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 CLASS CERTIFICATION**

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INTRODUCTION

Pursuant to Washington Civil Rule 23, Plaintiffs Christina Martin, Jason Longoria, Charles Arnold, John Sager, Darrel Nash, Erick Thomas, Darin Foster, and Luis Gonzalez respectfully request that the Court certify a class in this action, appoint the eight Plaintiffs as the Class Representatives, and appoint the undersigned counsel as Class Counsel. Pursuant to the Settlement Agreement, Defendants do not oppose this motion.

The Complaint alleges that for decades, the State of Washington, the Washington State Patrol, and Washington State Patrol officials (collectively, "WSP" or "Defendants") have systematically denied the Veterans' Preference mandated by Washington state law in public hiring and promotions and have violated the rights of veterans who applied to work as commissioned employees of the WSP or who sought promotions within the WSP. Second Amended Complaint ("Complaint" or "Compl.") ¶¶ 9-15. The Complaint alleges that these violations have taken several forms, including: (1) the denial of the Veterans' Preference to applicants for initial employment as WSP Troopers; (2) the denial of the Veterans' Preference to Troopers who sought promotions to the rank of Sergeant; (3) the denial of the Veterans' Preference to Sergeants who sought promotions to the rank of Lieutenant; and (4) the improper calculation of state-authorized military leave under RCW § 38.040.060. Compl. ¶¶ 9-18, 138, 142, 153-159, 167-179.

Plaintiffs filed this action under Washington Civil Rule 23 on behalf of similarly situated individuals who applied to work for the WSP as Troopers and sought promotions to the rank of Sergeant and/or Lieutenant. *Id.* ¶¶ 138-152. Under the Settlement Agreement, the Parties have agreed that the Court should certify the following Class:

> (1) individuals who, prior to January 1, 2013, applied for employment in the position of Trooper with the Washington State Patrol or were employed by and applied for a promotion to a higher ranking position of

> employment within the Washington State Patrol, including a position with the rank of Sergeant, or Lieutenant; and
>
> (2) individuals who were eligible to receive a veteran preference pursuant to RCW § 41.04.010(1)-(3) with respect to such application for a position of employment or application for a promotion to a higher ranking position of employment; and
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> (3) individuals who on one or more occasions did not receive such veteran preference in connection with such application for a position of employment or for a promotion to a higher ranking position of employment.
>
> Excluded from the Class are Defendants, the Defendants' legal representatives, assignees and successors, the judge to whom this case is assigned, any member of the judge's family, any person who has previously settled the same claims as set forth in this Complaint, and any individual who applied for a position of employment or a promotion to a position of employment other than Trooper, Sergeant, or Lieutenant (i.e. persons who applied for or were employed as non-commissioned positions are not included in the Class, unless they also applied for a position of Trooper, Sergeant, or Lieutenant).

Settlement Agreement ("Agmt.") § IV.1.

The Complaint alleges that the WSP denied Plaintiffs the Veterans' Preference and engaged in other practices that violate their rights as veterans and service members. Compl. ¶¶ 19-22. Through discovery, the Parties have identified at least 878 persons who are members of the Class, including 769 individuals who were employed by the WSP and 109 individuals who were denied the Veterans' Preference, but were never hired by the WSP. Agmt. § IV(3)-(5). The Parties also recognize that there are likely other persons who are members of this Class. *Id.* § IV(4)-(5).

Plaintiffs seek to have this case certified as a class action pursuant to Civil Rule 23(a) and (b)(3) so that the 878 previously identified current and former WSP employees and applicants—as well as other members of the Class—can have their claims resolved in a single fair and efficient proceeding. As described herein, class certification is appropriate, as Plaintiffs satisfy the

standards of Civil Rule 23(a) and (b)(3), and Defendants do not oppose Plaintiffs' motion for class certification.

FACTUAL AND LEGAL 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* Compl. ¶¶ 153-179.

