EXHIBIT A

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May 18, 2010

Via Email & First Class Mail

Mr. Gordon P. Erspamer, Esq.
Morrison & Foerster, LLP
425 Market Street
San Francisco, CA 94105-2482

RE: *Vietnam Veterans of America, et al. v. CIA, et al.*, No. CV 09 0037-CW (N.D. Cal.)

Dear Mr. Erspamer:

I write in response to your letter of April 30, 2010 regarding Defendants' March 4, 2010 Response to Plaintiffs' Notice to All Defendants Pursuant to Fed. R. Civ. P. 30(b)(6).

As an initial and overarching matter, your letter fails to account for the Court's narrowing of the claims at issue. In the January 19, 2010 Order on Defendants' motion to dismiss or, in the alternative, for summary judgment, the Court identified three claims that will proceed: "the lawfulness of the consent forms, to the extent that they required the individual Plaintiffs to take a secrecy oath," (Order of Jan. 19, 2010 at 12-13); whether testing participants are entitled to notice of test details and associated health risks, and available documentation concerning the tests (*id.* at 14-16); and whether testing participants are entitled to Army-provided medical care (*id.* at 16-18). Thus, the questions before the Court are: Are the consent forms that servicemember testing participants signed lawful? Are servicemember testing participants entitled to notice of test details and associated health risks, and available documentation concerning the tests? And are servicemember testing participants entitled to Army-provided medical care? Where noticed 30(b)(6) deposition topics do not bear on the claims that remain before the Court and these questions, Defendants have objected for lack of relevance.

Your letter also asserts in several places that Plaintiffs have attempted in good faith to stipulate to entry of a protective order, and suggests that Defendants have not reciprocated. However, the last communication the parties had regarding a possible protective order was a

February 3, 2010 letter from your colleague Mr. Adriano Hrvatin in which he stated that "Plaintiffs will circulate a revised proposed protective order under separate cover." To date, we have not received a revised proposed protective order from Plaintiffs.

I respond to each of the specific sections of your letter below.

A. Privilege Objections

Your letter questions Defendants' objections where topics seek information protected by the state secrets privilege, the Central Intelligence Agency Act, the Privacy Act and the Health Insurance Portability and Accountability Act ("HIPPA"). As the letter implicitly recognizes, Defendants have designated deponents for several of those topics. Those deponents will testify as to non-privileged matters. With regard to a protective order, while we have not received a revised proposed protective order such as Mr. Hrvatin stated Plaintiffs would be sending, we see no basis for agreeing to a provision for disclosure of information covered by the state secrets privilege, the Central Intelligence Agency Act, Privacy Act and HIPPA, for the reasons addressed herein.

With respect to the topics for which Defendants have not designated a deponent, we have also objected on the ground that the topics are irrelevant and do not seek information reasonably calculated to lead to the discovery of admissible evidence. Because the topics are not relevant to the issues that remain before the Court, Defendants need not designate a deponent for them.

1. State Secrets

Regarding Defendants' objections to topics to the extent that they seek information subject to the state secrets privilege, your letter incorrectly asserts that in order to protect information subject to that privilege there must be a formal claim by the head of the department with control over the requested information. A formal invocation of privilege is not required in advance of a motion to compel. *See, e.g., In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997); *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 134 n.13 (D.D.C. 2005). Further, as you may be aware, a formal invocation of the state secrets privilege must be made by the head of the agency with control of the information. To require the relevant agency head to formally invoke the state secrets privilege every time a discovery request in any lawsuit encompasses classified information, and in advance of possible narrowing of the information sought through the parties' meet and confer, would be unduly burdensome. *See, e.g., Freeman v. Seligson*, 405 F.2d 1326, 1338 (D.C. Cir. 1968) ("matters of privilege can appropriately be deferred for definitive ruling until after the production demand has been adequately bolstered by a general showing of relevance and good cause, and at least the rough dimensions of the Secretary[of Agriculture's] burden have been set") (citing cases). Indeed, one of the functions of the meet-and-confer requirement of the Federal Rules and this Court's Local Rules is to narrow discovery disputes. Moreover, with the exception of redactions to the "Historical Documentation of the

