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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 Noticed Motion Date and Time: January 13, 2011 2:00 p.m. **DEFENDANTS' PARTIAL MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT**

NOTICE OF MOTION AND DEFENDANTS' PARTIAL MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

Please take notice that on January 13, 2011, or as soon thereafter as counsel may be heard by the Court, before the Honorable Claudia Wilken in the United States District Court for the Northern District of California, located at 1301 Clay Street, Courtroom No. 2, Oakland, CA

94612-5212, Defendants, by and through their attorneys, will, and do hereby, move the Court to grant Defendants' Partial Motion to Dismiss Plaintiffs' Third Amended Complaint in the above captioned matter.

Defendants move pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Their motion is based on this Notice, the accompanying Memorandum and attachments thereto, the pleadings in this matter, and on such oral argument as the Court may permit. A proposed order is attached.

Dated: December 6, 2010

Respectfully submitted,

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INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants United States; Central Intelligence Agency and its Director Leon Panetta (collectively, "CIA"); United States Attorney General Eric Holder; and Department of Defense, its Secretary Robert M. Gates, Department of the Army, and its Secretary Pete Geren (collectively, "DoD") hereby move to dismiss, in part, the claims asserted in Plaintiffs' recently filed Third Amended Complaint ("3AC").[1] These issues raise pure legal questions that are ripe for resolution. Furthermore, resolution of the issues discussed herewith will significantly streamline the case and facilitate prompt resolution of Plaintiffs' remaining claims against Defendants.

This case involves government test programs concerning chemical and biological agents. It presents three narrow legal issues for the Court's consideration: (1) whether the service members who participated in the test programs are entitled to notice of the chemicals to which they were exposed and any known health effects ("notice claim"); (2) whether Defendants are obligated to provide medical care to the individual Plaintiffs ("health care claim"); and (3) the validity of the secrecy oaths. *See Order Granting in Part and Denying in Part Defs.' Mots. to Dismiss and Den. Defs.' Alternative Mot. for Summ. J.* ("Ct. Order on Defs.' Mots. to Dismiss") (Jan. 19, 2010) (Dkt. No. 59).

With regard to the CIA, Plaintiffs claim that the CIA must provide notice to service members of the test programs and any known health effects. This claim must be dismissed because it is based solely on an alleged state common law tort duty that does not create an enforceable legal right against the CIA. Alternatively, even if this alleged state tort common law duty could provide Plaintiffs with an enforceable legal right against the CIA, this Court would

[1] Defendant Department of Veteran Affairs does not seek to dismiss claims against it as part of this motion.

have no jurisdiction over the notice claim because it is forbidden by the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346. Finally, Plaintiffs' claim that service member participants in the test programs are entitled to health care is based on DoD policy and regulations that, by their plain terms, do not apply to the CIA and cannot form the basis for relief against it. Accordingly, the Court does not possess jurisdiction to adjudicate these claims against the CIA.

With regard to the Attorney General and DoD, Plaintiffs have failed to state a claim upon which relief can be granted. Under well-established case law, Plaintiffs must plead factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949 (2009). In this case, Plaintiffs' claims are premised on section 706(1) of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, permitting judicial review of agency action unlawfully withheld or unreasonably delayed. However, Plaintiffs have not identified in their Third Amended Complaint any facts or legal authority under which the Attorney General undertook a duty to provide notice to service members, and Plaintiffs have failed to make any factual allegations that the Attorney General administered secrecy oaths or was legally obligated to provide health care. Accordingly, the Attorney General should be dismissed from this lawsuit. Finally, the DoD policy and regulations cited by Plaintiffs to support their claim to medical care against DoD make clear, on their face, that those documents may not be the source of an entitlement to medical care arising out of testing on service members. As such, Plaintiffs have not pled adequately that DoD failed to take required and discrete agency action, as mandated by the APA, and the health care claims should be dismissed against DoD as a result.

BACKGROUND

This case arises out of the testing of chemical and biological agents by the U.S. Army during the cold war era. Plaintiffs allege that they, and other service members, have been harmed

as a result of chemical and biological tests conducted at Edgewood Arsenal, a U.S. Army research facility in Maryland, and several other military installations. (*See, e.g.*, 3AC ¶ 20.) Because this Court is well aware of the allegations in the Third Amended Complaint, and because those allegations are largely irrelevant to the legal issues to be decided here, they will not be repeated herein. As it must, this Motion assumes that Plaintiffs' well-pled factual allegations are true. *See NL Indus., Inc.v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *see also Iqbal*, 129 S. Ct. at 1949–50 (stating that "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are not taken as true).

In their Second Amended Complaint, Plaintiffs asserted violations of the Constitution, executive and military directives, and international law. (Second Am. Compl. ¶¶ 183–86, 189, 195.) They sought declaratory and injunctive relief requiring Defendants to release the individual Plaintiffs from secrecy oaths; notify them and all military test participants of the tests in which they participated, their exposures and any known health effects; to search for and provide participants with available documentation concerning the tests; and to provide participants with medical examinations and care.[2] (*Id.* ¶¶ 183–84, 189.)

By order dated January 19, 2010, this Court granted in part Defendants' motion to dismiss, leaving a narrow set of claims remaining. The remaining issues are: (1) whether the Plaintiffs are entitled to notice of the chemicals to which they were exposed and any known health effects; (2) whether Defendants are obligated to provide medical care to the individual Plaintiffs; and (3) the validity of the secrecy oaths. *See* Ct. Order on Defs.' Mots. to Dismiss. Plaintiffs then filed a Third Amended Complaint, (Dkt. 180), on November 18, 2010. In this

[2] Plaintiffs also sought a declaration that the "*Feres* doctrine" – the Supreme Court's holding that the Federal Torts Claims Act bars tort suits against the government for injuries arising out of or incident to military service, first articulated in *Feres v. United States*, 340 U.S. 135 (1950) – is unconstitutional. The Court dismissed Plaintiffs' challenge to the *Feres* doctrine. (Order of Jan. 19, 2010 at 19–20.)

