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August 18, 2023

By ECF

Hon. Peggy Kuo
United States Magistrate Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Scott et al. v. United States of America, 19-cv-01075 (ERK) (PK)

Dear Judge Kuo:

We are counsel to Plaintiffs in the above captioned matter and write on behalf of all parties to request the Court stay this case for 8 months to permit the parties to implement the terms of a proposed settlement framework that the parties memorialized on August 17, 2023 (the “Proposed Settlement”), as set forth in the Proposed Settlement Framework attached hereto as Exhibit A.

I. Procedural Background

Plaintiffs David Scott and Jeremy Cerda filed this case on February 22, 2019 individually and on behalf of approximately 1,600 individuals who were incarcerated in the Metropolitan Detention Center (“MDC”) in Brooklyn, New York from January 27, 2019 until February 3, 2019 when the MDC experienced a power outage. ECF No. 1. The operative Complaint alleges a claim for negligence under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b), 2671 et seq., against the United States of America (the “Government”).

After Rule 12(b)(6) motion practice, Plaintiffs’ *Bivens* claims were dismissed and Plaintiffs’ FTCA claim proceeded to discovery. ECF No. 95, ECF Entry dated Mar. 22, 2021. On May 25, 2021, this Court granted Plaintiffs’ motion to certify a class of “all those people who were confined in the Metropolitan Detention Center’s West Building from January 27, 2019 until February 3, 2019, and who have or will in the future have satisfied the exhaustion requirement

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imposed by 28 U.S.C. § 2675.” ECF No. 134, at 27. The parties then conducted document discovery and depositions for the next two years.

After substantial discovery was completed, the parties agreed to make efforts to mediate the case with the assistance of former Magistrate Judge Steven M. Gold. On August 19, 2022, the Court granted the parties an extension of time to complete discovery while they engaged in settlement discussions. ECF No. 197, ECF Entry dated Aug. 19, 2022. Several other subsequent extension requests were made and granted while the parties continued negotiations and private mediation with Judge Gold. *See* ECF Entries dated Oct. 17, 2022, Jan. 17, 2023, Feb. 21, 2023, Mar. 21, 2023, Apr. 19, 2023, May 18, 2023, June 13, 2023, and July 21, 2023.

II. Settlement Framework

The parties have now reached agreement on a proposed settlement framework, the complete terms of which are set forth in Exhibit A.

The Proposed Settlement involves the payment of a negotiated settlement amount by the Government to each of the nearly 1600 individuals who were incarcerated in the MDC during the 2019 power outage, in exchange for a release of their claims. Under the Proposed Settlement, Plaintiffs (or “Claimants”) will be offered a settlement payment as follows:

- (1) 945 Claimants who submitted valid, timely administrative claims to the Bureau of Prisons will be offered \$8,750, inclusive of attorney’s fees of 20% and costs, to resolve their claims. *See* Ex. A, Tab A.¹
- (2) 69 Claimants listed who submitted valid, timely administrative claims and claim medical conditions that went untreated during the power outage resulting in injury will be offered \$17,500, inclusive of attorney’s fees of 20% and costs, to resolve their claims. *See* Ex. A, Tab B.
- (3) 554 Claimants who submitted claims after February 3, 2021, or whose administrative claims were denied more than six months before the amended class complaint was filed on November 15, 2019, will be offered \$2,500, inclusive of attorney’s fees of 20% and costs, to resolve their claims. *See* Ex. A, Tab C.

In addition, Named Plaintiffs Scott and Cerda will be offered \$18,750, inclusive of attorney’s fees and costs not to exceed \$1,750, to resolve their claims.²

Out of the settlement amounts each Claimant will be offered under this framework, on consent of the Government, Plaintiffs’ counsel will seek authorization from the

¹ To protect the privacy of individual claimants, the lists of claimants set forth at Tabs A, B, and C of this document are not being filed on the public docket but they are available for the Court’s *in camera* review should the Court wish to review them.

² The tentative settlement offers proposed in the settlement framework, if accepted, also would resolve the three extant related matters, *Dobey v. United States*, 21-cv-4178, *Lambus v. United States*, 21-cv-5446, and *O’Neal v. United States*, 19-cv-5039, which were consolidated with *Scott v. United States* and administratively closed.

