UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHERIE EASTERLING, individually and on behalf of all others similarly situated,	:	CIVIL ACTION NO. 3:08-CV-826 (JCH)
Plaintiffs,	:	
-against-	:	
STATE OF CONNECTICUT, DEPARTMENT OF CORRECTION	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AND APPROVAL OF THE PROPOSED NOTICE OF SETTLEMENT AND CLASS ACTION SETTLEMENT PROCEDURE

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INTRODUCTION

Plaintiff seeks preliminary approval of the parties' settlement of this Title VII class action lawsuit.[1] After extensive negotiations with the assistance of Magistrate Judge Fitzsimmons, the parties have agreed to settle Named Plaintiff Cherie Easterling's and class members' disparate impact hiring claims. Under the settlement, the State of Connecticut will pay $1,851,892, in gross back pay to be distributed to class members on a pro rata basis. The settlement also includes: (1) a second priority hiring process offering expedited processing of applications for the Correction Officer ("CO") position and priority hiring of otherwise qualified class members; (2) adjustment of salary, overtime rates, and certain benefit accrual rates for up to 28 class members hired as Correction Officers; (3) a one-time payment for up to 28 class members hired as Correction Officers as compensation in lieu of certain seniority benefits; (4) pension credits for up to 28 class members who are otherwise eligible to participate in the State Employee's Retirement System ("SERS") as of the date of final approval of settlement; and (5) a payment of $1,232,463 in attorneys' fees and costs. Assuming all 124 members of the class participate, the average back pay award is approximately $15,000,[2] which is close to the actual economic loss that each class member suffered in back pay as a result of the challenged hiring process. Moreover, the plan of allocation is tailored to the lost earnings of each class member based on individualized information.

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[1] Defendant does not oppose preliminary approval of the proposed settlement, approval of the proposed notices of class action settlement, or approval of the proposed schedule for final settlement approval. *See* Declaration of Cyrus E. Dugger in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Settlement and Approval of the Proposed Notice of Settlement and Class Action Settlement Procedure, dated July 23, 2013 ("Dugger Decl.") ¶¶ 4-5.

[2] This average excludes the value of the additional monetary and non-monetary relief to which members of the class may be entitled under the agreement.

On May 3, 2013, defense counsel submitted the proposed settlement to the Connecticut General Assembly, in accordance with the provisions of Conn. Gen. Stat. §3-125a. The General Assembly did not vote to approve or reject the settlement and it was thus deemed approved thirty days after the submittal. Declaration of Cyrus E. Dugger in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Settlement and Approval of the Proposed Notice of Settlement and Class Action Settlement Procedure, dated July 23, 2013 ("Dugger Decl.") ¶ 32. The proposed settlement satisfies all of the criteria for preliminary approval. With this motion, Plaintiff respectfully requests that the Court: (1) grant preliminary approval of the parties' Stipulated Agreement, attached as Exhibit B to the Dugger Decl.;[3] (2) approve the proposed Notices of Class Action Settlement ("Notices"), attached as Exhibits C and D to the Dugger Decl.; and (3) approve the proposed class action settlement procedure.

I. Factual and Procedural Background

This Court, having presided over this class litigation for its entirety, is well-versed with its facts and history. For purposes of this motion, Plaintiff provides an abbreviated background; for a more comprehensive history of the case, *see Easterling v. Conn. Dep't of Corr. ("Easterling I")*, 265 F.R.D. 45 (D. Conn. 2010) (certifying class pursuant to Rule 23(b)(2)); *Easterling v. Conn. Dep't of Corr. ("Easterling II")*, 783 F. Supp. 2d 323 (D. Conn. 2011) (granting Plaintiff's motion for summary judgment); *Easterling v. Conn. Dep't of Corr. ("Easterling III")*, 278 F.R.D. 41 (D. Conn. 2011) (modifying class certification from Rule 23(b)(2) to bifurcated Rule 23(b)(2) and Rule 23(b)(3) class); *Easterling v. Conn. Dep't of Corr. ("Easterling IV")*, No. 08 CV 826 (D. Conn. June 27, 2012) (resolving temporal period of gross class damages relief and hiring shortfall calculation) (Dugger Decl., Exhibit G).

[3] All exhibits are attached to the Dugger Decl.

On April 20, 2005, Plaintiff Easterling filed a charge of discrimination with the Connecticut Commission on Human Rights and Opportunities ("CCHRO"). Dugger Decl., Ex. A (Complaint) ¶ 8. After she received a notice of right to sue, Plaintiff Easterling commenced this litigation against the Connecticut Department of Correction on May 30, 2008, alleging that the physical fitness test applied to applicants for the Correction Office position resulted in a disparate impact on female applicants in violation of Title VII of the Civil Rights Act. *See* Dugger Decl., Ex. A (Complaint).

On January 4, 2010, the Court granted Plaintiff's Motion for Class Certification, pursuant to Fed. R. Civ. P. 23(b)(2). *See Easterling I*, 265 F.R.D. 45. On May 5, 2011, the Court granted Plaintiff's Motion for Summary Judgment as to liability for disparate impact discrimination, based on Defendant's use of the 1.5 mile portion of the physical fitness test. *See Easterling II*, 783 F. Supp. 2d 323.

On November 22, 2011, in response to the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Court modified its earlier certification order. The Court certified Plaintiff's claims for class wide declaratory and injunctive relief pursuant to Fed. R. Civ. P. 23(b)(2), and Plaintiff's claims for monetary and individualized injunctive relief pursuant to Fed. R. Civ. P. 23(b)(3). *See Easterling III*, 278 F.R.D. 41. The Court held that the members of the class include "[a]ll female applicants for the position of Correction Officer ("CO") at the State of Connecticut Department of Correction ("DOC") who participated in the CO selection process and failed only the 1.5 mile run portion of the physical fitness test at any time from June 28, 2004, and continuing to the date of final judgment in this matter." *Id.* at 51.

On January 3, 2012, following briefing, the Court approved the notice and opt-out forms. *See* ECF No. 166. The Court then scheduled the remedial damages phase of litigation on

January 19, 2012. ECF No. 172. Only one class member, Virginia C. Brennan, opted out of the class. ECF No. 173.

