SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

JANE DOE 2, *et al.*	:	
	:	
Plaintiffs,	:	Case No. 2014 CA 8073 B,
	:	Consolidated with
v.	:	Case No. 2015 CA 7814 B
	:	Judge Brian F. Holeman
THE GEORGETOWN SYNAGOGUE - KESHER ISRAEL CONGREGATION, *et al.*,	:	Next Court Date: Sept. 7, 2018
	:	Event: Status Conference
	:	
Defendants.	:	
_____	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' CONSENT MOTION FOR PRELIMINARY APPROVAL OF THE CLASS SETTLEMENT

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I. INTRODUCTION

This civil class action lawsuit arises from the criminal voyeurism of the disgraced Rabbi Bernard Freundel. Over multiple years, Freundel videotaped his female conversion students, female students of universities where he taught, and other women without their knowledge or consent while they undressed at a Jewish ritual bath facility that he oversaw. In the criminal case that ensued, the United States District Attorney's Office for the District of Columbia ("USAO-DC") identified more than 150 women whom Freundel videotaped while they were partially or completely nude. Additionally, there are four religious institutions – the Georgetown Synagogue – Kesher Israel Congregation ("Kesher"), the National Capital Mikvah, Inc. (the "National Capital Mikvah"), the Rabbinical Council of America, Inc., and the Beth Din of the United States of America, Inc. (collectively, the "Institutional Defendants" or "Settling Defendants") – that are alleged to be liable for acts and omissions concerning Freundel.

Class Counsel engaged in efforts to resolve this class action lawsuit with the Institutional Defendants for nearly two years. The negotiations were unusually complex because there are separate sets of plaintiffs who brought separate lawsuits arising from Freundel's conduct, there are multiple institutional defendants each represented by separate counsel, and there is sharp disagreement among the parties and Travelers, the liability insurer for some of the Institutional Defendants, regarding insurance coverage. The Institutional Defendants deny all liability, and the liability insurer denies that the claims against the Institutional Defendants it insured are covered under the insurance policies issued to them. A settlement was achieved only after extensive arm's-length negotiations facilitated by the Honorable Nan Shuker, former Presiding Judge of the Civil Division of the Superior Court of the District of Columbia, serving as mediator.

After these hard fought and protracted negotiations, the Settlement delivers an excellent recovery for the Class – women who were videotaped by Freundel or who otherwise used the National Capital Mikvah. The settlement provides for a non-reversionary payment of $14.25 million. Class Members will receive substantial recoveries: Class Members who were identified as videotaped will receive $25,000 upon the completion of very minimal paperwork, and all Registered Class Members will have the opportunity to recover even larger total payments if they complete a more detailed Claim Form. By contrast, in the absence of this Settlement, Class Members would face substantial uncertainties, costs, and delays associated with further litigation, including extensive motion practice in connection with Defendants' pending motions to dismiss, Plaintiffs' contemplated motion for class certification, Defendants' contemplated motions for summary judgment, and separate litigation concerning the scope of applicable insurance coverage.

Considering the excellent result achieved in this case, and the "long-standing judicial attitude favoring class action settlements," *Vista Healthplan, Inc. v. Warner Holdings Co. III*, 246 F.R.D. 349, 357 (D.D.C. 2007), the Court should preliminarily approve the proposed Settlement in all respects, including certifying the proposed Class for settlement purposes and approving the issuance of the proposed Notice of Class Action Settlement.

II. HISTORY OF LITIGATION AND SETTLEMENT NEGOTIATIONS

This litigation has been ongoing for nearly four years. In December 2014, two sets of plaintiffs filed two separate class actions in D.C. Superior Court arising from Freundel's criminal voyeurism. *See* Case No. 2014 CA 7644 B and Case No. 2014 CA 8073 B. Defendants subsequently removed the cases to federal court. After extensive motion practice concerning whether the cases would proceed in federal court, Plaintiffs succeeded in obtaining an order from the federal district court remanding these cases to D.C. Superior Court. *Doe v. Georgetown*

Synagogue-Kesher Israel Congregation, et al., 118 F. Supp. 3d 88, 98 (D.D.C. 2015). Defendants appealed to the United States Court of Appeals for the D.C. Circuit, which declined the appeal. *See* USCA Case No. 15-8005, Nov. 17, 2015.

Following remand, this Court appointed Sanford Heisler Sharp, LLP as Lead Interim Class Counsel and directed Class Counsel to file a consolidated class action complaint. *See* Omnibus Order, June 14, 2016. The amended complaint asserts class claims on behalf of all females who used the National Capital Mikvah at any time from when it opened in 2005 until Freundel was arrested on October 14, 2014.[1] *See* Am. Compl. ¶ 126. The class claims are for negligent hiring, training, retention, and supervision; negligent infliction of emotional distress; intrusion upon seclusion; breach of warranty; premises liability; and negligence. *See id.* ¶¶ 146-207.

After the class actions were remanded and consolidated in D.C. Superior Court, the *Jane Doe 1* plaintiffs dismissed their class claims from D.C. Superior Court and filed a new individual action in federal court with over two dozen named plaintiffs. *See* Praecipe Submitting Notice of Voluntary Dismissal without Prejudice; *see also Doe v. Georgetown Synagogue-Kesher Israel Congregation*, 1:16-cv-01845-ABJ (D.D.C.). The result was two separate lawsuits – one class action and one individual action – arising from the same course of conduct.

Additionally, after Class Counsel filed the amended class complaint, several Defendants filed motions to dismiss this action that challenged Plaintiffs' very right to bring suit. Defendants Kesher, the National Capital Mikvah, and the Rabbinical Council of America, Inc. asserted that Plaintiffs' claims required judicial encroachment into the doctrine and governance of religious institutions and thus were barred under the First Amendment, among other purported grounds for

[1] The amended complaint also included a subclass of women who used the mikvah in connection with a contemplated conversion to Orthodox Judaism. *See* Am. Compl. ¶ 127. The proposed settlement covers all women included in the proposed classes set forth in the consolidated class action complaint.

dismissal. *See* Motions to Dismiss, Aug. 24, 2016.

