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<hr/>		) EEOC No. 570-2016-00501X
		) Agency No. M-94-6376
Matthew Fogg, et al.		)
Class Agents,		)
		)
v.		)
		)
Merrick Garland,		)
Attorney General,		)
Department of Justice,		)
Agency.		)
		)
		)
		)
		)
<hr/>		) Date: September 21, 2023

**ORDER GRANTING PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT,  
 AUTHORIZING NOTICE, AND SCHEDULING FAIRNESS HEARING**

Background

On July 12, 1994, Mr. Matthew Fogg, then proceeding *pro se*, filed a class complaint alleging that the United States Marshals Service (USMS or Agency) discriminated against him and other African Americans on the basis of their race, with respect to various employment practices relating to Deputy U.S. Marshal (DUSM) positions. In 1996, an EEOC Administrative Judge (AJ) declined to certify the class complaint, citing a lack of specific information to support class certification. The Agency adopted the AJ's Order and dismissed the complaint. Mr. Fogg appealed the dismissal to the Commission's Office of Federal Operations (OFO), which closed the appeal based on a clerical error in 1997. *Fogg v. Dep't of Justice*, EEOC Appeal No. 01964601 (Oct. 24, 1997). Nearly ten years later, represented by counsel, Mr. Fogg successfully petitioned OFO to reopen the case. The Commission's subsequent appellate decision overturned the 1996 dismissal of the class complaint and remanded the complaint to the EEOC Washington Field Office for a decision on class certification. *Fogg v. Dep't of Justice*, EEOC Appeal No. 01964601 (May 26, 2006) (request for reconsideration denied). In March of 2007, an AJ again denied class certification and dismissed the class complaint. The Agency adopted the AJ's Order. Class Agents again appealed, and the Commission reversed the AJ's Order denying class

certification. *Complainant v. U.S. Dep't of Justice*, EEOC Appeal No. 0120073003 (July 11, 2012). The Agency filed a Request to Reconsider, which the Commission denied. *Complainant v. Dep't of Justice*, EEOC Request No. 0520120575 (Nov. 17, 2015). In the decision denying the Request to Reconsider, the Commission, *sua sponte*, modified its decision on appeal, defining the Class as including “African Americans who served in law enforcement or operational positions and were subjected to discrimination in recruitment, assignments, training and promotional opportunities.” *Id.* The Commission directed Class Counsel to file an amended class complaint, and remanded the complaint for adjudication, directing the AJ to further define the Class in accordance with its decision. *Id.*

On January 27, 2016, the Washington Field Office assigned the case to the undersigned AJ. Briefing on Class Agent’s Motion to Amend proceeded through the Summer of 2016. On February 24, 2017, I granted the Motion to Amend, appointing additional Class Agents and further defining the scope of the Class. Several years of extensive, contentious discovery and motions practice followed. The Parties and I participated in regular Status Conferences to resolve disputes and address obstacles to the development of the evidence caused by the age of the case, the lengthy liability period, and the breadth of the claims. The Parties report that they have exchanged over 1.2 million documents and conducted forty-two depositions thus far.

On September 9, 2020, Class Agents again moved to amend the Class definition. On August 13, 2021, the then-assigned AJ<sup>1</sup> granted Class Agents’ Motion to Amend the Class Charge, further revising the Class definition to include:

All current and former African American Deputy U.S. Marshals who were subjected to USMS policies and practices regarding promotions under the Merit Promotion Process, Management Directed Reassignments, and Headquarters Division assignments, and all African American current and former Deputy U.S. Marshals, Detention Enforcement Officers, and applicants never employed who were subjected to USMS policies and practices for hiring and recruitment of Deputy U.S. Marshal positions from January 23, 1994 to present.

In early 2022, the Parties reported that they were engaged in settlement negotiations. I stayed litigation deadlines for settlement, and from March 2022 through August 2023, the Parties provided periodic status updates on the progress of their settlement talks. The Parties report that they participated in about thirty settlement conferences during this period.

On August 31, 2023, Class Agents, through Counsel, filed their Unopposed Motion for Preliminary Approval of Proposed Class Settlement (Motion) with Exhibits 1-4, along with copies of the Settlement Agreement and Release (Settlement Agreement) with Exhibits A-G. Class Agents, with the Agency’s consent, request: (1) preliminary approval of the proposed Settlement Agreement and all attachments thereto; (2) approval of the Notice of Resolution; (3) approval of the proposed manner of distribution of the Notice of Resolution; and (4) a date for a Fairness Hearing. On September 8, 2023, the Parties and I met for a Status Conference to discuss the Motion and the Settlement Agreement. On September 14, 2023, Class Agents

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<sup>1</sup> Administrative Judge Kurt Hodges was assigned to the case from October 2020 to February 2022 while the undersigned served on a detail assignment.

submitted revised documentation addressing the issues discussed during the Status Conference. For the reasons described herein, I conclude that the Motion should be granted.

