

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STEPHANIE MERCIER, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	No. 12-920C
v.)	(Judge Elaine Kaplan)
)	
THE UNITED STATES,)	
)	
Defendant.)	
)	

SETTLEMENT AGREEMENT

For the purpose of disposing of plaintiffs’ claims in this case, without any further judicial proceedings and without there being any trial or final judgment on any issue of law or fact, and without constituting an admission of liability on the part of the defendant, and for no other purpose, except as provided herein, the parties stipulate and agree as follows:

1. “Plaintiffs” or “Class Members” as defined herein shall mean those individuals listed on Attachment A, which is attached hereto.
2. Plaintiffs are current or former employees of the United States Department of Veterans Affairs, Veterans Health Administration (“VA”).
3. This lawsuit is an overtime wage class action involving VA advanced practice registered nurses (APRNs) and physician assistants (PAs) who claim entitlement to overtime pay under 38 U.S.C. § 7453(e)(1), which requires the agency to compensate “officially ordered or approved” overtime.
4. Plaintiffs filed their complaint on December 28, 2012 (ECF No. 1), an amended complaint on November 16, 2015 (ECF No. 56), and a second amended complaint on August 28, 2018 (ECF No. 155).

5. On June 7, 2018, the Court of Federal Claims granted plaintiffs' motion to certify an opt-in class of APRNs and PAs. ECF No. 138.

6. On August 22, 2018, the Court entered an order approving the parties' joint proposed plan for providing notice to potential class members. ECF No. 149. The proposed plan designated BrownGreer as Class Action Administrator (Administrator).

7. On February 15, 2019, the Court designated Michael Hamilton as Co-counsel of record (ECF No. 166) (Class Counsel), and on December 14, 2020 the Court granted plaintiff's motion to substitute Mr. Hamilton as plaintiffs' attorney of record. ECF No. 221.

8. On January 4, 2021, the parties participated in the Court of Federal Claims's mediation program in an attempt to resolve all claims contained in the second amended complaint for back pay and interest.

9. Plaintiffs have offered to settle this action in exchange for a payment by the United States in the total amount of \$160,000,000 inclusive of back pay, interest, attorney fees, litigation expenses, administration costs and any case contribution awards to Class Representatives (the "Settlement Amount" or "Gross Settlement Fund").

10. The settlement amount of \$160,000,000 comprises \$124,331,428.18 in gross back pay and \$35,668,571.82 in interest. As set forth in Attachment A, the Net Settlement Amount of \$111,151,455.67 is equal to \$160,000,000 minus \$48,463,544.33 in attorney fees and expenses; \$265,000 in costs to be incurred by the Class Action Administrator to administer this settlement; and \$120,000 in case contribution awards. The Net Settlement Amount consists of \$86,372,620.40 in back pay and \$24,778,835.27 in interest. The backpay after federal tax withholdings is \$60,909,787.25, which equals \$86,372,620.40 minus federal tax withholdings of

\$25,462,833.15. Subject to this Court's approval as set forth in paragraph 30, plaintiffs' offer has been accepted on behalf of the Attorney General.

11. Following the Court's order granting final approval of the settlement, as described in the "Fairness Hearing" portion of this agreement, the United States shall pay \$134,537,166.85 minus any applicable offsets, to the Administrator for deposit in the Settlement Trust, as referenced in paragraph 13. That amount, \$134,537,166.85, is the Settlement Amount less federal tax withholdings of \$25,462,833.15, as reflected in Attachment A.

12. Upon satisfaction of the terms set forth in paragraph 11, plaintiffs release, waive, and abandon all claims against the United States, its political subdivisions, its officers, agents, and employees, arising out of plaintiffs' second amended complaint or otherwise involved in this case, regardless of whether they were included in the second amended complaint including but not limited to any claims for costs, expenses, attorney fees, administrative fees and costs, and damages of any sort.

