DURNFORD and GLICKMAN v. JOHN ASHCROFT, Attorney General, U.S. Department of Justice, Agency

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON FIELD OFFICE

LAWRENCE D. DURNFORD
and MARK GLICKMAN
Class Agents,
v.

JOHN ASHCROFT, Attorney General,
U.S. Department of Justice,
Agency.

EEOC Case No. 100-2000-07059X*
Agency Case No. B-96-2206

_____ * formerly EEOC Case No. 100-A0-7059X

SETTLEMENT AGREEMENT

I. INTRODUCTION

In the interests of avoiding the expense, delay, and inconvenience of further litigation of the issues raised in this administrative class complaint, and in reliance on the representations, mutual promises, covenants, and obligations set out in this Settlement Agreement, and for good and valuable consideration also set out in this Settlement Agreement, the Class Agents, Lawrence D. Durnford and Mark Glickman, on behalf of themselves and all others similarly situated, and John D. Ashcroft, Attorney General of the United States, in his official capacity, through the parties' respective undersigned counsel, hereby stipulate and agree as follows:

II. GENERAL PROVISIONS

A. Definitions

The following terms, as they are used in this Settlement Agreement and its attachments, shall have the meanings defined below:

1. Administrative Class Complaint or Class Complaint

The formal administrative class complaint of discrimination filed against the Department of Justice by Lawrence D. Durnford on behalf of himself and all others similarly situated on March 1, 1996, and pending before the Equal Employment Opportunity Commission's (EEOC or

Commission) Washington Field Office as Case No. 100-A0-7059X.

2. The Agency

The Attorney General of the United States in his official capacity, the Department of Justice, the Executive Office for Immigration Review, and/or the Office of the Chief Immigration Judge.

3. Claimant

Any individual who submits a Claim Form to the Claims Administrator seeking relief related to this Settlement Agreement.

4. Claims Administrator

The firm retained pursuant to Part IV.B.1 of this Settlement Agreement to assist Class Counsel in the administration and distribution of awards to be made pursuant to this Settlement Agreement.

5. Class Agents

Lawrence D. Durnford and Mark Glickman.

6. Class Claim

Any individual or class-wide actual or potential race and/or sex discrimination claim, administrative charge, demand, grievance, complaint, right and cause of action of any kind, known or unknown, by a Class Member or the Class Agents against the Department of Justice for monetary, injunctive or equitable relief and/or for attorney's fees, arising from any events, acts, omissions, policies, practices, procedures, conditions or occurrences concerning selection for a position of Immigration Judge at any time on or after January 1, 1994, but no later than December 31, 1995, under Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., or any other federal, state, or local statute, regulation, rule, order, ordinance or other authority of any nature prohibiting racial and/or sex discrimination in employment. Class Claim refers to any claims or other cause of action described above brought in an arbitral, judicial or other forum of whatsoever kind or nature. A Class Claim, however, does not encompass an objection of a class member to the EEOC Administrative Judge (EEOC AJ) that the Settlement Agreement is not fair, adequate and reasonable, or an appeal or petition of the EEOC AJ's Final Approval to the EEOC's Office of Federal Operations, within the meaning of 29 C.F.R. § 1614.204(g)(4), or an attempted challenge brought in federal court seeking a review of the Final Approval.

7. Class Counsel

Michael Kator, David Weiser, Jeremy Wright, and other attorneys of the law firm of Kator, Parks & Weiser, P.L.L.C., 1020 19th Street, NW, Suite 350, Washington, DC 20036; and 812 San Antonio St., Suite 100, Austin, Texas 78701; and Mike Milligan, Esq., 303 Texas Ave., Suite 808, El Paso, Texas 79901.

8. Final Approval

The entry by the EEOC AJ of the Order granting final approval of this Settlement Agreement as fair, reasonable, and adequate to the Class as a whole pursuant to 29 C.F.R. § 1614.204(g).

9. Mandatory Joinder Claim

Any race and/or sex discrimination claim by a Member of the Class arising out of the same occurrence, event, or nucleus of facts as any Class Claim. See Part II.A.6.

10. Preliminary Approval

The entry by the presiding EEOC AJ of an Order preliminarily approving the settlement and the terms of the Notice of Resolution to be sent to the Class pursuant to 29 C.F.R. § 1614.204(g).

