

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT**

SHAUN DURAN, *et al.*,

Plaintiffs,

v.

**No. D-101-CV-2023-00698
Judge Maria Sanchez-Gagne**

**NEW MEXICO DEPARTMENT OF
WORKFORCE SOLUTIONS, *et al.*,**

Defendants.

**PLAINTIFFS' UNOPPOSED APPLICATION FOR APPROVAL OF INCENTIVE
AWARD, ATTORNEYS' FEES AND EXPENSES**

Plaintiffs respectfully request that the court review and approve an incentive award to the named plaintiffs in the above captioned case in the amount of \$10,000 each and award attorneys' fees in the amount of \$400,000 plus costs and payment of gross receipts taxes. The request for these amounts is made in accordance with the terms of the Settlement Agreement and prevailing law. The amount of fees requested reflects a large reduction of class counsels' lodestar in litigating this case and negotiating a settlement, which will result in a benefit in excess of \$100 million to nearly 50,000 class members.¹ The class representatives and class counsel have devoted considerable time and advocacy resources to litigating this case and to negotiating global settlement with significant recovery for the plaintiff class. As such, an incentive payment of \$10,000 is justified in this case and class counsel are entitled by law and equity to a fair fee. Defendants do not oppose the amounts requested in this Application.

I. The Nature of the Case

¹ The exact benefit to the class has not been fully determined. However, Defendants calculate the amount of debt to be waived for approximately 27,000 class members to be \$102,629,472.40. The actual benefit for the 49,046 class members will exceed this amount.

On March 27, 2023, the named plaintiffs in this case filed this class action lawsuit alleging that the New Mexico Department of Workforce Solutions (“NMDWS” or “Department”) had unlawfully sought repayment of agency caused overpayments of unemployment benefits issued pursuant to specific programs created during the COVID-19 pandemic. Plaintiffs also alleged that Defendants had improperly implemented a system, authorized and funded by the federal government, to waive these overpayments and requiring the agency to issue refunds of previous amounts collected. Plaintiffs claimed that this resulted in illegal collection efforts against New Mexico’s unemployed workers, leaving many with little to no income for months on end. Plaintiffs brought claims under the New Mexico Civil Rights Act for due process violations, and claims for violations of the New Mexico Unemployment Compensation Act, State Rules Act and New Mexico Workforce Solutions Act.

The Department disputed all of Plaintiffs claims and asserted various defenses but nevertheless agreed to negotiate a settlement early in the case. The negotiations were protracted due to the complex nature of the programs and need for federal approval for agency actions and further complicated in part by the Departments’ failed attempt to remove the case to federal court. After eleven settlement conferences between the parties, a Settlement Agreement was finalized on September 19, 2024, providing extensive relief to the class in the form of waived overpayments and refunds of amounts paid by class members to repay overpayments eligible for waiver. The Settlement Agreement also provides that Defendants will not oppose a request by Plaintiffs for class representative incentives in the amount of \$10,000 per class representative and payment to class counsel of \$400,000 in attorneys’ fees, plus costs and gross receipts taxes. The parties filed a Joint Motion for Preliminary Approval on October 31, 2024, and the Court has set a date for a hearing on final approval for January 9, 2025.

II. Named Plaintiffs Should Be Awarded a Reasonable Incentive of \$10,000 Each.

Plaintiffs request that the Court approve an incentive award of \$10,000 for the exceptional efforts of each of the named plaintiffs: Shaun Duran, Monica Fischetti Palmieri Williams, Erdem Yildiz, Coral Gonzalez-Inza and Yohanna Gerges. This incentive amount was agreed to by Defendants and is consistent with incentives awarded in similar cases. Awarding the requested incentive will serve to compensate the class representatives for their work in the case and encourage future participation in classwide public interest litigation.

“At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class.” 5 William B. Rubenstein, *Newberg on Class Actions* § 17.1 (6th Ed.). These payments, called class representative incentives, “aim to compensate class representatives for their service to the class and simultaneously serve to incentivize them to perform this function.” *Id.*; see *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, 861 F.3d 1182, 1195 (10th Cir. 2017) (“[C]ourts regularly give incentive awards to compensate named plaintiffs for the work they performed—their time and effort invested in the case.”); *Shaw v. Interthinx, Inc.*, No. 13-CV-01229-REB-NYW, 2015 WL 1867861, at *8 (D. Colo. Apr. 22, 2015) (“[I]ncentive awards are an efficient and productive way to encourage members of a class to become class representatives, and to reward the efforts they make on behalf of the class.” (internal quotation marks and citation omitted)). Class representative incentive payments typically range from \$10,000 to \$15,000 per named plaintiff. See *Newberg*, § 17.1 (noting that empirical evidence has shown that most class suits pay between \$10,000 and \$15,000 per class representative); *Shaw*, 2015 WL 1867861, at *8 (D. Colo. Apr. 22, 2015) (awarding \$10,000 to each of five named plaintiffs); *Jones v. I.Q. Data Int'l, Inc.*, No. 1:14-CV-00130-PJK, 2015 WL 5704016, at *2 (D.N.M. Sept. 23, 2015) (approving an incentive award of

