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16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA
 18 OAKLAND DIVISION

19 VIETNAM VETERANS OF AMERICA, *et al.*,
 Plaintiffs,
 20 v.
 21 CENTRAL INTELLIGENCE AGENCY, *et al.*,
 Defendants.

Case No. CV 09-0037-CW

**DECLARATION OF JOSHUA E.
 GARDNER IN SUPPORT OF
 DEFENDANTS' OPPOSITION TO
 PLAINTFFS' MOTION TO COMPEL**

1 I, Joshua E. Gardner, declare as follows:

- 2 1. I am a Trial Attorney in the Federal Programs Branch, Civil Division of the United States
3 Department of Justice. I represent Defendants in this case. I submit this declaration in
4 support of Defendants' Opposition to Plaintiffs' Motion to Compel. This declaration is
5 based on my personal knowledge and on information provided to me in my official
6 capacity.
- 7 2. The parties have taken approximately 40 depositions in this case and Defendants have
8 produced approximately 2 million pages of documents and have responded to hundreds of
9 requests for admissions.
- 10 3. Defendants provided Plaintiffs with a privilege log on February 11, 2011, reflecting the
11 privilege assertions made by the Department of Defense, the Department of the Army
12 (collectively "DoD"), and the Central Intelligence Agency ("CIA").
- 13 4. On September 13, 2011, at the request of Plaintiffs, DoD provided Plaintiffs with a
14 "consolidated" privilege log that separately identified the documents being withheld only
15 by DoD.
- 16 5. The September 13, 2011 privilege log included the two technical reports that were
17 contained on the February 2011 privilege log, and also included an entry for the magnetic
18 tapes.
- 19 6. On November 8, 2011, DoD provided Plaintiffs with a supplemental privilege log that
20 included a draft document withheld on work product grounds concerning Battelle
21 Memorial Institute.
- 22 7. On January 10, 2012, less than one month after DoD produced responsive, non-privileged
23 emails and attachments, DoD provided Plaintiffs with an updated, consolidated privilege
24 log. The only additions to this privilege log were the responsive, privileged documents
25 obtained by DoD during the recent additional search for emails and attachments.
- 26 8. On January 30, 2012, DoD provided an updated consolidated privilege log which revised
27 several entries in response to questions raised by Plaintiffs and which indicated that, upon
28

- 1 further review, 13 previously logged documents would be produced either in full or in
2 part.
- 3 9. On December 16, 2011, DoD produced responsive, non-privileged emails and attachments
4 from Roy Finno and Arnold Dupuy.
- 5 10. On December 19, 2011, DoD produced the responsive, non-privileged documents from
6 Norma St. Claire.
- 7 11. On December 22, 2011, DoD produced responsive, non-privileged emails from Dee
8 Dodson Morris.
- 9 12. On December 23, 2011, DoD produced responsive, non-privileged documents from Dr.
10 Kelly Brix.
- 11 13. On January 17, 2012, based upon its continuing privilege review, DoD produced a small
12 number of additional documents from Dr. Brix and Roy Finno.
- 13 14. On January 23, 2012, based upon its continuing privilege review, DoD produced a small
14 number of additional emails and attachments concerning Dee Dodson Morris.
- 15 15. Attached hereto as **Exhibit 1** is a true and accurate copy of a May 18, 2010 letter from
16 former counsel for Defendants Caroline Lewis Wolverton to counsel for Plaintiffs Gordon
17 Erspamer.
- 18 16. Attached hereto as **Exhibit 2** is a June 14, 2011 letter from Timothy W. Blakely to Joshua
19 E. Gardner.
- 20 17. Attached hereto as **Exhibit 3** is an April 14, 2011 letter from Gordon P. Erspamer to
21 Joshua E. Gardner.
- 22 18. Attached hereto as **Exhibit 4** is a true and accurate copy of excerpts of the July 6, 2011
23 deposition transcript of Department of Defense employee Dee Dodson Morris.
- 24 19. Attached hereto as **Exhibit 5** is a true and accurate copy of excerpts of the July 6-8, 2011
25 deposition transcript of Department of Defense employee Dr. Michael Kilpatrick.
- 26 20. Attached hereto as **Exhibit 6** is a true and accurate copy of the Department of Veterans
27 Affairs' ("VA") August 14, 2006 Information Letter 10-2006-010 (VET001_015606-09),
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1 which has been used as a deposition exhibit in numerous VA and DoD depositions in this
2 case as Exhibit 275.