### Legal Standard

EEOC Regulations at 29 C.F.R. § 1614.204(g)(4)(2023) provide that a settlement of a class complaint shall be approved if it is fair, adequate and reasonable to the class as a whole, and does not solely benefit the class agent. *See Complainant v. U.S. Postal Serv.*, EEOC Appeal No. 0120142423 (Nov. 13, 2014); *Grier v. U.S. Postal Serv.*, EEOC Appeal No. 0120081838 (July 1, 2008); *see also* EEOC Management Directive 110 (August 5, 2015) at 8-9, 8-10. Notice of the resolution must be given to the class members, with no less than a thirty-day period to object. 29 C.F.R. §1614.204(g)(4). Commission regulations do not address preliminary approval of the settlement prior to notice of resolution. Federal courts, however, have noted that preliminary approval of class settlements requires a lower standard than final approval. Requests for preliminary approval are evaluated to determine whether the agreement “discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval.” *Thomas v. NCO Financial Systems, Inc.* No. CIV. A. 00-5118 (July 31, 2002)(citing *In re Prudential Securities Incorporated Limited Partnerships Litigation*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995)).

### Analysis

Having carefully reviewed the Motion and the Settlement Agreement, I see no grounds upon which to doubt its fairness, nor do I see any obvious deficiencies. The Settlement Agreement is the product of over eighteen months of arms-length negotiation by capable counsel on both sides, with the benefit of substantial discovery to help them assess the strengths and weaknesses of their respective positions in litigation. Almost three decades have passed since the complaint was filed. Absent settlement, the Parties face years of continued litigation in the administrative hearings adjudication and appellate fora. All the while, Class Members would continue to wait.

The relief afforded appears to be within the range of what an administrative judge could award at the conclusion of this litigation. Throughout the litigation, the Parties employed experts to analyze their respective positions, the value of the case, and Class Members’ potential entitlement to relief. The \$15 million Settlement Fund constitutes about twenty-five (25) percent of the \$61 million Class Representatives’ experts estimate could be obtained upon successful conclusion of the litigation. It accounts for the uncertainty the Class faces in continuing to litigate the case, the possibility that they may not ultimately prevail, and the risks associated with proving claims for damages. The Settlement Agreement includes criteria for determining individual recovery for Class Members, and assigns the task of determining relief to an experienced third-party Claims Allocator. The Settlement Agreement also provides substantial remedial relief, including opportunities for priority consideration for merit promotions and voluntary reassignments, and important programmatic and policy changes. Finally, the Settlement Agreement provides for recovery of attorneys’ fees up to thirty-three (33) percent of the settlement value, a proportion that is within the typical range for a class action.

## Conclusion and Order

Because I find no reason to doubt the fairness of the Settlement Agreement nor any obvious deficiencies, I hereby **ORDER** as follows:

1. The Settlement Agreement resolving the Class Complaint is hereby **PRELIMINARILY APPROVED**. Final approval of the Settlement Agreement is subject to consideration of any objections by Class Members.
2. Pending final determination that the Settlement Agreement is fair, adequate, and reasonable to the Class as a whole, the Commission's Stay of this matter for settlement is **EXTENDED** through the Fairness Hearing and until further notice.
3. The proposed Notice of Resolution is in compliance with the Notice of Resolution requirements set forth at 29 C.F.R. § 1614.204(g)(4). Class Members will be provided access to a copy of the Settlement Agreement which sets out the relief and informs Class Members that the resolution will bind all members of the Class. The Notice of Resolution informs Class Members of their right to submit objections to the Settlement Agreement, along with the name and address of the Administrative Judge assigned to the matter. Therefore, the Notice of Resolution is **APPROVED**.
4. The proposed plan for distributing the Notice is reasonable. Due to the unique procedural history of this matter and the fact that a majority of the Class remains unknown, the Commission finds that the Parties' plan of using a combination of U.S. Mail, electronic mail, and expansive online advertising is reasonably calculated to inform Class Members of the Settlement Agreement and their rights. Therefore, the plan for distribution of the Notice of Resolution is **APPROVED**.
5. Agency Counsel will designate a vendor who will provide notice in the manner described above and subject to the provisions set forth in the Settlement Agreement.
6. Counsel for Class Agents have designated Michael Lewis as Claims Allocator and Settlement Services, Inc. ("SSI") as the Claims Administrator. The Claims Administrator will assist in creating a website for Class Members, answer questions from Class Members, and receive Claim Forms from Class Members. Mr. Lewis will serve as an independent third party to determine allocation of the Settlement pending final approval of the Settlement Agreement.
7. The deadlines set forth in the Chronology, which is Exhibit C to the Settlement Agreement, are **APPROVED**, subject to the provisions set forth in the Settlement Agreement. The Agency will notify the Commission if infeasibility impacts the date of the Fairness Hearing and/or the requirements for notice, or if a stay of the proceedings is necessary.

