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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 TO OVERRULE OBJECTIONS AND COMPEL PRODUCTION OF DOCUMENTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing 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:

PLEASE TAKE NOTICE that on September 29, 2010, at 9:30 a.m., or as soon thereafter as the matter may be heard before U.S. Magistrate Judge James Larson, at the United States District Courthouse, Oakland, California, 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 ("Plaintiffs") will and hereby do move the Court for an order overruling objections and compelling Central Intelligence Agency; Leon Panetta, Director of the Central Intelligence Agency; United States Department of Defense; Dr. Robert M. Gates, Secretary of Defense; United States Department of the Army; Pete Geren, United States Secretary of the Army; United States of America; Eric H. Holder, Jr., Attorney General of the United States ("Defendants") to produce documents responsive to Plaintiffs' Request For Production Nos. 1-7, 9, 11-14, 16-21, 23-26, 29-30, 33-40, 44-46, 48-49, 54-55, 57-58, 60-61, 63-66, and 72-77. Plaintiffs bring this motion on the grounds that Defendants have failed to respond to inspection demands pursuant to Rules 34 and 37(b) of the Federal Rules of Civil Procedure.

This motion to overrule objections and compel is based on this Notice of Motion, the Memorandum of Points and Authorities filed herewith, the Declaration of Daniel J. Vecchio ("Vecchio Decl.") and attached exhibits filed herewith, all other pleadings and matters of record, and such further oral and documentary evidence as may be presented at or before the hearing on this motion. Counsel for Plaintiffs certify that, prior to filing this motion, they in good faith conferred with Defendants' counsel in an effort to resolve this matter without court action.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Over a year and a half after Plaintiffs filed their original Complaint, Defendants' compliance with their discovery obligations has been nearly non-existent. In the course of this substantively complex litigation, involving chemical and biological weapons testing on thousands of human subjects by multiple government agencies over many years, Plaintiffs have served four sets of Requests for Production ("RFPs") with a total of 192 individual requests. (Declaration of Daniel J. Vecchio in Support of Plaintiffs' Motion to Overrule Objections and Compel Production of Documents ("Vecchio Decl.") ¶¶ 2, 4-5, Ex. A.) More than fifteen months after Plaintiffs served their first set of RFPs, Defendants collectively have produced fewer than 16,500 pages (approximately 1600 documents) — barely more than what is available in the public domain. (Vecchio Decl. ¶ 6.) The vast gaps in Defendants' production are also apparent based on documents produced by or obtained from third parties, which indicate that Defendants have preserved tens of thousands of relevant documents. Notably, Defendants have yet to identify a single document produced by the CIA, even though discovery suggests that there are, at least, thousands of documents relating to the CIA's testing programs dating back over forty years.

Relying on a misreading of Judge Wilken's January 19, 2010 Order, Defendants have circumvented their discovery obligation through a strategy of delay, knowing that the named Plaintiffs are aging veterans with a myriad of ailments, and at least one has terminal cancer. This is not how discovery is supposed to work. The Court should grant Plaintiffs' motion to compel.

II. BACKGROUND

A. Defendants' Misreading of Judge Wilken's Order.

Central to this discovery dispute is Defendants' misreading of Judge Wilken's January 19, 2010 Order on Defendants' Motion to Dismiss and Alternative Motion for Summary Judgment (the "Order"). Defendants contend that the Order somehow greatly narrowed the scope of relevant issues in this litigation. (Vecchio Decl. ¶ 7, Ex. C.) To the contrary, the Order upheld most of Plaintiffs' claims for relief. Specifically, there is no question that Judge Wilken upheld Plaintiffs' claims concerning: (1) Defendants' obligation to provide medical care to the test

subjects (the "Healthcare Claims"); (2) Defendants' obligation to provide notice to the test subjects disclosing information concerning the experiments, including information about the known health effects of Defendants' human experimentation programs (the "Notice Claims"); (3) the lawfulness of Plaintiffs' consent to testing; and (4) the lawfulness of Plaintiffs' secrecy oaths. (Order at 18-20.) Judge Wilken's Order dismissed only Plaintiffs' declaratory relief claims concerning the lawfulness of Defendants' testing programs and the constitutionality of the *Feres* doctrine. (*Id*. at 19-20.) Contrary to Defendants' assertions, the Order did not alter any of the facts at issue in the case, and all of them are incorporated into Plaintiffs' still-pending claims.

