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7 Attorneys for Plaintiffs  
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 8 Rights Organization; Bruce Price; Franklin D. Rochelle; Larry  
 Meirow; Eric P. Muth; David C. Dufrane; Tim Michael Josephs  
 9 and William Blazinski

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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' ADMINISTRATIVE  
 MOTION TO EXTEND CASE  
 DEADLINES**

**INTRODUCTION**

1  
2 Pursuant to Civil Local Rules 6-3 and 7-11, Plaintiffs seek a modest 90-day extension of  
3 the case schedule in order to avoid substantial harm and prejudice to Plaintiffs caused by the  
4 discovery delays of Defendants Department of Veterans Affairs (“DVA”), Central Intelligence  
5 Agency (“CIA”), Department of Defense (“DOD”), and Department of the Army (“Army”)  
6 (collectively, “Defendants”). Defendants have failed to timely produce a large volume of  
7 responsive non-privileged documents. Rather than producing documents on a rolling basis in a  
8 fair manner, it appears that Defendants are intent on dumping hundreds of thousands of pages of  
9 documents on Plaintiffs at the very end of fact discovery—making use in upcoming depositions  
10 and expert reports impossible.<sup>1</sup> Moreover, Defendants have refused to produce or have delayed  
11 producing key witnesses.

12 Despite Plaintiffs’ multiple requests, Defendants have failed to agree to a 90-day  
13 extension. On September 20, 2011, Plaintiffs requested that Defendants so stipulate.  
14 (Declaration of Ben Patterson (“Patterson Decl.”) ¶ 4, Ex. C.) On September 22, 2011,  
15 Magistrate Judge Corley told the parties that she would extend the discovery schedule by 30 days,  
16 and acknowledged that a further extension may be required. (Dkt. No. 293 at 108:18-20.) On  
17 September 28, 2011, Plaintiffs asked Defendants to confirm Plaintiffs’ understanding that  
18 Defendants would treat the 30-day extension of discovery as applicable to all parties and the  
19 expert report disclosure deadlines, and requested that Defendants stipulate to an additional 60-day  
20 extension of the case schedule (for a total of 90 days). (Patterson Decl. ¶ 5, Ex. D.) On  
21 October 3, 2011, Defendants confirmed that the 30-day extension applies to all parties and to the  
22 expert report deadline, but refused to agree to the additional 60-day extension.<sup>2</sup> (*Id.* ¶6, Ex. E.)  
23 On October 5, 2011, Judge Corley granted in part Plaintiffs’ motions to compel certain discovery

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24 <sup>1</sup> Also, much of Defendants’ production to date has been technologically problematic.  
25 (Patterson Decl. ¶ 20.)

26 <sup>2</sup> Defendants also seek to limit the scope of the 30-day extension to the scope of the June  
27 20, 2011 Stipulation. (Patterson Decl. ¶6, Ex. E.) Judge Corley did not indicate any such  
28 limitations when she told the parties that she would extend discovery. (*See* Dkt. No. 293 at  
108:18-20.) Consequently, Plaintiffs object to this improper attempt to limit the scope of  
discovery.

1 from CIA and others, and granted Plaintiffs' unopposed motion for an extension of discovery of  
2 CIA until 30 days after CIA completed discovery as ordered. (Dkt. No. 294.) On an October 6,  
3 2011 conference call, Plaintiffs again requested that Defendants stipulate to an additional 60-day  
4 extension of the case schedule (for a total of 90 days), but Defendants refused. (Patterson Decl.  
5 ¶ 13.)

6 Accordingly, Plaintiffs move this Court to amend its June 21, 2011 scheduling order  
7 ("June Order") (Dkt. No. 238), extending the case schedule by 90 days, such that the new fact  
8 discovery deadline will be January 12, 2012.<sup>3</sup> Plaintiffs request that the scope of this extended  
9 discovery not be restricted.<sup>4</sup> In order to avoid additional delays in Defendants' production,  
10 Plaintiffs also seek a separate deadline of December 29, 2011, for completion of all document  
11 production, which would be two weeks prior to the completion of fact discovery.

## 12 ARGUMENT

### 13 **An Extension of the Case Schedule is Necessary in Light of Defendants' 14 Discovery Delays in Order to Avoid Substantial Prejudice to Plaintiffs.**

15 Plaintiffs seek a reasonable extension of the case schedule in order to avoid substantial  
16 harm and prejudice to Plaintiffs as a result of Defendants' discovery delays. Defendants have  
17 failed to produce certain responsive non-privileged documents. Defendants' delays have severely  
18 limited Plaintiffs' ability to use these documents for upcoming depositions and expert reports.  
19 There are potentially hundreds of thousands of pages that have yet to be produced by DVA,  
20 DOD, the CIA, and third-party Battelle Memorial Institute ("Battelle"). Meanwhile, there are six  
21 noticed depositions outstanding, including ones for every single Defendant in this action as well  
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23 <sup>3</sup> The case schedule was previously modified by Order of this Court on May 4, 2011, and  
24 June 21, 2011 (Dkt. Nos. 230, 238.)

25 <sup>4</sup> At the time of the June 20 stipulation concerning the case schedule, which included  
26 certain written discovery limitations, Plaintiffs had not realized that the DOD had not produced  
27 emails. The parties are currently discussing appropriate search terms for DOD's email searches.  
28 (Patterson Decl. ¶8, Ex. G.) Once Plaintiffs receive and review these still untapped key  
documents, Plaintiffs may likely need to serve additional written discovery requests, as in the  
normal course of litigation, and thus the artificial limits placed by the stipulation should not be  
extended.

1 as Battelle. (Patterson Decl. ¶ 10.)<sup>5</sup> Furthermore, Defendants have refused to produce or have  
 2 delayed producing key witnesses. Plaintiffs will suffer substantial harm and prejudice if  
 3 Defendants' delays are permitted to impair Plaintiffs' ability to use belatedly produced documents  
 4 in depositions and expert reports.<sup>6</sup>

5 Failure to Produce DVA Documents: DVA has failed to produce documents as  
 6 previously contemplated by the June Order and has repeatedly pushed back their target date for  
 7 completing production ever since.<sup>7</sup> In the June 20, 2011 Stipulation ("Stipulation") proposing the  
 8 current case schedule, the parties agreed that an extension of the schedule was necessary to  
 9 provide DVA additional time to complete its production, and "permit Plaintiffs time to complete  
 10 discovery of DVA *once that production is complete.*" (Dkt. No. 237 at ¶ 12 (emphasis added).)<sup>8</sup>  
 11 At the time, DVA anticipated reviewing over one million pages for production to be completed  
 12 by August 31, 2011. (*Id.* at ¶¶ 6, 8.)<sup>9</sup> The June Order set the deadline for completion of fact  
 13 discovery and disclosure of expert reports as October 14, 2011—six weeks after DVA anticipated  
 14 completing its document production—allowing time for Plaintiffs to review these documents and  
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16 <sup>5</sup> Based on documents that Plaintiffs have already reviewed, Plaintiffs intend to seek  
 17 additional depositions. (Patterson Decl. ¶ 11.) Despite the complexity of this case, Defendants  
 18 are forcing Plaintiffs to seek leave of Court to take more than ten depositions, even though  
 19 Defendants themselves have already taken fourteen depositions and will soon take four more.  
 20 (*Id.* ¶ 12, Ex. I; *Id.* ¶ 14.)

21 <sup>6</sup> For example, Plaintiffs' experts will need to review the yet to be produced death  
 22 certificates, which will provide information regarding the various health effects suffered by test  
 23 participants. (Dkt. No. 250 at 113:16-114:9.) Death certificates are the most reliable means  
 24 available to Plaintiffs of obtaining cause-of-death information, which is relevant to Plaintiffs'  
 25 notice and health care claims as it relates to the health effects of test substances. Such  
 26 information is highly relevant to Plaintiffs' preparation for upcoming depositions, including DVA  
 27 Rule 30(b)(6) designee Michael Peterson. (Patterson Decl. ¶¶ 2, 10.)

28 <sup>7</sup> DVA has provided a moving target for its completion of production: first estimating  
 August 31, 2011, then September 30, 2011, and *now* October 14, 2011 for only *part of its*  
*production* (as DVA still has not specified a date for producing test participants' claims files).  
 (Patterson Decl. ¶¶ 22-23.)

<sup>8</sup> DVA and its Secretary, Eric K. Shinseki, were not formally added to this action until  
 November 18, 2010, and thus, discovery of DVA did not begin until long after formal discovery  
 of the other Defendants was well under way. (Dkt. No. 237 at ¶ 5.)

<sup>9</sup> Based on DVA's information, the parties further stipulated that Plaintiffs would not  
 proceed with discovery of DVA until DVA produced responsive documents, and Plaintiffs had a  
 chance to review them. (Dkt. No. 237 at ¶ 9.)

1 use them in depositions and expert reports. (Dkt. No. 237 at ¶ 14.) On August 4, 2011, however,  
2 DVA disclosed that there were “5 million pages still yet to be reviewed by VA,” which is five  
3 times more than what DVA thought it had to review at the time of the June Order. (Dkt. No. 250  
4 at 81:3 (emphasis added).) As of August 26, 2011, less than a week before DVA’s August 31  
5 estimated completion date, the DVA had only reviewed 680,000 of the five million pages of  
6 documents it needed to review—*less than fourteen percent*. (Dkt. No. 276-5 at ¶¶ 25-27.)<sup>10</sup>

7 Perhaps an even more compelling reason for the requested extension is the fact that  
8 Defendants *have yet to even provide a date* by which they plan to produce test participants’  
9 claims files. (Patterson Decl. ¶ 22.) These claims files are of central importance to Plaintiffs’  
10 bias claim against DVA, in part because Judge Corley declined to order DVA to provide  
11 up-to-date statistics on success rates for test participants’ claims, and instead ordered Plaintiffs to  
12 review the claims files of test participants and to undertake this statistical analysis themselves.  
13 (Dkt. No. 294 at 19.) Once DVA finally produces the claims files, Plaintiffs will likely need to  
14 engage an expert to perform this statistical analysis. Thus, Plaintiffs need the claims files well in  
15 advance of the end of fact discovery and expert disclosure deadline so that the necessary expert  
16 analysis can be completed. Plaintiffs clearly will be prejudiced if DVA produces the claims files  
17 *after* (or even just before) the deadline for expert disclosures—which is upon us.