Complaint, although Plaintiffs reserved their appellate rights with respect to all of its original claims, including those dismissed by the Court, Plaintiffs only seek to reassert those claims that remain in the wake of this Court's prior ruling.[3] (*Id.* at 1 n.1; *id.* at ¶¶ 182, 188, 190.)

As is the case with their Third Amended Complaint, Plaintiffs' prior complaints were not models of clarity. Among other problems, Plaintiffs frequently levy allegations against the collective "Defendants" without specifying which particular agency participated in the alleged conduct. As an example, Plaintiffs allege that the "Defendants . . . sought formal authority to recruit and use human subjects in a chemical warfare experiment" in 1942, (3AC at ¶ 103), which is impossible as to the CIA because it was not created until 1947, as Plaintiffs separately admit, (*id.* at ¶ 92). This conflation is also present with respect the legal allegations in the complaints, where Plaintiffs frequently allege that the "Defendants" have certain legal obligations without acknowledging that the CIA and Attorney General are distinct entities from the Department of Defense and U.S. Army.

STANDARDS OF REVIEW

Rule 12(b)(1) of the Federal Rules of Civil Procedure requires a court to dismiss a claim if the court lacks subject matter jurisdiction. "Federal courts are courts of limited jurisdiction," *United States v. Marks*, 530 F.3d 799, 810 (9th Cir. 2008), and "[a] federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *A-Z Int'l v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003) (citation and quotations omitted). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*,

[3] Based upon Plaintiffs' concession in the Third Amended Complaint that they are not seeking to pursue those claims that the Court previously dismissed, (3AC at 1 n.1), Defendants do not move anew to dismiss those claims.

511 U.S. 375, 377 (1994) (citations omitted); *see also Casey v. Lewis*, 4 F.3d 1516, 1519 (9th Cir. 1993) ("Federal courts are presumed to lack jurisdiction, 'unless the contrary appears affirmatively from the record.'") (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 (1986)). Jurisdictional defenses can be raised at "any time during the proceedings," *May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1216 (9th Cir. 1980), and "cannot be waived." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983).

Under Fed. R. Civ. P. 12(b)(6), as recently explained by the Supreme Court, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2008)). To establish "plausibility" under *Iqbal*, the plaintiff must plead factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Plausibility" requires more than a "sheer possibility that a defendant has acted unlawfully," and a complaint that alleges facts that are "merely consistent with" liability "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (citing *Twombly*, 550 U.S. at 557).

Accordingly, the Court in *Iqbal* articulated a two-pronged approach to analyzing the sufficiency of a complaint under Federal Rule of Civil Procedure 8(a). First, the Court should identify pleadings that are nothing more than legal conclusions, as such pleadings are not entitled to the assumption of truth. *Id. at* 1950. Stated differently, mere bare recitals of the elements of a cause of action will not suffice. *Id.* at 1949. Second, the Court should assume the veracity of those allegations that are well-pled and determine, based upon those well-pled allegations, whether plaintiff has alleged a plausible claim under Rule 8(a). *Id.*

ARGUMENT

I. PLAINTIFFS' NOTICE AND HEALTH CARE CLAIMS AGAINST THE CIA MUST BE DISMISSED.

The CIA seeks dismissal of two of Plaintiffs' claims against it: (1) Plaintiffs' claim that the CIA is obligated to provide the individual Plaintiffs with notice of chemicals to which they were allegedly exposed and any known health effects related thereto; and (2) Plaintiffs' claim that the CIA is obligated to provide medical care to the individual Plaintiffs.[4] As discussed below, Plaintiffs' claims should be dismissed.

A. Plaintiffs' Notice Claim Is Based on a State Tort Common-Law Duty That Is Not Enforceable Against the CIA Through the APA; Accordingly, This Claim Should Be Dismissed.

Liability may be imposed upon instrumentalities of the United States such as the CIA only if two requirements are met: (1) there must be a waiver of sovereign immunity; and (2) there must be a source of substantive law that provides a claim for relief against that instrumentality. *See U.S. Postal Serv. v. Flamingo Indus.*, 540 U.S. 736, 743 (2004); *F.D.I.C. v. Meyer*, 510 U.S. 471, 483-84 (1994); *Currier v. Potter*, 379 F.3d 716, 724 (9th Cir. 2004). A waiver of sovereign immunity by itself is not sufficient; both conditions must be established by the plaintiffs. As the Supreme Court has stated, "An absence of immunity does not result in liability if the substantive law in question is not intended to reach the federal entity." *Flamingo Indus.*, 540 U.S. at 744.

Although section 702 of the APA provides a waiver of sovereign immunity for certain claims seeking non-monetary relief, that section "does not create substantive rights." *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration*, 959 F.2d 742, 753 (9th Cir. 1991); *see also Hill v. United States*, 571 F.2d 1098, 1102 n.7 (9th Cir. 1978) (Section 702 "does not purport to grant any substantive rights."). As explained by the Fifth Circuit in *Stockman v. F.E.C.*, 138 F.3d 144

[4]Defendants do not presently move to dismiss the secrecy oath claim as part of this Motion to Dismiss.

(5th Cir. 1998), "the provisions of the APA 'do not declare self-actuating substantive rights, but rather, . . . merely provide a vehicle for enforcing rights which are declared elsewhere." *Id.* at 151 n.14 (citation omitted).

Thus, to sustain their claims, Plaintiffs must identify a source of substantive law that would require the CIA to provide notice to Plaintiffs. In this case, however, Plaintiffs solely rely on state tort law for the source of the alleged substantive right. Because state tort law is not cognizable as a substantive right under the APA and because the FTCA cannot serve as the basis for Plaintiffs' entitlement to relief, Plaintiffs notice claim against the CIA must fail. Accordingly, this claim should be dismissed.

