

1 GORDON P. ERSPAMER (CA SBN 83364)
 Gerspamer@mofo.com
 2 TIMOTHY W. BLAKELY (CA SBN 242178)
 TBlakely@mofo.com
 3 ADRIANO HRVATIN (CA SBN 220909)
 AHrvatn@mofo.com
 4 STACEY M. SPRENKEL (CA SBN 241689)
 SSprenkel@mofo.com
 5 DANIEL J. VECCHIO (CA SBN 253122)
 DVecchio@mofo.com
 6 DIANA LUO (CA SBN 233712)
 DLuo@mofo.com
 7 MORRISON & FOERSTER LLP
 425 Market Street
 8 San Francisco, California 94105-2482
 Telephone: 415.268.7000
 9 Facsimile: 415.268.7522

10 Attorneys for Plaintiffs
 Vietnam Veterans of America; Swords to
 11 Plowshares: Veterans Rights Organization;
 Bruce Price; Franklin D. Rochelle; Larry
 12 Meirow; Eric P. Muth; David C. Dufrane; and
 Wray C. Forrest
 13

14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 OAKLAND DIVISION
 17

18 VIETNAM VETERANS OF AMERICA, *et al.*,
 19 Plaintiffs,
 20 v.
 21 CENTRAL INTELLIGENCE AGENCY, *et al.*,
 22 Defendants.
 23

Case No. CV 09-0037-CW

**DECLARATION OF DANIEL J.
 VECCHIO IN SUPPORT OF
 PLAINTIFFS' MOTION FOR
 PROTECTIVE ORDER**

Complaint filed January 7, 2009

1 I, Daniel J. Vecchio, declare as follows:

2 1. I am an attorney licensed to practice law in the State of California and am admitted
3 to practice before this Court. I am an associate with the law firm of Morrison & Foerster LLP,
4 counsel of record for Vietnam Veterans of America, Swords to Plowshares: Veterans Rights
5 Organization, Bruce Price, Franklin D. Rochelle, Larry Meiorow, Eric P. Muth, David C. Dufrane
6 and Wray C. Forrest (“Plaintiffs”) in this action. I submit this Declaration in Support of
7 Plaintiffs’ Motion for Protective Order. I make this Declaration based on personal knowledge. If
8 called as a witness, I would testify to the facts set forth below.

9 2. On information and belief, after Plaintiffs broached the issue of a Protective Order
10 respecting certain discovery, Counsel for the parties exchanged multiple drafts and markups of a
11 proposed protective order, beginning on or about July 13, 2009.

12 3. On information and belief, Counsel for the parties met and conferred via telephone
13 to negotiate concerning a proposed protective order on July 31, 2009.

14 4. Attached as Exhibit A is a true and correct copy of a August 31, 2009 e-mail from
15 Caroline Lewis-Wolverton, Esq., counsel for Defendants, to Adriano Hrvatin, Esq., counsel for
16 Plaintiffs, in which Ms. Lewis-Wolverton states Defendants’ position that they are unwilling to
17 agree to a protective order providing for the disclosure of Privacy Act information pertaining to
18 individuals other than the named Plaintiffs.

19 5. Counsel for the parties again met and conferred via telephone regarding a
20 proposed protective order on May 19, 2010, and May 26, 2010. I participated in those
21 discussions.

22 6. Counsel for the parties met and conferred in person for approximately two hours
23 immediately following the hearing on Plaintiffs’ Motion to Compel Responses to Interrogatories
24 on June 30, 2010; lead counsel for Plaintiffs, Mr. Gordon Erspamer, was present for much of this
25 discussion. At that time, counsel for the parties discussed several outstanding discovery disputes,
26 including the proposed protective order. Defendants raised an issue with respect to limiting
27 access to protected documents, and Plaintiffs’ counsel agreed that they were amenable to a
28 reasonable limitation on the number of persons other than counsel and counsel’s agents,

1 employees, or consultants, who would have access to the protected information. No agreement
2 was reached as to a specific number of individuals who would have access.

3 7. At the June 30, 2010 meet-and-confer discussion, Kimberly L. Herb, Esq., counsel
4 for Defendants, indicated that Defendants were opposed to Plaintiffs contacting any of the
5 individual test subjects other than the named Plaintiffs, and proposed that Plaintiffs refrain from
6 doing so as a condition of a proposed protective order. I responded that Plaintiffs could not agree
7 to such a condition, pointing out that these putative class members are prospective witnesses.

8 8. On July 26, 2010, Plaintiffs sent a letter to Defendants to inquire whether
9 Defendants were willing to stipulate to a revised protective order subject to the agreed-upon
10 restrictions on who would have access to the protected information. Plaintiffs also sent a draft of
11 a joint statement of discovery dispute regarding the protective order to Defendants and requested
12 that they provide their input if Defendants were still unwilling to stipulate to the order.

13 9. Also on July 26, 2010, Plaintiffs transmitted a revised draft of the proposed
14 protective order to Defendants via e-mail. This draft had been updated to reflect the parties'
15 agreement regarding limiting the number of persons with access to the protected information.
16 Specifically, the draft provided that only three representatives of the individual Plaintiffs and only
17 two designated representatives from each organizational Plaintiff or Defendant Agency, each of
18 whom would sign an agreement to be bound by the protective order, would have access to the
19 information.

