

## **SETTLEMENT AGREEMENT**

Plaintiffs, by and through counsel, and Defendants, by and through counsel, enter into this Settlement Agreement ("Agreement") providing for resolution of the claims asserted by Plaintiffs in the civil action styled *Hicks, et al., v. Hetzel, et al.*, Civil Action No. 2:09-cv-155-WKW, in the United States District Court for the Middle District of Alabama (the "Lawsuit"), pursuant to the terms and conditions set forth below.

### **I. INTRODUCTION**

1. WHEREAS, the Lawsuit, a putative class action for injunctive relief, was filed based on allegations including failure to protect, excessive force, and unconstitutional conditions at Donaldson Correctional Facility;

2. WHEREAS, Defendants deny liability in this matter, but the parties, through this Agreement, seek to continue to improve safety for inmates and staff and conditions at Donaldson Correctional Facility as provided herein;

3. WHEREAS, Plaintiffs and Defendants acknowledge that this Agreement does not constitute: (a) an admission by any Defendant of any violation of law; or (b) an admission by any Defendant that any policy, practice, or procedure addressed in this agreement violated or failed to comply with any applicable Constitutional provision, law, rule, or regulation; or (c) a consent decree enforceable in any United States Federal Court.

4. WHEREAS, the parties agree that neither this Agreement, nor anything contained in this Agreement, confers "prevailing party" status on any Plaintiff for any purpose whatsoever, and that Plaintiffs have not achieved that status as a result of this litigation or the entry into this Agreement by the parties. Likewise, Plaintiffs shall not be determined to be "prevailing parties" as a result of this Agreement or any performance or failure of performance hereunder.

5. WHEREAS, the parties agree that a resolution of the claims in the Lawsuit would benefit all parties by avoiding the time and expense of ongoing litigation;

6. WHEREAS, the parties have entered into this Agreement in reliance on the mutual representations contained herein;

7. THEREFORE, in consideration of the mutual promises of the parties set forth below, the undersigned parties agree to the final resolution of all claims related to the Lawsuit. It is hereby stipulated and agreed by and between the undersigned as follows:

### **II. EFFECTIVE DATE**

8. The Effective Date of this Agreement shall be the date on which the Agreement is last executed by the parties, by and through counsel.

### **III. PARTIES**

9. Plaintiffs are Charles Malec, James Taylor, and Gregory Wynn. Plaintiffs filed the Lawsuit on behalf of all inmates who are now, or will in the future, be incarcerated at Donaldson Correctional Facility.

10. Defendants are Kim Thomas, Commissioner of the Alabama Department of Corrections, Robert Bentley, Governor of the State of Alabama, and individuals assigned to Donaldson Correctional Facility – Gary Hetzel, Correctional Warden III at Donaldson Correctional Facility; Christopher Gordy, Correctional Warden II at Donaldson Correctional Facility; and Lloyd Hicks, Correctional Warden I at Donaldson Correctional Facility (“Donaldson Defendants”). All of the Defendants are sued in their official capacities only and enter into this Agreement in their official capacities only.

### **IV. DEFINITIONS**

11. “ADOC” or “Alabama Department of Corrections” means the Alabama Department of Corrections and its employees and designated agents.

12. “Donaldson” means W. E. Donaldson Correctional Facility in Bessemer, Alabama.

13. “Inmates” means all persons who are now, or in the future will be, incarcerated at Donaldson.

14. “Officers” means Correctional Officers employed by the ADOC at Donaldson.

15. “I&I Division” means the Investigations and Intelligence Division of the Alabama Department of Corrections.

16. “Open Dormitories” means the dormitories that, as of the Effective Date of this Agreement, are designated as dormitories K, L, M, N, and O.

17. “Security Staff” means all APOST certified correctional security personnel and all employees of the ADOC, irrespective of job title, whose regular duties include the supervision of Inmates at Donaldson. This term also includes any CERT team member who performs duties at Donaldson.