B. Plaintiffs' Requests for Production.

Plaintiffs served their first seventy-seven RFPs on May 15, 2009. (Vecchio Decl. ¶ 2, Ex. A.) Defendants served objections to all these requests on March 4, 2010. (Vecchio Decl. ¶ 3, Ex. B.) Defendants failed to provide individual responses on behalf of each Defendant, even though it is unlikely that the state of knowledge and information for each entity would be identical, and objected to all but two of the document requests (RFP Nos. 1, 10) by incorporating by reference one or more "general objections," without specifying the basis for each objection.[1] For example, Defendants objected to sixty-nine of the first seventy-seven document requests on the grounds that they were "not reasonably calculated to lead to discovery of admissible evidence." Although Defendants have produced some responsive documents, they have failed to identify what types of responsive documents are being withheld on the grounds of their numerous objections. Based on their misreading of the January 19, 2010 Order, Defendants have asserted that these objections are justified by the narrowed scope of issues relevant to this litigation. (*Id*., Ex. B at 1.) As noted above, Defendants are wrong.

Plaintiffs served two additional sets of document requests on May 10, 2010, and July 1, 2010, which comprised an additional ninety-six Requests for Production. (Vecchio Decl. ¶ 4.) Many of these new Requests sought the production of information and specific documents

[1] All references to Plaintiffs' first set of RFPs and Defendants' responses can be found in Defendants' Response to Plaintiffs' First Request for Production of Documents, attached as Exhibit B to the accompanying Declaration of Daniel J. Vecchio.

referred to in other documents produced to date. Defendants completely failed to respond to both sets of RFPs. (*Id.*)[2] As a result, all objections have been waived, and the Court should compel Defendants to produce all responsive documents. *See Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992) ("It is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection.").

C. Defendants' Inadequate Document Search and Production.

More than fifteen months after Plaintiffs served their first set of RFPs, Defendants have produced relatively few documents and have yet to search some of the most obvious locations where documents relevant to this case might be located. Specifically, Defendants have produced fewer than 16,500 pages (approximately 1600 documents) in response to Plaintiffs' RFPs, which is barely more than what is available in the public domain. (Vecchio Decl. ¶ 6.) As late as July 12, 2010, Defendants indicated that they had not searched records stored at, among other places, Edgewood Arsenal, where many of the acts alleged in the Complaint took place. (Vecchio Decl. ¶ 8, Ex. D at 1-2.) Yet records obtained from third-parties indicate that the filing rooms at Edgewood contain over a thousand linear feet of documents in labeled and catalogued cabinets and drawers. (Vecchio Decl. ¶ 9, Ex. E at 2-3 of 33.) That Defendants have yet to search the Army's "primary research centers for chemical and biological agents" is alarming — and suggests that Defendants are not taking their discovery obligations seriously.

Defendants also have failed to search for records at any of the locations where field testing took place. A congressional briefing indicates that such testing was conducted at numerous facilities, including: Fort McClellan, Alabama (the home of the U.S. Army Chemical School); Fort Bragg, North Carolina; Fort Benning, Georgia; Dugway Proving Ground, Utah; Horn Island, Mississippi; Marshall Islands; San Jose Island, Panama; USAATRC, Fort Greely, Alaska; Walter Island; the Virgin Islands; and Yuma Proving Ground, Arizona. (Vecchio Decl. ¶ 10, Ex. F at 4 of 9.) While Plaintiffs are not aware of a single central repository for information on Defendants'

[2] Plaintiffs' Fourth Set of Requests for Production were served on Defendants on August 2, 2010. Defendants have until September 1, 2010, to respond.

chemical weapons testing programs, there are at least five major Department of Defense records holding sites where large volumes of information are held: Edgewood Arsenal, Maryland; the Naval Research Laboratory, Maryland; Dugway Proving Ground, Utah; the Army Chemical School Library, Alabama; and Rocky Mountain Arsenal, Colorado. (*Id.* at 6-7 of 9.) Additional records are kept at the National Archives in Suitland and St. Louis and at the University of Chicago, and may be stored at other contractor facilities and universities that have yet to be identified. (*Id.*) These locations hold thousands of linear feet of paper. (*Id.* at 7 of 9.) Yet Defendants appear to have overlooked these key places where relevant documents may be stored.

