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Attorneys for Petitioners and Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

21 Wendell G. Moen, Jay Davis, Donna Ventura, Gregory M.  
22 Bianchini, Alan Hindmarsh, Cal Wood and Sharon Wood, on  
23 behalf of Themselves and Others Similarly Situated,  
24  
25  
26 v.  
27 Regents of University of California, and Does, 1-99 through  
28 99, inclusive,  
Respondents. /

No. RG 10530492

**Ex Parte Application to: (1) Approve Legal Structure to Implement Settlement Agreement; (2) Designate QSF as Responsible for Funding and Indemnification; and (3) Designate LCASE as Successor to UCLRG for Purposes of Final Approval Order.**

**FILED**  
ALAMEDA COUNTY

MAY 17 2021  
CLERK OF THE SUPERIOR COURT  
By *[Signature]*  
Deputy

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Introduction

This Ex Parte Application, supported by the Court Monitor and Court-appointed Settlement Administrator and QSF Administrator, ARCHER Systems, asks the Court (1) to approve the legal structure established by Petitioners and ARCHER to distribute the Supplemental Payment on a tax-exempt basis; (2) designate the Qualified Settlement Fund as responsible for funding the Supplemental Payment; and (3) designate LCASE as the successor to UCLRG Legal Defense Fund (UCLRG) for purposes of repaying attorneys' fees pursuant to the Final Approval Order. The Regents have indicated that they do not oppose this application.

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Background

Joe Requa filed a Petition for Writ of Mandate on August 13, 2010, seeking restoration of University-sponsored health care benefits for UC retirees who had worked at the Lawrence Livermore National Laboratory (LLNL or Laboratory). These benefits were terminated by The Regents on October 1, 2007 when the U.S. Dept. of Energy awarded the contract to manage the Laboratory to Lawrence Livermore National Security (LLNS). After more than nine years, and two successful appeals, Requa v. Regents of Univ. of Cal., 213 Cal.App.4th 213 (2012), and Moen v. Regents of Univ. of Cal., 25 Cal.App.5th 845 (2018), the case settled on December 11, 2019.

The Court granted preliminary approval on December 20, 2019. Order Granting Preliminary Approval, p. 3, ¶ 1, et seq. The Court appointed ARCHER Systems as Settlement Administrator and directed ARCHER to establish a Qualified Settlement Fund (QSF) and act as QSF Administrator. The Court entered a Final Approval Order on April 10, 2020. ARCHER was directed to continue as Settlement Administrator and QSF Administrator. Order re Preliminary Approval, ¶¶ 6, 17, Final Approval Order, ¶¶ 8-10, 16-18.

The Final Approval Order incorporates the Settlement Agreement "as if explicitly set forth herein ... with the full force and effect of an order of this Court." Final Approval Order, ¶ 10. The Order directs "The Parties and Settlement Administrator ... to implement this Final Approval Order and Judgment and the Settlement Agreement in accordance with the terms and provisions thereof, including processing the payments provided for under the Settlement Agreement." Id. ¶ 17.

The Regents will pay \$80 million over seven years, plus \$4 million for benefit counselors and \$500,000 for administration costs. Settlement Agreement, Sinclair Decl., filed herewith, Exh. 3 at Exh.

1 A (Settlement Agreement) ¶ V-A-2. The required payments to date have all been paid. The \$80 million  
2 is being distributed to the class as three different benefits: (1) an Initial \$1000 Payment to all class  
3 members, living and deceased (approximately \$9 million); (2) Past Damages for class members, living  
4 and deceased, who incurred damages “as the result of the difference in premium costs between health  
5 care plans provided by LLNS and University-sponsored group health care plans” (approximately \$11  
6 million); and (3) an annual Supplemental Payment to living class members for the next 20 years  
7 (approximately \$60 million). Settlement Agreement, ¶ V-A-3.

8 The Supplemental Payment augments health care benefits currently provided by LLNS and will  
9 continue for 20 years (beginning in 2021) or until 1,000 or fewer class members are living, whichever  
10 occurs first, at which time the remaining funds will be distributed to class members who are alive at  
11 that time. Settlement Agreement, ¶ V-A-14, Schedule A, ¶ 5 & Schedule C.

12 While the Initial \$1000 Payment and the Past Damages Payment are expected to be taxable,  
13 the Supplemental Payment is “structured to avoid being taxable in light of their characterization as  
14 payments that fall within IRC § 501(c)(9).” *Id.* V-A-16. This Ex Parte Application asks the Court to  
15 approve the legal structure put in place to ensure that the Supplemental Payment is not taxed.

