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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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO OVERRULE OBJECTIONS AND COMPEL 30(b)(6) DEPOSITIONS

Date: October 27, 2010
Time: 9:30 a.m.
Ctrm: F, 15th Fl.
Judge: Hon. James Larson

Complaint filed January 7, 2009

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I. INTRODUCTION

Defendants' pattern of obstructing the orderly progression of discovery into relevant topics in this litigation continues in their Opposition to Plaintiffs' Motion to Compel 30(b)(6) Depositions (Docket No. 142) ("Opp'n"). By cherry-picking from distinguishable out-of-Circuit case law, grossly exaggerating their discovery efforts, and either ignoring or misconstruing the relevance of numerous topics, Defendants seek to continue to dodge their obligations to produce knowledgeable witnesses in response to Plaintiffs' Rule 30(b)(6) notices. As Judge Wilken recently recognized in the Court's October 7, 2010 Order denying Defendants' motion for a protective order that would have stayed all discovery for a year, "Defendants offer no reason why Rule 30(b)(6) witnesses should not be designated and depositions should not go forward." (Docket No. 159 at 3.) The Court should disregard Defendants' myriad excuses and efforts to drag their feet in resisting discovery and grant Plaintiffs' motion to compel.

II. ARGUMENT

A. Defendants Misstate the Law Regarding Their Duty To Designate Rule 30(b)(6) Witnesses.

Defendants claim that they should be excused from producing witnesses to testify on numerous deposition topics simply because Defendants assert that the witnesses with personal knowledge of the noticed topics no longer are affiliated with Defendants. (*See* Opp'n at 7 ("…requiring CIA to produce witnesses…would be…wasteful, given the passage of time and the lack of witnesses with *personal knowledge*") (emphasis added); *id*. at 10 ("…most of the CIA people who had been involved…had retired from the agency").) This reflects a fundamental misunderstanding of Defendants' obligations under the law.[1]

[1] It is telling that Defendants fail to cite a single case from within the Ninth Circuit to support this position. (*See, e.g.*, Opp'n at 7 & 11.) Moreover, the cases that Defendants do cite are distinguishable and unpersuasive. For example, Defendants cite *In re Indep. Serv. Orgs. Antitrust Litig.*, 168 F.R.D. 651 (D. Kan. 1996) for the proposition that Rule 30(b)(6) depositions are a "highly inefficient" method of discovery. In that case, however, there already was "voluminous discovery" conducted in the pending litigation and a related case. *Id*. at 654. Given Defendants' limited document production, the same rationale does not apply here. Defendants' reliance on *Metro. Life Ins. Co. v. Muldoon*, No. 06-2026, 2007 WL 4561142 (D. Kan. Dec. 20,

(Footnote continues on next page.)

First, there is no dispute that a Rule 30(b)(6) witness represents the knowledge of the organization, and is not required to have "personal knowledge" of the matter on which he or she is testifying. *JSR Micro, Inc. v. QBE Ins. Corp.*, No. C-09-03044, 2010 U.S. Dist. LEXIS 40185, at *30 (N.D. Cal. Apr. 5, 2010). Therefore, although an organization has a good-faith obligation to designate knowledgeable persons, if necessary the organization must educate its Rule 30(b)(6) designee on the topics for which he or she has been designated, to ensure that the individual is sufficiently prepared. *See Great Am. Ins. Co. of N.Y. v. Vegas Constr. Co.*, 251 F.R.D. 534, 539 (D. Nev. 2008); *see also So. Cal. Stroke Rehab. Assocs. v. Nautilus*, No. 09-CV-744, 2010 U.S. Dist. LEXIS 76508, at *3 (S.D. Cal. July 29, 2010). Therefore, Defendants' focus on the witnesses' lack of "personal knowledge" to justify Defendants' failure to identify an appropriate witness is misplaced.

