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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

OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER LIMITING DISCOVERY

Hearing Date: September 29, 2011
Hearing Time: 2:00 p.m.

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INTRODUCTION

On August 9, 2011, this Court issued an order stating that, absent a change to the case schedule, it would not hear any more case-dispositive motions before April 5, 2012 — the date set forth in the parties' most recent stipulation extending case deadlines. (*See* Docket No. 249.) Unable to file yet another dispositive motion, Defendants have now disguised what is essentially a dispositive motion as a motion for protective order to limit discovery. Defendants' arguments improperly focus on the merits of Plaintiffs' claims (discussing issues such as standing, the propriety of certification of a class when the motion has not yet been filed, etc.) and fundamentally misconstrue the intent behind Plaintiffs' discovery requests, as well as the relevance of those requests to Plaintiffs' pending claims.

In the latest rendition of the CIA's "broken record" argument that it has raised in various forms for more than two years, the CIA again contends that it should be excused from participation in any and all discovery in this action. The CIA's position is primarily based on its contention that Plaintiffs' Constitutional claims against the CIA are no longer at issue in this case, and on its perplexing suggestion that *even though Plaintiffs do not have any Administrative Procedure Act ("APA") claims against the CIA, the APA's evidentiary standards somehow govern Plaintiffs' Constitutional claims.* The CIA is wrong on both fronts.

First, as Plaintiffs repeatedly have pointed out to Defendants, and as Magistrate Judge Corley recognized during the August 4, 2011 discovery hearing, the Complaint asserts on its face that Defendants violated Plaintiffs' Constitutional due process rights, which independently are grounds for Plaintiffs' claims for notice and health care. (*See, e.g.*, Third Amended Complaint ("TAC") at ¶¶ 184, 186; *see* Docket No. 250 at 12:23-25.) Defendants never have moved on nor briefed the merits of Plaintiffs' Constitutional claims for notice and health care — despite their successive filing of motions to dismiss and the CIA's recent motion for "judgment on the pleadings" — and the Court never has dismissed those claims.

Second, Plaintiffs' Constitutional claims against the CIA are not governed by the APA. Thus, the Court's review of those claims is not restricted to a post-hoc administrative record compiled by the CIA in an attempt to rationalize the Agency's Constitutional shortcomings.

The CIA also suggests that discovery from the CIA is not relevant or "admissible" against the other Defendants, for a variety of inventive but spurious reasons. For example, the CIA argues that the Supreme Court's recent decision in *Wal-Mart v. Dukes* allegedly precludes any individualized evidence from consideration in a 23(b)(2) class action. This contention not only misreads the legal holding in *Dukes*, it also misconstrues the intent and purpose of Plaintiffs' discovery requests.

Finally, Defendants contend that the Department of Defense ("DoD") should not have to provide any discovery relating to pre-1953 testing, which, like Plaintiffs' Constitutional claims, has been the subject of specific allegations in every complaint, and has never been addressed in any of Defendants' serial motions.[1] And Defendants once again contend that Plaintiffs' Constitutional claims against the DoD — clear on the face of the Complaint and never dismissed — are no longer at issue.

Throughout this motion, Defendants confuse issues of "admissibility" and "relevance." Federal Rule of Civil Procedure 26 makes clear that in federal court, "[p]arties may obtain discovery regarding any nonprivileged matter that is *relevant* to any party's claim or defense." Fed. R. Civ. P. 26(b)(1) (emphasis added). As set forth herein, all of Plaintiffs' requested discovery is relevant to Plaintiffs' remaining claims. Defendants' continuing attempts to evade their discovery obligations should be rejected.

On August 30, 2011, the Court issued an Order providing that the Court will decide sections I.A and I.B of the CIA's motion for a protective order, which address the issues of whether Plaintiffs "have outstanding claims for notice and health care and, if so, whether these claims should be decided on an administrative record." (Docket No. 273 at 2.) The Court referred the remaining arguments in Defendants' motion to the Magistrate Judge. (*Id.*)

[1] Plaintiffs believe that Defendants' recent focus on the pre-1953 exposed soldiers, which Defendants' own documents number at 60,000, stems from discovery taken by Plaintiffs which shows that Defendants have omitted 55,000 of those 60,000 soldiers from the notification process Defendants purportedly have been working on since 1975. (*See* Docket No. 236 ¶ 227; Docket No. 259-9, Patterson Decl. ¶ 13, Ex. I; Docket No. 259-10, Patterson Decl. ¶ 14, Ex. J; *see also* Docket No. 258 at 11 n.9.)

BACKGROUND

This case arises out of top-secret government programs to test hundreds of biological and chemical agents on military service member "volunteers." Tens of thousands of service personnel improperly received hundreds of different toxic agents, including sarin, VX, nerve agents, mustard gas, psychochemicals, irritants, anticholinesterase chemicals, biological agents, and mind control agents. (TAC at ¶¶ 5, 10.)

The Complaint asserts (among other things) that: Defendants have violated, and continue to violate, their own regulations and directives governing the human testing programs which require that notice be provided to all test participants, and that health care be provided for all conditions resulting from participation (*id.* at ¶¶132, 184); that Defendants have violated Plaintiffs' Constitutional due process rights by refusing to notify victims, by failing to notify test participants in advance of the poisonous substances to be tested and to obtain their informed consent to be exposed, and by continuing to conceal information about the tests and their "known or suspected" health effects, and "failing to provide" required medical care (*id.* at ¶¶132, 184, 186); that the "secrecy oaths" that test participants were coerced into taking, and which have prevented them from adequately obtaining medical care and compensation, are invalid (*id.* at ¶184); and that as a result of its involvement in the testing programs, the Department of Veterans' Affairs ("DVA") is a biased adjudicator of the compensation claims of test participants in violation of the due process clause of the Constitution (*id.* at ¶¶ 232, 233). The Plaintiffs have asked the Court for specific declaratory and injunctive relief. The Complaint alleges substantive claims under the APA as well as the United States Constitution, and relies upon the APA's waiver of sovereign immunity for Plaintiffs' substantive claims for non-monetary relief. (*See, e.g.*, Pls.' Opp'n to Defs.' Mot. to Dismiss First Am. Compl. (Docket No. 43) at 5.)

