

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

RUSSELL K. OGDEN, BEATRICE HAMMER,)
and JOHN SMITH, on behalf of themselves and)
a class of persons similarly situated;)

Plaintiffs,)

v.)

PETE FIGGINS, in his official capacity as)
Sheriff for Wilson County, Kansas,)

Defendant.)

Case No. 2:16-cv-02268
CLASS ACTION

**JOINT MOTION FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT AND MEMORANDUM OF LAW IN SUPPORT**

Plaintiffs, individually and on behalf of the Settlement Class defined herein (hereinafter “Plaintiffs”), and Defendant Pete Figgins, in his official capacity as Sheriff for Wilson County, Kansas (hereinafter “Defendant Sheriff” and collectively referred to as the “Parties”), jointly move the Court for entry of an order preliminarily approving the Settlement Agreement and Consent Decree (hereinafter “Consent Decree,” attached as Exhibit A) and Notice of Proposed Settlement (hereinafter “Notice,” attached as Exhibit B), agreed to by the Parties in this matter.

I. BACKGROUND

Plaintiffs filed this action in April 2016, seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, and seeking to enjoin the Defendant Sheriff from forbidding inmates housed in the Wilson County Correctional Facility (hereinafter the “Jail”), and their parents, children, spouses, relatives, friends, loved ones, and other correspondents from sending letters enclosed in envelopes to and from the Jail (hereinafter the “Postcard-Only Mail Policy”).

Prior to the Postcard-Only Mail Policy, the Wilson County, Kansas Sheriff permitted Jail inmates to send and receive mail correspondence enclosed in envelopes.

Following discovery on Plaintiffs' allegations, the Parties engaged in arms'-length negotiations for a comprehensive resolution of this litigation. As a result of these negotiations, the Parties have agreed to a resolution of all claims brought against the Defendant Sheriff in this action, as set forth in the attached Consent Decree.

The Parties submit that the attached Consent Decree constitutes a fair, reasonable, and adequate resolution for the Plaintiffs, pursuant to Rule 23(e)(2), Federal Rules of Civil Procedure, and that the terms of the resolution, as set forth in the attached Consent Decree, are in the best interests of the Parties and the public. The Parties further submit that the attached Consent Decree constitutes narrowly drawn relief that extends no further than necessary to correct the alleged violation of Plaintiffs' constitutional rights and is the least intrusive means necessary to correct the alleged violation of Plaintiffs' constitutional rights.

As such, the Parties request that the Court enter an order (1) granting preliminary approval of the proposed settlement as set forth in the attached Consent Decree; (2) preliminarily certifying the proposed settlement class under Rule 23(b)(2), Federal Rules of Civil Procedure; (3) directing that members of the settlement class be given notice of the pendency of this action and the proposed settlement in the form and manner proposed by the Parties in the attached Consent Decree (Exhibit A) and Notice (Exhibit B); and (4) scheduling a hearing at which the Court will consider final approval of the settlement and entry of the attached Consent Decree.

II. OUTLINE OF PROPOSED SETTLEMENT

A. The Settlement Class

The proposed settlement has been reached on behalf of the “Settlement Class,” which will herein be defined as:

All current and former outside correspondents who wish to write letters to, and/or receive letters from, inmates in the Wilson County Correctional Facility and who are subject to or affected by the Postcard-Only Mail Policy.

B. Inmate Mail Provisions

The principle provisions of the attached Consent Decree are as follows:

Inmates May Send Letters. The Sheriff will not prohibit or restrict Jail inmates from mailing non-privileged letters in envelopes to correspondents outside the Jail, except as set forth in the Consent Decree.

Inmates May Receive Letters. The Sheriff will not prohibit or restrict Jail inmates from receiving non-privileged letters in envelopes from correspondents outside the Jail, except as set forth in the Consent Decree.

No Volume Restrictions on Mail. The Sheriff will not restrict the number of letters or postcards that an inmate can send or receive, unless there is clear evidence that such correspondence (i) poses a safety threat to the Jail, its inmates and/or staff; or (ii) reads of conducting and/or encouraging criminal activity. Additionally, Jail inmates may not correspond with (i) other inmates within the Jail or another correctional facility; or (ii) any individual that is listed as non-contact by a court or law enforcement agency due to domestic violence, endorsed witnesses, or victims of a crime.

