IN THE UNITED STATES COURT OF FEDERAL CLAIMS

YOLANDA QUIMBY, **et al.**, for themselves and on behalf of all others similarly situated, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	**Case No. 02-101C** (Judge Victor J. Wolski)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR UNOPPOSED MOTION FOR AWARD OF ATTORNEYS' FEES, COSTS, AND FEES AND COSTS OF THE COURT APPOINTED CLASS ACTION ADMINISTRATOR

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Plaintiffs, for themselves and on behalf of the class defined in the Court's March 27, 2008 Order (Dkt. No. 81), respectfully submit this memorandum of law in support of their motion for award of attorneys' fees, and nontaxable costs.

I. INTRODUCTION

Plaintiffs represent current and former employees of the Veterans Health Administration ("VHA") of the Department of Veterans Affairs ("VA") employed between September 5, 1995 to June 30, 2012, including registered nurses, physician assistants and a so-called "hybrid" category of health professionals. The registered nurses who are members of the class were regularly scheduled to work on Saturdays, and the hybrid employees regularly worked nights between the hours of 6:00 p.m. and 6:00 a.m. and on weekends. All of the members of the class receive premium pay for working those undesirable hours. Yet, when these employees took authorized leave with pay, the government routinely withheld their premium pay and paid them only their basic rate.

On July 8, 2005 (Dkt. No. 55), the Court determined the government was liable to these employees for back pay with respect to the premium rate which was not paid during periods of authorized paid leave.

The government agreed to a negotiated settlement of all issues presented in this case on August 13, 2012 after more than two years of ongoing negotiations between the parties. Under the terms of the settlement, the parties agreed that Plaintiffs could recover their attorneys' fees and reimbursable costs, as well as all administrative fees and costs of the Court-appointed Class Action Administrator, entirely from the Settlement Fund. Defendant stipulated it would not oppose any request by Plaintiffs for an award of attorneys' fees which did not exceed 30 percent of the Settlement Fund.

Accordingly, pursuant to Rules 23(h), 52(a), and 54(d) of the Rules of Court of Federal Claims ("RCFC"), and the other authorities discussed below, Plaintiffs respectfully request that the Court approve "Plaintiffs' Unopposed Motion To Recover Attorneys' Fees and Costs" from

the Settlement Fund equal to 30 percent of the Fund, and reimbursement of the nontaxable costs of $144,584.21 incurred by counsel as documented in the Declarations of Mr. Lechner and Mr. Brownlie, attached to Plaintiffs' Motion. Plaintiffs also request that the Court approve the administrative fees and costs of the Court-appointed Class Action Administrator, Epiq Class Action Solutions, Inc. ("Epiq") of $253,343.07 which have been incurred to July 31, 2012, as documented in the Declaration of Robert Oseas, attached to Plaintiffs' Motion. Moreover, Plaintiffs request that the Court approve the Administrator's setting aside a "Reserve Fund" of $3,700,000 which is equal to five percent of the gross Settlement Fund ("Fund") to cover future administrative fees and costs as well as potential back pay and interest which later may become due and owing to more than a thousand class members who have been declared ineligible by the VA but who may be able to establish their eligibility to the Administrator by the production of appropriate official documents. *Id.*

II. PROCEDURAL BACKGROUND

Plaintiffs filed their initial complaint on September 5, 2001 and the operative Second amended Complaint on May 20, 2002. On July 8, 2005, the Court granted in part and denied in part Plaintiffs' motion for partial summary judgment and granted in part and denied in part Defendant's motion for summary judgment (Dkt. No. 55). The Court found the government was liable for back pay to registered nurses, physician's assistants, and expanded function dental assistants for premium pay which was not paid to such employees for periods of authorized paid leave in lieu of work performed on regularly scheduled Saturday tours of duty which did not include Sunday hours after September 30, 1997, and for periods of authorized leave on regularly scheduled Saturday and Sunday tours of duty from September 5, 1995 to September 30, 1997.

As to hybrid employees, the Court found the government liable for back pay to hybrid employees at a premium rate which was not paid during periods of authorized paid leave to such employees who were regularly scheduled to receive additional pay for working nights and weekends, but who were not paid such additional pay when they were on authorized leave during

night and weekend hours. The Court held that for leave taken after September 30, 1997, such hybrid employees were owed additional weekend pay for authorized leave on regularly scheduled Saturdays (which did not include Sunday hours) (Dkt. No. 55, p. 20).

At the hearing for class certification, Defendant asserted that, although the Court's Order on the summary judgment motion determined liability in this case, it would not concede liability and declined to stipulate it would not appeal the Court's finding of liability (Dkt. No. 81, p. 7). Indeed, the Court observed the government was "unlikely" to "enter a legally-binding commitment to pay every member of the proposed class the amounts they would be owed under the Court's summary judgment ruling." (Dkt. No. 81, p. 7).

Following the Court's order certifying the class on March 27, 2008, the parties commenced lengthy settlement negotiations that continued through August 2012. The settlement agreement, dated August 13, 2012, ("Settlement Agreement") is submitted to this Court for preliminary approval concurrently with this motion by Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement . (*See* Plaintiffs' Unopposed Motion For Preliminary Approval of Settlement.)

