UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

ISABEL ZELAYA, et al., Plaintiffs, v. ROBERT HAMMER, et al., Defendants.	No. 3:19-CV-00062- TRM-CHS

PLAINTIFFS' AND INDIVIDUAL DEFENDANTS' JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT AND NOTICE TO CLASS MEMBERS AND INCORPORATED MEMORANDUM

Plaintiffs and Individual Defendants[1] respectfully submit for the Court's preliminary approval a proposed Class Action Settlement Agreement ("Settlement") that resolves the claims

[1] The Individual Defendants are 92 federal agents against whom the class claims are alleged in their individual capacities: Robert Hammer, Assistant Special Agent in Charge, Homeland Security Investigations ("HSI"); David Vicente Pena, Agent, Immigration and Customs Enforcement ("ICE"), Enforcement and Removal Operations ("ERO"); Francisco Ayala, Agent, ICE, ERO; Billy Riggins, Special Agent, ICE; Anthony Martin, Deportation Officer, ICE, ERO; Matthew Grooms, Deportation Officer, ICE; Jerrol Scott Partin, Special Agent, ICE; Theodore Francisco, Special Agent, HSI; Travis Carrier, Special Agent, ICE; Trevor Christensen, Special Agent, ICE; Glen Blache, Agent, ICE; Brenda Dickson, Agent, ICE; George Nalley, Agent, ICE; Clint Cantrell, Special Agent, ICE; Ricky Thornburgh, Agent, ICE; Jonathan Hendrix, Special Agent, HSI; Patrick Ryan Hubbard; Special Agent, ICE; Wayne Dickey, Special Agent, HSI; James Liles, Special Agent, HSI; Michael Perez, Special Agent, HSI; Keith Hale, Special Agent, ICE; Dennis Fetting, Special Agent, ICE; Deni Bukvic, Agent, ICE; Kashif Chowhan, Deportation Officer, ICE, ERO; Blake Diamond, Agent, ICE; Paul Criswell, Agent, ICE; Jeffery Klinko, Agent, ICE; Jeffrey Schroder, Agent, ICE; David Lodge, Deportation Officer, ICE, ERO; Waylon Hinkle, Deportation Officer, ICE, ERO; Connie Stephens, Agent, ICE; Tommy Pannell, Agent, ICE; Shannon Hope, Agent, ICE; Troy McCarter, Agent, ICE; Bradley Harris, Agent, ICE; Joshua McCready, Agent, ICE; Ronald Appel, Resident Agent in Charge, ICE; Bobby Smith, Agent, ICE; Robert Whited, Agent, ICE; Trey Lund, Deputy Field Office Director, ICE; John Witsell, Agent, ICE; Michelle Evans, Agent, ICE; Steven Ledgerwood, Agent, ICE; Christopher Cannon, Deportation Officer, ICE, ERO; John Heishman, Chief, Customs and Border Patrol ("CBP"); Aunrae Navarre, Agent, CBP; Ricky Smith, Agent,

in this case. The Settlement provides meaningful monetary relief for approximately 100 class members who were Latino employees detained during the April 5, 2018 enforcement operation at the Southeastern Provision, LLC ("SEP") meat processing facility (the "Plant") in Bean Station, Tennessee, as well as a letter from the government confirming their status as a class member in this case that class members may submit when seeking immigration relief. After over three years of litigation, the parties reached a Settlement in which Defendants Nicholas Worsham and Ronald Appel, on behalf of the Individual Defendants, agree to: (1) pay a total of $550,000.00 that will constitute the Class Settlement Fund, and (2) establish a process whereby class members may request a letter from Immigration and Customs Enforcement ("ICE") and the U.S. Attorney's Office for the Western District of Virginia that confirms their status as class members in this litigation. The United States of America agrees to pay Plaintiffs' counsel $150,000.00 for their fees and costs in connection with the settlement of Plaintiffs' individual claims as partial reimbursement for the expenses and fees expended by Plaintiffs' counsel.

