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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW (JL)

Noticed Motion Date and Time:
October 7, 2010
2:00 p.m.

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER STAYING FURTHER DISCOVERY AND FOR MODIFICATION OF CASE MANAGEMENT ORDER

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INTRODUCTION

Defendants' opening memorandum explains that interests of efficiency and conservation of resources warrant a protective order staying discovery until the Department of Defense ("DoD") completes its multi-year, multi-million dollar investigation to identify all servicemembers who participated in the Army's Cold War-era chemical and biological tests. The investigation is intended to compile as much information as possible about each test in which each individual servicemember participated, including the identity of the chemical or biological agent to which the participant was exposed, the amount of the agent administered, and the route of administration (e.g., oral). This is much of the information that Plaintiffs have argued they need to pursue their claims for notice and health care. The results of the DoD investigation, scheduled for completion in September 2011, together with the substantial amount of information about the tests already produced and the additional documents for which DoD and Army are searching should provide most, if not all, of the information necessary to decide the claims before the Court. Defendants have established good cause for both a protective order staying discovery until the DoD investigation is complete and a corresponding modification of the case management order to extend the case deadlines by nine months.

In opposing Defendants' request for a stay, Plaintiffs accuse Defendants of seeking to delay the progress of this case and question the scale of the DoD investigation as well as the significance of the information it is gathering to the issues before the Court. These arguments are unfounded. Defendants' stay request is consistent with efficient progress of this action rather than delay. That the investigation to identify individual test participants and exposure information is part of a DoD contract that includes additional objectives related to chemical and biological agents does not alter the salient fact that the investigation is compiling as much detailed exposure information as possible for each individual test participant. Plaintiffs' questioning the significance of that detailed information is undermined by the importance to this case that Plaintiffs have attributed to information about what substances were tested, in what amounts and by what route of administration. Plaintiffs' suggestion that the DoD investigation

might not be completed is purely speculative and directly at odds with the ongoing Congressional oversight of it.

Much of Plaintiffs' opposition reviews various discovery disputes that are before Magistrate Judge Larson and should not distract the Court from the important question of whether, as Defendants maintain, a discovery stay will further orderly and efficient progress of this litigation. Those disputes stem largely from the parties' disagreement about the appropriate scope of discovery given the relatively discrete claims under the Administrative Procedure Act ("APA") and Declaratory Judgment Act ("DJA") that are before the Court.

Plaintiffs' additional spurious attacks should also be given short shrift. Defendants are not forum-shopping; they noticed this motion for hearing before the District Judge because the request for a discovery stay necessarily requires a request for modification of the case management order entered by the District Judge. Contrary to Plaintiffs' charges of delay and avoidance of discovery obligations, DoD, Army and the Central Intelligence Agency ("CIA") have made robust productions of documents and have exercised their best efforts to negotiate a resolution of the parties' dispute concerning the scope of discovery — efforts that Plaintiffs have not reciprocated.

Defendants have worked and are continuing to work diligently to develop and implement a plan for orderly and efficient discovery that is consistent with the nature of the claims before the Court. A protective order staying further discovery until the DoD investigation is complete is consistent with such a plan and should be granted.

ARGUMENT

1. Staying Discovery Until the DoD Investigation Is Complete Will Facilitate Efficient Discovery and Conserve Resources.

Plaintiffs are incorrect in asserting that the DoD investigation is targeting only a "small portion" or "small subset" of information relevant to the claims at issue. *See* Pls.' Opp'n at 7-9 (Dkt. No. 151). The investigation is designed to "identify all test volunteers involved in chemical or biological testing programs other than Mustard Gas/Lewisite and Project 112/SHAD from

