GORDON P. ERSPAMER (CA SBN 83364)
GErspamer@mofo.com
EUGENE ILLOVSKY (CA SBN 117892)
EIllovsky@mofo.com
STACEY M. SPRENKEL (CA SBN 241689)
SSprenkel@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

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

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

NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION; MEMORANDUM OF POINTS AND AUTHORITIES

Hearing Date: March 15, 2012
Time: 2:00 p.m.
Courtroom: 2, 4th Floor
Judge: Hon. Claudia Wilken

Complaint filed January 7, 2009

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU ARE HEREBY NOTIFIED THAT on March 15, 2012 at 2:00 p.m., or as soon thereafter as counsel may be heard, before the Honorable Claudia Wilken in the United States District Court for the Northern District of California, located at 1301 Clay Street, Courtroom 2, 4th Floor, Oakland, California 94612, Plaintiffs, Vietnam Veterans of America; Swords to Plowshares: Veterans Rights Organization; Bruce Price; Franklin D. Rochelle; Larry Meirow; Eric P. Muth; David C. Dufrane, Wray C. Forrest; Tim Michael Josephs; and William Blazinski (collectively, "Plaintiffs"), will, and hereby do, move the Court for an Order certifying a class.

This motion is made pursuant to Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") on the grounds that Plaintiffs meet the requirements for class certification under Rule 23(a), Rule 23(b)(2), and Rule 23(b)(1)(A). This motion will be based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities and Declaration of Stacey Sprenkel filed herewith, and all other pleadings and matters of record, and such further oral and documentary evidence as may be presented at or before the hearing on this motion.

Plaintiffs attempted to negotiate a briefing schedule for this motion with Defendants. Defendants, however, refused to agree to a briefing schedule unless Plaintiffs agreed to other unrelated modifications to the case schedule. For that reason, this motion is set to proceed under the normal noticed motion briefing schedule set forth in the Northern District of California Local Rules.

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I. INTRODUCTION

The Court should certify the class in this case brought on behalf of many tens of thousands of current and former service members who were subjected to chemical and biological agent testing by the U.S. Military without their informed consent. Beginning as early as World War I, our government used its own service members as guinea pigs in dangerous chemical and biological weapons testing programs, and then cast them aside. Some service members were completely unwitting participants, while others were "volunteers" whose informed consent was never obtained. In the wake of these testing programs, many tens of thousands of service members were left without information regarding the toxic substances to which they were exposed or their health effects, without medical care, and paralyzed by secrecy obligations that prevented them from telling doctors about their exposures or from pursuing disability compensation. Defendants insist they owe no duties to these test participants and have refused to provide them with notice and necessary medical care. And for years, the Department of Veterans Affairs ("DVA"), itself an active participant in the test programs, has decided service-connected death and disability compensation ("SCDDC") claims using an unpublished set of standards that have resulted in the denial of nearly all claims of test participants. After years of fending for themselves, the aging members of the class have no option left but to seek redress from the Court.

Plaintiffs have raised constitutional and statutory claims, seeking declaratory and injunctive relief for Defendants' ongoing failures to provide notice and medical care, a release from secrecy oaths, and unbiased adjudication of their disability compensation claims. Plaintiffs seek certification of the following class as to all claims for relief in the Third Amended Complaint (the "Complaint") (Docket No. 180):

> Any current or former member of the armed forces, or in the case of deceased members, the personal representatives of their estates, who were test subjects in any human testing program involving chemical or biological substances, which was sponsored, overseen, directed, funded, and/or conducted by the Department of Defense or any branch thereof, including but not limited to the Department of the Army and the Department of the Navy, and/or the Central Intelligence Agency

between the inception of the testing programs in approximately 1922 and the present (hereinafter the "Proposed Class").[1]

This case is ideally suited for adjudication under Rule 23. The Proposed Class consists of at least tens of thousands of test participants for whom joinder in a single proceeding would be impossible. The representative Plaintiffs' claims are substantially similar and are based on legal theories identical to those of absent class members, and therefore are typical. The representative Plaintiffs and their counsel will fairly and adequately represent the absent class members' interests. And there are numerous legal and factual issues common to members of the Proposed Class that make class treatment the most effective and efficient way to adjudicate the claims. Those common issues include:

- The failure of the Department of Defense ("DOD") and the Army to fulfill their obligation to provide "Notice" to test participants. For purposes of this motion, "Notice" means notice to each test participant regarding the substances to which he or she was exposed, the doses to which he or she was exposed, the route of exposure (*e.g.*, inhalation, injection, dermal, etc.) and the potential health effects associated with those exposures or with participation in the tests;

- The failure of DOD and the Army to fulfill their obligation to provide medical care to members of the Proposed Class for any conditions arising out of their participation in the testing programs, including programs for medical monitoring;

- The failure of DOD, the Army, and the CIA to release class members from "Secrecy Oaths"[2] taken at the time of the testing; and

- The inability and failure of DVA to act as a neutral adjudicator of the SCDDC claims of members of the Proposed Class, as a result of DVA's involvement in the testing programs at issue, as well as DVA's own extensive testing programs involving the *same chemical and biological agents* to which members of the Proposed Class were exposed. DVA's bias is reflected in its unpublished rules for adjudicating claims arising out of participation in human testing programs, the false and misleading statements in "outreach letters" sent to members of the Proposed Class, and DVA's denial of *virtually all*

[1] The Proposed Class does not include persons who were exclusively test participants in Project 112/SHAD ("Shipboard Hazard and Defense").

[2] The term "Secrecy Oath" includes all promises or agreements, whether written or oral, and whether formal or informal, made by test participants after being told that they could never speak about their participation in the testing programs.

SCDDC claims by members of the Proposed Class who claim to have a health condition related to their participation in the testing programs.

These practices have served to deprive class members of the medical care to which they are entitled, denied them the ability to file a claim for service-connected disability compensation, and denied them a fair adjudication procedure that comports with due process. "It is well settled that class actions are an appropriate procedure in government benefit cases where statutes and policies are likely to have an impact upon a broad class of recipients." 7 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 23.7 (4th ed. Update 2011).

Certification of the Proposed Class is therefore not only appropriate, it is essential to vindicate the rights of test participants.

