UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

NICHOLE MARIE McDANIEL and LESSIE DAVIS, on behalf of themselves and a Settlement Class of Others Similarly Situated,	:
Plaintiffs,	:
v.	: No. 04-CV-757 (GLS/RFT)
THE COUNTY OF SCHENECTADY, *et. al.,*	:
Defendants.	:

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, FOR AN AWARD OF ATTORNEYS' FEES AND FOR APPROVAL OF INCENTIVE AWARDS TO THE CLASS REPRESENTATIVE AND A PROSPECTIVE INTERVENOR

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I. Introduction

On behalf of the Settlement Class certified by the Court on October 25, 2006, Plaintiff Lessie Davies and Class Counsel hereby move for final approval of the class action settlement, including an award of counsel fees, expenses and incentive payments to the Class Representative and a proposed intervenor. Class Counsel respectfully suggests to the Court that the $2.5 million settlement of the Class' claims against Schenectady County provides Class Members with exceptional relief when compared with other recent settlements in similar cases, and should be approved by the Court.

II. Procedural Background

This action was filed on June 29, 2004 as a proposed class action seeking to address the conduct of illegal strip searches at the Schenectady County Jail. The Named Plaintiffs, Nichole McDaniel and Lessie Davies, alleged that the Schenectady County Sheriff's Department employed a uniform policy and/or practice of strip searching all detainees admitted to the Schenectady County Jail on misdemeanor or other minor charges. This action was the subject of intense litigation from the date of the Court's Rule 16 conference until the parties reached the within settlement. The Plaintiffs took eight depositions, including the deposition of Major Robert Elwell (the SCJ Jail Superintendant) and several Corrections Officers, the Defendants deposed Class Representative Lessie Davies, and the parties filed a multitude of discovery disputes for decision by Magistrate Judge Randolph F. Treece. (Docket entries 8, 13-16, 18-24, 27-28, 62-63). The Defendants unsuccessfully moved for summary judgment on the bases of personal jurisdiction and the damages limitations of the Prisoner Litigation Reform Act (PLRA) (docket entries 33, 58), and both parties appealed some of Judge Treece's rulings to the District Court (docket entries 29, 43). The Defendants also moved to dismiss the claims of Class

Representative Nichole McDaniel, who failed to appear for her deposition despite a Court Order that she do so.

The efforts to settle this action begin in early 2005, and the parties participated in a settlement conference with Judge Treece on May 17, 2005. While this settlement conference was unsuccessful, Judge Treece laid the groundwork for the ultimate resolution of this action, as it was his suggestion regarding the monetary amount of the settlement that was ultimately incorporated into the Settlement Agreement. Settlement discussions began in earnest after the District Court denied the Defendants' Motions for Summary Judgment in September 2005, with those negotiations lasting for over nine months. While the parties agreed on the monetary amount of the settlement early in the process, several months passed as they negotiated the actual terms of the settlement, including extensive injunctive relief. The negotiations leading to the culmination of the Settlement Agreement were as contentious as the litigation, with several drafts of the agreements being exchanged and the parties ultimately seeking intervention from the Court when reaching a stalemate on one very contentious issue. (*See,* Docket Entries 91-96). The parties finally reached a settlement on July 31, 2006, and moved for preliminary approval on August 18, 2006. The Court provided preliminary approval of the Settlement on October 25, 2006, after which notice was mailed to the class members and published in accordance with the settlement agreement, and class members filed claims. Plaintiff Lessie Davies and Class Counsel now move for final approval of the Settlement.

III. Terms of the Settlement and Settlement Administration

The case was settled by the Defendants agreeing to consent to the certification of the case as a class action for settlement purposes, and agreeing to set up a common fund of $2.5 million to pay claims to class members. Schenectady County also agreed to extensive injunctive relief,

including implementing a new strip search policy and training all of its officers on the requirements of the new policy. *See,* Settlement Agreement, p. 10, part III(A) (exhibit A to Keach affirmation). The settlement was structured to provide $1.75 million for *pro rata* payments to class members who made claims on the settlement, with the remaining funds to pay administrative costs, incentive awards to the class representative and a prospective intervenor, and attorneys' fees and costs.

As the Court is aware, the adversarial nature of this proceeding continued even after a settlement was reached. In an effort to facilitate notice to the Settlement Class, Class Counsel attempted to compel production of the computerized booking records from the County. The Court denied this request, and the Defendants produced the paper booking sheets for members of the class. (*See,* Docket Entry 106). Those booking sheets, however, were in some cases incomplete in that they did not contain proper contact information for many class members. Additionally, the Defendants provided Class Counsel several thousand booking sheets for individuals who were not members of the class because they were charged with felonies or were already convicted when they entered the custody of the Schenectady County Jail. Class Counsel accordingly sought, and received, leave of Court to delay the commencement of the claims period, and then went through all 6,500 booking sheets by hand to determine who was, and was not, a member of the Class. After this review, Class Counsel determined that there were approximately 3,245 class members, and commenced the Notice Program.

