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United States District Court, D. New Jersey.

Harry PACK, et al., Plaintiffs,
v.
Howard BEYER, et al., Defendants.

Civ. A. No. 91–3709 (AET). | Dec. 22, 1995.

Attorneys and Law Firms

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Opinion

MEMORANDUM OPINION

HUGHES, United States Magistrate Judge.

***1** After traveling a "long and winding road" for over four years, this class action litigation is poised for final resolution. The parties, through their counsel, seek: (1) the approval of the proposed settlement agreement; (2) the award of fees to Plaintiffs' counsel; and (3) the appointment of a Special Master in furtherance of the settlement agreement.

The Court has considered the written submissions of the parties, including written objections to the proposed settlement from certain members of the class; the record of the settlement hearing, held on July 14, 1995; the record of the approval hearing, held on December 15, 1995; and the settlement agreement itself.

The parties have consented to all issues being decided by a United States Magistrate Judge, pursuant to 28 U.S.C.A. § 636 and *Fed.R.Civ.P.* 73.

I. *BACKGROUND*

In this civil rights action, brought pursuant to 42 U.S.C.A. § 1983, Plaintiffs, a group of African American inmates in the New Jersey State Prison, assert that they have unlawfully been placed in a close custody unit solely because of their race. Plaintiffs contend that their placement in the Management Control Unit [hereinafter "MCU"] violates their constitutional rights to equal protection and due process. Defendants, on the other hand, contend that Plaintiffs' placement in the MCU is due, in significant part, to their affiliation with the Afrikan National Ujamma [hereinafter "ANU"], an alleged terrorist organization, operating both within, and outside, the prison walls.

All cases involving these particular claims were consolidated by Order of the District Court, filed October 1, 1993.

II. *PROCEDURAL HISTORY*

In August, 1991, a complaint was filed in connection with the lead case (*Pack v. Beyer,* Civil Docket No. 91–3709 (GEB)). That case was soon followed by a number of *pro se* cases asserting the same claims. *Pro Bono* counsel had been assigned to represent a Plaintiff in a companion case and later assumed responsibility for all Plaintiffs at the time similar cases were consolidated by Order filed October 1, 1993.

Thereafter, an extensive and hard-fought motion practice began, with the case touching Magistrate Judge, District Judge, and Circuit Judge. A blow by blow description of the battle is unnecessary here but reference to two opinions (157 F.R.D. 219; 157 F.R.D. 226) are illustrative not only of the hard work by both sides but, more importantly, of the firmly entrenched positions of the parties.

After the discovery wars had somewhat subsided, the parties embarked upon serious settlement discussions. Beginning with a conference with the Court, held on August 29, 1994, the parties and the Court conducted at least nine settlement conferences culminating with an on the record settlement conference, with the class representatives and the named lead Defendant present, on July 14, 1995.

By Order and Consent, dated August 21, 1995, the parties consented to the jurisdiction of the United States Magistrate Judge.

***2** Thereafter, notice of the proposed settlement was afforded all class members, pursuant to *Fed.R.Civ.P.* 23(c), and an Order certifying the class action and setting a hearing on the approval of the settlement agreement was filed on September 25, 1995.

On December 4, 1995, the District Judge denied a motion to stay the order certifying the class and affirmed that order in a separate appeal.

Finally, a hearing was conducted on December 15, 1995

during which counsel for both sides offered reasons in support of the settlement agreement, award of attorneys' fees, and appointment of a Special Master.

III. *DISCUSSION*

A. *Class Certification*

Fed.R.Civ.P. 23 sets forth the requirements that must be satisfied in order to certify a litigation class, and states, in relevant part:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (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.

The Court must make a specific finding that each of these requirements has been satisfied before approving a class settlement. *See; In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.* 55 F.3d 768 (3d Cir.1995) [hereinafter "*In re General Motors* "].