PROCEDURAL HISTORY

Since the inception of this litigation more than two years ago, Defendants have filed a series of dispositive motions, seeking to deprive Plaintiffs of their day in court. (Docket Nos. 29, 34, 57, 187, 245.) Yet, despite these attempts, most of Plaintiffs' claims remain. In its January 19, 2010 Order, the Court dismissed with prejudice two of Plaintiffs' claims: (1) the

"organization Plaintiffs' claim for declaratory relief that the *Feres* doctrine is unconstitutional," and (2) "Plaintiffs' claim for declaratory relief on the lawfulness of the testing program." (Jan. 19, 2010 Order (Docket No. 59) at 19-20.) It permitted the remainder of Plaintiffs' claims to proceed, and Defendants have never moved to strike any of the substantive factual allegations of the Complaint.

In its May 31, 2011 Order, the Court addressed Defendants' Partial Motion to Dismiss, which attacked Plaintiffs' claims against the CIA "under the [APA]," and dismissed them because the Complaint did not identify "discrete agency action that [the CIA] is required to take" as required by the APA. (May 31, 2011 Order (Docket No. 233) at 6, 11 (emphasis added).) The Court again permitted the other challenged claims to proceed, including Plaintiffs' APA claims against the DoD and the U.S. Department of the Army ("Army").

Defendants have never briefed, nor has the Court ever addressed, discussed, or resolved Plaintiffs' Constitutional due process claims relating to notice and health care, although the Court did address Plaintiffs' APA notice and health care claims in its order of May 31, 2011. (Docket No. 233.)

On August 9, in response to Defendants' most recent dispositive motion, the Court issued an order stating that, absent a change to the case schedule, it would not hear any more case-dispositive motions before April 5, 2012 — the date set forth in the parties' most recent stipulation extending case deadlines. (*See* Docket No. 249.) Less than one week after the Court's Order, Defendants filed this motion to once again try to thwart discovery, but in doing so, Defendants also attempt to challenge the substance and validity of Plaintiffs' claims, apparently ignoring the Court's order instructing them not to file any further piecemeal, case-dispositive motions absent a showing of good cause.

ARGUMENT

I. THE COURT SHOULD PERMIT DISCOVERY OF THE CIA TO CONTINUE AND REQUIRE THE CIA TO COMPLY WITH ITS DISCOVERY OBLIGATIONS.

In its latest attempt to avoid its discovery obligations, the CIA now advances various arguments as to why it should not be required to participate in discovery. First, the CIA argues

that even though Plaintiffs' Third Amended Complaint ("TAC" or "Complaint") alleges Constitutionally-based claims for notice and health care against the CIA, and even though the Court has never dismissed those claims, they nonetheless are no longer a part of this case. Second, the CIA argues that even if this case includes Constitutional claims against the CIA, discovery is improper because those Constitutional claims are governed by parts of the APA — even though *all parties agree that the Court already dismissed all of Plaintiffs' APA claims against the CIA*. And finally, the CIA argues that the discovery propounded to the CIA is not admissible or relevant to Plaintiffs' claims against the CIA's co-defendants. Each argument — addressed in turn below — should be rejected, and the CIA should not be permitted to evade its discovery obligations.

A. Plaintiffs' Constitutional Claims for Notice and Health Care Remain Part of this Case.

The CIA does not, and cannot, argue that the Complaint does not assert Defendants' violation of Plaintiffs' Constitutional due process rights as a basis for seeking declaratory and injunctive relief requiring Defendants to notify test subjects and provide health care. (*See, e.g.*, TAC (Docket No. 180) at ¶¶ 2, 12, 161-173, 186, 189.) Among numerous other allegations, the TAC alleges:

> A present controversy exists between Plaintiffs and DEFENDANTS in that Plaintiffs contend and DEFENDANTS deny that DEFENDANTS violated Plaintiffs' property and liberty rights protected by the Due Process Clause of the Fifth Amendment to the United States Constitution by concealing (and continuing to conceal) the extent and nature of the tests conducted on Plaintiffs and the known or suspected effects of such experiments, and failing to provide adequate medical treatment to Plaintiffs after Plaintiffs were discharged from the military.

(TAC at ¶ 186; *see also* TAC at ¶ 184.) Indeed, every version of the complaint since the very beginning of this litigation has asserted this basis for relief. (*See, e.g.*, Docket No. 1 at ¶¶ 162, 165; Docket No. 31 at ¶¶ 177, 180; Docket No. 53 at ¶¶ 186, 189; Docket No. 180 at ¶¶ 186, 189.)[2]

[2] During the August 4, 2011 discovery hearing, the CIA argued that it should not be subject to further discovery, in part because it disagreed that Plaintiffs had a viable Constitutional

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Unable to dispute the fact that Plaintiffs' Constitutional claims are clearly articulated in the Complaint, the CIA alternatively argues that the Court has dismissed these claims or that Plaintiffs somehow have "disclaimed" or "waived" them. The CIA is categorically wrong on both counts.

1. The Court Has Never Dismissed Plaintiffs' Constitutional Claims for Notice and Health Care.

Contrary to Defendants' overbroad reading of the Court's January 19, 2010 Order ("Jan. 2010 Order" (Docket No. 59)), the Court did not dismiss Plaintiffs' Constitutional claims relating to notice and health care. Defendants suggest that Plaintiffs never asserted the Constitution as a basis for their notice and health care claims in their brief in Opposition to Defendants' Motion to Dismiss, but Defendants are wrong. Plaintiffs did, in fact, clearly articulate several of the due process theories underlying their Constitutional claims relating to notice and health care. (*See* Docket No. 43 at 22-23 ("Defendants violated due process and fundamental constitutional rights (and binding regulations) by subjecting Plaintiffs to testing without informed consent and *by failing to provide follow-up information and healthcare*." (emphasis added) (citing *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 813 (S.D. Ohio 1995) and *United States v. Stanley* 483 U.S. 669, 690 (1987) (Brennan, J., dissenting))).)

