

CLASS ACTION COMPLAINT FOR INJUNCTIVE AND MONETARY RELIEF

NATURE OF THE ACTION

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3 1. More than 45 years after being exposed to Agent Orange while serving in the United
4 States Armed Forces in Vietnam, many veterans and their families are still waiting for
5 compensation, including retroactive military retirement pay, due to them because of the devastating
6 effects of the toxic stew of chemicals on the veterans. This action for injunctive and monetary
7 relief seeks to end the unreasonable delay of the federal government defendants in (a) determining
8 whether members of a previously certified class of Vietnam War veterans and their surviving
9 family members are entitled to retroactive payments of military retired pay (“Military Retired Pay”)
10 pursuant to 10 U.S.C. § 1414 (“Section 1414”) as a consequence of the U.S. military departments’
11 use of Agent Orange in Vietnam during the Vietnam War and (b) making payments of retroactive
12 Military Retired Pay to those class members to whom such payments are owed.

13 2. This action is the latest chapter in the federal government’s unfortunate history of
14 failing to act to provide this class of veterans and their survivors (the “Veterans Class,” as defined
15 *infra*) with the benefits to which they have long been legally entitled. It concerns the intersection
16 of:

- 17 i. the final class action order entered in 1991 by the U.S. District Court for the
18 Northern District of California requiring the U.S. Department of Veterans
19 Affairs (“VA”) to readjudicate disability claims previously filed by class
20 members for diseases that were later found to be associated with Agent
21 Orange exposure (the “1991 Order”);
- 22 ii. the addition in 2010 of new diseases determined by the VA to be
23 presumptively associated with Agent Orange exposure, which triggered the
24 VA’s obligation under the 1991 Order to readjudicate the class members’
25 previously filed disability claims concerning those new diseases; and
- 26 iii. the retroactive application of Section 1414 requiring the Defendants to make
27 retroactive payments of Military Retired Pay to the Veterans Class due to
28 these readjudications.

1 3. More specifically, in 1987, a class of Vietnam War veterans and their survivors was
2 certified in *Beverly Nehmer, et al. v. Department of Veterans Affairs*, 118 F.R.D. 113 (N.D. Cal.
3 1987). Pursuant to court orders issued in that case, the VA is required to readjudicate a *Nehmer*
4 class member's previously filed disability claim whenever the Secretary of the VA determines
5 under the Agent Orange Act of 1991 that a new disease is presumptively associated with Agent
6 Orange exposure. In 2010, the VA added three new diseases. 38 C.F.R § 3.309(e). Beginning in
7 late 2010, the VA readjudicated the disability claims of more than 100,000 *Nehmer* class members
8 whose claims concerning one or more of those three diseases were previously denied. Tens of
9 thousands of those class members received a retroactive increase in their combined VA disability
10 rating as a result of this process and, as a result, became entitled to retroactive payment of disability
11 compensation from the VA ("VA Disability Compensation").

12 4. A large number of *Nehmer* class members are military retirees of the U.S. Armed
13 Forces who became entitled to Military Retired Pay upon separation from active duty service.
14 Beginning in late 2010, thousands of these military retirees received a retroactive increase in their
15 combined VA disability rating as a result of a *Nehmer* readjudication decision. The VA decision to
16 increase retroactively the combined VA disability rating of a military retiree triggered the duty of
17 defendant Defense Finance and Accounting Service ("DFAS") to determine whether the military
18 retiree was entitled to receive retroactive Military Retired Pay from DFAS based on the retroactive
19 increase in the retiree's combined VA disability rating.

20 5. Specifically, DFAS is charged with paying Military Retired Pay to veterans who are
21 military retirees with at least 20 years or more of creditable service in active or reserve duty. Prior
22 to January 1, 2004, a military retiree was prohibited by 38 U.S.C. § 5304 from receiving both the
23 full amount of VA Disability Compensation and the full amount of Military Retired Pay to which
24 the retiree would otherwise be entitled. By law prior to January 1, 2004, the aggregate amount of
25 VA Disability Compensation and Military Retired Pay paid to the veteran/retiree could not exceed
26 whatever was the higher of the two entitlements (i.e., VA Disability Compensation or Military
27 Retired Pay). For example, prior to January 1, 2004, a military retiree entitled to \$500 per month in
28 VA Disability Compensation and \$1,500 per month in Military Retired Pay could not legally

1 receive from VA and DFAS an aggregate amount in excess of \$1,500 per month. The
2 veteran/retiree would have the right to choose what part of the \$1,500 per month should be paid as
3 VA Disability Compensation and what part of the \$1,500 per month should be paid as Military
4 Retired Pay. Because VA Disability Compensation is tax-free, the veteran/retiree in this example
5 would generally choose to “waive” \$500 per month in Military Retired Pay so that the VA would
6 pay the veteran/retiree \$500 per month in VA Disability Compensation and DFAS would pay the
7 veteran/retiree \$1,000 per month in Military Retired Pay.

8 6. Effective in 2004, with some exceptions, Congress eliminated that prohibition,
9 resulting in thousands of veteran/retirees being entitled to receive on a prospective basis the
10 Military Retired Pay they had previously been waiving. Specifically, Congress enacted the
11 National Defense Authorization Act of 2004 which entitled eligible military retirees, with some
12 exceptions, to receive both their full VA Disability Compensation and their full Military Retired
13 Pay. That legislation was codified as 10 U.S.C. § 1414, and became effective January 1, 2004. The
14 amount of Military Retired Pay any particular veteran/retiree would be entitled to receive because
15 of this change in the law depends in part on the veteran/retiree’s combined VA disability rating and
16 the calendar year for the specific month of entitlement. Thus, when the VA added new diseases in
17 2010 which resulted thereafter in a retroactive increase in the combined VA disability rating of
18 *Nehmer* class members who were military retirees, some of those class members also became
19 entitled to receive from DFAS retroactive payments of Military Retired Pay that they previously
20 had waived in order to receive their full, tax-free VA Disability Compensation.

21 7. Although the VA readjudicated the cases of, and granted a retroactive increase in the
22 combined VA disability rating to, military retiree class members beginning in late 2010, DFAS has
23 yet to fulfill its longstanding obligation to pay the retroactive Military Retired Pay to which
24 Plaintiffs herein and the Veterans Class are entitled. Pursuant to the Administrative Procedure Act,
25 5 U.S.C. § 701 *et seq.*, Plaintiffs and the Veterans Class seek an injunction to compel DFAS to
26 comply with its mandatory obligation to determine the amount of retroactive Military Retired Pay
27 that each Plaintiff and member of the Veterans Class is entitled to receive. Plaintiffs and the
28 Veterans Payment Subclass (as defined *infra*) seek, pursuant to 10 U.S.C. § 1414 and 28 U.S.C. §

1 1346(a), payment of the retroactive Military Retired Pay to which they are entitled as a result of
2 Section 1414 and the *Nehmer* readjudication decision in their case.

3 **JURISDICTION AND VENUE**

4 8. This Court has jurisdiction over Count I for injunctive relief pursuant to 28 U.S.C. §
5 1331 and pursuant to the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, which entitles “a
6 person suffering legal wrong because of agency action, or adversely affected or aggrieved by
7 agency action. . . to judicial review thereof.” 5 U.S.C. § 702. Venue is proper pursuant to 28
8 U.S.C. § 1391(e).

9 9. This Court has jurisdiction over Count II for monetary relief pursuant to the Tucker
10 Act, 28 U.S.C. § 1346(a), in that it is a civil action or claim against the United States, not exceeding
11 \$10,000¹ in amount for each Plaintiff and each member of the Veterans Payment Subclass. The
12 statutory basis for invoking jurisdiction under the Tucker Act is 10 U.S.C. § 1414 and 38 U.S.C. §
13 5304. Venue is proper in this Court because the named Plaintiffs reside in this District as provided
14 in 28 U.S.C. § 1402(a)(1). This action is timely brought within the applicable limitations period.

15 **INTRADISTRICT ASSIGNMENT**

16 10. Pursuant to Civil Local Rule 3-2, this action is assigned to the San Jose Division
17 because each named Plaintiff is a resident of Monterey County, California.

