

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

MARIA ALEJANDRA CELIMEN SAVINO,
JULIO CESAR MEDEIROS NEVES, and all
those similarly situated,

Petitioners-Plaintiffs,

v.

STEVEN J. SOUZA,

Respondent-Defendant.

Case No. 1:20-cv-10617 WGY

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JOINT MOTION
TO PRELIMINARILY APPROVE SETTLEMENT, APPROVE CLASS NOTICE, AND
SCHEDULE FAIRNESS HEARING**

Plaintiffs and Defendant, pursuant to Fed. R. Civ. P. 23(e), hereby respectfully request that the Court enter an order substantially in the form of the Proposed Order attached to the Settlement Agreement filed concurrently herewith; (2) approving the parties' proposed notice to members of the class ("Notice") (Exhibit D to Settlement Agreement); and, (3) scheduling a fairness hearing ("Fairness Hearing"), at which the parties will ask the Court to issue final approval of the Settlement Agreement.

This case began approximately one year ago, as the COVID-19 pandemic was in its early stages. Plaintiffs filed a Petition for Writ of Habeas Corpus and a Complaint for Declaratory and Injunctive Relief (the "Complaint"), alleging Plaintiffs were subject to imminent risk of contracting and suffering from COVID-19 as a result of their detention in the Bristol County House of Correction ("BCHOC"), and seeking release from detention. Defendant denied and continues to deny these allegations. Defendant believes that it followed all available guidance from the Centers for Disease Control and the Massachusetts Department of Health regarding the

COVID-19 pandemic. Plaintiffs disagree. The Court subsequently certified a class of Plaintiffs, ordered a number of immigration detainees to be admitted to bail, and entered a preliminary injunction order that, *inter alia*, limited new admissions to the facility (the “Preliminary Injunction”). Discovery commenced, and a trial date of September 2021 has been proposed.

In January 2021, the parties entered into mediation before Chief Magistrate Judge Page Kelley. U.S. Immigration and Customs Enforcement (“ICE”) also participated in this mediation. Plaintiffs, Defendant, and ICE (collectively “the Settling Parties”) have now reached an agreement to resolve this litigation in its entirety.

If approved, the settlement will provide various forms of relief to Class Members, as detailed *infra* and in the accompanying Settlement Agreement.¹ Briefly, the Settlement Agreement provides that: (a) Class Members currently released on bail will remain free of detention, with their bail conditions modified and subject to certain protections against re-arrest/re-detention; (b) certain Class Members will be released, under specified conditions; (c) all Class Members who remain detained following these releases will be offered an option to transfer from BCHOC to a different ICE facility; (d) two Class Members who will remain detained will be provided relief particular to their individual circumstances; (e) related Appellate Proceedings will be dismissed; and (f) the Preliminary Injunction will be dissolved, allowing Defendant and ICE to repopulate BCHOC. Following provision of the above relief, Plaintiffs will dismiss their Complaint and waive any claim for attorneys’ fees and costs.

¹ The description in this paragraph, and other descriptions in this memorandum, are intended only as summaries of the Settlement Agreement provisions. The exact terms of the settlement are set forth in the Settlement Agreement itself; to the extent that there are any differences between the descriptions herein and the Settlement Agreement, the latter controls. All capitalized terms not defined herein shall have the meaning ascribed to them in the Settlement Agreement.

As explained below, the settlement far exceeds the threshold for both preliminary and final approval of a class action. Accordingly, the parties respectfully request that this Court grant this motion for Preliminary Approval.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed a Petition for Writ of Habeas Corpus and a Complaint for Declaratory and Injunctive Relief in this Action on March 27, 2020 (“Complaint”). ECF No. 1. The Complaint alleged that Plaintiffs were subject to imminent risk of contracting and suffering from COVID-19 as a result of their detention, in violation of their Fifth Amendment Right to Due Process and Section 504 of the Rehabilitation Act. On April 8, 2020, the Court granted Plaintiffs’ Motion to Certify a Class. ECF No. 64. On May 7, 2020, and by written order on May 12, 2020, the Court granted Plaintiffs’ Motion for a Preliminary Injunction. ECF Nos. 168, 175. The Preliminary Injunction ordered: (1) testing for all immigration detainees and for all BCHOC staff who come into contact with immigration detainees and (2) a bar on new admittees to BCHOC. ECF No. 175 at 33-34; *see also* ECF No. 206 (modifying Preliminary Injunction to clarify BCHOC staff testing was voluntary); ECF No. 225 (denying reconsideration of Preliminary Injunction); ECF No. 244 (modifying Preliminary Injunction to allow transfer from BCHOC criminal wing to immigration wing upon court approval).

