

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COPY

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ADAM INGLES, SHAWN DAVIS, ED SYKES,
MIGUEL ROMAN, AL SMITH, CHARLES PAIGE,
JAMAL BUTLER, ANDRE PRATT, ROBERT
ALLAWAY, PATRICK WASHINGTON, RANDOLPH
JOHNSON, ROGELIO FIGUEROA, PAUL PERSON,
CALVIN DANIELS, BOBBY JONES, PHILLIP
CAMPBELL, JONATHAN LUKES, LAMONT
BRADLEY, GARY SMITH, DAROLD FREEMAN,
ERIC RICHARDS, and KIMADA DIXON

SETTLEMENT AGREEMENT

01 CV 8279 (DC)

Plaintiffs,

-against-

ELMER TORO, ROBERT DASH, ROBERT
DAVOREN, WILLIAM FRASER, STEVEN CONRY,
BERNARD KERIK; OFFICERS CALDERO,
LANAUSSE, GRAY, GIVENS, MCCONNON,
RIVERA, MCKELLER, ROBERTS, NATALE,
ELLIOTT, KRAMER, COX, GUARNERI,
WILLIAMSON, GRAHAM, SMALLS, POWELL,
TORRES, ECHIVERIA, CLARK, HERSHAWAY,
DICE, LEWIS, YATES, SWETOKAS, MASTROAINNI,
STRAUGHN, WELLS, LOPEZ, VASQUEZ,
FERNANDEZ, CASE, WRIGHT, FISHER, GATTO,
BRADFORD, LAMONT, VALENTINE, CHAPMAN,
KEITH JACKSON, R. JACKSON, RIVERA, KINDER,
DEDICKE, ANDERSON, OROZCO, TOLENTINO,
ORTIZ, ARNOLD, CASTRO, HANDE, BERKELEY,
BRAYSON, RUSSO, DOUGHERTY, BOYLES,
MITCHELL, SANACORE, and JOHN DOES 5-8, 12-15,
17, 18, 21, 22, 24-44, 49-52, 56-62, 62, 66-68, and 71-73,
CAPTAINS ALCIA, SULLIVAN, CARDO, SMALL,
WRIGHT, VELEZ, HAYNES, MULVANEY, SPENCER
HERNANDEZ, GALLAGHER, CROOMS, RAMOS,
PEREZ, DANIELS, DEISO, BARBOUR and JOHN
DOES 16, 46-48, 53-55, 63 and 65; ASSISTANT
DEPUTY WARDEN PENNES and OWUSU;
WARDENS GERARD O'GARA AND ROGER
SLATTERY; CITY OF NEW YORK,

Defendants.

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PREAMBLE

This Settlement Agreement (the “Agreement”) is made and entered into, subject to Court approval, as of February 17, 2006 by the Plaintiff Class (as defined herein) and by the Municipal Defendants (as defined herein) (collectively, the “Parties”) in *Ingles et al. v. Toro et al.*, No. 01 Civ. 8279, pending before the Honorable Denny Chin in the United States District Court for the Southern District of New York (the “Action”). The Agreement, upon approval by the Court, will resolve all of the injunctive and declaratory claims in the Action. All of the individual claims in the Action are being resolved by separately executed agreements.

WHEREAS, in the Action, plaintiffs Shawn Davis, Ed Sykes, Al Smith, Paul Person and Lamont Bradley (collectively, the “Class Representatives”) seek, on behalf of themselves and the Plaintiff Class, injunctive and declaratory relief against the Municipal Defendants relating to the use of force against inmates by uniformed staff in the New York City Department of Correction (“DOC” or the “Department”); and

WHEREAS, the Class Representatives and plaintiffs Adam Ingles, Miguel Roman, Charles Paige, Jamal Butler, Andre Pratt, Robert Allaway, Patrick Washington, Randolph Johnson, Rogelio Figueroa, Calvin Daniels, Bobby Jones, Phillip Campbell, Jonathan Lukes, Gary Smith, Darold Freeman, Eric Richards and Kimada Dixon (collectively, the “Named Plaintiffs”) commenced the Action with the filing of the Amended Complaint on or about September 6, 2002, and filed the Fourth Amended Complaint on or about August 11, 2003 (the “Complaint”), which alleges that the use of excessive force by uniformed DOC staff against the Named Plaintiffs and against members of the Plaintiff Class, pursuant to a pattern and practice of excessive use of force that the Municipal Defendants (and/or their predecessors) have failed to remedy,

violated and/or violates the rights of the Named Plaintiffs and the members of the Plaintiff Class under the Eighth and Fourteenth Amendments to the United States Constitution and under the Constitution and laws of the State of New York; and

WHEREAS, in the Action, the Named Plaintiffs seek monetary damages from defendants identified in the Complaint to address specific incidents of alleged excessive use of force against them; and

WHEREAS, in the Action, the Class Representatives seek, on behalf of themselves and the Plaintiff Class, injunctive and declaratory relief against the Municipal Defendants to remedy alleged deficiencies in the Department's use of force policies and practices that the Class Representatives contend, on behalf of themselves and the Plaintiff Class, contribute to the alleged pattern and practice of excessive use of force in the Department, including those policies and practices relating to videotaping and investigating use of force incidents, supervising and training uniformed DOC staff, tracking use of force information, and disciplining misconduct by uniformed DOC staff relating to use of force incidents; and

WHEREAS, all defendants deny any and all allegations in the Complaint, and the Municipal Defendants deny that they or their predecessors had or currently have any policy or engaged in or currently engage in a pattern or practice of conduct that deprived or deprives persons of rights, privileges, or immunities secured or protected by the Constitution and laws of the United States and deny that the Department's use of force policies and practices contributed or contribute to any alleged pattern and practice of excessive use of force in the Department, including those policies and practices relating to videotaping and investigating use of force incidents, supervising and training

uniformed DOC staff, tracking use of force information, and disciplining misconduct by uniformed DOC staff relating to use of force incidents; and

WHEREAS, the Court certified the Plaintiff Class under Federal Rules of Civil Procedure 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2) by order dated February 26, 2003 (the “February 26, 2003 Class Certification Order”); and

WHEREAS, all of the plaintiffs and defendants in the Action have engaged in extensive discovery relating to the use of force practices, policies, customs and procedures of DOC, including the depositions of DOC employees and of the Named Plaintiffs, the disclosure of expert reports, and the production of more than 350,000 pages of documents; and

WHEREAS, the Class Representatives, on behalf of themselves and the Plaintiff Class, and the Municipal Defendants desire mutually to settle all claims asserted in the Action on behalf of the Plaintiff Class and have negotiated this Agreement for more than one year; and

WHEREAS, these negotiations have resulted in the Agreement, which, subject to the approval of the Court after notice to members of the Plaintiff Class, settles all of the injunctive and declaratory claims in the Action upon the terms set forth below; and

WHEREAS, each of the Named Plaintiffs, including each of the Class Representatives, is entering into a separately executed agreement to settle his individual claims in the Action, pursuant to which those individual claims will be dismissed with prejudice;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, as follows:

A. INTRODUCTION

1. The Plaintiff Class and the Municipal Defendants enter into this Agreement for the purpose of avoiding the burdens of further litigation. Settlement of the Action under the terms stated in the Agreement is in the public interest because the Agreement avoids diversion of private and public resources to adversarial action between the Municipal Defendants and the Plaintiff Class.

2. The Plaintiff Class enters into this Agreement for the purpose of addressing the allegations in the Complaint. The Plaintiff Class believes that the terms of the Agreement are in the public interest because they are designed to protect members of the Plaintiff Class from the use of excessive force.

3. The Municipal Defendants deny that they had or currently have any policy or engaged in or currently engage in a pattern or practice of conduct that deprived persons of rights, privileges, or immunities secured or protected by the Constitution and laws of the United States.

4. This Agreement does not and shall not be deemed to constitute any admission by the defendants as to the validity or accuracy of any of the allegations, assertions, or claims made in the Action. No determinations have been made by the Court concerning the merit or lack of merit of the allegations made in the Action. This Agreement does not constitute an admission, adjudication, or finding on the merits of the Action; nor does it constitute a finding of a violation of a federal right.

5. The Court has jurisdiction over the Action under 28 U.S.C. §§ 1331, 1343, and 1367. Venue is proper in the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1391. Upon dismissal of the Action with prejudice,

this Court shall not retain jurisdiction except in the event that Class Counsel seeks and the Court grants reinstatement of the Action.

