OUTTEN & GOLDEN LLP
Adam T. Klein
Justin M. Swartz
Lewis M. Steel
Ossai Miazad
Sally J. Abrahamson
Deirdre Aaron
3 Park Avenue, 29th Floor
New York, NY 10016

COMMUNITY SERVICE SOCIETY
Judy Whiting
Paul Keefe
105 East 22nd Street
New York, NY 10010

COMMUNITY LEGAL SERVICES, INC.
Sharon Dietrich*
1424 Chestnut Street
Philadelphia, PA 19102

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
Ray P. McClain*
1401 New York Ave., NW
Washington, DC 20005

CENTER FOR CONSTITUTIONAL RIGHTS
Darius Charney
666 Broadway 7th Floor
New York, NY 10012

INDIAN LAW RESOURCE CENTER
Robert T. Coulter*
602 North Ewing Street
Helena, MT 59601

LATINOJUSTICE PRLDEF
Jackson Chin
99 Hudson Street, 14th Floor
New York, NY 10013

**Admitted pro hac vice*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY GONZALEZ, IGNACIO RIESCO, PRECIOUS DANIELS, ALEXIS MATEO, FELICIA RICKETT-SAMUELS, CHYNELL SCOTT, VIVIAN KARGBO, SCOTTY DESPHY, and EDWARD ZAHNLE, on behalf of themselves and all others similarly situated, and CEPHUS HOUSER as the Trustee for the Trust Agreement of EVELYN HOUSER, individually, Plaintiffs, -against- PENNY PRITZKER, Secretary, United States Department of Commerce, Defendant.	CIVIL ACTION NO. 10-CV-3105 (FM)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, APPROVAL OF THE PROPOSED NOTICE OF SETTLEMENT AND CLASS ACTION SETTLEMENT PROCEDURE, AND CONDITIONAL CERTIFICATION FOR DAMAGES OF THE SETTLEMENT CLASS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

This class action lawsuit, filed in April 2010, involves issues of vital importance not only to the African American and Latino Named Plaintiffs and the hundreds of thousands of Class Members they represent who unsuccessfully sought temporary jobs during the 2010 decennial census. The issues litigated here are also crucial to the United States Department of Commerce and its Census Bureau ("Census" or Defendant), which has a constitutional mandate to count everyone residing in the United States every ten years. The parties have reached a proposed settlement which upon approval will provide for the fundamental relief Plaintiffs sought at precisely the right time: a hiring process for the 2020 decennial census, planning for which is underway, that levels the playing field for hundreds of thousands of African American and Latino applicants.

Plaintiffs allege that in hiring nearly a million temporary workers to assist in completing the 2010 decennial, Census erected unreasonable, largely insurmountable, hurdles for applicants with arrest records—regardless of whether the arrests were decades old, for minor charges, or led to criminal convictions. Over four years of hard-fought litigation, the Named Plaintiffs and their counsel worked diligently to prosecute the claims of the Class Members. Likewise, Census has consistently denied the allegations, and has aggressively asserted its defenses. Census has claimed it did its best under the circumstances to quickly choose acceptable temporary employees in a manner consistent with all applicable laws. Plaintiffs challenged this assertion and brought this lawsuit arguing that Census denied Plaintiffs and hundreds of thousands of other African American and Latino applicants the opportunity to fairly compete for these positions based on a plainly discriminatory criminal background check screening process in violation of Title VII of the Civil Rights Act of 1964.

The parties have now reached a proposed agreement to resolve this landmark disparate impact class action lawsuit.[1] The proposed class action settlement agreement is the product of over 16 months of good-faith negotiations, aided by an experienced and well-respected mediator. It was reached by experienced counsel, and informed through extensive discovery, motion practice, and expert analysis. If approved, the settlement will provide far-reaching class-wide programmatic relief addressing the hiring practices at issue in this litigation in anticipation of the 2020 decennial census, and will also provide individual Class Members with the option to either receive advance notice of the upcoming decennial census hiring, including information about the criminal background check process, or assistance reconciling and/or clearing mistakes in their criminal history records through a settlement-funded "Records Assistance Project."

The cornerstone of the settlement requires Census to hire two jointly selected expert Industrial Organizational Psychologists ("IOs") to develop a recommended validated structure and selection process for temporary hiring for the various operations of the 2020 decennial census that allows hundreds of thousands of African American and Latino applicants to fairly compete for the voluminous temporary job opportunities associated with the decennial census. The proposed settlement will make a strong positive impact on the hiring prospects for African American and Latino applicants across the nation. It is fair, adequate, and reasonable and was reached through serious, informed, non-collusive negotiations. Accordingly, pursuant to Fed. R.

---

[1] Census has informed Plaintiffs that it does not oppose preliminary approval of the proposed settlement, conditional certification of the settlement class for damages, approval of the proposed notice of class action settlement, or approval of the proposed schedule for final settlement approval. It does not, however, endorse this memorandum's description of the issues presented by the action, and continues to assert that its conduct was lawful. *See* Declaration of Adam T. Klein in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Settlement and Approval of the Proposed Notice of Settlement and Class Action Settlement Procedure, dated April 8, 2016 ("Klein Decl.") ¶ 19.

Civ. P. 23(e) ("Rule 23"), Plaintiffs respectfully request that the Court: (1) grant preliminary approval of the parties' Stipulated Agreement, attached as Exhibit 1 to the Klein Declaration;[2] (2) approve the proposed class action settlement procedure; (3) conditionally certify the settlement class under Federal Rule of Civil Procedure 23(b)(3); and (4) approve the proposed Notice of Class Action Settlement ("Notice"), attached as Exhibit 2.

CASE HISTORY

I. Relevant Factual and Procedural Background

The Court, having presided over this class litigation for its entirety, is well-versed with its facts and history. For purposes of this motion, Plaintiffs provide an abbreviated background; for a more comprehensive history of the case, *see Houser v. Blank*, No. 10 Civ. 3105, 2013 WL 873793 (S.D.N.Y. Mar. 11, 2013) (discovery order); *Houser v. Blank*, No. 10 Civ. 3105, 2012 WL 3188769 (S.D.N.Y. Aug. 3, 2012) (denying Plaintiffs' motion to amend or for reconsideration); *Johnson v. Bryson*, 851 F. Supp. 2d 688 (S.D.N.Y. 2012) (granting in part, and denying in part, Defendant's second motion to dismiss and Plaintiffs' motion for leave to amend); *Johnson v Locke*, No. 10 Civ. 3105, 2011 WL 1044151 (S.D.N.Y. Mar. 14, 2011) (granting in part, and denying in part, Defendant's first motion to dismiss).

A. The Complaint.

On April 13, 2010, Outten & Golden LLP, a private law firm specializing in class action employment litigation, and a legal consortium of seven non-profit civil rights oriented law offices (Lawyers' Committee for Civil Rights Under Law, Center for Constitutional Rights, Community Legal Services of Philadelphia, Community Service Society of New York, the Indian Law Resources Center of Helena, Montana, LatinoJustice PRLDEF, and the Public

---

[2] All exhibits are attached to the Klein Decl., unless otherwise stated.

Citizen Litigation Group) filed this action on behalf of Plaintiffs Eugene Johnson and Evelyn Houser and others similarly situated against Census.[3] ECF No. 1 (Complaint) ¶¶ 14-16. In the operative Third Amended Complaint, filed on September 16, 2014, Plaintiffs bring claims against Census on behalf of themselves and all others similarly situated, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C §§ 2000(e) *et seq.* ECF No. 295-2. Plaintiffs allege that Census hired over one million temporary workers to conduct the 2010 census in a manner that discriminated against over 450,000 African Americans and Latinos.

