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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

JOINT STATEMENT OF DISCOVERY DISPUTE CONCERNING DEPOSITIONS AND NAVY AND AIR FORCE DOCUMENT PRODUCTION

Pursuant to the Court's Standing Order, the parties submit this Joint Statement to advise the Court of their impasse concerning certain discovery issues. The parties' most recent efforts to resolve these disputes were by letters on September 28, 2011, September 30, 2011, and October 3, 2011, and again by telephone on October 6, 2011. Despite these efforts, both sides agree that the Court's intervention is required.

DEPOSITIONS

Plaintiffs' Statement.[1] Defendants have refused to provide dates for depositions which are critical to Plaintiffs' case, arguing that Plaintiffs should be limited to only ten depositions for all Defendants. Yet, this is an extraordinary case with complex dimensions: over a million pages of documents have been produced, there are multiple agency Defendants, and many witnesses — rendering the default limit of ten depositions inadequate. Defendants apparently agree, as Defendants' Initial Disclosures filed on March 4, 2010 and April 1, 2011 list twelve individuals as potential witnesses, and by Friday, *Defendants will have taken eighteen depositions, while Plaintiffs have taken only ten*.[2] This complex case merits additional depositions.

Based on the discovery produced thus far, Plaintiffs currently seek to depose fourteen additional individuals. From the DVA, Plaintiffs seek to depose key actors intricately involved in the purported notification and notice letter drafting process: David Abbott, Mark Brown, Glen Wallick, and Kenneth Hyams. (*See, e.g.*, Docket Nos. 258 at 15; 259-15; 259-16.) Mr. Abbott and Mr. Brown also appear to have been primary authors of the DVA training letter and

[1] Plaintiffs need to correct a misunderstanding cited by Defendants and the Court's October 5, 2011 Order. During the September 22, 2011 hearing, the Court asked if Plaintiffs had "reviewed the million pages of the DOD." (Docket No. 293 at 103:6-10.) Plaintiffs misunderstood the question, and thought the Court was asking if they had reviewed the voluminous Annual Reports offered for inspection, which Plaintiffs were contacting a vendor regarding an estimate. By contrast, Plaintiffs *have reviewed* Defendants' production and are continue to do so, as documents are received. With the exception of recent productions and many of the individual test files, that review is complete; it has been used, *inter alia*, to select exhibits used during depositions, to identify proposed deponents, and to draft expert reports.

[2] Three depositions were of non-parties, involving a smaller burden on Defendants. The discrepancy proposed by Defendants that, "Plaintiffs have taken or are scheduled to take 16 depositions" is account for — six have yet to occur or to even have dates finalized, and Defendants are counting multiple Rule 30(b)(6) designees individually, rather than as one Rule 30(b)(6) deposition for each agency. *See* Fed. R. Civ. P. 30(a) advisory committee's note (1993).

clinician's letter — two documents critical to the DVA bias claim that were discussed during the September 22, 2011 hearing.[3] Plaintiffs also seek to depose key DOD employees involved in the notification efforts, fact sheet drafting, 1993 mustard gas efforts, and both the mustard gas and chem-bio databases. As more fully addressed in Plaintiffs' Motion to Compel (Docket No. 258 at 16-18), these proposed deponents include: Norma St. Claire, Roy Finno, Dr. Kelley Brix, Arnold DuPuy, Col. Fred Kolbrenner, and Roxana Baylor. As originally requested on May 10, 2011, Plaintiffs seek to depose Patricia Cameresi — the CIA's sole Rule 30(b)(6) designee, repeated declarant, and Dee Dodson Morris' CIA contact when Morris reviewed CIA records as part of DOD's notification efforts — in her individual capacity.[4]

