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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' SUPPLEMENTAL SUBMISSION AND DEFENDANTS' POSITION CONCERNING MAGNETIC TAPES AND MOTION TO COMPEL**

Pursuant to the Court's April 6, 2012 Order (Docket No. 408), Plaintiffs submit this statement to advise the Court of the parties' impasse concerning Plaintiffs' motion to compel the contents of the 24 magnetic tapes. The Court's order required the parties to submit a joint statement concerning any remaining magnetic tapes disputes. Yet, Defendants have refused to submit their section of the joint statement. However, because of the long history of this dispute, the fully briefed motion to compel before the Court, the new issues before the Court (as addressed below), and the need to resolve these issues as soon as possible, Plaintiffs believe the extended joint statement and amended expert declaration of John Ashley is warranted.

There are two main issues in dispute: (1) the recovery of information from the four magnetic tapes that an employee at Defense Logistics Agency ("DLA")—Julie Parrish—was unable to load (Docket No. 400-1); and (2) the recovery of information regarding Edgewood tests contained on the remaining 18 magnetic tapes listed in the Manifest (Docket No. 291-1) that Defendants have recently recalled from storage and have never attempted to access.[1] The parties' most recent efforts to resolve this dispute were by letters dated April 24, 2012, May 1, 2012, May 3, 2012, and May 11, 2012, and by telephone on May 21, 2012. Despite these efforts, both sides agree that the Court's intervention is required.[2]

Plaintiffs' Statement.

Defendants' Efforts to Access Information on Six of the Magnetic Tapes

It is now apparent that Defendants have attempted to access only six of the 24 tapes listed in the Manifest that appear to contain clinical data, video files, and other documents from Edgewood. Defendants produced documents from two of those magnetic tapes—which are duplicates of each other—but Plaintiffs' review suggests that these tapes contained only raw animal testing data. As to the other four tapes, Defendants claim they are inaccessible—a curious coincidence, considering these tapes also happen to be the only ones that Defendants concede contain human clinical data from the Edgewood testing programs. As Plaintiffs have briefed on numerous occasions, these tapes are vital, as they may contain perhaps the richest source of contemporaneous and comprehensive data and video files regarding testing at Edgewood. (*See, e.g.*, Docket No. 300.) Yet Defendants' efforts thus far to obtain the data on these tapes have been inadequate.[3]

[1] For the Court's convenience, Plaintiffs will provide the Court with a binder containing excerpts from the relevant manifest and magnetic tape printouts, which Defendants have designated as subject to the protective order.

[2] Plaintiffs submitted their section of the joint statement and the amended expert declaration of John Ashley to Defendants on May 16, 2012, and requested Defendants' section by May 21, 2012. Defendants refused to provide their section during a May 21 meet and confer call.

[3] For a complete discussion of the problems with Defendants' recent efforts to access information on the magnetic tapes, Plaintiffs submit with this filing the Amended Declaration of Expert John Ashley ("Ashley Decl."), which is an updated version of the declaration filed on December 14, 2011 (Docket No. 335).

Recovering information from magnetic tapes requires specialized expertise in data retrieval and/or computer forensics. (Ashley Decl. ¶¶ 8-10, 33-36.) However, after a long delay, Defendants selected Julie Parrish, an information technology employee from DLA, because she was the only employee who had any experience with tape drives. But she has no expertise in data retrieval or forensic techniques. Indeed, as she notes in her declaration, she is an IT specialist in Solaris and Microsoft servers and systems, completely different platforms for a completely different era. (Docket No. 400-1 ("Parrish Decl.") ¶ 1; Ashley Decl. ¶ 30.) There is no indication that she has any experience with data retrieval, computer forensics, or legacy mainframe systems such as the UNIVAC 1108 (the computer system used with the tapes). (Ashley Decl. ¶ 30.) Nor is there any indication that she had access to any specialized tools to retrieve data from legacy systems or that she had any expertise in retrieving data from 9-track tapes, which were used to store the Edgewood files. (*Id.* ¶ 31.) Indeed, the opposite appears to be true, as she characterized her own methods as "trial and error," was forced to call outside vendors for advice, and attempted to read the clearly labeled 800 BPI tapes by using a tape drive capable of reading only 1600 and 6250 BPI—a serious judgment error. (Parrish Decl. ¶¶ 5, 7-8; Ashley Decl. ¶¶ 31-32.)

