SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

JANE DOE 2, *et al.*,	:	
	:	
Plaintiffs,	:	**Case No. 2014 CA 7644 B**
	:	**Case No. 2014 CA 8073 B**
v.	:	**Case No. 2015 CA 7814 B**
	:	**Calendar 12**
THE GEORGETOWN SYNAGOGUE - KESHER ISRAEL CONGREGATION, *et al.*,	:	**Judge Brian F. Holeman**
	:	
Defendants.	:	

ORDER

This matter comes before the Court upon consideration of Plaintiffs' Consent Motion for Preliminary Approval of the Class Settlement, filed on August 27, 2018, and upon the Court's review of exhibits annexed to this Motion, including the Settlement Agreement and Release ("Settlement" or "Agreement") and proposed Notice, as well as the pleadings, other court filings, and court proceedings in this case to date, including the Hearing on the instant Motion convened on September 7, 2018. This Order is intended to support and memorialize the ruling of this Court from the bench on that date, granting the instant Motion.

I. FACTUAL BACKGROUND

These consolidated class actions and one severed civil action are on remand from the United States District Court for the District of Columbia. From the Memorandum Opinion dated July 24, 2015, issued by the District Court:

> For twenty-five years, Bernard Freundel was the sole rabbi for Kesher Israel Congregation, an Orthodox Jewish Synagogue in Washington, D.C. During his tenure, Mr. Freundel advocated for the construction of a nearby mikvah—a Jewish ritual bath most frequently used by married Orthodox women as well as by women undergoing the process of converting to Judaism—and served as its supervising rabbi after it opened in 2005.

> Earlier this year, Freundel pled guilty, in a District of Columbia criminal proceeding, to illicitly filming numerous women as they used the mikvah. Two sets of Freundel's victims have brought class action lawsuits for negligence and vicarious liability against the synagogue, the mikvah, and the Rabbinical Council of North America—a professional organization for Orthodox rabbis in which Freundel held leadership positions—for allegedly failing to prevent his crimes.

II. PROCEDURAL HISTORY

On December 2, 2014, Plaintiffs constituting the *Jane Doe 1* putative class filed the Complaint initiating Case No. 2014 CA 007644 B. On December 18, 2014, Plaintiffs constituting the *Jane Doe 2* putative class filed the Class Action Complaint initiating Case No. 2014 CA 008073 B. On December 18, 2014, the *Jane Doe 1* Plaintiffs filed the Amended Complaint. On January 8, 2015, Defendants filed the Notice of Removal in Case Nos. 2014 CA 007644 B and 2014 CA 008073 B. On March 30, 2015, the District Court severed the claims asserted against Defendant The Georgetown University in Case No. 2014 CA 007644 B and remanded the severed action to the Superior Court of the District of Columbia (the "Superior Court"). On June 25, 2015, Plaintiff Jane Doe filed the Second Amended Complaint in the severed action.

On June 29, 2015, Defendant The Georgetown University filed the Motion to Dismiss. On August 21, 2015, the Court convened the Status Hearing and issued an oral ruling granting The Georgetown University's Motion to Dismiss in part, dismissing the claim of direct negligence asserted against Defendant The Georgetown University.

On July 24, 2015, the District Court entered the Memorandum Opinion and remanded all related putative class actions to the Superior Court.

On September 22, 2015, in Case No. 2014 CA 008073 B, Defendant Georgetown Synagogue-Kesher Israel Congregation (the "Synagogue") filed the Motion to Stay Proceedings. On October 13, 2015, the *Jane Doe 2* Plaintiffs filed the Amended Class Action Complaint in

Case No. 2014 CA 008073 B. On October 14, 2015, the Court entered the Order granting the Synagogue's Motion to Stay Proceedings and entered a stay pending final adjudication of all pending interlocutory appeals.

On October 9, 2015, Plaintiffs constituting the *Jane Doe 3* putative class filed the Class Action Complaint initiating Case No. 2015 CA 007814 B.

On December 22, 2015, Defendants filed the Partial Consent Motion for Consolidation. On March 4, 2016, the Court issued the Omnibus Order granting the Partial Consent Motion for Consolidation. The Court ruled, *inter alia*, that all putative class actions were consolidated, and entered a stay in all actions. (Omnibus Order, March 4, 2016 at 8-9.)

