

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

JACQUELINE CHESHER, et al.,	:	Case No. C-1-01-566
	:	
Plaintiffs,	:	Judge Spiegel
	:	
vs.	:	Magistrate Judge Hogan
	:	
TOM NEYER, JR., et al.,	:	<u>PLAINTIFFS' MEMORANDUM</u>
	:	<u>IN SUPPORT OF CLASS</u>
Defendants.	:	<u>ACTION SETTLEMENT OF</u>
	:	<u>INJUNCTION CLAIMS AND</u>
	:	<u>RESPONSE TO OBJECTIONS</u>

**I. INTRODUCTION**

This is a class action for damages brought by the families of deceased persons whose bodies were in the custody of the Hamilton County Coroner between August 2000 and January 2001<sup>1</sup>. Their claims are brought under 42 U.S.C. §1983 for alleged violations of substantive due process, procedural due process, and privacy rights protected by the Fourteenth Amendment to the United States Constitution. Plaintiffs also bring state tort claims for intentional and negligent infliction of emotional distress and civil conspiracy, the source of which is the death of their loved one and the subsequent actions of defendants. Plaintiffs seek damages from all Defendants. On August 14, 2007, the Court preliminarily approved a stipulated judgment between the Plaintiff class and Defendant Thomas Condon. Doc. 463. On August 30, 2007, the Court preliminarily approved a second, more comprehensive settlement with the remaining Defendants. Doc. 470. A fully executed copy of that settlement agreement (without attachments) is filed

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<sup>1</sup> After full discovery it was determined that the dates between which class member loved ones were improperly accessed, viewed, manipulated and photographed were August 16, 2000 and January 10, 2001, inclusive. The relief will be restricted to class members whose loved ones were in the morgue or whose death scene photos were present in Defendant Condon's studio between these dates.

with this memo as (A-1). If finally approved, these settlements will resolve the entire case.

The settlements accomplish both of the goals of the class members. First, as detailed below, they provide for fair compensation. Second, they insure destruction of the photos, a memorial to the class and a constructive, reassuring dialogue with the current coroner. The Plaintiff class representatives, John Brady and Mary Smith, and Class Counsel respectfully request that this settlement be approved as fair, adequate and reasonable.

## **II. DESCRIPTION OF PARTIES, CLASS DEFINITION AND NOTICE**

### **A. Parties and Class Definition**

The Court has certified the following as a plaintiff class in this case:

The family members of all the deceased whose remains, for other than a proper government purpose, were accessed, viewed, manipulated, or photographed by Thomas Condon or Jonathan Tobias, M.D., or one of their agents between August 2000 and January 2001 (inclusive) while such bodies were in the custody of the Hamilton County Coroner's Office, without permission from the legal representatives of the deceased.

(Doc. 96). There are two subclasses. One involves those families whose loved ones were photographed and another consists of those whose loved ones were accessed, viewed or manipulated by Thomas Condon or Jonathan Tobias but for whom there is no photograph. (Doc. 366.) The Court has appointed James Brady and Mary Smith as the class representatives and Stanley Chesley, Paul De Marco, Renee Infante and Alphonse Gerhardstein have been named as Class Counsel for the Plaintiffs. Defendants are Hamilton County, Ohio, Carl L. Parrott, Jr., M.D., Robert Pfalzgraf, M.D., Gary Utz, M.D., Jonathan Tobias, M.D., and Robert T. Daly.

## **B. Class Notice**

On August 14, 2007, this Court ordered that the Notice regarding the stipulated judgment with Thomas Condon that was approved by the Court (Doc. 449) be sent by regular mail to “the last known address of each class member.” Doc. 463. On August 30, 2007, this Court ordered that the Notice approved by the Court regarding the settlement with the remaining defendants (Doc. 469), also be sent “by regular mail to the last known address of each class member.” Doc. 470. These directives have been followed. See Affidavit of Julia Mattheis, A-2.

Moreover, out of an abundance of caution, class counsel also published the notice, Doc. 469, in the Cincinnati Enquirer and the Cincinnati Post on two weekdays, September 13 and 14, 2007 and on one Sunday, September 9, 2007. See Affidavit of Doris Thomas, A-3. Finally, there was substantial publicity regarding these settlements in the regional and statewide media. The class has been adequately notified of these settlements.

## **III. EVENTS LEADING UP TO THE PROPOSED SETTLEMENTS AND SUMMARY OF THE SETTLEMENT TERMS**

### **A. Relevant Procedural History**

The class action complaint was filed on November 7, 2001 in *Willenbrink, et al., v. Hamilton County Ohio*, et al, Case No. C-1-01-771, filed in the U.S. District Court for the Southern District of Ohio, consolidated with *Chesher, et al. v. Neyer, et al.*, Case No. C-1-01-cv-566 (Doc1) ) The First Amended Complaint was filed on March 28, 2002, naming the following defendants: Hamilton County, Ohio; then-Hamilton County Coroner Carl L. Parrott, M.D., then-Chief Deputy Coroner Robert Pfalzgraf, M.D., Staff Pathologist Gary Utz, M.D., Administrative Aide Terry Daly, then-Administrator Rhonda

Gros (f.k.a. Lindeman), former Pathology Fellow Jonathan Tobias, M.D., and photographer Thomas Condon. (Doc. 31, First Amended Complaint) In relevant part, the complaint asserted federal claims under Section 1983 and state-law claims for negligent infliction of emotional distress, intentional infliction of emotional distress, and civil conspiracy. (*Id.*) Gros has been dismissed and is not involved in these settlements.

