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

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

Noticed Motion Date and Time:
October 27, 2010
9:30 a.m.

**DEFENDANTS' MOTION FOR
PROTECTIVE ORDER LIMITING
SCOPE OF DISCOVERY**

**NOTICE OF MOTION AND DEFENDANTS' MOTION FOR
PROTECTIVE ORDER LIMITING SCOPE OF DISCOVERY**

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27 Please take notice that on October 27, 2010, at 9:30 a.m., before the Honorable James
28 Larson, Courtroom F, 15th Floor, 450 Golden Gate Avenue, San Francisco, California, 94102, or

1 as soon thereafter as counsel may be heard by the Court, Defendants, by and through their
2 attorneys, will move pursuant to Rule 26(c) of the Federal Rules of Civil Procedure for a
3 protective order limiting the scope of discovery in the above captioned matter.

4 Defendants' motion is based on this Notice, the accompanying Memorandum, the
5 Declarations of Michael Kilpatrick, Patricia Cameresi, Lloyd Roberts, Richard L. Wiltison, and
6 Kimberly L. Herb, and attachments thereto, the pleadings on file in this matter, and on such oral
7 argument as the Court may permit. A proposed order is attached.

8 In accordance with Fed. R. Civ. P. 26(c) and Local Civil Rule 16-2(d)(2), the
9 undersigned certifies that she has in good faith met and conferred with counsel for Plaintiffs in
10 an effort to resolve Defendants' request without Court intervention and that Plaintiffs oppose
11 Defendants' request.

12 Dated: September 15, 2010

Respectfully submitted,

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INTRODUCTION

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2 Plaintiffs have served numerous discovery requests that are not only far outside the scope
3 of this litigation, but also relate to claims that have been dismissed by the District Court.
4 Furthermore, Defendants have conducted extensive investigations of their test programs outside
5 of this litigation, the results of which have been made available to Plaintiffs. A renewed search in
6 the context of Plaintiffs' discovery requests is highly unlikely to yield additional discoverable
7 information and will duplicate past investigations. This Court should deny discovery that is
8 outside the scope of this litigation and that duplicates prior investigations.

9 Defendants also request that this Court issue an order limiting requests for information
10 that are irrelevant, protected by statute, overly broad, and unduly burdensome. For example,
11 Plaintiffs have sought information on animal testing and research, the operational use of chemical
12 and biological agents, irrelevant Central Intelligence Agency ("CIA") programs, and tests that
13 were not conducted on service members or as part of Department of Defense ("DoD") test
14 programs. Discovery into these topics is not reasonably calculated to lead to the discovery of
15 admissible evidence. This Court should also foreclose Plaintiffs' attempts to seek the identity of
16 individuals and institutions protected by 50 U.S.C. § 403g and intelligence sources and methods
17 protected by 50 U.S.C. § 403-1(i)(1). Finally, Defendants seek limitations on requests that are
18 not tailored to substances used in DoD's test programs; that encompass a broad swath of
19 irrelevant documents; that seek discovery from the Department of Justice ("DOJ") despite its
20 limited nexus to this litigation; that seek a reinvestigation of issues previously examined; and that
21 are being investigated as part of the ongoing DoD investigation. Such requests are unreasonably
22 duplicative and unduly burdensome, particularly in light of their limited potential relevance.

BACKGROUND

I. PLAINTIFFS ASSERT A NUMBER OF CLAIMS REGARDING DOD'S TEST PROGRAMS, AND THE COURT HAS RULED ON SOME OF THOSE CLAIMS.

24 This case arises out of the testing of chemical and biological agents by DoD during the
25 cold war era. Plaintiffs allege that they, and other service members, have been harmed as a result
26 of chemical and biological tests conducted at Edgewood Arsenal, a U.S. Army research facility in
27
28

1 Maryland, and several other military installations. In their Second Amended Complaint,
2 Plaintiffs assert violations of the Constitution, executive and military directives, and international
3 law. (Second Am. Compl. (“SAC”) ¶¶ 183–86, 189, 195.) They seek declaratory and injunctive
4 relief requiring Defendants to release the individual Plaintiffs from secrecy oaths; notify them and
5 all military test participants of the tests in which they participated, their exposures and any known
6 health effects; to search for and provide participants with available documentation concerning the
7 tests; and to provide participants with medical examinations and care.¹ (*Id.* ¶¶ 183–84, 189.)

8 In January 2010, Defendants moved to dismiss Plaintiffs’ claims or, in the alternative, for
9 summary judgment. (Defs.’ Mot. to Dismiss SAC or in the Alternative, for Summ. J. (Dkt. No.
10 57).) Judge Wilken granted Defendants’ motion in part, leaving a narrow set of claims
11 remaining. (Order of Jan. 19, 2010 at 19 (Dkt. No. 59).) Significantly, the Court concluded that
12 Plaintiffs lacked standing to assert claims regarding the lawfulness of the test programs. (*Id.* at
13 11–12 (concluding that the requested relief would neither redress Plaintiffs’ injuries nor prevent
14 future injury).) It also limited the scope of Plaintiffs’ broad claims arising from the Army’s use
15 of consent forms. The Court held that Plaintiffs had standing to challenge the consent forms only
16 “to the extent that [the Army] required the individual Plaintiffs to take a secrecy oath.” (*Id.* at
17 13.) With regard to Plaintiffs’ claims seeking notice of the test programs and known health
18 effects, as well as the production of documents related to the programs, the Court stated that “an
19 Army regulation . . . suggest[ed] that Defendants had a non-discretionary duty to warn the
20 individual Plaintiffs about the nature of the experiments.” (*Id.* at 16 (citing Army Regulation 70-
21 25 (indicating that test participants should “be told as much of the nature, duration, and purpose
22 of the experiment, the method and means by which it is to be conducted . . . [and] the effects upon
23 his health”))).) The Court also concluded that Plaintiffs had “sufficiently alleged a claim for

25 ¹ Plaintiffs also sought a declaration that the “*Feres* doctrine”—the Supreme Court’s holding that
26 the Federal Torts Claims Act bars tort suits against the government for injuries arising out of or
27 incident to military service, first articulated in *Feres v. United States*, 340 U.S. 135 (1950)—is
28 unconstitutional. The Court dismissed Plaintiffs’ challenge to the *Feres* doctrine. (Order of Jan.
19, 2010 at 19–20.)

1 medical care.” (*Id.* at 17.) Thus, the Court narrowed the claims in this action to three issues: (1)
2 the validity of consent forms as they relate to secrecy oaths; (2) whether the individual Plaintiffs
3 are entitled to notice of substances to which they were exposed and any known health effects; and
4 (3) whether Defendants are obligated to provide medical care to the individual Plaintiffs.