### **V. REMEDIAL PROVISIONS**

#### **A. POPULATION**

18. The Defendants shall not reinstitute the practice of housing three men to a cell in any of Donaldson’s cell blocks.

## **B. STAFFING**

19. Defendants are committed to adequate, responsible staffing at Donaldson. As of October 7, 2010, there are two-hundred-fifty-eight (258) allocated correctional officer positions at Donaldson, an increase of allocated positions since the commencement of this litigation. Defendants shall maintain the level of 258 allocated correctional officer positions for the duration of the agreement. As of October 7, 2010, 209 of these allocated positions are filled, leaving 47 positions to be filled. Defendants will use their best efforts to hire correctional officers to fill these positions. Best efforts shall include maintaining pay and housing incentives for officers employed at Donaldson.

20. **Open Dormitories (K, L, M, N, and O).** Donaldson Defendants agree to staff Donaldson so that there is at least one (1) Officer physically present inside each of the Open Dormitories at all times, absent emergency or exceptional circumstances. The term “emergency or exceptional circumstances” shall be narrowly construed. ADOC shall maintain records showing every shift on which there have not been enough officers to maintain this staffing level, and shall indicate on such records the actual number of Officers on duty for each such shift, and where each such Officer was assigned. Production of such records shall be subject to the Protective Order (Doc. 59) entered in this action.

21. **Cell Blocks (A, B, C, D, X, and Y).** Donaldson Defendants agree to staff Donaldson so that there is at least one (1) Officer physically present inside each of the following cell blocks at Donaldson at all times, absent emergency or exceptional circumstances: A, B, C, D, X, and Y. The term “emergency or exceptional circumstances” shall be narrowly construed. ADOC shall maintain records showing every shift on which there have not been enough officers to maintain this staffing level, and shall indicate on such records the actual number of Officers on duty for each such shift, and where each such Officer was assigned. Production of such records shall be subject to the Protective Order (Doc. 59) entered in this action.

22. **East Hallway.** Absent emergency or exceptional circumstances, the Defendants shall ensure that there is at least one (1) Officer physically present in the east hallway at all times when inmates are present.

23. **Duration of Staffing Commitment.** The Defendants shall maintain the commitments set forth in ¶ 18-22 for the duration of this Agreement.

## **C. SECURITY AND RELATED MEASURES**

24. **Request to National Institute of Corrections (NIC) for technical assistance.** Defendants have submitted a request to the NIC for technical assistance with reducing the presence of illegal drugs, weapons, and other contraband at Donaldson. Defendants shall produce to Plaintiffs’ counsel a copy of this letter upon request. If the NIC agrees to provide such technical assistance, Defendants shall use their best efforts to implement the NIC’s recommendations, and shall provide, subject to the Protective Order entered in this case (Doc. 59), Plaintiffs’ counsel with both NIC’s recommendations and Defendants’ response to those recommendations. If the NIC agrees to provide such technical assistance, Defendants shall also

confer with NIC regarding the cost and effectiveness of installing and operating video security cameras at the prison.

25. **Lines of sight in Open Dormitories.** Beds in the Open Dormitories shall be configured so that there are clear lines of sight and unobstructed passageways between beds for roving officers, as presently exist in O Dorm.

26. **Search of Officers.** Absent emergency or other extraordinary circumstances, and in compliance with existing laws, Officers entering Donaldson shall undergo a search for contraband before entering the Donaldson facility. All such Officers shall walk through a metal detector and property in the possession of Officers brought into the Donaldson facility shall be searched.<sup>1</sup>

27. **Security Cameras:** Defendants shall make their best efforts to investigate the feasibility (including costs and effectiveness) of installing and operating video security cameras permitting correctional security supervisors to view the dayrooms in the following cell blocks: A, B, C, D, X and Y.

28. **Medical records.** If an inmate's injury requires off-site medical treatment, the Donaldson Defendants will request and make reasonable efforts to obtain a discharge summary from the off-site facility. Upon receipt of the discharge summary, it shall be made a part of any I&I investigative report.

29. **Sexual assault investigations.** Whenever a report of sexual assault, or attempted sexual assault, on an Inmate is investigated, one or more of the Donaldson Defendants will inform the complainant Inmate of the results of the investigation within a reasonable time after the results of the investigation become known to the Donaldson Defendants. Each inmate who reports a sexual assault shall be offered counseling services with a mental health professional.

30. **Cell checks by roving security staff in cell blocks.** Security Staff shall patrol all cell blocks on an irregular basis during each shift. The patrols shall include direct visual inspection of each cell.

