

1 PAUL HASTINGS LLP
Stephen B. Kinnaird (DC SB# 454271) (*pro hac vice application pending*)
2 stephenkinnaird@paulhastings.com
2050 M Street NW
3 Washington, D.C., 20036
Telephone: (202) 551-1700
4 Facsimile: (202) 551-1705

5 PAUL HASTINGS LLP
Sean D. Unger (SB# 231694)
6 seanunger@paulhastings.com
101 California Street, Forty-Eighth Floor
7 San Francisco, CA
Telephone: (415) 856-7000
8 Facsimile: (415) 856-7100

9 NATIONAL VETERANS LEGAL
SERVICES PROGRAM
10 Barton F. Stichman (DC SB# 218834) (*pro hac vice*)
bart@nvlsp.org
11 Richard V. Spataro (DC SB# 975956) (*pro hac vice*)
richard@nvlsp.org
12 1600 K Street, NW, Suite 500
Washington, DC 20006
13 Telephone: (202) 265-8305

14 Attorneys for Plaintiffs

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION
18

19 BEVERLY NEHMER, et al.,

20 Plaintiffs,

21 v.

22 U.S. DEPARTMENT OF VETERANS
23 AFFAIRS, et al.,

24 Defendants.

CASE NO. 3:86-cv-06160

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR ENFORCEMENT
OF FINAL JUDGMENT AND
MEMORANDUM OF POINTS AND
AUTHORITIES**

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1 TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

2 NOTICE IS HEREBY GIVEN that pursuant to General Order 72-4 and revised General
3 Order 73, Class Counsel has not noticed this motion, as “[t]hrough September 30, 2020, all civil
4 matters will be decided on the papers, or if the assigned judge believes a hearing is necessary, the
5 hearing will be by telephone or videoconference.”

6 **CONCISE STATEMENT OF RELIEF REQUESTED**

7
8 Pursuant to Civil L.R. 7-1 and 7-2, Class Counsel, on behalf of Beverly Nehmer and the
9 plaintiff class, respectfully moves the Court to enforce the Final Stipulation and Order in this
10 case. *See* Declaration of Richard V. Spataro (“Spataro Decl.”) ¶ 1, Ex. 1, Dkt. No. 141 (Final
11 Stipulation and Order, filed May 21, 1991) (“Consent Decree”); Spataro Decl. ¶ 1, Ex. 2, Dkt.
12 No. 163 (Order, filed October 9, 1991). This Court should require the Department of Veterans
13 Affairs (“VA”)¹ to re-adjudicate the thousands of decisions made by the VA pursuant to
14 paragraphs 3-5 of the Consent Decree that denied retroactive disability or death compensation on
15 the ground that the class member served in the territorial waters of the Republic of Vietnam
16 without setting foot on the land mass.

17 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION**

18 **I. INTRODUCTION**

19 Thirty-three years ago, this Court certified a plaintiff class in this case consisting of
20 Vietnam veterans and their survivors who had applied, or were eligible to apply, to the VA for
21 service-connected disability or death compensation based on their exposure to herbicides
22 containing dioxin. *Nehmer v. U.S. Veterans’ Admin.*, 118 F.R.D. 113 (N.D. Cal. 1987) (“*Nehmer*
23 *Class Cert.*”). Dioxin is the toxic contaminant in the defoliant known as “Agent Orange”
24 (because of the orange-colored stripes on the barrels) that was heavily sprayed by the U.S. Armed
25 Forces in Vietnam to clear jungle land and forests during the Vietnam War. *See Nehmer v.*
26 *United States Veterans’ Administration*, 712 F. Supp. 1404, 1407 (N.D. Cal. 1989) (“*Nehmer I*”).

27 _____
28 ¹ This motion will also use the term VA to refer to the Department’s predecessor, the
Veterans Administration.

1 On the merits, this Court invalidated the VA Agent Orange compensation regulation challenged
2 by plaintiffs and voided all claims denials made under the invalidated regulation. *Id.* at 1423.

3 In 1991, this Court approved a Consent Decree governing the provision of relief to the
4 class. *See generally* Consent Decree. The Consent Decree created a unique, ongoing, non-
5 statutory remedy to ensure complete relief to the class. The Consent Decree requires the VA
6 automatically—regardless of any action, or non-action by an eligible class member—to
7 readjudicate any previously denied claim once a new disease related to dioxin exposure is
8 recognized in a VA regulation as giving rise to a presumption of service connection. *Id.* at ¶¶ 3,
9 5. The VA violates the Consent Decree when it denies a readjudicated claim in violation of the
10 law. The class is entitled to relief under the Consent Decree separate and apart from whether
11 relief is available to individual claimants.

12 Yet, over the last 29 years, the VA has had great difficulty in complying with its
13 obligations under the Consent Decree. This is the fourth time since the Consent Decree that
14 Plaintiffs have had to file a motion to enforce that Decree in order to obtain compliance. *See*
15 Spataro Decl. ¶ 2, Ex. 3, Dkt. No. 210 (Plaintiffs’ Notice of Motion and Motion for Enforcement
16 of Final Judgment and Memorandum of Points and Authorities, filed June 25, 1998)) (“First
17 Enforcement Motion”); Spataro Decl. ¶ 4, Ex. 5, Dkt. No. 226 (Plaintiffs’ Notice of Motion and
18 Motion for Enforcement of Final Judgment and Memorandum of Points and Authorities, filed
19 Feb. 2, 2000) (“Second Enforcement Motion”); Spataro Decl. ¶ 11, Ex. 11, Dkt. No. 331
20 (Plaintiffs’ Notice of Motion and Motion for An Order to Show Cause Why Defendants Should
21 Not Be Held In Contempt of the Final Stipulation and Order; Memorandum of Points and
22 Authorities, filed June 4, 2004); Spataro Decl. ¶ 11, Ex. 12, Dkt. No. 346 (Plaintiffs’
23 Memorandum in Support of Their Motion for Clarification and Enforcement of the 1991 Final
24 Stipulation and Order, filed Feb. 18, 2005) (“Third Enforcement Motion”).

