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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' ADMINISTRATIVE MOTION TO EXTEND DEADLINES**

## INTRODUCTION

Plaintiffs seek yet another enlargement of time, premised in large part upon the suggestion that there have been "discovery delays." Pls' Mot. at 1. Such a characterization is incorrect. Despite the narrow claims remaining in this putative class action, Defendants have produced more than 1.2 million pages of documents and collectively responded to approximately 100 interrogatories and 330 requests for admission. In addition, Plaintiffs have taken or are scheduled to take 17 depositions, including Rule 30(b)(6) depositions of each Defendant. Yet Plaintiffs remain dissatisfied, claiming they need more discovery, despite having admitted that they "had not yet reviewed [the] documents" produced by Defendants. *See* Dkt. 294 at 4. Indeed, almost three years after commencement of this lawsuit, it is apparent that rather than a means to an end, discovery has become an end in itself. Plaintiffs' motion should be denied.

## ARGUMENT

### Plaintiffs Have Failed To Demonstrate Good Cause For A Modification Of The Pretrial Scheduling Order In This Case.

A pretrial scheduling order "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). This Court "may modify the pretrial schedule 'if it cannot reasonably be met despite the diligence of the party seeking the extension.'" *Id.* (citation omitted). Plaintiffs have not established "good cause" for modifying the scheduling order yet again for three additional months of unfettered discovery.[1]

#### A. Plaintiffs' Claimed Need For Additional Time For Discovery Bears No Relationship To The Narrow Issues Remaining In This Case

Plaintiffs' motion proceeds upon the unsupported assumption that they need additional discovery to prove their case. With respect to Plaintiffs' notice and health care claims – to which the overwhelming majority of Plaintiffs' discovery is directed – Plaintiffs are mistaken. Plaintiffs

[1] Moreover, Plaintiffs' proposed schedule is highly prejudicial to Defendants, as it proposes the completion of document production two weeks prior to the close of fact discovery. If Plaintiffs, as they have done twice before, serve vast discovery requests thirty days before the close of discovery, Defendants will, contrary to the time allowed under the Federal Rules of Civil Procedure, have only two weeks to respond to those requests.

have brought a putative class action challenging, under Section 706(1) of the Administrative Procedure Act ("APA"), the Department of Defense's ("DoD") alleged unreasonable delay in complying with its purported *discrete legal obligation* to provide notice and health care.[2] Section 706(1) claims do not resemble trials on the merits; rather, such claims involve mostly legal issues related to an agency's legal obligation to take certain action, and the only remedy is for the district court to order the agency to take action. *See Mt. St. Helens Mining & Recovery Ltd. P'ship v. U.S.*, 384 F.3d 721, 728 (9th Cir. 2004) ("§ 706(1) of the APA does not empower the district court to conduct a de novo review of the administrative decision and order the agency to reach a particular result"); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("The factfinding capacity of the district court is . . . typically unnecessary to judicial review of agency decisionmaking."). Accordingly, Plaintiffs' purported reason for enlarging the discovery schedule by *three months* bears no relationship to the narrow, largely legal issues in this case.[3]

**B. VA Has Timely Complied With Plaintiffs' Voluminous Discovery Requests**

Plaintiffs' argument that the Department of Veterans Affairs' ("VA") alleged delay in production necessitates an extension of the discovery period is simply incorrect. The sole claim against VA is based on alleged inherent facial bias in VA's adjudications of test subjects' benefits claims. *See* Dkt. 177 at 11. Despite this narrow claim, since being added as a Defendant in November 2010, VA has responded to overwhelming discovery requests, including producing over 200,000 pages of documents in response to 232 requests for production, 29 interrogatories, many of which are compound, and 49 requests for admission. *See* Decl of Lily Farel ("Farel Decl.") at ¶ 2. In addition, VA has designated Rule 30(b)(6) witnesses to testify on seven wide-ranging topics. *See* Farel Decl. at ¶ 3, ex. A. Plaintiffs have already taken testimony on four of

[2] Plaintiffs have yet to move for class certification despite filing their lawsuit almost three years ago. Notably, even in seeking to modify the pretrial schedule once again, they do not seek to add dates for the briefing of class certification, further calling into question Plaintiffs' intention to actually move for class certification.

[3] Furthermore, Plaintiffs have provided no justification for seeking to enlarge discovery without the limitations previously agreed to by the parties and adopted by the Court in the June 2011 stipulation amending discovery. *See* Dkt. 238. To the extent the Court enlarges the time for fact discovery, it should be limited in accordance with the parties' prior stipulation.

those topics and deposed one VA employee in his individual capacity, and they will take 30(b)(6) testimony on the remaining topics and the individual capacity deposition of another VA employee in the near future.[4]

VA intends to complete its production of documents, other than the claims files, by October 14, 2011. Pls' Mot. at 3. Plaintiffs' claim that VA has "provided a moving target for its production," *id.* at 3, is disingenuous given that Plaintiffs have served five sets of requests for production on VA since December 2010, including substantial and extensive discovery served on VA thirty days before the scheduled close of discovery. *See* Farel Decl. at ¶ 9. Plaintiffs themselves have forced VA to extend its anticipated production deadline to accommodate the new discovery requests.[5] In any event, aside from the claims files, VA intends to complete its production within the week.