Class Counsel embarked on a lengthy settlement process, in hopes of bringing closure to this sensitive and disturbing matter without subjecting Class Members to the uncertainties, costs, and delays of further litigation. Sanford Decl. ¶ 9. The Institutional Defendants and Travelers, as the liability insurer for some of the Institutional Defendants, agreed to participate in mediation with the Honorable Nan Shuker, the former Presiding Judge of the Civil Division of the Superior Court of the District of Columbia, serving as mediator. *Id.* ¶ 12. Also participating in the mediation were the *Jane Doe 1* plaintiffs who had filed the separate individual action in federal district court. *Id.*

There were multiple mediation sessions facilitated by Judge Shuker before an agreement in principle was reached. *Id.* ¶ 14. On March 9, 2017, the parties and Travelers, along with their respective counsel, participated in a full-day mediation with Judge Shuker, but were unable to reach agreement. *Id.* On May 1, 2017, the parties and Travelers, along with their respective counsel, participated in another full-day mediation with Judge Shuker, followed by an all-day meeting facilitated by Judge Shuker on May 2, 2017 between counsel for Plaintiffs in the Superior Court and federal court actions. *Id.* As part of the mediation effort, and in addition to these sessions, the parties and Travelers exchanged multiple written submissions, participated in numerous teleconferences with Judge Shuker, and held additional in-person meetings with her. *Id.* ¶ 15.

Even after the parties and Travelers reached agreement in principle on the terms of the settlement, several months of additional negotiations were needed to finalize all terms of settlement. *Id.* ¶ 16. On August 23, 2018, the final Settlement Agreement and Release was fully executed. *Id.*; *see also id.* Ex. 1 (hereinafter "Settlement" or "Agreement").

III. KEY PROVISIONS OF THE CLASS SETTLEMENT

Under the terms of the proposed Settlement, a non-reversionary fund of $14.25 million (the "Total Settlement Amount") will be created to fund the settlement of all Class Members claims against the Settling Defendants. As further described below, the majority of the Total Settlement Amount will be used to make payments directly to Class Members, with the remainder of the Total Settlement Amount to be used for (a) fees and expenses for the Settlement Administrator and an Independent Claims Expert who will determine Supplemental Payments; (b) Court-awarded attorneys' fees and expenses; and (c) Court-awarded service payments to the plaintiffs who brought and assisted in the litigation against the Settling Defendants. *See* Agreement ¶¶ 4.2, 4.3, 8.1.1-4.

A. Payments to Class Members

The Settlement provides for Class Members to receive substantial monetary payments. Further, the process for recovering payments is structured to enable victims to vindicate their rights while minimizing the potential to aggravate their distress and avoiding unnecessary deterrents to participation in the Settlement by Class Members. Sanford Decl. ¶ 17.

According to the Settlement, Class Members are eligible to receive two types of payments: Base Payments and Supplemental Payments. Agreement ¶¶ 4.2, 4.3. The Base Payments are designed to provide Class Members with substantial monetary payments without requiring them to revisit their traumatic experiences in detail. To receive Base Payments, Class Members need only complete a brief Registration Form that confirms their membership in the Class and provides tax information required by the Internal Revenue Service. *See* Sanford Decl. Ex. 2, Confidential Registration Form. Registered Class Members whom the USAO-DC identified as videotaped will receive Base Payments of $25,000 each, while the other Registered Class Members who disrobed

in the National Capital Mikvah before Freundel's arrest, and attest to their emotional distress after learning of his videotaping, will receive Base Payments of $2,500 each. Agreement ¶ 4.2.

In addition to these Base Payments, each Registered Class Member will be eligible to receive an *additional*, Supplemental Payment if she chooses to complete a Claim Form describing the harm she may have suffered. Agreement ¶ 4.3. To avoid further traumatizing Class Members, the Claim Form was designed with the assistance of Dr. Annie Steinberg, a psychiatrist at the University of Pennsylvania who has extensive experience with abuse cases and the design of survey instruments. Sanford Decl. ¶ 18. To make the Claim Form as easy to answer as possible, the Claim Form provides Class Members with checkboxes to indicate the harms they suffered and does not require Class Members to provide any further narrative. *See* Sanford Decl. Ex. 3, Confidential Claim Form. To minimize the intrusiveness of the inquiry, Class Members are not required to complete any in-person interviews and are permitted to skip questions in the Claim Form that they may be uncomfortable answering. *Id.*

The amount of each Supplemental Payment will be determined based on factors that track harms caused by Freundel's conduct and the betrayals of trust that Class Members experienced, including: the level of emotional distress and physical sickness and/or physical injuries that the Class Member suffered, whether she received any medical diagnoses and/or treatment from any health care provider(s), the extent to which she suffered disruptions to her relationship with her spouse, fiancé, or romantic partner, any disruptions to her professional and social life, any adverse impact on her religious faith and practice, if her conversion to Orthodox Judaism was adversely affected, the duration and/or nature of her relationship with Freundel, whether her use of the Mikvah and/or relationship with Freundel arose from a religious rather than educational setting, the number of times and/or length of time that the Class Member was videotaped by Freundel (to

the extent this information is available), the number of times that she disrobed in the Mikvah, any fees she paid to use the Mikvah, any other aggravating factors (such as the Class Member's status as a minor and any history of abuse), and whether the Class Member participated in the criminal action against Freundel. Agreement ¶ 4.3.2. Supplemental Payment amounts will be determined by an Independent Claims Expert. *Id.* Based on the substantial expertise of Dr. Steinberg, Class Counsel proposes that she serve in this role. *See* Sanford Decl. ¶ 20; *see also id.* Ex. 6.