B. DEFINITIONS

6. The “Plaintiff Class” shall mean “[a]ll present and future inmates confined in any of the [DOC] institutions and commands not already subject to court order based on prior use of force litigation” as defined in the February 26, 2003 Class Certification Order, entered following the Court’s Memorandum Decision granting class certification, dated February 18, 2003 (the “February 18, 2003 Memorandum Decision”). At the time of the Court’s February 18, 2003 Memorandum Decision, Class members were in the custody of DOC in the following institutions and commands: Adolescent Reception and Detention Center (“ARDC”), Anna M. Kross Center (“AMKC”), George Motchan Detention Center (“GMDC”), George R. Vierno Center (“GRVC”), Manhattan Detention Complex (“MDC”) (now known as Bernard B. Kerik Center (“BBKC”)), North Infirmery Command (“NIC”), Otis Bantum Correctional Center (“OBCC”), Rose M. Singer Center (“RMSC”), West Facility, Bronx House of Detention (“BxHDM”), Queens House of Detention (“QHDM”), Transportation Division, Emergency Services Unit (“ESU”), and Vernon C. Bain Correctional Facility (“VCBC” or the “Barge”). The DOC institutions and commands excluded from this Agreement are the Central Punitive Segregation Unit (“CPSU”), Eric M. Taylor Center (“EMTC”), Brooklyn House of Detention for Men (now known as the Brooklyn Detention Complex (“BKDC”)), Bellevue Hospital Prison Ward (“BHPW”), Kings County Hospital Prison Ward (“KCHPW”), and Elmhurst Hospital Prison Ward (“EHPW”).

7. The “Effective Date” shall be the date upon which this Agreement enters into effect, which shall be twenty (20) days after the Court dismisses the Action with prejudice.

8. “Facilities at Issue” shall mean the DOC institutions and commands with custody of members of the Plaintiff Class as defined in the February 26, 2003 Class Certification Order, entered following the Court’s February 18, 2003 Memorandum Decision. At the time of the Court’s February 18, 2003 Memorandum Decision, Class members were in the custody of DOC in the following institutions and commands: ARDC, AMKC, GMDC, GRVC, BBKC, NIC, OBCC, RMSC, West Facility, BxHDM, QHDM, Transportation Division, ESU, and VCBC. “Facilities at Issue” shall not mean the CPSU, EMTC, BKDC, BHPW, KCHPW, or EHPW.

9. The “Municipal Defendants” shall mean the City of New York (the “City”) and the following individuals in their official capacity: Martin Horn, current Commissioner of DOC (successor to defendant William Fraser); Richard White, current Deputy Commissioner of DOC Investigations and Trials Division (successor to defendant Elmer Toro); Robert Davoren, current DOC Chief of Department; Steven Conry, former DOC Chief of Security and current DOC Bureau Chief of Facility Operations; Brian Riordan, current warden of AMKC (successor to defendant Gerard O’Gara); Larry Davis, current warden of GRVC (successor to defendant Roger Slattery); and any and all successor(s) to the City and these individuals. The City assumes all obligations undertaken by DOC under this Agreement.

10. “Recording Wall-Mounted Cameras” shall mean cameras that employ a recording capability sufficient to produce footage showing smooth action and to produce image quality sufficient to permit identification of persons with the assistance of

documents or other available information, if such information exists. The Parties agree that “Recording Wall-Mounted Cameras” may operate with motion sensors and shall produce recordings of at least seven and one-half (7.5) frames per second.

11. “Agreed-Upon Location” shall mean any location in a DOC facility in which DOC herein agrees to install Recording Wall-Mounted Cameras.

12. “Coverage” shall mean that Recording Wall-Mounted-Cameras will be installed in sufficient numbers and in sufficient positions to record (1) any person while such person is present in an Agreed-Upon Location; and (2) activity transpiring in an Agreed-Upon Location. “Coverage” need not extend to the interior of cells, pens, or search areas.

13. Member(s) of Service (“MOS”) shall mean any uniformed member(s) of DOC staff.

C. WALL-MOUNTED VIDEO CAMERAS

14. DOC shall install Recording Wall-Mounted Cameras that, unless otherwise specified, will provide Coverage in Agreed-Upon Locations identified in Exhibit A.

15. DOC shall provide Class Counsel with (a) quarterly reports reflecting the installation of all Recording Wall-Mounted Cameras required to be installed in the Agreed-Upon Locations; (b) notification that all Recording Wall-Mounted Cameras required by this Agreement have been installed according to the timeline agreed upon in Exhibit C; and (c) semiannual certifications as to whether or not cameras in the Agreed-Upon Locations are operable and recording. The first quarterly report required under (a) above shall reflect all Recording Wall-Mounted Cameras installed as of the date of the

first report. Subsequent reports shall reflect all Recording Wall-Mounted Cameras installed during the relevant quarter.

16. Class Counsel shall be permitted to tour all facilities in which Recording Wall-Mounted Cameras are required to be installed under this Agreement to observe the placement and operation of the cameras two (2) times per year until all cameras are installed, each visit limited to one seven-hour business day of one group of counsel touring together at all times. Class Counsel shall advise DOC which areas they wish to observe no less than three (3) weeks in advance of each visit. During the tour, Class Counsel shall be permitted to view monitors to observe the field of vision captured by any particular camera.

17. Class Counsel shall be permitted to make non-binding suggestions to DOC that additional Recording Wall-Mounted Cameras be installed in specific locations in the Facilities at Issue.

D. HAND-HELD CAMERAS

18. DOC shall continue to maintain a command-level order requiring the ESU to carry hand-held cameras when conducting searches and to record searches and any related uses of force.

E. REVISIONS TO THE USE OF FORCE DIRECTIVE

19. DOC will issue a revised use of force directive (the “Revised Use of Force Directive”) reflecting the following modifications to the existing Directive 5006R-A:

- a. *Paragraph I*, entitled “Purpose,” will provide: “This Directive is promulgated to establish Departmental policy concerning the use of force and use of security equipment, and to provide guidelines and procedures for staff when they are confronted with a situation requiring the use of force in order to minimize injuries to both inmates and staff.”

- b. *Paragraph III*, entitled “Policy,” will provide: “The Department recognizes that there are occasions when the use of force is necessary. When force is used, the actions of staff must be consistent with the law and this Directive. It is expressly prohibited to use more force than is necessary to restrain the inmate, control the situation or protect oneself or others. Force may not be used to punish an inmate.”
- c. *Paragraph V.B.2* will provide: “Not all options will be available in all circumstances; however, staff must start with the minimum amount of force needed and escalate the amount of force used only if the situation requires escalation. The actions described below are listed in order of least to greatest degree of force, and should be used in proportion to the situation, in order to minimize injuries to staff and inmates, increasing as the situation becomes more dangerous or threatening, and decreasing as the situation comes under control. For example, blows should not be struck if control holds, grasping or pushing would be adequate to restrain the inmate.”
- d. *Paragraph V.B.2(a)* will provide: “Staff should first try to defuse the situation by talking to the inmate.”
- e. *Paragraph IV.C.* will provide: See attached Exhibit B.

The Revised Use of Force Directive, like all DOC directives, shall be enforceable through the DOC disciplinary process.

20. Department-wide applicability of the Revised Use of Force Directive.

- a. All changes in the Revised Use of Force Directive shall apply Department-wide, and any use of force policy and/or directive(s) currently in effect as a result of other consent decrees or court orders (*e.g.*, those addressing EMTC and BKDC) shall be replaced by the Revised Use of Force Directive, as provided in paragraph 20(b).
- b. Within two (2) business days of the signing of this Agreement, Class Counsel shall advise counsel for the City in the Action and counsel for the City in *Jackson v. Montemagno*, CV 85-2384 (E.D.N.Y.) (concerning Brooklyn House of Detention for Men, now known as BKDC) that the Revised Use of Force Directive complies with the Order Approving Stipulation of Settlement and Entry as Consent Judgment (November 26, 1991) in *Jackson* and shall be applicable to the DOC command governed by that Order. Within two (2) business days of the signing of this Agreement,

Class Counsel shall make an appropriate application to the court presiding over *Fisher v. Koehler*, 83 Civ. 2128 (S.D.N.Y.) (concerning EMTC), seeking approval of a modification to the July 14, 1989 Decree entered in that case to permit the Revised Use of Force Directive to be applied to EMTC.

- c. Should the *Fisher* application referred to in the preceding paragraph be finally denied, this Agreement will be voidable *in toto* by the City within ten (10) days following written notice of any such denial. If the *Fisher* application is denied and this Agreement is not voided by the City within the ten (10) days allotted, the Revised Use of Force Directive shall not apply to EMTC.

21. DOC shall promulgate the Revised Use of Force Directive within forty-five (45) days of the entry or denial of the appropriate requested order by the court in *Fisher*, or within sixty (60) days of the Effective Date of the Agreement, whichever is later, and provide a copy of the Revised Use of Force Directive to Class Counsel within the same time period. Further, DOC shall issue command-level orders reflecting the changes to Directive 5006R-A within thirty (30) days of the promulgation of the Revised Use of Force Directive, shall provide copies of those orders to Class Counsel within the same time period, and shall instruct supervisors to apprise all MOS and ID investigators and supervisors of the changes.