This Court certified the case as a class action pursuant to Fed. R. Civ. Proc. 23(a) and (b)(3), defining the class as follows:

The family members of all the deceased whose bodies were accessed, viewed, manipulated, or photographed by Thomas Condon, Jonathan Tobias, M.D., or one of their agents between August 2000 and January 2001 (inclusive) while such bodies were in the custody of the Hamilton County Coroner's Office, without permission from the legal representatives of the deceased.

(Doc. 96) The district court later issued an order stating that

the Court is now convinced that substantial differences exist between class members to justify creating two sub-classes. The analysis and reasoning used in this earlier Order (Doc. 96) to find that the requirements of Rule 23 were met are applicable presently to these two sub-classes. These sub-classes are defined as follows. Sub-class 1 consists of:

The family members of all the deceased whose remains, for other than a proper government purpose, were photographed by Thomas Condon or Jonathan Tobias, M.D., or one of their agents between August 2000 and January 2001 (inclusive) while such bodies were in custody of the Hamilton County Coroner's office, without permission from the legal representatives of the deceased...

Sub-class 2 is defined as follows:

The family members of all the deceased whose remains, for other than a proper government purpose, were accessed, viewed, or manipulated, by Thomas Condon, Jonathan Tobias, M.D., or one of their agents between August 2000 and January 2001 (inclusive) while such bodies were in custody of the Hamilton County Coroner's Office, without permission from the legal representatives of the deceased.

(Doc. 366).

On September 8, 2003, this Court denied Defendants' Motions to dismiss the civil rights and state law claims. (Doc. 111) On July 29, 2004, this Court denied the Defendants' motions for summary judgment on the civil rights claims. (Doc. 224) On December 17, 2004, this Court denied defendants' motion to dismiss plaintiffs' state-law claims for negligent infliction of emotional distress, intentional infliction of emotional distress, and civil conspiracy. (Doc. 283) On September 29, 2005, this Court denied defendants' motions for summary judgment, which were based chiefly on claims of state-law immunity under Ohio Revised Code, Chapter 2744. (Doc. 380)

Defendants Hamilton County, Parrott, Pfalzgraf, Utz, Tobias, and Daly filed interlocutory appeals following the Order dated September 29, 2005. The Sixth Circuit Court of Appeals affirmed the order of this Court denying summary judgment to these defendants. *Chesher v. Neyer*, 477 F.3d 784 (6<sup>th</sup> Cir. 2007). The matter was set for trial on September 5, 2007 when the case settled.

## **B. Discovery and Factual Developments**

This case has been in litigation for six years. There have been approximately 500 documents filed in this Court, 74 depositions taken, thousands of documents reviewed, five experts involved, and thirteen appeals and other proceedings in the Sixth Circuit. The facts were comprehensively summarized by the Sixth Circuit as follows:

### **A. Factual background**

The substance of Chesher's claims arises from the heavily publicized discovery in January of 2001 of at least 317 allegedly improper photographs of dead bodies taken at the Hamilton County Morgue. Taken between August of 2000 and mid-January of 2001, the photographs depict the bodies in unnatural "artistic" poses, often employing props for effect. In a prior appeal that resolved a disputed issue

of attorney-client privilege, this court referred to the factual circumstances as “appalling,” and then-Coroner Dr. Carl Parrott has characterized the photographs as “deplorable.” [\*Chesher v. Allen\*, 122 Fed.Appx. 184, 185 \(6th Cir.2005\)](#). A criminal investigation and trial revealed that Condon had taken the vast majority of the offending photographs. Also found at Condon's studio were a small number of questionable photographs taken by Dr. Jonathan Tobias, a pathology fellow employed by the County Coroner's Office. Chesher alleges that the County defendants' involvement in Condon's actions, either through negligence, recklessness, or a cover-up effort, substantiates the civil claims asserted in this action.

### ***1. Condon's introduction to Parrott and the Coroner's Office***

At the time the offending photographs were taken, Parrott was the Hamilton County coroner. He testified in his deposition that, as coroner, he was the “top policy maker with respect to conducting any duties and faithfully preserving the integrity of those bodies while they are in the County's custody.” In 1999, Parrott began to explore the idea of creating an autopsy-training video for use by hospitals and law enforcement. He instructed Terry Daly, his administrative aide, to set up a \*788 meeting for the purpose of discussing this video project.

Daly invited Condon and film producer Ernie Waits, Jr. to meet with himself, Parrott, and Parrott's administrative assistant Rhonda Gros at the Coroner's Office in 1999. At that first meeting, Parrott explained to the group his idea for the training video and noted that he would seek legal counsel concerning issues of consent for the proposed video footage. As part of the instructional video or as a separate project, Parrott intended to showcase a rare neck-dissection procedure in which his office had developed a particular expertise.