Plaintiffs allege that approximately 3.8 million people applied for temporary work with Census to help complete the 2010 decennial count. *See id.* ¶ 2. Plaintiffs challenge two of Census's hiring procedures that had a disparate impact on African American and Latino applicants. First, as a precondition of employment, Census required nearly all job applicants who had ever been arrested to produce within 30 days the "official court documentation" for any and all of their arrests—regardless of whether a conviction resulted, the nature of the arrest, its relationship to the job, or when it took place (a "30-day letter"). Plaintiffs maintain that this 30-day letter requirement eliminated 93% of these applicants—roughly 700,000 people—from being considered for employment during the 2010 census. *See id.*

Second, Plaintiffs allege that for the small percentage of applicants who were able to find and deliver this documentation on time, Census applied an arbitrary and irrational screen whereby even those who had never been convicted, those who had their records officially expunged, and those with very minor and old offenses were excluded from this civic undertaking. *See id.* Plaintiffs allege that because each of these employment practices,

---

[3] During the pendency of this litigation, the two original named Plaintiffs, Mr. Johnson and Ms. Houser, passed away.

individually and collectively, had a significant adverse impact upon African Americans and Latinos (who are arrested and incarcerated at rates substantially higher than whites), and because these practices are neither job-related nor consistent with business necessity, they are unlawful under Title VII. *See id.*

B. Plaintiffs Have Explored Their Claims and Positions Through Extensive Discovery.

The Named Plaintiffs vigorously pursued their claims and the claims of the classes through extensive discovery spanning over four years of litigation. During the period leading up to Plaintiffs' class certification motion, Class Counsel took the depositions of 18 fact and Fed. R. Civ. P. 30(b)(6) witnesses. Class Counsel also defended the depositions of 10 Named Plaintiffs and assisted the Named Plaintiffs in responding to Census's requests for production and interrogatories. (Klein Decl. ¶ 10).

Class Counsel served over 50 separate requests for production, interrogatories and requests for admission. *Id.* ¶ 8. Plaintiffs obtained more than 66,000 pages of documents, as well as electronic applicant flow data regarding Census's four million applicants. *Id.* ¶ 6. Plaintiffs spent many hours reviewing this information and data in preparation for the class certification motion. *Id.* Plaintiffs also reviewed thousands of pages of FBI "rap sheets" and extracted relevant information including race identification codes used as part of a sampling methodology to meet their burden of establishing disparate racial impact. *Id.* ¶ 7.

Plaintiffs retained five expert witnesses—an industrial organizational psychologist, criminologist, statistician, sociologist, and a labor economist—each of whom provided extensive analysis of the employment practices at issue. *Id.* ¶ 9. Census deposed two of Plaintiffs' expert witnesses, and Class Counsel also deposed Census's three retained experts. *Id.*

C. Both Parties Asserted Their Positions Through Extensive Motion Practice.

The parties engaged in extensive motion practice on the merits of the claims prior to the contested motion for class certification.

1. Defendant's Motions to Dismiss Based on Administrative Exhaustion.

On July 16, 2010, Defendant filed a motion to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(6), arguing that Plaintiffs had failed to exhaust their administrative remedies. ECF No. 29. On August 5, 2010, as a matter of course pursuant to Fed. R. Civ. P. 15(a)(1)(B), Plaintiffs filed a First Amended Class Action Complaint, joining five additional Named Plaintiffs. ECF No. 32. On September 10, 2010, Defendant filed a motion to dismiss the First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6), again on the basis that Plaintiffs had failed to exhaust their remedies. ECF No. 35. On March 14, 2011, the Court issued a Decision and Order denying the Defendant's motion to dismiss the individual claims of Plaintiffs Johnson, Houser, Gonzalez, Riesco, and Daniels. *See Johnson v Locke,* 2011 WL 1044151 (S.D.N.Y. Mar. 14, 2011). The Court, however, dismissed the individual claims of Plaintiffs Rickett-Samuels and Anderson. The Court also dismissed Plaintiffs' class claims for failure to strictly comply with the federal Class Regulations.

2. Plaintiffs' Motion to Amend the First Amended Complaint.

On May 5, 2011, Plaintiffs filed a contested motion for leave to amend its First Amended Complaint to cure the pleading deficiencies found by the Court. ECF No. 52. Specifically, Plaintiffs sought to: (1) reassert the claim of Felicia Rickett-Samuels as a Named Plaintiff based on the exhaustion of her administrative class complaint; (2) join three new Named Plaintiffs – Chynell Scott, Vivian Kargbo, and Scotty Desphy—each of whom had an exhausted administrative class complaint; and (3) reassert the claim of Sandra Anderson as a Named Plaintiff, and representative of a proposed Native American class. *Id.*

On June 28, 2011, Defendant opposed Plaintiffs' motion in its entirety, attacking their class action allegations on the grounds of futility and in the alternative, seeking severance of Plaintiffs' claims and transfer to different fora across the U.S. or to the District Court in Maryland where Census is headquartered. ECF No. 67.

On March 22, 2012, the Court granted Plaintiffs' motion to amend the Complaint to reassert the claims of Rickett-Samuels, and to join Scott, Kargbo, and Desphy. ECF No. 101 However, the Court denied Plaintiffs' motion to amend the Complaint to reassert the claim of Anderson and the proposed Native American class. *Id.* The Court denied Defendant's motion to sever and transfer. *Id.*

3. Defendant's Motion to Dismiss Declaratory and Injunctive Relief Claims.

Also on June 28, 2011, Defendant moved to dismiss Plaintiffs' claims for injunctive and declaratory relief, arguing that Plaintiffs lacked Article III standing and the Court lacked jurisdiction because the claims were not yet ripe for review. ECF No. 61. On August 1, 2011, Plaintiffs opposed Defendant's motion, ECF No. 83, and Defendant replied in support of its motion on August 12, 2011. ECF No. 87. On March 22, 2012, the Court denied Defendant's motion to dismiss Plaintiffs' declaratory and injunctive relief claims. *See Johnson v. Bryson*, 851 F. Supp. 2d 688 (S.D.N.Y. 2012).

4. Plaintiffs' Second Motion to Amend the Complaint, or, Alternatively, for Reconsideration.

On May 4, 2012, Plaintiff Anderson moved to amend the Complaint in order to re-allege her claims, arguing that she had exhausted her administrative remedies subsequent to being dismissed without prejudice the first time. ECF No. 108. She also moved to assert the claims of a purported Native American class. *Id.* In the alternative, Plaintiffs requested that the Court grant its motion for reconsideration. *Id.* Defendant opposed the motion for leave to amend or

for reconsideration in its entirety on May 18, 2012, ECF No. 112, and Plaintiffs replied in support of her motion on May 25, 2018. ECF No. 116. On August 3, 2012, the Court again denied Anderson's request to reenter the litigation and assert the claims of a Native American class. *See Houser v. Blank*, 2012 WL 3188769 (S.D.N.Y. Aug. 3, 2012).

Thus, on September 21, 2012, Plaintiffs filed their Second Amended Complaint, adding two additional Named Plaintiffs, each having applied for, but ultimately been denied, temporary employment with Census during the 2010 decennial census. ECF No. 125. Defendant filed its Answer to Plaintiffs' Second Amended Complaint on October 19, 2012. ECF No. 129.

5. Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint.

On December 16, 2013, after the close of discovery and in the midst of class certification briefing, Defendant moved to dismiss the Complaint once again, specifically the Title VII damages claim, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3), arguing that the Court lacked jurisdiction because all Named Plaintiffs lacked standing to prosecute the suit. ECF No. 225. On February 10, 2014, Plaintiffs opposed Defendant's motion, ECF No. 246, and on March 14, 2014, Defendant replied in support of its motion to dismiss. ECF No. 256.

6. Plaintiffs' Motion for Class Certification.

On June 28, 2013, Plaintiffs moved for class certification. ECF No. 166. On July 8, 2013, Plaintiffs filed a corrected memorandum of law in support of their motion, moving the Court to certify a class under Rule 23(b)(2) for liability purposes, consisting of "all African Americans and Latino applicants who applied for temporary employment during the 2010 decennial and were harmed by . . . [Census'] use of the 30-day letter as a screening device . . . [Census'] use of adjudication criteria to screen applicants," or both. ECF No. 176. On October 28, 2013, Defendant opposed Plaintiffs' class certification motion. ECF No. 203. That same day, Defendants moved *in limine* to exclude the testimony of Plaintiffs' expert, Dr. Kathleen

Lundquist, for the purposes of class certification. ECF No. 207. On December 23, 2013, Plaintiffs opposed Defendant's motion *in limine*, arguing that the testimony was both relevant to the class certification issue and admissible. ECF No. 233.

On July 1, 2014, the Court granted Plaintiffs' class certification motion, in part, pursuant to Rule 23(b)(2) for liability, but limited the class to African-American applicants who sought temporary employment during the 2010 decennial census and claim to have been harmed by Census's 30-day letter, its adjudication criteria, or both. *See Houser*, 28 F. Supp. 3d at 254. The Court denied Defendant's motion to dismiss with respect to Houser, Daniels, Rickett-Samuels, Scott, and Desphy, holding that they each demonstrated standing to bring the lawsuit. However, the Court granted Defendant's motion to dismiss with respect to Gonzalez, Riesco, and Kargbo, holding that they lacked standing to bring suit against Census. *See id.* The Court excluded Latino applicants from the certified class definition for failure to have a Latino class representative with standing. The Court held that "[i]f the Plaintiffs are able identify a suitable Latino class representative, they may move to amend the Second Amended Complaint and the class certification order." *Id.* The Court also denied Defendant's motion *in limine* as moot, concluding that Dr. Lundquist's conclusions were unnecessary to resolve the class certification motion. *See id.* at 244, n.5.

7. Defendant's Motion to Reconsider and Clarify the Class Certification.

On July 15, 2014, Defendant filed a motion for the Court to reconsider and clarify its class certification order, pursuant to Local Civil Rule 6.3. ECF No. 269. On August 12, 2014, Plaintiffs opposed Defendant's motion, ECF No. 284, and Defendant replied in support of its motion on August 26, 2014. ECF No. 289.

8. The Court's Amended Order and the Latino Class.

After class certification, the parties engaged in additional discovery related to two additional Named Plaintiffs and to address errors in the Census's discovery production, and engaged in briefing on Census's motion for reconsideration. On July 21, 2014, Plaintiffs filed a letter with the Court indicating its intent to file another motion for leave to amend the Complaint with the aim of adding new Latino class representatives. ECF No. 276. On July 29, 2014, Census's counsel filed a letter with the Court and with Class Counsel addressing a newly identified document production issue. ECF No. 278. The sum of the error was that, under the Court's definition of "eligibility" from its Decision and Order, at least one Latino plaintiff—Gonzalez—should have been found to have Article III standing to litigate. *Id.* Accordingly, on October 2, 2014, the Court amended its July 1, 2014 Order and reinstated Gonzalez as a class representative[4]. ECF No. 303. The Court then amended the class definition as follows: Plaintiffs' class shall be limited to (1) African-American applicants who sought temporary employment during the 2010 Decennial Census and claim to have been harmed by the Census Bureau's 30-day Letter, its Adjudication Criteria, or both; and (2) all Latino applicants who sought temporary employment during the 2010 Decennial Census and claim to have been harmed by the Census Bureau's 30-day Letter, its Adjudication Criteria, or both. *Id.*

II. Settlement Negotiations

The parties devoted substantial time and effort to reaching a proposed settlement. At all times, the negotiations were conducted at arms' length and on a bifurcated basis: the parties negotiated class programmatic relief first, and only when substantial agreement was reached on

[4] The claims of Plaintiffs Riesco and Kargbo remained dismissed.

these issues did the parties discuss relief for the Named Plaintiffs and attorneys' fees. (Klein Decl. ¶ 20.)

On November 14, 2014, after the Court's Order granting Plaintiffs' motion for class certification, and full briefing of Defendant's motion for reconsideration, the parties appeared before Magistrate Judge Dolinger for a court-ordered mediation. *Id.* ¶ 13. In advance of that session, the parties' counsel met and conferred, and Class Counsel submitted a mediation statement to Judge Dolinger. *Id.* The parties had a productive session with Judge Dolinger which led them to hold a subsequent in-person conference at the offices of Outten & Golden LLP on December 5, 2014. *Id.*

Following the December meeting, the parties agreed to engage the services of Hunter Hughes, Esq., a private mediator who specializes in the mediation of complex class actions, including employment discrimination litigation. *Id.* ¶ 14. The parties participated in a telephone conference with the mediator on December 23, 2014, and thereafter worked to compile preliminary information requested by the mediator in advance of the mediation session. *Id.* The parties participated in the first of a series of all-day mediation sessions on February 23, 2015, followed by a second all-day session on March 25, 2015. *Id.* ¶ 15. The sessions were productive and the parties agreed to conduct research in order to propose concrete components of a settlement agreement in advance of a third mediation session. *Id.* The parties participated in a third in-person mediation session on June 1, 2015. *Id.* ¶ 16. During the June 1st session, the parties narrowed the issues further and agreed on dates for exchanging positions on issues identified by the mediator. *Id.* In particular, the parties discussed remedial relief related to the future hiring process and Census committed to consulting with key decision makers regarding those discussions within a set timeframe. *Id.* The parties attended a fourth in-person conference

with the mediator at the Department of Commerce headquarters in Washington D.C. on September 15, 2015, after which the mediator circulated a proposed Memorandum of Understanding. *Id.* ¶ 17. Subsequent to reaching agreement on the Memorandum of Understanding, the parties began negotiating the detailed terms of a full settlement agreement which was concluded by January 2016. *Id.* Throughout the entire process, the parties also held private conferences with the mediator to facilitate the on-going settlement discussion. *Id.* ¶ 18. After concluding their negotiations and reaching an agreement, Census took the necessary steps to seek Department of Justice ("DOJ") review and approval. *Id.* That process required a series of reviews and approval, ultimately, by the Associate Attorney General. *Id.*

III. The Terms of the Proposed Settlement

The settlement provides class-wide programmatic relief tailored to the Title VII violations alleged, and also affords individual relief offering Class Members the option of either assistance with their criminal history records through a settlement-funded Records Assistance Project or Advance Notice Hiring for the 2020 decennial census. Specifically, the settlement requires: (1) hiring two experts, at Census's expense, with experience in conducting complex job analyses and validating selection criteria, to work as independent consultants to develop a validated screening process and procedure for the hiring of temporary employees for the 2020 decennial census; (2) payment of fifteen million dollars ($15,000,000) to fund the Records Assistance Project, for payment of court-approved Service Awards to the Named Plaintiffs and for payment of Court-approved attorneys' fees and costs, including administration of the settlement and class representative service payments; and (3) providing early notice to Class Members of the hiring for temporary jobs which will include information about the criminal background check process, to assist Class Members interested in temporary employment during the 2020 decennial census. In exchange, Census will receive a release from the settlement class

of all claims for individual and class-wide declaratory, injunctive, and monetary relief. The proposed settlement has the full support of the Named Plaintiffs. *See* Ex. 10 (Daniels Decl.); Ex. 11 (Desphy Decl.); Ex. 14 (Gonzalez Decl.); Ex. 5 (Mateo Decl.); Ex. 9 (Rickett-Samuels Decl.); Ex. 13 (Scott Decl.); Ex. 8 (Zahnle Decl.).

