

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

ANTHONY D. KOLTON, S. DAVID)	
GOLDBERG and JEFFREY S. SCULLEY,)	
individually and on behalf of a class of all others)	
similarly situated,)	
)	
)	
Plaintiffs,)	
v.)	No. 16-cv-3792
)	
MICHAEL W. FRERICHES,)	
Treasurer of the State of Illinois,)	
Defendant.)	

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

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I. INTRODUCTION

Plaintiffs filed their Complaint more than five years ago alleging that the provision of the Illinois Unclaimed Property Act denying unclaimed property owners interest earned on their property while in state custody was an unconstitutional taking. Plaintiffs litigated the complex and unsettled constitutional and procedural issues for more than three years, including opposing motions to dismiss the Complaint and for class certification, each followed by Plaintiffs' appeal to the Seventh Circuit. These appeals resulted in landmark rulings from that Court. The Court of Appeals first held that the state must allow the owner of unclaimed property the benefit of the property's earnings while in state custody but dismissed Plaintiffs' claim for damages brought on behalf of owners of unclaimed property whose claims had been paid. *Kolton v. Frerichs*, 869 F.3d 532 (7th Cir. 2017)("Kolton I"). In its second holding, the Court of Appeals clarified that the owner of the property is entitled to these earnings regardless of what the owner had previously earned on the property. *Goldberg v. Frerichs*, 912 F.3d 1009 (7th Cir. 2019)("Kolton II").

The Seventh Circuit rulings established Plaintiffs' constitutional right to just compensation but left open two critical issues: how should the earnings to which Plaintiffs were entitled be measured and how much could the state deduct from these earnings as administrative expenses. The Court of Appeals left to this Court the task of calculating "net interest", that is, the amount the state could contend it owed after deducting expenses.

After the Seventh Circuit's second ruling, Plaintiffs renewed their motion for certification of a Rule 23(b)(2) Class consisting of all owners of money property in the Illinois unclaimed property program, which the Court granted, and conducted discovery. The parties then exchanged settlement proposals and entered into settlement negotiations. The result of these

negotiations is a Settlement Agreement (“Settlement”) that ensures that the Rule 23(b)(2) Class Members and Rule 23(b)(3) Settlement Class members—unclaimed property owners whose claims had been paid and who were dismissed from the federal court action by the Seventh Circuit’s decision -- will receive significant, tangible monetary relief and that future unclaimed property owners will continue to receive just compensation. Importantly, the proposed Settlement effectuates the constitutional principle announced by the Seventh Circuit and achieves broader and more equitable monetary relief than Plaintiffs could have achieved through litigation in Federal Court.

Under the proposed Settlement, the Treasurer will pay interest on unclaimed money property held by or delivered to the Treasurer after August 22, 2017-- the date of the first Court of Appeals decision— for a period of up to ten years, at a rate that is equal to or greater than the rate the Treasurer earns. A consultant for Defendant has calculated that, as of March 31, 2021, after deduction of a \$5 administrative fee to be assessed by the state, interest in the amount of approximately \$13.5 million would be payable on more than 207,000 properties owned by Rule 23(b)(3) Settlement Class members, and he has estimated that, as of that date, approximately \$30 million in interest would be payable to Rule 23(b)(2) Class members. Plaintiffs’ consultant has estimated that the amount payable to Rule 23(b)(2) Class members will be a much larger sum, in the range of \$50 million.

The proposed Settlement merits preliminary approval under Fed. R. Civ. P. Rule 23(e)(1) as it is fair, reasonable and adequate and, therefore, likely to receive final approval under Fed. R. Civ. P. Rule 23(e)(2), and it satisfies the standards for preliminary approval applied by the courts of this Circuit. The Rule 23(b)(2) Class has been certified by this Court and the Rule 23(b)(3) Settlement Class satisfies the requirements of Federal Rules of Civil Procedure 23(a) and

23(b)(3) for certification. Moreover, the proposed Notice Plan exceeds applicable requirements and has been designed to achieve reasonable notice to Rule 23(b)(2) Class members and the best notice practicable to the Rule 23(b)(3) Settlement Class Members.

II. BACKGROUND OF THE LITIGATION

In 2016, Plaintiffs Kolton and Goldberg commenced this action on behalf of themselves and other owners of unclaimed property held in the form of money by the Treasurer under the Illinois Uniform Disposition of Unclaimed Property Act (the “Act”).¹ The Treasurer holds unclaimed property until it is claimed by the owner, at which time the property is returned, but the Act prohibits the Treasurer from compensating the owner of property held as money for the interest or other earnings on the property while in state custody. Plaintiffs alleged that the Act’s prohibition was an unconstitutional taking. Plaintiffs brought their action under 42 U.S.C. §1983 and the U.S. Constitution and sought prospective declaratory and injunctive relief on behalf of owners of property held by the Treasurer in the form of money and damages on behalf of those owners whose claims had been paid.

Defendant moved to dismiss the Complaint under Rule 12(b)(1), Fed. R.Civ.P., on the ground that Plaintiffs’ claim was not ripe because they had not exhausted their state court and administrative remedies as required by *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).² The Court granted the Rule 12(b)(1) motion and dismissed the Complaint for lack of subject matter jurisdiction. Plaintiffs appealed

¹ That Act was subsequently repealed by the enactment of the Revised Uniform Unclaimed Property Act (765 ILCS 1026). The Revised Act violates the Fifth Amendment in the same manner as the former Act by not providing just compensation for the earnings of the owners’ money while in state custody.

