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U.S. DISTRICT COURT  
W.D.N.Y. BUFFALO

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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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.

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**Memorandum and Order**

The parties have jointly moved for the Court's approval of their settlement agreement in this case pursuant to Rule 23. As part of this motion, plaintiffs have also asked the Court to approve the contingent fee arrangement described in record, and to approve a proposed schedule for submission of their motion for reasonable attorneys' fees pursuant to 42 U.S.C. §1988.

For the reasons set forth below, these applications are GRANTED.

**I. Background**

**A. Issues Raised by the Complaint**

This case was originally filed in 1991, making it one of the oldest on this Court's docket. Plaintiffs allege that in consultation with the nursing home industry, the New York State Department of Social Services developed a plan with the ostensible purpose of transferring responsibility for certain nursing home residents covered by the State's Medicaid program to the federal Medicare program. The plan was known as the "Medicare Optimization Plan II" or "MOP II."

Plaintiffs allege that MOP II was illegal. Specifically, plaintiffs allege that MOP II actually authorized the nursing home industry to bill both the Medicare and Medicaid

programs for the same services, in violation of applicable law. In addition, plaintiffs allege that as part of this plan, MOP II authorized the nursing homes to illegally collect Medicaid co-pays from nursing home residents who were eligible for Medicare coverage. Plaintiffs estimate that in 1989 alone, MOP II resulted in improper Medicaid co-pay collections of over \$15 million from more than 12,000 aged and infirm nursing home residents of modest means.

Plaintiffs allege, and this Court has previously found, that the law required the nursing homes to accept Medicare payments, and only Medicare payments, as compensation for the care of these patients. *Conrad v. Perales*, 92 F.Supp. 2d 175, 187 (W.D.N.Y. 2000.) In that decision, this Court found that “plaintiffs had a statutory right not to be charged for the costs of nursing home services that were covered by their Medicare benefits.” *Id.*

Accordingly, the complaint seeks to recover the Medicaid co-pays that plaintiffs allege were collected illegally from the nursing home residents who are members of the class.

#### **B. Procedural History**

This case was certified as a class action in 1993. A review of the Court’s docket and the various pending motions indicates that through 1999, the parties and the Court focused their attention primarily on settlement.

The court resolved cross-motions for summary judgment in March 2000. The Court entered a further order in October 2000, directing that discovery be completed and the case ready for trial by April 2001.

Plaintiffs served discovery requests in January 2001. During the balance of 2001, the Court conducted numerous conferences regarding discovery, and entered nine additional discovery orders. Defendants eventually produced over 100 boxes of documents during this period, and responded to plaintiffs’ document demands, interrogatories and notices to admit with many original, amended and supplemental submissions. Defendants produced additional records on numerous occasions over the

subsequent history of the case.

Beginning in 2002, plaintiffs filed extensive motions dealing with discovery issues and the merits of the case. Defendants opposed these motions, and cross-moved for dismissal of the case or de-certification of the class.

In September 2004, the Court entered an order directing an evidentiary hearing on plaintiffs' request for sanctions. Thereafter, the Court directed the parties to enter into settlement discussions before Magistrate Judge Hugh B. Scott, holding the sanctions hearing in abeyance.

During this period, plaintiffs continued to file additional motion papers, including additional declarations supporting their pending motions, a request for interim attorneys' fees, and a further motion to compel.

After more than two years of effort, the settlement negotiations were fruitful. In November 2006 the parties moved for preliminary approval of the proposed settlement, approval of a notice plan, and scheduling of the fairness hearing mandated by Rule 23. The Court granted this motion in Item 409, scheduling the fairness hearing for December 28, 2006.

Since Item 409 was entered, the parties have implemented the notice plan authorized by that order. As described in the Declaration of Andrew J. Novak (Item 412), plaintiffs' notice expert, notice of the proposed settlement and the fairness hearing was published in 39 daily newspapers across New York State, representing the highest circulation daily newspaper in each county. The notice was also published in 164 community newspapers, the *New York Times*, and *USA Today*.

In addition to notice by publication, notice of the proposed settlement and fairness hearing was also mailed to all individuals whom the plaintiffs had identified as potential claimants.

The notices describe the proposed settlement, advise interested individuals how to obtain additional information, and state that any objections to the proposed settlement (including the application for attorneys' fees described below) had to be filed with the

Clerk by no later than December 22, 2006.

No objections to any aspect of the proposed settlement were filed by the December 22<sup>nd</sup> deadline, and none have come to the Court's attention since that time.

## **II. The Proposed Settlement**

### **A. Terms of the Proposed Settlement Agreement**

Under the proposed Settlement Agreement, the defendants will pay up to \$11 million in refunds to qualified claimants, in addition to reasonable attorneys' fees and costs incurred through February 10, 2006.

