UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GRETA CAZENAVE, ET AL Plaintiffs VERSUS SHERIFF CHARLES C. FOTI, JR. ET AL Defendants	CIVIL ACTION NUMBER 00-1246 SECTION A JUDGE JAY C. ZAINEY MAGISTRATE SECTION 5 MAGISTRATE ALMA L. CHASEZ

JOINT MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT

Named Plaintiffs, Jeff Brite, William Brice White III, Lionel Nelson, George Wurz, Anthony Pogorzelski, Kendra Spencer, Tony Buchen and Sylvia Brown, appearing as Class Representatives on behalf of all members of the previously certified classes for injunctive relief and for liability, and the Defendants, Charles C. Foti, Jr. in his individual capacity, Wardens Barbara Acomb, William Short, Joseph Howard, John LaCour, Gary Bordelon and Chief Rudy Belisle, each in their individual and official capacities, and Marlin N. Gusman, only in his official capacity as the present Criminal Sheriff of Orleans Parish, Louisiana, by and through their undersigned counsel, respectfully submit this Memorandum in Support of the Joint Motion For Preliminary Approval of the Class Action Settlement Agreement.

At the outset, it should be noted that Sheriff Gusman had no involvement in any of the policies or practices at issue in this case. These policies and practices were discontinued prior to the date he assumed office as Criminal Sheriff. Sheriff Gusman enters into the Settlement Agreement

only in his official capacity as the present Criminal Sheriff, in order to carry into effect the obligations of settlement of the case which are the legal obligations of the Orleans Parish Criminal Sheriff's Office (OPCSO) because they were agreed to by his predecessors in office and became binding on the Sheriff's Office prior to Sheriff Gusman's election as Sheriff.

I. INTRODUCTION AND PRELIMINARY STATEMENT:

On May 19, 2004, after participating in two long days of mediation with a Court-appointed mediator, the parties to this action agreed to a proposed settlement of this case. The proposed Class Action Settlement Agreement ("Settlement Agreement") sets forth the background, terms and conditions of this settlement; capitalized terms used but not defined herein have the meanings given to them in the Settlement Agreement.

The settlement provides for the creation of a Fed. R. Civ. P. Rule 23(b)(3) settlement Class/Sub-classes and a Settlement Fund in the amount of $9,375,000.00, plus interest accruing from June 2, 2004. This Settlement Fund is to provide for the distribution of money to those individuals who were arrested for minor offenses only, not involving drugs or weapons, during the stipulated time periods, whose constitutional rights are alleged to have been violated when Defendants subjected them to blanket strip and/or visual body cavity searches (pursuant to the now discontinued blanket policy and practices of the OPCSO), when they were transferred to general population of the Orleans Parish jail, prior to their first court appearance or release, whichever happened first.

There are three separate Sub-Classes, as defined in the Settlement Agreement. The Settlement Agreement also provides a proposed distribution grid with a mathematical formula for computing and

distributing the funds to Class Members[1], Long and Short Form Notices, a Proof of Claim and Release, and notice plan information. In addition to providing for monetary relief for class members, the Settlement Fund will also pay all attorneys fees, costs and expenses incurred in prosecuting this action (plus interest at the same rate and for the same periods as earned by the Settlement Fund), as well as all costs of notice and the fees and costs associated with the approval and administration of this settlement.

This settlement represents the culmination of over six (6) years of hard-fought and well-defended litigation. Class Counsel have, among other things: conducted discovery, reviewed numerous documents, researched and developed successful strategies, filed and defended against a number of motions, supporting those motions with well researched briefs and memoranda, attended innumerable status conferences, obtained three (3) Consent Decrees affording injunctive and other relief, helped to design and conducted inspections of privacy booths to protect the privacy of the men and women who are arrested for minor charges only and processed through the Orleans Parish jail facilities, and monitored the processing of these arrestees on a monthly basis for more than two years after injunctive relief was obtained. Such efforts not only contributed to the injunctive relief on behalf of the original Rule 23(b)(2) Class/Sub-Classes, but also resulted in material and permanent changes in Defendants' policies and practices and significantly contributed to an environment in which settlement of the damages portion of this litigation was feasible.

Since settlement negotiations began in earnest in September, 2003, the negotiations were extensive, protracted, on-again/off-again, and interspersed with continued efforts towards trial

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[1]Unless the context otherwise requires, "Class Member" or "Class/Sub-class Member" shall mean a putative or actual member of any of the Sub-classes now or hereafter certified in this case.

preparation. Counsel for the parties met on numerous occasions in efforts to resolve the litigation through settlement. When that process was not successful, the Court finally referred the parties to mediation. Two full days of intensive negotiations produced what the parties consider to be a fair and good faith settlement, negotiated at arms-length, that offers a fair, meaningful and final solution to the difficult and complex issues involved in this litigation.

Subsequent to the parties having agreed on the general terms for settlement of this litigation, the parties engaged in numerous meetings, Court conferences, document drafting sessions, and other efforts to bring this settlement to completion. A status hearing on the settlement was scheduled with the Court on August 29, 2005, the same day Hurricane Katrina hit New Orleans. Obviously, Hurricane Katrina and its devastating impact upon the City of New Orleans put that status hearing and the entire case on hold. In fact, shortly after the City was devastated, Sheriff Gusman filed a motion with the Court seeking a temporary loan and transfer of the money set aside in the Settlement Fund in the event these funds might have to be used to assist with post-storm recovery efforts. Class Counsel opposed this Motion. The Court held an evidentiary hearing on the Sheriff's motion via telephone, as New Orleans counsel and the Court were displaced as a result of the aftermath of Katrina. At the conclusion of the hearing, the Court granted the Sheriff's motion and set conditions for the temporary (one year) loan to the Sheriff's office, with which the Sheriff complied. As it turned out, the Sheriff did not have to use this Settlement Fund and at the end of the one-year period, the money was returned, with interest earned. Since that time the parties have renewed their efforts to conclude this matter, have continued to meet separately and with the Court, and are now in a position to move forward to finally resolve this lawsuit.

