IAN GERSHENGORN
Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney
VINCENT M. GARVEY
Deputy Branch Director
CAROLINE LEWIS WOLVERTON
District of Columbia Bar No. 496433
Senior Counsel
Telephone: (202) 514-0265
E-mail: caroline.lewis-wolverton@usdoj.gov
KIMBERLY L. HERB
Illinois Bar No. 6296725
Trial Attorney
LILY SARA FAREL
North Carolina Bar No. 35273
Trial Attorney
BRIGHAM J. BOWEN
District of Columbia Bar No. 981555
Trial Attorney
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044
Facsimile: (202) 616-8470

Attorneys for DEFENDANTS

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 (JL)

Noticed Motion Date and Time:
October 6, 2010
9:30 a.m.

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SANCTIONS

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INTRODUCTION

Plaintiffs' motion for sanctions under Fed. R. Civ. P. 37(a)(5) is wholly inappropriate. First, the motions to compel on which it is based rely on significant mischaracterizations about Defendants' document searches and productions that are directly at odds with information Defendants have given Plaintiffs. The Central Intelligence Agency ("CIA") has produced documents to Plaintiffs, as Plaintiffs undoubtedly are aware. Yet their motions to compel rely on assertions that Defendants have identified no document as having been produced by CIA, thereby suggesting that CIA has produced no documents in this litigation. To the contrary, CIA has produced documents to Plaintiffs both as part of its initial disclosures and in response to Plaintiffs' first set of requests for production of documents ("RFPs"), and has also provided to Plaintiffs outside of discovery more than 20,000 pages of documents concerning CIA's behavioral research programs. It simply is not tenable that Plaintiffs were unaware that CIA has produced documents. Plaintiffs' motions also assert that it appears the Department of Defense ("DoD") and Department of Army ("Army") have not conducted searches at Edgewood Arsenal, which was the Army's center for chemical research. DoD and Army focused their search efforts in response to Plaintiffs' first set of RFPs on documents stored at Edgewood, and, as Defendants explained to Plaintiffs well in advance of their moving for sanctions, DoD and Army are continuing to search for additional documents at Edgewood as a result of meet-and-confer discussions with Plaintiffs. Plaintiffs' assertions that Defendants have refused to cooperate in the discovery process and have been anything other than forthcoming in their discovery responses are absolutely unwarranted.

Second, Plaintiffs' sanctions request as well as their motions to compel refuse to acknowledge that the Court has narrowed the scope of this case. The Court dismissed Plaintiffs' challenge to the lawfulness of the tests at issue, and the remaining claims are relatively discrete requests for declaratory and injunctive relief under the Administrative Procedure Act ("APA") and Declaratory Judgment Act ("DJA") in the form of notification, medical care and release from secrecy oaths. Yet Plaintiffs proceed as if the Court had not dismissed a substantial portion of

their case and move for sanctions based on discovery requests that venture far beyond information bearing on the remaining claims.

Third, Plaintiffs have refused to reciprocate our efforts to negotiate an appropriate scope of discovery. Defendants' attempts to reach a compromise on the issue include two proposals for a definition of the scope of discovery that targets information bearing on the claims before the Court while accounting for the substantial impediments of the passage of time, the large span of time over which the tests at issue occurred and the corresponding enormous number of documents relating to the tests at issue. Plaintiffs refused to make even a single counter-proposal to address any deficiency they perceived in our proposals.

Finally, Defendants have made robust responses to Plaintiffs' discovery requests, producing over 14,000 pages of documents and designating 30(b)(6) witnesses to testify in response to 20 topics. However, Plaintiffs' document requests and 30(b)(6) topics are vastly overbroad given the discrete nature of the claims under the APA and DJA that are before the Court. And they are unduly burdensome in the extreme, encompassing an enormous number of historical documents and information concerning tests that spanned more than 20 years and began over 60 years ago. The requests encompass extensive information about CIA testing programs which, based on multiple extensive investigations that have scoured the Agency's documents concerning the programs and conducted extensive interviews of CIA personnel as well as DoD personnel, the Agency has concluded did not involve tests on military servicemembers. CIA has produced to Plaintiffs the results of its review of Agency records concerning Project OFTEN, the only CIA behavioral research program that contemplated tests on military personnel (but whose funding was terminated prior to such tests), as well as additional documents resulting from its search in response to Plaintiffs' first set of document requests. The overbreadth and undue burden of Plaintiffs' requests coupled with the fact that DoD is in the midst of an ongoing investigation to identify servicemember test participants and compile details about individual tests has compelled Defendants to seek relief from the Court in the form of a protective order staying discovery until the investigation is complete as well as limiting the scope of discovery.