18 *Failure to Produce DOD Emails and Navy, Air Force, and DTIC Documents:* To date,  
19 DOD has failed to produce emails—a likely critical source of documents for Plaintiffs’ remaining  
20 depositions of DOD, DVA, and Battelle. (Patterson Decl. ¶ 7, Ex. F; ¶ 5, Ex. D.) While DOD  
21 has agreed to produce these emails, the parties are still trying to reach an agreement on search  
22 terms, custodians, and the time period for DOD’s email collection and review, as directed by  
23 Judge Corley. (*Id.* ¶ 8, Ex. G; Dkt. No. 258 at 16.) DOD also has failed to produce any

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24 <sup>10</sup> Furthermore, to date, each of DVA’s productions has been exceedingly modest in  
25 volume, which suggests that DVA has no intention of completing its production in the near  
26 future. (Patterson Decl. ¶ 15-19, 21-22.) DVA has indicated that it has yet to complete review of  
27 “22 disks and 2 external hard drives of potentially responsive information,” (Dkt. No. 276-6 at ¶  
28 10), and that VHA is currently conducting searches that may yield still more responsive  
documents (*Id.* at ¶ 13.)

1 documents from the Departments of the Navy and Air Force—components of DOD—that have  
2 always been obligated to search for and produce responsive documents. (Patterson Decl. ¶ 5,  
3 Ex. D.)<sup>11</sup> Moreover, under Judge Corley’s order dated October 5, 2011 (“October 5 Order”),  
4 DOD must produce documents from the Defense Technical Information Center (“DTIC”), which  
5 Plaintiffs will need additional time to review. (Dkt. No. 294 at 12.)

6 Failure to Produce Battelle Documents: Under the October 5 Order, DOD must produce  
7 documents regarding the 1993-1994 notification efforts and the creation of the Chem-Bio  
8 database. (Dkt. No. 294 at 13.) Although Battelle has provided 60,000 pages of documents to  
9 DOD to review for Battelle’s production, DOD has not yet produced any of those documents.  
10 (Patterson Decl. ¶ 6, Ex. E.) Plaintiffs will need sufficient time to review these documents in  
11 preparation for upcoming Battelle and Defendant depositions. (*Id.* ¶ 5, Ex. D.)

12 Failure to Produce Magnetic Tapes: Defendants have failed to produce relevant CIA  
13 documents stored on “magnetic tapes” held by DOD. The tapes are said to contain: “Original  
14 human clinical data from Edgewood.” (Dkt. No. 291 at ¶ 3.) Despite Plaintiffs’ many requests,  
15 Defendants refuse to produce these tapes. (Patterson Decl. ¶ 9, Ex. H.)

16 Failure to Produce and Identify Key Witnesses: Defendants have refused or delayed  
17 production of several key witnesses. After repeated delays, Defendants only recently designated  
18 Patricia Cameresi as a Rule 30(b)(6) designee for CIA. (Patterson Decl. ¶7, Ex. F; ¶12, Ex. I.)

## 19 CONCLUSION

20 For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs’  
21 motion to extend the case deadlines by 90 days, and to set a separate deadline for completion of  
22 all document production by December 29, 2011.

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25 <sup>11</sup> DOD has taken the position that, as components of DOD, the Navy and Air Force are  
26 not third parties subject to Rule 45 subpoenas, but DOD has failed to produce any of their  
27 documents. (*See, e.g.*, Patterson Decl. ¶ 6, Ex. E.) Defendants cannot have it both ways: either  
28 the Navy and Air Force are third-parties, who must comply with Plaintiffs’ Rule 45 subpoenas, or  
they are components of Defendant DOD, that must search for and produce documents responsive  
to Plaintiffs’ outstanding requests for production.

1 Dated: October 7, 2011

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

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3 MORRISON & FOERSTER LLP

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6 By: /s/ Gordon P. Erspamer  
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8 Attorneys for Plaintiffs

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 8 Plowshares; Veterans Rights Organization;  
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 9 Meirow; Eric P. Muth; David C. Dufrane; Tim  
 Michael Josephs; and William Blazinski

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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

**DECLARATION OF BEN  
 PATTERSON IN SUPPORT OF  
 PLAINTIFFS' ADMINISTRATIVE  
 MOTION TO EXTEND CASE  
 DEADLINES**

Complaint filed January 7, 2009



1 I, Ben Patterson, declare as follows:

2 1. I am an attorney licensed to practice law in the State of California and am admitted  
3 to practice before this Court. I am an associate with the law firm of Morrison & Foerster LLP,  
4 counsel of record for Vietnam Veterans of America, Swords to Plowshares: Veterans Rights  
5 Organization, Bruce Price, Franklin D. Rochelle, Larry Meirow, Eric P. Muth, David C. Dufrane,  
6 Tim Michael Josephs, and William Blazinski (“Plaintiffs”) in this action. I submit this  
7 Declaration in Support of Plaintiffs’ Administrative Motion to Extend Case Deadlines. I make  
8 this Declaration based on personal knowledge and discussions with support staff working under  
9 my direction. If called as a witness, I would testify to the facts set forth below.

10 2. Attached hereto as Exhibit A is a true and correct copy of Plaintiffs’ Notice of  
11 Depositions to Department of Veterans Affairs Pursuant to Fed. R. Civ. P. 30(b)(6), served on  
12 Defendants on March 21, 2011.

13 3. Attached hereto as Exhibit B is a true and correct copy of email correspondence  
14 between Joshua Gardner, counsel for Defendants, and Tim Blakely, counsel for Plaintiffs, on  
15 September 8 and September 13, 2011.

16 4. Attached hereto as Exhibit C is a true and correct copy of email correspondence  
17 between Joshua Gardner, counsel for Defendants, and Tim Blakely, counsel for Plaintiffs, on  
18 September 20, 2011.

19 5. Attached hereto as Exhibit D is a true and correct copy of a letter from Gordon  
20 Erspamer, counsel for Plaintiffs, to Joshua Gardner, counsel for Defendants, dated  
21 September 28, 2011.

22 6. Attached hereto as Exhibit E is a true and correct copy of a letter sent by Joshua  
23 Gardner, counsel for Defendants, to Gordon Erspamer, counsel for Plaintiffs, on October 3, 2011.

24 7. Attached hereto as Exhibit F is a true and correct copy of a letter from Gordon  
25 Erspamer, counsel for Plaintiffs, to Joshua Gardner, counsel for Defendants, dated September 28,  
26 2011.

27 8. Attached hereto as Exhibit G is a true and correct copy of a letter from me to  
28 Joshua Gardner, counsel for Defendants, dated September 30, 2011.

1           9.       Attached hereto as Exhibit H is a true and correct copy of a letter from me to  
2 Kimberly Herb, counsel for Defendants, dated September 30, 2011.

3           10.       The parties have already agreed to the following depositions, but Plaintiffs have  
4 not yet taken them as a result of Defendants' delay in producing documents or in making the  
5 designation:

- 6               • Paul Black, DVA 30(b)(6) Designee
- 7               • Patricia Cameresi, CIA 30(b)(6) Designee
- 8               • William McKim, Battelle Memorial Institute 30(b)(6) Designee
- 9               • Michael Peterson, DVA 30(b)(6) Designee
- 10              • John Sowa, Battelle Memorial Institute 30(b)(6) Designee
- 11              • (To Be Determined), Army and DOD 30(b)(6) Designee.

12           11.       In addition, given the complexity of this litigation and based on the documents  
13 Plaintiffs have reviewed so far, Plaintiffs will shortly seek leave from Magistrate Judge Corley to  
14 depose more than ten deponents, including at least some of the following:

- 15              • David Abbott, Veterans Benefits Administration, VA Central Office
- 16              • Roxana Baylor, Deployment Health Support Directorate, DOD
- 17              • Kelley Brix, DOD Health Affairs Division, Force Health Protection and Readiness
- 18              • Mark Brown, Director, Environmental Agents Service, Office of Public Health and  
19                Environmental Hazards at DVA
- 20              • Arnold Dupuy, Government Contractor in Office of the Assistant Secretary of  
21                Defense for Health Affairs
- 22              • Roy Finno, Deployment Health Support Directorate, DOD
- 23              • Brad Flohr, Asst. Director for Policy, Compensation and Pension Service,  
24                Veterans Benefits Administration
- 25              • Tony Guagliardo, Director, DVA Health Eligibility Center; DVA Director of  
26                Business Policy
- 27              • Kenneth Hyams, Veterans Health Administration

- 1 • Fred Kolbrenner, Office of the Assistant Secretary of Defense for Personnel and
- 2 Readiness
- 3 • Norma St. Claire, Director, Office of Information Management for the Under
- 4 Secretary of Defense for Personnel and Readiness
- 5 • Glen Wallick, Veterans Benefits Administration
- 6 • William Winkenwerder, Former Assistant Secretary of Defense for Health Affairs.

7 12. Attached hereto as Exhibit I is a true and correct copy of a letter sent by Joshua  
8 Gardner, counsel for Defendants, to Gordon Erspamer, counsel for Plaintiffs, on October 3, 2011.

9 13. During a telephone call on October 6, 2011, Plaintiffs' Counsel again requested  
10 that Defendants stipulate to an additional 60-day extension of the case schedule (for a total of  
11 90-days), but Defendants rejected Plaintiffs' request.