1942 through present."[1] Decl. of Michael Kilpatrick ¶ 13 (Dkt. No. 134-1, Ex. 1 to Defs.' Mot. for Pro. Order Staying Further Disc. and for Modification of Case Management Order ("Defs.' Mot.")) (emphasis supplied). Contrary to Plaintiffs' assertion that the investigation does not encompass all relevant test sites, the list of sites that is set forth in the Statement of Work describing the investigation is not exclusive and the investigation has encompassed records at additional sites. *See* Decl. of Anthony Lee ¶ 5 (Dkt. No. 143-2, filed with, *inter alia*, Defs.' Opp'n to Mot. to Compel Docs.).[2] At each site, researchers are gathering for each individual test volunteer detailed information about each test in which the person participated, including "the chemical or biological agent each was exposed to, and the amount administered and route of administration (e.g., oral) where available." Kilpatrick Decl. ¶ 13. This is a substantial portion of the information that Plaintiffs have asserted they seek through discovery. *See* Pls.' Mot. to Overrule Objections and Compel Prod. of Docs. at 12-15 (Dkt. No. 128) (argument under heading "Defendants should produce documents about the conduct of the test programs and the identity, characteristics, and use of substances employed in the test programs.").[3]

Contrary to Plaintiffs' argument, that the contract under which the investigation is conducted encompasses additional objectives relating to chemical and biological agents does not alter the important fact that the identification of personnel potentially exposed to agents is a major part of the investigation. The Kilpatrick Declaration explains that the investigation to identify test

[1] The Kilpatrick Declaration explains that volunteers in Mustard Gas/Lewisite and Project 112/SHAD tests have been identified through previous investigations. Kilpatrick Decl. ¶ 12.

[2] Plaintiffs' letter to the Court of September 22, 2010 acknowledges that, based on their review of Mr. Lee's declaration, the Statement of Work encompasses records at Fort Detrick and Edgewood Arsenal. Dkt. No. 154. However, the letter, although filed as an "errata," includes argument concerning rule 30(b)(6) depositions, an issue not presented by the instant motion. To the extent that the Court is interested in the arguments concerning Plaintiffs' notices of rule 30(b)(6) depositions, Defendants respectfully refer the Court to the briefing of Plaintiffs' motion to compel concerning those depositions, Dkt. Nos. 125, 142.

[3] DoD and Army have already produced a large number of documents concerning the Army's chemical and biological tests and are searching for additional documents concerning the tests. *See* Kilpatrick Decl. ¶ 16; *see also* Defs.' Opp'n to Pls.' Mot. to Compel Prod. of Docs. at 15-17 (Dkt. No. 143) (describing DoD and Army's document productions).

volunteers is "all-encompassing" and, again, is designed to identify "all volunteers." Kilpatrick Decl. ¶¶ 13-14 (emphasis supplied). The investigation to identify test volunteers has cost millions of dollars. *Id.* ¶¶ 13-14, 17.[4]

There is no reason to doubt that DoD will complete its investigation and achieve the intended result of "consolidat[ing] as much information as possible about the test volunteers, including their names, the chemical or biological agent each was exposed to, and the amount administered and route of administration (e.g., oral) where available," Kilpatrick Decl. ¶ 13. While DoD may not be under a legal obligation to complete the investigation, as Plaintiffs emphasize, Pls.' Opp'n at 9, that the investigation is the subject of Congressional oversight makes it highly likely that the investigation will be completed.[5] *See* Kilpatrick Decl. ¶¶ 10, 13-15; *see also, e.g.*, GAO, "Chemical and Biological Defense: DOD Needs to Continue to Collect and Provide Information on Tests and Potentially Exposed Personnel," GAO-04-410 (Washington, D.C.: May 14, 2004), available at http://www.gao.gov/new.items/d04410.pdf. Plaintiffs' suggestion that identification of all of the test volunteers and compilation of information about individual exposures could somehow be accomplished more quickly is wholly speculative; it would be extremely time-consuming and costly to search individual records apart from the ongoing investigation, as well as duplicative and wasteful. *See* Kilpatrick Decl. ¶¶ 13-14.

