

REVISED SETTLEMENT AGREEMENT BETWEEN PLAINTIFFS
AND DEFENDANT SAN FRANCISCO

FRE 408

1.0 THE PARTIES

1.1 The following persons and entities are the parties to the Action and, through their respective counsel, parties to this Settlement Agreement (“Agreement”).

1.1.1 Individual Plaintiffs: Charles Davis, Jackie Del Rosario, Jesse Fitchett, Lorraine Robles, Gerald Scott, Hong T., and M. W.; and the organizational Plaintiff, Independent Living Resource Center of San Francisco (ILRCSF);

1.1.2 The Plaintiff Class is defined as “All adult Medi-Cal beneficiaries who: (1) are or will become residents of Laguna Honda Hospital and Rehabilitation Center, or (2) are or will be on waiting lists for Laguna Honda Hospital and Rehabilitation Center; or (3) are or will be within two years of discharge from Laguna Honda Hospital and Rehabilitation Center; or (4) are or will become patients at San Francisco General Hospital or other hospitals owned or controlled by the City and County of San Francisco, who are eligible for discharge to Laguna Honda Hospital and Rehabilitation Center.” The Individual Plaintiffs and the Class are collectively defined as “Plaintiffs”;

1.1.3 Defendants City and County of San Francisco (“San Francisco”); and

1.1.4 The Individual Plaintiffs, the Plaintiff Class and San Francisco are collectively referred to in this Agreement as the "Parties."

2.0 INTRODUCTION

- 2.1 This Settlement Agreement (“Agreement”) is between Plaintiffs and Defendant City and County of San Francisco in the case entitled *Charles Davis, et. al., v. California Health and Human Services Agency, et. al.*, Case No. C00-232 SBA, pending in the United States District Court for the Northern District of California, before the Honorable Sandra B. Armstrong (the “Action”).
- 2.2 The purpose of this Agreement is as follows:
- 2.2.1 To allow San Francisco until September 29, 2004 to implement the Targeted Case Management Program (“TCM”) described in Exhibit A, without further proceedings in this litigation, except as provided herein.
- 2.2.2 To enable the court to retain jurisdiction for the purposes set forth below in sections 4.3-4.5, 6.0-6.4.
- 2.2.3 As to Defendant San Francisco, to dismiss without prejudice the Third Amended Complaint, attached to Swain Declaration as Exhibit 4; to establish terms and procedures for a dismissal with prejudice of Claims 1,4 and 12; to postpone the re-filing of the community integration claims(Claims 2 and 5) until the implementation of the TCM program so that they can be re-filed based on pertinent facts at the time.
- 2.2.4 To allow Plaintiffs to reinstitute all or a portion of their claims, which have not been dismissed with prejudice, without San Francisco asserting defenses based on the dismissal without prejudice, the re-filing of the claims, or the lapse of time created by this Agreement.
- 2.2.5 To preserve any right Plaintiffs may have before the signing of this Agreement, including the right to file motions for reconsideration of claims dismissed at the time of this Agreement.

2.2.6 It is the intent of the parties that the effect of this Settlement Agreement shall be that of a “stand still” agreement, affording no right, benefit or detriment to either side, and to preserve all legal rights, obligations and responsibilities of the parties that are in existence immediately preceding the signing of this Agreement.

3.0 AMENDED COMPLAINT AND ANSWER

3.1 For the exclusive purpose of clarifying the claims subject to this Agreement, Plaintiffs shall file a Third Amended Complaint, which is attached to Swain Declaration as Exhibit 4. The filing of the Third Amended Complaint in no way limits Plaintiffs' rights to reconstitute the complaint in accordance with circumstances present at the time of any re-filing;

3.2 Defendants agree to either stipulate that their Answer to the Second Amended Complaint shall be deemed their Answer to the Third Amended Complaint, or file an Answer to the Third Amended Complaint. By filing the Third Amended Complaint and the Answer, it is the intent of the parties to facilitate the settlement of the claims described herein, not to add to or subtract from any claim or defense asserted in the Second Amended Complaint or the Answer thereto.

4.0 WHAT SAN FRANCISCO WILL DO

Defendant San Francisco agrees to do the following:

4.1 **TCM Program:** Establish a Targeted Case Management (“TCM”) Program by March 29, 2004, and conduct other activities as described in Exhibit A, and accompanying attachments 1-6, are incorporated herein by reference, or notify Plaintiffs in writing within 10 days after a decision has been made, but no later than March 29, 2004, that Defendant San Francisco has decided not to establish the TCM Program in accordance with Section 3 of Exhibit A.

