

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BENJAMIN BECKER,)	
et al.,)	
)	
Plaintiffs,)	Civ. Action No. 01-CV-00811 (PLF)(JMF)
)	
v.)	
)	
DISTRICT OF COLUMBIA,)	
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 practically 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. Certification of the Class

The Court certified the Becker class pursuant to Fed. R. Civ. P. 23(b)(3), certifying the following class for the liability phase of this case:

All person[s] who were detained and arrested on April 15, 2000 near the area of 20th Street, N.W. and I and K Streets, N.W., in connection with the protest against the Prison Industrial Complex during the IMF/World Bank demonstrations.

Docket Entry No. 250 (Adopting Magistrate Judge John M. Facciola's Report and Recommendation, found at Docket Entry No. 240).

The class certification was ordered on October 3, 2006. There are no material changes in circumstances regarding the class structure or definition since the time of certification.

II. The Settlement Agreement is Fair, Reasonable and Adequate

The class sought money damages and also equitable relief to prevent recurrence. The relief secured through settlement is fair, reasonable and adequate to resolve the outstanding claims for equitable relief and damages.

A. Equitable Relief

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 this litigation, that the 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 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 person 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).
- 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.

Where the trap-and-arrest through “pop up” police lines 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 incidents were challenged, with the same class counsel, in the case of Barham v. Ramsey, Civil Action 02-02283 (EGS)(JMF).

The Partnership for Civil Justice, whose attorneys were class counsel in each and 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.

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.

Becker 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 15-1968, "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. 4) became effective law in April, 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 letter¹ 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 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

¹ 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.

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 Becker plaintiffs in litigation, to that enacted by the Council is reflected in the following table:

Equitable Demands by <u>Becker</u> Class (as reflected in June, 2004 demand letter)	Statutory Enactment Under the First Amendment Rights and Police Standards Act of 2004 (Ex. 4)
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, “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.
No Arrests for Parading or Demonstrating Without a Permit.	Sec. 105, 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 ² 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.

² 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 not a requirement of law to engage in street protest.

Equitable Demands by <u>Becker Class</u> (as reflected in June, 2004 demand letter)	Statutory Enactment Under the First Amendment Rights and Police Standards Act of 2004 (Ex. 4)
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.”
Written Statement of Rights to Release	<p>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.</p> <p>Sec. 302, established detailed requirements for the content of such written notice.</p>
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.

Equitable Demands by <u>Becker Class</u> (as reflected in June, 2004 demand letter)	Statutory Enactment Under the First Amendment Rights and Police Standards Act of 2004 (Ex. 4)
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. Sec. 109, Sec. 321.
- Requires specific arrest documentation to be completed at a time reasonably contemporaneous with arrest. 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. 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. Sec. 116.
- Restricts and further regulates any use of chemical irritants, and requires written report issuance whenever such weapons are used. 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. 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. Sec. 105(h).
- Restricts police from interfering with the use of stands or structure ancillary to protest activity. Sec. 105(g).

- Prohibits the imposition of user fees upon persons or groups organizing First Amendment assemblies or demonstrations. 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. 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 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 is not subject to police modification. It is not regulation or policy or procedure. It is statutory law. 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. Sec. 117.

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.” 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.

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. 1, 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. 1, Proposed Becker Settlement Agreement at 9.

In the Becker mass arrest, the class members were each charged with the offense of “parading without a permit” and arrested without prior warning or notice. It has 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 by the Partnership for Civil Justice also 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 certain 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).

The Becker settlement also encompasses a monetary settlement of claims of non-class members, individuals alleging a range of other violations during the course of the same weekend. The Court is not required to approve those terms, as they are not class claims, but they have been included so as to apprise the Court of all terms that have been reached contemporaneous with the resolution of the class claims. See Fed. R. Civ. P. 23(e); See Ex. 1, Proposed Becker Settlement Agreement at 7-8 (identifying payment to Individual Non-Class Member Plaintiffs).

Among the individual Becker claims resolved are the claims of excessive use of force advanced by Brian Edwards-Tiekert and Sasha Keller Wright.

The excessive force claim-plaintiffs in the Becker case, just as plaintiffs alleging use of excessive force at the subsequent January, 2001 Presidential Inaugural Parade against protestors, asserted that the suspension 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).

