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COUNSEL FOR DEFENDANT ESMOR CORRECTIONAL SERVICES, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SAMSON BROWN, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 98-1282
vs.	)	
	)	Hon. Dickinson R. Debevoise
ESMOR CORRECTIONAL SERVICES, INC., et al.,	)	U.S.S.D.J.
	)	
Defendants.	)	

AFFIRMATION IN SUPPORT OF MOTION FOR ORDER APPROVING SETTLEMENT OF CLASS ACTION AND PLAN OF ALLOCATION

BRUCE J. RESSLER, an attorney duly admitted to practice in the state of New Jersey, and the United States District Courts for the District of New Jersey, and Frank R. Volpe, an attorney duly admitted to practice in the District of Columbia, and admitted *pro hoc vice* in the United States District Courts for the District of New Jersey for purposes of this case, hereby jointly affirm under penalty of perjury, as follows:

1. Bruce J. Ressler is a member of the firm of RESSLER & RESSLER, class counsel for the plaintiffs in the above-captioned matter (the "*Brown* class action"), and Frank R. Volpe is a member of the firm of SIDLEY AUSTIN BROWN & WOOD LLP, counsel for the defendant in the *Brown* class action. Both Mr. Ressler and Mr. Volpe are familiar with the facts and circumstances in all prior proceedings had in this case. (RESSLER & RESSLER is hereinafter referred to as "Class Counsel") (Sidley Austin Brown & Wood LLP, together with BLANK ROME LLP, are hereafter referred to as "Defendant's Counsel").

2. This affirmation is submitted in support of the Joint Motion of *Brown* Class Action Plaintiffs and the Defendant for an Order approving Stipulation and Agreement of Settlement attached hereto as **Exhibit 1**. All defined terms used herein shall have the meaning provided for in the Stipulation and Agreement of Settlement unless otherwise specified.

BACKGROUND OF THE *BROWN* CLASS ACTION

3. The facts of this case are set forth in this Court's decision and order, dated September 9, 2004 and as amended September 26, 2004, regarding the disposition of the motion for summary judgment filed in this action, *Jama v. U.S. I.N.S.*, 334 F. Supp. 2d 662 (D.N.J. 2004). The members of the plaintiff class were undocumented aliens who were detained by the INS pending a determination of their asylum status, at the Esmor Facility, in Elizabeth, New Jersey, from August 1994 until mid-June 1995. These detainees number approximately 1,600 people.

4. Plaintiffs allege that "while they were detainees at the Facility they were tortured, beaten, harassed, and otherwise mistreated by Esmor guards, and that they were subjected to abysmal living condition including inadequate sanitation, exercise and medical treatment." *Id.* at 666. The Court granted Esmor's motion for summary judgment as to all federal claims and claims for breach of contract, but denied Esmor's motion for summary judgment as to claims for negligent supervision and/or training and negligent hiring. *See id*. at 685.

6. Defendant has vigorously denied, and continues to deny, that it has committed any violation of federal or state law, and has vigorously denied and continues to deny all allegations of wrongdoing or liability whatsoever with respect to the Released Claims, including any and all claims of wrongdoing or liability alleged or asserted in the Action.

7. Notwithstanding the divergent positions of the parties, with the assistance of the Court, the parties reached a settlement of plaintiffs' claims, set forth in the attached Stipulation and Agreement of Settlement. Pursuant to the terms of the Settlement, Esmor agrees to pay $2.5 million in satisfaction of all claims of the participating members of the *Brown* class action against Esmor, together with the fees and expenses of Class Counsel. Once the approved amount of fees and expenses are paid to Class Counsel, the balance of the settlement proceeds will be distributed among *Brown* class members pursuant to a court approved Allocation Plan.

8. Defendant enters into this Settlement in good faith, and agrees to it solely to eliminate the substantial burden, expense and uncertainties of further litigation and the concomitant distraction of resources and efforts from its businesses. Defendant further states that the Settlement, and any of its terms, any agreement or order relating thereto, and any payment or consideration provided for herein, is not and shall not be construed as an admission by the Defendant or any of its officers or employees of any fault, wrongdoing, or liability whatsoever.

9. The Lead Plaintiffs, on behalf of themselves and all Class Members, state that they enter into this Settlement in good faith, and agree that it represents the maximum amount of recovery that can reasonably be expected under the circumstances of this case in view of the substantial delay that has resulted from the years of litigation in this class action. The Settlement will also eliminate the

substantial burden, expense and uncertainties of further litigation. The Settlement, any of its terms, any agreement or order relating thereto, and any payment or consideration provided for herein, are not and shall not be construed as an admission by any of the Lead Plaintiffs or any Class Member of any lack of merit of their claims against the Defendant.