² The Court did not reach Defendant’s motion under Fed.R.Civ. P. 12(b)(6).

the dismissal to the Seventh Circuit Court of Appeals, which reversed the Court's order in part, holding that Plaintiffs were not required to pursue state remedies and were entitled to seek prospective relief in federal court on their claim that the state's refusal to pay owners of unclaimed property the benefit of the property's earnings while in state custody was an unconstitutional taking.³ The Seventh Circuit remanded the case for further proceedings on the prospective relief claim but affirmed the dismissal of the claim for damages on behalf of those owners whose property had been returned on the ground that the claim was against the State and the State was not a person that could be sued under § 1983. See *Kolton I*. The Court of Appeals did not reach the state's Eleventh Amendment defense to Plaintiffs' direct constitutional challenge under the Fifth Amendment, but this defense was a further impediment to any claim for damages in federal court.

Plaintiffs Kolton and Goldberg and Plaintiff Jeffrey Sculley filed an Amended and Supplemental Complaint limited to claims for declaratory and injunctive relief entitling Plaintiffs to just compensation in the future. Plaintiffs moved for certification under Federal Rule of Civil Procedure 23(b)(2) of a class of all persons who are owners of property in the Illinois unclaimed property program in the form of money. Defendant opposed the motion, primarily arguing that the proposed class should be limited to owners of property in interest-bearing accounts and did not satisfy the commonality and typicality requirements of Rule 23 because it included owners of property that earned interest as well as property that did not earn interest before delivery to the

³ The Court of Appeals also clarified that its prior decisions based on failure to abide by *Williamson* were no longer to be read as deeming *Williamson* to be jurisdictional. *Kolton I*, at 533-34. The Supreme Court subsequently overruled *Williamson*'s state-litigation requirement and held that a property owner's Fifth Amendment rights are violated when the government takes his property without just compensation. *Kwick v. Twp. Of Scott*, 588 U.S. ___, 139 S.Ct. 2162 (2019).

Treasurer. Defendant relied on the Seventh Circuit's decision in *Cerajeski v. Zoeller*, 735 F.3d 577 (7th Cir. 2013), a case involving the owner of property that had been interest-bearing before delivery to the Treasurer, in which the court held that the provision of Indiana law similar to that of Illinois was an unconstitutional taking. The Court denied Plaintiffs' motion for certification and concluded that Plaintiff Goldberg had no claim for just compensation because his property was not earning interest before delivery to the Treasurer.

Following this ruling, Plaintiff Goldberg filed a motion for entry of a final judgment dismissing his claim. The Court granted this motion and entered judgment for the state, and Plaintiff Goldberg appealed. The Seventh Circuit reversed, affirming its holding in *Kolton I* that an owner of unclaimed property is entitled to income that the property earns while in State custody regardless of whether the property had previously been earning income in the owner's hands. See *Kolton II* at 1011.

Plaintiffs renewed their motion for class certification, and in June 2019, the Court granted this motion and certified a Rule 23(b)(2) Class of "all persons who are owners of property in the Illinois unclaimed property program that is in the form of money."

During June through August, 2019, the parties engaged in informal discovery, including conferences and interviews with the Defendant, the exchange of written questions and answers relating to the Treasurer's investment of unclaimed property held in State custody. This discovery provided detailed information on the earnings on the property in the Unclaimed Property Trust Fund, the use of unclaimed property while in State custody, the number and amount of claims made by owners of unclaimed property annually, and the length of time unclaimed property was held in the Unclaimed Property Trust Fund before being claimed. In

addition, Plaintiffs' counsel consulted with an expert economist on what might be a reasonable return on unclaimed property in the form of money held by the Treasurer.

III. SETTLEMENT NEGOTIATIONS

Plaintiffs presented a settlement demand to the Treasurer on August 19, 2019, and the Treasurer made a counter-proposal on October 10, 2019. Thereafter, counsel for the parties met and conferred on several occasions, and the Treasurer provided additional information in response to follow-up questions from Plaintiffs. After extensive arms-length negotiations and Plaintiffs' counsel's consultation with their expert economist, the Parties reached an agreement in principle to settle the case on January 22, 2020, and, after further arms-length negotiations over certain terms, memorialized their agreement in a Memorandum of Understanding dated March 11, 2020.

Although the Memorandum of Understanding set forth the basic terms of a settlement, including the outline of the measure of just compensation and the certification of a Rule 23(b)(3) Settlement Class, it left open a number of issues that had to be resolved relating to notice, mutual releases, distribution of compensation to Class members, calculations relating to the value of the settlement and treatment of future claimants. Negotiations over these and other terms continued through 2020 as the Parties worked to reduce their term sheet to a written settlement agreement and related exhibits. One of the terms of the proposed settlement was to include a Rule 23(b)(3) Settlement Class. Plaintiffs' Counsel identified Henry Krasnow, an attorney they knew professionally and were confident would be an adequate class representative for the Rule 23(b)(3) Settlement Class, from information compiled by the Treasurer concerning unclaimed property claims paid on or after August 22, 2017. Negotiations were slowed because of the pandemic that resulted in a shut-down of Illinois beginning the day after the parties entered into

their Memorandum of Understanding and continued over the course of more than a year. Throughout this time the parties were all working remotely and unable to meet face-to-face, making the scheduling of meetings and communication more difficult.

At all times throughout this settlement negotiation process, counsel for the parties engaged in vigorous, arms-length settlement negotiations. The parties did not negotiate attorneys' fees, costs or expenses prior to agreeing to the terms of the Settlement. When preliminary negotiations concerning attorneys' fees were not fruitful, the Parties agreed that they would proceed to finalize, and seek preliminary approval of, the Settlement without agreeing to an award of attorneys' fees and resume their efforts in good faith to reach agreement after the settlement papers were presented to the Court for preliminary approval.

IV. SETTLEMENT TERMS

The Settlement terms are detailed in the Agreement of Settlement attached as Exhibit "1" to Plaintiffs' Motion for Preliminary Approval. The following is a summary of material terms.

