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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

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

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

Pursuant to Local Rule 72-2, Federal Rule of Civil Procedure 72(a), and 28 U.S.C. § 636(b)(1)(A), Defendants hereby file this Motion for Relief From Non-Dispositive Pretrial Order of Magistrate Judge. Specifically, Defendants object to the portion of the Magistrate Judge's July 19, 2012 Order granting, in part, Plaintiffs' motion to compel documents withheld by the Department of Veterans Affairs ("VA") on the basis of the deliberative process privilege. Dkt. 469.

In Defendants' opposition to Plaintiffs' motion to compel, we explained that in light of the United States Court of Appeals for the Ninth Circuit's *en banc* decision in *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012), as well as the Supreme Court's even more recent decision in *Elgin v. Department of the Treasury*, 132 S. Ct. 2126 (2012), the Magistrate Judge should have revisited her earlier decision that 38 U.S.C. § 511(a) did not preclude Plaintiffs' claim against the VA and needed to reconsider the legal relevance of the challenged documents to the narrow remaining claims in this case. Dkt. 460 at 3-4. The Magistrate Judge declined to address this issue, however, noting that "the documents at issue are equally relevant to Plaintiffs' claims regarding the other Defendants; specifically, much of this discovery relates to whether the other Defendants failed to provide adequate notice to test participants including notice of the chemicals to which they were exposed and any known health effects." Dkt. 469 at 2. This conclusion is legally erroneous for several reasons.

First, by determining that the documents are "equally" relevant to the facial bias claim against VA and the notice claim against the Department of Defense and the Department of the Army (collectively, "DoD"), the Magistrate Judge concluded that these documents are relevant to the claim against VA. But, as noted above, the Magistrate Judge expressly refused to consider the preclusive effect of *VCS* on the claim against the VA, as well as the reasoning of the Supreme Court's recent decision in *Elgin*. The Court has an obligation to ensure that it has jurisdiction over the claims raised by the parties, and may raise this issue *sua sponte*. *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 593 (2004) ("[I]t is the obligation of both district court and counsel to be alert to jurisdictional requirements."); *Williams v. United Airlines, Inc.*, 500 F.3d

1019, 1021 (9th Cir.2007) ("[W]e are 'obliged to raise questions of the district court's subject-matter jurisdiction *sua sponte*.'") (quotation omitted). Indeed, Federal Rule of Civil Procedure 12(h)(3) provides that "[i]f the court determines *at any time* that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3) (emphasis added); *see also Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) (quoting Rule 12(h)(3)). Accordingly, the Magistrate Judge erred by determining that the challenged documents withheld by VA were legally relevant without first considering this new and controlling Ninth Circuit precedent, as well as the reasoning of the Supreme Court's recent decision in *Elgin*.[1]

Second, the Magistrate Judge's conclusion that these largely internal VA documents are equally relevant to the claim against DoD is also erroneous for several reasons. As an initial matter, the Magistrate Judge framed the issue as "whether the other Defendants failed to provide *adequate* notice to test participants." Dkt. 469 at 2 (emphasis added).[2] But the adequacy of the notice is plainly not at issue in this case challenging unreasonable agency delay under section 706(1) of the Administrative Procedure Act ("APA").[3]

Unlike a case brought under section 706(2) of the APA, which evaluates whether agency action as reflected in an administrative record is "arbitrary and capricious," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009), the scope of judicial review under section 706(1) is limited to determining whether the agency: (1) has a nondiscretionary, discrete legal obligation to act; and (2) has either unreasonably delayed or unlawfully withheld action on that

[1] The issue of the preclusive effect of section 511 is directly before this Court both in the context of Defendants' Motion for Leave to File a Motion for Reconsideration of the Court's November 15, 2010 Order, as well as in Defendants' Opposition to Plaintiffs' Motion for Leave to Substitute Ms. Kathryn McMillan Forrest as a Plaintiff ("Mot. To Substitute"). Dkt. 431; Dkt. 465.

[2] Although the Magistrate Judge stated that the challenged documents might be relevant to the notice claim against the other Defendants, Defendants understand this comment to be limited to DoD because this Court has dismissed all claims related to notice against the Central Intelligence Agency. Dkt. 233.