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Court to receive an award of attorneys' fees in connection with their work on behalf of Claimants not to exceed 20%. *See* 28 U.S.C. § 2678. Ex. A at Tabs D and E.

To accept the above settlement amounts, each Claimant must execute and return to the United States a release. *See* Ex. A, Tab D. This release describes the terms of the Proposed Settlement including Plaintiffs' Counsel's intention to seek a Court order authorizing the payment of attorneys' fees in connection with their work on behalf of Claimants.

Plaintiffs' counsel will retain an administrator to assist in locating Claimants and notifying them about the settlement offers and the terms of the proposed release.³ After the settlement offers and releases are mailed out to Claimants, Claimants will have six months from the date of mailing to respond. Ex. A at E.4.

The Proposed Settlement includes certain minimum acceptance and maximum rejection target thresholds—*i.e.*, absent agreement to the contrary by the parties, the agreement will be null and void unless at least 425 of the 1,014 Claimants in Tabs A and B accept the settlement amount, and no more than 40 of those Claimants reject it. Ex. A at H.1.

Within 21 days after the six-month period for Claimants to respond to the offers communicated under Section E, the Government will file a motion with the Court for decertification of the class, apprising the Court of the parties' good faith efforts made to locate all Claimants and offer them settlement awards, and advising the Court of the number of Claimants who accepted and rejected the offers. Ex. A at I.1.

Should the minimum acceptance and rejection thresholds be satisfied, and the class be decertified, the Proposed Settlement will be finalized and the United States will make the payments set forth therein and Scott and Cerda will dismiss the above captioned action.

For those individuals who are eligible to receive a settlement but either do not respond to the settlement offer or respond and reject it, they will have six months after their administrative claim is formally denied by the United States to file an individual suit in the appropriate U.S. District Court. Ex. A at K.1.

III. Grounds for a Stay

The parties request a stay so they can implement the terms of the Proposed Settlement, which requires making diligent efforts to contact the Claimants and present them with the settlement offers set forth in the Proposed Settlement. Given the volume of Claimants, the parties anticipate it will require significant work to locate and contact them, and to receive back responses from those who wish to accept the settlement amounts. Moreover, because of the minimum acceptance threshold, locating and communicating with all Claimants is critical to the success of the Proposed Settlement.

³ The Government will pay up to a total of \$75,000 in costs associated with locating and contacting Claimants to convey the offers and releases. Ex. A at E.1. Costs above that amount will be paid by Plaintiffs' Counsel. *Id.* at E.2.

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Accordingly, we respectfully request the Court stay this matter for 8 months while the parties effectuate the terms of the Proposed Settlement.

Respectfully submitted,

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Betsy Ginsberg
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Alexander A. Reinert

Encl.

cc: All Counsel of Record (via ECF)

Exhibit A

**Re: Settlement Framework in *Scott et. al. v. United States*, No. 19-cv-1075-ERK-PK
(E.D.N.Y.)**

This document memorializes counsels' mutual understanding concerning certain elements of a proposed framework for the resolution of the claims of approximately 1,600 inmates stemming from the power outage at the Metropolitan Detention Center in Brooklyn, New York, on or about January 27, 2019 through February 3, 2019.

A. Settlement Amounts

1. The 945 Claimants listed at Tab A submitted valid, timely administrative claims to the Bureau of Prisons. Each of the claimants listed at Tab A will be offered \$8,750, inclusive of attorney's fees of 20% and costs, to resolve their claims. Attorney's fees and costs for each of the Claimants listed at Tab A will not exceed \$1,750.
 - a. In the event that a Claimant who submitted a valid, timely administrative claim to the Bureau of Prisons is inadvertently not included on the list at Tab A, that Claimant will be added to Tab A, provided that Plaintiffs' Counsel and the United States mutually agree to the addition.
2. The 69 Claimants listed at Tab B submitted valid, timely administrative claims and claim medical conditions that went untreated during the power outage, resulting in injury. Each of the claimants listed at Tab B will be offered \$17,500, inclusive of attorney's fees of 20% and costs, to resolve their claims. Attorney's fees and costs for each of the Claimants listed at Tab B will not exceed \$3,500.
3. Plaintiffs Scott and Cerda will be offered \$18,750, inclusive of attorney's fees and costs, to resolve their claims. Attorney's fees and costs for Plaintiffs Scott and Cerda will not exceed \$1,750.

