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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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SANCTIONS

Date: October 27, 2010
Time: 9:30 a.m.
Ctrm: F, 15th Fl.
Judge: Hon. James Larson

Complaint filed January 7, 2009

I. INTRODUCTION

Defendants begin their Opposition to Plaintiffs' motion for mandatory Rule 37 sanctions with empty rhetoric, calling Plaintiffs' motion "wholly inappropriate." (Docket. No. 144 ("Opp'n") at 1.) Objective facts demonstrate just the opposite, and well-illustrate Defendants' long history of discovery recalcitrance justifying sanctions. For example, in response to Plaintiffs' motions to compel, Defendants:

- now concede that the Court should enter a protective order permitting the production of information covered by the Privacy Act and HIPAA — notwithstanding Defendants' refusal *for more than a year* to agree to such a protective order — which will result in the production of critical information that Defendants long have refused to produce;

- have withdrawn all assertions of the "deliberative process" privilege, resulting in the production of documents that Defendants previously had refused to provide; and,

- now concede that documents concerning health effects are relevant, and claim that the Department of Defense ("DoD") and Army (but not the CIA) are "continuing to search" for additional responsive documents, notwithstanding Defendants' prior position that they would search for such documents *only on the condition that Plaintiffs waive their rights to future discovery*.

These concessions alone — made only *after* Plaintiffs were forced to seek Court intervention — establish that Defendants had no substantial justification for resisting discovery and warrant the imposition of mandatory sanctions.

Defendants' discovery failures go far beyond these concessions, however, and amply illustrate why sanctions are appropriate here. For example, notwithstanding Defendants' argument that they "are continuing to search for documents," they have produced virtually *no documents* for more than six months. Defendants' responses to Plaintiffs' motions to compel also

confirm that Defendants still *refuse to search* the central source of documents that Defendants admit contain much of the requested information in this case: the records of the test subjects themselves. Indeed, the length to which Defendants have gone to avoid discovery in this matter is illustrated by the fact that Defendants responded to Plaintiffs' motions to compel by seeking protective orders from two *different judges* — including requesting that Judge Wilken halt *all* discovery for one year.[1]

Coupled with Defendants' continued discovery recalcitrance on other issues — including the CIA's position that it need not participate in discovery because it was not involved in drug research on servicemembers, despite significant evidence to the contrary and the *DoD's* conclusion that the CIA *did indeed* sponsor drug testing on military personnel — it is clear that Defendants' failures to meet their discovery obligations justify the imposition of mandatory sanctions, Defendants' rhetoric to the contrary notwithstanding. Awarding mandatory sanctions is the only way to ensure that Plaintiffs do not unfairly bear the burden of Defendants' discovery failures and to make clear that Defendants need to participate in earnest discovery practice going forward.

II. ARGUMENT

Rule 37 mandates sanctions in the form of reasonable expenses and attorney's fees if the Court grants a motion to compel *or* if the "requested discovery is provided *after* the motion [to compel] was filed." Fed. R. Civ. P. 37(a)(5)(A) (emphasis added). The Court may only withhold sanctions if it finds: (i) the moving party filed its motion to compel "before attempting in good faith to obtain the disclosure or discovery without court action;" (ii) the producing parties' nondisclosure was "substantially justified;" or (iii) other circumstances "would make an award of expenses unjust." *Id.* The party whose nondisclosure is at issue bears the burden of showing "substantial justification." *See Celano v. Marriott Int'l, Inc.*, No. C 05-4004 PJH, 2007 U.S. Dist.

[1] Judge Wilken summarily denied Defendants' motion — without hearing oral argument, even — on October 7, 2010, finding that Defendants failed to justify the "extraordinary step" of a year-long discovery stay. (*See* Oct. 7, 2010 Order (Docket No. 159) at 3.)

LEXIS 54707, at *11 (N.D. Cal. July 13, 2007) ("The burden is on the losing party to show substantial justification.").

Here, there is no question that mandatory sanctions are appropriate: in response to Plaintiffs' motions to compel, Defendants have for the first time offered to provide requested discovery that they long ago should have provided. Moreover, Defendants' failures to comply with their obligations to respond appropriately to Plaintiffs' outstanding discovery requests (including requests which Defendants have wholly ignored) independently justify an award of sanctions. Defendants simply cannot meet their burden to show that their failure to appropriately participate in discovery was substantially justified or that an award of sanctions would be unjust. In fact, objective facts demonstrate just the opposite.

A. Defendants' Discovery Failures Forced Plaintiffs To Seek Court Intervention.

Defendants argue that sanctions are inappropriate here because Plaintiffs "have not reciprocated Defendants' significant efforts" to resolve the parties' discovery differences. (Opp'n at 9.) Nothing could be further from the truth. Defendants' "significant efforts" were little more than attempts to strong arm Plaintiffs into waiving rights to future discovery in exchange for Defendants' willingness to perform routine searches for clearly responsive information.

