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 VETERANS FOR COMMON SENSE and
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12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 SAN FRANCISCO DIVISION

16 VETERANS FOR COMMON SENSE, and
 VETERANS UNITED FOR TRUTH, INC.,
 17
 Plaintiffs,
 18
 v.
 19 JAMES B. PEAKE, M.D., Secretary of Veterans
 Affairs, *et al.*,
 20
 Defendants.
 21

Case No. C-07-3758-SC

CLASS ACTION

**PLAINTIFFS' POST-TRIAL
BRIEF, PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF
LAW**

Complaint Filed: July 23, 2007
Trial Date: April 21, 2008

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1 **I. INTRODUCTION**

2 This Court is in an extraordinary position. Faced with an embattled, recalcitrant agency
3 that has abandoned its obligations to the veterans it serves, this Court must act to preserve and
4 protect our veterans. There is overwhelming evidence that veterans of the Iraq and Afghanistan
5 wars, together with veterans of earlier conflicts, are in dire need of significant mental health
6 services and assistance. It is undisputed that if these veterans are not provided the services they
7 need and to which they are entitled on a timely basis, their conditions will deteriorate, and many
8 will take their own lives.

9 The Department of Veterans' Affairs ("VA") concedes that veterans have an entitlement
10 to care and to service-connected death and disability compensation ("SCDDC"). VA also
11 concedes that it has the money and the capability to remedy the situation. Through this trial, VA
12 has presented to this Court numerous "plans" to address problems veterans face at VA, the same
13 problems that have been endemic for years. But VA's own expert witness has told the Court that
14 it is reasonable for the agency to take ten years to implement one of the most important plans.
15 And VA's own officials responsible for implementing and monitoring these plans have failed to
16 do so, and indeed seem to readily acknowledge their failures.

17 VA concedes many of the key legal issues in this action: that veterans need and are
18 entitled to health care and compensation; that the court has jurisdiction over Plaintiffs' challenge
19 to the procedural inadequacies of the SCDDC adjudication process; that Plaintiffs are challenging
20 discrete agency action in mental health care: that Defendant's failed to implement the Mental
21 Health Strategic Plan and the 2007 Feeley Memorandum; that VA has failed to fulfill its duty to
22 assist veterans, as required by statute, and that this failure is resulting in unacceptable levels of
23 avoidable remands; and that the extraordinary delays veterans face in the adjudication of their
24 SCDDC claims are unacceptable. Faced with these admissions and concessions, the Court has a
25 *clear path* to grant Plaintiffs' requested relief. The APA provides that the Court *must* compel
26 agency action unlawfully withheld or unreasonably delayed, and the Court has broad equitable
27 discretion to remedy VA's violations of the Constitution. As set forth herein, this Court has
28 jurisdiction over all of Plaintiffs' claims, and has the power to grant the remedies Plaintiffs seek.

1 But in addition to the jurisdiction to decide and the power to remedy, this Court has the
2 *opportunity* to avert an even more serious looming crisis that is likely to occur when the wars in
3 Iraq and Afghanistan come to an end, and the already overburdened VA system is crushed by the
4 mental health and disability compensation needs of the hundreds of thousands of returning troops.
5 VA has demonstrated for decades that it will not take the necessary steps absent Court
6 intervention; Plaintiffs respectfully request that the Court take this opportunity to save lives.

7 **II. THE COURT HAS SUBJECT MATTER JURISDICTION TO GRANT RELIEF**

8 As this Court held in the January Order Granting in Part and Denying in Part the Motion
9 to Dismiss, the Court has jurisdiction over this action because Plaintiffs' claims do not "require
10 this Court to review a decision by the Secretary involving an individual claim." *Veterans for*
11 *Common Sense v. Nicholson*, No. C-07-3758 SC, 2008 WL 114919, at *13 (N.D. Cal. Jan. 10,
12 2008) ("VCS"). VA suggests that the Court lacks jurisdiction because Plaintiffs are somehow
13 challenging regulations, citing the Federal Circuit's authority under 38 U.S.C. § 502. Plaintiffs
14 do not challenge regulations, but rather attack systemic aspects of the claims adjudication process
15 under a traditional due process balancing test. That regulations may play into the due process
16 analysis is irrelevant to the jurisdictional question. Yet Defendants persist in their attempts to
17 resurrect arguments from their Motion to Dismiss.

18 VA incorrectly suggests that Plaintiffs challenge 38 C.F.R. § 20.101(b), providing that
19 veterans cannot seek formal adjudication of medical decisions before the BVA. Plaintiffs
20 challenge the absence of any review mechanism for denials of care, and the constitutional
21 adequacy of the clinical appeals process for medical decisions. VA suggests that Plaintiffs
22 challenge 38 C.F.R. § 3.304(f), requiring credible evidence of an in-service stressor for a
23 determination of service-connection for PTSD. Plaintiffs do not challenge this regulation, but
24 merely point out that the credibility determination, and need to show in-service stressor are two
25 unique aspects of PTSD claims, which can result in lengthier delays for PTSD claims. Similarly,
26 Plaintiffs do not challenge 38 C.F.R. § 3.109(a), which provides that a veteran's claim is treated
27 as abandoned if evidence is not submitted within one year, the "ratings schedule" used to assign
28 disability ratings, set forth at 38 C.F.R. §§ 4.1-4.31, or the procedural requirements to pursue an

1 appeal, set forth at 38 C.F.R. §§ 20.200-20.202. What Plaintiffs challenge are unreasonable
2 delays, the absence of procedural protectors and the clearly adversarial-nature of the system, that
3 combine to create a high risk of erroneous deprivation. The fact that some regulations are
4 implicated in this analysis does not deprive this Court of jurisdiction over Plaintiffs'
5 constitutional due process claims.

6 Nor does case law support VA. Under § 502, the Federal Circuit only has exclusive
7 jurisdiction over cases that involve notice and comment before promulgation of a specific rule or
8 consider the constitutionality and interpretation of a particular regulation.¹ What VA cannot cite
9 to is any case law holding that systemic due process challenges that only tangentially involve
10 regulations belong in the Federal Circuit. In fact, the Ninth Circuit has held that § 502 does not
11 preclude district court jurisdiction over even direct challenges to VA regulations where the
12 challenge does not involve rule-making or an action by the Secretary requiring notice and
13 publication. *Preminger v. Principi*, 422 F.3d 815 (9th Cir. 2005). If direct challenges to
14 regulations can proceed in district courts, then clearly an action that does not directly challenge
15 any regulation is not barred from jurisdiction merely because regulations relating to the proof.
16 Moreover, district courts consider actions alleging that agency practices violate regulations. *City*
17 *of New York v. Heckler*, 578 F. Supp. 1109, 1124 (E.D.N.Y. 1984).

18 VA urges that *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 71 (2004), bars
19 the relief Plaintiffs seek; but *Norton actually supports* a programmatic challenge to agency action.
20 *Norton*, prescribes two requirements to relief under APA 706: (1) discrete agency action, and (2)
21 that action must be statutorily mandated. *Norton*, 542 U.S. at 64. In *Norton*, the Supreme Court
22 upheld the district court's dismissal of a complaint for lack of subject matter jurisdiction, refusing

23 ¹ See *Paralyzed Veterans of Am. v. Acting Sec'y of Veterans Affairs*, 138 F.3d 1434 (Fed.
24 Cir. 1998) (considering whether rule-making procedure incorrectly lacked public notice and
25 comment); *The Coalition for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs*,
26 464 F.3d 1306 (Fed. Cir. 2006) (same); *Splane v. Sec'y of Veterans Affairs*, 216 F.3d 1058 (Fed.
27 Cir. 2000) (considering whether Department of Veterans Affairs' general counsel opinion
28 amounted to rule-making and therefore required public notice and comment); *Nat'l Org. of*
Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 330 F.3d 1345 (Fed. Cir. 2003) (facial
challenge to the constitutionality of an amended VA rule); *Chinnock v. Turnage*, 995 F.2d 889
(9th Cir. 1993) (holding only Federal Circuit has jurisdiction to interpret a VA regulation).

1 to apply § 706's sovereign immunity waiver because the Agency had no legal duty to enforce the
2 speculative land-use plans at issue. *Norton* is clearly distinguishable from this case. Plaintiffs'
3 claims fulfill the requirements of *Norton* because they involve *discrete* and *mandatory* statutory
4 duties, including the duties to: provide veterans with health care (38 U.S.C. § 1710); provide
5 veterans with compensation (38 U.S.C. § 1110); expeditiously deal with remanded claims (38
6 U.S.C. § 5109B); and employ sufficient staffing levels at the Board of Veterans Appeals ("BVA")
7 to ensure timely adjudication of appeals (38 U.S.C. § 7101). In stark contrast, *Norton* involved a
8 non-binding plan, not a "statute itself as a source of the [agency] duty in question." *Our*
9 *Children's Earth Found. v. EPA*, 506 F.3d 781, 795 (9th Cir. 2007). The statutes Plaintiffs
10 challenge set forth unequivocal statutory duties. The Ninth Circuit has made clear that "shall
11 means shall." *Ctr. for Biological Diversity v. Norton*, 254 F.3d 833, 837 (9th Cir. 2001). Thus
12 *Norton* supports the Court's jurisdiction to grant Plaintiffs' requested relief. The Supreme Court
13 has held that courts may "intervene in the administration of the laws [pursuant to the APA] only
14 when, and to the extent that, a specific 'final agency action' has an actual or immediately
15 threatened effect. Such an intervention may ultimately have the effect of requiring a regulation, a
16 series of regulations, or *even a whole 'program' to be revised by the agency* in order to avoid the
17 unlawful result that the court discerns." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894 (1990)
18 (emphasis added). Thus, Supreme Court jurisprudence supports the notion that the Court can and
19 must act when faced with agency action unlawfully withheld or unreasonably delayed.

20 **III. JURISDICTION OVER APA CLAIMS**

21 Claims brought against an agency pursuant to the APA must satisfy certain agency action
22 requirements. They must challenge final agency action — which under § 706(1) also includes
23 agency actions unlawfully withheld or unreasonably delayed. Under the APA, once this Court
24 determines such action has been unlawfully withheld or unreasonable delayed, the Court must
25 compel the agency to act.

26 VA concedes that Plaintiffs' medical care claims challenge discrete agency action. VA
27 acknowledges that both the Mental Health Strategic Plan and the Feeley Memorandum of June 1,
28 2007 constitute discrete agency action, which properly can be challenged in this court. (RT 63:8-

1 21).² Moreover, this Court has already held that there is no alternative adequate remedy. Order
2 at 20. Having overcome these threshold issues, jurisdiction is proper over Plaintiffs' § 1710
3 claims, and sovereign immunity is waived pursuant to § 702 of the APA.

4 Plaintiffs also challenge agency actions relating to SCDDC adjudication. VA is required
5 to pay compensation to any veteran with a "disability resulting from personal injury suffered or
6 disease contracted in line of duty." 38 U.S.C. § 1110. Similarly, 38 U.S.C. § 7101 provides that
7 the BVA "shall consist of . . . such number of members . . . and sufficient personnel . . . to enable
8 the Board to conduct hearings and consider and dispose of appeals properly before the Board in a
9 timely manner." And 38 U.S.C. § 5109B provides that, "[t]he Secretary shall take such actions as
10 may be necessary to provide for the expeditious treatment . . . of any claim that is remanded to a
11 regional office" by BVA. VA is violating all of these statutory obligations, and this is agency
12 action unlawfully withheld or unreasonably delayed under § 706(1) of the APA. Thus, these
13 claims challenge agency action as required under the APA. Sovereign immunity is properly
14 waived, and this Court has jurisdiction to consider these claims, to compel agency action.

15 **IV. JURISDICTION OVER CONSTITUTIONAL CLAIMS**

16 VA relies on one legal argument to address the unconstitutional delays claimants face
17 during the veterans' benefits adjudication process: that Plaintiffs have failed to challenge a
18 "discrete agency action." This is misplaced for two reasons. First, this is a constitutional claim,
19 for which it is unnecessary to challenge a discrete agency action. Second, Plaintiffs do, in fact,
20 challenge discrete agency actions relating to delays.