25 The Court (Henderson, J.) granted each of the three prior enforcement motions. The VA
26 appealed the Orders granting two of the three enforcement motions to the Ninth Circuit, and the
27 VA lost both appeals. *See Nehmer v. Veterans Admin.*, 32 F. Supp. 2d 1175 (N.D. Cal. 1999)
28 (“First Enforcement Order”) (“*Nehmer II*”); Spataro Decl. ¶ 4, Ex. 6, Dkt. No. 269 (Class Action

1 Order, filed Dec. 12, 2000) (“Second Enforcement Order”), *aff’d Nehmer v. Veterans’ Admin. of*
2 *Gov’t of U.S.*, 284 F.3d 1158, 1161 (9th Cir. 2002) (“*Nehmer III*”); Spataro Decl. ¶ 11, Ex. 13,
3 Dkt. No. 354 (Order Granting Plaintiffs’ Motion for Clarification, filed Dec. 1, 2005)
4 (collectively “Third Enforcement Order”), *aff’d Nehmer v. U.S. Department of Veterans Affairs*,
5 494 F.3d 846, 851-52 (9th Cir. 2007) (“*Nehmer IV*”). In affirming this Court’s grant of the third
6 enforcement motion, a unanimous panel of the Ninth Circuit stated:

7 What is difficult for us to comprehend is why the Department of Veterans
8 Affairs, having entered into a settlement agreement and agreed to a
9 consent order some 16 years ago, continues to resist its implementation so
10 vigorously, as well as to resist equally vigorously the payment of
11 desperately needed benefits to Vietnam war veterans who fought for their
12 country and suffered grievous injury as a result of our government's own
13 conduct [O]ne thing is clear. Those young Americans who risked
14 their lives in their country's service and are even today suffering greatly as
15 a result are deserving of better treatment from the Department of Veterans
16 Affairs than they are currently receiving. We would hope that this
17 litigation will now end, that our government will now respect the legal
18 obligations it undertook in the Consent Decree some 16 years ago, that
19 obstructionist bureaucratic opposition will now cease, and that our
20 veterans will finally receive the benefits to which they are morally and
21 legally entitled.

22 *Nehmer IV*, 494 F.3d at 864-65.

23 Unfortunately, the wishes expressed by the Ninth Circuit remain unfulfilled. Since 2007,
24 Class Counsel discovered two additional systemic violations of the Consent Decree and submitted
25 demands for relief to the Department of Justice on behalf of more than 2,600 individually
26 identified class members. Spataro Decl. ¶ 8. These complaints resulted in VA payment under the
27 Consent Decree of an aggregate of more than \$58 million in retroactive disability and death
28 compensation to these class members without the necessity of an enforcement motion. *Id.*

29 This fourth enforcement motion raises yet another systemic violation of the Consent
30 Decree. It involves the rights of thousands of veterans who are class members, who served on
31 ships in the territorial sea of the Republic of Vietnam, but who never set foot on the land mass
32 (called the “Blue Water Vietnam veterans”). From 1991 to 2002, the VA duly and appropriately
33 paid these Navy class members and their survivors the retroactive compensation required by the
34 Consent Decree. But starting in 2002, the VA changed course. Spataro Decl. ¶ 10, Ex. 10, VA

1 Adjudication Procedures Manual M21-1, Part III, Change 88, ¶e (Feb. 27, 2002). It began to
 2 interpret the Consent Decree to deny *Nehmer* Blue Water Vietnam veterans the retroactive
 3 compensation required. The U.S. Court of Appeals for the Federal Circuit recently determined
 4 that the exclusion of Blue Water Vietnam veterans from coverage under the Agent Orange Act
 5 violated both the plain meaning of the statute and the VA’s own regulations. *See Procopio v.*
 6 *Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (en banc). Yet, the VA continues to systematically violate
 7 the Consent Decree by failing to readjudicate the claims of Blue Water Vietnam veterans that
 8 were denied under the Consent Decree based on this unlawful interpretation of which veterans
 9 served in “the Republic of Vietnam.” Dkt. No. 457 (Defendants’ Notice of Issuance of General
 10 Counsel Precedent Opinion, filed Dec. 18, 2019) (attaching 85 FR 788-01). This fourth
 11 enforcement motion challenges the VA’s altered and legally incorrect interpretation of the
 12 Consent Decree.

13 **II. SUMMARY OF THE COURSE OF PROCEEDINGS AND FACTUAL**
 14 **BACKGROUND**

15 **A. The Statute Upon Which This Lawsuit Was Based—The Veterans’ Dioxin**
 16 **and Radiation Exposure Compensation Standards Act of 1984**

17 During the Vietnam conflict, the U.S. Armed Forces used chemical herbicides to defoliate
 18 dense jungle and forests in the Republic of Vietnam, the most well-known and widely used of
 19 which was Agent Orange. There was no dispute that these herbicides contained a contaminant
 20 named dioxin and that dioxin was “one of the most highly toxic substances known to the
 21 scientific community.” *Nehmer I*, 712 F. Supp. at 1407 n.1 (quoting H.R. REP. 98-592, 1984
 22 U.S.C.C.A.N. 4449, 4451). Yet, the VA’s position during the 1970s and the 1980s was that only
 23 one disease—chloracne, a skin condition—is caused by exposure to dioxin. *Id.* at 1407. As a
 24 result, the VA denied tens of thousands of claims for disability or death compensation that
 25 Vietnam veterans and their survivors attributed to Agent Orange exposure.

26 As evidence began to mount that these herbicides caused seriously disabling diseases,
 27 Congress enacted The Veterans’ Dioxin and Radiation Exposure Compensation Standards Act
 28 of 1984, Pub.L. 98–542, 98 Stat. 2725 (“1984 Act” or “Dioxin Act”). As relevant here, the 1984

1 Act required the VA to conduct a public rulemaking proceeding to develop regulations governing
 2 payment of service-connected disability and death compensation “based on a veteran’s exposure
 3 during service ... in the Republic of Vietnam during the Vietnam era to an herbicide containing
 4 dioxin.” *Id.*, 98 Stat. at 2727. In 1985, after completion of the rulemaking proceeding, the VA
 5 promulgated a final regulation reiterating its previous position—that only one disease (chloracne)
 6 had a cause and effect relationship with exposure to herbicides. *See* 38 C.F.R. § 3.311a(d) (1986)
 7 (“Rule 3.311a(d”).

8 **B. The Court Certifies this Case as a Class Action and Invalidates the VA’s**
 9 **Agent Orange Compensation Regulation**

10 Shortly thereafter, several Vietnam veterans and their survivors brought this class action
 11 lawsuit to challenge Rule 3.311a(d)—the VA’s Agent Orange compensation rule developed
 12 pursuant to the Dioxin Act. *Nehmer I*, 712 F. Supp. at 1408-09. In 1987, this Court certified a
 13 class of all Vietnam veterans and their survivors who had been denied veterans’ disability
 14 benefits for a condition allegedly associated with herbicide exposure or who would be eligible to
 15 file a claim for such benefits in the future. *Nehmer Class Cert.*, 118 F.R.D. at 116, 125.²

16 In 1989, the Court granted in part Plaintiffs’ motion for summary judgment and
 17 invalidated the part of Rule 3.311a providing that no condition other than chloracne merited
 18 presumptive service connection status due to exposure to herbicides containing dioxin. *Nehmer I*,
 19 712 F. Supp. at 1423.

20 **C. The Agent Orange Act of 1991**

21 While the VA was in the process of promulgating regulations to replace the one
 22 invalidated by this Court, Congress enacted the Agent Orange Act of 1991 (“Agent Orange Act”).
 23 Pub. L. No. 102–4, 105 Stat 11 (Feb. 6, 1991), *now codified at* 38 U.S.C. § 1116(b) (originally
 24

25 ² Specifically, this Court certified a class consisting of “all current or former service
 26 members, or their next of kin (a) who are eligible to apply to, who will become eligible to apply
 27 to, or who have an existing claim pending before the Veteran’s Administration for service-
 28 connected disabilities or deaths arising from exposure during active-duty service to herbicides
 containing dioxin or (b) who have had a claim denied by the VA for service-connected disabilities
 or deaths arising from exposure during active-duty service to herbicides containing dioxin.”
Nehmer Class Cert., 118 F.R.D. at 116, 125.

