In the United States Court of Federal Claims

THE ELECTRICAL WELFARE TRUST FUND, THE OPERATING ENGINEERS TRUST FUND OF WASHINGTON, D.C., and THE STONE & MARBLE MASONS OF METROPOLITAN WASHINGTON, D.C. HEALTH AND WELFARE FUND on behalf of themselves and all others similarly situated, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 19-353 C Judge Roumel

MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN FOR ALLOCATING NET SETTLEMENT FUND TO EXACTION CLASS MEMBERS

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Class Representative Electrical Welfare Trust Fund ("EWTF" or "Class Representative") respectfully submits this Motion, pursuant to Rule 23 of the Rules of the United States Court of Federal Claims ("RCFC" or "Rules"), for: (i) final approval of the proposed settlement of the illegal exaction claim asserted in the above-captioned action ("Action") on the terms set forth in the Settlement Agreement dated February 16, 2024 (ECF No. 142-1) ("Settlement Agreement");[1] and (ii) approval of the proposed plan for allocating the net proceeds of the Settlement to the Exaction Class ("Plan of Allocation").[2]

I. INTRODUCTION

Subject to Court approval, Class Representative has agreed to settle the Exaction Class's claims against the United States of America ("Government" or "Defendant" and, together with Class Representative, the "Parties") for a $169,022,397.28 cash payment. This recovery—achieved after many years of dedicated litigation efforts by Class Counsel—not only avoids the risks of further litigation (namely, Defendant's pending appeal) but represents ***91.25%*** of the Exaction Class's recoverable damages (i.e., a mere 8.75% reduction on the total amount of damages awarded in the Court's May 12, 2023 Rule 54(b) Judgment (ECF No. 124)). Class Representative respectfully submits that the Settlement is an exceptional result for the Exaction Class and readily satisfies the standards for final approval under RCFC 23(e)(2).

[1] All capitalized terms not defined herein have the meanings ascribed to them in the Settlement Agreement and in the accompanying Declaration of Joseph H. Meltzer ("Meltzer Declaration" or "Meltzer Decl."). The Meltzer Declaration is an integral part of this submission and, for the sake of brevity herein, Class Representative respectfully refers the Court to the Meltzer Declaration for a detailed description of, *inter alia*, the history of the Action and the nature of the claims asserted.

[2] All internal citations, quotation marks, and footnotes have been omitted and emphasis has been added unless otherwise indicated. Additionally, "[RCFC 23] is modeled on Fed. R. Civ. P. 23, and while there are differences, cases from other federal courts that apply Fed. R. Civ. P. 23 are relevant to this court's interpretation of RCFC 23." *Dauphin Island Prop. Owners Ass'n v. United States*, 90 Fed. Cl. 95, 102 (2009).

The Parties' litigation of the Exaction Class's claims spans nearly a decade, with Class Counsel's investigation into the claims beginning in 2013, soon after the Department of Health and Human Services ("HHS") promulgated a rule forcing self-administered, self-insured health and welfare benefit plans ("SISAs") to make significant Transitional Reinsurance Program ("TRP") contributions for benefit year 2014, in contravention of the plain statutory language of the Affordable Care Act ("ACA"). In addition to their extensive investigation, Class Representative and Class Counsel had, at the time of settlement, successfully defeated Defendant's motion to dismiss, completed a comprehensive discovery process, obtained certification of a class, conducted a vigorous opt-in campaign, moved for and obtained summary judgment, and secured a roughly $185 million Judgment on behalf of the Exaction Class.[3] As a result of these efforts (and others), Class Representative and Class Counsel had a well-developed understanding of the Exaction Class's claims and Defendant's challenges (on appeal) when they agreed to resolve the Action.[4]

While Class Counsel believe the Exaction Class's claims and this Court's Judgment would survive Defendant's appeal, litigation is never without risk. Indeed, in the absence of settlement,

[3] The Court previously certified an opt-in class consisting of all self-administered, self-insured employee health and welfare benefit plans that are or were subject to the assessment and collection of the TRP Contribution under Section 1341 of the ACA for benefit year 2014. ECF No. 70, 160 Fed. Cl. 462 ("Class Order"). As a result of the notice campaign, 357 SISAs opted in to the Exaction Class, and were accepted by the Court. *See* Exhibit 1 to Judgment (ECF No. 124) and Exhibit A to Settlement Agreement (ECF No. 142-1).

[4] For the avoidance of doubt, the Settlement does not resolve any claims of Operating Engineers Trust Fund of Washington, D.C. ("OETF") and The Stone & Marble Masons of Metropolitan Washington, D.C. Health and Welfare Fund ("Stone Masons" and, together with OETF and EWTF, "Plaintiffs"), or the putative Takings Class (i.e., all self-insured employee health and welfare benefit plans with assets held pursuant to a trust agreement that were required to make the Transitional Reinsurance Contribution under Section 1341 of the ACA for benefit years 2014, 2015, and/or 2016 who are not members of the Exaction Class). These claims are still being litigated.