F. INVESTIGATION DIVISION

22. Investigations Manual. With the assistance of outside consultants who will be selected solely at DOC's discretion (hereafter the "Consultant"), DOC will create a new Investigation Division Manual ("the New ID Manual") that will address use of force investigations, among other topics. The New ID Manual will include, but not be limited to, the following topics:

- a. Burden of proof for recommending charges to be consistent with paragraph 25(h) below;

- b. The timeliness of investigations and the circumstances that may lead to delay;
- c. Basic medical terminology;
- d. Evaluating evidence, including (i) the importance of reviewing medical evidence and the relationship of any injuries to versions of events, (ii) even-handed review of staff and inmate statements and credibility; and (iii) consideration of whether staff prepared their reports based on their own observations, and wrote their reports independently from other staff who were involved or were alleged to have been involved in the incident;
- e. Writing reports;
- f. Vouchering procedures and preserving the chain of custody (including procedures for preserving videotapes);
- g. Understanding any video of the incident;
- h. Criteria as to whether staff should be interviewed following a use of force (*see* ¶¶ 25(a) & 32(e) below);
- i. Determining whether the force used and the procedures followed were appropriate under the law and Department policy.

23. DOC will use best efforts to complete and distribute the New ID Manual by December 31, 2006, or within twelve (12) months after the Effective Date, whichever is later. DOC will use best efforts to provide a draft of the New ID Manual to Class Counsel by October 1, 2006 or within ten (10) months of the Effective Date, whichever is later. Class Counsel will have thirty (30) days after receipt of the draft to provide DOC with non-binding comments. DOC shall notify Class Counsel of any significant delay in producing the New ID Manual beyond the target dates. DOC will provide to Class Counsel a copy of the New ID Manual upon its completion and will certify that it has been distributed to staff with appropriate instructions to use it in use of force investigations.

24. DOC shall inform Class Counsel of the name and address of the Consultant within thirty (30) days of the Consultant's retention or of the Effective Date, whichever is later. Class Counsel may thereafter request a meeting, through counsel for the Municipal Defendants, with the Consultant (who may meet with Class Counsel if he deems it appropriate) and submit materials and non-binding comments.

25. Forty-hour training program for investigators. DOC will provide all current and new ID investigators with adequate training materials and a forty-hour training program that include but are not limited to the following topics:

- a. Interviewing skills and techniques, including criteria as to whether staff should be interviewed following a use of force;
- b. Basic medical terminology;
- c. Evaluating evidence;
- d. Writing analytic reports;
- e. Vouchering procedures/preserving chain of custody;
- f. How to conduct a video review;
- g. Use of the Department's computer databases; and
- h. Burden of proof for recommending charges, *i.e.*, ID investigators will be instructed in the New ID Manual that when the evidence shows that it is more likely than not that an MOS violated a DOC rule or regulation concerning the use of force, ID investigators shall recommend charges regarding that violation.

The topics for the forty-hour training program shall be consistent with the topics for the New ID Manual.

26. DOC shall provide Class Counsel with the following regarding the forty-hour training program for ID investigators:

- a. certification (by letter or otherwise, sufficient to establish that all staff attended) upon completion of initial forty-hour training program for current ID investigators;

- b. annual certification of subsequent forty-hour training programs for new ID investigators; and
- c. any DOC training curriculum and training materials for the forty-hour ID investigator training program.

27. Annual training for investigators. DOC shall provide fourteen (14) hours of annual training for ID investigators related to further development of investigation skills and techniques, including those skills and techniques used in use of force investigations.

28. DOC shall provide Class Counsel with the following regarding the annual training for ID investigators:

- a. annual certification of attendance at 14-hour annual training for ID investigators; and
- b. any DOC training curriculum and training materials for the 14-hour annual training for ID investigators.

29. Use of medical forensic professionals. When, in the judgment of the ID investigator, a use of force incident investigation presents sufficiently complex or unclear forensic medical questions, s/he shall request the approval of the Deputy Commissioner for Investigations and Trials, or his or her designee, to consult with the Office of the Chief Medical Examiner (OCME). If the Deputy Commissioner agrees that such questions are presented, s/he shall grant permission for the consultation.

30. Criteria for opening investigations. DOC will open an ID investigation in the following cases:

- a. Class "A" uses of force (as defined in current Directive 5006R-A (V)(F)(4)(a));
- b. Allegations of force involving an inmate with injuries classifiable as Class "A," as defined in current Directive 5006R-A (V)(F)(4)(a);

- c. Allegations that inmates were dissuaded from reporting use of force;
- d. Allegations that inmates were denied medical treatment; and
- e. Uses (or allegations of use) of (i) unauthorized equipment, or (ii) authorized equipment in an unauthorized manner.

The Investigation Division (“ID”) shall conduct a limited inquiry of any allegation involving an inmate with injuries classifiable as Class “B,” as defined in current Directive 5006R-A (V)(F)(4)(b). In conducting such an inquiry, an ID investigator shall interview the injured inmate(s) in DOC custody within two (2) weeks of notice of such allegation and review any videotape(s) made in or around the time and location at which the incident was alleged to have occurred. An ID investigator may interview any inmate witnesses but shall interview inmates in DOC custody who have declined to speak to facility investigators but for whom an interest in speaking to investigators from outside the facility has been indicated in writing. Additionally, the facility shall conduct an investigation into the allegation, unless ID or an outside entity (*e.g.*, the Department of Investigation, the Inspector General or a prosecutor’s office) takes over the investigation before it has been completed by the facility. Based on the ID investigator’s independent interviews and review of the facility investigation packet, including any videotape(s), a Deputy Director of Investigations (“DDI”) shall determine whether the allegation is corroborated. If the DDI determines that an allegation is corroborated, and only when consistent with lawful authority, an investigation shall be opened, unless a Memorandum of Complaint (“MOC”) has already been filed against an MOS. Such corroboration may include direct evidence, such as an injury consistent with the allegation or statements of witnesses who saw or heard part or all of the incident and report one or more facts consistent with the allegation. Such corroboration may also

include circumstantial evidence, such as an officer being off post at the time of the incident, or an inmate being taken out of a housing area without explanation. Beginning no later than six (6) months after the Effective Date, DOC shall provide Class Counsel on a quarterly basis with a list of allegations made during the preceding calendar quarter involving an inmate(s) with injuries classifiable as Class "B," of which limited inquiries were conducted but for which no full investigation was opened. Consistent with lawful authority, nothing shall prevent ID from opening an ID investigation when it deems it appropriate.

31. Time Limits for Investigations.

- a. DOC agrees to maintain an eight-month average for the completion of ID investigations of Class "A" use of force incidents. Nothing in this Agreement shall prevent DOC from completing such investigations in a shorter average time period.
- b. Any Class "A" use of force investigation which has not been closed within five (5) months of ID's receipt of the facility packet shall be reviewed by the Deputy Commissioner for Investigations and Trials or his designee not below the rank of Deputy Director of Investigations to determine the status of the investigation. The Deputy Commissioner shall take appropriate action to ensure the timely conclusion of the investigation. Nothing in this Agreement shall prevent DOC from reviewing the status of ID investigations less than five (5) months after the receipt of facility packets.
- c. DOC shall provide Class Counsel with quarterly reports for all ID investigations related to use of force incidents opened during the preceding quarter, listing the incident date, use of force number, and the date the investigation was opened; and for all Class "A" ID investigations related to use of force opened after the Effective Date and pending in the preceding quarter, listing the incident date and use of force number and indicating any action taken by the Deputy Commissioner or his designee to ensure that the investigation was completed timely.

32. Interim Investigation Division Memorandum. Pending completion of the New ID Manual, DOC shall create an Interim Memorandum ("Interim ID Memo") signed

by the Deputy Commissioner for Investigations and Trials, to be followed by ID investigators. The Interim ID Memo shall include the following information:

- a. Notice that the DOC will be creating a New ID Manual and installing Recording Wall-Mounted Cameras.
- b. Changes in ID investigator training, as set forth in paragraphs 25 through 28 above.
- c. Criteria for opening ID investigations, as set forth in paragraph 30 above.
- d. Time limits for ID investigations, as set forth in paragraph 31 above.
- e. Criteria on when staff should be interviewed, including the following: "Subject to circumstances that render an interview inappropriate (such as a pending criminal investigation), investigators shall interview staff when, in the investigator's view, such an interview is necessary to understand the events of the incident. If the investigator has doubt about whether such an interview is necessary, he/she shall consult his/her supervisor for guidance."
- f. Instruction regarding the burden of proof for recommending charges, including the following: "Investigators will be instructed in the New ID Manual that when the evidence shows that it is more likely than not that an MOS violated departmental rules and regulations concerning the use of force, investigators shall recommend charges regarding that violation or those violations."
- g. Instruction regarding evaluating evidence, including the following: "Investigators shall (i) consider the importance of reviewing medical evidence and the relationship of any injuries to versions of events, (ii) review staff and inmate statements and credibility even-handedly; and (iii) consider whether staff prepared their reports based on their own observations and wrote their reports independently from other staff who were involved or were alleged to have been involved in the incident."

