UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VIETNAM VETERANS OF AMERICA; SWORDS TO PLOWSHARE: VETERANS RIGHTS ORGANIZATION; BRUCE PRICE; FRANKLIN D. ROCHELLE; LARRY MEIROW; ERIC P. MUTH; DAVID C. DUFRANE; WRAY C. FORREST, on behalf of themselves and all other similarly situated,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants.
_____/

No. C 09-0037 CW (JL)

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND MOTION TO COMPEL 30(b)(6) DEPOSITIONS; DENYING WITHOUT PREJUDICE PLAINTIFFS' MOTION FOR SANCTIONS AND DEFENDANTS' MOTION FOR PROTECTIVE ORDER LIMITING SCOPE OF DISCOVERY

(Docket # 125, 128, 131, and 140)

I. Introduction

Plaintiffs' Motion to Compel Production of Documents, Motion to Compel 30(b)(6) Depositions, Motion for Sanctions and Defendants' Motion for Protective Order Limiting Scope of Discovery came on for hearing before this Court on October 27, 2010. All discovery in this case was referred by the district court (Hon. Claudia Wilken) under 28 U.S.C. § 636(b) and Civil Local Rule 72-1. (Docket # 79). Attorneys Gordon P. Erspamer,

Timothy W. Blakely, and Daniel J. Vecchio of MORRISON & FOERSTER LLP appeared for Plaintiffs Vietnam Veterans of America, Swords to Plowshares: Veterans Rights Organization, Bruce Price, Franklin D. Rochelle, Larry Meirow, Eric P. Muth, David C. Dufrane and Wray C. Forrest. Attorneys Kimberly L. Herb, Lily Sara Farel, and Brigham John Bowen appeared for Defendants Central Intelligence Agency, et al. The Court carefully considered the pleadings and arguments of counsel and hereby GRANTS IN PART and DENIES IN PART Plaintiffs' Motions to Compel Production of Documents and 30(b)(6) Depositions. Plaintiffs' Motion for Sanctions and Defendants' Motion for Protective Order Limiting Scope of Discovery are DENIED WITHOUT PREJUDICE.

II. Factual Background

Plaintiffs Vietnam Veterans of America (VVA), Swords to Plowshares: Veterans Rights Organization and six individual veterans ("Plaintiffs") assert claims against Defendants Central Intelligence Agency (CIA), et al. ("Defendants"), arising from United States' human experimentation programs that occurred from approximately 1950 through 1975.

Plaintiffs allege that beginning in the early 1950's, the CIA and the Army engaged in experiments involving human subjects. The experiments ranged from biological and chemical weapons to researching "psychological warfare." The experiments exposed subjects to various chemicals, drugs, and the implantation of electronic devices. Many of the tests occurred at Edgewood Arsenal and Fort Detrick, both located in Maryland. Approximately 7,800 armed services personnel, including the six individual veterans named in this action, volunteered to participate in the experiments. However, the volunteers participated without giving informed consent because the risks of the experiments were not fully disclosed. Test subjects were required to sign a secrecy oath.

In September 2006, some, but not all, subjects in these programs received letters from the Department of Veterans Affairs (DVA), advising them that the Department of Defense (DOD) had authorized the subjects to discuss their exposure with their health care

providers. Although some subjects have been notified and have received information on their exposure, others have not.

III. Procedural Background

Plaintiffs filed their original complaint on January 7, 2009, amended it on July 24 , 2009 as their First Amended Complaint (FAC), then filed their Second Amended Complaint (SAC) on December 17, 2009. Plaintiffs requested declaratory and injunctive relief. Plaintiffs have not filed a jury demand. Plaintiffs served their First Set of Requests for Production on May 15, 2009 seeking *inter alia*, information about the identities of test subjects and the effects of the substances administered to them. Between October 2009 - April 2010, Defendants produced approximately 15,000 pages of documents, most of which were related to the individual named Plaintiffs' military files and were heavily redacted. Defendants objected to producing any documents subject to the Privacy Act and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), particularly documents relating to third parties. In July 2009, counsel for both parties began discussing the content of a protective order and several drafts of stipulated protective orders were exchanged over the course of several months.

Defendants moved to dismiss or, in the alternative, for summary judgment on January 5, 2010. On January 19, 2010, Judge Claudia Wilken granted Defendants' dispositive motion in part and denied it in part. (Docket # 59). Judge Wilken's ruling reduced the number of remaining claims to: (1) the validity of the secrecy oaths; (2) whether the individual Plaintiffs are entitled to notice of chemicals to which they were exposed and any known health effects; and (3) whether Defendants are obligated to provide medical care to the individual Plaintiffs. Defendants filed an Answer on March 17, 2010 and subsequently filed an Amended Answer on April 7, 2010. The case was referred by Judge Wilken to this Court for all Discovery purposes on April 21, 2010.

IV. Legal Analysis

A. Plaintiffs' Motion to Compel Production of Documents (Docket #128)

1. Prior Proceedings Regarding Production of Documents

Plaintiffs have served four sets of Requests for Production consisting of a total of 192 individual requests. Plaintiff's served their First Set of Requests for Production on May 15, 2009, which consist of seventy-seven requests. Defendants served objections to all of these requests on March 4, 2010. Plaintiffs served their Second Set of Requests for Production ("RFP") on May 10, 2010; their Third Set of Requests for Production on July 1, 2010; and their Fourth Set of Requests for Production on August 2, 2010. These three additional sets of requests for production consist of 115 individual requests. Plaintiffs assert that Defendants have yet to respond to requests for production of documents two, three, and four.

Defendants claim not to have responded to Plaintiffs' second, third and fourth sets of RFPs because they filed two Motions for Protective Order. First, on August 27, 2010, Defendants filed a Motion for a Protective Order Staying Discovery and for the Modification of the Case Management Order. This motion sought to stay all discovery for more than one year when ongoing DoD investigations are scheduled to conclude. On October 7, 2010, Judge Wilken issued an order denying the motion. Second, on September 15, 2010, Defendants' filed a Motion for Protective Order Limiting Scope of Discovery. This motion also currently before this Court and is discussed separately.

2. Overview of This Motion

Plaintiffs contend that Defendants' compliance with Plaintiffs' First Set of RFPs has been inadequate. Although Defendants have produced at least 14,000 responsive documents over the course of the past 16 months, Plaintiffs claim that Defendants have

produced a minimal number of documents over the past 6 months. They also claim that most of what has been provided constitutes the CIA's standard FOIA release set provided outside of discovery, and records pertaining only to the named plaintiffs. Thus, Plaintiffs argue Defendants production efforts have been inadequate because the documents Defendants have produced are "barely more than what is available in the public domain," and that there are still "vast gaps in Defendants' production."

Conversely, Defendants maintain that they have made "robust productions," of "a large number of documents," and that the Department of Defense and the Army are currently conducting additional searches. Defendants' further oppose Plaintiffs' Motion to Compel on the grounds that the production sought greatly exceeds what is an appropriate and workable scope of discovery and that the primary questions presented by Plaintiffs' motion are over-breadth and undue burden.

