



DOERING MEYER AND RYAN GIBSON, Class Agents,)	EEOC No.	531-2015-00092X
)		
v.)	Agency Nos.	DOS-F-034-07
)		DOS-F-091-08
SECRETARY, U.S. DEPARTMENT OF STATE, Agency.)	Administrative Judge R. Colin Power	
)		
)	March 17, 2023	

² The Administrative Judge received one objection from a non-class member, with no standing to object, which is discussed and overruled, below.

I. Background

The Agency has long required that applicants for career Foreign Service positions, absent a waiver, receive a Class 1 medical clearance, also known as a “Worldwide Available” medical clearance. *See* 22 C.F.R. § 11.20(a)(1) (“No person shall be eligible for appointment as a Foreign Service Officer unless that person is . . . world-wide available”). This clearance was issued to individuals who have no identifiable medical condition that would impact their ability to serve abroad.

In June 2005, Class Agent Doering Meyer received an offer of appointment as a career Foreign Service Officer, conditioned upon her receipt of a Class 1 medical clearance. In January 2007, Class Agent Doering Meyer filed a formal EEO complaint alleging discrimination based on her disability, after the Agency denied her a Class 1 medical clearance in October 2006.³

On September 30, 2010, the Commission granted class certification for disability discrimination claims in the denial of Class 1 medical clearances, with a class period beginning on October 7, 2006. The Agency issued a final order rejecting the certification decision and appealed. The Commission denied the Agency’s appeal on June 6, 2014. *See Vena H. v. Dep’t of State*, EEOC App. No. 0720110007 (June 6, 2014). The Agency requested reconsideration of the Commission’s order.

On February 19, 2015, the Commission denied the Agency’s request for reconsideration, remanding to the Agency to provide notice to the certified class of “all qualified applicants to the Foreign Service beginning on October 7, 2006, who were denied employment, or whose employment was delayed pending application for and receipt of a waiver, because the State Department deemed them not ‘worldwide available’ due to their disability.” *See Vena H. v. Dep’t of State*, EEOC Req. No. 0520140506 (Feb. 19, 2015).

In July 2016, the Commission granted a motion to add Ryan Gibson as a Class Agent. Between 2016 and 2020, the parties litigated numerous complex issues in this case, with extensive briefing provided by both parties, including, but not limited to, unsuccessful motions filed by the Agency to dismiss the complaint and clarify the class definition. *See generally* Class Agent’s Unopposed Motion to Grant Preliminary Approval of Class Action Settlement Agreement (Dec. 30, 2022) at 4-6. The parties also engaged in substantial discovery, which included voluminous written discovery, numerous depositions, and lengthy discovery disputes. *Id.*

In 2021, the parties reengaged in settlement negotiations with the assistance of a highly experienced mediator, Michael Lewis, of JAMS (a private alternative dispute resolution provider). *Id.* at 6-7. The parties engaged in substantial settlement discussions over the course of approximately 16 months, executing the Settlement Agreement on December 12, 2022. *Id.*

II. The Settlement Agreement

The resolution in the matter is extraordinarily beneficial for not only the 244 class members but future career candidates of the U.S. Foreign Service with disabilities, records of disabilities, and perceived disabilities.

³ While her complaint was pending, Meyer pursued a waiver of the worldwide availability requirement, which the Agency granted in February 2007, and she was offered an appointment for a Foreign Service position in July 2008.

As noted above, the Settlement Agreement establishes a \$37.5 million settlement fund to benefit the 244 class members. *See* Settlement Agreement at IV.A.2. After payments for attorney's fees and costs, and enhancements for the Class Agents, this provides a net average recovery for each class member of over \$100,000, assuming every class member cashes a settlement check. *See* Motion at 3; Settlement Agreement, Ex. 3. If any class members do not cash their checks, then the average recovery for participating class members will increase in secondary and tertiary allocations, because no reversion to the Agency is permitted. Settlement Agreement at III.D.

The Settlement Agreement provides that 95 individuals will receive conditional employment offers, so that they may proceed with the Foreign Service hiring process, and 8 others will receive an opportunity to test again to qualify to receive such offers. Settlement Agreement at IV.D; Ex. 4; Schwartz Final Approval Decl., at ¶8.