A. The Injunctive Relief and Damages Classes

This Court had previously certified a Rule 23(b)(2) Class of owners of unclaimed property who were seeking declaratory and injunctive relief that would entitle them to just compensation upon entry of the final Judgment in this action. The proposed Settlement modifies the Rule 23(b)(2) Class definition to establish a date certain for class membership and includes all persons who are owners of unclaimed property held in the form of money by the Treasurer as of the date of entry of the Preliminary Approval Order. Owners of unclaimed money property delivered to the Treasurer after the entry of the Preliminary Approval Order ("Future Claimants") will be entitled to just compensation and the benefits of the declaratory and injunctive relief resulting from the Seventh Circuit's decisions in this case.

Pursuant to the Settlement, Plaintiff Henry Krasnow is filing a Second Amended and Supplemental Complaint which adds claims on behalf of a Rule 23(b)(3) Settlement Class consisting of owners of Unclaimed Property that was held in the form of money by the Treasurer and whose claims for return of their property were paid or approved in the period from August 22, 2017 (the date of the Seventh Circuit's decision in *Kolton I*) through and including the date of preliminary approval of the Settlement by this Court. Defendant has agreed to certification of the Rule 23(b)(3) Settlement Class solely for the purpose of effectuating the Settlement.

B. Relief for the Benefit of Class Members

If the Court approves the Settlement, the Defendant has agreed to pay interest as just compensation to members of both the Rule 23(b)(3) Settlement Class and the Rule 23(b)(2) Class. Interest will be paid from the latest of August 22, 2017, the date the unclaimed property is delivered to the Treasurer, or the date the Treasurer converts unclaimed property that is not in the form of money to money. Interest accrues until the funds are returned to the property owner for up to a maximum of ten years. The Treasurer will also pay the just compensation measure agreed to in the Settlement to Future Claimants, subject to the General Assembly's enacting legislation that changes the just compensation owed to Future Claimants.

In sum, just compensation in the form of interest under the proposed Settlement is to be paid to: (a) those owners of unclaimed property whose claims were paid or approved from August 22, 2017 to the date of Preliminary Approval; (b) those owners who owned unclaimed property held by the Defendant as of the date of Preliminary Approval; and (c) those owners not in the classes set out in (a) or (b) whose unclaimed money property is delivered to the Defendant after the entry of the Preliminary Approval Order and who file a valid claim for return of their

property or are otherwise paid, subject to future legislative changes to the terms of just compensation owed to them.

The Settlement measure of just compensation is an interest rate calculated monthly and compounded monthly that is the greater of: (1) the actual return the Defendant earns on the Unclaimed Property Trust Fund maintained by the Defendant, or (2) the percentage increase, if any, in the Consumer Price Index for all Urban Consumers (CPI-U), for all items published by the U.S. Department of Labor. This measure will be applied to the gross amount of the Class Member's claim for each month that the Defendant has held the class member's property in the form of money. The Treasurer may assess an administrative fee of no more than \$5.00 for each claimed property, deductible only from interest due on each claimed property.

The Treasurer engaged an outside consultant with expertise analyzing unclaimed property funds who has calculated that, as of March 31, 2021, more than 207,000 properties owned by Rule 23(b)(3) Settlement Class Members were entitled to net interest of approximately \$13,563,000. Net interest payable to Rule 23(b)(2) Class Members can only be estimated because those claims have not yet been made. However, based on historical averages relating to holding periods and return rates of the Unclaimed Property Trust Fund, recent interest rates, and calculations of interest payable to the Rule 23(b)(3) Class, the Treasurer's consultant has estimated that the present value of interest to be paid to the Rule 23(b)(2) Class was approximately \$31 million as of March 31, 2021. Plaintiffs and Plaintiffs' Counsel have been advised by an expert economist, Sam Peltzman, professor emeritus of the University of Chicago Booth School, that, based on historical trends of unclaimed property claims paid by the Treasurer, the interest payable to the Rule 23(b)(2) Class will likely be well above that estimate and more likely in the vicinity of \$50 million. Correspondence from Mr. Wagers is attached as

Exhibit A to this Memorandum and spreadsheets comparing the analyses made by Mr. Wagers and Mr. Peltzman is available at the following link ([LiabilityAnalysis_20210106-revised comparison.xlsx](#)).

Class members will not be required to file an additional claim to obtain interest. Rule 23(b)(3) Settlement Class Members (and Rule 23(b)(2) Class Members whose claims are paid before the Judgment becomes final) whose mailing addresses can be verified by the Treasurer will receive their interest payments without further action on their part. If no current mailing address can be verified, the Class Member will be required to confirm the mailing address within 120 days of the date confirmation is requested or to file a separate request with verification of the mailing address within two years of the confirmation request.

Once the Court's judgment approving the Settlement becomes final and is not subject to appeal (the "Effective Date"), the Treasurer will begin making interest payments to Class Members and Future Claimants whose property has been returned or is returned in the future.

C. Releases

In return for the benefits received from the proposed Settlement, Plaintiffs and the Classes shall release and discharge Defendant, his representatives, and the State of Illinois from claims related to this Action, other than their respective obligations contained in the Settlement Agreement. Defendant has agreed to the same release of Plaintiffs, the Classes and Plaintiffs' Counsel. Upon the Effective Date, Class Members will be bound by all proceedings, orders and the final judgment in this Action, whether favorable or unfavorable to them.

D. Notice Program

The Parties' proposed notice program is set forth in Sections 3.2.1, 3.2.2 and 3.2.3 of the Agreement of Settlement.

