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 PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(Continued)

Page

OTHER AUTHORITIES

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 final approval of the Settlement Agreement, attached as Exhibit 1 to Plaintiffs' Unopposed Motion For Preliminary Approval of Settlement (Dkt. No. 197-1), which previously was submitted to, and reviewed by, this Court.

I. INTRODUCTION

This settlement comes after twelve years of contentious, hard-fought litigation and settlement negotiations, and represents a compromise reached after extensive, non-collusive negotiations between the parties that continued more than two years. The parties agreed the settlement is in the best interests of the class, and would afford class members with substantial benefits while avoiding the risks, uncertainty, and delay inherent in continued class action litigation.

On August 29, 2012, this Court approved the notice of proposed settlement and a fairness hearing to the class ("Notice of Proposed Settlement") and set the final approval hearing for October 18, 2012. (Dkt. No. 201.) Pursuant to the Court's Order, postcard copies of the Notice of Proposed Settlement were mailed on September 4, 2012 by the Court-appointed Class Action Administrator ("Epiq") to 58,479 class members. Objections to the settlement must be filed with the Clerk of Court postmarked no later than October 5, 2012. To Class Counsel's knowledge, no formal objections to the settlement have been filed with the Clerk of Court as of the filing of this Memorandum of Law on October 9, 2012.

Class Counsel respectfully submit that the proposed settlement is in the best interests of the members of the settlement class. The settlement affords the Class substantial relief (nearly full payment of the back pay owed plus some interest) and avoids the risks, uncertainty, and delay inherent in continued litigation. The reaction of the Class further confirms the settlement

is fair, reasonable, and adequate. Accordingly, Plaintiffs request the Court approve the Settlement Agreement.

II. THE STANDARD FOR JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS

Two areas of inquiry are paramount in determining of whether a proposed class action settlement is fair, reasonable, and adequate: (1) the substantive terms of the settlement and (2) the negotiation process. "The primary concern is with the substantive terms of the settlement . . . [t]o supplement the necessarily limited examination of the settlement's substantive terms, attention also has been paid to the negotiating process by which the settlement was reached ...." *Christensen v. United States*, 65 Fed Cl. 625, 629 (2005) (quoting *Weinberger v. Kendrick*, 698 F. 2d 61, 73-74 (2d Cir. 1982)).

This Court recently applied six factors to determine the fairness of the proposed settlement:

> (i) the relative strengths of plaintiff's case compared to the proposed settlement; (ii) the recommendation of the counsel for the class regarding the proposed settlement, taking into account the adequacy of class counsels' representation of the class; (iii) the reaction of the class members to the proposed settlement, taking into account the adequacy of notice to the class members of the settlement terms; (iv) the fairness of the settlement to the entire class; (v) the fairness of the provision for attorney fees; and (vi) the ability of the defendants to withstand a greater judgment, taking into account whether the defendant is a governmental actor or a private entity.

Barnes v. United States, 2010 WL 1904503, at *2 (May 7, 2010) (granting final approval). In granting final approval of the proposed settlement in *Barnes*, this Court relied on the findings it had made when it preliminarily approved the settlement agreement:

> (i) the settlement agreement was reached after extensive negotiation carried out by class counsel experienced in such matters, and after the parties had conducted sufficient discovery to determine that the benefits of settlement outweighed the cost of

> continued litigation; and (ii) individual payouts were calculated in a uniform fashion, indicating no preferential treatment or other deficiencies.

Id. This Court also found "significant the fact that not a single objection was lodged by members of the class following their receipt of notification regarding the settlement terms." *Id.*

This Court should be guided foremost by the general principal that "'[s]ettlement is always favored,' especially in class actions where the avoidance of formal litigation can save valuable time and resources." *Sabo v. U.S.*, 102 Fed.Cl. 619, 626 (2011) (citations omitted). "The trial court should not make a proponent of a proposed settlement 'justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained ....'" *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *see also, Weinberger v. Kendrick*, 698 F.2d 61, 73-74 (2d Cir. 1982), cited with approval in *Christensen*, 65 Fed. Cl. at 629.

