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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' NOTICE OF MOTION AND MOTION TO OVERRULE OBJECTIONS AND COMPEL 30(b)(6) DEPOSITIONS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: September 29, 2010
Time: 9:30 a.m.
Courtroom: F, 15th Floor
Judge: Hon. James Larson

Complaint filed January 7, 2009

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 29, 2010, at 9:30 a.m., or as soon thereafter as the matter may be heard before U.S. Magistrate Judge James Larson, at the United States District Courthouse, San Francisco, California, Courtroom F, 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 ("Plaintiffs") will and hereby do move the Court for an order overruling objections and compelling the Central Intelligence Agency; Leon Panetta, Director of the Central Intelligence Agency; United States Department of Defense; Dr. Robert M. Gates, Secretary of Defense; United States Department of the Army; Pete Geren, United States Secretary of the Army; United States of America; Eric H. Holder, Jr., Attorney General of the United States ("Defendants") to: (1) designate knowledgeable witnesses who can testify on Topics 2-3, 10-11, 14, 17, 20, 22-24, 32, 34, 36-37, 44-48, 50-52, and 54 of Plaintiffs' November 16, 2009 30(b)(6) Notice; and (2) designate knowledgeable witnesses from the Department of the Army, Department of Defense, and the Central Intelligence Agency who can testify on topics in Plaintiffs' June 16, 2010 30(b)(6) Notices. Plaintiffs bring this motion on the grounds that Defendants have failed to designate knowledgeable witnesses under Rule 30(b)(6). *See* Fed. R. Civ. P. 37(b).

This motion to compel is based on this Notice of Motion and the accompanying Memorandum of Points and Authorities filed herewith, the Declaration of Daniel J. Vecchio ("Vecchio Decl.") and attached exhibits filed herewith, all other pleadings and matters of record, and such further oral and documentary evidence as may be presented at or before the hearing on this motion. Counsel for Plaintiffs certify that, prior to filing this motion, they in good faith conferred with Defendants' counsel in an effort to resolve this matter without court action.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In the course of this substantively complex litigation involving chemical and biological weapons testing on thousands of human subjects by multiple government agencies over many years, depositions are essential to obtain the facts necessary to develop and prove Plaintiffs' claims. More than nine months after Plaintiffs served their first 30(b)(6) deposition notice, however, and despite months spent attempting to meet and confer, Defendants have yet to produce a single witness.

Relying on a misreading of Judge Wilken's January 19, 2010 Order, Defendants have effectively circumvented their discovery obligations through a strategy of delay, knowing that the named Plaintiffs are aging veterans with a myriad of ailments, and at least one has terminal cancer. Defendants must not be allowed to continue stonewalling discovery, and the Court should grant Plaintiffs' motion to compel so this case can move forward expeditiously.

II. STATEMENT OF FACTS

A. Judge Wilken's Order Denying in Part and Granting in Part Defendants' Motions to Dismiss and Denying Defendants' Alternative Motion for Summary Judgment.

Central to this discovery dispute is the proper reading of Judge Wilken's January 19, 2010 Order on Defendants' Motion to Dismiss and Alternative Motion for Summary Judgment (the "Order") (Docket No.59). Defendants contend that Judge Wilken's Order somehow greatly narrowed the scope of relevant issues in this litigation. (Vecchio Decl. ¶ 3, Ex. A.) To the contrary, the Order upheld most of Plaintiffs' claims for relief. Specifically, there is no question that Judge Wilken upheld Plaintiffs' claims concerning: (1) Defendants' obligation to provide medical care to the test subjects (the "Healthcare Claims"); (2) Defendants' obligation to provide notice to the test subjects disclosing information concerning the experiments and information about the known health effects of Defendants' human experimentation programs (the "Notice Claims"); (3) the lawfulness of Plaintiffs' consent to testing; and (4) the lawfulness of Plaintiffs' secrecy oaths. (Docket No. 59 at 19-20.) The Order dismissed only Plaintiffs' declaratory relief claims concerning the lawfulness of Defendants' testing programs and the constitutionality of the

Feres doctrine. (*Id*.) The Order did not alter any of the facts at issue in the case, all of which are incorporated into the claims that survived dismissal.