10. Both Parties respectfully submit that the Settlement is fair, reasonable and adequate under the circumstances of this case and should be approved under Federal Rule of Civil Procedure 23. The terms of the Settlement are summarized below.[1]

PAYMENT OF SETTLEMENT AMOUNT

11. Under the Settlement, Defendant shall pay the amount of $2.5 million on the Settlement Effective Date into an escrow account (the "Settlement Fund") controlled by RESSLER & RESSLER as Escrow Agent (subject to Court oversight) or controlled by such other person or entity as the Court may approve or appoint. No funds will be distributed from the Settlement Fund except in accordance with Court order.

12. Under the Settlement, the fees and expenses of RESSLER & RESSLER, as approved by the Court, will be paid from the Settlement Fund. By separate application, RESSLER & RESSLER is seeking Court approval of fees and expenses

[1] To the extent there is a discrepancy between the summary set forth below and the Stipulation and Agreement of Settlement, the terms of the Stipulation and Agreement of Settlement control.

incurred in connection with the prosecution of this Action and expenses expected to be incurred in connection with the distribution of funds to Members of the Class under the Settlement. (That application is being filed concurrently herewith.) The net amount of funds available for distribution to the Class under the Settlement cannot be ascertained until the Court determines the amount of allowed attorneys' fees and expenses to be paid out of the Settlement Fund. Accordingly, the fairness, reasonableness and the adequacy of the Settlement cannot be ascertained and the Final Judgment approving the Settlement cannot be entered until the Court enters an order determining the allowed amount of such fees and expenses to be paid out of the Settlement Fund. Movants respectfully submit that the amount of funds that will remain available for distribution to Authorized Claimants, after payment of the Court's allowed fees and expenses is fair, reasonable and adequate.

13. Under the Settlement, the remaining funds are referred to as the Distribution Fund and will be distributed to Authorized Claimants in accordance with the Settlement and the Plan of Allocation. The Lead Plaintiffs, together with all Class Members, shall look solely to the Distribution Fund for settlement and satisfaction of any and all Released Claims. No funds held in the Distribution Fund shall be distributed except in accordance with the Settlement and the Plan of Allocation or by order of the Court.

14. If any portion of the Settlement Amount of $2.5 million is not paid on the Settlement Effective Date, at the Lead Plaintiffs' option the Settlement may be

terminated or, as liquidated damages, Defendant agrees to entry of a consent judgment against it in the amount of any unpaid portion of the Settlement Amount, plus interest thereon at the post-judgment rate.

DISTRIBUTION OF SETTLEMENT PROCEEDS

15. The Settlement requires that settlement proceeds be distributed only to a person who resided at the Elizabeth Detention Facility between August 1, 1994 and June 18, 1995, who has not opted out of the *Brown* Class and who has submitted a timely Proof of Claim and Release. These are referred to as "Authorized Claimants." The Proof of Claim Form asks basic questions about each claimant's detention at the Esmor Facility, including details of time spent and specific injuries suffered. The information provided will be checked against existing records for accuracy and truthfulness.

16. RESSLER & RESSLER will review the Proofs of Claim, and on the basis of the injuries described, allocate units for the number of days spent at the Esmor Facility and the nature and severity of the other injuries specified, in accordance with the Allocation Schedule. The Allocation Schedule, the method of allocating these units, together with the entire distribution procedure, is called the Allocation Plan, and is attached hereto as **Exhibit 2**. The Allocation Plan provides for units to be allocated to each Authorized Claimant based upon the number of days in detention and the specific injuries identified in the Proof of Claim Form. The details regarding the method of allocating units is set forth in the Description of Allocation Plan attached hereto as **Exhibit 3,** and is based

upon Class Counsel's detailed review of the lengthy deposition testimony given by detainees in this action, the recurrence of certain types of alleged incidents of abuse, the severity of the alleged injuries, and the ability to verify alleged injuries.

(a) A single unit is allocated for each day of detention and is intended to compensate for any and all injuries the detainee may have suffered on a daily or routine basis, including: improper food, unsanitary conditions, improper building temperatures, improper clothing, sleep deprivation, denial of fresh air and exercise, inadequate medical assistance, verbal harassment, emotional abuse, non-invasive strip searches, improper shackling, denial of access to counsel, denial of access to visitors, deprivation of religious observance, together will all other injuries the detainee may have suffered that are not specifically set forth in the other categories of injuries.

