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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' REPLY MEMORANDUM IN SUPPORT OF PARTIAL MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

Both on its face and in substance, Defendants' Partial Motion to Dismiss Plaintiffs' Third Amended Complaint ("Defendants' Motion on the Third Amended Complaint" or "Motion") is not a motion for reconsideration. Instead, Defendants present issues and arguments not previously considered by this Court, including issues that go to the Court's jurisdiction, in an effort to streamline the claims remaining in this action and aid judicial resolution thereof. In fact, it is both appropriate and advantageous that the Court consider these issues now. As this Court has recognized, Plaintiffs have not always been clear about the nature of their claims. (Dkt. 177 at 7.) In particular, Plaintiffs continually lump the Defendants together without recognizing that they are individual federal agencies and officials with distinct roles and legal obligations. This problem is manifest in, among other things, the purported legal basis for Plaintiffs' notice claim against the Central Intelligence Agency ("CIA") and Attorney General and Plaintiffs' health care claim against the CIA.

As discussed in Defendants' Motion on the Third Amended Complaint, and which Plaintiffs do not dispute, an Army regulation cannot bind the CIA and Attorney General. Nor can the state common-law duty to warn discussed in a Department of Justice ("DOJ") letter and memorandum provide a substantive right enforceable through the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. And even if a state tort common law could create a substantive right to notice, the Court lacks subject matter jurisdiction to hear such claims because (1) the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, is the exclusive remedy for tort claims against the United States, and (2) injunctive relief is not available under the Act. Thus, there is no legal basis for Plaintiffs' notice claim against the CIA and Attorney General or the health care claim against the CIA. Even if there were a basis for these claims to proceed, a ruling from the Court clarifying the legal basis of those claims would guide the parties' discovery efforts and

enable them to understand the elements of the claims against the Defendants and their available defenses.

Plaintiffs' response to Defendants' contentions is to ignore them and mischaracterize Defendants' motion as a motion for reconsideration, which Plaintiffs somehow believe is improper and should not be considered by this Court. Plaintiffs are misguided on a number of levels. At bottom, Plaintiffs' response is a half-hearted (and baseless) motion to strike masquerading as an opposition. Moreover, as demonstrated below, the arguments raised in Defendants' Motion on the Third Amended Complaint are not subject to waiver, do not merely raise already-considered matters, and are not barred by any Court order. Indeed, the only legitimate question of waiver raised by the parties' filings is whether Plaintiffs have waived their opportunity to address the substance of Defendants' Motion on the Third Amended Complaint since they failed to do so in their opposition. For all these reasons, the claims addressed in Defendants' Motion on the Third Amended Complaint should be dismissed.

I. DEFENDANTS ARE NOT BARRED FROM RAISING THE ISSUES IDENTIFIED IN THEIR PARTIAL MOTION TO DISMISS.

Plaintiffs' sole argument in opposition to Defendants' Motion on the Third Amended Complaint is a procedural one. Specifically, Plaintiffs claim that this Court should not hear the motion because it "is a thinly-disguised attempt to seek reconsideration of the Court's January 19, 2010 Order denying in part" Defendants' earlier motion to dismiss. (Pls.' Opposition to Defs.' Partial Mot. to Dismiss ("Pls.' Opp'n") at 2.) Though Plaintiffs fail to identify the legal theory underlying their contention,[1] it appears that Plaintiffs believe Defendants have somehow waived

[1] Plaintiffs' citation to Federal Rules of Civil Procedure 59 and 60 is clearly inapposite. On their face, both rules apply solely to judgments, not interlocutory orders. Furthermore, as this Circuit has made clear, "'as long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient.'" *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 889 (9th Cir. 2001) (citation omitted).

arguments not previously presented to the Court. Alternatively, Plaintiffs seem to argue that some aspect of the law of the case doctrine bars this Court from considering Defendants' Motion on the Third Amended Complaint. Plaintiffs both misconstrue Defendants' Motion and, to the extent Plaintiffs rely on some uncited legal or procedural authority regarding waiver or the law of the case doctrine, Plaintiffs misconstrue those authorities. Defendants have not waived their right to make any legal argument arising from a newly filed amended complaint, nor does the law of the case doctrine or any other legal doctrine preclude Defendants from raising the new arguments identified in their present motion.