B. Plaintiffs' November 16, 2009 Deposition Notices Regarding Substantive Topics.

Plaintiffs served their first Notice of Deposition to all Defendants pursuant to Fed. R. Civ. P. 30(b)(6) on November 16, 2009, identifying fifty-seven topics. (Vecchio Decl. ¶ 4, Ex. B.) Defendants responded to Plaintiffs' notice on March 4, 2010, refusing to designate witnesses to testify about thirty-seven of the fifty-seven Topics, objecting on grounds of relevance, lack of knowledge, and privilege.[1] (Vecchio Decl. ¶ 5, Ex. C.) Defendants assert (incorrectly) that the Order somehow narrowed the scope of discovery, but have failed to provide any justification for the privilege objections. While Defendants claim they lack sufficient knowledge to designate a witness to testify to a number of 30(b)(6) topics, they also admit that they have failed to look at a number of document repositories which may have information on these topics. (Vecchio Decl. ¶ 6, Ex. D at 2, n.1.)

C. Plaintiffs' June 16, 2010 Deposition Notices Regarding Defendants' Inadequate Document Production.

As discussed in detail in Plaintiffs' Motion to Overrule Objections and Compel Production of Documents (filed concurrently herewith), Defendants' document production efforts have been woefully inadequate. It has been more than fourteen months since Plaintiffs served their first set of Requests for Production, but Defendants have produced fewer than 16,500 pages (approximately 1,600 documents) in response. (Vecchio Decl. ¶ 2.) As a result, Plaintiffs served supplemental 30(b)(6) notices of depositions on the Central Intelligence Agency ("CIA"), Department of Defense ("DOD"), and Department of the Army ("DOA") on June 16, 2010. [2]

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[1] Defendants refused to designate witnesses on Topics 2-3, 7, 10-11, 14, 17, 19-20, 22-28, 32, 34-37, 40-43, and 49-54.

[2] Plaintiffs also served a deposition notice on the Department of Justice ("DOJ"), but that notice is currently not at issue in this motion. Plaintiffs reserve all rights with respect to the deposition notice to DOJ and/or any noticed 30(b)(6) topics not addressed in this motion, including the right to file future motions to compel.

(Vecchio Decl. ¶¶ 7-9, Exs. E-G.) Each notice contained twenty nine deposition topics concerning steps taken by Defendants to identify requested documents, the scope of any asserted privileges, any destruction of documents, and any redactions in documents produced. Defendants have offered no witness on those topics to date: the DOD and DOA insist that these supplemental depositions follow the completion of their searches for and production of documents, but they have not specified when their searches will conclude or what searches they are performing. (Vecchio Decl. ¶ 6, Ex. D.) The CIA has altogether refused to produce a witness. (*Id*. at 2.)

D. Plaintiffs Have Attempted to Meet and Confer in Good Faith.

The parties met and conferred telephonically regarding various discovery disputes, including the ones at issue in this motion, on May 19, 2010, and in person on June 30, 2010, per the Court's order. (Vecchio Decl. ¶¶ 10-11.) The parties were not able to resolve the disputes, and filed a joint statement of discovery dispute with the Court on August 2, 2010. (Docket No. 118.) On August 6, the Court ordered the parties to submit formal briefing for any outstanding discovery disputes. (Docket No. 120.)

III. ARGUMENT

A. The Scope of Discovery Is Broad and Defendants Bear the Burden of Showing that Depositions Should Not Be Allowed.

Federal Rule of Civil Procedure 26(b)(1) provides that a party "may obtain discovery regarding *any nonprivileged matter*, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1) (emphasis added). Relevance under Rule 26 is interpreted broadly and liberally, and encompasses not only information that would be admissible at trial, but also information "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); *see also* 6 James W. Moore et. al., *Moore's Federal Practice* § 26.41[6] (3d ed. 2010). A deposition taken pursuant to Fed. R. Civ. P. 30(b)(6) may properly seek any evidence which may lead to the discovery of admissible evidence. *See Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 366-67 (N.D. Cal. 2000) (holding that the scope of 30(b)(6) deposition is determined solely by relevance under Rule 26).

Moreover, as the party resisting discovery, Defendants bear both the burden of "showing that discovery should not be allowed," and the burden of "clarifying, explaining, and supporting its objections." *See Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1998) (citing *Nestle Foods Corp. v. Aetna Cas. & Surety Co.*, 135 F.R.D. 101, 104 (D. N.J. 1990)); *see also Kaufman v. Bd. of Trustees*, 168 F.R.D. 278, 280 (C.D. Cal. 1996) ("The burden of proof is on the party opposing discovery to claim lack of relevancy and privilege."). "Boiler-plate objections that a request for discovery is 'overboard and unduly burdensome, and not reasonably calculated to lead to the discovery of material admissible in evidence,' . . . are improper unless based on particularized facts." *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008).

