

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT**

MARTIN JOHNSON and JANE DOE on  
behalf of themselves and all others similarly  
situated,

*Plaintiffs,*

v.

FRANK KENDALL, Secretary of the Air  
Force,

*Defendant.*

No. 3:21-cv-01214

April 24, 2023

**STIPULATION AND AGREEMENT OF SETTLEMENT**

This Stipulation and Agreement of Settlement (the “Stipulation” or “Settlement Agreement”) is made and entered into by and between: (i) Mr. Alex Wagner, Assistant Secretary of the Air Force for Manpower and Reserve Affairs, duly authorized in his official capacity to execute such agreement on behalf of Defendant Frank Kendall, in his official capacity as Secretary of the Air Force (“Air Force” or “Defendant”), and (ii) Martin Johnson and Jane Doe, on behalf of a class of persons similarly situated (“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 September 13, 2021, Plaintiffs commenced this action against Defendant to obtain judicial review of the denial by the Air Force Discharge Review Board (“AFDRB”) of the discharge upgrade applications of Mr. Johnson, Ms. Doe, and others similarly situated. ECF No. 1. The Complaint alleged, among other things, that since the start of military operations in Iraq

and Afghanistan, the Air Force, the Air Force Reserve, and the Air National Guard discharged thousands of men and women with less than Honorable characterizations of service due to misconduct attributable to post-traumatic stress disorder (“PTSD”), traumatic brain injury (“TBI”), and other mental health conditions. Specifically, the Complaint alleged that upon their return from Iraq and Afghanistan, veterans with service-connected PTSD, TBI, and other mental health conditions, or with experiences of military sexual assault, sexual harassment or intimate partner violence, received less than Honorable service characterizations and were systematically denied discharge upgrades by the AFDRB. The Complaint alleged that the AFDRB’s refusal to apply liberal consideration to the discharge upgrade applications of veterans with disabilities violates the Administrative Procedure Act (APA), Department of Defense guidance, the Due Process Clause of the Fifth Amendment, and Section 504 of the Rehabilitation Act. Defendant has denied and continues to deny each and all allegations of wrongdoing.

**B.** On September 13, 2021, Plaintiffs moved to certify a class of AFDRB applicants similarly situated to Mr. Johnson and Ms. Doe. ECF No. 2.

**C.** On March 21, 2022, Defendants filed an Answer and three affirmative defenses to Plaintiff’s complaint. ECF No. 37.

**D.** The same day, the Parties jointly requested that the Court refer the action to a U.S. Magistrate Judge for settlement conferencing. ECF No. 36.

**E.** On April 8, 2022, the Court referred the case to U.S. Magistrate Judge Robert M. Spector. ECF No. 39.

**F.** The Parties participated in three joint settlement conferences, on June 15, 2022, July 11, 2022, and September 6, 2022. *See* ECF Nos. 51, 54, 70. The Parties also engaged in a

series of *ex parte* settlement conferences with Judge Spector. *See* ECF Nos. 56, 58, 62, 64. At various times, the Parties also engaged directly with each other in settlement negotiations.

**G.** During the joint settlement conference on September 6, 2022 with Judge Spector, Plaintiffs and Defendant reached an agreement in principle to settle the Litigation.

**H.** Based on Plaintiffs' counsel's investigation and evaluation of the facts and law relating to the matters alleged in the pleadings, Plaintiffs agreed to settle the Litigation pursuant to the provisions of this Settlement Agreement after considering, among other things: (1) the substantial benefits available to Plaintiffs 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 Plaintiffs.

**I.** Defendant has denied and continues to deny each 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.

**J.** 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 the Department of the Air Force, as well as for its Veterans included in the Settlement Class, for the Litigation to be settled in the manner and upon the terms and conditions set forth in the Settlement Agreement.

