

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
DAVID GOODMAN, MICHAEL
DOHERTY, and ROBERT D. BLACK,
Individually and on behalf of a class of
similarly situated persons,

Plaintiffs,

- against -

CITY OF NEW YORK, NEW YORK
CITY POLICE DEPARTMENT, and NEW
YORK CITY POLICE PENSION FUND,

Defendants.
----- X

10 Civ. 5236 (RJS)

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
UNOPPOSED MOTION FOR CONDITIONAL CERTIFICATION OF THE
SETTLEMENT CLASS, PRELIMINARY APPROVAL OF THE SETTLEMENT
AGREEMENT, AND APPROVAL OF THE FORMS OF CLASS NOTICE**

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Table of Contents

Preliminary Statement.....i

Background.....2

Summary of The Settlement Agreement.....5

The Proposed Settlement Class Meets The Requirements For
Certification Under Rule 23.....8

 A. Numerosity10

 B. Commonality.....11

 C. Typicality11

 D. Adequacy of Representation.....12

 E. Implied Requirement of Ascertainability.....13

 F. Certification Pursuant to Rule 23(b)(3)13

 1. Predominance.....14

 2. Superiority.....16

The Agreement Satisfies The Requirements For Preliminary Approval16

 A. Procedural Fairness.....18

 B. Substantive Fairness.....19

 1. The Complexity, Expense, and Likely Duration of Trial19

 2. The Reaction of the Class to Settlement.....20

 3. The Stage of the Proceedings and the Amount of
 Discovery Completed.....20

 4. The Risks of Establishing Liability and Damages, and the Risks of
 Maintaining the Class Action Through Trial21

 5. Defendants’ Ability to Withstand a Greater Judgment.....22

6. The Proposed Agreement Is Within the Range of Reasonableness Given the Litigation Risks and the Best Possible Recovery	22
The Agreement’s Notice Procedures Satisfy Rule 23(e) and Due Process	24
Conclusion	25

PRELIMINARY STATEMENT

This class action, brought by three retired New York City Police Department (“NYPD”) officers who collectively performed multiple tours of active military service in the aftermath of September 11 while employed by the NYPD, involves claims that the City of New York (“City”), the NYPD, and the New York City Police Pension Fund (“Police Pension Fund”) wrongly calculated their pensionable earnings in violation of the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 *et seq.* (“USERRA”).

After three years of litigation involving motion practice, extensive discovery, a productive mediation session, and months of arms-length negotiations between counsel, the parties have reached an agreement to settle this case. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this unopposed motion respectfully requests that the Court:

- (1) Conditionally certify, for settlement purposes only, the Settlement Class and Settlement Sub-Classes pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure;
- (2) Provisionally designate Plaintiffs David Goodman, Michael Doherty, and Robert Black as representatives of the Settlement Class;
- (3) Provisionally designate Plaintiffs Goodman and Black as representatives of Sub-Class A;
- (4) Provisionally designate Plaintiff Doherty as a representative of Sub-Class B;
- (5) Provisionally designate Tara M. La Morte and Arastu Chaudhury of the United States Attorney’s Office for the Southern District of New York as counsel for the Settlement Class;
- (6) Preliminarily approve the Settlement Agreement;
- (7) Approve the Class Notice and forms appended thereto and order the mailing and publication to Settlement Class Members in accordance with the Settlement Agreement;

- (8) Direct Settlement Class Counsel to establish a specific electronic address for the purpose of enabling Settlement Class Members to communicate with Settlement Class Counsel; and
- (9) Schedule a Fairness Hearing for purposes of determining whether, among other things, to finally certify the Settlement Class and Settlement Sub-Classes and finally approve the Settlement Agreement.

BACKGROUND

On July 9, 2010, retired NYPD detective and Army reservist David Goodman filed a complaint alleging that Defendants the City of New York, the NYPD, and the Police Pension Fund violated his USERRA rights by failing to take into account all pensionable earnings, including overtime pay and night shift differential pay, he reasonably could have expected to receive during his multiple tours of active military service abroad. (*See* Dkt. No. 1). This, in turn, caused Goodman to suffer a loss of pension benefits. (Compl. ¶ 23). Goodman sought, *inter alia*, to enjoin Defendants to calculate pensionable earnings during periods of active military service in accordance with USERRA, to recalculate his pensionable earnings during his periods of active military service in accordance with USERRA, to remit to him any pension benefits owed as a result of recalculating his pensionable earnings, and to inform him of any pension contributions he may owe as a result of recalculating his pensionable earnings. (*Id.* Prayer for Relief). On May 19, 2011, retired NYPD officers and Coast Guard reservists Michael Doherty and Robert Black filed substantially similar complaints. *See Doherty v. City of New York*, No. 11 Civ. 3432 (RJS); *Black v. City of New York*, No. 11 Civ. 3433 (PGG).

Defendants moved to dismiss the servicemembers' individual complaints, arguing, among other things, that USERRA's pension calculation provision, *see* 38 U.S.C. § 4318, did not encompass non-seniority benefits such as overtime and night shift differential earnings, and that Doherty's and Black's respective claims were untimely. (*See* Dkt. No. 11; *Doherty*, No. 11 Civ.

3432, Dkt. Nos. 9, 11). However, by Decision and Order dated September 26, 2011, this Court denied the Defendants' motions, holding that (1) "the most natural reading of [38 U.S.C. § 4318(b)(3)] is that it includes all aspects of 'the employee's compensation' that would have been received 'but for' his deployment, regardless of whether some or all of such compensation has in fact been paid"; (2) "the Court cannot find, as a matter of law, that Congress intended USERRA to exclude from pension calculations overtime and night shift pay that Plaintiffs would have earned 'but for' the service member's deployment"; and (3) Doherty's USERRA claim was not time-barred because the Veterans' Benefits Improvement Act of 2008 ("VBIA"), 38 U.S.C. § 4327(b), eliminated statutes of limitations for USERRA claims that were "live" as of the passage of the statute on October 10, 2008, and Doherty's claim was "live" as of that date, *see* Memorandum and Order dated Sept. 26, 2011.¹ (*See* Dkt. No. 19). Defendants unsuccessfully sought interlocutory appeal of the Court's decision and order. *See* Order dated July 30, 2012 (Dkt. No. 71).

Following a period of discovery, Goodman sought to amend his individual complaint to bring claims on behalf of a class of similarly situated individuals and name himself, Doherty, and Black as class representatives (collectively, the "Plaintiffs" or "Class Representatives"). (*See* Dkt. No. 57). Defendants opposed, arguing that Plaintiffs could not meet the standards for class certification, and thus that the class action amendment was futile. (*See* Dkt. No. 61). The Court disagreed with Defendants, and permitted the amendment. *See* Order dated July 30, 2012 (Dkt. No. 71). Accordingly, on August 2, 2012, Plaintiffs filed an amended class action complaint (the "Class Action Complaint") alleging that the Defendants violated their USERRA rights as well as the USERRA rights of a class of similarly situated current and retired NYPD officers who were

¹ At this time, Black's suit was pending before another judge in this district. That judge did not rule on Defendants' motion to dismiss Black's complaint.

called to active military duty during their employment with the NYPD on or after September 11, 2001 by failing to impute the pensionable earnings the members of service could reasonably have expected to earn during periods of active military service in a manner consistent with USERRA. (*See generally* Class Action Compl. (Dkt. No. 72)).

The parties engaged in a significant amount of discovery both prior to and after Plaintiffs filed their Class Action Complaint. Thousands of pages of documents were exchanged, including, among other things, Defendants' pension policies, overtime policies, and night shift differential policies; Defendants' payroll records, timesheets, and overtime and night shift differential records for the Class Representatives and other similarly situated officers in their respective units; the Class Representatives' military service records; Defendants' budgetary documents; and documents reflecting the numbers of NYPD officers called to active military service on or after September 11, 2001. Nine depositions were taken in total, including several depositions pursuant to Rule 30(b)(6). Plaintiffs hired an expert consultant to analyze Defendants' data and perform calculations, and the parties made expert disclosures pursuant to Rule 26(a)(2).

Commencing in the fall of 2012, the parties engaged in months of settlement negotiations, including with the assistance of a court-appointed private mediator. The Court's rulings on the various motions described above along with the extensive and thorough discovery exchanged allowed the parties to reliably assess the merits of each other's positions, culminating in an executed settlement agreement (the "Agreement"), attached hereto as Exhibit A. As described below, the Agreement provides injunctive relief for servicemembers who are currently employed by the NYPD and participants in the Police Pension Fund, and both injunctive and monetary relief for the servicemember-retirees who are the putative Class Members. With respect to other

specified City retirement systems, the Agreement requires the City to provide legal guidance recommending that those systems apply the principles of the Agreement to their active and retired servicemembers and present resolutions to that effect to the other systems' boards of trustees, should the other systems not make appropriate changes within a certain period of time. Accordingly, if the Court certifies the class and approves the parties' settlement, this case will be fully and finally resolved. The Class Representatives fully endorse the approval of the Agreement by this Court as fair, reasonable, and adequate.

SUMMARY OF THE SETTLEMENT AGREEMENT

The Agreement provides substantial relief for the following groups of people: (1) current NYPD officers² who are members of the Police Pension Fund; (2) NYPD servicemember-retirees who are receiving pensions from the Police Pension Fund; (3) current City employees belonging to other City retirement systems including the New York City Employees' Retirement System, the Teachers' Retirement System, the Board of Education Retirement System, and the New York City Fire Department Pension Fund (the "Other City Retirement Systems"); and (4) City servicemember-retirees belonging to one of the Other City Retirement Systems. (*See* Agreement ¶¶ 2.16, 4.8).³ As described below, so-called "actives" are entitled to significant injunctive relief, while "retirees" are entitled to both injunctive relief and full monetary relief. *See* n.3.

² The Agreement refers to officers by their formal designation, "Uniformed Members of Service."

³ Current NYPD officers and employees of other City agencies who belong to one of the Other City Retirement Systems are also generally referred to as "actives" or "active servicemembers," while individuals who performed active military service and thereafter retired from the NYPD or another City agency are also generally referred to as "retirees" or "servicemember-retirees."

First, Defendants have agreed to calculate the pensionable earnings of NYPD actives in accordance with USERRA for all periods of active military service which are pending on or occur after the Effective Date of the Agreement. (*Id.* ¶ 4.1(c); *see id.* ¶¶ 2.8, 2.17). The calculation must account for any cost of living adjustments or wage increases that take effect during a period of active military service, as well as any other pensionable earnings the active servicemember could reasonably have expected to earn had s/he not been performing military service, including, for example, overtime pay and night shift differential pay. (*Id.* ¶¶ 4.1(a), (b), 2.17). If an active servicemember wishes to obtain a recalculation of pensionable earnings for any prior periods of active military service, he or she must simply submit a written request to the Police Pension Fund. (*Id.* ¶ 4.1(c)).

More generally, Defendants have also agreed to publish the Agreement and the revised methodology for calculating pensionable earnings during periods of active military service to its active and retired members via intranet and internet sites (*id.* ¶¶ 4.4, 4.5), modify any policies or practices in place to conform with the revised methodology for calculating such pensionable earnings (*id.* ¶ 4.2), and train and educate its employees responsible for performing the relevant calculations (*id.* ¶ 4.3). The Agreement mandates that Defendants complete these tasks within one year of the Effective Date. (*Id.* ¶ 4.7).

In addition to the foregoing injunctive relief, additional injunctive and monetary relief will be awarded to NYPD servicemember-retirees. Specifically, after recalculating the retirees' pensionable earnings for periods of active military duty occurring on or after September 11, 2001 and during the retiree's employment with the NYPD, Defendants will proceed to recalculate the retirees' annual pension benefit and remit any and all pension benefits owed to the retirees, offset by any additional contributions that the retiree may have owed as a result of the additional

imputed compensation, but adding 3% prejudgment simple interest per annum. (*Id.* ¶¶ 6.1, 6.2). Any back pension monies owed will be disseminated in a lump sum to the retiree by check, and prospective pension benefits will be adjusted accordingly. (*Id.* ¶¶ 6.1(b), 6.2). Moreover, if the recalculation does not result in an increase to the retiree's pension benefit, the retiree will continue receiving his or her existing annual pension benefit. (*Id.*). This process must be completed within a year of the Effective Date (*id.* ¶¶ 6.1(d), 6.2)), and the Agreement establishes a process by which class members may seek review of their respective computations (*id.* ¶ 6.4; *see also id.* ¶ 6.3). Accordingly, for purposes of settlement only, the parties are asking the Court to certify a Settlement Class consisting of all retired NYPD Uniformed Members of Service who performed Active Military Service on or after September 11, 2001 during their employment with the NYPD, or, if applicable, the beneficiary of the pension of such NYPD Uniformed Members of Service. (*Id.* ¶ 2.23). The parties are also seeking certification of two sub-classes that constitute the Settlement Class: Sub-Class A consists of all retired NYPD Uniformed Members of Service who performed active Military Service on or after September 11, 2001 during their employment with the NYPD, and who received their first pension check *on or after* October 10, 2004 and no later than the Effective Date, or, if applicable, their beneficiaries (*id.* ¶ 2.27); Sub-Class B is defined similarly except that it encompasses retired NYPD Uniformed Members of Service who received their first pension check *before* October 10, 2004 or, if applicable, their beneficiaries (*id.* ¶ 2.29). As explained below, sub-classes are necessary to distinguish retirees who may have untimely claims. *See infra* at 10 n. 4.