1. Plaintiffs' Notice Claim Against the CIA Is Based on an Alleged Duty Under State Tort Law.

Plaintiffs allege that the CIA has a legal duty to notify service members about government test programs and the known health effects of substances administered pursuant to those programs, as well as a duty to provide all available documents and evidence concerning their exposures. (3AC ¶¶ 183, 184, 189.) This Court previously held that the sole potential legal basis for this claim against the CIA is stated in a 1978 Department of Justice letter and memorandum regarding the CIA's MKULTRA program. (Ct. Order on Defs.' Mots. to Dismiss at 15 (citing Letter and Memorandum from John M. Harmon, Department of Justice, Office of Legal Counsel, to Anthony A. Lapham, General Counsel, CIA ("DOJ Letter and Memorandum") (attached as Ex. A to the 3AC)).) The DOJ Letter and Memorandum reached the following conclusion:

> [T]he CIA may well be held to have a legal duty to notify those MKULTRA drug-testing subjects whose health the CIA has reason to believe may still be adversely affected by their prior involvement in the MKULTRA drug-testing program; that an effort should thus be made to notify these subjects; . . . and, while the CIA might lawfully ask another agency to undertake the notification effort in this instance, the CIA also has lawful authority carry out this task on its own.

(Ex. A to 3AC at 6.) The DOJ Letter and Memorandum further stated that the CIA, "having created the harm or risk" to the MKULTRA test participants' health, has a duty

"to notify the individuals as an effort directed at rendering assistance and preventing further harm." (*Id.* at 2.)

Importantly, the DOJ Letter and Memorandum makes clear that this legal duty arises from a common law duty under ***state tort law***. First, in trying to decipher the government's "duty under the common law of torts," the DOJ Letter and Memorandum cites cases and other legal authorities that are all based on state tort duties. (*Id.* at 14-20). It also expressly states that courts "commonly speak of the government's obligations under state law, and would most likely do so in this case." (*Id.* at 14 (internal citation omitted).) Second, the Letter and Memorandum does not make reference to any similar duties that might arise under any federal legal authority. Nor could it have, as there is no corresponding *federal* common law duty to provide notice. *See Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) ("'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'" (citation omitted)); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) (noting "that federal courts have no authority to derive 'general' common law"). Accordingly, the DOJ Letter and Memorandum contemplates that this legal duty may be enforced, if at all, through the FTCA.

In sum, the legal duty that Plaintiffs are attempting to impose on the CIA through their notice claim does not arise from an independent federal legal authority.[5]

[5] Although Plaintiffs' Third Amended Complaint cites statements from the CIA to Congress about its potential notice obligations, (3AC at ¶ 13), this Court has already held that such statements are "not sufficient to establish a legally enforceable obligation." Order Granting in Part and Denying in Part Plaintiffs' Motion to File a Third Amended Complaint, at 16 (Nov. 15, 2010) (Dkt. No. 177). Additionally, Plaintiffs do not claim, nor could they, that the DOJ Letter and Memorandum by itself creates a substantive legal right. Finally, Plaintiffs do not appear to assert that DoD policy and regulations form the basis for their notice claim against the CIA, but if they were to make such a contention, it would be meritless for the same reasons discussed in Section I.C below.

Accordingly, Plaintiffs' claim of legal entitlement to notice from the CIA is based solely on state law, as potentially enforced through the FTCA.

2. Plaintiffs Have Not Established That This Alleged State Tort Duty Creates a Legally Enforceable Obligation on the CIA That May Be Enforced Through the APA.

Having established that Plaintiffs' notice claim rests on a state common law duty, the next question for this Court is whether this duty may be the source of a substantive right to be enforced against the CIA. This Circuit has stated that courts must look to whether "Congress . . . create[d] a substantive right upon which [the plaintiff's] claim for relief could be based." *Hill*, 571 F.2d at 1102. As recognized by this Court and others, this substantive right, in turn, must come from a federal authority, typically either federal statutes or regulations. (*See* Order Granting in Part and Denying in Part Pls.' Mot. to File a Third Am. Compl. ("Ct. Order on Pls. Mot. to File Third Am. Compl.") at 16 (Dkt. No. 177) (finding that Plaintiffs have not identified "any *statute or regulation* that compels the [Department of Veterans Affairs] to participate in the notification process" (emphasis added)); *see also El Rescate Legal Services, Inc.*, 959 F.2d at 753 ("There is no right to sue for a violation of the APA in the absence of a 'relevant statute' whose violation 'forms the legal basis for [the] complaint.'" (citation omitted)); *Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 793 (8th Cir. 1996) ("[T]he plaintiff must identify a substantive statute or regulation that the agency action had transgressed *and* establish that the statute or regulation applies to the United States." (emphasis in original)).

While, as a general matter, a federal statute may be the source of a substantive right, case law makes clear that the APA is not such a statute as it does not by itself create substantive, enforceable rights. As stated by one court, "[b]y its terms, the APA grants a person aggrieved by agency action the right to judicial review thereof." *Comm. of Blind Vendors of D.C. v. District of Colum*bia, 28 F.3d 130, 134 (D.C. Cir. 1994). It does not, however, "apply to [state] common-

law causes of action against an agency."[6] *Id.*; *see also In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 255 (5th Cir. 2006) ("That state law defines certain conduct as tortious . . . simply does not mean that a private person may sue the U.S. Government solely under the state's law.").[7] As articulated in a case, "the APA does not borrow state law or permit state law to be used as a basis for seeking injunctive or declaratory relief against the United States." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 854 (D.C. Cir. 2010) (J. Kavanaugh, concurring); *see also id.* ("[A]ny . . . state-law cause of action may not be brought against the United States absent congressional authorization to that effect."). Accordingly, the state tort-law claim identified in the DOJ Letter and Memorandum cannot provide a substantive right to notice that may be enforced through the APA.[8]

Nor can the FTCA be a source of the substantive right in this APA case.[9] To the extent Congress permitted tort liability under the FTCA, such claims may only be brought in the manner

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[6] Indeed, DOJ issued its letter and memorandum in 1978, two years after Congress amended section 702 of the APA to waive sovereign immunity to provide judicial review. If the APA provided a substantive right, the DOJ Letter and Memorandum would have relied upon it, but the APA is not mentioned in the letter or memorandum.

