IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JOHNNY REYNOLDS, et al.,	)	
	)	
Plaintiffs,	)	
	)	**CIVIL ACTION NO.**
v.	)	**CV-85-T-665-N**
	)	
ALABAMA DEPARTMENT OF TRANSPORTATION, et al.,	)	**Judge Thompson**
	)	
	)	
Defendants.	)	

JOINT MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

The Defendants Alabama Department of Transportation and State Personnel Department (hereinafter "Defendants"), on the one hand, and the certified Intervenor Contempt Relief Class, on the other hand, in the case of *Reynolds v. Ala. Dept. of Transportation*, case no. CV-85-T-665 (M.D. Ala.), file this Joint Motion for Preliminary Approval of Settlement Agreement (the "Motion") and respectfully request that the Court enter an Order:

a) Granting preliminary approval of the proposed Settlement Agreement, attached as Exhibit A, and supported by the Declaration of Raymond P. Fitzpatrick, attached as Exhibit B;

b) Conditionally certifying an Intervenor Settlement Class for settlement purposes only, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, as supported by a Memorandum of Law in Support of Motion to Conditionally Certify Intervenor Settlement Class, filed contemporaneously herewith;

c) Appointing Raymond P. Fitzpatrick as the Class Counsel for the Intervenor Settlement Class;

d) Appointing Class Action Administrators as the settlement administrators for the Rule 23(b)(2) settlement class;

e) Approving the proposed Notice of Settlement, attached as Exhibit C; and

f) Scheduling the Court's final Fairness Hearing for the proposed settlement.

In support of this Joint Motion, the parties state the following:

HISTORY OF THE INTERVENOR CLASS

1. In 1998, the Court certified an Intervenor class comprised of all non-black employees of the Alabama Department of Transportation (hereinafter "ALDOT"). Intervenors filed the following motions and pleadings: (i) Objections and Response to Plaintiffs' Motion for a Finding of Contempt and for Implementation of Goals (filed March 7, 1997) (ECF 1622), and (ii) Motion for Contempt Enforcement Through Race-Neutral Means, filed September 20, 1999 (ECF 4167) seeking, *inter alia*, relief for noncompliance with certain terms and provisions of Consent Decree I.

2. On April 6, 2001, the Intervenor class and Defendants entered into a partial settlement agreement resolving on a class-wide basis all claims for monetary relief through the date of the Fairness Hearing conducted by the Court on May 29, 2001. The Court approved the 2001 class settlement agreement, and the parties complied with said agreement. The remaining articles of Consent Decree I expired on December 31, 2006. The settlement did not, however, fully resolve claims for additional relief by individual class members harmed by Defendants' adjudicated contempt under Articles 15 and 19, *i.e.*, the individual Intervenor contempt claims.

3. The Article 19 grievance claims were based on the premise that Defendants were responsible for losses due to their failure to timely process grievances in the late 1990's. ECF 7039 (Ex. F, listing 393 grievances). Pursuant to the terms of the 2001 settlement, the Court dismissed 308 of those grievances. ECF 4923, Ex. 1, ¶ 1(c). During the period from 2000 through 2004, ALDOT processed the remaining backlogged grievances and Defendants filed a compliance motion on October 1, 2004. ECF 7457.

4. In December 2006, the Court allowed Article 19 to expire.

5. In March 2010, Intervenors filed a motion for partial summary judgment on liability for six Article 19 grievance claims. ECF 8618. The Special Master's recommendation to deny the motion was based on acceptance of Defendants' "impossibility" defense that they could not process grievances due to this court's 1997 and 1998 orders prohibiting them from doing so. ECF 8683. Intervenors filed objections to the Special Master's Report and Recommendation. ECF 8686. The District Court overruled the objections and adopted the recommendation as an order of the Court on March 21, 2012. ECF 8809.

6. On April 5, 2012, Defendants filed a motion for partial summary judgment seeking an order denying any additional contempt relief to any Intervenor class member based on Defendants' failure to timely implement the grievance requirements of Article 19. That motion was based on the same impossibility defense. *See* ECF 8824, 8825.

7. On June 25, 2012, the Special Master recommended the Defendants' motion be granted and that no additional contempt relief be provided for Article 19 contempt. ECF 8867. The recommendation was based on the same "impossibility" defense that the Court approved in its previous order on March 21, 2012. ECF 8809. Intervenors filed objections on July 18, 2012, which remain pending. ECF 8878.