31. **Inmate movement.** Defendants shall maintain their policy requiring inmates to wear wrist bands designating the housing unit to which they are assigned. Defendants shall further conduct weekly, unannounced inspections of the dormitories to search for inmates who are assigned to the cell blocks and of the cell blocks to search for inmates who are assigned to the dormitories. Security Staff shall document in an Incident Report any occasion on which an inmate was found in any living area he was not authorized to be in.

32. **Contraband searches.** Defendants shall schedule and conduct weekly unannounced searches of cells in each segregation unit. Within fourteen (14) days of the execution of this Agreement, Defendants shall advise Security Staff in writing that if any Officer falsifies a "shakedown form" or represents that he/she has searched a cell or an Inmate's person

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<sup>1</sup> This provision shall not limit the search of others who may wish to enter Donaldson.

or property when he/she has not, in fact, done so, said Officer will be subject to appropriate disciplinary action in accordance with ADOC Administrative Regulation 208. Defendants shall provide Plaintiffs' counsel with a copy of the written notice. For the duration of the Agreement, Defendants shall provide the same written notice to new correctional officers within a reasonable time after their employment at Donaldson begins. Appropriate disciplinary action shall be taken against an Officer who is found to have falsified a "shakedown form."

33. **Programming.** The Defendants shall use their best efforts to provide or make available vocational, educational, therapeutic, or other appropriate programming to the inmates assigned to open dormitories and population cellblocks at Donaldson, including otherwise qualified inmates serving sentences of life without parole, as allowed by law.

#### **D. PHYSICAL PLANT PROVISIONS**

34. Defendants will, consistent with the obligations set forth in the contractual agreement between ADOC and Noresco, LLC, dated July 19, 2010, implement the repairs, improvements, renovations and upgrades described therein for Donaldson. These repairs, improvements, renovations, and upgrades include, but are not limited to, the following: energy management system upgrade, lighting, air cooled condensing units, HVAC motor replacement, ice machine counterflow heat exchangers, and new water fixtures and controls. The work that will be contractually scheduled at Donaldson includes the following:

- a. Energy Management System Upgrade: Non-networked controls will be installed in the East and West Gym; the Laundry; dormitories K,L,M,N,O; and the trade school, for the purpose of regulating thermostats/heating/ventilation for more effective comfort controls and energy savings.
- b. Lighting: Existing light fixtures will be retrofitted or replaced with energy saving fixtures and bulbs in all dorms, each cell, and all common areas at Donaldson.
- c. Ice Machine Counterflow Heat Exchangers: Heat exchangers will be installed on all existing ice machines at Donaldson in order to enhance the performance of the ice machines and conserve energy.
- d. Ozone Laundry System: An ozone injection laundry system will be installed at Donaldson, minimizing energy, water, and chemical usage and providing a sterile washing environment.
- e. Water Fixtures/Controls: Existing concealed diaphragm flush valves will be replaced with high efficiency ICON control valves, shower valves and urinal valves. The Department will replace approximately 681 toilets, approximately 15 urinals, approximately 100 shower heads, and approximately 104 faucets at Donaldson.

In addition, Defendants will, consistent with the obligations set forth in the contractual Amendment to the Contract between ADOC and Noresco, LLC, implement the repairs, improvements, renovations and upgrades described as "Phase II" for Donaldson which will include: the replacement of all housing unit windows (excluding Southside dormitories), the replacement of the roof on the main building (East and West hallway, Health Care Unit,

Education, Gymnasiums, Kitchen and Dining)(excluding Southside) and the replacement of the domestic hot water system for the entire facility at Donaldson.

Plaintiffs acknowledge, however, that they are neither intended nor incidental beneficiaries of the contract between ADOC and Noresco, LLC and Plaintiffs, for themselves, do not and will not contend that any inmate at Donaldson is or was an intended beneficiary of the contract between ADOC and Noresco.

#### **E. USE OF FORCE**

35. **Timing.** Within ten (10) days after the Effective Date, the Defendants shall provide Security Staff with written notice of the provisions in this section (§§ 35-41).

36. **Batons.** Security Staff shall not use intentional overhead strikes with a baton to vital areas of an inmate's body unless reasonably necessary to defend oneself or others from an imminent threat of death or serious injury. Reasonable efforts should be made to avoid baton strikes to the head.

