UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFREY BARHAM et al.,	
Plaintiffs,	Case No.: 02-CV-2283 (EGS)(JMF)
v.	
CHARLES RAMSEY, et al.,	
Defendants.	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS SETTLEMENT, NOTICE TO CLASS, AND NOTICE OF FAIRNESS HEARING

For reasons set forth herein, the proposed Settlement Agreement warrants preliminary approval of this Court, subject to the Court's final consideration at a fairness hearing.

The Settlement Agreement is fair, reasonable and adequate, in the best interest of the Class as a whole, and in satisfaction of Fed. R. Civ. P. 23 and due process requirements. Plaintiffs address below the equitable relief that has issued through settlement and legislative action to effectively change the landscape, both practically on the streets and legally in the courts and under law, as pertains to police conduct during mass demonstrations.

The monetary relief is fair, reasonable and adequate, resulting in payments to class members that is around three times that received by class members who claimed identical damages in the same conditions of confinement for September 27, 2002 protest-related arrests in the case of Burgin v. District of Columbia, Civil Action No. 03-02005 (EGS).

The attorneys fees, likewise, are reasonable.

The plaintiffs submit, herein, proposals to direct class notice in a reasonable manner to all class members who would be bound by the proposal, including opportunity for class members to request exclusion from the monetary terms of settlement.

A copy of the Settlement Agreement is attached herein as Exhibit 1.

I. The Settlement Agreement is Fair, Reasonable and Adequate

A. Equitable Relief

The Court certified the Barham class pursuant to Fed. R. Civ. P. 23(b)(2), on the basis of claims that "by arresting all persons found in [Pershing] park on the morning in question [September 27, 2002] without giving a lawful order to disperse or allowing class members to obey such order, defendants engaged in a singular police action on grounds generally applicable to the class." Barham v. Ramsey, 217 F.R.D. 262, 264.

The Court acknowledged that, while monetary claims for damages existed, the predominant issue was the uniform action by police against the class as a whole, specifically the question of whether civil rights violations were perpetrated by the execution of the mass arrest without any warning or order to disperse. See Fed. R. Civ. P. 23(e). The most fundamental and dominant need was the prevention of recurrence. Barham, 217 F.R.D. at 264 (Court acknowledges that in each of the "related case" lawsuits filed pertaining to the September 27, 2002 arrests, "[a]ll four actions seek common relief from the District of Columbia," specifically equitable relief barring the use of police lines to "trap and arrest" protestors and others, expungement relief[1] and damages).

[1] Upon motion of the District of Columbia (Barham Docket No. 386; Chang Docket No. 365), the Court granted expungement relief to the Barham class (Barham Docket No, 405), to the four remaining Chang plaintiffs (Chang docket no. 381) and also issued to the four remaining Chang plaintiffs orders declaring the arrest of each to be "null and void" and authorizing each to deny the occurrence of the arrest without penalty (Chang docket Nos. 382 – 385). Similar relief was issued in the settlement of the claims of the seven plaintiffs in Abatte v. Ramsey, Civil Action No. 03-00767 (EGS) (Docket No. 99).

The certified class was not restricted to protestors. The class represents the interests of all those arrested, including protestors, non-protestors, journalists, bystanders, National Lawyers Guild legal observers, tourists, interested persons who approached to observe or hear protestors' message, and passers-by.[2]

1. The Need for Equitable Relief: The Alleged Pattern and Practice Violations Existing at Time of Complaint

Plaintiffs to this lawsuit, and other protest related lawsuits, have alleged that during a period of years starting with the April 15, 2000 arrests at issue in the matter of Becker, et al. v. District of Columbia, et al., the Metropolitan Police Department (MPD) engaged in a practice of trapping and detaining protest groups, including in each of the following circumstances:

- April 15, 2000, claim of trap and detain mass arrests at protests timed to coincide with the Spring annual meeting of the International Monetary Fund and World Bank. See Becker v. District of Columbia, Civil Action 01-00811 (PLF)(JMF) (class action with Partnership for Civil Justice Fund (PCJF) as class counsel).

- January 20, 2001, allegedly targeting protestors at the first Inauguration of George W. Bush and engaging in trap and detention tactics. See International Action Center, et al. v. United States, et al., Civil Action No. 01-00072 (GK) (plaintiffs represented by the PCJF attorneys).

- Saturday, September 29, 2001, in Murrow Park in front of IMF headquarters. Protestors claim that police lines allegedly appeared suddenly, trapping and detaining hundreds of persons without notice.

- April 22, 2002, at a march organized to raise awareness about U.S. policies towards Latin America, District and federal police allegedly deployed police lines without warning and encircled, trapped and detained demonstrators.

- September 27, 2002, mass arrest at protests timed to coincide with the Fall annual meeting of the IMF and World Bank. Barham v. Ramsey, Civil Action 02-02283 (EGS)(JMF) (class action with Partnership for Civil Justice Fund as class counsel).

[2] As best as Class Counsel can determine, based on the record, there were no distinctions made in this singular police action with the limited exception that some journalists were treated favorably and were allowed to leave the arrest area.

- March 22, 2003, at protests against the invasion of Iraq, marchers were allegedly trapped and detained by police lines suddenly deployed at the front and the rear of the march on a city block in downtown D.C.

The Partnership for Civil Justice filed the class complaint in Barham as the most recent in a series of lawsuits it had filed to challenge the "trap-and-arrest" tactic, describing the case as follows in the complaint.

> This complaint is the most recent in a series of lawsuits with a shared factual allegation: That the D.C. Metropolitan Police Department's Civil Disturbance Units maintain and execute unconstitutional tactics to disrupt lawful protest and assembly including specifically the routine use of mobile police lines to interfere with freedom of association, assembly, speech and free movement; and the use of administrative detention, false imprisonment and false arrest tactics in which the CDUs will trap protesters (and others in physical proximity) on all sides, seize, detain and arrest those trapped/seized in the absence of probable cause.

First Amended Complaint at 3, ¶¶4 – 5 (Docket Number 16).

This Court recognized and described that "[t]he heart of [plaintiffs'] 'trap and arrest' charge is that police cordoned off the Pershing Park area, essentially 'trapping' the protestors within the park, and then initiated a mass arrest without first warning the protestors that they must disperse to avoid arrest." Barham v. Ramsey, 338 F. Supp.2d 48, 54 (D.D.C. 2004).

Where the trap-and-arrest tactic has led to custodial arrests, protestors assert that they were held overnight in harsh conditions of confinement, bound wrist-to-ankle in a contorting and painful position that prevented extension of one's back, deprived access to food and water, and at times to bathroom facilities, and often required to sit on buses for hours. Equitable relief was sought to prevent these conditions from occurring in the future.

2. The Claims for Equitable Relief Have Been Resolved

As reflected in the timeline above, the April, 2000 IMF/World Bank related mass arrest that is the subject of the Becker class action was a predecessor incident to the September, 2002

IMF/World Bank mass arrest. The subsequent September 2002 incident was challenged, with the same class counsel, in this case of Barham v. Ramsey, Civil Action 02-02283 (EGS)(JMF).

The Partnership for Civil Justice Fund, whose attorneys were class counsel in both the Becker case and the Barham case, made a simultaneous demand for equitable relief in a settlement demand letter dated June 29, 2004 and issued in both the Barham and Becker cases. Because the alleged injuries and challenged tactics experienced in both cases were substantively similar if not identical in important respects, each class' demands for equitable relief to prevent recurrence were advanced in the same correspondence. These demands and their resolution are described further, below.

