UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

STEPHEN M. KENNEDY and ALICIA J. CARSON, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. RYAN D. McCARTHY, Secretary of the Army, *Defendant*.	No. 3:16-cv-2010-CSH November 17, 2020

JOINT MOTION FOR PRELIMINARY SETTLEMENT APPROVAL

Pursuant to Rule 23(e) of the Federal Rule of Civil Procedure (the "Rules"), the parties jointly move for Preliminary Approval of the Settlement Agreement (the "Settlement") and Class Notice submitted herewith.

Plaintiffs Steve Kennedy and Alicia Carson brought suit on behalf of themselves and all others similarly situated, challenging the treatment of former members of the U.S. Army separated with a less-than-fully-honorable discharge status and who experienced post-traumatic stress disorder, traumatic brain injury, military sexual assault, or other mental health conditions. On December 21, 2018, the Court certified a proposed class (the "Class"). *See* ECF No. 74. Subsequently, the Court denied a motion to dismiss, ECF No. 75, and ordered production of the administrative record. After motion practice, the Court also allowed discovery of the Army Discharge Review Board's internal policies, procedures, and practices, including a deposition pursuant to Rule 30(b)(6) of Colonel Michael G. Pratt, former Director of the Military Review

Boards, and the production of records from 15,393 decisional documents. The matter was then referred for settlement to Magistrate Judge Spector, who conducted at least twenty joint or individual conferences with the parties before they reached an agreement to resolve this litigation.

Applying the principles of Rule 23(e) to this case, the parties request that the Court grant Preliminary Approval of the Settlement. The Settlement is the product of complex and extended negotiations, and the parties believe that the Settlement secures significant and equitable relief for Class Members and is substantively fair, reasonable, and adequate. Further explanation is set forth in Plaintiffs' concurrently submitted Memorandum in Support of the Joint Motion for Preliminary Settlement Approval.

WHEREFORE, the parties respectfully request that this court enter an order to preliminarily approve the Settlement Agreement and Class Notice and set a schedule for this matter to proceed to a hearing for final settlement approval.

Respectfully submitted,

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

Since September 11th, millions of young men and women have joined the United States Army and deployed, often multiple times, to Iraq and Afghanistan to fight for our country. Hundreds of thousands of them have returned home suffering from post-traumatic stress disorder ("PTSD") or other mental health conditions. Unjustly, the Army gave many of these soldiers less-than-Honorable discharges *because of* incidents related to their mental health crises. As a result, these veterans bear a shameful stigma, suffer employment discrimination, and lose access to critical services and benefits that would help them heal their wounds and succeed in civilian life.

In 1944, Congress established military review boards, including the Army Discharge Review Board ("ADRB"), to which veterans can apply to upgrade an unjust or unlawful discharge status. Congress intended that these boards act generously to correct discharge decisions that were often made in haste or under duress in the field. In the post-9/11 era, however, the ADRB failed to carry out its statutory duties and arbitrarily denied the discharge upgrade applications of countless veterans.

In particular, the Army failed to account for advances in medical science that have furthered our understanding of PTSD, traumatic brain injury ("TBI"), and other mental health conditions. In recognition of these failings, Defense Department officials issued a series of memoranda and guidance, beginning in 2014 with a memo from then-Secretary of Defense Chuck Hagel (the "Hagel Memorandum"), directing that military review boards give "liberal consideration" to applications that indicate mental health conditions or experiences of Military Sexual Trauma ("MST") may have been "potential mitigating factors" for the misconduct that resulted in a less-than-Honorable discharge. Yet in spite of the Hagel Memorandum and subsequent guidance, the ADRB failed to carry out its congressional purpose, as codified in 10

U.S.C. § 1553 and in the Administrative Procedure Act ("APA"), or apply its own guidelines in a consistent manner.

Plaintiffs Stephen M. Kennedy and Alicia J. Carson filed the present action to right this wrong. Both Mr. Kennedy (who was deployed to Iraq) and Ms. Carson (who was deployed to Afghanistan) developed mental health conditions during their service and then received less-than-Honorable discharges because of incidents related to those conditions. Nevertheless, when they sought status upgrades, the ADRB denied their applications. They filed this action on behalf of a class to benefit not just themselves but also their many fellow Army veterans. They alleged that the ADRB's arbitrary rejection of applications since 2001 by veterans who experienced PTSD, TBI, MST, or other mental health conditions violated the APA and the Due Process Clause of the Fifth Amendment. They further alleged that the ADRB's haphazard application of binding guidance, such as the Hagel Memorandum, violated the APA, and that the ADRB's pattern of denying access to records important to the adjudication of individual claims impeded the ability of individuals to seek meaningful judicial review in violation of the Due Process Clause.

On December 21, 2018, Judge Eginton certified Plaintiffs' proposed class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure (the "Rules"). The class is composed of individuals whose discharge upgrade applications were decided between October 7, 2001, and the present, and whose applications contained a diagnosis, symptoms, or evidence of mental health conditions, TBI, or MST, but who were denied full relief by the ADRB. At the same time, Judge Eginton appointed the undersigned as class counsel and denied the Army's motion to dismiss.

The parties then engaged in discovery and protracted arm's-length settlement negotiations, including appearing for multiple settlement conferences before Magistrate Judge Robert M.

Spector. As a result of that process, the parties have reached a settlement. Accordingly, they now seek the Court's preliminary approval of their agreement.

The agreement is substantively fair and provides significant benefits to class members. Critically, the ADRB will reconsider its adverse decisions to ensure that it properly applies its legal standards, including the Hagel Memorandum and other implementing guidance. For adverse decisions issued on or after April 17, 2011, and subject to certain eligibility requirements, the ADRB will take this action *automatically*, without any need for applicants to do anything at all. The April 2011 date is significant because it is six years prior to when Plaintiffs filed their class action complaint, *see* ECF No. 11, coinciding with the statute of limitations period for APA claims. Where the ADRB issued an adverse decision between October 7, 2001, and April 16, 2011, the Army will allow veterans to reapply and will provide public and individualized notice to such veterans informing them of their right, along with referrals to legal services and medical resources. Accordingly, *every class member* will have the opportunity to ensure that the ADRB reconsiders his or her application applying the correct legal standard.

The agreement also includes numerous provisions to reform the ADRB's operations on an ongoing basis. For example, it requires the Army to revise certain internal documents governing ADRB adjudications to ensure the Hagel Memorandum and subsequent guidance are applied faithfully and rigorously in future cases. The ADRB will also create a universal telephonic hearing program to make it easier for veterans to participate personally in ADRB hearings from home or another convenient location. Further, the agreement requires the Army to revise its written materials sent to future applicants to the ADRB to better inform them of their rights and provide referrals to free legal and medical services. Finally, the Army will institute annual trainings for its ADRB members that are specifically tailored to address mental health conditions.

In sum, the settlement provides retrospective relief for class members whose discharge upgrade applications were inadequately reviewed and prospective relief to remedy procedural defects and prevent future mishandling of discharge upgrade applications. Further, the settlement streamlines and improves the process of discharge application review for thousands of class members. Finally, the Settlement eliminates the need for protracted discovery and litigation and thus makes it possible for class members to benefit more quickly.

Therefore, pursuant to Rule 23(e) and for the reasons explained more fully below, Plaintiffs request that the Court find that the settlement is fair, reasonable, and adequate, grant preliminary approval of the settlement, and approve their proposed class notice. Because this settlement resolves class members' class claims asserted in this litigation but does not affect any class member's right to litigate individual claims, the Court is not required to hold a fairness hearing under Rule 23(e)(2), but the Plaintiffs urge the Court to do so nevertheless.

FACTUAL BACKGROUND

I. Nature Of The Claims

The experiences of the two named plaintiffs in this action demonstrate the ADRB's failure to consistently apply its own standards. The first named plaintiff is Stephen M. Kennedy. Mr. Kennedy joined the Army in May 2006 and was deployed to Iraq from June 2007 through July 2008. Am. Compl. ¶¶ 21, 24. While deployed, Mr. Kennedy served as a Humvee turret gunner and machine gun operator. *Id.* ¶ 24. At first, his unit provided route clearance and security for a supply convoy in an area where improvised explosive devices ("IEDs") were so common that convoys hit or discovered them every other week. *Id.* ¶ 25. Later, Mr. Kennedy's unit was responsible for disrupting Al Qaeda supply lines and was engaged in several firefights with Al Qaeda combatants, two of which ended with an insurgent detonating a suicide vest. *Id.* ¶ 26. For his service,

Mr. Kennedy received multiple military awards and medals, and he was recommended for promotion. *Id.* ¶¶ 27-32.

However, when Mr. Kennedy returned to the United States, he suffered from "survivor's guilt" and depression. *Id.* ¶ 33. He began to self-isolate, had trouble sleeping, drank heavily, and physically harmed himself. *Id.* ¶ 33-35. Eventually, he began having thoughts of suicide. *Id.* ¶ 36. Fearing being labeled "weak," he did not seek help at that time. *Id.* ¶ 39.

In March 2009, Mr. Kennedy was denied leave to attend his own wedding because he had neglected to complete certain necessary paperwork. *Id.* ¶¶ 40-41. Fearing that he would lose his then-fiancée, he went absent without leave ("AWOL") to be married. *Id.* ¶ 42.

When he returned to his base, Mr. Kennedy was sent to see a psychologist and was diagnosed with a major depressive disorder. *Id.* ¶ 43. Shortly thereafter, Mr. Kennedy's unit was scheduled to be deployed, but Mr. Kennedy chose instead to accept a discharge so he could seek mental health treatment. *Id.* ¶ 46. Because Mr. Kennedy had gone AWOL, his discharge status was lowered from Honorable to General. *Id.* ¶ 47. As a result, Mr. Kennedy received reduced rehabilitation benefits from the Department of Veterans Affairs ("VA"), was barred from education benefits under the G.I. Bill, and was ineligible for additional state benefits open only to veterans with Honorable discharges. *Id.* ¶¶ 52-54. He was later diagnosed by both the VA and private clinicians with PTSD. *Id.* ¶ 55.

In November 2010, Mr. Kennedy applied to the ADRB for a status upgrade. *Id.* ¶ 65. The ADRB denied his application. *Id.* In February 2015, after the issuance of the Hagel Memorandum, Mr. Kennedy reapplied and provided documents to the ADRB showing his PTSD diagnosis and history of treatment. *Id.* ¶ 67. The ADRB denied his application again. *Id.* The ADRB's decision

did not even mention the statutory requirements, nor did it mention the Hagel Memorandum and subsequent clarifying guidance. *Id.* ¶ 68.

The second named plaintiff in this action is Alicia J. Carson. Ms. Carson joined the Connecticut Army National Guard in 2008. *Id.* ¶ 77. She deployed to Afghanistan in 2010. *Id.* ¶ 81. She served first as an Assistant Gunner but was quickly promoted to Gunner, where she was responsible for the safety and security of one vehicle in a multi-vehicle convoy. *Id.* ¶ 84. In fewer than 300 days in Afghanistan, she was engaged in over 100 missions and participated in direct contact with the enemy multiple times. *Id.* ¶ 87.

When Ms. Carson returned from her deployment, she reported that she was experiencing PTSD and was referred for treatment. *Id.* ¶ 89. In March 2012, a VA psychiatrist diagnosed her with PTSD and TBI. *Id.* ¶ 94. Because of her symptoms, she was unable to attend National Guard drills in March, April, and May 2012. *Id.* ¶ 100-02. She was also unable to report for a Post-Deployment Health Reassessment in May 2012 because she suffered a panic attack when she went to put on her uniform. *Id.* ¶ 103-05. The National Guard classified her absences as AWOLs. *Id.* ¶ 106. She then received a General discharge and was told by the National Guard that she would have to pay back nearly $9,000 of her enlistment bonus, would not be given access to the G.I. Bill, and eventually would be denied a burial at Arlington National Cemetery. *Id.* ¶ 113.

In April 2015, Ms. Carson applied to the ADRB for a status upgrade. *Id.* ¶ 115. The ADRB denied her application without applying or even mentioning the Hagel Memorandum. *Id.* ¶ 116.

Mr. Kennedy and Ms. Carson (collectively, "Class Representatives") filed this action to address the ADRB's systemic denial of discharge status upgrades to veterans who served during the Iraq and Afghanistan era, received less-than-Honorable discharges, and incurred service-

connected PTSD, TBI, or other behavioral health conditions ("OBH"), or who experienced military sexual trauma ("MST"). Am. Compl., ECF No. 11.

Specifically, Class Representatives allege that the Army has engaged in arbitrary and capricious actions against veterans with PTSD and related conditions attributable to military service by failing to consistently apply relevant binding instructions and statutory requirements in reviewing class members' discharge statuses in violation of the APA, 5 U.S.C. § 706(2)(A). *Id.* ¶¶ 164-69. The ADRB's arbitrary denials stigmatize class members, interfere with their employment prospects, and bar them from VA benefits to which they would otherwise be entitled. *Id.* ¶¶ 123-130.

Class Representatives further allege that the Army violated the Due Process Clause of the Fifth Amendment. *Id.* ¶¶ 170-179. First, the Army has refused to employ consistent standards in assessing the impact of veterans' PTSD when considering discharge upgrade applications. Second, the Army failed to comply with statutory requirements and subsequent clarifying guidance in reviewing class members' discharge upgrade applications. In addition to failing to adhere to relevant statutes and the Hagel Memorandum, the Army also neglected related guidance, such as the "Kurta Memorandum" (August 25, 2017), which directed the Army to consider specific factors when evaluating requests for discharge relief.[1] As a result, the Army either denied applications without any basis or on the basis of an undisclosed policy against which class members were not given a meaningful opportunity to defend themselves.

[1] The four Kurta Memorandum factors are:

a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
b. Did that condition exist/experience occur during military service?
c. Does that condition or experience actually excuse or mitigate the discharge?
d. Does that condition or experience outweigh the discharge?

II. Procedural History

A. Class Certification

Class Representatives filed an amended complaint including class allegations on April 17, 2017, ECF No. 11, and moved for class certification on June 27, 2017. ECF No. 15. The Army filed a motion to dismiss, or in the alternative, for voluntary remand on June 30, 2017. ECF No. 16. Judge Eginton granted the Army's motion for voluntary remand on September 29, 2017. ECF No. 29. On remand, the ADRB upgraded Mr. Kennedy's discharge characterization to Honorable and the National Guard, acting before the ADRB, did the same as to Ms. Carson's. *See* ECF No. 47 at 2. The Army then renewed its motion to dismiss on June 4, 2018, ECF No. 50, and Class Representatives renewed their motion for class certification. ECF No. 51. Judge Eginton denied the motion to dismiss, *see* ECF No. 75, and granted the motion for class certification, certifying a class of:

> All Army, Army Reserve, and Army National Guard veterans of the Iraq and Afghanistan era—the period between October 7, 2001 to present—who:
>
> (a) were discharged with a less than Honorable service characterization (this includes General and Other than Honorable discharges from the Army, Army Reserve, and Army National Guard, but not Bad Conduct or Dishonorable discharges);
>
> (b) have not received discharge upgrades to Honorable; and
>
> (c) have diagnoses of PTSD or PTSD-related conditions or record documenting one or more symptoms of PTSD or PTSD-related conditions at the time of discharge attributable to their military service under the Hagel Memo standards of liberal and special consideration.

ECF No. 74 at 16. In its class certification order, the Court appointed the Yale Law School Veterans Legal Services Clinic and the law firm Jenner & Block LLP as class counsel ("Class Counsel"). *Id.* at 16-17.

B. Discovery

On April 5, 2019, the Court ordered the Army to produce administrative records relevant to the claims made in this action "in addition to any relevant policy memoranda, regulations, and other documents." ECF No. 80. On May 31, 2019, the Army produced three volumes of materials that constituted the administrative record. ECF No. 82. The administrative record included all files pertaining to Mr. Kennedy's and Ms. Carson's discharge upgrade adjudications, as well as supplemental materials. ECF No. 84-85. After determining that the administrative record was insufficient to resolve the claims at issue, Class Counsel requested extra-record discovery. ECF No. 97. Judge Eginton granted Class Counsel's request and referred the case to Magistrate Judge Spector to supervise this discovery. ECF No. 101.

Under the guidance of Magistrate Judge Spector, the parties agreed to a joint discovery order. As part of that order, the Army agreed to produce all decisional documents issued by the ADRB in the course of adjudicating discharge upgrades during the class period (*i.e.*, from 2001 to 2019). ECF No. 117. The parties also agreed to a deposition conducted pursuant to Rule 30(b)(6) regarding the ADRB's training procedures and general operations. *Id.* Class Counsel also requested that the Army produce a sample of 100 underlying applications that served as the basis for 100 corresponding decisional documents. ECF No. 134. The Court ordered a sample of 50 underlying applications be produced. ECF No. 140.

