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10
 11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 OAKLAND DIVISION

15 VIETNAM VETERANS OF AMERICA, *et al.*,
 16 Plaintiffs,
 17 v.
 18 CENTRAL INTELLIGENCE AGENCY, *et al.*,
 19 Defendants.

Case No. CV 09-0037-CW

**PLAINTIFFS' SUPPLEMENTAL
 BRIEF FOR APPROVAL OF
 SETTLEMENT REGARDING
 PLAINTIFFS' CLAIM FOR
 ATTORNEYS' FEES AND
 EXPENSES**

Judge Claudia Wilken

Complaint filed January 7, 2009

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I. FACTUAL AND PROCEDURAL BACKGROUND..... 1

II. ARGUMENT 2

 A. Plaintiffs Are Entitled to Attorneys’ Fees and Costs Under the EAJA and Under the Parties’ Settlement Agreement..... 2

 B. The Court Should Approve the Settlement Amount for Fees and Costs. 3

 C. The Court Should Approve the Service Awards..... 6

 D. Direct Notice to the Class Is Not Required..... 9

III. CONCLUSION 10

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Cases

Briggs v. United States,
No. C 07-05760 WHA, 2010 WL 1759457 (N.D. Cal. Apr. 30, 2010).....4

Camacho v. Bridgeport Fin., Inc.,
523 F.3d 973 (9th Cir. 2008).....5

Chan v. Sutter Health Sacramento Sierra Region,
No. LA CV15-02004 JAK (AGRx), 2016 WL 7638111
(C.D. Cal. June 9, 2016).....9, 10

Comm’r, I.N.S. v. Jean,
496 U.S. 154 (1990).....5

Cunningham v. Cty. of Los Angeles,
879 F.2d 481 (9th Cir. 1988).....4

Godshall v. Franklin Mint Co.,
No. 01-CV-6539, 2004 WL 2745890 (E.D. Pa. Dec. 1, 2004).....9

Hensley v. Eckerhart,
461 U.S. 424 (1983).....3

Holman v. Experian Info. Sols., Inc.,
No. 11-CV-0180 CW (DMR), 2014 WL 7186207 (N.D. Cal. Dec. 12, 2014).....7

In re Apple Computer, Inc. Derivative Litig.,
No. C 06-4128 JF(HRL), 2008 WL 4820784 (N.D. Cal. Nov. 5, 2008)3

In re High-Tech Emp’t Antitrust Litig.,
No. 11-CV-02509 LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015).....9

In re Linerboard Antitrust Litig.,
No. MDL 1261, 2004 WL 1221350 (E.D. Pa. June 2, 2004)9

In re Nat’l Collegiate Athletic Ass’n Athletic Grant-In-Aid Cap Antitrust Litig.,
No. 4:14-md-2541-CW, 2017 WL 6040065 (N.D. Cal. Dec. 6, 2017).....7, 9

In re Yahoo Mail Litig.,
No. 13-CV-4980-LHK, 2016 WL 4474612 (N.D. Cal. Aug. 25, 2016).....9

Ingram v. Coca-Cola Co.,
200 F.R.D. 685 (N.D. Ga. 2001).....3

1 *Laguna v. Coverall N. Am., Inc.*,
753 F.3d 918 (9th Cir. 2014).....3, 4

2 *Love v. Reilly*,
3 924 F.2d 1492 (9th Cir. 1991).....6

4 *Pan v. Qualcomm Inc.*,
5 No. 16-cv-01885 JLS-DHB, 2017 WL 3252212
(S.D. Cal. July 31, 2017).....9

6 *Sorenson v. Mink*,
7 239 F.3d 1140 (9th Cir. 2001).....5

8 *Syed v. M-I, L.L.C.*,
9 No. 1:12-cv-01718 DAD-MJS, 2017 WL 3190341
(E.D. Cal. July 27, 2017)9

10 *Thompson v. Gomez*,
11 45 F.3d 1365 (9th Cir. 1995).....5

12 *United States v. 313.34 Acres of Land*,
13 897 F.2d 1473 (9th Cir. 1989).....2