Even more troubling is the fact that the CIA has virtually ignored all of its discovery obligations. Defendants have yet to identify any documents produced by the CIA, despite Plaintiffs' detailed allegations of the CIA's testing programs. (*See, e.g,* Second Amended Complaint ("Complaint") ¶¶ 114-55) (Docket No. 53).)[3] Documents obtained through discovery indicate that the CIA was closely involved with the testing of chemical and biological agents on servicemembers. For example, a 1955 memorandum from the director of the CIA to the Secretary of Defense states that CIA and Army scientists involved in the testing program maintained a close and effective liaison and that the CIA provided financial support for psychochemical experiments conducted by the Army Chemical Corps. (Vecchio Decl. ¶ 11, Ex. G.) Other documents show that the CIA funded human experimentation of BZ (known by the code name EA-3167) at Edgewood Arsenal as a part of Project OFTEN (Vecchio Decl. ¶ 12, Ex. H) and that boxes of documents related to these experiments are still in the CIA's possession (Vecchio Decl. ¶ 13, Ex. I).

D. Plaintiffs Have Attempted to Meet and Confer in Good Faith.

The parties met and conferred telephonically regarding these issues on May 19, 2010, and in-person on June 30, 2010, per the Court's order. (Vecchio Decl. ¶¶ 14-15.) Following these

[3] Defendants provided documents to Plaintiffs that are normally distributed in response to requests under the Freedom of Information Act relating to the CIA's MKULTRA project, which Defendants have made clear are not part of their production in this litigation. Defendants also provided documents regarding Project OFTEN as part of their initial disclosures, but have not identified any documents produced by the CIA in response to Plaintiffs' RFPs.

conferences, Defendants made a new proposal regarding the scope of document discovery on July 12. (Vecchio Decl. ¶ 8, Ex. D.) Not only did Defendants' proposal fail to bridge the gap between the parties' positions, it actually was a regression from the parties' earlier discussions and demanded sweeping restrictions on discovery — including a provision that Plaintiffs withdraw their most recent document requests and refrain from serving any additional requests for documents. (*Id.* at 2.) Plaintiffs rejected the proposal and filed a joint statement of discovery dispute with the court on August 2, 2010. On August 6, 2010, the Court ordered the parties to submit formal briefing for any outstanding discovery disputes. (Docket No. 120.)

III. ARGUMENT

A. Defendants Have Not Met Their Burden to Justify Their Failure to Produce Responsive Documents.

Rule 26 is clear on its face: a party "may obtain discovery regarding *any nonprivileged matter* that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1) (emphasis added). Relevance under Rule 26 is interpreted broadly and liberally, *see* 6 James W. Moore et al., *Moore's Federal Practice* § 26.41[6] (3d ed. 2010), and encompasses not only information that would be admissible at trial, but also information "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Additionally, any matter relevant to the subject matter involved in the action is discoverable, if the matter may reasonably assist a party in evaluating the case, preparing for trial, or facilitating a settlement. *See Id.* ("[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense"); *see also, e.g.*, *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation").

As the party resisting discovery, Defendants bear both the burden of "show[ing] that discovery should not be allowed, and . . . the burden of clarifying, explaining, and supporting its objections." *See Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1998) (internal citation omitted); *Kaufman v. Bd. of Trs.*, 168 F.R.D. 278, 280 (C.D. Cal. 1996) ("The burden of proof is on the party opposing discovery to claim lack of relevancy and privilege."). Defendants have not met either burden.