1 codified at § 316(b)). That Act provides that veterans who “served in the Republic of Vietnam”
 2 during the Vietnam era “shall be presumed to have been exposed during such service” to
 3 herbicides containing dioxin. *Id.* at § 1116(a) & (f). The Act also mandates that the VA accord
 4 service connection status to three diseases—non-Hodgkin’s lymphoma, soft tissue sarcomas, and
 5 chloracne, *id.* at § 1116(a)(2)(C)—if manifest by a veteran who “served in the Republic of
 6 Vietnam” during the Vietnam era. *Id.* at § 1116(a)(1)(B). Finally, the Act holds that whenever
 7 the VA Secretary determines that a “positive association exists between” exposure to herbicides
 8 and a disease, “the Secretary shall prescribe regulations providing that a presumption of service
 9 connection is warranted for that disease” due to herbicide exposure. *Id.* at § 1116(b)(1).

10 **D. The Consent Decree**

11 Three months after the Agent Orange Act became law, the parties to this class action
 12 entered into the court-approved Consent Decree. Spataro Decl. ¶ 1, Ex. 1, Consent Decree.
 13 Among other things, the Consent Decree provides that “[a]s soon as a final rule is issued service
 14 connecting, based on dioxin exposure, . . . any . . . disease in the future pursuant to the Agent
 15 Orange Act of 1991, . . . the VA shall promptly thereafter” (a) identify all class members who
 16 previously filed a disability or death compensation claim based on such disease, (b) readjudicate
 17 that claim under the new rule, and (c) if the claim is granted, assign as the effective date the date
 18 the VA received the claim or the date the claimant became disabled or death occurred, whichever
 19 is later. *See* Spataro Decl. ¶ 1, Ex. 1, Consent Decree at ¶¶ 3, 5.

20 **E. Plaintiffs’ First Motion to Enforce the Consent Decree**

21 In the first five years following the Consent Decree, the VA amended its regulations under
 22 the Agent Orange Act to provide service connection for nine additional diseases based on
 23 herbicide exposure (non-Hodgkins lymphoma,³ soft tissue sarcomas,⁴ Hodgkin’s disease,⁵
 24 multiple myeloma, lung cancer, trachea cancer, larynx cancer, and bronchus cancer,⁶ and prostate
 25

26 _____
 27 ³ 55 Fed. Reg. 43, 124 (Oct. 26, 1990), *codified at* 38 C.F.R. § 3.313 (1997).

⁴ 38 C.F.R. § 3.309(e).

⁵ 59 Fed. Reg. 5, 106 (Feb. 3, 1994).

⁶ 59 Fed. Reg. 29, 723 (June 9, 1994); *see also* 38 C.F.R. § 3.307(a)(6)(ii) (1997).

1 cancer⁷). *See Nehmer II*, 32 F. Supp.2d at 1177 n.2 (summarizing the VA’s changes). As a
2 consequence, there were many class members with claims relating to these nine diseases that had
3 been denied *before* the VA recognized the disease was linked to Agent Orange. *See Nehmer II*,
4 32 F. Supp.2d at 1177. Under the Consent Decree, they were owed readjudication of those
5 denied claims.

6 Yet, in 1995, the VA issued binding instructions narrowly construing the VA’s obligations
7 under the Consent Decree. *See Vet. Aff. Op. Gen Couns. Prec. 15-95*, 1995 WL 17875523
8 (D.V.A. June 2, 1995) (including this interpretation). The VA took the position that the Consent
9 Decree does not require the VA to readjudicate and pay compensation retroactive to the date of a
10 prior claim based on a disease later recognized as Agent Orange-related unless (1) the prior claim
11 *expressly alleged* that Agent Orange (or herbicides) was a factor in the veteran’s death or injury,
12 or (2) the VA’s denial of the benefits *expressly cited* to the regulation invalidated by this Court as
13 grounds for the denial. Plaintiffs challenged this construction of the Consent Decree. The Court
14 granted Plaintiffs’ enforcement motion, holding that the VA’s interpretation violated the Consent
15 Decree and also granted Plaintiffs’ request for discovery to assist them in identifying other class
16 members adversely affected by the invalidated the VA construction of the Consent Decree.
17 *Nehmer II*, 32 F. Supp. 2d at 1184.

18 Between 1999 and 2007, Class Counsel identified through discovery approximately 1,600
19 class members who had been denied retroactive disability or death compensation based on their
20 prior claims, in violation of the Consent Decree. Pursuant to Spataro Decl. ¶ 3, Ex. 4, Dkt. No.
21 272 (Stipulation and Order Setting a Timetable for Promptly Paying Class Members Retroactive
22 Benefits approved by this Court on February 12, 2001 (“the 2001 Timetable Order”)),
23 Class Counsel periodically sent written complaints to the Department of Justice identifying these
24 class members and the benefits to which they were wrongly denied in violation of the Consent
25 Decree. The VA agreed that approximately 1,300 of these 1,600 class members were entitled to
26 additional retroactive disability or death compensation under the Consent Decree and paid them
27 an aggregate of \$31 million in tax-free compensation. *See Spataro Decl. ¶ 3*.

28 _____
⁷ 61 Fed. Reg. 57, 586 (Nov. 7, 1996).

1 **F. Plaintiffs' Second Motion to Enforce the Consent Decree**

2 In 2000, Plaintiffs filed their second enforcement motion to challenge two additional VA
3 interpretations of the Consent Decree. Spataro Decl. ¶ 4, Ex. 5, Second Enforcement Motion.
4 The first challenged interpretation involved claims filed by class members based on prostate
5 cancer. In 1994, the VA had issued a regulation denying a link between Agent Orange and
6 prostate cancer, but in 1996, upon new evidence, the VA amended its regulation under the Agent
7 Orange Act to provide service connection for prostate cancer based on herbicide exposure; yet,
8 the VA did not readjudicate some of the claims denied under the prior regulation. *Nehmer v.*
9 *Veterans' Admin. of Gov't of U.S.*, 284 F.3d 1158, 1161 (9th Cir. 2002) ("*Nehmer III*"). Plaintiffs
10 challenged the interpretation contained in the 1999 VA directive that prostate cancer claimants
11 were not entitled to the favorable effective date rules in the Consent Decree if the initial disability
12 or death benefit claims based on prostate cancer was denied on or after January 4, 1994.
13 Class Counsel identified over 1,200 Vietnam veterans and surviving family members suffering
14 from prostate cancer who had been denied retroactive benefits under this unfavorable VA
15 interpretation. See Spataro Decl. ¶ 4.