1. Direct Notice to Class Members: The Rule 23(b)(3) Settlement Class Notice will be sent by email or, if not available, by mail, to each member of the Rule 23(b)(3) Settlement Class within 20 business days of the entry of the Preliminary Approval Order. The Treasurer will mail (by email where an address is available) approximately 635,000 notices to Rule 23(b)(3) Class members. As soon as practicable upon the entry of the Preliminary Approval Order, the Treasurer will provide direct notice to Rule 23(b)(2) Class members whose claims are approved by including in the “Notice to Claimants of the Approval of Payment of Principal to Owners of Unclaimed Property”, or in a separate mailing or email message, the Summary Notice and reference to the homepage of its website along with a request that these claimants notify the Treasurer of any change in their email or mailing address. The Treasurer will continue to include the Summary Notice in this Notice to Claimants for a period of one year after entry of the Preliminary Approval Order or until Final Judgment is entered by the Court, whichever is later.

2. Treasurer’s Website: The Treasurer will prominently display on the homepage of its website a reference to the *Kolton* Settlement with a direct link to a page with all materials related to the settlement, including FAQs and answers, the Summary Notice, the Rule 23(b)(3) Settlement Class Notice, the webform to update class members’ contact information and all subsequent court rulings. The Treasurer will include these links for a period of two years after entry of the Preliminary Approval Order, or until Final Judgment is entered by the Court, whichever is later.

3. Publication: Within 14 days of the entry of the Preliminary Approval Order, the Treasurer will cause the Summary Notice to be published in a newspaper of general circulation.

4. CAFA Notice: The Treasurer will serve notice of the proposed Settlement upon the appropriate state and federal officials in accordance with 28 U.S.C. § 1715 (CAFA Notice).

E. Attorneys' Fees and Costs and Plaintiffs' Request for Compensation

Plaintiffs' counsel will submit an application to the Court for an award of attorneys' fees and reimbursement of expenses (1) from Defendant under 42 U.S.C. §1988 on the §1983 claim for declaratory and injunctive relief and (2) under common law for creation of a common fund that benefits members of both classes. The total of this request shall not exceed 25% of the benefit Class members will receive in interest payments (conservatively estimated at approximately \$43 million as of March 31, 2021) or \$9.5 million (which represents a fee of approximately 22% of the conservative estimate of the benefit). Plaintiffs' counsel will request that the award of attorneys' fees under common law be paid out of the Unclaimed Property Trust Fund (that is, unclaimed property held by the Treasurer in custody until reclaimed by the Owner) and not reduce the amount of interest paid to class members or Future Claimants.

Defendant has agreed that any award of attorneys' fees or reimbursement of expenses may be paid from the Unclaimed Property Trust Fund. Defendant retains the right to challenge the amount of, or method of calculating, Plaintiffs' counsel's fee request in this Court or on appeal. Plaintiffs' counsel and Defendant have agreed to attempt in good faith to negotiate their differences with respect to the award of attorneys' fees before Plaintiffs' counsel submit their application for an award of attorneys' fees and reimbursement of expenses to the Court.

The named Plaintiffs⁴ may apply to the Court for Plaintiffs' compensation for their commitment and assistance on behalf of the Rule 23(b)(2) Class and the Rule 23(b)(3) Settlement Class in an amount not to exceed \$2,500 for each of them. Any amount awarded by the Court shall be paid from the Unclaimed Property Trust Fund and shall not reduce the amount of just compensation due or paid to any Class member or Future Claimant.

**V. THE PROPOSED SETTLEMENT SATISFIES RULE 23(e)
AND SEVENTH CIRCUIT GUIDELINES AND WILL LIKELY BE APPROVED**

Rule 23(e) sets out the factors a court must consider in determining whether a class action settlement is fair, reasonable and adequate and should be approved. On a motion for preliminary approval, the court must decide that it will likely be able to approve the proposal and certify the settlement class for purposes of judgment on the proposal. The factors to be considered are whether:

- A. The class representatives and class counsel have adequately represented the class;
- B. The proposal was negotiated at arm's length;
- C. The relief provided for the class is adequate, taking into account:
 - i. The costs, risks, and delay of trial and appeal;
 - ii. The effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims;
 - iii. The terms of any proposed award of attorney's fees, including timing of payment;
 - iv. Any agreement required to be identified under Rule 23(e)(3); and
- D. The proposal treats class members equitably relative to each other.

⁴ On July 1, 2021, Plaintiffs' Counsel were advised of the death of Plaintiff S. David Goldberg and will substitute a successor Plaintiff as appropriate.

Fed. R. Civ. P. 23(e)(2).

These factors are not intended to “displace” any factor courts have applied in the past but “rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal,” Rule 23(e)(2) Advisory Committee’s Note to 2018 amendments, and they should be considered along with Seventh Circuit guidelines for approval of a settlement. The factors that courts in the Seventh Circuit have identified when assessing whether to approve a class action Settlement as fair, reasonable and adequate are: (1) the strength of the plaintiffs’ case compared to the amount of the defendants’ settlement offer; (2) the complexity, length, and expense of continued litigation; (3) the amount of opposition to the settlement; (4) the opinion of experienced counsel; and (5) the stage of the proceedings and the amount of discovery completed. *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (internal quotation marks and citation omitted); *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863-64 (7th Cir. 2014). Because the Rule 23(e) factors and the factors applied by the courts in this Circuit overlap, we address them together and in combination where appropriate.

Preliminary approval of the proposed Settlement is warranted because, after considering these factors, the Court will likely be able to approve the Settlement as fair, reasonable and adequate and certify the Rule 23(b)(3) Settlement class for purposes of judgment.

A. Plaintiffs and Plaintiffs’ Counsel Have More Than Adequately Represented the Classes

The Rule 23(b)(2) Class Plaintiffs and Plaintiffs’ Counsel have prosecuted this action in this Court and through two appeals for more than five years. In granting Plaintiffs’ Motion to Certify the Rule 23(b)(2) Class, this Court acknowledged that Plaintiffs Kolton, Goldberg and Sculley were adequate class representatives who shared the same interests as absent class

members and had sufficient interest in the outcome of this litigation to ensure vigorous advocacy of the claims of all class members.⁵ These Plaintiffs have continued to support the litigation and have been willing and available to perform all the duties of a class representative and to assist counsel in their efforts. Each of the class representatives reviewed relevant documents and reviewed and approved the proposed Settlement. (See Exhibits 2, 3, and 4 to Plaintiffs' Motion for Preliminary Approval).

