GORDON P. ERSPAMER (CA SBN 83364)
GErspamer@mofo.com
TIMOTHY W. BLAKELY (CA SBN 242178)
TBlakely@mofo.com
STACEY M. SPRENKEL (CA SBN 241689)
SSprenkel@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

Attorneys for Plaintiffs
Vietnam Veterans of America; Swords to Plowshares: Veterans Rights Organization; Bruce Price; Franklin D. Rochelle; Larry Meirow; Eric P. Muth; David C. Dufrane; Tim Michael Josephs and William Blazinski

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 IN SUPPORT OF MOTION TO COMPEL RULE 30(b)(6) DEPOSITIONS AND PRODUCTION OF DOCUMENTS** Hearing Date: September 22, 2011 Time: 2:00 p.m. Courtroom: E, 15th Floor Judge: Hon. Jacqueline Scott Corley Complaint filed January 7, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

Plaintiffs' Motion to Compel Rule 30(b)(6) Depositions and Production of Documents seeks to require Defendants to provide basic discovery that they long have resisted — even in the face of prior Court orders. (*See* Docket No. 258 (the "Motion").) Defendants' Opposition seeks to justify their refusal to provide the discovery sought primarily by arguing that the discovery is (1) irrelevant, (2) largely cumulative, and/or (3) unduly burdensome. For the reasons explained below, the Court should reject Defendants' arguments and grant Plaintiffs' Motion.

BACKGROUND

Despite Defendants' attempts to describe the "enormous efforts" they have made in discovery or to characterize their participation in discovery as "substantial," they ignore that only through significant effort and extensive motion practice have Plaintiffs been able to obtain much of the discovery Defendants have provided thus far. (*See, e.g.*, Docket Nos. 76, 125, 128, 191, 258.) Defendants now attempt to undo part of that work, in particular, through the CIA's continued disregard of Judge Larson's November 12, 2010 Order (Docket No. 178 ("Nov. 2010 Order")). That Order — despite Defendants' efforts to dismiss its import — required Defendants, including the CIA, to provide Rule 30(b)(6) testimony about health effects from participation in the test programs, the use of DVA patients for chemical and biological weapon testing, and the CIA's involvement in Defendants' testing programs. (*See* Nov. 2010 Order at 18-29.)

On September 2, 2011, Judge Wilken denied the CIA's Motion for Judgment on the Pleadings concerning Plaintiffs' secrecy oath claim, allowing that claim to go forward. (Docket No. 281 ("Sept. 2 Order") at 6.) Judge Wilken concluded that the Court's May 31, 2011 Order had dismissed Plaintiffs' notice and health care claims against the CIA and that "Plaintiffs shall not take discovery based solely on claims against the CIA for notice or health care." (*Id.* at 9.) The Court made clear, however, that its ruling did "not address the scope of discovery against the CIA as to Plaintiffs' secrecy oath claim or their claims against other Defendants." (*Id.*)

ARGUMENT

The primary argument in Defendants' Opposition is that much of the discovery Plaintiffs seek is irrelevant to Plaintiffs' remaining claims. Defendants are mistaken. All of the discovery that Plaintiffs seek is highly relevant to the secrecy oath claim against the CIA, to Plaintiffs'

claims against the DOD, Army, or DVA, or to both. And regardless of Defendants' characterization of their past document productions as voluminous and sufficient, there remain *significant* gaps in critical areas, as discussed below. Accordingly, Plaintiffs respectfully request that the Court compel Defendants to produce these highly relevant documents and testimony.

I. THE COURT SHOULD COMPEL THE CIA TO PROVIDE RELEVANT DOCUMENTS AND TESTIMONY.

Plaintiffs seek discovery from the CIA concerning three topics: health effects, DVA involvement in testing, and CIA involvement in the test programs. (*See* Mot. at 7-9.) While the Sept. 2 Order concluded that Plaintiffs cannot seek discovery relating "solely" to the dismissed claims for notice and health care from the CIA, all of the discovery that Plaintiffs seek to compel from the CIA concerning these three topics is relevant either to Plaintiffs' remaining secrecy oath claim against the CIA, to Plaintiffs' claims against the other Defendants, or both.

The CIA's primary argument against much of the discovery sought concerning Plaintiffs' claims against the DOD and Army is, in essence, that such discovery is inappropriate because it would be inadmissible. This argument fails as: (1) admissibility is not the standard for allowing discovery[1] and (2) the discovery sought is highly relevant to Plaintiffs' remaining Constitutional and Administrative Procedures Act ("APA") claims against the DOD and Army.