5 **II. DEFENDANTS HAVE CONDUCTED EXTENSIVE INVESTIGATIONS OF THE**
6 **TEST PROGRAMS.**

7 **A. The CIA Has Thoroughly Examined Its Test Programs and Released More**
8 **than 20,000 Documents to Plaintiffs.**

9 In the wake of World War II, the United States received reports that foreign nations were
10 developing programs to alter human behavior through the use of drugs. (Decl. of Patricia
11 Cameresi, Assoc. Info. Review Officer for the Directorate of Sci. & Tech., CIA (“Cameresi
12 Decl.”) ¶ 4); *see also United States v. Sims*, 471 U.S. 159, 173 (1985) (“[T]he Agency was
13 concerned, not without reason, that other countries were charting new advances in brainwashing
14 and interrogation techniques.”). The CIA sought to counter this perceived threat by developing
15 its research capabilities concerning human behavior. (Cameresi Decl. ¶ 4.) It did so by
16 supporting “research into behavior modification underway at a number of universities and
17 research organizations,” but “did not attempt to develop its own research capability.” (*Id.*)

18 Beginning in the 1970s, information concerning the CIA’s support for behavioral research
19 became publicly known, which set in motion numerous investigations of the CIA’s research
20 programs. (*Id.* ¶ 5–6.) In response to Congressional and executive investigations, numerous
21 requests under the Freedom of Information Act (“FOIA”), civil litigation, and an internal
22 investigation commissioned by the then-CIA Director, CIA conducted exhaustive hand searches
23 of its files in order to identify all records in its possession relating to any drug testing program
24 sponsored by the CIA. (*Id.* ¶¶ 5–7.) In the span of a few years, the CIA’s closely guarded and
25 classified research programs morphed into “one of the most thoroughly investigated and exposed
26 aspects of the CIA’s past activities.” (*Id.* ¶ 5.) Furthermore, the results of these investigations—a
27 set of documents containing 20,000 pages concerning the CIA’s behavioral research programs—
28 have been made available to the public and Plaintiffs in this case. (*Id.* ¶¶ 6–7 & n.1.)

1 After an extensive review of records and information concerning the CIA's behavioral
2 research program, the CIA concluded that it did not fund or conduct testing on military personnel.
3 (*Id.* ¶¶ 8, 11–12 (“The Agency reached this conclusion after reviewing its documents and, in the
4 1970s as part of its internal investigations of its behavioral research programs, interviewing Army
5 personnel at Edgewood Arsenal.”).) Based on its review, CIA determined that only one program,
6 known as Project OFTEN, contemplated testing on service members, but funding for this project
7 was withdrawn before human testing began. (*Id.* ¶¶ 8, 12; *see also* Ex. A to Decl. of Kimberly L.
8 Herb, Trial Attorney, U.S. Department of Justice (“Herb Decl.”) (stating that, with regard to
9 Project OFTEN, “I do not believe that any drug or substance was actually . . . used in human
10 experimentation”); Ex. B to Herb Decl. (recounting that Dr. Van Sim, chief of clinical research at
11 Edgewood Arsenal, “was positive that no work on human subjects was performed under the
12 contract with the Agency”).) Nonetheless, “[i]n an abundance of caution,” CIA also has searched
13 for and produced, pursuant to this litigation, documents “relating to the named Plaintiffs,
14 Edgewood Arsenal, and Fort Detrick,” with exceptions noted on Defendants’ privilege log.
15 (Cameresi Decl. ¶ 13.)

16 **B. DoD Has Conducted Numerous Investigations of Its Test Programs, Including**
17 **the Health Effects, and It Has an Ongoing Investigation for Information.**

18 The Army's chemical and biological test programs have also been the subject of previous
19 large-scale investigations, the reports of which are either publicly available or have been
20 produced to Plaintiffs. (Decl. of Michael Kilpatrick, Dir., Strategic Commc'ns for the Office of
21 the Under Sec'y of Def. for Health Affairs (“Kilpatrick Decl.”) ¶¶ 3–10.) Beginning in 1975, the
22 Inspector General for the Department of the Army (“DAIG”) conducted a seven-month
23 investigation of the Army's chemical agent testing between 1950 and 1975. (*Id.* ¶ 3.) The
24 resulting report, which has been made available to Plaintiffs, is comprehensive: “[i]t describes the
25 history of chemical and biological warfare, the perceived threat that gave rise to the testing
26 programs, the authorities enacted for the testing programs, implementation of those authorities,
27 and specific tests conducted at Edgewood Arsenal and elsewhere.” (*Id.*) The following year, the
28 Army published a comprehensive report on its biological testing program at Fort Detrick,

1 Maryland between 1942 and 1977, and this report too has been provided to Plaintiffs. (*Id.*) In
2 addition, there have been multiple Congressional and public investigations into DoD's test
3 programs, culminating in several reports of the Government Accountability Office ("GAO") and
4 the U.S. Senate Committee on Veterans' Affairs. (*Id.* ¶ 10.) As a result of those investigations
5 and congressional and other public inquiries, DoD's test programs have been aired extensively.
6 (*Id.* ¶ 11.)

7 DoD's investigations have not only examined the nature of the test programs, but also
8 their associated health effects. In 1980, the Army published a report on the health effects
9 associated with exposure to LSD. (*Id.* ¶ 4.) This report was based on a follow-up study with 320
10 test volunteers, including 220 of whom received a one week in-patient evaluation. (*Id.*) Between
11 1982 and 1985 and again in 2003, the National Research Council ("NRC"), working under
12 contract with the Army, examined test volunteers to determine the long-term health effects of the
13 test programs. (*Id.* ¶¶ 5–6.) Pursuant to these reviews, the NRC solicited and received 4,085
14 responses from test participants in the 1980s and 2,748 in 2003 concerning the test subjects'
15 participation in the test programs and health effects. (*Id.*) Additionally, the Army contacted 358
16 biological test program participants and published a report in 2005 regarding the health status of
17 these volunteers, as compared to a control group of individuals who were not exposed to
18 biological agents. (*Id.* ¶ 9.)

19
20 Though DoD has revealed many details of its test programs, it is also currently working to
21 identify, under congressional direction and supervision, all service members who participated in
22 the Army's chemical and biological tests and to compile as much information about their
23 exposure as possible. (*Id.* ¶¶ 10, 13–15; Ex. 1 to Kilpatrick Decl.) *See also, e.g.,* GAO, GAO-04-
24 410, Chemical and Biological Defense: DOD Needs to Continue to Collect and Provide
25 Information on Tests and Potentially Exposed Personnel (2004). Working through its contractor
26 Battelle Memorial Institute ("Battelle"), DoD is analyzing "all documents at [relevant records]
27
28

1 sites for information on personnel potentially exposed to chemical and/or biological agents while
2 involved in tests and other ancillary events.” (Ex. 1 to Kilpatrick Decl. at 7.) In order to provide
3 test participants with pertinent information about the tests and to enable them to seek examination
4 at a Department of Veterans Affairs (“VA”) health care facility, Battelle is also collecting
5 information including “the test names, test objectives, chemical or biological agents involved, and
6 number of service members and other personnel potentially affected by each test from 1942 to the
7 present timeframe” and transmitting that information to the VA. (Kilpatrick Decl. ¶ 13–15.) This
8 investigation is scheduled for completion in September 2011. (*Id.* ¶ 14.) As part of its
9 investigation, Battelle is compiling information concerning the test subjects and the details of
10 their exposure in a database known as the “Chemical and Biological Tests Repository” or “Chem-
11 Bio Database.” (*Id.*) Defendants have produced to Plaintiffs a copy of the database as of March
12 2011. (Herb Decl. ¶ 4.)

