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State of Connecticut

MEMORANDUM

To: Senate President Pro Tempore Martin M. Looney
Speaker of the House of Representatives Brendan J. Sharkey
Senate Majority Leader Bob Duff
House Majority Leader Joe Aresimowicz
Senate Minority Leader Leonard A. Fasano
House Minority Leader Themis Klarides

From: George Jepsen
Attorney General *2*

Date: April 28, 2015

Subject: State Employees Bargaining Coalition, et al. v. John Rowland, et al.

The purpose of this memorandum is to apprise you of a proposed settlement of the above-referenced litigation. Our Office intends to submit the settlement to the General Assembly pursuant to Section 3-125a of the General Statutes. We have attached to this memorandum a Term Sheet summarizing the settlement.

I. BACKGROUND

In February 2003, a group of state employee unions and several individual members of the unions brought a civil action in the U.S. District Court pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983. The plaintiffs in that action are the State Employees Bargaining Agent Coalition ("SEBAC"), 12 of SEBAC's 13 constituent labor unions and several individual union members. SEBAC represented approximately 40,000 Connecticut state employees at the time of the layoffs. The defendants are John G. Rowland, former Governor of the State of Connecticut, and Marc S. Ryan, former Secretary of Connecticut's Office of Policy and Management. They are sued in both their official and individual capacities. The state is legally required to indemnify Governor Rowland and Mr. Ryan for any damages awarded against them in their individual capacities.

The plaintiffs have alleged, in essence, that the defendants intentionally violated their constitutional rights to freedom of speech, freedom of association, due process and equal protection of the law under the First, Fifth and Fourteenth Amendments to the U.S. Constitution by ordering the terminations of over 3,000 union members in retaliation for the unions' refusal to forego certain statutorily protected contract rights. The class of plaintiffs includes all those who

were laid off, whose employment was adversely affected through job changes, and "all individuals who were employees of the State of Connecticut as of November 17, 2002 who were members of a bargaining unit . . . and who, although their State employment was otherwise unchanged, were chilled in the exercise of their union rights as a result of the terminations alleged in the Amended Complaint." In effect, therefore, the plaintiff class consists of approximately 37,000 current or former state employees. They seek declaratory and injunctive relief and money damages.

In January 2005, a separate but related civil action (*Conboy, et al. v. State of Connecticut*) was filed in the Connecticut Superior Court pursuant to the provisions of Conn. Gen. Stat. §31-51q. The plaintiffs, four current or former state employees, brought the action both individually and on behalf of other similarly situated persons, alleging that they were terminated from state employment because of "anti-union animus" and "in retaliation for activity protected by federal and state guarantees of freedom of speech and association." After some limited motion practice, the Court stayed that case pending the outcome of the SEBAC litigation. In addition, a second related civil action (*Parizo v. State of Connecticut*) was filed in the Connecticut Superior Court and remains pending.

Shortly after the SEBAC case was filed, Ross Garber, Legal Counsel to then-Governor Rowland, sent a letter to the Deputy Attorney General requesting the Attorney General's Office ("AGO") to retain outside counsel, specifically the law firm Day Berry & Howard, to represent the Governor and OPM Secretary Marc Ryan. Pursuant to that request, the AGO engaged Day Berry & Howard. Attorney Garber further requested that the AGO retain the law firm Carmody & Torrance to represent then-Governor Rowland in his individual capacity. Based on that request, the AGO engaged Carmody and Torrance; that representation continued through December 31, 2003. In late 2007, the AGO made the decision to initiate a competitive selection process to select counsel to continue the representation of all defendants. The competitive selection process resulted in the issuance of a Request For Proposals and the selection of the law firm Pepe & Hazard (the firm's name was later changed to McElroy Deutsch as the result of a merger). The contract with that firm began on February 15, 2008 and continues to the present. Attorney Daniel Klau has acted as lead attorney for the defendants under the existing contract.

In the SEBAC case that is pending in federal court, the defendants moved to dismiss the amended complaint on several grounds, including legislative immunity and Eleventh Amendment sovereign immunity. The District Court held that the plaintiffs' claim for money damages, but not injunctive relief, were barred by sovereign immunity and that further discovery was required on the issue of whether legislative immunity would bar the claims for injunctive relief. The defendants filed an interlocutory appeal to the Second Circuit, which dismissed the appeal for lack of jurisdiction insofar as it challenged the District Court's denial of legislative immunity with respect to plaintiffs' claims seeking reinstatement to their previous positions; affirmed the order of the District Court insofar as it denied legislative immunity with respect to plaintiffs'

claims seeking placement into other, existing positions; and affirmed the District Court's finding that plaintiffs' claims for injunctive relief were not barred by the Eleventh Amendment. *State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 98-99 (2d Cir. 2007).

In June 2010, the parties filed cross motions for summary judgment based on their joint stipulated facts.¹ The parties requested declaratory relief only, having stipulated that the issue of remedy would be considered in subsequent proceedings, if necessary. Attorney Klau, on behalf of the defendants, agreed that the stipulation of facts entered by the parties in the federal lawsuit also would apply in the *Conboy* case, which remained pending in the Superior Court. On July 1, 2011 the Court issued its ruling, granting the defendants' motion for summary judgment and denying plaintiffs' motion on all claims before the Court. With respect to the plaintiffs' First Amendment claim, the Court found that the plaintiffs had "failed to persuade the court that their union association, in and of itself, raises a matter of public concern and is the type of 'speech' or 'assembly' that warrants constitutional protection." As for the plaintiffs' contract cause claim, the Court held that the defendants' conduct, *i.e.* ordering the elimination of union positions and the terminations of union employees because the unions failed to agree to the concessions that the Governor demanded, "does not amount to a 'state law' and, therefore does not fall within the meaning of the Contract Clause. Finally, the Court held that the plaintiffs had "failed to show that the union and non-union employees were similarly situated for the purposes of prosecuting an equal protection claim."