Judge Friedman, in the context of the Becker case, observed the highly publicized issues of document spoliation that had arisen in the context of protest litigation involving the District of Columbia. See August 20, 2009 Memorandum Opinion and Order (Doc. No. 346).

In particular, the Court has reviewed the declarations of District of Columbia Attorney General Peter J. Nickles and Senior Assistant Attorney General Thomas L. Koger, who is also lead counsel of record in the instant [Becker] case, which were filed on August 12, 2009. Both Mr. Nickles and Mr. Koger describe, in Mr. Nickles's words, the "failures in discovery and the problems with preservation of evidence" by the District of Columbia in those cases which, as Mr. Koger points out, are similar in subject matter to Becker v. District of Columbia. August 20, 2009 Memorandum Opinion and Order (Doc. No. 346).

Document management issues also were coming to the fore in this case. See, e.g., Notice by Plaintiffs Pertaining to Late Disclosed Documents from Defendant District of Columbia (Doc. No. 348, 9/23/2009). Any Becker class interests in remedying such circumstances, generally, have been addressed in the context of a proposed settlement agreement in the Barham class action. The Barham settlement agreement in principle reflects agreement by the District of Columbia, subject to court approval of the class settlement, that the District

- Shall fund a document management system for use in mass demonstration or protest cases;
- Shall maintain an index, and 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;
- Shall direct in writing and act to ensure the preservation of all documents, records, items, videos or computer files relating to the underlying incident for matters arising from mass demonstrations and protests for a period of no less than three (3) years from the date of notice of likely litigation;
- Upon command center system or other system activation (where used to assist in the management of mass demonstrations and protests) shall index and preserve for no less than three (3) years all computer files, communications recordings / radio runs and

documents reasonably related to the event;

- Whenever any MPD officer is assigned to (or with the capability to) engage in photographic or video recording or surveillance of mass demonstration activities or protests, shall maintain documents reflecting the officer's name, the assignment, the equipment and recording media issued. All returned media is required to be indexed and preserved; and
- Every six months for a period of three (3) years, the District of Columbia shall be required to report to counsel at the Partnership for Civil Justice Fund for their comment, and issue a public report including the PCJF's comments regarding implementation of the above-referenced measures.

The alleged particular tactics that were in play and employed by the D.C. Metropolitan Police Department in April 2000 and September 2002 in order to conduct mass arrests which served to violate the constitutional rights of protestors and others, and 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 has worked successfully to protect the right to dissent and to engage in spirited and vigorous protest and free speech in public fora.

B. Expungement Relief

The proposed Becker settlement will grant expungement and annulment relief to all class members. Among other specific expungement relief described in the proposed agreement, the Court will issue regarding each class member an order directing that “[t]he arrest of [insert name, date of birth, and social security number] on April 15, 2000, in the District of Columbia is hereby declared null and void.” The order shall further describe the effect of that relief, i.e., to restore the individual to the status he or she occupied before being arrested, specifically in accordance with the law of the District of Columbia, D.C. Code § 16-802. See Ex. 1, Proposed Becker Settlement Agreement at 11 – 12.

C. Monetary Relief

The monetary relief proposed for each Becker 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, Proposed Becker Settlement Agreement, at 5.

The Becker 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) (Doc. No. 65). The Burgin arrestees were arrested in a mass arrest on September 27, 2002. Protestors and others who were surrounded by police lines and mass arrested at Vermont and K Streets, N.W. were held overnight, restrained with flexcuffs attaching their wrist to ankle, and experienced duration and conditions of confinement similar to those experienced by Becker class members. The Burgin class member recovery of just over \$6,000 per claimant was deemed fair, reasonable and adequate³ for the same or similar injuries as experienced by the Becker class members, who would each receive up to \$18,000 in compensation.

³ The settlement of claims in Burgin v. District of Columbia, Civil Action No. 03-02005 (EGS) (Doc. 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 (Doc. 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”).

The monetary terms of the proposed class settlement in Becker are similarly, and comparably, structured to the monetary terms of the proposed class settlement in Barham, which encompasses the claims of nearly 400 persons arrested in Pershing Park on September 27, 2002. The proposed Barham class settlement would also establish a 75% participation rate expectation, with each class member receiving \$18,000 provided the actual participation rate is 75% or lesser, and reduced on a pro rata basis if the class participation rate exceeds 75%.