The Deputy Commissioner shall distribute the Interim ID Memo to and review it with ID staff, with appropriate instructions to use it in use of force investigations. DOC shall provide Class Counsel with a copy of a draft of the Interim ID Memo for non-binding comment within sixty (60) days of the Effective Date. Within ninety (90) days of the

Effective Date, DOC shall provide Class Counsel with a copy of the final version and shall certify that the Interim ID Memo has been distributed.

G. FACILITY LEVEL INVESTIGATIONS

33. Diagram to document inmate injuries. DOC will use an Injury to Inmate Report that includes a diagram of the human body (“homunculus”) that enables medical staff to note the locations of all injuries to the inmate, and on which medical staff shall so identify the injuries that they observe.

34. Upgrades of incidents. Captains shall be required to confirm the results of any medical diagnostic tests and/or hospital referrals related to use of force by DOC staff that may warrant upgrading an incident from Class “B” to Class “A” and to report any necessary upgrades to the Central Operations Desk, prior to submission of the investigating captain’s supervisor reports. DOC will issue a teletype order stating that wardens shall not accept use of force packages unless the investigating captain has indicated in his/her report that s/he has confirmed the results of any relevant medical diagnostic tests and/or hospital referrals. DOC shall provide Class Counsel with a copy of the teletype order within ninety (90) days of the Effective Date.

35. Photographing of inmate injuries.

- a. After a use of force incident, a captain will take four (4) photographs of each inmate involved in the incident from no more than four feet away from the waist up, showing left, right, front and back views. The inmate’s face shall be included in all such photographs. If, and only if, the four (4) photographs do not capture the visible injuries on the inmate’s body, the investigating captain shall then take any photographs which may be necessary to show all visible injuries. Provided, however, that such photographs shall not be required to be taken whenever (i) in the judgment of the investigating captain, the taking of photographs would endanger the safety of staff or inmates, or the security of the institution; (ii) the inmate is in need of immediate medical attention; or (iii) the inmate refuses to be photographed.

- b. Such photographs shall be taken after an inmate receives medical treatment and before an inmate is discharged from the medical clinic. Captains shall be instructed to make best efforts to take clear photographs.
- c. The health and well-being of both inmates and officers is the highest priority. When not inconsistent with the need for medical treatment and the circumstances existing at the time, photographs shall be taken before bandages are applied to an inmate injury.

36. Facility Investigation Procedures/Materials. DOC shall review its facility use of force investigation procedures, and develop written materials for facility use of force investigations that will include the terms set forth in paragraphs 33 through 35 above (the "Facility Investigations Materials"). DOC will use best efforts to complete and distribute the Facility Investigations Materials by December 31, 2006, or within twelve (12) months after the Effective Date, whichever is later. DOC will use best efforts to provide a draft of the Facility Investigations Materials to Class Counsel by October 1, 2006, or within ten (10) months of the Effective Date, whichever is later. Class Counsel will have thirty (30) days after receipt of the draft to provide DOC with non-binding comments. DOC will provide to Class Counsel a copy of the Facility Investigations Materials upon their completion and will certify that they have been distributed. The materials shall be reviewed by wardens with jail supervisors at staff meetings, with appropriate instructions to use them in facility investigations.

37. Interim Facility Investigations Materials. Pending completion of the Facility Investigations Materials, to the extent the Parties agree to modify DOC procedures for conducting facility use of force investigations (as reflected in paragraphs 33 through 35 above), those modifications will be disseminated in writing by the Department, in whatever form the Department deems suitable (the "Interim Facility Investigations Materials"). The Interim Facility Investigations Materials shall be

reviewed by wardens with jail supervisors at staff meetings, with appropriate instructions to use them in conducting facility use of force investigations. DOC shall provide Class Counsel with a copy of the Interim Facility Investigations Materials within sixty (60) days of the Effective Date for non-binding comment and will provide Class Counsel with a copy of the final version within ninety (90) days of the Effective Date and will certify that it has been distributed.

H. USE OF FORCE TRAINING

38. Increase in gym training.

- a. With respect to in-service use of force training, DOC will allocate one (1) hour of current use of force classroom training to use of force gym training for correction officers. This paragraph shall not operate to increase the total number of hours of use of force training.
- b. DOC will provide Class Counsel with certification, within ninety (90) days of the Effective Date, of the change in in-service use of force training for correction officers to allocate one (1) hour of current classroom training to gym training.

39. Certification of knowledge of defensive techniques.

- a. At recruit and in-service training in defensive techniques, the training instructor shall require all attendees to demonstrate to the instructor that they can perform the defensive technique(s) they were taught at the training session, as a condition to completing the class.
- b. DOC shall provide Class Counsel with the written instructions issued to training instructors directing them to certify staff demonstration of defensive techniques within ninety (90) days of the Effective Date. DOC shall also provide Class Counsel with quarterly certification of correction officers' satisfactory demonstration of defensive techniques at recruit and in-service training.

40. Additional roll call training.

- a. DOC will require that, once per month, roll-call training at all facilities includes review and reinforcement of the use of force

policy. Such roll call training will not be limited to pro forma admonitions to avoid force. Supervisors who conduct roll call training will be encouraged to discuss specific examples of uses of force, and proper and improper applications of force, if deemed relevant.

- b. DOC will provide Class Counsel with a copy of the written instructions requiring and setting forth the contents of monthly roll call training regarding use of force as set forth in the above paragraph, within ninety (90) days of the Effective Date. Further, DOC shall provide Class Counsel with quarterly certifications of monthly roll call training on use of force for correction officers.

I. USE OF FORCE TRACKING

41. Tracking Uses of Force.

- a. DOC will create a system (the "System") that will track officer use of force. The System will track data including: (i) the injuries sustained by inmates and staff; (ii) the location of the incident; and (iii) whether there was a videotape of the incident.
- b. With respect to the location of incidents, the System shall track the number of use of force incidents that occur in the following areas: (i) punitive segregation areas; (ii) mental observation areas; (iii) receiving rooms; (iv) general population housing areas; (v) corridor/vestibule/bridge areas; and (vi) stairwells outside housing areas.
- c. The information in the System will be used by facility commanders and central office staff for management purposes, as well as by ID investigators for investigation purposes.
- d. Additionally, for all use of force incidents and allegations, DOC will track (i) whether disciplinary charges were recommended and/or filed and (ii) the outcome of any disciplinary proceedings. The information will be used by ID investigators for investigation purposes and by facility commanding officers for management purposes.
- e. Best efforts will be made for the System and the data tracking set forth in paragraph 41(d) to be in place within twelve (12) months of the Effective Date.

42. Upon completion of the System and one (1) time only during the term of the Agreement, DOC shall provide Class Counsel with one month's worth of use of force

tracking information, in the form of a report or other document that is generated from the System in a form that can be or may be utilized by facility commanders, central office staff and ID investigators. At the same time, DOC shall provide Class Counsel with one month's worth of information tracked as set forth in paragraph 41(d), in the form of a report or other document that can be or may be utilized by ID investigators and facility commanding officers.

J. NEGOTIATED PLEAS

43. The Commissioner or the Deputy Commissioner of Investigations and Trials shall continue to approve all negotiated pleas before they are entered into in cases involving violations of use of force regulations.

44. DOC shall provide Class Counsel with a quarterly report of disciplinary charges preferred against any MOS at the Facilities at Issue related to any violation of law in relation to use of force; any violation of Departmental use of force rule, regulation or policy; or any misconduct in connection with use of force relating to videotaping, reporting, falsifying documents, falsifying or failing to make notations or entries, or making false statements. The quarterly report shall include the name(s) of the MOS against whom the charges are preferred, the use of force incident number, and the disposition of the charges.

K. ADDITIONAL DOCUMENTS TO BE PROVIDED BY DOC

45. In addition to obligations specifically set forth above, DOC shall provide Class Counsel with copies of the following, no later than the quarter after each is issued:

- a. Any revisions to the "Use of Force Directive 5006" curricula and lesson plans used in recruit and in-service training.
- b. Any updates or revisions to the following writings required to be provided pursuant to this Agreement: command-level orders

issued regarding the Revised Use of Force Directive (§ 21), the New ID Manual (§ 23), DOC curriculum/training materials for 40-hour ID training (§ 26), DOC curriculum/training materials for 14-hour ID training (§ 28), injury to inmate report containing a diagram of the human body (§ 33), and the Facility Investigations Materials (§ 36).

- c. Any revisions to or rescissions of the following which occur during the Term of the Agreement: Directive 7002R, "Investigation Division – Use of Force Unit" (07/19/93); Directive 4516, "Injury to Inmate Reports" (02/21/97); Directive 5003, "Monitoring Uses of Force" (11/17/86); Directive 7001R, "Investigation Division" (09/28/92); Operations Order 09/93, "Use of Force Incident Investigations" (3/10/93); Operations Order 06/98, "Reporting the Use of Force" (04/01/98); and Operations Order 16/97, "Reclassifying Incident Data" (11/13/97). In the event that directives or operations orders have been superseded, the obligation to provide revisions or rescissions of such documents shall cease.
- d. Any directives or orders applicable Department-wide concerning the use of force tracking system set forth in section I above.
- e. The command-level order governing the use of hand-held cameras by ESU (see Section D above).

