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STATE OF WASHINGTON
SPOKANE COUNTY SUPERIOR COURT

CHRISTINA MARTIN, ET. AL,

Plaintiffs,

vs.

THE STATE OF WASHINGTON, ET AL,

Defendants.

NO. 14-2-00016-7

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

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INTRODUCTION

Plaintiffs Christina Martin, Jason Longoria, Charles Arnold, John Sager, Darrel Nash, Erik Thomas, Darin Foster, and Luis Gonzalez ("Plaintiffs") respectfully submit this Memorandum in Support of Their Unopposed Motion for Preliminary Approval of Class Action Settlement Agreement, and request that the Court: (1) preliminarily approve the Settlement Agreement between Plaintiffs and Defendants; (2) approve the Proposed Notice of the Settlement Agreement to the Class; (3) approve the Proposed Plan of Allocation; (4) appoint a Notice Administrator, a Settlement Administrator, and a Special Master; and (5) set deadlines for a schedule of events described below, including a date for a hearing on the final approval of the Settlement and other dates necessary to implement and provide final approval of the Settlement.

FACTUAL AND PROCEDURAL BACKGROUND

A. Overview of the Action

This is an action under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4301 *et. seq*., and 42 U.S.C. § 1983, in which Plaintiffs, on behalf of a Class of applicants and employees of the Washington State Patrol ("WSP"), bring claims against the State of Washington, the WSP, and several current and former WSP officials (collectively, "Defendants"), and specifically challenge (a) the failure to apply RCW § 41.04.010(1)-(3) preference points to qualified veterans in the WSP's hiring and promotions process, (b) the failure to treat military-related leave as continuous employment in the WSP, and (c) the failure to count statutorily-mandated military leave (RCW § 38.40.060) in a manner consistent with Washington state law and USERRA. *See* Second Amended Complaint ¶¶ 153-179 (Jan. 9, 2015) ("Compl.").

Since the 1940s, Washington state law has required state-government employers, including the WSP, to provide qualified military veterans with additional points to their passing scores for entrance or promotional examinations. RCW § 41.04; Opinion of Attorney General Smith Troy, Preference in Promotional Examination, AGO 1951 No. 198 (Dec. 26, 1951), http://www.atg.wa.gov/ago-opinions/preference-promotional-examination ("conclu[ding] that an officer of the state patrol who is a veteran of World War II, but who has been recalled to military service, who takes a promotional examination is entitled to the ten percent veterans' preference provided by statute").

Plaintiffs filed their original Complaint on January 3, 2014. On May 8, 2017, following motion practice, substantial discovery, and lengthy, arms-length settlement discussions, the parties executed a Settlement Agreement. *See* Settlement Agreement ("Settlement" or "Agmt.").

B. <u>Plaintiffs' Claims</u>

The Complaint alleged that Defendants violated USERRA, 38 U.S.C. § 4311(a)-(b), by depriving WSP employees and applicants of various "benefits of employment" due to their military service or status, the most significant of which was the five-to-ten percent increase that must be added to the passing score of a qualified veteran's entrance or promotional examination under RCW § 41.04.010. *See* Compl. ¶¶ 153-159; 38 U.S.C. § 4311(a)-(b) (stating persons who have served in the uniformed services "shall not be denied . . . any benefit of employment by an employer on the basis of that membership . . . [or] performance of service," and "[a]n employer may not discriminate in employment against or take any adverse employment action against any person because such person [] has taken an action to enforce a protection" or "has exercised a right provided for in [USERRA]").

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In a separate claim brought under 42 U.S.C. § 1983, Plaintiffs alleged that the WSP's failure to apply Veterans' Preference in accordance with RCW § 41.04.010 violated their state-created property rights in violation of the Due Process Clause of the United States Constitution, because Plaintiffs were entitled to receive the benefits of RCW § 41.04.010 and the WSP had no discretion to deny those benefits. Compl. ¶¶ 167-179.[1]

Plaintiffs also alleged that Defendants violated USERRA, 38 U.S.C. § 4316(a), by failing to treat military-related absences as continued employment for the purpose of USERRA. Compl. ¶¶ 160-166; 38 U.S.C. § 4316(a) (stating that "[a] person who is reemployed under [USERRA] is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed").

In an Amended Complaint filed on January 13, 2014, Plaintiffs asserted that Defendants had further violated USERRA 38 U.S.C. § 4311 by improperly calculating state-authorized military leave under RCW § 38.040.060. First Amended Complaint ¶ 174; *see also* Compl. ¶ 157.

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[1] *See Carter v. City of Philadelphia*, 989 F.2d 117, 122 (3rd Cir. 1993) (holding a police officer had a state-created, constitutionally-protected property right under a state Veterans' Preference Act that granted "a preference to veterans in promotion"); *see also Ass'n of Orange Cty. Deputy Sheriffs v. Gates*, 716 F.2d 733, 734 (9th Cir. 1983) (stating "[a] property interest in a benefit protected by the due process clause results from a legitimate claim of entitlement created and defined by an independent source, such as state or federal law," and that "[a] reasonable expectation of entitlement is determined largely by the language of the statute and the extent to which the entitlement is couched in mandatory terms") (citations and quotations omitted).

Plaintiffs filed the lawsuit as a putative class action pursuant to Rule 23 of the Washington Rules of Civil Procedure, and alleged that the case is maintainable as a class action under Rule 23(a) and Rule 23(b)(1), (2) or (3). Compl. ¶¶ 138-152.

C. Procedural History

On January 23, 2014, Defendants moved to dismiss the lawsuit under Civil Rule 12(b)(6). D.E. No. 13. The Court held argument on Defendants' motion to dismiss on February 28, 2014. At the conclusion of the hearing, the Court orally denied Defendants' motion to dismiss and, on March 19, 2014, entered a written order memorializing its February 28, 2014 ruling. D.E. No. 22.

On April 4, 2014, the Court issued a Civil Case Scheduling Order that, *inter alia,* set the trial date for September 14, 2015. D.E. No. 23. Thereafter, the Parties entered into, and the Court approved, numerous stipulations staying the majority of the dates set out in the Civil Case Scheduling Order to allow the Parties time to conduct extensive discovery and explore resolution of the case.

On January 9, 2015, Plaintiffs filed the Second Amended Complaint. Defendants filed their Answer to the Second Amended Complaint on January 23, 2015. D.E. No. 30.

Between April 4, 2014, and September 6, 2016, the Parties engaged in discovery on both liability and damages to prepare the case for trial and to explore settlement. As part of these efforts, Plaintiffs' counsel developed methodologies for calculating the potential damages of the putative Class Members. Declaration of Matthew Z. Crotty ("Crotty Decl.") ¶¶ 12-16. After Plaintiffs' counsel obtained data, documents, and other voluminous information from Defendants related to each putative Class Member's potential damages, Plaintiffs engaged an expert economist to calculate the potential damages of Class Members pursuant to the methodologies

that they had developed for estimating such damages. *Id*. ¶ 16. Defendants engaged their own economist to calculate the potential damages of the Class Members. *Id.*

Due to substantial gaps in the information regarding members of the Class, the Parties and their counsel determined that they could not identify all of the putative Class Members through Defendants' personnel records. Accordingly, the Parties agreed to provide notice to the putative Class Members so that any unidentified putative Class Members could identify themselves and so that all putative Class Members could provide relevant personnel information that the Parties did not possess. On September 18, 2015, at the request of the Parties, the Court entered an order authorizing the Parties to transmit notices to putative Class Members and approving the appointment of Plaintiffs' Counsel as interim class counsel for the putative Class.

