

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

VICTOR B. SKAAR,)	
Appellant,)	
)	
v.)	Vet. App. No. 17-2574
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
Appellee.)	

APPELLANT’S RESPONSE TO THE COURT’S JANUARY 23, 2020, ORDER

Appellant addresses the three issues in the Court’s order separately. Appellant proposes two additional methods of notice beyond those set forth in the Joint Plan submitted by the parties on January 6, 2020, which are likely to reach more members: (1) generalized notice via direct mail, and (2) additional non-VA print publications. In addition, Appellant proposes to elaborate in more detail on the proposed notice methods in the January 6 Joint Plan. Appellant respectfully asks the Court to order the Secretary to take the steps set forth below and in his attached revised plan for notice.

(1) Appellant has asked the Secretary to use VA’s existing mailing infrastructure to provide generalized notice to class members because electronic notice alone will reach only those veterans who are online. VA has refused. Many of the elderly Palomares veterans with whom class counsel have spoken do not regularly access electronic communications and are unlikely to be able to navigate complex websites. Accordingly, mailing generalized print notice to those veterans likeliest to be in the class would “reach as many class members as possible.” *See* Dec. 6, 2019 Order at 8. Appellant previously acquiesced to VA’s requested digital-only notice only to prevent delay, given the need for prompt relief. *See* Dec. 6, 2016 Order at 34.

The record in this case contains a list of all Palomares veterans with names and SSNs redacted. R. at 2820-2865. VA can obtain this list from the Department of Defense and cross-reference it with its own database to find veterans' contact information. Indeed, VA has successfully obtained Palomares veteran information from DoD in the past in response to the Court's Order. Sec'y Resp. to Nov. 13, 2018 Order at 1-2. VA may also be able to obtain current address information from the Social Security Administration (SSA) for veterans not in VA's own system. Appellant would agree to measures necessary to protect veterans' privacy, such as redacted filings. Even if VA is unable to obtain every Palomares veteran's contact information, this method would still be the most effective way to ensure class members receive notice. VA concedes this method would be effective in reaching at least some class members but has refused to attempt any form of mailed notice unless the Court so orders.

VA should effect notice because it can issue mailed notice much more efficiently and at costs substantially lower than could Appellant. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978); *see also* Newberg on Class Actions § 8:33 (5th ed., 2019). VA has the infrastructure and resources to identify class-member contact information and mail notice, given the high volume of hard-copy correspondence it already processes on a daily basis. Courts routinely place the responsibility of providing notice to prospective class members on government agency defendants in Rule 23(b)(2) situations. *See, e.g., Phelps v. Harris*, 86 F.R.D. 506, 513 (D. Conn. 1980) (directing defendant to provide notice); *Franco-Gonzalez v. Napolitano*, 2011 WL 13147421, at *2 (C.D. Cal. Dec. 13, 2011) (ordering defendant to identify class members); *M.F. by & through Ferrer v. New York City Dep't of Educ.*, 2019 WL 2511874, at *7 (E.D.N.Y. June 18, 2019) (ordering defendant to publish and mail notice). Requiring Appellant

to bear the cost of notice would likely have a chilling effect on use of the class action mechanism where it is appropriate for veterans to protect their interests as a class. Moreover, it would significantly impede nonprofit legal organizations, like class counsel and co-counsel in this case, from providing pro bono representation.

Although electronic notice alone is insufficient, VA can increase the chances class members will see online notice by ensuring that the title of the blog post containing notice is clear, and that the links to online notice are visible and easy to navigate. Appellant's proposed notice plan includes additional detail accordingly.