Plaintiff Henry Krasnow is similarly an adequate class representative in that he shares the same interests as absent class members and has sufficient interest in the outcome of the litigation to ensure vigorous advocacy on behalf of the class he represents. Mr. Krasnow is an experienced lawyer who is well qualified to evaluate the benefits of the proposed Settlement and the risks of litigating the claims of the Settlement Class. As with the other class representatives, Mr. Krasnow has reviewed relevant documents and reviewed and approved the proposed Settlement. (See Exhibit 5 to Plaintiffs' Motion for Preliminary Approval).

Class counsel are well-qualified and experienced in class action and complex federal statutory litigation and have experience with the kind of constitutional claims involved in this case. The adequacy of class counsel was never challenged, and this Court has observed their conduct of this litigation from its inception.

B. The Proposed Settlement is the Result of Good Faith, Informed, Arm's Length Negotiations

As described above, settlement discussions in this case began only after more than three years of litigation, two rulings from the Seventh Circuit, certification of the Rule 23(b)(2) Class, discovery and investigation of factual and legal issues by Plaintiffs' Counsel, and consultation

⁵ The Rule 23(b)(2) class definition has been modified to clarify that it includes all unclaimed property owners as of the date of the entry of the Preliminary Approval Order.

with an expert economist. The negotiations involved experienced and qualified counsel and representatives of the Defendant, all of whom were well aware of the strengths and weaknesses of their respective positions and the benefits of settlement and the risks of litigation. At all times they were focused on pursuing the interests of the parties they represented. Negotiations extended over a seven-month period until the parties reached an agreement in principle which was memorialized in a Memorandum of Understanding. After that agreement was reached, the parties continued to negotiate in good faith to reach agreement on the details of the Rule 23(b)(3) Settlement Class, the language of a written settlement agreement, the forms of notice to both Classes, and other exhibits, and resolving administrative issues.

C. The Proposed Settlement Provides More Than Adequate Relief to the Classes

1. The Costs, Risks and Delay of Trial and Appeal

Plaintiffs' objective in bringing this action was twofold: (1) to obtain an unequivocal declaration that the State of Illinois was required, under the U.S. Constitution, to compensate owners of unclaimed property held by the Treasurer in the form of money for the interest or other earnings on their property while in state custody and injunctive relief that would effectuate the declaration in the future, and (2) to extend the State's obligation to pay just compensation to unclaimed property owners whose claims had been paid and recover damages for them. After two appeals to the Seventh Circuit, Plaintiffs achieved their intended objective of obtaining declaratory and injunctive relief under 42 U.S.C. § 1983 for owners of unclaimed money property, regardless of whether their property had been earning interest before the State acquired custody. No other federal court had so held.

The Court of Appeals, however, rejected the claim for damages that had been brought on behalf of the past property owners on the ground that the state could not be sued under 42 U.S.C.

§ 1983. Although Plaintiffs believed they had grounds to seek damages directly under the U.S. Constitution, they recognized the difficulty of pursuing that claim in federal court as Defendant had already raised the bar of the Eleventh Amendment. Any challenge to that defense involved risk and the possibility of delaying resolution of the issues the Court of Appeals left open on remand to this Court, namely the measure of just compensation and the determination of the administrative expenses the State was entitled to deduct before paying “net interest” to claimants.

It was at this stage, after three years of litigation and a successful outcome for Plaintiffs on the merits, that the parties broached the possibility of settlement. After discovery through written questions to and answers from Defendant and interviews with Defendant’s representatives, the Parties negotiated over the open issues of the measure of just compensation, net interest and relief for the damages class and reached an agreement in principle, the terms of which are reflected in the proposed Settlement.

In *Kolton I*, the Court of Appeals had held that the unclaimed property owner is entitled to income that the property earns while in state custody. The proposed Settlement provides that the state will pay at least what Defendant earns on unclaimed property in its custody and more than it earns if the percentage increase in the CPI is greater than Defendant’s actual return. When compared to various Treasury Bond rates for the prior five years (2014-2018), the agreed upon measure averaged slightly below the 5-year Treasury Bond rate, but it was higher than that Bond rate in at least one year and was significantly higher than what the Treasurer actually earned in each of the five years. Defendant has calculated that, as of March 2021, the average interest that will be paid to Rule 23(b)(3) Settlement Class Members is 2.056%. The recent rates for both five and ten-year Treasury bonds are lower than that rate and the five-year average is lower as well. The actual rate the Treasurer has earned over the past year is significantly lower

than this rate.. A comparison of recent rates earned by the Treasurer and a five year summary of rates reported on Federal Reserve Economic Data is attached as Exhibit B to this Memorandum.

Plaintiffs also were aware of the interest paid by the very few other states with statutes that provide interest on unclaimed money property without regard to whether the property had earned income before it was delivered to the state.⁶ These rates were substantially lower or were left to state regulatory authorities. Thus, Plaintiffs concluded that the measure of compensation in the proposed settlement was fair and more than adequate, especially when weighed against the risk that a court could find the appropriate measure to be what the Treasurer actually earned and the delay that would result from litigating this issue.

In *Kolton II*, the Court of Appeals limited the properties entitled to interest to those large enough to earn “‘net interest’—in other words, when administrative expenses exceed the return on investment” no interest is due, citing *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 224 (2003). The task of determining which parcels could or could not earn net interest would have required extensive fact and expert analysis and discovery, for example, as to which costs in the Treasurer’s annual budget were reasonably chargeable to the interest calculations for, and payments to, the Classes.⁷ Recognizing that this pursuit would be time-consuming, complex and costly and would require expert analysis and discovery and inevitable motion practice before trial over the additional expenses the Treasurer would incur in calculating monthly fees and

⁶ At that time, to Plaintiffs’ knowledge, only Massachusetts, Mississippi, New Jersey and Ohio fit within that category.