Finally, and importantly, the City of New York has agreed to take steps to ensure that all of the principles outlined above will apply to other City of New York employees, both active and retired. Specifically, the City will request that the Other City Retirement Systems implement the

principles of the Agreement with respect to their members. (*Id.* ¶ 4.8 & subsections (a), (b)). Absent voluntary compliance, the City will draft and present resolutions to each retirement system's Board of Trustees requiring compliance with the principles of the Agreement. (*Id.* ¶ 4.8(c)).

As explained in detail below, class certification of the Settlement Class and Sub-Classes is appropriate under Rules 23(a) and (b)(3). Furthermore, the terms of the Agreement are both fair and reasonable, thereby warranting preliminary approval of the Agreement and the issuance of notice.

**THE PROPOSED SETTLEMENT CLASS MEETS THE REQUIREMENTS FOR
CERTIFICATION UNDER RULE 23**

Plaintiffs respectfully request that the Court conditionally certify the Settlement Class and two Sub-Classes as defined *supra* at 7, under Federal Rule of Civil Procedure 23(e) for purposes of effectuating the settlement. As discussed below, the Settlement Class and Sub-Classes meet all of the requirements for class certification for settlement purposes, and Defendants do not oppose provisional certification for settlement purposes only. (*See* Agreement Section V); *see also* Herbert B. Newberg, *Newberg on Class Actions* § 11.27 (4th ed. 2002) (“When the court has not yet entered a formal order determining that the action may be maintained as a class action, the parties may stipulate that it be maintained as a class action for the purpose of settlement only.”); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1422, 1424 (E.D.N.Y. 1989) (“It is appropriate for the parties to a class action suit to negotiate a proposed settlement of the action prior to certification of the class.”), *aff'd in part, rev'd in part on other grounds*, 907 F.2d 1295 (2d Cir. 1990).

Provisional settlement class certification and appointment of class counsel have several practical purposes, including avoiding the costs of litigating class status while facilitating a

global settlement, ensuring notification of all class members of the terms of the proposed Agreement, and setting the date and time of the final approval hearing. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 790–91 (3d Cir. 1995) (discussing the advantages of certifying classes for settlement purposes); *Dorn v. Eddington Sec., Inc.*, No. 08 Civ. 10271 (LTS), 2011 WL 382200, at *1 (S.D.N.Y. Jan. 21, 2011) (conditionally certifying wage and hour settlement class and granting preliminary approval of settlement).

To certify a class, the proposed class must satisfy the four requirements of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – as well as the standards of one of the subdivisions of Rule 23(b). *See Jeffries v. Pension Trust Fund of the Pension, Hospitalization and Benefit Plan of the Elec. Indus.*, No. 99 Civ. 4174 (LMM), 2007 WL 2454111, at *11 (S.D.N.Y. Aug. 20, 2007). Here, Plaintiffs seek certification pursuant to subdivision 23(b)(3), which requires that common questions of law or fact “predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

While a Court must employ a “rigorous analysis” to ensure that the requirements of Rule 23 are satisfied, *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982), the Second Circuit has emphasized that Rule 23 is to be given a “liberal rather than restrictive” construction, *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997). Indeed, district courts in this circuit have observed that “it seems beyond peradventure that the Second Circuit’s general preference is for granting rather than denying class certification.” *Espinoza v. 953 Assoc. LLC*, 280 F.R.D. 113, 124 (S.D.N.Y. 2011) (quotation marks and citations omitted); *Cortigiano v. Oceanview Manor Home for Adults*, 227 F.R.D. 194, 203 (E.D.N.Y. 2005) (quoting *Leider v. Ralfe*, 01 Civ.

3137 (HB), 2003 WL 22339305, at * 11 (S.D.N.Y. Oct. 10, 2003)). As demonstrated below, the proposed Settlement Class and Sub-Classes satisfies all of the criteria set forth in Rule 23(a) and Rule 23(b)(3).⁴

A. Numerosity

Rule 23(a)(1) states that a class must be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). “[N]umerosity is presumed at a level of 40 members.” *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). However, precise calculations of the number of class members are not required. *See Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993); *Jeffries*, 2007 WL 2454111, at *11.

Here, as of December 5, 2012, of the approximately 1,529 NYPD employees called to active military service since September 11, 2001, 287 have retired. *See* Declaration of Tara M. La Morte (“La Morte Decl.”) dated June 14, 2013.⁵ Each of these individuals would be a member of the Settlement Class and one of the Settlement Sub-Classes, and thus, the proposed classes meet the numerosity requirement.

⁴ As noted above, the Class is defined as “all retired NYPD Uniformed Members of Service who performed Active Military Service on or after September 11, 2001 during their employment with the NYPD, or, if applicable, the beneficiary of the pension of a NYPD Uniformed Member of Service.” The Sub-Classes are distinguished only by whether class members received their first pension check before or after October 10, 2004, because those class members who received their first pension check before October 10, 2004, must provide additional information regarding their deployments to establish that they have a timely claim. Accordingly each of the arguments proffered in favor of class certification applies equally to the Settlement Class and the Settlement Sub-Classes. Thus, in advancing these arguments, except where specifically indicated otherwise, Plaintiffs simply refer to the Settlement Class and Settlement Sub-Classes collectively as the “class.”

⁵ In addition, 126 of the officers called to active military duty since September 11, 2001 have separated from the NYPD, and 5 are deceased. It is not yet clear how many of these individuals (or their beneficiaries) are drawing a pension.

B. Commonality

Rule 23(a)(2) requires that there be questions of law or fact common to the class. As the Supreme Court recently reaffirmed in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), this requirement is satisfied if the class shares even one common question of law or fact. *Id.* at 2556. Thus, even if the individual circumstances of class members differ, commonality is met if “their injuries derive from a unitary course of conduct.” *Marisol A*, 126 F.3d at 377.

That requirement is easily satisfied here. The Class Representatives’ claims and those of the members of the putative class arise from a common wrong: Defendants’ failure to calculate pensionable earnings during periods of active military duty in accordance with USERRA. This allegation is one that is common to all class members, and at the heart of this case. *Cf. Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 615-16 (S.D.N.Y. 2012) (commonality satisfied where, among other allegations, plaintiffs claimed that defendant had policy of not paying all class members overtime pay); *Espinoza*, 280 F.R.D. at 127 (commonality satisfied where plaintiffs claimed that employers unlawfully denied them minimum wage and overtime payments); *Trinidad v. Breakaway Courier Sys., Inc.*, 05 Civ. 4116 (RWS), 2007 WL 103073, at *5 (S.D.N.Y. Jan. 12, 2007) (commonality of claims involving minimum wages, overtime compensation, and improper deductions not defeated by questions affecting damages).

C. Typicality

Under Rule 23(a)(3), a plaintiff seeking class certification must show that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” “Like the commonality requirement, typicality does not require the representative party’s claims to be identical to those of all class members.” *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 182 (W.D.N.Y. 2005). Rather, typicality is satisfied “when each class member’s claim arises from

the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A.*, 126 F.3d at 376 (internal quotations omitted); *see also Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996) (counseling that typicality is evaluated "with reference to the company's actions, not with respect to particularized defenses it might have against certain class members"). Thus, "minor variations in the fact patterns underlying individual claims," including differences in damages, do not defeat typicality when the defendants direct "the same unlawful conduct" at the named plaintiff and the class. *Robidoux*, 987 F.2d at 936-37; *see Trinidad*, 2007 WL 103073, at *6.

Here, Defendants treated all members of the putative classes identically, including the Class Representatives, with respect to their failure to properly compute members' pensionable earnings during periods of active military service. Moreover, Defendants have not asserted a defense that would apply to any of the Class Representatives but not the rest of the class. *See Gary Plastic Packaging Corp. v. Merrill Lynch*, 903 F.2d 176, 180 (2d Cir. 1990).

D. Adequacy of Representation

Rule 23(a)(4) provides that a class action may be maintained only if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This is a two part inquiry: the rule "requires that plaintiffs demonstrate that class counsel is qualified, experienced, and generally able to conduct the litigation. Plaintiffs also must demonstrate that there is no conflict of interest between the named plaintiffs and other members of the plaintiff class." *Marisol A.*, 126 F.3d at 378 (internal quotation marks omitted); *see also* Fed. R. Civ. P. 23(g)(1), (4).

Turning first to the conflict of interest inquiry, it "merely requires that plaintiffs not have antagonistic interests, so only a conflict that goes to the very subject matter of the litigation will

defeat a party's claim of representative status." *Trinidad*, 2007 WL 103073, at *6 (internal quotation marks omitted). In this case, there is no indication of any conflicts between any of the Class Representatives and putative class members, or any reason why the Class Representatives would not be committed to vigorously prosecuting this action.

Second, the United States Attorney's Office for the Southern District of New York is qualified and experienced in handling a wide-range of complex litigation matters, including substantial civil rights matters. Also, because Class Counsel seeks no remuneration under the terms of settlement, all monetary payments will go to Plaintiffs and settlement class members, there is no conflict with respect to class counsel. Class Counsel is thus able to fairly and adequately conduct this litigation and represent the interests of the class. *See also* Rule 23(g)(4) (requiring that "class counsel must fairly and adequately represent the interests of the class").

E. Implied Requirement of Ascertainability

"In addition to Rule 23(a)'s four prerequisites, a requirement that there be an identifiable class has been implied by the courts." *Jeffries*, 2007 WL 2454111, at *14 (internal quotations and citations omitted). This implied requirement compels class plaintiffs to "demonstrate the existence of an aggrieved class," which must be "readily identified." *Espinoza*, 280 F.R.D. at 125 (internal quotation marks omitted). Here, members of the proposed Settlement Class and Sub-Classes can all be determined based on objective criteria, and membership does not hinge on a resolution of liability. (*See* Agreement ¶¶ 2.23, 2.27, 2.29). Accordingly, the proposed class is ascertainable.

F. Certification Pursuant to Rule 23(b)(3)

Rule 23(b)(3) requires that common questions of law or fact "predominate over any questions affecting only individual members, and that a class action is superior to other available

methods for fairly and efficiently adjudicating the controversy.” Rule 23(b)(3). Both factors are satisfied here.

1. Predominance

“In determining whether common issues will predominate overall, district courts are required to consider *all* factual or legal issues, including those conceded by the party opposing class certification or resolved earlier in the litigation.” *United States v. City of New York*, 276 F.R.D. 22, 30 (E.D.N.Y. 2011) (citing *Myers v. Hertz Corp.*, 624 F.3d 537, 549 (2d Cir. 2010) (“the predominance requirement requires a district court to consider *all* factual or legal issues, to determine whether the issues subject to generalized proof are more substantial than those subject to individual inquiry.”) (quotation marks and citation omitted)); *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227-29 (2d Cir. 2006).

Predominance of class wide issues exists “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.” *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 131 (2d Cir. 2010). The focus of the predominance inquiry is on defendants’ liability, not on damages. Accordingly, individualized damages determinations do not, in and of themselves, warrant denying class certification. *In re Visa Check Master Money Antitrust Litig.*, 280 F.3d 124, 139, 141 (2d Cir. 2001) (upholding class certification when individual damages could be determined using a class-wide formula, even though those determinations would need to be made on an individual basis); *Smellie v. Mount Sinai Hosp.*, No. 03 Civ. 0805 (LTS), 2004 WL 2725124, at *6 (S.D.N.Y. Nov. 29, 2004) (“Rule 23(b)(3) is sufficiently flexible to permit the Court and counsel to manage any necessary damages determination proceedings in a manner that

protects appropriately the individual class members' interests in pursuing claims tied to their particular factual situations.”).

Indeed, claims concerning an employer's failure to properly apply wage and labor laws is a classic instance where a Rule 23(b)(3) class is warranted, “[b]ecause liability can be determined on a class-wide basis.” *Espinoza*, 280 F.R.D. at 129; *see also Shahriar v. Smith and Wollensky Restaurant Group, Inc.*, 659 F.3d 234, 253 (2d Cir. 2011) (holding that class-wide liability issues predominated over individual damages assessments in Rule 23(b)(3) class of workers who were illegally required to share tips with other tip-ineligible workers). “[N]umerous courts have found that wage claims are especially suited to class litigation – perhaps ‘the most perfect questions for class treatment’ – despite differences in hours worked, wages paid, and wages due.” *Ramos v. SimplexGrinnell LP*, 796 F. Supp. 2d 346, 359 (E.D.N.Y. 2011) (collecting cases); *see also, e.g., Torres v. Gristede's Corp.*, No. 04 Civ. 3316 (PAC), 2006 WL 2819730, at *16 (S.D.N.Y. Sept. 29, 2006) (plaintiff “introduced sufficient proof that Defendants engaged in a common practice to deny employees overtime pay,” and “[t]his issue predominates over any individual calculations of overtime wages.”). In short, when the question of whether the defendants had violated the relevant law through their wage and labor policies is the same for the entire class, that question will predominate over the individualized damages determinations that will have to be made. *See Ramos*, 796 F. Supp. 2d. at 359-60.