11. Settlement Amount and Settlement Fund

The total settlement amount to be paid by the Agency to resolve this matter is Eleven Million Five Hundred Thousand Dollars ($11,500,000.00). The Settlement Fund is the qualified settlement fund created by the payment of the total settlement amount by the Agency, the purpose and administration of which are governed by Part IV of this Settlement Agreement.

12. This Case

All proceedings relating to or arising from the Administrative Class Complaint, including, without limitation, any related informal administrative proceedings, including the individual complaint of discrimination brought by Class Agent Lawrence D. Durnford to the full and entire extent of his claims for non-selection in 1994-95.

13. Trustees

Michael J. Kator and David Weiser shall serve as Trustees of the Settlement Fund, although under certain circumstances successor Trustees may be appointed. Trustees of the Settlement Fund shall serve without additional compensation. Each Trustee may act independently on behalf of the Settlement Fund.

14. White Male

A non-Hispanic man whose ancestral origins are from any of the original peoples of Europe, North Africa, or the Middle East, including any person who has adopted such origins as the basis for the purpose of identification for race, sex and national origin or who is regarded as having such origins as the basis for the purpose of identification for race, sex and national origin. See also Annual Report on the Federal Work Force: Fiscal Year 2002, by the United States Equal Employment Opportunity Commission, Office of Federal Operations, Appendix I, Glossary/Definitions.

B. Jurisdiction and Venue

The parties acknowledge that the Commission has jurisdiction over the parties and the subject matter of this case.

C. Persons Covered by Settlement Agreement

1. Definition of Class and Class Members

As defined by EEOC AJ Richard E. Schneider, on April 25, 2002, the class is composed of White male applicants for employment not selected as Immigration Judges during 1994 and 1995. "White male" is defined in section II.A.14, above. Applications for Immigration Judge positions posted on October 31, 1995 or later are not covered by this case.

2. Release/Bar of Claims

In consideration of the promises contained herein, and the benefits provided or to be provided hereunder, this Settlement Agreement shall fully resolve, extinguish, and finally and forever bar, and the Class Agents and other Class Members hereby release, any and all Class Claims and Mandatory Joinder Claims (as defined in Part II.A), in law or in equity, which any of them, their representatives, agents, heirs, executors, administrators, successors, or assigns, may have, may have had, or in the future may have against the Agency arising out of the Class Claim.

As a condition precedent to the receipt of any relief under the terms of this Settlement Agreement, each of the Class Members who seeks relief shall, in consideration thereof, first execute the Claim Form and Release, attached as Exhibit 1.

The parties agree that the Final Approval of this Settlement Agreement shall be fully binding on, and fully extinguish and release the claims of, all Class Members and the Class Agents, including Class Members who do not file a claim seeking recovery from the Settlement Fund. This Settlement Agreement may be pled as a full and complete defense to any subsequent action or other proceeding involving any person or party that arises out of the claims released and discharged by this Settlement Agreement (other than enforcement of this Settlement Agreement itself).

D. Denial of Liability

The Agency expressly denies any wrongdoing or liability whatsoever. This Settlement Agreement represents the compromise of disputed claims. It reflects the parties' recognition that litigation of these claims would severely burden all concerned and require a massive commitment of time, resources, and money. The Settlement Agreement does not constitute, and shall not under any circumstances be deemed to constitute, an admission by either party as to the merits, validity, or accuracy, or lack thereof, of any of the claims in this case. No ruling was ever made on the merits of the claims or allegations of the Class.
This Settlement Agreement may not be introduced or used or admitted in any other judicial,

arbitral, administrative, investigative or other proceeding of any kind or nature whatsoever as evidence of discrimination, retaliation, or any violation of Title VII, the United States Constitution, the common law of any jurisdiction, or any other federal, state or local law, statute, ordinance, regulation, rule or executive order, or any obligation or duty at law or in equity.

In the event that Final Approval of the Settlement Agreement is not obtained or the Settlement Agreement is deemed null and void, nothing herein shall be deemed to waive any of the Class's claims or the Agency's objections and defenses, and neither this Settlement Agreement nor the EEOC AJ's preliminary or final approval hereof shall be admissible in any court regarding the propriety of class certification or regarding any other issue or subject of this case.

If this Settlement Agreement becomes void for any reason, the case will be reinstated for further processing at the EEOC from the point processing ceased.