Class Representative faced the risk that litigating Defendant's appeal to conclusion might result in a smaller recovery for the Exaction Class, or no recovery at all, and these efforts likely would have taken several additional years—further delaying recovery to Exaction Class members, who made their TRP Contributions roughly a decade ago. In contrast, the Settlement avoids the risk, delay, and expense of continued litigation—while providing a substantial (and certain) recovery of ***over 91%*** of the Exaction Class member's damages ***now***. This type of recovery is practically unprecedented.

In February 2024, the Court preliminarily approved the Settlement, finding it fair, reasonable, and adequate and in the best interest of the Exaction Class. Order at ¶ 1, ECF No. 143. The Court's preliminary approval of the Settlement was the first step of RCFC 23(e)'s two-step approval process. By this Motion, Class Representative requests the Court grant final approval of the Settlement (i.e., the second step of the approval process). *See Furlong v. United States*, 131 Fed. Cl. 548, 550 (2017) ("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 settlement following notice to the class and a fairness hearing.").

As set forth in the Declaration of Michael McCarron on behalf of EWTF ("McCarron Decl.") filed herewith, the Settlement has the full support of the Class Representative—a sophisticated, self-administered group health plan that has taken an active role in supervising the litigation since 2016. McCarron Decl., ¶¶ 7-12.

The reaction of the Exaction Class as a whole has also been positive. While the deadline for objections has not yet passed, following a notice campaign to all 357 Exaction Class members, there have been no objections to the Settlement. Meltzer Decl., ¶ 8.[5]

Given the foregoing considerations and the factors addressed below, Class Representative and Class Counsel respectfully submit that: (i) the Settlement meets the standards for final approval under RCFC 23, and is a fair, reasonable, and adequate result for the Exaction Class; and (ii) the Plan of Allocation is a fair and reasonable method for equitably distributing the Net Settlement Fund to Exaction Class members.

II. QUESTIONS PRESENTED

1. Should the Court approve the proposed Settlement of this Action as fair, reasonable, and adequate under RCFC 23?

2. Should the Court approve the Plan of Allocation as a fair and reasonable method for equitably distributing the Net Settlement Fund to Exaction Class members?

III. STATEMENT OF THE CASE

As this Court knows, this case involves the ACA's TRP, a pool of funds meant to benefit commercial insurance issuers. 42 U.S.C. § 18061. Although EWTF and the other Exaction Class members are SISAs, HHS promulgated a rule requiring these entities to make TRP Contributions for benefit year 2014. 45 C.F.R. § 153.

On March 8, 2019, EWTF instituted this Action to recover the funds taken by Defendant in contravention of the ACA's plain language. ECF No. 1.[6] Thereafter, Defendant moved to

[5] To the extent any objections are received after this submission, they will be addressed in Class Representative's reply papers to be filed with the Court on April 24, 2024.

[6] Prior to filing the instant Action, EWTF filed an action against Defendant in the United States District Court for the District of Maryland in June 2016 ("2016 Action"), asserting claims under 28 U.S.C. § 1346(a)(1), the Admin. Procedures Act, 5 U.S.C. § 701 *et seq*., the Due Process Clause,

dismiss the Action. ECF No. 6. Following oral argument, the Court entered an Order granting in part and denying in part Defendant's Motion to Dismiss and for Summary Judgment ("MTD Order"). ECF No. 22. As to EWTF's exaction claim, this Court found that the "plain language of section 18061(b)(1)(A), requires 'health insurance issuers, and third-party administrators on behalf of group health plans . . . to make [reinsurance contributions],'" did not apply to self-administered plans like EWTF. MTD Order, 155 Fed. Cl. 169, 183 (2021). The Court further held that "Defendant's interpretation is in complete contravention of . . . well-established tenet[s] of statutory interpretation and effectively reads 'third party administrators' out of the statute" and that "[i]f Congress meant that all group health plans would pay the TRP, it could have easily omitted its third-party administrator qualifier." *Id.* Further, the Court found that "HHS did not have authority to ignore the plain language of the statute in the name of public policy or administrative efficiency." *Id.* at 184.