A Reserve Fund of $300,000 will be set aside from the Total Settlement Amount to provide Base Payments and/or Supplemental Payments to Class Members who do not submit Registration Forms or Claim Forms by the submission deadlines due to extraordinary circumstances. Agreement ¶ 4.5. If the Reserve Fund has not been disbursed within a year after all of the Base Payments and Supplemental Payments have been paid, the Settlement provides for the Reserve Fund to be distributed as follows: (1) if the Reserve Fund still contains $25,000 or more, the uncashed funds shall be used to make a second distribution, on *pro rata* basis, to the Class Members who received Supplemental Payments, or (2) if the Reserve Fund contains less than $25,000, then half of the uncashed funds shall be paid to the Jewish Social Services Agency as a *cy pres* beneficiary and half of the uncashed funds shall be paid to Network for Victim Recovery of D.C. as a *cy pres* beneficiary. *Id.* Under no circumstances will any of the funds from the Settlement revert to the Defendants or to their liability insurer. *Id.* ¶ 8.1.5.

B. Terms of the Release

As part of the Settlement, Class Members will release the Settling Defendants and Travelers, and each of their respective past, present and future directors, officers, insurers or reinsurers (as applicable), subsidiaries, affiliates and corporate parent (as applicable), employees, attorneys, accountants, agents, and trustees, from any and all claims arising from, related to, or

based upon the conduct of Freundel from July 1, 2005, through October 14, 2014, including, but not limited to, his conduct in the Mikvah and/or in videotaping elsewhere during this period. Agreement ¶ 5.1. The Released Parties include Freundel, and the action against Freundel will be dismissed following the Effective Date. *Id.* ¶ 5.3.

IV. THE COURT SHOULD CERTIFY THE PROPOSED CLASS FOR SETTLEMENT PURPOSES

In this Settlement, the Class to be certified for settlement purposes consists of all females whom the USAO-DC has identified as having been videotaped by Freundel during the Settlement Period and/or who otherwise disrobed, either partially or completely, in the National Capital Mikvah's ritual bath and/or associated facilities (including the anteroom, changing rooms, showers, and/or bathroom) at any time from July 1, 2005 (when the National Capital Mikvah opened) through October 14, 2014 (when Freundel was arrested). Agreement ¶ 3.5 (defining the "Class"); *id.* ¶ 3.13 (defining "Use of the Mikvah"); *id.* ¶ 3.20 (defining the "Settlement Period").

Class certification for settlement purposes "has become increasingly common," *In re APA Assessment Fee Litig.*, 311 F.R.D. 8, 13 (D.D.C. 2015), so much so that "[c]lasses certified for settlement purposes only are a hallmark of class action litigation." *Alvarez v. Keystone Plus Constr. Corp.*, 303 F.R.D. 152, 159 (D.D.C. 2014).

The Court may certify a class for settlement purposes if the proposed class meets the requirements for class certification under Rule 23. *See Anchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997).[2] Specifically, in the District of Columbia, a proposed class must satisfy the

[2] "Because Superior Court Civil Rule 23 is derived from the same numbered Rule in the Federal Rules of Civil Procedure, . . . [D.C. courts] construe it 'in light of the meaning of that federal rule.'" *Ford v. Chartone, Inc.*, 908 A.2d 72, 85 n.14 (D.C. 2006) (citing *Taylor v. Washington Hosp. Ctr.*, 407 A.2d 585, 590 n. 4 (D.C. 1979)). "When a federal rule and a local rule contain the same language," this Court "will look to federal court decisions interpreting the federal rule as persuasive authority in interpreting the local rule." *Oparaugo v. Watts*, 884 A.2d 63, 69 n.1 (D.C. 2005) (citations omitted).

factors of D.C. Super. Ct. R. Civ. P. 23(a) and one of the factors set forth in D.C. Super. Ct. R. Civ. P. 23(b). These requirements are addressed in turn.

A. The Requirements of Rule 23(a) are Satisfied

Under Rule 23(a), members of a class may sue as representative parties on behalf of all members of the class where: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. D.C. Super. Ct. R. Civ. P. 23(a). As detailed below, each of these requirements is satisfied here.

i. Numerosity is Satisfied

Numerosity is satisfied where plaintiffs "demonstrate Rule 23(a)(1)'s core requirement that joinder is impracticable. Demonstrating impracticability of joinder does not mandate that joinder of all parties be impossible—only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate." *DL v. D.C.*, 302 F.R.D. 1, 11 (D.D.C. 2013), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017) (citations omitted).

"Absent unique circumstances, numerosity is satisfied when a proposed class has at least forty members." *Coleman through Bunn v. D.C.*, 306 F.R.D. 68, 76 (D.D.C. 2015) (citation omitted). In considering the number of potential class members, the Court does not need to identify "an exact number of putative class members." *Pigford v. Glickman*, 182 F.R.D. 341, 347 (D.D.C. 1998). Rather, a plaintiff may provide some evidentiary basis of the existence of numerous class members, and the Court may "draw reasonable inferences from the facts presented to find the requisite numerosity." *Coleman*, 306 F.R.D. at 76 (citations omitted).