Plaintiffs move this Court to compel Defendants to produce documents responsive to fifty-three of Plaintiffs' seventy-seven document requests contained in Plaintiffs' First Set RFPs. (RFP Nos. 1-7, 9, 11-14, 16-21, 23-26, 29-30, 33-40, 44-46, 48-49, 54-55, 57-58, 60-61, 63-66, and 72-77.) More specifically, Plaintiffs request that this Court (1) overrule all objections to the enumerated RFPs and compel the production of documents responsive to those requests; (2) overrule Defendants General Objections Three and Five; (3) order Defendants to produce those documents they are withholding based on claims of deliberative process and state secrets privilege; and (4) order Defendants to produce all documents responsive to Plaintiffs Second and Third Sets of Requests for Production. Pltfs' Mot. to Compel Docs. at 24-25.

3. Legal Standard

A party "may obtain discovery regarding any non privileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Rule 26 initially defines the scope

of discovery broadly and encompasses not only information that would be admissible at trial, but also information that is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

Defendants adopt the part of the rule that provides for discovery to be limited where "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(c). A party resisting discovery may object by stating the reasons for the objection, Fed. R. Civ. P. 34(b)(2)(B), for example, over-breadth or undue burdensome. However, Defendants bear the burden of "showing that discovery should not be allowed, and the burden of clarifying, explaining, and supporting its objection." *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1998)(internal citation omitted). Other courts have come to similar conclusions. *See, e.g., Blankenship v. Hearst Corp.,* 519 F.2d 418, 429 (9th Cir. 1975) ("Under the liberal principle of the Federal Rules defendants [are] required to carry a heavy burden of showing why discovery was denied.") Objections to requests should be specific, tailored to the individual requests, and contain sufficient factual or legal support so as to meet the "heavy burden."

If the opponent fails to meet its burden, the proponent may move for an order compelling discovery, Fed. R. Civ. P. 37(a)(1), and upon a showing of good cause the court may compel discovery pursuant to Fed. R. Civ. P. 26(b)(1).

4. Plaintiffs' Motion to Overrule Objections and Compel Production of Documents Responsive to the Plaintiffs' First Set of Requests Is DENIED WITHOUT PREJUDICE. This Court ORDERS the parties to amend their requests and responses to conform with the following recommendations.

(a) Plaintiffs shall reduce the scope of discovery sought.

Plaintiffs shall reevaluate what information is central to their case, recognize limits on usefulness of some of the information they seek, and make a sincere effort to reduce the scope of discovery sought. Where possible, Plaintiffs shall restate their requests with heightened specificity and reduce the total number of requests. Perhaps most significantly, Plaintiffs now have the benefit of knowing what objections Defendants have raised in their responses to Plaintiffs' First Set of RFPs, Opposition to Plaintiffs' Motion to Compel, and Motion for Protective Order Limiting Scope. Knowing the grounds upon which Defendants have resisted discovery should permit Plaintiffs to modify their requests so as to avoid many objections raised by the Defendants and reduce the likelihood of future objections on those grounds.

(b) Responses to each request for production must document all production efforts pertaining specifically to that request, and should state the individualized factual and legal grounds for objections.

Plaintiffs base their motion to overrule Defendants' objections in large part on what Plaintiffs refer to as Defendants' "mostly boilerplate objections." Boilerplate objections to a request for a production are not sufficient. *Burlington Northern & Santa Fe Ry. v. United States Dist. Court,* 408 F.3d 1142, 1149 (9th Cir.2005). When a party resists discovery, he "has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Oakes,* 189 F.R.D at 283, *citing Nestle Food Corp. v. Aetna Cas. & Sur. Co.,* 135 F.R.D. 101, 104 (D.N.J.1990). Where a party objects to discovery, it must state with specificity the facts supporting those objections.

In their response to Plaintiffs First Set of Requests for Production, Defendants initially laid out a "General Responses" section, followed by a ten "General Objections." Finally, Defendants addressed Plaintiffs' individual requests in a section entitled "Specific Objections and Responses to Requests for Production." While Defendants' objections are not technically "boilerplate," as Plaintiffs note, the objections are problematic in that

Defendants object to many of Plaintiffs' RFPs "by incorporating by reference one or more 'general objections,' without specifying the bases for these objections as they relate to a particular request." Pls.' Mot. to Compel Prod. of Docs at 7. (emphasis added). It is this format for response that has led to this Court's conclusion that Defendants have failed to meet the "heavy burden" imposed on a party resisting discovery to show why the discovery should not be allowed. Because "an important purpose of discovery is to reveal what evidence the opposing party has...," *Computer Task Group, Inc. v. Brotby*, 364 F.3d 1112, 1117 (9th Cir., 2004), Defendants should have tailored each response to each request by providing clarification, support, and explanation of the underlying factual or legal grounds for objections so as to permit Plaintiffs and this Court to assess the substance of those objections.

Nevertheless, instead of granting Plaintiffs' motion to compel production of documents, because discovery in this case is potentially vast and burdensome, it is more prudent to give the parties a final opportunity to come to a workable solution to the current discovery dispute without mandating specific production. Defendants shall re-assert their responses to Plaintiffs' enumerated requests in a "Defendants' Amended Responses to Plaintiffs' First Set of Requests for Production of Documents, Nos. 1-7, 9, 11-14, 16-21, 23-26, 29-30, 33-40, 44-46, 48-49, 54-55, 57-58, 60-61, 63-66, and 72-77." Defendants should state any individualized objections to Plaintiffs' requests with specificity, backed by genuine factual and legal support. By ordering Defendants to further clarify, support, and explain their objections, the parties achieve the best route to enhancing the focus of the discovery at issue.

For example, in Defendants' related Motion for Protective Order Limiting the Scope of Discovery, Defendants provided an account of why responding to Interrogatory No. 14 would be unduly burdensome. The interrogatory requested that Defendants "identify all test subjects who, after signing a consent to participate in the test programs, revoked

consent or refused to continue participation, and summarize the outcome of each case." Defendants argued that the burden of this discovery would outweigh its benefit because Defendants would have to individually review 6,723 individual personnel files which would take 10 months and require 1,680 man hours of effort, yet the search is unlikely to yield much relevant information as the DAIG investigation found that only six volunteers refused to participate in testing after arriving at Edgewood Arsenal. Defs' Mot. for Protective Order Limiting Scope of Discovery, at 22. Without ruling on the merits of this particular objection, especially in light of the fact that discovery will likely require extensive searches into the personnel files of many military service members who may become involved in this litigation, it is the type of specificity found in the Defendants' response to Interrogatory No. 14 that will allow the Plaintiffs and this Court to weigh the merits of each objection, and to respond accordingly.

(c) Each named organizational defendant shall respond Individually to each request for production.