A. Defendants Have Not Waived Any of the Arguments in Their Motion on the Third Amended Complaint.

As a threshold matter, Plaintiffs appear to believe that, because Defendants did not raise certain issues or arguments previously, those arguments cannot be made now. Plaintiffs are incorrect. Defendants have not waived the arguments raised in their Motion on the Third Amended Complaint. Rule 12(b)(1) and 12(b)(6) defenses generally are not subject to waiver. This is most obviously the case where the defenses are raised in response to an amended complaint, which renders the prior complaint a nullity. *See In re Parmalat Sec. Litig.*, 421 F. Supp. 2d 703, 713 (S.D.N.Y. 2006) ("[Plaintiff] argues that defendants have waived this defense by not raising it in their motions to dismiss the original complaint. An amended complaint, however, supersedes the original and entitles a defendant to raise substantive arguments aimed at judicial resolution of the controversy in a new responsive pleading, even if those arguments were not raised in response to the original complaint." (internal quotation marks and citation omitted)); *see also Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994) (stating that the only "defenses and objections that are irrevocably waived by answering an original complaint are those that involve[] the core issue of a party's willingness to submit a dispute to judicial resolution, such as" arguments concerning personal jurisdiction, venue, and insufficiency of

process or service). Indeed, Defendants are entitled to raise arguments in response to an amended complaint "irrespective of whether those contentions were raised in response to" a prior operative pleading. *In re Chocolate Confectionary Antitrust Litig.*, No. 1:08-MDL-1935, ___ F. Supp. 2d _____, 2010 WL 3749288, at *13 (M.D. Pa. Sept. 21, 2010) ("[P]laintiffs' second amended complaint supersedes the consolidated amended complaint, which allows defendants to raise substantive arguments in a new responsive pleading irrespective of whether those contentions were raised in response to the consolidated amended complaint." (citations omitted)). In point of fact, but for Plaintiffs' express contention that they do not seek to relitigate already-dismissed claims, such as the lawfulness of the test programs and the *Feres* doctrine, Defendants may have been obligated to raise all their defenses to all claims in the present motion in order to preserve them.

Additionally, courts frequently hear subsequent Rule 12 motions "where such motions are not interposed for delay or harassment." *SCO Group, Inc. v. Novell Inc.*, 377 F. Supp. 2d 1145, 1151 (D. Utah 2005) ("Even if there was some factual basis for the motion when the prior motion was brought, the motion does not appear to be brought for purposes of delay. In fact, [Defendant] appears to be asserting these issues so that they can be ruled on before further time and money be spent on other issues in the case"); *see also Shields*, 25 F.3d at 1128 (stating that a successive motion to dismiss was "an effort to achieve judicial resolution of the controversy, not to foreclose it"). Here, Defendants' motion is not made for purposes of delay or harassment, but rather to streamline this case.[2] In fact, all Defendants are currently engaged in discovery while this motion is pending and do not seek a stay.

[2] Defendants' interest in streamlining the case is further demonstrated by the fact that they do not raise here issues that were squarely addressed in prior briefing, issues such as venue, statute of limitations defenses, standing, and the Supreme Court's decision in *United States v. Stanley*, 483 U.S. 669 (1987).

B. The Law of the Case Doctrine Does Not Serve As a Bar to Defendants' Motion on the Third Amended Complaint.

Although it is unclear, Plaintiffs may be attempting to ground their opposition on some aspect of the law of the case doctrine. Under this doctrine, "a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case." *Hydrick v. Hunter*, 500 F3d 978, 986 (9th Cir. 2007) (quoting *Richardson v. United States*, 841 F.2d 993, 996 (9th Cir.1988)). An issue is not barred by the doctrine, however, unless it was "squarely . . . presented for decision"; "'peripheral' statements as to issues that were not briefed or argued do not constitute law of the case." *Perkins v. Am. Electric Power Fuel Supply, Inc.*, 91 F. App'x 370, 374 (6th Cir. 2004). Indeed, courts have found that issues not briefed by the parties are not precluded from consideration under the law of the case doctrine. For instance, one court found that the law of the case doctrine did not apply where "at the most basic level, the merits of the instant motion were not briefed or ruled upon by the Court . . . in any meaningful way whatsoever." *Nesselrotte v. Allegheny Energy, Inc.*, No. 06-01390, 2008 WL 2890832, *3 (W.D. Pa. July 23, 2008). Another concluded that the doctrine only applies "if those matters were fully briefed to and necessary predicates to" an earlier decision; "if the issues were not briefed, the law of the case doctrine does not bar this Court from addressing them now." *In re Wright*, No. SA-03-CV-932, 2004 WL 569517, *5 (W.D. Tex. Mar. 8, 2004). For the reasons described below, neither the law of the case doctrine, nor the Court's orders, nor any other rule deprives Defendants of their right to address those matters presented in their Motion on the Third Amended Complaint.