46. Facility Packets and ID Files.

- a. Subject to the limitations in b. and c. below, DOC shall provide Class Counsel with on-site access on a monthly basis to all closed facility packets and closed ID files for use of force incidents at the Facilities at Issue that were closed in the preceding calendar month. Provided, however, that if Class Counsel are unable to conduct a particular monthly review, Class Counsel shall be provided with on-site access to all closed facility packets and closed ID files for use of force incidents at the Facilities at Issue that were closed since Class Counsel's last monthly review; but in no event shall Class Counsel be provided with access to files closed more than sixty (60) days prior to the first calendar day of the calendar month in which they are inspecting documents. The provisions contained in the preceding sentence shall be invoked no more than twice per year.
- b. Class Counsel's on-site inspection shall not exceed five (5) consecutive days in one (1) business week per month; shall take place only during the last two (2) full business weeks of any month as agreed and confirmed at least one (1) week prior to inspection;

and shall not last longer than twelve (12) hours per day, commencing at 9:00 a.m. There shall be no limitation on the number of people conducting the document reviews. The document reviews shall be conducted in a confidential setting. Upon Class Counsel's written request, DOC shall provide Class Counsel with copies of up to 20% of the packets and files reviewed. Class Counsel shall identify to the Municipal Defendants in writing the files to be copied, and the requested copies will be provided to Class Counsel within thirty (30) days of Class Counsel's notice. In the event that Class Counsel reviews sixty (60) days' worth of documents during one inspection and identifies and requests in writing copies of such documents (which in no event shall exceed 20% of the documents reviewed), DOC shall provide Class Counsel with such copies within sixty (60) days of Class Counsel's written notice.

- c. In the event that ID or an outside entity (*e.g.*, the Department of Investigation, the Inspector General or a prosecutor's office) takes over a facility investigation before it has been completed by the facility, or in the event that an outside entity takes over an ID investigation before it has been completed by ID, Class Counsel shall not have access to any documents contained in the facility packet and/or ID file, except the Injury to Inmate Reports for such incidents, which will be provided by DOC along with the name of the subject inmate(s); the incident date, time and location; whether the incident has been classified as Class "A" or Class "B" and the names and shield numbers of the MOS(s) involved. If an outside entity investigating and/or prosecuting a matter arising out of a use of force incident asks DOC to withhold information so as not to compromise or interfere with the investigation and/or prosecution, Class Counsel shall not have access to any DOC documents, but instead will be provided with the name of the injured inmate(s) involved in the incident.
- d. Subject to the above limitations in the preceding paragraphs and upon written request, Class Counsel shall be permitted to review any videotapes or audiotapes of any use of force incident that is the subject of a closed facility packet or a closed ID file that Class Counsel has reviewed.

L. DISPUTE RESOLUTION AND COURT RELIEF

47. Class Counsel and the City shall make a good faith effort to resolve any disputes that may arise under the Agreement. The City shall respond in writing within

thirty (30) calendar days to any written communications from Class Counsel concerning any matter addressed by the Agreement.

48. In the event of non-compliance with the terms of the Agreement, Class Counsel may seek judicial relief only by (1) moving to reinstate the Action in federal court, or (2) commencing an action for breach of the Agreement in state court. Provided, however, that Class Counsel may move to reinstate the Action only in the event of a material breach of the Agreement. Prior to moving to reinstate the Action or commencing an action for breach of the Agreement, Class Counsel shall notify the City in writing of the specific grounds and facts upon which Class Counsel alleges non-compliance with identified provisions of the Agreement. The City shall respond within thirty (30) calendar days. If the dispute is not resolved, Class Counsel shall notify the City by letter and request that counsel meet and confer. Class Counsel and the City shall meet within ten (10) business days of Class Counsel's notice or on some other date mutually agreed upon by counsel, in an attempt to arrive at an amicable resolution of the dispute. Nothing said by any party or counsel for any party during any and all meetings held pursuant to this section may be used by any opposing party in subsequent litigation in this or any other lawsuit.

49. If the dispute remains unresolved five (5) business days following the conclusion of such meeting or meetings, or if the City does not respond to Class Counsel's initial notice of dispute within thirty (30) days of that notice or if counsel do not meet and confer (or agree to a date to meet and confer) within ten (10) business days of Class Counsel's request to meet and confer, the City shall be so informed by Class Counsel in writing, and the Plaintiff Class may then, in connection with the matters which Class Counsel identified to the City, move to reinstate the Action or commence an

action for breach of the Agreement no sooner than ten (10) days from the written notice referenced herein. Class Counsel's compliance with the procedures outlined above is a condition precedent to any action for breach of the Agreement, any motion to reinstate the Action or any other request for judicial intervention in the Action or in connection with the Agreement.

M. GROUND UPON WHICH CLASS COUNSEL SHALL NOT SEEK COURT RELIEF

50. Class Counsel shall not commence an action for breach of the Agreement, move to reinstate the Action or make any other request for judicial intervention in the Action or in connection with the Agreement based upon any decision(s) by DOC not to adopt any non-binding suggestions by Class Counsel and/or any action by the Consultant to accept or not to accept Class Counsel's comments or request for a meeting; or based solely on isolated or minimal instances of non-compliance with the terms of the Agreement, or any increase in the number of use of force of incidents.

N. ATTORNEYS' FEES, COSTS AND DISBURSEMENTS

51. In full satisfaction of any and all claims for attorneys' fees, costs and disbursements incurred in the Action by the Named Plaintiffs and/or Class Counsel up to and including the date the Action is dismissed with prejudice, the City shall pay the following amounts:

- a. the sum of \$700,000 to Sullivan & Cromwell LLP; and
- b. the sum of \$750,000 to Emery Celli Brinckerhoff & Abady LLP.

The above amounts are being paid for certain of the attorneys' fees, costs and disbursements incurred by Class Counsel for prosecuting claims for injunctive and declaratory relief on behalf of the Plaintiff Class. Class Counsel shall not seek, and the

City is not obligated to pay, any attorneys' fees, costs or disbursements incurred by Class Counsel in connection with the Agreement during the Term of the Agreement. The Legal Aid Society's waiver of all attorneys' fees, costs and disbursements incurred in the Action may not be referred to as a precedent in future actions.

O. TERM OF THE AGREEMENT

52. The Agreement shall remain in effect until November 1, 2009. DOC shall use best efforts to complete its installation of Recording Wall-Mounted Cameras in the Agreed-Upon Locations according to the timeline agreed upon by the Parties (see Exhibit C) and all Recording Wall-Mounted Cameras required to be installed under this Agreement will be installed and operable, consistent with the terms of this Agreement, no later than three years after the Effective Date.

P. CIRCUMSTANCES OUTSIDE OF THE PARTIES' CONTROL

53. No party shall be liable for any failure to perform its obligations in connection with any action described in this Agreement, if such failure results from an act of God, riot, war, civil unrest, flood, earthquake, fire, strike or other cause beyond such party's reasonable control (including any mechanical, electronic, or communications failure, but excluding failure caused by a party's financial condition or negligence).

54. Further, no party to the Agreement shall be liable for any failure or delay in performance under this Agreement to the extent said failures or delays are proximately caused by causes beyond that party's reasonable control and occurring without its fault or negligence, including, without limitation, failure of suppliers, contractors, subcontractors, or carriers; provided that as a condition to the claim of nonliability, the party experiencing the difficulty shall give the other written notice, as soon as practicable, with full details following the occurrence of the cause relied upon. Dates by which

performance obligations delayed by the aforementioned circumstances are scheduled to be met will be extended for a period of time equal to the time lost due to any delay so caused.

Q. CONFIDENTIALITY AND USE OF DOCUMENTS AND INFORMATION

55. All documents and information obtained by Class Counsel from the City under this Agreement shall be deemed confidential (the “Confidential Documents and Information”). Class Counsel shall preserve the confidentiality of the Confidential Documents and Information unless and until the City expressly authorizes the disclosure of each specific document or piece of information. The Confidential Documents and Information shall not be used except to enforce this Agreement and shall not be used for any other litigation or any other purpose, including but not limited to, purposes of public disclosure or dissemination. To the extent any court filing by Class Counsel, in any action for breach of the Agreement, any motion to reinstate the Action, or any other request for judicial intervention in the Action or in connection with the Agreement includes specific references to Confidential Documents and Information, it shall be filed under seal.

56. In addition to the foregoing, the Confidential Documents and Information shall be deemed “Confidential Materials” under, and subject to, the protective order, dated June 11, 2003, a copy of which is attached hereto as Exhibit D.

