IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

KAREN MCNEIL, *et al.*, Plaintiffs, v. COMMUNITY PROBATION SERVICES, LLC; *et al.*, Defendants.	Case No. 1:18-cv-00033 Judge Campbell/Magistrate Judge Frensley JURY DEMAND

MEMORANDUM IN SUPPORT OF
PLAINTIFFS AND COUNTY DEFENDANTS' JOINT MOTION
FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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Plaintiffs Karen McNeil, Lesley Johnson, Indya Hilfort, Lucinda Brandon, the Estate of Tanya Mitchell, and Victor Gray (collectively, "Named Plaintiffs"), by and through their counsel, along with Defendants Giles County and Giles County Sheriff Kyle Helton in his official capacity (the "County Defendants") respectfully submit this Memorandum of Law in Support of their Joint Motion for Preliminary Approval of a Class Action Settlement and Consent Decree between the Named Plaintiffs and County Defendants. Named Plaintiffs and County Defendants have conferred and do not believe that a hearing is necessary for the Court to grant their joint preliminary approval motion initiating the claims process and setting a final in-person Fairness Hearing. PSI Defendants and CPS Defendants are not party to the Settlement Agreement or Consent Decree. They oppose the motion.

I. BACKGROUND OF LITIGATION

In this litigation against CPS Defendants,[1] PSI Defendants,[2] and County Defendants, Named Plaintiffs Karen McNeil, Lesley Johnson, Indya Hilfort, Lucinda Brandon,[3] the Estate of Tanya Mitchell,[4] and Victor Gray[5] represent a putative class of people who were on probation in connection with a misdemeanor offense in Giles County on or after April 23, 2017, through March 31, 2021, for alleged violations of their due process and equal protection rights under the U.S. Constitution and their rights under Tennessee law. Named Plaintiffs Brandon, McNeil, Johnson,

[1] "CPS Defendants" includes Defendant Community Probation Services, LLC, Defendant Community Probation Services, L.L.C., Defendant Community Probation Services, and Defendant Patricia McNair.
[2] "PSI Defendants" includes Defendant Progressive Sentencing, Inc., Defendant PSI-Probation II, LLC, Defendant PSI-Probation, L.L.C., Defendant Tennessee Correctional Services, LLC, Defendant Timothy Cook, Defendant Markeyta Bledsoe, and former Defendant Harriet Thompson.
[3] Ms. Brandon was substituted for original Named Plaintiff Sonya Beard on April 19, 2019. Dkt. 253.
[4] The Estate of Tanya Mitchell was substituted for Ms. Mitchell's damages claims on March 23, 2021. Dkt. 432.
[5] Victor Gray was added as a Named Plaintiff on April 30, 2021. Dkt. 439.

Gray, and the Estate of Tanya Mitchell represent a second class of people who were on probation in connection with a misdemeanor offense in Giles County from April 23, 2015 to March 31, 2021, who paid fees to CPS Defendants and/or PSI Defendants. Finally, Plaintiffs Hilfort and Gray represent all people who are or will be convicted of a misdemeanor offense in Giles County and who are required to make payments and/or who are sentenced to probation.

Plaintiffs also brought a bail claim challenging the use of pre-determined secured money bail amounts on misdemeanor violation-of-probation warrants. Dkt. 41 (Corrected First Amended Complaint); Dkt. 42 (Motion and Mem. in Support of Motion for Temporary Restraining Order and Motion for Preliminary Injunction). The Court granted a Temporary Restraining Order, Dkt. 45, and then a class-wide preliminary injunction on the bail claim, Dkts. 224, 225. The Sixth Circuit affirmed the decision. *McNeil v. Cmty. Prob. Servs., LLC*, Case No. 1:18-cv-00033, 2019 WL 633012 (M.D. Tenn. Feb. 14, 2019), *aff'd,* 945 F.3d 991 (6th Cir. 2019). As part of seeking a preliminary injunction, Plaintiffs engaged in significant discovery, including written discovery and taking and defending fifteen depositions, which included the deposition of Plaintiff Hilfort. *See* Ex. 1 (Decl. of E. Rossi) ¶¶ 10, 18, 21.

After Plaintiffs propounded their initial discovery requests, the parties engaged in significant discovery for several months. *See* Rossi Decl. ¶¶ 18, 21, 33-49. In addition to vigorously litigating the sufficiency of Defendants' discovery responses, Plaintiffs defended the depositions of two Named Plaintiffs, prepared for the depositions of additional Plaintiffs and witnesses, responded to numerous interrogatories and requests for production, and engaged in significant third-party discovery. *Id*. ¶¶ 68-75. On April 18, 2019, CPS Defendants moved for summary judgment, raising qualified immunity as to Plaintiffs' constitutional claims. Dkts. 245, 251. The Court denied CPS's summary judgment motion as premature, Dkt. 283, but it stayed oral

discovery generally and written discovery as to CPS pending appeal of that order, Dkts. 296, 304. On August 14, 2019, during the stay, PSI moved for summary judgment. Dkt. 300. The Court denied the motion as premature. Dkt. 361. The Sixth Circuit subsequently affirmed the district court's denial of CPS Defendants' motion. *McNeil v. Cmty. Prob. Servs, LLC*, Case No. 19-5660, 803 Fed. App'x 846 (6th Cir. Feb. 28, 2020).