C. Settlement Negotiations

While discovery was ongoing, the parties expressed a mutual interest in settlement. ECF No. 108. Counsel for the parties met to begin preliminary settlement discussions on October 10, 2019. On February 19, 2020, the parties participated in a formal settlement conference before Magistrate Judge Spector, during which Class Counsel presented their initial demands for relief. Over the course of several months, the parties engaged in numerous additional settlement

conferences with Magistrate Judge Spector, during which Magistrate Judge Spector guided settlement negotiations and their culmination into an agreement. On August 7, 2020, the parties conferred on a Term Sheet and reached an agreement-in-principle before Magistrate Judge Spector. Ultimately, the parties memorialized those terms and conditions in their Settlement Agreement.

III. The Proposed Settlement

The Settlement Agreement provides both retrospective and prospective relief. For class members who previously applied to the ADRB, the settlement provides either reconsideration or reapplication rights under current law and guidance that requires liberal review of discharge upgrade applications that describe symptoms and signs of PTSD or PTSD-related conditions. For class members who have not previously applied, as well as for all new applicants to the ADRB, the Settlement Agreement requires the ADRB to use updated decisional documents, provide training on these new documents to agency members, send applicants notice with referrals for legal and medical assistance that might help their discharge upgrade applications, and establish a universal telephonic personal appearance program to provide all applicants the ability to conveniently access personal appearance hearings. Defendant also agrees to pay $185,000 in attorneys' fees and costs to Class Counsel. The settlement terms are discussed in greater detail below. *See infra* pp. 17-23.

LEGAL STANDARD

Rule 23(e) provides that a class action may not be settled without the approval of the Court. The determination whether to approve a settlement is committed to the Court's discretion. *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000); *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-CV-1113, 2016 WL 6542707, at *6 (D. Conn. Nov. 3, 2016). As a matter of public policy, federal courts favor the settlement of disputed claims, particularly in complex class actions. *See Wal-Mart*

Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005). For class actions such as this one that do not bind class members with regard to their own individual claims, the Court need not hold a fairness hearing under Rule 23(e)(2). *See* Fed. R. Civ. P. 23(e)(2). This Court should still use that standard to guide the exercise of its settlement approval discretion in this action.

When reviewing a proposed settlement of a class action that requires a fairness determination under Rule 23(e)(2), the Court should determine whether the proposed settlement is "fair, reasonable, and adequate". Fed. R. Civ. P. 23(e)(2); *Simerlein v. Toyota Motor Corp.*, No. 3:17-CV-1091, 2019 WL 2417404, at *12 (D. Conn. June 10, 2019) (citing other sources). The Court should examine both the negotiating process leading to the settlement (procedural fairness) and the settlement's substantive terms (substantive fairness). *See* Fed. R. Civ. P. 23(e); *Wal-Mart*, 396 F.3d at 116; *Kemp-DeLisser*, 2016 WL 6542707, at *7.

Courts in this Circuit have traditionally determined the fairness of a proposed class action settlement by applying the factors drawn from the Second Circuit's 1974 opinion in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000). Those factors are:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. at 463.

Further, Rule 23 was amended in 2018 to provide additional guidance and make uniform the criteria to consider when class action settlements are proposed. *See* Fed. R. Civ. P. 23, 2018

Advisory Committee Notes. The four key factors to consider are whether: (A) the class representative and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided to the class is adequate; and (D) the proposal treats class members equitably relative to one another. Fed. R. Civ. P. 23(e)(2)(A)-(D). The 2018 amendments elaborate upon, rather than displace, the *Grinnell* factors. Fed. R. Civ. P. 23, 2018 Advisory Committee Notes. Accordingly, courts consider both sets of factors in its analysis of whether the proposed settlement is fair, reasonable, and adequate, and whether to grant final approval. *See, e.g.*, *In re Payment Card Interchange Fee*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019); *Berni v. Barilla G. e R. Fratelli, S.p.A.*, 332 F.R.D. 14, 33 (E.D.N.Y. 2019) (considering both sets of factors because "[i]t is unclear whether these criteria replace or merely supplement the *Grinnell* factors"), *vacated on other grounds by Berni v. Barilla S.p.A.*, 964 F.3d 141 (2d Cir. 2020). The Rule 23(e)(2)(C-D) factors and the *Grinnell* factors are used to assess the substantive suitability of the settlement; the factors from Rule 23(e)(2)(A-B), which subsume *Grinnell* factor (3), are primarily used to assess the procedural suitability of the settlement. *See In re Payment Card Interchange Fee*, 33 F.R.D. at 29.

ARGUMENT

The settlement is both procedurally and substantively fair. First, it is procedurally fair because the class was represented by appropriate plaintiffs and experienced counsel who engaged in meaningful discovery and settlement negotiations at arm's length, under the supervision of Magistrate Judge Spector. Second, the settlement is substantively fair, considering the benefits it confers to the class, its equitable treatment of class members, and the risks and delays inherent in protracted litigation.

Moreover, Class Counsel's notice plan, including notice by publication and press outreach, is also reasonable. Therefore, the Court should find the Settlement fair, reasonable, and adequate, approve the notice plan, and schedule a fairness hearing.

I. The Settlement Is The Result Of A Procedurally Fair Process

Courts in this Circuit evaluate the procedural fairness of a class action settlement by considering the adequacy of class counsel, the adequacy of the class representatives, and whether the negotiations were conducted at arm's length. *See In re Payment Card Interchange Fee*, 330 F.R.D at 30-36. "A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Wal-Mart*, 396 F.3d at 116; *see also In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) (noting that the presumption of procedural fairness under these conditions is "strong").

The class here was adequately represented by highly experienced attorneys and representative named plaintiffs who engaged in significant litigation, involving dispositive motion practice and discovery disputes. Through this litigation, Class Counsel obtained sufficient information to negotiate a fair settlement. Further, Class Counsel's settlement negotiations with the Army, supervised by Magistrate Judge Spector, were conducted at arm's length. Thus, the settlement is procedurally fair.

A. Class Counsel Provided Adequate Representation

1. *The Class Was Represented By Experienced And Capable Counsel*

The class in this case is represented by an experienced team of attorneys and law student interns from the Veterans Legal Services Clinic ("VLSC") at Yale Law School and Jenner & Block LLP. When he certified the class in this matter, Judge Eginton recognized that Class Counsel have the necessary "experience litigating class actions and issues involving veterans seeking discharge

upgrades" to adequately represent the class. ECF No. 74 at 15. Accordingly, Judge Eginton concluded that "adequacy of representation is assured." *Id.* Indeed, Class Counsel have extensive experience in discharge upgrade law, representing less-than-honorably discharged veterans, and litigating complex matters and class actions. Class Counsel, therefore, has the experience and qualifications to represent the class adequately.

2. ***Class Counsel Engaged In Meaningful Discovery In This Case***

In determining whether a class action settlement is fair, reasonable, and adequate, courts also consider the stage of the proceedings and the amount of discovery completed to ensure that Class Counsel had access to sufficient information to evaluate their case and the prospect of any settlement. *See Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982); *Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 213-14 (S.D.N.Y. 1992); *In re Global Crossing*, 225 F.R.D. 436, 458 (S.D.N.Y. 2004) (this requirement "is intended to assure the Court 'that counsel for plaintiffs have weighed their position based on a full consideration of the possibilities facing them'") (citation omitted).

Class Counsel here obtained a significant amount of discovery outside the administrative records of the named plaintiffs—which is unusual in APA litigation—that enabled them to understand the source and scope of the ADRB's systemic failure to adjudicate discharge upgrade applications correctly by applying the appropriate statutory and administrative standards. This includes:

- Internal ADRB memoranda, various iterations of the ADRB's Standard Operating Procedures, training documents, vote sheet templates used at different time periods, and decisional documents from the Army;
- Data gathered from the 15,393 decisional documents generated by the ADRB during the 2001-2019 period that Defendant produced pursuant to the parties' joint discovery plan;

- A random sample of 50 decisional documents and underlying applications produced by the Army to analyze discharge upgrade rates and whether the Army properly identified mental health conditions or military sexual trauma;

- A Rule 30(b)(6) deposition of Colonel Michael G. Pratt, former Director of the Military Review Boards, regarding the ADRB's internal policies, procedures, and practices, including its Standard Operating Procedures, training on Department of Defense guidance memoranda, and discharge characterization application adjudication processes; and

- Jointly with counsel in *Manker v. Spencer*, No. 3:18-cv-00372-CSH (D. Conn.), a Rule 30(b)(6) deposition of Lieutenant Colonel Reggie D. Yager, former Deputy Directory and former Acting Director of the Office of Legal Policy in the Office of the Under Secretary of Defense for Personnel and Readiness, inquiring into the policies, procedures, and practices of discharge review boards and boards for correction of military records; the Department of Defense (DOD) perception of how well its guidance memoranda were implemented by the boards, including the ADRB; and whether DOD intervened to promote compliance with these memoranda.

This discovery enabled Class Counsel to assess the legal position of the class and to negotiate a fair settlement. Accordingly, their considered judgment that the settlement meets the requirements of Rule 23(e) is entitled to "great weight." *In re NASDAQ*, 187 F.R.D. at 474; *see also Aramburu v. Healthcare Financial Services, Inc.*, No. 02-CV-6535, 2009 WL 1086938, at *2 (E.D.N.Y. Apr. 22, 2009) ("[I]n appraising the fairness of a proposed settlement, the view of experienced counsel favoring the settlement is entitled to a great weight.") (quotations omitted).

B. The Class Representatives Possess The Same Interest And Initially Suffered The Same Injury As Other Class Members

Class representatives satisfy the adequacy requirement of Rule 23(e)(2)(A) when they have "an interest in vigorously pursuing the claims of the class, and . . . have no interests antagonistic to the interests of other class members." *In re Payment Card Interchange Fee*, 330 F.R.D. at 31 (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006)). Courts look to class certification caselaw when assessing whether class representatives have adequately represented a class in settlements. *See id.* at 30 n. 25.

As Judge Eginton found in his order granting class certification, Mr. Kennedy and Ms. Carson are "particularly well qualified as class representative[s] because they have experienced the stigma of less-than-Honorable discharges and have participated in the upgrade application process." ECF No. 74. Both Class Representatives thus have an enhanced understanding of the considerations important to this action and "sufficient interest in the outcome of the case to ensure vigorous advocacy," even after they personally received discharge upgrades during this litigation. *Id*. In particular, Mr. Kennedy founded the Connecticut Chapter of Iraq and Afghanistan Veterans of American, a veteran advocacy membership organization, demonstrating his broad commitment to advancing the rights and promoting the well-being of his fellow veterans. *Id.* at 14-15. The Court should thus leave undisturbed Judge Eginton's determination that the Class Representatives are adequate representatives of the entire class.

C. The Settlement Was Negotiated At Arm's Length

This settlement is the product of an arm's-length process that involved multiple and lengthy negotiations over complex issues. Thus, it is entitled to a "presumption of fairness, adequacy, and reasonableness." *Wal–Mart*, 396 F.3d at 116.

The settlement is the result of a painstaking seven-month negotiation process overseen by Magistrate Judge Spector. During that period, Magistrate Judge Spector convened three joint settlement conferences and 17 Plaintiffs- or Defendant-only settlement conferences. *See* ECF Nos. 142, 145, 149, 151, 152, 155, 156, 158, 159, 162, 165, 167, 169, 171, 176, 177, 178, 180, 181, 189. In total, the parties participated in more than sixteen hours of Court-supervised negotiation before a settlement was finally reached. Moreover, the parties corresponded frequently among themselves to discuss the issues in the case and consider every textual and practical nuance of their resulting agreement. Throughout these negotiations both in and out of court, the parties often strongly disagreed, and their negotiations were frequently contentious. *See, e.g.*, ECF No. 78

(Defendant noted that "[t]his case has been vigorously litigated with multiple rounds of briefing"). Thus, the Settlement is the product of an arm's-length negotiation. *See Ingles v. Toro*, 438 F. Supp. 2d 203, 213 (S.D.N.Y. 2006) (approving injunctive class settlement in lawsuit where "the litigation was hard-fought and the settlement negotiations . . . were extended and involved the Court").

* * *

In sum, the experienced advocacy of Class Counsel (informed by the breadth of information gathered through discovery), the backgrounds and interests of Class Representatives, and the protracted arm's-length settlement negotiations supervised by Magistrate Judge Spector amply support a finding that the process resulting in this settlement was procedurally fair. *See In re Sturm*, 2012 WL 3589610, at *4.

II. The Settlement Agreement Is Substantively Fair, Reasonable, And Adequate

The settlement is also substantively fair as required by Rule 23(e)(2)(C) and (D). These subsections require the Court to examine the settlement's adequacy, taking into account the costs, risks, and delay of trial and appeal, the effectiveness of distributing relief, and terms of attorney's fees, and considering whether class members are treated equitably. Fed. R. Civ. P. 23(e)(2); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019). In this Circuit, courts make this determination with reference to the *Grinnell* factors. *See In re Payment Card Litig.*, 330 F.R.D. at 29. The *Grinnell* factors applicable to this substantive analysis include: the complexity, expense and likely duration of the litigation; the risks of establishing liability; the risks of maintaining the class action through trial; the range of reasonableness of the settlement fund in light of the best possible recovery; and the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. "For a settlement to be substantively fair, not every factor must weigh in favor of

settlement, rather, the court should consider the totality of these factors in light of the particular circumstances." *Kemp-DeLisser*, 2016 WL 6542707, at *7.

A. The Proposed Settlement Secures Significant Benefits For The Class

The settlement provides significant benefits to class members, including retrospective and prospective relief. Moreover, because the Settlement resolves only class claims concerning Defendant's policies and procedures, it will not bind any class member regarding his or her individual discharge upgrade claim. Similarly, the settlement does not waive any class member's right to challenge any past or future ADRB decision in an individual case.

The settlement offers six discrete benefits to the Class—none of which would have been available absent this settlement: (1) automatic reconsideration of all adverse decisions in class members' cases issued on or after April 17, 2011, until the effective date of settlement, subject to eligibility requirements discussed below; (2) public and individual notice to class members of the right to reapply to the ADRB or Army Board for Correction of Military Records ("ABCMR") where the ADRB issued the decision between October 7, 2001, and April 16, 2011, subject to eligibility requirements discussed below; (3) a revision to the Military Review Boards Standard Operating Procedures and a decisional document template; (4) a universal telephonic personal appearance board program; (5) annual training for ADRB members that is specifically tailored to mental health conditions; and (6) revised notice to all future applicants to the ADRB, including referral to free legal and medical services. In addition, the settlement either requires the ADRB to apply, or leaves intact, the rights provided to class members under four Department of Defense guidance memoranda that address applications based on mental health conditions or military sexual trauma.

1. ***Reconsideration For 2011-2020 Applications***

The settlement benefits class members who received an adverse decision on or after April 17, 2011, to the effective date of settlement by requiring *automatic* reconsideration of decisions that did not grant the full relief requested by the applicant and where the underlying application contained a diagnosis or allegation of, or evidence or allegations of symptoms of, PTSD, TBI, MST, or OBH. Settlement Agreement § IV.A.1. The ADRB will reconsider these decisions under the standards of the Hagel, Carson, Kurta, and Wilkie Memoranda, applying the "liberal consideration" standard of ADRB's governing statute. Class members receiving automatic reconsideration will receive notice that their prior applications are being reconsidered under the current standards and that they have the right to send medical and other evidence to further support their applications. *Id.* § IV.A.3. Such class members will also receive information regarding free legal services. *Id.*

The settlement ensures that these class members are not required to undertake any steps for their decisions to be reconsidered. The automatic, guaranteed mechanism to review adverse decisions received on or after April 17, 2011, to the effective date of settlement is a unique benefit of the settlement. Without the Settlement Agreement, these class members would be required to resubmit new applications to the ADRB or ABCMR to have their claims reconsidered under the "liberal consideration" standard. These class members will also have easier access to information regarding available legal and medical services under the settlement.