(b) Additional per incident units are allocated for specific injuries, such as alleged beatings and segregation. For each day in segregation, 25 units are allocated, which is intended to include improper conditions of confinement, denial of medical assistance, denial of counsel, denial of proper procedures and hearings. For each alleged beating incident, 30 units are allocated, which is intended to include all injuries suffered by

the detainee as a result of each beating incident. The Proof of Claim Form asks for details of each alleged incident, including witness, if any, and the identity of the accused Esmor guard (if known).

(c) Additional one-time allocations are made for certain alleged injuries, which the deposition testimony indicates recurred with frequency. It is difficult, if not impossible, to allocate units for these injuries on a per incident basis, and hence a one-time allocation of multiple units is provided for. These include (i) injuries during the Esmor uprising (20 units), which is intended to include any and all injuries allegedly suffered by a detainee as a result of the uprising, (ii) injuries allegedly suffered by a detainee as a result of a search by the SERT Team (15 units), which is intended to include all injuries suffered by the detainee as a result of any and all inspections by the Esmor SERT Team, (iii) injuries allegedly suffered by a detainee as a result of a digital body cavity search (15 units), which is intended to include all injuries suffered by a detainee as a result of any and all digital body cavity searches by an Esmor guard, (iv) injuries allegedly suffered by a detainee as a result of sexual harassment by an Esmor guard (15 units), which is intended to include all

injuries suffered by a detainee as a result of any and all such sexual harassment.

(d) Class Counsel has analyzed the foregoing Plan of Allocation against the deposition testimony of the detainees in this case and believes that these unit allocations provide a workable matrix for distributing settlement proceeds to members of the class, which is fair and equitable, and which reflects the nature and severity of the injuries suffered.

(e) Implementation of the Plan of Allocation will be based on the statements made in the Proofs of Claim, which are made under penalty of perjury. Class Counsel will review all Proofs of Claim submitted for accuracy and truthfulness against existing records and will bring to the Court's attention any Proof of Claim that does not appear to withstand scrutiny.

17. After allocating units to each Authorized Claimant based upon the Proof of Claim and the Plan of Allocation, RESSLER & RESSLER will file an application with the Court, (i) identifying the Authorized Claimants, (ii) advising of the number of units allocated to each Authorized Claimant under the Allocation Plan, (iii) advising of the total number of Authorized Claimants, and (iv) seeking Court approval of the foregoing and the amount of distributions to be made to each Authorized Claimant based upon the information in the Proof of Claim and the

Plan of Allocation. Upon Court approval, RESSLER & RESSLER will cause distributions to be made from the Distribution Fund to each Authorized Claimant in the amount so approved. All monies in the Distribution Fund (net of administrative expenses) will be paid to Authorized Claimants until the Distribution Fund is exhausted.

THE *JAMA* AND *DASILVA* LITIGATION

18. The Settlement is not subject to a settlement or other resolution in the *Jama* Action and/or the *DaSilva* Action; however, the Settlement requires that any settlement amounts paid to the plaintiffs in those actions shall be paid on a basis no more favorable than the settlement amounts paid to Authorized Claimants from the Distribution Fund under this Settlement pursuant to the Plan of Allocation. In the event that Defendant enters into a settlement of the *Jama* Action and/or *DaSilva* Action, the Defendant shall obtain an Order of the Court finding that such net settlements are no more favorable to the plaintiffs in these actions than the amounts paid to Authorized Claimants from the Distribution Fund under this Settlement pursuant to the Plan of Allocation (such an order shall be hereinafter referred to as the "Equitable Treatment Order"). In this way, Class Members can be assured that the Settlement is fair and equitable to them and that other similarly situated detainees (who are not Class Members) receive no additional amounts in settlement from the Defendant (or other Released Parties) than Class Members under the Plan of Allocation.

NO FURTHER OPT-OUTS FROM THE CLASS

19. There has been considerable opportunity in this Action for persons to opt out of the Class, and the deadline for doing so has been extended on more than one occasion. The original bar date for opting out of the Class was fixed by order of the Court to be no later than June 1, 1999. Thereafter, the Magistrate Judge extended the opt-out period until February 20, 2003. Finally, pursuant to Order dated June 10, 2003 ("June 2003 Order") this Court extended the opt-out period to July 23, 2003.[2] Nine *Jama* plaintiffs filed opt-outs within the extended deadline, while none of the *DaSilva* plaintiffs filed opt-outs.

