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14 UNITED STATES DISTRICT COURT  
 15 NORTHERN DISTRICT OF CALIFORNIA  
 16 OAKLAND DIVISION

17 VIETNAM VETERANS OF AMERICA, *et al.*,  
 18 Plaintiffs,  
 19 v.  
 20 CENTRAL INTELLIGENCE AGENCY, *et al.*,  
 21 Defendants.  
 22

Case No. CV 09-0037-CW

Noticed Motion Date and Time:  
September 1, 2011  
2:00 p.m.

**DEFENDANT CENTRAL  
INTELLIGENCE AGENCY'S  
MOTION FOR JUDGMENT ON THE  
PLEADINGS AND, IN THE  
ALTERNATIVE, MOTION FOR  
SUMMARY JUDGMENT**

23  
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 25  
 26 **NOTICE OF MOTION AND DEFENDANT CENTRAL INTELLIGENCE AGENCY'S**  
 27 **MOTION FOR JUDGMENT ON THE PLEADINGS AND, IN THE ALTERNATIVE,**  
 28 **MOTION FOR SUMMARY JUDGMENT**

1 Please take notice that on September 1, 2011, or as soon thereafter as counsel may be  
 2 heard by the Court, before the Honorable Claudia Wilken in the United States District Court for  
 3 the Northern District of California, located at 1301 Clay Street, Courtroom No. 2, Oakland, CA  
 4 94612-5212, Defendant Central Intelligence Agency and its Acting Director Michael J. Morrell  
 5 (collectively, "CIA"), by and through their attorneys, will, and do hereby, move the Court  
 6 pursuant to Federal Rules of Civil Procedure 12(c) and 56 to grant Defendant CIA's Motion for  
 7 Judgment on the Pleadings and, In the Alternative, Motion for Summary Judgment. The CIA  
 8 seeks dismissal of Plaintiffs' sole remaining claim against the CIA, which concerns the validity  
 9 of non-disclosure agreements – so-called "secrecy oaths" – that were allegedly administered to  
 10 volunteer service members who participated in the test programs at issue in this case. There is  
 11 no case or controversy between the CIA and Plaintiffs with respect to this claim because it  
 12 would be moot and because Plaintiffs lack standing. Alternatively, the CIA is entitled to  
 13 summary judgment on the merits.

14 The CIA's motion is based on this Notice, the accompanying Memorandum and  
 15 attachments thereto, the pleadings in this matter, and on such oral argument as the Court may  
 16 permit. A proposed order is attached.

17  
 18 Dated: July 28, 2011

Respectfully submitted,

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**INTRODUCTION**

1  
2 Defendant the Central Intelligence Agency and its Acting Director Michael J. Morrell<sup>1</sup>  
3 (collectively, “CIA” or “Agency”) are compelled to seek this Court’s intervention where, with  
4 only a single claim remaining against the CIA, Plaintiffs have already received all the relief to  
5 which they could have been entitled in relation to this claim and Plaintiffs have also  
6 acknowledged that they lack factual support it. Because Plaintiffs have refused on multiple  
7 occasions to withdraw this claim, the CIA must now move for judgment on the pleadings and, in  
8 the alternative, for summary judgment pursuant to Federal Rules of Civil Procedure 12(c) and 56  
9 on Plaintiffs’ sole remaining claim against the CIA, which concerns the validity of non-disclosure  
10 agreements – so-called “secrecy oaths” – that were allegedly administered to volunteer service  
11 members who participated in the test programs at issue in this case (“secrecy oath claim”). There  
12 is no case or controversy between the CIA and any of the Plaintiffs with respect to this claim and,  
13 therefore, it must be dismissed for lack of jurisdiction. Any theoretical claims of the Individual  
14 Plaintiffs or members of organizational Plaintiff Vietnam Veterans of America (“VVA”) would  
15 be moot because the CIA has released them from any secrecy oaths, assuming *arguendo* that they  
16 ever existed. Furthermore, Plaintiffs have failed to establish standing to pursue this claim at  
17 every phase of the litigation, as they have not identified any service member who purportedly had  
18 such an oath with the CIA. As Plaintiffs themselves have admitted, they had no specific facts to  
19 support this claim at the time they filed their complaint (or at the present time). Finally, the CIA  
20 is entitled to summary judgment on the merits of this claim, as it is undisputed that the CIA did  
21 not participate in the administration of secrecy oaths to participants in the tests at issue in this  
22 case.

23 In short, Plaintiffs’ secrecy oath claim against the CIA has no merit, and the CIA should  
24 be dismissed as a defendant in this case. Because the issues raised in this Motion go to the  
25

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26 <sup>1</sup> Leon Panetta, who was named as a defendant in his official capacity as Director of the  
27 CIA, became the Secretary of Defense on July 1, 2011, and Michael J. Morrell is currently  
28 serving as Acting Director of the CIA and is automatically substituted for Leon Panetta pursuant  
to Federal Rule of Civil Procedure 25(d).

1 Court's jurisdiction under Article III of the Constitution, they must be addressed now rather than  
 2 at the conclusion of pre-trial proceedings in ten months. Furthermore, consideration of this  
 3 motion now is appropriate because the CIA is substantially prejudiced by Plaintiffs attempts to  
 4 use it to justify substantial discovery from the CIA.<sup>2</sup>

### 5 BACKGROUND

6 As Defendants previously noted, three narrow claims remained in this action following  
 7 this Court's ruling in January, 2010, namely: (1) whether the service members who participated in  
 8 the test programs are entitled to notice of the chemicals to which they were exposed and any known  
 9 health effects ("notice claim"); (2) whether Defendants are obligated to provide medical care to the  
 10 individual Plaintiffs ("health care claim"); and (3) the validity of the secrecy oaths. (Dkt. 187 at 1  
 11 (citing *Order Granting in Part and Denying in Part Defs.' Mots. to Dismiss and Den. Defs.'*  
 12 *Alternative Mot. for Summ. J.* (Jan. 19, 2010) (Dkt. No. 59)).) Subsequently, however, the CIA  
 13 sought "dismissal of two of Plaintiffs' claims against it: (1) Plaintiffs' claim that the CIA is  
 14 obligated to provide the individual Plaintiffs with notice of chemicals to which they were  
 15 allegedly exposed and any known health effects related thereto; and (2) Plaintiffs' claim that the  
 16 CIA is obligated to provide medical care to the individual Plaintiffs." (Dkt. 187 at 6.) Because  
 17 Plaintiffs had failed to identify any enforceable, legal basis on which to maintain the notice and  
 18 health care claims, this Court granted the CIA's motion to dismiss these claims in their entirety on  
 19 May 31, 2011. (Dkt. 233 at 11 ("Plaintiffs' notice and medical care claims against the CIA . . .  
 20 are dismissed."))

