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 PRELIMINARY APPROVAL OF SETTLEMENT

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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 preliminary approval of the Settlement Agreement (Plaintiffs' Exhibit 1).

I. INTRODUCTION

Plaintiffs represent current and former health care employees of the Veterans Health Administration ("VHA") of the Department of Veterans Affairs ("VA"), who were routinely denied the "additional pay" owed to them under 38 U.S.C. sections 7453 and/or 7454. This Court determined the government was liable for back pay owed to plaintiffs. However, the government refused to concede to any liability or to waive its right to appeal the judgment. Thus, the parties embarked on an arduous, four-year journey to final settlement. After reviewing eligible – and ineligible – claims for 66,091 claimants, on August 13, 2012, the parties finally agreed upon terms of settlement, which are reflected in the Settlement Agreement.

Plaintiffs now submit this unopposed motion seeking preliminary approval of the Settlement Agreement. Preliminary approval is not explicitly required by the Court's rules, RCFC23(e), but it is often utilized as part of a court's fairness determination process. *See Berkley v. United States*, 59 Fed. Cl. 675, 677 (2004); *In Re NASDAQ Market-Makers Antitrust Litigation*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997); *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983). Plaintiffs respectfully submit that the Court should grant preliminary approval of the Settlement Agreement because it is the product of an informed, non-collusive negotiation, provides no preferential treatment to any category of class members, and is well within the range permissible for approval. *See In Re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. at 102.

II. PROCEDURAL BACKGROUND

The procedural background of this case is well-known to the Court and is recited in full as part of the accompanying "Plaintiffs' Memorandum of Law In Support of Plaintiffs' Unopposed Motion for Award of Attorney' Fees and Costs."

The Court granted class certification for an opt-in class on March 27, 2008. (Dkt. No. 81.) At the hearing for class certification, Defendant asserted that, although the Court's Order on the summary judgment motions determined liability in this case, the government would not concede liability and declined to stipulate that the government would not appeal the Court's finding of liability. (Dkt. No. 81, p. 7.) Indeed, the Court observed 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.)

A. Notice to the Class and The Number of Claims Filed

The Class Action Administrator mailed 274,301 notices of the availability of filing a claim for back pay and interest in this case to potential class members employed by the Department of Veterans Affairs ("Oseas Decl." ¶3, attached to Plaintiffs' Motion for fees as Plaintiffs' Exhibit 5 and attached to this Memorandum as Plaintiffs' Exhibit 2). The postcard notice approved by the Court referred potential claimants to the website www.VAbackpay.com which contained the Court's Official Notice in its entirety as well as a detailed claim form that could be filed online directly with the Class Action Administrator. In addition, the postcard contained an "800" number which enabled claimants to contact the Administrator to request that a paper claim form be mailed to them. As a result of these communications, 66,081 opt-in claims were filed online and by mail. *Id.*

The VA then carefully developed and implemented a template that permitted accurate calculations with respect to each of the individuals who filed a claim on or before February 26, 2011. (Dkt. No. 185.) Preparation and testing of the template took many months of painstaking effort by VA personnel and expert consultants who were retained to assist in the process. It was determined that 44,019 unique individuals were employed during the requisite time period in one or more appropriate job classifications who used authorized paid leave instead of working regularly scheduled night or weekend hours in conformity with the Court's decision with respect

to liability (Plaintiffs' Ex. 3, "Lechner Decl."). The template was then utilized to analyze the payroll records of those 44,019 claimants.

The VA then determined Defendant's potential exposure to each of the 44,019 claimants of weekend and night differential back pay beginning September 5, 1995. The calculation of potential exposure with respect to liability included back pay and interest through March 12, 2012 for eligible Registered Nurses, PAs, and EFDAs, and back pay and interest for all other eligible claimants through June 30, 2012. [1] Upon the completion of that detailed analysis, VA estimated the government's potential exposure as $92,488,389 with respect to the back pay and interest owed to 44,019 unique individuals (Plaintiffs' Ex. 3, "Lechner Decl.").[2]