[7] This issue is distinct from the question of whether the state tort-law duty cited by Plaintiffs creates a sufficiently discrete and non-discretionary duty that can form the standard for judicial review under 5 U.S.C. § 706(1) ("compel[ing] agency action unlawfully withheld or unreasonably delayed). Instead, this issue goes to the broader and more fundamental question of whether the alleged state tort law cited by Plaintiffs is a substantive right that may be judicially enforced against the federal government through the APA (or any other statute for that matter).

[8] If Plaintiffs' position were correct, the implication for our federal system would be significant. Under Plaintiffs' theory, any state law in the country could potentially be imposed on federal agencies through the APA, regardless of whether Congress so intended. Such a rule would effectively allow the states to regulate the federal government, thereby upending well-established principles of federal sovereignty. For these reasons, the law "clearly reject[s] the conception of the APA as substantive, mandating free-wheeling judicial review of any agency action." *Preferred Risk*, 86 F.3d at 793.

[9] First, it must be noted that Plaintiffs have failed to plead a claim based on the FTCA. Second, even if Plaintiffs were to do so and had properly exhausted their administrative remedies, the FTCA is the single, substantive mechanism through which potential tort claims may pursue relief against the federal government. However, non-monetary relief, such as the declaratory and injunctive relief sought by Plaintiffs here, is not available under the FTCA. *Moon v. Takisaki*,

(Footnote continues on next page.)

provided in that comprehensive and carefully-crafted statutory scheme. If this Court were to hold otherwise, it would contravene this Circuit's holding that "[t]he FTCA is the exclusive remedy for tortious conduct by the United States . . . ." *F.D.I.C. v. Craft*, 157 F.3d 697, 706 (9th Cir.1998). It would allow Plaintiffs to circumvent the fact that non-monetary relief, such as the declaratory and injunctive relief sought by Plaintiffs here, is not available under the FTCA. *See infra* Part I.B; *Moon v. Takisaki*, 501 F.2d 389, 390 (9th Cir. 1974) ("The [FTCA] makes the United States liable in money damages for the torts of its agents under specified conditions, but the Act does not submit the United States to injunctive relief.") Furthermore, Among other things, permitting state tort liability against the United States and its instrumentalities outside of the FTCA would circumvent all of the express limitations that Congress provided in that statute, such as the discretionary function exception, the intentional torts exception, and the exception for torts committed in a foreign country,[10] as well as the two-year statute of limitations and requisite administrative proceedings.[11]

Additionally, even when claimants do point to a federal law that may provide relief (which Plaintiffs have not done here), courts have not lightly inferred that Congress intended for federal statutes to create substantive rights that are enforceable against the United States and its agencies. For example, in *Sea-Land Servs., Inc. v. Alaska R.R.*, 659 F.2d 243 (D.C. Cir. 1981), the D.C. Circuit held that a plaintiff could not seek non-monetary recovery for violations of the antitrust laws even though section 702 waived sovereign immunity. *Id.* at 245. The court

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(Footnote continued from previous page.)

501 F.2d 389, 390 (9th Cir. 1974) ("The [FTCA] makes the United States liable in money damages for the torts of its agents under specified conditions, but the Act does not submit the United States to injunctive relief.")

[10] *See* 28 U.S.C. § 2680.

[11] *See* 28 U.S.C. § 2401(b); 28 U.S.C. §§ 2671-80.

explained that the Sherman Act "does not expose United States instrumentalities to liability, whether legal or equitable in character, for conduct alleged to violate antitrust constraints." *Id.* The court then concluded that it "should not infer" liability against the United States "from the silence of Congress." *Id.* at 247. Similarly, in *Preferred Risk Mutual Insurance Co.*, the Eighth Circuit held that because there was no evidence the Congress intended for the Lanham Act to apply to the United States, alleged trademark violations by the federal government could not be remedied through the APA. 86 F.3d at 793.

In the present case, Plaintiffs' notice claim rests solely on a state common-law duty. As discussed above, the APA cannot be a mechanism for the enforcement of a state common-law duty. The FTCA also fails to provide a substantive right entitling Plaintiffs to declaratory and injunctive relief against the CIA through the APA. In the absence of a clear, statutory entitlement to relief, such a right cannot be inferred. As a result, Plaintiffs have failed to establish an enforceable, substantive legal right to notice. This Court, accordingly, should dismiss Plaintiffs' notice claim as it applies to the CIA.[12]

B. Alternatively, This Court Has No Jurisdiction Over Plaintiffs' Notice Claim Against the CIA Under the APA Because It Is Impliedly Forbidden by the Federal Tort Claims Act.