III. THE COURT SHOULD APPROVE THE REQUESTED ATTORNEYS' FEES AND COSTS AS WELL AS THE FEES AND COSTS OF THE ADMINISTRATOR

The approval of the settlement by the Court as "fair, reasonable, and adequate" requires the Court to separately review and determine the amount of "reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." RCFC 23(h). Here, the Court must determine the attorneys' fees and costs to be awarded to class counsel, Ira M. Lechner and Robert W. Brownlie of DLA Piper LLP (US) (collectively, "Class Counsel"), pursuant to the terms of the Settlement Agreement. Notice of this motion for the award of fees and costs will be "directed to class members in a reasonable manner" by means of a postcard, if approved by the Court, which will be mailed by the Class Action Administrator to all class members who filed a timely claim. RCFC 23(h)(1);(Plaintiffs' Exhibit 5, Declaration of Robert Oseas, which is attached to Plaintiff's Unopposed Motion For Preliminary Approval Of

Settlement.) The postcard refers each class member to this motion of Class Counsel for attorneys' fees and costs. The motion for the award of attorneys' fees and costs, and the Memorandum of Law In Support thereof, also will be posted on the website www.VAbackpay.com. The website was authorized by the Court as part of the class certification process. Class members will be given the opportunity to object to the motion. RCFC 23(h)(2).

The Court "may hold a hearing [as to attorneys' fees and nontaxable costs] and must find the facts and state its legal conclusions under RCFC 52(a)." RCFC23 (h)(3).

As discussed below, the substantial efforts expended by Class Counsel on a contingency basis over an extended period of time in excess of a decade, the beneficial results achieved by the sustained effort of Class Counsel on behalf of 44,019 class members whereby the government agreed to create a Settlement Fund equal to 80 percent of the actual back pay and interest which is owed pursuant to the Court's findings of liability according to an exhaustive computerized analysis of the VA's own payroll records for each eligible class member, and the considerable risks assumed by Class Counsel as the litigation proceeded which culminated in the successful settlement of this matter after so many years of intensive negotiation on behalf of the Class, warrant an award of Plaintiffs' attorneys' fees of the "sum to be paid by the United States to the Class Settlement Fund" as a contingency based fee (Plaintiffs' Exhibit 1, Settlement Agreement, ¶ 10, attached to Plaintiffs' Motion).

The government has agreed to pay into the settlement fund the sum of $73,990,712, which would result in attorneys' fees of $22,197,213.60 calculated at a rate of 30 percent. The fee approved by the Court will be apportioned between Mr. Lechner's and Mr. Brownlie's firm. The percentage recovery of attorneys' fees has been earned as a "reasonable" contingent fee for the risks assumed by Class Counsel in litigating these claims—without any compensation whatever—for the extraordinary amount of time of 10 years and 11 months from the filing of the complaint to the date of the filing of this document. Consideration particularly should be accorded to Class Counsel in light of the extraordinarily successful outcome achieved for 44,019

eligible VA employees who filed a timely claim with the Class Action Administrator (Settlement Agreement, ¶ 6).

In Paragraph 12 of the Settlement Agreement, the parties agreed: "Plaintiffs shall apply for an award of attorneys' fees pursuant to RCFC 23(h) no greater than thirty percent (30%) of the sum to be paid by the United States to the Class Settlement Fund" and the United States pledged to "not oppose Plaintiffs' motion for an award of attorneys' fees if such application is for an award of attorneys' fees no greater than thirty percent (30%) of the sum to be paid by the United States to the Class Settlement Fund."

The Settlement Agreement also provides that Class Counsel will apply to the Court for reimbursement of expenses and other out-of-pocket costs advanced by Class Counsel for the litigation (Settlement Agreement, ¶ 12.) As detailed in the declarations of Mr. Lechner, dated August 24, 2012 (Plaintiffs' Exhibit 3, "Lechner Decl."), and Mr. Brownlie, dated August 24, 2012 (Plaintiffs' Exhibit 4, "Brownlie Decl."), Class Counsel collectively have incurred $144,584.21 in nontaxable costs over more than a decade of litigation, for which Plaintiffs now seek reimbursement.

Therefore, Plaintiffs respectfully request that the Court approve, as part of the settlement approval, an attorneys' fee award of $22,197,213.60 which amounts to 30 percent of the Settlement Fund, and an award of nontaxable costs equal to $144,584.21, both of which are to be paid entirely from the common-fund.

In addition, Plaintiffs respectfully request that the Court approve an award of $253,343.07 to be paid entirely from the common fund to the Court-appointed Class Action Administrator for administrative fees and expenses incurred by Epiq as of July 31, 2012. (Oseas Declaration, Plaintiffs' Exhibit 5.)

Plaintiffs also request that the Court approve the establishment by Epiq of a "Reserve Fund" equal to approximately five percent of the gross Settlement Fund ($3,700,000) in order to insure that there are sufficient funds remaining to pay all necessary administrative expenses and to pay

claimants whose eligibility is yet to be determined. Such a reserve is customary in class action settlements. (*Id*). [1]

A. THE APPROPRIATE METHOD FOR AWARDING ATTORNEYS' FEES IN COMMON-FUND CASES IS A REASONABLE PERCENTAGE OF THE FUND RECOVERED

