal questions or decide the merits of the case. *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). When assessing the reasonableness of the relief obtained by a proposed settlement, "it is possible to hypothesize about larger amounts that might have been recovered," but the evaluating court must "'guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution.'" *In re Lupron*, 228 F.R.D. at 97-98 (quoting *In re Gen. Motors Corp.*, 55 F.3d 768, 806 (3d Cir. 1995).

As referenced above in greater detail, the Settlement Agreement provides significant relief, including the substantial expansion and enhancement of community services that Plaintiffs and the United States sought in their Complaints. The State estimates an almost 30 million dollar expansion in services as a result of the Agreement.[3] In addition, the plaintiff class will benefit from other critical, systemwide improvements in the State's mental health system designed to improve the quality and delivery of services to people with SMI. *See supra* § III.B.-D.

While all settlements reflect compromise between the parties, here the value of the settlement to the plaintiff class compares favorably "to the relief the plaintiffs might recover after a successful trial and appeal, discounted for risk, delay and expense." *In re Compact Disc*, 216 F.R.D. at 207. While relief will be implemented over time to address the State's fiscal concerns and to allow adequate time for service development, it is important to emphasize that once approved, implementation of the Agreement will begin promptly and without the delay that would accompany a trial on the merits and potential appeals in this matter. Instead, the class will receive services much sooner with an approved Agreement, than if litigation were to continue.

3. Reaction of the Class to the Settlement Agreement

In reviewing the reasonableness of a settlement, courts look to the reaction of the class. Generally, courts find it persuasive when there are few objections from class members compared to the overall size of the class. *New England Carpenters Health Benefits Fund*, 602 F. Supp. 2d at 282; *In re Lupron*, 228 F.R.D. at 96; *In re Compact Disc*, 216 F.R.D. at 211. This District Court, in addition to considering the number of objectors, also considers the absence of objections from non-class members as persuasive of a positive reaction. *In re Tyco*, 535 F. Supp.

[3] *See* Governor Hassan's Statement on Settlement Agreement in Mental Health Services Lawsuit, Dec. 19, 2013, *available at* http://www.governor.nh.gov/media/news/2013/pr-20131219-mental-health.htm; Office of the Attorney General, Press Release: Settlement Agreement in Mental Health Services Lawsuit, Dec. 19, 2013, *available at* http://www.doj.nh.gov/media-center/press-releases/2013/20131219-mental-health-settlement.htm.

2d at 261. It is notable that no objections have been filed with the Court, nor sent to the Parties. To the contrary, the Agreement has been widely supported by individuals with SMI, family members, guardians, and organizations that support and advocate for individuals with mental illness.

Amanda D., a Named Plaintiff in this case, "fully supports this Agreement and [is] very pleased that the services people need and want will be made available." She is particularly "happy that crisis services will be available to help people stay out of hospital emergency rooms, which are terrible places to be when you are experiencing a mental health crisis." Exh. 2, Aff. of Amanda D. ¶ 7.

Both the Office of Public Guardian ("OPG") and Tri-County Guardianship Services ("Tri-County"), public guardian programs serving three of the Named Plaintiffs and many other individuals with SMI, are in full support of the Agreement. Exh. 3, Aff. of Linda Mallon ¶¶ 5, 8, 9; Exh. 4, Aff. of Jayne McCabe ¶¶ 9, 10. Linda Mallon, Executive Director of OPG, notes that "the terms of this Agreement will significantly enhance New Hampshire's community mental health system, and with it the lives of class members." Exh. 3 ¶ 8. Jayne McCabe, Associate Director of Tri-County, believes the "Agreement will make a real and significant contribution to mending the community mental health system and providing the class members in this action community services to maintain integrated lives in the communities of their choice." Exh. 4 ¶ 9.

New Hampshire's Chapter of the National Alliance on Mental Illness ("NAMI") includes hundreds of families who have first-hand experience with mental illness. Exh. 5, Aff. of Kenneth Norton ¶ 2. The organization is dedicated to supporting and advocating for individuals with mental illness and their families, and has long been involved in advocating for improvements to New Hampshire's mental health system. *Id.* at ¶ 3. After careful review of the Agreement,

NAMI's Board of Directors, composed almost entirely of individuals with mental illness, family members, or leaders in the mental health service delivery system, voted unanimously to support the Agreement. *Id.* at ¶ 5. NAMI notes that all of the services in the Agreement are "critical to promoting recovery and avoiding unnecessary institutionalization" and are "evidenced-based practices that have been proven to be effective." *Id.* at ¶¶ 6, 7. NAMI is also highly supportive of the Agreement because it includes "vitally important provisions for the retention of an Expert Reviewer." *Id.* at ¶ 7.