21 As this Court noted in its January Order, Plaintiffs must establish a valid waiver of
22 sovereign immunity, this waiver is provided in § 702 of the APA. The Court cited conflicting
23 authorities in the Ninth Circuit. In *Gallo Cattle Co. v. U.S. Dep't of Agriculture*, 159 F.3d 1194
24 (9th Cir. 1998), the Court held that § 702 is constrained by § 704 (necessitating a challenge to
25 "final agency action" in order to rely on the waiver set forth in § 702). In *Presbyterian Church v.*
26 *United States*, 870 F.2d 518 (9th Cir. 1989), the Ninth Circuit held that § 702 is not constrained

27 ² RT refers to the "Reporter's Transcript" from the trial held on April 21-30, 2008.

1 by the APA's "agency action" requirements. The Ninth Circuit recently considered this
2 perceived inconsistency, but declined the opportunity "to make a sua sponte en banc call to
3 resolve this conflict" due to the distinguishing facts in that case. *Gros Ventre Tribe v. United*
4 *States*, 469 F.3d 801, 809 (9th Cir 2006). The Ninth Circuit may have been mistaken in
5 suggesting that *Presbyterian Church* and *Gallo Cattle* are not distinguishable. There is, in fact,
6 one key distinction. *Presbyterian Church* was a constitutional claim, and relied only on the
7 APA's broad waiver of sovereign immunity. *Gallo Cattle*, on the other hand, was a case brought
8 solely *under* the APA, based on an agency's failure to comply with a statute. Thus, for a case
9 brought pursuant to the APA (as opposed to merely relying on the APA's sovereign immunity
10 waiver), the claims must fulfill the agency action requirements set forth in the APA. In the case
11 at hand, the claims brought pursuant to the APA must challenge some final agency action, failure
12 to act or unreasonable delay (and as set forth above, Plaintiffs do challenge such agency action),
13 but Plaintiffs' constitutional claims are not so constrained in order to rely on the sovereign
14 immunity waiver set forth in § 702. This squares nicely with this Court's holding in the January
15 Order that the *Presbyterian Church/Gallo Cattle* debate was resolved by the Supreme Court in
16 *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990). *Lujan* was a case brought pursuant to the
17 APA, like *Gallo Cattle*, as opposed to a constitutional claim merely relying on the APA's waiver
18 of sovereign immunity, as in *Presbyterian Church*. Thus, the Supreme Court's holding in *Lujan*
19 merely stands for the proposition that claims brought pursuant to the APA must satisfy the agency
20 action requirements.

21 However, even if the sovereign immunity waiver were constrained by the agency action
22 requirements of the APA, Plaintiffs' constitutional challenges involve discrete agency actions.
23 As this Court has already held, "Plaintiffs have sufficiently articulated various actions and delays
24 by Defendants that qualify as 'final agency actions.'" VCS, 2008 WL 114919, at *6. In fact, the
25 Court squarely addressed whether delay constitutes final agency action, and held that Plaintiffs'
26 challenge to "the failure by the VA to make timely decisions on benefits claims and provide
27 timely medical care . . . falls within the definition of 'final agency action.'" *Id.* at *6 (finding that
28 Plaintiffs plead a genuine § 706(1) claim). Defendants concede that the Court has jurisdiction to

1 consider Plaintiffs' systemic due process claims. "Now, the trial type procedures that — they say
2 the statute itself is unconstitutional, which we concede that you have jurisdiction to consider, your
3 Honor".³ (RT 80:24-81:1.)

4 **V. REMEDIES**

5 **A. Under APA, the Court Must Compel Agency Action Unlawfully Withheld**

6 Once a Court determines that an agency acted unlawfully, the APA provides a very
7 specific remedy: it *requires* the Court to compel the agency to take those discrete actions it is
8 required to take by statute. (Mar. 3, 2008 Order, PIRT 9:8-12.)⁴ (APA relief is mandatory where
9 Plaintiffs have proven that "agency action is unreasonably delayed or withheld"). (*Id.*) Plaintiffs
10 thus request an injunction compelling VA to abide by its statutory mandates. The relief issued by
11 the Court need not dictate how the agency should operate. Rather, the Court has the option of
12 requiring VA to "first propos[e] a remedy to the Court which can then determine whether that
13 plan meets [VA's] legal responsibilities to plaintiffs." *Cockrum v. Califano*, 475 F. Supp. 1222,
14 1240 (D.D.C. 1979) (failure to enjoin the delay "would neglect the Court's duty under the APA, 5
15 U.S.C. § 706(1)"). *Id.* at 1239. In *Cockrum*, the court ordered defendants to "submit a plan

16 ³ Unable to challenge the Court's jurisdiction over these claims, Defendants claim that the
17 proper legal standard for Plaintiffs' due process claims is the standard set forth in *United States v.*
18 *Salerno*, 481 U.S. 739 (1987). Defendants are mistaken. While the Ninth Circuit may have
19 applied the *Salerno* standard to facial challenges to statutory language, this is a systemic due
20 process case, and should be analyzed under *Mathews v. Eldridge*, as acknowledged by this Court
in the January Order. In finding Defendants' argument that an examination of due process claims
would involve a review of individual benefits decision was unpersuasive, this Court made clear
that due process analysis does not depend on individual cases:

21 In applying this [*the Matthew's*, 424 U.S. at 335] test we must keep
22 in mind . . . the fact that the very nature of the due process inquiry
23 indicates that the fundamental fairness of a particular procedure
does not turn on the result obtained in any individual case; rather,
procedural due process rules are shaped by the risk of error inherent
in the truth-finding process as applied to the generality of cases. . . .

24 VCS, 2008 WL 114919, at *16 citing *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305,
25 321 (1985) (internal quotes omitted.) Thus, *Mathews v. Eldridge* provides the governing standard
26 by which this Court should weigh the constitutional adequacy of the VA claims adjudication
system.

27 ⁴ PIRT refers to "Preliminary Injunction Reporter's Transcript." The Preliminary
28 Injunction hearing took place March 3-6, 2008, and was consolidated with the trial.

1 designed in good faith as an operational (not an advocate's) device to reduce the time for decision
2 making and ultimately to permit all decisions to be made within a reasonable time." *Id.* at 1240.
3 Such an order in the case at hand would allow the court to remedy the substantial delays in the
4 provision of benefits and health care, without requiring the Court to assume a managerial role in
5 the agency.

6 **B. The Court Has Broad Discretion to Remedy Constitutional Violations.**

7 The court's broad power to remedy constitutional violations has long been established. In
8 *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), a unanimous Court also held that the federal
9 judiciary had inherent power to fashion an appropriate remedy for constitutional violations. *Id.*
10 More than fifty years of jurisprudence following *Brown* have established several factors
11 governing equitable remedies for constitutional violations:

12 [First,] the nature of the [equitable] remedy is to be determined by
13 the nature and scope of the constitutional violation. The remedy
14 must therefore be related to the 'condition alleged to offend the
15 Constitution.' Second, the decree must indeed be remedial in
16 nature, that is, it must be designed as nearly as possible to restore
17 the victims of [unconstitutional] conduct to the position they would
18 have occupied in the absence of such conduct

19 *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (citations omitted). This Court should, at a
20 minimum, set time limits or require VA to establish a remedial plan to eliminate the
21 unconstitutional delays for rendering a decision at the RO and BVA level on SCDDC claims.
22 *White*, 434 F. Supp. 1252 (D. Conn. 1976). *Heckler v. Day*, 467 U.S. 104 (1984), does not bar
23 such a remedy here because Congress has not considered and rejected the idea of imposing
24 mandatory time limits at the various stages of the Veterans Benefits Administration (VBA")
25 adjudication process and has, in fact, never imposed any mandatory time limits on VBA.

26 **C. This Court Has Many Remedial Alternatives.**

27 This Court has broad discretion to fashion an appropriate remedy. The Court can declare
28 that the facts proven at trial constitute a denial of veterans' constitutional right to due process.
29 *Barnett v. Bowen*, 794 F.2d 17, 21-22 (2d Cir. 1986). Such an order is appropriate here, based on
30 the nearly undisputed facts. *White v. Matthews*, 434 F. Supp. at 1261 (holding unreasonable
31 delay constitutes a denial of due process). The Court may also direct VA to provide claimants

1 with minimal procedural safeguards “consistent with” *Goldberg v. Kelly*, 397 U.S. 254, 270-72
2 (1970) and *Solis v. Schweiker*, 719 F.2d 301 (9th Cir. 1983).⁵ The Court could also issue a
3 general “fix it” order, retaining jurisdiction to enforce it by ordering more targeted remedies later,
4 if necessary. Such an order would not involve the Court in “managing” the agency. The Court
5 may also order VA to propose a detailed remedial plan, or it could order the parties to confer and
6 jointly propose a plan. *See, e.g., Ctr. for Biological Diversity v. Norton*, 304 F. Supp. 2d 1174,
7 1184 (D. Ariz. 2003) (ordering Fish and Wildlife Commission to submit new plan for protection
8 of spotted owl, and retaining jurisdiction to enforce the order); *Henrietta v. Guiliani*, No. 95 CV
9 0641 (SJ), 2001 WL 1602114 (E.D.N.Y. Dec. 11, 2001).

10 This Court may also appoint a variety of “agents” to assist in oversight and enforcement
11 of the injunction (such as a special master, monitor, ombudsman, or advisory committee). *See Ex*
12 *parte Peterson*, 253 U.S. 300, 306 (1920); *United States v. Suquamish Indian Tribe*, 901 F.2d
13 772, 775 (9th Cir. 1990). Federal Rule of Civil Procedure 53 authorizes the appointment of
14 masters. The use of special masters is common when large bureaucracies, including federal
15 agencies, are permeated with systemic constitutional or statutory violations. For example, one
16 court appointed a master to develop and implement a plan to ensure that the state’s eligible
17 children received Medicaid benefits. *John B. v. Menke*, 176 F. Supp. 2d 786, 807 (M.D. Tenn.
18 2001). Similarly, another court used a number of special masters and expert consultants to fix the
19 state’s broken foster care system. *Joseph A. v. New Mexico Dep’t of Human Servs.*, 69 F.3d 1081
20 (10th Cir. 1995) (*rev’d on other grounds*). Cases addressing prison conditions often involve
21 special masters. *See, e.g., Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980) (*rev’d on other*
22 *grounds*), where the parties entered into a decree requiring reducing prison crowding, furnishing
23 adequate health care, and bringing living standards into compliance with state requirements. The
24 court appointed a special master to monitor compliance, noting that a master is particularly

25 ⁵ *Goldberg* holds that claims for welfare benefits affect “property interests,” entitling
26 claimants, under the Due Process Clause, to certain minimal procedural safeguards — including
27 an evidentiary hearing, the right to make oral arguments and cross-examine witnesses, and the
28 right to retain (and, presumably, to compensate) counsel if the claimant so desires, a right that
veterans are denied at the initial stages of their claims. 397 U.S. at 266.

1 appropriate when the institution has a history of unconstitutional practices. *Id.* at 1389.

2 While there are many forms that this Court's relief can take, one thing is clear: VA will
3 not remedy this situation absent a Court order. VA's promises have been made for decades, yet
4 the same problems exist, persist, and are predicted to get worse. The Court is faced with an
5 extraordinary opportunity to truly affect the lives of the men and women who are suffering from
6 PTSD as a direct consequence of their service to this Country. The Court should compel agency
7 action that is being unlawfully withheld and unreasonably delayed by VA, as it is required to do
8 pursuant to the APA, and should exercise its equitable discretion to grant relief to remedy the
9 unconstitutional delays and procedural inadequacies claims adjudication process.

10 **FINDINGS OF FACT⁶**

11 **I. THE NEED FOR MENTAL HEALTH SERVICES**

12 1. There is a significant unmet need for mental care services for veterans who are
13 returning from the Iraq and Afghanistan wars. Dr. Marcus Nemuth, Director of Psychiatry
14 Emergency Services in VA Puget Sound, testified he is seeing a "tsunami of medical need"
15 among returning veterans. (Ex. 1263 at 38:24-39:1.)

16 2. The suicide rate among veterans has been estimated by VA researchers to be as high
17 as 7.5 times the national average. (Ex. 133 at 8; RT 276:3-12.) The "Katz Suicide Study," dated
18 February 21, 2008, found that suicide rates among veterans are approximately 3.2 times higher
19 than the general population. (RT 274:15-275:19; Ex. 1183.)

20 3. An analysis by Dr. Stephen Rathbun, the interim head of the Department of
21 Epidemiology and Biostatistics at the University of Georgia, found that in 2005, the suicide rate
22 among veterans who were 20 to 24 years old was three to four times higher than the non-veteran
23 suicide rate for that age group. (PIRT 310:9-311:2.) Internal VA e-mails state that Dr. Rathbun's
24 methodology was "defensible" and "appears to be correct." (Exs. 1306, 1248.)