20. During the summer of 2003, the Court further determined that, given the passage of time since the inception of this case, it was appropriate to give supplemental notice to the members of the *Brown* class who could still be located by Class Counsel. By order dated June 23, 2003, the Court directed that Class Counsel mail notices to "detainees at the Elizabeth, New Jersey detention facility operated by Esmor Correctional Services whose directly mailed class action notices mailed in April 1999 were *not* returned as undeliverable and ii) the attorneys to whom class action notices were sent on April 19, 1999 and not returned." Order at 3-4 (June 23, 2003). In accordance with this direction, Class Counsel mailed notices to over 576 detainees and/or their attorneys and, of those mailings, it is

[2] That order is the subject of a pending appeal by Esmor before the United States Court of Appeals for the Third Circuit.

believed about 456 were delivered to the detainee and/or the attorney. Not one of these detainees or their attorneys indicated a desire to remove themselves from the Class.

21. Accordingly, after more than nine years and numerous opportunities to do so, nine *Jama* plaintiffs are the only members of the Class who have opted-out, pending appeal of that issue. The outcome of those appeals should have no impact on the fairness of the Settlement. If the Third Circuit reverses the June 2003 Order, then *Jama* plaintiffs will be treated like all other Members of the *Brown* Class and have an opportunity to receive distributions from the Distribution Fund in accordance with the Settlement and the Plan of Allocation. If the Third Circuit affirms the June 2003 Order, the fairness of the Settlement similarly remains intact because under the terms of the Stipulation of Settlement, any settlement reached with *Jama* or *DaSilva* plaintiffs will treat those plaintiffs no more favorably than Authorized Claimants under the Settlement and Plan of Allocation.

22. However, the Stipulation of Settlement was carefully negotiated to not accommodate additional persons opting out of the Class. Given the extended opportunity that members have been given to previously opt-out, and the additional notice that was given under the June 23, 2003 Order, it is respectfully submitted that the Court should afford no additional opportunity to opt-out of the Class under Federal Rule of Civil Procedure 23(e).

23. Prior to December 1, 2003, there was no specific provision allowing class members to opt out of a settled class action. The 2003 amendment to Rule 23(e)(b)(3) now allows the Court, *in its discretion*, to afford members of a Rule 23(b)(3) class action a second opportunity to opt out of the class. The Advisory Committee Note to rule 23(e)(3) states that "[m]any factors may influence the court's decision [to grant a second opt-out]. Among these are changes in the information available to class members since expiration of the first opportunity to request exclusion." Fed. R. Civ. P. 23(e)(3). In circumstances such as those present in the case at bar, other courts have declined to impose a second opt out opportunity in connection with approval of a settlement. For example, the court in *Denny v. Jenkins & Gilchrist*, No. 03 Civ. 5460(SAS), 2005 WL 388562 (S.D.N.Y. Feb. 18, 2005), declined to require a second opt out, explaining that "Rule 23(e)(3) was not meant to require an automatic second opt-out whenever a proposed settlement is amended after the close of the first opt-out period." *Id.* at *22. The Court noted that the second opt out under Rule 23(e)(3) was to be applied "sparingly, to a limited number of cases" where it would not be disruptive to the settlement. *Id*. The court further noted that no due process implications are involved in a second opportunity to opt out, and the provisions of Rule 23(e)(3) are intended solely to assist the Court in determining the fairness and adequacy of the settlement.

> Both before and after the 2003 amendments, courts have consistently rejected arguments that due process *requires* a second opportunity to opt out when the final terms of a proposed settlement become known—even in those cases where the initial opt-out period expires before a settlement agreement is reached. "[T]o hold that due process requires a second opportunity to opt out after the terms of the settlement have been disclosed to the class would impede the settlement process so favored in the law." Rule 23(e)(3) was not intended to alter this sound policy by mandating a second opt out opportunity every time parties renegotiate their settlement in any respect.

Id. (Citations omitted); *see also In re Lloyd's Am. Trust Fund Litig.*, 2002 WL 31663577, at *12 (S.D.N.Y. Nov. 26, 2002) ("Due process requires only that Class Members have notice of the proposed settlement and an opportunity to be heard at a fairness hearing. If the proposed settlement is fair, adequate and reasonable, due process does not afford Class Members a second opportunity to opt out."); *In re VISA Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 518 n.18 (E.D.N.Y. 2003) ("[Objectors] requested that Class members be given a second opportunity…to opt out of the Class now that the Settlements' terms are known. Because I have approved these Settlements as fair, however, due process does not afford Class members a second opportunity to opt out.").