From data produced by Defendants and putative Class Members' responses to the court-authorized notice and questionnaires, the Parties have identified 109 putative Class Members who were never hired by the WSP ("Applicant Class Members") and 769 putative Class Members who were hired by the WSP ("Employee Class Members"). Crotty Decl. ¶ 15; Agmt. § IV(3).

After the Parties' respective experts calculated the potential damages of the putative Class Members, the Parties conducted a lengthy mediation before attorneys William F. Etter and James McDevitt. Crotty Decl. ¶¶ 18-19. The mediation occurred in Spokane, Washington on September 7, 2016, but the Parties did not reach an agreement that day. *Id.* ¶ 19. Shortly after the mediation, the Parties reached an oral agreement in principle, and over the next several months they negotiated and drafted a written Settlement Agreement in Principle that was executed on December 21, 2016. Thereafter, the Parties negotiated and executed a final Settlement Agreement.

TERMS OF THE SETTLEMENT AGREEMENT

A. Benefits to Class Members

The Settlement Agreement provides relief to two subsets of Class Members: (a) individuals who applied for, but were never offered, employment with the WSP as commissioned employees, and were denied the Veterans' Preference in the WSP hiring process ("Applicant Class Members") and (b) individuals who were employed by the WSP as commissioned employees, and were denied the Veterans' Preference in the WSP hiring process or the promotions process ("Employee Class Members"). Agmt. § IV(1)-(5).

The Settlement Agreement provides both monetary and non-monetary relief. With respect to the monetary relief, (a) the State of Washington will pay $13 million to resolve all Class Members' claims for damages, including back wages arising out of Defendants' failure to apply the Veterans' Preference in the hiring and promotions process, into a Settlement Fund that will be distributed to Class Members pursuant to a Court-approved Plan of Allocation; and (b) in addition to and separate from the $13 million, Defendants will contribute, or cause to be contributed, money to the Washington State Department of Retirement Services ("DRS") to make up for lost retirement contributions of Class Members that were caused by Defendants' failure to apply the Veterans' Preference in the hiring or promotions process. Agmt. § VI(1)-(2). Plaintiffs' expert estimates that for the approximately 131 Employee Class Members for whom Defendants have agreed to revise their hiring or promotion dates and make additional pension contributions, the present value of the future pension benefits they will receive under the Settlement is $1.9 million. Declaration of Erick West Decl. ¶¶ 3-5.

Additionally, Defendants have agreed to pay for the cost of Notice to the Class and have agreed to pay for a portion of the costs of the Special Master to adjudicate challenges related to

adjustments to the correction of hiring or promotion dates. Agmt. §§ V(5), IX(3)(b). Thus, the Settlement is worth nearly $15 million. *Id.* §§ V(5), VI(1)-(2), IX(3)(b); West Decl. ¶¶ 3-5.

The Settlement Agreement allows Plaintiffs' counsel to seek an award of attorneys' fees and reimbursement of expenses in an amount to be determined by the Court, including certain costs of administering the Settlement, out of the $13 million Settlement Fund. Agmt. § XI(1). The Settlement Agreement also allows Plaintiffs to seek a service award for the work that each has performed as a Class Representative on behalf of the Class in an amount to be determined by the Court. *Id.* § XI(2). Once those amounts are paid out of the $13 million Settlement Fund, the balance of the Settlement Fund will be distributed to the Class Members pursuant to a Plan of Allocation that is described below. Based on the overall amount of funds available for distribution to Class Members and the Plan of Allocation, Class Counsel estimate that all Class Members who have claims that are not subject to a serious statute of limitations defense will receive payments that represent at least 100% of their potential damages, and that Class Members whose claims are subject to serious statute of limitations defenses will receive at least 50% of their potential damages. *See* Crotty Decl. ¶ 21; Plan of Allocation §§ II(A)(1)-(2), III, Ex. A to Agmt. The claims of Class Members that accrued prior to the October 1994 enactment of USERRA, which are the least likely to be considered timely, would likely receive 25% of their potential damages. *See* Crotty Decl. ¶ 21; Plan of Allocation § II(A)(1)-(2), III.

With respect to the non-monetary relief, the WSP has agreed to correct hiring or promotion dates for at least 135 of the 769 Employee Class members (*i.e.*, to modify the date that the WSP employee was hired or promoted to an earlier date). By backdating hiring or promotion dates, Employee Class Members will receive increased retirement compensation and promotional

opportunities in the future. These future benefits are in addition to, and are not included in, the estimated $15 million that Defendants will pay to settle this class action.

Furthermore, as a result of this lawsuit, the WSP has abandoned its decades-old practice of denying the Veterans' Preference. Over the past several years the WSP has followed the Veterans' Preference in the hiring and promotion process, and will continue to follow Washington law in the future. Crotty Decl. ¶ 25.

B. Settlement Administration and Proposed Distribution

Under the Settlement, notice will be provided to the Class Members, and Class Members will have an opportunity to object to the Settlement or to opt out of the Class and the Settlement. Agmt. §§ V, IX(1). To obtain monetary relief, Class Members who have already been identified will not be required to respond to the Notice. Instead, so long as they do not opt out of the Settlement, they will receive their shares of the Settlement pursuant to the terms of the Plan of Allocation recommended by Class Counsel and approved by the Court. *Id.* § VIII(4)-(6), X(1); Plan of Allocation §§ I, II, III. However, Class Members who have not yet been identified will have an opportunity to identify themselves as members of the Class and, if they demonstrate membership in the Class they will have the same rights to receive payments as Class Members who have already been identified. *Id.* §§ VIII(6), X(1), (3).

To ensure the accuracy of WSP's personnel information that is relevant to the issues in this case, the parties have agreed to give putative Class Members the opportunity to challenge two aspects of the relief proposed under the Settlement Agreement.

First, each putative Employee Class Member will receive a personalized worksheet containing the information that was used to calculate the potential damages of his or her claims. *Id.* § X(2). Each Employee Class Member may submit a written challenge to the personnel data

that was used to calculate his or her potential damages. *Id.* An experienced Settlement Administrator will review the submissions from any Class Members who challenge Defendants' personnel data, and will consider any information provided by Defendants. *Id.* After the Settlement Administrator responds to any challenge and allows Class Members an opportunity to provide any missing information, the Settlement Administrator will determine whether the person provided personnel data that is more reliable or accurate than the data Defendants provided, and whether to use the original or revised data to calculate the Class Member's potential damages. *Id.* § X(3). After the Settlement Administrator resolves all of the challenges by Class Members concerning Defendants' personnel data and membership in the Class, the Net Settlement Fund (*i.e.*, the Settlement Fund after attorneys' fees, costs, service awards, and various Settlement administration costs are deducted) will be distributed to the Class Members based on the Plan of Allocation approved by the Court. *Id.*

Second, Employee Class Members – for whom Defendants dispute whether their hiring or promotion dates should be adjusted – will have an opportunity challenge whether his or her hire date or promotion date should be adjusted to an earlier date than the Defendants have already agreed to under the Settlement Agreement. *Id.* § X(4). Under this process, Employee Class Members may bring their backdating challenge to an independent Special Master, who will decide whether the requested adjusted is warranted. *Id.* If the Special Master rules in favor of the Employee Class Member's challenge, the WSP will adjust the Class Member's hire date or promotion date consistent with that ruling. *Id.* § X(4)(g). The Special Master's determination will be subject to challenges before this Court on the same grounds as a determination of an arbitrator under Washington State law. *Id.*

ARGUMENT

A. The Settlement Should Be Granted Preliminary Approval

1. Settlement of Class Action Lawsuits is Strongly Favored

Washington and federal courts strongly favor and encourage class action settlements as a matter of express public policy. *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 190 (2001) ("voluntary conciliation and settlement are the preferred means of dispute resolution") (citations omitted); *see also Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) ("strong judicial policy . . . favors settlements, particularly where complex class action litigation is concerned"). This strong policy favoring settlement is even more pronounced in the context of complex employment discrimination class actions like the instant class action that challenges decades of discrimination against members of the Armed Forces. *See Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) ("[I]t must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation, and even more so where the subject matter is employment discrimination.") (citations omitted).