The Rule 23(b)(3) class claims here are analytically the same as the wage claims that are regularly certified for class-wide resolution, as the calculation of pensionable earnings is simply a special case of wage calculation. Thus, the question here of whether the Defendants are liable to the class predominates over the damages calculations.

2. Superiority

In determining whether a class action is a superior vehicle for fairly and efficiently adjudicating the controversy, the Court must first consider what other procedures exist for disposing of the suit. *See* 7A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1779 (3d ed. 2010). The Court must then determine whether a class action is sufficiently effective to justify the time and energy necessary to oversee it. *See id.* § 1779. A class action is superior to individual suits, if such suits would be voluminous and require the same witnesses, exhibits, and issues from trial to trial for days on end. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986).

Litigating this case as a class action would result in one indisputable formula that would apply to all other class members and ensure compliance with USERRA. This would ultimately save judicial resources because all potential existing claims would be resolved in one action. On the other hand, if each individual member of the Rule 23(b)(3) subclass were required to litigate individually, then each would file a claim, thus necessitating this Court to resolve each case separately. Thus, certifying this action as a class action would promote judicial economy.

THE AGREEMENT SATISFIES THE REQUIREMENTS FOR PRELIMINARY APPROVAL

Rule 23(e) provides that a class action “may be settled . . . or compromised only with the court’s approval.” Fed. R. Civ. P. 23(e). Courts have discretion regarding the approval of a proposed class action settlement, *see Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079-80 (2d Cir. 1995), and courts should exercise this discretion “in light of the general judicial policy favoring settlement.” *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999) (quoting *In re PaineWebber Ltd. P’ships Litig.*, 171 F.R.D. 104, 124 (S.D.N.Y.), *aff’d per curiam*, 117 F.3d 721 (2d Cir. 1997)). Indeed, as the Second Circuit

observed, there is a “strong judicial policy in favor of settlements, particularly in the class action context.” *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (quoting *In re PaineWebber Ltd. P’ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)).

In the Second Circuit, a court may approve a class action settlement “if it is fair, adequate, reasonable, and not a product of collusion.” *Wal-Mart*, 396 F.3d at 116. This inquiry entails an assessment of “both the settlement’s terms and the negotiating process leading to settlement.” *Id.* (citing *D’Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001)). To determine procedural fairness, courts examine the negotiating process leading to the settlement. *Id.* at 117. To determine substantive fairness, courts determine whether the settlement’s terms are fair, adequate, and reasonable according to the factors set forth in *City of Detroit v. Grinnell Corp.*, 445 F.2d 448 (2d Cir. 1974).

In light of the strong policy in favor of class action settlements, 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.” *Id.* at 116-17 (quoting Manual for Complex Litigation § 30.42 (3d ed. 1995)). “Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement.” *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007).

Preliminary approval is the first step in the settlement process. Preliminary approval requires only an “initial evaluation” of the fairness of the proposed settlement. *Clark v. Ecolab, Inc.*, Nos. 07 Civ 8623, 04 Civ. 4488, 06 Civ. 5672 (PAC), 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (citing Newberg on Class Actions § 11.25 (4th ed. 2002)). The Court need only find that there is “probable cause to submit the [settlement] proposal 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) (internal citation omitted). Where, as here, the proposed Agreement “appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval [should be] granted.” *In re Nasdaq Market-Makers Antitrust Litig.*, 176 F.R.D. 99 (S.D.N.Y. 1997).

If the Agreement is preliminarily approved, notice may be issued to the class and class members may object or opt-out of the settlement. After the notice period, the Court will be in a position to finally evaluate the Agreement with the benefit of class members’ input. *Clark*, 2009 WL 6615729, at *3. As shown below, the proposed Agreement satisfies the applicable criteria. The interests of the class are better served by this settlement than by further litigation.

A. Procedural Fairness

The Agreement is entitled to an initial finding of fairness, as it was reached after the parties conducted a thorough investigation and evaluated the claims and defenses, and after extensive and lengthy negotiations. *See* 4 Newberg on Class Actions § 11:41 (4th ed. 2002).

As noted above, the parties exchanged and reviewed a substantial amount of discovery. Class Counsel examined Defendants’ practices, policies, and procedures concerning, among other things, the calculation of pensionable earnings; overtime work and pay; night shift differential work and pay, and military leaves of absence. Class Counsel also reviewed the payroll records, earnings data, and pension files of the Class Representatives, and earnings data of other officers similarly situated, as well as Defendants’ budgetary documents reflecting amounts budgeted and spent by the NYPD for overtime and night shift differential work. Class Counsel deposed numerous witnesses to explain and interpret these documents, and retained a

consulting expert to analyze the data and perform damages calculations. Defendants' counsel deposed Plaintiffs Goodman and Doherty. The parties also exchanged expert reports. On October 15, 2012, Class Counsel provided a draft settlement proposal to Defendants, and on January 28, 2013, the parties attended a productive mediation session facilitated by a court-appointed mediator with expertise in employment discrimination. The parties proceeded to negotiate at arm's length for over 6 months before reaching an agreement in principle. The wide exchange and examination of information empowered the parties to reliably assess the merits of one another's positions prior to reaching a settlement.

B. Substantive Fairness

The Second Circuit has identified several factors that should guide a court's determination of whether a settlement agreement is fair, reasonable, and adequate:

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 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.

City of Detroit, 495 F.2d at 463 (citations omitted). As explained below, the Agreement satisfies the applicable criteria.

1. The Complexity, Expense, and Likely Duration of Trial

Litigation of this case through trial would be lengthy and complex. As an initial matter, prior to trial, the Court would have to resolve summary judgment and class certification motions. While the liability case is fairly straightforward, the presentation of evidence concerning actual damages calculations is not. At trial, each party would present expert testimony concerning how

Defendants actually calculated each Plaintiff's pensionable earnings during periods of active military service, how Plaintiffs contend their pensionable earnings should have been calculated under USERRA, and the effect that revised calculations would have on Plaintiffs' respective final pensions. Evidence of these calculations is complicated and lengthy. By approving the Agreement, the Court will be limiting the expense and duration of litigation. Accordingly, this factor weighs in favor of granting preliminary approval of the Agreement.

2. The Reaction of the Class to Settlement

Since notice of the terms of the Agreement has not yet been approved by the Court and sent to the class members, it is premature to determine the reaction of the class to the Agreement. At this point in time, this factor neither counsels for or against preliminary approval. However, given that the Agreement's terms (1) provide virtually full monetary relief (in the form of pension benefits) for any class member who has suffered reduced pension benefits as a result of Defendants' calculation of his/her pensionable earnings during period(s) of active military service, and (2) allow a class member to continue to receive his/her current annual pension benefit in the event the adjusted recalculation of pensionable earnings would result in a reduction of his/her annual pension benefit, Plaintiffs expect that the class will react positively to the Agreement.

3. The Stage of the Proceedings and the Amount of Discovery Completed

The litigation in this case has reached the stage where "the parties certainly have a clear view of the strengths and weaknesses of their cases." *In re Warner Communs. Secs. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986). Here, through motions practice, a voluminous exchange of discovery, in-depth witness examinations, and exchange of expert reports, the parties obtained sufficient knowledge to thoroughly analyze the viability of

their claims and defenses. The parties' participation in a mediation session allowed them to further explore the various issues involved. The decision of the parties to enter into the Agreement was made with a thorough understanding of the facts and law, and this factor thus favors preliminary approval of the Agreement.

4. The Risks of Establishing Liability and Damages, and the Risks of Maintaining the Class Action Through Trial

The risks of establishing liability and damages, and maintaining a class action through trial, further weighs in favor of preliminary approval. "Litigation inherently involves risks." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. at 126. Indeed, the law favors class action settlements because of the uncertainties of the outcome of litigation, the difficulties of proof, and the general length and expense of litigating class actions.

Although Class Counsel strongly believe that the material facts and relevant law fully support their claims, the Class Representatives recognize the uncertainties inherent in this litigation, including obtaining class certification and maintaining a certified class through trial. Defendants have aggressively and zealously asserted their defenses throughout this case, and as demonstrated in their pre-motion letter opposing Plaintiffs' request to amend Goodman's individual complaint to add class allegations, Defendants would continue to do so in the context of class certification briefing. If this litigation proceeded and Court granted class certification, Defendants might seek to file an appeal under Rule 23(f), the resolution of which would require additional time and briefing.

Turning to damages, Defendants are likely to dispute Plaintiffs' damages calculations, leading to a "battle of the experts" at trial. *See, e.g., In re Paine Webber Ltd. P'ships Litig.*, 171 F.R.D. at 129 (noting unpredictability of battle of damage experts). More specifically, Class Counsel recognize the risk that pursuant to USERRA's pension calculation provision, 38 U.S.C.

§ 4318(b)(3), certain class members may owe more to Defendants in pension contributions than Defendants would owe to them in pension benefits.

Settlement eliminates these risks, expenses, and delays. When the terms of the Agreement, which will confer substantial benefits upon class members in an expeditious manner, are considered within a “risk/reward” analytical framework, the Class Representatives believe that the Agreement is demonstrably fair, adequate, and reasonable.

5. Defendants’ Ability to Withstand a Greater Judgment

Given Defendants’ status as public entities, it is not clear how, if at all, this factor applies. This factor is thus neutral.

6. The Proposed Agreement Is Within the Range of Reasonableness Given the Litigation Risks and the Best Possible Recovery

The Agreement provides significant injunctive and monetary relief for class members. First, the Agreement specifies how class members’ pensionable earnings during periods of active military service must be recalculated. Not only must pensionable earnings include any applicable cost of living adjustments or wage increases that became effective during a period of active military service, but they must also include any other forms of compensation that the class member would have earned “but for” his or her active military service. (Agreement ¶¶ 4.1(a), (b)). To the extent it is not “reasonably certain,” that a class member would have earned a certain type of compensation but for active military service, *e.g.*, overtime pay and certain night shift differential pay, the compensation must nonetheless be accounted for by reference to the average amount of such compensation earned in the months preceding the period of active military service. (*Id.* ¶ 4.1(b)). This manner of calculation fully accords with the requirements of USERRA. 38 U.S.C. § 4318.

With respect to what constitutes “active military service” for purposes of the Agreement, the parties agreed that brief periods of service amounting to less than 5 days of continuous absence or less than 10 total days’ absence in a single calendar year will not materially affect the computation of a class member’s pension benefit amount. (Agreement ¶ 2.1). The exclusion of such periods of service from the required recalculations is thus fair and reasonable.

Next, in accordance with the calculation method set forth in the Agreement and described immediately above, Defendants have agreed to recalculate the pensionable earnings of each and every member of Sub-Class A, and each and every member of Sub-Class B who demonstrates that s/he has a timely claim, for all periods of active military service performed on or after September 11, 2001 and during the time of his/her employment with the NYPD. (Agreement ¶¶ 6.1, 6.2). Defendants will then use the recalculated pensionable earnings to determine each member’s revised annual pension benefit, adjusted to account for additional employee pension contributions owed by the member. (*Id.* ¶ 6.1(a)). Significantly, if Defendants’ recalculation of pensionable earnings shows that a member’s existing pension benefit is greater than or equal to the member’s revised pension benefit, Defendants have agreed that the member may continue receiving his/her existing pension benefit. (*Id.*). On the other hand, if application of the adjustment results in an increased revised pension benefit, Defendants will remit to the class member all back pension monies owed with 3% simple interest per annum, and adjust prospective pension payments accordingly. (*Id.* ¶ 6.1(b)). The Agreement also provides a mechanism for class members to challenge Defendants’ recalculation of his or her pensionable earnings. (*Id.* ¶ 6.4).

These terms afford class members close to the fullest relief possible under the law, and thus the proposed Agreement is within the range of reasonableness and should be preliminarily approved.

**THE AGREEMENT’S NOTICE PROCEDURES SATISFY RULE 23(e)
AND DUE PROCESS**

Rule 23(e)(1) requires the court to “direct notice in a reasonable manner to all class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1). The reasonable notice required under Rule 23 must meet both dissemination and content concerns. *See Wal-Mart*, 396 F.3d at 113-14. Notice is “adequate if it may be understood by the average class member.” *Id.* (internal quotation marks and citation omitted).

The notice process proposed in the Agreement satisfies both the dissemination and content requirements for notice. First, the Agreement provides for the mailing of individualized class notice via first-class mail to each class member to the address used by the Police Pension Fund to communicate with the member on pension matters. (*See* Agreement ¶¶ 7.3(a), (b)). This notice method is “appropriate” and “reasonable” under Rules 23(c)(2)(a) and 23(e)(1). *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974).

Second, the content of the class notice is adequate under Rule 23(c)(2)(A) because it informs class members, in easily understandable language, about (a) the nature of the action, including the claims asserted; (b) the definition of the Settlement Class and Sub-Classes; (c) the terms of the Agreement in summary; (d) the specific benefits being provided to the Settlement Class Members; (e) the nature of the released claims; (f) the process for Sub-Class B members to demonstrate that they have timely claims; (g) the process for making an objection and the ramifications objecting (or not) to the Agreement; (h) the process for opting-out of the Agreement and the consequences of opting-out of the Agreement; and (i) the date, time, and

location of the Fairness Hearing. Finally, the class notice provides a specific e-mail address to which requests for further information may be directed to Class Counsel. (*See* Agreement Ex. 1).

