

SETTLEMENT AGREEMENT

I. Introduction and General Agreements

1. The parties wish to settle *Wurtz, et al. v. Gerstenfeld*, U.S. Dist. Ct. Case No. 3:21-cv-00769-SI (“the Lawsuit”).
2. Plaintiffs are Sharon Wurtz, Matthew Belanger, and Northwest Workers Justice Project (“NWJP”), a nonprofit organization that serves and supports unemployed workers in Oregon.
3. Defendant is David Gerstenfeld, in his official capacity as the acting director of the Oregon Employment Department. Defendant will be referred to as “OED.”
4. This Settlement Agreement (“Settlement Agreement”) is a final settlement of plaintiffs’ claims asserted in the Second Amended Complaint (Exhibit 1). This Settlement Agreement resolves all of Plaintiffs’ claims seeking declaratory and injunctive relief.
5. Plaintiffs allege that OED unlawfully deemed Ms. Wurtz, Mr. Belanger, and tens of thousands of others ineligible for Pandemic Unemployment Assistance (“PUA”) benefits for submitting no, or insufficient, proof of employment (“POE”). Plaintiffs allege these ineligibility determinations—and related cessation of PUA benefits and subsequent imposition of overpayment determinations—violate the Due Process Clause of the Fourteenth Amendment and the “when due” clause of the Social Security Act, 42 U.S.C § 503(a)(1).
6. Defendant disputes Plaintiffs’ allegations. This Settlement Agreement is not an admission of liability, and defendant denies that it is in violation of the Fourteenth Amendment, the Social Security Act, or any other laws or regulations.
7. The parties represent and acknowledge that this Settlement Agreement is the result of good faith negotiations. The parties further represent and acknowledge that the terms of this Settlement Agreement have been voluntarily accepted, after consultation with counsel, for the purpose of making this Settlement Agreement.

II. Definitions

For the purposes of this Settlement Agreement, the following terms have the following meanings:

1. “PUA” means the Pandemic Unemployment Assistance program of unemployment benefits created by Congress in 2020 through the CARES Act and codified at 15 U.S.C. § 9021 *et seq* and subsequently amended. PUA is currently set to expire in Oregon on September 4, 2021.
2. “Claimant” means an individual who has applied for PUA benefits from OED.
3. “POE” or “proof of employment” means “documentation of employment, self-employment, or the planned commencement of employment or self-employment” claimants must provide to qualify for PUA under the Consolidated Appropriations Act of 2021, HR 133, Sec. 241(a)(2) (2021).
4. “Administrative Determination” means OED’s formal, written decision physically mailed to a claimant such as those described in Or. Rev. Stat. 657.267 and Or. Admin. R. 471-030-0039(3).
5. “Effective Date” means the date on which this Settlement Agreement has been fully executed by all parties.

III. OED communications regarding POE

- A. Within two weeks of the Effective Date, OED will send an email with the substance of Exhibit 2 to PUA claimants whose POE has been deemed insufficient (including those who have not submitted any POE) and whom OED has not subsequently determined to have submitted sufficient POE. For those for whom OED does not have an email address, within three weeks of the Effective Date, OED will send a letter via regular mail with the substance of Exhibit 2 to PUA claimants whose PUA has been deemed insufficient (including those who submitted no POE).
- B. Within six weeks of the Effective Date, for claimants who submitted POE that OED has already deemed insufficient and issued an administrative determination so stating, and for whom OED has not subsequently found to have satisfied the POE requirement, OED will issue a new Administrative Determination with new hearing rights to the claimant in writing with specific, individualized reasons why the claimant's POE was insufficient. OED will not issue a new Administrative Decision to such claimants who submitted no POE.
- C. For those claimants whose POE had been determined insufficient (including those who submitted no POE) and have submitted, or do submit, additional POE, OED will use good faith efforts to review the additional POE as soon as possible but no later than within two weeks of the Effective Date or two weeks of receipt of the additional POE, whichever is later. For these claimants, OED will do the following:

