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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 OAKLAND DIVISION

15
16 VIETNAM VETERANS OF AMERICA, *et al.*,
17 Plaintiffs,
18 v.
19 CENTRAL INTELLIGENCE AGENCY, *et al.*,
20 Defendants.

Case No. CV 09-0037-CW

**PLAINTIFFS' RESPONSE TO
THE COURT'S PROPOSED
INJUNCTION**

Complaint filed January 7, 2009

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

4 **I. PROPOSED MODIFICATIONS TO THE INJUNCTION**

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

9 **A. Reporting Requirement**

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

17 This reporting provision need not be an intrusive obligation. The Army is already
18 required to provide status reports to the Court regarding its compliance with the Notice
19 Injunction. The Army now needs to update the Court on the status of its efforts to comply with
20 the Court's medical care injunction as well, at a time interval that the Court finds sufficient.
21 These reports should include basic and readily available metrics concerning the Army's provision
22 of medical care to class members, including, for example, how many test subjects have applied
23 for medical care, how many test subjects have had their applications granted, how many test
24 subjects have been provided with medical care, how many test subjects have been denied care,
25 and the reasons for any individual denials of medical care. The reports should also include
26 information regarding how the Army is complying with its obligation under AR 70-25 to create a
27 "volunteer data base," the purpose of which is to "readily answer questions concerning an
28 individual's participation in research conducted or sponsored by the command," and "to ensure

1 that the command can exercise its ‘duty to warn.’” *See* AR 70-25 at Appx. H.¹ Plaintiffs
2 respectfully submit that status updates being filed quarterly, as reflected in their proposed
3 injunction, would be appropriate.

4 **B. Decision Timelines**

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

14 In its response to the Court’s order regarding the proposed medical care injunction, the
15 Army argued that such a time limit would be “inappropriate given the potential size of the class,
16 potential delays in obtaining a complete record and then issuing a final agency decision on the
17 matter.” (ECF No. 587 at 9.) Given the advanced age of class members and the passage of
18 decades since the testing programs, however, it is unlikely the Army will receive a significant
19 number of claims. Indeed, the Ninth Circuit found that “the Army would be required to provide
20 medical care to a relatively small group of living veterans,” and the “government substantially
21 exaggerates the impact of an injunction requiring the Army to provide medical care.” (ECF
22 No. 570 at 29.) As for the Army’s purported concern about “potential delays in obtaining a
23 complete record,” the Court can easily impose a timeline that only begins to run when an
24

25 ¹ The Army’s last status report concerning its compliance with the Court’s Notice
26 Injunction was filed on November 4, 2014 (ECF No. 566). Since that time, Plaintiffs have
27 received no further update and are unaware of the Army issuing any type of notice to class
28 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.

1 application is complete.

2 The Army's argument that "to the extent delay in obtaining decisions on eligibility is a
3 concern . . . the applicant has the right to move to 'compel agency action unlawfully withheld or
4 unreasonably delayed'" highlights why real deadlines are necessary and proper. (ECF No. 587
5 at 9 (quoting 5 U.S.C. § 706(1)).) The class members have already won this issue, and are still
6 waiting after the **seven years** this litigation has been pending to receive relief, pursuant to
7 5 U.S.C. § 706(1). The Army should not be permitted to indefinitely withhold medical care
8 contrary to its adjudicated legal obligations by devising such an open-ended procedure. As the
9 Court found with respect to the Army's compliance with the Notice Injunction, the Army's plan
10 "must include an actual timeline" and not be "unduly time-consuming and vague." (ECF No. 562
11 at 2-3.) At this stage and given the age of the class members, relief delayed is truly relief denied.

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

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

23 C. Factors Considered by the Panel

24 Paragraph 4 of the modified Army plan lists the factors that the Army Benefits
25 Application Panel "will" and "may" consider when evaluating a class member's claim for
26 medical care. (ECF No. 588-1 ¶ 4.) The "may" factors are identified as equitable factors that the
27 Panel "may" consider "in its discretion," such as the fact that "the medical research occurred over
28 40 years ago" and "scientific studies on the long-term health effects of certain chemical or

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

4 Indeed, considering those equitable factors is the least the Army can do, in light of its
5 failures to comply with its obligations that have exacerbated the harms class members already
6 face by virtue of their participation in the testing programs. Because the Army has ignored its
7 obligations not only to provide medical care, but also to monitor, track, and provide medical
8 follow-up to test subjects for decades, the Army has severely impeded class members’ efforts to
9 link their health problems to their decades-old exposures and participation in the testing
10 programs. If the Army had complied with its duties all along, class members would undoubtedly
11 have an easier time establishing that connection. The Army should not be rewarded for its
12 repeated and sustained dereliction of duty. *See Allen v. United States*, 588 F. Supp. 247, 411
13 (D. Utah 1984), *rev’d on other grounds*, 816 F.2d 1417 (10th Cir. 1987) (“If direct proof of actual
14 cause is to fail, the ultimate burden of the injury should fall upon him who was negligent and who
15 likely is in a better position to inform the court of the facts relating to cause.”).

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

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

3 **D. Retention of Jurisdiction**

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

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

17 In its response to the Court's order regarding the proposed medical care injunction, the
18 Army argued that "the only available health care that the Army is Congressionally-authorized to
19 provide to the plaintiff class would be at MTFs, pursuant to its authority under 10 U.S.C. § 1074."
20 (ECF No. 587 at 4.) But this Court and the Ninth Circuit have already rejected these kinds of
21 arguments. The Army still cites *Schism v. United States*, 316 F.3d 1259 (Fed. Cir. 2002), despite
22 this Court's prior order finding that the present case "is distinguishable from Schism." (ECF
23 No. 544 at 26.) As the Court held on summary judgment, "AR 70-25 is a substantive rule and
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25 ² Plaintiffs also propose a clarification to the introductory paragraph, as reflected in
26 Exhibit A. Consistent with the certified class definition and subsequent paragraphs of the
27 proposed plan, the class entitled to relief includes those who participated as research subjects in
28 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.

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

6 Even under 10 U.S.C. § 1074, moreover, the Court has the authority to require the Army
 7 to provide for private medical care if the MTFs are inadequate. The Army calls this a “statutory
 8 authority” issue, but it is really just a question of implementation. (ECF No. 587 at 10.) Under
 9 section 1074(c)(1), “funds appropriated to a military department . . . may be used to provide
 10 medical and dental care to persons *entitled to such care by law or regulations.*” 10 U.S.C.
 11 § 1074(c)(1) (emphasis added). The Ninth Circuit has already held that AR 70-25, a binding
 12 regulation on the Army, entitles class members to medical care. (ECF No. 570 at 28.) Thus,
 13 under the plain language of the statute, the Army has authority to use “appropriated funds” to pay
 14 for that care. The statute does not restrict how those “appropriated funds” must be used. By
 15 regulation, the Army has obligated itself to provide class members with medical care. How the
 16 Army provides such care—whether at MTFs or through private physicians—is simply a matter of
 17 implementation, not statutory authority. If the MTF network and the VA system are inadequate
 18 to provide such care, the Army has the authority under this statute to pay for private physicians,
 19 and the Court has the authority to order it.

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

26
 27 ³ Congress repealed 10 U.S.C. § 4503 in 1993. A concurrent amendment to 10 U.S.C.
 28 § 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).

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 research testing 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 40-400¹, 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 participation², any VA service connection decisions³, 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.