Throughout the first discovery stay, Plaintiffs continued to engage in substantial written discovery with County Defendants and PSI Defendants. Plaintiffs served additional requests for production and interrogatories, engaged in numerous meet and confers to obtain additional responsive documents and information in response to those requests, and gathered information from numerous third parties. Rossi Decl. ¶¶ 57-65. Altogether, Plaintiffs received over 76,000 documents spanning over 450,000 pages in discovery from County Defendants, CPS Defendants, and PSI Defendants. *Id*. ¶ 65. Plaintiffs also responded to additional discovery requests. *Id*. ¶ 73.

On May 14, 2020, PSI refiled its motion for summary judgment. Dkt. 363. The discovery stay was lifted on June 2, 2020. Dkt. 367. But CPS quickly filed two Rule 12 motions, challenging jurisdiction and the sufficiency of Plaintiffs' claims, and sought another stay of discovery pending resolution of those motions. Dkts. 369, 370, 374. The Court granted the stay. Dkt. 382. The parties fully briefed the motions, and on February 3, 2021, the Court issued decisions on the companies' dispositive motions, allowing several of Plaintiffs' claims to proceed. Dkts. 414-417.

On September 14, 2020, named Plaintiff Tanya Mitchell passed away unexpectedly. Dkt. 408. On January 12, 2021, Plaintiffs moved to substitute Ms. Mitchell's estate for Ms. Mitchell as class representative for Ms. Mitchell's damages claims. Dkts. 410, 413. The Court granted that motion on March 23, 2021. Dkt. 432. That same day, Plaintiffs filed a motion for leave to file a

Third Amended Complaint, seeking to add Victor Gray as a class representative for Ms. Mitchell's remaining injunctive claims. Dkt. 433. On April 30, that motion was granted. Dkt. 439.

Plaintiffs and County Defendants began settlement discussions in January 2020 and entered into mediation in the summer of 2020 with mediator Carlos Gonzalez. Rossi Decl. ¶ 93. Plaintiffs and County Defendants engaged in multiple telephonic meetings with Mr. Gonzalez, and he attended an in-person meeting with County Defendants and other Giles County officials in October 2020. *Id*. ¶ 94. The mediation process resulted in an agreement in principle between Named Plaintiffs and County Defendants for damages and injunctive relief. *Id*. ¶ 96. On May 7, 2021, the Giles County Commissioners Court voted to authorize the entry of a Settlement Agreement and Consent Decree, ending private probation in Giles County and approving a monetary settlement of $2 million. *Id*.

Named Plaintiffs and County Defendants concluded that settlement is desirable to avoid the time, expense, and inherent uncertainties of litigation and to resolve finally and completely all pending and potential claims relating to the alleged conduct involved in this litigation.[6] These parties further believe that the Settlement Agreement offers significant benefits to Class Members and is fair, reasonable, adequate, and in the best interest of all Class Members, defined as:

- Class A: All people (1) who are or will be convicted of a misdemeanor offense in Giles County and (2) who are required to make payments and/or who are sentenced to probation, represented by Named Plaintiffs Indya Hilfort and Victor Gray.

- Class B: All people who were on probation in connection with a misdemeanor offense in Giles County on or after April 23, 2017 through March 31, 2021, represented by all Named Plaintiffs.

- Class C: All people who paid CPS Fees and/or PSI Fees (as defined in the Settlement Agreement) while on probation in connection with a misdemeanor offense in Giles

[6] As part of the Settlement Agreement with County Defendants, Named Plaintiffs have agreed to dismiss with prejudice their claims against the PSI Defendants and CPS Defendants if the Court approves the Settlement Agreement and Consent Decree.

County on or after April 23, 2015 through March 31, 2021, represented by Karen McNeil, Lesley Johnson, Lucinda Brandon, Estate of Tanya Mitchell, and Victor Gray.

II. THE TERMS OF THE SETTLEMENT

In the interest of avoiding protracted and costly litigation, the parties have agreed to a proposed Consent Decree with the following basic terms:

1. Ending user-funded probation in Giles County (whether run by a third party or the County);

2. Ending the practice of keeping people in Giles County on supervised probation solely because they have not paid all of their probation fees;

3. Implementing use of a financial affidavit to ensure that the County does not collect legal financial obligations ("LFOs") or restitution from people who cannot afford to pay;

4. Waiving of past debts and notice thereof;

5. Recalling outstanding misdemeanor violation-of-probation ("VOP") warrants and notice thereof;

6. Restricting reissuance of past VOP warrants;

7. Restricting the reassessment of ability to pay during probation terms;

8. Eliminating pre-hearing detention for people arrested on misdemeanor VOP warrants;

9. Restricting the use of drug tests and reporting requirements for people on probation;

10. Training system actors on these new practices; and

11. Payment of $2 million in damages to Class Members and Named Plaintiffs and attorneys' fees.

Subject to court approval, payments out of the Settlement Fund will be allocated as follows: First, an award of 10% of the common fund will be paid in attorneys' fees and costs (the "Attorneys' Fee Award") from the Settlement Fund. Second, an additional $120,000 total will be distributed among Named Plaintiffs Hilfort, Brandon, the Estate of Tanya Mitchell, McNeil, Johnson, and Gray as payments for the service they provided in representing the classes in this

litigation. Third, each class member will receive equal portions of the Settlement Fund, which is expected to exceed the average amount of fees paid by class members to the companies.

