UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TAMARA G. NELSON and TIMOTHEA RICHARDSON, individually and on behalf of all other persons similarly situated, Plaintiffs, v. BELINDA C. CONSTANT, et al., Defendants.	Case No. 17-cv-14581-JVM Division 1: Magistrate van Meerveld (Class Action)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT

Plaintiff Timothea Richardson moves this Court for an order granting preliminary approval of the proposed class settlement, authorizing notice to class members with procedures and deadlines for filing objections, and scheduling a fairness hearing.

I. Procedural Summary

Plaintiffs Tamara Nelson and Timothea Richardson filed this action in December 2017, later amending their Complaint in June 2018. In Count II of the Amended Complaint, Plaintiff Richardson[1] claimed that the City of Gretna's operation of a Deferred Prosecution Program in its Mayor's Court violated her 14th Amendment rights to Equal Protection and Due Process. She alleged that the Deferred Prosecution Program was made available only to those who had the ability to pay the program fees, systematically discriminating against the poor. Defendants filed Answers to the Amended Complaint, denying Plaintiff's allegations. (ECF Nos. 43, 49.)

[1] For the purposes of this motion, "Plaintiff" will refer to Ms. Richardson.

Plaintiff first moved for class certification in December 2017. (ECF No. 2.) The Court denied this motion without prejudice "to give the parties additional time to conduct discovery and pursue, in good faith, an amicable resolution." (ECF No. 60 at 17.)

The parties entered into settlement negotiations on Count II of the Complaint beginning in March 2019. Since that time, counsel for the Parties have had lengthy and productive negotiations. They believe the settlement agreement they have arrived at, Ex. 1, is fair, reasonable, and adequate and should be approved by the Court. Plaintiff moved this Court to certify a settlement class and name her as class representative on May 14, 2020. (ECF No. 142.) Plaintiff moved to substitute the memo in support of her motion for class certification on July 13, 2020. (ECF No. 147.) Plaintiff moves now for preliminary approval of the attached settlement and means of notice to class members.

II. Rule 23(e) Standard for Settlement Approval

Federal Rule of Civil Procedure 23(e)(2) dictates the factors that this Court must consider when approving a class action settlement:

> If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering 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 provided for the class is adequate, taking into account:
>
> > **(i)** the costs, risks, and delay of trial and appeal;
> > **(ii)** the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> > **(iii)** the terms of any proposed award of attorney's fees, including timing of payment; and

> **(iv)** any agreement required to be identified under Rule 23(e)(3); and
>
> **(D)** the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

In addition, the Fifth Circuit prescribes a six-factor test: "1) the existence of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings; (4) plaintiffs' probability of success; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives, and absent class members." *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 424 F. Supp. 3d 456 (E.D. La. 2020) (citing *Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983)). The 2018 amendment of Rule 23(e)(2) has not displaced the Fifth Circuit's six-factor test, rather the two act in concert. *See* Fed. R. Civ. P. 23, Advisory Committee's Note 2018 (stating that "[t]he goal of this amendment is not to displace any factor" used by the circuits to weigh whether a settlement is fair, reasonable, and adequate).

III. Argument

a. The proposed settlement meets the Rule 23(e)(2) factors and the Fifth Circuit test.

i. Plaintiff's Counsel Provided Adequate Representation.

Plaintiff's counsel have been involved with this litigation since its filing, and have diligently represented Plaintiff at all stages of the litigation. As detailed in the declarations supporting class certification, Plaintiff's counsel are experienced litigators who have served as class counsel in federal suits in multiple jurisdictions. They have expended significant resources in investigating and prosecuting this claim.

ii. The Parties Negotiated the Proposed Settlement at Arm's Length.