E. Privacy Act and the Return of Documents

The parties, their retained experts, their consultants and attorneys (and all other signatories), and the agents of each of them, shall continue to be bound by the terms of the Joint Stipulation and Protective Order, dated September 3, 2002, as well as the Second Joint Stipulation and Protective Order, attached as Exhibit 2, which addresses the use of confidential information and other documents that may be protected by the Privacy Act, 5 U.S.C. § 552a. The parties agree that, even after dismissal, the EEOC AJ's protective orders shall continue to govern the use of Privacy Act materials, including documents and information that have been or may hereafter be provided to Class Counsel by the Agency for purposes of mediation, negotiation and administration of this Settlement Agreement. After dismissal, the parties may move to reopen for the limited purpose of enforcing the EEOC AJ's protective orders. Class Counsel shall be responsible for advising their experts, outside consultants, and any other individuals acting for, on behalf of, or at the request or direction of Class Counsel, including a Claims Administrator, of the confidentiality provisions of this Settlement Agreement and shall require that each such individual sign a confidentiality agreement substantially in the form of Exhibit 3, and shall promptly provide a copy of such signed agreement to counsel for the Agency.
The prohibition on disclosure of documents and information protected by the Privacy Act is not intended to bar Class Counsel from making statements to the Class which discuss the settlement process generally, or to bar either party from supporting and defending this Settlement Agreement, including at the Preliminary and Final Approval hearings. Also, notwithstanding the confidentiality provisions of this Settlement Agreement, the EEOC may determine that a document or information relating to the specific intent of a party in crafting the terms of this Settlement Agreement may be used in order to resolve a fundamental dispute regarding a provision of this Settlement Agreement.

Upon final distribution of monies from the Settlement Fund, Class Counsel agrees to return to the Agency all confidential information or other documents protected by the Privacy Act. The Agency will abide by the terms of applicable federal statutes and regulations regarding document retention and/or destruction, including the Freedom of Information Act and the Federal Records Act.

F. Approval of Settlement Agreement as Written

It is an express condition of this Settlement Agreement that all Class Members, defined in Part II.C.1 of this Settlement Agreement, be bound by the body of this Settlement Agreement, including Class Members who do not seek recovery from the Settlement Fund, and that it be approved by the EEOC AJ. The parties have bargained for the terms in this Settlement Agreement. If the EEOC AJ does not approve this Settlement Agreement as written, or if the EEOC, including the Office of Federal Operations, or a federal court alters, modifies or disapproves the Settlement Agreement in any material respect, the party that is adversely affected by such alteration, modification or disapproval of any provision of the Settlement Agreement may elect to file for reconsideration and/or to withdraw from the Settlement Agreement, which shall then be deemed null and void.

G. Interpretation of Settlement Agreement

1. Nature of Settlement Agreement

This Settlement Agreement is a contract and shall, upon Final Approval by the EEOC AJ, constitute an order of the Commission, and its provisions shall be enforceable by the parties as an order of the Commission.

2. No Modification of Title VII Requirements

Nothing in this Settlement Agreement may be taken as modifying either the statutory or regulatory procedures pertaining to initiating and maintaining administrative and judicial proceedings under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq., or the federal civil service laws.

III. NOTICE OF RESOLUTION AND FAIRNESS HEARING

A. Notice Pursuant to 29 C.F.R. § 1614.204(g)(4)

1. Pursuant to 29 C.F.R. § 1614.204(g)(4), the Agency shall provide a Notice of Resolution, attached as Exhibit 4 hereto. This Notice shall be provided to Class Members only after the EEOC AJ has preliminarily approved both the Settlement Agreement and the contents of the Notice of Resolution.

2. The Agency shall provide the Notice of Resolution to the Class by reasonable means and in a manner consistent with 29 C.F.R. § 1614.204(e), including, but not limited to, sending the Notice of Resolution to the last known address of all Class Members. Furthermore, the Agency will attempt to supplement the notification to the Class Members by requesting publication of a Summary Notice, attached as Exhibit 5 hereto, in the following trade and professional publications: Matthew Bender's Immigration Channels and Immigration Bulletin, as well as West Group's Interpreter Releases and the Federal Times.

3. The Agency will also post the Notice of Resolution (Exhibit 4) on its web site from the date of

preliminary approval of the Settlement Agreement to the date of the fairness hearing, and send a copy to the American Immigration Lawyers Association (AILA) with a request that the AILA publicize the Notice to its membership.

B. Fairness Hearing

The fairness hearing will be held pursuant to 29 C.F.R. § 1614.204(g)(4) as set by the EEOC AJ.