13 **III. DEFENDANTS HAVE MET AND CONFERRED IN GOOD FAITH WITH** 14 **PLAINTIFFS.**

15 The parties met and conferred telephonically regarding a number of discovery disputes,
16 including the scope of discovery in this case, on May 19, 2010. (Herb Decl. ¶ 5.) The parties
17 also met and conferred in-person on June 30, 2010, per the Court’s order. (*Id.* ¶ 6.) Following
18 the in-person meeting, on July 12, 2010, Defendants submitted by letter a proposal to limit the
19 scope of discovery. (*Id.* ¶ 7.) Plaintiffs rejected that proposal on July 20, 2010. (*Id.* ¶ 8.)
20 Defendants submitted a second proposal to Plaintiffs on July 30, 2010. (*Id.* ¶ 9.) Plaintiffs
21 rejected that proposal on August 4, 2010. (*Id.* ¶ 10.)

22 **ARGUMENT**

23 Rule 26(b)(1) of the Federal Rules of Civil Procedure sets forth the scope of discovery,
24 whether by depositions, written interrogatories, or production of documents. It provides that a
25 party “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s
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1 claim or defense.” Fed R. Civ. P. 26(b)(1). Information is relevant if it “appears reasonably
2 calculated to lead to the discovery of admissible evidence.” *Id.* In addition, even if the
3 information sought is relevant, a court “*must* limit the frequency or extent of discovery” if “the
4 burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P.
5 26(b)(2)(c) (emphasis added). Furthermore, a court may limit the scope of discovery in order to
6 protect a party “from annoyance, embarrassment, oppression, or undue burden or expense” by
7 granting an order “forbidding inquiry into certain matters, or limiting the scope of disclosure or
8 discovery to certain matters.” *Id.* 26(c); *see also Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th
9 Cir. 2004) (stating that Rule 26 is “subject to limitation” and that a court may issue a protective
10 order “prohibiting the requested discovery altogether, limiting the scope of the discovery, or
11 fixing the terms of disclosure”); 8A Charles Alan Wright et al., *Federal Practice and Procedure* §
12 2035 (3d ed. 1998) (“Rule 26(c) empowers the court to make a wide variety of orders for the
13 protection of parties and witnesses in the discovery process.”).

14 **I. THIS COURT SHOULD LIMIT DISCOVERY TO THE CLAIMS REMAINING IN**
15 **THIS ACTION AND PROHIBIT DUPLICATION OF PRIOR INVESTIGATIONS.**

16 In this case, Plaintiffs not only seek discovery on issues that are outside the scope of this
17 litigation, but also propound discovery requests on matters that have been dismissed by the
18 District Court. Furthermore, Defendants have conducted extensive investigations of their test
19 programs, namely the Army’s test programs and the CIA’s behavioral research program, and the
20 results have been made available to Plaintiffs. A renewed search, taken nearly forty years after
21 the conclusion of the test programs, is unlikely to yield additional discoverable information and
22 will duplicate past investigations. And, in any event, such a search would be unduly burdensome.
23 Pursuant to its authority under Rule 26(c), this Court should preclude discovery that is outside the
24 scope of this litigation and that duplicates prior investigations.

25 **A. Plaintiffs Inappropriately Seek a Wide-Scale Investigation of Defendants’**
26 **Test Programs and Information Outside the Scope of this Litigation.**

27 As described below, Plaintiffs seek to conduct a wide-scale investigation into the Army’s
28 test programs and CIA’s behavioral research over a sixty-year period, but such a search is

1 unwarranted given the narrow claims before the Court. As set forth above, the Court held that
2 Plaintiffs lacked standing to assert claims regarding the lawfulness of the test programs and that
3 Plaintiffs could challenge the consent forms only “to the extent that [the Army] required the
4 individual Plaintiffs to take a secrecy oath.” (Order of Jan. 19, 2010 at 11–13.) Furthermore, the
5 Court narrowed the issues in this action to three: (1) the validity of consent forms as they relate to
6 the secrecy oaths; (2) whether the individual Plaintiffs are entitled to notice of chemicals to which
7 they were exposed and any known health effects; and (3) whether Defendants are obligated to
8 provide medical care to the individual Plaintiffs. Because the Court dismissed some of Plaintiffs’
9 claims, and narrowed others, discovery should be limited to requests that seek information
10 relevant to these claims.

11 Despite the Court’s actions to narrow the claims in this action, Plaintiffs have continued to
12 seek wide-ranging discovery into all aspects of the Army’s test programs and CIA’s behavioral
13 research. For example, Plaintiffs have indicated an intent to serve additional interrogatories, one
14 of which they maintain will require Defendants to “IDENTIFY all military personnel who
15 directed or participated in any mind control experiments or studies, indicating their last known
16 address and phone number.” (Ex. D to Herb Decl. at 11.) This request would apply to every
17 aspect of the Army’s test programs—on its face, this request would encompass animal testing and
18 other studies that did not involve human trials. Additionally, in a letter to Defendants, Plaintiffs
19 demanded that the CIA produce all

20 documents that it created or maintained through the various ‘cut-out’ entities that
21 served as fronts for CIA funding of human experimentation projects by
22 contractors and researchers, including the Geschickter Fund for Medical
23 Research, the Society for the Investigation of Human Ecology, the Josiah H.
Macy, Jr. Foundation, the Granger Fund, the H.J. Rand Foundation, Medical
Sciences Research Foundation, and Amazon Natural Drug Co., among others.

24 (Ex. C to Herb Decl.; *see also* Ex. E to Herb Decl. at 2–3.) Plaintiffs demand this extensive
25 production, despite the absence of allegations (let alone evidence) that the alleged “cut-out”
26 organizations have conducted testing on service members. In fact, in their Second Amended
27 Complaint, Plaintiffs’ allege that the Geschickter Fund was used to fund tests at Georgetown
28

1 University Hospital in Washington, D.C. (SAC ¶ 137a.) But not even Plaintiffs' broad
2 Complaint, spanning some sixty-five pages and including nearly 200 paragraphs, makes any
3 reference to the Josiah H. Macy, Jr. Foundation, the Granger Fund, the H.J. Rand Foundation, the
4 Medical Sciences Research Foundation, or the Amazon Natural Drug Co., and it makes only
5 passing reference to the Society for the Investigation of Human Ecology. (*Id.* ¶ 117.) Yet,
6 Plaintiffs maintain that these organizations are relevant to this action—and Defendants, in turn,
7 must search for and produce every document related to each organization—because Plaintiffs
8 deem them so. To the degree Plaintiffs argue that these organizations may be relevant because
9 they may have tested some of the same substances and agents used on service members,²
10 Plaintiffs' demand for documents, on its face, is not so limited. (*See also* Ex. E to Herb Decl. at 2
11 (requesting that CIA produce “any documents [sic] relating to: (1) the legal status of these entities
12 . . . (2) funding provided by the CIA . . . (3) contracts between these entities and CIA related to
13 the procurement of drugs, the testing of drugs on humans or animals, or the implantation of
14 electrodes in human or animal brains; and (4) meetings and other communications between these
15 entities and the CIA”).) Because it is clear that Plaintiffs seek discovery outside of the scope of
16 the claims in this action, this Court should deny such requests.