21 Thus, in wake of this Court's Orders of January 19, 2010 and May 31, 2011, Plaintiffs  
 22 have one remaining claim against the CIA, which concerns the validity of "secrecy oaths"  
 23 allegedly administered to participants in the test programs at issue in this case to prevent them

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24 <sup>2</sup> This motion is timely because jurisdictional defenses can be raised at "any time during  
 25 the proceedings," *May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1216 (9th Cir. 1980),  
 26 and "cannot be waived." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). In  
 27 addition, the motion is permissible under the current scheduling order, which only states that  
 28 dispositive motions from the Defendants must be filed "no later than" February 3, 2012, but does  
 not prohibit the filing of such motions prior to that time. (Stipulation and Order Extending  
 Deadlines (Dkt. 238) at ¶ 14.)

1 from discussing the programs. Specifically, Plaintiffs are seeking a declaration “that Plaintiffs are  
2 released from any obligations or penalties under their secrecy oaths.” (Third Am. Compl.  
3 (“3AC”) (Dkt. 180) at ¶ 183.) The factual basis for Plaintiffs’ secrecy oath claim is set forth in  
4 paragraphs 28 and 156–160 of the Third Amended Complaint, in addition to allegations  
5 concerning the named Individual Plaintiffs. However, paragraphs 28 and 156–160 and the  
6 remainder of the Third Amended Complaint do not contain any allegation that the Plaintiffs or  
7 any other volunteer service member had a secrecy oath with the CIA. In fact, Plaintiffs’  
8 allegations concerning the nature of the secrecy oaths allegedly administered to test participants  
9 in this case are limited to two paragraphs. Not only is there no mention of the CIA in those two  
10 paragraphs, but it is clear that Plaintiffs are attempting to allege that the Department of Defense  
11 (“DoD”), rather than the CIA, administered the purported secrecy oaths. (3AC ¶ 156 (alleging  
12 that test participants were administered a “secrecy oath” that they would “not divulge or make  
13 available any information related to U.S. Army Intelligence Center” subject to “provisions of the  
14 Uniform Code of Military Justice); *id.* ¶ 157 (alleging that test participants signed an oath  
15 “implying that the Uniform Code of Military Justice applied to them after their discharge from  
16 service).)<sup>3</sup> In sum, Plaintiffs have made no allegations concerning the administration of secrecy  
17 oaths by the CIA.

18 Due to Plaintiffs failure to allege any facts to support this claim against the CIA, the CIA  
19 propounded an interrogatory on Plaintiffs asking them to identify the factual basis for a potential  
20 secrecy oath claim against the CIA. Plaintiffs acknowledged in their response in March 2011 that  
21 they “do not currently have facts identifying specific circumstances where the Central  
22 Intelligence Agency directly administered secrecy oaths to Plaintiffs . . . .” (Ex. A to Decl. of  
23  
24

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25 <sup>3</sup> Not only do Plaintiffs fail to allege in their Third Amended Complaint that the CIA  
26 administered secrecy oaths to test participants, but their allegations concerning written secrecy  
27 oaths administered by DoD have proven incorrect. After a diligent search pursuant to Plaintiffs’  
28 discovery requests and after reviewing the test files of individuals subject to the test programs,  
DoD has not uncovered a single written secrecy oath concerning the test programs at issue in this  
case. (Ex. U to Herb Decl. (Kilpatrick Dep.) at 77:8–23.)

1 Kimberly L. Herb, Trial Attorney, U.S. Department of Justice (“Herb Decl.”) at 15.)<sup>4</sup> Plaintiffs have  
2 not revised or supplemented this interrogatory response in the more than four months that have  
3 followed. (Herb Decl. ¶ 3.)

4 Furthermore, during their depositions in this case, each of the Individual Plaintiffs  
5 provided testimony that they had no personal knowledge of any CIA role in testing at Edgewood  
6 Arsenal (where the Individual Plaintiffs allegedly underwent tests) let alone personal knowledge  
7 of the CIA’s administration of any secrecy oath. (Ex. B to Herb Decl. (Muth Dep.) at 136:23–  
8 137:2 (“Q. Do you think the CIA had any role in the administration of secrecy oaths or your non-  
9 disclosure agreement? A. To my knowledge that was Military Intelligence.”); Ex. C to Herb  
10 Decl. (Blazinski Dep.) at 32:20–33:2 (“Q. So, other than just the fact that the CIA is a defendant  
11 in this case, do you have any knowledge whatsoever as to the CIA’s involvement in testing at  
12 Edgewood? A. No.”); Ex. D to Herb Decl. (Dufrane Dep.) 171:18–172:1 (“Q. Do you have any  
13 first-hand knowledge [of the CIA’s alleged involvement in testing at Edgewood]? A. No.”); Ex.  
14 E to Herb Decl. (Josephs Dep.) at 222:10–13 (“Q. Do you have any firsthand personal  
15 knowledge, Mr. Josephs, of the CIA’s involvement of testing at Edgewood? A. No.”); Ex. F  
16 (Meirow Dep.) at 115:4–7 (“Q. Do you have any firsthand knowledge of the CIA being involved  
17 in the tests? A. Did they come up and introduce their self as a CIA agent? No.”); Ex. G to Herb  
18 Decl. (Rochelle Dep.) at 284:7–16 (“Q. Okay. Do you have any knowledge of CIA’s  
19 involvement in the testing at Edgewood? A. Do I have any knowledge? Only what I’ve read . . . .  
20 Q. Okay. So do you recall about when you first heard something about the CIA being involved in  
21 Edgewood? A. Six – ‘06 or ‘07.”); Ex. H to Herb Decl. (Price Dep.) at 137:10–138:4 (stating that  
22 he believed the CIA had a role in the administration of secrecy oaths because it was “the first time  
23 [he had] ever come, come in contact with such a secrecy item,” but also stating that he did not  
24 recall personally having signed any secrecy oath form and that he did not begin to even suspect a  
25 CIA role in secrecy oaths until approximately the year 2000).)

26 \_\_\_\_\_  
27 <sup>4</sup> Plaintiffs’ interrogatory response went on to state that “the Central Intelligence Agency  
28 provided financial support for testing by the Chemical Corps and the Office of Naval Research  
and had knowledge that secrecy oaths were administered by these organizations.”