Defendants' own documents show that the DoD and Army (but not the CIA) agreed to search records (but not the records of individual test participants) for "documents addressing health effects or possible health effects," *without* agreeing that this discovery was relevant. Moreover, this offer came with a huge proviso: Defendants only agreed "to undertake these efforts *in lieu of responding* to Plaintiffs' second and third sets of" RFPs, and with the understanding that "*Plaintiffs will not serve Defendants with additional requests for documents* under Fed. R. Civ. P. 34." (Am. Decl. of Caroline Lewis-Wolverton in Supp. of Defs.' Opp'n (Docket No. 150) ("Wolverton Decl.") ¶ 8, Ex. E at 2 (emphasis added).) Defendants repeatedly made clear that they would not respond to further RFPs, and only would "consider discrete requests from Plaintiffs for specific documents" that "Plaintiffs identify by name." (*Id.* at ¶ 11, Ex. H at 4.) Although Defendants attempt to portray these purportedly "significant efforts" in a benevolent light, Defendants' offers clearly illustrate that Plaintiffs were right to seek Court

intervention. Only in response to Plaintiffs' motions have Defendants conceded that information about health effects is relevant and should be produced *without* a waiver of Plaintiffs' rights to discovery.

Notwithstanding their concession in response to Plaintiffs' motion for a protective order that they now "are in favor of entry of an appropriate protective order," Defendants also argue that sanctions are not justified because they "were in the process of working" on language for a protective order when Plaintiffs filed their motion. (Opp'n at 9 & 12 n.3.) This argument ignores two blunt facts: (1) despite more than a year of negotiations, Defendants first agreed to a draft protective order covering Privacy Act and HIPAA material *only in response to Plaintiffs' motion*; and (2) only now, after forcing Plaintiffs to seek Court intervention, will Defendants produce information that they long have withheld, purportedly due to the absence of a such a protective order. Had Plaintiffs not filed their motion for a protective order and their motion to compel RFP responses, Defendants *still* would be "working on" language for an appropriate protective order while simultaneously refusing to produce key responsive information because no protective order is in place.[2]

Finally, only in response to Plaintiffs' motions to compel have Defendants abandoned their longstanding assertion of the deliberative process privilege as justification for withholding responsive documents from discovery. (*See* Pls.' Reply in Supp. of Mot. to Overrule Objections

[2] Defendants' declaration concerning the protective order negotiations is remarkable, and suggests that liability concerns motivate their discovery tactics. It states that Defendants were reluctant to agree to a protective order because Defendants feared that Plaintiffs would contact other test subjects if Defendants revealed their identities in discovery. (*See* Wolverton Decl. at ¶ 15.) Defendants' concern was that "if test participants were given information about possible health effects, they might be predisposed to provide that information in response to questions about their symptoms or health effects." (*Id.*) This statement truly is astounding: as the Court recognized in its motion to dismiss order, Defendants' regulations *require them* to notify test subjects of "possible" health effects related to participation in experiments. (Jan. 19, 2010 Order (Docket No. 59) at 14-16.) Had Defendants complied with this duty in the first instance, the test subjects already would have information about possible health effects, and Defendants' concerns would be unfounded. It is only because Defendants have *not* complied with their duty to notify test subjects, and because Defendants do *not* want to comply with their duty to provide health care, that they fear the test subjects learning about "possible health effects" resulting from Defendants' testing programs. These stated concerns suggest that Defendants' efforts to resist discovery in this case are part of Defendants' larger efforts to avoid having to comply with their duty to notify and provide healthcare to the test subjects.

and Compel Produc. of Docs. (Docket No. 160) ("RFP Reply") at 4.) Defendants make this concession despite their repeated assertion of the privilege during meet-and-confer discussions over many months and on successive iterations of their privilege log. (*Id.*) This pattern illustrates, once again, that Defendants would not have produced these relevant, responsive documents absent Plaintiffs' motions.

Defendants' concessions in response to Plaintiffs' requests for Court intervention illustrate that sanctions are appropriate here — regardless of the outcome of Plaintiffs' motions to compel. *See* Fed. R. Civ. P. 37(a)(5)(A) (sanctions appropriate if "requested discovery is provided *after* the motion [to compel] was filed") (emphasis added). There is no question that these concessions were achieved only in response to Plaintiffs' motions, after Plaintiffs' good-faith efforts to resolve disputes through appropriate meet-and-confer practice fell on deaf ears. Accordingly, the Court should award sanctions so that Defendants (rather than Plaintiffs) will bear the cost of forcing Plaintiffs to seek Court intervention so that Defendants would comply with their discovery obligations in this action.