14 *Van Vranken v. Atl. Richfield Co.*,
901 F. Supp. 294 (N.D. Cal. 1995)9

15 *Wehlage v. Evergreen at Arvin LLC*,
16 No. 4:10-CV-05839-CW, 2012 WL 4755371 (N.D. Cal. Oct. 4, 2012).....3, 7, 9

17 *Wren v. RGIS Inventory Specialists*,
No. C-06-0578 JCS, 2011 WL 1838562 (N.D. Cal. April 1, 2011)7

18 **Statutes and Other Authorities**

19 28 U.S.C. § 2412(d)(1)(A).....2

20 Fed. R. Civ. P.

21 Rule 23(h)1, 2

22 Rule 23(b)(2).....9

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MEMORANDUM OF POINTS AND AUTHORITIES

1 Pursuant to the stipulation and order entered July 17, 2017 (ECF No. 602), Plaintiffs
2 hereby provide notice to inform the Court that the parties have reached a settlement to resolve
3 their dispute over Plaintiffs' right to attorneys' fees and expenses under the Equal Access to
4 Justice Act ("EAJA"). The Army has agreed to pay and Plaintiffs have agreed to accept, subject
5 to the Court's approval, \$3,400,000 for fees and costs and \$160,000 for service awards (or
6 \$20,000 each) for the eight individual named plaintiffs, Bruce Price, Franklin D. Rochelle, Eric P.
7 Muth, David C. Dufrane, Tim Michael Josephs, William Blazinski, and the heirs of Wray Forrest
8 and Larry Meiorow, who passed away during the litigation. Pursuant to Rule 23(h) of the Federal
9 Rules of Civil Procedure, Plaintiffs now move for the Court's approval of this settlement
10 regarding fees and costs.

I. FACTUAL AND PROCEDURAL BACKGROUND

11
12
13 Plaintiffs filed the original complaint in this action on January 7, 2009, on behalf of a
14 class of veterans who served as human test subjects during government-conducted chemical and
15 biological weapons experiments. This case was heavily litigated by all parties for nearly a
16 decade. Plaintiffs overcame several motions to dismiss, a motion for judgment on the pleadings,
17 extensive discovery fights, challenges to class certification, a cross-motion for summary
18 judgment, and appeals to the Ninth Circuit. (ECF Nos. 29, 34, 57, 59, 187, 233, 281, 423, 430,
19 485, 495, 517, 537-543, 567, 570.) Ultimately, Plaintiffs prevailed, and the Court ordered the
20 Army to provide notice and medical care to all class members. (ECF Nos. 545, 597.) The Court
21 entered an Amended Judgment in favor of Plaintiffs on April 19, 2017. (ECF No. 598.)

22 Following the entry of final judgment, the parties diligently negotiated at arm's length for
23 over a year to resolve Plaintiffs' claim for attorneys' fees and expenses under the EAJA.
24 Plaintiffs sent an initial proposal with detailed time records to defense counsel on June 1, 2017.
25 (ECF No. 603-1 ¶ 35.) To allow additional time to pursue a settlement, the parties filed a
26 stipulation requesting that the Court stay litigation over Plaintiffs' motion for fees and costs on
27 July 12, 2017. (ECF No. 601.) The Court ordered the stay on July 17, 2017. (ECF No. 602.) As
28 contemplated by the stipulation, Plaintiffs timely filed their fee petition on July 18, 2017. (ECF

1 No. 603.) Since then, the parties have negotiated at length over numerous telephone conferences
2 and through written correspondence in an attempt to settle the fee request without burdening the
3 Court. (Declaration of James P. Bennett (“Bennett Decl.”) ¶ 2.)

4 On August 17, 2018, the parties executed a stipulation and agreement regarding fees.
5 (ECF No. 615.) The Army agreed to pay and Plaintiffs agreed to accept, subject to the Court’s
6 approval, \$3,400,000 for fees and costs and \$20,000 each for service awards for the eight named
7 plaintiffs. (*Id.* at 2.) The matter of attorneys’ fees was not negotiated by the parties until after the
8 case had otherwise concluded on the merits and final judgment was entered. (Bennett Decl. ¶ 3.)
9 The proposed settlement currently before the Court will have no impact on the injunctive relief
10 ordered by the Court. It pertains only to Plaintiffs’ request for fees and costs under the EAJA.

