

ATTENTION ALL FORMER MEMBERS OF THE NAVY, NAVY RESERVE, MARINE CORPS, AND MARINE CORPS RESERVE WHO HAVE SERVED SINCE OCTOBER 7, 2001, AND WHO WERE DISCHARGED WITH A LESS-THAN-HONORABLE SERVICE CHARACTERIZATION WHILE HAVING A DIAGNOSIS OF, OR SHOWING SYMPTOMS ATTRIBUTABLE TO, PTSD OR PTSD-RELATED CONDITIONS:

YOUR RIGHTS MAY BE AFFECTED BY A PROPOSED SETTLEMENT IN THE *MANKER* CLASS ACTION.

**PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(e)
YOU ARE NOTIFIED AS FOLLOWS:**

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

TYSON MANKER and NATIONAL
VETERANS COUNCIL FOR LEGAL
REDRESS, et al.,

Plaintiffs,

No. 3:18-cv-372 (CSH)

-against-

CARLOS DEL TORO, Secretary of the Navy,

Defendant.

This is a notice of class members' rights in this class action litigation. This notice proceeds in three parts: (1) background information on the Plaintiffs' claims, the Navy's defenses, and the certified class; (2) a summary and description of proposed terms of settlement between the class and the Navy; and (3) information on the upcoming settlement hearing.

BACKGROUND

A. The Lawsuit. On March 2, 2018, Plaintiffs commenced this action against Defendant to obtain judicial review of the denial by the Naval Discharge Review Board (“NDRB”) of the discharge upgrade applications of Mr. Manker and NVCLR’s members, (the “Complaint”), and of others similarly situated. ECF No. 1. The Complaint alleged, among other things, that since the start of military operations in Iraq and Afghanistan, the Navy and Marine Corps discharged thousands of men and women with Other Than Honorable (“OTH”) or General (Under Honorable Conditions) (“GEN”) characterizations of service due to misconduct attributable to post-traumatic stress disorder (“PTSD”), traumatic brain injury (“TBI”), and related mental health conditions. Specifically, the Complaint alleged that upon their return from Iraq and Afghanistan, veterans with service-connected PTSD, TBI, and other related mental health conditions received OTH and GEN discharges and were systematically denied discharge upgrades by the NDRB. Defendant has denied and continues to deny each and all allegations of wrongdoing.

A. The Certified Class & Class Counsel

On November 15, 2018, the Court certified a class in this civil action (“The Plaintiff Class”) defined as follows:

“Veterans who served during the Iraq and Afghanistan Era – defined as the period between October 7, 2001, and the present – who:

- (a) were discharged from the Navy, Navy Reserve, Marine Corps, or Marine Corps Reserve with less-than-Honorable statuses, including General and Other-than-Honorable discharges but excluding Bad Conduct or Dishonorable discharges;

- (b) have not received upgrades of their discharge statuses to Honorable from the NDRB; and
- (c) have diagnoses of PTSD, TBI, or other related mental health conditions at the time of discharge, attributable to their military service under the Hagel Memo standards of liberal or special consideration.”

The Court named Plaintiffs as class representatives in this civil action and the Jerome N. Frank Legal Services Organization of Yale Law School and Jenner & Block LLP as Class Counsel (“Class Counsel”). Throughout 2018, 2019, 2020, and 2021, Plaintiffs and Defendant engaged in motion practice and discovery, and eventually settlement negotiations supervised by the Court. After extensive negotiations and exchanges of multiple proposals, Plaintiffs and Defendant reached an agreement in principle (“Joint Settlement Agreement”) on June 18, 2021 to settle the class claims in the Complaint. The Joint Settlement Agreement, if approved by the Court, will settle the class claims in the Complaint in the manner and upon the terms summarized and described below.

SUMMARY OF SETTLEMENT TERMS

A summarized listing of the terms of settlement is detailed below. The full text of the proposed Joint Settlement Agreement can be viewed at <https://www.secnav.navy.mil/mra/CORB/Pages/NDRB/default.aspx>. For the purposes of the settlement, references to “Special Cases” refers to the class of Veterans discharged from the Navy, Navy Reserves, Marine Corps, or Marine Corps Reserve with General (Under Honorable Conditions) and Other-than-Honorable discharges but excluding Uncharacterized Discharges, Bad Conduct, Dishonorable discharges, or Dismissals; who have diagnoses of Post-Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), or other related mental health conditions, or records documenting one or more symptoms of PTSD, TBI, or other related mental health conditions at the time of discharge, attributable to their military service under the Hagel Memo standards of liberal or special consideration.

