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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

**NOTICE OF MOTION & MOTION FOR PROTECTIVE ORDER AND TO OVERRULE OBJECTIONS**

Date: September 29, 2010
Time: 9:30 a.m.
Courtroom: F, 15th Floor
Judge: The HonorableJames Larson

Complaint filed January 7, 2009

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TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

YOU ARE HEREBY NOTIFIED THAT on Wednesday, September 29, at 9:30 a.m., or as soon thereafter as counsel may be heard, before the Honorable James Larson in the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, Courtroom F, 15th Floor, San Francisco, California 94102, Plaintiffs, Vietnam Veterans of America; Swords to Plowshares: Veterans Rights Organization; Bruce Price; Franklin D. Rochelle; Larry Meirow; Eric P. Muth; David C. Dufrane; and Wray C. Forrest (collectively, "Plaintiffs"), will, and hereby do, move the Court for entry of a protective order in the form attached as Plaintiffs' [Proposed] Protective Order Governing Discovery filed concurrently herewith and an order overruling Defendants' discovery objections based on the Privacy Act, 5 U.S.C. § 552a, and/or Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320d-2.

This motion is made pursuant to Federal Rule of Civil Procedure 26(c), and it is supported by the memorandum of points and authorities below, the attached Declaration of Daniel J. Vecchio ("Vecchio Decl."), and the complete files and records in this action.

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 26(c) and the Court's Order of August 6, 2010, Plaintiffs submit the following Motion for Protective Order and to Overrule Objections. The parties have a longstanding and unresolved dispute regarding the proper terms and scope of a protective order in this case. While both parties agree that some form of protective order is necessary, Defendants have refused to accept any protective order allowing for disclosure of any individual test subject's identifying information, except for information specifically related to the named Plaintiffs, despite negotiations spanning more than a year. This information, which concerns putative class members and the very individuals that Plaintiffs allege – and the Court has ruled – must receive notice of the details of their exposure, is critical, as it bears directly on issues concerning whether and how test subjects have been notified, health effects suffered by test subjects, and other facts relating to Defendants' test programs. Defendants object on Privacy Act, 5 U.S.C. § 552a, and/or Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320d-2, grounds despite the fact that protective orders permitting such disclosure have become routine, and in fact the DOJ has entered into them in other litigation. (Vecchio Decl. ¶ 12 Exh. C). Defendants withheld thousands and perhaps tens of thousands of documents from their production, which took place on a rolling basis from October 2009 through April 2010, with a small additional production of documents that had been previously withheld on July 29, 2010. Plaintiffs disagree with Defendants' Privacy Act and HIPAA objections and respectfully request that the Court intervene, enter the protective order proposed by Plaintiffs providing for the disclosure of such information, and accordingly overrule Defendants' discovery objections based on Privacy Act and/or HIPAA grounds.[1]

[1] Plaintiffs also anticipate filing a motion for sanctions regarding this issue in the near future.

## II. BACKGROUND

Plaintiffs filed this action on January 7, 2009, asserting claims for injunctive and declaratory relief. The crux of the case arises from Defendants' actions and inactions regarding, *inter alia*, top-secret government programs through which chemical and biological agents were tested on soldiers deemed "volunteers." A central question at issue is whether Defendants have fulfilled their obligation to locate test participants and to notify them regarding those exposures. Another crucial issue in the case is whether Defendants are required by their own regulations to provide healthcare to these test participant veterans. Accordingly, the identities of these veterans, whether they have been notified, and the impact of these chemical and biological agents on their health (including the nature and identity of the substances tested, the doses given, and the methods of administration) is an inquiry of the utmost importance.

These issues of proper notice and health care are critical for those aging veterans who may be suffering from health ailments related to exposures to chemical and biological agents. Without notice, these veterans simply cannot identify the source of their health problems or obtain adequate health care. Without the health care they were promised, they will continue to suffer in silence for their service to their country. Over the course of thirty years or more, Defendants have continually treated these issues like a hot potato – tossing off the obligation to provide notice because they do not want to handle it, and seeking to prevent or discourage veterans from seeking medical assistance because they do not want to provide it. Defendants have employed a strategy of unrelenting delay and stalling tactics since the 1970s, presumably waiting for the passage of time to relieve them of their obligations as more and more of these veterans pass on. Plaintiffs seek to force Defendants to finally honor their promises and obligations to the veterans after more than thirty years of waiting.

