UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-2406-CIV-MORENO

MICHAEL POTTINGER, PETER CARTER and BERRY YOUNG,

Plaintiff,

vs.

CITY OF MIAMI,

Defendant.
_____/

FINAL ORDER APPROVING SETTLEMENT AND DISMISSING CASE

THIS MATTER is before the Court upon the limited remand order from the Eleventh Circuit Court of Appeals issued on April 9, 1998 to consider the proposed settlement agreement pursuant to Fed.R.Civ.P. 23(e). The Court held a public hearing on September 29, 1998 to consider the parties' joint motion to approve the proposed settlement agreement. After hearing from all interested parties, the Court approves the proposed settlement.

In approving the settlement, the Court has weighed the following relevant factors:

(1) the likelihood that the judgment would be upheld on appeal if the motion were not granted;

(2) the complexity, expense, and duration of this ten-year-old case to date, all of which would be increased by further proceedings if the settlement were not approved;

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(3) the judgment of experienced trial counsel for both parties;

(4) any objections raised by the class members or the public; and

(5) the public interest.

See *Leverso v. South Trust Bank of Ala., Nat'l Assoc.*, 18 F.3d 1527, 1530 n.6 (11th Cir. 1994); *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984).

In weighing these factors, the Court is mindful that "settlements are favored over continued litigation." *United States v. Board of Public Instruction of St. Lucie County*, 977 F. Supp. 1202, 1206 (S.D. Fla. 1997) (citing *United States v. Miami*, 614 F.2d 1322, 1333 (5th Cir. 1980), *reh'g en banc on other grounds*, 664 F.2d 435 (5th Cir. 1981) (per curiam)); see also *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977).

The Court, in approving the settlement agreement, finds that it represents the product of nearly ten years of litigation, appeals, and mediation. The Court further recognizes that the parties have engaged in a serious and substantial effort to settle the issues in a manner that protects the interest of the Plaintiffs, the City, and the public.

In approving the settlement agreement, the Court makes the following findings of fact and separate conclusions of law, without objection, which shall support its judgment approving the proposed Settlement Agreement:

I. PROCEDURAL HISTORY

1. On December 23, 1988, Plaintiffs filed this action against the City of Miami on behalf of themselves and other homeless persons living in the City pursuant to 42 U.S.C. § 1983 alleging that the City had a custom, practice and policy of arresting homeless people for conduct that includes ordinary activity of daily life on the streets.

2. The Honorable C. Clyde Atkins certified a class of "homeless persons who reside or will reside on the streets, sidewalks, parks, and in other public places in the geographic area bound on the north by Interstate [3]95, on the south by Flagler Street, on the east by Biscayne Bay, and on the west by Interstate 95, within the City of Miami, who have been, expect to be, or will be arrested, harassed, or otherwise interfered with by members of the City of Miami Police Department for engaging in the ordinary and essential activities of daily living in public due to the lack of other adequate alternatives." *Pottinger v. City of Miami*, 720 F.Supp. 955, 960 (S.D. Fla. 1989).

3. On April 26, 1990, Judge Atkins ordered the City not to destroy property collected at the time of contact with homeless persons and to follow its own written policy of preserving property obtained by its police unit. A year later, Judge Atkins found the City in contempt of the order as a result of incidents under the I-395 underpass and in Lummus and Bicentennial Parks. However, Judge Atkins denied a motion by Plaintiffs to enjoin the City's plan to evacuate and close Lummus Park and the area under I-395, based on

the City's assurances that it would offer comparable or better housing to displaced individuals.

4. Judge Atkins bifurcated the trial of the case into liability and damage phases. A non-jury trial on liability was held and Judge Atkins ruled that the City, through a municipal policy, violated various constitutional rights of the Plaintiffs. Accordingly, Judge Atkins enjoined the City from arresting the homeless Plaintiffs for certain acts they were forced to perform in public, and from seizing and destroying their property without following its own procedures for handling found or seized property. *Pottinger v. City of Miami,* 810 F. Supp. 1551 (S.D. Fla. 1992). Judge Atkins directed the establishment of two or more arrest-free zones, or "safe zones," where the City would be enjoined from arresting homeless individuals for engaging in such harmless, involuntary conduct.

5. The City appealed to the Eleventh Circuit Court of Appeals, which stayed implementation of Judge Atkins' order pending appeal. The Court of Appeals subsequently remanded the case to Judge Atkins to make further findings of fact and to clarify the judgment. *Pottinger v. City of Miami*, 40 F.3d 1155 (11th Cir. 1994). Judge Atkins complied and concluded that "[t]hough improvement in the overall situation is occurring via the [Dade County Homeless] Trust," "the salient facts of this case have not changed substantially...."