Starting in early January, 2007, the Settlement Administrator mailed notice of the settlement (the "long form" notice") (exhibit B to Keach affidavit) to all members of the Settlement Class. Additionally, Class Counsel placed a summary of the long-form notice (the "short-form notice") in the Albany Times-Union and Schenectady Gazette (exhibit C to Keach

affidavit), and also set up a settlement website, www.scjsettlement.com, which contained copies of the notices and other court documents. The Settlement Administrator also maintained a toll free telephone number for individuals to call in and receive copies the settlement notice or ask questions.

A sizable majority of the initial mailing of the long-form notices were returned as undeliverable. The Settlement Administrator then forwarded the notice to alternative addresses contained on Schenectady County's booking records. For instance, detainees would often have multiple bookings, with multiple addresses listed. Detainees would also sometimes have alternative contact information, such as attorneys or next of kin, on their booking sheets. When notices were returned as being undeliverable, the Settlement Administrator then sent notices to these alternative addresses. Many of those notices were also returned as being undeliverable, and the Settlement Administrator then used a national locator database, as well as Schenectady Department of Social Services records, to continue their location efforts. Lead Class Counsel also fielded a range of questions on the Settlement, both over the phone and in writing, and also supplied class notices and claim forms to many individuals.

As the initial claims period came to an end, counsel for both parties was concerned about the rate of participation in the Settlement, and sought leave of Court to extend the claims period for 30 days. During that time, Lead Class Counsel began, or continued, supplemental efforts to locate absent class members. A phone bank was set up, and all members of the Settlement Class who listed a telephone number on their booking sheets, either for themselves or a contact person, were contacted by either Attorney Keach, his paralegal, or an intern in his office. Class Counsel also supervised efforts to locate Class Members who were incarcerated by attempting to locate them on the New York State Department of Correctional Services website. Finally, during the

final days of the Notice campaign, Attorney Keach spent two days in the Hamilton Hill area of Schenectady attempting to facilitate additional claims on the Settlement. The first day Attorney Keach spent walking on foot through Hamilton Hill, handing out class notices, claim forms and handbills, and assisting individuals that he spoke with to determine whether or not they were members of the Settlement Class.[1] The second day, Attorney Keach made himself available at a community organization in Schenectady (Jobs, Etc.) to answer questions from class members and assist individuals with filing claims.

The claims period concluded on June 5, 2007. As of that date, 861 claims had been filed on the Settlement Fund from individuals for whom there is a Schenectady County Jail booking sheet showing that individual is a class member. Fourteen late claims have been filed on the Settlement as of July 5, 2007. Additionally, 146 claims were received from individuals who were initially determined not to be members of the Settlement Class. Each of those individuals received a letter informing them that their claim was invalid, and that they would have to submit additional information to be considered a class member. (Exhibit D). Class Counsel has, and is presently, contacting these individuals to seek more information about their situation; some individuals who were initially believed to not be class members submitted information showing that they were. In addition, the Defendants submitted provided additional documentation for these individuals, with many, as the result of that additional information, added to the list of valid claims.[2] These efforts will continue up until the time of final approval.

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[1] During this first day, Attorney Keach was accompanied by Plummer Bradley, a community activist who also wrote to the Court in support of Class Counsel's efforts to prosecute this action. During the course of his time on Hamilton Hill, Attorney Keach spoke to several individuals who were unaware of their membership in the Class, including one gentleman who could not read, and assisted them in filing claims.

[2] Class Counsel will file affidavits from the Settlement Administrator and Website Administrator as part of their supplemental submission on Friday, July 27, 2007.

Only two individuals have opted out of the settlement, and one untimely objection was filed by Class Member Keith Harris. Mr. Harris' letter to the Court did not reflect the basis for his objection, only the he "objects" and "intends to appear" at the Final Approval Hearing.[3] Currently, 26.5% of the class filed claims on the settlement. While Class Counsel plans to provide the Court with a final class list at the time of the Final Approval Hearing, they believe, based on current claims, that class members will receive between $1,900 and $2,000 as their *pro rata* share of the Settlement Fund.

IV. Argument

POINT I

THE COURT SHOULD APPROVE THE CLASS ACTION SETTLEMENT, AS THE SETTLEMENT IS FAR, REASONABLE AND ADEQUATE, AND IS NOT THE PRODUCT OF COLLUSION

A court must approve the settlement of a class action before it can take effect. "Before such a settlement may be approved, the district court must determine that a class action settlement is fair, adequate, and reasonable, and not a product of collusion." *Joel A. v. Guiliani,* 218 F.3d 132, 138 (2d Cir. 2000). The fairness, adequacy, and reasonableness of the settlement is often called "substantive fairness," and the issue of possible collusion is known as "procedural fairness." *In Re Holocaust Victim Asset Litig.,* 105 F.Supp.2d 139, 145 (E.D.N.Y. 2000). In evaluating procedural fairness, courts consider "the negotiating process, examined in light of the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves." *Malachman v. Davis,* 706 F.2d 426, 433 (2d Cir. 1983). In evaluating substantive fairness, courts consider the nine factors enumerated in *City of Detroit v. Grinnell Corp.,* 495 F.2d 448 (2d Cir. 1974):

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[3] Mr. Harris is presently incarcerated in the Five Points Correctional Facility on Robbery charges, and is not eligible for parole until next year. Exhibit G.