B. Defendants' Wholesale, Boilerplate Objections Are Insufficient and Should Be Overruled.

Defendants rely on mostly boilerplate objections to circumvent their discovery obligations with respect to Plaintiffs' First Set of RFPs (and failed to respond at all to the Second and Third sets).[4] Defendants' responses are particularly problematic in that Defendants object to nearly all of Plaintiffs' RFPs (all but RFP Nos. 1, 10) by incorporating by reference one or more "general objections," without specifying the bases for these objections as they relate to a particular request. Other objections served by Defendants provide little more specificity. Defendants' unexplained and unsupported objections are improper and should be overruled. *See Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008) (objections that the requests are "overboard and unduly burdensome, and not reasonably calculated to lead to the discovery of material admissible in evidence . . . . are improper unless based on particularized facts") (internal quotations omitted); *Duran v. Cisco Sys., Inc.*, 258 F.R.D. 375, 379 (C.D. Cal. 2009) ("unexplained and unsupported boilerplate objections are improper").

Plaintiffs move the court to overrule all Defendants' objections to fifty-three of Plaintiffs' first seventy-seven document requests. (RFP Nos. 1-7, 9, 11-14, 16-21, 23-26, 29-30, 33-40, 44-46, 48-49, 54-55, 57-58, 60-61, 63-66, and 72-77.)[5] While Defendants have produced a few documents responsive to some of these requests, they have asserted objections to all, and have not made clear whether they are withholding documents based on these objections. Given Defendants' limited production thus far, it is apparent that they are doing so. Defendants have

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[4] Defendants' failure to provide specific responses for each agency Defendant also is problematic because the state of knowledge and information for different agencies with different leadership and employees can hardly be identical. Defendants' undifferentiated responses make it difficult for Plaintiffs and the Court to determine whether individual agencies are complying with their discovery obligations.

[5] Civil L.R. 37-2 requires that a motion to compel "set forth each request in full, followed immediately by objections and/or responses thereto." As Defendants have objected each of Plaintiff's first seventy-seven RFPs and have failed to respond to the next ninety-six, reproducing the text of all discovery requests in this memorandum of points and authorities would be impractical and far exceed the page limit according to the Local Rules. For the convenience of the Court, Plaintiffs have attached their discovery requests along with Defendants' responses as Exhibits A and B to the accompanying Declaration of Daniel J. Vecchio.

objected to Plaintiffs' Requests based on, among other grounds, relevance, undue burden and privilege.[6] Defendants have not met their burden of justifying these objections, and the Court should overrule them and order Defendants to produce relevant responsive documents after an adequate search.[7]

1. Defendants' General Objections 3 and 5 are improper and should be overruled.

In General Objection No. 3, Defendants assert that Plaintiffs' definition of "test programs" is overly broad, and Defendants seek to redefine the term to drastically and impermissibly limit their discovery obligations. Plaintiffs defined "test programs" to mean "each of the projects identified in the Complaint, including without limitation, Projects 'BLUEBIRD,' 'ARTICHOKE,' 'MKDELTA,' 'MKULTRA,' 'MKNAOMI,' 'MKSEARCH,' 'MKCHICKWIT,' 'MKOFTEN,' and any other program of experimentation involving human testing of any substance, including but not limited to, 'MATERIAL TESTING PROGRAM EA 1729.'" (Vecchio Decl. ¶ 2, Ex. A at 5.) This definition parallels the description of the test programs describes in the Complaint, which provides descriptions and timeframes for each program. (Compl. ¶¶ 100-155.)

General Objection No. 3, however, states that Defendants are limiting their responses to only those test programs conducted in conjunction with Edgewood Arsenal at Edgewood itself, Aberdeen Proving Grounds (where Edgewood is located), Fort Detrick, Maryland, and Fort Ord, California. This objection effectively limits discovery to only four of the at least fifteen locations where the Army conducted chemical and biological testing.[8] The Complaint alleges that human testing was conducted not only at Edgewood Arsenal, Fort Detrick, and Fort Ord, but also at Fort McClellan, Alabama; Fort Benning, Georgia; and Fort Bragg, North Carolina. (Compl. ¶¶ 9, 110-

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[6] Defendants' privilege objections are addressed separately in section C, below.

[7] Given the large number of requests at issue, the requests have been divided into groups based on relevance. Plaintiffs reserve all rights with respect to the RFPs not addressed in this motion, including the right to file further motions to compel.

