IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

PLAINTIFFS' MOTION TO LIFT STAY

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INTRODUCTION

As the Court is aware, for well over a year, extraordinary efforts have been made by many committed personnel on behalf of both parties to address, through an agreed resolution process, the legal violations upon which this lawsuit is based. Despite their best efforts, the "relief" being afforded by the Service Boards – which is the exclusive interim avenue established for rectifying the harm inflicted on the class members in this matter – is far short of what was expected, and what is legally required. The inconsistency in process and results and the extraordinary and unacceptable delay in processing claims leave the Plaintiffs no choice but to seek to lift the current stay, and to decline to agree to further extensions. Plaintiffs are simultaneously filing a motion for summary judgment, which Plaintiffs respectfully ask the Court to address and resolve at its earliest convenience.

We do not take this step lightly. But, as detailed in every status report since June 2010, and at the status conference on October 14, 2010, the current resolution process has failed to provide timely substantive relief to members of the class, relief which this Court

could grant expeditiously pursuant to the concurrently filed motion for summary judgment. In the meantime, many class members continue to suffer irreparable and serious harm from the continued deprivation of health care benefits and monetary compensation to which they are lawfully entitled. For those reasons, as described further below, Plaintiffs ask this Court to lift the stay and, with all deliberate speed, grant Plaintiffs' motion for summary judgment and order the benefit entitlements provided by law to these veterans who honorably served our country in time of war and were injured as a result of that service.

I. BACKGROUND: STATEMENT OF FACTS

A. The Complaint

Plaintiffs filed their initial complaint in this matter on December 17, 2008 and their first amended complaint on September 2, 2009. Plaintiffs allege that during the period from December 17, 2002[1] to October 14, 2008, the Departments of the Army, Navy, and Air Force systematically violated the rights of the named plaintiffs and thousands of similarly situated veterans of the wars in Iraq and Afghanistan in the administrative proceedings resulting in their separation from active military service, where those separations were based in whole or in part on a finding that they suffered from post traumatic stress disorder ("PTSD") that rendered them unfit for continued active service.

Plaintiffs and the class they represent do not challenge the military's administrative determination that, at the time of their medical separation, they suffered from PTSD and were unfit for continued service due to their PTSD. Rather, they

[1] December 17, 2002 is six years prior to the filing of the Complaint in this case. Six years is the governing statute of limitations, *see* 28 U.S.C. § 2501, in actions like this one brought under the Tucker Act, 28 U.S.C. § 1491(a)(1).

challenge the less than 50% disability rating for PTSD that the Military Services administratively assigned to them at separation. Plaintiffs allege that by denying all these veterans a disability rating for PTSD of at least 50%, the Military Services violated the provisions of Chapter 61 of Title 10, U.S.C. and agency regulations. Those legal authorities provide that in determining the appropriate disability rating for a physical or mental condition that renders a service member unfit for continued service, the Services are required to apply the disability rating criteria contained in the Veterans Affairs Schedule for Rating Disabilities ("VASRD"). The VASRD, in turn, provides that "[w]hen a mental disorder that develops in service as a result of a highly stressful event is severe enough to bring about the veteran's release from active military service, the rating agency shall assign an evaluation of not less than 50 percent . . . ." 38 C.F.R. § 4.129.

As indicated above, plaintiffs do not represent veterans discharged for PTSD on or after October 14, 2008. As the First Amended Complaint explains:

> On October 14, 2008, the Department of Defense acknowledged the obligations of the military services to assess a minimum PTSD rating of 50% and directed the Armed Forces to do so prospectively, yet the individual Service Branches have done nothing to address their mistreatment of . . . thousands of veterans they have already abandoned through their failure to rate properly those separated service members suffering from PTSD.

Docket No. 25 (First Amended Complaint) at 2. The relief sought by plaintiffs is "a Court Order requiring the military services" to award to each class member "the money and other benefits to which they would be entitled if they had been assigned at least a 50% disability rating from the date of release from active duty to the present." Docket No. 45-1 (Court-Approved Notice of Class Action) at ¶ 3.

B. The Temporary Stay Jointly Sought by the Parties to Allow the Class Members to Pursue an Administrative Resolution Process

Defendant's initial response to the Complaint was to seek extensions of time within which to respond. Plaintiffs accommodated Defendant's requests for extensions within which to respond, which allowed the Department of Justice to thoroughly familiarize itself with the allegations of the Complaint, and the service departments to identify the veterans who met the definition of the putative class and develop a consensus response among the service departments and relevant government agencies.