1. The CIA Raises Entirely New Issues that this Court Has Not Previously Addressed.

The CIA raises three entirely new issues in Defendants' Motion on the Third Amended Complaint. None of these issues were briefed by the parties as part of Defendants' prior motions,

due in large measure to the fact that Plaintiffs have not clearly indicated how their legal theories apply specifically to the CIA. Thus, these issues are not precluded under the law of the case doctrine. Furthermore, to the degree the Court touched on issues related to those currently before the court, new motions are permitted where the legal arguments raised by the CIA are a logical outgrowth of (or "triggered" by) the Court's order on Defendants' earlier motion to dismiss. *See SCO Group, Inc.*, 377 F. Supp. 2d at 1151 (concluding that the defendant's arguments were not the same in both briefs because the briefs discussed different elements of the same claim); *see id.* (holding that its "previous order on [defendant's] first motion to dismiss obviously triggered the filing of [defendant's] present motion"). For these reasons, none of the three arguments raised by the CIA should be denied review.

First, CIA argues in the Motion on the Third Amended Complaint that a state tort common-law duty is not enforceable against the CIA through the APA. As discussed in more detail below, this issue was not briefed before because it was unclear that Plaintiffs were seeking to establish that the DOJ letter and memorandum – which concerned the CIA's duties for the MKULTRA program as enforced through the FTCA – was also the source of the CIA's alleged duty to provide notice to service members.[3] Even if it was briefed, (which it was not), this issue did not crystallize until this Court ruled on the earlier motion to dismiss. As recognized by the CIA, "[t]his 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." (Mot. at 7.) A necessary question of law flows from this determination: "Having established that Plaintiffs' notice claim rests on a state common law duty, the next

[3] Tellingly, Plaintiffs' Opposition fails to provide an answer to the basic question they claim has already been decided in this case: what is the substantive *federal* law that provides the basis for their notice claim against the CIA?

question for this Court is whether this duty may be the source of a substantive right to be enforced by the CIA." (*Id.* at 9.) And more specifically, Defendants' motion raises the issue of whether a state common law duty can be used in the present case under the APA where "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). Thus, the issue presented here – which may implicate the Court's jurisdiction, (*see* Mot. at 12 n.12) – not only is different from the issue previously raised, but also is triggered by the Court's ruling in the earlier motion to dismiss. Accordingly, the CIA is entitled to raise the issue in the present motion.

In addition, identifying the source of federal law for Plaintiffs' notice claim against the CIA would help guide the parameters of discovery and assist the parties in further developing their claims or defenses. Although Defendants' Motion on the Third Amended Complaint establishes that there is no such federal authority, if Plaintiffs are correct that there is one, it would greatly benefit the parties to identify that authority now. As an illustration, if the FTCA were the source of authority (which it is not), the parties would need to develop evidence in discovery in accordance with the other legal requirements that Congress set forth in the FTCA. For example, the Ninth Circuit established detailed guidance on the type of evidence that needs to be developed to determine whether the FTCA's discretionary function exception bars duty to warn claims similar to the one brought by Plaintiffs in this case. *See Prescott v. United States*, 973 F.2d 696 (9th Cir. 1992); *In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982 (9th Cir. 1987). Additionally, this Court previously noted that "28 U.S.C. § 2401(a) provides a six-year limitations period for civil actions commenced against the United States." (Dkt. 59 at 18). However, if the Court were to find that the FTCA serves as the basis for Plaintiffs' notice claims, the limitations period is only two years. *See* 28 U.S.C. § 2401(b) ("A tort claim against the

United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues."). At this stage of the case, it would significantly benefit the parties to understand whether rules like this applied, but that is not currently possible because this issue has not been litigated and decided.