The Settlement satisfies the requirements for preliminary approval under Federal Rule of Civil Procedure 23(e), and all its terms are fair, reasonable, and adequate. The Settlement balances immediate monetary and non-monetary class benefits with the risks of further litigation. Further,

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CBP; Matthew Moon, Agent, CBP; Jason Miller, Agent, CBP; Jeff Bednar, Port Director, CBP; Austin Williams, Port Director, CBP; Nicholas R. Worsham, Special Agent, Internal Revenue Service-Criminal Investigations ("IRS"); Rich Nelson, Senior Special Agent, IRS; Carolyn Peters, Agent, IRS; Chris Altemus, Agent, IRS; Greg Martin, Agent, IRS; Danielle Barto, Agent, IRS; Jimmy Cline, Agent, IRS; Trent Tyson, Agent, IRS; Alex Meyer, Agent, IRS; Joey Wooten, Agent, IRS; John "JR" Stansfield, Agent, IRS; John Miller, Agent, IRS; Jarrad Roby, Agent, IRS; Andre Brooks, Agent, IRS; Kevin McCord, Agent, IRS; Bruce McMillan, Agent, IRS; Greg Alexander, Agent, IRS; Frank Downey, Special Agent, IRS; Bennett Strickland, Special Agent, IRS; Jon Witt, Agent, IRS; Don Lemons, Agent, IRS; Ken Runkle, Agent, IRS; James Colby Bird, Agent, IRS; Bill DeSantis, Agent, IRS; Russell Dotson, Agent, IRS; Ty Patterson, Agent, IRS; Sue Poshedley, Agent, IRS; Jane Rigsby, Agent, IRS; Will Stanley, Agent, IRS; Shari Paige, Agent, IRS; Juan Correa, Agent, IRS; Eva Alvarado, Agent, IRS; David Martin, Agent, IRS; Berta Icabalceta, Agent, IRS; Michael Medina, Agent, IRS; Timothy Tyler, Agent, IRS; Brian Grove, Agent, IRS; Meredith Louden, Agent, IRS; Jeannine Hammett, Agent, IRS; Barrett Dickson, Agent, IRS; Jennifer Velez, Agent, IRS; Scott Siedlaczek, Agent, IRS. The United States is also a Defendant but not as to the class claims and accordingly, takes no position on this motion.

the Settlement is well-informed by vigorous advocacy on two rounds of motions to dismiss, a motion for class certification which the Court granted, and numerous discovery motions, as well as the near completion of fact and expert discovery, which included taking and defending over 50 depositions, the production of over 32,000 documents, and review of at least 24 hours of video recordings of the enforcement operation. Finally, the Settlement is the product of arm's-length, non-collusive negotiations aided by the assistance Mr. Carlos A. Gonzalez, an independent, highly qualified mediator with over two decades of experience. A copy of the Settlement, a proposed Notice of Settlement for distribution to class members, and a proposed Claim Form are attached to this motion for the Court's review. The parties respectfully request that the Court (1) grant this joint motion for preliminary approval, (2) order the parties to direct notice to class members, and (3) set a final approval hearing.

I. PROCEDURAL HISTORY

This class action case commenced in February 2019, ten months after federal agents from the Department of Homeland Security ("DHS") and the Internal Revenue Service ("IRS") conducted an enforcement operation at the Plant. In their Fourth Amended Complaint, Plaintiffs alleged that federal officers executed a plan to target and arrest approximately 100 Latino workers at the Plant on April 5, 2018 based on their race and ethnicity, regardless of any worker's immigration status. Plaintiffs brought various constitutional and statutory claims, some of which were later dismissed. Additionally, Plaintiffs María del Pilar González Cruz and Catarino Zapote Hernández asserted claims under 42 U.S.C. §§ 1985(3) and 1986 for conspiracy to violate civil rights on behalf of a class of "All Latino individuals working in the Plant on April 5, 2018 who were detained" (the "Class"). (4th Am. Compl. at 23, Doc. 396.) Defendants deny Plaintiffs' allegations in the Fourth Amended Complaint, including any liability for the claims.

