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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' NOTICE OF MOTION AND MOTION FOR SANCTIONS

Date: September 29, 2010
Time: 9:30 a.m.
Courtroom: F, 15th Floor
Judge: Hon. James Larson

Complaint filed January 7, 2009

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU ARE HEREBY NOTIFIED THAT on Wednesday, September 29, at 9:30 a.m., or as soon thereafter as counsel may be heard, before the Honorable James Larson in the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, Courtroom F, 15th Floor, San Francisco, California, 94102, Plaintiffs, Vietnam Veterans of America; Swords to Plowshares: Veterans Rights Organization; Bruce Price; Franklin D. Rochelle; Larry Meirow; Eric P. Muth; David C. Dufrane; and Wray C. Forrest (collectively, "Plaintiffs"), will, and hereby do, move the Court for entry of sanctions against Defendants based on Defendants' serial noncompliance with their discovery obligations in this action.

This motion is made pursuant to Federal Rule of Civil Procedure 37(a) and Civil Local Rule 37-4, and it is supported by the memorandum of points and authorities below, the attached Declaration of Daniel J. Vecchio ("Vecchio Decl."), and the complete files and records in this action.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs respectfully request that the Court impose sanctions against Defendants under Federal Rule of Civil Procedure 37(a)(5)(A) based on Defendants' serial non-compliance with their discovery obligations to date, which has required Plaintiffs to move to compel appropriate discovery responses. Plaintiffs' First Set of Requests for Production have been pending for over a year, during which time Defendants have attempted to sidestep their discovery obligations at every turn, withholding (or even refusing to search for) large volumes of relevant, responsive documents, refusing to provide 30(b)(6) witnesses to testify about their document searches and certain substantive topics, and refusing to stipulate to a routine protective order that would address several of Defendants' objections to producing documents. Plaintiffs have been forced to turn to the Court multiple times for relief, and now request that sanctions be imposed on the basis of these multiple motions — which would not have been necessary but for Defendants' unreasonable refusal to cooperate in the discovery process.

II. ARGUMENT

Under the Federal Rules, if a Court grants motion to compel discovery, it *must* require the producing party or its counsel (or both) to pay the moving party's reasonable expenses incurred in making the motion. Fed. R. Civ. P. 37(a)(5)(A). The Court may only withhold sanctions if it finds: (i) the moving party filed its motion to compel "before attempting in good faith to obtain the disclosure or discovery without court action;" (ii) the producing parties' nondisclosure was "substantially justified;" or (iii) other circumstances "would make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(A)(i)-(iii). None of these factors are present here.

A. Defendants Have Failed to Meet Their Discovery Obligations Despite Plaintiffs' Good Faith Meet-and-Confer Efforts.

Plaintiffs have been attempting in good faith to obtain responses to their Requests for Production and 30(b)(6) notices and to stipulate to a protective order without Court intervention for over a year. Plaintiffs served their First Set of Requests for Production on May 15, 2009, and have subsequently filed three additional Requests for Production. Defendants have continually

resisted producing relevant documents by standing on myriad objections and unsubstantiated claims of privilege. (Vecchio Decl. ¶ 6, Ex. A.) To date, Defendants have produced fewer than 16,500 pages of documents, despite the fact that the relevant events in this case stretch back some fifty years. (Vecchio Decl. ¶ 6.) Even more unbelievably, it appears that Defendants have yet to search even the most obvious location for documents — **Edgewood Arsenal itself**. (Vecchio Decl. ¶ 12, Ex. G.) Defendants have served no responses or objections whatsoever to Plaintiffs' Second or Third Sets of Requests for Production.[1] Defendants' meet-and-confer proposals for resolving the parties' disputes regarding the Requests for Production have been conditioned on Plaintiffs agreeing not to serve additional discovery. (Vecchio Decl. ¶¶ 5, 12, Ex. G.) After initially filing an Individual Statement of Discovery Dispute on June 2, 2010 (Docket No. 84), and later a Joint Statement of Discovery Dispute on August 2, 2010 after further meet and confer efforts (Docket No. 118), Plaintiffs were left with no choice but to file a Motion to Overrule Objections and Compel Production of Documents on August 25, 2010.