Neither fraud nor collusion are present in this settlement. No side agreements exist, whether between parties' counsel or the parties themselves. The attached settlement agreement is the sole agreement between the parties. Plaintiff's counsel, a nonprofit law firm, have no financial interest in the settlement. As a 23(b)(2) class for equitable relief, there is no damages award from which Plaintiff's counsel might seek fees from the putative representative Plaintiff. The parties have entered no agreement as to attorney's fees. While Plaintiff's counsel intend to move the court for the award of fees under 42 U.S.C. § 1988, the amount awarded, if any, would be at the sole discretion of this Court. *Cf. In re Chinese Manufactured-Drywall*, 424 F. Supp. 3d at 486 ("Courts must be particularly diligent when evaluating a proposed settlement in which the fee award has been negotiated by class counsel because pecuniary self-interest has long been cited by courts and scholars as a threat to the performance of counsel's professional and fiduciary obligations to class members.")

iii. The proposed relief for the putative class is adequate.

The relief accorded to the class in the proposed settlement prevents the Gretna Mayor's Court from operating a wealth-based Deferred Prosecution program. Those who cannot afford to pay the deferred prosecution fee will be placed on payment plans, have fees waived, or be given nonfinancial alternatives to participation. For those class members placed on a payment plan, the amount of their monthly payment cannot exceed more than their average earnings for an eight-hour work day. Upon twelve months of payments, the individual's obligation will be satisfied, regardless of whether the original amount assessed has been paid in full; i.e., no payment plan obligations will extend beyond a year's time, regardless of the balance, if a person has made the minimum monthly payment.

Under the Mayor's Court's prior practice, if a person were terminated from the Deferred Prosecution Program for failure to pay fees, they forfeited any money they had paid into the program, and they were placed on the trial docket. If convicted, the money they previously paid to the Deferred Prosecution Program was not credited to their post-conviction fines or fees. In the proposed settlement agreement, those class members who were terminated for nonpayment and whose cases have not yet been adjudicated will be given the choice to rejoin the program, and any fees paid prior to termination will be credited to them. Those class members who were terminated and later convicted will receive refunds of any forfeited Deferred Prosecution fees.

Plaintiff's counsel believe that the proposed settlement fully remedies the constitutional violations identified in the Amended Complaint.

1. The Complexity, Expense, and Likely Duration of the Litigation Weigh in Favor of Approval.

In considering this factor, Courts "compare the benefits and risks of the proposed settlement as well as the potential future relief in light of the uncertainties of the litigation." *In re Chinese-Manufactured Drywall*, 424 F. Supp. 3d at 487 (citing *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 147 (E.D. La. 2013)). Litigation of this Count of the Complaint will involve significant costs. If the claim proceeds to trial, the Parties will expend additional resources in producing pretrial briefs and preparing for trial.

Plaintiff submits that the relief obtained through the settlement agreement fully addresses the relief requested in the Amended Complaint. While Plaintiff continues to believe that hers is a strong case, litigation is inherently uncertain and could result in a judgment affording less comprehensive relief. If Plaintiff prevailed in a trial, she would face the additional costs and uncertainty of Defendants' likely appeal to the Fifth Circuit.

2. The Stage of the Proceedings and the Amount of Discovery Completed Weigh in Favor of Approval.

Courts consider the stage of the proceedings and discovery to determine "whether the parties have obtained sufficient information to evaluate the merits of the competing positions." *In re Oil Spill*, 295 F.R.D. at 148. Here, the Parties have engaged in an extensive discovery process, including depositions of nine of the major participants and stakeholders in the Deferred Prosecution Program. Before filing suit, Plaintiff's counsel requested numerous public records related to the operations of the Deferred Prosecution Program. Plaintiff deposed the City Prosecutor and Clerk's office staff who are most knowledgeable of the workings of the Deferred Prosecution Program. Plaintiff also propounded Requests for Admission, two sets of Interrogatories, and three sets of Requests for Production on Defendants. In addition to voluminous documents produced, Plaintiff also received hundreds of hours of audio recordings from Mayor's Court arraignments and trials. Plaintiff is sufficiently informed to assess the Parties' positions and to determine that the proposed settlement is in the best interest of the putative class members.