1 In addition, plaintiff VVA is the sole membership-based organization in this lawsuit. It  
2 identified three individuals as likely to have information related to this lawsuit. (Ex. I to Herb  
3 Decl. at 3.) Each of the identified individuals testified that they did not have any information  
4 concerning the administration of secrecy oaths by the CIA. (Ex. J to Herb Decl. (Weidman Dep.)  
5 at 125:2–4 (“Q. Have you heard of any secrecy oaths being administered by the CIA? A. Not  
6 directly.”); Ex. K to Herb Decl. (Edelman Dep.) at 181:18–22 (“Q. Do you know if the CIA had  
7 any role in the nondisclosure agreements? . . . A. I don’t know.”); Ex. L to Herb Decl. (Berger  
8 Dep.) at 69:18–21 (“Q. You are aware of the CIA participating in testing at Edgewood Arsenal?  
9 A. I am not personally knowledgeable of that . . .”).)

10 Finally, Plaintiffs have identified only a single individual associated with Swords to  
11 Plowshares: Veterans Rights Organization (“Swords”) who can testify regarding its provision of  
12 services to test participants and whether its services have been hampered by alleged secrecy oaths  
13 as alleged in Plaintiffs’ Third Amended Complaint. (Ex. I to Herb Decl. at 4.) The identified  
14 individual, however, is a former employee who is not currently providing services on behalf of  
15 Swords, (*id.*), and thus cannot offer testimony regarding whether alleged secrecy oaths impact  
16 Swords. Additionally, she also lacks any knowledge of secrecy oaths being administered by the  
17 CIA. (Ex. M to Herb Decl. (Roberts Dep.) at 144:1–15 (“Q. Do you recall whether any veteran  
18 told you what government agency had imposed secrecy obligations on them? . . . A. I don’t  
19 recall anything specific. In general, when I talked to veterans who had a perceived secrecy or  
20 security obligation, they typically would refer to the government or to the military in the broadest  
21 terms. I have no specific recollection of agencies or other details.”).)

22 On February 16, 2011, the CIA filed a certified Administrative Record in this case. With  
23 respect to Plaintiffs’ secrecy oath claim, the CIA’s certification stated that “[b]ased on a  
24 reasonable search of its records, the CIA has uncovered no records indicating that it ever  
25 administered or otherwise entered into ‘secrecy oaths’ or other types of nondisclosure agreements  
26 with volunteer service members (including the Individual Plaintiffs) relating to the testing of  
27 chemical or biological substances upon them, as alleged in this case.” (Certification of  
28 Administrative R. (Dkt. 208-1) at ¶ 12.) The CIA has also provided an interrogatory response

1 reflecting this conclusion. (Ex. N to Herb Decl. at 2–3.) Based on this interrogatory response  
2 from the CIA, Plaintiffs abandoned their request for a Rule 30(b)(6) deposition from the CIA on  
3 the topic of secrecy oaths, (Ex. O to Herb Decl. at 1 (“Based on that updated response, Plaintiffs  
4 have agreed to withdraw their request for Rule 30(b)(6) testimony from the CIA concerning  
5 secrecy oaths.”)), and they are not currently seeking any other deposition or document discovery  
6 from the CIA specifically concerning the possible administration of secrecy oaths by the CIA,  
7 (Herb Decl. ¶ 18). Nor do Plaintiffs have any outstanding discovery requests with DoD or the  
8 Department of Veterans Affairs, the only other defendants in this action, that directly request  
9 information concerning whether the CIA had a role in the alleged administration of secrecy oaths.  
10 (*Id.* ¶ 19.) Thus, there is no basis to conclude that discovery is likely to yield any additional  
11 information relevant to Plaintiffs’ secrecy oath claim against the CIA.

12 On June 28, 2011, the CIA provided Plaintiffs with a sworn declaration that further  
13 detailed the CIA’s position on Plaintiffs’ secrecy oath claim. (Ex. P to Herb Decl.) With respect  
14 to the Individual Plaintiffs, the declaration explained that the CIA conducted a reasonable search  
15 of its records for information concerning the Individual Plaintiffs. (Ex. Q to Herb Decl. at ¶ 5.)  
16 “Included in this search were the records of the CIA’s Office of Security, the Agency component  
17 that would typically maintain files concerning any ‘secrecy oaths’ (which the CIA refers to as  
18 ‘non-disclosure agreements’) if such records existed.” (*Id.*) The CIA’s declaration asserted that  
19 “[t]hese reasonable searches located no evidence of any ‘secrecy oath’ or any other type of non-  
20 disclosure agreement between the CIA and the Individual Plaintiffs” and that “[b]ased on this  
21 lack of evidence, the CIA has concluded that no such agreements exist between the CIA and the  
22 Individual Plaintiffs.” (*Id.*)

23 The CIA also searched its Office of Security’s files for information concerning potential  
24 secrecy oaths with the twelve members of organizational Plaintiff VVA who were identified by  
25 Plaintiffs as having participated in the test programs at issue in this case (“VVA Members”). (*Id.*  
26 at ¶ 6.) As with the Individual Plaintiffs, “these reasonable searches located no evidence of any  
27 ‘secrecy oath’ or any other type of non-disclosure agreement between the CIA and the VVA  
28 Members.” (*Id.*) As a result, the CIA concluded “that no such agreements exist between the CIA

1 and the VVA Members.” (*Id.*)

2 Although these representations conclusively resolve any issues concerning potential  
3 secrecy oaths between the CIA and the Individual Plaintiffs and VVA Members, the CIA took the  
4 following further steps in an effort to put the issue to rest. As explained by the CIA declarant:

5 To resolve any lingering uncertainty that may be in the minds of the Individual  
6 Plaintiffs or the VVA Members, the CIA wishes to make abundantly clear that (a)  
7 it has no record of having any type of enforceable non-disclosure agreement, to  
8 include any oral agreements, with them; and (b) *to the extent the Individual  
9 Plaintiffs or VVA Members continue to believe that they are subject to any type of  
10 non-disclosure agreement with the CIA, they are hereby released from that  
11 agreement and any obligations or penalties related thereto by the CIA.*

12 (*Id.* at ¶ 7 (emphasis added).) Thus, to the degree that the Individual Plaintiffs and VVA  
13 Members had concerns regarding the existence of secrecy oaths, those concerns have been  
14 eliminated by the CIA’s assurances to those individuals that no such secrecy obligations remain.