57. All Confidential Documents and Information shall be returned to the Law Department within thirty (30) days of the termination of this Agreement. In the event that Class Counsel requests and the Court grants reinstatement of the Action, Class Counsel shall return all Confidential Documents and Information to the Law Department within thirty (30) days of the order granting reinstatement. Pursuant to paragraph 11 of

the Protective Order dated June 11, 2003, and within thirty (30) days of the Effective Date of the Agreement, Class Counsel shall return to the City all Confidential Materials produced in any form to Class Counsel in discovery in the Action. The City shall retain these Confidential Materials and provide them to Class Counsel in the event that this Action is reinstated.

58. Nothing in paragraphs 55-57 above constitutes or is intended to constitute a waiver of any applicable privilege. Nothing in this Agreement prevents Class Counsel from obtaining or disclosing information from sources other than the Confidential Documents and Information, and from representing clients consistent with the requirements of paragraphs 55-56 above and this paragraph.

R. RELEASE

59. This Agreement, as of the Effective Date, resolves in full any and all claims or rights of action for class-wide declaratory, injunctive or other form of equitable relief by any member of the Plaintiff Class against the Municipal Defendants and their predecessors, successors, or assignees, together with past, present, and future officials, employees, representatives, and agents of the Department (the "Released Persons") based both on events occurring prior to the signing of the Agreement and on claims that were or could have been asserted in, and arise from the allegations in, the Complaint. Provided, however, that this Agreement does not prevent an individual member of the Plaintiff Class from filing or prosecuting a claim or action on his/her own behalf seeking equitable relief tailored to the specific circumstances of that individual, or prevent Class Counsel from moving to reinstate the Action or prosecuting the Action in the event of reinstatement.

60. This Agreement, as of the Effective Date, resolves in full any and all claims or rights of action for class-wide declaratory, injunctive or other form of equitable relief that could be asserted after the signing of the Agreement through November 1, 2009 by any member of the Plaintiff Class against the Released Persons based both on events occurring after the signing of the Agreement through November 1, 2009 and on claims that were or could have been asserted in, and arise from the allegations in, the Complaint. Provided, however, that this Agreement does not prevent an individual member of the Plaintiff Class from filing or prosecuting a claim or action on his/her own behalf seeking equitable relief tailored to the specific circumstances of that individual, or prevent Class Counsel from commencing an action for breach of the Agreement, moving to reinstate the Action or prosecuting the Action in the event of reinstatement.

61. As of the Effective Date, all members of the Plaintiff Class hereby release and waive any and all claims and any and all rights to pursue, initiate, prosecute or commence any and all causes of action for class-wide declaratory, injunctive or other form of equitable relief against the Released Persons based both on events occurring prior to the signing of the Agreement and on claims that were or could have been asserted in, and arise from the allegations in, the Complaint. Provided, however, that this Agreement does not prevent an individual member of the Plaintiff Class from filing or prosecuting a claim or action on his/her own behalf seeking equitable relief tailored to the specific circumstances of that individual, or prevent Class Counsel from moving to reinstate the Action or prosecuting the Action in the event of reinstatement.

62. As of the Effective Date, all members of the Plaintiff Class hereby release and waive any and all claims and any and all rights to pursue, initiate, prosecute or commence after the signing of the Agreement through November 1, 2009 any and all

causes of action for class-wide declaratory, injunctive or other form of equitable relief against the Released Persons based both on events occurring after the signing of the Agreement through November 1, 2009 and on claims that were or could have been asserted in, and arise from the allegations in, the Complaint. Provided, however, that this Agreement does not prevent an individual member of the Plaintiff Class from filing or prosecuting a claim or action on his/her own behalf seeking equitable relief tailored to the specific circumstances of that individual, or prevent Class Counsel from commencing an action for breach of the Agreement, moving to reinstate the Action or prosecuting the Action in the event of reinstatement.

63. This Release and the terms of the Agreement will be, and may be, raised as a complete defense to and shall have *res judicata* and all other preclusive effect in all pending and future claims or rights of action resolved, released and/or waived by paragraphs 59-62 above. However, notwithstanding the foregoing, if the Action is reinstated, the Agreement shall be terminated. If the Agreement is terminated, each party to the Agreement may assert any and all rights, claims and defenses to which they were entitled in law and equity immediately prior to the execution of the Agreement, in addition to any other rights, claims and defenses that may be available at the time of termination. Nothing in the Agreement shall operate as a waiver of affirmative defenses.

64. Nothing in this Agreement prevents any member of the Plaintiff Class from bringing a new action for class-wide declaratory, injunctive or other form of equitable relief after November 1, 2009.

65. Nothing in this Agreement resolves or bars any claims for damages or rights of action for damages by or on behalf of any individual(s).

66. Any release of individual claims or rights of action for damages or injunctive relief in connection with any settlement of any Named Plaintiff's claim(s) shall be addressed in a separately executed agreement.

67. This Agreement applies to and is binding upon all members of the Plaintiff Class, including the Class Representatives, and the Municipal Defendants and their officers, agents, employees, successors, and assigns. This Agreement constitutes a private settlement agreement and not a court order. All enforcement of the Agreement shall be by Class Counsel. The undersigned counsel to the members of the Plaintiff Class, and the undersigned counsel to the Municipal Defendants, certify that they are authorized to enter into and consent to the terms and conditions of this Agreement and to legally bind the members of the Plaintiff Class and the Municipal Defendants.

S. APPLICABLE LAW

68. This Agreement shall be governed by, and construed under, the laws of the State of New York.

T. AVAILABILITY OF LEGAL AND EQUITABLE REMEDIES

69. Except where specified, the provisions set forth herein do not limit the remedies the Parties may have at law or in equity.

U. JOINT DEFENSE OF AGREEMENT

70. The Parties shall take all necessary and appropriate steps to obtain court approval of the Agreement. Upon Court approval, Class Counsel shall take all necessary and appropriate steps to obtain dismissal of the Action with prejudice in the form of an order attached hereto as Exhibit E. In the event of a challenge or objection to this Agreement in the district court, and/or if there is an appeal from any decision by the

district court, the Municipal Defendants and Class Counsel will join in the defense of the Agreement.

V. MODIFICATION OF THE AGREEMENT

71. This Agreement represents the entire agreement among the Parties as to the Class injunctive and declaratory claims in the Action, and no oral agreement entered into at any time nor any written agreement entered into prior to the execution of this Agreement shall be deemed to exist, or to bind the Parties hereto, or to vary the terms and conditions contained herein, or to determine the meaning of any provisions herein. This Agreement can be modified only on the written consent of all Parties.

W. NO ADMISSION OF LIABILITY

72. This Agreement does not constitute (a) an admission by any defendant of any violation of law or wrongdoing, (b) an admission by any defendant that any standard, policy, practice or procedure addressed in this Action violated or failed to comply with either the language or intent of any applicable law, rule or regulation, or (c) an admission by any defendant that its position in this litigation was not substantially justified. The election of the particular form and terms of this Agreement to resolve the Action shall not be referred to as a precedent or serve as a precedent in any other case.

X. MUTUAL EXCLUSIVITY OF PROVISIONS

73. If any provision of this Agreement is declared invalid, illegal or unenforceable in any respect, the remaining provisions shall remain in full force and effect, unaffected and unimpaired.

Y. NOTIFICATIONS

74. All written communications required by this Agreement shall be transmitted by U.S. Mail or hand-delivery to the Legal Aid Society Prisoners' Rights

Project, as Class Counsel, at the address listed below, and to the New York City Law Department, as counsel for the Municipal Defendants, and the General Counsel of the New York City Department of Correction, at the addresses listed below. In addition, copies of all written communications excluding attachments, or at a minimum the cover letters to all written communications excluding attachments, required by this Agreement shall be transmitted simultaneously by U.S. Mail or hand-delivery to Emery Celli Brinckerhoff & Abady LLP, as Class Counsel, at the address listed below. Notwithstanding the above, any response to a communication sent pursuant to paragraph 47 above shall be transmitted by U.S. Mail or hand-delivery only to the counsel who sent the original communication. All counsel shall make best efforts to send courtesy copies of all written communications by facsimile or e-mail, when possible. Counsel's receipt of a hand-delivered or U.S. Mail-delivered communication shall trigger the running of any applicable time limit. All counsel shall be informed promptly in the event that any substitution is to be made in counsel to receive notification under this Agreement, and the name and contact information for substitute counsel shall be promptly provided.

Jonathan Chasan, Esq.
Mary Lynne Werlwas, Esq.
Betsy Ginsberg, Esq.
John Boston, Esq.
Legal Aid Society
Prisoners' Rights Project
199 Water Street, 6th Floor
New York, NY 10038
(212) 577-3530 (phone)
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mlwerlwas@legal-aid.org

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Ilann Maazel, Esq.
Sarah Netburn, Esq.
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Class Counsel

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Florence Hutner, Esq.
Deputy Commissioner for Legal
Matters/General Counsel of the New York
City Department of Correction
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New York, NY 10013
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(212) 349-5065 (fax)
florence.hutner@doc.nyc.gov

Counsel for the Municipal Defendants

Z. CONSTRUCTION

75. This Agreement shall be deemed to have been drafted by the Parties collectively, and the rule that ambiguities are to be construed against the party who drafted the agreement shall be inapplicable.

