

In the United States Court of Federal Claims

_____)	
STEPHANIE MERCIER, et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 12-920C
)	(Filed: July 16, 2021)
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	
_____)	

Michael Hamilton, Provost Umphrey Law Firm LLP, Nashville, TN, for Plaintiffs. *William H. Narwold*, Motley Rice LLC, Hartford, CT, *Guy Fisher*, Provost Umphrey Law Firm LLP, Beaumont, TX, *Robert H. Stropp, Jr.*, Mooney, Green, Saindon, Murphy & Welch, P.C., Washington, D.C., *Bennett P. Allen*, Cook, Allen & Logothetis, LLC, Cincinnati, OH, and *E. Douglas Richards*, E. Douglas Richards, PSC, Lexington, KY, Of Counsel.

P. Davis Oliver, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., with whom were *Reginald T. Blades, Jr.*, Assistant Director, *Martin F. Hockey, Jr.*, Acting Director, and *Brian M. Boynton*, Acting Assistant Attorney General, for Defendant.

OPINION AND ORDER

Kaplan, Chief Judge.

BACKGROUND

Plaintiffs in this class action lawsuit are nurses and physician’s assistants employed at various Department of Veterans Affairs (“VA”) medical facilities across the country. They allege that the VA induced them to work on their own time to manage electronic health records. See 2d Am. Compl, ECF No. 155. Plaintiffs contend that the failure to compensate them for this overtime work violated 38 U.S.C. §§ 7453 and 7454, as well as the VA’s overtime pay regulations and policies.

Plaintiffs filed suit on December 28, 2012. ECF No. 1. The Court granted the government’s motion to dismiss on February 27, 2014. ECF No. 24. The Federal Circuit reversed the Court’s dismissal on May 15, 2015. ECF No. 28. The Court certified the case as a class action on June 7, 2018, and defined the class as those registered nurses and physician’s assistants who have been, are, or will be employed by the VA after December 28, 2006 at a VA facility

where at least one opt-in Plaintiff also works or has worked as of November 30, 2017. ECF No. 138. Pursuant to Rule 23(c)(2)(B) of the Rules of the Court of Federal Claims (“RCFC”), the Court directed notice to the class on August 22, 2018. ECF No. 149. Plaintiffs amended their complaint on August 29, 2018. ECF No. 155. On March 29, 2019, Plaintiffs notified the Court that more than 3,000 individuals had opted into the class. ECF No. 171. The parties engaged in extensive fact and expert discovery for more than year which included production of numerous electronic records and expert reports on potential damages. See, e.g., ECF Nos. 180 & 195.

Discovery closed in December of 2020 and the Court scheduled this case for trial to begin on February 22, 2021. ECF No. 207. Pursuant to the parties’ request, the Court referred the case to the court’s Alternative Dispute Resolution program with Senior Judge Marian Blank Horn. ECF No. 220. On January 6, 2021, the parties notified the Court they had “reached an agreement in principle to settle this litigation.” ECF No. 226. Accordingly, the Court canceled the upcoming trial six-weeks before it was to commence. ECF No. 228. On July 8, 2021, the parties notified the Court that the Associate Attorney General had approved the Settlement Agreement on behalf of the Attorney General. ECF No. 240.

Presently before the Court is Plaintiffs’ unopposed motion for preliminary approval of class action settlement for all class members and for approval of Notices of Class Action Settlement. ECF No. 246. In their motion, Plaintiffs request the Court: (1) preliminarily approve the Settlement Agreement; (2) approve the Notices of Class Action Settlement; (3) appoint Brown Greer, PLC as the Settlement Administrator; (4) direct the Settlement Administrator to mail the Notices of Class Action Settlement to class members and to establish a website; (5) establish certain deadlines; and (6) schedule a Fairness Hearing. Id. For the reasons set forth below, Plaintiffs’ motion is granted, with minor modifications to the proposed Notices of Class Action Settlement.