The fact that Ms. Parrish was able to access some information from two of the tapes but not the other four tapes does not necessarily mean the information on those four tapes is irretrievable, as Ms. Parrish appears to assume. (Ashley Decl. ¶ 33.) The four tapes may have been created using different hardware or software than the two tapes she was able to access, or the data on the four tapes may be stored in block sizes that she did not test. (*Id.*) In that situation, a different tape drive and software would be required to assess the retrievability of the information on those tapes. (*Id.*) An appropriate outside vendor would likely have multiple data retrieval tools at their disposal that Ms. Parrish did not, including additional hardware and tape drives. (*Id.*) Further, many vendors have devised multiple specialized methods, utilities, and tools specifically for recovering data from legacy systems, such as the UNIVAC 1108, and thus would be far more capable of retrieving the data. (*Id.*)

As a result, Plaintiffs request that the Court order Defendants to engage an outside vendor with the appropriate skill set, experience, and data retrieval tools that Ms. Parrish lacks, and

submit the candidate for the Court's approval. It is more likely that an outside vendor will be able to recover the information on these four tapes using forensic science methods. Plaintiffs have identified for Defendants numerous additional computer forensic experts with security clearance that could likely retrieve the remaining information on the magnetic tapes.[4] Defendants cannot discharge their discovery obligations by simply relying on the conclusion of an IT specialist who lacks the relevant expertise in forensics and data retrieval. Thus, consistent with the well-settled presumption that the responding party bears the cost of production, Defendants should bear the vendor's costs.[5] *See, e.g.*, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978). This is particularly warranted here because Defendants not only contributed to, but caused, the purported inaccessibility of the information. Further, the plaintiffs are individual veterans and two non-profit organizations, making it particularly inappropriate to saddle them with the costs.[6]

The 18 Tapes Defendants Have Not Attempted to Access

At the April 5, 2012 discovery hearing, Defendants relied on Patricia Cameresi's deposition testimony concerning an alleged search for the magnetic tapes—which it turns out was conducted six years ago and never in connection with this action. Defendants now argue for the first time that Plaintiffs have "waived" any request for the remaining 18 tapes. This position is without merit. As an initial matter, Ms. Cameresi's search was wholly inadequate, as she testified that she only recently transferred to the DOD only those tapes that she was "certain" said "human

[4] These experts include, but are by no means limited to, ProSync Technology Group (http://www.prosync.com/); the Forensics Group (http://www.theforensics-group.com); Delex Systems, Inc. – Digital Discovery (http://delex.com/sol_Security_Forensics.aspx); Sam Guttman, Chairman of the Board of Advisors, Digital Forensics Certification Board (http://www.dfcb.org/bios.html); and Dave Zolkiwsky, CISSP, CPP, ACE, Lead Analyst (Asset Protection) at AT&T (http://www.linkedin.com/pub/dave-zolkiwsky-cissp-cpp-ace/4/4b4/43b).

[5] For a more complete analysis of cost-shifting, Plaintiffs refer the Court to their December 14, 2011 Supplemental Filing Concerning Magnetic Tapes (Docket No. 334 at 2-5).

