IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CILICIA A. DeMons, et al., for themselves and on behalf of all others similarly situated, Plaintiffs, v. **THE UNITED STATES OF AMERICA,** Defendant.	**Case No. 13-779C** **PLAINTIFFS' UNOPPOSED MEMORANDUM OF LAW FOR APPROVAL OF THE SETTLEMENT AGREEMENT; APPROVAL OF CONTINGENT ATTORNEYS' FEE TO BE TAKEN FROM THE SETTLEMENT FUND AND REASONABLE ADMINISTRATIVE FEES AND EXPENSES** (**Judge Susan G. Braden)**

APPROVAL OF THE SETTLEMENT AGREEMENT IS FAIR AND REASONABLE

A. Legal Standards for Approval of Class Action Settlements

This Court's 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).

This Court approved the Settlement Agreement, including a contingent attorneys' fee of 30%, and reimbursable attorneys' expenses, as well as the Administrator's fees in *Adams,* as follows (ECF No. 49):

> Under RCFC 23(e), "the claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." The legal standard for such a settlement is that it must be "fair, reasonable and adequate." *Berkley* v. *United States,* 59 Fed. Cl. 675, 681 (2004). Settlement proposals enjoy a presumption of fairness afforded by a court's fairness determination. *Id*. The court has discretion either to accept or reject a proposed settlement. *Id*. The court, however, may not alter the terms of a proposed settlement. *See Evans* v. *Jeff D.,* 475 U.S. 717, 726-27 (1986) (noting that "Rule 23(e) [of the Federal Rules of Civil Procedure] does not give the court the power, in advance of trial, to modify a proposed consent decree and order its acceptance over either party's objection."). In addition, although the court must assess the strengths and weaknesses of the parties' positions, it may not "decide the merits of the case or resolve unsettled legal questions." *Nat'l Treasury Employees Union* v. *United States,* 54 Fed. Cl. 791, 797 (2002) (citing *Carson* v. *Am. Brands, Inc.,* 450 U.S. 79, 88 n.14 (1981)).

> The court has considered the following factors: "(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." *Sabo* v. *United States*, 102 Fed. Cl. 619, 627 (2011); *Barnes* v. *United States*, 2010 WL 190450 at *2 (Fed. Cl. 2010); *see also Dauphin Island Prop. Owners Ass'n*, 90 Fed. Cl. 95, 102-03 (2009).
>
> In determining that the settlement here is fair, the court considered the following factors: (i) the Settlement Agreement will result in a gross payment to the qualified claimants amounting to eighty-five percent of the amount of unpaid accrued and accumulated back pay subject to *Adams II*; (ii) the Settlement Agreement was reached after extensive arm's-length negotiation carried out by experienced class counsel, and after the parties had conducted extensive discovery to determine that the benefits of settlement outweighed the costs and risks of continued litigation; (iii) no class members have objected to the Settlement Agreement after receiving notification of its terms; (iv) individual recoveries will be uniformly calculated and proportionately distributed based on a detailed analysis of each class member's individual pay and leave records, instead of a distribution of equal shares; and (v) the attorneys' fees constitute 30% of the settlement amount, are reasonable and proportionate to market rates, and are to be paid from the common settlement fund.

As this Court noted in *Adams*, two areas of inquiry are paramount in determining 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," however, "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)); *Barnes v. United States*, 89 Fed. Cl. 668, 670 (2009) (approval). In concluding that the settlement merited final approval in *Barnes*, Judge Allegra noted that: "The Federal Circuit has not provided a definitive list of factors to be used in evaluating the Fairness of a proposed settlement. *Daughin Island Prop. Owners Ass'n v. United States*, 90 Fed. Cl. 95, 102 (2009)." 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. 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).

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).

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

All factors enumerated by this Court in *Adams*, as well as in the other cases cited herein, support the Court's approval of this settlement and the approval of a 30% contingent attorneys' fee.

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

There is no doubt the negotiations resulting in the proposed Settlement Agreement were at "arms-length" and were not-collusive. Defendant will pay 100% of the actual back pay and interest owed to the Fund which undoubtedly is a fair result. The negotiations, although civil,

were adversarial and there is no reason for the Court to believe any collusion took place. Class Counsel Ira M. Lechner spent more than six months negotiating the terms of the settlement, exchanging data concerning employment and pay records, and exchanging draft proposals before reaching agreement. Moreover, the terms reflect the parties' informed and realistic predictions about the range of potential outcomes.