The parties respectfully submit that the terms of this settlement are fair, reasonable and adequate for the Class/Sub-Classes sought to be certified, and the parties believe the requirements for final approval will be completely satisfied at the fairness hearing. At this time, the only real issue before the Court is whether the proposed settlement is within the range of what may be found to be fair, adequate and reasonable, so notice of the settlement can be issued to the Class Members and the fairness hearing can be scheduled. Only after the Class Members receive notice and have been given the opportunity to opt out, object and/or present supporting or opposing evidence at the fairness hearing, will the Court be called upon to render a final judgment regarding the fairness of this proposed settlement.

Therefore, pursuant to Federal Rule 23(e), Plaintiffs and Defendants have jointly moved the Court to grant preliminary approval to the Settlement Agreement and to certify the Class/Sub-Classes as defined in the Settlement Agreement. The parties further ask the Court to assign a date for the fairness hearing and to enter its Order of Preliminary Approval of Class Action Settlement so notice may be issued in the manner set forth in the Settlement Agreement and substantially in the form of the Exhibits thereto. The parties suggest the following time-line[2] for the various steps in the final approval process:

ITEM	EVENT	DATE
1	Submission of Class Action Settlement Agreement	12/14/06

[2]These are preliminary dates for purposes of example only. These dates and the incremental periods between the various stages are obviously subject to the Court's calendar, availability, and judgment.

2	Defendants deliver to Claims Administrator information needed for mailing lists, merging documents, notices and verification of Class Members' identity and location	DONE
3	Mail notice completed by	01/29/07
4	Publication notice begins by	02/29/07
5	Deadline for filing objections and notice of objections, intent to appear or notice to "opt-out" (Request for Exclusion)	07/02/07
6	Claim Date: Deadline by which Proof of Claim must be actually received by the Claims Administrator	08/02/07
7	Fairness hearing	09/14/07
8	Claims Administrator will send out Request for Cure for any deficient claims by	10/02/07
9	Cure Date: Deadline for claimant to file response to Request for Cure	11/02/07
10	Court review of Claims Administrator's determinations rejecting deficient claims	*

* To be determined by Court at a later appropriate date.

II. PROCEDURAL AND FACTUAL BACKGROUND OF THE CASE:

On April 25, 2000 Plaintiffs filed a Class Action Complaint against Orleans Parish Criminal Sheriff Charles C. Foti, Jr., his wardens and deputies, seeking injunctive relief and damages pursuant to 42 USC §1983 and §1988 on behalf of those persons arrested for minor offenses only who were subjected to strip and/or visual body cavity searches pursuant to an alleged unconstitutional blanket policy, practice and custom of the Sheriff's Office. The Defendants assert that all such searches were performed only to detect drugs, weapons, and other contraband in order to preserve the safety and lives of detainees, personnel and visitors at OPCSO. The "Recitals" section of the Settlement Agreement sets forth in detail the various stages and events which have transpired in this litigation for the past six years and is incorporated herein by reference.

During discovery and settlement negotiations, the size of the potential class became more apparent. It was learned that possibly upwards of 80,000 potential class members were subjected to some variation of a strip and/or visual body cavity search, depending upon when they were arrested and went through the intake procedures, with the number of incidents possibly exceeding 145,000 because of multiple arrests and bookings of some class members.

Class Counsel retained a government finance expert to analyze the Sheriff's Office's finances and budgets to determine the Office's ability to pay any judgment that might be rendered against it. Class Counsel also considered the financial resources of the individual Defendants, should the case proceed to trial and judgment in favor of Class Members. Class Counsel also looked to other strip search class action settlements around the country to determine the anticipated rate of response by putative class members following notice of the settlement, as well as the range of recovery deemed fair and reasonable by other courts in comparable cases. Class Counsel conferred with plaintiffs' attorneys involved in those similar strip search class actions and confirmed that this settlement comports with settlements which have been approved by other courts.

Defendants asserted that the Orleans Parish Criminal Sheriff's Office, as a public entity, was dependent for its revenues upon funds generated directly or indirectly, through taxes, bonds and fees, and that the financial resources of the OPCSO available to pay the claims of the Class/Sub-Classes were greatly restricted due to the expenses associated with providing adequate housing, staffing, welfare, and medical care for its prisoners. It also became apparent that there were other economic pressures on the OPCSO, including reduced revenues, requiring it to resort to significant belt-tightening efforts. All counsel were aware that punitive damages are not available against the OPCSO as a matter of law, that a punitive damage award against the individuals would be meaningless, as the

individual defendants' ability to pay any damages that might be awarded against them was highly unlikely to be within their means given the sheer number of these claims.

It was apparent that the defendants, a public entity and individual public employees, unlike many large private businesses, did not have "deep pockets" and that there were also strong public policy considerations regarding the continued economic viability of this public safety organization which had to be considered. All of these discussions and considerations and the agreement to settle this case occurred before the events of August 29, 2005 (pre-Katrina). Sufficient funds to implement the settlement were set aside long before that disaster occurred. It is obvious that, given current conditions, if this settlement were to fail, all of the considerations mentioned above would be greatly magnified and that the associated risks involved in this litigation for all parties have intensified.