1. If fewer than 500 claimants in a given week provide additional POE, no later than within one week of the receipt of the additional POE or two weeks from the Effective Date, whichever is later, where warranted, OED will reverse or cancel the prior ineligibility Administrative Determination based on insufficient POE and reverse the resulting overpayment (if there was one). If more than 500 claimants in a given week provide additional POE, then no later than within two weeks of the receipt of the additional POE or two weeks from the Effective Date, whichever is later, where warranted, OED will reverse or cancel the prior ineligibility administrative determination based on insufficient POE and reverse the resulting overpayment. AND
 2. If the additional POE is determined insufficient, within six weeks of the Effective Date, OED will issue a new Administrative Determination, with new appeal rights and an explanation about what rendered the submitted POE insufficient.
- D. Within six weeks of the Effective Date, all future Administrative Determinations about insufficient POE will provide specific, individualized reasons why the claimant's POE was insufficient along with hearing rights and a statement that OED will accept late POE until September 4, 2021 and, if adequate, will satisfy the POE requirement. OED will use good faith efforts to begin doing so sooner than within six weeks of the Effective Date. Until OED begins issuing these future detailed Administrative Determinations, claimants who OED determines have provided insufficient POE will receive an Administrative Determination with the general language currently in use; they will also receive another Administrative Decision later that includes the more specific language around the same time the other Administrative Decisions under this subsection are issued.
- E. PUA claimants' individual deadlines to submit POE are as set forth in the notices OED sends. If a PUA claimant's individualized deadline has already passed, OED will accept late filed POE up to and including September 4, 2021, which is the absolute final POE submission date for all PUA claimants.
- F. Plaintiffs' counsel shall inform OED regarding any perceived inaccuracies on OED's website and online interactive tool regarding OED's POE requirements, including any notarization requirement for affidavits, format requirements, and details about when a 2019 tax return, W-2, or other employment documentation is acceptable POE and when a 2020 tax return, W-2 or other employment documentation is acceptable POE. Within two weeks of being notified of any perceived deficiencies, OED will review its website and online interactive tool and make any appropriate corrections in English and in Spanish (other languages may require more time to obtain translation services). Any changes to the online interactive tool may need to be made by the vendor who created that tool, and the timeline for updating the tool may be outside the control of OED. OED will make

good faith efforts to make corrections within two weeks of being notified and will inform OLC if the vendor needs more than two weeks to make the updates.

- G. Within seven days of the effective date of this Settlement Agreement, OED shall add an option to the Contact Us webform for claimants to select “I don’t understand why my POE was rejected” and promptly respond to such claimants.
- H. OED shall review all PUA hearing requests and resolve them if possible based on information provided with the hearing request. OED shall call claimants whose requests for hearing are not resolvable based on information provided with the hearing request in the following manner:
 - 1. OED will make one telephone call to the claimant, try to resolve the POE issue by explaining why the POE was not adequate and seeing if the claimant can meet the documentation requirement.
 - 2. If the claimant does not answer, OED will send an email to the claimant (if OED has an email on file) with instructions to schedule a call-back using an AM call window or PM call window; during the call OED will tell claimants why their POE was not adequate and see if the claimant can meet the documentation requirement.
- I. By July 15, 2021 and again by August 15, 2021, OED will produce a report to plaintiffs’ counsel that details to date the number of claimants who have submitted no POE, the number of claimants that have submitted insufficient POE, and the number of claimants that have submitted sufficient POE. Individuals may appear in multiple reports (for example if they submitted multiple sets of POE, they could appear in both the report of those whose POE was sufficient, and those whose POE was insufficient).
- J. Until September 4, 2021, regardless of whether a claimant had previously submitted any POE, OED shall accept late POE from claimants and re-evaluate its determination as described above. If late POE is sufficient, OED will reverse its eligibility and (if any) overpayment determination, and (if applicable) pay PUA benefits retroactively for prior weeks. However, OED will not reverse decisions issued by an Administrative Law Judge after a contested case hearing, except on a case-by-case basis as permitted by ORS 657.290. OED will provide a statement communicating this final date for acceptance of late POE in all future Administrative Determinations as described above.
- K. Within seven days of the effective date of this Settlement Agreement, OED will post a copy of this Settlement Agreement on its website.
- L. OED shall not be held liable under the Settlement Agreement so long it is in substantial compliance with its material terms. “Substantial Compliance” means

compliance with the essential requirements of the Settlement Agreement that satisfy its overall purposes and objectives, recognizing that perfection is not required. Non-systemic or unintentional deviations that are so minor or trivial as to not substantially defeat the object of the Settlement Agreement shall not prevent a finding of substantial compliance.