At a status conference on June 12, 2009, the Government stated that it was willing to provide Plaintiffs and all of the members of the class they sought to represent with at least part, and potentially all, of the relief sought by Plaintiffs in this lawsuit. During this status conference and in subsequent discussions with counsel for Plaintiffs, the Government represented that it had identified more than 4,300 veterans who satisfied the definition of the class ultimately certified by the Court on September 21, 2009. *See* Docket No. 33 (Certification Order). The Government proposed that veterans who satisfy the class definition and opt in to the *Sabo* class would be offered the opportunity to apply to one of two existing administrative agencies – the Physical Disability Board of Review ("PDBR") or the Board for Correction of Military Records ("BCMR") of the service branch in which the veteran had served.

Although these boards already had before them thousands of pending applications for relief filed by non-*Sabo* applicants, the Government represented that these boards would "expedite" and provide "prioritized review" to all applications filed by *Sabo* class members. As Counsel for the Government stated at the June 12, 2009 status conference, "So we just want to make sure that there is a fair application [of the law] with the goal of

having an expeditious result for the soldier, without harming the individual, and we want to make sure it was applied across the board." Docket No. 22 (Transcript of June 12, 2009 Hearing) at 30. Counsel elaborated, "what they [the Service Departments] really decided was they want to make sure that they would be able to consistently apply it across the board [*i.e,* from Service to Service] at . . . whatever relief they did, they wanted to tie it to some statutory authority and in a manner that wasn't inconsistent with what Congress wanted." *Id.* at 33-34.

Over the next few months, the parties negotiated the details of a joint resolution process. The parties agreed that the class members who chose to opt-in to the lawsuit would be offered the opportunity to apply to a PDBR or BCMR. Eligibility to apply to either or both Boards is controlled by the Boards' enabling statutes and varies depending upon which one of three military statuses applies to the opted-in class member: (1) medically separated, (2) on the Temporary Disability Retired List ("TDRL"), or (3) on the Permanent Disability Retired List ("PDRL").

The Government agreed to provide counsel for Plaintiffs with a variety of information about each putative class member, including his or her current military status, so they could provide advice on issues of whether to opt in and the identity of the Board with jurisdiction to consider their case after opting in. *See* Memorandum of Understanding dated February 26, 2010, with clarifications (hereinafter "MOU"), attached hereto as Exhibit A. Class members who chose to opt-in to this lawsuit would be sent a preformatted application form on special color paper for use in applying to the Boards, and general advice from counsel for Plaintiffs. *Id.* The parties agreed and the putative class members were informed that counsel for Plaintiffs would not be

representing them on their individual applications to the Boards. *See* Docket No. 45-1 (Court-Approved Notice of Class Action) at ¶ 14; Ex. A (MOU) at 3. The Boards agreed to handle the class member's application expeditiously and on a priority basis. *See* Docket No. 45-1 (Court-Approved Notice of Class Action) at ¶ 7; Ex. A (MOU) at 2.

The Government agreed that when a class member filed an application with the PDBR or a BCMR, the Board would apply the requirements of VASRD 4.129 by correcting the class member's military records to show that his or her disability rating for PTSD was at least 50% for the six-month period following the date he or she was released from the service. Docket No. 45-1 (Court-Approved Notice of Class Action) at ¶ 9. The Board would also determine whether the class member's PTSD disability rating should be increased, decreased, or remain the same following the initial six-month period. *See id.*

Pursuant to a joint request by the parties, the Court certified this lawsuit as a class action on September 21, 2009, *see* Docket No. 33 (Certification Order), and approved a legal notice on December 18, 2009, *see* Docket No. 45 (Order Approving Notice of Class Action), to inform the putative class members of the right to opt in. On January 21, 2010, on a joint motion, the Court entered an Order which stayed all Court proceedings until February 3, 2011 pending the agreed upon resolution process. *See* Docket No. 47 (Order Staying Case). The Order acknowledges that both parties reserve the right to lift the stay in the interim.