> 1) the complexity, expense and likely duration of the litigation; 2) the reaction of the class to the settlement; 3) the stage of the proceedings and the amount of discovery completed; 4) the risks of establishing liability; 5) the risks of establishing damages; 6) the risks of maintaining the class action through trial; 7) the ability of the defendants to withstand a greater judgment; 8) the range of reasonableness of the settlement fund in light of the best possible recovery; 9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id., at 463 (citations omitted). Finally, "it is not a district judge's job to dictate the terms of a class settlement; he should approve or disapprove a proposed agreement as it is placed before him and should not take it upon himself to modify the terms." *In Re Warner Communications Sec. Litig.,* 798 F.2d 35, 37 (2d Cir. 1986).

A. The Settlement is Procedurally Fair

The conduct of counsel in this litigation, and during settlement negotiations, leaves no doubt that the settlement was achieved as the result of lengthy, adversarial and difficult negotiations. These negotiations were conducted both during and after substantial discovery had been completed by the parties. The parties engaged in settlement negotiations, on and off, for approximately eighteen months, and participated in some of these negotiations before Magistrate Judge Treece. Despite agreeing on the monetary terms of the Settlement in November 2006, the parties spent several months arguing about the language of the Settlement Agreement, injunctive relief provisions, notice provisions, the timing of the settlement and the provision of attorneys' fees to Class Counsel.[4] On one occasion, the District Court became directly involved in these issues.

[4] As will be detailed later, the percentage agreed upon for attorneys' fees was based on the percentage discussed, and awarded, in *Nilsen v. York County,* 400 F. Supp.2d 266 (D. Me. 2005). Specifically, the District of Maine provided a 25% attorneys' fee in a common fund strip search settlement, utilizing a "market-mimicking analysis." *Id.,* at 283. The parties in this action agreed to pay 26% of the fund as an award of attorneys' fees, with the additional percentage being intended to compensate for pre-settlement litigation costs.

These negotiations were conducted by "experienced counsel" who engaged in "the discovery necessary to effective representation of the class's interests." *Maley v. Del Global Technologies Corp.,* 186 F.Supp.2d 358, 366 (S.D.N.Y. 2002). They were also "extensive, hard fought and took place at arm's length between experienced and skilled attorneys," as they occurred over a period of several months, involved many meetings and teleconferences with all counsel, and involved the Defendants' insurance carriers. *Id.* "In this context, courts routinely add the voice of experienced counsel to the mix of considered factors." *Id.* Here, counsel for both parties recommend to the Court that it finally approve the proposed class action settlement. Class Counsel also confirms for the Court that the manner in which this settlement was negotiated was highly adversarial; so adversarial that Class Counsel was concerned that the Settlement Agreement would not be finalized and approved by the Schenectady County Legislature.[5]

Accordingly, the parties at all times were acting in a procedurally fair, arms-length manner, and there is no hint of collusion to the Settlement. The Settlement is thus procedurally fair.

B. The Settlement is Substantively Fair.

The Plaintiffs respectfully suggest to the Court that, when applying the *Grinnell* factors to the Settlement, the overwhelming majority of those factors strongly favor a finding that the Settlement is substantively fair to the Class and should be approved.

1. Complexity, Expense and Likely Duration of Litigation

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[5] As the Court is aware, there was a very serious disagreement over the timing of the Settlement that almost derailed negotiations. Additionally, the Settlement was vociferously opposed by several members of the Schenectady County Legislature who were quoted in the *Schenectady Gazette* as referring to Class Counsel as being "gangsters in three piece suits" and being "shaken down."

The Plaintiffs respectfully suggest that this factor strongly favors the final approval of the Settlement. While this action was settled prior to the Plaintiffs' moving for class certification, the underlying litigation was complex, and would likely become more complex as it progressed. The parties had routinely applied to Judge Treece for intervention in discovery disputes, including disputes over the costs of document production, the application of the attorney-client privilege and work product doctrine, the failure of Nichole McDaniel to appear for her deposition and the consequences of that failure, and discovery of the names of class members. Some of these disputes led to appeals to the District Court, and the Defendants also moved for Summary Judgment on service issues and the PLRA. The Defendants' request for permission to apply to the Second Circuit for an interlocutory appeal, pursuant to 28 U.S.C. Sec. 1292(b), was pending at the time settlement negotiations began in earnest.

Going forward, the Plaintiffs faced the additional burden and expense of additional discovery, filing a motion for class certification, trying the case as to liability, if summary judgment was not available. In all likelihood, the Defendants would have appealed, or attempted to appeal, any number of disputed issues, including taking an interlocutory appeal of any qualified immunity issues as to the individual Defendants.