The parties were in agreement that there were substantial risks and costs associated with proceeding to trial, and that a fair and reasonable settlement of this lawsuit was possible and desireable for the benefit of all parties and in the interest of judicial economy.

III. THE PROPOSED SETTLEMENT:

The Settlement Agreement recognizes that institutional reform was one of the main purposes of this lawsuit and that institutional reform through injunctive relief has now been achieved.[3] The damages provided by the settlement reenforce and strengthen those interests. The Defendants have made arrangements to commit, and have committed, sufficient resources to enter into a settlement of

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[3]The parties spent many months researching and drafting alternatives to the OPCSO's policies on strip and visual body cavity searches (the "ionscan" was one such alternative proposal that was closely examined). The Court ultimately issued three important orders of substantial benefit to the injunctive class, providing for significant changes in the defendants' policies and practices. As a result of these orders, the OPCSO built 'privacy enclaves' for arrestees entering their facilities. For two years the plaintiffs monitored the practices at OPCSO to ensure that there was compliance with the injunctive relief ordered by the Court.

the plaintiffs' damages claims in this lawsuit, in the amount of $9,375,000, plus interest accruing since June 2, 2004. The parties believe that this sum represents a fair and reasonable settlement of this matter that also serves to encourage and enhance the equitable injunctive relief obtained in this lawsuit.

The parties have proposed a method and formula for computation and distribution commensurate with those settlements that have been achieved around the country, which formula obviates the need for individualized hearings and which results in a fair and reasonable monetary recovery for individual class members while also comporting with the settlements that have been achieved nationwide in substantially similar strip search class actions. All members of each Sub-class are treated the same. Each Sub-class is defined according to what happened to the individuals in each sub-class on certain dates. Those dates, and the Sub-classes defined by them, were derived from changes which were brought specifically about by this litigation resulting in modification of the OPCSO's policies and practices as the case progressed. The estimated recovery for each Class Member is well within the range of recovery deemed to be a fair and reasonable outcome in numerous similar cases around the country, while avoiding the necessity of individual hearings.[4] In other similar strip search class actions the settlement class is the rule rather than the exception. In fact, the parties are not aware of any strip search class action which has been resolved by a means other than settlement after a class has been even provisionally certified for any kind of equitable or monetary

[4]The Court can take judicial notice of the fact that this case has been pending in excess of six (6) years, with an ample record produced during the course of this litigation. Yet, during this same time-frame, other than the three individual claims of Greta Cazenave, Janet Densmore and Beth Ann Boatman, no other individual claims have been filed. The parties are of the opinion that had any other individuals incurred significant damages, those individuals would have, by this time, pursued individual litigation on those claims.

relief. The case law and the anecdotal research from other plaintiffs' class counsel similarly situated to this case shows that class members prefer a straight-forward resolution of their claims with a certain monetary payout, without having to present specific proof of damages or file individual lawsuits. See e.g., *Foreman v. State of Connecticut*,[5] CA No. 3:01CV0061 (U. S. D.C. Conn. July 31, 2006)(Fairness Hearing Opinion and Order of Class Action Settlement); *Miller v. Mille Lacs County, Minn.* No. 48-CV-052130 (7th Judicial Dist., Minn., 2005); *Brecher v. St. Croix County, Wisconsin*, 2004 WL 1196982 (W.D.Wis. 2004); *Maneely v. City of Newburg*, 208 F.R.D. 69 (S.D.N.Y. 2002); *Mack v. Suffolk County*, 191 F.R.D. 16 (D. Mass 2000); *Eddleman v. Jefferson County*, 96 Fed 3d 1448 (table) 1996 WL 495013 (6th Cir., Aug. 29, 1996)(unpublished opinion); *Doan v. Watson*, 2002 WL 31187073 (S.D. Ind., May 12, 2002); *Blihovde v. St. Croix County, Wis.*, 219 F.R.D. 607 (W.D. Wis. 2003). All of these court approved class action settlements in jail strip search cases also involved use of grids, similar to that recommended by the parties herein, for calculation of individual damages.

The parties submit that this settlement represents a reasonable and fair monetary settlement for the remaining claims of the Class Members for the alleged violation of their constitutional rights,

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[5]The Fairness Hearing Opinion and Order issued by the Court in *Foreman* shows a $2.5 million dollar settlement was approved by the District Court. The damages to be paid to the plaintiffs in *Foreman* are to be determined based upon a per share distribution, much like the grid system proposed by this settlement. Class members in *Foreman* will receive their share after deduction of the one-third approved attorneys' fees and costs and $20,000.00 payments to the three named class representatives. "The Claims Administrator will divide the amount remaining in the settlement fund (after the payments made as provided above) by the number of shares to determine the amount each participating class member will receive. . . . Class members will receive only one payment no matter how many times they were admitted into and/or searched while incarcerated. . ." *Foreman v State of Connecticut* Settlement Agreement, filed July 20, 2006, at p. 13. Notably, after notice and an opportunity to object and/or opt out, there were no opt-outs or objectors at the fairness hearing in *Foreman.* Analytics, Inc., the proposed administrator for this case, was the court approved claims administrator in *Foreman.*

and for payment of attorneys fees, costs, expenses, expert and consultant fees, including the costs of notice and administration, as is fully set forth in the Settlement Agreement. The Settlement Fund will be treated as a "Qualified Settlement Fund" within the meaning of Treasury Reg. Sec. 1.468-B-1 under this proposal.

It is respectfully suggested, in view of the record of these proceedings and all the premises mentioned herein, that the Class/Sub-Classes set forth below and in the Settlement Agreement be conditionally certified under Fed. R. Civ. P., Rule 23(b)(3) damage class.