A. Health Effects Information Is Relevant to Plaintiffs' Claims Against the DOD.

Plaintiffs seek Rule 30(b)(6) testimony and documents from the CIA concerning the health effects resulting from exposure to test substances and from participation in Defendants' testing programs. "Parties 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 Judge Larson already held, information the CIA has concerning health effects is relevant to Plaintiffs'

---

[1] Plaintiffs need not prove admissibility at this stage — "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). As addressed below, Defendants' arguments that a court's review must be limited to an administrative record in an APA case (and *even* in a Constitutional case against an agency) must be rejected. Information about health effects, for example, would be admissible as evidence that Defendants have failed to fulfill their APA and Constitutional duties to provide notice to Plaintiffs.

claims against the other Defendants. (*See* Nov. 2010 Order at 26 ("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.").) Moreover, the CIA's close involvement in the testing programs included information received from the Army concerning the results of and health effects caused by tests. (*See, e.g.*, Docket No. 259-28.) Thus, the CIA is likely to have relevant health effects information, from this and other sources.

1. Health Effects Information Is Relevant to Both Plaintiffs' Constitutional and APA Claims Against the DOD and Army.

The health effects information requested is highly relevant to Plaintiffs' Constitutional claims for notice and health care against the DOD and Army. Defendants, however, argue that "Plaintiffs have not shown how this discovery . . . is relevant or necessary in an APA case, where the Court cannot create a new record nor conduct an inquiry into the merits. . . ." (Opp'n at 11.)

As an initial matter, Defendants' argument that discovery must be limited given Plaintiffs' APA claims is entirely inapposite given Plaintiffs' remaining *Constitutional* claims. (*See, e.g.*, 3AC ¶¶ 184, 186.) The Court's Sept. 2 Order confirmed that Plaintiffs' notice and health care claims *against the CIA* were no longer in the case — because the Court's May 31, 2011 Order had dismissed them. (*See* May 31 Order (Docket No. 233) at 11 ("Plaintiffs' notice and medical care claims against the CIA . . . are dismissed.") Neither the Sept. 2 Order nor the May 31 Order, however, addressed Plaintiffs' Constitutional claims against the DOD. In fact, the Court's May 31 Order *denied* the DOD's motion to dismiss Plaintiffs' health care claim. (*Id.* at 10-11.)

Nor did the Court's January 19, 2010 Order (Docket No. 59 ("Jan. 2010 Order")) dismiss Plaintiffs' Constitutional claims against the DOD and Army, as Defendants argue. The Jan. 2010 Order dismissed two claims: (1) the organizational 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." (*Id.* at 19-20.) The Court was clear, however, that "Defendants' Motions to Dismiss are *denied* with regard to Plaintiffs' *other claims*." (*Id.* at 19-20 (emphasis added).) It is clear, then, that the Court did not dismiss the Constitutional due process

basis for Plaintiffs' claims seeking notice and healthcare, which — as this Court has recognized — unquestionably are set forth in the Complaint. (*See, e.g.*, 3AC ¶¶ 184, 186, 189.)[2]

This conclusion is buttressed by the Court's reason for dismissing Plaintiffs' request for a "declaration on the testing's lawfulness." (Jan. 2010 Order at 11.) The Court concluded that Plaintiffs "lack[ed] standing" to pursue such a declaration because "[v]indication through a declaration that they have been wronged does not redress the individual Plaintiffs' injuries for the purposes of Article III." (*Id.*) Of course, the same cannot be said for Plaintiffs' request that Defendants be required to provide notice and health care to test subjects: this relief would directly address the injuries suffered by Plaintiffs and other test subjects, and Plaintiffs clearly have Article III standing to pursue these claims.[3]

Health effects information also is relevant to Plaintiffs' claims against the DOD and Army under Section 706(1) of the APA. *See* 5 U.S.C. § 706(1). Although Defendants argue that review of Plaintiffs' APA claims must be limited to an "administrative record," Plaintiffs repeatedly have made clear that they are not challenging a final agency decision under Section 706(2) of the APA; Plaintiffs challenge the DOD's and Army's *failure to act* under Section 706(1). (*See, e.g.*, 3AC ¶¶ 17, 22, 28, 178, 189; *see* Jan. 2010 Order at 17-18.) Because Plaintiffs are not challenging a "decision" under Section 706(2) but rather are seeking to compel agency action unlawfully withheld or unreasonably delayed under Section 706(1), "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." *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000).[4]

---

[2] During the September 1, 2011 hearing, Judge Wilken even stated that "I am going to tell you whether they have constitutional claims against the CIA, and I don't think they do, but *they do have constitutional claims against the other Defendants*, I believe." (Patterson Decl. ¶ 2, Ex. A at 21:4-7 (emphasis added).)