11 **II. ARGUMENT**

12 **A. Plaintiffs Are Entitled to Attorneys’ Fees and Costs Under the EAJA and** 13 **Under the Parties’ Settlement Agreement.**

14 “In a certified class action, the court may award reasonable attorney’s fees and nontaxable
15 costs that are authorized by law or by the parties’ agreement.” Fed. R. Civ. P. 23(h). Here,
16 Plaintiffs are entitled to attorneys’ fees and costs on either basis.

17 As explained in Plaintiffs’ prior brief, Plaintiffs are entitled to fees and costs under the
18 EAJA. The EAJA states that “a court shall award to a prevailing party other than the United
19 States fees and other expenses” in “any civil action . . . , including proceedings for judicial review
20 of agency action, brought by or against the United States in any court having jurisdiction of that
21 action.” 28 U.S.C. § 2412(d)(1)(A); *see also United States v. 313.34 Acres of Land*, 897 F.2d
22 1473, 1477 (9th Cir. 1989) (“[T]he ‘shall . . . unless’ language of the EAJA creates the
23 presumption of a fee award.” (citation omitted)). For the reasons stated in Plaintiffs’ Motion for
24 Attorneys’ Fees and Expenses, Plaintiffs satisfied the EAJA’s requirements and are entitled to an
25 award of fees and costs. (ECF No. 603.)

26 Furthermore, Plaintiffs are entitled to attorneys’ fees and costs pursuant to the stipulation
27 and agreement between the parties. The parties in this case entered into an agreement that settles
28 Plaintiffs’ fees and costs claim under the EAJA. (ECF No. 615.) Pursuant to the agreement,

1 payment will be made directly to Plaintiffs' counsel and will not have any impact on the relief
2 awarded to any individual class member. (*Id.* at 2-3.)

3 **B. The Court Should Approve the Settlement Amount for Fees and Costs.**

4 The Court should approve the parties' agreed-upon amount of \$3,400,000 in attorneys'
5 fees and costs, because the agreed-upon amount is reasonable and fair. The parties negotiated at
6 arm's length to arrive at a fee that all parties concluded is reasonable. (Bennett Decl. ¶ 3.) The
7 matter of attorneys' fees was not negotiated by the parties until after the case had otherwise
8 concluded on the merits and Final Judgment was entered. (*Id.* ¶ 2.) The award of fees and costs
9 will be paid directly by the Army and will not affect the injunctive relief benefiting the Class.
10 (ECF No. 615 at 2-3.)

11 Under these circumstances, "the agreed amounts for attorneys' fees and expenses, and
12 service awards for the Class Representatives, are presumed to be reasonable." *Wehlage v.*
13 *Evergreen at Arvin LLC*, No. 4:10-CV-05839-CW, 2012 WL 4755371, at *1 (N.D. Cal. Oct. 4,
14 2012); *see also Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees
15 should not result in a second major litigation. Ideally, of course, litigants will settle the amount of
16 a fee."); *In re Apple Computer, Inc. Derivative Litig.*, No. C 06-4128 JF(HRL), 2008 WL
17 4820784, at *3 (N.D. Cal. Nov. 5, 2008) (citation omitted) ("A court should refrain from
18 substituting its own value for a properly bargained-for agreement."); *Ingram v. Coca-Cola Co.*,
19 200 F.R.D. 685, 695 (N.D. Ga. 2001) (absent evidence of collusion or detriment to a party, the
20 court "should give substantial weight to a negotiated fee amount, assuming that it represents the
21 parties' best efforts to understandingly, sympathetically, and professionally arrive at a settlement
22 as to attorney's fees"). The Ninth Circuit has "made clear that 'since the proper amount of fees is
23 often open to dispute and the parties are compromising precisely to avoid litigation, the court
24 need not inquire into the reasonableness of the fees at even the high end with precisely the same
25 level of scrutiny as when the fee amount is litigated.'" *Laguna v. Coverall N. Am., Inc.*, 753 F.3d
26 918, 922 (9th Cir. 2014) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 966 (9th Cir. 2003))
27 (vacated and dismissed as moot because the parties subsequently reached a settlement regarding
28 the appeal, 772 F.3d 608 (9th Cir. 2014)).