On March 27, 2012, the parties filed a Joint Stipulation, pursuant to which the defendant agreed to grant priority hiring status to otherwise qualified class members who successfully completed the 2012 Correction Officer selection process. ECF No. 187. The Joint Stipulation did not provide for retroactive seniority or other individualized relief for the class. *Id.* ¶ 13.

Following the Court's November 22, 2011 decision denying Defendant's motion to decertify the class, the parties engaged in further extensive settlement negotiations regarding post-liability relief. Dugger Decl. ¶ 26. In furtherance of these negotiations, the parties submitted two critical issues concerning gross back pay to the Court for resolution: (1) the number of class members who would have been hired absent discrimination (the "hiring shortfall"); and (2) the eligibility period for back pay ("Damages Period"). *Id.* ¶ 27; ECF Nos. 182, 189, 197, 205, 208.

The Court resolved these questions on June 27, 2012. *See* ECF No. 213. With respect to the Damages Period, the Court determined that for class members who first took the physical fitness test in 2004, the back pay period began on the average date of appointment for successful candidates from the 2004 application cycle, and that for class members who took the test in 2006, the back pay period began on the average date of the appointment for successful candidates from the 2006 application cycle. *Id.* at 14. The Court also held that the back pay period terminated on the average date of appointment for class members who successfully completed the 2012 application cycle pursuant to the parties' 2012 priority hiring agreement. *Id.* Because the DOC offered a sufficient number of Correction Officer positions to class members

who successfully completed the selection process on November 2, 2012, the first hiring date of 2012, the parties agreed that the damages period ended on that date. Dugger Decl. ¶ 28.

The Court also resolved the methodology for calculating the hiring shortfall. The Court determined that "the hiring shortfall analysis in this case will assume that class members would have satisfied post-physical fitness test hiring criteria at the same rate as other applicants." ECF No. 213 at 9. Following this ruling, the parties agreed that the proper hiring shortfall number was 28. Dugger Decl. ¶ 28.

The parties thereafter continued settlement negotiations with the assistance of Judge Fitzsimmons, including telephonic conferences and in-person mediations, as well as numerous additional settlement discussions directly between the parties. *Id*. With the benefit of Judge Fitzsimmons's assistance, these mediations and negotiations ultimately resulted in the Stipulated Agreement. *Id.* ¶¶ 26-34.

II. Summary of the Settlement Terms

A. The Settlement Fund

The State of Connecticut will pay $1,851,892, which represents a complete settlement of the class members' back pay relief.[4] Dugger Decl., Ex. B (Stipulated Agreement) ¶ 22. The settlement funds will be distributed on a pro rata basis to participating class members as set forth in the claims process below.[5] *Id.*

B. One-Time Payment in Lieu of Retroactive Seniority

Class members who complete either priority hiring process will, upon successful

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[4] The class currently stands at 124 members.

[5] The parties have agreed that the State of Connecticut will assert any outstanding liens due and owing to the State against such payments. Dugger Decl., Ex. B (Stipulated Agreement) ¶ 23.

completion of the working test period, receive a one-time payment of $8,078 (for 2004 applicants) and $6,126 (for 2006 applicants). *Id.* ¶ 26. The total number of such awards is limited to a maximum of 28 and will be awarded up to that number, based upon the order in which class members complete the priority hiring process and become COs. *Id.* These payments are being made in lieu of certain retroactive seniority relief to which they may have otherwise been entitled. *Id.*[6]

C. Second Priority Hiring Agreement

In addition to the previously stipulated 2012 priority hiring agreement, ECF No. 187, class members will have an additional opportunity to participate in a priority hiring process, upon successful completion of the entire selection process for the CO position, during the first administration of the CO exam that occurs after the Effective Date of the Stipulated Agreement.[7] Dugger Decl., Ex. B (Stipulated Agreement) ¶ 28. Defendant is under no obligation to notify class members of the commencement of the hiring process, and class members must affirmatively notify Defendant that they are class members seeking priority hiring status. The total number of priority hires pursuant to the 2012 or second priority hiring agreement cannot exceed 28. *Id.* ¶ 29.

D. Pension Credit

Certain class members may seek pension credit in one of several forms under the circumstances described in the Stipulated Agreement. Pension credits will be provided to the first 28 class members who request and obtain them, but will not be provided to any class

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[6] Class members who receive this one-time payment are still eligible for a back pay award.

[7] Defendant expects that the Department of Administrative Services may administer the next Correction Officer examination in or around the year 2015, but is unable to state with certainty when the administration of the examination will take place. Dugger Decl., Ex. B (Stipulated Agreement) ¶ 28 n.1.

member for any period during which they otherwise received pension credit of any kind. Class members seeking pension credit must complete the required paperwork, including the required request form, Dugger Decl., Ex. E (Pension Credit Request Form), which will be distributed to the class shortly after final approval of the settlement. Dugger Decl. ¶ 41.

1) Pension Credit for 2012 Priority Hire Class Members.

Each class member who successfully completes the 2012 priority hiring process may, upon successful completion of her working test period and upon making a timely request, obtain hazardous duty pension credit for all or part of the applicable Damages Period, contingent upon her payment of the employee contribution for such credit. The amount of will be based upon the rate of pay that the class member would have earned had she been employed as a CO during the applicable Damages Period. *Id.* ¶¶ 31-32. This payment will be withheld from the class member's back pay award and any remainder must be paid in order to receive pension credit. *Id.* ¶ 32.

2) Pension Credit for Class Members Hired Through the Second Priority Hiring Process.

Each class member who successfully completes the second priority hiring process may, upon successful completion of the working test period for the CO position, likewise elect to obtain hazardous duty credit for all or part of the Damages Period. *Id.* ¶ 33. In such instance, the required employee contribution must be paid within sixty days of the class members' completion of her working test period. *Id.*

3) Pension Credit for Non-Priority Hire Class Members Currently Working in Hazardous Duty Positions.

