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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

PLAINTIFFS' BRIEF IN SUPPORT OF PROPOSED INJUNCTION

Complaint filed January 7, 2009

Pursuant to the Court's February 8, 2016 Order (ECF No. 572), Plaintiffs respectfully submit the proposed injunction filed herewith to enforce the Department of the Army's obligation to provide medical treatment, pursuant to Army Regulation 70-25 ("AR 70-25") and the January 26, 2016 Order of the Ninth Circuit Court of Appeals (ECF No. 570).

Despite having an Army Regulation on the books since at least 1962 that required the Army to provide medical treatment and notice to test subjects, these veterans were left to fend for themselves, and the Army admits that it did not provide—and still has not provided—them with medical care. Over the subsequent decades since participating in the testing programs, many test subjects did not come forward or tell their doctors about their experiences because of secrecy oaths. When test subjects finally did come forward, they struggled to maneuver the Department of Veterans Affairs' maelstrom, without sufficient information and ill-equipped to overcome considerable resistance. Now the Ninth Circuit has held, "as did the district court, that 'AR 70-25 entitles [test subjects] to medical care for disabilities, injuries or illnesses caused by their participation in government experiments,' not only during the course of the experiment but also after the experiment has ended." *Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1081 (9th Cir. 2016) (quoting ECF No. 544 at 47). All that remains now after seven years of litigation is the entry of an injunction to enforce that obligation.

The parties have been conferring since February 2016 attempting to resolve this matter and discussing the potential details for the Army's provision of medical care.[1] In furtherance of these efforts, the parties hired mediator Thomas J. Perrelli with the firm Jenner & Block LLP, and also received six extensions of time from the Court. (ECF Nos. 575, 577, 579, 581, 583, 585.) Unfortunately, the parties have been unable to reach an agreement. If the Court believes that a hearing on these matters or a further settlement conference would be useful, Plaintiffs would be happy to participate. Otherwise, Plaintiffs submit that their proposed injunction reflects a fair and

[1] The Army's last status report concerning its compliance with the Court's November 19, 2013 Notice Injunction (ECF No. 545) was filed on November 4, 2014 (ECF No. 566). Since that time, Plaintiffs have received no further update and are unaware of the Army issuing any type of notice to the class members. Accordingly, Plaintiffs respectfully request that the Court order the Army to file an updated status report and/or schedule a hearing concerning its provision of notice.

equitable resolution to ensure the Army's compliance with its legal duties under AR 70-25, as recognized by this Court and the Ninth Circuit, and for which the Army has neglected for over 50 years. The Army must comply with its now fully adjudicated legal obligations without any further delay.

I. REGULATORY REGIME & THE ARMY'S FAILURE TO PROVIDE MEDICAL CARE AND FOLLOW-UP

Since at least 1962, AR 70-25 has required the Army to provide notice and medical care to test subjects. The Army is also required to monitor and track test subjects, and maintain a volunteer database. AR 70-25 Appx. H (1990). Over the past decades, the Army has repromulgated this regulation, and in response to Congressional hearings in 1975 and 1977, issued numerous legal memoranda detailing its obligations.

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." (ECF No. 491-6.) Acknowledging the Army's underlying legal obligation to test subjects, Wine-Volner urged quick implementation of a notification program, stating that its "legal necessity . . . is not open to dispute." (*Id.*) A September 24, 1979 Memorandum 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." (ECF No. 491-7.) An October 25, 1979 Army Chief of Staff Memorandum further stated that "[p]articipants in those projects who are considered by medical authority to be subject to the possible risk of a continuing injury are to be notified." (ECF No. 491-8.) On November 2, 1979, the Army informed Congress of this notification plan and the Surgeon General's plan to ask the National Academy of Sciences to study the effects of the testing compounds. (ECF No. 491-9.)