[8] Ironically, Defendants have indicated in correspondence that they have not even searched Edgewood Arsenal itself for documents. (Vecchio Decl. ¶ 9, Ex. D at 1.)

11, 115.) Further, documents obtained through third party sources indicate that field testing also took place at Dugway Proving Ground, Utah; Hawaii; Horn Island, Mississippi; Marshall Islands; Maryland; San Jose Island, Panama; USAATC, Fort Greely, Alaska; Water Island; the Virgin Islands; and Yuma Proving Ground, Arizona. (Vecchio Decl. ¶ 10, Ex. F at 4 of 9.) Such tests are relevant to all of the issues at play in this matter — notice, secrecy oaths, consent, and health care — as military personnel were involved in the tests, the tests were carried out by Defendants, and the tests all involved similar substances.

General Objection No. 3 also would exclude all CIA files related to military testing. As noted above, the CIA and Army programs were closely linked and there is evidence to suggest that the CIA has boxes of material relating to testing conducted at Edgewood Arsenal. Furthermore, other related tests conducted through MKULTRA, ARTICHOKE, and various other CIA programs may provide invaluable information on the health effects of substances administered at Edgewood and other military test sites. To the extent that such tests involved the same types of substances as those used on the individual or putative class plaintiffs in this action, documents related to the tests are relevant.

General Objection No. 5 states Defendants' position that they will not produce documents subject to the "Privacy Act, 5 U.S.C. 552a, the Health Insurance Portability and Accounting Act of 1996 ('HIPAA'), 42 U.S.C. 1320d-2, the HIPAA Privacy Rule, and/or 45 C.F.R. parts 160 and 164." (Vecchio Decl. ¶ 3, Ex. B.) Plaintiffs filed a Motion for Protective Order and to Overrule Objections based on these grounds on August 19, 2010, which sets forth why Defendants' objections on these grounds should be overruled. (Docket No. 121.)

2. Defendants should produce documents concerning the health effects of substances used in Defendants' test programs.

Defendants have failed to adequately respond to numerous document requests concerning the health effects of substances administered through the human testing programs described in the Complaint. Such documents are relevant to Plaintiffs' Notice and Healthcare Claims. To determine whether these substances potentially have had negative health effects on the test subjects, Plaintiffs have requested documents concerning claims, allegations or notice of physical

or psychological harm (RFP No. 21) and hospitalizations, emergency room visits, diseases, and other medical conditions (RFP No. 29) attributable to these substances. Plaintiffs have also requested documents concerning studies, surveys, tabulations analyses, and reports concerning the health effects of these substances. (RFP Nos. 20, 44-46, 74-77.)

Table 1: Objections served against RFPs concerning the health effects of substances administered by Defendants. (RFP Nos. 20-21, 29, 44-46, 74-77.)

Defendants' Objections	**RFP Nos.**
Request irrelevant and/or not reasonably calculated to lead to the discovery of admissible evidence.	20-21, 29, 44-46, 74-77
Request unduly burdensome.	29, 75-77
Plaintiffs' definition of "test programs" overly broad and unduly burdensome.	20, 21, 29, 44-46
Request not limited to military service personnel.	29
Request seeks publicly available information or information from entity other than Defendants.	20, 29, 44-46, 74-77

Relevance objections: Without providing any explanation, let alone particularized facts, Defendants object to all of these requests on the ground that they are not reasonably calculated to lead to the discovery of admissible evidence. (RFP Nos. 20-21, 29, 44-46, 74-77.) This argument is simply wrong. Evidence of the health effects of the substances used in the testing programs is critical to Plaintiffs' Notice and Healthcare claims. As Judge Wilken noted, Defendants' own regulations required test subjects to be informed of "the effects upon his health or person which may possibly come from his participation in the experiment." (Order at 15.)[9] Evidence concerning the health effects of the substances used is relevant to the contours of appropriate notice under these regulations. Further, information concerning the health effects of these substances is relevant to evaluating Defendants' compliance with regulations requiring them to provide "medical treatment and hospitalization . . . for all casualties" of their experiments. (*Id.* at 16.)