\$20,000 out of a \$1,000,000 settlement fund); *Ponca Tribe of Indians of Oklahoma v. Cont'l Carbon Co.*, No. 05-445 (C), 2009 WL 2836508, at *2 (W.D. Okla. July 30, 2009) (noting that incentive awards are “common and widespread in class litigation” and approving awards ranging from \$1,000 to \$15,000 for each class representative).

While tens of thousands of individuals experienced harmful overpayments during the class period and many of them sought assistance from the New Mexico Center on Law and Poverty (“NMCLP”), very few were willing to serve as class representatives. The representatives met with class counsel for hours at a time, exposed their reputations and the details of their private financial situations to public scrutiny by participating in the case, consulted with class counsel on the details of the Settlement Agreement, and provided regular updates on collection efforts that were occurring in their individual unemployment overpayment cases. *See* Affidavit of Stephanie Welch, attached as Exhibit 1 (“Welch Aff.”) at ¶¶ 21-31. Participation by each of the class representatives in this case required considerable time and effort and produced a significant settlement that would have been impossible without them. Plaintiffs request a reasonable incentive award of \$10,000 to compensate the representatives in this case and promote their critical function.

III. Reasonable Attorneys’ Fees, GRT and Litigation Costs Should Be Awarded.

The Settlement Agreement in this case provides that Defendants will not oppose a request by Plaintiffs for payment of an amount not to exceed \$400,000 in attorneys’ fees plus gross receipts taxes and litigation costs. Plaintiffs now request the Court’s approval of an attorney fee award paid by Defendants of \$400,000 to class counsel, plus \$15,250 in gross receipts taxes, calculated at the Bernalillo County rate of 7.625% for Ives & Flores’s portion of the attorney fee award, plus litigation costs of \$248 for Plaintiffs’ filing fees.

When a class action is settled, the provisions in the settlement agreement concerning attorneys' fees are controlling, unless the terms produce a result that is unfair to the class or contrary to the policies underlying class actions. *In re N.M. Indirect Purchasers Microsoft Corp.*, 2007–NMCA–007, ¶¶ 16, 19, 140 N.M. 879. As a fiduciary for the class, the Court is required to review the reasonableness of the agreed upon fee. *See Rivera–Platte v. First Colony Life Ins. Co.*, 2007–NMCA–158, ¶ 77, 143 N.M. 77. In making this assessment, the Court has discretion to use either the percentage of recovery method or the lodestar method. *Id.* ¶ 78. The lodestar method is “ordinarily used in statutory fee-shifting cases because it provides adequate fees to attorneys who undertake litigation that is socially beneficial.” *Microsoft Corp.*, 2007–NMCA–007, ¶ 34.²

In the lodestar method, the Court determines a fee that approximates a reasonable hourly rate multiplied by the number of hours reasonably incurred in the representation. *See Perdue v. Kenny A. ex rel. Winn*, — U.S. —, 130 S.Ct. 1662, 1672, 176 L.Ed.2d 494 (2010). This value serves as a starting point for the calculation of a reasonable fee. *Microsoft Corp.*, 2007–NMCA–007, ¶ 34. “An award based on a lodestar may be increased by a multiplier if the lower court finds that a greater fee is more reasonable after the court considers the risk factor and the results obtained.” *Id.*; *Atherton v. Gopin*, 2012–NMCA–023, ¶ 7, 272 P.3d 700.

The lodestar method demonstrates that the requested fee is reasonable. To obtain this settlement, class counsel undertook extensive pre-suit investigation, expended substantial time and effort researching complex legal claims and defenses, interviewed hundreds of class members, met frequently with the class representatives, and engaged in protracted negotiations with Defendants that were further complicated by the involvement of the United States Department of Labor

² This case is a statutory fee shifting case. *See* NMSA 1978, § 41-4A-5 (2021) (“In any action brought under the New Mexico Civil Rights Act, the court may, in its discretion, allow a prevailing plaintiff or plaintiffs reasonable attorney fees and costs to be paid by the defendant.” NMSA 1978, § 41-4A-5 (2021)).

