UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

JOINT RESPONSE TO THE TIMELY OBJECTION LETTER FROM GENEVIEVE ROSLOFF AND TO THE UNTIMELY LETTER FROM NICHOLAS KAPPOS

Aside from the lengthy communication from attorneys in the Chang case, to which the settling parties shall respond independently, there has been received only one timely letter of objection.

Genevieve Rosloff objected, (letter attached, Exhibit 1), stating two objections which might more properly be considered requests rather than objections. The first, which she described to be her "primary concern with the settlement" does not state an objection to the settlement, *per se*, but focuses on her concerns regarding the consideration of the settlement agreement by a third party, specifically the Internal Revenue Service or other taxation authority. She asserts that the Settlement agreement fails to "accurately reflect the claims pursued in this litigation," that it "does not acknowledge that the settlement payment to class members is attributable, in part, to physical injuries sustained by class members," and therefore she requests the Court order the Settlement Agreement to be amended to "explicitly state that part of the

settlement award is for physical injuries that class members incurred." Ex. 1, Letter of Genevieve Rosloff (hereinafter "Rosloff Letter").

In her letter, Ms. Rosloff acknowledges that the complaint in this matter explicitly alleges "physical harm" and injuries in multiple averments. Id. (citing Third Amended Complaint, ¶¶173, 132, 135, 138, 148).

The Settlement Agreement does specifically and accurately state, and reflects, that the claims pursued in this litigation including "claims of constitutional violations pursuant to 42 U.S.C. §1983, common law tort and personal injury claims. . ." Settlement Agreement at 1 (Dkt. Nos. 595-3, 597-1). The Settlement Agreement, in the General Release provision specifically references the complaint, stating that the general release is "for all claims arising from. . . the allegations in the complaint." Id. at 16.

It is the intent of the parties to this agreement, as reflected in the agreement, that it constitutes a full release of all class member claims including those for physical harm or injury.

Class Counsel is sympathetic to the thrust of Ms. Rosloff's request, notwithstanding the fact that her objection should be overruled as there is nothing inaccurate in the Settlement Agreement[1] and since the pleadings, as Ms. Rosloff herself acknowledges, do fairly and explicitly allege physical injury.

Accordingly, Class Counsel has compiled a set of related record filings that draw out and present claims and evidence of physical injury, and has requested that the Administrator place those materials on the class administration web site under the Frequently Asked Questions in an

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[1] How independent actors, including in particular the IRS, may exercise their taxation authority is a matter beyond the control of counsels to this Settlement Agreement. Indeed, case law establishes that the IRS may conduct its own independent review to determine the proper allocation or characterization of damages issued through a settlement agreement. The IRS training bulletin for enforcement agents suggests that when considering the allocation or characterization of an award, the agent conduct a review of all relevant circumstances and documents, to include the complaint and nature of claims.

entry responsive to questions about taxation. The update should be available on the web site in a matter of days from this filing.

Indeed, the record reflects that the class has alleged, and presented record evidence in support of its claims, that the use of irregular wrist-to-ankle restraints to place arrestees in what they described to be a "stress and duress" position resulted in physical injuries including "pain that some described as 'agonizing' and 'severe' throughout their lengthy period of detention. A number of the class representatives suffered long term recurrent pain or injury from this unnecessarily harsh and painful manner of restraint." Plaintiffs' Opposition to District of Columbia's Motion for Partial Summary Judgment at 3 (Dkt. No. 257). The class submitted twenty (20) supporting exhibits, including fifteen sworn statements from class representatives in the form of deposition transcripts or affidavits.

Distinct from the wrist-to-ankle restraints used at the Blue Plains facility, the complaint also alleges that the handcuffs used on class members to cuff their wrists on the buses were excessively severe and painful. See e.g. First Amended Complaint (Dkt. No. 16) ¶148 ("The plastic handcuffs placed on many individuals were excessively tight. All plaintiffs experienced pain, and many experienced swelling and numbness from the handcuffs."); Id. ¶149 ("Arrested individuals were held on busses for many hours, with their hands handcuffed behind their backs.").