The Court is not bound by any one methodology for awarding fees from a common fund and has the discretion to award fees based on the circumstances of each case. However, like many other federal courts, the Court of Federal Claims has often employed the percentage-of-the-fund approach in common fund cases. *Moore v. United States*, 63 Fed. Cl. 781, 786 (2005); *see also National Treasury Employees' Union*, 54 Fed. Cl. 791, 807 (2002) ("*NTEU*"); *cf.*, *Applegate v. United States*, 52 Fed. Cl. 751, 755-761 (2002) ("…common fund claims, like suits

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[1] The fees and costs of the Class Action Administrator (Epiq) will continue for many months, if not for more than one year. The Administrator has a multitude of tasks ahead of it if the Court approves the settlement, such as: an initial payment of back pay and interest to 44,019 individuals, each of whom is entitled to a different amount based on his or her payroll records; constant communication with claimants who have questions about their award; handling of documentation potentially from thousands of claimants who have been determined by the VA to be ineligible for back pay but who are able to justify that they are owed back pay and interest while rejecting those claimants declared ineligible by VA who are unable to substantiate their claim to the Administrator and the Ombudsman who Epiq has retained to assist in this time-intensive process; processing of claims on behalf of heirs which arise due to the death of a claimant; resolving disputes arising as a result of divorce; computation of taxes owed by each eligible claimant; the preparation and mailing of federal tax forms 1099 and W-2 to claimants; and payment of taxes due and withheld to the federal, state, and local governments. In accord with the Settlement Agreement, the Class Action Administrator will be paid directly from the Fund such fees and costs of administration. Administrative fees and costs will be reviewed by Class Counsel, pursuant to documentation and written invoices submitted by Epiq to Counsel. The VA has documented the eligibility for back pay and interest of 44,019 claimants, but approximately 15,000 claimants were declared ineligible for a variety of reasons. These individuals will be notified of the opportunity to submit copies of official documents to establish their eligibility to participate in the settlement to an "Ombudsman" retained by Class Counsel and Epiq to evaluate each such claim, subject to final determination by Epiq of eligibility. Subsequent to payment of attorneys' fees, and reimbursement of costs to Class Counsel and Epiq, as approved by the Court, the Administrator will make an initial payment of back pay and interest to the 44,019 claimants declared eligible by VA. Money remaining in the "Reserve Fund" after further payment of administrative fees and costs, and payment of withheld taxes to federal, state and local governments, will be distributed in a secondary payment of back pay and interest to all eligible class members, according to his or her proportionate share, once all questions of eligibility have been resolved by the Administrator.

for contribution, effectuate a simple equitable notion–that those who have benefited from the litigation should share in its costs."); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). As discussed below, a 30 percent fee award is appropriate and reasonable in light of the results achieved as well as the time and resources expended by counsel, and most fairly correlates Class Counsel's compensation to the benefit achieved for the Settlement Class.

1. The Common-Fund Doctrine in the Federal Courts

The common-fund doctrine is a well-recognized application of the general principle that requires every litigant to bear his or her own attorney's fees. The purpose of the doctrine is to avoid unjust enrichment and to spread the litigation costs proportionately among the beneficiaries of the fund so that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F. 3d 1291, 1300 (9th Cir. 1994) ("*In re WPPSS*"); *see also Moore*, 63 Fed. Cl. at 789; *Applegate*, 52 Fed. Cl. at 755-61.

It has long been recognized in equity that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1377 (9th Cir. 1993); *Vizcaino*, 290 F.3d at 1051. The percentage-of-the-fund method is preferable to the lodestar method for awarding attorneys' fees because it: (1) fosters judicial economy by eliminating a detailed and time-consuming analysis of time records; (2) provides Plaintiffs' counsel with a strong incentive to effectuate the maximum possible recovery in the shortest amount of time necessary under the circumstances; (3) assures class members do not experience undue delay in receiving their share of the settlement; and (4) is consistent with the practice in the private marketplace that contingent-fee attorneys are compensated by a percentage-of-the-recovery method. *See Swedish Hosp. v. Shalala*, 1 F. 3d 1261, 1271 (D.C. Cir. 1993) ("a percentage-of-the fund method is the

appropriate mechanism for determining the attorney fees in common fund cases."); *In re Activision Secs. Litig.*, 723 F. Supp. 1373, 1375 (N.D. Cal. 1989) ("Where attorneys must depend on a lodestar approach there is little incentive to arrive at an early settlement.").

Moreover, other circuits and commentators have overwhelmingly endorsed the percentage method. *See Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988); *Radosti v. Envision EMI, LLC*, 760 F. Supp. 2d 73, 77 (D.D.C. 2011) ("[I]n class action cases in which the plaintiff class recovers benefits from a common fund, the favored method of calculating attorneys' fees is to award a percentage of the fund."); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) ("lodestar method better accounts for the amount of work done, while the percentage of the fund more accurately reflects the results achieved."); Martha Pacold, *Attorneys' Fees in Class Actions Governed by Fee-Shifting Statutes*, 68 U. Chi. L. Rev. 1007, 1022 (2001). Indeed, the Third Circuit Task Force recently stated: "A percentage fee, tailored to the realities of the particular case, remains superior to any other means of determining a reasonable fee for class counsel. In setting a percentage fee, the court should avoid rigid adherence to a 'benchmark.'" *Third Cir. Task Force Report on Selection of Class Counsel*, 74 Temp. L. Rev. 689, 705 (2001). Further, in *Kirchoff v. Flynn*, 786 F.2d 320, 325 (7th Cir. 1986), the court stated:

> The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains. . . . The unscrupulous lawyer paid by the hour may be willing to settle for a lower recovery coupled with a payment for more hours. Contingent fees eliminate this incentive and also ensure a reasonable proportion between the recovery and the fees assessed to defendants.