The proposed settlement Class/Sub-Classes should be defined as follows:

> CLASS: Every person arrested only on "minor offenses" (as defined below) who entered the Orleans Parish jail's Intake and Processing Center ("IPC"), operated by the Orleans Parish Criminal Sheriff's Office (OPCSO), during the time periods set forth below, who was required to submit to any or all of the following procedures, prior to his or her first court appearance or release, whichever came first, pursuant to a blanket policy, practice or custom of the OPCSO applicable to all arrestees to be admitted to the general population of the jail:
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> Sub-Class A or the "Kelly" class:
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> (A) The removal or rearrangement of some or all of the arrestee's clothing, including undergarments, in the presence of OPCSO deputies and/or other detainees, resulting in the exposure of the arrestee's genital area, anus, buttocks, and/or breasts (in the case of female arrestees) and the subsequent visual inspection of the arrestee's private parts by OPCSO deputy or deputies, which occurred from April 25, 1999 through February 14, 2002;
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> Sub-Class B or the "Change-Out" class:
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> (B) The removal or rearrangement of some or all of the arrestee's clothing, including undergarments, in order to change into OPCSO supplied garments under circumstances which allowed OPCSO deputies and/or other detainees the ability to view his or her genital area, anus, buttocks and/or (in the case of female arrestees) breasts, which occurred from February 15, 2002 through May 31, 2002;

Sub-Class C or the "Contempt" or "Templeman III" class:

(C) The removal or rearrangement of some or all of a male arrestee's clothing or clothing furnished by OPCSO including undergarments, in the presence of OPCSO deputies and/or other detainees, which resulted in the exposure of the arrestee's genital area, anus, and/or buttocks to others in violation of the Court's Order of May 20, 2002 as the arrestee was being admitted to the receiving tier at Templeman III from the IPC which occurred from June 1, 2002 through May 31, 2003.

As used herein "minor offenses" includes one or more traffic offenses, misdemeanors, petty offenses, or violations of municipal or parish ordinances, none of which involves weapons or controlled dangerous substances. This definition specifically excludes any and all felonies.

As used herein "visual inspection of an arrestee's private parts" means inspection of the arrestees' genitalia, buttocks, anal cavity, vaginal cavity and/or female breasts by an OPCSO deputy or deputies.

The dates provided in the class definitions and these subclassifications are based upon the following: April 25, 1999 is the earliest prescriptive date for any claim in this case. February 15, 2002 is the effective date of the first Consent Decree entered by the Court which modified OPCSO's written strip and visual body cavity search policy and officially ended the practice and procedure of blanket visual body cavity searches. June 1, 2002 is the effective date of the second Consent Decree entered by the Court which modified OPCSO's change-out procedure to require privacy booths. May 31, 2003 is the last date of the Templeman III post-change out blanket strip searches. Whether an individual qualifies as a Class member (and, if so, which Sub-class) will be based upon the records of the OPCSO; if the OPCSO records do not confirm that an individual fits within one of the Sub-Class definitions above, his or her claim will not be allowed.

The foregoing Class/Sub-classes have already been certified for the purposes of injunctive relief under Fed. R. Civ. P. 23 (b)(2). The initial focus of this lawsuit was institutional reform in the

form of injunctive relief to stop the policies and practices of the defendants at issue, to prevent the defendants from reinstating said policies and practices, and to deter the defendants and others from pursuing such policies and practices. These purposes have already been achieved. The parties submit that the amount of the Fed. R. Civ. P 23(b)(3) damages negotiated between the parties for the Class/Sub-class members is fair and reasonable under the totality of the circumstances of this litigation. The parties assert that the proposed settlement provides for a mathematical computation and distribution of those damages to Class Members which is fair, reasonable and equitable and, as contemplated by the settlement, is well within the range of comparable strip search settlements which have been approved by other courts, and provides a fair remedy to each Class/Sub-class member without the risk of wide disparities in outcome on liability or varying damages if separate trials were ordered for the thousands of individual claims. This settlement allows the Class/Sub-class members to recover for their damages through a predictable and certain administrative process without having to submit to the humiliation of having to relive the incident in public or the burden of presenting individualized proof of damages.

After the deduction of attorneys fees, costs, expenses, expert and consultant fees, all costs of notice and administration (including the Claims Administrator's fees and expenses), and the incentive awards to the Class Representatives, each Class Member will receive a share of the remaining Settlement Fund in accordance with the distribution formula set forth in the Settlement Agreement after submission, review and approval of the supporting documents required thereby. The proposed Settlement Agreement also contemplates that all injunctive relief and other mandates outstanding and already ruled upon and ordered in these proceedings will be confirmed in the final judgment and made

permanent, and that the Defendants will continue to comply with the Consent Decrees which have already been entered and made the law of this case.

Preliminary approval requires only a finding that the settlement falls within the range of possible approval, meaning primarily that the settlement was reached as a result of arms-length negotiations and after sufficient discovery was conducted. Here, both those requirements are satisfied. Investigation, discovery and motion practice proceeded for over three years before serious settlement negotiations on the damages claims even commenced. The settlement negotiations themselves were extensive and adversarial and were conducted, off-and-on, over a nine (9) month period (September 2003 through May 2004). The financial resources of all Defendants were examined and determined to be severely restricted in comparison with the potential number of claims. The negotiations were conducted by experienced and knowledgeable civil rights counsel, with the help of appropriate expert advice. Class representatives personally attended the mediation and actively participated in the settlement negotiations. Through such participation, they became aware of the financial limitations which could practically constrain any theoretical monetary award and the likely range of recovery by the Class/Sub-class members if the proposed settlement is not approved.