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 Complaint on January 3, 2014. On May 8, 2017, following motion practice, discovery, and lengthy, arms-length settlement discussions, the parties executed a Settlement Agreement. Agmt. § III(1)-(11).

B. Plaintiffs' Claims

The Complaint alleges 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) (providing that 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]").

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]

[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

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) (providing 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 alleged that Defendants had further violated USERRA § 4311 by improperly calculating state-authorized military leave under RCW § 38.040.060. First Amended Complaint ¶ 174; *see also* Compl. ¶ 157.

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 [which version] Complaint under CR 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, this 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

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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).

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 to explore the 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 ¶ 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 damages of Class Members pursuant to the methodologies they had developed for estimating potential damages. *Id.* ¶¶ 12-16. Defendants engaged their own economist to calculate the potential damages of the Class Members. *Id.* ¶ 16.

Due to substantial gaps in the personnel information that Defendants had retained over the last several decades, 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 approved the appointment of Plaintiffs' Counsel as interim class counsel for the putative Class.

From data produced by Defendants and from responses submitted pursuant 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 the Parties drafted a written Settlement Agreement in Principle that was executed on December 21, 2016. *Id.* ¶¶ 19-20. Thereafter, the Parties negotiated and executed a final Settlement Agreement. *Id.* ¶ 20.

Under the Settlement Agreement, the parties agreed that pursuant to Civil Rule 23(a) and (b)(3), Plaintiffs would request that the Court certify a Class, as defined in Section IV.1 of the Settlement Agreement, and that Defendants would not object to the certification of the Class. Agmt. § IV.6. In a separate motion filed concurrently with this class certification motion, Plaintiffs seek preliminary approval of the final Settlement Agreement and request the Court to approve notice to the Class Members of the Settlement Agreement and the certification of the Class.

D. Overview of the Settlement

The Settlement Agreement between the parties is described in detail in Plaintiffs' Motion for Preliminary Approval. The Settlement provides monetary relief for the lost wages and benefits, as well as injunctive relief. First, the Settlement provides $13 million to pay back wages

and non-retirement benefits to nearly 900 Class Members (after the payment of attorneys' fees and costs and service awards for the Class Representatives). Agmt. § VI.1. Second, the Settlement provides adjusted hiring or promotion dates for 131 Employee Class Members for whom Defendants have agreed to make adjustments and additional Employee Class Members who prevail before the Special Master. *Id.* § VI.2. Plaintiffs' expert estimates that due to the adjustment of hiring or promotion dates and the additional pension contributions Defendants will make into the Department of Retirement Systems ("DRS"), 131 Employee Class Members will receive future pension benefits that have a present value of $1.9 million. Declaration of Erick West ¶¶ 3-5. Third, Defendants have agreed to provide all eligible applicants and employees with the veteran preference in hiring and promotions in the future that will benefit Class Members who apply for promotion to the rank of Lieutenant. Agmt. § VI.3. Finally, Defendants have agreed to bear the costs of Notice and certain administrative costs in implementing the Settlement. *Id.* § V.5.

ARGUMENT

To certify a class action, the plaintiffs must demonstrate that the four requirements of Civil Rule 23(a) are satisfied, and that one or more of the conditions of Civil Rule 23(b) is met. *See* CR 23(a), (b)(1)-(3); *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 278 (2011). Here, Plaintiffs amply satisfy the requirements of Civil Rule 23(a) and (b)(3) to certify the proposed Class, and the Defendants do not oppose the certification of the proposed Class for the purpose of facilitating the settlement of this class action. Accordingly, the Court should certify the proposed Class.

