UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 76-cv-06086-DMM

OLLIE CARRUTHERS, *et al.*,

Plaintiffs,

vs.

SCOTT ISRAEL, as Sheriff of Broward County, *et al.*,

Defendants.
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ORDER APPROVING CLASS ACTION SETTLEMENT

THIS CAUSE comes before the Court upon Joint Motion for Final Approval of Settlement Agreement, filed by Plaintiffs and Defendant Scott Israel, in his capacity as Sheriff of Broward County, Florida ("Sheriff") (collectively, the "Settling Parties") on November 28, 2016. (DE 974). On November 28, 2016, the Sheriff filed a Notice of Approval of Settlement Agreement (DE 975), and Broward County filed a Notice of Objection to Settlement Agreement (DE 976).[1] Forty-seven class members have filed objections, either in writing or orally with Plaintiffs' counsel. For reasons stated below, the Settling Parties' Joint Motion for Final Approval of Settlement Agreement is granted.

BACKGROUND

A. *Procedural History*

In 1976, Plaintiffs filed a class action lawsuit against the Sheriff and Broward County on behalf of past, present, and future prison detainees in what was then known as the Broward County Jail, alleging constitutional violations resulting from overcrowding, safety and comfort issues, a lack of medical care, and a failure to provide opportunities for religious services or counseling. (Second Am. Compl. ¶¶ 15-21). Plaintiffs sought declarative and injunctive relief, damages, and attorney's fees. (*Id.*). In 1979, this Court, Judge Hoeveler presiding, certified a class of all persons who have been, are being, or will be confined in the Broward County

[1] While Broward County is no longer a Defendant in this action, it objects to the proposed Settlement Agreement to the extent the Settlement Agreement addresses the issue of overcrowding, for which the County was partially responsible under the Consent Decree.

corrections and rehabilitation facilities, including any facilities that may in the future confine Broward County prisoners ("Broward County Facilities"). (Order dated Nov. 9, 1979).

On July 27, 1994, Broward County, the Sheriff, and Plaintiffs filed a Stipulation for Entry of Consent Decree ("Consent Decree"), which was then ratified and confirmed by Judge Hoeveler. The Consent Decree acknowledged that conditions of confinement had been determined to be unconstitutional and provided that all Broward County Facilities must be operated and maintained, at a minimum, by applying the most stringent provisions of applicable federal and Florida law and the standards set forth in Chapter 33-8 of the Florida Administrative Code, and applicable professional standards. (Consent Decree at pg. 2, ¶ 4; pg. 4, at ¶ 10). The Consent Decree established a jail population cap and compliance monitoring and also specifically provided that force must be used only as a last resort, that mentally ill inmates who present a threat to themselves or others shall be supervised by documented sight checks by staff at intervals not to exceed fifteen minutes, and that any inmate identified as a suicide risk shall not be housed in a single occupancy cell unless observed continuously. (*Id.* at pg. 6, ¶¶ 3 – 4).

In September 1996, the Sheriff and Broward County moved to terminate the Consent Decree. In 2004, Plaintiffs, the Sheriff, and Broward County entered two Stipulations for Settlement, which would govern the Parties' conduct under the Consent Decree moving forward. (DE 886-1, 886-2). The Stipulations significantly narrowed the scope of the case, dismissing the medical claims altogether and narrowing the scope of continuing monitoring, inspection, and judicial oversight to conditions relating to mental health services, inmate rules and discipline, inmate safety and security, overcrowding, and inmate access to religious publications and services and access to legal materials.

In November 2014, Greg Jones and Renand Fleuridor separately filed *pro se* motions in this case asserting violations of the Consent Decree. On August 5, 2015, the Court issued an Order *sua sponte*, requiring the Parties to show cause as to why the Consent Decree should not be dissolved or modified. (DE 894). On October 17, 2016, after an Evidentiary Hearing in which the Court found no evidence of overcrowding, the Court dissolved the Consent Decree as to Broward County. (DE 957).

