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

17 VIETNAM VETERANS OF AMERICA, *et al.*,
 18
 19 Plaintiffs,
 20
 21 v.
 22 CENTRAL INTELLIGENCE AGENCY, *et al.*,
 23 Defendants.
 24

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

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

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

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

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

3 ARGUMENT

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

15 **1. The Court Should Reject Plaintiffs' Request for Sanctions Because It Relies** 16 **Upon Mischaracterizations of Defendants' Searches and Productions.**

17 The Court should not entertain Plaintiffs' request for sanctions based on motions to
18 compel that significantly mischaracterize CIA's, DoD's and Army's productions. The motions to
19 compel wrongly assert that no documents have been identified as having been produced by CIA.
20 Pls.' Mot. to Compel Prod. of Docs. at 2 ("Notably, Defendants have yet to identify a single
21 document produced by the CIA . . ."); *accord id.* at 17; Pls.' Mot. to Compel 30(b)(6) Deps. at 17.
22 CIA produced documents to Plaintiffs both in response to Plaintiffs' first set of RFPs and as part
23 of Defendants' Initial Disclosures. Decl. of Patricia Camerese, CIA Associate Information
24 Review Officer, Directorate of Science & Technology ¶¶ 12-13 (Aug. 26, 2010) (Ex. 1). In
25 addition, CIA provided Plaintiffs outside of discovery more than 20,000 pages of documents
26 concerning CIA's behavioral research programs. *Id.* ¶¶ 6, 12, 24. Defendants' discovery
27 responses make it quite plain that CIA has produced specific documents. *See, e.g.*, Ex. C to Decl.
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1 of Caroline Wolverton (Defs.' Am. Interrog. Resp. No. 4 (stating that "CIA previously produced
2 documents responsive RFP 14") (Ex. 4 hereto). Indeed, some of Plaintiffs' subsequent RFPs
3 specifically discuss documents produced to Plaintiffs by the CIA as Initial Disclosures, with
4 reference to specific Bates numbers. *See, e.g.*, Pls.' RFP Nos. 128, 138, and 139 (Ex. B to
5 Wolverton Decl.). It is therefore not tenable that Plaintiffs were unaware that CIA has, in fact,
6 produced documents.

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

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

17 For the reasons set forth in our oppositions to Plaintiffs' motions to compel production of
18 documents and 30(b)(6) depositions, those motions should be denied. *See* Dkt. Nos. 141, 142. In
19 sum, Defendants have already made large productions of documents, and as a result of the
20 parties' meet-and-confer discussions and the Court's July 13, 2010 Order, DoD and Army are
21 continuing to search for additional documents that could be potentially relevant to the claims
22 before the Court. *See* Decl. of Michael Kilpatrick, DoD Director of Strategic Communications,
23 Office of the Under Secretary of Defense for Health Affairs ¶ 16 (Ex. 3) ("DoD and the Army
24 continue to search for documents relating to the Army's chemical and biological agent testing,
25 including the documents listed in the footnotes and bibliography of the original [Army Inspector
26 General] investigation, documents pertaining to health effects of tested substances, and
27 documents relating to test volunteers' consent to the tests.") (Ex. 2 hereto). Notably, Defendants
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1 agreed to produce and did produce a substantial number of documents in 2009 while their motion
2 to dismiss or for summary judgment was pending despite their having a strong basis for discovery
3 not preceding a ruling on the dispositive motion, *see, e.g., Jarvis v. Regan*, 833 F.2d 149, 155 (9th
4 Cir. 1987) (recognizing courts' discretion to stay discovery until ruling on a motion to dismiss).
5 Wolverton Decl. ¶ 17. In addition, CIA has provided Plaintiffs outside of discovery over 20,000
6 pages of documents concerning CIA's behavioral research programs. Cameresi Decl. ¶ 6. And
7 Defendants have designated 30(b)(6) witnesses in response to 20 topics of deposition, and
8 proposed dates for witnesses designated in response to 13 of those topics.¹ Exs. D, I to
9 Wolverton Decl.