The second issue raised by the CIA in the Motion is that, even if state tort common law could create a substantive right to notice enforceable against the CIA, this Court lacks subject matter jurisdiction to hear such claims. As this Circuit has made clear, "[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); (*see also* Mot. at 10-11). Furthermore, injunctive relief is not available through the FTCA. *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."). In the instant case, if this Court were to find that state tort law provided a substantive right to notice, a clear jurisdictional issue would arise: APA Section 702 expressly states that sovereign immunity is not waived "if [an]other statute . . . impliedly forbids the relief sought," and the FTCA is the exclusive tort remedy against the United States and forbids injunctive relief. Therefore, the Court lacks subject matter jurisdiction. Defendants' Motion on the Third Amended Complaint raises and addresses this issue and its effect on the Court's subject matter jurisdiction for the first time in this case.

Moreover, like the first issue raised by the CIA, this issue only became poised for resolution following the Court's order on the earlier motion to dismiss. In its order on the earlier motion, this Court noted that "Plaintiffs also allege that the CIA remains under a legal duty to disclose, as explained by the DOJ opinion letter." (Dkt. 59 at 15.) The Court then stated that "[e]ven though this is not a statutory duty, the government can be held liable for the breach of its duty to warn . . . ." (*Id.* at 16.) However, this was the first time that the DOJ letter and

memorandum to which the Court referred, which concerned the CIA's duties for the MKULTRA program as potentially enforced through the FTCA, was being cited as the alleged source of the CIA's duty to provide notice to service members in this case. In Plaintiffs' Second Amended Complaint, the DOJ letter and memorandum is mentioned only once, as part of the background section of the complaint. (*See* Dkt. 53 at ¶ 14). Additionally, in Plaintiffs' opposition to Defendants' earlier motion to dismiss, Plaintiffs do not cite the letter and memorandum in the argument section of their brief. As it arose for the first time in the Court's order, this is the first opportunity the CIA has had to raise the defense, which, in any event, is not subject to waiver and cannot be the law of the case.

The CIA raises a third and final issue in the present motion. In its earlier order, this Court considered Plaintiffs' contention that "'obligatory duties' imposed by Defendants' own regulations," which Plaintiffs sought to "demonstrate . . . [by] citat[ion to] AR 70-75," provided a basis for their medical care claim. (Dkt. 59 at 16.) The CIA had not previously briefed whether and how that regulation would create individual liability for each individual agency because, it was not clear that Plaintiffs were arguing that AR 70-25 somehow bound the CIA. Now, as part of this motion, CIA seeks resolution of the subsequent question: whether, even if it were assumed that AR 70-25 could entitle service members to medical care, the CIA can be bound by the Army's regulation. This issue necessarily implicates questions about the limitations on an agency's power to act, and neither this Court nor the parties have addressed this issue. Thus, no rule, order, or doctrine prevents the CIA from raising this issue now.

2. This Court Did Not Address Plaintiffs' Claims Against the Attorney General, Let Alone Decide Those Issues.

To support their contention that the Attorney General has previously argued that claims against him "should be dismissed for failure to state a claim," Plaintiffs cite to Defendants' motion to dismiss Plaintiffs' original complaint. (Pls.' Opp'n at 4 (citing Defs.' Mot. to Dismiss

Original Compl. (Dkt. 29 at 24)).) This Court, however, dismissed "Defendants' motion to dismiss the original complaint . . . as moot in light of the filing of the amended complaint." (Dkt. 39 at 1.) As a result, for purposes of the law of the case doctrine, the Court neither considered nor ruled on any of the substantive arguments in that motion such that the Attorney General is now barred from reasserting those arguments. Nor did the Court consider or rule on this issue in response to Defendants' subsequent motions to dismiss. As a result, nothing prevents the Attorney General from presently arguing that Plaintiffs have failed to state a claim against him.[4] *See In re Chocolate Confectionary Antitrust Litig.*, 2010 WL 3749288, at *13 ("[P]laintiffs' second amended complaint supersedes the consolidated amended complaint, which allows defendants to raise substantive arguments in a new responsive pleading irrespective of whether those contentions were raised in response to the consolidated amended complaint." (citations omitted)); *infra* Part I.A.

