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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' RESPONSE TO THE COURT'S PROPOSED INJUNCTION

Complaint filed January 7, 2009

Pursuant to the Court's December 7, 2016 Order (ECF No. 588), Plaintiffs respectfully submit this response to the Court's proposed injunction requiring the Army to effectuate its plan for providing medical care, as modified by the Court.

I. PROPOSED MODIFICATIONS TO THE INJUNCTION

Plaintiffs propose the following modifications to the Army's plan, which would help ensure the injunction reflects a fair and equitable implementation of the Army's legal duties under AR 70-25 that it has neglected for over 50 years. These proposals are reflected in the attached Exhibit A.

A. Reporting Requirement

As in the November 19, 2013 Notice Injunction (ECF No. 545), affirmed by the Ninth Circuit (ECF No. 570), the Court should include a reporting requirement in the medical care injunction as well. The modified Army plan does not include any reporting requirement at all, leaving the Army with no obligation to keep the Court informed regarding its compliance with the Court's injunction. But in light of the Army's long-standing recalcitrance and admitted failure to provide medical care, Plaintiffs respectfully submit that a meaningful reporting requirement is necessary for the injunction to be effective.

This reporting provision need not be an intrusive obligation. The Army is already required to provide status reports to the Court regarding its compliance with the Notice Injunction. The Army now needs to update the Court on the status of its efforts to comply with the Court's medical care injunction as well, at a time interval that the Court finds sufficient. These reports should include basic and readily available metrics concerning the Army's provision of medical care to class members, including, for example, how many test subjects have applied for medical care, how many test subjects have had their applications granted, how many test subjects have been provided with medical care, how many test subjects have been denied care, and the reasons for any individual denials of medical care. The reports should also include information regarding how the Army is complying with its obligation under AR 70-25 to create a "volunteer data base," the purpose of which is 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.'" *See* AR 70-25 at Appx. H.[1] Plaintiffs respectfully submit that status updates being filed quarterly, as reflected in their proposed injunction, would be appropriate.

B. Decision Timelines

The Army's modified plan does not contain any timeline for the Army's Benefits Application Panel to make decisions on class member applications for medical care. But a timeline is essential to ensure that the Army meaningfully complies with the injunction and its duty to provide medical care to class members. Without a timeline, the Army could sit on applications indefinitely without rendering a decision, and neither the Court nor class counsel will know about it because the Court's modified plan only obligates the Army to notify class counsel when an application is *denied*. Class members are advanced in age and do not have the luxury of time. The end result will be even more delays for class members to obtain the medical care they have long been entitled to but have not been provided.

In its response to the Court's order regarding the proposed medical care injunction, the Army argued that such a time limit would be "inappropriate given the potential size of the class, potential delays in obtaining a complete record and then issuing a final agency decision on the matter." (ECF No. 587 at 9.) Given the advanced age of class members and the passage of decades since the testing programs, however, it is unlikely the Army will receive a significant number of claims. Indeed, the Ninth Circuit found that "the Army would be required to provide medical care to a relatively small group of living veterans," and the "government substantially exaggerates the impact of an injunction requiring the Army to provide medical care." (ECF No. 570 at 29.) As for the Army's purported concern about "potential delays in obtaining a complete record," the Court can easily impose a timeline that only begins to run when an

[1] The Army's last status report concerning its compliance with the Court's Notice Injunction 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 class members. Accordingly, Plaintiffs again respectfully request that the Court order the Army to file an updated status report and/or schedule a hearing concerning its provision of notice. An order to show cause why the Army has not issued any notice to class members over the past three years may also be warranted.

application is complete.

The Army's argument that "to the extent delay in obtaining decisions on eligibility is a concern . . . the applicant has the right to move to 'compel agency action unlawfully withheld or unreasonably delayed'" highlights why real deadlines are necessary and proper. (ECF No. 587 at 9 (quoting 5 U.S.C. § 706(1)).) The class members have already won this issue, and are still waiting after the **seven years** this litigation has been pending to receive relief, pursuant to 5 U.S.C. § 706(1). The Army should not be permitted to indefinitely withhold medical care contrary to its adjudicated legal obligations by devising such an open-ended procedure. As the Court found with respect to the Army's compliance with the Notice Injunction, the Army's plan "must include an actual timeline" and not be "unduly time-consuming and vague." (ECF No. 562 at 2-3.) At this stage and given the age of the class members, relief delayed is truly relief denied.

