UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NICKOYA HOYTE, *et al*., **Plaintiffs,** **v.** **GOVERNMENT OF THE DISTRICT OF COLUMBIA,** **Defendant.**	**Civil Action No. 13-569 (CRC)**

JOINT MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

INTRODUCTION

Plaintiffs and defendant the District of Columbia (the "District") move for preliminary approval of the proposed class action settlement set forth in the Settlement Agreement and for this Court to authorize them to send notice to the classes defined in the Settlement Agreement, because Plaintiffs and the District demonstrate that the Court will "likely be able to" grant final approval to the settlement. Fed. R. Civ. P. 23(e)(1);[1] see also William Rubenstein, 4 Newberg on Class Actions, § 13:15 (5th ed.) (Standard for granting preliminary approval—Substantive requirements). That is, "the terms of the Settlement Agreement are within the range of what would constitute a fair, reasonable, and adequate settlement in the best interests of the Class as a whole." Bynum v. Gov't of the D.C., 384 F. Supp. 2d 342, 343 (D.D.C. 2005). The full

[1] In 2018 Congress adopted changes to Fed. R. Civ. P. 23(e) which basically codified prior case law regarding the standard for evaluating whether to grant preliminary approval in a proposed class action settlement and to send notice of it to the class. See generally 4 Newberg on Class Actions § 13:13 (5th ed.). Plaintiffs discuss the effect of the amendments on pre-existing caselaw below in the section on the discussion of the standard.

Settlement Agreement, proposed Order of Preliminary Approval, proposed Claim and Release Forms and the proposed Class Notice are attached.

ARGUMENT

Nickoya Hoyte, Kelly Hughes, Steven May, Romona Person, Dorian Urquart, Shanita Washington, Tanisha Williams, Jarrett Acey, Julius Gordon, Marilyn Langly, Terrence Thomas, and Shane Lucas (individually, a "Plaintiff" and collectively "Plaintiffs"), individually and as representatives of the classes they represent, and defendant the District of Columbia, reached an agreement to settle this case as memorialized in the attached Settlement Agreement.[2] By agreement of the Parties, upon finalization of the Settlement and entry of final approval, this matter will be dismissed with prejudice and this Court shall retain jurisdiction for the sole purpose of enforcing the Settlement. The Parties also move to add Shanita Washington and Tanisha Williams as class representatives, and to revise the Class Definitions to conform to the terms of the Settlement Agreement.

The proposed settlement represents a fair and reasonable compromise of Plaintiffs' claims and the District's defenses. Undersigned counsel strongly believe that the proposed settlement is fair, reasonable and in the best interest of the classes.

I. Procedural History of the Case

Plaintiff Kimberly Katora Brown filed this case as a single plaintiff complaint for money damages on April 25, 2013. Complaint [1], Brown v. Government of the District of Columbia, 13-569 (D.D.C.) (KBJ/CRC). Ms. Brown later twice amended the complaint by adding several plaintiffs and several claims and adding class action allegations. The operative complaint is the

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[2] The defined terms used in this motion have the same meanings assigned in the Settlement Agreement.

Second Amended Complaint. [15].

On July 21, 2015, this Court decided the District's motion to dismiss the Second Amended Complaint and the following claims survived: Claim Three, for deprivation of prompt post-seizure retention hearings; Claim Five, for insufficient post-seizure notice; and two "individual" claims that were not ultimately certified, Claim Seven, for failure to notify owners of the right to retrieve non-forfeited property, and Claim Fourteen, for denial of bond waivers. Memorandum Opinion [49], Order [50] reported at Brown v. District of Columbia, 115 F. Supp. 3d 56, 60 (D.D.C. 2015).[3]

The Parties engaged in a lengthy period of discovery which began when the Court issued a Scheduling Order [61] on October 7, 2015 and continued until March 10, 2017, during which the Parties exchanged written discovery, took numerous depositions, and Plaintiffs requested and received data exports from the District's property management database, EvidenceOnQ.

By Order dated September 28, 2017, this Court dismissed Ms. Brown's claims with prejudice and dismissed the claims of Plaintiffs Gregory Stewart, Ishebekka Beckford and Chiquita Steele without prejudice. Sept. 28, 2017 Order [158] (granting motion to clarify and vacating Aug. 21, 2017 Order [151]).

On July 27, 2017 this Court granted plaintiffs' renewed motion for class action treatment, certifying Claim Three and Claim Five but not Claim Seven or Claim Fourteen, see July 27, 2017 Mem. Op. [148] reported at Hoyte v. District of Columbia, 325 F.R.D. 485 (D.D.C. 2017), and on October 26, 2017 issued class definitions for Claims 3 and 5. Oct. 26, 2017 Order [159].

The Parties filed cross motions for summary judgment in 2018 and on January 22, 2019, this Court held a motion hearing on the cross motions for summary judgment.

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[3] Claim Ten, for failure to notify owners of secret proceedings, was dismissed later. See Order [158].

At a status conference on May 31, 2019, the Court orally delivered a tentative opinion describing how the Court anticipated resolving the issues that have been framed at summary judgment to assist the Parties in resolving this case.

On August 12, 2019, the Court issued an Order [233] denying in part Plaintiffs' Motion for Partial Summary Judgment [176], and granting in part and denying in part Defendant's Motion for Summary Judgment [192] as to the individual claims (Claim Seven and Claim Fourteen) of certain Plaintiffs. See Order [233].

On August 18, 2019, the Court referred this case for mediation. The Parties engaged in a lengthy mediation process with the District of Columbia Circuit Mediation Program, and then mediated amongst themselves for several additional months.

II. The Addition of Ms. Shanita Washington and Ms. Tanisha Williams as Class Representatives for the Vehicle Forfeiture Class

The Parties move to add Ms. Shanita Washington and Ms. Tanisha Williams as class representatives for the Vehicle Forfeiture Class.

Ms. Washington and Ms. Williams were named in the caption of the Second Amended Complaint (the "Complaint") but the Complaint did not make allegations about the District's seizure and detention of their vehicles, so the Court dismissed their claims without prejudice. July 21, 2015 Order [50]. Nonetheless, they are members of the Vehicle Forfeiture Class (as defined below) because the District seized and detained their vehicles for longer than the applicable grace period without giving them prompt post seizure hearings.