AA. HEADINGS

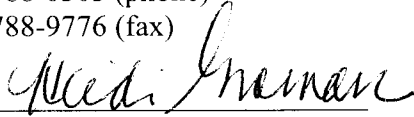
76. Paragraph and section headings do not and are not intended to have any effect on the construction of the Agreement.

BB. NO WAIVER OF PRIVILEGE

77. Nothing in this Agreement or undertaken pursuant to this Agreement constitutes or is intended to constitute a waiver of any applicable privilege.

Signed and Agreed this 17th day of February, 2006, by:

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for the Municipal Defendants
100 Church Street
New York, NY 10007
(212) 788-0303 (phone)
(212) 788-9776 (fax)

By: 
Heidi Grossman, Esq. (HG 0933)
Arthur G. Larkin, Esq. (AL 9059)

THE LEGAL AID SOCIETY

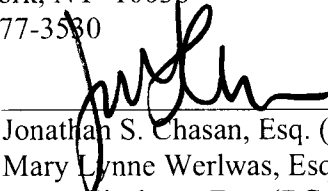
Prisoners' Rights Project

Class Counsel

199 Water Street, 6th Floor

New York, NY 10038

(212) 577-3580

By: 

Jonathan S. Chasan, Esq. (JC 9018)

Mary Lynne Werlwas, Esq. (MW 6403)

Betsy Ginsberg, Esq. (BG 9890)

John Boston, Esq. (JB 5511)

EMERY CELLI BRINCKERHOFF & ABADY LLP

Class Counsel

545 Madison Avenue, 3rd Floor

New York, NY 10022

(212) 763-5001 (fax)

(212) 763-5000 (phone)

By: 

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Andrew G. Celli, Jr., Esq. (AGC 3598)

Ilann M. Maazel, Esq. (IM 5724)

Sarah Netburn (SN 4223)

Katherine Rosenfeld (KR 8525)

SULLIVAN & CROMWELL LLP

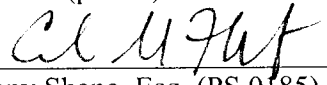
Class Counsel

125 Broad Street

New York, NY 10004

(212) 558-3588 (fax)

(212) 558-4000 (phone)

By: 

Penny Shane, Esq. (PS 0185)

Caroline M. Flintoft, Esq. (CF 9126)

Claire E. Coleman, Esq. (CC 2552)

Sara L. Manaugh, Esq. (SM 9626)

EXHIBIT B

IV.C. Anticipated Use of Force

1. Whenever a use of force is anticipated and the inmate does not pose an immediate threat, a supervisor shall be notified. All actions shall be under his/her direction unless circumstances change and the use of force is required before the supervisor arrives. In an emergency or situation where it is not possible or practical to notify a supervisor, staff may use appropriate force consistent with the procedures contained herein.
2. It is not always possible to predict when a confrontation with an inmate will require the use of force. To determine whether force is likely and whether delay would be harmful, an officer should consider the circumstances, including the location of the inmate, the layout of a particular facility, the safety and well-being of other inmates and staff, and the location of other inmates and staff. Some examples of anticipated uses of force may include but are not limited to situations in which an inmate:
 - a. Refuses to go to court
 - b. Refuses to leave a cell when ordered to do so;
 - c. Is not complying with search procedures either in the cell or in the three-point search areas.

Anticipated uses of force may occur inside or outside a cell or search area.

3. The fact that force is used does not necessarily establish that it should have been anticipated.
4. In all anticipated use of force situations, except where safety or security concerns require an immediate response that would make waiting for the provision of a camera impractical, staff shall immediately obtain a videocamera and begin recording the event as soon as it is feasible.
5. The commanding officer of every command shall ensure that a sufficient number of operable cameras are available for use at each command. Each tour commander shall ensure at the commencement of every shift that all video cameras are operable, charged, and available and that supervisors know where they are located and how to access them when needed.

EXHIBIT C

<u>Location*</u>	<u>Best Efforts Camera Installation Date</u>
Jail 1	December 2006
Jail 2	June 2007
Jail 3	September 2007
Jail 4	December 2007
All receiving rooms (intakes) in the Facilities at Issue	July 2008

*Jails 1-4 refer to AMKC, GMDC, GRVC and ARDC; however, neither this Agreement nor this exhibit is intended to identify which jails will be completed by which dates.

06/11/03 WED 18:07 FAX 1 212 805 7906

JUDGE CHIN'S CHAMBERS

14002

6/11/03

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-X

Adam Ingles, Shawn Davis, Ed Sykes, Miguel Roman, Al Smith, Charles Paige, Jamal Butler, Andre Pratt, Robert Allaway, Patrick Washington, Randolph Johnson, Rogelio Figueroa, Paul Person, Calvin Daniels, Bobby Jones, Phillip Campbell, Jonathan Lukes, Lamont Bradley, Gary Smith, Darold Freeman, Eric Richards and Kimada Dixon,

Plaintiffs,

-against-

Elmer Toro, Robert Dash, Robert Davoren, William Fraser, Steven Conry, Bernard Kerik, Officers Caldero, Lanausse, Gray, Givens, McCommon, Rivera, McKeller, Roberts, Natale, Elliott, Kramer, Cox, Guameri, Williamson, Graham, Smalls, Powell, Torres, Echiveria, Clark, Hershaway, Dice, Lewis, Yates, Swetokas, Mastroianni, Straughn, Wells, Lopez, Vasquez, Fernandez, Case, Wright, Fisher, Gatto, Bradford, Lamont, Valentine, Chapman, Keith Jackson, R. Jackson, Rivera, Kinder, Dedicke, Anderson and John Does 1-15, 17-44, 49-52, 56-62, and 66-75, Captains Alicia, Sullivan, Cardo, Small, Wright, Velez, Hayes, Mulvaney, Hernandez, Gallagher, Crooms, Ramos, Perez, Daniels, and John Does 16, 46-48, 53-55, 63 and 65, Assistant Deputy Warden Pennes, Wardens Gerard O'Gara and Roger Slattery, and the City of New York,

Defendants.

-X

WHEREAS, plaintiffs¹ have requested that the City of New York provide certain information and disclose documents in connection with this litigation; and

WHEREAS, defendants deem certain information and documents confidential; and

¹ As used herein the term "plaintiffs" includes all members of the plaintiff class.

PROTECTIVE ORDER

01 Civ. 8279 (DC)

06/11/03 WED 18:07 FAX 1 212 805 7906

JUDGE CHIN'S CHAMBERS

003

WHEREAS, defendants believe that revealing certain information and the contents of certain documents to the plaintiffs and others poses risks to the institutional safety and security of the New York City Department of Correction ("DOC"), implicates the privacy interests of correction officers, and is necessary to protect individuals from annoyance, embarrassment and oppression; and

WHEREAS, defendants object to the disclosure of this information and production of these documents unless appropriate protection for their confidentiality is assured (without waiving the objections set forth in City defendants' discovery responses or any future objections);

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. As used herein, "Confidential Materials" shall mean:

(a) all DOC employees' home addresses, telephone numbers, social security numbers, dates of birth, worker's compensation records and medical records unrelated to any alleged or actual use of force against an inmate; and

(b) all DOC employees' personnel records files and information relating to their employment histories; and

(c) "22R Reports" (that relate to individual employment histories) performance evaluations, pre-employment information, background information/checks and probationary officer files; and

(d) photographs, videotapes, and diagrams showing DOC facilities and staff; and

(e) all documents that concern the location of stationary video cameras in Department of Correction facilities; and

(f) information obtained as a result of a physical inspection of DOC facilities that would breach safety and security of the facilities; and

06/11/03 WED 18:08 FAX 1 212 805 7906

JUDGE CHIN'S CHAMBERS

004

(g) DOC Log Books to the extent that they reflect detailed information of movement of staff and inmates); and

(h) security reports, security information, training materials, memoranda and other writings setting forth agency policy and procedures, to the extent that these documents provide specific operational guidance to DOC staff that, if disclosed, would jeopardize the safety and security of DOC staff or prisoners; and

~~(i) all DOC employees' disciplinary records/files/histories and documents reflecting uses of force, allegations of misconduct and charges and specifications; and~~

(j) "quarterly reports," "force monitoring reports," "24-hour" ("CCC") reports, "violent and/or unusual incident" reports and all summaries, tabulations or compilations of data ~~that~~ name or otherwise identify individual DOC staff members in connection with allegations of improper uses of force/chemical agents or other misconduct; and

(k) "Investigation/Trials Division case tracking documents," "Investigation Division records," "Use of Force Reports," "Directive 5003 records" and all similar records ~~that~~ name or otherwise identify individual DOC staff members in connection with allegations of improper uses of force/chemical agents or other misconduct; and

(l) "Adjudication and Gang Intelligence Unit" documents ~~that~~ name or otherwise identify individual DOC staff members in connection with allegations of improper uses of force/chemical agents or other misconduct; and

06/11/03 WED 18:08 FAX 1 212 805 7906

JUDGE CHIN'S CHAMBERS

005

but only to the extent that such documents

(m) "TTP Lookup results" and similar documents ~~that~~ name or otherwise identify individual DOC staff members in connection with allegations of improper uses of force/chemical agents or other misconduct.