[9] Defendants' regulations also require Defendants to provide test subjects with any newly acquired information that may affect their well-being, a duty which exists even after the test subjects' participation in research has concluded. (*See* Compl. ¶ 17.)

Objection on grounds of undue burden: Defendants objected to four of these requests as unduly burdensome. (RFP Nos. 29, 75-77.) As an initial matter, Defendants have not provided sufficient detail to enable Plaintiffs to evaluate the burdens of producing this material. *See* Fed. R. Civ. P. 26, 2006 Notes of Advisory Committee ¶ 5. The responding party bears the burden of showing that the identified sources are not reasonably accessible. *Id.* ¶ 10. Pursuant to Rule 26, Plaintiffs requested that Defendants identify by category and type, the sources containing potentially responsive information that they neither produced from nor searched. (Vecchio Decl. ¶ 16, Ex. J at 6.) Defendants have not complied with this request with respect to any RFP related to this — or any other — topic.

Further, it is apparent that Defendants could produce materials responsive to these requests with relative ease. Request No. 29 seeks documents concerning "[d]eaths, hospitalizations, emergency room visits and diseases" resulting from the test programs. The Army should have access to such information since it commissioned the National Research Council ("NRC") to examine and analyze mortality and morbidity rates in test participants. *See* National Research Council, *Possible Long-Term Health Effects of Short-Term Exposure to Chemical Agents: Volume 1, Anticholinesterases and Anticholinergics*, ii, xi (June 1982). Thus, Defendants' claim that they have located no responsive documents after a reasonable search is suspect. Similarly, Defendants refused to produce any documents responsive to RFP Nos. 75, 76, and 77, which seek documents concerning the NRC studies on the long-term health effects of the test programs, on the grounds that the records are not in word searchable format. Notwithstanding this objection, these documents should be readily accessible. The studies were commissioned by one of the defendants and Plaintiffs have obtained from third-party sources a number of records kept by the NRC during the course of these studies.[10]

[10] Plaintiffs obtained documents concerning this issue from Dr. James Ketchum, a former employee of Defendants, in response to a Rule 45 subpoena. (Vecchio Decl. ¶ 19.) Dr. Ketchum's production of documents concerning these studies is not comprehensive, however, and Plaintiffs have reason to believe that Defendants have additional documents concerning this issue.

Objection limiting RFPs to military servicemembers: Defendants also objected to RFP No. 29 on the grounds that it is overbroad as it is not limited to military servicemembers. Even if they do not directly concern experimentation on military personnel, documents responsive to this request are relevant. As explained in the Complaint, contracts with outside researchers were an "important and integral" part of Defendants' program of human experimentation. (Compl. ¶¶ 9, 137, 141.) For example, the CIA and Army jointly conducted Project OFTEN, which involved testing a glycolate compound on both military personnel at Edgewood Arsenal and prisoners at Holmesburg State Prison. (*Id.* at ¶ 147b; Vecchio Decl. ¶ 12, Ex H .) Thus, documents explaining the negative health effects of civilian testing may pertain to possible health effects related to the substances tested (which is relevant to Plaintiffs' Health Care Claim) and to Defendants' knowledge of those possible effects (which is relevant to Plaintiffs' Notice Claim), since both civilians and military personnel were exposed to the same substances.

Objection that RFPs seek publicly available information or information from entity other than Defendants: Defendants objected to eight requests by incorporating by reference a general objection that Plaintiffs' RFPs sought responses from an individual other than Defendants or information that is publicly available and/or equally available to Plaintiffs. (RFP Nos. 20, 29, 44-46, 74-77.) Defendants, however, have exclusive possession over many of these documents as they relate to covert military operations, which have never been publicly revealed. (Compl. ¶¶ 1, 134.) Additionally, the mere fact that relevant material may be obtainable from another source is insufficient to justify Defendants' failure to produce such material. *See Fed. Deposit Ins. Corp. v. Renda*, 126 F.R.D. 70, 72 (D. Kan. 1989), *aff'd, Fed. Deposit Ins. Corp. v. Daily*, 973 F.2d 1525 (10th Cir. 1992) (holding that plaintiffs were entitled to certain documents in defendants' control, even though plaintiffs were already in possession of them).

