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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

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INTRODUCTION

The new claims presented in Plaintiffs' proposed Third Amended Complaint, if allowed, would expand the scope of the case far beyond what this Court has determined to be its focus. Plaintiffs' motion for leave to amend their complaint proposes claims that would challenge the Department of Veterans Affairs' ("VA") adjudication of individual disability benefits and health care eligibility claims, as well as the content of notices that VA sends to veterans whom Department of Defense records identify as having participated in chemical tests at Edgewood Arsenal. Plaintiffs' request to add those claims should be denied on grounds of prejudice to Defendants and undue delay. In addition, the proposed challenge to the VA adjudicatory process would be futile as outside of this Court's jurisdiction because exclusive jurisdiction lies with the United States Court of Appeals for Veterans Claims. Plaintiffs' request to amend their complaint to add those claims, therefore, should be denied. Defendants do not object to the Plaintiffs' request to amend the complaint to add two individual Plaintiffs.

BACKGROUND

This case arises out of chemical testing by the Army during the Cold War era. Plaintiffs allege that the individual Plaintiffs and other Army service members were injured when they participated in tests at Edgewood Arsenal, a U.S. Army research facility in Maryland, that administered or exposed them to chemical agents. Bringing their claims under the Declaratory Judgment Act ("DJA") and the Administrative Procedure Act ("APA"), Plaintiffs assert violations of the Constitution, executive and military directives, and international law. They seek declaratory and injunctive relief requiring Defendants to notify them and all military test participants of the details of the tests and of associated health risks; to search for and provide all participants with documentation concerning the tests; and to provide all participants with the medical examinations and care that Plaintiffs allege they were promised in return for undergoing

the tests. Plaintiffs further request a declaration that consent forms signed by testing participants are invalid and that the participants are released from "secrecy oaths" related to the testing. They also seek a declaration that the "*Feres* doctrine" -- the Supreme Court's interpretation of the Federal Torts Claims Act ("FTCA") to bar tort suits against the government for injuries arising out of or incident to military service, first articulated in *Feres v. United States*, 340 U.S. 135 (1950) -- is unconstitutional.

Plaintiffs filed their original Complaint on January 7, 2009. (Dkt. # 1). On July 24, 2009, after Defendants filed their first Motion to Dismiss (Dkt # 29), Plaintiffs filed their First Amended Complaint. (Dkt. # 31). On August 14, 2009, Defendants filed a second Motion to Dismiss, this time with regard to Plaintiffs' First Amended Complaint. (Dkt. # 34). On December 17, 2009, Plaintiffs filed their Second Amended Complaint, which Defendants moved to dismiss, or in the alternative for summary judgment, on January 5, 2010. (Dkt. # 53).

On January 19, 2010, the Court granted Defendants' dispositive motion in part and denied it in part. *Vietnam Veterans of Am., et al. v. Central Intelligence Agency*, No. 09-0037, 2010 WL 291840, at *2 (N.D. Cal. 2010). The ruling identified three claims that will proceed: "the lawfulness of the consent forms, to the extent that they required the individual Plaintiffs to take a secrecy oath," *id.* at *6; whether testing participants are entitled to notice of test details and associated health risks, along with available documentation concerning the tests, *id.* at *7-8; and whether testing participants are entitled to Army-provided medical care, *id*. at *8.[1]

[1] With regard to the Plaintiffs' claims for declaratory relief resulting from Defendants' prior conduct, the Court concluded that Plaintiffs lacked standing to challenge the lawfulness of the testing. *Id.* at *5 (concluding that the requested relief would neither redress Plaintiffs' injuries nor prevent future injury). It also limited the scope of Plaintiffs' broad claims arising from the Army's use of consent forms. The Court held that Plaintiffs had standing to challenge the consent forms only "to the extent that [the Army] required the individual Plaintiffs to take a secrecy oath." *Id.* at *6. With regard to Plaintiffs' claims for injunctive relief, the Court stated that "an Army regulation . . . suggest[ed] that Defendants had a non-discretionary duty to warn the individual Plaintiffs about the nature of the experiments." *Id.* at *7 (citing Army Regulation 70-25 (indicating that test participants should "be told as much of the nature, duration, and purpose of the experiment, the method and means by which it is to be conducted . . . [and]

(Footnote continues on next page.)