Moreover, the settlement mandates that the ADRB provide additional notice and reapplication rights to veterans whose applications were decided between April 17, 2011, and September 4, 2014, and who did not receive the relief they requested, but whose cases did not sufficiently raise issues of mental health or MST for them to be identified by the parties as class members. *Id.* § IV.A.6. This is because prior to the issuance of the Hagel Memorandum on

September 4, 2014, an applicant to the ADRB may have been less likely to discuss mental health conditions in their application even when the applicant had experienced relevant symptoms. In addition, before 2014, the ADRB did not specially code its cases for PTSD, TBI, MST, or other mental health conditions. Because the ADRB's review of case data targeted only those class members who discussed those conditions or experiences, this relief aims to identify and reach out to all class members who had service-related mental health conditions, TBI, or MST, but did not explicitly discuss those experiences or conditions in their applications. The settlement provides relief to these class members by ensuring that they receive notice informing them of their right to reapply and receive *de novo* review under the "liberal consideration" standard if they present a diagnosis or allegation of, or evidence or allegations of symptoms of, PTSD, TBI, MST, or OBH. Notice will also include information regarding available legal and medical services. This relief is particularly beneficial because it targets applicants who might otherwise be eligible for automatic reconsideration of their decisions and ensures they receive notice of an opportunity to reapply under a more liberal standard of review. The settlement is adequate because it is over-inclusive in its relief and notice requirements that provide benefits to all individuals who have been identified or otherwise could be identified as class members.

2. ***Notice Of Reapplication Rights For 2001-2011 Applicants***

The settlement benefits class members who received adverse decisions between October 7, 2001, and April 16, 2011, by providing them notice and the right to reapply to the ADRB (or notifying them of the right to apply to the ABCMR for discharges that now lie outside the ADRB's 15-year statute of limitations period). *Id.* § IV.B.1. Although some class members may have already had the right to reapply to the ADRB pursuant to 32 C.F.R. § 70.8, the settlement ensures that *all* class members in this period may reapply. By sending notice directly to these class members, *id.* § IV.B.3, the settlement will also help veterans by increasing awareness of their

rights. The settlement also benefits all class members by including a link to the four key Department of Defense guidance memoranda in the Settlement Agreement, which is provided in the Class Notice, thus increasing awareness of all class members' rights and the potentially increased likelihood of success should these class members choose to reapply. The settlement also benefits these class members by requiring that notice include information regarding available legal and medical services, *id.*, that each class member would otherwise be required to independently identify.

3. ***Revised Decisional Documents And Procedures***

The settlement provides prospective relief to all future ADRB applicants, including but not limited to class members, by requiring the ADRB to incorporate new language and procedures into its Military Review Boards Standard Operating Procedures and decisional document template. *Id.* § IV.D.1-D.2. Specifically, the new language requires that the ADRB explicitly respond to the Kurta Memorandum factors in each adverse decision it issues. *Id.* § IV.D.1. This feature of the settlement ensures future applicants have more information to understand the ADRB's decision-making process and why the ADRB found their claims insufficient.

This relief is important because the ADRB routinely fails to cite various authorities requiring liberal consideration, such as the Hagel Memorandum, Kurta Memorandum, Wilkie Memorandum, or relevant provisions of the National Defense Authorization Act of 2017 codified at 10 U.S.C. § 1553, even when the applicant presents a diagnosis, symptoms, or evidence of a mental health condition, TBI, or MST. Similarly, the ADRB routinely uses boilerplate language when discussing specific facts in cases without engaging in an individualized analysis of the veteran's claim. This settlement materially benefits applicants by ensuring that future applicants denied by the ADRB will receive a detailed explanation of the reasons for such denial, making it easier for applicants to challenge any adverse decision with more information about why the

application was denied and what evidence was relied upon to reach that conclusion. Because the ADRB's commitments under this portion of the Settlement Agreement are ongoing, the settlement provides fair and adequate relief to all future applicants.

4. ***Universal Option For Telephonic Personal Appearance Boards***

Under the settlement, the ADRB commits to create a new, universal Telephonic Personal Appearance Board Program that will increase access to personal appearances before the ADRB. *Id.* § IV.E.1. A personal appearance is an important feature of the application process and can increase the likelihood that an applicant will receive a favorable decision. Although the ADRB has previously offered applicants with an option to appear by videoconference, it has done so sporadically and only in certain geographic locations. This settlement materially benefits class members who are unable to travel at their own expense for a personal appearance before the ADRB in Washington, D.C., or who are unable to access the ADRB's infrequent videoconference hearings. This settlement ensures that all applicants who request a personal appearance hearing will be eligible for this telephonic program and may elect to participate from their personal residences or other location of their own choosing. *Id.* This option ameliorates the costs that applicants must bear to travel significant distances to attend their personal hearings. Without this settlement, applicants would have fewer opportunities to participate in their proceedings and persuade the ADRB of their claims.

5. ***Training***

This settlement benefits class members and all future applicants by requiring the Army to conduct an annual training for ADRB members that is specifically tailored to cases that reference PTSD, TBI, MST, or OBH. *Id.* § IV.F.1. Class Counsel's review of 50 decisional documents and underlying applications found that the ADRB sometimes mischaracterizes symptoms of mental health conditions when a diagnosis is absent. Training for PTSD became required for all ADRB

members only beginning around 2014, and analysts identify cases with mental health conditions only about five percent of the time when the applicant lists symptoms instead of a diagnosis. By mandating specialized training on how to adjudicate applications that present mental health conditions or symptoms thereof, including training on the new language in the Standard Operating Procedures, *id.* § IV.F.2, the settlement ensures that applications will be considered by more competent professionals.

6. ***Notice For New Applications***

Finally, the settlement benefits future applicants by requiring the ADRB to inform applicants regarding legal and medical services available to them. *Id.* § IV.G.1-G.2. Notice provided by the ADRB will direct applicants to Veterans Service Organizations and a national legal support webpage to locate free local advocacy resources that might assist with their applications. *Id.* § IV.G.1. It will also encourage applicants to provide medical evidence to better support their claims and shares potential options for obtaining such evidence. *Id.* § IV.G.2. The settlement materially benefits class members and all future applicants by enhancing their access to information and resources that they would otherwise have to obtain independently.

Moreover, the settlement leaves in place both the rights provided to class members under the four Department of Defense guidance memoranda on mental health and the existing procedures to seek review and appeal of individual ADRB decisions. Class members do not release their rights to pursue discharge upgrade applications at any of the available venues, and any application filed by class members will benefit from the procedural reforms proposed in the settlement.

B. The Relief Provided To The Class Is Adequate In Light Of The Costs, Risks, And Delay Of Trial And Appeal

This settlement secures substantial benefits for class members in light of the risk and expense of protracted litigation. It provides class members with multi-pronged relief and should be viewed as reasonable and adequate under Rule 23(e)(2)(C) and the *Grinnell* factors.

1. *The Complexity Of Continued Litigation And The Benefit Of Avoiding Delay*

Rule 23(e)(2)(C) requires the Court to consider whether the "relief provided for the class is adequate" by examining "the costs, risks, and delay of trial and appeal." Fed. R. Civ. P. 23(e)(2). In considering whether to approve this settlement, the Court balances the "complexity, expense and likely duration of the litigation" and benefits afforded to the class. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). "As a general policy matter, federal courts favor settlement, especially in complex and large-scale disputes, so as to encourage compromise and conserve judicial and private resources." *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004).

This class action is complex. Class Counsel's APA and Due Process Clause claims involve several discrete factors related to the ADRB's persistent failure to follow the law and implement its own rules and procedures in adjudicating discharge applications. As part of these claims, Class Counsel alleges that the ADRB has arbitrarily denied applications since 2001 and systematically failed to apply the "liberal consideration" standard of recent Department of Defense guidance and statutory amendments. Class Counsel also challenges the ADRB's training and operating procedures, arguing that both fail to provide substantive guidance on how to apply the Department of Defense guidance memoranda and related laws. These claims, among others, span over 19 years of class members' applications during which the ADRB's policies, practices, and procedures have

changed. Because this class action litigates issues spanning nearly two decades and which require careful analysis of the ADRB's implementation of changing standards, settlement should be favored in this multifaceted and large-scale litigation.

Absent this settlement, class counsel would pursue further discovery and litigation to seek relief for the tens of thousands of class members. Courts grant motions for extra-record discovery, as the Court did here, on a case-by-case basis to supplement the administrative record in APA actions. *Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) (citing *Florida Power & Light Co.*, 470 U.S. 729, 744 (1985)); *see also Camp v. Pitts*, 411 U.S. 138, 142–43 (1973). Class Counsel believes that additional discovery, including expert discovery, would be necessary to resolve its APA claims challenging the ADRB's policies, practices, and procedures that result in systemic disparities in the adjudication of class members' applications. Class Counsel will vigorously pursue additional discovery, which, if granted, could prove costly to all parties—particularly because the class spans over 19 years and COVID-19 may delay progress as it did during the settlement negotiations. Accordingly, the costs of this action would rise dramatically in the absence of a settlement. The parties will likely disagree about the amount and types of discovery appropriate in this matter and require the Court's assistance in resolving those disputes. The parties would also shoulder considerable expense to find and retain experts to testify on Class Counsel's claims. If litigation continues, the parties would spend many hours drafting motions, conducting discovery, and preparing for summary judgment and/or trial. In short, further litigation to secure relief for class members is likely to be an expensive and time-intensive endeavor.

To avoid such protracted litigation, this settlement offers immediate relief to class members. As noted above, class members receive the benefit of retrospective and prospective relief with regard to rereview of many class members' applications, updated decisional documents and

procedures, improved access to personal appearances before the ADRB, annual training for ADRB members, and informative notice to new applicants with referrals to legal and medical services. This settlement enunciates concrete timelines for the ADRB to begin to remedy its systemic failures and to report on its implementation of the settlement terms.

There are several benefits to providing immediate relief to class members through this settlement. Further discovery and litigation would delay a class member's opportunity to receive a discharge upgrade and its corresponding benefits. In particular, the COVID-19 pandemic has destabilized many individuals' lives, including those of class members who may have lost employment and will have a more difficult time finding new employment with a less-than-Honorable discharge status. Due to COVID-19, class members may require greater access to health care that they might be unable to receive with a less-than-Honorable status.

In addition, a protracted litigation process would render more class member claims ineligible for new or renewed applications to the ADRB due to its 15-year statute of limitations. Class members whose discharge dates fall outside of that limitations period could thus lose a venue in which to have their discharge reviewed and be left only with the opportunity to apply to the ABCMR. Applicants to the ABCMR may appear in person only at the discretion of that board, 32 C.F.R. § 581.3(f), and not as of right as before the ADRB, *see* 10 U.S.C. § 1553(c). As the ABCMR has granted few if any in-person hearing requests in recent decades, class members required to apply to that board would almost certainly lose a valuable opportunity to advocate in person for their discharge upgrades.

In light of the benefits noted above, and the complexity, expense, and likely extended duration of the litigation should it continue, the settlement should be viewed as a satisfactory result.

2. ***The Risks To Obtaining Relief***

Although Class Counsel's case rests on viable claims that survived a motion to dismiss and are well supported by evidence, litigation would introduce complex remedial issues and necessarily carries some risk of an unfavorable judgment. The *Grinnell* factors require the Court to consider the risks of liability and maintaining the class action through trial, and the reasonableness of the settlement in light of those risks. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *see also* Fed. R. Civ. P. 23(e)(2) (taking into account the risks of trial and appeal).

Class Counsel will vigorously prosecute Plaintiffs' claims and believe that further discovery would continue to produce evidence of the arbitrary and capricious decision-making and due process violations by the ADRB. Even so, Class Counsel recognizes the risk of an unfavorable judgment at trial, and questions of remedy may arise due to the novel nature of this class action.

As one example of an ongoing risk, the availability of a remedy for all class members from 2001 onward may be complex. Civil actions against the United States, including veterans' challenges to ADRB denials under the APA, are subject to a six-year statute of limitations, 28 U.S.C § 2401(a). *See Lasky v. McHugh*, 92 F. Supp. 3d 3, 9 (D. Conn. 2015), *aff'd*, 668 F. App'x 369 (2d Cir. 2016) (summary order). The class claims in this case were filed on April 17, 2017, making the statute of limitations cutoff April 17, 2011. Am. Compl., ECF No. 11. Given the nature of the class claims as challenges to the ADRB's *continuing* policies, practices, and procedures that could apply to future applications for reconsideration or other procedures, class members who received an adverse decision more than six years prior to the filing of the class claims would still have viable class claims, but the availability of an individualized remedy related to class members' pre-April 17, 2011 decisions may be limited. Furthermore, although litigation could result in the

court vacating and remanding all class members' decisions without time limitation, the ultimate relief could be limited when compared to the settlement's multi-pronged approach to remedying the ADRB's systemic failures. Class Counsel believes that the Court can and should produce remedies agreed upon in this settlement through trial, though Defendant is likely to disagree. While Class Counsel believes that the claims have merit and would prevail at trial, the risks at this stage of litigation are another reason to approve this settlement and provide guaranteed relief to class members and future applicants.

C. The Settlement Treats Class Members Equitably Relative To Each Other

Rule 23(e)(2)(D) requires the Court to assess whether the settlement "treats class members equitably relative to each other." As set forth in the Advisory Note to the 2018 amendments, "[m]atters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims." Fed. R. Civ. P. 23(e), 2018 Advisory Committee Notes. Thus, "equitable" treatment does not require identical treatment. *See, e.g.*, *Radcliffe v. Hernandez*, 794 F. App'x 605, 607 (9th Cir. 2019); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, No. 05-MD-1720, 2019 WL 6875422019 at * 27 (E.D.N.Y. Dec. 16, 2019) (approving settlement as "equitable" notwithstanding that merchants who were in the class for only a portion of the class period would have to release claims for the full class period without much compensation, while others might receive proportionally more compensation with the same release).

In this case, the settlement provides for procedural changes at the ADRB that will benefit all class members who apply, reapply, or have their applications automatically reconsidered by the ADRB. Settlement Agreement IV.D-G. Such procedural relief is fitting because this action's allegations center on procedural failures at the ADRB. Though the settlement does not guarantee that all class members will receive the same substantive discharge upgrade decision, their

applications will all be decided using the new procedures outlined in the Settlement Agreement. Thus, the procedural relief obtained in this settlement applies equitably to all class members. The primary difference in the way that relief is apportioned among class members is whether a class member receives automatic reconsideration by the ADRB or notice of a right to submit a new application to the ADRB or ABCMR. *See supra* pp. 17-23. As explained above, class members whose discharge upgrade applications were decided before April 17, 2011, would likely be time-barred from challenging those decisions by litigating individual APA claims. They are thus situated differently than class members with later discharge dates who could litigate individual claims and so receive automatic reconsideration. A difference in treatment based on different situations is permissible. *See* William H. Rubenstein, 5 Newberg on Class Actions § 13.44 (5th ed. June 2020 Update) (noting that a settlement is still equitable where "class members should be treated differently because they are situated differently"); *see also Clark v. Duke University*, No. 2019 WL 2588029, at *5–6 (M.D.N.C. 2019) (noting that "different circumstances" justified different treatment of class members and that settlement was both fair and equitable). Similarly, it is more likely that applications from 2011 to 2014, though not time-barred, would not have been as explicit about mental health claims, because the relevance of such claims was not widely known until issuance of the Hagel Memorandum in 2014. In addition, the ADRB did not code for PTSD cases before 2014. Accordingly, it is more likely that the Army review of case data failed to identify a class member in that period, thus warranting the additional notice efforts for 2011-2014 applicants provided in the Settlement Agreement. Consequently, the settlement treats class members equitably because the primary difference in relief is justified by a real and substantial situational difference.

III. The Proposed Class Notice Is Adequate

The proposed form and method of notice of proposed settlement ("Class Notice") is adequate because it satisfies all due process considerations and the requirements of Rule 23(e). Given the due process considerations for this type of injunctive relief under Rule 23(b)(2), the proposed form and method of notice are reasonable and robust.

A. The Proposed Class Notices Is Substantively Reasonable

Rule 23(e) provides that the "court may direct appropriate notice to the class." Fed. R. Civ. P. 23(e). Courts in this Circuit have consistently evaluated the adequacy of a class notice under a standard of reasonableness, including in the context of a Rule 23(b)(2) class action. *Hecht v. United Collection Bureau*, 691 F.3d 218, 224 (2d Cir. 2012). Class notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Handschu v. Special Services Div.*, 787 F.2d 828, 832-33 (2d Cir. 1986) (internal quotation marks omitted). "[T]he district court has virtually complete discretion as to the manner of giving notice to class members." *Id.* at 833.