Prior to the Court's Order dissolving the Consent Decree as to the County, the Sheriff and Plaintiffs had engaged in ongoing negotiations to address Plaintiffs' concerns as to practices and conditions that Plaintiffs contend pose an unreasonable risk of harm to prisoners at Broward

County Facilities. Plaintiffs and the Sheriff reached a Settlement Agreement on July 22, 2016 (DE 930-1), and sought preliminary approval of the Settlement Agreement on July 28, 2016 (DE 929). On September 6, 2016, the Court preliminarily approved the Settlement Agreement, finding that it was "fair, adequate, and reasonable, and within the range of possible final approval under Fed. R. Civ. P. 23." (DE 935). The Court also approved the Class Notice, set a schedule and process for class members to lodge objections, and scheduled a Fairness Hearing for final approval of the Settlement. (*Id.*). Accordingly, on December 1, 2016, the Court held a Fairness Hearing.

B. *The Proposed Settlement Agreement*[2]

The proposed Settlement Agreement provides a process to address Plaintiffs' contentions of overcrowding, excessive use of force, inmate violence, inadequate mental health care and facilities, and the imposition of substantial burdens upon religious exercise. Its terms bind the Office of the Broward County Sheriff, including his predecessors and successors, and all members of Plaintiffs' Class.

Under the Settlement Agreement, mutually-selected experts, Kathryn Burns, MD, MPH, and Michael Berg, whose costs will be split by the Settling Parties, will investigate whether there are current and ongoing violations of federal law in the above-mentioned categories and propose a plan to address any violations.[3] Upon reasonable advanced notice, the Sheriff will provide the experts with full access to Broward County Facilities, facility records and documents, prisoners' health care and custodial records, staff members, and prisoners. The experts will draft an Initial Report, detailing any current and ongoing violations of federal law, and if so, an Implementation

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[2] The proposed Settlement Agreement is located at DE 930-1. This summary does not purport to describe every term in the Agreement. To the extent the Court's summary and the terms of the Settlement Agreement differ, the Settlement Agreement governs.

[3] The experts have extensive experience in mental health and jail conditions, respectively. Dr. Burns is a board-certified psychiatrist, who currently serves as chief psychiatrist for the Ohio Department of Rehabilitation and Correction, for which she develops the psychiatric policies and procedures. (DE 974-2). She has also served as a court-appointed expert and consulting expert, charged with assessing correctional systems and recommending remedies across the country. (DE 974-2). Mr. Berg has over thirty-eight years of criminal justice management experience, including serving as Chief of Jails and the Deputy Director of Jails and Prisons for Duval County, Florida, and in various management positions within the Florida Department of Corrections. (DE 974-1). He has also served as a consultant, technical assistance provider, expert witness, and commissioner for the State of Florida Correctional Standards Council and the Criminal Justice Standards and Training Commission. (DE 974-1).

Plan, proposing remedies. The Settling Parties will provide feedback on the Initial Report and any Implementation Plan, which the experts will use to draft a Final Report and any Implementation Plan. If either Party objects to the experts' Final Report and any Implementation Plan, the Court will hold a hearing to resolve the objections. Once any objections are resolved, the Court will enter the Final Report, and if necessary Implementation Plan, as an Order of the Court, with which the Sheriff must comply, provided that the remedies therein comply with the Prison Litigation Reform Act.

Should an Implementation Plan be entered, the Sheriff's compliance with the Implementation Plan will be monitored until dissolution of the Consent Decree is appropriate. Specifically, the experts will submit reports at six month intervals, assessing whether the Sheriff is in substantial compliance with each of the provisions of the Implementation Plan. Plaintiffs' counsel is also entitled to conduct reasonable monitoring of the Sheriff's compliance, including by inspecting the facilities, accompanying the experts on their inspection tours, interviewing staff and inmates, reviewing relevant records, and observing practices related to compliance. However, upon entry of an Implementation Plan or termination of the Consent Decree, whichever is earlier, inmates' access to free phone calls to Plaintiffs' counsel will terminate.