The Court granted in part and denied in part Defendants' initial motion to dismiss. The Court's Order was clear:

> The organization Plaintiffs' claim for declaratory relief that the Feres doctrine is unconstitutional is dismissed with prejudice for lack of subject matter jurisdiction. Plaintiffs' claim for declaratory relief on the lawfulness of the testing program is dismissed with prejudice for lack of standing. Defendants' Motions to Dismiss are *denied* with regard to Plaintiffs' *other claims*.

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due process claim. The Magistrate Judge quickly dispensed with CIA's argument, noting that the due process claim was clearly in the Complaint. (*See* Docket No. 250 at 12:23-25.)

(Jan. 2010 Order at 19-20 (emphasis added).) Thus, with the exception of Plaintiffs' claim for declaratory relief regarding the *Feres* doctrine and their claim seeking declaratory relief concerning the lawfulness of the testing program, *all* of Plaintiffs' "other claims" — including their Constitutional claims relating to notice and health care — survived. This reading of the Court's order is also consistent with the Court's reasoning for dismissing Plaintiffs' claims regarding the lawfulness of the testing program. The Court found that Plaintiffs did not have standing to assert those claims because the requested relief — a declaration that the testing was unlawful — could not redress any ongoing harm to Plaintiffs. (*Id.* at 11-12.) In stark contrast, a court order requiring Defendants to provide notice and health care *would* redress ongoing harm to Plaintiffs. Thus, both the Court's holding and its reasoning support the conclusion that Plaintiffs' Constitutional claims relating to notice and health care remained viable after the Court's January 19, 2010 order.

Contrary to the CIA's arguments, these claims also survived the Court's May 31, 2011 order granting in part Defendants' partial motion to dismiss. (*See* Docket No. 187.) It cannot be disputed that Defendants' partial motion to dismiss did not discuss or substantively address Plaintiffs' Constitutional claims relating to notice and health care. Because the CIA did not challenge or even mention Plaintiffs' Constitutional due process claims, Plaintiffs did not, and had no obligation to, brief those claims, and the Court's Order necessarily could not and did not dismiss them.

Indeed, it is clear that it was Defendants (not Plaintiffs) who mischaracterized Plaintiffs' injunctive and declaratory requests for notice and health care as *solely* arising under the APA, and neglected to address the Constitutional basis for those claims. (*See id.*) Defendants argued that Plaintiffs' APA claims for notice and health care against the CIA could not properly be reviewed under the APA because Plaintiffs had not identified any *discrete, legally enforceable* obligations that the Court could compel the CIA to fulfill pursuant to Section 706(1) of the APA. (*Id.* at 6, 12.) The CIA's motion challenged Plaintiffs' reliance on the DOJ opinion letter attached to the Complaint, which the Court cited in its January 19, 2010 order in finding that Plaintiffs could pursue an APA claim against Defendants. (*Id*; Jan. 2010 Order at 15-16.) The CIA's motion

argued that the DOJ opinion letter, which was based on the CIA's duties under common law tort principles, could not support a duty enforceable under the APA. (Docket No. 187 at 7-10.)

Plaintiffs' Opposition to that motion — not surprisingly — responded to the issues actually raised in Defendants' motion; Plaintiffs did not brief the Constitutional claims that Defendants either decided to leave out or overlooked. Plaintiffs argued that the Complaint had identified various legal obligations that were enforceable under APA Section 706(1). (*See* Docket No. 217.) The Court disagreed and dismissed Plaintiffs' APA claims for notice and health care against the CIA. (*See* Docket No. 233 at 6, 11.) At no time did any party or the Court address any of the Constitutional claims relating to notice and health care brought by Plaintiffs, nor has any order of this Court dismissed them.

The CIA now insists that its previous motion somehow implicitly sought dismissal of Plaintiffs' Constitutional claims. The CIA's argument relies entirely on a fundamentally flawed premise: that Plaintiffs should somehow be penalized for failing to brief an issue never raised by Defendants' motion. Under the Federal Rules, parties may move in part to dismiss some, but not other, claims. (*See* Fed. R. Civ. P. 12(b)(6).) Plaintiffs cannot be penalized for failing to defend claims that Defendants have never moved against.

2. Plaintiffs Have Never "Disavowed" Their Constitutional Claims.

Contrary to the CIA's assertion, Plaintiffs have never "disavowed" their Constitutional claims for notice and health care as to the CIA or any other Defendant, but rather have repeatedly pointed out to Defendants' counsel that Defendants never moved to dismiss the Constitutional claims. In its Motion, the CIA has merely cobbled together a series of isolated statements taken completely out of context, and then mischaracterized those statements, in an attempt to persuade the Court that Plaintiffs have somehow abandoned their Constitutional claims. Yet, the Constitutional claims have been clearly articulated in each successive version of the complaint, including the allegations of the Third Amended Complaint that Defendants expressly denied in their Answer filed as recently as June 14, 2011. (Docket No. 236 at ¶¶ 184-86.)

The CIA's contention that Plaintiffs have "disavowed" their Constitutional claims blatantly mischaracterizes Plaintiffs' statements. For example, the CIA points to the following

statement from Plaintiffs' Opposition to Defendants' Motion to Dismiss the First Amended Complaint: "Plaintiffs do not seek relief based on . . . a 'constitutional right to information.'" (*See* Motion at 9 (citing Docket No. 43 at 24).) While the CIA now suggests that this statement was a repudiation of any Constitutional basis for Plaintiffs' claims seeking notice, the context makes clear that the statement was far more limited and did not even apply to Plaintiffs' due process claims. Rather, the quoted statement was responding to Defendants' argument that "[t]here is no *First Amendment* right to access government information" — an argument with which Plaintiffs did not disagree. (*See* Docket No. 34 at 19 (emphasis added).) The statement disavowing a "constitutional right to information" had nothing to do with the *Fifth Amendment* due process claims for notice, let alone "represent" that Plaintiffs had abandoned their due process claims, which are set forth clearly in later versions of the Complaint. (*See, e.g.*, TAC at ¶ 186.)