As a consequence of this litigation, and other litigation and factors, the Council of the District of Columbia authorized an investigation into pattern and practices of alleged misconduct by police in the context of mass demonstrations. After issuing a report containing many adverse findings against the police and, in particular, with respect to Chief Ramsey, the Council enacted remedial legislation, the "First Amendment Rights and Police Standards Act of 2004," D.C. Law 15-532 (April 13, 2005), 52 DCR 2296.

The legislative history of this Act reflects that one of the expressly stated legislative purposes was to eliminate the need for equitable relief to issue from this Court and to enact into statutory law the reasonable equitable demands of plaintiffs to this litigation.

Barham class counsel Mara Verheyden-Hilliard testified at the public hearing on the legislation. Upon completion of Ms. Verheyden-Hilliard's testimony, Judiciary Committee Chairperson Kathy Patterson stated, and asked, as follows:

> One of the things that we had looked at, **in doing this legislation, was trying to bring an end to the [protest] lawsuits here, from the standpoint of taking away all the injunctive relief sought, or taking away the need for injunctive relief**. Let me just ask you . . . if this legislation as proposed today were the law of

> the District of Columbia tomorrow, would there still be injunctive relief needed, that you needed to seek, in your view?

Media Exhibit A, Committee Chair Kathy Patterson, Council of the District of Columbia, Committee on the Judiciary, Public Hearing, Bill 15-968, "First Amendment Rights and Police Standards Act of 2004," (October 7, 2004) (emphasis added).

Ms. Verheyden-Hilliard responded with a qualified "Yes," acknowledging the breadth of the Council's proposals as well as areas for modification and improvement. Id.

The "First Amendment Rights and Police Standards Act of 2004" (Ex. 5) became effective law on April 13, 2005.

During the period from April, 2005 through January, 2010, there has been no recurrence of the use of police lines to engage in the mass trap-and-arrest of protestors. The plaintiffs' original claims for prospective relief barring the trap-and-arrest practice have been resolved by the fact that these tactics have not been repeated and by the First Amendment Rights and Police Standards Act of 2004, as well as by other equitable relief secured through settlements.

The plaintiffs' equitable demands, detailed in the June 29, 2004 equitable relief demand letter[3] transmitted jointly on behalf of the classes in Barham and Becker, were not limited strictly to the use of police lines.

Plaintiffs presented not a minimal set of demands, but a comprehensive package of demands that intruded on police operations as plaintiffs deemed necessary to protect constitutional rights in light of alleged police misconduct and disruption to free speech activities.

The expansive set of demands sought to address the following alleged practices: the use of police lines to surround, trap-and-arrest protestors and others; arrests based on "demonstrating without a permit"; use of ineffective and/or unlawful protest dispersal orders; the conditions of confinement and restraint imposed on persons arrested in protests; the practice of restraining

[3] Communications in settlement discussions are maintained as strictly confidential. As such, plaintiffs have not included the demand letter as an attachment, but have requested and received from the District its permission to summarize the demands for the purposes of this submission.

arrestees by using flexcuffs to bind wrist-to-ankle; to place objective limits on the lengthy duration of confinement before release, the effect of which allegedly kept protestors off of the streets and unable to engage in protected activities; to prevent the delivery of misinformation regarding options for release, which plaintiffs assert appeared calculated to prevent protestors from challenging the legality of their arrests by telling persons that unless they chose to "post and forfeit" that they would be jailed for days before a Judge would see them. The demands also sought to impose public record-keeping and report-issuance requirements.

As above, the Council's enactment of the "First Amendment Rights and Police Standards Act of 2004" was crafted to address the relief sought by plaintiffs. A comparison of the comprehensive package of equitable relief demanded by the Barham plaintiffs in litigation, to that enacted by the Council is reflected in the following table:

Equitable Demands by Barham Class (as reflected in June, 2004 demand letter)	**Statutory Enactment Under the First Amendment Rights and Police Standards Act of 2004 (Ex. 5)**
Restrictions on Use of Police lines.	Sec. 108, "Use of police lines," with identified exceptions, generally prohibits police from "using a police line to encircle, or substantially encircle, a demonstration"
Restrictions on Dispersal or Terminations of Demonstration Activity	Sec. 107(d), "The MPD shall not issue a general order to disperse to participants in a First Amendment assembly except" under three exceptional and defined circumstances. Establishes that "[a]n order to disperse or arrest assembly participants shall not be based solely on the fact that a plan has not been approved for assembly" or lacks a permit.

Equitable Demands by <u>Barham</u> Class (as reflected in June, 2004 demand letter)	**Statutory Enactment Under the First Amendment Rights and Police Standards Act of 2004 (Ex. 5)**
No Arrests for Parading or Demonstrating Without a Permit.	Sec. 105(a), declares "it shall not be an offense to assemble or parade on a District street, sidewalks, or other public way, or in a District park, without having provided notice" or receiving a permit[4] or an approved plan from the municipality. Sec. 142, modifies the existing regulations pertaining to parade permits to explicitly exclude from its scope protests or First Amendment assemblies.
Prohibition of Wrist-to-Ankle "Hogtying" or Methods of Restraint Causing Inhumane Stress and Duress	Sec. 111, "Use of handcuffs, plastic cuffs, or other physical restraints on persons arrested in connection with a First Amendment assembly," provides that "no such person shall be restrained by connecting his or her wrist to his or her ankle, and no such person shall be restrained in any other manner that forces the person to remain in a physically painful position."
Limitations on Period of Detention and Arrest	Sec. 112, "Prompt release of persons arrested in connection with a First Amendment assembly," establishes a standard that persons eligible for release be released within 4 hours from the time of arrests and requires "that an officer holding a supervisory rank document and explain any instance in which a person arrested in connection with a First Amendment assembly who opts for release pursuant to any lawful release option or who is not charged with any offense is not released within 4 hours from the time of arrest."
Provision of Food and Water to Arrestees	Sec. 112, For persons not released within a reasonable period of time, requires provision of "food appropriate to the person's health."

[4] The Act struck from the D.C. Code and/or ceased the use of statutory references to demonstration "permits," in an effort to convey that prior permit or permission is <u>not</u> a requirement of law to engage in street protest.

Equitable Demands by Barham Class (as reflected in June, 2004 demand letter)	**Statutory Enactment Under the First Amendment Rights and Police Standards Act of 2004 (Ex. 5)**
Written Statement of Rights to Release	Sec. 113, "Notice to persons arrested in connection with a First Amendment assembly of their release options," requires written notice clearly indicating the availability and alternatives for "obtaining a prompt release," which is required to be issued in English and Spanish and offered in any other languages as is reasonable to ensure notice for persons who are limited in English proficiency. Sec. 302, established detailed requirements for the content of such written notice.
Expungement of all Arrest Records in Connection with the Class Action Mass Arrests	Not addressed in the Act. Expungement relief is secured through the class action litigations and settlements.
Record-Keeping Obligations	Sec. 112, requires the Chief to issue an annual public report addressing specific matters related to arrest and prompt release of persons in connection with First Amendment assemblies.

Addressing other issues raised in various court cases, including other PCJF lawsuits, and in the public hearings regarding police conduct, the "First Amendment Rights and Police Standards Act of 2004," also:

- Requires that officers assigned to First Amendment assemblies are equipped with easily visible or "enhanced" badge or name identification that remains visible and allows identification even if officers are wearing riot gear. See Ex. 5, Sec. 109, Sec. 321.