With respect to information concerning health effects that may not be included in the information compiled through the DoD investigation, Plaintiffs' opposition overlooks the fact that Defendants have already produced substantial information concerning health effects and that there is a great deal of health-effects information available publicly. *See id*. ¶¶ 4-9; *see also*

[4] Undersigned counsel has no reason to believe that DoD or any other Defendant directed Battelle not to respond to Plaintiffs' Fed. R. Civ. P. 45 subpoena, as Plaintiffs suggest, *see* Pls.' Opp'n at 7.

[5] That the Department of Veterans Affairs is to notify individual test participants after receiving the participant's exposure information from DoD is likewise consistent with Congressional direction. *See, e.g.*, GAO, "Chemical and Biological Defense: DOD Needs to Continue to Collect and Provide Information on Tests and Potentially Exposed Personnel," GAO-04-410 (Washington, D.C.: May 14, 2004), available at http://www.gao.gov/new.items/d04410.pdf.

Defs.' Opp'n to Pls.' Mot. to Compel Prod. of Docs. at 9 (Dkt. No. 143) (describing Defendants' production concerning health effects). In addition, DoD and Army are willing, outside of discovery, to continue searching for additional documents, as noted in Defendants' opening memorandum, Defs.' Mem. in Supp. of Mot. for Protective Order Staying Further Disc. and for Modification of Case Management Order ("Defs.' Opening Mem.") at 7 n.2 (Dkt. No. 134). Similarly, they are willing to continue searching for documents concerning consent in light of Magistrate Judge Larson's July 13, 2010 Order indicating that information regarding consent could be relevant to the secrecy oath claim, Dkt. No. 112 at 5. *See* Defs.' Opening Mem. at 7 n.2. With respect to discovery concerning brain implants or "mind control testing" based on Plaintiffs' allegation that one named Plaintiff received a brain implant, *see* Pls.' Opp'n at 9, Plaintiffs' opposition fails to recognize that Defendants have previously explained that they have been unable to find any information on purported "brain implants" on servicemembers. *See* Defs.' Resp. to Req. for Prod. ("RFP") No. 7 (Dkt. No. 143-9, Ex. B. to Wolverton Decl. filed with Defs.' Opp'n to Mot. to Compel Docs.) (explaining that "after [] conducting a reasonable search, Defendants have identified only information concerning nasal implants used in the 1950s to treat pilots for disease and radiation contamination"). With respect to individual researcher names, which Plaintiffs assert they also seek, Pls.' Opp'n at 8, that information might be contained in documents encompassed in DoD and Army's ongoing search effort. *See* Decl. of Lloyd Roberts ¶ 10 (Dkt. No. 143-4, filed with, *inter alia*, Defs.' Opp'n to Mot. to Compel Docs.).

Only under an extraordinarily overbroad view of the scope of discovery would the results of the DoD investigation be insufficient to provide the bulk of information that, given the large number of documents already produced and DoD and Army's ongoing searches, is relevant to the claims before the Court. The Court's January 19, 2010 Order 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 APA and DJA in the form of notification, medical care and release from secrecy oaths. Dkt. No. 59. The January 19 ruling identified the following issues to 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 ("DOJ") document cited in the Second Amended Complaint; and whether test participants are entitled to medical care.[6] *Id.* at 12-17. Yet Plaintiffs have proceeded as if the Court had not narrowed the scope of this case. Their discovery requests in effect seek to conduct a full-scale investigation of the government's Cold War era human testing programs. *See, e.g.*, Ex. 1 to Wolverton Decl. (Dkt. No. 134-3).[7] The Kilpatrick Declaration explains that the enormous volume of documentation at issue is illustrated by the multiple investigations of the Army's tests over the years as well as the level of effort that is expended in the ongoing DoD investigation. Kilpatrick Decl. ¶ 17. It further explains that because a great many of the documents are quite old, they are searchable only by hand. *See id.* Plaintiffs' opposition refuses to acknowledge the substantial problem of undue burden presented by not only the volume of documents at issue but also their age, and attempts to dismiss this very real and very large problem by characterizing Dr. Kilpatrick's description of it as "conclusory," Pls.' Opp'n at 1.[8] The overbreadth and undue burden of Plaintiffs' discovery

[6] Contrary to Plaintiffs' characterization, the Court has not held that Defendants owe a legal obligation to provide notice and a legal obligation to provide medical care; if it had there would be no need for discovery as to those claims and Plaintiffs would be entitled to judgment on them.