10 Defendants have properly objected to Plaintiffs' document requests and 30(b)(6) topics as
11 significantly overbroad and irrelevant. The requests and topics far exceed the scope of
12 information bearing on the discrete APA and DJA claims that remain before the Court. On
13 January 19, 2010, Judge Wilken dismissed Plaintiffs' claim that the tests were unlawful and the
14 challenge to the *Feres* doctrine, and identified three issues that will proceed: "the lawfulness of
15 the consent forms, to the extent that they required the individual Plaintiffs to take a secrecy oath";
16 whether Defendants may be compelled to provide test participants with information about the
17 nature of the tests based on the Wilson Directive, Army regulation 70-25 (1962), and the
18 Department of Justice document cited in the Second Amended Complaint; and whether test
19 participants are entitled to medical care. Order of Jan. 19, 2010 at 12-13, 15, 17 (Dkt. No. 59). In
20 addition, the discovery requests are unduly burdensome in the extreme because they encompass
21 an enormous number of historical documents and information concerning chemical and biological
22 tests conducted over a period spanning more than 20 years and which began more than 60 years
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24 ¹ Plaintiffs have objected to one 30(b)(6) witness designated on behalf of DoD and Army.
25 However, it is up the agencies to select their 30(b)(6) witnesses. *E.g.*, 8 Charles Alan Wright,
26 Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2103, at 454 (2010). It is
27 significant in this regard that because of the substantial passage of time since the tests at issue,
28 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.

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

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

11 There is no basis for Plaintiffs’ motion to compel with respect to Plaintiffs’ second, third
12 or fourth sets of RFPs, which comprise an additional 115 requests for production of documents,
13 *see* Ex. A to Wolverton Decl. Defendants properly have not served responses or objections to
14 RFPs beyond the first set because they have sought a protective order staying further discovery
15 and/or limiting the scope of discovery, Dkt. Nos. 93, 134, 140. *See Nelson v. Capital One Bank*,
16 206 F.R.D. 499, 500 (N.D. Cal. 2001) (“the party responding to written discovery may either
17 ‘object properly or seek a protective order’”) (quoting 8 Charles Alan Wright, Arthur R. Miller &
18 Mary Kay Kane, *Federal Practice and Procedure* § 2035 (2d ed. 1994), and citing Schwarzer, *et*
19 *al.*, *Federal Civil Procedure Before Trial* § 11:778 (2001)). Defendants have sought and are
20 entitled to guidance from the Court on whether further discovery is appropriate at this time and
21 what the appropriate scope of discovery is before they are required to respond to Plaintiffs’
22 additional 115 RFPs that, as discussed in Defendants’ motion for a protective order limiting the
23 scope of discovery, are vastly overbroad and unduly burdensome. *See* Dkt. No. 140. And
24 contrary to Plaintiffs’ assertion that Defendants have sought to delay the progress of this case,
25 during the entire time that Defendants’ requests for relief in the form of a protective order have
26 been pending, DoD and Army have continued searching for potentially relevant documents as
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1 referenced above and described in Defendants' opposition to Plaintiffs' motion to compel
2 production of documents.

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

5 a. As described in Defendants' August 6, 2010 Status Report Regarding Meet and Confer
6 Process, following the Court's June 30, 2010 order that the parties meet and confer in effort to
7 resolve their discovery disputes, Defendants repeatedly engaged Plaintiffs in attempt to reach
8 agreement as to a workable scope of discovery. *See* Defs.' Status Report at 2-5 (Dkt No. 119).
9 As Plaintiffs recognize, the scope of discovery is at the center of the parties' discovery disputes.
10 *See* Jt. Statement of Discovery Dispute filed by Pls. Aug. 2, 2010, at 2 (Dkt. Not. 118). During
11 the parties' June 30 meet-and-confer, the parties agreed that (1) Defendants would outline a
12 proposal for additional discovery searches that would focus on locating information on possible
13 health effects of substances tested, which Plaintiffs indicated was the primary goal of their
14 discovery requests and (2) Plaintiffs would provide a list of key words or search terms that might
15 enable Defendants to locate additional information or documents that Plaintiffs sought.
16 Wolverton Decl. ¶ 7. On July 12, Defendants made an initial proposal for a definition of scope of
17 discovery, and despite receiving no list of proposed key words or search terms and no counter-
18 proposal from Plaintiffs in response, on July 30 expanded the proposal.² Exs. E, H to Wolverton
19 Decl. (Letters of July 12, 2010 and July 30, 2010 to Pls.). Plaintiffs' motion fails to reference
20 Defendants' July 30, 2010 proposal. In the letter making that proposal, Defendants specifically
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22 ² On July 12, Defendants proposed focusing additional searches on DoD and Army
23 records concerning known or suspected health effects. Ex. E to Wolverton Decl. Plaintiffs did
24 not, and to date have not, provided a list of key words or search terms, as agreed at the meet and
25 confer. Wolverton Decl. Ex. E. On July 20, Plaintiffs rejected Defendants' proposal as too
26 restrictive, but failed to suggest any key words or search terms or to make a counter-proposal as
27 to how Defendants' proposal could be expanded to capture relevant information without
28 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.

