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 10 Rights Organization; Bruce Price; Franklin D. Rochelle; Larry
 Meirow; Eric P. Muth; David C. Dufrane; Tim Michael Josephs;
 11 and William Blazinski

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 13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 OAKLAND DIVISION

16 VIETNAM VETERANS OF AMERICA, *et al.*,
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 Plaintiffs,
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 v.
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 20 CENTRAL INTELLIGENCE AGENCY, *et al.*,
 Defendants.
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Case No. CV 09-0037-CW

**PLAINTIFFS' NOTICE OF
 MOTION AND RENEWED
 MOTION TO COMPEL
 DEFENDANTS' RESPONSES TO
 INTERROGATORIES**

Date: January 26, 2011
 Time: 9:30 a.m.
 Ctrm: F, 15th Floor
 Judge: Hon. James Larson

Complaint filed January 7, 2009

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

2 YOU ARE HEREBY NOTIFIED THAT on January 26, 2011 at 9:30 a.m., or as soon
3 thereafter as counsel may be heard, before the Honorable James Larson in the United States
4 District Court for the Northern District of California, located at 450 Golden Gate Avenue, San
5 Francisco, California 94102, Plaintiffs, Vietnam Veterans of America; Swords to Plowshares:
6 Veterans Rights Organization; Bruce Price; Franklin D. Rochelle; Larry Meirow; Eric P. Muth;
7 David C. Dufrane; Tim Michael Josephs; and William Blazinski (collectively, "Plaintiffs"), will,
8 and hereby do, move the Court for an Order compelling each Defendant, Central Intelligence
9 Agency; Leon Panetta, Director of the Central Intelligence Agency; United States Department of
10 Defense; Dr. Robert M. Gates, Secretary of Defense; United States Department of the Army; Pete
11 Geren, United States Secretary of the Army; United States of America; and Eric H. Holder, Jr.,
12 Attorney General of the United States (collectively, "Defendants"), individually to answer
13 Plaintiffs' First Set of Interrogatories.

14 This motion is made pursuant to Federal Rule of Civil Procedure 37(a). Plaintiffs certify
15 that they have in good faith conferred with Defendants to resolve this dispute before involving the
16 Court, as required by Rule 37(a) and Local Rule 37-1. (Declaration of Gordon P. Erspamer
17 ("Erspamer Decl.") at ¶¶ 5-9, 11, 13-14). The motion is based on this notice, the memorandum of
18 points and authorities below, the Declaration of Gordon P. Erspamer and the exhibits attached
19 thereto, and the complete files and records in this action.

MEMORANDUM OF POINTS AND AUTHORITIES

1
2 Time and time again, Defendants have forced Plaintiffs to seek Court intervention to
3 compel Defendants' earnest participation in the discovery process. Despite multiple explicit
4 orders from the Court, Defendants' practice has not changed. It now has been eight months since
5 Plaintiffs filed their Motion to Compel Responses to Interrogatories (Docket No. 76), over five
6 months since the hearing on that motion, and five months since the Court issued its July 13, 2010
7 Order (Docket No. 112) (the "Order") compelling Plaintiffs to respond, yet Defendants still have
8 not provided substantive answers to Plaintiffs' interrogatories. Faced, then, with Defendants'
9 refusal to fulfill their agreed-upon obligation to respond to Plaintiffs' interrogatories, even in light
10 of an Order by this Court, Plaintiffs regretfully must ask the Court once again for an order
11 compelling Defendants to answer.

12 Plaintiffs initially served interrogatories on Defendants on November 16, 2009. (Decl. of
13 Cathleen E. Stadecker (Docket No. 78) ¶ 2.) The exhaustive meet-and-confer efforts that
14 followed are detailed in Plaintiffs' first Motion to Compel Responses to Interrogatories (Docket
15 No. 76) and in the Court's Order (Docket No. 112), and will not be recounted in full here. In
16 brief, after months of unsuccessful meet-and-confer efforts, Plaintiffs moved to compel
17 Defendants to respond to a narrowed set of interrogatories on April 19, 2010. (Docket No. 76.)
18 On the eve of the hearing on that motion, June 29, 2010, Defendants served a set of responses
19 that, as the Court noted, "consist[ed] mostly of objections." (Erspamer Decl. ¶ 2, Ex. A; Order
20 at 6.) Indeed, the Court later characterized Defendants' objections as "frivolous." (Erspamer
21 Decl. ¶ 10, Ex. I at 34 (Tr. of Oct. 27, 2010 Hr'g).) On July 13, 2010, the Court ruled on the
22 motion, ordering Defendants to serve substantive answers to Plaintiffs' interrogatories within
23 thirty days. (Order at 7.)