18 **PLAINTIFFS**

19 11. Doris Davis is the surviving spouse of *Nehmer* class member and military retiree
20 Calvin Coolidge Davis, who suffered from coronary artery disease and passed away on November
21 18, 2007. Mrs. Davis is a resident of Marina, California.

22 12. Marion Y. Grant is the daughter of *Nehmer* class member and military retiree Junior
23 Grant, who suffered from ischemic heart disease and passed away on May 17, 2008. Mrs. Grant is
24 a resident of Monterey, California.

25 _____
26 ¹ Plaintiffs also give notice that, prior to the filing of this Class Action Complaint for Injunctive and Monetary Relief, a
27 separate class action complaint for monetary relief was filed by other members of the *Nehmer* class in the Court of
28 Federal Claims. That separate action in the Court of Federal Claims seeks monetary relief under 28 U.S.C. § 1491(a)(1)
of the Tucker Act for claims against these same defendants of more than \$10,000 for each plaintiff and class member
therein, based on the same conduct as alleged herein.

DEFENDANTS

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13. The United States of America is acting by and through the Department of Defense, the Defense Finance and Accounting Service, and the Department of Veterans Affairs, each of which is an agency of the United States government.

14. The Defense Finance and Accounting Service is an agency of the United States Department of Defense.

15. The U.S. Department of Veterans Affairs is an agency of the United States government.

16. The Department of Defense is an agency of the United States government.

17. Teresa A. McKay is an individual named solely in her official capacity as the Director of DFAS.

18. Robert A. McDonald is an individual named solely in his official capacity as the Secretary of Veterans Affairs.

19. Ashton B. Carter is an individual named solely in his official capacity as the Secretary of Defense.

BACKGROUND

**Legal Standards Governing a Veteran’s Dual Receipt of Both
VA Disability Compensation and Military Retired Pay**

20. Military retirees who incurred disabilities as a result of their military service may be entitled to receive both Military Retired Pay, paid by DFAS, and VA Disability Compensation, paid by the VA.

21. The amount of VA Disability Compensation to which a veteran is entitled is based on the veteran’s combined disability rating, which is a determination made by the VA concerning the severity of the veteran’s service-connected disability (or disabilities). Disability ratings are made in increments of 10 percent, so a veteran’s combined disability rating can be 0 percent, 10 percent, 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, 80 percent, 90 percent, or 100 percent. The amount of Military Retired Pay a veteran/military retiree is entitled to receive is calculated by DFAS based on a formula which considers the military retiree’s former

1 salary and his years of service.

2 22. Prior to 2004, federal statutes and regulations did not permit veterans who were
3 entitled to both Military Retired Pay and VA Disability Compensation to receive full payments of
4 both benefits at the same time. *See* 38 U.S.C.S. § 5304 & 5305; 38 C.F.R. § 3.750. Rather,
5 veterans who were otherwise entitled to both benefits had to waive some or all of their Military
6 Retired Pay in order to receive all of the tax-free VA Disability Compensation to which they were
7 entitled.

8 23. Because VA Disability Compensation is tax-free, veterans often elected VA
9 Disability Compensation over Military Retired Pay. That is, they waived a dollar of their Military
10 Retired Pay for each dollar of VA Disability Compensation they received. Thus, the election that
11 most veterans made resulted in the amount of Military Retired Pay to which the veteran/retiree was
12 entitled to receive being reduced by the amount of their VA Disability Compensation.

13 24. When Section 1414 became effective in 2004, it allowed for concurrent receipt of
14 both Military Retired Pay and VA Disability Compensation for certain eligible military retirees.
15 *See* 10 U.S.C. § 1414. The Department of Defense is responsible for administering the program,
16 which it delegates to DFAS. In effect, Section 1414 “restored” to eligible veterans the right to
17 receive some or all of the Military Retired Pay that they previously had waived in order to receive
18 their VA Disability Compensation. This restoration of Military Retired Pay is known as Concurrent
19 Retirement and Disability Pay (“CRDP”). With the enactment of Section 1414, veterans with at
20 least a 50 percent combined VA disability rating and at least 20 years of qualifying military service
21 were scheduled for the first time to receive – at some future date – both their full Military Retired
22 Pay and their VA Disability Compensation. *See* 10 U.S.C. § 1414.

23 25. Upon enactment of Section 1414, veterans did not immediately become entitled to
24 receive 100 percent of their Military Retired Pay. Rather, Section 1414 has “phase-in” periods
25 during which a portion of the veteran’s Military Retired Pay is to be “restored” each calendar year
26 until the applicable phase-in period has been completed. *See* 10 U.S.C. § 1414(c). Section 1414
27 explains in detail how to determine the amount of Military Retired Pay under CRDP that is
28 available to veterans pursuant to this phase-in schedule.

1 26. Section 1414 has two phase-in periods: one for veterans with a combined VA
2 disability rating of 50-90 percent, and another for veterans with a combined VA disability rating of
3 100 percent. For veterans with a combined VA disability rating of 50-90 percent, Section 1414
4 provides for a 10-year phase-in period, such that the percentage amount of Military Retired Pay
5 restored to the veteran was to increase each calendar year until 2014, when the phase-in period
6 would be completed. From January 1, 2014 onward, the veteran would then be entitled to receive
7 his or her full Military Retired Pay.

8 27. For veterans with a disability rating of 100 percent, Section 1414 provides for a one-
9 year phase-in period, such that the veteran would be entitled to receive his or her full Military
10 Retired Pay beginning on January 1, 2005.

11 28. The applicable government guidelines state that “CRDP will be recomputed for any
12 month of the phase-in period in which changes to . . . VA disability compensation occur.” *See*
13 Financial Management Regulation Volume 7B: “Military Pay Policy and Procedures – Retired
14 Pay,” *available at* http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_07b.pdf., at p.
15 64-4.

16 29. As DFAS provides on its website, “[n]o application is required” for a veteran to
17 receive CRDP, and “[e]ligible retirees receive CRDP automatically.” *See*
18 <http://www.dfas.mil/retiredmilitary/disability/payment.html>. Unfortunately, in practice, DFAS did
19 not automatically make these determinations and payments and, instead, failed in many cases to
20 make any determination or payment whatsoever.

21 **VA and DFAS Procedures To Provide Both VA Disability Compensation**
22 **and Military Retired Pay to Eligible Veteran Retirees**

23 30. While the VA and DFAS are separate agencies, each responsible for providing its
24 own benefits to eligible veterans, both agencies represent that they work together to ensure that
25 eligible retired veterans receive the CRDP to which they are entitled under Section 1414.

26 31. On its website, under the heading “Retroactive Payments,” DFAS states:

27 DFAS and the Department of Veterans Affairs (VA) manage the CRDP/CRSC Processing
28 program (formerly known as VA Retro) to pay eligible military retirees any retroactive
 CRSC, CRDP and/or VA disability compensation they are owed. . .

1 A retiree may be due funds from DFAS, the VA or from both agencies. DFAS and the VA
2 remain in communication with each other to successfully establish and process CRDP and
3 CRSC accounts.

4 DFAS will audit your account to determine whether or not you are due retroactive payment.
5 An audit of your account requires researching pay information from both DFAS and VA. If
6 you are due any money from DFAS, you will receive it within 30-60 days of receipt of your
7 first CRSC or CRDP monthly payment.

8 If DFAS finds that you are also due a retroactive payment from the VA, we will forward an
9 audit to the VA. They are responsible for paying any money they may owe you.

10 See <http://www.dfas.mil/retiredmilitary/disability/payment.html>.

11 32. VA states the following on its website:

12 Additional Benefits for Eligible Military Retirees Concurrent Retirement and Disability Pay
13 (CRDP) is a DoD program that allows some individuals to receive both military retired pay
14 and VA disability compensation. Normally, such concurrent receipt is prohibited. []
15 Veterans do not need to apply for this benefit, as payment is coordinated between VA and
16 the military pay center.