II. BACKGROUND

A. History of Chemical and Biological Testing on Military Personnel

"The U.S. has had an active chemical warfare program since World War 1." Declaration of Stacey Sprenkel ("Sprenkel Decl.") Ex. 1 at VET001_015677. "A significant part of this program involved experimentation with U.S. service member 'soldier volunteers,' which ended only in 1975."[3] *Id.* These experiments were designed for many purposes, such as to enhance U.S. defensive capabilities, to test the efficacy of new materials as potential riot control agents, and to evaluate the effectiveness of incapacitating and "brainwashing" agents. *Id.* "Human subjects were part of this program from the beginning." *Id.*

Although military personnel were used as test subjects as early as World War I, managers of the U.S. chemical weapons programs were first officially authorized to recruit and use human "volunteer" test subjects in 1942. *Id*. at VET001_015678, Sprenkel Decl. Ex. 4 at VET017_000694-96; Ex. 5. "By the end of World War 2, over 60,000 U.S. service members had been used as human subjects in the U.S. chemical warfare defense research program." Sprenkel Decl. Ex. 1 at VET001_015678. During this official program, "soldier volunteers" were commonly exposed to "acutely toxic levels (i.e., levels resulting in immediate signs and

[3] Some documents provided in discovery indicate that the testing may have continued into the 1980s or 1990s. Sprenkel Decl. Ex. 2; Ex. 3 at VET125-047490.

symptoms of poisoning) of agents via small drops applied to the arm or to clothing, or in gas chambers, sometimes without protective clothing . . . ." *Id.* Field tests were also conducted, in which test subjects passed through areas of land that had been treated with hazardous agents including sulfur mustard or lewisite. *Id.* ("Documented injuries . . . using various exposure routes was initially 'quite high.'")

After World War II, DOD's human experimentation programs continued, with a focus on newer and potentially more effective chemical warfare agents, including nerve agents, nerve agent antidotes, incapacitating agents, psychoactive agents such as LSD, and biological agents such as anthrax, plague, tularemia, and Q fever. Sprenkel Decl. Ex. 1 at VET001_015679, Ex. 6 at 101, 168-169, 199-216. Up to the late 1970s, as many as 100,000 participants, or "soldier volunteers," were exposed to more than 400 agents. Sprenkel Decl. Ex. 7, Ex. 8 at DVA003 021520, Ex. 9. Participants were required to swear to Secrecy Oaths and told that they could never speak about their participation, under threat of general court martial. Sprenkel Decl. Ex. 10 at 258:8-10; Ex. 11 at 101:8-11; Ex. 12 at 160:7-10; Ex. 13 at VET123-002593, 2606-2607; Ex. 1 at VET001_015682. The testing programs ended abruptly, leaving test subjects without necessary medical care and follow-up. Sprenkel Decl. Ex. 14.

Congress convened hearings regarding the testing programs between 1975 and 1977. In the 1975 Senate hearings, where Army and CIA representatives testified, Senator Ted Kennedy noted Defendants' "complete failure of notification" of test subjects and "tragic little follow-up" regarding potential medical complications arising from the testing. Sprenkel Decl. Ex. 15 at 144. In response, in 1979, the Army issued a series of memoranda delineating its obligations to test subjects. On August 8, 1979, Army General Counsel Jill Wine-Volner advised top Army officials regarding "Notification of Participants in Drug or Chemical/Biological Agent Research." Sprenkel Decl. Ex. 16. Wine-Volner, recognizing that the Army had a legal obligation to test participants, urged the quick implementation of a notification program, stating that its "legal necessity . . . is not open to dispute." *Id.* at VET123-004994. On September 24, 1979, Wine-Volner further advised the Director of the Army Staff that "[i]f there is reason to believe that any participants in such research programs face the risk of continuing injury, those participants should

be notified of their participation and the information known today concerning the substance they received." Sprenkel Decl. Ex. 17 at VET017-000279. On October 25, 1979, the Chief of Staff distributed this memorandum to the heads of the Army agencies, prescribing a list of tasks and assigning responsibilities to various entities. Sprenkel Decl. Ex. 18. Finally, on November 2, 1979, the Army informed Congress of this notification plan and the Surgeon General's intention to request that the National Academy of Sciences study the effects of the compounds used in the testing programs. Sprenkel Decl. Ex. 19 at VET030-022693. Despite repeatedly recognizing their legal obligations to test participants, Defendants DOD and the Army failed to implement the steps specified in the 1979 directives.

More than a decade later, in 1993, the National Institutes of Health ("NIH") Institute of Medicine published *Veterans at Risk: The Health Effects of Mustard Gas and Lewisite*, which spawned renewed interest in government-conducted research using human test subjects. Sprenkel Decl. Ex. 4 at VET017_000014-18. Under the direction of President Clinton, Congress, and the Secretary of Defense, DOD initiated the "Chemical Weapons Study Task Group (CWEST)." *Id.*; Sprenkel Decl. Ex. 20. Despite the intense, but short-lived, interest in the testing program during the early 1990s, Defendants did not actually provide Notice to any of the test participants. As political interest in the plight of test participants waned, efforts by Defendants to locate test participants were abandoned. Sprenkel Decl. Ex. 21 at 129:1-13, 129:23-130:1, 158:23-159:20.

Yet another decade passed, until 2002, when Congressional hearings occurred on one subset of DOD's testing programs — the Project 112/SHAD programs. Those hearings and a class action lawsuit led to Project 112/SHAD test participants being placed in Priority 6 Health Care at DVA, which means they receive free medical care from DVA for all conditions associated with their participation in the testing programs. Sprenkel Decl. Ex. 22 at 1. By contrast, Defendants still have not provided members of the Proposed Class with Notice or medical care, and class members are severely hampered in their ability to file SCDDC claims because of their lack of information and their perceived continued obligations to abide by Secrecy Oaths. Sprenkel Decl. Ex. 23 at 39:2-41:6; Ex. 24 at 156:11-19, 158:6-24; Ex. 25 at DVA003 00030.

B. Defendants' Ongoing Failures to Fulfill Obligations to Test Participants

Since 1953, Defendants' own regulations and directives have explicitly recognized their duty to provide Notice and medical care to all test participants. In February 1953, DOD issued a directive that purported to bring the government into compliance with the 1947 Nuremberg Code on medical research (the "Wilson Directive"). Sprenkel Decl. Ex. 26 at C-001-02. The Wilson Directive required that test participants be informed of "all inconveniences and hazards reasonably to be expected; and the effects upon [their] health or person which may possibly come from [their] participation in the experiment," and provided that adequate facilities be provided "to protect experimental subjects against even remote possibilities of injury, disability, or death." *Id.* at C-002-03. Later in 1953, the Department of the Army Office of the Chief of Staff issued Memorandum CS: 385, "Use of Volunteers in Research." Sprenkel Decl. Ex. 27. CS: 385 promised that "[m]edical treatment and hospitalization *will be provided* for all casualties of the experimentation as required." *Id*. at VVA 024544 (emphasis added).