The objective of this litigation was from the beginning and remains to substantially alter the manner in which applications for the entry level jobs offered during the decennial census are automatically rejected based on invalid criteria having a substantial discriminatory effect on African American and Latino applicants. Ex. 10 (Daniels Decl.) ¶ 6; Ex. 11 (Desphy Decl.); ¶ 6; Ex. 14 (Gonzalez Decl.) ¶ 6; Ex. 5 (Mateo Decl.) ¶ 5; Ex. 9 (Rickett-Samuels Decl.) ¶ 6; Ex. 13 (Scott Decl.) ¶ 6; Ex. 8 (Zahnle Decl.) ¶ 5; Ex. 12 (Daniels Tr.) 148:5-12; Ex. 13 (Scott Tr.) 171:9-21; Ex. 14 (Gonzalez Tr.) 219:21-200:10. Although individual Class Members will not receive monetary payment through this settlement for any loss of temporary employment, the injunctive relief as well as the individual relief offered through the Records Assistance Program is significant, timely and targeted to confer a meaningful benefit on Class Members who choose to apply to temporary jobs for the upcoming decennial census.[5]

A. Programmatic Relief: Designing a Valid Selection Process for Hiring Temporary Census Workers in Consultation with Expert IOs.

The parties have agreed on meaningful and innovative programmatic relief to directly address the driving issue of this litigation: fixing a flawed and unvalidated criminal background check screening process that imported the huge disparities in arrest and conviction rates for African Americans and Latinos into Census's hiring practice. They agreed to the appointment of

---

[5] Notably, the Court certified a class for purposes of injunctive relief and declined to certify a damages class. *Houser*, 28 F. Supp. 3d at 255-56 ("the Plaintiffs' class shall be certified under Rule 23 (b) (2) for the purposes of determining liability and affording injunctive relief, but shall not be certified for purposes of resolving damages.").

two well-qualified IOs to develop validated procedures with regard to the hiring of temporary field employees for the 2020 decennial census. The parties have jointly selected the IOs to work together as independent consultants to Census relative to the selection and hiring of temporary employees for the 2020 decennial census.

The IOs have experience conducting professional job analyses and validating selection criteria, including experience in the criminal background check context. One of the IOs, Kathleen Lundquist, served as Plaintiffs' expert during the class certification phase of this Litigation. Census has agreed to enter into a consulting agreement with the IOs and compensate them for the project consistent with the Scope of Work Document, See Ex. 1 (Settlement Agreement), Ex. B (Scope of Work) agreed upon as part of the Settlement, and to make its relevant staff, employees, and outside contractors and other relevant entities or individuals available to the IOs on a timely basis.

The IOs will work together, in consultation with Census, to develop a recommended validated structure and selection process for the hiring of temporary employees for the various operations of the 2020 decennial census, which will be memorialized in a Hiring Selection Report. Ex. 1 (Settlement Agreement) ¶ 3.2(B). First, the IOs will meet and confer with appropriate Census representatives regarding: the job duties and number of temporary workers needed for the 2020 decennial census; proposed timelines for completion of various aspects of the 2020 decennial census; processes and procedures in carrying out Census operations; any assistance contemplated by partner agencies and organizations; and other such information and data as requested by the IOs. Ex. 1 (Settlement Agreement), Ex. B (Scope of Work) at 1. Upon completion of their analysis, the IOs will provide hiring recommendations to Census with validated selection procedures to both serve the interest of Census in completing a timely and effective 2020 decennial census and to eliminate or reduce any adverse racial or national origin

impact on African Americans and Hispanics. Such recommendations will include: (1) a detailed workflow analysis and timelines for the hiring process as it relates to Census's overall work plan for the various operations; (2) valid selection criteria for the different temporary positions; (3) job application processes for temporary positions; (4) a criminal background check process, including a detailed workflow analysis, the process for obtaining the background check reports, the methods for gathering additional information, valid policies and procedures for clearing and processing applicants with criminal histories, validated adjudication criteria, and recommendations on staffing levels and training for the individuals involved in the criminal background check process; and (5) the processes and criteria to be used to select applicants from the qualified applicant pool. See id. at 2.

The parties also outlined a dispute resolution process to resolve any differences between the IOs and disagreements between Census and the IOs regarding their recommendation. Ex. 1 (Settlement Agreement) ¶ 3.2(E). Census agreed to provide the IOs with access to information, materials, and individuals the IOs request in order to achieve successful and timely completion of their hiring recommendations. As set forth in the Scope of Work Document attached as Exhibit B to the Settlement Agreement, the IOs will provide Census, its counsel, Class Counsel and the mediator with quarterly written status reports that specifically identify any issues that may affect their ability to carry out the assignment, and the IOs may at any time request a meeting with counsel for the Parties and the mediator. Further, counsel for all Parties may at any time submit questions or comments to the IOs.

B. Class Member Relief: Establishing a Records Assistance Project and Advance Notice Hiring for 2020 Decennial Census.

The Parties have agreed to two forms of Class Member relief to allow Class Members to choose which relief is most advantageous to their particular and individual circumstances. Class Members who wish to resolve issues associated with their criminal history records will have the option to work with a Records Assistance Project ("Group A Filers"). Id. ¶ 3.3(A). Class Members who do not request assistance with their criminal history records and instead seek employment opportunities with Census, will receive early notice of the hiring for temporary jobs for the 2020 decennial census ("Group B Filers"). Id. ¶ 3.3(B).

First, the settlement provides for creation of a targeted project designed to address the pernicious effects of criminal background histories that severely disadvantage African American and Latino job applicants. The Records Assistance Project will work with Class Members to first obtain computerized criminal history record information. Id. ¶ 3.3(A). The Agreement allocates Five Million Dollars ($5,000,000) to fund the Records Assistance Project and for the payment of Named Plaintiff Service Awards (as discussed below). Class Counsel will work with Cornell University's School of Industrial and Labor Relations to serve as a clearinghouse for Group A Filers and to manage the Records Assistance Project. The Records Assistance Project will work with these Class Members to resolve particular issues that should not be on record reports, such as open dispositions or other discrepancies. Then, depending on the number of Group A Filers and budget constraints, the Records Assistance Project will work to provide additional more time-intensive services, such as criminal record expungement assistance. Id. ¶ 3.3(A). Class Counsel has agreed to work with the Records Assistance Project and coordinate with other federal government agencies, such as the U.S. Department of Labor and Department

of Justice that provide re-entry services, to maximize the reach and benefit of this work with Group A Filer Class Members. Id. ¶ 3.3(A).

