

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

GERALD K. KANDEL, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Court No. 06-872C
)	(Judge Patricia E. Campbell-Smith)
UNITED STATES,)	
)	
Defendant.)	

AMENDED PARTIAL SETTLEMENT AGREEMENT

Pursuant to the November 12, 2019 Scheduling Order, ECF No. 366, and for the purpose of settling and disposing of the plaintiffs' claims regarding former employees of the Commodity Futures Trading Commission, Corporation for National & Community Service, Consumer Product Safety Commission, Department of Education, Equal Employment Opportunity Commission, Export Import Bank, Federal Communications Commission, Federal Deposit Insurance Corporation, Federal Emergency Management Agency, Federal Labor Relations Authority, Federal Trade Commission, Inter-American Foundation, Interstate Commerce Commission, National Archives and Records Administration, National Capital Planning Commission, National Endowment of the Arts, National Endowment for the Humanities, National Labor Relations Board, Nuclear Regulatory Commission, Office of Navajo and Hopi Indian Relocation, Panama Canal Commission, Railroad Retirement Board, Securities and Exchange Commission, Smithsonian Institution, Selective Service System, U.S. Agency for International Development, U.S. Commission on Civil Rights, U.S. District Courts (including the Administrative Office of U.S. Courts), U.S. Information Agency, and U.S. Tax Court, without there being any trial or further adjudication of any issue of law or fact on damages, and without constituting an admission of liability on the part of either party, and with the exception of the

claims of 492 claimants who purport to be former employees of the Panama Canal Commission, and the plaintiffs' claims for interest and attorney fees, litigation costs, fees and expenses, and the costs and fees of the class action administrator, and for no other purpose, the parties stipulate and agree as follows:

1. On December 22, 2006, the plaintiffs filed this class action suit seeking money damages for unpaid lump-sum amounts, Sunday premium pay (for those who had separated on or before October 1, 1997), and/or foreign post allowances, and interest, attorney fees, and costs.

2. The plaintiffs and the class that they represent were all previously employed by agencies, boards, commissions, or other entities (agencies) of the United States.

3. The plaintiffs separated from Federal service at different times on and between October 14, 1993, and September 6, 1999.

4. The plaintiffs had unused accumulated and accrued annual leave, and/or were entitled to Sunday premium pay (for those who had separated on or before October 1, 1997) or foreign post allowances upon their separation from Federal service.

5. At or about the time that they separated, the plaintiffs with unused accumulated or accrued annual leave received a lump-sum payment for their unused accumulated and accrued annual leave pursuant to the Lump-Sum Payment Act, 5 U.S.C. § 5551 (the Lump-Sum Act).

6. The plaintiffs with unused accumulated or accrued annual leave had pay rates that were subject to an increase that became effective during their unused annual leave period as a result of a statutory adjustment, general system-wide pay increase, across the board annual adjustment and locality pay adjustment, or an increase in the rate of basic pay under Title 5 of the United States Code. Certain of the plaintiffs were entitled to Sunday premium pay (for those

who had separated on or before October 1, 1997) pursuant to 5 U.S.C. § 5546(a) or a foreign post allowance under 5 U.S.C. § 5924(1) as authorized by the U.S. Department of State's Standardized Regulations (Government Civilians, Foreign Areas) upon their separation from Federal service.

7. Upon their separation from Federal service, the plaintiffs did not receive the increases in pay for their accumulated and accrued annual leave, and/or Sunday premium pay (for those who had separated on or before October 1, 1997), or foreign post allowance to which they were entitled.

8. The plaintiffs are entitled to payment in the amount of the difference between what they received in lump-sum payments for their unused accumulated and accrued annual leave when they separated from Federal service and what they should have received had their lump-sum payments been properly calculated to include the pay increase that became effective during their unused annual leave period, Sunday premium pay (for those who had separated on or before October 1, 1997), and/or a foreign post allowance.

9. By oral order entered on June 21, 2010, the Court certified the class and, thereafter, on April 19, 2012, the Court amended the class certification, and redefined the class to exclude 80 federal agencies. *See Order, Kandel v. United States*, Court No. 06-872C (Fed. Cl. Apr. 19, 2012), ECF No. 123 (Certification Order), at 2 (defining class and excluding 20 agencies), & Ex. A (excluding an additional 60 agencies). The Court also further limited the class to include only those former Federal employees who had separated on and between October 14, 1993, and September 6, 1999. *See id.* at 2. On July 2, 2014, the Court (1) again amended the class certification to cover only 31 agencies, (2) approved class notices, and (3) appointed class

counsel and the class administrator. *See Order, Kandel v. United States*, Court No. 06-872C (Fed. Cl. July 2, 2014), ECF No. 172, at 2 (specifically identifying the 31 agencies encompassed by this class action).

