

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

In the Matter of the Claim of

5 U.S.C. §552(b)(6)

Against the Great Socialist People's
Libyan Arab Jamahiriya

Claim No. LIB-II-028

Decision No. LIB-II-020

Counsel for Claimant:

Stuart H. Newberger, Esq.
Crowell & Moring LLP

Oral hearing held on July 22, 2011.

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based on the hostage-taking or unlawful detention of 5 U.S.C. §552(b)(6) by armed hijackers on Pan Am Flight 73 at Karachi International Airport in Karachi, Pakistan, on September 5, 1986.

By Proposed Decision entered February 18, 2010, the Commission set forth a proposed standard, under Category A of the January Referral Letter, for claims by U.S. nationals who were held hostage or unlawfully detained in violation of international law, and determined that, in the instant claim, the claimant met this standard. The Commission further held that \$500,000 was an appropriate amount of compensation for all passengers on Pan Am Flight 73 who satisfied the requisite standard for compensability under

Category A. Accordingly, the Commission held that claimant was entitled to an award in this amount.

By letter dated March 9, 2010, the claimant, through counsel, objected to the Commission's Proposed Decision with respect only to the amount of the award, and requested an oral hearing. On June 30, 2011, claimant filed a "Submission on Behalf of Claimant Nabihah Hussain in Support of Objection to Proposed Decision on the Fixed Amount of Category A Award" ("Objection Brief"). The hearing on the objection was conducted on July 22, 2011.

In the Objection Brief, claimant supported her objection to the Commission's award of \$500,000 by arguing that the Commission should have adopted the State Department's recommendation of \$1 million as compensation for claims that meet the applicable standard under Category A. In part, claimant contended that the nature and severity of the Pan Am 73 hijacking, and particularly claimant's own personal experiences and those of the other passengers, warranted the higher \$1 million level of compensation. In addition, claimant argued that the international law cases cited in the Commission's Proposed Decision are inapposite, and therefore provide an inadequate basis to support its proposed award of \$500,000 for Category A claims. Claimant also argued that the Department of State's unique knowledge of the underlying litigation, including how Category A claims fit into the overall structure of the settlement, informed its recommendation, and therefore that the Commission should have deferred to the State Department and accepted its recommended level of compensation. Finally, claimant argued that the language of the January Referral Letter itself provided a sufficient basis for adopting the \$1 million recommendation, insofar as it set the recommendation for

Category A in light of the amount recommended for physical injury claims, and encompassed "all damages" for claimants who met the requisite standard.

During the oral hearing, claimant's counsel presented the live testimony of several Pan Am 73 hostages to supplement the affidavits that had been previously provided. Although claimant herself did not testify, the objecting claimants who did testify described in great detail the extreme physical discomfort, emotional distress, and fear of impending death that they suffered throughout the sixteen-hour ordeal. Indeed, each of the witnesses testified as to his or her belief at the time that they might not escape from the plane alive.

In addition to the live testimony of other Pan Am 73 passengers, counsel for the claimant presented additional legal and factual arguments in support of claimant's assertion that the Commission erred in awarding the claimant \$500,000, rather than the \$1 million recommended by the State Department. These arguments largely tracked those set forth in the Objection Brief previously submitted.

The Commission revisited the issue of the appropriate amount of compensation for victims of hostage-taking aboard Pan Am Flight 73 in the *Claim of* ^{5 U.S.C. §552(b)(6)}

Claim No. LIB-II-002, Decision No. LIB-II-002 (2011) (Final Decision).