2. No Class Members 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 actual back pay and interest owed to them as calculated by the VA from each class member's own employment and pay records during the appropriate time period. It is clear that before payment of the regular costs of arms-length litigation, each and every one of the qualified claimants will receive payment that equals the amount of unpaid accrued and accumulated back pay they should have received when they were regularly scheduled to work on Saturdays and/or at night, but did not work because they were on authorized paid leave—plus substantial pre-judgment interest.

In addition:

(a) Each distributive share will increase inasmuch as the settlement adds the full measure of interest to each share; (b) Interest has accumulated for many claimants for more than four years; (c) All appropriate taxes will be withheld from qualified claimants' distributive share; (d) Attorneys' fees, expenses, and costs of the administration of the Fund will be paid from the Fund itself, rather than being credited initially and individually to each claimant's gross recovery and then assessed against each claimant, and the Government will contribute $279,136.56 in partial payment of attorneys' fees which will be credited to the class against the contingent fee;

(e) The Fund will be divided into proportionate shares by an experienced Class Action Administrator (Epiq Systems Inc.) based on a detailed analysis of each class member's individual pay and leave records rather than as a distribution of equal shares of the fund after the payment of fees and expenses. [1] Thus, the terms of the settlement ensure that the administration of the Fund will enable payment only to eligible members of the settlement class in accord with the amount of back pay and interest earned by each class member. Therefore, the eligible class members will not have their distributive shares reduced by the influx of ineligible claimants.

3. Class Counsel Is Experienced and Informed of the Facts Via Discovery

Emphasis should also be placed upon the fact that Mr. Lechner is an experienced counsel with many years of class action experience in this court. Mr. Lechner has concluded that the settlement is fair and reasonable and within acceptable parameters. His conclusions are subject to some deference under the factors enumerated by this and other courts in evaluating Settlement Agreements.

[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 and Class Counsel Ira M. Lechner have a multitude of tasks ahead of both of them if the Court approves the settlement, such as: an initial payment of back pay and interest to more than ten thousand individuals; constant communication by Mr. Lechner assisted by Epiq staff with claimants who have questions about their award; handling of documentation potentially from several hundred claimants who complain their award is deficient; 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 or W-2 to all claimants; and ultimately managing the payment of taxes due and withheld to the federal, state, and local governments. Based upon practical experience in the *Adams* case and other class action cases, it is anticipated that Mr. Lechner will spend more than 600 additional hours without charging any additional legal fee over the course of the next year in extensive dealing with probably 500 or more claimants who dispute or have questions about their recovery amount. In accord with the Settlement Agreement, the Class Action Administrator will be paid its hourly fees and costs of administration directly from the "Reserve Fund" of ten percent which hopefully will be approved by the Court. Such administrative fees and costs will be reviewed by Class Counsel, pursuant to documentation and written invoices submitted by Epiq to Counsel. Subsequent to payment of court-approved attorneys' fees, and reimbursement of costs to class counsel and Epiq, the Administrator will make an initial payment of back pay and interest to the claimants declared eligible by VA. Money remaining in the "Reserve Fund" established by Epiq will be distributed later 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.

4. There Are No Deficiencies

Plaintiffs respectfully submit, without opposition from the Government, that the proposed terms of the settlement are reasonable, adequate and fair under all of the factors enumerated in *Adams, Quimby*, and *Barnes*. Furthermore, there are no "deficiencies" that would raise concerns relating to the terms of settlement. The settlement: (1) was the result of extensive arms-length negotiations; (2) it provides for proportionate recoveries for each class member, which are to be calculated in a fair and uniform fashion by an experienced Administrator and are anticipated to be equal to the amount of back pay owed to them, less taxes, and regular litigation fees and costs; (3) it provides for payment of attorneys' fees, expenses and costs from the common fund such that no class member bears the additional burden of compensating Class Counsel separately; and (4) it was reached after the parties had an opportunity to engage in discovery in this matter and after full liability was firmly established. Significantly, the settlement resolves the litigation now, and it removes all of Plaintiffs' uncertainties and risks attendant if the government appealed any issue of liability to the United States Court of Appeals for the Federal Circuit.

5. A Contingent Fee of 30% of Back Pay and Interest Is Reasonable in This Case

In order to encourage settlement, class counsel should be rewarded for his 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); *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.").