The parties have engaged in significant motions practice and discovery in support of their respective claims and defenses. Class counsel sought to discover the identities of relevant individuals through expedited and third-party discovery. (April 2019 Order Granting in Part Mot. for Expedited Discovery, Doc. 44.) The parties briefed two rounds of motions to dismiss. The Court's rulings on those motions dismissed some claims but allowed the §§ 1985(3) and 1986 proposed class claims, as well as certain individual claims, to proceed. (*See* Jan. 2021 Order Den. in Part, Granting in Part Defs. Mots. to Dismiss, Doc. 380; Jan. 2022 Order Den. IRS Defs. Mots. to Dismiss, Doc. 575.)

Further, since February 2021, the parties have engaged in substantial discovery.[2] The parties have taken or defended approximately 50 party depositions, in addition to multiple third-party depositions, including Plaintiffs' family members and Rule 30(b)(6) depositions of the Tennessee Highway Patrol ("THP") and the Morristown Police Department ("MPD"). Additionally, the parties conferred for months to identify search terms, custodians, and time periods for relevant discovery, and negotiated to narrow the scope of disputed discovery. In sum, the parties have reviewed over 32,000 documents produced in response to dozens of document requests, including documents obtained through third-party discovery, and have responded to dozens of interrogatories and requests for admission. Moreover, the parties have reviewed approximately 4,000 video files, which include at least 24 hours of video of the enforcement operation, from plant surveillance and body-worn camera footage obtained from the United States and the MPD. Finally, through the course of discovery, the parties have briefed numerous

[2] Discovery initially opened in late 2019, but was stayed during the pendency of the motions to dismiss from March 2020 to February 2021. (Order Staying Disc., Doc. 365.)

discovery disputes, including filing motions to compel, motions for protective orders, motions to quash, motions for reconsideration, and sealing motions.

On August 9, 2022, after substantial discovery had been taken, the Court granted Plaintiffs' motion for class certification. (Order Granting Mot. to Certify Class, Doc.738.) The Court determined that Plaintiffs satisfied all the requirements of Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure and appointed Plaintiffs Maria Del Pilar González Cruz and Catarino Zapote Hernández to serve as Class Representatives. (*Id.*) The Court also appointed Plaintiffs' counsel to serve as class counsel pursuant to Rule 23(g). (*Id.* at 14–16.)

The parties subsequently participated in a day-long mediation session with Mr. Carlos A. Gonzalez on August 22, 2022, following months of informal settlement talks. Plaintiffs and Defendants thereafter continued negotiations and, on August 23, reached an agreement in principle to settle the case. Upon the parties' joint request, the Court has stayed all litigation deadlines in the case through October 10 for the parties to finalize the terms of a Settlement Agreement. (Orders, Docs. 770, 772 & 775.) On October 11, 2022, the Court held a telephonic status conference and on October 12, issued an order further extending the stay to October 17, 2022. (Doc. 779) The parties executed a Final Settlement Agreement on October 12, 2022.

On September 23, 2022, Individual Defendants, to preserve their rights to appeal should the Court not grant preliminary and final approval of the Class Settlement, filed a Petition with the U.S. Court of Appeals for the Sixth Circuit requesting interlocutory appellate review of the class certification ruling. On September 27, 2022, Plaintiffs and Individual Defendants filed a joint motion for extension of time and to stay proceedings on appeal with the Sixth Circuit so that they could proceed with this motion. On October 3, 2022, Plaintiffs filed their answer to Individual Defendants' 23(f) Petition with the Sixth Circuit.

II. TERMS OF THE SETTLEMENT

A. Class Relief

The Settlement Agreement, attached as Exhibit 1, provides significant relief to class members.