[3] As discussed both in Defendants' Opposition to Class Certification and Defendants' Opposition to Plaintiffs' Motion to Substitute, Dkt. 393 at 10-12; Dkt. 465 at 7-8, which Defendants incorporate here by reference, Plaintiffs have abandoned any constitutional claims in this case, and, in any event, there is no constitutional right to notice as a matter of law.

duty.[4] *Norton v. S. Utah Wilderness Alliance ("SUWA")*, 542 U.S. 55, 63-64 (2004). The Supreme Court has made clear that not all failures to act by an agency are remediable under section 706(1) of the APA. *SUWA*, 542 U.S. at 61. Rather, "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64 (emphasis in original). Accordingly, Article III courts may not review under the APA "broad programmatic attacks" or discrete agency action that is not demanded by law. *Id.* at 64-66 (rejecting APA challenge where a statute provided a mandatory objective to be achieved, but also provided the agency with "a great deal of discretion in deciding how to achieve it.") Generalized deficiencies in compliance "lack the specificity requisite for agency action" reviewable under section 706(1) of the APA. *Id.* at 66; *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999) (holding that failure to conduct duties in strict compliance with regulations does not create an actionable section 706(1) claim). These limitations upon judicial review seek to "avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Id.* at 66, 67 ("If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved – which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management."). The Ninth Circuit has thus held that plaintiffs may not rely upon section 706(1)

[4] The Ninth Circuit has held that this second inquiry is governed by the so-called "TRAC" factors. *See Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997). Those factors include: "(1) the time agencies take to make decisions must be governed by a "rule of reason"[;] (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason [;] (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake [;] (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority[;] (5) the court should also take into account the nature and extent of the interests prejudiced by the delay[;] and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed." *Id.* These factors are used to determine only whether the agency's delay in taking a legally required action was reasonable or otherwise excusable. Whether DoD's notice was "adequate" is irrelevant to that inquiry. And as is evident from the nature of these factors, internal deliberative documents over which VA has asserted the deliberative process privilege could not possibly inform this second inquiry.

of the APA as an "end-run" around the judicial review limitations contained in section 706(2) (including, among other things, the pertinent statute of limitations). *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 933-934 (9th Cir. 2010).

Accordingly, the only questions relevant to Plaintiffs' section 706(1) claim against DoD are (1) whether DoD has a nondiscretionary, discrete legal obligation to provide "notice" to test participants and (2) if so, whether DoD has unreasonably delayed in fulfilling that obligation to provide notice. Even if the internal, deliberative VA documents were relevant to the question of whether DoD's notice efforts were "adequate," the adequacy of DoD's notice efforts is irrelevant to the ultimate question in this section 706(1) action. Instead, the "adequacy" of any notice efforts by DoD would be properly reviewable only under section 706(2) to determine whether the decision as to how to provide notice was arbitrary and capricious. Yet, because Plaintiffs are only pursuing a claim under section 706(1), any potential discovery that would relate to the "adequacy" of notice efforts by DoD is legally irrelevant.

Third, even if such evidence were theoretically relevant to Plaintiffs' section 706(1) notice claim against DoD, the overwhelming majority of the documents that the Magistrate Judge ordered to be produced are internal VA documents reflecting intra-agency deliberations. As both a legal and a factual matter, it is unclear how *VA's* internal deliberations reflected in the withheld documents could somehow inform the Court as to whether: (1) *DoD* possesses a discrete legal obligation to provide notice to former volunteer service members; and (2) *DoD* has unreasonably delayed in fulfilling that discrete legal obligation. *SUWA*, 542 U.S. at 64. Accordingly, because these withheld documents could not be reasonably calculated to lead to the discovery of admissible evidence against DoD with respect to Plaintiffs' APA notice claim, the Magistrate Judge's determination that Plaintiffs have established a substantial need sufficient to overcome the assertion of privilege over these documents is legally erroneous.

Finally, the Magistrate Judge erred in concluding that the documents over which VA has asserted the deliberative process privilege are not necessarily cumulative of the over 2 million pages of discovery produced in this case because "these processes are far from clear or consistent, and in fact, seem to have undergone numerous modifications over time." Dkt. 469 at 3. As

Defendants explained in their opposition, Plaintiffs failed to meet their burden of establishing that the documents they seek contain materials not available from other sources produced during discovery. *See* Dkt.460 at 5-7 (laying out, by category, the substantial discovery produced in this case). The Magistrate Judge's Order appears to relieve Plaintiffs of their substantial burden, and the conclusion that the "processes" have evolved over time does not change the fact that Plaintiffs failed to meet their burden of establishing that they lack relevant information about those "processes" despite the tremendous amount of discovery they have already obtained.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant Defendants' motion for relief from the Magistrate Judge's July 19, 2012 Order and overturn that decision to the extent it ordered the production of documents subject to the deliberative process privilege.

Dated: July 24, 2012

Respectfully submitted,

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