Each class member who, on the Effective Date of the Stipulated Agreement, is working in a position with the State of Connecticut that is categorized as a hazardous duty position (other

than those class members hired through the first or second priority hiring processes), may elect to obtain hazardous duty credit for all or part of the Damages Period. *Id.* ¶ 34. In such instance, the required employee contributions will be deducted from the class member's back pay award. If the back pay award is less than the required employee contribution, the additional contribution must be paid in order for the class member to receive pension credit. *Id.*

4) Pension Credit for Class Members Currently Working in Non-Hazardous Duty Positions or Otherwise Eligible to Participate in the Connecticut State Employee Retirement System.

Each class member currently working in a position with the State of Connecticut categorized as non-hazardous duty or who is otherwise eligible to participate in the State Employee Retirement System (SERS) on the Effective Date of the Stipulated Agreement, may elect to obtain non-hazardous duty pension credit for all of part of her Damages Period. In such instance, the required employee contributions will be deducted from the class member's back pay award. If the back pay award is less than the required employee contribution, the additional contribution must be paid in order for the class member to receive pension credit. *Id.* ¶ 34

E. Release

Upon the Effective Date of the Stipulated Agreement, each class member will release the Defendant and the State of Connecticut from all claims that were brought or could have been brought during the class period. *Id*. ¶ 46.

F. Eligible Employees

The settlement class consists of the following:

> All female applicants for the position of Correction Officer ("CO") at the State of Connecticut Department of Correction ("DOC") who participated in the CO selection process and failed only the 1.5 mile run portion of the physical fitness test at any time from June 28, 2004, and continuing to the date of final judgment in this matter.

Id. ¶ 5.

The Court has already certified this class pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3). *See Easterling III*, 278 F.R.D. 41. Any class member who desires to opt out of the class may do so by writing a letter to the clerk as detailed in the notices attached as Exhibit C and Exhibit D to the Dugger Decl. Only those class members selected under either of the priority hiring agreements and/or who return completed IRS and SSA authorizations within sixty days of the class members' receipt of notice of final approval of this settlement, will be eligible to receive any of the relief associated with this settlement agreement. Dugger Decl., Ex. B (Stipulated Agreement) ¶ 43.

G. Claims Process

1. Back Pay Awards

The Stipulated Agreement provides for distribution of funds on a pro rata basis, pursuant to a methodology developed by Class Counsel, and to be approved by the Court. *Id.* ¶ 22. Pursuant to the Stipulated Agreement, Defendant does not contest the methodology for the pro rata distribution proposed here. *Id.*

In individual Title VII litigation, each class member would have been entitled to the difference between the salary she would have obtained in the CO position and her interim earnings. *See* 42 U.S.C. § 2000e-5(g)(2)(A). The lower a plaintiff's interim earnings, the higher the value of her respective back pay award.

Here, the Court has already determined that: (1) because the number of applicant class members was higher than the number of positions that would have been available to the class absent discrimination; and (2) because it would be impossible to identify precisely which class members would have obtained the available positions, the Court must make a determination of gross class damages to be distributed to the class on a pro rata basis. *Easterling III*, 278 F.R.D.

at 48; *see also United States v. City of New York*, 276 F.R.D. 22, 44 (E.D.N.Y. 2011) ("Because it is impossible to determine exactly which non-hire victims would have received job offers . . . the court must first determine the aggregate amount of individual relief to which the subclasses are entitled and then distribute that relief pro rata to eligible claimants.").

The Court determined that "[r]ather than resort to 'mere guesswork,' . . . [it would] . . . make an aggregate calculation of the back pay to which the class is entitled" that could then "be distributed to eligible class members on a pro rata basis." *Easterling III*, 278 F.R.D. at 49; *see also Ingram v. Madison Square Garden Ctr., Inc.*, 709 F.2d 807, 812-13 (2d Cir. 1983) (quoting *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 161 n.6 (2d Cir. 2001)) ("The fairer procedure [is] to compute a gross award for all the injured class members and divide it among them on a pro rata basis.").

Plaintiff seeks approval of the following general methodology for distribution of back pay on a pro rata basis:

1. Class members who have submitted complete IRS and SSA authorization forms and who do not opt out will receive back pay awards.

2. Class members who have not submitted IRS and SSA authorization forms will receive the required forms.

3. If a class member submits incomplete SSA or IRS authorization(s), Class Counsel will send a letter to the class member explaining the reason that the authorization is incomplete within five days, after which the class member will have fourteen days from the mailing to submit the corrected authorization(s) to Class Counsel via facsimile (or submit by mail by the original deadline if that deadline provides more time).

4. Class members will be divided into two groups based on whether they first applied to the Correction Officer position in 2004 or 2006.

5. Using the information obtained for each class member from the IRS and SSA, Class Counsel will calculate the difference in wages for each class member as compared to the Correction Officer position (as valued in damages Tables 2 and 3

of the Stipulated Agreement) during the Damages Period. This value will represent the back pay value each class member would have been entitled to prior to a pro rata reduction reflecting the gross class damages methodology.[8]

6. The total difference in wages between each class member and the Correction Officer position during the Damages Periods will be separately totaled for 2004 and 2006 applicants. Class members whose actual wages were more than the wages they would have received as a Correction Officer during their Damages Period will have a value of zero for this step.

7. For each group (*i.e.* 2004 and 2006 applicants) the gross class damages attributed to that applicant group in damages Table 1 ($565,474 for 2004 and $1,286,418 for 2006)[9] will be divided by the total income difference for all participating class members for each respective group derived from the totals of step #6.

8. The resulting proportional value for the 2004 applicants and 2006 applicants will be applied to the value calculated for each class member in step #5, which will determine that class member's appropriate pro rata distribution (the 2004 and 2006 applicant groups will have different proportional values).

Dugger Decl. ¶ 41.

For example, if the combined wages differential calculated in step #6 for the 2004 applicant group is $750,000, Class Counsel would divide $565,474 by $750,000 to determine the proportional reduction (.754) to be applied to a 2004 applicant's individual pay differential calculated in step #5. In this example, a 2004 applicant whose total wages differential with the

[8] Where the information provided by the IRS and SSA differ for a given year, the values will be averaged. Where only one agency provides information in response to Class Counsel's submission of complete authorization forms for a given year, Class Counsel will base its calculations on only the information provided by the disbursement deadline. In instances where an authorization was submitted to Class Counsel, but became stale before submission to the IRS or SSA, Class Counsel will rely on the information received as of the time of disbursement of awards, but prior to such reliance, will also request an additional authorization from the class member and submit it to the relevant agency.