Here, the requirement of numerosity is easily satisfied. The proposed Class includes all women whom the USAO-DC identified as having been videotaped by Freundel, as well as all other women who disrobed, partially or completely, in the National Capital Mikvah from July 1, 2005 to October 14, 2014. Agreement ¶ 3.5. Because the USAO-DC has confirmed Freundel videotaped over 150 women, the proposed Class far surpasses the threshold for numerosity. *See* Case No. 2014-CMD-18262, United States' Memorandum in Aid of Sentencing.

ii. Commonality is Satisfied

The second requirement under Rule 23(a) is commonality. "The touchstone of the commonalty inquiry is 'the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.'" *Coleman*, 306 F.R.D. at 82 (citation omitted). The requirement is satisfied if plaintiffs' claims "depend upon a common contention . . . capable of classwide resolution[.]" *Little v. Washington Metro. Area Transit Auth.*, 249 F. Supp. 3d 394, 418 (D.D.C. 2017) (citation omitted). Not every issue of law or fact must be the same for each class member, however. *See Thorpe v. D.C.*, 303 F.R.D. 120, 145 (D.D.C. 2014) ("Even a single common question will do"). "Ultimately, when the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected." *Howard v. Liquidity Servs. Inc.*, 322 F.R.D. 103, 118 (D.D.C. 2017) (citation omitted).

In this action, there are numerous questions common to the class, and answering each question "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Little*, 249 F. Supp. 3d at 418 (citation omitted). These common questions include: (a) whether Freundel videotaped females without their consent in the changing areas of the National Capital Mikvah and, if so, for how long and with what frequency he did he do so; (b) whether Freundel

was acting as the agent, servant, and/or employee of any of the Institutional Defendants within the course and scope of his employment and/or agency; (c) whether the Institutional Defendants knew or should have known of Freundel's misconduct; (d) whether Class Members have a reasonable fear of having been videotaped by Freundel; (e) the nature of the privacy violation that Class Members have suffered, which is the cause of their damages; and (f) whether Class Members can recover damages for the acts above. Am. Compl. ¶ 133. This satisfies Rule 23(a)(2).

iii. Typicality is Satisfied

The third requirement under Rule 23(a) is typicality. This calls for "sufficient factual and legal similarity between the class representative's claims and those of the class to ensure that the representative's interests are in fact aligned with those of the absent class members." *In re Navy Chaplaincy*, 306 F.R.D. 33, 53 (D.D.C. 2014) (quoting William B. Rubenstein, Newberg on Class Actions § 3:31 (5th ed. 2013)); *see also Bynum v. D.C.*, 214 F.R.D. 27, 34 (D.D.C. 2003).

"Most importantly, 'the named plaintiffs' injuries [must] arise from the same course of conduct that gives rise to the other class members' claims." *Moore v. Napolitano*, 269 F.R.D. 21, 32 (D.D.C. 2010) (citation omitted; alteration in the original). Notably, typicality "is not destroyed merely by factual variations." *Howard*, 322 F.R.D. at 118–19 (citing *Wagner v. Taylor*, 836 F.2d 578, 591 (D.C. Cir. 1987)); *see also Greenberg v. Colvin*, 63 F. Supp. 3d 37, 44 (D.D.C. 2014) ("The fact that Plaintiff and the putative class members may have different damage amounts does not preclude a finding of typicality.").

Here, the Class Representatives assert claims that are typical of those of the other Class Members. Specifically, the Class Representatives allege that they disrobed, showered, and immersed themselves in the ritual bath in the National Capital Mikvah facility, were videotaped and/or photographed by Freundel there, and experienced serious emotional distress upon learning

of Freundel's conduct. Am. Compl. ¶¶ 64-65, 67-68, 70-71. Because the injuries allegedly suffered by Class Members all arise from this same course of conduct, typicality is satisfied.

iv. Adequacy of Representation is Satisfied

The last requirement in Rule 23(a) concerns adequacy of representation. Adequacy is satisfied when: "(1) there is no conflict of interest between the legal interests of the named plaintiff and those of the proposed class; and (2) counsel for the class is competent to represent the class." *Greenberg*, 63 F. Supp. 3d at 45. Adequacy "is not a stringent requirement, as a conflict must be fundamental and go to the heart of the litigation in order to preclude certification." *Hoyte v. D.C.*, 325 F.R.D. 485 (D.D.C. 2017) (citations omitted).

Here, there are no conflicts between the Class Representatives and the Class. Instead, the Class Representatives have actively and intensively pursued this case and negotiated its resolution on behalf of the Class. During the litigation and negotiations, the Class Representatives have represented the interests of all Class Members who used the Mikvah and may have been videotaped by Freundel. The Class Representatives have spent significant time assisting counsel, including providing information about Freundel and the National Capital Mikvah and consulting with counsel concerning the Settlement. Sanford Decl. ¶ 24.

Further, Class Counsel is highly experienced and well-versed in complex class litigation. Sanford Heisler Sharp, LLP has served as lead counsel in more than 50 class actions and collective actions around the country. *See* Joint Decl. of Pls.' Counsel [David Sanford and Jeremy Heisler] in Supp. of Mot. for Appointment as Interim Co-Class Counsel. When appointing Sanford Heisler Sharp as Lead Interim Class Counsel for this litigation, the Court found that "[Sanford Heisler Sharp] possesses the understanding, knowledge, experience, and capability to perform the required work on behalf of the putative class Plaintiffs. The Court is also satisfied that [Sanford Heisler

Sharp] is able and willing to expend the resources necessary to represent the interests of the putative class Plaintiffs." Omnibus Order, June 14, 2016. Courts across the country have recognized the firm's experience in complex class action litigation and its skilled and effective representation. *See, e.g.*, *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194 (CM), 2010 WL 4877852, at *10 (S.D.N.Y. Nov. 30, 2010) (recognizing Sanford Heisler Sharp as having "just the sort of established record contemplated by the Rules."); *Zolkos v. Scriptfleet, Inc.*, No. 12 CIV. 8230 GF, 2014 WL 7011819, at *5 (N.D. Ill. Dec. 12, 2014) ("Sanford Heisler is very experienced in complex class and collective litigation . . . and has been repeatedly recognized for its skilled and effective representation"); *Bellifemine v. Sanofi–Aventis*, No. 07 Civ. 2207, 2010 WL 3119374, at *1 (S.D.N.Y. Aug. 6, 2010) (recognizing Sanford Heisler Sharp as having "'an established record of 'competent and successful prosecution of large . . . class actions'"") (citation omitted; alteration in original).