Condon and Waits next met with representatives from the Coroner's Office in June or July of 2000. This meeting included the same attendees, except that Deputy Chief Coroner Dr. Robert Pfalzgraf attended in place of Gros. Daly and Waits testified in their depositions that, at either the first or second meeting, Condon mentioned that he would like to pursue an independent project of his own involving artistic photographs of dead bodies, and that he had brought along with him one or more books of such photographs to illustrate his intentions. Chesher alleges that one of these books was authored by Germano Celant, an Italian art critic, and included photographs of cadavers posed with props similar to the offending photographs later taken by Condon.

According to Daly, Parrott evinced little reaction to Condon's proposed art project, but stated something to the effect that “we can consider it” and that he had “seen things like that before.” An audiotaped conversation between Daly and Staff Pathologist Dr. Gary Utz that took place later, after the discovery of the photographs, similarly refers to Condon's art-project proposal at the meeting:

Utz: Didn't he [Parrott] know that Thomas [Condon] had an interest in doing this stuff?

Daly: We all did ... verified that that goddamn book was in that first fucking meeting and everybody in that goddamn room looked at it.

(Omission in original.) Parrott claimed in his deposition that he could not remember whether Condon explained his individual project or exhibited any artistic books at the meetings, but added "I can't say that it was not [discussed]."

By the time of this second meeting, Parrott had solicited and received a legal opinion from the Hamilton County Prosecutor's Office advising him that he could produce the training video without obtaining the consent of the families of the autopsy subjects so long as the video was not used for commercial purposes. The opinion further advised Parrott to take steps to obscure identifying features of any bodies filmed. Although Parrott discussed this advice at the meeting, he stated in his deposition that he instructed Daly and Pfalzgraf to allow Condon and Waits to "do whatever they needed to do to determine what resources would be needed" to produce a cost estimate for the proposed instructional film. As preliminary work began on the training-video project, Parrott assigned Daly and Pfalzgraf specific roles. Daly was to be in charge of the logistics, and Pfalzgraf was to perform the autopsy procedures to be filmed.

Condon stated at his sentencing hearing that he provided Daly with a list of "Symbolic Objects To Be Used And Their Intended Meanings" in regard to his art project. Daly, however, denies ever having seen such a list.

## *2. Condon begins photography at the Morgue*

Chesher claims that, in the course of preparing to produce the instructional film, \*789 Condon was essentially given free rein to pursue his own art project using the Morgue and the bodies housed there. Security at the Morgue during this time consisted primarily of what Parrott characterized as "an internal security system based entirely on trust."

The Morgue is located on the first floor of the Coroner's Office. Two coolers house the bodies, and County staff perform the autopsies in a suite adjacent to the coolers. During the relevant time period, the door to the autopsy suite was secured with a keypad lock that prevented entry by anyone without a proper code. The cooler itself, however, which also provided access to the autopsy suite, was unlocked. Coroner's Office staff members were also aware that the characters "\*7" could be entered on the keypad by anyone as a "shortcut" code. Condon used that code to enter the autopsy suite. Morgue employees stated that they received no training on who should be permitted to enter the Morgue.

In August of 2000, Daly explained to both Pfalzgraf and Tobias that Condon would be around the Morgue taking photographs for the training-video project. Pfalzgraf, Tobias, and Utz subsequently permitted Condon, beginning on August 16, to observe autopsies that they performed. Although standard practice required outside persons observing an autopsy to sign a "view sheet," Condon did not sign in for the autopsies that he observed on August 16, or for those that he observed and photographed during later visits.

Daly prepared a short outline of a script for the proposed video after the initial August 16 visit by Condon and Waits. Several weeks later, Condon and Waits provided Parrott with an estimate of \$10,000 to produce the instructional video. Parrott, according to his deposition testimony, determined that the Coroner's Office could not afford the project based on this bid. In addition, Parrott had in the meantime obtained an alternate training video at a National Association of Medical Examiners meeting that lessened the need to produce his own.

Parrott said in his deposition that he decided not to proceed with the video project at that point, but he conceded that he did not "recall giving [Daly], you know, a specific statement that it's over, it's done and history." Pfalzgraf similarly said that he "never knew of the project being cancelled." Parrott could not recall precisely when he decided to cancel the project, but indicated in his deposition testimony that his County Coroner campaign for the November 7, 2000 election was underway at the time. He asserts that his involvement with Condon ceased at that point, but Chesher alleges otherwise. She claims that Condon later received and distributed yard signs supporting Parrott's candidacy during his reelection campaign. According to Chesher, Condon also sent Parrott a Christmas card and sent the Coroner's Office staff a spiral-sliced ham for their holiday party.

### ***3. Project cancelled but offending photography continues***

Despite Parrott's deposition testimony that the project was cancelled, the Coroner's Office staff continued to permit Condon access to the Morgue and to the bodies housed there through 2000 and into January of 2001. Photographs later discovered in Condon's studio reveal that he had observed, and often arranged with props, numerous bodies at the Morgue during that time. Condon photographed bodies both in the autopsy suite and in the cooler. The bodies photographed included those on whom autopsies had been performed by Pfalzgraf, Tobias, and Utz. Although the employee defendants assert \*790 that Condon visited the Morgue no more than five times in all, the district court found that Chesher had "highlighted instances which reasonably could lead one to find that Condon frequented the morgue at least eleven times." During the time frame in question, 532 bodies were housed at the Morgue.