12 14. To date, Defendants have already deposed the following fourteen deponents:

- 13 • Thomas Berger, Executive Director, Veterans Health Council, Vietnam Veterans
- 14 of America ("VVA")
- 15 • William Blazinski, Plaintiff
- 16 • Michael Blecker, Executive Director, Swords to Plowshares
- 17 • David Dufrane, Plaintiff
- 18 • Bernie Edelman, Deputy Director for Policy and Government Affairs, VVA
- 19 • Wray Forrest, Former Plaintiff
- 20 • Tim Josephs, Plaintiff
- 21 • Larry Meirow, Plaintiff
- 22 • Eric Muth, Plaintiff
- 23 • Teresa Panepinto, Legal Director, Swords to Plowshares
- 24 • Bruce Price, Plaintiff
- 25 • Elinor Roberts, Former Legal Director, Swords to Plowshares
- 26 • Franklin Rochelle, Plaintiff
- 27 • Richard Weidman, Executive Director for Policy and Government Affairs, VVA.

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1 Additionally, Defendants have subpoenaed four VVA members to be deposed by October 14,  
2 2011.

3 15. Since the August 4, 2011 hearing before Magistrate Judge Corley, the Department  
4 of Veterans Affairs (“DVA”) has produced 1,005 documents, which total 15,605 pages. An  
5 additional production was received today, but had not yet been uploaded to review the number of  
6 documents or pages, at the time of this filing.

7 16. On August 10, 2011, DVA produced three documents, totaling 2,766 pages,  
8 identified by Bates numbers DVA010\_000001 to DVA010\_002766.

9 17. On August 15, 2011, DVA produced 204 documents, totaling 3,770 pages,  
10 identified by Bates numbers DVA011\_000001 to DVA011\_003770.

11 18. On September 8, 2011, DVA produced 381 documents, totaling 1,878 pages,  
12 identified by Bates numbers DVA012\_000001 to DVA012\_001878.

13 19. On September 20, 2011, DVA produced 417 documents, totaling 7,191 pages,  
14 identified by Bates numbers DVA013\_000001 to DVA013\_000827 and DVA014\_000001 to  
15 DVA014\_006364.

16 20. Plaintiffs have encountered significant difficulty in reviewing some of Defendants’  
17 production. A sampling of these difficulties includes:

- 18 • Mismatched numbers of load files and images and text;
- 19 • Inconsistent metadata in the load files between productions (*e.g.*, OCR Text in  
20 different locations);
- 21 • Data produced in U8-DOS format rather than DOS, requiring time-consuming  
22 conversion to the proper format;
- 23 • Unreadable or incomplete spreadsheets (*e.g.*, DVA002\_002776-2841,  
24 DVA001\_000628-631, DVA001\_004112-4167, DVA002\_004370-4385,  
DVA002\_004677-4846)
- 25 • Illegible documents (*e.g.*, DVA003\_006676-6678, DVA003\_007663-7666,  
26 DVA003\_009316-9324, DVA006\_057463-64, DVA006\_102424-102716);
- 27 • Excerpts of documents produced out of sequence as a single document (*e.g.*,  
28 VET001\_013857-13986, VET001\_014280-014437)

1           21. To date, various types of documents that Plaintiffs expected to see in DVA's  
2 production have not been produced as substantially as Plaintiffs expected.

3           22. During a telephone call on October 6, 2011, Defendants' Counsel stated that DVA  
4 would complete its production, except for DVA test participant claims files, by the end of next  
5 week. Defendants' Counsel did not specify a date by when these claims files will be produced.

6           23. Since the June 20, 2011 Stipulation, DVA has provided various dates for  
7 completing production, with the following dates as estimated deadlines: August 31, 2011,  
8 September 30, 2011, and October 14, 2011 (but not including claims files).

9           24. Plaintiffs request that the schedule in this litigation be modified by extending the  
10 current deadlines by ninety days as reflected in the following schedule:

Event	Current Deadline	New Deadline
Completion of all document production	October 14, 2011	December 29, 2011
Completion of fact discovery	October 14, 2011	January 12, 2012
Disclosure of identity and reports of expert witnesses	October 14, 2011	January 12, 2012
Completion of expert discovery	January 2, 2012	April 1, 2012
Plaintiffs' opening dispositive motion due no later than	January 13, 2012	April 12, 2012
Defendants' opposition and any cross-motion due no later than	February 3, 2012	May 3, 2012
Plaintiffs' reply / opposition to cross-motion due no later than	February 17, 2012	May 17, 2012
Defendants' reply to cross-motion due no later than	February 24, 2012	May 24, 2012

Event	Current Deadline	New Deadline
All case-dispositive motions to be heard, 2:00 PM	April 5, 2012	July 9, 2012 <sup>1</sup>
Further case management conference, 2:00 PM	April 5, 2012	July 9, 2012
Final pretrial conference, 2:00 PM	June 12, 2012	September 10, 2012
Trial to begin, 8:30 AM	July 9, 2012	October 8, 2012

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed in San Francisco, California on this 7th day of October, 2011.

/s/ Ben Patterson  
Ben Patterson

<sup>1</sup> Plaintiffs propose July 9, 2012, as the date for dispositive motion hearings and any further case management conference in light of the Court's planned unavailability from June 29 through July 5, 2012.

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**Attestation Pursuant to General Order 45, section X.B**

I hereby attest that I have on file all holograph signatures for any signatures indicated by a “conformed” signature (/S/) within this efiled document.

/s/ GORDON ERSPAMER

Gordon Erspamer

# Exhibit A



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UNITED STATES DISTRICT COURT  
 NOTHERN 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

**PLAINTIFFS' NOTICE OF  
 DEPOSITIONS TO  
 DEPARTMENT OF VETERANS  
 AFFAIRS PURSUANT TO FED.  
 R. CIV. P. 30(b)(6)**

1 TO THE UNITED STATES DEPARTMENT OF VETERANS AFFAIRS AND ITS  
2 ATTORNEY(S) OF RECORD:

3 PLEASE TAKE NOTICE THAT, pursuant to Rule 30(b)(6) of the Federal Rules of Civil  
4 Procedure, plaintiffs Vietnam Veterans of America (“VVA”) and six individual veterans will  
5 conduct depositions upon oral examination of Defendant United States department of Veterans  
6 Affairs (“DVA”) beginning April 19, 2011, commencing at 9:30 a.m., and continuing from that  
7 time until complete, at the law offices of Morrison & Foerster LLP, 2000 Pennsylvania Avenue,  
8 NW, Suite 6000, Washington, DC 20006. The depositions will be recorded stenographically,  
9 and will be taken before a court reporter or other person authorized to administer oaths, and will  
10 be conducted in accordance with the Federal Rules of Civil Procedure. Please be advised that  
11 the depositions may be recorded on video and/or audio tape and/or LiveNote in addition to  
12 stenographic recording. The depositions will continue from day to day, Saturday, Sundays, and  
13 holidays excepted until completed or adjourned.

14 Pursuant to the provisions of Rule 30(b)(6), Defendant DVA is hereby directed to  
15 designate one or more of its officers, directors, managing agents, employees, or agents who  
16 consent to testify and who are the most knowledgeable and competent to testify regarding the  
17 topics set forth below. Please provide such designations for each subject matter no later than  
18 twenty days of service of this request.

19 Plaintiffs reserve the right to take subsequent depositions, not just on all material issues,  
20 but also on those issues raised by documents produced by Defendant DVA and witnesses  
21 identified in discovery.  
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**DEFINITIONS**

Unless otherwise indicated, the following definitions shall apply:

1. “COMMUNICATION” or “COMMUNICATIONS” means, unless otherwise specified, any of the following: (a) any written letter, memorandum, DOCUMENT or any other writing; (b) any telephone call between two or more PERSONS, whether or not such call was by chance or prearranged, formal, or informal; and (c) any conversation or MEETING between two or more PERSONS, whether or not such contact was by chance or prearranged, formal, or informal, including without limitation, conversations or MEETINGS occurring via telephone, teleconference, video conference, electronic mail (e-mail), or instant electronic messenger.

2. “CONCERNING” means constituting, summarizing, memorializing, referring to, regarding and/or relating to.

3. “DOCUMENT” or “DOCUMENTS” means any tangible thing upon which any expression, COMMUNICATION or representation has been recorded by any means, including but not limited to, handwriting, typewriting, printing, photostating, photographing, magnetic impulse or mechanical or electronic recording and any non-identical copies (whether different from the original because of notes made on such copies, because of indications that said copies were sent to different individuals than were the originals or because of any other reason), including but not limited to, working papers, preliminary, intermediate or final drafts, correspondence, memoranda, charts, notes, records of any sort of MEETINGS, invoices, financial statements, financial calculations, diaries, reports of telephone or other oral conversations, desk calendars, appointment books, audio or video tape recordings, e-mail or electronic mail, electronic folders, microfilm, microfiche, computer tape, computer disk, computer printout, computer card and all other writings and recordings of every kind that are in YOUR actual or constructive possession, custody or control.

4. “IDENTIFY” or “IDENTITY” means:

a. with respect to a PERSON, to state the PERSON’s full name, current or last known employer, that employer’s address and telephone number, the PERSON’s title and/or

1 position with that employer, and the PERSON's current or last known home address and  
2 telephone number;

3           b.       with respect to a DOCUMENT, to state the type of DOCUMENT (i.e.,  
4 letter, memorandum, telephone note, computer floppy or hard disk, magnetic tape, etc.), the title  
5 of the DOCUMENT (if any), the date it was created, the author, all intended recipients including  
6 the addressee and any and all copyees, a brief description of the subject matter of the  
7 DOCUMENT, the present and/or last known location of the DOCUMENT, and to IDENTIFY all  
8 present or last known person in possession, custody or control of the DOCUMENT;

9           c.       with respect to a COMMUNICATION to state the name and affiliation of  
10 all PERSONS participating in, or present for, the COMMUNICATION, the date of the  
11 COMMUNICATION, and whether it was conducted in person or by other means (such as  
12 telephone, correspondence, e-mail), and whether it was recorded (e.g., stenographically or by  
13 audio or videotape);

14           d.       with respect to a MEETING to state the names and affiliations of all  
15 PERSONS participating in, or present for, the MEETING, the date of the MEETING, and the  
16 location of the MEETING and the purpose of the MEETING.