The proposed Class Notice is substantively reasonable because it contains every key component that the Second Circuit has previously considered in evaluating the adequacy of class notice in Rule 23(b)(2) class actions. In this Circuit, courts have generally found class notice substantively reasonable when it identifies the parties and class, reviews the central issues of the lawsuit, summarizes the central terms of the settlement agreement, and notifies class members of the date and location of the fairness hearing along with their right to participate in it. *See, e.g.*, *McReynolds v. Richards Cantave*, 588 F.3d 790, 797-98 (2d Cir. 2009); *Handschu*, 787 F.3d at 828. In that vein, the class notice does not need to include the entire settlement agreement. *Handschu*, 787 F.3d at 832-33.

Here, the proposed Class Notice satisfies all the criteria previously used by the Second Circuit. The Notice: (a) identifies the action to be settled and the parties to the action; (b) describes the class; (c) provides a summary of the claims, issues, and the terms of the settlement, including attorneys' fees; (d) states that a class member may enter an appearance through an attorney if he or she so desires; (e) notes the date and location of the settlement fairness hearing; (f) identifies where documents relating to the settlement are available for review; (g) informs class members of their right to object to the settlement and the procedures for adequately and timely presenting any objections to the Court; and (h) provides that Defendant will issue a press release publicizing the settlement. *See* Ex. A. The proposed Class Notice thus contains all the information that previously approved notices have contained and is therefore substantively reasonable.

B. The Proposed Distribution Method Is Reasonable

Further, the methods of distribution of the proposed Class Notice satisfy the due process considerations of Rule 23(e), particularly in light of the type of relief being afforded and the preservation of class members' individual claims. The settlement provides that the Class Notice will be published in two separate locations: on Class Counsel's class settlement website https://www.kennedysettlement.com and on Defendant's website https://arba.army.pentagon.mil/adrb-overview.html. The Army will further publicize the settlement and Class Notice by issuing a press release. Class Counsel also intends to publicize the settlement with a press release of its own, engagement with traditional and social media, collaboration with elected officials, and distribution of the settlement and Class Notice to veterans organizations and veterans advocates across the country.

These measures comport with the Second Circuit's requirement that the manner of distribution to the class should be "the best notice practicable under the circumstances." *McReynolds v. Richards Cantave*, 588 F.3d 790, 798 (2d Cir. 2009). Publication can be an

acceptable notice procedure. For example, the Second Circuit has held that repeated publication of a notice in several metropolitan New York newspapers for several weeks adequately notified class members of a potential settlement. *See Handschu*, 787 F.2d at 833. The Second Circuit has also held that a notice procedure was sufficient where the notice was published in three newspapers, posted in field offices, provided to executive directors of foster care agencies that contracted with the city government, and distributed to all child welfare groups known to the plaintiff's counsel. *See McReynolds*, 588 F.3d at 797.

Here, the distribution plan is the best practicable under the circumstances, and it is more robust than those approved by the Second Circuit in *Handschu* and *McReynolds*. Each party will issue a press release, and each party will publish the Class Notice to its own website. Class Counsel's press conference and engagement with media outlets will promote awareness of the settlement and the Class Notice through print and digital news media. Collaboration with elected officials enables such officials to draw upon their expertise in determining the most effective manner of reaching their constituent veteran populations, many of whom may be class members. Distributing the notice to veterans advocates and organizations throughout the country enables them to distribute the Notice among the populations they serve and to further amplify the settlement through their networks and social media accounts. Given the increasing number of individuals who receive news and information through social media, the use of numerous social media outlets provides a low-cost but highly effective method of the distributing Class Notice to populations that may not be reached through these other means.

Alternative methods of class notice distribution are impracticable. It is impossible to mail individualized notice to every member of the class because the settlement provides prospective relief for class members who have not yet applied for a discharge upgrade and whose addresses

are therefore unknown. Publication through the various preceding means is the only feasible manner of reaching those class members. Courts in this Circuit have reasoned that "[t]o the extent . . . that individual members cannot be identified, notice by publication is sufficient." *Zink v. First Niagara Bank, N.A.*, 155 F. Supp. 3d 297, 314 (W.D.N.Y. 2016).

Further, mailing individualized notices to every class member whom the parties have been able to identify to date would create an unreasonable burden. The parties can identify some class members only by mailing address (not email), making individualized notices expensive to produce and slow to deliver. These costs outweigh the potential benefits of individualized notices, especially because of the high likelihood that class members will become aware of the settlement through other means and the fact that the settlement does not actually extinguish future claims class members might want to bring.

The proposed class notice is adequate in its substance and its manner of distribution and accordingly satisfies the requirements of the Rules and due process. The Court should find the Class Notice and its distribution method adequate.

PROPOSED SCHEDULE

Class Counsel proposes the below schedule, which is based on the need to give fair notice to the class while accounting for the nature of the injunctive Rule 23(b)(2) relief, which does not require individualized notice or a lengthy publication period.

Deadline for Completing Distribution of Class Notice	14 days after entry of Preliminary Order Approving Settlement
Deadline for Filing Plaintiffs' Motion for Final Approval	7 days prior to the proposed Fairness Hearing
Deadline for Settlement Class Members to Comment Upon or Object to the Proposed Settlement	21 days prior to the proposed Fairness Hearing

Fairness Hearing	At least 60 days after entry of Preliminary Order Approving Settlement

CONCLUSION

Through rigorous discovery and negotiations, Class Counsel has secured a robust settlement that remediates the violations of the APA and Fifth Amendment perpetrated on a protracted and systemic scale against members of the class. For these reasons, Class Counsel requests that this Court grant preliminary approval of the settlement, schedule a fairness hearing, and authorize distribution of the proposed Class Notice.

By: /s/ Michael Wishnie

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

STEPHEN M. KENNEDY and ALICIA J. CARSON, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. RYAN D. McCARTHY, Acting Secretary of the Army, *Defendant*.	No. 3:16-cv-2010-CSH **STIPULATION AND AGREEMENT OF SETTLEMENT**

STIPULATION AND AGREEMENT OF SETTLEMENT

This Stipulation and Agreement of Settlement (the "Stipulation" or "Settlement Agreement"), dated as of November 17, 2020, is made and entered into by and between: (i) Ryan D. McCarthy, in his official capacity as Secretary of the U.S. Army (the "Army") ("Defendant"); and (ii) Stephen M. Kennedy and Alicia J. Carson, individually and on behalf of themselves and a class of persons similarly situated (the "Plaintiffs"). Plaintiffs and Defendant shall be referred to in this Settlement Agreement individually as a "Party" and collectively as the "Parties."

I. RECITALS

This Settlement Agreement is made and entered into with reference to the following facts:

A. On December 8, 2016, Plaintiff Kennedy commenced this action against Defendant to obtain judicial review of the Army Discharge Review Board's ("ADRB") denial of his discharge upgrade application (the "Initial Complaint"). (ECF No. 1.)

B. Defendant moved to remand or dismiss the Initial Complaint on March 27, 2017. (ECF No. 10.)

C. On April 17, 2017, Plaintiff Kennedy and Plaintiff Carson filed an Amended Complaint seeking to litigate this action on behalf of a class. (ECF No. 11.) The Amended Complaint alleged, among other things, that since start of military operations in Iraq and Afghanistan, the Army discharged thousands of men and women with Other Than Honorable ("OTH") or General (Under Honorable Conditions) ("GEN") statuses due to misconduct attributable to post-traumatic stress disorder ("PTSD"), traumatic brain injury ("TBI"), and related mental health conditions. Specifically, the Amended 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 status upgrades by the ADRB. The Amended Complaint further alleged that these veterans were denied status upgrades even as scientific and medical understanding of PTSD and TBI advanced and explained how these conditions can affect soldiers' behavior. Plaintiffs further alleged that, despite the 1944 statute creating the ADRB, longstanding regulations, and binding Department of Defense guidance that clarified the ADRB's obligation to give liberal consideration to the applications of former soldiers who incurred these mental health conditions, the ADRB systematically failed to apply appropriate decisional standards or provide Class members with due consideration, in violation of the Administrative Procedure Act ("APA") and the Due Process Clause of the Fifth Amendment.

D. On June 27, 2017, Plaintiffs filed a motion for class certification. (ECF No. 15.) Defendant opposed Plaintiffs' motion.

E. On June 30, 2017, Defendant filed a motion to dismiss the Amended Complaint or, in the alternative, remand Plaintiff Kennedy's and Plaintiff Carson's ADRB applications to the Army for further consideration. (ECF No. 16.) Plaintiffs opposed Defendant's motion.

F. On September 18, 2017, the Court denied Defendant's motion to dismiss without prejudice, granted Defendant's motion for voluntary remand, and stayed this action pending reconsideration of Plaintiff Kennedy's and Plaintiff Carson's ADRB applications. (ECF No. 29.)

G. On October 18, 2017, before the ADRB could reconsider Plaintiff Carson's application, the Adjutant General, Major General Thaddeus Martin, exercised his authority to upgrade Plaintiff Carson's characterization of service to Honorable.

H. On March 29, 2018, the ADRB upgraded Mr. Kennedy's discharge characterization to Honorable.

I. On June 4, 2018, Defendant filed a second motion to dismiss the Amended Complaint. (ECF No. 50.) Plaintiffs opposed Defendant's motion.

J. Also on June 4, 2018, Plaintiffs filed a second motion for class certification. (ECF No. 51.) Defendant opposed Plaintiffs' motion.

K. On December 21, 2018, the Court granted Plaintiffs' motion for class certification pursuant to Federal Rule of Civil Procedure 23(b)(2). (ECF No. 74.) The Court defined the class as "[a]ll Army, Army Reserve, and Army National Guard veterans of the Iraq and Afghanistan era—the period between October 7, 2001 to present—who: (a) were discharged with a less-than-Honorable service characterization (this includes General and Other than Honorable discharges from the Army, Army Reserve, and Army National Guard, but not Bad Conduct or Dishonorable discharges); (b) have not received discharge upgrades to Honorable; and (c) have diagnoses of PTSD or PTSD-related conditions or record documenting one or more

symptoms of PTSD or PTSD-related conditions at the time of discharge attributable to their military service under the Hagel Memo standards of liberal and special consideration."

L. The Court also named Plaintiff Kennedy and Plaintiff Carson as class representatives, and the Jerome L. Frank Legal Services Clinic of Yale Law School and Jenner & Block LLP as Class Counsel.

M. On January 9, 2019, the Court denied Defendant's motion to dismiss. (ECF No. 75.)

N. On March 6, 2019, Plaintiffs filed a Federal Rule of Civil Procedure 26(f) Report, which contained a proposed case management plan. (ECF No. 76.) The same day, Defendant filed a motion for a status conference, in which Defendant took the position that discovery was not warranted in this case. (ECF No. 77.)

O. On April 5, 2019, the Court ordered Defendant to produce to Plaintiffs "the full administrative records relevant to the claims of lead plaintiffs in this action in addition to any relevant policy memoranda, regulations and other documents, to the extent that these documents might provide background information." The Court also determined that it would "consider whether discovery is necessary thereafter." (ECF No. 80.) Defendant filed the administrative record on May 31, 2019. (ECF Nos. 82–85.)

P. On June 18, 2019, Plaintiffs moved for additional discovery. (ECF No. 97.) Defendant opposed Plaintiffs' motion.

Q. On September 6, 2019, the Court ruled that it would allow Plaintiffs to conduct discovery outside of the administrative record and referred the case Magistrate Judge Robert M. Spector to supervise discovery. (ECF No. 101.)

R. On February 19, 2020, Defendant and Plaintiffs participated in a settlement conference before Judge Spector. (ECF No. 142.) Over the subsequent months, the Parties engaged in protracted and extensive settlement negotiations supervised by Judge Spector. (*See* ECF Nos. 145, 149, 154, 156, 158, 189, 162, 165, 167, 169, 176, 177, 178, 180, 181.)

S. On October 7, 2020, after extensive arm's-length negotiations and exchange of multiple proposals, Plaintiffs and Defendants reached an agreement in principle to settle the Litigation.

T. Based on Class Counsel's investigation and evaluation of the facts and law relating to the matters alleged in the pleadings, Plaintiffs and Class Counsel agreed to settle the Litigation pursuant to the provisions of this Stipulation after considering, among other things: (1) the substantial benefits available to the Class under the terms herein; (2) the attendant risks and uncertainty of litigation, especially in complex actions such as this, as well as the difficulties and delays inherent in such litigation; and (3) the desirability of consummating this Settlement Agreement to provide effective relief to the Class.

U. Defendant has denied and continues to deny each and all of the claims and contentions alleged by Plaintiffs. Defendant has expressly denied and continues to deny all charges of wrongdoing or liability against it arising out of any of the conduct, statements, acts or omissions alleged, or that could have been alleged, in this Litigation.

V. Nonetheless, Defendant has concluded that further defense of the Litigation would be protracted and expensive, and that it is desirable that the Litigation be fully and finally settled in the manner and upon the terms and conditions set forth in the Settlement Agreement. Defendant also has taken into account the uncertainty and risks inherent in any litigation.

Defendant, therefore, has determined that it is desirable and beneficial to it that the Litigation be settled in the manner and upon the terms and conditions set forth in the Settlement Agreement.

W. This Stipulation effectuates the resolution of disputed claims and is for settlement purposes only.

II. DEFINITIONS

As used in this Stipulation the following capitalized terms have the meanings specified below. Unless otherwise indicated, defined terms include the plural as well as the singular.

A. "Army Discharge Review Board" or "ADRB" means the U.S. Army board that reviews discharges of former soldiers on the basis of issues of propriety and equity. 10 U.S.C. § 1553; 32 C.F.R. § 581.2.

B. "Army Review Boards Agency" or "ARBA" means the U.S. Army agency that administers the ADRB.

C. "Applicant" means any individual that seeks a discharge review through submission of the Department of Defense Form 293 to the ADRB.

D. "Case Data" means any materials associated with an applicant's case file, whether submitted by the applicant or obtained or produced by the ADRB in the course of an adjudication, that were used in ARBA's effort to identify Special Cases.

E. "Class" or "Settlement Class" means members and former members of the Army, Army Reserve, and Army National Guard who served during the Iraq and Afghanistan era—the period between October 7, 2001 to the Effective Date of Settlement—who:

1. were discharged with a less-than Honorable service characterization (this includes GEN and OTH discharges from the Army, Army Reserve, and Army National Guard, but not Bad Conduct or Dishonorable discharges);

2. have not received discharge upgrades to Honorable; and

3. have diagnoses of PTSD or PTSD-related conditions or records documenting one or more symptoms of PTSD or PTSD-related conditions at the time of discharge attributable to their military service under the Hagel Memo standards of liberal and special consideration.

F. "Class Counsel" means, collectively, the Jerome L. Frank Legal Services Organization of Yale Law School and the law firm of Jenner & Block LLP.

G. "Class Notice" means the notice substantially in the form attached to this Settlement Agreement as Exhibit "A", to be provided to the Class as set forth in Section VI below.

H. "Court" means the United States District Court for the District of Connecticut.

I. "DD-293" means the Department of Defense Form 293, Application for the Review of Discharge or Dismissal from the Armed Forces of the United States.

J. "Defendant" means Ryan D. McCarthy, Secretary of the U.S. Army, in his official capacity.

K. "Effective Date of Settlement" means the date of the Final Approval Order.

L. "Fairness Hearing" means the hearing to be held by the Court, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, to determine whether the settlement set forth in this Settlement Agreement should be approved.

M. "Final Approval Order" means the order by the Court, after notice and the holding of the Fairness Hearing, granting approval of this Settlement Agreement under Rule 23(a) of the Federal Rules of Civil Procedure, substantially in the form attached to this Settlement Agreement as Exhibit "B".

N. "GEN" means a character of service of General (Under Honorable Conditions).

O. "Group A Applicants" are defined below in Section IV.A.

P. "Group B Applicants" are defined below in Section IV.B.

Q. "Hagel Memo" means the memorandum issued by then-Secretary of Defense Chuck Hagel on September 3, 2014, directing all military record-correction boards to give "special consideration" to PTSD diagnoses by the U.S. Department of Veterans Affairs and "liberal consideration" to diagnoses of PTSD by civilian providers when adjudicating discharge upgrade applications submitted by veterans.

R. "Honorable" means a character of service of Honorable.

S. "Kurta Memo" means the memorandum issued by then-Acting Under Secretary of Defense for Personnel and Readiness A.M. Kurta on August 25, 2017, issuing additional guidance clarifying that "[l]iberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions."

T. "Kurta Factors" means the four questions provided in the Kurta Memo regarding when requests for discharge relief is appropriate in Special Cases. (Kurta Memo, att. at 1.)