IV. RELIEF AND ADMINISTRATION

A. Monetary Relief

1. Creation of the Settlement Fund

a. For the purpose of satisfying and settling all of the eligible claims of the Class Agents, Class Members and Class Counsel, and if granted final approval by the EEOC AJ, the Agency shall deliver to Class Counsel via electronic transfer into an account in the name of "Durnford Settlement Fund" (the “Settlement Fund” or "Fund"), at a bank to be designated by class counsel and agreed upon by the Agency, a total of $11,500,000 no later than thirty (30) days after the EEOC AJ's order of Final Approval of this Settlement Agreement. The Fund shall be established by Class Counsel as a qualified settlement fund under Part 468B of the Internal Revenue Code, and Class Counsel shall provide the relevant bank routing and account information to the Agency to permit the electronic funds transfer of the settlement monies into the Settlement Fund. The Agency shall provide a statement to the Administrator and Trustees that complies with Treasury Regulation § 1.468B-3(e), no later than February 15 of the year following each calendar year in which it made a transfer to the Fund. Such statement shall include: (a) the legend “§ 1.468B-3 Statement” at the top of the first page, (b) the Agency’s name, address, and EIN, (c) the Fund’s name, address, and EIN, (d) the date of each transfer to the Fund, (e) the amount transferred, and (f) a description of any property, if any, transferred and its fair market value on the date of the transfer.

b. The Agency’s payment of $11,500,000 represents the total amount that the Agency is required to pay to settle this case. This sum shall settle all of the eligible claims of the Class Agents, Class Members and Class Counsel, including claims for lost earnings, benefits and interest; emotional distress; other non-pecuniary compensatory damages; all past and future attorneys' fees and expenses; all past and future expert fees incurred by Class Counsel; all costs, fees and expenses of whatever kind associated with administering and disbursing the Settlement Fund, including, but not limited to, the fees and expenses of any Claims Administrator that Class Counsel may elect to retain, as well as any expert fees incurred in connection with disbursing the Settlement Fund; and all amounts that represent the Agency's share of taxes and other withholdings for FICA and Medicare.

c. Class Counsel makes the following designations: The portion of the Settlement Fund to pay the claims of Class Members for Back Pay, Front Pay, compensatory damages, and prejudgment interest shall consist of seven million dollars ($7,000,000), and any income derived thereon and shall be known as the “Claims Portion,” less any amount specified for reserves. Fifty percent

(50%) of the Claims Portion shall be allocated to pay claims for Back Pay/Front Pay plus prejudgment interest, fifty percent (50%) shall be allocated to pay claims for compensatory damages plus prejudgment interest. Prejudgment interest shall be computed as 12.4% of any payments made to Class Members from the Claims Portion. The portion of the Fund designated to pay Class Members for contribution made to the litigation of this matter shall consist of five hundred thirty-three thousand three hundred thirty-four dollars ($533,334) and any income derived thereon and shall be known as the "Contribution Portion," less any amount specified for reserves. The portion of the Fund designated to pay and/or reimburse Class Counsel and other non-Class Member payees to which Class Counsel is liable for their reasonable fees, expenses and costs, shall be known as the "Litigation Portion." The Litigation Portion shall consist of three million nine hundred sixty-six thousand six hundred sixty-six dollars ($3,966,666). Income as to all portions shall include interest earned by the Fund pending distribution from it. Such portions of the Settlement Fund amounts that are not needed immediately for payment of fees and expenses and the disbursement of awards to Class Members may be invested by the Trustees or Claims Administrator in interest-bearing United States Treasury securities and/or securities of agencies of the United States backed by the full faith and credit of the United States. All portions shall be governed by Administrative Order No. 1, attached hereto as Exhibit 6. Any investment losses incurred by the Fund shall be shared proportionately among the Litigation Portion, the Claims Portion, and the Contribution Portion.

d. The Litigation Portion shall cover past, present and future attorneys' fees, costs and expenses, incurred in connection with this litigation by Class Counsel, including, but not limited to, the defense of the settlement agreement and collateral litigation regarding the subject matter of this settlement. Notwithstanding the above, attorneys' fees, costs and expenses incurred by any person objecting to, or making a collateral or direct attack on the Settlement Agreement or on the actions of the Claims Administrator, shall be borne by that person and shall not be chargeable to either the Agency or the Fund.