The Court is satisfied that the requirements of *Fed.R.Civ.P.* 23 have been met. The elements of numerosity, adequacy of representation, commonality of claims, and typicality of claims were all addressed in the Order certifying the class and directing notice of proposed settlement, when the Court made the following findings: (1) the class, comprised of approximately 99 African American inmates, is so numerous that joinder of all members is impracticable; (2) discovery has shown that there are questions of law and fact common to the class, including, but not limited to, applicability of state secrets privilege and *ex parte* use of privileged material; (3) the record developed in the proceedings established that the claims or defenses of the representative parties are typical of the claims or defenses of the class, chiefly the competing interests of the right to due process and the need to maintain prison security; and (4) the representative parties will fairly and adequately protect the interests of the class, and the appointed counsel has vigorously represented class members' interests in this matter.

B. *Class Settlement*

Once a class has been certified, a class action may be dismissed only with the approval of the court. *Fed.R.Civ.P.* 23. The class certification prerequisites outlined above initially provide the Court with the information necessary to ensure that the settlement is adequate and fair to the entire class. *In re General Motors,* 55 F.3d at 796). Additionally, when considering whether to approve a settlement, the court must determine whether the settlement is fair, reasonable, and adequate. *See, Girsh v. Jepson,* 521 F.2d 153, 156–57 (3d Cir.1975). "The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court," *Girsh,* 521 F.2d at 156, and is reversible only for abuse of discretion. *See, Bryan v. Pittsburgh Plate Glass Co., et al.* 494 F.2d. 799, 801 (3d Cir.1974) *cert. denied,* 419 U.S. 900 (1974) ("The district court has considerable discretion in determining whether a settlement is fair and reasonable, and its determination will be reversed only for abuse of discretion.").

***3** In determining whether the settlement is fair, reasonable, and adequate, a court must weigh the following factors: (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 the reasonableness of the settlement in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Stoetzner v. United States Steel Corp.,* 897 F.2d 115, 118 (3d Cir.1990) (citing *Girsh,* 521 F.2d at 157; *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974)); *See also, In re Matzo Food Prods. Litigation,* 156 F.R.D. 600, 604 (D.N.J.1994).

The Court may also consider: (1) the presence of collusion in reaching a settlement; and (2) the opinion of competent counsel. *Armstrong v. Board of School Directors of the City of Milwaukee,* 616 F.2d 305, 314 (7th Cir.1980) (citing Manual for Complex Litigation § 1.46, at 56 (West 1977) and 3B Moore's Federal Practice ¶ 23.80[4] at 23–521 (2d ed. 1978)).

In a class action, when any member of the class objects to a negotiated settlement, the objecting class member must be afforded the opportunity to demonstrate to the court why the proposed settlement is unfair or inadequate. *Grimes v. Vitalink Communications Corp.,* 17 F.3d 1553, 1558 (3d Cir.1994). "It is not unusual for objections to be presented at a hearing on a proposed settlement of a class action, [footnote omitted] and it is elemental that an objector at such a hearing is entitled to an opportunity to

develop a record in support of his contentions by means of cross examination and argument to the court....” *Greenfield v. Villager Industries, Inc.,* 483 F.2d 824, 833 (3d Cir.1973). However, the *Grimes* court also stated that the settlement agreement is binding upon all members of the class, finding that “... all ordinary class members are bound by the deal struck by their named representatives in the event the court determines that they were adequately and fairly represented during the course of the negotiations.” *Grimes,* 17 F.3d at 1558.

In this case, the Court has reviewed the factors set forth in *Stoetzner* and *Girsh* and has determined that the proposed settlement agreement should be approved.

Considering the complexity, expense and likely duration of the litigation, the Court initially finds that it is in favor of settlement as it will avoid unnecessary expense to both parties and will conserve judicial resources. This case, if it were to continue, would necessarily involve the time and expense of presenting ninety-nine capsulized cases, involve novel issues of *ex parte* use of privileged material, and involve vast judicial resources and ingenuity in assuring that all parties had an opportunity to fairly present their case.

***4** The Court finds that, at this stage of the proceedings, there is no dispute that substantial discovery and motion practice has been conducted over the past four years concerning the equal protection and due process claims of the class members. Therefore, the parties have a clear understanding of the facts underlying this case, as well as the strengths and weaknesses of the arguments. A settlement at this stage of the proceedings illustrates that the settlement has been fully and fairly negotiated, as both parties are aware of the particular facts of the case.