B. Defendants Have Not Shown That Their Discovery Failures Were Substantially Justified.

Defendants argue that their discovery responses have been "substantially justified" because they have produced a "large amount of information" and because the DoD and the Army "continue to search for additional information." (Opp'n at 10.) As discussed below (and in Plaintiffs' motions to compel), these superficial arguments fail to justify Defendants' discovery failures. Moreover, Defendants' concessions — in the face of Plaintiffs' motions to compel — that certain discovery is appropriate, despite their longstanding positions to the contrary, well-illustrate the lack of justification for Defendants' prior discovery responses.

First, Defendants' document production to date falls far short of showing that Defendants' discovery responses were substantially justified. Although Defendants repeatedly point to their purportedly "robust" document production of "over 14,000 pages," Defendants do not contest that 40% of this production was comprised merely of the military records and claim files of the Individual Plaintiffs (*see* Pls.' Mot. for Sanctions (Docket No. 131) at 5), or that much of the

remaining production consisted of publicly available documents that *Plaintiffs already had cited in the Complaint* (*see* RFP Reply at 6).[3] And, although Defendants repeatedly claim that DoD and Army are "continuing to search" for additional documents in response to Plaintiffs' requests for production, Defendants have produced virtually *nothing* for over six months, suggesting that their renewed efforts began *after* Plaintiffs' motions were filed.[4] Moreover, Defendants have not searched, and still *refuse to search*, the central source of documents that Defendants admit contain much of the requested information in this case: the records of the test subjects themselves. (*See* RFP Reply at 5-6.) Under routine discovery practice, Defendants should have searched and produced responsive documents from this known and centralized source of key information long ago. Instead, even Defendants' purportedly "ongoing" document searches are ignoring these admittedly relevant records.

Second, although Defendants claim that the DoD and Army are continuing to search for documents, it is clear that the CIA is not. The CIA's "justification" for refusing to participate in further discovery — including its refusal to provide appropriate Rule 30(b)(6) deponents — is its self-serving "conclusion" that it was not involved in "tests on military servicemembers." (Opp'n at 2.) There is ample evidence, however, even in the limited documents produced in this litigation, that the CIA *did* sponsor and participate in testing on military personnel. (*See* RFP Reply at 6-9.) Indeed, the DoD — the CIA's co-defendant in this litigation — has concluded, based on its review of the record, that certain human testing on military personnel at Edgewood Arsenal "was part of the CIA program." (*Id.* at 8.) These facts — which must have been known to Defendants, all of which share the same counsel — illustrate the lack of "substantial

[3] To put the size of Defendants' purportedly "robust" production in perspective, Dr. James Ketchum, a non-party former Army researcher, produced nearly *29,000 pages* of documents in response to Plaintiffs' subpoena. (*See* Pls.' Mot. for Sanctions (Docket No. 131) at 6 n.2.)

[4] In fact, the *ten documents* that Defendants have produced during over the last six months were not produced as a result of Defendants' purportedly ongoing document searches at all. Rather, these documents already were known to Defendants and previously had been withheld as privileged. In fact, *six* of these documents were produced only *after* Plaintiffs filed their motions to compel. (*See* RFP Reply at 4.)

justification" for the CIA's refusal to participate in discovery.[5] Nor does the CIA's provision to Plaintiffs of its standard FOIA MKULTRA release *outside* of discovery justify the CIA's discovery failures. (*See* Opp'n at 10.) To the contrary, Defendants have insisted that these documents are not relevant and provided them outside of discovery to *avoid* discovery obligations such as the need to justify the extensive redactions in these documents. (*See* RFP Reply at 8-9.)

Third, Defendants now concede that there is no dispute about whether a protective order covering Privacy Act and HIPAA material should be entered — all parties agree that there should be one. This concession — after more than a year of obstruction and the resulting redaction or withholding of relevant information that only now will be produced — demonstrates that there never was a "genuine dispute" about whether such an order should be entered here. That alone shows that Defendants had no "substantial justification" for their position on this issue. *See JSR Micro, Inc. v. QBE Ins. Corp.*, No. C-09-03044 PJH (EDL), 2010 WL 1957465, at *2 (N.D. Cal. May 14, 2010) ("A party meets the 'substantially justified' standard when there is a 'genuine dispute' or if 'reasonable people could differ'" on the issue). Accordingly, sanctions are warranted "to reimburse Plaintiff[s] for the attorney fees incurred to bring a motion [for a Protective Order] that should never have been necessary." *See Quality Inv. Props. Santa Clara, LLC v. Serrano Elec., Inc.*, NO. C 09-5376 JF (PVT), 2010 WL 2889178, at *4 (N.D. Cal. July 22, 2010).