17 See http://www.va.gov/opa/publications/benefits_book/benefits_chap02.asp.

18 **The Nehmer Litigation**

19 33. While the material facts that led to the necessity of filing this action concern DFAS's
20 failure after October 2010 to make the retroactive payment of Military Retired Pay pursuant to
21 Section 1414, the history dates back to the United States' involvement in the Vietnam War and
22 subsequent litigation and orders that were entered by the United States District Court for the
23 Northern District of California in *Beverly Nehmer, et al. v. United States Veterans' Administration,*
24 *et al.*

25 34. During the Vietnam War, many veterans were exposed to Agent Orange, a chemical
26 defoliant containing the toxic substance dioxin. *Nehmer v. US Veterans Admin.*, 32 F. Supp. 2d
27 1175 (N.D. Cal. 1999) ("*Nehmer II*"). The United States used Agent Orange to clear dense jungle
28 land and, through such use, exposed members of the military to "one of the most highly toxic
substances known to the scientific community." *Nehmer v. U.S. Veterans' Admin.*, 712 F. Supp.
1404, 1407 (N.D. Cal. 1989) ("*Nehmer I*"). Human exposure to Agent Orange led to a multitude of
diseases, including leukemia, Hodgkin's Disease, Ischemic Heart Disease, Diabetes, Multiple
Myeloma, Non-Hodgkin's Lymphoma, Parkinson's Disease, Peripheral Neuropathy, Porphyria

1 Cutanea Tarda, Prostate Cancer, Respiratory Cancers, and Soft Tissue Sarcomas. *See Veterans'*
2 *Diseases Associated with Agent Orange*, U.S. Dept. of Veterans Affairs, available at
3 <http://www.publichealth.va.gov/exposures/agentorange/conditions/>.

4 35. After the Vietnam War ended, the VA “routinely denied compensation for veterans
5 who allege[d] that exposure to Agent Orange . . . caused diseases other than chloracne.” *Nehmer I* at
6 1407. “As of October 1, 1983, 9,170 veterans filed claims with disabilities that they allege[d] were
7 caused by Agent Orange; 7,709 were denied compensation because the VA found that the claimed
8 diseases were not service connected.” *Id.*

9 36. “In response to the controversy over Agent Orange, Congress in 1984 enacted the
10 Veterans’ Dioxin and Radiation Exposure Compensation Standards Act (“the Dioxin Act”), Pub.L.
11 98-542 (HR 1961), 99 Stat. 2725, 98th Cong.2d Sess., *reprinted in part at*, 38 U.S.C. § 1154 note.”
12 *Nehmer II* at 1176. The Dioxin Act was intended to ensure that all veterans who were disabled by
13 reason of their service in Vietnam received appropriate disability compensation. *Nehmer I* at 1407.
14 The Dioxin Act authorized “the Administrator of the VA to conduct rulemaking to determine which
15 diseases will be deemed service connected for *all diseases* claimed to be caused by Agent Orange
16 exposure,” rather than determining whether each veteran’s claimed disease was caused by Agent
17 Orange exposure on an individual basis. *Id.* Despite the Dioxin Act and Congress’s stated goal of
18 providing appropriate benefits to all veterans who were disabled as a result of exposure to Agent
19 Orange, the VA’s inability and unwillingness to provide veterans with the benefits they were due
20 necessitated extensive litigation brought on behalf of the *Nehmer* class.

21 37. On April 22, 1985, the Administrator of the VA (“Administrator”), in a proposed
22 rule, “set forth five factors to govern evaluation of the scientific evidence.” *Id.* at 1408. The
23 proposed rule also reiterated that chloracne was the only disease that was service-connected. *Id.*
24 After significant review of background information and scientific studies on the effects of Agent
25 Orange exposure on human populations, the VA published a final regulation identical to the
26 proposed rule, which stated “that ‘sound scientific and medical evidence does not establish a cause
27 and effect relationship between dioxin exposure’ and any other disease but chloracne.” *Id.* By
28 December 1987, “over 31,000 veterans [had] been denied compensation under this regulation.”

1 *Nehmer I* at 1408.

2 38. On February 2, 1987, Vietnam veterans and survivors of veterans filed a class action
3 lawsuit in the Northern District of California alleging that the final regulation was invalid because it
4 violated, among other things, provisions of the Dioxin Act and the judicial review provisions of the
5 Administrative Procedure Act. *Id.* The District Court certified the plaintiffs' proposed class of
6 current or former service members, or their next of kin, who were eligible to apply for claims before
7 the VA for service-connected disabilities arising from exposure to Agent Orange, or who had had a
8 claim denied by the VA for exposure to Agent Orange. The District Court agreed with the plaintiffs
9 that without certification, "they could win the battle to change the Dioxin regulation, and lose the
10 war to provide benefits to wrongly denied applicants." *Nehmer v. U.S. Veterans' Admin*, 118
11 F.R.D. 113, 120 (N.D. Cal. 1987).

12 39. In the substantive case, the plaintiffs alleged that the VA and the Administrator
13 failed to comply with the Dioxin Act by failing to review pertinent scientific studies, wrongfully
14 precluding consideration of animal studies, wrongfully requiring the scientific evidence to
15 demonstrate a "cause and effect" relationship between exposure to Agent Orange and the claimed
16 diseases rather than the less demanding standard that there be a "statistical association" between the
17 two, "failing to give the benefit of the doubt to the veterans when confronted with conflicting
18 evidence of approximately equal weight," and "fail[ing] to produce and transmit accurate
19 committee minutes to the Administrator, so that the administrator's review of the Committee's
20 conclusions was distorted." *Nehmer I* at 1409. The District Court stated:

21 [T]he Court agrees with plaintiffs that the Administrator's adoption of the cause and effect
22 test and failure to give the benefit of the doubt to veterans violated the Dioxin Act. The
23 Court further determines that these errors sharply tipped the scales against the claims of
24 veterans. Given the congressional finding of substantial scientific uncertainty regarding the
effects of Agent Orange, we hold that these errors are not harmless; they may very well
account for the conclusion that the Administrator reached in the Dioxin regulation.

25 *Nehmer I* at 1409.

26 **The Agent Orange Act of 1991**

27 40. The Agent Orange Act of 1991, 38 U.S.C. § 1116, was enacted after the District
28

1 Court in *Nehmer* invalidated the VA regulations under the Dioxin Act. The Agent Orange Act
2 required that the Secretary of the VA conduct new rulemaking proceedings to determine which
3 diseases are sufficiently associated with exposure to Agent Orange so that veterans with diseases
4 determined to be associated receive a presumption of service-connection, thus entitling them to VA
5 Disability Compensation. *See* 38 U.S.C. § 1116.

6 **The 1991 Final Stipulation and Order in *Nehmer***

7 41. In May of 1991, following the enactment of the Agent Orange Act of 1991, the VA
8 and *Nehmer* class entered into the above-referenced 1991 Order. *See* Final Stipulation and Order,
9 *Nehmer v. U.S. Dep't of Veterans Affairs*, No. CV 86-6160 (N.D. Cal. May 14, 1991). The 1991
10 Order provides, among other things, that as soon as the VA promulgates a regulation designating a
11 particular dioxin-related disease as “service-connected,” the VA must (1) identify all veterans and
12 survivors who had previously filed a claim based on the newly recognized disease, (2) readjudicate
13 the claims of these veterans and survivors under the newly promulgated regulation, and (3) in those
14 cases in which the VA awards disability compensation for the newly recognized disease as a result
15 of the readjudication, pay those veterans VA disability compensation retroactive to the date of the
16 previous claim. The end product of this process is typically described as a “*Nehmer* readjudication
17 decision.” The VA is also required to provide notice to each class member that his or her claim
18 would be readjudicated. A true and correct copy of the 1991 Order is attached to this Complaint as
19 Exhibit A, and its contents are incorporated herein by reference.

20 42. Federal regulations provide that “[i]f a *Nehmer* class member entitled to retroactive
21 benefits . . . dies prior to receiving payment of any such benefits, VA shall pay such unpaid
22 retroactive benefits to the first individual or entity listed below that is in existence at the time of
23 payment: (i) The class member’s spouse. . . (ii) The class member’s child(ren). . . (iii) The class
24 member’s parent(s) . . . (iv) The class member’s estate.” 38 C.F.R. § 3.816(f)(i)–(iv).