4.2 File a motion to establish compliance with the terms contained in Exhibit A (“Motion for Compliance”) no later than September 29, 2004 as set forth in Paragraph 6 below, unless

San Francisco chooses not to establish the TCM Program pursuant to Section 4.1;

- 4.3 Meet with Magistrate Judge Chen and Plaintiffs on the 15th of each month, or as rescheduled by Judge Chen, to report progress, subject to both parties agreeing a meeting is not necessary that month;
- 4.4 **Monthly Reporting:** During the period *before* resolution of San Francisco's Motion for Compliance, San Francisco shall provide to Plaintiffs' counsel by the 10th of each month, a written report on activities undertaken with respect to each section of this Settlement Agreement during the previous month, which shall include detailed progress of the establishment of the TCM Program, and updated information on implementation of the screening, assessment, and service/discharge planning processes, and other components of the Agreement;
- 4.5 **Reporting After Assessments Begin:** Once assessments begin, San Francisco will provide to counsel for Plaintiffs:
 - 4.5.1 aggregate data as specified in Exhibit A, section 11.1, of this Settlement Agreement; and
 - 4.5.2 a random sample of 15 percent of the screens, assessments (including PASRR II evaluations if used in lieu of the TCM assessment), and service/discharge plans, completed for each month by the TCM Program, but no less than a total of 15 assessments and service/discharge plans. These assessments and service/discharge plans shall include a sample from both at risk class members and those residing at LHH.
 - 4.5.3. If the complete data set forth in subpart 4.6.1, above, is not available by the 10th of the month, San Francisco will provide Plaintiffs with a copy of each and every screen, assessment and individual service/discharge plan completed by the TCM Program during the preceding month.

4.5.4 As soon as available, but no more than 14 days after completion of each of the items set forth below, San Francisco will provide to Plaintiffs' counsel the information specified in the Agreement as follows:

- i. Screening, Assessment, and Service/Discharge Planning Instrument changes and/or updates, as specified in Exhibit A, section 4.2.
- ii. Protocols and procedures for screening and assessment of class members, as set forth in Exhibit A, sections 4.5-4.7;
- iii. Consumer survey results and names of consumer volunteers, as set forth in Exhibit A, section 8.2(b);
- iv. Training curriculum and materials and trainer information, as set forth in Exhibit A, sections 5.0-5.4;
- v. Membership, agendas, and minutes of the CAC, as set forth in Exhibit A, section 8.1;
- vi. Information regarding efforts to inform and provide transition services to class members, as set forth in Exhibit A, section 6.8.

4.5.5 The above reporting requirements will terminate on September 29, 2004, or upon the earlier occurrence of either of the following: (a) notice by San Francisco to Plaintiffs that San Francisco will not be implementing the TCM Program, or (b) filing by San Francisco of a motion for compliance/dismissal (as described below in paragraph 6).

5.0 WHAT PLAINTIFFS WILL DO

Subject to all other terms and conditions set forth in this Agreement, Plaintiffs will do the following:

5.1 File a stipulation for dismissal without prejudice as to all

claims against San Francisco (Claims 1, 2, 4, 5 and 12) under the Third Amended Complaint, subject to the terms and conditions set forth below;

- 5.2 Agree not to re-file their claims in court prior to September 29, 2004, unless San Francisco notifies Plaintiffs that the City will not institute the TCM Program in accordance with Section 4.1.
- 5.3 The parties agree that no judgment will be entered on the dismissal without prejudice and that judgment will only be entered after there is a dismissal with prejudice pursuant to section 6.4.

6.0 ESTABLISHING COMPLIANCE/DISMISSAL WITH PREJUDICE

- 6.1 At any time prior to September 29, 2004, San Francisco may move the court to establish that it is in compliance with the terms of Exhibit A. The motion shall be before Judge Armstrong, unless otherwise agreed by the parties or ordered by the Court.
- 6.2 Compliance will mean:
 - 6.2.1 Compliance with each section and subsection of Exhibit A, except as to paragraph 4.4(a), the completion of at least six (6) months of assessments by the TCM Program, including screening of at least 50 percent of, or 500 (whichever is larger) residents of LHH residing there on March 1, 2004, in the order of priority identified in this Agreement.
 - 6.2.2 Compliance with the reporting requirements specified in sections 4.4-4.5 of this Agreement.
- 6.3 **Discovery:** Thirty days before San Francisco files its motion to establish compliance, the parties agree to meet and confer regarding: (1) discovery that Plaintiffs may need; (2) a proposed hearing date for the motion for compliance to allow for that discovery; and (3) to arrange a conference with Judge Chen, or any other mutually agreeable Magistrate Judge if Judge Chen is unavailable, to resolve any disputes they are

unable to resolve on their own pertaining to discovery or a hearing date.