[CIA's] Role in the Human Subject Test Program at Edgewood Arsenal Research Laboratories" (Oct. 21, 1994), provided as part of Defendants' initial disclosures, Defendants have not identified materials covered by the state secrets privilege that are relevant to the issues before the Court or reasonably calculated to lead to the discovery of admissible evidence. In any event, a protective order allowing access to information protected by the state secrets privilege in a civil case such as this would not be appropriate. *See, e.g., Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (authority to determine who may have access to classified information "is committed by law to the appropriate agency of the Executive Branch"); *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983) (rule denying counsel access to classified information is "well settled"; "our nation's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer . . . or to the coercive power of a protective order").

2. Central Intelligence Agency Act

Your letter challenges Defendants' objections to topics seeking information covered by 50 U.S.C. § 403g and asserts that Defendants have not provided sufficient information in support of the objections. As you quote, section 403g protects "the organization, functions, names official titles, salaries, or numbers of personnel employed by the [CIA]." Each of the topics to which we have objected on section 403g grounds encompasses the information listed in the statute, and we have objected to that information extent. Because the information is protected by the plain language of the statute, further explanation of the objections is not necessary. Additionally, none of the topics that you reference appears relevant to any of the claims before the Court. Accordingly, in the absence of a reason to intrude on the interests protected by the statute, there is no basis for considering a protective order concerning such information.

3. Privacy Act and HIPAA

Your letter requests confirmation that Defendants have not withheld "additional or alternative designees" based on the objections based on the Privacy Act and Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Selection of a designee for a particular topic is up to Defendants, and by designating an individual for the topics your letter references, Defendants have fulfilled their obligation under Rule 30(b)(6). Defendants do not intend to present testimony that is covered by the Privacy Act and/or HIPAA based on the protections afforded by those Acts, except with respect to the named Plaintiffs who have authorized release of such information. Given the lack of relevance that non-plaintiff information covered by the Privacy Act and/or HIPAA has to the claims before the Court, there is no justification for impinging on the privacy interests protected by those statutes. Regarding the parties' negotiations concerning a protective order, as previously discussed, the last communication we received from Plaintiffs was Mr. Hrvatin's statement on February 3 that Plaintiffs would be sending us a revised proposed order, which we have not received. In any event, however, in the absence of a showing of relevance sufficient to outweigh the interests protected by the Privacy

Act and/or HIPAA, a protective order allowing access to information covered by those statutes would not be appropriate.

B. Objections to Topics to the Extent They Concern Non- Military Servicemembers

The allegations of the Second Amended Complaint are concerned with testing that involved military servicemembers. We disagree that information concerning tests on non-military servicemembers is relevant or is reasonably calculated to lead to the discovery of admissible evidence. With respect to the example your letter provides of how such information could be relevant – any negative health effects associated with civilian tests could bear on Plaintiffs' health care needs – Defendants disagree that the details of the type of any health care that individual Plaintiffs might need bears on the claims before the Court. The Court identified as a claim that may proceed whether there is a duty to provide care. Exhaustive information regarding health effects that may be associated with sets of tests entirely separate from the tests that Plaintiffs underwent at Edgewood Arsenal is not reasonably calculated to lead to the discovery of admissible evidence. Even if there were some minimal relevance, it would be outweighed by the burden associated with preparing a witness to testify about health effects associated with every human test involving any substance that Defendants may have conducted at any time.

C. Objections Based on Lack of Knowledge

Your letter asserts that Defendants have improperly objected to certain of the noticed topics on the ground that the topics seek information that is not known or reasonably available to defendants. It incorrectly suggests that Defendants are obligated to prepare a witness to testify on a topic regardless of whether the information is reasonably available to Defendants. Rule 30(b)(6) requires that an organization designate persons to testify only "about information known or reasonably available to the organization." Fed. R. Civ. P. 30(b)(6). If the requested information is either not known or not reasonably available to Defendants there is no obligation to designate a witness. *See, e.g., Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 76 (D. Neb. 1995) ("If [the defendant] does not possess such knowledge as to so prepare [its proffered 30(b)(6) witness] or another designate, then its obligations under Rule 30(b)(6) obviously cease, since the rule requires testimony only as to "'matters known or reasonably available to the organization'") (quoting Fed. R. Civ. P. 30(b)(6)). Defendants have objected where they do not know or do not have reasonably available to them information sought on a given topic.