The plaintiffs filed an appeal of the summary judgment ruling to the Second Circuit. On May 31, 2013, the Second Circuit unanimously concluded that the plaintiffs had "made out a claim that defendants violated their First Amendment rights to freedom of association by targeting union employees for firing based on their union membership." The Court found that the defendants "intentionally fired only union members" and that the firings were not tailored to reduce the cost of the State's work force, since the "firings" had a minimal impact on the State budget deficit. After finding that the defendants had "fired employees based on their union membership without narrowly tailoring the terminations to a vital government interest", the Court reversed the District Court's grant of summary judgment to the defendants and remanded to the district court with instructions to grant summary judgment to plaintiffs on their First Amendment claim and to enter appropriate relief. *SEBAC v. Rowland*, 718 F.3d 126 (2d Cir. 2012).

The defendants filed a petition for a writ of certiorari to the U.S. Supreme Court but withdrew the petition, without prejudice, in December 2013 in order to pursue settlement discussions.

¹ The motions were addressed only to the fifth and seventh claims for relief, alleging violation of the First Amendment right to freedom of association, and the Equal Protection Clause and Contract Clause components of the ninth and tenth claims for relief, the remaining claims having previously been dismissed or withdrawn.

II. RISKS OF NOT SETTling

In the event a settlement is not achieved, the case will proceed to a hearing in damages before the federal District Court. Both sides have retained economic experts to analyze the damages, particularly the lost wage claims, as such claims vary greatly among the class members. Preparation for the hearing will require extensive discovery and a significant commitment of resources to adjudicate the individual damages owing to thousands of current and former state employees. Following the hearing in damages, the District Court would make an award of damages and enter judgment for the plaintiffs and the plaintiff class.

At that point, our options would include taking an appeal to the U.S. Court of Appeals for the Second Circuit, raising any legal issues that might arise during the hearing in damages, or reactivating our petition for certiorari in the U.S. Supreme Court. Although we believe that our petition raises an important issue, the chances of it being granted are low.

As a general matter, the Supreme Court declines to hear approximately 99% of the cases in which certiorari is sought. During the 2011-2012 Term for instance, the Court received over 7,000 petitions and issued only 64 signed opinions. Though the percentage of petitions by State Attorneys General is somewhat higher than the overall percentage (last year, the Court granted 12.5% of petitions filed by Attorneys General), a number of factors decrease the likelihood a petition would be granted in this case. First, no member of the Second Circuit panel that decided our case dissented. Second, there is no split between the Second Circuit and other Circuit Courts of Appeals on the central issues we likely would raise. Third, Governor Rowland and Marc Ryan both already sought and were denied certiorari from the Supreme Court on the same issues.

An additional factor that makes certiorari unlikely is the highly particularized stipulation of facts entered into by the private law firm the prior administration hired to represent the defendants. In those stipulations, defense counsel agreed that:

1. There was no correlation between the amount of the concessions demanded by Governor Rowland and any savings from terminations.
2. The terminations were not based on any calculation of which and how many job reductions were necessary to achieve the budget savings sought by the concessions.
3. Many of the terminations had no effect on budgetary expenses.
4. The layoffs were not based on any evaluations by OPM of the staffing needs of each agency.

5. The decisions about which and how many union workers were to be terminated were not based on an analysis of the State's staffing needs or savings that could be achieved through terminations of non-union employees.
6. The unions' collective bargaining agreements had been approved by the General Assembly, had the force of law, and included a statutory right to decline to agree to the concessions the defendants sought.
7. As of November 2002, non-unionized employees held management and non-management positions and, in some instances, held the same non-management positions as unionized employees.
8. The layoffs were limited to unionized employees and were based on the Governor's "determination of what it would take to compel the unions to agree to the demanded concessions."

In the event the U.S. Supreme Court denies our petition for certiorari or affirms the Second Circuit, the judgment would become final. All money damages would be due and payable at that time. The private counsel hired to represent the defendants stipulated that the federal court ruling on the First Amendment claims would control the companion state court case against the State under Conn. Gen. Stat. § 31-51q. That statute provides that an employer, including the State, who is found to have violated that statute "...shall be liable to [the] employee for damages...including punitive damages and for reasonable attorney's fees as part of the costs of any such action for damages." As for the §1983 claim pending in federal court, the damages that the court may award include back pay and benefits, front pay, compensatory and punitive damages, prejudgment interest and attorney's fees.

