

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL SABO, NICHOLAS WELLS,)	
JUAN PEREZ, ALAN PITTS, BILLY J.)	
TALLEY, AIMEE SHERROD, and TYLER)	
EINARSON on behalf of themselves and all)	
other individuals similarly situated,)	
)	Case No. 08-899 C
Plaintiffs,)	(Judge George W. Miller)
)	
v.)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

**JOINT MOTION FOR FINAL APPROVAL
OF CLASS ACTION SETTLEMENT AGREEMENT**

TABLE OF CONTENTS

	PAGE(S)
TABLE OF AUTHORITIES.....	ii
I. INTRODUCTION AND BACKGROUND	1
A. Procedural History of the Litigation	1
B. The Settlement Agreement.....	3
1. Ratings Adjustment Relief to Class Members.....	3
2. Other Available Relief to Class Members.....	6
3. Releases and Administrative Finality	7
4. Attorneys’ Fees	7
C. Notice to Class Members	7
D. Class Member Comments	8
II. STANDARD FOR EVALUATING WHETHER SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE	9
III. THE CLASS ACTION SETTLEMENT SHOULD BE GIVEN FINAL APPROVAL. .	11
A. Balancing the Relative Strength of Plaintiffs’ Case Against the Proposed Settlement Weighs in Favor of Settlement.	12
B. Class Counsel’s Recommendation of the Proposed Settlement, Factoring in Class Counsel’s Representation of the Class Throughout the Litigation, Favors Final Approval.....	13
C. Class Members Overwhelmingly Approve of the Proposed Settlement.	14
D. The Settlement Is Fair to the Entire Class.....	15
E. The Parties’ Agreed-upon Approach to Addressing Attorneys’ Fees Favors Final Approval.....	16
F. The Government’s Ability to Withstand Greater Judgment Neither Favors Nor Hinders Final Approval.....	17
IV. CONCLUSION	17

TABLE OF AUTHORITIES

	PAGE(S)
CASES	
<u>Barnes v. United States</u> , No. 04-1335C, 2010 U.S. Claims LEXIS 213 (May 7, 2010).....	10
<u>Berkley v. United States</u> , 59 Fed. Cl. 675 (2004).....	passim
<u>Bryan v. Pittsburgh Plate Glass Co.</u> , 494 F.2d 799 (3d Cir. 1974)	15
<u>Carson v. Am. Brands, Inc.</u> , 450 U.S. 79 (1981).....	9, 12
<u>Christensen v. United States</u> , 65 Fed. Cl. 625 (2005).....	10
<u>Dauphin Island Prop. Owners Ass’n v. United States</u> , 90 Fed. Cl. 95 (2009).....	passim
<u>Evans v. Jeff D.</u> , 475 U.S. 717 (1986).....	9
<u>In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.</u> , 55 F.3d 768 (3d Cir. 2001)	10
<u>Hanlon v. Chrysler Corp.</u> , 50 F.3d 1011 (9th Cir. 1998)	9
<u>Leuvano v. Campbell</u> , 93 F.R.D. 68 (D.D.C. 1981).....	11
<u>Moore v. United States</u> , 63 Fed. Cl. 781 (2005).....	11
<u>Nat’l Treasury Emps. Union v. United States</u> , 54 Fed. Cl. 791 (2002).....	passim
<u>In re Prudential Ins. Co. Am. Sales Practice Litig.</u> , 148 F.3d 283 (3d Cir. 1998)	10
<u>Stoetzner v. U.S. Steel Corp.</u> , 897 F.2d 115 (3d Cir. 1990)	14

Torrise v. Tucson Elec. Power Co.,
8 F.3d 1370 (9th Cir. 1993) 10

RULES

Rule 23(e) of the Rules of the United States Court of Federal Claims 1, 9

REGULATIONS

38 C.F.R. § 4.129 1, 7, 12, 15

Pursuant to Rule 23(e) of the Rules of the United States Court of Federal Claims (“RCFC”), the parties hereby jointly request that the Court grant final approval of the Settlement Agreement and Stipulation and Order of Dismissal (the “Agreement” or “Settlement Agreement”) reached by the parties. The Agreement was filed, with exhibits under seal, with the Court on July 15, 2011, see Docket Nos. 113, 114, and preliminarily approved by the Court on August 12, 2011, see Docket No. 119.

I. INTRODUCTION AND BACKGROUND

A. Procedural History of the Litigation

Plaintiffs, all veterans who served in Operation Enduring Freedom and/or Operation Iraqi Freedom as members of the Army, Navy, Marine Corps, or Air Force (the “Service Branches”), filed their initial Complaint on December 17, 2008, see Docket No. 1, and their First Amended Complaint on September 2, 2009, see Docket No. 25. The First Amended Complaint alleges that the Service Branches failed to follow the requirements of the VA Schedule for Rating Disabilities (“VASRD”) Section 4.129, 38 C.F.R. § 4.129, in assigning a disability rating to service members determined to be unfit for continued active service due, in whole or in part, to Post Traumatic Stress Disorder (“PTSD”). Section 4.129 of the VASRD mandates that “[w]hen a mental disorder that develops in service as a result of a highly stressful event is severe enough” to justify the Armed Services to separate a service member from active service, the government “shall assign an evaluation of not less than 50 percent and schedule an examination within the six month period following the veteran’s discharge to determine whether a change in evaluation is warranted.” 38 C.F.R. § 4.129. The Class Members here suffer from PTSD and were separated from military service on that basis but were assigned a PTSD disability rating of less than 50%.