17 Plaintiffs also seek information that goes to the lawfulness of the test programs, despite
18 the District Court's ruling that Plaintiffs lacked standing to assert this claim. Courts have held
19 that “it is proper to deny discovery of [a] matter that is relevant only to claims or defenses that
20 have been stricken” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 (1978); *Jane*
21 *Doe 130 v. Archdiocese of Portland in Or.*, ___ F. Supp. 2d ___, 2010 WL 1838844, *18 (D.
22 Or. 2010) (finding discovery requests irrelevant where, “[w]hile these documents . . . were likely
23 of significant relevance to [Plaintiff's] voluntarily withdrawn misrepresentation claim, they are

24
25 ² As will be addressed in Part II, discovery should be denied under this theory because of the
26 undue burden of finding such information and its minimal relevance. Additionally, if Plaintiffs'
27 theory of relevance is that testimony regarding cut-outs will lead them to information concerning
28 DoD test programs or unearth evidence of some CIA involvement, this attenuated theory has
already been answered in the negative by the numerous more contemporaneous investigations of
the CIA's behavioral research program.

1 not of clear relevance to her remaining claims”). In this case, the Court held that Plaintiffs lacked
2 standing to challenge the lawfulness of Defendants’ test programs. (Order of Jan. 19, 2010 at 11–
3 12.) Yet, Plaintiffs continue to seek discovery related to this claim. For instance, RFP No. 153
4 requests information on “[a]n agreement between the CIA and the U.S. Department of Justice . . .
5 whereby the violation of ‘criminal statutes’ by CIA would not result in Department of Justice
6 prosecutions”. (Ex. G to Herb Decl. at 8.) Likewise, RFP No. 113 asks for “[a]ll reported,
7 alleged, or actual violations of protocols involving the use of human subjects in chemical or
8 biological weapons test at the Edgewood Arsenal or any other Army facility.” (Ex. F to Herb
9 Decl. at 15; *see also id.* 16 (requesting “procedures, regulations, requirements, standards, and
10 violations of any of the same, and other DOCUMENTS CONCERNING the use of human beings
11 in experiments”); *id.* 15 (requesting all documents regarding “the activities of the Medical
12 Review Committee for scientific evaluation of protocols using human subjects and a Human Uses
13 Committee for the moral and ethical review of such protocols”).) These requests concern the
14 lawfulness of the test programs. Under *Oppenheimer* and *Jane Doe*, Plaintiffs should be
15 foreclosed from propounding discovery on claims that have been dismissed by the Court.

16 **B. The Court Should Exclude Discovery Requests That Are Duplicative of Prior**
17 **Investigations.**

18 In cases with broad discovery requests that are duplicative of previously produced
19 materials or publicly available information, courts have denied discovery to the propounding
20 party. *In re Agent Orange Product Liability Litigation*, 517 F.3d 76 (2d Cir. 2008), arose out of
21 the military’s use of Agent Orange during the Vietnam War. *Id.* at 82. The plaintiffs sought
22 discovery documents from earlier, multidistrict litigation (“MDL”) concerning the same
23 pesticides and claims. *Id.* at 102. The district court ruled, however, that the plaintiffs had to
24 familiarize themselves with the MDL discovery documents before serving additional requests.
25 *Id.* It also denied the plaintiffs’ efforts to seek documents produced from litigation and
26 government hearings after the MDL, despite the plaintiffs’ arguments that documents produced in
27 those later cases and hearings were more extensive and germane to the pending claims than the
28 earlier investigations. *Id.* The Second Circuit upheld the district court’s decisions to require the

1 plaintiffs to review the MDL and deny discovery into the later litigation and government
2 hearings. *Id.* at 102–03. It found there was no basis “for a conclusion on our part that the
3 documents would differ materially from the voluminous documents available to them through the
4 MDL.” *Id.* at 103. It noted that the plaintiffs sought “many thousands of additional documents,
5 made without any attempt to review what was already available to them or to tailor their request
6 to materials reasonably expected to produce relevant, non-duplicative information.” *Id.*; *see also*
7 *Pub. Serv. Enter. Grp. Inc. v. Philadelphia Elec. Co.*, 130 F.R.D. 543, 551–52 (D.N.J. 1990)
8 (finding that Rule 26(b)(1)(1), denying discovery that is unreasonably cumulative, was implicated
9 where “the essential information . . . is readily available” by virtue of government hearings and
10 other litigation); *Carlson Cos., Inc. v. Sperry and Hutchinson Co.*, 374 F. Supp. 1080, 1085 (D.
11 Minn. 1974) (refusing to require document productions, “the contents of which will possibly
12 serve only to supplement material already revealed”).

13 In this case, Plaintiffs seek information that duplicates prior investigations by DoD and
14 CIA. Defendants have provided Plaintiffs with thousands of pages of documents concerning the
15 conduct of the test programs, including the results of comprehensive Congressional and executive
16 investigations, FOIA requests, and lawsuits, as described above. Yet, Plaintiffs continue to serve
17 requests that would be duplicative of information previously disclosed pursuant to these
18 investigations. By way of example, RFP No. 155 requests information on “[c]ollaboration
19 between officials within the CIA’s Security Office, scientists from Fort Detrick’s Special
20 Operations Division, and scientists from other Army installations, including Edgewood Arsenal,
21 on experiments with LSD, mescaline, peyote, and synthesized substance known as ‘Smasher’ in
22 the summer of 1951.” (Ex. G to Herb Decl. at 8–9.) Defendants, however, have previously
23 provided a comprehensive memorandum concerning any “project conducted or participated in by
24 the Department of Defense in which there was any Central Intelligence Agency involvement and
25 which included the administration of drugs to human subjects for mind-control or behavior-
26 modification purposes.” (Ex. I to Herb Decl. at 1.)

1 Additionally, RFP No. 92 requests “[r]esearch that YOU sponsored, financed, directed,
2 controlled, monitored or received the results of involving the chemical stimulation to areas of the
3 brain, electrical self-stimulation to the human brain, and all MEETINGS and
4 COMMUNICATIONS CONCERNING the same.” (Ex. F to Herb Decl. at 12.) If DoD and CIA
5 were to produce all communications concerning chemical stimulation of the brain, a primary
6 focus of the test programs, they would be required to replicate previous extensive searches and
7 reproduce many of the documents already provided, as discussed above. Furthermore, though
8 this request would likely require an extensive search, it would not likely produce new
9 information. (Cameresi Decl. ¶ 25 (“Engaging in a repeated search of the same files (many
10 paper-based) at this late date could be expected to impose substantial burden on the CIA—taking
11 employees away from their duties in furtherance of the Agency’s mission—but likely adding
12 nothing to CIA’s discovery responses.”); Kilpatrick Decl. ¶ 11 (“As a result of these
13 investigations and congressional and public inquiries, the subject of the Army’s chemical and
14 biological agent tests involving human subjects has been aired extensively. I therefore do not
15 have reason to believe that there exists a significant amount of critical information about those
16 testing programs that is not already publicly known.”).) Because many of Plaintiffs’ requests
17 seek information previously provided to Plaintiffs and resulting from extensive investigations,
18 duplicative discovery requests should be denied.

