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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO COMPEL DISCOVERY

Hearing Date: September 22, 2011
Time: 2:00 p.m.
Courtroom: E, 15th Floor
Judge: Hon. Jacqueline Scott Corley

Complaint filed January 7, 2009

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I. INTRODUCTION

In an effort to avoid its discovery obligations, Defendant Department of Veterans Affairs ("DVA") fundamentally misconstrues the nature of Plaintiffs' due process claims against DVA. This mischaracterization is woven throughout DVA's opposition to Plaintiffs' motion to compel. This fundamental misperception that — somehow — evidence of DVA's bias is *not relevant* to Plaintiffs' bias claim against DVA is not only illogical, but also unsupported by any case law. Once this flawed argument is recognized, DVA's remaining arguments fall by the wayside.

First, because DVA's intent *is* relevant to Plaintiffs' claims, DVA's contention that hundreds of relevant documents should be protected by the deliberative process privilege should be squarely rejected. The privilege *does not even apply* in cases where the Government's intent is at issue, but even if it did, Plaintiffs' need for the withheld documents overrides any interest DVA has in nondisclosure.

Second, DVA should be compelled to produce updated statistics on "Chem-Bio Claims." After initially claiming that it cannot produce those statistics, DVA has revised its position, and now contends that while it *can* produce those statistics, as it has in the past, it would prefer not to because they might be "unreliable." Yet the Under Secretary for Benefits at DVA relied on those very statistics every month for several years in reports on DVA outreach activities. What is good enough for Admiral Cooper should be good enough for Plaintiffs and this Court. DVA should not be permitted to withhold statistics because it does not like what those statistics show. DVA is always free at trial to point out any errors in the data, which would go to weight, not admissibility at trial; of course, we are talking about the discovery standard here.

Finally, DVA should be compelled to produce documents relating to pre-1953 testing. There is simply *no reason to conclude* that DVA's involvement in testing before 1953 is any less relevant to Plaintiffs' bias claim than DVA's involvement in post-1953 testing. DVA's burden arguments rest largely on its failure to initially search for and provide the requested, relevant documents, despite the clear allegations in the Complaint covering this period. DVA suggests that this initial failure means it will have to go back and look again, which would be unduly burdensome. But DVA should not be rewarded for failing to make the appropriate initial search.

DVA should be compelled to search for and provide documents regarding pre-1953 testing.

II. THE COURT SHOULD GRANT PLAINTIFFS' MOTION TO COMPEL DISCOVERY

A. DVA Misrepresents the Nature of Plaintiffs' Claim Against DVA.

As set forth below and in Plaintiffs' Opening Brief, all of Plaintiffs' requests at issue are squarely relevant to the central question at issue here: is DVA, an admitted participant in human testing, a biased adjudicator of test participants' claims for disability compensation? As Judge Wilken has pointed out, Plaintiffs do not challenge any particular individual veteran's benefits determination, but rather the manner in which those decisions are made. (Docket No. 177 at 8.) And as DVA notes, the Court explained that the crux of Plaintiffs' claim is that

> because the DVA allegedly was involved in the testing programs at issue, the agency is incapable of making neutral, unbiased benefits determinations for veterans who were test participants. That bias, according to Plaintiffs, renders the benefits determination process constitutionally defective as to them and other class members.

(*Id.* at 11.) Thus, what is at issue is not solely DVA's involvement in the test programs, but whether that involvement has created an impermissible bias that renders DVA a constitutionally-defective adjudicator of the claims of test participants. DVA illogically contends that because Plaintiffs' claim has been characterized as "facial," evidence of DVA's bias or prejudgment of the test participants' claims is not relevant to Plaintiffs' bias claim. This contention is unavailing.

Plaintiffs' claim may be "facial" in the sense that it is *not* an "as applied" challenge and is not dependent on a demonstration that the outcome of any particular veteran's compensation claim would have been different absent the challenged procedures. But Plaintiffs' claim is not a facial challenge in the sense that they are challenging a *statute*. In a facial challenge to a statute, the claim is that the statute *on its face* is unconstitutional. Such a challenge raises a purely legal question. And the Court may only need to review the language of the statute and legislative history to determine whether the statute is — in fact — unconstitutional *on its face*.