1 The agreed upon amount is reasonable when compared to a lodestar. “The lodestar
2 method [for calculating a reasonable attorneys’ fee] is most appropriate where the relief sought is
3 ‘primarily injunctive in nature,’ and a fee-shifting statute authorizes ‘the award of fees to ensure
4 compensation for counsel undertaking socially beneficial litigation.’” *Laguna*, 753 F.3d at 922
5 (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011)). A
6 lodestar figure is “presumptively reasonable.” *Cunningham v. Cty. of Los Angeles*, 879 F.2d 481,
7 488 (9th Cir. 1988) (citation omitted).

8 The settlement amount of \$3.4 million is a fraction of the fees actually incurred by Class
9 Counsel. After over nine years of contentious litigation, the total amount of Plaintiffs’ attorneys’
10 fees exceeds \$20 million. (ECF No. 603-1 ¶¶ 4-5.) After an extensive effort to voluntarily
11 narrow the fees requested, Plaintiffs submitted contemporaneous billing records for attorneys’
12 fees and costs totaling more than \$9 million. (ECF No. 603-2 at 255; ECF No. 604 at 2.) More
13 specifically, Plaintiffs submitted billing records for 16,309 hours and \$836,864.71 in costs. (ECF
14 No. 603-2 at 255; ECF No. 604 at 2.) At the EAJA’s rates for all timekeepers except Gordon
15 Erspamer—who should receive an enhanced rate for the reasons explained in Plaintiffs’ motion
16 (ECF No. 603 at 17-19)—the requested amount for fees and costs is \$4,515,868.21. (Bennett
17 Decl. ¶ 4.) Even without an enhanced rate for Mr. Erspamer, the requested amount for fees and
18 costs would be over \$3.8 million. (*Id.*) Plaintiffs are willing to accept the lower settlement
19 amount of \$3.4 million to avoid burdening the Court, in the interest of compromise, and to
20 account for the risk inherent in any continuing litigation. Because all of these figures exceed the
21 settlement amount of \$3.4 million, the settlement amount is presumptively reasonable.
22 *Cunningham*, 879 F.2d at 488; *see also Briggs v. United States*, No. C 07-05760 WHA, 2010 WL
23 1759457, at *8 (N.D. Cal. Apr. 30, 2010) (approving negotiated fee award *higher* than the Court’s
24 EAJA rate calculation, but still “within the range of attorney’s fees that would likely have been
25 awarded had the Court been tasked with such a determination,” as a “fair and reasonable award”).

26 Moreover, these figures are significantly lower than an appropriate lodestar. In the first
27 instance, Plaintiffs’ request limited the number of timekeepers (by excluding all time spent by
28 several attorneys, paralegals, and other members of the team) and the number of hours from the

1 remaining timekeepers (by excluding time spent on numerous tasks, including litigating discovery
2 disputes, obtaining and reviewing discovery from defendants who were ultimately dismissed,
3 preparing for and taking several depositions, researching numerous legal and factual questions,
4 and communicating with class members). (ECF No. 603 at 8, 17-21.) These fees are recoverable
5 under the EAJA. *See, e.g., Sorenson v. Mink*, 239 F.3d 1140, 1147 (9th Cir. 2001) (declining to
6 reduce plaintiffs’ award under EAJA where plaintiffs “obtained excellent results” and their
7 successful and unsuccessful claims “involved a common core of facts’ and were ‘based on related
8 legal theories’”).¹ Even so, Plaintiffs voluntarily eliminated millions of dollars in fees before
9 filing their request with the Court in order to streamline these proceedings, avoid unnecessary
10 briefing, work expeditiously toward a settlement, and limit the burden on the Court.

11 These amounts further understate the fees to which Plaintiffs are entitled, because they do
12 not include any fees incurred after June 2017. Plaintiffs’ initial request was filed on July 18,
13 2017, and thus it only included fees and expenses incurred through June 30, 2017. (ECF No. 603
14 at 16, n.4) The stipulation and order entered by the Court anticipated a supplemental fee request.
15 (ECF No. 602 at 3 (“Plaintiffs may file a supplemental fees petition seeking recovery for time
16 spent after June 30, 2017, including additional work on the fees filings.”).) Supplemental fee
17 requests are permitted under the EAJA. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 981 (9th
18 Cir. 2008) (quoting *In re Nucorp Energy, Inc.*, 764 F.2d 655, 659-660 (9th Cir. 1985)) (“In
19 statutory fee cases, federal courts, including our own, have uniformly held that time spent in
20 establishing the entitlement to and amount of the fee is compensable.”); *see also Comm’r, I.N.S.*
21 *v. Jean*, 496 U.S. 154, 163 (1990) (awarding fees for fees in EAJA case); *Thompson v. Gomez*, 45

