IAN GERSHENGORN
Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney
VINCENT M. GARVEY
Deputy Branch Director
JOSHUA E. GARDNER
District of Columbia Bar No. 478049
KIMBERLY L. HERB
Illinois Bar No. 6296725
LILY SARA FAREL
North Carolina Bar No. 35273
BRIGHAM JOHN BOWEN
District of Columbia Bar No. 981555
Trial Attorneys
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 514-6289
Facsimile: (202) 616-8470
E-mail: Brigham.Bowen@usdoj.gov

Attorneys for DEFENDANTS

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

DEFENDANTS' RESPONSE TO PLAINTIFFS' LETTER REGARDING 50 U.S.C. § 403g

Plaintiffs have filed a letter with the Court [Dkt. #190] raising issues concerning a recent Rule 45 deposition that took place in the District of Massachusetts. For multiple reasons, this letter should be given no consideration by the Court.

First, Plaintiffs' filing is a discovery motion disguised as an informal notice letter. *See* Dkt. #190 at 1-2 (asking the Court, "[i]n evaluating [the government's] privilege claim" concerning documents, to take the governments' privilege assertions at the Massachusetts deposition "into account when evaluating [the CIA's] 403g declaration"). Such a request for relief should be subject to the normal rules of procedure regarding motions, which rules Plaintiffs have disregarded.[1]

Among these rules is the obligation to meet and confer before making a discovery motion — an obligation with which Plaintiffs demonstrably failed to comply. *See* Civil L.R. 37-1(a). Indeed, mere hours before Plaintiffs filed their "letter," Plaintiffs raised in a teleconference the subject of the governments' privilege assertions at the Pelikan deposition. During this conversation, Plaintiffs' counsel stated that, as a part of the meet-and-confer process, they would provide a letter to the government setting forth their purported bases for objecting to the privilege assertions. Counsel made no mention of an intent to place matters concerning the deposition before this Court in advance of the meet-and-confer process, much less to ask (i.e., move) the Court to "take into account" the Pelikan privilege dispute when evaluating the § 403g declaration. Instead, Plaintiffs unilaterally dispensed with the meet-and-confer process and filed their motion-in-disguise with the Court. *See* Civil L.R. 37-1(a) (requiring parties to meet and confer before filing discovery motions and providing for sanctions for failure to do so).

[1] Perhaps Plaintiffs' filing may also be construed as a surreply or supplemental brief, filed without leave of court. However construed, the filing is improper.

Second, there is no basis for Plaintiffs' attempt to poison the well by importing a deposition dispute into the separate dispute over the supplemental § 403g declaration regarding documents. Setting aside Defendants' disagreement that the Pelikan privilege assertions were in any way unjustified,[2] the privilege assertions before this Court, as set forth in the § 403g declaration, are sustainable on their own merit. To apply some sort of presumption or other burden-altering inference, from a separate context, into the Court's assessment of those documents plainly would be improper. This is particularly true where, as here, the deposition privilege assertions neither have been litigated before nor assessed by any court.[3]

Third, and most fundamentally, the deposition at issue was taken pursuant to a Rule 45 subpoena in the District of Massachusetts. Whatever objections Plaintiffs may have to the government's privilege assertions at the deposition, such objections must be made in that district, which has jurisdiction over the subpoena. Fed. R. Civ. P. 45. This Court may not assess them. *In re Sealed Case*, 141 F.3d 337, 341 (D.C. Cir. 1998) (observing that "only the issuing court has the power to act on its subpoenas"). Indeed, the fact that Plaintiffs have not (yet) filed a motion to compel, either in Massachusetts or before this Court, suggests that Plaintiffs recognize this Court's lack of jurisdiction over the dispute, but nonetheless improperly seek to taint these proceedings to their litigation advantage, while depriving Defendants a full opportunity to respond.

[2] The government disagrees not only with Plaintiffs' objections, but also with their characterizations of the privilege assertions and other matters at the deposition. In fact, as reflected in the transcript — and unacknowledged in Plaintiffs' letter — the privilege assertions were not confined to § 403g. *See, e.g.*, Pelikan Rough Tr. at 17, 19, 22; *cf.* Pls.' Ltr. at 2 (characterizing the privilege assertions as relying upon "section 403g as a basis for wholesale exemption from discovery"). Of course, this Court need not assess these disputes, which are not properly before it.

[3] In essence, Plaintiffs ask the Court to (1) infer, without deciding the question, that Defendants' privilege assertions in the Massachusetts deposition are overbroad, and then to (2) apply that inference to call into question the § 403g declaration that is before the Court. There is no basis for the Court to entertain either request, let alone both.

Dated: December 23, 2010

Respectfully submitted,

IAN GERSHENGORN
Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney
VINCENT M. GARVEY
Deputy Branch Director

/s/ Brigham J. Bowen
JOSHUA E. GARDNER
KIMBERLY L. HERB
LILY SARA FAREL
BRIGHAM JOHN BOWEN
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 514-6289
Facsimile: (202) 616-8470
E-mail: Brigham.Bowen@usdoj.gov

Attorneys for Defendants