25 4. An internal VA e-mail, dated December 15, 2007, states that "[t]here are about 18

26
27 ⁶ All findings of fact should also be construed as conclusions of law, and all conclusions
28 of law should also be construed as findings of fact

1 suicides per day among American's 25 million veterans." The e-mail adds: "VA's own data
2 demonstrate 4-5 suicides per day among those who receive care from us." (Ex. 1247.) In
3 addition to completed suicides, an internal VA e-mail, dated February 13, 2008, states: "Shh!
4 Our suicide prevention coordinators are identifying about 1,000 suicide attempts per month
5 among the veterans we see in our medical facilities. Is this something we should (carefully)
6 address ourselves in some sort of release before someone stumbles on it?" (Ex. 1249.) There
7 have been dramatic increases in calls to the suicide hotline over time. (Exs. 1304, 1305).

8 5. A study released on April 17, 2008, by the RAND Corporation included the following
9 "key" findings: approximately 18.5% of U.S. service members who have returned from Iraq and
10 Afghanistan currently have PTSD and 19.5% reported experiencing a traumatic brain injury.
11 "Roughly half of those who need treatment for these conditions seek it, but only slightly more
12 than half who receive treatment get minimally adequate care." (Ex. 1191 at 1.) The RAND study
13 also estimates that 300,000 American soldiers deployed to Iraq and Afghanistan "currently suffer
14 from PTSD or major depression." (Ex. 1253 at xxi.)

15 6. In 2008, Dr. Robert Rosenheck, Director of VA's Northeast Program Evaluation
16 Center ("NEPEC"), issued a report entitled "Recent Trends in VA Treatment of Post-Traumatic
17 Stress Disorder and other Mental Disorders." (Exs. 442, 444.) That report found that during
18 2003-2005, for veterans born after 1972, there was a 232% increase in PTSD diagnosis. (Ex. 442
19 at 1722.) And although the number of veterans diagnosed with PTSD doubled between 1997 and
20 2005 (*id.*), "the number of clinic contacts per veteran per year declined steadily and relatively
21 uniformly across the years." (*Id.* at 1723.) Dr. Rosenheck found that increases in PTSD
22 diagnosis among Iraq and Afghanistan veterans born after 1972 continued to increase
23 "substantially" during 2005-2007. (Exs. 1265 at 75:15-77:5; 448.)

24 7. The 2007 Long Journey Home report, which reports on service delivery and
25 performance of VA's PTSD programs, confirms that service intensity (visits per veteran) for
26 specialized PTSD outpatient treatment programs has continued to decline, reflecting a 4.7%
27 decrease in intensity during 2006-2007. (Ex. 1265 at 132:11-135:3; Ex. 445 at 23-24.) Many
28 Iraq and Afghanistan veterans also suffer from depression. (RT 276:13-18.) Depression and

1 PTSD are two of the leading risk factors for suicide. (*Id.* at 276:13-19; 274:7-14.)

2 8. Dr. Arthur Blank is an expert in psychiatry, specializing in treatment of veterans with
3 mental health problems, including PTSD. He spent 10 years as a teaching and supervising
4 psychiatrist at the Westhaven VA Medical Center and during 1994-1997 was the chief
5 psychiatrist on the PTSD team at the Minneapolis VA. (PIRT 57:18-23.) The Court finds that
6 Dr. Blank's testimony was knowledgeable, forthright and credible. Dr. Blank testified that there
7 is "a strong connection" between PTSD and suicide. (*Id.* at 69:23-70:6.) He also testified that
8 depression is one outcome of untreated PTSD (*Id.* at 70:21-25) and that depression increases the
9 risk of suicide. (*Id.* at 71:1-7.) If PTSD is not properly treated, it can lead to "terrible" suffering
10 and pain, and disruptions in the person's family and/or career. (*Id.* at 76:23-77:5.) PTSD
11 becomes more difficult to treat as symptoms progress. (*Id.* at 77:6-9.)

12 9. Dr. Chad Peterson is a Board Certified Psychiatrist. From July 2005 to July 2007, Dr.
13 Peterson was the medical director of the PTSD clinical team at the San Francisco VA hospital.
14 (PIRT 319:4-23.) The Court finds that Dr. Peterson's testimony was persuasive and convincing.
15 Dr. Peterson explained that a number of studies demonstrate "a strong link" between PTSD and
16 suicide. (*Id.* at 332:25-333:17.) Dr. Peterson also testified regarding the importance of prompt
17 treatment for PTSD. He opined that failing to see a doctor promptly can lead to suicide. (*Id.* at
18 355:20-25.) In addition, that if the wait time for a mental health appointment was more than a
19 week, "the attendance rate was very low." (Ex. 40; PIRT 354:11-355:18.)

20 10. Dr. Gerald Cross is Principal Deputy Under Secretary for Health at the VHA. Dr.
21 Cross agreed that the longer a person suffering from PTSD waits to receive medical attention, the
22 greater the risk that that person will develop a psychosocial problem. (PIRT 137:9-16.) Dr.
23 Cross also agreed that the longer a veteran with PTSD has to wait for medical attention, the
24 greater the risk that a mild form of the disorder will develop into even more severe forms of
25 pathology. (*Id.* at 137:17-23.) Dr. Cross agreed with the National Center for Post Traumatic
26 Stress Disorder (an agency within VA) that 35% of service members from Iraq were seen in VA
27 for a mental health visit within a year of their return. (Ex. 182 at 2; PIRT 219:3-220:17.) Dr.
28 Cross testified that the high rates of PTSD among Iraq veterans are a result of a number of

1 factors, including multiple deployments, an inability to identify the enemy, the lack of a real “safe
2 zone,” and the inadvertent killing of innocent civilians. (PIRT 216:23-218:2.)

3 11. There is a direct relationship between increased spending on mental health care and
4 decreased suicide rates. The study entitled “Time Trends and Predictors of Suicide Among
5 Mental Health Outpatients in the Department of Veterans Affairs,” authored by Dr. Rosenheck
6 and published in 2008, found that every \$100 increase in per capita outpatient mental health
7 spending was associated with a 6% decrease in the rate of suicide. (Ex. 446 at 118.)

8 12. Veterans are entitled to five years of care from VA (PIRT 226:20-23) and to free
9 medical care if they develop PTSD or become suicidal in the future, even 10 years from now. (*Id.*
10 at 230:5-11.) VA’s obligation to provide this care is “a sacred mission.” (*Id.* at 227:12-21.)

11 13. Mr. Kearns, VHA’s CFO, testified that VHA is not currently facing a budget crisis and
12 has adequate money to “meet the mission requirements.” (PIRT 574:13-18.) Dr. Cross agreed
13 that VA has enough funding from Congress to “carry out [the] mission” to provide the medical
14 care needed, and is in fact currently “running under budget.” (*Id.* at 225:12-19; 239:4-10.)
15 VHA’s current budget provides enough funding to cover even a “worst-case scenario of returning
16 troops with mental illness.” (*Id.* at 787:17-20.) From 2004 to present, VHA’s medical care
17 budget included “unspent multi-year appropriations funds carried forward from the previous
18 year” — money that could have been spent providing mental health care to veterans. (Kearns
19 Decl. ¶ 5; PIRT 559:23-561:2; 567:19-568:13.) At the end of FY2007, \$1.3 billion was carried
20 over to the FY2008 budget. (Ex. 305 at 1; Kearns Decl. ¶ 5.) At least \$500 million was carried
21 over from the FY2006 VHA budget to the FY2007 budget. (Ex. 305 at 1; PIRT 572:4-9.) There
22 are currently approximately 3,800 unfilled mental health positions at the VA. (PIRT 419:10-14.)
23 As of October 31, 2007, there were 2,403 unfilled nursing positions and 1,394 unfilled doctor
24 positions. The VA, however, has enough money to fill these positions and “enough money and
25 funding to carry out our mission” with respect to providing medical care to veterans. (*Id.* at
26 222:22-225:23; 230:23-231:24; Ex. 316 at 20; Ex. 319 at 19.)

27 **II. VHA FAILURE TO IMPLEMENT MENTAL HEALTH STRATEGIC PLAN**

28 14. VA adopted the Comprehensive Mental Health Strategic Plan (“MHSP”) in July 2004.

1 (Ex. 398.) One of the initiatives in the MHSP was to “[r]educe suicides among veterans.” (*Id.* at
2 A-2.) A key component of the MHSP was to “[d]evelop methods for tracking veterans with risk
3 factors for suicide and systems for appropriate referral of such patients to specialty mental health
4 care.” (*Id.* at A-29.) Another vital component of the MHSP was expanding access to mental
5 health services in Community Based Outpatient Clinics (“CBOCs”). (*Id.* at A-6.) The MHSP
6 also requires screening returning veterans for mental health issues is also required by the MHSP.
7 (*Id.* at A-5, A-27.)

8 15. William Feeley, as Deputy Under Secretary for Health Operations and Management, is
9 responsible for the implementation of policy and procedure in the 21 Veterans Integrated Service
10 Networks (“VISNs”). According to Mr. Feeley, when it comes to compliance, “the buck stops
11 with [him].” (Ex. 1259 at 20:20-21:5; 50:7-22; 54:23-55:13.) On June 1, 2007, Mr. Feeley
12 issued a memorandum to all VISN Directors regarding “Mental Health Initiatives” (“the Feeley
13 Memo”). These “initiatives” purportedly served to “reinforce the priorities established by the
14 VHA Comprehensive Mental Health Strategic Plan,” adopted in July 2004. (Ex. 148.) However,
15 Mr. Feeley admitted he was not aware of any steps taken to implement the MHSP prior to the
16 release of his Memo, and did not know whether prior to that time, VISN directors had or were
17 supposed to implement the MHSP in their VISNs. (Ex. 1259 at 78:22-79:8; 79:19-80:5; 88:10-
18 14; 154:19-155:9.) The asserted driving force behind the Feeley Memo was “the importance of
19 getting the specific implementations of the mental health plan starting to roll out,” which he
20 believed was “overdue.” Mr. Feeley acknowledges, however, that his memo was not intended to
21 implement all of the MHSP initiatives. (Ex. 1259 at 198:25-199:22; 220:20-24.)

22 16. VA admits it is not monitoring compliance with the MHSP’s requirement that VA
23 track all veterans with risk factors for suicide. When asked why not, Mr. Feeley responded: “I
24 have no answer other than we haven’t done it, and that’s a good suggestion.” (Ex. 1259 at 158:5-
25 159:10; 163:9-14.) Mr. Feeley also admitted that he does not know whether a national program
26 for suicide prevention was developed as directed by the MHSP. (*Id.* at 93:8-15.)

27 17. The only metrics used to track implementation of the Feeley Memo are (1) the number
28 of vacant mental health staff positions and (2) the number of veterans waiting for mental health

1 appointments beyond the 30-day standard. (Ex. 1259 at 27:20-28:16; 267:5-16.) VA is not
2 tracking whether veterans seeking or referred for mental health care receive an initial evaluation
3 within 24 hours, as required by the Feeley Memo. As of April 9, 2008, Mr. Feely did not know
4 how many VA Medical Centers (“VAMCs”) or CBOCs had actually implemented the 24-hour
5 provision. (Ex. 1259 at 247:25-248:15; 257:19-258:1.)

6 18. VA’s reliance on site visits to ensure implementation of the provisions of the Feeley
7 Memo is inadequate. Between August 1, 2007 and March, 2008, only two site visits had
8 occurred. (Ex. 1259 at 254:20-255:13; 257:1-12.) Dr. Antonette Zeiss is the Deputy Chief
9 Consultant for the Office of Mental Health Services in the VA Central Office. (PIRT 395:9-12.)
10 According to her, the first site visit occurred three weeks before the preliminary injunction
11 hearing, in March 2008. (PIRT 457:9-13) That visit to Los Angeles revealed areas where 100%
12 implementation had not yet been achieved. (*Id.* at 456:4-14.) Dr. Zeiss further testified “[w]e
13 don’t have a specific plan” for monitoring VA facilities for compliance with the Feeley Memo
14 and therefore “can’t say” when that will happen. (*Id.* 458:6-14.) No one at VA audits facilities
15 that contract with VA to ensure that they are complying with the Feeley Memo. (*Id.* 459:2-19.)