Throughout April and May 2020, the parties also engaged in a process through which the Court assessed each individual class member’s application for bail. This process led to the release of 43 individuals on bail. ECF Nos. 44, 54, 55, 73, 76, 86, 90, 107, 135, 147. These released individuals were subject to strict conditions of release including a 14-day quarantine, followed by house arrest, with discretion for ICE to use electronic monitoring. *See* ECF Nos. 64

at 9 n.6, 73. Over the last year, the Court has ordered modifications to these bail conditions on both an individual and group-wide basis. *See* ECF Nos. 298, 302, 304, 317, 318, 354.

The conditions at BCHOC have changed since Plaintiffs brought their suit in March 2020. Through the bail process described above and the Court's limitation on new admittees, together with releases, transfers, and removals executed by ICE in the ordinary course, the population of BCHOC has fallen from 148 at the outset of the litigation to 7 today. BCHOC has also represented that it has offered the COVID-19 vaccine to all immigration detainees who remain detained.

In December 2020, the parties agreed to pause the litigation and enter mediation, and the case was referred to Chief Magistrate Judge Page Kelley on January 11, 2021. Decl. of Mike Brown ¶ 2; ECF No. 356. Starting on January 22, 2021, the parties engaged in four formal mediation sessions with Magistrate Judge Kelley. Decl. of Mike Brown ¶ 3. These sessions included Plaintiffs' counsel and counsel for BCHOC and ICE. Decl. of Mike Brown ¶ 4. Plaintiffs, BCHOC, and ICE also communicated frequently outside of the formal mediation sessions to facilitate a resolution to the litigation. Decl. of Mike Brown ¶ 5.

The Settling Parties have now reached an agreement on the terms of a proposed settlement to resolve each of the claims alleged in the Complaint.²

II. THE PROPOSED SETTLEMENT

The Class Members, as that term is defined and used for the purposes of the Settlement Agreement, are specified in Section I (1) of the Settlement Agreement. The Settling Parties have agreed to the terms summarized herein and as detailed in the Settlement Agreement.

² The Settling Parties express their gratitude and appreciation to Chief Magistrate Judge Kelley for her assistance in helping reach this Settlement Agreement.

Class Members who are currently released on bail by order of this Court will remain released following Final Approval of the Settlement Agreement. In addition, the parties are jointly moving, concurrently herewith, for the modification of the release conditions of the thirty-two (32) individuals currently on bail. That modification will include the removal of any curfew or home confinement restrictions, inclusive of the restrictions imposed by the Court's December 22, 2020 Order. *See* ECF No. 354 (modifying release conditions to permit individuals to leave their homes during a prescribed time window each day for delineated purposes). In addition, the modification will include the removal of electronic monitoring for these Class Members. To the extent the Court has not already approved these modifications via the concurrently-filed motion, they will become effective upon Final Approval.

Six (6) Class Members who were until recently held at BCHOC will be released pursuant to this Settlement Agreement.³ Those individuals will be subject to the same conditions as those individuals currently on bail by order of this Court, with the modifications described above, with the exception that ICE, in its discretion, will be able to apply electronic monitoring to these individuals.

Seven (7) Class Members who are currently held at BCHOC, and who will not be released, will be provided other relief in the form of a transfer option. Defendant will provide Plaintiffs' counsel with a list of alternative detention locations within fourteen (14) days of execution of the Agreement and will provide counsel with phone access to these Class Members. Class Members will have five (5) days from the date of that phone access to exercise their right to transfer from BCHOC to another facility within the Boston Area of Responsibility.

³ On March 25, 2021, Defendant released these individuals from detention, in anticipation of this Agreement being filed. Continued release of these individuals is conditioned on the Court granting Final Approval.

Two (2) Class Members who will receive the transfer option described above will additionally receive individualized relief. First, ICE will join a motion by Joao Fernandes to reopen before the Board of Immigration Appeals. In return, Mr. Fernandes will dismiss his currently pending petition for review in the First Circuit and will agree not to file any habeas petition alleging unlawful prolonged detention unless his reopened removal proceedings before the Board of Immigration Appeals extends beyond one year. Second, Defendant or ICE will send a letter to the Salem Probate Court supporting Janito De Carvalho's motion to reopen his case in that court, which was closed due to his failure to appear while detained at BCHOC. Defendant and ICE further agree to make Mr. De Carvalho available for hearings in that matter if it is reopened and Defendant and ICE are provided notice thereof.