Before and after the filing of the First Amended Complaint, the parties devoted substantial efforts toward an interim resolution process, involving review by the Physical

Disability Board of Review (“PDBR”) and Boards for Correction of Military Records (“BCMRs”) for the respective services (collectively, the “Boards”). On September 21, 2009, the Court entered an order, certifying the following class:

All individuals who (a) served on active duty in the U.S. Army, Navy, Marine Corps, or Air Force, (b) were found by a Physical Evaluation Board to be unfit for continued service due, at least in part, to the individual’s Post Traumatic Stress Disorder (“PTSD”), (c) were assigned a disability rating for PTSD of less than 50%, and, as a result, (d) were released, separated, retired, or discharged from active duty after December 17, 2002, and prior to October 14, 2008 (regardless of whether such release, separation, retirement, or discharge resulted in the individual’s placement on the Temporary Disability Retirement List).

Docket No. 33. Following approval of class notice on December 18, 2009, see Docket No. 45, the Court, again on joint motion by the parties, stayed the litigation until February 3, 2011, pending the anticipated completion of the parties’ agreed-upon military review board review process, see Docket No. 47.

On January 28, 2011, Plaintiffs requested that the Court lift the existing stay. See Docket No. 89. Plaintiffs concurrently filed a motion for summary judgment on the merits. See Docket No. 90. Soon thereafter, the parties commenced negotiations aimed at a final settlement for all Class Members. The discussions proved productive, see, e.g., Docket No. 99, 101, 103, 105, 110 (requesting stay of matter on behalf of both parties), and over the course of several months, the parties were eventually able to reach agreement. The terms of that proposed settlement have been accepted by counsel for Plaintiffs and the Authorized Representative of the Attorney General, conditioned upon the Court’s approval of the Agreement. See Docket No. 114 (Agreement) at ¶ 34. The Court, on joint motion of the parties, see Docket No. 116, has granted preliminary approval of the Agreement, see Docket No. 119.

B. The Settlement Agreement

1. Ratings Adjustment Relief to Class Members

The Agreement covers 2,176 Class Members who have opted into the class. The Agreement divides Class Members into nine discrete categories. In general, each Class Member, regardless of the category in which they are placed, will have their military records changed (if necessary) to reflect that they were placed on the Temporary Disability Retirement List (“TDRL”) and assigned PTSD disability rating of 50% effective for a first six-month period beginning on the date the Class Member was released from active service. Thereafter, depending upon the applicable category, each Class Member will receive the additional relief described below, within six months of the date the Court grants final approval of the Agreement. Under current law, such relief will include permanent military disability retirement benefits for the rest of their lives if the Class Member receives a permanent disability rating of at least 30% due in whole or in part to PTSD. The categories are as follows:

1. 792 Class Members separated with severance pay without first being placed on the TDRL (and who have not received a military review board (“Board”) decision). Exhibit C to the Agreement lists the names of 792 Class Members who have not yet received a decision from one of the Boards under the previously agreed-to procedures between the parties and who were medically separated for PTSD, in whole or in part, with a less than 30% disability rating. After they were separated from active service, they received a disability rating for PTSD of at least 30% from the Department of Veterans Affairs (VA). For each of the 792 Class Members listed in Exhibit C, that exhibit lists the disability rating for PTSD (30% or higher) that the Class Member received from the VA. The Agreement provides that the military records of these 792 Class Members will be changed to reflect that they received a 50% disability rating for PTSD for the six-month period beginning on the date of separation from active service, followed by a permanent rating for PTSD equal to the VA disability rating for PTSD listed in Exhibit C. Thus, the Agreement provides all 792 Class Members listed in Exhibit C with lifetime permanent military disability retirement benefits, eligibility to apply for additional monetary benefits in the form of Combat Related Special Compensation, and eligibility to apply for reimbursement of the past medical expenses incurred by the Class Member, the Class Member’s spouse, and the Class Member’s minor children from the date of release from active military service to the present. See Agreement, ¶¶ 6, 7, and 24.

2. 79 Class members retired for disability without first being placed on TDRL (and who have not received a Board decision). Exhibit J to the Agreement lists the names of 79 Class Members who have not yet received a decision from one of the Boards under the previously agreed-to procedures between the parties and who were, upon separation from active service, permanently retired for disability due to PTSD, in whole or in part, with a disability rating for PTSD of 30% or lower. After they were separated from active service, they received a disability rating for PTSD of at least 30% from the VA. For each of the 79 Class Members listed in Exhibit J, that exhibit lists the disability rating for PTSD (30% or higher) that the Class Member received from the VA. The settlement provides that the military records of these 79 Class Members will be changed to reflect that they received a 50% disability rating for PTSD for the six-month period beginning on the date of separation from active service, followed by a permanent rating for PTSD equal to the VA disability rating for PTSD listed in Exhibit J. See Agreement, ¶¶ 6, 8.

