

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,

v.

THE UNITED STATES,

Defendant.

No. 08-899C

Filed August 12, 2011

ORDER

On July 28, 2011, the parties jointly filed a motion for preliminary approval of the class action settlement agreement (docket entry 116). The parties state that the terms of the proposed agreement (“the Agreement”) (docket entry 114-1, July 15, 2011) have been accepted by counsel for plaintiffs and by the authorized representative of the United States Attorney General, conditioned upon the Court’s approval of the Agreement. The parties ask the Court to preliminarily approve the Agreement and to enter an order setting a further schedule for Court approval of the Agreement.¹

Preliminary approval of a proposed class action settlement agreement is the first step in a two-step process before a class action may be settled. *Barnes v. United States*, 89 Fed. Cl. 668, 670 (2009) (quoting *Nat’l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004)); 7B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1797.5 (3d ed. 2011) (noting that a court should preliminarily review settlement proposal to determine whether it is sufficient to warrant a fairness hearing).

¹ On August 12, 2011, the parties filed a Joint Motion to File Updated Settlement Agreement Exhibits Under Seal (docket entry 117). At the same time, the parties filed under seal updated and corrected Exhibits to the Agreement (docket entry 118). The parties state that since they filed the Agreement, several additional putative class members have opted into the class, other class members have received correction board decisions, and other class members have had their statuses corrected, requiring transfer of some class members between settlement categories (see discussion of nine class categories below). The parties therefore request that the updated and corrected Exhibits be deemed filed as replacements to the existing Exhibits to the Agreement. The parties’ motion is **GRANTED**. The updated and corrected Exhibits are deemed filed as part of the Agreement as of today’s date.

The Agreement covers 2161 class members who had opted into the litigation as of July 13, 2011, plus additional service members who opted in by August 2, 2011. In essence, the Agreement divides the class members into nine discrete categories. All class members, regardless of their category, will, where necessary, have their military records changed to reflect that they were placed on the Temporary Disability Retirement List and assigned a disability rating for PTSD of 50% effective for the six-month period immediately after they were released from active service. Within six months of the Court's approval of the Agreement, class members will receive the additional relief described in the Agreement based on their assigned category. Such relief will include permanent lifetime military disability retirement benefits for class members who receive permanent disability ratings of at least 30% due in whole or in part to PTSD.

The Agreement also allows class members who qualify for disability retirement to seek reimbursement for past medical expenses incurred by both class members and qualifying family members after the class member's release from active military service. In addition, class members will have the option of obtaining survivor benefits for qualifying family members. Class members will also have the option of having any Combat Related Special Compensation benefits the class members receive taken into account in determining benefits due to them under the Agreement.

The parties state that they have not yet addressed the issue of plaintiffs' entitlement to an award of attorneys' fees and litigation expenses. They propose that if they are not able to resolve this matter, the Court resolve it after receiving briefing from the parties, as described below.

Under Rule 23(e) of the Rules of the Court of Federal Claims, "[t]he claims, issues or defenses of a certified class may be settled . . . only with the court's approval," requiring a "finding that it is fair, reasonable, and adequate." *Barnes*, 89 Fed. Cl. at 670 (quoting RCFC 23(e); 23(e)(2)). On a motion for preliminary approval, "counsel submit the proposed terms of [the] settlement and the judge makes a preliminary fairness evaluation." MANUAL FOR COMPLEX LITIGATION § 21.632 (4th ed. 2004); *see also Tenn. Ass'n of Health Maint. Orgs. v. Grier*, 262 F.3d 559, 565-66 (6th Cir. 2001). Thus, at the preliminary approval stage, the Court determines only whether it is reasonable to believe that a proposed agreement is "fair, reasonable, and adequate." MANUAL FOR COMPLEX LITIGATION § 21.632. "Where the settlement appears to be the product of serious, informed, noncollusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *In re NASDAQ Market-Makers Antitrust Lit.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (internal citations omitted).

Upon preliminary review, the Court finds that the Agreement appears to be fair, reasonable, and adequate. Throughout the approximately two-and-a-half-years of settlement negotiations in this case, the parties have been ably represented by counsel, who, in the opinion of the Court, have represented their clients zealously, creatively, and with civility. The negotiations were serious, informed, and noncollusive.

The resulting proposed Agreement provides significant relief for all class members, not favoring the class representatives or any other class segment. The Agreement requires the Government to take actions that appear to comply with applicable federal regulations. Finally,

the Court believes that under the Agreement, all class members will be treated fairly and will receive reasonable and adequate relief.

In view of the foregoing, the parties' motion for preliminary approval of the class action settlement agreement is **GRANTED** and the Agreement is **PRELIMINARILY APPROVED**. The parties have also proposed a schedule for further proceedings in the approval process, which the Court adopts. It is therefore **ORDERED** that:

1. Within fourteen days of the filing of this Order, the parties shall submit to the Court a draft Notice of Proposed Class Settlement to the Class.
2. Within fourteen days after the Court approves the draft Notice of Proposed Class Settlement to the Class, the parties shall mail such Notice to each class member at the class member's last known mailing address.
3. Class members may express to the Court their views in support of, or in opposition to, the fairness, reasonableness, or adequacy of the proposed Agreement. Such submissions shall be considered only if the class member mails to the Clerk of the Court of Federal Claims a statement describing his or her views postmarked no later than forty-five days following the date the Notice of Proposed Class Settlement was mailed.
4. At its earliest convenience, the Court shall set a briefing schedule and final approval hearing date. The motion for final approval shall be scheduled no sooner than twenty-one days after the close of the objection period, and the hearing shall be set no sooner than thirty days after the close of the objection period.
5. Pending the Court's decision on final approval, the service branches will change the military records of each class member listed on Exhibits C, J, and G of the Agreement in accordance with the terms of the Agreement, to expedite relief to these class members in the event the Court gives final approval to the Agreement. Should the Court disapprove the settlement agreement, the parties will jointly evaluate how to proceed with respect to claims of class members listed on these exhibits.
6. Following final approval of the Settlement Agreement Order and entry of judgment, the parties will, if necessary, submit briefs regarding plaintiffs' application for an award of attorneys' fees and litigation expenses, as described above.
7. In accordance with Paragraph 6 of the Agreement, within six months of final approval, defendant shall take all steps necessary to execute the actions outlined in Paragraph 6 of the Agreement.

IT IS SO ORDERED.

s/ George W. Miller
GEORGE W. MILLER
Judge