Under the terms of the Settlement Agreement, ICE will not arrest or re-detain any released Class Member but for Good Cause, which is defined in the Settlement Agreement as a material violation of the terms and conditions of a Class Member's order of recognizance or supervision. Further, except as expressly delineated in the Settlement Agreement, re-arrest or detention will be subject to Field Office Director or Special Agent in Charge advance approval. The Settlement Agreement provides for limited exceptions to the above re-arrest conditions to effectuate a final order of removal.

Plaintiffs have agreed, through the Settlement Agreement, to dismiss without prejudice one appellate proceeding, Case No. 20-1626.

The Court's Preliminary Injunction, which *inter alia* limits new admissions to BCHOC, currently remains in place. Pursuant to the Settlement Agreement, that injunction shall dissolve upon Final Approval of the settlement.

Plaintiffs will release and forever discharge Defendant and ICE from the habeas and Rehabilitation Act claims expressly alleged in the Complaint. Class Members will retain their right to file individual habeas claims seeking release from detention on any grounds that were not expressly raised in the Complaint, except as set forth specifically in the Settlement Agreement for Class Member Joao Fernandes.⁴

In addition to the above, Plaintiffs and Plaintiffs' counsel have agreed to waive any and all claims to the recovery of attorneys' fees and costs in connection with this Action if Final Approval is ordered by this Court and the relief contemplated by the Settlement Agreement is effectuated.

III. THE COURT SHOULD GRANT PRELIMINARY APPROVAL

Preliminary approval of a class action settlement is appropriate under Rule 23 of the Federal Rules of Civil Procedure where the Court finds that it "will likely be able to" approve the proposed settlement. Fed. R. Civ. P. 23(e)(1)(B)(i). The Rule authorizes final approval of a settlement upon a finding that the settlement is "fair, reasonable, and adequate" after considering specified procedural and substantive factors, including whether (A) "the class representatives and class counsel have adequately represented the class"; (B) "the proposal was negotiated at arm's length"; (C) the relief is adequate; and (D) "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(A)-(D).

This Settlement Agreement satisfies these factors. *First*, the class in this case is adequately represented by an experienced team of attorneys and law student interns from Lawyers for Civil Rights, Wilmer Cutler Pickering Hale and Dorr LLP, and the Worker and

⁴ Aside from the habeas and Rehabilitation Act claims expressly alleged in the Complaint, no Class Member will waive, dismiss, or release any claim arising out of their detention, including without limitation claims under the Massachusetts Tort Claims Act, the Federal Tort Claims Act, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and 42 U.S.C. § 1983.

Immigrant Rights Advocacy Clinic at Yale Law School.⁵ Fed. R. Civ. P. 23(e)(2)(A). The Court recognized class counsel as adequate in certifying the class and finding that Plaintiffs met the standards of Rule 23. ECF No. 64 at 25. Class counsel have zealously represented the interests of the class, including securing a preliminary injunction for the class; filing numerous motions and bail applications for both the immigration detainees who remained detained and those who were released; and conducting written and oral discovery on Defendant's policies and practices relating to the COVID-19 pandemic to prepare for trial and advocate for those still detained during the course of the lawsuit. As a result, counsel had an "adequate information base" in negotiating the Settlement Agreement. Fed. R. Civ. P. 23(e)(2) advisory committee note.

Second, the Settlement Agreement is the product of serious, informed, arm's length negotiations. Fed. R. Civ. P. 23(e)(2)(B). The Settling Parties have reached agreement after almost a year of litigation and after counsel participated in four formal mediation sessions with Magistrate Judge Kelley. The Settling Parties also engaged in extensive back-and-forth negotiations about the specific provisions included in the Settlement Agreement, both over videoconference and email. All Settling Parties are represented by experienced counsel and have been adequately represented throughout the litigation and the settlement negotiations.

Third, the relief is adequate. Fed. R. Civ. P. 23(e)(2)(C). Each Class Member is afforded relief through the Settlement Agreement that addresses the claims in the Complaint, whether through release, through an option to transfer to another facility, or through the opportunity to remain on bail with relaxed bail conditions. The Settlement Agreement guarantees this relief while removing the risk inherent in going to trial. It also guarantees relief at a date certain – something of vital importance given the ongoing risk and changing nature of the coronavirus

⁵ Members of the class were also represented by the Harvard Immigration and Refugee Clinical Program in their related Appellate Proceedings.

pandemic and measures to combat it. In exchange, Class Members are settling only the claims raised in the Complaint. The relief contemplated by the Settlement Agreement is meaningful, has the support of all Settling Parties, and should be endorsed by this Court.