A. Civil Rule 23(a)'s Four Requirements for Class Certification Are Satisfied

1. The Class is Sufficiently Numerous so that Joinder is Impracticable

Civil Rule 23(a)(1) provides that "[o]ne or more members of a class may sue [] as representative parties on behalf of" other class members where "the class is so numerous that joinder of all members is impracticable." CR 23(a)(1). "As a general rule, where a class contains at least 40 members, [] courts have recognized a rebuttable presumption that joinder is impracticable." *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 821 (2003) (citing *Cox v. Am. Cast Iron Pipe Co*., 784 F.2d 1546, 1553 (11th Cir. 1986), and 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions, § 3.05 (3d ed. 1992), *inter alia*); *see also* 6 James Wm. Moore et al., Moore's Federal Practice ¶ 23.22[l][b] (3d ed. 1997) ("[a] class of 41 or more is usually sufficiently numerous."). In addition, "other factors" weigh strongly in favor of a finding of impracticability of joinder. *Miller*, 115 Wn. App. at 822. Here, there is substantial "judicial economy arising from the avoidance of multiplicity of actions" that all involve the same federal and constitutional claims; there is "geographic dispersement of class members" not just in different parts of Washington state, but throughout the nation; the "size of individual claims," which for many Class Members are hundreds to thousands of dollars, would not warrant individual suit; and most of the Class Members lack the "financial resources" or the "ability" to find counsel "to institute individual suits," as they are retired or active civil servants with modest incomes or pensions, and their claims are insufficiently large. *Id.*

Here, Plaintiffs easily satisfy numerosity, as the parties have already identified 878 Class Members and additional Class Members may be identified through the notice that the Parties have proposed in a separate Motion for Preliminary Approval. *See* Crotty Decl. ¶ 15. Joinder of each Class Member, therefore, would be impracticable, onerous, and inefficient.

Class certification, therefore, will ensure fair and efficient adjudication for each of the 878 or more Class Members in this case.

2. <u>There Are Legal and Factual Questions Common to the Class</u>

Civil Rule 23(a)(2) requires that there are "questions of law or fact common to the class." CR 23(a)(2). "[T]here is a low threshold to satisfy this test," as Plaintiffs only need to show there is a "single issue common to all members of the class." *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 320 (2002) (citations and internal quotations omitted). "A class meets the commonality requirement when 'class members' situations share a common issue of law or fact, and are sufficiently parallel to insure a vigorous and full presentation of all claims for relief.'" *Torres v. Mercer Canyons, Inc*., 305 F.R.D. 646, 652 (E.D. Wash. 2015), *aff'd*, 835 F.3d 1125 (9th Cir. 2016) (quoting *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010)). Commonality will generally be satisfied when workers allege that their employer generally had a policy of denying them the same benefit, such as providing misleading information to the class or denying overtime pay. *See id.* (following *Jimenez v. Allstate Ins. Co*., 765 F.3d 1161, 1164 (9th Cir. 2014)).

In this action, the proposed Class Members share numerous common legal and factual questions. The factual situation for all Plaintiffs and Class Members arises out of the WSP's general, uniform practice of refusing to follow the Veterans' Preference in hiring and promotions. Compl. ¶¶ 15-18, 153-159. The Complaint alleges that this general policy constitutes a violation of USERRA and that Defendants' denial of Plaintiffs' state-created property right to the Veterans' Preference violated the federal Due Process Clause. *Id.* ¶¶ 15, 167-179. These common factual and legal questions drive the resolution of all Class Members' claims, because all of the claims require demonstrating that Defendants are liable to the Class Members for

engaging in an unlawful pattern or practice of discrimination under USERRA and for depriving them of the same state-mandated benefit in violation of the federal Due Process Clause. Furthermore, Class Members seek the same types of legal and equitable remedies, such as lost pay and benefits from a delay in hiring or promotion; a modification of their seniority or rank due to such a delay in hiring or promotion; and lost pension contributions due to such a delay in hiring or promotion. *Id.*, Prayer for Relief ¶¶ 1(a)-(j).

These numerous common legal and factual questions that challenge the WSP's uniform employment practice of systematically denying the veteran preference are more than sufficient to satisfy the "low threshold" of commonality.