19 **II. THIS COURT SHOULD LIMIT THE SCOPE OF DISCOVERY TO EXCLUDE**
20 **IRRELEVANT, PROTECTED, OVERLY BROAD, AND UNDULY**
21 **BURDENSOME REQUESTS.**

22 Plaintiffs have served numerous discovery requests for information that are irrelevant,
23 protected, overly broad, and unduly burdensome. Defendants respectfully request that this Court
24 limit discovery into topics such as animal testing and research; the operational use of chemical
25 and biological agents; irrelevant CIA programs; and tests that were not conducted on service
26 members or as part of the test programs. Discovery into these topics is not reasonably calculated
27 to lead to the discovery of admissible evidence. This Court should also foreclose Plaintiffs’
28 attempts to seek the identity of individuals and institutions protected by 50 U.S.C. §§ 403-1(i)(1)

1 & 403g. Sections 403-1(i)(1) & 403g are unqualified and distinct from any executive order
2 safeguards for protecting classified information. Finally, Defendants seek limitations on requests
3 that are not tailored to agents used in Defendants' test programs; that encompass a broad swath of
4 irrelevant documents; that seek discovery from DOJ despite its limited nexus to this litigation;
5 that seek a reinvestigation of issues previously examined; and that are being investigated as part
6 of the Battelle investigation. Such requests are unreasonably duplicative and unduly burdensome,
7 particularly in light of their limited relevance.

8 **A. The Court Should Exclude Discovery Requests That Are Irrelevant and**
9 **Exceed the Scope of This Litigation.**

10 **1. Plaintiffs Seek Information Related to Animal Testing, Which Has No**
11 **Bearing on Their Claims.**

12 Plaintiffs' discovery requests seek, among other things, information concerning the testing
13 of chemical and biological agents on animals. For example, Plaintiffs have indicated an interest
14 in serving additional interrogatories, one of which would require Defendants to identify all
15 locations where tests were conducted, identify the nature of experiments at those locations, and
16 produce all documents about the tests, regardless of "whether or not testing was done on
17 humans." (Ex. D. to Herb Decl. at 11.) Another request asks that Defendants "IDENTIFY each
18 experiment in the TEST PROGRAMS which involved a human subject which was not preceded
19 by animal experimentation, and explain why prior animal experimentation was not done." (*Id.* at
20 9.) Additionally, Plaintiffs have requested every communication and document related to a
21 contract that "established and used test procedures with animals from which behavioral effects of
22 drugs and chemical compounds in humans could be predicted." (Ex. F to Herb Decl. at 18–19
23 (requesting information regarding animal research in RFP No. 133 and 134).) On its face, this
24 document concerns animal research.³ (Cameresi Decl. ¶ 20; Ex. J to Herb Decl. at 2.)

25
26 ³ Not only are the requests irrelevant, but they are also unduly burdensome. The CIA estimates
27 that it would take "three months to collect and to review documents potentially responsive to
28 these [two] requests." (Cameresi Decl. ¶ 20.)

1 Additionally, all of Plaintiffs' requests that seek information about particular tests
2 programs and substances are not limited to tests on human subjects. By way of example, RFP
3 No. 79 requests information concerning the "administration of LSD in eye drops", (Ex. E. 10);
4 RFP No. 89 seeks "[c]ontracts involving research on hallucinogenic drugs", (*id.* at 11); and RFP
5 Nos. 93–95 inquire into research, reports, and experiments concerning "EA-1476 or its analogs
6 and/or dimethylheptyl", (*id.* 12). None of these requests state, nor do Plaintiffs' discovery
7 requests otherwise indicate, that Defendants may limit their response to tests on human subjects.
8 As such, Defendants would be required to produce documents concerning animal research,
9 despite the limited utility of this information.

10 Animal research has no bearing on Plaintiffs' claims. At best, Plaintiffs could argue that
11 such research could be relevant to the health effects experienced by human subjects. There is no
12 evidence, however, that animal studies are predictive of the long-term health effects experienced
13 by human subjects. Robert J. Berlin, *Epidemiology As More Than Statistics: A Revised Tool for*
14 *Products Liability*, Tort Trial & Ins. Prac. L.J. 81, 84 (2006) ("Courts and scholars consistently
15 maintain that animal studies and in vitro studies are not as valuable as epidemiology for
16 predicting health effects in humans. Simply put, it is believed that the truth about causes of
17 human disease is more reliably derived from human studies than in vivo or in vitro evidence.").
18 Moreover, even if animal studies were relevant to health effects in humans in the abstract, animal
19 studies are unlikely to be so here given that the test programs date back at least twenty-five years,
20 and as much as sixty years, and that animal testing did not and could not examine health effects of
21 that duration. Accordingly, Plaintiffs' discovery requests should be limited to exclude requests
22 for tests and research conducted on animals.

23 **2. The Court Should Preclude Discovery on the Operational Use of Chemical**
24 **and Biological Weapons Because There Are No Allegations of**
25 **Operational Exposure.**

26 In this case, Plaintiffs allege that the named Plaintiffs and putative class members were
27 exposed to chemical and biological substances through tests primarily at Edgewood Arsenal and
28 Fort Detrick, though Plaintiffs also allege tests at other locations within the United States. (*See,*

1 e.g., SAC ¶¶ 103, 105, 107, 111.) Plaintiffs have not, however, made any allegations of
2 operational exposure, such as in a war zone. Despite the absence of such allegations, Plaintiffs
3 have propounded many discovery requests regarding the operational use of chemical and
4 biological agents in war zones. For instance, Defendants seek the following information:

5 RFP No. 80: The composition and IDENTITY of any chemicals or other
6 substances developed or tested at Edgewood or Fort Detrick and spread or used
7 in war zones, including, without limitation, known or suspected infiltration of
supply routes such as the Ho Chi Minh Trail in Vietnam.”

8 RFP No. 81: The activities, orders, reports from, and other DOCUMENTS
9 CONCERNING military personnel referred to as “dusters,” including, without
10 limitation, the spreading and use of chemicals or other substances developed or
tested at Edgewood or Fort Detrick in war zones.

11 (Ex. F to Herb Decl. at 10.)

12 Defendants respectfully request that this Court exclude discovery into operational
13 exposure. On their face, these requests seek information regarding the operational use of
14 chemicals in war zones. Accordingly, the requests do not seek information related to consent
15 forms, health care, health effects, or the notice to be provided to individuals tested pursuant to
16 DoD’s test programs and can have no bearing on Plaintiffs’ claims.

