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11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA

14 VIETNAM VETERANS OF AMERICA, *et al.*,
 15 Plaintiffs,
 16 v.
 17 CENTRAL INTELLIGENCE AGENCY, *et al.*,
 18 Defendants.

Case No. CV 09-0037-CW

**JOINT STATEMENT OF
 DISCOVERY DISPUTE OVER
 DEFENDANT DEPARTMENT OF
 VETERANS AFFAIRS'
 RESPONSES TO PLAINTIFFS'
 DISCOVERY REQUESTS**

1 Pursuant to the Court's Standing Order, the parties submit this Joint Statement to advise
2 the Court of their impasse concerning the responses and objections of Defendant Department of
3 Veterans Affairs ("DVA" or "VA") to Plaintiffs' notice of Rule 30(b)(6) depositions, First Set of
4 Interrogatories, and Second Set of Requests for Production.¹ The parties have attempted to
5 resolve their disputes via letter and by telephone on May 9 and July 14, 2011. Despite these good
6 faith efforts, both sides agree that the issues below require the Court's intervention.

7 **INTRODUCTION**

8 Plaintiffs' Statement. DVA has refused discovery regarding matters that are central to
9 Plaintiffs' claims. Plaintiffs seek to file a motion to compel regarding the following topics.

10 Defendant's Statement. In its November 15, 2010 Order, the Court granted leave for the
11 Plaintiffs to amend their complaint to add only a claim concerning VA's alleged bias in
12 adjudicating Plaintiffs' and putative class members' claims. Dkt. # 177 at 18, *see also* id at 11.
13 Despite the narrow claim of alleged facial bias and the limited basis on which that claim is made,
14 Plaintiffs' seek overly broad, unduly burdensome, and irrelevant discovery from VA.

15 **DISCOVERY REGARDING DVA INVOLVEMENT IN HUMAN TESTING**

16 Plaintiffs' Statement. RFP Nos. 194, 195, 206, 214, and 215 and Interrogatory Nos. 7 and
17 8 seek discovery about DVA involvement in Defendants' testing programs, including at
18 Edgewood Arsenal. Evidence of DVA involvement in human testing programs (such as at
19 Edgewood) goes to the heart of Plaintiffs' bias claims as it proves that DVA has an impermissible
20 interest in the outcome of test subjects' and survivors' claims. To fairly adjudge the facts of a
21 claim, an adjudicator must be neutral to the possibility that Defendants' testing 8
22 including the Edgewood test programs, caused harm to test subjects. DVA cannot be neutral to
23 such a possibility because DVA's own culpable conduct has left it reluctant to admit that such
24 testing caused harm. Despite Plaintiffs' repeated reassurances that the requests exclude
25 therapeutic research and are intended only to cover research regarding chemical or biological

26 _____
27 ¹ The parties continue to negotiate additional issues related to DVA's discovery responses,
28 which the parties hope to resolve without Court intervention. Plaintiffs reserve the right to move
to compel regarding discovery requests not addressed in this statement, as appropriate.

1 weapons, Defendants continue to assume the contrary. Plaintiffs do not know when the research
2 began but documents indicate that DVA was involved, at the very least, in testing in the 1960s.
3 DVA does not contend that evidence of DVA involvement in relevant testing programs does not
4 exist – in fact the agency has already admitted involvement in such testing (*See Answer to Third*
5 *Amended Complaint* ¶ 226.) – rather, DVA contends it would be too burdensome to look for such
6 evidence. DVA should not be allowed to evade disclosure simply by complaining that it is too
7 burdensome to look for evidence of its own culpable conduct.

8 *Defendant's Statement.* Plaintiffs' discovery requests are not limited to VA documents
9 related to "Defendants' testing programs" or "relevant testing programs." Rather, they seek
10 information on all VA human-subject testing, which would require VA to produce documents
11 regarding all such testing undertaken by VA since 1930, when the Veterans Administration was
12 created. Beginning in 1955, VA reported annually to Congress on its medical research. These
13 reports are publically available for Plaintiffs' review. Plaintiffs have repeatedly refused to inspect
14 and copy these reports, as provided for in Rule 34(a)(1). In addition, as VA has explained to
15 Plaintiffs, although it is currently unaware of VA involvement in the Edgewood Arsenal test
16 programs, it will continue to search for and produce all non-privileged documents.