17       5.       "MEETING" or "MEETINGS" means any coincidence of, or presence of, or  
18 telephone, television, video teleconferencing, radio or other electronic communication between  
19 or among persons, whether such was by chance or prearranged, informal or formal, as well as the  
20 results of or actions to be taken following such communication.

21       6.       "PERSON" or "PERSONS" means, unless otherwise specified, any natural  
22 person, firm, entity, corporation, partnership, proprietorship, association, joint venture, other  
23 form of organization or arrangement and government and government agency of every nature  
24 and type.

25       7.       "YOU" or "YOUR" means DEFENDANT the United States Department of  
26 Veterans Affairs, and all of its past and present offices, departments, organizations,  
27 administrations, boards, commissions, task forces, management, and past and present employees  
28

1 and service members. These terms also include any representatives or agents acting on YOUR  
2 behalf, including without limitation, attorneys, investigators or consultants.

3 8. "DEFENDANTS" means the Defendants in this action, and all of their past and  
4 present offices, departments, organizations, administrations, boards, commissions, task forces,  
5 management, and past and present employees and service members.

6 **SPECIAL DEFINITIONS**  
7

8 Unless otherwise indicated, the following special definitions shall apply:

9 1. "CIA" means the Central Intelligence Agency of the United States, and all its  
10 offices, departments, organizations, administrations, boards, commissions, task forces,  
11 management, and past and present employees and service members.

12 2. "DEPARTMENT OF DEFENSE" or "DoD" means the United States Department of  
13 Defense, and all its offices, departments, organizations, administrations, boards, commissions,  
14 task forces, management, and past and present employees and service members.

15 3. "DEPARTMENT OF THE ARMY" or "DoA" means the United States Department  
16 of the Army, and all its offices, departments, organizations, administrations, boards,  
17 commissions, task forces, management, and past and present employees and service members.

18 4. "IOM" means the Institute of Medicine, a branch of the National Academies, and all  
19 its predecessors, offices, departments, organizations, administrations, boards, commissions, task  
20 forces, management, and past and present employees.

21 5. "NRC" means the National Research Council, a branch of the National Academies,  
22 and all its predecessors, offices, departments, organizations, administrations, boards,  
23 commissions, task forces, management, and past and present employees.

24 6. "NAS" means the National Academy of Sciences, a branch of the National  
25 Academies, and all its predecessors, offices, departments, organizations, administrations, boards,  
26 commissions, task forces, management, and past and present employees.



- 1 1. "All" or "each" shall be construed as "all and each."
- 2 2. "Any" should be understood to include and encompass "all;" "all" should be  
3 understood to include and encompass "any."
- 4 3. "And" or "or" shall be construed either disjunctively or conjunctively as  
5 necessary to bring within the scope of the discovery request all responses that might otherwise be  
6 construed to be outside of its scope.
- 7 4. The use of the singular form of any word shall include the plural and vice versa.

### 8 TOPICS

9 Pursuant to Federal Rule of Civil Procedure 30(b)(6), Defendant's designee(s) shall be  
10 prepared to testify regarding the following subjects:.

11  
12 1. YOUR involvement with any of the EDGEWOOD TEST PROGRAMS or any  
13 other testing of the chemical or biological substances that were part of the EDGEWOOD TEST  
14 PROGRAMS, including but not limited to YOUR participation in any of the EDGEWOOD  
15 TEST PROGRAMS or any other testing of the chemical or biological substances that were part  
16 of the EDGEWOOD TEST PROGRAMS, YOUR presence at any of the EDGEWOOD TEST  
17 PROGRAMS or any other testing of the chemical or biological substances that were part of the  
18 EDGEWOOD TEST PROGRAMS, YOUR monitoring of any of the EDGEWOOD TEST  
19 PROGRAMS or any other testing of the chemical or biological substances that were part of the  
20 EDGEWOOD TEST PROGRAMS, YOUR funding of any of the EDGEWOOD TEST  
21 PROGRAMS or any other testing of the chemical or biological substances that were part of the  
22 EDGEWOOD TEST PROGRAMS, and YOUR provision of or suggestion of candidates for  
23 chemical or biological substances to be used in any of the EDGEWOOD TEST PROGRAMS or  
24 any other testing of the chemical or biological substances that were part of the EDGEWOOD  
25 TEST PROGRAMS.

26 2. The types, properties, and health effects of all substances tested or used on human  
27 subjects in the EDGEWOOD TEST PROGRAMS, including but not limited to the health effects  
28 from participation in the EDGEWOOD TEST PROGRAMS, the steps taken by YOU to identify

1 such types, properties, and health effects, and YOUR knowledge of, involvement with, and the  
2 findings of any study or studies undertaken by any entity or individual, including but not limited  
3 to the NRC, IOM, or NAS, regarding the short-term or long-term health effects, including but  
4 not limited to the psychological effects, of exposure to any of the substances used in the  
5 EDGEWOOD TEST PROGAMS or participation in the EDGEWOOD TEST PROGRAMS or  
6 any other testing of chemical or biological substances on human test subjects, and  
7 COMMUNICATIONS or MEETINGS between or among YOU and any other DEFENDANT or  
8 DEFENDANTS respecting these topics.

9         3.       The ratings procedures YOU use for the determination of whether any TEST  
10 SUBJECT is entitled to service-connected disability or death compensation, including any  
11 applicable provisions of the M21-1 Manual, other VA Manuals, compacts, arrangements or  
12 understandings between YOU and DOD or any other DEFENDANT, policies, fast letters,  
13 training letters, and Compensation & Pension Exam procedures, and the creation or revision of  
14 such procedures, manuals, policies, fast letters, and training letters, and all MEETINGS and  
15 COMMUNICATIONS between or among YOU and any other DEFENDANT or  
16 DEFENDANTS CONCERNING the same topics.

17         4.       Any COMMUNICATIONS or DOCUMENTS YOU provided to, distributed or  
18 otherwise made available to DVA Regional Office claims adjudicators, Compensation & Pension  
19 Exam providers, or DVA doctors or medical personnel and/or received from the same  
20 CONCERNING the EDGEWOOD TEST PROGRAMS, the adjudication of claims on behalf of  
21 TEST SUBJECTS, or the medical evaluation of TEST SUBJECTS, including but not limited to  
22 ratings procedures, fast letters, training letters, and training manuals, and the creation or revision  
23 of such DOCUMENTS.

24         5.       The success rates of TEST SUBJECTS CONCERNING claims for death and/or  
25 disability compensation, including at the Regional Office level, the Board of Veterans Appeals,  
26 and appeals to the Court of Appeals for Veterans Claims, and MEETINGS and  
27 COMMUNICATIONS between or among YOU and any other DEFENDANT or  
28 DEFENDANTS CONCERNING the same topics.



1           6.       The diseases or conditions reported, claimed, or experienced by TEST  
2 SUBJECTS, including, without limitation, summaries, tables, stored data, and/or computer  
3 printouts, and all COMMUNICATIONS and MEETINGS CONCERNING the same.

4           7.       The doses received by TEST SUBJECTS and all COMMUNICATIONS and  
5 MEETINGS CONCERNING the same.


6           8.       YOUR publicity and/or outreach efforts to TEST SUBJECTS, including but not  
7 limited to YOUR involvement with the DOD's efforts to notify TEST SUBJECTS regarding  
8 their participation in any of the EDGEWOOD TEST PROGRAMS, the impetus for YOUR  
9 outreach or publicity efforts, and YOUR COMMUNICATIONS with DOD or any  
10 DEFENDANT regarding such efforts, YOUR notification letters and all attachments, including  
11 but not limited to fact sheets and frequently asked questions, that YOU sent to TEST  
12 SUBJECTS, the statistics regarding YOUR outreach efforts as set forth in the document Bates  
13 labeled VVA-VA 023302-11, and any updated statistics regarding outreach activities by YOU or  
14 any other DEFENDANT and adjudication of claims for TEST SUBJECTS.

15  
16 Plaintiffs reserve the right to supplement these topics following receipt and review of  
17 Defendants' responses to Interrogatories and Requests for Production propounded by Plaintiffs.

18  
19 Dated: March 21, 2011

GORDON P. ERSPAMER  
TIMOTHY W. BLAKELY  
STACEY M. SPRENKEL  
DANIEL J. VECCHIO  
DIANA LUO

MORRISON & FOERSTER LLP

21  
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23 By: 

24 Attorneys for Plaintiffs  
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**PROOF OF SERVICE**

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California 94105. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on March 21, 2011, I served a copy of:

**PLAINTIFFS’ NOTICE OF DEPOSITIONS TO DEPARTMENT OF VETERANS AFFAIRS PURSUANT TO FED. R. CIV. P. 30(B)(6)**

**BY U.S. MAIL [Fed. R. Civ. Proc. Rule 5(b)]** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as follows, for collection and mailing at Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105-2482 in accordance with Morrison & Foerster LLP’s ordinary business practices.

I am readily familiar with Morrison & Foerster LLP’s practice for collection and processing of correspondence for mailing with the United States Postal Service, and know that in the ordinary course of Morrison & Foerster LLP’s business practice the document(s) described above will be deposited with the United States Postal Service on the same date that it (they) is (are) placed at Morrison & Foerster LLP with postage thereon fully prepaid for collection and mailing.

Joshua E. Gardner  
United States Department of Justice  
Civil Division, Federal Programs Branch  
P.O. Box 883  
Washington, DC 20044

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California, this 21<sup>st</sup> day of March, 2011.