3. 667 Class Members placed on the TDRL (and who have not received a Board decision). Exhibit G to the Agreement lists the names of 667 Class Members who were placed on the TDRL upon separation from active service and have not yet received a decision from one of the Boards under the previously agreed-to procedures between the parties. All of these individuals were placed on the TDRL due to PTSD, in whole or in part, with a disability rating for PTSD of 30% or lower. The Agreement provides that the military records of these 667 Class Members will be changed to reflect that they received a 50% disability rating for PTSD for the entire period that the Class Member remained or remains on the TDRL. See Agreement, ¶¶ 6, 9.

4. 256 Class Members separated with severance pay without first being placed on TDRL (and who have received a Board decision). Exhibit D to the Agreement lists the names of 256 Class Members who have received a decision from one of the Boards during the agreed-upon administrative process and who were medically separated for PTSD, in whole or in part, with a less than 30% disability rating for PTSD. After they were separated from active service, they received a disability rating for PTSD of at least 30% from the VA. For each of the 256 Class Members listed in Exhibit D, that exhibit lists the disability rating for PTSD (30% or higher) that the Class Member received from the VA. The Board decisions applicable to these Class Members are presumed final. Nonetheless, the Agreement gives each of these 256 Class Members the option of having the Class Member's military records changed to reflect receipt of a 50% disability rating for PTSD for the six-month period beginning on the date of separation from active service, followed by a permanent rating for PTSD equal to the VA disability rating for PTSD listed in Exhibit D. Thus, the Agreement provides all 256 Class Members listed in Exhibit D with the right to elect lifetime permanent military disability retirement benefits, eligibility to apply for additional monetary benefits in the form of Combat Related Special Compensation, and eligibility to apply for reimbursement of the past medical expenses incurred by the Class Member, the Class Member's spouse, and the Class Member's minor children from the date of release from active military service to the present. See Agreement, ¶¶ 6, 10, 11, and 24.

5. 43 Class Members separated with severance pay without first being placed on TDRL (and who have received a Board decision). Exhibit F to the Agreement lists the names of 43 Class Members who have received a decision from one of the Boards during the agreed-upon administrative process and were medically separated for PTSD, in whole or in part, with a less than 30% disability rating for PTSD. After they were separated from active service, they received a disability rating for PTSD of less than 30% from the VA. For each of the 43 Class Members listed in Exhibit F, that exhibit lists the disability rating for PTSD (less than 30%) that the Class Member received from the VA. The Board decisions applicable to these Class Members are presumed final. Nonetheless, the Agreement gives each of these 43 Class Members the option of having the Class Member's military records changed to reflect receipt of a 50% disability rating for PTSD for the six-month period beginning on the date of separation from active service, followed by a permanent rating for PTSD equal to the VA disability rating for PTSD listed in Exhibit F. See Agreement, ¶¶ 6, 10, 12.

6. 16 Class Members who were retired for disability without first being placed on TDRL (and who have received a Board decision). Exhibit K to the Agreement lists the names of 16 Class Members who received a decision from one of the Boards under the previously agreed-to procedures between the parties and who were, upon separation from active service, permanently retired for disability due to PTSD, in whole or in part, with a disability rating for PTSD of 30% or lower. After they were separated from active service, they received a disability rating for PTSD of at least 30% from the VA. For each of the 16 Class Members listed in Exhibit K, that exhibit lists the disability rating for PTSD (30% or higher) that the Class Member received from the VA. The Board decisions applicable to these Class Members are presumed final. Nonetheless, the Agreement gives each of these 16 Class Members the option of having the Class Member's military records changed to reflect receipt of a 50% disability rating for PTSD for the six-month period beginning on the date of separation from active service, followed by a permanent rating for PTSD equal to the VA disability rating for PTSD listed in Exhibit K. See Agreement, ¶¶ 6, 10, 13.

7. 227 Class members placed on TDRL (and who have received a Board decision). Exhibit H to the Agreement lists the names of 227 Class Members who received a decision from one of the Boards under the previously agreed-to procedures between the parties and who were placed on the TDRL upon separation from active service due to PTSD, in whole or in part, with a disability rating for PTSD of 30% or lower. The Board decisions applicable to these Class Members are presumed final. Nonetheless, the Agreement gives each of these 227 Class Members the option of having the Class Member's military records changed to reflect that they received a 50% disability rating for PTSD for the entire period that the Class Member remained or remains on the TDRL. See Agreement, ¶¶ 6, 10, 14.