6. On February 7, 1996, the Court of Appeals referred this matter to its Chief Circuit Mediator for settlement discussions.

Pottinger v. City of Miami, 76 F.3d 1154 (11th Cir. 1996).

7. The settlement negotiations were conducted over a period of 20 months. During that period, counsel for Plaintiffs met approximately 15 times for full-day mediation sessions with counsel for the City, involving more than 100 total hours of face-to-face mediation. Many other participants, including a City Commissioner, the City Manager, the Fire Chief, the Assistant Chief of Police, and the Director of the City of Miami Office of Homeless Programs, were also involved in a number of the mediation sessions. In addition, representatives of homeless service providers participated in a number of sessions. The City was represented by experienced counsel from the City Attorney's Office and by outside counsel, including Tom Scott and Kendall Coffey. Plaintiffs were represented by a team of experienced counsel as well, led by Benjamin Waxman, a criminal appellate specialist with extensive experience in constitutional and criminal issues, and former co-Chair and later President of the Greater Miami Chapter of the ACLU. Counsel were also assisted by experts in homelessness, Mayors Xavier Suarez and Joe Carollo, members of the City Commission, particularly Commissioner Wilfredo Gort, the Chiefs of the Police and Fire Departments, and class representatives.

8. The extensive mediation sessions resulted in the signing of a settlement agreement resolving every remaining issue in this case.

9. On December 9, 1997, the City Commission approved the settlement agreement by a vote of 3-2, subject to the condition

that the $900,000 in attorneys' fees agreed to in paragraph 25 be paid out over three years. Within the ten-day period for vetoes, the Mayor announced that he would not veto the settlement agreement. On February 12, 1998, the Oversight Committee appointed by Governor Lawton Chiles of the State of Florida to assist the City in overcoming its fiscal crisis approved the settlement agreement.

II. THE SETTLEMENT AGREEMENT

The settlement agreement is a 31-page document with four attachments:

1) **Exhibit A** is a Departmental Order that the City has agreed will be adopted by the City of Miami Police Department.

2) **Exhibit B** is a Proof of Claim Form, with Instructions in English, Spanish and Creole.

3) **Exhibit C** is a form pertaining to the collection of homeless awards.

4) **Exhibit D** is a "Class Claimant Release of All Claims."

The Settlement Agreement provides for a dismissal with prejudice of this lawsuit, including the three pending appeals, without additional costs or attorneys' fees, except for the $900,000 specifically provided in the agreement. Although the City of Miami does not admit liability, it agrees to implement training for its law enforcement officers, and to adopt a policy to protect the constitutional rights of homeless persons through measures

including a "Law Enforcement Protocol" and a procedure to monitor the officers. The City's aggregate responsibility for claims is limited to $600,000, which shall be placed in a Compensation Fund administered by a United States Magistrate appointed by this Court.

ATTORNEY'S FEES

In recognition of the fact that this litigation has spanned nearly ten years, including two trials, numerous other hearings before the district court, two appeals, as well as extensive court-ordered mediation, the City agreed to pay the Plaintiffs' attorneys $900,000 for fees and costs. The Miami City Commission adopted specifications concerning payment, and conditioned the City's acceptance of the Settlement Agreement on payment of these fees over three years, without interest. Plaintiffs have accepted this condition.

FAIRNESS HEARING

On May 12, 1998, Judge Atkins entered an Omnibus Order approving, with modifications, the class notice. The notices to class members were published, as provided in Judge Atkins' order, in:

a) the Miami Herald and El Nuevo Herald on Friday, July 10, 1998, Tuesday, July 14, 1998, and Sunday, July 19, 1998;

b) the Miami Times on three successive Thursdays, July 9, 1998, July 16, 19998 and July 23, 1998; and

c) the New Times (Miami) issues of July 9-15, 1998, July 16-22, 1998 and July 23-29, 1998.

In addition, the Court takes judicial notice of the fact that a number of articles about the proposed settlement have appeared in the Miami Herald in the past year.[1]

Strong public support for approval of the settlement agreement was expressed during the September 29, 1998 hearing by the following groups: class representatives; downtown business groups; downtown residents; City of Miami officials, including Manager and Chief of Police Donald Warshaw and Commissioner Wilfredo Gort; and homeless advocacy groups and civic leaders such as Alvah Chapman, head of the statewide homeless trust. Over 60 individuals were present in the court, with only one partial dissenting voice expressing concern that some homeless individuals may unwisely spend the $1,500 to be received. The dissenter, a former homeless individual, argued that the money might be better spent on repairing buildings and establishing programs to reintegrate the homeless into society.

Since this lawsuit was initiated, the Dade County Homeless Trust was created, funded by a 1% food and beverage tax in Miami-Dade County, as well as by numerous philanthropic contributions. As part of the effort to provide for homeless people, the Trust, in conjunction with the Community Partnership for the Homeless, has established a Homeless Assistance Center in the City of Miami.