8. In accordance with 29 C.F.R. § 1614.204(g), the Parties are hereby ORDERED to participate in a Fairness Hearing for **March 20, 2024, at 9:00 a.m. Eastern Time, at the U.S. Equal Employment Opportunity Commission, 131 M Street, NE, Washington, D.C.**<sup>2</sup> The Agency will provide a court reporter<sup>3</sup> for the Fairness Hearing. At the Fairness Hearing, I will consider any objections to the Settlement Agreement; hear the Parties' arguments regarding the fairness, adequateness, and reasonableness of the Settlement Agreement; hear the Parties' arguments on the motion for service awards for Class Agents and certain Class Members; and consider the attorneys' fee petition and statement of costs for the Class Allocator and Class Administrator.
9. Any Class Member may petition the Commission to vacate the Settlement Agreement because it benefits only the Class Agents, or is otherwise not fair, adequate, and reasonable to the Class as a whole. Any objection must be submitted no later than the date set forth in the Notice of Resolution.
10. Objections must be submitted in writing to Supervisory Administrative Judge Sharon E. Debbage Alexander by U.S. Postal Mail to EEOC Washington Field Office, 131 M Street, N.E., Washington, DC 20507, or by electronic mail to [FoggClassAction@eeoc.gov](mailto:FoggClassAction@eeoc.gov). A copy of any objection must also be sent to Agency Counsel and Class Counsel at the addresses included in the Settlement Agreement and the Notice of Resolution.
11. Any Class Member objection must include the following information: (1) the objector's name, address, e-mail address (if available), and telephone number (if available); (2) reason(s) for the objection; (3) whether the objector wants to speak at the Fairness Hearing; (4) if the objector wants to speak at the Fairness Hearing, whether the objector wishes to appear at the Fairness Hearing in person or virtually.
12. The Claims Form will be due no earlier than sixty (60) days after the Date of the Notice of Resolution.
13. Class Counsel shall file a petition for attorneys' fees, statement of costs for SSI, statement of costs for Mr. Lewis, and application for service awards, along with all supporting memoranda, affidavits, declarations and other evidence, no later than seven (7) days prior to the Fairness Hearing.

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<sup>2</sup> EEOC federal sector hearings are closed to the public. Class Members are permitted, but not required, to attend the hearing. Any Class Member wishing to attend the hearing in person or virtually must advise Class Counsel no later than two weeks prior to the Fairness Hearing. In-person attendees will be required to present government-issued identification and go through building security. Virtual participants must participate from a private place, without non-Class Members present. Class Members will advise Class Counsel of any accommodations they require to attend the Fairness Hearing. Class Counsel will include a list of in-person and virtual attendees, including any requests for accommodation, with their prehearing submissions no later than seven (7) days prior to the hearing.

<sup>3</sup> The Court Reporter will make an official transcript of the hearing. No other recording of the hearing is permitted.

14. The Parties are hereby **ORDERED** to participate in a **Prehearing Status Conference** on **March 7, 2024 at 2:00 p.m. Eastern Time.**<sup>4</sup> At the Prehearing Status Conference, the Parties will be prepared to discuss the format and order of presentation for the hearing. At the conclusion of the Prehearing Status Conference, and after consideration of the prehearing submissions due seven (7) days prior to the hearing, I will issue a notice with detailed instructions and an agenda for the Fairness Hearing.
15. I reserve the right to stay the proceedings in this case or continue the deadlines and dates referenced in this Order, including the date of the Fairness Hearing.

It is so ORDERED.

For the Commission:

  
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Sharon E. Debbage Alexander  
Supervisory Administrative Judge

**By Electronic Mail (via FedSEP/EEOC Public Portal):**

**Class Representatives:**

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<sup>4</sup> I will provide a conference line to Class Counsel and Agency Counsel under separate cover.