The Becker Settlement Agreement provides that the payments to class members is 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 of 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 or similar injuries in connection with the September 27, 2002 IMF/World Bank mass arrests. 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. 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 \$3,272,500 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.⁴

⁴ 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., 2001 U.S. Dist. LEXIS 25067, at *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 attorneys' fees.

That there is a potentiality of unclaimed claimant funds reverting to the District 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 Gemert, [444 U.S. 156, 100 S. Ct. 745 (1980)] the Supreme Court settled this question [of 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 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

The Class Settlement Fund, i.e., the gross settlement fund inclusive of administrative costs and attorneys' fees and litigation costs, is \$13,302,500 with the percentage of attorneys' fees and costs therefore constituting 24.6% 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 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, under 25%, 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 v. District of Columbia, 412 F. Supp. 2d 73, 85 (D.D.C. 2006) (“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*

“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”).

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 Becker litigation was conducted, in part, to secure equitable relief and 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 in the area of restrictions on police tactics through legislative enactment that also drew upon evidence developed by plaintiffs and plaintiffs’ requests for injunctive relief. The Becker plaintiffs seek to render that result more meaningful, to give it even greater vitality and effectiveness, by imposing specific additional training requirements through the proposed settlement agreement.

Plaintiffs believe that the results secured are exceptional.

The proposed attorneys’ fee recovery reflects a compromise of attorneys’ fees incurred during nearly ten years of litigation. It is lower than the lodestar would be as calculated under 42 U.S.C. § 1988 and is inclusive of costs. 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 75 pages. There has been extensive and involved motions practice.⁵

⁵ See Motion for Class Certification and Notice, filed by plaintiffs (Doc. Nos. 15, 22, 23, 25); Plaintiffs’ Response to Defendants’ Objections to the August 22, 2006 Report and Recommendation (Doc. Nos. 248, 249)

Multiple dispositive motion briefings included the substantial briefing leading to Magistrate Judge Facciola's recommendation that summary judgment be entered on behalf of the plaintiff class for mass false arrest claims.⁶ Discovery, which has extended over a period of years, has been voluminous,⁷ protracted, contentious and the subject of many contested motions.⁸

(including 29 exhibits); Plaintiffs' Opposition to District of Columbia's Motion for Leave to File Amended Answer (Doc. No. 257); Plaintiffs' Opposition to Renewed Motion of Defendants' District of Columbia, Charles H. Ramsey and Terrance W. Gainer for Leave to File Amended Answer (Doc. No. 291); Plaintiffs' Opposition to Second Renewed Motion of Defendants District of Columbia, Charles H. Ramsey and Terrence W. Gainer for Leave to File Amended Answer (Doc. No. 340).

⁶ See Plaintiffs' Opposition to Defendant District of Columbia's Motion for Partial Summary Judgment (Doc. No. 262); Plaintiffs' Opposition to Chief Charles H. Ramsey's and Terrance W. Gainer's Motion for Summary Judgment (Doc. Nos. 269, 271, 272) (including 40 exhibits); Plaintiffs' Opposition to Defendants Charles H. Ramsey's and Terrance W. Gainer's Motion to Extend Briefing on Motion for Summary Judgment (Doc. No. 283); Defendant District of Columbia's Motion for Partial Summary Judgment (Doc. No. 288), and Plaintiffs' Opposition thereto (Doc. Nos. 300, 301) (including 52 exhibits); Defendants Chief Charles H. Ramsey's and Terrance W. Gainer's *Renewed* Motion for Summary Judgment (Doc. No. 289), and Plaintiffs' Opposition thereto (Doc. Nos. 294, 297) (including 48 exhibits); Motion for Summary Judgment Filed by the Plaintiff Class and by Elizabeth Butler Against the District of Columbia Municipality (Doc. Nos. 290, 293, 306, 314) (including 37 exhibits); Plaintiffs' Motion to Exclude and Evidentiary Objections to the Declarations of Jeffrey Herold, Charles Ramsey, and Terrance Gainer Filed in Support of Defendants' Motions for Summary Judgment and in Opposition to Plaintiffs' Motion for Partial Summary Judgment (Doc. Nos. 309, 315, 317, 320, 321); Plaintiffs' Motion to Exclude Inadmissible Representations Made in Jeffrey Herold's Declaration Dated October 24, 2007 and Filed on the Evening of October 26, 2007 (Doc. Nos. 310, 315, 317, 320, 321); Motion of Defendant District of Columbia to Exclude Certain of Plaintiffs' Exhibits (Doc. No. 295); Motion of Defendants Charles H. Ramsey and Terrance W. Gainer to Exclude Certain of Plaintiffs' Exhibits (Doc. No. 308), Plaintiffs' Consolidated Opposition to the District of Columbia Defendants' Motions to Exclude (Doc. No. 316); Plaintiffs' Response to Defendant District of Columbia's Objections to the February 28, 2008 Report and Recommendation Herein (Doc. No. 338); Plaintiffs' Response to Objections by Defendants Charles H. Ramsey and Terrence W. Gainer to the February 28, 2008 Report and Recommendation Herein (Doc. No. 339).