In March 1962, the Army more formally codified these principles in Army Regulation 70-25, which concerned the Use of Volunteers as Subjects in Research ("AR 70-25"). Sprenkel Decl. Ex. 28. AR 70-25 set forth certain "basic principles" that "must be observed to satisfy moral, ethical, and legal concepts," including that each volunteer "will be fully informed of the effects upon his health or person which may possibly come from his participation in the experiment" and that "[r]equired medical treatment and hospitalization *will be provided* for all casualties." *Id.* at 1-2 (emphasis added). As this Court previously recognized in its January 19, 2010 Order denying Defendants' motion to dismiss in part, this regulation "suggests that Defendants had a non-discretionary duty to warn" the volunteers about the "nature of the experiments." *See* Docket No. 59 at 16. Indeed, the 1990 version of AR 70-25 contained a formal acknowledgment of the ongoing nature of the Army's "duty to warn":

> Duty to warn. Commanders have an obligation to ensure that research volunteers are adequately informed concerning the risks involved with their participation in research, and to provide them with any newly acquired information that may affect their well-being when that information becomes available. The duty to warn exists even after the individual volunteer has completed his or her participation in research.

Sprenkel Decl. Ex. 29 at 5. AR 70-25 also required the Army to create and maintain a "volunteer data base" to "ensure that the command can exercise its 'duty to warn.'" *Id.* at 13-14.

In 1991, DOD issued regulations adopting what is commonly referred to as the "Common Rule," which formally codified the same basic principles contained in the Wilson Directive. *See* 32 C.F.R. pt. 219. Then, in 2002, Congress passed Section 709 of the National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 709(c), 116 Stat. 2586 (2002), which "established a requirement to identify potentially exposed Service members and civilians during chemical and biological warfare tests conducted outside Project 112 from 1942 to present." Sprenkel Decl. Ex. 32 at DVA002 004549; s*ee also* Ex. 33 at VET021-000001.

These regulations, rules, and directives require Defendants DOD and the Army to provide to all members of the Proposed Class:

- Notice regarding their participation in the testing (where unknown);
- Notice regarding the substances and doses to which the test participant was exposed; and
- Notice regarding the possible health effects associated with exposure to those substances, and associated with participation in human testing.

A number of other regulations impose specific requirements governing Defendants' ongoing obligations respecting their human testing programs. Sprenkel Decl. Exs. 30, 31.

Despite their duty to do so, Defendants DOD and the Army have not provided members of the Proposed Class with Notice regarding their participation in the testing programs. In the mid-2000s, DOD partnered with DVA to conduct a limited "outreach" effort with regard to limited participants in the testing programs. In connection with this outreach effort, DOD and DVA made a policy decision *not to* inform test participants regarding the substances to which they were exposed, the dosages associated with those exposures, and the potential health effects. Sprenkel Decl. Ex. 24 at 255:7-24; Ex. 34 at DVA003 007673. In addition, Defendants *intentionally excluded tens of thousands of test participants* from their outreach effort, including tests at certain locations, tests involving certain substances (for example, gas mask or chamber tests involving chlorine), and tests involving particular routes of exposure, such as "drop tests" and "sniff tests." Sprenkel Decl. Ex. 35 at VET140-002111 ("DoD provides VA with list of test (sic) excluded

from being counted and standard denial criteria"); Ex. 36 at DVA003 006756 (DOD informing DVA that certain types of chemical and biological tests "do not count as exposures."); Ex. 37 at VET140-002119. These limited outreach efforts resulted in "outreach letters" being sent to fewer than 4,000 of the approximately 100,000 test participants, and approximately 10% of those letters were returned to sender. Sprenkel Decl. Ex. 38 at 75:7 - 76:9, 132:1-7; Ex. 39; Ex. 40 at 4.

Nor have Defendants DOD and the Army provided health care to test participants under their TriCare program, despite AR 70-25's clear mandate that "[r]equired medical treatment and hospitalization *will be provided* for all casualties." Sprenkel Decl. Ex. 28 at 2 (emphasis added). Instead, DOD and the Army take the position that they have no ongoing obligation to any of these veterans who were subjected to hazardous chemicals at the hand of their own government. Indeed, DOD's Rule 30(b)(6) designee, Dr. Michael Kilpatrick, testified that DOD's view is that each exposed veteran must prove causation before any of DOD's obligations are triggered, a quintessential catch-22. Sprenkel Decl. Ex. 41 at 481:25 – 484:10.

To make matters worse, the lack of information about test subjects' exposures has limited their ability even to get their own adequate health care from private providers. Defendants admit that without information about exposures, dosages, and health effects, test participants are at a significant disadvantage in their ability to prove a SCDDC claim. Sprenkel Decl. Ex. 23 at 39:2 – 41:6; Ex. 24 at 156:11-19, 158:6-24. *See also* Sprenkel Decl. Ex. 42 at DVA003 006437 (listing data that DVA "absolutely required" from DOD to adjudicate claims, including the test substance, "test dose," and "details of any exposure injuries"); Ex. 43 at 49:21 – 50:11. This lack of information, combined with Secrecy Oaths, has prohibited members of the Proposed Class from seeking much-needed medical care and disability compensation to which they are entitled.

C. DVA — Who Participated in the Testing Programs and Conducted Its Own Testing — Adjudicates Class Members' SCDDC Claims

Members of the Proposed Class are forced to turn to DVA, itself a participant in the testing programs, to decide the merits of their SCDDC claims. Sprenkel Decl. Ex. 44 at MKULTRA190090_0325; Ex. 45 at VET001_009241. DVA also has conducted human testing programs for years, in which subjects were exposed to the same substances tested by DOD and

the Army. Sprenkel Decl. Ex. 46 (excerpt of DVA Annual Reports describing DVA testing of, *inter alia*, LSD, Thorazine, and Mescaline). In filing a SCDDC claim, test participants must establish that their condition is at least as likely as not caused by their exposures during the testing programs. Sprenkel Decl. Ex. 47 at VET001_015127-28; *see generally, Reasonable Doubt*, 38 C.F.R. §3.102 (2012).[4] As a result of DVA's participation in testing programs, DVA has a keen interest in concluding that there are no long-term health effects resulting from the testing programs, and thus, an interest in denying test participants' claims.

DVA's structural bias is reflected in many ways, including:

- DVA's unpublished rules for adjudicating claims arising out of participation in human testing programs, Sprenkel Decl. Exs. 47, 48;
- Inaccurate and misleading statements in form "outreach letters" (*see, e.g.*, Sprenkel Decl. Exs. 51, 53-55) that DVA sent to class members, Sprenkel Decl. Ex. 52 (noting "significant inaccuracies"); and
- DVA's denial of *virtually all* SCDDC claims by members of the Proposed Class who claim to have a health condition related to their participation in the testing programs, as reflected in DVA's own reports on outreach efforts provided to Undersecretary for Benefits, Admiral Cooper. Sprenkel Decl. Ex. 40 at 4 (only "two of the 86 decisions . . . include a grant of service connection"); Ex. 56 at 11; Ex. 57 at 10.