The Washington Supreme Court has made clear that when a court evaluates the fairness of a class action settlement, the court should not "*reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute,* for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Pickett*, 145 Wn. 2d at 190 (emphasis in original). Any such review of the merits of a class case at the settlement stage is "limited to assessing rough probabilities of success as they existed at the time of settlement." *Id.* This rule applies, because any other approach would de-incentivize the settlement of class actions. *Id.* at 190-91. Accordingly, approving the instant

Settlement Agreement will advance the express public policy of Washington, preserve judicial and public resources, and provide relief to more than 800 veterans who have been denied justice for decades.

2. **The Legal Standard for Preliminary Approval of a Class Settlement**

Civil Rule 23(e) governs the approval of class action settlements, *Pickett*, 145 Wn. 2d at 187,[2] and provides as follows:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

CR 23(e). In *Pickett*, the Washington Supreme Court affirmed the final approval of a class action settlement, and explained that while "CR 23 is silent in guiding trial courts in their review of class settlements, it is universally stated that a proposed class settlement may be approved by the trial court if it is determined to be 'fair, adequate, and reasonable.'" *Pickett*, 145 Wn. 2d at 188 (citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)). The fair, adequate, and reasonable standard is the same standard provided by Rule 23(e) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 23(e).

The Washington Supreme Court has outlined eight factors that should guide a court's assessment at the final approval stage of whether a class settlement is "fair, adequate, and reasonable":

> [1] the likelihood of success by plaintiffs; [2] the amount of discovery or evidence; [3] the settlement terms and conditions; [4] recommendation and experience of counsel; [5] future expense and likely duration of litigation; [6] recommendation

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[2] Since Civil Rule 23 is identical to its federal counterpart, Rule 23 of the Federal Rules of Civil Procedure, Washington courts have held that "federal cases interpreting the analogous federal provision are highly persuasive." *Pickett*, 145 Wn. 2d at 188 (citing *Brown v. Brown*, 6 Wn. App. 249, 252 (1971)).

> of neutral parties, if any; [7] number of objectors and nature of objections; and [8] the presence of good faith and the absence of collusion.

Pickett, 145 Wn.2d at 188-89 (citing 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 11.43 "General Criteria for Settlement Approval" (3d ed. 1992)).

The Washington Supreme Court has not addressed the standard that a trial court should apply at the preliminary approval stage. Nor is there any known Washington Court of Appeals published opinion that directly addresses the preliminary approval standard. Unpublished Washington appellate court opinions, however, suggest that the preliminary approval standard is—like the standard that applies in federal court—a more limited inquiry than the eight-part test for final approval set forth in *Pickett*. *See Dolan v. King Cty.*, 184 Wn. App. 1038 (2014) (stating "preliminary approval is a preliminary ruling which approves the form of the class notice and the method of providing notice to the settlement class, sets deadlines for the filing of objections, and sets the final settlement hearing date"); *see Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 665 (E.D. Cal. 2008) ("Given that some of these [final approval] factors cannot be fully assessed until the court conducts its fairness hearing, a full fairness analysis is unnecessary at this stage [and t]he court, therefore, will simply conduct a cursory review of the terms of the parties' settlement for the purpose of resolving any glaring deficiencies before ordering the parties to send the proposal to class members.") (internal quotations omitted).

Engaging in a more basic, limited inquiry at the preliminary approval stage under Civil Rule 23(e) would be consistent with the preliminary approval standard federal courts routinely apply under Rule 23(e). *See Alberto*, 252 F.R.D. at 665. Indeed, as the Washington Supreme Court has instructed, because "CR 23 is identical to its federal counterpart, Fed. R. Civ. P. 23," "federal cases interpreting the analogous federal provision are highly persuasive." *Pickett*, 145 Wn. 2d at 188 (citation omitted).

At the preliminary approval stage, federal courts engage in "an 'initial evaluation' of the fairness of a proposed settlement." § 21.632 Preliminary Fairness Review, Manual for Complex Litigation § 21.632 (4th ed. 2015). The purpose of this initial evaluation is to determine whether to give notice of the proposed settlement to the class members and an opportunity to voice approval or disapproval of the settlement. *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003); Manual for Complex Litigation § 21.631 (4th ed. 2015). This initial evaluation is not a dispositive assessment of the fairness of the proposed settlement, but rather determines whether it falls within the "range of possible approval." *Collins v. Cargill Meat Sols. Corp.*, 274 F.R.D. 294, 302 (E.D. Cal. 2011) (citation and internal quotations omitted).

Federal courts grant preliminary approval when the following four factors are satisfied:

> [i]f [1] the proposed settlements appears to be the product of serious, informed, non-collusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, and [4] falls within the range of possible approval.

Id. at 301-02 (citation and internal quotations omitted).

Because Washington appellate courts have not yet adopted a legal standard for preliminary approval, in this motion Plaintiffs will describe why they satisfy the more limited standard that federal courts follow at the preliminary stage and also will address any of the eight final approval factors set forth in *Pickett* that are relevant at this preliminary stage. For example, given that notice has not yet been sent to Class Members and there has been no opportunity for Class Members to lodge objections to the Settlement, it is not necessary to consider the number or nature of the objections. Nor are there any neutral recommendations of the Settlement to consider at this time. *See Pickett*, 145 Wn. 2d at 188–89.

In applying the *Pickett* factors, the importance of each factor turns on the facts and circumstances germane to the claims advanced, relief requested, and facts of each case. *Id.* at

189. Nonetheless, "[i]t is not the trial court's duty, nor place, to make sure that every party is content with the settlement." *Id*. As addressed in detail below, the Settlement Agreement in this case is fair, adequate, and reasonable.

3. Plaintiffs Satisfy the Standard for Preliminary Approval

The instant Settlement Agreement easily satisfies the four-part test that courts apply to determine whether to grant preliminary approval. *See Collins*, 274 F.R.D. at 301–02.