In its Final Decision in that claim, the Commission determined that, given the language of the January Referral Letter, and considering in particular the object and purpose of Category A in the context of the referral letter as a whole, \$1 million is the appropriate amount of compensation to be awarded to Pan Am Flight 73 hostage-taking victims. Thus, for the reasons discussed in ^{5 U.S.C. §552(b)(6)} the Commission determines that the appropriate amount of compensation in this claim is \$1 million. As regards interest, the Commission held in ^{5 U.S.C. §552(b)(6)} that claims under Category A are not

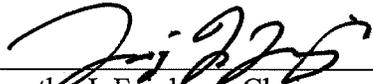
entitled to interest as part of the awards made therein. *Id.* Therefore, the award of \$1 million made herein constitutes the entirety of the compensation that the claimant is entitled to under the CSA.

The Commission accordingly modifies the award made in its Proposed Decision in this claim, and enters the following award, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICSA. 22 U.S.C. §§ 1626-1627 (2006). This constitutes the Commission's final determination in this claim.

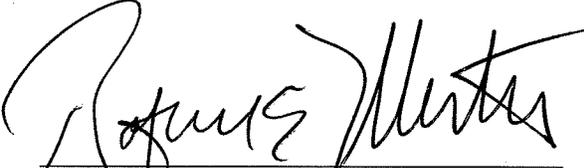
AWARD

Claimant 5 U.S.C. §552(b)(6) is entitled to an award in the amount of One Million Dollars (\$1,000,000.00).

Dated at Washington, DC, September 28, 2011
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

In the Matter of the Claim of

Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6)

Against the Great Socialist People's
Libyan Arab Jamahiriya

Claim No. LIB-II-028

Decision No. LIB-II-020

Counsel for Claimant:

Stuart H. Newberger, Esq.
Crowell & Moring LLP

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based on the claimant being held hostage or unlawfully detained by armed hijackers on Pan Am Flight 73 at Karachi International Airport in Karachi, Pakistan, on September 5, 1986.

Under subsection 4(a) of Title I of the International Claims Settlement Act of 1949 ("ICSA"), as amended, the Commission has jurisdiction to

receive, examine, adjudicate, and render a final decision with respect to any claim of . . . any national of the United States . . . included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State.

22 U.S.C. § 1623(a)(1)(C) (2006).

On January 15, 2009, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication six categories of claims of United States nationals against Libya. *Letter dated January*

15, 2009, from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission ("January Referral Letter"). Category A consists of

claims by U.S. nationals who were held hostage or unlawfully detained in violation of international law, provided that (1) the claimant meets the standard for such claims adopted by the Commission; (2) the claim was set forth as a claim for injury other than emotional distress alone by the claimant named in the Pending Litigation; (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission; and (4) the claimant did not receive an award pursuant to the [Secretary of State's] referral of December 11, 2008.

Id. at ¶ 3. Attachment 1 to the January Referral Letter lists the suits comprising the Pending Litigation.

The January Referral Letter, as well as a December 11, 2008 referral letter ("December Referral Letter") from the State Department, followed a number of official actions that were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 4, 2008, the President signed into law the Libyan Claims Resolution Act ("LCRA"), Pub. L. No. 110-301, 122 Stat. 2999, and on August 14, 2008, the United States and Libya concluded the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* ("Claims Settlement Agreement"), 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008. On October 31, 2008, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Oct. 31, 2008), espousing the claims of United States nationals coming within the terms of the Claims Settlement Agreement, barring United States nationals from asserting or maintaining such claims, terminating any pending suit within the terms of the Claims Settlement Agreement, and directing the Secretary of State to

establish procedures governing claims by United States nationals falling within the terms of the Claims Settlement Agreement.