The Court has already indicated in its modified injunction that class members may move to enforce the injunction in this Court without the need for filing separate APA actions, rejecting the Army's original proposal. (ECF No. 588-1 ¶ 7.) In situations where the Army has failed to render a decision in a timely manner, class members and the Army need clear guidance as to when a motion to enforce the injunction may properly be brought in this Court. Plaintiffs respectfully submit that the best way to accomplish this is to include a concrete timeline in the injunction itself.

Plaintiffs submit that the 45-day timeline included in their proposed injunction is more than sufficient for the Army to render a decision on a class member's complete application. (ECF No. 586-1 ¶ 7.) At a minimum, the Court should either include its own timeline or require the Army to propose an alternative timeline for the Court's consideration.

C. Factors Considered by the Panel

Paragraph 4 of the modified Army plan lists the factors that the Army Benefits Application Panel "will" and "may" consider when evaluating a class member's claim for medical care. (ECF No. 588-1 ¶ 4.) The "may" factors are identified as equitable factors that the Panel "may" consider "in its discretion," such as the fact that "the medical research occurred over 40 years ago" and "scientific studies on the long-term health effects of certain chemical or

biological substances may be limited or incomplete." (*Id.*) There is no reason, however, why weighing these factors should be optional. The Court already proposes to require the Army to weigh the "will" factors; the Court should do the same with respect to the "may" factors.

Indeed, considering those equitable factors is the least the Army can do, in light of its failures to comply with its obligations that have exacerbated the harms class members already face by virtue of their participation in the testing programs. Because the Army has ignored its obligations not only to provide medical care, but also to monitor, track, and provide medical follow-up to test subjects for decades, the Army has severely impeded class members' efforts to link their health problems to their decades-old exposures and participation in the testing programs. If the Army had complied with its duties all along, class members would undoubtedly have an easier time establishing that connection. The Army should not be rewarded for its repeated and sustained dereliction of duty. *See Allen v. United States*, 588 F. Supp. 247, 411 (D. Utah 1984), *rev'd on other grounds*, 816 F.2d 1417 (10th Cir. 1987) ("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.").

In addition, the last "will" factor should be modified to reflect the practicalities of that information. The Army proposes that the Panel will consider "(e) all information provided by the applicant, to include documents obtained from Defendants during discovery pertaining to the Chem-Bio Database, the Mustard Gas Database, the Chemical, Biological, Radiological & Nuclear Defense Information Analysis Center ("CBRNIAC") Database and other related databases created in conjunction with Battelle Memorial Institute, and the Defense Technical Information Center ("DTIC") repository." (ECF No. 587-1, Attach. 5 ¶ 4.) While the Army Panel should consider "all information provided by the applicant" and should consider relevant information from those listed sources and databases where available, the applicants themselves do not have access to that information in order to provide it. The Army designated much of that production as "Confidential" under the Protective Order in this case (ECF No. 232), limiting its permitted uses and disclosure. By contrast, the Army itself has direct access to that information and should be able to readily retrieve it for the Panel's consideration when needed. The burden

should not be placed on the applicant. This provision merely adds an unnecessary layer further delaying the Army's performance of its medical care obligations.

D. Retention of Jurisdiction

As it did with the Notice Injunction, the Court should include a provision that explicitly states the Court will retain jurisdiction to enforce the terms of the medical care injunction. This is standard and uncontroversial language for any injunction. *See, e.g., Sierra Club v. Penfold*, 857 F.2d 1307, 1321-22 (9th Cir. 1988) (court did not abuse discretion in retaining jurisdiction to review environmental studies as part of injunctive relief under APA). For consistency, Plaintiffs propose adding the same provision from the Notice Injunction: "The Court retains jurisdiction to enforce the terms of this Injunction and Order." (ECF No. 545 ¶ 5.) Under the modified Army plan, the Court has already added a provision that contemplates the Court's continuing jurisdiction: "Any disputes regarding the denial of medical care may be presented to the Court as a motion to enforce the injunction." (ECF No. 588-1 ¶ 7.) Plaintiffs' proposed addition merely makes the Court's retention of jurisdiction explicit rather than implied.[2]