Even after the liability issues would have been resolved, the parties would have then had to address the damages phase of the case, which may have required determinations of individual damages for each class member. Accordingly, "[t]he potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interests of the Class." *Slomovics v. All For A Dollar,* 906 F. Supp. 146 (S.D.N.Y. 1995), and the first *Grinnell* factor favors final approval of the Settlement.

2. Reaction of the Class to the Settlement

The Class's reaction to the Settlement also favors final approval. Only one class member, out of 3,200, has objected to the Settlement, and his objection was not timely filed and does not state the basis for his objection. Only two individuals filed a request for exclusion. One class member, Plummer Bradley, wrote to the Court to praise the Settlement and the efforts of Class Counsel. (Exhibit F). "It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy. In fact, the lack of objections may well evidence the fairness of the settlement" *Maley,* 186 F. Supp.2d at 362 (citations omitted). Other cases have held that relatively low numbers of objectors are indicative of the adequacy of the settlement. *See, D'Amato v. Deutsche Bank,* 296 F.3d 78, 86 (2d Cir. 2001) (18 objectors of 27,883 class notices weighed in favor of settlement). The lack of objectors and opt-outs in this case, therefore, shows that the reaction of the class to the settlement is extremely favorable.

Additionally, the number of claims filed on the Settlement is commensurate with, or greater, than claims rates in other strip search cases. Here, approximately 26.5% of the Settlement Class has filed a claim. This percentage will likely rise slightly as class counsel continues to investigate claims that initially appear invalid. This claims rate is comparable to the claims rates achieved by Class Counsel in other strip search cases in this District, including a 28% claims rate in the Rensselaer County Jail case and 29% in the Montgomery County Jail case. (Keach Aff., ¶ 5). This claims rate is also far higher than other recent strip search settlements in New York, and slightly higher than others from other judicial districts. *See, McBean v. City of New York,* 233 F.R.D. 377, 381-2 (S.D.N.Y. 2006) (3,402 of 40,352, or 8.4%, of class members made valid claims); *Doan v. Watson,* 2002 WL 31730917 (S.D. Ind. December 4, 2002) (619 of 2,591 class members, or 24%); *Eddleman v. Jefferson County,* No. 91-CV 144-J

(W.D. Ky.) (Exhibit H, p. 7) (50,000 class notices, yielding approximately 12,000 claims; 24% claims rate). Class Counsel respectfully suggests to the Court that the claims rate in this case has been achieved because of counsel's extensive notice efforts that go well beyond the mailing of a written notice and newspaper publication. The fact that the class members responded and made claims at a high rate, coupled with the limited number of opt-outs and objectors, shows that the reaction of the class to the proposed settlement has been overwhelmingly positive.

3. Stage of Proceedings and Amount of Discovery Completed

The third *Grinnell* factor also favors approval of the Settlement. This action was the subject of extensive discovery at the time it was resolved, with the Plaintiffs taking extensive deposition testimony of the Jail commanders and corrections officers. Additionally, Class Counsel compelled production of all class member booking sheets, and also received a decision from the Court allowing them to talk to current SCJ Corrections Officers outside of the presence of Defendants' counsel. The Plaintiffs also successfully defended the Defendants' summary judgment motion regarding the Prisoners' Litigation Reform Act. "The stage of the proceedings and the amount of discovery completed is another factor that may be considered in determining the fairness, reasonableness and adequacy of a settlement. To approve a settlement, however, the Court need not find that the parties have engaged in extensive discovery." *Maley,* 186 F. Supp.2d at 363. Final approval of a class action settlement is appropriate where "Plaintiffs' Counsel possessed a record sufficient to permit evaluation of Plaintiffs' claims, the strengths of the defenses asserted by Defendants, and the value of Plaintiffs' causes of action for purposes of settlement." *Id.,* at 364. Class Counsel respectfully suggests that they have taken sufficient discovery to substantiate their request for Final Approval, and that application of the third *Grinnell* factors favors the approval of the settlement.

4. <u>The Risks of Establishing Liability and Damages, and Risk of Maintaining Class Action Through Trial</u>

Class Counsel admits that the fourth *Grinnell* factor, risk establishing liability, does not significantly favor Final Approval.[6] In the aftermath of this Court's decision in *Marriott v. County of Montgomery,* 227 F.R.D. 159 (N.D.N.Y. 2005) (certification of strip search class action where Judge Hurd held that a so-called "change out" similar to that described in Robert Elwell's testimony was unconstitutional absent reasonable suspicion) and *In Re Nassau County Strip Search Cases,* 461 F.3d 219 (2d Cir. 2006 (overruling denial of class certification in strip search class action), Class Counsel does not believe that establishing liability and receiving class certification were significant obstacles in this litigation. They also do not believe that the PLRA would preclude class members from receiving compensation for violation of their constitutional rights by the County, *see, Kelsey v. County of Schoharie,* 2005 WL 1972557 (N.D.N.Y. August 5, 2005), despite the existence of a District Court case to the contrary (*Cox v. Malone*, 199 F.Supp.2d 235 (S.D.N.Y 2002)). The only possible defense the Defendants could have raised was that they relied upon their former written policies, which were revised at least twice during the class period, and that those policies were appropriate. Class Counsel does not believe this would have been a successful defense, but "it is enough to observe, however, that there are no guaranties in life, and while it appears likely that plaintiffs would be able to establish liability at trial, things change." *McBean v. City of New York,* 233 F.R.D. 337, 387 (S.D.N.Y. 2006).

