IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PHYLLIS BALL, et al.,	:	
	:	Case No. 2-16-cv-282
Plaintiffs,	:	
	:	CHIEF JUDGE EDMUND A. SARGUS, JR.
v.	:	
	:	Magistrate Judge Elizabeth P. Deavers
JOHN KASICH, et al.,	:	
	:	ORAL ARGUMENT REQUESTED
Defendants.	:	
	:	
and	:	
	:	
GUARDIANS OF HENRY LAHRMANN, et al.; and OHIO ASSOCIATION OF COUNTY BOARDS,	:	
	:	
Defendants-Intervenors.	:	

INTERVENOR GUARDIANS' SUPPLEMENTAL BRIEF
IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

William Choslovsky (6224664 IL)
Fox Rothschild LLP
353 N. Clark Street, Suite 3650
Chicago, IL 60654
O - (312) 517-9200 F – (312) 517-9201
wchoslovsky@foxrothschild.com
Attorney (Pro Hac Vice) for Intervenor-Guardians, Henry Lahrmann, et al.

Roger P. Sugarman (0012007)
Robert G. Cohen (0041707)
Kegler Brown Hill & Ritter Co., LPA
65 E. State Street, Suite 1800
Columbus, OH 43215
O – (614) 462-5400 F – (614) 464-2634
rsugarman@keglerbrown.com
rcohen@keglerbrown.com
Attorneys for Intervenor-Guardians, Henry Lahrmann, et al.

I. INTRODUCTION

In "supplementing" their original motion for class certification, Plaintiffs concede – as they must – that their first attempt at class certification failed. So now they try to fix it. And they do so by "modifying" their proposed class definition, as if class certification turns on wordsmithing. It does not. Class certification, of course, instead turns on substance – specifically applying the Rule 23 factors – and no attempted word play changes the substance of the analysis.

Applied here, class certification is inappropriate because no magic words can solve the basic rub that Plaintiffs cannot even identify their class, meaning they have offered widely ranging numbers of who would comprise the class. This is to be expected when the proposed definition includes such amorphous descriptions as those "who may be interested" in something, as the proposed new definition does.

But of course, even if Plaintiffs could identify a clearly ascertainable class of people, that "class" would then still need to clear the Rule 23(a) hurdles of commonality, typicality, and adequacy of representation. They can't.

And finally, even if Plaintiffs could identify a clearly ascertainable class and satisfy the Rule 23(a) requirements, they must then still satisfy the Rule 23(b)(2) requirements: specifically, that the state "has acted or refused to act on grounds that apply generally to the class so that final injunctive relief . . . is appropriate respecting the class as a whole." Applied here, the analysis borders on the silly because not only is classwide relief unnecessary, individual relief is arguably unnecessary as demonstrated by the named plaintiff, Phyllis Ball. Remember, Ms. Ball obtained exactly what she wanted – an "exit waiver" from her ICF (which waivers are *under*subscribed) – once she simply asked for it.

Put it all together, and this case reflects the proverbial "solution in search of a problem." More accurately it is social policy masquerading as a lawsuit. Whatever one calls it, the conclusion is simple: class certification is both inappropriate and unnecessary here. The Rule 23 factors are not satisfied. The motion should be denied.

II. DISCUSSION

A. Intervenors Adopt and Incorporate Other Briefs

The court is busy. As such, there is no need for a fifth brief addressing the Rule 23 factors. Specifically, the Defendants have twice addressed the Rule 23 factors (ECF 273 & 291) and so now has VOR (*amicus curiae*) (ECF 294). They have done so masterfully and exhaustively. Likewise, in August, Intervenors filed their original opposition to class certification (ECF 278), which also addressed some of the Rule 23 factors. Thus, for economy sake, Intervenors adopt and incorporate these briefs.

B. ARC of Ohio's *Amicus* Reveals the Futility of Class Certification

Though lengthy briefs are sometimes good, common sense is usually better. Applied here, the Court need look no further than the ARC of Ohio ("ARC"), which filed an *amicus curiae* brief in support of class certification (ECF 287). ARC and plaintiffs' counsel (DRO) work closely together, sharing policy goals and initiatives.