⁷ In the past, the Illinois legislature had allowed the Treasurer to deduct up to \$20.00 per claim to cover administrative costs of the unclaimed property trust fund. Repealed 765 ILCS 1025/20(b).

overseeing the program, the Parties reached an agreement that the Treasurer could deduct an administrative fee of up to \$5.00, but only from interest due on each unclaimed property.⁸

Agreement as to the amount of the administrative fee took into account the Court of Appeals' statement that "Illinois could contend that it does not owe interest on small amounts, such as the \$100 it held on behalf of Goldberg," *Kolton II* at 1011, and the Supreme Court's holding in *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 224 (2003). The administrative fee can only be deducted from interest due, and it is an amount that has been approved in settlements of other cases as a threshold for recovery. See *In re Blue Cross Blue Shield*, 2020 U.S. Dist. LEXIS 248401 (N.D. Ala. Nov. 30, 2020). As of January, 2021, more than 177,000 properties owned by Rule 23(b)(3) Settlement Class members were entitled to some interest, and more than half of these were entitled to receive interest of \$5.00 or more.⁹

The proposed Settlement provides that interest accrues from the date of the decision of the Court of Appeals in *Kolton I* or when unclaimed money property is delivered to the Treasurer, whichever is later. Agreement on this start date avoided further litigation over disputed questions of whether property owners were entitled to interest on their property only prospectively and not prior to the entry of a final judgment. The agreement that interest will be paid for up to ten years is the period allowed under the recently revised Illinois law governing interest-bearing property and is in line with the period allowed under the laws of other states. For these reasons, the proposed settlement provides exceptional relief to the rule 23(b)(2) Class.

⁸ The state does not currently deduct any bookkeeping or other custodial fee from principal. The proposed Settlement provides that the \$5.00 administrative fee may be charged only so long as no other administrative fee is charged on principal or on interest earned on unclaimed property.

⁹ The percentage of properties entitled to net interest reflects the fact that interest started accruing only in August, 2017 and that nearly 90% of the properties delivered to the Treasurer are \$100 or less.

The proposed Settlement also provides more than adequate relief to the Rule 23(b)(3) Settlement Class. The prosecution of claims brought on behalf of the damages class was always risky and, in addition to the Eleventh Amendment challenge to a federal court action, would be subject to statute of limitations and retroactivity defenses even if brought in a separate state court action. The claims of the damages class members had been dismissed in 2017, and the Illinois two-year statute of limitations would have barred many of these claims. *Bieneman v. Chicago*, 864 F.2d 463 (7th Cir. 1988). In the course of negotiations, Defendant agreed to include the Rule 23(b)(3) damages class in the settlement, thus promoting judicial efficiency and avoiding risky and protracted further litigation in state court.

These considerations also satisfy factors the courts in this Circuit look to in determining the fairness and adequacy of class action settlements. in particular, the strength of plaintiff's case compared to the amount of the settlement offer, which is the most important factor; the complexity, length and expense of further litigation; and the stage of proceedings and amount of discovery. *Synfuel Techs, Inc.*, 463 F.3d at 653; *Wong*, 773 F.3d at 863-64.

2. The Effectiveness of the Proposed Method of Distributing Relief

The proposed Settlement provides an efficient and effective method for distributing interest payments based on the detailed information the Treasurer maintains on property owners whose claims have been paid or approved. No member of either Class will have to file a claim for interest. Class members whose claims are paid before the Settlement becomes effective will receive their interest payments without any action on their part or, where necessary, with verification of their address. Class members whose claims are approved and paid after entry of the Settlement becomes effective will receive interest along with payment of their principal. (Settlement Agreement, Sections 2.8-2.10)

3. The Terms of Any Proposed Award of Attorneys' Fees

Plaintiffs' Counsel will apply for a combined fee and expense award not to exceed \$9.5 million or less than 25% of the common benefit, that is, the funds from the Unclaimed Property Trust Fund that will be used for the payment of interest. This is in line with the benchmarks set by district courts in the Seventh Circuit for fees alone. *Gaskill v. Gordon*, 160 F. 3d 361, 362-63 (7th Cir. 1998); *Kaufman v. Am. Express Travel Related Servs.*, 2016 U.S. Dist. LEXIS 26167*38 (N.D. Ill. Mar. 2, 2016) ("Typically, attorneys' fees of 25-33 1/3% of a settlement value are reasonable and typical"). Plaintiffs' Counsel will request fees from Defendant pursuant to §1988 as a portion of their award and that any award of fees not be deducted from the interest payable to class members.¹⁰ Plaintiffs' Counsel will address the basis for a fee and expense award at greater length in a separate fee petition to be filed within 45 business days of entry of the Preliminary Approval Order. Class Members will receive notice of the proposed fee and expense request and will have an opportunity to object prior to Final Approval. See Fed. R. Civ. P. 23(h); *Redman v. Radioshack Corp.*, 768 F. 3d, 622 (7th Cir. 2015)¹¹

D. The Proposed Settlement Treats Class Members Equitably

The Seventh Circuit's decisions in *Kolton I* and *Kolton II* make clear that all owners of unclaimed money property are entitled to interest regardless of whether their property previously earned income. The proposed Settlement makes no distinction, and members of both classes will receive the same measure of just compensation. The rate of interest they receive will depend only on the time period their money property was in state custody. Rule 23(b)(3)

¹⁰ Plaintiffs' Counsel's estimate of their lodestar through June 30, 2021 is approximately \$1.2 million.

¹¹ There are no agreements required to be identified under Rule 23(e)(3).