C. Implementation of the Administrative Resolution Process

In January 2010, the Government mailed the Court-approved legal notice to the veterans it had identified as satisfying the definition of the certified class. Since that time, counsel for Plaintiffs has received timely opt-in forms from 2,153 putative class

members, mailed application packages and general advice to 1,914 opted-in class members, and received from them and submitted 674 color-coded applications to the PDBR and 366 color-coded applications to a BCMR. *See* Docket No. 87 (Joint Status Report, Jan. 13, 2011) at Ex. A.

1. ***PDBR Decision-Making.*** Some veterans who opted in to the class had already submitted non-color coded applications to the PDBR when they received the Court-approved legal notice that was mailed in January 2010. Then, beginning in March 2010, counsel for Plaintiffs began submitting to the PDBR the completed color-coded PDBR applications received from class members who had already opted in. *See* Declaration of Megan Gentile ("Gentile Decl."), attached hereto as Exhibit B, at ¶ 5.

In June 2010, Plaintiffs first raised concerns about the slow pace of review by the Boards. *See* Docket No. 55 (Joint Status Report, June 21, 2010). In response to these concerns, Defendant represented that it had established "the processes necessary to expedite review of the class members' applications. Those processes are in place and the United States expects the Boards to complete adjudications at a faster pace in the coming months." *Id.* at ¶ 1 (emphasis added). In July 2010, Defendant informed the Plaintiffs and the Court that the PDBR had hired additional medical review officers and physicians to assist with their review of *Sabo* applications, and that the new staff would be fully operational in mid-August 2010. *See* Docket No. 60 (Transcript of July 15, 2010 Hearing) at 17-18.

Despite the apparent best efforts of the Government given the available resources, as of January 11, 2011, the PDBR had adjudicated a grand total of 90 applications filed by *Sabo* class members. *See* Ex. B (Gentile Decl.) at ¶ 6. As the chart below reflects,

while the enhanced work force of the PDBR increased the pace of decision-making from the prior rate of two or three decisions per month, an average of only 12.3 PDBR applications per month were adjudicated during the six-month period from July 1, 2010 to December 31, 2010, and the pace does not appear to be increasing. *Id.* at ¶ 5.

Month in Which Final PDBR Decision Was Issued	**# of Final Decisions on PDBR *Sabo* Class Member PDBR Application**
July 2010	12
August 2010	13
September 2010	17
October 2010	8
November 2010	11
December 2010	13
Total Final Decisions Issued Over 6- Month Period	**74**

As of January 11, 2011, there were 1,125 veterans who had opted into the *Sabo* class and had applied or are currently eligible to apply to the PDBR. *Id.* at ¶ 6. Six hundred ninety-four of them had already filed an application with the PDBR, and 431 have yet to apply. *Id.* Ninety of the 694 filed PDBR applications have been finally adjudicated, leaving 604 PDBR applications that are pending, but undecided. *Id.* At the ramped-up rate of 12.3 decisions per month, it will take the Government more than 49 months – or until February 2015 – to adjudicate the 604 PDBR applications that are currently pending. At that same rate, it will take the Government an additional 35 months – or until January 2018 – to decide the 431 applications of *Sabo* class members who are eligible, but have yet to apply to the PDBR.

2. Air Force BCMR Decision-Making. As of January 11, 2011, 21 applications that have been filed by *Sabo* class members with the Air Force BCMR, and none have been decided. *See* Ex. B (Gentile Decl.) at ¶ 7.

*3. **Board for Correction of Naval Records Decision-Making.*** Of the 86 applications that have been filed by *Sabo* class members with the Board for Correction of Naval Records ("BCNR"), 54 have been finally decided as of January 11, 2011. *Id.* at ¶ 8. In all 54 cases, a panel of duly appointed civilian Board members of the BCNR adjudicated the class member's entire request for relief – that is, it adjudicated the appropriate disability rating for the class member's PTSD from the date the class member was separated from active service to the date of the BCNR decision. *Id.* In 17 of these 54 decisions, the BCNR decision changed the class member's PTSD rating to 50% effective from the date of separation from active service to the date six months thereafter, but then retroactively reduced the 50% rating at the six-month mark. *Id.* These 17 decisions violate the rights of the class members to a 50% rating from the six-month mark to the present, as discussed in the motion for summary judgment that accompanies this motion.