Once the experts' certify the Sheriff's substantial compliance with each of the substantive provisions of the Implementation Plan for one year, the Court shall terminate the Consent Decree. Following entry of an Implementation Plan or termination of the Consent Decree, whichever is earlier, the Court shall determine and award attorney's fees and litigation costs to Plaintiffs' counsel.

STANDARD

A. *Prison Litigation Reform Act*

The PLRA limits the prospective relief a federal court may order in cases concerning prison conditions. Although "private settlement agreements" are not subject to the statute's limitations, this Settlement Agreement is subject to judicial enforcement beyond "the reinstatement of the civil proceeding that the agreement settled," and is thus within the scope of the PLRA's heighted restrictions on prospective relief. *See* 18 U.S.C. § 3626(c)(2) & (g)(6).

The PLRA provides that a "court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation

of the Federal right." 18 U.S.C. § 3626(a)(1)(A). The court must also "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." 18 U.S.C.A. § 3626(a)(1)(B). Finally, "[t]he court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law," except in certain specified instances. 18 U.S.C. § 3626(a)(1)(B).

While the court must make "particularized findings, on a provision-by-provision basis, that each requirement imposed by the consent decrees satisfies the need-narrowness-intrusiveness criteria, given the nature of the current and ongoing violation," the court need not "conduct an evidentiary hearing about or enter particularized findings concerning any facts or factors about which there is not dispute." *Cason v. Seckinger*, 231 F.3d 777, 785, 785 n.8 (11th Cir. 2000). Rather, "[t]he parties are free to make any concessions or enter into any stipulations they deem appropriate." *Id.* at 785 n.8.

B. *Rule 23(e)*

Fed. R. Civ. P. 23(e) requires judicial approval of a class action settlement. In order to approve a settlement, the district court "must find that it is fair, adequate and reasonable and is not the product of collusion between the parties." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) (internal citation omitted). In assessing whether a settlement is fair, adequate, and reasonable, the court must consider the following factors: (1) the stage of the proceedings at which settlement was achieved, (2) the likelihood of success at trial, (3) the range of possible recovery, (4) the point on or below the range of recovery at which a settlement is fair, adequate and reasonable, (5) the complexity, expense, and duration of litigation, and (6) the substance and amount of opposition to the settlement. *Id.*

The district court's inquiry "should focus upon the terms of the settlement," and "should not reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute." *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977).[4] "Neither should it be forgotten that compromise is the essence of a settlement." *Id.* Accordingly, "[t]he trial court should not make a proponent of a proposed settlement justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in

[4] The Eleventh Circuit has recognized the case law of the former Fifth Circuit prior to 1981 as its governing body of precedent. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

compromise is a yielding of absolutes and an abandoning of highest hopes." *Id.* (internal quotations and citation omitted). Finally, "[i]n performing this balancing task, the trial court is entitled to rely upon the judgment of experienced counsel for the parties." *Id.* (internal citation omitted).

DISCUSSION

A. *Absence of Collusion*

The Court finds there is no evidence of collusion in the Settlement Agreement. Plaintiffs' counsel, Eric Balaban, avers in his Affidavit that the Settlement Agreement is the product of arms' length negotiations. (DE 974-3). Balaban's representation is supported by the length of negotiations, which continued for eight months before resulting in the Settlement Agreement. (*Id.*). Accordingly, the absence of collusion favors approval of the Settlement Agreement.