First, Defendants Worsham and Appel have agreed to pay into a Class Settlement Fund (the "Fund") a gross amount of $550,000.00. Class counsel, with the assistance of a settlement administrator, Settlement Services, Inc., will administer the Fund, compute each claiming class member's share, and distribute payments. Plaintiffs anticipate each class member will be entitled to approximately $5,000 to $6,000 before taxes and withholding. Any remaining Class Settlement Funds will be redistributed to class members, and in the event that the unclaimed funds are under $40,000, will be awarded as a *cy pres* to the McNabb Center, a nonprofit provider of mental health, substance use, and social and victim services in East Tennessee.

Second, the United States has agreed to establish a centralized email account through which any class member will be able to request a letter from ICE and the U.S. Attorney's Office for the Western District of Virginia confirming that the individual is a member of the Class. The letter, attached as Exhibit C to the Settlement Agreement, may then be used by class members in any future application for immigration relief or any other purpose for which the class member seeks to use it. The inclusion of the letter in any application for immigration relief does not require any specific course of action by the U.S. Government (*e.g.*, the Government is not required to grant prosecutorial discretion). The class member's application will continue to be reviewed, considered, and/or adjudicated in accordance with prevailing law, regulation, and policy.

In exchange for the foregoing benefits, the case will be dismissed with prejudice as to the Individual Defendants upon final approval of the class action Settlement. Class members will

thereby release all claims that have been asserted or could have been asserted arising from or related to the SEP enforcement operation against the Individual Defendants or any other parties that potentially could be held liable. The Settlement requires no admission of liability, and Defendants deny all liability.

B. Class Notice

The Settlement provides that within 20 days of the Court's preliminary approval of the Settlement, class counsel will send, through Settlement Services, Inc., the proposed Notice of Settlement, attached as Exhibit A to the Settlement Agreement, and the proposed Claim Form, attached as Exhibit B to the Settlement Agreement, by mail to class members with known addresses. In addition, within 10 days of the filing of the Settlement with the Court, Defendants will send the required notices pursuant to the Class Action Fairness Act, thereby triggering the 90-day period before the Court may enter judgment. *See* 28 U.S.C. § 1715(d).

The proposed Notice of Settlement explains: the nature and history of the class action; the definition of the Class; the terms of Settlement; the benefits the Settlement will provide for claiming class members; class members' right to file objections or request exclusion from the Settlement, the consequences of doing so, and the process to follow; the date for the Final Approval Hearing at which the Court can hear objections to the proposed settlement; and the phone number that may be used to direct questions to class counsel. The Claim Form attached to the Notice of Settlement provides instructions for submitting claims, applicable deadlines, and the minimum amount the individual class member will receive. The Notice and Claim Form will be available in both English and Spanish. The members of the Class will have 90 days from the date of the first notice distribution to opt out.

C. Attorneys' Fees and Expenses

The global Settlement of this case requires the United States to pay Plaintiffs' attorneys $150,000.00 in connection with the settlement of Plaintiffs' individual claims as partial reimbursement of expenses and fees expended by counsel. The Parties agree that no other moneys shall be paid to Plaintiffs' counsel for fees and expenses in connection with or related to this lawsuit. Should the Court elect to consider whether to approve the payment of Plaintiff's attorneys' fees and expenses, Plaintiffs and Individual Defendants maintain that payment should be approved. Based on preliminary review, class counsel the Southern Poverty Law Center and National Immigration Law Center estimate their expenses to be approximately $375,000.00 and its lodestar to be over $2 million for hours billed in the case. Should the Court direct Plaintiffs to file a motion for approval of attorneys' fees in advance of the Final Approval Hearing, such motion will explain that the remaining balance of the fees and expenses payment represents a substantial reduction in Plaintiffs' counsel's lodestar figure for hours and expenses dedicated to the litigation of this case to date.

D. Final Approval Hearing

The parties request that the Court schedule a Final Approval Hearing for a date that is at least 120 days after the entry of the Order granting preliminary approval, to permit sufficient time for the notice and opt-out process set forth in the Settlement to run its course. In advance of the Final Approval Hearing, the parties will submit a motion for final approval and, should the Court require it, a motion for attorneys' fees.