The Court can take judicial notice, from its prior and extensive experience with overseeing litigation against the OPCSO and its deputies, wardens and employees for many years, of the unique challenges involved in litigating against the OPCSO, that the OPCSO has many pressing needs for its financial resources and that the settlement contemplated herein represents a serious and significant commitment by the OPCSO to fairly satisfy the claims of the Class/Sub-Classes. For those reasons and the reasons set forth in the legal argument below, the parties respectfully urge the Court to enter its Preliminary Order of Approval in the form submitted herewith.

IV. LEGAL SUPPORT:

A. CERTIFICATION OF THE PROPOSED SETTLEMENT UNDER FED. R. CIV. P. 23(b)(3) IS APPROPRIATE TO RESOLVE ALL MONETARY CLAIMS AGAINST DEFENDANTS.

The Court has already determined (and the Defendants have stipulated) that this case meets the criteria for class action certification under Rule 23(a). (See Record, Doc. No. 36 -- Joint Stipulation for Purposes of Class Certification Only, entered: 03/23/2001). The Court has recognized that this group of plaintiffs is "homogenous and cohesive" with few conflicting interests among its members when it certified the 23(b)(2) injunctive class on January 14, 2002. (See Record, Doc. No. 54 – Joint Consent Decree for Injunctive and Declaratory Relief, entered 01/15/02).

On September 19, 2002, the Court certified a Rule 23(c)(4) class "as to liability only." (See Record, Doc. No. 70, entered 09/19/02). The remaining question for this Court and the parties was what was required to resolve any potential damage claims. In that framework, the Court urged settlement negotiations and ordered mediation. A settlement was finally reached in May of 2004, establishing a settlement fund for monetary relief for Class Members.

Without question, there is a strong judicial policy favoring the resolution of disputes through settlement. *Smith v. Tower Loan,* 216 F.R.D. 338 (S.D.Miss. 2003), *aff'd* 91 Fed. Appx. 952 (5th Cir. 2004), *cert. denied sub. nom., Crystian v. Tower Loan of Mississippi, Inc.*, 543 U.S. 1089 (2005), quoting *Parker v. Anderson,* 667 F.2d 1204, 1209 (5th Cir. 1982). The Supreme Court of the United States and many lower courts have confirmed the viability of settlement classes. See *Amchem Prod. Inc. v. Windsor*, 521 U.S. 591 (1997); *In Re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283 (3d Cir. 1998), *cert. denied sub. nom, Krek v. Prudential Ins. Co. of America*, 525 U.S. 1114 (1999); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998); *Blyden v. Mancusi*, 186 F.3d

252, 270, n. 9 (2d Cir. 1999). See also *Shaw v. Toshiba American Information Systems, Inc.*, 91 F. Supp. 942, 959 (S.D. Tex. 2000)("The very uncertainty of the outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power of compromise [i.e., behind creation of Rule 23(e)].")(brackets in original).

These settlement classes are recognized so long as "district judges who decide to employ such a procedure . . . scrutinize the fairness of the settlement with even more than the usual care." *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), *cert. denied sub. nom, Coyre v. Weinberger* and *Leny v. Weinberger*, 464 U.S. 818 (1983); *In Re Prudential Sec.*, 163 F.R.D. 200, 205 (S.D.N.Y, 1995) quoting *In re Indus. Antitrust Lit.*, 607 F.2d 167 (5th Cir. 1979), *cert. denied*, 952 U.S. 905 (1981) ("tentative or temporary settlement classes are favored when there is little likelihood of abuse, and the settlement is fair and reasonable and under scrutiny of the trial judge").

In *Tower Loan*, supra, the District Court for the Southern District of Mississippi reasoned that "class action settlement agreements should only be approved when they are 'fair, adequate and reasonable.'" 216 F.R.D. at 352. The District Court relied on the Fifth Circuit's decision in *Reed v General Motors Corp*, 703 F.2d 170, 172 (5th Cir. 1983), in which that Court affirmed a class action settlement and stated that in order for a district court to make a determination, there are "six focal facets" to consider:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives and absent class members.

Tower Loan, 216 F.R.D. at 352 - 53, quoting *Reed v General Motors Corp*, 703 F.2d 170, 172 (5th Cir. 1983).

The Fifth Circuit reiterated and emphasized in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998), that "the district court maintains substantial discretion in determining whether to certify a class action, a decision . . . review[ed] only for abuse." The case law also emphasizes that courts should take into consideration that "settlement is a compromise, [and] a yielding of the highest hopes in exchange for certainty and resolution." *In re General Motors Pick-up Truck Fuel Tank Litigation*, 55 F.3d 768, 806 (3d Cir. 1995). See also *In re Shell Oil Refinery*, 155 F.R.D. 552, 560 (E.D. La. 1993)(court should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief, after protracted and expensive litigation.)

The settlement in this case readily meets the *Reed* criteria. Certainly, the extent and duration of this case do not suggest collusion or abuse of the process, but rather manifest a protracted, arms-length adversarial process, and a fair and reasonable result for the Class Members. See also 2 Newberg & Conte, *Newberg on Class Actions*, §11.41 (3d ed. 1998)("There is usually an initial presumption of fairness when a proposed settlement, which was negotiated at arm's length by counsel for the class is presented for Court approval"); *Manual for Complex Litigation*, §30.42 (3d ed. 1995(*ibid.*); *In re A.H. Robbins*, 880 F.2d 709, 752 (4th Cir. 1989)(class counsel aggressively pursued the action); *Meyer v. Citizens and Southern National Bank*, 677 F. Supp. 1196, 1201 (M.D. Ga. 1988)("class had been extremely hard fought from the very beginning"). Note too, the cases warn that the court must be mindful not to "try" the case at the settlement stage as "the very purpose of a compromise is to avoid the delay and expense of such a trial." *Reed v. General Motors*, 703 F.3d at 172, citing *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971).