17 **3. The Court Should Exclude Discovery Concerning CIA Programs and** 18 **Activities That Are Not Relevant to This Litigation.**

19 Plaintiffs seek a broad investigation of the CIA’s behavioral research program. For
20 instance, Plaintiffs have indicated an intention to seek additional interrogatories, one of which
21 asks the CIA to “indicate the annual funding provided by the CIA for each of the TEST
22 PROGRAMS between 1943 and the present.” (Ex. D to Herb Decl. at 10.) If the CIA were to
23 provide a specific dollar amount, as requested, this information would have no bearing on
24 Plaintiffs’ claims: it would not reveal whether testing was actually conducted on service members
25 or whether service members received notice of the tests, and it has no relevance to health effects
26 or health care. This information is irrelevant, and it is not likely to lead to the discovery of
27 admissible evidence.
28

1 Plaintiffs also seek information on the Graphic Arts Reproduction Branch (“GARB”),
2 which concerned the reproduction of sensitive documents and did not involve the testing of
3 chemical or biological agents. Plaintiffs have served two discovery requests concerning GARB:

4 RFP No. 126: The activities, functions, and purpose of . . . the [GARB] of the
5 Technical Services Division (“TSD”), as referred to in paragraph 4 of the Report
6 of Inspection of MKULTRA/TSD, in the version of the CIA Inspector General
7 Report produced by Defendants to Plaintiffs on Friday, April 30, 2010.

8 RFP No. 127: All agendas, reports, or analyses received, prepared or distributed
9 by the GARB that relate to chemical and biological weapons research or testing.

10 (Ex. F to Herb Decl. at 17.) These requests seek information that has no bearing on Plaintiffs’
11 claims. GARB was devoted to document reproduction and did not involve drug research (human
12 or otherwise). (Cameresi Decl. ¶ 14.) This is apparent on the face of the document that Plaintiffs
13 reference. The document notes that “[t]he security considerations applying to [the redacted
14 classified work of the GARB] were found to be significantly different from those governing the
15 manipulation of human behavior.” (*Id.*) The document also makes clear that MKULTRA had
16 two distinct purposes, one of which concerned behavioral research while the other concerned the
17 reproduction of sensitive documents. (*Id.*) Because the document that Plaintiffs reference makes
18 clear that GARB did not relate to biological and chemical agent testing, information related to
19 GARB can have no bearing on Plaintiffs’ claims.

20 Finally, Plaintiffs have sought information on CIA behavioral research program that did
21 not involve testing on service members. Plaintiffs have propounded numerous discovery requests
22 concerning MKULTRA, ZR/ALERT,⁴ MKDELTA, and CHICKWIT, among others, in RFP Nos.
23 90, 117, 125, 128. (Ex. F to Herb Decl. at 11, 16–18.) As discussed above, however, only one
24 CIA program even contemplated the testing of service members: Project OFTEN. (Cameresi
25 Decl. ¶¶ 8, 11.) Furthermore, based on multiple extensive investigations, including interviews
26 with personnel at Edgewood Arsenal, the CIA concluded that funding for this program was

27 ⁴ Plaintiffs have failed to define this program. Nonetheless, Plaintiffs have indicated that they are
28 alleging that ZR/ALERT has some relationship with the CIA.

1 withdrawn before the commencement of human testing. (*Id.* ¶ 12.) Plaintiffs’ requests seeking a
2 broader investigation of CIA’s test programs is unwarranted, particularly in light of the Court’s
3 finding that Plaintiffs lacked standing to challenge the lawfulness of the programs.

4 **4. The Court Should Exclude Discovery on Tests That Were Not Conducted**
5 **on Service Members or as Part of the Test Programs.**

6 Plaintiffs seek information concerning the health effects reported by individuals other than
7 the named Plaintiffs or putative class members. For example, RFP No. 82 requests information
8 on the “health effects reported by ‘dusters’ used to deploy, release or spread chemicals in war
9 zones . . . such as the Ho Chi Minh Trail.” (Ex. F to Herb Decl. at 10.) Additionally, Plaintiffs
10 request information concerning tests conducted at and through contracts with non-military
11 installations. RFP Nos. 89, 91, 94, 108, 136, 177 concern research allegedly conducted at Tulane
12 University, Yale University, University of Maryland, University of Michigan Medical School,
13 George Washington University, and University of Pennsylvania, respectively. (*Id.* at 11–12, 14,
14 18; Ex. G to Herb Decl. at 8.) However, Plaintiffs have not made any allegations that the named
15 Plaintiffs or putative class members received operational exposure to chemical or biological
16 agents in a war zone or were exposed to chemical or biological agents at the referenced
17 institutions.

18 Nor would the health effects experienced by individuals encompassed by these requests be
19 of particular usefulness here. If individuals were tested at these locations, descriptions of those
20 tests would identify side or health effects reported by the test recipient and would, accordingly,
21 reflect the short-term effects on and experience of the individual. Furthermore, even if there had
22 been tests, we have no indication or evidence that there would have been or were follow-up
23 studies conducted on these individuals, and thus, there is little likelihood of finding information
24 related to the long-term health effects of exposure. As such, it would be unduly burdensome to
25 require Defendants to search for documents concerning exposure to these individuals.

1 **B. The Court Should Exclude From Discovery Information That Is Protected**
2 **Pursuant to Statutory Privileges.**

3 Plaintiffs have served numerous discovery requests that seek the disclosure of the identity
4 of individuals and institutions associated with the CIA and protected by statutory privilege.
5 (Supplemental Decl. of Patricia Cameresi, Assoc. Info. Review Officer for the Directorate of Sci.
6 & Tech., CIA (“Supplemental Cameresi Decl.”) ¶ 4) For example, RFP No. 130, referencing a
7 memorandum to the CIA Inspector General, requests the identity “of the author of the
8 memorandum”, as well as of “private industry members”, “university professors”, and the
9 “Division Chief” referenced in the memorandum. (Ex. F to Herb Decl. at 18.) RFP No. 132
10 requests the membership of a CIA panel. (*Id.*) RFP No. 143 requests identification of the
11 “members of” the CIA’s ARTICHOKE Committee. (*Id.* at 21.) RFP No. 144 seeks the identity
12 of the institutions that contracted with the CIA. (*Id.*)

13 This information is protected by the National Security Act of 1947, 50 U.S.C. § 403-
14 1(i)(1), and the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403g. (Supplemental
15 Cameresi Decl. ¶ 5.) Section 403g states that, in the interest of “protecting intelligence sources
16 and methods from unauthorized disclosure, the Agency shall be exempted from the . . . provisions
17 of any other law which require the publication or disclosure of the organization, functions, names,
18 official titles, salaries, or numbers of personnel employed by the Agency.” Section 403-1(i)(1)
19 states that “The Director of National Intelligence shall protect intelligence sources and methods
20 from unauthorized disclosure.” In *CIA v. Sims*, 471 U.S. 159 (1985), the Supreme Court held that
21 the CIA’s research of chemical and biological agents “was related to the Agency’s intelligence-
22 gathering function in part because it revealed information about the ability of foreign
23 governments to use drugs and other biological, chemical, or physical agents in warfare or
24 intelligence operations against adversaries.” *Id.* at 173. Accordingly, the Court held that the
25 National Security Act protected the names of individuals and institutions associated with the
26
27
28

1 CIA's behavioral research program. *Id.* Here, Plaintiffs seek the identity of CIA intelligence
2 sources associated with the CIA's behavioral research program, as well as the names of CIA
3 employees involved in aspects of these programs. The National Security Act, the CIA Act, and
4 *Sims* establish that such information is protected from disclosure.⁵