Content Regulation Not Covered. The Consent Decree is not intended to restrict any authority the Defendant Sheriff may have to regulate the content of correspondence.

C. Notice to the Settlement Class

Rule 23(e)(1), Federal Rules of Civil Procedure, requires that the Court direct notice in a reasonable manner to all members of the Settlement Class who would be bound by the proposed resolution of this matter. In satisfaction of this requirement, the Parties have agreed on the proposed wording of the Notice to members of the Settlement Class, attached as Exhibit B.

As set forth in the attached Consent Decree, the Defendant Sheriff, within fourteen (14) days of the Court's preliminary approval of the attached Notice, shall provide the Notice to those members of the Settlement Class as presently constituted by publication in the Wilson County Citizen. Additionally, the Defendant Sheriff shall post a copy of the attached Notice in each pod and visitation area in the Jail, to remain posted for no less than sixty (60) days, and shall publish a copy of the Notice on the Jail's public website. The attached Notice shall be posted, provided, and published, in English and Spanish. The cost of providing such notice shall be borne by the Defendant Sheriff in his official capacity.

D. Costs, Expenses and Attorneys' Fees

In settlement of all claims for attorneys' fees, taxable costs, and non-taxable litigation expenses incurred through the date of entry of the proposed Consent Decree, the Defendant Sheriff agrees to tender to Class Counsel the gross sum of TEN THOUSAND DOLLARS (\$10,000.00), via check made payable to the Social Justice Law Collective Trust Account (Fed. Tax ID No. 46-0961071) (the "Settlement Amount"), within fourteen (14) days of the Court's final entry of this Consent Decree. The Parties agree that this settlement amount includes the resolution and payment in full of all of Plaintiffs' claims for reasonable attorneys' fees and costs.

E. Court Adoption

The attached Consent Decree is subject to and conditioned upon the Court's entry of the attached Consent Decree and dismissal of the action with prejudice, subject to the Court's jurisdiction to enforce the attached Consent Decree. In the event that the Court declines to approve or enter the attached Consent Decree, the Parties agree that the attached Consent Decree shall be null and void and without prejudice to the Parties' rights.

III. PRELIMINARY COURT APPROVAL

A. Proposed Terms of Settlement

Rule 23(e), Federal Rules of Civil Procedure, requires judicial approval for any compromise of claims brought on a class basis. Review of a proposed class action settlement generally involves a two-step process: preliminary approval and a fairness hearing. *See Manual for Complex Litigation, Fourth*, § 21.632 (West 2004). First, the court reviews the proposed terms of settlement and makes a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms. *See id.* "Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (citing *Manual for Complex Litigation, Third*, § 30.41 (West 1995)); *see also Freebird, Inc. v. Merit Energy Co.*, 2012 U.S. Dist. LEXIS 173075, No. 10-1154-KHV, 2012 WL 6085135, at *5 (D. Kan. Dec. 6, 2012) ("[The Court] will ordinarily grant preliminary approval where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies,

does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval.”) (citations omitted).

Moreover, it is well established that there is an overriding public interest in settling and quieting litigation, particularly in the context of a class action. *See In re Bank of Am. Wage & Hour Empl. Litig.*, 740 F. Supp. 2d 1207, 1219 (D. Kan. 2010); *see also Newberg on Class Actions* § 11:41, at 87 (4th ed. 2002) (“The compromise of complex litigation is encouraged by the courts and favored by public policy.”). In furtherance of this public interest, in considering a proposed settlement, the trial court need not reach any ultimate conclusion on the substantive factual or legal issues of plaintiffs’ claims. *See FreeBird, Inc.*, 2012 U.S. Dist. LEXIS 173075 at *13, 2012 WL 6085135, at *5. “We recognize that since ‘[t]he very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation,’ the court must not turn the settlement hearing ‘into a trial or a rehearsal of the trial’; and that the court ‘is concerned with the likelihood of success or failure and ought, therefore, to avoid any actual determination of the merits.’” *Saylor v. Lindsley*, 456 F.2d 896, 904 (2d Cir. 1972) (citation omitted). Instead, the court’s primary concern should be whether the proposed settlement is fair, reasonable and adequate. *See Cotton v. Hinton*, 559 F.2d 1326, 1330-31 (5th Cir. 1997).