24. Here, where multiple opportunities to opt out have been offered over an extended period of time, and supplemental notice of the nature of this proceeding was given in 2003 to hundreds of members (none of whom expressed a desire to opt out), yet another opportunity to opt out of the Class is not required for this Court to approve the reasonableness, fairness and adequacy of the Settlement. This is

particularly true here where the Court has carefully overseen the settlement negotiations between the parties and made certain that they were conducted at arm's length. Moreover, any Class Member that wishes to object to the fairness of the Settlement retains his right to do so under Rule 23 and will be given notice and an opportunity to be heard.

NOTICE PROVISIONS

25. The Settlement requires RESSLER & RESSLER to mail a Notice of Hearing to each Class Member who can be identified through reasonable effort. In addition, the Settlement requires RESSLER & RESSLER to give notice by publication on the Internet, in at least one national newspaper and at least two ethnic newspapers. The Notice of Hearing informs members of the class of the pendency of this application to approve the Settlement, describes the terms thereof, and advises them of their opportunity to object and be heard at the hearing scheduled to consider the fairness, reasonableness and adequacy of the Settlement. The Notice of Hearing further advises all members of the class that RESSLER & RESSLER, as Class Counsel, recommends approval of the Settlement as being, in its view, in the best interests of the class and represents the maximum amount of recovery that can reasonably be expected under the circumstances of this case. The Notice of Hearing will be given by mail at least 30 days in advance of the hearing scheduled to consider approval of the settlement, and notice by publication will be given at least 30 days prior to that hearing. The Notice to class members further explains

that RESSLER & RESSLER must receive the Proof of Claim & Release by the Bar Date, which is a date to be fixed by this Court. It is respectfully submitted that the Bar Date should be fixed at a date no earlier than 120 days after the date on which the forms are mailed to class members. The Notice advises that (i) if the Proof of Claim is mailed to RESSLER & RESSLER, it must postmarked no later than November 7, 2005, and (ii) any late Proofs of Claim Forms are not valid and will not be considered for distribution. The Notice is attached hereto as **Exhibit A-1 to the Stipulation of Settlement** and Court approval of it is hereby sought.

26. The Settlement also requires RESSLER & RESSLER to mail a Proof of Claim & Release Form to each Class Member who can be identified through reasonable effort. (These Forms will be mailed together with the Notice to Class Members described above.) Each Proof of Claim & Release Form contains (i) a questionnaire asking basic questions about the class member's detention at the Esmor Facility, including details of time spent and specific injuries suffered, (ii) notice it is being signed under penalty of perjury, and (iii) a release of all claims against Esmor and the Released Parties. The Proof of Claim & Release Form is attached as **Exhibit A-2 to the Stipulation of Settlement** and Court approval of it is hereby sought.

27. RESSLER & RESSLER will also send a Description of the Plan of Allocation, which explains (i) the method for allocating units based upon the information set forth on the Proofs of Claim, (ii) the method for distributing to

each member its pro rata share of the settlement proceeds based upon the number of units allocated under the Allocation Plan, and (iii) the expected timing of those distributions, if the Settlement is approved. The Description of the Plan of Allocation, together with the Allocation Schedule, are attached as **Exhibits 2 and 3** and Court approval of them is hereby sought.

28. In addition, RESSLER & RESSLER will cause a Summary Notice to be published once in the national edition of *USA Today* and once in 2 local ethnic newspapers , and will also cause the Summary Notice and Proof of Claim to be posted on the Internet on the website of RESSLER & RESSLER, www.resslerlaw.com. The Summary Notice is attached to the Stipulation as Exhibit A-3 and Court approval of it is hereby sought.

29. It is respectfully submitted that the notice to class members described above is the "best notice practicable under all the circumstances" of this case and satisfies the notice requirements of Rule 23 (e). *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975). The timing and substance of the notice proposed herein satisfies the requirements articulated by the Third Circuit in *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993). In that case, the Court held that notice to class members is "sufficient and informative" when it "summarized the allegations in the complaint, informed class members of the settlement's terms, the availability of further information from the court, and the right of each class member to object and be heard at the settlement hearing … . To satisfy due process, the notice must

be sufficiently informative and give sufficient opportunity for response." *Id.* at 1316.

> The notice advised shareholders that a hearing to determine whether the proposed settlement should be approved would be held on June 26, 1992. The notice summarized the *Bell of Pennsylvania* matter, the procedural history, the parties' contentions, the issues involved, the reasons each party recommended settlement, and the terms of the settlement agreement. The notice advised shareholders of their right to object, the consequences of not doing so, and how to go about obtaining further information available on file with the court. Examination of the notice convinces us that it satisfies the requisites of due process.
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> The notice here proposed a "full and final disposition of any and all claims against defendants arising out of or related to the claims asserted" by plaintiffs.
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> * * *
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> In view of its content, it is clear the essential purpose "to fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them" was satisfied. *Philadelphia Housing Auth. v. American Radiator & Std. Sanitary Corp.*, 323 F. Supp. 364, 378 (E.D. Pa. 1970), *aff'd*, 453 F.2d 30 (3d Cir. 1971).