(“USDOL”). In total, class counsel spent more than 1,162.7 hours working on this case. *See Welch Aff.*, Ex. 1, at ¶¶ 32-37, and attached billing records; Affidavit of Adam C. Flores, attached as Plaintiffs’ Exhibit 2 (“Flores Aff.”) at ¶¶ 18-20, and attached billing records. Counsel have contemporaneously maintained time records, exercised billing judgment, and—pursuant to the terms of the Settlement Agreement—reduced counsels’ fees by over \$40,205 in order to facilitate settlement. *See Welch Aff.*, Ex. 1, at ¶¶ 36-37; Flores Aff., Ex. 2, at ¶¶ 15-22. As is fully explained below, Plaintiffs’ requested fees are reasonable and should be approved by the Court.

A. Plaintiffs’ Requested Fees are Reasonable.

When applying the lodestar method, a New Mexico court “determines the reasonableness of attorney fees by applying the Fryar factors found in Rule 16–105.” *Rivera-Platte*, 2007-NMCA-158, ¶ 83 (citing *Microsoft Corp.*, 2007-NMCA-007, ¶ 76). These factors are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood that the acceptance of the employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the lawyer performing the services; and (8) whether the fee is fixed or contingent.

Ultimately, the key factor in determining the appropriateness of an award is whether Plaintiffs achieved a high degree of success. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983).

1. Class Counsel Achieved a High Degree of Success.

The attorneys achieved outstanding success in this case, which reverses widespread and harmful pandemic related unemployment overpayments for New Mexicans. This is reflected in the

Settlement Agreement resulting in well over *\$100 Million* in forgivable debt for the plaintiff class, with reimbursement to class members of any amounts previously paid. The Settlement Agreement also sets forth a process for Defendants to implement the least burdensome and broad debt forgiveness program, known as blanket waivers, so that as many class members as possible can receive relief in the form of waived overpayments without having to apply to the Department or take any action at all. *See* Settlement Agreement, attached to Joint Motion for Class Certification (“Agreement”), at ¶¶ 28-33. Currently approximately 32,500 class members have overpayments being forgiven through this process. For those who do not receive blanket waivers, the Settlement Agreement provides for an accessible and streamlined application process, whereby remaining class members can complete an application for an individualized waiver, which may result in debt forgiveness and if applicable, reimbursement. *See* Agreement at ¶¶ 34-40. Because potential relief in this case was limited by federal law, overseen by USDOL, even if Plaintiffs proceeded to trial and prevailed, it is unlikely they could have obtained a better result.

2. The Novelty and Difficulty of the Issues Supports the Requested Fee.

This case involved a complex, time limited unemployment benefit program that was created and implemented during the COVID-19 pandemic. In order to bring claims under New Mexico law, class counsel had to research the new and complex legal framework applicable to the pandemic related unemployment programs, including USDOL’s oversight and implementation of administrative authority for overpayment forgiveness. Claims were alleged pursuant to the New Mexico Civil Rights Act, which at the time was a novel enactment that had never been construed by New Mexico’s appellate courts. At every step of the way, the parties had to navigate the federal-state relationship with respect to unemployment benefits and secure USDOL’s approval of proposed remedies. There was no precedent for this type of class action in New Mexico. As such,

there was significant risk that Defendants might prevail, that there would be no recovery for all class members, or that the recovery would be small or limited to a small number of individuals.

To overcome these obstacles, class counsel thoroughly researched the issues, defenses and claims prior to filing the case, submitted public records requests, filed a public records lawsuit, consulted with national experts, and engaged in thorough review of USDOL program letters, unemployment insurance requirements, and state options concerning overpayment collections and forgiveness. Class counsel spoke to hundreds of potential class members and analyzed agency documents in order to establish prior to filing the Complaint that 1) the Department had calculated and pursued overpayments in error; 2) the agency had the authority and federal funding to reverse these errors; and 3) Plaintiffs' claims were amenable to classwide resolution pursuant to the New Mexico Constitution, the New Mexico Civil Rights Act, the doctrine of equitable estoppel, USDOL's regulatory scheme, and state law governing unemployment benefits. Class counsel also extensively researched potential remedies and began pre-suit negotiations for remedies in the Settlement Agreement that implement detailed processes to ensure the benefit and accessibility of debt forgiveness are maximized.