The Court, having considered the risks of establishing liability and damages at trial, notes that Plaintiffs claim that prisons officials placed inmates in the MCU because of their race and their affiliation with the ANU. Plaintiffs seek injunctive relief, claiming that the discriminatory practices of the prison officials have caused harm that can be remedied by a court ordered injunction. Plaintiffs also seek monetary damages to be paid to those inmates who were erroneously placed in the MCU. Although the Defendants *emphatically* continue to deny any unlawful discrimination, the relief sought by Plaintiffs is fully addressed in the settlement agreement. In weighing acceptance of this agreement with the prospect of litigation “there is no assurance that the relief would be greater or different than the relief provided ...” in the proposed agreement. *Harris v. Reeves,* 761 F.Supp. 382, 401 (E.D.Pa.1991). Therefore, the Court finds that, due to the risks of establishing liability and damages, the settlement is appropriate.

After considering the risk of maintaining the class action through the trial, the Court further finds that since this class has been certified only for purposes of settlement and there are individual claims that still exist, it is in the best interest of the class to accept this settlement offer and have the common interests of the class addressed.

In addition, the Court, having examined the reasonableness of the settlement in light of the best possible recovery, finds that the settlement offer covers the relief sought by Plaintiffs. The proposed settlement outlines in great detail the methods and procedures to be followed by prison officials in the placement of any inmate in the MCU. The Court notes that Plaintiffs have received copies of the proposed outline and procedures. The Court also has taken into consideration the fact that the settlement has been negotiated by experienced counsel in the best interests of the Plaintiff class. Counsel for the Plaintiffs has acted in a conscientious manner seeking to achieve the goals of the class members. In light of the risks of litigation, the additional costs of litigation, and the completeness of the settlement agreement, the Court finds that the settlement is appropriate.

C. *Objections to the Settlement*

Of considerable concern to the Court, however, is the reaction of a significant percentage of the class. All objections have been filed with the Clerk of the Court.

***5** The proposed settlement of this civil rights class action was published to the class pursuant to this Court’s Order of September 22, 1995. The class presently consists of 99 individuals; service was made on those in state custody by Defendants, and by Plaintiffs’ counsel on those not in state custody. Of the 99 identified class members, nine could not be located (Tyehimba Taiwo, Christopher Young, Christopher Brown, Joseph Lockhart, Kevin Thomas, Ajamu Kamau Ogug Bala, Elijah Khan, Olu Jimi Hashim, and Arzra Caldwell.) Of those served, 39 individuals submitted comments that either were clearly objections, or which could be construed as objections. Those 39 class members are:

Masia Mugmuk

Najee Shabazz

Ojore Lutalo

Damon Venable

Vernon Harris

Keith Bowman

Earl Best

Atum Ra Tehuti

William J. Johnson

Sydid Afrika

Vernon Harris

Dumisani Bankole

Daud Tulam

Hatari Wa'haki

Atu Bomani N'Gubu

Gregory Wynn

Daniel Rawls

Wolf Hundley

Ajamu Shomari

Jahi M. Shakur

Humphrey Cohen

Gregory Wynn

Allen Jackson

Larry Douglas

William Stovall

Thomas McLucas

Patrick Smith

Mwalimu Zuberi Atiba

Isiah Bell

Omari Atiba

Bomani Jubweza

Robert J. Parrish

Wonderful B. Brims

Gene Belton

Lawrence White

Alvin Camillo

Raymond T. Perry

Cyrus Ford

Rajabu Ogbonna Khalfani

In addition, three members filed comments favorable to the settlement:

Ernest Hawks

Rumiejah Ukawabutu

Marvin Russell

Furthermore, one objection was received out of time (Omar Yasin), and one objection was received from an inmate who is not a class member (Anibal Santiago).

Finally, three members responded with questions, and after consultation with class counsel did not file objections:

Walter Saxon

LaRan McKinley Bey

Rodney Williams

Although the quantity of objections is somewhat alarming and although the substantive aspects are very well taken, the Court, after considerable thought, finds that these particular responses should not prevent the settlement agreement from going into full force and effect.