**K.** This Settlement Agreement effectuates the resolution of disputed claims and is for settlement purposes only.

## **II. DEFINITIONS**

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

**A.** “Air Force Discharge Review Board” or “AFDRB” means the Department of the Air Force board that reviews discharges of former members of the United States Air Force, United States Space Force, Air Force Reserve, and Air National Guard, if an application for review is submitted within 15 years from the date of their discharge, *see* 32 C.F.R. 865.106(b), on the basis of propriety and equity in accordance with 10 U.S.C. § 1553 and 32 C.F.R. § 865.100 *et seq.*

**B.** “Applicant” means any individual who seeks a discharge review through submission of the Department of Defense Form 293 to the AFDRB.

**C.** “Settlement Class” means all individuals who are included within the Parties’ stipulated class definition, as set forth in Exhibit “A”. The Parties stipulate that the Settlement Class includes members and former members of the Air Force, Space Force, Air Force Reserve, and Air National Guard who served in the military during the Iraq and Afghanistan eras, defined as those with discharge dates from October 7, 2001 through the Effective Date of Settlement, and who:

1. were discharged from the Air Force, Space Force, Air Force Reserve, or Air National Guard with the following service characterizations: Under Honorable Conditions (General), or Under Other Than Honorable Conditions (UOTHC); but not the following service characterizations: Bad

Conduct Discharges (BCDs), Dishonorable discharges, Uncharacterized discharges, or Dismissals;

2. who, if they submitted a previous discharge upgrade application or application for reconsideration, submitted at least one such application on or after September 13, 2006;
3. have not received upgrades of their service characterizations to Honorable; and
4. have diagnoses of post-traumatic stress disorder (“PTSD”), Traumatic Brain Injury (“TBI”), or other mental health conditions, or have experiences of sexual assault or sexual harassment, or records documenting that one or more symptoms of PTSD, TBI, other mental health conditions, or experiences of sexual assault or sexual harassment existed/occurred during military service, under the Kurta Memo standard of liberal consideration.

**D.** “Settlement Class Counsel” means, collectively, the Jerome N. Frank Legal Services Organization of Yale Law School and the law firm of Jenner & Block LLP.

**E.** “Class Notice” means the notice substantially in the form attached to this Settlement Agreement as Exhibit “B,” to be provided to the Settlement Class as set forth in Section IV below.

**F.** “Court” means the U.S. District Court for the District of Connecticut.

**G.** “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.

**H.** “Defendant” means the Secretary of the Air Force, in his official capacity. The current Secretary of the Air Force is Frank Kendall.

**I.** “Effective Date of Settlement” means the date of the Final Approval Order.

**J.** “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.

**K.** “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(e) of the Federal Rules of Civil Procedure, substantially in the form attached to this Settlement Agreement as Exhibit “C”.

**L.** The “Automatic Reconsideration Group” is defined below in Section IV.A.

**M.** The “Reapplication Group” is defined below in Section IV.B.

**N.** “Honorable” means an Honorable service characterization which is earned when the quality of the member’s service generally has met Department of the Air Force standards of acceptable conduct and performance of duty or when a member’s service is otherwise so meritorious that any other characterization would be inappropriate. *See* Department of the Air Force Instruction 36-3211, *Military Separations*, 24 June 2022, at paragraphs 3.14.1.1 and 14.7.1.

**O.** “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 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.” ECF No. 1-2 at 3.

**P.** “Kurta Factors” means the four questions provided at paragraph 2 in the attachment to the Kurta Memo.

**Q.** “Liberal Consideration Cases” refers to the class of Veterans discharged from the Department of the Air Force, United States Space Force, Air Force Reserve, or Air National Guard with the following service characterizations: Under Honorable Conditions (General), or Under Other Than Honorable Conditions (UOTHC); but not the following service characterizations: Bad Conduct Discharges (BCDs), Dishonorable Discharges, Uncharacterized discharges, or Dismissals; who have diagnoses of Post-Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), or other mental health conditions, or have experiences of sexual assault or sexual harassment, or records documenting that one or more symptoms of PTSD, TBI, other mental health conditions, or experiences of sexual assault or sexual harassment existed/occurred during military service, under the Kurta Memo standard of liberal consideration.