[3] Indeed, the Court permitted Plaintiffs' secrecy oath claim to go forward precisely because a declaration concerning the lawfulness of the secrecy oaths would "redress [Plaintiffs'] alleged injuries" by allowing them "to speak freely about their experiences." (Jan. 2010 Order at 12-13.) In the same way, the declaratory and injunctive relief that Plaintiffs seek requiring Defendants to provide notice and health care would "redress Plaintiffs' alleged injuries" by permitting them to seek treatment for ongoing harm suffered as a result of Defendants' test programs.

[4] Defendants' authority is easily distinguishable, as addressed in Plaintiffs' Opposition to Defendants' Motion for Protective Order (Docket No. 275 at 13-16, 18-19). For example, the

(Footnote continues on next page.)

Accordingly, this case necessarily cannot be limited to any "administrative record." *See Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 665 (9th Cir. 1998)("where the issue is alleged agency inaction, we believe the scope of review . . . is broader, . . . A broader scope of review is necessary because there will generally be little, if any, record to review."); *see also San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002); *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 511 (9th Cir. 1997).

Indeed, *there is no "administrative record" for the Court to review.* This action was filed more than 2.5 years ago and neither the DOD nor the Army has identified any administrative record governing this case.[5] To the contrary, discovery has been ongoing for more than a year, the Court already has ordered the CIA and others to provide discovery on many occasions (*see* Docket Nos. 112, 178, 202), and Defendants repeatedly trumpet the amount of discovery they have provided in response to Plaintiffs' discovery requests. Defendants cannot now credibly argue that none of this discovery was appropriate, that none of it is relevant, or that none of it will be admissible. Nor can Defendants credibly argue that the Court should refuse additional discovery in deference to a *non-existent* "administrative record."

The Court should reject Defendants' request — nearly two years into discovery — to restrict discovery simply because some of Plaintiffs claims are brought under the APA. (*See* Opp'n at 2-4.) As discussed more fully in Plaintiffs' Opposition to Defendants' Motion for a Protective Order (Docket 275 at 13-16, 18-19) — and as Defendants have acknowledged (*see* Docket No. 254-1 at 17) — the Ninth Circuit has made clear that evidence outside of the administrative record is allowed in Section 706(1) cases, even where plaintiffs do not allege

---

(Footnote continued from previous page.)

court in *Mt. St. Helens Mining & Recovery Ltd. P'ship v. United States* reviewed a *final agency action* under APA section 706(2), not an action unreasonably delayed or unlawfully withheld under 706(1). *See* 384 F.3d 721, 727-28 (9th Cir. 2004). The discussion on which Defendants rely (Opp'n at 3) is dicta, and the case did not involve the scope of discovery.

[5] The Court should reject any DOD attempt to limit discovery by compiling a *post hoc* "administrative record" now. *See Earth Island Inst. v. Evans*, 256 F. Supp. 2d 1064, 1078 n.16 (N.D. Cal. 2003)("Given that defendants have yet to provide the Court with an administrative record, it is not clear that any material can, at this point, be objected to as going beyond something that does not yet exist.")

Constitutional violations. *See Friends of the Clearwater*, 222 F.3d at 560. *But Plaintiffs here have asserted Constitutional claims independent of the APA.* There is thus no basis for precluding discovery, as courts routinely permit discovery where constitutional claims are alleged against agencies, even when APA claims are alleged as well.[6] Here, where plaintiffs allege constitutional claims — and where there is no agency *decision* being challenged under Section 706(2) of the APA — discovery, and the scope of the Court's review, should not be limited to an agency record — especially one that does not even exist.

2. Plaintiffs' Health Effects Requests Are Not Unduly Burdensome.

To address Defendants' concerns about burden as to any outstanding document requests — and the Court's concerns about proportionality as raised during the August 4 hearing — Plaintiffs are willing to narrow the health effects discovery sought by withdrawing their requests for discovery concerning: (a) the 11 biological substances listed on Plaintiffs' narrowed substance list[7] (Docket No. 259-3 at 9); and (b) the chemical substance lidocaine (*id.* at 8). Discovery concerning the remaining substances — a subset of only 51 of the more than 400 substances used in Defendants' testing programs — however, is highly relevant, and the need for this information outweighs the CIA's purported burden.[8]

Documents already in the record make clear that the DOD and the Army communicated extensively with the CIA concerning the test programs, including copying the CIA on reports about the results of tests. (*See, e.g.*, Docket No. 259-28.) Therefore, it is reasonable to conclude

---

[6] *See 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); *Miccosukee Tribe of Indians of Fla. v. United States*, No. 08-23001, 2010 U.S. Dist. LEXIS 66012, at *6-9 (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).