8. 40 Class Members who were separated with severance pay or retired for disability without first being placed on the TDRL (and who have not received a Board decision). Exhibit E to the Agreement lists the names of 40 Class Members who have not received a decision from one of the Boards under the previously agreed-to procedures between the parties and who were separated with severance pay or retired for

disability without first being placed on the TDRL. All 40 Class Members were separated or retired due to PTSD, in whole or in part, with a disability rating for PTSD of 30% or lower. After they were separated from active service, they received a disability rating for PTSD of less than 30% from the VA. The Agreement provides each of these 40 Class Members the option of (a) applying to a military review board for relief within 60 days of approval of the agreement or (b) having the Class Member's military records changed to reflect receipt of a 50% disability rating for PTSD for the six-month period beginning on the date of separation from active service, followed by a permanent rating for PTSD equal to the VA disability rating for PTSD listed in Exhibit E. See Agreement, ¶¶ 6, 15, 16.

9. 56 Class Members who were separated with severance pay or retired for disability without first being placed on the TDRL. Exhibit L to this Agreement lists the names of 56 Class Members who were separated with severance pay or retired for disability without first being placed on the TDRL. All 56 Class Members were separated or retired for disability due to PTSD, in whole or in part, with a disability rating for PTSD of 30% or lower. None of the 56 Class Members have received a disability rating from the VA for the PTSD that led to their separation or retirement for disability. The Agreement provides each of the 56 Class Members with a 60-day opportunity to apply to the VA for disability benefits for PTSD. If the Class Member timely applies to the VA, the Class Member may elect, upon receiving a VA disability rating, to have the Class Member's military records changed to reflect that they received a 50% disability rating for PTSD for the six-month period beginning on the date of separation or retirement for disability, followed by a permanent rating for PTSD equal to the VA disability rating. See Agreement, ¶¶ 6, 17-19.

See Docket Nos. 130-31.

2. Other Available Relief to Class Members

The Agreement also allows Class Members who qualify for disability retirement to seek reimbursement for past medical expenses incurred by Class Members and qualifying family members, from the date of release of the Class Member from active military service. In addition, Class Members will have the option of obtaining survivor benefits for qualifying family members, as well as having any benefits due them under this Agreement take into account a Class Member's receipt of any Combat Related Special Compensation benefits the Class Members may already be receiving.

3. Releases and Administrative Finality

The parties have negotiated certain releases and waivers regarding potential claims the Class Members may have with respect to the application of VASRD 4.129 and the specific disability rating they will receive under the provisions of this Agreement.

4. Attorneys' Fees

The parties have spent considerable time and effort in reaching this Agreement but have not yet addressed the issue of attorneys' fees. The parties have proposed that, if they are not able to resolve the attorneys' fees issue, Plaintiffs may apply for an award of attorneys' fees, costs, and expenses incurred in connection with the prosecution of this action incurred through the date of approval, with supplementation for fees and expenses incurred after that date if necessary. The parties have further agreed that, after Plaintiffs have filed that application, Defendant may file any response, opposition, or objection that it may have.

C. Notice to Class Members

In its Order granting preliminary approval, the Court directed the parties to submit for approval a draft notice informing the class of the proposed settlement. The parties submitted a proposed notice on August 30, 2011, see Docket No. 122. The Court approved the notice on September 6, 2011. See Docket No. 123.

The Court-approved notice describes the action generally; sets forth the terms of the Agreement; and describes the nine class member categories and the applicable settlement relief for each category. The notice also sets forth the parties' agreements regarding releases, waivers, and attorneys' fees. Section 3 of the notice informs the Class Members of the time and location of the final approval hearing. See Docket No. 123-1.

The notice invites each Class Member to submit comments on the Agreement and attaches a Court-approved form on which to submit any such comments. The notice provides an

address, and deadline by which, to submit comments to the Court; the submissions were to be postmarked no later than 45 days following the date the notice was mailed. Also included with each notice was an Individual Disclosure Statement informing each Class Member of the particular category into which the settlement placed them.

The parties coordinated to mail the approved notice to the more than 2,100 Class Members. In accordance with the Court's order to provide notice by September 20, 2011, see Docket No. 123, the notice was mailed on September 19, 2011.

D. Class Member Comments

Class Members submitted comments directly to the Court, and the Court forwarded copies of comments to Class Counsel. Class Counsel has received and reviewed approximately 501 timely-submitted Class Member comments.¹ Of the 501 Class Members who timely submitted comments, approximately 485 approve of the settlement. Only 11 object to the settlement. All Class Members, including each of the 11 objecting Class Members, will receive a 50% PTSD rating on the TDRL for a minimum of six months from their date of discharge. The majority of the 11 objecting Class Members will not receive additional relief entitling them to Permanent Disability Retirement; the objections generally focus on this fact. Four Class Members failed to indicate whether they approve or object to the settlement. One asked to be removed from the class. Thus, 97% of Class Members who from whom comments have been received expressly approve of the settlement. A number of Class Members submitted short statements in support of the process and settlement. Several of the comments express gratitude to the Court, counsel for the parties, and the named Plaintiffs for their efforts. For example, one Class Member stated, "I appreciate the soldiers and servicemen that made this possible." Exhibit

¹ Fourteen Class Members submitted comments after the submission deadline. Of those 14 Class Member, 11 approve of and three object to the settlement.