8. On February 6, 2017, Intervenors filed a Notice of Withdrawal of Remaining Article 19 Grievance Contempt Claims, ECF 9190. In that Notice, Intervenors amended their pending motion for additional contempt relief (ECF 4167, 7039) by withdrawing any further request for Article 19 grievance-based contempt relief. Given the withdrawal of the Article 19 claims, Intervenors contend, and Defendants agree, that Defendants' pending summary judgment motion directed to Article 19 (ECF 8824) is now moot.

9. The remaining unresolved claims of the members of the Intervenor Contempt

Relief Class regarding individual contempt relief relate to Article 15, paragraph 1 (reclassification). The Court has addressed the reclassification claims in part. *See* ECF 8807 and 8883. The Special Master also addressed the reclassification claims on September 19, 2016. *See* ECF 9179. Objections to the 2016 decision are pending. ECF 9181.

THE CONTEMPT RELIEF CLASS

10. Informed by the Special Master's recommendation and the Court's decisions to date, Intervenors and Defendants desire to settle and resolve all remaining individual contempt claims of the Intervenor Contempt Relief Class. The remaining 213 non-black members of the Intervenor Contempt Relief Class are those members of the Intervenor class whom:

(a) Defendants identified as entitled to reclassification based on April 1994 duties (*see* exhibit nos. DX2184 and DX2188 from January 1998 hearing; *see also*, ECF 8843, n.3);

(b) were employed by ALDOT after the May 29, 2001 Fairness Hearing;

(c) currently are employed by ALDOT or were employed by ALDOT before 2007;

(d) have been identified as having potentially valid claims for individual contempt relief for potential lost pay occurring after May 29, 2001, arising from Defendants' alleged failure to timely implement the reclassifications required by Article 15 of the 1994 Consent Decree; and

(e) were not in a higher classification than their proposed reclassification position as of May 29, 2001. Individual Intervenor class members meeting such criteria are listed on ECF 9087-4.

THE PROPOSED SETTLEMENT AGREEMENT

11. Pursuant to the terms of the propose Settlement Agreement, Intervenors and Defendants agree that the sum of $213,000.00 shall be released from the Court registry fine fund and $1000.00 shall be paid to each of the 213 members of the Intervenor Contempt Relief Class identified in ECF 9087-4 in full resolution of all remaining

claims for individual contempt relief concerning reclassification. Both Notice of this Settlement Agreement and payment of the forgoing funds shall be administered and paid by Class Action Administration, LLC of Westminster, CO. The reasonable costs of such administration shall be paid from the contempt fine fund. Members of the Intervenor Contempt Relief Class receiving payments shall be responsible for payment of all taxes and fees of any sort payable as a result of their receipt of funds.

12. In return, Intervenors release all further claims, demands, causes of action or requests for further relief, monetary or nonmonetary, compensatory or injunctive, whether for individual class members or for the class as a whole, for matters arising out of Defendants' previously adjudicated contempt of Consent Decree I, the 2000 civil contempt order, or all past motions or other requests for contempt relief in the *Reynolds* litigation. Intervenors further release any and all other claims against or interest in the contempt fine fund held by the Court, except for the specific obligations provided for herein.

13. The parties move the Court to certify the remaining 213 Intervenors as a class for settlement purposes only, pursuant to Rule 23(b)(2), FED. R. CIV. P. Under Rule 23(a) of the Federal Rules of Civil Procedure, a party seeking class certification, whether for settlement or litigation purposes, first must demonstrate that: "(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." FED. R. CIV. P. 23(a). Second, if the requirements of Rule 23(a) are met, then the proposed class must fit within one of the three types of classes listed in Rule 23(b). The Intervenor Settlement Class meets the criteria for Rule 23(b)(2), FED. R. CIV. P., for the reasons set forth in the

accompanying Memorandum of Law in Support of Motion to Conditionally Certify Intervenor Settlement Class Pursuant to Rule 23, filed contemporaneously herewith.

REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT

14. Intervenors, jointly with Defendants, seek approval of this Settlement Agreement by the Court as a class action settlement consistent with the provisions of Rule 23, FED. R. CIV. P. The Settlement Agreement is contingent on its full approval by the Court. *See* Rule 23(e), FED. R. CIV. P. ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval."). "Preliminary approval of a proposed class action settlement does not involve a determination of the merits of the proposed settlement or affect the substantive rights of any class member." *Figueroa v. Sharper Image Corp*., 517 F. Supp. 2d 1292, 1299 (S.D. Fla. 2007). During the preliminary approval process, "the court simply determines whether the proposed settlement falls within the range of possible approval." *Id.* at 1298 (citations omitted).