On June 13, 2016, the Court issued the Omnibus Order, *inter alia*, appointing David W. Sanford, Esquire, Jeremy Heisler, Esquire, and Sanford Heisler Kimpel LLP as Lead Interim Class Counsel for the consolidated class action. (Omnibus Order, June 13, 2016 at 10.)

On August 16, 2016, Plaintiffs filed the Amended Consolidated Class Action Complaint, which asserts the following claims against Defendants The Synagogue, The National Capital Mikvah, Inc., The Rabbinical Council of America, The Beth Din of America, and Bernard Freundel: (1) intrusion upon seclusion; (2) negligent hiring, training, retention, and supervision; (3) negligent infliction of emotional distress; (4) breach of warranty; (5) premises liability; (6) negligence; and (7) loss of consortium. (Am. Consolidated Class Action Compl. at 32-44.)

On August 24, 2016, Defendant The Rabbinical Council of America, Inc. and Defendant The National Capital Mikvah, Inc. filed their Motions to Dismiss the Amended Consolidated Class Action Complaint.

On September 21, 2016, the parties filed the Consent Motion to Stay Proceedings Pending Settlement Discussion. On October 3, 2016, the Court issued the Order granting the Consent Motion to Stay Proceedings Pending Settlement Discussions.

On December 29, 2016, the Court granted the Second Consent Motion to Stay Proceedings Pending Settlement. The Order stayed all deadlines in the consolidated cases pending settlement discussions until February 1, 2017. (Order, Dec. 29, 2016 at 1-2.)

On February 1, 2017, the Court convened the Status Hearing, memorialized in the Order of that date. The Order stayed all deadlines in the consolidated cases until April 14, 2017, pending settlement discussions. (Order, February 1, 2017 at 1.)

On April 12, 2017, the Court convened the Status Hearing, memorialized in the Order of that date. The Order stayed all deadlines in the consolidated cases until May 26, 2017, pending settlement discussions. (Order, Apr. 12, 2017 at 1-2.)

On May 26, 2017, the Court convened the Status Hearing, and from the bench granted the parties' oral motion to stay all deadlines in the consolidated cases and set a new Status Hearing for July 7, 2017. On June 12, 2017, the parties filed the Consent Motion to Continue the July 7, 2017 Status Conference to July 21, 2017. On June 26, 2017, the Court issued the Order granting in part the Consent Motion and continued the Status Hearing to August 16, 2017. On July 22, 2017, the Court memorialized the teleconference with counsel, continuing the Status Hearing to October 27, 2017. (Order, July 22, 2017 at 1.)

On October 16, 2017, the Court issued the Order continuing the Status Hearing to January 26, 2018.

On July 7, 2017, Defendant Beth Din of the United States of America's filed the Motion to Dismiss the Amended Consolidated Class Action Complaint.

On January 13, 2018, the Court issued the Order continuing the Status Hearing to January 19, 2018.

On January 19, 2018, the Court convened the Status Hearing. The parties represented that they had reached an agreement in principle, but needed time to procure the cooperation of various liability coverage entities.

On April 20, 2018, the Court convened the Status Hearing, memorialized in the Order of April 23, 2018. The Order directed the Honorable Nan R. Shuker, Senior Judge of the Superior Court of the District of Columbia and current Mediator of the consolidated matters, as having authority to convene additional mediation sessions toward resolution of these matters and to compel mandatory attendance of the parties, representatives and counsel. Further, the Court ordered that the Lead Interim Class Counsel must submit by June 15, 2018, for review by the Court, preliminary papers proposing settlement and judicial approval. (Order, Apr. 23, 2018, at 4.)

On June 28, 2018, the Court issued the Order granting the Consent Motion to Extend the June 15, 2018, Deadline to Submit the Motion for Approval of Settlement and Continue the June 29, 2018 Status Hearing, previously filed on June 25, 2018. (Order, June 28, 2018, at 3.) The parties represented that some additional time was needed to respond to revisions recently proposed by the liability coverage entities, and to secure final approval of the Settlement for all represented parties. (*Id*. at 2.) Further, the Court set a new deadline of August 27, 2018, for the parties to file the motion for preliminary approval of the settlement. (*Id.* at 3.)

III. THE APPLICABLE LAW

The Superior Court Rules of Civil Procedure, Rule 23, governs class actions. It states:

> **(a) Prerequisites. --** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> > **(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.

(b) Types of class actions. -- A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

. . . .