Given these circumstances, an award of sanctions against Defendants would be unjust. Plaintiffs' motion should be denied.

ARGUMENT

Rule 37(a)(5) of the Federal Rules of Civil Procedure provides for sanctions in the form of the movants' expenses including attorney's fees if a motion to compel discovery is granted unless "(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust." Here, sanctions are unwarranted because Plaintiffs' request is based on motions to compel that rely on significantly inaccurate characterizations of Defendants' document searches and productions; Plaintiffs' motions to compel lack merit; Plaintiffs have not reciprocated Defendants' significant efforts to resolve the parties' central dispute concerning the scope of discovery; Defendants' responses to Plaintiffs' discovery requests are at a minimum substantially justified; and sanctions would be unjust.

1. The Court Should Reject Plaintiffs' Request for Sanctions Because It Relies Upon Mischaracterizations of Defendants' Searches and Productions.

The Court should not entertain Plaintiffs' request for sanctions based on motions to compel that significantly mischaracterize CIA's, DoD's and Army's productions. The motions to compel wrongly assert that no documents have been identified as having been produced by CIA. Pls.' Mot. to Compel Prod. of Docs. at 2 ("Notably, Defendants have yet to identify a single document produced by the CIA . . ."); *accord id.* at 17; Pls.' Mot. to Compel 30(b)(6) Deps. at 17. CIA produced documents to Plaintiffs both in response to Plaintiffs' first set of RFPs and as part of Defendants' Initial Disclosures. Decl. of Patricia Cameresi, CIA Associate Information Review Officer, Directorate of Science & Technology ¶¶ 12-13 (Aug. 26, 2010) (Ex. 1). In addition, CIA provided Plaintiffs outside of discovery more than 20,000 pages of documents concerning CIA's behavioral research programs. *Id.* ¶¶ 6, 12, 24. Defendants' discovery responses make it quite plain that CIA has produced specific documents. *See, e.g.*, Ex. C to Decl.

of Caroline Wolverton (Defs.' Am. Interrog. Resp. No. 4 (stating that "CIA previously produced documents responsive RFP 14") (Ex. 4 hereto). Indeed, some of Plaintiffs' subsequent RFPs specifically discuss documents produced to Plaintiffs by the CIA as Initial Disclosures, with reference to specific Bates numbers. *See, e.g.*, Pls.' RFP Nos. 128, 138, and 139 (Ex. B to Wolverton Decl.). It is therefore not tenable that Plaintiffs were unaware that CIA has, in fact, produced documents.

Second, Plaintiffs erroneously assert that it appears that DoD and Army have not yet searched for documents at Edgewood Arsenal, which was the Army's center for chemical research. Pls.' Mot. for Sanctions at 3; Pls.' Mot. to Compel Prod. of Docs. at 4, 8 n.8; Pls.' Mot. to Compel 30(b)(6) Deps. at 16 n.12. Edgewood Arsenal and Fort Detrick were the focus of DoD's and Army's searches in response to Plaintiffs' first set of RFPs. Decl. of DoD Program Analyst Anthony Lee ¶¶ 2-3 (Ex. 2). And Defendants have informed Plaintiffs that Edgewood and Fort Detrick have been the focus of DoD's and Army's ongoing document searches since Defendants' production in response to Plaintiffs' first set of RFPs. Ex. H to Wolverton Decl. (Letter of July 30, 2010 to Pls. at 2).