III. PRELIMINARY SETTLEMENT APPROVAL IS APPROPRIATE

The law favors settlement, particularly in class actions, where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation. *See Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007). "Public policy strongly favors settlement of disputes without litigation. . . . Settlement agreements should therefore be upheld whenever equitable and policy considerations so permit." *Ford Motor Co. v. Mustangs Unlimited, Inc.*, 487 F.3d 465, 469 (6th Cir. 2007) (alteration in original) (quoting *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976)).

Where, as here, the parties resolve class action litigation through a class-wide settlement, they must obtain the Court's approval. *See* Fed. R. Civ. P. 23(e). Review of a proposed class action settlement generally occurs in two steps. In the first step, "[t]he judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b)." Manual for Complex Litigation (Fourth) § 21.632 (2004). Additionally, "[t]he judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." *Id.* At this stage, "the Court does not finally decide whether the settlement is fair and reasonable. Rather, the question . . . is simply whether the settlement is fair enough that it is worthwhile to expend the effort and costs associated with sending potential class members notices and processing . . . objections." *Garner Props. & Mgmt., LLC v. City of Inkster*, 333 F.R.D. 614, 626 (E.D. Mich. 2020).

For a proposed settlement to proceed to class notice and a fairness hearing, the Court must preliminarily determine that the settlement is "fair, reasonable and adequate," Fed. R. Civ. P. 23(e)(1)-(2), applying the following factors:

> (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 attorneys' 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).[7]

As set forth further below, the proposed settlement falls well within the range of possible approval, and thus warrants the dissemination of notice apprising class members of their opportunity to participate in, opt out of, or object to the settlement.

A. Class Representatives and Counsel Have Fairly Represented the Class

Both Named Plaintiffs and Class Counsel have diligently and fairly represented their respective classes throughout this litigation. Several of the Named Plaintiffs have been actively litigating this case for over three years. They have assisted in the preparation of responses to numerous discovery requests, including turning over sensitive documents and information regarding their finances. Rossi Decl. ¶¶ 67-68, 70. Three of the Named Plaintiffs were subjected

[7] This list of factors, added in the 2018 amendment to Rule 23, merely codified factors that already existed in the federal courts, including in the Sixth Circuit. *See* Fed. R. Civ. P. 23(e) advisory committee's note to 2018 amendment; *UAW v. GMC*, 497 F.3d 615, 631 (6th Cir. 2007). While the list of Rule 23(e)(2) factors does not purport to "displace any factor" considered previously in a particular circuit, its purpose is to "focus[] on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal." Fed. R. Civ. P. 23(e) advisory committee's note to 2018 amendment.

to intense depositions that lasted between four and seven hours and included extensive discussions of personal history such as prior criminal convictions; mental and physical health conditions; their families, including their young children; their financial situations; and traumatic encounters with law enforcement officers and in jail. *Id*. ¶ 72. All of them responded to detailed, intrusive interrogatories covering sensitive, personal topics such as every source of their income (including information regarding any money borrowed from anyone, who it was borrowed from, and whether it was paid back), their employment history, their monthly expenses, financial account information, credit card information, phone numbers, and history of interaction with the criminal legal system. *Id*. ¶ 70. Three Plaintiffs were on supervised probation during the pendency of this lawsuit, exposing them to publicity and the risk of retaliation at a time when their liberty depended on decisions made by the parties they sued. And even after the Named Plaintiffs were released from their terms of supervised probation, they continued to vigorously represent the interests of class members on supervised probation, including strongly advocating for injunctive relief that would prevent others from being subjected to the constitutional violations that they had endured.

Class Counsel has likewise fairly represented the class. Class Counsel has engaged in significant litigation in this case, including litigating and winning a temporary restraining order and preliminary injunction; engaging in significant motions practice, including responding to multiple motions to dismiss, preparing lengthy evidentiary exhibits in response to repeated premature motions for summary judgment, and prevailing on their core legal claims; and briefing and winning two interlocutory appeals to the Sixth Circuit. Rossi Decl. ¶¶ 48-55, 74-82. Class Counsel has also participated in extensive discovery, making more than twenty sets of discovery requests to three sets of defendants, responding to multiple requests for discovery, turning over thousands of pages of documents, and reviewing more than 450,000 pages of materials received

in discovery. *Id.* ¶¶ 10, 33, 39, 43-45, 62, 65, 67-68, 70. And, when two Named Plaintiffs could no longer participate in the litigation, Class Counsel expended significant energy locating class members who were willing to serve as substitute class representatives. *Id.* ¶ 132.

The proposed relief reflects this fair representation. Because neither the County nor the Companies have accurate records of the amount paid in fees or court costs, it is impossible to calculate individualized damages. Accordingly, the settlement proposes to distribute shares of the Settlement Fund to class members equally, recognizing both the harm suffered by those on supervised probation generally (Class B) and the harm suffered by those who paid fees to the Companies (Class C). The exact amount will depend on the total number of people in the classes,[8] and the number of class members who accept payment, as described below. But even if every member of the roughly 4,300 class members accepted payment, the average class member would receive more than $450, which significantly exceeds the average amount of fees paid by class members to the companies based on a sampling of probation files. Rossi Decl. ¶¶ 99, 101. Given the circumstances, it is fair and reasonable to remit an average award that reflects substantial compensation to the average class member.