[9] The 2004 and 2006 totals will, however, each be reduced by half of any incentive payment awarded to Cherie Easterling from the gross class damages fund. The maximum such award permitted by the Stipulated Agreement is $10,000. Dugger Decl., Ex. B (Stipulated Agreement) ¶ 41.

CO position was $85,000 (as calculated in step #5) would be subject to a proportional reduction of (.754) and receive a pro rata back pay award of $64,087.[10]

This proposed methodology most closely approximates the pro rata distribution that would have occurred following individualized *Teamsters* hearings during the remedial period had this litigation proceeded to trial. *See Teamsters v. United States*, 431 U.S. 324 (2011); *see also Ingram*, 709 F.2d 807 at 812-13.

The proposed methodology proportionally allots class members' pro rata back pay share based on their respective income levels. Class members with the lowest interim earnings will receive a larger proportional share of gross class damages and class members with the highest interim earnings will receive a smaller proportional share (or no back pay award if their interim earnings exceeded CO compensation for their Damages Period).

While this methodology does not perfectly mirror the pro rata distribution each class member would have received if these issues had been fully litigated to trial (because it only compares wages and not the difference in the value of fringe benefits), it is a reasonable estimate for the pro rata award possible from successful litigation. Indeed, even in litigation, the Court is charged only with "as nearly as possible . . . recreat[ing] the conditions and relationships that would have been had there been no unlawful discrimination," *Teamsters*, 431 U.S. at 372 (internal quotation marks omitted), and "[u]nrealistic exactitude is not required in determining back pay." *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 47 (2d Cir. 1980) (citing *EEOC v. Enter. Ass'n. Steamfitters*, 542 F.2d 579, 587 (2d Cir. 1976)).

[10] As noted above, the amount of the back pay award distributed to each class member will be reduced by the amount of any outstanding liens that are due and owing to the State of Connecticut. *See* Dugger Decl., Ex. B (Stipulated Agreement) ¶ 23.

Class Counsel's proposed claim methodology is also procedurally sound. First, class members from whom Class Counsel have received IRS and SSA authorization forms will automatically receive a pro rata share of the gross class damages. For years that the IRS and SSA report no information, and/or for which records are not available regarding income, the class member will be designated an income of $10,000.[11] Dugger Decl. ¶ 41. Second, class members from whom Class Counsel have not received IRS and SSA authorizations will have sixty days from the final approval of settlement to return the forms to be eligible to obtain a monetary recovery. Dugger Decl., Ex. B (Stipulated Agreement) ¶ 43. Funds that remain because class members do not cash their back pay award checks within ninety days of receipt will be disbursed to the class members who deposited their checks within ninety days. *Id.* ¶ 25. This second distribution from the remaining funds will be apportioned equally to all class members who deposited their checks within ninety days of receipt, and will be sent within sixty days of the latest deadline for all class members to have deposited their back pay award check. Dugger Decl. ¶ 41.

If a class member submits incomplete IRS and SSA authorizations, Class Counsel will send any such class members notice of such deficiency within five days of receipt of the deficient authorizations, after which the class member will have fourteen days to submit complete forms via facsimile (or until the original mailing deadline if sent by mail). Dugger Decl. ¶ 41.

[11] Where only one agency provides information by the disbursement date for a given year, Class Counsel will utilize that agency's records. *See also supra* note 8.

2. Claims Process for Rate of Pay and PTO Accrual Rates.

Class members who complete either of the priority hiring processes or who are COs on the date of final approval of settlement (and submit completed IRS and SSA authorization forms within sixty days of the final approval of settlement), will, upon completion of the working test period for Correction Officers, automatically have their rate of pay and accrual of vacation and sick time adjusted to the rate each would have received had she been hired on her presumptive hire date. Dugger Decl., Ex. B (Stipulated Agreement) ¶ 37.

3. Claims Process for One-Time Payment in Lieu of Retroactive Seniority.

The payments in lieu of retroactive seniority will be made to eligible class members within thirty days of the Effective Date of the Stipulated Agreement if Class Counsel is in possession of their SSA and IRS authorization forms on the Effective Date. *Id.* ¶ 26. Class members hired pursuant to the second priority hiring process will receive this payment within thirty days of the successful completion of the working test period for the Correction Officer position. *Id.* In either instance, in order to be eligible for this payment, the class member must submit complete SSA and IRS authorization forms within sixty days of the class member's notice of final approval of settlement. *Id.* ¶¶ 26, 42.

4. Claims Process for SERS Credits.

Class members who are seeking SERS credit must follow the claims process, including completion of the required forms, within the time limits stated in the Stipulated Agreement. *Id.* ¶¶ 31-35.

5. Second Priority Hiring Process.

In order to participate in the second priority hiring process, class members must successfully complete the written examination and physical fitness test administered by the

Department of Administrative Services and, within ten business days of their notification of passage of the physical fitness test, notify the Director of Recruitment for DOC that they are seeking employment as a priority hire, as set forth in the Stipulated Agreement. *Id.* ¶ 28. Only those class members who successfully complete the entire CO selection process are eligible for priority hiring status. *Id.* Class members who declined to participate in or failed to advance within the 2012 priority hiring process are also eligible to participate in the second priority hiring process. *Id.*

H. Attorneys' Fees and Litigation Costs

Under the Stipulated Agreement, Defendant will pay Class Counsel a negotiated amount of $1,232,463 as complete settlement of Plaintiff's entitlement to attorneys' fees and costs through the termination of the case (including the disbursement of the settlement proceeds to the Class). *Id.* ¶ 48. Plaintiff will file a Motion for Approval of Attorneys' Fees and Costs and Incentive Award, along with a Motion for Final Approval of Settlement.[12] This value was reached following extensive mediations with Judge Fitzsimmons, who recommended settlement of fees and costs in this amount after accepting detailed submissions from both parties. Dugger Decl. ¶ 30.

