IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ANDREW RUSSELL and RUTH GALLEGO, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	Case No. 1:14-cv-01062-SGB
v.	)	The Honorable Susan G. Braden
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFFS' CONSENT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Pursuant to Rule 23(e) of the Rules of the United States Court of Federal Claims ("RCFC"), Plaintiffs Andrew Russell and Ruth Gallego hereby request that the Court preliminarily approve[1] the Settlement Agreement reached by Plaintiffs and Defendant United States (collectively, the "Parties") in this class action, a copy of which Settlement Agreement is attached hereto as Exhibit A. Defendant's counsel advises that the United States consents to this motion and the relief requested herein.

By this motion, Plaintiffs respectfully move the Court for an Order: (1) certifying for settlement purposes only the proposed Settlement Class defined herein; (2) appointing Plaintiffs' counsel as Class Counsel (3) appointing Plaintiffs as Class Representatives; (4) granting preliminary approval of the proposed Settlement; (5) approving the Parties' proposed forms of notice and notice program, and directing that notice be disseminated to the Class pursuant to such program; (6) approving the Parties' proposed opt-in claim form; (7) appointing RSM US

[1] Although RCFC 23(e) does not explicitly require preliminary approval of a class action settlement agreement, the preliminary approval process is common and well recognized. *Barnes v. United States,* 04-1335C, 2009 WL 4363451 (Fed. Cl. Nov. 24, 2009).

LLP as the Settlement Administrator and directing it to establish a Qualified Settlement Trust pursuant to section 468B of the Internal Revenue Code and as described in paragraph 3(d) of the Settlement Agreement, for which it shall act as trustee; (8) directing AAFES to furnish the Settlement Administrator and Class Counsel with the information described in paragraph 6 of the Settlement Agreement pursuant to the Privacy Act, 5 U.S.C. §552a(b)(11); and (9) setting a Final Approval Hearing and certain other dates in connection with the final approval of the Settlement. A copy of the proposed Preliminary Approval Order is attached hereto as Exhibit B.

This motion is supported by the Declaration Of John G. Jacobs, attached hereto. As set forth below, the proposed settlement, which provides significant relief for all class members, is fair, reasonable, and adequate and deserving of this Court's preliminary approval.

I. INTRODUCTION

A. Plaintiffs' Allegations, The Litigation And Settlement

Plaintiffs allege that while employed by the Army and Air Force Exchange Service ("AAFES") they were entitled to receive premium pay for working night shift hours but were not paid these benefits properly by AAFES. See Docket Number ("Dkt. Nos.") 1 and 8. Specifically, plaintiffs allege that they worked regularly-scheduled non-overtime shifts where the majority of the shift hours were between 3:00 p.m. and midnight ("second shift") or between 11:00 p.m. and 8:00 a.m. ("third shift"), and that they were therefore entitled to premium pay, known as night shift differential pay ("shift differential"). *Id.* Plaintiffs allege that the payment of shift differential is mandated by federal statute and regulations promulgated by the Office of Personnel Management ("OPM"), the Department of Defense ("DoD") and AAFES, which require that employees working the second shift be paid a night shift differential of 7.5% of their scheduled rate of pay for the entire shift when the majority of whole hours fall within the second

shift, or 10% of their scheduled rate of pay for the entire shift when the majority of whole hours fall within the third shift. *Id.* Plaintiffs assert that because of an error in the payroll system used by AAFES, employees often failed to receive the 7.5 percent additional premium pay for working the second shift and the 10 percent additional premium pay for working the third shift. *Id.* Additionally, Plaintiffs claim that shift differential pay is required to be included as part of the rate of basic pay in the computation of "lump sum payments" for accrued annual leave and vacation leave for employees upon separation from AAFES and that, as a result of the alleged failure to accurately pay the shift differential, lump sum payments were not accurately paid to employees.

Plaintiffs filed their Complaint on October 31, 2014, seeking relief on behalf of themselves and a putative class of employees similarly situated to them. (See Dkt. No. 1.) Defendant filed a Motion to Dismiss Plaintiffs' Complaint on March 2, 2015. (See Dkt. No. 6.) On April 27, 2015, Plaintiffs filed an Amended Complaint to address the various issues raised by the Motion to Dismiss. (See Dkt. No. 8.) Defendant filed its Answer to the Amended Complaint on June 15, 2015, acknowledging that affected AAFES employees had not received all the amounts they may be owed for working certain night shifts, but denying that Plaintiffs were entitled to any relief and requesting that the Court enter judgment in its favor and that the Amended Complaint be dismissed. (See Dkt. No. 10.) On August 4, 2015, the Parties filed a Joint Motion For Extension of Time to File Their Joint Preliminary Status Report so that they could discuss how best to proceed in the litigation and to explore a possible settlement, which motion the Court granted. (See Dkt. Nos. 11 and 12.) The Parties agreed to a settlement process whereby Defendant would, in consultation with Plaintiffs' counsel, identify and retain a suitable expert to analyze the pay records of AAFES to examine the extent and effect of the issues raised

in the litigation. (Jacobs Declaration ¶ 7.) In this regard, Robert B. Speakman, Ph.D, Senior Economist at Welch Consulting,[2] was retained as the expert to review data for over 100,000 employees and to calculate estimated damages for shift differential and lump sum leave.