17 TEST SUBSTANCES

18 *Plaintiffs' Statement.* DVA has refused to provide discovery regarding the full range of
19 substances tested during Defendants' testing programs conducted between 1942 and 1975, as
20 identified in the Chem-Bio Database that Defendants produced. While Plaintiffs are willing to
21 limit discovery to a narrowed list of substances for certain discovery requests (Request Nos. 202,
22 203, 205, 216), Plaintiffs seek discovery related to the full list of substances tested during
23 Defendants' testing programs for requests related to DVA involvement in testing (194, 195, 206,
24 214, and 215 and Interrogatories 7 and 8).

25 *Defendant's Statement.* As explained above, VA has advised Plaintiffs that VA's annual
26 reports to Congress contain information regarding human-subject testing. Also, the Veterans
27 Health Administration, the VA component most likely to have responsive documents, is
28 searching for all substances contained in the narrowed list Plaintiffs provided to the Defendants

1 pursuant to Magistrate Judge Larsen's Order. It is unreasonable and overly burdensome for VA
2 to search for terms that have no bearing on Plaintiffs' claims against any Defendant.

3 **SEARCH TERMS**

4 Plaintiffs' Statement. DVA's use of search terms to identify responsive documents is
5 inadequate. The list of search terms used by DVA does not even include terms that DVA itself
6 regularly uses to refer to issues related to test subjects, including terms such as chem-bio, CB,
7 CBRNE, and chemical and biological testing. DVA initially stated it was willing to add search
8 terms suggested by Plaintiffs, but has refused all terms Plaintiffs have suggested.

9 Defendant's Statement. In addition to conducting term searches of VA databases, VA has
10 provided Plaintiff's 220 RFPs to all components that would be likely to have responsive
11 documents and directed those components to search for all relevant documents. VA has provided
12 Plaintiffs with more than 191,000 pages of documents responsive to Plaintiffs' 220 RFPs and is
13 currently reviewing over 5 million additional pages. Plaintiffs have not indicated that VA's
14 productions are incomplete or inadequate.

15 **COMMUNICATIONS REGARDING LAWSUIT**

16 Plaintiffs' Statement. DVA has refused to produce communications between DVA and
17 other defendants or persons regarding the particular subject of this lawsuit (Request No. 212).
18 Plaintiffs seek production of *non-privileged*, responsive documents. Such requests are not
19 uncommon and courts have upheld a party's right to such discovery. *See Flying J Inc. v. TA*
20 *Operating Corp.*, 2007 U.S. Dist. LEXIS 55574, *24-25 (D. Utah 2007).

21 Defendant's Statement. Absent some reasonable narrowing or particularity as required by
22 Rule 34, Plaintiffs' request, on its face, is the very definition of overbreadth and lacks any
23 reasonable particularity. *See Equal Employment Opportunity Commission v. Creative Networks,*
24 *LLC*, 2009 WL 4824846 at *1 (D. Ariz. 2009).

25 **DISCOVERY REGARDING TESTING PRIOR TO 1953**

26 Plaintiffs' Statement. Plaintiffs seek documents and 30(b)(6) testimony regarding the
27 entire timeframe of the testing programs, which began in 1942. Plaintiffs' Complaint clearly
28 asserts claims and alleges facts related to testing programs that began in 1942. (*See, e.g.*, 3rd Am.

1 Compl. ¶¶ 2, 102–104, 224.) Documents and information related to mustard-lewisite testing that
 2 occurred beginning in World War II – a testing program that reportedly included some 60,000
 3 servicemembers – is relevant and should be provided.

4 *Defendant’s Statement:* The burden of undertaking a search for those documents greatly
 5 outweighs its relevance, if any of documents related to Mustard Gas and Lewisite tests conducted
 6 during and prior to World War II, particularly since none of the named individual plaintiffs have
 7 standing to pursue such claims and the Court lacks jurisdiction to adjudicate these claims. VA
 8 has, however, produced all responsive, non-privileged documents found in the course of other
 9 searches. Further, Plaintiffs asked questions regarding this topic during Rule 30(b)(6) depositions
 10 and have made no allegations that 30(b)(6) witnesses were unprepared to testify to this topic.