I. Service Award

In addition to her individual award under the allocation formula, Plaintiff Cherie Easterling seeks a reasonable service payment of up to $10,000, in recognition of the services she rendered on behalf of the class ("Service Award"). Dugger Decl., Ex. B (Stipulated

[12] Class Counsel will also share $40,000 of their attorney's fee award with the Law Offices of Jamie L. Mills pursuant to an agreement between the firms. The Law Offices of Jamie L. Mills provided assistance in the early phase of the case and Class Counsel is not seeking any additional fees or costs for their work. Dugger Decl. ¶ 30 n.1.

Agreement) ¶ 41. This payment will be deducted from the gross back pay damages award in addition to Plaintiff Easterling's pro rata share of the back pay award. *Id*. Plaintiff Easterling will submit a motion seeking an incentive payment in addition to attorney's fees and costs. Dugger Decl. ¶ 40.

III. Class Action Settlement Procedure

Courts have established a defined procedure and specific criteria for settlement approval in class action settlements that include three distinct steps:

1. Preliminary approval of the proposed settlement after submission to the Court of a written motion for preliminary approval and certification of the settlement class;

2. Dissemination of mailed and/or published notice of settlement to all affected class members; and

3. A final settlement approval hearing at which class members may be heard regarding the settlement, and at which argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented.

See Fed. R. Civ. P. 23(e); *see also* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("*Newberg*") §§ 11.22 *et seq.* (4th ed. 2002); *Reyes v. Buddha-Bar NYC*, No. 08 CV 02494, 2009 WL 5841177, at *1-2 (S.D.N.Y. May 28, 2009). This process safeguards class members' procedural due process rights and enables the Court to fulfill its role as the guardian of class interests. With this motion, Plaintiff requests that the Court take the first step – granting preliminary approval of the Stipulated Agreement, approving the proposed notices, and authorizing the claims administrator to send it. Plaintiff respectfully submits the following specific schedule for final resolution of this matter for the Court's approval:

1. Following preliminary approval, and prior to mailing notice, Class Counsel will run a search for any new addresses for each class member reported since January 1, 2012, on Westlaw People Search.

2. On August 2, 2013, Class Counsel will mail the notices to class members (class members for whom Class Counsel has not received SSA and IRS authorization

forms will also receive the required forms and a pre-paid envelope for delivery to Class Counsel), at their last known address, as well as any additional addresses provided by Westlaw People Search, for the period after January 1, 2012. Class members for whom Class Counsel have received completed IRS and SSA authorization forms will receive the notice attached to the Dugger Decl. as Ex. C, and class members for whom Class Counsel has not received completed authorizations will receive the notice attached to the Dugger Decl. as Ex. D.

3. Class members will have until September 3, 2013, to opt out of or object to the settlement ("Notice Period").

4. A final fairness hearing will occur on September 10, 2013 at 2:00 pm.

5. Plaintiff will file a Motion for Final Settlement Approval and Motion for Approval of Attorney's Fees and Costs by September 6, 2013.

6. After the fairness hearing, if the Court grants Plaintiff's Motion for Approval of Settlement, the Court will issue a Final Order and Judgment. If no party objects to the proposed settlement, the "Effective Date" of the settlement will be the day the Court enters its Final Order and Judgment.

7. If an individual or party object to and appeals the Court's Final Order and Judgment, the "Effective Date" of the settlement shall be the day after all appeals are finally resolved in favor of final approval and the time for any further appeal, rehearing, or reconsideration has expired.

8. Class Counsel will mail class members a copy of the Final Order and Judgment and the pension credit request form, Dugger Decl., Ex. E (Pension Credit Request Form), within seven days of the Effective Date of settlement. Following approval of the settlement, Class Counsel will also send a short follow-up notice, to be agreed to by both parties, and ultimately approved by the Court at the fairness hearing, containing the final deadline for submitting SSA and IRS authorizations (to class members that have failed to submit them), and any other information agreed to by the parties.

9. Defendant will disburse one check in the amount of $1,851,892 (gross back pay relief) and one check in the amount of $1,232,463 (attorney's fees and costs) to Class Counsel within thirty days of the Effective Date of settlement.

10. Back pay award checks will be mailed to class members one hundred and fifty days after the Effective Date of the settlement. If, after Class Counsel submits the IRS and SSA authorization forms, it does not receive SSA and/or IRS information from the respective agencies (for any given class members in any given year) within one hundred and thirty-five days of the Effective Date of settlement, Class

Counsel will designate that year a value of $10,000 in wages with respect to the class member's wages/damages calculations.[13]

11. Class Counsel will deduct the amount of outstanding liens due and owing to the State of Connecticut from the disbursement made to each class member who is subject to such lien(s) and remit those funds to the State at the time the disbursement check is sent to the class member. Defendant's counsel will provide Class Counsel with a list of such outstanding liens.

12. Funds that remain undisbursed because class members do not cash their back pay award checks within ninety days of receipt (as required by the Stipulated Agreement ¶ 25) will be disbursed to the class members who deposited checks within the required ninety days. This second distribution of the remaining funds will be apportioned equally, to all class members who deposit their checks within the deadline, and will be disbursed sixty days after the latest deadline for all class members to have deposited their back pay award check.

Dugger Decl. ¶ 41.

ARGUMENT

IV. Preliminary Approval of the Settlement Is Appropriate.

The law favors compromise and settlement of class action suits. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) (quoting *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)) (internal quotation marks omitted) (noting the "strong judicial policy in favor of settlements, particularly in the class action context"); *Newberg* § 11.25 (4th ed.) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). The approval of a proposed class action settlement is a matter of discretion for the trial court. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1998). In exercising their discretion, courts should give "proper deference to the private consensual decision of the parties." *Torres v. Gristede's Operating Corp.*, Nos. 04 CV 3316, 08 CV 8531, 08 CV 9627, 2010 WL 2572937, at *2 (S.D.N.Y. June 1, 2010) (quoting *Clark v. Ecolab, Inc.*

[13] *See also supra* note 8.

Nos. 07 CV 8623, 04 CV 4488, 06 CV 5672, 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 17, 2009)) (internal quotation marks omitted).

Preliminary approval requires only an "initial evaluation" of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties. *Newberg* § 11.25. The Court need only find that there is "'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *In re Traffic Exec. Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980); *see Newberg* § 11.25 ("If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness . . . and appears to fall within the range of possible approval, the court should permit notice of the settlement to be sent to class members.").