- Requires specific arrest documentation to be completed at a time reasonably contemporaneous with arrest. Id. Sec. 110.

- Requires, in the limited circumstances where dispersal of a protest may be authorized under law, that the MPD shall issue one or more audible orders to those assembled using an amplification system or device, and shall provide persons with an adequate time to disperse and with a clear and safe route for dispersal. Id. Sec. 107.

- Prohibits the deployment of officers in riot gear to First Amendment assemblies, except in limited circumstances where there is a danger of violence and, further, requires the commander at the scene to issue a written report to the Chief which is to be made

available to the public following any deployment of officers in riot gear. Id. Sec. 116.

- Restricts and further regulates any use of chemical irritants, and requires written report issuance whenever such weapons are used. Id. Sec. 116.

- Removes reference and use of the term "permits" in connection with protests, establishing a policy that authorizes protest without prior notice to the police. Id. Sec. 106.

- Allows demonstration-related merchandise to be vended within a protest area without a Department of Consumer and Regulatory Affairs vending permit or license. Id. Sec. 105(h).

- Restricts police from interfering with the use of stands or structure ancillary to protest activity. Id. Sec. 105(g).

- Prohibits the imposition of user fees upon persons or groups organizing First Amendment assemblies or demonstrations. Id. Sec. 105(e).

- Affirms that resolution of a criminal charge through the "post-and-forfeit" procedure "shall not be equated to a criminal conviction" and cannot be relied upon by any D.C. court or agency to impose any sanction, penalty, enhanced sentence or civil disability. Id. Sec. 302.

The "First Amendment Rights and Police Standards Act of 2004" also addresses issues raised by student and professional journalists who cover protests. See Ex. 5, Sec. 114, "Police-media relations." The Act requires the issuance of new regulations to grant enhanced privileges of access to journalists. Id. The Act mandates that media not be denied the access that is available to members of the general public and be granted additional physical access to areas closed to the general public in order to assist their ability to report on the event. Id.; See also 24 D.C.M.R. § 2104 (regulations, as promulgated, which among other things establish the policy of the MPD is "that media representatives shall have maximum access to First Amendment assemblies. . . consistent with maintaining public safety. . . .").

The relief in the "First Amendment Rights and Police Standards Act of 2004" is not subject to police modification. It is not regulation or policy or procedure. It is statutory law.

Unlike MPD policies, which may be overridden within the authority of the Police Chief, statutory law binds the Department, including the Chief. It does not expire after three years, or at any time.

With respect to enforceability, the Act itself provides that it may be used by plaintiffs in their private causes of action in litigation. Section 117, "Construction," provides that "[p]rovisions of this title are intended to protect persons who are exercising First Amendment rights in the District of Columbia, and the standards for police conduct set forth in this title may be relied upon by such persons in any action alleging violations of statutory or common law rights." Ex. 5, Sec. 117.

The Council rejected the need to enact a new and additional private right of action within the Act, on the grounds that protestor-plaintiffs alleging false arrest and other violations had no obstacle to access to court jurisdiction under existing causes of action under common law, constitutional law and statutes, including 42 U.S.C. §1983, which were invoked by the Barham plaintiffs and those in the related cases in the instant litigation.

The Act contained a section that generally required "all relevant MPD personnel" to be properly trained in the "handling of, and response to, First Amendment assemblies" including "instruction on the provisions of this [Act], and the regulations issued hereunder." Ex. 5, Sec. 115.

However, class counsel had received multiple reports from persons seeking to engage in protest activity about encounters with police officials who, notwithstanding this general training requirement, allegedly gave them misinformation or allegedly simply did not know the fundamental details established by the Act. Accordingly, recognizing this as an area of substantive deficiency, plaintiffs' counsel has sought to impose through the Becker settlement

terms a more specific regimen of training that is sufficiently specific to remedy these circumstances. See Ex. 4 (Settlement Agreement in Becker); See also, February 4, 2010 Order (Becker Docket No. 357) (granting preliminary approval to Becker Settlement Agreement).

Supplementing and extending the Act's training requirements, in the proposed class action settlement reached in Becker v. District of Columbia, the class has sought, and the District has agreed to mandate, that commencing not later than 120 days following the Court's final approval of settlement:

- "[E]ach District of Columbia Metropolitan Police Department ("MPD") officer will be required to take training on the Standard Operating Procedures for Handling First Amendment Assemblies and Mass Demonstrations. The training records for this course will be preserved for a minimum of three (3) years." See Ex. 4, Proposed Becker Settlement Agreement, at 8.

- "[T]he MPD shall refer each police officer currently assigned, or assigned in the future, to responsibilities encompassing or related to the handling of First Amendment 'mass demonstration' activities to the provisions of the First Amendment Rights and Police Standards Act of 2004, D.C. Code §§ 5-331.01, *et seq.* and the implementing rules that are posted on the MPD's intranet site." Id. at 9.

- "[T]he MPD, shall, through the MPD's website, make available to all persons inquiring regarding demonstration permits or related activities a copy of the statute and the rules implementing the statute and any forms governing First Amendment assembly plans." Id.

The Becker class action settlement also includes terms calculated to address particular deficiencies that uniquely arise in Washington, D.C., because of the frequent deployment of officers from multiple and various jurisdictions to work jointly alongside the District of Columbia MPD in the context of mass demonstrations. Accordingly, the proposed Becker class action settlement requires that

> In all situations in which, through mutual aid agreements or otherwise, the District of Columbia obtains the assistance of outside law enforcement agencies for demonstration related duties, the MPD shall brief outside agency commanders of the requirements of the MPD's Standard Operating Procedures for Handling First Amendment Assemblies and Mass Demonstrations and shall assign an MPD officer to each such outside agency unit.

Ex. 4, Proposed Becker Settlement Agreement at 9.

A number of the Barham plaintiffs, in particular those non-class plaintiffs arrested in the vicinity of Vermont & K on September 27, 2002, were each charged with the offense of "parading without a permit" and arrested without prior warning or notice. It had been a priority to ensure that this charge, which plaintiffs have long asserted to be a non-arrestable civil infraction, no longer be used by police to arrest and jail protestors. The issue was advanced in the Barham litigation in 2004 in which plaintiffs sought a Motion for Preliminary Injunction to Enjoin the District of Columbia from Arresting or Prosecuting Persons for Parading Without a Permit. (Barham Doc. No. 144). At the hearing on the motion, the District of Columbia announced that as a matter of policy it would cease the practice of suddenly arresting protestors for parading without a permit. See Barham Doc. No. 168 (denying the motion for preliminary injunction as moot in light of District counsel's representations in open court).

To ensure that MPD officers know that parading without a permit is a non-arrestable offense, in an earlier (February, 2007) settlement of the non-class Vermont & K plaintiffs' claims in the Barham matter, the following equitable relief was agreed to by the District of Columbia:

> The Metropolitan Police Department's Mass Demonstration Handbook and/or its successor publication, in the event of a change of title, shall, within 120 days of the entry of judgment upon these terms provide written notice that parading without a permit, demonstrating without a permit, and participating in a First Amendment assembly without a permit are not arrestable offenses. . .

Notice of Acceptance of Offer of Judgment (Barham Doc. No. 302-1).

Excessive use of force claims were not advanced by the plaintiff class in the Pershing Park litigation. Nevertheless, as affects the conduct of the Metropolitan Police Department's handling of mass demonstrations, the equitable relief that has issued since the time of the Pershing Park incident addresses what plaintiffs in other demonstration cases have alleged to

have been one cause of use of excessive force by the Metropolitan Police Department during mass demonstrations.