The Settlement Agreement provides for substantial equitable relief, revising the Agency's medical clearance policies, practices, and procedures, and addressing the core issues at stake in this litigation. Specifically, the Agency will cease requiring that applicants for career Foreign Service positions receive a Class 1 medical clearance, thereby reinterpreting "worldwide availability," which was previously issued to individuals who have no identifiable medical condition that would impact their ability to serve abroad. Settlement Agreement at IV.E. Instead, applicants for career Foreign Service Positions will be required to meet revised medical qualification standards as outlined in the Settlement Agreement. For example, Generalists and Specialists, except for Medical Specialists, only need to be medically cleared to serve at all designated Regional Medical Evacuation Centers (currently Bangkok, London, Pretoria, and Singapore), instead of being medically cleared to serve at any of the Agency's posts around the world. *Id.* For applicants with an identifiable medical condition, the Agency will engage in an interactive process with the applicant and their medical provider to in order to assess whether the applicant is able to meet the applicable medical qualification standard with a reasonable accommodation. *Id.* Class Counsel will monitor compliance with the Settlement Agreement over a period of five years, and the Agency will provide Compliance Reports to Class Counsel and the Administrative Judge multiple times each year. Settlement Agreement at V. The Compliance Reports will include, among other information, a description of the Agency's efforts to implement the policy changes described above.

The Settlement Agreement provides for contingency-based compensation for Class Counsel as a 1/3 percentage of the common fund for their extensive and until now uncompensated service to the Class Agents and the class members. Settlement Agreement at IV.A.3, Ex. 3. The Settlement Agreement further provides for enhancement payments to the Class Agents for their extended service to the class, additional risk incurred, and their execution of broader releases. Settlement Agreement at IV.B.2.

A Plan for the Distribution of Settlement Funds is included as Exhibit 3 to the Settlement Agreement (the Distribution Plan). The Distribution Plan describes how the monetary relief will be distributed, and aims to provide fair, adequate, and reasonable compensation to the class members. The settlement allocation will be highly individualized, designed to most closely approximate each class members' likely proportional recovery if their individual damages claims were tried to conclusion. Settlement Agreement, Ex. 3; Breshears Prelim. Approval Decl., at ¶¶ 7-18. Class member allocations are to be determined based upon extensive information provided by the Agency and the individual class members themselves, evaluated by both Class Counsel and their retained experts. Schwartz Prelim. Approval Decl., at ¶ 16; Breshears Decl., at ¶ 5. As described in further detail in the

Distribution Plan, class members' allocations are based on many factors: including the position and salary that was offered, average salary increases, action dates in the Agency's medical clearance system, length of time in the loss period, interim earnings during the loss period, and detailed information from each class member regarding nonpecuniary damages such as emotional distress.⁴ Settlement Agreement, Ex. 3; Breshears Decl., at ¶¶ 7-18. Based upon all of these factors, individuals will be assigned portions of the common fund allocation for back pay, lost benefits, and compensatory damages.⁵ The record demonstrates that class members have had numerous opportunities to provide information to Class Counsel to support their settlement allocation under the Distribution Plan, including in response to the Notice of Resolution of Class Action. Settlement Agreement, Exs. 2, 3; Stuzin Prelim. Approval Decl., at ¶ 6; Stuzin Final Approval Decl., at ¶¶ 3-4.

In exchange for the above relief, the Settlement Agreement shall resolve and bar any and all class claims as defined in the agreement (e.g., disability discrimination claims relating to the Agency's hiring process, prior to the effective date of the agreement) of any class members, and the Class Agents with execute general releases. Settlement Agreement at II.A.7, II.D., Ex. 5.

III. Legal Standard

Class action complaints may be resolved by agreement of the Agency and the Class Agents at any time, provided they comply with the notice and approval process outlined in the regulations. *See* 29 C.F.R. § 1614.204(g)(2). When resolution of a class complaint is proposed, notice of resolution must be given to all class members in the same manner of the acceptance of the class complaint. 29 C.F.R. § 1614.204(g)(4). The notice must state that within thirty (30) days, any member of the class may petition the Administrative Judge to vacate the resolution because it benefits only the class agent, or is otherwise not fair, adequate, and reasonable to the class as a whole. *Id.* The Administrative Judge must consider these petitions and determine whether to vacate the agreement. *Id.* If the Administrative Judge finds that the resolution is fair, adequate and reasonable to the class as a whole, the resolution shall bind all members of the class. *Id.*

The Commission has analyzed whether a class action settlement is fair, adequate, and reasonable to the class as a whole using the standards enunciated for Federal Rule of Civil Procedure 23(e). *See Modlin*, EEOC App. No. 01A24054. Under such standards, the Administrative Judge's primary task is to evaluate the terms of the settlement in relation to the strength of the class members'

⁴ Compensatory damages allocations are based upon a ranking system (0 to 4 points) based upon the symptoms described by each class member. For example, where class members did not provide any information regarding emotional distress or claimed no symptoms, they will receive a 0 ranking and receive a \$5,000 minimum allocation. But where a class member provided information and documentation showing severe emotional distress (e.g., suicidal ideation or attempts, long-term treatment with psychologist/psychiatrist and a need for prescribed psychotropic medications), that class member would receive a 4 ranking and be entitled to a larger allocation. *See* Settlement Agreement, Ex. 3.