"As such, [preliminary approval] is appropriate where it is the result of serious, informed, and non-collusive negotiations, where there are no grounds to doubt its fairness and no other obvious deficiencies . . . , and where the settlement appears to fall within the range of possible approval." *Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 101 (D. Conn. 2010) (quoting *Reade–Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 33 (E.D.N.Y. 2006) (internal quotation marks omitted); *see also Authors Guild v. Google, Inc.*, No. 05 CV 8136, 2009 WL 4434586, at *1 (S.D.N.Y. Dec. 1, 2009); *Chin v. RCN Corp.*, No. 08 CV 7349, 2010 WL 1257586, at *2 (S.D.N.Y. Mar. 12, 2010)).

A court decides whether a proposed settlement falls within the range of possible approval by looking to its fairness. *See Stolt-Nielsen S.A.*, 270 F.R.D. at 101-02. "Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached

in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores*, 396 F.3d at 116 (quoting Manual for Complex Litigation, Third, § 30.42 (1995)) (internal quotation marks omitted). "'Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement.'" *Willix v. Healthfirst, Inc.*, No. 07 CV. 1143, 2011 WL 754862, *2 (E.D.N.Y. Feb. 18, 2011) (quoting *In re EVCI Career Colls. Holding Corp. Sec. Litig*., No. 05 CV 10240, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007)); *see also Capsolas v. Pasta Res., Inc.*, No. 10 CV 5595, 2012 WL 1656920, at *1 (S.D.N.Y. May 9, 2012).

The first step in the settlement process simply allows notice to issue to the class and for class members to object or opt out of the settlement. After the notice period, the Court will be able to evaluate the settlement with the benefit of the class members' input.

A. The Settlement Is Fair Reasonable and Adequate.

In evaluating a class action settlement, courts in the Second Circuit consider the nine factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberg v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). Although the Court need not evaluate the *Grinnell* factors in order to conduct its initial evaluation of the settlement, for purposes of evaluating the settlement's fairness, it is useful for the Court to consider these criteria.

The *Grinnell* factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of

the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Grinnell*, 495 F.2d at 463.

Here, the protracted litigation and posture of the case make several of the factors less relevant to the fairness inquiry. First, because this Court granted class certification (with one later modification) and granted Plaintiff's Motion for Summary Judgment, the first and fourth factors (regarding duration of litigation and risk of establishing liability) are less relevant. Additionally, because Defendant is the State of Connecticut, the seventh factor (regarding ability to withstand greater judgment) is also less relevant. All of the rest of the *Grinnell* factors weigh in favor of approval of the Stipulated Agreement, and certainly in favor of preliminary approval.

1. The Reaction to the Settlement Has Been Positive (Grinnell Factor 2).

"It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *In re Sturm, Ruger, & Co., Inc. Sec. Litig.*, 09 CV 1293, 2012 WL 3589610, at *5 (D. Conn. Aug. 20, 2012) (citing *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y.2001)).

After notice issues and class members have had an opportunity to be heard, the Court can more fully analyze this factor. At this point, the Named Plaintiff has indicated her support for the settlement. Dugger Decl. ¶ 33. Based on Class Counsel's communications with the class over the course of the last year, most class members expected to receive far less than the $15,000 in back pay that will be the average award if all 124 class members participate. *Id.* ¶ 39. In addition, many class members have also expressed strong interest in receiving their awards in the near future. *Id.* ¶ 34.

Indeed, Class Counsel is particularly attuned to the interests of the class because they have mounted extraordinary outreach efforts to identify class members, keep them informed, and

obtain extensive information and documentation regarding their circumstances in response to Defendant's request for class wide discovery. *Id.* ¶ 35-39. Shortly after the commencement of the remedial damages phase, Class Counsel conducted two in-depth class meetings in Connecticut in early June 2012. *Id.* ¶ 36. At these meetings, Class Counsel spent considerable time explaining the nature of the class claims and procedural posture of the case, as well as answering a wide range of questions from class members regarding the potential scope of relief. *Id.* These class meetings not only resulted in class members having a particularly acute understanding of the claims, they likewise provided Class Counsel with insight into the views, opinions, and expectations of the class. *Id.* Following these class meetings, Class Counsel conducted close to 100 in-depth interviews of class members in anticipation of Defendant's requests for class discovery. *Id.* ¶ 21. Over the course of the remedial proceedings, Class Counsel has also made or received more than a thousand class member telephone calls. *Id.* ¶ 36.

Accordingly, given these extensive interactions with members of the class (atypical of most Title VII class actions) Class Counsel is confident that they have accurately forecast that the class will respond favorably to the proposed settlement. *Id.* ¶¶ 37-38.

2. Discovery Has Advanced Far Enough to Allow the Parties to Resolve the Case Responsibly (*Grinnell* Factor 3).

The parties have completed enough discovery to recommend settlement. The proper question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004) (internal quotation marks omitted). "[T]he pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . but an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000) (internal quotation marks omitted).

The parties' litigation efforts and discovery here meet this standard. As outlined above, the litigation thus far has been "an aggressive effort" by both parties, including a motion to dismiss, cross-motions for summary judgment, a motion for class certification motion, a motion for decertification, and briefing on the proper scope of gross class damages.

The parties have also engaged in extensive investigatory and discovery efforts. While few previous Title VII class actions had been extensively litigated post-liability, Defendant vigorously contested the remedial damages phase in this action. Dugger Decl. ¶ 25. Indeed, Defendant served extensive class interrogatories and document requests regarding all potential defenses to individualized relief. *Id.* ¶ 20.

As a result, Class Counsel made extraordinary efforts to contact class members (many of whom Defendant did not have current contact information for), including utilizing: (1) electronic databases; (2) a private investigator; and (3) a contract attorney to conduct home visits for class members that were otherwise unreachable. These efforts led to communication with almost 80% of class members, a ratio which greatly exceeds comparable class actions. *Id.* ¶ 35.