Finally, Plaintiffs state that they will be prejudiced if VA produces the claims files of identifiable test subjects after the deadline for expert disclosures. Pls' Mot. at 4. VA has provided Plaintiffs complete copies of the claims files for all test subjects named as parties to this litigation. Further, VA has located and obtained the claims files of other identifiable test subjects and is producing those claims files (as it completes the mandatory review for information protected by 38 U.S.C. § 7332) on a rolling basis. While this production may warrant an extension of the deadline for *expert* discovery because of Plaintiffs' claimed need for additional

[4] Plaintiffs' claim that they are still waiting to take 30(b)(6) testimony from Mr. Paul Black and Dr. Michael Peterson due to "delay in producing documents or making the designation" is without merit. *See* Dkt. 295-1 at ¶ 10. On April 11, 2011, VA designated witnesses for each of Plaintiffs' requested 30(b)(6) topics. *See* Farel Decl. at ¶ 4, ex. B. On May 19, 2011, Plaintiffs scheduled 30(b)(6) depositions on four topics. *See* Farel Decl. at ¶ 5, ex. C. On June 30, 2011, Plaintiffs took 6 hours of testimony from Mr. Black. *See* Farel Decl. at ¶ 6. Notably, Plaintiffs did not attempt to schedule additional 30(b)(6) testimony until September 28, 2011. *See* Farel Decl. at ¶ 7, ex. D. Moreover, at no time during the preceding four months did Plaintiffs indicate that their delay in scheduling the testimony was due to VA's production of documents. The final hour of 30(b)(6) testimony from Mr. Black is currently scheduled for November 4, 2011. *See* Farel Decl. at ¶ 8, ex. E.

[5] Plaintiffs' citations to the numbers of documents left for VA to review are misleading. *See* Pls' Mot. at 3-4. VA has, in fact, reviewed an enormous number of documents that were potentially responsive to Plaintiffs' discovery requests. Indeed, the massive number of documents reviewed by VA is evidence of the comprehensive and wide-ranging search VA undertook despite the narrow claim against it.

time for their experts to consider the claims files, it does not justify Plaintiffs' request for a three-month enlargement of *fact* discovery.[6]

VA has already undertaken a herculean effort, despite the narrow claim of inherent facial bias against it, to respond to Plaintiffs' myriad discovery requests and produce all responsive, non-privileged documents. It has done so in a timely manner, and it will complete its production in advance of the pertinent deadlines in this case. Plaintiffs have shown no good cause why VA's discovery efforts warrant an extension of the discovery deadline.

**C. DoD Has Diligently Responded To Discovery In This Case**

Plaintiffs have everything they could possibly need to pursue their narrow claims against DoD. With respect to the notice claim, Defendants have produced all service member test files, which provide information concerning any acute health effects as well as notification letters from the DoD concerning the chemicals used during the testing; the Chemical and Biological database used by VA to provide notification letters to test participants; the VA's notification letters; the DoD website, which provides information to veterans about the testing; and a large volume of follow-up studies concerning the health effects, if any, associated with the test program. With regard to Plaintiffs' health care claims, DoD has admitted in the context of a request for admission that it, in general, has not provided ongoing health care to the Edgewood test participants. Accordingly, the sole issue remaining concerning health care is a legal one; namely, whether there is a discrete legal obligation for DoD to provide such care. Finally, with respect to Plaintiffs' secrecy oath claim, DoD has produced the 1993 and 2011 releases from secrecy oaths and responded to a number of requests for admission concerning the scope of these releases.

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[6] If, as Plaintiffs claim, they require "cause-of-death information" for use in depositions, there has been no delay. On June 20, 2011, VA produced to Plaintiffs a statistical analysis of all claims for death compensation made by the survivors of identifiable test subjects. *See* Farel Decl. at ¶ 11, ex. F. Included in that analysis were the claimed causes of death for which service connection was granted or denied. As such, Plaintiffs have had the information they purportedly require to take all depositions in their possession for more than three months.

Accordingly, as with health care, the issue before the Court is a legal one: whether the scope of any remaining non-disclosure agreement is unconstitutional. *See* Dkt. 279.

Nevertheless, Plaintiffs contend that DoD has not produced six categories of documents and that this justifies their requested enlargement. Plaintiffs' motion fails to acknowledge that, with respect to three of those categories – discovery from the Navy and Air Force, the "magnetic tapes," and an additional fourteen depositions beyond the presumptive ten depositions permitted by Rule 30 – the Magistrate Judge has yet to order such discovery. In addition, Defendants expect that the Rule 30(b)(6) depositions of the Central Intelligence Agency ("CIA") and DoD can be completed by early-to-mid November. Indeed, Plaintiffs have been entitled to the continuation of the Rule 30(b)(6) deposition of DoD concerning the CIA's involvement in the chemical and biological test program since September 1, 2011, but failed to request a deposition date until almost one month later, on September 28, 2011. See Farel Decl. at ¶ 12, ex. G. Furthermore, despite Defendants' repeated requests dating back several months for narrowed DTIC search terms, Plaintiffs still have not provided such terms. With respect to DoD emails and Battelle documents, while Defendants are working diligently to produce these incredibly voluminous materials, they cannot possibly be relevant to the narrow legal issues under the APA concerning an alleged obligation on the part of DoD to provide notice and health care and thus provide no basis for enlarging fact discovery by yet another three months. In short, Plaintiffs have failed to establish good cause for a three-month enlargement based upon any alleged deficiencies in DoD's discovery responses.[7]

**CONCLUSION**

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' motion to extend case deadlines by an additional 90 days, and reject Plaintiffs' request for a separate deadline for completion of all document production by December 29, 2011.

[7] Notably, Plaintiffs' request for these additional depositions beyond the ten allowed under the Federal Rules of Civil Procedure violates the current Rule 16 pretrial scheduling order. *See* Dkt. 238 at ¶ 15.

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Respectfully submitted,

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