First, the Settlement is "the product of serious, informed, non-collusive negotiations." *Id.*, at 301. The Parties engaged in extensive discovery to inform themselves about the strengths and weaknesses of Plaintiffs' claims and Defendants' affirmative defenses, including the potential damages that Plaintiffs could claim in this action. Crotty Decl. ¶¶ 12-16. Before commencing their negotiations, the Parties had their experts analyze decades of personnel information based on the potential damages methodologies they had developed. *Id.* ¶¶ 16, 24. All told, the information sought related to over 75 discrete categories of data that, broadly described, related to decades of hiring, promotion, and retirement determinations germane to the Class Members. *Id* ¶ 12. The Parties engaged in more than two years of discovery, numerous meetings, and substantial coordination to acquire the information needed to identify the size of the Class and its potential damages and to resolve the case. *Id.* ¶¶ 12-16.

The settlement negotiations were intensive, lengthy, and negotiated at an arm's length. Discussion about the structure of a potential settlement began before the mediation. *Id.* ¶ 17. The mediation on September 7, 2016, involved two mediators with extensive legal experience: James McDevitt, the former United States Attorney for the Eastern District of Washington and a former U.S. Air Force General Officer, and Bill Etter, an experienced mediator and trial attorney. *Id.* ¶¶ 18-19. The mediation started at 9 am and finished after 10 pm. *Id.* ¶ 19. Even though

significant progress was made at the mediation, no agreement was reached and there were still obstacles to reaching an agreement. *Id*. An oral agreement in principle was not reached until September 22, 2016. *Id.* ¶ 20. The terms of the written agreement in principle were subject to significant further negotiation, and were not agreed upon until December 21, 2016. *Id*. Moreover, the Settlement was negotiated by experienced counsel, including senior attorneys from the Washington State Attorney General's Office and plaintiffs' attorneys who have extensive experience in employment class actions. *See infra* at 25.

Second, the Settlement has no obvious deficiencies. *See Collins*, 274 F.R.D. at 301–02. The Settlement Agreement is a 49-page, comprehensive agreement that resolves complex claims brought by nearly 900 law enforcement employees and applicants. In conjunction with the proposed Plan of Allocation, the Settlement Agreement identifies how approximately $13 million of payments will be distributed to Class Members who were harmed by the WSP's failure to provide them with the Veterans' Preference in hiring and promotions, and how additional pension contributions with an estimated value of up to $1.9 million will be made to eligible Class Members. Agmt. § VI(1); West Decl. ¶¶ 3-5. And it establishes a process to resolve issues concerning the correction of hiring and promotion dates. Agmt. § X(4).

Third, the Settlement does not provide any improper preferential treatment to the Class Representatives or certain segments of the Class. *Collins*, 274 F.R.D. at 301–02. As described below, the proposed Plan of Allocation sets forth how the Net Settlement Fund will be distributed to Class Members. That Plan of Allocation directly relies upon a potential damages methodology that Plaintiffs' counsel developed to estimate the amount of economic harm that Class Members experienced due to the denial of the Veterans' Preference in the hiring or promotion process. And while the Plan of Allocation provides certain categories of claims a higher proportional recovery

than other categories of claims, these distinctions are rational and largely based on the fact that certain categories of claims face serious affirmative defenses based on timeliness of the claims. *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1067 (C.D. Cal. 2010) ("differential treatment of class members may be appropriate where the settlement terms are rationally based on legitimate considerations") (internal quotations omitted); *see infra* at 27-29.

Fourth, the Settlement falls well within the range of possible approval. *See Collins*, 274 F.R.D. at 301–02. As described in detail with respect to the eight *Picket* factors, the recovery of $13 million of monetary relief, plus the potential for up to another $1.9 million in retirement contributions, plus important programmatic relief, is outstanding, particularly in light of the significant risks that the Plaintiffs face in this action.

4. The Settlement is Fair, Reasonable, and Adequate

a. The Likelihood of Success by Plaintiffs

"The likelihood of success by Plaintiffs must be evaluated as it existed at the time of settlement" and consider the legal obstacles faced by the class. *Pickett*, 145 Wn. 2d at 192–93 (citing *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 890 (7th Cir. 1985)).

i. The Merits of Plaintiffs' Claims and Certification

Although this Court largely rejected Defendants' arguments on the merits of Plaintiffs' USERRA and Section 1983 claims at the motion to dismiss stage, Plaintiffs nevertheless faced risk in proving these claims and obtaining class certification with respect to those claims. Moreover, it is possible that this Court's legal conclusion with respect to the merits of Plaintiffs' claims could be reversed on appeal.

ii. Defendants' Affirmative Defenses

Defendants asserted a number of affirmative defenses that, if accepted, could bar some or all of the Class Members' claims in this litigation. In particular, in their Answer to Plaintiffs' Second Amended Complaint, Defendants asserted a range of affirmative defenses, including (1) jurisdictional/sovereign immunity, (2) statute of limitations, and (3) laches, and Defendants would have pressed those defenses as the case progressed. Answer to Second Am. Compl, p. 25, ¶¶ 1, 2, 6. Success on any of those defenses, all of which remained viable at the time of settlement, could have partially or completely eliminated the claims of some or all of the Class Members.

First, with respect to Defendants' jurisdictional/sovereign immunity defense, the Washington State Supreme Court has not addressed whether the sovereign immunity doctrine bars plaintiffs from bringing a USERRA action for damages against a state government. Other state supreme courts, however, have issued conflicting rulings about whether state employers can claim sovereign immunity in USERRA actions. *Compare Clark v. Virginia Dep't of State Police*, 292 Va. 725 (2016) ("In sum, the trial court correctly held that sovereign immunity barred [plaintiff's] USERRA claim against the VSP, an arm of the Commonwealth[.]"), *with Ramirez v. State, CYFD*, 372 P.3d 497, 501 (N.M. 2016) ("In this case, we conclude that the Legislature consented to private USERRA actions for damages."). As such, there was a risk regarding whether Plaintiffs' USERRA claims would survive a pre-trial summary judgment motion or a motion for judgment on the pleadings, or post-verdict appeal on the issue of sovereign immunity. If Defendants were to successfully assert a sovereign immunity defense, it would eliminate all Class Members' claims for damages under USERRA. Although Plaintiffs challenged the same conduct of denying them the Veterans' Preference as a violation of the Due Process Clause, Plaintiffs would likely be limited to collecting damages for a two-year period of time under 42

U.S.C. § 1983 (*i.e.*, from 2011 to 2013). In contrast, under the Settlement Agreement, Class Members who were denied the Veterans' Preference for more than two decades will be eligible to receive monetary relief.

Second, with respect to Defendants' statute of limitations defense to Plaintiffs' USERRA claims, this Court has held that—consistent with 38 U.S.C. § 4327(b)—no statute of limitations period applies to USERRA claims. Order Denying Defendants' Motion to Dismiss, p. 3, ¶ 8. But other courts have held that before Congress amended USERRA on October 10, 2008, to clarify that USERRA contains no statute of limitations period, a four-year statute of limitations period applied to USERRA claims pursuant to 28 U.S.C. § 1658(a)'s federal catch-all statute of limitations period. *See e.g.*, *Hogan v. United Parcel Serv.*, 648 F. Supp. 2d 1128, 1137 (W.D. Mo. 2009) (collecting cases). And a number of courts have refused to apply the 2008 amendment retroactively, such that most claims that accrued on or before October 10, 2004, would be considered untimely. *See Cabrera v. Perceptive Software, LLC*, 147 F. Supp. 3d 1247, 1250 (D. Kan. 2015) (explaining that while the 2008 amendment "was enacted to eliminate any limitations period for USERRA claims," "numerous district courts and the Seventh Circuit have determined that the [2008 amendment] does not apply retroactively to revive those USERRA claims that expired before its passage"). Under the approach taken by most federal courts to analyze the 2008 amendment that created 38 U.S.C. § 4327(b), "USERRA claims that accrued and expired before October 10, 2008," using the four-year limitations period in 28 U.S.C. § 1658, would be untimely, while claims that accrued before October 10, 2008, and remained timely on October 10, 2008, including by virtue of tolling under the Servicemembers Civil Relief Act, are timely. *Id*. at 1250-52.