Second, the parties recognize that some Class Members might not desire criminal history assistance due to their own particular circumstances, and instead, might seek to optimize their employment opportunities with Census. Those Class Members, Group B Filers, will receive early notice of the commencement of hiring for temporary jobs for the 2020 decennial census. The parties agree to work together to provide meaningful early notice and other relevant information about decennial hiring that will assist Group B Filers in pursuing temporary job opportunities for the 2020 decennial hiring, such as information about the criminal background check process. Id. ¶ 3.3(B). Such "early notice" shall be made before, or no later than contemporaneously with, Census's first general announcement of 2020 decennial hiring through the Settlement Administrator, such that Group B Filers who provide timely and complete applications will have their applications considered for Census jobs along with the first group of applicants for the 2020 decennial. When hiring commences, Group B Filers who have completed the standard temporary hiring application will have their criminal history reviewed through the process adopted by Census following consultation with the IOs. Id. ¶ 3.3(B).

C. Settlement Fund.

Census will pay a gross amount of $15 million on a non-reversionary basis into a Settlement Fund. Ex. 1 (Settlement Agreement) ¶¶ 1.37, 3.1(A). The proposed Settlement provides for payment of $5 million from the Settlement Fund to fund the Records Assistance Project and pay any court-approved Service Awards to Named Plaintiffs. *Id.* ¶ 3.3(A). The Settlement permits Class Counsel to petition the Court for an award of attorneys' fees and reimbursement of actual litigation costs and expenses, including settlement claim administrator fees and costs, in an amount of no more than $10 million from the Settlement Fund.

D. The Claims Process.

The settlement class consists of the following:

> (1) all African American applicants who sought temporary employment during the 2010 Decennial Census and claim to have been harmed by Census's 30-day Letter, its Adjudication Criteria, or both; and (2) all Latino applicants who sought temporary employment during the 2010 Decennial Census and claim to have been harmed by Census's 30-day Letter, its adjudication criteria, or both.

Id. ¶ 1.8.

The Court has already certified this class pursuant to Fed. R. Civ. P. 23(b)(2) for purposes of determining liability and affording injunctive and declaratory relief. *See Houser*, 28 F. Supp. 3d at 254. Any Class Member who desires to opt out of the class may do so by writing a letter to the Settlement Administrator as detailed in the notice. Ex. 2 (Notice). Those Class Members who wish obtain relief as a Group A or Group B Filer must complete the simple Claim Form. Ex. 3 (Claim Form). The Claim Form requires that the Class Member provide her or his name, signature, date of signing, an option for email address, and certification that they self-identify as African American or Latino. *Id.* The Claim Form also includes a short description of what it means to be a Group A Filer and Group B Filer, and an opportunity to select to be a Group A or Group B Filer. The Claim Form must be received within 90 days of the class members' receipt of notice of final approval of this settlement, but no later than 120 days after the date of the initial mailing of notice. Ex. 1 (Settlement Agreement) ¶ 2.4.

E. Scope of the Release.

Upon the Effective Date of the Stipulated Agreement, each Class Member will release Defendant from all claims that were brought or could have been brought during the class period. Ex. 1 (Settlement Agreement) ¶ 4.1. Specifically, the Class Members release Census from all claims arising from or relating to the hiring and employment eligibility procedures for the 2010 decennial census, including but not limited to the claims and facts alleged in the operative

complaint and the underlying EEOC charges, as well as claims against Census for attorneys' fees and costs. *Id.*

F. Service Awards.

In addition to class member relief, Named Plaintiffs Anthony Gonzalez, Ignacio Riesco, Precious Daniels, Alexis Mateo, Felicia Rickett-Samuels, Chynell Scott, Vivian Kargbo, Scotty Desphy, Edward Zahnle will seek reasonable service payments of up to $10,000 each, for themselves and two former Named Plaintiffs (Ignacio Riesco and Vivian Kargbo) and the Estate of Evelyn Houser in recognition of the services each rendered on behalf of the class ("Service Award"). Ex. 1 (Stipulated Agreement) ¶ 3.6. These Service Awards are intended to compensate the Named Plaintiffs, current and former, for the extensive services they performed for the class, the time they spent on this case, and the risks they assumed in connection with this litigation. Plaintiffs will submit a motion seeking these service payments with their motion for attorneys' fees and costs. (Klein Decl. ¶ 23.)

G. Attorneys' Fees and Litigation Costs.

Class Counsel will petition the Court for an award of attorneys' fees and reimbursement of actual litigation costs and expenses, including settlement claim administrator fees and costs, in an amount of no more than Ten Million Dollars ($10,000,000) from the Settlement Fund. Plaintiffs will file a Motion for Approval of Attorneys' Fees and Costs and a Motion for Service Awards, along with a Motion for Final Approval of Settlement.

CLASS ACTION SETTLEMENT PROCEDURE

Courts have established a defined procedure and specific criteria for settlement approval in class action settlements that include three distinct steps:

1. Preliminary approval of the proposed settlement after submission to the court of a written motion for preliminary approval and certification of the settlement class;

2. Dissemination of mailed and/or published notice of settlement to all affected class members; and
3. A final settlement approval hearing at which class members may be heard regarding the settlement, and at which argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented.

See Fed. R. Civ. P. 23(e); *see also* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("*Newberg*") §§ 11.22 *et seq.* (4th ed. 2002); *Reyes v. Buddha-Bar NYC*, No. 08 CV 02494, 2009 WL 5841177, at *1-2 (S.D.N.Y. May 28, 2009). This process safeguards class members' procedural due process rights and enables the Court to fulfill its role as the guardian of the class's interests. With this motion, Plaintiffs request that the Court take the first step – granting preliminary approval of the Stipulated Agreement, approving the proposed notice, and authorizing the claims administrator to distribute the notice.

ARGUMENT

I. Preliminary Approval of the Settlement Is Appropriate.

The law favors compromise and settlement of class action suits. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) (quoting *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)) (internal quotation marks omitted) (noting the "strong judicial policy in favor of settlements, particularly in the class action context"); *Newberg* § 11.25 (4th ed.) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). The approval of a proposed class action settlement is a matter of discretion for the trial court. *See Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078-79 (2d Cir. 1995). In exercising their discretion, courts should give "proper deference to the private consensual decision of the parties." *Torres v. Gristede's Operating Corp.*, Nos. 04 Civ. 3316, 08 Civ. 8531, 08 CV 9627, 2010 WL 2572937, at *2 (S.D.N.Y. June 1, 2010) (quoting *Clark v. Ecolab, Inc.* Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672, 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 17, 2009)) (internal quotation marks omitted).

Review of a class settlement proceeds in two steps. First, "counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation." Manual for Complex Litigation (Fourth) § 21.632. The Court need only find that there is "'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *In re Traffic Exec. Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980); *see Newberg* § 11.25 ("If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness . . . and appears to fall within the range of possible approval, the court should permit notice of the settlement to be sent to class members."). Second, after notice is given to the class, the court holds a fairness hearing. Manual for Complex Litigation (Fourth) § 21.634.