Defendants have already deposited the \$11 million with the escrow agent, Citizens Bank, where it will accrue interest, and be available to fund fees and costs associated with the settlement process, before ultimate distribution to qualified claimants.

The procedures for distributing the settlement proceeds are detailed in the record. Briefly, the Agreement calls for preparation of a list of class members and the refunds to which they are entitled. The list is being prepared by Larry Glatz, of the Center for Medicare Advocacy, Inc. All parties accept Mr. Glatz as a Medicare and Medicaid expert. Mr. Glatz is nearing completion of his task.

The class members were aged and infirm nursing home residents during 1989. For this reason, the parties anticipate that virtually all class members are deceased. Identifying and locating the class members' heirs will be a significant focus of settlement administration.

The New York State Department of Health and the City of New York will produce death certificates for the class members identified on Mr. Glatz's Master List.

Complete Claims Solutions, LLC ("CCS"), the Settlement Administrator, will use the data from the death certificates and other sources to locate the heirs. CCS has significant experience in heir location from administering settlements in other class actions.

If there are more claimants than funds available, CCS will propose a *pro rata* distribution. If there are funds available in the account following the determination of the

allowable refunds, these remaining funds will be returned to the defendants.<sup>1</sup>

The Agreement contemplates that CCS will complete this process within three years of the delivery of the death certificates, although this date may be extended by the Court for good cause shown.

Once the Court has approved the distribution plan and the funds have been disbursed, the settlement will be complete and the case will be closed. Until that time, the Court will retain continuing jurisdiction over the case.

**B. Approval of the Settlement Agreement Under Rule 23**

Rule 23 requires the Court to make an independent determination that the proposed Settlement Agreement is reasonable and fair to the interests of the class. The legal standards applicable to this determination are reviewed in Item 409, and will be repeated here only as necessary.

As noted in Item 409, the “overwhelming majority” of class action settlements are approved when the Court is satisfied that the agreement has been reached through arms-length bargaining between competent counsel, particularly where there has been sufficient discovery to insure the negotiations were conducted with an understanding of the facts and law applicable to the case. *4 Newberg and Conte on Class Actions*, §§11.25, 11.42. *Accord, Wal-Mart Stores, Inc. v. Visa USA Inc.*, 396 F.3d 96, 116-21 (2d Cir. 2005).

As noted in Item 409, the Court is satisfied that that the settlement in this case is the product of arms-length negotiations between competent counsel based on sufficient discovery to reflect an understanding of the merits of the case. Accordingly, the settlement is entitled the presumption of fairness described above.

The Court notes further that to date, no class member or potential claimant has filed any opposition to any aspect of the proposed settlement, despite the extensive notice

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<sup>1</sup> Under the Agreement, CCS may add prejudgment interest to the individual claims if necessary to exhaust the settlement amount. With this provision, plaintiffs represent that the Settlement Fund will likely be exhausted even if qualified claimants are found for only 50% of the class members, or even less. Under the circumstances, and based on projections by CCS regarding the heir location process, plaintiffs represent that it is highly unlikely any funds will be available for return to the defendants after the settlement process is complete.

program described above.

Plaintiffs advise that CCS has received a large number of requests for claim forms and/or additional information as a result of the notice program. These requests provide assurance that the terms of the proposed settlement have actually been presented to large numbers of potential claimants. This same assurance is also provided by the individual mailings to potential claimants described above.

The absence of objections from potential claimants, or a small number of objections on a percentage basis, constitutes strong evidence that a proposed settlement is reasonable and fair. *See, e.g., Wal-Mart, supra*, 396 F.3d at 120 (“Indeed, the favorable reaction of the overwhelming majority of class members is perhaps the most significant factor in our [ ] inquiry.”) The present record provides ample support for applying this principle to the settlement before the Court.

A settlement may also be approved if it falls within the range of what the Court finds to be a reasonable disposition, considering the issues raised and the risks and burdens of litigation. *See, generally, Manual for Complex Litigation* §21.62 (4<sup>th</sup> Ed. 2004); *Wal-Mart Stores v. Visa USA Inc., supra*, 396 F.3d 96 (2d Cir. 2005) and cases there cited.

In this case, the proposed settlement has produced a recovery fund that plaintiffs estimate to be equivalent to 80% or more of the principal value of the claims that are likely to be submitted to and approved by CCS.

The settlement is the product of fifteen years of hard-fought and demanding litigation. (Killeen & Killeen, which has served as lead litigation counsel for the plaintiffs since 2000, represents that it has spent over 5,000 hours, valued at over \$1.22 million at its standard hourly rates, during the last six years alone.<sup>2</sup>)

In the absence of settlement, completion of this case would likely take many more years, especially if appeals are considered. Plaintiffs’ counsel candidly acknowledge that

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<sup>2</sup> The parties agree that defendants are free to contest this representation in the future.

trial of the case, if necessary, would present practical proof problems in light of the age of the case, and that the case presents legal issues that in many cases have not been finally resolved at the appellate level. Even if plaintiffs were successful ultimately, qualified claimants would be increasingly difficult to locate, and increasingly remote in consanguinity from the members of the class.