The Parties thereafter engaged in regular conversations to discuss the data and progress of Dr. Speakman's expert analysis and entered upon an extensive negotiation process, culminating some sixteen months later in the proposed settlement agreement that has been entered into and presented to the Court. (Jacobs Declaration ¶¶ 7-8.). The negotiations were serious, informed, and non-collusive, and involved the exchange of various information and documents, including employee pay records, work schedule data, punch data of hours worked, pay rules and work rules of the Kronos payroll software used by AAFES, payroll time and attendance reporting procedures, DoD and AAFES regulations, data samples and damage calculations, and information relating to changes made to the software and methodology used by AAFES to properly calculate night shift differential pay and lump sum leave payments. *Id.* Plaintiffs and their counsel have conducted a thorough investigation and evaluation of the claims and underlying facts alleged in the Complaint and the Amended Complaint, and retained their own statistical consultant and expert, Whitman T. Soule, who reviewed Dr. Speakman's calculations and the data he relied upon, and confirmed the correctness of those calculations. *Id.*

After considering, among other things, the risks, uncertainties and delay attendant to protracted litigation and the substantial benefits available through Settlement, Plaintiffs and their counsel have concluded that the terms set forth in the Settlement Agreement are fair, reasonable and adequate and very much in the best interests of Plaintiffs and the Settlement Class. *Id.*

[2] See, http://www.ei.com/robert_speakman/.

II. TERMS OF THE PROPOSED SETTLEMENT

The key terms of the settlement are summarized below:

A. Settlement Class Definition:

The Settlement Agreement defines the Settlement Class as consisting of all "employees who worked for the Army and Air Force Exchange Service ("AAFES") at any time between November 1, 2008 and April 22, 2016 (the "Class Period") and who were eligible for night shift differential pursuant to 5 U.S.C. § 5343(f), 5 C.F.R. § 532.505 *et seq.* or various similar regulations promulgated by the Department of Defense ("DoD") and AAFES, and who (i) worked or were scheduled to work non-overtime shifts where the majority of such shift hours occurred either between the hours of 3:00 p.m. and midnight or between 11:00 p.m. and 8:00 a.m. and who were not paid the night shift differential to which they were entitled; or (ii) were eligible for accumulated and current accrued annual or vacation leave payments upon separation under 5 U.S.C. § 5551, 5 C.F.R. § 550 *et seq*. or various related regulations promulgated by the DoD and AAFES, who separated from AAFES, and who, upon separation, were not paid all of the lump-sum payments to which they were entitled." (Ex. A ¶ 3a.) Excluded from the Settlement Class are all employees whose damages for night shift differential and/or lump sum leave payments are less than a total of $10.00. Those employees with damages of $10 or greater who choose to opt in to the settlement are the "Settlement Class Members." (Ex. A ¶ 3b.)[3]

[3] Such employees are excluded from the proposed Class because the costs associated with administering the Settlement for such employees, including the costs of printing and mailing notices, responding to inquiries, processing claims, printing/mailing checks, following up regarding uncashed checks, withholding/remitting taxes to taxing authorities and issuing W-2s, is likely to exceed the payments to such persons. (Jacobs Declaration ¶ 9). Such *de minimis* thresholds are quite common. *See, e.g., In re Gilat Satellite Networks, Ltd.,* No. CV-02-1510, 2007 WL 1191048, at *9 (E.D.N.Y. Apr. 19, 2007) ("*de minimis* thresholds for payable claims are beneficial to the class as a whole since they save the settlement fund from being depleted by the administrative costs associated with claims unlikely to exceed those costs and courts have frequently approved such thresholds, often at $10."); *Hill v. State St. Corp*., No. CIV.A. 09-12146-GAO, 2015 WL 127728, at *12 (D. Mass. Jan. 8, 2015) ("$10.00 minimum is common.").

B. Settlement Benefits:

AAFES will create a common settlement fund by paying $4,000,000 (the "Settlement Amount") into a Qualified Settlement Trust ("QST") established by a Settlement Administrator. (Ex. A ¶¶ 3, 7, 19.) The QST will be used to pay the costs of the Settlement Administrator, the costs of providing notice and processing claims, proposed Class Counsel's attorney fees and expenses, proposed Class Representative incentive awards, and, after the payment of these various items, the amount remaining (the "Net Settlement Fund") will be used to pay claims of Settlement Class Members who opt in to the class and file claims.

1. *Cash Payments To Approved Claimants*:

Employees in the Settlement Class can opt in to the settlement and file claims with the Settlement Administrator during a 120-day filing period. (Ex. A ¶ 3f.) Approved claimants will be paid 100 percent of their calculated underpayments for shift differential and lump sum amounts during the Class Period, provided there are sufficient funds in the Net Settlement Fund to pay all approved claims. (Ex. A ¶ 3g.) If there are not enough funds in the Net Settlement Fund to pay 100 percent of all approved claims, the approved claims will be paid on a *pro rata* basis. *Id.* If any funds remain in the QST after payment of all items called for by the Settlement Agreement, such funds will be returned to AAFES. (Ex. A ¶ 3h.) The class notice will provide each potential class member an individualized estimate of the amounts he or she may receive under the settlement. (Ex. A ¶ 6.) The Settlement Administrator will notify each claimant within 60 days of the Court's order granting final approval of the settlement either: (a) that his or her claim has been approved and the amount for which the claim has been approved; or (b) that the claim has been denied and the reason for the denial. (Ex. A ¶ 21.) Upon notifying Settlement Class Members that their claims have been approved or denied, the Settlement