B. *Stage of Proceedings*

The advanced stage of the litigation favors approval of the Settlement Agreement. The Settling Parties have been litigating the terms of various Consent Decrees and settlement agreements since 1976. Accordingly, the Settling Parties have an intimate understanding of conditions in the Broward County Facilities. They also have experience proposing remedies to address current and ongoing violations in the Broward County Facilities and monitoring compliance with implementation plans designed to remedy these violations. In addition, in preparation for the October 17, 2016 Evidentiary Hearing on whether the Consent Decree should be dissolved as to the County, Plaintiffs' counsel engaged in extensive fact-finding, including site visits, records review, formal discovery, staff interviews, and communication with class members. As a result, the Settling Parties have a detailed record with which to evaluate the relative strengths of their positions, to understand the scope and complexity of the case, and to ensure that the Settlement Agreement addresses current conditions that require remediation.

C. *Likelihood of Success at Trial*

The uncertainty of success at an evidentiary hearing favors approval of the Settlement Agreement.[5] The Sheriff denies the existence of current and ongoing violations of federal rights.

[5] The Settlement Agreement stems from the Court's Order to Show Cause as to why the Consent Decree should not be terminated. Accordingly, if the Parties do not settle, the case will proceed to an evidentiary hearing, rather than to trial.

Therefore, to obtain relief, Plaintiffs will need to present evidence of conditions affecting approximately 4,000 prisoners housed at four institutions across Broward County on four separate bases: mental health, excessive force, inmate violence, and burdens on religion. In addition, to prove an Eighth Amendment violation, Plaintiffs must meet the difficult burden of both "an objective showing of a deprivation or injury that is 'sufficiently serious' to constitute a denial of the 'minimal civilized measure of life's necessities' and a subjective showing that the official had a 'sufficiently culpable state of mind.'" *Thomas v. Bryant*, 614 F.3d 1288, 1304 (11th Cir. 2010) (citing *Farmer v. Brennan,* 511 U.S. 825, 834 (1994)).[6] Given the burdensome evidentiary showing, along with the risk that the Court may exclude evidence, Plaintiffs face uncertain success at the evidentiary hearing.

The Sheriff also faces risks from continued litigation. Plaintiffs have amassed a substantial amount of evidence through ongoing monitoring of the Broward County Facilities. Accordingly, the uncertainty of the Sheriff's success at an evidentiary hearing also favors approval of the Settlement Agreement.

D. *Whether the Settlement is Within the Range of Possible Recovery*

The Settlement Agreement is fairly within the range of possible recovery. Without settlement, the Court may find that there are no current and ongoing violations of federal rights and therefore that no injunctive relief is justified. Even if Plaintiffs ultimately prove current and ongoing violations in every area of contention, proceeding through discovery and a hearing would delay the implementation of relief. Finally, the relief fashioned by the Court may prove unsatisfactory to both Parties. Accordingly, at best, Plaintiffs may obtain delayed relief fashioned by the Court, and at worst, no recovery.

In contrast, under the Settlement Agreement, neutral experts determine whether there are current and ongoing violations and what remedies are appropriate. First, because the Parties jointly select the experts and can provide feedback on the experts' findings, Plaintiffs are likely to encounter less resistance from the Sheriff than they would in an adversarial context. Second, the Settlement Agreement's streamlined process for identifying violations and implementing remedies may provide more rapid relief for Plaintiffs. Third, both experts have experience, as

[6] The Broward County facilities also house pretrial detainees, whose rights are protected by the Due Process provisions of the Fifth and Fourteenth Amendments rather than by the Eighth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979).

court-appointed monitors, in devising fair and appropriate remedies. Accordingly, the remedies they propose are more likely to effectively and efficiently target violations, which will benefit both class members and the Sheriff. Finally, the Settlement Agreement includes a timetable for termination of the Consent Decree so the Sheriff does not have to expend unnecessary resources filing a motion to terminate. Given the risks involved in further litigation, the process set forth in the Settlement Agreement is likely to provide recovery that falls within the range of possible recovery were the Parties to continue to litigate.

E. *Complexity, Expense, and Duration of Litigation*

The complexity, expense, and duration of this litigation favor approval of the Settlement Agreement. Proving current and ongoing violations in mental health, excessive force, inmate violence, and religious exercise across multiple jail facilities on behalf of a class of 3,884 prisoners will require multiple witnesses, including expert witnesses, review of thousands of pages of jail records, and depositions of multiple members of prison staff. The resulting hearing could last weeks. Accordingly, the considerable time and expense of continued litigation to the Parties and the Court favors approval of the Settlement Agreement.