The risk of establishing damages for each individual class member, however, is another story entirely. The possibility that some members of the Settlement Class, especially individuals with extensive criminal histories and/or a history of incarceration, would receive nominal damages from a jury or special master. *See, Shain v. Ellison,* 356 F.3d 211 (2d Cir. 2004)

[6] Class Counsel believes that the risks associated with this action were much higher at the time it was filed, June 2004, and discusses this fact in their arguments about attorneys' fees.

(awarding nominal damages to an attorney who was strip searched at the Nassau County Jail); *McBean,* 233 F.R.D. 377 at 387 (discussing this factor in a strip search class action). Certainly, for many class members, receiving $2,000 from a jury for being illegally strip searched is not a certainty, and would be subjected to a vigorous defense by the Defendants. If the case were not to settle, each class member would, in all likelihood, be required to prove their own emotional distress at trial. This would be an inherently subjective and inexact undertaking, and would expose each class member to substantial uncertainty, the risk of getting only a nominal award, and the additional distress of having testify. This assumes, of course, that the Court would certify this action for damages, and that a class wide damages trial, or individual inquests, would be manageable.

The Court here need not "decide the merits of the case," *Carlson v. American Brands, Inc.,* 450 U.S. 79, 88, n. 14 (1981), rather, the Court must only "weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *Marisol A. v. Giulani,* 185 F.R.D. 152, 164 (S.D.N.Y. 1999). The relief provided to Class Members is a payment that will likely exceed $1,900.00, which is a significant and substantial damages award for a class member who need do nothing more than fill out and mail a claim form. It is also well in excess of other strip search settlements that have recently been settled in New York State, including one negotiated by Class Counsel in this action. *See, Kahler v. County of Rensselaer,* 03CV1324 (N.D.N.Y.) ($1,000.00 per claim) (Keach aff. para. 5); *McBean v. City of New York,* 233 F.R.D. at 381 ($750 per claimant; $1,000 for claimants strip searched more than once); *Maneely v. City of Newburgh,* 01CV2600(CLB) (S.D.N.Y.) (cited in *McBean* at 390-91; $1,000 per claimant); *Dodge v. County of Orange,* 02CV769 (S.D.N.Y.) ($600,000 shared by 18,000 class members) (exhibit I). Other settlements from outside this Judicial Circuit also paid $1,000 per claim. *See,*

Doan v. Watson, 2002 WL31730917, 99-4-C-B/S (S.D. Ind. Dec. 4, 2002) ($1,000 per claim); *Moser v. Anderson,* No. 93-634-B (D.N.H.) ($1,000 per class member) (Keach Aff., Ex. 5). Therefore, the relatively low risks of proving liability in this case, when considered together with the substantial relief offered to the class and the inherent risk and uncertainty of having to prove emotional distress damages, show that the fourth, fifth and sixth *Grinnell* factors favor the approval of the settlement here.

5. Ability of the Defendants to Withstand a Greater Judgment

Class Counsel acknowledges that Schenectady County can withstand a greater judgment. While this settlement has largely exhausted the County's insurance policy limits, the County, upon information and belief, agreed to pay some public money (less than 10% of the total settlement) into the Settlement Fund. Having the County sustain a larger judgment could, of course, take money away from its other important governmental responsibilities, or require a tax increase. "[F]airness does not require that the [municipal defendant] empty its coffers before this Court will approve a settlement....[T]he ability of the defendants to pay more, on its own, does not render the settlement unfair, especially where the other *Grinnell* factors favor approval." *McBean,* 233 F.R.D. at 388.

6. The Range of Reasonableness of the Settlement Fund

The eighth *Grinnell* factor, the range of reasonableness of the settlement fund in light of the best possible recovery, taken together with the ninth factor, the range of reasonableness of the settlement fund in light of all of the attendant risk of litigation, favors approval of the settlement. As detailed previously in this memorandum, the anticipated payout to class members ($1,900 to $2,000) exceeds the payouts in other similar class actions. It also far exceeds the possible recovery that some class members would receive in the event they are awarded nominal

damages. While some percentage of class members could achieve verdicts well in excess of the settlement payment, "the settlement allows individuals to opt out and pursue their own claims." *McBean,* 233 F.R.D. at 388. Class Counsel respectfully suggests that the Proposed Settlement is within the range of reasonableness, and should be finally approved by the Court.