25 43. Since 1991, the VA has issued new determinations designating particular dioxin-
26 related disease as service-connected, including in 1994, 1996, 2001, 2003, 2007, and most recently
27 (as described herein) in 2010. It was the most recent additions in 2007 and 2010—after CRDP was
28 enacted—that resulted in veteran/retirees becoming entitled, as a result of a *Nehmer* readjudication

1 decision, to both retroactive payments of VA Disability Compensation (because of a retroactive
2 increase in their combined VA disability rating) and Military Retired Pay (because Section 1414
3 requires receipt of both benefits).

4 **The Secretary of Veterans Affairs Adds New Diseases in 2010**

5 44. On October 13, 2009, the former Secretary of Veterans Affairs announced his
6 decision under the Agent Orange Act of 1991 to establish new diseases as being presumptively
7 service-related due to Agent Orange exposure. These new diseases included hairy-cell leukemia
8 and other B-cell leukemias, Parkinson's Disease, and ischemic heart disease. Then, on August 31,
9 2010, a final regulation, 38 C.F.R. § 3.309(e), was published in the Federal Register by the VA,
10 expanding the list of disabilities that are presumed to be related to Agent Orange and other
11 herbicide exposures to include the foregoing diseases. *See* 38 C.F.R. § 3.309(e).

12 **VA Readjudicates Class Member Cases Starting in October 2010**

13 **But Unlawfully Withholds VA Disability Compensation**

14 45. After the promulgation of 38 C.F.R. § 3.309(e) and pursuant to the 1991 Order in
15 *Nehmer*, the VA identified more than 100,000 *Nehmer* class members who were entitled to a
16 *Nehmer* readjudication because they had previously filed a VA claim based on one or more of the
17 newly recognized diseases. On or about October 31, 2010, the VA began to readjudicate these
18 previously filed disability claims concerning the three new diseases listed in Section 3.309(e).

19 46. Typically, the readjudication resulted in one of two outcomes. Either (1) the
20 readjudication resulted in a retroactive increase in the veteran's combined VA disability rating, or
21 (2) the readjudication had no effect on the veteran's combined VA disability rating. If the veteran
22 received a retroactive increase in the combined VA disability rating, then the veteran could
23 potentially receive not only retroactive payments of VA Disability Compensation from the VA
24 (regardless of the magnitude of the increase in the combined disability rating), but also retroactive
25 payments of Military Retired Pay from DFAS (so long as the new combined VA disability rating
26 was at least 50 percent and the veteran had served at least 20 qualifying years).

27 47. After a readjudication, the VA would notify (or attempt to notify) by mail the
28 *Nehmer* veterans, or their surviving spouses, children or parents, of their *Nehmer* readjudication

1 decision, as required under the 1991 Order and 38 C.F.R. § 3.816(f). In many cases the VA failed
2 to locate the veteran or his survivors. The National Veterans Legal Services Program (“NVLSP”),
3 co-counsel here and in *Nehmer*, later undertook to and succeeded in finding many of those veterans
4 or survivors, resulting in the payment of more than \$3 million dollars in VA Disability
5 Compensation.

6 48. In literally thousands of cases in which the VA mailed a *Nehmer* readjudication
7 decision to a military retiree class member or the survivor of such a retiree, the VA announced in its
8 notice letter to the class member that although the accompanying readjudication decision resulted in
9 a retroactive increase in the combined VA disability rating, the VA was withholding payment of the
10 retroactive VA Disability Compensation that was owed. In many of these notice letters, the VA
11 expressly stated that it was required *by law* to withhold all of the retroactive VA Disability
12 Compensation that would otherwise be owed to the class member as a result of the accompanying
13 readjudication decision because the class member had received Military Retired Pay. This
14 statement of law was then, and still is, incorrect and contrary to law because of the provisions of
15 Section 1414.

16 49. Notably, in many other cases in which the VA made a readjudication decision that
17 increased the combined VA disability rating of a military retiree class member, the notice letter sent
18 to the retiree or survivor of the retiree stated, correctly, the exact opposite; namely, that the law
19 required VA to pay, rather than withhold, the retroactive VA Disability Compensation owed as a
20 result of the *Nehmer* readjudication decision, even though the class member had also received
21 Military Retired Pay. In these cases, the VA paid pursuant to Section 1414, rather than withheld,
22 the retroactive VA Disability Compensation owed as a result of the *Nehmer* readjudication decision.

23 **VA’s Failure to Take Remedial Action to Release the Retroactive VA Disability**
24 **Compensation It Had Wrongfully Withheld From Retirees and Their Survivors**

25 50. Pursuant to the privacy protection order entered during the *Nehmer* litigation, the
26 VA has been periodically disclosing to NVLSP copies of the more than 100,000 notice letters and
27 *Nehmer* readjudication decisions that VA has been sending to class members beginning in late
28 2010. Starting in 2013, class members who are military retirees or their survivors began

1 complaining to NVLSP that (a) VA had announced in the notice letters that it withheld the
2 retroactive VA Disability Compensation owed as a result of the accompanying *Nehmer*
3 readjudication decision and (b) in the years that had elapsed since the announced withholding, the
4 VA had still not released the wrongfully withheld compensation. Accordingly, NVLSP began in
5 2013 to file written complaints with counsel for the VA in *Nehmer* about individual military retirees
6 or their survivors whose retroactive VA Disability Compensation had been wrongfully withheld,
7 and VA's failure to take remedial action. The government's response to these complaints differed
8 depending on whether the class member involved was a living military retiree or a survivor of a
9 deceased military retiree.

10 51. With regard to living military retirees, government counsel informed NVLSP in
11 2014 that continued use by NVLSP of the complaint process to remedy VA withholding of
12 retroactive VA disability compensation was not justified because the government represented that it
13 had, in 2014, "a process in place to ensure that the necessary withholding pay adjustments take
14 place" for living military retirees whose VA disability compensation had been withheld years
15 earlier. NVLSP responded by asking, given that VA apparently had such a process in place, for VA
16 to disclose to NVLSP the identity of the living military retirees whose cases VA intended to process
17 in the future for a "necessary withholding pay adjustment." The government responded to this
18 request by retracting its representation, admitting that no such process was in place to ensure that
19 VA would release to living military retirees retroactive VA Disability Compensation the VA had
20 previously withheld.

21 52. The government stated it would develop a list of all living military retirees who are
22 potentially entitled to release of the VA Disability Compensation that VA had previously withheld
23 and agreed to a timetable for review of these cases. In 2015, VA provided NVLSP a list of 3,491
24 class members and a timetable for reviewing all 3,491 cases. In the exercise of due diligence,
25 NVLSP tested the VA's representation that the list of 3,491 truly included all living military retirees
26 as to whom VA still owed the Disability Compensation it had withheld years earlier. NVLSP
27 selected the cases of 197 living retirees who were not on the list of 3,491, but who had their VA
28 Disability Compensation withheld by the VA. Part way through investigating the cases of these

1 197 living retirees, NVLSP identified four who had their VA Disability Compensation withheld,
2 and who informed NVLSP that they had never received the withheld compensation from the VA.
3 In response to NVLSP's 2015 complaint about these four living retirees, the VA admitted that these
4 four retirees were owed the aggregate amount of \$174,898 (more than \$43,000 in tax-free
5 compensation per retiree) that VA had withheld years earlier. Thereafter, VA admitted that its list
6 of 3,491 was not "sufficient." In 2016, the VA developed and provided NVLSP with a new list of
7 7,305 living retirees. As it did in 2015 with regard to its list of 3,491, the VA represented that the
8 new list of 7,305 included all living military retirees as to whom VA still owed VA Disability
9 Compensation it had previously withheld. The VA is currently reviewing the cases on the list of
10 7,305.

11 53. In contrast to its response regarding living military retirees, VA did not take the
12 position that it had a process in place to ensure that survivors of deceased military retirees would
13 receive the VA Disability Compensation that VA had wrongfully withheld. Nor did VA take the
14 position that it had the ability to identify these survivors. VA agreed, however, that if NVLSP
15 reviewed on its own the more than 100,000 notice letters and readjudication decisions that VA had
16 disclosed pursuant to the privacy protection order and isolated class members who (a) are survivors
17 of deceased military retirees, (b) had been the subject of VA withholding, and (c) had their
18 combined VA disability rating retroactively increased in a *Nehmer* readjudication decision from
19 less than 50 percent to 50 percent or more for all or part of the period from January 1, 2004 to the
20 present, VA would review the case to determine whether it was required by law to release all or part
21 of the retroactive VA Disability Compensation it had withheld years earlier.