(e) Settlement, voluntary dismissal, or compromise. -- The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

> **(5)** Any class member may object to the proposal if it requires court approval under Rule 23(e); the objection may be withdrawn only with the court's approval.

In order to satisfy class certification a party must meet the requirements of Rule 23(a) and at least one subdivision of Rule 23(b).

Numerosity is satisfied where the class is so numerous that joinder of all members is impracticable. Super. Ct. R. Civ. P. 23(a)(1). Plaintiffs do not need to provide the exact number of potential class members to satisfy this requirement. *Kifafi v. Hilton Hotels Ret. Plan*, 189 F.R.D. 174, 176 (D.D.C. 1999.)[1] Numerosity is presumed at 40 members. *Bynum v. District of Columbia*, 214 F.R.D. 27, 33 (D.D.C. 2003.) The Court may "draw reasonable inferences from the facts presented to find the requisite numersoity." *Coleman v. District of Columbia,* 306 F.R.D. 68, 76 (D.D.C. 2015) (citing *McCuin v. Sec'y of Health & Human Servs.*, 817 F.2d 161, 167 (1st Cir. 1987).) Further, Plaintiffs must show that joinder is impracticable. *DL v. District of Columbia*, 302 F.R.D. 1, 11 (D.D.C. 2013.) "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.'" *Id.* (citing *Cent. States SE. & SW. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244-245 (2d Cir. 2007).)

Commonality is satisfied where there are common questions of law or fact to parties in the class. Super. Ct. R. Civ. P. 23(a)(2). It is not necessary that every member of the class share

[1] The Superior Court is not bound by the decisions of the federal district court. *M.A.P. v. Ryan*, 285 A.2d 312 (D.C. 1971) (stating that the Court Reform Act declared that "[the] highest court of the District of Columbia is the District of Columbia Court of Appeals.") However, the Superior Court will defer to non-conflicting federal authority on matters of procedural interpretation. D.C. Code §11-946 (2018) (stating that the Superior Court "shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in Title 23) unless it prescribes or adopts rules which modify those Rules."); *Sellars v. United States*, 401 A.2d 974, 978 (D.C. 1979) (stating that "local court rules of procedure which parallel the federal rules are to be construed in light of the meaning given to the latter.")

the same issue of law or fact. *Bynum*, 214 F.R.D. at 33. "The touchstone of the commonality 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 (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551, 180 L. Ed.2d 374 (2011).) "[F]actual variations among the class members will not defeat the commonality requirement, so long as a single aspect or feature of the claim is common to all proposed class members." *Id.* Commonality is also satisfied where there is a common question of law or fact and the same evidence can be used by each member of the class to make a prima facie showing of liability. *Julian Ford v. ChartOne, Inc.*, 908 A.2d 72, 85-86 (D.C. 2006.)

Typicality is satisfied where "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Super. Ct. R. Civ. P. 23(a)(3). Typicality focuses on whether the representative of the class suffered similar injury from the same cause of conduct that gives rise to the other class members' claims. *Bynum*, 214 F.R.D. at 34; *Moore v. Napolitano*, 269 F.R. D. 21, 32 (D.D.C. 2010.) "Essentially, the class representative's claim is typical of the claims of the class if his or her claim and those of the class arise from the same event or pattern or practice and are based on the same legal theory." *Julian Ford*, 908 A.2d at 86 (citing *Singer v. AT&T Corp.*, 185 F.R.D. 681, 689 (S.D. Fla. 1998).) The purpose of typicality is to ensure that the class representative's claims are the same as other class members to safeguard their interests. *Bynum*, 214 F.R.D. at 34. Factual variations do not destroy typicality. *Id.*; *Howard v. Liquidity Servs. Inc.*, 322 F.R.D. 103, 118-119 (D.D.C. 2017) (citing *Wagner v. Taylor*, 836 F.2d 578, 591 (D.C. Cir. 1987).)

Adequacy of representation is satisfied where "the representative parties will fairly and adequately protect the interests of the class." Super. Ct. R. Civ. P. 23(a)(4). "Two criteria for determining the adequacy of representation are generally recognized: 1) the named

representative must not have antagonistic or conflicting interests with the unnamed members of the class, and 2) the representative must appear able to vigorously prosecute the interest of the class through qualified counsel." *Julian Ford*, 908 A.2d at 86 (citing *Twelve John Does v. District of Columbia*, 326 App. D.C. 17, 21, 117 F.3d 571, 575 (1997).) If the Court can conclude that by "pursuing their own interests vigorously the named representatives will necessarily raise all claims or defenses common to the class, representativeness will be satisfied." *Id.* (citing *United States v. Trucking Emp'rs.*, 75 F.R.D. 682, 688 (D.D.C. 1997).)