3. Defendants should produce documents about the conduct of the test programs and the identity, characteristics, and use of substances employed in the test programs.

Defendants also have failed to respond adequately to RFPs about the identity and characteristics of the substances used in the test programs as well as the way these substances

were administered.[11] Plaintiffs requested documents concerning the identity (including code names) and characteristics of these substances, the doses administered to each test participant, the means of administration (*e.g.*, inhalation or injection), the frequency with which the doses were given, and, to determine synergistic effects, the number of different compounds given to each participant.

Table 2: Objections served against RFPs concerning the conduct of the test programs and the identity, characteristics, and use of substances employed in the test programs. (RFP Nos. 3, 5, 7 23, 25, 36, 48, 57, 60-65.)

Defendants' Objections	**RFP No(s).**
Request irrelevant and/or not reasonably calculated to lead to the discovery of admissible evidence.	23, 25, 36, 48, 57, 60-61, 63-65
Request unduly burdensome.	25, 61, 63-64
Request not limited to military service personnel.	7
Request does not identify any documents.	3, 5
Request seeks publicly available information or information from entity other than Defendants.	3, 5, 23, 25, 36, 48, 57, 60-61, 63-65

Relevance objections: Defendants asserted boilerplate relevance objections to eleven of these requests. (RFP Nos. 23, 25, 36, 48, 57, 60-61, 63-65.) Contrary to Defendants' objections, the information sought is relevant to Plaintiffs Notice and Health Care Claims. Defendants have failed to provide notice to many participants on the grounds that certain substances used in testing did not qualify as "drugs" or were considered at the time "'not likely to produce long-term after effects.'" (Compl. ¶ 15.) While the Complaint alleges that the doses of substances were at times several multiples above known toxic thresholds, Defendants have publicly maintained that the substances used in the tests were safe or were administered at safe doses. (*Id.* at ¶ 11.)

[11] The RFPs on this topic are RFP Nos. 3 (types properties, and health effects of substances), 5 (planning, conduct, activities, findings, results and participants in the test programs), 7 (septal implants installed in participants), 23 (code names of substances), 25 (unpublished papers concerning results of testing), 36 (task plans and descriptions of test programs), 48 (number of substances administered to each participant), 57 (dose relationship of substances), 60 (definitive technical names of substances), 61 (quantity of substances administered), 63 (Army code designation of substances), 64 (toxicity of substances), and 65 (storage, handling, and transport of substances).

Information concerning the nature of the substances administered is relevant at the very least to test these assertions.

Objections on the grounds of undue burden: Defendants objected on grounds of undue burden to requests for "all unpublished papers, reports or manuscripts concerning the results of the test programs" (RFP No. 25), and requests for all documents concerning the quantity (RFP No. 61), the U.S. Army code designation (RFP No. 63), and the toxicity (RFP No. 64) of each substance used in the test programs. In response, Defendants produced a handful of documents and a heavily redacted Department of Defense ("DoD") database with certain test results. It appears that Defendants have produced nothing from the filing rooms at Edgewood Arsenal which contain over a thousand linear feet of documents in labeled and catalogued cabinets and drawers. (Vecchio Decl. ¶ 9, Ex. E.) Defendants' claims of burden are suspect, as these documents are not classified and they are concentrated in a single, known location. Further, as noted above, Defendants improperly have failed to identify, by category and type, the sources containing potentially responsive information that they neither produced from nor searched. *See supra* at p. 11.

Other objections: Defendants' objections concerning the limitation of requests to military personnel (RFP No. 7) and information equally available to Plaintiffs (RFP Nos. 3, 5, 23, 25, 36, 48, 57, 60-61, 63-65) should be overruled for the reasons discussed above. *See supra* at pp. 12-13.