3. Plaintiffs' Claims Are Typical of Those of the Class

Under Civil Rule 23(a)(3), Plaintiffs must show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." CR 23(a)(3). "Typicality is satisfied if the claim 'arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.'" *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 684 (2011) (holding typicality satisfied where plaintiffs alleged they were denied state-mandated rest and meal breaks due to employer's course of conduct, and quoting *Smith*, 113 Wn. App. at 320 (quoting *In re Am. Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996)). Moreover, where "the same unlawful conduct is alleged to have affected both the named plaintiffs and the class members, varying fact patterns in the individual claims will not defeat the typicality requirement." *Smith*, 113 Wn. App. at 320 (citing *Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994)). Indeed, under Civil Rule 23(a)(3)'s "permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

Here, typicality is easily satisfied because Plaintiffs challenge the same exact course of conduct applied to all members of the proposed Class and that gives rise to their USERRA and Due Process claims—that the WSP did not follow the Veterans' Preference in the hiring or promotion process as mandated by Washington state law. These USERRA and Due Process claims all rely upon the same legal theories: (1) that the denial of the Veterans' Preference constitutes discrimination based on military service in violation of 38 U.S.C. § 4311(a); and (2) that the Class Members were entitled to the Veterans' Preference required by state law and, in turn, the denial of that mandatory benefit constitutes the denial of a state-created property right without Due Process. Compl. ¶¶ 153-179. In addition, the Class Members similarly rely upon the same legal claims and theories to support their damages claims. *Id.* ¶¶ 153-159.

4. <u>The Representatives Will Adequately Protect the Interests of the Class</u>

Civil Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." CR 23(a)(4). Courts have interpreted this standard to require a two-part inquiry: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the entire class." *Torres*, 305 F.R.D. at 653 (quoting *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011)).

a. <u>Plaintiffs Have and Will Vigorously Protect the Interests of the Class</u>

Under the first requirement, Plaintiffs' interests must be co-extensive with those of the Class. *Trimble v. Holmes Harbor Sewer Dist.*, No. 01-2-00751-8, 2003 WL 23100273, at *6 (Wash. Super. Oct. 6, 2003). This requirement is satisfied where each "Plaintiff and each Class member allegedly have been injured by the conduct of Defendants, and Plaintiffs seek relief that is identical to that which could be sought by every other member of the Class." *Id.* As explained

above, the claims all arise out of the same practice by Defendants – namely failure to correctly apply Veterans' Preference. And all of the Class Members, including Plaintiffs, have been injured by and have the same interest in receiving compensation for the harm that they have suffered as a result of the Defendants' same general practice of denying the Veterans' Preference in the hiring and promotion process.

Plaintiffs already have demonstrated their ability and commitment to vigorously prosecute the claims of the Class Members. This litigation arose because a number of the Plaintiffs tried to raise and resolve these issues prior to litigation, but those efforts proved to be unsuccessful. Declaration of Tina Martin ¶¶ 4-6. Once those efforts failed, Plaintiffs Martin and Longoria sought out attorneys who had prior experience prosecuting USERRA actions. *Id.* ¶¶ 7-9. After hiring such attorneys, each of the Plaintiffs agreed to take the courageous action of suing their current employer, and not merely seeking an individual resolution, but filing an action on behalf of others similarly affected. *Id.* Each of the Plaintiffs expended numerous hours consulting with their attorneys, providing information and documents to their attorneys, and reading and reviewing the Complaints and other filings in this case. *Id* ¶¶ 6-15. At counsel's request, the number of Plaintiffs attending the mediation was limited to just three persons agreed upon by all Plaintiffs: Tina Martin, Chuck Arnold and Darren Foster. *Id.* ¶ 15. Those designated representatives spent more than eight hours at the mediation. All of the Plaintiffs were informed of and agreed to the terms of the Settlement after discussing them with counsel. *Id.* ¶¶ 15-16. After expending substantial amounts of time and resources to litigate the case, their dedication to adequately and fairly protecting the interests of the Class resulted in an agreement to provide an estimated $15 million of monetary relief and other valuable forms of non-monetary relief to nearly 900 Class Members. Agmt. § VI(1)-(4). Notably, the Named Plaintiffs and their counsel

have secured the largest reported settlement in the history of USERRA, Crotty Decl. ¶ 21, a statute that Congress enacted to protect veterans and service members from discrimination and to make it possible for them to serve in the Armed Forces. 38 U.S.C. § 4301(a).