An action that satisfies the prerequisites of Rule 23 (a) must also meet the requirements of one or more of the three subdivisions of subpart (b). Certification under Rule 23(b)(1)(B), is "proper on the grounds that the claims made are numerous against a fund that is insufficient to satisfy all the claims." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999.) Every award made to a claimant reduces the total amount of funds available to other claimants until some claimants are unable "to obtain full satisfaction of their claims, while others are left with no recovery at all." *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 16 (D.D.C. 2011.)

To qualify for class certification on such a limited fund rationale, the Moving Plaintiffs must meet three criteria. *Ortiz*, 527 U.S. at 838. First, "the total 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." *Id.* at 839. Second, "the whole of the inadequate fund" must be dedicated "to the overwhelming claims." *Id.* Third, all claimants to the fund who are "identified by a common theory of recovery [must be] treated equitably among themselves." *Id.*; *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d at 16.

Rule 23(e) controls class action settlements. The Court may approve a proposed settlement "after a hearing and on finding that it is fair, reasonable, and adequate." There is no set test for determining whether a proposed settlement is fair, reasonable, and adequate.

However, the Court in addressing a class action settlement will 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 deficiency, 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, 106-107 (D.D.C. 2013).)

The Court notes that there are five additional factors that are generally considered when it must decide whether the proposed settlement is fair, adequate, and reasonable: "(1) whether the settlement is the result of arms-length negotiations; (2) the terms of the settlement in relation to the strengths of plaintiffs' case; (3) the status of the litigation proceedings at the time of the settlement; (4) the reaction of the class; and (5) the opinion of experienced counsel." *Alvarez v. Keystone Plus Constr. Corp.*, 303 F.R.D. 152, 163 (D.D.C. 2014); *Livengood Feeds, Inc. v. Merck KGaA (in re Vitamins Antitrust Litig.)*, 305 F. Supp. 2d 100, 104 (D.D.C. 2004.)

Rule 23(e) requires that all class members be provided with adequate notice of the proposed settlement. The Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Super. Ct. R. Civ. P. 23(e)(1).

IV. ANALYSIS

On September 7, 2018, the Court convened the Status Hearing on the Consent Motion for Preliminary Approval of the Class Settlement. The consolidated cases have been pending between three and four years, and the parties, through counsel, have used the majority of this time to effectuate settlement. The Court finds that the requirements of numerosity, commonality, typicality, and adequacy of representation are satisfied under Rule 23(a).

The Court finds that certification is appropriate under Rule 23(b)(1)(B); the intended consequence is, in part, to reduce the risk of multiple individual adjudications and potential

impediments to non-members or non-party members to protect their interests. The Court appreciates that the institutional defendants here are religious institutions and, consequently, that there would be inadequate funds from these institutions available for the purpose of satisfying these multiple claims. The Court is satisfied that the funds, as addressed in the papers, would be dedicated to the claims, fees, and expenses related to the consolidated actions. The Court is further satisfied that the individual claimants, the members, would be treated equally here.

The Court finds that the proposed settlement is a fair, reasonable, and adequate result of arm's length negotiations and within the range of numbers that the Court would find possible or even probable during the course of litigation through disposition. The Court is satisfied that there is no undue preferential treatment and that the notice, as proposed, is adequate.

WHEREFORE, it is this 19th day of September 2018, hereby

ORDERED, that Plaintiff's Consent Motion for Preliminary Approval of the Class Settlement is **GRANTED**; and it is further

ORDERED, that the Court preliminarily approves the Settlement as being fair, reasonable, and adequate, subject to the right of any Class Member to challenge the fairness, reasonableness, or adequacy of the Settlement pursuant to the procedure set forth below; and it is further

ORDERED, that the Class is hereby preliminarily certified for settlement purposes under D.C. Super. Ct. R. Civ. P. 23(b)(1) as follows:

> All females whom the United States Attorney's Office for the District of Columbia has identified as having been videorecorded by Bernard Freundel from July 1, 2005, through October 14, 2014, 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 (regardless of whether they were videorecorded), at any time from July 1, 2005 through October 14, 2014.