POINT II

CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES AND EXPENSES IS REASONABLE AND SHOULD BE APPROVED BY THE COURT

Class counsel seeks an award of attorneys' fees and costs in the amount of $650,000, or 26% of the common fund created by the Settlement. After extensive negotiation, defendants agreed to pay this amount of the fund as attorneys' fees and not oppose class counsel's application. *See, Parties' Settlement Agreement.* The Court, at this juncture, must ascertain what a fair and reasonable fee would be to compensate class counsel.

Where class counsel create a common fund, courts use either the 'lodestar' method' or the 'percentage of the fund' method." *Walmart Stores v. Visa U.S.A.,* 396 F.3d 96, 121 (2d Cir. 2005). *See also, Goldberger v. Integrated Resources,* 209 F.3d 43 (2d Cir. 2000). "The trend in this Circuit is toward the percentage method, which "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Walmart,* 396 F.3d at 121. "In contrast, the lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in gimlet-eyed review of line-item fee audits."" *Id.* (*quoting, Baffa v. Donaldson Lufkin & Jenrette Secs. Corp.,* 2002 WL 1315603, at *1 (S.D.N.Y. June 17, 2002). Judicial economy and efficiency is fostered by reasonable settlements, and a "prompt and efficient attorney who achieves a fair settlement without extensive litigation serves both his client and the interests of justice." *McKenzie Construction Inc. v. Maynard,* 758 F.2d 97, 101-2

(3d Cir. 1985). "In the context of a complex class action, early settlement has far reaching benefits in the judicial system." *Maley,* 186 F. Supp.2d at 373.

Here, class counsel requests that the Court evaluate the requested fees and expenses as a reasonable percentage of the $2.5 million common fund it successfully created. Not only is it the overwhelming trend in the district courts of this Circuit to follow the percentage of the fund approach, but judges in two of the more recent, settled strip search cases followed this approach as well. *Marriott v. County of Montgomery,* 03 Civ. 0531 (DNH)(DEP) (N.D.N.Y.); *Nilsen v. York County,* 400 F.Supp.2d 266 (D. Me. 2005).

A. Application of the "Goldberger" Factors Support the Requested Award of Attorneys' Fees.

In evaluating the reasonableness of the proposed attorneys' fees in a common fund settlement, a District Court should look to the following factors:

(1) the time and labor expended by counsel;
(2) the magnitude and complexities of the litigation;
(3) the risk of the litigation …;
(4) the quality of representation;
(5) the requested fee in relation to the settlement; and
(6) public policy considerations

Goldberger, 209 F.3d at 50. Class Counsel respectfully suggests that these "*Goldberger* factors" support the reasonableness of Class Counsel's fee application.

A(1) The Time and Labor expended by Counsel

Counsel has spent hundreds of hours of attorney time litigating this action, and several hundred more in lengthy settlement negotiations. *See attached Fee Affirmations.* Plaintiffs' Class Counsel developed, litigated and successfully negotiated this action by themselves,

expending substantial time and effort." *Maley,* 186 F. Supp.2d at 371. Class counsel will also continue to resolve the claims of self-identifiers seeking to obtain an award, administer the conclusion of the settlement and locate those class members who do not initially receive their settlement checks. They also faced a competent and determined adversary who aggressively litigated this action for over a year, and continued to aggressively represent his clients during lengthy and protracted settlement negotiations that went for nearly a year and one-half. In fact, it was Defendants' counsel who initially conceived of the Prisoners Litigation Reform Act (PLRA) as a partial defense to a strip search case. Although Mr. Greagan's idea was later co-opted by defense counsel in another case and presented to Judge Homer before being raised in this action, (*See, Kelsey v. County of Schoharie,* 04 Civ. 299 (LEK)(DRH) (N.D.N.Y)), it was this type of creative and smart litigation that caused class counsel to spend much time and labor prosecuting this case.

A(2) The Magnitude and Complexities of the Litigation

This litigation lasted over three years and involved extensive discovery. *See Docket Sheet.* Like the *Nilsen* case, this case involved significant factual disputes as to whether the corrections officers actually viewed the arrestees' naked bodies while they changed into jail clothing. *Nilsen,* 400 F.Supp.2d at 285. Also, there was additional complexity due to the individualized nature of the damages suffered by the plaintiffs and various insurance coverage issues that cropped up. *Id.* Finally, it is always challenging to represent a class of thousands of relatively disenfranchised, transient individuals with which it is often very difficult to reach and communicate.

A(3) The Risk of the Litigation

At the time this action started, Class Counsel also took considerable risk in prosecuting this action. Judge Hurd had not rendered his decision on class certification and the legality of "change outs" in *Marriott,* this District had not decided the application of the PLRA to a strip search class action, and the Second Circuit had not yet rectified the Eastern District of New York's denial of class certification in *Augustin v. Jablonsky,* 99-CV-3126, 2001 WL 770839, at *13 (E.D.N.Y. Mar.8, 2001) For a good portion of the class period, Schenectady County had changed its blanket strip search policy to one that, at first blush, arguably could have been considered constitutional (e.g. the "change out"). In fact, in a recent case, these "change outs" were found not to be in violation of the Constitution. *See, Steinberg v. County of Rockland,* 04 Civ. 4889 (CLB) (S.D.N.Y. May 20, 2005) (bench decision) (Keach Aff., Ex. K). However, one of the determinative factors here was that the County's 30(b)(6) witness admitted that the policy for a part of the class period was to strip search all admittees and then detailed the use of "change outs" during the remainder of the class period.