3. Probability of Success on the Merits.

In this step of the analysis, the "settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case" to determine whether the settlement is fair, adequate, and reasonable to the class. *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("The relief sought in the complaint may be helpful to establish a benchmark by which to compare the settlement terms.")

Here, the fairness, adequacy, and reasonableness of the settlement is evident, as the results obtained address the due process violations raised in Count II of the Complaint. The Class

will benefit from procedures to re-instate members wrongly terminated from the Deferred Prosecution Program and the protections to ensure the program is accessible to all.

Class counsel is prepared to present a compelling case in support of class-wide declaratory and injunctive relief. But counsel also recognizes that the inherent risk of litigation supports settlement of this action in order to achieve guaranteed relief for the class. Although it is possible that Plaintiff might have obtained more relief at a trial on the merits in some areas of the proposed decree, counsel maintains that the proposed settlement addresses the claims raised in Count II of the complaint while avoiding the risk of prolonged litigation and speeding remedy.

4. Range of Possible Recovery.

In this 23(b)(2) class, there is no award of damages. The only financial transfer anticipated by the settlement is, in accordance with paragraphs 11(o) and 11(p) of the agreement, the equitable relief of the refund or credit of Deferred Prosecution Program fees that were wrongfully forfeited. Under paragraph 11(o) there are 60 class members who would be receiving a full refund of the fees paid into the Deferred Prosecution Program. There are an estimated 60–70 class members who would be eligible for a credit under paragraph 11(p). Attempts to seek damages under § 1983 for the convictions that followed a termination from the Deferred Prosecution Program could have been barred by *Heck v. Humphrey*, 512 U.S 477 (1994), and its progeny.

5. Opinions of the class counsel and class representative weigh in favor of the Settlement.

Courts look at the opinions of class counsel, class representatives, and objectors in assessing whether a proposed class settlement is fair, adequate, and reasonable. *Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004). As a general matter, "recommendation of counsel is entitled to great weight following arm's-length settlement negotiations." Newberg, supra, §

14:47; *see also Cotton*, 559 F.2d at 1330 ("[T]he trial court is entitled to rely upon the judgment of experienced counsel for the parties.")

Plaintiff's counsel have many years of experience litigating civil rights cases. (ECF Nos. 142-2, 142-3 (declarations of counsel).) This experience informs counsel's conclusion that the proposed settlement is fair, adequate and reasonable to all class members.

The agreement has been explained to Ms. Richardson, class representative for Count II. She accepts the settlement as fair, adequate, and reasonable. She is prepared to testify regarding her opinions of the settlement.

Should objections from other class members be made to the Court in the course of the notice period, Plaintiff requests the opportunity to file supplemental briefing to address those objections.

6. Class Members are treated equitably under the settlement agreement.

Rule 23(e)(2)(d) requires courts to consider whether class members are treated fairly relative to one another. The terms of the settlement provide equal relief to all current and prospective class members. The only difference in treatment is that some members of the class will receive a refund of fees paid to the Deferred Prosecution Program; however, these are class members who forfeited funds to the program when they were terminated. Other class members would not be entitled to that equitable relief because they had not forfeited funds; e.g., they had not made any payments of program fees when they were terminated for non-payment, as opposed to someone who had made six months of payments before termination.

Relatedly, Rule 23(e)(2)(C)(ii) points Courts to "the effectiveness of any proposed method of distributing relief to the class." Defendants have identified those class members who are owed a refund. Upon approval of the settlement, Defendants will mail class members with

instructions for claiming their refund. Refunds unclaimed within 12 months of entry of the agreement will be forwarded to the Louisiana Treasury Department's unclaimed property division.

b. Notice to Class Members.