Applying these criteria demonstrates the Settlement Agreement warrants the Court's approval because: (1) there are numerous risks to the class inherent in the continuation of this litigation; (2) most of the qualified claimants will receive a gross payment (before the deduction of withheld taxes and even after the deduction of attorneys' fees as well as nontaxable costs) that approximates the amount of unpaid accrued and accumulated back pay 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 paid leave; (3) experienced Class Counsel have concluded the settlement is fair and reasonable and within acceptable parameters; (4) no class members have objected to the settlement; (5) the settlement fund will be divided into proportionate shares by the experienced Class Action Administrator based on a detailed analysis of each class member's individual pay and leave records rather than a distribution of equal shares of the fund after the payment of fees and expenses, which has the effect of sharing fairly the attorneys' fees and all the costs of counsel and the Administrator among all eligible claimants in well-reasoned,

distributive shares; and (6) the attorneys' fees are reasonable, proportionate to market rates in the private sector, and within the range of attorneys' fees routinely awarded in class actions of similar complexity and duration.[1]

III. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND MEETS THE STANDARDS FOR APPROVAL[2]

A. The Settlement Appropriately Balances the Risks of Litigation and the Immediate Benefit to the Class of a Certain Recovery.

When determining whether to approve a settlement, the Court first must consider the strengths of a plaintiff's case in relation to the proposed settlement, which involves evaluation of the following factors:

> (a) The complexity, expense and likely duration of the litigation; (b) the risks of establishing liability; (c) the risks of establishing damages; (d) the risks of maintaining the class action through trial; (e) the reasonableness of the settlement fund in light of the best possible recovery; (f) the reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation; [and] (g) the stage of the proceedings and the amount of discovery completed ....

Sabo, 102 Fed.Cl. at 627 (citations omitted).

While Plaintiffs believe they could prevail at trial with respect to the computation of damages and on appeal, there are numerous risks associated with continuing this litigation,

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[1] The final factor, whether defendant could withstand a greater judgment, is not discussed here, as "[t]he defendant's solvency is of minimal concern when the defendant is the federal government." *Berkley v. U.S.*, 59 Fed.Cl. 675, 711 (2004). The federal government's ability to withstand greater judgment typically does not factor into the court's consideration. *Id.*

[2] Plaintiffs incorporate by reference: (1) Plaintiffs' Memorandum of Law in Support of Plaintiffs' Unopposed Motion For Preliminary Approval of Settlement ("Preliminary Approval Brief"), the accompanying declarations of Robert Oseas and Ira M. Lechner, and the exhibits attached thereto, and (2) Plaintiffs' Memorandum of Law in Support of Plaintiffs' Unopposed Motion For Award of Attorneys' Fees, Costs, and Fees and Costs of the Court Appointed Class Action Administrator ("Motion for Attorneys' Fees and Costs").

including the risk on appeal that the Federal Circuit would reverse this Court's findings with respect to liability; the risk Defendant is found not liable for the payment of millions of dollars of interest and attorneys' fees under the specific circumstances of this case pursuant to the Back Pay Act; and the risk the Court would not award substantial back pay despite its findings of liability because the class would have difficulty in proving specific back pay liability for each one of the tens of thousands of claimants based on each person's unique and vastly different pay records. These risks are not insignificant.

In addition to the substantial risks and uncertainty inherent in continued litigation, the parties face the *certainty* that further litigation would be expensive, complex, and of substantial duration, particularly in light of Defendant's refusal to concede liability or stipulate that it would not appeal the Court's liability ruling. A substantial judgment favorable to Plaintiffs would unquestionably be the subject of post-trial motions and appeals, which would prolong the case potentially for years. Twelve years have already passed since this action was first investigated and then filed in the District Court. It is understandable the Plaintiffs and other members of this very large class of health care professionals lodged no objection to the settlement because a fair settlement is far more preferable than years of additional litigation which might even involve a remand and further appeals. As other courts have acknowledged, "unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecomms. Cooperative v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (quoting 4 A Conte & Newberg, *Newberg on Class Actions*, § 11:50 at 155 (4th ed. 2004)).

Thus, the risks of continued litigation when weighed against the substantial and certain recovery for the class of over $73 million, wherein each class member will receive a gross payment (before the deduction of withheld taxes and after the deduction of attorneys' fees and administrative costs) that is at least 80%—and as much as 84%—of the amount of unpaid accrued and accumulated back pay 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 paid authorized leave, confirms the reasonableness of the settlement. *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971); *Bullock v. Administrator of Kircher's Estate*, 84 F.R.D. 1, 10-11 (D.N.J. 1979). As one court has noted, "[a] very large bird in the hand in this litigation is surely worth more than whatever birds are lurking in the bushes." *In re Chambers Dev. Sec. Litig.*, 912 F.Supp. 822, 838 (W.D. Pa. 1995). The settlement is unquestionably better than other distinct possibilities—no recovery for portions of the class, or the slow bleeding of protracted litigation at trial with respect to damages and on appeal as to a myriad of issues, with the potential prospect of reversal, remand, and successive appeals thereafter.