B. The "Omnibus Claimants" and Claimants with time-barred claims

1. The 554 Claimants listed at Tab C will be offered \$2,500, inclusive of attorney's fees of 20% and costs, to resolve their claims. Attorney's fees and costs for each of the Claimants listed at Tab C will not exceed \$500.
 - a. In the event that a Claimant who (1) submitted an administrative claim after February 3, 2021, or (2) whose administrative claim was denied more than six months before the amended class complaint was filed on November 15, 2019, is inadvertently not included on the list at Tab C, that Claimant will be added to Tab C, provided that Plaintiffs' Counsel and the United States mutually agree to the addition. However, in no event will a Claimant be added to Tab C if their administrative claim was submitted after the date that this document is signed by counsel for Plaintiffs.

C. Form of Releases

1. In order to accept the above referenced settlement amounts, each Claimant under sections A.1., A.2. and B.1, above, must execute and return to the United States the release attached at Tab D, which shall include the respective settlement amount for each Claimant.
 - a. However, Claimants under sections A.1., A.2. and B.1, above, who are represented by counsel other than the undersigned counsel for Plaintiffs, will be provided with a separate release that they must execute and return to the United States in order to accept the above referenced settlement amounts. For the avoidance of doubt, these 23 claimants are listed at footnote 1.¹
2. In order to accept the settlement amount referred to in section A.3, above, Plaintiffs Scott and Cerda must execute and return to the United States the release attached at Tab E.
3. The releases sent to Claimants under sections A.1, A.2. and B.1., above, will state that the parties intend to request that the court approve payment of fees of no more than 20% of each claimant's settlement amount, to be paid out of each settlement payment, and not in addition thereto. See 28 U.S.C. § 2678.
 - a. However, the releases sent to the 23 Claimants listed at footnote 1 will not state that the parties intend to request court approval of attorney's fees, as such approval will not be required for these Claimants.
4. The releases sent to Plaintiffs Scott and Cerda will state that attorney's fees not to exceed \$1,750 will be paid out of and not in addition to their settlement amounts.

D. Prerequisites to Settlement

1. The proposed settlements are contingent upon:
 - a. The terms and conditions set out in the releases attached at Tabs D and E, and the releases sent to the 23 Claimants listed at footnote 1, including approval by the Attorney General or the Attorney General's designee.
 - b. An order from the Court decertifying the class in the action.

¹ [REDACTED], and [REDACTED].

- i. In the event that the Court denies the parties' motion for decertification, the entire settlement will be null and void.²

E. Contacting the Claimants

1. The United States will pay up to a total of \$75,000 in costs associated with locating and contacting the Claimants to convey the above referenced settlement offers and releases. Upon the Court's approval of the motion to stay, counsel for the United States will begin the process of contracting with a vendor chosen by the United States from a list provided by Plaintiff's counsel of vendors capable of delivering the services necessary to effectuate the process contemplated in this Section E. Once the United States selects and retains a suitable vendor, counsel for the United States will provide to Plaintiffs' counsel releases prepared by the Government so that the vendor can verify the claimants' addresses, mail out the releases, and collect the responses. Plaintiffs' counsel will be solely responsible for providing the vendor with the information necessary to perform the services contemplated in this Section E.
2. Any costs of locating and contacting the claimants beyond \$75,000 will be paid solely by Plaintiffs' Counsel.
3. The United States will assist Plaintiffs' Counsel to identify the locations of Claimants still within BOP custody, as well as the last known addresses of those Claimants who have been released.
4. Claimants will have 6 months from the date of mailing of the settlement offers to respond to the offer. In the event that a Claimant accepts the settlement offer after the 6-month deadline, the United States retains the option, at its sole discretion, to accept or reject that particular Claimant's settlement.