Defendants also have refused to stipulate to a protective order, which has allowed Defendants improperly to avoid producing relevant documents or testimony. After Plaintiffs served their First Set of Requests for Production on May 15, 2009, counsel began discussing the possibility of a protective order to cover certain materials that Defendants claim are covered by the Privacy Act and/or HIPAA. (Vecchio Decl. ¶ 2.) Several drafts of stipulated protective orders were exchanged over the course of many months, and counsel met and conferred by phone multiple times, including on July 31, 2009, May 19, 2010, and May 26, 2010. (Vecchio Decl. ¶¶ 2-4.) Despite these efforts, Defendants would not agree to any protective order allowing for the disclosure of any individual test subject's identifying information, except for information specifically related to the Individual Plaintiffs. After it became apparent that the parties' disagreement could not be resolved without the Court's intervention, Plaintiffs filed an Individual Statement of Discovery Dispute on June 2, 2010. (Docket No. 82.) After further meet-and-

[1] Given this failure, it seems likely that Defendants will similarly fail to respond to Plaintiffs' Fourth Set of Requests for Production. Those responses are due on September 1, 2010.

confer efforts, Plaintiffs filed a Joint Statement of Discovery Dispute regarding the same issue on August 2, 2010. (Docket No. 115.) Plaintiffs ultimately were left with no choice but to file a Motion for Protective Order and to Overrule Objections on August 19, 2010. (Docket No. 121.)

Finally, Defendants have engaged in similar resist-and-delay tactics with respect to Plaintiffs' Notices of 30(b)(6) Deposition. Plaintiffs first served Notices of 30(b)(6) Depositions on November 16, 2009. (Vecchio Decl. ¶ 7.) Defendants objected to all fifty-seven topics identified by Plaintiffs and refused to designate a deponent to testify regarding thirty-seven of those topics. (*Id.*, Ex. B.) Further, Plaintiffs served supplemental 30(b)(6) notices of depositions on the CIA, Department of Defense, and Department of the Army on June 16, 2010, in an effort to seek discovery concerning the (inadequate) scope of Defendants' production as described above. (Vecchio Decl. ¶¶ 8-10, Exs. C-E.) The Department of Defense and Department of the Army insisted that these supplemental depositions follow the completion of their searches for documents, while the CIA attempted to avoid a deposition altogether by proposing only a written response. (Vecchio Decl. ¶ 12, Ex. G.) Defendants have not specified when their searches for responsive documents will be completed. It is also unclear what searches remain ongoing or whether Defendants contemplate additional searches they have yet to undertake. Accordingly, Plaintiffs filed a Motion to Overrule Objections and Compel 30(b)(6) Depositions and Memorandum of Points and Authorities in Support Thereof on August 25, 2010.

B. Defendants' Failure to Meet Their Discovery Obligations Is Not Substantially Justified.

Defendants have not — and cannot — meet their burden of demonstrating that their meager document production, refusal to stipulate to a protective order, and willful refusal to produce 30(b)(6) witnesses were substantially justified. A position is "substantially justified" where it has a reasonable basis in law and fact. *Proa v. NRT Mid Atl., Inc.*, 633 F. Supp. 2d 209, 213 (D. Md. 2009). A showing of bad faith is not required and even "negligent failures to allow reasonable discovery" may constitute cause for imposing sanctions. *Eureka Fin. Corp. v. Hartford Accident & Indem. Co.*, 136 F.R.D. 179, 186 (E.D. Cal. 1991). Defendants' response to

each of Plaintiffs' discovery requests demonstrates an intent to unnecessarily delay discovery and unwillingness to turn over clearly relevant information.

Defendants cannot offer sufficient justification for producing so few documents after over a year of discovery. Defendants' testing programs exposed thousands of test subjects to hundreds of toxic compounds over the course of many years. This is a complex case implicating tens of thousands of documents. Yet, Defendants have produced fewer than 16,500 pages (approximately 1600 documents), and approximately 40% of these pages deal only with the six Individual Plaintiffs' military records and Veterans Administration claim files. (Vecchio Decl. ¶ 6.) Further, it appears that Defendants have yet to search the primary repositories for documents concerning Defendants' testing programs, let alone the several other major Department of Defense record holding sites with relevant documents. (Vecchio Decl. ¶ 12, Ex. G.) Despite the patent inadequacies of their production, Defendants have consistently and repeatedly maintained that producing additional documents would be unduly burdensome and unnecessary given the scope of this case. In fact, Defendants have failed to respond at all to Plaintiffs' Second and Third Sets of Requests for Production, despite the time for response having elapsed. (Vecchio Decl. ¶ 14.) Such disregard of their discovery obligations constitutes a clear basis for mandatory sanctions under Federal Rule of Civil Procedure 37(a)(5)(A).