Plaintiffs are unaware of any Washington appellate court to address this USERRA statute of limitations issue. Given the lack of controlling authority on this legal question, the Class risked an appellate ruling that could have eliminated all of the USERRA claims—and damages under those claims—that relate to WSP personnel decisions that were made prior to October 10, 2004. In approving other class action settlements under USERRA, other courts have recognized that uncertainty over USERRA's statute of limitations contributes to the reasonableness of the recovery obtained for the Class. *See, e.g.*, *Tuten v. United Airlines, Inc.*, 41 F. Supp. 3d 1003, 1007 (D. Colo. 2014) (approving USERRA class action settlement and recognizing that "[s]erious questions of law and fact exist[ed]" with regard to the issue of statute of limitations and whether any claims prior to 2008 could be brought under USERRA).

Third, some courts have held that a laches defense applies to USERRA claims. *Miller v. City of Indianapolis*, 281 F.3d 648, 653 (7th Cir. 2002). Although Plaintiffs believe that the 2008 amendment to USERRA eliminated any laches defense by making a categorical statement that "there shall be no limit on the period for filing the complaint or claim," 38 U.S.C. § 4327(b), there is no settled law on whether employers may still assert a laches defense after the 2008 amendment. Either before or after trial, Plaintiffs would have faced the risk of Defendants asserting a laches defense, given that many of the Class Members' claims accrued more than twenty years ago and given that the WSP had major gaps in the personnel information it retained over this lengthy period of time.

Approval of the settlement is appropriate because substantial risk exists as to whether a vast majority of the Class Members' claims would survive a post-verdict motion or appeal based on jurisdictional, statute of limitations, and laches defenses.

iii. <u>Other Factors Relevant to the Likelihood of Success</u>

Additional factors are relevant to Plaintiffs' likelihood of success in this action. For example, there were serious disputes over the calculation of potential damages and it could prove difficult to prove the claims of Applicant Class Members (*i.e.*, individuals who were never hired by the WSP).

First, the Parties had widely different theories as to whether certain Class Members had been harmed, and, if so, how the Class Members' potential losses should be calculated and what the aggregate potential damages of the Class Members could be. Before mediation, Plaintiffs retained Erick West, CPA, a well-regarded economic damages expert with extensive experience in calculating economic losses in employment cases. Crotty Decl. ¶ 16. Defendants retained Sean Black, CPA, a well-respected expert with extensive experience in calculating losses in employment discrimination cases. *Id*. Based on their rival damages methodologies, the Parties' experts calculated varying levels of aggregate potential damages for the Class Members. Before mediation, Plaintiffs' expert concluded that the Class Members collectively could have $29 million in potential damages, while Defendants assessed the Class Members' aggregate potential damages at $1.541 million. *Id.* If the case did not settle at this time, a jury would likely determine which damages methodology and expert calculations should be accepted, placing the Class Members at a significant risk of receiving far less than they will obtain under the Settlement.

Plaintiffs also faced significant evidentiary challenges regarding the liability and damages of individuals who were never hired by the WSP. Foremost among these challenges is that WSP does not have personnel records on most of these applicants. For example, the State's record retention requirements only apply to the most recent period, and WSP claimed in discovery that it had no reason to maintain complete application materials for unsuccessful applicants. This lack of records would only compound the difficulty of proving liability and damages for any Applicant

Class Members, who, in order to prevail in this case, would need to be able to show that they would have been hired by the WSP had they received the Veterans' Preference.

Significant risk existed during the timeframe in which the settlement was negotiated and the likelihood of Plaintiffs wholly prevailing on the above issues was uncertain.

b. Significant Discovery Occurred in This Case

The parties engaged in significant discovery before attempting to settle the case, which supports the reasonableness of the Settlement. As part of their discovery efforts, Plaintiffs requested data from a 30-year period, including over 70 separate fields of data, and documents on the WSP's hiring and promotion processes that relates to thousands of employees and applicants. Crotty Decl. ¶ 12. Following the receipt of that data and documents, Plaintiffs' counsel conducted a detailed analysis regarding liability and the potential damages that the Class Members could claim. *Id.* ¶¶ 13-16. Once the Defendants represented that all responsive documents had been produced, Plaintiffs' counsel determined that additional discovery was warranted to identify unknown putative Class Members, given that the Defendants had represented that they had not collected or retained a large amount of personnel information relevant to assessing liability and damages. *See* Joint Motion and Order at 5, 6, 12 (Sep. 18, 2015). Thereafter, the Parties engaged in a 60-day notice campaign that involved direct mailings to previously identified putative Class Members to obtain missing information germane to their potential damages, and a public media advertising campaign via Facebook, Yahoo, and fourteen local or regional Washington state newspapers with the goal of identifying unknown putative Class Members. *Id.* at 11. Following the completion of the "notice campaign," Plaintiffs had their expert witness calculate the Class's potential damages. Crotty Decl. ¶ 16.

Overall, it took nearly three years of consistent work for the parties to request, receive, and analyze the data and documents upon which an informed settlement could be based. Thus, there can be no doubt that the parties conducted adequate discovery to inform their decision to settle the case. *See Pickett*, 145 Wn. 2d at 199 (holding that two years of pre-settlement discovery supported a finding that a settlement was fair, adequate, and reasonable).

c. <u>The Settlement Terms and Conditions Are Highly Favorable</u>

The terms and conditions of the Settlement are highly favorable to the Class Members, particularly in light of the numerous risks that the Class Members faced in this litigation.

Class action lawsuits are inherently risky and that risk factor should be considered in evaluating the settlement. As a federal district court recently explained:

> Class action litigation is risky by its very nature. In a Federal Judicial Center 1996 report, titled "Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules" ("FJC Report"), the Report authors studied the outcomes of four federal districts and concluded that 31.7% or less of the filed class cases resulted in successful class outcomes for Plaintiffs. This does not account for the degree of success (i.e., some cases could have resulted in minimal or partial success, and they would still be in the successful claim category).

Aichele v. City of Los Angeles, No. 12 Civ. 10863, 2015 WL 5286028, at *5 (C.D. Cal. Sept. 9, 2015).

The Settlement's terms and conditions strongly favor the Class for a variety of reasons. First, the Settlement provides $13 million of consideration to compensate nearly 900 Class Members for back wages and non-retirement benefits (after the payment of attorneys' fees and costs to Class Counsel, service awards for the Class Representatives, and certain administrative costs of implementing the Settlement). Second, the Settlement provides Employee Class Members whom Defendants agree are entitled to adjusted hiring or promotion dates or whom the Special Master determines are entitled to adjusted hiring or promotion dates with additional

pension contributions through payments to the DRS. Agmt. § VI(2). And Plaintiffs' expert estimates that the present value of those future pension benefits is approximately $1.9 million for the 131 Employee Class Members for whom Defendants have agreed to adjust hiring or promotion dates. West Decl. ¶¶ 3-5. Third, the Settlement is procedurally fair to Class Members, who will be allowed to challenge the WSP's personnel data that was used to calculate their payments under the Settlement and to contest the calculation of their backdated hiring or promotion dates. Agmt. § X(1)-(5).