Ms. Washington and Ms. Williams are each entitled to be a class representative and receive an incentive payment even if they were not named as plaintiffs in the Complaint. A class member can be appointed as a class representative even if the class member is not named as a plaintiff in the complaint. In re Telectronics Pacing Sys., 172 F.R.D. 271, 283 (S.D. Ohio 1997)

(finding no requirement in Rule 23 that class representatives be named plaintiffs); Peterson v. Alaska Commc'ns Sys. Grp., Inc., 328 F.R.D. 255, 268 (D. Alaska 2018), amended by No. 3:12-CV-00090-TMB, 2019 WL 6331355 (D. Alaska Nov. 26, 2019); Barnes v. District of Columbia, No. 06-315 (RCL) (D.D.C. Nov. 8, 2013), Preliminary Approval Order [466], ¶ 5 (appointing as class representatives two class members who testified at trial, replacing a deceased plaintiff).

Moreover, courts routinely add class representatives in the preliminary and final approval order if they provided services to the class even if they were not named in the complaint. For example, in Barnes, Judge Lamberth appointed two class members who were not named plaintiffs but who testified at trial as class representatives and who replaced Mr. Barnes who had died. See Barnes, Preliminary Approval Order [466] ¶ 5. In this case, Ms. Kimberly Katora Brown and Ms. Ishebekka Beckford withdrew as class representatives and the Parties propose that Ms. Washington and Ms. Williams replace them.

III. Incentive Payments for Class Representatives

The Parties ask the Court to award incentive payments of $10,000 to each Class representative for the Vehicle Forfeiture Class and $3,500 to each Class representative of the Forfeiture Notice Class to compensate class representatives for their service to the classes and for the risks they took in stepping forward to represent the classes. The basis for incentive payments is the services Class representatives provide to the class, such as monitoring class counsel, responding to interrogatories and document production requests, being deposed by opposing counsel, keeping informed of the progress of the litigation, and serving as a client for purposes of approving any proposed settlement with the defendant. 5 Newberg on Class Actions § 17:3 (Rationale for incentive awards); see also Wells v. Allstate Ins. Co., 557 F. Supp. 2d 1, 8-9 (D.D.C. 2008) ("In deciding whether to grant incentive awards and the amounts of such awards,

courts consider factors such as the actions the plaintiff[s] [have] taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff[s] expended in pursing the litigation.") (internal quotations omitted). Each of the Class representatives provided these services and the class has benefitted from those actions, and each Class representative has participated in over seven years of litigation and settlement negotiations. They also provided invaluable information to Class Counsel about the District's civil forfeiture procedures and other issues throughout the litigation.

Both Ms. Washington and Ms. Williams were identified in Plaintiffs' initial disclosures, they provided written responses to the District's interrogatories and document production requests, and both made themselves available for depositions (although the District chose not to depose them). Both were prepared to intervene in the Complaint as named plaintiffs and class representatives, but ultimately Class Counsel decided not to add them as class representatives by motion to intervene. Moreover, they both provided valuable information to Class Counsel about the forfeiture process and other issues throughout the litigation.

The difference in the amount of the payments for the members of the two different classes represents the difference in the value of the two different classes.

There was no *ex ante* agreement between putative class counsel and putative class representatives containing any assurances with regard to incentive awards, and each Class representative understands that whether to award incentive payments is within the discretion of the Court. See, e.g., 5 Newberg on Class Actions § 17:17 (Judicial review—Disfavored practices—Ex ante incentive award agreements); Rodriguez v. West Publishing Corp., 563 F.3d 948, 959–60 (9th Cir. 2009) (finding that a requirement in the retainer agreement between some class representatives and their counsel that counsel seek incentive awards created a conflict of

interest). The amounts of the proposed incentive payments are within the range awarded by Courts in this District in similar cases. See, e.g., Hardy v. District of Columbia, 49 F. Supp. 3d 48, 50 (D.D.C. 2014) ($5,000 to each of two class representatives); Wells, 557 F. Supp. 2d at 9 ($10,000 to each of two class representative).

IV. Proposed Changes to the Settlement Class Definitions

The Parties propose revisions to the class definitions the Court set forth in the Order [159] defining the classes, which will: (1) conform the class definition to the rulings in the tentative summary judgment opinion and the actual facts of the case; and (2) make the class easier to administer. The proposed revisions do not depart from the rationale of the Court's prior rulings on certification or any of the elements of Rule 23(a) or (b).

This is a settlement class and the Parties, with Court approval, can always amend the class definitions to fit the terms of the settlement, especially in the wake of a liability determination. Fonder v. Sheriff of Kankakee Cty., 823 F.3d 1144, 1147 (7th Cir. 2016). "The class definition must yield to the facts, rather than the other way 'round." Id. Therefore, the Parties believe the class definitions should be revised to reflect the facts disclosed in discovery and the liability determinations proposed by the tentative ruling on the cross motions for summary judgment. See generally Tr. of Jan. 22, 2019 Mot. Hearing [231]; Tr. of May 31, 2020 Status Conference [232].

A. Vehicle Forfeiture Class Definition

The class definition contained in the Court's Order [159] and the proposed revised class definition are both set forth below.

Court's Order of October 26, 2017	Proposed Settlement definition
Each person (1) whose vehicle was seized and retained for civil forfeiture by the District at any point between April 25, 2010 and June 15, 2015; or (2) whose vehicle and/or currency was seized for civil forfeiture by the District before that period but remained in the District's custody during that period; and (3) who did not receive a post-seizure hearing within thirty (30) days of the seizure; provided that (4) each person whose vehicle was seized and retained for civil forfeiture was, at the time of seizure, the owner of the vehicle and (5) the vehicle was not held by the District as potential evidence in a criminal prosecution as determined by the U.S. Attorney's Office for the District.	Each person (1) whose vehicle was seized and retained for civil forfeiture by the District at any point between April 25, 2010 and June 15, 2015; or (2) whose vehicle was seized for civil forfeiture by the District before that period but remained in the District's custody during some or all of that period; and (3) who did not receive a post-seizure hearing within thirty (30) days of the seizure (or within 15 days if the vehicle was not classified as evidence in the District's EvidenceOnQ database); provided that (4) each person whose vehicle was seized for civil forfeiture was, at the time of seizure, the owner of the vehicle.

The Parties' proposed revised Vehicle Forfeiture Class definition: (1) omits mention in the definition allowing claims for currency seized; (2) merges the notice claim for car owners into their Claim 3 because virtually no car owners have notice claims; (3) changes the grace period from 30 days to 15 days except for vehicles classified "as evidence" in the data export from EvidenceOnQ the District provided to Plaintiffs; and (4) eliminates the clause about "evidentiary holds" imposed by the U.S. Attorney because the Court tentatively ruled: "The Court is prepared to construe a hold lasting longer than 30 days as a forfeiture-only hold even if the initial seizure was for dual purposes. There is no reason to believe that any evidentiary utility lasted beyond that time period." See Tr. of May 31, 2019 Status Conference at 7-8.

B. Forfeiture Notice Class Definition

The class definition contained in the Court's Order and the proposed revised class definition are both set forth below.