Defendants also consistently refused to enter into a routine protective order that would protect information subject to the Privacy Act or HIPAA from disclosure or use outside of this litigation, thereby permitting its production to Plaintiffs. Instead, Defendants have refused to produce documents containing such information, or have produced documents with such information wholly redacted. For example, Defendants used the Privacy Act as a basis for withholding the names of all Edgewood test subjects other than the named plaintiffs, despite the fact that the test subjects are all potential class members and percipient witnesses. (Vecchio Decl. ¶ 6, Ex. A.) Defendants have also used the Privacy Act as an excuse to withhold documents concerning individuals who *conducted* the test programs. These categorical refusals to provide the names of critical witnesses, when a routine protective order could have obviated any of Defendants' concerns, have unnecessarily delayed discovery and prejudiced Plaintiffs. Given

Defendants' admitted destruction of documents concerning the test programs and their apparent reluctance to produce documents in this litigation, it is quite likely that Plaintiffs will need to seek discovery from some of these individuals; due to Defendants' delays, Plaintiffs will have significantly less time in which to do so.[2] Defendants' refusals to agree to a protective order and produce this information are grounds for sanctions. *See Quality Inv. Props. Santa Clara, LLC v. Serrano Electric, Inc.* No. C 09-5376 JF (PVT), 2010 WL 2889178, at *4 (N.D. Cal. July 22, 2010) (ordering defendant to show cause why it should not be ordered to reimburse plaintiffs' attorneys fees based on defendant's refusal to stipulate to protective order); *see also, e.g., Mixt Greens v. Sprout Café*, No. C-08-5175 EMC, 2010 WL 2555753, at *2 (N.D. Cal. June 21, 2010) (privacy objections were "without any merit because any privacy concerns could have been addressed by a protective order…").

Additionally, Defendants have been unwilling to explain their decision to withhold relevant documents and their refusal to search particular document repositories. In response to Defendants' foot-dragging, Plaintiffs served notices of 30(b)(6) depositions on the Department of Army, Department of Defense, and the CIA on June 16, 2010. (Vecchio Decl. ¶¶ 8-10, Exs. C-E.) The noticed depositions concern Defendants' document searches thus far, and were intended to ensure, among other things, that Defendants were searching in the appropriate locations. The noticed depositions were scheduled for late July and early August, 2010. Defendants objected to producing witnesses and insist on delaying the depositions until after Defendants have completed their document searches. Defendants have set no deadlines for the completion of document searches and have not explained what document searches are ongoing. Defendants' proposal to delay these depositions would allow Defendants to continue withholding relevant information without accounting for these decisions.

[2] Indeed, some of the most robust discovery in this action was provided by Dr. James Ketchum, a former employee of Defendants who produced in excess of 29,000 pages of documents in response to Plaintiffs' Rule 45 subpoena. (Vecchio Decl. ¶ 11.) Many of these documents have not been found in Defendants' production.

Defendants cannot point to any circumstances which would make the award of fee shifting expenses unjust. Over the past year, Plaintiffs have attempted to meet and confer in good faith and have provided Defendants with ample opportunity to ameliorate the deficiencies in their discovery responses. Notwithstanding Plaintiffs' good faith efforts, Defendants have effectively stalled the discovery process. In short, over the last year Defendants have done little more than delay and withhold. Such tactics have required Plaintiffs to seek Court intervention, and Plaintiffs are entitled to sanctions under the mandatory sanctions provision of Federal Rule of Civil Procedure 37. Fed. R. Civ. P. 37(a)(5)(A)(i)-(iii).

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court impose sanctions against Defendants under Federal Rule of Civil Procedure 37(a)(5)(A)(i)-(iii), and require Defendants to reimburse Plaintiffs for costs and fees incurred in seeking Court intervention through the pending motions to compel. Defendants' consistent refusals to respond adequately to Plaintiffs' discovery requests for over a year reflects their global resistance to discovery obligations in this case. Plaintiffs should not bear the costs — which could have been so easily avoided — for having to bring multiple motions in order to secure Defendants' compliance.

Dated: August 25, 2010

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Attestation Pursuant to General Order 45, section X.B

I hereby attest that I have on file all holograph signatures for any signatures indicated by a "conformed" signature (/S/) within this efiled document.

/s/ GORDON P. ERSPAMER

Gordon P. Erspamer