Given the significant risks associated with the case, a settlement with a value between $13 million and $15 million is an excellent result. Indeed, Plaintiffs' counsel estimate that all Class Members who have claims that are not subject to a serious statute of limitations defense will receive payments that represent at least 100% of their potential damages, and that Class Members whose claims are subject to serious a statute of limitations defense will receive 25% to 50% of their potential damages. Crotty Decl. ¶ 21.

Such a high level of recovery is excellent, particularly given that courts routinely approve Settlements in which Class Members recover a small fraction of their potential damages. As one federal court recently explained in approving such settlement:

> Considering the total recovery of the Settlement and the risks of continued litigation, the Court finds this [7.3% to 13.3%] rate of recovery to be fair, adequate, and reasonable. *See, e.g.*, *Linney v. Cellular Ala. P'ship,* 151 F.3d 1234, 1242 (9th Cir. 1998) (noting that "the very essence of settlement is . . . a yielding of absolutes and an abandoning of highest hopes" (citation and quotation marks omitted)); *In re Checking Account Overdraft Litig.,* 830 F. Supp. 2d 1330, 1346 (S.D. Fla. 2011) (finding that "standing alone, nine percent or higher constitutes a fair settlement even absent the risks associated with prosecuting these claims"); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, securities class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses"); *Newbridge Networks Sec. Litig.*, 1998 WL 765724, at *2 (D.D.C. Oct. 23, 1998) (noting that "an agreement that secures roughly six to twelve percent of a *potential* trial recovery . . . seems to be within the targeted range of reasonableness") (emphasis in original).

Arnett v. Bank of Am., N.A., 3:11-CV-1372-SI, 2014 WL 4672458, at *7 (D. Or. Sept. 18, 2014). The Washington State Supreme Court has endorsed this view, stating that "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved" and "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Pickett*, 145 Wn. 2d at 199 (citations omitted).

Simply put, the Settlement is an outstanding result, given the claims and the potential defenses, the absence of controlling authority on a range of dispositive or key issues in the case, and the serious affirmative defenses that the Defendants have asserted. Given the uncertainties of a jury trial, post-trial motion practice, or appellate rulings, Plaintiffs' counsel believe that it is unlikely that a better aggregate result could have been obtained for the Class at trial and upheld on appeal.

d. <u>Plaintiffs' Experienced Counsel Recommend this Settlement</u>

"When experienced and skilled class counsel support a settlement, their views are given great weight." *Pickett*, 145 Wn. 2d at 200 (citing *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983)). Plaintiffs' counsel have extensive class action experience in employment litigation, including in USERRA cases. *See* Declaration of Thomas G. Jarrard ¶¶ 3-4, 8-11; Declaration of R. Joseph Barton ¶¶ 1-8; Declaration of Peter Romer-Friedman ¶¶ 5-6, 11-13; Declaration of Matthew Z. Crotty ¶¶ 3-10. In fact, in approving significant USERRA class action settlements, two federal courts have recognized the expertise of the same Plaintiffs' counsel. *See e.g.*, *Tuten*, 41 F. Supp. 3d at 1008 (stating that "Class Counsel has specialized knowledge and experience in USERRA, which facilitated and promoted the settlement of this action" in

approving a $6.15 million settlement of USERRA claims); *Allman v. American Airlines, Inc. Pilot Retirement Benefit Program Variable Income Plan*, No. 1:14-cv-10138-IT, at 1 (D. Mass. Feb. 15, 2017), attached as Ex. A (recognizing that these Plaintiffs' counsel have "significant experience litigating civil rights and employee benefits class actions" in approving a USERRA settlement worth approximately $6 million). The same team of attorneys has now obtained three of the largest reported class action settlements in the history of USERRA, including *United Airlines*, *American Airlines*, and the instant action.

Each member of Plaintiffs' counsel strongly recommends approval of this Settlement Agreement because of (a) the significant unresolved legal issues that pose a risk to the Class Members, (b) the uncertainties that accompany any jury trial, (c) the lengthy delay any post-trial appeal would cause, and (d) the fact that the Settlement provides all eligible Class Members a significant financial recovery.

e. The Future Expense and Likely Duration of the Litigation Would Be Significant

Courts consistently hold that "[t]he track record for large class action employment discrimination cases demonstrates that many years may be consumed by trial(s) and appeal(s) before the dust finally settles." *Officers for Justice*, 688 F.2d at 629 (citation omitted). This case is no exception.

Plaintiffs commenced this action on January 3, 2014. The Settlement Agreement contemplates that the Class Members will receive payments under the Settlement in the second half of 2017—at least three and a half years after the case was filed. Had the case not settled at this time, at least 20 depositions would have likely occurred, numerous expert reports would have been exchanged and analyzed, the Parties would have engaged in substantial motion practice

(including summary judgment and other pre-trial motions), and a three- to four-week trial would have occurred. In all likelihood, the case would not have been tried until late 2018. An appeal of any judgment would, in turn, delay any recovery for the Class until at least 2019 or 2020, if not longer. As of April 2017, Plaintiffs' counsel have expended approximately $150,000 in litigation expenses, and those expenses would have increased substantially if a Settlement had not been reached. Barton Decl. ¶ 10.

Accordingly, taking the case to and through trial would have resulted in additional fees and costs, especially since a major component of the trial would have focused on expert testimony on the potential damages of Class Members.

f. The Parties Have Resolved This Case in Good Faith Without Collusion

The absence of any allegation of bad faith or collusion in the settlement process further supports the approval of the Settlement. *Pickett*, 145 Wn. 2d at 201. Here, the instant Settlement was reached following the denial of Defendants' motion to dismiss, three years of discovery, notice to putative Class Members to obtain information relevant to settlement, arms-length negotiations that spanned numerous months, and a mediation presided over by two well-respected attorneys. No collusion is present and this Settlement has been reached in good faith. Crotty Decl. ¶¶ 12-22.

B. The Plan of Allocation Should be Preliminarily Approved

The approval of a plan for allocating settlement proceeds among class members is governed by the same standard that courts apply to approval of a settlement—the plan of allocation must be fair, reasonable, and adequate. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1045 (N.D. Cal. 2008) (citations omitted). In applying this standard, it is well established that it "is reasonable to allocate the settlement funds to class members based on the extent of their

injuries or the strength of their claims on the merits." *Id.* (citations omitted); *accord In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012) (stating that "[a] reasonable plan [of allocation] may consider the relative strength and values of different categories of claims," and citing *In re Lloyd's Am. Trust Fund Litig*., No. 96 Civ. 1262, 2002 WL 31663577, at *18 (S.D.N.Y. Nov. 26, 2002)).

Here, the proposed Plan of Allocation is fair, reasonable, and adequate, and compensates the Class Members various amounts based on the strength of their claims (including credible affirmative defenses that Defendants have asserted) and the value of each Class Member's potential damages, as calculated by Plaintiffs' damages expert. *See* Plan of Allocation § I, II, III.

The proposed Plan of Allocation allocates recovery to the Employee Class Members based on the following Groups.