16 19. On May 10, 2007, VA Office of Inspector General (“OIG”) issued a report, entitled
17 “Implementing VHA’s Mental Health Strategic Plan Initiatives for Suicide Prevention” (“May
18 2007 OIG Report”). (Ex. 133.) That report concluded that many components of the Plan had not
19 been implemented. For example, screening, assessment of veterans at risk, emerging best
20 practices, suicide prevention database, and education programs were all only in the “Pilot Stage.”
21 (*Id.* at 53.) Four other programs were implemented only at certain VISNs. (*Id.*) Only one
22 program (research) had been implemented systemwide. (*Id.*)

23 20. The May 2007 OIG Report also found 61.8% of VA facilities had not implemented a
24 suicide prevention strategy to target veterans returning from Iraq and Afghanistan. (Ex. 133 at
25 37.) In addition, 42.7% of VA facilities had not implemented a program to educate first contact
26 non-clinical personnel about how to respond to crisis situations involving veterans at risk for
27 suicide. (*Id.* at 46.) Of those facilities who had implemented such programs, 30.3% were not
28 mandatory. (*Id.*) Seventy percent of VA facilities had not implemented a tracking system for

1 veterans with risk factors for suicide. (Ex. 133 at 33.) In addition, 16.4% of VA facilities had not
2 implemented a system to facilitate referral of veterans with risk factors for suicide. (*Id.* at 25, 30.)

3 21. CBOCs only provide outpatient services during regular business hours, generally
4 Monday through Friday from 8 a.m. until 4:30 or 5:00 p.m. (PIRT 169:19-25.) VA's failure to
5 provide 24-hour access to mental health services is a critical defect in VA's provision of care and
6 further evidence of its failure to implement the MHSP. (RT 312:24-313:2.)

7 22. In fiscal year 2005, \$12 million of \$100 million allocated for spending on the MHSP
8 was not spent and in FY06, \$88 million of the \$200 million allocation was left unspent. (Kearns
9 Decl. ¶ 8; PIRT 563:9-564:7.)

10 **III. DELAYS IN THE RECEIPT OF MENTAL HEALTH CARE**

11 23. The May 2007 OIG Report found delays in obtaining referrals for depression and
12 PTSD. Where a primary care provider refers a patient with symptoms of moderate severity for
13 depression, 24.5% of VA facilities reported a wait time of 2-4 weeks and 4.5% reported a wait
14 time of 4-8 weeks. (Ex. 133 at 31.) The wait times for PTSD referrals were even longer, with
15 26.4% reporting 2-4 week waiting periods and 5.5% reporting waits as long as 4-8 weeks. (*Id.* at
16 32.)

17 24. On September 10, 2007, VA's OIG issued a report entitled, "Audit of the Veterans
18 Health Administration's Outpatient Waiting Times" ("Sept. 2007 OIG Report"). (Ex. 169.) That
19 report was prepared at the request of the U.S. Senate Committee on Veterans' Affairs. (*Id.* at i.)
20 Its purpose was to follow up on a July 2005 audit, reporting that "VHA did not follow established
21 procedures when scheduling medical appointments for veterans seeking outpatient care." (*Id.*)
22 That July 2005 report made eight recommendations for corrective action, five of which the Sept.
23 2007 OIG Report found had not been implemented. (*Id.* at vi.)

24 25. The Sept. 2007 OIG Report found that "(25 percent) of the appointments we reviewed
25 had waiting times over 30 days when we used the desired date of care that was established and
26 documented by the medical providers in the medical records." (Ex. 169 at ii, 5.) The report
27 found that "(72 percent) of the 600 appointments for established patients had unexplained
28 differences between the desired date of care documented in medical records and the desired date

1 of care the schedulers recorded in VistA [the electronic waiting list].” (*Id.* at iii, 7.) The report
2 also found that “[o]f the 100 pending consults, 79 (79 percent) were not acted on within the 7-day
3 requirement and were not placed on the electronic waiting list. Of this number, 50 veterans had
4 been waiting over 30 days without action on the consult request.” (*Id.* at vi.)

5 26. The Sept. 2007 OIG Report also found that schedulers were not adequately trained.
6 Of 113 schedulers interviewed, 47% had no training on consults within the last year, and 53% had
7 no training on the electronic waiting list in the last year. (Ex. 169 at vi.) The report states:
8 “While waiting time inaccuracies and omissions from electronic waiting lists can be caused by a
9 lack of training and data entry errors, we also found that schedulers at some facilities were
10 interpreting the guidance from their managers to reduce waiting times as instruction never to put
11 patients on the electronic waiting list. This seems to have resulted in some ‘gaming’ of the
12 scheduling process.” (*Id.*) The Sept. 2007 OIG Report also found that VA “has not implemented
13 effective mechanisms to ensure scheduling procedures are followed.” (*Id.* at 9.) The Sept. 2007
14 OIG Report concluded that, “VHA’s method of calculating the waiting times of new patients
15 understates the actual waiting times.” (*Id.* at iii, 7.)

16 27. As of April 2008, according to VHA’s data, there are approximately 85,450 veterans
17 on VHA waiting lists for mental health services. (Ex. 1244.) Patients who wait up to 30 days for
18 an appointment are not included in the electronic waiting lists. (PIRT 635:10-16.) A report from
19 the South Dakota VA facility found that for the first quarter of 2008, “access/timeliness” was one
20 of the top three patient complaints. (Ex. 1296.)

21 28. The Special Committee on PTSD issued its first report on ways to improve VA’s
22 PTSD services in 1985, and its latest report in 2004. (Ex. 37 at 2.) In a 2005 report: “VA Should
23 Expedite the Implementation of Recommendations Needed to Improve Post-Traumatic Stress
24 Disorder Services” (“PTSD Report”), the U.S. Government Accountability Office (“GAO”)
25 found that none of the 24 recommendations made by the Special Committee on clinical care were
26 fully implemented, including 10 recommendations that dated back to the 1985 report. (*Id.* at 5.)

27 29. In the PTSD Report, GAO found VA had only partially met the recommendation to
28 “[p]rovide increased access to PTSD services.” (*Id.* at 26.) Although VA was treating more

1 veterans for PTSD, it had not developed referral mechanisms in CBOCs that do not offer mental
2 health services. (*Id.* at 26-27.) GAO also found VA had not met 10 of the 24 Special Committee
3 recommendations related to PTSD clinical care and education, including (1) extending efforts to
4 monitor productivity and quality of specialized services across the PTSD continuum of care; (2)
5 expanding PTSD treatment to include family assessment and treatment services; (3) designating a
6 PTSD coordinator in each VISN; (4) developing a national PTSD education plan for VA; and (5)
7 developing credentialing standards for VA clinicians specializing in PTSD. (*Id.* at 30-31.)
8 GAO's PTSD Report concluded that "VA's delay in fully implementing the recommendations
9 raises questions about VA's capacity to identify and treat veterans returning from military combat
10 who may be at risk for developing PTSD, while maintaining PTSD services for veterans currently
11 receiving them." (*Id.* at 3.) Despite GAO's findings, schedulers currently "are not given specific
12 training about PTSD." (PIRT 166:21-24.)

13 30. Dr. Frances M. Murphy was Deputy Under Secretary for Health for Health Policy
14 Coordination. She was VA's representative to the President's New Freedom Commission on
15 Mental Health ("Commission"), created to improve mental health care. (Ex. 1262 at 124:2-14.)
16 Dr. Murphy helped draft the MHSP. (*Id.* at 37:1-15.) On March 29, 2006, she stated: "In some
17 communities, VA clinics do not provide mental health or substance abuse care or waiting lists
18 render that care virtually inaccessible." (Ex. 397 at 7.)

19 31. In the fall of 2005, Dr. Murphy informed then Secretary Nicholson that there were
20 "still significant gaps in delivery of substance abuse care, and that in certain areas of the country
21 mental health access was still not meeting VHA standards." (Ex. 1262 at 32:14-33:13; 35:7-
22 36:15.) In February, 2006, VA eliminated Dr. Murphy's position, telling her they were closing
23 her office as of April, 2006, and refusing to give her an explanation. (Ex. 1262 at 24:13-23;
24 103:16-25; 107:16-17.) Mr. Kussman offered her an "early retirement". (*Id.* at 68:8-69:4.) Dr.
25 Murphy stood by her criticism of VA's delivery of care testifying "the statement was accurate"
26 and "the data that it was based on was VHA data." (*Id.* at 165:8-15.)

27 32. Suicide Prevention Coordinator positions exist only at VA Medical Centers, of which
28 there are 153 nationwide. (RT 1318:10-1319:3; Ex. 357.) The more than 800 CBOCs, where

1 most veterans receive care, do not have suicide prevention coordinators. (*Id.*)

2 33. Eligibility determinations are the only medical care-related decisions that may be
3 appealed to the BVA. *See, e.g.*, 38 C.F.R. §§ 19.29, 19.30, 20.201, 20.202. Plaintiffs do not
4 challenge the process by which eligibility determinations are made by VA.

5 34. The clinical appeals process does not apply to denials or delays in access to care that
6 do not involve clinical decisions. (PIRT 656:5-9.) For example, if a scheduler or clerk tells a
7 veteran that there are no available appointments within the time frame requested by the patient,
8 the clinical appeals process does not provide a resolution because the scheduler's "decision" is
9 not clinical. (*Id.* at 705:6-20.) All disputes regarding the course of treatment are handled through
10 an informal clinical appeals process outlined in VHA Directive 2006-057. (Ex. 536.) The
11 clinical appeals process is unnecessarily complex and, in practice, fails to resolve patients'
12 concerns about the course of their treatment. (Ex. 536 at A-1; *see, e.g.*, Decl. of Sister 1 at 3:17-
13 19; 4:20-21; 4:23-28; Decl. of Brother 1 at 2:16-21; 4:3-6; Decl. of Girlfriend 1 at 2:1-4.)

14 35. The clinical appeals process does not provide a decision by a neutral party; rather, the
15 VISN director is responsible for the decision, including whether to seek an "external appeal" and
16 whether to disregard the recommendation resulting from the appeal. (Ex. 536; PIRT 660:25-
17 661:8.) The veteran has no right to initiate this external appeal, nor does the veteran have a right
18 to know that an external appeal has been initiated or what the resulting recommendation was.
19 (PIRT 715:17-718:14.) According to Dr. Murawsky, Director of VISN 12, if a veteran wants to
20 know the outcome of the external appeal, the veteran can file an FOIA request. (*Id.* at 718:15-
21 719:13.) Because veterans are not adequately notified regarding the clinical appeals process, and
22 because of the complex nature of the process, few patient complaints make it to the formal appeal
23 stage. (PIRT 643:22-644:2.) For example, Dr. Murawsky testified he only sees, on average, six
24 formal appeals in his VISN per year. (*Id.* at 643:22-23.)

25 36. The patient advocacy program does not provide an adequate remedy for veterans
26 denied timely access to care. VA explains "[t]he Patient Advocate Program is a system that VHA
27 has in place to provide patients with a surrogate or an individual to help them grieve any issues
28 they have or walk through any problems they have with VHA." (PIRT 638:16-19.)

1 37. Dr. Ronald Maris is an expert in suicidology and a distinguished professor emeritus at
2 the University of South Carolina. Dr. Maris has published approximately 100 books, articles, and
3 chapters on the topic of suicide and suicide prevention. (RT 264:18-266:8.) The Court finds that
4 Dr. Maris was more credible, and evidenced a greater understanding of the issues, than
5 Defendants' expert, Dr. Berman, who only consulted on the case for four days and a total of
6 approximately 25-30 hours. (RT 1303:14-1304:1.)

7 38. Dr. Maris testified that the approximately 170 veteran suicide reports he read exposed
8 significant and dangerous departures from standards of care by VA. (Ex. 1331; RT 294:18-
9 296:22.) Dr. Maris determined that VA delayed treatment of suicidal veterans, neglected to
10 evaluate patients for suicide risks, failed to commit veterans requiring inpatient psychiatric care,
11 and ignored its own policies on suicide assessment and appointment scheduling. (*Id.*)

12 39. VA's failure to implement the MHSP is further evidenced by its failure to develop a
13 proper suicide screening mechanism. (Ex. 398 at A-5, A-27.) The suicide screen currently used
14 by VA is inadequate (RT 287:18-289-24; 291:17-293:13) and, incomplete because it does not
15 require additional screening considered clinically necessary when a patient reports feeling
16 depressed and hopeless. (RT 1325:19-1328:12.) If veterans were receiving proper and timely
17 care for their mental ailments, the suicide rate should be lower. (RT 310:18-311:5.)