After identifying class members, Class Counsel obtained comprehensive information, from 2004 to the present, regarding class members' income, job history, current eligibility for the CO position, and additional potentially relevant information. *Id.* Class Counsel obtained this information through: (1) extensive interviews of almost 100 class members (many of which were in-person home visits); and (2) collecting SSA and IRS authorization forms providing Class Counsel with detailed salary and employment information for almost 100 class members. *Id.* ¶ 21. Much of this information was shared with defense counsel in the context of settlement discussions. *Id.* Class Counsel also obtained and analyzed massive amounts of information regarding Defendant's potential defenses to instatement and front pay relief. Plaintiff served

extensive document requests and interrogatories on Defendant concerning all post-liability defenses to individual back pay, instatement, and/or front pay relief (as well as all pre-liability issues). *Id.* ¶¶ 22-23. Class Counsel also conducted a Fed. R. Civ. P. 30(b)(6) deposition concerning Defendant's employment processes. *Id.* ¶ 24.

Similarly, prior to the Court's finding of liability, the parties engaged in vigorous litigation and discovery, as chronicled in this Court's previous decisions. By way of a general summary, prior to the finding of liability: (1) the parties conducted six pre-liability depositions (including expert depositions); (2) Defendant unsuccessfully moved to dismiss; and (3) the parties submitted cross-motions for summary judgment as to liability. *Id.* ¶ 19.

Accordingly, the parties were well-equipped to evaluate the strengths and weaknesses of their respective claims and defenses. The extensive (and protracted) litigation in both the pre-liability and post-liability phases of this litigation strongly favors preliminary approval.

3. The Risk of Establishing Damages for the Class through Trial (*Grinnell* Factor 5).

Although the class has strong claims, Title VII disparate impact class actions are subject to considerable risk at trial, even when the only issues that remain are the scope of individualized relief available in the remedial damages phase. Even following liability, Defendant still maintained the right to raise individualized affirmative defenses as to each class member's entitlement to back pay, the amount of back pay relief, and instatement rights. *See* 42 U.S.C. § 2000e-5(g)(2)(A); *Robinson*, 267 F.3d at 162 (following a finding of liability "the class member is entitled to individual relief *unless* the employer in turn can establish by a preponderance of the evidence that a legitimate non-discriminatory reason existed for the particular adverse action") (emphasis added).

In fact, *Wal-Mart Stores, Inc. v. Dukes*, recently reminded litigants that Defendant's affirmative defenses cannot be determined based on a "trial by formula," but must be resolved in individualized *Teamsters* hearings. *Dukes*, 131 S.Ct. at 2561 (2011) (quoting *Teamsters*, 97 S.Ct. 1843) (emphasis added) (internal quotation marks omitted) ("We have established a procedure . . . that gives effect to these statutory requirements" in which "the burden of proof will shift to the company, but it will have the right to raise any *individual affirmative defenses* it may have, and to demonstrate *that the individual applicant* was denied an employment opportunity for lawful reasons.").

Substantial risk existed for each class member that their back pay award would have been reduced following individualized *Teamsters* hearings through: (1) an attack on the scope of each class member's mitigation efforts; and/or (2) Defendant's potential ability to establish that a class member would have been disqualified from the CO position in 2004 or 2006 for an alternative lawful reason. Dugger Decl. ¶ 43.

Defendant settled this litigation without reducing the gross class damages for individual mitigation failures. This was a concession made in furtherance of settlement and benefited the class as a whole. *Id.* ¶ 42.

4. The Risks of Maintaining the Class Action Through the Trial (*Grinnell* Factor 6).

Although Plaintiff was successful in certifying the class and withstanding a motion to decertify, Defendant's potential appeal of class certification was not an insubstantial risk for the class. The legal framework for class actions undeniably shifted during the pendency of this litigation, at one point, requiring the Court to modify the initial certification decision. *Easterling III*, 278 F.R.D. 41. Indeed, the Second Circuit's leading decision on Title VII class certification, upon which the Court initially relied in certifying the class, was abrogated in part by the

Supreme Court's *Dukes* decision. *Id.* Given the legal landscape, Plaintiff's class certification may have been exposed to further modification on appeal, and the settlement of these claims ensured the class would avoid the associated risks and delays.

5. The Settlement Fund Is Substantial, Even in Light of the Best Possible Recovery and the Attendant Risks of Litigation (*Grinnell* Factors 8 and 9).

The $1,851,892 settlement of back pay, as well as the hiring processes and additional benefits, represent a good value given the risks of continued litigation. In Class Counsel's estimation, the back pay settlement represents a significant percentage of the recovery that Plaintiff and the class would have achieved if they succeeded on all claims at trial and survived an appeal.[14] Dugger Decl. ¶ 44. As discussed above, settlement of the class claims means that class members will receive close to the maximum value for their claims because they will not be subject to reduction by mitigation defenses. The primary discount to the gross class damages award has been: (1) an agreement to accept a slight reduction in value to reflect potential of unemployment benefits; and (2) removal of the value of pension benefits from back pay and substitution of pension credits. *Id.*

Moreover, in addition to a pro rata back pay distribution, each class member is (or was) eligible to: (1) participate in the 2012 priority hiring process; (2) participate in a second priority hiring process applicable to the next time Defendant accepts applications for the CO position: (3) receive compensation in lieu of certain seniority benefits for up to 28 successful priority hires;

[14] Even if the relief obtained were far less favorable, it would not necessarily preclude the approval of the settlement, as "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Grinnell*, 495 F.2d at 455 n.2. "It is well settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair." *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of S.F.*, 688 F.2d 615, 628 (E.D. Tex. 1982); *see also Cagan v. Anchor Sav. Bank FSB*, No. 88 CV 3024, 1990 WL 73423, at *12-13 (E.D.N.Y. May 22, 1990) (approving $2.3 million class settlement over objections that the "best possible recovery would be approximately $121 million").

(4) receive a prospective adjustment of regular and overtime pay; (5) receive a prospective adjustment of rate of vacation and sick time accrual; and (6) receive pension credits. *See* Dugger Decl, Ex. B (Stipulated Agreement).