Substantial discovery has already been conducted on these claims. *See* Dkt. # 96, Decl. of Kimberly L. Herb ¶¶ 2-3 (explaining that Defendants have dedicated significant time and resources to discovery and that Defendants, and VA in response to a Fed. R. Civ. P. 45 subpoena, have produced over 28,000 documents). Defendants have also provided written responses to Plaintiffs' seventy-seven requests for production of documents and the fifty-seven topics listed in Plaintiffs' 30(b)(6) notice. The parties have already participated in two settlement conferences with Magistrate Judge Laporte, pursuant to this Court's Order on December 28, 2009.

Plaintiffs now request leave from the Court to amend their complaint for the third time to add claims of a substantially different nature. (*See* Dkt. # 31, 53). Plaintiffs propose to add to their lawsuit claims regarding 1) VA's procedures for adjudication of claims for disability compensation; 2) VA's role in testing in conjunction with that adjudication; and 3) the content of notice to test participants. (Dkt. # 88-1 (hereinafter "TAC"), ¶¶ 242, 243, 247).

STANDARD OF REVIEW

While Federal Rule of Civil Procedure 15(a) provides that leave to amend a pleading should be freely given when justice so requires, *id.*, denial of leave to amend is appropriate in cases of "undue delay . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Leave to permit supplemental pleading, although "favored," "cannot be used to introduce a 'separate, distinct and new cause of action'." *Planned Parenthood of S. Ariz. v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997) (internal citation omitted). Nor should the Court allow a moving party to amend

(Footnote continued from previous page.)

the effects upon his health")). The Court also concluded that Plaintiffs had "sufficiently alleged a claim for medical care." *Id.* at *8.

its complaint where the matters asserted in the amendment were known to them at the beginning of the suit. *See Komie v. Buehler Corp.*, 449 F.2d 644, 648 (9th Cir.1971).

While multiple factors are considered "to determine the propriety of a motion for leave to amend . . . the crucial factor is the resulting prejudice to the opposing party." *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973). In determining prejudice to a party, a Court must consider whether new claims alter the nature of litigation or relate to existing claims in a lawsuit. *See Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.1990) (finding that plaintiff's attempt to add claims that would greatly alter the nature of the litigation was prejudicial to the defendant); *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387-88 (9th Cir. 1990) (affirming denial of leave to add claims based on different legal theories and requiring proof of different facts).

Finally, courts determine futility based on whether a proposed claim would survive a motion to dismiss. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293,1296 (9th Cir.1998). If the proposed claim would fail to clear the applicable legal threshold, the proposed claim is futile and should not be added to the complaint. *See id.*

ARGUMENT

I. Plaintiffs' Proposed Challenge to the VA's Adjudicatory Process Would Be Futile and Prejudice Defendants.

Plaintiffs request leave from this Court to add additional claims regarding VA's adjudicatory process, including the standards and procedures used to determine benefits and healthcare entitlement. Such claims, however, are futile, because 38 U.S.C. § 511 bars District Court review of VA's adjudicatory process. In addition, these proposed claims would be prejudicial to the Defendants, as the claims are beyond the scope of the current case and would greatly alter the nature of the litigation. *See Morongo Band of Mission Indians*, 893 F.2d at 1079.

A. This Court does not have jurisdiction to hear Plaintiffs' Proposed Claims regarding the VA's adjudicatory process.

In their proposed Third Amended Complaint, Plaintiffs ask this Court to undertake review of various VA regulations pertaining to adjudication of claims for disability compensation and direct VA to administer its programs in a particular way. (*See* TAC ¶¶ 242, 243, 247). Plaintiffs' claims ask this Court to review VA decisions concerning entitlement to disability compensation and VA's application of its regulations in making individual benefits determinations.

Pursuant to 38 U.S.C. § 511, this type of review is outside the Court's jurisdiction, and therefore, Plaintiffs' claims would not survive a motion to dismiss. "Without jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868)).

In 1988, Congress enacted the Veterans' Judicial Review Act ("VJRA"), Pub. L. No. 100-687, 102 Stat. 4105 (1988), which created an exclusive review procedure for veterans to resolve challenges to VA benefits determinations. *See Zuspann v. Brown*, 60 F.3d 1156, 1158 (5th Cir.1995), *cert. denied*, 516 U.S. 1111 (1996). Under the VJRA, jurisdiction to review final decisions of the Board of Veterans' Appeals is conferred exclusively on the United States Court of Appeals for Veterans Claims ("CAVC"), 38 U.S.C. § 7252(a), 7266(a); and exclusive jurisdiction to review the decisions of the CAVC is conferred on the United States Court of Appeals for the Federal Circuit. 38 U.S.C. § 7292(a). Congress has expressly directed that determinations by VA that affect veterans' benefits are not reviewable in district court. Section 511 of Title 38 provides:

> (a) The Secretary [of Veterans Affairs] shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans.