2. Good Faith Payment by the Agency

The Agency agrees, in a show of good faith, to pay $795,000 to the Settlement Fund after the EEOC AJ's preliminary approval of the Settlement Agreement. This payment is a portion of the $11.5 million Settlement Amount referenced in II.A.11. The Trustees and/or the Claims Administrator shall invest all portions of this money in accordance with Section IV.A.1.c. If the EEOC AJ does not grant final approval to the Settlement Agreement, or if the EEOC AJ grants final approval of the Settlement Agreement and such final approval is overturned by the EEOC (including the Office of Federal Operations) or by a federal court ruling on an attempted challenge seeking a review of the Final Approval, or if the Agency abrogates the Agreement pursuant to Part VII below, Class Counsel will return this money, less taxes owed and reasonable fees and costs of the Claims Administrator, plus interest earned on the $795,000, to the Agency within 30 days of such a decision. The fees and costs deducted shall not exceed $5,000.

3. No Injunctive Relief

The settlement of this case does not include the award of any Immigration Judge positions to the Class Members or Class Agents. This Settlement Agreement does not require the Agency to hire

Class Members or the Class Agents into current or future Immigration Judge vacancies, or to provide the Class Agents or Class Members with preferential consideration for future vacancies.

B. Administration and Calculation of the Fund

1. Class Counsel shall designate a Claims Administrator to administer and distribute the Settlement Fund. The duties and responsibilities of the Administrator are identified in Part IV.D and in Exhibit 6, attached hereto.

2. The identification of Class Members to receive monetary relief and distribution of such relief is the exclusive province of Class Counsel and the Claims Administrator, acting on behalf of the Class. The Agency shall have no role in, nor shall it be held liable for, determining the distribution methodology, the determination of relief to be accorded each individual, or other aspects of the monetary awards process, with the exception that the Agency shall, to the extent that such a request is reasonable: (1) provide to Class Counsel and/or the Claims Administrator, data and/or documentation relating to any Class Member's current or former employment with the Agency, including pay information and current or last known addresses or other information that Class Counsel and/or the Claims Administrator reasonably determine is necessary, for use by Class Counsel and/or the Claims Administrator in contacting Class Members or otherwise administering the Settlement Fund; (2) provide all information currently available to the agency regarding the addresses for Class Members; and (3) issue the Notice of Resolution (Ex. 4) and a copy of the Settlement Agreement with exhibits to Class Members as stated in Part III.A., above. All information provided to Class Counsel for purposes of administering and distributing the Settlement Fund shall be treated as confidential as discussed in Part II.E. The distribution formula shall not be enforceable against the Agency.

3. Class Counsel shall arrange for allocation of the Claims Portion in accordance with the distribution methodologies set forth in Exhibit 7 and the provisions of this Settlement Agreement. Each Class Member shall receive the amounts calculated according to the distribution formula. The Claims Administrator shall be responsible for distributing the monetary relief in accordance with the distribution formula and the provisions of this Settlement Agreement after the conditions of IV.E have been satisfied.
Calculation of amounts due each Class Member according to the formula set forth in Exhibit 7 shall be performed by the Trustee and/or the Claims Administrator. The Agency shall provide Class Counsel with available personnel information as may be necessary to perform the requisite calculations to the extent the Agency has not previously provided such information; all such information shall be treated as confidential information pursuant to the provisions of this Settlement Agreement.

4. To the extent the distribution formula, attached hereto as Exhibit 7, or the Administrative Order No. 1, attached hereto as Exhibit 6, conflicts with the terms of the Settlement Agreement, the Settlement Agreement shall govern.

C. Notice of Final Approval and Claim Filing by Class Members

1. Class Counsel shall be responsible for notifying Class Members once the EEOC AJ has

ordered a Final Approval of this Settlement Agreement. The Notice shall notify Class Members of the Final Approval and of their need to file a Claim Form and Release in order to be eligible for relief from the Settlement Fund.

2. In order to be eligible for relief pursuant to the claims mechanism established by this Settlement Agreement, Class Members must file a Claim Form and Release, signed under penalty of perjury, with the Claims Administrator, within 65 calendar days of the issuance of a notice regarding Final Approval of this Settlement Agreement from Class Counsel and/or the Claims Administrator. The Claim Form and Release is attached as Exhibit 1. Class Agents shall file a separate claim form, which is attached as Exhibit 8. For Class Members who are current or former federal employees, the Claim Form and Release contains a waiver provision under the Privacy Act, 5 U.S.C. § 552a, permitting the agency to disclose information to the Claims Administrator for purposes of applying the distribution formula. The claim form also contains a general release.