Second, "that an organization no longer has a person with knowledge on the designated topics does *not* relieve the organization of the duty to prepare a Rule 30(b)(6) designee." *Great Am. Ins.*, 251 F.R.D. at 539 (emphasis added). While it is not uncommon for an organization to no longer employ individuals who remember distant events, the entity still must prepare its Rule 30(b)(6) designee based on "documents, past employees, or other sources." *Id.*; *see also Hewlett-Packard Co. v. Mustek Sys.*, No. 99-CV-351, 2001 U.S. Dist. LEXIS 26331, at *6-*7 (N.D. Cal. June 8, 2001). Even Defendants' own authority recognizes this principle. *See, e.g., Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D. Neb. 1995) ("If *no current employee* has sufficient knowledge to provide the requested information, the party *is obligated to prepare* [one or more witnesses] so that they may give complete, knowledgeable and binding answers on behalf of the corporation.") (emphasis added) (internal quotations omitted). Therefore, the fact that individuals

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2007) similarly is misplaced. In *Muldoon*, the court already had ruled that the information requested was irrelevant. *Id.* In contrast, Plaintiffs seek highly relevant information here.

who personally were involved with the relevant issues may have retired from the various agencies does not constitute an appropriate basis to refuse to produce a Rule 30(b)(6) witness.[2]

B. Defendants' Document Production Cannot Substitute for the Informed Deposition Testimony to Which Plaintiffs Are Entitled.

Instead of preparing appropriate witnesses for deposition, as required by the Federal Rules, Defendants seek to rely on their limited document production, claiming that "the information Plaintiffs seek is . . . retained . . . in documents." (Opp'n at 10.)[3] There are obvious problems with Defendants' position that their document production should substitute for Rule 30(b)(6) testimony, however.

First, Defendants' document production in this case has been *woefully inadequate*, as detailed in Plaintiffs' pending motions and discussed in greater depth below. Defendants have resisted discovery at every turn, have refused to search known, centralized repositories of clearly relevant documents, and have improperly asserted privileges and withheld significant discovery that they now concede should be provided under an appropriate protective order. (*See generally* Pls.' Reply In Supp. of Mot. To Compel Produc. of Docs. (Docket No. 160) ("RFP Reply").) It is clear that Defendants' document production cannot substitute for knowledgeable testimony from Defendants' designated witnesses.

Second, even if Defendants' document production was adequate, courts disfavor this practice. *See Great Am. Ins.*, 251 F.R.D. at 539 ("[I]n responding to a Rule 30(b)(6) notice … [an

[2] In fact, because it is likely that few individuals with personal knowledge of Defendants' testing programs still are employed by Defendants, Plaintiffs are *forced* to seek relevant deposition testimony from Defendants pursuant to Rule 30(b)(6).

[3] It is ironic that Defendants take the position that documents they produced should substitute for Rule 30(b)(6) witnesses given Defendants' production of fewer than 17,000 pages in this case and continued resistance to producing more. In a motion seeking to stay all discovery until May 2012, Defendants also argued that DoD's own investigation regarding chemical test programs, using Battelle (a private contractor), would reveal sufficient information and substitute for their further document production. (Opp'n at 3 ("DoD is currently undertaking a massive investigation targeting service member testing"); *see also* Defs.' Mot. for a Protective Order Staying Further Disc. (Docket No. 134).) Judge Wilken denied that motion on October 7, 2010, noting that "[i]t is not apparent that the DoD investigation addresses all the matters subject to discovery in this case." (*See* Oct. 7, 2010 Order (Docket No. 159) at 3.) Defendants' pattern has been to expend most of their energy on resisting discovery in an apparent effort to rely on what they have already done outside of this litigation.

organization] may not take the position that its documents state the company's position.") The rationale is simple: because of the "nature" of deposition, where the deponent is under oath to answer questions in real time, and where the attorney taking the deposition can ask follow-up questions and observe the witness's body language, "the deposition process provides a means to obtain more complete information and is, therefore, favored." *Id*.