III. THE COURT SHOULD PRELIMINARILY APPROVE THE PROPOSED SETTLEMENT.

A class action lawsuit may only be settled with court approval. Fed. R. Civ. P. 23. At the preliminary approval stage, the Court must initially determine whether it "will likely be able to"

approve the settlement as fair, reasonable, and adequate under Rule 23(e)(2), and if it has not previously done so, "certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B).[3] Then, after class members are provided notice and an opportunity to object, the Court must hold a hearing to consider whether to approve the settlement. *See* Fed. R. Civ. P. 23(e)(2), (4), (5).

In determining whether it "will likely be able to" approve the Settlement as fair, reasonable, and adequate, the Court must consider whether: (1) the class representatives and class counsel have adequately represented the class; (2) the proposed settlement was negotiated at arm's length; (3) the relief provided is adequate; and (4) the proposed settlement treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(1)-(2). These factors are intended to focus the Court "on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal." Fed. R. Civ. P. 23(e)(2) advisory committee's notes to 2018 amendment; *see also International Union, UAW v. General Motors Corp.* ("*UAW*"), 497 F.3d 615, 631 (6th Cir. 2007) (noting seven factors for preliminary approval that preceded and are largely encompassed by the 2018 Amendments to Rule 23(e)(2)). For the reasons below, the Court should preliminarily approve the proposed Settlement.

A. The Class Has Been Adequately Represented.

The Court previously concluded that "the Named Plaintiffs and class counsel are adequate representatives of the interests of the class members." (Order Granting Mot. to Certify Class, Doc. 738.) Nothing has changed since then to disturb that finding. By the time the parties reached a

[3] Where a court has already certified a class, as here, it does not need to re-certify it for settlement purposes. *See* Fed. R. Civ. P. 23(e)(1) advisory committee's notes to 2018 amendments ("If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted."); *see also* 4 *Newberg and Rubenstein on Class Actions* § 13:16 (6th ed.) ("If the court has certified a class prior to settlement, it does not need to re-certify it for settlement purposes.").

Settlement in principle, class counsel had taken or defended well over 50 depositions, reviewed over 32,000 responsive documents and 24 hours of video recordings of the Plant, propounded and responded to dozens of document and written discovery requests related to the Class, briefed numerous dispositive and discovery-related motions, and worked with experts to consult on the nature and degree of the Class Representatives' alleged emotional distress and dignitary harms. Further, each Class Representative had committed substantial time to this litigation, including sitting through day-long depositions, collecting documents, drafting written responses, attending medical examinations, and ultimately approving the terms of the Settlement. Through those efforts, the Class Representatives and their counsel secured a Settlement entitling each class member to meaningful relief. Taken together, these efforts demonstrate that the Class has been adequately represented.

B. The Settlement Was Negotiated at Arm's Length.

The Settlement was reached after serious, non-collusive, arm's-length negotiations. The parties vigorously litigated this action for over three-and-a-half years and conducted extensive fact and expert discovery prior to entering into the Settlement. Indeed, the Settlement was reached just one week before the deadline for completion of discovery. The parties, therefore, had a wealth of information about the case to gauge the strengths and weaknesses of the claims and the adequacy of the proposed Settlement. *See In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 2:12-CV-4, 2015 WL 13650515, at *2 (E.D. Tenn. Jan. 16, 2015) (finding settlement was entered on a "fully-informed basis" where discovery was "nearly complete" at the time of settlement, enabling plaintiffs "competently and thoroughly to evaluate the strengths and weaknesses of their claims and the associated litigation risks"); *Macy v. GC Servs. Ltd. P'ship*, No. 3:15-CV-819-DJH-CHL, 2019 WL 6684522, at *3 (W.D. Ky. Dec. 6, 2019) (finding settlement was product of arm's-length,

