

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

KEVIN VODAK, et al., individually and on
behalf of others similarly situated,

Plaintiffs,

v.

CITY OF CHICAGO, et al.,

Defendants.

Case No. 03 C 2463

Judge Virginia M. Kendall

Magistrate Judge Nan Nolan

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT**

This Memorandum of Law supports Plaintiffs' Motion for Preliminary Approval of Proposed Class Action Settlement ("Motion").

The Parties have reached a proposed Stipulation and Agreement of Settlement ("Stipulation", attached hereto as Exhibit A) which resolves all the claims at issue in this litigation. Without Defendants' admission of any wrongdoing, the Stipulation establishes an aggregate Settlement Fund¹ of \$6,200,000 that will provide monetary relief of up to \$500.00 to members of Settlement subclass A-1, up to \$8,750.00 to members of Settlement subclass A-2, and up to \$15,000 to members of Settlement subclass A-3 for each Class Member who submits a valid and timely Proof of Claim. The Stipulation is the result of the Parties' arms'-length settlement negotiations conducted via the Mediator, former Federal Court Judge Wayne Andersen, who ultimately recommended the accepted settlement amount to the Parties.

¹ All capitalized terms not defined herein have the same meaning as found in the Stipulation.

Pursuant to FED. R. CIV. P. 23(e), this Court must preliminarily approve the settlement of the Class claims and determine whether the proposed Stipulation is fair, reasonable and adequate. *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Gautreaux v. Pierce*, 690 F.2d 616, 621 (7th Cir. 1982); *see also* MANUAL FOR COMPLEX LITIGATION, § 21.632 (4th ed. 2004) (outlining numerous factors courts consider in reviewing whether to preliminarily approve a proposed class action settlement). The Court is also responsible for ensuring that the plan for providing notice to the Class is the "best practicable [plan], reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* The Chicago City Council must also approve the monetary terms of the Stipulation before it can be effectuated by the Parties.

At this juncture, the Parties are seeking the Court's approval of the Parties' proposed Stipulation prior to its presentation to the Chicago City Council.² Assuming the City Council approves the Stipulation, the parties will seek leave to file a detailed motion seeking approval of the Parties' proposed plan to provide the class notice of the settlement with final copies of all the necessary documents, including the proposed notices (individual and published) and Proof of Claim form(s). Preliminary approval of the Stipulation is appropriate here because the Stipulation provides substantial monetary compensation to Settlement Class Members and is a fair, reasonable and adequate resolution of this lengthy litigation involving numerous hotly contested issues.

² The Parties believe that this Court's approval of the settlement will facilitate in their efforts to obtaining City Council's approval of the Stipulation and Settlement Agreement.

I. FACTUAL SUMMARY AND PROCEDURAL HISTORY

On March 20, 2003, approximately 850 people were detained, arrested and/or criminally charged by Chicago Police Officers at or near a demonstration opposing the initiation of the Iraq War. On April 10, 2003, Plaintiffs filed a class action against the City of Chicago, Chicago Police Department Superintendent Hillard and other police personnel (hereinafter "CPD Defendants"), alleging they were seized in violation of their rights to speech, assembly and liberty guaranteed by the First, Fourth and Fourteenth Amendments to the United States Constitution and Illinois law, and that the City of Chicago (the "City") was liable under *Monell v. N.Y.C. Dept. of Soc. Serv.*, 436 U.S. 658 (1978), *respondeat superior* and 745 ILCS 10/9-102. Dkt. 1. Plaintiffs subsequently filed a Third Amended Complaint additionally alleging malicious prosecution of class members and claims for excessive force, battery, deprivation of property and the denial of adequate medical care on behalf of seven individual plaintiffs. Dkt. 140.

On April 17, 2006, after a two-day hearing, the District Court certified the class of people surrounded and seized at Chicago and Michigan Avenues (hereinafter the "bounded area"), and three subclasses which included: people who were detained for one and a half to three hours before they were released from the bounded area (A-1); people who were arrested in the bounded area, detained at a police station and who were released without being charged (A-2); and people who were arrested in the bounded area, detained at a police station, charged with a criminal offense, released on bond, required to appear in court and their charges were dismissed in their favor (A-3). Dkts. 218-19.