In connection with these efforts, Plaintiffs served their First Set of Requests for Production on May 15, 2009. Plaintiffs sought, *inter alia*, information about the identities of test subjects and the effects of the substances administered to them. Defendants produced approximately 15,000 pages of documents on a rolling basis between October 2009 and April 2010, most of which related to the individual Plaintiffs' military files and many of which were

heavily redacted. (Vecchio Decl. ¶ 14 Exh. G). Defendants objected to producing any documents they deemed subject to Privacy Act and/or HIPAA considerations. (*Id.*). Plaintiffs subsequently served their Second, Third, and Fourth Sets of Requests for Production, which in large part sought specific un-produced documents referenced in other documents within Defendants' small production. In July 2009, counsel for both parties began discussing the content of a protective order, and several drafts of stipulated protective orders were exchanged over the course of several months. (Vecchio Decl. ¶ 2).

After the Court denied Defendants' Motion to Dismiss in part on January 19, 2010, discovery resumed, as did the meet and confer process. With respect to the protective order issue, counsel have met and conferred by phone multiple times, including on July 31, 2009, May 19, 2010, and May 26, 2010. (Vecchio Decl. ¶¶ 3, 5). After it became apparent that the parties' disagreement could not be resolved without the Court's intervention, Plaintiffs filed an Individual Statement of Discovery Dispute regarding this issue on June 2, 2010 (Docket No. 82). Defendants filed their Response on June 9, 2010 (Docket No. 94).

Immediately following the Court's June 30, 2010 hearing on Plaintiffs' Motion to Compel Responses to Interrogatories, counsel once again met and conferred for two hours regarding various discovery disputes, including the specific issues concerning the protective order. (Vecchio Decl. ¶ 6). Defendants expressed a desire to limit the number of persons with access to the protected information; Plaintiffs responded that they were amenable to such a request and revised the proposed protective order to reflect that only a limited number of representatives from the organizational and individual Plaintiffs would be given access to the information. Revealing their true concern, Defendants also demanded that Plaintiffs agree not to contact any individual test subjects identified in discovery. Plaintiffs refused to agree to this condition for the key reason that such discovery is necessary: these individuals are potential witnesses and putative class members. (Vecchio Decl. ¶ 7).

Plaintiffs transmitted an updated draft protective order to Defendants on July 26, 2010, revised to reflect the parties' discussions regarding the number of persons with access and requested that Defendants stipulate to the order. (Vecchio Decl. ¶¶ 8-9) Plaintiffs also sent

Defendants a draft joint statement of discovery dispute regarding the protective order on June 26, 2010, and requested Defendants' input. Defendants would not provide any input regarding the joint statement. Instead, Defendants sent Plaintiffs a letter misconstruing the parties' discussion during the June 30, 2010 meet and confer session, indicating that Defendants were waiting on Plaintiffs to inform them of how they plan to use protected information in connection with contacting potential witnesses identified in the documents.[2] (Vecchio Decl. ¶ 10 Exh. B). Having already informed Defendants at the meet and confer that Plaintiffs were unwilling to agree to any restriction on their ability to contact these witnesses, Plaintiffs filed a Joint Statement of Discovery Dispute on August 2, 2010 (Docket No. 115). On August 6, 2010, the Court ordered the parties to submit formal briefing on this and other pending discovery issues.

Throughout this time, Defendants' primary objections to the protective order proposed by Plaintiffs have been the Privacy Act and HIPAA. Defendants have steadfastly refused to produce information potentially subject to the Privacy Act and/or HIPAA: Defendants specifically asserted Privacy Act and/or HIPAA objections to 41 of Plaintiffs' 77 requests in Plaintiffs' First Set of Requests for Production, in addition to a general objection covering the same issues (Vecchio Decl. ¶ 14 Exh. E). Defendants produced their "chem-bio" database, which contains information about the testing, but with each putative class member's name redacted. Defendants maintain further databases concerning these tests and the putative class members, but have not produced them at all. (Vecchio Decl. ¶¶ 19-20 Exhs. J, K). Defendants also included six entries on their July 29, 2010 privilege log based on the Privacy Act and/or HIPAA. (Vecchio Decl. ¶ 16 Exh. G). Further, Defendants also continue their ongoing refusal to answer Plaintiffs' interrogatories based on similar objections, asserting Privacy Act and/or HIPAA objections to 13 of Plaintiffs' 25 interrogatories **even after the Court's July 13, 2010 Order ordering**