b. Plaintiffs' Counsel Have Substantial Experience and Expertise

Plaintiffs' counsel meet the second adequacy requirement by demonstrating "experience in prosecuting complex class actions such as this one." *Trimble*, 2003 WL 23100273, at *5. Each of Plaintiffs' counsel has the experience, skill, and resources to vigorously prosecute this type of complex employment class action lawsuit. In this case, each member of Plaintiffs' counsel possesses common and unique skills and experiences that add significant value to the Class, including specialized knowledge and experience in USERRA, constitutional rights, and employment class action litigation. *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.

Plaintiffs' counsel R. Joseph Barton, Peter Romer-Friedman, Thomas G. Jarrard, and Matthew Z. Crotty have worked together on several other USERRA class actions, including two class cases in which settlements were reached due to their specialized knowledge and experience. *See, e.g., Tuten v. United Airlines, Inc.*, 41 F. Supp. 3d 1003, 1008 (D. Colo. 2014) (finding that these same "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); Order, *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 to Preliminary Approval Motion (recognizing that these same Plaintiffs' counsel have "significant experience litigating civil rights and employee benefits class actions" in approving

a USERRA settlement worth approximately $6.4 million at time of judgment). Likewise, here the outstanding result—a settlement with an estimated value of approximately $15 million—was achieved due to the experience, skill, and efforts of Plaintiffs' counsel, both before and after this Court appointed Plaintiffs' counsel as interim class counsel.

Accordingly, Messrs. Barton and Romer-Friedman should be appointed as Co-Lead Class Counsel and Messrs. Crotty and Jarrard also appointed as Class Counsel.

B. Class Certification is Appropriate Under Civil Rule 23(b)(3)

In addition to satisfying the prerequisites of Rule 23(a), Plaintiffs must satisfy one of the three prongs of Civil Rule 23(b) to obtain class certification. *Moeller*, 173 Wn.2d at 278. Rule 23(b)(3) requires "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." CR 23(b)(3). Here, Plaintiffs satisfy the predominance and superiority requirements of Rule 23(b)(3).

1. Common Questions Predominate Over Individual Ones

The predominance inquiry—whether "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members," CR 23(b)(3)—is "particularly concerned with whether the putative class is sufficiently cohesive to justify the class vehicle." *Torres*, 305 F.R.D. at 654 (citing *Wolin*, 617 F.3d at 1172). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022 (quoting 7A

Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure §1778 (2d ed. 1986)).

To "decid[e] whether common issues predominate over individual ones, the court [] engage[s] in a 'pragmatic' inquiry into whether there is a 'common nucleus of operative facts' to each class member's claim." *Smith*, 113 Wn. App. at 323 (quoting *Clark v. Bonded Adjustment Co.*, 204 F.R.D. 662, 666 (E.D. Wash. 2002) (quoting 7A Wright et al., *supra*, § 1778). As the U.S. Supreme Court explained, "[t]he predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (internal quotations omitted). Indeed, the Court of Appeals of Washington observed that:

> [T]he predominance requirement is not defeated merely because individual factual or legal issues exist; rather, the relevant inquiry is whether the issue shared by the class members is the dominant, central, or overriding issue shared by the class. Further, a single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions. And the fact that those individual issues might take some time to resolve does not defeat predominance because courts have a number of methods for dealing with individual issues in class litigation.