Settlement Class Members are treated in the same manner as Rule 23(b)(2) Class Members because they suffered the same injury—the only difference is that they claimed their property while this Action has been pending--and are entitled to benefit to the same extent from the rulings of the Seventh Circuit.

The proposed Settlement ensures that any members of either Class who are entitled to interest under the present Illinois Unclaimed Property Act because their property was earning interest before it was delivered to the Treasurer shall not lose any rights under the present Act but will receive any greater amount due under the proposed Settlement. (See Settlement Agreement, Section 2.7)

VI. CERTIFICATION OF THE RULE 23(b) SETTLEMENT CLASS IS LIKELY

At the preliminary approval stage, Rule 23(e)(1) requires the Court to determine whether it is likely to be able to certify the class for settlement purposes at final approval. The proposed Settlement defines the Rule 23(b)(3) Settlement Class as “all owners of Unclaimed Property whose Unclaimed Property claims were paid or approved for payment from August 22, 2017 through the date of entry of the Preliminary Approval Order.” The proposed Settlement Class satisfies the requirements of Rules 23(a) and 23(b)(3) and is likely to be certified at final approval.¹²

A. The Proposed Settlement Class Satisfies the Requirements of Rule 23(a)

Rule 23(a) provides:

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

¹² The Settlement Class is sufficiently definite and readily ascertainable to meet this implied prerequisite of Rule 23. See *In re NCAA Student-Athlete Concussion Injury Litig.*, 332 F.R.D. 202, 214n.9 (N.D. Ill. 2019)(Citation omitted).

- (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.”

1. Numerosity

According to the Treasurer’s calculations, the number of Rule 23(b)(3) Settlement Class members whose claims have been paid or approved is in the hundreds of thousands. The numerosity requirement of Rule 23(a)(1) is, therefore, satisfied.

2. Commonality

Rule 23(a)(2) commonality is satisfied where “claims depend on a common contention that is capable of class-wide resolution” and the determination of the truth or falsity of that contention will “resolve an issue that is central to the validity of each claim.” *Chi. Teachers Union, Local No. 1 v. Bd of Educ. of Chi.*, 797 F.3d 425, 434 (7th Cir. 2015), citing *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011). That requirement is met here. Whether the state’s refusal to compensate Plaintiff and class members for the time value of their money is a taking in violation of the Fifth Amendment presents a “common contention that is capable of class-wide resolution.” *Chi. Teachers Union*, 797 F.3d at 434. Moreover, plaintiff’s claim depends on facts that are common to the proposed class, rather than individual to its members, and proof of Plaintiff’s claim will resolve an issue central to the validity of the class claims. *Bell v. PNC Bank, N.A.*, 800 F.3d 360, 375 (7th Cir. 2015).

3. Typicality

Plaintiffs’ claim is typical of the claims of the proposed Settlement Class. The legal theory and central questions in the litigation are the same for Plaintiff and all putative class members. Plaintiff’s claim -- that, when his unclaimed property was returned, the state did not

pay just compensation for the earnings on that property -- is the claim of all Settlement Class members. Rule 23(a)(3) is satisfied where, as here, there is a similarity of legal theory and both representative plaintiff and class members claim that they were injured by the same state policy. *Muro v. Target Corp.*, 580 F.3d 485, 492 (7th Cir. 2009)(quoting *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983)); *Gomez v. PNC Bank, N.A.*, 306 F.R.D. 156, 172 (N.D. Ill. 2014); *Pawelczak v. Fin'l Recovery Svc., Inc.*, 286 F.R.D. 381, 386 (N.D. Ill. 2012).

4. Fairness and Adequacy

Plaintiff and his counsel satisfy the adequacy and fairness requirements of Rule 23(a)(4). Plaintiff's claims do not conflict with the claims of other class members, as all class members seek the same relief and class representative's proof would not damage or diminish other class members' ability to recover. *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 813 (7th Cir. 2013). Plaintiff has sufficient interest in the outcome of this litigation to ensure vigorous advocacy, as he seeks to vindicate the rights of all class members and recover the measure of monetary relief due all. See *Pawelczak v. Fin'l Recovery Svc., Inc.*, 286 F.R.D. at 387. Moreover, as demonstrated by their efforts in this litigation to date, their advocacy on behalf of the Settlement Class, and their qualification and experience in this type of litigation, Settlement Class Counsel have adequately and fairly represented the Settlement Class.

B. The Proposed Settlement Class Satisfies the Requirements of Rule 23(b)(3).

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Common questions of law and fact clearly predominate in this case. The Settlement Class members' claims all arise under the same Illinois law and the same course of conduct, namely

the refusal of the state to compensate them for the earnings on their property while in state custody. Their common allegations and legal theory predominate over any variations among class members. See *Zolkos v. Scriptfleet, Inc.*, 2014 U.S. Dist. LEXIS 172519, at *9 (N.D. Ill. Dec. 12 2014). Furthermore, a class action is clearly superior to other methods for resolving the issues in this case. Plaintiff is not aware of any unclaimed property owner in Illinois filing an action for damages with respect to the claims involved in this case, and that is not surprising, given the size of each Settlement Class member's damages claim.

VII. THE PROPOSED NOTICE PROGRAM COMPLIES WITH RULE 23 AND DUE PROCESS

Rule 23(c) requires the Court to direct “appropriate notice” to the Rule 23 (b)(2) Class and the “best notice that is practicable under the circumstances” to the Rule 23(b)(3) Settlement Class. The Notice Program includes direct notice to Rule 23(b)(3) Settlement Class members by email or mail that contains the information specified in Rule 23(c)(2)(B). Rule 23(b)(2) Class members whose claims are approved will also receive an individual notice. The Treasurer will highlight the Settlement on the home page of its website and will include the notices and key case documents there. (Agreement of Settlement, Sections 3.2.1 – 3.2.3, Exhibits A-1, A-2 to the Agreement of Settlement). The proposed Notice Program satisfies each of the requirements of Rule 23(c) and should be approved.