B. The Negotiated Settlement of Back Pay Act Claims

The parties negotiated the settlement of this case at arm's length for more than two years (Plaintiffs' Ex. 3, "Lechner Decl."). The Settlement Agreement provides for payment by the United States of $73,990,712 to the Class Settlement Fund, which represents precisely a twenty percent (20%) discount to the estimated exposure of $92,488,389 in back pay and interest calculated by the VA after analyzing the results of the computerized template against the payroll records of employees and former employees who filed claims. Payment is to be made to the

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[1] Back pay and interest attributable to RNs, Pas, and EFDAs was calculated to March 12, 2012 because on that date the Secretary amended the VA's Handbook to clearly state that from that date forward RNs are not eligible to receive Saturday premium pay whenever they use paid leave instead of working regularly scheduled Saturday hours. This policy amendment thereby terminated the government's potential exposure for back pay and interest for this group of VA employees as March 12, 2012 (VA HANDBOOK 5007/43 Part V, March 12, 2012). Back pay and interest was calculated for all hybrids to June 30, 2012.

[2] The VA determined that more than 15,000 individuals who filed claims were ineligible for back pay for a variety of reasons: they were not employed in the requisite job classifications during the operative period; they were not regularly scheduled to work on weekends or at night; or if they were regularly scheduled to work weekend or night hours, they did not use authorized paid leave during those hours; their social security number did not match in the VA database; and/or they did not file a timely claim. (Plaintiffs' Exhibit 3, "Lechner Decl."¶ 10). As part of the settlement process, each of those individuals will be given an opportunity to produce documentation to establish his or her entitlement to back pay, and if so, they will included in the class for payment of his or her proportionate share of the settlement with appropriate interest in the secondary distribution of back pay and interest. *Id.*

Class Action Administrator, Epiq (the "Administrator"), to distribute in proportionate shares to eligible members of the class, or their heirs, as defined by this Court in its Order certifying the class, who returned an opt-in claim to the Administrator on or before December 31, 2011 (Plaintiffs' Ex. 1, Settlement Agreement, ¶¶ 7-9). The proportionate distributive shares are to be paid to eligible claimants who filed claims based on each individual's payroll records which have been provided to the Class Action Administrator by the VA.

The proportionate distributive shares are to be paid to eligible class members after payment of attorneys' fees and expenses from the settlement fund which have been approved by the Court, as well as reasonable administrative fees and costs incurred by Epiq as Class Action Administrator (*Id.*, ¶ 10). The amounts to be paid are for the alleged failure of the government to pay compensation due, and interest on said sum (*Id.*, ¶¶ 7,10). The Administrator shall withhold such sums from each class member's individual Settlement Award as necessary to comply with State, Federal and city tax laws and shall report the taxes withheld on Forms 1099 and W-2 and pay such withheld funds, plus the employer's contribution, to the appropriate taxing authorities (*Id.*,¶ 10).

C. The Settlement Agreement Approval Process

The Settlement Agreement was approved by the Attorney General.

Plaintiffs' counsel has consulted Defendant's counsel to jointly propose a schedule for the Court to issue as part of the Court's Preliminary Approval of the Settlement Agreement (*see* Plaintiffs' Unopposed Motion for Preliminary Approval of the Settlement Agreement, Unopposed Proposed Schedule, Plaintiffs' Exhibit 4).

III. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT AGREEMENT

A. Legal Standard for Approval of Class Action Settlements

This Court's preliminary approval of the proposed settlement will further the public policy of conserving judicial resources and reducing parties' costs. As the Supreme Court has noted, there is "a strong preference for encouraging voluntary settlement" in employment cases. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981); *see also Sabo v. United States*, 102 Fed. Cl. 619, 626-27 (2011) ("In general, '[s]ettlement is always favored,' especially in class actions where the avoidance of formal litigation can save valuable time and resources.") (citations omitted).

Under RCFC 23(e)(1)(A), "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Final approval may be given "only after a hearing and on finding that it is fair, reasonable, and adequate." RCFC 23(e)(2).