[7] Anthrax, Bacillus Globibii, Botulinum toxin, Brucella, Bubonic Plague, Q Fever, Ricin, Tularemia, Typhus, Venezuelan Equuine Encephalomyelitis, and Viral Encephalitis

[8] Defendants also argue that, given the DOD's answers to Plaintiffs' Requests for Admission ("RFA's") concerning health effects, "it is unclear how information from the CIA would be relevant in light of these admissions." (Opp'n at 11.) Plaintiffs address this argument at length in Section II-A-1 below. In short, this argument fails because there are a considerable number of other health effects not addressed in Plaintiffs' RFA's, which discovery from the CIA might reveal or address. Also, the DOD's admissions are limited in many tactical ways.

that the CIA possesses key information concerning the effects of the substances used during the testing programs, and the CIA should be required to search for that information. Moreover, given the unique nature of the testing programs and the fact that human testing with these substances outside of Defendants' testing programs has been rare, the CIA is a key repository of highly relevant health effects information for these test substances. The information simply is not available from other sources. Accordingly, the Court should *once again* order the CIA provide Rule 30(b)(6) testimony and produce all responsive documents about this topic.[9]

B. Information Concerning DVA Involvement in the Testing Programs Is Central to Plaintiffs' Claim Against the DVA.

Plaintiffs seek Rule 30(b)(6) testimony concerning "the use of DVA patients in testing conducted or funded by [CIA] related to chemical and/or biological weapons." (Docket No. 259-2 at 4.) The CIA argues that such testimony would be irrelevant to Plaintiffs' bias claim against DVA, contending that "the relevant inquiry is not the nature of any alleged historical relationship between the CIA and VA . . . ." (Opp'n at 12.) Yet, DVA involvement is *precisely* the point. As the CIA even acknowledges by quoting the District Court's Nov. 15, 2010 Order, the alleged reason for the bias is that "the DVA allegedly was involved in the testing programs at issue. . . ." (Opp. at 12 (quoting Docket No. 177 at 11).) It does not matter who possesses information concerning DVA's involvement — this information is critically important to Plaintiffs' bias claim, regardless of whether it comes from DVA, the CIA, or any other party.

C. CIA Involvement in the Testing Programs is Relevant to Plaintiffs' Claim Against the CIA and Plaintiffs' Claims Against the DOD and Army.

Plaintiffs seek Rule 30(b)(6) testimony from the CIA concerning *the CIA's involvement* in the testing programs. There could be no more central topic of discovery in this case with respect to the CIA, and this discovery is of core relevance to Plaintiffs' secrecy oath claim against the

[9] The CIA also refuses to answer Plaintiffs' RFA's. (*See* Docket No. 286 at 9-10.) There is no doubt, however, that the CIA must respond to Plaintiffs' RFA's related to secrecy oaths. The CIA should be compelled to respond to other RFA's concerning, for example, health effects and the CIA's involvement in the testing programs, which are relevant to Plaintiffs' Constitutional and APA claims against the DOD and Army for the same reasons discussed above.

Agency. In its Sept. 2 Order, the Court denied the CIA's Motion for Judgment on the Pleadings as to Plaintiffs' secrecy oath claims against the CIA, reasoning that:

> Plaintiffs plead facts about the CIA's pervasive involvement in planning, funding and executing the experimentation programs. Plaintiffs also plead that the CIA had an interest in concealing the programs from "enemy forces" and "the American public in general." 3AC ¶ 145 (citation and internal quotation marks omitted). These allegations, construed in Plaintiffs' favor, suggest that the challenged secrecy oath could be traced fairly to the CIA. . .

(Sept. 2 Order at 5-6.) It is clear that Plaintiffs are entitled to seek discovery from the CIA to test the extent of the CIA's "pervasive involvement in planning, funding and executing the experimentation programs," which is at the heart of the requested Rule 30(b)(6) testimony. Moreover, despite the CIA's consistent resistance to discovery, Plaintiffs have been able to confirm some facts about the CIA's extensive role in the testing programs, which utilized "secrecy oaths" as a key tool. (*See* Erspamer Decl. ¶¶ 2-9; *see, e.g.*, Docket. Nos. 129-7, 129-8, 129-9, 259-4, 259-5, 272-2; 3AC ¶¶ 2, 106, 113, 132.) This key testimony sought from the CIA concerning the Agency's involvement in the testing programs is obviously relevant to Plaintiffs' secrecy oath claims against the DOD and Army, as well, for the same reasons.[10]

II. PLAINTIFFFS SEEK CORE DISCOVERY FROM THE DOD.

Plaintiffs have moved to compel the DOD and Army to search for and produce documents that are highly relevant to Plaintiffs' Constitutional and APA claims for notice and health care.

