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14
15 UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO/OAKLAND DIVISION

17 DAVID OSTER, *et al.*,
18
19 Plaintiffs

19 v.

20 WILL LIGHTBOURNE, Director of the
21 California Department of Social Services;
22 TOBY DOUGLAS, Director of the California
23 Department of Health Care Services;
24 CALIFORNIA DEPARTMENT OF HEALTH
25 CARE SERVICES; and CALIFORNIA
26 DEPARTMENT OF SOCIAL SERVICES,
27
28 Defendants

) Case No.: CV 09-04668 CW

) **CLASS ACTION**

) **DECLARATION OF MELINDA BIRD IN**
) **SUPPORT OF PRELIMINARY**
) **APPROVAL OF SETTLEMENT**
) **AGREEMENT**

) **Hearing Date:**
) **Time:**
) **Judge:** Hon. Claudia Wilken
) **Address:** 1301 Clay Street
) Oakland, CA 94102
) **Courtroom:** 2, 4th Floor

1 **DECLARATION OF MELINDA BIRD**

2 I, Melinda Bird declare as follows:

3 1. If called as a witness in this matter, I could and would competently testify to the
4 following matters, which I know of my personal knowledge.

5 2. I am a member of the Bar of the State of California, and am one of the attorneys
6 representing the class of Plaintiff IHSS recipients in *David Oster, et al. v. Will Lightbourne, et al.*,
7 Case No. CV 09-04668 CW.

8 3. The original, executed Settlement Agreement between Plaintiffs and Defendants is
9 submitted herewith as Attachment 1 to this Declaration. The settlement agreement contains five
10 exhibits. Exhibit C to the Agreement is the proposed combined plan for class notice in Oster and
11 Dominguez. Exhibit D to the Agreement is the proposed combined Class Notice in Oster and
12 Dominquez.

13 **EXPERIENCE AND QUALIFICATIONS**

14 1. Disability Rights California (formerly called Protection & Advocacy, Inc. or PAI) is a
15 private, nonprofit corporation established in 1978 as California's independent, federally mandated
16 system to advocate for the legal, civil and service rights of people with disabilities throughout the
17 state. *See* 42 U.S.C. §§ 10801 *et seq.*, 15001 *et seq.*; 29 U.S.C. § 794e; Cal. Welf. & Inst. Code §
18 4900 *et seq.* I am the Co-Litigation Director for Disability Rights California and have been the
19 primary attorney working on this case since it was filed.

20 2. I have been licensed to practice law since 1980. I have worked on many individual
21 and systemic cases involving the Americans with Disabilities Act and rights to Medicaid services.
22 I have represented individuals in class action litigation involving health care and public benefits
23 for more than two decades.

24 3. Attorneys with Disability Rights California ("DRC") advocate for people with
25 disabilities, including representation in individual and class litigation in federal and state court, on
26 a wide variety of issues, including access to long-term care services and government benefits,
27 disability-based discrimination, community integration, abuse and neglect, and rights in facilities.
28 Among Disability Rights California's cases over the past several years are the following:

- 1 a. *Esther Darling et al. v. Toby Douglas*, C09-03798 SBA (N.D. Cal.
2 Settlement approved and Judgment entered January 25, 2012). This class
3 action lawsuit on behalf of recipients of Medi-Cal funded Adult Day Health
4 Care services was settled in 2012, preserving the benefit for tens of
5 thousands of Class Members.
- 6 b. *Emily Q. et al. v. Bontá et al.*, No. 98-4181 AHM (AIJx) (C.D. Cal.,
7 Judgment & Permanent Injunction entered May 10, 2001): This class action
8 challenged the Department of Health Services' failure to comply with
9 mandatory Medi-Cal/Medicaid statutes requiring the Department to provide
10 necessary mental health services to children, including Therapeutic
11 Behavioral Services.
- 12 c. *Katie A et al. v. Bontá et al.*, No. CV-02-05662 AHM (SHx)(C.D. Cal.,
13 2002, Settlement reached 2011).This class action resulted in a settlement
14 agreement making two types of mental health services, "Intensive Home-
15 Based Services" and "Intensive Care Coordination," available to certain
16 children under Medi-Cal.
- 17 d. *Chanda Smith v. Los Angeles Unified School District*, No. CV-93-7044
18 RSWL (C.D. Cal., Consent Decree approved April 15, 1996): This class
19 action under federal and state special education law and Section 504
20 resulted in the development of 31 plans to bring the school district into
21 compliance with federal and state special education law.