Any proposed settlement must be "fundamentally fair, adequate, and reasonable." *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000). "Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005) (citation omitted). "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores*, 396 F.3d at 116 (quoting Manual for Complex Litigation, Third, § 30.42 (1995)) (internal quotation marks omitted). "'Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement.'" *Willix v. Healthfirst, Inc.*, No. 07 Civ. 1143, 2011 WL 754862, at *2 (E.D.N.Y. Feb. 18, 2011) (quoting *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 CV 10240, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007)); *see also Capsolas v. Pasta Res., Inc.*, No. 10 Civ. 5595, 2012 WL 1656920, at *1 (S.D.N.Y. May 9, 2012).

The first step in the settlement process simply allows notice to issue to the class and for class members to object or opt out of the settlement. After the notice period, the Court will be

able to evaluate the settlement with the benefit of the class members' input. In evaluating a class action settlement, courts in the Second Circuit consider the nine factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberg v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). Although the Court need not evaluate the *Grinnell* factors in order to conduct its initial evaluation of the settlement, for purposes of evaluating the settlement's fairness, it is useful for the Court to consider these criteria.

The *Grinnell* factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Grinnell*, 495 F.2d at 463.

Here, the relevant *Grinnell* factors weigh in favor of approval of the Settlement, and certainly in favor of preliminary approval.[6]

---

[6] Factor 7 regarding the ability of the defendant to withstand greater judgment is not relevant where, as here the Defendant is the United States government. *See D.M. v. Terhune*, 67 F. Supp. 2d 401, 410 (D.N.J. 1999) ("the ability of a governmental unit to withstand a greater judgment is not particularly applicable and is not a factor considered by this Court").

A. Litigation Through Trial Would Be Complex, Costly, and Long (*Grinnell* Factor 1).

By reaching a favorable settlement prior to summary judgment motions, trial or appeals, Plaintiffs avoid significant expense and delay and ensure timely programmatic and individual relief for the Class. "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.,* 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub. nom. D'Amato v. Deutsche Bank,* 236 F.3d 78 (2d Cir. 2001). This case is extremely complex, with hundreds of thousands of Class Members, the federal government as the Defendant party, and Title VII discriminatory impact hiring class claims of first impression untried by the federal courts. (Klein Decl. ¶ 5.)

The parties have completed extensive discovery and fully briefed class certification and the next step would be for protracted motion practice on defendant's request for reconsideration of that decision, merits expert discovery and related motion practice and summary judgment motions. This would be a time intensive and costly undertaking, requiring the parties to prepare, review and depose their respective experts (there were half a dozen expert submissions for just the class certification motion) and to review dozens of deposition transcripts and thousands of documents, and finalize supporting affidavits from Class Members for the summary judgment motions. In addition, any judgment related to Defendant's motion for reconsideration of the class certification order or the summary judgment motions may be appealed, extending the duration of the litigation. The Settlement, on the other hand, makes programmatic and class member relief available in an efficient manner and significantly in time to have an impact on the 2020 decennial hiring.

B. The Reaction to the Settlement Has Been Positive (*Grinnell* Factor 2).

After notice issues and class members have had an opportunity to be heard, the Court can fully analyze this factor. At this point, the seven Named Plaintiffs have indicated their support for the Settlement. Ex. 10 (Daniels Decl.); Ex. 11 (Desphy Decl.); Ex. 6 (Gonzalez Decl.); Ex. 5 (Mateo Decl.); Ex. 9 (Rickett-Samuels Decl.); Ex. 7 (Scott Decl.); Ex. 8 (Zahnle Decl.). Based on Class Counsel's communications with the Named Plaintiffs and their communications with various Class Members over the course of the five-year litigation, the primary concern of Class Members is future job prospects. (Klein Decl. ¶ 22.) This settlement directly addresses those concerns by creating the Records Assistance Project and advance notice hiring. More broadly, the Settlement addresses the root causes of Class Members' harm—fixing the hiring criteria and creating a validated selection structure, under the supervision of expert IOs with experience in this litigation. By directly addressing the primary concerns of Class Members, Class Counsel is confident that the Class will respond favorably to the proposed settlement. *Id.*

C. Discovery Has Advanced Far Enough to Allow the Parties to Resolve the Case Responsibly (*Grinnell* Factor 3).

The parties have completed more than enough discovery to recommend settlement. The proper question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004) (citation and internal quotation marks omitted). "[T]he pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . but an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000) (citation and internal quotation marks omitted).

The parties' litigation efforts and discovery here meet this standard. As outlined above, the litigation thus far has been "an aggressive effort" by both parties, including two motions to dismiss, a motion for class certification, discovery motions, and multiple amended complaints, as chronicled in this Court's previous decisions. The parties engaged in significant discovery, taking and defending approximately 28 depositions, including those of the Named Plaintiffs and Defendants' designees and executives, and substantial document and data discovery. (Klein Decl. ¶¶6-11.) Based on these circumstances, the parties were well equipped to evaluate the strengths and weaknesses of the case.

D. The Risk of Establishing Liability and Damages for the Class Through Trial Favor Settlement (*Grinnell* Factors 4 and 5).

Although Plaintiffs believe their claims have merit, they also recognize that they would face significant legal and procedural obstacles in establishing liability and recovering damages on their claims. Indeed, "[i]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *In re Ira Haupt & Co.,* 304 F. Supp. 917, 934 (S.D.N.Y. 1969).

Title VII disparate impact class actions are subject to considerable risk at trial. This is especially true here, where Plaintiffs bring hiring race discrimination disparate impact claims based on criminal background histories—a largely untried legal theory in federal court. As witnessed by the successful outcome of the multiple dismissal and class certification motions, Plaintiffs are confident that their race claims would be successful at trial. However, Class Counsel is realistic and cognizant of the risk involved in bringing issues of first impression to verdict.

Additionally, establishing damages for a class of hundreds of thousands of Class Members is not without challenges. While Plaintiffs disagree with Defendant's argument raised

in the class certification phase that questions of individual entitlement to damages would overwhelm the litigation, this Court found in its class certification order that Plaintiffs' proposed damages model of estimating the "hiring shortfall" might not survive challenge. *See Houser*, 28 F. Supp. 3d at 252-53 (*citing Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013)). The Court declined to certify the damages subclasses pursuant to Rule 23(b)(3) for that reason. *Id.* This means that if Plaintiffs prevailed on the merits, eligibility for back pay for roughly 450,000 class members would likely have to be determined through some form of individualized hearings as described in *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361 (1977), with a complex process to establish the right to individual back-pay relief. First, the Class Member would have to prove that she would have been minimally qualified for the position—based on the validated criminal history adjudication process and then satisfy the other localized conditions to demonstrate a right to monetary relief. And Class Members only had on average a one in three chance of actual employment—based on local hiring needs and when the applicant sought employment during the 2010 decennial census hiring process.[7] These factors would dramatically reduce the actual number of injury-in-fact class members and lead to a large amount of resources being expended in an attempt to recover a few thousand dollars for each stage-two class member.[8]

---

[7] In fact, Census filed a motion to dismiss after the close of discovery arguing that none of the Named Plaintiffs would have even appeared on a "selection record" even if Census did not screen them out based on criminal history and so should be dismissed for lack of injury in fact. ECF No. 225.