Several examples serve to illustrate the nature of the photographs at issue. One involved the body of John Brady, whose autopsy was performed by Pfalzgraf.

Brady was shown on the autopsy table with props that included a dollhouse ladder placed against his open skull. Photographs of Thomas Senteney, whose autopsy was performed by Utz, depict his body with a cloth scarf placed over his eyes and an egg displayed nearby. Utz also performed the autopsy of Christina Folchi, who was photographed with sheet music placed on her body and a snail near her groin area as well as other items pressed into her hand and mouth. The photographs indicate Condon's presence at these and other autopsies. Autopsy view sheets for the photographed subjects, however, do not reflect his presence. According to Chesher, several of the offending photographs depict the hands of Morgue employees as they were performing the autopsies.

Chesher alleges that although Condon showed both Tobias and Utz samples of the offending photographs during this time, they continued to permit Condon to visit the Morgue and take photographs. In Tobias's case, he acknowledged that Condon showed him some of the offending propped photographs, including the Brady photo, first in September of 2000 and then again in January of 2001. According to Tobias, he trusted Condon to obtain proper authorization from Parrott for the taking of such photographs.

Tobias kept in personal contact with Condon and met with him two or three more times, including one event at a local bar. On December 6, 2000, Tobias met with Condon during Senteney's autopsy, but during the course of the meeting "left [Condon] alone in the morgue" with the body. Condon used the opportunity to take additional offending photographs, which Tobias claims was without his knowledge. When Condon again showed Tobias some of the offending photographs in January of 2001, Tobias instructed Condon to show his pictures to Utz and get permission before continuing his project. Tobias said that Condon complied and showed some of his propped photographs and an art book to Utz, to which Utz allegedly responded "[o]h, that's kind of cool."

Utz similarly testified in his deposition that, sometime in early January of 2001, he saw several of Condon's propped photographs, including an autopsy photograph showing Utz's hands. One of the propped photographs that Condon showed to Utz was that of Brady with the dollhouse ladder leaning against his open skull.

In addition to permitting Condon to take photographs at the Morgue, Tobias began using Condon's studio for printing some of his own offending photographs, including several from the death scene of a woman named Toby Malakoff. Tobias used a Morgue camera to take photographs of her body first as he found it at the scene, and then after he had turned the body over and lifted her shirt to reveal her breasts. Parrott testified in his deposition that Tobias's photographs "shouldn't have been at a commercial photographer's studio" such as Condon's. He added that Tobias's photographs of Malakoff could be interpreted as "souvenirs or, you know, an effort at art" and that he was not aware of any forensic purpose served by them. Tobias, on the other hand,

maintains that the photographs were forensically necessary and \*791 that he developed them at Condon's studio because he believed Condon to be trusted by the Coroner's Office.

#### ***4. Discovery of the photographs, prosecution, and the alleged cover-up***

On January 8, 2001, Robin Imaging Services, a Cincinnati photo-developing studio, contacted the Cincinnati Police Department's vice squad regarding some unusual photographs in its possession that indicated the possible abuse of corpses. Sergeant Lovett of the vice squad dispatched officers to investigate the call. The officers obtained the photographs from Robin Imaging and learned that Condon was the customer who had dropped them off. A search warrant was then executed for Condon's personal photography studio. There the police discovered numerous other corpse photographs as well as a sheet of "symbols" listing props that appeared in the photographs. This initial investigation led police to the conclusion that the photographs were taken at the Hamilton County Morgue, so Lovett began contacting Morgue personnel. Lovett interviewed all of the Morgue staff members before handing the investigation over to the County Prosecutor's Office. Ultimately, the prosecutor charged Condon with eight counts of gross abuse of a corpse. See [State v. Condon, 157 Ohio App.3d 26, 808 N.E.2d 912, 913 \(2004\)](#).

The prosecutor also determined that Tobias had taken a personal interest in Condon's work and had conducted at least two of the autopsies during which Condon took offending photographs. See [State v. Tobias, No. C-020261, 2003 WL 21034555, at \\*6 \(Ohio Ct.App. May 9, 2003\)](#). Tobias was the only Coroner's Office staff member criminally charged, but his conviction was later overturned on appeal due to insufficient evidence to prove beyond a reasonable doubt that he had taken affirmative action to aid or abet Condon's corpse abuse. *Id.* at \*7.

Chesher alleges that, upon discovery of the photographs, the County defendants and other County officials began a concerted effort to cover up and minimize any official involvement in Condon's art project. First, Chesher claims that County authorities suspended only Tobias, the lowest-level physician in the Coroner's Office, following the discovery of the photographs. According to Tobias, Gros informed him that he was being suspended in order to "protect the county," and Tobias noted that "there was already speculation about a civil lawsuit." Tobias contends that, just after the Morgue photograph scandal became public, Parrott had assured him that "I know you did nothing wrong." According to Pfalzgraf, Parrott later stated that "his hand were tied" regarding Tobias's suspension, allegedly because the Prosecutor's Office had insisted on the measure. Furthermore, Tobias claims that Parrot told him that "they needed to protect the county, and that he couldn't talk to me because I knew that he knew about the art books."