**R.** “Litigation” means the lawsuit captioned *Johnson et al. v. Kendall*, Case No. 3:21-cv-01214 (D. Conn.).

**S.** “Person” means a natural person, individual, corporation, partnership, association, or any other type of legal entity.

**T.** “Plaintiffs” means the class representatives Martin Johnson and Jane Doe, on behalf of themselves and the Settlement Class.

**U.** “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 “D” attached hereto, which, among other things, would preliminarily approve this Settlement Agreement and provide for notification to the Settlement Class and set the schedule for the Fairness Hearing.

**V.** “PTSD” means Post-Traumatic Stress Disorder.

**W.** “Settled Claims” means all claims for relief that were brought on behalf of the Settlement Class based on the facts and circumstances alleged in the Complaint. ECF No. 1. The Settled Claims do not include Claims VIII through XIII of the Complaint, which are brought on behalf of the named Plaintiffs individually.

**X.** “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 Settlement Class Counsel and counsel for Defendant.

**Y.** “TBI” means Traumatic Brain Injury.

**Z.** “VTC” means Video-Teleconference.

**AA.** “Wilkie Memo” means the memorandum issued by then-Under Secretary of Defense Robert L. Wilkie on July 25, 2018, providing additional guidance that “[r]equests for relief based in whole or in part on a mental health condition, including post-traumatic stress disorder (PTSD); Traumatic Brain Injury (TBI); or a sexual assault or sexual harassment experience, should be considered for relief on equitable, injustice, or clemency grounds whenever there is insufficient evidence to warrant relief for an error or impropriety.” ECF No. 1-3 at 4.

### **III. CERTIFICATION OF THE SETTLEMENT CLASS**

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

### **IV. SETTLEMENT RELIEF**

#### **A. Automatic Reconsideration**

1. The AFDRB will automatically reconsider its decisions that meet all of the following three criteria: (a) the applicant is a member of the Settlement Class, (b) whose

application was submitted on or after September 13, 2015 to the Effective Date of Settlement, (c) where the grant state indicates the applicant did not receive a full upgrade to Honorable, and (d) where the denial was not based on the discharge date being more than 15 years before the application date. Applicants meeting the above criteria are entitled to automatic reconsideration by the AFDRB under the terms of this settlement, regardless of discharge date. The applicants who are entitled to reconsideration under this paragraph are henceforth referred to as the “Automatic Reconsideration Group Applicants.”

2. Defendant will identify Automatic Reconsideration Group Applicants by searching its electronic database of applications where possible, and will otherwise conduct an individual review of applications. In its searches, Defendant will first identify cases that were not rejected for untimeliness. Defendant will next identify Liberal Consideration Cases. Defendant will next review the files to determine if the applicant’s record indicates they did or did not receive a full upgrade to an Honorable service characterization. Any individual who meets the criteria set out in the paragraph above shall be considered an Automatic Reconsideration Group Applicant.

3. Defendant will send a notice, in the form of Exhibit “E,” to all Automatic Reconsideration Group Applicants, to both their last known mailing and e-mail addresses on file with the AFDRB. The text of that notice, as provided in Exhibit “E,” will state that the AFDRB will reconsider that individual’s case without a need for further response 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; provide examples of the types of additional evidence that may be relevant; and include information regarding

available resources to assist Applicants in supplementing their applications, including legal and medical services. The AFDRB notice will provide that reasonable extensions will be granted upon request.

4. Defendant will mail and e-mail the notice to Automatic Reconsideration Group Applicants within 120 days of the Effective Date of Settlement. Defendant shall do so at its own cost.

5. The AFDRB will make every effort to complete its reconsideration of Automatic Reconsideration Group Applicants in a timely manner.

**B. Notice of Reapplication Rights**

1. Plaintiffs will mail a notice to the last known addresses of Settlement Class Members for whom the AFDRB's decisions meet the following two criteria: (a) whose application was submitted between September 13, 2006 and September 12, 2015 with a discharge date after October 6, 2001, and (b) whose grant state indicates the Applicant did not receive a full upgrade to an Honorable service characterization. The Applicants from this group who (a) qualify as Liberal Consideration Cases, and (b) did not receive a full upgrade to Honorable from the AFDRB, are defined here as Reapplication Group Applicants. Reapplication Group Applicants who were discharged 15 years ago or less from the date of application for reconsideration may apply to the AFDRB. Reapplication Group Applicants whose discharge date is older than 15 years as of the date of application must apply to the Air Force Board for Correction of Military Records ("AFBCMR").