The injunctive relief set forth in the proposed Consent Decree also affects sweeping reforms to Giles County's practices that will benefit Class Members, and confers significant financial benefits to Class Members in the form of immediate forgiveness of millions of dollars of outstanding debts and fines. Additionally, outstanding misdemeanor violation-of-probation warrants will not be executed. This relief will protect the financial resources of Class Members, ensure that they will not be kept on probation solely to pay fees, and will prevent them from being

[8] At the time of filing, Plaintiffs are waiting for database records from CPS Defendants and PSI Defendants that will allow Class Counsel to determine the exact number of people in the classes.

charged fees to fund the probation system. The settlement thus offers fair and substantial relief given the significant challenges and risks associated with pursuing such claims individually or through further litigation.

B. The Proposed Settlement Was Negotiated at Arm's Length

Named Plaintiffs and County Defendants employed a neutral mediator who is experienced in litigation regarding private probation practices to assist the parties in reaching agreement. The negotiations took place over more than a year, and resulted in an agreement that reflects significant compromise of both parties' initial positions. Throughout the period of negotiations, Plaintiffs and County Defendants also engaged in extensive discovery that resulted in the parties seeking intervention of the Court to resolve discovery disputes, further demonstrating that these parties were not engaging in any form of collusion. Rossi Decl. ¶¶ 35, 41-42, 58-59, 62, 64; *cf. Dick v. Sprint Comms. Co.*, 297 F.R.D. 283, 295 (W.D. Ky. 2014) (noting that "extensive motion practice" between the parties and a lack of any "allegation[s] of fraud or collusion" weighed in favor of approving settlement). A settlement like this one that is reached through arms-length negotiations is entitled to a presumption of fairness. *See 4 Newberg on Class Actions* § 13:43 (5th ed.) ("[A] settlement reached at arms-length is presumed to be fair . . . ."); *Granada Investments, Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992) ("Absent evidence of fraud or collusion, such settlements are not to be trifled with.").

C. The Proposed Settlement Is Adequate Given the Costs and Risks of Litigation, the Method of Distribution, and the Proposed Attorneys' Fees

The settlement provides adequate relief to all class members in light of Rule 23(e)(2)'s considerations. First, the complexity, risks, and costs of additional litigation in this case are great. As this case's length and history plainly demonstrate, this case has been vigorously contested at every stage over the course of over three years. And although Plaintiffs have completed paper

discovery with County and PSI Defendants, discovery with CPS Defendants has effectively been on pause since the first stay of discovery in June 2019, with only limited discovery occurring before then. In addition, other than an initial round of depositions before the Preliminary Injunction, Plaintiffs have taken no depositions. It would require a significant expenditure of time to prepare for and conduct depositions against three sets of Defendants and third-party witnesses, as well as defending the remaining Plaintiff depositions and additional witnesses subjected to supervised probation by Defendants. Any trial in this case would likely be lengthy and complex given the multiple sets of Defendants, significant number of witnesses, the volume of evidence needed to demonstrate that the constitutional violations resulted from policies and practices of the Defendants, and the need for expert witness testimony. This case, like all litigation, presents additional risks and costs for the Named Plaintiffs themselves, including the significant burdens of preparing for and participating in a multi-week trial, as well as the emotional toll of sharing the details of their personal life and their financial struggles publicly.

Second, the method of distribution of the settlement is adequate. Plaintiffs are proposing that the primary class, those with constitutional claims, be given a distribution that, to the best of Plaintiffs' knowledge, will exceed Counsel's best estimate of the mean, median, and mode amount of fees paid by class members. Rossi Decl. ¶¶ 99, 101. In addition, those who paid supervision fees would receive an additional payment that further compensates them for the amount extracted by the Companies. *Id.* And this amount does not include the automatic waiver of any fees and costs that are not yet paid. Plaintiffs expect that many people who were on misdemeanor probation will have around $1,500 of debt waived, *id.* ¶ 102, often clearing the way to reinstate driver's licenses that were suspended for nonpayment. The value of this relief is significant.

Counsel estimates that there are approximately 4,300 class members: 3,700 in Class B and 3,200 in Class C. *Id.* ¶¶ 97-98. There is significant overlap between those classes: Plaintiffs' counsel estimates that approximately 2,600 are in both Class B and Class C, approximately 1,000 are solely in Class B, and approximately 600 are solely in Class C. *Id.* The Settlement Fund, minus proposed Service Payments and Attorneys' Fees, is equal to $1,680,000. The funds will be distributed as follows:

- Each member of Class B will be entitled to receive an initial Cash Award equal to 80% of $1,680,000 (the Settlement Fund minus attorneys' fees and service payments), divided by the total number of people in Class B. If there are 3,700 individuals in Class B, then the initial Cash Award for Class B would be $363. *Id.* ¶ 101.