#### 16 Legal Structure to Maintain Tax Exemption of Supplemental Payment

17 To keep the Supplemental Payment tax exempt, the Settlement Agreement provides that  
18 Petitioners will establish a Voluntary Employees Beneficiary Association (VEBA), Settlement  
19 Agreement, ¶ V-A-4-(i) & (iii), exempt from taxation under IRC § 501(c)(9).

20 VEBAs usually involve an employer or a union. See, e.g., Doe v. United Behav. Health, No. 17-  
21 CV-06456-YGR, 2018 WL 2197532, at \*2 (N.D. Cal. May 14, 2018); Wise v. Maximus Fed. Servs., Inc.,  
22 No. 18-CV-07454-LHK, 2019 WL 3554376, at \*1 (N.D. Cal. Aug. 5, 2019). But here, “The Regents shall  
23 not be responsible for the VEBA in any way.” Settlement Agreement, ¶ V-A-4-ii. And there is no union.  
24 Accordingly, the Settlement Agreement provides that “The Class Representatives, by virtue of their  
25 sharing an employment related common bond with the Class Members, shall establish the VEBA Trust  
26 as a ‘voluntary employees’ beneficiary association’ under IRC § 501(c)(9), and the regulations and  
27 guidance promulgated thereunder.” *Id.* ¶ V-A-4-(iii).

28 To assist in establishing an appropriate legal structure, Petitioners worked closely with ARCHER  
Systems and also retained outside counsel, Bradley Arant Boult Cummings, Nashville, TN (Bradley law

1 firm). As a first step, the Bradley law firm assisted Petitioners to set up a nonprofit corporation, the  
2 Livermore Class Action Settlement Administration and Education Funds (LCASE), which was  
3 incorporated on September 16, 2020. See Sinclair Decl. ¶¶ 18-19, Exh. 6. The LCASE Board of  
4 Directors is composed of the seven named Petitioners (Gregory Bianchini, Jay Davis, Alan Hindmarsh,  
5 Wendell Moen, Donna Ventura, Calvin D. Wood and Sharon Wood). *Id.* ¶ 19, Exh. 8.<sup>1</sup>

6 In December 2020, again with the assistance of the Bradley law firm, Petitioners signed a Trust  
7 Agreement which provides that “the Class Representatives on behalf of themselves and the Class  
8 Members they represent, including through LCASE.” The Trust Agreement, “when taken together with  
9 an appropriate vehicle, shall constitute a VEBA under IRC Section 501(c)(9),” Sinclair Decl. ¶ 20, Exh. 9,  
10 Trust Agreement, pp. 1-2; Settlement Agreement, ¶ V-A-4-(i), thus establishing the VEBA.

11 After further consultation with the Bradley law firm, ARCHER, the Court-appointed VEBA  
12 Trustee (Argent), and Petitioners determined that the Supplemental Payment must be distributed  
13 through a Health Reimbursement Arrangement (HRA). Sinclair Decl. ¶ 21; see IRC § 105(h)(6); see also  
14 I.R.S. Notice 2002-45 (guidance re HRAs); see also, e.g., 26 CFR § 1.36B-2(c)(3), 29 CFR § 2510.3-1(l).  
15 Accordingly, Petitioners, acting through LCASE, established the Livermore Retirees Health  
16 Reimbursement Arrangement Plan (Livermore Retirees HRA Plan). Sinclair Decl. ¶ 21, Exh. 10.

17 Since the Plan involves distribution of a “health and welfare benefit,” it is subject to the  
18 Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. § 1001. See  
19 Summary Plan Description for Livermore Retirees HRA Plan. Sinclair Decl. ¶ 21, Exh. 10. The Summary  
20 Plan Description (SPD) provides in relevant part: “The purpose of the Plan is to reimburse eligible  
21 members for certain medical expenses and health insurance premiums that are not otherwise  
22 reimbursed. The Plan is intended to qualify as a self-insured medical reimbursement plan for purposes  
23 of Sections 105 and 106 of the Internal Revenue Code, as amended (‘Code’), as well as a health  
24 reimbursement arrangement as defined in IRS Notice 2002-45. This Plan is also intended to be exempt  
25 from the Affordable Care Act as a separate ‘retiree-only’ plan pursuant to ERISA Section 732(a) and IRC  
26 Section 9831(a)(2).” Sinclair Decl., ¶ 21, Exh. 10 (Summary Plan Description, Introduction, p. 1).

27 <sup>1</sup> Petitioners Robert Becker and Geores Buttner passed away during the litigation. Joe Requa  
28 and Steve Hornstein withdrew for medical reason. Sinclair Decl. ¶¶ 4-5.