In sum, there are no conflicts between Class Representatives and the proposed Class, and Class Counsel are "experienced civil rights class action litigators who have participated in multiple class actions, [and] are capable of representing the interests of the class in a satisfactory manner." *See Johnson v. D.C.*, 248 F.R.D. 46, 54 (D.D.C. 2008). Thus, adequacy is satisfied.

B. Certification under Rule 23(b)(1) is Appropriate

According to D.C. Superior Court Rule of Civil Procedure 23(b)(1)(B), which mirrors Federal Rule of Civil Procedure 23(b)(1)(B), an action may be maintained as a class action when "the prosecution of separate actions by or against individual members of the class would create a risk of . . . adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[.]"

Historically, class actions have been certified under Rule 23(b)(1)(B) where there are "limited funds" available to satisfy the class claims. "The basic concept of a 'limited fund' settlement is that there is a definite, limited amount of capital that is available to class members, and that such a f[u]nd is insufficient to cover all claims." *Stott v. Capital Fin. Servs.*, 277 F.R.D. 316, 326 (N.D. Tex. 2011). A limited fund class action is preferable where having class members individually litigate their claims would deplete the fund's resources and diminish the eventual recovery of other class members. Proceeding as a limited fund class action settlement avoids a race to judgment among class members and ensures that all class members receive "an equitable, pro rata distribution" of the fund. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841 (1999).

It is well established that "[t]he traditional 'limited fund' situation typically involved multiple claims to a single, tangible fund, such as a[n] . . . insurance policy." *Stott*, 277 F.R.D. at 326 (holding that the remaining insurance assets were "a proper amount set at its maximum for purposes of the first Ortiz factor."); *see also Worsham v Americor Lending Group, Inc.*, No. 259191-V, 2008 WL 5325400 (Md. Cir. Ct. July 08, 2008) ("The typical case is where there is a limited fund, such as an insurance policy[.]").

Certification of a limited-fund class action is appropriate when three factors are met: (1) "the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims"; (2) "the whole of the inadequate fund" is dedicated "to the overwhelming claims"; and (3) all claimants to the fund who are "identified by a common theory of recovery" are treated equitably. *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 16-17 (D.D.C. 2011) (quoting *Ortiz*, 527 U.S. at 838-839). As discussed further below, each of these factors is satisfied here.

i. The Available Funds Are Inadequate to Pay All Claims

In this litigation, the Settling Defendants are religious institutions whose assets are limited, illiquid, and integral to their ability to continue their operations.[3] Those assets do not need to be devoted to the settlement, as the operational capacity of a defendant may be preserved in a Rule 23(b)(1)(B) certification. *Stott*, 277 F.R.D. at 331 (holding that "the fact that [Defendant] will maintain limited assets to continue operations does not preclude the Court from approving this settlement"); *see also Williams v. Nat'l Sec. Ins. Co.*, 237 F.R.D. 685 (M.D. Ala. 2006).

Accordingly, for the purposes of resolving this case, the Institutional Defendants' available assets consist of the proceeds, if any, from the liability insurance policies that certain of them maintained. Insurance coverage for the claims asserted against Defendants Kesher, the National Capital Mikvah, and the Beth Din of the United States of America, Inc. has been a sharply disputed issue. Travelers disputes that this lawsuit triggers any coverage under the insurance policies, claiming among other things that the injuries suffered here fall outside the policy definitions, are the subject of exclusions, and in any event do not trigger multiple years of insurance coverage. Sanford Decl. ¶ 10. Resolution of these coverage issues through litigation rather than compromise would have involved considerable time and expense and presented a risk to the Class Members of non-recovery of any judgment they may have obtained in the liability case. The compromise reached on the insurance coverage dispute – a Total Settlement Amount of $14.25 million – was the result of protracted multi-lateral negotiations.

[3] The only significant assets that the Institutional Defendants identified having ownership of are parcels of real property owned by Kesher that it maintains are essential to continue the operations of Kesher and the National Capital Mikvah. These properties are a historic synagogue building, a parsonage, and the building that houses the National Capital Mikvah. Based on this, it expected that without these properties, Kesher may well cease to exist as a congregation and the National Capital Mikvah would cease to exist as a ritual bath facility. Sanford Decl. ¶ 13.

The limited assets of the Institutional Defendants are insufficient to satisfy their potential exposure in this action. Because Class Members may recover only to the extent that the insurance policies allow, "every award made to one claimant [will] reduce[] the amount of funds available to other claimants until, in the absence of equitable management of the fund, some claimants [will] obtain full satisfaction of their claims, while others [will be] left with no recovery at all." *In re Black Farmers Discrimination Litig.*, 856 F. Supp. at 16. Thus, absent class certification, individual litigants could deplete the entire fund before other Class Members have their day in court. Accordingly, the first factor for a Rule 23(b)(1)(B) certification has been established.

ii. The Whole of the Inadequate Fund Is Dedicated to Claims

Here, "the whole of the inadequate fund" is dedicated "to the overwhelming claims." *In re Black Farmers Discrimination Litig.*, 856 F. Supp. at 16-17. Certification in this case would ensure that "the class as a whole was given the best deal; they did not give a defendant a better deal than *seriatim* litigation would have produced." *Ortiz*, 527 U.S. at 839. As explained above, "[i]t is clear that the whole of the settlement fund will be devoted to paying claimants. Should the Court approve the settlement, the [$14.25] million fund, minus costs and attorneys' fees, will be distributed to all class members who have claims." *See Stott*, 277 F.R.D. at 327–28. The Settlement does not allow the Settling Defendants to retain any insurance proceeds, nor are they getting a "better deal" by resolving these claims on a classwide basis – regardless of whether these claims are resolved individually or collectively, the Settling Defendants will rely on their insurance policies to cover any liability. Factor two is therefore satisfied.