The CIA also points to this footnote in Plaintiffs' Opposition to Defendants' Partial Motion to Dismiss: "Plaintiffs also note that Defendants do not seek dismissal of the secrecy oath claim against the CIA. [] Thus, the CIA will remain a defendant in this action regardless of the Court's resolution of the Motion." (Docket No. 217 at 2 n.2.) The CIA suggests that this footnote should be read as an admission by Plaintiffs that if Defendants' motion was successful, the *only* remaining claim against the CIA would be the secrecy oath claim. (Motion at 8.) Once again, the CIA completely misreads this statement. The footnote merely responded to a similar footnote in the CIA's Partial Motion to Dismiss, which stated that Defendants "do not presently move to dismiss the *secrecy oath claim* as part of this Motion to Dismiss." (Docket No. 187 at 6 n.4 (emphasis added).) Plaintiffs' footnote merely pointed out Defendants' concession that the CIA would remain part of the case even if the Court dismissed Plaintiffs' APA notice and health care claims against the Agency. The footnote was not intended to — and did not purport to — provide an exhaustive list of all claims remaining against the CIA that were not implicated in Defendants' motion.[3]

[3] The CIA's quotation from Plaintiffs' Reply in Support of Motion to Strike Administrative Record is similarly misleading (Docket 216): "The complaint in this action, the

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The CIA would have this Court tease a waiver of core Constitutional claims from negative inferences drawn from briefs directed *to other* claims. To hold that Plaintiffs have waived their right to seek redress for Defendants' violations of Plaintiffs' Constitutional rights because Plaintiffs did not assert them in response to motions that did not address them would be unjust in the extreme.

Even more wildly, the CIA contends that Plaintiffs have taken inconsistent positions regarding their Constitutional claims that prejudice the CIA, justifying judicial estoppel. (*See* Motion at 6.) The CIA cannot meet the requirements for invoking the doctrine of judicial estoppel. Courts have discretion to invoke judicial estoppel, and in so doing, "typically consider (1) whether a party's later position is clearly inconsistent with its original position; (2) whether the party has successfully persuaded the court of the earlier position; and (3) whether allowing the inconsistent position would allow the party to derive an unfair advantage or impose an unfair detriment on the opposing party." *United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (internal quotation marks omitted).) None of these factors is applicable here.

First, the prior position must be *directly* inconsistent with the position in question. *See USW v. Ret. Income Plan for Hourly-Rated Emples. of ASARCO, Inc.*, 512 F.3d 555, 563 (9th Cir. 2008) (refusing to apply judicial estoppel where plaintiffs' prior contention that defendant was a proper party in case was not clearly inconsistent with later contention that defendant was a necessary party). As discussed above, Plaintiffs have never disavowed their Constitutional claims relating to notice and health care, nor taken any inconsistent position regarding those claims' continued vitality, let alone an explicitly inconsistent position. Only by cobbling together edited

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Court's substantive and discovery rulings, and the parties' actions throughout discovery all confirm that this is an action under Section 706(1) of the APA." (Motion at 9.) Defendants once again ignore the context. Plaintiffs were merely rebutting "Defendants' efforts to re-characterize Plaintiffs' **APA claims** against the CIA as claims challenging agency action [under Section 706(2)] rather than seeking to compel action 'unlawfully withheld or unreasonably delayed' under **Section 706(1)** of the Administrative Procedures Act. . . ." (Docket 216 at 2 (emphasis added).)

language that is taken out of context does the CIA attempt to invent some purported inconsistency. Once the context of these statements is revealed, as discussed above, no inconsistency persists. And the CIA cannot point to a single statement in which Plaintiffs have stated that they no longer intended to pursue the Constitutional claims relating to notice and health care that are indisputably alleged in the Complaint — because there is not one.

Second, the doctrine "does not apply if 'no court ever adopted the original . . . position.'" *Safeway Inc. v. Abbott Labs.*, 761 F. Supp. 2d 874, 891 (N.D. Cal. 2011) (Wilken, J.) (quoting *Masayesva ex rel. Hopi Indian Tribe v. Hale*, 118 F.3d 1371, 1382 (9th Cir. 1997) (additional internal citation omitted)). Even assuming *arguendo* that Plaintiffs' prior statements were inconsistent, the Court has never adopted those statements by stating that Plaintiffs have abandoned their Constitutional claims, or that Plaintiffs' Constitutional claims are otherwise no longer at issue.[4]

Finally, Plaintiffs have gained no unfair advantage, nor have Defendants suffered any detriment, as a result of Plaintiffs' allegedly "inconsistent" statements. Nor has there been any unfair surprise, as Plaintiffs' Constitutional claims are unquestionably in the Third Amended Complaint, have repeatedly been brought to Defendants' attention, and as set forth above, were included in every iteration of the complaint since the inception of this litigation.[5] Accordingly, the Court should not apply the doctrine of judicial estoppel.

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[4] This is particularly true as to the statements the CIA quotes from initial Plaintiffs' Responses to Defendants' Interrogatories, which the Court has had no occasion to consider.

[5] The CIA cites, without discussion, *Rissetto v. Plumbers & Steamfitters Local 343* and *Wagner v. Professional Engineers in California Government*. These cases are inapposite. In each, the plaintiff made clearly inconsistent statements to the court and to the defendants, causing clear prejudice to the defendants. *See Rissetto*, 94 F. 3d 597, 605-06 (9th Cir. 1996) (estopping plaintiff from claiming she was performing her job adequately in support of an age discrimination claim when she had previously obtained a favorable workers' compensation settlement based on assertion that she *could not work*); *Wagner*, 354 F.3d 1036, 1048-49 (9th Cir. 2004) (estopping plaintiffs from reasserting a claim that they specifically disavowed in a prior proceeding and where the court relied on that representation in issuing its order in plaintiffs' favor). By contrast, here Plaintiffs have made no inconsistent statements to the Court regarding the scope of their claims and the CIA has suffered no prejudice as a result of any alleged "inconsistent" statements.

Plaintiffs' Constitutional claims relating to notice and health care remain in this case, and are the proper subject of discovery. The CIA's motion for a protective order should be denied.

B. Plaintiffs' Constitutional Claims Against the CIA Should Not Be Limited to the CIA's "Administrative Record."

The CIA asserts for the first time, after two years of discovery, that discovery is inappropriate in this case because judicial review of Plaintiffs' *Constitutional claims* against the CIA is limited to the CIA's "administrative record." Again, the CIA is wrong.