Likewise, Judge Patel, in *In re Activision Securities Litigation*, observed that applying the lodestar and *Kerr-Johnson* methods to common-fund cases:

> [D]oes not achieve the stated purposes of proportionality, predictability and protection of the class. It encourages abuses such as unjustified work and protracting the litigation. It adds to the work load of already overworked district courts. In short, it does not encourage efficiency, but rather, it adds inefficiency to the process….the better practice is to set a percentage fee and that, absent

> extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be at 30%.

723 F. Supp. at 1378. The Ninth Circuit later commented on the *Activision* opinion, stating that Judge Patel had "crafted an extremely persuasive cost-benefit analysis to support the use of the percentage-of-the-fund method." *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990).

Indeed, the *Dunne* court recognized a "recent ground swell of support for mandating a percentage-of-the-fund approach in common fund cases," requiring "only that the fee awards in common fund cases be reasonable[.]" *Id.*; *see also Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) ("we believe that the percentage of the fund approach is the better reasoned [one] in a common fund case."); *Report of the Third Circuit Task Force (Arthur R. Miller, Reporter) Court-Awarded Attorney's Fees*, 108 F.R.D. 237, 258 (1986) (lodestar method combined with *Johnson* factors is a "cumbersome, enervating, and often surrealistic process of preparing and evaluating fee petitions that now plagues the Bench and Bar").

Here, each of the claimants specifically agreed that he or she had engaged the attorneys for the class to provide professional legal services on a contingency basis, and each claimant specifically agreed that class counsel would request the Court to approve an attorneys' fee award of 30 percent to be paid out of the common fund. The claim form each claimant signed under oath provides (Plaintiffs' Ex. 2, attached to Plaintiffs' Motion for Approval of Attorneys' Fees):

> By clicking on the signature box in the space below, you understand that you are consenting to join the collective action of plaintiffs on whose behalf the named Plaintiffs have alleged the violations described in the accompanying notice. You are authorizing Ira M. Lechner, Esq., and Robert W. Brownlie, Esq. of DLA Piper US LLP, to represent you as Class Counsel with respect to your claim for back pay and interest. Such attorneys are authorized to take all steps pertinent thereto on your behalf, including but not limited to, the settlement and collection of such claim. You agree that Class Counsel is handling this case on a contingency basis, which means <u>that you will not be billed for their services.</u> Instead, at the conclusion of this case, Class Counsel will make an application to the court for an award of attorney fees of thirty percent of the recovery of each class member, and costs, to be taken out of the total recovery of the class, or to be paid in part

> by the United States in addition to the total recovery of the class, as the court may direct.

Moreover, Defendant agreed not to oppose Plaintiffs' Motion for attorneys' fees of 30 percent, to be paid out of the common fund, indicating the government's assent of the reasonableness of the attorneys' fees sought. Defendant also agreed "that the Court shall award a percentage of the sum which will be paid by the United States to the Fund as attorneys' fees…" (Agreement, ¶12). A 30 percent fee award is reasonable in light of the duration of this case, the expertise and experience of Class Counsel, the risk of nonpayment, and complex issues present in the case.

2. Awarding a Reasonable Percentage of the Fund is Appropriate Where the Case is Brought Under a Fee-Shifting Statute

Plaintiffs brought this action under the Back Pay Act, 5 U.S.C. 5596, a fee-shifting statute that provides for "reasonable attorney fees" under certain circumstances. It is well-settled that a reasonable percentage of the common fund for attorneys' contingent fees is appropriate in the settlement of cases that could involve fee-shifting statutes. *See Staton v. Boeing Co.*, 327 F. 3d 938, 968-969 (9th Cir. 2003); *Moore*, 63 Fed. Cl. at 788. In *Staton*, the Court stated:

> Application of the common fund doctrine to class action settlements does not compromise the purposes underlying fee-shifting statutes. In settlement negotiations, the defendant's determination of the amount it will pay into a common fund will necessarily be informed by the magnitude of its potential liability for fees under the fee-shifting statute, as those fees will have to be paid after successful litigation and could be treated at that point as part of a common fund against which the attorneys' fees are measured.

Staton, 327 F. 3d at 968-969. Similarly, in *Moore*, the Court agreed with the *Staton* court "that the application of common-fund principles generally does not conflict with the purpose behind fee-shifting statutes." *Moore*, 63 Fed. Cl. at 788. Indeed, in *Moore*, upon a finding that Plaintiffs' counsel was entitled to a 34 percent fee award in the successful settlement of a class action, this Court stated: "The Federal Circuit has not articulated a preference for a particular method when calculating an award of attorneys' fees under the common-fund theory. However,

an award is typically based on some percentage of the common fund." *Moore*, 63 Fed. Cl. at 786. Furthermore, the percentage of the fund approach is more appropriate where a common fund has been established that contemplates the payment of attorneys' fees as a percentage of the fund. *Cf. Applegate*, 52 Fed. Cl. at 761 (applying lodestar because no common fund was established and the settlement agreement provided simply that defendant, not plaintiffs, would pay the attorneys fees and costs) (citations omitted).

