UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CODY BARNETT, et al.,

Plaintiffs/Petitioners,

Case No. 0:20-cv-61113-WPD

v.

GREGORY TONY,

Defendant/Respondent.
/

JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF CLASS NOTICE AND INCORPORATED MEMORANDUM OF LAW

CONTENTS

Plaintiffs and Defendant, Gregory Tony, by and through their respective undersigned counsel, jointly and respectfully move this Court for preliminary approval of the settlement reached in the above-captioned matter.[1] For the reasons set forth below, the settlement is fair, reasonable, and adequate and serves the best interests of the proposed class members. Therefore, pursuant to Rule 23, Plaintiffs and Defendant (the "Parties") request that the Court issue an Order granting preliminary approval of the Parties' proposed class settlement (the "Settlement"), preliminary certification of the settlement class (the "Class" or "Class Members") defined in the Settlement, and approval of the proposed notice (the "Notice") to the Class. Further, the Parties request that this Court appoint the undersigned counsel for Plaintiffs as Settlement Class Counsel and schedule a Fairness Hearing for the week of February 1, 2021, subject to the Court's availability and convenience.

INTRODUCTION

A. Factual Background

This litigation arises from conditions at the Broward County Jail facilities (the "Jail") during the present global COVID-19 pandemic. As this Court is well aware, COVID-19 is a serious and potentially fatal respiratory disease caused by a novel coronavirus. Around the globe, millions of people have suffered or died from COVID-19. As of November 24, 2020, in the state of Florida alone, over 944,000 people have been infected with COVID-19, and over 18,000 people have died.[2] In Broward County, over 1,620 people have died from COVID-19, and the virus has

---

[1] The Settlement is attached hereto as Exhibit 1. Capitalized terms not defined herein shall have the same definitions and meanings ascribed to them in the Settlement.

[2] *Florida Covid Map and Case Count*, N.Y. TIMES (updated Nov. 24, 2020), https://www.nytimes.com/interactive/2020/us/florida-coronavirus-cases.html?auth=login-email&login=email.

shown no signs of slowing down.[3] While progress has been made on a vaccine for COVID-19, scientists expect that any mass distribution to the public of a vaccine is still months away.[4]

Scientists worldwide accept that COVID-19 spreads from person to person through respiratory droplets and close personal contact.[5] Symptomatic persons spread the disease, but asymptomatic and pre-symptomatic persons can spread it as well.[6] COVID-19 presents an even greater risk of serious symptoms and death for those who are over 50 or have certain preexisting medical conditions.[7] Scientists have identified several potential long-term effects of a COVID-19 infection among patients who survive, including neurological damage, loss of respiratory capacity, and heart palpitations.[8]

The expert consensus is that the most effective strategy for limiting the spread of the disease is social distancing—deliberately keeping at least six feet of space between persons to avoid spreading the illness—combined with a vigilant hygiene regimen, including frequent hand

---

3 *Florida's COVID-19 Surge Sees More Than 9,000 New Cases*, SUN SENTINEL (Nov. 19, 2020), https://www.sun-sentinel.com/coronavirus/fl-ne-florida-coronavirus-deaths-cases-thursday-november-19-20201119-2dffrksvinhlbmjneyyveeyiui-story.html.

4 Arielle Mitropoulos & Sony Salzman, *COVID-19 Vaccine Still Months Away for Most Americans*, ABC NEWS (Nov. 20, 2020) ("The regular Joe is probably not going to receive a vaccine until July or August."), https://abcnews.go.com/Health/covid-19-vaccine-months-americans/story?id=74324596.

5 *How To Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION (updated Nov. 4, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.

6 *Id.*

7 *Older Adults*, CTRS. FOR DISEASE CONTROL & PREVENTION (updated Sept. 11, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html; *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL (updated Nov. 2, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html.

8 Long-Term Effects of COVID-19, CTRS. FOR DISEASE CONTROL & PREVENTION (updated Nov. 13, 2020), https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html.

washing and routine disinfecting of surfaces, and covering one's mouth and nose when around others.[9]

Correctional facilities have proven to be particularly vulnerable to COVID-19 outbreaks. Two inmates have died from COVID-19 at the Broward County Jail since the beginning of the pandemic's spread in Florida.[10] Correctional facilities are particularly susceptible to the spread of COVID-19 because their congregate settings force people incarcerated at the Jail into close contact with each other and prison staff, including corrections officers. (Compl. ¶¶ 60, 64.) Some of the housing units in the Jail are multiple-person cells holding up to six people, while others are separated by low walls. (Compl. ¶ 76.) Further, any time prisoners are outside their cells, they share physical space and surfaces with all other members of the housing unit in common areas.

It is difficult for incarcerated people to achieve the recommended social distancing needed to effectively prevent the spread of COVID-19. They share or touch objects used often by others and cleaned infrequently. In addition to eating, sleeping, recreating, and living close to each other, they must share bathroom facilities: showers, toilets, and sinks. Additionally, incarcerated people "have a higher prevalence of infectious and chronic disease and are in poorer health than the general population, even at young ages."[11] (*See* Compl. ¶ 60.) Many of these illnesses, such

---

9 *How To Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION (updated Nov. 4, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.