F. Court Authorization to Pay Attorney's Fees Out of Settlement Proceeds

1. The request for court authorization to pay attorney's fees out of the settlement proceeds will be submitted in conjunction with the motion for decertification, and the award of fees will be based upon (1) the benefit conferred upon claimants by counsel in negotiating the settlement, and (2) the Court's broad discretion to award attorney's fees under *quantum meruit* principles. Moreover, the award of fees will be subject to the limitations set out at 28 U.S.C. § 2678.

G. Stay of Discovery

1. The parties agree to file a joint motion to stay the case to permit implementation of the above proposed settlement structure.

² In the event that the proposed settlement does not materialize, this proposal does not alter or in any way waive, or in any way hinder, the United States' ability to independently move for decertification, or Plaintiffs' ability to proceed as a class.

- a. The motion to stay will inform the Court that the parties will make diligent efforts to contact the claimants and present them with the settlement offers.
- b. The motion to stay also will inform the Court that the parties intend to seek approval of payment of fees up to 20% of the Claimants' settlement amounts, and that the United States intends to seek decertification of the class.

H. Acceptance and Rejection Rates

1. If (1) fewer than 425 of the Claimants listed at Tabs A and B accept the settlement offers; or (2) more than 40 Claimants listed at Tabs A and B reject the settlement offers, the proposed settlement is null and void, unless Plaintiffs' Counsel and the United States mutually agree to waive this provision.
2. For the avoidance of doubt, the Claimants listed at footnote 1 who accept settlement offers commensurate but distinct from the offers set forth herein will count towards the threshold acceptance rate set forth in H.1 above.
3. If Plaintiffs Scott or Cerda reject their settlement offers, the proposed settlement is null and void. This provision cannot be waived by either Plaintiffs or the United States.

I. Decertification

1. Within 21 days after the expiration of the 6-month deadline described above at paragraph E.4., the United States will file a decertification motion that will apprise the Court that a good faith effort was made to offer a settlement to all claimants that submitted valid, timely administrative claims to the United States, and of the number of claimants that accepted and rejected (if any) the proposed settlement.
2. The parties will confer about the contours of the decertification motion, including whether Plaintiffs will join the United States in the motion. Plaintiffs' Counsel agree not to oppose the United States' proposed decertification motion. However, Plaintiffs' Counsel reserves the right to file a motion setting forth separate grounds for decertification should they oppose the underlying grounds for decertification set forth in the Government's motion.

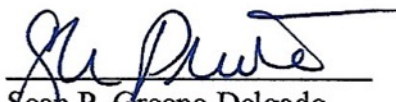
J. Settlement Payments and Dismissal

1. Should the minimum acceptance and rejection thresholds set forth in Section H above be satisfied and the class be decertified, the Proposed Settlement will be finalized and the United States will make the payments set forth therein pursuant to the terms and conditions set out in the Stipulations attached at Tabs D and E.
2. Plaintiffs Scott and Cerda will dismiss the above captioned action after the provisions in Section J.1. are satisfied.

K. Denial of Claims Post-Decertification

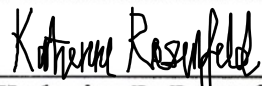
1. After decertification, the United States will issue denial letters to all claimants covered by sections A.1 and A.2, above, and to those claimants covered by section B.1, above, with time-barred claims who either do not respond to the settlement offer, or respond and reject the settlement offer.
 - a. For those claimants that timely submitted valid administrative claims, the denial letter will notify them that, if they are dissatisfied with the agency action, they may file suit in an appropriate U.S. District Court not later than 6 months after the date of mailing of the notification.
 - b. For those claimants who (i) submitted administrative claims after February 3, 2021, or (ii) whose administrative claims were denied more than six months before the amended class complaint was filed on November 15, 2019, the denial letter will notify them that, if they are dissatisfied with the agency action, they may file suit in an appropriate U.S. District Court not later than 6 months after the date of mailing of the notification, but that the United States intends to argue that their claims are time-barred in the event that they file suit.

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