In addition to responding specifically to each request for production, each named organizational Defendant shall respond individually to each request for production. Because there are potentially thousands of discoverable documents, possibly in the possession of numerous government entities, structuring the discovery process by keeping track of which Defendants have responded to discovery requests with what documents or objections will ultimately expedite the discovery process by reducing the likelihood of future allegations of failures to locate, produce, or respond.

5. Plaintiffs' Motion to Overrule Defendants' General Objection 3 is DENIED. This Court ORDERS Plaintiffs to modify the definition of "Test Programs" to conform with the following specifications.

Defendants' General Objection 3 seeks to limit Plaintiffs' definition of "Test Programs." Plaintiffs defined "Test Programs" as follows:

> 'TEST PROGRAMS' means each of the projects identified in the Complaint, *including without limitation*, Projects 'BLUEBIRD,' 'ARTICHOKE,' 'MKDELTA,' MKULTRA,' MKNAOMI,' 'MKSEARCH,' 'MKCHICKWIT,' 'MKOFTEN,' *and any other program of experimentation involving human testing of any substance,* including, but not limited to 'MATERIAL TESTING PROGRAM EA 1729.'

Plaintiffs' First Set of RFPs at 5 (emphases added). This definition is overbroad. Documents relating to "any program of experimentation involving human testing of any substance," are potentially irrelevant, vast in number, and the burden on the Defendants of producing documents on is potentially great. The definition of "Test Programs" shall be modified to include only projects or programs that Plaintiffs specifically identify at the outset of the requests, and which have a reasonable foundation in the complaint, or in the discovery that has already been produced. In addition to providing Defendants with a list of test programs, instead of using the phrase "any substance," Plaintiffs should provide a list of test substances that Plaintiffs would like Defendants to search for which have a similarly reasonable foundation. The searches should not be limited only to "chemical or biological testing involving service members conducted in conjunction with the Edgewood Arsenal Area of Aberdeen Proving Ground, Maryland, Fort Detrick Maryland and Fort Ord, California" as Defendants propose in General Objection 3. Instead, Plaintiffs should specifically identify those locations where documents are reasonably believed to be, but not necessarily limited to those outlined in General Objection 3. Defendants must conduct reasonable searches of those locations, or provide strong support for not doing so. By specifically identifying the programs and substances that Plaintiffs seek information about, and the locations where that information is believed to be, Defendants' searches will be better targeted to net relevant information.

6. Plaintiffs' Motion to Overrule Defendants' General Objection 5 is GRANTED IN PART.

In General Objection 5 of Defendants' Response to Plaintiffs' First RFPs at 3, Defendants' state the following:

> Defendants object to providing any files, records, reports, and any other papers and documents pertaining to any individual other than the individually named Plaintiffs to the extent that such information is protected by the Privacy Act, 5 U.S.C. § 552a, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320d-2, the HIPAA Privacy Rule, and/or 45 C.F.R. parts 160 and 164. Defendants further object to Plaintiffs request for production of documents to the extent they seek information protected from disclosure by the attorney-client privilege, the work product doctrine, deliberative process, or any other applicable privilege or immunity recognized under statute, regulation, or applicable case law. In conformance with Fed. Rule Civ. P. 26(b)(5), Defendants will describe the nature of any documents that are withheld as privileged or subject to protection as attorney work product.

Regarding production of documents pertaining to individuals other than the named Plaintiffs, Defendants shall produce documents and information pursuant to this Court's Order Granting Plaintiffs' Motion for Protective Order.

Regarding objections based on claims of deliberative process Defendants "[have] decided to no longer assert the deliberative process privilege over its documents that are listed on the privilege log and to produce them." Opp'n to Pls.' Mot. to Compel Docs. at 24. Therefore, because Defendants have waived their assertions of the deliberative process privilege, Plaintiffs' request that this Court overrule this portion of General Objection 5 is moot.

Regarding Defendants' assertions of the state secrets privilege, Plaintiffs contend that Defendants have improperly withheld 21 documents based on the Central Intelligence Agency Act of 1949 and 50 U.S.C. § 403g. Section 403g states that "the Agency shall be exempted from...the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency...."

While 403g protects against disclosure of information actually covered by the provision, neither Defendants' responses to Plaintiffs RFPs, nor Defendants' privilege log fully address the issue of how to determine *whether* the information is actually privileged under 403g, and thus whether the privilege has been properly invoked.

In upholding the CIA's claim of privilege under 50 U.S.C. § 403-3(c)(6) and 50 U.S.C. § 403g, the court in *Linder v. Dep't of Def.,* 133 F.3d 17, 25 (D.C. Cir. 1988), noted the following:

> [T]he district court relied on very detailed information contained in the *ex parte* declaration of William McNair. Paragraphs 10-31 of the declaration explain the potential harms to national security from the disclosure of intelligence sources, intelligence methods, location of covert CIA field installations, CIA employee names and organizational data, and cryptonyms and pseudonyms. Paragraph 35, redacted from the public version of the declaration, specifically discusses six of the withheld documents, and paragraph 36 explains that their release would reveal the names of CIA employees and employee numbers, internal organizational data, locations of CIA installations, and cryptonyms.
>
> In addition to reviewing the McNair declaration in camera, the district court examined the withheld documents. *Given the detailed information contained in the McNair declaration and the district court's own review of the documents*, we find no abuse of discretion in the court's determination that the CIA *properly justified* its statutory claims of privilege over the seven withheld documents.

Linder, 133 F.3d at 25. (emphases added). In addition, in *Linder v. National Sec. Agency*, the court accepted a similar declaration as justifying the NSA's invocation of privilege, *Linder v. National Sec. Agency*, 94 F.3d 693, 695 (D.C. Cir., 1996), while the court in *United States v. Koreh* upheld a CIA claim of statutory privilege after reviewing a similar declaration from a CIA information review office, as well as the withheld documents themselves. *U.S. v. Koreh*, 144 F.R.D. 218, 222 (D.N.J.,1992).

It is clear that courts have used detailed declarations to support ultimate determinations as to whether statutory claims of privilege are "properly justified" and thus whether to uphold a 403g privilege assertion. Furthermore, it is instructive that the court of appeals in *Linder* found no abuse of discretion *based on* the district court's review of a CIA declaration. Therefore, as in *Linder*, this Court will base its decision on whether to sustain or overrule the CIA's 403g privilege claims on similarly detailed justifications.