\_\_\_\_\_  
Kathy Beaudoin  
(typed)

\_\_\_\_\_  
*Kathy Beaudoin*  
(signature)

# Exhibit B

---

**From:** Gardner, Joshua E (CIV) [Joshua.E.Gardner@usdoj.gov]  
**Sent:** Tuesday, September 13, 2011 12:47 PM  
**To:** Blakely, Timothy W.  
**Cc:** Erspamer, Gordon P.; Patterson, Ben F.; Herb, Kimberly (CIV); Farel, Lily (CIV); Bowen, Brigham (CIV); Littleton, Judson O. (CIV)  
**Subject:** RE: VVA v. CIA -- Scheduling and Production Issues

Tim:

Thank you for your email. Frankly, I am somewhat surprised by your suggestion that “the foundation for the current schedule has eroded and that a new schedule will be necessary to permit the completion of DVA discovery.” As an initial matter, VA’s estimation of the completion for its document production was based upon the then-outstanding discovery requests Plaintiffs had served. And as you are aware, VA has to date produced a substantial amount of discovery in response to those discovery requests.

In addition, since the entry of the current scheduling order, VA has agreed to produce at substantial cost and burden additional categories of documents, including hundreds of claims files from veterans, death certificates, and notice letters sent to identifiable test veterans. Notwithstanding that additional production, VA anticipates completing its production efforts by September 30, 2011—well in advance of the close of discovery.

With regard to DoD, it has largely completed its review and production of documents, and hopes to produced any additional responsive, non-privileged documents by no later than October 1, 2011. With respect to the CIA, its additional search efforts have not identified yet any responsive documents. To the extent such items are identified, the CIA hopes to produce them no later than September 16, 2011.

When do Plaintiffs anticipate completing their production of documents? In addition, as we have repeatedly requested, please provide us with available dates for deposition of the Vietnam Veterans of America members whom you represent and have identified in Plaintiffs’ supplemental discovery responses.

Best regards,

Josh

---

**From:** Blakely, Timothy W. [mailto:TBlakely@mofo.com]  
**Sent:** Thursday, September 08, 2011 11:49 AM  
**To:** Gardner, Joshua E (CIV)  
**Cc:** Erspamer, Gordon P.; Patterson, Ben F.  
**Subject:** VVA v. CIA -- Scheduling and Production Issues

Josh,

I write concerning the stipulated schedule currently governing this case. As you know, the current schedule was predicated upon the DVA’s estimate of August 31, 2011 for the completion of its document production. The DVA has informed us that it now anticipates that its document

production will not be complete until September 30, 2011 -- and that the production will only be "largely completed" at that point. In view of this development it is apparent that the foundation for the current schedule has eroded and that a new schedule will be necessary to permit the completion of DVA discovery, as contemplated by the parties' stipulation. Before the parties can have an informed discussion about an appropriate modification of the schedule, however, we need more certainty about when the DVA will complete its production. What is a realistic date by which the DVA's document production will be complete -- as opposed to "largely complete"?

Also, Defendants' opposition to Plaintiffs' motion to compel (at pages 14 and 22) indicates that the CIA and DOD also are still in the process of searching for additional information to produce. When will the CIA and DOD complete those productions? Other than these two categories of information, have Defendants completed production of everything they intend to produce, subject to the Court's resolution of the issues presented in the pending discovery motions?

Best regards,  
Tim

---

Timothy W. Blakely  
Morrison & Foerster LLP  
425 Market Street  
San Francisco, CA 94105-2482  
Phone: 415/268-6853  
Fax: 415/268-7522  
email: [tblakely@mofocom](mailto:tblakely@mofocom)  
[www.mofocom](http://www.mofocom)

-----  
To ensure compliance with requirements imposed by the IRS, Morrison & Foerster LLP informs you that, if any advice concerning one or more U.S. Federal tax issues is contained in this communication (including any attachments), such advice is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

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# Exhibit C

**From:** Gardner, Joshua E (CIV) [mailto:Joshua.E.Gardner@usdoj.gov]  
**Sent:** Tuesday, September 20, 2011 1:30 PM  
**To:** Blakely, Timothy W.  
**Cc:** Erspamer, Gordon P.; Patterson, Ben F.; Herb, Kimberly (CIV); Farel, Lily (CIV); Bowen, Brigham (CIV); Littleton, Judson O. (CIV)  
**Subject:** RE: VVA v. CIA -- Case Schedule

Tim:

Thank you for your email. As an initial matter, as I mentioned when we spoke last week, before the government can consider any proposal to enlarge the schedule, we need to understand the scope and purposes for which you seek an enlargement. As you acknowledged in your email last week, and as memorialized in the stipulation to enlarge the discovery schedule, the purpose of the enlargement was to pursue discovery from the Department of Veterans Affairs, as well as to complete the then-noticed depositions of Department of Defense witnesses and resolve with the magistrate any outstanding discovery disputes. Plaintiffs have now completed its discovery against DoD and have submitted all of their claimed discovery disputes to the magistrate for resolution. Accordingly, it is not clear to me whether your proposed enlargement seeks to include additional discovery against DoD or the CIA, or is limited to additional discovery against only VA. Please clarify whether your proposal seeks additional discovery against all defendants, or just discovery against VA, as well as the specific additional discovery you intend to seek.

In addition, as I mentioned in my letter last week, VA will be done with its production efforts well in advance of the October 14, 2011 fact discovery cut-off. Your email seems to suggest that VA will be producing five million pages of documents before the close of discovery. I can assure you that is not the case. VA's review of the five million pages has revealed that the overwhelming majority of these documents are either duplicative of what has already been produced or is otherwise non-responsive. Accordingly, it is not clear to me why Plaintiffs are seeking three additional months of discovery, or what limitations, if any, Plaintiffs propose regarding this proposed three month enlargement. Please clarify specifically what additional discovery you contemplate over this proposed three-month enlargement.

As I mentioned when we spoke last week, I am happy to discuss this issue with you before or after the discovery hearing on Thursday.

In addition, where do we stand on the stipulation regarding expert witnesses? And when can I expect dates for the depositions of the VVA members whom you represent and have identified in Plaintiffs' supplemental discovery responses?

Finally, as indicated in my letter from last week, in light of the Court's order concerning the scope of the claims against the CIA, please let me know whether you are willing to reconsider the need to depose a DoD designee under Rule 30(b)(6) concerning the CIA's involvement in the test program. To the extent you are unwilling to reconsider the need for such a deposition, we intend to raise this issue with the Court on Thursday.

Best regards,

Josh

**From:** Blakely, Timothy W. [mailto:TBlakely@mofo.com]  
**Sent:** Tuesday, September 20, 2011 3:27 AM  
**To:** Gardner, Joshua E (CIV)  
**Cc:** Erspamer, Gordon P.; Patterson, Ben F.  
**Subject:** VVA v. CIA -- Case Schedule

Josh,

This email follows up on our conversation last week concerning the current case schedule. As we discussed, given the circumstances surrounding Defendants' document production -- including the fact that DVA has produced fewer than 8,500 pages since the August 4 discovery hearing despite its statements during the hearing that it still had *five million* pages to review for production -- it is clear that the current deadline governing discovery in this action will not work. At this point, and assuming that Defendants complete their document productions in accordance with the latest estimates you provided, Plaintiffs believe that a three-month expansion of current case deadlines is necessary. This would move the fact discovery cutoff to January 13, 2012, with all other case deadlines to follow in sequence consistent with the current case schedule. Of course, and as we discussed, the outcome of Thursday's discovery hearing before the Magistrate could impact the case schedule as well. Plaintiffs will be prepared to discuss this issue at the hearing. Please let us know if Defendants will stipulate to a three-month modification of the current case deadlines.

Tim

---

Timothy W. Blakely  
Morrison & Foerster LLP  
425 Market Street  
San Francisco, CA 94105-2482  
Phone: 415/268-6853  
Fax: 415/268-7522  
email: [tblakely@mofo.com](mailto:tblakely@mofo.com)  
[www.mofo.com](http://www.mofo.com)

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To ensure compliance with requirements imposed by the IRS, Morrison & Foerster LLP informs you that, if any advice concerning one or more U.S. Federal tax issues is contained in this communication (including any attachments), such advice is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under



the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

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# Exhibit D

**MORRISON** | **FOERSTER**

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SAN FRANCISCO  
CALIFORNIA 94105-2482

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FACSIMILE: 415.268.7522

WWW.MOFO.COM

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SAN DIEGO, WASHINGTON, D.C.  
NORTHERN VIRGINIA, DENVER,  
SACRAMENTO, WALNUT CREEK  
TOKYO, LONDON, BRUSSELS,  
BEIJING, SHANGHAI, HONG KONG

September 28, 2011

Writer's Direct Contact  
415.268.6411  
Gerspamer@mofo.com

Via E-Mail

Joshua E. Gardner, Esq.  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue NW  
Washington, DC 20530

Re: *Vietnam Veterans of America, et al. v. Central Intelligence Agency, et al.*,  
No. CV 09-0037 CW (N.D. Cal.)

Dear Mr. Gardner:

I am writing to follow-up on the discovery extension issue from the September 22, 2011 hearing before Magistrate Judge Corley and to respond to Defendants' September 21, 2011 letter regarding the Navy and Air Force subpoenas.

#### Discovery Extension

During the September 22 hearing, Judge Corley ordered a 30-day extension of discovery. Please confirm Plaintiffs' understanding that Defendants will treat this as a 30-day extension of discovery for all parties and of the expert report disclosure deadline, which were both set for October 14, 2011, prior to Judge Corley's ordered extension. If not, please let us know immediately.