Third, the documents at issue in this case are filled with agency-specific jargon (*e.g.*, Project OFTEN) and technical information that Defendants are in a much better position to interpret than are Plaintiffs. Moreover, the information contained in the documents that Defendants have produced often is contradictory. The Project OFTEN documents provided with the CIA's initial disclosures are a key case in point. Throughout Defendants' briefing on the pending motions to compel, the CIA takes the position that the agency did not sponsor human testing through Project OFTEN. As Plaintiffs have pointed out, however, Defendants produced documents contradicting that conclusion, and the DoD testified before Congress that the CIA did indeed sponsor human testing through Project OFTEN. (*See* RFP Reply at 7-8.) Plaintiffs are entitled to know each Defendant's position on the relevant issues, which may not be apparent from the face of the documents. Plaintiffs' review of the documents Defendants have produced simply cannot substitute for educated testimony about relevant matters. Defendants must produce knowledgeable witnesses to testify about Plaintiffs' Rule 30(b)(6) deposition topics.[4]

C. Defendants Exaggerate the Scope of Their Discovery Efforts.

As noted above, Defendants seek to rely on the documents they have produced in lieu of designating Rule 30(b)(6) witnesses. In advancing that position, however, Defendants vastly overstate the extent to which they have produced relevant documents, as detailed in Plaintiffs' pending motion to compel (Docket No. 143). As just one example, Defendants greatly

[4] Defendants claim that the witnesses they have designated on certain topics are "more than sufficient to provide opportunities to obtain" relevant information. (Opp'n at 12.) Defendants' obligation goes beyond "providing opportunities" for Plaintiffs to take discovery regarding *some* relevant information, however, and the fact that Defendants have designated witness for *some* relevant topics does not absolve them of their responsibility for identifying appropriate witnesses for others.

exaggerate the CIA's participation in discovery. Defendants repeatedly emphasize the "20,000 pages" regarding MKULTRA provided to Plaintiffs, but even they admit that these documents were provided "outside of discovery." (Opp'n at 4.) In fact, the CIA's much touted provision of "20,000 pages" is merely a standard FOIA package that the CIA sends to anyone who requests information on MKULTRA. (Decl. of Patricia Cameresi (Docket No. 142-8) at ¶ 6.) These documents are heavily redacted and, because Defendants insisted on providing them outside of discovery, Defendants have avoided updating the classification review or reviewing the longstanding redactions for continued appropriateness.[5]

Furthermore, although Defendants insist that Plaintiffs "erroneously assert" that Defendants have not yet searched Edgewood Arsenal (Opp'n at 5), Defendants' positions on this point have been confusing and contradictory. For instance, on July 12, 2010, Defendants proposed to search Edgewood Arsenal in exchange for Plaintiffs' agreement not to serve additional discovery. (Decl. of Caroline Lewis-Wolverton in Supp. of Defs.' Opp'n to Pls.' Mot. to Compel Produc. of Docs. (Docket No. 143-8) at ¶ 10, Ex. E at 1-2.) Assuming that Defendants' proposal was a good-faith effort to negotiate a resolution to the parties' discovery disputes, this proposal suggests that Defendants had not yet searched Edgewood; otherwise this "offer" was nothing more than an offer to do what they already had done or were going to do — tantamount to no offer at all. The confusion about this point underscores the need for Rule 30(b)(6) witnesses to testify regarding Defendants' document search and production. Given Defendants' vague and contradictory representations, Plaintiffs are entitled to know the truth about the scope of Defendants' search and production, once and for all.[6]

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[5] As Defendants note, the updated classification review of the 1963 CIA Inspector General report resulted in the production of additional (previously redacted) information. (Opp'n at 23.)

[6] Defendants' only basis for refusing Rule 30(b)(6) depositions on document collection and production is that they would be premature before the completion of Defendants' productions. (Opp'n at 25.) Defendants cite no authority for this proposition. Regardless, delaying these clearly permissible depositions until the purported completion of Defendants' document productions could jeopardize Defendants' ability to cure any defect revealed by the testimony.

D. Defendants Improperly Contest the Relevance of Important Deposition Topics.

Faced with Plaintiffs' motion to compel, Defendants now have reversed course and conceded that certain topics to which they have continually objected are, indeed, relevant to the litigation. (*See, e.g.*, RFP Reply at 2-4.) Nevertheless, Defendants continue to insist that other topics — or even specific issues within topics they admit are relevant — are not relevant, despite clear evidence to the contrary.