A. The DOD Must Produce Documents Concerning Pre-1953 Testing.

Regardless of Defendants' confused arguments that Plaintiffs lack a "jurisdictional basis" for their APA claims concerning pre-1953 testing (*see* Docket No. 286 at 13), discovery with respect to pre-1953 testing is highly relevant to Plaintiffs' Constitutional claims for notice and health care against the DOD and Army.[11] As addressed above, Plaintiffs' Constitutional claims

---

[10] With respect to Plaintiffs' Request for Production No. 60, the CIA states that it has, in response to Plaintiffs' Motion, initiated the process of searching for and producing documents concerning the drugs and substances the CIA obtained from the DVA and other government agencies. (*See* Opp. at 14 (citing Cameresi Decl. (Docket No. 279-26) ¶ 39).) As the CIA does not oppose Plaintiffs' Motion on this topic, the Court should grant Plaintiffs' requested relief.

[11] As addressed in Plaintiffs' Opposition to Defendants' Motion for Protective Order (Docket No. 275 at 22), Defendants' argument that the Court lacks subject matter jurisdiction to adjudicate

(Footnote continues on next page.)

against the DOD were allowed to go forward in the Court's Jan. 2010 Order. (*See* Jan. 2010 Order at 19-20.) As this Court recognized during the August 4 hearing, Plaintiffs' action covers the full time frame of the testing programs which started long before 1953 (*see, e.g.*, 3AC ¶¶ 2, 102-106);[12] thus discovery about the early phases of the testing programs is certainly relevant.[13]

1. The DOD's RFA Responses Do Not Foreclose Discovery.

The DOD argues that its admissions of certain health effects in response to Plaintiffs' RFAs somehow completely forecloses discovery concerning health effects from pre-1953 testing. (*See* Opp'n at 15-16.) Yet, the health effects covered by Plaintiffs' RFA's are by no means comprehensive. If the Court were to accept Defendants' argument, then the DOD's RFA responses would in essence become a denial of *any other health effect* caused by mustard gas, lewisite, or any other pre-1953 test substance (*e.g.*, LSD), which were not included in Plaintiffs' RFA's. The DOD's admissions of some health effects cannot foreclose discovery concerning others or even as to the admitted substances where exposure, dose, and other issues remain.

In addition, the DOD's responses themselves are self-limiting. Without exception, Defendants based their responses regarding certain health effects of mustard agent exposure solely on the 1993 National Academy of Sciences Report "Veterans at Risk: The Health Effects of Mustard Gas and Lewisite." (*See* Docket No. 259-8 at RFA Nos. 43-71.) And Defendants expressly limited each admission to the extent of that purported "study's" findings. (*See id.*) For

---

(Footnote continued from previous page.)

Plaintiffs' pre-1953 claims (Opp'n at 15) is clearly erroneous. The Court's jurisdiction does not arise under the 1953 Wilson Memorandum, but rather under 28 U.S.C. § 1331. As an entirely separate legal issue, Plaintiffs properly rely on the APA's waiver of sovereign immunity as to all of their claims — including those related to pre-1953 testing. *See Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 865 (9th Cir. 2011).

[12] Recently produced documents now show that Edgewood testing began as early as 1937.

[13] This information also is relevant to Plaintiffs' APA claims against the DOD and Army, which include pre-1953 testing. AR 70-25 states that the DOD must "establish a system which will permit the identification of volunteers who *have participated* in research conducted or sponsored by that command or agency, and take actions to notify volunteers of *newly acquired* information." AR 70-25 (1990) (emphasis added). By this clear language, AR 70-25 implicates past testing; it refers to volunteers who "have participated" and requires that notification efforts must include "newly acquired" information, demonstrating a duty going forward as to historic test subjects.

example, in response to a request to admit that exposure to mustard agents can cause mood disorders, Defendants stated:

> Admitted to the extent that the 1993 NAS study concluded that there was a causal relationship between the experiences of subjects in chamber and field tests of mustard agents and the development of mood disorders. DOD further states that the 1993 NAS study concluded that it was not possible to draw any conclusions about specific physiological conditions and their possible psychological concomitants or causes.