15 Finally, in addition to searches related to the Individual Plaintiffs and VVA Members, the  
16 CIA’s declaration described its “broad-based search of its files designed to uncover records  
17 concerning the potential involvement by the CIA in testing on volunteer service members.” (*Id.*  
18 at ¶ 8.) In other words, these searches were not focused on a specific individual, but rather were  
19 designed to locate information on potential testing on *any* volunteer service member. “These  
20 searches focused on, but were not limited to, records concerning (a) testing on volunteer service  
21 members at Edgewood Arsenal or Fort Detrick and (b) Project OFTEN, the only CIA program  
22 known to CIA to have contemplated testing on volunteer service members.” (*Id.*) Based on these  
23 searches and others in the case, the CIA produced over 2,275 pages of responsive documents to  
24 Plaintiffs. (*Id.*) As explained in the CIA’s declaration, however, “[t]here is no indication in these  
25 documents that the CIA ever administered or otherwise entered into ‘secrecy oaths’ or any other  
26 types of non-disclosure agreements with any volunteer service members relating to the testing of  
27 chemical or biological substances upon them, as alleged in this case.” (*Id.*) Accordingly, the CIA  
28 “concluded that no such agreements with the Agency exist.” (*Id.*)

This record makes clear that Plaintiffs have never seriously pursued their “secrecy oath”  
claim against the CIA. Due to the absence of allegations concerning the CIA with regard to this

1 sole remaining claim and Plaintiffs' own admissions that they do not have specific facts to  
2 support it, the CIA has repeatedly asked Plaintiffs to voluntarily withdraw the claim. In fact,  
3 Defendants have reminded Plaintiffs of their obligations to ensure that their allegations have  
4 factual support on four occasions and, because Plaintiffs lack such support for their secrecy oath  
5 claim against the CIA, Defendants have requested that Plaintiffs withdraw this claim. (Ex. R to  
6 Herb Decl. at 9–10; Ex. S to Herb Decl. at 1; Ex. T to Herb Decl. at 2; Ex. P to Herb Decl at 1.)  
7 Most recently, on June 28, 2011, Defendants provided Plaintiffs with a declaration from the CIA  
8 that confirmed, as Plaintiffs recognized, that there is no factual basis for this claim. (Ex. P to  
9 Herb Decl. at 1.) Furthermore, the CIA took further steps to assure the Individual Plaintiffs and  
10 VVA Members that no such secrecy obligation exists such that their claims would be moot, to the  
11 extent they ever existed. (Ex. Q to Herb Decl. ¶ 7.) Plaintiffs did not respond to Defendants'  
12 June 28, 2011 letter and, therefore, have not provided any basis for their continued maintenance  
13 of this claim. Plaintiffs failure to respond is particularly noteworthy given that, following  
14 Defendants' June 28, 2011 letter requesting that Plaintiffs withdrawal their sole remaining claim,  
15 Plaintiffs have filed a notice of discovery dispute with the magistrate judge that seeks substantial  
16 discovery from the CIA that not only does not pertain to secrecy oaths but also does not pertain to  
17 testing on volunteer service members. (Dkts. 239, 240.) In light of the burden of responding to  
18 such a request and its lack of relevance given this Court's May 2011 Order, the CIA now seeks  
19 dismissal of the only remaining claim against it.

### 20 ARGUMENT

21 Plaintiffs' secrecy oath claim against the CIA must be dismissed because this Court lacks  
22 jurisdiction over it. In order for jurisdiction to exist, there must be a live case or controversy  
23 between Plaintiffs and the CIA. This fundamental constitutional requirement is lacking for two  
24 independent reasons. First, any such claims of the Individual Plaintiffs and VVA would be moot  
25 in light of CIA's efforts, out of an abundance of caution, to address the concerns of the  
26 Individuals Plaintiffs and VVA Members related to any potential secrecy oath they continued to  
27 believe they had with the CIA (notwithstanding the lack of evidence of such oaths). Second,  
28 Plaintiffs have failed to establish that they have standing to pursue this claim because they do not

1 now, nor did they ever, have a factual basis for it. Accordingly, there is no live dispute between  
2 the CIA and the Plaintiffs with respect to this claim, and it must be dismissed for lack of  
3 jurisdiction. Finally, if the Court finds that there is jurisdiction, the CIA is nonetheless entitled to  
4 summary judgment on the merits, as it is undisputed that the CIA did not administer secrecy oaths  
5 to the participants in the test programs at issue in this case.

6 I. THE COURT SHOULD DISMISS PLAINTIFFS' SECRECY OATH CLAIM  
7 AGAINST THE CIA BECAUSE, EVEN IF SUCH A CLAIM EXISTED, IT  
8 WOULD BE MOOT

9 A federal court's jurisdiction is limited to actual cases or controversies. U.S. Const. art.  
10 III, § 2. As a result, "a federal court has no authority 'to give opinions upon moot questions or  
11 abstract propositions, or to declare principles or rules of law which cannot affect the matter in  
12 issue in the case before it.'" *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)  
13 (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). A case becomes moot when it loses "its  
14 character as a present, live controversy." *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d  
15 1118, 1123 (9th Cir.1997); *GTE Cal., Inc. v. FCC*, 39 F.3d 940, 945 (9th Cir. 1994) ("If an event  
16 occurs that prevents the court from granting effective relief, the claim is moot and must be  
17 dismissed."). This can occur "when an administrative agency has performed the action sought by  
18 a plaintiff in litigation," thereby eliminating the ability of a federal court "to grant effective relief"  
19 and rendering the claim moot. *Rosemere Neighborhood Ass'n v. U.S. Env'tl. Prot. Agency*, 581  
20 F.3d 1169, 1173 (9th Cir. 2009). Furthermore, in cases such as the present one, mootness is  
21 evaluated at the time of the court's review. *Pub. Utils. Comm'n of State of Cal. v. F.E.R.C.*, 100  
22 F.3d 1451, 1458 (9th Cir. 1996).

23 In this case, Plaintiffs' requested relief related to their alleged secrecy oaths is that they be  
24 "released from any obligations or penalties under their secrecy oaths." (3AC ¶ 183.) The CIA,  
25 however, has performed the requested action. As discussed above, the CIA provided Plaintiffs  
26 with a declaration on June 28, 2011. (Ex. P to Herb Decl.) This declaration recounted that the  
27 CIA has no evidence of any non-disclosure agreement or secrecy oath with any of the Individual  
28 Plaintiffs, nor does it have such an agreement or oath with the VVA Members. (Ex. Q to Herb

1 Decl. ¶¶ 5, 6.) Nonetheless, the CIA recognized that it was possible that some volunteer service  
 2 members may continue to erroneously believe that they are subject to these oaths notwithstanding  
 3 the evidence to the contrary. (*Id.* ¶ 7.) To put the issue conclusively to rest, and to alleviate any  
 4 remaining potential concerns of the Individual Plaintiffs and identified VVA Members, the CIA  
 5 expressly released those individuals from any non-disclosure agreement or secrecy oath to the  
 6 extent they continued to believe one existed. (*Id.*) As explained by the CIA declarant:

7 to the extent the Individual Plaintiffs or VVA Members continue to believe that  
 8 they are subject to any type of non-disclosure agreement with the CIA, they are  
 9 hereby released from that agreement and any obligations or penalties related  
 thereto by the CIA.