So what is ARC?

On its website ARC describes itself as follows: "Together with our individual members and local chapters, we represent more than 330,000 Ohioans with intellectual and developmental

disabilities and their families. Ohio Law recognizes The Arc of Ohio as the organization to represent families in legislative decisions."[1] ARC repeats this assertion on page one of its brief.[2]

In its brief, ARC mimics Plaintiffs' language that the state "maintain[s] an excessive number of segregated institutional placements." *Id.* at 3.[3] ARC then proclaims: "Only class-wide relief can remedy these structural defects." *Id.* It continues: "[s]uch structural and systematic changes simply cannot be achieved through individual lawsuits." *Id.* So ARC, the self-proclaimed voice for all Ohioans with IDD, makes clear that only a class can remedy the claimed "structural defects" that supposedly plague Ohio and constitute violations of federal law.

But what did ARC say 13 years ago?

Back then, *Martin v. Taft* (No. 89-362) was pending before this Court, the predecessor case to the instant case. Back then *Taft* was already two decades old with a proposed classwide settlement pending. In *Taft*, the plaintiffs filed the "lawsuit to compel Defendants to provide them with a choice of community based, integrated residential services that are readily available." *Id.*, *Taft Consent Order* at 1 (ECF 797). Sound familiar?

Taft eventually settled – with classwide relief – but not before ARC spoke. On November 29, 2004, ARC's Executive Director – Gary Tonks – wrote the Court, imploring it to de-certify the class! In its "Dear Judge Sargus" letter, here is what ARC said about classwide relief:

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[1] https://www.thearcofohio.org/ (visited December 22, 2017).

[2] To be clear, ARC's claim is specious at best. ARC claims to represent *every* Ohioan with intellectual and developmental disabilities ("IDD"). That would, of course, include Intervenors, a clear falsehood. In reality, ARC's dues-paying members are a small fraction of the number it cites. But for purposes of this exercise, the accuracy of ARC's assertion is irrelevant.

[3] What ARC (and Plaintiffs) call "segregated institutional placements," Intervenors – and thousands of others – call their loving, integrated "homes."

> It has become increasingly apparent that the needs and desires of those identified as the "Class" of Martin vs. Taft are significantly different. The proposed settlement and subsequent objections/negotiations have exasperated these differences. . . . The accomplishments detailed in the proposed settlement occurred in spite of Martin vs. Taft, not because of it.
>
> It is time to move on. Martin vs Taft is a tired law suit, no longer relevant, no longer necessary. Its existence has distracted too long from the prime objective of serving the thousands of Ohioans in need of services.
>
> Your honor, The Arc of Ohio urges you to decertifying [sic] the Martin vs. Taft Class.

See ARC letter from Gary Tonks to Judge Sargus dated November 29, 2004 attached as Exhibit A.

Gary Tonks wrote that letter 13 years ago. Today Gary Tonks remains ARC's CEO.

If in 2004 the *Taft* suit – which sought relief similar, if not identical, to that sought here – was "a tired law suit, no longer relevant, no longer necessary," what is today's lawsuit?

If in 2004 the *Taft* lawsuit had "distracted too long from the prime objective of serving the thousands of Ohioans in need of services," what does today's lawsuit do?

And no matter how Plaintiffs and ARC may try to run from their prior positions – i.e., "Your Honor, that was then, this is now, positions and times change" – they cannot run from the most important statement in ARC's letter: "It has become increasingly apparent that the needs and desires of those identified as the "Class" of Martin vs. Taft are ***significantly different***." *Id* (emphasis added).