II. THE COURT HAS AUTHORITY TO REQUIRE THE ARMY TO PAY FOR MEDICAL CARE OUTSIDE OF MILITARY TREATMENT FACILITIES.

In its response to the Court's order regarding the proposed medical care injunction, the Army argued that "the only available health care that the Army is Congressionally-authorized to provide to the plaintiff class would be at MTFs, pursuant to its authority under 10 U.S.C. § 1074." (ECF No. 587 at 4.) But this Court and the Ninth Circuit have already rejected these kinds of arguments. The Army still cites *Schism v. United States*, 316 F.3d 1259 (Fed. Cir. 2002), despite this Court's prior order finding that the present case "is distinguishable from Schism." (ECF No. 544 at 26.) As the Court held on summary judgment, "AR 70-25 is a substantive rule and

[2] Plaintiffs also propose a clarification to the introductory paragraph, as reflected in Exhibit A. Consistent with the certified class definition and subsequent paragraphs of the proposed plan, the class entitled to relief includes those who participated as research subjects in the testing programs, not just those who were exposed to chemical or biological substances. (ECF No. 485 at 58.) For example, test subjects who received placebos may still suffer PTSD from the testing experience and not knowing whether what they ingested or inhaled was a dangerous substance.

was promulgated under 10 U.S.C. §§ 3013 and 4503, [which are] statutory grants of authority sufficient to create enforceable rights," including a right to medical care.[3] (*Id.* at 27.) In passing these statutes, "Congress delegated to the Secretary of the Army the authority to contract for services needed to carry out research." (*Id.*) There is no proscription in these statutes that medical treatment "services" must be accomplished solely through the use of MTFs.

Even under 10 U.S.C. § 1074, moreover, the Court has the authority to require the Army to provide for private medical care if the MTFs are inadequate. The Army calls this a "statutory authority" issue, but it is really just a question of implementation. (ECF No. 587 at 10.) Under section 1074(c)(1), "funds appropriated to a military department . . . may be used to provide medical and dental care to persons ***entitled to such care by law or regulations***." 10 U.S.C. § 1074(c)(1) (emphasis added). The Ninth Circuit has already held that AR 70-25, a binding regulation on the Army, entitles class members to medical care. (ECF No. 570 at 28.) Thus, under the plain language of the statute, the Army has authority to use "appropriated funds" to pay for that care. The statute does not restrict how those "appropriated funds" must be used. By regulation, the Army has obligated itself to provide class members with medical care. How the Army provides such care—whether at MTFs or through private physicians—is simply a matter of implementation, not statutory authority. If the MTF network and the VA system are inadequate to provide such care, the Army has the authority under this statute to pay for private physicians, and the Court has the authority to order it.

Because of this broad grant of statutory authority from Congress, the fact that the Army has not passed another separate regulation that specifically states that these class members may receive care outside of MTFs is irrelevant. The Army again erroneously points to the Secretarial Designee regulation (32 C.F.R. § 108.4) as the sole means by which a military department can authorize medical care. (ECF No. 587 at 4-5.) Besides being at odds with the plain language of section 1074(c)(1), the Army's position ignores DOD's own regulations. DOD Instruction

[3] Congress repealed 10 U.S.C. § 4503 in 1993. A concurrent amendment to 10 U.S.C. § 2358 rendered section 4503 "redundant and obsolete authority." National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 827(c), 107 Stat. 1547, 1713 (1993).

3216.02, concerning the "Protection of Human Subjects and Adherence to Ethical Standards in DOD-Supported Research," specifically states that DOD components, such as the Army, "may *supplement* [the] Secretarial Designee procedure with *additional procedures* consistent with applicable authority" in order to "protect human subjects from medical expenses." DOD Instruction 3216.02, Enclosure 3, ¶ 10.b (Nov. 8, 2011) (emphasis added). Thus, even if the Secretarial Designee procedure itself does not contemplate non-MTF care for the class members, DOD Instruction 3216.02 shows that the Army is authorized to supplement that procedure with non-MTF care as long as it is "consistent with applicable authority." Sections 3013 and 1074(c)(1) provide the requisite authority.