Court's Order of October 26, 2017	Proposed Settlement definition
Each person (1) whose vehicle and/or currency was seized and retained by the District at any point between April 25, 2010 and June 15, 2015 for civil forfeiture; (2) who was not timely sent - by certified mail, first-class mail, or by in-person delivery - a Notice of Intent to Administratively Forfeit the Following Property ("Notice") or (3) whose Notice was sent but returned to the District as undelivered and the District thereafter failed to take reasonable, practicable steps to provide notice of the seizure; provided that (4) the person's claim in this case was not released in Hardy v. D.C., United States District Court for the District of Columbia, Civil Action No. 09-1062 (CRC).	Each person who meets the following criteria: (1) the Metropolitan Police Department seized his or her currency for civil forfeiture or a forfeiture determination at any point between April 25, 2010 and June 15, 2015 and it is still in the possession of the District; (2) there is no notation that forfeiture notice was provided to the person in the EvidenceOnQ database notes fields; (3) if there is a notation that forfeiture notice was provided to the person in the EvidenceOnQ database notes fields, any forfeiture notice was not provided to the person within one year after seizure; and (4) the person's claim was not released by the Settlement Agreement in Hardy v. District of Columbia, No. 09-1062 (CRC), as amended in Hardy v. District of Columbia, 49 F. Supp. 3d 48 (D.D.C. 2014) (final approval order).

The Parties' proposed revisions: (1) combine the notice claims for vehicles into the owners' Claims 3, see Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1287 (9th Cir. 1992) ("The weight of authority holds that a federal court may release not only those claims alleged in the complaint, but also a claim 'based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action.'") (emphasis omitted) (quoting TBK Partners, Ltd. v. W. Union Corp., 675 F.2d 456, 460 (2d Cir. 1982)); (2) clarify that Settlement Class Members get paid only if the District has not previously returned their money; and (3) give an objective number to the clause which defines the Constitutional period within which forfeiture notice must be sent, "who was not timely sent [forfeiture notice]- by certified mail, first-class mail, or by in-person delivery;" see Miller v. State (In re U.S. Currency Totaling $470,040.00), 2020 WY 30, 459 P.3d 430 (Wyo. March 23, 2020) (holding State's 270-day delay in instituting civil forfeiture

proceedings violated the statutory requirement that the State institute such proceedings "promptly" and the owner's right to due process).

V. <u>The Settlement Terms</u>

The full Settlement Agreement is filed with this motion. The key terms are:

1. <u>Settlement Amount</u>

The District has agreed to pay Three Million Nine Hundred and Fifty Thousand Dollars and Zero Cents ($3,950,000.00) ("the Settlement Amount"), which is divided as follows:

a. $1,955,214.39 to be paid to the Settlement Class members ("SCM Fund");

b. $133,000 for payment to the class representatives to pay their claims and for their special assistance in the case. Of that amount, each Vehicle Forfeiture Class representative will receive $10,000 and each Forfeiture Notice Class representative will receive $3,500 as incentive payments;

c. Up to $48,879.00 for sending notice to Class Members and the other costs of administering the class settlement;

d. $1,777,500.00 to Class Counsel for attorney's fees;

e. $35,406.61 for Litigation Expenses for costs incurred by Plaintiffs' counsel;[4]

f. In addition, the District will return to Vehicle Forfeiture Class Members any vehicles belonging to that Member remaining in the District's possession, provided that the Vehicle Forfeiture Class Member holds good title to that vehicle.

2. <u>Notice</u>

a. Class Administrator JND Legal Administration, which handled the administration of claims for the <u>Cobell v. Norton</u> "Indian Trust Fund" class action, will send notice, which shall include:

[4] The Litigation Expenses originally totaled $292,118.11, of which $256,711.50 was earmarked for payment to Tritura Information Governance LLC ("Tritura") for discovery and data analysis services performed on behalf of the Class Members. This amount of $256,711.50 will be waived and donated to increase the SCM Fund and the Class Representative Award, and has been incorporated in the figures above.

b. Sending notice to all Class Members;

c. Pre-mailing address updates using U.S. Postal Service databases for address verification and mail forwarding for all Class Members;

d. Post-mailing follow-up using a skip-tracing service for all mailed Notices returned undelivered; remailing to alternative addresses discovered by the skip-tracing service;

e. Mailing reminder postcards for large claims;

f. Publishing notice in a local newspaper, and maintaining an informational website;

g. Posting and maintaining notice at the D.C. Jail in a conspicuous location and on the Metropolitan Police Department ("MPD") website; and

h. Sending notice to state officials of class residents pursuant to 28 U.S.C. § 1715(b).

3. <u>Claims Process</u>

a. Class Administrator JND Legal Administration will administer the claims process, which shall include:

b. A 120-day claims period;

c. That each member of the Vehicle Forfeiture Class whose vehicle was held more than 30 days is eligible to receive for each compensable over-detention day (that is, for each day after the first 30 day grace period) $30 if their vehicle was a standard vehicle or $50 if their vehicle was a specialty vehicle (as classified by Plaintiffs' expert based on rental car industry classifications), except that no Vehicle Forfeiture Class member whose vehicle was held more than 30 days will receive less than $250, regardless of vehicle type and number of detention days, subject to adjustment as described below;

d. That each member of the Vehicle Forfeiture Class (1) whose vehicle was held more than 15 but less than 30 days; and (2) whose vehicle was not classified as evidence in the District's EvidenceOnQ database is eligible to receive a flat payment of $250, regardless of vehicle type and regardless of the number of detention days, subject to adjustment as described below;

e. That each Forfeiture Notice Class Member whose money was seized during the Class Period (and not returned by the District) is eligible to

receive 75% of the amount seized by the District for forfeiture, subject to adjustment as described below;

f. That each member of the Vehicle Forfeiture Class and Forfeiture Notice Class may receive lower amounts. The portion of the SCM Fund set aside for the Classes shall be distributed according to the number of valid and timely Claim and Release Forms received. The amounts to be paid to members of the Vehicle Forfeiture Class (not including class representatives) will be adjusted if the amount to be awarded based on valid claims exceeds $1,755,214.39. The amounts to be paid to members of the Forfeiture Notice Class (not including class representatives) will be adjusted if the amount to be awarded based on valid claims exceeds $200,000. In either event, the payments to absent members of the affected Class will be adjusted on a pro-rated basis among valid claimants of that Class, which will result in payments lower than those set forth above;

g. That SCMs can choose among the following three payment methods: (1) check sent by mail (good for ten months); (2) ATM cards sent by mail (good for ten months); and (3) electronic payments ("e-payments") sent online using an e-payment provider or direct bank deposits; and

h. That any funds from the Tritura payment donated to the SCM Fund by Tritura not distributed to Class Members will be returned to Tritura. Any funds from the SCM Fund not distributed to settling Class Members or returned to Tritura will revert to the District of Columbia General Fund.