B. Defendants Cannot Justify Their Failure to Designate Knowledgeable Witnesses.

1. Topics 2 and 3: DVA claims brought by test participants.

Defendants improperly objected to designating any 30(b)(6) witness to testify on Topics 2 and 3, which concern interactions between test participants and the Department of Veterans Affairs ("DVA").[3] Topic 2 seeks testimony on "the interface between and representatives involved in contacts between [Defendants] regarding death and disability claims brought by TEST SUBJECTS." Topic 3 seeks testimony on "[e]ach instance in which a veteran claimed to be involved in one or more of the TEST PROGRAMS, but [Defendants] informed anyone, including the DVA, that [Defendants] had no record of such participation."

Relevance objections: Defendants object to these topics on the grounds that they were "irrelevant and seek[] information not reasonably calculated to lead to the discovery of admissible

[3] Civil L.R. 37-2 requires that a motion to compel "set forth each request in full, followed immediately by objections and/or responses thereto." As Defendants have objected each of the topics in Plaintiffs' November 16, 2009 30(b)(6) notice and refused to respond to the twenty-nine topics in four 30(b)(6) notices served on June 16, 2010, reproducing the text of all discovery requests in this memorandum of points and authorities would be impractical and far exceed the page limit according to the Local Rules. For the convenience of the Court, Plaintiffs have attached their discovery request along with Defendants' responses as Exs. B-C, and E-G to the accompanying Declaration of Daniel J. Vecchio.

evidence." As an initial matter, these boilerplate objections, which do not explain why the topics are irrelevant, are insufficient to justify Defendants' refusal to produce any witnesses. *See Mancia*, 253 F.R.D. at 358. Further, these topics are relevant: they seek information about the health effects potentially suffered by test subjects as a result of their participation, and thus bear directly on Plaintiffs' Healthcare Claims. Moreover, whether test subjects seek care for their ailments is relevant to Plaintiffs' Notice Claims. As described in the Complaint, DVA has denied claims brought by the individual Plaintiffs for their testing related illnesses. For example, DVA turned away David C. Dufrane when he sought medical care for his Edgewood-related ailments. (Second Amended Complaint ("Compl.") (Docket No. 53) at ¶ 80.)

Objection based on lack of knowledge: Defendants' objection that Topic 3 "seeks information not known or reasonably available to Defendants" is not credible, because Defendants must be aware of official statements made by Defendants or their representatives regarding the test programs. Indeed, a 30(b)(6) witness is required to review all matters known or reasonably available to the organization, if potentially relevant to the witness' topics, even if "the documents are voluminous and the review of those documents would be burdensome." *Bd. of Trustees of Leland Stanford Jr. Univ. v. Tyco Intl.*, 253 F.R.D. 524, 526 (C.D. Cal. 2008) (quoting *Calzaturficio S.C.A.R.P.A. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 36 (D. Mass. 2001)). Because Defendants should have records regarding statements made about subjects' participations in the test programs, they should be compelled to designate a deponent to testify about these records.

2. Topics 10 and 11: The 1963 CIA Inspector General Report.

Defendants objected to producing any witness to testify about the 1963 Inspector General Report of Inspection of MKULTRA ("1963 CIA IG Report"), which was attached to and cited numerous times in the Complaint. (Compl. ¶¶ 114, 133-135, 142, 145.) Specifically, Defendants refused to respond to Topic 10, concerning "[t]he authorship, creation and approval of the [1963 CIA IG Report]," and Topic 11, concerning "[t]he persons contacted or interviewed in connection with the 1963 CIA IG Report and the notes, comments, analysis or other writing CONCERNING its contents."

Relevance objections: Defendants objected to both topics on the grounds that they are "irrelevant and seek[] information not reasonably calculated to lead to the discovery of admissible evidence." (Vecchio Decl. ¶ 5, Ex. C at 9.) Such objections are improper. The 1963 CIA IG Report is cited frequently in the Complaint, and concerns the CIA's involvement in Defendants' test programs. The report describes the CIA's Project MKULTRA, which concerned human testing of biological and chemical weapons, among other experiments, and concludes that "[s]ome MKULTRA activities raises questions of legality" and "testing of MKULTRA products places the rights and interests of U.S. citizens in jeopardy." (Vecchio Decl. ¶ 12, Ex. H at B-004.) Information about the report may demonstrate the CIA's further involvement in testing on military personnel as well the potential health effects of the testing programs, and is therefore relevant.