The considerations just described are further evidence that settlement at this time is reasonable, and in the best interests of the class. When the Court considers all of the factors described above, the Court is satisfied that the settlement is fair and reasonable, and should be approved.

### **III. Attorneys' Fees**

#### **A. Approval of the Contingent Fee Agreement**

As part of their request for approval of the settlement, plaintiffs ask the Court to approve the contingent fee agreement described in the papers made available to potential claimants in anticipation of the fairness hearing. *See, generally, Manual for Complex Litigation* §14.121 (4<sup>th</sup> Ed. 2004); 5-23 *Moore's Federal Practice – Civil* §23.124; *Wal-Mart Stores v. Visa USA Inc., supra*, 396 F.3d 96, 121-24 (2d Cir. 2005) and cases there cited, including *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

##### **1. The Terms of the Proposed Fee Agreement**

Under the proposed agreement, one third of the settlement fund would be paid over four years, in equal installments, without interest, to Killeen & Killeen, as compensation for their services through the court's approval of the settlement. This firm has served as plaintiffs' lead litigation counsel since appearing in the case.

Plaintiffs' co-counsel Anthony Szczygiel, Esq. and Peter O'B. Dellinger, Esq., are affiliated with organizations barred by law and charter from participating in contingent fees. They will be compensated by fees from the defendants awarded separately pursuant to 42 U.S.C. §1988 and related applications. (See discussion of the §1988 motion below.)

If the proposed contingent fee is approved, Killeen & Killeen will forego

participation in the §1988 award. Instead, the §1988 fees attributable to the Killeen & Killeen time will flow directly to the Settlement Fund, to partially offset the contingent fee. Taking into consideration the offset for the §1988 fee attributable to Killeen & Killeen's time, together with the interest that will accrue on the unpaid portion of the contingent fee during the four-year payment period, plaintiffs estimate that the actual impact of the contingent fee on the Settlement Fund will be in the range of 24%.

## **2. Reasons Advanced for Approving the Proposed Fee**

As with the settlement agreement itself, the Court has an independent duty under Rule 23 to insure the fairness and reasonableness of the proposed contingent fee.

The Supreme Court has expressly endorsed fee arrangements of this kind. See, Congressional Research Service, *Awards of Attorneys' Fees by Federal Courts and Federal Agencies* (2006), at 52 ("If the contingent fee is higher, then, the Supreme Court held in *Venegas v. Mitchell*, 495 U.S. 82 (1990), the defendant is liable only for the [§1988] fee, but the plaintiff must still pay his lawyer the higher contingent fee.")

Plaintiffs have advanced several bases for approving the contingent fee proposed in this case. The Court accepts these justifications for approving the proposed fee, which are summarized below.

### **a. The Fee Falls at the Most Conservative End of the Spectrum Approved by the Second Circuit for Evaluating Contingent Fees in Class Actions.**

There is a strong public interest in assuring that fee arrangements are adequate to provide an incentive to private attorneys to take on the risks and burdens associated with class action litigation.

In light of such considerations, the Second Circuit has recognized expressly that fees in the range of 3 – 4.5 times the "lodestar" value of the time invested are reasonable in class action litigation. *Wal-Mart, supra*, 396 F.3d 96, 123 (2d Cir. 2005) (noting with approval that "multipliers of between 3 and 4.5 have become common") (citations omitted.)

In this case, as noted above, Mr. Killeen represents that he his firm have devoted

more than 5,000 hours over a six-year period to advancing this case, without interim compensation, and have been forced to repeated and extensive borrowings and retirement plan liquidations to support this effort as a result.

The lodestar value of the Killeen & Killeen time in this case is approximately \$1.225 million. The resulting multiplier of 3 is at the most conservative end of the scale approved by the Second Circuit in *Wal-Mart Stores, supra*, for determining whether a class action contingent fee is reasonable.

**b. In Addition to Being Commensurate With the Level of Effort, the Proposed Fee is Justified by the Outcome of this Case.**

As noted above, the Court finds the proposed settlement is in the best interests of the class, providing as it does benefits equivalent to 80% or more of the principal value of the claims the parties expect to be approved for payment. This positive outcome for the members of the class provides further support for the proposed fee. *Goldberger, supra*, 209 F.3d at 55 (“the quality of representation is best measured by results.”)