24 In response to the Order, Defendants served a set of "amended" responses on August 12,
25 2010 (the "August 12 Responses"). (Erspamer Decl. ¶ 3, Ex. B.) The August 12 Responses were
26 substantially similar to Defendants' initial, inadequate responses, still consisted primarily of
27 objections, and again contained next to nothing in the way of substantive answers. (*See* Erspamer
28 Decl. ¶ 4, Ex. C.) Indeed, many of Defendants' purported "amendments" merely consisted of

1 rephrasing responses indicating that Defendants had “no information” regarding the issue posed
2 by the interrogatory. Examples of Defendants’ purported “amendments” follow:

- 3 • Interrogatory No. 4: “Please IDENTIFY all COMMUNICATIONS between YOU
4 and any TEST SUBJECT or other former service members whom YOU believe or
5 understand to have participated in the TEST PROGRAMS.”
 - 6 ○ DOJ’s June 29 Response: “Based on searches conducted to date, DOJ has
7 identified no information that is responsive to this request.” (Erspamer
8 Decl. ¶ 2, Ex. A.)
 - 9 ○ DOJ’s “Amended” Response: “Based on searches conducted to date, *as*
10 *outlined in General Objection 4*, DOJ has identified no information that is
11 responsive to this request.” (Erspamer Decl. ¶ 3, Ex. B (emphasis added).)
- 12 • Interrogatory No. 6: “Please IDENTIFY all repositories of DOCUMENTS
13 CONCERNING the TEST PROGRAMS.”
 - 14 ○ DoD’s June 29 Response: “DoD previously produced documents
15 responsive to RFP ## 3 and 26. Additionally, the National Archives serves
16 as a depository for DoD documents.” (Erspamer Decl. ¶ 2, Ex. A.)
 - 17 ○ DoD’s “Amended” Response: “DoD previously produced documents
18 responsive to RFP ## 3 and 26. Additionally, the National Archives *of the*
19 *United States* serves as a depository for DoD documents.” (Erspamer Decl.
20 ¶ 3, Ex. B (emphasis added).)

21 In addition, many of the responses — *e.g.*, Nos. 1, 4, 12, 19 — are unchanged except for
22 the renumbering of references to Defendants’ General Objections. (*See* Erspamer Decl. ¶ 4,
23 Ex. C.)

24 Plaintiffs advised Defendants that the August 12 Responses did not cure the deficiencies
25 noted by the Court in the Order, and still were inadequate. (Erspamer Decl. ¶ 5, Ex. D.)
26 Defendants disagreed, taking the position that the August 12 Responses were “fully responsive
27 and compliant with the Rules of Civil Procedure” and the Order. (Erspamer Decl. ¶ 6, Ex. E.)
28

1 The parties met and conferred telephonically regarding, *inter alia*, the August 12
2 Responses on September 23, 2010. (Erspamer Decl. ¶ 7, Ex. F.) Plaintiffs explained how
3 Defendants' August 12 Responses were insufficient and failed to comply with the Court's order
4 and agreed to send Defendants a letter addressing additional shortcomings of the August 12
5 Responses and identifying specific interrogatories that Defendants did not need to revise or
6 revisit. (*Id.*) In exchange, Defendants agreed to provide amended responses within 30 days of
7 receiving Plaintiffs' letter. (*Id.*) Plaintiffs provided their promised letter on September 29, 2010.
8 (Erspamer Decl. ¶ 8, Ex. G.)