B. Counsel Are Experienced, Have Been Adequately Informed of the Facts Via Discovery, and Have Concluded the Settlement is Fair, Reasonable, and Within Acceptable Parameters.

As set forth in the Preliminary Approval Brief, emphasis should also be placed upon the fact that Class Counsel, Ira M. Lechner and Robert W. Brownlie, experienced counsel with a wealth of class action experience, have concluded the settlement is fair and reasonable and within acceptable parameters. (See Dkt. Nos. 199-3, 199-5.) 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, pp. 10-11.) 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)." (Dkt. No. 81, p. 11, fn. 12.)

The conclusions of Class Counsel are subject to some deference under the factors enumerated by this Court and others in evaluating settlement agreements. *See, e.g., Barnes*, 89 Fed. Cl. at 670; *Stewart v. Rubin*, 948 F. Supp. 1077, 1087 (D.D.C. 1996) ("[a] court should defer to the judgment of experienced counsel who have competently evaluated the strength of the

proof."); *Dauphin Island Prop. Owners Ass'n v. United States*, 90 Fed.Cl. 95, 104 (2009) ("The competency and acceptance of the settlement by counsel for the class weighs heavily in favor of approval.").

Here, counsel's opinion is well-informed through extensive discovery and litigation of the claims in this case through which counsel gained "an adequate appreciation of the merits of the case before negotiating." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F. 3d 768, 813 (3d Cir. 1995). As set forth in the Lechner Declaration in support of Plaintiffs' Motion for Attorneys' Fees and Costs, the parties engaged in substantial discovery, including the production by Defendant of thousands of pages of documents, internal pay data as to every element of the potential class, and the retention of experts who worked with counsel to analyze the documents. (Dkt. No. 199-3.) The parties have litigated this case for more than a decade, during which time "sufficient discovery" took place "to determine that the benefits of the settlement outweighed the cost of continued litigation." *Barnes*, 89 Fed. Cl. at 671. In short, the litigation has reached the stage where "the parties certainly have a clear view of the strengths and weaknesses of their cases." *In re Warner Communications Sec. Litig.*, 618 F.Supp. 735, 745 (S.D. N.Y. 1985); *see also Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), aff'd, 661 F.2d 939 (9th Cir. 1981). The parties are uniquely qualified to assess their case and Plaintiffs conducted settlement negotiations with a full understanding of the merits of the case, and the possible success of Defendant's defenses.

The settlement also was influenced by the proceedings before this Court. In 2006, the Court heard extensive oral argument and examined complex briefs as to Plaintiffs' claims and Defendant's defenses with respect to partial summary judgment, granting in part and denying in part the parties' motions. Specifically, the Court granted Plaintiffs' motion almost in its entirety, except the Court held Plaintiffs were not entitled to additional Saturday pay for leave taken after September 30, 1997 if any portion of that leave originated on a Saturday but included Sunday hours. (Dkt. No. 55, at p. 20.) Although the Court's Order determined the government was

liable for back pay in the overwhelming number of instances at issue in the case, the government refused to concede liability or stipulate it would not appeal the ruling. Accordingly, both parties have settled the claims in light of their expectations of the likelihood of success on appeal and in favor of immediate resolution of those uncertainties rather than enduring several more years of litigation and the substantial risks entailed in that process.

C. No Class Members Have Objected to the Settlement.

The reaction of class members to the proposed settlement is another factor to be considered in determining whether the settlement is fair, reasonable, and adequate. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). The approved Notice of Proposed Settlement was mailed by first class mail to each and every current and former Veterans' Administration employee who filed a claim on or before August 30, 2012, totaling 58,715 individuals. (Declaration of Robert Oseas in Support of Motion for Final Approval of Settlement ("Oseas Decl."), ¶ 2.) To the best of Class Counsel's knowledge as of the filing of this brief, no formal objections to either the settlement itself or the 30% contingency fee (which each claimant agreed to when he or she filed an opt-in claim) have been filed with the Clerk of Court as required by this Court's Order of August 29, 2012. (*Id.*, ¶ 3.) In addition, the named class representatives have not expressed any opposition to the settlement. The opinions of the class representatives are "especially important because '[t]he representatives' views may be important in shaping the agreement and will usually be presented at the fairness hearing; they may be entitled to special weight because the representatives may have a better understanding of the case than most members of the class.'" *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 490 (E.D. Cal. 2010).