Following its MTD Order, the Court entered an initial Scheduling Order on September 1, 2021. ECF No. 27. Plaintiffs filed an Amended Complaint on September 14, 2021 (ECF No. 28) and a Second Amended Complaint on May 2, 2022 modifying the class definitions (ECF No. 59). At the Parties' joint request, the schedule was twice extended. ECF Nos. 30, 47. The operative Scheduling Order ultimately provided separate tracks for Plaintiffs' illegal exaction claim and

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U.S. Const. amend. V, and the Takings Clause, U.S. Const. amend. V. The 2016 Action was ultimately dismissed for lack of subject matter jurisdiction and EWTF appealed to the Fourth Circuit. In November 2017, EWTF filed a complaint in this Court asserting substantially similar claims as the 2016 Action. The Government subsequently moved to dismiss on the basis that 28 U.S.C. § 1500 deprived this Court of subject matter jurisdiction over the claims during the pendency of the appeal in the Fourth Circuit. The parties subsequently stipulated to dismissal of the action without prejudice. This Action was filed after the Fourth Circuit affirmed dismissal. Meltzer Decl., ¶¶ 14-37.

takings claim, which allowed the exaction claim to be brought to resolution on a more expeditious timeline. Meltzer Decl., ¶¶ 73-76.

The Court certified the Exaction Class on June 22, 2022. Class Order, 160 Fed. Cl. 462. Class Counsel thereafter conducted a thorough opt-in campaign, which lasted several months. At the culmination of this process, Class Counsel submitted a Final Certification of the Exaction Class, which was ultimately accepted by the Court. ECF No. 111; Meltzer Decl., ¶¶ 96-108.

Following the Court's acceptance of the Final Certification of the Exaction Class, EWTF and the Exaction Class moved for summary judgment. Meltzer Decl., ¶¶ 109-112. The decision to defer a summary judgment motion was made so that the anticipated granting of judgment in favor of EWTF would apply to all Exaction Class members. Meltzer Decl., ¶ 111.

On December 21, 2022, the Court granted EWTF's Motion for Summary Judgment. ECF No. 97. The Court entered Rule 54(b) Judgment in favor of the Exaction Class on May 12, 2023, which represented 100% of all available damages. ECF No. 124.

On June 26, 2023, the Government filed a Notice of Appeal of the Judgment. ECF No. 128. The Parties subsequently negotiated a settlement, which resolved all claims brought by the Exaction Class in exchange for the Government's payment of roughly $169 million, or 91.25% of the Judgment amount. Meltzer Decl., ¶¶ 113-121.

IV. THE SETTLEMENT WARRANTS FINAL APPROVAL

RCFC 23(e) requires judicial approval of any class action settlement. While the decision to grant such approval lies within the court's discretion, this discretion should be guided by Federal Claims courts' "strong public and judicial policy in favor of [class action] settlement[s]." *Berkley v. United States*, 59 Fed. Cl. 675, 681 (2004); *see also Sabo v. United States*, 102 Fed. Cl. 619,

626 (2011) ("In general, '[s]ettlement is always favored,' especially in class actions where the avoidance of formal litigation can save valuable time and resources.").

Under RCFC 23(e)(2), the Court should approve a proposed class action settlement if it finds it to be fair, reasonable, and adequate. *See Courval v. United States*, 140 Fed. Cl. 133, 138 (2018) ("The touchstone is whether the parties' proposed settlement is 'fair, reasonable, and adequate.'"). In making this determination, the Court should examine both the negotiating process leading to the settlement, and the settlement's substantive terms. *See Quimby v. United States*, 107 Fed. Cl. 126, 130 (2012). To this end, RCFC 23(e)(2) requires courts to consider whether:

> (A) [T]he class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under RCFC 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

Consistent with this guidance, Federal Claims courts have also found the following factors instructive in deciding whether to approve a class action settlement:

> (1) The relative strengths of plaintiffs' case in comparison to the proposed settlement; (2) [t]he recommendation of the counsel for the class regarding the proposed settlement, taking into account the adequacy of class counsel's representation of the class; (3) [t]he reaction of the class members to the proposed settlement, taking into account the adequacy of notice to the class members of the settlement terms; (4) [t]he fairness of the settlement to the entire class; (5) [t]he fairness of the provision for attorneys' fees; and (6) [t]he ability of the defendants to withstand a greater judgment, taking into account whether the defendant is a governmental actor or a private entity.

See, e.g., *Sabo*, 120 Fed. Cl. at 627; *Mercier v. United States*, 156 Fed. Cl. 580, 586 (2021); *Furlong v. United States*, 132 Fed. Cl. 630, 632-33 (2017).[7] A court has "considerable discretion

[7] These six factors are referred to herein as the *Sabo* factors.

as to what weight to afford each factor in the factual context of the case before it." *Raulerson v. United States*, 108 Fed. Cl. 675, 677 (2013).