On July 7, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this portion of the Libya Claims Program pursuant to the ICSA and the January Referral Letter. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

BASIS OF THE PRESENT CLAIM

On September 18, 2009, the Commission received from claimant's counsel a completed Statement of Claim and accompanying exhibits supporting the claimant's claim. In substance, the claimant, Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) states that on September 5, 1986, she was held hostage or unlawfully detained by armed hijackers on board Pan Am Flight 73 in Karachi, Pakistan, for approximately sixteen hours. The claimant has provided evidence of her United States nationality, both on the date of the incident and at the time of the Settlement Agreement. Additionally, she has provided an extensive description of the hijacking; a copy of the complaint in the litigation against Libya to which she was a party; a copy of the Stipulation of Dismissal of that litigation; a copy of a list of the passengers on the flight which includes her name; copies of newspaper articles describing the incident and specifically mentioning her presence there; and an excerpt from a statement that the claimant gave at the sentencing hearing of one of the hijackers, in which the claimant described her experience on Pan Am Flight 73 and the psychological effect the incident had on her. Lastly, the claimant states, and Commission records confirm, that she did not receive an award in a claim pursuant to the December Referral Letter.

DISCUSSION

Jurisdiction

As an initial matter, the Commission must consider whether this claim falls within the category of claims referred to it by the Department of State. The Commission's jurisdiction under the "Category A" paragraph of the January Referral Letter is limited to claims of individuals who: (1) are United States nationals; (2) are named parties in a Pending Litigation case against Libya which has been dismissed; (3) set forth a claim for injury other than emotional distress alone in the Pending Litigation; and (4) did not receive an award pursuant to the December 11, 2008 referral letter. January Referral Letter, *supra*, ¶ 3.

Nationality

As noted above, the January Referral Letter tasked the Commission with adjudicating and certifying six categories of claims of United States nationals. In order to determine who qualifies as a United States national, the Commission must look to the provisions of the ICSA, the statute under which the referral is made. Under that statute, the Commission is directed to apply, in the following order, "the provisions of the applicable claims agreement" and "the applicable principles of international law, justice and equity" in its deliberative process. 22 U.S.C. § 1623(a)(2) (2006).

Although the Claims Settlement Agreement states that it settles the claims of "United States nationals," it does not define that term. However, the Commission's authorizing statute defines the term "nationals of the United States" as "(1) persons who are citizens of the United States, and (2) persons who, though not citizens of the United

States, owe permanent allegiance to the United States. It does not include aliens.” 22 U.S.C. § 1621(c) (2006).¹

In the *Claim of* Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6), Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held, consistent with its past jurisprudence and generally accepted principles of international law, that in order for a claim filed in the Libya Claims Program to be compensable, the claimant must have been a national of the United States, as that term is defined in the Commission’s authorizing statute, from the date the claim arose until the date of the Claims Settlement Agreement. Therefore, consistent with its past jurisprudence, the Commission holds that in order for a claim filed under Category A of the January Referral Letter to be compensable, the claimant must have been a national of the United States, as that term is defined in the Commission’s authorizing statute, at the time the claim arose and continuously thereafter until the date of the Claims Settlement Agreement.

Based on the evidence submitted with this claim, the Commission determines that the claim was owned by a United States national at the time of the incident and has been so held until the effective date of the Claims Settlement Agreement.

Pending Litigation and its Dismissal

To fall within the category of claims referred to the Commission, the claimant must also be a named party in the Pending Litigation listed in Attachment 1 to the January Referral Letter and must provide evidence that the Pending Litigation against

¹ The Commission notes that both LCRA, Pub. L. No. 110-301, 122 Stat. 2999 (2008), and Executive Order No. 13,477 define the term “national of the United States” by reference to the Immigration and Nationality Act, 8 U.S.C. § 1101(a) (22) (2006), which similarly defines the term as a citizen of the United States, or a person who, though not a citizen, owes permanent allegiance to the United States. LCRA § 2(3), 122 Stat. at 2999; Exec. Order No. 13,477, 73 Fed. Reg. at 65,965.

Libya has been dismissed. January Referral Letter, *supra*, ¶ 3. The claimant has provided an excerpted copy of the Second Amended Complaint in Case No. 06-cv-626, filed in the United States District Court for the District of Columbia, which names her as a party. Additionally, the claimant has provided evidence that the litigation was dismissed under a Stipulation of Dismissal dated December 16, 2008. Based on this evidence, the Commission finds that the claimant was a named party in the Pending Litigation and that the Pending Litigation has been properly dismissed.