22 54. As a result of this agreement, the VA has thus far released more than \$38.1 million
23 to more than 1,500 class members accurately identified by NVLSP as having been the subject of
24 wrongful VA withholding of retroactive VA Disability Compensation (an average of more than
25 \$25,000 per class member in tax-free compensation). These figures do not include hundreds of
26 other survivors of deceased military retiree class members whom NVLSP has identified for VA to
27 review and pay.

28 //

1 **DFAS's Failure to Make Retroactive Payments of Military Retired Pay**

2 **Pursuant to Section 1414**

3 55. Like the VA, DFAS has also taken an inconsistent and unlawful approach with
4 respect to retroactive payments of Military Retired Pay.

5 56. As described above, federal law prior to 2004 did not permit a veteran/military
6 retiree to receive the full amounts of both VA Disability Compensation and Military Retired Pay.
7 Section 1414 amended this prohibition for military retirees with a combined VA disability rating of
8 50 percent or more for any period after January 1, 2004. As a result, when the VA began in late
9 2010 to issue *Nehmer* readjudication decisions to military retiree class members or their survivors
10 that retroactively increased the combined VA disability rating to 50 percent or more for any part of
11 the period on or after January 1, 2004, DFAS was obligated to determine whether the military
12 retiree or survivor was entitled to retroactive Military Retired Pay, and, if so, to make the payment
13 required by law.

14 57. However, in many cases, *Nehmer* class veterans who served for at least 20 years (or
15 their survivors, if deceased) and had a combined disability rating of at least 50 percent for any
16 period of time on or after January 1, 2004, never received any communications from DFAS at all;
17 they neither received any payment of retroactive Military Retired Pay, nor heard from DFAS the
18 amount they would be entitled to receive.

19 **INDIVIDUAL PLAINTIFFS' FACTS**

20 **Doris Davis, Spouse of Calvin Coolidge Davis**

21 58. Calvin Coolidge Davis was a veteran of the U.S. Army who served on active duty
22 for more than 20 years and was diagnosed with coronary artery disease, which is a type of ischemic
23 heart disease, after serving on active duty in Vietnam during the Vietnam War. Mr. Davis passed
24 away on November 18, 2007, and is survived by his spouse, Plaintiff Doris Davis.

25 59. On March 25, 2002, prior to his death, Mr. Davis submitted to the VA a disability
26 claim for coronary artery disease. At the time, his combined VA disability rating was 40 percent.
27 VA denied his claim on November 7, 2002.

28 60. Based on information and belief, pursuant to the 1991 Order, the VA readjudicated

1 Mr. Davis's claim on or about December 14, 2011—a little more than a year after ischemic heart
2 disease was added to the list of diseases which are presumed to be service related based on Agent
3 Orange exposure. In its *Nehmer* readjudication decision, the VA granted Mr. Davis's disability
4 claim for coronary artery disease and raised his combined VA disability rating to 50 percent,
5 effective retroactive to November 22, 2004.

6 61. Because his prior combined disability rating was less than the 50 percent minimum
7 in order to be eligible for CRDP under Section 1414, Mr. Davis previously could not have received
8 the full amount of both his VA Disability Compensation and his Military Retired Pay. Thus, he
9 waived a portion of his Military Retired Pay in order to receive the full amount of his VA Disability
10 Compensation. But when the VA increased his combined disability rating to the minimum 50
11 percent requirement retroactive to November 22, 2004, Mr. Davis became eligible for CRDP and
12 potentially entitled to retroactive payments of Military Retired Pay from DFAS that he previously
13 had to waive in order to receive his tax-free VA Disability Compensation.

14 62. Based on information and belief, the VA mailed to Mrs. Davis on March 13, 2012, a
15 letter about her husband's *Nehmer* readjudication decision, attaching a copy of the decision. While
16 acknowledging that Mr. Davis's combined VA disability rating had increased to 50 percent—thus
17 entitling him to not only an increase in VA Disability Compensation, but also making him eligible
18 for retroactive payments of Military Retired Pay under Section 1414—the VA's letter stated “You
19 are not entitled to any retroactive benefits for Calvin Coolidge Davis's claim for service connected
20 compensation based on this decision. Any retroactive benefits that would otherwise be payable
21 have been withheld based on your receipt of [military] retired pay.”

22 63. NVLSP complained to the VA in early 2016 about the VA's wrongful withholding
23 of VA Disability Compensation in March 2012. Based on information and belief, on or about
24 March 22, 2016—four years after its March 2012 correspondence in which it notified Mrs. Davis it
25 had withheld VA Disability Compensation—the VA sent Mrs. Davis another letter. In that letter,
26 VA stated that “Funds were initially withheld for military retired pay pending receipt of information
27 from Defense Finance and Accounting Services (DFAS). Please note that based on receipt of that
28 information a portion of previously withheld funds are being released.” The VA accordingly

1 compensated Mrs. Davis with \$7,145.00 in retroactive VA Disability Compensation.

2 64. However, while the VA represented in its March 2016 letter that it had previously
3 been in contact with DFAS about Military Retired Pay, DFAS never contacted Mrs. Davis about
4 whether she was also entitled to retroactive payment of Military Retired Pay. Thus, instead of
5 DFAS “automatically” making payments for CRDP, it did nothing in that regard, and Mrs. Davis
6 has yet to receive any retroactive payments of Military Retired Pay based on her deceased
7 husband’s increase in his combined VA disability rating, or any notice that there has been a
8 determination regarding the amount of those benefits. Based on information and belief, Mrs. Davis
9 is entitled to payment by DFAS of retroactive Military Retired Pay.

10 **Marion Y. Grant, Daughter of Junior Grant**

11 65. Junior Grant was a veteran of the U.S. Army who served on active duty for more
12 than 20 years and was diagnosed with ischemic heart disease after serving in Vietnam during the
13 Vietnam War. Mr. Grant passed away in 2008, and is survived by his daughter, Plaintiff Marion Y.
14 Grant.

15 66. Prior to his death, Mr. Grant submitted to the VA multiple claims for heart disease.
16 VA denied his claims in 1989, 2006, and 2008. Mr. Grant’s combined VA disability rating was 0
17 percent for the period prior to August 24, 2006, 30 percent for the period from August 24, 2006 to
18 March 11, 2008, and 50 percent for the two-month period from March 11, 2008 to the date of his
19 death.

20 67. Based on information and belief, pursuant to the 1991 Order, the VA readjudicated
21 Mr. Grant’s claim on or about January 23, 2012. In its *Nehmer* readjudication decision, the VA
22 granted Mr. Grant’s disability claim for ischemic heart disease and raised his combined VA
23 disability rating to 100 percent effective from August 11, 2003 to the date of his death in 2008.

24 68. Prior to his *Nehmer* readjudication decision, Mr. Grant’s combined VA disability
25 rating was less than the 50 percent minimum required in order to be eligible for CRDP under
26 Section 1414. He thus waived a portion of his Military Retired Pay in order to receive the full
27 amount of his tax-free VA Disability Compensation. But when the VA increased his combined
28 disability rating to 100 percent retroactive to August 11, 2003, Mr. Grant became eligible for CRDP

1 and potentially entitled to retroactive payments of Military Retired Pay from DFAS that he
2 previously had to waive in order to receive the full amount of his tax-free VA Disability
3 Compensation.

4 69. Based on information and belief, the VA mailed to Ms. Grant on June 21, 2012, a
5 letter about the VA's *Nehmer* readjudication decision for her father's condition, attaching a copy of
6 that decision. While acknowledging that Mr. Grant's combined VA disability rating increased to
7 100 percent—thus entitling him to not only an increase in VA Disability Compensation, but also
8 making him eligible for retroactive payments of Military Retired Pay under Section 1414—the
9 VA's letter stated “The veteran is not allowed to receive full military retired pay and full VA
10 compensation at the same time. . . [W]e must withhold part of the veteran's compensation effective
11 September 1, 2003 until his death to prevent a double payment. By working together with the
12 military service department, we will make sure you get your full combined payment.”