10. Class notices were published online and mailed to all known potential class members by June 26, 2015, and former employees (hereinafter referred to as “claimants”) of 26 agencies opted-into the class by October 5, 2015.

11. After a protracted discovery period, the parties determined the lump-sum amounts that may be due to each of the plaintiffs and claimants employed by all agencies, except the Interstate Commerce Commission and the Panama Canal Commission, for the difference between what they had received in lump-sum payments and what they should have received had their lump-sum payments been properly calculated to include the pay increase that became effective during their unused annual leave period, Sunday premium pay (for those who separated on or before October 1, 1997), foreign post allowances, living quarters allowances, and separate maintenance allowances.

12. The parties entered into negotiations designed to resolve amicably the claims of the former employees of the Commodity Futures Trading Commission, Corporation for National & Community Service, Consumer Product Safety Commission, Department of Education, Equal Employment Opportunity Commission, Export Import Bank, Federal Communications Commission, Federal Deposit Insurance Corporation, Federal Emergency Management Agency, Federal Labor Relations Authority, Federal Trade Commission, Inter-American Foundation, National Archives and Records Administration, National Capital Planning Commission, National Endowment of the Arts, National Endowment for the Humanities, National Labor Relations

Board, Nuclear Regulatory Commission, Office of Navajo and Hopi Indian Relocation, Railroad Retirement Board, Securities and Exchange Commission, Smithsonian Institution, Selective Service System, U.S. Agency for International Development, U.S. Commission on Civil Rights, U.S. District Courts (including the Administrative Office of U.S. Courts), U.S. Information Agency, and U.S. Tax Court.

13. The plaintiffs have offered to settle the part of this case involving the claims of former employees of the agencies identified in paragraph 12, above, in exchange for the United States paying the class action administrator, in trust on behalf of the plaintiffs and claimants, the combined total amount of \$196,800.54 and any required employer's contributions for Social Security and Medicare, exclusive of interest, attorney fees, expenses, and costs, and the costs and fees of the class action administrator.

14. After the discovery period, the parties entered into negotiations designed to resolve amicably the plaintiffs' claims regarding the former employees of the Interstate Commerce Commission.

15. The plaintiffs have offered to settle the claims of former Interstate Commerce Commission employees in exchange for the United States paying to the class action administrator, in trust on behalf of the plaintiffs and claimants, \$5,216.54 and any required employer's contributions for Social Security and Medicare, exclusive of interest, attorney fees, expenses, and costs, and the costs and fees of the class action administrator.

16. After the discovery period, the parties entered into negotiations designed to resolve amicably the plaintiffs' claims regarding the former employees of the Panama Canal Commission.

17. The plaintiffs have offered to settle the claims of 246 of the former Panama Canal Commission employees in exchange for the United States paying to the class action administrator, in trust on behalf of the plaintiffs and claimants, the total amount of \$48,369.58, plus any required employer's contributions for Social Security and Medicare, in the following manner:

- a. For the 10 PCC claimants who have a social security number and for whom the plaintiffs were able to produce a Panama Canal Commission (PCC) Form 2764, the combined amount of \$2,590.53, an amount that represents what these 10 claimants would have been entitled to in supplemental lump-sum payment, and the combined amount of \$198.17 in employer contributions for Social Security and Medicare;
- b. For the 149 PCC claimants who have a social security number but have not produced a PCC Form 2764, the combined amount of \$29,651.00, an amount that represents a compromise payment of \$199 to each of these 149 claimants, and the combined amount of \$2,269.27 in employer contributions for Social Security and Medicare; and
- c. For the 87 PCC claimants who are citizens of Panama and for whom the plaintiffs were able to produce a PCC Form 2764, the combined amount of \$16,128.05, an amount that represents what these 87 claimants would have been entitled to in supplemental lump-sum payment.

18. The plaintiffs' offers as set forth in paragraphs 13, 15, and 17 have been accepted on behalf of the Attorney General.

19. Based upon the acceptance by the United States of the terms set forth in paragraphs 13, 15, and 17 above, plaintiffs release, waive, and abandon all claims for lump-sum payments for unused accumulated and accrued annual leave, Sunday premium pay (for those who had separated on or before October 1, 1997), and foreign post allowances, against the United States, its political subdivisions, its officers, agents, and employees, arising out of the complaint or otherwise involved in this case, regardless of whether they were included in the complaint, excluding the plaintiffs' claims for lump-sum payments for unused accumulated and accrued annual leave of former employees of the Panama Canal Commission who did not produce a PCC Form 2764, attorney fees, expenses, and costs, and the costs and fees of the class action administrator.