Even if this Court were to find that state tort common law, or some other mechanism, created a substantive right to notice against the CIA, this Court nonetheless lacks jurisdiction

[12] Although courts are in agreement with the foregoing principles, which would require dismissal of Plaintiffs' notice claim, the relevant decisions have varied slightly regarding the basis for dismissal. In *Preferred Risk*, the Eighth Circuit found that, because the Lanham Act did not apply to the United States, the plaintiffs had not suffered a "legal wrong" or been "adversely affected or aggrieved . . . within the meaning of a relevant statute," as required in section 702. 86 F.3d at 792-93. In contrast, when the D.C. Circuit rejected plaintiff's attempt to bring a Sherman Act claim through the APA in *Sea-Land Services*, it instead focused on the fact that section 702 expressly provides that nothing therein "affects . . . the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 659 F.2d at 245. These decisions did not further explain whether dismissal under such circumstances would be for lack of jurisdiction or for failure to state a claim. Here, the CIA submits that dismissal of Plaintiffs' notice claim is appropriate under either theory.

under the APA. Section 702 of the APA does not waive sovereign immunity "if any other statute . . . impliedly forbids the relief which is sought." 5 U.S.C. § 702; *see also North Side Lumber Co. v. Block*, 753 F.2d 1482, 1484-85 (9th Cir. 1985). Here, the FTCA bars Plaintiffs' notice claim because the FTCA impliedly forbids claims against the United States seeking declaratory or injunctive relief. *See Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 863 (10th Cir. 2005) ("[T]he district court lacks subject matter jurisdiction under the FTCA to provide injunctive and declaratory relief."); *Takisaki*, 501 F.2d at 390 ("The [FTCA] makes the United States liable in money damages for the torts of its agents under specified conditions, but the Act does not submit the United States to injunctive relief.").

As discussed above, this Circuit has expressly held that "[t]he FTCA is the *exclusive remedy* for tortious conduct by the United States . . . ." *F.D.I.C.*, 157 F.3d at 706 (emphasis added); *In re Supreme Beef Processors*, 468 F.3d at 252 n.4 (5th Cir. 2006) ("The FTCA provides the sole basis of recovery for tort claims against the United States."); *see also Kennedy v. U.S. Postal Serv.*, 145 F.3d 1077, 1078 (9th Cir.1998) (per curiam) ("The FTCA is the exclusive remedy for tort actions against a federal agency . . . ."). Congress simply did not intend that the carefully crafted and limited remedies it provided in the FTCA would be circumvented by a limited waiver of sovereign immunity in APA section 702. This conclusion is supported by the legislative history of section 702, which notes that its "partial abolition of sovereign immunity . . . does not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as government contracts, as well as patent infringement, *tort claims*, and tax claims." H.R. Rep. No. 1656, 94th Cong., 2d Sess. 13, reprinted in 1976 U.S. Code Cong. & Ad. News 6121, 6133 (emphasis added).

This Circuit's analogous holdings with respect to the interplay between the APA and the Tucker Act[13] also demonstrate that the FTCA impliedly forbids declaratory and injunctive relief under the APA. *See North Star Alaska v. United States*, 14 F.3d 36 (9th Cir. 1994); *North Side Lumber Co. v. Block*, 753 F.2d 1482 (9th Cir. 1985); *see also Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992); *Sharp v. Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986). These cases hold that section 702 of the APA does not waive sovereign immunity in contract-based claims against the federal government seeking equitable relief. *See North Star Alaska*, 14 F.3d at 38; *North Side Lumber*, 753 F.2d at 1484-86; *Transohio Sav. Bank*, 967 F.2d at 613; *Sharp*, 798 F.2d at 1523-24. In doing so, the courts relied on the fact that the Tucker Act "impliedly forbids" such equitable relief and only permits suits for money damages. *See e.g., Sharp*, 798 F.2d at 1523 ("The waiver of sovereign immunity in the Administrative Procedure Act does not run to actions seeking declaratory relief or specific performance in contract cases, because . . . the Tucker Act and Little Tucker Act impliedly forbid such relief."). These decisions also point to the legislative history cited above, providing that section 702 did "not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as government contracts, as well . . . tort claims . . . ." H.R. Rep. No. 1656, 94th Cong., 2d Sess. 13, reprinted in 1976 U.S. Code Cong. & Ad. News 6121, 6133 (emphasis added).[14]

Because the FTCA impliedly forbids Plaintiffs' notice claim against the CIA, there has been no waiver of sovereign immunity under section 702, and this Court has no jurisdiction over the claim. *Kaiser v. Blue Cross of Cal.*, 347 F.3d 1107, 1117 (9th Cir. 2003) (citation omitted)

[13] *See* 28 U.S.C. § 1346; 28 U.S.C. § 1491.

[14] These cases note that, while the Tucker Act would forbid claims based on contractual rights, it would not necessarily forbid claims under the APA that are based on *independent* statutory or constitutional rights. *See, e.g., North Side Lumber*, 14 F.3d at 1484. Applying this rule to the FTCA would not help Plaintiffs because, as established in Section I, Plaintiffs notice claim is only based on state tort law and does not arise from an independent federal authority.

("Absent a waiver of sovereign immunity, courts have no subject matter jurisdiction over cases against the government.").

C. Plaintiffs' Health Care Claim Against the CIA Has No Legal Basis, and Therefore It Must Be Dismissed.

As discussed above, a federal agency cannot be liable in an action brought under the APA "if the substantive law in question is not intended to reach the federal entity." *Flamingo Indus.*, 540 U.S. at 744. The substantive law that Plaintiffs cite to in support of their health care claim against the CIA stems from a DoD policy and an Army regulation. These authorities do not purport to have a binding effect on the CIA. Even if they did, there is no support for the proposition that these distinct federal agencies may regulate the CIA in this manner. Accordingly, Plaintiffs' health care claim against the CIA must be dismissed.

1. Plaintiffs' Health Care Claim Against the CIA Is Based on Department of Defense Policy and Regulations.

In its order on Defendants' Motion to Dismiss the Second Amended Complaint, this Court recognized that Plaintiffs' claim for "medical care arises from 'obligatory duties' imposed by Defendants' own regulations." (Ct. Order on Defs.' Mots. to Dismiss at 16.) The primary authority relied upon by Plaintiffs is an Army regulation referred to as "AR 70-25." *Id.* In their Third Amended Complaint, Plaintiffs assert that a duty to provide medical care also arises under DoD policy, as evidenced by the Wilson Memorandum and a 1953 memorandum from the Department of the Army Office of the Chief of Staff. (3AC ¶ 125.)