DISCUSSION

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.” In implementing RCFC 23(e), the Court conducts a preliminary fairness evaluation of the proposed settlement, then directs notice of the settlement be provided to the class, and last, may grant final approval of the proposed settlement following notice to the class and a fairness hearing. Barnes v. United States, 89 Fed. Cl. 668, 670 (2009).

I. The Terms of the Settlement

At the preliminary fairness evaluation stage, the Court’s role is not “to reach any ultimate conclusions regarding the merits of the dispute, nor to second guess the settlement terms.” Id. (citations omitted). Its only task is to examine the settlement agreement for “obvious deficiencies.” Thomas v. United States, 121 Fed. Cl. 524, 528 (2015), rev’d in part on other grounds sub nom. Longnecker Prop. v. United States, No. 2015-5045, 2016 WL 9445914 (Fed. Cir. Nov. 14, 2016).

The parties agree that there are currently 3,207 class members. Pls.’ Mem. of Law in Supp. of Their Unopposed Mot. for Prelim. Approval of Class Action Settlement Agreement and

Approval of Notices of Class Action Settlement (“Pls.’ Mem.”) at 2, ECF No. 245. The parties’ Settlement Agreement provides that the government shall pay 160,000,000.00 to resolve Plaintiffs’ claims for unpaid overtime, interest, and attorneys’ fees and expenses (“the Gross Settlement Fund”). Id. at 3. The Gross Settlement Fund is comprised of \$124,331,428.18 in gross back pay and \$35,668,571.82 in interest. Pls.’ Mem. Ex. 2 (“Settlement Agreement”) ¶ 10, ECF No. 245-1. From the Gross Settlement Fund, the Settlement Agreement explains, the government will withhold \$25,462,833.15 in federal taxes. Id. ¶ 11. In addition, \$48,463,544.33 is designated for attorneys’ fees and expenses, \$265,000 for costs to be incurred by the Settlement Administrator to administer the settlement, and \$120,000 for case contribution awards.¹ Id. ¶ 10.

The \$111,151,455.67 that remains (“the Net Settlement Amount”) consists of \$86,372,620.40 in backpay and \$24,778,835.27 in interest. Id. Funds will be paid out to individual plaintiffs from the Net Settlement Amount based on each plaintiff’s proportionate share calculated from the number of hours each worked in excess of forty hours per week during the class period multiplied by his or her overtime rate of pay. Pls.’ Mem. at 3; see also Attach. A to the Settlement Agreement, ECF No. 247.

The parties’ proposed agreement has been accepted on behalf of the Attorney General. Settlement Agreement ¶ 10. Upon review, the Court does not find any deficiencies in the terms of the proposed Settlement Agreement. To the contrary, it is of the view that the Agreement appears to be fair and equitable and also “the product of serious, informed, non-collusive negotiations.” Barnes, 89 Fed. Cl. at 670. The total settlement amount of \$160,000,000.00, according to Plaintiffs’ damages expert, represents over sixty-five percent of the maximum damages Plaintiffs could have possibly recovered if they had persevered at trial and, Plaintiffs allege, is one of the largest recoveries ever in a suit for unpaid overtime against the government. Pls.’ Mem. at 11. Each plaintiff will receive his or her proportionate share from the Net Settlement Fund to compensate for unpaid overtime based on a thorough analysis of their work records. Id. at 7–8; see also Attach. A to the Settlement Agreement.

II. Notice to Class Members

In addition to its review of the terms of the Settlement Agreement, RCFC 23(e)(1)(B) obligates the Court to “direct notice in a reasonable manner to all class members who would be bound by the proposal.” A notice of settlement must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Haggart v. Woodley, 809 F.3d 1336, 1348–49 (Fed. Cir. 2016) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). The Court’s final approval may be granted “only after a hearing and only on finding that [the proposed settlement] is fair, reasonable, and adequate.” RCFC 23(e)(2); see also Lambert v. United States, 124 Fed. Cl. 675, 677 (2015) (“In implementing RCFC 23(e), courts typically review the proposed settlement for a preliminary fairness evaluation and direct notice of the [proposed] settlement to be provided to the class, and then grant final approval of the proposed

¹ The case contribution awards are for six class representatives for their “extensive work” in the case, including “help[ing] counsel answer discovery, provid[ing] relevant documents, [attending] numerous in-person and telephonic conferences with counsel, g[iving] twelve [] depositions, and participat[ing] in mediating the proposed settlement.” Pls.’ Mem. at 9.

settlement following notice to the class and a fairness hearing.”) (citing Barnes, 89 Fed. Cl. at 670).