The Agreement is also supported by individuals with professional expertise and longstanding affiliation with and knowledge of New Hampshire's mental health system, who have recognized the significant value of the specific services that will be developed and enhanced through this Agreement. Donald Shumway is a former commissioner of the Department of Health and Human Services and one of the architects of New Hampshire's community mental health system. He has both direct experience with the New Hampshire mental health system and an intimate understanding of what is necessary to restore it to its former status as a model in the nation. In Mr. Shumway's opinion, the Agreement "provides for a much needed expansion of community mental health services," "takes a careful and thoughtful approach to transition planning," and includes the appointment of an Expert Reviewer, which is "important to ensure successful implementation of the Agreement." Exh. 6, Aff. of Shumway ¶¶ 7, 9, 10. Mr. Shumway "strongly" supports the Agreement and believes it will significantly benefit the class. *Id.* at ¶¶ 7, 11.

Dr. Robert Drake is a nationally-acclaimed psychiatrist, the director of the Dartmouth Psychiatric Research Center, director and vice-chair of research at Dartmouth Medical School, and the author of best-practice standards for some of the most effective mental health

interventions, including ACT and supported employment. Dr. Drake notes that the services in the Agreement have been proven effective for meeting the needs of individuals with SMI and will significantly improve the quality of life for individuals in the class. Exh. 7, Aff. of Drake ¶ 3. Dr. Drake also "strongly" supports the Agreement. *Id.* at ¶ 4.

Given the absence of individual or organizational objectors, and the wide-ranging support for the Agreement among class members, family members, and mental health professionals, analysis of this factor weighs heavily in favor of the Court finding that the Agreement is fair, reasonable, and adequate.

4. Stage of the Litigation and the Amount of Discovery Completed

The stage of the litigation and the amount of discovery completed indicate whether there is enough information to assess the adequacy of the agreement. *Giusti-Bravo*, 853 F. Supp. at 38; *see also In re Compact Disc*, 216 F.R.D. at 211. Engaging in extensive discovery and motions practice before settlement helps ensure that the parties "have most of the crucial facts in their possession, making them well-positioned to understand the merits of their case." *In re Tyco*, 535 F. Supp. 2d at 261; *In re Compact Disc*, 216 F.R.D. at 211. Courts have taken note when the plaintiffs have been "extremely diligent in conducting discovery." *Giusti-Bravo*, 853 F. Supp. at 38.

The meaningful discovery conducted in this case and the considerable motions practice have enabled Plaintiffs' counsel and the United States to reliably assess the merits of the case and to negotiate an Agreement that is fair, reasonable, and adequate. Even before formal discovery began in this case, Plaintiffs and the United States had each independently conducted investigations of New Hampshire's mental health system. During the course of discovery, the Parties exchanged over 200 requests for production and over one million documents. In addition

to document discovery, Plaintiffs conducted in-depth expert reviews of class members' needs and of the State mental health system. During this review, six experts met with class members, their families and guardians, mental health professionals, and individuals involved in the systemwide administration of mental health services.

Considering the Plaintiffs' and United States' investigations, the volume of document and expert discovery, and the extent of motions practice in this matter, the Parties are in a strong position to assess the adequacy of the Agreement.

5. Quality of Counsel and Conduct During Litigation and Settlement Negotiations

In reaching a determination on reasonableness, courts need to ensure that the negotiations were "the product of arms-length negotiations." *In re Tyco*, 535 F. Supp. 2d at 261. This District Court, in *Tyco*, emphasized that the advocacy of counsel on both sides was outstanding and that counsel were well prepared. *Id.* In *Compact Disc*, the court stressed the preparedness of counsel, as well as their dedication to their clients' causes in finding the settlement reasonable. 216 F.R.D. at 211-212; *see also Giusti-Bravo*, 853 F. Supp. at 40.

Counsel on both sides of this case are experienced, capable, and diligent. Plaintiffs' counsel includes one private and three public interest law firms, each bringing a distinct area of knowledge and expertise relevant to ensuring that Plaintiffs are well represented. *See* Assented-to Mot. Pls.' Att'ys' Fees and Costs, ECF No. 101, Exh. 2, Aff. of Messer, ECF No. 101-3 ¶ 24. The three public interest firms, the Disabilities Rights Center, the Center for Public Representation, and the Judge David L. Bazelon Center for Mental Health Law, are dedicated exclusively to advocacy on behalf of individuals with disabilities and do so at all levels of the state and federal court systems. *See Id.*, Exh. 2, Aff. of Messer, ECF No. 101-3; *Id.*, Exh. 3, Aff. of Schwartz, ECF No. 101-4; and *Id.*, Exh. 4, Aff. of Burnim, ECF No. 101-5. Devine Millimet

& Branch, one of New Hampshire's premier private law firms, provided the skills of two highly-experienced litigators. *See Id.*, Exh. 5, Aff. of Will, ECF No. 101-6. In addition to Plaintiffs' counsel, the United States was represented in this matter by highly qualified and experienced attorneys from the Special Litigation Section of the Civil Rights Division of the United States Department of Justice.