2. The AFDRB will provide Plaintiffs with the names and last-known mailing and e-mail addresses (according to AFDRB data) for Applicants whose cases did not

receive an upgrade to an Honorable service characterization by the AFDRB for applications submitted between September 13, 2006 and September 12, 2015. Plaintiffs will send a notice, in the form of Exhibit “F,” to individuals on this list of names and addresses by mail and e-mail, referring them to the Class Notice and informing them of their potential right to reapply if they qualify as a member of the class. That notice, as laid out in Exhibit “F,” will state that the Applicant may reapply to the AFDRB or, if the Applicant’s discharge date is beyond the AFDRB’s 15-year statute of limitations pursuant to 10 U.S.C. § 1553, to the AFBCMR for reconsideration of their case; 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. The notices will not include the name, contact information, or return mailing address of Plaintiffs’ counsel.

3. Along with the notice in the form Exhibit “F,” Plaintiffs will send an additional notice to inform Reapplication Group Applicants of resources available to help answer Applicants’ questions about the application process or to help Applicants supplement their applications. This notice is described in more detail in Section IV.D. An example of this notice is appended as Exhibit “G”.

4. Applications for reconsideration must be submitted and/or postmarked to the AFDRB or AFBCMR within one (1) year of the date of the notice.

5. An Applicant’s notice will be dated to be mailed within 120 days of the Effective Date of Settlement or of Plaintiffs’ receipt of the Applicant’s name, mail, and e-mail addresses from the AFDRB, whichever is later. If the first notice is returned as

undeliverable, Plaintiffs may send a subsequent notice to the Applicant within this same period of time to an address Plaintiffs identify as currently belonging to the Applicant.

6. Plaintiffs will bear the cost of mailing and e-mailing these notices to Reapplication Group Applicants, paid out of the attorneys' fees and costs set forth in Section V(A) below.

**C. Online Notice of Reapplication Rights and of Reconsiderations**

1. Defendant will post notice of Reapplication Rights, as described above, and Automatic Reconsideration, as described above, in the form of Exhibits "E" and "F," on the main page of its website, within 45 days of the Effective Date of Settlement.

2. The online notices described in this section will be posted in a way that does not create confusion by implying that anyone who accesses the notice on the website is receiving this relief. Confusion will be avoided by including the word "Sample" in any hyperlink(s) to the document(s) and including a watermark of the word "Sample" diagonally across the versions of Exhibits "E" and "F" that are posted online.

3. The AFDRB's website will state that, if an individual believes they are part of the automatic reconsideration or reapplication groups but did not receive a notice, they should contact the AFDRB by e-mail.

4. Defendant will also update the Frequently Asked Questions ("FAQ") section of its website in accordance with the terms of this settlement, an example of which is attached in the form of Exhibit "H".

**D. Provision of Additional Information to New and Pending AFDRB Applicants**

1. For all discharge upgrade applications submitted to the AFDRB after the Effective Date of Settlement, when the Board writes the Applicant to acknowledge receipt of a submitted DD Form 293, the Board shall provide an additional notice to inform