37. **Inmate statement forms.** As soon as reasonably possible after an application of force, the inmate(s) subject to force shall be provided with a Statement Form upon which he may make a written statement pertaining to the force used. These Statement Forms, the format of which was provided by Plaintiffs' counsel, shall be made a part of the Incident Report and any investigative report.

38. **Photographing of inmate injuries.** After a use of force or an allegation of a use of force on an Inmate, a designated person (the "Designated Person") shall ensure that color digital photographs are taken of each Inmate involved in the incident, as soon as reasonably possible following the incident, according to the procedure set forth below:

- a. The photographs shall capture the Inmate from the waist up, showing left, right, front and back views. The Inmate's face shall be included in left, right and front photographs.
- b. If the photographs do not capture the visible injuries on the Inmate's body, the Designated Person shall ensure that additional photographs are taken to show all visible injuries.
- c. Unless inconsistent with the need for medical treatment or the circumstances existing at the time, photographs shall be taken as soon as reasonably possible after the incident or alleged incident, and, if medically acceptable, shall be taken before bandages are applied to an Inmate's injury.
- d. The person taking the photograph shall make reasonable efforts to take clear photographs in a well-lit area.
- e. No employee who was involved in the use of force incident shall take the photographs.
- f. The photographs shall be attached to the Incident Report.

- g. If an Inmate is in need of immediate medical attention following an application of force, photographs shall be taken pursuant to this section as soon as reasonably practicable after the Inmate has been treated.
- h. Photographs shall not be required pursuant to this section whenever, in the judgment of the Designated Person, the taking of photographs would endanger the safety of Security Staff or Inmates, or the security of Donaldson. In cases where photographs are not taken, the Designated Person shall note the reason in the Incident Report.

39. **Criteria for use of force investigation.** In reviewing use of force Incident Reports and/or in otherwise investigating allegations of use of excessive or unnecessary force, and consistent with ADOC and Donaldson regulations, the Warden and/or other supervisory personnel shall consider the criteria listed below:

- a. whether the level or amount of force actually used appeared to be inconsistent or disproportionate to the level of resistance or threat presented by the Inmate;
- b. whether the injuries sustained by the Inmate required care by an outside medical provider as determined by a licensed medical professional;
- c. whether the Inmate sustained injuries not explained by Officer reports;
- d. whether hard impact strikes were delivered to an Inmate's head, neck, groin, kidney area, or spine;
- e. whether Officer reports appear to be incomplete, inconsistent, or conflicting regarding the force applied;
- f. whether Officers used prohibited or unauthorized weaponry;
- g. whether Officers used prohibited techniques;
- h. whether Officers used authorized weaponry improperly;
- i. whether Officers used hard impact strikes to a cuffed subject; and
- j. whether the Inmate involved in a Use of Force incident received medical attention.

40. **Referral of use of force incidents to I&I Division.** If any of the criteria listed in ¶ 39 are met, the Warden shall refer the matter to the I&I Division pursuant to Administrative Regulation 300 § (V)(F)(4). If an Inmate is transported to an off-site medical provider for treatment or diagnosis of injuries sustained or allegedly sustained during a use of force incident, the warden shall refer the incident to the I&I Division for investigation.

41. **Criteria for use of force investigation.** When a correctional security officer or warden conducts an investigation into a use of force incident or an alleged incident of excessive/unnecessary force, his or her findings shall be documented in writing.

## **VI. PROVISION OF INFORMATION TO PLAINTIFFS' COUNSEL**

42. Defendants shall provide Plaintiffs' counsel with the following documents on the first day of each month for the duration of the Agreement: (a) All Incident Reports documenting use of force, alleged use of force, assaults with or without a weapon, fighting with or without a weapon, sexual assaults or alleged sexual assaults; (b) All I&I investigative reports pertaining to

the matters described in ¶ 42(a) above for Donaldson that have been closed within the preceding month; (c) all logs required to be maintained under this Agreement; (d) a list of recovered contraband or Incident Reports documenting recovered contraband; (e) unredacted staffing rosters for the 1<sup>st</sup> and 15<sup>th</sup> day of the preceding month showing the number of officers who actually reported for duty and where they were assigned. Production of such records shall be subject to the Protective Order (Doc. 59) entered in this action.