10 Amanda Batchelor & Ian Margol, *Inmate Diagnosed with Coronavirus Had Emergency Motion Filed for Release Prior to his Death*, LOCAL10 (Apr. 9, 2020), https://cutt.ly/jyV1Oi4; Wayne K. Roustan, *Broward Jail Inmate Died of COVID-19, Medical Examiner Says*, SUN SENTINEL (Nov. 21, 2020), https://www.sun-sentinel.com/local/broward/fort-lauderdale/fl-ne-covid-inmate-death-20201121-2p333b44cjhilhv56mnmgqrfmi-story.html.

11 CENTERS FOR DISEASE CONTROL, CS 316182-A, INTERIM GUIDANCE ON MANAGEMENT OF CORONAVIRUS DISEASE 2019 (COVID-19) IN CORRECTIONAL AND DETENTION FACILITIES (Mar. 27, 2020), https://cutt.ly/LyVWfed ("Note that incarcerated/detained populations have higher

as hypertension, asthma, diabetes, and chronic kidney disease, are associated with more severe cases of COVID-19 and poorer outcomes, including death.

Public health experts have issued guidance in light of the extraordinary risk COVID-19 poses to those in correctional facilities. The Centers for Disease Control's ("CDC") COVID-19 guidance documents for correctional facilities recommend, among other things, social distancing to increase space between incarcerated people to six feet.[12] Because regular, frequent hand washing is vital for limiting the spread of COVID-19, they also establish that prisons should "[p]rovide a no-cost supply of soap to incarcerated/detained persons, sufficient to allow frequent hand washing." They further provide that doorknobs, light switches, sink handles, countertops, toilets, toilet handles, recreation equipment, kiosks, and telephones be cleaned "several times a day."

B. Procedural Background

On June 5, 2020, Plaintiffs, for themselves and proposed Class Members confined at the Broward County Jail, filed a complaint and habeas petition alleging that the fact and conditions of their confinement violated their rights under the Eighth and Fourteenth Amendments, the Americans with Disabilities Act, and the Rehabilitation Act. Plaintiffs sued the Sheriff of Broward County, Florida, Gregory Tony ("Defendant"), in his official capacity, seeking remedies to address alleged substantial risks of their contracting the COVID-19 virus and of suffering serious illness or death should they contract the virus.

---

prevalence of infectious and chronic diseases and are in poorer health than the general population, even at younger ages.").

12 *Id.*

Plaintiffs also filed a motion for temporary restraining order and preliminary injunction (the "TRO Motion"), accompanied by forty-four declarations from prisoners at the Jail and two expert declarations, seeking: identification of all medically vulnerable prisoners and prisoners with disabilities, as defined in the TRO Motion; release for medically vulnerable inmates; a housing plan to maximize social distancing; education of prisoners about COVID-19 symptoms and ways to prevent its spread; more frequent and regular temperature checks and symptom-screenings; increased testing for the novel coronavirus; cohorting of newly admitted arrestees at the Jail; contact tracing; adequate personal protective equipment, hygiene, and cleaning supplies for prisoners; and waiver of co-pays and charges for medical/sick calls during the COVID-19 pandemic. (Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction and Incorporated Memorandum of Law, *Barnett* v. *Tony*, No. 20-cv-61113 (S.D. Fla. June 25, 2020), ECF Doc. Nos. 17-18.)

Upon filing the Complaint, counsel for both sides immediately entered into settlement negotiations. Although Defendant has at all times vigorously contested the allegations in the Complaint and denied wrongdoing, because the Parties agreed to seek a stay of proceedings to pursue settlement, Defendant did not file a response or opposition to the Complaint or the TRO Motion. In conjunction with the stay, Defendant agreed to provide certain discovery about current conditions at the Jail and COVID-19 testing results and to take certain additional steps to mitigate the spread of COVID-19 in the Jail while the parties engaged in settlement discussions. (Joint Motion for a Temporary Stay of Proceedings, *Barnett* v. *Tony*, No. 20-cv-61113 (S.D. Fla. June 25, 2020), ECF No. 20.) Aided by the ongoing discovery, the Parties engaged in months of intensive negotiations and have now reached the proposed Settlement.

C. Terms of the Settlement

This Settlement ensures all Class Members will have access to adequate personal protective equipment, hygiene supplies, and medical care; that Class Members, especially medically vulnerable Class Members, will be able to maintain the recommended social distance from other detainees when possible, now and throughout the remaining course of the pandemic. The terms of the Settlement are detailed in the Agreement, attached hereto as Exhibit 1. The following is a summary of the material terms of the Settlement.

1. The Settlement Class

The Settlement Class is defined in the Settlement as "persons who are being, or will be, confined in the Broward County Jail at any time while the Agreement remains in effect, including any facilities where the Defendant may in the future confine persons." The Settlement Class includes but is not limited to persons who are "Medically Vulnerable," defined in the Settlement as "persons 65 years of age and over, persons who are both age 50 and over and who are hypertensive, and persons of any age who suffer from certain underlying medical conditions which the CDC has determined are at an increased risk of severe illness from COVID-19."[13]

[13] The Centers for Disease Control and Prevention has determined that persons who suffer from following underlying medical conditions are at an increased risk of severe illness from COVID-19: (a) cancer, (b) chronic kidney disease, (c) chronic obstructive pulmonary disease ("COPD"), (d) heart conditions, (e) immunocompromised state (weakened immune system) from solid organ transplant, (f) obesity, (g) severe obesity, (h) sickle cell disease, (i) smoking, (j) Type 2 diabetes mellitus, and (k) pregnancy. *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL (updated Nov. 2, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html.