Administrator will pay each approved claimant the amount due under the settlement in the form of a check from the QST, less any taxes withheld and remitted to taxing authorities in accordance with Federal, State and local tax laws. (Ex. A ¶¶ 20 and 22.)[4]

2. *Payment Of Notice And Administrative Fees*:

The costs of a Settlement Administrator and the costs of providing notice to the Settlement Class will be paid from the QST. (Ex. A ¶¶ 3e, 7, 19.) The Settlement Administrator's responsibilities include providing notice to the Settlement Class, accepting and processing claims, establishing and overseeing the QST, paying Settlement Class Members' approved claims, making appropriate withholding from claimants' settlement distributions and remitting amounts withheld or payable to appropriate taxing authorities, making other required payments from the QST, and providing the parties a final accounting of all payments made. (Ex. A ¶¶ 3c-e, 10-11, 13, 19-24.) Within 30 days of the Court's entry of the Preliminary Approval Order, AAFES will pay the first $50,000 of the $4,000,000 Settlement Amount into the QST established by the Settlement Administrator to be used to offset the initial costs of providing notices and other administrative costs of the Settlement Administrator. (Ex. A ¶ 7.) Within 30 days of the Court's order granting final approval of the settlement, AAFES will deposit the remainder of the Settlement Amount, $3,950,000, into the QST, and all additional reasonable

[4] If any settlement checks are returned as undeliverable, the Settlement Administrator shall make a reasonable attempt to achieve payment to any such Settlement Class Member at a valid address. (Ex. A ¶ 23). In the event the Settlement Administrator is unable to locate a valid address after making reasonable attempts, the amounts represented by such undeliverable checks shall revert to the Net Settlement Fund. *Id.* If any settlement payment checks remain uncashed 90 days after issuance, such checks shall be become void, and the amounts represented by such uncashed checks shall also revert to the Net Settlement Fund. *Id.* In the event that claimants had theretofore been paid on a *pro rata* basis, the amounts of such uncashed and voided checks will, if it is deemed economically feasible by the Settlement Administrator and Class Counsel, be paid to the other approved claimants on a *pro rata* basis in a supplemental distribution. *Id.*

settlement administration fees and costs will be paid from QST within 15 days of receipt of this amount. (Ex. A ¶ 19.) The proposed Settlement Administrator, RSM US LLP, has estimated that its fees and costs to administer the settlement will be $250,000 and has guaranteed that its charges will not exceed this amount. (Jacobs Declaration ¶ 14.)

3. *Compensation For The Class Representative*:

In addition to any other payment under the settlement, and in recognition of their efforts on behalf of the class, Plaintiffs' Counsel will submit an application to the Court to approve the payment from the QST of an incentive award of $5,000 each to Plaintiffs Andrew Russell and Ruth Gallego, as appropriate compensation for their time and effort and risks incurred in serving as the Class Representatives in this litigation. (Ex. A ¶¶ 3e, 17, 19); *See e.g., Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 342 (E.D. Pa. 2007) (stating that "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation" and approving an incentive award in the amount of $75,000); *Wells v. Allstate Ins. Co.,* 557 F. Supp. 2d 1, 8 (D.D.C. 2008) (approving incentive award of $10,000 to each class representative, noting that "incentive awards to named plaintiffs are not uncommon in class action litigation, particularly where a common fund has been created for the benefit of the entire class" and that "allowing modest compensation to class representatives seems obvious.").

4. *Payment Of Attorneys' Fees And Expenses*:

Plaintiffs' Counsel have not received any payment for their work in prosecuting this action on behalf of the proposed Settlement Class, nor have they been reimbursed for their out-of-pocket expenses. As part of the settlement, Plaintiffs' counsel will request, by separate motion under RCFC 23(h) and RCFC 54(d)(2), that the Court approve the payment of an award

of attorneys' fees and expense reimbursement out of the common fund created by the settlement in an amount representing no more than 40% of the Settlement Amount to compensate them for their efforts in achieving the benefits obtained for the Settlement Class and for their risk in undertaking this representation on a fully contingent basis and to reimburse Plaintiffs' counsel for their reasonable litigation expenses. (Ex. A ¶¶ 3e, 17, 19.) Payment of attorneys' fees and expenses out of a common fund is based on the "equitable notion that lawyers are entitled to reasonable compensation for their professional services from those who accept the fruits of their labors." *Moore v. United States*, 63 Fed. Cl. 781, 786 (2005) (approving payment of attorneys' fee of $1.6 million in class action settlement, representing 34% of the gross recovery of approximately $4.7 million, not including expenses, and approving Class Counsel's request for reimbursement of expenses in the amount of $356,745, resulting in the total payment of attorney's fees and expenses of $1,956,745 out of a total gross settlement recovery of $5,065,820, representing roughly 38.6% of the total recovery); *Voth Oil Co., Inc. v. United States*, 108 Fed. Cl. 98, 105 (2012) (finding a 40% contingent fee reasonable); *Thomas v. United States*, 121 Fed. Cl. 524, 531 (2015) ("Counsel's request for a 35% fee is within the acceptable range for a contingency fee"); *Sutton v. United States*, 120 Fed. Cl. 526, 533 (2015) (same).

5. *Fees Of Damage Calculation Expert*

As part of the settlement process, the United States procured appropriated funds in the amount of $192,372 to pay the fees of Dr. Speakman to calculate damages to the Settlement Class for shift differential and lump sum leave. (Jacobs Declaration ¶ 7.) Although the Settlement Class has received the benefits of Dr. Speakman's expert analysis, they are not required under the Settlement Agreement to contribute toward the payment of the fees charged for those services.