- Each member of Class C will be entitled to receive an initial Cash Award equal to 20% of $1,680,000, divided by the total number of people in Class C. If there are 3,200 individuals in Class C, each person will receive $105. *Id.*

- Individuals in Class B *and* Class C would thus receive an initial Cash Award of $468. *Id.*

- If money reverts to the Settlement Fund after the deadline to cash the initial checks has passed, the Settlement Administrator will make a second payment to each Settlement Class Member who cashed a check or accepted payment from the Settlement Administrator through another means. Each member of Class B who cashed their initial checks or otherwise accepted their initial payment will be entitled to a second Cash Award equal to 80% of the reverted settlement funds divided by the total number of people in Class B who cashed their initial checks or otherwise accepted their initial payment. Each member of Class C who cashed their initial checks or otherwise accepted their initial payment will be entitled to a second Cash Award equal to 20% of the reverted settlement funds divided by the total number of people in Class C who cashed their initial checks or otherwise accepted their initial payment. The Settlement Administrator will not, however, issue payments equal to less than $25.00.[9]

[9] For example, if 50% of class members cash their initial Awards or otherwise receive payment, Class B members will receive a second Cash Award of $363 and Class C members will receive a second Cash Award of $105. If 60% of class members cash their initial Awards or otherwise receive payment, Class B members receive $242 and Class C members receive $70. *Id.* ¶ 101.

- If any additional funds remain in the Settlement Account after the second distribution, they shall be donated to Free Hearts in Nashville, Tennessee.

In addition, individuals on probation in Giles County at the time of Final Approval or in the future will receive significant nonfinancial benefits in the form of injunctive relief.

Finally, the settlement is fair in light of the Attorneys' Fee Award sought. Plaintiffs are requesting a lump sum of $200,000 to cover their costs and fees. This is 10% of the total award, which is far less than the percentage of a class-action settlement often found fair in this circuit. *See Gokare v. Fed. Express Corp.*, 2013 WL 12094887, at *4 (W.D. Tenn. Nov. 22, 2013) (approving attorneys' fees worth 30.9% of settlement fund); *In re Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at *3–4 (E.D. Tenn. May 17, 2013) (approving attorneys' fees constituting one-third of settlement fund); *Bessey v. Packerland Plainwell, Inc.*, 2007 WL 3173972, at *4 (W.D. Mich. Oct. 26, 2007) (approving an award of 33%, including costs and expenses, and noting that "[e]mpirical studies show that . . . fee awards in class actions average around one-third of recovery" (citation omitted)). Moreover, this amount represents a fraction of the attorneys' fees expended; Class Counsel have collectively worked more than 10,000 hours on this case, and costs alone exceed $190,000. Rossi Decl. ¶¶ 133-34. Counsel is foregoing a significant amount of fees given the nature of the case and in order to maximize the recovery to the class.

D. The Proposal Treats Absent Class Members Equitably

The proposed Settlement Agreement and Consent Decree are equitable with respect to both Named Plaintiffs and Class Members. The Consent Decree results in significant injunctive relief, including the forgiveness of millions of dollars of debt for countless class members. And the distribution of the financial portion of the settlement will apply equally to the Named Plaintiffs and absent Class Members. Although Named Plaintiffs seek a Service Payment, this amount is justified by the significant expenditure of time and effort by Named Plaintiffs to participate in this

litigation (several for more than three years), and to be subjected to invasive discovery. *See infra* Sec. IV.

E. Other Factors Favor Settlement

Other factors that the Sixth Circuit considers but not contained in Rule 23(e)(2) also demonstrate the fairness of this settlement. *See UAW*, 497 F.3d at 631 (listing factors like sufficiency of discovery, opinions of represented class, and public interest). *First*, the parties have conducted sufficient discovery to justify approval of settlement. Plaintiffs have reviewed a large number of documents from County Defendants, CPS Defendants, and PSI Defendants to assess the strength of their claims, to confirm municipal liability and the companies' policies and practices, the likely number of individuals in the class, and the amount of financial injury suffered by Class Members. *Second*, Class Counsel and the Named Plaintiffs support preliminary approval. The judgment of experienced counsel who have evaluated the strength of their evidence weighs in favor of approving this class settlement. The class would achieve through this settlement much of what was sought in litigation while preventing costly, protracted litigation. Named Plaintiffs unanimously support the proposed settlement as in the best interests of the class. *Third*, the public interest strongly favors approval of the settlement. Protecting constitutional rights is always in the public interest. The proposed Settlement Agreement preserves the constitutional rights of individuals on supervised probation in Giles County by ensuring that they are not subjected to harsher treatment based on inability to pay and that they will not be supervised by a probation officer with a financial incentive to make discretionary decisions in ways that restrict their liberty and result in longer periods on supervision and more debt.

IV. THE ATTORNEYS' FEES ARE FAIR AND REASONABLE

Under the terms of the Settlement Agreement, class counsel will receive $200,000 to cover their attorneys' fees and costs, or 10% of the total settlement fund. The Sixth Circuit permits courts

to employ the percentage approach, which "more accurately reflects the results achieved," *see Rawlings v. Prudential-Bache Props.*, 9 F.3d 513, 515-16 (6th Cir. 1993), and a 10% recovery falls well below the range of percentage-of-fund awards routinely approved in this circuit, *see Gokare*, 2013 WL 12094887, at *4; *In re Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at *3–4; *Bessey v. Packerland Plainwell, Inc.*, 2007 WL 3173972, at *4 (all approving attorneys' fees awards of 30% or greater).

