

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

**REPLY SUBMISSION IN FURTHER SUPPORT OF
(I) MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN FOR
ALLOCATING NET SETTLEMENT FUND TO EXACTION CLASS MEMBERS; AND
(II) MOTION FOR AN AWARD OF ATTORNEYS' FEES, EXPENSES, AND CASE
CONTRIBUTION AWARD TO CLASS REPRESENTATIVE**

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Class Representative Electrical Welfare Trust Fund, on behalf of itself and the Exaction Class, and Class Counsel respectfully submit this Reply in further support of: (i) Motion for Final Approval of Settlement and Plan for Allocating Net Settlement Fund to Exaction Class Members (ECF No. 144); and (ii) Motion for an Award of Attorneys' Fees, Expenses, and Case Contribution Award to Class Representative (ECF No. 145) (together, the "Motions").¹

I. INTRODUCTION

As detailed in the opening papers in support of the Motions filed on March 27, 2024 (ECF Nos. 144, 145) ("Opening Papers"), the proposed Settlement—a \$169,022,397.28 cash payment representing **91.25%** of the Exaction Class's recoverable damages—is an exceptional result for the Exaction Class.² This recovery reflects 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) while eliminating the risk, delay, and continued expense of litigating Defendant's pending appeal. Indeed, when factoring in the time value of money over such an appeal—which in all likelihood would be between one and two years—the Settlement Amount represents a near total recovery of Exaction Class members' 2014 TRP Contributions.

Likewise, Class Counsel's request for a 25% fee plus litigation expenses is fair and reasonable considering the excellent result achieved for the Exaction Class, the extent and caliber of the work performed by Class Counsel (over the course of nearly a decade), and the significant

¹ Capitalized terms not defined herein have the meanings ascribed to them in the Settlement Agreement dated February 16, 2024 (ECF No. 142-1) or in the Declaration of Joseph H. Meltzer dated March 27, 2024 (ECF No. 144-1). All references to Appendix Exhibits A-F refer to the Appendix submitted with the Motions (ECF Nos. 144-1, 145-1).

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).

risks presented. Notably, Class Counsel were the only lawyers in the country willing to take on this novel case and litigate it to finality. The requested fee accounts for all of these factors.

In accordance with the Court's Order dated February 21, 2024 (ECF No. 143), the Settlement Administrator, JND Legal Administration, conducted a thorough notice campaign—sending the Court-approved Notice by email or mail to each of the 357 Exaction Class members and posting relevant information and documents related to the Settlement on the case website, www.TRPLitigation.com/exaction. The Notice informed Exaction Class members of the Settlement, the Plan of Allocation, and the requested attorneys' fees and expenses, as well as their option to submit an objection if they believed the Settlement, fee request, and/or any aspect thereof, was unfair or unreasonable.

Following this notice campaign, there have been *no objections* to the Settlement, the plan for allocating the Settlement proceeds to Exaction Class members ("Plan of Allocation"), or the requested attorneys' fees and expenses. As discussed below, this overwhelmingly positive reaction of the Exaction Class further demonstrates that the Settlement, the Plan of Allocation, and the request for attorneys' fees and expenses are fair and reasonable.

II. THE EXACTION CLASS'S REACTION PROVIDES ADDITIONAL SUPPORT FOR APPROVAL OF THE MOTIONS

The Opening Papers set forth why the Settlement, the Plan of Allocation, and the request for attorneys' fees and expenses were fair and reasonable and warranted the Court's approval. That said, one criteria—the reaction of the Exaction Class—was not fully ripe at the time the Opening Papers were filed. With the time for objecting having passed, this Reply outlines how the Exaction Class's reaction also clearly supports approval of the Motions.

A. The Exaction Class’s Reaction to the Settlement and Plan of Allocation Has Been Positive

The reaction of the class is among the most important factors a court considers in determining whether to approve a class action settlement. *See Mercier v. United States*, 156 Fed. Cl. 580, 586 (2021) (listing “reaction of the class members to the proposed settlement, taking into account the adequacy of notice to the class members of the settlement terms” as approval factor); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) (noting “the absence of substantial opposition is indicative of class approval”); *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) (“It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.”).