Miller, 115 Wn. App. at 825-26 (citations and internal quotations omitted). Thus, for example, in *Miller*, the predominance standard was satisfied because the "overriding issue" in the case was whether the employer violated Washington state law by "classifying delivery drivers as sales agents" even if there were individualized issues that needed to be resolved for each class member. *Id.* at 826.

Furthermore, the fact that "class members may eventually have to make an individual showing of damages does not preclude class certification." *Smith*, 113 Wn. App. at 323 (citing *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975)); *accord Tyson Foods*, 136 S. Ct. at 1045

("When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.") (citation and internal quotations omitted); *Torres*, 305 F.R.D. at 654 ("Individual issues that may result in different damage findings do not defeat certification.") (citing *Leyva v. Medline Industries Inc*., 716 F.3d 510, 513–14 (9th Cir. 2013)).

In this action, predominance is satisfied, because there are numerous legal and factual issues that are common to all Class Members and those issues predominate over any individual ones. As described above with respect to commonality, all Class Members challenge the same uniform, general practice of denying them the Veterans' Preference in hiring and/or promotions as a violation of USERRA and the Due Process Clause, and answering the same legal and factual questions will resolve their claims. *Supra* at 10-11. These legal and factual questions are the "dominant, central, [and] overriding" issues that the Class Members share. *Miller*, 115 Wn. App. at 825. In addition, the Class Members seek the same types of remedies. A determination that Defendants were required to, but failed to provide the required Veterans' Preference would be followed by an order requiring them to reassess hiring and promotion and provide any unpaid increased wages and benefits. As already demonstrated through discovery and the work of their experts, by using objective personnel information produced by the Defendants, Plaintiffs can identify which Class Members were impacted by the Defendants' general practice—the denial of a job or a promotion—and the extent to which they suffered economic harm due to the practice. Crotty Decl. ¶¶ 12-16. Thus, proving which Class Members were harmed and how much they were harmed involves common legal questions, common sources of evidence, and common modes of analysis. And while each Class Member may ultimately have a different amount of

damages, it is well established that varying amounts of damages will not destroy predominance. *Tyson Foods*, 136 S. Ct. at 1045.

Accordingly, because common issues predominate over any individualized issues, the predominance requirement is satisfied.

2. A Class Action is Superior Method of Resolving These Claims

The Court should certify a class if it finds that a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." CR 23(b)(3). Civil Rule 23(b)(3) identifies four factors that may be pertinent to the Court's analysis of superiority:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
>
> (D) the difficulties likely to be encountered in the management of a class action.

CR 23(b)(3)(A)-(D); *see also Miller*, 115 Wn. App. at 829 (explaining that these four factors guide the superiority determination, which "involves consideration of all the pros and cons of a class action as opposed to individual lawsuits"). The United States Supreme Court has concluded that when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). As Plaintiffs are asking the Court to certify a class for settlement purposes, the Court does not analyze the manageability of the case if it were to proceed to trial as a class action.

In applying the superiority standard, courts find that a class action is the "superior means of litigating the common issues shared by class members when it 'reduces litigation costs and

promotes greater efficiency'" or "if no realistic alternative exists." *Orvis v. Spokane Cty.*, 281 F.R.D. 469, 475 (E.D. Wash. 2012) (quoting *Valentino v. Carter–Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996)). As the Ninth Circuit explained, "the purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy. Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification." *Wolin*, 617 F.3d at 1175 (citations and internal quotations omitted).

Here, the parties have already identified nearly 900 Class Members. Given the large numbers of Class Members and the many complex, common issues present in this action, the class action device is the most efficient and fair way of adjudicating the common claims that arise out of WSP's denial of the Veterans' Preference over decades of time. For all or nearly all Class Members, their modest amounts of individual damages will be dwarfed by the cost of litigating this action. Indeed, the average back pay claim is only worth approximately $14,800. Jarrard Decl. ¶ 20. It is likely that most Class members lack the resources necessary to litigate separate actions. Thus, all or nearly all Class Members have no practicable avenue for redress other than through a class action. Class treatment is also superior to nearly 900 individual suits, or piecemeal litigation, because it conserves judicial resources and promotes consistency and efficiency of adjudication, as each class member would be forced to re-litigate the issue of whether the WSP should have applied a Veterans' Preference (and a host of other issues, such as Defendants' asserted defenses). Accordingly, class treatment is a far superior method of resolving these claims.

