IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JESUS LIRA, BEN GARCIA, GRACIELA MARTINEZ, STEPHEN CULLER, CYNTHIA ARCHER, FREDERICK GARCIA and DOUGLAS BEIDLER, on their own behalf and on behalf of a class of similarly situated persons,

Plaintiffs,

vs. **No. CIV 06-0179 WPJ/WPL**

DONA ANA COUNTY BOARD OF COMMISSIONERS; Dona Ana County Detention Center administrator CHRISTOPHER BARELA, in his individual and official capacities; former Dona Ana County Detention Center administrator DAVID WOOLEY, in his individual and official capacities; former Dona Ana County Detention Center administrator ALFONSO SOLIZ, in his individual and official capacities, and former Dona Ana County Detention Center acting administrator CHERYL ROACH, in her individual and official capacities.

Defendants.

JOINT UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT

Plaintiffs Jesus Lira, Ben Garcia, Graciela Martinez, Stephen Culler, Cynthia Archer, Frederick Garcia and Douglas Beidler, individually and on behalf of the settlement class defined herein, on the one hand (hereinafter, "Plaintiffs"); and Defendants Dona Ana County Board of Commissioners, Dona Ana County Detention Center (hereinafter "DACDC") administrator Christopher Barela, former DACDC administrators David Wooley and Alfonso Soliz, and former

acting administrator Cheryl Roach, on the other hand (hereinafter "Defendants") (Plaintiffs and Defendants are hereinafter collectively referred to as "the Parties"), by and through their respective counsel, jointly move the Court to grant preliminary approval of a Stipulation of Settlement ("Settlement Agreement") that has been negotiated and reached by the Parties as a proposed complete resolution of this class action case. A copy of the Settlement Agreement is attached hereto as Exhibit A. Specifically, the Parties request the Court to enter an Order, in the form attached hereto as Exhibit B: (1) preliminarily approving the Settlement Agreement; (2) conditionally certifying the Class; (3) appointing Named Plaintiffs as Class Representatives; (4) appointing counsel for the Named Plaintiffs as Class Counsel; (5) approving the form and manner of the Notice to be sent to Class Members and a Summary Notice to be published in various newspapers concerning the Settlement Agreement;[1] (6) approving the forms of, and setting deadlines for submission of, claim forms, exclusion requests ("opt outs") and objections;[2] and (7) setting a date for a final fairness hearing.

This motion will explain the circumstances and terms of the settlement, and the legal grounds supporting its preliminary approval.

I. INTRODUCTION

A. The Action

On March 7, 2006, Plaintiffs, on behalf of themselves and all persons similarly situated, filed a complaint in the above-captioned matter (the "Action") in which they challenged certain

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[1] A Copy of the proposed Notice is attached as Exhibit 2 to the Settlement Agreement.

[2] A Copy of the Claim Form is attached as Exhibit 1 to the Settlement Agreement.

practices of Defendants including the strip search of certain detainees, and sought damages and declaratory and injunctive relief. Plaintiffs allege that they were each unlawfully subjected to a strip search performed pursuant to the policies, practices and customs of Defendants of conducting strip searches of all incoming pre-arraignment detainees. Plaintiffs allege that these strip searches were performed without regard to the nature of the alleged offenses for which Plaintiffs had been arrested, and without Defendants having a reasonable belief that the Plaintiffs possessed weapons or contraband, or that there existed facts supporting a reasonable belief that the search would produce contraband or weapons.

Plaintiffs sought damages for civil rights violations under 42 U.S.C. § 1983, and for claims arising under the New Mexico Tort Claims Act. Plaintiffs additionally sought a judgment declaring that Defendants must cease the activities described herein and enjoining Defendants from any further strip searches without individualized reasonable suspicion. Plaintiffs brought this action on their own behalf and on behalf of a class of similarly situated individuals.

Defendants contend that not all incoming pre-arraignment detainees were subjected to strip searches. Defendants further contend that the admissions search policies at the DACDC were and are reasonably related to legitimate penological interests in deterring the introduction of weapons, drugs and other contraband into the detention center. Defendants submit that the detention center policies are entitled to deference under the law, and that the policies should not be found to violate the Constitution or any state law. Defendants further deny that the searches of Plaintiffs violated any state or federal law.