13 70. NVLSP complained to the VA in early 2015 about the VA's wrongful withholding
14 of VA Disability Compensation that took place in this case in June 2012. Based on information and
15 belief, in 2015, the VA sent Mrs. Davis another letter, which was undated. In that letter, the VA
16 stated that “Funds were initially withheld for military retired pay pending receipt of information
17 from Defense Finance and Accounting Services (DFAS). Please note that based on receipt of that
18 information a portion of previously withheld funds are being released.” The VA accordingly
19 compensated Mrs. Grant with \$21,563.00 in retroactive VA Disability Compensation.

20 71. However, while the VA represented in its 2015 letter that it had been in contact with
21 DFAS about Military Retired Pay, DFAS never contacted Ms. Grant about whether she was entitled
22 to retroactive payment of Military Retired Pay. Thus, instead of DFAS “automatically” making
23 payments for CRDP, it did nothing in that regard, and Ms. Grant has yet to receive any retroactive
24 payments of Military Retired Pay based on her father's increase in his combined VA disability
25 rating, or any notice that there has been a determination regarding the amount of those benefits.
26 Based on information and belief, Ms. Grant is entitled to payment by DFAS of retroactive Military
27 Retired Pay.

28 //

CLASS ALLEGATIONS

1
2 72. This action for injunctive and monetary relief is brought by the named Plaintiffs as a
3 class action, on their own behalf and on behalf of all others similarly situated, under the provisions
4 of Rule 23(a), Rule 23(b)(3), and Rule 23(b)(2) of the Federal Rules of Civil Procedure.

5 73. The Veterans Class so represented by Plaintiffs in this action, and of which Plaintiffs
6 are themselves members, consists of a nationwide class of:

- 7 i. All living members of the *Nehmer* class who served for at least 20 years or more of
8 creditable service in active or reserve duty, or, if any such member is deceased, his
9 surviving spouse, children, or parents;
- 10 ii. Who received a retroactive increase in their combined VA disability rating to at
11 least 50 percent for any period of time on or after January 1, 2004, as a result of the
12 VA *Nehmer* readjudication on or after October 2010 that awarded them VA
13 Disability Compensation based, at least in part, on a previous claim for either hairy-
14 cell leukemia and other B-cell leukemias, Parkinson’s Disease, or ischemic heart
15 disease; and
- 16 iii. As to whom no determination has been made by Defendants as to the class
17 member’s entitlement to retroactive payment of Military Retired Pay.

18 74. The Veterans Payment Subclass so represented by Plaintiffs in this action, and of
19 which Plaintiffs are themselves members, consists of a nationwide class of:

- 20 i. All living members of the *Nehmer* class who served for at least 20 years or
21 more of creditable service in active or reserve duty, or, if any such member is
22 deceased, his surviving spouse, children, or parents;
- 23 ii. Who received a retroactive increase in their combined VA disability rating to
24 at least 50 percent for any period of time on or after January 1, 2004, as a
25 result of the VA *Nehmer* readjudication on or after October 2010 that
26 awarded them VA Disability Compensation based, at least in part, on a
27 previous claim for either hairy-cell leukemia and other B-cell leukemias,
28 Parkinson’s Disease, or ischemic heart disease; and

1 iii. Who have not received payment of retroactive Military Retired Pay in an
2 amount that is \$10,000 or less.

3 75. The exact number of Veterans Class and Veterans Payment Subclass members is not
4 presently known to Plaintiffs and can only be ascertained through discovery. Discovery is also
5 necessary to ascertain which Veterans Class members are entitled to payment of \$10,000 or less in
6 retroactive Military Retired Pay, and which Veterans Class members are entitled to payment of
7 more than \$10,000. The Veterans Class and Veterans Payment Subclass are so numerous that
8 joinder of individual members in this action is impracticable.

9 76. There are common questions of law and fact in the action that relate to and affect the
10 rights of each member of the Veterans Class and Veterans Payment Subclass which predominate
11 over any questions solely affecting individual members of each such class and subclass, and the
12 relief sought by the Veterans Class and Veterans Payment Subclass is common for each such class
13 and subclass. The questions of law and fact common to the Veterans Class and Veterans Payment
14 Subclass include whether Defendants failed to properly implement 10 U.S.C. § 1414 and whether
15 Defendants have unreasonably delayed or otherwise acted unlawfully with respect to the Plaintiffs
16 and the class and subclass members by not making any determination as to whether the Plaintiffs
17 and the Veterans Class are eligible to receive any retroactive payment of Military Retired Pay, and
18 by not making retroactive payments of Military Retired Pay to Plaintiffs and the Veterans Payment
19 Subclass.

20 77. The claims of Plaintiffs, who are representatives of both the Veterans Class and
21 Veterans Payment Subclass in this action, are typical of the claims of the class and subclass, in that
22 the claims of all members of the class and subclass, including Plaintiffs, depend on a showing of the
23 acts and omissions of DFAS giving rise to the right of Plaintiffs to the relief sought. There is no
24 conflict as between any individual named Plaintiff and other members of the class and subclass
25 with respect to this action, or with respect to the claims for relief set forth herein.

26 78. The named Plaintiffs are the representative parties for the Veterans Class and
27 Veterans Payment Subclass, and are able to, and will, fairly and adequately protect the interests of
28 the class and subclass. The attorneys for Plaintiffs are experienced and capable in litigation.

1 Indeed, NVLSP and Sidley Austin LLP, counsel in this action, represented the certified class in
2 *Nehmer*. The attorneys designated as counsel for Plaintiffs will actively conduct and be responsible
3 for Plaintiffs' case.

4 79. This action is properly maintained as a class action as the questions of law and fact
5 common to the members of the class predominate over any questions affecting only individual
6 members, and a class action is superior to other available methods for the fair and efficient
7 adjudication of the controversy. Further, this action is properly maintained as a class action as
8 DFAS has acted or refused to act, as specifically alleged herein, on grounds which are applicable to
9 the class, and have by reason of such conduct, made appropriate final injunctive relief or
10 corresponding declaratory relief with respect to the entire class, as sought in this action.

11 COUNT I

12 **(Injunctive Relief for the Veterans Class Pursuant to the Administrative Procedures Act;** 13 **5 U.S.C. § 701-706)**

14 80. Plaintiffs re-allege and incorporate by reference the facts contained in ¶¶ 1 through
15 79 above as if fully set forth herein.

16 81. This cause of action for injunctive relief is to compel Defendants to determine the
17 amount of retroactive Military Retired Pay that Plaintiffs and each member of the Veterans Class
18 are entitled to receive under 10 U.S.C. § 1414. *See* 5 U.S.C. § 706.

19 82. Section 1414 confers on eligible veterans, such as Plaintiffs and the Veterans Class,
20 a substantive right to monetary benefits from the United States by prohibiting the United States
21 from, under certain circumstances, withholding Military Retired Pay from a veteran who is also in
22 receipt of VA Disability Compensation.

23 83. Defendants' unreasonable delay and failure to determine the amounts of retroactive
24 Military Retired Pay due to Plaintiffs and the Veterans Class as a result of their *Nehmer*
25 readjudication decisions on or after October 2010 constitutes "agency action," which is defined in
26 part as "the whole or part of an agency['s] . . . failure to act" under 5 U.S.C. § 551(13).

27 84. A plaintiff "suffering legal wrong because of agency action, or adversely affected or
28 aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review

1 thereof,” except to the extent that “(1) the statutes preclude judicial review; or (2) agency action is
2 committed to agency discretion by law.” 5 U.S.C. § 701-02.

3 85. No statute precludes judicial review of Defendants’ failure to determine the amounts
4 of retroactive Military Retired Pay due to Plaintiffs. Nor is Defendants’ compliance with Section
5 1414 an agency action committed to Defendants’ discretion by law. Rather, Defendants’ obligation
6 to restore Military Retired Pay to eligible veterans under Section 1414 is mandatory, and even
7 DFAS acknowledges that such determinations must “automatically” be made.

8 86. Plaintiffs and the Veterans Class members have been unlawfully deprived of a
9 determination of the amounts of retroactive payments of Military Retired Pay to which they are
10 entitled under 10 U.S.C. § 1414 as a result of an increase in their combined VA disability rating
11 from their *Nehmer* readjudication decision (including whether the amount due each Plaintiff and
12 each member of the Veterans Class is \$10,000 or less, or is more than \$10,000). Under 5 U.S.C. §
13 706, a “reviewing court shall--(1) compel agency action unlawfully withheld or unreasonably
14 delayed.”