non-collusive negotiations based on the posture of the case, which "ha[d] been pending for four years, with extensive motion practice and discovery during that time"); 4 *Newberg and Rubenstein on Class Actions* ("*Newberg*") § 13:14 (6th ed.) ("Where the proposed settlement is preceded by a lengthy period of adversarial litigation involving substantial discovery, a court is likely to conclude that settlement negotiations occurred at arms-length."). Based on this knowledge and their experience litigating civil rights class actions, class counsel believe that the Settlement is fair, reasonable, and adequate. *See Does 1-2 v. Deja Vu Servs., Inc.*, 925 F.3d 886, 899 (6th Cir. 2019) (noting that experienced counsel's "positive outlook toward the fairness of the settlement weighed in favor of approv[al]"); *In re Se. Milk Antitrust Litig.*, No. 2:07-CV-208, 2012 WL 2236692, at *3 (E.D. Tenn. June 15, 2012) ("[W]hen significant discovery has been completed, the Court should defer to the judgment of experienced trial counsel who has evaluated the strength of his case." (citation omitted)).

Further, the involvement of a highly qualified independent neutral mediator, Mr. González, during a private day-long mediation supports a finding that the Settlement is not the product of collusion. *See Hillson v. Kelly Servs. Inc.*, No. 2:15-CV-10803, 2017 WL 279814, at *6 (E.D. Mich. Jan. 23, 2017) ("[T]he use of neutral, experienced mediators is an indication that the parties' agreement is noncollusive."); *Macy*, 2019 WL 6684522, at *3 ("The fact that the settlement was reached through mediation likewise suggests 'an absence of collusion.'" (citation omitted)); *Newberg* § 13:14 ("[C]ollusion [is] less likely when settlement negotiations are conducted by a third-party mediator."). This factor therefore favors preliminary approval of the Settlement.

C. The Settlement Provides Adequate Relief to Class Members.

The Settlement provides more than "adequate" relief to the Class considering (1) the costs, risks, and delay of trial and appeal; (2) the effectiveness of any proposed method of distributing

relief to the class; (3) the terms of any proposed award of attorneys' fees; and (4) any agreement required to be identified under Rule 23(e)(3). *See* Fed. R. Civ. P. 23(e)(2)(C).

First, the Settlement's terms reflect an excellent result for the Class in light of the costs, risks, and delay of trial and appeal. Under the proposed Settlement, each class member will be entitled to a payment of approximately $5,000 to $6,000 upon submission of a Claim Form. And settlements in other civil rights class actions alleging unlawful targeting of individuals on the basis of race or ethnicity—though not §§ 1985(3) and 1986 cases—further support the adequacy of the relief here. *See, e.g.*, *Cervantez v. Whitfield*, 613 F. Supp. 1439, 1443–44 (N.D. Tex. 1985) (approving monetary payments to class members ranging from $220 to $1,320 in civil rights class action alleging unconstitutional seizures of Latino individuals). Further, the Settlement creates a centralized process for requesting letters from ICE and the U.S. Attorney's Office for the Western District of Virginia confirming class members' status in this litigation, which may be used in applications for immigration relief.

In contrast to the benefits conferred by the Settlement, continued litigation would have carried significant costs, risks, and delay. Individual Defendants deny the allegations and the claims asserted against them. Absent the Settlement, Individual Defendants would continue to pursue interlocutory appellate review of the class certification decision. Additionally, the parties would have continued to aggressively litigate the Class's §§ 1985(3) and 1986 claims, including filing consolidated and individual summary judgment motions, *Daubert* motions, and appealing an adverse judgment. The Individual Defendants anticipated moving for summary judgment as to the §§ 1985(3) and 1986 claims on the merits, as well as on the grounds of qualified immunity. (Scheduling Order, Doc. 706.) A number of Individual Defendants also would have moved for summary judgment based on the applicable statute of limitations. Regardless of the Court's

decision, either party would have likely sought interlocutory appeal on the issue of qualified immunity in the Sixth Circuit. *See Flint ex rel. Flint v. Kentucky Dep't of Corr.*, 270 F.3d 340, 346 (6th Cir. 2001) ("The denial of a motion for summary judgment on the issue of qualified immunity is immediately appealable if the affirmative defense of qualified immunity rests on an issue of law."). Finally, the Settlement avoids significant uncertainties, including the risk of establishing and defending against liability and damages. Considering the costs, risks, and delay associated with continued litigation, the benefits secured by the Settlement reflect an excellent result.