[7] The extreme overbreadth and burden of the scope of discovery that Plaintiffs have pursued is evident from review of their 193 requests for production of documents — each of which seeks "all" documents created between 1940 and the present. *See* Ex. 1 to Wolverton Decl. (Dkt. No. 134-3). Defendants properly have not served written responses to the second through fourth sets of document requests because they have sought a protective order staying further discovery and a protective order limiting the scope of discovery. *See Nelson v. Capital One Bank*, 206 F.R.D. 499, 500 (N.D. Cal. 2001) (Chen, Mag. J.). Defendants 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.

[8] The problems of undue burden as well as overbreadth are described in further detail in, *inter alia*, Defendants' motion for a protective order limiting the scope of discovery and Defendants' opposition to Plaintiffs' motion to compel production of documents. *See* Dkt. No. 140; Dkt. No. 143 at 4-7.

requests have compelled Defendants to move for a protective order limiting the scope of discovery, which is before Magistrate Judge Larson.[9] *See* Dkt. No. 140.

Plaintiffs have substantial documentation bearing on their claims as a result of Defendants' productions as well as the results of the multiple investigations and inquiries concerning the Army's chemical and biological tests over the years, as discussed above and in Defendants' opening memorandum. And DoD and Army are willing to continue searching for additional documents pertaining to health effects of tested substances, documents concerning test subjects' consent, and other documents related to the Army's chemical and biological agent testing. This information together with the results of the DoD investigation should be sufficient to decide the claims remaining in this case. To the extent that any further discovery is warranted following the investigation, the parties will be better positioned to identify it and then focus their efforts on gathering it efficiently and expeditiously.

2. A Stay of Discovery as to CIA is in the Interests of Efficiency and Conservation of Resources.

Plaintiffs' opposition to Defendants' request that a discovery stay extend to CIA ignores the fact that CIA's behavioral research programs have been investigated extensively and exhaustively as a result of multiple Congressional investigations, internal investigations and other public inquiries, and that CIA has already produced the results of its review of the only program that could even arguably be relevant to Plaintiffs' claims. *See* Decl. of Patricia Cameresi ¶¶ 4-14 (Dkt. No. 134-2, Ex. 2 to Defs.' Mot.). As explained in Defendants' opening memorandum,

[9] Contrary to Plaintiffs' characterization, Defendants' motion for a protective order limiting the scope of discovery seeks a workable scope of discovery, *viz.*, one that is consistent with the three relatively discrete claims that are before the Court and is not unduly burdensome. *See* Dkt. No. 140. With respect to Defendants' argument that discovery should not extend to operational use of chemical and biological agents, which Plaintiffs specifically challenge in their opposition to this motion, Pls.' Opp'n at 5, such discovery is not reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs do not allege operational exposure, such as in a war zone, nor is there reason to believe that details about how chemical and biological agents may have been employed in a war zone or other operational use has any bearing on possible long-term health effects associated with the tests that Army conducted at Edgewood Arsenal or other Army test sites. *See* Defs.' Mot. for Pro. Order Limiting Scope of Disc. at 14-15 (Dkt. No. 140.)