Plaintiffs alleging use of excessive force in the Becker case, as well as at the January, 2001 Presidential Inaugural Parade against protestors, asserted that the suspension by Chief Ramsey of use of force reporting requirements during mass demonstrations sent a message to officers that use of force need not be reported, and by logical extension, would not be investigated or disciplined. The District denies such allegations.

Accordingly, in the resolution of the 2001 Inaugural litigation, in November, 2006, the plaintiffs represented by the Partnership for Civil Justice secured the following relief:

> The Metropolitan Police Department's Mass Demonstration Handbook and/or its successor publication, in the event of a change of title, shall be modified within 120 days to state, in substance, that the requirement that an officer reports use of force, as established in General Order 901.7, shall fully apply in the context of mass demonstration activity where the officer independently – rather than at the direction of a superior officer – determines to apply force and such modification shall be reflected in CDU refresher training as well as the 40-hour [training] course. Where officers utilize force at the direction of a superior officer the current provisions of the Mass Demonstration Handbook [regarding use of force reporting] shall apply.

See Settlement Agreement between District of Columbia Defendants and all Plaintiffs, Collectively at 3, International Action Center, et al. v. United States, et al., Civil Action No. 01-00072 (GK) (Doc. No. 340-1).

The alleged particular tactics that were in play and employed by the D.C. Metropolitan Police Department in April 2000 and September 2002 and which were sought to be challenged through this litigation have now been addressed through settlement terms and legislative action.

The legislation combined with nearly a decade of hard-fought litigation and close judicial oversight has worked successfully to protect the right to dissent and to engage in spirited and vigorous protest and free speech in public fora.

3. Judicial Determination of the Unconstitutionality of the Barham Class Arrests

The careful consideration and formal rulings of this Court, as affirmed by the D.C. Circuit, have established lasting judicial precedent that stands not only to protect the rights to free speech of protestors in Washington, D.C., but across the nation.

These declarations of constitutional rights and standards are, in and of themselves, a substantial form of equitable and declaratory relief that accrue widespread benefit beyond the immediate litigants.

This Court and the U.S. Court of Appeals for the District of Columbia Circuit provided a critical and detailed articulation of the standards to be followed by police in the context of mass demonstrations. "[W]here a group contains persons who have not been violent or obstructive, police may not mass arrest the demonstration as a group without fair warning or notice and the opportunity to come into compliance." Id., 338 F. Supp.2d at 58. The D.C. Circuit affirmed and adopted the standards articulated by this Court, ruling that only "when compelling circumstances are present, the police may be justified in detaining an undifferentiated crowd of protestors, but only after providing a lawful order to disperse followed by a reasonable opportunity to comply with that order." Barham v. Ramsey, 434 F.3d at 575.

The judicial articulations of constitutional standards have been relied upon by protestor-plaintiffs advancing claims of mass false arrest against police in other jurisdictions and have been cited and relied upon by courts applying these standards to protect constitutional and free speech rights. See, e.g., Fogarty v. Gallegos, 523 F.3d 1147, 1158 (10th Cir. 2008) (affirming denial of qualified immunity to arresting officers in connection with anti-war protest and march in Albuquerque, New Mexico) (citing Barham v. Ramsey, 434 F.3d at 574); Beal v. City of Chicago, Civil Case No. 04-2039 (N.D. Ill March 30, 2007) at 10, 12 (citing Barham v. Ramsey,

338 F. Supp. 2d 48, 58 (D.D.C. 2004)) (denying defendants' motion for summary judgment on false arrest claims in connection with anti-war march and rally at the Federal Plaza in Chicago, Illinois resulting in mass arrest); Hickey v. City of Seattle, Civil Action No. 00-1672, at 10 (W.D. Washington, December 13, 2006) ("Barham v. Ramsey, 434 F.3d 565 (D.C. Cir. 2006) is instructive here" in the opinion granting plaintiffs' motion for summary judgment on the issue of probable cause in connection with December 1, 1999 anti-World Trade Organization protests in Seattle, Washington).

B. Expungement Relief

Expungement and annulment relief was granted by Court Order dated January 28, 2008 (Doc. No. 405). Among other relief set forth in that Order, the Court did declare that "The arrests of the *Barham* Plaintiffs and the absent class members are hereby declared null and void. Each of the *Barham* plaintiffs and the individual absent class members is authorized to deny the occurrence of his or her arrest that day without being subject to any penalty of perjury, fraud or other offense premised upon misrepresentation or deception in response to any inquiry, whether posed orally or in writing. These rights accrue to the full benefit of any absent class member regardless of whether an individualized entry of a nullification order [see below] is entered."

The proposed Barham settlement will provide that each class member be issued an Order as above. See, Ex. 1, Settlement Agreement at 8.

C. Monetary Relief

The monetary relief proposed for each Barham class member is structured around a baseline expectation of 75% or lesser participation rate.

In the event that the participation rate is 75% or lesser, each class member shall receive a payment of $18,000. In the event that the participation rate exceeds 75%, the compensation amount will be reduced on a pro-rata basis. See Ex. 1, Settlement Agreement, at 5.

The Barham class member recovery is, therefore, between 250% and 350% greater per claimant than was recovered by the class members in Burgin v. District of Columbia, Civil Action No. 03-02005 (EGS) (Docket No. 65). The Burgin arrestees were arrested on the same day as the Barham arrestees and the majority merged together for the purposes of confinement. In other words, as a class, the Burgin arrestees from Vermont and K suffered identical injury and identical conditions and durations of confinement as the Barham arrestees. The Burgin class member recovery of no more than $6,000 per claimant was deemed fair, reasonable and adequate[5] for the same injuries as experienced by the Barham class members, who would each receive up to $18,000 in compensation.

The monetary terms of the proposed class settlement in Barham are similarly, and comparably, structured to the monetary terms of the proposed class settlement in Becker, which encompasses the claims of nearly 700 persons arrested in Washington, D.C., on April 15, 2000, which has received preliminary approval. See Ex. 4 (Settlement Agreement in Becker); See also,

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[5] The settlement of claims in Burgin v. District of Columbia, Civil Action No. 03-02005 (EGS) (Docket No. 65) (preliminary approval order) established a fund of $720,000 to be divided on an equal basis between claimants. See Consent Motion for Preliminary Approval of Proposed Judgment and Distribution, Notice to Class, Fairness Hearing, and Schedule, Burgin v. District of Columbia (Docket No. 60) at 4. The Burgin counsel estimated there to be between 158 to 190 class members. At the time of the motion for preliminary approval, the Burgin counsel projected the participation of 100 claimants, which would have led to a recovery of $7,200 each. Id. at 6. The Court Docket reflects there to have been 120 claimant expungement orders entered under seal on August 17, 2007, from which the undersigned infers there to have been no less than 120 claimants (it is unclear whether the 16 class representatives are in addition to the figure of 120). Accordingly, in Burgin, the recovery per claimant was no more than $6,000, which was deemed fair, adequate and sufficient for the identical injury as experienced by Barham class members. See also id. at 7 (Burgin counsel preliminarily projected "each Class Member who timely submits a claim [will receive] an amount ranging from about $3,500 to about $7,000").

February 4, 2010 Order (Becker Docket No. 357) (granting preliminary approval to Becker Settlement Agreement).

