

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 02-N-0740 (CBS)

AMERICAN FRIENDS SERVICE COMMITTEE, a Pennsylvania not-for-profit corporation;
ANTONIA ANTHONY;
END THE POLITICS OF CRUELTY, an unincorporated association;
CHIAPAS COALITION, an unincorporated association;
STEPHEN NASH; and
VICKI NASH,

Plaintiffs,

v.

CITY AND COUNTY OF DENVER,

Defendant.

**JOINT MOTION FOR
APPROVAL OF SETTLEMENT AND FOR
ADMINISTRATIVE CLOSURE OF CASE**

Plaintiffs, American Friends Service Committee, Antonia Anthony, End the Politics of Cruelty, Chiapas Coalition, Stephen Nash, and Vicki Nash (collectively, "Plaintiffs"), and Defendant, City and County of Denver (the "City"), respectfully jointly move for (a) approval of the terms of their settlement of this action, pursuant to Fed. R. Civ. P. 23(e), and (b) for administrative closure of this civil action, subject to reopening for good cause, for a period of twelve months, pursuant to D.C.COLO.LCivR 41.2, for the reasons set forth herein.

1. Plaintiffs and the City have agreed to settle this action. The terms and conditions of such settlement are documented in the parties' Settlement Agreement and Release (the "Agreement"), a copy of which is appended hereto as Attachment A. The Agreement provides, *inter alia*, that the parties shall jointly move for an order (a) approving the settlement of this

action, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and (b) closing the case administratively, subject to reopening for good cause, for a period of twelve months, pursuant to D.C.COLO.LCivR 41.2. See Agreement §§ 9.1 and 9.3.

2. Because this case was filed as a proposed class action, this Court must approve the parties' settlement, pursuant to Rule 23(e). Under the majority rule, Rule 23(e) applies to all class actions, including those where the plaintiffs have not yet sought or obtained class certification. See Baker v. America's Mortgage Servicing, Inc., 58 F.3d 321, 324 (7th Cir. 1995); Diaz v. Trust Terr. of the Pac. Islands, 876 F.2d 1401, 1408 (9th Cir. 1989) ("Diaz"); In re Nazi Era Cases Against German Defendants Lit., 198 F.R.D. 429, 438-39 (D.N.J. 2000) ("Nazi Era"); 7B Charles Alan Wright, Arthur R. Miller & Mary Ann Kane, Federal Practice and Procedure § 1797 (2d ed. 1987 & Supp. 2003). The applicability of Rule 23(e) to the settlement of this action, however, does not mean that notice of the settlement must be provided to all members of the putative class, or that the Court must conduct a hearing before approving the settlement.

3. Rule 23(e) requires court approval of class actions "to determine whether a proposed settlement and dismissal are tainted by collusion or will prejudice absent members of the putative class." Nazi Era, 198 F.R.D. at 439. "When engaging in this inquiry, a court need not perform the sort of substantive oversight required when reviewing the settlement of a certified class, nor need it engage in the laborious duty of conducting a certification determination, as the dismissal is not *res judicata* against the putative class" Id. at 439. A pre-certification dismissal does not bind absent class members and, as a result, such persons have only a speculative reliance interest in the case. Id. at 440. The approval process focuses on

whether the settlement reflects collusion, in the form of sacrifice of the interests of the class for private gain, or prejudice to the absent class members. Id. at 439.

4. Courts have flexibility in deciding whether notice of a settlement must be provided to absent class members. Such notice is not mandatory. Id. at 441. Notice is not required where the cost of notice could harm the putative class, such as where such cost would diminish payments to putative class members, or deter the assertion of meritorious class actions. Id. Notice is not required where (1) there is no evidence that the named plaintiffs asserted class action allegations in bad faith to pressure the defendant into settling, Diaz, 876 F.2d at 1409; (2) the settlement does not involve “objectionable structural relief, trade-offs between compensatory and structural relief, or depletion of limited funds available to pay the class claims . . . ,” id.; and (3) no prospective class member could be prejudiced by having refrained from filing suit based on knowledge of this action. Id. at 1409-10. None of these risks is present here because the Plaintiffs did not seek a monetary remedy, and because the terms of the settlement benefit the entire putative class.