*4. **Army BCMR Decision-Making.*** As of January 11, 2011, 258 *Sabo* class members had applied to the Army BCMR. *Id.* at ¶ 9. After the Court-approved legal notice promised Army veterans that if they opted in and applied to the Army BCMR, that civilian board would decide what the appropriate disability for PTSD should have been from the date of separation from active duty to the present, and after that same representation was made to counsel for Plaintiffs in the MOU, the Army unilaterally decided to use a dramatically different decision-making process on applications filed with the Army BCMR.

The Army decided that, in every case, the Army BCMR would render a boilerplate decision stating that (1) the class member's military records should be

corrected to show that the class member received a PTSD disability rating of at least 50%, effective for the six-month period beginning on the date of separation from active service; and (2) the case is transferred to a different agency – the U.S. Army Physical Disability Agency ("PDA") – to determine what the appropriate disability rating should have been for the period from six months after separation from active service to the present. *See* Docket No. 83-1 (Defendant's Responses to Plaintiffs' Interrogatories, attached to Notice of Submission of Government's Responses to Plaintiffs' Questions Regarding the Administrative Review Process) at 3-4. Of the 258 applications filed with the Army BCMR by *Sabo* class members as of January 11, 2011, the Army BCMR has "decided" 211 of them. *See* Ex. B (Gentile Decl.) at ¶ 9. For present purposes, each and every one of these 211 decisions reads exactly the same. Each of them contains the boilerplate results discussed above and refers the case to the PDA. *Id.*

Of the 211 cases that have been transferred for decision-making from the Army BCMR to the PDA, the PDA had issued 88 final decisions as of January 11, 2011. *See See id.* at ¶ 10; Docket No. 87 (Joint Status Report, Jan. 13, 2011) at Ex. A n.3. In 44 of these 88 decisions, the PDA retroactively lowered the 50% disability rating granted by the Army BCMR for PTSD as of six months after separation from active service and made that less than 50% rating effective from six months after separation to at least the present. *See* Ex. B (Gentile Decl.) at ¶ 10. These 44 decisions – 50% of the Army PDA decision-making thus far – violate the rights of the class members to a 50% rating from the six-month mark to the present, as discussed in the motion for summary judgment that accompanies this motion.

II. ARGUMENT

There were three fundamental reasons why counsel for Plaintiffs agreed to a temporary stay of proceedings to allow class members to pursue the administrative resolution process proposed by the Government. First, counsel believed that the expectations of the parties regarding expeditious adjudication by the PDBR and BCMR of applications filed by those who opted in would be met. Second, counsel expected that a high percentage of the class would expeditiously receive from the PDBR and BCMRs all of the relief that Plaintiffs sought in this litigation. This expectation was based on the PDBR and BCMR decisions provided by the Government to counsel for Plaintiffs prior to the joint motion for a stay – decisions that had provided veterans who satisfied the class definition with the full relief sought in this litigation.[2] Third, the Government's

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[2] During the time that the parties were negotiating the terms of the resolution process, the Government represented that it was already following VASRD 4.129 in adjudicating the PDBR and BCMR applications filed by veterans who met the definition of the class. *See* Declaration of Thomas A. Moore, attached hereto as Exhibit B, at ¶ 2. In order to assess whether to agree to a stay of proceedings to allow class members to pursue the resolution process proposed by the Government, counsel for Plaintiffs requested disclosure of a copy of each final decision that had been made on an application filed with the PDBR or a BCMR by a veteran who met the definition of the class in *Sabo*. *Id.* In response, the Government disclosed one BCMR decision and 11 PDBR decisions. *Id.*

In six of the 11 PDBR decisions, the veteran's military records were corrected to show that he was (a) placed on the Temporary Disability Retired List ("TDRL") for six months with a disability rating for PTSD of 50 percent or higher, retroactively effective on the date the veteran was medically separated from active service and (b) permanently retired with a permanent disability rating of 50 percent or higher for PTSD, effective on the date six months after the date the veteran was medically separated from active service. *Id.* at ¶ 5. In other words, in six of the 11 decisions, the veteran received all of the relief Plaintiffs are seeking in Sabo.