Under Rule 23(e)(1)(B), the Court must "direct notice in a reasonable manner to all class members who would be bound by the proposal." Unlike notice of class certification, notice of class settlement is mandatory. The manner of notice is left to the Court's discretion. The Manual for Complex Litigation notes that individual notice is generally required in settlement of claims for a class certified under Rule 23(b)(3); the manual is silent, however, as to the manner of notice for 23(b)(2) classes. *See* Manual for Complex Litigation, Fourth, § 21.312. A leading treatise notes the dearth of authority on this issue but points to the Manual for Complex Litigation's directive that "settlement notices should be delivered or communicated to class members in the same manner as certification notices" as further support for the treatment of individual notice as discretionary in a 23(b)(2) class settlement. 3 Newberg on Class Actions § 8:15 (5th ed.) ("[Courts] periodically opt to issue individual notice to (b)(1) and (b)(2) settlement class members even though only general notice is required." (internal citations omitted)). In determining the method of notice, the Court should choose a means "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. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Here, the terms of the settlement agreement are binding upon all class members. So, some form of notice is necessary. Plaintiff proposes that individual notice should be given to those members of subclasses B and C who have been identified as eligible for a refund or a credit

of program fees under the agreement. Plaintiff proposes the attached draft notice for use as a direct mailing. *See* Ex. 2. It consists of a cover page conveying basic information about the settlement and the ability to object, and is followed by two pages of more detailed information. In drafting this notice, Plaintiff's counsel referred to the Federal Judicial Center's *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*[2] and the FJC's *Illustrative Forms of Class Action Notices: Securities Notices*,[3] as the FJC provides no templates for 23(b)(2) settlement notifications. The notice points readers to a settlement website, www.GretnaDeferredProsecutionProgram.com, that will contain information on the settlement, means of filing objections or attending the hearing, and links to download all relevant documents in the case, including the Complaint, the proposed settlement, the motion for class certification, the present motion, and fee petition. Ex. 3 (renderings of proposed website).

Plaintiff proposes that general notice is sufficient for remaining current class members; i.e. those with cases pending before the Mayor's Court, and future class members. The annual number of participants in the Deferred Prosecution Program ranged from 1,633–1,851 between 2015 and 2018. (ECF No. 112-2 at 4 ¶ 19). The number of prospective class members is, by definition, unknowable. As forms of general notice to the class as a whole, Plaintiffs propose the use of targeted ads (based on zip codes) on Facebook, links from the current Mayor's Court websites hosted by the City of Gretna and the Gretna Police Department—including the payment portal—and flyers to be displayed at the Gretna clerk of court's office and in the courtroom during settings of Mayor's Court.

[2] Available at https://www.fjc.gov/content/judges-class-action-notice-and-claims-process-checklist-and-plain-language-guide-0 (last accessed May 9, 2020).
[3] Available at https://www.fjc.gov/content/securities-notices (last accessed May 9, 2020).

Plaintiff attaches, as Ex. 4, a proposed social media ad, which would also link to the settlement website for further information.[4] Plaintiff estimates that a Facebook ad targeted to newsfeeds of residents of zip codes for Gretna, Algiers, Harvey, Marrero, Westwego, Avondale, Bridge City, and Terrytown and with a reach of up to 20,000 people would cost approximately $71.42 per day. Defendants' search of their court management database shows that of those people with charges filed in the Mayor's Court, 83% reside in zip codes within the communities listed above. Plaintiff suggests that such targeted ads should run for at least 7 non-consecutive days.

Plaintiff attaches, as Ex. 5, a flyer that can be posted in the Gretna Clerk of Court's office and in the courtroom during sittings of the Mayor's Court. These were designed to convey basic information to class members and direct them to the settlement website for further information. Plaintiff suggests that the contents of this notice could be linked from the City's website,[5] the Clerk of Court's website,[6] and the portal for online payments to the city.[7]

In the Parties' view, notice in a print publication would be a relatively ineffective and costly means of providing general notice in this case. With the decline of print media in favor of online news, there are both fewer local print media outlets to choose from and less reach for those publications. The high costs of newspaper and magazine ads are not proportionate to the

