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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

VIETNAM VETERANS OF AMERICA, *et al.*,
 Plaintiffs,
 v.
 CENTRAL INTELLIGENCE AGENCY, *et al.*,
 Defendants.

Case No. CV 09-0037-CW

**JOINT STATEMENT OF
 DISCOVERY DISPUTE
 CONCERNING MAGNETIC
 TAPES REGARDING DATABASE
 OF EDGEWOOD TEST
 PARTICIPANTS AND PROJECT
 "OFTEN" DOCUMENTS**

1 Pursuant to the Court's Standing Order, the parties submit this Joint Statement to advise
2 the Court of their impasse concerning Plaintiffs' request that certain magnetic tapes and Project
3 OFTEN documents be produced. The parties' most recent efforts to resolve this dispute were by
4 letters dated September 30, 2011, and October 5, 2011, and again by telephone on October 6,
5 2011. Despite these efforts, both sides agree that the Court's intervention is required.

6 **Plaintiffs' Request Regarding "Magnetic Tapes"**

7 Plaintiffs' Statement.¹ This discovery dispute, which is explained in Mr. Erspamer's
8 Reply Declaration (Docket No. 291), relates to what Plaintiffs believe to be the most important
9 documents in the case and information that is not available from any other source. On
10 September 13, 2011, Plaintiffs learned for the first time that Defendants were refusing to produce
11 Edgewood databases stored on "magnetic tapes," first identified in Defendants' Initial
12 Disclosures and requested long ago, which contain critical information about the putative class of
13 test participants, including "Original human clinical data from Edgewood." (VVA023831.)
14 Thus, these tapes provide perhaps the *sole contemporaneous and comprehensive information*
15 regarding testing at Edgewood. Defendants cannot claim that this testing information *from*
16 *Edgewood* is not relevant — indeed, it is central to Plaintiffs' claims regarding notice, health care,
17 and bias as to DVA, as these tapes likely contain information about the identities of test subjects,
18 substances and doses administered, and observed health effects at the time.²

19 First, it is clear that the DOD and Army are relying upon the DVA's "notice" letters to a
20 tiny percentage of participants as a basis for asserting that they have not unreasonably delayed or
21 unlawfully withheld performing their duty to provide notice. Laying aside the fact that the only
22 purported "notice" letters sent were from DVA, not the DOD or Army, the fact remains that the
23 basis for which veterans were selected to be sent these letters was by the DOD's provision of
24 names to DVA through the Chem-Bio database. The Chem-Bio database, however, is not an

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26 ¹ Given the complexity of this issue and its factual history, Plaintiffs request leave to file a
slightly longer statement than contemplated by the Court's Standing Order.

27 ² The document produced by Defendants that they believe is a printout from the magnetic
28 tapes includes this information in database form: name, substance, dose, and treatment.

1 original document — it was populated decades after the experiments were conducted, and was
2 compiled *without* access to the magnetic tapes database. The deficiencies in the database are
3 apparent in both the fragmental nature of the database itself as well as the lack of success in the
4 notification efforts through its use. The database widely lacks basic information such as health
5 effects or dosage information and is vastly incomplete, even as to such basic information as
6 names and addresses. For example, *less than 10%* of the personnel entries in the database have
7 any corresponding address information.³ Further, DVA’s “notification” effort has resulted in
8 letters to only a small fraction of the 100,000+ test participants. (*See* Docket Nos. 256-10 at 12;
9 258 at 11 n.9.) It is obvious that Defendants do not want to find them and are hoping that they
10 will simply pass away quietly. Defendants have repeatedly put their heads in the sand, refusing to
11 consult the most obvious source for this information: the magnetic tapes at issue here, which
12 contain “Original human clinical data from Edgewood.” (VVA023831.)

13 Second, perhaps an even more egregious consequence of Defendants’ inaction relates to
14 the DVA claims process (and thus Plaintiffs’ bias claim). As DVA admits in its Information
15 Letter (Docket No. 256-17 at 3), Defendants claim that the records of most participants are “poor
16 or often incomplete.” In deciding DVA claims filed by test participants, the DVA relies
17 *exclusively* upon the DOD to “confirm” that claimant’s participation in testing. (*See* Docket No.
18 256-16 at 5-7.) If DOD does not confirm participation in testing, DVA will not even conduct a
19 medical examination and the processing of the veteran’s testing-related claim is truncated, leading
20 to an automatic denial — the outcome in the vast majority of cases. (*Id.* at 7; Docket No. 256-10
21 at 12.) Thus, at the same time that the DOD has advised DVA that it is “unable to confirm
22 participation” for many test subjects, Defendants have never examined or utilized the media that
23 store basic information about the tests and participants. These *unreviewed* tapes, containing
24 original human clinical data from Edgewood, should supply the missing information to “verify”
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27 ³ As of September 2011, of the 29,745 personnel entries logged in the Chem-Bio database,
28 only 2,904 had a corresponding address. It is unclear if these addresses are even current
information or if the contact information is dated to the time of enlistment or discharge.