While Defendants have provided a declaration from an Information Review Officer with the Directorate of Science & Technology of the CIA in support of their 403g privilege assertions, the declaration does not provide sufficient substantive information upon which

to evaluate the privilege claims. The declaration states that "CIA has redacted a small amount of information," and has "claimed privilege over a few documents noted on Defendants' privilege log that consists entirely of information protected by § 403g...." Opp'n at 24; Suppl Cameresi Decl. ¶ 4. The declarant also notes that she has "reviewed the privileged documents and attest[s] that the discrete information redacted and/or withheld from these documents on the basis of 403g consists of CIA organizational and functional data, names and titles of CIA personnel, locations of CIA buildings, and phone numbers of personnel employed by the CIA." *Id.*

Rather than relying on this broad simultaneous assertion of privilege over all 21 contested documents, this Court hereby orders Defendants to file a supplemental declaration explaining with heightened specificity why 403g privilege assertions over each document is properly justified. However, because the documents may contain sensitive information, this Court will permit the Defendants to file the supplemental declaration under seal, and will review the declaration and those documents purportedly subject to the privilege *in camera*. These steps will provide protection against the disclosure of that information that is actually subject to the § 403g privilege, while permitting this Court to accurately determine whether documents are properly subject to the privilege. Finally, these recommendations apply where a document is being withheld in its entirety based on the § 403g privilege. Where a document is not being withheld in its entirety, Defendants must redact the protected parts of the documents, and produce the unprotected parts.

7. Plaintiffs' Motion To Overrule Objections and Compel Production of All Documents Responsive to Plaintiffs' Second and Third Sets of Requests For Production Is DENIED.

Plaintiffs contend that Defendants' objections to Plaintiffs' Second and Third Sets of Requests for Production, served on May 10, 2010, and July 1, 2010 respectively, have been waived due to failure to timely respond.

Defendants counter that they have not yet served objections to the second and third sets of Plaintiffs' RFPs because they sought a protective order staying further discovery and a protective order limiting the scope of discovery.

Fed R. Civ. P. 34(b)(2)(A) notes, "[t]he party to whom the request is directed must respond in writing within 30 days after being served." Defendants cite *Nelson v. Capital One Bank*, for the proposition that "the party responding to written discovery may either 'object properly *or* seek a protective order.'" *Nelson v. Capital One Bank*, 206 F.R.D 499, 500 (N.D. Cal., 2001) (emphasis added). Furthermore, Defendants note that the court in *Nelson* stated that "[i]t would make little sense to hold that in order to preserve objections to written discovery, the responding party must file written objections *rather than* moving for a protective order." *Id.* (emphasis added). However, as these citations illustrate, Defendants were in an either/or position - they must either have filed objections or a motion for protective order within 30 days after service of the request. Otherwise, "[f]ailure to object to discovery requests within the time required constitutes a waiver of any objection." *Richmark Corp. v. Timber Falling Consultants,* 959 F.2d 1468, 1473 (9th Cir. 1992).

Rule 37(d) addresses in relevant part the consequences for a party's failure to respond to a request for inspection. 37(d)(1)(A) notes that "[t]he court where the action is pending may, on motion, order sanctions if...(ii) a party, after being properly served with...a request for inspection under Rule 34, fails to serve its answers, objections or written response." Rule 37(d)(2) notes that "[a] failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a *pending* motion for a protective order under rule 26(c)." (emphasis added). Furthermore, the 1993 Notes of Advisory Committee state that "it is the *pendency* of a motion for protective order that may be urged as an excuse for a violation of subdivision (d)." (emphasis added).

Plaintiffs served their Second Set of Requests for Production on May 10, 2010 with responses due June 9, 2010. Plaintiffs served their Third Set of Requests for Production

on July 1, 2010 with responses due on July 31, 2010. Defendants attempt to justify not having responded to either the Second or Third Set of RFPs by claiming to have "sought a protective order staying further discovery, and a protective order limiting the scope of discovery" pursuant to Fed. R. Civ. P. 26(c). While not styled as a formal motion, on June 9, the last day to respond to Plaintiffs Second Set of RFPs, Defendants filed a Response to Plaintiffs' [June 2, 2010] Statement of Discovery Dispute Regarding Requests for Production and 30(b)(6) Designations. Dkt. No. 93. In this response, Defendants stated the following: "Defendants additionally respectfully request that the Court enter a protective order staying further discovery until completion of the large-scale identification of servicemembers who participated in all chemical and biological testing and limiting the scope of further discovery." Defs.' Resp. to Pls.' Statement of Discovery Dispute Re RFPs and 30(b)(6), Dkt. No. 93 at 2. "Defendants therefore respectfully request leave to further brief their request for a protective order staying further discovery and limiting its scope." *Id.* at 3.

On June 16, 2010, Plaintiffs filed a Statement of Discovery Dispute: Opposition to Defendants' Request for Order Staying Discovery and Limiting Scope of Discovery. Dkt. No. 101. It their opposition, Plaintiffs acknowledged that "Defendants requested that the Court enter a protective order (1) staying further discovery and (2) limiting the scope of further discovery." *Id* at 1. Plaintiffs concluded their opposition by stating "Plaintiffs respectfully request that the Court deny Defendants' request for an order staying discovery and limiting the scope of discovery." *Id* at 2.

This Court finds that Defendants' request was a pending motion by implication and therefore denies Plaintiffs' Motion to Compel Production of Documents in Response to Plaintiffs' Second and Third Sets of Requests for Production. Finally, as will be discussed in greater detail below, this Court denies without prejudice Defendants' Motion for Protective Order Limiting Scope of Discovery. Doing so removes the remaining hurdle for Defendants to respond to Plaintiffs' Second, Third, and Fourth Sets of Requests for

Production. Defendants must respond according to the specifications outlined above pertaining to Plaintiffs' First Set of Requests for Production of Documents.

8. Defendants' Remaining Objections

Defendants' opposition relies, in large part, on descriptions of what has already been produced and the ongoing search efforts being conducted by the various Defendants. These descriptions, however, do not respond directly to Plaintiffs' specific RFPs, nor do they reduce the need for specific and individualized responses to those RFPs.

Judge Wilken recently ruled on a related issue. In their first Motion for Protective Order Staying Discovery, Defendants sought to stay discovery pending an ongoing DoD investigation being conducted by Battelle Memorial Institute. In her October 7, 2010 Order Denying Defendants' Motion for Protective Order to Stay Discovery, Judge Wilken noted that "it is not apparent that the [Battelle] investigation addresses all the matters subject to discovery in this case," and that "Defendants do not suggest that they cannot satisfy their discovery obligations by providing plaintiffs with information received from Battelle as the investigation progresses." Dkt. No. 153, at 3. Consistent with Judge Wilken's order, this Court finds that Defendants' reliance on ongoing searches is misplaced. Defendants should respond in earnest to Plaintiffs' discovery requests, regardless of any ongoing or prior searches, investigations, or litigation. If Defendants can cite specific instances of undue burden or duplicative discovery in response to individual requests for production, they may object on these grounds. Defendants may not however avoid their discovery obligations altogether by relying on prior inquiries into similar subject matter that may or may not overlap with the present litigation.

Defendants have also repeatedly asserted that discovery from the CIA is unwarranted due to its limited nexus with tests on military service members. Defendants' declarant, Patricia Cameresi, states that "[a]fter scouring the Agency for documents through these investigations and conducting extensive interviews of CIA personnel and DoD personnel, the Agency has concluded that it did not fund or conduct drug research on military

personnel." Cameresi Decl. in Support of Opp'n to Pltfs.' Motion to Compel Prod. of Docs. at ¶ 12. However, consistent with Judge Wilken's October 7, 2010 Order, this Court rejects the conclusion that the CIA necessarily lacks a nexus to Plaintiffs' claims, and orders the CIA to respond in earnest to all of Plaintiffs' RFPs, particularly because Defendants have presented evidence that would appear to cast doubt on that conclusion.