18 **IV. DELAYS IN VBA'S SCDDC ADJUDICATION SYSTEM**

19 **A. Disabled Veterans and Their Survivors Have Both a Need and Strong Interest** 20 **in SCDDC**

21 40. Defendants' Answer admits that "[s]ervice-connected injuries frequently interfere with
22 the quality of life and/or preclude employment of a veteran upon return to civilian life, while
23 deaths often deprive a veteran's dependents of their principal or sole means of support." (Pls.'
24 Pretrial Stmt., Att. C, Pleading Desig. From Defs.' Answer, 10:25-26.) Defendants' Answer to
25 also admits that "[m]any PTSD claimants and recipients are frequently incapacitated, and many
26 recipients are totally or primarily dependent upon SCDDC for support and upon VA Medical
27 Services for their health care needs." (*Id.*) Approximately 82% of Army personnel and 89% of
28 Marines have only a high school education or less. (RT 358:1-14.) There are approximately

1 154,000 homeless veterans on any given night. (RT 503:17-22.)

2 41. In 2004, Congress created the Veterans' Disability Benefits Commission, which
3 conducted an in-depth analysis of the benefits and services available to veterans for the effects of
4 disabilities attributable to military service. (Ex. 386 at 1.) The Commission issued, in October
5 2007, its final report entitled, "Honoring the Call to Duty: Veterans' Disability Benefits in the
6 21st Century." (*Id.*) The report found that disabled veterans have the lowest average earned
7 income, with a significant gap between them and a non-disabled comparison group. (*Id.* at 218.)
8 The report also found that without VA compensation, service-connected veterans have on average
9 earned income significantly less than non-service-connected veterans, who already have
10 significantly lower incomes than the general population. (*Id.* at 220.)

11 42. The Commission's report also found that "[f]or every age group and rating percentage
12 group, the average earned income of service-connected veterans with mental primary disabilities
13 is less — substantially less at higher rating percentages — than the average earned income of
14 service-connected veterans with physical primary disabilities." (*Id.* at 225.) Average earned
15 income of veterans with mental primary disability is significantly less than that of veterans with
16 physical primary disability, no matter what the rating of disability. (*Id.*)

17 **B. VBA's Adjudication Process for SCDDC Claims for PTSD**

18 43. The VBA includes the Compensation and Pension service that administers SCDDC,
19 which VBA views as its "core mission." (RT 883:9-15; 885:8-22; 893:5-9.) The Veterans
20 Service Center within each of VBA's 57 Regional Offices ("ROs") is responsible for adjudicating
21 veterans' and their survivors' claims for SCDDC. (RT 887:22-888:8.)

22 44. To establish a claim for SCDDC, there must be evidence of a disability, service in the
23 military, and a nexus between the disability and one's service. (RT 887:6-11.) Approximately
24 88% of veterans are granted SCDDC for at least one claimed disability. (RT 1042:10-24.)
25 Admiral Daniel Cooper, the Undersecretary for Benefits at VA until April 2008, testified that
26 veterans' disability benefits are "entitlements." (Ex. 1258 at 14:11-22; 55:23-56:5.)

27 45. Veterans pursuing a SCDDC claim for PTSD have the additional burden of proving a
28 "stressor" event in his or her service. (RT 952:22-953:8.) This additional requirement makes

1 SCDDC claims for PTSD unique from all other claims. (*Id.*) SCDDC claims for PTSD are one
2 of the most complex types of claims that VBA adjudicates, in part due to the subjectivity involved
3 in adjudicating PTSD claims. (Ex. 1257 at 142:25-143:9; RT 406:1-14.)

4 46. A claim for SCDDC begins with the filing of a 23-page application on VA Form 21-
5 526. (RT 408:12-20; Ex. 1069.) Veterans often make mistakes when completing the application
6 for SCDDC benefits, and veterans suffering from PTSD have special difficulty completing the
7 application. (RT 348:9-25; 398:9-13.) Veterans seeking SCDDC for PTSD based on a stressor
8 experienced during combat also complete a VA Form 21-0781, entitled “Statement in Support of
9 Claim for Service Connection for Post-Traumatic Stress Disorder.” (RT 409:23-410:3;
10 Ex. 1321.) Veterans get frustrated completing this form when they do not remember the details
11 of the stressor that caused their PTSD. (RT 410:12-412:10.)

12 47. Upon receiving a substantially complete application for benefits from a veteran, VBA
13 has a duty to notify the veteran, under the Veterans Claims Assistance Act (“VCAA”), of any
14 information that is necessary to substantiate the claim. (RT 940:10-941:18; 38 U.S.C. § 5103.)
15 The notice provided in the “VCAA letter” must indicate which information is to be provided by
16 the veteran and which information VBA will attempt to obtain on behalf of the veteran. (*Id.*)

17 48. VBA also has a duty to assist veterans under the VCAA. (RT 923:8-11; 38 U.S.C.
18 § 5103A.) VBA’s duty to assist veterans includes providing a medical examination or obtaining a
19 medical opinion. 38 U.S.C. § 5103A(d). The medical examination is known as a Compensation
20 and Pension Examination (“C&P Exam”). (RT 946:22-947:6; 951:18-21.)

21 49. The VCAA also imposes on VBA a duty to assist veterans in obtaining private and
22 federal records needed to substantiate their claims. 38 U.S.C. § 5103A(b)-(c). The records
23 needed to substantiate a claim for disability compensation include medical records from the
24 veteran’s service, private medical professionals, and VHA healthcare facilities. *Id.*

25 50. Once all evidence is gathered, a Rating Veterans Service Representative (or “rating
26 specialist”) within an RO decides whether the disability is service connected and assigns a rating
27 to the claim. (RT 895:16-20; 956:19-957:9.) The rating assigned to a claim is based on a rating
28 schedule, which is a sliding scale of monthly compensation ranging from \$115 per month for a

1 10% rating to \$2471 per month for a 100% rating. 38 U.S.C. § 1114.

2 51. Veterans dissatisfied with an RO's decision have one year to file an NOD. 38 U.S.C.
3 § 7105(b)(1). Upon receiving a Notice of Disagreement ("NOD"), the RO sends the veteran an
4 election letter to choose between a *de novo* review with a Decision Review Officer ("DRO") or
5 just asking the RO to issue a Statement of the Case ("SOC"), explaining the reasons for its initial
6 decision. (RT 1009:2-19; 38 U.S.C. § 7105(d)(1).) To continue the appeal, a veteran has 60 days
7 to file a substantive appeal on a VA Form 9 after receiving the SOC. (RT 1010:3-15; 38 U.S.C.
8 § 7105(d)(3).) When an RO receives a veteran's Form 9 substantive appeal, the RO must then
9 certify the appeal to BVA. 38 C.F.R. § 19.35. There are currently no statutory or regulatory time
10 limits imposed on VA during any step of the adjudication process for SCDDC. (RT: 578:22 -
11 579:8; Ex. P-1258 at 13-14.) There are time limits imposed on veterans, however, at various
12 stages of the adjudication process. (RT: 579:7-14.) A veterans' failure to meet certain time limits
13 within the appellate process, results in a jurisdictional dismissal of the appeal. (RT 1024:17-20.)

14 **C. VBA's Inventory of Claims Will Continue Growing**

15 52. On May 22, 2001, the Secretary signed a charter establishing the Claims Processing
16 Task Force ("Task Force"). (Ex. 374 at 1.) The goal of the Task Force was to recommend
17 specific actions that the Secretary could initiate to relieve the claims backlog and make claims
18 processing more efficient. (*Id.*) The Chairman of the Task Force, Admiral Daniel Cooper, issued
19 a report to the Secretary in October 2001. (*Id.* at i.) The report found two categories of claims to
20 be troubling. (*Id.* at 13.) First, it found that the number of claims in process for a period in
21 excess of one year were of "real concern and, except under very unusual circumstances, hard to
22 justify." (*Id.* at 13.) Second, the Task Force found "the time delays to handle appeals and then
23 the time to correct remanded decisions are both unreasonable and unfair to veterans awaiting
24 decisions." (*Id.* at 14.) Admiral Cooper testified during his deposition that these two
25 observations are still applicable today. (Ex. 1258 at 113:22-114:5; 119:6-20.)

26 53. VBA's inventory of pending rating-related claims has increased from 337,742 claims
27 as of January 1, 2005, to 400,450 claims as of April 12, 2008. (Ex. 1322; *see also* Ex. D-544.)
28 The inventory of "appeals requiring adjudicative action" has also increased from 132,421 appeals

1 as of January 1, 2005, to 150,132 appeals as of April 12, 2008. (*Id.*)

2 54. Since October 2001, approximately 1.64 million U.S. troops have been deployed to
3 the conflicts in Iraq and Afghanistan. (Ex. 1253 at iii.) Thus far, 799,791 have left active duty.
4 (Ex. 420 at 5.) VBA has not prepared estimates of the number of PTSD, TBI, and depression
5 claims that are expected to be filed by veterans returning from the Global War on Terror.
6 (RT 1153:15-23.) VBA does not have a contingency plan in place to address an increase in the
7 number of veterans upon the ending of the war in Iraq. (Ex. 1258 at 86:23-87:5.)

8 **D. Extensive Delays for ROs to Adjudicate PTSD Claims**

9 55. SCDDC claims for PTSD take longer to adjudicate than the average SCDDC claim.
10 (RT 120:24-121:2; 406:21-407:16; Ex. 1264 at 160:17-22.) Unlike other claims for SCDDC,
11 VBA must frequently request records from the Joint Services Records Research Center
12 (“JSRRC”) to verify alleged “stressors” because JSRRC is the Department of Defense’s
13 authoritative source for information regarding such events. (Ex. 1257 at 110:11-111:13.) VA
14 does not track the average number of days of pending JSRRC requests. (Ex. 1243 at 12-13.)
15 According to a GAO report, however, it takes approximately one year, on average, for the VA to
16 receive records from JSRRC. (Ex. 380 at 2.) Given the additional requirement of proving a
17 “stressor” event during service and the additional evidence gathering needed to verify “stressors,”
18 PTSD claims take longer to adjudicate than the average claim. Despite the fact that several VBA
19 witnesses testified that VBA’s computer systems were capable of calculating RO processing
20 times for PTSD claims (RT 1005:2-1006:11; Ex. 1260-A.), VA claimed in its interrogatory
21 answers that such information was “not available.” (Ex. 1243 at 12.)

22 56. It takes, on average, 182.3 days from the date of claim for an RO to issue an initial
23 decision on claim types that comprise the “rating bundle.” (RT 936:8-15.) As of April 12, 2008,
24 there were 101,019 rating-related claims pending more than 180 days. (Ex. 1322.) VBA’s
25 strategic goal is to process all claims in 125 days. (RT 936:16-19.) The 182.3-day average
26 processing time is artificially reduced by a number of factors. First, the 182.3-day average
27 processing time includes claims that are processed through the Benefits Delivery at Discharge
28 (“BDD”) program. (RT 1089:16-1090:17.) The clock for claims processed through the BDD

1 program, however, does not start ticking until the moment of discharge, and VBA's goal is to
2 process BDD claims within 60 days of discharge. (*Id.*; Ex. 1257 at 95:6-17.) Second, the
3 182.3-day average processing time includes all claims that comprise the "rating bundle." (RT
4 1154:12-19.) Some of the claim types, unrelated to SCDDC, which comprise the "rating bundle"
5 take less time to process than SCDDC claims. (RT 1158:21-1159:13.) Third, the 182.3-day
6 average processing time does not take into account claims that are prematurely denied and then
7 reopened, sometimes multiple times, resulting in a single claim to generate multiple average
8 processing times well below the 182.3-day average. (RT 132:23-134:24.) Accordingly, the
9 average processing time for SCDDC claims is actually significantly higher than 182.3 days.

10 **E. Extensive Delays in the Appellate Adjudication Process**

11 57. For veterans who pursue an appeal to completion, it takes 1,419 days, on average, to
12 receive a BVA decision after filing an NOD, ranging from 990 to 1,965 days depending on the
13 RO. (Ex. 1323 at VA322-00002551-2; RT 221:22-25.) It takes approximately 4.4 years —
14 182 days for an initial RO decision plus 1,419 days to receive a BVA decision — for a veteran to
15 adjudicate a claim all the way to a BVA decision. (RT 259:22-261:2.) This 4.4-year period
16 excludes the time between an RO's initial decision and a veteran's NOD filing. (RT 261:3-6.)