Nonetheless, while denying any liability, the Defendants consider it desirable and in their interests that the Action be dismissed on the terms set forth in the Settlement Agreement in order to avoid further expense, inconvenience, and distraction, and to avoid protracted litigation.

By entering into the Settlement Agreement and taking actions pursuant to it, the Parties do not concede that any particular allegations, claims or defenses in the Action have merit. Accordingly, while Defendants join in this motion for preliminary approval of the Settlement Agreement and request that the Court enter the accompanying Order, this motion does not constitute an admission of any liability or of the propriety of class action treatment of this litigation in the event that the Court does not preliminarily or finally approve the Settlement or if such approval is overturned on appeal. In the event that final approval is not obtained and the Settlement Agreement does not become effective, nothing in this motion or the accompanying settlement pleadings may be used for any purpose in further litigation of the claims of the Named Plaintiffs or of any of the putative Class Members that they seek to represent. Similarly, even if the Settlement Agreement is finally approved and becomes effective, none of the assertions made in this motion or in any of the accompanying settlement pleadings constitutes or should be deemed an admission by any of the Defendants in any litigation commenced by any putative class member who opts out of the Settlement or by any person who does not meet the criteria for inclusion in the Class.

B. Summary of the Settlement Terms

After exchanging discovery, the Parties entered into the arms-length settlement negotiations that culminated in the Settlement Agreement. Under the Settlement Agreement, the

Parties have stipulated that the Action should be certified as a class action under Fed.R.Civ.P. 23. The Parties agree that the Defendants will pay $5 million (the "Settlement Fund") in compensation for the Settlement Class (as that term is defined in the Settlement Agreement), for payment of incentive compensation for each Named Plaintiff, and for Plaintiffs' reasonable attorneys' fees and costs. The settlement will constitute a full and complete adjudication of the claims, rights and obligations of the Parties and the Class with respect to the matters alleged in the Action and as further set forth in the Settlement Agreement. The Parties believe that they have crafted a fair, reasonable and adequate settlement of the claims at issue in this case, and one that warrants the Court's preliminary approval.

II. FACTUAL BACKGROUND RELEVANT TO PRELIMINARY APPROVAL

A. History of This Litigation

The Action was filed on March 7, 2006. The Parties entered into the voluntary exchange of all relevant information pertaining to the claims raised herein, including extensive review of thousands of individual booking records. On May 14 and 15, 2007, the Parties engaged in two days of mediation sessions with experienced mediator Nancy Lesser, and, following mediation, continued negotiations until the attached Settlement Agreement was finally reached. In addition, the Plaintiffs obtained and analyzed the voluminous database maintained by the Defendants for all persons booked into the DACDC during the relevant class period (numbering in excess of 36,000 individual bookings). *See* Affidavit of Attorney John C. Bienvenu, filed separately.

B. The Settlement Terms

The terms of the settlement are fully described in the Settlement Agreement, and are

summarized as follows.

1. Certification of the Class

The Settlement Class is defined in the Settlement Agreement as all persons arrested on a non-VDW Offense[3] who were strip searched between March 7, 2003 and March 7, 2006 at DACDC prior to arraignment. The Parties estimate that there are approximately 11,000 Settlement Class members. *See* Bienvenu Affidavit. The Parties agree that the Action should be conditionally certified as a class action under Fed.R.Civ.P. 23.

2. Monetary Relief to Settlement Class Members

a. Payments to the Settlement Class

The Settlement Agreement provides that the Defendants will deposit a Settlement Fund of $5,000,000 into an interest-earning qualified settlement fund account within thirty days of the date of preliminary approval. The Claims Administrator will pay out of the Settlement Fund to each Settlement Class member who submits a valid and timely Claim Form a Settlement Payment calculated for that Settlement Class member under the proposed Plan of Allocation (attached to the Settlement Agreement as Exhibit 3). At this time, depending on how many Settlement Class members actually file claims, the range of expected pay-outs per individual claimants is estimated at $1,200 to $2,400. *See* Bienvenu Affidavit.

b. Incentive Payments

Under the Settlement Agreement, the Class Representatives will be eligible to receive compensation for their contribution to the investigation and prosecution of this case, in addition