> Subject to subsection (b),[2] the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

38 U.S.C. § 511(a) (emphasis added).[3] Therefore, the following claims from Plaintiffs' proposed Third Amended Complaint are precluded:

- the claim that Plaintiffs are entitled to a declaration from this Court stating that
  - decisions made by the [VA] respecting entitlement to SCDDC [Service-connected death and disability compensation] and/or eligibility for free and/or medical care based upon service connection are null and void due to violations of the due process clause of the Fifth Amendment to the U.S. Constitution (TAC ¶ 242);

- the claim that Plaintiffs are also entitled to a preliminary and permanent injunction
  - forbidding the VA from continuing to use biased decision makers to decide their eligibility for free, priority health care and for SCDDC, including DIC and
  - directing [VA] to propose a plan to remedy denials of affected claims for SCDDC and/or eligibility for medical care based upon service connection and
  - to devise procedures for resolving such claims that comply with the due process clause, which involve, at a minimum, an independent decision maker, all to be submitted to the Court for advance approval (TAC ¶ 243);

- the claim that Plaintiffs are entitled to
  - a declaration that [VA's] rating procedures and standards for deciding chemical and biological weapons claims violate the rule of reasonable doubt under VA regulations and
  - an injunction compelling the [VA] to apply the reasonable doubt doctrine to Plaintiffs and all "volunteers" whose conditions may be related to their participation in testing, or where the effects of their exposure are unknown, and thus may be the cause of their disabilities or diseases (TAC ¶ 247).

These determinations and decisions fall squarely within section 511's preclusion of review, since determinations as to how to apply VA benefit statutes to individual claims undeniably affect the provision of benefits to veterans. *See Larrabee ex. rel. Jones v. Derwinski*,

[2] Section (b) provides that "[t]he second sentence of subsection (a) does not apply to - (1) matters subject to section 502 of this title; (2) matters covered by sections 1975 and 1984 of this title; (3) matters arising under chapter 37 of this title; and (4) matters covered by chapter 72 of this title."

[3] Section 511 was enacted in 1988 with the passage of the VJRA, and was codified at Section 211(a). In 1991, the provision was renumerated as Section 511(a). Pub. L. No. 102-83, § 2(a), 105 Stat. 378, 388 (1991).

968 F.2d 1497, 1501 (2nd Cir. 1992), *cf. Bates v. Nicholson*, 398 F.3d 1355 (Fed. Cir. 2005). Because this Court does not have jurisdiction to hear or rule on these claims, Plaintiffs should not be permitted to include those claims in their Third Amended Complaint.

B. Plaintiffs' Proposed Challenge to VA Adjudications Would Add a Separate, Distinct Cause of Action.

Plaintiffs' proposed new claim regarding the manner in which VA adjudicates individual disability benefits and health care eligibility claims ventures far beyond the current scope of this case.[4] In support of their claim, Plaintiffs allege that VA decisionmakers approach individual claims with bias and a conflict of interest. (TAC ¶¶ 240-41.) The proposed new claim thus would add a separate and distinct subject to this lawsuit: how individual VA benefit claims are decided. By contrast, the claims currently before the Court focus on: whether the secrecy oaths administered to servicemember testing participants are lawful; whether servicemember testing participants are entitled to notice of test details and associated health risks, and available documentation concerning the tests; and whether servicemember testing participants are entitled to medical care provided by Defendants. *See Vietnam Veterans of Am., et al*, No. 09-0037, 2010 WL 291840.

Discovery associated with this new claim, which could entail examination of the details of individual VA benefit claim determinations, would differ fundamentally from the discovery relating to the claims before the Court. Plaintiffs have argued that they do not wish for this case

[4] VA is required to furnish hospital care and medical services to veterans for a service-connected disability and to veterans who have a service-connected disability rated 50% or more, as well as to certain other veterans specified by statute. 38 U.S.C. § 1710(a)(1) and (2). Veterans are enrolled in the VA healthcare system based upon an order of priority. There are currently 8 priority categories. 38 U.S.C.§ 1705; 38 C.F.R. § 17.36(b). Priority category 1 is for veterans rated 50% or greater for one or more service-connected disabilities. The second priority category is for veterans with a singular or combined rating of 30% or 40% based on one or more service-connected disabilities. Veterans who are not eligible for hospital care and medical service under 38 U.S.C. § 1710(a)(1) and (2) are enrolled in the VA healthcare system in either priority category 7 or 8.

to be delayed, *see, e.g.*, dkt # 101, but the time required for discovery into the proposed claim regarding VA adjudications would be likely to inject delay.