1. The CIA Has Waived Its Objection that Discovery Is Not Appropriate.

As a preliminary matter, the CIA's new objection to discovery is untimely and preposterous given the procedural posture of this case. By failing to raise this objection to discovery in this action, the CIA has waived it. Two years into discovery, Defendants have already produced more than a million pages of documents (*see* Docket No. 240 at 1) and provided Rule 30(b)(6) depositions and responses to interrogatories. The CIA has opposed two motions to compel (Docket Nos. 96, 142) and stipulated to two extensions of the discovery deadline (Docket Nos. 228, 237). Until now, Defendants never have refused to participate in all discovery based on the assertion that discovery is improper or unwarranted simply because some of Plaintiffs' claims arise under the APA. And even now, only one Defendant — the CIA — is asserting this argument.

Failure to state a timely objection to a discovery request constitutes a waiver of that objection. *See* Fed. R. Civ. P. 33(b)(4) ("[a]ny ground [for objection to an interrogatory] not stated in a timely objection is waived unless the court, for good cause, excuses the failure"); *Peskoff v. Faber*, 244 F.R.D. 54, 64 (D.D.C. 2007) ("Courts have found that failure to state any objections to the production of documents in a timely manner constitutes a waiver of any objections, similar to Rule 33, even though Rule 34 does not contain an automatic waiver provision."). As such, the CIA has waived any objection that discovery is improper because Plaintiffs' have alleged some claims under the APA.[6] The CIA should not be allowed to raise this

[6] At a discovery hearing on August 4, 2011, Magistrate Judge Corley noted the inappropriate timing of Defendants' objection. "I don't get it because usually if it's an APA case,

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objection as a device to forestall that long-delayed discovery process, especially given the advanced stage of this action.

2. Plaintiffs Are Entitled to Discovery from CIA Regarding Plaintiffs' Constitutional Claims Against the CIA.

Perhaps even more perplexing is the CIA's contention that *even though the APA claims against the CIA have been dismissed,* discovery and judicial review in this action are restricted by the provisions of the APA. The CIA's assertion that Plaintiffs' remaining claims, brought under the Constitution, are subject to the evidentiary standards applicable to APA claims, is incorrect. Defendants cite no authority that supports the proposition that in a Constitutional case that does not involve claims under the APA, judicial review is limited to an administrative record. The CIA's blanket objection to Plaintiffs' pending discovery requests should be denied.

Because Plaintiffs seek declaratory and injunctive relief against the federal government, Plaintiffs are able to rely on the waiver of sovereign immunity set forth in Section 702 of the APA. 5 U.S.C. § 702. Plaintiffs' reliance on that waiver, however, does not turn their claims into APA claims, such that the review provisions of the APA apply. *See, e.g., Veterans for Common Sense v. Shinseki,* 644 F.3d 845, 865 (9th Cir. 2011) (holding that the "agency action" requirement of the APA's review provisions do not constrain the applicability of § 702's waiver of sovereign immunity and finding due process violations despite affirming dismissal of APA claims); *see also The Presbyterian Church (USA) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989).

Defendants seem to suggest, however, that simply because Plaintiffs' claims are against an agency, the scope of judicial review and evidentiary standards of the APA necessarily apply. Defendants cite no authority for this position. The federal courts have long been open, apart from

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you would have done that [objected to discovery] at the beginning, not two years into the case." (Docket 250 at 4:12-14.) In response, the only explanation lead counsel for Defendants, Joshua Gardner, could offer was the following: "I agree with that sentiment, your Honor. Very candidly, I have been involved in this case for eight months." (*Id.* at 4:15-17.) A change in one counsel is not an adequate excuse for waiting two years to raise such a fundamental objection.

the APA, to provide prospective remedies for Constitutional violations. It is well-established that Plaintiffs need not rely on the APA to bring a claim against a federal official or agency to vindicate Constitutional rights. *See, e.g.*, *Porter v. Califano*, 592 F.2d 770, 781 (5th Cir. 1979); *Rydeen v. Quigg*, 748 F.Supp. 900, 906 (D.D.C. 1990).

Plaintiffs' Constitutional claims, asserted independent of the APA, and seeking only declaratory and injunctive relief, are not limited to the CIA's administrative record. "Where, as here, the question presented is whether defendants violated plaintiffs' constitutional [] rights, not whether defendants acted reasonably or unreasonably, judicial deference to agency decisions is not required." *Little Earth of United Tribes, Inc. v. U.S. Dept. of Housing and Urban Dev.*, 675 F. Supp. 497, 531 (D. Minn. 1988) (holding that for Constitutional claims against an agency, the review is de novo, and not limited to the agency's administrative record); *see also Miccosukee Tribe of Indians of Fla. v. United States*, No. 08-23001, 2010 WL 337653, at *2 (S.D. Fla. Jan. 22, 2010) (finding tribe's Constitutional claim to be "independent of any APA claim" and that discovery on that claim was not limited to the agency record).

In *Porter v. Califano*, for example, the Fifth Circuit ordered a full evidentiary hearing regarding the plaintiff's Constitutional claim against an agency. *Porter v. Califano*, 592 F.2d 770, 772 (5th Cir. 1979). In reaching this conclusion, the court noted that "it is improper to rely heavily on the investigative findings and conclusions of an interested agency in a case such as this involving delicate and complex matters of an individual's constitutional right against the government, especially where, as here, agency fact-finding procedures were inadequate." *Id; see also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 314 (1985) (involving judicial review of Constitutional claims against an agency after full discovery and trial); *Webster v. Doe*, 486 U.S. 592, 604 (1988) (allowing discovery regarding a Constitutional claim against the CIA and noting that the District Court had the latitude to control discovery to balance the plaintiff's need for access to proof against the agency's needs); *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049 (N.D. Cal. 2008) (permitting discovery and trial in action against Department of Veterans Affairs involving Constitutional (and APA) claims, and not restricting review to an administrative record); *see also Georgia Gazette Publ'g Co. v. U.S. Dept. of Defense*, 562 F.

Supp. 1000, 1003-04 (S.D. Ga. 1983) (permitting discovery in action against the Department of Defense); *Thompson v. U.S. Dep't of Housing and Urban Dev.*, No. Civ.A.MJG-95-309, 2006 WL 581260, at *6 (D. Md. Jan. 10, 2006) (allowing plaintiffs to present evidence outside of the administrative record).