1 participation, allowing for otherwise “unverified” test subjects to receive notice, and seek health
2 care and DVA disability payments related to their Edgewood exposures.

3 The DOD even recognized the importance of this information for the notification efforts.
4 As explained in Defendants’ Response to Plaintiffs’ Interrogatory No. 16 and in a document
5 produced at VET024-000088, Ms. Morris of DOD reviewed CIA possessed human clinical
6 testing data (*i.e.*, the magnetic tapes printout) and concluded that such information would be
7 useful to DOD, in particular, if test subjects filed medical claims.

8 Due to their obvious relevance, Plaintiffs sought these tapes from the very beginning of
9 the case. Defendants have repeatedly delayed and frustrated the process, offering an intricate
10 “song and dance” of excuses to delay or avoid producing the magnetic tapes, including the
11 obvious fact that older databases cannot run on modern-day computers without effort. Despite
12 the outstanding document request from Plaintiffs, the CIA transferred possession of the magnetic
13 tapes to the DOD/Army, supposedly to help convert the files to a modern format for production.
14 Yet, much to Plaintiffs’ surprise, these still unreviewed CIA-possessed tapes **suddenly appeared**
15 **on DOD’s September 13, 2011 Privilege Log as “state secrets” without any foundation**
16 **supporting the privilege.** (*See* Docket No. 291-6.)

17 As an initial matter, with respect to Defendants’ asserted technological impediments,
18 Defendants have, over the last two years, apparently done nothing to attempt to access or analyze
19 the data stored on the tapes.⁴ The DOD’s recent claim of state secrets privilege over the tapes,
20 raised for the first time two years after the tapes were requested, is *per se* invalid, moreover, as
21 Defendants admittedly *have not reviewed the tapes for privilege, and the information stored in*
22 *the tapes is almost 40 years old.*⁵ Further defeating the DOD’s claim of privilege is the fact that

24 ⁴ Defendants’ burden arguments should be rejected as Defendants have the tapes and
25 could, if they so choose, simply copy them to Plaintiffs, subject to the protective order.

26 ⁵ The “classified” status of these documents is further suspect, given the presumption of
27 declassification after twenty-five years. *See* 6 CFR § 7.28; Exec. Order 12958 § 3.3 (Dec. 29,
28 2009) (subject to some exceptions, “all classified records that (1) are more than 25 years old and
(2) have been determined to have permanent historical value under title 44, United States Code,
shall be automatically declassified whether or not the records have been reviewed.”)

1 Defendants have produced what appears may be a printout of a small portion of the data stored on
2 the magnetic tapes, which significantly undermines any claim of “state secrets” privilege.

3 Defendants’ Statement.⁶ Despite Plaintiffs’ repeated demands and Defendants’ repeated
4 attempts to cooperate, it appears that it simply is not feasible to recover the information contained
5 on these magnetic tapes. Before this lawsuit was initiated, CIA located magnetic computer tapes
6 it believed it received from DoD employees at Edgewood Arsenal in the early 1970s. The tapes
7 were, and still are, marked as classified. Attempts to extract data from the tapes in 2007 failed, as
8 CIA no longer had the particular computer program used to create those databases. Further, a
9 CIA memorandum produced to Plaintiffs states that CIA no longer had the technical capability to
10 interpret the data on the magnetic tapes as far back as 1978.

11 Because they were created and owned by DoD, CIA transferred the magnetic tapes to
12 DoD in March of this year so DoD could attempt to extract the data from the tapes.⁷ Since that
13 time, DoD has determined it also does not have the computer systems necessary to review the
14 tapes. Plaintiffs have been on notice of these technical issues for months. Ultimately, DoD has
15 not been able to recover any information from the magnetic tapes through existing processing
16 systems, and accordingly it has been unable to conduct any review, much less a declassification
17 review, of the tapes. Such a review is required before a document may be released, regardless of
18 the age of the documents, because the information may, for example, be exempt from the general
19 25-year declassification presumption. *See* Exec. Order 13526 § 3.3(b). Absent the ability to
20 review the tapes to determine whether they qualify for an exemption, release of the tapes is not
21 feasible. In any event, Defendants have produced what Defendants believe to be a partial printout
22 of the data contained on the magnetic tapes.⁸ Moreover, contrary to their demonstrably false
23 assertions, Plaintiffs have an abundance of contemporaneous and comprehensive information and
24 documents concerning the testing program, including innumerable test protocol and plan

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26 ⁶ Defendants object to Plaintiffs’ refusal to comply with the Court’s standing order, *see*
27 n.1, and submit that Plaintiffs should be required to revise their statement to come into
28 compliance. To the extent the Court agrees that the issues are, in fact, complex, Defendants
request full briefing. Defendants have made every effort to comply by including no more than 2
½ pages of text.

1 documents, original source documents collected by Battelle, and individual test files containing
 2 test and dose information collected contemporaneously with the tests, along with medical doctors'
 3 detailed direct observations of the effects the research substances produced on individual
 4 participants during the tests — precisely the information Plaintiffs claim to seek from the tapes.