[6] Defendants opted to store critical information regarding sensitive human testing on magnetic tapes, and to send it to a storage facility where only three top officials could obtain access. (*See* VET001_009230.) It also appears that Defendants subsequently failed to follow their own regulations with respect to data maintenance that required them to maintain the accessibility of the data on the tapes. (*See* AR 25-400-2 § 3-12 (1993) (Media care and maintenance: specifies quality control measures for "magnetic tapes that store records retained for 8 years or longer . . .").

clinical data" on the outside of the tape. She made no attempt to determine the actual content of the tapes, and specifically excluded all the tapes that had no label or were ambiguously marked. Regardless, as has been clear since the beginning of this dispute, Plaintiffs requested *all* of the magnetic tapes listed in the Manifest and have never limited that request or motion to only six of the tapes. (*See* Docket Nos. 300, 335, 405-27.) Rather, it was *Defendants*—not Plaintiffs—who unilaterally decided to send only six of the tapes to DLA; Plaintiffs only learned this for the first time in Defendants' Opposition to Plaintiffs' March 1, 2012 Motion to Compel Discovery (*see* Docket No. 371). Indeed, until their Opposition, Defendants repeatedly refused to give Plaintiffs *any* substantive information on DLA's efforts. If Defendants wished to rely upon Ms. Cameresi's deposition testimony as dispositive of their discovery obligations, it was incumbent on them to do so in the many briefs they have filed on this issue. It is too late to do so now.

In any event, after three years of dragging their feet, it appears that Defendants have finally in the last two weeks recalled from storage the remaining magnetic tapes listed on the Manifest. However, their "review" of the tapes has consisted only of looking at the labels on the tapes and speculating what the tapes might contain. From this superficial examination, Defendants speculate that none of the remaining 18 tapes listed in the Manifest contains information concerning human testing at Edgewood Arsenal. But this cursory review is plainly insufficient, as Defendants have not yet produced the human clinical data referenced in the Manifest or the highly relevant Edgewood video and photograph files listed in the magnetic tapes printout (*See* VET102-00363-367, 371, 374-395).

The Court should not allow Defendants to rely on mere labels—the only proper way to examine the contents of a magnetic tape is to actually load the tape into a tape drive and examine the contents. (Ashley Decl. ¶ 38.) But Defendants refuse to take this necessary step, or to even produce photographs of the labels on each of the tapes to enable Plaintiffs to independently evaluate the conclusions Defendants draw.[7] Instead, Defendants insist that Plaintiffs must rely on

[7] In light of Defendants' unwillingness to produce even photographs of the labels despite their clear reliance on them, Plaintiffs are concerned that this is another example of Defendants' "strategic" considerations the Court referenced in its May 14, 2012 Order concerning Defendants' claims of deliberative process privilege. (*See* Docket No. 423 at 7 ("Defendant's redactions are not deliberative, but strategic").)

unfounded inferences and assumptions by individuals lacking personal knowledge[8] to support their inadmissible speculation regarding the contents of the 18 magnetic tapes from Boxes 8, 9, and 10 (as listed in the Manifest). Specifically, Defendants' counsel has theorized that all of the tapes in Box 8 and some of the tapes in Boxes 9 and 10 contain only animal data because they were the product of an unidentified non-governmental contractor that conducted animal testing for the CIA. But Defendants point to no admissible evidence to support the nature of the unidentified contractor's role or roles. Further, the fact that this contractor conducted animal testing does not mean it had no involvement in either researching or processing research results from the Edgewood testing programs. Further, Defendants improperly assume that all data on a single magnetic tape can come from only a single source, when in reality a single magnetic tape can contain different file types, including databases and film files. (Ashley Decl. ¶ 39.)

With respect to the tapes in Boxes 9 and 10, Defendants' counsel also speculates that because a couple of the tapes likely contain animal testing data from the same unidentified non-governmental contractor and "the tapes in these boxes were intended to be merged together for further analysis," "the logical conclusion" is that *all* of the tapes contain animal data. Notably, Defendants make this assumption despite acknowledging that tape numbers 283 and 366 from Box 9 contain "Edgewood final databases," as listed in the Manifest (VET001_009234). But just as a logical matter, Defendants' conclusion is flawed because merging tapes does not require that all the merged tapes have the same contents, i.e., animal data. (Ashley Decl. ¶ 39.) More importantly, Defendants' documents suggest that the data "merger" actually involved the merger of human data from Edgewood with other human test data. (*See* Docket No. 259-5 at VET001_009242.) Other documents show the important relationship between animal data and human data, namely that the animal data informs which compounds to test on humans. (*See* VET001_009228.)