23 ¹ Here, Plaintiffs achieved excellent results and obtained substantial benefits on behalf of
24 the class. For decades, the Army ignored its legal obligation under its own regulations to provide
25 medical care for class members and to notify them of newly acquired information that may affect
26 their well-being. (ECF No. 507 at 17, 25-26.) As a result of this case, the Army set up a program
27 to provide ongoing medical treatment for class members, and the Army continues to work toward
28 sharing newly acquired information. (ECF No. 609; ECF No. 610.) Plaintiffs were also released
from their secrecy oaths. (ECF No. 245-18 at 5; ECF No. 496-61 at 1.) Accordingly, Plaintiffs
have obtained excellent and lasting benefits for the class. (*See also* ECF No. 603 at 17-21
(describing Plaintiffs’ success in greater detail).) Additionally, Plaintiffs’ unsuccessful claims
were related to the successful claims and based on the same common core of facts, i.e., human
experimentation by the government on service members. (ECF No. 486; ECF No. 603 at 17.)

1 F.3d 1365, 1366 (9th Cir. 1995) (quoting *Clark v. City of Los Angeles*, 803 F.2d 987, 922 (9th
2 Cir. 1986) (“Recoverable attorney’s fees may include fees incurred while doing work on the
3 underlying merits of the action (‘merits fees’) as well as fees incurred while pursuing merits fees
4 (‘fees-on-fees’).”); *Love v. Reilly*, 924 F.2d 1492, 1497 (9th Cir. 1991) (Once a party has
5 established that it is entitled to an award of fees and costs under the EAJA, it is “automatically
6 entitled to attorney’s fees for any fee litigation.”). Since June 30, 2017, Plaintiffs have reasonably
7 spent considerable time and effort pursuing their right to an award of fees under the EAJA,
8 including, but not limited to: (1) reviewing time notes for all billers; (2) voluntarily and
9 significantly narrowing the fee request in an effort reduce the burden on the Court;
10 (3) researching EAJA standards; (4) preparing the original fee application, including the opening
11 brief, supporting declarations, itemized spreadsheets of fees and costs, and supporting receipts
12 and documentation; (5) researching and preparing an administrative motion to accept the bill of
13 costs as timely; (6) pursuing settlement with Defendants, including preparing and making an
14 initial opening offer, evaluating Defendants’ responses, and calculating new counteroffers in
15 response; (7) preparing the present motion and accompanying declaration; and (8) working with
16 class members and opposing counsel to monitor compliance with the Court’s injunctions. (*See*
17 *Bennett Decl.* ¶ 3.) Because Plaintiffs would be entitled to the additional fees incurred in excess
18 of the amount already before the Court, this further supports the reasonableness of the agreed
19 upon settlement amount.

20 The Court should approve the agreed upon amount of \$3,400,000 for attorneys’ fees and
21 costs pursuant to stipulation and settlement between the parties, because it is fair and reasonable.

22 **C. The Court Should Approve the Service Awards.**

23 The parties’ request for service awards should also be granted. As part of the settlement
24 of Plaintiffs’ claim for attorneys’ fees, the Army has agreed to pay service awards of \$20,000 to
25 each named plaintiff, or \$160,000 in total, to compensate them for their significant work on
26 behalf of the class. The named plaintiffs have expended substantial time and energy over the past
27 nine years to prosecute this action. The requested service awards are reasonable in amount and
28 appropriate under the circumstances of this case.