1, p. 2. Another Class Member stated, “Thank you for giving me the percentage that I deserve after my years of service in the Army. This makes me and my family really happy.” Id. at p. 4. Echoing that sentiment, another Class Member stated, “This settlement will give peace of mind to my family and me. Our medical bills will finally be taken care of. Thank you.” Id. at p. 6. A few comments approving of the proposed settlement do express concern regarding the length of the process. For example, one Class Member stated, “Please hurry, we need our benefits.” Id. at p. 8.

II. STANDARD FOR EVALUATING WHETHER SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

Under RCFC 23(e), “[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.” The court may only approve a settlement that it finds to be “fair, reasonable and adequate.” Berkley v. United States, 59 Fed. Cl. 675, 681 (2004). Settlement proposals enjoy a presumption of fairness afforded by a court’s preliminary fairness determination. Id. Although the court has discretion to either accept or reject a proposed settlement, id., it may not alter the terms of a proposed settlement, see Evans v. Jeff D., 475 U.S. 717, 726-27 (1986); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1996) (stating, without exception, that “settlement must stand or fall in its entirety”). In evaluating the settlement, the court must assess the strengths and weaknesses of the parties’ positions; it may not, however, “decide the merits of the case or resolve unsettled legal questions.” Nat’l Treasury Emps. Union v. United States, 54 Fed. Cl. 791, 797 (2002) (citing Carson v. Am. Brands, Inc., 450 U.S. 79, 88 n.14 (1981)). “Settlement is always favored, ‘particularly in class actions and other complex cases where substantial [] resources can be conserved by avoiding formal litigation.’” Dauphin Island Prop. Owners Ass’n v. United States,

90 Fed. Cl. 95, 102 (2009) (quoting In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 2001)) (omission in original).

The Federal Circuit has not established a definitive list of factors for analyzing a proposed settlement's fairness. See id. A review of Court of Federal Claims' decisions, however, reveals that the following six factor have been used commonly for this purpose:

- (1) the relative strengths of plaintiff's case compared to the proposed settlement;
- (2) the recommendation of the counsel for the class regarding the proposed settlement, taking into account the adequacy of class counsels' representation of the class;
- (3) the reaction of the class members to the proposed settlement, taking into account the adequacy of notice to the class members of the settlement terms;
- (4) the fairness of the settlement to the entire class;
- (5) the fairness of the provision for attorney fees; and
- (6) the ability of the defendants to withstand a greater judgment, taking into account whether the defendant is a governmental actor or a private entity.

See, e.g., Barnes v. United States, No. 04-1335C, 2010 U.S. Claims LEXIS 213, at *4 (May 7, 2010); Dauphin Island, 90 Fed. Cl. 95, 102 (2009) (citing In re Prudential Ins. Co. Am. Sales Practice Litig., 148 F.3d 283, 317, 328-29 (3d Cir. 1998)); Christensen v. United States, 65 Fed. Cl. 625, 629 (2005); Berkley, 59 Fed. Cl. at 681. "This list is not exclusive and different factors may predominate in different factual contexts." Barnes, 2010 U.S. Claims LEXIS 213, at *5 (citing Torrise v. Tucson Elec. Power Co., 8 F.3d 1370, 1376 (9th Cir. 1993), cert. denied, 512 U.S. 1220 (1994)). The court may, in its discretion, determine the appropriate weight to give each one. Id.; Berkley, 59 Fed. Cl. at 682.

The Court of Federal Claims traditionally has applied a reasonable and deferential standard when evaluating the fairness of an agreed upon settlement proposal, explaining that “[i]t . . . is appropriate for the court to defer to the judgment of the lawyers supporting the proposed settlement. Nat’l Treasury Emps. Union, 54 Fed. Cl. at 797. “In particular, the professional judgment of plaintiff’s counsel is ‘entitled to considerable weight in the court’s determination of the overall adequacy of the settlement’” Id. (quoting Leuvano v. Campbell, 93 F.R.D. 68, 88 (D.D.C. 1981)). Given the reasonableness presumption established by counsel’s agreement, “[a]n individual who objects, consequently, has a heavy burden of demonstrating that the [agreement] is unreasonable.” Moore v. United States, 63 Fed. Cl. 781, 784 (2005). Where there are a comparatively small number of objections, that fact weighs heavily in favor of approval. See Nat’l Treasury Emps. Union, 54 Fed. Cl. at 798.

III. THE CLASS ACTION SETTLEMENT SHOULD BE GIVEN FINAL APPROVAL

The Court of Federal Claims has explained that “[c]lass actions, by their complex nature, carry with them a particularly strong public and judicial policy in favor of settlement.” Berkley, 59 Fed. Cl. at 681. Since the Court certified the class here, the parties have engaged in comprehensive good faith negotiations aimed at resolving this matter fully and finally. The parties’ extensive negotiations resulted in the execution of a global Settlement Agreement that grants each Class Member relief. An overwhelming majority of Class Members commenting on the settlement approves of the settlement without reservation. Given these facts, and applying the six factors discussed above, the negotiated settlement reached in this matter is fair, reasonable, and adequate and should be granted final approval.