Privilege objections: Defendants also object to these topics on the grounds that they seek information protected pursuant to the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403g ("Section 403g"). As a threshold matter, Defendants' blanket refusal to produce any testimony on this topic is improper because Defendants have not shown that all information related to the topic is privileged. *See SEC v. Morelli*, 143 F.R.D. 42, 46 (S.D.N.Y 1992) (rejecting the SEC's generalized assertion that a proposed deposition would necessarily reveal information protected by the attorney-client privilege). Defendants, who are asserting the privilege, bear the burden of showing that the privilege applies. *United States v. Chevron Corp.*, No. C-94-1885 (SBA), 1996 WL 264769, at*4 (N.D. Cal. March 13, 1996). Section 403g provides that the CIA "shall be exempted from . . . the provisions of any other law which requires the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." Where Section 403g is asserted in response to discovery requests, as opposed to FOIA requests, courts have required the government to provide detailed information supporting its claim of privilege and explaining the potential harms to national security from disclosure. *See Linder v. Dep't of Defense*, 133 F.3d 17, 25 (D.C. Cir. 1998) (upholding CIA claims of privilege based on "very detailed information" provided in declaration). Defendants have yet to explain

why information described in these Topics, which concerns events that took place long ago, should be protected under the privilege.

3. Topic 14: The scope and conduct of document searches conducted pursuant to congressional requests.

Defendants improperly have objected to producing 30(b)(6) testimony related to Topic 14, which concerns Defendants' search for documents in connection with various congressional investigations into the testing programs.[4] Defendants object that the Topic "encompasses information not known or reasonably available to Defendants." Here, Plaintiffs are requesting information on highly publicized hearings involving hours of testimony by Defendants. It is unlikely that no records of searches related to these hearings remain. Moreover, Defendants have the burden to designate one or more witnesses who either have personal knowledge or can review "all matters known or reasonably available" to the organization that is relevant to this topic. Simply stating that the "information is not known" does not fulfill Defendants' discovery obligations.

4. Topic 17: Doses of substances administered to test subjects and the expected effects of those doses.

Remarkably, Defendants objected to producing a deponent to testify on Topic 17, concerning the results of the test programs Defendants conducted, on the ground that such information is not known or reasonably available to them.[5] Contrary to Defendants' objection, there is ample material reasonably available to Defendants to prepare a deponent to testify on this topic. For example, Defendants commissioned the National Research Council to conduct studies on the long-term health effects of substances used in the Test Programs. National Research

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[4] Topic 14 seeks testimony on "[t]he scope and conduct of the search for DOCUMENTS pursuant to requests from Congress in connection with hearings of the Church Committee in 1975 . . . , the Pike Committee in 1975-1976 (House Select Committee on Intelligence) and other committees and subcommittees in 1975-1977 related in any way to the TEST PROGRAMS . . . . including all supplemental requests and the content of all correspondence back and forth."

[5] Topic 17 concerns "the doses administered to test subjects . . . and the . . . levels of dose where specified types of effects are apparent, . . . the dose response relationship, and the estimated dose that would induce death."

Council, *Possible Long-Term Health Effects of Short-Term Exposure to Chemical Agents, Volume 1: Anticholinesterases and Anticholinergics* (June 1982). DOD records also indicate that there are cabinets of documents at Edgewood Arsenal which contain data from Defendants' test programs. (Vecchio Decl. ¶ 13, Ex. I at Tab C.) Documents Plaintiffs have received in response to third party subpoenas indicate that Edgewood Arsenal produced scores of technical reports concerning Topic 17 based on the results of the test programs. (*See, e.g.*,Vecchio Decl. ¶ 14, Ex. J.) Defendants could also prepare a 30(b)(6) deponent with documents from the Chemical and Biological Test Repository, which they have refused to search. (Vecchio Decl. ¶ 5, Ex. D at 2, n.1.)

5. Topic 20: Contracts performed by third parties concerning the test programs.

Defendants improperly objected to producing a witness on Topic 20, which seeks testimony on "[c]ontracts, contract proposals, contract approvals, and payments for each task or role performed by a third party (such as a contractor or university researcher) CONCERNING the TEST PROGRAMS including each sub-project."