Claim for Other than Emotional Distress

The January Referral Letter also requires that the claimant must have set forth a claim for injury other than emotional distress alone in the Pending Litigation. January Referral Letter, *supra*, ¶ 3. Claimant alleges in the complaint in the Pending Litigation that the incident caused her “pain, suffering and economic loss.” The Commission further notes that the claimant states causes of action for, *inter alia*, battery and assault under Counts VI and VII of the complaint. The Commission therefore finds that the claimant has satisfied this element of her claim.

Prior Award

Finally, the January Referral Letter requires that the claimant must not have received an award pursuant to the Department of State’s December 11, 2008 referral letter. January Referral Letter, *supra*, ¶ 3. Claimant has stated under oath in her Statement of Claim, and Commission records confirm, that she has not received an award pursuant to the December Referral Letter. Accordingly, the Commission is satisfied that the claimant has received no such award and has therefore met this element of her claim.

In summary, therefore, the Commission concludes that this claim is within the Commission's jurisdiction pursuant to the January Referral Letter and is entitled to adjudication on the merits.

Merits

Standard for Claims under Category A

As stated in the January Referral Letter, to be eligible for compensation, a claimant asserting a claim under Category A must meet the "standard . . . adopted by the Commission." January Referral Letter, *supra*, ¶ 3. In order to develop such a threshold standard for compensability, the Commission has considered pertinent sources in both international and domestic law. On this point, the Commission notes that the United Nations Compensation Commission ("UNCC"), which compensated for losses resulting from Iraq's invasion of Kuwait in 1991, developed a threshold standard to apply in determining whether a claimant had been illegally detained and what facts would qualify such a claimant for compensation for the resulting mental pain and anguish. The UNCC determined that a valid claim was one where the individual established that he or she was "taken hostage or illegally detained for more than three days, *or* for a shorter period in circumstances indicating an imminent threat to his or her life[.]" *Decision taken by the Governing Council of the United Nations Compensation Commission during its second session, at the 15th meeting, held on 18 October 1991: Personal Injury and Mental Pain and Anguish*, S/AC.26/1991/3, Oct. 23, 1991 (emphasis added). The UNCC defined detention as "the holding of persons by force in a particular location" *Id.*

Further, the International Convention Against the Taking of Hostages defines hostage taking as the offense committed by

[a]ny person who seizes or detains and threatens to kill, to injure or to continue to detain another person . . . in order to compel a third party, namely, a State, an international organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of [that other person.]

International Convention Against the Taking of Hostages art. 1, Dec. 18, 1979, T.I.A.S. 11,081, 1316 U.N.T.S. 205 (“Hostages Convention”).

In enacting the Hostage Taking Act of 1984, which implemented the Hostages Convention,² Congress similarly defined hostage taking as the offense committed by any person who

whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so[.]

18 U.S.C. §1203(a) (2006).

Based upon the foregoing, and after careful and thorough consideration, the Commission finds that in order for a claim to be considered compensable under the Claims Settlement Agreement and Category A of the January Referral Letter, a claimant must have been:

- (a) held illegally against his or her will;
- (b) in a particular area; and
- (c) for an extended period of time, or for shorter periods of time in circumstances in which he or she reasonably felt an imminent threat to his or her life.

² H.R. Rep. No. 98-1159, at 418 (1984) (Conf. Rep.), as reprinted in 1984 U.S.C.C.A.N. 3710, 3714; see also Act for the Prevention and Punishment of the Crime of Hostage Taking, Pub. L. No. 98-473, secs. 2001-2003, 98 Stat. 2186 (1984) (codified as amended at 18 U.S.C. § 1203 (2006)).