Here, a substantial common fund has been created that permits this Court to invoke the percentage-of-common fund methodology in awarding Plaintiffs' Counsel's contingent attorney fees. After more than two years of intensive negotiations, the government agreed to create a common-fund consisting of a lump-sum of $73,990,712 which equals 80 percent of the back pay and interest owed to eligible class members according to the government's own computerized analysis of the payroll records of those who filed a claim. In reaching such a compromise agreement, Defendant obviously contemplated its risks on appeal and the potential for additional liability for back pay and interest as well as its liability for attorneys' fees pursuant to the fee-shifting statute. All of those factors undoubtedly played a part in the creation of a common fund of this magnitude from which, the parties agreed, Class Counsel's contingency attorneys' fees would be paid. Importantly, the government does not raise any objection to Plaintiffs' motion for an award of attorneys' fees to be paid entirely from the Fund, and each of the individual class members who filed a claim specifically agreed as well that Plaintiffs' attorneys' contingent fees could be paid from this common fund, subject of course to Court approval. Appropriately, the contingency fee spreads the attorneys' fees across all of the Fund's beneficiaries. Awarding a percentage of the fund is therefore appropriate in this case.

B. A FEE OF 30 PERCENT OF THE FUND IS REASONABLE IN THIS CASE

In order to encourage settlement, Class Counsel should be rewarded for their time and effort by no less than a marketplace fee. As the court in *Hensley v. Eckerhart* noted, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. . . .

The result is what matters." 461 U.S. 424, 435 (1983); *see also In re King Resources Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976) ("the amount of the recovery, and end result achieved are of primary importance, for these are the true benefit to the client."); *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988), *aff'd* 899 F.2d 21 (11th Cir. 1990) ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained.").

To determine whether a percentage of the fund is reasonable, this Court has considered:

> (1) the quality of counsel; (2) the complexity and duration of the litigation; (3) the risk of nonrecovery; (4) the fee that likely would have been negotiated between private parties in similar cases; (5) any objections to the settlement terms or fees requested by class counsel; (6) the percentage applied in other class actions; and (7) the size of the award.

Moore, 63 Fed. Cl. at 787. All of these factors weigh in favor of awarding the requested attorneys' fees in this case.

1. The Quality of Class Counsel Supports an Award of 30 Percent of the Common Fund

The requested fees are particularly appropriate here, where Class Counsel utilized their considerable experience to achieve a $74 million recovery for the benefit of the Class. Indeed, it is anticipated that most of the qualified claimants will receive a payment that approximates the amount of unpaid accrued and accumulated back pay that they should have been paid when they were regularly scheduled to work at night and/or on weekends but did not work because they were on authorized leave.[2]

Class Counsels' expertise and ability played no small part in this outstanding result. Counsel are some of the most highly experienced class action counsel in the country in back pay cases involving federal employees, having been directly involved in numerous highly successful

[2] The potential interest included within the lump-sum settlement calculations exceeds by $4 Million the total amount of attorneys' fees requested by Plaintiffs. Thus, eligible class members will receive approximately 85 percent of the back pay they should have been paid for more than a decade considering the addition of interest obtained by this case even after payment of contingent attorneys' fees from the common fund.

class action cases (Lechner Decl., ¶ 7; Brownlie Decl., ¶ 2). In granting class action certification, the Court found: "Messrs. Ira M. Lechner and Robert W. Brownlie have extensive experience in class litigation and appear capable of providing competent representation to plaintiffs in this matter….Defendant has not challenged counsel's qualifications." (Dkt. No. 81, p. 10-11, fn. 12). The Court appointed Messrs. Lechner and Brownlie "class counsel pursuant to RCFC 23(g)" and found "these attorneys adequate under RCFC 23(g)(1)(B) and (C)." Further, in litigating this case and negotiating the settlement, Class Counsel were opposed by highly skilled and experienced trial counsel. Defense counsel of this caliber obviously presented formidable opposition. Indeed, this Court observed in 2008 that the government was "unlikely" to "enter a legally-binding commitment to pay every member of the proposed class the amounts they would be owed under the Court's summary judgment ruling." (Dkt. No. 81, p. 7). Yet, Class Counsel was able to achieve a result affording substantial settlement benefits to the Class.

2. The Uncertainty of Recovery Supports an Award of 30 Percent of the Fund

A determination of a fair fee also includes a consideration of the contingent nature of the fee. It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* 534-35 (3d ed. 1986). Contingent fees that may exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they would win or lose. *In re WPPSS*, 19 F.3d at 1299.

Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of contingent attorneys' fees. For example, in *In re Prudential-Bache Energy Income P'ships Sec. Litig.*, No. 888, 1994 WL 202394, at *6 (E.D. La. May 18, 1994), the court noted the risks incurred by plaintiffs' counsel:

> Although today it might appear that risk was not great based on Prudential Securities' global settlement with the Securities and Exchange Commission, such was not the case when the action was commenced and throughout most of the litigation. Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

