

UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF NEW YORK

---

KENNETH CONRAD, et al.,

Plaintiffs,

v.

Case No. 91-CV-846C

CESAR PERALES, in his personal  
capacity, and  
ANTONIA NOVELLO, in her official  
capacity, as Commissioner of the  
New York State Department of Health,

Defendants.

---

**MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT  
AND NOTICE PLAN, AND TO SET SCHEDULE FOR FAIRNESS HEARING,  
PURSUANT TO FRCP RULE 23(e)**

Plaintiffs hereby move this Court for an Order pursuant to Rule 23(e) of the  
Federal Rules of Civil Procedure, providing the following relief:

- (a) Preliminary approval of the settlement agreement;
- (b) Approval of the program for giving notice of the settlement to members of the  
class, as documented in Exhibit H to the settlement agreement and the  
Declaration of Andrew J. Novak, submitted herewith; and
- (c) A schedule for the fairness hearing contemplated by Rule 23(e)(1)(C),  
including a schedule for the submission of any objections to the proposed  
settlement.

Plaintiffs anticipate that defendants will join in the request for the relief sought in  
this motion.

The parties have not yet signed the settlement agreement. We are filing this motion at this time with the expectation that the agreement will be signed in the very near future. We will advise the Court as soon as the agreement has been signed, and ask the Court to award the relief requested herein at that time.

We are supporting this motion at this time with the Declaration of Andrew J. Novak, describing the proposed plan for providing notice of the settlement to potential claimants on the settlement fund. The proposed notices themselves appear as part of Exhibit H to the settlement agreement, which has been previously provided to the Court.

The *Manual for Complex Litigation* provides that the “initial [fairness] evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions or informal presentations by parties.” *Id.* at §21.632.

The informal nature of the initial fairness review is also stressed by Professors Newberg and Conte in their treatise on class actions: “the parties are well advised to seek informally a preliminary court response in a pretrial conference that the proposed settlement is within the range of possible judicial approval.” *4 Newberg and Conte on Class Actions* at §11:25 (4<sup>th</sup> Ed. 2002.)

As the Newberg and Conte treatise shows, the threshold standard for review at the present stage is merely whether “the proposed settlement is *within the range of possible judicial approval.*” *Id.* (emphasis added.)

The parties have already provided the Court with a summary of the proposed settlement, together with a copy of the agreement, during a status conference held on October 23, 2006. Doc. No. 405. As part of this presentation, we advised the Court of

our recommendation that the agreement be approved. We have also provided the Court with additional correspondence detailing some of the features of the agreement.

In light of the informal nature of the present application as documented by the Manual on Complex Litigation and the Newberg and Conte treatise, we stand ready to provide the Court with further particulars regarding the proposed settlement, and the details of the relief sought in this motion, at any time and in any fashion the Court may direct.

Dated: November 7, 2006  
Orchard Park, New York

Respectfully submitted,

s/ Henry W. Killeen, III  
Henry W. Killeen, III  
Attorney for the Plaintiffs  
Killeen & Killeen  
4214 North Buffalo Street  
Orchard Park, New York 14127  
hkilleen@killeenlaw.com

Anthony Szczygiel, of Counsel  
Legal Services for the Disabled,  
Elderly or Disadvantaged of  
Western New York, Inc.  
821 Ellicott Square Building  
295 Main Street  
Buffalo, New York 14203  
szczygie@buffalo.edu

Peter O'Brian Dellinger, of Counsel  
Empire Justice Center  
1 West Main Street, Suite 200  
Rochester, New York 14614  
pdellinger@empirejustice.org