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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' MOTION FOR RELIEF FROM PORTION OF NON-DISPOSITIVE PRETRIAL ORDER OF MAGISTRATE JUDGE

INTRODUCTION

Pursuant to Civil Local Rules 72-2, Federal Rule of Civil Procedure 72(a), and 28 U.S.C. § 636(b)(1)(A), Plaintiffs hereby file this Motion for Relief from Portion of Non-Dispositive Pretrial Order of Magistrate Judge. Specifically, Plaintiffs object to sections A.1, A.2 and B.1 of the Magistrate Judge's order, dated October 5, 2011 ("Oct. 2011 Order" (Dkt. No. 294)), granting in part Defendants' Motion for Protective Order Limiting Discovery (Dkt. No. 252) and denying in part Plaintiffs' Motion to Compel Rule 30(b)(6) Depositions and Production of Documents (Dkt. No. 258) concerning discovery of Defendant Central Intelligence Agency ("CIA") regarding (i) Rule 30(b)(6) testimony and documents from the CIA concerning the health effects resulting from exposure to a narrowed list of 51 test substances and from participation in Defendants' testing programs, and (ii) Rule 30(b)(6) testimony concerning the use of U.S. Department of Veterans Affairs' ("DVA") patients in testing conducted or funded by the CIA related to chemical and/or biological weapons (collectively, "CIA Discovery").

Respectfully, as discussed below, Magistrate Judge Corley's narrowing of the scope of discovery is inconsistent with Magistrate Judge Larson's prior order, dated November 12, 2010 ("Nov. 2010 Order" (Dkt. No. 178)), which addressed the same CIA discovery issues. Plaintiffs also respectfully contend that the Oct. 2011 Order failed to consider the significant relevance of the CIA Discovery to Plaintiffs' claims against Defendants U.S. Department of Defense ("DOD") and the U.S. Department of the Army (the "Army"). Accordingly, Plaintiffs respectfully request that this Court overturn sections A.1, A.2 and B.1 of the Magistrate Judge's decision granting in part Defendants' motion for a protective order and denying in part Plaintiffs' motion to compel.

ARGUMENT

I. The CIA Was in Contempt of Judge Larson's Order and Improperly Sought Reconsideration of that Order Nine Months Later.

Plaintiffs were entitled to the CIA Discovery under Magistrate Judge Larson's Nov. 2010 Order, (Nov. 2010 Order at 16-17, 22, 25, 26), and the CIA never moved for relief from the Nov. 2010 Order under Local Rule 72-2 and Federal Rule of Civil Procedure 72(a). Instead, the CIA

ignored the Nov. 2010 Order for nine months, and in August 2011, the CIA filed a motion seeking relief from Judge Larson's Order, but cloaking it as a new motion for protective order that would essentially preclude any discovery of the CIA. (Dkt. No. 252.) The Nov. 2010 Order was law of the case, and the CIA was clearly in contempt of that order. The CIA's clear violations of Judge Larson's Order and purposeful delay of discovery to take advantage of the discovery cut-off are improper, and should not be permitted.

In Judge Larson's Nov. 2010 Order, the Court ordered the CIA to designate Rule 30(b)(6) witnesses to testify regarding a series of specific topics. (*See* Nov. 2010 Order at 18-29.) Further, Judge Larson ordered "the CIA to respond in earnest to all of Plaintiffs' RFPs." (*Id.* at 17.) Subsequently, Plaintiffs renoticed the CIA 30(b)(6) depositions, narrowing some topics and combining others to result in just three topics (Dkt. No. 259 ¶ 3, Ex. B.), and significantly reduced the scope of discovery requests to only 51 test substances, narrowed from the over 400 substances tested by Defendants and still at issue in this case (Dkt. No. 289 at 6). Despite these good faith efforts by Plaintiffs, Defendants repeatedly refused both to designate a witness on topics that go to the core of Plaintiffs' claims and to provide responsive non-privileged documents.

The Oct. 2011 Order fails to address the CIA's contempt of Judge Larson's Nov. 2010 Order, and improperly permits the CIA to avoid providing the CIA Discovery it was obligated to provide to Plaintiffs months ago. The CIA's refusal to designate witnesses for any topic and its refusal to produce documents in response to Plaintiffs' narrowed document requests flew in the face of Judge Larson's Nov. 2010 Order.[1] These rulings are law of the case, and as a result the CIA was in contempt of the Court's Order. Moreover, the discovery ordered by Judge Larson was based on factual issues that remain in the case, notwithstanding the later dismissal of two claims against the CIA.

[1] The CIA has only recently designated a witness for a single topic, after being ordered to do so for the second time in the Oct. 2011 Order. (Oct. 2011 Order at 7-8.) The CIA has never designated a witness for any other topic.

II. Health Effects Information Is Relevant to Plaintiffs' Claims Against DOD and the Army and Plaintiffs' Requests Are Not Unduly Burdensome.