(2) Appellant has obtained several estimates for printing notice from non-VA print publications: \$2,667 for a 1/6 page ad in *VFW Magazine*; \$124,685 for a 1/4 page ad in the *AARP Bulletin*; and \$36,900–\$44,700 for a 1/6 page ad in *USA Today*. These estimates are cost prohibitive for Appellant's pro bono counsel. It is unlikely any one print publication will reach a significant portion of the class, whose members are geographically dispersed and share no common traits beyond their age, gender, and service. For example, the print notice Appellant secured at no cost in the *VVA Veteran* will reach only Vietnam War veterans who are members of that Veterans Service Organization (VSO). While preferable to online-only notice, third-party print notice is scattershot by nature, and should be used to supplement generalized notice mailed by VA to potential class members. *See* 3 Newberg on Class Actions § 8:29 (5th ed.).

If this Court orders additional notice, the Court should order VA to bear the costs. VA's pro-veteran orientation distinguishes this injunctive class from 23(b)(3) money damages class actions in which plaintiffs pay for notice. VA's statutory pro-veteran orientation reinforces that veterans should not be made to bear notice costs, especially when they have

met the standards for 23(b)(2)-type class certification and when notice would be cost prohibitive. *See Henderson v. Shinseki*, 562 U.S. 428, 431-432 (2011). Support for plaintiffs effecting notice is strongest where parties have a “truly adversary” relationship. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 179 (1974). The opposite is true here in light of VA’s statutory pro-veteran orientation, which is similar to other non-adversarial situations where defendants pay for notice pursuant to their duty to protect plaintiffs’ interests. *Eisen*, 417 U.S. at 178.

This Court should exercise its power to order VA to pay for such additional notice as it deems necessary under its broad grant of power over the VA. *See* 38 U.S.C. §§ 5701(b)(2), 7261, 7265; 28 U.S.C. § 1651; *see also* proposed U.S. Vet. App. R. 23(c)(2), R. 23(d). VA’s pro-veteran orientation reinforces that VA should effect notice in this injunctive class setting.

WHEREFORE, Appellant requests that the Court enter an order for effectuating notice as set forth in their revised plan, attached hereto.

Respectfully submitted,

FOR APPELLANT:

Date: January 30, 2020

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* Motion for law student appearances
forthcoming.

** This filing does not purport to represent the
views of Yale Law School, if any.

† Notices of attorney appearances forthcoming.

Notice of Class Certification for Veterans of 1966 Nuclear Clean-Up at Palomares, Spain

Victor B. Skaar v. Robert L. Wilkie, Secretary of Veterans Affairs

United States Court of Appeals for Veterans Claims, No. 17-2574

If you participated in U.S. military operations at Palomares, Spain, after the January 17, 1966, B-52 crash that released plutonium dust and have a potentially radiation-related disease, you *may* be part of a class action lawsuit.

1. What is this lawsuit about?

This case is about whether the Department of Veterans Affairs (VA) has failed to use sound scientific evidence to decide claims for service-connected disability compensation for medical conditions potentially caused by exposure to ionizing radiation at Palomares, Spain.

2. Am I a part of the lawsuit?

You may be a class member if you have a medical condition that may have been caused by exposure to ionizing radiation at Palomares, if you EITHER

- (1) filed a VA claim for disability compensation related to Palomares in which VA obtained a radiation dose estimate in 2001 or later, or appealed a denial of such a claim, and have not yet received a decision; OR
- (2) have not yet filed a VA compensation claim for your Palomares-related medical condition but will do so in the future.

3. Am I required to do anything?

You are not required to respond to this notice. Even if you are a member of the class, you must file a claim to receive compensation. If you file or have filed a claim, you should meet all applicable deadlines for submission of evidence and appeals.

4. What happens next?

The Court of Appeals for Veterans Claims approved this case as a class action on behalf of a group of veterans. Next, the Court will decide if VA acted unlawfully. If the Court decides that it has, VA will not be able to use its current dose estimate methodology to decide your claim for Palomares-related benefits. Any final judgment entered in this case will be binding on all members of the class.

5. If I am a member of the class, do I have a lawyer?

The Court has named Michael J. Wishnie of the Veterans Legal Services Clinic at Yale Law School as the lawyer for the class. If you already have a representative before VA, that person is still your representative on your individual claim. If you are in the class, Mr. Wishnie represents you too, for free, but *only* as to the legal challenge in this lawsuit. You may contact Mr. Wishnie and his team with questions, including to find out whether you are a member of the class, at (203) 432-4800.