3. The Department of Defense's Argument Is Not Barred By the Law of the Case Doctrine.

As stated in Defendants' Motion on the Third Amended Complaint, the Department of Defense ("DoD") recognizes that it "previously argued, and the Court has considered, whether AR 70-25 may form the basis of a legally cognizable obligation to provide health coverage." (Motion at 19.) Nothing, however, bars consideration of the new arguments raised here. First, this Court may assess its prior decision in light of the new complaint and Plaintiffs' contentions in

[4] Plaintiffs have now filed four complaints in this matter to correct deficiencies in venue, assert new claims, and add new parties (despite the fact that Plaintiffs were aware of and could have addressed most, if not all, these problems at the outset of the litigation). It is disingenuous for Plaintiffs to argue that they are entitled to repeatedly seek and receive opportunities to correct deficiencies in their filings, while arguing that the Attorney General is precluded from identifying any perceived shortcomings in his responses to those numerous amendments. Furthermore, as discussed in Part I.A, the Attorney General has not waived his right to argue that Plaintiffs have failed to identify a single legal basis upon which he is responsible for notifying former service members of government test programs, a failure which, again, is particularly notable given Plaintiffs' three amendments to their original pleading.

their motion for leave to file a third amended complaint. Second, the deference due to the Army's interpretation of its regulation was not addressed in the parties' earlier briefs or the Court's prior order.

DoD's argument in the Motion on the Third Amended Complaint that it neither intended nor committed to providing lifetime medical care under AR 70-25 is implicated – indeed, supported – by Plaintiffs' arguments in their motion to file a third amended complaint. Plaintiffs' proposed amended complaint sought a court order "'directing the [Department of Veterans Affairs ("VA")] to propose a plan to remedy denials of affected claims for SCDDC and/or eligibility for medical care based upon service connection and to devise procedures for resolving such claims.'" (Dkt. 177 at 4 (citation omitted).) Plaintiffs also sought a court order requiring the VA to apply a rule of reasonable doubt to the VA's "rating procedures and standards for deciding [the] chemical and biological weapons claims" of former test participants. (*Id.* at 5-6.) Plaintiffs' proposed claims against the VA make clear that they recognize that current law not only requires that the VA provide medical care for service-connected illnesses and injuries, but also contains procedures and standards that govern the care of veterans exposed to the very chemical and biological agents at issue in this case. This being the case, Plaintiffs own contentions undermine the notion that DoD has these same duties. In this respect, it is telling that nowhere in Plaintiffs' Third Amended Complaint do they allege that service members have *ever* sought medical care from DoD or the Army – a clear recognition by Plaintiffs that medical care for service-related injuries is exclusive to the VA. This lends further support to DoD's contention in Defendants' Motion on the Third Amended Complaint that it is other "provisions of law," such as those laws governing care by the VA, and not AR 70-25, that provides a "substantive right to entitlement to a benefit or compensation arising from a test program." (*See* Motion at 21-22.) Therefore, AR 70-25, by its own terms, cannot be a basis for DoD provided care. Given Plaintiffs' Third Amended

Complaint raising these issues, this court is "free to re-examine its ruling on the causes of action in the prior complaint with a view of determining whether, in the light of the new cause of action, its previous order was correct." *Sidebotham v. Robison*, 216 F.2d 816, 823 (9th Cir. 1954).

Moreover, the Army's interpretation of AR 70-25 is entitled to deference. As discussed in Defendants' Motion on the Third Amended Complaint, an agency's interpretation of its own regulation is "'controlling unless plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation omitted). This is particularly true 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)). Here, the government has not previously raised, and this Court has not previously addressed, the critical question of the deference due to the Army's interpretation of its regulation.[5] As such, the law of the case doctrine does not serve as a bar preventing the Court from addressing this issue now.

II. DEFENDANTS' MOTION ON THE THIRD AMENDED COMPLAINT COMPLIES WITH PRIOR STATEMENTS AND ORDERS FROM THIS COURT.

Contrary to Plaintiffs' assertions, Defendants' Motion on the Third Amended Complaint complies with both the letter and spirit of the Court's prior instructions. Plaintiffs contend that, during the December 3, 2009 hearing on the motion to dismiss Plaintiffs' First Amended Complaint, this Court instructed the parties not to rebrief issues previously raised, and that Defendants are ignoring this instruction. (Pls.' Opp'n 4-5.) As a threshold matter, the language cited by Plaintiffs to support this argument states only that Defendants need not repeat arguments previously raised, but does not bar Defendants from doing so. (Ex. B to Erspamer Decl. (Dkt.