D. Claims for Relief

The named Plaintiffs brought suit seeking class-wide injunctive and declaratory judgment relief. In particular, pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, Plaintiffs seek an order that Defendants DOD and the Army are required to fulfill their duties to provide test participants with Notice and with medical care for any conditions associated with participation in the testing programs.

Plaintiffs also seek relief for DOD, the Army, and the CIA's unconstitutional continuing failure to release participants fully and completely from the Secrecy Oaths imposed on them. Plaintiffs seek a declaration invalidating all Secrecy Oaths, and an injunction requiring Defendants to notify test participants that they are released from Secrecy Oaths.

[4] Survivors are also entitled to claim accrued disability compensation upon the death of a veteran. *See* 38 C.F.R. § 3.1000 (2012); 38 U.S.C. § 5121.

Plaintiffs also seek a declaration that DOD and the Army's continuing failure to provide Notice, medical care, and a release from Secrecy Oaths violates the substantive due process rights of class members. Test participants' lack of information regarding their exposures during the testing, combined with the Secrecy Oath, prohibits test participants from being able to access medical care — in violation of test participants' right to bodily integrity, protected under the Fifth Amendment to the United States Constitution. That test participants have no procedure by which to challenge this denial further violates the procedural due process rights of test participants.

Plaintiffs also seek a declaration that the combination of the Secrecy Oaths and the lack of Notice from Defendants DOD and the Army prohibit test participants from being able to file SCDDC claims with DVA, which violates test participants' right to access to the courts. Finally, Plaintiffs seek a declaration that DVA is a biased adjudicator of the claims of test participants, and seek an injunction requiring DVA to re-adjudicate the claims of members of the Proposed Class under fair and unbiased procedures.

III. STANDARDS FOR CLASS CERTIFICATION

A class may be certified if it meets the prerequisites of Rule 23, including: (1) numerosity, (2) commonality of law or fact, (3) typicality between the class claims and those of the named parties, and (4) adequacy of representation by the named parties and class counsel. Fed. R. Civ. P. 23(a).

"[T]he proposed class [also] must satisfy at least one of the three requirements listed in Rule 23(b)." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011). Because Plaintiffs seek to certify a class under Rule 23(b)(2), they must show that "the party opposing the class has acted or refused to act on grounds that apply generally to the whole class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Plaintiffs also satisfy Rule 23(b)(1)(A), because "the prosecut[ion] [of] separate actions by … individual class members would create a risk of inconsistent or varying adjudications . . . that would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A).

Courts should conduct a "rigorous analysis" to determine whether Rule 23 has been satisfied, which may "entail some overlap with the merits" of the underlying claim. *Wal-Mart*, 131 S. Ct at 2551-2. But as the Ninth Circuit recently cautioned in *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011), the district court need "examine the merits . . . only inasmuch as it must determine whether common questions exist; not to determine whether class members could actually prevail on the merits of their claims . . . . To hold otherwise would turn class certification into a mini-trial."

As discussed below, after conducting the necessary rigorous analysis, the Court should find that this action satisfies the requirements of Rule 23(a), 23(b)(2), and 23(b)(1)(A).

IV. ARGUMENT

A. Class Certification Is Appropriate Because Plaintiffs Satisfy Rule 23(a)

The Proposed Class and the Proposed Class Representatives satisfy all of Rule 23(a)'s requirements: (1) the size of the Proposed Class, combined with other factors, makes joinder of all class members impracticable; (2) the members of the Proposed Class share common questions of law and fact; (3) the claims of Tim Josephs, William Blazinski, and Vietnam Veterans of America ("VVA") are typical of those of the Proposed Class; and (4) Tim Josephs, William Blazinski, and VVA and their counsel will vigorously protect the Proposed Class's interests.

1. Joinder of All Members of the Class Is Impracticable

Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Generally, "classes numbering greater than 41 individuals satisfy the numerosity requirement." *Nat'l Fed'n of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1199 (N.D. Cal. 2007) (citing 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.22[1][b] (3d ed. 2004)). Here, the Proposed Class has at least tens of thousands of members. Defendants admit that as many as 100,000 military personnel, at numerous facilities over several decades, were subjected to the testing programs.[5] Sprenkel Decl. Ex. 7.

[5] Defendants' Answer to Paragraph 103 of the Second Amended Complaint does not deny the use of human subjects in chemical warfare experiments at Camp Siebert, Alabama; Bushnell, Florida; Dugway Proving Ground, Utah; and off the coast of Panama near the Panama Canal Zone. (Docket No. 74 ¶ 103.) Discovery has revealed additional test locations, including Fort

(Footnote continues on next page.)

Accordingly, the number of class members makes joinder of all class members impracticable.[6]

2. There Are Numerous Questions of Law and Fact Common to the Class

To satisfy the commonality requirement, class members' claims "must depend upon a common contention." *Wal-Mart*, 131 S. Ct. at 2551. And that common contention "must be of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* The Supreme Court made clear that "*even a single [common] question will do*." *Id.* at 2556 (emphasis added) (quotations omitted).

"[C]ommonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (citations omitted). Where a class challenges a system-wide practice or policy, "individual factual differences among the individual litigants or groups of litigants will not preclude a finding of commonality." *Id.* Where "broad discriminatory policies and practices constitute the gravamen of a class suit, common questions of law or fact are necessarily presented." *Midwest Cmty. Council v. Chicago Park Dist.*, 87 F.R.D. 457, 460 (N.D. Ill. 1980) (citation omitted); *see also Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D 439, 448 (N.D. Cal. 1994).

Defendants have systematically applied the policies and practices challenged in this action to delay or deny Notice and medical care. The present class action seeks declaratory and

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(Footnote continued from previous page.)

Detrick, Naval Research Laboratory, Maryland; Fort McClellan, Alabama; Rocky Mountain Arsenal, Colorado; Fort Bragg, North Carolina; Fort Benning, Georgia; USAATRC, Fort Greely, Alaska; Horn Island Installation, Mississippi; Walter Island; Virgin Islands; Marshall Islands; Hawaii; England; Maryland; Yuma Proving Ground, Arizona; Fort Pierce, Florida; Dry Tortugas, Florida Keys; Gulfport, Mississippi; San Carlos, California; New Guinea; Camp Polk, Louisiana; El Centro, California; Fort Richardson, Alaska; and San Jose Island. Sprenkel Decl. Ex. 58 at 4-6; Ex. 59 at VET122-001617-18; Ex. 60 at VET123-004123.