APPELLANT'S PROPOSED PLAN FOR EFFECTING NOTICE OF CLASS CERTIFICATION

On January 6, 2020, the Parties submitted the following Joint Proposed Plan for Effecting Notice to the Court (“January 6 Joint Plan”):

“Within 30 days of the Court’s issuing an order approving the class notice, the Secretary will:

1. Publish the content of this notice on Vantage Point, the Official Blog of the United States Department of Veterans Affairs (VA)
2. Distribute the notice through the Department’s “#VetResources” newsletter;
3. Forward this notice to 160 Community Veterans Engagement Boards; and
4. Publish a hyperlink to the notice on VA’s website, which will be accessible at:
<https://www.publichealth.va.gov/exposures/radiation/sources/palomares.asp>.

Within 30 days of the Court’s issuing an order approving the class notice, Appellants will:

5. furnish the attached one-sixth-page advertisement to Vietnam Veterans of America (VVA), for publication in its March/April issue of its print magazine, The VVA Veteran, at no cost to the parties.”

In response to this Court’s Order dated January 23, 2020, Appellants hereby submit the following Amended Plan, with Appellants’ proposed additions to the January 6 Joint Plan indicated in **bold**:

“Within 30 days of the Court’s issuing an order approving the class notice, the Secretary will:

1. Publish the content of this notice on Vantage Point, the Official Blog of the United States Department of Veterans Affairs (VA), **under the blog title “Notice of Class Certification for Veterans of 1966 Nuclear Clean-Up at Palomares, Spain,” replicating the formatting and design of the Court-approved notice as practicable on the online platform, with the title included in the “News Releases” ticker on the blog’s homepage. The title of the notice will be no smaller than 18 point font and prominently displayed in the Vantage Point blog;**

2. Distribute the notice through the Department's "#VetResources" Newsletter, **using the same formatting as for Vantage Point blog posts;**
3. Forward this notice to 160 Community Veterans Engagement Boards;
4. Publish a hyperlink to the notice on VA's website, which will be accessible at:
<https://www.publichealth.va.gov/exposures/radiation/sources/palomares.asp>. **The hyperlink to the notice will be no smaller than 18 point font and prominently displayed on VA's website;**
5. **Obtain from the U.S. Department of Defense (U.S. Air Force) the list of the names and Social Security Numbers (SSNs) of Palomares veterans. See R. at 2820-2865 (listing the redacted names and SSNs of Palomares veterans). Within 14 days after obtaining this list, the Secretary will mail hard-copy generalized notice to all veterans on the list; and**
6. **Publish notice in at least two third-party print publications reasonably targeted to reach the age and service demographic of class members, such as VSO print magazines, e.g. VFW and American Legion, and non-VA print publications aimed at elderly populations, e.g. AARP.**

The Secretary will bear the costs associated with these six items.

Within 30 days of the Court's issuing an order approving the class notice, Appellants will:

7. furnish the attached one-sixth-page advertisement to Vietnam Veterans of America (VVA), for publication in its March/April issue of its print magazine, *The VVA Veteran*, at no cost to the parties."

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Date: January 30, 2020

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PALOMARES VETERANS

The U.S. Court of Appeals for Veterans Claims has certified a class of veterans with medical conditions potentially related to exposure to radioactive plutonium at Palomares, Spain in 1966.

You may be part of the class action lawsuit if you participated in the Palomares nuclear clean-up, and either (1) have not yet filed a related claim for VA disability compensation, or (2) have filed a claim or appeal but do not yet have a decision.

For more information, contact the free lawyer for the class, Michael J. Wishnie of the Yale Veterans Legal Services Clinic, at **(XXX) XXX-XXXX**, or visit **www.xxxxxxx/VA.gov**.