II. Plaintiffs' Proposed Claim Regarding Testing by VA Would Be Futile and Is the Product of Undue Delay.

Plaintiffs have failed to allege any fact that would establish standing for their claims regarding the VA's role in testing. As such, those claims are futile, and Plaintiffs should not be allowed leave to bring these claims. *See Steckman*, 143 F.3d at1296 (courts may deny a motion for leave to amend a complaint as futile where the proposed claim would not survive a motion to dismiss). In addition, the facts that form the basis for Plaintiffs' claims have been in the public record and were known to the Plaintiffs well before the initiation of this lawsuit. Granting Plaintiffs' leave to bring those claims now would cause undue delay in the resolution of this case.

A. Plaintiffs Lack Standing to Bring Claims Regarding Testing by VA.

Plaintiffs' proposed claims regarding the VA's role in testing are futile because Plaintiffs fail to demonstrate that they have standing to allege that VA was involved in chemical testing on veterans. Plaintiffs request that the Court enter "a preliminary and permanent injunction forbidding defendants [including VA] from continuing to mislead 'volunteers' or their survivors concerning the nature and extent of the testing program, health effects, and the other representations described above," (TAC ¶ 243), but they do not present evidence that any of the individual plaintiffs or members of the organizational plaintiffs were ever involved with any VA testing.

The doctrine of "standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). At the pleadings stage "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke . . . the exercise of the court's remedial powers." *Renne v. Geary*, 501 U.S. 312, 316 (1991), *quoting Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534,

546 n.8 (1986). Standing requires a plaintiff, at an irreducible minimum, to show: (1) a distinct and palpable injury, actual or threatened; (2) that the injury is fairly traceable to the defendant's conduct; and (3) that a favorable decision is likely to redress the complained-of injury. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

Plaintiffs must establish, therefore, that at least one of the named individual plaintiffs or members of the organizational plaintiffs has suffered a "concrete and particularized" injury that is fairly traceable to each of the agency practices they seek to challenge and that is likely to be redressed by the relief they seek. *Lujan*, 504 U.S. at 560. Moreover, because Plaintiffs seek prospective injunctive relief, (TAC ¶¶ 243, 247), they must establish not merely that their members were injured in the past or that a veteran may be harmed in the future, but rather that the organizations' members themselves are "realistically threatened by a repetition of [the alleged violations]." *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983); *see also Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) (request for injunctive relief does not automatically confer representational standing).

Plaintiffs' proposed Third Amended Complaint fails to allege the existence of such an essential causal nexus. The Plaintiffs' proposed Third Amended Complaint does not contain a single reference to any Plaintiffs being exposed to chemicals while seeking care at a VA facility, being involved in testing while at a VA facility, or suffering any harm due to actions related to testing that occurred at any VA facility. Because Plaintiffs fail to allege any injury that is traceable to the actions of the VA, Plaintiffs' claims relating to testing at VA facilities would be futile amendments to their complaint. As Plaintiffs have failed to allege any facts that would establish standing to bring claims related to VA's role in experimental testing, these claims would be futile.

B. Plaintiffs' Delay in Raising Claims Based on VA Testing Should Not Be Excused.

Plaintiffs assert that any delay should be excused because "only through the course of discovery have Plaintiffs learned the extent of [VA's] involvement." (Dkt. #88 at 4:17-18). In his declaration, Plaintiffs' counsel states that, through recent discovery, he has learned that VA was involved in experimental testing of many of the same biological and chemical substances tested at Edgewood Arsenal. (*See* Dkt. # 89 (Erspamer Declaration) ¶ 4). Plaintiffs then ask to be allowed leave to amend their Complaint to encompass this "new" information.