The risk of a zero recovery in complex cases of this type is very real. Before Plaintiffs' counsel committed to litigate this class action on a contingent fee basis, an assessment of the risks of litigating the case had to be evaluated: the strength of the case where, as here, the government had many technical objections to liability based on arguments asserting statutory interpretations, any one of which, if successful, would defeat Plaintiffs' claims; the Department of Veterans Affairs would assert that Congress permitted the Secretary paramount control with respect to payment of weekend premium pay to registered nurses who used paid leave; the likelihood of a recovery in the face of a plethora of government arguments which were a matter of first impression judicially and had never been tested before the Federal Circuit; the probable size of damages where, as here, the number of individuals who would file an eligible claim was unknown and the amount of back pay owed could not be estimated without extensive discovery of the government's payroll records; and the cost of litigating the case over many years of determined resistance by the Department of Veterans Affairs and the Department of Justice. Moreover, there are numerous class actions in which plaintiffs' counsel took the risk, expended thousands of hours, and yet received no remuneration whatsoever despite their diligence and expertise. Courts have recognized that the risk assumed by Plaintiff's counsel in handling such a complex matter on a wholly contingent basis is an important factor in determining the appropriate amount of fees. *In re WPPSS*, 19 F.3d at 1299-1301; *Lindy Bros Builders Inc. of Philadelphia v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3rd Cir. 1976). Here, the risks associated with this action included: (1) complex legal issues, (2) liability issues, and (3) causation and back pay.

a. Legal Issues

From the outset, Class Counsel encountered numerous issues of statutory construction. As this Court noted in its order granting in part and denying in part the motion for summary judgment, the issues in this case were significantly complicated by the fact that the claims involved the alleged failure to pay for nighttime or weekend pay during authorized paid leave for numerous different types of VHA employees (Dkt. No. 55.) This Court broadly classified plaintiffs into three categories of employees, applying a detailed statutory analysis for each group to determine liability. *Id.* Although the Court ultimately found liability against Defendants, Class Counsel undertook enormous risk in initiating the present suit due to the intricacies of the case. Moreover, there was no guarantee of prevailing on appeal.

b. Liability Issues

Although the Court determined liability at the summary judgment stage, Defendant refused to concede liability or stipulate it would not appeal the judgment. As a result, on appeal, Defendant would have argued the government was not liable for any back pay. Furthermore, Defendant would have argued that, at best, the government's practices may have resulted in *de minimis* injury to far fewer potential claimants than Plaintiffs assert were injured by virtue of the government's pay practices, and that the government's conduct did not subject it to liability for interest. During negotiations, Plaintiffs strenuously argued to the contrary. Although Plaintiffs proffered evidence to support their claims, there is no guarantee Plaintiffs' view of the law and evidence would have prevailed on appeal.

c. Causation and Back Pay

Another substantial risk that Plaintiffs would have faced at trial would be to establish through competent evidence – as to each of the 44,019 eligible claimants – that pay for authorized leave had been improperly calculated and paid.

Thus, not only was this case hard-fought by highly competent defense counsel, there existed at all times a substantial risk Plaintiffs would not succeed in proving their individual

claims. The risk of establishing liability, back pay, and interest was formidable in this complex litigation. Intelligent compromise and candid recognition of the relevant strengths and weaknesses of each party's case ultimately resulted in the settlement that is currently before the Court for final approval.

3. The 30 Percent Fee is In Line with Fees Awarded in Other Class Actions

A fee award of 30 percent lies within the range of the established benchmark in this court. Citing the *Manual for Complex Litigation* (*Fourth*) §14.121 n.488 (2004) (citing several studies) and other authorities, this Court noted that "[w]hile 40 percent is within the acceptable range, awards more typically range between 20 percent to 30 percent of the total fund, with 50 percent being the upper limit . . . . Our reading of these authorities suggest that one-third is a typical recovery." *Moore*, 63 Fed. Cl. at 787 (internal citations omitted). Likewise, in *NTEU,* Judge Firestone stated that a range "between 20 percent to 30 percent" of the fund is the benchmark award for such attorneys' fees." 54 Fed. Cl. at 807.

This benchmark is comparable to those set by other jurisdictions. A Federal Judiciary Center study released in 1996, which covered all class actions in four selected federal district courts with a high number of class actions, found that as to the size of attorneys' fees: "Median rates ranged from 27 percent to 30 percent." Thomas E. Willging, Laural L. Hooper, & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 69 (Federal Judicial Center 1996). This finding is in line with an analysis of fee awards in class actions conducted in 1996 by National Economic Research Associates, an economics consulting firm. Using data from 433 shareholder class actions, the study concluded that, "[r]egardless of case size, fees average approximately 32 percent of the settlement." Denise N. Martin, Vinita M. Juneja, Todd S. Foster, & Frederick C. Dunbar, *Recent Trends IV: What Explains Filings and Settlements in Shareholders Class Actions?* 12-13 (NERA Nov. 1996).

Furthermore, there are numerous fee awards in cases with much larger settlement funds than the instant case where courts have awarded contingent fee percentages equal to, or above, the contingent fee percentage requested here. *See In re Combustion, Inc.*, 968 F. Supp. 1116, 1131-32 (W.D. La. 1997) (fee of 36 percent of $127 million settlement); *In re Automotive Refinishing Paint Antitrust Litig.*, MDL Docket No. 1426, 2008 WL 63269, at *3-6 (E.D. Pa. Jan. 3, 2008) (granting attorneys' fees of 32 percent of approximately $66 million settlement and 33 percent of later $39 million settlement with remaining defendants); *In re Checking Account Overdraft Litig.*, Nos. 09-MD-02036-JLK, 1:08-CV-23323-JLK, 1:09-CV-21963-JLK, 1:10-CV-24316-JLK, 3:09-2186, 5:10-CV-01185-R, MDL 20362011, WL 5873389, *1366 (S.D.Fla. Nov. 22, 2011) (awarding counsel 30 percent of $410 million fund); *In re Vitamins Antitrust Litig.*, No. 99–197, MDL 1285, 2001 WL 34312839, at *10 (D.D.C. July 16, 2001) (awarding 33 percent of approximately a $360 million dollar fund); *In re Linerboard Antitrust Litig.*, MDL. No. 1261, 2004 WL 1221350, at *2 (E.D.Pa. June 2, 2004) (granting attorneys' fees of 30 percent of the total settlement fund of $202,572,489).