Here, DVA's argument that no evidence is necessary for a facial due process bias challenge makes no sense, where there is no statute under review. Thus, characterizing Plaintiffs' claim as "facial" is far from determinative on the question of the relevance of evidence, whether

for discovery purposes or trial. Notably, DVA cites *no authority* for the contention that evidence of DVA's intent, or the manifestations of DVA's bias, is irrelevant in a due process bias claim. This failure is clearly due to the fact that the case law suggests that evidence of the *manifestations of DVA's bias is actually of central relevance to Plaintiffs' claim against DVA.*

"A party alleging unconstitutional bias may prove this claim by introducing extrajudicial statements by the adjudicator that are inconsistent with the role of impartial decision maker." *Stivers v. Pierce*, 71 F.3d 732, 744 (9th Cir. 1995). In *Stivers*, the Ninth Circuit explained that to make out a claim of unconstitutional bias, one must show that the adjudicator "'has prejudged, or reasonably appears to have prejudged, an issue.'" *Id.* at 741 (quoting *Kenneally v. Lungren*, 967 F.2d 329, 333 (9th Cir. 1992)). In assessing whether there was a genuine issue of fact as to the adjudicators' bias, the Ninth Circuit looked at many types of evidence, including evidence of the adjudicators' past associations, of efforts to impede and delay, and of extrajudicial statements reflecting hostility. *Id.* at 742. The Court found that unconstitutional bias may be shown through evidence that the adjudicators "had it 'in' for the party…." *Id.* at 744 (quoting *McLaughlin v. Union Oil of Cal.*, 869 F.2d 1039, 1047 (7th Cir. 1989)). The court considered evidence that adjudicators may have "made up their minds" in advance. *Id.* at 745. This is precisely the type of evidence that DVA seeks to withhold from Plaintiffs, claiming it is irrelevant.

For example, documents relating to the drafting of the notification letter sent to test subjects (which Plaintiffs allege contains a series of false and misleading statements), the preparation of training materials for claims adjudicators and clinicians, and the provision of healthcare to test subjects are relevant to Plaintiffs' allegations that DVA deliberately understated the health risks to test subjects in its notification letter and in materials provided to adjudicators. (Third Amended Complaint ¶¶ 15, 173, 228, 229, and 231.) DVA's own documents provided to clinicians actually acknowledged potential health effects from participation in testing, yet this information was withheld from the notice letter that DVA provided to test subjects. (Docket No. 256, O'Neill Decl. ¶ 9, Ex. H at VET001_014268; ¶ 17, Ex. P at VET001_015608.) Plaintiffs also allege that DVA deliberately excluded survivors and certain test subjects from its notification effort in order to discourage the filing of claims. Evidence of such intent would suggest that

DVA is, in fact, biased. The requested documents may very well establish that DVA "had it in" for the test participants, or has otherwise prejudged their claims by impermissibly deciding in advance that they are not entitled to compensation or health care. The discussions and deliberations around the notification efforts and the content of notice letters are likely to provide insight into DVA's pre-views regarding the validity of test participants' claims, and are relevant to the question of whether DVA has prejudged the issue of test participants' entitlement to service-connected disability compensation. The documents that DVA has withheld are thus central to Plaintiffs' allegations, and are clearly relevant to Plaintiffs' bias claim. *See also Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 765 (6th Cir. 1966) (basing finding that adjudicator was impermissibly biased on evidence that adjudicator had previously formed an opinion about the facts before him); *Ciechon v. City of Chicago*, 686 F.2d 511, 517-18 (7th Cir. 1982) (finding unconstitutional bias based on evidence that City was motivated by fear of adverse publicity).[1]