2. New Arrestees and the Jail's Admissions Procedures

The Settlement[14] addresses temperature and COVID-19 symptom checks consistent with CDC guidance at intake/booking; social distancing of at least six feet in intake holding cells and other areas where newly admitted persons are held before their transfer to Jail facilities, where possible; the provision of face coverings to newly admitted prisoners before entering the booking area; that no one shall spend more than six (6) hours in the booking area; and that staff shall wear face coverings and gloves in the booking area while within six feet of prisoners.

3. Housing and Social Distancing

To help prevent the spread of COVID-19 in the housing areas of the Broward County Jail and to allow the Class to better protect themselves from the risks associated with the spread of COVID-19 in the housing areas of the Broward County Jail, the Settlement addresses the identification of all persons who are vulnerable to serious illness or death because of COVID-19 infection, including all medically vulnerable persons; the housing of all medically vulnerable persons so they can maintain social distancing of at least six feet from others when possible and in a non-punitive setting in single cells, or, at a minimum, not in cells with other prisoners whose COVID-19 status is unknown or with those who have pending tests or who are symptomatic; a housing plan that would allow, where possible, prisoners to maintain six feet of social distance from others while in their cells (including implementation of head-to-foot sleeping) and common areas, including dayrooms, dining areas, recreation areas, and bath and shower rooms; and the

[14] The parties dispute whether the Sheriff had been performing certain protocols and procedures addressed in the Settlement prior to commencement of the instant litigation, and their respective positions are reflected in that Agreement. However, because these factual disputes are not material to the Court's review of the Settlement for preliminary approval purposes and because the parties are submitting this motion jointly, the summary of the Settlement's terms here does not include discussion of these differences.

laying out of tape markers at six-foot increments in areas where persons are required to line up or congregate for medications, security searches of cells and housing units, recreation, and food service.

The Settlement addresses the housing of persons who test positive for COVID-19 in medical isolation in individual cells in separate housing units, not in cells or on tiers with non-positive, test-pending, or symptomatic persons; the housing of symptomatic persons in medical isolation in individual cells in separate housing units, not in cells or on tiers with positive or other symptomatic persons; and the restriction of the transfer of prisoners from other jurisdictions and within the Jail facilities, unless necessary as detailed in the Settlement.

4. Screening, Testing, and Contact Tracing

The Settlement addresses the testing of all of the following for COVID-19 infection: (1) prisoners and staff who display symptoms; (2) prisoners who are exposed to a person who has tested positive for COVID-19; and, (3) prisoners who are medically vulnerable persons and who have been incarcerated for a minimum of 72 hours, except where such person meets the criteria for testing as outlined in ¶¶ 43(1) and 43(2) of the Settlement. The Settlement also addresses the identification of persons who came into contact with others (staff or prisoners) who test positive or are symptomatic and apply clinically appropriate cohorting, quarantining, and medical isolation procedures; the clinical monitoring of persons who are quarantined or medically isolated for known or suspect exposure to COVID-19, including conducting twice-daily temperature checks, symptom screening, and pulse-oxygenation testing; and no-cost vaccinations for seasonal influenza ("flu shots") to all prisoners to the extent Defendant's medical vendor is able to procure such vaccinations.

5. Quarantining, Cohorting, Medical Isolation, and Medical Care

The Settlement addresses CDC-compliant cohorting, quarantining, and medical isolation procedures for those who test positive, who are symptomatic, or those who have come into close contact with such persons, including Jail staff. The Settlement addresses the cohorting of newly admitted persons for 14 days in separate housing units and the monitoring of them on a daily basis for COVID-19 infection before they are transferred to units in other Jail facilities, except for prisoners who require mental health or medical services necessitating their being moved to the infirmary, where they will thereafter be cohorted for 14 days.

To encourage the reporting of COVID-19 symptoms and potential cases, the Settlement addresses the waiver of all co-payments for sick calls for any individual reporting COVID-19 related symptoms, such as fever, cough, diarrhea, aches, or breathing difficulties, and that all routine medical appointments shall include CDC-compliant COVID-19 symptom screening and temperature checks.

6. PPE, Cleaning and Disinfecting Procedures, and Personal Hygiene Supplies

The Settlement addresses the provision to prisoners of two face coverings that can be used as well as sanitized or replaced per manufacturers' instructions; the provision to Jail staff of face coverings and other PPE and supplies appropriate to their duties in the Jail as recommended by CDC Guidance; and the provision to prisoners of sufficient CDC-compliant equipment and supplies to clean and disinfect their cells, dayrooms, and common areas and surfaces on a daily basis and throughout the day.

7. Education and Transparency

The Settlement addresses instructing prisoners on the latest CDC and other public health guidance on COVID-19, including best practices about preventing COVID-19 infection and

transmission, including instruction in a manner adequate for Class Members with low literacy or for whom English is not their primary language. The Settlement addresses the tracking of and reporting upon statistics and other data concerning COVID-19 infection and transmission in the Jail.

8. Monitoring

Plaintiffs and their retained experts are entitled to conduct reasonable monitoring of the Jail's compliance with this Agreement including the right to inspect the Jail, interview staff and Class Members, request and receive documents and information while off-site, review and receive copies of relevant records, and observe practices related to compliance with the provisions of this Agreement. All recorded images from inside the Jail shall be subject to review by Defendant, who has the right to object on security grounds to the introduction of any such images into the public record, and may provide Plaintiffs with redacted images of such recordings.