Two areas of inquiry are paramount in determining of whether a proposed 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…to 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)). With this in mind, this Court recently applied four factors to determine whether the terms and negotiation process of a settlement are fair and reasonable:

> (i) "whether the settlement agreement appears to be the product of serious, informed, non-collusive negotiations;" (ii) "whether it improperly grants preferential treatment to class representatives or other members of the class;"(iii) "whether counsel are experienced and have been adequately informed of the facts

> via discovery;" and (iv) "whether the agreement otherwise has obvious deficiencies."

Barnes v. United States, 89 Fed. Cl. 668, 670 (2009) (granting preliminary approval); *see also In Re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. at 102.

At this preliminary stage, courts need not consider the additional factors weighed by courts for final approval, which is only granted after class members have been given an opportunity to object and after a fairness hearing has been conducted. *Bourlas v. Davis Law Assocs.*, 237 F.R.D. 345, 355 (E.D.N.Y. 2006) (postponing application of nine *Grinnel* factors until settlement was ready for final approval).

Although the reviewing court must assess the strength of plaintiffs' claims when evaluating the adequacy of a proposed class settlement, it should "not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *accord Barnes*, 89 Fed. Cl. at 670; *Berkley*, 59 Fed. Cl. at 682. It is thus appropriate for the Court to defer to the judgment of the lawyers supporting the proposed settlement. Although not controlling, "[a] court should defer to the judgment of experienced counsel who have competently evaluated the strength of the proof." *Stewart v. Rubin*, 948 F. Supp. 1077, 1087 (D.D.C. 1996); s*ee also Hammon v. Barry*, 752 F. Supp. 1087, 1093 (D.D.C. 1990). In particular, the professional judgment of plaintiffs' counsel is "entitled to considerable weight in the Court's determination of the overall adequacy of the settlement." *Luevano v. Campbell*, 93 F.R.D. 68, 88 (D.D.C. 1981). While the Court should consider the substance of a proposed agreement in determining its reasonableness,

> [o]ften, the settlement benefits are somewhat speculative in nature and capable of only approximate valuation. Nevertheless, the settlement may be approved if it is clear that it secures some adequate advantage for the class. The settlement does not have to be a brilliant one in order to secure judicial approval. On the other hand, the court may approve settlement even if it determines that the plaintiffs are receiving a windfall.

2 Herbert Newberg & Alba Conte, Newberg On Class Actions ¶ 11.46, at 11-110 - 11-112 (3d ed. 1992) (footnotes omitted).

Even if a settlement would not yield more substantive benefit for a plaintiff class than they would get if they fully litigated the case, an agreement that would substantially decrease the amount of time it would take to resolve a matter can be reason enough for the settlement to be approved. *Isby v. Bayh*, 75 F. 3d 1191, 1200 (7th Cir. 1996) (holding that a settlement should not be rejected "solely because it does not provide a complete victory to the plaintiffs."). Thus, "[e]ven putting aside all considerations of the risks of litigation, the delay in providing relief to the class if this case were to be litigated is a factor strongly supporting the compromise reached by the parties." *Luevano*, 93 F.R.D. at 89.

Finally, in reviewing the Settlement Agreement, the Court has discretion either to accept or to reject a proposed settlement. *In Re Prudential Insur. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 317 (3d Cir. 1998) (citations omitted). "Accepting or rejecting the proposal are the Court's only options, however, because the Court cannot alter the terms of a proposed settlement." *Berkley*, 59 Fed. Cl. at 681; *Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986) (finding that the court cannot adjust attorney fees or lack of attorney fees provided by proposed settlement).

B. The Proposed Settlement Agreement is Fair, Reasonable, and Adequate

All factors enumerated in *Barnes* and the other cases cited herein support the Court's preliminary approval of this settlement.

1. The Settlement Agreement is the Product of Serious, Informed, Non-Collusive Negotiations

There is no doubt the negotiations resulting in the proposed Settlement Agreement were at "arms-length" and were not-collusive. The negotiations, although civil, were adversarial and

there is no reason for the Court to believe any collusion took place. Counsel spent more than two years negotiating the terms of the settlement, exchanging data concerning Plaintiffs' employment and pay records, and exchanging draft proposals before reaching agreement. Moreover, as discussed below, the terms reflect the parties' informed and realistic predictions about the range of potential outcomes.