DVA cites *Withrow v. Larkin* as support for its contention that Plaintiffs' claim is narrow, but the case does not stand for the proposition that evidence of bias or prejudgment is irrelevant. On the contrary, in *Withrow*, the Supreme Court held that it was not unconstitutional for a licensing board to act in both an investigative and an adjudicatory capacity, but as a basis for its decision noted that "no specific foundation has been presented for suspecting that the Board had been prejudiced" and that "without a showing to the contrary," the Board would be assumed to be "capable of judging a particular controversy fairly on the basis of its own circumstances." *Withrow v. Larkin*, 421 U.S. 35, 55 (1975). The evidence Plaintiffs seek, which DVA contends is not relevant, is precisely the type of evidence to support a showing of bias or prejudgment. And far from standing for the proposition that evidence of bias or the adjudicator's intent is irrelevant in a bias claim, the Court in *Withrow* explicitly stated that its decision did not "preclude a court from determining from the *special facts and circumstances* present in the case before it that the

[1] That the Court dismissed Plaintiffs' challenges to DVA's efforts to locate and notify test participants under the Administrative Procedure Act ("APA") does not render all documents related to those efforts irrelevant to Plaintiffs' remaining claims. The draft notice letters, for example, are clearly relevant to Plaintiffs' bias claim. In any event, the Court noted this distinction during the hearing on August 4, 2011. (Docket No. 250 at 88:24–89:7.)

risk of unfairness [was] intolerably high." *Id.* at 58 (emphasis added). Thus, the question of an adjudicator's bias is not a "narrow legal question," but rather is dependent on the facts and circumstances of the case. Here, the evidence that DVA is, in fact, biased or has prejudged the issue of whether test participants had health consequences from their participation in the testing program is central to the question of whether DVA is a neutral adjudicator.

B. DVA Should Be Compelled to Produce Documents Improperly Withheld on the Basis of the Deliberative Process Privilege.

As set forth in Plaintiffs' Opening Brief, DVA's refusal to produce hundreds of documents on the basis of the qualified deliberative process privilege is improper. (Docket No. 255 at 2-8.) The privilege simply does not apply where, as here, the Government's intent is squarely at issue in the litigation. *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998); *L.H. v. Schwarzenegger*, No. CIV. S-06-2042 LKK/GGH, 2007 WL 2009807, at *4 (E.D. Cal. July 6, 2007). Yet DVA argues not only that the privilege applies, but also that DVA's interest in protecting the documents outweighs Plaintiffs' need for the documents. DVA's arguments are unavailing, and the Court should grant Plaintiffs' motion to compel the documents that are being improperly withheld.

Moreover, the procedural requirements for asserting the deliberative process privilege were intended to provide a safeguard to ensure that the privilege is not abused. Yet this is exactly what DVA is attempting to do — it is invoking the privilege in an effort to shield critically relevant evidence from Plaintiffs. DVA improperly waited months to assert the privilege until Plaintiffs brought a motion to compel. If protecting the documents were truly important, DVA would not have waited until *just weeks* before the close of discovery to assert the privilege. DVA does not provide reasons for its delay. DVA's attempt to comply with the procedural requirements at the eleventh hour counsels in favor of disclosure. Why would DVA withhold the documents unless they actually show bias or other embarrassing facts? Regardless of the propriety of DVA's assertion of the privilege at this late stage, the privilege should not apply, because DVA's intent is at issue, and because the requested documents are central to Plaintiffs' claims.