iii. Claimants to the Fund Are Treated Equitably

Finally, through equitable distribution of the fund, all "similarly situated plaintiffs will ultimately receive the same awards, thus satisfying the requirement that all claimants to the fund

who are 'identified by a common theory of recovery [will be] treated equitably among themselves.'" *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d at 19 (quoting *Ortiz*, 527 U.S. at 839). All Class Members "state a claim on a single or repeated set of facts, invoking a common theory of recovery . . . and every prevailing plaintiff will be paid out of the limited fund[.]" *Id*. Specifically, all Registered Class Members who were videotaped will receive a Base Payment of $25,000, and all Registered Class Members who used the Mikvah and experienced emotional distress but cannot confirm that they were videotaped will receive a Base Payment of $2,500. Additionally, there is a clearly defined process for obtaining additional recovery that applies uniformly to all Class Members, who will be eligible to receive Supplemental Payments based on enumerated criteria. *See* discussion *supra* Part III(A). Therefore, "an equitable, pro rata distribution" of the fund will ensure all Class Members are treated fairly, which satisfies the final requirement for certification as a (b)(1)(B) limited fund class action. *Ortiz*, 527 U.S. at 841.

In summary, because the circumstances here satisfy all the required elements, the Court should certify this class under Rule 23(b)(1)(B).

V. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE PRELIMINARILY APPROVED

Public policy in the District of Columbia favors the settlement of class actions. *See, e.g.*, *Freeport Partners, L.L.C. v. Allbritton*, No. CIV.A. 04-2030, 2006 WL 627140, at *8 (D.D.C. Mar. 13, 2006) (citing *Mayfield v. Barr*, 985 F.2d 1090, 1092 (D.C. Cir. 1993)) (courts have an "interest in encouraging settlements, particularly in class actions, which are often complex, drawn out proceedings demanding a large share of finite judicial resources.").

The Court may approve a proposed settlement for a certified class "after a hearing and on finding that it is fair, reasonable, and adequate." D.C. Super. Ct. R. Civ. P. 23(e)(2). Courts considering a motion for preliminary approval of a class settlement agreement "typically 'consider

(1) whether the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, (2) whether it falls within the range of possible judicial approval, and (3) whether it has any obvious deficiencies, such as granting unduly preferential treatment.'" *Ross v. Lockheed Martin Corp.*, 267 F. Supp. 3d 174, 194 (D.D.C. 2017) (citing *Richardson v. L'Oreal USA, Inc*., 951 F.Supp.2d 104, 106-07 (D.D.C. 2013)).

Approval of a proposed settlement to a class action is at the discretion of the Court, *see id*., but "there is a long-standing judicial attitude favoring class action settlements, and the Court's discretion is constrained by the principle of preference favoring and encouraging settlement in appropriate cases." *Alvarez v. Keystone Plus Constr. Corp.*, 303 F.R.D. 152, 160 (D.D.C. 2014) (citation omitted). Here, each factor illustrates that the proposed Settlement is fair, reasonable, and adequate. Thus, the Court should approve Plaintiffs' Consent Motion for Preliminary Approval of the Class Settlement.

A. The Settlement is the Product of Extensive, 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." *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d 100, 104 (D.D.C. 2004) (citation omitted). Here, after detailed information regarding Freundel's conduct became publicly known, there were extensive arm's-length negotiations between multiple sets of plaintiffs, multiple defendants, and an insurance carrier before this Settlement was reached.

As discussed above, the parties retained the services of the Honorable Nan R. Shuker, drafted and exchanged multiple mediation submissions addressing legal and insurance issues, participated in numerous teleconferences with Judge Shuker, and engaged in multiple mediation sessions (with some involving defendants only, some involving plaintiffs only, and others

involving all parties and the insurance carrier). Sanford Decl. ¶ 14. Throughout the litigation and mediation, the parties to the Settlement were all represented by their own experienced and capable counsel. *Id.* ¶ 11. It took multiple mediation sessions over nearly six months before Plaintiffs and the Settling Defendant reached an agreement in principle, and nearly an additional year to reach a compromise on the insurance coverage issues. *Id.* ¶ 10.

After these protracted negotiations, the parties and Travelers agreed to a non-reversionary settlement of $14.25 million. But even after this agreement in principle was reached, additional months of arm's-lengths negotiations between and among the parties and Travelers were required to finalize all the Settlement terms. *Id.* ¶ 16. Because "the litigation history between these parties as to these claims is substantial, and has allowed time for meaningful arm's-length negotiations," there is no reason to suspect that the settlement is the product of collusion or misinformation. *Richardson*, 951 F. Supp. 2d at 107 (finding a settlement reached after significant investigation, multiple mediations, and extensive settlement discussions to be the product of serious, informed, and non-collusive negotiations). The ongoing involvement of Judge Shuker as mediator, laboring to bring the adverse parties together, is evidence of an absence of collusion.

"Because there is nothing in the course of the negotiations or the face of the Settlement that discloses grounds to doubt its fairness," the Court should grant the Motion for Preliminary Approval. *See Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 5 (D.D.C. 2008) (citation omitted).

B. The Settlement Falls Within the Range of Possible Judicial Approval

On a motion for preliminary approval, courts consider whether the proposed settlement falls within the "range of possible judicial approval." *Richardson*, 951 F. Supp. 2d at 107. The key consideration is "the relief provided in the proposed settlement against the relative strength of plaintiffs' case, including their ability to obtain recovery at trial." *Prince v. Aramark Corp.*, No.