43. The parties agree that should Defendants fail to comply with the preceding paragraph, Plaintiffs may ask the Court to remove this case from its administrative docket and restore this case to the Court's active docket for resolution of any dispute arising under ¶ 42. Such a motion will not relieve the parties of their obligations to produce the documents described in ¶ 42. Prior to approaching a court for such relief, Plaintiffs' counsel will make a good faith effort to confer with Defendants to resolve the issue.

## **VII. ATTORNEYS' FEES AND COSTS**

44. ADOC shall pay Plaintiffs' counsel \$66,860.10 within 30 days of their execution of this Agreement as reimbursement for any and all claims for costs and fees as of the date of this Agreement associated with Plaintiffs' prosecution of the Lawsuit. By their signatures to this Agreement, Plaintiffs' counsel waive any further or additional claim for litigation costs, attorney fees, reimbursement or the like associated with the prosecution of the Lawsuit as of the date of this Agreement and release Defendants, ADOC and any other person or entity from any claim of attorney fees, litigation costs, reimbursement or the like Plaintiffs or their counsel may have, or claim to have, in connection with the prosecution of the Lawsuit as of the date of this Agreement by Plaintiffs or their counsel.

By their signatures to this Agreement, Defendants waive any claim for litigation costs, attorney fees, reimbursement or the like associated with the defense of the Lawsuit as of the date of this Agreement and release Plaintiffs and Plaintiffs' counsel from any claim of attorney fees, litigation costs, reimbursement or the like Defendants or their counsel may have, or claim to have, in connection with the defense of the Lawsuit as of the date of this Agreement by Defendants or their counsel.

## **VIII. MISCELLANEOUS PROVISIONS**

45. **Best efforts.** All parties agree to exercise their best efforts and take all reasonable steps necessary to effectuate this Agreement. The parties commit to open and timely communication about issues that arise with regard to implementation of this Agreement.

46. **Dissemination of this Agreement to Security Staff:** Defendants shall educate and inform their employees, assigns, and successors regarding the contents of this Agreement. Defendants shall post a summary of the material points of this Agreement.

47. **Availability of this Agreement to prisoners:** Defendants shall maintain copies of this Agreement in Donaldson's law library and/or make the same available on Donaldson's law library computers for the duration of this Agreement.



48. **No waiver of privilege.** Nothing in this Agreement, or undertaken pursuant to this Agreement, constitutes or is intended to constitute a waiver of any applicable privilege.

49. **Entire Agreement.** This Agreement represents the entire agreement by and among the parties as to the claims in this case and no agreement entered into at any time, nor any written agreement entered into prior to the execution of this Agreement, shall be deemed to exist or bind the parties, or to vary the terms and conditions contained herein, or to determine the meaning of any provisions therein.

50. **Mutual exclusivity of provisions.** If any provision of this Agreement is declared invalid, illegal, or unenforceable in any respect, the remaining provisions shall remain in full force and effect, unaffected and unimpaired.

51. **Persons bound.** This Agreement shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors and assigns.

52. **Applicable Law.** This Agreement shall be governed by the laws of the State of Alabama as to interpretation, construction, and performance.

#### **IX. STIPULATION OF DISMISSAL AND EXECUTION OF THE AGREEMENT**

53. Upon execution of the Agreement, the parties will jointly move the Court to stay the Lawsuit and place the Lawsuit on the Court's administrative docket until March 28, 2012.

54. The parties shall perform their respective obligations and duties under this Agreement beginning on the Effective Date. The parties agree to make a good faith effort to confer regarding any dispute that arises under the Agreement and mediate any dispute that arises under this Agreement. Counsel will make good faith efforts to mediate any dispute in a timely manner.

55. At any time prior to March 28, 2012, Plaintiffs may file a motion requesting that this case be restored to the Court's active docket for such proceedings as the Court deems necessary and appropriate.

56. If the Plaintiffs do not file the motion described in the preceding paragraph within the prescribed time, or if the motion is filed but the Court finds after an evidentiary hearing that there is no current and ongoing violation of Plaintiffs' rights or current violations of the Agreement, the case will be dismissed without prejudice.

57. The Court will retain jurisdiction of the case until it is finally dismissed pursuant to the terms of this Agreement.

58. The parties hereto, by and through counsel, with full and complete authority, have caused this Agreement to be properly executed as of the date last executed below.

Samuel Geraghty  
One of the Attorneys for Plaintiffs

Date: April 19, 2011

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