The Settlement Agreement provides that the payments to class members are to be spread over two municipal fiscal years. Accordingly the first payment, which will be no less than sixty percent of that due to each class member, is to be funded by the end of September, 2010. The remainder is to be funded by no later than, and possibly earlier than, the end September, 2011.

Class Representatives shall share equally in a fund that will provide each $50,000 in compensation for their services on behalf of the class. This has been lengthy and hard fought litigation, and the class representatives have engaged in extensive and repeated discovery, returned to the area for deposition, and been available and have actively participated in the advance of this lengthy litigation and negotiations. The amount of $50,000 is commensurate with the most recent recoveries by individuals who have actively brought and advanced claims as individuals for the same injuries. Class counsel views it as imperative that class representatives receive compensation that is at least commensurate with that which they would likely have recovered if they had advanced claims actively as individual plaintiffs over these past years. In the absence of such commensurate recovery, there would be a severe disincentive for persons to serve as class representatives, a role which entails the same or greater activity as an individual plaintiff along with the additional fiduciary responsibilities and obligations in service to the class as a whole. Class Counsel represents that the class representatives have each served as stalwart advocates on behalf of the class as a whole and have been essential to securing the exceptional results for the benefit of the class overall.

D. Judicially Enforced Document Management, Retention and Preservation Obligations; Full Funding to Develop and Implement Document Management System

The total monetary commitment the District of Columbia has made through the Settlement Agreement is potentially greater than just the $8,251,333 allocated for the Class Settlement Fund and includes an additional commitment of monies to implement a document management system to prevent any recurrence of evidence loss/destruction.

The Settlement Agreement provides for funding for the Document Management, Retention, and Preservation Obligations for a period of three years, which may be extended by the District for an additional two one-year periods to ensure continued funding. In other words, funding as needed is established for up to a five-year period.

These funds for this system are over and above the $8,251,333 allocated for the Class Settlement Fund and are authorized to be paid from the D.C. Judgment and Settlement Fund, which is a funding source within the District of Columbia municipal budget that provides fiscal resources to settle claims and lawsuits and pay judgments in most types of civil cases filed against the District of Columbia. It is an uncapped fund, and therefore this element of relief satisfies two important characteristics: it provides full funding for the document management system and does not affect the availability of funds for settlements or judgments regarding other lawsuits against the District.

The District has, in the resolution of other class action lawsuits seeking systemic change, previously funded systems needed to facilitate systemic equitable reforms by specifically providing for such funding in the class action settlement agreement. For example, in the class action resolution of Bynum v. District of Columbia, the agreement provided for three million dollars for prison processing facilities development, the existence of which was needed to

prevent future instances of over-detention. Bynum v. District of Columbia, 412 F. Supp. 2d 73 (D.D.C. 2006). These commitments were properly considered in determining the total valuation of the settlement of claims. Id.

In the Barham resolution, the distinction is that there is no particular dollar amount maximum to the funding of the equitable relief, although the funding is obviously limited by the actual needs of the document management system and the terms of the Settlement Agreement. Within those needs, the parties recognize that the largest financial and technical hurdles will come in the first years of development and implementation of the document management system. There will be significant one-time start-up costs. Technical start-up costs will exist for the development and implementation, from a systems perspective. Other costs, associated with personnel training and the integration of the system into actual case operations, will be significantly greater during initial years of implementation. Once the use and benefits of the system become a part of operations, and personnel are properly trained, then of course the ongoing per-year maintenance costs will not be encumbered by these front-end expenses.

> "The parties' intent is to fully fund, through this agreement, the acquisition, development and training costs for the Document Management System, which would be expected to be greater in the initial years of implementation than in subsequent periods, and to establish funding for three years, or as may be extended, a period of time believed to be amply sufficient for the use and benefits of the system to be well established."

Ex. 1, Settlement Agreement at 17 – 18.

The parties' intent is that, when the Settlement Agreement does eventually expire, the start-up costs will have all been covered within the Agreement, the operating expenses during the initial three- to five-year period will all have been covered, and the expected future financial costs will accordingly be limited to maintenance costs. At that time, the use of the system will be incorporated into certain case management procedures and the benefits will be well established.

While budgeting will, of course, be needed to continue use of the system, the Agreement has been structured and funded to make the system long-standing, cost-effective and essential.

The Settlement Agreement provides for this Court to retain jurisdiction for three years for purposes of enforcement of the Document Management and Retention Requirements in the Agreement. See Ex. 1, Settlement Agreement at 18.

The District has also agreed to the series of requirements set forth below relating to the mandatory indexing, logging and preservation of evidence.

1. Commitment of Funds to Implement New Document Management System

The District has agreed to fund, using additional monies from the District of Columbia Judgment and Settlement Fund, a document management protocol or system the function of which is to prevent the recurrence of the destruction of evidence issues that were discovered in the course of litigation. Ex. 1, Settlement Agreement at 13.

2. Mandatory Indexing and Logging of Evidence

Under new policies mandated as terms of the Settlement Agreement, the District will now be required to maintain an index, and to log, any documents, items, things, recorded or electronic/computer/digitized material related to a complaint or litigation hold letter for matters arising from mass demonstrations and protests. Ex. 1, Settlement Agreement at 9 – 10.

This is relief calculated to enforce indexing of evidence, to create an internal audit trail that would alert the District to any missing records or evidence. Id. at 10.

3. Mandatory Evidence Preservation For Protest Related Claims

Under the Agreement, "the OAG shall issue policy statements mandating that upon written notice of likely litigation and/or request to preserve documents and records pertaining to alleged police misconduct involving or relating to mass demonstrations or protests, the OAG

shall affirmatively direct in writing and ensure that all documents, records, items, videos or computer files relating to the underlying incident be preserved and affirmatively protected from destruction for a period of no less than three (3) years." Ex. 1, Settlement Agreement at 11.

4. Mandatory Preservation and Indexing of Radio Runs, Command Center Records, and Other Computer Based Recordings or Data Records

Under the Agreement, upon any command or other system activation to assist in the management of mass demonstrations and protests, "all computer files, communications recordings / radio runs and documents reasonably related to the event shall be indexed and preserved for a period of no less than three (3) years." Ex. 1, Settlement Agreement at 11 – 12.

5. Mandatory Preservation and Indexing of Photographic or Video Recordings

Under the Agreement, "whenever any MPD officer is assigned to (or with the capability to) engage in photographic or video recording or surveillance of mass demonstration activity or protests; documentation shall be maintained reflecting the officer's name, assignment, the equipment and recording media issued; and indexing and logging the return of all media. Upon the return of any media, the officer shall document the dates, times, locations and events recorded and affix such information to the media itself or secure to the container that contains the media." Ex. 1, Settlement Agreement at 12.

The Agreement is explicit that it does not authorize such surveillance, but "is intended solely to focus on indexing and record-keeping" in the event such media is created. Id. at 12.

6. Office of the Attorney General Required to Report to the Partnership for Civil Justice Fund, and to Issue Public Report to the Court, Every Six Months During Enforcement Period

At six month intervals, for a period of three years, the District of Columbia is required to report to class counsel at the Partnership for Civil Justice Fund regarding measures taken to perform the above-referenced system development, records indexing and maintenance

requirements. The Partnership for Civil Justice Fund will have opportunity for review and comment. The District shall be afforded an opportunity to consider these comments, after which the final report will be submitted to the Court and published. The comments of the PCJF are required to be published within or as an attachment to the report. See Ex. 1, Settlement Agreement at 12 – 13.