1. The Deliberative Process Privilege Does Not Apply Because DVA's Intent Is Central to Plaintiffs' Bias Claim.

Plaintiffs have established that the very assertion of the privilege is improper in this case, since Plaintiffs' due process bias claim is directed at DVA's intent itself. The privilege does not — and should not — apply where, as here, the Government's intent is at issue. *L.H. v. Schwarzenegger*, 2007 WL 2009807, at *4. In its Opposition, DVA implies that the Ninth Circuit has declined to adopt the D.C. Circuit's holding in *In re Subpoena Duces Tecum*, 145 F.3d at 1424, and that the Ninth Circuit has rejected the notion that the privilege does not apply when the Government's intent is at issue. (Docket No. 276 at 10) (*citing Thomas v. Cate*, 715 F. Supp. 2d 1012, 1021 (E.D. Cal. 2010) (*citing F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156 (9th Cir. 1984)).) DVA misrepresents the law. The Government's intent *was not at issue* in *Warner*, a case which predated *In re Subpoena* by a decade and a half. In the quarter century since *Warner*, the Ninth Circuit has not squarely addressed whether the fact that Government intent is at issue in a case precludes application of the deliberative process privilege. *See Thomas*, 715 F. Supp. 2d at 1021 (noting the "lack of binding [] authority on the matter" in the Ninth Circuit). Indeed, in *Thomas*, the case DVA relies upon, the court noted that "a number of courts have held that the deliberative process privilege does not apply in actions where the government's decision making is central to the plaintiff's case," and found the *In re Subpoena* position "highly persuasive." *Id.* at 1020-21. In fact, the *Thomas* court found that "the fact that the [Government's] decision making process is at issue in this case weighs heavily against [] assertion of [the deliberative process] privilege," and ultimately found in favor of disclosure of documents evidencing the Government's intent. *Id.* at 1021. And the D.C. Circuit's reasoning in *In re Subpoena* has been adopted in this Circuit. *See, e.g., L.H. v. Schwarzenegger*, 2007 WL 2009807, at *4 (noting that "where the agency's deliberative process is at issue, the deliberative process privilege does not apply") (citing *In re Subpoena Duces Tecum*, 145 F.3d at 1424).

In the present case, as set forth in section II(A) *supra*, there is no question that the Government's intent is fundamental to Plaintiffs' claims. In fact, the Court has already noted as much, for instance stating at the August 4, 2011 hearing that DVA's intent in drafting the

notification letter "would be squarely relevant" to Plaintiffs' bias claims. (Docket No. 250 at 88:4-5.) DVA sent information to test subjects falsely suggesting that *no* significant long-term health effects were associated with the testing (*see* Docket No. 256, O'Neill Decl. ¶ 9, Ex. H at VET001_014268), despite the fact that DVA knew studies showed long-term health effects were a likely consequence of the testing. (*See* Docket No. 256, O'Neill Decl. ¶ 17, Ex. P at VET001_015608.) The drafts of DVA's notification letter and correspondence discussing drafts, both of which DVA has withheld from Plaintiffs, are direct evidence of DVA's bias.

DVA's intent is at the heart of Plaintiffs' bias claim. Thus, DVA should not be allowed to rely on the deliberative process privilege at all, let alone to shield incriminating evidence.

2. The Privilege Is Qualified and Is Overcome Here by Plaintiffs' Need for the Documents.

Even if the fact that DVA's intent is at issue does not itself render the privilege inapplicable — and it does — the privilege is nonetheless qualified and can be overcome by a showing of need. *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Where, as here, Plaintiffs' need for the withheld materials and for accurate fact-finding overrides the Government's interest in nondisclosure, disclosure is appropriate. *Id.*

In the Opening Brief, Plaintiffs established that to determine whether the privilege is overcome by need, there are eight factors to consider: (1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions; (5) the interest of the litigant, and ultimately society, in accurate judicial fact finding; (6) the seriousness of the litigation and the issues involved; (7) the presence of issues concerning alleged governmental misconduct; and (8) the federal interest in the enforcement of federal law. *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003); *see also Surf & Sand, LLC v. City of Capitola*, No. C 09-05542, 2010 U.S. Dist. LEXIS 122040, at *6-7 (N.D. Cal. Oct. 28, 2010). Plaintiffs also established that each of the eight factors weighed in favor of disclosure. DVA, however, suggests that only four of the eight factors should be included in the balancing test. (Docket No. 276, Opp'n at 9.) But *even if* DVA is correct that only four factors

apply, the outcome would be no different because *all of the factors to balance* weigh in favor of disclosure:

Relevance of the evidence. As discussed, DVA suggests without basis that the documents Plaintiffs seek are completely irrelevant to Plaintiffs' claims. (*Id.* at 10.) This contention should be rejected out of hand for the reasons discussed above. DVA disputes Plaintiffs' argument that "'DVA's decisions regarding how and why to notify test subjects about test programs and associated health risks go to the heart' of [Plaintiffs'] claim that VA is biased in adjudicating benefits claims." (*Id.* at 13 (citing Docket No. 255 at 6).) Yet the Court itself noted that such decisions would be relevant to Plaintiffs' bias claim; the other documents withheld are relevant to the issue of DVA's bias for similar reasons. (Docket No. 250 at 88:25-89:6.) DVA's suggestion that the requested documents are irrelevant must be rejected.

Availability of other evidence. DVA again mischaracterizes Plaintiffs' claim as a narrow facial bias claim, and suggests that DVA has provided Plaintiffs with sufficient documents reflecting its decisions concerning the provision of health care to veterans. (Docket No. 276 at 14.) Yet, as Plaintiffs have stated, only from correspondence and memoranda prepared in the process of making those decisions can Plaintiffs obtain information as to why DVA understated the risks associated with test programs. Such evidence of DVA's motivations and preconceived notions about test participants is not only *relevant* to Plaintiffs' bias claim, it is critically important.

Government's role in the litigation. DVA argues that "VA's internal deliberative documents are entirely collateral" to Plaintiffs' claims. (*Id.* at 15.) Yet they clearly are not collateral — they are *central* to Plaintiffs' claims. And here, the Government's role in the litigation (as a defendant whose intent is squarely at issue) "tip[s] the scale in favor of disclosure." *N. Pacifica*, 274 F. Supp. 2d at 1124 (internal citations omitted).

Extent to which disclosure would hinder frank and independent discussion. While DVA suggests that disclosure would hinder frank and independent discussion, frank and independent discussion of ways to discourage claims by disabled veterans or otherwise demonstrating bias *should* be hindered. Where, as here, the DVA has impermissibly prejudged the claims of test

participants as a group, disclosure could have the positive effect of reminding agency employees that DVA's role is as a *neutral* adjudicator, and that bias toward a certain group of veterans is intolerable. *N. Pacifica*, 274 F. Supp. 2d at 1125.

Interest of the litigant and society in accurate judicial fact-finding. It is clear that this litigation is not only important for Plaintiffs, but is also in the public interest. Disclosure of the challenged documents would make judicial fact-finding more accurate and could help bring to a close the long history of secrecy surrounding the testing programs. *See id.* at 1124.

Seriousness of the litigation and the issues involved. Plaintiffs allege that the very agency charged with providing health care and compensation to veterans — including test subjects — has discriminated against them. This strongly counsels in favor of disclosure. *See id.* at 1123-24.

Presence of issues concerning alleged governmental misconduct. As Plaintiffs have alleged, DVA *intentionally* misled test subjects regarding the health risks associated with the test programs, and has impermissibly prejudged their claims for disability compensation. As just one example, information that DVA sent to test subjects states that volunteer records from Edgewood did not record flashbacks, but Defendants have admitted that participants reported flashbacks.[2] (Docket No. 256, O'Neill Decl. ¶ 9, Ex. H at VET001_014271; Docket No. 259-8, Patterson Decl. ¶ 12, Ex. H at RFA No. 39.) This alleged misconduct weighs in favor of full disclosure.

Federal interest in the enforcement of federal law. The federal interest in enforcing the Constitution and federal statutes is strong, and weighs in favor of disclosure. *See id.* at 1123.

In sum, Plaintiffs have demonstrated a need for the evidence which greatly outweighs DVA's professed need to protect the challenged documents. If DVA is permitted to continue hiding evidence of its bias behind the deliberative process privilege, Plaintiffs will be severely disadvantaged in proving their bias claims. Consideration of the factors above (whether four factors or eight) compels the conclusion that the Court should overrule DVA's claim of privilege and order production of the challenged documents.

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[2] DoD's 30(b)(6) designee confirmed that Defendants had this information at the time the notice was sent to test subjects.