16-CV-1477 (CKK), 2017 WL 9471949, at *5 (D.D.C. Mar. 14, 2017) (citation omitted). The court may consider "the likely length and complexity of this litigation, and the inherent risk of trial, any recovery would have come at great expense to the class, if at all." *Freeport Partners, L.L.C. v. Allbritton*, 2006 WL 627140, at *11.

Absent the Settlement reached in this case, Plaintiffs would be required to undertake extensive motion practice in connection with the Settling Defendants' pending motions to dismiss, the Class Representatives' contemplated motion for class certification, and Defendants' contemplated motions for summary judgment, which if unsuccessful would be followed by trial and appellate proceedings brought by the losing side – all in addition to a separate litigation concerning the scope of available insurance coverage (if any). While Plaintiffs expect to prevail, each of these stages of litigation presents risks, uncertainties, and costs.

If the Institutional Defendants prevailed on their Motions to Dismiss, defeated class certification, or won summary judgment, Class Members would have zero recovery against them. Even if Plaintiffs prevailed throughout a long course of litigation and established class-wide liability, the damages would be sharply disputed. Cases involving damages due to emotional distress have returned widely varying verdicts and are especially hard to predict. *See, e.g.*, *Thorsen v. Cty. of Nassau*, 722 F. Supp. 2d 277, 293 (E.D.N.Y. 2010) (recognizing the "wide range of emotional distress awards"); *In re Air Crash Disaster at Charlotte, N.C. on July 2, 1994*, 982 F. Supp. 1115, 1129 (D.S.C. 1997) ("damages for emotional distress are perhaps the most difficult damages to quantify"); *Briski v. Hersey*, No. C 17-02675 WHA, 2017 WL 4418866, at *4 (N.D. Cal. Oct. 5, 2017) ("awards for emotional damages [can] span a wide range"); *Monthei v. Morton Buildings, Inc.*, No. 4:01-CV-30510, 2003 WL 21212641, at *10 (S.D. Iowa Mar. 26, 2003) ("the case law can be plumbed to find a wide range of emotional distress verdicts").

While the range of possible awards cannot be determined with certainty, this Settlement compares extremely favorably to the settlement recently approved in the similar case of *Doe v. The Johns Hopkins Hosp.*, No. 24C13001041, 2014 WL 4147208, at *1 (Md. Cir. Ct. 2014). Both cases involve criminal voyeurism by a trusted authority figure – this case involves a rabbi videotaping nude women in a ritual bath, the Johns Hopkins case involved a gynecologist who took sexually explicit photos and videos of his patients in his exam room. Both cases involved tortious conduct in the greater Washington, D.C. metropolitan area. Both cases were brought against non-profit defendants – this case involves religious institutions, and that case involved a university. But in the Johns Hopkins case, class members received payments ranging from a minimum of $1,750 to a *maximum* of $26,048.[4] Here, by contrast, Registered Class Members will receive a *minimum* of $2,500 (for non-videotaped Class Members) or a *minimum* of $25,000 (for videotaped Class Members). Agreement ¶ 4.2. Class Members can receive significantly more by completing a simple Claim Form, without the need for a personal interview. Agreement ¶ 4.2; Sanford Decl. Ex. 3, Confidential Claim Form. This is an excellent result for the Class.

If this case were to proceed in litigation, Defendants will likely continue their motions to dismiss, fight against class certification, aggressively defend the case at trial, and appeal any positive outcome of trial. And even if the Class Members were to prevail on liability, there remains the prospect of prolonged litigation of the insurance coverage issues, including any appeal in that litigation. "[T]his settlement enables Plaintiffs to avoid the burden, expense and delay of litigation," *Prince*, 2017 WL 9471949, at *5, as well as secure a meaningful, guaranteed recovery

[4] *See* Balingit, Moriah, *A gynecologist secretly photographed patients. What's their pain worth?,* WASHINGTON POST, Jan. 14, 2017, https://www.washingtonpost.com/local/education/a-gynecologist-secretly-photographed-patients-whats-their-pain-worth/2017/01/14/35bcf156-d45e-11e6-a783-cd3fa950f2fd_story.html?utm_term=.6e659ab81eec.

for *all* Registered Class Members. Thus, the Settlement is squarely within the range of possible judicial approval.

C. The Settlement Has No Obvious Deficiencies and Does Not Grant Unduly Preferential Treatment

The Settlement has no "obvious deficiencies" and does not grant unduly preferential treatment. The Settlement contemplates service payments to the plaintiffs who brought litigation against the Settling Defendants, as well as attorneys' fees and expenses, but the Court need not rule on these awards now. Plaintiffs will move for approval of these awards with their motion for final approval of the Settlement, after Class Members have an opportunity to assert any objections.

Service Payments. Plaintiffs' Counsel will seek service payments of between $2,500 and $25,000 for each of the plaintiffs who brought litigation against the Settling Defendants. Agreement ¶ 8.1.4. These Service Payments amount to less than 1.3% of the entire Settlement fund and do not undermine the fairness of the proposed Settlement.

Service payments of this type are commonly awarded to the named plaintiffs and class members who actively assisted in prosecuting a class case. *See In re Lorazepam & Clorazepate Antitrust Litig.*, No. 99MS276(TFH), 2003 WL 22037741, at *11 (D.D.C. June 16, 2003) ("In this case, the additional payments to the named Plaintiffs are reasonable in light of their investments of time, money, and effort on the part of the class.") (citation omitted); *see also Little v. Wash. Metro. Area Transit Auth.*, Civil No. 14–1289, 2018 WL 1997257 at *4 (D.D.C., April 27, 2018) ("It is common for courts to approve incentive awards in class-action litigations, especially when there is a common fund created to benefit the entire class.").