At the preliminary approval stage, this Court considered the RCFC 23(e)(2) factors, and found the Settlement to be fair, reasonable, and adequate. Order at ¶ 1, ECF No. 143. Nothing has changed to alter the Court's previous findings, and the factors supporting the Court's determination to preliminarily approve the Settlement apply with equal force now. *See Ciapessoni v. United States*, 145 Fed. Cl. 685, 688 (2019) ("Settlement proposals enjoy a presumption of fairness afforded by a court's preliminary fairness determination."). Accordingly, Class Representative and Class Counsel respectfully submit that the Settlement is fair, reasonable, and adequate, and warrants final approval under the RCFC 23(e)(2) factors and Federal Circuit law.[8]

A. Class Representative and Class Counsel Have Adequately Represented the Exaction Class in this Action

The first RCFC 23(e)(2) factor—whether Class Representative and Class Counsel "have adequately represented the class"—favors approval of the Settlement.[9] The determination of adequacy "encompasses two components: whether proposed class counsel is qualified and capable of representing the class and whether conflicts exist between the putative class representatives and

[8] Class Representative discusses below the fairness, reasonableness, and adequacy of the Settlement principally in relation to the four RCFC 23(e)(2) factors, but also discusses the application of the non-duplicative *Sabo* factors. Relatedly, the advisory committee notes to the 2018 Amendments to Federal Rule of Civil Procedure 23 explain that the four Rule 23(e)(2) factors are not intended to "displace" any factor previously adopted by the courts, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment.

[9] RCFC 23(e)(2)(A) overlaps with the second *Sabo* factor—i.e., the recommendation of the counsel for the class regarding the proposed settlement, taking into account the adequacy of class counsel's representation of the class.

the remaining class members." *Carson v. United States*, 2023 WL 8812926, at *4 (Fed. Cl. Dec. 20, 2023).

In certifying the Exaction Class in June 2022, the Court expressed confidence in the abilities of Class Representative and Class Counsel to pursue this litigation in satisfaction of RCFC 23(a)(4)'s adequacy requirement. *See* Class Order, 160 Fed. Cl. at 469 ("EWTF and its counsel will provide adequate representation of the proposed class's interests."). The Court's confidence was well placed as Class Representative and Class Counsel have zealously pursued this Action on behalf of the Exaction Class.

Here, EWTF has diligently supervised and participated in the Action and through its efforts, has provided valuable and meaningful assistance and direction to Class Counsel. These efforts have included, *inter alia*, communicating regularly with Class Counsel, reviewing and commenting on all material Court submissions and other case documents, participating in discovery, including responding to Defendant's document requests (searching for and producing potentially relevant documents) and interrogatories, and following the negotiations leading to the Settlement and authorizing entry into the same. *See* McCarron Decl., ¶¶ 7-11. In addition, as the Court confirmed in its class certification ruling, EWTF—a SISA required to pay the TRP Contribution for benefit year 2014 in absence of statutory authority and whose claims are typical of other Exaction Class members—has no interests antagonistic to the Exaction Class. *See* Class Order, 160 Fed. Cl. at 469 ("The Court does not detect any conflict between EWTF and the proposed class members, and Defendant does not identify any such conflicts."). *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members.").

Likewise, Class Counsel—firms the Court found to have "the experience and expertise necessary to adequately represent the class" (*id.*)—investigated and pioneered the theory of liability in this complex and novel case, litigated the Exaction Class's claims for years (in multiple courts) through many successes (i.e., defeating Defendant's motion to dismiss, obtaining certification of a class, obtaining summary judgment in the Exaction Class's favor, and securing the Judgment for 100% of the Exaction Class's damages), and negotiated the outstanding Settlement. In agreeing to resolve the Action, Class Counsel recognized that litigating Defendant's appeal would further delay (and needlessly put at risk) any recovery for the Exaction Class. Meltzer Decl., ¶¶ 9-121. *See Raulerson*, 108 Fed. Cl. at 678 ("[T]he professional judgment of plaintiff's counsel is entitled to considerable weight in the court's determination of the overall adequacy of the settlement.").

B. The Settlement Was Negotiated at Arm's Length

RCFC 23(e)(2)(B) supports final approval because the Settlement is the result of good-faith bargaining between highly experienced counsel. As noted above, "if satisfied as to the competence of class counsel, the court should give deference to the recommendation of the lawyers in support of the proposed settlement." *Berkely*, 59 Fed. Cl. at 708.

Here, the Parties' settlement negotiations were conducted at arm's length and extended over the course of several weeks. *See City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014) ("[I]nitial presumption of fairness and adequacy applies" where "[s]ettlement was reached by experienced, fully-informed counsel after arm's-length negotiations"), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015); *Dauphin Island*, 90 Fed. Cl. at 107 (approving settlement that was "achieved through good-faith, non-

collusive negotiation"). In addition, the Settlement has been reviewed and accepted by the Attorney General.