V. Attorneys' Fees and Expenses

- A. Following execution of this Agreement, Plaintiffs' counsel may seek an award of reasonable attorney fees and costs incurred in the prosecution of the claims in the Second Amended Complaint as of the Effective Date of this Settlement Agreement. The parties and Judge Acosta shall apply the reasonableness standard in *Hensley v. Eckhart*, 461 U.S. 424, 435 (1983).
- B. The parties agree to work in good faith to agree on the amount of the reasonable fees and costs that will be paid to counsel for Plaintiffs pursuant to this section.
- C. In the event the parties do not reach agreement on the amount of reasonable fees and costs within 45 days of the Effective Date, counsel for Plaintiffs may submit a fee petition in this Action to Judge Acosta for the recovery of fees and costs under this section. Defendants shall be entitled to present objections to any fee petition submitted by counsel for Plaintiffs.
- D. Plaintiffs' fee petition shall be subject to the procedures, rules, and substantive law applicable to fee petitions in the United States District Court for the District of Oregon. Rates will be based on a percentile of the rates stated in the Oregon State Bar Economic Survey as adjusted as permissible under decisions by the United States District Court for the District of Oregon. Plaintiffs may not seek any fees for time beyond that actually spent or costs beyond those actually incurred, and they shall not seek any fee multiplier or other enhancement.
- E. Judge Acosta's decision on reasonable fees and costs shall be binding, and that no party will have any right to appeal his decision.

VI. Release and Dismissal


- A. Upon execution of this Settlement Agreement by all the parties, plaintiffs will promptly file a stipulation of dismissal with prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii).
- B. Upon execution of this Settlement Agreement, the parties hereby fully release, discharge and forever acquit each other from any and all claims and causes of actions of any kind, arising from the beginning of time to the Effective Date, arising from or relating to the facts set forth in the Amended Complaint attached as Exhibit 1.

VI. Dispute Resolution and Enforcement

- A. All of the provisions included in this Settlement Agreement are separately and independently enforceable by the parties.
- B. This Settlement Agreement shall be enforceable under the laws of the state of Oregon in a court of competent jurisdiction.

VII. Miscellaneous


- 1. This Settlement Agreement may be modified upon the written consent of all parties.
- 2. This Settlement Agreement represents the entire agreement between the plaintiffs and defendant with regard to the subject matters contained above. This Settlement Agreement supersedes all earlier agreements, representations, statements and negotiations made in this matter.
- 3. Both plaintiffs and defendant have participated in the drafting of this Settlement Agreement, so any ambiguity will not be construed for or against any party.
- 4. Failure by any party to enforce this entire Settlement Agreement or any provision thereof shall not be construed as a waiver of other provisions of this Settlement Agreement.
- 5. Each party signing this Settlement Agreement represents and warrants that he or she is duly authorized to enter into this Agreement and to bind that party on behalf of which he or she signed to the terms and conditions of this Settlement Agreement.



Sharon Wurtz

06/08/2021

Date




Matthew Belanger

06/07/2021

Date

NORTHWEST WORKERS JUSTICE
PROJECT


By: _____

06/07/2021

Date

Title: Director

OREGON EMPLOYMENT DEPARTMENT,
by and through its Director David Gerstenfeld

By: s/ David Gerstenfeld

6/8/2021

Title: Director

Date

APPROVED:

06/08/2021

etfox

Date

Name: Emily Teplin Fox

Of Attorneys for All Plaintiffs

OREGON DEPARTMENT OF JUSTICE

s/ Shaune Morgan

6/8/2021

Name: Shaune Morgan

Of Attorneys for Defendant

Date