9 On October 27, 2010 — two days before the amended responses were due — counsel for
10 Defendants informed Plaintiffs prior to a discovery hearing that Defendants likely would not meet
11 their commitment to provide amended responses on October 29. Defendants stated that the
12 responses would be delayed due to travel schedules and the need to acquire agency verifications,
13 but assured Plaintiffs that Defendants were working diligently to provide the amended responses.
14 (Erspamer Decl. ¶ 9.) Defendants sent an e-mail the following day confirming that Defendants
15 would not provide amended responses as they had committed to do, again citing “travel schedules
16 and other impediments.” (Erspamer Decl. ¶ 9, Ex. H.) This e-mail stated that Defendants would
17 “endeavor to provide [the responses] by the end of next week,” *i.e.*, by November 5, 2010. *Id.*

18 On November 5, 2010 Defendants informed Plaintiffs by letter that, once again,
19 Defendants would fail to meet their commitment to provided updated responses. Defendants'
20 letter claimed that although Defendants were “working diligently” to provide the amended
21 responses, they had “encountered difficulty” and would be unable to do so. (Erspamer Decl. ¶ 11,
22 Ex. J.)

23 As of today — more than *seven weeks* after Defendants had committed to provide updated
24 responses following Plaintiffs' good-faith meet and confer efforts, more than *five months* after the
25 Court overruled Defendants' prior “frivolous” objections and ordered Defendants to provide
26 substantive responses, and more than *one year* after Plaintiffs served their initial set of
27 interrogatories — Defendants *still* have not provided the long-promised substantive responses that
28 the Court ordered them to provide.

1 It is apparent that Defendants' requests for more time to provide amended responses were
2 driven not by considerations related to the responses themselves, but instead by the desire to
3 proceed with discovery — and with the case in general — on their own schedule. Indeed, despite
4 Defendants' claimed "difficulties" due to "travel schedules and other impediments," and their
5 purportedly "diligent" work in connection with responding to the interrogatories, they have still
6 found the time to (1) draft and serve interrogatories of their own; (2) draft and serve requests for
7 production; (3) draft and file a motion to dismiss seeking reconsideration of the Court's prior
8 motion to dismiss order; and (4) request dates for depositions of the named Plaintiffs despite
9 never having produced a witness for deposition in response to Plaintiffs' noticed 30(b)(6)
10 depositions, which have now been pending over a year. On December 6, 2010, Defendants
11 served an extensive set of interrogatories and document requests on Plaintiffs. (Erspamer Decl.
12 ¶ 12, Ex. K.) The same day, Defendants also filed a motion to dismiss the Third Amended
13 Complaint in which they sought to re-argue issues already decided by the Court's January 19,
14 2010 Order disposing of the previous motions to dismiss. (Docket No. 59.)

15 On December 10, 2010, Plaintiffs notified Defendants that unless Defendants provided the
16 long-promised updated responses by December 17, 2010, Plaintiffs would be forced to seek Court
17 intervention. (Erspamer Decl. ¶ 13, Ex. L.) In response, Defendants stated that they would
18 provide amended responses "where appropriate" on January 6, 2011.¹ (Erspamer Decl. ¶ 14,
19 Ex. M.) Defendants stated that, in their view, such responses would be "premature" and
20 "unproductive," in contrast to their earlier claims that their responses already were "fully
21 responsive." (*Id.*) This highly conditional language, coupled with Defendants' repeated failures
22 to meet their deadlines or otherwise live up to their commitments throughout this litigation, make
23 such assertions ring hollow. Moreover, Defendants' position simply is incredible given:
24 (1) Defendants' oft-repeated (and oft-broken) commitment to provide updated responses long
25 ago; (2) Defendants' repeated representations that they were "working diligently" on responses

26 ¹ January 6, 2011 is 416 days from the date the interrogatories were first served, 177 days
27 from the date the Court ordered Defendants to provide answers, and 69 days from the date
28 Defendants agreed to provide them.

1 and merely needed a little extra time due to “travel schedules;” (3) Defendants’ prior history of
2 failing to live up to discovery commitments; and (4) the fact that *the Court overruled Defendants’*
3 *“frivolous” objections and ordered Defendants to provide substantive responses to these*
4 *interrogatories* many months ago. Defendants have proven time and again that they will not meet
5 their obligations unless compelled to do so by the Court — and sometimes not even then.² The
6 Court should order Defendants to serve fully responsive and substantive answers to Plaintiffs’
7 interrogatories without further delay.

8 **CONCLUSION**

9 For the foregoing reasons, this Court should order Defendants to answer Plaintiffs’ First
10 Set of Interrogatories.

11 Dated: December 17, 2010

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16 By: /s/Gordon P. Erspamer
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17 Attorneys for Plaintiffs
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27 ² Accordingly, Plaintiffs intend to seek sanctions in connection with this motion.
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