15 87. The VA began readjudicating *Nehmer* claims nearly six years ago, starting in
16 October 2010, but Defendants have taken no action to inform Plaintiffs and the Veterans Class of
17 the amounts they are owed. Plaintiffs thus request that Defendants be ordered to make a
18 determination of the amounts Plaintiffs and members of the Veterans Class are entitled to receive as
19 retroactive compensation of Military Retired Pay under the CRDP program.

20 COUNT II

21 (Monetary Relief for the Veterans Payment Subclass

22 Pursuant to the Tucker Act, 28 U.S.C. § 1346; 10 U.S.C. § 1414 & 38 U.S.C. § 5304)

23 88. Plaintiffs re-allege and incorporate by reference the facts contained in ¶¶ 1 through
24 79 above as if fully set forth herein.

25 89. 10 U.S.C. § 1414 confers on eligible veterans, such as Plaintiffs and the Veterans
26 Payment Subclass, a substantive right to monetary benefits against the United States by prohibiting
27 the United States from withholding all or part of a veteran’s Military Retired Pay due to receipt of
28 VA Disability Compensation.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury.

Dated: October 28, 2016

SIDLEY AUSTIN LLP

By: /s/ Ronald C. Cohen*
Howard J. Rubinroit
Bradley H. Ellis
Ronald C. Cohen
Bradley J. Dugan
Logan P. Brown

Attorneys for Plaintiffs
DORIS DAVIS and MARION GRANT

NATIONAL VETERAN'S LEGAL SERVICES PROGRAM

By: /s/ Barton F. Stichman
Barton F. Stichman (*Pro hac vice* application forthcoming)

Attorneys for Plaintiffs
DORIS DAVIS and MARION GRANT

*Pursuant to Local Rule 5-1(i), the filer attests that concurrence in the filing of this document has been obtained from the signatories above.

EXHIBIT A

5/4/17

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEVERLY NEHMER, et al.,)
)
Plaintiffs,)
)
v.)
)
UNITED STATES VETERANS)
ADMINISTRATION, et al.,)
)
Defendants.)
_____)

Civil Action No.
CV-86-6160 (TEH)

FINAL STIPULATION AND ORDER

1
2 Plaintiffs filed an Emergency Motion for Enforcement and
3 Supplementation of Prior Orders. As a result of subsequent
4 discussion of the matters raised by plaintiffs' motion,
5 plaintiffs and defendants, through their undersigned counsel,
6 hereby stipulate as follows:

7 1. The Veterans' Advisory Committee on Environmental
8 Hazards, ("Advisory Committee" or "Committee") created
9 pursuant to the Veterans' Dioxin and Radiation Exposure
10 Compensation Standards Act of 1984, 38 U.S.C. § 354 note,
11 Sect. 6, will complete its analysis as to whether the scien-
12 tific or medical evidence reveals a connection between
13 exposure to dioxin and diabetes, lung cancer and peripheral
14 neuropathy (hereafter referred to as the "three diseases") at
15 or shortly after its May 23-24, 1991 meeting and convey its
16 evaluations and any recommendations to the Secretary forth-
17 with.

18 2. The Secretary will review the Committee's report and
19 all other relevant scientific or medical evidence he deter-
20 mines appropriate and, for each of the three diseases, make
21 one of the following determinations: (a) to initiate rule-
22 making to service connect the disease through the issuance of
23 a proposed positive rule and a final rule as appropriate
24 following public comment on the proposed rule; (b) to initiate
25 rulemaking to issue a negative proposed rule, i.e., rejecting
26 service connection (based on a finding of a lack of evidence
27 establishing a significant statistical association between the
28

1 disease and exposure to dioxin) and a final rule as appropri-
2 ate following public comment on the proposed rule; or (c)
3 defer issuing any rule (for example, but not limited to,
4 circumstances where there is a decision that there is insuffi-
5 cient current information). The Secretary's determination for
6 each of the three identified diseases will be made and
7 communicated to the Court and plaintiffs no later than July 1,
8 1991.

9
10 3. As soon as a final rule is issued service connect-
11 ing, based on dioxin exposure, any of the three diseases, soft
12 tissue sarcoma, and any other disease which may be service
13 connected in the future pursuant to the Agent Orange Act of
14 1991, 38 U.S.C. § 316(b), the VA shall promptly thereafter
15 readjudicate all claims for any such disease which were voided
16 by the Court's Order of May 3, 1989, as well as adjudicate all
17 similar claims filed subsequent to the Court's May 3, 1989
18 Order, without waiting for final rules to be issued on any
19 other diseases.

20 4. Prior to conducting the adjudications referred to in
21 paragraph 3, above, VA will provide individual notice to each
22 claimant denied benefits under the previous regulation (as
23 identified from the Special Issue Rating System ("SIRS") or as
24 a result of a VA finding based on information brought to its
25 attention by a claimant or claimant's representative, that,
26 although the individual is not on SIRS, he or she had a claim
27 denial that was voided by the Court's Order) that the claims

1 will be readjudicated with all of the procedural rights
2 normally applicable to such VA proceedings. The notice will
3 inform the claimant: that the claim is in the process of
4 being readjudicated; that the claimant will be afforded a
5 reasonable and specified time within which to present evidence
6 or reasons why the claim is meritorious under the new regula-
7 tions, and that if the claimant does not present such evidence
8 or reasons, VA will readjudicate the claim on the basis of the
9 previous adjudicatory record alone; and that VA will provide
10 notice of the final result. The VA shall conduct all adjudi-
11 cations referred to in paragraph 3 above, in accordance with
12 all the terms of the notice specified in this paragraph.
13

14 5. For any of the three diseases for which the Secre-
15 tary determines to issue a final positive rule, as well as
16 soft tissue sarcoma, as to which the Secretary has issued a
17 proposed rule providing service connection in certain circum-
18 stances, and any other disease which may be service connected
19 in the future pursuant to paragraph 3 above, as to any denials
20 of claims which were voided as a result of the Court's May 3,
21 1989 Order, the effective date for disability compensation or
22 dependency and indemnity compensation ("DIC"), if the claim is
23 allowed upon readjudication pursuant to paragraphs 3 and 4
24 above, will be the date the claim giving rise to the voided
25 decision was filed (except as otherwise provided in 38 U.S.C.
26 § § 3010(b)(1), or 3010(d)(1)), assuming the basis upon which
27 compensation is granted after readjudication is the same basis
28

1 upon which the original claim was filed,¹ or the date the
2 claimant became disabled or death occurred, whichever is
3 later. In the event the basis upon which a claim for compen-
4 sation benefits is granted after readjudication is different
5 than the basis for the original claim giving rise to the
6 voided decision,² the effective date for beginning disability
7 compensation or DIC will be the date on which the claim
8 asserting the basis upon which the claim is granted was filed,
9 or the date the claimant became disabled or death occurred,
10 whichever is later. For any claim for any such disease which
11 was not filed until after May 3, 1989, the effective date for
12 beginning disability compensation or DIC will be the date the
13 claim was filed or the date the claimant became disabled or
14 death occurred, whichever is later.
15

16 6. For any of the three diseases for which the Secre-
17 tary determines, pursuant to paragraph 2(c) above, not to
18 issue any rule, and for all other diseases for which the
19 Secretary has not already issued a proposed or final rule, the
20 Agent Orange claims of plaintiff class will not be denied at
21 least until the Secretary acts on the first report from the
22 National Academy of Sciences, or another entity in its stead,

23 ¹ The basis upon which the original claim was filed
24 refers to the disease[s] or condition[s] which Chapter 46 of
25 VA Manual M21-1, paragraph 46.02 required to be coded in the
ratings decision contained in the claimant's claim file, which
ratings decision was voided by the Court's May 3, 1989 Order.

26 ² E.g., the original claim giving rise to the voided
27 decision was based on a disease different than the disease
upon which the claim is granted under the final regulations.