Group 1 is Employee Class Members whose claims arose between October 10, 2004, and January 1, 2013—claims that would not face a credible statute of limitations defense. Under the proposed Plan of Allocation, Plaintiffs' counsel estimate that Class Members in Group 1 will recover 100% of the potential damages that Plaintiffs' expert has calculated. Crotty Decl. ¶ 21; Plan of Allocation § II(A)(1)-(2), III.

Group 2 is Employee Class Members whose claims arose between October 12, 1994 (the date that USERRA became effective), and October 9, 2004 (four years and a day before the 2008 amendment eliminating any statute of limitations under USERRA)—claims that many federal courts have concluded to be untimely based on a four-year statute of limitations period under 28 U.S.C. § 1658(a). *See Cabrera*, 147 F. Supp. 3d at 1250. Under the proposed Plan of Allocation, Plaintiffs' counsel estimate that Class Members in Group 2 will receive at least 50% of potential damages that Plaintiffs' expert has calculated. The discount for Group 2 claims is due to the

unresolved issue of whether those claims would be held untimely based on a statute of limitations or laches defense. Crotty Decl. ¶ 21; Plan of Allocation § II(A)(1)-(2), III.

Group 3 is Employee Class Members whose claims arose *prior to* October 12, 1994, the effective date of USERRA—claims that would likely face a credible timeliness defense and also an assertion that such claims are not cognizable under USERRA. Under the proposed Plan of Allocation, Plaintiffs' counsel estimate that Class Members in Group 3 will receive 25% of their potential damages. Crotty Decl. ¶ 21; Plan of Allocation § II(A)(1)-(2), III. The recovery for Group 3 claims is notable, given that USERRA did not exist at the time that the claims accrued.

Under the Plan of Allocation, each Applicant Class Member will receive a payment of $5,000. Plan of Allocation § II(B). As part of the above-referenced notice campaign, the Parties received survey responses from 38 putative Applicant Class Members. The surveys had requested, *inter alia*, that WSP applicants who were not hired provide information on their lost wages. Upon receiving the survey responses, Plaintiffs' expert, Mr. West, calculated the potential damages for these 38 Applicant Class Members and concluded that the average potential damages in back wages and lost benefits for those 38 individuals is $4,816. Crotty Decl. ¶ 16. Accordingly, the $5,000 that will be provided to each Applicant Class Member under the proposed Plan of Allocation is slightly higher than the average potential damages of the 38 Applicant Class Members whose potential damages were determined.

C. <u>The Settlement Notice and Notice Plan Should be Approved</u>

Once the parties obtain preliminary approval of a settlement, Washington Civil Rule 23(e) requires that the Court give notice to the Class Members. CR 23(e). In addition, Washington Civil Rule 23(c)(2) describes the notice that must be provided to Class Members when a class is certified under Rule 23(b)(3):

> In any class action maintained under subsection (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

CR 23(c)(2).

Civil Rule 23(c)(2)'s notice requirement relies upon the same principles that the U.S. Supreme Court has recognized—that to protect the rights of absent class members, the Court must provide the "best practicable" notice to class members of a potential class action settlement. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174–75 (1974); *cf. Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Federal Rule 23 requires that "[i]ndividual notice . . . be sent to all class members whose names and addresses may be ascertained through reasonable effort." *Eisen*, 417 U.S. at 173. And "[w]hen reasonable effort would not suffice to identify the class members, notice by publication, imperfect though it is, may be substituted." *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013) (citing *Juris v. Inamed Corp.*, 685 F.3d 1294, 1321 (11th Cir. 2012); Federal Judicial Center, Manual for Complex Litigation § 21.311, pp. 287–88 (4th ed. 2004)); *cf. In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1127 (9th Cir. 1977) ("Neither rule 23 nor due process requires that a settlement fund be depleted in efforts to perfectly address mailed claim notices. It is fair and reasonable to proceed, as the district court did here, by mailing claim notices to last known addresses of potential class members and by publication.").

The Notice Plan and the content of the proposed Notice satisfy Washington Civil Rule 23 and all of the requirements of Due Process.

First, consistent with Civil Rule 23(c)(2), the Notice describes the scope of the Class, the terms of the Settlement, how Class Members can exclude themselves from the Class by a specific

1 date, that the judgment will include all Class Members who do not opt out, that any Class Member
2 who does not opt out can appear through their counsel, and how Class Members can object to or
3 comment on the Settlement, *inter alia*, critical information. *See* Long Form Notice, Ex. B to
4 Agmt; Short Form Notice, Ex. C to Agmt; Hiring/Promotion Date Notice Addenda, Ex. D *see In*
5 *re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th Cir. 2015) (holding notice
6 providing "simple and straightforward information about the class action" complied with Rule 23
7 and Due Process).

8 Second, the Notice Plan satisfies Rule 23 and Due Process. To reach the 878 previously
9 identified Class Members, notice will be e-mailed directly to the last known e-mail addresses of
10 these individuals, and if Defendants do not have e-mail addresses for such individuals or the e-
11 mails are returned as undeliverable, the Notice will be mailed directly to their last known physical
12 addresses. Agmt. § V(3). Such a method of delivering notice directly to class members is proper
13 under Rule 23. *See, e.g.*, *In re Lithium Ion Batteries Antitrust Litig*., No. 4:13-md-02420-YGR
14 (DMR), 2017 WL 1086331, at *2-4 (N.D. Cal. Mar. 20, 2017) (holding notice was proper where
15 notice was e-mailed to 15.8 million class members, along with online publication notice); *In re*
16 *Netflix Privacy Litig.*, 5:11-CV-00379, 2012 WL 2598819, at *4 (N.D. Cal. July 5, 2012)
17 (approving use of email to notify class members of a settlement); *Margulies v. Tri-Cty. Metro.*
18 *Transp. Dist. of Or.*, No. 3:13-CV-00475, 2013 WL 5593040, at *21 (D. Or. Oct. 10, 2013)
19 (approving notice to collective action members by email, finding that "email is an efficient and
20 nonintrusive method of communication, and collecting cases holding the same) (internal
21 quotations omitted).

22 Furthermore, publication notice will be used to provide Notice to Class Members who
23 have not yet been identified by the Parties. The Notice Administrator will establish a web site
24
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with substantial information about the action and the Settlement, including orders and pleadings from the case. Agmt. § V(4)(a); AB Data Notice Plan, attached as Ex. B. Paid online advertisements will be used to present potential Class Members with information about the Settlement, including more than 10 million digital impressions that will be displayed on Facebook or the Yahoo! Network, and more than 900,000 banner advertisements that will be displaced on PoliceOne.com and other web sites that are popular among current and retired law enforcement. *Id.* Although the advertisements will run nationally, there will be a geographic emphasis on reaching individuals in the State of Washington.

The proposed publication notice is appropriate. Despite the reasonable efforts of the Parties to identify all Class Members—including searching the WSP's personnel records and engaging in a prior notice campaign that requested Class Members to identify themselves—there may still be some Class Members who have not been identified. Thus, it is appropriate to use "notice by publication" to reach these unidentified Class Members. *Hughes*, 731 F.3d at 677. Furthermore, the proposed methods to provide publication notice to Class Members in this case—paid online ads on social media, banner ads on web sites, and establishing a web site on the settlement—are the same methods that courts have approved in prior class action cases. *See, e.g.*, *Warner v. Toyota Motor Sales, U.S.A., Inc.*, No. Civ. 15-2171, 2016 WL 8578913, at *14 (C.D. Cal. Dec. 2, 2016); *Spann v. J.C. Penney Corp.*, No. Civ. 12-0215, 2016 WL 5844606, at *3-5 (C.D. Cal. Sept. 30, 2016); *Woods v. Vector Mktg. Corp.*, No. Civ. 14-0264, 2015 WL 1198593, at *4-5 (N.D. Cal. Mar. 16, 2015).