VI. Standard for Preliminary Approval

In 2018 Congress adopted changes to Fed. R. Civ. P. 23(e) which basically codified prior case law. See generally, 4 Newberg on Class Actions § 13:13 (Standard for granting preliminary approval—Generally). Under the Rule as amended the Court preliminarily reviews a class action settlement to determine whether to grant preliminary approval of a proposed class action settlement and to send notice of it to the class if the movant demonstrates that the Court will "likely be able to" grant final approval to the settlement. Fed. R. Civ. P. 23(e).

Under case law pre-dating the 2018 amendments to the Rule, the Court reviewed a proposed settlement to determine whether it was "within the range such that final settlement approval may be appropriate." Bynum, 384 F.Supp.2d at 343. Plaintiffs and the District rely on

case law predating the 2018 changes to Rule 23(e) in this motion because this Court continues to do so. See, e.g., Abraha v. Colonial Parking, Inc., No. 16-680 (CKK), 2020 U.S. Dist. LEXIS 136538, at *20 (D.D.C. July 31, 2020) (citing to Rule 23(e) and evaluating whether a proposed settlement is fair, reasonable, and adequate according to the usual five-factor test used in this Circuit before the 2018 amendments).

Although "[t]here is no single test in this Circuit for determining whether a proposed class action settlement should be approved under Rule 23(e)," the following factors are relevant:

> (a) whether the settlement is the result of arm's length negotiations; (b) the terms of the settlement in relation to the strength of plaintiffs' case; (c) the status of the litigation at the time of settlement; (d) the reaction of the class; and, (e) the opinion of experienced counsel.

Wells, 557 F. Supp. 2d at 4-5; see also Hardy, 49 F. Supp. 3d at 49-50 (final approval order).

In evaluating the reasonableness of a settlement under Fed. R. Civ. P. 23(e), "the issue is whether the settlement is adequate and reasonable, not whether one could conceive of a better settlement." Jackson v. Wells Fargo Bank, N.A., 136 F. Supp. 3d 687, 709 (W.D. Pa. 2015) (quoting In re Prudential Ins., 962 F.Supp. 450, 534-35 (D.N.J. 1997)). Moreover, although the Court should undertake careful scrutiny of the settlement terms, the discretion to reject a settlement is "restrained by the 'principle of preference' that encourages settlements." Trombley v. Nat'l City Bank, 826 F. Supp. 2d 179, 191 (D.D.C. 2011) (quoting and citing cases).

Applying these presumptions, each factor weighs in favor of approving the proposed Settlement Agreement.

A. This Settlement Is the Result of Arm's Length Negotiations.

A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery." Livengood Feeds, Inc. v. Merck KGaA (In re Vitamins Antitrust Litig.),

305 F. Supp. 2d 100, 104 (D.D.C. 2004) (quoting Manual for Complex Litigation (Third), § 30.42 at 238 (1995)).

This settlement is the result of arm's length negotiations conducted by counsel with experience in civil rights class actions. Class counsel are experienced in litigating class actions, including actions pertaining to complex civil rights cases against the District, other governmental entities and private corporations. Defense counsel likewise has litigated numerous complex civil rights class actions on behalf of the District.

Moreover, the parties vigorously litigated the case for many years and entered into negotiations only when the Court issued its tentative summary judgment opinion. During the litigation the District filed a motion to dismiss and the Parties litigated the motion for class action treatment and then engaged in a separate round of litigation on the class definitions.

The Parties conducted the full panoply of discovery over a two-year discovery period and plaintiffs filed several contested discovery motions. Plaintiffs retained a data analysis company and associated discovery counsel to assist in planning discovery and analyzing the ESI (data exports from the MPD's EvidenceOnQ property management database) and the approximately 200,000 PDF documents produced in discovery. Plaintiffs also retained an expert to issue an opinion on the fair market daily rental rate for vehicles.

The Parties filed cross motions for summary judgment, and only agreed to enter settlement negotiations after the Court issued a tentative summary judgment opinion and referred the Parties to mediation. See Tr. of May 31, 2019 Status Conference; Minute Order of August 12, 2019. After mediation through the District of Columbia Circuit Mediation Program concluded, the Parties mediated amongst themselves and devoted many months to the details of the settlement such as the class definitions, notice, and the distribution plan. Here, "[t]he

settlement agreement is the result of years of litigation, but neither party has yet to face the time and expense of trial (or the inevitable appeal) … the settlement has 'not come too early to be suspicious nor too late to be a waste of resources.'" Wells, 557 F. Supp. 2d at 5 (quoting In re Vitamins Antitrust Litig., 305 F. Supp. 2d at 105).

In contrast, "trial would have been costly, and the case would have undoubtedly continued through the appeals process after a trial." Id. (internal quotation omitted). Plaintiffs would have been forced to defend a motion to decertify the class. Moreover, plaintiffs would likely have appealed any adverse ruling in a motion to decertify the class, and any resolution of the appeal would have consumed a year.

Each party has concluded, after arm's length negotiation, that settlement at this juncture is in their interests, and this settlement should be afforded the presumption of fairness, adequacy, and reasonableness on that criterion. See In re Vitamins Antitrust Litig., 305 F. Supp. 2d at 104.

B. Terms of the Settlement Reflect the Strength of the Parties' Positions and the Risks of Continued Litigation.

"The most important factor in the Court's evaluation of a proposed class action settlement is how the relief secured by the settlement compares to the class members' likely recovery had the case gone to trial." Blackman v. District of Columbia, 454 F. Supp. 2d 1, 9-10 (D.D.C. 2006). Under the amended Rule the standard is now formulated as whether the relief provided for the class is adequate, taking into account the costs, risks, and delay of trial and appeal. Fed. R. Civ. P. 23(e)(2)(C); see also 4 Newberg on Class Actions § 13:13 (Standard for granting preliminary approval—Generally).

Here, the settlement should be approved because the amount of the settlement is fair and recognizes the substantial risks and costs to each party of proceeding with the litigation, and the amount of time further litigation would consume. The Parties have extensively analyzed the

strengths and weaknesses of their respective positions and the amount of the Settlement Fund reflects their analysis.