[6] Further, there is no possibility of all the class members bringing separate suits individually. The necessary implication of Defendants' failure to provide notice is that *many members of the class may not know that they were exposed to chemical or biological agents.* It is also possible that many class members will not bring separate suit individually because they believe they remain bound by the very secrecy oaths that Plaintiffs now seek to have declared invalid and unenforceable. Further, the class is a geographically diverse and aging group of veterans, many of whom have debilitating health conditions, and some of whom are dying.

injunctive relief with respect to the practices of Defendants who acted uniformly against all members of the class. Cases combining challenges to uniform practices with requests for declaratory or injunctive relief by their very nature deal with common questions of law and fact. 7A Wright, Miller & Kane, *Fed. Prac. & Proc. Civ.* § 1763 (3d ed. Update 2011). Classes are routinely certified in cases involving constitutional and statutory challenges to agency actions and inactions. *Dominguez v. Schwarzenegger*, 270 F.R.D. 477, 486 (N.D. Cal. 2010) (certifying class alleging agency failed to fulfill its legal obligations); *Roshandel v. Chertoff*, 554 F.Supp.2d 1194, 1203 (W.D. Wash. 2008) (where plaintiffs "challenge the legality of the same government program, they inherently share common issues"); *Cyrus v. Walker*, 233 F.R.D. 467 (S.D. W. Va. 2005).

All of Plaintiffs' claims have common issues of law and fact for all members of the Proposed Class.

a. APA Claims for Notice and Medical Care

Plaintiffs' APA claims are based on a common contention: that Defendants have a legal duty to provide members of the Proposed Class with Notice and with medical care for conditions arising out of their participation in Defendants' human testing programs. As the Supreme Court envisioned in *Wal-Mart*, the determination of the truth or falsity of these contentions will resolve an issue that is central to the claims of each member of the Proposed Class. *See Wal-Mart*, 131 S. Ct. at 2551. Thus, Plaintiffs' claims are ideal for resolution on a class-wide basis.

Section 706(1) of the APA requires reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Plaintiffs seek to compel *discrete* actions that the agencies are *required to take*. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). The resolution of Plaintiffs' APA claims will turn on two central questions:

(1) Whether Defendants DOD and the Army have a duty to provide members of the Proposed Class with Notice and medical care; and

(2) Whether Defendants DOD and the Army have fulfilled these duties.

Not only are these questions common to the class; the answers are common as well. Plaintiffs point to regulations, rules, directives, and instructions governing Defendants' testing programs

and establishing Defendants' obligations to subjects of medical or scientific research. *See* Section II.B, *supra*. Plaintiffs contend that these regulations, rules, and directives require Defendants DOD and the Army to provide to all members of the Proposed Class:

- Notice regarding their participation in the testing (where unknown);
- Notice regarding the substances and doses to which the test participant was exposed; and
- Notice regarding the possible health effects associated with exposure to those substances and associated with participation in human testing.

Plaintiffs also contend that these same regulations, rules, and directives require DOD and the Army to provide "medical treatment and hospitalization … for all casualties" arising from participation in Defendants' testing programs. Sprenkel Decl. Ex. 28 at 2.

The Court already has found that "Army regulation [70-25], buttressed by [a] DOJ opinion, suggests that Defendants had a non-discretionary duty to warn the individual Plaintiffs about the nature of the experiments." *See* Docket No. 59 at 16. The Court also found that AR 70-25 creates an ongoing obligation to provide test participants with medical care, regardless of whether symptoms appeared at the time of testing or decades later. *Id.* at 17. These determinations are not specific to any individual, but rather are legal conclusions regarding the scope of DOD and the Army's duties to the entire Proposed Class. Thus, the question of Defendants' obligations to the Proposed Class and the answer to that question are common, and appropriate for class-wide resolution. In fact, DOD and the Army have acknowledged the existence of common issues by promulgating regulations applicable to all test participants.

Similarly, the question of whether DOD and the Army have fulfilled these legal obligations is also common to the Proposed Class. There is no dispute that DOD and the Army *have not* provided members of the Proposed Class with Notice. Neither DOD nor the Army has informed members of the Proposed Class regarding the substances to which they were exposed, the doses associated with those exposures, and the potential health effects that may result. And there is no dispute that DOD and the Army *have not* provided medical care to members of the Proposed Class. DVA has successfully asserted that it has no legal duty to provide Notice. The

other Defendants' position is not that they have fulfilled their obligations, but rather that *they have no obligations to any members of the Proposed Class.* Thus, resolution of this central — and common — question will resolve this issue as to the entire class, and any resulting declaratory and/or injunctive relief will also be common to the entire class.

b. Constitutional Claims for Release of Secrecy Oath, Notice and Medical Care

The Proposed Class is not only entitled to a remedy under the APA, but also under the United States Constitution.

(i) Secrecy Oaths

Plaintiffs seek a declaration that the Secrecy Oaths taken by members of the Proposed Class — whether written or oral — are invalid, and an injunction requiring Defendants DOD, the Army, and the CIA to notify test participants that they are released from any Secrecy Oaths.

The issue of the validity of any Secrecy Oaths taken by class members is common to the class. Because no test participant was provided with information sufficient to enable informed consent, the Secrecy Oaths should be deemed invalid *ab initio*. Sprenkel Decl. Ex. 15 at 161-162. Defendants — in internal memoranda — have already purported to release test participants from any Secrecy Oath obligations. Sprenkel Decl. Exs. 20, 33. Yet these releases were partial and qualified. The Perry Memo purported to provide a complete release to all participants in tests predating 1968, but did not address participants in post-1968 tests. Sprenkel Decl. Ex. 20 at VET001_011181. The 2011 Memo — apparently drafted in response to this litigation — purports to release *all* test participants, but is qualified, allowing participants to speak only to health care providers and only about some aspects of testing. Sprenkel Decl. Ex. 33 at VET021-000001; Ex. 62. In addition to their limited and qualified nature, *neither release was communicated to members of the Proposed Class.* And once again, both releases are generic, thus underscoring the fact that Defendants view the issues here as common.

The remedy for these wrongs also would be common to the class. In fact, as the Court has already noted, "a declaration concerning the lawfulness of the consent forms, to the extent that they required the individual Plaintiffs to take a Secrecy Oath, would redress their alleged

injuries." Docket No. 59 at 12. And such a declaration would redress the injuries of the entire Proposed Class.