Here, the Plaintiffs joined this case early on and expended significant time and effort to the benefit of the Class. They have helped to plan and organize the litigation to the benefit of their fellow Class Members. Sanford Decl. ¶ 23. Choosing to involve oneself in litigation is a daunting

decision, magnified here by the highly emotional nature of this case. Through their pursuit of this litigation, the plaintiffs have achieved an incredible result for all Class Members – many of whom, without this litigation and resulting Settlement Agreement, would have recovered nothing. In granting service awards, Courts in this circuit consider "the degree to which the class benefitted" from the plaintiffs' actions. *Little*, 2018 WL 1997257 at *4. The benefit is substantial for Class Members in this case. The Court should therefore award service payments in this action.

Attorneys' Fees and Costs. Likewise, the contemplated attorneys' fees and costs do not undermine the fairness of the proposed Settlement. Multiple law firms brought claims and litigation against the Settling Defendants; the firms involved in the negotiations that resulted in this Settlement are Lead Interim Class Counsel Sanford Heisler Sharp, LLP, as well as Chaikin, Sherman, Cammarata & Siegel, P.C.; Silverman, Thompson, Slutkin & White, LLC; and the Cochran Firm (collectively, "Plaintiffs' Counsel"). Sanford Decl. ¶ 11. Plaintiffs' Counsel will request that the Court award attorneys' fees in a *combined* amount equal to up to one-third of the Total Settlement Amount, to reimburse counsel for the time spent investigating, litigating, and settling this matter, as well as the anticipated time spent overseeing the settlement of this matter. Agreement ¶ 8.1.3. In addition, Plaintiffs' Counsel will request reimbursement of the out-of-pocket costs that they have incurred, including costs for the mediator, for coverage counsel, and for expert consultations concerning the Claim Form. *See* Sanford Decl. ¶ 22.

"Courts have recognized that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d 14, 16 (D.D.C. 2003) (citation omitted). A percentage-of-the-fund method, as proposed in the Settlement Agreement, "is the appropriate mechanism for determining the attorney fees award in common fund cases." *Swedish*

Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271 (D.C. Cir. 1993); *see also In re First Databank Antitrust Litig.*, 209 F.Supp.2d 96, 98 n.4 (D.D.C. 2002) ("Class counsel in common fund cases are also entitled to reasonable litigation expenses from that fund.").

Courts have approved attorneys' fee awards within close range of the one-third award contemplated in the Settlement. *See, e.g.*, *Bynum v. D.C.*, 412 F. Supp. 2d 73, 81 (D.D.C. 2006) (awarding Class Counsel 33% of the $12,000,000 settlement fund*); Stephens v. US Airways Grp., Inc.*, 102 F. Supp. 3d 222, 230 (D.D.C. 2015) (granting Class Counsel's requested fee award of 38% of the total settlement); *Wells*, 557 F. Supp. 2d at 7 (awarding a fee award amounting to 45% of the total recovery); *In re Lorazepam*, 2003 WL 22037741 at *9 (awarding Class Counsel 30% of the settlement amount and listing cases with awards of 30%-33% of the settlement). The percentage of the fund proposed in the Settlement Agreement is appropriate "because this class action was vigorously litigated for a protracted period of time, raised novel and complex issues, involved a substantial risk of absolute non-payment, and demonstrated the quality of Class Counsel's reputation." *See In re Lorazepam*, 2003 WL 22037741 at *9.

VI. THE PROPOSED FORM AND METHOD OF NOTICE SHOULD BE APPROVED

In connection with a proposed class action settlement, "[t]he court must direct to class members notice in a reasonable manner to all class members who would be bound by the proposal." *See* D.C. Super. Ct. R. Civ. P. 23(e)(1). The widespread distribution of Notice contemplated in the Settlement Agreement, and the form reflected in Exhibits 4 and 5 of the Sanford Declaration, comply in all respects with the requirements of D.C. Super. Ct. R. Civ. P. 23 and should be approved.

First, the Notice will be widely disseminated to reach Class Members. *See generally* Agreement ¶ 6.3. Class Counsel has requested that the USAO-DC directly send the Notice to

individuals they identified as having been videotaped by Freundel. To reach other potential Class Members, the respective Settling Defendants will provide the Settlement Administrator with a list of all female members of Kesher, a list of all identifiable donors to the National Capital Mikvah, and a list of all females who converted to Orthodox Judaism under Freundel's authority during the Settlement Period. Additionally, Class Counsel will distribute the Notice to non-profits in the D.C. area that provide victim support services, and the Short-Form Notice will be published in multiple publications in the United States and Israel, including the *Washington Post*, the *Washington Jewish Week*, the *Baltimore Jewish Times*, the *Jewish Week*, the *Forward*, *Kol HaBirah*, *Haaretz*, and the *Jerusalem Post*. *Id.* ¶¶ 6.3.1-3.

Second, the Notice provides Class Members with a clear, comprehensive, and easy to understand description of the proposed Class covered by the Settlement; an overview of the proposed Settlement, including descriptions of each Class Member's potential monetary recovery, the procedure and deadlines for submitting the paperwork required to obtain Base Payments and Supplemental Payments, and the scope of the release; disclosure of Plaintiffs' Counsel anticipated request for an award of attorneys' fees and costs; an explanation of the procedure and deadline for filing objections to the Settlement; and an announcement of the time and location of the final approval hearing. Sanford Decl. Ex. 4 and 5. Accordingly, the detailed information in the Notice is more than adequate to put Class Members on notice of the proposed Settlement and satisfies D.C. Super. Ct. R. Civ. P. 23(e)(1).

VII. CONCLUSION

For the foregoing reasons, the Court should preliminarily certify the settlement Class, grant preliminary approval of the Settlement Agreement and Release, and enter the proposed Order submitted in connection with this Motion.

Dated: August 27, 2018

Respectfully Submitted,

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