Considering the credibility jurors often give to law enforcement testimony and the fact that it would have been difficult for the plaintiffs to "prove and recover damages for harms that were often dignitary rather than pecuniary," class counsel faced a substantial risk of nonpayment. *Id.*

As noted by the Southern District of New York in a recent class action settlement:

> Plaintiffs' Class Counsel have received no compensation during the course of this litigation despite having made a significant time commitment and incurred significant expenses to bring this matter to a successful conclusion for the benefit of the Class. Any fee award or expense reimbursement to Plaintiffs' Class Counsel has always been contingent on the result achieved and on this Court's exercise of its discretion in making any award. Class Counsel undertook a substantial risk of absolute non-payment in prosecuting this action, for which they should be adequately compensated.

Maley, 186 F. Supp.2d at 372 (quotations omitted). *See also, City of Detroit v. Grinnell Corp.,* 356 F. Supp. 1380 (S.D.N.Y. 1972), *aff'd in part and rev'd in part on other grounds,* 495 F.2d 448 (2d Cir. 1974) ("No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance has agreed to pay for his services, regardless of success"). In short, Class Counsel maintains that the risks associated with difficult civil rights litigation, and the complexities of this action, support their request for attorneys' fees, as agreed to in the Settlement Agreement.

A(4) *The Quality of Representation*

Additionally, Class Counsel respectfully suggests that the quality of their representation of the class supports their request as well. "The critical element in determining the appropriate fee to be awarded class counsel out of a common fund is the result obtained for the Class through the efforts of such counsel." *Maley,* 186 F. Supp.2d at 374. Here, the monetary results achieved for the class exceed those paid out in other recent strip search class actions, including *McBean,* where class members received $750 or $1,000 per claim, and especially *Dodge v. County of Orange,* where Class Counsel took over half of $1.2 million settlement fund as attorneys' fees and left 18,000 class members with very little recovery. The public policy of enforcing the nation's civil rights laws and protecting some of the poorest members of our community from a practice described by one Circuit Court as being "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission," *Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1272 (7th Cir. 1983), also strongly favors the requested award of attorneys' fees. *See, Maley,* 186 F. Supp.2d at 373-74.

Finally, the reaction of the class to the Settlement also deserves consideration by the Court. Despite the Notice Program and healthy claims rate, not one single claimant filed an

objection to Class Counsel's request for attorneys' fees. "As was true with the underlying settlement, this overwhelmingly positive response by the Class attests to the approval of the Class with respect to the Settlement and the fee and expense application." *Maley,* 186 F. Supp.2d at 374.

A(5) The Requested Percentage of the Settlement Fund is Fair and Reasonable, and is also Commensurate with Other Settlements.

The Court, in considering the reasonable percentage of the Settlement Fund to award as attorneys' fees, must look to both the percentage of the fund sought and the collective lodestar of Class Counsel. As mentioned above, the twenty-six percent attorneys' fee negotiated as part of the Settlement Agreement was based on the recent District Court ruling in *Nilsen.*. 400 F. Supp.2d at 266. In *Nilsen,* District Judge Hornby did what appears to be the most extensive, published analysis of other strip search settlements and attorneys' fees, and concluded that, based on a "market-oriented approach" an appropriate attorneys' fee in a strip search class action is 25%. *Id.* at 283. Acknowledging that a "multifactor approach…offers little predictability to either the awarding court, or the lawyers who seek fee awards," Judge Hornby applied the "market mimicking approach" adopted by the U.S. Court of Appeals for the Seventh Circuit because it is "most amenable to predictability" and it "minimizes the difficulty and arbitrariness of assessing the reasonableness of a given fee." *Id.,* at 276, 278-79.

Judge Hornby's analysis is in accord with case precedent in this judicial circuit, where courts "have awarded fees ranging from 15% to 50% of the settlement fund." *Maley,* 186 F. Supp.2d at 370 (awarding 33 1/ 3 % of common fund). *See also, In re Lloyd's American Trust Fund Litig.,* 2002 WL 31663577 (S.D.N.Y. November 26, 2002) (awarding 28% of a $20 million common fund); *Baffa v. Donaldson Lufkin & Jenrette Sec. Co.,* 2002 WL 1315603 (S.D.N.Y.

November 26, 2002) (awarding 30 % of a $3 million common fund) (exhibit N) *In re Arakis*, *supra*, (25% of a $24 million common fund); *In re American Bank Note*, 127 F.Supp.2d 418 S.D.N.Y. 2001) (awarding 25% of $ 14.85 million fund). In another strip search class action case also handled by class counsel, *Marriott v. County of Montgomery,* District Judge Hurd awarded an attorneys' fee of 30% of the $2.0 million settlement fund.[7] The Court should also consider, when awarding an appropriate percentage, the extensive injunctive relief achieved by Class Counsel in the Settlement Agreement. *E.g. Wal-Mart Stores,* 396 F.3d at 121.