Relevance objection: Defendants objected that Topic 20 is irrelevant, but Topic 20 is directly tied to key allegations in the Complaint. For example, the Complaint alleges that contracts with outside researchers, including researchers with Stanford University, were an "important and integral part" of Defendants' program of human experimentation. (Compl. ¶ 9.) The Complaint further alleges that the CIA also sponsored multiple studies at Stanford University through MKULTRA subprojects, including studies of psychochemicals and knockout drugs. (*Id.* ¶ 154.) Some of these CIA projects were monitored by Edgewood employee Ray Treichler. (*Id.* ¶¶ 132, 154.) The CIA's use of third parties in connection with the test programs is clearly relevant to the CIA's participation in — and liability for — those programs.

Privilege objection: As argued above, Section 403g does not provide sufficient grounds to justify Defendants' blanket refusal to produce a witness who can testify about information that is several decades old. *See supra* at 6.

6. Topics 22-24: The identities of cut-outs used by Defendants and the test programs conducted through these cut-outs.

Defendants improperly objected to producing any witnesses on Topics 22-24, which concern cut-outs (i.e., front organizations) used to conduct a variety of aspects of Defendants programs of human experimentation.[6]

Relevance objections: Defendants' relevance objections are improper because Topics 22-24 again seek information relevant to the CIA's participation in the test programs through the use of third parties. As alleged in the Complaint, the CIA used front organizations such as the Charles Geschtickter Fund for Medical Research and the Society for the Investigation of Human Ecology as cut-out sources for the CIA's secret funding of numerous MKULTRA human experiment projects. (Compl. ¶¶ 117, 137a.) Scientists who worked at Edgewood, such as Ray Treichler, also served as CIA monitors for MKULTRA sub-projects funded through cut-outs. (*Id.* ¶¶ 132, 154.)

Privilege objections: As argued above, Defendants' boilerplate Section 403g objection does not provide sufficient grounds to justify Defendants' blanket refusal to produce a witness who can testify about information that is several decades old. *See supra* at 6.

7. Topic 32: Test subjects' attempts to withdraw consent or refusal to participate in the test programs.

Defendants improperly objected to producing any witness who can testify on Topic 32, concerning the central issue of consent, on the ground the topic seeks information "not known or reasonably available to defendants." Topic 32 seeks testimony concerning "[t]he circumstances involving an attempt, by any TEST SUBJECT to withdraw consent or refuse to participate in an

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[6] Topic 22 states: "[t]he identity of all cut-outs (as defined in Paragraph 130(a) of the First Amended Complaint) used in connection with the TEST PROGRAMS, including each sub-project." Topic 23 states "[t]he activities of each PERSON used as a cut-out (as defined in Paragraph 130(a) of the First Amended Complaint) for CIA activities CONCERNING the TEST PROGRAMS, such as Geschickter Fund for Medical Research identified in Paragraph 130(a) of the First Amended Complaint." Topic 24 states: "[t]he projects in the TEST PROGRAMS that were funded, directed or controlled by [Defendants] through front organizations, including but not limited to, the Society for the Investigation of Human Ecology, and all COMMUNICATIONS and MEETINGS between you any such front organization."

experiment or experiment conducted in the TEST PROGRAMS." Indeed, this topic is central to the case as Defendants raised consent ***as an affirmative defense*** in their answer to the Second Amended Complaint. (Docket No. 71 at 40.) As noted above, a 30(b)(6) deponent is required to review "all matters known or reasonably available" to the organization, even if the available documentation is voluminous and document review would be burdensome. As evidenced in their correspondence with Plaintiffs, Defendants have yet to search and review all information reasonably available to them. For example, Defendants have refused to search the Chemical and Biological Test Repository, which contains well over 10,000 servicemember test records. (Vecchio Decl. ¶ 6, Ex. D at 2, n.1.)

8. Topic 34: Human testing conducted from 1975 to date.

Defendants improperly objected to producing any witness who can testify on Topic 34 on the grounds that the topic is "irrelevant and seeks information not reasonably calculated to lead to the discovery of admissible evidence." Topic 34 seeks testimony concerning "[e]xperiments or tests CONCERNING existing or potential chemical or biological weapons done on veterans from 1975 to date." This topic is relevant because human testing performed by Defendants on veterans since 1975 bears directly on the health effects of substances that were also tested at earlier times (either at Edgewood or other locations) on military servicemembers. Such information is relevant to Plaintiffs' Healthcare Claims. Moreover, information about potential negative health effects of these substances learned by Defendants as a result of these tests is relevant to Defendants' duty to warn former test subjects about the nature of the experiments. (*See, e.g.*, Compl. ¶ 17.)