[3] A "Non-VDW Offense" is defined as an offense not involving drugs, weapons or violence as identified in Exhibit 4 to the Settlement Agreement.

to the amounts to which they are entitled under the Plan of Allocation. The Parties have agreed that $175,000 of the Settlement Fund will be allocated for this purpose, subject to approval of the Court, representing $25,000 per Class Representative.

c. Equitable Relief

The Parties have stipulated and agreed that the strip search policies at the DCADC were changed as a result of Plaintiffs' and Plaintiffs' counsel's efforts preceding and during this lawsuit, and that the request for equitable relief was thereby rendered moot.

d. Attorneys' Fees and Costs

The Parties have stipulated and agreed that $1,666,667 of the Settlement Fund will be allocated to Plaintiffs' attorneys' fees, gross receipts tax on fees, and litigation expenses, subject to approval of the Court.

e. Release of Claims

All Plaintiffs and Settlement Class members who do not opt out of the settlement will release the Defendants from any and all claims which are based upon or could be based upon or arise from the facts alleged in the Action.

f. Notice and Opt-Out Procedures

The Settlement Agreement provides for a detailed Notice to be sent by mail to all Settlement Class members informing them (in English and Spanish) of their rights under the Settlement Agreement, and for a summary Notice (in English and Spanish) to be published in local newspapers informing Settlement Class members of the settlement and directing them to sources of additional information. In addition, announcements summarizing the settlement are to

be made in English and Spanish on three local radio stations.

The Settlement Agreement provides that Settlement Class members have two options for responding to the Notice. A Settlement Class member may (1) remain a Settlement Class member and be eligible to submit a Claim Form, or (2) request exclusion from the Settlement Class and opt out. Settlement Class members who request exclusion from the Settlement Class and opt out will not be deemed to have released the Defendants from any claims and may pursue any claims they may have against the Defendants, but will not receive any payments from the Settlement Fund. Settlement Class members who do nothing will be deemed to have released their claims, but will not receive any payments from the Settlement Fund. Settlement Class members who submit Claim Forms will be eligible to receive payments from the Settlement Fund as determined under the Plan of Allocation.

Settlement Class members who do not opt-out may also present objections to the Court at the final fairness hearing.

III. ARGUMENT

A. The Settlement Agreement Merits Preliminary Approval

Preliminary approval of a proposed settlement is part of a two-step process required before a class action can be settled. *See Manual for Complex Litigation, Fourth* (hereinafter "*Manual*") § 21.632 (Fed. Jud. Ctr. 2004). In considering preliminary approval, courts make a preliminary evaluation of the fairness of the settlement. "Where 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, preliminary approval is granted." *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997); *see also Manual* § 21.632. "Once preliminary approval is bestowed, the second step of the process ensues: notice is given to the class members [of the terms of the proposed settlement and of a hearing] at which class members and the settling parties may be heard with respect to final court approval." *NASDAQ*, 176 F.R.D. at 102; *Manual* at §§ 21.633-34.

In considering whether to grant a motion for preliminary approval of a proposed settlement agreement, the Court utilizes a "threshold inquiry" intended merely to reveal conspicuous defects. S*ee In re Inter-Op Hip Prosthesis Liability Litig.*, 204 F.R.D. 330, 337-38 (N.D. Ohio 2001). Ultimately, of course, before a settlement can be finally approved, the Court must determine that a settlement is fair, reasonable and adequate. *See Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984). At the preliminary approval stage, however, the Court should evaluate, based on the terms of the Settlement Agreement, the contents of the record, and the controlling legal authority whether "the proposed settlement is sufficiently reasonable, adequate, fair, and consistent with the requirements of Fed.R.Civ.P. 23 to warrant notice… to the class members and a fairness hearing." *See Marcus v. Kan., Dep't of Revenue*, 206 F.R.D. 509, 513 (D. Kan. 2002).

Considering the issues, evidence, and nature of the settlement negotiations, preliminary approval is appropriate in this case. First, the proposed settlement is the product of serious, informed, non-collusive negotiations. The settlement negotiations lasted many months, were adversarial in nature, and involved numerous parties with varying interests. The Parties engaged

in mediation with the assistance of a highly experienced mediator, Nancy Lesser on May 14 and May 15, 2007, and then continued negotiations amongst counsel through August 2006. *See* Bienvenu Affidavit. Thus, the course of settlement negotiations rises well above the threshold for preliminary approval.