B. Plaintiffs' Motion to Compel 30(b)(6) Depositions (Docket #125)

1. Prior Proceedings Regarding 30(b)(6) Depositions

Plaintiffs served their first Notice of Deposition to all Defendants pursuant to Fed. R. Civ. P. 30(b)(6) on November 16, 2009, identifying fifty-seven topics. Defendants responded on March 4, 2010, refusing to designate witnesses to testify about thirty-seven of the fifty-seven substantive topics, objecting on grounds of relevance, lack of knowledge, and privilege. As a result of minimal production of documents by the Defendants, Plaintiffs served supplemental 30(b)(6) notices of depositions on the Central Intelligence Agency ("CIA"), Department of Defense ("DOD"), and Department of the Army ("DOA") on June 16, 2010. Each notice contained twenty-nine deposition topics regarding Defendants' steps taken to identify requested documents, the scope of asserted privileges, any destruction of documents, and any redactions in documents produced. Defendants have offered no witnesses to those topics to date, arguing that they may be offered after completion of their production of documents but have not specified when the searches will conclude. The parties attempted to meet and confer regarding these Notice of Depositions on May 19, 2010 and June 30, 2010. The parties were unable to resolve the dispute and filed a joint statement of discovery dispute with this Court on August 2, 2010. On August 6, 2010, this Court ordered the parties to submit formal briefs for any outstanding discovery dispute.

2. Legal Standard

Fed. R. Civ. P. 30(b)(6) depositions are also governed by Fed. R. Civ. P. 26(b)(1) as stated above. Plaintiffs contend that depositions taken pursuant to Fed. R. Civ. P. 30(b)(6)

may properly seek any evidence which may lead to the discovery of admissible evidence. *Detoy v. City and County of San Francisco,* 196 F.R.D. 362, 366-67 (N.D. Cal. 2000) (holding that the scope of 30(b)(6) deposition is determined solely by relevance under Rule 26).

Defendants, resisting discovery, "[have] the burden to show that discovery should not be allowed, and [have] the burden of clarifying, explaining, and supporting. . . objections." *Oakes,* 179 F.R.D. at 283. Furthermore, "boiler plate objections that a request for discovery is 'overbroad and unduly burdensome, and not reasonably calculated to lead to the discovery of material admissible in evidence,' . . . are improper unless based on particularized facts." *Mancia v. Mayflower Textile Servs. Co.,* 253 F.R.D. 354, 358 (D. Md. 2008).

3. Defendants' Misstatement of the Law Regarding Their Duty to Designate 30(b)(6) Witnesses

Defendants repeatedly object to designating witnesses because due to passage of time, witnesses with personal knowledge of the events and documents in question are no longer employed by the Defendants. However, a Rule 30(b)(6) witness represents the knowledge of the organization or corporation and is not required to have "personal knowledge" on the matter to 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). "The fact 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" to the extent preparation materials are reasonably available, whether from documents, past employees, or other sources. *Great Am. Ins. Co. Of N.Y. v. Vegas Constr. Co.,* 251 F.R.D. 534, 539 (D. Nev. 2008). Therefore, Defendants' arguments regarding passage of time and lack of personal knowledge are without merit.

Furthermore, Defendants repeatedly object that documents themselves are a better source of information than educating witnesses to testify based on those same documents.

They argue that this procedure would be duplicative, wasteful of time, and overly burdensome. *Metro. Life Ins. Co. v. Muldoon,* 2007 WL 4561142 at *5 (D. Kan. Dec. 20, 2007) ("[I]t would be unduly burdensome, if not impossible, for the Government to reconstruct the facts surrounding [a settlement agreement and annuity]. . . when the [documents were prepared] twenty five years ago. Such facts are neither known nor reasonably known by the United States, and the burden of attempting to reconstruct the requested information simply outweighs its minimal benefit.") *FDIC v. Wachovia Ins. Serv., Inc.,* 2007 WL 2460685 at *3 (D. Conn. Aug. 27, 2007) (quashing 30(b)(6) notice that would have burdened plaintiff with educating representatives in a number of topic areas in different categories of documents, many of which are of marginal, tangential, or dubious relevance, and enforcement of this deposition notice would be abusive.)

Plaintiffs distinguish *Muldoon,* stating the court had already ruled that the information requested from the 30(b)(6) deposition notices was irrelevant, whereas the information requested here is highly relevant to both claims and defenses. *Muldoon,* 2007 WL 4561142 at *5. Morever, "in responding to a Rule 30(b)(6) notice or subpoena, a corporation may not take the position that its documents state the company's position." *Id.* As Plaintiffs argue, particularly in this case, the documents involve many code names and technical jargon that Defendants are better able to interpret and explain at a deposition.

4. Judge Wilken's October 7, 2010 Order Denying Defendants' Motion For A Protective Order Staying Further Discovery

As discussed above, Judge Wilken's October 7, 2010 Order Denying Defendants' Motion For a Protective Order Staying Further Discovery effectively renders Defendants' arguments insufficient, specifically that the DoD investigation will render fruitful discovery and all discovery requests compelling documents or witnesses should be stayed until the investigation is complete. The court found that, "the DoD investigation largely entails the collection and compilation of documents and information. Defendants offer no reason why Rule 30(b)(6) witnesses should not be designated and deposition should not go forward."

Dkt. No. 159, at 3:21-25. Therefore, Defendants cannot use the DoD investigation as an excuse to avoid discovery responsibilities.

5. Individual Topics

5.1. Topics 2 and 3: "Interface" with VA Regarding Claims Brought By Test Subjects

Topics 2 and 3 seek testimony on communications and interactions between Defendants and the DVA regarding death and disability claims brought by test subjects and the instances where Defendants denied any record of participation in test programs.

In addition to boiler plate objections of relevance and lack of knowledge, Defendants argue Plaintiffs' healthcare claims turn on facts concerning DoD's relationships and duties concerning the Plaintiffs, but not on how DoD allegedly interacts with the VA when service members seek care from the VA. Plaintiffs counter that the Court already ruled that Defendants have the duty to provide accurate information to the VA regarding VA healthcare to service members; any inaccurate information from Defendants passed to the VA would impair the VA's ability to provide healthcare. Thus, such information is relevant to Plaintiffs' healthcare and notice claims. Therefore, this Court overrules Defendants' objections to Topics 2 and 3. Defendants are required to designate a witness to testify concerning these topics.

5.2. Topics 10 and 11: The 1963 CIA Inspector General Report

Topics 10 and 11 concern the authorship, creation, and approval of the 1963 Inspector General Report of Inspection of MKULTRA ("1963 CIA IG Report"), and any persons contacted or interviewed in connection with the report or other notes, analysis or other writings concerning its contents.