20. The Lump-Sum Act does not provide for interest and, on August 31, 2015, the Court denied plaintiffs' claims for interest under the Back Pay Act, 5 U.S.C. § 5596. *See* Consol. Op. & Order, *Athey v. United States*, No. 99-2051(Fed. Cl.)/*Kandel v. United States*, Court No. 06-872C (Fed. Cl. Aug. 31, 2015), ECF No. 198. The United States Court of Appeals for the Federal Circuit affirmed the Court's decision in *Athey v. United States*, 908 F.3d 696 (Fed. Cir. 2018), *aff'g*, 123 Fed. Cl. 42 (2015). Therefore, this stipulation does not include interest, attorney fees, expenses, and costs, and the costs and fees of the class action administrator.

Disbursement of the Settlement Amount

21. Epiq Systems, Inc. of Portland, Oregon (Epiq Systems), the class action administrator, will establish a Settlement Trust, designated the "Kandel Class Settlement Trust" (Settlement Trust) to disburse the proceeds of the settlement. The administration and

maintenance of the Settlement Trust will be the sole responsibility of the class action administrator. The parties agree that the class action administrator shall hold the proceeds of the settlement in the Settlement Trust and will distribute said proceeds only pursuant to the affirmative order of the United States Court of Federal Claims.

22. Following approval by the Court, as described in the “Fairness Hearing” portion of this agreement, within 14 days of the Court’s order granting final approval of the settlement, counsel for defendant will provide the necessary paperwork to the Department of the Treasury to initiate payment of the Settlement Amount, \$268,308.46 (an amount that represents the amounts referenced in paragraph 13, 15, and 17 above and \$17,921.80 in employer paid employment taxes), to the Settlement Trust. The parties agree that, with the exception of the plaintiffs’ claims for attorney fees, expenses, costs, and costs and fees of the class action administrator, and the claims of 492 former employees of the Panama Canal Commission who did not produce a PCC Form 2764, unless otherwise specified herein, the United States’ obligations and duties to plaintiffs and to the class members under this agreement will be fully satisfied upon payment by the United States of the Settlement Amount to the Settlement Trust. The United States makes no warranties, representations, or guarantees concerning any disbursements that the Settlement Trust makes, or fails to make, to any potential claimants. If any class member has any disagreement concerning any disbursement, the class member shall resolve any such concern with the class action administrator.

23. The class action administrator is solely responsible for payment of any applicable taxes, including all Federal, state, and local taxes, withheld by the administrator that it has calculated as owed as a result of the disbursement of the settlement proceeds.

24. The class action administrator will make payments to claimants in the form of a check from the Settlement Trust, mailed to the last known address of each class member. If a class member's settlement check is returned as undeliverable, the class action administrator shall make a reasonable attempt to locate a mailing address for that class member and re-mail the check once, but only if the check is returned within 90 days of the date it was mailed.

25. In the event the class action administrator is unable to locate a valid mailing address, after undertaking the efforts discussed in paragraph 24, the amount represented by that check shall revert to the Settlement Trust. In the event a class member loses, destroys, or is unable to take possession of a settlement check, the class action administrator will void the original check and then reissue a new check to the class member, but only if a request to reissue the check is made by the class member and received by the class action administrator within 90 days of the issuance of the original check. Any such request must be sent by mail to the class action administrator.

26. If any settlement payment check remains uncashed 90 days after issuance, that check shall be void, and the amounts represented by that uncashed check shall revert to the Settlement Trust.

27. After paying all approved claims and all fees and expenses approved by the Court, the class action administrator shall return any amount that remains in the Settlement Trust to the United States, with a cover letter attaching this stipulation and identifying the amount returned pursuant to this paragraph. The letter and any returned proceeds shall be addressed to: U.S. Department of Justice, Civil Division, Attn: Director, National Courts Section, P.O. Box 480, Ben Franklin Station, Washington, D.C. 20044.

Payment of Taxes

28. In accordance with Federal, state and local tax laws, the class action administrator shall calculate the amount to be withheld from each claimant's individual settlement payment, as required by applicable legal requirements. The class action administrator shall timely remit such withheld funds, plus any employer's contributions for Social Security and Medicare, to the appropriate Federal, state, and local authorities and shall report such withholdings and remissions to the appropriate authorities as required by law (*e.g.* IRS Form W-2). The class action administrator shall timely provide each class member that it pays, with the appropriate documentation of the submissions and remissions.

29. If class members have any disagreements or concerns regarding the calculation and withholding of taxes, the class members shall resolve these concerns with the class action administrator. Except as otherwise specified in this agreement, the United States will have no role or obligation in calculating, withholding, or confirming the applicable taxes for each class member.