1. Information about health effects is critical to Plaintiffs' claims.

Nearly ten months ago, the Court ruled that Defendants' duty to notify test subjects of "the effects upon his health or person which may possibly come from his participation in the experiment" is a core issue in this litigation. (*See* Jan. 19, 2010 Order (Docket No. 59) ("MTD Order") at 15; *see also* Army Regulation ("AR") 70-25, *Use of Volunteers As Subjects of Research* (Mar. 26, 1962).) Moreover, the Court ruled that Defendants' own regulations require them to provide medical treatment "for all casualties" of the experiments, even if "symptoms appear after the experiment ends." (MTD Order at 16-17.) Defendants' regulations further require them to warn test subjects and to provide them with any "newly acquired information that may affect their well-being . . . even after the individual volunteer has completed his or her participation in research." (Second Am. Compl. (Docket No. 53) ("Compl.") ¶ 17; AR 70-25 (Jan. 25, 1990).) Clearly, the health effects of the test substances are critical to this litigation, a fact which Defendants finally have acknowledged after months of resistance. (*See* Defs.' Opp'n to Pls.' Mot. to Compel Produc. (Docket No. 143) ("RFP Opp'n") at 2.) Inexplicably, however, Defendants continue to insist that they need not designate Rule 30(b)(6) witnesses to testify about numerous categories of information directly related to the issue of possible health effects. To wit:

Topic 17 — Dose and Effects of Substances Administered to Test Subjects: While the DoD database produced by Defendants reports some dose information, Defendants concede that it does not contain information regarding the *effects* of the drugs on the test subjects — *i.e.*, the dose-response relationship. (*See* Decl. of Arnold Dupuy (Docket No. 142-4) at ¶ 3.) As such,

even under Defendants' view of the world, their production is insufficient to provide relevant information about health effects. Plaintiffs are entitled to educated testimony on this topic.

Topic 34 — Testing From 1975 to Date: Defendants claim that any testing done after 1975 is irrelevant to Plaintiffs' claims. (Opp'n at 19.) Not so: as noted above, Defendants have a duty to warn and to provide "newly acquired" information that could affect the test subjects' health. (*See supra* at 6.) Information newly acquired as a result of testing that took place after 1975 is, therefore, relevant (at the very least) to Plaintiffs' notice claims under the APA. Such information also is relevant to the health effects that "may possibly come" from exposure to substances used during Defendants' testing programs. (*See* MTD Order at 15.)

Topics 36-37 — Use of Patients from VA Medical Facilities: Defendants' knowledge of possible health effects from experiments on VA patients involving the same substances that Defendants used on military test subjects is relevant, at the very least, to whether Defendants have satisfied their duty to provide the "volunteers" with notice of possible health effects. This issue, of course, is fundamental to Plaintiffs' notice claim under the APA.

Topics 44-48 — Septal Implants: Plaintiffs allege that Defendants engaged in experiments concerning brain implants at Edgewood and elsewhere, and specifically that Defendants inserted an implant in the brain of one of the Individual Plaintiffs, Bruce Price. (Compl. ¶¶ 33-34, 149.) Although Defendants deny these allegations, they have no basis for refusing to provide a witness to testify as to their knowledge of (and position regarding) this topic. And, as Plaintiffs have informed Defendants, there is evidence that Defendants sponsored brain implant testing through Tulane University. (*See, e.g.*, Defs.' Mot. for Protective Order Limiting Scope of Disc. (Docket No. 140) at 23.)