22 4. In addition to Disability Rights California, Class counsel includes two non-profit
23 law firms with national scope and reputation: the National Senior Citizens Law center and the
24 National Health Law Program. These two firms have access to unparalleled national resources
25 and expertise in the area of Medicaid and long-term services and supports such as IHSS. Class
26 Counsel also includes two California based law firms with extensive experience in disability rights
27 matters: Disability Rights Legal Center and the Law Office of Charles Wolfinger. Collectively,
28 our firms possess decades of experience in the prosecution and settlement of class actions, claims

1 under the ADA and the Medicaid Act, and the rights of people who are elderly or disabled. We
2 have a longstanding commitment to protecting the rights of people with disabilities and to
3 ensuring that they are not unnecessarily institutionalized in violation of federal and state anti-
4 discrimination laws.

5 5. On December 1, 2012, Plaintiffs filed a motion for class certification that discussed
6 the qualifications of class counsel in greater depth. Dkt No. 356. While Defendants opposed this
7 motion, they did not dispute that Class counsel were well-qualified. On March 2, 2012, this court
8 ordered that this case proceed as a class action under Fed.R.Civ. Pro. 23(b)(2) and approved
9 Disability Rights California and the other law firms listed above as class counsel. Dkt. No. 505.

10 6. The law firm of Altshuler Berzon LLP represents the six union plaintiffs. The lead
11 Altshuler attorneys - Stephen Berzon, Stacey Leyton and Eve Cervantez – are extremely
12 experienced, and have contributed significantly to relief obtained for the Class and the resolution
13 of this litigation.

14 **THE SETTLEMENT AGREEMENT**

15 7. Counsel for the plaintiffs in this case have litigated vigorously through two motions
16 for preliminary relief, a motion to dismiss and a motion for class certification. However, we are
17 also aware of the risks to the class inherent in continued appeals and trial. The uncertainty about
18 the outcome of the litigation was especially difficult for many class members, who were anxious
19 about the outcome of the pending appeal.

20 8. In May 2012, while appeals from both the 2009 and 2001 cuts were pending in the
21 9th Circuit, the Parties began serious discussions regarding a potential settlement agreement. At
22 the request of the parties, the 9th Circuit ordered both appeals placed in the 9th Circuit mediation
23 program on May 30, 2012. However, settlement negotiations were unsuccessful. The parties
24 notified the 9th Circuit of this development and the appeals were released from the mediation
25 program on June 19, 2012.

26 9. In late February 2013, the parties began a new round of settlement negotiations that
27 were ultimately successful. In addition to numerous telephone calls and email exchanges, the
28 Parties met in person on multiple occasions and exchanged written drafts and proposals.

1 Discussions included direct participation of high-level staff and directors from the DHCS, CDSS,
2 the Department of Finance and other state agencies. Chief Counsel for DHCS and other senior
3 lawyers with other executive agencies participated throughout the settlement negotiations.

4 10. On March 13, the parties signed a term sheet and filed a joint notice to the Ninth
5 Circuit regarding their settlement and seeking a 120 day continuance of the oral argument. This
6 request was granted on March 14, 2013. Based on the term sheet, counsel for the Parties then
7 negotiated the more detailed provisions and attachments to the Settlement Agreement, which was
8 signed on March 27, 2013. Throughout this process, virtually every element and phrase in the
9 agreement has been extensively discussed. The parties considered alternative proposals, consulted
10 clients and knowledgeable associates on a daily basis. Many of these discussions involved the
11 principals directly, that is, state agency directors, union leaders and representatives for IHSS
12 recipients.

13 11. One important element of the settlement for DRC was CDSS' agreement to send a
14 directive to counties about the process by which a recipient requests a reassessment. After the
15 imposition of a 3.6% cut in IHSS hours in 2009, many recipients requested reassessments, based
16 on a change in circumstances. Counties insisted on evidence of a change in medical condition,
17 such as doctor's note or medical certification. Although CDSS agreed that counties could not
18 impose such a limitation, the department was not willing to instruct counties to discontinue this
19 practice. Through the Settlement, CDSS has also agreed to remind recipients of their right to a
20 reassessment when issuing the notice of action about the upcoming 8% cut in hours. Both steps
21 will offer an important protection for recipients as they attempt to cope with the 8% and 7%
22 reduction in IHSS hours.

23 12. There was no collusion between the parties or their counsel in these negotiations.
24 Class Plaintiffs have derived no direct benefit from the settlement, as we have waived all claims to
25 fees or costs, despite the many thousands of hours that our firms have collectively invested in this
26 litigation.