10 (*Id.*) Thus, to the degree that the Individual Plaintiffs and VVA Members had concerns regarding  
 11 the existence of secrecy oaths, those concerns have been put to rest and those individuals have  
 12 already received all of the relief to which they could have been entitled pursuant to this litigation.  
 13 Accordingly, any secrecy oath claim by Plaintiffs against the CIA would be moot, and the CIA  
 14 should be dismissed from this case. *See Rosemere Neighborhood Ass'n*, 581 F.3d at 1173 (“In  
 15 general, when an administrative agency has performed the action sought by a plaintiff in litigation  
 16 . . . the claim is moot.”).

## 17 II. THIS COURT MUST DISMISS PLAINTIFFS’ SECRECY OATH CLAIM 18 AGAINST THE CIA BECAUSE PLAINTIFFS LACK STANDING

19 Even if Plaintiffs had not already received all of the relief to which they could have been  
 20 entitled, Plaintiffs have not established that they have standing to pursue a secrecy oath claim  
 21 against the CIA. “Article III of the Constitution requires that a plaintiff have standing before a  
 22 case may be adjudicated.” *Covington v. Idaho*, 358 F.3d 626, 637 (9th Cir. 2004). To have  
 23 standing to sue in federal court, a plaintiff must allege “‘such a personal stake in the outcome of  
 24 the controversy’ as to warrant his invocation of federal-court jurisdiction and to justify exercise of  
 25 the court’s remedial powers on his behalf.” *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975)  
 26 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). To satisfy the Constitution’s standing  
 27 requirements, a plaintiff must show (1) an “injury in fact” that is (a) concrete and particularized  
 28 and (b) actual or imminent, not conjectural or hypothetical; (2) the injury must be fairly traceable

1 to the challenged action of the defendant; and (3) it must be likely, as opposed to merely  
2 speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of*  
3 *Wildlife*, 504 U.S. 555, 560–61 (1992); *see also Covington v. Jefferson Cnty.*, 358 F.3d 626, 637–  
4 38 (9th Cir. 2004). As the party invoking federal jurisdiction, the plaintiff bears the burden of  
5 establishing these elements. *Lujan*, 504 U.S. at 561.

6 The fact that this case is a proposed class action is immaterial to the Court’s standing  
7 analysis. “The only plaintiffs whose claims may be considered in deciding whether plaintiffs  
8 have standing to bring this lawsuit are the named plaintiffs.” *Daley’s Dump Truck Serv., Inc. v.*  
9 *Kiewit Pac. Co.*, 759 F. Supp. 1498, 1501 (W.D. Wash. 1991). “If the plaintiff has no standing  
10 individually, then no case or controversy arises, and the plaintiffs’ claims are not typical of the  
11 claims of those who might otherwise litigate the action.” 1 Alba Conte & Herbert Newberg,  
12 *Newberg on Class Actions* § 2:7 at 102 (4th ed. 2002). As explained by the Supreme Court,  
13 “[plaintiffs] must allege and show that they personally have been injured, not that injury has been  
14 suffered by other, unidentified members of the class to which they belong and which they purport  
15 to represent. Unless these [plaintiffs] can thus demonstrate the requisite case or controversy  
16 between themselves personally and [the defendant], ‘none may seek relief on behalf of himself or  
17 any other member of the class.’” *Warth*, 422 U.S. at 502 (citation omitted).

18 The Plaintiffs in this case – the seven Individual Plaintiffs, VVA, and Swords – have  
19 failed to meet this burden with respect to their secrecy oath claim against the CIA. Because their  
20 Third Amended Complaint does not sufficiently allege standing to pursue a secrecy oath claim  
21 against the CIA, the CIA is entitled to a judgment on the pleadings under Federal Rule of Civil  
22 Procedure 12(c). Even if the Third Amended Complaint could survive a Rule 12 motion, the CIA  
23 is still entitled to summary judgment for lack of jurisdiction under Rule 56 because the Plaintiffs  
24 have admitted that they do not have specific facts to support this claim against the CIA, and  
25 therefore they do not have standing.

26 **A. Plaintiffs’ Third Amended Complaint Does Not Establish Standing to Pursue**  
27 **a Secrecy Oath Claim Against the CIA, and Therefore the CIA is Entitled to**  
28 **Judgment on the Pleadings**

1 Under Rule 12(c), “a party may move for judgment on the pleadings” once “the pleadings  
2 are closed – but early enough not to delay trial.” Fed. R. Civ. P. 12(c). Because the CIA filed its  
3 Answer to Plaintiffs’ Third Amended Complaint on June 14, 2011, (Dkt. 236), and trial is not  
4 scheduled to commence until July 9, 2012, (Dkt. 238 at 4), the CIA may appropriately file a  
5 motion for judgment on the pleadings at this time.

6 A motion for judgment on the pleadings is “‘functionally identical’ to Rule 12(b)(6) and []  
7 ‘the same standard of review’ applies to motions brought under either rule.” *United States ex rel.*  
8 *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 n.4 (9th Cir. 2011). In both, “the  
9 Court assumes the allegations in the complaint are true and construes them in the light most  
10 favorable to the plaintiff.” *Vera v. O’Keefe*, \_\_ F. Supp. 2d \_\_, No. 10cv1422L, 2011 WL  
11 2005196, at \*2 (S.D. Cal. 2011). Furthermore, the standard articulated by the Supreme Court in  
12 *Ashcroft v. Iqbal*, \_\_ U.S. \_\_, 129 S. Ct. 1937, 1949 (2009), and *Bell Atlantic Corp. v. Twombly*,  
13 550 U.S. 544, 556 (2007) regarding pleading requirements apply equally to motions under  
14 12(b)(6) and 12(c). *United States ex rel. Cafasso*, 637 F.3d at 1055 n.4; *see also Vera*, 2011 WL  
15 2005196, at \*2. Accordingly, while a complaint attacked under Rule 12(c) “does not need  
16 detailed factual allegations, the pleader’s obligation to provide the grounds for relief requires  
17 ‘more than labels and conclusions, and a formulaic recitation of the elements of a cause of action  
18 will not do.’” *Loos v. Lowe’s HIW, Inc.*, \_\_F. Supp. 2d \_\_, No. CV11-232-PHX, 2011 WL  
19 2457508, at \*2 (D. Ariz. 2011) (quoting *Twombly*, 550 U.S. at 555). Instead, “[t]o survive a  
20 Federal Rule of Civil Procedure 12(c) motion, a plaintiff must allege enough facts to state a claim  
21 to relief that is plausible on its face.” *Vera*, 2011 WL 2005196, at \*2 (quoting *Lowden v. T-*  
22 *Mobile USA, Inc.*, 378 Fed. Appx. 693, 694 (9th Cir. 2010)); *Loos*, 2011 WL 2457508, at \*2  
23 (“The factual allegations of the complaint must be sufficient to raise a right to relief above a  
24 speculative level.”).