In five of the 11 PDBR decisions, the veteran's military records were corrected to show that he was (a) placed on the TDRL for six months at a disability rating for PTSD of 50 percent or higher and (b) permanently retired with a permanent disability rating for PTSD of 30 percent, effective on the date six months after the date the veteran was medically separated from active service. *Id.* at ¶ 6. Although the disposition in these five cases did not provide the full relief being sought in this lawsuit, the decisions provided considerable value to the veteran applicants as all five were permanently retired. A veteran who is permanently retired is entitled to the following: lifetime military medical care for the veteran and the veteran's spouse, military medical care for the veteran's minor children, monthly military disability compensation for the veteran's lifetime, eligibility to apply for combat-related special compensation, and lifetime access to military commissaries and post exchanges. *Id.*

proposal did not require Plaintiffs to waive any of their rights in this lawsuit. If the resolution process did not result in full relief to one or more class members, they could pursue this litigation once the stay expired.

It is now clear that these first two assumptions, upon which counsel for Plaintiffs based their agreement to a stay, have not come to pass. The pace of decision-making in the resolution process has been inexcusably slow, rather than expeditious. Moreover, many of the relatively few final decisions have resulted in a denial of the full relief sought in this litigation and required by law. Indeed, the BCMR with authority to change the disability rating of the large majority of the class – the Army BCMR – has completely abdicated its role under the agreed upon resolution process. Instead of deciding applications itself, this statutory <u>civilian</u> board has funneled the class member applications it has received to the non-statutory <u>military</u> board that imposed the unlawful, less than 50% disability rating on the class member in the first place – in direct violation of the Court-approved legal notice and the statutory rights of the class under the BCMR's enabling statute.

A. The Inexcusably Slow Pace of PDBR Decision-Making

The Government has repeatedly and consistently promised counsel for Plaintiffs, the *Sabo* class members, and the Court that it would expeditiously adjudicate the applications filed by *Sabo* class members. The Government proposed the resolution

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In the one decision rendered on an application to BCNR, the final decision ordered that the veteran's naval records be corrected to show that he was released from active service on July 18, 2006 (the same day the veteran had been released from active service in the past), and placed on the TDRL with a disability rating of 50 percent for PTSD, effective from July 19, 2006 to the present and that the veteran "be afforded a periodic physical examination [in the future] as soon as practicable." *Id.* at ¶ 7-8. In other words, the final decision was that this veteran be given a 50 percent disability rating for PTSD, effective from July 19, 2006 until at least the time in the future when the veteran is provided with a military medical examination and a PEB re-evaluation proceeding. This is the full relief Plaintiffs seek in this litigation.

process six months after the Complaint was filed, presumably after a review of the capabilities of the PDBR and the BCMRs and the number of potential cases. On June 12, 2009, it presented to the Court and counsel for Plaintiffs a detailed power-point presentation of a proposal it had devised in response to the Complaint. In describing the process that led the Government to make its proposal, Government counsel stated that: "Whatever we started, we want to make sure we get finished in an expedited manner . . . ." Docket No. 22 (Transcript of June 12, 2009 Hearing) at 29 (emphasis added). The Government indicated that its goal was to process all applications by the class members "within a year." *Id.* at 40.

The legal notice of the class action drafted by the parties, approved by the Court, and mailed to every putative class member incorporated the representation of expedited decision-making. It promised putative class members that if they opted in and applied to a PDBR or BCMR, they would receive "prioritized" review. *See, e.g.*, Docket No. 45-1 (Court-Approved Notice of Class Action) at ¶ 7. The Government confirmed this commitment yet again in the February 26, 2010 MOU between the parties, which stated that all putative class members who opted in would be provided "the opportunity to pursue expedited relief by the" PDBR and BCMRs. *See* Ex. A (MOU) at 2.

But despite the best efforts of the Government, the Government has wholly failed to keep the promise of expedited PDBR decision-making. No reasonable person could possibly characterize as "expeditious" a process that would take nine years (from March 2010 to January 2018) to adjudicate the cases subject to the process.

It is difficult to overstate the adverse impact that the delay has had on the class. All 1,094 PDBR-eligible class members who have not received a decision from the

PDBR were medically separated by the military services with a disability rating of less than 30%. As the accompanying motion for summary judgment explains, these low disability ratings deprived the 1,094 class members of entitlement to military disability retirement payments; eligibility for Combat-Related Special Compensation; and entitlement to military medical care (called TRICARE) for them, their spouse, and their dependent children. If the PDBR had expeditiously raised their less than 30% rating to 30% or 50%, they would immediately become entitled to these benefits and to reimbursement of the medical expenses the veterans and their family members incurred during the years that have expired since they were medically separated.