2. Information concerning Defendants' legal duties is critical to Plaintiffs' claims.

Defendants' legal duties with respect to the test subjects, and whether Defendants have fulfilled those legal duties, are at the heart of Plaintiffs' claims under the APA. Incredibly, however, Defendants continue to argue that they need not respond to discovery into topics relating to these duties. For example:

Topics 2 and 3 — "Interface" with VA Regarding Test Subject Claims: Defendants have argued in this litigation that it is *the VA's* responsibility to provide healthcare to veterans who participated in Defendants' testing programs, and have stated that *the VA* has taken on the responsibility to notify veterans based on information gathered by DoD's private contractor, Battelle. (*See* Defs.' Mot. to Dismiss (Docket No. 29) at 3-5.)[7] Yet, the Court already has ruled that *Defendants* possess that duty. Any failure by Defendants to provide complete or accurate information in response to VA requests in support of veteran healthcare claims obviously would impair the ability of the VA to provide appropriate healthcare to veterans exposed during Defendants' test programs. Topics 2 and 3 are relevant, and Defendants must produce an educated witness.

Topic 54 — Confidential Army Memorandum on the Use of Volunteers in Research: Defendants take the position that they should not be required to produce a knowledgeable witness to testify about the 1953 Confidential Memorandum Item 3247 (Army Directive CS: 385). As alleged in the Complaint, however, this Army Directive is a source of Defendants' duty under the APA to provide medical care to casualties of Defendants' experiments. (Compl. ¶ 125 ("Medical treatment and hospitalization *will be provided* for all casualties of the experiments as required.") (quoting Memorandum) (emphasis added); *see also* MTD Order at 17 ("The fact that symptoms appear after the experiment ends does not obviate the need to provide care.").) Defendants' refusal to produce a witness to testify about an official Directive underlying the source of a duty grounding Plaintiffs' APA claims is unsupportable. Unless Defendants are prepared to concede that: (a) the Directive sets forth an enforceable duty under the APA; (b) Defendants have not fulfilled this duty; and (c) Plaintiffs are entitled to an order under the APA requiring Defendants to provide healthcare as required by the Directive, Plaintiffs are entitled to depose a knowledgeable witness on these issues that go to the very heart of Plaintiffs' claims.

[7] Defendants also filed subsequent motions to dismiss Plaintiffs' amended complaints, in which they made largely the same arguments. (*See* Docket Nos. 34, 57.)

3. Information concerning test subject consent is relevant.

Defendants also finally have conceded that information regarding the test subjects' consent to the testing is relevant. Notwithstanding the fact Defendants raised consent as an affirmative defense in their Answer over six months ago, Defendants assert that they only *now* understand, based on the Court's July 13, 2010 Order, that the issue of consent remains in the case. (RFP Opp'n at 2; *see also* Defs.' Answer to Compl. (Docket No. 71) at 40.) Again, however, Defendants continue to resist designating Rule 30(b)(6) deponents for topics clearly related to this issue. For example, Topic 32 seeks information regarding attempts by test subjects to withdraw their consent or refuse to participate in Defendants' tests. Defendants concede that any information about whether test subjects withdrew or refused consent likely is contained in the records pertaining to the individual "volunteers." (*See, e.g.*, Decl. of Lloyd Roberts (Docket No. 142-3) at ¶ 7.) Defendants, however, *refuse to search those records*. (Opp'n at 16-17; *see also* RFP Opp'n at 14.) Defendants' untenable position, then, is that this relevant information simply *should go undiscovered*. Defendants cannot justify such an inequitable result, and Plaintiffs' are entitled to knowledgeable testimony on this topic.

4. Information regarding the CIA's participation in the test programs is relevant.

Defendants continue to insist that participation by the CIA in the discovery process should be limited (if not eliminated altogether) based on the CIA's self-serving "conclusion" that it did not participate in human testing on military servicemembers. (Opp'n at 14.) Even the limited documents produced by the CIA in this litigation to date cast doubt on this "conclusion," however, and in fact, the DoD — the CIA's co-defendant in this litigation — concluded that the CIA *did indeed* sponsor drug testing on military personnel. (*See* RFP Reply at 7-8; Pls.' Opp'n to Defs.' Mot. for Protective Order (Docket No. 157) at 10-11.) Plaintiffs are entitled to test this issue through deposition, at the very least to explore these contradictions. For example:

Topics 10, 11, and 52 — the 1963 CIA Inspector General Report: Plaintiffs are entitled to testimony regarding this document, which is an important source of information regarding the

CIA's participation in human testing programs — particularly given Defendants' repeated attempts to rely on the CIA's "conclusions" in lieu of participating in discovery.