Defendants have suggested that the parties' scheduling stipulation, entered by the Court on June 21, 2011 (Docket No. 238), somehow forecloses these depositions. It does not. Six of the requested fourteen deponents are from DVA, which was subject to *no limit* on discovery, and the stipulation only limits "written discovery," not depositions. (*Id.* at 4.) Indeed, Plaintiffs specifically added the following language to avoid such an overbroad misinterpretation: "Unless specifically restricted by this stipulation, discovery in this action will otherwise proceed in accordance with the Federal Rules." (*Id.* at 5.) This Court's 30-day extension of discovery ordered during the September 22, 2011 hearing, moreover, contained no such limitations.[5]

Defendants' Statement. Plaintiffs have taken or are scheduled to take 16 depositions in this case, and seek an additional 14 depositions — for a total of 30 depositions in this putative class action challenging agency action unreasonably delayed under Section 706(1) of the

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[3] Plaintiffs also request depositions of Brad Flohr and Tony Guagliardo, who are both listed on Defendants' April 1, 2011 Initial Disclosures, and Dr. Kilpatrick's supervisor, Dr. Winkenwerder, who reviewed and approved "notice" documents such as the draft fact sheet. Defendants' attempt to avoid Mr. Flohr's and Mr. Guagliardo's depositions by removing them from Defendants' Initial Disclosures — 6 months after identifying them — should be rejected.

[4] Because these deponents are likely outside of the Court's subpoena power, it is particularly important that Plaintiffs be granted these important depositions, as it may be Plaintiffs' only opportunity to retrieve such critical testimony.

[5] Given the considerable amount of outstanding discovery and Defendants' significant delays in producing key documents, Plaintiffs have moved the Court to extend discovery (and other case deadlines) by a total of 90 days, *without* such restrictions. (*See* Docket No. 295.)

Administrative Procedure Act ("APA") and asserting a claim of inherent facial bias by Department of Veteran Affairs' ("VA") adjudicators.[6] Plaintiffs have already taken a three-day Rule 30(b)(6) deposition of the Department of Defense and Department of the Army (collectively, "DoD"), covering the entire possible waterfront of issues in this case. Plaintiffs also have taken wide-ranging discovery from VA, including, among other things, a Rule 30(b)(6) deposition covering multiple topics, with depositions concerning three additional broad Rule 30(b)(6) topics to be taken in the near future. Plaintiffs also will be deposing both the DoD and the Central Intelligence Agency ("CIA") concerning the CIA's alleged involvement in the volunteer test program as it might relate to secrecy oaths. Plaintiffs have taken the deposition of every single individual identified on Defendants' initial disclosures (and then some).[7] Plaintiffs' request for additional deponents is cumulative and unduly burdensome.

Plaintiffs seek to triple the presumptive limits under Rule 30. *See* Fed. R. Civ. P. 30(a)(2)(A)(i). "A party seeking leave of court 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." *Lehman Bros. Holdings, Inc. v. CMG Mortg., Inc.*, No. 10-0402, 2011 WL 203675, at *2 (N.D. Cal. Jan. 21, 2011). Given the

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[6] In contrast, Defendants have deposed eight named plaintiffs (two of which were also taken by Plaintiffs as *de bene esse* depositions), as well as the six individuals Plaintiffs identified in their supplemental Rule 26 initial disclosures from the two organizational plaintiffs. Notably, these individuals are not putative class representatives. In a recent supplemental response to an interrogatory, Plaintiffs identified eight additional individuals who allegedly were members of VVA and who allegedly participated in the volunteer test program. Despite repeated inquiries, Plaintiffs refused to state whether they intended to rely upon these newly identified individuals to establish VVA's standing to sue. Accordingly, Defendants were left with little choice but to notice their depositions, to which Plaintiffs' consented.

[7] Defendants have made Plaintiffs aware of their intention to serve amended initial disclosures, which will not include the names of VA employees Plaintiffs now seek to depose.

extensive discovery that Plaintiffs have already taken, they have failed to make the requisite particularized showing of why any of these additional depositions are necessary, especially when balanced against the cumulativeness and the expense associated with Plaintiffs' proposed additional depositions.