On April 28, 2004, the City filed a Counterclaim against all Plaintiffs pursuant to CHI. MUN. CODE, §10-8-330, alleging that they were liable for the cost of police services provided in connection with the demonstration and subsequent arrests. Dkt. 80. On March 31, 2005, the

District Court dismissed the City's Counterclaim without prejudice on grounds of inadequate notice of individual liability. Dkt. 171. The City filed an Amended Counterclaim against the Class and its representatives on May 16, 2006, Dkt. 238, but on March 10, 2008, the District Court denied certification of the City's counter-class, finding members of the class did not engage in any "standardized unlawful conduct" to satisfy the requirements of commonality and predominance. Dkt. 391, p. 6 ("some organized the march; some participated in the march from its inception; some joined the march before marchers were turned around at Michigan Avenue; some joined after; and some were merely bystanders who were never a part of the march.").

The Parties conducted voluminous discovery, including extensive written discovery and over one hundred and fifty depositions, many of which were extremely lengthy. The parties also engaged in significant motion practice surrounding discovery, including many motions to compel, motions regarding the sufficiency of objections to admissions by the parties, and motions pertaining to the entry of several different protective orders. Plaintiffs made an attempt to determine whether settlement of the case was feasible, and prepared a detailed demand letter in October of 2004 which was served upon the defendants but it was rejected.

Plaintiffs and Defendants filed cross motions for summary judgment with Plaintiffs seeking judgment on their Fourth Amendment claims and against the City's Counterclaim, Dkts. 400, 401, and Defendants seeking judgment on all claims except for those brought on behalf of the Individual Plaintiffs. Dkts. 140, 396, 412. After initial briefs were filed, the Court ordered the parties in *Vodak* and *Beal* to submit supplemental briefs regarding Defendants' abandonment of their position in *Beal* that *Dellums v. Powell*, 566 F.2d 167, 173 (D.C. Cir. 1977) and

Washington Mobilization Committee v. Cullinane, 566 F.2d 107, 120 (D.C. Cir. 1977) clearly established the law with respect to demonstrators' constitutional rights. Dkts. 544, 549.

While the summary judgment motions were pending, the parties also prepared for trial and prepared a voluminous Pretrial Order, as well as filing proposed jury instructions and briefing numerous motions in limine. *See* Dkts. 494-524 (Defendants' Motions in Limine); Dkts. 526-539 (Plaintiffs' Motions in Limine).

On February 25, 2009, the District Court granted Defendants' motions for summary judgment on Plaintiffs' claims and denied Plaintiffs' motion for judgment on their Fourth Amendment claims. Dkt. 555; *Vodak v. City of Chicago*, 623 F. Supp.2d 933 (N.D. Ill. 2009). The Court held the CPD Defendants were entitled to qualified immunity with respect to Plaintiffs' First and Fourth Amendment claims because it was not clearly established that Plaintiffs had a right to an order to disperse prior to their arrests and it was reasonable for the CPD Defendants to arrest all Plaintiffs for participating in a march without a permit. Dkt. 555 at 33-44. The District Court also granted judgment to the City with respect to Plaintiffs' *Monell* claims, *id.* at 48-57, and state law claims for false arrest, malicious prosecution and conspiracy. *Id.* at 44-48. The Court granted the Counter-Defendants summary judgment on the City's counterclaim, finding it was unable to set forth any evidence of illegal conduct specific to the Plaintiffs that could subject them to liability. Ultimately, after the seven individual plaintiffs settled and resolved their excessive force and other individual claims, the District Court terminated the entire case. Dkt. 577.

Plaintiffs appealed the District Court's grant of summary judgment to Defendants to the Seventh Circuit Court of Appeals and the City cross-appealed the judgment against it on the

counterclaim, but later abandoned this cross-appeal. After briefing and oral argument the Seventh Circuit reversed the judgment in favor of Defendants and remanded for trial, setting out parameters of what issues should be decided by the trial jury.

After remand, Plaintiffs filed a trial plan for resolution of the class action claims, which the City opposed in part. After briefing on the issue, including whether *Vodak* and *Beal* should be tried together or seriatim, the District Court decided to try *Beal* first, followed by *Vodak*. The *Vodak* Plaintiffs again prepared for trial and the parties again filed an extensive Pretrial Order, jury instructions and motions in limine. At this point, the Parties engaged in settlement discussions.

In January 2012, on the eve of trial, under the supervision of former Judge Wayne Andersen, the Parties began active negotiations, with Judge Andersen acting as intermediary. After extensive settlement discussions, the Parties were able to reach the settlement terms underlying the Stipulation, based on Judge Andersen's recommendation of a fair and reasonable settlement.