6. *Other Settlement Benefits: Prospective Relief*

As a result of this litigation, changes have been made to the payroll system software and methodology used by AAFES to accurately calculate shift differential pay and lump sum pay. (Ex. A ¶ 25.) As part of the settlement, AAFES has agreed to maintain these newly-implemented procedures in place hereafter and to monitor regularly its continued compliance with the requirement to pay its employees shift differential and lump sum payments in accordance with applicable law. *Id.* Class Counsel estimates that in the years to come, AAFES employees will receive millions of dollars more in night shift differential and lump sum payments as a result of the changes made to AAFES's payroll system. (Jacobs Declaration ¶ 10.)

C. Release

All Settlement Class Members will provide a full and complete release of all shift differential and lump sum claims arising out of or related to the claims brought in this lawsuit, or that could have been brought, against the United States, or any other agencies or instrumentalities of the United States, including AAFES, or any agents, employees, or officers thereof, by Settlement Class Members. (Ex. A ¶ 3i.) The settlement agreement will constitute a full and complete release of all shift differential and lump sum claims arising out of or relating to the claims brought in this lawsuit, or that could have been brought, against the United States, or any other agencies or instrumentalities of the United States, including AAFES, or any agents, employees, or officers thereof, by Settlement Class Members. (Ex. A ¶ 26.) Upon final approval of the settlement by the Court, each Settlement Class Member employed or formerly employed by AAFES releases, waives, and abandons any and all claims, causes of action, and demands arising out of or relating to the shift differential and lump sum claims brought in this lawsuit, whether known or unknown, whether arising in law or in equity, jointly or severally, which they,

their heirs, executors, administrators or assignees may have or hereafter acquire against the defendant or any of its agencies, departments, officers, agents or employees, including but not limited to any claims for costs, expenses, attorney fees, and damages of any sort. *Id.*

IV. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED.

Prior to granting preliminary approval of a settlement, the Court should determine that the proposed settlement class is a proper class for settlement purposes. Manual for Complex Litigation § 21.632 (4th ed. 2004); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The certification of a class in actions in the Court of Federal Claims is governed by RCFC 23. RCFC 23 is based on the comparable rule of the Federal Rules of Civil Procedure but with a key distinction. *Singleton v. United States*, 92 Fed. Cl. 78 (2010). Unlike the federal rule, RCFC 23 allows only for an "opt-in" class: if a class is certified, members of the class are notified and given an opportunity to affirmatively include themselves in the lawsuit. *Id.* Only if they do so are they bound by the outcome of the action. *Id.*

RCFC 23 provides that "one or more members of a class may sue as representative parties on behalf of all members only if" certain prerequisites are met. The prerequisites are: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." RCFC 23(a). In addition, for the class action to be maintainable, the court must find that "the United States has acted or refused to act on grounds generally applicable to the class," that the common questions of law and fact predominate, and that the class action is superior to other methods for adjudicating the controversy. RCFC 23(b).

These requirements have been conveniently restated as comprising five elements: (1) numerosity; (2) commonality; (3) typicality; (4) adequacy; and (5) superiority. *See Barnes v. United States,* 68 Fed.Cl. 492, 494 (2005). Because a class action is basically a procedural technique for resolving the claims of many individuals, a "liberal construction serves public purposes of judicial economy and efficiency." *Singleton*, 92 Fed. Cl. at 82. Moreover, "class actions are not disfavored by the United States Court of Federal Claims." *Filosa v. United States*, 70 Fed. Cl. 609, 611 (2006) (Braden, J.) (granting motion for class certification).

A. <u>The Requirement Of Numerosity Is Satisfied.</u>

The numerosity prerequisite is met when "the class is so numerous that joinder of all members is impracticable." RCFC 23(a)(1). To satisfy this requirement no "magic number" is required, nor are the plaintiffs required to state the "exact" number of potential class members. *King v. United States*, 84 Fed. Cl. 120, 124 (2008). However, "While not outcome determinative, the number of potential class members is persuasive when determining numerosity." *Id.* In this case, based upon defendant's records, the class consists of approximately 38,331 persons, easily enough to establish numerosity. *See Adams v. United States*, 93 Fed. Cl. 563, 575 (2010) (Braden, J.) (certifying a class consisting of upwards of 10,000 members), *citing Curry v. United States*, 81 Fed. Cl. 328, 332 (2008) (certifying a class with an estimated size in excess of 10,000 members) and *Bacon v. Honda of Am. Mfg*., 370 F.3d 565, 570 (6th Cir.2004) ("[The] sheer number of potential litigants in a class, especially if it is more than several hundred, can be the only factor needed to satisfy Rule 23(a)(1)")").

Another factor to consider in determining numerosity is the geographical location of the potential class members. *King,* 84 Fed. Cl. at 124. If plaintiffs are dispersed geographically, then a court is more likely to certify a class action. *Id*. Here, the class is located throughout the

United States and certain foreign countries. (See Dkt. No. 8, ¶16.) Thus, the geographical dispersion of class members strongly supports certification.