Chesher alleges that the second step of the cover-up consisted of "block[ing] public access" to facts that demonstrated the involvement of County officials other than Tobias. She claims that in order to limit the County's exposure, the Prosecutor's

Office purposefully withheld evidence from the criminal trial of Condon and Tobias, such as the taped conversation between Daly and Utz quoted above. Prosecutors similarly did not introduce into evidence the opinion letter that Parrott had obtained from the Prosecutor's Office advising him that he could go forward with the autopsy video project without obtaining the consent of the decedents' families.

Chesher also relies on a letter that Hamilton County Commissioner Todd Portune sent to the presiding judge during the criminal trial in June of 2002, suggesting \*792 that a cover-up may have occurred. In the letter, Portune asserted that the Coroner's Office personnel bore responsibility for the scandal. Portune also relayed to the judge a sworn statement from Condon's wife, Kelly Blank, in which she explains that Utz told her that prosecutors "came into the morgue and 'openly threatened people' as to what to say and how to testify." Blank claimed that Utz agreed that "there was a purposeful plan from the beginning to convict Condon and Tobias and protect higher-ranking officials."

*Chesher v. Neyer, supra*, at 787 - 792 (6<sup>th</sup> Cir. 2007).

### C. Summary of Noneconomic Terms

Both settlements have economic and noneconomic provisions. The noneconomic terms in the Stipulated Judgment Against Defendant Condon include provisions to secure return and destruction of the images, forfeiting of ownership rights to any story based on the photos and providing a deposition without asserting any privilege under the Fifth Amendment:

1. Condon hereby transfers to the *Chesher* class any ownership interest he claims, could claim, or in the future might claim in the photos of any and all deceased family members in the *Chesher* class.
2. Condon and his attorneys and agents hereby agree to remain under a lifelong duty to return to class counsel for the *Chesher* class all images, including but not limited to negatives, jpegs, prints, photographs, videos, and proofs, in any format, whether electronic or otherwise, of any and all deceased family members of the *Chesher* class. Counsel for Condon in his criminal case shall deliver all images to class counsel immediately after the criminal case is finally concluded.
3. Condon hereby stipulates that Condon, his wife, any children, and everyone acting in concert with him or his family shall never accept any money or things of value as compensation, either directly or indirectly, for performing any services or divulging any information

regarding any photos or images of the deceased family members of the *Chesher* class or the story of his actions with respect to the deceased family members of the *Chesher* class.

4. Condon hereby agrees to provide a limited deposition in his bankruptcy proceeding no later than August 7, 2007 without assertion of his privilege under the Fifth Amendment.
5. Condon hereby agrees that, after full notice to the class and subject to approval of a stipulated judgment in the *Chesher* class action and in bankruptcy court proceedings, that he will provide a full deposition to all parties in the *Chesher* case without the assertion of his privilege under the Fifth Amendment prior to the class action trial.

The noneconomic terms in the settlement with the remaining defendants include an apology from the County, return and destruction of the photos, a memorial to be posted at the Morgue, and meeting with the current coroner on a number of issues. A copy of the apology from Hamilton County is attached, A-4.

#### **D. Summary of Economic Terms**

The County has agreed to pay eight million dollars in satisfaction of all claims for damages, attorney fees and litigation expenses. Four million dollars will be paid by November 1, 2007 and another four million dollars will be paid by February 29, 2008. Defendant Condon has agreed to pay, “an amount equal to the average amount awarded by the jury against the other defendants or otherwise paid by them in *Chesher*. Further, Condon agrees not to appeal said judgment or seek a stay of execution of said judgment.” This means that Condon has agreed to pay one million three hundred thirty-three thousand three hundred thirty-three dollars and thirty-three cents (\$1,333,333.33). Defendant Condon is in bankruptcy. Payment by Condon will therefore be addressed as follows under the terms of the Condon stipulated judgment:

6. Condon agrees that, upon dismissal of the *Chesher* appeal currently pending before the Sixth Circuit and the withdrawal of the objection by the *Chesher* Class to the conversion from Chapter 7 to Chapter 13, he will promptly present to the Bankruptcy Court an amended Chapter

XIII plan incorporating the terms of this agreement and which addresses the terms of the stipulated judgment with respect to the class action (present by August 17, 2007).

7. Condon agrees that he will remain in the Chapter 13 plan for at least 36 months.

Unfortunately, defendant Condon currently has very few resources. Unless his income picks up dramatically the amount that will be recovered from him is very small.

#### **E. Proposed Allocation of Monetary Award**

The class notice provided a summary of the allocation proposed by class counsel. It is recited at length below. Note that sub class two is defined as including persons in the morgue from the beginning of August, 2000 through the end of January, 2001. The class is also defined as including “The family members of all the deceased whose remains, for other than a proper government purpose, were accessed, viewed, or manipulated, by Thomas Condon, Jonathan Tobias, M.D., or one of their agents...” Class counsel has found no evidence to suggest that defendant Condon was in the Morgue or involved with any death scene photo before August 16, 2000 or after January 10, 2001. From all established accounts August 16, 2000 is the first day he was in the Morgue with a camera and January 10, 2001 is the last day he has access. Thus Class Counsel will be recommending that awards be limited to families with loved ones in the morgue between those dates and not before or after those dates.