27 13. I believe the proposed Settlement Agreement (which is attached hereto as
28 Attachment 1) is fair under the circumstances. The settlement is fair in that both Plaintiffs and

1 Defendants will made compromises and will also derive significant benefit. Plaintiff IHSS
2 recipients will be protected from the deep reductions at issue in this case, and will be subject to an
3 incremental reduction in hours that may well be eliminated within several years. They will benefit
4 from the longer term stability in funding for the IHSS program. In effect, Defendants have agreed
5 to adjure from the ongoing attempts to cut IHSS benefits that have marked the past four years.
6 See, for example, the statements from state officials in their press release announcing the
7 settlement. Attachment 2, Press Release from CDSS and DHCS on March 19, 2013. The
8 prospect of additional revenue and the incremental cut for two years appears likely to resolve
9 Defendant's concern about state budget shortfalls.

10 14. The settlement is also reasonable in that the continuing costs to all parties
11 associated with pursuing the case through the pending appeals and to trial will be saved. All
12 parties will also benefit from the end to uncertainty about the outcome.

13 15. I have personally presented the terms of the settlement agreement to named
14 plaintiffs David Oster, Dottie Jones, Willie Mae Shepherd and Andrea Hylton. A Managing
15 Attorney for Disability Rights California, Maria Iriarte, presented the terms of the settlement
16 agreement to the mother of named Plaintiff L.C., who is a Spanish speaker. None raised
17 objections to the settlement. I have been unable to contact named Plaintiffs Charles Thurman,
18 Helen Polly Stern and the mother of named plaintiff C.R. Their contact phone numbers have
19 been disconnected and letters directed to them have been returned. We are prepared to seek leave
20 of court to dismiss these individuals as class representatives if we are still unable to locate them by
21 the time of the final approval hearing.

22 **CLASS NOTICE AND OUTREACH**

23 16. The parties have prepared a draft Class Notice for approval by the Court. This
24 notice concisely and accurately summarizes the major provisions of the proposed Settlement, and
25 is applicable to class members in both the Oster case and the Dominquez case. Exhibit C to
26 Settlement Agreement. The settlement documents will include a three page class notice and a one
27 page summary that can be used as a flyer or poster suitable for display in a county social services
28 waiting room.

1 17. The Class Notice is written in plain language, understandable by people with a
2 sixth grade education. As measured by the readability scales incorporated in the Windows
3 operating system, the Flesch-Kincaid grade level rating is 6.2, which is the first quarter of sixth
4 grade. After much consultation, my co-counsel and I concluded that attempting to reduce the
5 reading level to a fifth grade reading level would require the elimination of important information
6 which class member must weigh in deciding whether to file an objection.

7 18. The notice and flyer inform IHSS recipients about how to obtain a copy of the
8 entire settlement agreement, including a list of Class counsel

9 19. The one page flyer is in 16 point font and is intended to be handed out at a meeting
10 or posted in a waiting room or office.

11 20. The notice also provides contact information so that class members can contact
12 Class counsel by leaving messages on a toll-free line, by writing a letter or by sending an email.
13 IHSS recipients will be free to ask questions, obtain additional information, and request the notice
14 in accessible formats and additional languages. DRC and other class counsel will be able to
15 respond to inquiries using our own bi-lingual staff and also by using telephone interpretation
16 services. Copies of the full Settlement Agreement and a list of class counsel will be available
17 from county welfare offices, online on the parties' websites, and by requests submitted to class
18 counsel's toll-free number, post-office box or email address.

19 21. Key documents will be available from class counsel's website. DRC's website
20 alone had 330,000 "hits" or visits during the last calendar year. Information about the settlement
21 will be prominently linked on the landing page. In conformance with recommendation from the
22 Federal Judicial Center, DRC's web page for the Oster case also includes Plaintiffs' complaint, the
23 settlement agreement and other key pleadings and rulings.

24 22. We have prepared an exhaustive plan for disseminating the class notice and
25 information about the settlement to class members and those associated with or who act on their
26 behalf. This plan is Exhibit C-3 to the Settlement Agreement. We have listed more than 25 public
27 and non-profit agencies and associations that will distribute the notice to their members and
28 clients. Defendants will assist by helping distribute the notice through local government offices

1 and agencies that typically serve IHSS recipients and with which IHSS recipients have frequent
2 business, such as county welfare offices.