Topics 20, 22, 23, and 24 — Third Party Contracts and Cut-Outs: Defendants' argument that the "nature of the [CIA's] contractual relationships simply has no bearing on whether *DoD* must provide healthcare and/or notice to plaintiffs" (Opp'n at 18 (emphasis added)), badly misconstrues the state of the record in this case. In denying Defendants' motion to dismiss, Judge Wilken held that *the CIA* (as well as the DoD) has a duty to warn test subjects. (MTD Order at 15-16.) The CIA's involvement in the testing programs, whether directly or through various contractual intermediaries, is relevant to Plaintiffs' claims about *the CIA's* responsibility to provide notice to the test participants. Although Defendants apparently would prefer to proceed as if the Court did not permit the claims against the CIA to go forward, Plaintiffs are entitled to depose one or more knowledgeable CIA witness(es) on these topics.

Topics 50 and 51 — Application of MKULTRA Materials and Tests by Dr. Paul Hoch: Defendants have conceded that information concerning the health effects of substances used in their experiments are relevant to this litigation. (*See supra* at 6.) As such, to the extent that the CIA's MKULTRA projects involved the use on humans of substances also tested as part of Defendants' testing programs, information about those projects is relevant and discoverable. Accordingly, Defendants' assertion that the time is not right to evaluate their invocation of the state secrets privilege is without merit. (*See* Opp'n at 21-22.) Because Defendants have not properly asserted that privilege, they must produce one or more knowledgeable witnesses on this topic. Furthermore, even were the CIA not directly involved in the test programs, its roles in financing, procuring, field testing, and sponsoring private research provides a more-than-ample basis for discovery and liability. (*See* Mot. at 5.)

5. Defendants must provide Rule 30(b)(6) witnesses to testify regarding their document search and production efforts.

Defendants' concerted resistance to conducting searches and producing documents in this litigation highlight the critical importance of testimony to delineate precisely what they have and have not done. Such testimony will be key for Plaintiffs to understand, for example, which

document repositories already have been searched for relevant information, and to tailor future discovery requests accordingly.

Moreover, in response to Plaintiffs' motions, the Army and the DoD claim that they are conducting "continuing" or "ongoing" searches for documents. (*See, e.g.*, RFP Opp'n at 17.) The precise scope of these searches, or why they were not performed earlier, is unclear. The CIA, on the other hand, claims that it has "provided to Plaintiffs the full range of documents it has collected" in connection with Congressional investigations over the years. (Opp'n at 16.) Given the CIA's production of only one collection of documents (fewer than 200 pages) related to Project OFTEN as part of Defendants' initial disclosures, this position hardly is credible.[8] In any event, Plaintiffs are entitled to deposition testimony regarding the scope and content of Defendants' searches to date. Furthermore, Topic 14 seeks testimony regarding the scope and conduct of Defendants' document searches in connection with various Congressional investigations, which Plaintiffs are entitled to test through deposition — particularly given Defendants' repeated contention that they should be permitted to rely on these searches in lieu of further discovery.

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[8] Even assuming this were true (and there is ample reason *not* to), Defendants' position that the CIA has produced the "full range" of relevant documents undercuts Defendants' concurrent argument that depositions regarding document search and production efforts should not go forward now because their searches are not complete.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court overrule Defendants' objections and compel Defendants to: (1) designate knowledgeable witnesses who can testify on Topics 2-3, 10-11, 14, 17, 20, 22-24, 32, 34, 36-37, 44-48, 50-52, and 54 of Plaintiffs' November 16, 2009 30(b)(6) Notice; and (2) designate knowledgeable witnesses from the DoA, DoD, and CIA who can testify on the topics in Plaintiffs' June 16, 2010 Rule 30(b)(6) Notices.

Dated: October 13, 2010

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Responses and Replies

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