The Court initially notes that Plaintiffs were represented by counsel at the discussion of the settlement agreement and by two named representative class members. These class members were afforded the opportunity to address their concerns and questions to the Court when the settlement agreement was first presented. Counsel for the class also agrees that the settlement is in the best interest of the class.

Secondly, many of the objections relate to the identity of the person initially selected as Special Master. That person has graciously withdrawn and any such objection has become moot.

Thirdly, the substantive objections (i.e., vagueness of language, lack of review of the Special Master's decisions, brief duration of the agreement (2½ years)), all concern issues that were discussed, negotiated, modified, and rejected in extensive settlement negotiations over the course of a year. Although the Court can readily see why the objectors are not content, a settlement agreement, like life itself, is not perfect. The bottom line here is that this settlement provides, for a limited time, an independent, agreed upon Special Master to adjudicate matters previously left to the Department of Corrections, and that is, indeed, a significant benefit to this class. The settlement further provides for clarification of existing rules and regulations and for damages to individual inmates if found to have been impermissibly assigned to the MCU.

***6** Finally, the clear majority of the class favors approval of the settlement agreement.

Accordingly, the Court finds that the objections to the settlement agreement are insufficient to defeat approval.

D. ***Approval of the Settlement***

In light of these findings, the Court concludes that the settlement was negotiated by capable counsel for both parties and provides the essential relief sought by the Plaintiffs. The Court has received the objections submitted by members of the class rejecting the proposed settlement agreement and has determined that the settlement should not be rejected on the basis of these objections. The Court further finds that the class was adequately represented by counsel and by representative members of the class in the negotiations. The class representatives were present during the settlement hearing at which the proposed agreement was reviewed. The settlement agreement was negotiated with the best interests of the class members in mind and is fair, adequate and reasonable. Accordingly, the proposed settlement agreement is approved and will be made part of the judgment of the Court.

IV. ***AWARD OF ATTORNEYS' FEES***

Pursuant to 42 U.S.C. § 1988, the prevailing party in a civil rights case is permitted reasonable attorneys' fees. There is no question that the Plaintiff class is a prevailing party in view of the substantial benefit bestowed by virtue of the settlement agreement.

Normally, the amount of a fee award is calculated by determining the "lodestar"—the number of hours reasonably expended multiplied by the applicable hourly market rate for legal service. *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983). In addition, the actual award of fees, under Section 1988, remains in the Court's discretion, as does the determination of what figure constitutes a reasonable amount.

Here, the parties and the Court agree that a lodestar determination is unnecessary as the amount of fees is an element of the over-all settlement. Furthermore, the Defendants have represented that they closely examined Plaintiffs' counsel's billing records and found the actual fees, and the fees reflected in the settlement agreement, to be justified. Defendants have no objections to any of Plaintiffs' counsel's billing practices. The Court is not permitted to "decrease a fee award based on factors not raised at all by the adverse party." *See, Rode v. Dellarciprete,* 892 F.2d 1177, 1183 (3d Cir.1990) (citing *Bell v. United Princeton Properties, Inc.,* 884 F.2d 713 (3d Cir.1989)). In addition, further review of the records by the Court would not only unreasonably dissipate scarce judicial resources, but also circumvent the intentions of the parties in arriving at settlement.

However, some limited judicial inquiry and findings are appropriate to address the concerns raised by *In re General Motors, supra,* and *Armstrong, supra.* Care should always be given that lawyers do not get rich while litigants get shortchanged.

***7** Although, at first blush, an award of $150,000 in attorneys' fees might appear to conflict with the charitable nature of *pro bono* representation, this is clearly not the situation here. This Court has first hand knowledge of the work performed by Plaintiffs' counsel and every penny is justified. Counsel attended over a dozen conferences and hearings. He competently addressed numerous and complex issues of law. He masterfully dealt with diverse and very involved class members. Finally, he achieved for his clients a very meaningful benefit in a very important case by negotiating with an equally worthy adversary in a consistently civil and professional manner. Given all the circumstances in this very complex case, the fees agreed upon are reasonable.