The CIA ignores the body of case law that prescribes an entirely different standard and scope of review for Constitutional claims against federal agencies, and asserts that even though Plaintiffs' APA claims against the CIA have been dismissed, Section 706 of the APA prescribes the applicable scope of review based on the administrative record. In so doing, the CIA relies exclusively on case law involving challenges brought under the APA, pursuant to Section 706(2).[7] Each case involved a challenge to a *final agency decision*, either in the context of an agency adjudication or rulemaking. Each case involved a true administrative record, in the sense that the agency actually had a record in front of it at the time it made its final decision. And in each case, the Constitutional claims at issue were challenges to the procedures employed in the decision-making process, or to the agency's decision itself, meaning that the administrative record before the agency at the time of the challenged decision *was by its nature* the universe of documents relevant to review of that decision. The Complaint in this case cannot be so cabined, as Plaintiffs rely upon a complicated series of CIA acts, including covert actions and actions made in concert with the other Defendants, that violated Plaintiffs' Constitutional rights. Plaintiffs do not challenge any agency *decision* of the CIA, and as such, no adjudication or rulemaking procedure took place before the CIA that resulted in the development of a true, historical administrative record.

[7] Not a single case cited by the CIA involves *only* Constitutional claims, and all involve challenges to final agency decisions reviewable under Section 706(2), and are otherwise distinguishable. For example, in *Alabama-Tombigbee Rivers Coalition v. Norton*, No. Civ.A.CV-01-S-0194-S, 2002 WL 227032 (N.D. Ala. Jan. 29, 2002), the court made clear that its decision not to allow discovery beyond the administrative record was based on what it viewed as an "important distinction between the cases cited by plaintiffs [in support of discovery] and the present action" — specifically that the cited cases "involved actions directed at individuals, and not rule making of the agency affecting the public at large." *Id.* at *6. And the court in *Malone Mortgage Company v. Martinez*, No. 3:02-CV-1870-P, 2003 WL 23272381 (N.D. Tex. Jan. 6, 2003) restricted its conclusion that discovery beyond the administrative record was inappropriate to "actions seeking the reversal of a *final administrative action*." *Id.* at *2 (emphasis added).

And even when Constitutional claims are raised in conjunction with Section 706(2) claims challenging an agency *decision* — the type of claim for which review pursuant to an administrative record is appropriate — courts frequently permit discovery beyond the administrative record. *See, e.g., Kaiser v. Ortiz*, No. SA-09-CV-0757 XR, 2010 WL 3419432, at *1 (W.D. Tex. Aug. 27, 2010) (rejecting defendants' argument that the court's determination of a Fifth Amendment claim was limited to the administrative record, and refusing to restrict discovery); *Puerto Rico Public Housing Admin. v. U.S. Dept. of Housing & Urban Dev.*, 59 F.Supp.2d 310, 328 (D. Puerto Rico 1999) (allowing discovery with regard to Constitutional claims, finding that those claims were not "limited to abide by the guidelines established in the APA"); *Rydeen v. Quigg*, 748 F.Supp. 900, 906 (D.D.C. 1990) (considering evidence that was not part of administrative record when evaluating Constitutional claim); *see also Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1558 (11th Cir. 1985) (permitting discovery in case alleging due process and APA claims against the Department of Agriculture). The arguments in support of review beyond the record are *even stronger* where, as here, there is no agency *decision* being challenged under Section 706(2) of the APA, and thus, there is no true administrative record.

Because Plaintiffs' Constitutional claims are not brought under the APA, they are not subject to any procedural limitations in the APA, Plaintiffs are entitled to discovery from the CIA, and the CIA's motion for a protective order must be denied.

3. Discovery of CIA Concerning Plaintiffs' Claims Against the Remaining Defendants Should Not Be Precluded.

The CIA also suggests that it is improper for Plaintiffs to seek discovery from the CIA concerning Plaintiffs' claims against the DoD, the Army, and DVA.[8] The CIA contends that this is so for three primary reasons: (1) that information from the CIA would not be admissible at trial in an APA action against the DoD and the Army; (2) that information from the CIA would not be

[8] Plaintiffs understand that, pursuant to the Court's August 30, 2011 Order, the issues addressed in this section have been referred to the Magistrate Judge for consideration. (Docket No. 273 at 2.)

admissible in a Rule 23(b)(2) class action; and (3) that the information sought from the CIA is not relevant to Plaintiffs' claims against DVA. These contentions should be rejected.

First, as set forth above, Plaintiffs have alleged Constitutional claims against *all* Defendants (including the DoD and the Army). (TAC ¶ 186; *see also* TAC ¶ 184.) Those claims, just like the Constitutional claims against the CIA, are clear on the face of the Complaint, and have never been dismissed.[9] And as discussed above, the review of Constitutional claims — brought independent of the APA — is not limited to the administrative record.[10] Thus, discovery is not improper.

Second, the discovery sought from the CIA is relevant to Plaintiffs' APA and Constitutional claims against the DoD and the Army. The CIA contends that the discovery sought is not relevant because "the Court cannot conduct a *de novo* review of the alleged health effects of any substance" and that information about health effects is therefore neither relevant nor admissible. (Motion at 15.) But setting aside the question of whether such a pre-trial determination of admissibility would ever be appropriate, and the CIA's failure to cite any authority to support it, the Court does not have to engage in such a review of health effects in order for information about health effects to be relevant. In federal court, "[p]arties may obtain discovery regarding any nonprivileged matter that is *relevant* to any party's claim or defense." Fed. R. Civ. P. 26(b)(1) (emphasis added).[11] Plaintiffs contend that the DoD has a duty to provide notice to test subjects regarding the health effects of the testing and that the DoD has

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[9] *See* Section I(A) *supra.*

[10] *See* Section I(B)(2) *supra*. That Plaintiffs allege APA claims — in addition to Constitutional claims — against the remaining Defendants does not alter this result. *See, e.g., Veterans for Common Sense*, 563 F.Supp.2d 1049 (permitting discovery and trial in action against Department of Veterans Affairs alleging claims under APA § 706(1) and the due process clause of the Constitution).