2. These Authorities Are Not Enforceable Against the CIA Under the APA.

In this case, the DoD policy and Army regulation cited by Plaintiffs do not purport to regulate the CIA. Even if they did, Plaintiffs have cited no authority for the proposition that the DoD or Army had the authority to regulate the CIA's provision of health care to individuals. It is well established that "an agency literally has no power to act . . . unless and until Congress

confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). A corollary to this proposition is that an agency cannot govern the conduct or obligations of another federal agency without the authority to so act. In *Clouser v. Espy*, 42 F.3d 1522 (9th Cir. 1994), this Circuit considered a case in which a claimant sought to stay the effect of a U.S. Department of Agriculture decision on the basis of a regulation from the U.S. Department of the Interior. *Id.* at 1534–35. The Court rejected this effort, finding that "[t]he Interior department regulation does not purport to instruct other agencies . . . about how to treat putative mining claims." *Id.* Moreover, the Court found that "even if the regulation did purport to do so, plaintiffs have cited no authority for the proposition that one agency may promulgate regulations that bind another agency in that way." *Id.*; *see also Reed v. Reno*, 146 F.3d 392, 397 (6th Cir. 1998) (stating that the Department of Justice "is not bound by the definitions set forth in the regulations promulgated by the OPM" where the relevant statute had not granted OPM the authority to promulgate definitions to which other agencies would be bound). (*See also* Ct. Order on Pls. Mot. to File Third Am. Compl. (finding that Plaintiffs have not identified "any statute or regulation that compels the [Department of Veterans Affairs] to participate in the notification process").)

In this case, much like *Clouser*, Plaintiffs have not cited any authority for the proposition that the DoD and Army had the authority to bind the CIA and require it to provide health care to individuals. Furthermore, not only did the DoD and Army lack the authority to impose such obligations on CIA, the DoD policy and Army regulation cited by Plaintiffs do not purport to do so. For instance, the Wilson Memorandum is from the Secretary of Defense and is addressed solely to the Secretaries of the Army, Navy, and Air Force. (Ex. C to 3AC at 1.) The substance of the memorandum makes clear that it is the "Secretaries of the Army, Navy and Air Force [who] are authorized to conduct experiments . . . within the limits prescribed" in the memorandum. (*Id.* at 3; *see also* Ex. A at 1 (cited at 3AC ¶ 125) (providing guidance on the "Use

of Volunteers in Research" to the Army Surgeon General").) Similarly, AR 70-25 expressly states it "applies to research, development, test, and evaluation (RDTE) programs conducted by the Active Army." (Ex. B at 1; *see also* Ex. C at 5 (noting that distribution of the AR 70-25 was limited to the "Active Army").)

As in *Clouser*, Plaintiffs have failed to identify any authority under which DoD may compel the CIA to take action. Moreover, even if it had such authority, DoD has made clear that its regulations concerning volunteer research only apply to the Department of the Army. Because Plaintiffs have failed to identify any legal basis in the Third Amended Complaint for obligating the CIA to provide health care, Plaintiffs' claims for medical care must fail and should be dismissed under Rule 12(b)(6).

II. PLAINTIFFS' CLAIMS AGAINST THE ATTORNEY GENERAL SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

Plaintiffs' Third Amended Complaint references the Department of Justice or Attorney General in only three paragraphs. Paragraph 13 alleges both that the CIA testified that it was working with the Attorney General regarding the identification of test participants and that the Attorney General participated in efforts to locate test participants. (3AC ¶ 13.) Paragraph 14 characterizes the DOJ Letter and Memorandum as to whether the CIA had a duty to locate participants in the CIA's MKULTRA program. (*Id.* ¶ 14.) The factual allegations in both of these paragraphs pertain solely to Plaintiffs' claim regarding the identification and notification of test participants. Plaintiffs make this explicit in Paragraph 98, when they state that the Attorney General "is named solely in his official capacity and in connection with the Attorney General's assumption of responsibility to notify the victims of biological and chemical weapons tests." (*Id.* ¶ 98.)

As an initial matter, because Plaintiffs have not made any factual allegations concerning the Attorney General's involvement in the conduct of the test programs, during which secrecy

oaths were allegedly administered, or the provision of health care to test participants, these claims must be dismissed as to the Attorney General.

Additionally, Plaintiffs' remaining claim relating to notice must be dismissed as to the Attorney General pursuant to Federal Rule of Civil Procedure 12(b)(6) because Plaintiffs have failed to identify any legal basis upon which the Attorney General is responsible for notifying former service members of government test programs. In paragraph 13 of the Third Amended Complaint, Plaintiffs make the following completely unsupported allegations against the Attorney General:

> . . . . Admiral Stansfield Turner, the CIA Director, promised to locate participants in the tests and compensate those whose conditions or diseases were linked to their exposures during the programs of human experimentation. Turner assured a joint Congressional Committee that the CIA was working with both the Attorney General and the Secretary of Health, Education and Welfare "to determine whether it is practicable . . . to attempt to identify any of the persons to whom drugs may have been administered unwittingly," and was "working to determine if there are adequate clues to lead to their identification, and if so, how to go about fulfilling the Government's responsibilities in the matter." ***Thereafter, the Attorney General assumed responsibility for the overall governmental effort to locate "volunteers," with the other DEFENDANTS providing a supporting role***. . . .