Yet this information regarding VA's testing is not new. Each of these assertions is a matter of public record—public record, it must be noted, that has been available to Plaintiffs since before this lawsuit began. The information regarding VA's involvement in testing has been in the public domain for many years.[5] VA's role in testing has been widely reported in the media, including the New York Times, in articles dated as far back as 1975. *See* Exhibit A. Congress held public hearings on military research in 1994 and, in response to written questions from Chairman Rockefeller, VA provided a list of all 1992 and 1993 projects sponsored or approved by VA or DoD in which veterans were tested with living biological agents. *See* Exhibit B. As Plaintiffs cannot justify the dilatory effect of yet another amended complaint by declaring information already in the public record to have been newly discovered, Plaintiffs' Motion for Leave should be denied. *See Komie*, 449 F.2d at 648 (holding that a Court may preclude a moving party from amending its complaint where the matters asserted in the amendment were known to them at the beginning of the suit).

[5] *See* Mariavittoria Mangini, *Treatment of Alcoholism Using Psychedelic Drugs: A Review of the Program of Research*, 30 Journal of Psychoactive Drugs 381, 391 (Dec. 1998) (manufacturer restricted distribution of LSD to VA-sanctioned programs in VA hospitals and other programs); William H. McGlothlin, Sidney Cohen, & Marcella S. McGlothlin, *Short-Term Effects of LSD on Anxiety, Attitudes, and Performance* (June 1963), http://www.rand.org/pubs/papers/2006/P2757.pdf (describing research at VA medical center in Los Angeles, California)

III. Plaintiffs' Proposed Claims Regarding VA's Notification Process Would Be Futile, and Plaintiffs Delayed Unreasonably *in Raising* Them.

Plaintiffs should not be allowed leave to add claims regarding the VA's current or future notification process because such claims would be futile. There is neither a statutory obligation for VA to notify veterans of exposure nor would such a challenge be allowed under the APA, 5 U.S.C. § 706(1), and therefore, the proposed claims could not withstand a Motion to Dismiss. *See Steckman*, 143 F.3d at 1296. In addition, similar to Plaintiffs' claims regarding VA's role in testing, the facts that form the basis for Plaintiffs' claims about VA's notification policies have been in the public sphere for many years.[6] Further, there is ample evidence to show that the Plaintiffs have been aware of VA's role in notification since before this lawsuit.

A. Plaintiffs' claims regarding VA's notification process are futile.

In their proposed Third Amended Complaint, Plaintiffs ask that the Court enter a "preliminary and permanent injunction forbidding defendants from continuing to mislead 'volunteers' or their survivors concerning the nature and extent of the testing program, health effects, and the other representations described above", (TAC ¶243), as well as enter "an injunction forbidding DVA from refusing to notify Plaintiffs and all 'volunteers' of the details of their participation in human experimentation programs and provide them with full documentation of the experiments done on them and all known or suspected health effects." (TAC ¶ 247). Plaintiffs also assert that they are "entitled to a declaration from this Court stating that the notification procedures and efforts by the DVA are inadequate, that Defendants' compliance with

[6] Available at:
http://www.warrelatedillness.va.gov/veterans/deploymentexposures/edgewood_aberdeen_experiments.asp
http://www.vba.va.gov/bln/21/Mustardgas/index.htm
http://www.publichealth.va.gov/exposures/mustardgas/index.asp
last visited on June 22, 2010

their notification obligations has been unreasonably delayed, extending at this point in time to at least 33 years . . .” TAC ¶ 242. Plaintiffs imply that VA is not meeting some standard for notification. In reality, however, no such standard exists.

Plaintiffs bring their proposed claim for VA to provide notice under the APA, 5 U.S.C. § 706(1), which authorizes a court to “compel agency action unlawfully withheld or unreasonably delayed.” This claim fails for two reasons. First, Plaintiffs’ claim fails because there is no “a *discrete* agency action that [the agency] is *required* to take.” *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (“a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take”). In other words, no statute or regulation requires VA to take action regarding notification, and therefore, there is no basis for such a claim. [7]

Second, the APA authorizes judicial review only of “agency action made reviewable by statute” or “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. VA’s notification policies do not fall into either of these categories. As established above, there is no statutory obligation that compels VA to provide notification. Further, any notification undertaken by VA, such as the Plaintiffs seek to challenge, is not a final agency action. “As a general matter, two conditions must be satisfied for agency action to be ‘final.’” *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). “First, the action must mark the ‘consummation’ of the agency’s decision-making process . . . it must not be of a merely tentative or interlocutory nature.” *Id.* at 178. “And second, the action must be one by which rights or obligations have been determined, or