Accordingly, the Court will approve this portion of the settlement and will award counsel fees in the amount of $150,000.

V. ***APPOINTMENT OF A SPECIAL MASTER***

The parties finally seek approval of that part of the settlement requiring the appointment of a Special Master. Pursuant to the settlement agreement, the Special Master will have immense adjudicative power. The selection of

the Special Master and some limited court control over the Master's dissemination of confidential materials are of paramount concern to the parties.

The Court, via Federal Rule of Civil Procedure 53, is empowered to appoint a master, provide for compensation, and specify the master's powers.

The Court will approve that part of the settlement agreement requiring the appointment of a Special Master as this case clearly constitutes an "exceptional condition" justifying appointment. *See, Fed.R.Civ.P.* 53(b).

The parties have tentatively agreed upon the appointment of a particular master but must circulate the identity among all class members. In any event, the appointment of a particular master and protection of documents to be received should properly be in the form of a separate order. Assuming that the new Special Master is acceptable to all parties, a confidentiality order must be crafted. *See, Pansy v. Borough of Stroudsburg,* 23 F.3d 772 (3d Cir.1994); *Glenmede Trust Company v. Thompson,* 56 F.3d 476 (1995) (requiring good cause for confidentiality). Pending these considerations, there is no reason why the settlement cannot be approved and mechanisms for effectuating the settlement, other than through the identity of the Special Master, be put in place. (*See, Fed.R.Civ.P.* 54(b) permitting the entry of final judgment if there is no just reason for delay, even though other forms of decision remain to be made.)

VI. *CONCLUSION*

For the reasons stated here, the Court will approve the proposed settlement agreement in this class action litigation and will incorporate it as part of the accompanying Judgment of the Court.

Specifically, the Court finds that:

(1) notice of the settlement agreement and the approval hearing was properly published to the class;

***8** (2) the class is properly certified;

(3) the settlement is fair, reasonable, and adequate;

(4) the facts and circumstances of this case specifically conform to the requirements of *In re General Motors, supra;*

(5) the objections to the settlement from class members, though numerous, are insufficient to negate the benefit of the settlement to the class;

(6) the agreed upon attorneys' fees are reasonable;

(7) appointment of a Special Master is appropriate.

An appropriate Order of Judgment accompanies this Memorandum Opinion.

FINAL JUDGMENT AND ORDER OF DISMISSAL

This matter having come before the Court for approval of the proposed class action settlement, including the award of attorneys fees and the appointment of a Special Master; and the Court having considered the positions of counsel for the parties; and the Court having conducted a hearing on the matter on December 15, 1995 in open court; and the Court finding that notice of the settlement agreement and the hearing was properly published to the class; and the Court having found that there has been a full opportunity to present objections to the Court; and the Court having considered the objections to the proposed settlement from various class members; and the Court having found that the settlement is fair, reasonable, and adequate; and the Court further finding that the settlement specifically comports with the numerosity, commonality, typicality, and adequacy of representation required by *Fed.R.Civ.P.* 23; and the Court finding that the award and amount of attorneys fees are reasonable; and the Court finding that the appointment of a Special Master is appropriate; and the parties having consented to the jurisdiction of the United States Magistrate Judge; and the Court having filed a Memorandum Opinion with this Judgment; and good cause having been shown;

IT IS on this 22nd day of December, 1995, ORDERED that:

1. The attached settlement agreement is approved and is hereby made a part of this Judgment thereby giving it full force and effect as an official decree of this Court.

2. Attorneys fees in the amount of $150,000 shall be paid to Plaintiffs' counsel pursuant to 42 U.S.C. Section 1988.

3. A Special Master shall be appointed, by separate order, pursuant to *Fed.R.Civ.P.* 53.

4. All claims embodied in this class action are hereby dismissed with prejudice.

5. It is expressly determined, within the meaning of *Fed.R.Civ.P.* 54(b), that there is no just reason for delay, and the entry of this judgment is hereby expressly directed.