The class notice and its proposed dissemination satisfy the requirements of Rule 23 and due process for notifying settlement class members of the conditional certification of the Settlement Class and Sub-Classes and preliminary approval of the agreement. *See, e.g., In re Baldwin-United*, 105 F.R.D. 475, 485 (S.D.N.Y. 1984); *see also* Manual for Complex Litig. §§ 21.31, 21.311 (4th ed. 2004). Accordingly, the Court should approve the class notice and order it disseminated.

CONCLUSION

The parties submit that the Agreement is fair, reasonable, and adequate, and was the product of lengthy arms-length negotiations after the parties conducted extensive discovery. Plaintiffs respectfully request that the Court grant Plaintiffs' Unopposed Motion for Conditional Certification of the Settlement Class, Preliminary Approval of the Settlement Agreement, and Approval of the Form of Class Notice, certify a Settlement Class for injunctive and monetary relief pursuant to Rule 23(b)(3), designate Plaintiffs David Goodman, Michael Doherty, and Robert Black as Class Representatives, designate Plaintiffs Goodman and Black as Representatives for Sub-Class A, designate Plaintiff Doherty as Representative for Sub-Class B, appoint Plaintiffs' attorneys as counsel for the certified class, preliminarily approve the Agreement, approve the proposed Class Notice and forms appended thereto for final distribution, and set a final fairness hearing, as the Court's calendar permits. A proposed order is attached as Exhibit B of the Agreement.

Dated: New York, New York
June 17, 2013

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for Plaintiffs and the Class

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
DAVID GOODMAN, MICHAEL :
DOHERTY, and ROBERT D. BLACK, :
Individually and on behalf of a class of :
similarly situated persons, :
:
Plaintiffs, :
:
- against - :
:
CITY OF NEW YORK, NEW YORK :
CITY POLICE DEPARTMENT, and NEW :
YORK CITY POLICE PENSION FUND, :
:
Defendants. :
-----X

10 Civ. 5236 (RJS)

ECF CASE

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is made and entered into by and among the following Parties to the above-captioned action (the “Litigation”): Plaintiffs David Goodman, Michael Doherty, and Robert D. Black (collectively, the “Representative Plaintiffs”), on behalf of themselves and on behalf of the Settlement Class (as defined below), by and through their counsel of record in the Litigation, and Defendants City of New York, New York City Police Department (“NYPD”), and New York City Police Pension Fund (“PPF”) (collectively, “Defendants”), by and through their counsel of record in the Litigation. It is the intent of the Parties that this Agreement be a final and binding settlement in full disposition of all claims raised in this Litigation.

I. RECITALS

WHEREAS, on or about July 9, 2010, Plaintiff David Goodman (“Goodman”) commenced this action in the United States District Court for the Southern District of New York, alleging that the Defendants violated the Uniformed Services Employment and Reemployment

Rights Act of 1994, 38 U.S.C. § 4301, *et seq.* (“USERRA”), by failing to compute Goodman’s compensation for pension purposes during his periods of Active Military Service (as defined in paragraph 2.1 below) to include all Pensionable Earnings (as defined in paragraph 2.17 below) Goodman would have received but for those periods of Active Military Service in a manner consistent with USERRA;

WHEREAS, USERRA defines the “uniformed services” to mean “the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency,” 38 U.S.C. § 4303(16);

WHEREAS, USERRA defines “service in the uniformed services” to mean “the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by [10 U.S.C. § 12503] or [32 U.S.C. § 115],” 38 U.S.C. § 4303(13);

WHEREAS, on or about March 19, 2011, Plaintiffs Michael Doherty (“Doherty”) and Robert D. Black (“Black”) commenced separate actions in the United States District Court for the Southern District of New York, which raised substantially similar claims as those raised by Goodman;

WHEREAS, USERRA requires, *inter alia*, that “[f]or purposes of computing an employer’s [pension] liability under paragraph [38 U.S.C. § 4318(b)](1) or [an] employee’s contributions under paragraph [38 U.S.C. § 4318(b)](2), the employee’s compensation during the period of service [in the uniformed services] shall be computed – (A) at the rate the employee would have received but for the period of [uniformed] service [], or (B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee’s average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period),” 38 U.S.C. § 4318(b)(3);

WHEREAS, by decision and order dated September 26, 2011, this Court denied the Defendants’ motion to dismiss the complaints of Goodman and Doherty, holding that (1) “the most natural reading of [§ 4318(b)(3)] is that it includes all aspects of ‘the employee’s compensation’ that would have been received ‘but for’ his deployment, regardless of whether some or all of such compensation has in fact been paid”; (2) “the Court cannot find, as a matter of law, that Congress intended USERRA to exclude from pension calculations overtime and night shift pay that Plaintiffs would have earned ‘but for’ the service member’s deployment”; and (3) Doherty’s USERRA claim was not time-barred because the Veterans’ Benefits Improvement Act of 2008 (“VBIA”), 38 U.S.C. § 4327(b), eliminated statutes of limitations for USERRA claims that were “live” as of the passage of the statute on October 10, 2008, and Doherty’s claim was “live” as of that date, *see* Memorandum and Order dated Sept. 26, 2011;

WHEREAS, on or about August 2, 2012, the Representative Plaintiffs filed an amended class action complaint (the “Class Action Complaint”) alleging that the Defendants violated the USERRA rights of the Representative Plaintiffs and a class of similarly-situated current and retired NYPD Uniformed Members of Service (as defined in paragraph 2.14 below) who were

called to active military duty during their employment with the NYPD on or after September 11, 2001 by failing to impute and calculate the pensionable earnings the members of service would have earned but for periods of Active Military Service in a manner consistent with USERRA;

WHEREAS, the Representative Plaintiffs to this Litigation seek, among other things, declaratory and injunctive relief on behalf of themselves and similarly-situated active and retired NYPD Uniformed Members of Service who have performed or will perform Active Military Service at some time on or after September 11, 2001, during their employment with the NYPD, as well as monetary relief and prejudgment interest on behalf of themselves and a sub-class of retired NYPD Uniformed Members of Service who performed Active Military Service on or after September 11, 2001, during their employment with the NYPD;

WHEREAS, Defendants timely answered the Class Action Complaint on or about August 27, 2012;

WHEREAS, Defendants admit in Paragraph 16 of their Answer that the City of New York's pension contributions made on behalf of NYPD Uniformed Members of Service during periods of Active Military Service "were not computed in the manner described" in Paragraph 16 of the Class Action Complaint (*see* First Amended Complaint, ¶ 16; Defendants' Answer to First Amended Complaint, ¶ 16);

WHEREAS, under USERRA, the pension calculation for any employee of any City agency, instrumentality, or other entity, who has been absent from employment due to a period of Active Military Service, must be based upon compensation "at the rate the employee would have received but for the period of service," including all Pensionable Earnings, or, "in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding [the

employee's period of military service] (or, if shorter, the period of employment immediately preceding such period)," 38 U.S.C. § 4318(b)(3)(A)–(B);

WHEREAS, settlement negotiations with respect to the Litigation have taken place by and among the Representative Plaintiffs, Settlement Class Counsel (as defined below), and Defendants, pursuant to which the Parties have: (i) conducted a thorough investigation and analysis into the factual and legal issues involved in the Litigation; and (ii) reviewed voluminous documents, data, and other materials relevant to the claims contained in the Class Action Complaint;

WHEREAS, as a product of the negotiations, this Agreement embodies the terms and conditions of the settlement reached between the Representative Plaintiffs and the Settlement Class Members, and Defendants, subject to the Court's approval in a Final Order (as defined below); and

WHEREAS, the Parties and Settlement Class Counsel believe that the settlement set forth in this Agreement contains significant benefits for the Settlement Class, and further, that the settlement set forth herein is lawful, fair, reasonable, adequate, just, and in the best interests of the Settlement Class;

NOW, THEREFORE, for and in consideration of the foregoing recitals of mutual promises and covenants contained herein, it is agreed by and among the undersigned, on behalf of the Representative Plaintiffs, the Settlement Class, and Defendants, that the Litigation be fully and finally settled and compromised, subject to the approval of the Court and the following terms and conditions:

II. DEFINITIONS

As used in the Agreement, the following terms have the meanings specified below:

2.1 “Active Military Service” means “the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by [10 U.S.C. § 12503] or [32 U.S.C. § 115].” 38 U.S.C. § 4303(13). While NYPD Uniformed Members of Service who are military reservists are, from time to time, called to participate in training and other drills for the uniformed services, the Parties acknowledge that brief periods of service amounting to less than 5 days of continuous absence or less than 10 total days’ absence in a single calendar year will not materially affect the computation of a Class Member’s pension benefit amount. The Parties also acknowledge that USERRA generally obligates NYPD Uniformed Members of Service to provide the NYPD with advance notice of any Active Military Service that they perform or are scheduled to perform, 38 U.S.C. § 4312(a), and that, absent such notice, the NYPD may not have a record that Active Military Service was the reason for a particular absence.

2.2 “Class Action Complaint” means the First Amended Complaint – Class Action, filed in this Litigation on or about August 2, 2012.

2.3 “Claim Certification Form for NYPD Retirees Who Received Their First Pension Check Earlier Than October 10, 2004” means the form appended to the Class Notice that is submitted to Defendants by a Member of Sub-Class B (as defined below) in order to demonstrate

his or her entitlement to receive the injunctive and monetary relief described in section VI of this Agreement, substantially in the form attached hereto as Exhibit 2.

2.4 “Class Notice” means the Notice of Proposed Settlement of Class Action and Fairness Hearing, which has been agreed upon by the Parties to be submitted to the Court for approval, substantially in the form attached hereto as Exhibit 1.

2.5 “Court” means the Honorable Richard J. Sullivan, United States District Court Judge for the Southern District of New York.

2.6 “Defendants” means the City of New York, the New York City Police Department (“NYPD”), and the New York City Police Pension Fund (“PPF”).

2.7 “Election to Opt-Out of Settlement and Class Action” means the form appended to the Class Notice that is submitted to Defendants by a putative Class Member (as defined below) who wishes to opt out of the Litigation and this Agreement, substantially in the form attached hereto as Exhibit 3.

2.8 “Effective Date” means the date by which all of the events and conditions specified in section XI of the Agreement have been met and have occurred.

2.9 “Fairness Hearing” means the hearing at which the Court will consider and decide whether to certify the Settlement Class and Settlement Sub-Classes, to approve this Agreement, to enter the Final Order (as defined below), and to make such other final rulings as are contemplated by this Agreement.

2.10 “Fairness Hearing Date” means the date set by the Court for the Fairness Hearing.

2.11 “Final Order” means the Order to be entered by the Court, which, *inter alia*, (i) certifies the class; (ii) approves the Agreement; (iii) retains jurisdiction to enforce the

Agreement; and (iv) dismisses the remainder of the Litigation with prejudice without further motion, order, or action of the Court.

2.12 “First Pension Check” means the first disbursement of a retirement allowance, whether in the form of a paper check or electronic direct deposit, from PPF to an NYPD Uniformed Member of Service following his or her date of retirement.

2.13 “Notice Deadline” means the date 90 days after the Class Notice is mailed to the Settlement Class Members by Defendants.

2.14 “NYPD Uniformed Member of Service” means any employee of the NYPD who is eligible to receive a pension through the PPF.

2.15 “Objection Date” means the date, at least 30 days prior to the Fairness Hearing Date, set by the Court for objectors to file objections to the Agreement in accordance with paragraphs 7.2(i) and 7.6 of this Agreement.

2.16 “Other City Retirement Systems” means the New York City Employees’ Retirement System, the Teachers’ Retirement System of the City of New York, the New York City Board of Education Retirement System, and the New York Fire Department Pension Fund.

2.17 “Pensionable Earnings” means base salary, overtime, night shift differential, holiday pay, worked vacation, portal-to-portal, and allowable longevity payments.

2.18 “Preliminary Approval Date” means the date the Court signs the Preliminary Order (as defined below), which, *inter alia*, conditionally certifies the Settlement Class and Settlement Sub-Classes (as defined below); preliminarily approves this Agreement; approves the Class Notice and forms appended thereto and orders the mailing and publication of the Class Notice and forms appended thereto; and provisionally designates the Representative Plaintiffs as representatives of the Settlement Class and Preet Bharara, United States Attorney for the

Southern District of New York, as counsel for the Settlement Class, by the Chief of the Civil Rights Unit.

2.19 “Preliminary Approval Hearing” means the hearing the Court may set, in its discretion, to consider, *inter alia*, whether to preliminarily approve this Agreement and conditionally certify the Settlement Class and Settlement Sub-Classes.

2.20 “Preliminary Order” means the order preliminarily approving the Agreement, conditionally certifying the Settlement Class and Settlement Sub-Classes, approving the forms of class notice, and scheduling a Fairness Hearing, to be entered by the Court.

2.21 “Release” means the release set forth in section IX of this Agreement.

2.22 “Representative Plaintiffs” means Plaintiffs David Goodman, Michael Doherty, and Robert D. Black.

2.23 “Settlement Class” means all retired NYPD Uniformed Members of Service who performed Active Military Service on or after September 11, 2001 during their employment with the NYPD, or, if applicable, the beneficiary of the pension of a NYPD Uniformed Member of Service described in this paragraph 2.23. The Settlement Class shall consist only of Sub-Classes A and B, as defined in paragraphs 2.27 and 2.29, and is not intended to include any other individuals.