based on the "scouring" searches and review of CIA records conducted as a result of those investigations — including the records that Plaintiffs reference, Pls.' Opp'n at 10 — and extensive interviews of CIA personnel and DoD personnel, the Agency has concluded that its programs did not fund or conduct tests on military personnel. *See* Cameresi Decl. ¶¶ 6-7, 11-12. CIA has already produced to Plaintiffs the results of its review of Project OFTEN, the only CIA behavioral research program that could even arguably be relevant, as well as the results of its search for documents relating to the named Plaintiffs, Edgewood Arsenal and Fort Detrick.[10] *Id.* ¶¶ 8, 12-13. With respect to the "at least eleven boxes of documents and tapes" referenced in Plaintiffs' opposition, Pls.' Opp'n at 10, items described in the records retirement request cited by Plaintiffs have been a subject of CIA's searches. Supplemental Cameresi Decl. ¶ 6 (Dkt. No. 143-7, filed with, *inter alia*, Defs.' Opp'n to Mot. to Compel Docs.). CIA produced to Plaintiffs some of the documents described in that records retirement request as part of its Initial Disclosures and, in response to Plaintiffs' first set of RFPs, searched the items described in that records retirement request but identified no materials therein as responsive. *Id.* CIA has also produced 20,000 pages of documents concerning the Agency's behavioral research programs. Cameresi Decl. ¶¶ 6, 12, 24 (Dkt. No. 134-2).[11]

Given that the named individual Plaintiffs are former Army personnel who participated in Army tests and that Plaintiffs seek to represent a class of former military personnel, there is no reason to expect that further discovery of CIA will produce any information bearing on the claims

[10] Project OFTEN contemplated tests on volunteers at Edgewood Arsenal but was terminated before any human testing occurred. Cameresi Decl. ¶ 12.

[11] Plaintiffs' assertion that CIA's determination that it did not fund or conduct tests on military personnel is "suspect" in light of the admitted destruction of some documents relating to MKULTRA by then-Director Richard Helms, *see* Pls.' Opp'n at 10-11 n.13, is a red herring. CIA has concluded after exhaustive investigation that Project OFTEN was separate from MKULTRA, and CIA's review of its records reflects that only Project OFTEN contemplated research using military personnel. *See* Cameresi Decl. ¶ 12. Further, many thousands of pages of documents relating to and describing MKULTRA exist and are in Plaintiffs' possession, provided by CIA outside of discovery despite their irrelevance to this action. *See id.* ¶ 6.

before the Court. Staying further discovery of CIA therefore would further interests of efficiency and conservation of resources.

3. Defendants' Request for a Protective Order Staying Discovery and a Corresponding Modification of the Case Management Order Is Consistent with Their Good Faith Efforts to Achieve an Orderly Plan for Efficient Discovery.

Plaintiffs' charges that Defendants have proceded other than in good faith are baseless. First, Defendants have not shirked their discovery obligations, nor have they sought or are they seeking to delay the progress of this litigation. Defendants have made robust productions of documents in response to Plaintiffs' first set of document requests, and CIA has produced over 20,000 additional pages of documents concerning its behavioral research programs, as referenced above. It is significant to observe in this regard that Defendants' substantial efforts to negotiate a workable scope of discovery and appropriate protective order covering third-party information have not been reciprocated by Plaintiffs.[12] Defendants' reasons for seeking a protective order staying further discovery are strong, as set forth herein and in Defendants' opening memorandum. Moreover, during the entire time that Defendants' requests for relief in the form of a protective order or orders have been pending, DoD and Army have continued searching for potentially relevant documents as referenced above, further undercutting Plaintiffs' accusations of delay. And DoD and Army are willing to continue those searches, outside of discovery, during a stay of formal discovery.[13]

[12] As set forth in Defendants' opposition to Plaintiffs' motion for sanctions, Dkt. No. 144 at 7-9, Defendants' efforts to negotiate a workable scope of discovery include making two proposals to target information bearing on the claims before the Court while avoiding undue burden. However, Plaintiffs refused to make any counter-proposal to address any deficiencies they perceived in Defendants' proposals or to propose a list of key words or search terms as Plaintiffs indicated they would provide during the parties' June 30 meet-and-confer. With respect to a protective order covering third-party information, Plaintiffs prematurely cut off the parties' discussion of an appropriate order without providing information that Defendants requested and explained was important in determining the contours of a protective order, to which Defendants had informed Plaintiffs they were amenable.