A. Reconsideration of 2012-2021 Applications. The NDRB will automatically reconsider its decisions that meet all of the following criteria: (a) Special Cases, (b) issued on or after March 2, 2012, until the Effective Date of Settlement, and (c) whose grant state indicates the applicant did not receive a full upgrade to Honorable. These applicants will be referred to as “Group A Applicants.” To determine the pool of “Group A” Applicants, defendant will conduct a search of its electronic database to determine applicants who were classified as a “special case” who did not receive a full upgrade to an Honorable discharge. Defendant will also conduct a manual search of its decisional document archives from March 2, 2012, to September 4, 2014, to identify Special Cases who did not receive a full upgrade to an Honorable discharge. Applicants identified as a Group A member will receive notification of their status, the forthcoming automatic reconsideration of their case pursuant to this settlement, and of the opportunity to submit additional materials for consideration by the board. The NDRB will pull the Group A Applicant’s prior

application file for reconsideration. In the event a Group A Applicant wishes to submit additional information to the NDRB for consideration, all supplemental materials should be submitted to the board within 60 days of their notice. Any supplemental materials submitted after the Board has heard a case will not be considered. All notices will be mailed to applicants within 120 days of the effective date of settlement, at Defendant's cost. The NDRB will make every effort to complete its reconsideration of Group A Applicants in a timely manner.

B. Notice of Reapplication Rights for 2001-2012 Applicants. The NDRB has agreed to reconsider its decisions for applicants who (a) qualify as "Special Cases," (b) were issued between October 7, 2001, and March 1, 2012, and (c) whose "grant state" indicates the Applicant did not receive a full upgrade. Individuals meeting these qualifications will be referred to as "Group B" Applicants. Due to statutory limitations on the NDRB's authority, Group B Applicants whose discharges are older than 15 years will be provided the opportunity to re-apply to the BCNR. To identify Group B Applicants, the NDRB will provide the names and last-known addresses for Applicants who did not receive an upgrade to Honorable discharge by the NDRB between October 7, 2001, and March 1, 2012. Because the NDRB did not track whether or not applicants were "Special Cases" until 2014, the re-application notice for Group B will be broadly addressed, with information regarding what constitutes a "special case," as well as a point of contact for individuals with questions about the notice. Group B members will have one year to submit their re-application to the NDRB, and will be entitled to supplement their prior applications with new information if they choose. Upon receipt of an application, the NDRB will pull the applicant's prior file for reconsideration. Group B applicants will be informed that they may submit additional evidence to the NDRB or BCNR for reconsideration and where to submit their evidence. The notices will not include the name, contact information, or return mailing address of any of

Plaintiffs' counsel. Plaintiffs will bear the cost of mailing notices to the Group B Applicants, which will be paid out of the attorney's fees and costs set forth below.

C. Website Notice. The NDRB will post an online notice regarding its automatic reconsideration of Group A Applicants and the reapplication rights of Group B Applicants.

D. NDRB Decisional Document Revisions. Defendant has agreed to revise its NDRB decisional documents to include a medical board member's opinion and to incorporate the following language, or reasonable equivalent:

If the Board concludes that there is insufficient evidence per the four factors in paragraph two (2) of the Kurta Memo ("Kurta Factors"), including that the evidence in mitigation does not outweigh the severity of misconduct, so as to grant a full upgrade to Honorable in any Special Case, the Board must, in the decision document sent to the Veteran: (a) respond to each of the applicant's contentions; (b) describe the evidence on which it relied in consideration of each of the applicable Kurta Factors; (c) explain why it decided against the Veteran with respect to each applicable Kurta Factor; (d) articulate a rational connection between facts found and conclusions drawn; and (e) distinguish any prior Board decisions cited by the applicant in accordance with applicable law and regulations.

E. Acknowledgment Letter Revisions. Defendant will provide future applicants an acknowledgement letter informing applicants of their right to submit materials to the NDRB for consideration with their application, and of resources available to help answer applicants' questions about the application process and submissions. This information shall include, but not be limited to (a) general information regarding legal counsel resources for assistance with NDRB applications; (b) Veterans Service Organizations that assist with NDRB applications; (c) links for Stateside Legal, www.statesidelegal.org, and (d) information regarding mental health treatment and evaluation resources with the Department of Veterans Affairs ("VA"), and links the VA's "Directory of Veterans Service Organizations," <https://www.va.gov/vso/>. Due to

government ethical restrictions, the Navy will incorporate a non-endorsement clause into such notices, to avoid the appearance of bias or partiality toward any particular organization, and to inform applicants that additional organizations may be able to assist them.