Moreover, at the time of settlement, the Exaction Class's claims had been litigated to a judgment and the Judgment was on appeal. Clearly, the Parties had reached a stage in the litigation where they could make a sound evaluation of the claims (and defenses) at issue and the propriety of settlement. As detailed in the accompanying Meltzer Declaration, Class Counsel had: (i) exhaustively investigated the Exaction Class's claims (Meltzer Decl., ¶¶ 9-13; Declaration of William P. Dale, submitted herewith); (ii) researched and prepared multiple complaints based on that investigation (Meltzer Decl., ¶¶ 14-39); (iii) opposed (and defeated) Defendant's motion to dismiss in this Court (Meltzer Decl., ¶¶ 40-49); (iv) engaged in discovery, including participating in numerous meet and confers with Defendant over the scope of discovery (Meltzer Decl., ¶¶ 50-79); (v) successfully moved for class certification (Meltzer Decl., ¶¶ 80-84); (vi) oversaw a vigorous notice and opt-in campaign, including the review and analysis of over 600 opt-in requests as well as the defense of the Exaction Class against Defendant's objections to Exaction Class membership (Meltzer Decl., ¶¶ 85-108); and (vii) successfully moved for summary judgment and secured a Judgment for 100% of the Exaction Class's damages (Meltzer Decl., ¶¶ 109-112). Additionally, the Parties' settlement negotiations further informed Class Counsel of the strength of the Exaction Class's claims and Defendant's challenges to those claims, had the Action continued through appeal. Meltzer Decl., ¶¶ 138, 141-144.

As a result, Class Representative and Class Counsel were well informed of the strengths and risks of the case when they agreed to settle. *See* 4 William B. Rubenstein, Newberg on Class Actions § 13:49 (6th ed. 2023 update) (approval warranted "[w]here a court can conclude that the parties had sufficient information to make an informed decision about settlement").

C. The Settlement Provides the Exaction Class Adequate Relief, Considering the Costs, Risks, and Delay of Litigation and Other Relevant Factors

While the first two RCFC 23(e)(2) factors focus on the procedural fairness of a settlement, RCFC 23(e)(2)(C), along with many of the approval factors articulated by Federal Claims courts, entails a substantive review of the terms of the settlement and the relief that the settlement is expected to provide to the class.[10] Moreover, "[s]ubstantive fairness requires the Court to consider the balance of the likely costs and rewards of further litigation." *Barlow*, 145 Fed. Cl. at 234.

1. The Complexity, Expense, and Likely Duration of the Litigation

Rule 23(e)(2)(C)(i) supports final approval of the Settlement, as courts consistently recognize that the complexity, expense, and possible duration of the litigation are key factors in evaluating the reasonableness of a settlement. *See In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) ("Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation."); *In re LinkedIn User Priv. Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015) ("Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.").

Had the Action continued, the Exaction Class would face the risks associated with litigating Defendant's pending appeal, as well as the substantial time and expense that would be required to litigate the appeal to conclusion. *See Mercier*, 156 Fed. Cl. at 586-87 ("In addition to the[] risks of

[10] The first *Sabo* factor, i.e., the relative strength of plaintiffs' case in comparison to the proposed settlement, "necessarily takes into account: a. [t]he complexity, expense and likely duration of the litigation; b. the risks of establishing liability[;] c. the risks of establishing damages; d. the risks of maintaining the class action through trial; e. the reasonableness of the settlement fund in light of the best possible recovery; f. the reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation; g. the stage of proceedings and the amount of discovery completed; [and] h. the risks of maintaining the class action through trial." *Barlow v. United States*, 145 Fed. Cl. 228, 232-33 (2019).

continued litigation, there is no question that further litigation would be expensive, complex, and likely of substantial duration. . . . A fair settlement is preferable to years of additional litigation.").[11] The Settlement avoids this risk, expense, and delay while providing an exceptional, immediate recovery of ***over 91%*** of the Exaction Class's damages, underscoring the Settlement's fairness.

i. The Reasonableness of the Settlement Amount in Light of the Best Possible Recovery and the Risks of Continued Litigation

In assessing a settlement, a court should consider "the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation." *Loomis v. Slendertone Distrib., Inc.*, 2021 WL 873340, at *6 (S.D. Cal. Mar. 9, 2021); *see also Dexter's LLC v. Gruma Corp.*, 2023 WL 8790268, at *4 (S.D. Cal. Dec. 19, 2023) (noting "[i]t has been held proper to take the bird in hand instead of a prospective flock in the bush"). Moreover, there is "a range of reasonableness with respect to a settlement" that "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Here, had the Action continued, the Parties would have litigated the Government's appeal of this Court's $185 million Judgment. While Class Counsel believed they would succeed on appeal (and the Judgment ultimately upheld), litigation is never without risk—especially in a novel case such as this Action where the claims are rare and fact-specific, and there is very little legal precedent. In addition, the appeal process would have likely taken several years to complete. To