The District has agreed to pay $3,950,000.00 to resolve this case, of which $2,088,214.39 is available for payment to Class Members including both the Class Representatives and the absent class members. Settlement Agreement ¶ 41. Of that amount, $1,955,214.39 is allocated for absent Class Members (not including Class Representatives) and $133,000.00 is allocated for Class Representatives for their incentive payments and the value of their individual claims. Id. This amount is extremely fair given the risks Plaintiffs face from possible decertification of the class on the issue of causation and damages. Plaintiffs do not believe that the risks of further litigation would result in significantly higher recoveries for either class after discounting the recoveries for the amount of time involved. Even damages hearings tried to the Court would have taken a great deal of time, especially given the ongoing COVID-19 pandemic. See Tr. of May 31, 2019 Status Hearing at 16 (Court suggests it hold individualized hearings on the issue of damages to the named plaintiffs).

The amount of money available for payment to Class Members includes $256,711.50 allocated for litigation expenses earmarked to Tritura Information Governance LLC (“Tritura”) for discovery and data analysis services performed on behalf of the Class Members, which is being donated to the SCM Fund for distribution to Class Members. Settlement Agreement ¶ 41.[5]

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[5] As a base amount the Settlement Agreement allocates $103,000.00 for payments to the Vehicle Forfeiture Class Representatives and the Forfeiture Notice Class Representatives in settlement of their claims and as an incentive payment in consideration of their services as Class Representatives. Settlement Agreement ¶ 41(a). $30,000 of the litigation expenses earmarked for Tritura are added to this amount, bringing the total amount available for payment to Class Representatives to $133,000. Id. ¶ 41(b)(i). As a base amount the Settlement Agreement allocates $1,728,502.89 for payments to the Vehicle Forfeiture Class members and the Forfeiture Notice Class members. Id. ¶ 41(e). An additional $226,711.50 of the litigations expenses

Most of the Settlement Fund is allocated to payment of claims of the Vehicle Forfeiture Class because this is by far the stronger and larger claim. A smaller amount of the Settlement Fund is allocated to pay claims of the Forfeiture Notice Class because many of the claims are small or were released by the Hardy Class Settlement, and the District has already returned money to many claimants. Based on notations in the District's EvidenceOnQ database and the District's method of providing notice by first class mail rather than by mail with return receipt requested, the District provided notice to many people.

The goal of the Distribution Plans is to get as much of the available damages remedy to Class Members as possible and in as simple and expedient a manner as possible. See 4 Newberg on Class Actions § 12:15 (Methods for determining individual awards).

The District asserts that it has strong defenses, which in the absence of a settlement might have foreclosed the possibility of any class-wide recovery. In re LivingSocial Mktg. & Sales Practice Litig., 298 F.R.D. 1, 12 (D.D.C. 2013). For example, at the summary judgment motion hearing the Court seemed inclined to enter summary judgment against all but one of the Forfeiture Notice Class representatives. Tr. of Jan. 22, 2019 Mot. Hearing at 59–60, 63; see also Tr. of May 31, 2019 Status Conference at 16-19.

The District also asserts that Plaintiffs' damages expert's opinions should be excluded, and that loss of use damages for vehicles should be contingent on an owner proving a need for a vehicle and should be capped at the fair market value of a vehicle, contentions that would limit Class Members' recovery even should the District be held liable.

Significantly, in the tentative opinion, the Court contemplated that both classes would be

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earmarked for Tritura are added to this amount, bringing the total amount available to absent Class Members to $1,955,214.39 (the SCM Fund). Id. ¶ 41(b)(i).

decertified as to causation and individual Class Members would have to appear and prove both causation and damage. See Tr. of May 31, 2019 Status Hearing at 13-14 (regarding Vehicle Forfeiture Class), 19 (regarding Forfeiture Notice Class). The District planned to file a motion to decertify the classes on the issue of causation and damages.

Plaintiffs' theory of the case is that Plaintiffs established a presumption that each Class Member (including absent Class Members) is entitled to damages by establishing that each Class Members' vehicle was seized and by establishing the daily fair market rental rate for each vehicle by expert testimony. Plaintiffs further allege that the District waived any arguments as to causation by failing to rebut the presumption established by Plaintiffs for the named Plaintiffs and the absent Class Members, and since this is not a Title VII case the District has no statutory right to present defenses individually. Still, Plaintiffs would have been forced to defend a motion to decertify the class, which would have consumed six months to a year. Moreover, Plaintiffs would likely have appealed any adverse ruling in a motion to decertify the class, and any resolution of the appeal would have consumed a year or more and success would not have been guaranteed. Absent a settlement, Plaintiffs may have had to prosecute appeals or appear in person to press their claims one by one.

Courts recognize that the comparison of settlements in similar cases can be relevant when evaluating the fairness, adequacy, and reasonableness of a proposed settlement. See, e.g., Trombley v. Nat'l City Bank, 759 F. Supp. 2d 20, 24-25 (D.D.C. 2011). One measure of the fairness of the settlement here is that this case is the only case Class Counsel knows of where plaintiffs were poised to prevail on a procedural due process claim for money damages for a municipality's failure to provide prompt post seizure hearings after seizure for civil forfeiture. The other cases Plaintiffs have found settled for injunctive relief or, at most, damages for the

named plaintiffs only. For example, Krimstock v. Kelly, 306 F.3d 40, 46 (2d Cir. 2002) was an injunctive relief claim, as was Sourovelis v. City of Philadelphia, 103 F. Supp. 3d 694 (E.D. Pa. 2015). In Smith v. City of Chicago, 524 F.3d 834 (7th Cir. 2008) after remand by the Seventh Circuit, the Parties settled for damages for the named plaintiff and attorney's fees and expenses. Smith v. City of Chicago, No. 6-6423 [253] (N.D. Ill. Oct. 5, 2012).

In Price v. City of Seattle, where plaintiffs obtained summary judgment on liability on their common law claims after all § 1983 and other claims were dismissed, Price v. City of Seattle, 2005 U.S. Dist. LEXIS 49634 (W.D. Wash. June 27, 2005), the district court decertified the class as to loss of use damages and remanded the class members' cases to state court for individual damages hearings, leaving damages solely for storage and towing fees and fair market value of vehicles the city sold after impoundment. Price v. City of Seattle, 2006 U.S. Dist. LEXIS 71041 (W.D. Wash. Sept. 19, 2006). Similarly, the biggest hurdle Plaintiffs face in this case is likely decertification of the class on both causation and damages for absent Class Members. See Tr. of May 31, 2019 Status Hearing at 13-14 (regarding Vehicle Forfeiture Class), 19 (regarding Forfeiture Notice Class).

Plaintiffs in this case are not entitled to the replacement value of judicially forfeited vehicles. See Brown, 115 F. Supp. 3d at 75 n.5 (noting Ms. Brown may well be collaterally estopped from arguing that she is entitled to the return of her car, having pursued judicial forfeiture proceedings). But most vehicle owners have received their vehicles back from the District and all vehicles that have not been judicially forfeited or surrendered by the owner to lienholders will be available for retrieval by their owners. So, the payments in this settlement are in addition to the value of the vehicles recovered by most Class Members. Wells, 557 F. Supp. 2d at 5 (noting payments to class members were in addition to any payment that class members

might have obtained under their individual policies).