2.24 “Settlement Class Counsel” means Preet Bharara, United States Attorney for the Southern District of New York, by the Chief of the Civil Rights Unit and Assistant United States Attorneys Tara M. La Morte and Arastu K. Chaudhury, 86 Chambers Street, 3rd Floor, New York, New York 10007, (212) 637-2746/2633.

2.25 “Settlement Class Member(s),” “Class Member(s),” or “Member(s) of the Settlement Class” means any individual who falls within the definition of the Settlement Class as set forth in paragraphs 2.23 and 2.25 through 2.30.

2.26 “Settlement Sub-Classes” means Sub-Class A and Sub-Class B.

2.27 “Sub-Class A” means all retired NYPD Uniformed Members of Service who are members of PPF and performed Active Military Service on or after September 11, 2001 during their employment with the NYPD, and who received their First Pension Check on or after October 10, 2004 and no later than the Effective Date, or, if applicable, the beneficiary of the pension of a NYPD Uniformed Member of Service described in this paragraph 2.27.

2.28 “Sub-Class A Member(s)” or “Member(s) of Sub-Class A” means any individual who falls within the definition of the Sub-Class A as set forth herein.

2.29 “Sub-Class B” means all retired NYPD Uniformed Members of Service who are members of PPF and performed Active Military Service on or after September 11, 2001 during their employment with the NYPD, and who received their First Pension Check before October 10, 2004, or, if applicable, the beneficiary of the pension of a NYPD Uniformed Member of Service described in this paragraph 2.29.

2.30 “Sub-Class B Member(s)” or “Member(s) of Sub-Class B” means any individual who falls within the definition of Sub-Class B as set forth herein.

2.31 Membership in PPF “Tier I”; “Tier II”; and/or “Tier 3/Tier 3 Revised Plan (also known as Tier 6).” As set forth in PPF’s Summary Plan Descriptions for each of the foregoing plans: NYPD Uniformed Members of Service appointed on or before June 30, 1973 are Tier I members of PPF; NYPD Uniformed Members of Service appointed from July 1, 1973 through June 30, 2009 are Tier II members of PPF; NYPD Uniformed Members of Service appointed

from July 1, 2009 to March 31, 2012 are Tier 3 members of PPF; and NYPD Uniformed Members of Service appointed on or after April 1, 2012 are Tier 3 Revised Plan (also known as Tier 6) members of PPF.

III. JURISDICTION AND VENUE

3.1 The United States District Court for the Southern District of New York has jurisdiction over the subject matter of this action and over the Parties to this case for the purpose of approving this Agreement and, if necessary, enforcing this Agreement.

3.2 Venue is proper in the United States District Court for the Southern District of New York for purposes of this Agreement and any proceedings related to this Agreement.

3.3 All statutory conditions precedent to the institution of this Litigation on behalf of the Representative Plaintiffs have been fulfilled.

IV. GENERAL INJUNCTIVE REQUIREMENTS

4.1 Upon the Effective Date, Defendants will take all reasonable steps necessary to calculate the compensation for pension purposes of all Members of Sub-Classes A and B—and any NYPD Uniformed Member of Service who performs or has performed Active Military Service during any time of his or her employment with the NYPD on or after September 11, 2001, and retires from the NYPD on or after the Effective Date—in accordance with USERRA. These calculations have the limited purpose of assisting in the recalculation of pension benefit amounts, and are not for purposes of back pay compensation, as USERRA does not require civilian employers to pay service members any compensation during periods of Active Military Service. Accordingly, for each Member of Sub-Classes A and B (and active NYPD Uniformed Members of Service in accordance with subparagraph (c) below), compensation for pension purposes during period(s) of Active Military Service must include the following:

a. Any cost of living adjustments or wage increases that become effective during a period of Active Military Service that the NYPD Uniformed Member of Service would have earned “but for” his or her period(s) of Active Military Service. 38 U.S.C. § 4318(b)(3)(A);

b. All compensation for all Pensionable Earnings that the NYPD Uniformed Member of Service would have earned “but for” his or her period(s) of Active Military Service, 38 U.S.C. § 4318(b)(3)(A). To the extent such compensation is “not reasonably certain,” it shall be determined based upon the average amount of Pensionable Earnings earned by the NYPD Uniformed Member of Service during the 12 months immediately preceding his or her period(s) of Active Military Service (or, if the period of employment was shorter than 12 months, the period of employment immediately preceding the period of Active Military Service), *id.* § 4318(b)(3)(B); the Parties acknowledge that some NYPD Uniformed Members of Service who earned night shift differential compensation prior to a period of Active Military Service may have, by virtue of certain work scheduling arrangements (sometimes referred to as “rotating night shift differential” or being “charted” for night shift differential), continued to receive that compensation throughout the period of service and that, to the extent such compensation was actually received by NYPD Uniformed Members of Service during periods of Active Military Service, it has already been included in the pensionable earnings figures that PPF uses to compute their pension benefit amounts.

c. With respect to active NYPD Uniformed Members of Service, Defendants must calculate Pensionable Earnings in accordance with USERRA, as described in this paragraph 4.1, for all periods of Active Military Service which are pending on or occur after the Effective Date. With respect to any prior periods of Active Military Service on or after September 11, 2001, from which the active NYPD Uniformed Member of Service returned to

employment on or before the Effective Date, no such calculation or imputation of additional Pensionable Earnings shall be made unless the Member directs a written request for such calculation to PPF. While this paragraph provides for certain relief to active NYPD Uniformed Members of Service, the Parties agree that they are not members of the Settlement Class or Sub-Classes A or B, but rather, the relief as described in this subparagraph applies to them pursuant to the General Injunctive Requirements set forth in this section IV.

4.2 Upon the Effective Date, the NYPD and PPF shall modify, consistent with the revised methodology set forth in paragraph 4.1, any agreement, practice, order, rule, regulation, or policy currently in place concerning: (1) the calculation of compensation of NYPD Uniformed Members of Service for pension purposes (*i.e.*, Pensionable Earnings) during their periods of Active Military Service, and (2) the calculation of their pension benefit to ensure consistency with the terms of the Agreement.

4.3 Upon the Effective Date, the NYPD and PPF shall take all reasonable steps necessary to train and educate all employees responsible for performing the calculation of Pensionable Earnings of NYPD Uniformed Members of Service during periods of Active Military Service concerning the revised methodology set forth in paragraph 4.1 of this section.

4.4 Upon the Effective Date, Defendants shall make this Agreement available to all active and retired NYPD Uniformed Members of Service on the NYPD's Military and Extended Leave Desk intranet site (<http://finest/cfml/benefits/finesthealth/html/meld/meld.html>); the NYPD retiree website (<http://www.nypd2.org/retirement/home.html>); and PPF's website (<http://www.nyc.gov/nycppf>).

4.5 Upon the Effective Date, Defendants shall publish their revised methodology for calculating compensation of NYPD Uniformed Members of Service for pension purposes during

periods of Active Military Service on the NYPD's Military and Extended Leave Desk intranet site (<http://finest/cfml/benefits/finesthealth/html/meld/meld.html>); the NYPD retiree website (<http://www.nypd2.org/retirement/home.html>); and PPF's website (<http://www.nyc.gov/nycppf>).

4.6 Defendants shall achieve compliance with the foregoing paragraphs of this section within one year of the Effective Date.

4.7 Pursuant to 38 U.S.C. § 4311, Defendants shall not take any action against any person that constitutes retaliation or interference with the exercise of such person's rights under USERRA because such person gave testimony or assistance or participated in any manner in any investigation, proceeding, or hearing in connection with the Litigation, participated, or participates in any manner in connection with the monitoring or implementation of this Agreement, or sought, seeks and/or receives any monetary and/or non-monetary relief pursuant to this Agreement.

4.8 In addition to the foregoing general injunctive requirements concerning the NYPD and PPF, the City of New York will take all reasonable steps within its legal authority to advise the Other City Retirement Systems of the terms and injunctive relief agreed upon by the Parties in this Agreement; to request that the Other City Retirement Systems make any and all changes to their policies and practices that are necessary to conform them to the requirements of USERRA; and to similarly treat all other City of New York employees (who are active or retired members of the Other City Retirement Systems) who perform or have performed Active Military Service on or after September 11, 2001, during their employment with the City of New York, as set forth in this Agreement. The steps to be taken by the City of New York shall include, but are not limited to:

a. Notifying the Other City Retirement Systems about this lawsuit, this Agreement, and the requirements of 38 U.S.C. § 4318 of USERRA no later than 10 days after the Effective Date;

b. Issuing written legal guidance, via the Office of the Corporation Counsel, as counsel to the Other City Retirement Systems, within 30 days of the Effective Date, advising and formally recommending that each of the Other City Retirement Systems: (i) review its current policies and practices concerning calculation of the pensions of City employees who are members of the Other City Retirement Systems and perform or have performed Active Military Service, (ii) modify its policies and practices, as necessary, to ensure that they are consistent with USERRA and this Agreement, (iii) identify all existing retirees collecting pensions, who have performed Active Military Service on or after September 11, 2001 (“Other Relevant Pensioners”), (iv) recalculate the pensions of the Other Relevant Pensioners in accordance with paragraphs 4.1, 6.1, and 6.2 of this Agreement, *see* 20 C.F.R. §§ 1002.262(c), (d); 1002.265(c), (v) provide notice to the Other Relevant Pensioners of the effect of such recalculation, (vi) provide all existing and future pensioners an administrative process by which they may dispute the calculation of their pension benefits, similar to the process provided in this Agreement to the Class Members, and (vii) communicate the foregoing changes, as well as the steps of the administrative process for contesting the computation of pension benefits, to all their members (active or retired) who have performed Active Military Service. Defendants shall apprise Settlement Class Counsel of any and all actions, including no action, taken by the Other City Retirement Systems as a result of or in response to the legal guidance provided by Corporation Counsel within 30 days after such guidance is given.

c. Drafting and presenting resolutions to each of the Other City Retirement Systems' Board of Trustees for consideration, in the event that the Other City Retirement Systems have not begun effecting changes to their respective systems that are materially consistent with the terms of this Agreement within 30 days of receiving the guidance from the Corporation Counsel. Any such resolution shall be drafted in consultation with Settlement Class Counsel, and will not be presented to the Board of Trustees of any of the Other City Retirement Systems without authorization from Settlement Class Counsel. Any resolutions drafted and presented in compliance with this section must be presented within 90 days of the Effective Date, or at the next regularly scheduled meeting of each Other City Retirement System's Board of Trustees, if later, and must require each of the Other City Retirement Systems to take the actions in the Corporation Counsel's guidance to the Boards of Trustees and enumerated in paragraph 4.8(b), and otherwise apply the principles of this Agreement as to all other City of New York employees (who are active or retired members of the Other City Retirement Systems) who are not Class Members in this action, and recommend to the Boards of Trustees that they pass the resolutions in accordance with each system's governing statutes, rules, and regulations. Members of the Other Pension City Retirement Systems' Boards of Trustees who are acting on behalf of the City of New York (including representatives and appointees of the Mayor's Office and agency commissioners and their representatives, but not including members sitting in their capacity as union representatives rather than their capacity as City employees, or the teachers who are independently elected by Teachers' Retirement System of the City of New York membership to its Board of Trustees/Retirement Board) shall not take any steps to delay, block, hinder, or prevent the adoption of any resolution, regardless of originating source (including, but not limited to, resolutions presented pursuant to this paragraph), presented to any of the Boards

of Trustees of the Other City Retirement Systems, to the extent such resolution is consistent with the terms of this Agreement.

V. SETTLEMENT CLASS AND SUB-CLASSES

5.1. Certification of Settlement Class. The Parties agree to the certification of the Settlement Class, as defined in paragraph 2.23 of this Agreement.

5.2. Certification of Sub-Class A. The Parties agree to the certification of the Settlement Sub-Class A, as defined in paragraph 2.27 of this Agreement.

5.3. Certification of Sub-Class B. The Parties agree to the certification of the Settlement Sub-Class B, as defined in paragraph 2.29 of this Agreement.

VI. ADDITIONAL INJUNCTIVE AND MONETARY RELIEF FOR THE SETTLEMENT SUB-CLASSES

6.1. Sub-Class A.

a. Following the Effective Date, Defendants shall recalculate the Pensionable Earnings of each and every Member of Sub-Class A for all period(s) of Active Military Service he or she performed on or after September 11, 2001 and during his or her employment with the NYPD and as a member of PPF, in accordance with paragraph 4.1 of this Agreement, then use the recalculated Pensionable Earnings to determine each member's revised Final Average Salary (as defined in PPF's Summary Plan Descriptions for each tier) and revised annual pension benefit, adjusted by the actuarial equivalent of any shortage resulting from additional employee pension contributions that the Member of Sub-Class A would have owed as a result of the recalculated Pensionable Earnings, in accordance with applicable federal pension laws and regulations, as well as state and city pension laws, to the extent such state and city laws are not inconsistent with USERRA. If the revised annual pension benefit computed pursuant to this paragraph 6.1(a) minus the existing annual pension benefit ("Net Annual Pension Change") for a

Member of Sub-Class A is not greater than zero dollars, no further computations under this paragraph 6.1 shall be made with respect to such Member of Sub-Class A pursuant to the Settlement Agreement, and the Member will continue receiving his or her existing annual pension benefit.

b. If the Net Annual Pension Change for a Member of Sub-Class A is greater than zero dollars, then Defendants shall calculate the Net Annual Pension Change multiplied by the number of years and fraction thereof that the Member of Sub-Class A has been retired (“Pension Owed”) and remit the Pension Owed to the Member of Sub-Class A, plus prejudgment simple interest at the rate of 3% per annum commencing for each part of the Pension Owed on the date such part should have been paid and ending at the end of the month preceding the Effective Date. Defendants shall remit monies owed via check(s) disseminated to members of Sub-Class A. Defendants shall further adjust the amounts to be distributed in Members’ prospective pension checks consistent with the calculation performed pursuant to paragraph 6.1(a) of this Agreement.

c. PPF shall remit any additional pension benefits owed to Members of Sub-Class A in accordance with the procedures described in section X of this Agreement.

d. Defendants shall achieve compliance with paragraph 6.1 of this section within one year of the Effective Date.