⁵ The Distribution Plan appears reasonably designed to avoid a windfall to class members who failed to provide information about interim earnings for any year in the loss period, recognizing that it would be unreasonable to presume that any class member's interim earnings were zero in any year. In the event of fully successful litigation, the backpay due a victim of discrimination is intended to restore the individual the income he or she would have otherwise earned but for the discrimination. 29 C.F.R. §1614.501; *Oliver N. v. Dep't of Def.*, EEOC App. No. 2021000920 (July 20, 2022). Regardless, even class members who do not provide any information regarding interim earnings will receive a minimum \$5,000 settlement allocation. Class members should note that the Settlement Agreement is inherently a compromise, designed to obtain earlier relief for class members, who might have to wait many more years to potentially recover full relief, and who otherwise risk no recovery in the event judgment is entered for the Agency. *See Modlin v. Soc. Sec. Admin.*, EEOC App. No. 01A24054 (Feb. 20, 2003).

case—and the settlement should not be rejected “merely because individual class members complain that they would have received more had they prevailed after trial.” *Id.* (citing *Thomas v. Albright*, 139 F.3d 227, 231 (D.C. Cir. 1998), *cert den.*, 525 U.S. 1033 (1998)).

In determining the fairness of the settlement under Federal Rule of Civil Procedure 23, the following factors are considered:

- 1) whether the proposed settlement was fairly and honestly negotiated;
- 2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;
- 3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and
- 4) the judgment of the parties and their counsel that the settlement is fair and reasonable.

McCormick v. U.S. Postal Serv., EEOC App. No. 0120081844 (July 1, 2008) (citing *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984)); *see also Reed v. General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983) (finding that the judgment of experienced class counsel negotiating at arm’s length is an important factor for consideration, as they understand the strengths and weaknesses of the case); *Zonia C. v. U.S. Postal Serv.*, EEOC App. No. 2020001830 (Aug. 25, 2020) (stating that the final approval of the resolution was based on appropriate factors, including the absence of fraud or collusion, and public policy in favor of reasonable settlements).

Additional factors which may be relevant include:

- 1) the risk of establishing damages;
- 2) the extent of discovery and the current posture of the case;
- 3) the range of possible settlement; and
- 4) the reaction of class members to the proposed settlement.

McCormick, EEOC App. No. 0120081844 (citing *In Re New Mexico Natural Gas Antitrust Litigation*, 607 F.Supp. 1491 at 1504 (D. Colo.); *EEOC v. Hiram Walker & Sons*, 768 F.2d 884 at 889 (7th Cir. 1985)).

IV. Analysis

Upon consideration of the Settlement Agreement and the record in its entirety, I find that that the resolution of this class action fair, adequate and reasonable to the class as a whole.

A. Negotiation of the Settlement Agreement and Absence of Fraud or Collusion

I note that the record supports that the Settlement Agreement was fairly and honestly negotiated. After previous unsuccessful attempts, the parties began negotiating a settlement in earnest in 2021, with the assistance of a neutral and highly qualified mediator. When an initial full-day mediation did not yield an agreement, Agency Counsel and Class Counsel continued negotiations for approximately 16 months, negotiating every aspect of the Settlement Agreement both through the mediator and bilaterally, before executing the Settlement Agreement on December 12, 2022. *See* Schwartz Final Approval Decl., at ¶11. The settlement was reached after the parties engaged in

extensive, arm's-length settlement negotiations. Nothing in the record suggests that this agreement was the result of any fraud or collusion.

B. History and Current Case Posture, Risks in Continuing Litigation, and the Judgment of the Parties and their Counsel

Despite that the ongoing nature of this litigation for nearly two decades, there remained serious questions of law and fact, the legal representatives were well-aware of the strengths and weakness of their respective cases, and the ultimate outcome of the litigation remained difficult to predict. *See* Class Agents' Unopposed Motion to Grant Preliminary Approval of Class Action Settlement Agreement at 14-17, 19-20. The parties have been represented by counsel with significant experience litigating class actions and in matters before the Commission. What is abundantly clear is that the parties vigorously and contentiously litigated their positions at each stage of the hearing process. This case has been addressed by the Commission's Office of Federal Operations in both an appeal and reconsideration request. The parties have engaged in extensive class-wide discovery, briefed numerous complex issues, and strongly advocated their positions in a myriad of discovery disputes. Yet, despite the length of this litigation, both sides would still have needed to address the potential for summary judgment in this matter, and there may have been a hearing on class liability. The Agency would undoubtedly assert a host of defenses, and even if Class agents prevailed on the merits of their claims, it is reasonable to assume that the Agency would appeal any finding of liability and reassert the numerous arguments it has made in motions throughout the proceedings. Moreover, the class always bears the risk of being unable to prove their claims on their merit. If the class prevailed on the issue of liability, the class would face the monumental task of proving individual damages for each of the class members—the potential litigation of hundreds of individual damages claims would be extremely time-consuming and costly, and the Agency would undoubtedly offer arguments regarding the extent of nonpecuniary compensatory damages which could dramatically affect the outcome for individual class members. Accordingly, the parties reached a compromise in order to resolve the case instead of going through years of continued litigation, at great expense, before a final decision of the Commission could be issued. I find that the Settlement Agreement eliminates a great deal of uncertainty and is in accordance with public policy in favor of reasonable settlements.