3. DVA Should Not Be Allowed to Use the Privilege as both a Shield and a Sword.

As established in the Opening Brief, DVA is impermissibly using the deliberative process privilege as both a shield and a sword. (Docket No. 255, Motion at 7-8.) DVA's election to produce certain documents related to the decision-making process while withholding others shows that DVA is not concerned with protecting the confidentiality of the decision-making process but rather is seeking to shield highly-relevant, incriminating evidence. For example, DVA produced some drafts of the notification letter (*see* Docket No. 256, O'Neill Decl. ¶ 13, Ex. L) but withheld other drafts (*see id.* ¶ 14, Ex. M at 37, pp 1077-78). Despite DVA's failure to recall the produced drafts in the many months since the documents were produced, and despite their use in depositions without objection, DVA suggests that the production of these documents was "inadvertent," and that the qualified privilege should not be deemed waived. Waiver would result under these circumstances even were the privilege not qualified. But the more important point is that DVA cannot *selectively* produce documents while withholding other versions of the same documents or related documents that are more damaging. DVA represents that it has no intention of affirmatively using the documents over which it *has asserted* the deliberative process privilege, but does not represent to the Court that DVA will not affirmatively use those documents over which it *has failed to assert* the privilege, underscoring Plaintiffs' concern. DVA should not be able to use the privilege to shield documents it has no intention of relying upon, while producing documents that are favorable to DVA's position.

Moreover, that some of the documents over which the deliberative process privilege has been asserted also are subject to assertions of other privileges does not render this motion moot. First, only forty-four of the withheld documents are allegedly "substantially" covered by another privilege. (Declaration of Stacey Sprenkel filed herewith, ¶ 2, Ex. A.) More importantly, it is not clear that the assertion of other privileges renders the entire documents at issue privileged, or simply requires redactions. Either way, there is no dispute that the vast majority of documents being withheld on the basis of deliberative process privilege are not covered by another privilege.

The Court should order production of the documents DVA has withheld on the basis of

the deliberative process privilege or, in the alternative, conduct an *in camera* review of those documents to determine whether the qualified privilege applies here.

C. DVA Should Be Compelled to Produce Up-to-Date Statistics Regarding "Chem-Bio Claims."

There is no doubt that DVA should be compelled to produce up-to-date statistics regarding "Chem-Bio claims" in the same manner as it previously compiled them for its reports on outreach activities. Although DVA originally stated that it "cannot" produce the requested statistics, it has now revised its position, admitting that it can, in fact, produce the statistics, but simply would prefer not to. Yet, DVA does not dispute that End Product 683 ("EP 683") was "a designator VA used in certain electronic databases to denote claims related to chemical or biological exposure in Edgewood Arsenal testing programs." (Docket No. 276, Opp'n at 22.) There is thus *no question* regarding the relevance of the requested statistics to Plaintiffs' claims.

DVA suggests (without support) that producing these statistics would cause it to expend "an unwarranted amount of money and time," again ignoring the fact that it has already done so for its monthly outreach reports. (*See id.*, Opp'n at 23.) DVA suggests that it cannot simply run a computer query, but that generating these statistics is a "multi-step process that involve[s] review of contemporaneous reports of VA's inventory of pending claims to which End Product 683 [] may have applied." (Docket No. 276-5, Black Decl. at 2.) But DVA does not support its bald claims with any analysis regarding the cost or time associated with running such statistics. The fact of the matter is that DVA compiled such statistics in just this way, month after month for a period of years, belying any suggestion that conducting the identical review at this time would be unreasonably burdensome. Plaintiffs merely request that DVA provide an updated version of *the very same statistics* that it generated and relied on every month for several years.