9. Topics 36-37: Use of patients from DVA medical facilities as test subjects.

Defendants improperly objected to producing any witness who can testify on Topics 36-37, which deal with Defendants' experimentation on patients of the Department of Veterans Affairs (DVA). Specifically, Topic 36 concerns "[t]he use of patients from DVA medical facilities, including hospitals, clinics, CBOCs, etc., as subjects for experiments involving the testing of potential chemical and/or biological weapons between 1943 and the present." Topic 37 concerns [i]nput into or comments upon the protocols or tests administered by DVA, either

directly or indirectly, upon veterans or [Defendants'] receipt of the results of experiments conducted by DVA using veteran subjects."

Relevance objection: Defendants object to Topics 36-37 as "irrelevant," but this is simply not the case. Plaintiffs have grounds to believe that testing on DVA patients was closely connected with the tests performed by Defendants on individual Plaintiffs and described in the Complaint. For example, there is evidence that the CIA tested amphetamines on patients at the Veterans Administration Center, Martinsburg, West Virginia ("Martinsburg VA Center") as part of MKULTRA. (Vecchio Decl. ¶ 15, Ex. K at 327.) Defendants also tested amphetamines on military servicemembers at Edgewood. (Compl. ¶ 5.)

Objection on the grounds of lack of knowledge: Defendants' objection that Topics 36-37 "seek[] information not known or reasonably available to Defendants" rings hollow. As evidenced by the MKULTRA briefing book describing Defendants' experiments at the Martinsburg VA Center, Defendants must have some knowledge of these experiments. (Vecchio Decl. ¶ 15, Ex. K at 327.) Defendants' failure to conduct a reasonable search of potentially relevant documents should not excuse them from testifying on these 30(b)(6) deposition topics.

10. Topics 44-48: Use of septal implants in Defendants' test programs and on Individual Plaintiff Bruce Price.

Defendants improperly objected to producing any witness to testify on Topics 44-48, which concern septal implants installed in subjects of Defendants' test programs, including Individual Plaintiff Bruce Price.[7] These deposition topics arise directly from allegations in the

[7] Topic 44 states: "The design, purpose, function, use and effects of all septal implants CONCERNING the TEST PROGRAMS, including, without limitation, the septal implant placed into Individual Plaintiff Bruce Price." Topic 45 states: "The PERSON(S) who performed any operation on Individual Plaintiff Bruce Price and/or installed an implant in his body." Topic 46 states: "The design, planning, conduct, participants, and results of any experiment(s) as part of the TEST PROGRAMS involving the insertion of any implant, device, or foreign body into a TEST SUBJECT." Topic 47 states: "The known or anticipated health effects, or impact on the well-being of the patient, associated with the removal of septal implants implanted in connection with the TEST PROGRAMS." Topic 48 states: "The identity of, and health effects experienced by, TEST SUBJECTS who received septal implants from YOU in connection with the TEST PROGRAMS."

Complaint that Defendants installed some sort of implant in Bruce Price's brain (right ethmoid), as confirmed in a radiology report dated June 30, 2004. (Compl. ¶ 34.)

Objection that topics not limited to military servicemembers: Defendants improperly object to three of these topics (46-48) "insofar as they are not limited to military servicemembers." Testimony about septal implants used by Defendants on non-servicemembers is appropriate, as it is relevant to the health effects of using septal implants in human test subjects; this information is relevant to evaluate potential health effects that the use of similar implants may have had on Defendants' military test subjects.

Objection on the grounds of lack of knowledge: Defendants' statement that they have no knowledge or record of the use of septal implants is insufficient to justify withholding relevant testimony on these topics, for the reasons discussed above. *See supra* at 10.[8] At the very least, Defendants should be compelled to undertake searches for relevant information and, to the extent those searches do not yield information about these topics, so testify.

Objections that terms not defined: Defendants objected to all of these topics on the ground that the terms "septal implant," "implant" and "device" were not defined. In an April 30, 2010 letter to Defendants, Plaintiffs defined these terms to mean "any electrical device implanted in any region of the human brain for any purpose, including but not limited to activating human behavior by remote means, creating feelings and emotions, and testing drugs." (Vecchio Decl. ¶ 16, Ex. L at 7, n.1.) Despite this clarification, Defendants have not withdrawn the objections.