U. "Litigation" means the lawsuit captioned Kennedy v. McCarthy, Case No. 16-CV-02010 (D. Conn.).

V. "Military Sexual Trauma" or "MST" means physical assault of a sexual nature, battery of a sexual nature, or sexual harassment that occurred during military service.

W. "Other Behavioral Health" or "OBH" means a behavioral health condition other than PTSD or TBI and unrelated to MST.

X. "Other Than Honorable" or "OTH" means a character of service of Other Than Honorable.

Y. "Person" means a natural person, individual, corporation, partnership, association, or any other type of legal entity.

Z. "Plaintiffs" means the class representatives Stephen M. Kennedy and Alicia J. Carson, on behalf of themselves and each of the Class members.

AA. "Preliminary Approval Order" means the "Order Preliminarily Approving Class Action Settlement, Conditionally Certifying the Settlement Class, Providing For Notice and Scheduling Order," substantially in the form of Exhibit "C" attached hereto, which, among other things, preliminarily approves this Stipulation and provides for notification to the Settlement Class and sets the schedule for the Fairness Hearing.

BB. "PTSD" means Post-Traumatic Stress Disorder.

CC. "Settled Claims" means all claims for relief that were brought on behalf of Class members based on the facts and circumstances alleged in the Amended Complaint (ECF No. 11).

DD. "Special Cases" means any application for a discharge upgrade or change in narrative reason for separation that includes a diagnosis or allegation of, or evidence or allegations of symptoms of, PTSD, TBI, MST, or OBH.

EE. "Stipulation and Agreement of Settlement" or "Stipulation" or "Settlement Agreement" means this agreement, including its attached exhibits (which are incorporated herein by reference), duly executed by Class Counsel and counsel for Defendant.

FF. "TBI" means Traumatic Brain Injury.

III. CERTIFICATION OF THE SETTLEMENT CLASS

The Parties agree that the Settlement Class shall be conditionally certified, in accordance with the terms of this Settlement Agreement, solely for purposes of effectuating the settlement embodied in this Settlement Agreement. The Settlement Class differs from the class certified by

the Court on December 21, 2018 only in that it sets the end date of the Class as the Effective Date of Settlement.

IV. SETTLEMENT RELIEF

A. Reconsideration of 2011-2020 Applications

1. The ADRB will automatically reconsider its decisions that meet all of the following three criteria: (a) Special Cases, (b) issued on or after April 17, 2011 until the Effective Date of Settlement, (c) whose grant state indicates the applicant did not receive the full relief they requested. The applicants who are the subject of these decisions are defined here as Group A Applicants.

2. To identify Group A Applicants, Defendant will conduct an electronic search of ADRB data to identify individuals whose record "grant state" indicates they did not receive the full relief that they requested, and whose Case Data raises PTSD, TBI, MST, or OBH. Defendant has already identified about 3,500 decisions for reconsideration through this search algorithm, and will reconsider those applications as well as others that it finds after completing its searches.

3. Defendant will send a notice, in the form of Exhibit "D", to all Group A Applicants at their last known address on file with ARBA. That notice, as laid out in Exhibit D, will state that the ADRB will reconsider each case without a need for further responses from the applicant; state that if the applicant wishes to supplement their application, they should submit supplemental evidence within 60 days of the notice; state that submitting medical evidence in support of the application benefits the applicant; and include information regarding available legal and medical services.

4. Defendant will bear the cost of sending a notice in the form of Exhibit D to Group A Applicants by mail and of posting said notice to its website. Defendant will mail the

notice to Group A Applicants within 120 days of the Effective Date of Settlement. Defendant will also publicly post the notice on ARBA's website https://arba.army.pentagon.mil/adrb-overview.html within 120 days of the Effective Date of Settlement.

5. The ADRB will make every effort to complete its reconsideration of Group A Applicants in a timely manner, and agrees to provide a report every six months of the number of Group A cases reconsidered and decided.

6. Defendant agrees to provide Plaintiffs with the names and last-known addresses (according to ARBA data) for applicants who (a) are not identified as Group A Applicants by the ADRB; and (b) whose cases were either denied or only granted partial relief by the ADRB between April 17, 2011 and September 4, 2014. These names and addresses will be subject to the Protective Order in effect for this Litigation, and will be provided to Plaintiffs within 90 days of the Effective Date of Settlement. Plaintiffs will send a notice, in the form of Exhibit "E", to individuals on this list of names and addresses, informing them of their right to reapply and referring to the Class Notice. Plaintiffs will bear the cost of mailing notice in the form of Exhibit E. The notices sent by Plaintiffs will not include the name of any of Plaintiffs' counsel, including on any mailing information (*e.g.*, return address, non-profit mailing indicia).

B. Notice of Reapplication Rights for 2001-2011 Applicants

1. Defendant agrees to facilitate mailing notices to the last known addresses of ADRB applicants for whom the ADRB's decisions meet all of the following three criteria: (a) are Special Cases, (b) were issued between October 7, 2001 and April 16, 2011, and (c) whose grant state indicates they did not receive the full relief they requested. The applicants who are the subject of these decisions are defined here as Group B Applicants.

2. To identify Group B Applicants, the ADRB will conduct an electronic search of ADRB data to identify individuals whose record "grant state" indicates they did not receive the full relief that they requested, and whose Case Data raises PTSD, TBI, MST, or OBH. For most cases in the 2001–2004 timeframe, the only grant states recorded were "grant" or "deny." For these cases, "deny" will be used as the grant state indicating the applicant did not receive the full relief they requested. Defendant will provide the names of Group B Applicants from October 7, 2001 through April 16, 2011 within 90 days of the Effective Date of Settlement.

3. Defendant will provide the names and last known addresses (according to ARBA data) of Group B Applicants to Plaintiffs. Plaintiffs will then mail a notice in the form of Exhibit "F" to Group B Applicants. That notice, as laid out in Exhibit F, will state that the applicant may reapply to the ADRB, or to the ABCMR if the applicant's discharge date is beyond the ADRB 15-year statute of limitations, 10 U.S.C. § 1553, for reconsideration of their case; state that should the applicant wish to supplement their application, they will have the opportunity to do so; state that submitting medical evidence in support of the application benefits the applicant; include information regarding available legal and medical services; and refer to the Class Notice. Plaintiffs will bear the cost of mailing this notice to Group B Applicants, paid out of the attorneys' fees and costs set forth in V(A) below. The notices sent by Plaintiffs will not include the name of any of Plaintiffs' counsel, including on any mailing information (e.g., return address, non-profit mailing indicia).

C. Online Notice of Reapplication Rights for 2001-2011 Applicants and Reconsideration for 2011-2020 Applicants

1. Defendant will post notice of reapplication rights for 2001-2011 Applicants and reconsideration for 2011-2020 Applicants, in the form of Exhibit "G", on its

website, including at https://arba.army.pentagon.mil/adrb-overview.html, https://arba.army.pentagon.mil/adrb-faq.html, within 45 days of the Effective Date of Settlement.

D. Revised Decisional Documents & Procedures

1. The Army agrees to adopt the following language and procedure, to be incorporated as quoted below into the Military Review Boards Standard Operating Procedures:

> 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 on consideration of each of the applicable Kurta Factors; (c) explain why it decided against the veteran with respect to each applicable Kurta Factor; (d) ensure it draws 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.

2. The Army will revise processing language in the ADRB's decisional document template to include the Kurta Factors, consistent with the above modifications to the Military Review Boards Standard Operating Procedures.

3. The Army will consider (a) issuing a guidance memo describing the revised Standard Operating Procedure requirements stated above and/or (b) revising the format of the ADRB voting sheet to address the same. The Army will inform Class Counsel regarding any final determination made to issue or not issue any guidance memo or to revise or not revise any ADRB voting sheet after consideration made in accordance with this paragraph.

E. Universal Option for Telephonic Personal Appearance Boards

1. Defendant will complete implementation of a Telephonic Personal Appearance Board Program for the ADRB within 18 months of the Final Approval Order, available to all applicants who request a Personal Appearance hearing. Applicants will be

invited to opt-in to a telephonic ADRB hearing in the letter acknowledging receipt of their DD-293 application. Applicants will have an opportunity to participate in telephonic hearings from their personal residences, or other location of their own choice.

2. At each of six, twelve, and eighteen months after the Effective Date of Settlement, the Army shall report to the Court and to Plaintiffs its progress in implementing the Telephonic Personal Appearance Board Program. The report shall include, but is not limited to: (a) steps the Army has taken, is taking, and will take to facilitate applicants' access to telephonic personal appearance with minimal, if any, travel; (b) steps the Army has taken, is taking, and will take to enable applicants to access telephonic hearings year-round; (c) the number of telephonic hearings completed during the prior six months; and (d) the location of hearings not chosen by the applicant, and the number of hearings in those locations.

F. Training

1. The Army agrees to conduct annual training for ADRB members and staff specifically tailored to Special Cases.

2. This training will include changes made as a result of this Settlement Agreement, including training on the revised Military Review Boards Standard Operating Procedures.

G. Notice for New Applications

1. For all discharge upgrade applications submitted to the ADRB after the Effective Date of Settlement, when the Board writes the applicant to acknowledge receipt of a submitted DD-293, the Board letter shall inform applicants of how to find legal counsel and Veterans Service Organizations to assist with their application. The notice shall include a link for Stateside Legal, www.statesidelegal.org, and a link to the Department of Veterans Affairs

"Directory of Veterans Service Organizations," https://www.va.gov/vso/. This list of resources shall be updated by the Board as needed.

2. The notice shall also (a) state that the applicant may seek out and provide additional medical evidence of their Special Case condition, and state that it is to applicant's benefit to provide medical evidence for the review process; (b) invite the applicant to provide such evidence within 45 days of the date the notice is sent; and (c) advise the applicant of their right under 38 U.S.C. § 1720I to obtain mental health evaluation and treatments at Department of Veterans Affairs facilities. Defendant agrees that an ADRB applicant's failure to submit additional evidence shall not prejudice the applicant's ADRB application, and shall not be referenced for the purpose of evaluating the applicant's claims.

V. ATTORNEYS' FEES AND COSTS

With respect to the issue of attorneys' fees and costs incurred by Plaintiffs and the payment thereof by Defendant, the Parties agree to the following as a complete resolution of the issue.

A. Defendant agrees to pay $185,000 in attorneys' fees and costs to Class Counsel.

B. Defendant agrees to submit payment of attorneys' fees to Class Counsel within 90 days of either (a) the Effective Date of Settlement, or (b) Defendant's receipt of Class Counsel information (including banking information) necessary to effectuate the attorneys' fee transfer, whichever occurs later.

VI. NOTICE AND APPROVAL PROCEDURE

A. Preliminary Approval. As soon as practicable after the execution of this Agreement, the Parties shall jointly move for a Preliminary Approval Order, substantially in the form of Exhibit C, preliminarily approving this Settlement Agreement and this settlement to be fair, just, reasonable, and adequate, approving the Class Notice to the Class members as

described *infra* Section VI.C, and setting a Fairness Hearing to consider the Final Approval Order and any objections thereto.

B. Effect of the Court's Denial of the Agreement. This Settlement Agreement is subject to and contingent upon Court approval under Rule 23(e) of the Federal Rules of Civil Procedure. If the Court rejects this Agreement, in whole or in part, or otherwise finds that the Agreement is not fair, reasonable, and adequate, Parties agree to meet and confer to work to resolve the concerns articulated by the Court and modify the agreement accordingly. Except as otherwise provided herein, in the event the Settlement Agreement is terminated or modified in any material respect or fails to become effective for any reason, then the Settlement Agreement shall be without prejudice and none of its terms shall be effective or enforceable; the Parties to this Settlement Agreement shall be deemed to have reverted to their respective status in the Action as of the date and time immediately prior to the execution of this Settlement Agreement; and except as otherwise expressly provided, the Parties shall proceed in all respects as if this Settlement Agreement and any related orders had not been entered. In the event that the Settlement Agreement is terminated or modified in any material respect, the Parties shall be deemed not to have waived, not to have modified, or not be estopped from asserting any additional defenses or arguments available to them. In such event, neither this Settlement Agreement nor any draft thereof, nor any negotiation, documentation, or other part or aspect of the Parties' settlement discussions, nor any other document filed or created in connection with this settlement, shall have any effect or be admissible in evidence for any purpose in the Litigation or in any other proceeding, and all such documents or information shall be treated as strictly confidential and may not, absent a court order, be disclosed to any person other than the Parties' counsel, and in any event only for the purposes of the Litigation.

C. Notice for Fairness Hearing. Not later than 14 business days after entry of the Preliminary Approval Order (unless otherwise modified by the Parties or by order of the Court), the Parties shall effectuate the following Class Notice.

1. Plaintiffs shall post the Class Notice substantially in the form of Exhibit A, as well as a copy of the Settlement Agreement, on www.kennedysettlement.com.

2. The Army shall post the Class Notice substantially in the form of Exhibit A, including a copy of the Settlement Agreement, on https://arba.army.pentagon.mil/adrb-overview.html.

3. The Army shall issue a press release that describes the Class Notice and provides a link to the website listed in Section VI.C.2.

D. Objections to Settlement. On or before 21 calendar days before the Fairness Hearing, in the above-described manner, any Class member who wishes to object to the fairness, reasonableness, or adequacy of this Settlement Agreement or the settlement contemplated herein must file with the Clerk of Court and serve on the Parties a statement of objection setting forth the specific reason(s), if any, for the objection, including any legal support or evidence in support of the objection, grounds to support their status as a Class member, and whether the Class member intends to appear at the Fairness Hearing. The Parties will have 14 days following the objection period in which to submit answers to any objections that are filed. The notice to the Clerk of the Court shall be sent to: Clerk of the Court, U.S. District Court of Connecticut, 141 Church Street, New Haven, CT 06510; and both envelope and letter shall state: "Attention: Kennedy v. McCarthy, No. 3:16-cv-2010 (D. Conn.)." Copies shall also be served on counsel for Plaintiffs and counsel for Defendants.

E. Fairness Hearing. At the Fairness Hearing, as required for Final Approval of the settlement pursuant to Federal Rule of Civil Procedure 23(e)(2), the Parties will jointly request that the Court approve the settlement as final, fair, reasonable, adequate, and binding on the Class, all Class members, and all Plaintiffs.

F. Opt-Outs. The Parties agree that the Settlement Class shall be certified in accordance with the standards applicable under Rule 23(b)(2) of the Federal Rules of Civil Procedure and that, accordingly, no Settlement Class member may opt out of any of the provisions of this Settlement Agreement.

G. Final Approval Order and Judgment. At the Fairness Hearing, the Parties shall jointly move for entry of the Final Approval Order, substantially in the form of Exhibit B, granting final approval of this Agreement to be final, fair, reasonable, adequate, and binding on all Class members; overruling any objections to the Settlement Agreement; ordering that the terms be effectuated as set forth in this Settlement Agreement; and giving effect to the releases as set forth in Section VII.

VII. RELEASES

A. As of the Effective Date, the Plaintiffs and the Class members, on behalf of themselves; their heirs, executors, administrators, representatives, attorneys, successors, assigns, agents, affiliates, and partners; and any persons they represent, by operation of any final judgment entered by the Court, shall have fully, finally, and forever released, relinquished, and discharged the Defendant of and from any and all of the Settled Claims, and the Plaintiffs and the Class members shall forever be barred and enjoined from bringing or prosecuting any Settled Claim against any of the Defendants, and all of their past and present agencies, officials, employees, agents, attorneys, and successors. This Release shall not apply to claims that arise or accrue after the effective date of Agreement.

B. In consideration of the terms and conditions set forth herein, Plaintiffs hereby release and forever discharge Defendant, and all of their past and present agencies, officials, employees, agents, attorneys, successors, and assigns from any and all obligations, damages, liabilities, causes of action, claims, and demands of any kind and nature whatsoever, whether suspected or unsuspected, arising in law or equity, arising from or by reason of any and all known, unknown, foreseen, or unforeseen injuries, and the consequences thereof, resulting from the facts, circumstances and subject matter that gave rise to the Litigation, including all claims that were asserted or that Plaintiffs could have asserted in the Litigation.

AGREED TO:

FOR PLAINTIFFS:

By: 

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By: /s/ Natalie Elicker
Natalie Nicole Elicker
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Kyle Montague Meisner
Major, U.S. Army

Counsel for Defendant

ATTENTION ALL FORMER MEMBERS OF THE ARMY, ARMY RESERVE, AND ARMY NATIONAL GUARD 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 KENNEDY CLASS ACTION.