Here, the substance of the notice to class members has been designed to explain the nature of the allegations in the complaint, the terms of the settlement in layman's terms, the right to object, the consequences of the failure to approve the settlement, the scope of the releases, the method of allocation and distribution of proceeds if the settlement is approved. In short, the notice is sufficiently informative to advise class members of the substance of the settlement and give them a meaningful opportunity to respond.

30. Moreover, notice by mail will be given to all members of the class who can be identified through reasonable effort. The process of giving supplemental notice to class members in 2003 has enabled Class Counsel to identify 456 detainees and/or their attorneys who could be given notice by mail as of that date. Notice of this Settlement will be given by first class mail to these 456 detainees. Moreover, notice by publication will not be restricted to a national newspaper. Published notice will also be given in at least two local ethnic newspapers that have been selected as most likely to reach the ethnic makeup of the class. Notice in all circumstances will be given not less than 30 days prior to the hearing, so that all class members will have an opportunity to consider the settlement and file objections thereto should they so desire.

31. Accordingly, it is respectfully submitted that the proposed notice conforms with the requirements of due process, as interpreted by the Third Circuit.

FAIRNESS OF THE SETTLEMENT UNDER THE *GIRSH* FACTORS

32. The Third Circuit, in *Girsh*, 521 F.2d at 157, articulated the factors to be considered in evaluating the fairness of a class action settlement, as follows:

> (1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement . . . ; (3) the stage of the proceedings and the amount of discovery completed . . . ; (4) the risks of establishing liability . . . ; (5) the risks of establishing damages . . . ; (6) the risks of maintaining the class action through the trial . . . ; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; (9) the range of reasonableness of the settlement

> fund to a possible recovery in light of all the attendant risks of litigation . . ..

These nine factors have been consistently applied in the Third Circuit in evaluating the fairness of class action settlements. *See In re Cendant Corp. Litigation*, 264 F.3d 201 (3d Cir. 2001); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283 (3d Cir. 1998); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank*, 55 F.3d 768 (3d Cir 1995). The Settlement in this class action satisfies each of the *Girsh* factors and should be approved as fair, adequate and reasonable.

THE *BROWN* CLASS ACTION IS COMPLEX, EXPENSIVE AND LENGTHY

33. This class action has already been pending for more than nine years, and has resulted in extensive expense for all parties involved. The complexity of the issues raised was heightened by the procedural consolidation of this class action with the separate *Jama* action, which included multiple defendants and novel claims under federal and constitutional law, and the *DaSilva* action. The discovery process alone involved the depositions of over 47 separate witnesses over an aggregate period of approximately 161 days. These depositions resulted in thousands of pages of transcripts, all of which had to be reviewed and analyzed. In addition, the consolidated discovery process involved document production on an enormous scale. Because of the number of defendants involved in the consolidated discovery that were required to produce documents, the volume of documents

produced was massive, numbering in the hundreds of thousands of pages and thousands of hours were spent in reviewing, analyzing and cataloguing them.

34. Moreover, this case has involved numerous complex issues of fact. The parties were required to analyze tens of thousands of pages of documents produced in discovery to determined key facts, such as the number of detainees sent to segregation, the number of days spent in segregation, the purported infractions for which they were sent to segregation and the conditions of confinement in segregation. Similar analysis was required to determine which detainees were resident in the Facility, for how long, the nature of their treatment, the procedures employed by Esmor, and the training and supervision given by Esmor.

35. The transient nature of the class members also added to the complexity of maintaining this class action, requiring multiple mailings of notice to members of the class and/or their attorneys. As noted above, Class Counsel identified and located 1,180 detainees and mailed notices to each of them and/or their attorneys in 1999. During the summer of 2003, Class Counsel again mailed notices to over 576 detainees and/or their attorneys and, of those mailings, 456 were deliverable to the detainee and/or the attorney, as summarized in the Class Counsel certification filed on or about September 17, 2003.

36. The dispositive motions also were complex, producing literally thousands of pages of briefs, statements of fact, affidavits and related documents

from the various parties—all of which had to be reviewed, researched and analyzed by the parties. Complex issues of law permeated the dispositive motion phase, including numerous issues of constitutional, federal and state law that were raised as grounds for dismissing the *Brown* class action, including (i) the admissibility of the INS Interim Report under the Federal Rules of Evidence, (ii) the availability of the government contractor defense under federal law, and (iii) the viability of plaintiffs' state law claims for negligent hiring, supervision and training. These three issues were resolved by this Court's decision and order denying in part, and granting in part, Esmor's motion for summary judgment. *See Brown*, 334 F. Supp. 2d at 662.