15. Before approving a settlement agreement in a class action though, "a court has a heavy, independent duty to ensure that the settlement is 'fair, adequate, and reasonable.'" *Williams v. Natl. Sec. Ins. Co.*, 237 F.R.D. 685, 694 (M.D. Ala. 2006) (Thompson, J.); *Laube v. Campbell*, 333 F. Supp. 2d 1234, 1238 (M.D. Ala. 2004) (Thompson, J.) (quoting FED. R. CIV. P. 23(e)(2), additional citation omitted). This careful inspection is "essential to ensure adequate representation of class members who have not participated in shaping the settlement." FED. R. CIV. P. 23(e) advisory committee note. *See also Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 434 (11th Cir. 2012) ("In determining whether the class action settlement is fair, reasonable, and adequate, the district court considers these factors: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible

recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved.").

16. Here, the parties stipulate that the terms of the Settlement Agreement are fair, adequate and reasonable, and that the Agreement was negotiated by capable, experienced counsel in good faith and at arms' length, following extensive, lengthy and difficult litigation and negotiations. Furthermore, judicial policy favors the settlement of class-action cases. *Williams*, 237 F.R.D. at 694 (certifying an African-American settlement class under Rule 23(b)(2) that had been subject to discriminatory insurance policy terms); *Dunn v. Dunn*, Civ. Act. No. 2:14cv601-MHT, 2016 WL 4718216, at *12 (M.D. Ala. Sept. 9, 2016) (Thompson, J.) (certifying a class for settlement purposes under Rule 23(b)(2)) (citing *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir.1984))

NOTICE TO INTERVENOR SETTLEMENT CLASS

17. Once preliminary approval of a settlement class is granted, Rule 23(e)(1)(B) requires the Court to "direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Fed. R. Civ. P. 23(e)(1)(B). "The court has complete discretion in determining what constitutes a reasonable notice scheme, both in terms of how notice is given and what it contains." 7B Charles Alan Wright et al., Federal Practice and Procedure § 1797.6 (3d ed. 2006). The manner of the settlement notice need only comply with due-process "reasonableness" requirements, which will vary based on the circumstances of the case. See *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir. 1979).

18. Neither Rule 23 nor the case law requires individualized, mailed notice for a

Rule 23(b)(2) settlement class, where class members do not have the opportunity to opt out of the settlement and are not required to take any affirmative action to receive the benefits of the settlement. FED. R. CIV. P. 23(c)(2)(A) ("For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class."). Unlike class actions certified under Rule 23(b)(3), which require individual notice to class members and the opportunity to opt out of the settlement, class actions certified under Rule 23(b)(2) ordinarily do not require individual notice to class members because there is greater cohesion of interests in a (b)(2) class. *See* 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1793 (3d ed. 2006) (stating that while Rule 23(b)(3) classes require mandatory notice, notice is not as important for Rule 23(b)(2) classes "because the class typically will be more cohesive").

19. The parties have retained and consulted with Class Action Administrators, an experienced class-action notice company, regarding the most reasonable and appropriate means to provide notice to the Rule 23(b)(2) Intervenor Settlement Class. The parties to this Agreement also submit for the Court's approval the attached Proposed Notice of Settlement to the class. The parties propose that the Notice of the Proposed Settlement be provided by first-class mail to the last known addresses of the 213 persons identified by the Intervenors' counsel and that the reasonable costs of such notice shall be paid from the contempt fine fund.

20. The parties to this Agreement also request that the Court schedule a Fairness Hearing at its earliest convenience in compliance with the requirements pursuant to Rule 23, FED. R. CIV. P.

21. Upon approval and full compliance with the Settlement Agreement, Intervenors shall be dismissed as a party to the *Reynolds* litigation and the Intervenor class shall be wholly dissolved. The parties agree to jointly defend the lawfulness and validity of the Settlement

Agreement.

22. Counsel for all parties who are shown as electronically signing this Joint Motion have agreed that the attorney electronically filing the document may affix their electronic signature on the document.

Respectfully submitted, this 6th day of February, 2017.

/s/ Raymond P. Fitzpatrick, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record that are currently representing parties to this litigation.

/s/ Raymond P. Fitzpatrick, Jr.
Of Counsel