- 6.4 If Defendants establish at the hearing on their Motion for Compliance that each term of Exhibit A is satisfied, Plaintiffs agree to file a dismissal with prejudice as to Defendant San Francisco (Claims 1, 4 and 12) under the Third Amended Complaint, attached to Swain Declaration as Exhibit 4. This dismissal with prejudice shall not affect Plaintiffs' right to pursue claims 2 and 5 against San Francisco.

7.0 REINSTITUTION OF CLAIMS

- 7.1 Plaintiffs may re-file claims dismissed without prejudice at any time after September 29, 2004 or sooner as set forth in Section 5.2. Should Plaintiffs re-file any of those claims dismissed without prejudice, they shall file a Notice of Related Case, as required by N.D. Cal. Civ. L.R. 3-12.
- 7.2 Any right Plaintiffs may have before the signing of this Agreement, including but not limited to Plaintiffs' right to appeal from, or file a motion for reconsideration with respect to, the Court's December 21, 2001 Order regarding dismissal with prejudice of Plaintiffs' claim under Government Code section 11135 (Claim No. 11, Third Amended Complaint) shall be unaffected by the passage of time between the dismissal of this action against San Francisco and the time the claims are re-filed.

8.0 EFFECT OF REINSTITUTING CLAIMS

- 8.1 Defendants expressly covenant and agree to waive all procedural defenses based on the passage of time between the dismissal of this action without prejudice and the time that those claims are re-filed, including but not limited to any defense based on statutes of limitation, laches, delay in prosecution, claim preclusion, or issue preclusion and to waive all objections to class certification as defined in 2.1.2 (provided that Plaintiffs re-file those claims within 1 year of this Court's ruling on San Francisco's Motion for Compliance pursuant to Section 4.2).

8.2 Plaintiffs do not waive any rights they may have to file any claims which have not been dismissed with prejudice after one year from the Court's ruling on San Francisco's Motion for Compliance pursuant to Section 4.2.

8.3 It is further agreed and understood that in any further proceedings in this action (including any re-filing pursuant to sections 7 and 8 of this agreement) neither the signing of the dismissal without prejudice nor the dismissal without prejudice itself, will be relied upon by either Plaintiffs or Defendants to assert that there has been a final judgment, adjudication or resolution of any claim or defense raised in this matter.

9.0 PROCEDURE IF CLAIMS REINSTITUTED

9.1 If this matter is re-filed, the parties will immediately request a Case Management Conference to set new dates for any remaining discovery and a new trial date.

10.0 COURT APPROVAL

10.1 **Joint Application:** The Parties agree to file a joint application with the Court, and to take all other steps necessary, to request a fairness hearing and to seek the Court's preliminary approval of this Agreement pursuant to Rule 23.

10.2 **Meet and Confer Regarding Modifications to Secure Approval:** If the Court withholds its approval of this Agreement or the settlement for any reason, the Parties shall meet and confer to determine whether the Agreement and/or settlement can be amended or modified in a manner so as to secure the Court's approval, failing which, the Agreement shall be null and void and cannot be referred to or relied upon as a settlement of any Party's obligations or rights or as a measure of any duty.

11.0 NOTICE TO CLASS AND HEARING

11.1 **Notice to the Class; Fairness Hearing:** Notice of the proposed settlement pursuant to this Agreement is contained in Exhibit 3 to Swain Declaration. The parties will request that

the Court direct that such notice be provided to the Class, as follows: Defendant San Francisco will translate the notice attached hereto as Exhibit 3 to Swain Declaration into Spanish and Chinese writing and alternative formats (e.g. audio cassette) and provide the translated notice to Plaintiffs upon completion. Plaintiffs will proofread and provide comments to San Francisco within 14 days. Defendant San Francisco will distribute the notice to all class members at LHH and SFGH. San Francisco will also post a copy of the notice at LHH in the Administrative Office and on each floor of the LHH Main Building and Clarendon Hall, and at SFGH. For at risk class members, not identified at the time of the initial notice, a copy of the notice will be provided within three (3) days of being identified as a class member. San Francisco will also publish the notice in the *San Francisco Chronicle* for two (2) consecutive days. A hearing on any objections to the settlement shall be scheduled in accordance with the requirements of FRCP Rule 23.