16 The other focus of the second enforcement motion was the VA's application of the
17 Consent Decree in the following common scenario: (1) the VA amends its regulations under the
18 Agent Orange Act to add a disease as herbicide related; (2) under the Consent Decree, the VA
19 then identifies and readjudicates a past claim by a Vietnam veteran for the newly added disease;
20 (3) this *Nehmer* readjudication results in an award of retroactive compensation to the veteran; but
21 (4) the veteran dies before the VA is ready to make payment of the retroactive compensation to
22 the veteran. Class counsel discovered that the VA interpreted the Consent Decree to allow it to
23 keep the retroactive compensation awarded in this situation, rather than pay it to the veteran's
24 estate. This Court ruled that both the VA's refusal to pay retroactive compensation to these
25 prostate cancer claimants and the estates of deceased veterans violated the Consent Decree.
26 Spataro Decl. ¶ 4, Ex. 6, Second Enforcement Order.

27 The Ninth Circuit affirmed in *Nehmer III*. In *Nehmer III*, the Court rejected the VA's
28 argument that it was not required to pay retroactive prostate cancer benefits to claimants whose

1 claims were denied on the basis of the 1994 regulation. 284 F.3d at 1161-62. The VA paid an
2 aggregate of nearly \$5 million in retroactive compensation to 1,200 Vietnam veterans and
3 surviving family members who had filed claims based on prostate cancer that were denied after
4 January 4, 1994. *See* Spataro Decl. ¶ 4. The Court also rejected the VA’s argument “that it need
5 not pay to the estates of deceased veterans all accrued retroactive benefits owed to the veterans
6 under the [Consent Decree].” *Nehmer III*, 284 F.3d at 1162; *see also* Spataro Decl. ¶ 3, Ex. 4,
7 2001 Timetable Order (outlining process to notify the estates of retroactive benefits owed); *c.f.*,
8 38 C.F.R. § 3.816(f) (codifying the Stipulation and Order).

9 **G. Plaintiffs’ Third Motion to Enforce the Consent Decree**

10 In 2004, Plaintiffs again had to come to this Court, for its third enforcement action; this
11 time regarding leukemia. *See* Spataro Decl. ¶ 11, Exs. 11-12, Third Enforcement Motion.
12 In 2003, the VA amended its regulations under the Agent Orange Act to add chronic lymphocytic
13 leukemia (“CLL”) as a disease presumptively service connected due to herbicide exposure. In
14 that final rule, however, the VA unilaterally announced the proposition that the Consent Decree
15 did *not* apply to benefit claims based on a disease for which the VA establishes service
16 connection *after* September 30, 2002 (the original effective sunset date of the Agent Orange Act,
17 38 U.S.C. § 1116(e)). *See Disease Associated with Exposure to Certain Herbicide Agents:*
18 *Chronic Lymphocytic Leukemia*, 68 Fed. Reg. 59540-01, 59540 (Oct. 16, 2003). Thus, the VA
19 declared that it would not identify and readjudicate disability and death compensation claims
20 based on CLL that were finally denied prior to the 2003 CLL rule change. Nor would the VA pay
21 retroactive disability and death compensation based on these prior CLL claims.

22 In response to Plaintiffs’ third enforcement motion, the VA took the position that simply
23 including its interpretation of the Consent Decree in a regulation robbed this Court of the power
24 to interpret its own Decree, and that the class members’ only recourse was to challenge the
25 regulation in the United States Court of Appeals for the Federal Circuit under 38 U.S.C. § 502.
26 This Court disagreed. In 2005, this Court rejected the VA’s claim that it lost jurisdiction to
27 interpret the Order, and, on the merits, agreed with the Plaintiff class that the Consent Decree
28 applies not only to CLL claims, but to claims for any disease the VA may service connect due to

1 herbicide exposure until September 30, 2015, when the 1991 Act was at that time set to expire.
 2 Dkt. No. 354 (Order Granting Plaintiffs’ Motion for Clarification, filed Dec. 1, 2005) at *10.

3 The VA appealed to the Ninth Circuit, which affirmed, again, this Court’s enforcement of
 4 the Consent Decree. *Nehmer IV*, 494 F.3d at 851-52. The Ninth Circuit ruled that the VA lacked
 5 “the right to unilaterally withdraw the jurisdiction of the district court and of this circuit.” *Id.*
 6 at 860. On the merits, the Court found the “Consent Decree is plain on its face: the VA must
 7 reconsider the previous denial of a claim of a veteran suffering from a disease determined by the
 8 VA to be service-connected regardless of when the determination is made, so long as that
 9 determination is made pursuant to 38 U.S.C. § 1116(b).” *Id.* at 863.⁸

10 H. Additional Enforcement Activities Since 2010

11 Despite being chastised by the Ninth Circuit in *Nehmer IV*—see *Nehmer IV*, 494 F.3d at
 12 849 (“It is a disturbing story, and the performance of the United States Department of Veterans
 13 Affairs (VA) has contributed substantially to our sense of national shame”)—the VA continued to
 14 violate the Consent Decree. In 2010, the VA amended its regulations pursuant to the Agent
 15 Orange Act to recognize three new diseases (ischemic heart disease, Parkinson’s disease, and
 16 chronic B-Cell leukemias) as presumptively service-connected based on herbicide exposure. The
 17 VA identified more than 150,000 Vietnam veterans and surviving family members whose prior
 18 claims for one of the three newly added diseases the VA was required to readjudicate pursuant to
 19 the terms of the Consent Decree. See Spataro Decl. ¶ 12. Class Counsel discovered that shortly
 20 before the VA started to conduct these 150,000 readjudications, the VA had trained its
 21 adjudicators in how to decide *Nehmer* readjudications through both a written *Nehmer* training
 22 guide and a *Nehmer* videotape guide. Unfortunately, both sets of instructions contained guidance
 23 that itself violated the Consent Decree. After Class Counsel complained, the VA belatedly

24 _____
 25 ⁸ After the VA added CLL to the list of Agent Orange-related diseases in 2003, the VA
 26 amended its regulations pursuant to the Agent Orange Act to add the following diseases as related
 27 to herbicide exposure: primary AL amyloidosis in 2009, ischemic heart disease in 2010, chronic
 28 B-cell leukemias in 2010, and Parkinson’s disease in 2010. The VA has thus far paid pursuant to
 the Consent Decree more than \$4.6 billion in retroactive compensation for these four diseases.
 See Spataro Decl. ¶ 12. None of this \$4.6 billion would have been paid to Vietnam veterans and
 their surviving family members if the VA had prevailed, instead of lost, on its appeal to the Ninth
 Circuit.

1 circulated a written correction notice (but not a corrected videotape), but the damage had been
2 done. *See* Spataro Decl. ¶ 5. After conducting discovery, and communicating with class
3 members, from July 2011 to February 2020, Class Counsel filed more than one thousand
4 individual complaints with the Department of Justice pursuant to the 2001 Timetable Order
5 challenging a class member’s *Nehmer* readjudication decision on the ground that VA denied the
6 class member the amount of retroactive disability or death compensation required by the Consent
7 Decree. Spataro Decl. ¶¶ 7-8.