6.2 Sub-Class B

a. Following receipt of documentation demonstrating Active Military Service, as described above and as further described in 38 U.S.C. § 4312(f)(2), which shows that a Member of Sub-Class B performed Active Military Service subsequent to retirement as an NYPD Uniformed Member of Service such that a period of four years or less, exclusive of the

time(s) the Member performed Active Military Service subsequent to retirement, passed between receipt of his or her First Pension Check and October 10, 2008, Defendants shall apply the terms of paragraph 6.1 to that Member of Sub-Class B in the same manner applied to a Member of Sub-Class A. For such members of Sub-Class B, the entirety of paragraph 6.1 is incorporated into this paragraph 6.2 by reference.

6.3 Review of Calculations. Upon the request of Settlement Class Counsel, Defendants shall provide documents in a form acceptable to Settlement Class Counsel sufficient to show how Defendants performed the calculations done pursuant to this section and how it determined the recalculated amounts of Pensionable Earnings, employee pension contributions, and revised annual pension benefits described herein. Such documents shall be furnished within 20 days of a request, unless a longer period of time is agreed upon by the Parties.

6.4 Disputes Regarding Calculations. If a Class Member disputes the computation of his or her recalculated Pensionable Earnings after the Effective Date (a “Post-Effective Date Calculation Dispute”), that Class Member shall submit the Post-Effective Date Calculation Dispute in writing to Robert Sens-Castet (or his successor), Deputy Executive Director, New York City Police Pension Fund, 233 Broadway, 19th Floor, New York, NY 10279, referencing the caption of this lawsuit, *Goodman, et al. v. City of New York, et al.*, No. 10 Civ. 5236 (RJS) in the letter. Mr. Sens-Castet or his successor in conjunction with the Office of the Actuary shall resolve the Post-Effective Date Calculation Dispute within 45 days of receipt of notice of the dispute. If Mr. Sens-Castet or his successor does not resolve the dispute to the satisfaction of the Class Member, or 45 days transpires without resolution, then the Class Member may provide notice to Settlement Class Counsel, who then shall meet and confer in good faith with Counsel for Defendants regarding the Post-Effective Date Calculation Dispute as to the amount(s) owed

to the Class Member pursuant to this Agreement. In the event that such disputes cannot be resolved by PPF or among counsel, such Post-Effective Date Calculation Dispute shall be submitted to the Court for resolution, upon 15-day notice to the other Party. Defendants shall provide an explanation of the foregoing process in a manner that is readily available to all Class Members, including but not limited to through the NYPD's Military and Extended Leave Desk intranet site (<http://finest/cfml/benefits/finesthealth/html/meld/meld.html>); the NYPD retiree website (<http://www.nypd2.org/retirement/home.html>); and PPF's website (<http://www.nyc.gov/nycppf>).

VII. APPROVAL AND CLASS NOTICE

7.1 Claims Administration. Defendants shall be responsible for mailing the Class Notice and appended forms, as appropriate, to Class Members, collecting these forms, locating Class Members whose forms were returned by the United States Postal Service as undeliverable, and performing such other duties as are specified herein. Defendants shall divide the duties and responsibilities of the claims process as follows:

a. NYPD's Military and Extended Leave Desk has provided a list of the NYPD Uniformed Members of Service who took leaves of absence because of Active Military Service beginning September 11, 2001 through and including December 6, 2012, and will provide periodic updates to that data as needed;

b. PPF will provide Class Members' mailing addresses to which PPF currently transmits pension checks and other correspondence;

c. PPF will perform recalculations of Class Members' pensions based on the method described in paragraphs 4.1, 6.1, and 6.2 above;

d. PPF will remit any additional pension benefits owed to Class Members following recalculation by adjusting the amounts to be distributed in their prospective pension checks as appropriate and by mailing checks for any back-pension benefits owed under this Agreement in accordance with paragraphs 6.1 and 6.2;

e. PPF and the New York City Law Department will work with the New York City Financial Information Services Agency (“FISA”) to gather Class Member compensation data necessary to PPF’s pension recalculations;

f. The New York City Law Department’s Operations Division will be responsible for mailing the Class Notice and appended forms, as appropriate, to Class Members, collecting these forms from Class Members and transmitting them to the Parties’ counsel, and notifying the Parties when or if there are Class Members whose forms are returned by the United States Postal Service as undeliverable; and

g. Defense Counsel will be responsible for transmitting Class Member forms, objections, or other documents, as required, to the Court. Settlement Class Counsel agrees to cooperate with Defendants and assist them in all reasonable ways possible in administering the claims process.

h. If Defendants allocate the responsibilities related to the Claim Administration process described in this paragraph 7.1 in a manner different from that provided for in paragraph 7.1, then Defendants shall notify Settlement Class Counsel within 2 business days of any such change. Further, such alternative allocation of responsibilities shall not affect the requirement to provide periodic reports set forth in paragraph 12.1.

7.2 Preliminary Order. Promptly after the execution of this Agreement, Representative Plaintiffs shall submit this Agreement to the Court and shall present to the Court,

following review and approval by Defendants, an unopposed motion for entry of the Preliminary Order, accompanied by a memorandum in support thereof which, among other things, asks the Court to:

- a. Conditionally certify the Settlement Class and Settlement Sub-Classes.
- b. Find that the Representative Plaintiffs fairly and adequately represent the interests of the Settlement Class and Settlement Sub-Classes and have claims typical of members of the Settlement Class and Settlement Sub-Classes and provisionally designate them as representatives for the Settlement Class and Settlement Sub-Classes.
- c. Find that counsel for Representative Plaintiffs fairly and adequately represent the interests of the Settlement Class and Settlement Sub-Classes, and provisionally designate them as Settlement Class Counsel.
- d. Order that the Agreement is preliminarily approved.
- e. Schedule a Fairness Hearing on the Agreement.
- f. Approve the Class Notice that has been agreed upon by the Parties and forms appended thereto.
- g. Order Defendants to mail, via first class mail, to all Representative Plaintiffs and Settlement Class Members, in accordance with the procedures set forth in paragraph 7.3 of this section, the approved Class Notice and forms appended thereto, as appropriate, within 45 days of the Court entering the Preliminary Order.
- h. Direct Settlement Class Counsel to establish a specific electronic mail address, which shall be identified in the Class Notice, for the purpose of enabling Settlement Class Members to obtain copies of the Class Notice and/or forms appended thereto, make inquiries with respect to the Agreement, and respond to the Class Notice. It shall be the

responsibility of Settlement Class Counsel to respond to inquiries of Settlement Class Members, pursuant to a specific electronic mail inquiry address or otherwise, as appropriate. Settlement Class Counsel shall maintain this specific electronic mail address described in this paragraph until the Certifications described in section XII of this Agreement are served and filed.

i. Provide that objections to the Agreement shall be heard at the Fairness Hearing and that objectors shall serve upon Defendants, by the Objection Date, written notice of their intention to appear and all papers in support of their objections, or else be deemed to have waived and be forever foreclosed and barred from asserting such objections. No later than 20 days prior to the Fairness Hearing, Defendants shall file all objections and supporting papers received pursuant to these instructions in the manner prescribed by the Court.

7.3 Class Notice Process.

a. Within 30 days of submission of the Agreement and Preliminary Order for the Court's consideration and approval, as described in paragraph 7.2, Defendants shall provide Settlement Class Counsel with a list, in electronic form, of the names, addresses to which PPF sends pension-related correspondence, telephone numbers, and retirement dates of all Settlement Class Members. Neither Plaintiffs nor Settlement Class Counsel shall disseminate Class Members' addresses, telephone numbers, or retirement dates, or use that information for any purpose other than for the prosecution of this action or the administration of the terms of this Agreement.

b. Within 45 days of the Court's entry of the Preliminary Order, Defendants shall mail, via First Class United States mail, postage prepaid, the Class Notice and the appended form entitled "Election to Opt Out of Settlement and Class Action" to all Members of the Settlement Class, and, with respect to Members of Sub-Class B, shall also include the form

entitled "Claim Certification Form For NYPD Retirees Who Received Their First Pension Check Earlier Than October 10, 2004." The notice period shall be 90 days from the date of the mailing.

c. In the event that, subsequent to the first mailing of the Class Notice and appended form(s), the Class Notice and appended forms are returned to Defendants by the United States Postal Service with a forwarding address for the recipient, Defendants shall promptly re-mail the Class Notice and appended form(s) to the forwarding address provided, the Class Notice and appended form(s) shall be deemed mailed as of that date, and Defendants shall retain the forwarding address as the updated address. In the event that, subsequent to the first mailing of the Class Notice and appended form(s), the Class Notice and appended form(s) are returned to Defendants by the United States Postal Service because the address of the recipient is no longer valid, *i.e.*, the envelope is marked "Return to Sender," Defendants shall make further attempts to ascertain a valid address for the recipient, *e.g.*, by attempting telephonic or e-mail contact (if such information is available), and using any additional contact information in Defendants' possession. If a valid address is ascertained by Settlement Class Counsel and provided to Defendants, Defendants will re-send the Class Notice and appended form(s) to such address within 7 days of receiving such information. If no additional address is ascertained, the Class Notice and appended form(s) shall be sent again to the last known address. In either event, the Class Notice and appended form(s) shall be deemed received 5 days after the date it is mailed for the second time.

d. With respect to a Member of Sub-Class B whose address has not been deemed unknown, and who has not submitted to Defendants some form of written response to the Class Notice and appended forms by the date that is 30 days before the Notice Deadline, Defendants shall send that Class Member a document (a) referencing the name of the Class

Action; (b) stating that the Member received a Class Notice and appended forms in this action; (c) providing the address and contact information for Settlement Class Counsel; (d) stating the deadline to respond to the Class Notice and appended forms if the recipient desires to do so; and (e) stating that the Member can contact Defendants to receive an additional copy of the Class Notice and/or the appended forms. Nothing in this paragraph shall be construed to extend the deadline for responding to the Class Notice or appended forms.

7.4 Class Member Opt-Out.

a. Class Members may elect to “opt out” of the Settlement Class and thus exclude themselves from the Litigation, the Agreement, and the Settlement Class. Class Members who choose to do so must fully complete, properly execute, and timely mail to Defendants the form entitled “Election to Opt Out of Settlement and Class Action” attached to the Class Notice, per the instructions contained therein. Class Members who timely submit fully completed and properly executed Opt-Out Forms shall have no further role in the Litigation, and for all purposes they shall be regarded as if they never were either a party to the Litigation or a Class Member, and thus they shall not be entitled to any benefit as a result of the Litigation or this Agreement, nor will they have released any claims they may have against Defendants.

b. Defendants shall stamp the postmark date on the original of each Opt-Out Form that they receive and shall serve copies of each Opt-Out Form received in a given week on Settlement Class Counsel not later than the Friday (or last business day) of that week, by email. Defendants also shall, within 3 business days of the end of the Notice Deadline, file with the Clerk of Court stamped copies of any Opt-Out Forms. Defendants shall, within 1 business day of the end of the Notice Deadline, send a final list of all Opt-Out Forms to Settlement Class Counsel by email. Defendants shall retain the stamped originals of all Opt-Out Forms and

originals of all envelopes accompanying Opt-Out Forms in its files, and send duplicate copies of all such forms and envelopes to Settlement Class Counsel for their files.