A revised version of AR 70-25 was promulgated in 1990. It requires the Army to "provide [research volunteers] with any newly acquired information that may affect their well being when that information becomes available," and states that "[t]he duty to warn exists even after the individual volunteer has completed his or her participation in research." AR 70-25 § 3-

2(h) (1990). The regulation also requires a "volunteer data base." *Id*. at Appx. H. That database has two purposes: to "readily answer questions concerning an individual's participation in research conducted or sponsored by the command," and "to ensure that the command can exercise its 'duty to warn.'" *Id*. at Appx. H-1. Along with personal information that must be contained in the database (e.g., "name, social security number"), other elements may include: "Report[s] generated by the results of the test or protocol," the laboratory or facility that conducted the test, the test period, the "Name of the material used (both active and inert material)," and a "Description of untoward reactions experienced by the volunteer." *Id*. at Appx. H-2. The regulation states that a "method should be established, which is consistent with the *potential for long-term risks* of the test or protocol," to update "perishable" volunteer contact information (e.g., "local address and telephone number"). *Id*. at Appx. H-3 (emphasis added).

The 1990 version of AR 70-25 also states that "[v]olunteers are authorized all necessary medical care for injury or disease that is a proximate result of their participation in research." *Id*. § 3-1(k). This duty to provide medical care is linked to the Army's ongoing duty to warn. The regulation requires that "[t]he Surgeon General (TSG) will . . . [d]irect medical followup, when appropriate, on research subjects to ensure that *any long-range problems* are detected and treated." *Id*. § 2-5(j) (emphasis added). Despite these obligations, the Army admits that it has not provided such medical care to test subjects and continues to fight these obligations to this day.

II. PLAINTIFFS' PROPOSED INJUNCTION WILL ENSURE THE ARMY'S COMPLIANCE WITH ITS LONG-NEGLECTED LEGAL OBLIGATIONS.

This Court is empowered in its administration of this class action and its equitable powers to fashion an appropriate injunction to ensure the Army's compliance with AR 70-25. In light of the Army's long-standing recalcitrance and failure to provide care, Plaintiffs respectfully submit that reporting requirements and court review of denials of care are necessary features for any injunction to be effective. If the Army continues to deny care, the Court can of course review that denial as the unlawful withholding of required agency action. In order to lessen the burden on the Court and to facilitate this process, Plaintiffs propose that the Court appoint a special master or monitor to oversee the Army's compliance.

A. The Court May Retain Jurisdiction to Ensure Compliance.

Plaintiffs anticipate that the Army will argue, as it has before, that the Court ensuring compliance with its order somehow oversteps the bounds of the Court's authority under the APA. But that argument has been rejected by the Ninth Circuit, this matter is well-beyond such threshold APA issues, and Plaintiffs submit that their proposed injunction is narrowly-tailored and appropriate. The Ninth Circuit has held that the Army has an enforceable non-discretionary duty to provide medical care. As with any denial of an entitlement that an agency is required to provide, the individual class members can seek review if the Army is unlawfully withholding that medical care, pursuant to 5 U.S.C. § 706(1). That this injunction will be on a class-wide level rather than an individual basis makes no difference to that legal principle. Rather than filing a new APA action individually, class members should be able to remedy the unlawful withholding of care through the injunction review process.

This is not a case where injunctive relief would impede the legitimate policy-making discretion of a government agency. *Cf. Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004) ("The principal purpose of the APA limitations we have discussed" is "to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve."). The proposed injunction will do no more than require the Army to follow its own regulation, which it cannot be disputed the Army is required to do. *See, e.g.*, *United States v. Ramos*, 623 F.3d 672, 683 (9th Cir. 2010) ("It is a well-known maxim that agencies must comply with their own regulations." (quoting *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1310 (9th Cir. 1984))); *Sameena Inc. v. U.S. Air Force*, 147 F.3d 1148, 1154-55 (9th Cir. 1998) (an agency's failure to "comply with binding regulations" violates due process); *Legal Aid Soc'y of Alameda Cty. v. Brennan*, 608 F.2d 1319, 1330-31 (9th Cir. 1979) (affirming summary judgment for plaintiff on section 706(1) claim). The accompanying judicial oversight and provision for review of denials does no more than assure that the Army faithfully fulfills, *at long last*, its now adjudicated obligations to class members.