Disbursement of the Settlement Amount

13. The Administrator shall establish a Settlement Trust, designated the "Mercier Class Settlement Trust," to disburse the proceeds of the settlement. The administration and maintenance of the Settlement Trust shall be the sole responsibility of the Administrator.

14. As approved by the Court, and in accordance with Attachment A, the Administrator shall disburse the proceeds of the settlement as follows: the Administrator shall retain \$265,000 from the Settlement Trust for the Administrator's services established by this agreement, and shall disburse the remaining funds to the Class Members and Class Counsel in the following amounts: \$60,909,787.25 for back pay and \$24,778,835.27 for interest to Class Members, and \$48,463,544.33 in attorney fees and expenses to the Class Counsel. As approved

by the Court, the Administrator shall distribute \$120,000 in cash contribution awards to the named plaintiffs, in accordance with Attachment A.

15. As approved by the Court, the Administrator shall distribute to individual class members the funds remaining after payment of attorney fees, litigation expenses, settlement administration costs and any case contribution awards in proportionate shares in two (2) checks. The first check will be for the back pay portion of the class member's recovery, and the second check will be for the interest portion of her or his recovery. The Class Members' proportionate shares of back pay shall be subject to withholding of Federal income taxes, the employee's share of Social Security and Medicare taxes and, if applicable, offsets for debt collection. If applicable, offsets for debt collection under the Treasury Offset Program shall be made from both the net back pay and interest amounts. Offsets for debt collection, if any, shall be determined by the United States prior to the disbursement of funds. Attachment A sets forth the Class Members' proportionate shares of back pay, the amounts to be withheld by the United States under paragraph 11 for federal income, Social Security and Medicare taxes attributable to such back pay, net back pay, and their proportionate share of interest. The United States agrees to pay the appropriate taxing authority the employer's share, if any, of Social Security and Medicare taxes that are due related to back pay paid to Class Members. The United States shall also remit to the IRS all income taxes and employee shares of Social Security and Medicare taxes withheld from Class Members' back pay.

16. The Administrator shall complete disbursement of proportionate shares of back pay and interest to Class Members within fifteen (15) days of the receipt of each disbursement tranche from the United States and shall complete disbursement of proportionate amounts for

attorney fees and litigation expenses to Counsel within fifteen (15) days of receipt of each disbursement tranche from the United States.

17. The Administrator shall issue an Internal Revenue Service (“IRS”) Form W-2 Wage and Tax statement to each Class Member under the VA’s tax identification number for the gross amount of back pay identified in Attachment A. The Administrator shall distribute the Form W-2s with the checks.

18. The Administrator shall issue one or more IRS Form 1099 to each Class Member under the VA’s tax identification number for his or her proportionate share of interest, attorneys’ fees, litigation expenses and settlement administration costs as identified in Attachment A, and the Administrator shall distribute the Form 1099s with the checks. The Administrator shall also issue an IRS Form 1099 under the VA’s tax identification number to each Class Representative for their case contribution award as identified in Attachment A and shall distribute those Form 1099s with the checks.

19. Except as provided above in paragraph 15, this agreement is in no way related to or concerned with income taxes or other taxes for which the Administrator, plaintiffs, class members, class counsel Provost Umphrey, or any Co-Counsel of Provost Umphrey, are now liable or may become liable in the future as a result of this agreement.

20. Neither the Parties nor their counsel shall be liable for any act or omission of the Administrator or for any mis-payments, overpayments, or underpayments of the Net Settlement Fund by the Administrator.

21. Upon satisfaction of the terms set forth in paragraph 11, Plaintiffs agree to stipulate with the United States to the dismissal of this lawsuit with prejudice pursuant to Rule 41 of the Rules of the United States Court of Federal Claims.