7.5 Sub-Class B Recovery.

a. Class Members who do not Opt Out of the Settlement Class pursuant to paragraph 7.4(a) and who contend they are entitled to the additional injunctive and monetary relief set forth in section VI of this Agreement as Members of Sub-Class B, must fully and timely complete, execute and mail the form entitled “Claim Certification Form For NYPD Retirees Who Received Their First Pension Check Earlier Than October 10, 2004” (the “Claim Certification Form”) attached to the Class Notice, along with all supporting documentation, to Defendants, per the instructions therein. If a completed and properly executed Claim Certification Form and supporting documentation is not received by Defendants from a Sub-Class B Member and timely postmarked before the Notice Deadline, then that Sub-Class B Member will be deemed to have forever waived his or her right to receive the relief described in section VI of this Agreement, unless they properly submit an Opt-Out Form. However, any Sub-Class B Members who submit an improperly-completed Claim Certification Form or incomplete or incorrect supporting documentation shall be sent a “Cure Letter” by Defendants reminding them that they must submit properly-completed forms and supporting documentation on a timely basis if they wish for their pension benefits to be recalculated and any additional monies owed provided to them pursuant to the Agreement.

b. Defendants shall stamp the postmark date on the original of each Claim Certification Form that it receives and shall serve copies of each Form it receives in a given week on Settlement Class Counsel not later than the Friday (or last business day) of that week, by email. Defendants shall, within 1 business day of the end of the Notice Deadline, send a final

list of all Claim Certification Forms to Settlement Class Counsel by email. Defendants shall retain the stamped originals of all Claim Certification Forms and originals of all envelopes accompanying Claim Certification Forms in its files, and send duplicate copies of all such forms and envelopes to Settlement Class Counsel for their files.

c. Upon receipt from Defendants of a Claim Certification Form and supporting documentation, Settlement Class Counsel and Defendants' counsel shall meet and confer in good faith to determine whether the Sub-Class B Member is entitled to the injunctive and monetary relief described in section VI of this Agreement. In the event that counsel cannot resolve a dispute on this matter, such dispute shall be submitted to the Court for a final, non-appealable resolution, upon 15 days' notice to the other Party.

7.6 Unidentified Potential Class Members. If an individual comes forward who claims to be a Class Member who has not been sent the Class Notice, Defendants shall direct that individual to Settlement Class Counsel, who will initially review the claim to determine its validity, and if valid, whether the individual is a Member of Sub-Class A or B. If Settlement Class Counsel determines the claim is valid, Settlement Class Counsel will forward the claim with a certifying letter to Defendants, who shall mail the Class Notice and appended forms to the individual within 7 business days, in accordance with the procedures set forth in paragraph 7.3 of the Agreement. Such individuals shall be considered Class Members within the terms of this Agreement, and shall have the same opportunity as previously-identified Class Members to have their claims resolved under the terms of this Agreement. However, if such a Class Member comes forward after the Notice Deadline, the Parties agree and acknowledge that he or she may be unable to timely file objections with the Court on or before the Objection Date and/or to participate in the Fairness Hearing.

7.7 Objections to Agreement.

a. Class Members who wish to file objections to the proposed settlement embodied in this Agreement by the Objection Date for consideration at the Fairness Hearing must first do so in writing. To be considered, such statement must be sent to Defendants via First-Class United States mail, postage prepaid, and received by Defendants by the Objection Date. Defendants shall stamp the date received on the original and send copies of each objection to Settlement Class Counsel by email on a weekly basis. Defendants shall also file the date-stamped originals of any and all objections with the Clerk of Court within 3 business days after the Objection Date.

b. Written objections should include the following: (1) a statement of each objection asserted; (2) a description of the basis underlying each objection; (3) a statement of whether the objector intends to appear and argue at the Fairness Hearing and, if so, how much time the objector anticipates needing to present the objection; (d) all exhibits and statements that the objector may offer during the Fairness Hearing; and (e) a list of all witnesses that the objector may call to testify live during the Fairness Hearing, and a summary of their anticipated testimony.

c. An objector also has the right to appear at the Fairness Hearing either in person or through counsel hired by the objector. An objector who wishes to appear at the Fairness Hearing must state his or her intention to do so at the time he/she submits his/her written objections. An objector may withdraw his/her objections at any time. No Class Member may appear at the Fairness Hearing unless he or she has filed a timely objection that complies with the procedures provided in this section. Any Class Member who has submitted an Opt-Out Form is not permitted to submit objections to the Agreement.

d. The Parties may file with the Court written responses to any filed objections before the Fairness Hearing.

VIII. FINAL ORDER AND APPROVAL

8.1 Fairness Hearing. The Fairness Hearing shall be scheduled at the Court's convenience, and notice of the date shall be given pursuant to paragraph 7.2 of this Agreement.

8.2 Final Order. If the Court grants final approval of the settlement embodied in this Agreement, the Parties to this Agreement shall submit to the Court, for entry pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Final Order that will constitute a final and binding decision within the meaning of 28 U.S.C. § 1291, and that will:

a. Determine that the Litigation may be maintained as a class action on behalf of the Settlement Class and for settlement purposes;

b. Approve the Agreement as fair, reasonable, and adequate as to Members of the Settlement Class and Settlement Sub-Classes, and direct the consummation and performance of the terms of this Agreement;

c. Find that Goodman, Doherty, and Black, as representatives of the Settlement Class and Settlement Sub-Classes, fairly and adequately represent the interests of the Settlement Class and Settlement Sub-Classes, find that they have in fact fairly and adequately represented the interests of the Settlement Class and Settlement Sub-Classes, and approve designation of them as Representative Plaintiffs;

d. Find that Settlement Class Counsel is adequate, qualified, experienced and competent to conduct this Litigation and to protect the interests of the Settlement Class and Settlement-Sub-Classes, find that Settlement Class Counsel in fact has fairly and adequately

represented the interests of the Settlement Class and Settlement Sub-Classes, and approve designation of him as Settlement Class Counsel;

e. Approve the relief set forth in sections IV and VI as lawful, fair, reasonable, and adequate to the Settlement Class and Settlement Sub-Classes;

f. Permanently enjoin all Settlement Class Members who do not opt out from pursuing and/or seeking to reopen claims that have been released by this Agreement;

g. Affirm the approval of the Class Notice and appended forms as satisfying the requirements of due process and other applicable law; and

h. Retain jurisdiction of all matters relating to the modification, interpretation, implementation, effectuation, enforcement, and administration of the Agreement and Final Order, which jurisdiction may be called upon by filing a motion to enforce for alleged failure to comply with the terms of the Agreement, and provide that the Parties may conduct discovery under the Federal Rules of Civil Procedure for the purpose of determining compliance with this Agreement or defending against a claim of non-compliance.

IX. THE RELEASE

9.1 Full and Final Release. As of the date of entry of the Final Order, Representative Plaintiffs and all Settlement Class Members, on behalf of themselves, their heirs, executors, personal representatives, administrators, successors, assigns, and attorneys, hereby release and discharge Defendants, their successors or assigns, and all present and former officials, employees, representatives and agents of Defendants (“Released Parties”) from any and all claims, liabilities and/or causes of action which Representative Plaintiffs and all Settlement Class Members have or may have against any of the Released Parties based on any violation of

USERRA alleged in the Amended Complaint. This release and discharge of claims is subject only to the Defendants' compliance with the terms of the Agreement and Final Order.

X. DISTRIBUTION OF MONETARY BENEFIT

10.1 Distribution of Monetary Benefit to Class Members. Defendants shall distribute all monies owed pursuant to this Agreement to Class Members using the same methods and procedures by which pension payments are disseminated and distributed pursuant to applicable federal, state, and city pension laws, to the extent such state or city laws are not inconsistent with USERRA.

XI. CONDITIONS TO THE EFFECTIVE DATE

11.1 Conditions to the Effective Date. The Effective Date of the Agreement shall occur if and when all of the following events take place:

a. The Court has entered the Preliminary Order, as required by paragraphs 2.20 and 7.2 of this Agreement;

b. The Court has entered the Final Order, as required by paragraphs 2.11 and 8.2, above; and

c. The time period for filing a notice of appeal of the Final Order pursuant to the Federal Rules of Appellate Procedure has expired or, if any appeal is filed, the mandate has issued following resolution of the appeal.

11.2 Failure to Achieve Effective Date. In the event the Court fails to enter the Final Order, the Litigation will resume unless (1) a Party seeks reconsideration or appellate review of the decision denying entry of the Final Order, or (2) the Parties attempt to renegotiate a settlement and seek Court approval of the renegotiated settlement. In the event any reconsideration and/or appellate review are denied, or a mutually agreed-upon renegotiated

settlement is not approved, the Litigation will proceed as if no settlement had been attempted. Notice will be provided to Class Members that the Agreement did not receive final approval and that, as a result, no payments will be made to Class Members under the Agreement. Such notice shall be mailed by Settlement Class Counsel via First Class United States Mail, postage prepaid, to the addresses used in mailing the Class Notice.

XII. CERTIFICATIONS AND MONITORING

12.1 Periodic Reports. Defendants shall provide quarterly reports to Settlement Class Counsel as to the progress of the remedial relief to the Representative Plaintiffs and Settlement Class Members under paragraphs 6.1 and 6.2, and the compliance with the other terms of this Agreement. For each quarterly report served on Settlement Class Counsel, Defendants shall simultaneously file a certificate of service with the Court. The quarterly reports shall include, but not be limited to, the following:

a. Providing the names of each individual in Sub-Class A whose pension has been recalculated pursuant to paragraph 6.1, the result of the calculations required under paragraph 6.1 relevant to that individual, the date that calculation was conducted, whether any amount owed has been remitted to that individual, and the amount and date of that remittance.

b. Providing the names of each individual in Sub-Class B whose pension has been recalculated pursuant to paragraph 6.2, the result of the calculations required under paragraph 6.2 relevant to that individual, the date that calculation was conducted, whether any amount owed has been remitted to that individual, and the amount and date of that remittance.

c. Providing the number of calculations pursuant to paragraph 6.1 and 6.2 conducted for each month since the Effective Date.

d. Providing the names of each individual who has filed a Post-Effective Date Calculation Dispute with the Defendants, the date that Post-Effective Date Calculation Dispute was received by the Defendants, the status of that Post-Effective Date Calculation Dispute, the date resolved if applicable, and the amount in controversy in that Post-Effective Date Calculation Dispute.

e. Providing the names of each individual claiming to be an Unidentified Potential Class Member under paragraph 7.6 and the status of that claim.

f. Providing a list of any agreement, practice, order, rule, regulation, or policy that the Defendants have modified in order to comply with paragraph 4.2, and a copy of any such modified agreement, practice, order, rule, regulation, or policy.

g. Providing a copy of the training materials produced in compliance with paragraph 4.3, the steps taken to train individuals in accordance with paragraph 4.3, and certifications by individuals so trained.

h. Providing a copy of any resolutions presented to any of the Other City Retirement Systems in order to comply with paragraph 4.8, the status of that resolution with respect to adoption by the Board of Trustees of that Other City Retirement System, and the anticipated date of adoption for each.

12.2 Final Certification of Compliance With Respect to Settlement Class. Upon Defendants' implementation of all the remedial relief to Representative Plaintiffs and Settlement Class Members under paragraphs 6.1 and 6.2, Defendants shall serve Settlement Class Counsel with a final written certification signifying that all remedial relief to Representative Plaintiffs and Settlement Class Members has been implemented. Such final written certification shall set forth and include: the identity, by name and employee identification number, of each Representative

Plaintiff and Settlement Class Member who received remedial relief under this Agreement, as well as a description of any monetary relief received or that will be received, as well as records and information evidencing implementation of all non-monetary remedial relief set forth in this Agreement. Defendants shall also file a version of this final written certification with the Court that redacts personal identifying information.

12.3 Final Certification of Compliance With Respect to General Injunctive Relief.

Upon Defendants' implementation of all the General Injunctive Relief addressed in section IV above, Defendants shall serve Settlement Class Counsel with a final written certification signifying that the General Injunctive Relief has been implemented. Such final written certification shall set forth and include: identification of the changes made to any agreement, practice, order, rule, regulation, or policy in order to comply with paragraph 4.2, and a copy of any resolutions passed by the Other City Retirement Systems in order to comply with paragraph 4.8, and documents sufficient to describe the implementation of the relief described herein at section IV. Defendants shall also file this final written certification with the Court.

12.4 Time For Compliance With This Agreement. Defendants shall comply with the terms of this Agreement no later than one (1) year after the Effective Date. This deadline may be extended by written agreement between the Settlement Class Counsel and Defendants' counsel.

XIII. MISCELLANEOUS

13.1 Attorney's Fees and Costs. All Parties shall bear their own costs and expenses of litigation, including attorneys' fees.

13.2 Entire Agreement. This Agreement constitutes the entire agreement between the Parties with regard to the subject matter contained herein, and all prior and contemporaneous negotiations and understandings between the Parties shall be deemed merged into this

Agreement. All of the exhibits and attachments to this Agreement are material and integral parts hereof and fully incorporated herein by reference.

13.3 Headings. Headings in this Agreement are for convenience only and shall not limit, expand, affect, or alter the meaning of any text.

13.4 Construction. The determination of the terms and conditions of this Agreement has been by mutual agreement of the Parties. The terms and conditions of this Agreement are not intended to be, and shall not be, construed against any Party by virtue of draftsmanship.

13.5 Final Judgment. The Final Order constitutes the entry of final judgment within the meaning of Rule 54 of the Federal Rules of Civil Procedure on all claims asserted in this action. The Court retains jurisdiction over this matter, however, for the purpose of entering appropriate orders implementing, effectuating, enforcing, modifying, administering, and interpreting this judgment.

13.6 No Claims Based Upon Distribution. No person shall have any claim against Settlement Class Counsel or Defendants or their counsel based on the distribution of financial benefits made in accordance with this Agreement or further order of the Court.

13.7 Severability. Following the Effective Date, if any provision of this Agreement is held by a court of competent jurisdiction to be unlawful or unenforceable, the remaining portions of this Agreement will remain in full force and effect.