Plaintiffs' request also is inconsistent with the agreed-to stipulation enlarging discovery. *See* Dkt. No. 238. That stipulation enlarged 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.

PLAINTIFFS' REQUESTS TO THE NAVY AND AIR FORCE

Plaintiffs' Statement. Defendants, arguing inconsistent positions, have failed to comply with either Plaintiffs' document requests or third-party subpoenas propounded to the Navy and Air Force respective chem-bio exposures.[8] Defendants' current position is that the Navy and Air Force are parties to this litigation. Yet, despite acknowledging their active role in key parts of the testing program, Defendants admit that they have not searched for Navy or Air Force responsive documents for *over two years*, and refuse to do so. Plaintiffs expressly addressed Navy and Air Force involvement *in the complaint* (*see* Docket No. 180 ¶¶ 101, 104, 153). DOD has produced documents showing the Navy's involvement in the early phases of the testing program and

[8] Defendants' theories for noncompliance are perpetually wavering, but Defendants cannot have it both ways: either the Navy and Air Force are third parties and must comply with the Rule 45 subpoenas, or they are parties subject to Plaintiffs' outstanding document requests. Documents requested by Plaintiffs' Rule 45 subpoenas are fairly encompassed within, for example, Amended RFP Nos. 1, 3, 4, and 22. Pre-1940 testing was added in the subpoenas because recently produced documents indicate that testing began as early as 1937.

authorization of testing — included in the sixty-one pages attached to the Navy Rule 45 subpoena, which Plaintiffs can make available to the Court. Given (i) the extensive Navy and Air Force involvement in the early phases of the testing programs, particularly of mustard gas and Lewisite; and (ii) the Court's October 5, 2011 Order denying Defendants' motion for protective order to prevent discovery of pre-1953 testing (Docket No. 294 at 10), Defendants must be ordered to *search* for responsive documents to these narrowly drawn requests.[9]

Defendants' Statement. Plaintiffs have challenged, under the APA, ***the Army's*** obligation to provide notice and health care based upon an ***Army*** regulation, AR 70-25. The two paragraphs of Plaintiffs' Third Amended Complaint cited by Plaintiffs have nothing to do with the testing of chemical or biological substances on ***service members*** — the only issue in this case. Plaintiffs' new discovery requests are anything but "narrowly drawn," and seek broad categories of information from 1935 to the present. Plaintiffs do not identify which prior discovery request these twenty new production requests are allegedly encompassed within. Given that Plaintiffs have not yet reviewed the more than 1.2 million pages of discovery already produced in this case, *see* Dkt. No. 294, at 4, Plaintiffs' suggestion that ***different*** branches of the armed forces engage in extremely broad, time consuming, and expensive discovery — for health-effects information cumulative to information Plaintiffs already possess in abundance — lacks any notion of proportionality. Plaintiffs' additional discovery requests also fail to comply with the Court's June 21, 2011 scheduling order, see Dkt. No. 238 at ¶¶ 12, 15, which precluded additional written discovery directed to any defendant other than VA. Finally, Defendants have sought review of that aspect of the Magistrate Judge's October 5, 2011 Order concerning pre-1953 testing.

CONCLUSION

Plaintiffs' Statement. Plaintiffs respectfully request that this Court grant them leave to take additional depositions and compel production of responsive Navy and Air Force documents.

Defendants' Statement. Defendants respectfully request that this Court deny Plaintiffs' requests, or, in the alternative, permit formal briefing.

[9] Defendants' continued refusal to produce documents concerning pre-1953 testing from *any party* leaves Plaintiffs with virtually no discovery on this first decade of testing.

Respectfully submitted, this 12th day of October, 2011.

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GENERAL ORDER 45 ATTESTATION

I, Gordon P. Erspamer, am the ECF User filing this Joint Statement of Discovery Dispute Concerning Depositions and Navy and Air Force Document Production. In compliance with General Order 45, X.B., I hereby attest that Joshua E. Gardner has concurred in this filing.

Dated: October 12, 2011

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