1 “Service awards for class representatives are provided to encourage them to undertake the
2 responsibilities and risks of representing the classes and to recognize the time and effort spent in
3 the case.” *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-In-Aid Cap Antitrust Litig.*,
4 No. 4:14-md-2541-CW, 2017 WL 6040065, at *11 (N.D. Cal. Dec. 6, 2017) (citing *Rodriguez v.*
5 *West Publ’g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009)), *appeal filed*, No. 18-15054 (9th Cir.
6 2018). “It is well-established in this circuit that named plaintiffs in a class action are eligible for
7 reasonable incentive payments, also known as service awards. In fact, the Ninth Circuit recently
8 noted that incentive payments to named plaintiffs have become ‘fairly typical’ in class actions.”
9 *Wren v. RGIS Inventory Specialists*, No. C-06-0578 JCS, 2011 WL 1838562, at *31 (N.D. Cal.
10 April 1, 2011) (quoting *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009))
11 (internal citation omitted).

12 When approving service awards in cases obtaining injunctive relief, this Court has looked
13 to the following considerations:

14 In addition to lending their names to this case, and thus subjecting
15 themselves to public attention, [the named plaintiffs] actively
16 participated in the litigation, consulting with Class Counsel on a
17 regular basis. Moreover, the [service awards] requested here will
18 be paid directly by Defendants, will not affect the injunctive relief
19 benefiting the Class, and are reasonable in amount.

20 *Wehlage*, 2012 WL 4755371, at *4-5 (citations omitted). More specifically, the Court considers
21 the “time assisting in the litigation of this case, in preparing for and having their depositions
22 taken, in searching for and producing documents that spanned many years, and in conferring with
23 counsel throughout the litigation.” *In re Nat’l Collegiate Athletic Ass’n*, 2017 WL 6040065, at
24 *11. “Incentive awards ‘compensate class representatives for work done on behalf of the class, to
25 make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to
26 recognize their willingness to act as a private attorney general.’” *Id.*²

27 _____
28 ² In some cases, these considerations are summarized using a five-factor test: “(1) the risk
to the class representative in commencing a class action, both financial and otherwise; (2) the
notoriety and personal difficulties encountered by the class representative; (3) the amount of time
and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal
benefit, or lack thereof, enjoyed by the class representative as a result of the litigation.” *Holman*
v. Experian Info. Sols., Inc., No. 11-CV-0180 CW (DMR), 2014 WL 7186207, at *5 (N.D. Cal.

1 Here, the named plaintiffs actively participated in this case for nearly 10 years and were
2 essential to its success. Each named plaintiff was subjected to a deposition. (Bennett Decl.
3 ¶¶ 6-14.) They searched for and produced documents in response to Defendants’ requests for
4 production. (*Id.*) They provided information for numerous court filings and for responses to
5 Defendants’ interrogatories. (*Id.*) They participated in mediation and attended court hearings.
6 (*Id.*) The named plaintiffs pressed members of Congress to act on behalf of the class. (*Id.*) They
7 agreed to participate in interviews with the media, reliving their experiences publicly in order to
8 increase awareness and public pressure on the government. (*Id.* ¶ 6.) And they regularly
9 conferred with class counsel by email and telephone to discuss case developments and provide
10 direction. (*Id.* ¶¶ 6-14.)

11 The named plaintiffs incurred particularly high costs and reputational risk in this case.
12 They put their private medical and mental conditions into public scrutiny. (*Id.*) They suffered an
13 emotional toll in reliving painful past experiences as test subjects. (*Id.*) They risked retribution,
14 because many of the named plaintiffs were already recipients of disability or other benefits from
15 the very governmental entities against which they filed suit. (*Id.*) They risked reputational harm
16 by speaking out against the government and armed services in which they proudly served, but
17 which subsequently treated them unfairly and denied them care. (*Id.*) In bringing this case under
18 the Administrative Procedure Act to enforce the Army’s regulations and compel agency action
19 that had been unlawfully withheld, the named plaintiffs acted as private attorneys general on
20 behalf of the entire class. (*See* ECF No. 486 at 12.) Despite incurring these additional burdens on
21 behalf of their fellow class members, the named plaintiffs will not receive personal benefits
22 beyond the class.³ Their considerable time and effort is properly compensable by a service
23 award.

24 Service awards of \$20,000 per class representative are “consistent with service awards in
25

26 Dec. 12, 2014) (citing *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal.
1995)).

27 ³ In fact, several of the named plaintiffs do not intend to apply for or accept medical care
28 under the program provided by the injunction, because they are already receiving medical care
elsewhere and will continue with their current treatment regimens.