2. Sanctions Are Unwarranted Because Plaintiffs' Motions to Compel Lacks Merit.

For the reasons set forth in our oppositions to Plaintiffs' motions to compel production of documents and 30(b)(6) depositions, those motions should be denied. *See* Dkt. Nos. 141, 142. In sum, Defendants have already made large productions of documents, and as a result of the parties' meet-and-confer discussions and the Court's July 13, 2010 Order, DoD and Army are continuing to search for additional documents that could be potentially relevant to the claims before the Court. *See* Decl. of Michael Kilpatrick, DoD Director of Strategic Communications, Office of the Under Secretary of Defense for Health Affairs ¶ 16 (Ex. 3) ("DoD and the Army continue to search for documents relating to the Army's chemical and biological agent testing, including the documents listed in the footnotes and bibliography of the original [Army Inspector General] investigation, documents pertaining to health effects of tested substances, and documents relating to test volunteers' consent to the tests.") (Ex. 2 hereto). Notably, Defendants

agreed to produce and did produce a substantial number of documents in 2009 while their motion to dismiss or for summary judgment was pending despite their having a strong basis for discovery not preceding a ruling on the dispositive motion, *see, e.g., Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) (recognizing courts' discretion to stay discovery until ruling on a motion to dismiss). Wolverton Decl. ¶ 17. In addition, CIA has provided Plaintiffs outside of discovery over 20,000 pages of documents concerning CIA's behavioral research programs. Cameresi Decl. ¶ 6. And Defendants have designated 30(b)(6) witnesses in response to 20 topics of deposition, and proposed dates for witnesses designated in response to 13 of those topics.[1] Exs. D, I to Wolverton Decl.

Defendants have properly objected to Plaintiffs' document requests and 30(b)(6) topics as significantly overbroad and irrelevant. The requests and topics far exceed the scope of information bearing on the discrete APA and DJA claims that remain before the Court. On January 19, 2010, Judge Wilken dismissed Plaintiffs' claim that the tests were unlawful and the challenge to the *Feres* doctrine, and identified three issues that will proceed: "the lawfulness of the consent forms, to the extent that they required the individual Plaintiffs to take a secrecy oath"; whether Defendants may be compelled to provide test participants with information about the nature of the tests based on the Wilson Directive, Army regulation 70-25 (1962), and the Department of Justice document cited in the Second Amended Complaint; and whether test participants are entitled to medical care. Order of Jan. 19, 2010 at 12-13, 15, 17 (Dkt. No. 59). In addition, the discovery requests are unduly burdensome in the extreme because they encompass an enormous number of historical documents and information concerning chemical and biological tests conducted over a period spanning more than 20 years and which began more than 60 years

[1] Plaintiffs have objected to one 30(b)(6) witness designated on behalf of DoD and Army. However, it is up the agencies to select their 30(b)(6) witnesses. *E.g.*, 8 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2103, at 454 (2010). It is significant in this regard that because of the substantial passage of time since the tests at issue, information about the tests responsive to Plaintiffs' 30(b)(6) topics can be expected to exist largely if not entirely in historical documents rather than in personal knowledge of current agency officials. The parties will meet and confer on this issue.

ago. *See* Kilpatrick Decl. ¶ 17; s*ee also* Defs.' Mot. for Protective Order Limiting the Scope of Discovery (Dkt No. 140); Defs.' Mot. for Protective Order Staying Further Discovery and for Modification of Case Management Order (Dkt No. 134).

Additional discovery following completion of the ongoing DoD investigation, or if Defendants' motion for protective order staying discovery is not granted before completion, should be governed by a definition of scope of discovery that focuses on information relevant to the claims before the Court and, recognizing the enormous amount of information relating to the government's testing programs and the substantial passage of time, provides reasonable limits to prevent undue burden. Accordingly, Defendants have moved for a protective order limiting the scope of discovery. Dkt No. 140.