The proposed settlement, as set forth in the attached Consent Decree, is fair, reasonable, and adequate. The attached Consent Decree is the product of extensive, arm’s-length negotiations between experienced counsel, who have concluded that the proposed settlement strikes a reasonable balance between the constitutional rights of the Settlement Class and the legitimate security concerns of the Defendant Sheriff, and is in the best interests of their respective clients and the Settlement Class as a whole. *See Reed v. General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983) (“[T]he value of the assessment of able counsel negotiating at

arm's length cannot be gainsaid. Lawyers know their strengths and they know where the bones are buried."); *see also In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 359, 380 (N.D. Ohio 2001) ("[W]hen a settlement is the result of extensive negotiations by experienced counsel, the Court should presume it is fair.") (citations omitted).

Furthermore, the proposed Consent Decree has no obvious deficiencies, and does not mandate preferential treatment to class representatives or segments of the class. *See FreeBird, Inc.*, 2012 U.S. Dist. LEXIS 173075 at *12, 2012 WL 6085135, at *5. The proposed Consent Decree constitutes a complete resolution of all claims against the Defendant Sheriff by all Plaintiffs, including named Plaintiffs Russell K. Ogden, Beatrice Hammer, and John Smith, involving all alleged violations of their First Amendment rights, and no member of the Settlement Class, including the named Plaintiffs, will receive any monetary payment or additional relief as part of the relief contained therein. As such, the settlement terms as set forth in the attached Consent Decree merit preliminary approval by this Court and submission to the Settlement Class for consideration.

B. Notice

"If the court preliminarily approves the settlement, it must direct the preparation of notice of the certification of the settlement class, the proposed settlement and the date of the final fairness hearing." *Manual for Complex Litigation, Fourth*, § 21.632-21.635 (West 2004); *see also* Fed. R. Civ. P. 23(e)(1) ("The court must direct notice in a reasonable manner to all class members who would be bound by the [proposed settlement, voluntary dismissal, or compromise]."). The standard for the adequacy of a settlement notice in a class action is measured by reasonableness. *See Faught v. American Home Shield Corp.*, 668 F.3d 1233, 1239 (11th Cir. 2011). "There are no rigid rules to determine whether a settlement notice to the class

satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.” *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) (internal quotation marks and citations omitted).

The attached Notice submitted by the Parties clearly meets this reasonableness standard in all respects. The attached Notice (1) describes the nature, history, and status of the litigation; (2) sets forth a clear definition of the proposed Settlement Class; (3) sets forth the basic terms of the proposed Consent Decree; and (4) advises members of the Settlement Class of the method to object to the proposed Consent Decree, if desired. In addition, the proposed Notice provides contact information for Class Counsel, discloses the date, time and place of the formal Fairness Hearing, and provides a method for members of the Settlement Class to obtain full copies of the proposed Consent Decree.

In granting preliminary settlement approval, the Court should also approve the Parties’ proposed form and method of providing notice to members of the Settlement Class, as set forth in the attached Notice.

WHEREFORE the Parties jointly request the Court’s entry of an Order:

(1) granting preliminary approval of the proposed settlement as set forth in the attached Consent Decree (Exhibit A);

(2) preliminarily certifying the proposed Settlement Class pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure;

(3) directing that members of the Settlement Class be given notice of the pendency of this action and the proposed settlement in the form and manner proposed by the Parties in the attached Consent Decree (Exhibit A) and Notice (Exhibit B); and

(4) scheduling a hearing at which the Court will consider final approval of the settlement and entry of the attached Consent Decree.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, on this 16th day of June, 2017, which will send a notice of electronic filing to all attorneys of record.

/s/ Joshua A. Glickman
Joshua A. Glickman, Esq.