After filing the case, class counsel successfully defended against Defendants' attempt to remove the case to federal court and obtained agreements from the Department to cease collections while the settlement was being negotiated, thereby providing immediate benefit to the class. In negotiating the settlement, class counsel worked with Defendants to design the waiver process, develop regulations concerning overpayment waiver applications, and draft the application through which tens of thousands of individual class members can seek waiver of their overpayments. Class counsel used their unparalleled expertise in these programs and the state and federal regulatory structures to propose a process to ensure efficient elimination of the wrongful

debt of class members and increase Defendants' capacity to administer the remedies in the Settlement Agreement. These negotiations, which began in September of 2022 and concluded in September of 2024, included consultation with the USDOL at different periods and requests for USDOL approval.

Class counsel undertook to represent the class and devoted long hours to develop the case and negotiate complex issues without any assurance that they would be compensated. Awarding the fees requested in this application furthers the public policy of encouraging attorneys to undertake meritorious cases that involve a high degree of risk and complexity, as did this one. *See Fryar v. Johnson*, 1979-NMSC-080, ¶ 13, 93 N.M. 485 (noting the “chilling effect of miserly fees” upon the ability of future plaintiffs to obtain adequate representation). This is especially true here, where New Mexicans suffered through the precarity of the pandemic having lost their jobs, only to have their pandemic unemployment benefits clawed back through no fault of their own. Class counsel were able to leverage their skill and expertise to bring this lawsuit and negotiate settlement to protect the class. The substantial time and expenses by class counsel on a contingent basis merits the requested award.

3. Counsels' Rates are Customary and Reasonable When Accounting for Counsels' Skill, Reputation, and Experience.

Class counsels' collective knowledge allowed them to craft claims that brought Defendants to the table for settlement. The reputation, skill and experience of class counsel facilitated the settlement in this case, and no doubt was a factor considered by Defendants in its determination to settle for substantial and important relief, which strongly supports the Court's approval of the proposed attorneys' fee.

Over the decades since it was founded, the NMCLP is one of the few legal organizations in New Mexico that can and does represent low-income New Mexicans in impact litigation on

issues of economic and social justice. This includes cases against state agencies that fail to administer programs and systems in accordance with authorizing legislation and the state constitution. *See* Welch Aff., Ex. 1, at ¶¶ 3-18. Ives & Flores has also developed extensive expertise and experience in litigating important and high-profile cases to advance civil rights in this jurisdiction. *See* Flores Aff., Ex. 2, at ¶¶ 6-12. It was through this experience that class counsel developed the strategies that drove success in this litigation and maximized relief for the class.

The rates charged by attorneys working on this case are reasonable. Stephanie Welch and Sovereign Hager are attorneys at NMCLP. Ms. Welch directs the Center's work related to workers' rights and Ms. Hager is the Center's Legal Director. Felipe Guevara was a workers' rights attorney at NMCLP when the case was filed and while the settlement was being negotiated. Ms. Welch has eighteen years of experience and bills at a rate of \$450 per hour. Ms. Welch holds special expertise in legal issues facing workers. This rate was previously approved in *Atyani, et al. v. Bonfantine, et al.* D-202-CV-2016-02775. Ms. Hager has thirteen years of experience and bills at a rate of \$400 per hour. Ms. Hager holds special expertise in litigation concerning government programs and benefits. Both Ms. Welch and Ms. Hager have substantial experience in class action litigation. *See* Welch Aff., Ex. 1. Felipe Guevara has four years of experience and bills at a rate of \$300 an hour. These rates are consistent with the rates charged by other attorneys with comparable levels of skill and experience. *See* Affidavit of Alexandra Freedman Smith ("Smith Aff."), attached Plaintiffs' Exhibit 3 at ¶¶ 9-24.

Laura Ives and Adam Flores are partners at Ives & Flores. They are experienced in class actions, have developed special expertise in civil rights law, and have litigated major civil rights cases, including monumental litigation advancing rights under the New Mexico Constitution. *See* Flores Aff., Ex. 2, at ¶¶ 6-12. Laura Ives and Adam Flores charge \$475 and \$375 per hour,

respectively and their associates, Martha Mulvany and Alyssa D. Quijano charge \$350 and \$325 per hour. *See* Flores Aff., Ex. 2. These rates are consistent with the rates charged by other attorneys with comparable levels of skill and experience. *See* Smith Aff., Ex. 3 at ¶¶ 9-24.