The monetary and other relief afforded to each class member is significant and fair, and I find that the value of this immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation. As described above, the Settlement Agreement provides for valuable equitable relief, including changes to the Agency's policies and procedures – reflecting a commitment by the Agency to inclusive workforce policies and hiring practices that reflect the full diversity of the American people. Moreover, the relief provided to the class members is extensive and meaningful, not only in providing an historic monetary settlement of \$37.5 million, but also in providing new career opportunities to many of the class members. As noted above, it is also appropriate to consider the judgment of experienced counsel in determining whether an agreement is fair. *See Reed*, 703 F.2d at 175. Here, Class Counsel attest that the settlement is not only fair, adequate, and reasonable, but exceptionally favorable for the Class Members. Schwartz Final Approval Decl., at ¶ 2; Gilbert Final Approval Decl., at ¶¶ 12-14.

I find that the Distribution Plan, which contains a complex formula for allocating the recovery amount to each individual class member is fair, adequate, and reasonable. In determining such allocations, the Distribution Plan requires the examination several factors based on evidence in the record and that which was submitted by class members, including mitigation efforts for backpay and

nonpecuniary compensatory damages. Moreover, Class Counsel attested to exhaustive efforts by to communicate with class members to ensure fairness and provide many opportunities to provide additional information. Stuzin Prelim. Approval Decl., at ¶¶3-12; Stuzin Final Approval Decl., at ¶¶3-5.

C. Class Agents' Additional Compensation

I find that the Class Agents are also fairly compensated with additional enhancements as contained within the Settlement Agreement. Federal courts recognize that awards to class representatives are both common and appropriate to provide an incentive to bring important cases that have broad impact benefiting a class of individuals, not just the complainant. *See, e.g., Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (noting that incentive awards are fairly typical in class action cases, and are intended to compensate class agents for work done on behalf of the class, as well as to make up for financial or reputational risk undertaken in bringing the action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (stating that relevant factors in consideration of an incentive award include the degree to which the class has benefitted from the class agent's actions, and the amount of time and effort expended by class agent); *Modlin*, EEOC App. No. 01A24054 (affirming that a class settlement agreement was fair even though the class agents were the only employees to receive promotions, rewarding them for their efforts to spearhead the claim, where the agreement still provided extensive relief for the other class members).

Here, Class Agents were undoubtedly essential to bringing forth this class action and achieving a hugely successful benefit for all members of the class. I find that it is appropriate to compensate the Class Agents for the tremendous time and effort invested in this case and the additional financial and reputational risks that they assumed. *See Meyer Prelim. Approval Decl.*, at ¶¶ 7-15; *Gibson Prelim. Approval Decl.*, at ¶¶ 6-11. Accordingly, the Commission approves the enhancement payments of \$250,000 to Meyer and \$150,000 to Gibson, without whom no Class Member would have recovered at all, including those who will benefit from the substantial policy and practice reforms called for by the Settlement Agreement.

D. Attorney's Fees and Costs

I find that Class Counsel is fairly compensated by the settlement, and that the attorney's fees and costs are fair, adequate, and reasonable. Courts have recognized the "common fund" doctrine under which an attorney who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003) (quoting *Boeing Co. v. Van Gernert*, 444 U.S. 472, 478 (1980)); *see also Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) (concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney's fees award in common fund cases). Moreover, the Commission has previously approved class settlements reflecting fee awards as a percentage of the common fund. *See Schwartz Prelim. Approval Decl.*, Exs. G, H, and I (class settlements approved by the Commission reflecting fee awards as a percentage of the common fund). Factors to consider in determining the reasonable percentage of the common fund as a fee include time and labor expended by counsel, the complexity and risk of litigation, quality of representation, the requested fee in relation to the settlement, and public policy considerations. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). I note that one third of the common fund is within the typical range for attorney's fees in class action settlements and verdicts. *See, e.g., Multi-Ethnic Immigrant Workers Org. Network v. City of Los Angeles*, 2009 WL 9100391, at

*4 (C.D. Cal. June 24, 2009) (detailing studies, including one by the Federal Judicial Center surveying 407 class action settlements and verdicts, finding that “attorneys’ fees were generally in the traditional range of approximately one-third of the total settlement”).