9. Expiration of Settlement

The Settlement shall expire in its entirety upon the earliest of: (1) twelve (12) months from the date of final approval of the Agreement if the COVID-19 emergency orders ("Emergency Orders") for both the State of Florida and Broward County have been lifted as of that date; (2) subsequent to twelve (12) months from the date of final approval of the Agreement but before fifteen (15) months from the date of final approval of the Agreement on any date when the Emergency Orders are lifted; or (3) fifteen (15) months from the date of final approval of the Agreement.

D. The Settlement Is Fair, Reasonable, and Adequate, and the Class Satisfies Rule 23's Requirements.

The proposed Settlement is fair, reasonable, and adequate. The Settlement is detailed and puts in place a variety of specific mitigation measures to improve COVID-19-related

sanitation, hygiene, and medical monitoring at every Jail facility. The Settlement entitles Plaintiffs and their retained experts to conduct reasonable monitoring of the Jail's compliance with the Settlement, including the right to inspect the Jail, interview staff and Class Members, request and receive documents and information while off-site, review and receive copies of relevant records, and observe practices related to compliance with the provisions of the Settlement. Finally, the Settlement provides for a dispute resolution procedure in front of this Court in the event of Defendant's non-compliance with the measures in the Settlement.

The Class described in the Settlement, moreover, satisfies all the requirements of Rule 23 for settlement purposes. And the Notice designed to communicate the Settlement to the Class satisfies all applicable requirements of law, including Rule 23 and constitutional due process.

Accordingly, the Parties seek preliminary approval of the Settlement, certification of the Class, approval of the Notice, and the setting of a schedule for the final approval process. A proposed Preliminary Approval Order for the Settlement is attached as Exhibit 2 to this motion and as Exhibit 1 to the Settlement.

ARGUMENT

A. This Court Should Grant Preliminary Approval of the Settlement.

The Parties' hard-fought and fairly negotiated Settlement satisfies the criteria for preliminary approval under Rule 23, and the proposed Class is proper. Therefore, this Court should issue an Order granting preliminary approval of the Parties' proposed class settlement, preliminary certification of the Class defined in the Settlement, and approval of the proposed notice to the Class.

1. The Legal Standard for Preliminary Approval

Rule 23(e) requires judicial approval for the compromise of claims brought on a class basis. "Such approval is committed to the sound discretion of the district court." *In re U.S.*

Oil & Gas Litig., 967 F.2d 489, 493 (11th Cir. 1992). In exercising that discretion, courts are mindful of the "strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett* v. *Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). The policy favoring settlement is especially relevant in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See, e.g.*, *Ass'n for Disabled Americans, Inc.* v. *Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002) ("There is an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex.") (citing *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)); *see also* 4 NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2002) (citing cases). "Preliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *Smith* v. *Wm. Wrigley Jr. Co.*, 2010 WL 2401149, at *2 (S.D. Fla. June 15, 2010).

In reviewing a proposed settlement for procedural fairness, "[s]ettlement negotiations that involve arm's length, informed bargaining with the aid of experienced counsel support a preliminary finding of fairness." *Almanazar* v. *Select Portfolio Servicing, Inc.*, 2015 WL 10857401, at *1 (S.D. Fla. Oct. 15, 2015); *see also* MANUAL FOR COMPLEX LITIGATION, Third, § 30.42 (West 1995) ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." (internal quotation marks omitted)).

In assessing the substance of any settlement, courts in this Circuit also look to six so-called "*Bennett*" 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 the proceedings at which the settlement was achieved." *Bennett*, 737 F.2d at 986. Courts may engage in a "preliminary evaluation" of these factors to determine whether the settlement falls within the range of reason at the preliminary approval stage. *See, e.g., Smith*, 2010 WL 2401149, at *2.

2. The Settlement Is the Product of a Good-Faith, Informed, and Arm's-Length Negotiation.

A class action settlement should be approved so long as a district court finds that "the settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Cotton*, 559 F.2d at 1330; *see also Lipuma* v. *Am. Express Co.*, 406 F. Supp. 2d 1298, 318-19 (S.D. Fla. 2005) (approving class settlement where the "benefits conferred upon the Class are substantial, and are the result of informed, arms-length negotiations by experienced Class Counsel").

The Settlement is the result of intensive, arm's-length negotiations between experienced attorneys who are familiar with class action litigation involving incarcerated persons, and with the legal and factual issues of this case. Indeed, certain counsel for Plaintiffs and counsel for Defendant have previously litigated and settled class-action matters involving the Broward County Jail. *See, e.g., Carruthers* v. *Israel*, No. 76-cv-06086 (S.D. Fla.). Counsel for both Plaintiffs and Defendant engaged in extensive, adversarial negotiations for several months, exchanging numerous proposals. The Parties' negotiations were conducted in the absence of collusion.

In negotiating this Settlement, counsel for Plaintiffs were informed by hundreds of interviews conducted with current and former inmates. Moreover, during negotiations, Defendant agreed to provide certain discovery about current conditions at the Jail and COVID-19 testing

results and to take certain steps to improve conditions in the Jail while the parties engaged in settlement discussions. (Joint Motion for a Temporary Stay of Proceedings, *Barnett* v. *Tony*, No. 20-cv-61113 (S.D. Fla. June 25, 2020), ECF No. 20.) That discovery and Defendant's agreement to institute certain testing, cohorting, quarantine, and medical co-pay policies helped provide Plaintiffs with "sufficient information to adequately evaluate the merits of the case and weight the benefits against further litigation." *Francisco* v. *Numismatic Guaranty Corp. of America*, 2008 WL 649124, at *11 (S.D. Fla. Jan. 31, 2008).