1 To have an HRA there must be a “plan sponsor.” See, e.g., 29 CFR § 2510.3-1(l), 45 CFR §  
2 147.126, 45 CFR § 146.123. The Code of Federal Regulations (CFR) incorporates the definition of “plan  
3 sponsor” from ERISA:

4 The term “plan sponsor” means (i) the employer in the case of an employee benefit plan  
5 established or maintained by a single employer, (ii) an employee organization in the  
6 case of plan established or maintained by an employee organization, (iii) in the case of a  
7 plan established or maintained by two or more employers or jointly by one or more  
8 employers and one or more employee organizations, the association, committee, joint  
9 board of trustees, or other similar group of representatives of the parties who establish  
10 or maintain the plan, or (iv) in the case of a pooled employer plan, the pooled plan  
11 provider.

12 29 U.S.C. § 1002(16)(B), emp. added; see 45 CFR § 144.103.

13 Since The Regents will not be acting as the plan sponsor, the only entity that could assume this  
14 role is an “employee organization.” Typically, this would be a union, but there is no union here. Based  
15 on further consultation with ARCHER and the Bradley law firm, Petitioners agreed that to facilitate  
16 formation of the HRA LCASE would act as the Plan Sponsor of the Livermore Retirees HRA Plan.

17 As the Plan Sponsor, LCASE has contracted with Willis Towers Watson (WTW) to distribute the  
18 Supplemental Payment. LCASE entered into an agreement with WTW on April 15, 2021. See Sinclair  
19 Decl. ¶ 22, Exhs. 11, 12 (WTW Master Program Agreement and WTW Statement of Work).

20 The Settlement Agreement provides that the funds distributed as the Supplemental Payment  
21 shall be under the control of ARCHER and Argent. See, e.g., Settlement Agreement , ¶¶ III-3, 27; V-A-7,  
22 16; XIII(a)(ix), (xi). Consistent with this, neither Petitioners nor LCASE will have any role in  
23 administering, distributing or exercising control over the Supplemental Payment. Accordingly, after  
24 further consultation with ARCHER and the Bradley law firm, Petitioners entered into an agreement  
25 with the QSF Administrator providing that the QSF would provide the funds necessary to satisfy  
26 LCASE’s contractual obligation to provide funds to Willis Towers Watson: “The QSF will fund the HRA as  
27 described in the MPA & SOW [Master Program Agreement and Statement of Work] and be responsible  
28 for all costs and expenses incurred by LCASE in its role as plan sponsor of the HRA,” Sinclair Decl. ¶ 23,  
Exh. 13; and further providing that the QSF will “indemnify and hold harmless LCASE directors and  
officers” from claims arising from their implementation of the Settlement Agreement. Ibid.

1 This Ex Parte Application asks the Court to approve the legal structure described above.  
2 Although Court approval may not be strictly required, given the complexity of the legal structure,  
3 Petitioners and ARCHER believe it is appropriate for the Court to endorse the structure as a reasonable  
4 means to implementing the Settlement Agreement, as required by the Final Approval Order. See ¶¶  
5 17-18, 30.

6 The QSF Will Provide Funding and Indemnify LCASE and Petitioners

7 As noted, the LLNL Retiree Qualified Settlement Fund, a separate taxable entity, will provide  
8 funds to Willis Towers Watson for the Supplemental Payment, including the costs of administering the  
9 HRAs. Likewise, the QSF will indemnify and hold Petitioners and LCASE harmless for claims arising out  
10 of LCASE implementing the Final Approval Order and Settlement Agreement, including acting as Plan  
11 Sponsor. Petitioners and ARCHER ask the Court to approve this arrangement by directing the QSF to  
12 provide funding to Willis Towers Watson to fund the Supplement Payment; and by directing the QSF to  
13 indemnify and hold Petitioners and LCASE harmless.

14 Petitioners have served without compensation as the Court-appointed Class Representatives  
15 during this litigation. Petitioners will continue to serve without compensation to implement the Final  
16 Approval Order and the Settlement Agreement, including their service as members of the LCASE Board  
17 of Directors. Petitioners agreed to form LCASE and have LCASE serve as Plan Sponsor in order to  
18 facilitate the implementation of the settlement on the terms approved by the Court. It is appropriate  
19 for the Court to approve this structure which provides a measure of protection to Petitioners.