The absence of "similar cases" cuts in favor of viewing the settlement as reasonable because Class Counsel in this case were able to do what other plaintiffs' counsel have been unable to do or even to attempt.

Moreover, the amounts that eligible Vehicle Forfeiture Class Members may claim under the Settlement Agreement are approximately 50% of their maximum recovery had this case gone to trial and a jury had awarded each one the maximum fair market daily rental rate for each day the District held their vehicle. Settlement Agreement ¶ 57. Although a court need not include in its approval order a specific finding of fact as to the potential recovery at trial for each of the plaintiffs' causes of action, it is one method of measuring the fairness of a settlement. Marshall v. NFL, 787 F.3d 502, 517 (8th Cir. 2015) (citing Lane v. Facebook, Inc., 696 F.3d 811, 823 (9th Cir. 2012)).

Here, Plaintiffs' expert assigned a fair market daily rental rate to each vehicle based on based on rental car industry classifications. Pls.' Ex. # 223 (Attachments B and C) [220-2]. The rates range from $52.59 for sedans to $137.50 for Sport vehicles. Id. The "median" of all these rates is $81.00. The average fair market daily rental rate for "standard vehicles" (sedans and SUVs) was $56.49 and the average daily fair market rental rate for "specialty vehicles" (all others) was $113.25. The fair market daily rental rates for budget cars rented by a local budget chains ranged from $25.89 to $52.89 per day with the average fair market daily rental rate approximately between $30 and $40 per day. Under the Settlement Agreement, the daily rental rate eligible Vehicle Forfeiture Class Members may claim is $30 per day (after the grace period) for "standard vehicles" and $50 for "specialty vehicles" (after the grace period). There is no cap or ceiling on the number of over-detention days an owner may claim compensation for, and the

grace period is 30 days, unless the vehicle was not classified as evidence by the Property Clerk, in which case the grace period is 15 days. Eligible Class Members whose vehicles were held for more than 30 days will receive at least a minimum payment of $250, regardless of vehicle type or number of days past 30 days an owner's vehicle was held. Moreover, owners whose vehicles were held for more than 15 but less than 30 days are entitled to a flat sum of $250 if their vehicles were not classified by the Property Clerk as evidence in the EvidenceOnQ data regardless of vehicle type or number of days past 15 days the vehicle was held. This ensures such owners will receive a minimum payment for such vehicles above what they would have received if the number of compensable over-detention days were multiplied by the daily rental rate.

Plaintiffs' team analyzed and modelled possible claiming rates using statistical and computer techniques and the team estimates that it would take a claiming rate of at least 20% to exhaust the $1,755,214.39 settlement pool set aside for Vehicle Forfeiture Class members at these rates. In the event that the total amount of claims exceeds the size of the fund for Vehicle Forfeiture Class Members, the payments to members of the Vehicle Forfeiture Class will be adjusted on a pro-rated basis among valid claimants. A claiming rate of at least 20% is quite high for these cases. The claim rate in Hardy was 14.1%. Hardy, 49 F. Supp. at 50.

It is not just the daily rental rates that must be considered in determining the value of the settlement to class members: the lack of any cap (such as fair market value of the vehicle) on a class member's recovery also significantly increases the value of most class members' recoveries. There are 95 vehicles held more than 1,000 ***compensable*** over-detention days, 103 vehicles held between 500 and 999 compensable over-detention days, and 433 vehicles held

between 100 and 499 compensable over-detention days.[6]

Eligible Forfeiture Notice Class members are entitled to claim 75% of the amount of money the District seized from them if the District still retains their money. This is roughly the amount claimants in the Hardy class actually received from the settlement pool. Hardy, 49 F. Supp. 3d at 50 (claimants received approximately 72% of their forfeited monies based on the value of the settlement pool). Plaintiffs' team analyzed possible claiming rates and estimate that it would take a claiming rate in excess of 20% to exhaust the $200,000 settlement pool for Forfeiture Notice Class members at these rates. Id. (claiming rate of 14.1% in Hardy). In the event that the amount of claims exceeds the size of the fund for Forfeiture Notice Class Members, the payments to members of the Forfeiture Notice Class will be adjusted on a pro-rated basis among valid claimants.

At the end of the day, the settlement makes available—now—a total of $2,088,214.39 for distribution, of which $1,955,214.39 will be available for distribution to absent Class Members and $133,000 for distribution to Class representatives. As stated above, none of the other cases Plaintiffs are aware of have resulted in loss of use damages for absent Class Members.

The benefits to the Class Members are real and immediate upon final approval of the settlement, and involve the payment of cash. It is money that will surely be welcomed by claimants in this time of economic distress.

As to injunctive relief, after Plaintiffs filed this suit the D.C. Council amended the civil forfeiture statute effective June 2015, resolving the majority of Plaintiffs' complaints about the

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[6] Compensable over-detention days is defined as over-detention days past the initial 30 days of a seizure.

relevant District of Columbia civil forfeiture statutes.[7] Class Counsel believe that the prospect of the damage awards in this action also encouraged the District to return vehicles to owners who requested post-seizure hearings in response to notice.

The Settlement Agreement provides that amounts not distributed to the Class representatives and eligible absent Class Members or returned to Tritura should revert to the District. Settlement Agreement ¶ 57. Although some courts closely scrutinize settlements with reversions or claims made settlements, a settlement with a reversionary clause is not *per se* collusive, Partl v. Volkswagen, AG (In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig), 895 F.3d 597, 611-12 (9th Cir. 2018). In fact, Courts recognize that, "[a] reversion provision might encourage a more generous settlement offer." Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 785 (7th Cir. 2004). Such is the case here.

Courts in this Circuit and other Circuits regularly approve settlements with reversions or claims made settlements. 4 Newberg on Class Actions § 13:7 (Terms of art in class action settlement agreements—"Claims-made" settlement). For example, Wells was a claims-made settlement, Settlement Agreement [234-1], ¶ 6(A) (at pages 8-9 of the agreement, at pages 9-10 on ECF), as was Barnes v. Government of the District of Columbia, 06-315 (RCL) (Settlement Agreement ¶ 36), and Stephens v. Farmers Rest. Group, 2019 U.S. Dist. LEXIS 103031, at *22-23 (D.D.C. 2019) (noting that "any unclaimed funds set aside for the Rule 23 classes will revert to Defendants"), and Hardy v. D.C. provided for a reversion of unclaimed funds to the defendant. Hardy, 1:09-cv-01062- RLW/CRC) (Settlement Agreement [67-1] ¶ 55, providing for a reversion of unclaimed funds to the District).