(*Id.* at RFA No. 64.) These qualified admissions cannot preclude discovery into pre-1953 testing entirely. If Defendants have additional information about these health effects — especially effects not covered by the NAS "study" — that information is discoverable. Defendants' reliance on the mere production of the NAS "study" (*see* Opp'n at 17-18) fails for the same reason; all responsive documents — not just that *single document* — must be produced.[14]

2. Once Again, the DOD Ignores the 55,000 Mustard Gas and Lewisite Test Subjects Who Have Never Received Any Notice.

The DOD asserts that the information concerning DVA's notification letter is undisputed (Opp'n at 16) — disregarding a broad range of issues concerning the notice. For example, the DOD fails to mention that the DVA *has not notified* approximately 55,000 veterans with other than full-body exposure to mustard gas and Lewisite. (*See* Mot. at 11 n.9.) The DOD's failure to address these particularly vulnerable and aging members of Plaintiffs' putative class underscores the importance of this discovery and why — despite Defendants' claims of burden — the Court should compel discovery concerning pre-1953 testing. These test subjects are particularly vulnerable in at least three respects: (1) they have not received notice letters of any kind (*see id.*); (2) they were not included in Defendants' Mustard Gas and Lewisite database (*id.*); and (3) the

[14] The Court should reject Defendants' half-hearted argument that their production of at least some responsive documents somehow satisfies Plaintiffs' discovery needs concerning mustard gas and lewisite testing. (Opp'n at 17-18.) It is clear that Defendants have made no effort to conduct a good faith search for all responsive information pre-dating 1953, but instead have specifically restricted their discovery responses for that period. In addition, Defendants' reliance on the threadbare DTIC bibliographies regarding pre-1953 testing (Opp'n at 17) ignores the simple facts that Plaintiffs *do not have* and Defendants never have searched for or produced the underlying documents.

testing took place before the 1953 Wilson Memorandum formalized testing protections (although, as Plaintiffs allege, those protections were ignored). The Court should compel discovery concerning these "lost" test subjects and the DOD's efforts (or more accurately, lack of effort) to notify them. The importance of this discovery outweighs the burden claimed by Defendants.[15]

B. Plaintiffs Are Willing to Lessen Defendants' Burden Concerning DTIC Located Documents, and These Documents Are Highly Relevant.

The DOD's burden arguments should be rejected, as the information sought is highly relevant to Plaintiffs' notice and health care claims: the requests cover key topics, including health effects and testing protocols, and DTIC is the *only* source searched by Defendants for many remote testing locations. Defendants repeatedly assert that Plaintiffs have refused to offer search terms to narrow Defendants' DTIC search parameters. (*See, e.g.*, Opp. at 11 n.14.) It is Defendants' obligation to search for relevant documents; they cannot force Plaintiffs to reduce their case to vocabulary words. Further, Defendants ignore one key fact that makes their whole argument illusory — at no time have Defendants committed to provide *the underlying documents identified* in the results of any such searches. The parties would have been back to square one: Plaintiffs with nothing more than vague abstracts and no underlying documents.

As mentioned above, Plaintiffs agreed to lessen Defendants' burden by removing a dozen test substances from their narrowed list. (*See* Sect. I-A-2.) This should significantly lessen Defendants' burden. Plaintiffs also are willing to provide a narrowed search term list, as Defendants request, if the Court orders Defendants *to produce the underlying documents* identified through that narrowed DTIC search.

Defendants bear the "heavy burden" of "showing that discovery should not be allowed" and "clarifying, explaining, and supporting [their] objections." *See Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1998) (internal citation omitted); *Blankenship v. Hearst Corp*, 519 F.2d 418, 429 (9th Cir. 1975) ("Under the liberal discovery principles of the Federal

---

[15] The DOD's engagement with Battelle, in fact, covers testing from 1942 to present. (*See* Docket No. 279-20 ¶¶ 3, 5.)

Rules defendants [are] required to carry a heavy burden of showing why discovery was denied.").[16] Accordingly, due to the highly relevant nature of the documents in DTIC and the fact that DTIC may be the *sole repository* for these documents, many of which retain some level of classification (*see* Mot. at 13-14), the Court should compel their production.

C. There Is Indeed a Ripe Dispute Concerning Emails; DOD Must Produce Responsive Emails Which Are Likely Central to Plaintiffs' Claims.