ARC was correct in 2004: the needs and desires of the tens of thousands of Ohioans with IDD are so different and distinct, there is no way to shoehorn them into a singular class. The "differences" ARC correctly noted in 2004 have not somehow since vanished. The needs of

Caroline's Lahrmann's twins – then just four years old – and thousands of other Ohioans are not now any less varied and unique than they were in 2004.[4]

Of course, one thing has changed dramatically since 2004: the number of Ohioans with IDD receiving services has more than doubled, with 85% now receiving waiver services. As Defendants detail in their supplemental brief, "Ohio has encouraged ICF downsizing." ECF 291 at 7. The irony is that Ohio has actually done such a good job of encouraging ICF downsizing, that what is threatened today in Ohio – and may require class protection – is not the waiver choice, but instead the ICF choice.[5]

The *sine qua non* of any class is, of course, a common group of people with a common problem or injury. *Wal-Mart v. Dukes*, 564 U.S. 338, 349-50 (2011) ("Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury.") But here, just as ARC itself lectured in 2004, it is differences – not similarities – that distinguish Ohio's tens of thousands of IDD residents.

[4] Intervenors were at risk then and remain at risk now of losing their ICF homes. In fact, back in 2004, Intervenor Shawna Klein, who is an ICF resident, led a group of objectors called the "Klein Objectors" in the *Taft* case. How many times must Ms. Klein participate in a federal lawsuit before she can rest easy that her home is safe? DRO claims Ms. Klein has led an "isolating" life in ICFs, but few Americans have had to thrust themselves twice into federal court simply to live where they choose.

[5] Intervenors detailed these issues in their original brief, so they do not restate them here. (ECF 278)

C. Some Other Items Worth Noting

Intervenors share the following items less to persuade the Court, and more to simply inform the Court:

1. The ICF-Option is the Only Entitlement Under Medicaid Law

Both the "old" and "new" class definition begin with the words, "All Medicaid-eligible adults with intellectual and developmental disabilities." One should stop and ask, "eligible" for what? The answer is Medicaid-eligible adults with intellectual and developmental disabilities are eligible for ICF services, meaning "institutional" services, as Plaintiffs like to call and denigrate them. It is the ICF service for which they are all eligible. And only once they are eligible for ICF services can they *then* seek to "waive" from an ICF placement into a "community" placement; hence the phrase, "waiver services." Waiver recipients are, by definition, waiving from their ICF entitlement. Without the ICF eligibility, there is nothing to "waive" from and into.

This is not mere semantics, but instead exposes all that is wrong with Plaintiffs' approach. When you carefully read Plaintiffs' proposed class definition, it is telling:

> All Medicaid-eligible adults with intellectual and developmental disabilities residing in the state of Ohio who, on or after March 31, 2016, are qualified for home and community-based services, ***but (a) are institutionalized in an Intermediate Care Facility*** with eight or more beds, and, after receiving options counseling, express that they are interested in, or may be interested in, integrated community-based services; ***or (b) are at serious risk of institutionalization in an Intermediate Care Facility*** with eight or more beds and have, by placing themselves on a waiting list for community-based services, expressed an interest in receiving integrated services while continuing to live in the community. *Emphasis added*.

The proposed definition turns Medicaid law upside down. By cleverly using the word "but," it begins by negatively defining and categorizing those who "are institutionalized in an ICF . . . or at serious risk of institutionalization in an ICF." Defining those who are in ICFs or at

risk of ICFs as aberrational defies the entire Medicaid statutory set-up. Again, it is the ICF choice for which IDD residents become eligible. The "default," if you will, is the ICF choice, so to frame the problem as people choosing their entitlement is itself the problem. The Court surely understands that there is nothing wrong or aberrational with the ICF choice; quite the contrary, it is what Medicaid law requires under Ohio's Medicaid state plan.

Given the Medicaid framework, and given that it is the ICF choice that is under attack in Ohio and inadequately funded, a more apt class definition is:

> All Medicaid-eligible adults with intellectual and developmental disabilities residing in the state of Ohio who despite their eligibility are (a) unaware that the ICF choice is an entitlement for which they could immediately request placement and receive comprehensive services or (b) at serious risk of placement in a waiver setting at some future, indefinite date while languishing on a so-called "waiting list."