Applicants of resources available to help answer Applicants' questions about the application process or to help Applicants supplement their applications. This information shall include, but not be limited to: (a) information on the types of evidence that can be submitted to support an applicant's claim; (b) information regarding potential eligibility for mental health treatment and evaluation services offered by the Department of Veterans Affairs ("VA"), and the weblink to locate VA facilities providing such services; (c) general information regarding Veterans Service Organizations that may assist with AFDRB applications, and applicants' right to retain counsel; (d) the link for Stateside Legal, which provides a database of legal services organizations that serve members of the military, veterans, and their families as well as other resources; (e) the weblink to the VA's "Directory of Veterans Service Organizations"; and (f) information regarding reasonable accommodation requests from the AFDRB in the application and adjudication process. The Department of the Air Force will incorporate a non-endorsement clause into such notices to avoid the appearance of bias or partiality toward any particular organization, and to inform applicants that additional organizations may be able to assist them. The notice may take the form of Exhibit "G" or a reasonable equivalent, and changes may be made to the notice as needed to reflect changes in applicable law or policy. If the AFDRB becomes aware of changes to factual information in the notice, such as if weblinks external to the Department of the Air Force are no longer operable, the AFDRB will, with or without notice to any party, update the information, or remove it and replace it with its reasonable equivalent, if any exists.

2. Defendant shall provide the same notice to all AFDRB applicants whose applications were submitted to the AFDRB before the Effective Date of Settlement, but not adjudicated before the Effective Date of Settlement.

3. Defendant shall provide the same notice as an attachment to the Notice of Reapplication Rights described in Section IV.B.

**E. Notice Inviting Additional Evidence**

1. For applicants who apply to the AFDRB after the Effective Date of Settlement and claim to have PTSD, TBI, or other mental health conditions, or to have experiences of sexual assault or sexual harassment, the AFDRB's medical professional will review the applicant's DD-293, the official military and medical file to which the Department of the Air Force has access, and submitted materials. If the medical professional determines that there may be insufficient records to establish the mental health condition or experience, or that it existed/occurred in service, the medical professional will send the form notice, attached as Exhibit "I," to the applicant.

2. This will be a trial program of one (1) year in duration from the date of the program's implementation, and only applies to new applications and applications not yet assessed by the AFDRB's medical professional at the time of the program's implementation. This program will be implemented within 45 days of the Effective Date of Settlement.

3. At six months and twelve months' time, Defendant will report to Plaintiffs' counsel the following information:

- i. The number of applications reviewed in the time period where the applicant claimed a mental health condition or covered experience;

- ii. The number of applicants to whom the AFDRB sent a letter as per this settlement term;
- iii. The number of applicants who sent additional records (not previously in the AFDRB's possession) within 60 days for consideration;
- iv. The number of applicants who requested an extension; and
- v. The number of applicants who responded to ask that their application remain in processing (*i.e.*, who said they would decline to send additional materials).

The Parties recognize that because an individual may change their mind, send records late, request an extension, or not respond at all, numbers reported in categories iii through v may not total the numbers in categories i or ii.

**F. Revised Decisional Documents and Procedures**

1. For Liberal Consideration Cases, Defendant has incorporated the text of the four "Kurta Factors" and the following procedure, or a reasonable equivalent, into AFDRB decisional documents, subject to modification due to relevant changes to statutes, regulations, or Department of Defense guidance binding on the AFDRB:

In the event the AFDRB denies an Applicant's request for relief, in this decision the Board will, in accordance with applicable law and regulation: (a) respond to the Applicant's contentions; (b) explain why the Board decided against the Applicant regarding any denied bases for relief; and (c) describe the evidence on which the AFDRB relied in making its determination. In doing so, the Board will articulate a rational connection between facts found and conclusions drawn. If the Applicant claims to have, or the evidence suggests the Applicant may have, post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), another mental health condition, or an experience of sexual assault or harassment in military service, this decision will include a narrative explanation of why the AFDRB decided against the Applicant as to each of the four factors set out at paragraph two of the 2017 Kurta Memo, as applicable. This explanation should restate and answer the applicable Kurta factors, and give a narrative reason why the Board finds insufficient mitigation to support a discharge upgrade. The Board will also

distinguish [explain how the facts or outcome are different] any prior Board decisions cited by the Applicant, in accordance with applicable law and regulation.

2. The AFDRB will append a medical opinion to its decisional document if the conditions of 32 C.F.R. § 865.114(b)(13) are satisfied. That medical opinion will include a narrative explanation as to the following, if applicable: (A) whether the available record reasonably supports that a mental health condition existed at the time of the applicant's military service; (B) whether these conditions were present at the time of the misconduct; (C) whether these conditions were mitigating for the misconduct; and (D) whether the applicant received mental health and/or medical evaluations prior to their administrative separation. The content of the medical opinion and conditions under which it is appended to decisional documents are subject to modification due to relevant changes to statutes, regulations, or Department of Defense guidance binding on the AFDRB.