Class Counsel have attested to thousands of hours of uncompensated work and extensive out-of-pocket costs in bringing about this outcome, and the extent of the work performed is also readily apparent throughout the record. Schwartz Prelim. Approval Decl., at ¶¶ 6, 19; Schwartz Final Approval Decl., at ¶ 12. I find that the Settlement Administrator fee is likewise supported and reasonable. Pavlik (Rust Consulting) Decl., at ¶ 13, Ex. C. It is apparent that without the tireless efforts of lead Class Counsel Bryan Schwartz, who has worked toward a resolution in this case with no compensation for more than 16 years, this settlement would not have occurred. This case involved complex issues and Class Counsel provided high-quality representation to the class at all stages. Moreover, this case came with risk, as a successful result was not guaranteed, and I note the important public policy consideration of incentivizing experienced and qualified attorneys to devote their efforts to time-consuming class discrimination cases in which they risk receiving no compensation. *See Deposit Guar. Nat. Bank. v. Roper*, 445 U.S. 326, 338-39 (1980). Accordingly, the Commission approves the attorneys’ fees agreed upon as of one third of the common fund created by the settlement, plus the litigation costs and Settlement Administrator expense of \$100,000 and \$50,000, respectively.

E. No Class Member Objections and the Positive Reactions of Class Members

On February 10, 2023, the Agency and Settlement Administrator mailed, and the Settlement Administrator also emailed, the Class Notice to all individuals identified by Class Counsel and Agency counsel as possible Class Members. Pavlik (Rust Consulting) Decl., at ¶ 9; Schwartz Final Approval Decl., at ¶ 4. The Notice included information about the terms of the Settlement Agreement, which had received preliminary approval from the Commission. The Agency also issued a press release regarding the settlement and notified all Agency employees. Schwartz Final Approval Decl., at ¶ 4. In addition, Class Counsel established a website regarding the settlement, which included a complete copy of the Settlement Agreement and all exhibits, including the Distribution Plan. Schwartz Final Approval Decl., at ¶ 4.

The Notice informed class members of their right to object to the Settlement Agreement, by filing a written petition with the Administrative Judge within 30 days of the date of the notice (i.e., by March 13, 2023). No class members filed petitions or objections to the Settlement Agreement with the Administrative Judge. *See also* Schwartz Final Approval Decl., at ¶ 3. The Notice of Resolution of Class Action, which was also publicly posted on Class Counsel’s website regarding the settlement, stated that a Final Approval hearing would be held on March 15, 2023, and provided a link to join the virtual hearing. During the Final Approval hearing on March 15, 2023, held virtually via a videoconferencing platform, the Administrative Judge offered anyone present an opportunity to object to the Settlement Agreement – no objections were received.

Overall, the Class Members’ response was overwhelmingly positive, with class members expressing their support of the very meaningful restitution in the agreement, the future beneficial impact for disabled individuals, and expressing sincere gratitude for the work of Class Counsel. Class Agent’s Unopposed Motion Seeking Final Approval of Class Action Settlement Agreement at 1-2; Stuzin Final Approval Decl., at ¶3. During the Final Approval Hearing on March 15, 2023, one class member stated that it is “amazing that this case has made such a difference for the future,” and thanked all those who worked for toward this result.

F. Sole Objection Filed by a Non-Class Member Without Standing

On March 13, 2023, the last day for objections, an individual contacted the Administrative Judge by both telephone and email to raise concerns with the resolution of the class case.⁶ I provided a copy of the individual's written objections to the parties, by email, and instructed the parties to respond to the objection and be prepared to address the issue at the Final Approval Hearing. Class Counsel addressed this objection in the Class Agents' Unopposed Motion Seeking Final Approval of Class Action Settlement Agreement, and Agency Counsel filed a Response to this objection on March 14, 2023.

Upon review of the record, including the objection itself and responses by both Agency and Class counsel, I find that this individual was previously and erroneously identified as a potential class member by the Agency. Schwartz Final Approval Decl., at ¶¶15-16; Ex 1. Agency's Response of March 14, 2023. In 2018, she received a notice from the Agency informing her that she "may be a member of the class." Agency's Response (Mar. 14, 2023). The notice provided a definition of the class (i.e., "all qualified applicants to the Foreign Service beginning on October 7, 2006, who were denied employment, or whose employment was delayed pending application for and receipt of a waiver, because the State Department deemed them not 'worldwide available' due to their disability"), and explained that to be a class member, you must meet all criteria in the definition of the class. *Id.*

In 2018, the non-class member was in contact with Class Counsel, stating that she was unsure of the date she was denied a Class 1 medical clearance, but that it could have been in late 2006. Schwartz Final Approval Decl., at ¶¶ 15-16; *see also* Agency Response (Mar. 14, 2023) at 2-3, Ex. 2 (acknowledging that in 2018, she did not recall the dates that her clearance was denied). In January 2023, while reviewing exhaustive documentation regarding damages allocations, Class Counsel discovered that the non-class member was denied medical clearance in September 2005, well before the October 7, 2006 date in the class definition.⁷ Schwartz Final Approval Decl., at ¶¶15-16, Ex. 2; Stuzin Final Approval Decl., at ¶12. Exs. A and B. In her objection, the non-class member conceded that her conditional job offer was withdrawn by April 2006, several months before the class period began.