Class Counsel's efforts to date resulted in significant institutional reform in the form of injunctive relief, which stopped the policies and practices of the Defendants at issue. The proposed settlement will ensure that all of that relief will remain in effect. The significant monetary relief also provided by the Settlement Agreement is sufficient to deter both the Defendants and others from pursuing such unconstitutional policies or practices in the future.

A number of other federal district courts have certified strip search class action settlements where it is alleged that a political subdivision employed a blanket strip search policy. See, e.g., *Blihovde v. St. Croix County*, 219 F.R.D. 602 (W.D. Wis. 2003); *Brecher v. St. Croix County, Wisconsin*, 2004 WL 1196982 (W.D.Wis. 2004); *Mack v. Suffolk County Co.*, 191 F.R.D. 16 (D.Mass. 2000); *Doan v. Watson*, 2002 WL 31730917 (S.D. Ind. 2002); *Eddleman v. Jefferson County, Ky.*, 96 F.3d 1448 (table), 1996 WL 495013 (6th Cir. 1996)(unpublished opinion), *Price v. Jefferson County*, 9 Fed. Appx. 369 (6th Cir.2001). See generally Plaintiff's Response to Court Order (Record Doc. No. 129, filed February 23, 2005) containing an extensive survey of additional strip search cases from throughout the country. Since that time, there have been decisions in other cases approving strip search class action settlements in addition to those previously cited. See *Foreman v. State of Connecticut*, CA No. 3:01CV0061 (U.S.D.C. Conn. July 31, 2006)(Fairness Hearing Opinion and Order of Class Action Settlement); *McBean v. City of New York*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005)(class certified for inmates subjected to blanket policy of post-arraignment misdemeanor arrestee intake strip searches and court indicated it would preliminarily approve settlement previously proposed if a motion to do so were renewed); *Miller v. Mille Lacs County, Minn.* No. 48-CV-052130 (7th Judicial Dist., Minn., 2005); *Nilsen v. York County*, 382 F.Supp.2d 206 (D.Me. 2005); *Smook v. Minnehaha* County, 340 F.Supp.2d 1037 (D.S.C. 2004)(damages class

certified where policy of suspicionless strip searches of all juveniles admitted to facility regardless of offense or reasonable suspicion was not justified; qualified immunity denied). The parties also anticipate that the payouts to individual Class Members in this case will be in line with the amounts recovered by class members in similar litigation in other jurisdictions.

Certification of the Class/Sub-classes at this time under Fed. R. Civ. P. Rule 23(b)(3) to add a monetary fund in addition to the extensive equitable relief is appropriate and has been approved by the Class Representatives. The monetary relief contemplated by this settlement is premised upon the predominating and common issues of the blanket searches which took place pursuant to policies, procedures and practices of the OPCDO during the defined class periods. The damages serve the important functions of deterring future bad acts by Defendants and others and providing compensation for damages for the constitutional violations and injuries suffered by the Class Members. The Class/Sub-class members will have a predictable and certain recovery with this settlement without further delay, which in itself is a very valuable asset.

The monetary settlement also provides for relief to the Plaintiffs by being a significant enough sum to deter the Defendants and any others who might otherwise be inclined to pursue a similar path of violating detainees' rights through blanket strip and/or visual body cavity searches. The Plaintiffs have a significant interest in insuring that their accomplishments in this case are not transitory and that the important constitutional interests at stake are protected and guarded from future intrusions.

The fact that money has already been set aside in the Settlement Fund strengthens the guarantees provided by the equitable relief. The settlement recognizes the monetary value assigned to the constitutional violations at issue, the injuries suffered by the Class/Sub-Class members, and

also the important deterrent value of a monetary payment which strengthens the enforcement of the other relief already achieved here.

The grid in this Settlement Agreement does not require the Class Members to provide subjective statements of how they may have been injured, which they may be disinclined to do in a public forum. Instead, each Class/Sub-class member will be entitled to a damage amount as defined by the settlement grid and each will get this payout through a simple administrative procedure, rather than through further protracted litigation and public exposure.

Moreover, this case has been pending for more than six (6) years now and the parties believe that had there been other claims for individual damages beyond those already filed, those individuals would most probably have already come forward. If a significant individual damage claim existed, it is likely that individual would have contacted Plaintiffs' Class Counsel or hired separate individual counsel to pursue any such significant individual damage claim. The parties know of no such individual claim or lawsuits for damages other than those that have already been resolved. The damage payments will be received by the Class/Sub-class members through a simple, straight forward administration process provided by the Settlement Agreement and thus provide the Class Members with predictable, certain, defined, and prompt relief, which is also an important element in the reasonableness and fairness of the resolution of this dispute.

Should this settlement not be approved as recommended by the parties, and the case proceeds, there would be the prospect of an adverse class determination which could result in tens of thousands of individual suits for damages against the OPCSO and individual defendants who could not financially withstand the judgments awarded against them, thereby sparking a "race to the court-house," "first-come/first-served" scramble for a limited pot of money which would be quickly

depleted in an arbitrary fashion among only some claimants. Even a favorable class determination achieved as a result of litigation could be subject to appeals that could take years to resolve and could possibly be reversed or modified on appeal, delaying the final resolution of this matter even further.

The Rule 23(b)(3) damages Settlement Fund has already been established,[6] and provides each claimant a secure monetary recovery for their damages within a reasonable time period through an efficient and timely process. This settlement also provides the Defendants with the ability to direct their attention and efforts to carrying out the essential public services provided by the OPCSO rather than continuing to divert resources to defending and litigating this case. The settlement is also of sufficient magnitude to provide a deterrent to other public officers and entities who may be otherwise inclined or predisposed to violate the constitutional and civil rights of persons who have been arrested only on minor charges by subjecting them to blanket strip and/or visual body cavity searches.