20 LCASE as Successor to UCLRG for Purposes of the Final Approval Order

21 The UCLRG Legal Defense Fund was formed in 2009 by Joe Requa and three other retirees. The  
22 Internal Revenue Service granted tax exemption on June 15, 2012. Sinclair Decl. ¶ 2, Exhs. 1, 2. UCLRG  
23 was instrumental in raising funds to support the litigation. All funds were raised from members of the  
24 class; no funds were raised from foundations or other sources. *Id.* ¶ 26. Most of the funds went to  
25 defray expert costs, but as explained in Petitioners' Motion for Award of Attorneys' Fees, during the  
26 earlier years, UCLRG paid the four law firms that worked on the case \$446,125.46. See, Memo. ISO of  
27 Award of Attorneys' Fees (4/14/20) at p. 14; Decl. of Andrew T. Sinclair (4/15/20), at ¶¶ 98-100. After  
28 February 2016, counsel did not take any further fees because all available funds were needed for  
experts and related costs. Sinclair Decl., ¶ 98. When fees were awarded on April 10, 2020, the Court

1 directed the law firms “to return funds in the amount of \$446,125.46 to University of California  
2 Livermore Retirees Group (‘UCLRG’) Legal Defense Fund or its successor.” Final Approval Order  
3 (4/10/20), ¶ 20-b, emp. added. (The term “or its successor” was included in the proposed order  
4 submitted by Petitioners and adopted by the Court in the Final Approval Order in case Petitioners  
5 determined that it was not appropriate for UCLRG to be involved in implementing the settlement.  
Sinclair Decl. ¶ 26.)

6 After the Final Approval Order was entered on April 10, 2020, Petitioners, through class  
7 counsel, retained a law firm with expertise in nonprofit organizations (Adler & Colvin, San Francisco) to  
8 consult on what role, if any, UCLRG should play in implementing the settlement. Based on this  
9 consultation, Petitioners concluded that UCLRG should not be involved in implementing the settlement  
10 and that a new nonprofit organization should be. Accordingly, on September 16, 2020, Petitioners,  
11 with assistance from the Bradley law firm, and with the knowledge and consent of the Settlement  
12 Administrator, formed the Livermore Class Action Settlement Administration and Education Fund, Inc.  
13 (LCASE) with the corporate purpose of “ensur[ing] compliance with the terms of that certain  
14 Stipulation of Class Action Settlement and Release.” Sinclair Decl. ¶¶ 12, 19, Exh. 6, LCASE Articles of  
15 Incorporation, Art. VI. On December 4, 2020, Petitioners passed a “Resolution re Successor  
16 Organization” designating LCASE “as the successor to UCLRG for purposes of compliance with the Final  
Approval Order and Judgment,” including repayment of attorneys’ fees. Id. ¶ 19, Exh. 7.

17 LCASE has incurred substantial expenses in setting up the structures to implement the Final  
18 Approval Order and Settlement Agreement and will continue to incur substantial expenses in the  
19 future, including as a result of its taking on the role of Plan Sponsor. As with many aspects of this  
20 unusually complex settlement, setting up the legal structure described above has been unexpectedly  
21 difficult and time-consuming.

22 Although the Court awarded fees on April 10, 2020, class counsel decided not to begin charging  
23 for their services again until July 1, 2020, and then a greatly discounted rate. Sinclair Decl. ¶ 27. Since  
24 July 1, 2002, class counsel have devoted hundreds of hours to implement the Settlement Agreement.  
25 Id.

1 Accordingly, the Court should find that LCASE is the proper "successor" to UCLRG for purposes  
2 of paragraph 20-b of the Final Approval Order so that the funds paid to counsel by UCLRG  
3 (\$446,125.46) may be paid to LCASE to support the ongoing implementation of the settlement.

4 Relief Requested

5 Petitioners respectfully request that the Court enter the accompany proposed Order granting  
6 the relief described above.

7 DATED: May 17, 2021

8   
9 Andrew Thomas Sinclair  
10 Attorney for Petitioners and Class

11 Statement by Court Monitor

12 Having reviewed the Ex Parte Application and have discussed the matter with respective  
13 counsel, I approve of the relief requested and ask that the Court signed the proposed Order.

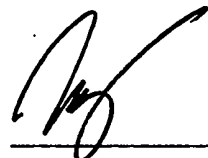
14 DATE: May 17, 2021

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16 \_\_\_\_\_  
17 Hon. Maria-Elena James (Ret.)  
18 Court Monitor

19 Statement by Settlement Administrator

20 Having reviewed the Ex Parte Application, ARCHER Systems, LLC is in agreement that the Order  
21 should be entered.

22 DATE: May 17, 2021

23   
24 \_\_\_\_\_  
25 Blake A. Deady  
26 General Counsel  
27 ARCHER Systems, Inc.  
28 Settlement and QSF Administrator