Lacking any legitimate burden or relevance argument, DVA resorts to suggesting that it should not be compelled to produce the statistics because they are "unreliable." Yet those very statistics were not so unreliable as to render them insufficient for the Under Secretary of Benefits, to whom statistics were provided on a monthly basis to inform him about DVA's outreach activities to test victims. Moreover, any alleged "unreliability" of the requested statistics *might*

be relevant — at most — to the weight of the evidence at trial, but *certainly* does not speak to the *relevance* of the data for discovery purposes. DVA suggests, for example, that the requested statistics are unreliable because EP 683 includes Project 112/SHAD claims. (Docket No. 276-5, Black Decl. at ¶ 10.) Yet DVA still managed to break out the statistics for Project 112/SHAD claims from Chem-Bio claims in its monthly reports. (*See* Docket No. 256, O'Neill Decl. ¶ 11, Ex. J at 9-13.) DVA can surely repeat the very method it used to compile the statistics before.

The only reasonable conclusion here is that DVA does not *want* to produce these statistics because *DVA does not like what they show*. But DVA should not be permitted to hide evidence that is clearly relevant, and that DVA itself found sufficient until this litigation began.

Nor are these statistics cumulative. DVA's own evidence makes clear that the EP 683 tag was used to "identify cases flagged by VA employees *as potentially involving a claim* based on testing at Edgewood Arsenal …" (Docket No. 276-5, Black Decl. at 3) (emphasis added.) DVA is only providing to Plaintiffs the claims files of identifiable test subjects. The EP 683 statistics are thus significant in that they include the claims of test subjects for whom test participation *cannot* be verified, as well as of those for whom participation *can* be verified. (*See* Docket No. 256, O'Neill Decl. ¶ 8, Ex. G at 212:11-14.) That claims are being denied because Defendants have lost or destroyed records does not detract from the bias conclusion, it supports it. The thousands of claims denied due to flaws in record-keeping or verification procedures (*see* Docket No. 256, O'Neill Decl. ¶ 12, Ex. K at 2), which comprise a subset of EP 683 statistics, provide essential and non-cumulative information regarding the adjudication of test participants' claims.

DVA should not be permitted to withhold readily available information that the Under-Secretary of Benefits found relevant and sufficiently reliable for years, simply because DVA does not like what the evidence shows. The Court should compel DVA to provide updated statistics.

D. DVA Should Be Compelled to Search for and Produce Documents Regarding Pre-1953 Testing.

As set forth in Plaintiffs' Reply Memorandum in support of the Motion to Compel 30(b)(6) Depositions and Production of Documents against the other Defendants, the Court should compel DVA and the other Defendants to search for and provide discovery regarding pre-

1953 testing. As DVA repeatedly points out, the crux of Plaintiffs' bias claim against DVA is that because of DVA's involvement in chemical and biological testing, it is not a neutral adjudicator of test participants' claims for disability compensation. *There is no date restriction* with regard to Plaintiffs' claim against DVA, and the Complaint highlights events occurring between World War II and the early 1950s. (TAC ¶¶ 2, 102-106.) *There is no logical reason* why DVA's involvement in the testing that took place *before* 1953, as opposed to after 1953, is any less relevant to Plaintiffs' claims. DVA wants to avoid producing the documents because it arbitrarily eliminated all pre-1953 exposed participants from any of its notification efforts.

DVA contends that the burden of searching for the requested documents outweighs the relevance of those documents (contending that the documents are in fact irrelevant). (Docket No. 276, Opp'n at 21.) The reason that the burden exists *at all* is because DVA's initial searches in response to Plaintiffs' discovery requests were inadequate. DVA admits that it would have to expand its search to "explicitly include testing before 1953." (Docket No. 276-5, Black Decl. at ¶ 29.) DVA is essentially asking the Court to condone and reward DVA for its failure to conduct the proper searches initially. None of DVA's burden arguments are based on burdens associated *specifically* with documents relating to pre-1953 testing. Rather, the issue is that DVA will have to do now what it should have done in the first instance, but failed to do.

DVA notes that its "Records Control Schedule" or "RCS" — which categorizes and identifies the types of documents produced in the regular course of business by the Veterans Benefits Administration ("VBA") and designates how the VBA will dispose of each type of document once it is no longer needed — does not list any categories of documents that would suggest they include information about pre-1953 testing. (Docket No. 276-5, Black Decl. at ¶ 35.) It is no surprise, however, that the RCS does not list categories of documents discussing clandestine programs of conducting chemical and biological weapons tests on unwitting soldiers. Moreover, the RCS is not — nor does it purport to be — a catalogue of the information that VBA has stored in its archives. It is simply a schedule of document control and destruction procedures.