Given the significant amount of outstanding discovery remaining, including, for example, the completion of DVA's document production, at least 60,000 outstanding pages of Battelle documents to be reviewed for production, Defendants' email searches, and several depositions of DVA, DOD, CIA, and Battelle deponents, it is clear that a longer extension of discovery is now necessary. We have previously communicated the need for such an extension to you on multiple occasions, and Judge Corley appears to be in agreement. Nevertheless, Defendants have thus far refused to agree to a longer extension of discovery, and it appears that we have exhausted the meet-and-confer process on this issue. If Defendants are still unwilling to stipulate to an extension of all case deadlines set by the scheduling order of an additional 60 days (for a total of 90 days), Plaintiffs will seek the Court's intervention. Please let us know by close of business on Monday, October 3, 2011,

MORRISON | FOERSTER

Joshua E. Gardner, Esq.  
September 28, 2011  
Page Two

whether Defendants will agree to Plaintiffs' proposed extension. If not, we will proceed to file a motion seeking the extension.

Navy and Air Force Subpoenas

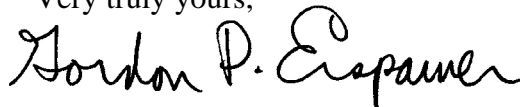
Thank you for Defendants' September 21 letter. In that letter, Defendants indicated that the Navy and Air Force would not comply with Plaintiffs' Rule 45 subpoenas because, among other things, the subpoenas are "not directed at third parties," as "the Air Force and Navy are components of the Department of Defense." On that basis, Defendants concluded that the "additional requests for production of documents from the Department of Defense" are precluded by the June 21, 2011 scheduling order governing discovery.

In light of this clarification, the Navy and Air Force as components of the Department of Defense have been obligated *all along* to search for and produce documents responsive to Plaintiffs' outstanding document requests. Yet, we have not identified any documents produced by the Navy or Air Force in Defendants' productions. You advised us during the August 12, 2011 meet-and-confer call that Defendants had not searched for documents from the Navy, nor intended to do so. Only because of this failure to search, now reconfirmed by the September 21 letter, were Plaintiffs forced to serve these subpoenas.

Defendants cannot have it both ways: either the Navy and Air Force are third-parties, who must comply with Plaintiffs' Rule 45 subpoenas, or those departments are — as you assert — parties, who must search for and produce documents responsive to Plaintiffs' outstanding Requests for Production (and should have been doing so from the beginning). We believe that the document requests in the Rule 45 subpoenas are fairly encompassed within topics of prior document requests. Please confirm that the Navy and Air Force will search for and produce responsive documents, and explain when those departments expect to complete their productions. If not, Plaintiffs will raise this issue with the Court.

Thank you for your time and attention. Plaintiffs will address other outstanding discovery issues, including, among others, Defendants' email searches, under separate cover shortly.

Very truly yours,



Gordon P. Ersamer

cc: Kimberly Herb  
Brigham Bowen  
Lily Farel  
Judson O. Littleton

# Exhibit E



U.S. Department of Justice  
Civil Division  
Federal Programs Branch

Mailing Address  
P.O. Box 883  
Washington, D.C. 20044

Overnight Delivery Address  
20 Massachusetts Ave., N.W.  
Washington, D.C. 20001

---

*Joshua E. Gardner*  
*Trial Attorney*  
Tel: (202) 305-7584  
Fax: (202) 616-8470  
Joshua.E.Gardner@usdoj.gov

October 3, 2011

Via Electronic Mail

Mr. Gordon Erspamer  
Morrison & Foerster, LLP  
425 Market Street  
San Francisco, CA 94105-2482

RE: *Vietnam Veterans of America, et al. v. CIA, et al.*, No. CV 09 0037-CW (N.D. Cal.)

Dear Mr. Erspamer:

We are in receipt of your September 28, 2011 letter regarding yet another proposed enlargement of the discovery deadline and regarding the Rule 45 subpoenas recently served upon the Department of the Navy and the Department of the Air Force.

**I. Plaintiffs' Proposed Discovery Extension**

With respect to the 30-day discovery extension ordered by Magistrate Judge Corley, you first ask whether "Defendants will treat this as a 30-day extension of discovery for all parties and of the expert report disclosure deadline." As I have previously mentioned on multiple occasions to your colleagues Mr. Blakely and Mr. Patterson, while we will agree to treat the 30-day extension of discovery as applicable to all parties, we will treat the scope of that 30-day enlargement as consistent with the parties' previous stipulation from June 20, 2011. That is, the parties agreed that discovery would be enlarged for three additional months solely for four limited purposes: "(a) [to] accommodate the DVA's need for additional time to complete its document production; (b) [to] permit Plaintiffs time to complete discovery of the DVA once that production is complete; (c) [to] permit Defendants time to complete deposition discovery of individuals identified in Plaintiffs' Second Amended Initial Disclosures and to complete discovery limited to the extent necessary to follow-up on Plaintiffs' amended discovery responses served within the last 30 days; and (d) [to] permit time for the resolution of outstanding discovery disputes between the parties, with the assistance of the Magistrate Judge as necessary." See Dkt. No. 237, at ¶ 12. Indeed, as reflected in Paragraph 15 of the joint stipulation, no additional depositions of DoD or CIA beyond the discovery disputes submitted for Court resolution were contemplated. Accordingly, for any new matters, such as the Rule 45 subpoenas concerning the Navy and Air Force and your requests to schedule additional depositions, the extension does not

properly apply. In addition, we agree that the 30-day extension ordered by the Court consequently moves back the disclosure of experts by 30-days.

With respect to sixty additional days beyond the thirty ordered by Magistrate Judge Corley, as I have again repeatedly told Mr. Blakely and Mr. Patterson, we cannot agree to any additional enlargement in the absence of some explanation as to why you believe you need additional time. Previously, Plaintiffs had contended that the reason for an enlargement was due to VA's production of documents. Yet in your letter, you state that additional time is needed because of the "completion of DVA's document production, at least 60,000 outstanding pages of Battelle documents to be reviewed for production, Defendants' email searches, and several depositions of DVA, DOD, CIA, and Battelle deponents." We do not believe that any of these reasons justify additional time for discovery beyond the thirty days ordered by Magistrate Corley.

First, as we explained in our previous correspondence, with the exception of the claims files, VA intends to have completed its production by October 14, 2011 – well in advance of the November 14, 2011 fact discovery cut-off. Second, it is unclear how the production of Battelle documents or DoD emails affects Plaintiffs' ability to complete discovery by November 14, 2011. Third, as you are no doubt aware, you have requested deposition dates in early-to-mid October for the remaining VA Rule 30(b)(6) and individual depositions, the CIA Rule 30(b)(6) deposition, and the DoD Rule 30(b)(6) deposition. Accordingly, to the extent those depositions are completed well in advance of the November 14, 2011 fact discovery cut-off, it is unclear why you believe discovery should be enlarged for an additional two months. Absent an explanation as to the specific, additional discovery that you believe justifies a three-month enlargement of the discovery schedule, we cannot agree to your proposal.

## **II. Rule 45 Subpoenas to the Navy and the Air Force**

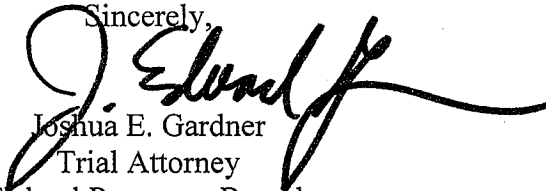
After having served improper Rule 45 subpoenas on the Navy and the Air Force, you nonetheless contend that the Navy and the Air Force as "parties" must still conduct a search and produce documents responsive to Plaintiffs' document requests in those subpoenas. We disagree. As explained in Defendants' September 21, 2011 letter, the document requests in the purported Rule 45 subpoenas constitute additional requests for production of documents and are therefore foreclosed by the parties' June 20, 2011 stipulated schedule governing discovery in this case.

Nor are the Navy and the Air Force obligated at this late date to conduct a new search and produce documents responsive to Plaintiffs' outstanding document requests to DoD and the Army. Simply put, the Navy and the Air Force are not and have never been likely to possess information that is relevant to the remaining claims in this case. Plaintiffs' claims in this case concern *Army* testing and allege a duty to notify and provide health care based on an *Army* memorandum from 1953 and an *Army* regulation, AR 70-25. In contrast, Plaintiffs have not made any allegation in the Third Amended Complaint concerning Navy or Air Force involvement in the chemical or biological testing program on service members. Moreover, to the extent Air Force or Navy service members participated as volunteer test subjects, those individuals would be reflected in both the Chem-Bio database and service member test files, both of which have previously been produced to Plaintiffs.

When responding to Plaintiffs' extensive document requests, DoD reasonably confined its search efforts to those components most likely to have information relevant to Plaintiffs' claims. The Navy and the Air Force are not such components, and there accordingly was no need for them to conduct searches in response to Plaintiffs' original document requests. Furthermore, as the improper additional document requests in the purported Rule 45 subpoenas seek documents dating as far back as 1935 concerning the involvement of DoD components other than the Army in chemical or biological agent testing, they cannot be said to be "fairly encompassed within topics of prior document requests" even if they were directed to appropriate DoD components. Consequently, any requests that the Navy and the Air Force search for documents constitute additional written discovery requests that are foreclosed by the stipulated scheduling order governing discovery. Indeed, even if that were not the case, such eleventh-hour searches and document productions would impose an enormous and undue burden on the Navy and the Air Force, particularly in light of the minimal (if any) relevance of such documents to this litigation and the likely cumulativeness of any such responsive documents in light of the vast amount of information Plaintiffs have already obtained through discovery in this case.

In sum, there is no basis to broaden the scope of discovery as you have requested, particularly in light of the limited nature of the claims in this case, the inherently limited relevance of factual information in this putative class action under the APA, and the current stipulated schedule governing discovery in this matter. Accordingly, in the absence of a court order, the Navy and the Air Force will not conduct broad searches or produce documents in response to Plaintiffs' Rule 45 subpoenas.