In particular, the Settlement Agreement recognizes that the individuals subjected to the conduct at issue in this lawsuit are those who likely would not be able to find attorneys to represent them individually because of the limited size and nature of the potential individual recovery. Pursuant to the class action process and this settlement, all these individuals are provided with the ability to obtain prompt monetary relief for the violation of their rights through a predictable, certain and defined relief, from an already established Settlement Fund, through the relatively easy claims process. By contrast, individual litigation of these claims carries with it uncertainty, risk and costs

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[6]On Oct. 4, 2005 the Court issued an order permitting the OPCSO to borrow the sums of money in the fund in response to the emergency conditions which existed following the Hurricane Katrina disaster, and setting forth the terms for handling and restoration of those sums. (Doc. No. 144). As per the Court's Order all sums were returned to the Settlement Fund by October 6, 2006, with interest.

to the Plaintiffs and Defendants alike, and provides no guarantee that individuals would obtain judgments, much less recover any damages at the conclusion of the litigation process. It also makes sense for one court to resolve both the injunctive and damages issues. As noted by the Fifth Circuit in *In re Monumental Life*: "Indeed, interests of judicial economy are best served by resolving plaintiffs' claims for injunctive and monetary relief together." *Id.*, 365 F.3d 480, 417-18

The 23 (b)(3) damage certification provides a mechanism to aggregate claims and permit both compensation and deterrence that are otherwise impossible, relieving the judicial burdens that would be caused by repeated adjudication of the same issues in thousands of individualized trials against the OPCSO, the individual Defendants and perhaps other personnel of the OPCSO. A fundamental aim of class actions is "'to promote judicial economy and efficiency by obviating the need for multiple adjudications of the same issues. . ." 5 *Moore's Federal Practice* § 23.02 (3d ed.1998), citing *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982) and *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974). See also *Gary v. Sheahan*, 1999 WL 281347 (N.D. Ill 1999), *appeal dismissed*, 188 F.3d 891 (7th Cir. 1999)(Rule 23(b)(2) and 23(b)(3) classes certified and motion to decertify denied: "each of the plaintiffs was subject to a strip search at the same location, in the same manner, and the same time in the process," and "the resulting injuries are not so different between plaintiffs.")

B. NOTICE AS SET FORTH IN THE SETTLEMENT AGREEMENT SHOULD BE PRESENTED TO THE PROSPECTIVE CLASS MEMBERS.

Part of the Court's function is "to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Prudential*, 163 F.R.D. at 209, quoting *Armstrong v. Board of Sch. Directors*, 616 F.2d 305, 314 (7th Cir. 1980). The

procedure of providing notice to the class followed by a fairness hearing to consider approval of the class settlement has been accepted by numerous courts and is now standard practice. *Prudential, supra*; *Bronson v. Board of Educ.*, 604 F. Supp. 68 (S.D. Ohio 1984). The court in *Bronson* outlined the following procedures for preliminary approval of a class action settlement: "The court must preliminarily approve the proposed settlement; then, members of the class must be given notice of the proposed settlement and after a hearing the court must decide whether the proposed settlement is fair, reasonable and adequate." *Id.* at 71. The *Manual for Complex Litigation* affirms this recommended procedure. It states:

> A two step process is followed when considering class settlements. First, the court makes a preliminary evaluation of the fairness of the settlement . . . If the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement.

Manual for Complex Litigation, Third (Fed. Judicial Center 1995) §30.41.

Authorization to disseminate notice reflects a recognition by the Court only that the settlement is in the range of possible approval; the ultimate determination is reserved pending the completion of the notice process so the Court can consider input from the class members who will be bound by the final approval order. See *In re Baldwin-United Corp.*, 105 F.R.D. 475, 485 (S.D.N.Y. 1984) (court authorized provisional class certification and notice "without prejudice to the findings the Court will make after conducting the fairness hearing, at which time all objections or arguments in opposition to the proposed settlements will be heard and considered and proponents

must discharge their burden to prove that the proposed settlement agreements are fair and reasonable").

Whether the settlement falls within the range of possible approval under Rule 23 turns upon whether there is a conceivable basis for presuming that the more rigorous standard applied for final approval will be satisfied. The standard for final approval of a settlement consists of showing that the settlement is "fair, reasonable and adequate" (*Weinberger,* 698 F.2d at 73), considering "the complexity of the litigation, comparison of the proposed settlement with the likely result of litigation, experience of class counsel, scope of discovery preceding settlement, and the ability of the defendant to satisfy a greater judgment." *In re Drexel Burnham Lambert Group*, 960 F.2d 285, 293 (2d Cir. 1992). In the absence of fraud, collusion or the like, the court should not substitute its own judgment for that of counsel. *Weinberger, supra.* See also *Trief v. Dun & Bradstreet Corp.*, 840 F. Supp. 277, 281 (S.D.N.Y. 1993) ("absent evidence of fraud or overreaching [courts] consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel"); *Berenson Co. v. Faneuil Hall Market Place*, 671 F. Supp. 819, 822 (D. Mass 1987) ("[w]here, as here, a proposed settlement has been reached after meaningful discovery, after arm's length negotiation, conducted by capable counsel, it is presumptively fair.") Preliminary approval is not a definitive final finding on the fairness of the proposed settlement, and permitting notice to members of the class does not mean that the court has found the settlement to be fair, reasonable, and adequate for purposes of final approval, but simply allows the parties to proceed with notice and a fairness hearing. See*Holden v. Burlington Northern*, 655 F. Supp. 1398 (D. Minn. 1987).