Application of Standard to this Claim

According to her Statement of Claim, on September 5, 1986, claimant<sup>Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6)</sup>

was a passenger on Pan Am Flight 73 when the aircraft was attacked and taken over by four heavily armed gunmen while waiting to take off from Karachi, Pakistan, en route to Frankfurt, West Germany. Claimant has provided an extensive narrative, in affidavit form, recounting her experience aboard the hijacked aircraft. Because the claimant was only three years old at the time of the hijacking, she does not remember many of the details of the incident; however, over the years her mother has explained to her much of what happened that day. Still, the claimant recalls that she was frightened from the moment the hijacking began, despite her mother's attempts to offer a benign explanation to her as to why the plane was not flying.

The claimant describes how, towards the end of the sixteen-hour ordeal, the lights went out on the plane, after which the hijackers opened fire on the passengers. Once gunfire erupted inside the cabin, claimant's mother<sup>Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6)</sup> pushed the claimant and her brother under the seat in front of them. Claimant states that she was terrified, and that she heard passengers screaming all around them. Some of the passengers seated around her were killed, and the claimant was covered in blood. Eventually, the claimant, along with her mother and brother, located an open emergency exit; however, because the emergency slide had not been deployed, they went back into the cabin, eventually locating an emergency exit where the emergency slide was deployed, whereby they escaped from the plane and ran toward the airport terminal.

Based on the evidence and information submitted in this claim and described above, the Commission finds that the claim of claimant<sup>Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6)</sup> meets the

standard for compensability under Category A of the January Referral Letter.

COMPENSATION

Having concluded that the present claim is compensable, the Commission must next determine the appropriate amount of compensation.

The January Referral Letter recommended “a fixed amount of \$1 million [as] an appropriate level of compensation for all damages for a claim that meets the applicable standards under Category A.” January Referral Letter, *supra*, ¶ 3. In order to determine whether this amount is the appropriate level of compensation, the Commission takes notice of the discussion in Dan B. Dobbs’ treatise, *Dobbs’ Law of Remedies*, Volume 2 (2nd ed. 1993) at section 8.3(6), which observes the difficulty in assessing intangible, non-economic damages. *See also* Marjorie M. Whiteman, *Damages in International Law*, Volume 1 (1937) at page 777-778 (citing a decision of Umpire Parker in *Mixed Claims Commission United States and Germany, Decisions and Opinions* at 17, 21-22 (November 1, 1923), which states that “it is manifestly impossible to compute mathematically or with any degree of accuracy or by the use of any precise formula” certain forms of damages, such as those sustained as a result of mental suffering). In this context, the Commission has carefully reviewed its prior claims programs as well as those of other tribunals and commissions which have adjudicated similar claims, and notes that the amount recommended by the State Department is significantly greater than the amounts that have been awarded in similar claims brought before international tribunals.³

³ For example, pursuant to the *Decision taken by the Governing Council of the United Nations Compensation Commission during its Fourth Session, at the 22nd meeting, held on 24 January 1992: Determination of Ceilings for Compensation for Mental Pain and Anguish*, S/AC.26/1992/8, 27 January 1992, the UNCC limited its awards in claims for illegal detention against Saddam Hussein’s Iraqi

The Commission recognizes that the claimant in this case—as well as other claimants similarly situated—has waited many years to have her claim resolved. However, even with this point in mind, the Commission is not persuaded that the recommended amount of \$1 million is justified. After careful consideration, the Commission, for purposes of determining the appropriate level of compensation for claimants meeting the standard for Category A claims, will take into account both the duration and severity of the incident. In the instant case, the Commission notes that although the passengers on Pan Am Flight 73, including the claimant, were detained for a relatively short time, they were forced to endure the entire ordeal under conditions entailing severe physical discomfort and the constant threat of violence. Moreover, the psychological trauma of the passengers' detention could only have been exacerbated by the hijackers' final assault on the main cabin, characterized by indiscriminate machine-gun fire, the throwing of grenades, and the resulting panic that ensued as passengers were killed, injured, and/or covered with blood and shrapnel.