D. Definition of "Test Programs"

Your letter takes issue with Defendants' objection to the definition of "Test Programs" set forth in Plaintiffs' notice. "Test Program" is defined to include, "without limitation," specifically identified test programs "and any other program of experimentation involving human testing of any substance." As we explained in General Objection 3, that definition is

overly broad. It is therefore contrary to Rule 30(b)(6)'s requirement that a deposition notice under the rule "must describe with reasonable particularity the matters on which examination is requested." Fed. R. Civ. P. 30(b)(6) (emphasis supplied); *accord, e.g., Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000) (requesting party "must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute"); *cf. Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000) ("An overbroad Rule 30(b)(6) notice subjects the noticed party to an impossible task."). The definition of "Test Programs" encompasses clinical trials and other human tests in any setting, under any circumstances, and within any time frame. Such an overly broad definition renders any corresponding topics not reasonably calculated to lead to the discovery of admissible evidence. Preparing a witnesses to testify about all tests encompassed by the notice's definition of "Test Programs" would be unduly burdensome. That the definition of "Test Programs" of the document requests parallels the definition of "test programs" in the Second Amended Complaint does not obligate Defendants to incur that burden. As discussed above, the Court has narrowed the scope of the case. In light of the discrete nature of the questions before the Court – Are servicemember testing participants entitled notice of test details and associated health risks, and available documentation concerning the tests? Are servicemember testing participants' entitled to Army-provided medical care? And are the consent forms that servicemember testing participants signed lawful? – the notice's definition of test programs is overly broad.

E. Vagueness Objections

Your letter asserts that Defendants have not explained why Topic Nos. 31 and 55 are vague and unclear. Topic No. 31 seeks a witness to testify about "[e]ach experiment conducted on each of the individual Plaintiffs, including the protocols, actions, conduct, and results of each experiment." It is unclear what is meant by "protocols, actions and conduct." Topic No. 55 seeks a witness to testify about "[t]he impact or potential impact on the well being of TEST SUBJECTS of participation in the TEST PROGRAMS, including all information learned by YOU CONCERNING the impact or potential impact at any time from the inception of the TEST PROGRAMS to the present." It is unclear what is meant by "well being." Defendants will need clarification on those topics in order to prepare the witness appropriately.

F. Objections to Testimony Regarding Legal Opinions or Conclusions

Defendants have objected to certain noticed topics to the extent that they call for a legal opinion or conclusion, which is grounds for objection during a rule 30(b)(6) deposition, as the case you cite, *P.S. v. Farm, Inc.*, 2009 WL 483236, *11 (D. Kan. 2009), recognizes. A legal opinion or conclusion is not the same as an organization's legal position, and the topics to which Defendants have objected as calling for legal opinions or conclusions do not seek information about Defendants' legal positions. As your letter recognizes, Defendants have designated

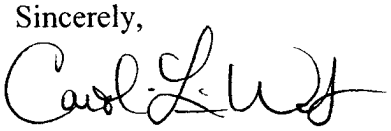
witnesses to testify on each of the topics you list. Again, the selection of a witness or witnesses is up to Defendants, and by designating witnesses for the topics Defendants have satisfied their obligation under rule 30(b)(6).

G. Objections to Topics that are Cumulative

Your letter recognizes that Defendants have designated witnesses for the two topics to which they have objected on grounds that the topics are cumulative. As set forth above, the selection of a witness or witnesses is up to Defendants, and by designating witnesses for the topics Defendants have satisfied their obligation under rule 30(b)(6).

We look forward to the telephone conference regarding these issues that is scheduled for tomorrow, May 19.

Sincerely,



Caroline Lewis Wolverton