The district court in *In Re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 196 (E.D. Pa. 2000) approved a fee award of 30 percent of a net settlement fund of $111 million and noted, "[t]he court will not reduce the requested award simply for the sake of doing so when every other factor ordinarily considered weighs in favor of approving class counsel's request of thirty percent.").[3] These and many other cases affirmed the district court's discretion to award 30 percent or more of gross settlement funds.

There are also many cases where the dollar value of court-awarded attorney fees far exceeded the dollar amount requested here. *See In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735-36 (E.D. Pa. 2001) ($193 million settlement, $48 million in attorneys' fees); *In re*

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[3] See also *Kurzweil v. Philip Morris Cos.*, Nos. 94 Civ. 2373, 94 Civ. 2546, 1999 WL 1076105, at *1–2 (S.D.N.Y. Nov. 30, 1999) (awarding 30 percent of about a $124 million dollar fund); *In re Oxford Health Plans, Inc. Sec. Litig.*, MDL No. 1222 (CLB), 2003 U.S. Dist. LEXIS 26795 (S.D.N.Y. June 12, 2003) (court granted fee of 28 percent of $300 million settlement).

Sumitomo Copper Litig., 74 F. Supp. 2d 393, 400 (S.D.N.Y. 1999) ($116 million settlement, $32 million in attorneys' fees); *In re Prudential Sec. Ltd. P'ships Litig.*, 912 F. Supp. 97, 104 (S.D.N.Y. 1996) ($110 million settlement, $29.7 million in attorneys' fees); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403, 448 (S.D. Tex. 1999) ($190 million settlement, $46.7 million in attorneys' fees).

The fee requested here is more than reasonable given these benchmarks. The requested fee is based on a results-oriented fee analysis that reflects the extraordinary success of Class Counsel in shaping the case and in negotiating the settlement; the amount of Class Counsels' time, patience and diligence expended over more than a decade; the agreement by each of the class claimants to a contingent attorney fee of 30 percent; the lack of any objection to the fee by the government; and the very substantial risks involved in such a contingency fee arrangement. *In re PayPal Lit.*, No. C-02-1227-JF (PVT), 2004 U.S. Dist LEXIS 22470 (N.D. Cal. Oct. 13, 2004) (30 percent of attorneys' fees awarded where "the settlement achieved is quite favorable to the class; the settlement was solely the result of the attorneys' hard work over more than two years; counsel took on the burden of the contingent fee arrangement and fronted all the litigation expenses; a 30 percent award reflects the market rate in similar complex, contingent litigation; and the case would have been difficult and risky to litigate"). [4] Thus, the fee is not only comparable to attorneys' fee awards granted by other courts, but is the same fee that likely would

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[4] "No one writing in the field today is defending the lodestar on the ground that it minimizes conflicts between class counsel and absent claimants. *In view of this, it is as clear as it possibly can be that judges should not apply the lodestar method in common fund class actions.* The Due Process Clause requires them to minimize conflicts between absent claimants and their representatives. The contingent percentage approach accomplishes this." Charles Silver, *Class Actions in the Gulf South Symposium: Due Process and the Lodestar Method: You Can't Get There from Here*, 74 Tul. L. Rev. 1809, 1819-20 (2000) (emphasis added); accord, *In re Rite Aid*, 146 F. Supp. 2d at 736; *In re Activision Secs. Litig.*,723 F. Supp. at 1378. As demonstrated by the statements of Class Counsel contained in the Lechner Declaration and in the Brownlie Declaration, Class Counsel and their associates expended an extraordinary amount of time and effort in this case over more than a ten year time period amounting to many thousands of hours of work ("courts may rely on summaries submitted by attorneys and need not review actual billing records." *Rite Aid*, 396 F.3d at 306-307 *(*citing *Prudential*, 148 F.3d at 342*).*

have been negotiated between private parties. *Id.* (finding that a 30 percent fee "reflects the market rate").

That the 30 percent contingency fee requested here is reasonable, and in keeping with other awards granted by the courts and negotiated by private parties, is underscored by the fact that the government agreed not to object to an attorneys' fee award of 30 percent. Moreover, by reaching an agreement on fees, the parties have embraced the ideal pronounced by the United States Supreme Court that a "request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley*, 461 U.S. at 437; *accord In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 568-70 (7th Cir. 1992) (market factors, best known by the negotiating parties themselves, should determine the quantum of attorneys' fees); s*ee also 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions* 13-130 (3d ed. 1992) ("Counsel . . .may, of course, seek to negotiate fees with the defendants . . .").[5]

C. CLASS COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

Class Counsel have incurred expenses in an aggregate amount of $144,343.21 in prosecuting the litigation. These itemized expenses are set forth in attachments A and B to Plaintiffs' Exhibit 2, Lechner Declaration and Plaintiffs' Exhibit 3, Brownlie Declaration.