and it is further

ORDERED, that the Court hereby appoints as Class Counsel, David W. Sanford, Esquire, Jeremy Heisler, Esquire, and Alexandra Harwin, Esquire, of Sanford Heisler Sharp, LLP to represent the Class for purposes of the Settlement; and it is further

ORDERED, that the Court hereby appoints RG/2 Claims Administration LLC, 30 South 17th Street, Philadelphia, PA 19103 as the Settlement Administrator for this Settlement. The Settlement Administrator shall perform the duties set forth in the Agreement; and it is further

ORDERED, that the Court hereby appoints Annie G. Steinberg, M.D. as the Independent Claims Expert for this Settlement. The Independent Claims Expert shall perform the duties set forth in the Agreement. The Independent Claims Expert may be assisted by personnel working at her direction; and it is further

ORDERED, that the Court hereby approves the substance, form, and manner of issuance of the Confidential Registration Form (the "Registration Form"), Confidential Claim Form, Notice of Class Action Settlement (the "Notice"), and Short-Form Notice of Class Action Settlement ("Short-Form Notice") attached as Exhibits 2, 3, 4, and 5 to the Declaration of David W. Sanford in Support of Plaintiffs' Consent Motion for Preliminary Approval of the Class Settlement. The Settlement Administrator is hereby directed to issue the Notice and Registration Form to Class Members pursuant to the Agreement as soon as possible following the Court's ruling from the bench on September 7, 2018, or the entry of this written Order. The Settlement Administrator is further directed to arrange for publication of the Short-Form Notice in the *Washington Post,* the *Washington Jewish Week*, the *Baltimore Jewish Times*, the *Baltimore Sun*, the *Jewish Week*, the *Forward*, *Kol HaBirah*, *Haaretz*, and the *Jerusalem Post* to take place as soon as possible following the Settlement Administrator's issuance of the Notice. The United States Attorney's Office for the District of Columbia may forward the Notice and Registration

Form by electronic mail to persons on its contact list when the Settlement Administrator issues the Notice and Registration Form; and it is further

ORDERED, that a **Final Approval Hearing shall take place on October 22, 2018, at 10:00 a.m. in Courtroom 516**, for a final determination by the Court whether the proposed settlement of this action on the terms and conditions provided for in the Settlement Agreement is fair, reasonable, and adequate, whether the proposed settlement should be finally approved by the Court pursuant to D.C. Super. Ct. R. Civ. P. 23, whether attorneys' fees, costs and service payments as requested by Plaintiffs' Counsel shall be awarded, and whether this action should be dismissed as a result of the Settlement. This date shall be promptly observed after the deadline for objections set forth below; and it is further

ORDERED, that the Settlement Administrator shall proceed with **Notice to the Class Members by September 14, 2018**. **The objection deadline for Class Members will be October 15, 2018**; and it is further

ORDERED, that the Court will consider objections to the Settlement that are submitted in a timely and proper manner, as provided herein. To object to the Settlement, a Class Member must send written objections to the Settlement Administrator and Class Counsel postmarked no later than 30 days after the Settlement Administrator forwards the Notice. Any objection: (1) must be in writing and personally signed by the person objecting, or by his or her counsel or legal representative; (2) must contain the statement "I object to the class settlement in *Jane Doe 2 et al. v. Georgetown Synagogue-Kesher Israel et al.*;" (3) must contain the name, address, telephone number, and email address of the person objecting (if the objection is submitted by counsel, the name and contact information of the client must be provided); (4) must include a detailed description of the basis for the objection; and (5) must state whether the person objecting intends to appear in person or through counsel at the Final Approval Hearing. All

persons who fail to make objections in the manner specified herein shall be deemed to have waived any objections and shall be foreclosed from making any objection (whether by appeal or otherwise) to the Settlement. If the Court rejects a Class Member's objection, that Class Member will still be bound by the Terms of the Settlement, including the release of Claims. The Plaintiffs as defined in the Agreement have consented to and shall not be entitled to object to the Settlement; and it is further

ORDERED, that all pending dispositive Motions are **DENIED, WITHOUT PREJUDICE** to the Defendants to renew these Motions in the event of the failure of the final Settlement; and it is further

ORDERED, that Defendants' time to file their respective answers is extended *sine die*; and it is further

ORDERED, that as of September 7, 2018, all proceedings in this case are stayed until further order of this Court, except as may be necessary to implement the Settlement Agreement.

BRIAN F. HOLEMAN
JUDGE

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