D. The Notice Administrator, Settlement Administrator and Special Master Should be Appointed

Courts "often appoint a claims administrator or special master" to handle the administration of a class action settlement. Manual for Complex Litigation, § 21.661 (4th ed.

2004); *Beaulieu v. EQ Indus. Serv., Inc.*, No. 5:06 Civ. 400, 2009 WL 2208131, at *22 (E.D.N.C. July 22, 2009) (explaining same). To obtain such services, it is common for class counsel to obtain bids from various professional claims administration companies and to make a recommendation for the Court to appoint one of those companies. *See, e.g.*, *Nielson v. The Sports Auth.*, No. 11 Civ. 4724, 2013 WL 3957764, at *8 (N.D. Cal. July 29, 2013) (authorizing that process).

Under the terms of the Settlement, Defendants pay for the costs of Notice, including the costs of a Notice Administrator, who will be jointly recommended by the Parties and approved by the Court. Agmt. § IX.1. The Parties jointly recommend that the Court appoint A.B. Data as Notice Administrator, who will mail Notice to the previously identified Class Members and the provide publication notice to the unidentified Class Members and will generally handle communication with Class Members. *Id.* § IX.1. A.B. Data is a company that specializes in settlement notice and administration, and was previously appointed by this Court to provide notice to putative Class Members in this action. Crotty Decl. ¶ 27.

The Settlement provides that the Settlement Administrator will be selected by Class Counsel and approved by the Court to handle matters related to administration and distribution of the $13 million Settlement Fund. Agmt. § IX.2. To select a Settlement Administrator, Plaintiffs' counsel submitted a request for proposal to **five** settlement administration companies, including A.B. Data. Crotty Decl. ¶ 27. In response, Plaintiffs' counsel received three bids. As recent changes to the settlement agreement may affect those proposals, Plaintiffs are not in a position to recommend a settlement administrator at this time; however, Plaintiffs file a separate motion in advance of the hearing on preliminary approval hearing recommending a Settlement Administrator.

The Settlement Agreement also provides for the appointment of a Special Master to adjudicate and resolve Challenges, under Section X.4 of the Settlement Agreement, by Class Members whose eligibility for correction of their hiring and/or promotion date(s) is disputed by Defendants. Agmt § IX.3. The Parties jointly recommend that the Court appoint attorney James McDevitt to serve as the Special Master, given Mr. McDevitt's familiarity with this case as a mediator and his military and law enforcement experience. Crotty Decl. ¶¶ 18-19. Courts have the authority to appoint special masters in analogous circumstances and should do so here. Manual for Complex Litigation § 21.644 n. 994 (4th ed. 2015) (citing *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 215 n.30 (5th Cir. 1981)).

E. The Court Should Establish Dates for the Approval of the Settlement

The Parties jointly request that the Court approve deadlines for a number of events associated with the approval of the Settlement, including the date for Notice to be provided to the Class and for a fairness hearing. Those dates are as follows:

Event	**Deadline under the Settlement Agreement or Recommended by the Parties**
Notice mailed by the Notice Administrator to the Class and commence publication notice	20 days after preliminary approval order.
Deadline for Defendants to provide Class Counsel with Class Member Contact information	20 days after preliminary approval order. Agmt.§ V.6.
Deadline for Defendants to file Declaration regarding Class Notice.	30 days after Notice is required to be sent. Agmt. § V.7.
Deadline for Class Members to submit any request to opt out from the Class	60 days after Notice is sent.

Deadline for Class Members to submit any objection to the Settlement, Attorneys' Fees or Service Awards.	60 days after Notice is sent.
Deadline for Class Members to submit challenges to Defendants' personnel data, to demonstrate membership in the Class, or to challenge a Class Member's hiring or promotion date.	60 days after Notice is sent.
Date by which Class Counsel must submit any Motion for Attorneys' Fees and Costs and their Motion for Service Awards.	15 days prior to the Deadline for Class Members to object.
Deadline for Settlement Administrator to file Declaration regarding completion of adjudication of any challenges to Defendants' data, to send an explanation of its adjudications to challenging Class Members.	At least 20 days before Fairness Hearing. Agmt. § XII.4.
Deadline for Class Counsel to file Motion for Final Approval of Settlement	At least 14 days after deadline for Class Members to file objections, but no later than two weeks before the date of the Fairness Hearing
Date of Fairness hearing	
Deadline for Special Master to complete Adjudications and file declaration	60 days after Fairness Hearing

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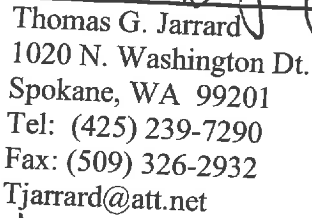
CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be granted.

DATED this 5th day of May, 2017.

Law Office of Thomas Jarrard PLLC



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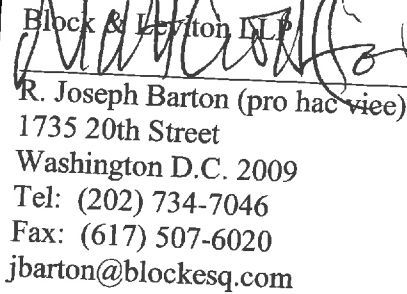

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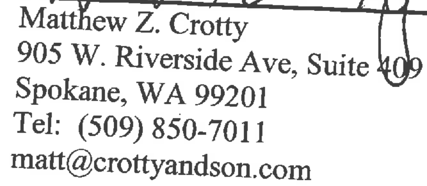

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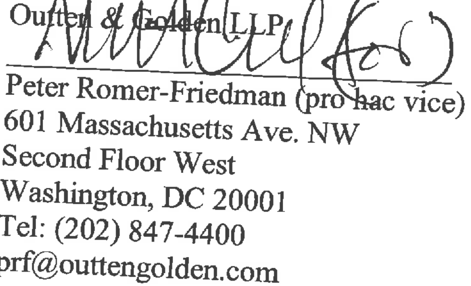

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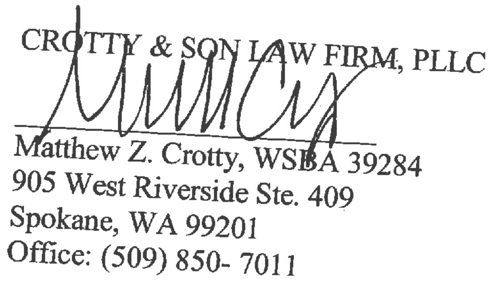
CERTIFICATE OF SERVICE

Pursuant to RCW § 9A.72.085 the undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the 5 day of MAY 2017, the foregoing was delivered to the following persons in the manner indicated:

Jason D. Brown, Esq. Attorney General of Washington 1116 W. Riverside Ave. Spokane, WA 99201	VIA REGULAR MAIL _ VIA FACSIMILE _ HAND DELIVERED X VIA EMAIL X



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