Finally, requiring the Army to pay for private medical care in some circumstances to effectuate its long-neglected duty is also consistent with this Court's inherent authority to fashion an injunction that awards class members "complete relief." *See Xiao v. Reno*, 930 F. Supp. 1377, 1379 (N.D. Cal. 1996) (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." (citations omitted)). The Court should ensure that the Army does not continue to effectively withhold medical care by unduly burdening class members' ability to receive treatment.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court make the above modifications to the proposed injunction and maintain the provisions in the proposed injunction that require the Army to pay for private physicians, as necessary.

Dated: January 11, 2017

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EXHIBIT A

Plaintiffs' Exhibit A

Proposed Plan for Implementing the Provision of Medical Care Pursuant to Army Regulation 70-25

To fulfill the obligations under Army Regulation 70-25 (AR 70-25) to provide medical care to former members of the armed forces who participated as research subjects in the Army's exposed to a chemical or biological substance as part of their participation in researchtesting programs, for any injury or disease that is the proximate result of their participation in the research, medical care will be provided to requesting class members as set forth below.

If the class member is determined, under the process set forth below, to have any health condition having a sufficiently strong causal link such that a reasonable person could find that the injury or disease was caused by testing exposure or participation in research, the Army will provide the requisite health care at Department of Defense (DoD) medical treatment facilities (MTFs), whether by using the Secretarial Designee (SECDES) statutory authority, see, e.g., 10 U.S.C. § 1074(c), DoD Instruction 6025.23, AR 40-400[1], or otherwise.

A. The Army will implement the following process to determine eligibility for medical care:

1. Notice to the Class. The Army will notify individuals who may qualify for research related medical care of the potential availability of Army provided medical care and the process to apply for such care. The Army will provide individual notification via first class mail to those class members for whom the Army has contact information. The Army will also provide notice via public media and outreach to the VA and to veteran's service organizations.

[1] The health care provided through this plan is supplemental to the comprehensive care a plaintiff is entitled to receive through the Department of Veterans Affairs (VA) based on his or her status as a veteran. *See* 38 CFR 17.36(b). This plan will have no bearing and has no effect on the provision of care or benefits independently performed by the VA under its own statutory and regulatory requirements, separate from this plan.

2. The Army will use a previously established DoD toll-free number for veterans who believe they may qualify for research related medical care to obtain additional information about potential eligibility for medical care and the process for applying for such care. The Army will make reasonable efforts to assist veterans in determining whether they participated in the relevant research programs by providing internet and toll-free contact information to obtain records of participation in the relevant research programs, to obtain medical records from the VA concerning a diagnosis (the veteran does not have to use a diagnosis from the VA), and to obtain a VA determination concerning service connected disability. The Army will also provide application information to veterans eligible for enrollment in the VA's comprehensive healthcare system. Once a veteran obtains records substantiating research participation, a diagnosis, and any pending or complete VA service connection determination, the veteran may apply (electronically or through the mail) for medical treatment in a military treatment facility.

3. Application: To apply for medical care, an applicant will submit an application to the Army. The application for medical care will consist of a form to be completed by the applicant and treating physician, and documentation to support the applicant's claim, including: any civilian, VA, or Army medical records showing a diagnosis the applicant believes is proximately caused by exposure during research, Army personnel records relating to research participation[2], any VA service connection decisions[3], and a short statement about why the physician believes the injury or illness is caused by the exposure or participation during research. Complete

[2] To the extent that former research participants do not have records to show participation, the Army will inform applicants how to apply to the Army Board for the Correction of Military Records (ABCMR). Applicants must then provide the ABCMR will sufficient information to prove research participation in order to have their records corrected to validate their participation in the medical research programs. Upon record correction to indicate research participation, a Veteran can apply for ~~SECDES~~ medical care under this plan.

[3] The Army will make independent proximate result determinations and will be informed by but not bound to any VA service connection decision.

applications will include (1) records of participation in relevant research (where available); (2) a medical diagnosis believed caused by research participation; and (3) any VA service connection decision (if applicable). In the event a class member is unable to pay for a medical examination for purposes of obtaining a diagnosis to support an application, the Army will arrange for the class member to be examined at no cost at the nearest DoD MTF or VA facility. Upon receipt of a complete application, the Army will make the determination required in para. 4 below.