[2] Defendants' assertion is further undercut by the draft of the proposed protective order itself, which includes a clause indicating that Protected Material "may only be used in connection with the prosecution or defense of this litigation and for no other purpose …." ([Proposed] Protective Order Governing Discovery ("Proposed Order") at ¶ 7.2).

**Defendants to respond to the interrogatories**.[3] In addition, the Department of Veterans' Affairs, a third party represented by the same counsel as Defendants and which Plaintiffs seek to add as a Defendant in the Third Amended Complaint, has submitted a 202-page privilege log in response to a Rule 45 subpoena served by Plaintiffs that includes 250 entries based on the Privacy Act and/or HIPAA. (Vecchio Decl. ¶ 17 Exh. H).

## III. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 26(c)(1), "[a] party or any person from whom discovery is sought may move for a protective order in the court where the action is pending . . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."

Information subject to the Privacy Act may be disclosed "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. § 552a(b)(11). A court may order the disclosure of information subject to the Privacy Act where that information is relevant under Federal Rule of Civil Procedure 26(b)(1). *Laxalt v. McClatchy*, 809 F.2d 885, 889 (D.C. Cir. 1987); *see Weahkee v. Norton*, 621 F.2d 1080, 1082 (10th Cir. 1980) ("The test for determining whether material is discoverable is relevancy.").[4] These same standards "give the District Court ample discretion to fashion appropriate protective orders upon a showing of 'good cause.'" *Laxalt*, 809 F.2d at 889 (citing Fed. R. Civ. P. 26(c)). In considering the propriety and scope of a protective order, some courts balance "the need for the disclosure against the potential harm to the subject of the disclosure." *Perry v. State Farm Fire & Cas. Co.*, 734 F.2d 1441, 1447 (11th Cir.1984) (citation omitted); *cf. Soto v. City of Concord*, 162 F.R.D. 603, 616 (N.D. Cal. 1995) (citing *Perry* when applying similar standard outside Privacy Act context). This balancing analysis can be conducted

[3] Plaintiffs intend to seek further relief from the Court in light of Defendants' non-compliance with the Court's order compelling them to serve answers.

[4] "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

"presumably to the extent such a determination would shed light upon good cause for [a protective order]." *See Lohrenz v. Donnelly*, 187 F.R.D. 1, 8 (D.D.C. 1999) (citation omitted).

With respect to HIPAA, "[a] covered entity may disclose protected health information in the course of any judicial or administrative proceeding: (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order . . . ." 45 C.F.R. § 164.512(e)(1). Disclosure is also permitted "in response to a subpoena, discovery request, or other lawful process . . . if the party seeking the information . . . makes a reasonable effort to secure a qualified protective order, that is, an order that prohibits the use or disclosure of the information outside the litigation and requires the return or destruction of the information at the end of the litigation. *45 C.F.R. § 164.512(e)(1)(v)." Rosales v. City of Bakersfield*, No. 1:05-CV-0237 REC TAG, 2006 U.S. Dist. LEXIS 22382, at *8-9 (E.D. Cal. Apr. 12, 2006) (quoting *Nw. Mem'l. Hosp. v. Ashcroft*, 362 F.3d 923, 925 (7th Cir. 2004)) (internal quotations omitted).