3 23. As soon as the settlement was made public, I and other class counsel contacted
4 more than dozen leaders in the IHSS advocacy and disability rights community to explain the
5 terms of the settlement and to seek support in distributing the class notice. During the week of
6 March 18 to 22, I participated as a guest speaker on three conference calls hosted by different
7 state-wide organizations that requested information about the settlement. The plan for class notice
8 reflects these contacts and the commitments from many organizations to disseminate information
9 about the settlement.

10 24. The parties are prepared to post the class notice on their websites and to begin
11 disseminating the class notice within 24 hours of this Court's preliminary approval of the
12 settlement and class notice plan. As noted above, time is of the essence with this settlement, as it
13 rests on budget solutions that must be implemented by July 1, 2013. It is crucial that the parties
14 secure final approval for the settlement before these budget solutions are enacted. This rapid
15 distribution of the notice means that the four week period for class members to file objections can
16 begin almost immediately.

17 25. We have concluded that individual mailed notice would not be a reasonable means
18 of effectuating class notice in this case. Defendants have represented that printing and mailing
19 notices to approximately 400,000 class members would take an additional 30 days, which would
20 delay the hearing on final approval past June 1, which is the deadline for legislative action.
21 Individual mailed notice will also be costly, and would be likely to exceed \$500,000.

22 26. In my experience, Medi-Cal class actions such as this in which there are no
23 monetary damages and class members cannot opt-out of the class are typically resolved via posted
24 and distributed notice such as we have proposed here. For example, I am counsel in another
25 Medi-Cal class action, *Katie A. v. Bontá*, No. CV-02-05662 AHM (SHx)(C.D. Cal., 2002)
26 (Settlement reached in 2011). *Katie A.* involved the settlement of a (b)(2) class, in which the
27 federal court approved the distribution of class notice through posting at county social services
28

1 offices and through other agencies that worked with class members, rather than through mailed
2 notice.

3 27. DRC is also co-counsel in *Martinez v Astrue*, No. 08-CV-4735 CW (N.D.Cal.), a
4 case involving over 200,000 Social Security recipients denied benefits based on an improper
5 agency rule regarding “fleeing felons.” After the parties reached a settlement in 2009, this Court
6 approved a very effective notice plan involving widespread posting on the websites of many non-
7 profit agencies as well as that of the Social Security Agency itself. *See, e.g.*,

8 <http://www.socialsecurity.gov/martinezsettlement/notice.htm>

9 <http://www.nslc.org/index.php/litigation/economic-security/martinez-v-astrue/>

10 http://www.disabilityrightsca.org/advocacy/Martinez_v_Astrue/index.htm

11 28. In *Martinez v Astrue*, class counsel also conducted extensive outreach, education
12 seminars and presentations to reach class members and their advocates. The notice plan
13 negotiated in this case is similar to that in *Martinez*. We also obtained the assistance of other
14 public interest law projects that were not class counsel in distributing the class notice. This is a
15 common practice in the settlement of class action cases involving government benefits and health
16 care services, and will also be part of the notice plan here. For example, the website of the
17 National Health Law Program includes a news article and posted notice regarding the settlement
18 of another federal class action involving Medicare recipients, in which a federal district court in
19 Vermont approved a similar plan involving notices posted on the websites of non-profit advocacy
20 projects. *See*,

21 http://www.healthlaw.org/index.php?option=com_content&view=article&id=711:jimmo-v-

22 [sebelius-notice-of-settlement-that-will-end-medicare-qimprovement-standardq&catid=37:news-a-](http://www.healthlaw.org/index.php?option=com_content&view=article&id=711:jimmo-v-sebelius-notice-of-settlement-that-will-end-medicare-qimprovement-standardq&catid=37:news-alerts&Itemid=123)
23 [alerts&Itemid=123](http://www.healthlaw.org/index.php?option=com_content&view=article&id=711:jimmo-v-sebelius-notice-of-settlement-that-will-end-medicare-qimprovement-standardq&catid=37:news-alerts&Itemid=123)

24
25 I declare under penalty of perjury that the foregoing is true and correct and that this
26 declaration was signed this 28th day of March, 2013, at Los Angeles County, California.

27
28 By: /s/ Melinda Bird
MELINDA BIRD (SBN 102236)

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Attachments

- 1. Settlement Agreement
 - Exhibit A – Proposed Legislation
 - Exhibit B – Schedule
 - Exhibit C – Proposed Class Notices and Class Notice Plan
 - Exhibit D – Proposed Final Judgment
- 2. Press Release from CDSS and DHCS, March 19, 2013.