Similarly, Defendants were represented by capable and experienced counsel from the New Hampshire Attorney General's Office and the private law firm of Sheehan, Phinney, Bass and Green.

Counsel for all Parties have been involved in this matter from the filing of the Plaintiffs' complaint, and have vigorously litigated the case. The Parties spent several months meeting regularly, often twice a week, to reach the proposed Agreement. Plaintiffs' and the United States' considerable experience in mental health and community integration litigation, access to experts, and understanding of mental health services and administration made them uniquely qualified to negotiate the terms of settlement in this matter. Similarly, counsel from the Attorney General's Office, an experienced attorney with the Department of Health and Human Services, and private counsel were well-positioned to negotiate on behalf of the Defendants.

Because this matter has been vigorously litigated and capably negotiated at arm's-length by competent, well-prepared counsel, this Agreement should be approved.

6. Participation of the United States

An additional, important factor in evaluating the reasonableness and adequacy of the proposed Agreement is the involvement of the United States Department of Justice as Plaintiff-Intervenor. The participation of the federal government in crafting this Agreement, through the federal agency empowered to enforce the ADA and other disability laws across the country,

provides further assurance that the Agreement adequately protects the needs and interests of class members. *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) ("The participation of a government agency serves to protect the interests of the class members, particularly absentees, and approval by the agency is an important factor for the court's consideration."); *see also Ayers*, 358 F.3d at 374 n.29 (finding that "counsel for the United States was personally involved in the settlement negotiations gives us an additional reason to conclude that the class was adequately represented"). Courts give weight to a finding of reasonableness when the United States is involved because the United States is "charged with seeing that the laws are enforced," and, therefore, the court "can safely assume that the interests of all affected have been considered." *United States v. City of Miami*, 614 F.2d 1322, 1332 (5th Cir. 1980) *on reh'g*, 664 F.2d 435 (5th Cir. 1981).

In this case, the Department of Justice conducted an investigation on the legal issues raised in the case, intervened at an early stage, was deeply engaged in all aspects of discovery, and participated in all phases of the settlement negotiations. The Department of Justice litigates community integration cases nationally to enforce federal laws protecting the civil rights of individuals with disabilities. This national perspective on the proposed Settlement Agreement further supports a finding that it is fair, reasonable, and adequate.

V. The Class Definition Should Include the Nursing Home Reform Act Claims

In addition to seeking the Court's approval on the Agreement, the Parties' Joint Motion for Final Approval requests that the Court grant their request for a modification to the Court's class certification order of September 17, 2013, to include class claims brought under the NHRA, 42 U.S.C. §§ 1396r *et seq*.

The NHRA claims brought on behalf of class members alleged a failure of the State to develop and implement an adequate Preadmission Screening and Resident Review ("PASRR") process for individuals admitted, or referred for admission, to Glencliff. (Pls.' Redacted Compl., ECF No. 1 ¶ 130). In its class certification order, this Court denied class certification on the Plaintiffs' NHRA claims, finding that the Plaintiffs had not provided sufficient evidence of numerosity. (Order on Pls.' Mot. Class Certification, ECF No. 90 at 24).

The PASRR claims, like the ADA and Rehabilitation Act claims, address the unnecessary segregation of individuals in institutional settings. The Agreement provides relief that is directed toward ending such unnecessary segregation, and includes specific requirements for the State to conduct PASRR reviews for any individual referred to Glencliff. Exh. 1 at ¶ VI.A.10.

The Parties intend that the Agreement will bring finality to the systemic claims brought by the class in this matter. Therefore, the Parties jointly ask the Court to grant their request to modify its class certification order to include the NHRA claims of the class, by approving paragraph six of the proposed Order for Final Approval of Proposed Settlement and Entry of Judgment (ECF No. 100-1), which is attached to the Parties' Joint Motion for Final Approval (ECF No. 100).

VI. Conclusion

With this Agreement, Plaintiffs and the United States have secured significant systemwide relief for the class. The Agreement was reached by the Parties after extensive discovery, pre-trial litigation, and arms-length bargaining. Analysis of the legal criteria for a determination of the reasonableness of a settlement supports a decision by the Court that the Agreement is fair, reasonable, and adequate, and should be approved.

For the reasons set forth above, Plaintiffs and the United States urge the Court to approve the proposed modification to its order on class certification and grant final approval of the Parties' proposed Settlement Agreement.

Dated: February 7, 2014

FOR THE PLAINTIFFS:

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically and served on all Parties of record by operation of the Court's Electronic Case Filing system.

February 7, 2014 /s/ Amy Messer