[11] *See Median Time to Disposition in Cases Terminated After Hearing or Submission*, U.S. Court of Appeals for the Fed. Cir., https://cafc.uscourts.gov/wp-content/uploads/reports-stats/FY2023/MedDispTimeMERITS-Table-FY23.pdf (last visited Mar. 26, 2024) (median time for disposition of appeal from Court of Federal Claims was 13.5 months in 2023).

avoid this risk and delay, Class Counsel engaged in several weeks of negotiations with the Government to obtain the best possible result for the Exaction Class in a timely manner. As a result of these negotiations, Class Counsel were able to settle the Action for a ***slight reduction*** to the Judgment amount. The $169 million Settlement not only guarantees a substantial recovery for the Exaction Class—***over 91% of damages*** to be allocated among members of the Exaction Class, following deduction of the Settlement Fees and Costs—but it also eliminates any additional delay in returning money back to the Exaction Class. Indeed, when factoring the time value of money, this recovery is roughly the same as the $185 million Judgment.

Additionally, while each class action reflects its own unique risks, this Settlement compares very favorably to recoveries achieved in other class actions approved by Federal Claims courts (and other federal courts) and clearly falls within the range of reasonableness. *See, e.g.*, *Pearlstein v. BlackBerry Ltd.*, 2022 WL 4554858, at *6 (S.D.N.Y. Sept. 29, 2022) (approving $165 million settlement representing approximately 13.75% of damages and noting the recovery to be "well within the range of reasonableness and, in fact, considerably above the high end of historical averages"); *Mercier*, 156 Fed. Cl. at 587 (approving settlement recovering 65% of class's damages); *Quimby*, 107 Fed. Cl. at 131 (approving settlement recovering approximately 80% of the class's damages).

Further, the average recovery for Exaction Class members, net of fees and expenses, is more than $350,000, with more than half of the Exaction Class (182 plans) each receiving more than $100,000 and almost 10% of the Exaction Class (30 plans) receiving more than $1 million each.

ii. Stage of the Proceedings and Amount of Discovery Completed

When determining whether to approve a settlement, a court should also consider the stage of the proceedings and the amount of information available to the parties to assess the strengths and weaknesses of their case. *See Martignago v. Merrill Lynch & Co.*, 2013 WL 12316358, at *6 (S.D.N.Y. Oct. 3, 2013) ("[P]ertinent question is whether counsel had an adequate appreciation of the merits of the case before negotiating."); *see also Velazquez v. Int'l Marine & Indus. Applicators, LLC*, 2018 WL 828199, at *5 (S.D. Cal. Feb. 9, 2018) ("A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair.").

Here, Class Representative and Class Counsel have spent substantial time and resources litigating the factual and legal issues involved in the Action. At the time of settlement, the Parties had proceeded through ***all stages of litigation*** and the Government's ***post-judgment*** appeal was pending. It is clear that Class Counsel and Class Representative had more than enough information to make an informed decision regarding settlement.

2. The Reaction of the Exaction Class to Date

Federal Claims courts also consider "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." *Mercier*, 156 Fed. Cl. at 586. Here, each Exaction Class member was provided with the Notice of Class Action Settlement ("Notice"), which advised them of the terms of the Settlement as well as their right to object to the Settlement.[12] While the deadline for objecting to the Settlement (April 10, 2024) has not passed, there have been no objections to the Settlement to date. Meltzer

[12] *See* Declaration of Luiggy Segura ("Segura Decl.") submitted herewith on behalf of the Court-approved Settlement Administrator, JND Legal Administration ("JND"), at ¶¶ 3-11. *See also* Class Notice, ECF No. 142-2 (Court-approved Notice).

Decl., ¶ 8. Should any objections be received, Class Representative will address them in its reply to be filed no later than April 24, 2024.

3. The Fairness of the Settlement to the Entire Exaction Class

In evaluating the Settlement, a court must also ensure that "the terms of a settlement treat the class as a whole fairly." *Sabo*, 102 Fed. Cl. at 629; *Dauphin Island*, 90 Fed. Cl. at 107 (finding factor met where "settlement does not single out any particular group of plaintiffs, nor does any group merit special treatment"). The Settlement satisfies this factor. Here, as set forth in the proposed plan for allocating the Net Settlement Fund below, all Exaction Class members will receive their *pro rata* share of the Net Settlement Fund based on the total amount of their respective 2014 TRP Contribution. All payments will be calculated in the same manner.

4. Ability of Defendant to Withstand a Greater Judgment

The final *Sabo* factor—the ability of defendant to withstand a greater judgment—is neutral here. Further, courts have found this factor to carry little weight in a case such as this one where the defendant is the federal government as the government can theoretically "always withstand greater judgment because of Congress's unlimited ability to tax." *Berkley*, 59 Fed. Cl. at 713; *see also Sabo*, 102 Fed. Cl. at 630 ("The defendant's solvency is of minimal concern when the defendant is the federal government."). Notably, while it could theoretically pay more here, the Government is already paying ***over 91%*** of the Exaction Class's damages—a modest reduction on the Court's Judgment awarding 100% of damages. *See In re Schering-Plough Corp. Sec. Litig.*, 2009 WL 5218066, at *5 (D.N.J. Dec. 31, 2009) ("[P]ushing for more in the face of risks and delay would not be in the interests of the class."). Accordingly, this factor does not render the significant amount recovered through the Settlement any less fair, reasonable, or adequate.