Here, not a single objection from any Exaction Class member to the Settlement or Plan of Allocation has been raised. This strongly favors approval. *See Barnes v. United States*, 2010 WL 1904503, at *2 (Fed. Cl. May 7, 2010) (“[T]he court finds significant the fact that not a single objection was lodged by members of the class following their receipt of notification regarding the settlement terms.”); *Whiteley v. Zynerba Pharms., Inc.*, 2021 WL 4206696, at *3 (E.D. Pa. Sept. 16, 2021) (finding lack of objections to be “persuasive evidence of the fairness and adequacy of the proposed settlement,” which “weighs in favor of a final approval”). In addition, the fact that Exaction Class members are institutions (with substantial losses) who possess ample means and incentive to object to the Settlement if they deemed it unsatisfactory further supports the Settlement’s fairness.

B. The Exaction Class’s Reaction Also Supports Approval of Class Counsel’s Request for Attorneys’ Fees and Expenses

The positive and enthusiastic reaction of the Exaction Class should also be considered with respect to Class Counsel’s request for attorneys’ fees and expenses. *See Moore v. United States*,

63 Fed. Cl. 781, 787 (2005) (instructing courts to consider “any class members’ objections to the settlement terms or fees requested by class counsel” when determining fee award); *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007) (the reaction of class members to a fee and expense request is “entitled to great weight” by the Court). Not one member of the Exaction Class has raised an objection.

Here, the lack of objections is strong evidence that the requested fees and expenses are reasonable. *See, e.g., Raulerson v. United States*, 108 Fed. Cl. 675, 680 (2013) (“As with the settlement, a nearly unanimous positive reaction to the fee request is highly relevant.”); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005) (noting “extraordinary support Plaintiffs have shown for counsel’s request for fees”); *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (noting, in assessing fee request, the “near-unanimous and ‘eye-popping’ support for this settlement”); *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 121 (D.N.J. 2012) (“The absence of substantial objections by Settlement Class members to the fees requested by Class Counsel strongly supports approval.”).

And, as noted above, the Exaction Class members—all sophisticated institutions often with their own in-house legal departments and access to experienced outside lawyers—know how to object to fee requests when appropriate. It is telling that none did so here. As Professor Fitzpatrick explained, the fact that all Exaction Class members elected to opt-in (and, as we now know, not object to the requested fee) “is as close to a consensual, privately negotiated fee percentage that you can get in class action litigation.” Appx. Ex. F, Fitzpatrick Decl. at Appx. 93, ¶ 14.

Equally if not more important, the affirmative reactions from Exaction Class members have been overwhelmingly positive. Since submitting their preliminary approval papers, Class Counsel

have spoken to representatives from dozens of plans in the Exaction Class. All are thrilled with the result achieved by Class Counsel, which, net of fees and expenses, provides Exaction Class members with a recovery of roughly 68 cents on the dollar. In fact, the average Exaction Class recovery, net of fees and expenses, is more than \$350,000. More than half of the Exaction Class (182 plans) will receive more than \$100,000 and almost 10% of the Exaction Class (30 plans) will receive more than \$1 million. In addition to delight, many Exaction Class members have also expressed surprise, as recoveries of this magnitude are all but unheard of.

Accordingly, the favorable reaction of the Exaction Class provides strong support for the Settlement, the Plan of Allocation, and Class Counsel's request for attorneys' fees, expenses, and case contribution award to Class Representative and warrants the Court's approval of the Motions.

III. CONCLUSION

For these reasons, and those set forth in their Opening Papers, Class Representative and Class Counsel respectfully request that the Court approve the Motions.

DATED: April 24, 2024

Respectfully submitted,

/s/ Joseph H. Meltzer
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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 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