No plan administrator has yet been appointed and therefore no allocation plan has been adopted. Nonetheless, this allocation is consistent with the relative valuation of the claims through the course of the litigation:

The estimate for attorney fees and costs is approximately \$2,000,000.00<sup>2</sup>. If, after review of time records and receipts, that sum is approved by the court, the

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<sup>2</sup> Class counsel will submit detailed time and expense records in support of an application for fees and expenses. No payment will be made without approval by the Court.

balance of the fund, \$6,000,000 plus interest, will be available for damage awards to the class and administration fees and expenses. The *Chesher* Class Qualified Settlement Fund will be administered by an Administrator appointed by the Court. The QSF Administrator will propose an allocation plan to the Court, which must be approved at the Fairness Hearing. In summary, the allocation plan will include the following features:

1. Sub-class Two. One Million Dollars will be available to the members of subclass two. One award will be made per family. That award will be divided among the members of the family unit as defined by the Court. Awards will be based on the net value of the fund<sup>3</sup> after administrative expenses and fees are deducted. The final allocation plan will be guided in part by (but not fixed on) the amount of \$2,000.00 per family utilized by the parties in negotiation. The actual amount distributed to each family unit will be a function of the number of family units in each sub-class and the pro-rata share of Fund administrative fees and expenses. The final allocation plan will reflect the contribution of those families officially designated as bellwether families in the litigation.
2. Sub-Class One. The balance of the Net Value of the Fund after their pro-rata share of the Fund Administration Fees and Expenses will be available to the members of subclass one, also on a per-family basis. The QSF Administrator will propose that awards to subclass one be highest for those whose loved ones were manipulated and photographed, followed by those whose loved ones' photograph was in the custody of Mr. Condon but for whom there is no evidence of manipulation. She will propose to be guided in part by (but not fixed on) the distinctions first proposed by the Defendants in their recent "Rule 68 offer of judgment."

The Court has previously established that Awards will be allocated by decedent and the award for each decedent will be distributed to the "family members." The Court defined family members as "surviving spouse, children, parents, and other next of kin who suffered severe emotional distress." Doc. 381. Whether a person is a "next of kin" included in a "family" shall be determined with guidance from the Ohio Wrongful Death Statute, ORC §2125.02(A) (1) and case law interpreting that statute. See Doc. 381. The Court defined serious emotional distress as distress that is both severe and debilitating and renders a reasonable person, normally constituted unable to cope adequately with mental distress. Seriousness might also suffice in the mishandling of a corpse arena where the Plaintiffs were horrified, angry, saddened, wept, and were unable to sleep. Doc. 380.

In order to provide maximum awards to family members with the least administrative costs, the QSF Administrator is likely to propose a large allocation

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<sup>3</sup> Net Value of the Fund shall be the Fund Value after the 42 U.S.C. §1988 attorney fees and associated expenses, which are the responsibility of the Defendant, and included in the global settlement, are paid as ordered by the Court.

to the “surviving spouses, children and parents” with the other next of kin that have suffered serious emotional distress sharing the remaining percent. Exceptions will be made on a case by case basis. Appeals will be available to the United States Magistrate Judge. Under the proposed plan, the decisions of the Magistrate Judge will be final. No distribution will be made within a subclass until all payments have been paid by the Defendants, the Plan has been approved by the Court, the Class has been closed by Order of the Court; applications have been made for distribution providing the addresses of all distributees in a family unit; all matters before the Court have been satisfied; and Settlement Agreements with the Fund have been executed by all distributees in a given family.

After the Court appoints a Settlement Master and a proposed allocation plan is drafted, a copy of that plan will be posted on the website of Gerhardstein & Branch Co. LPA, [gbfirm.com](http://gbfirm.com). Counsel will also post all claim forms, orders, hearing notices, etc in order to provide a central place for members of the class to learn of developments.

#### **F. Settlement Negotiation Process**

The parties participated in a summary jury trial in January, 2005, a formal mediation in May, 2007 and another formal mediation over several days in August, 2007. Separately, Plaintiffs and their counsel and Mr. Condon and his counsel had extended negotiations during the summer of 2007. All of these negotiations resulted in the exchange of numerous drafts before the final text of each agreement was finalized and presented to the Court.

### **IV. ARGUMENT**

#### **A. Standard for Approval of Class Action Settlement**

Pursuant to Fed. R. Civ. Proc. 23(e), court approval is required in order to settle a class action:

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs.

The law generally favors and encourages the settlement of class actions. *In re SOCF*, 173 F.R.D. 205 (S.D. Oh. 1997); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 246 (S.D. Ohio 1991); *Thompson v. Midwest Foundation Independent Physicians Ass'n.*, 124 F.R.D. 154, 157 (S.D. Ohio 1988). The prevailing, two-pronged analysis to be followed by a court in reviewing a proposed settlement of a class action is to determine whether there has been any fraud or collusion in arriving at the proposed settlement and whether the terms of the settlement agreement are fair, reasonable, and adequate. *Clark Equipment Co. v. International Union, Allied Industrial Workers of America, AFL-CIO*, 803 F.2d 878, 880 (6<sup>th</sup> Cir. 1986), cert denied, 480 U.S. 934 (1987); *In re Dunn & Bradstreet Credit Services Customer Litigation*, 130 F.R.D. 366, 370 (S.D. Ohio 1990). The burden of proving the fairness of the settlement is on the proponents of the settlement. *In re General Motors Corp Engine Interchange Litigation*, 594 F.2d 1106 (7<sup>th</sup> Cir), cert denied, 444 US 870 (1979).