6. Without affecting the finality of this judgment, the Court hereby reserves and retains continuing jurisdiction over all matters relating to the

administration and effectuation of this judgment.

SETTLEMENT AGREEMENT

The parties to this matter, having determined to reach an amicable settlement of the consolidated matter without further litigation, hereby set forth the terms of their agreement, which is intended to be incorporated by reference into the Order of Dismissal to be entered by the Court. The settlement of this matter is not intended to assess blame or resolve the factual issues that gave rise to this litigation, and shall not constitute an admission of wrongdoing.

A. ***Class Action***

***9** 1. The plaintiff class defined as all African American inmates who have been confined to or recommended for confinement to the Management Control Unit ("MCU") of New Jersey State Prison ("NJSP") at any time since August 29, 1990, shall be certified by consent pursuant to Federal Rule of Civil Procedure 23(b)(2).

B. ***Procedure for MCU Placement***

2. The New Jersey Department of Corrections ("DOC") covenants and agrees to publish, within 180 days of the entry of the Order dismissing this action, proposed regulations incorporating the terms set out in Part B of this Settlement Agreement. It is the intent of the parties that following the publication and comment period, the DOC shall submit the proposed rules for publication taking into consideration the comments obtained through the comment period. Substantial modification of these terms in finally adopted regulations shall be grounds for reopening this matter.

3. No plaintiff shall be assigned to the MCU unless he has been afforded the procedures described in N.J.A.C. 10A:5–2.1 *et seq.,* incorporated herein by reference, as may be amended.

4. The notice provided to the plaintiffs at least 24 hours prior to appearing before the Management Control Unit Review Committee ("MCURC") shall delineate the criteria which will be utilized in determining the plaintiff's suitability for the MCU and shall provide an outline of the major factors in the particular plaintiff's case history. This notice is referred to herein as a "Criteria Record Sheet."

5. With the exception of the information set forth in ¶ 6 below, the Criteria Record Sheet shall contain a concise statement of the factual basis on which the recommendation of MCU placement is based, and not merely conclusions.

6. If full disclosure of the factual basis would reveal confidential information, the plaintiff shall be provided with a concise summary of the confidential information in language that is factual and not conclusory. Confidential information is defined as information which:

(i) is contained in the reports of health care professionals which are evaluative, diagnostic or prognostic in nature and which are furnished with a legitimate expectation of confidentiality and which, if revealed to the plaintiff or others could be detrimental to the plaintiff or could jeopardize the safety of individuals who signed the reports or were parties to the decisions, conclusions or statements contained therein; or

(ii) which the DOC reasonably believes:

(a) would impede ongoing criminal or disciplinary investigations;

(b) would create a risk of reprisal;

(c) would reveal the identity of confidential informants;

(d) would reveal the identity of the target of ongoing investigations (unless that target has been so advised);

(e) would reveal the technique of investigations or the manner in which the fruits of the investigations are compiled so long as they interfere with the security of the correctional facility; or

***10** (f) would interfere with the security of a correctional facility.

7. If the proposed placement is based in part on information from a confidential informant, the plaintiff shall be provided with a concise summary of the facts based upon which the DOC proposes to establish that the informant is credible or his or her information reliable, and the informant's statement (either in writing or as reported) in language that is factual rather than a conclusion, and based on the informant's personal knowledge of the matters contained in such statement.

8. A record shall be maintained of the proceeding of the MCURC, including substance of the evidence presented, a summary of the statements of participants in the hearing, a log of the evidence considered, and the decision of the MCURC. The recorder of the hearing proceedings shall certify that the record is a true and accurate representation of the proceedings.

9. Prior to rendering a decision to place or maintain a plaintiff in the MCU, the MCURC shall consider alternatives to MCU placement as a means of addressing the institutional concerns related to the plaintiff. These alternatives shall include, but not be limited to: transfer to another institution, reduction in privileges, and transfer to another housing unit in general population. The MCURC shall include in the record of the hearing a written indication of the alternatives considered.