Sincerely,



Joshua E. Gardner  
Trial Attorney  
Federal Programs Branch



# Exhibit F

**MORRISON | FOERSTER**

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September 28, 2011

Writer's Direct Contact  
415.268.6411  
GErspamer@mofo.com

Via E-Mail

Joshua E. Gardner, Esq.  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue NW  
Washington, DC 20530

Re: *Vietnam Veterans of America, et al. v. Central Intelligence Agency, et al.*,  
No. CV 09-0037 CW (N.D. Cal.)

Dear Mr. Gardner:

I am writing to schedule depositions from Defendants Department of Defense ("DOD"), Department of Army ("Army"), and Central Intelligence Agency ("CIA"), and to address Defendants' question concerning VVA members' depositions. Department of Veterans Affairs' depositions will be addressed under separate cover.

#### Defendants' Depositions

Please designate deponents and provide dates during the first two weeks of October when Defendants' designees will be available to testify regarding the following topics concerning the CIA's involvement in the testing programs: (1) DOD Rule 30(b)(6) Topic 7, (2) Army Rule 30(b)(6) Topic 7, and (3) CIA Rule 30(b)(6) Topic 3. We request that the CIA designee's deposition be scheduled to go forward first. Plaintiffs also intend to proceed with depositions of CIA designees concerning Rule 30(b)(6) Topics 1 and 2, subject to the result of the Court's order. Thus, please also designate deponents and provide provisional dates when those CIA designees will be available for deposition.

In addition, Plaintiffs seek testimony from the following deponents in their individual capacity: Patricia Cameresi, Roy Finno, Norma St. Claire, Dr. William Winkenwerder, Dr. Kelley Brix, Col. Kolbrenner, Arnold DuPuy, and Roxana Baylor. Please provide available dates for these depositions that occur before the current November 14, 2011 fact discovery deadline. Plaintiffs' formal deposition notices will follow.

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Joshua E. Gardner, Esq.  
September 28, 2011  
Page Two

Plaintiffs assume that the above-mentioned depositions will occur in Washington, D.C. Please let us know if that is not the case. Plaintiffs intend to use Morrison & Foerster's Washington, D.C. office for these depositions.

Plaintiffs may request additional DOD, Army, or CIA depositions. Those depositions will be addressed separately.

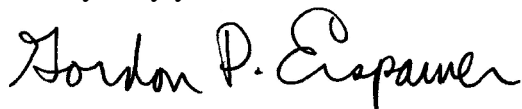
VVA Members

As addressed in Mr. Patterson's September 21, 2011 email, the four VVA members who you seek to depose are not parties to this litigation. We have provided dates when Plaintiffs' Counsel are available. It is your choice of whether to serve these third-parties with subpoenas for deposition. Please understand that we are not in a position to guarantee their attendance for deposition. They are not party witnesses.

Your deposition notices will be sufficient, however, for Plaintiffs to make arrangements to attend the depositions on the dates noticed. Should we incur fees or expenses related to a failure of these third-party witnesses to appear under circumstances where you have failed to serve them with a subpoena, we, of course, reserve our right to seek costs and attorney's fees. For this reason, and scheduling purposes, please advise us whether you intend to proceed with the depositions on the dates we have indicated. Failing that, we shall assume that you have decided not to proceed with the depositions.

Thank you for your time and attention.

Very truly yours,



Gordon P. Erspamer

cc: Kimberly Herb  
Brigham Bowen  
Lily Farel  
Judson O. Littleton

# Exhibit G

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September 30, 2011

Writer's Direct Contact  
415.268.6818  
BPatterson@mofo.com

Via E-Mail

Joshua E. Gardner, Esq.  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue NW  
Washington, DC 20530

Re: *Vietnam Veterans of America, et al. v. Central Intelligence Agency, et al.*,  
No. CV 09-0037 CW (N.D. Cal.)

Dear Mr. Gardner:

I am writing regarding Defendants' email searches. We will address DTIC searches under separate cover shortly.

During our call on September 27, 2011, you proposed the following search terms for Defendants' email searches: BA.org, Battelle, Cold War, human, testing, volunteer, Edgewood, and VVA. You proposed removing "VVA" as a search term, which is fine with Plaintiffs. You also agreed to add Chem-Bio and CBRNE as search terms. In addition to these search terms, please add the following: 70-25; biological test(s); Blackburn; CBIAC; cheat sheet; chemical agent; chemical test(s); Detrick; Ditrick; DoD/VA; Dugway; EA 3167; exposure studies; fact sheet; Hamed; HVAC; lewisite; long-term follow-up; long-term health effects; LSD follow-up; March 9, 1993; MKULTRA; mustard gas; NAS study; National Research Council; non-disclosure restrict; notice letter; notification letter; NRC; Project OFTEN; secrecy oath; short-term exposure; Sistek; test participant; test subject; Veterans at Risk; and warfare agent test.

You also explained that the search would include all emails for the entire DOD Force Health Protection and Readiness office. Please provide a list of email custodians, outside of this one DOD office, in which you are going to search. For example, what Army, CIA, or Battelle custodians are you going to include in Defendants' email searches? In addition, what is the status of searching for and capturing the emails of former employees?

With respect to your assertion that the DOD cannot retrieve emails that pre-date 2003, please further explain why this is so and whether this limitation is only for the DOD Force Health

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Joshua E. Gardner, Esq.  
September 30, 2011  
Page Two

Protection and Readiness office or applies to DOD as a whole, and whether that time limitation applies to the emails of Defendants other than the DOD. You also stated that DOD does not use back-up tapes. Are there any other available methods to back-up emails or access emails from before 2003? If emails prior to 2003 cannot be accessed or retrieved, please provide a declaration supporting Defendants' asserted inability to do so.

Feel free to reach out if you have any questions.

Sincerely,



Ben Patterson

cc: Kimberly Herb  
Brigham Bowen  
Lily Farel  
Judson O. Littleton

# Exhibit H

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BEIJING, SHANGHAI, HONG KONG

September 30, 2011

Writer's Direct Contact  
415.268.6818  
BPatterson@mofocom

Via E-Mail

Kimberly Herb, Esq.  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue NW  
Washington, DC 20530

Re: *Vietnam Veterans of America, et al. v. Central Intelligence Agency, et al.*,  
No. CV 09-0037 CW (N.D. Cal.)

Dear Ms. Herb:

I am writing regarding various discovery issues.

CIA Magnetic Tapes

With respect to the magnetic tapes addressed in Mr. Erspamer's Reply Declaration (Docket No. 291), Plaintiffs *once again* ask that Defendants immediately produce these tapes. Defendants previously advised that the CIA transferred the magnetic tapes to the DOD for the purpose of obtaining assistance in reading the contents. Now it appears that the DOD has taken full possession of the CIA documents, which we believe is improper, especially with the action pending and document requests to the CIA for the contents outstanding. Notwithstanding your transfer of the tapes to the DOD, those tapes — together with the contents of the 11 boxes CIA held in storage for about 40 years — remain CIA documents. Yet these tapes are listed on *DOD's* latest Privilege Log, dated September 13, 2011, without any supporting entries of foundational information. Has the CIA or DOD reviewed them to ascertain whether they are in fact privileged? Based on Defendants' correspondence and the lack of any meaningful foundation or description on the DOD's Privilege Log, it appears clear that neither the CIA nor the DOD has reviewed them.

Considering that the magnetic tapes and other contents of the 11 boxes referenced at VVA023826 through VVA023831 relate exclusively to Project OFTEN — the service member testing program in which the CIA undisputedly concedes involvement — they appear to be highly relevant, even under the CIA's highly questionable version of its involvement. And the documents alone would appear to exceed the volume of the entire CIA



MORRISON | FOERSTER

Kimberly Herb, Esq.  
September 30, 2011  
Page Two

production to date. Obviously, many Project OFTEN documents in the 11 boxes have been withheld from production. Were any documents contained within the 11 boxes produced to Plaintiffs? If so, please identify their location by Bates range. If not, why were these documents concerning Project OFTEN not produced?

Please advise us whether Defendants will take steps to convert the information on the magnetic tapes to a readable format and whether Defendants will continue to assert privilege over these tapes *without reviewing them* and therefore refuse to produce them. Under such circumstances, Plaintiffs will seek the Court's intervention to overrule Defendants' objections and compel production in connection with the upcoming Status Conference.

#### CIA's Privilege Log

As addressed in Mr. Erspamer's July 11, 2011 letter, Plaintiffs have significant concerns with the CIA's current Privilege Log that extend beyond the issues relating to DOD's inclusion of the magnetic tapes on its privilege log, rather than the CIA's privilege log, discussed above. During the parties' August 12, 2011 meet-and-confer call, you explained that you would work with the CIA to determine if additional details could be added to the privilege log to enable Plaintiffs to assess the CIA's assertions of privilege. For example, instead of listing merely "CIA" as author and "CIA" as recipient, one proposal was that some anonymous identification system could be used (*e.g.*, CIA 1 to Attorney 2). You also stated that the CIA would look into segregating documents or producing some with redactions — for example, where only part of a document was subject to an asserted privilege. You planned to report back to us by August 23, a date that has long since passed. Finally, you were going to check with the CIA to determine how long it would take for the Agency to formally invoke the deliberative process privilege for documents currently withheld.

Plaintiffs have not received any answer or update regarding these issues, nor an updated CIA privilege log. Will the CIA update its privilege log to address any of the Plaintiffs' concerns explained in Mr. Erspamer's July 11 letter? Will the CIA produce any additional documents (or parts of documents) previously withheld under assertion of privilege?

#### VVA Members

Please produce any documents concerning Defendants' Counsel's communications with any of the 12 VVA members listed in Plaintiff VVA's Amended Interrogatory Response No. 19.

Thank you for your time and attention.