3. The Settlement Satisfies the *Bennett* Factors.

This Court may conduct a preliminary review of the *Bennett* factors to determine whether the Settlement falls within the "range of reasonableness" such that notice and a final hearing as to the fairness, adequacy, and reasonableness of the Settlement are warranted. *Almanzar*, 2015 WL 10857401, at *1. Here, the *Bennett* factors weighs in favor of approving the Settlement.

Likelihood of Success at Trial. While Plaintiffs and Settlement Class Counsel are confident in the strength of their case, they are also pragmatic in their awareness of the various defenses available to Defendant, as well as the risks inherent to litigation. Defendant maintains that Plaintiffs' constitutional rights have not been violated during their confinement in the Jail facilities during the COVID-19 pandemic, and there are significant procedural hurdles to relief through a litigated judgment. Moreover, even if Plaintiffs were successful, Defendant could seek appellate review of any decision or of the class certification, potentially delaying any remedy for the class. *See Lipuma*, 406 F. Supp. 2d at 1322 (likelihood that appellate proceedings could delay class recovery "strongly favor[s]" approval of a settlement).

This Settlement provides substantial, immediate relief to Class Members to address numerous conditions at the Jail facilities that pose a serious risk of injury or death to Plaintiffs. As

a result of the Settlement, Class Members have been assured, among other things, that they will have access to sufficient PPE, hygiene, and cleaning supplies and information about protecting themselves from COVID-19. (Settlement ¶¶ 52-61.) The Settlement ensures that, where possible, Class Members will be able to keep six feet of social distance from other detainees. (Settlement ¶¶ 36-37.) Further, as a result of the Settlement, Defendant has instituted a number of procedures meant to protect Class Members from the spread of COVID-19 in the Jail. (*E.g.*, Settlement ¶ 36 (Defendant implemented a housing plan that would allow, where possible, prisoners to maintain six feet of social distance from others while in their cells and common areas); ¶ 43 (Defendant instituted procedure to test all prisoners who are medically vulnerable and who have been incarcerated for a minimum of seventy-two (72) hours); ¶ 53 (Defendant instituted procedure to provide prisoners with two face coverings that can be used as well as sanitized or replaced per manufacturers' instructions); and ¶ 64 (Defendant instituted procedure to monitor medically vulnerable prisoners who do not meet the criteria determined for the released to have twice-daily temperature checks and other preventative measures detailed in the Settlement).) The fact is that settlement will ensure safer conditions in the Jail facilities for the Class Members far sooner than a litigated outcome. Even expedited litigation in the context of a TRO motion could take months and would involve substantial fact and expert discovery, lengthy pretrial proceedings in this Court and the appellate courts, and, ultimately, a trial and potential appeals. As COVID-19 runs rampant in Florida, Plaintiffs risk serious illness or death without the protective measures secured by the Settlement. Under the circumstances, the Parties determined that the Settlement outweighs the risks of continued litigation.

Range of Possible Recovery and the Point on or Below the Range of Recovery at Which a Settlement Is Fair. When evaluating "the terms of the compromise in relation to the

likely benefits of a successful trial . . . the trial court is entitled to rely upon the judgment of experienced counsel for the parties." *Cotton*, 559 F.2d at 1330. "Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Id.* Courts have determined that settlements may be reasonable even where Plaintiffs recover only part of the relief requested in their complaint. *See Behrens* v. *Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988) ("[T]he fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate."); *see also Ass'n for Disabled Americans, Inc.*, 211 F.R.D. at 468 (noting Plaintiffs obtained "most" of the injunctive relief they sought in the complaint). Settlement Class Counsel have a thorough understanding of the practical and legal issues they would continue to face litigating these claims against Defendant. In this case, Plaintiffs face a number of challenges to secure relief. Given the substantial benefits that the Settlement provides to Class Members and the extraordinary public health crisis that the Settlement aims to address, the Settlement is fair and represents a reasonable recovery for the Class in light of Defendant's defenses and the challenging and unpredictable path of litigation Plaintiffs would have faced absent a settlement. Moreover, the Settlement preserves the rights of Class Members to seek additional relief on an individual basis as circumstances warrant, up to and including release.

Complexity, Expense, and Duration of Litigation. The traditional means for handling claims like those at issue here would unduly tax the court system, require a massive expenditure of public and private resources, and ultimately would be impracticable in these unique circumstances. The Settlement is the best vehicle for Class Members to receive the relief to which they are entitled in a prompt and efficient manner. Ongoing litigation would involve substantial and expensive fact and expert discovery, lengthy pretrial proceedings in this Court and the

appellate courts, and, ultimately, a trial and potential appeals. Absent the Settlement, litigation would likely continue many more months, at a minimum, and given the serious risks associated with COVID-19, lengthy litigation would not serve the best interests of the Class. In short, time is of the essence here. Without the protections assured by the Settlement, the Class Members risk serious illness or even death as Florida sees a growing spike in COVID-19 cases.[15] The protections and procedures detailed in the Settlement give Class Members the best chance of protecting themselves from the spread of COVID-19 while confined to the Jail.