In *Adams*, this Court held that a contingent fee of 30% was "reasonable and proportionate to market rates." Moreover, in *Adams*, the fee was to paid "from the common settlement fund"

which constituted 85% of the government's liability for back pay. By contrast in the case at bar, plaintiffs' counsel was successful in negotiating a settlement amount equal to 100% of back pay and interest. Plaintiffs' counsel also successfully negotiated that the Government pay additional amounts to the Fund of $279,136.56 in statutory attorney fees which will be credited to the class against the contingent fee; $491,533.32 in pre-judgment interest; and also $582,973.00 to satisfy the employer's portion of Medicare fees and other employer liabilities---which often is not included in other class action settlements and thus require payment from the common fund. All of these factors weigh in favor of awarding the requested contingent attorneys' fees in this case.

In sum, to determine whether a 30% percentage of the fund is reasonable as a contingent fee, this Court considered the following in *Adams* (ECF No. 49*)*:

> In determining that the settlement here is fair, the court considered the following factors:…(v) the attorneys' fees constitute 30% of the settlement amount, are reasonable and proportionate to market rates, and are to be paid from the common settlement fund.

The requested fees are particularly appropriate here, where class counsel utilized his considerable experience to achieve a $6.5 million recovery for the benefit of the class. Indeed, because of the negotiated agreement whereby the Government will pay almost $1,500,000 to the benefit of the class members as pre-judgment interest, statutory attorney fees, and more than a half million dollars as the government's share of employment taxes, the qualified claimants will receive a net payment that equals 100 percent (100%) of the amount of unpaid accrued and accumulated back pay that they should have been paid, less taxes and regular litigation costs. It is anticipated that before taxes, the qualified claimants will recover a substantial amount of back pay and interest, even after the deduction of the requested contingent attorneys' fees and the deduction of anticipated administrative fees in calculating and paying the back pay and taxes.

In granting class action certification in this case, the Court found: "The Government does not challenge the fact that Plaintiffs' proposed class counsel, Mr. Ira M. Lechner, is qualified to conduct the litigation." (ECF No. 13, p. 13.)

5. A Contingent Fee of 30% of Back Pay and Interest Is Reasonable and Proportionate to Market Rates, To Be Paid from the Common Fund, and Is Supported by the Affirmative Agreement of Each One of the Claimants

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). 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, the 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 v. United States*, 63 Fed. Cl. 781, at 787 (2005) (internal citations omitted).

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' patience and diligence expended over more than four years; the affirmative agreement by each of the 10,190 class claimants to a contingent attorneys' fee of 30 percent and thereby the lack of any rational objection to the fee by any of the members of the class who received notice of this settlement, which included the application of a 30% contingent fee; the decision of the government not to oppose a fee of 30 percent from the common fund; and the obvious 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 contingent fee litigation"). [2] As Mr. Lechner recounts in his Declaration (Pls. Ex. 1, attached hereto):

"¶16: The legal work expended as Plaintiffs' counsel in this case, and the communications by phone and email with many hundreds of individual plaintiffs, opt-in claimants, and their representatives on multiple occasions, will consume more than one thousand two hundred (1,200) attorneys' hours which began in early 2013 before the two Complaints were filed until the final distribution of all funds in this case and the final "wrap-up" of this matter, probably in 2018. Based on my experience in many class action cases in this court, more than six hundred additional and unbillable attorneys' hours will be consumed in assisting the Administrator in resolving legal and factual conflicts raised by claimants and in communicating directly with hundreds of opt-in claimants with respect to the appropriate amount of back pay and interest which will be allocated to them as a distributive share of the Settlement Fund."

Thus, the fee is not only comparable to attorneys' fee awards granted by other courts, but is the same fee that likely would have been negotiated between private parties, as the Court found in *Adams* that a 30 percent fee "reflects the market rate." 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*

[2]"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." 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); accord, *In re Rite Aid*, 146 F. Supp. 2d at 736. Class Counsel's additional non-billable time in this case will consume at least 600 more attorney hours until 2018 when the distribution of the settlement probably will be finally completed.

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 . . .").

Wherefore, Plaintiffs respectfully submit that the facts with respect to this Settlement Agreement, supported by overwhelming precedent, justify approval of the Agreement, as well as the 30% contingent attorneys' fee and reimbursement of the reasonable expenses of Class Counsel, and the fees and costs of the Administrator in continuation of the administration of this class action case.

Dated: March 7, 2017

Respectfully submitted,

s/Ira M. Lechner_____

IRA M. LECHNER, ESQ.
Class Counsel
1127 Connecticut Avenue, NW, Ste. 106
Washington, DC 20036
Tel: (858) 864-2258
Fax: (858) 997-2691
Iralechner@yahoo.com
Attorney for Plaintiffs and Class Counsel