10. The MCURC's decision to place a plaintiff in the MCU shall be based on the information contained in the record. In a case in which the record contains information received from a confidential informant, the MCURC shall provide a summary of the facts on the basis of which it concluded that the informant was credible or his or her information reliable and the informant's statement (either in writing or as reported) in language that is factual rather than a conclusion, and based on the informant's personal knowledge of the matters contained in such statement.

11. A plaintiff assigned to the MCU may request in writing an out-of-state transfer. The DOC shall respond to the request after making a good faith evaluation of the request. If the response is denial, the DOC shall provide an explanation for the denial, without revealing confidential information, if any, which resulted in the denial.

12. For plaintiffs placed in the MCU pursuant to the procedures described herein, the DOC shall conduct a hearing at least annually to review the status of the plaintiff. In determining whether a plaintiff's release from MCU is appropriate, the plaintiff has the initial burden of demonstrating that (a) he has participated in the required programs, jobs and educational and recreational programs afforded to him pursuant to N.J.A.C. 10A:5–2.20, 2.23 and 2.24; (b) he has complied with the criteria detailed by the MCURC; (c) he has remained free from major (asterisk) charges for the program year; and (d) he has agreed to reaffirm his obligation to adhere to the rules and regulations for inmate behavior, as described in the inmate handbook. If the plaintiff demonstrates the above criteria, he will be considered for release from the MCU and will be released unless the DOC can demonstrate through substantial evidence including behavior and attitude adjustment and disciplinary history that the plaintiff continues to pose an identifiable threat to the safety of others, of damage to or destruction of property or of interrupting the operation of a State correctional facility.

C. ***Special Master Review***

***11** 13. As soon as is practical after the entry of the Order of Dismissal, the Court will, pursuant to Federal Rule of Civil Procedure 53, appoint a Special Master who is acceptable to plaintiffs and defendants to hear appeals from class members' initial placement decisions of the MCURC. The parties agree that the total compensation for the Special Master shall be $20,000, with plaintiffs and defendants each contributing one half of the amount.

14. All class members shall have the opportunity to be represented in the process by counsel provided through Crummy, Del Deo, Dolan, Griffinger & Vecchione.

15. Either party may submit a written request for oral argument setting forth the issues requested to be argued to the Special Master. The opposing party may oppose such request. Neither the request for oral argument, nor the opposition to such request may exceed five (5) pages. The Special Master may, within his or her discretion, permit oral argument if he or she determines that it would assist in completing the review.

16. The Special Master shall adopt or reject the MCURC decision within a reasonable period of time following the expiration of time for the last submission as set forth in ¶¶ 21 and 25, or the date of oral argument, if any, whichever is later. The Special Master's decision shall be based on substantial evidence in the record, and shall describe the basis for the decision with specificity. The Special Master shall make a decision on the basis of the record without further investigation. The decision of the Special Master is final and the parties agree to be bound by his or her factual findings and determinations.

I. ***Timing of submissions in connection with plaintiffs who were confined to or recommended for confinement to the MCU prior to the date of the execution of this Agreement.***

17. Within 270 days of the entry of the Order of Dismissal, the DOC shall provide to each class member who has been confined to or recommended for confinement to the MCU prior to the date of execution of this Agreement, or his attorney, if he chooses to be represented, the MCURC's initial placement decision and all material in the record before the MCURC at the time of the initial placement decision except for that information described in ¶ 6 above. In place of any such materials described in ¶ 6, the DOC shall provide a concise summary of the facts and the informant's statement in the manner described in ¶ 10 above. Disputes regarding the completeness or accuracy of summaries of confidential information may be addressed to the Special Master for resolution. The Special Master is empowered to resolve such disputes by ordering revised or supplemental summaries, and, in the event that DOC fails to comply with such order, to disregard the underlying confidential information. Pursuant to ¶¶ 20 and 21 below, class members may supplement the record with factual

information. The DOC may not add facts to the record unless it provides a new hearing to the class member pursuant to ¶¶ 4–11 above.

***12** 18. If any of these class members want to submit a request for review of the MCURC's initial placement decision to the Special Master and the DOC, they must do so within 30 days of the receipt of the materials described in ¶ 17.