Obtaining responsive emails from the DOD and Army is potentially the most important category of discovery that Plaintiffs seek in the present Motion. Defendants attempt to dodge this issue by falsely claiming there is no ripe dispute, but the fact remains that Plaintiffs' Requests for Production have been pending for years, and the DOD and Army *still* have produced virtually no email communications. Moreover, despite repeated requests, Defendants have failed to provide basic information about the scope of their email searches, including the custodians, systems, scope, and time-frame of email encompassed in those searches. The reason seems clear: "In conducting their searches, these components were not told to exclude emails." (Gardner Decl. (Docket No. 279) ¶ 10.) In other words, by implication, and as never disputed by Defendants, those components were not told to *include* emails in their searches for responsive documents. (*See also* Docket No. 259-11 at 2-3.)[17] Plaintiffs can no longer wait and see if the DOD and Army might produce responsive emails, and even then, there will be uncertainty about

---

[16] Despite Defendants' apparent assertion (Opp'n at 21), *Exxon Shipping Co. v. U.S. Dep't of Interior* does not establish any special balancing test for government agencies responding to discovery. *See* 34 F.3d 774, 779-780 (9th Cir. 1994) (holding that the federal rules of discovery provided the government with ample protection from unwarranted discovery requests). *Exxon* also is distinguishable, as plaintiffs there attempted to turn the agency into a "speakers' bureau for private litigants" seeking information unrelated to the agency's official business. *Id.* at 780. By contrast, the DOD is a key party to the present litigation. The Court also should reject the DOD's undue burden argument that some DTIC repository documents may be stored at offsite locations (Opp'n at 19). *See LG Display Co. v. Chi Mei Optroelectronics Corp.*, No. 08-cv-2408-L (POR), 2009 U.S. Dist. LEXIS 6362, at *6 (S.D. Cal. Jan. 28, 2009) (requiring third party to produce documents after rejecting their argument that the requests were unduly burdensome because the documents had been archived on either microfiche or in hard copy in an off-site storage facility).

[17] Defendants mischaracterize Plaintiffs' motion as only seeking emails from "certain custodians." (Opp'n at 14-15.) While Plaintiffs offered a list of key custodians of which Plaintiffs are aware, that list was by no means comprehensive. The same goes for Plaintiffs' identification of Anthony Lee and Arnold DuPuy for Battelle-related emails. If other relevant custodians exist, Defendants should be required to search for and produce their responsive emails.

compliance. A Court Order is now necessary, as is the case with most of Defendants' claims of ongoing searches, which they initiated in time for their opposition brief.

Given Defendants' surprising response that there is no ripe dispute, Plaintiffs sent a letter on September 9, 2011, seeking clarification and again asking for information concerning the DOD's email searches: "(1) a list of custodians from whom Defendants are collecting email, and (2) a description of the scope of email included in the search for each custodian (whether a current or former employee), including the timeframe of email that will be captured in the search." (Patterson Decl. ¶ 3, Ex. B at 1-2.) The DOD evasively and vaguely responded on September 13 by describing a far more limited effort: "DoD's efforts to identify responsive, non-privileged emails is *focused upon the individuals you identified in your Motion to Compel*, and *has included* both individual custodian searches and keyword searches." (Patterson Decl. ¶ 4, Ex. C at 2 (emphasis added).)

Thus, while the DOD has represented to the Court that relevant custodians are (belatedly) searching for responsive emails (Opp'n at 22), Plaintiffs still do not know the identity of the numerous other individuals with responsive emails, who the custodians are — except for those identified in Plaintiffs' Motion — or what the scope of the search is (including timeframe). If Defendants refuse to produce emails by former employees, including any back-up tape or archived emails, for example, then a critical period of time — including 1993-1995 and 2004-2006 — will be excluded. Accordingly, given the extreme importance of relevant emails — as evidenced by the DVA-DOD email examples filed with the Motion (*see* Mot. at 15), the Court should compel the DOD and Army to search for and produce all responsive emails.

D. The Court Should Compel Production of Remaining Battelle Documents.

After Plaintiffs moved to compel on this topic, Defendants finally produced some additional Battelle-related documents, including what appears to be the over-arching contract and some contract modifications. (Patterson Decl. ¶ 5.) There are several other important categories of documents remaining, however, that Defendants continue to improperly withhold, including documents concerning the 1993-1994 notification efforts, lists of personnel and team leaders assigned to the Battelle Chem-Bio database and document collection projects, and documents

reflecting gaps in the files and explaining how those gaps are reconciled. (*See* Mot. at 21-22.) Battelle has produced nothing in response to Plaintiffs' subpoena duces tecum.

1. There Are Significant Gaps in Defendants' Produced Documents Concerning the 1993-1994 Notification Efforts.

With respect to the 1993-1994 notification effort, Defendants' primary argument is that additional discovery would be cumulative and burdensome. (Opp'n at 24-25.) To the contrary, the Chemical Weapons Exposure Project Report (the "Report") and Martha Hamed's deposition provide little information regarding Battelle's work on the 1993-1994 notification efforts. The Report contains very few documents that mention Battelle, let alone documents that Battelle itself generated, such as reports and other deliverables. Indeed, Plaintiffs could only find one Statement of Work. Further, by her own admission, Martha Hamed's knowledge of Battelle's work was limited. For example, Ms. Hamed testified that she gave Battelle a contract to document the sites where mustard gas was tested, stored, produced or transported, but she did not "know how they did it" nor what sites they visited. (Patterson Decl. ¶ 6, Ex. D at 119:15, 121:12).[18] Given these key gaps, Plaintiffs are entitled to this discovery.