[11] It is not necessary to prove that any requested discovery is admissible at this stage; the Federal Rules are clear that "relevant information *need not be admissible* at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1) (emphasis added.) In any event, information in Defendants' possession about health effects would be admissible as evidence that Defendants have failed to fulfill their APA and Constitutional duties to provide notice to Plaintiffs.

failed to fulfill this duty — a duty that the Court expressly referenced in its January 19, 2010 Order. (Jan. 2010 Order at 15-16.) Information about health effects of the toxic substances administered to service personnel is not only clearly relevant, but central to these claims. Magistrate Judge Corley, during the August 4, 2011 discovery hearing, agreed that this information "certainly would be relevant." (Docket 250 at 34:18-35:9.)[12] Because information about health effects is relevant to Plaintiffs' claims, this information is discoverable from the CIA.

Third, as Defendants acknowledge (*see* Motion at 17), the Ninth Circuit has made clear that evidence outside the administrative record is allowed in Section 706(1) cases (even when plaintiffs do not allege Constitutional violations). *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000). In *Friends of the Clearwater*, the Ninth Circuit explained that in a 706(1) case, "review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record." (*Id.* at 560.) Because Plaintiffs challenge the DoD's failure to act, Plaintiffs are entitled to discovery outside of the administrative record, even for Plaintiffs' APA claims against the DoD and the Army (the only claims for which an administrative record is even arguably appropriate).

Defendants misquote *Seattle Audubon Society v. Norton*, No. C05-1835L, 2006 WL 1518895 (W.D. Wash. May 25, 2006), and contend that cases in the Ninth Circuit have only permitted discovery in Section 706(1) actions where "the agency sought to supplement the record for the 'limited purpose' of explaining its delay." (Motion at 18.)[13] As the court in *Seattle Audubon* noted, "the Ninth Circuit has seen fit to approve of efforts by both parties to supplement the administrative record [in 706(1) actions]." *Id. at* *3. (citing *Independence Mining v. Babbitt*, 105 F.3d 502, 511-12 (9th Cir. 1997) ("Accordingly, the district court was not prohibited from

[12] Magistrate Judge Larson also considered the relevance of the health effects discovery sought from the CIA, and agreed that "health effects of drugs used in MKULTRA known from [sic] to be similar to those in Edgewood Arsenal testing, are relevant to Plaintiffs' notice and healthcare claims." (*See* Nov. 2010 Order (Docket No. 178) at 26.)

[13] The quote included by Defendants is misleadingly taken from a section where the court summarized the *defendant agency's* arguments, not the court's conclusion.

considering [the agency's supplemental memo], especially where the court permitted both sides to submit supplemental evidence.").)

Moreover, discovery outside of the administrative record is available "(1) when necessary to determine whether the agency considered all relevant factors in making its decision; (2) when the agency has relied on extra-record materials; (3) when necessary to explain technical terms or complex subject matter; or (4) when the agency has acted in bad faith." *WildWest Inst. v. Bull*, 547 F.3d 1162, 1176 (9th Cir. 2008). Here, discovery outside of the administrative record is warranted because: (1) it is necessary to ensure that the DoD has considered all relevant factors; (2) it is necessary to explain complex subject matter; and (3) the DoD has acted in bad faith by failing to acknowledge and meet its duties to participants in its testing program for years and years.

The CIA's contention that review of Plaintiffs' claims against the DoD should be limited to the "documentary record put forward by the agency-defendant" is particularly baffling in light of the fact that *the DoD has never claimed the existence of or submitted an administrative record.* As an afterthought, Defendants include a footnote in their motion, which states that "the Department of Defense and Department of the Army intend to seek leave of Court to file an administrative record." (Motion at 16 n.7.) If a DoD administrative record existed, Defendants would have submitted it years ago, as required by local rules. *See* Civil L.R. 16-5. Any "administrative record" submitted by the DoD at this late stage of litigation would be nothing more than a post-hoc rationalization of Defendants' actions, carefully crafted to gain advantage in this litigation.

The CIA's suggestion that the requested discovery is somehow precluded by the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* defies logic. In *Dukes*, the Supreme Court discussed the propriety of certifying a class action where it found not a single common question of law or fact. The Supreme Court did not suggest that evidence relating to any individual class member or issue is not relevant or admissible in a Rule 23(b)(2) class action as Defendants suggest. On the contrary, the Supreme Court found that individual anecdotes and accounts can be evidence of class-wide discrimination. *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, Slip Op.

at 18 (June 20, 2011). While the Court found such evidence *insufficient* in that case, it did not in any way suggest that such evidence was *inadmissible* (let alone irrelevant) simply because plaintiffs sought certification of a Rule 23(b)(2) class. Defendants thus misread not only the intent of Plaintiffs' discovery requests, but also the legal holding in *Dukes*.

Finally, the CIA's argument that the nature of Plaintiffs' Constitutional claim against DVA is such that the requested evidence is not relevant to those claims also should be rejected. Defendants seem to suggest that evidence the CIA may be withholding regarding DVA's involvement in the testing programs would not be relevant to Plaintiffs' bias claim. Yet, this information would be of central relevance to Plaintiffs' bias claim, regardless of whether the evidence comes from DVA, the CIA, or any other party. Plaintiffs assert that *as a result of DVA's involvement in the testing programs*, DVA cannot act as a neutral adjudicator of claims arising out of those testing programs. (TAC at ¶¶ 232, 233.) By logic that can only be described as tortuous, the CIA suggests that any evidence it has of DVA's involvement is not relevant because if the evidence of involvement does not come from DVA, then *DVA must not know* about its involvement — and that if the DVA does not know that it was involved, the involvement cannot lead to bias. Plaintiffs disagree with the CIA's conceptualization of Plaintiffs' claims against the DVA, but assuming *arguendo* that the CIA's articulation of Plaintiffs' claim made sense, the CIA's relevance argument requires the Court to *assume* that DVA can only *know* about its involvement if it is set forth in identical documentary evidence in its own possession that it saved and produced. There is no reason to make these outlandish assumptions. Moreover, even if the documents in the CIA's possession ultimately are deemed inadmissible to show DVA's knowledge, they are clearly relevant at this stage of discovery. Particularly in light of the history of document destruction, the CIA should be required to produce any evidence in its possession of DVA's involvement in the testing programs.