[8] Notably, Defendants' speculations are not sworn to under oath. Defendants have made many representations to the Court on this issue without support in a declaration from anyone with personal knowledge. Because some of these representations have proved to be inaccurate (e.g., that the data on the tapes is inaccessible), the Court should treat these representations as suspect.

Also problematic with Defendants' speculations is their failure to account for the highly relevant and voluminous files concerning the Edgewood program that are contained in the magnetic tapes printouts. For example, it appears from one of the printouts that one or more of the magnetic tapes contain video and photograph files, which range in topics from casualty reports for nerve agent exposures to toxic agent studies for a wide variety of test substances to cover-up plans. (*See* VET102-000363-367, 371, 374-395; Ashley Decl. ¶¶ 39-40.) Other printouts contain references to symptoms exhibited by test participants (*see, e.g.*, VET102-000584) and other exposure information regarding 7,155 individual test subjects, including several of the named plaintiffs (*see* VET102-000129[9]). The information on these printouts indicates that the magnetic tapes must contain the computer records and source material used to print out this information. Indeed, despite the unquestionable relevance of all of these materials, Defendants have not otherwise produced them, thus making it likely they are stored on the tapes.

In light of the uncertainty concerning the contents of the 18 tapes and Defendants' refusal to even look, it is at the very least impossible to rule out that these tapes contain relevant information without first loading the tapes and reviewing the contents. (Ashley Decl. ¶ 38.) Thus, as with the four tapes Defendants were unable to access, Plaintiffs request that the Court order Defendants to engage an outside vendor with the appropriate skill set, experience, and data retrieval tools to retrieve the information contained on these tapes, subject to Court approval. Defendants do not need to produce any animal data they find after reviewing the contents of the tapes, but all of the files regarding human testing should be produced. Cost-shifting should not even be considered with respect to recovering the data on these tapes because Defendants *have not even attempted* to access the data on these tapes, and thus cannot show that the data is inaccessible. *See OpenTV v. Liberate Tech.*, 219 F.R.D. 474, 477 (N.D. Cal. 2003) (cost-shifting *only* considered when inaccessible data is sought).

[9] The exposure information on this magnetic tapes printout also contains dosage information, but omits the units of measurement. As Plaintiffs addressed in the March 2012 motion to compel briefing, this only strengthens Plaintiffs' request that the Court order Defendants to produce a witness to testify regarding the contents and authentication of the magnetic tapes. (Docket Nos. 378, 404.)

Defendants' Statement. Defendants have declined to submit their section of a joint statement on the grounds that Plaintiffs' section and accompanying amended declaration of John Ashley violates the Court's Standing Order

Conclusion

Plaintiffs' Statement. Plaintiffs respectfully request that the Court order Defendants to: (1) by June 1, 2012, engage a vendor with the appropriate skill set, experience, security clearance, and data retrieval tools to retrieve the information contained on the following magnetic tapes (listed by number from Manifest): 305, 190 (duplicate), 353, 204 (duplicate), 043, 260 (duplicate), 196, 252 (duplicate), 283, 366 (duplicate), 307, 398 (duplicate), 296, 186 (duplicate), 168, 057 (duplicate), 103, 192 (duplicate), 372, 144, 159, and 098 (*see* VET001_009234-35);[10] (2) if Defendants do not meet that deadline, then by June 5, 2012, the parties will propose candidates as a Special Master who would supervise the retrieval using qualified forensic experts at Defendants' expense; (3) produce non-animal testing documents stored on the magnetic tapes in computer readable format or complete Defendants' declassification review (and log any withheld documents stored on the tapes resulting from the review) by July 1, 2012; (4) produce photographs of the labels on the 18 magnetic tapes Defendants have not yet accessed; (5) produce all correspondence to and from DLA regarding the magnetic tapes; and (6) produce a witness to testify regarding the contents and authentication of the magnetic tapes.

Dated: May 21, 2012

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[10] The appointment would be subject to Court approval after advance notice of the vendor's qualifications to Plaintiffs and the Court.