Stage of the Proceedings. Courts consider the stage of proceedings at which settlement is achieved "to ensure that Plaintiffs had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation." *Lipuma*, 406 F. Supp. 2d at 1324. Still, "courts favor early settlement" and "vast formal discovery need not be taken." *Id.* Further, "[i]nformation obtained from other cases may be used to assist in evaluating the merits of a proposed settlement of a different case." *Id.* at 1325.

Plaintiffs settled the Action after months of interviews with dozens of Class Members and review of certain discovery data and information from Defendant. Further, Plaintiffs were informed by publicly available reporting on the rise of COVID-19 cases in the country and Florida and other litigations across the country concerning COVID-19 conditions in other prisons and jails. Given the extraordinary circumstances of this case, review of this information and the interviews allowed Settlement Class Counsel to evaluate with confidence the strengths and

[15] Danielle Waugh, *Gov. DeSantis' Office Pledges No Lockdown in Florida as COVID Cases Spike*, WEAR-TV (Nov. 16, 2020) (noting Florida added more than 10,000 new COVID-19 cases in a single day over the November 13–November 15 weekend, "a number the state hasn't seen since the summer surge"), https://weartv.com/news/local/gov-desantis-office-pledges-no-lockdown-in-florida-as-covid-cases-spike.

weaknesses of Plaintiffs' claims and prospects for success at class certification, summary judgment, and trial. *Id*.; *see also Numismatic Guaranty Corp.*, 2008 WL 649124, at *11.

B. Preliminary Certification of the Settlement Class Is Appropriate.

To certify a settlement class, the Court must determine that the proposed class (i) satisfies the Rule 23(a) factors common to all class actions, and (ii) is one of the three proper types of class actions under Rule 23(b). *See Borcea* v. *Carnival Corp.*, 238 F.R.D. 664, 676 (S.D. Fla. 2006). Those requirements are met here.

1. Each of the Rule 23(a) Factors is Met.

Under Rule 23(a), a class action must meet four factors: "(1) the class is so numerous that joinder of all members would be impracticable; (2) there are questions of fact and law common to the class; (3) the claims or defenses of the representatives are typical of the claims and defenses of the unnamed members; and (4) the named representatives will be able to represent the interests of the class adequately and fairly." *Valley Drug Co.* v. *Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181, 1187-88 (11th Cir. 2003) (citing Fed. R. Civ. P. 23(a)). Rule 23(a)'s requirements "will be read liberally in the context of a civil rights suit." *Armstead* v. *Pingree*, 629 F. Supp. 273, 279 (M.D. Fla. 1986). The proposed class here satisfies each of the Rule 23(a) requirements.

Numerosity. The first Rule 23(a) factor requires only that the class is "so numerous that joinder of all members is impracticable." Rule 23(a)(1). Generally, a class size of greater than forty is sufficient. *See Cox* v. *Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) ("[G]enerally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors." (citations omitted)). The Settlement Class is composed of all current and future detainees at the Broward County Jail, numbering in the thousands, and well in excess of the forty-member threshold for numerosity.

Commonality. Plaintiffs satisfy Rule 23(a)(2)'s commonality requirement because "there are questions common to the class." Fed. R. Civ. P. 23(a)(2). To show commonality, class members' "claims must depend upon a common contention . . . which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 350 (2011). Commonality is a "relatively light burden" that "does not require that all questions of law and fact be common to the putative class members." *Gayle* v. *Meade*, 2020 WL 2744580, at *17 (S.D. Fla. May 22, 2020). Instead, Plaintiffs need only present a "single common question" of law or fact to satisfy Rule 23(a)(2). *Wal-Mart*, 564 U.S. at 359 (alterations and citation omitted). Commonality is generally satisfied in the civil rights context, because "[a] broad based allegation of civil rights violations typically presents common questions of law and fact." *Lawson* v. *Wainwright*, 108 F.R.D. 450, 455 (S.D. Fla. 1986) (citation and quotation marks omitted).

This action raises a number of issues common to all Class Members, including whether Defendant's policies and practices around COVID-19, as applied to all members of the putative Class, violated Class Members' statutory and constitutional rights. This case thus comfortably fits into the long line of cases finding the commonality requirement "satisfied by proof of the existence of systemic policies and practices that allegedly expose putative class members to a substantial risk of harm." *Groover* v. *Prisoner Transportation Services, LLC*, 2018 WL 6831119, at *10 (S.D. Fla. Dec. 26, 2018) (collecting cases); *see also Gayle*, 2020 WL 2744580, at *17 ("Common questions also circle on the (in)adequacy of ICE's policies and practices governing the conditions of confinement, including ICE's failure to follow CDC Guidelines.").

Typicality. Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class," meaning the named plaintiffs "possess

the same interest and suffer the same injury as the class members." *East Texas Motor Freight System Inc.* v. *Rodriguez*, 431 U.S. 395, 403 (1977) (quotation marks and citations omitted). Named plaintiffs' and the purported class's claims "need not be identical to satisfy the typicality requirement." *Ault* v. *Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012); *see also Kornberg* v. *Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) ("A factual variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class."). Rather, typicality is satisfied "if the claims or defenses of the class and the class representatives arise from the same event or pattern or practice and are based on the same legal theory." *Ault*, 692 F.3d at 1216 (quotation marks and citation omitted).