- 11.2 If the court rules that notice to the class is not required, the parties will proceed with notification of class members in accordance with the Settlement Agreement Exhibit A, section 10.1.

12.0 FEES AND COSTS

- 12.1 It is agreed and understood that neither this Settlement Agreement, the fact of the settlement, the circumstances leading to this Agreement, nor any action taken by the Court to approve or provide oversight of this Agreement may be cited, referred to, relied on or used in any way to support or oppose a request for attorney's fees and/or costs.
- 12.2 It is the intention of the parties that the fact that this Agreement has been reached may not be considered in any way in the determination of any request for fees and/or costs, neither helping nor hurting either side. In other words, it is the intention of the parties that any determination of any request for fees and/or costs shall be made as if there had been no Agreement.

12.3 Defendants further waive any rights to seek costs as to any matters dismissed without prejudice pursuant to this agreement if Plaintiffs do not re-file those claims. In addition, Defendants waive the right to seek costs with respect to any claims dismissed with prejudice pursuant to this Agreement. It is further agreed and understood that upon the reinstatement of the action, F.R.Civ.P § 41(d) shall not serve as a basis for Plaintiffs to be liable to Defendants for any costs.

13.0 NO ADMISSION OF LIABILITY, NO WAIVER OF CLAIMS NOT SETTLED:

13.1 By entering into this Agreement, San Francisco does not concede liability as to anything. In particular, San Francisco does not concede liability as to any aspect of its facilities or programs. Nothing in this Agreement may be considered an admission by San Francisco of any wrongdoing or an admission concerning any aspect, requirement or interpretation of the law, the Americans with Disabilities Act or *Olmstead v. L.C.*, 527 U.S. 581 (1999), Section 504 of the Rehabilitation Act, the Medicaid Act or the Nursing Home Reform Act. Likewise, by entering into this Agreement, Plaintiffs do not waive any claims not expressly settled herein.

14.0 ENTIRE AGREEMENT.

14.1 This Agreement contains the entire agreement of the Parties and supersedes any prior oral or written agreements, understandings or discussions.

15.0 SUCCESSORS AND ASSIGNS.

15.1 The terms and conditions of this Agreement shall inure to the benefit of, and be binding upon, the successors, heirs and assignees of the Parties.

16.0 DRAFTING OF AGREEMENT.

16.1 The Parties agree that this Agreement was jointly drafted by the Parties and that any ambiguities in it shall not be construed against any of the Parties.

17.0 NOTICES

17.1 Except for the Notice to the class required under Exhibit A, Section 10.1, all other notices that are required in this Agreement shall be given in writing as follows:

To the Individual Plaintiffs and the Class, by letter hand-delivered or sent by first-class mail to:

KIMBERLY SWAIN
Managing Attorney
Protection & Advocacy, Inc.
433 Hegenberger Road, Suite 220
Oakland, CA 94621

and

ERIC GELBER
Managing Attorney
Protection & Advocacy, Inc.
100 Howe Street, Suite 235N
Sacramento, CA 95825

To San Francisco, by Letter hand-delivered or sent by first-class mail to:

DENNIS J. HERRERA,
City Attorney
JOANNE HOPPER,
Chief Trial Deputy
BLAKE P. LOEBS,
ELLEN SHAPIRO,
Deputy City Attorneys
Office of San Francisco Attorney
1390 Market Street, Sixth Floor
San Francisco, CA 94102

18. AMENDMENT OF AGREEMENT.

18.1 This Agreement may be amended only by a written instrument signed by counsel for all Parties and approved by the San Francisco Board of Supervisors, if such approval is required by law, and by counsel for Plaintiffs and Plaintiff Class. All amendments of the Agreement that modify the rights or obligations of the Class must also be approved by the Court.

19. SIGNING IN COUNTERPART.

19.1 This Agreement maybe executed in counterpart. The counterparts shall have the same force and effect as if a single document had been signed.

DENNIS J. HERRERA,
JOANNE HOEPER
BLAKE LOEBS
ELLEN SHAPIRO

Dated: _____

By: _____
Blake Loeb
City Attorney's Office
1390 Market Street, 6th Floor
San Francisco, CA 94102

Attorneys for Defendants
CITY AND COUNTY OF
SAN FRANCISCO