Accordingly, the record conclusively establishes that the sole objection received by the Administrative Judge was filed by an individual who does not meet the definition of a class member. A non-class member has no standing to object to a class settlement, which does not affect her rights. *See Shawnta A. v. Dep't of Justice*, EEOC App. No. 0120181245 (June 26, 2019) (affirming that an individual who does not meet the definition of a class member did not have standing to challenge the settlement agreement); *see also Douglas v. The W. Union Co.*, 955 F.3d 662, 665 (7th Cir. 2020) (stating that only a "class member" may object to a class settlement); *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244 (2d Cir. 2007) (stating that non-class members do not have an affected interest and generally do not have standing to

⁶ The non-class member verbally informed the Administrative Judge that she was aware of the Final Approval Hearing scheduled for March 15, 2023 (the information and link to join the hearing was contained within the Notice of Resolution of Class Action, publicly available online); however, she did not attend the hearing.

⁷ This individual was previously listed on Exhibit 1 (Class List) to the Settlement Agreement, submitted with the Class Agent's Unopposed Motion to Grant Preliminary Approval of Class Action Settlement Agreement, filed on December 30, 2022. She was subsequently removed from Exhibit 1, as agreed to by the parties, and amended Exhibit 1 was approved by Order dated January 23, 2023.

object to a settlement of a class action); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989) (holding that non-class members have no standing to object to a proposed class settlement under Federal Rule of Civil Procedure 23(e)).

I note that even if this non-class member had standing to object to the Settlement Agreement, the concerns that she raised would in no way alter my finding that the resolution of this class action is fair, adequate, and reasonable to the class as a whole. *See Zonia C.*, EEOC App. No. 2020001830 (finding that the complainant's objection was properly denied when she only argued that she should have been included as a class member in the settlement agreement, and did not question the fairness, adequacy or reasonableness of the settlement agreement to the class as a whole). The non-class member's objection does not involve the fairness of settlement to a class as a whole, but rather, focuses on her disappointment regarding the individual relief she had hoped to receive if she qualified as a class member, and her disappointment with the attorneys involved, for what she described as a lack "due diligence [in] checking the date." She did not otherwise dispute that she is not a member of the class, according to the definition of the class.

For the reasons above, the non-class member lacks standing to object to the Settlement Agreement and does not present a valid argument as to why the settlement is not fair to the class. Accordingly, her objection is overruled.

V. Findings and Conclusion

This resolution of a class action complaint complies with the notice and approval process outlined in the regulations. *See* 29 C.F.R. § 1614.204(g). All of the factors outlined above support a finding that the resolution should receive final approval, including the lengthy and contentious litigation of this case; the extensive arm's-length settlement negotiations; the anticipated future expense and duration of litigating and resolving all claims; the risks that the class bears in being unable to establish the claims and/or individual relief; the relief provided is substantial and fair; and the reaction to the settlement was favorable, with no objections from any class members with standing to object.

After careful consideration of the Settlement Agreement, attached exhibits, the Class Agents' Unopposed Motion Seeking Final Approval of Class Action Settlement Agreement, and the record as a whole, I find that the resolution is fair, adequate, and reasonable to the class as a whole. *See* C.F.R. § 1614.204(g)(4). Accordingly, the Class Agents' Unopposed Motion Seeking Final Approval of Class Action Settlement Agreement is **GRANTED** and the Settlement Agreement is **APPROVED**.

VI. Order

As I have determined that the class action resolution is fair, adequate, and reasonable to the class as a whole, this **ORDER** shall bind all members of the class. 29 C.F.R. § 1614.204(g)(4); EEOC Management Directive for 29 C.F.R. 1614 (EEO MD-110), Ch. 8, VIII.C.3.

Commission guidance sets forth that a class member or petitioner may appeal "[a]n Administrative Judge's decision finding a proposed resolution fair, adequate, and reasonable to the class as a whole if the class member filed a petition to vacate the resolution; or finding that the petitioner is not a member of the class and did not have standing to challenge the resolution." EEO MD-110, Ch. 9, III (E)(1); *see also Modlin v. v. Soc. Sec. Admin.*, EEOC App. No. 01A24054 (stating

that the Administrative Judge must consider any petitions filed, and the decision must inform the petitioner of his or her right to appeal to the Commission); *Shawnta A.* (reviewing and denying an appeal from a non-class member); *Zonia C.*, EEOC App. No. 2020001830 (reviewing and denying an appeal from a non-class member). The Administrative Judge's decision "must inform the petitioner of the right to appeal the decision to the Commission." EEO MD-110, Ch. 9, II.A.3.