The class' reaction to the settlement can only be fairly described as overwhelmingly and uniformly supportive. *Hanlon*, 150 F.3d at 1027 ("[T]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective

positive commentary as to its fairness"); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) ("the small number of class members indicating their disapproval of the settlement, here only one percent, also indicates its acceptability."); *City of Detroit v. Grinnell Corp*, 495 F.2d 448, 462 (2d Cir. 1974) (reasonableness and adequacy of settlement supported by fact that only 20 of 14,156 claimants objected).

D. The Settlement is Fair to the Entire Class.

In evaluating the Settlement Agreement, the Court must "'ensure that the terms of a settlement treat the class as a whole fairly.' A settlement must be 'uniformly available, yet simultaneously tailored to distinct groups within the class.'" *Sabo*, 102 Fed.Cl. at 629 (citations omitted). Here, the Settlement Agreement treats each member of the class fairly, while taking into account each class member's specific circumstances and his or her right to recovery. The settlement fund will be divided into proportionate shares by Epiq, an experienced class action administrator, based on a detailed analysis of each class member's individual pay and leave records, rather than a distribution of equal shares of the fund, after the payment of fees and expenses. This ensures each class member's payment is fair and proportional to the actual amount of back pay due to that individual class member.

E. The Attorneys' Fees Are Reasonable and In Accordance With the Range of Attorneys' Fees Routinely Awarded in Class Actions of Similar Complexity.

The Court must also examine "whether the fee structure proposed by the settlement is fair, adequate, and reasonable. Additionally, the Court should ensure that the fee structure does not create any type of conflict of interest for class counsel." *Sabo*, 102 Fed.Cl. at 630 (citations omitted). As set forth in Plaintiff's Motion for Attorneys' Fees and Costs filed on August 27, 2012, the attorneys' fees provided by the Settlement Agreement are fair, adequate and reasonable. (Dkt. No. 200.)

Moreover, no objection has been lodged to the attorneys' fee by any of the 58,479 employees and former employees of the VA who were notified by postcard and on the website www.VAbackpay.com of Plaintiffs' unopposed motion for approval of a contingent attorneys' fee of 30 percent. (Oseas Decl., ¶ 3.)

F. There Are No Deficiencies.

Finally, Plaintiffs respectfully submit, without opposition from the government, that the proposed terms of settlement are reasonable, adequate and fair under all of the Barnes factors enumerated above. Furthermore, as in *Barnes*, there are no "deficiencies" that would raise concerns relating to the terms of settlement. *Barnes v. United States*, 89 Fed. Cl. 668, 671 (2009). The settlement: (1) was the result of extensive arms-length negotiations; (2) it provides for proportionate recoveries for each eligible class member, which are to be calculated in a fair and uniform fashion by an experienced Administrator and are anticipated to be approximate to the amount of back pay owed to them; (3) it provides for payment of attorneys' fees, expenses and all administrative costs from the common fund such that no class member bears the additional burden of compensating Class Counsel or the Administrator separately; and (4) it was reached after the parties had an opportunity to engage in extensive discovery in this matter and after the parties obtained a finding of liability from this Court. Significantly, the settlement resolves the litigation now, and removes all of Plaintiffs' uncertainties and risks attendant to an appeal by the government to the Federal Circuit of the Court's finding of liability.

IV. CONCLUSION

Because the Settlement Agreement constitutes a fair and reasonable resolution of this class action which has been pending for more than a decade, and for the reasons provided above, Plaintiffs respectfully request that the Court should grant Plaintiffs' motion for final approval of the Settlement Agreement. The Court is fully aware of the adversarial, though cordial, relationship between counsel for Plaintiffs and counsel for the government on a high level of

professionalism. Quite obviously, there was no potential for collusion during the very lengthy negotiations that ultimately culminated in an extremely fair settlement for members of the class.

Respectfully submitted,

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