Although Plaintiff could have appealed the Court's determination that Defendant was not obligated to put forward evidence disqualifying each of the 124 class members, the Court's resolution of this issue was not unsupported by pre-*Dukes* case law, making the prospects for a successful appeal far from certain. *See* ECF 123 at 14. Weighing the significant scope of the monetary and non-monetary benefits of the settlement, against the risks associated with proceeding in the litigation, the settlement is more than reasonable.[15]

Moreover, when, as here, settlement assures immediate payment of substantial amounts to class members, "even if it means sacrificing 'speculative payment of a hypothetically larger amount years down the road,'" it is all the more reasonable under this factor. *See Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05 CV 3452, 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008) (quoting *Teachers' Ret. Sys. of Louisiana v. A.C.L.N. Ltd.*, No. 01 CV 11814, 2004 WL 2997957, at *5 (S.D.N.Y. May 14, 2004)). Indeed, many class members have expressed strong interest in payment now instead of further litigation. Dugger Decl. ¶ 34.

Nor is the gross class damages methodology cause to question the fairness of this settlement. As this Court has already recognized, when "the number of qualified class members exceeds the number of openings lost to the class through discrimination," *City of New York*, 276

[15] The determination of whether a settlement amount is reasonable "does not involve the use of a 'mathematical equation yielding a particularized sum.'" *Frank*, 228 F.R.D. at 186 (quoting *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 178 (S.D.N.Y. 2000)). "Instead, 'there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Id.* (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)).

F.R.D. at 39; *Robinson*, 267 F.3d at 161 n. 6; *see also Ingram*, 709 F.2d at 812-13; *United States v. City of Miami*, 195 F.3d 1292, 1299-01 (11th Cir. 1999); *Segar v. Smith*, 738 F.2d 1249, 1289-91 (D.C. Cir. 1984), and the "identification of the individuals entitled to relief would drag the court into a quagmire of hypothetical judgments and result in mere guesswork," courts in the Second Circuit utilize a modified "gross" form of proof. *City of New York*, 276 F.R.D. at 44 n.11 (internal quotations marks and citation omitted). Specifically, to avoid "mere guesswork," the Second Circuit holds that "[t]he fairer procedure [is] to compute a gross award for all the injured class members and divide it among them on a pro rata basis." *City of New York*, 276 F.R.D. at 39 (quoting *Ingram*, 709 F.2d at 812-13). Absent this procedure, each class member could pursue her damages claim as an individual with a presumption of liability, yet her damages award, litigated separately, would be unbound from the total number of positions that were available. *See, e.g.*, *Ingram*, 709 F.2d at 812-13.

Similarly, the fact that the settlement procedure takes into account the difference in annual income between class members and the CO position, but not the difference in the value of each class member's fringe benefits, is not a reason to disapprove this settlement agreement. Certainly, "[u]nrealistic exactitude is not required in determining back pay." *Grant*, 622 F.2d at 47 (quoting *EEOC v. Enter. Ass'n. Steamfitters*, 542 F.2d 579, 587 (2d Cir. 1976)); *see also Teamsters*, 431 U.S. at 372 (internal quotation marks omitted) (citing *Franks*, 424 U.S. at 769). Indeed, averages are often used by courts even when fashioning equitable remedies in *individual* Title VII discrimination cases. *See, e.g.*, *Maturo v. Nat'l Graphics, Inc.*,722 F. Supp. 916, 929 (D. Conn. 1989) (utilizing average hours worked a week to calculate plaintiff's backpay award); *see also James v. Nat'l R.R. Passenger Corp.*, No. 02 CV. 3915, 2005 WL 6182322, at *10 (S.D.N.Y. Mar. 3, 2005) ("The determination of back-pay need not be made with mathematical

exactitude" and there "was sufficient evidence in the record [for] a reasonable estimation of plaintiff's average workweek during her employment.").

Here, the proposed methodology means that each class members' award reflects her proportional lost wages from the failure to obtain the CO position. The less money a class member made with respect to their peers, the higher their share of the gross class damages award. This approach is reasonable and applies the pro rata distribution methodology that the Court endorsed (and neither party appealed), without requiring complicated calculations concerning the value of all of each class member's fringe benefits.

B. The Proposed Notices Are Appropriate.

The contents of the proposed Notices, which are attached as Exhibit C and D to the Dugger Decl., comply fully with due process and Federal Rule of Civil Procedure 23. Pursuant to Rule 23(c)(2)(B), the notice must provide:

> the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through counsel if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

The Notices satisfy each of these requirements. They generally explain the pro rata distribution methodology, the allocation of attorneys' fees and costs, the priority hiring processes, the prospective wage rate and accrual adjustments, the one-time payment, and the pension credit. The Notices also provide specific information regarding the date, time, and place of the final approval hearing and how to object to or exclude oneself from the settlement. This information is adequate to put class members on notice of the proposed settlement and is well within the requirements of Rule 23(c)(2)(B).

The proposed settlement procedure provides that Class Counsel will mail the Notices to the last known address of each class member (as well as any additional new addresses found through Westlaw People Search for the period after January 1, 2012). Dugger Decl. ¶ 41. Class Counsel will mail the notice attached as Exhibit C the Dugger Decl. to class members that have sent Class Counsel completed IRS and SSA authorization forms. *Id.* Class Counsel will mail the notice attached as Exhibit D the Dugger Decl. to class members that have not sent Class Counsel completed IRS and SSA authorization forms, as well as the required SSA and IRS authorization forms and a pre-paid return envelope. *Id.* Class members will have thirty days to opt out of the settlement and/or object to the settlement, and sixty days after final approval of the settlement to return the signed IRS and SSA authorization forms. *Id.* If a class member submits an incomplete authorization, Class Counsel will send written notification of such deficiency within five days, and the class member will have fourteen from such date to submit the corrected authorization to Class Counsel via facsimile (or will have until their original deadline to mail the new forms to Class Counsel). *Id.*

In sum, because the information provided in the proposed Notices comply fully with the Rule 23 requirements in a clear and precise manner, it should be approved by the Court for dissemination to the Class.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court preliminarily approve the settlement, approve the Notices, approve the proposed settlement procedure, and enter the Proposed Order. *See* Dugger Decl., Ex. F (Proposed Order).

Dated: July 23, 2013
New York, New York

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2013, a copy of the foregoing was filed electronically or served by certified mail to anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by certified mail for anyone unable to accept electronic filing. The parties may access this filing through the Court's system.

/s/ *Adam T. Klein*