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[1] *ACLU Informing Homeless of $1,500 Compensation,* Miami Herald, July 14, 1998, at 3B; *A Worthy Settlement*, Miami Herald, December 18, 1997, at 28A (editorial endorsing settlement); Bruce Taylor Seeman, *Settlement Backs Civil Rights of Homeless,* Miami Herald, December 18, 1997, at 1A; Bruce Taylor Seeman, *Homeless Lawsuit Near Settlement,* Miami Herald, November 16, 1997, at 1B.

CONCLUSIONS OF LAW

It is uncontroverted that the settlement agreement was reached as a result of good faith, arms-length bargaining, as the settlement was reached at a very advanced stage of the litigation and counsel for both sides are experienced attorneys who have vigorously represented their respective clients. The case was strongly contested over eight years, including two trials and two appeals. Furthermore, the costs of failing to approve the settlement agreement would be substantial. If this Court did not approve it, further litigation would delay for quite some time any relief for class members and any resolution of the City's liability. Although the Court expressed concern about such matters as the availability of public restrooms for the homeless and the amount of attorney's fees, the Court does not have the power to modify a proposed settlement agreement and order its acceptance over either party's objection. In the City's case, any modification would mean presenting the revised settlement agreement again to the City Commission, the Mayor, and the State Oversight Committee, with uncertain results. The support for the settlement agreement is widespread among the community, as indicated by the interested citizen who remarked at the hearing in hyperbolic terms: "The Court could bring back sanity to the streets of Miami with the stroke of a pen." In addition, there appears to be unanimous support from within the class.

The Court further finds that the notice given the class

members pursuant to Judge Atkins' Order of May 12, 1998 constituted fair and effective notice as provided under Fed.R.Civ.P.23. The notice fairly and accurately described the nature of the proposed settlement agreement, the persons whose rights would be affected, and the impact of its terms on their rights. Individual notification by mail to the homeless would not have been feasible. In addition, the local media published numerous articles about the proposed settlement agreement.

Any settlement agreement is obviously a compromise, one not likely to be perfect from either party's point of view. However, taken as a whole, the settlement agreement represents a fair and equitable resolution of this case.

Plaintiffs originally sought primarily injunctive relief, and a settlement that provided either no damages or nominal damages would have been fair and equitable. The provision of compensatory damages in the amount of $600,000, or $1,500 per successful claimant (assuming no pro-rating), represents a significant benefit for Plaintiffs. The provision establishes a monetary benefit, but perhaps more importantly, this recovery represents, in a tangible way, the dignity and rights of homeless persons. Further, if the Compensation Fund of $600,000 is not exhausted, the remaining money will be used for a "Start Off Fund" to help members of the homeless community to afford permanent shelter. Finally, the manner of disbursement of the funds is fair and adequate, in accordance with the carefully-crafted procedure to be supervised by a United States Magistrate. The procedure is designed to protect *all* class

members. It ensures that as many class members as possible recover, by having a relatively informal procedure with as little documentation as possible. At the same time, it protects that fund from exhaustion by false claims, by ensuring that some form of documentation be submitted before a claim can succeed. The disbursement of monies from the "Start Off Fund" will be handled by the City's Office of Homeless Persons, which is experienced in such matters, and will be audited by the City's Department of Internal Audits at the conclusion. Recognizing that no mechanism for providing damages to class members, particularly homeless and formerly homeless persons, can perfectly balance the need to provide relief to all of those who were injured and the need to limit relief to such persons, the Court finds the settlement agreement's provisions of compensatory damages to be fair and adequate.

The Court also concludes that the agreed-upon award of attorney's fees is reasonable, in light of the length of this case, the quality of the attorneys, and the novelty of the issues raised, as previously described in the procedural history section of this order. The Court recognizes that the attorney's fees amount is greater than the compensatory award. However, courts have approved attorney's fees many times greater than compensatory damages. See *Davis v. Locke,* 936 F.2d 1208, 1215 (11th Cir. 1991); *Cullins v. Georgia Dep't of Transportation,* 29 F.3d 1489, 1494 (11th Cir. 1994). In this case, counsel for Plaintiffs obtained not only extensive injunctive relief, but significant compensatory relief as

well.

WHEREFORE, it is ORDERED and ADJUDGED that:

(1) The Joint Motion to Approve Settlement Agreement is GRANTED.

(2) This lawsuit is DISMISSED with prejudice.

(3) The Court retains jurisdiction to enforce the settlement, and

(4) All pending motions are denied as moot.

DONE and ORDERED this lst day of October 1998 in Miami, Dade County, Florida.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Benjamin S. Waxman, Esq.
Warren Bittner, Esq.