1 other cases.” *In re Nat’l Collegiate Athletic Ass’n*, 2017 WL 6040065, at *11 (approving awards
2 of \$20,000 and citing other cases between \$15,000 and \$120,000); *see also Pan v. Qualcomm*
3 *Inc.*, No. 16-cv-01885 JLS-DHB, 2017 WL 3252212, at *14 (S.D. Cal. July 31, 2017)
4 (“\$50,000.000-per-Class-Representative award is reasonable”); *Syed v. M-I, L.L.C.*, No. 1:12-cv-
5 01718 DAD-MJS, 2017 WL 3190341, at *9 (E.D. Cal. July 27, 2017) (awarding \$15,000 and
6 \$20,000 to two class representatives); *In re High-Tech Emp’t Antitrust Litig.*, No. 11-CV-02509
7 LHK, 2015 WL 5158730, at *17 (N.D. Cal. Sept. 2, 2015) (authorizing \$80,000 and \$120,000
8 service awards); *Godshall v. Franklin Mint Co.*, No. 01-CV-6539, 2004 WL 2745890 (E.D. Pa.
9 Dec. 1, 2004) (granting incentive award of \$20,000 to each plaintiff); *In re Linerboard Antitrust*
10 *Litig.*, No. MDL 1261, 2004 WL 1221350, at *18-19 (E.D. Pa. June 2, 2004) (awarding \$25,000
11 for each of five class representatives and collecting cases in which awards of \$24,000 or more
12 were authorized); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995)
13 (authorizing \$50,000 incentive award). Moreover, unlike a case in which service awards are
14 subtracted from the common fund, the proposed service awards in this case will have no impact
15 on the other class members, for whom the Court has already entered final judgment and
16 injunctive relief. The Army has agreed to pay these awards directly to the named plaintiffs.
17 (ECF No. 615 at 2-3.) Under these circumstances, “service awards for the Class Representatives,
18 are presumed to be reasonable.” *Wehlage*, 2012 WL 4755371, at *1 (citation omitted). In light of
19 the burdens described above, service awards of \$20,000 are fair and reasonable.

20 **D. Direct Notice to the Class Is Not Required.**

21 Plaintiffs are not required to give direct notice of the proposed settlement regarding fees
22 and costs. The Court certified the class under Rule 23(b)(2). (ECF No. 485 at 51.) “[B]ecause
23 Rule 23(b)(2) provides only injunctive and declaratory relief, ‘notice to the class is not required.’”
24 *In re Yahoo Mail Litig.*, No. 13-CV-4980-LHK, 2016 WL 4474612, at *5 (N.D. Cal. Aug. 25,
25 2016) (quoting *Lyon v. United States Immigration & Customs Enforcement*, 300 F.R.D. 628, 643
26 (N.D. Cal. 2014)); *see also Chan v. Sutter Health Sacramento Sierra Region*, No. LA CV15-
27 02004 JAK (AGR_x), 2016 WL 7638111, at *14 (C.D. Cal. June 9, 2016) (citing Fed. R. Civ. P.
28 23(c)(2)(A)). Furthermore, class members’ rights will not be prejudiced by this settlement

1 agreement, because they will still “receive the benefit of the injunctive relief” ordered by the
2 Court, and they “do not release any statutory damages claims or claims for monetary relief.”
3 *Chan*, 2016 WL 7638111 at *13.

4 Plaintiffs’ counsel have maintained a class website (edgewoodtestvets.org) since shortly
5 after the complaint was filed in 2009, routinely use it to communicate with class members, and
6 regularly post all significant court filings. (Bennett Decl. ¶ 5.) Plaintiffs’ motion for attorneys’
7 fees and supporting documentation have been available to class members on this website for more
8 than a year. (*Id.*) The present motion for approval, supporting documents, and stipulation with
9 opposing counsel will be posted concurrently with this filing with the Court. (*Id.*)

10 **III. CONCLUSION**

11 For the reasons stated above, Plaintiffs respectfully request that the Court award to its
12 counsel \$3,400,000 in fees and costs and to each named plaintiff a service award of \$20,000
13 (\$160,000 total) pursuant to the stipulation and settlement agreement between the parties.

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15 Dated: August 17, 2018

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