The parties propose to send three separate Notices of Class Action Settlement to three categories of class members: the Advanced Practice Registered Nurse Class, the Physician Assistant Class, and the New Facilities Sub-Class. Pls.’ Mem. Exs. 3(a), 3(b), & 3(c), ECF No. 245-1; see also Pls.’ Mem. at 12.²

The Court has determined that—with two minor changes described below—Plaintiffs’ proposed Notices are reasonable and adequate to alert class members to their rights and obligations under the terms of the proposed settlement. It also affords them the opportunity to object to the proposed settlement in advance of the Fairness Hearing. The Notices set forth the terms of the Settlement Agreement, explains how and when to object to the settlement and/or request for attorneys’ fees and expenses and case contribution awards, describes the procedures for calculating distributions and distributing funds paid pursuant to the Settlement Agreement, notes the class members’ tax obligations, and states that the Court will hold a Fairness Hearing pursuant to RCFC 23(e), which class members have the right to attend.

As noted, the Court directs two relatively minor changes to Plaintiffs’ proposed Notices. The first is designed to make it easier for class members to listen to the Fairness Hearing.³ In addition to holding the Fairness Hearing in person in the National Courts Building in Washington, D.C., the Court will also allow all class members to call into the hearing using the following dial-in instructions:

² The Notices are virtually identical to one another with the only substantive difference pertaining to the applicable statute of limitations for each of the three categories of class members. See Pls.’ Mem. at 12 n.4.

³ The Court adopts the parties’ agreement in paragraphs 27 through 29 of the Settlement Agreement that it will only consider objections to the settlement that have been provided in writing to Plaintiffs’ counsel by the deadline established in this Order. Settlement Agreement ¶¶ 27–29. The Court will determine on a case-by-case basis which class members may speak at the Fairness Hearing based on the substance of their written objections. If the Court determines that it would be useful to have an objecting class member speak to his or her objection at the Fairness Hearing, the Court will contact the objecting class member directly using the phone number provided in his or her written objection. If that person wishes to speak to their objection remotely, the Court will during that phone call provide that person with the information the objecting class member will need to call into the Fairness Hearing from a remote location.

Class members who would like to call-in to the Fairness Hearing scheduled for Tuesday September 14, 2021 at 2pm Eastern Time to listen to the hearing may participate in the following manner:

- 1) DIAL 1-877-810-9415;
- 2) ENTER access code: 7790908#; and
- 3) ENTER security code: 120920#

The parties shall amend section nine of the Notices of Proposed Settlement to include the telephonic participation option and the dial-in instructions printed above.

The second change the Court directs concerns the method for class members to file written objections. For ease of administration, the Court directs that any objecting class members shall mail their objections solely to Plaintiffs' counsel Michael Hamilton, rather than also sending them to the Clerk of Court and government counsel. Plaintiffs shall amend section 7(b) of the Notices of Class Action Settlement that directs objecting class members to file a written statement with the Court, with simultaneous service on Plaintiffs' counsel and government counsel, to instead direct that they mail any written objections only to Plaintiffs' counsel.⁴ Plaintiffs shall make all changes to the Notices necessary to effect this order, including removing the addresses for the Court's Clerk of Court and for counsel for the government. Other than these two changes, the Court approves the parties' Notices of Class Action Settlement.

Plaintiffs further propose that the Notices of Class Action Settlement will be both mailed to the last known addresses of all class members and contemporaneously posted to the website dedicated to the settlement. The Court agrees these two methods of notice are reasonable and adequate.