## IV. ARGUMENT

Plaintiffs have been attempting in good faith to enter a standard protective order with Defendants – something ordinarily stipulated to by counsel without the need for Court intervention – for over a year. (Vecchio Decl. ¶¶ 2-6 Exh. A). The protective order proposed by Plaintiffs would allow for the production of necessary information, while also protecting it from disclosure or use outside of this litigation. Contrary to their practice in other recent cases, Defendants refuse to stipulate to a protective order that provides for disclosure of this information, despite the fact that they have routinely produced such information in other litigation pursuant to a standard Privacy Act protective order.[5] Defendants' posture is made all the more

[5] *See, e.g.*, Protective Order, *Veterans for Common Sense v. Mansfield*, No. C-07-3758-SC (N.D. Cal. March 6, 2008) (Vecchio Decl. ¶ 21 Exh. L). Moreover, Dr. James Ketchum, former Chief of the Clinical Research Department at Edgewood Arsenal, took documents and test data containing the **real** names of volunteers when he left Edgewood. (Vecchio Decl. ¶ 13 Exh. D, Deposition of James Ketchum at 48-49, July 14, 2010). There was no screening procedure in place to monitor what documents he was taking, and no apparent effort has been made to recover these documents potentially covered by the Privacy Act, undercutting Defendants' purported concerns about keeping this information secret. (*Id.*)

baffling by their tacit admission over a decade ago that this information should no longer be kept secret.[6]

Instead, Defendants have consistently refused to produce documents containing such information, or have produced documents with such information wholly redacted. For example, Defendants have asserted Privacy Act and HIPAA objections as the basis for refusing to produce documents responsive to Plaintiffs' Request for Production No. 34, which seeks copies of all participant agreements and/or consent forms signed by the test subjects – instead agreeing only to produce forms signed by the named Plaintiffs.[7] Defendants used these objections as a basis for refusing to produce documents regarding the names of service personnel who were involved in any of Defendants' test programs (in any capacity)[8], and as a basis for refusing to answer interrogatories about the identities of test subjects, communications between Defendants and test subjects, and the text of consent forms, among other topics.[9]

Because Plaintiffs' proposed protective order would obviate most of Defendants' objections, Defendants' continued opposition indicates that they are simply unwilling to comply with their discovery obligations and are seeking to use Privacy Act and HIPAA concerns as a means to avoid producing directly relevant information. Simply put, it appears to Plaintiffs that Defendants do not *want* to enter into a protective order because it would deprive them of a convenient basis to withhold relevant documents they do not wish to produce and to continue their refusal to answer Plaintiffs' interrogatories.

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[6] *See* March 9, 1993 Memorandum of William Perry, Deputy Director of Defense, (declassifying documents regarding the "name, service or social security number, and military unit of each individual known to have participated in a chemical weapons research or testing program.") (Vecchio Decl. ¶ 18 Exh. I at 1).

[7] Defendants' Response to Plaintiffs' Document Request No. 34 (Vecchio Decl. ¶ 14 Exh. E).

[8] Defendants' Response to Plaintiffs' Document Request No. 11 (*Id.*).

[9] *See* Defendants' responses to Plaintiffs' Interrogatories Nos. 2 (identities of test subjects), 4 (communications between Defendants and test subjects), and 15 (text of consent forms) (Vecchio Decl. ¶ 15 Exh. F).

Plaintiffs certainly recognize the legal significance of the Privacy Act and HIPAA and the implications that this discovery will have on test subjects. It is for these very reasons that Plaintiffs have carefully drafted and *redrafted* their proposed protective order to address Defendants' concerns and provide certainty that covered information will be protected. Defendants' refusal to stipulate to this routine protective order has left Plaintiffs in an odd predicament: both seeking discovery and moving for a protective order. Plaintiffs are attempting to reach a compromise – moving for a protective order that will both provide Plaintiffs with essential discovery *and* resolve Defendants' purported concerns. Plaintiffs also intend to file a motion to compel production of documents in the near future.[10]

**A. The Information Sought Is Highly Relevant**

In this case, a protective order should be entered to permit the production of relevant – and indeed, critical – information, while simultaneously protecting that information from needless disclosure outside the litigation. Defendants are withholding, *inter alia*, the names of the experimental test subjects, all of whom are **potential witnesses and putative class members**.[11] Defendants further refuse to enter into a routine protective order unless Plaintiffs agree not to contact any of these witnesses. (Vecchio Decl. ¶ 7). Clearly, this is an unacceptable precondition; contacting potential witnesses is one of the key facets of discovery. Without the names of test subjects and the ability to contact them, Plaintiffs are unable to obtain critical information regarding the events at issue in this case, or to properly analyze the accuracy of information and data compiled by Defendants. Moreover, these test subjects are the very same individuals who comprise members of the putative class that Plaintiffs seek to represent. Due to Defendants' staunch reliance on their purported Privacy Act and HIPAA concerns, however, the parties are left with the absurd – and intrinsically unfair – circumstance in which *only the*

[10] "A court order under *Fed.R.Civ.P. 37* in response to [a] motion to compel discovery would meet the standards of [the Privacy Act]." *Weahkee*, 621 F.2d at 1082.