(ii) Due Process and First Amendment Claims

Plaintiffs' Constitutional claims fall into four familiar and well-defined areas within Due Process and First Amendment jurisprudence — (i) procedural due process and application of the *Mathews v. Eldridge*, 424 U.S. 319 (1976), balancing test; (ii) substantive due process, including the right to bodily integrity; (iii) an agency's violations of its own rules and procedures; and (iv) the right of access to the courts. Each of these claims raises common issues of law and fact.

The factual issues underpinning these due process claims are overlapping and involve issues such as:

- Whether Defendants provided Notice to and obtained the informed consent of test participants, adopted reasonable testing protocols and procedures, and complied with their obligations to adopt procedures for continued medical care and treatment of casualties;
- Whether Defendants implemented reasonable procedures to monitor and provide follow-up care to test subjects who experienced physical and/or mental health problems or otherwise became casualties of their participation in the tests;
- Whether Defendants complied with the procedures set forth in their own regulations[7] regarding Notice, monitoring, medical follow-up, the creation of a participant database, and their ongoing duty to warn and provide health care for casualties;
- Whether Defendants' failure to provide Notice and a release from Secrecy Oaths has violated class members' constitutional rights — *e.g.*, by preventing them from communicating with their health care providers, thus interfering in the doctor-patient relationship and depriving class members of access to medical care; and
- The effects of Defendants' acts and failures to act upon the ability of test subjects to obtain redress for their grievances.

Defendants' failures to provide Notice to members of the proposed class and exaction of secrecy obligations have infringed Plaintiffs' property and, in some cases, life interests under the Fifth

[7] *See United States v. Braswell*, No. 98-30198, 2000 U.S. App. LEXIS 5965, at *3 (9th Cir. Mar. 30, 2000) (citing *Sameena Inc. v. United States Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998)) (An agency's failure to follow its own regulations may violate due process where a procedure is intended to protect the interest of a party before the agency.).

Amendment. Defendants also prevented class members from adequately obtaining their own medical care (a clear deprivation of the right to bodily integrity).

The relief Plaintiffs seek is also common to the class: a declaration that their Constitutional rights are being violated, and an injunction requiring Defendants to release class members from Secrecy Oaths, and to provide constitutionally sufficient notice to class members. Moreover, there are *no procedures*, let alone constitutionally adequate procedures, by which class members can challenge these deprivations of Notice, medical care, and release from Secrecy Oaths. As the Supreme Court counseled in *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985), procedural due process analysis looks to the generality of claims, and asks whether the existing procedural safeguards are sufficient. Where there are no procedural safeguards, that analysis is simple and common to the class.

Defendants' failures to provide Notice to class members, and to release class members from Secrecy Oaths, have effectively prevented them from pursuing SCDDC claims with DVA. This is a deprivation of the right to access to the courts. Common questions include:

- Whether members of the class have a right to access to the courts protected by the First Amendment and the Due Process Clause of the Constitution;
- Whether Defendants have provided Notice to class members;
- Whether Defendants have notified class members that they are released from Secrecy Oaths; and
- Whether Defendants' failure to provide Notice and a release from Secrecy Oaths has impeded class members' ability to file SCDDC claims with DVA, thus depriving class members of access to the courts.

An injunction requiring DOD and the Army to provide Notice and information about testing, and a release from Secrecy Oaths, to members of the Proposed Class would redress the injuries of the entire class, and permit those class members who either lack knowledge of exposure and/or remain bound by Secrecy Oaths to seek medical care and pursue SCDDC claims with DVA or other remedies.

Courts routinely certify classes challenging the constitutionality of agency policies and procedures. *See, e.g., Jaegel v. Cnty. of Alameda*, No. C 09-00242 CW, 2010 U.S. Dist. LEXIS

5125, at *14-16 (N.D. Cal. Jan. 22, 2010) (certifying class where "the real issue in th[e] case [was] the constitutionality of the policies and practices of the [Defendants] which were applied to all class members."); *La Duke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985) (case challenging constitutionality of INS procedure "plainly" raised common questions of law and fact); *Rodriguez v. Hayes*, 591 F.3d 1105, 1123 (certifying class to "answer comprehensively in a class setting [] constitutional question[s] . . . at the center of the proposed class's claims"); *Cyrus v. Walker*, 233 F.R.D. at 467 (certifying class in case alleging that changes in Medicaid home and community-based eligibility determination processes led to termination of benefits in violation of due process); *Diaz v. Hillsborough Cnty. Hosp. Auth.*, 165 F.R.D. 689, 693 (M.D. Fla. 1996) (certifying class alleging lack of informed consent in medical experiments violated due process.)

(iii) Constitutional Claim That DVA Is a Biased Adjudicator

Plaintiffs contend that DVA's participation in the testing programs and DVA's own extensive testing programs over several decades, which have involved testing many of the same substances that were tested on members of the Proposed Class, makes DVA an impermissibly biased adjudicator of the disability compensation claims of test participants. This is because DVA has an interest in determining that there are no long-term health effects from the testing that it was involved with and conducted. And this interest undermines DVA's statutory obligation to determine whether test participants have medical conditions that are at least as likely as not to have been caused by their exposures or participation in the testing programs.

There are questions relating to DVA's bias that are common to the entire Proposed Class:

- Whether DVA was involved in the testing programs; and
- Whether DVA's own testing programs involved many of the same substances at issue in this litigation.

Moreover, the evidence of the manifestation of DVA's bias is common to the class. For example, DVA made a policy decision to send generic outreach letters to class members. *See* Sprenkel Decl. Exs. 51, 53-55. The use of generic letters is an admission that DVA considers the issues to be common. Moreover, DVA's unpublished adjudication procedures for class members, set forth in "training letters," are also rules of general applicability to the members of the class — further

evidencing that DVA considers these issues to be common. Sprenkel Decl. Exs. 47, 48. Similarly, DVA's use of generic "information letters" to provide information to clinicians regarding the testing programs further underscores that the issues here are common. Sprenkel Decl. Exs. 49, 50.

There will be no need to examine the practices of individual adjudicators or individual regional offices, nor is there a need to examine the facts of any specific veteran's case. *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988) (finding class-wide claims for injunctive and declaratory relief based on Secretary's failure to follow the law in the adjudication of claims did not depend on individual facts of each case, and the fact that "the claims of individual class members may differ factually should not preclude certification under Rule 23(b)(2) of a claim seeking the application of a common policy"). The question (and answer) of whether DVA is a neutral adjudicator as required under the Due Process Clause of the Fifth Amendment is a question common to the entire Proposed Class. And to prove this claim, Plaintiffs will rely solely on evidence that is applicable across the class, including evidence of DVA's policies and procedures, DVA's knowledge of health effects resulting from the testing and failure to provide that information in its generic outreach letters to veterans, and DVA's own reports showing that the SCDDC grant rate for test participants is extremely low (indeed much lower than the average grant rate for all veterans). Sprenkel Decl. Ex. 40 at 4; Ex. 56 at 11; Ex. 57 at 10; Ex. 63 at DVA002 025799 ("These claims resulted in very few grants.").