11. Topic 50: Application of MKULTRA materials to unwitting subjects in normal life settings.

Defendants objected, on relevance and privilege grounds, to producing witness who can testify on Topic 50, which the concerns allegations in the Complaint that Defendants exposed unwitting test subjects to chemical and biological substances. Specifically, Topic 50 concerns

[8] Specifically, Defendants state "they have no knowledge or record" of: "any implant used on Bruce Price" (Topic 44), "any operation performed on Bruce Price or any [sic] installed in his body" (Topic No. 45), or "any implant used on other military servicemembers apart from nasal implants used in the 1950s to treat pilots for disease and radiation contamination" (Topics 44, 46-48). (Vecchio Decl. ¶ 5, Ex. C.)

"[t]he final testing of MKULTRA materials or substances referred to in Paragraph 130(e) of and Exhibit B to the First Amended Complaint." Paragraph 130e alleges that the CIA entered into an informal agreement with the Federal Bureau of Narcotics ("FBN") whereby the "FBN operated safehouses in [] San Francisco and New York where they secretly administered experimental substances to the patrons of prostitutes."[9]

Relevance objection: Defendants object that Topic 50 "seeks information not reasonably calculated to lead to the discovery of admissible evidence." Again, this boilerplate objection has no merit. To the extent that these tests involved the same substances or types of substances as those used on Plaintiffs, documents related to the tests are relevant to the health effects of test substances and, therefore, to Plaintiffs' Notice and Healthcare Claims.

Privilege Objection: Defendants further object that Topic 50 "seeks information protected under 50 U.S.C § 403g and information that is classified pursuant to Executive Order No. 12,958 and subject to state secrets privilege or otherwise subject to the state secrets privilege." As argued above, Section 403g does not provide sufficient grounds to justify Defendants' blanket refusal to produce any witness who can testify about information that is several decades old. Further, in order to claim privilege against discovery of military and state secrets, Defendants must make a formal request, "lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *See United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). No such claim has been made here.

12. Topic 51: Studies and experiments conducted by Paul Hoch.

Defendants also objected to producing a witness on studies and experiments by Paul Hoch, who, as alleged in the Complaint, killed a patient with a mescaline injection in an experiment that was funded by the Army and the CIA. (Compl. ¶ 141.) Specifically, Topic 51 requests testimony on "COMMUNICATIONS and MEETINGS between [Defendants] and Dr

[9] Paragraph 130e of the First Amended Complaint corresponds to Paragraph 137e of the Second Amended Complaint.

Paul Hoch CONCERNING the studies or experiments identified in Paragraph 134 of the First Amended Complaint, and all DOCUMENTS CONCERNING the same."[10]

Relevance objection: Defendants object to Topic 51 as "irrelevant," despite the fact that is directly tied to the allegations in the Complaint. Paul Hoch's experiments at the New York State Psychiatric Institute, which killed Harold Blauer, were funded and directed by Defendants and used materials supplied by Defendants — materials which were also tested on servicemembers at Edgewood. (Compl. ¶ 141; Vecchio Decl. ¶ 17, Ex. M at JK10 0016449.) As such, testimony on this topic is relevant to Plaintiffs' Notice and Healthcare Claims.

Privilege objection: Defendants also improperly object to Topic 51 on the grounds, addressed above, that it seeks information protected under Section 403g and the state secrets privilege. But Defendants have not met the minimal burden in explaining why such privilege is applicable.

13. Topic 52: The basis for redactions to the 1963 CIA Inspector General Report.

Defendants improperly objected to producing any witness on Topic 52, concerning "the basis for each redaction on the 1963 CIA IG [Inspector General] Report," on the grounds that "it is irrelevant." Contrary to Defendants' objection, the 1963 CIA IG Report is highly relevant, and was attached to and cited throughout the Complaint. (*See, e.g.*, Compl. ¶¶ 114, 133-35, 142.) As Defendants intentionally kept poor records of the MKULTRA testing program and destroyed CIA files regarding human experimentation, this report is an important source concerning MKULTRA. (*Id.*, ¶¶ 137f, 143.) Portions of the report have been heavily redacted, including entire pages. The basis for these redactions is relevant because the redacted information may lead to the identification of witnesses, the identification of substances used in Defendants' test programs, details about the CIA's involvement with testing performed on military servicemembers, or other information central to Plaintiffs' claims. If the basis for the redactions

[10] Paragraph 134 of the First Amended Complaint corresponds to Paragraph 141 of the Second Amended Complaint.

is not proper or no longer applicable, Plaintiffs should have the opportunity to challenge those redactions and obtain this information. As such, Plaintiffs should have an opportunity to discover the basis for these redactions.