[11] Defendants' position throughout this dispute has been that information could only be produced if individual test subjects sign waivers authorizing such disclosure. (Vecchio Decl. ¶ 4 Exh. A). This position, of course, puts Plaintiffs in a "Catch-22." Without knowing who former test subjects are, Plaintiffs cannot locate them to seek waivers.

*Defendants have access to information regarding the Plaintiff class*, and *only the Defendants have the information necessary to contact putative class members*. Thus, as further explained below, this information clearly meets the relevancy standard for production via 5 U.S.C. § 552a(b)(11). *Laxalt*, 809 F.2d at 888.

Contacting test subject witnesses is vital to the issue of notice, including Plaintiffs' proposed Third Amended Complaint's allegations and claims against Department of Veterans Affairs (Docket No. 88-1 at ¶¶ 232-247). The information sought regards the very individuals that Plaintiffs allege, and the Court has ruled, must receive notice of the **details** of their exposure. (Order Granting In Part and Denying In Part Defendants' Motion to Dismiss, Jan. 19, 2010, Docket No. 59 at 14-16.) Plaintiffs also need to determine if individual test subjects have in fact been notified, what they were told, whether the information provided to them was erroneous or misleading, whether test subjects have responded or sought health care, and whether that health care was provided.

Without the test subjects' names, Plaintiffs cannot accurately match adverse health effects to related chemicals, drugs, and doses. Patterns and links between particular chemicals and current health problems – which are relevant to the issue of health care – cannot be developed.[12] As they have admitted before Congress, Defendants have destroyed many of the documents pertaining to Defendants' human testing programs; most of the scarce information that remains

[12] Although various "surveys" collecting information from test subjects have purportedly been performed in the past, these surveys, such as one conducted by the Institute of Medicine, are unreliable for a number of methodological reasons (including use of an improper control group, the large number of unreturned surveys (likely those of deceased soldiers), and other problems). *See, e.g.*, William F. Page, *Long-Term Health Effects of Exposure to Sarin and Other Anticholinesterase Chemical Warfare Agents*, 168 MILITARY MEDICINE 3:239 (March 2003). Most notably, the "healthy soldier effect" renders these surveys inadequate. It has been well established that servicemembers are generally healthier than the general population, which is termed the "healthy soldier effect." *See, e.g.*, Robert W. Haley, *Point: Bias From the "Healthy-Warrior Effect" and Unequal Follow-up in Three Government Studies of Health Effects of the Gulf War*, 148 AMERICAN JOURNAL OF EPIDEMIOLOGY 4, 315 (1998). Because test subjects were carefully screened to exclude those with significant health problems, the healthy soldier effect has been intensified; those tested were the "best of the best." (Vecchio Decl. ¶ 22 Exh. M). Accordingly, former test subjects would likely be more resilient, and surveys, comparing them to the general population, would fail to demonstrate the actual frequency and magnitude of health problems caused by the experiments.

available is exclusively in Defendants' control. Yet, Defendants continue to withhold this vital information – only producing it in heavily redacted form, if at all. Trying to make sense of this information and develop any patterns or links, *without* test subjects' names providing context, is like trying to construct a building without a blueprint.

Furthermore, this information is relevant to the issues of consent and the secrecy oaths. Plaintiffs challenge the validity of consents and secrecy oaths given during these experiments (Docket No. 88-1 at ¶¶ 156-173), and Defendants have asserted consent as an affirmative defense. (Defendants' Answer to Second Amended Complaint, Docket No. 71 at 40.) Information regarding the identities of test subjects is critical in order to determine and/or verify the circumstances under which purported consents and secrecy oaths were given. For example, the test subjects may be able to identify instances of coercion or undue influence, or instances in which objections to participating in tests were refused. This is all relevant information that can only be ascertained by examining unredacted documents and/or contacting the test subjects themselves.