**c. The Proposed Fee Is Consistent With Other Awards in Similar Cases.**

The record also contains declarations from Christopher W. Ritchie of Citizens Bank, the escrow agent in this case, and Thomas R. Glenn, the Chief Operating Officer of Complete Claims Solutions, both of whom have extensive experience across the country in class action settlements. Both declarations describe the proposed fee as “well within” the range of fees they have seen approved in comparable cases, and Mr. Ritchie states his opinion that the proposed fee is “reasonable and fair to the interests of the class.”

The Ritchie and Glenn Declarations are consistent with the reported decisions collected in Conte, *Attorney Fee Awards* at §2:32 (3<sup>rd</sup> Edition 2004). These Declarations provide independent confirmation that the proposed fee is well within the range of fees approved by courts around the country. *See, e.g., Moore’s, supra*, §23.124[6][b][iii].

**d. The Absence of Any Objection From Potential Claimants is Strong Evidence that the Fee Is Fair.**

As noted above, no potential claimant has objected to this proposed fee, despite

the extensive notice program described above.<sup>3</sup>

The law recognizes that in making its fairness determination, the Court can appropriately place significant weight on the absence of objection from potential claimants, particularly in light of an extensive notice program like the one in this case. *Wal-Mart, supra*, 396 F.3d at 120 (quoted *supra* page 7.)

**e. The Role of Messrs. Szczygiel and Dellinger Provides Additional Assurance that the Proposed Fee Is Fair to the Class.**

While they do not benefit from the contingent fee payment, Messrs. Szczygiel and Dellinger participated in the fee negotiations, and support the Court's approval of the award in their capacity as counsel to the class.

Messrs. Szczygiel and Dellinger represent that Mr. Killeen has served as lead litigation counsel since 2000 at their request; that since that time, he has been primarily responsible for developing the plaintiffs' litigation strategy and prosecuting the case on plaintiffs' behalf; and that they believe the contingent fee to be reasonable and fair to the interests of the class in light of Mr. Killeen's level of effort and the results obtained.

The Court notes that the role of Messrs. Szczygiel and Dellinger has provided additional protection to the interests of the class in arriving at the proposed fee. Since they are not participating in the contingent fee award, the Court may appropriately consider their support of the fee application, and their role in the formulation of the fee proposal, as further evidence that the proposed fee is fair. *Moore's, supra*, §23.124[6][b][i].

**3. Summary**

As the Second Circuit has recognized, the class action system will yield its intended and important benefits to the public only if it provides adequate incentives for private attorneys to undertake the significant risks and burdens of pursuing such

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<sup>3</sup> Defendants have agreed not to oppose this application as part of the settlement agreement, with the understanding that the fee will be allocated to the distributions to the class members under the final CCS allocation.

demanding, time consuming and complex litigation. *Wal-Mart, supra*, 396 F.3d 96, 121-24 (2d Cir. 2005).

The demands associated with prosecuting this case described in the record are a clear illustration of how significant these risks and burdens can be in actual litigation practice.

As noted above, the proposed fee in this case falls at the most conservative end of the range of “lodestar multiples” the Second Circuit has found adequate to providing this incentive, *id.* at 123, and is well within the range of fees approved in other class action cases. The Court finds the proposed fee to be justified by the results achieved and the level of effort invested to achieve them.

For all these reasons, the Court concludes that the proposed fee is reasonable and fair to the interests of the class, and approves the payment of the fee as proposed.<sup>4</sup>

**B. Schedule for Motion Pursuant to 42 U.S.C. §1988**

Finally, plaintiffs have asked the Court to approve a proposed schedule for submitting the motion to fix attorneys’ fees pursuant to 42 U.S.C. §1988. Plaintiffs propose to file this motion on or about March 1, 2007, following Mr. Szczygiel’s return from a long-planned sabbatical. The proposed schedule is approved.

**Conclusion**

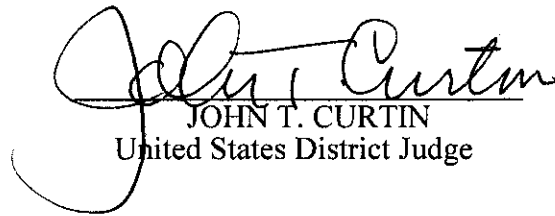
The Court approves the proposed settlement as reasonable and fair to the interests of the class. The Court also approves a contingent fee of one third the settlement amount of \$11 million, payable to Killeen & Killeen over four years without interest, offset by the amount of any §1988 fee award applicable to the Killeen & Killeen time. Plaintiffs shall file their motion for §1988 fees by March 1, 2007.

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<sup>4</sup> The Settlement Agreement contemplates that plaintiffs will make additional applications for the payment of fees and costs from time to time during the settlement administration process. Such applications may include, among other things, requests for payment of fees, costs and expenses that are not recovered under the §1988 motion. The Court will address such requests if and when they are filed.

So ordered.

Dated: 12/28, 2006  
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JOHN T. CURTIN  
United States District Judge