The appropriate analysis to apply in deciding the expenses compensable in a common fund case is whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. Relying on *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989), the court in *Brown v. Pro Football*, 839 F. Supp. 905, 916 (D.D.C. 1993), *rev'd on other grounds*, 50 F.3d 1041 (D.C. Cir. 1995), held: "Plaintiff's out-of-pocket costs for telephone, telecopier, air and local couriers, postage, photocopying, Westlaw research, secretarial overtime, and counsels' travel expenses are routinely billed to fee-paying clients, and thus are all compensable as part of

[5] In the case at bar, the United States also agreed that the fee award should be a percentage of the amount Defendant paid to the settlement fund. (Settlement Agreement,¶ 12.)

a reasonable attorney's fee." *See also Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client;'") (citations omitted); *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996); *Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 725-26 (10th Cir. 1993) (expenses reimbursable if they would normally be billed to client); *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995) (expenses recoverable if customary to bill clients for them); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients.") (citations omitted); *Agster v. Maricopa County*, 486 F. Supp. 2d 1005, 1017-23 (D.Ariz. 2007) (awarding non-taxable costs for copying, messengers, faxing and mailing, deposition, videographers and internet research because such costs are customarily billed to clients). Here, the categories of expenses for which class counsel seek reimbursement are the same types of expenses routinely charged to hourly-paying clients and therefore should be reimbursed out of the common fund.

Class Counsels' expenses include the costs of computerized research. These are the charges for computerized factual and legal research services such as Lexis-Nexis and Westlaw. It is standard practice for attorneys to use such research tools to assist them in researching legal and factual issues and reimbursement is proper. *See Media Vision*, 913 F. Supp. at 1371; *Agster*, 486 F. Supp. 2d at 1017 (reimbursing for legal research); *In re Marsh Erisa Litig.*, 265 F.R.D. 128, 150 (S.D.N.Y. Jan 29, 2010) (same). Indeed, courts recognize these tools create efficiencies in litigation and, ultimately, save clients and the class money. *See Cont'l Ill. Sec. Lit.*, 962 F.2d at 570; *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 335 (W.D.Tex. 2007) (recognizing merits of internet research and reimbursing accordingly); *Agster*, 486 F. Supp. 2d at 1017-23 (awarding non-taxable costs internet research). In approving expenses for computerized research, the court in *Apple Corporations v. International Collectors Society*, 25 F. Supp. 2d 480, 497-98 (D.N.J. 1998), underscored the time-saving attributes of computerized research as a reason

reimbursement should be encouraged. The court also noted that fee-paying clients reimburse counsel for computerized legal and factual research. *Id*.; *see also Gottlieb v. Wiles*, 150 F.R.D. 174, 186 (D. Colo. 1993), *rev'd on other grounds sub nom. Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994) (same).

In addition, Mr. Lechner was required to perform necessary travel in connection with this case to appear before the Court and to meet on many occasions with counsel for the Department of Justice and the VA in order to negotiate the settlement. (Lechner Declaration, Plaintiffs' Exhibit 3, attached to the Motion for fees). Mr. Lechner's travel expenses are reasonable in amount and carefully exclude any charges for meals. Mr. Lechner's travel expenses are properly charged against the fund created. *See Thornberry v. Delta Air Lines*, 676 F.2d 1240, 1244 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952 (1983); *In re McDonnell Douglas Equip. Leasing Sec. Litig.*, 842 F. Supp. 733, 746 (S.D.N.Y. 1994) (expenses are properly charged against the common fund); *Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 741 F. Supp. 84, 86 (S.D.N.Y. 1990).

Photocopying costs are also customarily reimbursed in common-fund cases. *See McDonnell Douglas*, 842 F. Supp. at 746. Duplication of documents and pleadings was necessary for the effective prosecution of this case. Thus, Plaintiffs submit that they are entitled to an award reimbursing Class Counsel for the costs and expenses incurred over this lengthy litigation as detailed in Plaintiffs' Exhibits 3A and 4A to the Lechner and Brownlie Declarations.

IV. CONCLUSION

From the beginning, Plaintiffs were faced with a determined adversary represented by experienced counsel. Without any assurance of success, Plaintiffs and their counsel pursued this litigation to an excellent conclusion. Accordingly, we submit that for the reasons set forth above, the Court should award Plaintiffs recovery of attorneys' fees of 30 percent of the "Settlement Fund" in the amount of $22,197,213.60, and reimbursement of $144,584.21 for reasonable out-of-pocket nontaxable costs of litigation. In addition, Plaintiffs respectfully request that the Court

approve an award of $253,343.07 to be paid entirely from the common fund to the Court-appointed Class Action Administrator, Epiq Systems, Inc., for administrative fees and expenses incurred by Epiq from the inception of its service as Administrator to and including July 31, 2012. Moreover, Plaintiffs request that the Court approve the Administrator's setting aside of a "Reserve Fund" of $3,700, 000, equal to approximately five percent of the gross Settlement Fund, to cover future administrative fees and costs, as well as potential back pay and interest **w**hich may later become due and owing to those class members who have been declared ineligible by the VA but who may be able to establish their eligibility by the production of appropriate official documents to the Administrator and the Ombudsman appointed by Epiq to assist in this complicated and lengthy claims administration process.

Respectfully submitted,

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