11 **DISCOVERY REGARDING TEST SUBJECTS’ RECORDS**

12 *Plaintiffs’ Statement.* DVA has refused discovery regarding test subjects’ medical and
 13 claims files (Request Nos. 199, 200, and 208), contending that disclosure of information would
 14 violate 38 U.S.C. § 7332. These files show what diseases test subjects have suffered from and are
 15 therefore highly relevant. DVA exaggerates the requirements of Section 7332 in an effort to
 16 evade its discovery obligations. Plaintiffs request that the Court order disclosure of protected
 17 material as allowed for under the statute (38 U.S.C. § 7332(2)(D) (allowing for disclosure “[i]f
 18 authorized by an appropriate order of a court of competent jurisdiction”)).

19 *Defendant’s Statement:* VA may not disclose medical records protected by section 7332
 20 except as provided by statute and regulations. 38 U.S.C. ‘ 7332 (b); 38 C.F.R. §§ 1.462, 1.475,
 21 1.490, 1.493. VA has offered Plaintiffs multiple options for obtaining this information without
 22 violating the statute, yet Plaintiffs have neither responded to VA’s offer nor attempted to
 23 negotiate a mutually-agreeable compromise.

24 **RULE 30(b)(6) TOPIC 5**

25 *Plaintiffs’ Statement.* DVA has refused to designate a deponent regarding the success
 26 rates of test subjects concerning claims for death and/or disability compensation before the Board
 27 of Veterans’ Appeals and the Court of Appeals for Veterans Claims. Because such statistics are
 28

1 highly relevant to Plaintiffs' bias claim, the Court should compel DVA to designate a deponent
2 on this topic.

3 Defendant's Statement. VA does not keep statistics regarding the success rates of test
4 subjects before the Board of Veterans' Appeals or at the Court of Appeals for Veterans Claims.
5 To create the statistics Plaintiffs request, VA would have to review all Board and court decisions
6 on appeals by identifiable test participants, a task that is unduly burdensome.

7 **DVA'S ASSERTION OF THE DELIBERATIVE PROCESS PRIVILEGE**

8 Plaintiffs' Statement. DVA has asserted the qualified deliberative process privilege and,
9 on that basis, improperly withheld or redacted hundreds of documents relating to DVA's efforts
10 to notify test subjects. DVA's assertion of the privilege is improper for at least the following
11 reasons: (1) the deliberative process privilege is qualified and Plaintiffs can demonstrate a
12 particularized need for the documents; (2) the privilege should not be used to shield decision-
13 making that evidences the bias against test subjects that informed the drafting of the notification
14 letter – a topic that is squarely at issue in this litigation; (3) DVA has not met the procedural
15 requirements for asserting the privilege.

16 Defendant's Statement. Plaintiffs have failed to identify the specific documents for which
17 VA has relied upon the deliberative process privilege that they are challenging. Furthermore,
18 VA's notification efforts are not "squarely at issue in this litigation" because Plaintiffs previously
19 "disavow[ed] any challenge to the adequacy of the content of [VA's] notice," *see* Dkt. No. 177,
20 n.3 & p.14, and the Court denied Plaintiffs leave to amend their complaint to bring a challenge to
21 VA's notification efforts. *Id.* at 18. Finally, Plaintiffs have failed to identify any basis for their
22 assertion that VA has not satisfied the procedural requirements for reliance on the deliberative
23 process privilege, and there is no need for formal assertion of the privilege at this time.

24 **CONCLUSION**

25 Plaintiffs' Statement. Plaintiffs respectfully request an order compelling discovery
26 regarding the issues outlined above or, in the alternative, the opportunity to offer formal briefing.

27 Defendant's Statement. Defendant respectfully requests a protective order precluding the
28 discovery requests discussed above or the opportunity to offer formal briefing.

1 Respectfully submitted, this 22nd day of July, 2011.

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GENERAL ORDER 45 ATTESTATION

I, Gordon P. Erspamer, am the ECF User filing this Joint Statement of Discovery Dispute Over Plaintiffs' Requests for Production of Documents. In compliance with General Order 45, X.B., I hereby attest that Joshua E. Gardner has concurred in this filing.

Dated: July 22, 2011

/s/ Gordon P. Erspamer
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