30. Portions of any individual settlement award not subject to withholding will be issued with the appropriate tax form (*e.g.*, IRS Form 1099). Class members shall be responsible for remitting to Federal, state, and local taxing authorities any taxes due other than the amounts withheld from their lump sum payment and the amount of the employer's contribution. Class members shall hold the defendant, class counsel and the class action administrator harmless and shall indemnify the defendant, class counsel and the class action administrator for any liabilities, costs and expenses, including attorney fees, assessed or caused by any such taxing authority

relating in any way to any taxes due, other than the amounts withheld from their wages and the amount of the employer's contribution.

Fairness Hearing

31. As soon as possible, class counsel shall submit to the Court a motion for preliminary approval of the settlement contemplated by this agreement. The motion shall include (a) the proposed form of the order preliminarily approving this agreement, and (b) the proposed forms of notice of the settlement to members of the class by publication on the website created for this class action. The parties shall request that a decision on the motion for preliminary approval of the settlement and on the proposed forms 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.

32. Within ten days of the Court's preliminary approval of this settlement and of the proposed notice to the class members, the class action administrator shall, by publication on the website created for this class action, notify all class members of the terms of this settlement, the procedures for allocating and distributing funds paid pursuant to this settlement, the date upon which the Court will hold a "Fairness Hearing" pursuant to the Rules of the Court of Federal Claims (RCFC) 23(e), and the date by which class members must file their written objection, if any, to the settlement and scheduling of a fairness hearing.

33. 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, that objection will be considered only if received no later than 30 days following the notice date. 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 all 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.

34. Class counsel and defendant's counsel may file with the Court a response to any objection within 14 days after receipt of the objection.

35. 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 33 shall be deemed to have waived any such objections and shall forever be foreclosed from making any objections (by appeal or otherwise) to the proposed settlement.

36. After the deadline for filing objections and the responses to objections has lapsed, the Court will hold a final approval 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 a final approval hearing no later than 60 days from the notice date.

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

Wrap-up Of Settlement Trust

38. Within 180 days of the date upon which the class action administrator mails the last settlement check, including any replacement checks, the class action administrator will provide the parties, through the parties' attorneys of record in this matter, with a full and final written accounting of all payments made from the Settlement Trust, including any funds returned to the United States. Within 15 days of the date that accounting is sent to the parties, the parties will confer to determine whether they are satisfied with the accounting. If not, they will attempt in good faith to resolve any dissatisfaction with the class action administrator. If either party is not satisfied after such good faith efforts, either party may petition the Court to resolve the matter.

Miscellaneous Terms

39. This settlement agreement is for the purpose of settling the part of this lawsuit involving the damages claims for lump-sum payments for unused accumulated and accrued annual leave, Sunday premium pay, and foreign post allowances of the former employees of the Federal entities identified in paragraphs 13, 15, and 17 above, and for no other purpose. Accordingly, the terms of this settlement agreement shall not bind the parties, nor shall it be cited or otherwise referred to, in any other 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 effect the terms of this agreement.

40. The plaintiffs warrant and represent that no other action or suit with respect to the claims advanced in this suit is pending or will be filed in or submitted to any other court, administrative agency, or legislative body. The plaintiffs further warrant and represent that they

have made no assignment or transfer of all or any part of their rights arising out of or relating to the claims advanced in this suit. Should 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 shall be refunded promptly by the plaintiffs, together with interest thereon at the rates provided in 41 U.S.C. § 7109, computed from the date the United States makes payment.

41. Except as described herein, this Agreement is in no way related to or concerned with any Federal income taxes owed by the plaintiffs, class members, class counsel, the class administrator, or any other person collectible by the United States as a result of this Agreement or for which any of these persons may in the future be liable to the United States.

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

43. The parties agree to cooperate fully with each other and the class action administrator to effectuate this stipulation and to resolve any matters that may arise with respect to effectuation or interpretation of the stipulation that are not expressly resolved by this stipulation.

44. This Agreement sets forth the entire agreement of the parties with respect to the subject matter hereof as to all class members, except with respect to plaintiffs' claims for lump-sum payments for unused accumulated and accrued annual leave of the 492 claimants who were former employees of the Panama Canal Commission and who did not produce a PCC Form 2764

prior to the execution of this agreement, attorney fees, expenses, and costs, and the costs and fees of the class action administrator, and supersedes any and all prior oral or written representations, understandings, or agreements among or between them.

45. No modification or addition to this Agreement or waiver of any right herein will be effective unless it is approved in writing by counsel for the parties and by the Court.

46. This Agreement is governed by the laws of the United States. For purposes of construing this Agreement, the Agreement shall be deemed to have been drafted by all parties to the Agreement and shall not, therefore, be construed against any party for that reason in any subsequent dispute.

47. The parties represent that each enters into this Agreement knowingly and voluntarily, and the undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons or entities indicated below.

AGREED TO:

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