In determining whether a proposed class action settlement is fair, reasonable, and adequate, the court should consider the following factors:

- (1) the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement;
- (2) the complexity, expense and likely duration of the litigation;
- (3) the stage of the proceedings and the amount of discovery completed;
- (4) the judgment of experienced trial counsel;
- (5) the nature of the negotiations;
- (6) the objection raised by class members; and
- (7) the public interest.

*Enterprise Energy Corp.*, 137 F.R.D. at 245, citing *Williams v. Vukovich*, 720 F.2d 909, 920 (6<sup>th</sup> Cir. 1983); *Thompson*, 124 F.R.D. at 157. In determining the fairness, adequacy, and reasonableness of the proposed settlement, this Court need not reach the ultimate conclusions of fact regarding the merits of the case or decide the underlining issues of law. *Williams*, 720 F.2d at 921. In addition, the Court should rely upon the judgment of

experienced counsel and “should be hesitant to substitute its own judgment for that of counsel.” *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5<sup>th</sup> Cir. 1977). Upon consideration of these factors in this case, this Court should conclude that this settlement is fair, reasonable, and adequate.

**B. The Stipulated Judgment with Defendant Condon and the Settlement With the Remaining Defendants Should Be Approved by the Court**

As set out above this Court must first determine that the proposed class action settlements are not the product of any collusion, and then determine if it is fair, adequate and reasonable. On this record the court should approve the settlements.

**1. The Settlements are not Collusive**

The settlements resulted from arms-length bargaining among seasoned counsel. Class Counsel did a thorough investigation before filing and maintained extensive contacts with class members throughout discovery and negotiations. Before negotiating the terms of these settlements class counsel conducted mock jury trials and focus groups and met with the class representatives and various members of the class and determined the goals of the members of the class.

The results of the summary jury trial were very instructive to the parties as the negotiations proceeded. All of the negotiations leading to the settlements were conducted at arms length and have not always been harmonious. The parties were dramatically apart on their valuation of the case for several years and the litigation dragged on. At one point defendants Hamilton County, Parrott, Pfalzgraf, Utz, Daly, and Tobias opposed the settlement with Condon, a clear indication that matters have been hard fought. There was no collusion in the settlement.

The negotiation process was deliberate, lengthy and vigorous. The final product reflects compromises from both sides. This Court should find therefore that the terms of the stipulated judgment with defendant Condon and the settlement with the remaining defendants are not collusive but rather the product of arms-length bargaining.

**2. The Settlements are Fair, Reasonable and Adequate**

**a. The Relief Secured Through the Settlements are More Favorable to the Class Than That Which Would Be Won through Continued Litigation**

In assessing a proposed class settlement a court must compare plaintiffs' ultimate likelihood of success on the merits to the amount and form of relief offered in the settlement. In this case the settlements offer more relief than a litigated result. A verdict would include only money. These settlements have extensive noneconomic relief including an apology from the County, a memorial to the class and recovery and destruction of the vile and offensive images. The settlement ends the controversy comprehensively. The settlements total more than eight million dollars when the Condon settlement is added. The summary jury awarded only two million two hundred thousand dollars to the class. There was no guarantee that the jury that was to be empaneled on September 5, 2007, would order a higher verdict. The eight million dollars awarded is well above the summary jury verdict.

**b. The Complexity, Expense and Duration of the Litigation Favor Settlement**

The photos were taken seven years ago. The case is over six years old. The trial would have raised cutting edge issues of law – most important, what is the standard for determining serious emotional distress on these facts. More appeals were certain.

Attorney fees and expenses were increasing. Thus, the complexity, expense and likely duration of the case definitely favor settlement.

**c. The Settlement is Timely Given the Stage of the Proceedings and the Amount of Discovery Completed**

The case was settled on the eve of trial. Discovery was completed and all of the facts that could be uncovered that relate to the controversy were made part of the record. In fact, it is only through the settlement that the class and the public will have access to depositions by Condon that are not obstructed by invocations of the Fifth Amendment privilege against self incrimination. The settlement is therefore definitely timely and of great benefit in the search for truth.

**d. Trial Counsel Recommend the Settlement Following Extensive Negotiations**

Class counsel is very experienced in class action litigation and in civil rights litigation. Class counsel has maintained regular contact with the class. Multiple settlement efforts were pursued including a full summary jury trial. Only when the terms offered in these settlements became available has Class Counsel recommended settlement. These terms meet the goals repeatedly identified by class members. The recommendation of class counsel should be given great weight.

**e. The Objection Does Not Require Rejection of the Settlement**

There are potentially 532 families in the class. This represents the number of deceased persons in the Morgue during the period when Defendant Condon had access (August 16, 2000 – January 10, 2001). There are multiple persons who are members of these families. The class has thousands of individuals. Only one person has objected.