An additional factor in determining numerosity is whether the size of each individual plaintiff's claim hinders the ability of a plaintiff to file any action at all. *King,* 84 Fed. Cl. at 125, citing *Wright, Miller, & Kane* § 1762 at 206 & n. 55. The smaller the size of the claim and the larger the number of persons, the less likely it is that, without the benefit of a class action, any plaintiff will recover. *See Barnes*, 68 Fed.Cl. at 499–500 ("[T]he small recoveries expected to be received by these individuals-estimated to be individually in the hundreds of dollars-render it less likely that, without the benefit of class representation, they would be willing to incur the financial costs and hardships of separate litigations, the costs of which would certainly exceed their recoveries many-fold."). Here, the size of the individual class members' claims for shift differential and lump sum pay range from between $10 and several hundred dollars, and in some small number of instances, a few thousand dollars. (See Jacobs Declaration at ¶ 9.) Thus, the size of each individual plaintiff's claim also strongly supports certification.

B. <u>The Requirement Of Commonality Is Satisfied</u>.

The "commonality requirement" entails three inquiries: (1) whether there are "questions of law or fact common to the class;" (2) whether those common questions "predominate over any questions affecting only individual members;" and (3) whether the "United States has acted or refused to act on grounds generally applicable to the class." *Adams*, 93 Fed. Cl. at 575. Commonality does "not require that the individual class members be identically situated." *Barnes*, 68 Fed. Cl. at 496. Rather, to meet RCFC 23(a)(2), the "questions underlying the claims of the class merely must share essential characteristics, so that their resolution will advance the overall case." *Id.* Moreover, the threshold of commonality is "not high." *King,* 84 Fed. at 125.

1. *Questions Of Law And Fact Are Common To The Class.*

RCFC 23(a)(2) requires that there be "questions of law or fact common to the class." RCFC 23(a)(2). A class shares a common question of law or fact "when there is at least one issue whose resolution will affect all or a significant number of the putative class members." *Adams*, 93 Fed. Cl. at 575 (finding common question of fact as to "whether the VA failed to pay Plaintiffs the appropriate amount" and common question of law as to "whether the VA violated the "leave with pay" statutes of Title 5."), citing *Curry*, 81 Fed. Cl. at 333 (commonality satisfied in whether VA employees were entitled to premium pay when taking authorized leave for late-night and Saturday shifts) and *Barnes*, 68 Fed.Cl. at 496 (commonality satisfied in "whether the Navy ha[d] systematically failed to pay ... specified individuals premium pay for leave of less than eight hours per pay period or certain holidays"). Here, all class members share claims that arose out of the same activity of the Defendant, are based on the same legal theories, and implicate the following common questions or issues of fact and law whose resolution will affect all class members: (a) whether Defendant failed to properly calculate and pay the appropriate amount of night shift differential and/or lump sum annual leave; (b) whether Defendant violated the shift differential and lump sum annual leave statutes and regulations; and (c) whether Plaintiff and the proposed class are entitled to relief. (Dkt. No. 8, ¶ 43)

2. *Common Questions Predominate Over Any Individual Questions.*

RCFC 23(b)(3) requires that the "questions of law or fact common to class members predominate over any questions affecting only individual members." RCFC 23(b)(3). Class-wide questions predominate over issues specific to individual members "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine

controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Barnes*, 68 Fed. Cl. at 496. Factual variation among the class grievances is acceptable as long as a common nucleus of operative fact exists. *Curry*, 81 Fed. Cl. at 334. The fact that computation of an eventual award will ultimately require individualized fact determinations is insufficient, by itself, to defeat a class action. *Adams*, 93 Fed. Cl. at 575; *see also* Barnes, 68 Fed.Cl. at 498 ("[T]here scarcely would be a case that would qualify for class status in this court" if the need to determine damages on an individual basis precluded class certification.).

In this case, common issues of fact and law predominate over any individual issues that may exist. The central factual and legal questions of this case, which all revolve around Defendant's systematic policies and practices with regard to the payment of shift differential and lump sum leave, and the legality of such conduct, can all be resolved through generalized proof and are more substantial than any possible issues subject only to individualized proof. Because this lawsuit challenges the system-wide payroll software and methodology used by AAFES to calculate the payment of shift differential and lump sum leave, Defendant's liability can be decided on a class-wide basis. The asserted systematic failure by AAFES to comply with the law governing the payment of shift differential and lump sum leave plainly predominates over the relatively straightforward calculation issues associated with determining the amounts of shift differential and/or lump sum annual leave to which each putative class member may be entitled. *See, Barnes*, 04-1335 C, 68 Fed.Cl. at 496-7 ("And, because the assertion is that the Navy's failure to comply with the Federal pay statutes is systematic and long-standing, that issue plainly is more substantial than -- and thus predominates over -- the relatively straightforward calculation issues associated with determining the hours and amounts of premium pay to which

each putative class member may be entitled."); *Curry*, 81 Fed. Cl. at 334 ("Clearly, the predominant question in this case is whether the VHA has failed, on a system-wide basis, to pay certain categories of employees premium pay to which they are entitled when they take paid leave.").

3. *Defendant Acted Or Refused To Act On Grounds Generally Applicable To The Class.*

RCFC 23(b)(2) further requires that the United States have "acted or refused to act on grounds generally applicable to the class." RCFC 23(b)(2). There can be little question that the government acted on grounds applicable to the entire class in this case by allegedly failing, on a system-wide basis, to pay shift differential and lump sum leave to workers who constitute the class. *Adams*, 93 Fed. Cl. at 576. ("In this case, Plaintiffs allege a systematic government policy of withholding additional premium pay from an entire class of individuals who have taken paid leave for Saturday shifts that would ordinarily entitle them to 25% premium pay…. Given that the common question involves a 'systematic Government policy,' Plaintiffs have satisfied the court that the United States has acted on grounds generally applicable to the class.")