III. BENEFITS OF SETTLING

The proposed settlement reflects a compromise of the positions of all parties and takes into consideration the uncertainty, expense and delays attendant to further litigation, as well as a mutual recognition of the benefits of reaching an agreed resolution of this long-standing dispute. The parties have negotiated the terms of the proposed settlement in recognition of the economic and other injuries sustained by plaintiffs and in recognition of the economic circumstances of the State and the ways in which a settlement (as opposed to a litigated outcome) can be structured to ameliorate the potential financial effects of this lawsuit on the State's budget. In particular, the parties believe that the terms of proposed settlement reflect:

- a fair formula and process for compensating individuals for the economic losses they sustained as a result of the layoffs, while at the same time providing the State a substantial discount from the full economic damages that could potentially be recovered by plaintiffs. The par-

ties have agreed to a 30% discount to damages to reflect the possibility that the United States Supreme Court could, after remedy proceedings, still decide to hear the case and, if it decided to consider the case, might reverse the Second Circuit decision.;

- an adjustment to the damages awarded to account for the delay in payment, as required by applicable law, but with a significant reduction from the statutory rate of prejudgment interest that could potentially be recovered by plaintiffs;²

- an agreement by plaintiffs to accept deferred payment of their economic damages (except in cases of extreme financial hardship), either in the form of vacation pay and personal leave awards to be used as vacation or leave time or redeemed at the end of State employment or in monetary installment payments over the next three years. If damages in the case were litigated to conclusion, no such deferral could be imposed;

- a measured and fixed basis for awarding limited emotional distress and other compensatory damages and punitive damages against the State and on plaintiffs' individual capacity claims against former Governor Rowland and former Secretary of OPM Ryan, who are entitled to indemnification under State law, with an agreement to accept deferred awards. This eliminates the possibility of the State having to litigate thousands of individual claims, thus saving the State the time and expense of its own attorneys' fees and the obligation to pay hourly amounts to plaintiffs' counsel for each individual's case;

- a substantial reduction in the attorneys' fees award otherwise recoverable under applicable Connecticut case law;³

² Courts have consistently recognized that in cases where lost wages are awarded, prejudgment interest is necessary both to make the employee whole for his losses and to insure that the defendant does not enjoy a windfall as a result of its wrongdoing. *See, e.g., Slupinski v. First Unum Life Insurance Co.*, 554 F.3d 38, 53-54 (2d Cir. 2009) ("an award [of prejudgment interest] is particularly appropriate as a means of ensuring that plaintiffs are made whole and that defendants do not profit by their failure to comply with the [law]"); *Sharkey v. Lasmo* (AUL Ltd.), 214 F.3d 371, 375 (2d Cir. 2000) ("in employment-related cases we have consistently stated that '[t]o the extent ... that the damages awarded to the plaintiff represent compensation for lost wages, it is ordinarily an abuse of discretion not to include pre-judgment interest"). Conn. Gen. Stats. § 37a-3 provides for prejudgment interest up to 10% per annum, and one Connecticut state court has recently held that it "customarily use[s] a 10% interest rate" in calculating interest in employment cases. *Lapre v. W & K Property Services, LLC*, 2014 WL 783653, at *3 (Conn. Super. Jan. 17, 2014). Here, in the interests of reaching an amicable resolution, the plaintiffs have agreed to a prejudgment interest rate of 5% simple interest per annum.

- a simplified claims administration process designed to streamline and facilitate determination of class member awards and limit the State's future legal expenses and time.

As a result of the discounts and compromises agreed to by the plaintiffs, each dollar of damages for economic loss plaintiffs could potentially recover if this action were not settled (and damages continued to accrue) has been reduced by over 40%, and payment of the economic damages has been deferred over a minimum of two budget cycles and, in the majority of cases, until the conclusion of employment of the class members who remain employed by the State. Likewise, payment of the awards of compensatory and punitive damages is deferred and, by fixing the amounts by category of class member, the State's potential open-ended exposure for such amounts and liability for paying both sides' attorneys' fees and costs – amounts that could exceed the amount of the agreed awards – is avoided. Notably, the potential claims of over 37,000 union members for chilling of their First Amendment rights of association have been resolved without any future payment in the majority of cases through a small award of personal leave time.

IV. CONCLUSION

For all of the foregoing reasons, we believe the proposed settlement is in the best interests of the State.

³ Section 31-51q provides that an employer, including the State, who violates an employee's First Amendment rights "shall be liable to such employee ...for reasonable attorneys' fees." Under Connecticut law, a plaintiff's contingent fee agreement with his attorneys provides the basis for determining attorneys' fee under § 31-51q. *See Burrell v. Yale University*, 2005 Conn. Super. LEXIS 1529, **2-3 (Conn. Sup. Ct. May 26, 2005) (where plaintiff had 1/3 contingency fee agreement, awarding § 31-51q attorneys' fees of \$1,225,062.50, equaling one third of recovery of \$3,765,187.50); *McClain v. Pfizer, Inc.*, 2011 U.S. Dist. LEXIS 68415, at *8 (D. Conn. June 27, 2011) (where plaintiff had 1/3 contingency fee agreement, awarding § 31-51q attorneys' fees of \$456,666.67, equal to 1/3 of \$1,370,000 verdict), *aff'd.*, 505 Fed. App'x 59 (2d Cir. 2012); *see generally Schoonmaker v. Lawrence Brunoli, Inc.*, 265 Conn. 210, 270-71 (2003) (fee agreement, where reasonable, states measure of attorneys' fees to be imposed on defendant). Although plaintiffs have a 33.33% contingent fee agreement with their attorneys, Class Counsel have agreed to accept a reduced contingent fee of 17.5%. Counsel have further agreed to seek no future award for the cost of litigating their clients' individual claims, nor any award in the federal action pursuant to 42 U.S.C. § 1988.

State Employees Bargaining Agent Coalition, et al v. Rowland, et al,
Civ. No. 3:03 cv 221 (AVC) (D. Conn.)

Conboy, et al v. State of Connecticut,
Dkt. No. HHD CV-05-5001734 S (Conn. Super. CLD at Hartford)

Parizo v. State of Connecticut,
Dkt. No. HHD CV-03-0828527 S (Conn. Super. CLD at Hartford)

TERM SHEET

The following Term Sheet sets forth the parties' terms of settlement with respect to the resolution of all class and individual claims pending in the following matters:

State Employees Bargaining Agent Coalition, et al v. Rowland, et al,
Civ. No. 3:03 cv 221 (AVC) (D. Conn.)