Doc. 472<sup>4</sup>. That objection appears to challenge the proposed allocation plan as it states, “we ask that all survivors be treated equally because whether there is a picture or not, our minds, hearts, and souls will always feel the violation<sup>5</sup>.” The objector does not appear to challenge the amount of the overall settlement. Any debate about the allocation plan should be addressed at the time the court is asked to approve an allocation plan. A court should not withhold approval of a class action settlement merely because some members of the class object to it. *Flinn v. FMC Corp.*, 528 F. 2d 1169, 1171 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); *Bronson v. Board of Education*, 604 S. Supp. 68, 73 (S.D. Ohio 1984). In considering the extent and significance of opposition, the court must view the agreement in its entirety, rather than isolating individual components of the agreement for analysis. *Armstrong v. Board of School Directors*, 616 F. 2d 305, 315 (7th Cir. 1980); *Bronson*, 604 F.Supp. at 78. The single objection in this case does not provide sufficient basis to reject the settlement.

#### **f. The Public Interest**

The public interest is clearly served by the prompt approval of these settlements. The new Coroner, Dr. O’Dell Owens, is operating the morgue in excellent fashion and serving the community well in this role. The Coroner’s office, the class members and the

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<sup>4</sup> Class Counsel has also received numerous phone calls which generally seek further explanation of the settlement. Class Counsel has also received a letter from the husband of a class member. The loved one who was in the morgue at the time of the abuses was the former spouse of the class member. The subsequent husband is not a member of the class. He protests the lack of criminal prosecution for those responsible for Condon’s presence in the morgue. He also considers the settlement “a slap in the face of those who have suffered and a slap in the face of justice.” Class Counsel is trying to secure a phone number in order to call the writer. The settlements should not be rejected because of this letter from the subsequent husband of a class member.

<sup>5</sup> Class counsel has telephoned the objector and advised him that his loved one was retrieved from the morgue on August 12, 2000. Morgue Log, Ex 12. There is no evidence that defendant Condon was alone in the morgue taking any photographs before August 16, 2000. Therefore, under the definition of the class and the proposed allocation plan, the objector may not be eligible for any recovery. The objector expressed some increased peace of mind knowing that his loved one was gone from the premises before defendant Condon arrived. A copy of this brief will be mailed to the objector.

Hamilton County Community will be well served by full implementation of both the economic and noneconomic terms of these settlements.

### **C. Steps Required to Implement Settlement Terms**

The settlements impose many duties on the parties that must be complied with in order to complete implementation. Note that the settlement agreement as modified requires that the first payment of four million dollars must be made to the Chesher Qualified Settlement Fund by November 1, 2007. Class Counsel respectfully suggests that if this settlement is approved, the Settlement Master/Plan Administrator be appointed and the order establishing the fund be issued before that date in order that a depository is established to receive the funds. Class Counsel respectfully suggests the following as a schedule for compliance with implementation duties. Anything that is not completed by the initial date can become an agenda item for a regular quarterly report to be scheduled by the Court.

<b>TASK</b>	<b>PROPOSED DATE</b>
Class Counsel - Submit proposed budget for proposed Settlement Master and Psychologist Consultant	Oct 15, 2007
Settlement Master - Submit Claims Protocol or Plan for identifying all members of each decedent family and securing claims from them	Oct. 15, 2007
Class Counsel – Submit application for attorneys fees and expenses	Oct 22, 2007
Settlement Master Deadline to submit motion to close class and propose formal allocation plan	180 days after commencing Claims Protocol
Class Counsel – Deadline to Comply with ¶6a global settlement re Memorial	Nov 30, 2007
Class Counsel – Deadline to report on ¶6b – d global settlement	Nov 30, 2007
Class Counsel – Deadline to report to Court re compliance with ¶5 global settlement on status of image transfers and with ¶3 Condon Stipulated Judgment re status of image transfers	Nov 30, 2007
Class Counsel – Deadline to report to Court on status of	Nov 30, 2007

TASK	PROPOSED DATE
¶5 Condon Stipulated Judgment re deposition	
Class Counsel – Deadline to report on Status of Condon Chap XIII	Nov 30, 2007
Class Counsel – Deadline to report on status of compliance by Condon with ¶3 of Condon Stipulated Judgment	Nov 30, 2007

### V. CONCLUSION

The motions to approve the settlements should be approved. The motion to establish the Cheshier Qualified Settlement Fund should be approved. A Settlement Master and psychology consultant should be appointed. A schedule for implementation of the two settlements should be established.

Respectfully Submitted,

Stanley M. Chesley (0000852)  
Renee A. Infante (0052142)  
Paul M. DeMarco (0041153)  
WAITE, SCHNEIDER, BAYLESS,  
& CHESLEY CO., L.P.A.  
1513 Central Trust Tower  
Cincinnati, OH 45202  
(513) 621-0267

and

/s/ Alphonse A. Gerhardstein (0032053)  
GERHARDSTEIN & BRANCH  
1409 Enquirer Building  
617 Vine Street  
Cincinnati, Ohio 45202  
(513) 621-9100

COUNSEL FOR PLAINTIFF CLASS

**CERTIFICATE OF SERVICE**

I hereby certify that on October 8, 2007, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Alphonse A. Gerhardstein  
Class Counsel for Plaintiffs