There is no basis for Plaintiffs' motion to compel with respect to Plaintiffs' second, third or fourth sets of RFPs, which comprise an additional 115 requests for production of documents, *see* Ex. A to Wolverton Decl. Defendants properly have not served responses or objections to RFPs beyond the first set because they have sought a protective order staying further discovery and/or limiting the scope of discovery, Dkt. Nos. 93, 134, 140. *See Nelson v. Capital One Bank*, 206 F.R.D. 499, 500 (N.D. Cal. 2001) ("the party responding to written discovery may either 'object properly or seek a protective order'") (quoting 8 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2035 (2d ed. 1994), and citing Schwarzer, *et al*., Federal Civil Procedure Before Trial § 11:778 (2001)). Defendants have sought and are entitled to guidance from the Court on whether further discovery is appropriate at this time and what the appropriate scope of discovery is before they are required to respond to Plaintiffs' additional 115 RFPs that, as discussed in Defendants' motion for a protective order limiting the scope of discovery, are vastly overbroad and unduly burdensome. *See* Dkt. No. 140. And contrary to Plaintiffs' assertion that Defendants have sought to delay the progress of this case, during the entire time that Defendants' requests for relief in the form of a protective order have been pending, DoD and Army have continued searching for potentially relevant documents as

referenced above and described in Defendants' opposition to Plaintiffs' motion to compel production of documents.

3. Plaintiffs' Failure to Reciprocate Defendants' Substantial Efforts to Resolve Discovery Disputes Precludes Sanctions Against Defendants.

a. As described in Defendants' August 6, 2010 Status Report Regarding Meet and Confer Process, following the Court's June 30, 2010 order that the parties meet and confer in effort to resolve their discovery disputes, Defendants repeatedly engaged Plaintiffs in attempt to reach agreement as to a workable scope of discovery. *See* Defs.' Status Report at 2-5 (Dkt No. 119). As Plaintiffs recognize, the scope of discovery is at the center of the parties' discovery disputes. *See* Jt. Statement of Discovery Dispute filed by Pls. Aug. 2, 2010, at 2 (Dkt. Not. 118). During the parties' June 30 meet-and-confer, the parties agreed that (1) Defendants would outline a proposal for additional discovery searches that would focus on locating information on possible health effects of substances tested, which Plaintiffs indicated was the primary goal of their discovery requests and (2) Plaintiffs would provide a list of key words or search terms that might enable Defendants to locate additional information or documents that Plaintiffs sought. Wolverton Decl. ¶ 7. On July 12, Defendants made an initial proposal for a definition of scope of discovery, and despite receiving no list of proposed key words or search terms and no counter-proposal from Plaintiffs in response, on July 30 expanded the proposal.[2] Exs. E, H to Wolverton Decl. (Letters of July 12, 2010 and July 30, 2010 to Pls.). Plaintiffs' motion fails to reference Defendants' July 30, 2010 proposal. In the letter making that proposal, Defendants specifically

[2] On July 12, Defendants proposed focusing additional searches on DoD and Army records concerning known or suspected health effects. Ex. E to Wolverton Decl. Plaintiffs did not, and to date have not, provided a list of key words or search terms, as agreed at the meet and confer. Wolverton Decl. Ex. E. On July 20, Plaintiffs rejected Defendants' proposal as too restrictive, but failed to suggest any key words or search terms or to make a counter-proposal as to how Defendants' proposal could be expanded to capture relevant information without discovery becoming unduly burdensome. Ex. F to Wolverton Decl. Nevertheless, on July 30, Defendants made a second proposal that expanded the first proposal to include DoD and Army records addressing consent to testing as well as extensive DoD and Army records relating to the Army's chemical and biological tests generally, starting with records examined in previous investigations of the tests. Ex. H to Wolverton Decl.

requested that if Plaintiffs still perceived Defendants' proposal as insufficient, Plaintiffs propose how it could be appropriately broadened without causing undue burden. Ex. H to Wolverton Decl. (Letter of July 30, 2010 to Pls.). Plaintiffs still made no counter-proposal. Wolverton Decl. ¶ 12. Rather, Plaintiffs continue to insist on a scope of discovery that, given the enormous number of materials implicated, their age and the large span of time over which they were generated, simply is not workable in a manner that would be consistent with reasonable progress of this litigation. Notably, neither Plaintiffs' motion for sanctions nor either of its motions to compel acknowledges the problem of undue burden in the extreme that their expansive discovery requests present.

b. With respect to Plaintiffs' motion for a protective order covering third-party information, Plaintiffs prematurely cut off the parties' discussion of an appropriate protective order without providing information that Defendants requested and explained was important in determining the contours of any protective order, as also described in Defendants' August 6 status report. *See* Dkt. No. 119 at 3, 5.