5 **Plaintiffs' Request Regarding Project OFTEN Documents**

6 Plaintiffs' Statement. Along with the magnetic tapes, Defendants have withheld (at least
 7 in large part) 11 boxes of documents concerning Project OFTEN referenced in Defendants' Initial
 8 Disclosures. (See VVA023826-31.) Defendants claim to have searched these boxes for
 9 responsive documents, but given the insignificant CIA production of just 2,200 pages, it is clear
 10 that the vast majority of documents in these 11 boxes have been withheld, and are not on the
 11 privilege log. Based on the CIA's truncated and vague view of "responsiveness" (see Docket No.
 12 279-26 at 26), this is not surprising, but yet another attempt by the CIA to avoid its discovery
 13 obligations by artificially limiting its production even as to the one undisputedly *admitted* joint
 14 Army-CIA program, where documents had been collected in one place: Project OFTEN. It is
 15 obvious that the CIA and the DOD have continued their effort to cover up the CIA's leadership
 16 role in the testing of military "volunteers," just as it has for over 6 decades.⁹

17 Defendants' Statement. Plaintiffs' unsupported allegations are disingenuous and should
 18 be disregarded by the Court. Plaintiffs claim that the CIA must be withholding documents from
 19 its archived records related to testing on service members, not because they have any evidence of
 20 withholding, but because they surmises that the eleven boxes relating to Project OFTEN that are
 21 indexed on a manifest from the 1970s must contain more than 2,200 pages of responsive, non-

22 ⁷ Defendants emphatically reject Plaintiffs' baseless *ad hominem* attacks regarding
 23 Defendants' motives and (multi-year and hugely expensive) efforts to identify and notify service
 member test participants.

24 ⁸ While the printout is not classified, DoD cannot assume, based solely on the printout,
 25 that the tapes, which are marked classified, otherwise do not contain classified information.

26 ⁹ In a September 20, 1977 Letter from Deanne Siemer to Senator Kennedy, she writes, "It
 27 appears from the available documents that projects MKSEARCH, MKOFTEN and
 28 MKCHICKWIT were directed, controlled and funded by the [CIA]. Much of the participation of
 the military departments was solely as a conduit of funds from the [CIA] to outside contractors."
 (VET020_000038.)

1 privileged records (the volume of records the CIA has produced). Plaintiffs' argument, however,
2 is belied by three significant facts of which they are aware and which are well supported by the
3 evidence in this case. First, the historical manifest that the CIA has provided to Plaintiffs makes
4 clear that the volume of documents in these boxes is much smaller than what Plaintiffs would
5 have the Court believe. The manifest states that there are only "38 files and reports" and "three
6 computer printouts" and that six of the boxes consist entirely of computer tapes and not
7 documents. (AR 24-F at VET020-000120). Plaintiffs have failed to identify any document
8 described on that manifest that has been inappropriately withheld. Second, as Plaintiffs are also
9 aware, the vast majority of those boxes are entirely irrelevant to the present action: "The majority
10 of material deal with animal testing," not testing on service members. (*Id.*) For instance, one of
11 the files contained in the Project OFTEN boxes is a report about the "Grooming Activity of
12 Albion Mice." (AR 24-G at VET020-000219). It is unclear how information on animal testing
13 has any relation to Plaintiffs' narrow claim against the CIA concerning the alleged administration
14 of secrecy oaths to service members. Third, the CIA has repeatedly represented to Plaintiffs and
15 in declarations to this Court that it has conducted "repeated hand-searches of boxes of documents
16 related to Projects OFTEN and CHICKWIT and other archived files that potentially contained
17 responsive information." (Dkt. 279-26 at p. 26.) The CIA has produced all records from these
18 boxes that pertain to service members. It would be unduly burdensome to require the CIA to
19 search these boxes again when Plaintiffs have made no showing of a deficiency in the search or
20 that the CIA has withheld specific documents relevant to testing on service members or Plaintiffs'
21 secrecy oath claim and Plaintiffs instead have mere, unsupported allegations regarding the
22 adequacy of the CIA's search.

23 Conclusion

24 Plaintiffs' Statement. Plaintiffs respectfully request that the Court overrule Defendants'
25 privilege objection and compel the production of the magnetic tapes and compel production of
26 related Project OFTEN documents contained in the 11 boxes stored at the CIA in the early 1970s.

27 Defendants' Statement. Defendants respectfully request that the Court deny Plaintiffs'
28 requests, or, in the alternative, order formal briefing.

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Respectfully submitted, this 12th day of October, 2011.

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GENERAL ORDER 45 ATTESTATION

I, Gordon P. Erspamer, am the ECF User filing this Joint Statement of Discovery Dispute Concerning Magnetic Tapes Regarding Database of Edgewood Test Participants and Project “OFTEN” Documents. In compliance with General Order 45, X.B., I hereby attest that Joshua E. Gardner has concurred in this filing.

Dated: October 12, 2011

/s/ Gordon P. Erspamer
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