17 58. The metric "Appeals Resolution Time" measures the average number of days,
18 nationwide, that it takes to resolve appeals from the date an NOD is filed. (RT 568:20-24.) The
19 total "Appeals Resolution Time" includes appeals that are resolved before they reach BVA, such
20 as appellant deaths which are treated as a form of resolution. (RT 568:25-569:3; 1174:2-10.) The
21 total "Appeals Resolution Time" increased from 599 days in April 2005, to 671 days at the end of
22 February 2008. (RT 563:14-16; 567:17-19.) During that same period of time, VBA's internal
23 goal also increased from 500 to 700 days. (RT 563:14-18; 567:13-16.) The "Appeals Resolution
24 Time" is expected to increase by another 100 days in fiscal year 2008. (Ex. 1264 at 265:25-
25 266:14.) Admiral Cooper testified that the 657-day Appeals Resolution Time in fiscal year 2006
26 was "certainly long" and longer than he would like. (Ex. 1258 at 276:11-278:3.)

27 59. It, on average, takes 261 days for an RO to mail an SOC to a veteran after receiving an
28 NOD. (Ex. 1320 at VA322-00002598.) It takes, on average, 43 days for a veteran to file a Form

1 9 substantive appeal after receiving an SOC. (Ex. 1310 at VA322-00002505-06; RT 215:7-
2 216:20.) It takes, on average, 573 days for an RO to certify an appeal to BVA after receiving a
3 Form 9 substantive appeal. (Ex. 1310 at VA322-00002505-06; RT 215:7-217:2.) Some SOCs
4 and certifications of appeals to BVA have been pending for more than 1,000 days. (Ex. 1260 at
5 177:13-25; 179:4-15.) VBA has not studied reasons why appeals have aged this long. (*Id.*)

6 60. Inordinate delays on appeals are, in part, attributable to VBA's decision to focus on
7 original compensation claims. (Ex. 1258 at 99:25-101:14; RT 1129:15-1130:10; 1171:25-
8 1172:18.) Michael Walcoff explained, regarding the "500-some days" period between Form 9
9 filings and certification to the BVA, that "we have put a priority on working the actual claims,
10 and I think that the fact that we haven't put as much a priority on [appellate claims] as maybe we
11 could have, I think in some way contributes to the 500-some days." (RT 1019:15-20.)

12 61. It takes 336 days, on average, for BVA to render a decision on an original appeal (as
13 opposed to a remand returned to the BVA) after a claim is certified to the BVA by an RO.
14 (Ex. 1310 at VA322-00002505-06) BVA does not currently intend to add any new-full time
15 employees in fiscal year 2009, though it is hoping to get authorization to hire 10 more employees.
16 (Ex. 555; RT 645:16-646:18.)

17 62. Veterans have a right to submit new evidence during the appellate adjudication
18 process, but that right alone does not account for the delays in the process. (RT 207:25-208:3;
19 249:9-250:12; 364:9-23; 1019:15-20; 1129:15-1130:10; 1171:25-1172:18.) When a veteran
20 submits new evidence to an RO after receiving an SOC, the RO sends the veteran a Supplemental
21 Statement of the Case (an "SSOC"). (RT 1015:24-1016:20.) Form 9 substantive appeals without
22 an SSOC have been pending for 320 days, on average, compared to Form 9s with an SSOC,
23 which have been pending for almost twice as long or 623 days, on average. (Ex. 1320 at VA322-
24 00002598 & 2600; RT 237:24-238:9.) More veterans would file an appeal if the delays in the
25 appellate adjudication process were shorter. (RT 262:8-21; 419:24-420:7.)

26 **F. Delays in Obtaining BVA Hearings**

27 63. Veterans have the right to a hearing before BVA. (RT 528:23-25.) BVA offers: (1)
28 Travel Board hearings, (2) in-person hearings in Washington D.C. at the expense of the veteran,

1 and (3) videoconference hearings. (RT 529:1-4.) Requests for hearings before BVA have been
2 pending, on average, for 455 days. (Ex. 1324 at VA322-00002653-54; RT 231:12-18.) Requests
3 for videoconference hearings before BVA have been pending, on average, for 458 days. (*Id.*)

4 64. Veterans who receive a BVA hearing are more likely to prevail. (Ex. 1243 at 5.)
5 Claimants who receive a Travel Board, videoconference, or in-person hearing from the BVA in
6 Washington D.C. have at least one issue from the RO's decision overturned 25.3% of the time.
7 (*Id.*) For veterans who do not receive such a BVA hearing, only 18.4% have at least one issue
8 from the RO's decision overturned. (*Id.*) Veterans who receive a hearing are also 10% less likely
9 to have their appeal denied than those who do not receive a hearing — 34% versus 44.7%. (*Id.*)

10 65. More veterans would request BVA hearings if it took less time to get a hearing.

11 **G. BVA Remands Add Further Delay to the Adjudication Process**

12 66. When the BVA remands a claim, it is sent to either the Appeals Management Center
13 (“AMC”) or returned to an RO. (RT 210:10-14.) The BVA's remand rate for claims received
14 from ROs is 41%. (Ex. 1309 at VA322-00002491-92; RT 223:21-224:3.) VBA admits that a
15 processing time of more than one year for remanded claims is not “expeditious.” (Ex. 1258 at
16 188:21-189:8.) It takes, on average, 499.1 days for SCDDC claims to be granted, withdrawn, or
17 returned to the BVA for a second time. (Ex. 1243 at 13.) It takes on average, 563.9 days for
18 PTSD claims to be granted, withdrawn, or returned to the BVA for a second time. (*Id.*)

19 67. After an initial remand, approximately 75% of remanded claims are subsequently
20 returned to BVA for a second time. (RT 544:15-24; Ex. 370 at 3.) It then takes BVA 149 days to
21 render a second decision on a remanded claim returned to it. (Ex. 1310 at VA322-00002505-06;
22 RT 215:7-217:19.) Of the remanded claims returned to BVA by AMC, 27% are remanded by
23 BVA a second time. (Ex. 1309 at VA322-00002491-92; RT 223:21-224:10; 551:3-6.) BVA
24 Chairman Terry explained that claims that are remanded a second time are known as “Stegall
25 violations.” (RT 544:25-545:11.) A “Stegall violation” occurs when BVA's remand instructions
26 are not followed. (RT 544:25-545:11; *Stegall v. West*, 11 Vet. App. 268, 271 (1998).)

27 68. The Task Force's report describes how remands get introduced back into the workflow
28 more than once over a period of time and “churn” in the system at each RO. (Ex. 374 at 13.)

1 BVA Chairman Terry admitted that “the entire system is hurt by remands.” (RT 543:20-25.)

2 **H. Delays in the Adjudication Process Produce Dire Consequences**

3 69. If an award of benefits is granted, it is generally retroactive to the date of the claim,
4 but the veteran is not entitled to interest. (RT 551:7-14; Ex. 1258 at 194:2-13.) The delay in the
5 adjudication process hinders disabled veterans’ ability to make payments on their home and other
6 necessities. (RT 517:25-518:9; PIRT 324:13-325:5.) At least 1,467 appellants died, between
7 October 1, 2007 and March 31, 2008, during the appellate adjudication process. (Ex. 1316 at
8 VA322-00002613-24; RT 254:6-255:2.) When an appellant dies, the appeal is extinguished. (RT
9 1173:24-1174:1.) Michael Walcoff agreed that one appellant death is one too many, and the issue
10 is something that the VBA must do something about. (RT 1173:7-23.)

11 **I. VBA’s Alleged “Fixes” Do Not Moot Plaintiffs’ Claims**

12 70. The BDD program enables servicemen and servicewomen to apply for disability
13 compensation up to 180 days before discharge from service. (RT 1091:14-21.) Defendants’
14 Answer to Plaintiffs’ Complaint admits that “PTSD can develop at any time after exposure to a
15 traumatic stressor. When PTSD does not appear until six months or more after the exposure to
16 the traumatic event, it is termed ‘delayed onset.’ For veterans, it often emerges several months
17 after return to civilian life.” (Pls.’ Pretrial Stmt., Att. C, Pleading Desig. From Defs.’ Answer
18 at 8:8.) The BDD program is thus of limited benefit to veterans who suffer from PTSD.

19 71. On April 16, 2008, VBA proposed a new pilot program for expedited claims
20 adjudication (Ex. 557.) The two-year program would be limited to four ROs. (*Id.*) The program
21 would ask veterans to sign a waiver upon filing a claim, shortening time limits imposed on them
22 during the process. (*Id.*) Veterans have always been able to waive these time limits. (RT
23 1169:14-17.) The program imposes an unenforceable time limit on VBA during of the appellate
24 process — from a veteran’s Form 9 filing to an RO’s certification to BVA. (RT 1167:10-1168:9.)
25 There are “no consequences” if VBA exceeds the time limit. (RT 1024:11-16; 1168:10-14.)

26 72. Michael Walcoff announced at trial that VBA would pursue two new efforts to reduce
27 the delays in the appellate process at ROs. (RT 1020:6-1021:9.) First, VBA will establish
28 resource centers dedicated to appellate work. (*Id.*) Mr. Walcoff, however, testified that he has

1 not even seen the plan to create these resource centers. (RT 1162:7-8.) Second, VBA will
2 emphasize appellate performance measures in evaluations. (RT 1020:6-1021:9.) ROs have not
3 yet reassigned more people to work on appeals. (RT 1163:4-13.)

4 73. No evidence was presented concerning the effectiveness of these proposed measures
5 in reducing the lengthy delays in the adjudication process

6 **V. ERROR RATES IN THE ADJUDICATION PROCESS ARE HIGH**

7 74. Of the approximately 100,000 NODs filed in fiscal year 2006, 33,000 (or 33%) were
8 resolved between the filing of the NOD and certification to BVA. (Ex. 386 at 318-320.)

9 75. BVA issued 40,401 decisions in fiscal year 2007. (Ex. 370 at 19.) Ninety-five percent
10 of BVA's decisions were claims for SCDDC. (*Id.*) 21.6% of those compensation decisions
11 reversed at least one issue decided by the RO. (*Id.*) A veteran dissatisfied with a BVA decision
12 can appeal to the U.S. Court of Appeals for Veterans Claims ("CAVC"). (RT 588:14-16.) Of the
13 CAVC's 3,211 decisions on the merits in 2007, the CAVC either remanded or reversed the BVA,
14 in whole or in part, 64% of the time. (Ex. 1097; RT 591:12-17.)

15 76. An "avoidable remand" is a remand that is identifiable before an RO certifies the
16 appeal to BVA. (RT 553:5-8.) Between January 1 and March 31, 2008, approximately 44% of
17 the 16,633 reasons for BVA remands were identifiable before certification to the BVA if the ROs
18 had fulfilled their duty to assist, their duty to notify, and due process requirements. (Ex. 1312 at
19 VA322-00002521-22; RT 234:23-236:3, 559:9-560:10.) The vast majority of avoidable remand
20 reasons were attributable to violations of the duty to assist. (RT 556:16-24.) VA admits that
21 violating the duty to assist is one of the most common errors made by ROs. (RT 1166:17-20.)

22 77. VA has the ability to reduce avoidable remands. (Ex. 1257 at 119:19-21.) Asked if
23 PTSD claims have a higher avoidable remand rate than average, Chairman Terry testified that
24 PTSD claims have a "higher number than we would like." (RT 561:16-562:3.)

25 78. A survey of VBA rating specialists found that 70% of the rating specialists surveyed
26 believed that speed was emphasized over accuracy. (Ex. 414 at VA007-00000258.) 84% of the
27 rating specialists also believed that too much emphasis was placed on speed. (*Id.*)

28 79. During the first six months of fiscal year 2006, approximately 28% of RO decisions on

1 PTSD claims, in which the veteran sought an increased rating on appeal from the BVA, were
2 overturned. (Ex. 1230 at 67, 83; RT 599:25-601:20.) In contrast, on average, only 15% of RO
3 decisions on claims for an increased rating were overturned by the BVA. (*Id.*) A VA Office of
4 Inspector General report, dated May 19, 2005, found that there were variances in average
5 disability compensation among the 50 states, and attributed 34.1% of the variance to the
6 distribution of veterans who were assigned a 100% rating for PTSD. (Ex. 392 at 43-45.)

7 80. The adjudication process at the initial RO level has become adversarial. (RT 348:12-
8 349:12; *see also Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998).)