government to a fixed amount of \$1,500 per incident. The United States-Mexican General Claims Commission, sitting in the 1920s and early 1930s, issued damages awards in several cases involving unlawful detention, ranging from \$500 (\$6,466.14 in 2009 as adjusted for inflation using the Department of Labor's Consumer Price Index (CPI) Inflation Calendar) for five days' detention, *see Chazen (U.S.) v. United Mexican States*, 4 R. Int'l Arb. Awards 564 (Gen. Claims Comm'n 1930), to \$8,000 (\$101,038.13 in 2009 adjusted for inflation) for eighteen months' detention, *see Dyches (U.S.) v. United Mexican States*, 4 R. Int'l Arb. Awards 458 (Gen. Claims Comm'n 1929). The European Court of Human Rights (ECHR) has also issued awards in several unlawful detention cases; as with the UNCC and the General Claims Commission, these awards have been considerably less than the amount proposed by the State Department. For example, in *Raninen v. Finland*, 1997-VIII Eur. Ct. H.R. 2804, the ECHR awarded 10,000 Finnish Marks (\$1,857 in U.S. dollars) as non-pecuniary damages to an applicant who was unlawfully detained by military police. In *K.-F. v. Germany*, 1997-VII Eur. Ct. H.R. 2657—another case involving unlawful detention by police—the ECHR awarded 10,000 German Marks (\$5,764 in U.S. dollars) as non-pecuniary damages. However, in *Assanidze v. Georgia*, 2004-II Eur. Ct. H.R. 221, the court awarded €150,000 (\$181,320 in U.S. dollars) to an applicant who had been illegally detained for over three years by local authorities, despite a presidential pardon and a court order for his release. The ECHR's award covered both pecuniary and non-pecuniary compensation. In *Özkan v. Turkey*, App. No. 21689/93 Eur. Ct. H.R. (2004), available at <http://worldlii.org/eu/cases/ECHR/2004/133.html>, a case involving over thirty applicants, the court awarded a range of awards as non-pecuniary damages for inappropriate detentions, although none exceeded €49,800 (\$60,203 in U.S. dollars).

As this Commission has previously stated, each claims settlement is based on a unique set of circumstances, which may in turn lead to breaks with past practices. With this in mind, under this Claims Settlement Agreement and noting the specific circumstances described above, the Commission holds that for all passengers on Pan Am Flight 73, taking into account the sixteen hours during which they were held hostage or unlawfully detained and the conditions of their confinement in the main cabin, the appropriate amount of compensation is \$500,000.00. Accordingly, the Commission determines that the claimant, Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) is entitled herein to an award of \$500,000.

As regards interest, in the *Claim of* Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) *supra*, after consideration of principles of international law and precedent decisions, the Commission held that compensable tort claims in this claims program are not entitled to interest as part of the awards made therein. *Id.* Therefore, the award of \$500,000.00 made herein constitutes the entirety of the compensation that the claimant is entitled to under the Claims Settlement Agreement.

CONCLUSION

Accordingly, the Commission enters the following award, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICOSA. 22 U.S.C. §§ 1626 and 1627 (2006).

AWARD

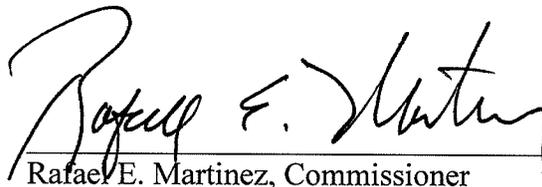
Claimant Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) is entitled to an award in the amount of Five

Hundred Thousand Dollars (\$500,000.00).

Dated at Washington, DC, and
entered as the Proposed Decision
of the Commission.

FEB 18 2010


Mauricio J. Tamargo, Chairman


Rafael E. Martinez, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days after service or receipt of notice of this Proposed Decision. Absent objection, this decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2008).