The money is available for the claiming and claimants have only to file a claim—by mail

[7] Plaintiffs are indebted to the efforts of Alec Karakatsanis, Staff Attorney, Special Litigation Division, Public Defender Service, and other citizens.

or online—and eligible claimants will promptly receive their money by check, ATM card, or by electronic transfer. Settlement Agreement ¶ 66. The D.C. Council recognized in the Committee Report to the "Civil Asset Forfeiture Amendment Act of 2014" that about 11% of households in the District have no bank accounts. Pls.' Ex. 224 [220], Comm. on the Judiciary & Public Safety, Council of D.C., Report on Bill 20-48, "Civil Asset Forfeiture Amendment Act of 2014," at 20-21 (Nov. 12, 2014) ("Committee Report").[8] Allowing claimants to elect to receive their awards by ATM card rather than by check will save the "unbanked" the typical 20% or 30% check cashing fee that Class Counsel have seen clients in previous cases pay.

The claims process in this case is not burdensome and it is provided as much for the protection of the Settlement Fund as for any other reason. The claiming period, 120 days, is long enough to ensure class members have an adequate opportunity to submit claims. Settlement Agreement ¶ 9. Both classes have members with very large claims. Moreover, the addresses in the MPD database are old and many of the Forfeiture Notice Class Members with small claims have no fixed address or the addresses the MPD has on file for them are incorrect, so mailing checks without a claims process is not feasible. Hardy, 49 F. Supp. 3d at 51 (referring to the "transient nature of the class members"). The "transient nature of the [Forfeiture Notice Class] members" presents the same challenges in this case, making the address verification of this claims process a necessary part of distributing funds to the Classes.

C. The Litigation Has Already Progressed Through Discovery.

In evaluating the terms of a proposed Settlement, the Court should "consider whether counsel had sufficient information, through adequate discovery, to reasonably assess the risks of

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[8] The Committee Report is available online at https://lims.dccouncil.us/downloads/LIMS/29204/Committee_Report/B20-0048-CommitteeReport1.pdf (last accessed Aug. 31, 2020).

litigation *vis-à-vis* the probability of success and range of recovery." Advocate Health Care v. Mylan Labs. Inc. (In re Lorazepam & Clorazepate Antitrust Litig.), Nos. MDL 1290 (TFH), 00MS276(TFH), Civ. 99-0790 (TFH) 2003 U.S. Dist. LEXIS 12344, at *14-15 (D.D.C. June 16, 2003) (emphasis added).

Here, given that this settlement was reached after more than seven years of vigorously contested litigation, extensive discovery, and cross motions for summary judgment, this factor too plainly counsels in favor of approval. As in Wells, "[t]he settlement agreement is the result of years of litigation, but neither party has yet to face the time and expense of trial (or the inevitable appeal). Accordingly, the settlement has not come too early to be suspicious nor too late to be a waste of resources." 557 F. Supp. 2d at 5 (internal quotation omitted).

D. Class Representatives Have Approved the Settlement.

The Class Representatives (including putative Class representatives Ms. Washington and Ms. Williams) have unanimously approved the settlement. The reaction of the absent Class Members can be reported to the Court after notice has been sent.

E. Experienced Counsel Approve of the Settlement.

Although courts do not defer blindly to the views of counsel with regard to the adequacy of a settlement, courts do recognize a presumption of reasonableness where, as here, the proposed settlement was the result of arms' length negotiations and is thus presumptively fair, adequate and reasonable. Wells, 557 F. Supp. 2d at 5. Attorney Claiborne has litigated numerous complex federal civil rights cases against government defendants in several jurisdictions including several cases against the District of Columbia. In addition, Attorney Claiborne has consulted on numerous class actions in this and other jurisdictions. Attorney Borden has been

involved in complex federal litigation in cases across the country. Both counsel believe the proposed settlement is fair, adequate, and reasonable under Fed. R. Civ. P. 23(e).

Class Counsel have based their approval of settlement on the risks of decertification, trial, and appeal. Moreover, even if Plaintiffs were to win at trial and on appeal, the protracted litigation would result in considerable delay to Plaintiffs' recovery. A lower, guaranteed sum today over the possibility of getting a larger amount (with risk of getting nothing) in the future is a rational balance, especially in today's troubled economic environment. This settlement is based upon a reasonably-anticipated claims rate of 20% which is very high in this type of case and very unlikely to be exceeded. Further, the notice contains sufficient notice provisions and the Settlement Agreement provides a simple claims process.

This settlement provides for a claims process as fraud protection because both classes have large claims. This is not to make the claims process unduly difficult, but to protect Class Members from fraud by non-Class Members since the Settlement Fund could get exhausted by claims, requiring a pro-rata adjustment on payments. See Manual for Complex Litigation § 21.66 (4th ed. 2020) (noting that the larger potential claims are, the more protections from fraud should be considered).

F. The Attorney's Fees Request is Reasonable.

Class counsel seek a fee in this case of $1,777,500, which is 45% of the "Settlement Amount" of $3,950,000. The percentage itself, 45%, although toward the high end of the range of percentages awarded by courts, is nonetheless within the range of reasonable percentages awarded by Courts in this District. See, e.g., Wells v. Allstate Ins. Co., 557 F. Supp. 2d 1, 7 (D.D.C. 2008); In re Ampicillin Antitrust Litigation, 526 F. Supp. 494, 498-499 (D.D.C. 1981).

Class Counsel plan to file a separate Motion for Approval of Attorney's Fees before the

final approval hearing but after notice has been sent and the reaction of the classes has become known. As preliminary support for the attorney's fee award, a letter memorandum provided by Plaintiffs to the District during settlement negotiations that explains the reasonableness of their fees given the litigation and the number of hours expended by Class Counsel in the case is attached as Exhibit E to the Settlement Agreement.

Using the "percentage of the fund" method to calculate their fees, Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1265 (D.C. Cir. 1993), Class Counsel seek a fee in this case of $1,777,500, which is 45% of the Settlement Amount of $3,950,000, the total amount the District is paying to settle the case. The requested fee will be paid out of the Settlement Amount. This fee award is reasonable using all of the yardsticks courts use to evaluate attorney's fees awards in class action cases using the "percentage of the fund" method: the percentage itself, 45%, although toward the high end of the range of percentages awarded by courts, is nonetheless within the range of reasonable percentages awarded in this District;[9] Plaintiffs score high on all of the factors courts consider in evaluating the reasonableness of the percentage in attorney's fees awards;[10] and a

[9] See, e.g., Wells v. Allstate Ins. Co., 557 F. Supp. 2d 1, 7 (D.D.C. 2008); In re Ampicillin Antitrust Litigation, 526 F. Supp. 494, 498-499 (D.D.C. 1981) (awarding 45%, or about $3.3 million; noting that while the bulk of fee awards in antitrust cases are less than twenty-five percent, several courts have awarded more than forty percent of the settlement fund); Advocate Health Care, 2003 U.S. Dist. LEXIS 12344, at *25 (fee awards in common fund cases may range from 15% to 45%).