The *Wal-Mart* Court recognized that where an "employer 'used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly *would satisfy the commonality and typicality requirements of Rule 23(a).*'" *Wal-Mart*, 131 S.Ct. at 2553 (emphasis added) (citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. at 159, n. 15, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)). In *Wal-Mart*, the plaintiffs were unable to identify any specific policies that tied the claims of class members together. *Id.* at 2555-56. By contrast, Plaintiffs claim here that DVA's bias is uniform across the class, and is evidenced by policies and procedures that apply across the class. *See Kendrick v Sullivan*, 784 F. Supp. 94, 104-106

(S.D.N.Y. 1992) (granting certification of a class claiming that a biased adjudicator denied them of the right to a fair hearing.)

To be clear, Plaintiffs do not seek any particular outcome for any particular class member. Plaintiffs do not ask the Court to find that any particular class member has any particular health outcome, or is entitled to any particular health care, or any particular decision on a SCDDC claim. Rather, Plaintiffs ask the Court to find that Defendants are failing to fulfill their duties as to all class members, and that Defendants' policies and practices violate the constitutional rights of all class members. The commonality requirement of Rule 23(a) is thus satisfied.

3. Tim Josephs's and William Blazinski's Claims Are Typical of Those of the Proposed Class

To show typicality under Rule 23(a)(3), a Plaintiff must show "there is a nexus between the injury suffered by the plaintiff and the injury suffered by the class." *Jordan v. Cnty. of Los Angeles*, 669 F.2d 1311, 1321 (9th Cir.), *vacated on other grounds*, 459 U.S. 810 (1982). Where challenged conduct is a policy or practice that affects all class members, as here, "[t]he test for typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named Plaintiffs, and whether other class members have been injured by the same course of conduct." *Dominguez v. Schwarzenegger*, 270 F.R.D. 477, 486 (N.D. Cal. 2010) (citation omitted). Messrs. Josephs and Blazinski meet this requirement.

This action is based on conduct by Defendants that is not unique to the named Plaintiffs; rather, Defendants' failures are common to the entire class. And many other class members — at least tens of thousands in fact — have been injured by the same course of conduct.

In this case, the injuries claimed by Tim Josephs and William Blazinski and those suffered by the class are identical: both Mr. Josephs and Mr. Blazinski were participants in the testing programs during their service in the military. Sprenkel Decl. Ex. 11 at 78:4-21; Ex. 12 at 70:2-12. In the aftermath of the testing programs, Messrs. Josephs and Blazinski were both denied the Notice to which they were entitled, medical care, a release from Secrecy Oaths, and a neutral adjudicator. Complaint (Docket No. 180) ¶¶ 201-219, 223-228.

The claims of Mr. Josephs and Mr. Blazinksi are typical of all members of the Proposed Class in that both Mr. Josephs and Mr. Blazinski, due to the challenged policies and practices of Defendants:

- have been subject to participation in Defendants' testing programs, Sprenkel Decl. Ex. 12 at 70:2-12; Ex. 11 at 78:4-21;
- did not provide informed consent and were told that they must keep the testing programs a secret, Sprenkel Decl. Ex. 12 at 115:6-9, 160:7-10; Ex. 11 at 97:8-11, 101:8-11;
- have not been provided Notice or medical care from DOD or the Army, Complaint ¶ 210; Sprenkel Decl. Ex. 11 at 107:4-6, 122:16-19; Ex. 12 at 221:17-20;
- have had SCDDC claims adjudicated by a biased adjudicator, Sprenkel Decl. Ex. 11 at 113:11-22; Ex. 12 at 216:17-20; Complaint ¶ 221; and
- have suffered from the inability to tell even their medical doctors about their experiences in testing programs, Sprenkel Decl. Ex. 12 at 32:1-3; Ex. 11 at 104:15-105:1; Complaint ¶¶ 211-212, 221.

Neither Mr. Josephs nor Mr. Blazinski has any interest antagonistic to or in conflict with the interests of the class members they seek to represent. In fact, Mr. Blazinski, Mr. Josephs, and the entire class share a common goal. They all want DOD and the Army to provide them notification regarding their exposure and all known health effects; they all want medical care for any conditions arising out of their participation in testing programs; they all want a fair and neutral adjudication of their claims for statutorily mandated disability compensation; and they all want to be released fully and finally from any Secrecy Oaths administered by Defendants.

4. VVA's Claims Are Typical of Those of the Proposed Class

VVA's claims also are typical of those of the Proposed Class. VVA is a national veterans' organization with a membership over 65,000 members. Sprenkel Decl. Ex. 66. Several of VVA's 65,000 members were test subjects in the experiments at issue. Sprenkel Decl. Ex. 68 at 30:16 – 31:6; Ex. 12 at 70:2-12, 100:22 – 101:8; Ex. 69 at 27:11-21; Ex. 70 at 31:23 – 32:5; Ex. 71 at 22:9-19; Ex. 72 at 25:6-19; Ex. 73 at 1-2. Accordingly, VVA has "representational standing" to bring the instant lawsuit, in which its standing arises vicariously from the standing of its members who fall within the Proposed Class: "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right .

. . ." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000); *see also Int'l News Serv. v. Associated Press*, 248 U.S. 215, 233 (1918). Therefore, as long as it has members who have claims that are typical of the Proposed Class, VVA will satisfy the typicality requirement. *See Cal. Rural Legal Assistance v. Legal Servs. Co.*, 917 F.2d 1171, 1175 (9th Cir. 1990) (rejecting argument that unions cannot be class representatives of class composed of newly legalized aliens because the unions are not class members as being "without merit, since, in their associational capacity, the unions are acting on behalf of section 245A legalized aliens"). VVA's membership does in fact include members of the Proposed Class. Sprenkel Decl. Ex. 68 at 30:16-31:6; Ex. 12 at 70:2-12, 100:22 – 101:8; Ex. 69 at 27:11-21; Ex. 70 at 31:23 – 32:5; Ex. 71 at 22:9-19; Ex. 72 at 25:6-19; Ex. 73 at 1-2.

