

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

GERALD K. KANDEL, *et al.*,

Plaintiffs,

v.

UNITED STATES,

Defendant.

Court No. 06-872C

(Judge Patricia E. Campbell-Smith)

**PCC SUBCLASS SETTLEMENT AGREEMENT**

For the purpose of settling and disposing of the plaintiffs' remaining claims in this civil action, which claims pertain to the 492 former employees of Panama Canal Commission (PCC) who comprise the PCC Subclass, 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 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 foreign post allowances, plus 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 also claimed entitlement to Sunday premium pay (for those who had separated on or before October 1, 1997) or foreign post allowances, or both, 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 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, 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 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), and 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). Thereafter, by order entered on July 1, 2020, the Court certified two subclasses, ECF No. 384, and identified and defined the two subclasses as the “Settlement Subclass” and the “PCC Subclass.” ECF No. 387 (order defining the two subclasses).

10. The Settlement Subclass includes plaintiffs and claimants who were 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, PCC, 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.

11. The PCC Subclass consists of 492 former PCC employees who are Panamanian nationals and, therefore, unlike members of the Settlement Subclass, do not have a social security number. The members of the PCC Subclass also do not possess or did not request that the appropriate agency provide to them a copy of their PCC Form 2764, a form that verifies an employees' dates of service, hourly rates, and leave balances upon separation.

12. On December 9, 2019, the parties reached an agreement to resolve the claims brought by the Settlement Subclass. *See* ECF No. 370. According to the terms of the settlement agreement, defendant agreed to pay a total of \$268,308.46 to be distributed to individual Settlement Subclass members by the class action administrator. *See id.* at 8. The settlement amount also included any required employer's contributions for Social Security and Medicare.

13. On September 21, 2020, plaintiffs filed their first amended complaint. *See* ECF No. 401.

14. After conducting a Fairness Hearing on September 30, 2020, by order entered on October 30, 2020, the Court approved the parties' partial settlement agreement that resolved the claims of the Settlement Class.

15. After the Court's approval of the partial settlement agreement that resolved the claims of the Settlement Subclass, the parties entered into negotiations designed to amicably resolve the plaintiffs' claims regarding the PCC Subclass.

16. The plaintiffs have offered to settle the claims of the PCC Subclass in exchange for the United States paying to the class action administrator, in trust on behalf of the 492 members of the PCC Subclass, the combined amount of \$36,900, an amount that represents a compromise payment of \$75 to each of the 492 members of the subclass, excluding attorney fees, expenses, and costs, and the costs and fees of the class action administrator.

17. The plaintiffs' offer as set forth in paragraph 16 has been accepted on behalf of the Attorney General.

18. Based upon the acceptance by the United States of the terms set forth in paragraph 16, plaintiffs release, waive, and abandon all PCC Subclass 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 amended complaint or otherwise involved in this case, regardless of whether they were included in the amended complaint, excluding the plaintiffs' claims for attorney fees, expenses, and costs, and the costs and fees of the class action administrator.

19. 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

20. 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 pursuant to only the affirmative order of the United States Court of Federal Claims.

21. 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, \$39,600 (an amount that represents the amount referenced in paragraph 16) 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, unless otherwise specified herein, the United States’s 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 PCC Subclass member has any disagreement concerning any disbursement, the class member shall resolve any such concern with the class action administrator.

22. The members of the PCC Subclass are Panamanian nationals and, therefore, the class action administrator will not be responsible for calculating, withholding, or paying any



taxes that may be owed by any class member as a result of the disbursement of the settlement proceeds.

23. 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 not make an attempt to locate a mailing address for that class member or to re-mail the check, and the amount represented by that check shall revert to the Settlement Trust. In the event that a class member's settlement check is returned as undeliverable, and the class member notifies the class action administrator of a new mailing address within 30 days of the class action administrator's receipt of the returned and undeliverable check, the class action administrator shall reissue and mail the settlement check to the class member's new mailing address.

24. 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 60 days of the issuance of the original check. Any such request must be sent by mail to the class action administrator.

25. Except as provided in paragraph 24, above, if any settlement payment check remains uncashed 60 days after issuance, the check shall be void, and the amounts represented by that uncashed check shall revert to the Settlement Trust.

26. After paying all approved claims, 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, DC 20044.

Payment of Taxes

27. The members of the PCC Subclass are Panamanian nationals, who were employed by the Panama Canal Commission in Panama, and are not subject to Federal, state, or local tax laws applicable in the United States.

28. The United States will have no role or obligation in calculating, withholding, or confirming the applicable Panamanian taxes for any PCC Subclass member.

29. Class members shall be responsible for remitting to the appropriate Panamanian taxing authorities any taxes that may be due. 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.



Fairness Hearing

30. 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.

31. 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.

32. 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.

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

34. Any PCC Subclass 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 PCC Subclass members who do not make and serve written objections in the manner provided in paragraph 32 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.

35. 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.

36. 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

37. 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

38. 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 members of the PCC Subclass identified in paragraph 16 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.

39. 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.

40. 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.

41. 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.

42. 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.

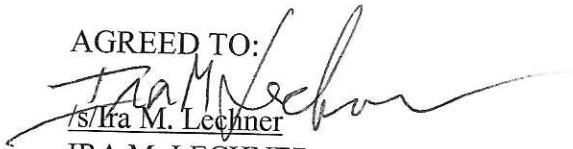
43. This Agreement sets forth the entire agreement of the parties with respect to the subject matter hereof as to the 492 members of the PCC Subclass, excluding attorney fees, expenses, and costs, and the costs and fees of the class action administrator, and supersedes any and all prior oral or written representations, understandings, or agreements among or between them with respect to plaintiffs' claims regarding the PCC Subclass.

44. 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.

45. 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.

46. 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:

  
/s/ Ira M. Lechner

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DATED: February 16, 2021

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