II. OVERVIEW OF THE STIPULATION

Pursuant to FED. R. CIV. P. 23(e)(3), all of the settling Parties' agreements with each other are being disclosed to the Court in the Stipulation and its exhibits. A general description of the Stipulation is found below.

A . Description of Class Members

The Settlement Class and three subclasses are defined below.³

³ This Court previously certified the class and subclasses at issue in this proposed settlement. Dkts. 218-19.

1. Settlement subclass A-1 is defined as:

All Class members who were surrounded by Defendants in the bounded area for one and a half to three hours before they were allowed to leave the area.

2. Settlement subclass A-2 is defined as:

All Class members who were surrounded by Defendants in the bounded area, arrested and detained at a police station. These individuals were released without being charged with any crime or ordinance violation.

3. Settlement subclass A-3 is defined as:

All Class members who were surrounded by Defendants in the bounded area, were charged with criminal offenses, released only upon condition of bond, required to appear in court on criminal charges and later the charges against them were dismissed in their favor.

B . Aggregate Settlement Fund and Compensation to Class Members

The Stipulation creates an Aggregate Settlement Fund which will not exceed \$6,200,000 for the purposes of providing compensation to Class Members, incentive awards to class representative Plaintiffs and those who sat for a deposition, and payment of the expert fees of Class Counsel's expert witness.

The Settlement Class members will receive the following amounts: (1) Settlement subclass A-1 members will receive an award up to \$500; (2) Settlement subclass A-2 members will receive an award up to \$8,750; and (3) Settlement subclass A-3 will receive an award up to \$15,000. In the event that the payment amounts exceed the funds remaining in the Settlement Fund, payments will be adjusted on a pro rata basis within the amount allotted to each subclass in

order that Defendant City of Chicago's total payment does not exceed \$100,000, \$1,898,750, or \$4,065,000 in Settlement subclass A-1, A-2 and A-3, respectively. The named Plaintiffs will receive Incentive Awards in the amount of \$7,750, plus the amount awarded to the subclass of which they are a member. Class Members who were not named Plaintiffs but who sat for a deposition will receive up to \$1,000 plus the amount awarded to the subclass of which they are a member. Named Plaintiffs and deponents will not be permitted to make any additional claims on the Settlement Fund.

The Stipulation provides that Plaintiffs and Settlement Class Members will receive their awards once the Court has ruled on the fairness of the Settlement and that ruling has become final, after the time for filing claims or objections to the Settlement has expired, and after the validity of all potential claims have been determined, but in no event before January 7, 2013.

C . Claims Administration

The Parties have agreed to a Claims Administrator, Class Action Administration, Inc. ("CAA"), who all Parties believe will provide professional, competent and neutral service. CAA has many years of experience in settlement claims administration and has a proven record of achieving high claim rates. The Parties have further agreed to the procedures and documents to validate claims.

D . Opt-outs

Because individualized notice was previously provided to the Class through U.S. mail and publication, and an opportunity to opt out of the settlement was previously given pursuant to this Court's November 21, 2008 Order (Dkt. 478), the Parties agree that there is not a need for an additional opportunity for Class Members to opt out. Members of the Class who previously opted out are not eligible to participate in the Settlement.

E . Resolution of Claims

The Stipulation further provides that upon the Effective Date, all members of the Settlement Class who have not properly or timely excluded themselves from the Settlement Class will release Defendants from any causes of action or damages that arise out of the allegations in Third Amended Complaint.

F . Non-Monetary Relief

In addition to the significant monetary relief outlined above, the Parties have further negotiated basic parameters for non-monetary relief relating to arrest records of Class Members in the A-2 and A-3 subclasses. The City has agreed that it will cooperate with Class Members in the A-2 and A-3 subclasses in any efforts to either seal or expunge records relating solely to the March 20, 2003 anti-war protest arrest, through the statutory expungement or sealing process. The Parties are determining the most appropriate method for providing the members of the A-2 and A-3 subclasses with the opportunity for obtaining that relief. The Parties are further attempting to identify Defendants' role (if any) in "cooperating" with these efforts beyond their express agreement not to object to any individual request for the sealing or expungement of records relating solely to the March 20, 2003 anti-war protest arrest. The Parties hope to provide additional details to the Court after meetings with the Circuit Court of Cook County, Criminal Division.

G . Attorneys' Fees and Costs

Finally, the City will pay the Plaintiffs' Attorneys' Fees separate from the Aggregate Settlement Fund. Class Counsel and Defendants' Counsel are in discussions in an attempt to settle Class Counsel's claims for Attorneys' Fees and litigation costs, but the Court does not need to address this issue as part of the settlement terms of the Class claims.

III. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

The Stipulation warrants this Court's preliminary approval because it is within the range of possible settlements that are fair, reasonable and adequate in that it provides substantial monetary relief to Settlement Class Members who submit valid claims. Considering the complexities of this litigation and the risks to the Parties were they to proceed to trial, the Stipulation is a reasonable and fair resolution of this Litigation. Moreover, "federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) (citations omitted).

Before final approval of the Stipulation, the Court will need to evaluate the following factors: (1) the strength of the plaintiffs' case compared to the amount of the settlement offer; (2) an assessment of the likely complexity of a trial; (3) the length and expense of the litigation; (4) the amount of opposition to settlement among affected parties; (5) the opinion of competent counsel; and (6) the stage of the proceedings and amount of discovery completed at the time of settlement. *Armstrong*, 616 F.3d at 314; *see also Isby*, 75 F.3d at 1196; *Abrams v. Van Kampen Funds, Inc.*, No. 01 C7538, 2006 WL 163023, at *1, 2006 U.S. Dist. LEXIS 2129 (N.D. Ill. Jan. 18, 2006) (analyzing the above factors for final approval of a class action settlement). Some of these factors are helpful to the Court's analysis during this preliminary approval stage. Each of the relevant factors supports the Court's preliminary approval of the Stipulation.

A . The Stipulation is a Fair and Reasonable Resolution of This Action Through Monetary Compensation for Settlement Class Members

First, the strengths and weaknesses of Plaintiffs' case and Defendants' defenses are fairly and reasonably balanced with the settlement terms. Plaintiffs have alleged significant constitutional and state law violations and have developed a factual record that Plaintiffs believe

support their allegations. On the other hand, Defendants have contested, and would continue to contest, Plaintiffs' allegations and challenge the existence and value of Settlement Class Members' compensable injuries resulting from Defendants' actions. Were the Parties to continue to litigate, all Parties would expend considerable time and money to advance their positions.

Settlement subclass A-3 members, who were arrested and charged will receive up to \$15,000, thus providing adequate compensation for their detention, arrest and prosecution. Settlement subclass A-2 members who were arrested and detained at a police station but not criminally charged, will receive up to \$8,750 to compensate for the arrest and detention, while Settlement subclass A-1 members who were detained for at least one and a half hours in the Bounded Area will receive up to \$500.⁴ In all cases these amounts are fair and reasonable given the certainty of the settlement as opposed to the vagaries of litigation, the varying amounts that different juries award in such cases, and the fact that the Plaintiffs, many of whom no longer reside in the immediate area, will not be required to interrupt their daily activities to participate in the time-consuming and stressful experience of a trial.

Moreover, although the primary recovery in the case is monetary, and the City does not formally acknowledge that it violated the constitutional rights of the plaintiffs, the current

⁴ The settlement amounts for the A-3 subclass members are comparable to the settlement amounts others have received with similar damages in other demonstration mass arrest cases. In *Barham v. Ramsey, et al.*, 02-CV-2283 (D.D.C.), a civil rights class action stemming from a 2002 protest in Washington, D.C., 386 plaintiffs were arrested en masse and charged with failing to obey an officer. The plaintiffs in *Barham* were arrested and detained overnight while hog tied and some were detained up to 30 hours or more. The parties reached a settlement in 2010, and each of the plaintiffs who submitted claims were given \$16,000, and the class representative plaintiffs were given \$50,000. In *Becker v. District of Columbia, et al.*, 01-CV-00811 (D.D.C.), a civil rights class action stemming from a 2000 protest in Washington D.C., 680 plaintiffs were arrested en masse, detained overnight and some were kept in hog tied positions. The parties reached a settlement in 2010, and each of the plaintiffs who submitted claims were projected to receive \$18,000 and the class representative plaintiffs were given \$50,000 each.

Superintendent of Police and other spokespersons for the City of Chicago have publicly stated that the City has changed its policies because of the litigation, and that recent events have demonstrated these changes.

B . Further Litigation Would Be Lengthy, Costly and Complex

This litigation has already extended more than nine years, thousands of hours have been spent in discovery and trial preparation, hundreds of filings have been presented to this Court (the latest docket entry was number 687), and an appeal was determined by the Seventh Circuit Court of Appeals, all before a trial on the merits. If the Parties were to continue to litigate this Litigation, each side would expend considerable time and expense in prosecuting and defending their claims.