37. If this class action were to go to trial, final resolution would still be significantly delayed. Not only would the trial itself be a complex, expensive and time-consuming undertaking, but also any judgment would undoubtedly be followed by lengthy appeals. During this period, the transient members of the plaintiff class would undoubtedly become even more difficult to contact and all member of the class would be compelled to suffer additional delay in receiving compensation, while Defendant would be required to expend yet further resources on this litigation.

THE REACTION OF THE CLASS TO THE SETTLEMENT

38. During the nine-year pendency of this class action, Class Counsel has received no indication from the numerous class members with whom it has

maintained contact, that a settlement of the magnitude reached here would be objectionable. Indeed, almost every direct communication with members of the class has been answering questions as to when a settlement is likely, when will the delay end, and the magnitude of the likely recovery. Notably, not one of the 456 detainees who received the 2003 notice gave any indication that they wished to opt out of the class and pursue a separate recovery. All who contacted Class Counsel reiterated their desire for a settlement, end to delay, and a reasonable recovery. It is the view of Class Counsel and the Defendant that this Settlement of $2.5 million is the maximum recoverable under the circumstances of this case. While no objections have yet been received from any member of the class, it is anticipated that there will be few objecting, if any, and none that can effectively dispute the reasonableness of the result achieved.

THE STAGE OF THE PROCEEDINGS AND AMOUNT OF DISCOVERY COMPLETED

39. This is not a class action where a settlement is reached at the outset, before any meaningful discovery has been completed. As discussed above, this case has been pending for more than nine years, during which massive discovery has been undertaken. All fact discovery has been completed long ago, and expert discovery would have been strictly limited had this case gone to trial. Under these circumstances, there is no reason to believe that additional time and/or discovery would affect the magnitude of the settlement, other than to impose yet additional delay and expense on the parties.

THE RISKS OF ESTABLISHING LIABILITY

40. Plaintiffs allege that "while they were detainees at the Facility they were tortured, beaten, harassed, and otherwise mistreated by Esmor guards, and that they were subjected to abysmal living condition including inadequate sanitation, exercise and medical treatment." 34 F. Supp. 2d at 666. In the order denying Esmor's motion for summary judgment, this Court found that plaintiffs in the Brown class action "have presented substantial evidence in support of those allegations." *Id.* at 674. In reviewing the evidence, the Court noted the extensive deposition testimony of the detainees, in which they describe the conditions of brutal abuse that prevailed at Esmor, together with the report prepared by the INS that confirmed the substance of that testimony. *Id.* at 674.

41. The Court held that the *Brown* plaintiff class had presented "ample" evidence to support its claims that Esmor "was negligent in the hiring, retention, training, or supervision of its guards." *Id.* at 683. Accordingly, the Court denied Esmor's motion for summary judgment dismissing plaintiffs' claims for negligent supervision and/or training and negligent hiring. *Id*. at 685. As a result of that decision, the surviving claims of the *Brown* plaintiffs were ready to proceed to settlement or trial.

42. Notwithstanding any finding by the Court in the foregoing Decision and Order, Defendant has vigorously denied, and continues to deny, that it has committed any violation of federal or state laws, and has vigorously denied and

continues to deny all allegations of wrongdoing or liability whatsoever with respect to the Released Claims, including any and all claims of wrongdoing or liability alleged or asserted in the Action.

43. Accordingly, establishing Defendant's liability at trial is by no means certain. This is particularly true since the proof of liability required to defeat a motion for summary judgment is substantially less than the level of proof required to establish liability at trial. The certainty achieved by this Settlement avoids the risk of proving liability for the plaintiffs and enables the Defendant to avoid the risk of an adverse finding.

THE RISKS OF ESTABLISHING DAMAGES

44. Even if liability were established, there would remain the risks associated with establishing damages. In this case, all of the detainees alleged they were injured in some way by their detention at the Esmor Facility, but the nature and severity of their injuries suffered are widely divergent. Some detainees were never put into segregation, beaten, searched by the SERT Team, or sexually harassed. Others allege they were abused in this way on a regular basis. Establishing damages at trial would require separate mini-trials for each type of detainee, ranging from those who suffered no specific injuries (other than the alleged daily conditions of detention) to those who alleged multiple incidents of specific abuse. A representative sampling of detainees would have been required to appear and testify as to the nature of their injuries and the witnesses, if any, to

the incidents. The certainty achieved by this Settlement avoids the risk of proving damages for the plaintiffs and enables the Defendant to avoid the risk of a judgment against it.