[8] While the case has not advanced to stage two discovery, reserved for post-liability finding, the portion of the class that could survive the Government's challenges to injury in fact would likely have a back pay claim between $1,000 and $3,000. Census set forth offers pursuant to Fed. R. Civ. P. 68 to five Named Plaintiffs in this case and one in an individual litigation on the same issue for amounts ranging from $1,260 to $2,547.42. *See* Ex. 17 (Rule 68 Offer); *see also Robinson v. Prtizker*, 11 Civ. 2480 (S.D.N.Y. April 3, 2015), Ex. 18 (*Robinson* Rule 68

In contrast to these known risks, the programmatic and class member relief offered in this Settlement remedies the injustice at the very heart of the litigation: leveling the playing field for African American and Latino applicants who are arrested in numbers disproportionate to their representation in the general population. In light of the strengths and weaknesses of the case, the Settlement achieves significant benefits for the Class in a case where failure at trial is certainly possible.

E. The Risks of Maintaining the Class Action Through Trial (*Grinnell* Factor 6).

The risk of successfully maintaining the class action through trial is a factor that also supports settlement. Although Plaintiffs were successful in certifying the liability class and feel confident that they would withstand Defendant's motion for reconsideration or a motion to decertify, Defendant's potential appeal of class certification was not an insubstantial risk for the Class. Given the scope and complexity of this disparate-impact class action, Defendant's attempt to decertify the class would involve extensive risk, delay, and expense for the Class. Defendant likely would have argued that a class action is not a superior method to resolve Plaintiffs' claims and that a class trial is not manageable. Because this case involves complex data requiring expert analysis, a novel Title VII legal issue, and hundreds of thousands of class members, such arguments might have found fertile ground, given the hostile legal landscape to large-scale class actions.[9] Accordingly, Plaintiffs' class certification may have been exposed to

---

Offer) & ECF No. 70 (individual offers of judgment of $1,260 and subsequently $2,052.50 for a decennial census applicant).

[9] As Justice Kagan recognized in a dissenting opinion: "To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled." *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

further modification on appeal. Settlement of these claims ensures that the Class avoids the associated risks and delays; this factor therefore favors preliminary approval.

F. The Settlement Is Substantial, Even in Light of the Best Possible Recovery and the Attendant Risks of Litigation (*Grinnell* Factors 8 and 9).

The relief provided in the Settlement is comprehensive and targeted to the harm addressed in this litigation. First, Plaintiffs allege that Census used an unvalidated and flawed employment screening system that denied Class Members (African American and Latino applicants) the opportunity to fairly compete for positions. The Settlement provides for two IO experts, at the expense of Census to collaborate and recommend a validated screening system for Census to implement in future hiring.

Second, Plaintiffs brought forth evidence that African American and Latino applicants are arrested in numbers disproportionate to their representation in the general population to support their race disparate impact hiring claims. The Settlement provides for assistance and counseling to Class Members to address discrepancies in their criminal history records.

Third, Plaintiffs claim that Census's flawed employment screening processes resulted in the unlawful denial of employment opportunities to Class Members. The Settlement provides for early notification of job opportunities for the 2020 decennial census including information designed to assist in navigating the (revised) criminal background check process.

Accordingly, the remedies provided for in the Settlement are specifically tailored to target the alleged harms challenged in the litigation. When, as here, settlement assures immediate relief to class members tailored to the alleged harms, "even if it means sacrificing 'speculative payment of a hypothetically larger amount years down the road,'" the Settlement should be found reasonable. *See Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05 Civ. 3452, 2008

WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008) (quoting *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814, 2004 WL 1087261, at *5 (S.D.N.Y. May 14, 2004)).

In sum, the terms of the proposed Settlement are fair and reasonable, as evidenced by application of the relevant *Grinnell* factors, which support preliminary approval of the Settlement.

II. Conditional Certification of the Settlement Class under Rule 23(b)(3) Is Appropriate.

To grant preliminary approval of this class action Settlement, this Court should also make a determination that the proposed Settlement Class satisfies Rule 23(b)(3). The Court has already found that the Class satisfies Rule 23(a)'s requirements of numerosity, commonality, typicality and adequacy of representation, and Rule 23(b)(2) for liability and injunctive and declaratory relief. *See Houser*, 28 F. Supp. 3d at 241-50. Plaintiffs now move the Court to conditionally certify the Settlement Class pursuant to Rule 23(b)(3) for damages. *See Newberg* § 13.16. Doing so will allow Class Members the opportunity to take advantage of the class member relief of the Records Clearance Project (for Group A Filers) or the Advance Noticed Hiring (for Group B Filers) of the Settlement, but preserves the right of any Class Member who wishes to opt out of the Settlement's relief and move forward with an individual action. *See* Fed. R. Civ. P. 23(b)(3) (allowing for an opt-out mechanism).[10] Because the reasoning of the Court in previously denying Rule 23(b)(3) certification for damages has now been abrogated by this Settlement, the Court should find that this Settlement Class satisfies Rule 23(b)(3).

---

[10] Although Plaintiffs previously moved for the Court to grant certification of three damages subclasses tailored to the particular harm they suffered, subclasses are no longer necessary because the Settlement's terms allow for Class Members to choose relief under the Class Member relief options (Group A or B Filers) to address their particular needs.

Under Rule 23(b)(3), certification is appropriate where "questions of law or fact common to class members predominate over any questions affecting only individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This inquiry examines "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor,* 521 U.S. 591, 623 (1997). Satisfaction of Rule 23(a) "goes a long way toward satisfying the Rule 23(b)(3) requirement of commonality." *Rossini v. Ogilvy & Mather, Inc.,* 798 F.2d 590, 598 (2d Cir. 1986).

Class-wide issues predominate "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *In re U.S. Foodservice Inc. Pricing Litig.,* 729 F.3d 108, 118 (2d Cir. 2013) (internal citations and quotation marks omitted). The Second Circuit has emphasized that "Rule 23(b)(3) requires that common questions predominate, not that the action include only common questions." *Brown v. Kelly*, 609 F.3d 467, 484 (2d Cir. 2010). In carrying out this inquiry, the court may "consider the '. . . improbability that large numbers of class members would possess the initiative to litigate individually.'" *D'Alauro v. GC Servs. Ltd.,* 168 F.R.D. 451, 458 (E.D.N.Y. 1996) (quoting *Haynes v. Logan Furniture Mart,* 503 F.2d 1161, 1165 (7th Cir. 1974)).

The essential inquiry is whether "liability can be determined on a class-wide basis, even when there are some individualized damage issues." *In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d 124, 139 (2d Cir. 2001) (internal quotation marks omitted), *abrogated on other grounds by Miles v. Merrill Lynch & Co.* (*In re Initial Pub. Offering Sec. Litig.*), 471 F.3d 24 (2d Cir. 2006). Where plaintiffs are "unified by a common legal theory" and by common facts, the

predominance requirement is satisfied. *McBean v. City of N.Y.,* 228 F.R.D. 487, 502 (S.D.N.Y. 2005).

With regard to the superiority inquiry, the purpose of the superiority requirement is to ensure that the action is the most "fair and efficient" method of resolving a case. *See In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 230 (2d Cir. 2006) (*citing* Fed. R. Civ. P. 23(b)(3)). "In analyzing [this element], courts must consider four nonexclusive factors: (1) the interest of the class members in maintaining separate actions; (2) 'the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;' (3) 'the desirability or undesirability of concentrating the litigation of the claims in the particular forum;' and (4) 'the difficulties likely to be encountered in the management of a class action.'" *Id.* (quoting Fed. R. Civ. P. 23(b)(3)).