D. Distribution of Monetary Awards to Class Members

Except with respect to calculation of the amounts due each Class Member (to be calculated by the Trustee and/or the Claims Administrator), the administration and distribution of monetary awards shall be handled by Class Counsel (or others as may be designated by Class Counsel), who will: (i) respond to procedural questions from Class Members about the claims process under this Settlement Agreement; (ii) provide notice to each Class Member of the number of points allocated to the Class Member as determined by the Claims Administrator under the distribution formula; (iii) address requests for corrections by Class Members; (iv) procure executed releases (included in Exhibit 1, hereto) and W-9s from each Class Member who seeks relief; (v) withhold all required income and employment taxes (if any), including each Class Member's portion of FICA, Medicare and other taxes, and including the employer's portion of FICA, Medicare and other taxes; (vi) prepare, file and pay the taxes associated with any required tax returns of the Settlement Fund; (vii) distribute funds to and prepare W-2 and 1099-MISC tax forms for Class Members; (viii) compute the Agency's share of its FICA and Medicare and notify the Agency of that amount; (ix) forward withheld taxes to appropriate tax authorities; and (x) forward the employer's portion of taxes to appropriate governmental agencies.
If a Class Member who is entitled to monetary relief under this Settlement Agreement is deceased at the time of such distribution, the amount payable to such deceased Class Member shall be paid to his estate, or, if there is insufficient information or proof regarding the deceased person's estate to permit such payment, the deceased person's share shall be distributed to the remaining Class Members on a pro rata basis pursuant to the distribution formula.

The Claims Administrator, Class Counsel and the Agency shall provide to and exchange with each other such information as shall be reasonably necessary to file notices, reports and returns and to make timely determinations of withholding obligations, subject to the Privacy Act and other federal law.

E. Distribution of Settlement Fund Money

No money shall be distributed from the Settlement Fund until all of the following conditions

have been satisfied:

1. Class Agents Durnford and Glickman have executed the releases attached hereto as Exhibit 9.

2. Each Class Member who files a claim to the Settlement Fund pursuant to part IV.C.2. above has fully executed a release as part of the claim process or the time to file a claim has expired.

3. Any administrative appeals under 29 C.F.R. § 1614.204(g)(4) of the EEOC AJ's Final Approval to the EEOC, including the Office of Federal Operations, have been fully and finally resolved, or the time for any such appeal has passed.

4. Any attempted challenges brought in federal court seeking a review of the Final Approval (for example, a challenge brought by a class agent as contemplated by 29 C.F.R. § 1614.407) have been fully and finally resolved, or the time for filing such a challenge has passed.

5. The Agency's right to abrogate the Settlement Agreement under Part VII of the Settlement Agreement is foreclosed as set forth under Part VII.2.

6. The employer's amount of FICA and Medicare taxes have been determined by the Claims Administrator and the Agency has been notified of those amounts, pursuant to Part IV.D(viii), above.

F. Tax Consequences of Monetary Relief

Compliance with all applicable federal, state, and local tax requirements shall be the sole responsibility of the Class Agents and Class Members who receive monetary relief pursuant to this Settlement Agreement. This Settlement Agreement is executed without reliance upon any representation by the Agency or Class Agents or Class Counsel as to tax consequences, and the Class Agents and Class Members who receive monetary relief are responsible for the payment of all taxes that may be associated with the settlement payments.

Neither the Agency, Class Counsel, Class Agents, nor the Claims Administrator make any representation nor express any opinion as to the final taxability of the payments made to the Class Agents, any other Class Members, or any other recipient. The Claims Administrator shall be responsible for withholding and paying appropriate amounts from awards for purposes of satisfying the employer share of employment taxes, such as FICA and Medicare. Notwithstanding the above, each recipient of an award shall be ultimately responsible for making payment to the appropriate taxing authorities, federal, state, and local, if any, for any additional employee tax liability on distributions, including liability resulting from any underpayment of taxes from the calculations performed by the Claims Administrator, or for seeking refund of any overpayment of taxes.

G. Return of Settlement Fund Money

1. If, by whatever means, the Order finally approving the Settlement Agreement does not become a final order of the Commission, or if this Settlement Agreement becomes void for any

reason, including the Agency's valid exercise of its rights under Part VII below, Class Counsel shall return the entire Settlement Amount of $11,500,000.00 promptly to the Agency, less taxes owed and reasonable fees and costs of the Claims Administrator. Any interest earned on the $11,500,000 shall also be paid to the Agency. Disputes as to the continued force of the Settlement Agreement shall be governed by the mechanism set forth in Part VI below.