Documents and information shall not be deemed "Confidential Materials" to the extent, that they are: (i) obtained by plaintiffs' counsel from sources other than defendants, or (ii) are otherwise publicly available.

2. In addition to the above, the defendants may further designate in good faith particular documents as "Confidential Materials" by labeling such documents "Confidential" and/or by designating such documents by title, Bates number or other method reasonably calculated to give plaintiffs notice of the confidentiality designation, in a writing directed to plaintiffs' counsel. The defendants reserve the right to designate any documents confidential pursuant to this agreement if necessary after production of such documents to plaintiffs' counsel.

3. If plaintiffs' counsel object to the designation of particular documents as "Confidential Materials," they shall state such objection and the basis for their objection in writing to the defendants in a reasonably timely basis and the parties shall endeavor in good faith to resolve such objection. If such objection cannot be resolved, then defendants shall, in a reasonably timely basis after receiving plaintiffs' counsels' objections, move for an order approving such designation. Failure to so move shall constitute abandonment of any claim of confidentiality.

4. Plaintiffs' attorneys shall not disclose the Confidential Materials for any purpose other than for the preparation or presentation of the case entitled Adam Ingles, et al. v. Elmer Toro, et al., 01 Civ. 8279 (DC) ("this action").

5. Plaintiffs' attorneys shall not disclose the Confidential Materials to any person not a member of the staff of their law office or employed by plaintiffs for administrative purposes (i.e.

06/11/03 WED 16:09 FAX 1 212 805 7906

JUDGE CHIN'S CHAMBERS

006

copying) and the Confidential Materials shall be deemed "for attorneys eyes only" except under the following conditions:

- (a) Disclosure may be made only if necessary to the preparation or presentation of their case in this action; and
- (b) Disclosure before trial may be made to an expert who has been retained or specially employed by plaintiffs' counsel in this action in anticipation of litigation or preparation for this action, or to the Court. Confidential Materials regarding a particular use of force incident may be disclosed to an individual who was involved in, or witnessed, that particular incident. If this information is disclosed to such an individual, any Confidential Information not related to that particular use of force should be redacted or withheld from the individual to whom disclosure is being made. Under no circumstance shall any Confidential Materials, or copies thereof, be left in the custody of any prisoner. The home addresses, telephone numbers, dates of birth, and social security numbers of DOC employees shall not be disclosed to any plaintiff; and
- (c) In the event a conflict arises between the parties as to whether plaintiffs' counsel may show the Confidential Materials to a potential deponent, or other person described in subsection (b) hereof, plaintiffs' counsel agree not to do so until such time that the parties can obtain a ruling from the Court in this regard; and
- (d) Before any disclosure is made to any person listed in subparagraph (b) above (other than to the Court or plaintiffs), plaintiffs' attorneys shall

06/11/03 WED 18:09 FAX 1 212 805 7906

JUDGE CHIN'S CHAMBERS

14007

provide each such person with a copy of this Stipulation and Protective Order, and such person shall consent in writing, in the form annexed hereto as Exhibit A, not to use the Confidential Materials for any purpose other than in connection with the prosecution of this case and not to further disclose the Confidential Materials except in testimony taken in this case. The signed consent shall be retained by plaintiffs' attorneys.

6. Deposition testimony concerning any Confidential Materials that reveals the contents of such materials shall be deemed confidential, and the transcript of such testimony, together with any exhibits referred to therein, shall at defendants request to the reporter, be either redacted or separately bound, with a cover page or redaction prominently marked "CONFIDENTIAL." Such portion of the transcript shall be deemed to be Confidential Materials within the meaning of this Stipulation and Protective Order.

7. If any party intends to file the Confidential Materials with the Court, in conjunction with a motion for summary judgment or otherwise, or intends to utilize any of the Confidential Materials at trial, the party seeking to do so must first present the Confidential Materials to the Court for a ruling on whether the Confidential Materials shall be filed under seal.

8. If the Court determines that the Confidential Materials shall be filed under seal, the Confidential Materials shall be placed in a sealed envelope bearing the caption of this action, an indication of the nature of the contents, and the following legend:

CONFIDENTIAL

This envelope contains documents or information designated confidential pursuant to an order entered by the United States District Court for the Southern District of New York in the above-captioned action. This envelope shall not be opened or unsealed without the express direction of a judge of this Court, and its contents shall not be displayed or revealed except as the Court may order. This envelope and its contents shall at all

06/11/03 WED 18:10 FAX 1 212 303 7906

JUDGE CHIN'S CHAMBERS

12008

times be maintained separate and apart from the publicly available files of this case.

9. Nothing in this Stipulation and Protective Order shall be construed to limit defendants' objection to, or use of, the Confidential Materials in any manner.

10. Nothing in this Stipulation and Protective Order shall be construed to limit plaintiffs' objections to: (1) defendants' future designation of Confidential Material; or (2) defendants' objections to, or use of, the Confidential Materials.

11. Within thirty (30) days after the termination of this case, including any appeals, the Confidential Materials, including all copies, and all nonconforming copies, shall, upon defendants' request, be returned to defendants' attorneys or destroyed.

Dated: New York, New York
June 11, 2003

SO ORDERED:


HONORABLE PENNY CHIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
ADAM INGLES, SHAWN DAVIS, ED SYKES,
MIGUEL ROMAN, AL SMITH, CHARLES PAIGE,
JAMAL BUTLER, ANDRE PRATT, ROBERT
ALLAWAY, PATRICK WASHINGTON, RANDOLPH
JOHNSON, ROGELIO FIGUEROA, PAUL PERSON,
CALVIN DANIELS, BOBBY JONES, PHILLIP
CAMPBELL, JONATHAN LUKES, LAMONT
BRADLEY, GARY SMITH, DAROLD FREEMAN,
ERIC RICHARDS, and KIMADA DIXON

Plaintiffs,

-against-

ELMER TORO, ROBERT DASH, ROBERT
DAVOREN, WILLIAM FRASER, STEVEN CONRY,
BERNARD KERIK; OFFICERS CALDERO,
LANAUSSE, GRAY, GIVENS, MCCONNON,
RIVERA, MCKELLER, ROBERTS, NATALE,
ELLIOTT, KRAMER, COX, GUARNERI,
WILLIAMSON, GRAHAM, SMALLS, POWELL,
TORRES, ECHIVERIA, CLARK, HERSHAWAY,
DICE, LEWIS, YATES, SWETOKAS, MASTROAINNI,
STRAUGHN, WELLS, LOPEZ, VASQUEZ,
FERNANDEZ, CASE, WRIGHT, FISHER, GATTO,
BRADFORD, LAMONT, VALENTINE, CHAPMAN,
KEITH JACKSON, R. JACKSON, RIVERA, KINDER,
DEDICKE, ANDERSON, OROZCO, TOLENTINO,
ORTIZ, ARNOLD, CASTRO, HANDE, BERKELEY,
BRAYSON, RUSSO, DOUGHERTY, BOYLES,
MITCHELL, SANACORE, and JOHN DOES 5-8, 12-15,
17, 18, 21, 22, 24-44, 49-52, 56-62, 62, 66-68, and 71-73,
CAPTAINS ALCIA, SULLIVAN, CARDO, SMALL,
WRIGHT, VELEZ, HAYNES, MULVANEY, SPENCER
HERNANDEZ, GALLAGHER, CROOMS, RAMOS,
PEREZ, DANIELS, DEISO, BARBOUR and JOHN
DOES 16, 46-48, 53-55, 63 and 65; ASSISTANT
DEPUTY WARDEN PENNES and OWUSU;
WARDENS GERARD O'GARA AND ROGER
SLATTERY; CITY OF NEW YORK,

Defendants.

ORDER OF DISMISSAL
WITH PREJUDICE

01 CV 8279 (DC)

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The parties having requested approval of, and the Court having approved, the Settlement Agreement of February 17, 2006, and all other claims in this action having been resolved by separately executed agreements, this action is hereby dismissed with prejudice by consent of the parties. The Court shall not retain jurisdiction over this action except if Class Counsel seeks, and the Court grants, reinstatement of the Action.

SO ORDERED.

Dated: New York, New York
_____, 2006

Hon. Denny Chin
United States District Judge