3. Defendant agrees to disclose, upon request by the applicant, the type of mental health professional providing the opinion, their licenses and certifications, and the identity of the mental health professional if their military pay grade is at or above the O-6 level or its civilian equivalent.

4. Defendant has provided Plaintiffs with the personnel description for the AFDRB mental health professional position. The description is provided as Exhibit "J."

#### **G. Training**

1. The Department of the Air Force agrees to additional, routine training, including making its unconscious bias training for supervisors available to AFDRB staff and members.

2. Defendant agrees that AFDRB members and staff will participate in live training specifically tailored to Liberal Consideration Cases and that new AFDRB

members and staff will attend such training prior to participating in discharge upgrade decisions. This training obligation can be met through attendance of trainings conducted by the AFDRB or the Army Discharge Review Board.

3. The live training described in this subsection will: cover posttraumatic stress disorder, military sexual trauma, intimate partner violence, other behavioral health disorders, and traumatic brain injury; include a discussion of liberal consideration including general examples of mitigation, non-mitigation, or possible mitigation; include time for questions and discussion.

4. AFDRB members and staff must attend the live training described in this subsection upon joining the AFDRB and every two years thereafter, or within a reasonable period of time after significant changes to Liberal Consideration requirements.

#### **H. AFDRB Phone Number to be Provided to Applicants**

1. Defendant agrees to provide a phone number for applicants with questions to leave voicemail messages. Applicants who call should receive a response to their voicemail via phone, unless the applicant clearly indicates a preference for a written response in the voicemail. This will be a trial program of one (1) year in duration.

#### **I. Video-Teleconference Personal Appearance Hearings**

1. Defendant will continue to provide Video-Teleconference (“VTC”) personal appearance hearings for the AFDRB, which will continue to be available to all Applicants who request a Personal Appearance hearing. Defendant will inform Applicants of their ability to opt-in to a VTC AFDRB hearing in the letter acknowledging receipt of their DD-293 application. Applicants can participate in VTC hearings from their personal residences or other locations of their choice.

**J. Review of AFDRB Decisions by the Secretarial Review Authority**

1. Defendant acknowledges that the Kurta and Wilkie memoranda apply to the exercise of Secretarial Review Authority detailed under 32 C.F.R. § 865.113.

2. Where acting to overturn a favorable AFDRB decision for a Liberal Consideration Case, the Secretary's discussion of issues under 32 C.F.R. § 865.113(e) shall address each issue considered by the AFDRB, including a discussion of each Kurta Factor as considered by the AFDRB under Section IV.F of this agreement.

**K. Settlement Compliance Deadlines**

1. Unless a compliance deadline is otherwise specified, the Parties shall implement all terms in this agreement within 45 days of the Effective Date of Settlement.

**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 \$55,000.00 in attorneys' fees and costs to Settlement Class Counsel.

**B.** Defendant agrees to submit payment of attorneys' fees to Settlement Class Counsel within 90 days of either (a) the Effective Date of Settlement, or (b) Defendant's receipt of Settlement 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 “D,” preliminarily approving this Settlement Agreement and finding this settlement to be fair, just, reasonable, and adequate; certifying the Settlement Class as defined in Exhibit “A”; approving the Class Notice to the Settlement Class members as described in Section VI.C, *infra*; 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, the 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, 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 Litigation 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 to be estopped from asserting any additional defenses or arguments

available to them. Regardless of the outcome of the Settlement Agreement—whether it is approved, terminated, or modified in any material respect, or meets some other outcome—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. Unless and until the Court approves the Settlement Agreement, it is without legal effect.

**C. Notice for Fairness Hearing.** Not later than 14 calendar 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 “B” as well as a copy of the Settlement Agreement, on the website [www.JohnsonAirForceSettlement.com](http://www.JohnsonAirForceSettlement.com).