Conboy, et al v. State of Connecticut,
Dkt. No. HHD CV-05-5001734 S (Conn. Super. CLD at Hartford)

Parizo v. State of Connecticut,
Dkt. No. HHD CV-03-0828527 S (Conn. Super. CLD at Hartford),

including all claims for economic damages; compensatory damages for infringement of constitutional rights and emotional distress; statutory or common law punitive damages; and attorneys' fees and costs, asserted against the State of Connecticut; against any current officers or employees of the State of Connecticut; and against John G. Rowland and Marc S. Ryan in their individual capacities.

The parties acknowledge that any settlement must be submitted to the General Assembly pursuant to Conn. Gen. Stats. § 3-125a. Unless disapproved by the legislature, these terms of settlement will be presented for judicial approval (and entry of a Judgment incorporating the terms), and will resolve all claims in the above-referenced actions.

The parties have negotiated these terms of settlement at arm's length and acknowledge that the terms reflect a compromise of their positions in light of the uncertainty, expense and delays attendant to further litigation, as well as a mutual recognition of the benefits of reaching an agreed resolution of this long-standing dispute. The parties have further negotiated these terms of settlement in recognition of the economic and other injuries sustained by plaintiffs and in recognition of the economic circumstances of the State of Connecticut and the ways in which a settlement (as opposed to a litigated outcome) can be structured to ameliorate the potential financial effects of this lawsuit on the State's budget.

In particular, the parties believe that these terms of settlement reflect

- a fair formula and process for compensating individuals for the economic losses they sustained as a result of the layoffs determined by the United States Court of Appeals for the Second Circuit to be illegal, while at the same time providing the State a substantial discount from the full economic damages that could potentially be recovered by plaintiffs;¹
- an adjustment to the damages awarded to account for the delay in payment, as required by applicable law, but with a significant reduction from the statutory rate of prejudgment interest that could potentially be recovered by plaintiffs;²
- an agreement by plaintiffs to accept deferred payment of their economic damages (except in cases of extreme financial hardship), either in the form of vacation pay and personal leave awards to be used as vacation or leave time or redeemed at the end of State employment or in monetary installment payments over the next three years;³

¹ Plaintiffs' First Amendment claims have been upheld by a unanimous panel of the United States Court of Appeals for the Second Circuit, which remanded the case for remedy proceedings in the district court, and the United States Supreme Court denied former Governor Rowland's petition for writ of *certiorari*. The parties have agreed to a 30% discount to damages to reflect the possibility that the United States Supreme Court could, after remedy proceedings, still decide to hear the case and, if it decided to consider the case, might reverse the Second Circuit decision.

² Courts have consistently recognized that in cases where lost wages are awarded, prejudgment interest is necessary both to make the employee whole for his losses and to insure that the defendant does not enjoy a windfall as a result of its wrongdoing. *See, e.g., Slupinski v. First Unum Life Insurance Co.*, 554 F.3d 38, 53-54 (2d Cir. 2009) ("an award [of prejudgment interest] is particularly appropriate as a means of ensuring that plaintiffs are made whole and that defendants do not profit by their failure to comply with the [law]"); *Sharkey v. Lasmo (AUL Ltd.)*, 214 F.3d 371, 375 (2d Cir. 2000) ("in employment-related cases we have consistently stated that '[t]o the extent ... that the damages awarded to the plaintiff represent compensation for lost wages, it is ordinarily an abuse of discretion *not* to include pre-judgment interest").

Conn. Gen. Stats. § 37a-3 provides for prejudgment interest up to 10% per annum, and one Connecticut state court has recently held that it "customarily use[s] a 10% interest rate" in calculating interest in employment cases. *Lapre v. W & K Property Services, LLC*, 2014 WL 783653, at *3 (Conn. Super. Jan. 17, 2014). Here, in the interests of reaching an amicable resolution, the plaintiffs have agreed to a prejudgment interest rate of 5% simple interest per annum.

³ Plaintiffs have agreed, as a major benefit to the State of settlement, to defer payment of their economic and non-economic damages, either by allowing — absent hardship — payments of the damages amounts through awards of vacation or personal leave days or, if the class member is no longer employed by the State, by structuring the payments over three years (*i.e.*, through two budget cycles). Of course, if damages in the case were litigated to conclusion, no such deferral could be imposed.

- a measured and fixed basis for awarding limited emotional distress and other compensatory damages and punitive damages against the State and on plaintiffs' individual capacity claims against former Governor Rowland and former Secretary of OPM Ryan, who are entitled to indemnification under State law, with an agreement to accept deferred awards;⁴
- a substantial reduction in the attorneys' fees award otherwise recoverable under applicable Connecticut case law;⁵
- a simplified claims administration process designed to streamline and facilitate determination of class member awards and limit the State's future legal expenses and time.

As a result of the discounts and compromises agreed to by the plaintiffs, each dollar of damages for economic loss plaintiffs could potentially recover if this action were not settled (and damages continued to accrue) has been reduced by over 40%, and payment of the economic damages has been deferred over a minimum of two budget cycles and, in the majority of cases, until the conclusion of employment of the class members who remain employed by the State. Likewise, payment of the awards of compensatory and punitive damages is deferred and, by fixing the amounts by category of class member, the State's potential open-ended exposure for such amounts and liability for paying both sides' attorneys' fees and costs – amounts that could exceed the amount of the agreed awards – is avoided.⁶

⁴ The agreed settlement of the class members' non-economic claims eliminates the possibility of the State having to litigate thousands of individual claims, thus saving the State the time and expense of its own attorneys' fees and the obligation to pay hourly amounts to plaintiffs' counsel for each individual's case.