The FAQs to the class administration website has been requested to be updated to advise claimants that they should consult with a tax adviser regarding the taxability of their settlement payment. The updated section will provide a link to IRS publication 4345 entitled "Settlements – Taxability" (revision year 2010). It will also provide links to a compilation of record materials, including the complaint and the settlement agreement and the above-referenced Opposition to the

District's Motion for Partial Summary Judgment with all exhibits and to this filing, all of which may be helpful to bring to the attention of their tax advisor. Neither Class Counsel nor the Class Administrator provides tax advice or counseling.

Ms. Rosloff's second objection, which she characterizes as less primary than her first, is an objection that the compensation amount does not vary based on duration of confinement. She requests the Court "require the parties to modify the settlement to account for differences in each claimant's duration of detention."

Since there is a fixed amount of Claimants' Funds, her request is that the existing distribution be restructured, that some class members be awarded a larger amount of compensation based on one metric (duration of arrest) and that others' (regardless of other individualized circumstances which they may claim to be relevant) be reduced. This would constitute a radical restructuring of the settlement terms, require re-issuance of notice, and a new opportunity for those who are adversely affected to object.

Ms. Rosloff's letter, however, accurately acknowledges that there may be an insurmountable practical obstacle to consideration of her proposal: the absence of records recording duration of confinement. She adds

> "To the extent that there are no remaining records of when individuals were release, one simple (albeit less exacting) way to approximate detention length this [sic] would be to divide the class into two sub-classes. It is my understanding that individuals who were released prior to a certain hour were cited $100, whereas those who were not released until the following day were cited $50. This could serve as a useful proxy for estimating the length of a class member's detention. (However, I have spoken with out-of-town arrestees who say they were not assessed any fine.)."

Ex. 1, Rosloff Letter at 2, n.1.

The fact is: Records do not exist from which duration of confinement can be determined for the class.

The arrest data in this case is, at best, non-uniform, non-comprehensive and fragmented. It has required a substantial effort to be able to accurately compile the database which reflects the mere fact of arrest and identity of arrestee. For some genuine arrestees, there is no paperwork at all even evidencing arrest.

In settlement discussions it was recognized "that persons genuinely subject to the arrest at Pershing Park will not be properly identified or documented in law enforcement records; and consequently seek to provide sufficient guidance to the Class Administrator to qualify individuals, in the potential presence of inaccurate or incomplete records, where such individuals were in fact subject to the underlying arrest." Settlement Agreement at 19 – 20 (Dkt. No. 595-3); See, gen'ly, id. at 19 – 23 (setting forth standards and procedures for the Administrator to follow in the absence of proper arrest records).

Duration of confinement, which was in no way ever uniformly recorded, cannot be determined on an objectively confirmable basis for the class.

Class Counsel has considered throughout the litigation the structure of possible resolutions. It has been long evident that there are not records from which duration of confinement can be determined on a class-wide basis.

Nevertheless, Class Counsel assigned attorney Radhika Miller to conduct an examination specifically to document the condition of the arrest documents in response to Ms. Rosloff's objection letter. Ms. Miller has filed an affidavit attesting to her observations. Ex. 3, Affidavit of Radhika Miller, (hereinafter "Miller Aff.") ¶3.[2]

[2] Because the inspection of documents was done by Ms. Miller independent of the District of Columbia, defendants are unable to stipulate to each factual contention contained in Ms. Miller's affidavit and which are incorporated in this response. However, for the purposes of this joint filing, differences in the views of the parties on the underlying facts (if any) do not undermine their agreement on the response in this matter.

Ms. Miller attests that the printouts from the primary data source for arrest data for the MPD, the Criminal Justice Information System, does not record either time of release or duration of confinement. Reflecting the substantial imperfections of the available data, the CJIS printout does not even accurately reflect either the arrest date or time. The CJIS system, under the fields identified as "ARR DATE & TIME" instead records the date and time of entry into the CJIS computer. Many arrestees are identified with an arrest date of September 28, 2002, since booking into the computer continued past midnight. Id. ¶7.