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

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STEPHEN M. KENNEDY and ALICIA J. CARSON, et al.,

Plaintiffs,

No. 3:16-cv-2010-CSH

-against-

RYAN D. McCARTHY, Acting Secretary of the Army,

Defendant.

BACKGROUND

In 2017, plaintiffs Stephen Kennedy and Alicia Carson ("Plaintiffs") filed an Amended Complaint alleging that since the start of military operations in Iraq and Afghanistan, the Army discharged thousands of people with Other Than Honorable ("OTH") or General (Under Honorable Conditions) ("GEN") statuses due to misconduct attributable to post-traumatic stress disorder ("PTSD"), traumatic brain injury ("TBI"), military sexual trauma ("MST"), and other

behavioral health conditions ("OBH"). Specifically, the Amended 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 status upgrades by the Army Discharge Review Board ("ADRB").

The Amended Complaint further alleged that these veterans were denied status upgrades even as scientific and medical understandings of PTSD and TBI advanced and explained how these conditions can affect Soldiers' behavior. Plaintiffs further alleged that, despite the 1944 statute creating the ADRB, longstanding regulations, and binding Department of Defense guidance that clarified the ADRB's obligation to give liberal consideration to the applications of former Soldiers who incurred these mental health conditions, the ADRB systematically failed to apply appropriate decisional standards or provide veterans with due consideration, in violation of the Administrative Procedure Act and the Due Process Clause of the Fifth Amendment.

Defendant has denied and continues to deny each and all of the claims and contentions alleged by Plaintiffs. Defendant has expressly denied and continues to deny all charges of wrongdoing or liability against it arising out of any of the conduct, statements, acts or omissions alleged, or that could have been alleged by Plaintiffs. The Defendant specifically denies the allegations in the Amended Complaint, including any allegation that the Army violated the APA or failed to follow appropriate procedures, that the allegedly relevant DOD guidance was binding on the ADRB, that the Army otherwise acted arbitrarily and capriciously, that the Plaintiff's raised an actionable Due Process/Fifth Amendment claim, and all other allegations of wrongdoing.

On December 21, 2018, the Court certified a class in this civil action ("The Plaintiff Class") defined as follows:

> "All Army, Army Reserve, and Army National Guard veterans of the Iraq and Afghanistan era—the period between October 7, 2001 to present—who:
>
> (a) were discharged with a less-than-Honorable service characterization (this includes General and Other than Honorable discharges from the Army, Army Reserve, and Army National Guard, but not Bad Conduct or Dishonorable discharges);
>
> (b) have not received discharge upgrades to Honorable; and

> (c) have diagnoses of PTSD or PTSD-related conditions or record[s] documenting one or more symptoms of PTSD or PTSD-related conditions at the time of discharge attributable to their military service under the Hagel Memo standards of liberal and special consideration."

The Court named Plaintiffs as class representatives in this civil action and the Jerome L. Frank Legal Services Clinic of Yale Law School and Jenner & Block LLP as Class Counsel ("Class Counsel"). Throughout 2019 and 2020, Plaintiffs and Defendant engaged in motion practice and discovery, and eventually settlement negotiations supervised by the Court. After extensive arm's-length negotiations and exchanges of multiple proposals, Plaintiffs and Defendant reached an agreement in principle ("Joint Settlement Agreement") on November 17, 2020, to settle the claims in the Amended Complaint. The Joint Settlement Agreement, if approved by the Court, will settle the claims in the Amended Complaint in the manner and upon the terms summarized and described below.

SUMMARY OF SETTLEMENT TERMS

The full text of the proposed Joint Settlement Agreement can be viewed at https://arba.army.pentagon.mil/adrb-overview.html.

Automatic Reconsideration for Certain 2011-2020 Applicants and Reapplication Rights for Certain 2001-2011 Applicants

- The ADRB will automatically reconsider its decisions that meet all of the following three criteria: (a) Special Cases (cases that include a diagnosis or allegation of, or evidence or allegations of symptoms of, PTSD, TBI, MST, or OBH), (b) issued on or after April 17, 2011 until the Effective Date of Settlement, (c) whose grant state indicates the applicant did not receive the full relief they requested. The Defendant will identify these applicants by conducting an electronic search of ADRB data to identify individuals whose record "grant state" indicates they did not receive the full relief that they requested, and whose Case Data raises PTSD, TBI, MST, or OBH.
- The Army will send notice of this automatic reconsideration process to all eligible applicants, inviting them to submit additional evidence within 60 days of the notice date

to ensure that new evidence is considered when their application is reviewed and providing them with referral information for potential free legal representation. This notice will be posted to https://arba.army.pentagon.mil/adrb-overview.html and https://www.kennedysettlement.com, and sent to eligible veterans within 120 days of the date the settlement is approved.

- Previous applicants to the ADRB who are not eligible for automatic reconsideration according to the paragraph above, and whose cases were either denied or only granted partial relief by the ADRB between April 17, 2011, and September 4, 2014, are eligible to reapply to the ADRB. Plaintiff will send notice to these applicants informing them of their right to reapply, including referral information for potential free legal representation.
- Previous applicants to the ADRB whose applications (a) are Special Cases, (b) were issued between October 7, 2001 and April 16, 2011, and (c) whose grant state indicates they did not receive the full relief they requested, have the right to apply anew to the ADRB or, if the applicant was discharged more than 15 years ago, to the Army Board for Correction of Military Records. This is because the ADRB's statute of limitations is 15 years. The Defendant will identify these applicants by conducting an electronic search of ADRB data to identify individuals whose record "grant state" indicates they did not receive the full relief that they requested, and whose Case Data raises PTSD, TBI, MST, or OBH. For most cases in the 2001–2004 timeframe, the only grant states recorded were "grant" or "deny." For these cases, "deny" will be used as the grant state indicating the applicant did not receive the full relief they requested.
- The Army will provide contact information to the Plaintiffs for previous applicants eligible to reapply to the ADRB, and Plaintiffs will send notice to these previous applicants providing referral information for potentially free legal representation and informing them of their right to reapply.
- Defendant will post notice of reapplication rights for 2001-2011 applicants and reconsideration for 2011-2020 applicants on its website, including at https://arba.army.pentagon.mil/adrb-overview.html and https://arba.army.pentagon.mil/adrb-faq.html, within 45 days of the date the settlement is approved.

Revised Decisional Documents & Procedures

- Defendant agrees to incorporate new language and procedures into the Military Review Boards Standard Operating Procedures that governs applications including a diagnosis or allegation of, or evidence or allegations of symptoms of, PTSD, TBI, MST, or OBH. If the ADRB finds that there is insufficient evidence per the four factors ("Kurta Factors) set forth in paragraph two (2) of the Kurta Memorandum issued on August 25, 2017 to warrant a grant of a full upgrade to Honorable, including that the evidence in mitigation does not outweigh the severity of misconduct in these applications, the Board must, in the decisional document sent to the applicant:
    - respond to each of the applicant's contentions;
    - describe the evidence on which it relied on consideration of each of the applicable Kurta Factors;
    - explain why it decided against the veteran with respect to each applicable Kurta Factor;
    - ensure it draws a rational connection between facts found and conclusions drawn; and
    - distinguish any prior Board decisions cited by the applicant in accordance with applicable law and regulations.
- Defendant will revise the decisional document template used by the ADRB to reflect the new language and procedures and will consider revising the ADRB voting sheet and/or issuing a guidance memo explaining these new procedures.
- Defendant will conduct annual training for ADRB members and staff tailored to applications that include a diagnosis or allegation of, or evidence or allegations of symptoms of, PTSD, TBI, MST, or OBH. This training will include information on the new procedures in the Joint Settlement Agreement and the telephonic hearings program.

Universal Option for Telephonic Personal Appearance Board Program

- Defendant will implement a Telephonic Personal Appearance Board Program for the ADRB within 18 months of the final approval of the settlement. All applicants who request a Personal Appearance hearing will be eligible for this telephonic program and

may elect to participate in a telephonic hearing from their personal residences or other location of their own choice.

Notice for New Applications

- For all discharge upgrade applications submitted to the ADRB after the date the settlement is approved, when the Board writes the applicant to acknowledge receipt of their application, the Board letter will inform the applicant of how to find legal counsel and Veterans Service Organizations to assist with their application.
- This notice will also encourage applicants to seek out and provide additional evidence related to an applicant's possible diagnosis or allegation of, or evidence or allegations of symptoms of, PTSD, TBI, MST, or OBH. The notice will provide information helping applicants to submit this additional evidence and informing them that they may be able to obtain mental health evaluation and treatment at Department of Veterans Affairs facilities.

Attorneys' Fees and Costs

- If the settlement is approved by the Court, defendant agrees to pay $185,000 in attorneys' fees and costs to Class Counsel. A portion of these fees will be used by Class Counsel to pay for the production and mailing of notices to some members of the class informing them of their right to reapply to the ADRB.

THE SETTLEMENT HEARING

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

B. In order to give class members an opportunity to express their comments in support or objection to the settlement, a hearing will be held before the Hon. Charles S. Haight, Jr., via the videoconferencing software Zoom on [**date**] at [time]. Class members or their attorneys can attend the hearing using the following link, [Zoom link], or by dialing in to [phone number]. The meeting ID for the hearing is [XXX] and the passcode is [YYY].

C. 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, kennedy.settlement@yale.edu; and Defendant's Counsel: Natalie N. Elicker, U.S. Attorney's Office for the District of Connecticut, 157 Church St, 25th Floor, 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 received by [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.** 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. This settlement, if approved by the Court, will be a full and final adjudication of the issues raised on behalf of the plaintiff class in the Amended Complaint and of any and all claims resulting from the facts, circumstances and subject matter that gave rise to the Amended Complaint and that were known to Class Counsel on the date the settlement is approved.

Dated: New Haven, CT
[Date of signature]

_____
Hon. Charles S. Haight, Jr.
Senior United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

STEPHEN M. KENNEDY and ALICIA J. CARSON, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. RYAN D. McCARTHY, Acting Secretary of the Army, *Defendant*.	No. 3:16-cv-2010-CSH

[PROPOSED] FINAL ORDER AND JUDGMENT

WHEREAS:

A. As of _____ _____, _____, Stephen M. Kennedy and Alicia J. Carson ("Class Representatives"), individually and on behalf of themselves and a class of persons similarly situated (the "Plaintiffs"), on the one hand, and Ryan D. McCarthy, in his official capacity as Secretary of the U.S. Army (the "Army") ("Defendant"), on the other, entered into a Stipulation and Agreement of Settlement (the "Stipulation" or "Settlement Agreement") in the above-titled litigation (the "Action"), which is subject to review under Rule 23 of the Federal Rules of Civil Procedure and which, together with the exhibits thereto, sets forth the terms and conditions of the proposed settlement of the Action and the claims alleged in the Amended Complaint filed on April 17, 2017 (Dkt. No. 11) on the merits and with prejudice (the "Settlement");

B. Pursuant to the Order Granting Preliminary Approval of Class Action Settlement, entered _____, 2020 (the "Preliminary Approval Order"), the Court scheduled a hearing

for _____, _____, at ___:____ ___.m. (the "Fairness Hearing") to, among other things: (i) determine whether the proposed Settlement of the Action on the terms and conditions provided for in the Stipulation is fair, reasonable, and adequate, and should be approved by the Court; and (ii) determine whether a judgment as provided for in the Stipulation should be entered;

C. The Court ordered that the Class Notice, substantially in the forms attached to the Stipulation as Exhibit A, be provided Settlement Class members as described in the Stipulation. The Class Notice advised potential Settlement Class members of the date, time, place, and purpose of the Fairness Hearing. The Class Notice further advised that any objections to the Settlement were required to be filed with the Court and served on counsel for the Parties such that they were received by _____ ___, _____;

D. The provisions of the Preliminary Approval Order as to notice were complied with;

E. On _____ ____, _____, Plaintiffs moved for final approval of the Settlement, as set forth in the Preliminary Approval Order. The Fairness Hearing was duly held before this Court on _____ ___, _____, at which time all interested Persons were afforded the opportunity to be heard; and

F. This Court has duly considered Plaintiffs' motion, the affidavits, declarations, memoranda of law submitted in support thereof, the Stipulation, and all of the submissions and arguments presented with respect to the proposed Settlement;

NOW, THEREFORE, after due deliberation, IT IS ORDERED, ADJUDGED AND DECREED that:

1. This Judgment incorporates and makes a part hereof the Stipulation filed with the Court on _____ ____, 2020. Capitalized terms not defined in this Judgment shall have the meaning set forth in the Stipulation.

2. This Court has jurisdiction over the subject matter of the Action and over all parties to the Action, including all Settlement Class members.

3. The Court hereby affirms its determinations in the Preliminary Approval Order and finally certifies, for purposes of the Settlement only, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, the Settlement Class of:

> Members and former members of the Army, Army Reserve, and Army National Guard who served during the Iraq and Afghanistan era—the period between October 7, 2001 to the Effective Date of Settlement—who
>
> (1) were discharged with a less-than-Honorable service characterization (this includes GEN and OTH discharges from the Army, Army Reserve, and Army National Guard, but not Bad Conduct or Dishonorable discharges);
>
> (2) have not received discharge upgrades to Honorable; and
>
> (3) have diagnoses of PTSD or PTSD-related conditions or records documenting one or more symptoms of PTSD or PTSD-related conditions at the time of discharge attributable to their military service under the Hagel Memo standards of liberal and special consideration.

4. Pursuant to Fed. R. Civ. P. 23, and for purposes of the Settlement only, the Court hereby re-affirms its determinations in the Preliminary Approval Order and finally certifies Stephen M. Kennedy and Alicia J. Carson as Class Representatives for the Settlement Class; and finally appoints the Jerome L. Frank Legal Services Organization of Yale Law School and the law firm of Jenner & Block LLP as Class Counsel for the Settlement Class.

5. The Court finds that the publication of the Class Notice (i) complied with the Preliminary Approval Order; (ii) constituted the best notice practicable under the circumstances;

(iii) constituted notice that was reasonably calculated to apprise Settlement Class members of the effect of the Settlement, of Class Counsel's request for an award of attorney's fees and payment of litigation expenses incurred in connection with the prosecution of the Action, of Settlement Class members' right to object to the Settlement, and of their right to appear at the Fairness Hearing; (iv) constituted due, adequate, and sufficient notice to all Persons entitled to receive notice of the proposed Settlement; and (v) satisfied the notice requirements of Rule 23 of the Federal Rules of Civil Procedure and the United States Constitution (including the Due Process Clause).

6. [There have been no objections to the Settlement.]

7. In light of the benefits to the Settlement Class, the complexity, expense and possible duration of further litigation against Defendant, the risks of establishing liability and damages, and the costs of continued litigation, the Court hereby fully and finally approves the Settlement as set forth in the Stipulation in all respects, and finds that the Settlement is, in all respects, fair, reasonable and adequate, and in the best interests of Class Representatives and the Settlement Class. This Court further finds the Settlement set forth in the Stipulation is the result of arm's-length negotiations between experienced counsel representing the interests of Class Representatives, the Settlement Class, and Defendant. The Settlement shall be consummated in accordance with the terms and provisions of the Stipulation.

8. The Amended Complaint filed on April 17, 2017 (Dkt. No. 11) is dismissed in its entirety, with prejudice, and without costs to any Party, except as otherwise provided in the Stipulation.

9. The Court finds that during the course of the Action, the Parties and their respective counsel at all times complied with the requirements of Rule 11 of the Federal Rules of Civil Procedure.

10. Upon the Effective Date of the Settlement and as specified in the Stipulation, Class Representatives and each and every other Settlement Class Member, on behalf of themselves and each of their respective heirs, executors, trustees, administrators, predecessors, successors, and assigns, shall be deemed to have fully, finally, and forever waived, released, discharged, and dismissed each and every one of the Settled Claims against the Defendant and shall forever be barred and enjoined from commencing, instituting, prosecuting, or maintaining any and all of the Settled Claims against the Defendant.

11. Each Settlement Class member is bound by this Judgment, including, without limitation, the release of claims as set forth in the Stipulation.

12. Defendant shall pay Class Counsel's fees and costs in the amount of $185,000, as specified in the Stipulation. This amount does not include any time, if necessary, to enforce any breach of the Stipulation. The Court finds that this award is fair and reasonable. This payment shall be made in accordance with the timeline specified in the Stipulation.

13. Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation.