The typicality requirement is satisfied here because "[a]ll claims in this class action arise from the same policy." *Ault*, 692 F.3d at 1216-17. Specifically, the named Plaintiffs in this case challenge Defendant's COVID-19 policies and procedures at the Broward County Jail, which are applicable to all Class Members. *See Gayle*, 2020 WL 2744580, at *21 ("Here, the proposed class members have suffered the same injury because they are subject to the same confinement under the same allegedly unconstitutional conditions caused by the same purported deliberate indifference by the same entity (i.e., ICE) which is exposing them to the same risk of developing COVID-19.").

Adequacy. The final requirement under Rule 23(a) is satisfied because the named plaintiffs will—and, indeed, already have—adequately and fairly represented all members of the purported class. The adequacy requirement "encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Valley Drug Co.*, 350 F.3d at 1189 (citation

and quotation marks omitted). As to the first inquiry, a substantial conflict of interest will arise only where "some party members claim to have been *harmed* by the same conduct that *benefitted* other members of the class." *Grimes* v. *Fairfield Resorts, Inc.*, 331 F. App'x 630, 633 (11th Cir. 2007) (citation omitted). As to the second inquiry, courts ask whether the class representatives "will vigorously prosecute the interests of the class through qualified counsel." *Piazza*, 273 F.3d at 1346.

On the first inquiry, named Plaintiffs and all purported Class Members have suffered the same alleged harm with regard to the conditions around COVID-19, and there are no named Plaintiffs or unnamed purported Class Members who have benefited from those conditions. *See Ga. Advocacy Office* v. *Jackson*, 2019 WL 8438491, at *7 (N.D. Ga. July 30, 2019) (adequacy requirement met where "Plaintiffs have stated that there are no known conflicts, and the Court f[ound] no conflict based on the matters presented by Defendant and otherwise [wa]s aware of no fundamental conflict of interest between counsel, the class representatives, and the class"). They will therefore all benefit from the relief named Plaintiffs are pursuing in this litigation and from the Settlement.

As to the second inquiry, named Plaintiffs have vigorously prosecuted this action through counsel, who have filed a detailed complaint and preliminary injunction motion well-supported by voluminous evidence and legal authority. Class counsel have also worked to negotiate a settlement agreement with Defendant that stands to benefit all purported Class Members. In addition, the named Plaintiffs' claims have been prosecuted by counsel well qualified in civil rights cases, including substantial experience litigating civil rights actions on behalf of detainees. Therefore, the adequacy requirement is satisfied.

2. Plaintiffs Meet the Requirements of Rule 23(b)(2)

A class may be maintained under Rule 23(b)(2) where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." For purposes of Rule 23(b)(2), "[t]he focus thus is on the nature of Plaintiffs' claims, minimizing the need to scrutinize evidence that will be adduced to support the claims." *Anderson* v. *Garner*, 22 F. Supp. 2d 1379, 1382 (N.D. Ga. 1997) (citations omitted).

Civil rights cases like this one are "prime examples" of Rule 23(b)(2) cases, *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 614 (1997), because "[t]he key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them," *Wal-Mart*, 564 U.S. at 360 (quotation marks and citation omitted). That includes civil rights cases brought on behalf of incarcerated individuals. *See Braggs* v. *Dunn*, 317 F.R.D. 634, 667 (M.D. Ala. 2016) ("Rule 23(b)(2) has been liberally applied in the area of civil rights, including suits challenging conditions and practices at various detention facilities." (quotation marks and citations omitted)). Where conditions at a correctional facility reflect "systemwide deficiencies," such "system-wide relief" is appropriate. *Id.* (quoting *Brown* v. *Plata*, 563 U.S. 493, 532 (2011).

As applied here, named Plaintiffs, on behalf of the Class, are seeking and have negotiated with Defendant for class-wide relief to address "systemic deficiencies that create a substantial risk of serious harm," which is a "well recognized" challenge in the context of jails and prisons. *Braggs*, 317 F.R.D. at 668; *see also Anderson*, 22 F. Supp. 2d at 1384 ("[T]he Court observes that numerous courts presented with facts [relating to excessive force] have certified class actions pursuant to Rule 23(b)(2) and issued injunctive orders that governed the conduct of prison

officials." (collecting cases)); *Ga. Advocacy Office*, 2019 WL 8438491, at *7 (holding "it [w]as apparent that injunctive relief can be addressed to the class as a whole" in class action challenging conditions of confinement and discrimination in provision of programs and activities). Thus, this class action can be maintained under Rule 23(b)(2).

C. Undersigned Counsel Should Be Appointed Class Counsel Under Rule 23(g).

When a class is certified, the court must also appoint class counsel under Rule 23(g)(1). In assessing whether counsel is qualified to represent the class, the court must consider:

> (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). All of those factors weigh in favor of appointing the undersigned as class counsel here. They include experienced and dedicated lawyers from the ACLU Foundation of Florida, American Civil Liberties Union Foundation, American Civil Liberties Union National Prison Project, Disability Rights Florida, Inc., and Sullivan & Cromwell LLP. These lawyers have experience litigating complex civil rights class action lawsuits in federal court, concerning both prisoner rights and disability rights. Undersigned counsel have also conducted a thorough investigation concerning conditions at the Broward County Jail as they relate to COVID-19, including interviewing dozens of inmates and consulting with qualified experts. Further, the undersigned have sufficient financial and human resources to litigate this matter and are prepared to "fairly and adequately represent the interests of the class," Fed. R. Civ. P. 23(g)(1)(B), as they have already done in negotiating the proposed settlement. Therefore, the Court should appoint the undersigned as class counsel.