19. Within 30 days of receipt of the request for review, the DOC shall submit to the Special Master the MCURC's initial placement decision and all material in the record before the MCURC including all confidential information described in ¶ 6.

20. Within 30 days of the submission of the request for review, the class member shall deliver to the Special Master and the DOC any written submission, including factual information or legal argument challenging the MCURC's initial placement decision.

21. Within 30 days of receipt of the class member's papers as set forth above, the DOC shall deliver to the Special Master and the class member, if proceeding pro se, or his attorney, any written submission containing legal argument supporting the MCURC's initial placement decision.

II. ***Timing of submissions in connection with plaintiffs who are confined to or recommended for confinement to the MCU subsequent to the date of the execution of this Agreement***

22. Class members who are confined to or recommended for confinement to the MCU subsequent to the date of the execution of this Agreement may appeal from an initial placement decision of the MCURC by submitting a request for review to the Special Master and the DOC. If any of these class members want to submit a request for review of the MCURC's initial placement decision to the Special Master and the DOC, they must do so within 20 days of the receipt of the placement decision.

23. Within 60 days of receipt of the request for review, the DOC shall forward to the Special Master the MCURC's decision and all material in the record before the MCURC including all confidential information described in ¶ 6. The DOC shall also send a true copy to the attorney, or, if the class member chooses to proceed *pro se,* to the plaintiff, of all materials described in ¶ 17.

24. Within 30 days of receipt of the documents described in ¶ 17, the class member shall deliver to the Special Master and the DOC, any written submission, including factual information or legal argument challenging the MCURC decision.

25. The DOC shall deliver to the Special Master and the class member, if proceeding pro se, or his attorney, within 30 days of receipt of the class member's papers described in ¶ 24, any written submission containing or legal argument supporting the MCURC decision.

D. ***Compliance and Termination***

26. The defendants agree that they shall not impose any negative consequences on a class member as a result of his availing himself of the review process described herein. It is the contemplation of the Parties that any class member whose MCU placement is reversed by the Special Master shall be appropriately housed pursuant to the standards set forth in N.J.A.C. 10A:9–3.3

***13** 27. Any plaintiff may seek enforcement of this agreement either by himself, if he is proceeding *pro se,* or through his attorney by first notifying the attorney for the defendants of the alleged violation of the Settlement Agreement within 30 days of the alleged violation; and within 30 days of said notification the defendants shall either (a) resolve the violation or (b) inform either the plaintiff, if he is proceeding *pro se,* or the plaintiff's attorney why the alleged violation cannot be resolved. If the defendants cannot resolve the alleged violation, than either the plaintiff, if he is proceeding *pro se,* or the plaintiff's attorney may file a motion with the court pursuant to the Federal Rules of Civil Procedure for enforcement of this Settlement Agreement.

28. It is agreed between the parties that the Settlement Agreement shall remain in full force for a period of two and one-half years from the date of filing of the Settlement Agreement.

F. ***Compensatory Payments***

29. Defendants agree to make compensatory payments to all class members who are released from the MCU following a review pursuant to Part C above. Payment following such a review shall be $17.50 per day for each day the class member was housed in the MCU.

G. ***Attorneys' Fees***

30. Defendants agree to pay plaintiffs' attorneys' fees pursuant to 42 *U.S.C.* § 1988 in an amount of $150,000, $10,000 of which is to be attributable to compensation of the Special Master as set forth in ¶ 13. Defendants agree to pay the sum approved by the Court to plaintiffs' counsel in full settlement pursuant to 42 U.S.C. § 1988 for all reasonable fees and costs incurred up to the date of the entry of this Order. Plaintiffs reserve the right to apply

for attorneys fees and costs for legal representation after that date necessary for enforcement of this Order before the Courts of the United States. Plaintiffs further reserve the right to apply for attorneys fees and costs for legal representation in connection with any claim not settled pursuant to this Agreement. Plaintiffs waive any rights to attorneys fees and costs incurred in connection with representation before the Special Master pursuant to ¶¶ 17–25 above.