14. The Parties are hereby directed to consummate the Stipulation and to perform its terms.

15. Without affecting the finality of this Judgment in any way, this Court hereby retains continuing jurisdiction over: (i) implementation of the Settlement; (ii) the allowance, disallowance or adjustment of any Settlement Class member's claim on equitable grounds; (iii)

all parties for the purpose of construing, enforcing and administering the Settlement and this Judgment; and (vi) other matters related or ancillary to the foregoing. There is no just reason for delay in the entry of this Judgment and immediate entry by the Clerk of the Court is expressly directed.

DATED this _____ day of _____, _____

BY THE COURT:

_____
Honorable Charles S. Haight, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

STEPHEN M. KENNEDY and ALICIA J. CARSON, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. RYAN D. McCARTHY, Acting Secretary of the Army, *Defendant*.	No. 3:16-cv-2010-CSH

[PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

WHEREAS, as of _____ _____, 2020, Stephen M. Kennedy and Alicia J. Carson ("Class Representatives"), individually and on behalf of themselves and a class of persons similarly situated (the "Plaintiffs"), on the one hand, and Ryan D. McCarthy, in his official capacity as Secretary of the U.S. Army (the "Army") ("Defendant"), on the other, entered into a Stipulation and Agreement of Settlement (the "Stipulation" or "Settlement Agreement") in the above-titled litigation (the "Action"), which is subject to review under Rule 23 of the Federal Rules of Civil Procedure and which, together with the exhibits thereto, sets forth the terms and conditions of the proposed settlement of the Action and the claims alleged in the Amended Complaint filed on April 17, 2017 (Dkt. No. 11) on the merits and with prejudice (the "Settlement"); and

WHEREAS, the Court has reviewed and considered the Stipulation and the accompanying exhibits; and

WHEREAS, the Parties to the Stipulation have consented to the entry of this order; and

WHEREAS, all capitalized terms used in this order that are not otherwise defined herein have the meanings defined in the Stipulation;

NOW, THEREFORE, IT IS HEREBY ORDERED, this _____ day of _____, 2020 that:

1. The Court has reviewed the Stipulation and preliminarily finds the Settlement set forth therein to be fundamentally fair, reasonable, adequate, and in the best interests of the Settlement Class members, especially in light of the benefits achieved on behalf of them, the risks and delay inherent in litigation, and the limited amount of any potential recovery that could be shared by the Settlement Class members. Furthermore, the parties' Settlement Agreement was the result of good-faith, arm's-length negotiations between experienced counsel under the supervision of Magistrate Judge Robert M. Spector, and is without any obvious deficiencies.

2. Pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, the Court has made a preliminary determination to certify the following Settlement Class for the purposes of settlement only:

> Members and former members of the Army, Army Reserve, and Army National Guard who served during the Iraq and Afghanistan era—the period between October 7, 2001 to the Effective Date of Settlement—who
>
> (1) were discharged with a less-than-Honorable service characterization (this includes GEN and OTH discharges from the Army, Army Reserve, and Army National Guard, but not Bad Conduct or Dishonorable discharges);
>
> (2) have not received discharge upgrades to Honorable; and
>
> (3) have diagnoses of PTSD or PTSD-related conditions or records documenting one or more symptoms of PTSD or PTSD-related conditions at the time of discharge attributable to their military service under the Hagel Memo standards of liberal and special consideration.

3. The Court finds and concludes that the prerequisites of class action certification under Rule 23 of the Federal Rules of Civil Procedure have been satisfied for the Settlement Class defined herein and for the purposes of the Settlement only, in that:

(a) the members of the Settlement Class are so numerous that joinder of all Settlement Class members is impracticable;

(b) there are questions of law and fact common to the Settlement Class members;

(c) the claims of the Class Representatives are typical of the Settlement Class's claims;

(d) Class Representatives and Class Counsel have fairly and adequately represented and protected the interests of the Settlement Class;

(e) there are no conflicts of interest between the Class Representatives and members of the Settlement Class;

(f) the questions of law and fact common to Settlement Class members predominate over any individual questions; and

(g) a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

4. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, and for the purposes of the Settlement only, Stephen M. Kennedy and Alicia J. Carson are certified as Class Representatives. The Jerome L. Frank Legal Services Organization of Yale Law School and the law firm of Jenner & Block LLP are appointed as Class Counsel.

5. A hearing (the "Fairness Hearing") pursuant to Rule 23(e) of the Federal Rules of Civil Procedure is hereby scheduled to be held before the Court on _____,

at ___:____ [a.m. or p.m.] (a day at least sixty (60) days after the entry of this Order). At the Fairness Hearing, the Court will address: (a) whether to grant final approval to the Settlement as fair, reasonable, and adequate, and issue the Final Approval Order dismissing the Amended Complaint with prejudice and releasing the claims set forth in the Stipulation; (b) whether the Settlement Class should be finally certified for purposes of the Settlement only; (c) whether the relief provided to the Settlement Class for reconsideration and reapplication of discharge upgrade applications is fair, reasonable, and adequate; (d) whether to approve the Stipulation's award of attorneys' fees and costs; and (e) any other matters as the Court may deem appropriate.

6. The Court reserves the right to approve the Settlement with or without modification and with or without further notice to the Settlement Class of any kind. The Court may also adjourn the Fairness Hearing or modify any of the dates herein without further notice to members of the Settlement Class.

7. The Court finds that the distribution of the Class Notice attached as Exhibit A to the Stipulation in the manner set forth in the Stipulation is the best notice practicable under the circumstances, consistent with due process of law, and constitutes due and sufficient notice of this Order and the Settlement to all persons entitled thereto and is in full compliance with the requirements of Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs have also developed an extensive outreach strategy that includes a press conference and issuance of a press release, engagement with both traditional media outlets and social media, collaboration with key elected officials, and publicization of the settlement with veterans' organizations and veterans advocates across the country. Defendant shall publicize the Settlement and Class Notice by issuing a press release of its own.

8. Plaintiffs shall cause the Class Notice to be distributed to Settlement Class members in accordance with the terms of the Stipulation no later than fourteen (14) days after the entry of this Order.

9. Settlement Class members shall be bound by all orders, determinations and judgments in this Action concerning the Settlement, whether favorable or unfavorable.

10. Any Settlement Class member may appear in person or through counsel (at their own expense) at the Fairness Hearing and be heard in support of or in opposition to the fairness, reasonableness, and adequacy of the proposed Settlement, award of counsel fees, and the reimbursement of costs. The Court will consider any Settlement Class member's objection to the Settlement only if such Settlement Class member has served by hand, mail, or e-mail their written objection and supporting papers (including any legal support or evidence in support of the objection and grounds to support their status as a Class member) such that they are received on or before twenty-one (21) calendar days before the Fairness Hearing, upon Class Counsel: Michael J. Wishnie, Jerome N. Frank Legal Services Organization, Yale Law School, P.O. Box 209090, New Haven, CT 06520-9090, kennedy.settlement@yale.edu; and Defendant's Counsel: Natalie N. Elicker, U.S. Attorney's Office for the District of Connecticut, 157 Church St, 25th Floor, New Haven, CT 06510, Natalie.Elicker@usdoj.gov; and has filed said objections and supporting papers with the Clerk of the Court, United States District Court for the District of Connecticut, 141 Church Street, New Haven, CT 06510. Any Settlement Class member who does not make his, her, or its objection in the manner provided for in the Class Notice 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. Attendance at the Fairness Hearing is not necessary, however, persons wishing to be heard orally in opposition

to the approval of the Settlement are required to indicate in their written objection their intention to appear at the hearing. Persons who intend to object to the Settlement and desire to present evidence at the Fairness Hearing must include in their written objections the identity of any witnesses they may call to testify and exhibits they intend to introduce into evidence at the Fairness Hearing.

11. Settlement Class members do not need to appear at the hearing or take any other action to indicate their approval.

12. Pending final determination of whether the Settlement should be approved, Class Representatives, all Settlement Class members, and each of them, and anyone who acts or purports to act on their behalf, shall not institute, commence or prosecute any action which asserts the Settled Claims in the Stipulation against the Defendant.

13. Class Counsel shall file and serve its application for final approval of the Settlement no later than seven (7) days prior to the date of the Fairness Hearing.

14. If the Settlement fails to become effective as defined in the Stipulation or is terminated, then both the Stipulation, including any amendment(s) thereof, except as expressly provided in the Stipulation, and this Preliminary Approval Order shall be null and void, of no further force or effect, and without prejudice to any Party, and may not be introduced as evidence or used in any actions or proceedings by any person or entity against the Parties, and the Parties shall be deemed to have reverted to their respective litigation positions as of the date and time immediately prior to the execution of the Stipulation.

15. The Court retains exclusive jurisdiction over the Action to consider all further matters arising out of or connected with the Settlement.

DATED this _____ day of _____, 2020

BY THE COURT:

_____
Honorable Charles S. Haight, Jr.
UNITED STATES DISTRICT JUDGE

DEPARTMENT OF THE ARMY
ARMY REVIEW BOARDS AGENCY
251 18TH STREET SOUTH, SUITE 385
ARLINGTON, VA 22202-3531

[date]

GROUP A
[applicant name]
[applicant address]

Dear Sir or Madam:

You are receiving this letter as part of a settlement agreement in a class-action lawsuit filed in federal court in Connecticut, *Kennedy v. McCarthy*. The Army Review Boards Agency (ARBA) has agreed to reconsider the application you previously presented to the Army Discharge Review Board (ADRB). You may submit additional evidence in support of your reconsideration, but the ADRB must receive your evidence within 60 days of the date on this letter. For more information on this settlement, please visit https://arba.army.pentagon.mil/adrb-overview.html.

You are eligible for three reasons. First, you have applied to the ADRB before. Second, your application was denied or not fully granted between April 17, 2011 and [effective date of settlement]. Last, you may have raised evidence related to Post-Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), Military Sexual Trauma (MST), and / or other behavioral health issues.

There have been changes in the laws and in Defense Department guidance since the ADRB decided your case. The ADRB will automatically reconsider your case in light of these new laws and guidance. In particular, the Board will consider whether PTSD, TBI, MST, and / or other behavioral health issues related to your service may have contributed to the reasons you were discharged. Copies of the new guidance memoranda are at https://arba.army.pentagon.mil/abcmr-overview.html.

The ADRB will reconsider your application and send you its decision. It is important to understand the following about this process:

a. You do not need to submit an application to the ADRB. The ADRB will take a fresh look at your previous application. You may receive a discharge upgrade even if you choose not to contact the ADRB.

b. There is no guarantee you will receive a discharge upgrade. Your application must show that your current discharge characterization is erroneous or unjust. If the ADRB finds there is not enough evidence that your discharge characterization is erroneous or unjust, your current discharge status will stay the same. The ADRB cannot make your current discharge characterization worse. It cannot take any other negative action on your military records.

c. You may provide written materials as evidence to the ADRB to support your case. You can include documents that you did not submit previously. This is an opportunity to persuade the Board that it should upgrade your discharge.

d. Any additional written materials you submit must be received by the ADRB no later than 60 days from the date of this letter. The ADRB may decide your application at any time after the 60-day period.

e. It will help your case if you are able to provide written medical evidence to support your application. ARBA has agreed to have the ADRB follow the guidance memoranda described above. They direct that "liberal consideration" be given to applications that document one or more symptoms of PTSD, TBI, MST, or other behavioral health issues.

f. By submitting relevant evidence, you will help the ADRB understand whether your experiences, conditions, and / or mental health conditions are related to any misconduct in your military record. Relevant evidence includes, but is not limited to:

- Diagnoses from a medical professional, either in service or after service, of PTSD, TBI, and / or other behavioral health issues;
- Documentation from a medical professional or licensed social worker recording symptoms that are associated with PTSD, TBI, MST, and / or other behavioral health issues, even if a formal diagnosis was not made; and
- Letters from people who knew you before, during, or after your service that can describe any behavioral changes or symptoms of PTSD, TBI, and / or other behavioral health issues.

If possible, you or a medical professional should explain how these symptoms or diagnoses mitigate or outweigh any misconduct contained in your military record.

g. This evidence may come from evaluation and treatment you received from a private medical practitioner. You may also be eligible for mental health evaluation and treatment at the Department of Veterans Affairs, even if you do not have an Honorable or General discharge status. You may contact the Department of Veterans Affairs at 1-844-698-2311.

h. You can get help to submit written materials. A directory of free legal service programs is available through Stateside Legal at https://www.statesidelegal.org. The Department of Veterans Affairs also publishes a Directory of Veterans Service Organizations at https://www.va.gov/vso/.

i. You can send additional materials by mail or email. Your documents must include your case number. Your case number is the number beginning with "AR" referenced at the top of this letter. Please ensure the entire case number, beginning with the letters "AR" is written clearly near the top of the first page of your documents. Please also include your preferred mailing address, your phone number, and an email address that you check frequently. If the ADRB must contact you, it will first use your

email address. If that is unsuccessful, it will use your phone number or mailing address. To send by mail, please send to:

Army Review Boards Agency
Army Discharge Review Board
ATTN: Court Reconsideration
251 18th Street S., Suite 385
Arlington, VA 22202-3531

To send by email, please send to:
usarmy.pentagon.hqda-arba.mbx.adrb-grpa@us.army.mil.

Thank you for your attention. We hope you will take advantage of the opportunity to provide additional written materials to the ADRB. As a reminder, any written materials you submit must be received by the ADRB no later than 60 days from the date of this letter. If you have questions about this letter or about your case, you may contact usarmy.pentagon.hqda-arba.mbx.adrb-grpa@us.army.mil.

Sincerely,

Army Review Boards Agency

DEPARTMENT OF THE ARMY
ARMY REVIEW BOARDS AGENCY
251 18TH STREET SOUTH, SUITE 385
ARLINGTON, VA 22202-3531

[date]

GROUP C
[applicant name]
[applicant address]

Dear Sir or Madam:

You are receiving this letter as part of a settlement agreement in a class-action lawsuit filed in federal court in Connecticut, *Kennedy v. McCarthy*. The Army Review Boards Agency (ARBA) has agreed to accept re-applications from a group of former Soldiers who previously requested that the Army Discharge Review Board (ADRB) upgrade their discharges. You are receiving this letter because you are eligible to submit a new application. For more information on this settlement, please visit https://arba.army.pentagon.mil/adrb-overview.html.

You are eligible for two reasons. First, you have applied to the ADRB before. Second, your application was denied or not fully granted between April 17, 2011 and September 4, 2014.

There have been changes in the laws and in Defense Department guidance since the ADRB decided your case. If you reapply, the ADRB will consider your case in light of these new laws and guidance. In particular, the Board will consider whether PTSD, TBI, MST, and / or other behavioral health issues related to your service may have contributed to the reasons you were discharged. Copies of the new guidance memoranda are at https://arba.army.pentagon.mil/abcmr-overview.html.

It is important to understand the following about your opportunity to reapply:

a. If you reapply, you must submit a new application. If you submit a new application, the ADRB will take a fresh look at your case.

b. How to reapply depends on how long ago you were discharged. If you were discharged less than 15 years before ARBA receives your re-application, you may reapply to the ADRB for relief. Please use DD Form 293, *Application for Review of Discharge from the Armed Forces*. The form is included with this notice and can also be found at https://arba.army.pentagon.mil/documents/DDForm293.pdf.

c. If you were discharged more than 15 years before ARBA receives your application, you may reapply directly to the Army Board for Correction of Military Records (ABCMR). Or, if you submit a new application to the ADRB at the address below, it will forward your application to the ABCMR. You will not need to do anything else to make sure the ABCMR processes your application.

d. After receiving your new application, the ADRB or ABCMR will reconsider your case. As a result, you might receive a discharge upgrade.

e. There is no guarantee you will receive a discharge upgrade. Your application must show that your current discharge characterization is erroneous or unjust. If the ADRB or the ABCMR finds there is not enough evidence that your discharge characterization is erroneous or unjust, your current discharge status will stay the same. The ADRB or the ABCMR cannot make your current discharge characterization worse. They cannot take any other negative action on your military records.

f. You may provide written materials as evidence to the ADRB to support your case. You can include documents that you did not submit with your previous application(s). This is an opportunity to persuade the Board that it should upgrade your discharge.

g. It will help your case if you are able to provide written medical evidence to support your application. ARBA has agreed to have the ADRB follow the guidance memoranda described above. They direct that "liberal consideration" be given to applications that document one or more symptoms of PTSD, TBI, MST, or other behavioral health issues.

h. By submitting relevant evidence, you will help the ADRB understand whether your experiences, conditions, and / or mental health conditions are related to any misconduct in your military record. Relevant evidence includes, but is not limited to:

- Diagnoses from a medical professional, either in service or after service, of PTSD, TBI, and / or other behavioral health issues;
- Documentation from a medical professional or licensed social worker recording symptoms that are associated with PTSD, TBI, MST, and / or other behavioral health issues, even if a formal diagnosis was not made; and
- Letters from people who knew you before, during, or after your service that can describe any behavioral changes or symptoms of PTSD, TBI, and / or other behavioral health issues.