D. The Court Should Approve the Proposed Settlement Class Notice.

"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 regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." MANUAL FOR COMPL. LITIG., § 21.312 (internal quotation marks omitted). The best practicable notice is that which is "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." *Mullane* v. *Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). To satisfy this standard, "[n]ot only must the substantive claims be adequately described but the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action." *Twigg* v. *Sears, Roebuck & Co*., 153 F.3d 1222, 1227 (11th Cir. 1998) (internal quotation marks omitted); *see also* MANUAL FOR COMPL. LITIG., § 21.312 (listing relevant information).

The proposed Notice, attached hereto as Exhibit 3, satisfies all of these criteria. As recited in the Settlement and above, the Notice will inform Class Members of the substantive terms of the Settlement, and will direct them where to obtain additional information about the Settlement. Importantly, the Notice will be available in English, Creole, and Spanish. *See Saccoccio* v. *JP Morgan Chase Bank, N.A.*, 2013 WL 10847126, at *2 (S.D. Fla. Oct. 4, 2013) (finding a Spanish translation of the English-language version of the notice is "the best practicable notice under the circumstances and is reasonably calculated, under all the circumstances, to apprise the Settlement Class Members of the pendency of this Action"). The Court should therefore approve the Notice.

E. The Court Should Schedule a Fairness Hearing.

The last step in the Settlement approval process is a Fairness Hearing, at which the Court will hear all evidence and argument necessary to make its final evaluation of the Settlement.

Proponents of the Settlement may explain the terms and conditions of the Settlement, and offer argument in support of final approval. The Court will determine at or after the Fairness Hearing whether the Settlement should be approved, whether to enter a final order and judgment under Rule 23(e), and whether to approve Class Counsel's application for attorneys' fees and reimbursement of costs and expenses.

Plaintiffs request that the Court schedule the Fairness Hearing during the week of February 1, 2021, if that is convenient for the Court. Plaintiffs will file their motion for final approval of the Settlement, no later than fourteen (14) days prior to the Fairness Hearing.

CONCLUSION

For the reasons stated above, the Parties respectfully move, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for this Court to issue an Order granting preliminary approval of the Parties' Settlement, preliminary certification of the Class defined in the Settlement, and approval of the proposed Notice to the Class. Further, the Parties request that this Court appoints the undersigned counsel as Settlement Class Counsel and schedules a Fairness Hearing during the week of February 1, 2021, subject to the Court's availability and convenience.

Dated: December 15, 2020

Respectfully submitted,

/s/ *Michael R. Piper*
Michael R. Piper
Florida Bar No. 710105
JOHNSON, ANSELMO, MURDOCH,
BURKE, PIPER & HOCHMAN, P.A.
2455 E. Sunrise Blvd., Suite 1000
Fort Lauderdale, FL 33304
Telephone: (954) 463-0100
piper@jambg.com

Attorney for Defendant

/s/ *Benjamin James Stevenson*
Benjamin James Stevenson
Florida Bar. No. 598909
ACLU FOUNDATION OF FLORIDA
3 W. Garden St., Suite 712
Pensacola, FL 32502-5636
Telephone: (786) 363-2738
bstevenson@aclufl.org

Jacqueline Nicole Azis
Florida Bar No.101057
ACLU FOUNDATION OF FLORIDA
4023 N. Armenia Ave., Suite 450
Tampa, FL 33607
Telephone: (786) 363-2708
jazis@aclufl.org

Daniel Tilley
Florida Bar No. 102882
ACLU FOUNDATION OF FLORIDA
4343 W. Flagler St., Suite 400
Miami, FL 33134
Telephone: (786) 363-2714
dtilley@aclufl.org

Anjana Samant (*pro hac vice*)
Steven M. Watt (*pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 18th Fl.
New York, NY 10004
Telephone: (212) 549-2500
asamant@aclu.org
swatt@aclu.org

Eric Balaban (*pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION
NATIONAL PRISON PROJECT
915 15th St., N.W.
Washington, D.C. 20005
Telephone: (202) 393-4930
ebalaban@aclu.org

Curtis Filaroski
Florida Bar. No. 111972
Kathryn Strobach
Florida Bar No. 670121
DISABILITY RIGHTS FLORIDA, INC.
1000 N. Ashley Drive, Suite 640
Tampa, FL 32308
Telephone: (850) 488-9071
curtisf@disabilityrightsflorida.org
kathryns@disabilityrightsflorida.org

Suhana S. Han (*pro hac vice*)
Akash M. Toprani (*pro hac vice*)
SULLIVAN & CROMWELL LLP
125 Broad St.
New York, NY 10004
Telephone: (212) 558-4000
hans@sullcrom.com
toprania@sullcrom.com

James H. Congdon (*pro hac vice*)
SULLIVAN & CROMWELL LLP
1700 New York Ave NW
Washington, DC 20006
Telephone: (202) 956-7500
congdonj@sullcrom.com

Attorneys for Plaintiffs/Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed via CM/ECF and served on all counsel of record via electronic notices generated by CM/ECF on December 15, 2020.

/s/ *Benjamin James Stevenson*
Benjamin James Stevenson
Florida Bar. No. 598909
ACLU FOUNDATION OF FLORIDA
3 W. Garden St., Suite 712
Pensacola, FL 32502-5636
Telephone: (786) 363-2738
bstevenson@aclufl.org