[13] Contrary to Plaintiffs' assertion that Defendants sought to delay progress of the case at the December 3, 2009 hearing, Pls.' Opp'n at 2 n.3, Defendants asked that the time for their discovery responses run from the Court's ruling on the then-planned Amended Complaint so that they might have as much time as reasonable to respond to Plaintiffs' large number of discovery requests.

Second, Defendants are not forum-shopping; this motion is noticed for hearing before the District Judge because the requested stay of discovery would necessarily require a corresponding extension of the case deadlines in the case management order. Plaintiffs' assertion that the request for a protective order could have been filed before Magistrate Judge Larson and then, if he granted it, Defendants could have sought a modification of the case management order from the District Judge, Pls.' Opp'n at 5 n.6, is illogical; the request for a stay and the request for a corresponding modification of the case management order are inextricably intertwined.

Third, much of Plaintiffs' opposition recounts the various discovery disputes that are the subject of Plaintiffs' discovery motions before Magistrate Judge Larson. Those disputes do not bear on the propriety of a protective order staying further discovery and corresponding modification of the case management order, and Plaintiffs' rehashing of them appears designed to prejudice the Court with respect to the issue that Defendants have presented. To the extent that the Court is interested in the arguments concerning Plaintiffs' discovery motions, Defendants respectfully refer the Court to the extensive briefing of them, Dkt. Nos. 76, 96, 121, 125, 128, 131, 139, 142-144.

Lastly, it is important to observe that Plaintiffs continue to rely on a significant mischaracterization of DoD and Army's document searches despite Defendants' having prominently pointed it out in their oppositions to Plaintiffs' discovery motions (which Defendants filed the day before Plaintiffs' opposition to the instant motion). *See* Pls.' Opp'n at 4 ("it is apparent that Defendants have yet to search some of the most basic locations for documents"). In support of their discovery motions, Plaintiffs asserted that it appears DoD and Army have not conducted searches at Edgewood Arsenal, which was the Army's center for chemical research. *E.g.*, Pls.' Mot. for Sanctions at 3 (Dkt. No. 131). To the contrary, DoD and Army focused their search efforts in response to Plaintiffs' first set of RFPs on documents stored at Edgewood, and Defendants explained to Plaintiffs well in advance of Plaintiffs' discovery motions that DoD and Army are continuing to search for additional documents at Edgewood. *See, e.g.*, Lee Decl. ¶¶ 2-3 (Dkt. No. 143-2, filed with, *inter alia*, Defs.' Opp'n to Mot. to Compel Docs.); Letter of July 30,

2010 from C. Wolverton to Pls. at 2 (Dkt. No. 150-4, Ex. H to Am. Wolverton Decl. filed in support of Defendants' opposition to Plaintiffs' motion for sanctions). And contrary to the press article that Plaintiffs cite, Pls.' Opp'n at 8 n.11, Fort Detrick was also a focus of DoD and Army's searches in response to Plaintiffs' first set of RFPs. *See* Lee Decl. ¶¶ 2-3 (Dkt. No. 143-2, filed with, *inter alia*, Defs.' Opp'n to Mot. to Compel Docs.).

CONCLUSION

For the foregoing reasons and those set forth in Defendants' opening memorandum, the Court should find Defendants' motion supported by good cause, grant it, and (i) enter a protective order staying Defendants' obligation to respond to Plaintiffs' discovery requests and any further discovery requests until completion of DoD's investigation, and (ii) modify the Case Management Order to extend the remaining deadlines by nine months.

Dated: September 23, 2010

Respectfully submitted,

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Sent: Thursday, September 23, 2010 7:01 PM

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Eric H. Holder, Jr
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Docket Text:
Reply to Opposition re [134] MOTION for Protective Order *and Modification of*

9/24/2010

Case Management Order **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 9/23/2010)**

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