As Plaintiffs relate, the parties initially discussed a possible protective order concerning third-party information in mid-2009. However, Defendants determined that given the extreme sensitivity of the third-party information at issue, including information about exposures to test substances and medical information, disclosure of such information would not be appropriate, and we informed Plaintiffs that Defendants would not agree to entry of a protective order concerning third-party information, at least in advance of certification of a class. Wolverton Decl. ¶ 14. Defendants also explained that including a provision for classified information would be inappropriate. *Id.*

During the June 30 meet and confer, the parties revisited the issue of a protective order for third-party information. *Id.* ¶ 15. Defendants asked Plaintiffs for information on how they proposed that representatives of the organizational named Plaintiffs, if included in a protective order, would use the information. *Id.* The request is based on a concern that, if test participants

were given information about possible health effects, they might be predisposed to provide that information in response to questions about their symptoms or health effects. *Id.*

Following the parties' June 30, 2010 meet-and-confer session, counsel for Defendants revisited the issue of a possible protective order covering third-party information with our clients as well as with other governmental agencies that had been served with Fed. R. Civ. P. 45 subpoenas whose third-party information also would be implicated, as well as with others in the Department of Justice. *Id.* ¶ 16. Following those discussions, we informed counsel for Plaintiffs of our belief that Defendants would be able to agree to a stipulated proposed protective order and that we were in the process of working with our clients to craft language that both protects the interests of third parties and facilitates discovery. Ex. J to Wolverton Decl. (Letter of July 30, 2010 from L. Farel to Pls.). We also reiterated our request for information about how Plaintiffs proposed representatives of the named organizational Plaintiffs would use the third-party information if included among those with access. *Id.* Plaintiffs, however, insisted on filing a statement advising the Court of a discovery dispute on this issue the following business day. *See* Dkt. No. 115. Here again, Plaintiffs failed to follow through on initial meet-and-confer statements by providing specific information that Defendants requested and explained was important to possible resolution of a discovery issue without Court intervention.

* * *

Because Plaintiffs have not reciprocated Defendants' significant efforts to resolve the issue of an appropriate scope of discovery and prematurely ended discussions concerning a protective order covering third-party information without providing important information that Defendants requested, Defendants take issue with the motion's characterization of Plaintiffs' meet-and-confer efforts as having been in good faith.

4. Defendants' Discovery Responses Have Been Substantially Justified.

Plaintiffs' accusations that Defendants have shirked their discovery obligations, have made only a "meager" document production, and have sought to unnecessarily delay discovery are baseless. Defendants have conducted reasonable searches for and produced a large amount of information that, consistent with their objections, may be relevant to the claims before the Court. And DoD and Army continue to search for additional information that may be potentially relevant, as described in the Declaration of Michael Kilpatrick, Director of the Under Secretary of Defense for Health Affairs' Strategic Communications Office. Ex. 2.

a. Requests for Production of Documents

The Lee and Cameresi Declarations describe DoD and Army's and the CIA's searches and productions in response to Plaintiffs' first set of RFPs. They demonstrate that Defendants have conducted reasonable searches for documents in response to Plaintiffs' first set of RFPs and produced the identified documents that are not privileged. In addition, CIA has produced the results of its review of its records concerning Project OFTEN and over 20,000 pages of documents concerning its behavioral research programs. Cameresi Decl.¶ 6. And DoD and Army have agreed to conduct additional searches for documents related to the Army's chemical and biological testing. Kilpatrick Decl. ¶ 16. Further, as the Kilpatrick Declaration describes, the Army's chemical and biological tests involving human subjects have been the subject of previous large-scale investigations, the reports of which are either publicly available or have been produced to Plaintiffs. Kilpatrick Decl. ¶¶ 3-10. DoD has also expended considerable resources to determine long-term health effects on test participants, and the results of those studies are either publicly available or have been produced to Plaintiffs. *Id.* ¶¶ 4–9. The Cameresi Declaration describes the thorough investigation and evaluation of the CIA's behavioral research programs over the course of multiple investigations and explains that, as a consequence, most information concerning the programs was publicly disclosed in the 1970s and early 1980s. Cameresi Decl. ¶ 6.