Furthermore, it is well-established that "when a court issues an injunction, it automatically retains jurisdiction to enforce it." *Thompson v. United States HUD*, 404 F.3d 821, 833 (4th Cir.

2005) (quoting *United States v. Fisher*, 864 F.2d 434, 436 (7th Cir. 1988) and collecting cases). Indeed, in situations involving far more interference with agency's day-to-day operations than here, courts have imposed or affirmed such judicial oversight under the APA. For example, in *Sierra Club v. Penfold*, 857 F.2d 1307, 1321-22 (9th Cir. 1988), the Ninth Circuit found no abuse of discretion when the district court retained jurisdiction to review environmental studies as part of injunctive relief under the APA. In *Nader v. FCC*, 520 F.2d 182, 207 (D.C. Cir. 1975), after a delay of ten years, the FCC was placed under judicial supervision to ensure compliance: "the court shall either approve or reject the Commission's schedule or make such further orders as appropriate. After a schedule of proceedings has been approved, the Commission will be expected to adhere to it; any alterations will require the approval of this court and the Commission will be required to explain any and all material failures to comply." Last year, the District of Massachusetts similarly ordered "the SEC to file with the Court in 30 days an expedited schedule for promulgating" a final rule, and the court retained jurisdiction "to monitor the schedule and 'to ensure compliance' with its order." *Oxfam Am., Inc. v. U.S. SEC*, 126 F. Supp. 3d 168, 176 (D. Mass. 2015) (quoting *Nader*, 520 F.2d at 207); *see also Colo. Envtl. Coal. v. Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1225 (D. Colo. 2011) (issuing injunctive relief under the APA "subject to the Court's continuing jurisdiction to enforce full compliance" with the injunction), *amended on reconsideration*, No. 08-cv-01624-WJM-MJW, 2012 WL 628547, at *6 (D. Colo. Feb. 27, 2012).

Injunctions with judicial monitoring to ensure compliance, including the appointment of special masters or monitors, are accepted practices and proper exercises of a court's equitable powers. Pursuant to Federal Rule of Civil Procedure 53, this Court may delegate authority to a special master, which "has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order." *United States v. Clifford Matley Family Tr.*, 354 F.3d 1154, 1159-60 (9th Cir. 2004); *see* Fed R. Civ. P. 53. Even beyond Rule 53, district courts have "inherent equitable power to appoint a person, whatever be his title, to assist it in administering a remedy" and the "power of a federal court to appoint an agent to supervise the

implementation of its decrees has long been established." *Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir. 1982), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982). And this available power includes and has been used to appoint special masters to ensure government defendants are providing medical care to individuals. *See, e.g.*, *Coleman v. Wilson*, 912 F. Supp. 1282, 1324 (E.D. Cal. 1995) (appointing special master to monitor compliance with injunction requiring the government to provide mental health care services to inmates); *Feliciano v. Gonzalez*, 13 F. Supp. 2d 151, 156 (D.P.R. 1998) (appointing monitor to review whether a prison was complying with the court's injunction to provide medical treatment).

B. The Army's Failure to Track and Monitor Necessitates a Simplified Process to Receive Care Expeditiously.

In light of the Army's long history of negligent, if not willful, disregard for its duties to class members, including the failure to monitor, track, and follow up on health conditions for decades, Plaintiffs respectfully request that the Court ease the burden for class members seeking medical care under the injunction. Where "the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award *complete relief*," including awarding "ancillary relief necessary to accomplish complete justice." *Xiao v. Reno*, 930 F. Supp. 1377, 1379 (N.D. Cal. 1996) (citations omitted). Rather than applying a rigid, almost insurmountable, proximate causation standard several decades after exposure, the Court should in its equitable discretion lessen the burden to accomplish complete justice for the class members.