Second, the proposed method of distributing relief to class members is effective. "[T]he goal of any distribution method is to get as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible." Newberg § 13:53. The proposed Notice of Settlement describes both the monetary and non-monetary terms, and the payment procedures are simple and direct. Settlement notices will be sent by mail to class members with known addresses and distributed online in both English and Spanish. The members of the Class will have 90 days from the date of the first notice distribution to opt out. Payment will be distributed directly to class members via check, money transfer, or bank wire.

Third, should the Court find that the payment of Plaintiffs' attorneys' fees and expenses is subject to Court approval, the reimbursement of a portion of attorney's fees and expenses is reasonable and does not impact the relief to the Class because the attorneys' fees and expenses are paid by the United States as part of the resolution of the individual Plaintiffs' claims. The Settlement provides for an award of $150,000.00 total in attorneys' fees and expenses, to be shared between the nonprofit organizations the Southern Poverty Law Center and National Immigration Law Center. This is a modest sum relative to the estimated expenses of $375,000.00 and lodestar

of over $2 million that the National Immigration Law Center and the Southern Poverty Law Center have expended in this action. Ultimately, even if the Court finds the award of attorneys' fees and expenses must be evaluated under Federal Rule of Civil Procedure 23(h), nothing about the attorneys' fees provision impacts the adequacy of the Class relief.

Finally, the parties have made no other agreements in connection with the proposed Settlement that impacts relief to the Class. Fed. R. Civ. P. 23(e)(2)(C)(iv). The Class Representatives and named Plaintiffs entered into separate individual settlements with the United States in exchange for releasing their Federal Tort Claims Act claims and any other individual claims against any Individual Defendant that were based on individualized allegations of additional harm. Under those separate settlements of the individual Plaintiffs' FTCA claims, the United States will pay the individual Plaintiffs a total amount of $475,000.00, of which the two Class Representatives will receive $36,893.20 each. As this Court has already recognized, the individualized FTCA claims—directed only at United States, which is not a Defendant to the class claims—in no way impacts the adequacy of the Class Representatives' representation and the relief secured for the Class. (Order Granting Mot. to Certify Class at 14, Doc. 738.) Indeed, Plaintiffs—including Class Representatives—have agreed to decline any additional payment as class members.

A district court is not required to engage in a trial of the case on the merits as part of the preliminary approval process, rather only a determination that the settlement did not result from overreaching or collusion:

> In making a preliminary assessment of the fairness of the proposed settlement agreement, the Court's "intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned." A

> preliminary fairness assessment "is not to be turned into a trial or rehearsal for trial on the merits," for "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." Rather, the Court's duty is to conduct a threshold examination of the overall fairness and adequacy of the settlement in light of the likely outcome and the cost of continued litigation.
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> As part of this evaluation, the Court may not second guess the settlement terms. Moreover, when a settlement is the result of extensive negotiations by experienced counsel, the Court should presume it is fair.

In re Inter-Op Hip Prosthetics Liab. Litig., 204 F.R.D. 330, 350-51 (N.D. Ohio 2001) (citations omitted). The facts of this case clearly demonstrate that the proposed settlement did not result from overreaching or collusion by the parties and/or their counsel.