Fourth, the Settlement Agreement does not have any obvious deficiencies and does not improperly grant preferential treatment to segments of the class. Fed. R. Civ. P. 23(e)(2)(D). While each Class Member is not afforded identical relief under the Settlement Agreement, any difference is based on objective differences in Class Members' individual circumstances and on different outcomes of the individualized review conducted of each individual Class Member's eligibility for the different forms of relief, and not because the process was applied more equitably to some as opposed to others. Each Class Member is being provided meaningful relief that addresses the claims in the Complaint. The forms of relief were duly considered for each Class Member, and no member was given preferential treatment. This objective approach supports the adequacy of the settlement. *See Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 75 (D. Mass. 1999) ("The Court . . . finds that any differences in the nature and value of the benefits received by Class members reflect the Settlement's fairness insofar as they are rationally based on objective differences in the positions of Class members. . . .").

IV. THE COURT SHOULD APPROVE THE NOTICE PLAN AND SET A FINAL APPROVAL HEARING

The Settlement Agreement also provides for a notice plan that is reasonably calculated to reach absent Class Members, advise them of the terms of the proposed settlement, and provide the opportunity to present any objections. Fed. R. Civ. P. 23(e)(1)(B). Although individual notice of a proposed class settlement is not required for classes certified under Rule 23(b)(2), the Settling Parties believe that individual notice to each Class Member is appropriate in this case. The Settling Parties have agreed to issue written notice to Class Members by having Plaintiffs

send the Notice, as approved by the Court, through First-Class mail to all Class Members. The Settling Parties agree that the language in the Notice accurately portrays the Settlement Agreement and that, through Plaintiffs' counsel, the Settling Parties will be able to effectuate Notice within the timeline agreed to and articulated in the Settlement Agreement and attached Proposed Order. The Notice sets forth the main terms of the Settlement Agreement, explains to Class Members how to object and the deadline for doing so, and informs Class Members how they can obtain more information about the Settlement Agreement. The proposed notice plan will ensure that all Class Members receive reasonable notice of the Settlement Agreement.

To expedite the resolution of this matter while still allowing adequate time for any Class Member to file an objection, the parties further request that the Court schedule a Fairness Hearing no later than twenty-eight (28) days from the filing of this Motion.

V. CONCLUSION

WHEREFORE, Plaintiffs and Defendant respectfully request that the Court preliminarily approve the Settlement Agreement by entering an order substantially in the form of the Proposed Order submitted herewith.

April 6, 2021

Respectfully submitted,

MARIA ALEJANDRA CELIMEN SAVINO,
JULIO CESAR MEDEIROS NEVES

By their attorneys:

/s/ Oren Sellstrom

Oren Sellstrom (BBO #569045)
Lauren Sampson (BBO #704319)
Ivan Espinoza-Madrigal†
Lawyers for Civil Rights
61 Battery March Street, 5th Floor
Boston, MA 02110

Emily Jo Coady, Law Student Intern[♦]
Grace Choi, Law Student Intern
Kayla Crowell, Law Student Intern
Juan Fernando Luna León, Law Student
Intern[♦]
Siyuan Sonia Qin, Law Student Intern[♦]

(617) 988-0606
osellstrom@lawyersforcivilrights.org

Fernando Quiroz, Law Student Intern[♦]
Isir Said, Law Student Intern[♦]
Michael Wishnie (BBO# 568654)
Sara Zampierin[†]
Jerome N. Frank Legal Svcs. Org.
P.O. Box 209090
New Haven, CT 06520
Phone: (203) 432-4800
michael.wishnie@ylsclinics.org

Lisa Pirozzolo (BBO #561922)
John Butts (BBO #643201)
Felicia Ellsworth (BBO #665232)
Nicole M.F. Dooley (BBO #690539)
Annaleigh Curtis (BBO #696165)
Michael Brown (BBO #695276)
Andy O'Laughlin (BBO #691836)
Rama Attreya (BBO #699395)
Gary Howell-Walton (BBO #705470)
Mikayla C. Foster (BBO #705360)
Elizabeth E. Driscoll (BBO #705302)
Asma Jaber (BBO #707322) **
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street, Boston, MA 02109
Mike.Brown@wilmerhale.com

[†] Admitted *pro hac vice*

* Motion for law student appearance pending.

[♦] Motion for law student appearance forthcoming.

** *Pro hac vice* forthcoming

STEVEN SOUZA

By his attorney,

NATHANIEL B. MENDELL
Acting United States Attorney
District of Massachusetts

/s/ Thomas E. Kanwit
THOMAS E. KANWIT
Assistant U.S. Attorney
1 Courthouse Way, Suite 9200
Boston, MA 02210
Thomas.kanwit@usdoj.gov
(617) 748-3100

CERTIFICATE OF SERVICE

I hereby certify that, on April 6, 2021 a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of this court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF system.

Date: April 6, 2021

/s/ Oren M. Sellstrom

Oren M. Sellstrom