D. The Remaining RCFC(e)(2) Factors Support Final Approval of the Settlement

In evaluating a settlement, RCFC 23(e)(2) instructs courts to also consider: (i) the effectiveness of the proposed method of distributing the relief provided to the class; (ii) the terms of any proposed award of attorney's fees, including the timing of payment; (iii) any other agreement made in connection with the proposed settlement; and (iv) whether class members are treated equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv) & (e)(2)(D). These factors also support final approval of the Settlement.

First, the proposed method of distributing the net Settlement proceeds ensures equitable treatment of Exaction Class members. *See* RCFC 23(e)(2)(C)(ii) & (e)(2)(D). As set forth in the Notice, the proposed method of distribution to the 357 Exaction Class members is straightforward and treats Exaction Class members equitably relative to each other. As addressed in § V below, each Exaction Class member will receive a proportionate share of the Net Settlement Fund based upon the total amount of their respective 2014 TRP Contribution—ensuring that Exaction Class members' recoveries are based upon the relative losses they sustained. Thus, the method for distributing the Net Settlement Fund treats all Exaction Class members the same, further supporting final approval of the Settlement.

Second, the relief provided by the Settlement remains adequate upon consideration of the terms of the proposed award of attorneys' fees and expenses incurred in prosecuting this Action, including the timing of any such Court-approved payments. *See* RCFC 23(e)(2)(C)(iii). As shown in the Fee Memorandum, the requested attorneys' fees of 25% of the Settlement Amount (net of expenses)—which has the full approval of Class Representative EWTF (*see* McCarron Decl., ¶¶ 13-17)—is reasonable in light of Class Counsel's efforts over the course of the litigation and the near complete recovery obtained for the Exaction Class, as well as the significant risks shouldered

by Class Counsel.[13] Additionally, the 25% fee request is fully supported by Federal Claims court case law. *See Raulerson*, 108 Fed. Cl. at 680 ("Awards in other class action settlements with common funds typically range between 20% to 30% of the fund, with 50% being the upper limit."); *see also Quimby*, 107 Fed. Cl. at 133 (finding 30% to be within the acceptable range). The Settlement Agreement provides that Court-approved fees and expenses will be paid to Class Counsel within fifteen days following payment of the Settlement Amount by the Government. *See* Settlement Agreement, ¶ 19.

Lastly, as previously disclosed, the Settlement Agreement is the only agreement made by the Parties in connection with the Settlement. There are no additional agreements to identify.

For the reasons set forth above and in the Meltzer Declaration, the Settlement is fair, reasonable, and adequate when evaluated under any standard, or set of factors and, therefore, warrants the Court's final approval.

V. THE COURT SHOULD APPROVE THE PLAN FOR ALLOCATING THE NET SETTLEMENT FUND TO EXACTION CLASS MEMBERS

In connection with final approval of the Settlement, the Court must also approve the proposed method for allocating the Net Settlement Fund to Exaction Class members. The proposed Plan of Allocation, set forth in the Notice, provides a straightforward and effective means of distributing the Net Settlement Fund.

The allocation method provides for a *pro rata* distribution of the Net Settlement Fund to the 357 Exaction Class members listed on Exhibit 1 to the Judgment and Exhibit A to the Settlement Agreement. Each Exaction Class member will receive their proportionate share of the

[13] In connection with their fee request, Class Counsel also seek payment from the Settlement Amount of Class Counsel's expenses in the total amount of $513,631.77 and case contribution award to EWTF in the amount of $25,000. Meltzer Decl., ¶¶ 151-155.

Net Settlement Fund (i.e., the Settlement Amount *less* Settlement Fees and Costs (as defined at ¶ 19 of the Settlement Agreement) based upon each Exaction Class member's respective 2014 TRP Contribution amount. More specifically, each Exaction Class member's payment will be determined by (1) dividing their respective 2014 TRP Contribution (as set forth in Exhibit 1 to the Judgment) by the total 2014 TRP Contributions for all Exaction Class members—with the resulting fraction expressed as a percentage that is then (2) multiplied by the Net Settlement Fund. This method of allocation ensures that distributions to Exaction Class members are calculated in the same manner and based upon the relative losses each Exaction Class member sustained. *See Beneli v. BCA Fin. Servs., Inc.*, 324 F.R.D. 89, 105 (D.N.J. 2018) ("[P]ro rata distributions are consistently upheld . . . ."); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 581 (S.D.N.Y. 2008) ("Pro-rata distribution of settlement funds based on . . . loss is clearly a reasonable approach.").