F. Notice to Pending Applicants. Defendant will provide the same or substantially similar notice as described in section E above to all discharge upgrade applications submitted to the NDRB before the Effective Date of Settlement but not adjudicated before the Effective Date of Settlement.

G. Video-Teleconference Hearings. Defendant will implement a Video-Teleconference (“VTC”) Personal Appearance Hearing Program for the NDRB, which will be available to all applicants who request a Personal Appearance hearing. Defendant has already begun to implement this program on a limited basis and has agreed to make it a universal option for all applicants. The project is estimated to be completed within 24 months of the conclusion of settlement proceedings. Defendant is not bound by this projection.

H. Online Application Portal. Defendant will implement an online application portal and submission process for the NDRB, which will be available to all applicants. Defendant has already begun to implement this program, and the project is estimated to be completed within 24 months of the conclusion of settlement proceedings. Defendant is not bound by this projection.

I. NDRB Training. Defendant agrees to conduct annual training for NDRB members and staff specifically tailored to Special Cases, which will include but is not limited to NDRB standard operating procedures regarding Special Cases, the presumption

of regularity, health conditions commonly cited in Special Cases, and identifying and eliminating implicit biases around mental health conditions. Persons designated secretarial review authority of NDRB cases will also complete an annual training on these matters.

J. Processing Time. The NDRB will aspire to match the processing timeline of the BCNR, and will aspire to decide 90% of its applications within ten months of receipt. Defendant is not bound by this processing timeline.

K. NDRB President Report. Defendant will make the NDRB's President Report available annually via the NDRB's publically accessible online reading room.

L. Secretarial Review Decisions. Defendant acknowledges that the Kurta and Wilkie memoranda apply to the exercise of Secretarial Review Authority detailed under 32 C.F.R. § 724.814. To the extent a Secretarial Review Authority overturns an NDRB determination for a Special Case, the Secretary's discussion of issues will also address each issue considered by the NDRB, and a discussion of each Kurta factor in the same manner implemented by the NDRB.

M. Attorney's fees and costs. Defendant agrees to pay \$220,000.00 in attorneys' fees and costs to Class Counsel.

THE SETTLEMENT HEARING

Before the settlement can become final, it must be approved by the Court. Any affected person may comment for or against the proposed settlement.

A. The Settlement Hearing

In order to give class members an opportunity to express their comments in support or objection to the settlement, a settlement fairness hearing will be held before the Hon. Charles S. Haight, Jr., via the videoconferencing software Zoom on December 16, 2021 at 10:00 a.m. Class members or their attorneys can attend this fairness hearing using the following link,

<https://www.zoomgov.com/j/1616321999?pwd=dW9XcDNjanJxWXVRTmZKNmtPU1lIQT09>, or by dialing in to 1 (646) 828-7666. The meeting ID for the hearing is 161 632 1999 and the passcode is 879086.

B. How to Comment and/or Object to Settlement

If you wish to comment for or against the settlement, you must serve by hand, mail, or e-mail your written objection and support papers, including any legal support for your objection and your status as a class member, upon Class Counsel: Michael J. Wishnie, Jerome N. Frank Legal Services Organization, Yale Law School, P.O. Box 209090, New Haven, CT 06520-9090, manker.settlement@yale.edu; and Defendant's Counsel: Natalie Nicole Elicker, U.S. Attorney's Office for the District of Connecticut, 157 Church St, New Haven, CT 06510, Natalie.Elicker@usdoj.gov; and also file these documents with the Clerk of the Court: United States District Court for the District of Connecticut, 141 Church Street, New Haven, CT 06510. All written objections must be sent or postmarked on or before 21 calendar days before hearing date. Objections or comments will not be considered by the Court unless you have given notice in the manner described.

C. Presenting Evidence at the Settlement Hearing

If you intend to object to the Settlement and desire to present evidence at the fairness hearing, you must include in your written objections the identity of any witnesses you may call to testify and the exhibits you intend to introduce into evidence at the fairness hearing. If you fail to object in the manner described you shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to any aspect of the Settlement, unless otherwise ordered by the Court. You may present your comments yourself or you may have an attorney

present them for you. You are invited to attend the hearing whether or not you have given notice that you want to comment on the settlement.

D. Effect of the Settlement

This settlement, if approved by the Court, will be a full and final adjudication of the issues raised on behalf of the settlement class in the Complaint and of any and all claims resulting from the facts, circumstances and subject matter that gave rise to the Complaint and that were known to plaintiff class counsel on the date the settlement is approved.

Dated: New Haven, CT
 October 12, 2021