This is an oversight and reporting function that is intended to assure plaintiffs, the Court, and the public that the Document Management, Retention and Preservation goals of the Settlement Agreement are, in fact, advanced and achieved.

II. The Attorneys Fees are Reasonable

When awarding attorneys' fees, the court has a duty to ensure that the claim for attorneys' fees is reasonable. See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

The Settlement Agreement provides an award of $2,463,333 to Class Counsel as attorneys' fees and costs, which is reasonable. This amount was determined in settlement negotiations after the amount of recovery to class members was negotiated, and reflects the application of a percentage to certain monetary components in the agreement. The attorneys' fees are funded and/or allocated separately and independent of the claimants' recovery. As such, the award of fees does not decrease the amount received by each claimant. [6]

[6] Technically, the Settlement Agreement does not create a true common fund. "In a true common fund case, the attorneys' fees would be taken from a fund shared in common with class plaintiffs; therefore, the amount recovered by plaintiffs is reduced by the amount awarded in attorneys' fees." Hensley v. Wade, 461 U.S. 30, *36 (1983). In the case at hand, the parties established a separate attorneys' fee fund. Accordingly, the case does "not present the typical conflict of interest between class counsel and class members that underlies the application of the percentage of recovery method." Vitamins Antitrust Litig., U.S. Dist. LEXIS 25, 067, *38 (D.D.C. July 13 2001).

It is appropriate to consider this to be a "constructive common fund" case, Vitamins Antitrust Litig., 2001 U.S. Dist. LEXIS 25067, at *36, and to analyze the size of the fund to be the gross settlement funds, inclusive of the total funds potentially available to the claimants, administrative costs and attorney's fees.

That there is a potentiality of unclaimed claimant funds reverting to the District, or being used for the benefit of the class to pay the costs of a document management system to prevent future evidence loss, does not alter the analysis. Herbert B. Newberg and Alba Conte, *Newberg on Class Actions* § 14.6 (4th Ed. 2007 update) ("[i]n *Boeing Co. v. Van Gemerty*, [444 U.S. 156, 100 S. Ct. 745 (1980)] the Supreme Court settled this question [of

The Class Settlement Fund, i.e., the gross settlement fund inclusive of administrative costs and attorneys' fees, is $8,251,333 *plus* unspecified additional monies as may be paid from the D.C. Judgment and Settlement Fund as needed to create a new document management system and train staff.

When calculating the percentage of the total settlement value that is accounted for in attorneys' fees, the Court is to count the additional monies to fund equitable relief in determining the valuation of the total settlement resolution. See Bynum, 412 F. Supp. 2d 73 (D.D.C. 2006) (counting the $3 million reverting to the District for purposes of facilities development as component of total value of the settlement, which was $12 million with consideration of that amount; approving attorneys fees of 33% plus expenses).

If one entirely excludes consideration of the monetary recovery attributed to the document management system relief, and considers the total monetary amount of the recovery to be $8,251,333, the percentage of attorneys' fees would constitute approximately 29%.

If one estimates the additional monies needed for procurement, implementation, training and operation of a new document management system to be one million dollars, the total monetary amount of the settlement recovery would be $9,251,333, with the percentage of attorneys' fees therefore constituting approximately 26% of the aggregate fund. The D.C. Circuit holds that "the proper measure of such fees in a common fund case is a percentage of the fund." Swedish Hosp. v. Shalala, 1 F.3d 1261, 1263 (D.C. Cir. 1993). Many courts and commentators

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whether class fund fees are based on the gross settlement or net settlement funds actually claimed] by ruling that class counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed"); Williams v. MGM-Pathe Commun. Co., 129 F.3d 1026 (9th Cir. 1997) (reversing award of attorney's fees because trial court failed to base fee award on the entire settlement, rather than the amount claimed); Waters v. Int'l Precious Metals Corp., 190 F.3d 1291, 1295 (11th Cir. 1999) (distribution of attorneys' fees are to be based on the the funds available to eligible claimants, whether claimed or not; affirming a fee award nearly twice the amount actually claimed by the class from the fund); Masters v. Wilhemina Model Agency, Inc., 473 F.3d 423, 437 (the "entire Fund . . . is created through the efforts of counsel at the instigation of the entire class"; an "allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not").

recognize the percentage of the fund analysis to be the preferred approach in class action fee requests because it more closely aligns the interest of the counsel and the class, i.e., class counsel directly benefit from increasing the size of the class fund and working in the most efficient manner. Id. at 1266-67. The lodestar approach "encourages significant elements of inefficiency" by giving attorneys and law firms "incentive to spend as many hours as possible" and "a strong incentive against early settlement." Id.

In the context of the Settlement Agreement, the line item for fees is separate and apart from the line items for payments to the class. Further, were there any reduction in fees, the reduction would likely return to the District of Columbia through reversion provisions that were a necessary condition of settlement.

The percentage in this case, fairly considered to be between 26 – 29% of the gross monetary settlement value, is well within the range of reasonable fees in common fund cases. As the D.C. Circuit surveyed the literature and cases, it found "that a majority of common fund class action awards fall between twenty and thirty percent." Id. at 1272 ; See also Bynum, 412 F. Supp. 2d at 85 ("A 1/3 fee is within the range of what is customarily awarded in this District."); Vitamins Antitrust Litig., 2001 U.S. Dist. LEXIS 25067, at *68-69 (awarding 34%); Federal Judiciary Center, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996) at 69, 90 (reports that most class action fee awards, in its study of 407 class action lawsuits, "were between 20% and 40% of the gross monetary settlement" and that "attorneys' fees were generally in the traditional range of approximately one-third of the total settlement"); Silber and Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel's Response*, 17 RevLitig 525, 545-46 (1998) (reports results of a 1994 study by National Economic Research Associates that attorneys

fees in class actions averaged 32% of the recovery, regardless of case size, and averaged 34.74% when the fees and expenses were added together).

The Barham litigation has worked to ensure there would not be a recurrence of the trap-and-arrest tactics and other harmful police practices identified in the complaint. Substantial benefits have been conferred upon the class beyond the monetary recovery, in terms of significant policy changes both in the area of restrictions on police tactics as well as implementation of practices addressing document management and indexing procedures to ensure a document audit trail.

Plaintiffs believe that the results secured are exceptional.

The proposed attorneys' fee recovery reflects a compromise of attorneys' fees incurred during more than seven years of litigation. It is lower than the lodestar would be as calculated under 42 U.S.C. §1988. As the Court is well aware, this has been hard fought, protracted, complex and resource-intensive litigation, as reflected in the size of the docket sheet printout which exceeds one hundred pages. There has been extensive and involved motions practice, including multiple dispositive motion briefings,[7] which led to the interlocutory appeals of the denial of qualified immunity by Peter Newsham and Charles Ramsey to the U.S. Court of