[7] VA has no statutory obligation to provide any notice to veterans beyond a few limited circumstances. The general statute that governs VA outreach is 38 U.S.C. § 6303. Section 6303(b) requires VA to notify a veteran at the time of discharge from active military service of all VA benefits and services. Section 6303(c) (1)(A) requires VA to distribute “full information” to eligible veterans and their dependents regarding all benefits and services to which they may be entitled. Finally, under 38 U.S.C. § 6303(c)(2), when a veteran or dependent first applies for any benefit, VA must provide information concerning VA benefits and health care services. But no statutory obligation exists that requires VA to notify testing volunteers, and therefore, Plaintiffs have no claim that VA has failed to meet standards of notification.

from which legal consequences will flow." *Id.* (internal quotation marks omitted); *Reliable Automatic Sprinkler Co. v. Consumer Product Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003) ("[a]gency action is considered final to the extent that it imposes an obligation, denies a right, or fixes some legal relationship."). Here, VA's notification procedures simply do not impose any obligation or deny any right; nor is the notification an action "from which 'legal consequences will flow'." *Bennett*, 520 U.S. at 178. Because VA's notification policies were undertaken without any legal obligation, statutory or otherwise, they trigger no legal consequences and determine no rights or obligations. The notification, therefore, does not constitute "final agency action" within the meaning of the APA, and is not subject to judicial review under that statute. Consequently, Plaintiffs' allegations regarding VA's notification procedures are futile.

To the extent that Plaintiffs find the government's efforts insufficient, their dispute is with the manner in which the government is providing notice and information. The manner in which the government carries out the provision of information is not prescribed by statute or otherwise, and is thus "committed to agency discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *accord, e.g.*, *Liang v. Attorney General*, No. C-07-2349 CW, 2007 WL 3225441, at *4 (N.D. Cal. Oct. 30, 2007) (Wilken, J.). Accordingly, there is "no law to apply," and APA review is precluded. *Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003); *accord, e.g.*, *Liang*, 2007 WL 3225441, at *4.

Even if Plaintiffs could challenge the adequacy of notice that VA has provided, such a challenge of adequacy is premature since the question of whether notice is required is still before the Court. This Court denied Defendants' Motion to Dismiss as it related to questions of whether the current Defendants have an obligation to provide notice to soldiers who participated in testing or experiments. *Vietnam Veterans of Am., et al.*, No. 09-0037, 2010 WL 291840. The question of

whether notice is required by law, therefore, is still before this Court. This Court must determine that Defendants have a duty to provide notice before examining the adequacy of that notice. Plaintiffs' current attempts to shoehorn questions of the adequacy of VA's notice, are premature and should not be raised before this Court.

B. Plaintiffs' Delay Should Not Be Excused.

Similar to their explanation for only now asserting claims regarding VA's role in experimental testing, Plaintiffs state that, through recent discovery, they learned that VA has assumed responsibility for notifying participants in those experiments and others conducted by the Army. (*See* Dkt. #89 (Erspamer Declaration) ¶ 4). Both the evidence and Plaintiffs' own filings, however, contradict Plaintiffs' claim that they only recently became aware that VA notified some individuals about their possible participation in testing. As Plaintiffs stated in their first Complaint, filed on January 7, 2009, many of the individual Plaintiffs received notices regarding the testing from VA. (*See* Dkt. 1 at ¶ 47) ("In 2006, Eric received a letter from the VA offering him the opportunity to undertake another health examination as a follow-up to his Edgewood service."); ¶ 82 ("In fact, the only time Wray has been contacted regarding his Edgewood service was by a Department of Veterans Affairs outreach survey in 2007"); ¶ 144 ("In approximately September 2006, some, but not all, Edgewood recipients, received form letters from the DVA advising them that notwithstanding their secrecy oaths, the DOD had authorized them to discuss exposure information with their health care providers."). Plaintiffs' counsel certainly had access to those files, since they were used as the basis for Plaintiffs' first Complaint, which was filed over eighteen months ago. Because the fact that VA is involved in the notifications sent to veterans involved in testing, that information has been known to the Plaintiffs since prior to the beginning of this lawsuit, and these claims should be rejected on grounds of undue delay. *See Komie,* 449 F.2d at 648.

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court deny Plaintiffs' Motion for Leave to File Third Amended Complaint.

Dated: June 24, 2010

Respectfully submitted,

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