THE RISKS OF MAINTAINING THE CLASS ACTION THROUGH TRIAL

45. As discussed above, Class Members are undocumented aliens who are extremely transient. Not only were a fair number of members of the class deported, but also those who continue to reside in the United States are transient within this country. If this action were to proceed to trial, with attendant post-trial and appellate delays, it is reasonable to expect that the number of detainees with whom contact could be made would diminish. Thus, if a substantial additional delay were to ensue, it is reasonably expected that any ultimate recovery in this action would not be capable of distribution to a significant number of members of the class.

THE ABILITY OF THE DEFENDANTS TO WITHSTAND A GREATER JUDGMENT

46. The Defendant maintains insurance coverage for claims arising from this class action in an amount that is greater than the $2.5 million provided for in this Settlement, although the extensive expense of these consolidated cases has exhausted most of the excess coverage. Settlement negotiations were undertaken directly with the Defendant's primary insurance carrier, under the supervision of this Court, where it was made clear that the amount of this Settlement is the maximum amount the carrier is willing to pay. Accordingly, while the Defendant

has some ability to withstand a greater judgment, it is clear that the Defendant and its carriers could be required to pay a greater judgment only after trial and the resolution of any ensuing appeals. In view of the significant delay already suffered by the plaintiffs in this action, and risks attendant to a trial, the ability of the Defendant to pay more than the amount of the Settlement is an insufficient basis to disapprove the Settlement under the circumstances of this case.

THE RANGE OF REASONABLENESS OF THE SETTLEMENT FUND IN LIGHT OF THE BEST POSSIBLE RECOVERY

47. Without exception, similar plaintiffs in other reported cases have recovered more only after a jury verdict, and without exception those cases did not involve a significant delay of nine years between the commencement of the case and the trial. In those cases, witnesses were available, memories were fresh and evidence was easily obtainable. Moreover, it is difficult to compare the recovery here to those cases involving a single plaintiff because, in this case, the actual recovery per plaintiff cannot be ascertained until all of the proofs of claim are filed. The pro rata recovery per plaintiff depends not only on the number of units allocated under the Allocation Plan, but also depends on the total number of class members who file timely proofs of claim. Accordingly, it is respectfully submitted that cases involving awards to single plaintiffs (who share their recovery with no one) cannot serve as a proper basis upon which to evaluate the recovery for the class members here.

THE RANGE OF REASONABLENESS OF THE SETTLEMENT FUND IN LIGHT OF ALL ATTENDANT RISKS OF LITIGATION

48. In view of the risks, expense and delay attendant to further litigation in this action, the Settlement is fair, reasonable and adequate. This Settlement represents the maximum amount of recovery that can reasonably be expected under the circumstances of this case, particularly in view of the substantial delay in payment that has resulted from the years of litigation in this class action. Moreover, the Settlement will eliminate the substantial burden, expense and uncertainties of further litigation. The parties respectfully submit that the Settlement falls well within the range of reasonableness under the circumstances of this case.

CONCLUSION

WHEREFORE, it is respectfully requested that the Court enter an order, (i) preliminarily approving the fairness of the Settlement, subject to the Fairness Hearing under Rule 23(e); (ii) scheduling the Fairness Hearing to consider this Settlement and the Plan of Allocation for August 10, 2005, (iii) approving the attached forms of the Notice of Hearing, the Proof of Claim and Release, the Summary Notice, the Allocation Schedule, the Plan of Allocation (iv) directing Class Counsel to mail the foregoing documents to all members of the class who can be identified through reasonable effort by no later than June 24, 2005, (v) fixing the Bar Date to be November 10, 2005 , (vi) fixing November 7, 2005 as the

last date on which a timely Proof of Claim can be post-marked, (vi) directing Class Counsel to cause the Summary Notice to be published once in the national edition or *USA Today* and once in two ethnic newspapers by no later than June 24, 2005, 2005, and to post the Summary Notice and Proof of Claim and Release Form on its website by no later than June 24, 2005, (viii) after the Fairness Hearing, approving the Settlement and Plan of Allocation in all respects and entering the Final Judgment (as defined in the Settlement), (ix) after entry of the Final Judgment, entering such other and further orders as are contemplated by the Settlement and the Plan of Allocation for implementation, administration, and distribution of the Settlement Fund, and (x) such other and further relief as is just.

Dated: May 19, 2005

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