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

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

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

23 During the June 30 meet and confer, the parties revisited the issue of a protective order for
24 third-party information. *Id.* ¶ 15. Defendants asked Plaintiffs for information on how they
25 proposed that representatives of the organizational named Plaintiffs, if included in a protective
26 order, would use the information. *Id.* The request is based on a concern that, if test participants
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1 were given information about possible health effects, they might be predisposed to provide that
2 information in response to questions about their symptoms or health effects. *Id.*

3 Following the parties' June 30, 2010 meet-and-confer session, counsel for Defendants
4 revisited the issue of a possible protective order covering third-party information with our clients
5 as well as with other governmental agencies that had been served with Fed. R. Civ. P. 45
6 subpoenas whose third-party information also would be implicated, as well as with others in the
7 Department of Justice. *Id.* ¶ 16. Following those discussions, we informed counsel for Plaintiffs
8 of our belief that Defendants would be able to agree to a stipulated proposed protective order and
9 that we were in the process of working with our clients to craft language that both protects the
10 interests of third parties and facilitates discovery. Ex. J to Wolverton Decl. (Letter of July 30,
11 2010 from L. Farel to Pls.). We also reiterated our request for information about how Plaintiffs
12 proposed representatives of the named organizational Plaintiffs would use the third-party
13 information if included among those with access. *Id.* Plaintiffs, however, insisted on filing a
14 statement advising the Court of a discovery dispute on this issue the following business day. *See*
15 Dkt. No. 115. Here again, Plaintiffs failed to follow through on initial meet-and-confer
16 statements by providing specific information that Defendants requested and explained was
17 important to possible resolution of a discovery issue without Court intervention.

18 * * *

19 Because Plaintiffs have not reciprocated Defendants' significant efforts to resolve the
20 issue of an appropriate scope of discovery and prematurely ended discussions concerning a
21 protective order covering third-party information without providing important information that
22 Defendants requested, Defendants take issue with the motion's characterization of Plaintiffs'
23 meet-and-confer efforts as having been in good faith.
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1 **4. Defendants’ Discovery Responses Have Been Substantially Justified.**

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

9 **a. Requests for Production of Documents**

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

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

17 Contrary to Plaintiffs' assertion that Defendants' meet-and-confer proposals attempted to
18 unreasonably limit Plaintiffs' ability to obtain additional discovery, Defendants proposed that, in
19 light of the mass of information that DoD and Army proposed to search, discovery would be both
20 more productive and more expeditious if it proceeded based on agreed-upon categories of
21 information rather than in response to specific RFPs. Ex. H to Wolverton Decl. (Letter of July
22 30, 2010 to Pls. at 4). Defendants further offered to consider discrete requests for specific
23 additional documents and stated that they would endeavor in good faith to provide such
24 documents where they could be located through reasonable search efforts and are not protected
25 from disclosure by privilege or otherwise. *Id.* Again, Plaintiffs made no counter-proposal.
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1 **b. Proposed Protective Order Covering Third-Party Information**

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

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

20 With respect to Plaintiffs' notices of 30(b)(6) depositions, Defendants designated 13
21 witnesses to testify in response to 20 substantive topics, e.g., regarding health effects associated
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23 ³ Plaintiffs incorrectly assert that Defendants have withheld documents concerning
24 individuals who conducted tests based on the Privacy Act. Pls.' Mot. at 5. Indeed, Plaintiffs have
25 cited no support for that assertion. Defendants did not cite the Privacy Act in objecting to
26 Plaintiffs' Document Request No. 12, which concerns service personnel who supervised,
27 controlled or performed tests. *See* Ex. B to Wolverton Decl. Defendants relied on the Privacy
28 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.