Defendants' opposition to the motion to compel production of documents explains the extreme overbreadth of Plaintiffs' document requests and the validity of Defendants' objections in that regard. *See* Dkt. No. 142. In sum, given the discrete nature of the claims before the Court under the APA and DJA, the extraordinarily wide-ranging discovery that Plaintiffs seek concerning tests over a span of 20 years that began more than 40 years ago is neither appropriate nor workable. With respect to potentially relevant information that may be encompassed in the additional documents that is not contained in documents already produced or publicly available or encompassed by the additional searches that DoD and Army are conducting, any potential relevance would likely be minimal. The extreme burden of the additional searches that Plaintiffs demand would dwarf any such potential minimal relevance. At a minimum, then, Defendants responses to the first set of RFPs are substantially justified. *See, e.g.*, *Neumont v. Florida*, 610 F.3d 1249, 1253 (11th Cir. 2010) ("Objections are substantially justified when 'reasonable people could differ as to the appropriateness of the contested action.'") (quoting *Maddow v. Procter & Gamble Co.*, 107 F.3d 846, 853 (11th Cir.1997)). As explained above, Defendants are entitled to have their requests for a protective order staying discovery and/or limiting its scope heard before they are required to respond to Plaintiffs' additional 115 RFPs. *See Nelson*, 206 F.R.D. at 500.

Contrary to Plaintiffs' assertion that Defendants' meet-and-confer proposals attempted to unreasonably limit Plaintiffs' ability to obtain additional discovery, Defendants proposed that, in light of the mass of information that DoD and Army proposed to search, discovery would be both more productive and more expeditious if it proceeded based on agreed-upon categories of information rather than in response to specific RFPs. Ex. H to Wolverton Decl. (Letter of July 30, 2010 to Pls. at 4). Defendants further offered to consider discrete requests for specific additional documents and stated that they would endeavor in good faith to provide such documents where they could be located through reasonable search efforts and are not protected from disclosure by privilege or otherwise. *Id.* Again, Plaintiffs made no counter-proposal.

b. Proposed Protective Order Covering Third-Party Information

With respect to a protective order governing disclosure and use of third-party information covered by the Privacy Act and other statutory protections, as described above, Plaintiffs prematurely cut off the parties' discussion of an appropriate protective order without providing important information bearing on a proposed protective order that Defendants had previously requested. Following the parties' meet-and-confer discussions on June 30, Defendants reached the position that a protective order is appropriate and have proposed an order that accounts for the sensitive nature and large volume of the information at issue. *See* Defs.' Resp. to Pls.' Mot. for Protective Order (Dkt. No. 139). The extreme sensitivity of the exposure and medical information at issue, potentially implicating medical records of close to 8,000 veterans, substantially justifies Defendants' previous opposition to a protective order at least in advance of certification of a class. A protective order covering this type information cannot be characterized as "routine," as Plaintiffs assert.[3] *Contrast Quality Inv. Properties Santa Clara, LLC v. Serrano Elec., Inc.*, No. C 09-5376 JF (PVT), 2010 WL 2889178, at *3 (N.D. Cal. July 22, 2010) (concerning confidential and proprietary information implicated in litigation between two businesses); *Mixt Greens v. Sprout Cafe*, No. C-08-5175 EMC,2010 WL 2555753, at *2 (N.D. Cal. June 21, 2010) (concerning financial documents implicated in litigation between two businesses) (cited in Pls.' Mot. at 6).

c. Notices of 30(b)(6) Depositions

With respect to Plaintiffs' notices of 30(b)(6) depositions, Defendants designated 13 witnesses to testify in response to 20 substantive topics, e.g., regarding health effects associated