Second, the terms of the Settlement Agreement are fair, reasonable, and adequate to resolve the dispute. Liability was hotly contested. Both sides developed evidence to support their claims and defenses. Plaintiffs believe their class would have been certified. Defendants are equally convinced they would have defeated class certification and would have been allowed to defend the claims on an individual basis. All Parties predicted protracted litigation. Most courts, in considering approval of a class action settlement, note the advantages of avoiding lengthy and expensive litigation. *See, e.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)(recognizing "the strong judicial policy that favors settlements, particularly where complex class action litigation is concerned"); *Wald v. Wolfson (In re United States Oil and Gas Litig.)*, 967 F.2d 489, 493 (11th Cir. 1992) ("Complex litigation . . . can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive"). The Parties here recognized the advantages of settlement over continued litigation.

The Settlement Fund established here is a meaningful benefit to Settlement Class members. Plaintiffs' counsel, who are experienced in this type of litigation, believe the Class members' chances of obtaining better results by continuing the litigation or by pursuing separate claims are uncertain at best. *See* Bienvenu Affidavit. *See also Duhaime v. John Hancock Mut.*

Life Ins. Co., 177 F.R.D. 54, 69 (D. Mass. 1997) (approving settlement agreement and noting that settlement "provides class members with timely relief without having to risk the uncertainty of outcome, duration, and expense inherent in continuing the litigation").

Finally, the Settlement Agreement does not grant unduly preferential treatment of class representatives or segments of the class. *NASDAQ*, 176 F.R.D. at 102. In this instance, through non-collusive negotiation, the Parties have agreed that the Settlement Agreement should include incentive awards to the Class Representatives. The Plaintiffs submit that the proposed incentive awards are reasonable and are intended to recognize the significant time and efforts expended by the Class Representatives on behalf of the Class and the risks that they undertook in bringing the lawsuit. *Ingram v. The Coca Cola Co*., 200 F.R.D. 685, 694 (N.D. Ga. 2001)("'Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incurred during the course of the class action litigation'" (*quoting In re Southern Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997)). The Class Representatives contributed substantial time and energy in support of the action, including extensive participation in discovery, case strategy, case management, and mediation. *Van Vranken v. Atlantic Richfield Co*., 901 F. Supp. 294, 299 (N.D. Cal. 1995) (in considering an incentive award, the court may consider the risk to the class representatives, both financial and otherwise; the personal difficulties encountered by the class representatives; the amount of time and effort spent on litigation; the duration of the litigation; and the personal benefit—or lack thereof—enjoyed by the class representative as a result of the litigation). Given their contributions throughout the litigation, these individual payments are reasonable and not excessive. *Cf. Ingram*, 200 F.R.D. at

694 (approving $300,000 incentive award to each named plaintiff); *see also*, Bienvenu Aff., (payments of $42,500 per named plaintiff approved by United States District Judge Bruce Black in *Leyba, et al. v. Santa Fe County Board of Commissioners, et al.*, No. CIV 05-0036 BB/ACT). The Defendants have agreed to neither oppose nor support the amounts proposed to be paid to the Class Representatives as an incentive.

B. The Court Should Appoint Class Representatives and Class Counsel and Conditionally Certify the Class

The instant case, which alleges that the Defendants' practices affected a large group of individual detainees at the DCADC, is exactly the sort of dispute that Fed.R.Civ.P. 23 is designed to remedy. For that reason, the Parties urge the Court to appoint Class Representatives and Class Counsel, and to conditionally certify the Class under Rule 23. Courts have regularly certified classes of a similar nature. *See e.g. Tardiff v. Knox County*, 365 F.3d 1 (1st Cir. 2004) (upholding certification of class of arrestees challenging counties' alleged policies of conducting routine strip searches of all pre-arraignment detainees); *Blihovde v. St. Croix County, Wis.*, 219 F.R.D. 607 (W.D. Wis. 2003) (certifying class of persons strip searched at county jail); *Mack v. Suffolk County*, 191 F.R.D. 16 (D. Mass. 2000) (certifying class of pre-arraignment female detainees challenging county's policy of routine subjecting female pre-arraignment detainees to strip searches without individualized reasonable suspicion). Because Plaintiffs meet all the technical requirements of Rule 23, and because it is fair and efficient to resolve all the claims together, the Court should conditionally certify the Class in this case.