[10] These factors include: (1) the percentage still leaves more than $2,000,000 of the fund available for distribution to Class representatives and the other Class Members; (2) Class Counsel are experienced litigators specializing in complex federal litigation who prosecuted the case for over **seven years** over the vigorous defense of the District's Office of the Attorney General; (3) Class Counsel undertook this case on a purely contingent basis so the risk of nonpayment through either summary judgment or loss at trial was significant; and finally, (4) the lawsuit and the settlement serve the public interest not only by conserving the resources that would be consumed by further litigation, but also by providing reasonable compensation to the Class Members for the loss of use of their vehicles and money. Wells, 557 F. Supp. 2d at 7-8.

cross-check of the "percentage of the fund" fee against the "lodestar" fee shows that the "percentage of the fund" fee is a significant 40% reduction to the actual "lodestar" fee expended by Class Counsel on behalf of the Classes.[11] See generally Ex. E at 3-7.

This case is an outlier in that most "percentage of the fund" fee awards represent the "lodestar" fee multiplied by an enhancement factor (a multiplier) and courts check to ensure that the percentage award does not represent too much of a multiplier applied to the "lodestar fee." Ceccone v. Equifax Info. Servs. LLC, 2016 U.S. Dist. LEXIS 127942, at *34-35 (D.D.C. 2016); Advocate Health Care, 2003 U.S. Dist. LEXIS 12344, at *32. Courts routinely approve settlements where the portion of the settlement fund for attorney's fees results in an award that is 2-4 times higher than the lodestar amount under the lodestar cross-check. Advocate Health Care, 2003 U.S. Dist. LEXIS 12344, at *32 (noting that a fee award that is 1.15 or 1.36 times *greater* than the lodestar "falls near the low end of normal multipliers" and "multiples ranging up to four are frequently awarded in common fund cases when the lodestar method is applied") (internal quotation omitted). In contrast, there is no "multiplier" in this case because counsel is seeking an award of only 60% of the fees expended on behalf of the class. Thus, rather than applying a multiplier to increase the fee paid to Class Counsel, the "percentage of the fund" fee is a **significant 40% reduction** to the "lodestar fee." Moreover, the hours considered in determining Class Counsel's fees do not include the hours spent drafting and negotiating changes to the settlement documents since the Lodestar Calculation Summary was prepared.

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[11] The market rate "lodestar" fee totals $3,016,764. Ex. E Attach. 1 (Lodestar Calculation Summary). The requested $1,777,500 "percentage of the fund" fee amounts to only 60% of the "lodestar" fee. This "lodestar" calculation is based upon 3,525 reasonable billable hours multiplied by the LSI Laffey Rate for Attorney Claiborne and the usual billing rate for Attorney Borden and his associates. Of the hours expended since the beginning of this case over seven years ago, Attorney Claiborne billed 2,998 hours and Attorney Borden and his associates billed 527 hours. Id.

VII. The Court Should Approve the Proposed Form and Manner of Notice to the Class.

"The court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Under that rule and the mandates of due process, class members must be given "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Hubbard v. Donahoe, 958 F. Supp. 2d 116, 122 (D.D.C. 2013) (quoting Fed. R. Civ. P. Rule 23(c)(2)(B)). However, "[n]either Rule 23 nor the requirements of due process require actual notice to each and every possible class member." In re Prudential Ins. Co. of Am. Sales Practices Litig., 177 F.R.D. 216, 233 (D.N.J. 1997); see also Pigford v. Veneman, 208 F.R.D. 21, 23 (D.D.C. 2002).

The Parties request that the Court direct the use of JND Legal Administration as class administrators, as contemplated by the Settlement Agreement. Settlement Agreement ¶ 7. Judge Lamberth appointed JND Legal Administration as the class administrators in the $3.4 billion Indian Trust Fund Settlement case (Cobell v. Salazar).

A. The Proposed Notice Is Reasonable and Tailored to the Needs of Class Members.

Class Counsel have carefully considered various options for providing reasonable notice of the proposed settlement to Class Members. Class Counsel believe that the proposed notice clearly and concisely informs potential Class Members of the nature and scope of the Agreement and of their rights to object and be heard. The proposed notice provides a clear explanation of (i) the lawsuit, its history, and current procedural posture, (ii) how to determine if one is a member of the classes, (iii) the reasons for settlement, (iv) the key provisions of the Settlement Agreement, and (v) the procedure for making objections and being heard at a final fairness hearing.

Accordingly, the Court should approve the form of notice attached as Exhibit C to the Settlement Agreement.

B. The Manner of Notice Is the Best Practicable Notice Under the Circumstances.

The Court should also approve the notice plan set forth in the Settlement Agreement. In formulating the notice plan, the Parties have given considerable thought to the difficulties involved in reaching many Class Members, and have developed a multi-faceted, comprehensive notice plan in order to reach as many Class Members as possible. The "transient nature of the class members" this Court referenced in Hardy presents the same challenges in this case. See Hardy, 49 F. Supp. 3d at 51. Plaintiffs plan to send notice to about 3,500 potential Forfeiture Notice Class Members and to follow up returned notices with remailings when updated addresses can be obtained in an attempt to reach as many Class Members as practicable.

In addition to providing individual notice to Class Members (and/or their legal representatives) where practicable, the notice plan calls for publication notice, posting of the notice in corrections facilities, and posting of settlement information on the Metropolitan Police Department's website. Plaintiffs also plan to enlist the help of the Public Defender Service for the District of Columbia and the Criminal Justice Act Bar (court-appointed attorneys representing indigents in criminal cases pursuant to D.C. Code § 11-2601, et seq.), many of whom have previously represented class members, in delivering class notice. Class Counsel also plan to email a copy of the Claim and Release Form and blank claim for each of the Classes to the Superior Court Trial Lawyers Association of the District of Columbia. The Court should therefore approve the notice plan set forth in the Settlement Agreement as providing the best notice practicable under the circumstances of this case.

CONCLUSION

For the foregoing reasons, the Court should grant the Parties' Joint Motion for Preliminary Approval, approve the manner and form of notice to be furnished to the class, and schedule a Fairness Hearing under Fed. R. Civ. P. 23(e)(1)(C) for the purpose of determining whether the settlement is fair, reasonable, and adequate.

Dated: September 11, 2020.

Respectfully submitted,

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