25 In this case, Plaintiffs’ Third Amended Complaint does not sufficiently allege the  
26 elements of standing for any of the Plaintiffs with respect to a secrecy oath claim against the CIA.  
27 With regard to the seven Individual Plaintiffs, the Third Amended Complaint devotes over eighty  
28 paragraphs to their individual claims, but not once does it ever allege that one of them has or had

1 a secrecy oath with the CIA. (3AC ¶ 34 (alleging solely that Mr. Price’s secrecy oath resulted  
2 from an oral debriefing with “government personnel”; *id.* ¶ (alleging solely that Mr. Muth signed  
3 a non-disclosure form but failing to allege who presented it to him); *id.* ¶ (alleging solely that Mr.  
4 Rochelle was “instructed to never talk about any of his tests,” but failing to allege who offered the  
5 instruction); *id.* ¶ 66 (alleging solely that Mr. Meiorow participated in a “group presentation”  
6 during which soldiers were promised medals and “ordered to never disclose any details of their  
7 Edgewood experience”); *id.* ¶ 78 (alleging solely that, during an exit interview, Mr. Dufrane was  
8 instructed not to speak of his service and directed to sign a confidentiality agreement, but failing  
9 to allege who presented it to him); *id.* ¶¶ 197, 204 (alleging solely that Mr. Josephs was instructed  
10 never to discuss his experience); *id.* ¶ 217 (alleging solely that Mr. Blazinski was told the  
11 experiments were top-secret and he could not disclose anything about his experience).)

12 Furthermore, as discussed above, the only other allegations in the Third Amended  
13 Complaint regarding the nature of the secrecy oaths allegedly administered to test participants not  
14 only fail to mention the CIA, but also make clear that Plaintiffs are alleging that DoD was  
15 responsible for the administration of such oaths. For instance, Plaintiffs allege that test  
16 participants were administered a “secrecy oath” that they would “not divulge or make available  
17 any information related to U.S. Army Intelligence Center” subject to “provisions of the Uniform  
18 Code of Military Justice.” (*Id.* ¶ 156.) Additionally, Plaintiffs allege that test participants signed  
19 an oath “implying that the Uniform Code of Military Justice applied to them after their discharge  
20 from service.” (*Id.* ¶ 157). The clear implication from Plaintiffs’ allegations is that it was DoD,  
21 rather than the CIA, that allegedly administered secrecy oaths.

22 Because the Individual Plaintiffs have made no allegations concerning the administration  
23 of secrecy oaths by the CIA, they fail to meet the “fairly traceable” and redressability elements of  
24 standing. First, the Individual Plaintiffs’ generalized allegations of secrecy oaths by unnamed  
25 individuals are not fairly traceable to the CIA. As the Ninth Circuit has recognized, in multi-  
26 defendant litigation, plaintiffs must establish standing for their claims against each individual  
27 defendant. *See Easter v. Am. W. Fin.*, 381 F.3d 948, 961–62 (9th Cir. 2004) (“Here, no named  
28 plaintiff can trace the alleged injury in fact – payment of usurious interest rates – to all of the

1 Trust Defendants, but only to the Trust Defendant that holds or held that plaintiff's note. As to  
2 those trusts which have never held a named plaintiff's loan, Borrowers cannot allege a traceable  
3 injury and lack standing.”). Nor have the Individual Plaintiffs established that it is likely that the  
4 alleged injury will be redressed by a favorable decision. Taking the Individual Plaintiffs  
5 allegations as true that some other government agency administered secrecy oaths, there is no  
6 basis to conclude that the CIA controlled DoD's decision with regard to any perceived secrecy  
7 oaths, to the extent that Plaintiffs are attempting to allege that DoD was the agency that  
8 administered such oaths. *See Clouser v. Espy*, 42 F.3d 1522, 1535 (9th Cir. 1994) (noting that  
9 one government agency cannot bind another); *Reed v. Reno*, 146 F.3d 392, 397 (6th Cir. 1998)  
10 (stating that the Department of Justice “is not bound by the definitions set forth in the regulations  
11 promulgated by the OPM” where the relevant statute had not granted OPM the authority to  
12 promulgate definitions binding other agencies). Accordingly, Plaintiffs lack standing to assert this  
13 claim against the CIA.

14 Similarly, in order to have standing, VVA must allege, at a minimum, that one of its  
15 members has a secrecy oath with the CIA. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432  
16 U.S. 333, 343 (1977) (“An association has standing to assert its members' claims only where . . .  
17 its members would otherwise have standing to sue in their own right . . .”). The Third Amended  
18 Complaint is devoid of such an allegation. In fact, Plaintiffs have failed to make a single  
19 allegation concerning the administration of secrecy oaths to any VVA member. (3AC ¶ 26  
20 (alleging solely that VVA members “have been barred from asserting or deterred from asserting  
21 damages claims,” but failing to allege that this is due to secrecy oath or to otherwise mention the  
22 administration of such oaths by any entity let alone by the CIA.) Accordingly, VVA (suing on  
23 behalf of its members) has failed to establish that it suffered an injury in fact that is traceable to  
24 any action by the CIA.

25 Swords fares no better. As a threshold matter, it is not even clear that Swords is seeking  
26 relief from the Court with respect to this claim. The only relief sought by Plaintiffs with respect  
27 to the secrecy oath claim is a declaration “that Plaintiffs are released from any obligations or  
28 penalties under their secrecy oaths.” (3AC at ¶ 183.) Because Swords is not a membership

1 organization, and because Swords has no “secrecy oath” related to the test programs, Plaintiffs’  
2 request for relief for “Plaintiffs” must be referring to the Individual Plaintiffs or VVA Members,  
3 whose claims would be moot and lack standing. Thus, on the face of Plaintiffs’ Complaint, it  
4 does not appear that Swords is pursuing this claim against the CIA, as Plaintiffs are not requesting  
5 relief from some perceived injury directly suffered by Swords.