2. Defendant shall post the Class Notice substantially in the form of Exhibit “B,” including a copy of the Settlement Agreement, on its website.

3. The Parties shall issue a joint press release, attached as Exhibit “K,” that describes the Class Notice and provides a link to the website listed in Section VI.C.1.

4. Plaintiffs agree to further publicize the Class Notice through outreach to individuals and organizations likely to interface with Class Members. Examples of such outreach include: (a) efforts to engage national and regional news media, (b) efforts to engage military- and Veterans-specific news media, (c) requests to elected officials to

distribute the Class Notice to colleagues and constituents, and (d) attempts to publicize the Class Notice through Veterans' organizations, legal services organizations, and other advocates across the country.

**D. Objections to Settlement.** Unless otherwise modified by the Parties or by order of the Court, within 21 calendar days before the Fairness Hearing 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 for the District of Connecticut, 141 Church Street, New Haven, CT 06510; and both envelope and letter shall state: "Attention: *Johnson v. Kendall*, Case No. 3:18-CV-01214 (CSH) (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 “C,” 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, Plaintiffs and 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 Defendant of and from any and all of the Settled Claims, and Plaintiffs and Class members shall forever be barred and enjoined from bringing or prosecuting any Settled Claim against any of 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 his 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 Settled Claims, including all claims that were asserted or that Plaintiffs could have asserted on behalf of the Class in the Litigation.

C. For avoidance of doubt, this agreement does not resolve or release any claim that the named Plaintiffs may hold in their individual capacities, including without limitation Claims VIII-XIII of the Litigation.

**[Remainder of this page intentionally left blank. Agreement resumes on page 24, which contains only the requisite party signatures.]**

FOR PLAINTIFFS:

SO STIPULATED AND AGREED:

Dated: April 24, 2023



---

Gustavo Berrizbeitia, Law Student Intern  
Yael Caplan, Law Student Intern  
Grace Fenwick, Law Student Intern  
Jun Luke Foster, Law Student Intern  
Alexis Kallen, Law Student Intern  
Nate Urban, Law Student Intern  
Meghan E. Brooks (ct31147)  
Michael J. Wishnie (ct27221)  
Veterans Legal Services Clinic  
Jerome N. Frank Legal Services Org.  
Yale Law School  
P.O. Box 209090  
New Haven, CT 06520-9090  
Tel: (203) 432-4800  
michael.wishnie@ylsclinics.org

Jacob Tracer, pro hac vice  
Susan J. Kohlmann, pro hac vice  
Jenner & Block LLP  
919 Third Avenue, New York, NY 10022-3908  
Tel: (212) 891-1678  
jtracer@jenner.com

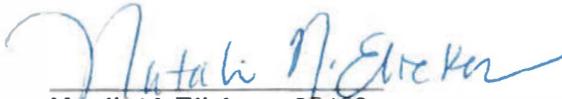
*Counsel for Plaintiffs*

FOR DEFENDANTS:

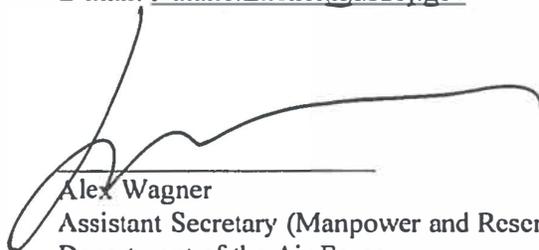
SO STIPULATED AND AGREED:

Dated: April 24, 2023

VANESSA ROBERTS AVERY  
UNITED STATES ATTORNEY



Natalie N. Elicker, ct28458  
Assistant United States Attorney  
157 Church Street  
New Haven, CT 06510  
Telephone: (203) 821-3700  
Fax: (203) 773-5373  
E-mail: [Natalie.Elicker@usdoj.gov](mailto:Natalie.Elicker@usdoj.gov)



Alex Wagner  
Assistant Secretary (Manpower and Reserve Affairs)  
Department of the Air Force

Executed this 11 day of April, 2023