9 VI. PROCEDURAL INADEQUACIES OF VBA'S ADJUDICATION PROCESS

10 81. A veteran never finds out which rating specialist rated his or her claim, and rating
11 specialists never attend hearings. (RT 202:16-203:5; 1046:24-25; Ex. 1261 at 159:22-160:5.)

12 82. Approximately 64% of veterans receiving disability compensation from VA have in
13 place a Power of Attorney designating a representative to act on their behalf. (Ex. 392 at 24.)

14 VA does not provide training to veterans' service officers regarding how to do their jobs. (RT
15 934:4-13.) All of the VSOs combined cannot meet the need of veterans. (RT 514:19-515:1.)

16 83. Paid attorneys are permitted at every stage of the adjudication process except the
17 initial stage at the RO level. (*Id.*) Paid attorneys at the initial RO level of the adjudication
18 process would reduce the overall delays in the process by submitting complete applications for
19 SCDDC. (RT 348:9-349:12; 514:19-516:6.)

20 84. The evidence shows that hearings are rarely, if ever, held prior to an initial decision by
21 an RO. (Ex. 1258 at 294:14-295:17; Ex. 1264 at 189:8-190:3; 191:3-6.) The evidence also
22 shows that having a hearing increases a veteran's likelihood of success (Ex. 1243 at 5), and that
23 the RO stage is the most critical part of the adjudication process because it is where the record is
24 built (RT 359:5-360:6.) The Court finds that the absence of pre-decisional hearings is linked to
25 the prohibition against paid counsel at the RO level and also points to the value of paid counsel,
26 for it is likely that any counsel armed with evidence about the higher success rates for claims with
27 hearings would likely ask for a hearing.

VII. EXTRAORDINARY AWARDS PROCEDURE VIOLATES VETERANS' RIGHTS

85. The Compensation & Pension Service ("C&P Service") is an organization within the VA's central office in Washington D.C. (RT 903:13-17; 904:22-24.) The C&P Service is responsible for setting the policies governing the adjudication of SCDDC claims (RT 903:13-904:7); it is not empowered to decide veteran claims (Ex. 1260 at 237:9-16).

86. The C&P Service conveys policies and procedures to the ROs by publishing manuals. (RT 905:22-25.) The C&P Service issues "Fast Letters" to RO directors when there are changes to a procedure within a manual. (RT 913:4-15.) ROs are expected to abide by the terms of a Fast Letter. (RT 913:13-15.) In Fast Letter 07-19, dated August 27, 2007, the C&P Service outlined an "extraordinary awards" procedure for ROs to follow in claims that would result in a retroactive payment of at least eight years or greater than \$250,000. (Ex. 375-A at 1-2; RT 1043:2-12.) This procedure has no basis in statute or regulation. (Ex. 1260 at 236:9-25.) The procedure directs ROs to send the claims folder for all cases meeting the criteria to C&P Service for a concurring decision before the award is promulgated to the veteran. (*Id.*) In the selection process, VBA only looks at grants, not denials. (RT 1044:18-20.) Veterans are never notified that their claims are reviewed pursuant to this procedure. (RT 1045:17-19; Ex. 164 at 287:9-12; 288:9-14.)

87. C&P Service has reviewed approximately 800 rating decisions pursuant to the extraordinary awards procedure. (RT 1043:20-22.) The vast majority of those reviews resulted in a reduction to the proposed benefit. (Ex. 1264 at 286:5-12.) The C&P Service has only recommended that one proposed award be increased. (Ex. 1264 at 280:8-12.)

CONCLUSIONS OF LAW

I. JURISDICTION & STANDING

1. Plaintiffs do not challenge the decision of the Secretary on any individual SCDDC determinations or directly challenge any VA regulation; therefore this Court has jurisdiction to decide Plaintiffs' claims. 38 U.S.C. § 511.

2. Both plaintiff organizations have standing to bring this lawsuit and to obtain systemic relief regarding both VA mental health care and SCDDC adjudications. *Warth v. Seldin*, 422 U.S. 490, 515 (1975); (RT 666:3-10; 671:10-16; 813:17-19; 813:24-814:9.)

1 **II. STATUTORY MANDATES GOVERN VA MENTAL HEALTH CARE**

2 3. VA is required to provide veterans with medical care, as codified in the Veterans'
3 Health Care Eligibility Reform Act of 1996, 38 U.S.C. §§ 1704 *et seq.* The statute mandates
4 health care for two separate groups of veterans: (1) veterans who have established service-
5 connected disabilities through the adjudication process; and (2) combat veterans within five years
6 of their discharge, irrespective of whether “there is insufficient medical evidence to conclude that
7 such condition is attributable to [combat] service.” 38 U.S.C. §§ 1710(a)(1), (e)(1)(D).

8 4. “Shall” in § 1710 modifies both (a)(1) and (a)(2); the Secretary is required to (1)
9 determine what medical services are “needed” and (2) provide those services in accordance with
10 the statutory scheme. *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (“Congress could not
11 have chosen stronger words to express its intent[.]”); *see also Ctr. for Biological Diversity v.*
12 *Norton*, 254 F.3d 833 (9th Cir. 2001). The Secretary has determined that mental health care and
13 suicide prevention are “needed” for veterans (Prelim. Inj. Opp’n at 12:15-17), and now must
14 provide those services in accordance with the statutory scheme. VA’s obligation to provide care
15 under § 1710(a) is not subject to the language in section (e)(1)(D) limiting certain obligations to
16 the extent of congressional appropriations. *VCS*, 2008 WL 114919, at *18.

17 5. VA is required to furnish veterans with established or presumed service-connected
18 disabilities (including “mental defect[s]”) with “hospital care and medical services,” including
19 “medical examination, treatment, and rehabilitative services.” 38 U.S.C. §§ 1701(1), (6),
20 1710(a)(1), (a)(2). VA must also “ensure that the [health care] system will be managed in a
21 manner to ensure that the provision of care to enrollees is timely and acceptable in quality.”
22 38 U.S.C. § 1705(b)(1).

23 **III. STATUTORY MANDATES GOVERN SCDDC ADJUDICATION**

24 6. 38 U.S.C. § 1110 creates a “basic entitlement” for veterans and a statutory duty for
25 VA to provide veterans with SCDDC , including for PTSD. VA must adjudicate those claims
26 “within a reasonable time.” 5 U.S.C. § 555(b).

27 7. 38 U.S.C. § 7101(a) requires the Board of Veterans’ Appeals to maintain as many
28 members “as may be found necessary in order to conduct hearings and dispose of appeals

1 properly before the Board in a timely manner.” 38 U.S.C. § 5109B requires the Secretary to take
2 such actions as may be necessary for an RO to expeditiously resolve a claim remanded from the
3 BVA. 38 U.S.C. §5103A(a)(1) requires VA to assist veterans in developing their claims.

4 **IV. ADMINISTRATIVE PROCEDURE ACT**

5 8. “[T]here is a strong presumption in favor of judicial review of administrative action.”
6 *Wang v. Chertoff*, No. CIV 07-077-TUC-GEE, 2007 U.S. Dist. LEXIS 87419, *10 (D. Ariz. Nov.
7 26, 2007). Section 702 of the APA provides a valid “waiver of sovereign immunity in suits
8 seeking judicial review of a federal agency action under [28 U.S.C.] § 1331.” *Gallo Cattle Co. v.*
9 *Dep’t of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998); 5 U.S.C. § 702.

10 9. Under the APA, the District Court “shall . . . compel agency action unlawfully
11 withheld or unreasonably delayed.” 5 U.S.C. § 706(1). APA injunctive relief is mandatory if the
12 Court determines that the agency action is being unreasonably delayed or withheld.

13 10. As this Court has already held, delay in mental health care or adjudication of SCDDC
14 claims is discrete and final agency action. *VCS*, 2008 WL 114919, at *6.

15 11. An assessment of whether final agency action has been unreasonably delayed under
16 § 706(1) is governed by the *TRAC* factors. *Independence Mining Co. v. Babbitt*, 105 F.3d 502,
17 507 (9th Cir. 1997). The *TRAC* factors are: “(1) the time agencies take to make decision must be
18 governed by a “rule of reason”; (2) where Congress has provided a timetable or other indication
19 of the speed with which it expects the agency to proceed in the enabling statute, that statutory
20 scheme may supply content for this rule of reason; (3) delays that might be reasonable in the
21 sphere of economic regulation are less tolerable when human health and welfare are at stake; (4)
22 the court should consider the effect of expediting delayed action on agency activities of higher or
23 competing priority; (5) the court should also take into account the nature and extent of the
24 interests prejudiced by the delay; and (6) the court need not “find any impropriety lurking behind
25 agency lassitude in order to hold that agency action is unreasonably delayed.” *Id.* at 507 n.7.

26 **V. VA UNREASONABLY WITHHOLDS AND DELAYS MENTAL HEALTH CARE** 27 **DELIVERY**

28 12. All 6 *TRAC* factors favor relief for VA’s failure to provide timely health care. Factors

1 one and two are met, as VA is statutorily required to provide health care to veterans in a timely
2 manner, 38 U.S.C. § 1705(b)(1); yet VA has failed to provide such care within a reasonable time
3 period. (*See* Exs. 133, 169, 1244, and 1296.) Further, despite its knowledge of the “tsunami of
4 medical need” among veterans (Ex. 1263 at 38; 24-39:1), VA has also failed to implement and
5 monitor the efficacy of its Mental Health Strategic Plan in a timely manner. (Ex. 1259 at 78:22-
6 79:8, 158:5-159:10.) Factors 3 and 4 are also satisfied, as this Court has recognized, “it is
7 difficult to imagine how preventing veteran suicides could be trumped by a greater priority,”
8 (PIRT 10:14-11:5), and VA itself has stated that there is no agency priority higher than the
9 prevention of veteran suicides (Defs.’ Pretrial Stmt at 12:15-18).

10 13. *TRAC* factor 5 also favors relief because there can be no greater prejudice to veterans
11 than the worsening of their mental condition or — ultimately — the loss of their own life, as may
12 result from delay. (PIRT 69:23-70:6; 332:25-333:17; 137:17-23.) Finally, factor 6 supports
13 relief: despite VA’s awareness of the prevalence of PTSD and suicide among veterans,
14 Defendants have attempted to obscure the extent of the problem. (Ex. 1249.)

15 **VI. VA UNREASONABLY WITHHOLDS AND DELAYS ADJUDICATION OF** 16 **SCDDC CLAIMS**

17 14. *TRAC* factors are also met by the unconscionable delays at each stage of the claims
18 adjudication process. The first *TRAC* factor requires time periods for agency determinations to be
19 governed by a “rule of reason” however, the processing times — for an initial decision, resolution
20 of an appeal by an RO and the BVA, remand to an RO and the return of an appeal to the BVA —
21 do not even meet Defendants’ internal standards of reasonableness. (Ex. 1258 at 188:21-189:8
22 and 276:11-278:3; RT 1129:15-1130:10; RT 1171:25-1172:18.) The second factor is also met, as
23 VA has a statutory duty to provide veterans with SCDDC determinations, 38 U.S.C. § 1110, a
24 statutory duty to hire sufficient personnel to process appeals at the BVA in a timely manner, 38
25 U.S.C. § 7101; a statutory duty to undertake all actions necessary to resolve remands in an
26 expeditious manner, 38 U.S.C. § 5109B, and § 555(b) of the APA requires agencies to “proceed
27 to conclude a matter presented to it ... within a reasonable time.”

28 15. The third and fifth factors also weigh in favor of relief. Given the particular

1 vulnerability of SCDDC claimants, the effects of delay can be devastating. (Ex. 386 at 218, 220.)
2 The fourth *TRAC* factor also weighs in favor of Plaintiffs' relief. As presented above, VA admits
3 that RO decisions have been the priority, to the detriment of appeals. If, as VA claims, it plans to
4 emphasize both initial decisions and appeals, then VA acknowledges that expediting both RO and
5 appeal resolutions has little, if any, effect on competing VBA activities.

6 16. The sixth *TRAC* factor also weighs in favor of granting relief. Despite VA's duty to
7 assist, failure to meet that duty is one of the most common reasons for avoidable remands (RT
8 1166:17-20); this further protracts the time a veteran must wait for a final determination of his
9 claim. Though VA has the ability to reduce avoidable remands, it fails to do so.