Ms. Miller attests that the primary source of arrest data from the Federal Bureau of Investigation, from the FBI National Criminal Information Center, likewise does not record either time of release or duration of confinement. Id. ¶8.

Ms. Rosloff correctly suggests that the time of release, or at least something approximating time of release, can be found on the receipts issued to arrestees when they paid to secure release. However, there are relatively few collateral receipts that have been preserved.

Ms. Miller reports that, out of the 386 Pershing Park arrestees, there are collateral receipts for only fifty-seven (57) persons, or less than 15% of those arrested. Id. ¶9.

Ms. Rosloff proposes that if duration of confinement was not recorded, that a proxy be used. She proposes that the class be sub-classed based on whether a person posted $50 or $100 to secure release. Ms. Rosloff believes based on her experience that persons released earlier had to post $100, and those released later had to post $50. But she also recognizes that she herself knows persons who do not conform to that pattern, and is aware of persons who were released without having to pay any fine or collateral. Ex. 1, Rosloff Letter, at 2 n.1.

Ms. Miller examined the available collateral receipts, and reports that this pattern is not observed in the available collateral receipts. Ex. 3, Miller Aff. ¶10 (Exhibit 11). Out of the 57

Pershing Park collateral receipts, all but four indicate an amount of $100 paid. Two of the $50 receipts were issued for release of persons at 12:05 a.m. and 1:35 a.m., and two for persons released at 10:15 a.m. and 10:31 a.m. on September 28, 2002, with multiple $100 receipts in between these pairings. In other words, there is no consistent or distinctive change reflected in these receipts. Id. ¶11.

Ms. Miller examined the available collateral receipts, both for Pershing Park and non-Pershing Park arrestees, in efforts to discern any pattern that would explain why some paid $50 and some paid $100. She observed no consistent pattern. Id. ¶12. It bears reminder, that the processing of arrestees was reported to be irregular and chaotic or at the very least inconsistent.

Even were all of the collateral receipts preserved, which apparently were not, these receipts still would not be sufficient to determine the time of release on a class-wide basis. There were, in fact, multiple and disparate and uncoordinated avenues for release, including release by citation release, by posting collateral, by appearing before any one of many D.C. Superior Court Judges, by release to the recognizance of a parent or guardian. There was no consistent effort to document time of release.

It is, therefore, impossible to vary compensation based on total duration of confinement, even were one to believe that that was the best metric by which to approximate the severity of an arrestee's confinement.

Ms. Rosloff argues or suggests that this Court, in certifying the class in 2003, ruled that duration of detention "would have an impact . . . on the amount of damages awarded" in a settlement or adjudication of claims. Ex. 1, Rosloff Letter. That takes the Court's ruling out of the context of what was then at issue. The Court in 2003 ruled that commonality and typicality,

prerequisites for class certification, were not defeated by a claim that damages might vary on an individualized basis.

The Court did not hold that a settlement agreement in this case would fail to be fair, adequate and reasonable if it did not vary compensation based on duration of confinement. Indeed, this same Court has approved as fair, adequate and reasonable the settlement of claims for two classes of arrestees who were also arrested on September 27, 2002 along with the Barham class without distinctions on the basis of duration of confinement. Burgin v. District of Columbia, Civil Action No. 03-02005 (EGS) (Burgin Dkt. No. 65, August 1, 2007, order granting approval of Proposed Judgment and Payment Distribution).The Vermont & K arrestees were intermixed with the Barham class for processing, and suffered as a class identical conditions and durations of confinement.