⁵ Section 31-51q provides that an employer, including the State, who violates an employee's First Amendment rights "shall be liable to such employee ...for reasonable attorneys' fees." Under Connecticut law, a plaintiff's contingent fee agreement with his attorneys provides the basis for determining attorneys' fee under § 31-51q. *See Burrell v. Yale University*, 2005 Conn. Super. LEXIS 1529, **2-3 (Conn. Sup. Ct. May 26, 2005) (where plaintiff had 1/3 contingency fee agreement, awarding § 31-51q attorneys' fees of \$1,225,062.50, equaling one third of recovery of \$3,765,187.50); *McClain v. Pfizer, Inc.*, 2011 U.S. Dist. LEXIS 68415, at *8 (D. Conn. June 27, 2011) (where plaintiff had 1/3 contingency fee agreement, awarding § 31-51q attorneys' fees of \$456,666.67, equal to 1/3 of \$1,370,000 verdict), *aff'd*, 505 Fed. App'x 59 (2d Cir. 2012); *see generally Schoonmaker v. Lawrence Brunoli, Inc.*, 265 Conn. 210, 270-71 (2003) (fee agreement, where reasonable, states measure of attorneys' fees to be imposed on defendant). Here, although plaintiffs have a 33.33% contingent fee agreement with their attorneys, Class Counsel have agreed to accept a reduced contingent fee of 17.5%. Counsel have further agreed to seek no future award for the cost of litigating their clients' individual claims, nor any award in the federal action pursuant to 42 U.S.C. § 1988.

⁶ Notably, the potential claims of over 37,000 union members for chilling of their First Amendment rights of association have been resolved without future payment through a small award of personal leave time.

And, finally, the parties' agreement, as reflected in this Term Sheet, brings to an amicable end – on terms acceptable and beneficial to both sides – over twelve years of unfortunate litigation between the State and its public employee unions.

I. Economic Damages

A. Each class member who has sustained economic loss as a result of the layoffs (or layoff orders) shall be entitled to receive a sum to compensate for economic loss, calculated as follows:

Gross economic loss
less: mitigation earnings
less: 30% settlement discount
plus: prejudgment interest calculated from date of loss to date of payment @ the rate of 5% simple interest per annum.

B. Gross economic loss shall include all forms of economic loss that are ordinarily recoverable under state and federal law in similar cases (subject to the limitations set forth below), including, where applicable, lost wages, lost pension benefits, and lost health insurance and damages resulting from the loss of health insurance coverage.

C. For each class member who was laid off and rehired to the State's work force within one year of the date of layoff, the deduction for mitigation earnings shall, except for any class member who earned an amount equal to or greater than the pay he would have received from the State at the time of layoff, be equal to the amount the class member received or was eligible to receive in unemployment compensation benefits and which shall be deemed to have been received for up to the first 39 weeks of any such class member's layoff period. The mitigation earnings deduction for each class member who earned an amount equal to or greater than the annualized amount of his or her wages from the State at the time of layoff shall be calculated based on actual mitigation received by the class member.

D. For each class member who was laid off and (1) rehired to the State's work force more than one year after the date of layoff, or (2) never rehired to the State's work force, mitigation shall be calculated for the first year on the basis of the amount the class member received or was eligible to receive in unemployment compensation benefits and for each year thereafter based on actual mitigation. For purposes of determining mitigation for the first year, each class member will be deemed to have been received 39 weeks of unemployment compensation, unless the class member earned an amount equal to or greater than the annualized amount of his or her wages from the State at the time of layoff during the first year of layoff, in which case the mitigation earnings deduction for the first year will be based on actual mitigation.

E. No class member who retired from the State's work force from December 1, 2002 through June 30, 2003 shall be entitled to an award for economic damages unless at the time the class member retired, the class member had received a layoff notice and had no option for a lateral transfer or faced bumping to a lesser paying position as a result of a layoff notice to another class member.

F. No class member who has previously been made whole for his or her economic losses as a result of an arbitration, grievance or other legal or quasi-legal proceeding shall be entitled to an award for economic damages.

G. Class members shall have the right to seek an award of front pay, and the State shall have the right to oppose any award of front pay for any class member as unwarranted. No award of front pay shall, in any event, exceed 10 years.

H. A claim for the costs of increased mileage expense due to a change in work location as a result of the layoffs shall be compensable provided that the change increased the class member's commute by more than 25 miles in each direction. An award of damages based on increased mileage shall be compensated at \$0.50 cents/mile or the State employee rate of reimbursement applicable at the time of loss, whichever is lesser.

I. Awards to class members for pension losses shall be made in the form of adjustment to the class member's pension service and earnings credits.

J. Awards for damages from the loss of health insurance shall, in the case of class members who were laid off and rehired to the State's work force within one year of the date of layoff, be limited to the cost of COBRA or to the amount of any uncovered medical expenses that would have been covered by the State's employee health plan. Any class member who claims medical expense damages arising from or relating to the discontinuation of state employee health plan benefits shall bear the burden of proving such damages and proving that he or she took reasonable steps to avoid or mitigate such damages, including by taking steps to obtain replacement health insurance coverage (but failure to purchase COBRA or other replacement health insurance due to lack of sufficient funds shall not constitute a failure to take reasonable steps to avoid or mitigate such damages). The State shall have right to present evidence to contest the employee's entitlement to or the amount of such damages.