As the Court is undoubtedly aware, the provision of attorneys' fees in the settlement agreement, just like every other issue in this case, was hotly contested and aggressively negotiated. The parties finally agreed on the percentage fee based on a discussion of the *Nilsen* decision, with an additional percentage added to compensate for litigation costs. The Defendants agreed to the payment of this fee, and also agreed not to oppose Class Counsel's application for attorneys' fees. *See, Settlement Agreement*.

In considering a percentage attorney fee in a class action, the Court must also consider a "'cross-check' to a percentage award," which involves taking Class Counsel's collective lodestar and dividing it into the proposed fund, which yields the "mulitipier." *Wal-Mart Stores,* 396 F.3d at 123, n. 27. Here, considering the approximate hourly attorneys' fees to date, class counsel seeks a modest multiplier of approximately 2.3, depending on the total size of counsel's lodestar at the time of final approval. This is well within the range of reasonableness for a class action

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[7] Class Counsel acknowledges that Judge McAvoy awarded a much smaller percentage of the Settlement Fund in *Kahler v. County of Rensselaer* than that requested here. The Kahler Settlement Fund was $2.7 million, with a reversionary interest to the County in the event the Fund was not exhausted after class members were awarded $1,000 per claim. Judge McAvoy awarded class counsel their lodestar at prevailing rates for each attorney's home jurisdiction, $370,000, or approximately 13.7% of the Settlement Fund. The *Nilsen* case mistakenly evaluates the settlement in *Kahler*, and presents the percentage of attorneys' fees paid as much higher than it actually was because it mistakenly included $73,000 in reimbursed expenses and administrative costs, allowed under Judge McAvoy's Final Approval Order, in its report on the total attorneys' fees paid in the *Kahler* settlement.
Judge McAvoy did not award any multiplier in the *Kahler* action. Class counsel did not appeal Judge McAvoy's attorneys' fees ruling because it would have delayed distribution of settlement payments to class members.

settlement. In *Wal-Mart,* the Second Circuit approved a multiplier of 3.5. Other Courts have approved multipliers far in excess of the one sought here by class counsel. *See, In Re NASDAQ Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (court awarded multiplier of 3.97, noting that "[i]n recent years multipliers of between 3 and 4.5 have become common); *Maley,* 186 F. Supp.2d at 371 (awarding a "modest" multiplier of 4.65). Judge Hurd's final approval of $600,000 in attorneys' fees and costs (like here, the amount agreed to by the parties) amounted to a multiplier of 1.4 in *Marriott v. County of Montgomery.*

Class Counsel respectfully suggests to the Court that the counsel fee requested is reasonable in light of the extensive time and labor expended by counsel, the magnitude of the litigation, the risks taken in the litigation, the monetary results achieved for the class, and the amount of the fee in proportion to the monetary settlement and injunctive relief achieved. Class Counsel now requests that the Court approve the requested fee.

POINT III

THE INCENTIVE AWARDS TO LESSIE DAVIES AND WILLIAM SMITH SHOULD BE APPROVED

The Settlement Agreement provides for incentive awards for Class Representative Lessie Davies of $12,000, and an additional payment for William Smith of $1,500 above his *pro rata* share of the Settlement Fund. Class Counsel maintains that Lessie Davies provided substantial support to this litigation by serving as the Class Representative, and fulfilling her commitments in that regard. This action initially had two Class Representatives, one of whom, Nichole McDaniel, abdicated her responsibilities to the Class and failed, repeatedly, to appear for her deposition. While Lessie Davies left the area to live in the Bronx, she took her responsibilities to the Class seriously, stayed in touch with Class Counsel and, despite living in a homeless shelter in New York City at the time, appeared as scheduled to be deposed by the Defendants. Had Miss

Davies not fulfilled her responsibilities to the Class, this action may well have had a different outcome. Additionally, William Smith agreed to serve as a class representative in 2005, and provided Class Counsel with assistance in locating and speaking to members of the Class. While Mr. Smith's intervention was eventually unnecessary because of the efforts to resolve this action, Class Counsel maintains that he is entitled to a modest incentive payment for his assistance.

The awards to these individuals are reasonable and should be approved. The law recognizes that it is appropriate to make modest awards in the range of $1,000 to $20,000 in recognition of the services that such plaintiffs perform in a successful class action. *See, Roberts v. Texaco,* 979 F. Supp. 185, 205 (S.D.N.Y. 1997); *Genden v. Merrill Lynch*, 700 F. Supp. 208, 210 (S.D.N.Y. 1998) (granting incentive awards of $20,085 for each class representative). Class Counsel respectfully requests that these incentive awards be approved.

V. Conclusion

For the foregoing reasons, Plaintiff's motion for final approval of the class action settlement should be granted in its entirety.

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