Each member of the Proposed Class, like each named Plaintiff, was used as a human test subject by Defendants while he or she was a member of the U.S. military. Two of the named Plaintiffs are also members of VVA. Sprenkel Decl. Ex. 12 at 55:19 – 56:13; Ex. 68 at 21:17-22:5; Ex. 73 at 1. The claims of these named Plaintiffs are typical of the Proposed Class: pursuant to their military service, they participated in Defendants' testing programs, and therefore Defendants have a duty to provide them Notice, medical care for any conditions arising out of their participation, and a neutral adjudicator for their disability compensation claims. Accordingly, because some of the named individual Plaintiffs have claims that are typical of the Proposed Class and are also members of VVA, VVA through its representational capacity satisfies the typicality requirement for the Proposed Class. *See Cal. Rural Legal Assistance*, 917 F.2d at 1175.

5. The Proposed Class Representatives and Class Counsel Will Fairly and Adequately Protect the Interests of the Proposed Class

The Proposed Class representatives will vigorously prosecute this case and "fairly and adequately protect the interests of the" Proposed Class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (citing Fed. R. Civ. P. 23(a)(4)). Not only are there no conflicts of interest between Tim Josephs, William Blazinski, VVA, and the class members, but VVA and its counsel have already shown their ability to handle, and willingness to participate in, significant

and complex litigation on behalf of veterans. There are no conflicts among the members of Proposed Class, who are by definition veterans, and VVA, a national veterans' organization dedicated to advocating for and litigating on behalf of veterans. *E.g.*, Sprenkel Decl. Ex. 66.

Moreover, VVA is particularly well positioned to vigorously prosecute this action on behalf of the Proposed Class. VVA is a national organization that has been in existence for 34 years with 65,000 members and 650 chapters in 48 states. *Id*. As such, VVA not only has the resources commensurate with a large, national organization, it has already accumulated considerable litigation experience having regularly used its resources to litigate on behalf of veterans. *Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654 (D.C. Cir. 2010) (constitutional challenge regarding the adjudication of PTSD claims); *Nehmer v. U.S. Dep't of Veterans Affairs*, 494 F.3d 846 (9th Cir. 2007) (constitutional challenge regarding Agent Orange exposure).

Similarly, VVA's counsel has the experience and resources to vigorously represent the interests of the Proposed Class. The Proposed Representatives are capable of prosecuting this action vigorously, and the Proposed Class will be represented by attorneys from Morrison & Foerster LLP (Morrison & Foerster) on a *pro bono* basis. Morrison & Foerster has more than 1,000 lawyers in 15 offices in the United States, Asia, and Europe. Sprenkel Decl. Ex. 67. Moreover, lead counsel will be Gordon Erspamer, who has represented veterans and veterans' organizations in a number of prior cases, including acting as class counsel in a class action on behalf of veterans challenging the validity and application of a federal statute limiting attorney fees in SCDDC claims, *Nat'l Ass'n of Radiation Survivors v. Walters*, 111 F.R.D. 595 (1986), and as counsel representing two veterans' organizations in an action challenging DVA's failures to provide timely mental health care and disability compensation determinations for veterans. *See Veterans for Common Sense v. Shinseki*, 644 F.3d 845 (9th Cir. 2011). Accordingly, there can be no dispute that the proposed representatives and counsel for the Proposed Class have the ability, resources, and motivation to vigorously pursue the current case on behalf of the Proposed Class.

B. The Proposed Class Satisfies the Requirements of Rule 23(b)

Plaintiffs need satisfy only one of the three prongs of Rule 23(b). As demonstrated below, Plaintiffs clearly meet the requirements of Rule 23(b)(2) and Rule 23(b)(1)(A).

1. Defendants Have Acted on Grounds Generally Applicable to the Entire Class, Making Final Injunctive and Declaratory Relief Appropriate with Respect to the Class as a Whole

Rule 23(b)(2) provides for class certification where Defendants have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Where, as here, the primary purpose in bringing the action is to seek injunctive relief, the action is properly certifiable under Rule 23(b)(2). *See Elliott v. Weinberger*, 564 F.2d 1219, 1228 (9th Cir. 1977); *Baby Neal v. Casey*, 43 F.3d 48, 58-59 (3d Cir. 1994); *Stolz v. United Bhd. of Carpenters and Joiners of Am.*, 620 F. Supp. 396, 407 (D. Nev. 1985).

Under Rule 23(b)(2), courts are not required "to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez v. Hayes*, 578 F.3d 1032, 1051 (9th Cir. 2009); *see also Cyrus*, 233 F.R.D. 467; *M.A.C. v. Betit*, 284 F. Supp. 2d 1298 (D. Utah 2003) (certifying class of disabled Medicaid recipients challenging the denial of Medicaid waiver services as a violation of federal law). "It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." *Jaegel v. Cnty. of Alameda*, No. C 09-00242 CW, 2010 U.S. Dist. LEXIS 5125, at *15-16 (N.D. Cal. Jan. 22, 2010) (quoting *Walters v Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)).

Defendants' failures to fulfill their legal obligations to the test participants apply uniformly across the Proposed Class, as all class members were participants in human testing programs, were denied Notice and medical care, and had their constitutional rights violated by the Secrecy Oaths. Thus, all members of the Proposed Class are at risk of severe harm on account of Defendants' unlawful acts and failures to act. Similarly, Defendants have violated the constitutional rights of every member of the Proposed Class. All class members are entitled to due process, and DVA's failure to act as a neutral adjudicator of class members' claims violates all class members' rights — regardless of the outcome of any particular claim. Plaintiffs seek only declaratory and injunctive relief to require Defendants to fulfill their obligations to the entire

class, and to provide a neutral adjudicator — a fundamental tenet of procedural due process — to all test participants and their survivors.

2. The Proposed Class Satisfies Rule 23(b)(1)(A)

Class actions certified under Rule 23(b)(1)(A) "encompass[] cases in which the defendant is obligated to treat class members alike," such as this one. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 412 (5th Cir. 1998). Plaintiffs seek injunctive relief with respect to Defendants' policies and procedures. Because separate actions brought by individual members of the Proposed Class would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendants, class certification under Rule 23(b)(1)(A) is appropriate. For instance, a determination by a court that any plaintiff's rights were violated under federal law, or that Defendants owed a duty to any plaintiff, would create a risk of an inconsistent determination in a lawsuit brought separately by other putative class members. There is also a risk that individual determinations would result in varying obligations for Defendants as to different test participants. Thus, class treatment is appropriate.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court certify the Proposed Class, designate William Blazinski, Tim Josephs, and VVA as the Representatives of the Proposed Class, and appoint their attorneys as class counsel.

Dated: February 9, 2012

GORDON P. ERSPAMER
EUGENE ILLOVSKY
STACEY M. SPRENKEL
MORRISON & FOERSTER LLP

By: /s/ Gordon P. Erspamer
GORDON P. ERSPAMER

Attorneys for Plaintiffs