6 Even if Swords intended to seek relief from the Court with respect to the secrecy oath  
7 claim, it still has failed to allege the elements necessary to establish standing. Although Swords  
8 does claim to have been inhibited from providing comprehensive legal services to certain  
9 unnamed service members who have “perceived secrecy obligations,” (3AC at ¶¶ 28, 158), this  
10 allegation is insufficient to confer standing for several reasons. First, unlike VVA, Swords is not  
11 a membership organization, and therefore it does not have standing to sue on behalf of any  
12 volunteer service members. *See Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654 (D.C. Cir.  
13 2010) (“[O]ne cannot have standing in federal court by asserting an injury to someone else.”).  
14 Second, Swords alleges solely that service members to whom it has provided initial counseling  
15 had “perceived secrecy obligations,” (*Id.* at ¶¶ 28, 158 (emphasis added)); Swords makes no  
16 allegation that it has any information concerning the actual administration of secrecy oaths by any  
17 entity. A “perceived” obligation that does not actually exist is not a concrete and particularized  
18 injury that can be remedied by the Court. Third, even if a *perceived* secrecy obligation could be  
19 construed as a concrete injury, Swords fails to satisfy the traceability requirement because it does  
20 not allege that any of the service members who allegedly refused to disclose information to it had  
21 secrecy oaths *with the CIA*. Finally, Swords fails to establish that it has an imminent, but  
22 redressable, injury that can be remedied by a favorable decision from the Court. Indeed, the only  
23 individual identified as having information regarding the impact of alleged secrecy oaths on  
24 Swords is a *former* employee. Having failed to plead any of the elements required to establish  
25 standing, Swords’ secrecy oath claim must be dismissed along with those of the Individual  
26 Plaintiffs and VVA.

27 If the Court finds that the Plaintiffs have not adequately pled standing with respect to their  
28 secrecy oath claim against the CIA, the Court’s inquiry must end there and Plaintiffs’ claim

1 should be dismissed. While a court dismissing claims under Rule 12(c) may consider granting a  
2 plaintiff leave to amend his complaint, the Court should not do so where amendment would be  
3 futile. *Doe I v. AOL LLC*, 719 F. Supp. 2d 1102, 1108 (N.D. Cal. 2010); *see also Deveraturda v.*  
4 *Globe Aviation Sec. Servs.*, 454 F.3d 1043, 1050 (9th Cir. 2006). In this case, it would be futile to  
5 permit Plaintiffs to amend their complaint (a fourth time no less) because, among other reasons,  
6 they have admitted that they “do not currently have facts identifying specific circumstances where  
7 the Central Intelligence Agency directly administered secrecy oaths to Plaintiffs.” (Ex. A to Herb  
8 Decl. at 15.) The lack of merit for such a claim is discussed in more detail below.

9 **B. Alternatively, the Court Must Grant the CIA’s Motion for Summary**  
10 **Judgment Because Plaintiffs Have Not Subsequently Identified Any Evidence**  
11 **to Establish Standing for Their Secrecy Oath Claim Against the CIA**

12 Even if Plaintiffs have provided sufficient allegations of standing for purposes of  
13 surviving a motion for judgment on the pleadings, Plaintiffs lack the evidence necessary to  
14 establish standing at the summary judgment stage. As discussed above, Plaintiffs are invoking  
15 this Court’s jurisdiction and therefore have the burden of establishing the element of standing.  
16 *Lujan*, 504 U.S. at 561. “Since they are not mere pleading requirements but rather an  
17 indispensable part of the plaintiff’s case, each element must be supported in the same way as any  
18 other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of  
19 evidence required at the successive stages of the litigation.” *Id.* Thus, on “a motion for summary  
20 judgment [concerning the existence of standing], ‘a plaintiff must establish that there exists no  
21 genuine issue of material fact as to justiciability or the merits.’” *Hubbard v. 7-Eleven, Inc.*, 433  
22 F. Supp. 2d 1134, 1141 (S.D. Cal. 2006) (quoting *Dep’t of Commerce v. U.S. House of*  
23 *Representatives*, 525 U.S. 316, 329 (1999)).

24 Because a plaintiff has the burden of establishing jurisdiction, a defendant does not need  
25 to “negate or disprove” the existence of standing and, instead, need “only point out to the Court  
26 that there is an absence of evidence to support the non-moving party’s case.” *Sluimer v. Verity,*  
27 *Inc.*, 606 F.3d 584, 586 (9th Cir. 2010) (citing *Celotex Corp.*, 477 U.S. at 325). Once the moving  
28 party has met this threshold requirement, “[t]he burden then shift[s] to the non-moving party to

1 ‘designate specific facts showing that there is a genuine issue for trial.’” *Id.* (citing *Celotex*  
2 *Corp.*, 477 U.S. at 324).

3 When putting forth evidence to establish standing, the plaintiff must “do more than simply  
4 show that there is some metaphysical doubt” regarding the existence of the elements, *Matsushita*  
5 *Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (citing advisory  
6 committee’s note on 1963 amendments), and must instead “support its allegations of injury[,  
7 traceability, and redressability] by affidavit or evidence of specific facts,” *Hubbard*, 433 F. Supp.  
8 2d at 1141. *See also Snake River Farmers’ Ass’n, Inc. v. Dep’t of Labor*, 9 F.3d 792, 795 (9th  
9 Cir. 1993) (“The party invoking federal jurisdiction bears the burden of establishing standing, and  
10 in response to a summary judgment motion must provide cognizable evidence of specific facts,  
11 not mere allegations.”) (citing *Lujan*, 504 U.S. at 561). Furthermore, with regard to standing, the  
12 non-moving party may not attempt to remedy their failure to sufficiently allege facts to support  
13 standing in their complaint by subsequently submitting affidavits or other evidence. *See La*  
14 *Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1089 (9th Cir.  
15 2010) (“Given its inadequate pleading regarding organizational standing, [plaintiff] may not  
16 effectively amend its Complaint by raising a new theory of standing in its response to a motion  
17 for summary judgment.”).

18 In this case, there is a clear absence of evidence to support Plaintiffs’ standing to assert a  
19 secrecy oath claim against the CIA. Plaintiffs have long acknowledged that they have no factual  
20 basis to support this claim and thus have no evidence of any alleged injury being suffered by  
21 Plaintiffs. After Defendants propounded an interrogatory requesting that Plaintiffs identify the  
22 factual basis for a potential secrecy oath claim against the CIA, Plaintiffs’ sworn response was  
23 that they “do not currently have facts identifying specific circumstances where the Central  
24 Intelligence Agency directly administered secrecy oaths to Plaintiffs . . . .” (Ex. A to Herb Decl.  
25 at 15.) It is worth noting that Plaintiffs’ interrogatory response came *after* the CIA had produced  
26 more than 2,200 pages of documents to Plaintiffs in response to their discovery requests.<sup>5</sup> (Ex. Q

27 <sup>5</sup> Plaintiffs have also received approximately a million pages of documents from the other  
28 defendants concerning the test programs at issue in this case. (Herb Decl. ¶ 25.)