(*Id.* ¶ 13 (emphasis added) (internal citation omitted).) Plaintiffs fail to explain, however, the basis for their assertion of assumption of responsibility, and likewise do not identify or cite any legal authority under which the Attorney General could have "assumed responsibility for the overall governmental effort to locate 'volunteers.'"[15]

Most obviously, Plaintiffs identify no substantive law providing a right to relief against the Attorney General. *Cf.* Part I.A., *supra*. Moreover, as discussed above, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are not taken as true. *Iqbal*, 129 S. Ct. at 1949-50. Instead, Plaintiffs must plead factual content that "allows the court

[15] To the degree Plaintiffs seek to rest on CIA Director Turner's testimony, they cannot do so for the reasons articulated in Part I.C. Even if this Court were to assume that Plaintiffs' characterization of Admiral Turner's testimony was correct, the CIA cannot legally obligate the Attorney General to undertake action and provide notice to former test subjects.

to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1549. In this case, premised on APA section 706(1) permitting judicial review of agency action unlawfully withheld or unreasonably delayed, *Iqbal* requires that Plaintiffs show that the Attorney General "failed to take a *discrete* agency action that it is *required* to take." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original). Furthermore, Plaintiffs must demonstrate that the Attorney General's duty to take action is clear and express on its face, as judicial intervention under section 706(1) is warranted only "[w]hen agency recalcitrance is in the face of clear statutory [or regulatory] duty or is of such a magnitude that it amounts to an abdication of statutory [or regulatory] responsibility." *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1137 (9th Cir. 1998) (internal citation omitted).

Plaintiffs cannot meet this standard. As stated above, Plaintiffs have failed to identify ***any*** such legal obligation on the part of the Attorney General to locate or notify the volunteer service members who were subject to testing. Accordingly, they have failed to meet their burden of pleading sufficient facts to "'state a claim for relief that is plausible on its face.'" *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1107 (9th Cir. 2010) (quoting *Twombly*, 550 U.S. at 570). This Court must, therefore, dismiss all of Plaintiffs' claims against the Attorney General.

III. PLAINTIFFS' CLAIMS FOR MEDICAL CARE AGAINST THE DEPARTMENT OF DEFENSE MUST BE DISMISSED.

Plaintiffs' claims of entitlement to medical care from DoD are predicated on DoD policy and regulations, namely a 1953 memorandum from the Army Chief of Staff and AR 70-25. Defendants have previously argued, and the Court has considered, whether AR 70-25 may form the basis of a legally cognizable obligation to provide health coverage. Defendants' argument was based on Defendants' contention that: (1) under 10 U.S.C. § 1074, the Army may only provide medical care to active duty service members and certain other retirees; (2) AR 70-25 contemplated providing medical care to service members as the need arose during the course of

an experiment, not over the course of a test participant's lifetime; and (3) that the 1990 version of AR 70-25 cannot be the basis of the Army's obligation. (Defs.' Mot. to Dismiss Second Am. Compl. or in the Alternative, for Summ. J. (Dkt. 57) at 8–10.) In this motion, DoD identifies an additional reason why AR 70-25 may not form the basis of DoD's obligation to provide health care. AR 70-25 and the 1953 memorandum cited by Plaintiffs in their complaints, which forms the basis for AR 70-25, makes clear that DoD neither intended nor committed to providing medical care to test participants over the duration of their lifetime.[16] As such, Plaintiffs have failed to state a claim for relief.

A. Plaintiffs' Health Care Claims Against DoD Are Based on DoD Policy and Regulations.

Plaintiffs allege that DoD policy and regulations require it to provide test subjects with medical care. They cite a 1953 memorandum from the U.S. Army Office of the Chief of Staff, which Plaintiff contends requires that "[m]edical treatment and hospitalization *will be provided* for all casualties of the experiment as required." (3AC ¶ 125 (citing Memorandum, Department of the Army Office of the Chief of Staff, at 7 (Ex. A)) (emphasis in original).) Additionally, Plaintiffs allege that an Army regulation, AR 70-25, also "mandates that '[as] added protection for volunteers, the following safeguards *will be provided*: . . . Required medical treatment and hospitalization *will be provided* for all casualties.'" (*Id.* ¶ 128 (quoting AR 70-75) (emphasis in original).)

In its ruling on Defendants' motion to dismiss, the Court recognized that DoD policy and regulations are the source of Plaintiffs' claim to entitlement to health care. It stated that "Plaintiffs assert that their right to medical care arises from 'obligatory duties' imposed by

[16] That this regulation provides no basis for Plaintiffs' claims does not implicate the broader issue of the adequacy of health care provided to veterans. Indeed, the mission of the Department of Veterans Affairs is to provide a comprehensive system for administering health benefits to veterans.

Defendants' own regulations." (Ct. Order on Defs.' Mots. to Dismiss at 16.) The Court then noted that "Plaintiffs cite AR 70-25" as a means to "demonstrate their entitlement to medical care." *Id.*

B. DoD Policy and Regulations Clearly State on Their Face That They May Not Serve as the Basis of an Entitlement to Benefits and Compensation.

While the 1953 memorandum on which Plaintiffs rely does state that "[m]edical treatment and hospitalization will be provided for all casualties of the experimentation as required," (Ex. A at 7), this requirement follows language in which the Army expressly disavows any right to benefits or compensation arising from its test programs. Earlier in this same 1953 memorandum, the Army had provided legal guidance concerning the benefits available to military personnel. In this legal guidance, DoD states:

> The amount, and type of disability compensation or other benefits pay-able by reason of the death or disability of a member of the Army resulting from injury or disease incident to service depends upon the individual status of each member, and is covered by various provisions of law. It may be stated generally that under present laws no additional rights against the Government will result from the death or disability of military and civilian personnel participant in experiments by reason of the hazardous nature of the operations, although it is possible that the Congress may confer benefits or grant relief by general or special legislation subsequently enacted. Even should the injury or disease result from a negligent or wrongful act, the recovery of any compensation or benefit under present law in addition to those noted above is doubtful.