22. Within six months of the completion of the disbursements by the United States to the Administrator's trust account, the Administrator, on behalf of plaintiffs' counsel, shall provide to the United States an accounting of the disbursements to Class Members, including for each Class Member the amount(s) disbursed, the date(s) of disbursement, and the outcome(s) (deposited, returned, or unknown), and shall further provide to the United States additional accountings every six months thereafter until all funds are confirmed deposited, unclaimed funds are returned pursuant to paragraph 23, or the United States releases Plaintiffs' counsel from any future accounting obligation.

23. If any individual Class Member's funds are not confirmed as deposited within two (2) years after the final disbursement by the United States to the Administrator's trust account, then the Administrator shall promptly return to the United States) that Class Member's total net settlement fund allocations, minus tax withholdings in the amounts set forth in Attachment A, with a cover letter attaching this settlement agreement and identifying the amount returned pursuant to this paragraph. The letter and any returned amount shall be addressed to: Department of Justice, Civil Division, Attn: Director, National Courts Section, P.O. Box 480, Ben Franklin Station, Washington, D.C. 20044. Notwithstanding the return of any individual class member's funds, the United States' obligations with respect to that Class Member are nevertheless satisfied, any and all claims by that Class Member against the United States under this agreement are waived and abandoned, and all of the releases, waivers, discharges, representations, and warranties applicable to the Class Member pursuant to this agreement shall continue in full force and effect.

Fairness Hearing

24. As soon as possible and in no event later than twenty (20) business days after the execution of this agreement, class counsel shall submit to the Court a motion for preliminary approval of the settlement contemplated by this agreement, pursuant to RCFC 23(e). The motion shall include (a) a copy of this executed Settlement Agreement with Attachment A filed under seal; (b) the proposed form of the order preliminarily approving this agreement, and (c) the proposed form of notice of the settlement to members of the class to be mailed to Class Members and posted on an internet website dedicated to this settlement by the Administrator. The parties shall request that a decision on the motion for preliminary approval of the settlement and on the proposed form of notice of the settlement be made promptly on the papers or that a hearing on the motion for preliminary approval of the settlement be held at the earliest date available to the Court.

25. Pursuant to RCFC 54(d)(2)(B)(i), subject to the provisions of RCFC 23 (h), Plaintiffs shall apply for an award of attorney fees of no greater than thirty percent (30%) of the Gross Settlement Fund. That application will also seek an award of reasonable litigation expenses not to exceed \$463,544.33 to be paid from the Gross Settlement Fund. Defendant agrees that it will not oppose Plaintiffs' motion for an award of attorney fees no greater than thirty percent (30%) of the Gross Settlement Fund plus reasonable litigation expenses not to exceed \$463,544.33. Plaintiffs' motion for an award of attorney fees and litigations expenses shall be subject to the approval of the Court at the Fairness Hearing and notice of this settlement shall advise members of the class that Plaintiffs' counsel will request that the Court approve attorney fees and litigation expenses in the amounts referenced herein and of class members' right to object to Plaintiffs' motion for an award of attorney fees and litigation expenses. If the

Court reduces the amount of attorney fees, litigation expenses and/or case contribution awards requested by Plaintiffs, the amount of any reduction shall be added, on a pro rata basis, to the gross backpay and interest amounts set forth in paragraph 11 for distribution to members of the class .

26. Within fifteen (15) days of the Court's preliminary approval of this settlement and of the proposed notice to the class members of the terms of this settlement, the Administrator shall mail or cause to be mailed the Notice of Class Action Settlement by first class mail to all class members. Contemporaneous with the mailing of the Notice and continuing through the date of the Fairness Hearing, the Administrator shall also display on an internet website dedicated to this Settlement the following documents: (a) the Notice of Class Action Settlement; (b) the Second Amended Complaint; (c) the Settlement Agreement without Attachment A; (d) the Preliminary Approval Order; and (e) Answers to frequently asked questions about the Settlement. The Notice of Class Action Settlement shall include an explanation of procedures for allocating and distributing funds paid pursuant to this settlement, the date upon which the Court will hold a "Fairness Hearing" pursuant to RCFC 23(e), and the date by which class members must file their written objection, if any, to the settlement.