1 pursuant to Section 2 of the Agent Orange Act of 1991, Pub. L.
2 102-4, amending 38 U.S.C. § 316(c). The claims for any of the
3 identified diseases may be denied only if the Secretary makes
4 a determination for such disease, in accordance with 38 U.S.C.
5 § 316(c), as amended, to the effect that there is no positive
6 association for such disease.

7
8 7. Pursuant to the court's protective order, VA will
9 provide to plaintiffs' counsel at plaintiffs' expense, mailing
10 lists of those individuals listed on the Agent Orange Registry
11 and of all Agent Orange claimants identified from SIRS whose
12 names are not currently on the Registry and whose addresses
13 are obtained through computer matches and searches of VA
14 files. Mailing lists, with addresses updated through sources
15 other than Internal Revenue Service, as described below, will
16 be provided within 10 days of any request by plaintiffs'
17 counsel. The "court's protective order" referred to above is
18 Attachment B to the Stipulation and Order of January 12, 1990
19 entered in this case, the terms of which protective order are
20 incorporated herein by reference. As explained in the court's
21 protective order, the mailing list of individuals will not at
22 this time include current addresses of individuals obtained
23 from Internal Revenue Service taxpayer returns, the disclosure
24 of which may be prohibited by 26 U.S.C. § 6103.

25 8. Upon the Court's signing this proposed Final
26 Stipulation and Order, plaintiffs agree to dismiss their
27 Emergency Motion for Enforcement and Supplementation of Prior
28

1 Orders with prejudice.

2 9. Upon expiration of 30 days after VA has notified the
3 Court and plaintiffs of the determinations the Secretary has
4 made pursuant to paragraph 2, above, with respect to the three
5 diseases, assuming that there are no motions pending before
6 the Court which directly relate to the parties' compliance
7 with the terms of this Final Stipulation and Order,³ final
8 judgment will be entered. The final judgment will provide
9 that it incorporates the terms of the Court's May 3, 1989
10 decision and this Final Stipulation and Order, but that any
11 provisions of the January 12, 1990 Stipulation and Order which
12 have not been expressly incorporated into this Final Stipula-
13 tion and Order are superseded. The parties will seek to agree
14 to the contents of a proposed Final Judgment and submit it to
15 the Court at least 10 days prior to the expiration of the 30
16 day period referred to above. Consistent with the Court's
17 practice, the Final Judgment also will result in the case
18 being closed.

19 10. Nothing in the Final Stipulation and Order is
20 intended by the parties to waive arguments concerning the
21 Court's jurisdiction after August 6, 1991, except that the
22 parties agree not to dispute the jurisdiction of the Court to
23 enter Final Judgment in accordance with the terms of paragraph
24

25
26 ³ This proviso is without prejudice to, and does not
27 encompass, any claim either party could make with respect to
28 attorney's fees, expenses or costs in this action.

9 above, or to rule on attorney's fees after August 6, 1991.

Respectfully submitted,

Theodore C. Hirt
Theodore C. Hirt

Gershon M. Ratner
Gershon M. Ratner

Charles W. Sorenson, Jr.
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U.S. Dept. of Justice
Civil Division, Room 3531
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2001 S Street, N.W., Suite 610
Washington, D.C. 20009
202-265-8305

Attorneys for Defendants

Attorneys for Plaintiffs and
their Class

May 14, 1991

May 14, 1991

It is so ORDERED this _____ day of May 1991:

Thelton E. Henderson
United States District Judge

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
DORIS DAVIS, an individual, MARION GRANT, an individual, and on behalf of themselves and all others similarly situated,
(b) County of Residence of First Listed Plaintiff Monterey
(c) Attorneys (Firm Name, Address, and Telephone Number)
Howard J. Rubinroit, Bradley H. Ellis, Ronald C. Cohen, Bradley J. Dugan, Logan P. Brown
SIDLEY AUSTIN LLP
555 W. Fifth Street, Suite 4000, Los Angeles, CA 90292; Tel. (213) 896-6000

DEFENDANTS
UNITED STATES OF AMERICA, U.S. DEPT. OF VETERANS AFFAIRS, U.S. DEPT. OF DEFENSE, DEFENSE FINANCE AND ACCOUNTING SERVICE, ROBERT A. MCDONALD, ASHTON B. CARTER, TERESA A. MCKAY
County of Residence of First Listed Defendant
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
PTF DEF
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
Incorporated or Principal Place of Business In This State
Incorporated and Principal Place of Business In Another State
Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)
CONTRACT: 110 Insurance, 120 Marine, 130 Miller Act, 140 Negotiable Instrument, 150 Recovery of Overpayment Of Veteran's Benefits, 151 Medicare Act, 152 Recovery of Defaulted Student Loans (Excludes Veterans), 153 Recovery of Overpayment of Veteran's Benefits, 160 Stockholders' Suits, 190 Other Contract, 195 Contract Product Liability, 196 Franchise
REAL PROPERTY: 210 Land Condemnation, 220 Foreclosure, 230 Rent Lease & Ejectment, 240 Torts to Land, 245 Tort Product Liability, 290 All Other Real Property
PERSONAL INJURY: 310 Airplane, 315 Airplane Product Liability, 320 Assault, Libel & Slander, 330 Federal Employers' Liability, 340 Marine, 345 Marine Product Liability, 350 Motor Vehicle, 355 Motor Vehicle Product Liability, 360 Other Personal Injury, 362 Personal Injury - Medical Malpractice
PERSONAL INJURY: 365 Personal Injury - Product Liability, 367 Health Care/Pharmaceutical Personal Injury Product Liability, 368 Asbestos Personal Injury Product Liability, 370 Other Fraud, 371 Truth in Lending, 380 Other Personal Property Damage, 385 Property Damage Product Liability
PRISONER PETITIONS: Habeas Corpus: 463 Alien Detainee, 510 Motions to Vacate Sentence, 530 General, 535 Death Penalty; Other: 540 Mandamus & Other, 550 Civil Rights, 555 Prison Condition, 560 Civil Detainee-Conditions of Confinement
FORFEITURE/PENALTY: 625 Drug Related Seizure of Property 21 USC § 881, 690 Other
LABOR: 710 Fair Labor Standards Act, 720 Labor/Management Relations, 740 Railway Labor Act, 751 Family and Medical Leave Act, 790 Other Labor Litigation, 791 Employee Retirement Income Security Act
IMMIGRATION: 462 Naturalization Application, 465 Other Immigration Actions
BANKRUPTCY: 422 Appeal 28 USC § 158, 423 Withdrawal 28 USC § 157
PROPERTY RIGHTS: 820 Copyrights, 830 Patent, 840 Trademark
SOCIAL SECURITY: 861 HIA (1395ff), 862 Black Lung (923), 863 DIWC/DIWW (405(g)), 864 SSID Title XVI, 865 RSI (405(g))
FEDERAL TAX SUITS: 870 Taxes (U.S. Plaintiff or Defendant), 871 IRS-Third Party 26 USC § 7609
OTHER STATUTES: 375 False Claims Act, 376 Qui Tam (31 USC § 3729(a)), 400 State Reapportionment, 410 Antitrust, 430 Banks and Banking, 450 Commerce, 460 Deportation, 470 Racketeer Influenced and Corrupt Organizations, 480 Consumer Credit, 490 Cable/Sat TV, 850 Securities/Commodities/Exchange, 890 Other Statutory Actions, 891 Agricultural Acts, 893 Environmental Matters, 895 Freedom of Information Act, 896 Arbitration, 899 Administrative Procedure Act/Review or Appeal of Agency Decision, 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation-Transfer
8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
5 U.S.C. Section 701 et seq.; 28 U.S.C Section 1346(a) and 10 U.S.C Section 1414 and 38 U.S.C. Section 5304
Brief description of cause:
Class action for injunctive and monetary relief relating to retroactive Military Retired Pay to Vietnam Veterans.

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$
CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S), IF ANY (See instructions):
JUDGE Hon. Thelton E. Henderson DOCKET NUMBER 86-6160 (TEH)

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)
(Place an "X" in One Box Only)
SAN FRANCISCO/OAKLAND
SAN JOSE
EUREKA-MCKINLEYVILLE

DATE: 10/28/2016 SIGNATURE OF ATTORNEY OF RECORD: s/Ronald C. Cohen

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Surviving Spouses of Vietnam Vets Sue for Agent Orange Exposure](#)