1. The Court Should Appoint the Class Representatives and Class Counsel

This Motion seeks appointment of Named Plaintiffs Jesus Lira, Ben Garcia, Graciela Martinez, Stephen Culler, Cynthia Archer, Frederick Garcia and Douglas Beidler as Class Representatives. All of these Named Plaintiffs are appropriate Class Representatives because they were subject to the same policies and practices that allegedly violated the rights of the Class members. Furthermore, all of these Plaintiffs have acted in the best interest of the Class and none of these Plaintiffs has a conflict of interest which would preclude him or her from serving as a representative of the Class.

This Motion also seeks appointment of Robert R. Rothstein, John C. Bienvenu and Mark H. Donatelli of Rothstein, Donatelli, Hughes, Dahlstrom, Schoenburg & Bienvenu, LLP, and Michael W. Lilley and Marc A. Lilley, Lilley Law Offices, as Class Counsel. These lawyers are experienced in the areas of civil rights law and class action litigation, and none has any conflict of interest which would preclude him from serving as Class Counsel. All of these lawyers have been involved in the litigation from the time the lawsuit was filed, and all participated in the negotiations that led to the Settlement Agreement.

2. The Proposed Settlement Class Meets the Requirements of Rule 23(a)

A class must have the following prerequisites in order to be certified under Fed. R. Civ. P. 23(a): "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." *See Lopez v. City of Santa Fe*, 206

F.R.D. 285, 288 (D.N.M. 2002)(certifying settlement class); Fed. R. Civ. P. 23(a). Here the proposed Class clearly satisfies all of the Rule 23(a) requirements.

a. The Class Is So Numerous that Joinder Is Impracticable

The Settlement Class in this case is estimated to include approximately 11,000 individuals. *See* Bienvenu Affidavit. Joinder of so many individual members would be impracticable, and accordingly this Court should find that the numerosity requirement of Rule 23(a) is satisfied in this case. *See* 1 H. Newberg & A. Conte, *Newberg on Class Actions* §3:5, at 246 (4th. ed. 2002)(in most cases where class size numbers in the hundreds, numerosity is not an issue).

b. There Are Questions of Law and Fact Common to the Class

The commonality requirement is met if plaintiffs' grievances share a common question of law or fact. *Lopez*, 206 F.R.D. at 288. "Commonality requires only a single issue common to the class, and the fact that the claims of individual class members may differ factually should not preclude certification under Rule 23(b)(2) of a claim seeking the application of a common policy." *Id.* at 289 (internal quotations marks & citations omitted); *see also Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988).

The claims on behalf of the Class before the Court share numerous common questions of fact and law. Most importantly, the case is dominated by the factual and legal questions of whether the Defendants' policies and procedures with respect to strip searches of pre-arraignment detainees violated the rights of the Settlement Class members. Resolving these questions would depend in large part upon evidence that would apply to the Settlement Class as a whole. Thus,

the Rule 23(a)(2) commonality requirement is satisfied.

c. Plaintiffs' Claims Are Typical of the Settlement Class and There Are No Conflicts

The proposed Class Representatives present claims that are typical of those of the Settlement Class. "A… plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and if his or her claims are based on the same legal theory." *Lopez*, 206 F.R.D. at 289 (internal quotation marks & citations omitted); *see also In re American Medical Systems, Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996) (*citing Newberg on Class Actions* §3.13, at 3-76 (3d. ed. 1992)).