The facts surrounding one of these 1,094 class members illustrates the serious irreparable harm that the Government's delay has caused and continues to cause the class. After nine years of military service and deployment to Iraq as part of Operation Iraqi Freedom, class member was diagnosed with PTSD due to traumatic events he experienced in Iraq. *See* Declaration of , attached hereto as Exhibit D, at ¶ 1-3. As a result, he was medically separated by the Army in 2007 and assigned a 10% disability rating for his PTSD. *Id.* at ¶ 3. He is currently unable to work due to his service-related PTSD. has a wife and four dependent children. His wife suffers from a medical disability and is unable to work. His eldest son is diagnosed with a disabling medical condition as well. The sole source of income for and his family is the disability compensation that receives from the VA and an annuity benefit. He and his family struggle to make ends meet. They cannot afford health care insurance and cannot afford to pay for the medical treatment and prescription

medication that his wife and eldest son currently need for their medical conditions. Nor can they afford the dental and eye care that all of their children need. *Id.* at ¶ 6.

When [redacted] received the Court-approved legal notice in this case, he was understandably motivated to quickly opt in and complete an application to the PDBR. His PDBR application was transmitted by counsel for Plaintiffs to the PDBR on April 22, 2010. Since then, [redacted] has repeatedly telephoned the PDBR to check on the status of his application. On December 13, 2010, nearly eight months after his application was filed, he was told by a PDBR representative that there would be an additional eight to nine-month wait before he could expect to receive a decision on his application.

[redacted] was among the early applicants to the PDBR under the agreed upon resolution process. His application should have already been adjudicated. And if the PDBR had granted him the relief it has granted to the large majority of the 90 class members whose cases it has adjudicated, [redacted] and his family would already be entitled to military medical care, reimbursement for past medical expenses, and the possibility of additional retroactive and prospective monetary benefits from the military.

[redacted] is merely one of 1,094 PDBR-eligible class members who have yet to receive a decision under the agreed upon resolution process. Each of these veterans honorably served our country in time of war, risking their lives in Iraq or Afghanistan, thousands of miles from their families. Each of them was stricken with PTSD as a result of their war experiences. Each of them was medically separated without free medical care for their families or military disability retirement pay.

According to the motion for summary judgment that accompanies this motion, each of them is entitled to these benefits prospectively and retroactively to the date they

were medically separated. These 1,094 veterans were medically separated between two months and six years prior to the filing of the Complaint in this case. They have waited for more than two additional years since the filing of the Complaint. For their honorable service to our country, they deserve, at long last, federal court resolution of their legal rights.

B. The *Ultra Vires* Decision-Making Process Used on Army BCMR Applications

The delay in PDBR decision-making alone warrants lifting the current stay of proceedings to allow this litigation to go forward on the motion for summary judgment lodged by Plaintiffs concurrently with this motion. But an additional reason for lifting the stay is that the Army – the military service in which the large majority of the class members served – has adopted an *ultra vires* process for handling the cases of class members who apply to the Army BCMR.

Shortly after World War II, Congress authorized the Secretary of each military department to appoint a civilian board with authority to correct an applicant's military records to rectify errors or remove an injustice. 10 U.S.C. § 1552. A Board for Correction of Military Records (BCMR) has been established by the Secretaries of the Army, Navy and Air Force. *See* 32 C.F.R. § 581.3 *et seq.* (Army BCMR); *id.* § 865.1 (Air Force BCMR); *id.* § 723.1 (BCNR).

As explained above, applications filed with the Air Force BCMR and the BCNR are adjudicated by a duly appointed panel of civilian Board members of the service correction board. In sharp contrast, the Army has manufactured out of whole cloth a dramatically different decision-making process in which the Army BCMR makes a boilerplate partial decision and transfers the case to a military agency – the PDA – to

determine what the appropriate PTSD disability rating should have been for all but six months of the multi-year period from separation from active service to the present.

The novel adjudication system recently created by the Army in 2010 is inconsistent with how the Government represented the resolution process would work at the outset in 2009. As counsel for the Government emphasized when first introducing the resolution process to the Court and Plaintiffs, ". . . [w]e are not going to treat soldiers different from airmen or sailors . . . . We [] want to make sure that whatever is developed is done in a timely fashion and then, we want to make sure, as I said before, that it's consistent across the board at DoD." Docket No. 22 (Transcript of June 12, 2009 Hearing) at 8-9. "What we do for one, we are going to do for all." *Id.* at 28.