[7] See Motion to Dismiss, or in the Alternative for Summary Judgment, filed by Charles Ramsey, et al. (Doc. No. 67); Motion to Dismiss Portions of the Complaint, filed by District of Columbia (Doc. No. 69); Plaintiffs' Memorandum in Opposition to Motion to Dismiss Portions of Complaint (Doc. No. 77); Plaintiffs' Memorandum in Opposition to Motion to Dismiss, or in the Alternative for Summary Judgment filed by Chief Ramsey and Mayor Williams (Doc. No. 76) (including 37 exhibits); Motion to Dismiss or in the Alternative for Summary Judgment filed by Peter J. Newsham (Doc. No. 89); Plaintiffs' Memorandum in Opposition to Motion to Dismiss filed by Newsham (Doc. No. 95); Motion for Partial Summary Judgment on Grounds of Qualified Immunity filed by Charles Ramsey and Anthony Williams (Doc. No. 99, 102); Plaintiffs' Memorandum in Opposition to Motion to Dismiss or in the Alternative for Summary Judgment filed by Ramsey and Williams (Doc. No. 103); Plaintiffs' Supplemental Memorandum Regarding Applicability of Groh v. Ramirez to the Motions to Dismiss Based on Qualified Immunity (Doc. No. 112); Plaintiffs' Supplemental Memorandum Of Materials Received That Relate to Qualified Immunity Defenses (Doc. No. 118); Plaintiffs' Supplemental Memorandum Regarding Applicability of International Action Center v. United States, Including Submission of Supplementary Material Related to Qualified Immunity (Doc. No. 126); Motion for Partial Summary Judgment on Plaintiffs' Common Law Claims by Anthony Williams (Doc. No. 228); Plaintiffs' Memorandum in Opposition to the Motion for Partial Summary Judgment filed by the District of Columbia (Doc. No. 257).

Appeals. See Barham v. Ramsey, 434 F.3d 565 (D.C. 2006). The Class Plaintiffs filed two motions for preliminary injunctions, and eventually secured the relief sought in each.[8] After extensive litigation the District conceded liability for common law false arrest. Discovery, which has extended over a period of years, has been voluminous,[9] protracted, contentious and the subject of many contested motions.[10] Ultimately, the loss and destruction of evidence itself became the subject of extensive investigation, motions to compel, briefings, and voluminous motions for sanctions.[11]

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[8] Motion for Preliminary Injunction Enjoining the District of Columbia from Arresting or Prosecuting Persons for Parading without a Permit (Doc. No. 144); Motion for Preliminary Injunction Mandating That the Defendants Expunge the Arrest Records of Plaintiffs, and grant additional related relief (Doc. No. 145).

[9] Over 40,000 documents have been produced. There have been well in excess of 100 hours of radio runs produced, often multiple versions (not copies) encompassing the same periods of time. Class Counsel estimates it required an average of 5 hours to closely review one hour of recorded radio communication, due to the poor quality, the fading in and out of transmissions, the fact that overlapping or sequential transmissions can be initiated by *any* source and (unlike a deposition) not sources easily identifiable or even known in advance, etc. There is a substantial volume of video, as well. The extremely close examination of the radio runs conducted by Barham plaintiffs' counsel, which resulted in the identification of critical - - but latent and non-immediately apparent - - deficiencies or loss of data was exceedingly time consuming. There have, to date, been over 120 depositions in this case. Counsel has also reviewed the 5,000+ pages of documents released by the D.C. Council upon conclusion of its investigation, reviewed the additional 11 depositions taken by the Council in executive session, as well as the multiple days of related public hearings, including those occurring on October 24, 2002, October 24, 2003, December 17 - 18, 2003 and October 7, 2004.

[10] Plaintiffs' Motion to Compel Against Peter Newsham (Doc. Nos. 248, 249, 251); Plaintiffs' Memorandum in Opposition to Motion to Stay Discovery Pending Resolution of Motion to Disqualify the Office of the Attorney General, filed in Chang case (Doc. No. 258); Motion for Protective Order filed by District of Columbia (Doc. No. 263); Plaintiffs' Motion to Compel Production of Properly Prepared Rule 30(b)(6) Deponent to Testify With the Collective Knowledge of the District of Columbia Municipality (Doc. Nos. 264, 273, 300); Plaintiffs' Motion to Lift Stay of Discovery (Doc. No. 311); Motion by District of Columbia and Individual Defendants to Propound Discovery to the Class Members (Doc. No. 326); Motion to Compel the Production of Running Resumes and Recorded Police Channel Communications (Doc. No. 338, 339); Plaintiffs' Opposition to District of Columbia's Motion for Discovery Against Class Members (Doc. No. 341); Motion for Protective Order by District of Columbia (Doc. No. 354), and Plaintiffs' Opposition thereto (Doc. No. 362); Plaintiffs' Motion to Compel Production of Field Arrest Forms and Related Arrest Records from the District of Columbia (Doc. No. 363); Plaintiffs' Opposition to Motion to Compel filed by District of Columbia against Plaintiffs (Doc. No. 380); Plaintiffs' Motion to Lift Stay of Proceedings (Doc. No. 427, 429, 431, 432, 434).

[11] Motion to Compel the Production of Running Resumes and Recorded Police Channel Communications (Doc. No. 338, 339); Plaintiffs' Motion to Compel Production of Field Arrest Forms and Related Arrest Records from the District of Columbia (Doc. No. 363); Motion for Sanctions for Discovery Abuse Perpetrated by the District of Columbia (Doc. No. 439, 447, 448, 449, 450, 452, 459, 460, 462, 466, 467, 468, 469, 470, 481, 482); Barham Plaintiffs' Response to the Court's Request for a Proposal for Further Discovery in Light of the Sanctionable Conduct by the District of Columbia (Doc. No. 502); Barham Class' Response to the Representations of Kathy Patterson as They Pertain to the Loss and Destruction of the J.O.C.C. Running Resume Database (Doc. No. 514); The Barham Class' Response to the Declaration of Attorney General Peter J. Nickles (Doc. No. 515); The Barham

Indeed, it was as a consequence of Barham class counsel's painstaking litigation that significant issues involving loss and destruction of evidence were uncovered and revealed. These matters may now be the subject of forensic investigation. Class Counsel remains actively involved in these matters without additional remuneration. As the Court is aware, Class Counsel is committed to the pursuit of these matters, which is in the public interest as well as the plaintiffs' interests.

In this resolution, Class Counsel has forgone any additional recovery of costs and expenses. Class Counsel has also forgone recovery of additional fees attributed to necessary attorney services during administration of the class claims as well as the period of implementation of the document management system which requires counsels' ongoing involvement.

The attorneys' fees are reasonable as a percentage of the recovery, measured strictly in monetary terms. The benefit to the class of counsels' services is far greater than simply the monetary relief as is evidenced by the substantial advancement of key constitutional rights issues and matters of public integrity in this litigation and the securing of meaningful and important equitable relief.

III. Proposed Notice, Opportunities for Exclusion or Opting Out of Monetary Components of the Settlement, and Procedures for Notice and Hearing

The Settlement Agreement and proposed notice, and opportunity to opt out, appropriately accommodates the due process interests of class members to opt out of the monetary portion of the class settlement.

Class' Renewed Motion for Sanctions, and Memorandum in Support, Against the District of Columbia and Against Charles H. Ramsey (Doc. No. 520; 522; 524; 534; 538; 539; 540; 544).

This Court certified the Barham class under Rule 23(b)(2). Barham v. Ramsey, 217 F.R.D. 262, 275. Certification under Rule 23(b)(2) is appropriate in civil rights lawsuits where equitable/injunctive relief is necessary to redress group injuries or to effect institutional reform through injunctive relief. Manual for Complex Litigation, Fourth, §21.142; See also Eubanks v. Billington, 110 F.3d 87, 92 (D.C. Cir. 1997) ("civil rights class actions are frequently certified pursuant to Rule 23(b)(2).").

A. Opportunity to Opt Out of Monetary Relief

The Settlement Agreement protects class members' due process rights and affords the opportunity to opt out of the monetary claims or relief. The law distinguishes between relatively limited opt out rights for equitable relief from the constitutionally required opt out rights for monetary relief, which trigger jury entitlement rights.