Here, this Court denied Plaintiffs' motion for certification of a damages class under Rule 23(b)(3) for failing to meet the predominance factor. The Court held that Plaintiffs' proposed "hiring shortfall" damages calculation[11] was "over inclusive" because it "doubtlessly includes individuals who are not entitled to back pay under the proposed theory of liability because they would not have been hired even absent the alleged discrimination." *Houser*, 28 F. Supp. 3d at 253. Because the hiring shortfall calculation "makes no attempt whatsoever to separate those class members who are entitled to damages from those who are not," the Court found predominance not met. *Id.*

This Settlement does not implicate the Court's concerns above because it provides for programmatic and class member relief without the need to calculate back pay through a hiring

---

[11] The hiring shortfall calculation would allow backpay to be calculated by the number of applicants who would have been hired absent the alleged discriminatory practices, estimate the aggregate wages that the shortfall hires would have earned had they been hired, and then distribute those aggregate wages on a pro rata basis. *See Houser*, 28 F. Supp. 3d at 253.

shortfall calculation. Because the Settlement avoids this Court's concern regarding calculating back pay damages, the Court can now conditionally certify the Settlement Class.

First, all members of the class are unified by common factual allegations—that all Class Members were subjected to the same flawed screening systems by Census. They are also unified by a common legal theory—that these policies violated Title VII. These common issues predominate over any issues affecting only individual Class Members. *See Easterling v. Conn. Dep't of Corr.,* 278 F.R.D. 41, 45-50 (D. Conn. 2011) (holding that individual questions regarding class member status, qualifications, and mitigation were less substantial than the issues that were subject to generalized proof, including whether the challenged physical fitness test had a disparate impact on female applicants; whether that impact was justified by business necessity; the total amount of back pay, the rate at which those women would have been paid; the total number of priority hiring slots that should be awarded, if any; and the total amount of front pay); *United States v. City of N.Y.,* 276 F.R.D. 22, 48-49 (E.D.N.Y. 2011) (finding that common issues, including the aggregate amount of relief available and the criteria used to establish who is eligible to receive retroactive seniority and priority hiring relief, predominated in a disparate impact case challenging a written entrance examination, despite individual questions regarding claimants' mitigation efforts).

Moreover, granting conditional certification of the Settlement Class is superior to individual adjudication because it will conserve judicial resources and is more efficient for Class Members, particularly those who lack the resources to bring their claims individually. *See Capsolas,* 2012 WL 1656920, at *2. Here, Plaintiffs and Class Members have limited financial resources with which to prosecute individual actions. Employing the class device here will achieve economies of scale for Class Members, conserve judicial resources, and preserve public

confidence in the system by avoiding repetitive proceedings and preventing inconsistent adjudications.

Because the Court's concerns regarding Rule 23(b)(3) certification are no longer present, and Plaintiffs make a strong showing for conditional certification of the Settlement Class, the Court should grant conditional certification pursuant to Rule 23(b)(3), and allow the Class Members to remain in the Settlement Class and receive the benefits of the programmatic and class member relief, or opt-out to pursue individual claims.

III. The Proposed Notice Is Appropriate.

The contents of the proposed Notice, which is attached as Exhibit 2 to the Klein Declaration, comply fully with due process and Federal Rule of Civil Procedure 23. Pursuant to Rule 23(c)(2)(B), the notice must provide:

> the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

The Notice satisfies each of these requirements. It explains the programmatic relief that addresses and corrects Census's allegedly flawed screening process, the class member relief that allows for individualized assistance in correcting discrepancies in criminal background histories and early job notification of Census's hiring for the 2020 decennial census, the proposed allocation of attorneys' fees and costs and the service payments to the Named Plaintiffs. The Notice will also provide specific information regarding the date, time, and place of the final approval hearing and how to object to or exclude oneself from the settlement. This information

is adequate to put Class Members on notice of the proposed settlement and is well within the requirements of Rule 23(c)(2)(B).

The Settlement provides that notice will be electronically mailed by the settlement administrator to each potential settlement Class Member with an e-mail address. Ex. 1 (Stipulated Agreement) ¶ 2.4. To ensure a complete and accurate mailing, Census will provide the settlement administrator with names, social security numbers, self-reported e-mail addresses, last known addresses, and last known phone numbers of Class Members within fourteen (14) days of preliminary approval. *Id.* The Government seeks to produce the information pursuant to a proposed Privacy Act Protective Order submitted on consent with this motion. Ex. 15 (Protective Order). Notices will be electronically mailed by the settlement administrator to each Class Member within fourteen (14) days of receipt of the contact information. Ex. 1 (Stipulated Agreement) ¶ 2.4.

For Class Members for whom Census does not produce an e-mail address and those for whom the e-mail notice is returned undeliverable, the settlement administrator will provide, via First Class United States Mail, postage prepaid, a postcard notifying them of the settlement and directing them to an interactive settlement website and a toll-free number for additional information. *Id.* Class Members will be able to view the notice and claim form through the website and can either submit it online or by print via e-mail, fax, or U.S. Mail. Class Members will also be able to request a hard copy to be sent to them via First Class Mail. *Id.*

The Notice to the Class will contain information about how to exclude oneself, object to the settlement, and/or file a claim. Class Members will have 120 days from the mailing of Notice to submit a claim form. *Id.* ¶ 2.4(F). Class Members will have 90 days after the day on which the settlement administrator successfully mails a Notice to the Class Member, to opt out of or object to the settlement. Class Members whose first mailing was returned to the settlement

administrator as undeliverable, will be allowed until the earlier of (a) ninety (90) days after the re-mailing or (b) one hundred and twenty (120) days after the settlement administrator's initial mailing to all Class Members to opt-out. This is sufficient time to give settlement Class Members a fair opportunity to respond. *Cf. Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1375 (9th Cir. 1993) (approving notice sent 31 days before the deadline for objections).

In sum, because the information provided in the proposed Notices comply fully with the Rule 23 requirements in a clear and precise manner, it should be approved by the Court for dissemination to the Class.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court preliminarily approve the settlement, approve the proposed settlement procedure, conditionally certify the proposed settlement class pursuant to Rule 23(b)(3) for damages, approve the Notice, and enter the Proposed Order Granting Plaintiffs Motion for Preliminary Approval of the Settlement and the Privacy Act Protective Order. *See* Ex. 16 (Proposed Order); Ex. 15 (Protective Order).

Dated: April 19, 2016
New York, New York

Respectfully submitted,
By: /s/ Adam T. Klein

OUTTEN & GOLDEN LLP
Adam T. Klein
Justin M. Swartz
Lewis M. Steel
Ossai Miazad
Sally J. Abrahamson
Deirdre Aaron
3 Park Avenue, 29th Floor
New York, NY 10016
Telephone: 212-245-1000

and

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
Ray P. McClain*
1401 New York Ave., NW
Washington, DC 20005

CENTER FOR CONSTITUTIONAL RIGHTS
Darius Charney
666 Broadway 7th Floor
New York, NY 10012

COMMUNITY SERVICE SOCIETY
Judy Whiting
Paul Keefe
105 East 22nd Street
New York, NY 10010

INDIAN LAW RESOURCE CENTER
Robert T. Coulter*
602 North Ewing Street
Helena, MT 59601

COMMUNITY LEGAL SERVICES, INC.
Sharon Dietrich*
1424 Chestnut Street
Philadelphia, PA 19102

** Admitted pro hac vice*

LATINOJUSTICE PRLDEF
Jackson Chin
99 Hudson Street, 14th Floor
New York, NY 10013

Attorneys for Plaintiffs and the Class