The Army's novel system is also inconsistent with the representations made to the class by the Court and the parties in the Court-approved legal notice sent to all putative class members. That notice could not have been clearer:

> If you join this lawsuit, you will be given an opportunity to . . . apply for a prioritized review by a military records correction board, <u>as described in paragraph 10 below</u> . . . . If you file the application . . . , <u>the board</u> will correct your military records to show that your disability rating for PTSD was at least 50% for the six-month period following the date you were released from the service. In addition, <u>the board</u> will determine whether – between the date six-months after your release from the service to the date of the board's review – your PTSD disability rating of at least 50% should be increased, decreased, or remain the same."

See Docket No. 45-1 (Court-Approved Notice of Class Action) at ¶ 9 (emphasis added). The only boards "described in paragraph 10 below" are "the Physical Disability Board of Review or the Board for Correction of Military Records of the service branch in which you served." *Id.* at ¶ 10. The legal notice never mentioned the Army PDA.

Finally, the Army's novel approach violates the statutory rights of the Army class members who have applied to the Army BCMR. These veterans are guaranteed by statute that their adjudication to that board will be adjudicated on the merits by a duly appointed board of civilians. Section 1552(a)(1), Title 10 provides, in pertinent part, that the

> Secretary of a military department may correct any military record of the Secretary's department . . . . [S]uch corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. (Emphasis added).

Section 1552(a)(3), Title 10 provides, in pertinent part, that

> [c]orrections under this section shall be made under procedures established by the Secretary concerned. In the case of the Secretary of a military department, those procedures must be approved by the Secretary of Defense.

The Army BCMR procedures established by the Secretary of the Army and approved by the Secretary of Defense are set forth in 32 C.F.R. § 581.3. That regulation provides that the only individuals with authority to adjudicate a Section 1552 application filed with the Army BCMR are "civilians regularly employed in the executive part of the Department of the Army (DA) who are appointed by the Secretary of the Army and serve on the ABCMR as an additional duty. Three members constitute a quorum." 32 C.F.R. § 581.3(c)(1).

In response to Plaintiffs' interrogatories, the Army conceded that the Army PDA employs military personnel – not civilians – to adjudicate the Army BCMR applications that the Army BCMR refers to the PDA for decision. *See* Docket No. 83-1 (Defendant's Responses to Plaintiffs' Interrogatories) at 3-4. Obviously, these military officials are not "civilians . . . who are appointed by the Secretary of the Army and serve on the [Army

BCMR] as an additional duty" within the meaning of 32 C.F.R. § 581.3. And, the military personnel selected by the Army for this venture serve on the very military board that issued the less than 50% rating that the class member received in the first place. *See* Docket No. 83-1 (Defendant's Responses to Plaintiffs' Interrogatories) at 3-4.

C. The Systemic, Wrongful Denial of Relief to Class Members Under the Agreed Upon Resolution Process

Yet an additional reason why the stay should be lifted is that in a significant portion of the relatively few cases that have been finally decided under the resolution process, the class member has been denied the relief required by law. In 17 of the cases adjudicated by the BCNR, and 44 cases adjudicated by military personnel employed by the PDA, the class member's 50% disability rating for PTSD was retroactively reduced, effective six months after the veteran's separation from active service. *See* Ex. B (Gentile Decl.) at ¶ 8-10. As explained in more detail in the accompanying motion for summary judgment, these denials are systemic and violate the rights of the class members. Legal relief by the Court is warranted, and Plaintiffs respectfully request that that relief be entered sooner rather than later.

III. CONCLUSION

The power to issue a stay "is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). The power to grant a stay includes the inherent power and discretion to lift that stay. *Dano Res. Recovery, Inc. v. District of Columbia*, 923 F. Supp. 249, 252 (D.D.C. 1996). Moreover, the Court's Order expressly preserves the Plaintiff's right to petition the Court

to lift the stay prior to its February 3, 2011, expiration. For the foregoing reasons, the Court should lift the stay and eschew any extension.

Respectfully Submitted,

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Dated: January 28, 2011

Counsel for Plaintiffs

CERTIFICATE OF FILING

I hereby certify that on this 28th day of January, 2011, a copy of the foregoing was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/Brad Fagg
Brad Fagg