Defendants objected to Topics 10 and 11 on grounds of relevance and privilege. The 1963 CIA IG Report is cited frequently in the Complaint and concerns the CIA's involvement in Defendants' test programs and is therefore relevant. Defendants argue that these topics contain information protected under the Central Intelligence Agency Act of

1949, 50 U.S.C. § 403g, which protects CIA employees' names, personal identifiers and internal organization data. However, Defendants' blanket refusal to produce any witness to testify on this topic is improper because Defendants have not shown that all information related to the topic is privileged. *SEC v. Morelli*, 143 F.R.D. 42, 46 (S.D.N.Y. 1992) (rejecting SEC's generalized assertion that a proposed deposition would necessarily reveal privileged information).

When the government asserts a privilege, it must provide detailed information supporting its claim of privilege and explaining the potential harms to national security from disclosure. *Linder v. Dept. of Defense*, 133 F.3d 17, 25 (D.C. Cir. 1998) (upholding CIA claims of privilege based on "very detailed information" provided in declaration). Defendants have yet to show with specificity the harm of designating a witness to testify to the creation and preparation of the 1963 CIA IG Report. Therefore, this Court finds that Topics 10 and 11 are both relevant to Plaintiffs' claims and Defendants have yet to show why the claimed privilege applies. Defendants' objections to Topics 10 and 11 are overruled and Defendants shall designate a witness to testify concerning these topics.

5.3. Topic 14: The Scope and Conduct of Document Searches Conducted Pursuant to Congressional Requests

Topic 14 seeks testimony on the scope and conduct of the search for documents pursuant to requests from Congress in 1975-1977 related in any way to the test programs, including all supplemental requests and the content of all correspondence.

Defendants object that Topic 14 "encompasses information not known or reasonably available to Defendants." Defendants argue that they have already produced a significant range of documents and the existence of additional documents is highly unlikely. They maintain that they did not keep a record of specific documents used in congressional testimony concerning the test programs. However, these congressional hearings were highly publicized involving hours of testimony by Defendants. Therefore, at the very least, Defendants should designate a witness to testify regarding what documents they do and do

not have pertaining to congressional hearings. Simply stating that the information is not known does not suffice. Defendants' objections to Topic 14 are overruled. Therefore, Defendants shall designate a witness to testify concerning Topic 14.

5.4. Topic 17: Doses of Substances Administered to Test Subjects and the Expected Effects of Those Doses

Topic 17 concerns the drug dosage administered to test subjects, the dose response relationship, and the estimated dose that would induce death. Defendants object that such information is not known or reasonably available to them. However, there is evidence that Defendants commissioned the National Research Council to conduct studies on the long-term effects of substances used in the Test Programs. DoD records also indicate that there are cabinets full of documents at Edgewood Arsenal pertaining to data from Defendants' test programs; thus, there is ample relevant material available to Defendants.

Defendants further argue that locating and preparing a witness to testify at this level of pharmacological detail concerning each substance tested and their dose-response information would be unreasonable and nearly impossible, since much of the information was from decades-old research and records. However, as set forth above, this argument is insufficient. Both parties understand that this action derives from research and experimentation that occurred over fifty years ago. Merely stating that finding documents or witnesses is difficult is unacceptable. Therefore, this Court overrules Defendants' objections and finds that there is ample material to review and prepare for depositions concerning Topic 17. Defendants must designate a witness to testify.

5.5. Topic 20, 22-24: Third Party Contracts and Cut-Outs

Topics 20 and 22-24 seek testimony on the identity, activities, projects, contracts and contract proposals, approvals, and payments for all third party participation (contractor or university researcher) concerning the test programs and all related communications and meetings.

In Judge Wilken's January 19, 2010 Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, she stated that "Defendants had a non-discretionary duty to warn the individual Plaintiffs about the nature of the experiments." Dkt. No. 59 at 16. Plaintiffs argue that CIA's involvement, even if only through its third party contracts, is relevant to Plaintiffs' claim regarding CIA's responsibility to notify test subjects of the drug exposure and potential health effects.

Defendants repeatedly argue that the CIA never conducted any human testing experiments. However, clearly, there is a discrepancy in the production of documents that casts doubt and alleges CIA participation in the drug tests and experiments on military personnel. Therefore, this Court overrules Defendants' objections and orders Defendants to designate a witness to testify to Topics 20, 22-24.

5.6 Topic 32: Test Subjects' Attempts to Withdraw Consent or Refusal to Participate in the Test Programs

Topic 32 seeks testimony concerning the circumstances involving an attempt, by any test subject to withdraw consent or refuse to participate in an experiment conducted in the test programs.

In his declaration in support of Defendants' Opposition, Lloyd Roberts of the U.S. Army Medical Research Institute of Chemical Defense states that, according to the 1976 DAIG Report, Defendants are only aware of six volunteers who refused to participate after arriving at Edgewood Arsenal**.** Their names are unknown and to identify them would require Mr. Roberts to individually review 6,723 personnel files to determine if those individuals' refusals were noted in their records. Mr. Roberts states that this review would require approximately 1680 man-hours of effort, each record averages 70 pages in length and would require an estimated 15 minutes to review the individual records in its entirety. Mr. Roberts declares that under present staffing he would be the only staff member available to conduct this review of the records and would then be unable to tend to his other duties for at least 10 months. Defendants' objection to this topic is stated with specificity and reason.

This Court finds that at this point of the litigation, requiring Defendants to designate a witness for this topic would be overly burdensome.

Concurrently filed with this motion was Plaintiffs' Motion for Protective Order which governs documents designated as confidential. The protective order was negotiated between the parties particularly to protect medical records and personnel files under the Privacy Act. This Court granted Plaintiffs' Protective Order; therefore, Defendants are free to disclose all 6,723 personnel records to Plaintiffs. This Court recommends that Plaintiffs review all records to determine whether there were any attempts to withdraw consent noted in the records. After Plaintiffs' review of the personnel documents, Plaintiffs may file an amended 30(b)(6) notice to designate witnesses to testify concerning Topic 32 and ask specific questions regarding the personnel files if necessary. Therefore, this Court sustains Defendants' objections and denies Topic 32 without prejudice

5.7. Topic 34: Human Testing Conducted From 1975 to Date

Topic 34 seeks testimony regarding experiments or tests concerning existing or potential chemical or biological weapons done on veterans from 1975 to date. Plaintiffs argue that Defendants have a duty to warn and any newly acquired information from tests conducted after 1975 would be relevant to Plaintiffs' Notice claims. Defendants argue all testing on veterans ceased in 1975 and any DoD activities after 1975 would not be relevant to the testing conducted prior to 1975.

Current or more recent testing on veterans would likely yield information relevant to this action; however, Plaintiffs' topic, "Existing or potential chemical or biological weapons done on veterans," is extremely broad and would better serve this litigation if it were narrowed. This Court overrules Defendants' objections and orders Defendants to designate a witness to testify on the modified Topic 34 for experiments or tests concerning existing or potential chemical or biological weapons done on veterans from 1975 to date, limited to experiments or tests that involve the particular drugs discovered in this action.