A. Balancing the Relative Strength of Plaintiffs' Case Against the Proposed Settlement Weighs in Favor of Settlement.

To assess the relative strength of the plaintiffs' case compared to the proposed settlement, the court must consider how the case would have proceeded if the parties had not reached a settlement. See Dauphin Island, 90 Fed. Cl. at 103. The Court of Federal Claims has acknowledged that the guarantees of settlement are valuable consideration and permit plaintiffs to "avoid[] the 'risks' and 'uncertainties of litigation.'" Berkley, 59 Fed. Cl. at 675 (citing Carson, 450 U.S. at 87). Here, if the Court does not approve the Agreement, Class Members, and the Government, will face the delays and uncertainties of continued and expensive litigation, including appeals. Although Plaintiffs moved for summary judgment on the legal question at the center of this case, the case was stayed before the Government responded to the motion to permit settlement negotiations to play out. Because the negotiations were successful, the Government has not been required to respond. Moreover, the Government has yet to answer the Amended Complaint. The Government has suggested that it will assert a number of defenses in the event that it must answer the Amended Complaint. Discovery may be required to explore those defenses.

Plaintiffs bear the burden to demonstrate that the Service Branches failed to follow VASRD 4.129 and that such failure entitles them to the relief requested in the Amended Complaint. Although Plaintiffs are confident in their legal arguments, there is of course no guarantee that they will prevail. Even if the Court agrees with Plaintiffs' legal arguments regarding VASRD 4.129, they may still face affirmative defenses potentially available to the Government. The relief afforded under the Agreement is in many respects as comprehensive as the relief that might be ordered by this Court after ruling on Plaintiffs' pending motion for summary judgment or after conclusion of trial, with the benefit of avoiding delays and

uncertainties of continued litigation, including appeals. Under such circumstances, balancing the relative strength of Plaintiffs' case against the proposed settlement weighs in favor of settlement.

B. Class Counsel's Recommendation of the Proposed Settlement, Factoring in Class Counsel's Representation of the Class Throughout the Litigation, Favors Final Approval.

Class counsel's competency and acceptance of the settlement weigh heavily in favor of approval. Dauphin Island, 90 Fed. Cl. at 104. The court should defer to the judgment of experienced counsel who have competently evaluated the strength of proof. Berkley, 50 Fed. Cl. at 708. With respect, we believe Class Counsel's competence is clear from both the professional backgrounds and their conduct in this litigation. Class Counsel have substantial experience in representing veterans seeking disability benefits in administrative proceedings and before the federal courts, litigating large scale class actions, and representing clients in the Court of Federal Claims. Specifically, Barton F. Stichman, Amy F. Fletcher, and the lawyers and staff members of NVLSP are subject-matter experts in the area of veterans' legal issues, and have extensive experience representing veterans across in a wide range of legal matters, including those encompassing claims like those asserted here. In addition to their own personal expertise in handling claims of the type asserted here, Mr. Stichman and Ms. Fletcher have the benefit of the collective veterans' affairs and legal expertise of the entire NVLSP. Plaintiffs' counsel Brad Fagg, James Kelley, and Charles Groppe of Morgan, Lewis & Bockius LLP all have extensive experience handling class and collective action litigation. That experience includes negotiations of countless class and collective action settlements, and, Mr. Fagg has extensive experience litigating claims before the United States Court of Federal Claims. The Court relied on this experience in certifying the Class. See Docket No. 28, p. 11-13 (setting forth Class Counsel's experience in support of motion for class certification); Docket No. 33 (granting class certification).

Class Counsel has diligently pursued this case in all respects and zealously represented the Class at each stage. As the Court recognized in its Preliminary Approval Order, Class Counsel and counsel for the Government have ably represented their clients throughout this litigation. See Docket No. 119, p. 2. Creativity, zealous advocacy, and civility have defined that representation, the Court observed. See id. Settlement negotiations have been “serious, informed, and non-collusive.” Id. When the negotiated interim resolution procedure proved ineffective, Class Counsel requested that the Court lift the existing stay and filed a comprehensive motion for summary judgment on the merits. See Docket Nos. 89-90. At the same time, Class Counsel continued to engage in meaningful settlement negotiations with the Government; those negotiations eventually led to the parties executing the Agreement. Throughout the negotiations and settlement approval process, Class Counsel continued to gather information about Class Members’ Board decisions and VA ratings to make a fully-informed decision regarding the merits of any proposed settlement. Class Counsel’s ongoing, diligent representation of the class and their eventual acceptance of the settlement terms support final approval.