In this case, each of the proposed Class Representatives claims that he or she was strip searched in violation of his or her rights. *See* Compl. ¶¶ 18-42. These claims are also brought on behalf of the Settlement Class. *See* Compl. ¶¶ 44-53. The Complaint alleges that the Named Plaintiffs' claims arise out of the same events, practices and course of conduct that give rise to the class-wide injury at issue. *See* Compl. at ¶¶ 44-53. As such, it is manifest that the typicality requirement is met.

d. The Class Representatives Have Fairly and Adequately Protected the Interests of the Settlement Class

The purpose of the adequacy of representation requirement is to "protect the legal rights of absent class members." *Lopez*, 206 F.R.D. at 289 (internal quotation marks & citation omitted); *see also Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 721 (11th Cir. 1987). "In order to adequately represent the class, two requirements must be met: (1) the class representative must not have interests antagonistic to those of the class, and (2) the attorneys

representing the class must be qualified, experienced, and generally able to conduct the proposed litigation." *Lopez*, 206 F.R.D. at 289-9; *see also Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993); *Cross v. Nat'l Trust Life Ins. Co.*, 553 F.2d 1026, 1031 (6th Cir. 1977).

The first requirement, an absence of any conflicts between the Class Representatives and the Settlement Class, is satisfied because both the Class Representatives and the Settlement Class members allege they have been harmed by the Defendants' allegedly unlawful practices. Because all Class Representatives and the Settlement Class Members have allegedly suffered harm as a result of the Defendants' practices, there are no antagonistic or conflicting interests that would prevent the Class Representatives from safeguarding the rights of absent Settlement Class members.

The second requirement is also met. Counsel for the Plaintiffs are qualified and experienced in class action and civil rights litigation. Bienvenu Affidavit. Class Counsel have diligently pursued this case on behalf of the Named Plaintiffs and absent Settlement Class members and are continuing to do so. Thus, the adequacy requirement is met.

3. The Proposed Settlement Class Satisfies the Rule 23(b) Requirements

Once the Court finds that the prerequisites of Rule 23(a) are satisfied, the Court must determine whether or not the action is maintainable as a class action under one or more provisions of Rule 23(b). *See, e.g., Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976). Courts have certified class actions under both Rules 23(b)(2) and (b)(3) when both monetary compensation and equitable relief are at issue. *See, e.g., Molski v. Gleich*, 318 F.3d

937 (9th Cir. 2003); *Senter v. Gen. Motors Corp.*, 532 F.2d 511 (6th Cir. 1976). As the claims here satisfy the requirements of both Rule 23(b)(2) and (b)(3), the Court should certify the Class.

a. Rule 23(b)(2) Certification Is Appropriate

Certification is appropriate under Rule 23(b)(2) where the defendant has "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2); *Marcus v. Kan., Dep't of Revenue*, 206 F.R.D. 509, 513 (D. Kan. 2002). This case involves a class of individuals who claim that they were unlawfully strip searched pursuant to a blanket policy. *See* Compl. ¶¶ 44, 48. This is precisely the type of case where certification under Rule 23(b)(2) is appropriate. *See Marcus*, 206 F.R.D. at 513 (finding certification appropriate under Rule 23(b)(2) where defendant had allegedly violated the law "in a manner that is generally applicable to the class"); *Wilfong v. Rent-A-Center, Inc.,* No. 00-CV-680, 2001 WL 1795093, at *7-8 (S.D. Ill. Dec. 27, 2001).

b. Rule 23(b)(3) Certification Is Appropriate

Class certification under Rule 23(b)(3) is appropriate when "questions of law or fact common to the members of the class predominate" and "a class action is superior to other available methods" of adjudicating the controversy. Fed. R. Civ. P. 23(b)(3); *Wilfong*, 2001 WL 1795093, at *7-8. Here, Plaintiffs' claims are properly certified under Rule 23(b)(3) because Plaintiffs satisfy both the "predominance" and the "superiority" requirements. To satisfy the predominance requirements, Plaintiffs must show that one or more common issues predominate over individual issues and that one trial of common issues is superior to conducting literally

hundreds or thousands of separate trials. *See* Fed. R. Civ. P. 23(b)(3). The primary purpose of Rule 23(b)(3) is to promote efficiency and to take advantage of the economy that results from jointly adjudicating a large number of claims that share one or more common questions. *See* Fed. R. Civ. P. 23 Advisory Committee Notes, 1966 Amendments; *see also Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1196 (6th Cir. 1988) (goal of Rule 23(b)(3) is "to achieve the economies of time, effort, and expense").