(*Id.* at 3.)

Nearly ten years later, the Army incorporated this language, in large measure, as part of AR 70-25, again stating that the regulation cannot serve as the basis of a claim to entitlement to any benefit or compensation. (Ex. B at 4.) In the "Legal Implications" section, AR 70-25 states:

> The amount and type of disability compensation or other benefits payable by reason of the death or disability of a member of the Army resulting from injury or disease incident to service depends upon the individual status of each member, and is covered by various provisions of law. It may be stated generally that under present laws no additional rights against the Government will result from the death or disability of military and civilian personnel participating in experiments by reason of the hazardous nature of the operations.

(*Id.*)

The language of the 1953 memorandum and AR 70-25 make clear that DoD neither intended nor committed to providing medical care for service member participants in the test programs. First, both documents clearly state that compensation and benefits are dependent on the service member's status, which inherently contradicts Plaintiffs' contention that DoD was offering a blanket right to health care to all participants. Second, the regulation expressly conditions the availability of benefits and compensation on "provisions of law." Because neither the 1952 memorandum nor AR 70-25 is a law, it is clear that the Army was excluding both as a source of a substantive right to entitlement to a benefit or compensation arising from a test program related injury or illness. It is also worth noting that both documents state that there may be no other source for entitlement to benefits outside of "provisions of law," thereby making it apparent that DoD sought to prevent a court or administrative law judge from inferring rights that are not expressly provided elsewhere in law.

Finally, even if the memorandum and/or AR 70-25 were ambiguous regarding their implications for long-term provision of medical care – and DoD submits that they are not – these are DoD regulations and guidance, and DoD is entitled to deference of its own regulations. Indeed, DoD's interpretation that these sources do not give rise to any health care entitlement to Plaintiffs is "controlling unless plainly erroneous or inconsistent with the regulation[s]." *Auer v. Robbins*, 519 U.S. 452, 461 (1997). As the Ninth Circuit recently observed, "[t]he Supreme Court has described this standard as 'deferential,' and this deference is particularly appropriate where the subject matter is technical and the relevant background complex." *Chae v. SLM Corp.*, 593 F.3d 936, 948 (9th Cir. 2010) (quoting *Auer*, 519 U.S. at 461, and citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000)). Under such circumstances, "[t]he agency is likely to have a thorough understanding of its own regulation and its objectives and is uniquely qualified to

comprehend" its meaning and application. *Chae*, 593 F.3d at 949 (quoting *Geier*, 529 U.S. at 883). Here, DoD's testing programs – and DoD's handling, over decades, of these programs and responses to the controversies surrounding them – are manifestly technical and complex. Accordingly, giving due deference to DoD's interpretation of its own guidance and regulations is all the more important. Ultimately, the result is plain: Even if the guidance upon which Plaintiffs rely admitted of any ambiguity, DoD's interpretation controls unless it is inconsistent with the guidance. It is not. Plaintiffs' claims, therefore, must fail.

C. Plaintiffs' Claims Against DoD for Health Care Must Fail Because Plaintiffs Have Failed to Identify Any Enforceable Requirement That Would Compel DoD to Provide Such Care.

As was the case with its claims against the Attorney General, Plaintiffs must plead factual content that "allows the court to draw the reasonable inference" that DoD is liable for unlawfully withholding or unreasonably delaying required agency action. *Iqbal*, 129 S. Ct at 1549. And once again, this standard is a high one: Judicial intervention under section 706(1) is warranted only "[w]hen agency recalcitrance is in the face of clear statutory [or regulatory] duty or is of such a magnitude that it amounts to an abdication of statutory [or regulatory] responsibility." *ONRC Action*, 150 F.3d at 1137 (internal citation omitted). Because the discussion in Part III.B above makes clear that neither the 1953 memorandum nor AR 70-25 may serve as the source of the Army's obligation to provide medical care to test subjects, Plaintiffs, accordingly, must identify another federal statute or regulation compelling DoD to provide medical care.

Once more, Plaintiffs cannot meet this standard. In their Third Amended Complaint, Plaintiffs failed to identify any source outside of the 1953 memorandum or AR 70-25 for DoD's legal obligation to provide health care to test participants. As a result, DoD's failure or delay in providing medical care to test subjects "cannot be unreasonable with respect to action that [it] is

not required" to take. *Norton*, 542 U.S. at 63 n.1. Accordingly, Plaintiffs' claims against DoD for medical care must be dismissed.

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court grant their Partial Motion to Dismiss Plaintiffs' Third Amended Complaint.

Dated: December 6, 2010

Respectfully submitted,

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Case Name: Vietnam Veterans of America et al v. Central Intelligence Agency et al
Case Number: 4:09-cv-00037-CW
Filer: United States of America
Department of Veterans Affairs
Central Intelligence Agency
United States Department of the Army
Leon Panetta
United States Department of Defense
United States Department of Veterans Affairs
Robert M. Gates
Pete Geren
Eric H. Holder, Jr
Eric K. Shinseki
United States Secretary of Veterans Affairs
Document Number: 187

Docket Text:
MOTION to Dismiss *Plaintiffs' Third Amended Complaint* filed by Central Intelligence Agency, Department of Veterans Affairs, Robert M. Gates, Pete Geren, Eric H. Holder, Jr, Leon Panetta, Eric K. Shinseki, United States Department of Defense, United States Department of Veterans Affairs, United States Department of the Army, United States Secretary of Veterans Affairs, United States of America. Motion Hearing set for 1/13/2011 02:00 PM in Courtroom 2, 4th Floor, Oakland. (Attachments: # (1) Exhibit A, # (2) Exhibit B, # (3) Exhibit C, # (4) Proposed Order)(Herb, Kimberly) (Filed on 12/6/2010)

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