8 Class Counsel also discovered another systemic violation of the Consent Decree in
9 *Nehmer* readjudications for class members who are military retirees. In most of these cases, the
10 VA agreed in its *Nehmer* readjudication decision that the retiree was owed retroactive disability
11 compensation under the Consent Decree, but, starting in July 2011, the VA nonetheless informed
12 the veteran that it was withholding this money because (1) the veteran had been in receipt of
13 military retired pay and (2) under law, military retirees cannot receive both VA disability
14 compensation and military retired pay. Spataro Decl. ¶ 7. Yet, the VA’s withholding in *Nehmer*
15 began in 2011, many years after Congress amended the law so that many military retirees could
16 receive both the full amount of the VA disability compensation and the full amount of military
17 retired pay. *See* 10 U.S.C. § 1414. Again using the written complaint process, Class Counsel
18 filed complaints on behalf of more than one thousand class members/retirees, or their surviving
19 family members, whose retroactive compensation had been wrongfully withheld. *See* Spataro
20 Decl. ¶ 8. As a result of the written complaints that class counsel submitted to the Department of
21 Justice regarding more than 2,600 class members subject to one of the two aforementioned
22 systemic violations of the Consent Decree, the VA paid an aggregate of more than \$58 million in
23 retroactive compensation. *See id.*

24 **III. ARGUMENT**

25 **A. Introduction**

26 This fourth motion for enforcement of the Consent Decree seeks injunctive relief to
27 remedy the VA’s failure to comply with its obligations under the Consent Decree to “Blue Water
28 Vietnam veterans.” “Blue Water Vietnam veterans” is the term of art that has come to be used for

1 those veterans whose military service included service aboard a ship that was located in the
2 territorial waters of the Republic of Vietnam during the Vietnam era.

3 When the parties signed and the Court approved the Consent Decree in 1991, it required
4 the VA to take the same actions for all Vietnam veterans, both those who set foot on the land
5 mass of the Republic of Vietnam and those who served in the territorial seas of the Republic of
6 Vietnam. In fact, during the decade following the Consent Decree, the VA applied the terms of
7 the Consent Decree to *Nehmer* Blue Water Vietnam veterans.

8 In 2002, however, the VA began a long campaign to deny Blue Water Vietnam veteran
9 class members the retroactive compensation that should have been theirs by virtue of the Consent
10 Decree. In that year, the VA changed its long-held (and correct) position that the service of Blue
11 Water Vietnam veterans counted as “service in the Republic of Vietnam” within the meaning of
12 the Agent Orange Act of 1991—the Act expressly incorporated into the Consent Decree. As a
13 result, when, after 2002, the VA added new diseases as related to herbicide exposure under the
14 Agent Orange Act, the VA denied the retroactive disability and death compensation owed under
15 the Consent Decree to thousands of Blue Water Vietnam veterans and their survivors.

16 After nearly two decades of activism by Blue Water Vietnam veterans and their survivors,
17 in 2019, the VA’s hurtful campaign against Blue Water Vietnam veterans came to an end. The
18 U.S. Court of Appeals for the Federal Circuit, acting *en banc*, struck down the VA’s mistaken
19 construction of the Agent Orange Act and held that the unambiguous intent of Congress in using
20 the term “veteran who . . . served in the Republic of Vietnam” in the Agent Orange Act was to
21 include all Blue Water Vietnam veterans in that statute’s presumption of exposure to herbicides
22 containing dioxin. *See Procopio*, 913 F.3d at 1381. Yet, the VA has not yet readjudicated the
23 claims of the thousands of *Nehmer* class members who were improperly denied benefits solely
24 due to the VA’s improper exclusion of Blue Water Vietnam veterans.

25 This motion seeks an Order requiring the VA to remedy its past unlawful refusal to pay
26 the retroactive compensation required by the Consent Decree to Blue Water Vietnam veterans and
27 their survivors on the meritless ground that the Consent Decree does not cover class members
28 who served within the territorial sea of Vietnam during the Vietnam era without ever setting foot

1 on the land mass.

2 **B. The VA’s Obligations Under the Consent Decree to Blue Water Vietnam**
 3 **Veterans**

4 The Consent Decree provisions that are relevant here are paragraphs 3-5, which mandate
 5 that as soon as the VA issues a final rule providing presumptive service connection for any
 6 disease pursuant to the Agent Orange Act, “the VA shall promptly thereafter” (a) identify all class
 7 members who previously filed a disability or death compensation claim based on such disease,
 8 (b) readjudicate each such claim under the VA rules as amended, and (c) if the claim is granted,
 9 assign the date the VA received the prior claim as the effective date of the award. *See Spataro*
 10 *Decl.* ¶ 1, Ex. 1, Consent Decree at ¶¶ 3, 5.

11 The VA is plainly required to comply with these ¶¶ 3-5 requirements for prior claims filed
 12 by Blue Water Vietnam veterans and their survivors. First, the 1984 Dioxin Act afforded a
 13 presumption of exposure to herbicides containing dioxin to veterans who “served in the Republic
 14 of Vietnam” during the Vietnam era. PL 98–542 (HR 1961), October 24, 1984, 98 Stat 2725, §
 15 2(1). The VA regulation that implemented the Dioxin Act defined the statutory phrase “serv[ice]
 16 in the Republic of Vietnam” to include “service in the waters offshore and service in other
 17 locations, if the conditions of service involved duty or visitation in the Republic of Vietnam.” 38
 18 C.F.R. § 3.311a(a)(1) (1986); *see Procopio*, 913 F.3d at 1377-78 (holding that this regulation
 19 included veterans who served in the territorial waters of the Republic of Vietnam). Thus, Navy
 20 veterans who served in the territorial waters of Vietnam were covered by the presumption of
 21 herbicide exposure in the 1984 Dioxin Act and its implementing VA regulation.

22 The Plaintiffs in *Nehmer* challenged subsection (d) of that implementing regulation, which
 23 provided that the only disease that warranted service connection due to exposure to herbicides
 24 containing dioxin is chloracne (a skin disease). 38 C.F.R. § 3.311a(d) (1986). Plaintiffs sought
 25 and the Court certified a class consisting of all “current or former service members, or their next
 26 of kin” eligible for benefits “for service-connected disabilities or deaths arising from exposure
 27 during active-duty service to herbicides containing dioxin.” *Nehmer Class Cert.*, 118 F.R.D.
 28 at 116. Given that (1) the challenged regulation provided a presumption of herbicide exposure to

1 Blue Water Vietnam veterans and (2) that presumption of exposure plainly made these veterans
2 “eligible” for service-connected disability benefits resulting from herbicide exposure, the plaintiff
3 class included those who served in the territorial waters of the Republic of Vietnam.