As this Order grants **FINAL APPROVAL** of the class action Settlement Agreement pursuant to 29 C.F.R. § 1614.204(g)(4), an appeal may be filed directly with the Commission's Office of Federal Operations. 29 C.F.R. §1614.401(c). The Agency is not required to issue a final order following receipt of this Order Granting Final Approval of Class Action Settlement Agreement. A Notice of Appeal Rights is attached. Appeals pursuant to § 1614.401(c) must be filed within 30 days of receipt of the decision. A copy of EEOC Form 573, Notice of Appeal/Petition, is attached in compliance with EEO MD-110. *See* EEO MD-110, Ch. 8, VIII.C.3. Class Counsel is directed to post a copy of this Order to the established website regarding the settlement, within seven (7) days of the date of this Order.

Pursuant to the Settlement Agreement, the Agency shall transmit the payment of \$37,500,000 to the Settlement Administrator, as soon as practicable, but no later than sixty (60) days after the Effective Date (i.e., the first date after which there can no longer be timely challenges to the Settlement Agreement in any administrative or judicial forum, occurring only after the Administrative Judge has finally approved the settlement agreement and the time for any appeals have run without an appeal being filed, or, if an appeal is filed, the final resolution of the appeals process). *See* Settlement Agreement at II.A.13, IV.A.2. The Settlement Administrator will thereafter follow the terms of the Settlement Agreement concerning settlement disbursement, requiring the first distribution within 30 days after payment is received, the second distribution within 180 days after payment is received, and the third distribution or *cy pres* contribution within 360 days after payment is received.⁸ *See* Settlement Agreement at III.D.

It is so ORDERED.

For the Commission:



R. Colin Power
Administrative Judge
R.Colin.Power@eeoc.gov
(267) 589-9729

⁸ The parties requested that the Administrative Judge's Order denote specific dates and timeframes for appeal. *See* Settlement Agreement at II.A.13. If no appeals are filed by the April 17, 2023 deadline (i.e., within 30 days), the Effective Date shall be April 18, 2023; the funding date shall be no later June 19, 2023; and the first distribution date shall be no later than July 19, 2023. The effective, funding, and first distribution dates are subject to change if the Commission receives a timely appeal.

NOTICE OF APPEAL RIGHTS

TO CLASS AGENTS, CLASS COUNSEL, AGENCY, AND OBJECTORS TO THE SETTLEMENT AGREEMENT

If an Administrative Judge determines that the resolution of a class complaint is fair, adequate and reasonable to the class as a whole, the resolution shall bind all members of the class. 29 C.F.R. § 1614.204(g). When an Administrative Judge issues such an order approving a class settlement agreement, an appeal may be filed directly with the Commission. 29 C.F.R. §1614.401(c).

Please take **NOTICE** that the Settlement Agreement agreed to by the parties in this case has received **FINAL APPROVAL** from the Administrative Judge. An appeal of the Order Granting Final Approval of Class Action Settlement Agreement may be filed directly with the Commission's Office of Federal Operations. 29 C.F.R. §1614.401(c). Appeals pursuant to § 1614.401(c) must be filed within 30 days of receipt of the Order Granting Final Approval of Class Action Settlement Agreement. A copy of EEOC Form 573, Notice of Appeal/Petition, is attached in compliance with EEO MD-110. *See* EEO MD-110, Ch. 8, VIII.C.3.

FILING AN APPEAL

To file an appeal, refer to the attached EEOC Form 573, Notice of Appeal/Petition. Do not send your appeal to the Administrative Judge. Your appeal must be filed with the Commission's Office of Federal Operations at the address set forth below, and you must send a copy of your appeal to the Agency and Class Counsel at the same time that you file it with the Office of Federal Operations. In or attached to your appeal to the Office of Federal Operations, you must certify the date and method by which you sent a copy of your appeal to the Agency and Class Counsel. You must attach a copy of this Order Granting Final Approval of Class Action Settlement Agreement to your appeal.

WHERE TO FILE AN APPEAL

All appeals to the Commission must be filed via the EEOC's Public Portal, or by mail, hand delivery or facsimile.

VIA EEOC'S PUBLIC PORTAL (RECOMMENDED METHOD) – The EEOC highly recommends that you file your appeal online using the EEOC Public Portal at <https://publicportal.eeoc.gov/>, and clicking on the "Filing with the EEOC" link. If you have not already registered in the Public Portal, you will be asked to register by entering your contact information and confirming your email address. Once you are registered you can request an appeal, upload relevant documents (e.g., a statement or brief in support of your appeal), and manage your personal and representative information. During the adjudication of your appeal, you can also use the Public Portal to view and download the appellate record. **If you use the Public Portal to file your appeal, you do not have to send a copy to the agency.** A complainant with an account with the EEOC's Public Portal may waive receipt of the appellate decision via U.S. mail and receive the decision via the EEOC Public Portal. Federal agencies will receive the appellate decision via the FedSEP digital platform.