5.8. Topic 36-37: Use of Patients from VA Medical Facilities as Test Subjects

Topics 36-37 concern the use of patients from DVA medical facilities as subjects for experiments involving the testing of potential chemical and/or biological weapons between 1943 and the present and the input or comments upon the protocols or tests conducted by DVA using veteran subjects.

Defendants reasonably argue that due to the passage of time, requiring Defendants to prepare witnesses concerning these alleged tests is burdensome and potentially duplicative of information Plaintiffs can obtain from a review of the produced documents. However, since Plaintiffs assert that Defendants have not made an adequate production of documents, Plaintiffs are left with neither documents nor witnesses to depose. This Court overrules Defendants' objections and order Defendants to designate a witness to testify to Topics 36-37.

5.9. Topics 44-48: Use of Septal Implants in Defendants' Test Programs and on Individual Plaintiff Bruce Price

Topics 44-48 seeks testimony on the design, purpose, function, use and health effects of any and all implants, devices, or foreign bodies inserted into a test subject, particularly septal implants inserted into Individual Plaintiff Bruce Price. These topics also seek testimony about the persons who performed such operations and any known health effects or impact on the removal of such objects.

Defendants argue that after thorough searches, they have been unable to find any information pertaining to septal implants. The only information they found on implantation of devices were nasal devices for pilots. However, Plaintiffs counter that there is evidence that Defendants sponsored brain implant testing through Tulane University. (Defs' Mtn for Protective Order Limiting Scope of Disc. Dkt. No. 140, at 23 and Decl. Of Kimberly L. Herb in Support, Ex. L at 2). Also, Plaintiff Bruce Price's septal implant is obvious evidence of

such research practices. Thus, there must be some available evidence at least of septal implants.

As discussed above, concurrently filed with this motion was Plaintiffs' Motion for Protective Order, which was granted by this Court. This Court recommends that Plaintiffs review all test subject army personnel records for any evidence of septal implants, after Defendants' disclosure of documents. After Plaintiffs' review of the personnel documents, Plaintiffs may file an amended 30(b)(6) notice to designate witnesses to testify concerning Topics 44-48 and ask specific questions regarding the personnel files if necessary. Therefore, this Court sustains Defendants' objections and denies Topics 44-48 without prejudice

5.10. Topic 50: Application of MKULTRA Materials to Unwitting Subjects in Normal Life Settings

Topic 50 concerns the final testing of MKULTRA materials or substances used, as alleged in Paragraph 130(e) of and Exhibit B to the FAC, when the CIA entered into an informal agreement with the Federal Bureau of Narcotics ("FBN") whereby the "FBN operated safehouses in [] San Francisco and New York where they secretly administered experimental substances to the patrons of prostitutes."

Defendants originally objected to designating witnesses for this topic based on grounds of relevance and privilege. However, health effects of drugs used in MKULTRA, known from to be similar to those in Edgewood Arsenal testing, are relevant to Plaintiffs' notice and healthcare claims.

Defendants claim that this topic includes testimony subject to the state secrets privilege under 50 U.S.C. § 403g. However, claims of state secrets privileges cannot be invoked lightly, "there must be [a] formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege." *U.S. v. Reynolds*, 345 U.S. 1, 7-8 (1953). Defendants counter that it is

still premature whether it is necessary for Defendants to formally invoke the state secrets privilege and they are not required to formally invoke it until the court determines that Defendants' other objections to discovery do not protect the information. *Mohamed v. Jeppesen Dataplan, Inc.,* 614 F. 3d 1070, 1080-81 (9th Circ. Sept. 8, 2010) (state secrets privilege may be asserted at any time), *Freeman v. Seligson*, 405 F.2d 1326, 1338 (D.C. Cir. 1968) (stating that "matters of privilege can appropriately be deferred for definitive ruling until after the production demand has been adequately bolstered by a general showing of relevance and good cause, and at least the rough dimensions of the [government's] burden has been set"). Defendants reserve the right to invoke the privilege.

If Defendants intend to formally invoke the state secrets privilege with respect to Topic 50, they should do so. This Court overrules Defendants' objections and orders Defendants to designate a witness to testify to Topic 50, if Defendants do not formally invoke the state secrets privilege.

5.11. Topic 51: Studies and Experiments Conducted By Paul Hoch

Topic 51 requests testimony on communications and meetings between Defendants and Dr. Paul Hoch concerning the studies or experiments identified in Paragraph 134 of the FAC, and all related documents.

Topic 51 is relevant to Plaintiffs' claims because Plaintiffs allege in their FAC that Dr. Paul Hoch's drug research studies were funded by the government and caused the death of a patient, Harold Blauer. However, Mr. Blauer was not in the military and not part of the alleged testing at Edgewood Arsenal or other military bases. As Defendants argue, Dr. Hoch and his studies were thoroughly investigated and litigated over a period of 10 years. (*Barrett v. U.S.*, 660 F. Supp. 1291 (S.D.N.Y. 1987) (brought by Mr. Blauer's Estate)). The *Barrett* opinion is approximately 30 pages and provides a thorough summation of litigation history and factual background, which may be more beneficial than requiring Defendants to educate a witness to testify on the matter.

Additionally, Defendants have noted a document that on its face says the CIA was not involved with the death of Mr. Blauer. The document is an August 13, 1975 Memorandum from the CIA Inspector General regarding the death of Harold Blauer. (Vecchio Decl. In Support Mtn to Compel 30(b)(6) Depo, Ex. M). It states that an investigation was conducted following Mr. Blauer's death and the results were negative concerning any evidence of CIA association. *Id.* If there was any CIA connection, it would possibly involve Army use of funds CIA transferred to the Army in support of a mutual program. *Id.* The attached page also indicates that CIA was advised that, "we had no funds involved nor were we involved in any way." *Id.* Thus, it seems there is conflicting information whether CIA was involved with Dr. Hoch's studies and the death of Mr. Blauer.

Although deposition testimony concerning Dr. Hoch and his studies would be relevant, it seems less relevant than other topics because Mr. Blauer was not military personnel and the testing was not conducted on a military base or conducted by military staff. There is also evidence that CIA may not have been involved at all. Therefore, this Court sustains Defendants' objections and denies Plaintiffs' request for designation of a witness to testify on Topic 51. This Court recommends that Plaintiffs review the *Barrett* opinion to cover this topic.

5.12. Topic 52: The Basis For Redactions to the 1963 Inspector General Report

Topic 52 concerns the basis for each redaction on the 1963 CIA IG Report. Plaintiffs ask for the opportunity to challenge Defendants' redaction of the 1963 CIA IG Report. Defendants argue that the redactions are fairly minor (single-line/word redactions on four of 42 pages, paragraph redaction on one page, and one page redaction) and warranted because the information is either protected from disclosure by the 403g privilege or classified. Neither party provides any authority that either allows or does not allow Plaintiffs to challenge the basis for redactions. Therefore, this Court overrules Defendants' objections and Defendants are required to designate a witness to testify on the basis for

redactions of the 1963 CIA IG Report, bearing in mind that Defendants are not required to disclose any privileged or classified information.