C. <u>The Requirement Of Typicality Is Satisfied</u>.

Rule 23 next requires that the claims or defenses of the representative parties must be "typical of the claims or defenses of the class." RCFC 23(a)(3). The threshold for establishing typicality, like that for showing commonality, is "not high." *Adams*, 93 Fed. Cl. at 576. Like the commonality requirement, typicality also does not require the representative parties' claims to be identical to those of the putative class members; rather their claims need only "share the same essential characteristics as the claims of the class at large." *Curry*, 81 Fed. Cl. at 335 ("a finding of commonality leads to one of typicality" since both requirements serve as guideposts for

determining whether a class action is economical and whether claims of named plaintiff and the class are so interrelated that the interests of the class will be fairly and adequately protected.)

Here, Plaintiffs' claims share the same "essential characteristics" as the claims of the class because they are all based on the same factual and legal predicates. Both the named Plaintiffs and the putative class members claim that while employed by AAFES they worked or were scheduled to work regularly scheduled non-overtime shifts where the majority of the shift hours were in the second shift or third shift and were therefore entitled to the payment of night shift differential, but were not paid all of the shift differential amounts due them and/or were not paid all of the lump-sum annual leave payments due to them upon separation from AAFES, and that Defendant is liable to them for such underpayments under the relevant statutes and regulations. *See, Adams*, 93 Fed. Cl. at 576 (the "essential characteristic" of Plaintiffs' claim is whether or not the Government is liable for Saturday additional pay when specified employees use paid leave). Potential factual differences such as different job duties, different schedules, and different places of employment, are "inconsequential." *Id., citing Barnes*, 68 Fed.Cl. at 498 and *Curry*, 81 Fed. Cl. at 335-336 (holding that the common question of the Government's liability regarding back pay satisfied the typicality requirement, despite different employment facilities, different job descriptions and different schedules).

D. <u>The Requirement Of Adequate Representation Is Satisfied</u>.

Rule 23 next requires that the "representative parties will fairly and adequately protect the interests of the class." RCFC 23(a)(4) The "adequacy requirement" has two components. First, class counsel must be "qualified, experienced and generally able to conduct the litigation." *Adams*, 93 Fed. Cl. at 576-77 Second, "the class members must not have interests that are 'antagonistic' to one another." *Id.*

Plaintiffs' counsel will fairly and adequately represent the class (see Jacobs Declaration at ¶ 2). Plaintiffs' counsel have substantial experience in prosecuting complex litigation and class actions, including experience litigating class action cases before both the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit. (*Id.*, See also Firm Resume of Jacobs Kolton, Chtd., attached hereto as Exhibit C.) Plaintiffs' counsel is committed to vigorously prosecuting this action on behalf of the proposed class and have the resources to do so. (See Dkt. No. 8, ¶ 45) Moreover, there is no suggestion that the proposed class members have interests that would put them at odds with one another. (see Jacobs Declaration at ¶ 13). To the contrary, the interests of the named Plaintiffs and the proposed class members are aligned because the claims of Plaintiffs and the class are based on the same legal theories and arise from the same conduct.

E. <u>The Requirement Of Superiority Is Satisfied</u>.

Rule 23(b)(3) requires that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." RCFC 23(b)(3). This requirement "encompasses the advantage to prospective class members of litigating their own claims, the risk of inconsistent adjudications should multiple actions be pursued, and the court's conceivable difficulties in managing the class action." *Adams*, 93 Fed. Cl. at 577. Superiority is met when "a class action would achieve economics of time, effort, and expenses, and promote uniformity ... without sacrificing procedural fairness or bringing about other undesirable results." *Id.,* quoting FRCP 23, Advisory Committee Notes (1966). Here, there are approximately 38,331 potential claims that share the common predominant questions of Defendant's liability for shift differential and lump sum annual leave payments. Certification of the proposed class will allow for "consolidation of these claims, reducing the time and expense of litigation, ensuring a consistent

decision regarding the Government's liability, and enabling class members with smaller damages to assert their claims." *Id.; see also Filosa*, 70 Fed. Cl. at 622 (2006) ("there is little benefit to having each proposed class member retain counsel, pay filing fees, and submit duplicative pleadings."). Indeed, absent a class action, many class members would find the cost of litigating their claims to be prohibitive, and may have no effective or complete remedy, and many of the proposed class members may not even know that their rights may have been violated.

Moreover, the proposed class is manageable, because "individual damage calculations can be ascertained since the Government can mechanically identify and notify potential class members, as well as calculate their individual damages." *Adams*, 93 Fed. Cl. at 577-578*, citing Curry,* 81 Fed.Cl. at 338 ("The Court does not find identifying or notifying potential class members to be particularly daunting, given the records at the government's disposal.").

Here, a class action is superior to individual litigation.

V. THE COURT SHOULD APPOINT PLAINTIFFS' COUNSEL AS CLASS COUNSEL.

Under Rule 23, "a court that certifies a class must appoint class counsel . . .[who] must fairly and adequately represent the interests of the class." RCFC 23(g)(1)(A)-(B). In making this determination, the Court considers counsel's: (1) work in identifying or investigating potential claims; (2) experience in handling class actions or other complex litigation, and the types of claims asserted in the case; (3) knowledge of the applicable law; and (4) resources committed to representing the class. RCFC 23(g)(1)(A)(i-iv).