In common fund cases, a fee award is appropriate if it is reasonable under the circumstances, in light of factors like the complexity of the legal questions involved, the results achieved, the efforts expended, and the importance of the matter at hand. *See Denney v. Phillips & Buttorf Corp.*, 331 F.2d 249, 251 (6th Cir. 1964); *Smillie v. Park Chem. Co.*, 710 F.2d 271, 275 (6th Cir. 1983); *Pergament v. Kaiser-Frazer Corp*., 224 F.2d 80, 83 (6th Cir. 1955). Collectively, these factors militate in favor of approving the requested Attorneys' Fee Award. Class Counsel has litigated complex and novel questions of federal civil rights law over three years, including litigating several dispositive motions and prevailing in two Sixth Circuit interlocutory appeals. Rossi Decl. ¶¶ 31, 53. The settlement fund impacts approximately 4,300 affected class members and obtains debt forgiveness for the class members, and the injunctive relief in the proposed Consent Decree ensures that no one in Giles County will endure violations of their federal constitutional rights.

IV. THE SERVICE PAYMENT TO NAMED PLAINTIFFS IS FAIR AND REASONABLE

In accordance with the Settlement Agreement, the Named Plaintiffs will receive a Service Payment that is allocated based on the length of time they participated in the case and whether and to what extent they participated in discovery, including whether they submitted to a deposition. The proposed Service Payments are $25,000 for individuals who were deposed (Lucinda Brandon,

the estate of Tanya Mitchell, and Indya Hilfort), $20,000 for the other original Named Plaintiffs (Karen McNeil and Lesley Johnson), and $5,000 for recently-added Named Plaintiff Victor Gray.

These Service Payments are reasonable. While the Sixth Circuit "has never explicitly passed judgment on the appropriateness of incentive awards," it has recognized that numerous courts of appeals "have stressed that incentive awards are efficacious ways of encouraging members of a class to become class representatives and rewarding individual efforts taken on behalf of the class." *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003); *accord Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 787 (N.D. Ohio 2010) ("Courts within the Sixth Circuit . . . recognize that, in common fund cases and where the settlement agreement provides for incentive awards, class representatives who have had extensive involvement in a class action litigation deserve compensation above and beyond amounts to which they are entitled to by virtue of class membership alone."). Here, the Named Plaintiffs provided substantial support to Class Counsel throughout the course of litigation over more than three years. Rossi Decl. ¶¶ 103-24. This includes providing a significant amount of documents, including personal financial information; participating in the investigation and litigation, including helping counsel identify potential witnesses and substitute class representatives when necessary; preparing for and sitting for lengthy depositions, which included invasive questions about their personal finances, life choices, criminal history, and time on probation; and having an untold number of conversations with Class Counsel about their experiences and proposed relief. Named Plaintiffs remained committed to their roles in this case, even as they dealt with personal tragedy, housing and food

insecurity, medical issues, and juggled immense familial responsibility. *Id.* ¶¶ 72, 110-11, 114, 117-18, 120-21, 124.

The total amount that will be awarded in Service Payments is $120,000, with the highest individual amount being $25,000. The total amount of Service Payments amounts to 6% of the total settlement, with the highest individual Service Payment representing 1.25% of the total settlement. And the Settlement Fund does not include the total amount of debt being forgiven, which Plaintiffs' counsel estimates could exceed $6.5 million dollars. Rossi. Decl. ¶ 102. Considering both the cash awards *and* the amount of debt forgiven, the service payments amount to 1.41% of the total settlement, with the highest individual Service Payment representing .29%. The Service Payment amounts are proportional to the benefits received by the entire class, which include a financial award that exceeds the average amount of costs class members paid to Defendants during their time on supervised probation; automatic forgiveness of any remaining outstanding fees and debts; and a continuing benefit in the form of significant changes to the way in which supervised probation is run in Giles County.

The service payments sought are also in line with similar awards given within this Circuit. *See* Order Granting Final Approval to Class Settlement at 10, *Rodriguez v. Providence Cmty. Corr., Inc.*, No. 15-01048 (M.D. Tenn. July 5, 2018), Dkt. 228 (approving $10,000 per named plaintiff in suit against private probation companies as "just compensation for the time and effort spent on bringing this action to a successful conclusion" where the case was stayed just seven months after filing and settlement occurred before discovery opened); *In re Polyurethane Foam Antitrust Litig.*, 135 F. Supp. 3d 679, 694 (N.D. Ohio 2015) (approving $35,000 per named plaintiff where "the representative Plaintiffs responded to document requests and were deposed"); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 WL 2946459, at *4 (E.D. Tenn. June 30, 2014)

(collecting cases awarding $50,000 or more to each named plaintiff); *Boynton v. Headwaters, Inc.*, 2012 WL 12546853, at *3 (W.D. Tenn. Mar. 27, 2012) (approving $100,000 for each of two named plaintiffs and $10,000 each for other named plaintiffs).