5 **C. Plaintiffs' Discovery Requests Are Overbroad and Not Tailored to Lead to**
6 **the Discovery of Relevant Information.**

7 **1. Plaintiffs' Requests Are Not Tailored to the Agents Used in Defendants'**
8 **Test Programs.**

9 Defendants argue above that any health effects experienced by individuals who were
10 exposed to a chemical or biological substance outside of the test programs are irrelevant. Even if
11 the Court were to disagree, Plaintiffs have failed to tailor their discovery requests in a manner that
12 is likely to produce information relevant to this litigation. For instance, RFP No. 82, referenced
13 above, concerning the "[a]dverse health effects reported by 'dusters' used to deploy, release or
14 spread chemicals in war zones", encompasses substances that were not tested at Edgewood. By
15 way of example, it is well known that a variety of herbicides were used during the Vietnam War
16 to defoliate forests. *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 19
17 (E.D.N.Y. 2005) (listing eight herbicides used in Vietnam, the most well-known of which was
18 Agent Orange). There is no allegation in this case that any of the named Plaintiffs or members of
19 the putative class were exposed to herbicides.⁶ Yet, RFP No. 82 would require that Defendants
20 produce information related to herbicide use during the Vietnam War, and it is therefore
21 overbroad. Defendants respectfully request that this Court limit Plaintiffs' discovery requests to
22 chemicals and substances that were tested on service members. *See Bredemus v. Int'l. Paper*

23 _____
24 ⁵ In the event the Court requires CIA to respond to these, and other, discovery requests that
25 implicate information protected pursuant to 50 U.S.C. § 403-1(i)(1) and 50 U.S.C. § 403g, CIA
reserves the right to explain the withholding of protected information.

26 ⁶ Nor would plaintiffs be able to seek relief for such exposure as part of this action, given that
27 such claims have been extensively litigated and subject to numerous class-action settlements. *See*
28 *In re "Agent Orange" Product Liability Litigation*, 304 F. Supp. 2d 404, 408 (E.D.N.Y. 2004)
(discussing the more than one hundred cases involving Agent Orange and other herbicides).

1 Co., 252 F.R.D. 529, 535 (D. Minn. 2008) (refusing to permit discovery into chemical agents that
2 were not alleged to have caused harm to the plaintiffs).

3 **2. Plaintiffs' Requests Concerning the Test Programs Encompass a Broad**
4 **Swath of Irrelevant Documents.**

5 Plaintiffs have served numerous discovery requests that seek every document related to
6 the Army's test programs or CIA's behavioral research. For instance, RFP Nos. 98–102 seek the
7 “[r]eports, minutes, memos, budgets, notes, minutes [sic], transcripts and other DOCUMENTS
8 CONCERNING all activities” of the Chemical Corps Advisory Council, the Chemical Corps
9 R&D Command, the Chemical Warfare Laboratory, the Chemical Research and Development
10 Laboratory, and the Chemical Corps Technical Committee, respectively. (Ex. F to Herb Decl. at
11 13.) Additionally, Plaintiffs have requested that Defendants identify every communication and
12 document related to any test program that involved biological substances. (Ex. D to Herb Decl. at
13 12.) Because these requests seek every document related to an activity, entity, or program, the
14 requests necessary encompass all invoices, bills of lading, inventories, and other administrative
15 minutiae ranging from salary information to the purchase of pens and paper. Though the requests
16 may include some relevant information, the requests, as framed, are substantially overbroad and
17 would require Defendants to produce countless documents that have no bearing on Plaintiffs’
18 claims. *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 657 (C.D. Cal. 2005) (finding
19 a discovery request overbroad for capturing extraneous information). As such, this Court should
20 limit discovery requests that are overly broad.

21 **3. The Court Should Limit Discovery Directed to the Department of Justice.**

22 Plaintiffs have demanded that each individual Defendant respond to every discovery
23 request, but they have made few allegations about DOJ generally and no allegations about DOJ
24 having a nexus to the conduct of the test programs. Plaintiffs’ Second Amended Complaint
25 references the DOJ or Attorney General in only three paragraphs, and all three paragraphs pertain
26 solely to Plaintiffs’ claims regarding the identification and notification of participants in
27 government test programs. (SAC ¶¶13, 14, 98.) Paragraph 13 alleges both that the CIA testified
28

1 that it was working with the Attorney General regarding the identification of test participants and
2 that the Attorney General participated in efforts to locate test participants. (*Id.* ¶ 13.) Paragraph
3 14 characterizes a DOJ opinion regarding whether the CIA had a duty to locate participants in the
4 CIA’s MKULTRA program. (*Id.* ¶ 14.) Paragraph 98 then expressly states that the Attorney
5 General “is named solely in his official capacity and in connection with the Attorney General’s
6 assumption of responsibility to notify the victims of biological and chemical weapons tests.” (*Id.*
7 ¶ 98.)

8
9 DOJ has searched for documents and information pertaining to the allegations concerning
10 it and the Attorney General, namely allegations that they assumed some role in providing notice
11 to test participants. (Herb Decl. ¶ 18.) Because Plaintiffs’ have not made any allegations beyond
12 notice, Plaintiffs’ demands that DOJ respond to each discovery request are overbroad and not
13 reasonably calculated to lead to admissible evidence. This Court should limit discovery to DOJ
14 to claims and allegations concerning notice.

15
16 **D. The Court Should Limit Discovery to Exclude Requests That Are Unduly Burdensome.**

17 “In making a decision regarding burdensomeness, a court must balance the burden on the
18 interrogated party against the benefit to the discovering party of having the information.” *Thomas*
19 *v. Cate*, ___ F.3d ___, 2010 WL 671254, *14 (E.D. Cal. 2010). In this case, Plaintiffs seek
20 information that has been or is currently part of an extensive investigation. It would be unduly
21 burdensome to require Defendants to replicate these searches and investigations, particularly
22 given the low likelihood of discovering new materials as a result of the discovery searches.

23 **1. The Court Should Limit Discovery to Exclude Requests That Seek Information Currently Being Examined As Part of the Ongoing DoD Investigation.**

24
25 As discussed above, DoD is searching for information related to test participants in its
26 chemical and biological tests. (Kilpatrick Decl. ¶ 13.) It has entered into a contract with Battelle
27 to “review individual test records and other sources for veterans’ identifying information and
28

1 details about the tests they underwent,” including “the chemical or biological agent each was
2 exposed to, and the amount administered and route of administration (e.g., oral) where available.”
3 *Id.* This search is comprehensive, requiring “a laborious by-hand search of hard copy records . . .
4 by individual researchers.” (*Id.* ¶ 14.)