1 to Herb Decl. ¶ 8.) It is also significant that Plaintiffs have not supplemented that response in the  
2 more than four months since they issued it, despite the fact that Defendants have notified  
3 Plaintiffs on multiple occasions in the intervening months that Defendants would seek to have the  
4 secrecy oath claim dismissed given the absence of factual support for it. (Herb Decl. ¶¶ 3, 21–  
5 24.)

6 Furthermore, as discussed above, deposition testimony from every one of the Individual  
7 Plaintiffs and the organizational plaintiffs fail to establish that any had suffered an injury  
8 traceable to the CIA due to the alleged administration of secrecy oaths. Each of the Individual  
9 Plaintiffs testified that they had no personal knowledge of the CIA’s role in testing at Edgewood  
10 Arsenal (where the Individual Plaintiffs allegedly underwent tests), let alone personal knowledge  
11 of the CIA’s administration of any secrecy oath. (*See, e.g.*, Ex. B to Herb Decl. at 136:23–137:2  
12 (“Q. Do you think the CIA had any role in the administration of secrecy oaths or your non-  
13 disclosure agreement? A. To my knowledge that was Military Intelligence.”). In addition,  
14 representatives of Plaintiff VVA had no information concerning the administration of secrecy  
15 oaths by the CIA, and thus did not identify any member who had suffered an injury traceable to  
16 the CIA. (*See, e.g.*, Ex. J to Herb Decl. at 125:2–4 (“Q. Have you heard of any secrecy oaths  
17 being administered by the CIA? A. Not directly.”). Finally, Plaintiff Swords cannot claim to  
18 have suffered any injury as a result of the CIA’s alleged administration of secrecy oaths given  
19 that the sole individual with information on how Swords’ services have been impacted by  
20 Defendants’ test programs not only was a former employee whose testimony cannot be used to  
21 support Swords’ present standing, but she also stated that she had no knowledge of secrecy oaths  
22 being administered by the CIA. (Ex. M to Herb Decl. at 144:1–15 (“Q. Do you recall whether  
23 any veteran told you what government agency had imposed secrecy obligations on them? . . . . A.  
24 I don't recall anything specific. In general, when I talked to veterans who had a perceived secrecy  
25 or security obligation, they typically would refer to the government or to the military in the  
26 broadest terms. I have no specific recollection of agencies or other details.”).)

27 In sum, there is “an absence of evidence to support” Plaintiffs’ assertion of standing to  
28 pursue a secrecy oath claim, as Plaintiffs have not identified a single fact that establishes an injury

1 fairly traceable to the CIA. *Sluimer*, 606 F.3d at 586. Where a party fails to offer evidence  
2 sufficient to establish the essential elements of standing, no genuine issue of material fact can  
3 exist, because “a complete failure of proof concerning an essential element of the nonmoving  
4 party’s case necessarily renders all other facts immaterial.” *Celotex Corp.*, 477 U.S. at 322–23.  
5 As such, summary judgment in favor of the CIA is warranted because Plaintiffs have not  
6 established standing and, therefore, jurisdiction is lacking.

7 **III. THE CIA IS ENTITLED TO SUMMARY JUDGMENT ON THE MERITS**  
8 **BECAUSE THE CIA DID NOT ADMINISTER SECRECY OATHS TO TEST**  
9 **PARTICIPANTS**

10 If this Court first determines that it has jurisdiction over Plaintiffs’ secrecy oath claim  
11 against the CIA, then Defendant CIA respectfully requests that this Court grant the CIA summary  
12 judgment on the merits of that claim. *Unigard Ins. Co. v. Dep’t of Treasury*, 997 F. Supp. 1339,  
13 1343 (S.D. Cal. 1997) (“Because the court dismisses [plaintiff’s] action for lack of standing, the  
14 court does not have jurisdiction to address the merits of the cross-motions for summary  
15 judgment.”) As discussed above, “[t]he court shall grant summary judgment if the movant shows  
16 that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a  
17 matter of law.” Fed. R. Civ. P. 56(a). In this case, it is undisputed that the CIA did not  
18 participate in the administration of secrecy oaths, and thus the CIA is entitled to judgment as a  
19 matter of law.

20 Not only have Plaintiffs failed to identify a single fact in support of their secrecy oath  
21 claim against the CIA, as discussed in more detail above, but the CIA has conducted reasonable  
22 searches of its records and confirmed that it has no evidence regarding the administration of  
23 secrecy oaths by it to participants in the test programs at issue in this case. In February 2011, the  
24 CIA issued a certified Administrative Record concluding that it “has uncovered no records that it  
25 ever administered or otherwise entered into ‘secrecy oaths’ or other types of nondisclosure  
26 agreements with volunteer service members (including the Individual Plaintiffs) relating to the  
27 testing of chemical or biological substances upon them, as alleged in this case.” (Certification of  
28 Administrative R. (Dkt. 208-1) at ¶ 12.) The CIA reaffirmed that it had not located any evidence

1 of alleged secrecy oaths in a subsequent interrogatory response. (Ex. N to Herb Decl. at 2–3.)  
 2 Most recently, the CIA provided Plaintiffs with a sworn declaration stating that, in addition to  
 3 searching for information related to secrecy oaths between certain named individuals and the  
 4 CIA, the CIA “also conducted a more broad-based search of its files designed to uncover records  
 5 concerning the potential involvement by the CIA in testing on volunteer service members.”) (Ex.  
 6 Q to Herb Decl. ¶ 8.) After once again reaffirming that the CIA’s document searches had not  
 7 located any records regarding secrecy oaths, the CIA declarant stated that “[b]ased on this lack of  
 8 evidence, the CIA has concluded that no such agreements with the Agency exist.” (*Id.*)

9 In this case, it is undisputed that the CIA did not participate in the administration of  
 10 secrecy oaths. As detailed above in Part II.B above, which is incorporated by reference, Plaintiffs  
 11 have acknowledged that they have no evidence that the CIA participated in the administration of  
 12 secrecy oaths. After diligent broad-based searches, the CIA has confirmed that there is no  
 13 evidence of CIA involvement in the administration of such oaths. With the parties in agreement  
 14 on this material fact, summary judgment is mandated and the CIA should be dismissed from this  
 15 case. Fed. R. Civ. P. 56 (“The court shall grant summary judgment if the movant shows that there  
 16 is no genuine dispute as to any material fact . . .”).

### 17 CONCLUSION

18 For the reasons stated above, Defendant Central Intelligence Agency respectfully requests  
 19 that the Court grant its Motion for Judgment on the Pleadings and, in the Alternative, Motion for  
 20 Summary Judgment and that it dismiss the CIA as a Defendant in this case.

21  
 22 Dated: July 28, 2011

Respectfully submitted,

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