V. THE PROPOSED CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

A. The Proposed Class Meets the *Amchem* Requirements for Certification of a Settlement Class

Before granting preliminary approval of a settlement in a case where a class has not yet been certified, the court should determine whether the class proposed for settlement is appropriate under Federal Rule of Civil Procedure 23. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); *Manual* § 21.632. "To proceed as a class action, the litigation must satisfy the four prerequisites of Rule 23(a) as well as at least one of the three requirements of Rule 23(b)." *In re Aquila ERISA Litig.*, 237 F.R.D. 202, 207 (W.D. Mo. 2006). In certifying a settlement class, however, the court need not determine whether the action, if tried, "would present intractable management problems, for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620; *see also* Fed.R.Civ.P. 23(b)(3)(D). Here the proposed classes meet the requirements of Rule 23(a) and satisfies the requirements of Rule 23(b)(2) and (3). Therefore, Named Plaintiffs request that the Court provisionally certify the proposed classes for settlement purposes only.

B. The Requirements of Rule 23(a) Are Met

Numerosity. "Rule 23(a)(1) requires that the proposed class be 'so numerous that joinder of all members is impracticable.'" *Aquila ERISA Litig.*, 237 F.R.D. at 207 (quoting Fed. R. Civ. P 23(a)(1)). There are approximately 4,300 total class members in Class B and Class C, which readily satisfies the numerosity requirement. *See, e.g., Jones v. Novastar Fin., Inc.*, 257 F.R.D. 181, 186 (W.D. Mo. 2009); *1 Newberg* § 3.12, at 8–16 (5th ed.) (noting that a class of more than 40 members presumptively satisfies numerosity); Rossi Decl. ¶¶ 97-98. Class A, the injunctive class, also

satisfies numerosity. Historically, there were hundreds of people on supervised probation in Giles County at any given time, the majority of whom were indigent and would have been placed on unsupervised probation if they could afford to pay their court debts and supervision fees in full. Traditional joinder is not practicable because there is a future stream of class members who will suffer the same injury absent injunctive relief. *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (finding impracticability of non-class joinder for a class including future members, who could not yet be identified); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 184 F.R.D. 583, 586 (N.D. Ohio 1998) ("In deciding whether joinder would be impracticable, factors such as . . . requests for prospective and injunctive relief that could affect future class members are significant.").

Commonality. The proposed class also meets the commonality requirement, which requires that "there [be] questions of law or fact common to the class." It "does not require commonality on every single question raised in a class action." *Aquila ERISA Litig.*, 237 F.R.D. at 207. Here, ample evidence demonstrates the existence of common questions, such as whether Giles County's decision to contract with a for-profit, user-funded probation officer that has the duties and powers of a traditional probation officer but also has a personal financial interest in the management and outcome of every case it supervises violates federal law. *See* Dkt. 416 (Mem. Op. Denying PSI Def.'s MSJ) at 5-6 (explaining that County entered into "similar arrangements" with PSI and CPS, where the County does not pay the companies but issues orders requiring the payment of supervision fees to the companies, in addition to fines, court costs, and restitution). Similarly, whether Defendants placed and kept individuals on supervised probation solely because they could not afford to pay their court debts and probation fees without an inquiry to determine whether or not their failure to pay was willful is a common question. *See, e.g.*, *id.* at 7 (discussing evidence

that PSI initiated violation-of-probation proceedings solely for non-payment). And this Court already found that Giles County required pre-determined secured money bail amounts to be paid upfront before it will release a person from its jail after an arrest for an alleged violation of misdemeanor probation. Dkt. 224 at 5-6. These are just a handful of the common questions of law and fact that apply to the class members in the litigation.[10]

Typicality. Rule 23(a)(3) requires that "the claims . . . of the representative parties [be] typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). "This subsection simply requires 'a demonstration that there are other members of the class who have the same or similar grievances as the [class representative].'" *Aquila ERISA Litig.*, 237 F.R.D. at 209 (citation omitted) (alterations in original). Named Plaintiffs' claims are typical of the claims of the members of the Classes, and they have the same interests in this case as all other members of the Classes that they represent. Each of them alleges that she or he suffered injuries from the failure of the Defendants to comply with the constitutional and state-law provisions detailed in the Third Amended Complaint. The answer to whether the Defendants' policies and practices is unlawful in the ways alleged will determine the claims of the Named Plaintiffs and every other Class Member.

Adequacy. The fourth and final requirement of Rule 23(a) is that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This analysis focuses on: (1) whether the Named Plaintiffs have common interests with the other class members, and (2) whether they will adequately prosecute the action through qualified counsel. *In re Am. Medical Systems, Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996). Here, there are no conflicts of interest between Named Plaintiffs and Class Members. *See Jones*, 257 F.R.D. at 192. All have the mutual

[10] County Defendants do not admit liability or wrongdoing with respect to the common questions of law and fact.

incentive to establish the unlawfulness of Defendants' policies and practices and vindicate their constitutional and other rights. The policies and practices at issue impacted all Class Members in the same way. And Class Counsel has provided fair and vigorous representation for the Class. Collectively, Class Counsel has significant experience litigating civil rights class action lawsuits. Rossi Decl. ¶¶ 135-38. In multiple federal class action lawsuits, courts have found them to provide adequate representation. *Id.*

C. The Requirements of Rule 23(b)(3) Are Met

Rule 23(b)(3) provides for class certification if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." To satisfy the predominance requirement, "a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007) (citation omitted).