4. Review of Application: Complete applications will be reviewed by a Benefits Application Panel. This Panel will be established by the Army Medical Command (MEDCOM). The panel will consist of at least three medical professionals from either the US Army Medical Research Institute of Chemical Defense (for chemical exposure cases) or the US Army Medical Research Institute of Infectious Disease (for biological exposure cases) and may include additional specialty members based on the type of illness or injury being considered. The panel will conduct a record review of the application, extrinsic medical evidence, VA records, and Army records and will determine, by a preponderance of the evidence, whether the applicant's diagnosed condition was a proximate result of his or her participation in the specific research program. A decision shall be issued within forty-five (45) days of when the application is completed. If no decision has been reached within forty-five (45) days, the applicant may file a motion with the Court to enforce the injunction.

The Panel's decision will be based on a majority vote. A "proximate result" is defined as a sufficiently strong causal link such that a reasonable person could find that the injury or disease was caused by the research. In evaluating medical care claims under this standard, the Panel will reasonably weigh the following evidence:

(a) the nature of the applicant's participation in the research, to include the type of substance, means of administration, dosage, and frequency of exposure;

(b) the applicant's health condition during and after his or her research participation, including timing and severity of the onset of symptoms of medical illness, disease, or injury, as supported by the applicant's medical evidence and available records from the DoD and VA;

(c) the nature of the applicant's current medical condition, as supported by the applicant's submitted medical evidence and available records from the DoD and VA;

(d) available scientific evidence concerning the long term health effects of the chemical or biological substance to which the applicant was exposed, including any relevant information retrieved from the Chem-Bio Database, the Mustard Gas Database, the Chemical, Biological, Radiological & Nuclear Defense Information Analysis Center ("CBRNIAC") Database and other related databases created in conjunction with Battelle Memorial Institute, and the Defense Technical Information Center ("DTIC") repository; and

(e) all information provided by the applicant~~, to include documents obtained from Defendants during discovery pertaining to the Chem-Bio Database, the Mustard Gas Database, the Chemical, Biological, Radiological & Nuclear Defense Information Analysis Center ("CBRNIAC") Database and other related databases created in conjunction with Battelle Memorial Institute, and the Defense Technical Information Center ("DTIC") repository~~.

In making its determination the Panel~~, in its discretion, may~~ will equitably weigh the following:

(a) the medical research occurred over 40 years ago;

(b) records concerning the research may be limited or incomplete;

(c) scientific studies on the long-term health effects of certain chemical or biological substances may be limited or incomplete; and

(d) evidence related to the precise proximate cause of a particular diagnosed medical condition may not be definitive.

5. If the Panel determines there is a sufficiently strong causal link such that a reasonable person could find the applicant's condition was caused by participation in the specific research program claimed, the Panel will submit a recommendation to provide the applicant with necessary medical care for the research related medical condition to the Secretary of the Army or his designee.

6. The Secretary of the Army or his designee will review the Panel's recommendation in accordance with the criteria specified in 32 C.F.R. 108 and DoDI 6025.23 and the Court's orders. If medical care is granted to the applicant, the applicant will be provided with information for the nearest DoD MTF with the capability to treat the approved condition and given a limited access ID card, as necessary, entitling him to receive treatment at the MTF for the specific medical condition, injury, or disease determined to be the proximate result of the research. If the nearest MTF is more than fifty (50) miles from the applicant's home, or in situations where necessary treatment is not available through a MTF, the Army will assist the applicant in requesting health care from the VA. If the necessary treatment is also not available from the VA, the Army will arrange for treatment by and payment of a private medical provider.

7. Final Agency Action: When an application to the Army for medical care is denied, the Army shall inform class counsel. Any disputes regarding the denial of medical care may be presented to the Court as a motion to enforce the injunction.

B. Reporting and Jurisdiction.

1. Within thirty (30) days of the date of entry of this Injunction, the Army shall file with the Court a report describing its implementation of policies and procedures to facilitate its compliance with this Injunction.

2. After this initial report, the Army shall file status reports every three months to update the Court on the implementation of these plans, policies, and procedures. These reports shall include at minimum the following information: how many test subjects have applied for medical care, how many test subjects have had their applications granted, how many test subjects have been provided with medical care, how many test subjects have been denied care, the reasons for any individual denials of medical care, the treatment facility locations being made available for care, and the frequency of visits to those facilities by test subjects.

3. The Court retains jurisdiction to enforce the terms of this Injunction and Order.