BY MAIL:

Director, Office of Federal Operations

Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

BY PERSONAL DELIVERY (HAND DELIVERY OR COURRIER):
U.S. Equal Employment Opportunity Commission Office of Federal Operations
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

BY FACSIMILE:
Number: (202) 663-7022
Facsimile transmissions of more than ten (10) pages will not be accepted.

CERTIFICATE OF SERVICE

I certify that on March 17, 2023, the foregoing Order Granting Final Approval of Class Action Settlement Agreement, and Notice of Appeal Rights, was served by electronic issuance to the following:

Class Agents

Doering Meyer
[REDACTED]

[REDACTED]

Ryan Gibson
[REDACTED]

[REDACTED]

Class Legal Representatives

Bryan Schwartz, Esq.

bryan@bryanschwartzlaw.com

By email and EEOC Public Portal

Gary Gilbert, Esq.

Gary-efile@gelawyer.com

By email and EEOC Public Portal

Agency Legal Representative

Yedidya “Eddie” Cohen, Esq.

CohenY@state.gov

By email and FedSEP

Objector / Petitioner

Dr. Klara Gershman

dr.gershman@me.com

klarag@msn.com

dr.gershman@icloud.com

By email only



R. Colin Power

Administrative Judge

R.Colin.Power@eeoc.gov

(267) 589-9729

**NOTICE OF APPEAL/PETITION - COMPLAINANT
TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS
P.O. Box 77960
Washington, DC 20013**

Complainant Information: (Please Print or Type)

Complainant's name (Last, First, M.I.):	
Home/mailling address:	
City, State, ZIP Code:	
Daytime Telephone # (with area code)	
E-mail address (if any):	

Attorney/Representative Information (if any):

Attorney name:	
Non-Attorney Representative name:	
Address:	
City, State, ZIP Code:	
Telephone number (if applicable):	
E-mail address (if any):	

General Information:

Name of the agency being charged with discrimination:	
Identify the Agency's complaint number:	
Location of the duty station or local facility in which the complaint arose:	
Has a final action been taken by the agency, an Arbitrator, FLRA, or MSPB on this complaint?	<input type="checkbox"/> Yes Date Received _____ (Remember to attach a copy) <input type="checkbox"/> No <input type="checkbox"/> This appeal alleges a breach of a settlement agreement
Has a complaint been filed on this same matter with the Commission, another agency, or through any other administrative or collective bargaining procedures?	<input type="checkbox"/> No <input type="checkbox"/> Yes (Indicate the agency or procedure, complaint/docket number, and attach a copy, if appropriate)
Has a civil action (lawsuit) been filed in connection with this complaint?	<input type="checkbox"/> No <input type="checkbox"/> Yes (Attach a copy of the civil action filed)

NOTICE: Please **attach a copy of the final decision or order** from which you are appealing. If a hearing was requested, please attach a copy of the agency's final order and a copy of the Commission Administrative Judge's decision. Any comments or brief in support of this appeal **MUST** be filed with the Commission and with the agency **within 30 days** of the date this appeal is filed. The date the appeal is filed is the date on which it is postmarked, hand delivered, submitted, or faxed to the Commission at the address above.

Please specify any reasonable accommodations you will require to participate in the appeal process:

Signature of complainant or complainant's representative:	
Date:	
Method of Service on Agency:	
Date of Service:	

**PRIVACY ACT STATEMENT ON REVERSE SIDE.
EEOC Form 573 REV 2/09
PRIVACY ACT STATEMENT**

(This form is covered by the Privacy Act of 1974. Public Law 93-597. Authority for requesting the personal data and the use thereof are given below)

1. **FORM NUMBER/TITLE/DATE:** EEOC Form 573, Notice of Appeal/Petition, February 2009
2. **AUTHORITY:** 42 U.S.C. § 2000e-16
3. **PRINCIPAL PURPOSE:** The purpose of this questionnaire is to solicit information to enable the Commission to properly and effectively adjudicate appeals filed by federal employees, former federal employees, and applicants for federal employment.
4. **ROUTINE USES:** Information provided on this form may be disclosed to: (a) appropriate federal, state, or local agencies when relevant to civil, criminal, or regulatory investigations or proceedings; (b) a Congressional office in response to an inquiry from that office at your request; and (c) a bar association or disciplinary board investigating complaints against attorneys representing parties before the Commission. Decisions of the Commission are final administrative decisions, and, as such, are available to the public under the provisions of the Freedom of Information Act. Some information may also be used in depersonalized form as a database for statistical purposes.
5. **WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION:** Since your appeal is a voluntary action, you are not required to provide any personal information in connection with it. However, failure to supply the Commission with the requested information could hinder timely processing of your case, or even result in the rejection or dismissal of your appeal.

You may send your appeal to:

**The Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013**

Fax it to (202) 663-7022 or submit it through the Commission's electronic submission portal.