All of the relevant factors set forth in Rule 23(b)(3) weigh strongly in favor of superiority. First, Plaintiffs are aware of no other litigation that has been commenced by members of the

Class regarding the WSP's decades-old practice of denying the Veterans' Preference. Crotty Decl. ¶ 23. Second, the Class Members have little interest in controlling the prosecution of their claims in separate actions, due to the modest value of their claims, the complexity and cost of litigating their claims, and the low likelihood that Class Members could obtain counsel to litigate their claims separately. Indeed, this is demonstrated by the fact that no prior action has been brought even though this practice persisted for decades. Third, it is highly desirable to concentrate this litigation in a single forum, as the litigation of a single class action will resolve the same legal and factual questions for nearly 900 Class Members who live and work throughout the State of Washington (and some in other states), and it will ensure that these Class Members receive a uniform resolution of their identical claims. In addition, resolving this action in one proceeding will ensure that the Defendants are not faced with inconsistent judgments against them.

To the extent that the Court needs to consider the manageability of this case as a class action, it only needs to consider the manageability of this case as a settlement class. In this case, the Parties have proposed a process to identify previously unidentified members of the Class, to resolve issues with respect to disputes over the data on which Class Members' payments will be based, and to resolve disputes over whether Class Members' hiring or promotion dates should be adjusted (which, in turn, will result in corrected pension credits for such Class Members). Agmt. §§ VI(2), IX(3)-(5), and X(4). Based on the personnel data produced by Defendants, Plaintiffs' expert has already performed an analysis about the extent to which each Class Member was harmed and the potential damages that each could obtain in this action. Crotty Decl. ¶¶ 16, 24. With the exception of the claims of Class Members whom the parties have not yet identified, Plaintiffs' expert has already calculated all Class Members' potential damages, and will be

readily able to calculate the potential damages of Class Members who identify themselves through the claims process. *Id.* Accordingly, neither the Court nor the parties will face any difficulties managing this case as a class action and determining the relief that the Class Members should receive.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court certify the proposed Class pursuant to Civil Rule 23(a) and (b)(3), appoint the Plaintiffs as Class representatives, and appoint R. Joseph Barton and Peter Romer-Friedman as Co-Lead Class counsel and Thomas Jarrard and Matthew Crotty as additional Class Counsel.

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Law Office of Thomas Jarrard PLLC

/s/ Thomas G. Jarrard (for)
Thomas G. Jarrard
1020 N. Washington Dt.
Spokane, WA 99201
Tel: (425) 239-7290
Fax: (509) 326-2932
Tjarrard@att.net

Block & Leviton LLP

R. Joseph Barton (pro hac vice)
1735 20th Street
Washington D.C. 2009
Tel: (202) 734-7046
Fax: (617) 507-6020
jbarton@blockesq.com

Crotty & Son Law Firm, PLLC

Matthew Z. Crotty (pro hac vice)
905 W. Riverside Ave, Suite 409
Spokane, WA 99201
Tel: (509) 850-7011
matt@crottyandson.com

Outten & Golden LLP

Peter Romer-Friedman (pro hac vice)
601 Massachusetts Ave. NW
Second Floor West
Washington, DC 20001
Tel: (202) 847-4400
prf@outtengolden.com

Attorneys for Plaintiffs

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~~ SVC VIA EMAIL _X_

CROTTY & SON LAW FIRM, PLLC

Matthew Z. Crotty, WSBA 39284
905 West Riverside Ste. 409
Spokane, WA 99201
Office: (509) 850- 7011