2. In the event that three or more class claims are filed within 120 days after final approval of the Settlement Agreement, the Agency will notify class counsel. After such notification, the Claims Administrator will cease processing claimants' claims. Any processing of claims after such notification shall not be included in the reasonable fees and costs of the Claims Administrator. Other work performed by the Claims Administrator after such notification, such as fielding class claimant questions, sending out notices regarding delay, or working on administrative issues with respect to the Settlement Fund, shall not exceed $5,000. If the Agency thereafter loses its right to void the Settlement Agreement, the Claims Administrator shall resume the processing of claimants' claims, and the Claims Administrator's reasonable fees and costs shall be recoverable pursuant to the distribution formula.

H. Notification by Administrator

The Claims Administrator shall notify Class Counsel and counsel for the Agency within 10 business days after the Claims Administrator’s obligations under this Settlement Agreement have been fulfilled.

V. DISMISSAL

The Class agrees that the Complaint in this case, and any individual complaints or grievances filed by Class Members constituting Mandatory Joinder Claims against the Agency, shall be dismissed in their entirety, with prejudice, within 15 calendar days after the expiration of the periods within which the Agency has the potential or actual right to void this Settlement Agreement under Part VII below, or within 15 days of the Agency's statement that it will not void this Settlement Agreement under Part VII. No distribution shall be made from the Settlement Fund until after the filing of the Stipulation of Dismissal with Prejudice.

The dismissal shall be effectuated by filing the Stipulation of Dismissal with Prejudice in the form as it appears in Exhibit 10. Counsel for the Class agree to take any additional steps necessary to insure that this matter, and any Mandatory Joinder Claims, are dismissed in their entirety with prejudice. Administrative Order No. 1 and the Joint Stipulation and Protective Orders shall survive the dismissal of this case. After dismissal, the parties may move to reopen this case for the limited purpose of enforcing Administrative Order No. 1 or the Joint Stipulation and Protective Orders.

VI. ENFORCEMENT

In the event of a material breach of this Settlement Agreement, encompassing the breach of any part herein whether expressly designated as subject to Enforcement or not, the following principles and procedures shall apply.

A. Remedy for Breach

In accordance with 29 C.F.R. § 1614.504(a), if Class Agents or Class Counsel claim material breach of this Settlement Agreement by the Agency, Class Agents may request:

1. Reinstatement of the complaint for further processing; or

2. Implementation of the terms of the Settlement Agreement.

B. Mechanism for Addressing Alleged Breach

1. Allegations of breach shall be governed by 29 C.F.R. §§ 1614.401(e) and 1614.504.

2. The exclusive remedy for any person dissatisfied with the Claims Administrator's determination of his class membership and share (if any) of the settlement amount is set forth in the distribution formula attached hereto.

3. Pursuant to 29 C.F.R. § 1614.504(c), allegations that subsequent acts of discrimination violate this Settlement Agreement and/or are retaliatory in nature, shall be processed as separate complaints.

VII. ADDITIONAL CLASS CLAIMS IN CONTRAVENTION OF SETTLEMENT AGREEMENT

(1) If, notwithstanding the Release/Bar provision in part II.C.2 of this Settlement Agreement, as well as other provisions herein binding Class Members, a total of three (3) or more Class Members pursue in any forum a Class Claim against the Agency, as defined in part II.A.6 of this agreement, the entire Settlement Agreement shall be voidable at the election of the Agency within fifteen (15) days of when those claims become final (including resolution of all appeals), so long as the total monetary recovery by one or more class members (including damages, backpay, frontpay, attorneys' fees, interest, and the reasonable value of any injunctive relief) from one or more of those proceedings exceeds $1,000,000 in the aggregate. Notwithstanding the above, the Agency's option to void the settlement agreement under this section shall expire if two (2) or fewer such Class Claims remain pending in any forum without the total monetary recovery for any other such claims having exceeded $1,000,000 in the aggregate.

(2) If three (3) or more class claims by Class Members are initiated within 120 days after final approval of this Settlement Agreement, including any appeals and challenges in federal court, then disbursement of payments to Class Members from the Settlement Fund will not issue until either: (a) the Agency states in writing that it will not void the Agreement, (b) the Agency's option to void this Settlement Agreement is eliminated due to final resolution of all of the class claims (including resolution of all appeals), or (c) the Agency's fifteen (15) day period for electing to void this Settlement Agreement elapses without the Agency having elected to void this Settlement Agreement in writing. If fewer than three (3) class claims by Class Members are initiated within 120 days after final approval of this Settlement Agreement, including any

appeals and challenges in federal court, the Agency shall not have the option to void this Settlement Agreement under this provision. Moreover, if two (2) or fewer such Class Claims remain pending in any forum, the Agency shall not have the option to void this Settlement Agreement under this provision.