[3] Plaintiffs incorrectly assert that Defendants have withheld documents concerning individuals who conducted tests based on the Privacy Act. Pls.' Mot. at 5. Indeed, Plaintiffs have cited no support for that assertion. Defendants did not cite the Privacy Act in objecting to Plaintiffs' Document Request No. 12, which concerns service personnel who supervised, controlled or performed tests. *See* Ex. B to Wolverton Decl. Defendants relied on the Privacy Act, *inter alia*, in objecting to Plaintiffs' Document Request No. 11, which encompasses test participants. *See id.* As explained above and in response to Plaintiffs' motion for a protective order covering third-party information, Defendants are in favor of entry of an appropriate protective order.

with chemical and biological substances that were tested by Army. Ex. D to Wolverton Decl. (Defs.' Resp. to Pls.' 30(b)(6) Notice, Topic 15). Defendants have proposed dates on which DoD's and Army's designees for 13 topics are available for deposition. *See id.* and Ex. I to Wolverton Decl. Defendants' objections to substantive 30(b)(6) topics are warranted for the reasons set forth in Defendants' opposition to the motion to compel 30(b)(6) depositions. In sum, like the additional productions Plaintiffs seek to compel, the 30(b)(6) topics and portions of topics to which Defendants have objected venture far beyond an appropriate scope of discovery and, especially given length of time over which testing occurred and the substantial passage of time since tests ceased, are unduly burdensome. At a minimum, Defendants' objections are substantially justified. *See, e.g.*, *Neumont*, 610 F.3d at 1253.

With respect to Plaintiffs' supplemental notices of 30(b)(6) depositions regarding Defendants' document searches in response to Plaintiffs' first set of document requests, we objected on the grounds that going forward with the depositions before the then-ongoing meet-and-confer efforts concluded was not reasonable and that the depositions would be unduly burdensome. Ex. G to Wolverton Decl. (Letter of July 23, 2010 to Pls.). We explained that the depositions would cause undue burden because (i) Plaintiffs have served additional document requests and we anticipated that Plaintiffs would seek depositions describing the searches in response to those requests, (ii) each defendant agency's search in response to Plaintiffs' first set of RFPs involved multiple individuals in multiple offices and 30(b)(6) depositions would take multiple agency employees away from their responsibilities and duties to either testify or to prepare an agency representative to testify, and (iii) given CIA's commitment to evaluate any evidence that Plaintiffs maintain contradicts CIA's conclusion that its involvement relating to human subject testing on military personnel was limited to contemplated, but not consummated, testing at Edgewood Arsenal through Project OFTEN and to then conduct any additional searches appropriate, a document-search 30(b)(6) deposition ahead of Plaintiffs' presenting CIA with any such evidence would not be sensible or efficient. *Id.* We proposed that because Plaintiffs had noticed 30(b)(6) depositions on topics other than document searches and that because only one

deposition of each agency is appropriate without leave of Court, *see, e.g., Blackwell v. City & Cty. of San Francisco*, No. C-07-4629 SBA (EMC), 2010 WL 2608330, at *1 (N.D. Cal. Jun. 25, 2010), if Defendants did not obtain a protective order staying discovery or other relief, the parties work together to schedule a single 30(b)(6) deposition of each agency that would cover all of Plaintiffs' topics. Ex. G to Wolverton Decl. at 2. Contrary to Plaintiffs' assertion that CIA "attempted to avoid a deposition altogether by proposing on a written response," CIA proposed a written description of its search efforts as more efficient than a deposition. Ex. H to Wolverton Decl. (Letter of July 30, 2010 to Pls. at 4). Further, in response to Plaintiffs' assertion that it is unclear what searches have been made, Pls.' Mot. at 4, the Lee and Cameresi Declarations describe the searches of their respective agencies. At a minimum, these objections to the 30(b)(6) document search depositions are substantially justified. *See, e.g., Neumont*, 610 F.3d at 1253.