As discussed above, proposed Class Counsel have extensive experience in prosecuting class actions and other complex litigation, including experience litigating class action cases before the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit. (See Exhibit C.) Further, proposed Class Counsel have diligently investigated

and prosecuted the claims in this matter, have knowledge of the applicable law, have dedicated substantial resources to representing the class and are committed to continue doing so, and have successfully negotiated the settlement of this matter. Accordingly, the Court should appoint John G. Jacobs and Bryan G. Kolton of Jacobs Kolton, Chtd. to serve as Class Counsel for the proposed class pursuant to Rule 23(g).

VI. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL.

After certifying the settlement class, the Court should preliminarily approve the settlement. Under RCFC 23(e), "[t]he claims, issues or defenses of a certified class may be settled . . . only with the court's approval," requiring a "finding that it is fair, reasonable, and adequate." The procedure for review of a proposed class action settlement is a well-established two-step process. *Barnes v. United States*, 89 Fed. Cl. 668, 670 (2009) ("Judicial review of a proposed class action settlement 'involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted.'").

The first step is a preliminary, pre-notification determination as to whether the proposed settlement is "within the range of possible approval" as "fair, reasonable, and adequate." Newberg, §11.25, at 38 39 (quoting Manual for Complex Litigation §30.41 (3rd ed. 1995). At this stage, "counsel submit the proposed terms of [the] settlement and the judge makes a preliminary fairness evaluation." *Barnes*, 89 Fed. Cl. at 670. This evaluation generally is "made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties." *Id*. The purpose is to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a final approval hearing. If the court finds a settlement proposal "within the range of possible approval," it then proceeds

to the second step in the review process—the final approval hearing. *Newberg*, §11.25, at 38 39. The standard of scrutiny for preliminary approval is more relaxed than for final approval. *Armstrong v. Bd. of Schl. Dirs. of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980).

A strong judicial policy exists that favors the voluntary conciliation and settlement of complex class action litigation. *Sabo v. United States*, 08-899 C, 2011 WL 6778497 (Fed. Cl. Dec. 22, 2011) ("Class actions, by their complex nature, carry with them a particularly strong public and judicial policy in favor of settlement."). In general, settlement is "always favored," especially in class actions where the avoidance of formal litigation can save valuable time and resources. *Id.* A court, of course, has discretion to accept or reject a proposed settlement, but it may not alter the proposed settlement, nor may it decide the merits of the case or resolve unsettled legal questions. *Voth Oil Co., Inc. v. United States*, 108 Fed. Cl. 98, 103 (2012).

In deciding whether a settlement falls within the range of approval, courts have considered a variety of factors, among them: (i) whether the settlement agreement appears to be the product of serious, informed, non-collusive negotiations; (ii) whether it improperly grants preferential treatment to class representatives or other members of the class; (iii) whether counsel are experienced and have been adequately informed of the facts; and (iv) whether the agreement otherwise has obvious deficiencies. *Barnes*, 89 Fed. Cl. at 670. In conducting this evaluation, it is neither for the court to reach any ultimate conclusions regarding the merits of the dispute, nor to second guess the settlement terms. *Id., citing See Officers for Justice v. San Fran. Civ. Serv. Comm'n,* 688 F.2d 615, 625 (9th Cir.1982) ("the proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators").

In this case, the proposed settlement is plainly "within the range of possible approval." The settlement is the result of extensive, arms-length negotiations between counsel experienced

in class action litigation. It achieves an outstanding result and one that could not confidently have been predicted at the outset of the litigation. (Jacobs Declaration ¶ 8.) Payouts to individual class members will be calculated in a uniform fashion and no class member will receive preferential treatment. The fairness, reasonableness, and adequacy of this settlement are apparent from the substantial immediate benefit conferred upon the members of the class, who will get up to 100% of the shift differential and lump sum leave payments that they would have been paid had they been properly paid shift differential and lump sum leave during the class period. And, Plaintiffs' counsel is not aware of any deficiencies in the settlement agreement. Although Plaintiffs' counsel believe that Plaintiffs' claims are meritorious and should prevail, it would blink reality to not recognize that there are risks to continued litigation, and nothing to be gained. *Id.* When the strengths of Plaintiffs' claims are weighed against the risk, expense, and likely duration of further litigation and the complexity of class action practice, it is apparent that the proposed settlement is clearly in the best interest of class members as it provides substantial recovery now.

As this settlement easily falls well "within the range of possible approval," it should be preliminarily approved by the Court.

VII. THE PROPOSED PLAN OF CLASS NOTICE

When certification of a settlement class is sought under Rule 23(b)(3), the substance of the notice to the settlement class must clearly and concisely state in plain, easily understood language (1) the nature of the action, (2) the definition of the class certified, (3) the class claims, issues and defenses, (4) that a class member may enter an appearance through counsel if so desired, (5) that the court will include in the class any member who requests inclusion, (6) the time and manner for requesting inclusion and (7) the binding effect of a class judgment on

members. See RCFC 23 (c)(2)(B). In the context of a settlement, the notice must also include a general description of the proposed settlement. *See, e.g., Torrisi v. Tucson Elec. Power Co*., 8 F.3d 1370, 1375 (9th Cir. 1993). In addition to the substance of the notice, the manner of issuing notice must also satisfy Rule 23 and Due Process, which require that the Parties give "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." RCFC 23(b)(3); *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974). The proposed notice in this case satisfies all the requirements of Rule 23 and Due Process. The proposed forms of class notice, copies of which are attached as Exhibits 1 and 2 to the proposed Preliminary Approval Order submitted herewith, apprise the settlement class of the items required by RCFC 23(c)(2)(B), as well as the key terms of the Settlement, Class Counsel's request for attorneys' fees and expenses and Class Representative incentive awards, and the right to object to the Settlement and/or to Class Counsel's attorneys' fee application or application for Class Representative incentive awards.