Likewise, Judge Friedman has approved the settlement of the claims arising from the April, 2000 IMF / World Bank protests without varying compensation based on duration of confinement, where the Becker class arrestees were also restrained wrist-to-ankle at the Blue Plains facility and painfully handcuffed on busses in conditions and for durations substantially similar to those experienced by the Barham class. Becker v. District of Columbia, Civil Action No. 02-00811 (PLF) (Becker Dkt. No. 362, July 15, 2010, granting Joint Motion for Final Approval of Proposed Class Settlement and Payment Distribution).

In Barham, as in Burgin and in Becker, the interests of class members to seek additional monetary compensation by opting out or excluding themselves from the settlement has adequately protected due process interests *and* afforded an avenue for those who believe they are entitled to more compensation to attempt to recover it.

Ms. Rosloff points to the Dellums case, in which the jury considered the duration of confinement to be a secondary consideration in determining damage. Each arrestee was awarded by the jury $7,500 for the fact of the arrest, as a First Amendment violation, and an addition lesser amount ranging from an additional 2% ($180) up to an additional 24% ($1,800) based on duration of detention for the false arrest violation. Dellums v. Powell, 566 F.2d 167, 174 n.6 (D.C. Cir. 1977). The jury in Dellums clearly treated duration as a secondary factor with respect to the measure of damages. In Dellums, apparently there were records in which duration of confinement was recorded.

Dellums reflects that under certain circumstances as were present in that case the duration of confinement may be a reasonable basis on which to vary compensation. Dellums does not stand for the proposition that it is a necessary element in order for a settlement agreement to be fair, reasonable and adequate.

However, as addressed above, the compensation level secured for the class is substantial, greater than that secured for the Burgin classes. During this claims period (other than the Chang plaintiffs' filing, to be addressed separately by the parties) no claimant has opted out to secure additional monetary relief, a circumstance which itself evidences the fairness, adequacy and reasonableness of the monetary terms as structured and provided for in the Settlement Agreement.

Class Counsel did receive one untimely objection to the settlement from Nicholas Kappos (attached, Exhibit 2). Defense Counsel, to whom a copy was required to be mailed, did not receive a copy. The Court required that all objections be postmarked by July 15, 2010. Mr. Kappos, begins his letter by stating "I am writing this on July 13th, hopefully I can get it in the mail on time." He did not, however, timely post his letter. Instead, he handwrote in the postmark

area of the envelope, “Postmark July 15th dropped off at closing last pickup.” The last line of his letter directs: “Postmark this July 15th. I am dropping this in the mail box on July 15th after closing.” See Exhibit 2 (envelope and letter).

Even were his untimely objection considered on the merits, it should be overruled. In a relatively short missive, Mr. Kappos writes that “on top of my unlawful arrest” that he was beaten, “my head was slammed into a bus and a window, I was kicked and punched and struck with batons and stepped on” by agents of an unspecified law enforcement agency. He claims permanent physical injury from the severity of his handcuffing, that he was deprived of “important medications,” suffered severe pain and suffering, and suffered the loss or conversion of several expensive items of value, to include “[a]n expensive bicycle” and “other items of value in my backpack.” According to Mr. Kappos, “I feel that I should be entitled to no less than 5x what I have been awarded [by settlement].” Ex. 2, Letter of Nicholas Kappos.

Mr. Kappos also objects that he “was also assaulted and subjected to other [unspecified] crimes by the Police and Park Service and FBI besides unlawful arrest.” Id.

Mr. Kappos’ objection appears to be that he suffered additional claims and injuries far beyond the scope of the class claims, which did not allege nor seek damages for the alleged acts of excessive force against him or unspecified “crimes” he attributes to unidentified local or federal law enforcement agents or agencies. Even to the extent his complaint encompasses claims fairly within the scope of the class claims, his due process right to exclude himself and seek additional monetary damages has been provided for. Mr. Kappos did not exercise that right to opt-out, which is his prerogative, and instead filed a Proof of Claim form in which chose to remain in the class.

The lengthy document styled as objections offered by the attorneys for the Chang plaintiffs will be responded to separately by counsel for the settling parties.

Respectfully submitted,

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