Intervenors are confident that this class would far outnumber the class Plaintiffs seek to certify, and is a class more in need of protection from "systematic defects."

2. Merits Analysis not only Permissive, but Required

Plaintiffs engage in circular reasoning. On the one hand, their entire case is premised on the state's alleged "systematic failures" in providing waiver services. Plaintiffs must allege as such to sustain a class. Said differently, if there are no "systematic failures," then there is no need for a class.

Yet when the state then provides basic facts demonstrating the falsity of Plaintiffs' premise – i.e., in less than 20 years, the state's waiver population has increased 556% while its ICF population has decreased 22% (*see* ECF 273-4) – Plaintiffs cry foul, claiming any "merits" analysis is premature.

Plaintiffs cannot have it both ways. When determining whether a class should be certified, the Supreme Court has made clear that the inquiry often "entail[s] some overlap with

the merits of plaintiff's underlying claim." *Dukes*, 564 U.S. at 351. So some analysis of Plaintiffs' claims – which form the basis of not just its lawsuit but applicability of class relief – is not just permissible, but required.

3. If Any Class is Certified, it must include an ICF Resident Subclass

In granting the Guardians' intervention, the Court expressly acknowledged that ICF residents require protection that neither Plaintiffs nor Defendants provide:

> Thus, the Court finds that the rights of those individuals who do not wish to move from their residence in an ICF, or those who are at serious risk of institutionalization who wish to obtain residence in an ICF, are directly impacted in this lawsuit. Those rights were not protected until the Guardians filed their Motion to Intervene." *Intervention Opinion* at 16-17 (ECF 261).

The Court recognized that two groups actually need protecting: (1) existing ICF residents (like Guardians' loved ones); *and* (2) the thousands of other Ohioans – many on "wait lists" – who *may* want or need an ICF (now or in the future). Indeed, it is only these two groups who see their entitlement being whittled away by state policy, DRO litigation, and one-sided "Informed Choice." Thus, if this case is indeed about choice – *all* choices – then those who seek the ICF choice need a voice to insure it is actually offered, communicated, and adequately funded.[6]

III. CONCLUSION

Plaintiffs are (rightly) in a panic. Recognizing that their original class definition is fatally flawed, they have attempted to solve their problem with a "new" definition. But this case is not about clever wordsmithing. Rather it is about the unique needs of tens of thousands of Ohioans who are incapable of being pigeon-holed into an artificially contrived homogenous class definition.

[6] To insure the ICF choice remains viable, Guardians require that: (1) the state honor, and adequately fund, the ICF choice, (2) the county boards (and state) communicate the ICF choice; and (3) DRO respects the ICF choice.

Whether the Court engages in a detailed Rule 23 analysis or simply re-reads ARC's 2004 letter, the conclusion is the same: the class certification requirements are not satisfied. Plaintiffs' motion for class certification should be denied.

Dated: December 22, 2017

Respectfully submitted,

CAROLINE LAHRMANN, et al.
Intervenor-Guardians

/s/ Roger P. Sugarman
Roger P. Sugarman (0012007)
Robert G. Cohen (0041707)
Kegler Brown Hill + Ritter Co., LPA
65 E. State Street, Suite 1800
Columbus, OH 43215
Telephone: (614) 462-5400
Facsimile: (614) 464-2634

rsugarman@keglerbrown.com
rcohen@keglerbrown.com

Attorneys for Intervenor-Guardians Henry Lahrmann, et al.

William Choslovsky (6224664 IL)
Fox Rothschild LLP
353 N. Clark Street, Suite 3650
Chicago, IL 60654
O - (312) 517-9200 F – (312) 517-9201
wchoslovsky@foxrothschild.com

Attorney (Pro Hac Vice) for Intervenor-Guardians, Henry Lahrmann, et al.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on December 22, 2017, I caused a true and correct copy of **Intervenor-Guardians' Supplemental Brief in Opposition to Plaintiffs' Motion for Class Certification** to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the Plaintiffs and all other parties to this action.

/s/ Roger P. Sugarman
Roger P. Sugarman