4 After this Court invalidated VA regulation 3.311a(d) because it failed to comply with the
5 rulemaking process required by the Dioxin Act (*Nehmer I*, 712 F. Supp. at 1406), the VA
6 promulgated a regulation providing service connection to non-Hodgins lymphoma, and defined
7 that “Service in Vietnam includes service in waters offshore, or service in other locations if the
8 conditions of service involved duty or visitation in Vietnam.” 38 C.F.R. § 3.313 (1991). The
9 Agent Orange Act applied to a “veteran who . . . served in the Republic of Vietnam.” PL 102–4,
10 February 6, 1991, 105 Stat 11, *codified at* 38 U.S.C. § 1116. The intent of Congress is clear from
11 the use of the term “in the Republic of Vietnam” because “[i]nternational law uniformly confirms
12 that the ‘Republic of Vietnam,’ like all sovereign nations, included its territorial sea.” *See*
13 *Procopio*, 913 F.3d at 1375; *see also id.* at 1378 (“It is undisputed that [38 C.F.R. § 3.313] . . .
14 applied to veterans who served . . . in the territorial sea” of the Republic of Vietnam).

15 Several months after passage of the Agent Orange Act, the parties signed and the Court
16 approved the Consent Decree. The Consent Decree expressly incorporated the Agent Orange
17 Act. *See* Spataro Decl. ¶ 1, Ex. 1, Consent Decree at ¶ 3. Thus, the Consent Decree’s
18 readjudication and retroactive compensation provisions apply to veterans who set foot on land *or*
19 served on a ship in the territorial sea of the Republic of Vietnam.

20 **C. The VA’s Inconsistent Application of the Consent Decree to Blue Water**
21 **Vietnam Veterans**

22 During the first decade following the Consent Decree, the VA continued to interpret the
23 presumption of herbicide exposure in the Agent Orange Act to apply to Blue Water Vietnam
24 veterans. This interpretation is evidenced by both VA’s exposure regulation⁹ and the following
25

26 ⁹ The VA interpreted the statutory phrase “served . . . in the Republic of Vietnam” in the
27 Agent Orange Act to include veterans who served within the territorial sea of Vietnam in its
28 implementing regulation—38 C.F.R. § 3.307(a)(6)(iii) (1991), which provided that this statutory
phrase “includes service in the waters offshore and service in other locations if the conditions of
service involved duty or visitation in the Republic of Vietnam.” The Federal Circuit held that this

1 binding VA guidance issued after the Consent Decree:

2 **g. Verifying Vietnam Service for Claims Involving Exposure to**
 3 **Herbicide Agents**

4 (1) It may be necessary to determine if a veteran had “service in
 5 Vietnam” in connection with claims based on exposure to
 6 herbicide agents. . . In the absence of contradictory evidence,
 7 ‘service in Vietnam’ will be conceded if the records show that
 8 the veteran received the Vietnam Service Medal except if the
 9 veteran participated in high altitude flights only . . .

10 (2) If a veteran who did not receive the Vietnam Service Medal
 11 claims service connection for exposure to herbicide agents, and
 12 alleges service on a ship in the waters offshore of Vietnam,
 13 review the record for evidence that the ship was in the waters
 14 off Vietnam. If the veteran cannot produce evidence that the
 15 ship was in the waters offshore of Vietnam, request verification
 16 from the Navy . . .¹⁰

17 The Vietnam Service Medal was “[a]warded to all members of the Armed Forces of the United
 18 States serving at any time between July 4, 1965 and March 28, 1973, in Vietnam, *its contiguous*
 19 *waters*, or airspace, thereover.” See Spataro Decl. ¶ 9, Ex. 9, *Manual of Military Decorations &*
 20 *Awards*, Assistant Secretary of Defense (September 1996) at 50-51 (emphasis added).

21 As a result, the VA interpreted the Consent Decree to require it to apply the ¶¶ 3 and 5
 22 readjudication and retroactive compensation requirements to *both* veterans who served on the
 23 land mass of Vietnam *and* veterans who served in the territorial sea of Vietnam. During the first
 24 decade of the Consent Decree, the VA added the 12 new diseases set forth in the margin below¹¹
 25 as related to herbicide exposure under the Agent Orange Act. On each occasion, the VA
 26 readjudicated the prior claims for a newly added disease and paid retroactive disability and death

27 VA regulation provides that those who served in the territorial sea of Vietnam are entitled to the
 28 presumption of herbicide exposure. See *Procopio*, 913 F.3d at 1376 (en banc).

¹⁰ See Spataro Decl. ¶ 9, Ex. 7, VA Adjudication Procedures Manual M21-1, Part III,
 Change 76 (June 1, 1999); see also Spataro Decl. ¶ 9, Ex. 8, VA Adjudication Procedures Manual
 M21-1, Part III, Change 23 (November 8, 1991).

¹¹ From 1991 to 2001, the VA amended its regulations to provide presumptive service
 connection to the following 12 diseases under the Agent Orange Act of 1991 due to their
 association with herbicides containing dioxin: soft-tissue sarcomas, non-Hodgkin’s lymphoma,
 porphyria cutanea tarda, Hodgkin’s disease, lung cancer, larynx cancer, trachea cancer, bronchus
 cancer, trachea cancer, multiple myeloma, prostate cancer, and type 2 diabetes. See *supra* notes
 3-7.

1 compensation under the Consent Decree when those prior claims were filed by Blue Water
2 Vietnam veteran class members and their survivors, as well as Vietnam veterans class members
3 who set foot on land and their survivors.

4 In 2002, however, the VA changed its position on the applicability of the Agent Orange
5 Act and the Consent Decree to Blue Water Vietnam veterans. The VA rescinded the binding
6 M21-1 Manual provision in effect from 1991 to 2002 that provided a presumption of herbicide
7 exposure to all veterans who were awarded the Vietnam Service Medal, and replaced it with an
8 arbitrary requirement that service must have been “on land.” Spataro Decl. ¶ 10, Ex. 10, M21-1,
9 Part III, Change 88, ¶e (Feb. 27, 2002).

10 After this 2002 change of position, the VA amended its regulations under the Agent
11 Orange Act to provide presumptive service connection to five additional diseases due to their
12 association with herbicide exposure. *See supra notes 3-7*. On these three occasions, the VA
13 identified under the Consent Decree an aggregate of more than 150,000 *Nehmer* class members
14 who previously filed a claim based on one of the five newly added diseases. The VA
15 readjudicated these prior claims under the terms of the Consent Decree—that is, both Vietnam
16 veterans who set foot on land as well as Blue Water Vietnam veterans (and the survivors of both
17 types of Vietnam veterans). As a result of these *Nehmer* readjudications, the VA paid under the
18 terms of the Consent Decree an aggregate of more than \$4.6 billion in retroactive disability or
19 death compensation to the tens of thousands of Vietnam veterans who set foot on land or their
20 survivors. *See Spataro Decl. ¶ 12*. But in those thousands of *Nehmer* readjudication decisions
21 involving Blue Water Vietnam veterans, the VA refused, due to its 2002 change in interpretation,
22 to pay *any* retroactive disability or death compensation based on the prior claim.