As the Court knows, it had allocated five weeks for the trial of this matter, a verdict for Plaintiffs would have necessitated numerous additional trials on damages, and it is highly likely that the losing side would have appealed the trial verdict. If not settled now, this litigation had the potential of stretching for several years into the future. The length and expense of a trial would be considerable given the complexity of the issues raised by Plaintiffs' allegations and Defendants' defenses, and the proof of violations and the policies that led to the violations. On the other hand, the Stipulation will fairly compensate those affected by Defendants' actions, and not push possible compensation to some date years in the future.

C . The Stipulation is Endorsed by Class Counsel and Was Negotiated Under Former Judge Wayne Andersen's Supervision

Counsel for the Parties support the Stipulation as a fair and reasonable resolution of the Litigation as it provides significant monetary compensation to Settlement Class Members while avoiding the delays and uncertainties involved in any litigation. Counsel for the Parties have

reached this opinion after careful consideration of the strength of Plaintiffs' case balanced with the difficulties and costs and delay of further litigation. Counsel for the Parties further endorse the fairness of procedures for individuals to submit claims and receive compensation. While Class Counsel continue to believe that the allegations are serious infringements on citizens' constitutional rights, counsel are satisfied that the monetary relief found in the Stipulation provides adequate compensation and is a reasonable resolution of the Litigation.

Importantly, the Parties' agreement has been reached through the supervision and support of former Federal Judge Wayne Andersen. *See* MANUAL FOR COMPLEX LITIGATION, §21.62, at 316 (listing the participation of a judge in the negotiations as one of the factors to consider in evaluating a proposed class action settlement). Former Judge Wayne Andersen has devoted considerable time and energy to understand the issues in the Litigation and to facilitate the Parties' negotiations. Under his guidance, the Parties have had to compromise and make realistic assessments of their respective positions. The ultimate settlement number reached by the Parties was based on Judge Andersen's recommendation of the amount which he considered appropriate as a compromise by both sides. As a result, the Stipulation is a fair and reasonable outcome of this Litigation.

D . There is No or Minimal Opposition to the Settlement Among Interested Parties

While anyone who opposes the Settlement will have an opportunity to express their opposition at the fairness hearing, Class Counsel is not aware of any significant opposition to the Settlement. On the contrary, class representatives have unanimously supported the settlement, and Class Members who have been in contact with Class Counsel have also stated that they believe it is a fair and equitable settlement.

E . The Litigation Settled on the Eve of Trial

This action settled after all discovery had been completed and the case prepared, for the second time, for trial. Class Counsel were fully prepared to try their case to a jury, but in light of the substantial offer from Defendants and the length and difficulty of obtaining recoveries for a significant number of Class Members if the case did not settle, this settlement was a good result. Had the case gone forward, it is likely that Class Counsel's potential attorneys' fees award would have become greater, but it is possible that awards to Class Members would have been less than, or not substantially larger than, the settlement amounts.

Overall, the factors relevant to the Court's inquiry at the preliminary stage overwhelmingly support the preliminary approval of the Stipulation as being within the range of agreements that are fair, reasonable and adequate. The Parties jointly request that the Court issue an Order preliminarily approving the Stipulation.

IV. The Parties Will Present the Draft Notices to the Court at a Later Date

The Parties have exchanged drafts of documents to effectuate notice to the Class. However, until the Parties specifically determine the manner in which the non-monetary relief relating to sealing and/or expungement of arrest records will be made available, those notices cannot be finalized. Consequently, the Parties respectfully request that this Court reserve to a later date the approval and determination of any additional and appropriate procedures, notices or orders necessary to be adopted by it to effectuate the terms and conditions of the Settlement encompassed in the Stipulation.

CONCLUSION

The Court should preliminarily approve the Stipulation because it is within the range of agreements that are a fair, reasonable and adequate resolution of this Litigation. The Court should schedule a date in late June, 2012 at which to approve the notices to the Class and schedule a fairness hearing.

Dated: May 9, 2012

Respectfully submitted,

By: /s/ Joey L. Mogul

Joey Mogul
John L. Stainthorp
Janine L. Hoft
Sarah Gelsomino
People's Law Office
1180 N. Milwaukee Ave.
Chicago, IL 60642
773 235-0070

James Fennerty
36 S. Wabash Avenue, Suite 1310
Chicago, Illinois 60603
312 422-0708

Melinda Power
West Town Community Law Office
2502 W. Division Street
Chicago, Illinois 60622
773 278-6706

Attorneys for Vodak Plaintiffs