4. Class Counsel Expended Substantial Effort.

Preparation for litigation in this case began long before the lawsuit was filed and included, interviews of claimants and potential class representatives, extensive legal research, administrative advocacy and policy work from NMCLP, and a public records lawsuit to obtain documents necessary for investigating Plaintiffs' claims. After filing, litigation proceeded for twenty months, with no compensation for class counsels' services during that time. The time required to develop the case and negotiate a complex class action settlement like this on a contingent fee basis prevented NMCLP from taking on other important advocacy and prevented class counsel from taking competing opportunities to generate revenue to support the day-to-day overhead of a law firm and nonprofit. Few firms, especially in New Mexico where contingent-fee firms are mostly small and the larger firms tend to be business law or defense oriented, are willing or able to take on this risk or can afford not to take on other, more immediately paying work. It is notable that when NMCLP sought co-counsel for this case, no other experienced civil rights attorneys other than Ives & Flores were able to participate in the representation. Settlement discussions were protracted and difficult and several sessions were conducted over an almost two-year period. The parties exchanged terms sheets, drafts of the Agreement, regulations and proposed forms, criteria for blanket waiver requests and strategized to obtain approval from USDOL. Class counsel worked relentlessly and effectively in advancing the case towards the final settlement. Given the time expended in the case, the complexity of the issues, and the quality of the relief obtained for tens of thousands of New Mexicans, the \$400,000 fee award is reasonable.

5. The Percentage of Recovery Doctrine Supports the Requested Fee.

The percentage of recovery doctrine also supports Plaintiffs’ requested fee. *See Microsoft Corp.*, 2007-NMCA-007, ¶ 33. The value of the benefit to the class in this case is over \$100 million. As such, the requested payment of \$400,000 to class counsel for fees represents less than one half of one percent of the total recovery in the case. The funds paid to class counsel are paid separately and not taken from any funds shared with the class.

E. Costs

Plaintiffs request that the Court award costs incurred to bring this case to settlement, currently totaling \$248.00. *See* NMSA 1978, § 41-4A-5 (2021) (permitting the Court to shift litigation costs to defendants in CRA cases). Defendants have agreed to pay Plaintiffs’ litigation costs. To date, Plaintiffs have incurred the following costs necessary for this litigation:

Date	Description	Amount
3/27/23	Civil Complaint	\$144.00
4/21/23	Summons	\$13.00
5/4/23	Affidavit of Service	\$13.00
10/25/23	Request for Hearing/Scheduling Conference	\$13.00
5/6/24	Motion to Withdraw Martha E. Mulvany	\$13.00
6/3/24	Motion to Vacate Scheduling Order	\$13.00
10/31/24	Joint Motion to Approve Settlement Agreement	\$13.00
11/6/24	Request for Hearing/Settlement Approval	\$13.00
11/14/24	Motion to Continue and Reset Hearing	\$13.00
TOTAL:		\$248.00

F. New Mexico Gross Receipts Tax

Class counsel with Ives & Flores must pay gross receipts tax on their fees. *See* NMSA 1978 7-9-1 through 117. Defendants agreed to pay these expenses in the Settlement Agreement. Payment of taxes is a reasonable and necessary litigation expense for which class counsel should be compensated. Courts in New Mexico have specifically held that class counsel is entitled to recover gross receipts taxes. *See Campbell v. Travelers Insurance Company, Inc., Santa Fe County*, No. D-0101-CV-2000- 00175 (awarding fees and payment of gross receipts tax); *Dichter v. BP America Production Co., Santa Fe County*, No. D-0101-CV-2000-001620 (granting class counsel’s application for attorneys’ fees and finding “an award of monies for the expense of New Mexico gross receipts tax liability is appropriate.”); *see also Mills v. Zurich Insurance Company of America, Bernalillo County*, No. D-202-CV 2003-01471; *Berry v. Fed. Kemper*, D-0101-CV-2000- 2602 (awarding gross receipts tax in modal premium class action case). Ives & Flores is requesting reimbursement of gross receipts taxes on its portion of the attorneys’ fee at the Bernalillo County rate of 7.625%, totaling \$15,250.

CONCLUSION

For all the reasons set forth above, Plaintiffs respectfully request that the Court approve an incentive award to the class representatives in the amount of \$10,000 and award attorneys’ fees in the amount of \$400,000, plus litigation costs in the amount of \$248, and gross receipts taxes in the amount of \$15,250, for taxes on the portion of attorneys’ fees owed to class counsel Ives & Flores. The total amount requested is \$50,000 in class representative incentives for five named plaintiffs and \$415,498 in attorneys’ fees, gross receipts taxes, and litigation costs.

Respectfully submitted,

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