(3) The Agency shall promptly dismiss each class claim complaint that is submitted in the administrative process pursuant to 29 C.F.R. § 1614.107(a)(1). In the event of a class claim filed in district court, the government shall use its best efforts to defend this Settlement, including utilization of the defense of settlement and release. In the event of the filing of such a class claim in district court, the government shall promptly serve a copy of the complaint and motion to dismiss and/or dismissal decision and other significant pleadings on Class Counsel, and support efforts by Class Counsel to intervene if Class Counsel so elects. This Part shall have no effect on delivery of payment from the Agency to the Settlement Fund.

(4) Nothing in this Settlement Agreement shall limit the Agency's ability to settle a class claim, as defined in part II.A.6 of this agreement, brought against it in any forum by a Class Member which is initiated within 120 days after final approval of this Settlement Agreement. Nor shall anything in this Settlement Agreement limit the Agency's discretion whether to appeal any adverse decision on such a claim. Nothing in this Settlement Agreement shall be construed to eliminate or modify any statutory or regulatory requirement, including any deadline, for pursuing a Title VII claim.

VIII. CONTINUING EFFECT OF AGREEMENT

The determination by a court during the course of a Class Claim, as that term is defined in Part II.A.6, that this Settlement Agreement or a portion thereof is void shall not render the Settlement Agreement null and void within the meaning of the Settlement Agreement, except to the extent that the conditions of Part VII are fulfilled.

IX. NO THIRD PARTY RIGHTS

This Settlement Agreement is not intended to, and does not, create any claims for relief or third-party beneficiary rights in employees of the Agency or any other person, groups or entities (except for Class Members).

X. GOVERNING LAW

The parties agree that the validity, construction, and enforcement of this Settlement Agreement shall be governed by federal law.

XI. PARTIES' OBLIGATION TO DEFEND SETTLEMENT AGREEMENT

In the event this Settlement Agreement is challenged administratively or judicially, the Class Agents, Class Counsel and the Agency shall fully defend its lawfulness, except that the Agency will take no position as to the provisions of IV.A.1.c or as to any formula by which amounts in the Settlement Fund are allocated to individual class members.

XII. BINDING AGREEMENT

When all of the required signatures (as shown below) have been obtained, this Settlement Agreement is binding on all parties and their successors, assigns, representatives, and trustees, subject to the provisions of Title VII and its implementing regulations, and other applicable law. Undersigned counsel represent that they have the requisite authority to enter into this Settlement Agreement.

XIII. ENTIRE AGREEMENT

The terms of this Settlement Agreement (including the exhibits hereto) constitute the entire agreement of the parties, and no prior statement, representation, agreement or understanding, oral or written, that is not contained herein, shall have any force or effect.

XIV. COUNTERPARTS

(1) This Settlement Agreement may be executed in several counterparts and on multiple signature pages by one or more of the undersigned and all such counterparts so executed shall together be deemed and constitute one final agreement, as if one document had been signed by all Parties hereto; and each such counterpart shall be deemed an original, binding the Parties subscribed hereto; and multiple signature pages affixed to a single copy of this Settlement Agreement shall be deemed to be a fully executed original Settlement Agreement.

(2) The parties agree that facsimile signature pages may be submitted to the EEOC AJ.
[balance of page left intentionally blank]
[signature page to follow]

AGREED:

For the Class:

_____ _____
Lawrence D. Durnford Date
Class Agent

_____ _____
Mark Glickman Date
Class Agent

_____ _____
Mike Milligan Date
303 Texas Ave., Suite 808
El Paso, TX 79901

For the Class and as Trustees of the Settlement Fund:

_____ _____

Michael J. Kator Date
Kator Parks & Weiser, P.L.L.C.
1020 19th Street, NW, Ste. 350
Washington, DC 20036

_____ _____

David Weiser Date
Kator, Parks, & Weiser, P.L.L.C.
812 San Antonio St., Suite 100
Austin, Texas 78701

For Agency:

_____ _____

Henry A. Azar, Jr. Date
Tamara Ulrich
U.S. Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044

_____ _____

Bruce I. Waxman Date
Chief Counsel, Employee/Labor Relations
U.S. Department of Justice
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2600