5. Award of Sanctions Against Defendants Would Be Unjust.

The gross mischaracterizations of Defendants' responses to Plaintiffs' discovery requests on which Plaintiffs' motion for sanctions relies alone render award of attorney fees and costs to Plaintiffs unjust. Further, as set forth above and in our oppositions to Plaintiffs' motions to compel, Defendants have produced a great deal of information about Army's tests as well as CIA's tests and have designated 30(b)(6) witnesses for topics related to the issues before the Court. Defendants have objected to Plaintiffs' discovery requests to the extent that they are overbroad or irrelevant in light of the claims before the Court, or are unduly burdensome where appropriate given the claims that are before the Court and the vast amount and age of the information implicated by Plaintiffs' discovery requests. And we have endeavored diligently and in good faith to resolve the parties' disputes concerning the scope of discovery, the related issues of appropriate searches in response to Plaintiffs' document requests and appropriate topics for 30(b)(6) depositions, the timing of depositions regarding document searches, and an appropriate protective order concerning a large volume of sensitive third-party information. Plaintiffs have not reciprocated these efforts to reach agreement on a workable plan for discovery that will focus on producing information relevant to the claims before the Court and, given the extraordinary

amount of information concerning the tests at issue and the age of that information, will not be unduly burdensome. Finally, it is appropriate to recognize that Plaintiffs have yet to produce a single document in response to Defendants' first set of document requests, which we served on May 6, 2010. *See* Wolverton Decl. ¶ 17.

Under these circumstances, an award of sanctions against Defendants would be unjust.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for sanctions should be denied.

Dated: September 15, 2010

Respectfully submitted,

IAN GERSHENGORN
Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney
VINCENT M. GARVEY
Deputy Branch Director

/s/ Caroline Lewis Wolverton
CAROLINE LEWIS WOLVERTON
Senior Counsel
KIMBERLY L. HERB
Trial Attorney
LILY SARA FAREL
Trial Attorney
BRIGHAM J. BOWEN
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 514-0265
Facsimile: (202) 616-8470
E-mail: caroline.lewis-wolverton@usdoj.gov

Attorneys for Defendants

GENERAL ORDER 45 ATTESTATION

I, Caroline Lewis Wolverton, am the ECF User filing this Motion for a Protective Order Staying Further Discovery and for Modification of Case Management Order. In compliance with General Order 45, X.B., I hereby attest that Patricia Cameresi, Anthony Lee and Michael Kilpatrick have each concurred in the filing of their Declarations.

Dated: September 15, 2010

/s/ Caroline Lewis Wolverton
Caroline Lewis Wolverton
Attorney for Defendants

Beaudoin, Kathy E.

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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 Michael V. Hayden Robert M. Gates Michael B. Mukasey Pete Geren

Eric H. Holder, Jr

Document Number: 144

Docket Text:

Memorandum in Opposition re [131] MOTION for Sanctions filed byCentral Intelligence Agency, Robert M. Gates, Pete Geren, Michael V. Hayden, Eric H. Holder, Jr, Michael B. Mukasey, Leon Panetta, United States Department of Defense, United States Department of the Army, United States of America. (Wolverton, Caroline) (Filed on 9/15/2010)

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

Adriano Hrvatin ahrvatin@mofo.com, patherton@mofo.com

Brigham John Bowen Brigham.Bowen@usdoj.gov

Caroline Lewis Wolverton caroline.lewis-wolverton@usdoj.gov, caroline.lewis-wolverton@usdoj.gov, Stephanie.Parker@usdoj.gov

Gordon P. Erspamer GErspamer@mofo.com, jdwight@mofo.com, kbeaudoin@mofo.com, lsario@mofo.com

Kimberly L. Herb Kimberly.L.Herb@usdoj.gov

Lily Sara Farel lily.farel@usdoj.gov

Stacey Michelle Sprenkel ssprenkel@mofo.com, jhaskins@mofo.com

Timothy W. Blakely tblakely@mofo.com

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Document description: Main Document
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[STAMP CANDStamp_ID=977336130 [Date=9/15/2010] [FileNumber=6723433-0] [799ebf94d2eddce498c02f132e7cf16e0b93e9b5e368e7b538fda89ff17629e8e659c 2fd7af116847bae1f2665d35f4def520b49dc55238c304747e1af3c9b44]]