MORRISON | FOERSTER

Kimberly Herb, Esq.  
September 30, 2011  
Page Three

Sincerely,

*Ben Patterson*

Ben Patterson

cc: Joshua E. Gardner  
Brigham Bowen  
Lily Farel  
Judson O. Littleton

# Exhibit I



Civil Division  
Federal Programs Branch

**Mailing Address**  
P.O. Box 883  
Washington, D.C. 20044

**Overnight Delivery Address**  
20 Massachusetts Ave., N.W.  
Washington, D.C. 20001

---

*Joshua E. Gardner*  
*Trial Attorney*  
Tel: (202) 305-7584  
Fax: (202) 616-8470  
Joshua.E.Gardner@usdoj.gov

October 3, 2011

Via Electronic Mail

Mr. Gordon Erspamer  
Morrison & Foerster, LLP  
425 Market Street  
San Francisco, CA 94105-2482

RE: *Vietnam Veterans of America, et al. v. CIA, et al.*, No. CV 09 0037-CW (N.D. Cal.)

Dear Mr. Erspamer:

We are in receipt of your September 28, 2011 letter regarding depositions concerning the Department of Defense/Department of the Army (collectively, "DoD"), and the Central Intelligence Agency ("CIA"), as well as depositions concerning certain members of Vietnam Veterans of America ("VVA"). In addition, this letter responds to a portion of your September 28, 2011 letter concerning depositions of former and current employees of the Department of Veterans Affairs ("VA").

**I. Depositions of DoD, the CIA and VA**

As an initial matter, you have inquired into available dates for the Rule 30(b)(6) deposition of DoD concerning Topic 7 and the Rule 30(b)(6) deposition of the CIA on Topic 3 (and Topics 1 and 2 to the extent the Court orders depositions on those topics). With respect to the CIA, the Rule 30(b)(6) designee will be Patricia Cameresi. However, until the Court resolves the scope of Topic 3 and determines whether to permit depositions on Topics 1 and 2, we are not in a position to schedule this deposition. Given your stated preference that the CIA Rule 30(b)(6) deposition take place before the DoD Rule 30(b)(6) deposition, we can provide you with dates for the DoD Rule 30(b)(6) deposition once the parties receive the Court's order regarding scope of the CIA Rule 30(b)(6) deposition.

Regarding the 30(b)(6) deposition for VA, Dr. Michael Peterson, who has been designated to testify regarding Topics 1, 2 and 6, will be available on October 25, 2011. Please note that Dr. Peterson will be the sole designee on Topic 2. We will get back to you as soon as we have an available date for both the 1-hour remainder of Paul Black's 30(b)(6) deposition and his individual deposition.

You have also asked, for the first time, and after almost three years of litigation, for available dates for the deposition of seven current or former DoD employees or contractors, as well as the deposition of CIA employee Patricia Camerese in her individual capacity. In addition, you now request available dates for the deposition of six current or former VA employees. We cannot agree to your request for several reasons.

First, this request for additional DoD and CIA depositions is inconsistent with the agreed-to stipulation enlarging discovery that was entered by the Court on June 21, 2011. *See* Dkt. No. 238. As reflected in the June 20, 2011 joint stipulation, the parties agreed to a three-month enlargement of discovery for four limited purposes: “(a) [to] accommodate the DVA’s need for additional time to complete its document production; (b) [to] permit Plaintiffs time to complete discovery of the DVA once that production is complete; (c) [to] permit Defendants time to complete deposition discovery of individuals identified in Plaintiffs’ Second Amended Initial Disclosures and to complete discovery limited to the extent necessary to follow-up on Plaintiffs’ amended discovery responses served within the last 30 days; and (d) [to] permit time for the resolution of outstanding discovery disputes between the parties, with the assistance of the Magistrate Judge as necessary.” *See* Dkt. No. 237, at ¶ 12. Indeed, as reflected in Paragraph 15 of the joint stipulation, no additional depositions of DoD or CIA beyond the discovery disputes submitted for Court resolution were contemplated. Accordingly, Plaintiffs’ request for eight additional depositions from the DoD and CIA is inconsistent with the current scheduling order in this case, and Plaintiffs have failed to articulate any reasons, let alone demonstrated “good cause” under Federal Rule of Civil Procedure 16, for a modification of the scheduling order at this late date.

Second, Plaintiffs’ scattershot request for fourteen additional depositions from CIA, DoD and VA is entirely inconsistent with the admonition of both Magistrate Judge Larson and Magistrate Judge Corley that Plaintiffs must narrow the discovery they seek and identify what is truly necessary to prove their narrow, largely legal claims under the Administrative Procedure Act (“APA”).

Finally, because Plaintiffs have already exceeded the ten deposition presumptive limit contained in Rule 30(a)(2)(A)(i), leave of court is required to take additional depositions. Pursuant to the 1993 amendments to Rule 30, the 10 deposition presumptive limit applies per side rather than per party. *See Felman Production, Inc. v. Industrial Risk Insurers*, No. 09-0481, 2009 WL 3668038, at \*2 (S.D.W. Va. 2009) (“This per-side limit reflects the federal rules’ policy of promoting cost-effective discovery; a policy which explicitly seeks to minimize the burden and expense imposed by discovery by avoiding unreasonable duplication and/or other cumulative efforts.”). In the Northern District of California, “[a] party seeking leave of court [to take additional depositions] must make a “particularized showing” why the discovery is necessary.” *Doubt v. NCR Corp.*, No. 09-5917, 2011 WL 3740853 (N.D. Cal. Aug. 25, 2011). That “particularized showing” is established through consideration of the Rule 26(b)(2)(C) balancing factors, such as “whether the discovery sought is cumulative or duplicative, or can better be obtained from some another source; whether the party seeking discovery has had ample opportunity to obtain the information by discovery in this action; and whether the burden or expense of the proposed discovery outweighs its likely benefit.” *See Lehman Bros. Holdings, Inc. v. CMG Mortg., Inc.*, No. 10-0402, 2011 WL 203675, at \*2 (N.D. Cal. Jan. 21, 2011).

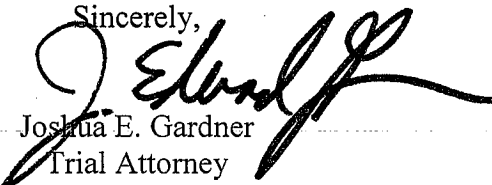
Here, where Plaintiffs have taken a Rule 30(b)(6) deposition of DoD covering the waterfront of possible issues in this case, where Plaintiffs will have taken a Rule 30(b)(6) on seven broad topics and two individual depositions of VA of topics extending far beyond the narrow facial bias claim against the agency, where Plaintiffs will take a deposition of a CIA designee pursuant to Rule 30(b)(6) (despite the limited secrecy oath claim that remains against that agency), and where the government has produced well over 1.2 million pages of documents – which you admitted you had not even fully reviewed – we do not believe you have made the requisite particularized showing, especially given the expense associated with Plaintiffs’ proposed additional depositions.

## II. Depositions of VVA Members

In your letter, you suggest that four of the individuals you identified in your supplemental interrogatory response who were allegedly test participants and who are members of VVA “are not parties to this litigation.” We do not understand this statement. We understand that, as alleged Edgewood test participants, these individuals are members of the putative class, and that you are class counsel. Additionally, you have also indicated (though you will not tell us for certain) that you may rely on these individuals to establish VVA’s standing in this action. Accordingly, we do not understand how you do not represent these individuals. Confusing matters even more, you have indicated that you represent these individuals for “purposes of the deposition.” Whatever that may mean, it is nonsensical that class counsel represents putative class members for “purposes of their depositions,” but will not accept service of a Rule 30 deposition notice for their depositions. Nonetheless, in an effort to move forward, we have served Rule 45 subpoenas upon each of the four VVA members you claim that you “represent for purposes of their depositions.”

Please do not hesitate to contact me with any questions you may have.

Sincerely,



Joshua E. Gardner  
Trial Attorney  
Federal Programs Branch

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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

**[PROPOSED] ORDER GRANTING  
PLAINTIFFS' ADMINISTRATIVE  
MOTION TO EXTEND CASE  
DEADLINES**

1 Plaintiffs' Administrative Motion to Extend Case Deadlines came before this Court on  
 2 October 7, 2011. Having read and considered the submissions of the parties, and finding good  
 3 cause therefore, the Court hereby GRANTS the motion.

4 All prior scheduling orders in this action are hereby vacated, and the schedule in this  
 5 litigation is modified by extending the current deadlines by ninety days as reflected in the  
 6 following schedule:

Event	Current Deadline	New Deadline
Completion of all document production	October 14, 2011	December 29, 2011
Completion of fact discovery	October 14, 2011	January 12, 2012
Disclosure of identity and reports of expert witnesses	October 14, 2011	January 12, 2012
Completion of expert discovery	January 2, 2012	April 1, 2012
Plaintiffs' opening dispositive motion due no later than	January 13, 2012	April 12, 2012
Defendants' opposition and any cross-motion due no later than	February 3, 2012	May 3, 2012
Plaintiffs' reply / opposition to cross-motion due no later than	February 17, 2012	May 17, 2012
Defendants' reply to cross-motion due no later than	February 24, 2012	May 24, 2012
All case-dispositive motions to be heard, 2:00 PM	April 5, 2012	July 9, 2012 <sup>1</sup>
Further case management conference, 2:00 PM	April 5, 2012	July 9, 2012
Final pretrial conference, 2:00 PM	June 12, 2012	September 10, 2012

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<sup>1</sup> Plaintiffs propose July 9, 2012, as the date for dispositive motion hearings and any further case management conference in light of the Court's planned unavailability from June 29 through July 5, 2012.



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Event	Current Deadline	New Deadline
Trial to begin, 8:30 AM	July 9, 2012	October 8, 2012

**IT IS SO ORDERED.**

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
UNITED STATES DISTRICT JUDGE  
HONORABLE CLAUDIA WILKEN