5. The strongest indicia of Plaintiffs’ and the City’s good faith in entering into the settlement are the significant benefits that the Agreement grants to all members of the putative class, i.e., “all organizations and all past, current, and future Denver residents and visitors who engage in or have engaged in peaceful political, religious, educational, social or expressive activities, and who, as a result of these activities, have been, are now, or will become, targets of surveillance by the [Denver Police] Department or the subjects of the Department’s Spy Files.” Complaint ¶ 54. As part of the settlement, the City will adopt a revised policy (the “Policy”) for the collection and maintenance of criminal intelligence information. (A copy of the Policy is

attached to the Agreement as Exhibit 1.) The Policy contains new and significant safeguards for expressive activities and expressive associations protected under the First Amendment, which will benefit the putative class as a whole. For example, the Policy:

- Prohibits the Denver Police Department’s intelligence unit (the “Unit”) from collecting or maintaining information about the political, religious, social views, associations or activities of any individual or group, unless that information is directly related to criminal activity and there is reasonable suspicion that the individual is or may be involved in that criminal activity.
- Applies to all forms of intelligence information collection, including undercover operations, photography, videography, and electronic and other media.
- Limits the Unit to collection and maintenance of information regarding specified types of criminal activity; prohibits collection and maintenance of information regarding criminal activity that is directly related to purely expressive conduct; and prohibits information gathering merely on the basis of involvement in expressive activity that takes the form of non-violent civil disobedience that amounts, at most, to a misdemeanor offense.
- Establishes procedures governing and limiting the dissemination of information from the Denver Police Department’s criminal intelligence files.
- Specifies internal safeguards, such as training, supervisory review, and thorough documentation of an audit trail.
- Requires quarterly and then annual audits by an independent agency whose reports will be submitted to the Public Safety Review Commission.

6. The Agreement also contains a number of other benefits to the entire putative class. For example, the Policy provides that the City will:

- Purge all of the existing intelligence files that do not meet the rigorous criteria of the Policy.
- Permit individuals and organizations, for a 90-day period, another opportunity to obtain copies of their purged intelligence files.
- Provide letters from the Chief of the Denver Police Department to the subjects of all purged intelligence files, stating that the police have no information that justifies maintaining a criminal intelligence file.
- Provide notice of the purge to other law enforcement agencies that may have received information from the Denver Police Department intelligence files.
- Submit to quarterly audits for the first year and subsequent annual audits.

These provisions on their face establish that the settlement does not prejudice the absent members of the putative class.

7. Furthermore, there is no risk of improper or disproportionate payments to the named plaintiffs, as the plaintiffs sought only injunctive and declaratory relief and will not receive any payments as part of the settlement. (The settlement does require the City to pay plaintiffs' reasonable attorney's fees and costs, in an amount to be determined by the Court. Such payment does not create any risk of prejudice to the absent class members, due to the nature of the relief sought in this case.)

8. The Agreement further provides that the parties will request that the Court close the case administratively, subject to reopening for good cause, for a period of twelve months.

See Agreement at ¶¶ 9.1-9.3. The Agreement states that the party filing any such motion to reopen the case would need to comply in good faith with D.C.COLO.LCivR 7.1. See id. § 9.2. Under the Agreement, after the case has been administratively closed for twelve months, absent a motion to reopen from either Plaintiffs or the City, the Court shall dismiss the action, with prejudice, *sua sponte* and without further action from either Plaintiffs or the City. See id.

WHEREFORE, Plaintiffs and the City respectfully request that the Court enter an order (a) approving the settlement of this action, as documented in the Agreement; (b) closing the case administratively, subject to reopening for good cause for a period of twelve months, pursuant to D.C.COLO.L.CivR 41.2; (c) providing that, during such twelve-month period, any party filing a motion to reopen the case would need to comply in good faith with D.C.COLO.LCivR 7.1; and (d) stating that, after the case has been administratively closed for twelve months, absent a motion to reopen from either Plaintiffs or the City, the Court shall dismiss the action, with prejudice, *sua sponte* and without further action from either Plaintiffs or the City.

Dated: May 5, 2003

Respectfully submitted,

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(IN COOPERATION WITH THE

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