Defendants also maintain a series of databases containing individual and summary information about the names, addresses, phone numbers, health status, substances exposed to, and other critical information regarding test participants. Defendants have refused to produce these databases, with the exception of the aforementioned "chem-bio" database from which Defendants redacted all test participant names. (Vecchio Decl. ¶¶ 19-20 Exhs. J, K). Defendants obviously are using these databases to defend this case, relying on information regarding notices to veterans, substances and doses administered, and health effects on the exposed populations. A protective order would allow Plaintiffs access to this critical information while assuring Defendants of its continued confidentiality outside this litigation going forward, yet Defendants are apparently determined to avoid such a reasonable outcome.

For the aforementioned reasons, the information being withheld is significant to the subject matter of this case. This information is relevant under Rule 26(b)(1) and the Court should overrule Defendants' Privacy Act and HIPAA objections and enter a protective order covering this information and limiting use to this litigation. See *Laxalt*, 809 F.2d at 889. Moreover, given

the importance of this withheld information to the case, the need for disclosure significantly outweighs any potential harm to the test subjects resulting from production. *See Perry,* 734 F.2d at 1447. The information being sought regards putative class members, rather than entirely unrelated third parties. A protective order will obviate any potential concerns regarding disclosure outside this litigation, thus clearing the way for Defendants to produce vital information potentially subject to the Privacy Act and/or HIPAA. *Rosales*, 2006 U.S. Dist. LEXIS 22382 at *8-9.

**B. There Is Good Cause to Enter a Protective Order**

While Plaintiffs reserve the right to file a motion to compel the production of responsive documents, "good cause" clearly exists for entry of a general protective order governing discovery, as the same issues will continue to be raised in other forms of discovery. Defendants' reasons for objecting to the entry of a protective order – *i.e.*, the potential harms to test subjects if this information is produced – illustrate the good cause why a protective order is proper.[13] *See Lohrenz*, 187 F.R.D. 1, at 8. Whatever concerns Defendants have about disclosure would be avoided through entry of a proper protective order – something that is ordinarily stipulated to without court intervention.[14]

With respect to HIPAA materials specifically, not only may that information be produced pursuant to a court order, but alternatively it may be produced pursuant to a protective order that satisfies 45 C.F.R. § 164.512(e)(1)(v). Plaintiffs' proposed protective order satisfies both 45 C.F.R. § 164.512(e)(1)(v) requirements by prohibiting use of the information outside of the litigation and requiring that it be returned or destroyed at the case's conclusion. (Proposed Order

[13] For the sake of judicial efficiency, Plaintiffs will leave these issues for Defendants' brief.

[14] Plaintiffs' Proposed Protective Order includes a routine provision covering "classified" information or documents. (Proposed Order at ¶ 3(a)(v)). This provision provides for the protection of classified information that may be produced through the course of litigation. Thus, it moots many of Defendants' objections by providing a mechanism by which such documents would be protected. The provision does *not*, however, purport to force the production of legitimately classified documents. It is a shield, not a sword.

at ¶ 11). The regulation itself contemplates the exact type of protective order sought in this case, further demonstrating Defendants' unreasonableness in refusing to stipulate.

The withheld discovery at issue is highly relevant to the subject matter of the case, and good cause exists for entry of a protective order covering it. Accordingly, Plaintiffs ask that the Court enter a protective order pursuant to Rule 26(c)(1), protecting this information from disclosure or use outside this litigation, and overrule Defendants' objections pursuant to 5 U.S.C. § 552a(b)(11) and 45 C.F.R. § 164.512(e)(1).

## V. CONCLUSION

Due to Defendants' longstanding refusal to stipulate to a standard protective order – the likes of which they have regularly entered into in other cases – Plaintiffs must regretfully request that the Court intervene to resolve this dispute. Plaintiffs ask that the Court enter Plaintiffs' proposed protective order providing for the production of documents and other evidence that may be subject to the Privacy Act and/or HIPAA. Until a proper protective order is in place and Defendants' objections on these grounds overruled, Defendants will continue to shirk their discovery obligations in this case, as they have now done for well over a year, by withholding critical information on the basis of an alleged concern that they themselves could have easily allayed.

Dated: August 19, 2010

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