3 21. Attached hereto as **Exhibit 7** is a true and accurate copy of a July 7 and July 10, 2006
4 email chain between DoD employee Dr. Kelley Brix and former VA employee Dr. Mark
5 Brown (VET140_000723), which has been used as a deposition exhibit in this case as
6 Exhibit 751.

7 22. Attached hereto as **Exhibit 8** is a true and accurate copy of excerpts of the June 29, 2011
8 deposition transcript of VA employee Joe Salvatore.

9 23. Attached hereto as **Exhibit 9** is a true and accurate copy of excerpts of the January 24-25,
10 2012 deposition transcript of former VA employee David Abbot.

11 24. Attached hereto as **Exhibit 10** is a true and accurate copy of the VA notification letter to
12 Cold War-era test participants, and the accompanying DoD fact sheet and frequently
13 asked questions (VET001_014266-271), which has been used in numerous depositions in
14 this case as Exhibit 264.

15 25. Attached hereto as **Exhibit 11** is a true and accurate copy of DoD call-in logs to its toll-
16 free number for questions concerning chemical and biological exposures
17 (VET001_011998-12052).

18 26. Attached hereto as **Exhibit 12** is a true and accurate copy of excerpts of the June 9, 2011
19 deposition transcript of Department of the Army employee Mr. Lloyd Roberts.

20 27. Attached hereto as **Exhibit 13** is a true and accurate copy of June 13, 2006 notes prepared
21 by VA employee Joe Salvatore discussing outreach efforts (VET001_014012).

22 28. Attached hereto as **Exhibit 14** is a true and accurate copy of November 29, 2004 notes
23 prepared by VA employee Joe Salvatore discussing a meeting regarding the “Department
24 of Defense’s Chemical and Biological Release Project” (DVA003 006436), which has
25 been used as a deposition exhibit in this case as Exhibit 269.

26 29. Defendants also have produced numerous meeting minutes of the DoD/VA Deployment
27 Health Work Group, including the following minutes: December 8, 2005; January 30,
28 2006; March 2, 2006; July 25, 2006; September 7, 2006; May 31, 2007; June 21, 2007;

1 February 21, 2008; March 18, 2008; April 17, 2008; September 18, 2008; October 30,
2 2008 and September 17, 2009.

3 30. Defendants also have produced to Plaintiffs a read-only version of the DoD Chemical and
4 Biological database. The database includes, among other things, the test participants'
5 names, the substances exposed to, the routes of administration and doses, where that
6 information is available.

7 31. Among the documents Defendants have produced are the 7,839 service member test files
8 for the chemical agent test participants.

9 32. Attached hereto as **Exhibit 15** is a true and accurate copy of excerpts of the January 27,
10 2012 deposition transcript of former DoD contractor Roy Finno.

11 33. Attached hereto as **Exhibit 16** is a true and accurate copy of Plaintiffs' Notice of
12 Deposition to the Department of Veterans Affairs Pursuant to Fed. R. Civ. P. 30(b)(6),
13 served on March 21, 2011.

14 34. Attached hereto as **Exhibit 17** is a true and accurate copy of Plaintiffs' Notice of
15 Deposition to the Department of Defense and United States Department of the Army
16 Pursuant to Fed. R. Civ. P. 30(b)(6), served on May 27, 2011.

17 35. Attached hereto as **Exhibit 18** is a true and accurate copy of excerpts of the June 30, 2011
18 deposition transcript of VA employee Mr. Paul Black.

19 36. Attached hereto as **Exhibit 19** is a true and accurate copy of draft legislation (DVA012
20 000505-518), which has been used as a deposition exhibit in this case as Exhibit 742.

21 37. Attached hereto as **Exhibit 20** is a true and accurate copy of draft legislation (DVA052
22 000175-177), which has been used as a deposition exhibit in this case as Exhibit 754.

23 38. Attached hereto as **Exhibit 21** is a true and accurate copy of draft legislation (DVA052
24 000089-91), which has been used as a deposition exhibit in this case as Exhibit 783.

25 39. Attached hereto as **Exhibit 22** is a true and accurate copy of draft legislation (DVA052
26 000118), which has been used as a deposition exhibit in this case as Exhibit 833.

27 40. Attached hereto as **Exhibit 23** is a true and accurate copy of draft legislation (DVA 052
28 000136-37), which has been used as a deposition exhibit in this case as Exhibit 834.