C. Requiring Defendants To Pay Plaintiffs' Costs for Seeking Court Intervention Would Not Be Unjust.

Defendants' final attempt to avoid sanctions is to argue that awarding sanctions would be "unjust" because "Defendants have produced a great deal of information about Army's tests as well as CIA's tests" and because they "have endeavored diligently and in good faith to resolve the parties' disputes concerning the scope of discovery." (Opp'n at 14-15.) These arguments ring

[5] In addition, as pointed out in Plaintiffs' RFP Reply, it is beyond dispute that the CIA acquired relevant responsive documents concerning Defendants' testing programs on military personnel irrespective of whether the CIA sponsored that testing. (*See* RFP Reply at 9.) There is *no justification* — let alone *substantial* justification — for failing to search for and produce these documents.

hollow and ignore the big picture. In reality, Defendants' concerted efforts to impede and avoid discovery in this matter demonstrate that sanctions are appropriate here.

Defendants' assertion that they have "produced a great deal of information" in response to Plaintiffs' discovery requests is based on the premise that their purportedly "robust" document production was adequate. As discussed above, *supra* at 5-6, that is simply incorrect. There are obvious, serious, protracted and unjustified shortcomings in Defendants' discovery responses, as detailed in Plaintiffs' motions to compel.

Defendants' argument that they have attempted "in good faith" to resolve the parties' discovery differences also is misguided. As detailed above, Defendants' efforts to resolve the scope of discovery were nothing more than an attempt to strong arm Plaintiffs into *giving up rights to future discovery* in exchange for Defendants' agreement to search for and provide documents concerning health effects — information that, in the face of Plaintiffs' motions to compel, Defendants now belatedly admit is relevant and should be provided. *See supra* at 4-5. Defendants' tactics are evident — concede nothing in meet-and-confer negotiations and look to compromise only where a discovery motion forces their hand.

Finally, Defendants provided the best justification for sanctions here with their various actions in response to Plaintiffs' motions to compel. First, in the face of those motions, Defendants finally conceded numerous points which will result in the production of documents that Defendants long ago should have provided. *See supra* at 5-6. Second, Defendants moved for a protective order *in front of Judge Wilken rather than the Discovery Magistrate*, seeking to put an end to *all* discovery for one year. (*See* Defs.' Mot. for Protective Order Staying Further Discovery (Docket No. 134).) In that motion, Defendants submitted many of the same declarations they submitted in support of their oppositions to Plaintiffs' motions to compel, and advanced many of the same arguments. Although Judge Wilken summarily denied Defendants' motion — without oral argument, even — Plaintiffs were forced to expend additional resources and bear additional costs in litigating the present discovery issues before two judges at once. Third, Defendants responded to Plaintiffs' motions to compel by filing a *second* motion for a protective order before the Discovery Magistrate, seeking to foreclose discovery into clearly

relevant topics — including the possible health effects of substances used in Defendants' human testing programs and information concerning consent that the Court *already had ruled was relevant.* (*See* Pls.' Opp'n to Defs.' Mot. for Protective Order (Docket No. 157) at 6-10.)

These actions in response to Plaintiffs' motions to compel demonstrate Defendants' concerted efforts to avoid participating in discovery and their willingness to expend significant resources (and impose significant costs on Plaintiffs) to achieve that goal. Under these circumstances, it would not be unjust to award Plaintiffs mandatory sanctions to compensate for the expense incurred in seeking clearly justified Court intervention. In fact, justice *demands* such an award.[6]

III. CONCLUSION

For the reasons above, and those stated in Plaintiffs' Motion for Sanctions, Plaintiffs request that the Court award them their costs and reasonable attorney's fees incurred in seeking Court intervention through the pending motions to compel, and for their costs and reasonable attorney's fees incurred in connection with their Motion for Sanctions.

Dated: October 13, 2010

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[6] Given Defendants' concessions in the face of Plaintiffs' motions to compel, it is clear that mandatory sanctions are appropriate here. In the event that the Court grants only a portion of the remaining relief sought by Plaintiffs' motions, it should award Plaintiffs at least a significant portion of the fees incurred in seeking Court intervention. *See, e.g., E-Pass Techs., Inc. v. 3Com, Inc.*, Nos. C-00-2255 DLJ (EDL), C-03-4747 DLJ (EDL), C-04-528 DLJ (EDL), 2008 WL 2899719, at *2 (N.D. Cal. July 22, 2008) (reducing Defendants' "requested fee award by 10% to account for the small number of points on which Plaintiff prevailed [in opposing] the motion to compel").

Responses and Replies

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Docket Text:
RESPONSE in Support re [131] MOTION for Sanctions filed byDavid C. Dufrane, Wray C. Forrest, Larry Meirow, Eric P. Muth, Bruce Price, Franklin D. Rochelle, Swords to Plowshares, Veterans Rights Organization, Vietnam Veterans of America. (Erspamer, Gordon) (Filed on 10/13/2010)

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