20 10. On July 30, 2010, Lily Farel, Esq., counsel for Defendants, sent me a letter via e-
21 mail in which she stated that Defendants would not provide input to the joint statement, and were
22 awaiting additional information from Plaintiffs before making a determination regarding their
23 willingness to stipulate to the protective order. Attached as Exhibit B is a true and correct copy of
24 Ms. Farel's July 30, 2010 letter.

25 11. I have read Defendants' Status Report Regarding Meet and Confer Process, filed
26 with the Court on August 6, 2010. I understand that in that filing, Defendants indicate that it was
27 their belief that during the June 30, 2010 meet and confer I agreed to provide information
28 regarding how the organizational Plaintiffs will use information regarding the identities of the test

1 subjects, as referenced in Exhibit B (July 30, 2010 Farel letter). I did not make any such
2 agreement. As noted above, I recall Defendants, specifically Ms. Herb, expressing concern
3 regarding how the information would be used, but I informed them that Plaintiffs could not agree
4 to abstain from contacting individual test subjects as a condition of the protective order. I believe
5 Defendants may be confusing portions of our discussion concerning additional information about
6 who would have access (i.e., how many representatives from each organizational Plaintiff) with
7 these discussions about Defendants' concerns. Plaintiffs did provide information about the
8 number of representatives who would have access to protected information in the revised draft of
9 the protective order they submitted to Defendants on July 26, 2010.

10 12. Attached as Exhibit C is a true and correct copy of a document I am informed and
11 believe is a draft Privacy Act protective order proposed by the Department of Justice in another
12 case.

13 13. Attached as Exhibit D is a true and correct copy of an excerpt of the testimony of
14 Dr. James Ketchum at his deposition in this action.

15 14. Attached as Exhibit E is a true and correct copy of Defendants' Response to
16 Plaintiffs' First Request for Production of Documents, served on March 4, 2010. On information
17 and belief, Defendants have produced approximately 15,000 pages of documents to date in
18 response to Plaintiffs' First Request for Production of Documents.

19 15. Attached as Exhibit F is a true and correct copy of Defendants' Amended
20 Response to Plaintiffs' Interrogatories, served on August 12, 2010.

21 16. Attached as Exhibit G is a true and correct copy of the Privilege Log to
22 Defendants' Production in Response to Plaintiffs' First Set of Requests for Production, as
23 amended and served on July 29, 2010.

24 17. Attached as Exhibit H is a true and correct copy of the Department of Veterans
25 Affairs Response to Rule 45 Subpoena, Privilege Log, as amended and served on August 4, 2010.

26 18. Attached as Exhibit I is a true and correct copy of what I am informed and believe
27 is a memorandum by William Perry, Deputy Director of Defense, dated March 9, 1993, produced
28 by Defendants in this action as Bates number VVA 09145 to VVA 09146.

1 19. Attached as Exhibit J is a true and correct copy of what I am informed and believe
2 is a summary of an “information exchange meeting” between the Department of Defense and the
3 Department of Veterans Affairs, produced by the Department of Veterans Affairs in response to
4 Plaintiffs’ Rule 45 subpoena as VVA-VA 029843 through VVA-VA 029847. This document
5 appears to reflect that contractors employed by the Department of Defense’s Deployment Health
6 Support Directorate (DHSD) maintain two “spreadsheets” containing “several thousand names”
7 of test subjects at Fort Detrick. This document also appears to reflect the existence of a “CHEM
8 GAS database” maintained by the DHSD. To the best of my knowledge, neither these
9 spreadsheets nor the CHEM GAS database have been produced in this litigation.

10 20. Attached as Exhibit K is a true and correct copy of what I am informed and believe
11 is a document authored by Mr. Joe Salvatore, produced by the Department of Veterans Affairs in
12 response to Plaintiffs’ Rule 45 subpoena as VVA-VA 029848, outlining “all historic and possible
13 future test releases” of information concerning chemical testing by the Department of Defense to
14 the Department of Veterans Affairs. This document states that the “DoD now provides the
15 Department of Veterans (VA) with test program information and a database for each declassified
16 test program for the purposes of outreach, claims adjudication, and health care.” To the best of
17 my knowledge, these databases have not been produced in this litigation.

18 21. Attached as Exhibit L is a true and correct copy of a Protective Order issued in
19 *Veterans for Common Sense v. Mansfield*, No. C-07-3758-SC (N.D. Cal. March 6, 2008).

20 22. Attached as Exhibit M is a true and correct copy of what I am informed and
21 believe is a list of Frequently Asked Questions regarding Edgewood Arsenal Chemical Agent
22 Exposure Studies: 1955-1975, produced by Defendants as VVA-VA 023347 through VVA-VA
23 023348. The answer to the first question states, “As a group, the volunteers selected to participate
24 in the studies were above average in physical and mental qualifications when compared to other
25 service members.”
26
27
28

1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct and that this Declaration was executed in San Francisco, California
3 on this 19th day of August, 2010.

4
5 /s/ Daniel J. Vecchio
Daniel J. Vecchio

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Attestation Pursuant to General Order 45, section X.B

I hereby attest that I have on file all holograph signatures for any signatures indicated by a “conformed” signature (/S/) within this efiled document.

/s/ GORDON P. ERSPAMER

Gordon P. Erspamer