II. THE COURT SHOULD REQUIRE THE DOD TO COMPLY WITH ITS DISCOVERY OBLIGATIONS RELATED TO PRE-1953 TESTING.

The DoD also seeks a protective order restricting discovery regarding Defendants' testing of chemical and biological substances before 1953, a topic which, like the Constitutional claims,

has been in the Complaint from the beginning of this case.[14] (*See, e.g.*, Docket No. 1 at ¶¶ 2, 97-100; Docket No. 31 at ¶¶ 2, 100-103; Docket No. 53 at ¶¶ 2, 102-106; Docket No. 180 at ¶¶ 2, 102-106.) The DoD contends that there is no basis for seeking such discovery because the Army Memorandum which is one of the documents setting forth Defendants' legal obligation to provide Plaintiffs with notice and health care was written in 1953.

Defendants once again ignore Plaintiffs' Constitutional claims for notice and health care, which are also alleged against the DoD. (*See, e.g.*, Docket No. 1 at ¶¶ 162, 165; Docket No. 31 at ¶¶ 177, 180; Docket No. 53 at ¶¶ 186, 189; Docket No. 180 at ¶¶ 186, 189.) Plaintiffs' Constitutional claims do not depend in any way on the 1953 Army Memorandum or any other independent basis for concluding that the DoD has a legal obligation that is enforceable under the APA. Nor do Plaintiffs' Constitutional claims have any date restrictions.

Again, Defendants act as if the Constitutional claims do not exist. As explained above, the Court has never dismissed the notice and health care claims — neither the APA claims, nor the Constitutional claims — as to the DoD and Army. (*See* Section I(A)(1) *supra*.) And contrary to Defendants' assertion, and as discussed above, Plaintiffs have not disavowed these Constitutional claims. (*See* Section I(A)(2) *supra*.) Defendants point to no truly "inconsistent" statements by Plaintiffs, and instead, once again, try to fabricate inconsistencies by cherry-picking language from statements taken out of context.

Defendants once again suggest that the Court should deem Plaintiffs' Constitutional claims to be waived through negative inference — because when the DoD moved to dismiss Plaintiffs' APA claim for medical care against the DoD, Plaintiffs did not brief the merits of their Constitutional claims against the DoD. This same absurd argument was made by the CIA, and should be rejected. Moreover, the Court *denied* the DoD's motion to dismiss the APA claim for health care against the DoD. (Docket No. 233 at 10, 11.) Thus, there is no basis even to *infer*

[14] Plaintiffs understand that, pursuant to the Court's August 30, 2011 Order, the issues addressed in this section have been referred to the Magistrate Judge for consideration. (Docket No. 273 at 2.)

that the Constitutional claims relating to health care (or notice) against the DoD have been dismissed.

Moreover, the fact that Plaintiffs' claims involve testing that pre-dates 1953 is evidenced on the face of the Complaint (*see, e.g.*, TAC ¶¶ 100-105), as acknowledged by Magistrate Judge Corley during the August 4, 2011 discovery hearing. (Docket 250 at 65:4-8.) The proposed class definition set forth in the Complaint contains no such date restriction. (TAC at 174.) And Defendants admit, in response to Plaintiffs' Request for Admission No. 109, that "the first indication of formal authority sought to recruit and use volunteer subjects in chemical warfare experiments was in 1942." (Docket No. 259-8 at 43.)

Defendants' brief confuses matters by characterizing the 1953 Memorandum and Army Regulation 70-25[15] as the "jurisdictional basis" for Plaintiffs' claims. This Court's jurisdiction in this action is based on 28 U.S.C. § 1331. Plaintiffs' causes of action arise under both the APA and the U.S. Constitution. And as set forth above, neither Plaintiffs' APA nor Constitutional claims for notice and health care against the DoD have been dismissed. The APA is not a jurisdiction-conferring statute; nor do the 1953 Memorandum or the Army Regulation confer jurisdiction. The 1953 Memorandum and the Army Regulation simply set forth the legal obligations that Plaintiffs seek to compel pursuant to Section 706(1) of the APA. They do not form the basis of the Court's jurisdiction. Finally, Plaintiffs properly rely on the APA's waiver of sovereign immunity as to all of its claims. *See Veterans for Common Sense*, 644 F.3d at 865. Defendants' attempt to raise a jurisdictional bar to discovery of the first decade of their nefarious test activities is frivolous, and should be rejected.

[15] Moreover, Army Regulation 70-25 is not limited to post-1953 veterans, as it requires Defendants to warn test subjects and to provide "any newly acquired information that may affect their well-being . . . even after the individual volunteer has completed his or her participation in research." (AR 70-25, §3-2(e)(1)(h) (Jan. 25, 1990).) The Regulation requires identification of volunteers who "have participated" in research (not only those volunteers whose participation post-dates the Regulation) so that those past participants can be notified. (*Id.*) This further undercuts Defendants' argument that Plaintiffs' claims are somehow date-restricted.

Finally, Defendants contend that discovery is improper because none of the individual Plaintiffs were exposed to the specific types of toxic substances that were tested before 1953. This type of argument is not appropriate in the discovery context, and Defendants can raise their theories in opposition to Plaintiffs' class certification motion. Defendants' refusal to produce documents regarding the test substances that were used pre-1953 is unsupportable. Moreover, Plaintiffs challenge Defendants' failure to provide notice and health care *to all test participants* in the testing program, in violation of their legal obligations (including the Army Memorandum and Army Regulation 70-25) and in violation of the due process clause of the U.S. Constitution. As Magistrate Judge Corley recognized during the August 4, 2011 hearing, even if the individual named Plaintiffs were not exposed to mustard gas, veterans who were exposed are within Plaintiffs' contemplated class. (*See* Docket No. 250 at 53-54.) The named Plaintiffs themselves did not need to have been exposed to *every substance tested* in order to make evidence regarding those substances relevant to the questions at issue in this litigation.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court DENY Defendants' Motion for Protective Order to Limit Discovery.

Dated: August 31, 2011

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