C. Class Members Overwhelmingly Approve of the Proposed Settlement.

Class members’ response to the settlement also factors in to the fairness analysis. See Berkley, 59 Fed. Cl. at 687. Settlement is strongly favored where only a small number of class members object. See Dauphin Island, 90 Fed. Cl. at 104 (citing Stoetzner v. U.S. Steel Corp., 897 F.2d 115, 119 (3d Cir. 1990)).

Here, the detailed, Court-approved Notice not only described the terms of the Agreement and informed Class Members of the option to submit comments, but also attached an individualized explanation for each Class Member regarding the category into which they were placed. In response to the Notice, Class Counsel has received comments from 501 of the 2,176

Class Members, or approximately 23% of the class. None of the comments challenge the adequacy of the Notice. Only 11 of those 501, or approximately 2% of comments, object to the proposed settlement. “[T]here is no question that th[is] small number of objections weigh[s] in favor of the court’s approval.” Nat’l Treasury Emps. Union, 54 Fed. Cl. at 798. The percentage of objectors here is dramatically lower than the range of objections that courts have found acceptable. See, e.g., Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 803 (3d Cir. 1974) (affirming approval of settlement over objections from more than 20% of class); Dauphin Island, 90 Fed. Cl. at 104-06 (approving approving settlement where 123 of 238 (approximately 52%) comments objected to settlement); Berkley, 59 Fed. Cl. at 679-80, 687 (approving settlement where 78 of 602 (approximately 12%) comments objected to settlement); Nat’l Treasury Emps. Union, 54 Fed. Cl. at 806 (approving settlement where only 131 of 200,000 class members commented on settlement and where 65 of 131 (approximately 50%) objected to settlement). The overwhelmingly positive response from Class Members to the proposed settlement supports final approval.

D. The Settlement Is Fair to the Entire Class.

In evaluating a proposed settlement, the court should consider whether the proposed settlement is uniformly available yet simultaneously tailored to distinct groups within the class. Berkley, 59 Fed. Cl. at 711. A settlement agreement that fails to afford relief to a segment of the class, however, cannot be deemed fair. Id. Here, as the Court recognized in its Preliminary Approval Order, the Agreement provides “significant relief for all class members.” See Docket No. 119, p. 2. The Agreement does not favor the named plaintiffs or any segment of the class. Id. Instead, the Agreement treats all Class Members the same by implementing benefits under VASRD §4.129 for the first six months after each member’s separation from active duty. This is true for the three Class Members who objected to the Settlement.

The additional relief any Class Member will receive is tailored to her particular circumstances. See Berkley, 59 Fed. Cl. at 711 (approving settlement offering sufficient options to address needs of individual class members and class as whole). The nine Class Member categories, and the related relief, take into account the differing circumstances of the various Class Members. Any permanent change to a Class Member's military record results from a more recent evaluation of the Class Member's PTSD. Thus, although some Class Members may receive a higher permanent disability rating for PTSD under the Agreement than others, such ratings stem directly from consideration of each Class Member's post-separation medical condition. Additionally, and further evidencing the fairness of the Agreement, the parties have on several occasions since filing the Agreement sought leave to amend the Agreement Exhibits, which list the Class Members placed into each category. See Docket Nos. 117, 124. Additional Class Members have opted in to the Class. Other Class Members have received recent Board decisions or required corrections that resulted in a change in the category into which they are placed. The parties have endeavored to ensure that changes in class membership or relevant changes in a Class Member's records are reflected in the Agreement and that the additional relief is tailored appropriately to each Class Member's circumstances. Accordingly, the Agreement is fair to the entire class.

E. The Parties' Agreed-upon Approach to Addressing Attorneys' Fees Favors Final Approval.

In reviewing a proposed settlement, the court must determine whether the fee structure is fair, adequate, and reasonable. See Berkley, 90 Fed. Cl. at 711. Here, the parties have not yet addressed attorneys' fees. Pursuant to the Court's Preliminary Approval Order, they will brief the issue if they are not able reach an agreement after final approval. See Docket No. 119, p. 3.

Accordingly, there is no fee structure for the Court to evaluate for fairness, adequacy, and reasonableness.

This factor, however, weighs in favor of final approval in these circumstances. The majority of approved class action settlements charge class counsel's fees to the plaintiff class. See Berkley, 59 Fed. Cl. at 702. Here, in contrast, no attorneys' fees will be paid out of any settlement proceeds. Any eventual fees award will be paid by the Government and will have no impact on any Class Member's relief. Accordingly, this factor favors final approval.

F. The Government's Ability to Withstand Greater Judgment Neither Favors Nor Hinders Final Approval.

As recognized in other Court of Federal Claims class actions, the defendant's solvency is of minimal concern when the federal government is the defendant. "In theory," courts have reasoned, "the government can always withstand greater judgment because of Congress's unlimited ability to tax." Berkley, 59 Fed. Cl. at 713. At the same time, because the funds from which the United States pays judgments ultimately derive from the taxpayers, the Court and the Department of Justice have a duty to consider the source of the funds when determining the fairness of the settlement. See id. Because "[t]hese two competing considerations essentially cancel each other out, and both will always exist in judgments against the government, . . . the government's ability to withstand greater judgment has little bearing on a decision to approve or reject a proposed class action settlement in which the government is a party." Id. Here, the Government's ability to withstand greater judgment neither favors nor hinders final approval.