1 41. Attached hereto as **Exhibit 24** is a true and accurate copy of the transcript of the
2 December 15, 2011 hearing in this case.

3 42. Attached hereto as **Exhibit 25** is a true and accurate copy of a November 22, 2011 letter
4 from Gordon P. Erspamer to Joshua E. Gardner identifying the eight individuals whom
5 Plaintiffs wished to depose pursuant to Magistrate Judge Corley's November 17, 2011
6 Order.

7 43. On February 28, 2012, counsel for Plaintiffs Ben Patterson sent a letter to Joshua E.
8 Gardner asking, for the first time, for Defendants' position regarding Plaintiffs' request to
9 depose Dr. Kelley Brix and to re-open the depositions of Dee Dodson Morris, Joe
10 Salvatore, and David Abbot, and requesting a response by close of business the next day.
11 Attached hereto as **Exhibit 26** is a copy of that letter.

12 44. On February 29, 2012, counsel for Defendants, Joshua E. Gardner responded to Plaintiffs'
13 February 28 letter. In that letter, Defendants stated, among other things, that with respect
14 to the deposition of Dr. Brix, Plaintiffs had selected the eight depositions that they were
15 entitled to under the Magistrate Judge's November 17 Order and provided no explanation
16 in their letter for seeking depositions in excess of those permitted in the Court's Order. In
17 addition, Defendants noted that Plaintiffs had failed to meaningfully meet and confer on
18 this issue, because they failed to explain the reasons they sought to re-open either fact
19 discovery generally or to re-open the specific depositions they sought, and the amount of
20 time they sought with each deponent, and that Defendants could not agree to any
21 additional depositions in the absence of Plaintiffs providing these basic facts. Attached
22 hereto as **Exhibit 27** is a copy of that letter.

23 45. On March 1, 2012, the date Plaintiffs' motion to compel was due, counsel for Plaintiffs,
24 Ben Patterson, called me to discuss the issue of taking the deposition of Dr. Brix and re-
25 opening the depositions of Joe Salvatore, Dave Abbot and Dee Dodson Morris. Because
26 Plaintiffs had not responded to my February 29, 2012 letter, I asked Mr. Patterson to
27 provide me with an explanation of the specific areas that they wished to explore with these
28 individuals and the amount of additional time they wished to spend with each deponent.

1 Mr. Patterson would not provide any specific areas of inquiries or otherwise justify their
2 request for yet more depositions beyond the generic fact that some documents were
3 produced after the deponents' depositions. Mr. Patterson did suggest that one area they
4 wished to question Dr. Brix about was the email she wrote to Dr. Brown about VA's
5 Information Letter. In an attempt to try and narrow the discovery dispute, I asked Mr.
6 Patterson whether this was the only area that they sought testimony on from Dr. Brix.
7 However, Mr. Patterson indicated that they wanted testimony beyond this topic, but
8 refused to identify what those areas were. At no time during this meet and confer did I
9 indicate that Defendants would agree to put up Dr. Brix for deposition on the topic of her
10 email to Dr. Brown (which would implicate information covered by the deliberative
11 process privilege), or on any other topic.

12 46. Attached hereto as **Exhibit 28** is a true and accurate copy of minutes of a June 3, 2005
13 meeting between DoD and the VA (DVA003_006754-761), which previously has been
14 used as a deposition exhibit in this case as Exhibit 796.

15 47. Attached hereto as **Exhibit 29** is a true and accurate copy of March 30, 2006 notes
16 prepared by VA employee Joe Salvatore (DVA003 007671-74), discussing a meeting
17 regarding the "Department of Defense's Chemical and Biological Release Project."

18 48. Attached hereto as **Exhibit 30** is a true and accurate copy of an August 20, 2008 email
19 from former DoD contractor Roy Finno to another former DoD contractor Andrew
20 Blackburn (Battelle_0000001077), which has been used as a deposition exhibit in this
21 case as Exhibit 808.

22 49. Attached hereto as **Exhibit 31** is a true and accurate copy of a May 27, 2005 email from
23 former DoD contractor Lionel West to VA employee Joe Salvatore, DoD employee Dee
24 Dodson Morris, and former DoD contractors Roy Finno, Andrew Blackburn and Roxana
25 Baylor, and attaching power point slides (VET140_002114-19), which has been used as a
26 deposition exhibit in this case as Exhibit 811.