5 Despite this ongoing effort by DoD to determine the nature of the test programs, an
6 investigation which has cost millions of dollars, (*id.*), Plaintiffs have served discovery requests
7 that would impose a similar burden on Defendants with little hope of offering relevant
8 information. For instance, Interrogatory No. 14 requires Defendants to “IDENTIFY all TEST
9 SUBJECTS who, after signing a consent to participate in the TEST PROGRAMS, revoked
10 consent or refused to continue participation, and summarize the outcome of each case.” (Ex. K to
11 Herb Decl. at 11.) In order to comply with this request, Defendants would have to “individually
12 review 6,723 individual personnel files to determine if those individuals’ refusal was noted in
13 their record.” (Decl. of Lloyd Roberts, Biological Scientist, U.S. Army Med. Research Inst. of
14 Chem. Def. ¶ 7.) The burden of producing this information is substantial—it would take ten
15 months and require 1,680 man-hours of effort. (*Id.*) Yet, the search is unlikely to yield much
16 relevant information, as the DAIG investigation found that only six volunteers refused to
17 participate in testing after arriving at Edgewood Arsenal. (Roberts Decl. ¶ 7.)

18 Additionally, Plaintiffs have served discovery requests that are duplicative of information
19 investigated by Battelle. For instance, RFP No. 79 requests information concerning “[t]he
20 administration of LSD in eye drops in connection with the TEST PROGRAMS, and the health
21 effects of the same.” (Ex. F to Herb Decl. at 10.) To the degree this request is designed to
22 uncover information concerning the administration of LSD on individual test subjects, it would
23 require an extensive and labor-intensive search. For instance, the CIA has more than 9,000
24 documents containing the words LSD or lysergic, and CIA personnel would have to review each
25 document individually to determine its responsiveness. (Cameresi Decl. ¶ 23.) Yet, the payoff of
26 such an effort would be minimal, as Battelle is already searching for information on each agent to
27 which a test subject was exposed. (Kilpatrick Decl. ¶ 13.)
28

2. Plaintiffs Seek an Investigation of a Contract Previously Examined.

Plaintiffs seek to require Defendants to reexamine an Army contract that has been thoroughly investigated by the Army, which found few available records. Two RFPs concern Army Contract DA-18-108-CML-5596:

RFP No. 87: Army Contract DA-18-108-CML-5596, including without limitation, all drafts, negotiations, reports, payments, and research progress and results.

RFP No. 88: MEETINGS and COMMUNICATIONS between YOU and researchers, including, without limitation, Dr. Edward Heath and Dr. Russell Monroe at Tulane University, CONCERNING Army Contract DA-18-108-CML-5596 and any other contracts between YOU and the researchers at Tulane University.

(Ex. F to Herb Decl. at 11.) This contract was investigated by the Deputy Army Inspector General, who found “few Army records available regarding the experiments” under this contract. (Ex. L to Herb Decl. at 160.) The DAIG report also provided the outcome of its investigation into this contract: experiments were conducted by “Tulane medical investigators” on mental patients, normal volunteers and neurological patients”; “no determination was made concerning [Tulane’s] compliance with Department of the Army policies nor could any judgment be made as to the quality of consent rendered by the patients”; and the Army’s “interest in the experiments . . . did not go beyond gathering evidence of the effects of LSD and mescaline in humans”, as evidenced by the fact that follow-up reports “did not discuss the implantation procedures, purpose or effect” but “rather they stressed the effects of the drugs.” *Id.*

It would be unduly burdensome to require Defendants to re-search for documents concerning DA-18-108-CML-5596. (Decl. of Richard L. Wiltison, U.S. Army Research, Dev., and Eng’g Command ¶ 4 (stating that a search for materials underlying the DAIG Report, namely the references, only located 11 documents).) As the above discussion makes clear, the Army has already conducted an examination of this very contract. It has reported its findings concerning the contract, and those findings have been made available to the Plaintiffs. Accordingly, any expenditure of time and resources on this contract would outweigh the utility

1 of a renewed investigation of this contract, particularly in light of the DAIG Report's notation
2 that there were few documents pertaining to it.

3 **E. Defendants Seek Limits on the Categories of Information That May Be**
4 **Sought by Plaintiffs.**

5 In light of the discussion above, Defendants respectfully request that this Court exclude
6 the following categories of information from discovery in this case:

- 7 1. Animal testing and research;
- 8 2. Operational use of chemical and biological agents;
- 9 3. CIA programs and activities that do not reflect on testing on military service members;
- 10 4. Tests that were not conducted on service member volunteers or as part of the test
11 programs;
- 12 5. The identity of individuals and institutions protected by 50 U.S.C. §§ 403-1(i)(1) &
13 403g;
- 14 6. Requests that are not tailored to agents used in Defendant DoD's test program
15 volunteers;
- 16 7. Requests that encompass a broad swath of irrelevant documents;
- 17 8. Requests that seek information from DOJ and do not pertain to the notification of test
18 participants.
- 19 9. Requests that seek a reinvestigation of issues previously examined; and
- 20 10. Requests that are being investigated as part of the Battelle investigation.

21 **CONCLUSION**

22 For the reasons stated above, Defendants respectfully request that the Court grant their
23 Motion for Protective Order Limiting Scope of Discovery.

24 Dated: September 15, 2010

Respectfully submitted,

26 IAN GERSHENGORN
Deputy Assistant Attorney General
27 MELINDA L. HAAG
United States Attorney
28 VINCENT M. GARVEY

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Deputy Branch Director

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Beaudoin, Kathy E.

From: ECF-CAND@cand.uscourts.gov
Sent: Wednesday, September 15, 2010 8:43 PM
To: efilings@cand.uscourts.gov
Subject: Activity in Case 4:09-cv-00037-CW Vietnam Veterans of America et al v. Central Intelligence Agency et al Motion for Protective Order

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Case Name: Vietnam Veterans of America et al v. Central Intelligence Agency et al
Case Number: [4:09-cv-00037-CW](#)
Filer: United States of America
Central Intelligence Agency
United States Department of the Army
Leon Panetta
United States Department of Defense
Robert M. Gates
Pete Geren
Eric H. Holder, Jr

Document Number: [140](#)

9/16/2010

Docket Text:

MOTION for Protective Order *Limiting Scope of Discovery* filed by Central Intelligence Agency, Robert M. Gates, Pete Geren, Eric H. Holder, Jr, Leon Panetta, United States Department of Defense, United States Department of the Army, United States of America. Motion Hearing set for 10/27/2010 09:30 AM in Courtroom F, 15th Floor, San Francisco. (Attachments: # (1) Herb Declaration, # (2) Exhibit A to Herb Declaration, # (3) Exhibit B to Herb Declaration, # (4) Exhibit C to Herb Declaration, # (5) Exhibit D to Herb Declaration, # (6) Exhibit E to Herb Declaration, # (7) Exhibit F to Herb Declaration, # (8) Exhibit G to Herb Declaration, # (9) Exhibit H to Herb Declaration, # (10) Exhibit I to Herb Declaration, # (11) Exhibit J to Herb Declaration, # (12) Exhibit K to Herb Declaration, # (13) Exhibit L to Herb Declaration, # (14) Cameresi Declaration, # (15) Supplemental Cameresi Declaration, # (16) Kilpatrick Declaration and Exhibit 1, # (17) Roberts Declaration, # (18) Wiltison Declaration)(Herb, Kimberly) (Filed on 9/15/2010)

4:09-cv-00037-CW Notice has been electronically mailed to:

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Document description: Supplemental Cameresi Declaration

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Document description: Kilpatrick Declaration and Exhibit 1

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