[5] Nor is this argument waived. As discussed in Part I.A, a 12(b)(6) claim is not waived by virtue of the fact that the issue was not addressed in a prior motion to dismiss on an inoperative complaint.

189.2) at 34 (responding to a question from Plaintiff's counsel – who told the Court that Plaintiffs were going to file an amended complaint and asked whether Defendants' subsequent motion to dismiss would need to address only venue or "rebrief everything" – that Defendants need not rebrief all issues and instead "*may* just incorporate by reference your previous motion" (emphasis added)).) Furthermore, even if the Court sought to bar Defendants from reasserting issues previously raised, it did so only to the extent that "something [Defendants] say is exactly the same as they said before." (*Id.*) For the reasons discussed above, *see supra* Part I, the arguments made in the present Motion differ from those raised previously, and thus would not fall into such a prohibition.

Additionally, Defendants' Motion on the Third Amended Complaint is consistent with this Court's Order Granting in Part and Denying in Part Plaintiffs' Motion to File Third Amended Complaint. (Dkt. 177.) In that Order, the Court stated that "Defendants may not file a motion to dismiss based on the arguments made in this motion," i.e., the motion to file a third amended complaint and the opposition thereto. (*Id.* at 18.) Thus, the Court preserved the right of all the Defendants to file a motion to dismiss so long as such a motion did not revisit the futility arguments addressed in Defendants' opposition to the motion to file a third amended complaint. Those arguments related solely to the claims against the VA and do not form the basis of the pending motion.

III. PLAINTIFFS HAVE WAIVED THEIR RIGHT TO RESPOND TO THE SUBSTANCE OF DEFENDANTS' MOTION.

As noted, Plaintiffs' responsive motion to strike filed under the guise of an opposition – and a cursory one, neglecting to cite a single case, at that. Through this ruse, Plaintiffs apparently have granted themselves leave to address the merits in some other later filing. (Pls.' Opp'n at 6.) There is no basis for doing so. Even if Plaintiffs' procedural objections had merit, (which they do not), Plaintiffs were required to address Defendants' Motion on the Third Amended Complaint to

avoid conceding those arguments they failed to address. *See, e.g.*, *Pecover v. Elecs. Arts Inc.*, 633 F. Supp. 2d 976, 984-85 (N.D. Cal. 2009); *Smith v. Nat'l City Bank of Ind.*, No. C 09-5715, 2010 WL 1729392, at *3 (N.D. Cal. Apr. 27, 2010); *Gomez v. City & Cnty. of San Francisco*, No. C 04-1692, 2005 WL 43869, at *5 n.4 (N.D. Cal. Jan. 10, 2005). By refusing to address Defendants' motion on the merits, notwithstanding their obligation to do so, Plaintiffs necessarily have conceded it. The claims addressed in Defendants' Motion on the Third Amended Complaint should be dismissed.[6]

CONCLUSION

For the reasons stated above and in the Defendants' Partial Motion to Dismiss Plaintiffs' Third Amended Complaint, this Court should dismiss the notice and health care claims against the CIA, all claims against the Attorney General, and the medical care claim against DoD.

Dated: December 17, 2010

Respectfully submitted,

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[6] Should the Court, notwithstanding Plaintiffs' failure to oppose Defendants' Motion as required, nonetheless provide Plaintiffs a second opportunity to address Defendants' Motion, Defendants respectfully request an opportunity to reply. Defendants also request that this Court not delay briefing on the present motion; if the Court permits additional briefing, Plaintiffs should have no more than ten days (the time they had remaining on their opposition) to file a response.

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United States Secretary of Veterans Affairs
Document Number: 194

Docket Text:

12/20/2010

Reply Memorandum re [187] MOTION to Dismiss *Plaintiffs' Third Amended Complaint* filed byCentral Intelligence Agency, 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. (Herb, Kimberly) (Filed on 12/17/2010)

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