27 50. Attached hereto as **Exhibit 32** is a true and accurate copy of excerpts of the January 20,
28 2012 deposition transcript of former VA employee Dr. Mark Brown.

1 51. Attached hereto as **Exhibit 33** is a true and accurate copy of excerpts of the January 31,
2 2012 deposition transcript of VA employee Glen Wallick.

3 52. Attached hereto as **Exhibit 34** is a true and accurate copy of excerpts of the January 13,
4 2012 deposition transcript of VA employee Dr. Kenneth Hyams.

5 53. With respect to the magnetic tapes, it is my understanding that neither of the vendors who
6 submitted responses had the necessary security clearance. As a result, DoD turned to the
7 Defense Logistics Agency (“DLA”), which, although it lacked the necessary hardware at
8 that time to perform the conversion, was able to acquire the hardware it deemed best
9 suited to extract the information.

10 54. It is my understanding that since acquiring the hardware, DLA has extracted information
11 from two of the six magnetic tapes and referred them to DoD for classification review. As
12 to the remaining four tapes, it is my understanding that the hardware used was
13 unsuccessful in recovering information. Accordingly, it is my understanding that DLA is
14 undertaking alternative efforts to extract the data, including the possible acquisition of
15 additional hardware, assuming the tapes contain retrievable data.

16 55. With respect to the MKULTRA FOIA set, the CIA offered to review two LSD documents
17 in an effort to resolve the last dispute against the CIA (the two documents were the only
18 ones potentially related to health effects identified by Plaintiffs at that time as being of
19 interest to Plaintiffs). In return, however, the CIA asked that Plaintiffs agree to drop their
20 request for other FOIA documents, as Plaintiffs had not identified how the remaining
21 documents would be relevant to their secrecy oath claim against the CIA. Plaintiffs
22 would not agree either to drop the remaining document requests or to identify the
23 purported relevance of the remaining documents.

24 56. DoD provided Plaintiffs with a bibliography from the Defense Technical Information
25 Center with 548 entries concerning LSD, and Plaintiffs chose the entries that they would
26 like to receive.

27 57. Additionally, Defendants have produced to Plaintiffs the 1980 “LSD Follow-Up Study,”
28 for which the Army attempted to contact every service member exposed to LSD as part of

1 the Army's chemical test programs and which analyzed the potential health effects of LSD
2 usage on test participants, as well as the follow up studies by the National Research
3 Council that included an analysis of LSD usage during the experiments and that also
4 included participant surveys regarding health effects. Plaintiffs also deposed Dr. George
5 Aghajanian, a neuropsychologist with extensive research experience related to LSD.

6 58. Attached hereto as **Exhibit 35** is a true and accurate copy of excerpts of the July 14-15,
7 2010 deposition transcript of former Edgewood Arsenal employee, Dr. James Ketchum.

8 59. During the parties' meet and confer, counsel for Defendants pointed out to Plaintiffs the
9 unequivocal deposition testimony from Dr. Ketchum in which he stated that he did not
10 have any personal knowledge about the CIA's involvement in the test programs nor in the
11 CIA's testing on service members.

12 60. Attached hereto as **Exhibit 36** is a true and accurate copy of excerpts of the November 9,
13 2011 deposition transcript of CIA employee Patricia Cameresi.

14 61. Attached hereto as **Exhibit 37** is an email chain between Dr. Mark Brown, and Dr.
15 Kenneth Hyams, among others, dated June 29, 2006 (DVA052 000113-14), which
16 previously has been used as a deposition exhibit in this case as Exhibit 727.

17 62. Beyond the Rule 45 subpoena served upon VA, Plaintiffs have served six sets of requests
18 for production of documents on VA, totaling 236 separate requests, with the most recent
19 set being served in October 2011.

20 63. Plaintiffs have obtained extensive testimony from Martha Hamed, Colonel Frederick
21 Kolbrener and Norma St. Claire regarding DoD's efforts in identifying WWII-era test
22 participants; have thousands of pages from the CWEST index reflecting those efforts,
23 including the voluminous three-volume set that describes in great detail DoD's efforts;
24 and have a copy of "Veterans at Risk," which provides a comprehensive overview of the
25 WWII-era testing program.

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64. Defendants provided Plaintiffs with the MKULTRA FOIA documents in October 2009.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Washington, D.C. on March 15, 2012.

/s/ Joshua E. Gardner
Joshua E. Gardner

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