IV. CONCLUSION

For the foregoing reasons, the parties request that the Court give final approval to the parties' proposed Settlement Agreement.

Respectfully submitted,

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Office of the Judge Advocate General
General Litigation

Attorneys for Defendant

Dated: December 1, 2011

CERTIFICATE OF FILING

I hereby certify that on this 1st day of December 2011, a copy of the foregoing was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

_____/s Brad Fagg_____

Comments:

I Appreciate the soldiers & Servicemen that Made this Possible

B. REQUEST TO SPEAK

[If you are a Class Member, and only if you expressed your objection, approval, or other comment by the deadline set forth above, you may (but are not required to) speak at the Hearing at which the Court will consider whether to give final approval to the Settlement. You do not need to speak or appear at the Hearing to remain in the class or have the Court consider your written commentary.]

I wish to appear at the Fairness Hearing.

REDACTED

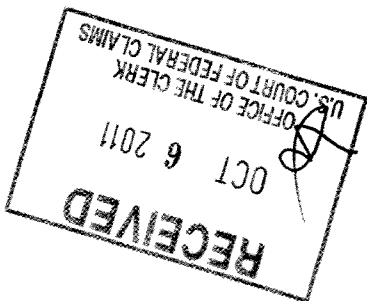
30 Sep 11

Signature

Date

Please mail this form (postmarked no later than November 4, 2011) to:

Clerk of the Court
United States Court of Federal Claims
Howard T. Markey National Courts Building,
717 Madison Place, NW, Room 103
Washington, D.C. 20439



IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL SABO, NICHOLAS WELLS,)	
JUAN PEREZ, ALAN PITTS, BILLY J.)	
TALLEY, AIMEE SHERROD, and TYLER)	
EINARSON on behalf of themselves and all)	
other individuals similarly situated,)	
)	Case No. 08-899 C
Plaintiffs,)	(Judge George W. Miller)
)	
v.)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

**INDIVIDUAL CLASS MEMBER'S COMMENTS ON
 PROPOSED SETTLEMENT AGREEMENT
AND/OR REQUEST TO ADDRESS THE COURT AT FAIRNESS HEARING**

REDACTED

Class Member Name: _____

Mailing Address: _____

Phone (optional): _____

A. COMMENTS ON PROPOSED SETTLEMENT

[As a Class Member, you may approve of, object to, or comment on the proposed Settlement. You are not required, however, to take any additional action to participate as a Class Member in the Lawsuit at this time.]

I approve of the proposed Settlement.

I object to the proposed Settlement.

Comments:

Thank you for giving me the percentage that I deserve after my years of service in the Army. This makes me and my family really happy.

B. REQUEST TO SPEAK

[If you are a Class Member, and only if you expressed your objection, approval, or other comment by the deadline set forth above, you may (but are not required to) speak at the Hearing at which the Court will consider whether to give final approval to the Settlement. You do not need to speak or appear at the Hearing to remain in the class or have the Court consider your written commentary.]

I wish to appear at the Fairness Hearing.

REDACTED

_____ sept 24 2011

Signature

Date

Please mail this form (postmarked no later than November 4, 2011) to:

Clerk of the Court
United States Court of Federal Claims
Howard T. Markey National Courts Building,
717 Madison Place, NW, Room 103
Washington, D.C. 20439

RECEIVED

OCT - 3 2011

14

OFFICE OF THE CLERK
U.S. COURT OF FEDERAL CLAIMS

Comments:

This settlement will give peace of mind to my family and me. Our medical bills will finally be taken care of. Thank you.

B. REQUEST TO SPEAK

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I wish to appear at the Fairness Hearing.

REDACTED

Signature

Date

9/25/11

Please mail this form (postmarked no later than November 4, 2011) to:

Clerk of the Court
United States Court of Federal Claims
Howard T. Markey National Courts Building,
717 Madison Place, NW, Room 103
Washington, D.C. 20439

RECEIVED

OCT - 3 2011

OFFICE OF THE CLERK
U.S. COURT OF FEDERAL CLAIMS

Comments:

PLEASE HURRY, WE NEED
OUR BENEFITS.

B. REQUEST TO SPEAK

[If you are a Class Member, and only if you expressed your objection, approval, or other comment by the deadline set forth above, you may (but are not required to) speak at the Hearing at which the Court will consider whether to give final approval to the Settlement. You do not need to speak or appear at the Hearing to remain in the class or have the Court consider your written commentary.]

I wish to appear at the Fairness Hearing.

REDACTED

9/26/2011

Signature

Date

Please mail this form (postmarked no later than November 4, 2011) to:

Clerk of the Court
United States Court of Federal Claims
Howard T. Markey National Courts Building,
717 Madison Place, NW, Room 103
Washington, D.C. 20439