2. Other Battelle Documents Are Highly Relevant to Plaintiffs' Claims.

The database creation and notification efforts related to Battelle's work are central to Plaintiffs' remaining claims. Plaintiffs allege that the DOD and Army have not provided required notice to test subjects. In response to Plaintiffs' RFA's, the DVA — the actual agency who drafted and sent veterans purported "notice" letters — cites the DOD's Chem-Bio database as the source identifying the veterans to whom they sent letters. (*See* Patterson Decl. ¶ 7, Ex. E at Gen. Obj. No. 5, RFA Nos. 6, 25.)[19] Because the DVA "notice" letters (which were not sent to a vast

---

[18] Neither the Report nor Ms. Hamed's testimony shed any light on why the DOD suddenly abandoned the 1993-1994 notification efforts in spite of the at least 55,000 service members who had not been notified of their exposures (*see* Mot. at 11 n.9).

[19] In addition, the DOD and Army denied Plaintiffs' RFA No. 4 "that neither DOD nor DOA has provided NOTICE to TEST SUBJECTS of the possible health effects that may result from their participation in and/or exposures during the TEST PROGRAMS." (Docket No. 259-8 at RFA No. 4) — claiming, among other things, that "DoD prepared materials that were provided to volunteer service members with the Department of Veterans Affairs *notice letters*. . ." (Patterson Decl. ¶ 8, Ex. F at 1 (emphasis added).) Yet, the DOD designated Rule 30(b)(6) witness, Dr.

(Footnote continues on next page.)

number of test subjects, failed to include specific information concerning health effects, and misstated critical facts) are important for understanding whether notice has been provided and whether those letters evidence the DVA's bias against the test subjects — and because the Chem-Bio database was the source for identifying those to whom these letters were sent, understanding the veracity of the Chem-Bio Database itself is paramount. Without the requested Battelle-related discovery concerning (1) the creation of the database, (2) the identification and collection of documents, (3) what was included or excluded, and (4) why the 1993-1994 effort ceased, Plaintiffs' ability to test the veracity of that database would be significantly undermined.

From a discovery standpoint, Defendants once again assert that Plaintiffs must rely on the unproven secondary source, the Chem-Bio Database, in lieu of other discovery (*see* Opp'n at 5, 7, 18 n.15), despite all of its many infirmities and limitations, such as missing information and scope. This bald assertion lacks meaning if Plaintiffs cannot obtain the discovery sought concerning the creation, execution, and compilation of the database, which Defendants clearly intend to rely upon at trial. Defendants' attempt to avoid its discovery obligations by predicting that Plaintiffs "will depose Battelle officials" (Opp'n at 24) must also be rejected. Defendants fail to mention that they, in fact, together with Battelle, have opposed Plaintiffs' motion to enforce the subpoena duces tecum directed to Battelle, and that Battelle moved to quash both Plaintiffs' subpoena duces tecum and deposition subpoenas. (Patterson Decl ¶¶ 10-12, Ex. H, I, J.)[20] The Ohio Court repeatedly stressed in taking the motion under submission that Plaintiffs must obtain documents in Defendants' possession *from Defendants*, not Battelle. (*See* Mot. at 23.)

CONCLUSION

For the foregoing reasons and those stated in Plaintiffs' Motion, Plaintiffs respectfully ask that this Court order Defendants to produce the requested discovery within 30 days.

(Footnote continued from previous page.)

Michael Kilpatrick, testified that it was *the VA's letter* and the DOD's suggested changes were only advisory. (Patterson Decl. ¶ 9, Ex. G at 518-519.)

[20] Since then, Battelle and Plaintiffs unsuccessfully attempted to reach agreement regarding Plaintiffs' Rule 30(b)(6) topics and Battelle witnesses. (Patterson Decl. ¶ 13, Ex. K.) But Battelle has not produced any documents, none of the noticed depositions have been scheduled, no stipulations have been signed or entered, and the Ohio Court has yet to rule.

Dated: September 15, 2011

GORDON P. ERSPAMER
TIMOTHY W. BLAKELY
STACEY M. SPRENKEL

MORRISON & FOERSTER LLP

By: /s/ Gordon P. Erspamer
Gordon P. Erspamer
[GErspamer@mofo.com]

Attorneys for Plaintiffs