Under Fed. R. Civ. P. 23(e), class members are entitled to notice of any proposed settlement before it is finally approved by the court. *Manual for Complex Litigation, Third* (1995)

§30.212. Under Rule 23(e) and due process, adequate notice must be given to all absent class members and potential class members to enable them to make an intelligent choice as to the fairness and reasonableness of the settlement. The Supreme Court has held that Rule 23 and due process do not require delivery of actual notice to every class member, but rather that "notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). "It is well-settled that in the usual situation first class mail and publication fully satisfy the notice requirements of Fed. R. Civ. Rule 23 and the due process clause." *Zimmer Paper Products Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90 (3rd Cir. 1985). See also *Cayuga Indian Nation v. Carey*, 89 F.R.D. 627, 633 (N.D.N.Y. 1981) ("individual notice by first class mail, coupled with notice by publication satisfies the requirements of due process and Rule 23").

In this case, the Settlement Agreement proposes notice of the settlement to be sent to all potential Class Members by mailing the Class Action Notice (Long Form) and Proof of Claim and Release to the individual's last known address, verified where possible through a national locator service. There will be a follow-up mailing for any notice that is returned as undeliverable, if another viable address can be found through using a national locator database or service and whatever additional post-Katrina address locator resources are available and accessible. Defendants have already provided Class Counsel and the Claims Administrator with data in electronic form containing the name, last known address, birth date, social security number and unique OPCSO identifier number, as well as other pertinent information for each Class Member.

Media publication of notice will include, but is not necessarily limited to, publication of a notice designed to comply with due process and in a form substantially similar to the Class Action

Notice (Short Form), attached as Exhibit B1. The media notice will include media publication, to the extent required by due process, in New Orleans and in other major metropolitan areas identified as having significant numbers of the New Orleans area population post-Katrina and will be printed and published on a date(s) to be set by the Court. The Claims Administrator and Class Counsel will develop and provide the Court with an appropriate notice plan deemed appropriate and consistent with the requirements of due process. The Class Action Notice (Short Form), Exhibit B1 and the Class Action Notice (Long Form), Exhibit B, will also be published and posted on the internet. Any additional media notice will either be coordinated with Defendants' counsel as to its form, content and placement location, or shall be ordered by the Court.

Moreover, the Claims Administrator will also provide a free copy of the Notices (Short and Long Form) and Proof of Claim and Release to anyone who requests these documents. The Claims Administrator will be available for contact through a mailing address, a dedicated internet website and a toll-free telephone number, to provide further information to the Class/Sub-Classes.

Class Members will be notified that they have the right to be excluded (i.e., opt out) from the settlement and may request to do so. In order to be excluded, a written Request for Exclusion as described in the Settlement Agreement must be received by the Claims Administrator by the date specified by the Court and copies furnished to counsel for the parties. Also, if a Class/Sub-class member wishes to appear at the Fairness Hearing in support of his or her request for exclusion, notice of intention to appear must be timely received by the Claims Administrator in writing and served on counsel of record for the parties.

At the Fairness Hearing, the Court will consider on the timeliness and validity of all Requests for Exclusion. Should any one or more Class/Sub-Class Members file a Request for Exclusion which is found by the Court to be timely and valid, then the Criminal Sheriff in office at the time of such ruling may elect to withdraw from the Settlement Agreement. Should the Criminal Sheriff elect to withdraw, this Settlement Agreement shall be null and void, with full reservation of all rights of all parties.

Those persons wishing to object to any aspect of the settlement must file a written objection setting forth the basis to support the objection and supported by any such documents or case law upon which he or she intends to rely to support the objection. Any such objection and supporting documents must be timely received by the Claims Administrator with a copy provided to Plaintiffs' Class Counsel and Defense Counsel, at the addresses provided herein. Also, if a Class/Sub-class member wishes to appear, either in support of his or her objection or in support of the settlement, notice of intention to appear must be timely received by the Claims Administrator in writing and served on counsel of record so all such objections and appearances can be docketed and addressed at the fairness hearing.

The parties believe these procedures fully satisfy the requirements of due process and Rule 23, and recommend approval by the Court.

C. A FINAL FAIRNESS HEARING SHOULD BE SCHEDULED BY THE COURT.

It is respectfully suggested that the Court schedule a fairness hearing to obtain all required information to finally determine that class certification is proper and that the settlement should be approved. See *Manual for Complex Litigation, Third* §30.44 (1995). The fairness hearing

will provide a forum for proponents and opponents to explain, describe or challenge the terms and conditions of the class certification and the proposed Settlement Agreement, including the fairness, adequacy and reasonableness of the settlement. Accordingly, the parties request that the Court schedule the time, date, and place of the fairness hearing in accordance with the proposed Order for Preliminary Approval, attached as Exhibit A to the Settlement Agreement. The proposed Order also suggests appropriate dates for filing requests for exclusion or objections to the settlement and notices of intent to appear, as well as other deadlines.

CONCLUSION

For the foregoing reasons, the parties respectfully request that this Court enter an Order: (1) certifying the Class/Sub-Classes, as set out and defined herein above with respect to the claims against Defendants pursuant to Fed. R. Civ. P. 23(b)(3) for the purpose of effectuating a class action settlement of Plaintiffs' claims for damages against the Defendants; (2) preliminarily approving the Class Action Settlement Agreement the parties have entered into; (3) directing notice to class members regarding the proposed settlement of the claims; and (4) scheduling a fairness hearing.

Respectfully submitted this 21st day of December, 2006.

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