13.8 Amendment. Any modifications or amendments must be mutually agreed upon and memorialized in a writing signed by the Parties.

13.9 Further Action. Settlement Class Counsel, on behalf of the Settlement Class, represent that they have been expressly authorized by the Representative Plaintiffs to take all appropriate action pursuant to the Agreement to effectuate its terms and also are expressly

authorized to enter into any modifications or amendments to the Agreement on behalf of the Settlement Class which they deem appropriate.

13.10 Representation to Execute. Each counsel or other person executing this Agreement on behalf of any Party hereby warrants that such person has the full authority to do so.

13.11 Execution. This Agreement may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument.

13.12 Disputes. The Parties shall attempt in good faith to resolve informally any dispute that may arise under this Agreement. If the Parties are unable to resolve the dispute, any Party may, upon 15 days' notice to the other Party, move the Court for a resolution of the disputed issue.

13.13 Binding Agreement. The terms of this Agreement are and shall be binding upon the present and future directors, employees, agents, administrators, heirs, successors, representatives, and assigns of the City of New York, the NYPD, and the PPF, and upon the heirs, successors, and assigns of the Representative Plaintiffs and Settlement Class Members.

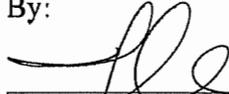
13.14 Waiver. The Parties shall not appeal any portion of this Agreement or the related orders, including but not limited to, the Preliminary Order and the Final Order, and further knowingly and voluntarily waive their rights to appeal any order by the Court in this case, including but not limited to the Preliminary Order and the Final Order.

Dated: June 17, 2013

On behalf of Representative Plaintiffs and
Settlement Class Members:

PREET BHARARA
United States Attorney for the
Southern District of New York

By:

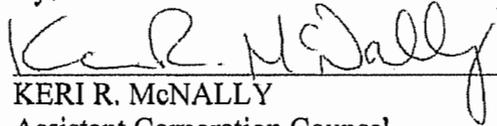


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On behalf of the Defendants:

MICHAEL A. CARDOZO
Corporation Counsel for
the City of New York

By:



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Assistant Corporation Counsel
New York City Law Department
100 Church Street
New York, NY 10007
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Fax No. (212) 788-8877
kmcnally@law.nyc.gov

Exhibit 1

Plaintiffs seek to represent in the case is referred to collectively as the “Class,” and its individual members, including potentially you, are “Class Members.” The Plaintiffs and the Class are represented by Preet Bharara, United States Attorney for the Southern District of New York, and other members of his Office.

Plaintiffs allege in the lawsuit that the NYPD failed to include likely overtime, night shift differential, and worked vacation compensation in the calculation of their pensionable earnings during periods when they were deployed to Active Military Service, which is in violation of the Uniformed Services Employment and Reemployment Rights Act (“USERRA”). USERRA requires that pensionable earnings include overtime, night shift differential, and worked vacation compensation that the uniformed member of service would have earned if he or she had not been deployed to Active Military Service.

If the amount of the overtime, worked vacation, or night-shift differential cannot be established with reasonable certainty, then USERRA requires that the likely compensation be calculated based on the average earnings from the 12 months prior to the uniformed member of service’s Active Military Service. Note USERRA does not require the uniformed member of service actually be paid the overtime, night shift differential, or worked vacation compensation that is imputed to their pensionable earnings, nor does the settlement agreement contemplate such payments.

Plaintiffs and Defendants have agreed to settle the lawsuit subject to the approval of the Court. The Defendants have agreed to recalculate the pensionable earnings of all Class Members to determine if they would be entitled to an increase in their pension benefit amount as a result of the proper application of USERRA. The PPF will re-calculate the pensionable earnings of each Class Member and, taking into account the additional pension contributions owed by the Class Member as a result of the increased pensionable earnings, will appropriately adjust future pension benefits and pay the Class Member the past pension benefits owed. If the re-calculation results in no effect or a negative effect to the Class Member’s pension benefit, the PPF will not adjust the Class Member’s current pension benefit.

A copy of the proposed settlement can be found on-line at _____, and is available upon request through the United States Attorney’s Office for the Southern District of New York, contact information for which is provided at the end of this notice.

Your Legal Rights

If you are a retired NYPD uniformed member of service who performed Active Military Service on or after September 11, 2001, you are potentially a Class Member. If you are a Class Member then you have the following options:

- Be a Class Member and potentially receive the benefits of the proposed settlement
- Object to the proposed settlement as a Class Member
- Opt out of the Class and proposed settlement

Each of these options as well as other relevant information about the Class and your rights is explained in detail below.

Why Did I Receive This Notice?

You received this notice because NYPD and PPF records reflect that you are a retired NYPD uniformed member of service who was deployed to Active Military Service on or after September 11, 2001.

What Is a Class Action?

A class action is a lawsuit where one or more persons sue not only for themselves, but also for other people who have similar claims. These other people are known as Class Members. In a class action, one court resolves the issues for all Class Members, except for those who opt-out from the Class.

Why Is There a Proposed Settlement?

The lawyers for the Class – Preet Bharara, United States Attorney for the Southern District of New York, and other members of his Office – have extensively analyzed and evaluated the merits of the claims made against the Defendants in this case. Based on that analysis and evaluation, the lawyers for the Class entered into the proposed settlement. The United States Attorney's Office is satisfied that the terms and conditions of the proposed settlement are fair, reasonable, and in the best interest of the Plaintiffs and Class Members because the proposed settlement provides each Class Member with the full relief that they are entitled to under USERRA.

What Benefit Does a Class Member Receive As a Result of the Proposed Settlement?

The PPF will re-calculate in accordance with USERRA the amount of your pensionable earnings during periods of time you were deployed to Active Military Service. That is, the PPF will include the overtime, worked vacation, and night shift differential compensation that you would have likely earned if you had not been deployed to Active Military Service by taking the average rate of compensation for the overtime, worked vacation, and night-shift differential you earned in the 12 months prior to your deployment and add that average rate of compensation to your pensionable earnings during periods of deployment to Active Military Service. Then, the PPF will discount the additional pension contributions you would have owed as a result of the increased pensionable earnings from the amount owed to you. If the re-calculation results in an increase over your current pension benefit, the PPF will adjust your future pension benefit accordingly, and pay you for any past pension benefit owed with interest. Otherwise, if there is no increase over your current pension benefit, the PPF will not adjust your current pension benefit, and you will continue receiving your usual payments.

Do You Want to Be a Class Member and Receive the Benefits of the Settlement?

If you want to receive the benefits of the proposed settlement then you have to be a Class Member. In order to be a Class Member, you must be retired NYPD member of uniformed service who was deployed to active military duty with a uniformed military service, that is, the U.S. Army, Navy, Air Force, Marines, or Coast Guard, on or after September 11, 2001.

If you do not fit the foregoing description, then you are not a Class Member, and you have received this notice in error. If you do fit that description, then you are a Class Member, but whether you are eligible to recover under the proposed settlement depends on when you received your first pension benefit payment as described below.

Did You Receive Your First Pension Benefit Payment on or after October 10, 2004?

If you received your first pension benefit payment on or after October 10, 2004, then you do not have to do anything in order to receive the benefits of the proposed settlement. You will automatically be a Class Member who is eligible to recover unless you opt-out as described above.

Did you Receive Your First Pension Benefit Payment before October 10, 2004?

If you received your first pension benefit payment before October 10, 2004, then you may be ineligible to recover under the proposed settlement because the applicable statute of limitations prevents your recovery as a matter of law, **unless** you can show that you were deployed with a uniformed military service for a sufficient amount time *after you retired from the NYPD*.

In order to establish that you are eligible to recover under the proposed settlement you must complete the "Claim Certification Form for NYPD Retirees Who Have Received Their First Pension Check Earlier Than October 10, 2004" that is included with this notice. If you believe that the aforementioned Claim Certification Form has improperly been included with this notice or you have not received the Claim Certification Form but should have, then please contact the United States Attorney's Office for the Southern District of New York at the contact information provided at the end of this notice.

What Am I Giving Up If I Become a Class Member?

Unless you opt-out of the settlement as described above, you will be a Class Member, and you cannot sue, continue to sue, or be a party to a lawsuit against the Defendants for violating USERRA by improperly calculating your pensionable earnings.

What If I Do Not Like the Proposed Settlement?

If remain a Class Member and for any reason do not believe the proposed settlement is fair, you will have an opportunity to be heard by the Court during the Fairness Hearing, which will occur on **[FAIRNESS HEARING DATE]**.

In order to ensure that your concerns are addressed, please fill out the attached Objection Form and either email it to usany.userra@usdoj.gov or mail it to the address below by **[OBJECTION DATE]**.

ATTN: Goodman Class Action
Law Department of the City of New York
100 Church Street
New York, NY 10007

Include in or with the Objection Form a statement of each objection you have to the proposed settlement agreement and a description of the basis for those objections; a statement of whether you intend to appear at the fairness hearing, and if so, how long you anticipate you will need to present your objections; a copy of any exhibits or statements you wish the Court to consider at the Fairness Hearing; and a list of any witnesses you may call along with a summary of their anticipated testimony.

Do You Want to Opt-Out of the Proposed Settlement?

If you do NOT want to be a Class Member then you may opt-out of the class settlement by filling out and signing the attached "OPT-OUT FORM" and e-mailing it to usany.userra@usdoj.gov or mailing it to:

ATTN: Goodman Class Action
Law Department of the City of New York
100 Church Street
New York, NY 10007

Note that if you decide to opt-out you will not receive any proceeds as a result of this settlement, and will have to enforce your own rights through the usual processes available to you.

What is the Difference between Opting-Out and Objecting?

Objecting is simply telling the Court that you do not like something about the proposed settlement. You can only object if you remain a Class Member. Opting-out is telling the Court that you do not want to part of the Class. If you opt-out, you have no basis to object because the proposed settlement no longer affects you.

Do You Have Questions?

If you have any questions regarding the proposed settlement or your rights please do not hesitate to contact the United States Attorney's Office for the Southern District of New York by email, telephone or regular mail:

ATTN: Goodman Class Action
c/o Juliette Deen
United States Attorney's Office
86 Chambers Street, 3rd Floor
New York, New York
(212) 637-0840
usanys.userra@usdoj.gov

Exhibit 2

**CLAIM CERTIFICATION FORM FOR NYPD RETIREES WHO HAVE
RECEIVED THEIR FIRST PENSION CHECK EARLIER THAN
OCTOBER 10, 2004**

If you received your first pension check on or after October 10, 2004, you may ignore this form.

If you want to be a Class Member and received your first pension benefit payment before October 10, 2004, then you must have been deployed to active duty after your retirement, and number of days spent on those deployments in total must be greater than or equal to the number of days between the date you received your first pension benefit payment and October 10, 2004.

Please provide documentation of your deployments with a uniformed military service after your retirement from the NYPD. You can provide any documentation that establishes your deployment, including, but not limited to:

- (1) DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty;
- (2) Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service;
- (3) Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;
- (4) Certificate of completion from military training school;
- (5) Discharge certificate showing character of service;
- (6) Copy of extracts from payroll documents showing periods of service; or
- (7) Letter from National Disaster Medical System (NDMS) Team Leader or Administrative Officer verifying dates and times of NDMS training or Federal activation.

Please send documentation of your deployments after your retirement from the NYPD to the following address:

ATTN: Goodman Class Action
Law Department of the City of New York
100 Church Street
New York, NY 10007

If you have any questions regarding appropriately documenting your deployments, or other issues related to whether you are a Class Member, please contact the United States Attorney's Office for the Southern District of New York in the manner provided in the notice that came with this form.

Please sign and print your name below to acknowledge that you understand the instructions provided in this form, and return a copy of this form with your documentation.

NAME

SIGNATURE

Exhibit 3

OPT-OUT FORM
Goodman et al. v. City of New York et al., 10 Civ. 5236 (RJS)

In order to opt-out from the Class described in the Notice of Proposed Class Action Settlement, please fill out the form below, sign, and return it to the following address:

ATTN: Goodman Class Action
Law Department of the City of New York
100 Church Street
New York, NY 10007

Name: _____

Address: _____

By signing below, I acknowledge that I have carefully read the Notice of Proposed Class Action Settlement that came with this form, and elect to opt-out from the Class described in that Notice. I further acknowledge that by opting out of that Class, I am not entitled to any of the benefits of the Class Action or bound by the proposed settlement entered into between the Class and the Defendants.

Signature

Exhibit 4

OBJECTION TO THE PROPOSED CLASS ACTION SETTLEMENT
Goodman et al. v. City of New York et al., 10 Civ. 5236 (RJS)

If you wish to object to the proposed settlement described in the Notice of Proposed Class Action Settlement, please fill out the form below, sign, and send it to the following address:

ATTN: Goodman Class Action
Law Department of the City of New York
100 Church Street
New York, NY 10007

I, _____, am a Class Member in the above class action lawsuit. I have read the Notice of Proposed Class Action Settlement that came with this form. I have decided not to opt-out from the Class described in that Notice. I will/will not (circle one) appear at the Fairness Hearing, and would like _____ minutes to present my objection(s). I object to the proposed settlement for the following reason(s):

(Note: you may attach additional sheets of paper if necessary to fully describe your objection. You should also attach any exhibits or statements, and identify any potential witnesses that you may call at the Fairness Hearing)

Signature