F. *Substance and Amount of Opposition to Settlement*

Out of a class of 3,884 prisoners, the Court received 35 letters and 12 phone messages, transcribed by Plaintiffs' counsel, expressing objections to the Settlement Agreement. In addition, Broward County filed an objection.

The predominant objection is that there are continued violations of federal rights in the areas covered by the Consent Decree, particularly excessive force, inmate violence, mental health, and burdens on religious exercise. However, the Settlement Agreement does not necessarily, or immediately, end relief for ongoing violations or oversight of the Broward County Facilities. As discussed above, neutral experts will determine whether there are ongoing violations and the appropriate remedy, and the Court, Plaintiffs' counsel, and the experts will provide continued oversight of the Broward County Facilities until the Sheriff obtains substantial compliance.

Other class members object to the termination of the system of free phone calls to Plaintiffs' counsel and the absence of surprise inspections, both of which, the objectors argue, are necessary to ensure meaningful compliance by the Sheriff. While the Court recognizes the validity of class members' concerns, the Settlement Agreement contains provisions that reduce

the risk that systemic violations will be concealed or undetected. First, the Settlement Agreement provides two neutral experts with extensive access to Broward County Facilities, records, staff, and inmates. Second, Plaintiffs' counsel will also provide oversight, including by speaking directly with inmates.

Several class members object that they were not given access to the Settlement Agreement even though the Court-approved Notice indicates that they can receive a copy from their Housing Deputies. At the Fairness Hearing, Plaintiffs' counsel indicated that they rectified this oversight and ensured that all prisoners had access to copies of the Settlement Agreement.

Finally, Broward County objects to the proposed Settlement Agreement to the extent that it applies to capacity and overcrowding. In the Order Dissolving the Consent Decree as to the County, the Court found that the reports submitted by the Court-appointed expert and by Plaintiffs' expert did not evidence overcrowding. However, in the Settlement Agreement, Plaintiffs contend that overcrowding in the Broward County Facilities creates current and ongoing violations of federal rights. The Sheriff denies that overcrowding constitutes a current and ongoing violation of federal rights or warrants prospective relief under the PLRA, but he agrees that a plan is needed to address potential overcrowding. The Court does not find that the Settlement Agreement's process for investigating potential overcrowding conflicts with the Court's Order Dissolving the Consent Decree as to the County.

In sum, the Court finds that the objections are sufficiently addressed by the Settlement Agreement.

G. *Compliance with the PLRA*

The Settlement Agreement expressly incorporates the PLRA's need-narrowness-intrusiveness requirements into its process for fashioning relief. The experts are directed to identify current and ongoing violations of federal rights and to propose an Implementation Plan that is narrowly drawn, extends no further than necessary, and is the least intrusive means necessary to correct any violation of federal right. In addition, the Settlement Agreement provides that the Court will not enter an Implementation Plan if it determines that the prospective relief is not in accordance with 18 U.S.C. § 3626(a). Accordingly, while the Court cannot make particularized findings at this stage of approving the Settlement Agreement because no prospective relief has been proposed, the requirements that the experts make such findings before

proposing relief and that the Court approve the proposal before entering relief satisfy the PLRA requirement for particularized findings on the need-narrowness-intrusiveness criteria.

CONCLUSION

Based on the above factors, the Court finds that the Settlement Agreement is fair, adequate, and reasonable, and in compliance with the PLRA. Accordingly, it is hereby

ORDERED AND ADJUDGED that:

(1) The Settling Parties' Joint Motion for Final Approval of Settlement Agreement (DE 974) is **GRANTED.**

(2) The Settlement Agreement (DE 930-1) is **APPROVED.**

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 1st day of December, 2016.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record