Predominance. As described above, Named Plaintiffs and Class Members allege injuries from a common set of policies and practices that are applicable to the class as a whole. These common issues ensure predominance of common questions over individual issues. The common questions of law and fact listed above are dispositive questions in the case of every member of the Class and can therefore be determined on a class-wide basis. Class-wide treatment of liability is a far superior method to determine the content and legality of Defendants' policies and practices than individual suits by hundreds or thousands of people. The question of damages is suitable for class-wide determination because it will be driven by common considerations, such as the policies and practices of the Defendants. Under the terms of the settlement, Class Members who were on

probation with CPS or PSI during the relevant time period will receive a lump sum payment that reflects, on average, an amount greater than the amount of fees paid to the companies.

Superiority. The Court's final consideration in applying Rule 23(b)(3) is whether a class action is the superior method for adjudicating the case. Fed. R. Civ. P. 23(b)(3) lists the factors pertinent to the superiority determination as follows:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

All four of these factors support certification here for settlement purposes. *First,* most class members have an insufficient interest to justify individual lawsuits. Certification permits a class-wide adjudication of the claims of similarly situated claimants when individual prosecution would not be cost-effective. The Supreme Court has frequently noted the need for aggregate representation through certification if such claims are to be addressed. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *see also Amchem*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (noting that the "policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action" and that "a class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.").

Effective private enforcement requires mechanisms to aggregate these claims lest the relatively small stake of each individual, as well as the indigence of many putative class members, impede the vindication of their constitutional rights. Aggregate litigation is therefore necessary to protect the rights of people Plaintiffs alleged were harmed by Defendants' unconstitutional policies and practices while on supervised probation with CPS or PSI. The class action mechanism is meant

to afford remedies to claimants who cannot otherwise prosecute their claims in a cost-effective manner. *Deposit Guar. Nat. Bank*, 445 U.S. at 338 n.9. The claims at issue here are such that class relief is the only realistic option for the vast majority of Class Members.

Second, the extent and nature of any other litigation by class members also supports class certification. There are no other pending class actions, or, to Plaintiffs' knowledge, individual cases against Defendants asserting the claims here in dispute. So, this factor supports settlement class certification. *Third,* this Court has subject matter jurisdiction over the claims alleged in this case, personal jurisdiction over the parties, and personal jurisdiction extends to members of the Class because the notice provided in this case will be constitutionally sufficient. *Shutts*, 472 U.S. at 811–812. And *fourth*, the Supreme Court confirmed in *Amchem* that the manageability of a class action at trial is an irrelevant consideration in the context of a proposed settlement class, because the proposal is that there be no trial. *Amchem*, 521 U.S. at 620. Therefore, the Court need not consider manageability *at trial* as part of its settlement approval calculus. The settlement class, as described above, will be easily manageable. This factor supports certifying the Settlement Class.

VI. THE PROPOSED NOTICE TO PUTATIVE CLASS MEMBERS IS APPROPRIATE

Under Rule 23(e), the Court must direct notice in a reasonable manner to all class members who would be bound by the proposal. Fed. R. Civ. P. 23(e)(1). This Court has wide discretion in determining what constitutes reasonable notice under Rule 23(e), in form and method. *See Franks v. Kroger Co.*, 649 F.2d 1216, 1222-23 (6th Cir. 1981), *modified on other grounds on rehearing,* 670 F.2d 71 (6th Cir. 1982); 7B Fed. Prac. & Proc. Civ. § 1797.6 (3d ed.). "The notice should be reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *UAW*, 497 F.3d at 629.

The notice must "concisely and clearly state in plain, easily understood language: the nature of the action, the definition of the class certified, the class claims, issues or defenses, that a class member may enter an appearance through counsel if the class member so desires, that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and the binding effect of a class judgment on class members under Rule 23(c)(3)." Fed. R. Civ. P. 23 (c)(2)(B). It need not "set forth every ground on which class members might object." *UAW*, 497 F.3d at 630. It must only "fairly apprise the prospective members of the class of the terms of the proposed settlement" so they can decide whether the settlement serves their interests. *Id.* It is not necessary for all of the details of the settlement to be included, "as long as sufficient contact information is provided to allow the class members to obtain more detailed information." 7B Fed. Prac. & Proc. Civ. §1797.6 (3d ed.).

Plaintiffs and County Defendants have jointly crafted a notice that complies with Rule 23(c)(2)(B) and provides clear information to putative class members in plain language. *See* Ex. B. Postcard notice will be mailed to the last known address of each putative class member. It will also be posted on Facebook, in the Pulaski Citizen (local newspaper), and in the local courthouse. This variety will reasonably ensure that each putative class member receives notice.

V. CONCLUSION

For all of the foregoing reasons, Named Plaintiffs respectfully request that the Court (1) grant preliminary approval of the proposed class action settlement; (2) preliminarily certify the proposed settlement class; (3) authorize the publication of Class Notice; and (4) schedule a final approval hearing as soon as practicable.

Dated: June 30, 2021

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on June 30, 2021, I electronically filed the foregoing Memorandum in Support of Named Plaintiffs' and County Defendants' Joint Motion for Preliminary Approval of a Class Action Settlement and Consent Decree using the CM-ECF System, which caused notice to be sent to via email to the following counsel of record:

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