23 **D. The Federal Circuit’s Decision in *Procopio* and Its Aftermath**

24 The 2002 change in the VA’s construction of the phrase “served in the Republic of
25 Vietnam” to exclude Blue Water Vietnam veterans was challenged in the Federal Circuit.
26 Initially, the Federal Circuit gave deference to the VA’s interpretation. *See Haas v. Peake*, 525
27 F.3d 1168, 1195 (Fed. Cir. 2008), *overruled by Procopio*, 913 F.3d 1371. But recently in
28 *Procopio*, the Federal Circuit *sua sponte* convened en banc and overruled *Haas*, rejecting the

1 VA's exclusion of Blue Water Vietnam veterans at *Chevron* step 1, as contrary to the plain
2 meaning of the Agent Orange Act of 1991. *Procopio*, 913 F.3d at 1380-81 (citing *Chevron*,
3 *U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). The Federal
4 Circuit held that veterans who served within the twelve nautical mile territorial sea of the
5 Republic of Vietnam during the Vietnam War were entitled to the presumption that they were
6 exposed to Agent Orange, and thus to service-connection for the associated diseases. *Id.*

7 Shortly after the judgment in *Procopio* became final, Congress codified the proposition
8 that the presumption of herbicide exposure applies to Blue Water Vietnam veterans. *See* Blue
9 Water Navy Vietnam Veterans Act of 2019, Pub. L. No. 116-23 (2019) ("BWN Act") (to be
10 codified at 38 U.S.C. § 1116A(c)). The BWN Act also provided a pathway for some Blue Water
11 Vietnam veterans and their survivors to obtain retroactive disability and death benefits. If such a
12 veteran or survivor (a) had been denied disability or death compensation between September 25,
13 1985 and January 1, 2020, for a disease that the VA later granted service connected status under
14 the Agent Orange Act, and (b) submits a new claim after January 1, 2020 for the same disease,
15 and that claim is approved, the VA must pay compensation retroactive to the date the pre-2020
16 claim was filed. *Id.* at § 1116A(c)(2)(B).

17 The retroactive benefits provisions in the BWN Act were modeled in some respects on the
18 retroactive benefit provisions in the *Nehmer* Consent Decree. *See* H.R. REP. 116-58, 2019
19 U.S.C.C.A.N. 279, 283-84 (2019) (discussing H.R. 299, as amended, which became the BWN
20 Act). But the BWN Act does not completely coincide with the *Nehmer* Consent Decree. Some
21 Blue Water Vietnam veterans and their survivors are entitled to retroactive compensation under
22 the Consent Decree, but are *not* entitled to retroactive compensation under the BWN Act, and
23 vice versa, and some may be entitled to compensation under either route. In recognition of this
24 fact, the House Report indicated that "[n]othing in [the BWN Act] intends to limit the rights of
25 *Nehmer* class members who seek relief for benefits under the *Nehmer* Consent Decree." H.R.
26 REP. 116-58, 2019 U.S.C.C.A.N. 279, 284.

27 It should be clear that the 2019 BWN Act does not moot the necessity of this relief. For
28 one thing, the BWN Act does not automatically require the VA to determine whether *any* Blue

1 Water Vietnam veteran or survivor is entitled to retroactive compensation. As the House Report
2 observed, the BWN Act “does not require VA to automatically re-adjudicate previously denied
3 BWN claims.” *Id.*; *see also* Dkt. No. 457 at ¶¶ 40-41. The BWN Act requirement to pay
4 retroactive compensation to a Blue Water Vietnam veteran is only triggered if the veteran files a
5 claim after January 1, 2020 and specifically identifies the Agent Orange-related disease that was
6 the subject of the veteran’s prior claim. *See id.* In other words, living *Nehmer* class members,
7 such as Veteran A discussed *infra* Section E, will *not* receive retroactive compensation under the
8 BWN Act based on their prior claim for ischemic heart disease (“IHD”) if they do not file a post-
9 January 1, 2000 claim based on IHD because, for example, no one ever informs them of their
10 rights under the BWN Act.

11 Further, if the Blue Water Vietnam veteran or survivor who filed a prior claim for an
12 Agent Orange-related disease is now deceased, the VA candidly concedes that the *Nehmer* class
13 member’s estate does not have the right to any retroactive compensation under the BWN Act.
14 *See id.* at 1 (stating that “the BWN Act does not authorize the VA to pay benefits to estates of
15 deceased disability claimants”). But the estate does have a right to recovery under the Consent
16 Decree.

17 **E. The VA Violated the Rights Under the Consent Decree of Thousands of Blue**
18 **Water Vietnam Veteran Class Members**

19 It is plain that the VA violated the Consent Decree by denying the retroactive
20 compensation it was required to pay to thousands of Blue Water Vietnam veterans. Since 2002,
21 *Nehmer* readjudication decisions have resulted in payment under the Consent Decree of more
22 than *\$4.6 billion* in retroactive compensation to the tens of thousands of Vietnam veterans who
23 set foot on land and their survivors, *but in absolutely no retroactive compensation* to Blue Water
24 Vietnam veterans and the survivors. Spataro Decl. ¶ 12. The sole reason for this disparate
25 treatment under the Consent Decree was the VA’s improper legal position that veterans who
26 served in the territorial sea of Vietnam were not entitled to the presumption of herbicide exposure
27 set forth in the Agent Orange Act of 1991.

28 As the Ninth Circuit previously made clear in this case, the Consent Decree is a contract

1 and must be “construed with reference to ordinary contract principles.” *Nehmer IV*, 494 F.3d
 2 at 861. “The obligation of a contract is the law which binds the parties to perform their
 3 agreement.” *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 429 (1934) (citing *Sturges*
 4 *v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 197 (1819)). Absent a provision to the contrary, the
 5 contract is presumed to *incorporate the law that existed at the time the contract was made*. See
 6 *Norfolk & Western Ry. Co. v. American Train Dispatchers’ Ass’n*, 499 U.S. 117, 130 (1991).

7 The Consent Decree here was signed and approved in May 1991, three months after
 8 enactment of the Agent Orange Act. The Federal Circuit made clear in *Procopio* that the law that
 9 existed at the time the Consent Decree was signed was that the presumption of herbicide exposure
 10 set forth in both the Agent Orange Act and existing VA regulations applied on their face to all
 11 veterans who served in the territorial sea of Vietnam. Thus, under ordinary contract principles,
 12 paragraphs 3-5 of the Consent Decree required that whenever the VA added a disease as related
 13 to herbicide exposure pursuant to the Agent Orange Act, the VA must identify all prior disability
 14 and death claims based on that disease that were filed by veterans who served in the territorial sea
 15 of Vietnam and their survivors, and readjudicate their prior claims based on the presumption that
 16 the veterans were exposed to herbicides, and pay them the retroactive compensation required by
 17 the Decree.

18 The cases of two *Nehmer* class members illustrate how the VA’s change of position has
 19 violated the contractual rights of Blue Water Vietnam veterans. In 2011, the VA sent Veteran A¹²
 20 a letter stating that the VA had “conducted a special review of your claims file *mandated* by the
 21 United States District Court’s orders in *Nehmer v. U.S. Department of Veterans Affairs*” to
 22 readjudicate his prior denied claim for IHD, following the VA adding IHD in 2010 as service
 23 connected. Spataro Decl. ¶ 13, Ex. 14, “Veteran A” *Nehmer* Re-Adjudication Decision, at 1
 24 (initial italics added). The letter enclosed a June 21, 2011 VA decision stating that Veteran A was
 25 diagnosed with IHD in 1994 and his VA records showed that he was assigned to a ship which
 26 “served in the official waters of the Republic of Vietnam” for a total of 91 days between
 27

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¹² Name has been changed and redacted in relevant exhibits to preserve veteran’s confidentiality.