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

11 With respect to Plaintiffs' supplemental notices of 30(b)(6) depositions regarding
12 Defendants' document searches in response to Plaintiffs' first set of document requests, we
13 objected on the grounds that going forward with the depositions before the then-ongoing meet-
14 and-confer efforts concluded was not reasonable and that the depositions would be unduly
15 burdensome. Ex. G to Wolverton Decl. (Letter of July 23, 2010 to Pls.). We explained that the
16 depositions would cause undue burden because (i) Plaintiffs have served additional document
17 requests and we anticipated that Plaintiffs would seek depositions describing the searches in
18 response to those requests, (ii) each defendant agency's search in response to Plaintiffs' first set
19 of RFPs involved multiple individuals in multiple offices and 30(b)(6) depositions would take
20 multiple agency employees away from their responsibilities and duties to either testify or to
21 prepare an agency representative to testify, and (iii) given CIA's commitment to evaluate any
22 evidence that Plaintiffs maintain contradicts CIA's conclusion that its involvement relating to
23 human subject testing on military personnel was limited to contemplated, but not consummated,
24 testing at Edgewood Arsenal through Project OFTEN and to then conduct any additional searches
25 appropriate, a document-search 30(b)(6) deposition ahead of Plaintiffs' presenting CIA with any
26 such evidence would not be sensible or efficient. *Id.* We proposed that because Plaintiffs had
27 noticed 30(b)(6) depositions on topics other than document searches and that because only one
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1 deposition of each agency is appropriate without leave of Court, *see, e.g., Blackwell v. City &*
2 *Cty. of San Francisco*, No. C-07-4629 SBA (EMC), 2010 WL 2608330, at *1 (N.D. Cal. Jun. 25,
3 2010), if Defendants did not obtain a protective order staying discovery or other relief, the parties
4 work together to schedule a single 30(b)(6) deposition of each agency that would cover all of
5 Plaintiffs' topics. Ex. G to Wolverton Decl. at 2. Contrary to Plaintiffs' assertion that CIA
6 "attempted to avoid a deposition altogether by proposing on a written response," CIA proposed a
7 written description of its search efforts as more efficient than a deposition. Ex. H to Wolverton
8 Decl. (Letter of July 30, 2010 to Pls. at 4). Further, in response to Plaintiffs' assertion that it is
9 unclear what searches have been made, Pls.' Mot. at 4, the Lee and Cameresi Declarations
10 describe the searches of their respective agencies. At a minimum, these objections to the 30(b)(6)
11 document search depositions are substantially justified. *See, e.g., Neumont*, 610 F.3d at 1253.

12 **5. Award of Sanctions Against Defendants Would Be Unjust.**

13 The gross mischaracterizations of Defendants' responses to Plaintiffs' discovery requests
14 on which Plaintiffs' motion for sanctions relies alone render award of attorney fees and costs to
15 Plaintiffs unjust. Further, as set forth above and in our oppositions to Plaintiffs' motions to
16 compel, Defendants have produced a great deal of information about Army's tests as well as
17 CIA's tests and have designated 30(b)(6) witnesses for topics related to the issues before the
18 Court. Defendants have objected to Plaintiffs' discovery requests to the extent that they are
19 overbroad or irrelevant in light of the claims before the Court, or are unduly burdensome where
20 appropriate given the claims that are before the Court and the vast amount and age of the
21 information implicated by Plaintiffs' discovery requests. And we have endeavored diligently and
22 in good faith to resolve the parties' disputes concerning the scope of discovery, the related issues
23 of appropriate searches in response to Plaintiffs' document requests and appropriate topics for
24 30(b)(6) depositions, the timing of depositions regarding document searches, and an appropriate
25 protective order concerning a large volume of sensitive third-party information. Plaintiffs have
26 not reciprocated these efforts to reach agreement on a workable plan for discovery that will focus
27 on producing information relevant to the claims before the Court and, given the extraordinary
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1 amount of information concerning the tests at issue and the age of that information, will not be
2 unduly burdensome. Finally, it is appropriate to recognize that Plaintiffs have yet to produce a
3 single document in response to Defendants' first set of document requests, which we served on
4 May 6, 2010. *See* Wolverton Decl. ¶ 17.

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

6 **CONCLUSION**

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

8
9 Dated: September 15, 2010

Respectfully submitted,

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

13
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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.

From: ECF-CAND@cand.uscourts.gov
Sent: Thursday, September 16, 2010 12:00 AM
To: efiling@cand.uscourts.gov
Subject: Activity in Case 4:09-cv-00037-CW Vietnam Veterans of America et al v. Central Intelligence Agency et al Memorandum in Opposition

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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
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United States Department of the Army
Leon Panetta
United States Department of Defense
Michael V. Hayden
Robert M. Gates
Michael B. Mukasey
Pete Geren

9/16/2010

Eric H. Holder, Jr

Document Number: [144](#)

Docket Text:

Memorandum in Opposition re [131] MOTION for Sanctions filed by Central 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)

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