K. Form and timing of payments: Economic damage awards shall be paid for class members employed in the State's work force at the time of the award who receive vacation pay as an element of their annual compensation, at the State's sole option, in the form (in whole or in part) of an award of vacation pay or (in whole or in part) in equal yearly installments over four years with the first payment made within 30 days after either an offer or counteroffer with respect to the class member's economic damages award is accepted or a final determination is made by the Claims Administrator or Claims Panel, if applicable, and in three payments annually thereafter (or, at the State's option, on a shorter time schedule), with interest (at the rate of 5% simple interest per annum) running through the dates of each installment payment. Payments in the form of vacation time will be calculated based on the class member's rate of pay at the time of the award. Any balance not paid in vacation time shall be paid to the class member on the schedule set out above. No interest shall accrue on an award of vacation pay once the award is made. For class members no longer employed in the State's work force at the time of the award or class members employed by the State who do not receive vacation pay as an element of their annual compensation, economic damage awards shall be paid in equal yearly installments over

four years, with the first payment made within 30 days after either an offer or counteroffer with respect to the class member's economic damages award is accepted or a final determination is made by the Claims Administrator or Claims Panel, if applicable, and in three payments annually thereafter (or, at the State's option, on a shorter time schedule), with interest (at the rate of 5% simple interest per annum) running through the dates of each payment. In the event of a class member's extreme financial hardship, the class member may apply to the Claims Administrator for expedited payment of the award, as the Claims Administrator determines is appropriate.

L. State's Option to Buy-out Unused Vacation Pay Awards: In the event the State has elected to pay a class member's economic damages award, in whole or in part, through an award of vacation days, the State shall have the option, at any time after the award is made, of converting all or part of the vacation day award to installment payments, with the amount of each installment payment based upon the class member's annual rate of compensation at the time each installment is paid. No interest will accrue on any such installment payments.

M. Use of Vacation Day Awards: Class members may use, in addition to any vacation time the class member is otherwise permitted to use in any year, as many vacation days received as part of an economic damages award as the class member's Department head determines will not interfere with the operations of the class member's Department. Notwithstanding any contractual or other applicable provision to the contrary capping the amount of vacation time an employee may carry over from year to year, class members will be entitled to carry the unused or unpaid portion of any vacation time received as part of any an economic damages award through the date of termination of their State employment, provided, however, remaining balance of such vacation day award shall not constitute state service for purposes of calculating such members retirement or any other benefit for which length of service is prerequisite.

II. Emotional Distress, Other Compensatory and Punitive Damages Awards and Attorneys' Fees

A. Each class member shall be entitled to receive the following in payment of the class member's claims for compensatory and punitive damages:

1. Each class member who was laid off as a result of the layoff orders shall, if the class member is employed by the State at the time of the award, receive an award of ten vacation days and five personal leave days or, if the class member is not employed by the State at the time of the award, receive an award of \$1,500.00 to be paid in two equal installments, the first within 30 days of final judicial approval of the settlement and the second one year thereafter. No interest shall be paid on any of these payments.

2. Each class member whose employment was adversely affected as a result of the layoff orders, either through change of position causing economic loss or other form of economic loss, shall, if the class member is employed by the State at the time of the award, receive an award of four vacation days and three personal days or, if the class member is not employed by the State at the time of the award, receive an award of \$700.00 to be paid in two equal installments, the

first within 30 days of final judicial approval of the settlement and the second one year thereafter. No interest shall be paid on any of these payments.

3. Each class member who is not entitled to an award pursuant to ¶¶ II-A-1 or 2 shall, if the class member is employed by the State at the time of the award, receive an award of 1.25 personal leave days or, if the class member is not employed by the State at the time of the award, receive an award of \$100.00 to be paid within 30 days of final judicial approval of the settlement. Any class member who is not entitled to recover an award of economic damages shall receive an award for compensatory and punitive damages pursuant to this § II-A-3.

B. Use of Vacation Day Awards: Class members may use, in addition to any vacation time the class member is otherwise permitted to use in any year, as many vacation days received as part of an economic damages award as the class member's Department head determines will not interfere with the operations of the class member's Department. Notwithstanding any contractual or other applicable provision to the contrary capping the amount of vacation time an employee may carry over from year to year, class members will be entitled to carry the unused or unpaid portion of any vacation time received as part of any an economic damages award through the date of termination of their State employment, provided, however, remaining balance of such vacation day award shall not constitute state service for purposes of calculating such members retirement or any other benefit for which length of service is prerequisite. Any personal leave days awarded pursuant to §§ II-A-1, 2 or 3 must be used in accordance with existing rules and procedures for use of personal leave days.

C. The named plaintiffs in the three actions shall each receive incentive awards in the amount of \$10,000 each for their service as named plaintiffs, payable within 30 days of final judicial approval of the settlement.⁷

⁷ "Incentive awards are fairly typical in class actions." See *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (citing William B. Rubenstein et al., *Newberg on Class Actions* § 11:38 (4th ed. 2008); Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 U.C.L.A. L.Rev. 1303 (2006) (finding twenty-eight percent of settled class actions between 1993 and 2002 included incentive awards to class representatives)). Courts that have approved incentive awards "have stressed that incentive awards are efficacious ways of encouraging members of a class to become class representatives and rewarding individual efforts taken on behalf of the class." *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003). "Such awards . . . are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action." *Rodriguez*, 563 F.3d at 958; accord *In re Worldcom, Inc. ERISA Litig.*, No. 02 Civ. 4816, 2004 WL 2338151, at *11 (S.D.N.Y. Oct. 18, 2004) ("The named plaintiffs have performed an important service to the class and the burden of this commitment deserves to be recognized.")