If possible, you or a medical professional should explain how these symptoms or diagnoses mitigate or outweigh any misconduct contained in your military record.

i. This evidence may come from evaluation and treatment you received from a private medical practitioner. You may also be eligible for mental health evaluation and treatment at the Department of Veterans Affairs, even if you do not have an Honorable or General discharge status. You may contact the Department of Veterans Affairs at 1-844-698-2311.

j. You can get help to submit an application. A directory of free legal service programs is available through Stateside Legal at https://www.statesidelegal.org. The Department of Veterans Affairs also publishes a Directory of Veterans Service Organizations at https://www.va.gov/vso/.

k. You can send your application and any supporting documents by mail or email. Please include a copy of this letter with your application. To send by mail, please send to:

Army Review Boards Agency
Army Discharge Review Board
ATTN: Group C Reapplication
251 18th Street S., Suite 385
Arlington, VA 22202-3531

To send by email, please send to: usarmy.pentagon.hqda-arba.mbx.i@mail.mil.

Thank you for your attention. We hope you will take advantage of the opportunity to reapply for a discharge upgrade. If you have questions about this letter or about your case, you may contact usarmy.pentagon.hqda-arba.mbx.i@mail.mil.

Sincerely,

Army Review Boards Agency

DEPARTMENT OF THE ARMY
ARMY REVIEW BOARDS AGENCY
251 18TH STREET SOUTH, SUITE 385
ARLINGTON, VA 22202-3531

[date]

GROUP B
[applicant name]
[applicant address]

Dear Sir or Madam:

You are receiving this letter as part of a settlement agreement in a class-action lawsuit filed in federal court in Connecticut, *Kennedy v. McCarthy*. The Army Review Boards Agency (ARBA) has agreed to accept re-applications from a group of former Soldiers who previously requested that the Army Discharge Review Board (ADRB) upgrade their discharges. You are receiving this letter because you are eligible to submit a new application. For more information on this settlement, please visit https://arba.army.pentagon.mil/adrb-overview.html.

You are eligible for three reasons. First, you have applied to the ADRB before. Second, your application was denied or not fully granted between October 7, 2001 and April 16, 2011. Last, you may have raised evidence related to Post-Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), Military Sexual Trauma (MST), and / or other behavioral health issues.

There have been changes in the laws and in Defense Department guidance since the ADRB decided your case. If you reapply, the ADRB will consider your case in light of these new laws and guidance. In particular, the Board will consider whether PTSD, TBI, MST, and / or other behavioral health issues related to your service may have contributed to the reasons you were discharged. Copies of the new guidance memoranda are at https://arba.army.pentagon.mil/abcmr-overview.html.

It is important to understand the following about your opportunity to reapply:

a. If you reapply, you must submit a new application. If you submit a new application, the ADRB will take a fresh look at your case.

b. How to reapply depends on how long ago you were discharged. If you were discharged less than 15 years before ARBA receives your re-application, you may reapply to the ADRB for relief. Please use DD Form 293, *Application for Review of Discharge from the Armed Forces*. The form is included with this notice and can also be found at https://arba.army.pentagon.mil/documents/DDForm293.pdf.

c. If you were discharged more than 15 years before ARBA receives your application, you may reapply directly to the Army Board for Correction of Military Records (ABCMR). Or, if you submit a new application to the ADRB at the address below, it will forward your application to the ABCMR. You will not need to do anything else to make sure the ABCMR processes your application.

d. After receiving your new application, the ADRB or ABCMR will reconsider your case. As a result, you might receive a discharge upgrade.

e. There is no guarantee you will receive a discharge upgrade. Your application must show that your current discharge characterization is erroneous or unjust. If the ADRB or the ABCMR finds there is not enough evidence that your discharge characterization is erroneous or unjust, your current discharge status will stay the same. The ADRB or the ABCMR cannot make your current discharge characterization worse. They cannot take any other negative action on your military records.

f. You may provide written materials as evidence to the ADRB to support your case. You can include documents that you did not submit with your previous application(s). This is an opportunity to persuade the Board that it should upgrade your discharge.

g. It will help your case if you are able to provide written medical evidence to support your application. ARBA has agreed to have the ADRB follow the guidance memoranda described above. They direct that "liberal consideration" be given to applications that document one or more symptoms of PTSD, TBI, MST, or other behavioral health issues.

h. By submitting relevant evidence, you will help the ADRB understand whether your experiences, conditions, and / or mental health conditions are related to any misconduct in your military record. Relevant evidence includes, but is not limited to:

- Diagnoses from a medical professional, either in service or after service, of PTSD, TBI, and / or other behavioral health issues;
- Documentation from a medical professional or licensed social worker recording symptoms that are associated with PTSD, TBI, MST, and / or other behavioral health issues, even if a formal diagnosis was not made; and
- Letters from people who knew you before, during, or after your service that can describe any behavioral changes or symptoms of PTSD, TBI, and / or other behavioral health issues.

If possible, you or a medical professional should explain how these symptoms or diagnoses mitigate or outweigh any misconduct contained in your military record.

i. This evidence may come from evaluation and treatment you received from a private medical practitioner. You may also be eligible for mental health evaluation and treatment at the Department of Veterans Affairs, even if you do not have an Honorable or General discharge status. You may contact the Department of Veterans Affairs at 1-844-698-2311.

j. You can get help to submit an application. A directory of free legal service programs is available through Stateside Legal at https://www.statesidelegal.org. The

Department of Veterans Affairs also publishes a Directory of Veterans Service Organizations at https://www.va.gov/vso/.

k. You can send your application and any supporting documents by mail or email. Please include a copy of this letter with your application. To send by mail, please send to:

Army Review Boards Agency
Army Discharge Review Board
ATTN: Group B Reapplication
251 18th Street S., Suite 385
Arlington, VA 22202-3531

To send by email, please send to: usarmy.pentagon.hqda-arba.mbx.i@mail.mil.

Thank you for your attention. We hope you will take advantage of the opportunity to reapply for a discharge upgrade. If you have questions about this letter or about your case, you may contact usarmy.pentagon.hqda-arba.mbx.i@mail.mil.

Sincerely,

Army Review Boards Agency

DEPARTMENT OF THE ARMY
ARMY REVIEW BOARDS AGENCY
251 18TH STREET SOUTH, SUITE 385
ARLINGTON, VA 22202-3531

PUBLIC NOTICE
[Date Posted]

As part of a settlement agreement in a lawsuit filed in the U.S. District Court for the District of Connecticut, the Army Review Boards Agency (ARBA) has agreed to have the Army Discharge Review Board (ADRB) automatically reconsider discharge upgrade applications of a group of former Soldiers who previously applied to the ADRB, and to accept new applications from a separate group of former Soldiers who previously applied to the ADRB for discharge upgrades. Please read carefully the information in Part I below to learn if you, as a former Soldier who previously applied to the ADRB for a discharge upgrade, might qualify for automatic reconsideration. If you do not qualify for automatic reconsideration, please see Part II to learn if you might qualify to re-apply to the ADRB for a discharge upgrade.

Part I: Automatic Reconsideration of Previously Submitted Applications to the ADRB.

As mentioned above, ARBA has agreed to have the ADRB automatically reconsider discharge upgrade applications of a particular group of former Soldiers, which we refer to here as Group A Soldiers. This group is limited to those former Soldiers: a) who had their cases decided by the ADRB between April 17, 2011 and [effective date of settlement]; b) who did not receive the entire discharge upgrade they had requested; and, c) whose records and / or previous application may have raised evidence pertaining to Post-Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), Military Sexual Trauma (MST), and / or other behavioral health issues.

There have been changes in the laws and in Defense Department guidance since the ADRB decided these former Soldiers' cases. The ADRB will automatically reconsider the identified cases in light of these new laws and guidance. In particular, the Board will consider whether PTSD, TBI, MST, and / or other behavioral health issues related to the Soldier's service may have contributed to the reasons they were discharged. Copies of the new guidance memoranda are at https://arba.army.pentagon.mil/abcmr-overview.html.

The ADRB will reconsider each Group A Soldier's application and send them its decision. The ADRB will also send a notice letter to all Group A Soldiers at their last known address on file with the agency notifying them that their application will be reconsidered and that they have the opportunity to submit additional evidence. Soldiers will have 60 days to respond to this letter. It is important to understand the following about this process:

a. The Soldier does not need to submit an application to the ADRB. The ADRB will take a fresh look at the Soldier's previous application. The Soldier may receive a discharge upgrade even if the Soldier chooses not to contact the ADRB.

b. There is no guarantee the Soldier will receive a discharge upgrade. The Soldier's application must show that their current discharge characterization is erroneous or unjust. If the ADRB finds there is not enough evidence that their discharge characterization is erroneous or unjust, the Soldier's current discharge status will stay the same. The ADRB cannot make the Soldier's current discharge characterization worse. It cannot take any other negative action on the Soldier's military records.

c. The Soldier may provide written materials as evidence to the ADRB to support their case. The Soldier can include documents that they did not submit previously. This is an opportunity to persuade the Board that it should upgrade the Soldier's discharge.

d. Any additional written materials the Soldier submits must be received by the ADRB no later than 60 days from the date of the letter they receive from the ADRB. The ADRB may decide the Soldier's application at any time after the 60-day period.

e. It will help the Soldier's case if they are able to provide written medical evidence to support their application. ARBA has agreed to have the ADRB follow the guidance memoranda described above. They direct that "liberal consideration" be given to applications that document one or more symptoms of PTSD, TBI, MST, or other behavioral health issues.

f. By submitting relevant evidence, the Soldier will help the ADRB understand whether the Soldier's experiences, conditions, and / or mental health conditions are related to any misconduct in the Soldier's military record. Relevant evidence includes, but is not limited to:

- Diagnoses from a medical professional, either in service or after service, of PTSD, TBI, and / or other behavioral health issues;
- Documentation from a medical professional or licensed social worker recording symptoms that are associated with PTSD, TBI, MST, and / or other behavioral health issues, even if a formal diagnosis was not made; and
- Letters from people who knew the Soldier before, during, or after their service that can describe any behavioral changes or symptoms of PTSD, TBI, and / or other behavioral health issues.

If possible, the Soldier or a medical professional should explain how these symptoms or diagnoses mitigate or outweigh any misconduct contained in the Soldier's military record.

g. This evidence may come from evaluation and treatment the Soldier received from a private medical practitioner. The Soldier may also be eligible for mental health evaluation and treatment at the Department of Veterans Affairs, even if they do not have an Honorable or General discharge status. The Soldier may contact the Department of Veterans Affairs at 1-844-698-2311.

h. The Soldier can get help to submit written materials. A directory of free legal service programs is available through Stateside Legal at www.statesidelegal.org. The Department of Veterans Affairs also publishes a Directory of Veterans Service Organizations at https://www.va.gov/vso/.

i. The Soldier can send additional materials by mail or email. The Soldier's documents must include their case number. The case number is the number beginning with "AR" referenced at the top of the notice letter sent to Group A Soldiers by the ADRB. Please ensure the entire case number, beginning with the letters "AR" is written clearly near the top of the first page of all documents. Please also include the Soldier's preferred mailing address, phone number, and an email address that is checked frequently. If the ADRB must contact the Soldier, it will first use the email address. If that is unsuccessful, it will use the phone number or mailing address. To send by mail, please send to:

Army Review Boards Agency
Army Discharge Review Board
ATTN: Court Reconsideration
251 18th Street S., Suite 385
Arlington, VA 22202-3531

To send by email, please send to:
usarmy.pentagon.hqda-arba.mbx.adrb-grpa@us.army.mil.

Part II: New Applications for Previously Adjudicated Discharge Upgrade Requests.

In addition to the automatic reconsideration discussed in Part I, ARBA has also agreed to accept new applications for discharge upgrade requests for a different group of former Soldiers, which we refer to here as Group B and Group C Soldiers. Group B is limited to those former Soldiers: a) who previously applied to the ADRB; b) whose application was denied or not fully granted between October 7, 2001 and April 16, 2011; and, c) whose records and / or previous application may have raised evidence pertaining to Post-Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), Military Sexual Trauma (MST), and / or other behavioral health issues. Group C is limited to those former Solders: a) who previously applied to the ADRB; and b) whose application was denied or not fully granted between April 17, 2011 and September 4, 2014.

There have been changes in the laws and in Defense Department guidance since the ADRB decided these former Soldiers' cases. If a Group B or Group C Soldier reapplies, the ADRB will consider their case in light of these new laws and guidance. In particular, the Board will consider whether PTSD, TBI, MST, and / or other behavioral health issues related to their service may have contributed to the reasons they were discharged. Copies of the new guidance memoranda are at https://arba.army.pentagon.mil/abcmr-overview.html.

A notice letter will be sent to all Group B and C Soldiers at their last known address on file with the agency notifying them of this opportunity. It is important to understand the following about a Group B or Group C Soldier's opportunity to reapply:

a. If the Soldier reapplies, they must submit a new application. If the Soldier submits a new application, the ADRB will take a fresh look at their case.

b. How to reapply depends on how long ago the Soldier was discharged. If the Soldier was discharged less than 15 years before ARBA receives their re-application, they may reapply to the ADRB for relief. Please use DD Form 293, *Application for Review of Discharge from the Armed Forces*. The form is included with this notice and can also be found at https://arba.army.pentagon.mil/documents/DDForm293.pdf.

c. If the Soldier was discharged more than 15 years before ARBA receives their application, they may reapply directly to the Army Board for Correction of Military Records (ABCMR). Or, if the Soldier submits a new application to the ADRB at the address below, it will forward the application to the ABCMR. The Soldier will not need to do anything else to make sure the ABCMR processes their application.

d. After receiving the Soldier's new application, the ADRB or ABCMR will reconsider their case. As a result, the Soldier might receive a discharge upgrade.

e. There is no guarantee the Soldier will receive a discharge upgrade. The Soldier's application must show that their current discharge characterization is erroneous or unjust. If the ADRB or the ABCMR finds there is not enough evidence that the Soldier's discharge characterization is erroneous or unjust, their current discharge status will stay the same. The ADRB or the ABCMR cannot make the Soldier's current discharge characterization worse. They cannot take any other negative action on the Soldier's military records.

f. The Soldier may provide written materials as evidence to the ADRB to support their case. The Soldier can include documents that they did not submit with their previous application(s). This is an opportunity to persuade the Board that it should upgrade the Soldier's discharge.

g. It will help the Soldier's case if they are able to provide written medical evidence to support the application. ARBA has agreed to have the ADRB follow the guidance memoranda described above. They direct that "liberal consideration" be given to applications that document one or more symptoms of PTSD, TBI, MST, or other behavioral health issues.

h. By submitting relevant evidence, the Soldier will help the ADRB understand whether the Soldier's experiences, conditions, and / or health conditions are related to any misconduct in their military record. Relevant evidence includes, but is not limited to:

- Diagnoses from a medical professional, either in service or after service, of PTSD, TBI, and / or other behavioral health issues;

- Documentation from a medical professional or licensed social worker recording symptoms that are associated with PTSD, TBI, MST, and / or other behavioral health issues, even if a formal diagnosis was not made; and
- Letters from people who knew the Soldier before, during, or after their service that can describe any behavioral changes or symptoms of PTSD, TBI, and / or other behavioral health issues.

If possible, the Soldier or a medical professional should explain how these symptoms or diagnoses mitigate or outweigh any misconduct contained in the Soldier's military record.

i. This evidence may come from evaluation and treatment the Soldier received from a private medical practitioner. The Soldier may also be eligible for mental health evaluation and treatment at the Department of Veterans Affairs, even if the Soldier does not have an Honorable or General discharge status. The Soldier may contact the Department of Veterans Affairs at 1-844-698-2311.

j. The Soldier can get help to submit an application. A directory of free legal service programs is available through Stateside Legal at www.statesidelegal.org. The Department of Veterans Affairs also publishes a Directory of Veterans Service Organizations at https://www.va.gov/vso/.

k. The Soldier can send their application and any supporting documents by mail or email. They should include a copy of their notice letter with their application. To send by mail, please send to:

Army Review Boards Agency
Army Discharge Review Board
ATTN: Group B Reapplication OR ATTN: Group C Reapplication
251 18th Street S., Suite 385
Arlington, VA 22202-3531

To send by email, please send to: usarmy.pentagon.hqda-arba.mbx.i@mail.mil.