D. The Settlement Treats Class Members Equitably.

The Settlement benefits all class members equitably. Each class member is entitled to a pro rata share of the overall class settlement, which will result in the same monetary payment of $5,000 to $6,000 per class member. The six named Plaintiffs in this Class will not separately be able to make a claim from the Class settlement fund given the settlement of their FTCA claims arising out of the same action. Additionally, the letters from ICE and the U.S. Attorney's Office for the Western District of Virginia for class members are available to *all* class members for use in any applications for immigration relief. This factor therefore also supports preliminary approval.

IV. THE COURT SHOULD APPROVE THE PROPOSED NOTICE.

When the parties demonstrate that preliminary approval is justified, the Court "must direct notice in a reasonable manner to all class members who would be bound" by the settlement. Fed. R. Civ. P. 23(e)(1). In the context of Rule 23(b)(3) class actions, notice must be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Further, due process requires

that notice to the class be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *UAW*, 497 F.3d at 629–30 (quotations and citation omitted). Accordingly, the notice must fairly apprise class members of the terms of the Settlement "so that class members may come to their own conclusions about whether the settlement serves their interests." *Id.* at 630.

Here, the parties' proposed Notice of Settlement and Claim Form fully satisfy Rule 23 and the requirements of due process. First, the form of the Notice is substantively adequate. The proposed Notice and Claim Form are written in plain English and will be translated to Spanish. The Notice and Claim Form provide information for an individual to determine whether to remain in the Class, whether to opt-out, whether to file an objection to the terms of the Settlement, the time and place for the Final Approval Hearing on the proposed settlement, how to file a claim to obtain a monetary payment, and the deadlines related to each option. The Notice therefore contains all the necessary content. *See, e.g.*, *Kizer v. Summit Partners, L.P.*, No. 1:11-CV-38, 2012 WL 1598066, at *9 (E.D. Tenn. May 7, 2012); *Busby v. Bonner*, No. 2:20-CV-2359-SHL-ATC, 2021 WL 4127775, at *5 (W.D. Tenn. Jan. 28, 2021).

Second, the manner of Notice complies with Rule 23 and due process. Upon approval, class counsel, through Settlement Services, Inc., will send the proposed Notice of Settlement and Claim Form to all class members with known addresses. *See Harbin v. Emergency Coverage Corp.*, No. 3:16-CV-125-TRM-HBG, 2017 WL 6329715, at *3 (E.D. Tenn. Nov. 21, 2017), R. & R. adopted, 2017 WL 6328161 (E.D. Tenn. Dec. 11, 2017) (approving notice in Rule 23(b)(3) settlement where claim administrator sent mail notice to settlement class). Additionally, in an effort to reach class members without known addresses or who may be outside the United States, class counsel will work with the Claims Administrator, proposed to be Settlement Services, Inc.,

and community-based organizations to disseminate the notice through other reasonable means, which may include electronic mail, facsimile, posting of the Class Notice on class counsel's websites, or other means to ensure Class Members receive the notice. *See In re Cast Iron Soil Pipe & Fittings Antitrust Litig.*, No. 1:14-MD-2508-HSM-CHS, 2017 WL 3124105, at *2 (E.D. Tenn. May 26, 2017) (approving notice in Rule 23(b)(3) settlement that combined direct mail notice with notice disseminated through national periodicals and an online website); *Kizer*, 2012 WL 1598066, at *9 (approving notice in Rule 23(b)(3) settlement where the parties provided notice to the "last known address of each settlement class member" and sought to locate "class members who fail[ed] to receive the initial mailing"). The manner of notice complies with due process and constitutes the "best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). Accordingly, the Court should approve the Notice of Proposed Settlement and the accompanying Claim Form.

V. CONCLUSION

The parties respectfully request that the Court (1) grant this joint motion for preliminary approval, finding that it will likely approve the Settlement, (2) order the parties to direct notice to class members, and (3) set a final approval hearing.

Respectfully submitted this 12th day of October, 2022

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CERTIFICATE OF SERVICE

I, Michelle Lapointe, hereby certify, that on October 12, 2022, a true copy of this Motion was served via the Court's electronic filing system upon all counsel of record.

s/ Michelle Lapointe
Michelle Lapointe