"Common issues predominate within the meaning of Rule 23(b)(3) when they constitute a significant part of the litigation." *Wilfong*, 2001 WL 1795093 at *8; *see also Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir. 1986). The predominance requirement addresses efficiency by making certain that class wide issues outweigh individual issues. *See Sterling*, 855 F.2d at 1197. The claims in the Action are based on what Plaintiffs allege to be a single course of conduct: the Defendants' unconstitutional policy of strip searching all pre-arraignment detainees without individualized reasonable suspicion. Thus, Plaintiffs face a common set of factual and legal issues and a common cause of injury that predominates over individual questions.

Since all Settlement Class members have the right to opt out of the settlement, there is nothing that prevents any plaintiff from continuing to prosecute his or her claim for monetary relief individually. *See, e.g., In re Inter-Op Hip Prosthesis Liab. Litig.,* 204 F.R.D. 330, 347 (N.D. Ohio 2001); Fed. R. Civ. P. 23(b)(3)(A). Further, the relief provided in the Settlement Agreement would not be available in the absence of the class treatment. *See Hip Prosthesis*, 204 F.R.D. at 347-48.

C. The Court Should Approve the Proposed Settlement Notices and Authorize Their Dissemination

"[I]n any proceeding [that] is to be accorded finality," due process requires that interested parties be provided with "notice reasonably calculated, under… the circumstances, to apprise [them] of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). The notice must be reasonably calculated to reach interested parties and where the names and address of the interested parties are known, due process requires mailed notices. *Id*. at 318-19; *Dejulius v. Sprint Corp*., 429 F.3d 935 (10th Cir. 2005).

The contents of class notice must '"fairly apprise the . . . members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings."' *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995) (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982)). Class notice is sufficient if it "may be understood by the average… class member." *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104 (5th Cir. 1997); *see also Churchill Village L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)("Notice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.")(internal quotation marks & citation omitted).

Here, the proposed notices and their method of dissemination meet these requirements. The proposed notices clearly and concisely inform Settlement Class members of all the relevant aspects of the litigation: (a) the Class definition and statement of claims; (b) the litigation history; (c) the terms of the Settlement Agreement; (d) the binding effect of any judgment approving the Settlement on those who do not opt out; (e) the right to object to the Settlement and the

procedure for doing so; (g) whom to contact to obtain additional information regarding the Settlement or the litigation; (h) the amount of compensation requested for the Class Representatives to compensate them for their services to the Class; and (i) the amount requested for reasonable attorneys' fees and costs. Thus, the notices provide all the information necessary for Settlement Class members to make an informed decision with respect to whether to remain in or opt out of the Settlement Class or whether to object to the proposed Settlement. Further, delivery by first class mail to the Settlement Class members' last known addresses is designed to reach the members in the most expeditious and economical way. In addition, summary notice of the Settlement will be published in local newspapers and will be broadcast on three local radio stations in order to notify Settlement Class members who are not notified of the Settlement through other means.

D. The Court Should Schedule a Fairness Hearing and Approve the Proposed Schedule for the Mailing of Settlement Notices, the Return of Opt-Outs, and the Filing of Objections

The Parties propose the following sequence of events and deadlines, assuming the Court grants this Motion for Preliminary Approval:

Mailing of Notice Package to Class:	45 days after preliminary approval.
Opt out deadline:	45 days after mailing of Notice Package.
Objections to settlement:	45 days after mailing of Notice Package.
Fairness Hearing:	At least 135 days after preliminary approval.
Claims Deadline:	30 days after final approval hearing.

IV. CONCLUSION

For the foregoing reasons, the Parties respectfully request that the Court issue its Order, substantially in the form attached hereto as Exhibit B,

(1) Preliminarily approving the Settlement Agreement;

(2) Conditionally certifying the proposed Settlement Class;

(3) Appointing Named Plaintiffs as Class Representatives;

(4) Appointing counsel for Named Plaintiffs herein as Class Counsel;

(5) Approving the form and manner of Notice to be sent to Settlement Class Members and Summary Notice to be published in various newspapers in accordance with the Settlement Agreement;

(6) Approving the forms for, and setting deadlines with respect to, claims, opt outs, and objections; and

(7) Setting a date for a final fairness hearing.

Respectfully submitted,

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