D. Attorneys' Fees and Costs: The State shall pay Class Counsel attorneys' fees equal to 17.5% of each class member's economic damages award, whether the claim is resolved by agreement or determination by the Claims Administrator or Claims Panel. The fee shall be calculated based on the total value of the award to each class member at the time of award (without discount for the value of future payments, if any) and paid within 30 days after either an offer or counteroffer with respect to the class member's economic damages award is accepted or a final determination of the award is made by the Claims Administrator or Claims Panel, if applicable.

The State shall pay Class Counsel attorneys' fees equal to 17.5% of the amounts of each class member's compensatory and punitive damages awards. The fees shall be calculated based on the value of the award to each class member at the time of award, either based upon the gross cash value of the vacation pay and personal leave awards as of the date of award or the total amount of the cash award (without discount for the time value of future payments, if any). The State shall pay the attorneys' fees at the time of the initial award to each class member pursuant to § II-A.

The State shall pay the law firm of Livingston, Adler, Pulda, Meiklejohn, & Kelly, P.C. the sum of \$250,000.00 for legal services rendered in connection with the federal and state litigation. The State shall pay Class Counsel \$400,000 in litigation expenses. The amounts to be paid pursuant to this paragraph shall be payable within 30 days of final judicial approval of the settlement.

The payments for attorneys' fees and costs set forth in this § II-D shall be dispositive of any liability the State (or any other defendant) in the above-referenced actions might otherwise have to Class Counsel and to the law firm of Livingston, Adler, Pulda, Meiklejohn, & Kelly, P.C. for past and future attorneys' fees and for past and future expenses that may be incurred in conjunction with the judicial process necessary to conclude the above-referenced actions and the representation of class members in conjunction with the determination and payment of class members' awards, not including, however, any attorneys' fees or expenses that may be incurred to enforce the provisions of the parties' settlement agreement in the event of any breach thereof.

III. Claims Procedure:

A. Claims Administrator: The parties shall, prior to the submission of this settlement for judicial approval, agree upon a Claims Administrator to determine any disputes over the amounts any class member is entitled to receive pursuant to the settlement or other matters relating, in any way, to the terms of the parties' settlement or implementation of the settlement. The State shall bear the cost of claims administration, including all fees of the Claims Administrator, but not including any attorneys' fees or costs incurred by any class member in connection with the settlement (other than fees or costs arising out of a breach of the settlement agreement). Before the Claims Administrator decides a dispute regarding damages the State shall be entitled to request and receive reasonable documents and information pertaining to the class member's claimed damages and mitigation thereof. Both the class member and the State shall be entitled to be heard thereon.

B. Simplified Claims Process: The Claims Administrator selected by the parties shall adopt a simplified claims process to enhance the efficient resolution of any disputed claims. The provisions of the Administrative Procedures Act shall not apply to proceedings before the Claims Administrator. In the event a dispute as to damages is submitted to the Claims Administrator, the parties shall bear the same burden(s) of proof as would be applicable in any legal action for such damages, but strict adherence to the rules of evidence shall not be necessary. The parties agree to cooperate in the efficient administration of the claims process, and to seek to resolve disputes in good faith and in a manner that minimizes delay and expense.

C. Claims Appeal Panel: The parties shall, prior to the submission of this settlement for judicial approval, agree upon a three-person Claims Appeal Panel to review determinations by the Claims Administrator, as permitted by § III-F.

D. Determination of Class Members' Claims for Economic Loss:

1. For each class member who was laid off or otherwise separated from the State's work force and was rehired to the State's work force within one year of the date of layoff:

a. The State shall provide a statement of the class member's net economic loss calculated in accordance with § I-A, B and H-K above, including (1) the amount of unemployment compensation benefits the class members received or was entitled to receive during the class member's layoff; (2) the class member's annual rate of compensation at the time of the layoff and any adjustments to the compensation payable to the position held by the class member for the period subsequent to the date of layoff and continuing through the date of rehire; (3) the adjustment to the class member's pension benefit necessary to remedy any lost pension benefits resulting from the layoff or separation, representing the award the State offers to pay in economic damages to the class member pursuant to the settlement. The State's offer may include a proposed promotion, transfer of position or future salary increases in lieu of or reduction of monetary damages, including front pay, and a proposed adjustment to the class member's pension service or salary credit to remedy any pension loss resulting from the layoff or separation. Such statements shall be provided to Class Counsel within 30 days of the final judicial approval of this settlement.

b. Within 30 days of receiving the State's offer statement, each class member will, in writing, either accept or reject the State's offer.

c. In the event the class member accepts the offer, the economic damages award will be made in accordance with § I-K above.

d. In the event the class member rejects the offer, the class member shall provide the State with a counter-offer (that includes the basis for the counter-offer), and the State shall within 30 days, in writing, accept or reject the counter-offer. The class member's counter-offer may include a proposed promotion, transfer of position or future salary increases in lieu or reduction of monetary

damages, including front pay, and a proposed adjustment to the class member's pension service or salary credit to remedy any pension loss resulting from the layoff or separation.

e. In the event the State accepts the counter-offer, the economic damages award will be made in accordance with §I-K above.

f. In the event the State rejects the counter-offer, the class member and the State shall have the right to a determination by the Claims Administrator of the award of economic damages the class member should receive.

g. In the event that the State and a class member agree to some, but not all, aspects of an economic damages award, the disputed aspect(s) of the award may be submitted to the Claims Administrator for determination.