DVA's remaining burden arguments essentially boil down to the fact that the relevant documents are *old, in paper format, and not easily identifiable.* (*See* Docket No. 276-6, Thomas

Decl. at ¶ 18.) But such is the nature of Plaintiffs' claims. Plaintiffs' challenges relate to secret, historical events, and the fact that DVA has found some documents dating back to the early 1950s suggests that it knows where to look.

DVA suggests that in order to identify relevant documents, VBA employees would have to conduct a manual file search at several DVA record storage facilities. Yet this presumably would be true of any historical documents; DVA provides no explanation as to why locating pre-1953 documents presents a greater burden than locating post-1953 documents. Similarly, DVA provides no information regarding the cataloging nor any other information that is available to assist in the identification of documents in its storage facilities. Surely there are some records that would allow DVA to more efficiently review only those boxes in its storage facilities with potentially relevant documents (if not by identifying specific records about pre-1953 testing, then by identifying documents from the relevant time period, or from related subject areas).

DVA suggests that because documents might be at various "record storage facilities scattered throughout the United States," DVA should not be compelled to search any of those facilities. (Docket No. 276-5, Black Decl. at ¶ 36.) Yet DVA identifies what appears to be a primary off-site storage facility — the VA Records Center and Vault — which it apparently has not even searched. (*Id.* at ¶ 37.) DVA should be ordered to conduct a reasonable search, perhaps beginning at this main facility and other sites likely to have responsive documents.[3] Again, DVA does not explain how the search for these pre-1953 documents, or how the burden associated with such a search, is any different from the search for relevant post-1953 documents, other than by pointing to the fact that DVA failed to initially conduct an adequate search. DVA should not be rewarded for this failure. To the extent that DVA's argument is simply that DVA's involvement in testing that took place pre-1953 is somehow *less relevant* than DVA's involvement in post-1953 testing, and thus the burden is not justified as to this subset of requested documents, this

[3] DVA notes that archive retrieval can take up to ninety days or more to complete. (Docket No. 276-5, Black Decl. at ¶ 37.) Had DVA requested the necessary archived documents for review months ago, when originally requested by Plaintiffs, DVA would now have the archives in its possession. DVA should be ordered to expedite the retrieval process.

argument should be squarely rejected, as discussed above. DVA simply cannot avoid its discovery obligations because the testing took place long ago. DVA should be required to search for and produce relevant pre-1953 documents, and should not be rewarded for its failure to conduct the appropriate search originally.

E. DVA Should Be Compelled to Search for and Produce Documents Related to the Narrowed List of Substances.

To reach a result that satisfies the Court's concerns regarding proportionality, Plaintiffs agree — for the purposes of their discovery requests only — to limit the requests to the narrowed list of test substances governing Plaintiffs' discovery requests propounded on the other Defendants. This appears to be consistent with what DVA is suggesting as a reasonable approach (*see* Docket No. 276, Opp'n at 19), and with the search that DVA contends it has already undertaken. (*See* Docket No. 276-6, Thomas Decl. at ¶¶ 9-15.)

F. Plaintiffs Reserve the Right to Revisit the Issue of Death Certificates.

Plaintiffs disagree with DVA's suggestion that there is no actual dispute between the parties regarding the issue of death certificates of all deceased test subjects. (Docket No. 276, Opp'n at 25.) Plaintiffs have requested *all* death certificates, but DVA has agreed to search only in two repositories which it claims are "likely" to contain death certificates. However, for the sake of proportionality, Plaintiffs are willing to permit DVA to initially search the two most likely sites, but reserve the right to raise this issue before the Court at a later date if DVA's search does not yield the responsive documents.

III. CONCLUSION

For the reasons set forth above and in the Opening Memorandum, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion to Compel.

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