1 December 1966 to March 1967, and that Veteran A had testified that his ship docked twice in
2 Danang Harbor in the Republic of Vietnam, “but that he did not go ashore.” *Id.* at 5. The VA
3 held that “exposure to Agent Orange is not conceded” and refused to pay him many years of
4 retroactive disability compensation based on his prior IHD claim solely because he did not go
5 ashore.

6 This is an absurd result given that the VA had already readjudicated and paid Veteran A
7 for a prior claim related to prostate cancer under the Consent Decree, including paying him
8 disability compensation retroactive to the date of his prior prostate cancer claim, as the Consent
9 Decree required. *Id.* at 9. In its 2011 readjudication decision, the VA explained that it was
10 inconsistently readjudicating Veteran A’s prior IHD and prostate cancer claims because “*current*
11 *VA regulations* do not allow service connection for veterans who did not step foot in Vietnam.”
12 *Id.* at 5 (emphasis added). Thus, this decision shows both that the VA understands that Veteran A
13 is a *Nehmer* class member entitled to the relief of a readjudication decision under the Consent
14 Decree, but that because he is a Blue Water Vietnam veteran, he cannot get the relief of
15 retroactive compensation under the Consent Decree.

16 The case of Veteran B¹³ further illustrates this point. Veteran B served in the Marine
17 Corps during the Vietnam War on a ship, which, according to the VA, “spent time within the
18 contiguous waters of the Republic of Vietnam.” Spataro Decl. ¶ 13, Ex. 15, Veteran B *Nehmer*
19 Readjudication Decisions, at 8. In 2001, Veteran B filed claims for disability compensation for
20 two diseases: diabetes and hypertensive cardiovascular diseases—a form of IHD. The VA
21 awarded Veteran B service connected disability compensation for diabetes, even though he was a
22 Blue Water Vietnam veteran. *Id.* at 7. At the time, he was denied coverage for IHD because that
23 disease was not then service-connected. *Id.* at 8.

24 Veteran B died in 2005 from coronary artery disease (a form of IHD), diabetes, and
25 hypertension. *Id.* at 9. In 2010, when the VA amended its regulations pursuant to the Agent
26 Orange Act to add IHD to the list of diseases presumptively service connected due to herbicide
27

28 _____
¹³ Name has been changed and redacted in relevant exhibits to preserve veteran’s
confidentiality.

1 exposure, the VA identified Veteran B pursuant to the Consent Decree due to his prior claim
2 based on IHD. On November 21, 2011, the VA sent a letter to Veteran B's daughter, stating that
3 "[w]e have conducted a special review of your father's claims file mandated by the United States
4 District Court's orders in *Nehmer v. U.S. Department of Veterans Affairs*." *Id.* at 1. The letter
5 further stated that "[s]ervice connection has been denied for hypertensive cardiovascular disease
6 for purpose of entitlement to retroactive benefits." *Id.* Enclosed with the letter was the *Nehmer*
7 readjudication decision denying retroactive disability compensation from September 24, 2001, the
8 date of Veteran B's claim based on IHD, to April 27, 2005, the date of his death. *Id.* at 5-8. The
9 decision stated that although Veteran B had suffered from IHD, he was not entitled to the
10 presumption of herbicide exposure because he served on a ship. *Id.* at 8 (finding that he did not
11 present evidence of the "required service in Vietnam" because his service record only showed
12 that he served "within the contiguous waters of the Republic of Vietnam, [and] there is no
13 evidence that the ship docked to land or the Veteran went ashore").

14 Thus, under the law in effect when the Consent Decree was signed, Veteran B was a
15 member of the plaintiff class because he served in the Republic of Vietnam during the Vietnam
16 era within the meaning of the Agent Orange Act. Yet, he was wrongly denied four years of
17 retroactive disability compensation to which his daughter would have been entitled pursuant to
18 the Consent Decree and 38 C.F.R. § 3.816(f). As the Notice recently filed by the VA in this case
19 confirms, the VA gets to keep the four years of retroactive disability compensation owed to her
20 deceased father because neither Veteran B's daughter nor his estate is entitled to this
21 compensation under the BWN Act. But if the Court issues the Order sought in this enforcement
22 motion, the VA will be obligated to issue a replacement decision that determines whether her
23 father served in the territorial sea of Vietnam, and, if so, the amount of retroactive compensation,
24 if any, to which the daughter of this deceased veteran is entitled under the terms of Consent
25 Decree.

26 **IV. CONCLUSION**

27 The Consent Decree requires the VA to automatically readjudicate any affected claim
28 once a new disease related to dioxin exposure is recognized in a VA regulation as giving rise to a

1 presumption of service connection. Here, the VA has systematically violated the Consent Decree
2 by improperly denying readjudicated claims based on a restrictive interpretation of which
3 veterans served in “the Republic of Vietnam,” which the U.S. Court of Appeals recently
4 determined violated both the plain meaning of the statute and the VA’s own regulations.

5 To enforce the Consent Decree, the Court should order the VA to (1) identify, within 120
6 days of the date of the Court’s Order, all of the *Nehmer* readjudication decisions made pursuant to
7 the Consent Decree in which the VA denied compensation on the ground that the veteran was not
8 entitled to the presumption of herbicide exposure because the veteran did not set foot on the land
9 mass or serve on the inland waterways of Vietnam;¹⁴ (2) issue, within 240 days of the date of the
10 Court’s Order, a replacement decision that determines: (a) whether the veteran served in the
11 territorial sea of the Republic of Vietnam during the Vietnam era and, if so, (b) the amount of
12 retroactive compensation, if any, the veteran or the veteran’s survivor (or, if the veteran or
13 survivor is deceased, the estate of the deceased veteran or survivor) is entitled under the terms of
14 Consent Decree; and (3) provide class counsel, pursuant to the Court’s Privacy Protection Order,
15 with a copy of (a) all of the *Nehmer* readjudication decisions identified, (b) all of the replacement
16 decisions issued, and (c) each notice letter sent to the class member and coding sheet that is
17 associated with such replacement decision. The VA is capable of identifying these past
18 readjudication decisions because the VA previously gave Class Counsel a copy of these decisions
19 under the Court’s Privacy Protection Order. *See* Spataro Decl. ¶ 12. *Nehmer* Blue Water
20 Vietnam veterans deserve the benefits that are owed under the Consent Decree.

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27 ¹⁴ The term “*Nehmer* readjudication decisions” includes decisions made on a claim for
28 disability or death compensation that was (a) based on a disease that was service connected
pursuant to the Agent Orange Act of 1991 and (b) pending before VA on the date VA issued a
final rule service connecting such disease pursuant to the Agent Orange Act of 1991.