A decision from the District of Utah persuasively articulates the rationale behind such an injunction lessening the burden on class members. *See Allen v. United States*, 588 F. Supp. 247, 257-58 (D. Utah 1984), *rev'd on other grounds*, 816 F.2d 1417 (10th Cir. 1987). In *Allen*, the plaintiffs claimed to have suffered injury or death from leukemia and other forms of cancer that developed because of exposure to radioactive fallout from a government nuclear test site. *Id.* The court held that where plaintiffs were injured but had "no means of identifying the specific cause-in-fact of the injury, the burden of proof has been placed upon the *defendant* to establish the factual details of the incident and show that defendant's conduct did not contribute to the

victim's injury." *Id.* at 410. The court continued that "[t]his shift in burden of proof reflects a sound application of important legal policies" because "where a strong factual connection exists between defendant's conduct and the plaintiff's injury, but selection of 'actual' cause-in-fact from among several 'causes' is problematical, those difficulties of proof are shifted to the tortfeasor, the wrongdoer, in order to do substantial justice between the parties." *Id.* at 411.

Even more directly on point, the court in *Allen* relied on the lack of recordkeeping by the defendant regarding causation evidence as an additional rationale for shifting the burden. *Id.* at 412-13. If the Army here had simply complied with its duties established in the 1960s, reiterated by its own General Counsel's office in 1979, and repromulgated again in 1990, class members would have ample causation evidence available to prove their claims in 2016. The impact of the Army's dereliction of duty is even further complicated by the secrecy oaths prohibiting class members from talking about their experiences with doctors until decades later, and the fact that many class members even today do not know what substances they were exposed to and at what doses. (ECF No. 544 at 13-14; No. 485 at 22-23.)

Plaintiffs submit that the Army should not be permitted to shirk its medical care duty by setting up a system whereby the Army's own neglect results in ***virtually no class member*** being able to satisfy their purported burden. *See Allen*, 588 F. Supp. at 411 ("If direct proof of actual cause is to fail, the ultimate burden of the injury should fall upon him who was negligent and who likely is in a better position to inform the court of the facts relating to cause."). Indeed, the "rationale supporting the power of a court of equity to frame its injunctive decrees in such manner as to prevent their frustration is also the foundation for the rule that . . . *the courts have power to protect individual rights against unlawful and unauthorized administrative power*." *Xiao*, 930 F. Supp. at 1380 (citation omitted). If the Army continues to withhold medical care after this injunction is issued, it should face considerable scrutiny from the Court and any special master appointed to monitor its compliance.

C. The Army Can No Longer Argue That It Lacks Authority To Provide Care.

Plaintiffs anticipate that the Army will argue, as it has before, that it lacks statutory authority to provide medical care to class members. Yet, the Court explicitly rejected the Army's

lack of statutory authority argument, finding that "Congress delegated to the Secretary of the Army the authority to contract for services needed to carry out research and to implement regulations to do so," and "because AR 70-25 is a substantive rule and was promulgated under 10 U.S.C. §§ 3013 and 4503, statutory grants of authority sufficient to create enforceable rights, it created duties that are enforceable against the Army under the APA." (ECF No. 544 at 27.) The Army repeated these same statutory authorization arguments in the Ninth Circuit in its appellate briefs and again in its petition for rehearing en banc, and the Ninth Circuit implicitly rejected them.

Furthermore, given the passage of decades, the remaining class members represent a small, discrete subset of veterans. Indeed, the Ninth Circuit concluded that "the provision of medical care to this limited population would hardly require a 'broad restructuring of Army programs and operations.'" *Vietnam Veterans*, 811 F.3d at 1082. The Ninth Circuit found that "the Army would be required to provide medical care to a relatively small group of living veterans," and that the "government substantially exaggerates the impact of an injunction requiring the Army to provide medical care to human test subjects who were harmed by DOD experiments." *Id.* At this point, the Army should simply honor its duty, and Plaintiffs submit that their proposed injunction will ensure that it does, while respecting the legal limits of the APA.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter their proposed injunction, filed herewith, and require that the Army comply with its long-neglected legal obligations without delay.

Dated: November 15, 2016

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