2. No Class Members Will Receive Preferential Treatment

The methodology for calculating payments to each individual class member is fair, adequate and reasonable. Each class member shall receive a proportionate distributive share from the Settlement Fund, based upon the back pay owed to them, from their employment and pay records during the appropriate time period, less attorneys' fees, attorneys' reimbursable costs, and administrative fees and costs of the Class Action Administrator.

It is anticipated that most of the qualified claimants will receive a gross payment (before the deduction of withheld taxes) 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 leave, taking into account the addition of interest and other tax factors to the amount of back pay owed in accordance with the Court's findings of liability: [3]

1) Each distributive share of back pay will increase inasmuch as the settlement adds the full measure of interest to each share;

[3] 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 could receive approximately 85 percent of the back pay they should have been paid for more than a decade if the addition of years of interest obtained in the settlement is considered (even after contingent attorneys' fees requested by Plaintiffs are paid from the common fund).

2) Interest has accumulated for many claimants for more than seven years, and in some cases for more than a decade;

3) All appropriate taxes will be withheld from qualified claimants' distributive share and paid directly by the Administrator to the appropriate authorities; and

4) Attorneys' fees, reimbursable expenses, and the costs of the administration will be paid from the Fund rather than assessed individually from each claimant's gross recovery which would have a positive impact upon individual tax liability from the point of view of the taxpayer.

Moreover, the settlement fund will be divided into proportionate shares by an experienced Class Action Administrator (Epiq) 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.

Thus, the procedural terms of the settlement ensure that the administration of the settlement trust will be made only to eligible and qualified members of the settlement class in accord with the amount of back pay and interest earned by each class member. The Settlement Class has been closed, and a process will be put in place whereby claimants who have been deemed ineligible by VA's examination of payroll records will share in the fund proportionally if they establish their eligibility with official documentation. Therefore, the eligible class members will not have their distributive shares reduced by the influx of ineligible claimants.

3. Counsel Are Experienced And Have Been Adequately Informed Of The Facts Via Discovery

Emphasis should also be placed upon the fact that Messrs. Lechner and Brownlie, experienced counsel with a wealth of class action experience, have concluded that the settlement is fair and reasonable and within acceptable parameters. (*See* Lechner Decl., at ¶ 7; Brownlie Decl., at ¶¶2-3). 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)." 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*, 948 F. Supp. at 1087 ("[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 Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F. 3d 768, 813 (3d Cir. 1995). Indeed, the parties have litigated this case for more than a decade, during which time "sufficient discovery" took place "to determine that the benefits of settlement outweigh the cost of continued litigation." *Barnes*, 89 Fed. Cl. at 670.

The parties' negotiations have also been 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 summary judgment, granting in part and denying in part the parties' motions. Specifically, the Court granted Plaintiffs' motion almost in its entirety. (Dkt. No. 55, at p. 20.) Although the Court's Order determined the government was liable for back pay, the government refused to concede liability or stipulate that 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.

4. There are No Deficiencies

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*, 89 Fed. Cl. at 670. 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 it removes all of Plaintiffs' uncertainties and risks attendant to an appeal by the government to the United States Court of Appeals for the Federal Circuit of this Court's finding of liability.

Further, Plaintiffs' request for a fairness hearing within approximately 45 days of the Court's preliminary approval of the settlement is warranted given that the Administrator already has all of the contact information for the eligible class members, based on their return of opt-in

claims, and will be able to notify them of the terms of the settlement within seven (7) days of the Order.

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 and set the following schedule as soon as possible:

1. Preliminarily approve the Settlement Agreement;
2. Approve the wording of the Proposed Summary Notice of Settlement and the mailing of the Summary Notice by postcard;
3. Set a prompt date for a fairness hearing date, approximately forty (45) days from the date of the Order Granting Preliminary Approval, to consider any objections to the settlement;
4. Grant final approval of the Settlement Agreement as soon as possible after conclusion of the fairness hearing in order to put in motion the administrative process whereby the Class Action Administrator will make payment of back pay and interest to tens of thousands of eligible class members from the Settlement Fund.

Respectfully submitted,

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