VIII. CONCLUSION

For all of the reasons set forth above, this Court should grant Plaintiffs' Motion for Preliminary Approval and set a Final Approval Hearing.

Respectfully submitted,

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Counsel for Plaintiffs and the Classes

Dated: July 13, 2021

Exhibit A

Kelmar Associates, LLC
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781-213-6926
www.kelmarassoc.com

G. Allen Mayer
Chief of Staff
Illinois State Treasury Michael W. Frerichs
Capitol Building
219 State House
Springfield, IL 62706

- Interest is compounded monthly, using the higher of the Illinois ROR interest rate or the Consumer Price Index Historical Tables for All Urban Consumers percent change from 12 months ago. The interest rate is adjusted for each month.
https://www.bls.gov/regions/mid-atlantic/data/consumerpriceindexhistorical_us_table.htm
- The Starting Date for interest is the latter of:
 - The date the property was received by the Treasurer; or
 - The date the property was converted to cash by the Treasurer; or
 - August 22, 2017
- The Ending Date for interest is the date the payment was submitted to the Illinois State Comptroller for payment.

[illegible]



KELMAR

Calculation Summary

■ Number of Properties Calculated:	1,235,337
■ Total Cash Paid before Interest	\$574,891,770.73
■ Compound Interest Calculated	\$15,599,371.92
■ Deduction of \$5.00 or the amount of Interest, whichever is less:	\$2,035,641.03
■ Net Payable Interest	\$13,563,730.89

Calculation 2

This calculation determines an estimate of the interest that would be payable based on cash property held by the Illinois State Treasurer as of March 31, 2021. The following parameters were used for this calculation:

- A single average interest rate was used for the calculation, averaging the higher of the Illinois ROR interest rate or the Consumer Price Index Historical Tables for All Urban Consumers percent change from 12 months ago. The average interest rate for this period is 2.084%.
- The average holding period for each property is assumed to be the same as the Treasurer's historical average for the past 10 years. The holding period is the date the property was received by the state until the claim was submitted for payment. The department has significantly increased their outreach efforts to find owners, and we recommend using the most recent period of 56 months average or 4.67 years.
- For property reported to the Treasurer after 2011, since interest is only payable for periods held after 8/22/2017, we have reduced the average holding period to 70.30% of the normal reporting period based on six-year returned property averages. For these years, the average holding period is 3.28 years.
- We assumed the Deduction amount of \$5.00 or the lesser of the calculated interest would follow the same percentage of the deduction as determined in Calculation 1. The deduction was calculated as 13.02% of the total interest calculated.
- Because we used a single average rate, and a single average holding period, we used the following compound interest formula:
 - $A = P (1 + r/n)^{(nt)}$, where:
 - A = the value of the claimed property, including interest
 - P = the value of the claimed property before interest
 - r = the annual interest rate (decimal) (.02056)
 - n = the number of times that interest is compounded per unit t (12 = monthly)
 - t = the time the money is invested or borrowed for ($4.67 * 12 = 56.04$ months)



Estimation of Likely Claims

Not all unclaimed property reported to the Treasurer's office is returned to the rightful owner. While the Treasurer makes every effort to return property, some property is never claimed. To determine the likely amounts to be returned to owners, we used historical calculations to determine likely returned amounts.

- We calculated property received for each Report Year
- We calculated property without names for each Report Year (Aggregate and Unknown property)
- We calculated the total amount paid for all property for the Report Year over time.
- We created a five-year running average of percentage for each year.
- Using the five-year running average, we calculated the likelihood of paying additional property out of a Report Year.
- For years after 2010, we used the five-year running average for years 2005-2010. These years have reached their estimated maximum payout and using that percentage for years that have not been fully paid out provides a project of likely claims paid for these Report Years.

Calculation Summary

■ Total Cash Received by the Illinois State Treasurer	\$6,810,831,313.12
■ Unknown / Aggregated Property	\$919,463,513.08
■ Claims Paid to Date	\$2,236,043,819.90
■ Total Claimable Remaining Property	\$3,655,323,980.14
■ Amounts based on historical returns expected to be returned	\$468,164,488.57
■ Estimated Compound Interest	\$35,764,721.42
■ Estimated \$5.00 or less deduction	\$4,656,566.73 (13.02% of interest)
■ Net estimated interest to be paid	\$31,108,154.69

Please let me know if I may clarify or explain any of these calculations in more detail.

Sincerely,

Ken Wagers
 Vice President, Client Information Services
kenneth.wagers@kelmarassoc.com
 (303) 517-6016

Exhibit B

Treasurer's Monthly Rate of Return, 6/1/2020 - 5/31/2021

Month ending	Rate of return
6/30/2020	1.010%
7/31/2020	0.730%
8/30/2020	0.330%
9/30/2020	0.420%
10/31/2020	0.410%
11/30/2020	0.370%
12/31/2020	0.420%
1/31/2021	0.350%
2/28/2021	0.350%
3/31/2021	0.380%
4/30/2021	0.350%
5/31/2021	0.390%
Average	0.459%

5 yr summary

year	5 yr Tbond	5 yr TIP	% chg CPI	5yrTip+cpi
2017	1.62	-0.03	1.65	1.63
2018	2.30	0.44	2.80	3.24
2019	2.57	0.75	1.69	2.44
2020	1.19	-0.09	0.73	0.64
2021	0.52	-1.48	4.69	3.21
5yr avg	1.64	-0.08	2.31	2.23
ck avg	1.64	-0.08	2.31	2.23

annual averages for year beginning 7/1 of previous year & ending 6/31 of indicated year.

2021 cpi change based on annualized average of 11 months through may, 2021