14. Topic 54: Confidential Army memorandum concerning the use of volunteers in research.

Finally, Defendants have improperly objected to producing any witness to testify on Topic 54, concerning a June 30, 1953 memorandum from the DOA Office of the Chief of Staff concerning "Use of Volunteers in Research." (Vecchio Decl. ¶ 18, Ex. N.)[11] The memorandum sets forth opinions of the Judge Advocate General on the use of volunteers in testing of biological and/or chemical warfare agents. (Compl. ¶ 125.) Defendants object "on the ground that the information is not known or reasonably available to Defendants." This objection is improper for the reasons described above. *See supra* at 10.

C. Defendants Seek to Unduly Delay and Avoid 30(b)(6) Depositions Concerning their Inadequate Document Searches.

In response to the inadequacy of the Defendants' document production, Plaintiffs served 30(b)(6) notices on the DOD, DOA, and CIA on June 16, 2010, concerning Defendants' document search, collection and production. Plaintiffs noticed these depositions to identify the locations Defendants have searched (or are searching), locations Defendants are not searching, and to understand the scope of Defendants searches, in an effort to correct any deficiencies while time still remains in discovery.[12] Rather than be forthcoming about their efforts, however, Defendants instead have sought to delay and ultimately avoid these depositions.

First, Defendants requested to delay DOD and DOA depositions until after they have completed their document searches. (Vecchio Decl. ¶ 6, Ex. D at 2.) Yet Defendants also

[11] Specifically, Topic 54 concerns "The CONFIDENTIAL Memorandum numbered Item 3247 identified in paragraph 118 of the First Amended Complaint." Paragraph 118 of the First Amended Complaint corresponds to paragraph 125 of the Complaint.

[12] Indeed, Defendants' correspondence suggests that they have not even searched the most obvious location for relevant documents — Edgewood Arsenal itself. (Vecchio Decl. ¶ 6, Ex. D at 1.) Plaintiffs wish to timely identify and address such deficiencies in Defendants' document search efforts.

provided no date by which those document searches would be complete. As such, this proposal would allow Defendants to continue to withhold documents and avoid searches of obvious document repositories indefinitely, without being accountable for their decisions. In fact, the depositions may be so delayed that should Defendants actually allow the depositions to take place, it may be too late for Plaintiffs to request Defendants to correct deficiencies in their searches.

Second, Defendants proposed that the CIA be allowed to provide written descriptions of its searches in lieu of providing witness to testify. Plaintiffs cannot accept such a proposition for obvious reasons.[13] Since the inception of this litigation, the CIA has apparently shirked its discovery obligations — as evidenced by the fact that Defendants have yet to identify a single specific document produced by the agency. This type of neglect must stop. The CIA should be compelled to meet its discovery obligations in this case, including appearing for noticed depositions.

Depositions on a party's document search, collection and/or production are run-of-the mill, yet critical in determining whether that party has satisfied its obligations under Federal Rules of Civil Procedure 26 and 34. Defendants must not be allowed to hide the ball any longer, and should be ordered to produce one or more knowledgeable witnesses on these topics.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court overrule Defendants' objections and compel Defendants to: (1) designate knowledgeable witnesses who can testify on Topics 2-3, 10-11, 14, 17, 20, 22-24, 32, 34, 36-37, 44-48, 50-52, and 54 of Plaintiffs' November 16, 2009 30(b)(6) Notice; and (2) designate knowledgeable witnesses from

[13] As a compromise, Plaintiffs would be willing to accept, in the first instance, a written description, under oath, of the CIA's searches for and production of documents — without waiving the right to require deposition testimony on those topics. If, in Plaintiffs' reasonable judgment, the CIA's written description is inadequate, Plaintiffs could require the CIA to produce a witness to testify on these topics.

the DOA, DOD, and CIA who can testify on the topics in Plaintiffs' June 16, 2010 30(b)(6) Notices.

Dated: August 25, 2010

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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