⁷ There have been over 50 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 depositions taken by the Council in executive session, as well as the multiple days of related public hearings and testimony, including those occurring on October 24, 2002, October 24, 2003, December 17 - 18, 2003 and October 7, 2004.

⁸ See Plaintiffs' Motion for Enlargement of Discovery Period to Provide for Final Phase of Discovery (Doc. Nos. 127, 129, 134, 136, 137); Plaintiffs' Response to the Federal and District Defendants' Motion for Clarification of the Magistrate Judge's August 20, 2003 Non-Dispositive Order (Doc. No. 144); Plaintiffs' Objections to, and Motion for Reconsideration of, the Magistrate Judge's February 7, 2005 Report and Recommendation (Doc. Nos. 177, 180, 181, 189); Motion of the District of Columbia for Protective Order (Doc. No. 178); Plaintiffs' Opposition to District of Columbia's Motion for Protective Order (Doc. No. 188); Plaintiffs' Motion to Compel the District of Columbia to Produce a Deponent on Behalf of the Municipal Defendant to Testify Based on the Collective Knowledge of the Municipal Defendant (Doc. No. 206); Defendant District of Columbia's Amended Motion for Protective Order (Doc. Nos. 210); Plaintiffs' Opposition to Defendant District of Columbia's Amended Motion for Protective Order (Doc. No. 211); Plaintiffs' Amended Motion to Compel the District of Columbia to Produce a Deponent on Behalf of the Municipal Defendant to Testify Based on the Collective Knowledge of the Municipal Defendant (Doc. Nos. 214, 215); Plaintiffs' Opposition to Defendant District of Columbia's Objections to and Motion for Reconsideration of and/or Appeal from June 15, 2006 Decision and Order (Doc. No. 236).

Magistrate Judge Facciola has been called upon to issue two Reports and Recommendations, each of which was contested, resulted in motions for reconsideration filed by the District and objections filed with the trial court. The District contested class certification, notwithstanding the fact that it had consented to the class definition and to certification.

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 over these next two years.

III. Proposed Notice 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.

A. Opportunity to Request Exclusion

The Settlement Agreement protects class members' due process rights and affords the opportunity to request exclusion.

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 nearly ten 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.

The class is believed to be, by and large, “web savvy.” Much political organizing and communications are internet and e-mail based and a substantial representation of those arrested were in Washington in response to such calls for protest activity. 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 D.C. Office of the Attorney General’s web site. These are sites that potential class members may visit seeking information.

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.

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 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 (attached as Ex. 2); and submitting a Proof of Claim form (Ex. 3) will be approximately 90 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) (Doc. No. 60) (71 days for response).

The timeline we anticipate is that initial notices will issue on or by February 12, 2010.

There shall be an approximately ninety (90) day period in which class members will be required to submit a Proof of Claim Form.

The deadline to request exclusion will be May 17, 2010.

The Class Administrator will complete his report, and counsel will prepare filings in advance of the final approval / fairness hearing.

The deadline for filing objections will be May 31, 2010, 30 days prior to the fairness hearing.

The Court has established the fairness hearing to occur at 9:30 a.m. on Wednesday, June 30, 2010. See January 14, 2010 Minute Order.

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 5.

IV. Conclusion

After nearly ten years of litigation, 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, as well as this Court's involved and engaged oversight.

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 and approve the proposed form and manner of notice.

January 29, 2010

Respectfully submitted,

/s/

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