The Oct. 2011 Order failed to address the fact that the health effects information is highly relevant to Plaintiffs' claims against DOD and the Army. In the Oct. 2011 Order, the Court held that "[g]iven that this discovery is not relevant to a claim Plaintiffs currently have *against the CIA* and the possibility that such discovery would be cumulative of discovery Plaintiffs either already have or could obtain from another agency . . . under Rule 26's proportionality analysis Plaintiffs are not entitled to a Rule 30(b)(6) deposition from the CIA on the subject of health effects." (Oct. 2011 Order at 6 (emphasis added).) But Plaintiffs are entitled to "obtain discovery regarding any nonprivileged matter that is relevant to *any party's claim or defense*"— including Plaintiffs' claims against DOD and the Army, (Fed. R. Civ. P. 26(b)(1) (emphasis added)), and Defendants, represented by the same counsel, made no showing that any of the CIA discovery was duplicative. At its core, Plaintiffs allege that Defendants have a duty to notify all test subjects of the particulars of their exposures, and provide treatment for any adverse health effects arising from the experiments. (*See, e.g.* Third Amended Complaint ("TAC") (Dkt. No. 180) ¶¶ 183, 187, 189.) As Judge Larson already held in the Nov. 2010 Order (which CIA ignored), information the CIA has concerning health effects is relevant to Plaintiffs' claims against the other Defendants. (*See* Nov. 2010 Order at 26 ("health effects of drugs used in MKULTRA, known from [sic] to be similar to those in Edgewood Arsenal testing, are relevant to Plaintiffs' notice and healthcare claims.").) Moreover, the CIA's close involvement in the testing programs included information received from the Army concerning the results of and health effects caused by tests. (*See e.g.* Dkt. No. 259-28.) Indeed, the CIA recently produced a printout listing the contents of several magnetic tapes from its mainframe computer that shows the significant depth and breadth of the CIA's involvement with experiments on Army troops. This list includes a variety of materials over a nine-year period, including: clinical files from Edgewood, experimental results, a

database of Army test subjects, videos and films.[2] Thus, the CIA is likely to have health effects information, and this information is of critical importance to Plaintiffs' existing claims in this action, regardless of the claims against the CIA or whether or not it is a party to this action.

Moreover, the mere "possibility that such discovery would be cumulative," (Oct. 2011 Order at 6), is *not* a sufficient basis to limit the scope of discovery, especially in light of the highly relevant nature of the information sought by Plaintiffs. *See* Fed. R. Civ. P. 26(b)(2)(C). Furthermore, Plaintiffs' requests are not overly burdensome on the CIA, which has not produced any meaningful discovery. Indeed, Plaintiffs have gone to great lengths to reduce the burden of this discovery by withdrawing several requests for discovery in order to narrow the scope of health effects discovery sought. Accordingly, Plaintiffs are entitled to Rule 30(b)(6) testimony and documents regarding the health effects information, and this Court should overturn sections A.1 and B.1 of the Oct. 2011 Order.

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

In the Oct. 2011 Order, the Court erred in holding that Plaintiffs were not entitled to Rule 30(b)(6) testimony concerning the use of the DVA patients in testing conducted or funded by the CIA related to chemical and/or biological weapons. Plaintiffs have asserted due process claims against the DVA and allege that the DVA's involvement in testing programs makes the DVA an inherently biased decision-maker. (TAC ¶¶ 232-34.) The DVA and CIA were involved in multiple aspects of the experimentation program, such as the experiments conducted by the CIA in a DVA domiciliary in Martinsburg, Virginia. (TAC ¶¶ 148, 225-26). Yet in the Oct. 2011 Order, the Court held that Plaintiffs were not entitled to a Rule 30(b)(6) deposition from the CIA on this topic, because "Plaintiffs could seek this evidence through a Rule 30(b)(6) deposition directed at the DVA." (Oct. 2011 Order at 7.) The Court had no basis to conclude that the

[2] The CIA has not, however, produced the contents of these magnetic tapes, and their refusal to retrieve and produce this information is the subject of an ongoing dispute between the parties.

identical discovery was available from the DVA or to justify the withholding of discovery by the CIA of what it knows. While Rule 26(b)(2)(C) provides certain bases upon which the Court may limit the scope of discovery, none are present here. In the Oct. 2011 Order, the Court did *not* find that such a Rule 30(b)(6) deposition was outside the scope of discovery, nor did it find the discovery unreasonably cumulative or duplicative, nor did the Court find it overly burdensome to the CIA. Rather, the Court held that because similar evidence could be sought from one involved Defendant, the DVA, discovery against another party, the CIA, would not be permitted despite the prior order from Judge Larson. Plaintiffs respectfully submit that the Oct. 2011 Order incorrectly narrows the proper scope of discovery and blocks Plaintiffs from obtaining information that is highly relevant to Plaintiffs' claims against the DVA, and perhaps the CIA as well, that is clearly within the scope of permissible discovery. *See* Fed. R. Civ. P. 26(b)(1).

Accordingly, Plaintiffs are entitled to Rule 30(b)(6) testimony and documents regarding the health effects information, and this Court should overturn section A.2 of the Oct. 2011 Order.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court overturn sections A.1, A.2 and B.1 of the Magistrate Judge's order, dated October 5, 2011 (Dkt. No. 294), granting in part Defendants' Motion for Protective Order Limiting Discovery (Dkt. No. 252) and denying in part Plaintiffs' Motion to Compel Rule 30(b)(6) Depositions and Production of Documents (Dkt. No. 258) concerning discovery of the CIA.

Dated: October 24, 2011

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