There is no mandatory right to opt out of the prospective equitable relief that may issue in a Rule 23(b)(2) class action. See Tricor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994) (per curiam); See also Bynum v. District of Columbia, 412 F. Supp. 2d 73, 77 (D.D.C. 2006) (Issuing final approval of class action settlement, pursuant to Rule 23(b)(2) "regarding prospective relief, no member of the class may opt-out."); Manual for Complex Litigation, Fourth, §21.142 (ordinarily, "a Rule 23(b)(2) class action does not permit opting out"); See also Fed. R. Civ. P. 23(c)(2)(A) (no mandatory requirement that notice must issue to a class certified under Rule 23(b)(2)).

"Although not required, this Circuit has held that District Courts have the discretion to grant opt-out rights in class actions certified pursuant to Fed. R. Civ. P. 23(b)(1) or (2)." Barham v. Ramsey, 217 F.R.D. 262, 274 (citing Eubanks, 110 F.3d at 94).

A typical circumstance which may justify recognition of notice and opt-out rights in a Rule 23(b)(2) class action, is where there are present demands for both equitable relief (which are resolved by the Court) and monetary relief (which may be resolved by jury), as is present in the instant case. "[W]here both injunctive and monetary relief are sought, the need to protect the rights of individual class members may necessitate procedural protections beyond those ordinarily provided under (b)(1) and (b)(2)." Eubanks, 110 F.3d at 95; See also Fed. R. Civ. P. 23 advisory committee's note (2003 amendments).

Consistent with this framework, the settlement agreement provides that "[n]o opt outs for the equitable relief are allowed." See, e.g., Bynum, 412 F. Supp. 2d at 77 (Judge Lamberth approved class action settlement against District of Columbia, allowing opt-outs for monetary relief and that "regarding prospective relief, no member of the class may opt-out.").

With respect to monetary claims, however, the Settlement Agreement accords the full provision of notice, equivalent to that which would be required were monetary claims certified pursuant to Fed. R. Civ. P. 23(b)(3).

B. Notice

The substance of the notice satisfies all requirements for notice to a Rule 23(b)(3) class, which are the strictest and the fullest notice requirements of any class type. See Fed. R. Civ. P. 23(c)(2). See Exhibit 2 (Class Notice).

Class Counsel has undertaken significant efforts to evaluate and determine the most effective and comprehensive manner of notice. The class is geographically diverse. Law enforcement arrest records created during the processing of hundreds of simultaneous arrests, are in many instances inaccurate and incomplete. The records, where they do exist, reflect addresses that are at least seven years old. For some arrestee names, there is also social security or date of

birth information, which can be used to update arrest information through public records searches. Many arrestees are believed to be associated by topical and political and organizational interests. Others may be regionally located.

Rather than rely only on the MPD's Criminal Justice Information System (CJIS) records, Class Counsel is aggregating all sources of identity information produced in discovery, to include any arrest information produced by federal law enforcement, handwritten lists created during arrest processing (i.e., transport logs or lists of persons released by posting a bond, etc.). These multiple sources of information are to be produced to the Class Administrator, which is required to process each, either using optical character recognition software or hiring persons to review and do manual data entry of all relevant fields of information into a central database. Having aggregated the data, it will be de-duplicated and organized such that identity and contact information is accessible.

The Class Administrator will send a mailed notice and proof of claim form to all class members who can be identified through reasonable effort, including by first class mail to the last known address of each class member. The United States Postal Service address forwarding database and other public records sources will be used in efforts to update addresses.

Multiple additional means will be used to reach class members by publication.

Abbreviated forms of notice will be printed in the *Washington Post* and the *Washington City Paper*. Each has a regional circulation and has also run articles pertaining to the protest, court proceedings or settlement which may cause interested persons to review them.

The class members are geographically diverse. Some, however, are connected by political interests that drew them to the underlying protest activity. Notice will also be published in no

less than three periodicals/media outlets believed to be of topical interest to persons or organizations associated with the protests.

Class counsel will also seek to have the notice announced on the web sites or e-mail lists of political or protest organizations whose constituency is believed to be among those participating at the protest.

A stand-alone web site dedicated to class administration will be set up. The notice will also be published/linked on the web sites of the Partnership for Civil Justice Fund and on the front page of the Metropolitan Police Department's web site and the District of Columbia Office of the Attorney General's web site. These are sites that potential class members may visit seeking information.

The Class Administrator will also establish a toll free telephone line for inquiries from potential class members. Whether class members learn of the settlement through the newspaper, the internet, or word of mouth, they will be able to pick up the phone and speak to a person if they still have any questions. This is the best notice possible under the circumstances. The arrest records, where accurate and complete, are the best source for determining the identity of class members. The published notice is designed to reach class members through region-based publication and topically based publication.

The time period for responding to the notice (Ex. 2) and submitting a Proof of Claim form (Ex. 3) will be no less than 76 days from the date notice is initially mailed. This is of reasonable and sufficient duration. See, e.g., Bynum v. District of Columbia, 384 F. Supp. 2d 342, 343 (D.D.C. 2005) (allowing 63 day period for class member responses); Burgin v. District of Columbia, Civil Action 03-02005 (EGS) (Docket No. 60) (71 days for response).

The timeline we anticipate is that initial notices will issue on or by April 30, 2010.

There shall be an approximately ninety (75) day period in which Class Members will be required to submit a Proof of Claim Form.

The deadline to submit a claim, to request exclusion from the class, to file written objections, and to file a Notice of Intent to be heard at the Fairness hearing will, for each, be July 15, 2010 (requests/filings required to be received or postmarked by this date).

The Class Administrator will complete his report, and will prepare filings in advance of the final approval / fairness hearing, with a due date of August 1, 2010.

The deadline for the parties to file responses to any objections will be September 1, 2010.

The parties jointly propose that the fairness hearing on September 15, 2010 or at a similar date of the Court's selection.

The parties have jointly agreed upon, and propose, the firm of Gilardi & Co., L.L.C. to serve as Class Administrator. They are an eminently qualified and experienced class administration firm. Their expertise and experience is described in the Gilardi & Co. firm materials, attached as Exhibit 6.

IV. Conclusion

After seven years of litigation, and after multiple failed attempts at settlement/mediation over the years,[12] the parties have come to terms.

This settlement, in Class Counsels' view, occurred only through the accumulated incremental litigation victories and the advancement of key issues during the years of litigation including that of the past year, as well as this Court's involved and engaged oversight.

[12] Settlement communications failed in 2004. The case was stayed from October 5, 2006 to allow for three months of mediation with George Cohen and Richard Hotvedt, appointed through the Mediation Program through the U.S. Court of Appeals for the District of Columbia Circuit. (Docket No. 294). Despite rigorous efforts, those failed. The case was stayed on February 1, 2008, to allow private mediation before the Honorable Richard A. Levie. Mediation not only failed, but led to substantial motions practice regarding the allocation of mediation fees. (Docket Nos. 410, 411, 412, 414, 415, 417, 418, 421, 422, 423, 424, 425, 426). Settlement negotiations have, clearly, been at arms-length.

The terms that have been reached are, indeed, historic. They are substantial for plaintiffs *and* are a fair deal for the District.

For the reasons stated above, this Court should preliminarily approve the settlement, schedule a hearing for final approval, and approve the proposed form and manner of notice.

Respectfully submitted,

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DATED: March 5, 2010