The proposed notice program, which will be administered by the Settlement Administrator, is comprehensive, and consists of a five-part notice plan designed to reach as many potential settlement class members as possible through reasonable effort. First, the Settlement Administrator will send direct notice of the settlement via U.S. Mail to the last known postal addresses of potential Settlement Class Members. (Ex. A, ¶ 9.) Second, the Settlement Administrator will send direct notice of the settlement to the email addresses of all potential Settlement Class Members for whom AAFES has email addresses. *Id.* Third, internet notice will be given through a class action settlement website established and maintained by the Settlement Administrator and supported by Google Adwords. *Id.* at ¶ 11. The settlement website will contain a copy of the notice and will allow for online claims filing. *Id.* Fourth,

AAFES will put a link on its website to the settlement website. Fifth, at all AAFES facilities, AAFES will cause a notice, no smaller than 24 inches by 24 inches, to be posted prominently and conspicuously near any time clock where employees regularly punch in and out for their shift (or, in the event that there is no time clock where employees punch in and out, the notice will be posted in a place where employees are most likely to see it as is reasonably determined by AAFES). *Id.* at ¶12.

The proposed class action notice plan is robust, comports with Rule 23 and the requirements of Due Process, and should be approved by this Court as the best notice practicable.

VIII. PROPOSED PRELIMINARY SCHEDULE

Plaintiff proposes the following schedule leading to a final approval hearing.

The United States will provide the Settlement Administrator and Class Counsel the names, last known postal and email addresses, phone numbers, employee ID numbers, work location, and Social Security Numbers of potential Settlement Class Members and the amounts due each Class Member under the settlement. (Ex. A, ¶ 6.)	Within 10 days of the Court's entry of the Preliminary Approval Order
AAFES will, at all AAFES facilities, post prominently and conspicuously near any time clock where employees regularly punch in and out for their shift, a notice of the settlement. (Ex. A, ¶ 12.)	Within 40 days of the Court's entry of the Preliminary Approval Order
Internet notice will begin through a class action settlement website established and maintained	Within 40 days of the Court's entry of the Preliminary Approval Order

by the Settlement Administrator and supported by Google Adwords. (Ex. A, ¶ 11.)	
AAFES to publish a link on its website to the Settlement website. (Ex. A, ¶ 11.)	Within 10 days of the establishment of the settlement website, or as later agreed to by the parties
Settlement Administrator will mail and email a copy of the notice and claim form to the Settlement Class (the "Notice Date") (Ex. A, ¶ 10.)	Within 30 days after the United States provides the Settlement Administrator the information described in paragraph 6 of the Settlement Agreement (i.e., within 40 days of the Court's entry of the Preliminary Approval Order)
Deadline To File and Serve Objections (Ex. A, ¶ 14.)	No later than 60 days from the Notice Date (i.e., within 100 days of the Court's entry of the Preliminary Approval Order)
Deadline to Respond to Objections (Ex. A, ¶ 15.)	Within 14 days after deadline for receipt of objections (i.e., within 114 days from the Court's entry of the Preliminary Approval Order)
Deadline to File Consent Motion for Final Approval of Settlement	Within 114 days of the Court's entry of the Preliminary Approval Order
Deadline to Opt In / File A Claim (Ex. A, ¶ 9.)	No later than 120 days after the Notice Date (i.e., within 160 days of the Court's entry of the Preliminary Approval Order)
Final Settlement Hearing (Ex. A, ¶ 17.)	No later than 90 days from the Notice Date (at the Court's convenience) (i.e., within

	130 days from the Court's entry of the Preliminary Approval Order)

IX. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask that the Court grant preliminary approval of the proposed settlement agreement, approve the form and manner of notice described above, and enter the proposed preliminary approval order separately submitted herewith, and grant such further relief the Court deems reasonable and just.

Dated: December 6, 2016

Respectfully Submitted,

By: /s/ John G. Jacobs

John G. Jacobs
Jacobs Kolton, Chtd.
55 West Monroe Street, Suite 2970
Chicago, Illinois 60603
Telephone: (312) 427-4000
Facsimile: (312) 268-2425
jgjacobs@jacobskolton.com

Counsel Of Record For Plaintiffs
Andrew Russell and Ruth Gallego
And The Proposed Settlement Class

Of Counsel:

Bryan G. Kolton (pending *pro hac vice*)
Jacobs Kolton, Chtd.
55 West Monroe Street, Suite 2970
Chicago, Illinois 60603
Telephone: (312) 427-4000
Facsimile: (312) 268-2425
bgkolton@jacobskolton.com

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2016, I caused to be served the foregoing document by electronically transmitting it to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing upon the following ECF registrants:

Michael A. Rodriguez, Esq.
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 305-4696
Fax: (202) 514-8624
Email: Michael.A.Rodriguez@usdoj.gov

/s/ John G. Jacobs
John G. Jacobs