CONCLUSION

Pursuant to the foregoing, the Court **GRANTS** Plaintiffs' unopposed motion for preliminary approval of class action settlement and **APPROVES** the Notices of Class Action Settlement (with the changes to the Notices directed above). ECF No. 246. The Clerk shall also

⁴ Plaintiffs shall amend the paragraph in section 7(b) of the proposed Notices that reads "To object, you must file a written statement with the Court, and serve it on Plaintiffs' Counsel and Defendant's Counsel by United States Mail, saying that you object to the proposed Settlement." Pls.' Mem. Ex. 3(a) § 7(b), ECF No. 245-1; Pls.' Mem. Ex. 3(b) § 7(b), ECF No. 245-1; Pls.' Mem. Ex. 3(c) § 7(b), ECF No. 245-1. That paragraph shall instead read: "To object, you must mail a written statement to Plaintiffs' counsel Michael Hamilton, saying that you object to the proposed Settlement."

The sentence in the same section of the Notices that reads "Your Objection must be filed with the Court no later than _____, 2021" shall instead read "Your Objection must be mailed to Plaintiffs' Counsel Michael Hamilton no later than _____, 2021." Id.

terminate the pending gavel of the superseded motion for preliminary approval. ECF No. 244. The Court further **ORDERS** as follows:

1. The Court **APPOINTS** Brown Greer PLC as the Settlement Administrator that is authorized to act in accordance with the Settlement Agreement and all Court orders relating to the Settlement Agreement.
2. The Settlement Administrator shall mail to each Plaintiff the appropriate Notice of Class Action Settlement and establish a website dedicated to the settlement by **Monday August 2, 2021**. The Court directs the Settlement Administrator to make reasonable efforts to verify the last known address of the class members.
3. At a minimum, by **Monday August 2, 2021**, the Settlement Administrator shall post to the website the following documents: (1) the three Notices of Class Action Settlement; (2) the Second Amended Complaint; (3) the Settlement Agreement; (4) this Order; and (5) answers to frequently asked questions. Once it has been filed with the Court, the Settlement Administrator shall post Plaintiffs' Motion for Attorneys' Fees, Litigation Expenses, and Class Contribution Awards.
4. Plaintiffs shall file their Motion for Final Approval and Motion for Attorneys' Fees, Litigation Expenses, and Class Contribution Awards by **Monday August 16, 2021**.
5. Class members shall provide any written objections to the proposed Settlement Agreement or to Plaintiffs' Motion for Attorneys' Fees, Litigation Expenses, and Class Contribution Awards to Plaintiffs' Counsel Michael Hamilton, Provost Umphrey Law Firm LLP, 4205 Hillsboro Pike, Suite 303, Nashville, TN 37215, postmarked no later than **Monday August 30, 2021**.
6. Plaintiffs' counsel shall serve counsel for the government with any written objections on a rolling basis as objections are received.
7. Plaintiffs' counsel shall file any written objections received from class members with the Court by **Friday September 3, 2021**.
8. Plaintiffs' counsel and the government shall file responses to these objections by **Thursday September 9, 2021**.
9. The Fairness Hearing shall be held on **Tuesday September 14, 2021 at 2 PM Eastern Time**. It shall be held at the National Courts Building, 717 Madison Place, NW, Washington, DC 20439, and class members may attend either in person or participate telephonically using the dial-in instructions provided to them.
 - a. The purpose of the Fairness Hearing is to determine whether the Court should:
 - i. (1) finally approve the Settlement Agreement as fair, reasonable, adequate and in the best interest of the class;

- ii. (2) approve Plaintiffs' request for attorneys' fees and expenses and case contribution awards as fair and reasonable; and
- iii. (3) issue a Final Judgment dismissing all claims in this litigation with prejudice and releasing all claims asserted herein against the government in accordance with the Settlement Agreement.

IT IS SO ORDERED.

s/ Elaine D. Kaplan

ELAINE D. KAPLAN
Chief Judge