10 **VII. VA ADJUDICATION SYSTEM DEPRIVES VETERANS OF DUE PROCESS**

11 17. Procedural Due Process imposes constraints on actions of the federal government that
12 deprive individuals of "liberty" or "property" interests within the meaning of the Due Process
13 Clause of the Fifth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

14 **A. Plaintiffs' Members Possess Fifth Amendment Property Interests**

15 18. Recipients of statutorily-entitled compensation have a property interest under the Due
16 Process Clause in the continued receipt of such compensation. *See Mathews*, 424 U.S. at 332,
17 *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970), *Walters v. NARS*, 472 U.S. 305, 320 n.8 (1985).
18 Applicants for nondiscretionary benefits have a proprietary interest protected by Due Process.
19 *Kapps v. Wing*, 404 F.3d 105, 115 (2d Cir. 2005); *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d
20 584, 588 (9th Cir. 1998); *Griffith v. Detrick*, 603 F.2d 118, 122 (9th Cir. 1979).

21 19. Claimants who satisfy the statutory criteria for eligibility are entitled as a matter of
22 law to SCDDC. Based on the statutory framework, certain members of VUFT and VCS have a
23 protected property interest as recipients of and applicants for SCDDC.

24 **B. The Adjudication System Deprives Veterans of Due Process**

25 20. In determining what process is required in a particular situation, the Supreme Court
26 has traditionally considered three factors: (1) the private interest that will be affected by the
27 official action; (2) the risk of an erroneous deprivation of such interest through the procedures
28 used, and the probable value of additional procedural safeguards; and (3) the government's

1 interest, including the fiscal and administrative burden that the additional or substitute procedures
2 would entail. *Mathews*, 424 U.S. at 335. Under the *Mathews* factors, the current system for
3 adjudicating veterans' SCDDC claims is unconstitutional.

4 21. Plaintiffs' members and their families have a compelling need for SCDDC, such that
5 the private interest affected by official action is vital. Defendants themselves have admitted
6 "many PTSD claimants and recipients are frequently incapacitated and many recipients are totally
7 or primarily dependent upon SCDDC for support" (Pls.' Pretrial Stmt., Att. C, Pleading Desig.
8 From Defs.' Answer, 10:25-26.) Given the nature of the vulnerabilities of these claimants, the
9 consequences of lengthy delays and erroneous deprivation can be devastating.

10 22. The lengthy delays in the adjudication of SCDDC claims at the RO and BVA, as set
11 forth above in Section IV (D&E) *supra*, independently violate due process. *See, e.g., Cockrum*,
12 475 F. Supp. At 1239-40 (D.D.C. 1979); *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486 (3d Cir. 1980),
13 *White v. Mathews*, 434 F. Supp. 1252 (D. Conn. 1976), *aff'd* 559 F.2d 852 (2d Cir. 1977).

14 23. The claims adjudication system is adversarial. *See, e.g., Bailey v. West*, 160 F.3d
15 1360, 1365 (Fed. Cir. 1998) (en banc) ("[I]t appears the system has changed from a
16 nonadversarial, *ex parte*, paternalistic system for adjudicating veterans' claims, to one in which
17 veterans . . . must satisfy formal legal requirements, often without the benefit of legal counsel,
18 before they are entitled to administrative and judicial review.")

19 24. In light of the adversarial nature of VBA adjudications, and due to the following
20 procedural failures, the risk of erroneous deprivation is high: veterans are not notified that the
21 C&P Service has reviewed their claims pursuant to the extraordinary awards procedure; hearings
22 are rarely, if ever, held prior to an initial decision by a RO, despite the fact that a hearing
23 increases a veteran's likelihood of success; VA's production quotas and link to incentive
24 compensation for adjudicators deprive veterans of a right to a fair and impartial hearing by pitting
25 the self-interest of adjudicators against veterans, prohibition of fees for attorney representation
26 before an RO deny a veteran the right to assistance of counsel at the most crucial stage of the
27 adjudication proceedings, lack of general right to discovery, including the right to subpoena
28 witnesses and documents and the right to examine and cross-examine witnesses.

1 25. The informal adoption of the extraordinary awards procedure (Ex. P-375-A) has no
2 foundation in law or regulation. Therefore, it deprives claimants and recipients — those with
3 retroactive awards of over \$250,000 or a retroactive award extending over a period in excess of
4 eight years — of their property interest in the receipt of SCDDC without due process of law.

5 26. VA's failure to follow its own statutes and regulations independently violates the due
6 process rights of veterans seeking benefits. *See Holmes v. N.Y. City Hous. Auth.*, 398 F.2d 262,
7 265 (2d Cir. 1968). For example, the extraordinary awards procedure violates the notice
8 requirement set forth in 38 C.F.R. § 3.103, which provides that veterans are entitled to notice of
9 "any decision made by VA affecting the payment of benefits or the granting of relief."

10 27. Increased procedural protections, including legal representation and time limits, will
11 not damage any legitimate government interest whatsoever. With regard to time limits, setting
12 time limits will decrease the average claim handling time, thus increasing efficiencies and
13 eliminating backlogs. With regard to increased procedural options and attorneys, these options
14 and the ability to pay an attorney would only be available to those claimants who wished to utilize
15 them. Paid representation at the RO stage would serve the government interest in reducing the
16 backlog because it would result in better claims development at the initial stage, reducing the
17 number of appeals, the number of remands, and the number of pending claims overall. The
18 government has an interest in maximizing the welfare of society, which is benefited by ensuring
19 fair and timely adjudications of veterans' SCDDC claims. *Goldberg*, 397 U.S. 254 at 265;
20 *Jeffries v. Ga. Residential Fin. Auth.*, 503 F.Supp. 610, 620-21 (N.D. Ga. 1980).

21 28. Applying the balancing test set forth in *Mathews*, 424 U.S. 319, the Court finds that
22 the interest of claimants and recipients in the receipt of SCDDC is compelling; that the
23 government has no legitimate interest in delaying decisions on SCDDC claims or appeals,
24 enforcing illegal policies such as the Extraordinary Awards Procedure or refusing to provide
25 SCDDC to veterans; and that both the risk of error as a result of the procedural inadequacies and
26 the value of additional procedural safeguards are high.

27 **VIII. DUE PROCESS VIOLATIONS IN OF MENTAL HEALTH CARE DELIVERY**

28 29. 38 U.S.C. § 1710(a)(4) creates a property interest in health care for eligible veterans

1 protected by the Due Process Clause of the Constitution. *VCS*, 2008 WL 114919, at *18.

2 30. VA's process for resolving clinical disputes denies veterans their statutory entitlement
3 without due process because it does not apply to refusals to provide care, and where the appeals
4 process does apply, there is no opportunity for any hearing by a neutral decision-maker, the
5 process is unduly convoluted and complex, and there is no provision for any expedited process.
6 (PIRT 656:5-9; Ex. 535; PIRT 638:3-10.)

7 31. Defendants' delay and denial of mental health care causes irreparable injury to the
8 highest private interest — veterans' lives. *Consiglio v. Woodford*, No. CIVS051701GEBGGHP,
9 2005 WL 2810356 at *12 (E.D. Cal. Oct. 26, 2005); *Lee v. Oregon*, 869 F. Supp. 1491, 1501 (D.
10 Or. 1994); *Beltran v. Meyers*, 677 F.2d 1317, 1322 (9th Cir. 1982).

11 32. Without an appeals process that addresses the denial, or delay in access to healthcare,
12 there is great risk of erroneous deprivation, with significant consequences. *Mathews*, 424 U.S. at
13 335. There is considerable value to be gained with additional procedural safeguards, especially if,
14 as VA suggests, VA already has a clinical appeals process for other disputes.

15 **IX. VA'S CLAIMED RECENT INITIATIVES**

16 33. The initiatives VA claims to have recently adopted are insufficient as a matter of law,
17 as they fail to show implementation or efficacy, VA retains discretion to withdraw those measures
18 at any time, and Defendants fail to show how such measures permanently mitigate harm to
19 Plaintiffs. *See Eng v. Smith*, 849 F.2d 80, 83 (2d Cir. 1988) ("Although defendants claim to have
20 voluntarily implemented substantially all of the ordered relief, [in the absence of injunctive
21 relief,] there is nothing to prevent defendants from abandoning procedures which the court
22 determined to be necessary to protect plaintiffs' constitutional rights").

23 **X. REMEDIES**

24 34. Remedies are available to Plaintiffs under 706 of the APA and the Due Process
25 Clause. As the *TRAC* factors are satisfied both by the delay in delivering mental health care and
26 adjudicating SCDDC claims, this Court must compel agency action. The Court has several forms
27 of relief available, including ordering VA to submit a plan for reducing wait times, *Cockrum v.*
28 *Califano*, 475 F. Supp. 1222, 1239-40 (D.D.C. 1979), and ordering VA to set time limits subject

1 to judicial review, *Williams v. Schweiker*, 541 F. Supp. 1360, 1367 (E.D. Mo. 1982).

2 35. To obtain a permanent injunction for violation of due process, Plaintiffs must show:
3 (1) they suffered an irreparable injury; (2) remedies available at law are inadequate to compensate
4 for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a
5 remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent
6 injunction. *eBay v. MercExchange*, 547 U.S. 388, 391 (2006).

7 36. Veterans relegated to undue delays in mental health care and SCDDC adjudications
8 are irreparably harmed. There is no dispute among the courts that death constitutes irreparable
9 harm, and veterans have died — many by their own hand — while awaiting mental health
10 treatment. Veterans are irreparably harmed when their SCDDC claims are adjudicated in an
11 adversarial system lacking constitutional due process safeguards. Without appropriate
12 safeguards, veterans and their families are at a high risk for erroneously losing much-needed
13 compensation, and medical and death benefits. *Beltran v. Meyers*, 677 F.2d 1317, 1322 (9th Cir.
14 1982); *Boldon v. Humana*, 466 F. Supp. 2d 1199, 1207 (D. Ariz. 2006).

15 37. There is no alternative remedy available to Plaintiffs for redress of their statutory or
16 constitutional violations because the CAVC only has jurisdiction over individual SCDDC claims,
17 38 U.S.C. § 7252(a), while Plaintiffs bring their claims on behalf of their organizations.

18 38. The irreparable harm that continues to befall veterans — namely, worsening mental
19 health, death and inability to support one's self and his family, cannot be outweighed by any
20 government interest, especially when VA has ample resources. (PIRT 574:13-18.) Ordering
21 Plaintiffs' requested relief serves the public interest when veterans with PTSD are an ever-
22 growing and particularly vulnerable population. *United States v. W. T. Grant Co.*, 345 U.S. 629,
23 633 (1953); and *Cupolo v. BART*, 5 F. Supp. 2d 1078, 1084 (N.D. Cal. 1997).

24 39. Plaintiffs have shown the factors for injunctive relief are met and the *Mathews v.*
25 *Eldridge* analysis weighs in their favor; therefore injunctive relief is appropriate, *see Walters v.*
26 *Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998), and may include the imposition of time limits,
27 *White v. Mathews*, 559 F.2d 852, 855 (2d Cir. 1977).

28

1 **XI. RIGHT TO ACCESS**

2 40. The Supreme Court has long recognized that citizens have a right of access to the
3 courts, and has grounded that right in the First and Fifth Amendments of the Constitution.
4 *Broudy v. Mather*, 460 F.3d 106, 117 (D.C. Cir. 2006) (citing *Christopher v. Harbury*, 536 US.
5 403, 413 (2002)). Plaintiffs present a forward-looking right of access claim, as veterans are
6 presently denied an opportunity to meaningfully litigate their claims as a result of systemic due
7 process failures of VA SCDDC adjudications. There are two necessary elements to a forward-
8 looking claim and Plaintiffs meet both: (1) an arguable underlying claim, and (2) present
9 foreclosure of a meaningful opportunity to pursue that claim. *Broudy*, at 120-21.

10 41. As previously recognized by this Court, Plaintiffs have alleged an “arguable
11 underlying [due process] claim.” *VCS*, 2008 WL 114919, at *17. The lack of appropriate due
12 process safeguards for the adjudication of SCDDC claims denies veterans an opportunity to
13 meaningfully pursue their claims. Claim development at the RO is the most critical part of a
14 veteran’s claim adjudication, as it establishes the record upon which the CAVC and Federal
15 Circuit rely on appeal. (RT 359:5-360:6.) The cumulative effect of foreclosing the opportunity to
16 subpoena witnesses and records, disallowing payment of counsel, and requiring the veteran to
17 rely on a non-neutral VBA service representative, denies veterans any meaningful opportunity to
18 litigate their appeals at the CAVC and Federal Circuit.

19 Dated: May 9, 2008

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