Further, as set forth in the Settlement Agreement, JND will make payments in the form of a check or electronic transfer (if requested) from the Net Settlement Fund to each Exaction Class member who has provided a Taxpayer Identification Number ("TIN") to the Government. *See* Settlement Agreement, ¶ 21. Class Counsel have provided a full list of Exaction Class member TINs to the Government.

Payments to Exaction Class members will be made once the Settlement receives final approval and the Government has paid the Settlement Amount. If an Exaction Class member's payment is returned as undeliverable, JND will attempt to locate an updated mailing address for that Exaction Class member and remail the check. *See id*. at ¶ 22. If JND is unable to locate a valid mailing address, the amount represented by that check shall revert to the Net Settlement Fund and be redistributed to Exaction Class members on a *pro rata* basis, up to an amount that represents each Exaction Class member's 2014 TRP Contribution amount. *Id*. Likewise, if a payment remains

uncashed for more than ninety (90) days, that check will be voided, and the amount represented by that check shall revert to the Net Settlement Fund and be redistributed to Exaction Class members. *See id.* at ¶ 23. In the unlikely event that redistribution of uncashed Settlement funds would result in payments in excess of Exaction Class members' TRP Contributions, JND will return the exceeding amount to the Government. *Id.*

The proposed method of allocation outlined above will result in a fair and equitable distribution of the Settlement proceeds among Exaction Class members who were required to pay TRP Contributions in contravention of the ACA. The Plan of Allocation was fully disclosed in the Notice that was e-mailed or mailed directly to Exaction Class members, as well as in the Settlement Agreement (available at www.TRPlitigation.com/exaction). To date, there have been no objections to the proposed Plan of Allocation. Meltzer Decl., ¶ 8; *see also* Segura Decl., ¶ 18. For these reasons, the Court should approve the proposed plan for allocating the Net Settlement Fund to Exaction Class members.

VI. NOTICE SATISFIED RCFC 23 AND DUE PROCESS

Exaction Class members have been provided with adequate notice of the Settlement. Here, notice satisfied both: (i) RCFC 23, as it was "the best notice . . . practicable under the circumstances," and directed "in a reasonable manner to all class members who would be bound by the" Settlement (RCFC 23(c)(2)(B) & (e)(1)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974)); and (ii) Due Process, as it was "reasonably calculated, under all the circumstances, to apprise interested parties of the [Settlement] and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); *see also Russell v. United States*, 132 Fed. Cl. 361, 363 (2017) (finding notice "complied fully with the requirements of RCFC 23 and of Due Process" where it "apprised the class of the items

required by RCFC 23(c)(2)(B), the key terms of the Settlement, Class Counsel's request for attorneys' fees and expenses and Class Representative incentive award, and Class Members' right to object").

In accordance with the Preliminary Approval Order, JND sent the Notice to each of the 357 Exaction Class members at the e-mail address provided in connection with the opt-in process. *See* Segura Decl., ¶¶ 3-11. JND carefully monitored these emails to ensure that all 357 were delivered. *Id.* at ¶¶ 10-11.[14] In addition, JND updated the "Exaction Class" section of the case-dedicated website, www.TRPLitigation.com, to provide information regarding the Settlement and downloadable copies of the Notice, Settlement Agreement, and Preliminary Approval Order. *Id.* at ¶ 14.

In sum, the notice campaign utilized here provides sufficient information for Exaction Class members to make informed decisions regarding the Settlement, fairly apprises them of their rights with respect to the Settlement (i.e., their right to object to any aspect of the Settlement and the deadline to do so), represents the best notice practicable under the circumstances, and complies with the Court's Preliminary Approval Order, RCFC 23, and due process.

VII. CONCLUSION

For the reasons set forth herein and in the Meltzer Declaration, Class Representative respectfully requests that the Court grant final approval of the Settlement and approve the Plan of Allocation.

DATED: March 27, 2024

Respectfully submitted,

/s/ Joseph H. Meltzer
KESSLER TOPAZ
MELTZER & CHECK, LLP

[14] A total of 15 emails were returned undeliverable. JND sent the Notice to these 15 Exaction Class members via overnight mail and they were successfully delivered. Segura Decl., ¶¶ 10-11.

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Attorneys for Class Representative EWTF and Class Counsel for the Exaction Class

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March, 2024, a true and correct copy of the foregoing document was electronically filed with the Clerk of the Court, is available for viewing and downloading from the ECF system, and will be served by operation of the Court's electronic filing system (CM/ECF) upon all counsel of record.

/s/ Joseph H. Meltzer
Joseph H. Meltzer