27. Any class member may express to the Court his or her views in support of, or in opposition to, the fairness, reasonableness, and adequacy of the proposed settlement. If a class member objects to the settlement, such objection will be considered only if received no later than the deadline to file objections established by the Court in the Preliminary Approval Order. The objection shall be filed with the Court, with copies provided to class counsel and defendant's counsel, and the objection must include a signed, sworn statement that (a) identifies the case name and number, (b) describes the basis for the objection, including citations to legal authority

and evidence supporting the objection, (c) contains the objector's name, address, and telephone number, and if represented by counsel, the name, address, email address, and phone number of counsel, (d) indicates whether the objector has filed a claim form and opted in to the case, and (e) indicates whether the objector intends to appear at the Fairness Hearing.

28. Class counsel and defendant's counsel may respond to any objection within ten (10) days after receipt of the objection.

29. Any Class Member who submits a timely objection to the proposed settlement may appear in person or through counsel at the Fairness Hearing and be heard to the extent allowed by the Court. Any Class Members who do not make and serve written objections in the manner provided in paragraph 27 shall be deemed to have waived such objections and shall forever be foreclosed from making any objections (by appeal or otherwise) to the proposed settlement.

30. After the deadline for filing objections and the responses to objections has lapsed, the Court will hold the Fairness Hearing at which it will consider any timely and properly submitted objections made by Class members to the proposed settlement. The Court will decide whether to approve the settlement. The parties shall request that the Court schedule the Fairness Hearing no later than sixty (60) days after entry of the Court's preliminary Approval Order.

31. If this settlement is not approved by the Court in its entirety, this settlement agreement shall be void and of no force and effect whatsoever.

Miscellaneous Terms

32. Plaintiffs warrant and represent that they have brought no other action or suit with respect to the overtime claims pursuant to 38 U.S.C. § 7453(e)(1), which arise out of or relate to their employment with VA prior to January 16, 2021, and will not file or submit these claims to

any other court, administrative agency, or legislative body. If there be now, or in the future, any violation of these warranties and representations, any amount paid by the United States pursuant to this agreement to any Class Member shall be refunded promptly by such Class Member or Class Members, together with interest thereon at the rates provided in 41 U.S.C. § 7109, computed from the date the United States makes payment.

33. This agreement is for the purpose of settling Plaintiffs' claims asserted in this action, and for no other, and shall not reflect or be interpreted as an admission of liability upon the part of any party. Accordingly, this agreement shall not bind the parties, nor shall it be cited or otherwise referred to, in any future proceedings, whether judicial or administrative in nature, in which the parties or counsel for the parties have or may acquire an interest, except as is necessary to effectuate the terms of this agreement.

34. The parties agree that each fully participated in the drafting of this Settlement Agreement, and therefore, no clause shall be construed against any party for that reason in any subsequent dispute.

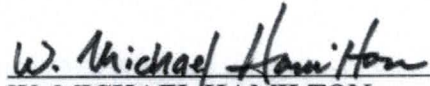
35. In the event that a party believes that the other party has failed to perform an obligation required by this Settlement Agreement or has violated the terms of the Settlement Agreement, the party who believes such a failure has occurred must so notify the other party in writing and afford it forty-five (45) days to cure the breach, prior to initiating any legal action to enforce this Settlement Agreement or any of its provisions.

36. The Court shall retain jurisdiction for the purpose of enforcing the terms of this Settlement Agreement.

37. Plaintiffs' counsel, W. Michael Hamilton, represents that he has been and is authorized to enter into this agreement on behalf of Plaintiffs and the class.

38. This document constitutes a complete integration of the agreement between the parties and supersedes any and all prior oral or written representations, understandings or agreements among or between them.

AGREED TO:



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