2. For each class member who (1) was laid off or otherwise separated from the State's work force and (a) was rehired to the State's work force more than one year after the date of layoff, or (b) was never rehired to the State's work force; or (2) suffered a loss of compensation (including lost pension or other benefits) as a result of a reduction in position as a result of the layoff orders:

a. The State shall provide a statement of (1) the amount of unemployment compensation benefits the class members received or was entitled to receive during the first year of the class member's layoff; (2) any adjustments to the compensation payable to the position held by the class member at the time of layoff for the period subsequent to the date of layoff and continuing through either the date of rehire or, in the event the class member was not rehired, through the date of the statement; and (3) the adjustment to the class member's pension benefit necessary to remedy any lost pension benefits resulting from the layoff or separation. Such statements shall be provided to Class Counsel within 60 days of the final judicial approval of this settlement. The State may, at its option, include in the statement a proposed promotion, transfer of position or future salary increases in lieu or reduction of monetary damages, including front pay.

b. Within 45 days of receiving the State's statement, each class member will, in writing, provide the State with a statement setting forth information concerning any mitigation earnings the class member has received subsequent to the first year of the layoff period, and setting forth the terms of an award the class member offers to accept in settlement of the class member's economic damages claim. The class member's offer may include a proposed promotion, transfer of position or future salary increases in lieu or reduction of monetary damages, including front pay, and an adjustment to the class member's pension service or salary credit to remedy any pension loss resulting from the layoff or separation.

c. Within 30 days of receiving the class member's offer statement, the State will, in writing, either accept or reject the class member's offer.

d. In the event the State accepts the offer, the economic damages award will be made in accordance with § I-K above.

e. In the event the State rejects the offer, the State shall provide the class member with a counter-offer (that includes the basis for the counter-offer), and the class member shall within 30 days, in writing, accept or reject the counter-offer. The State's counter-offer may include a promotion, transfer of position or future salary increases in lieu or reduction of monetary damages, including front pay, and an adjustment to the class member's pension service or salary credit to remedy any pension loss resulting from the layoff or separation.

f. In the event the class member accepts the State's counter-offer, the economic damages award will be made in accordance with § I-K above.

g. In the event the class member rejects the State's counter-offer, the class member and the State shall have the right to a determination by the Claims Administrator of the award of economic damages the class member should receive.

h. In the event that the State and a class member agree to some, but not all, aspects of an economic damages award, the disputed aspect(s) of the award may be submitted to the Claims Administrator for determination.

3. For each class member who sustained economic loss as a consequence of the layoff orders other than lost compensation in the form of salary or other employment benefits as set forth in ¶¶ I-C and D:

a. The class member shall provide the State with a statement setting forth the basis and amount of any claimed economic loss, representing the terms of the award the class member offers to accept in settlement of the class member's economic damages claim. Such statements shall be provided to counsel for the State within 30 days of the final judicial approval of this settlement.

b. Within 30 days of receiving the class member's offer statement, the State will, in writing, either accept or reject the class member's offer.

c. In the event the State accepts the offer, the economic damages award will be made in accordance with § I-K above.

d. In the event the State rejects the offer, the State shall provide the class member with a counter-offer (that includes the basis for the counter-offer), and the class member shall within 30 days, in writing, accept or reject the counter-offer.

e. In the event the class member accepts the State's counter-offer, the economic damages award will be made in accordance with § I-K above.

f. In the event the class member rejects the State's counter-offer, the class member and the State shall have the right to a determination by the Claims Administrator of the award of economic damages the class member should receive.

g. In the event that the State and a class member agree to some, but not all, aspects of an economic damages award, the disputed aspect(s) of the award may be submitted to the Claims Administrator for determination.

E. The determination of the Claims Administrator of the amount of the economic damages a class member is entitled to receive shall, except as provided in § III-F, be final, binding and non-appealable by either the State or the class member.

F. With respect to any economic damages award determined by the Claims Administrator where the total award sought by the class member exceeds \$30,000.00 and where the total value of the award is 150% or more greater than the total value of the award offered by the State or 50% or more less than the total value of the award sought by the class member, the parties shall have the right to seek review of the Claims Administrator's determination by the Claims Appeal Panel. The Claims Appeal Panel shall decide any appeal based on the clearly-erroneous standard. The decision of the Claims Appeal Panel shall be binding, final and non-appealable, and there will be no right to judicial review of the decision of the Claims Appeal Panel for any reason. The provisions of the Administrative Procedures Act shall not apply to proceedings before the Claims Appeal Panel.

G. Determination of Class Members' Claims for Non-Economic Loss: Any dispute over the amount any class member is entitled to receive for non-economic loss pursuant to § II shall be determined by the Claims Administrator. The determination of the Claims Administrator shall be final, binding and non-appealable.

H. Dispute over Attorneys' Fees: Any dispute over the amount of any attorneys' fee award pursuant to §II-D shall be resolved by the Claims Administrator. The determination of the Claims Administrator as to the amount of any disputed attorneys' fee shall be final, binding and non-appealable.

I. Claim Information Assistance: The State will, within 60 days of a class member's or Class Counsel's request, provide the class member or Class Counsel with information in the State's possession concerning the class member's employment, position history and benefits entitlements, including pension information (including virtual reinstatement calculations) and salary and promotion information applicable to positions the class member contends he or she would have attained but for the layoffs.