[4] Courts have approved social media as forms of general notice of class settlement. *See Berni v. Barilla G.E.R. Fratelli S.P.A.*, 332 F.R.D. 14, 30 (E.D.N.Y. 2019) (approving notice plan for nationwide 23(b)(2) class settlement relying heavily upon internet notices and a settlement website); *Fitzhenry-Russell v. Coca-Cola Co.*, No. 5:17-cv-603-EJD, 2019 WL 6111378, at *3 (N.D. Calif. June 13, 2019) (approving notice plan for nation-wide settlement class consisting of settlement website, one print ad, and social media); *Busch v. Bluestem Brands, Inc.*, No. 16-cv-644-WHM/HB, 2019 WL 1976147, at *2 (D. Minn. May 3, 2019) (approving use of targeted Facebook ads in settlement notice plan); *Mark v. Gawker Media LLC*, No. 13-cv-4347, 2015 WL 2330274 (S.D.N.Y. Apr. 10, 2015) (approving use of Facebook and Twitter to disseminate settlement notice in Fair Labor Standard Act class action); *Evans v. Linden Research, Inc.*, No. C-11-01078, 2013 WL 5781284, at *3 (N.D. Cal. Oct. 25, 2013) ("[N]otice will appear on Facebook targeting [possible class members]."); *Kelly v. Phiten USA Inc.*, 277 F.R.D. 564, 569–70 (S.D. Iowa 2011)

[5] Available at https://www.gretnala.com (last accessed May 9, 2020).

[6] Available at https://www.gretnapolice.com/department-information/divisions/ (last accessed May 9, 2020).

[7] Available at https://tickets.gretnaclerkofcourt.com/Account/Login?ReturnUrl=%2f (last accessed May 9, 2020).

relatively small class in this case. The standard rate for a quarter page print advertisement in the Advocate / Times-Picayune is $2,100.00 per day. Regardless, Plaintiff's proposed social media notice, Ex. 4, could be adapted to print publication if the Court deems print publication necessary. Plaintiff referred to the FJC's sample publication notice in designing this notice.[8]

Plaintiff's counsel intend to file a petition for attorney's fees before the issuance of settlement notices, on Sept. 4, 2020. The proposed notice contains a provision notifying the putative class of the fees petition, in compliance with Fed. R. Civ. P. 23(h). Plaintiff's counsel will make the petition available on the settlement website for class members' review.

Finally, the Parties' settlement agreement does not address which party shall be responsible for the cost of settlement notice. Plaintiff suggests that Defendants should bear the cost of settlement notice. The Manual for Complex Litigation § 21.312 notes that defendants are often the parties responsible for the costs of settlement notice. Here, where there is no settlement fund or award of damages to the putative class members, placing the costs of notice on the representative Plaintiff or her counsel—a nonprofit law firm—would be particularly burdensome. The Parties have no agreement on the provision of attorney's fees, so Plaintiff's counsel would not be able to fund the settlement notice through such expected fees. Given the relatively small size of the class and the suggested means of notice, the costs of notice would not be overly burdensome for the municipality.

IV. Conclusion

Plaintiff's counsel believe that the proposed settlement is a fair, adequate, and reasonable resolution of the putative class's claims. The Court should grant preliminary approval, order

[8] *See supra* note 2.

notice to the class as it deems reasonable, and set a date for Plaintiff's counsel to submit their fee petition.

Respectfully submitted,

/s/ Eric A. Foley
Eric A. Foley, La. Bar No. 34199, TC
James W. Craig, La. Bar No. 33687
Elizabeth Cumming, La. Bar No. 31685
Roderick & Solange MacArthur Justice Center
4400 S. Carrollton Ave.
New Orleans, LA 70119
(504) 620-2259 (p)
(504) 208-3133 (f)
eric.foley@macarthurjustice.org
jim.craig@macarthurjustice.org
elizabeth.cumming@macarthurjustice.org

Counsel for Plaintiffs