5.13. Topic 54: Confidential Army Memorandum Concerning the Use of Volunteers in Research

Topic 54 concerns the CONFIDENTIAL Memorandum numbered Item 3247 identified in paragraph 118 of the FAC, from the DOA Office of the Chief of Staff concerning "Use of Volunteers in Research."

Defendants reiterate arguments set forth above regarding passage of time and that requiring Defendants to educate a witness to testify on the topic is overly burdensome. However, Plaintiffs argue that this 1953 Confidential Memorandum Item 3247 is essential to their claims because it is an army directive that is a source of Defendants' duty to provide medical treatment and hospitalization of all test subjects. Plaintiffs argue that unless Defendants concede that (a) the Directive sets forth an enforceable duty, (b) Defendants have not fulfilled this duty, and (c) Plaintiffs are entitled to an order requiring Defendants to provide healthcare as required by the Directive, Plaintiffs are entitled to depose a knowledgeable witness on this Topic.

Since this document is vital to claims and defenses, this Court finds that Defendants' claim of burden due to passage of time is not sufficient to avoid their discovery responsibilities. This Court overrules Defendants' objections; therefore, Defendants shall to designate a witness to testify to Topic 54.

6. Plaintiffs' Motion to Compel Compliance with June 16, 2010 30(b)(6) Deposition Notices

This Court finds that given the multiple discovery requests by Plaintiffs and the voluminous amount of discovery anticipated in this action, it is premature to insist that deposition testimony should be taken now regarding Defendants' efforts to comply with the requests for production of documents. Instead, it is more important that Defendants comply with these requests rather than prepare witnesses to testify about these requests.

To move all discovery forward, this Court denies without prejudice Plaintiffs' Motion to Compel Compliance with June 16, 2010 30(b)(6) Deposition Notices regarding Defendants' inadequate document production. Plaintiffs are allowed to revisit the issue dependent on Defendants' compliance with the Motion for Production of Documents.

C. Defendants' Motion For Protective Order Limiting Scope of Discovery is DENIED WITHOUT PREJUDICE (Docket #140)

A party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Information is relevant if it appears "reasonably calculated to lead to the discovery of admissible evidence." *Id*. "The court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2)(C). Rule 26(c)(1)(D) provides that "the court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,...by forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters."

Defendants make a number of arguments in support of their Motion for Protective Order Limiting Scope of Discovery. These arguments fall into four broad categories: (1) the Court has already ruled on some of Plaintiffs' claims; (2) Defendants have previously conducted extensive investigations of the "Test Programs;" (3) this Court should prohibit duplication of prior investigations; and (4) this Court should exclude irrelevant, protected, overly broad, and unduly burdensome requests.

The Proposed Order Granting Defendants' Motion for Protective Order Limiting Scope of Discovery requests that this Court exclude the following specific categories of information from discovery in this case:

1. Animal testing and research;
2. Operational use of chemical and biological agents;
3. CIA programs and activities that do not reflect on testing on military service members;

4. Tests that were not conducted on service member volunteers or as part of the test programs;
5. The identity of individuals and institutions protected by 50 U.S.C. §§ 403-1(i)(1) & 403g;
6. Requests that are not tailored to agents used on Defendant DoD's test program volunteers;
7. Requests that encompass a broad swath of irrelevant documents;
8. Requests that seek information from DoJ and do not pertain to the notification of test participants;
9. Requests that seek a reinvestigation of issues previously examined;
10. Requests that are being investigated as part of the Battelle investigation.

In light of the unresolved issues surrounding Defendants' responses to Plaintiffs' requests for production, Defendants' proposed protective order is an inappropriate method of limiting discovery at this stage of litigation. Defendants have been ordered to re-respond to Plaintiffs' discovery requests in a way that will provide this Court and the Plaintiffs with more information with which to evaluate Defendants' objections. This Court DENIES WITHOUT PREJUDICE Defendants' Motion for Protective Order Limiting Scope of Discovery.

D. Plaintiffs' Motion For Sanctions is DENIED WITHOUT PREJUDICE (Docket #131)

While the parties have engaged in vigorous discovery practice, this Court is not inclined to impose sanctions at this time. However, if either party engages in future unjustifiable discovery recalcitrance, this Court will impose applicable Rule 37 sanctions on the offending party.

V. Conclusion

This Court hereby GRANTS IN PART and DENIES IN PART Plaintiffs' Motion to Overrule Objections and to Compel Production of Documents. Specifically:

1. This Court DENIES WITHOUT PREJUDICE Plaintiffs' Motion to Overrule Objections and Compel Production of Documents Responsive to Plaintiffs' First Set of Requests for Production. Instead, this Court ORDERS the

parties to amend their requests and responses to conform with this Court's protocol recommendations.

2. This Court DENIES Plaintiffs' Motion to Overrule Defendants' General Objection 5. Instead, this Court ORDERS Plaintiffs to modify the definition of "Test Programs."

3. This Court GRANTS IN PART Plaintiffs' Motion to Overrule Defendants' General Objection 5.

4. This Court DENIES Plaintiffs' Motion to Overrule Objections and Compel Production of Documents responsive to Plaintiffs' second and third sets of requests for production.

This Court hereby GRANTS IN PART AND DENIES IN PART Plaintiffs' Motion to Overrule Objections and to Compel 30(b)(6) Depositions. Specifically:

1. This Court GRANTS Plaintiffs' Motion to Compel in part and orders Defendants to designate knowledgeable witnesses to testify to Plaintiffs' November 16, 2009 30(b)(6) Deposition regarding Topics 2-3, 10-11, 14, 17, 20, 22-24, 34 as modified, 36-37, 50 if Defendants do not invoke formal privileges, 52 and 54.

2. This Court DENIES WITHOUT PREJUDICE Plaintiffs' Motion to Compel November 16, 2009 30(b)(6) Deposition regarding Topics 32, and 44-48.

3. This Court DENIES WITH PREJUDICE Plaintiffs' Motion to Compel November 16, 2009 30(b)(6) Deposition regarding Topic 51.

4. This Court DENIES WITHOUT PREJUDICE Plaintiffs' Motion to Compel June 16, 2010 30(b)(6) Deposition Notices regarding Defendants' inadequate document production. Plaintiffs are allowed to revisit the issue dependent on Defendants' compliance with the order on Plaintiffs' Motion for Production of Documents.

This Court hereby DENIES WITHOUT PREJUDICE Defendants' Motion for Protective Order Limiting Scope of Discovery.

This Court hereby DENIES WITHOUT PREJUDICE Plaintiffs' Motion for Sanctions. Compliance is due within 20 days of issuance of this order.

IT IS SO ORDERED.

DATED: November 12, 2010.

JAMES LARSON
United States Magistrate Judge