Redactions to the Department of Defense Database: In response to RFP No. 3, 5, 48, 60-61, and 63, Defendants agreed to produce a printout from and an electronic copy of a Department of Defense database containing test data from Fort Detrick and Edgewood Arsenal.[12] All of the names in this database, except for those of the Individual Plaintiffs, have been redacted. Such redactions are unnecessary and inappropriate under the protective order moved for by Plaintiffs. Additionally, as discussed in Plaintiffs' motion for a protective order, the redacted names are

[12] Defendants claim that the Department of Defense Database is also responsive to RFP Nos. 26 and 44.

relevant as Plaintiffs need to match the substances and doses administered with names in order to evaluate the cause of certain negative health effects, among other things.

4. Defendants should produce documents concerning consent to testing and human testing protocols.

Defendants improperly objected to Plaintiffs' document requests concerning the materials and forms provided to test subjects in the attempt to gain their consent as well as past and current human testing protocols and violations of those protocols. (RFP Nos. 2, 4, 26, 30, 34, 39.) Specifically, Plaintiffs requested documents concerning a memorandum by the Secretary of Defense concluding that the secrecy oaths signed by participants should be unenforceable (RFP No. 2), volunteer handbooks (RFP No. 4), and copies of all participant agreements and consent forms (RFP No. 34). Defendants have refused to produce any consent forms or participation agreements, except those signed by the Individual Plaintiffs. Plaintiffs also have requested documents concerning authorizations and denials pursuant to the Wilson Directive and violations of that directive. (RFP Nos. 30, 39.)

Table 3: Defendants' objections to RFPs concerning consent to testing and human testing protocols. (RFP Nos. 2, 4, 26, 30, 34, 39.)

Defendants' Objections	**RFP No(s).**
Request irrelevant and/or not reasonably calculated to lead to the discovery of admissible evidence.	26, 30, 34, 39
Request is unduly burdensome.	34
Request seeks publicly available information or information from entity other than Defendants.	2, 4, 26, 30, 34, 39

Relevance Objections: Misreading Judge Wilken's Order, Defendants object to nearly all of these requests on relevance grounds. (RFP Nos. 26, 30, 34, 39.) Defendants wrongly assert that consent is not an open issue in this case. (Vecchio Decl. ¶ 3, Ex. B.) This Court already has found that Judge Wilken's January 19, 2010 Order "could reasonably be interpreted to mean that the legality of the [Plaintiffs'] consent is still at issue." (July 13, 2010 Order Granting Plaintiffs' Motion to Compel, Docket No. 112 at 5.) Further, Defendants have raised consent as an

affirmative defense in their Answer. (Docket No. 74 at 40.) There is no question that documents concerning the nature and scope of consent are relevant to this action.

All participants' consent forms — not just those of the Individual Plaintiffs — are relevant and should be produced, since all participants fall within the class definition and those forms contain information relevant to Plaintiffs' Notice Claims. (Compl. ¶ 174.) Without these records, Plaintiffs cannot determine whether signatures were obtained from each participant, whether the signatures obtained were valid, when consent forms were signed, whether supplementary consent was obtained for additional testing, and the content of the consent forms, among other things.

Documents concerning human testing protocols, protocols for obtaining consent, inspection requests, and reported violations of these protocols are also are relevant. These documents will provide evidence of whether Defendants followed protocols for obtaining valid consent and whether valid consent actually was obtained.

Objections on the grounds of undue burden: Defendants' burden objections fail to acknowledge that Plaintiffs' requests reflect the scope of this case. Defendants object to Plaintiffs' request for copies of all consent forms and participants' agreements (RFP No. 34) as unduly burdensome since the documents pertain to several thousand individuals. These requests are appropriate given the scope of Defendants' program of human experimentation. Between 1950 and 1975, at least 6,720 soldiers were used as human guinea pigs. (Compl. ¶ 108.) Moreover, during the 1975 congressional testimony of Dr. Van Sim, an employee of Defendants who was one of the chief researchers at Edgewood Arsenal, Senator Edward Kennedy requested that Defendants produce to Congress the consent forms for all test subjects. (Vecchio Decl. ¶ 18, Ex. L.) Presumably, then, all of the consent forms have already been collected in a single location, eliminating any burden Defendants might claim.

Other objections: Defendants' objections concerning information that is publicly available/equally available to Plaintiffs (RFP Nos. 2, 4, 26, 30, 34, 39) should be overruled. *See supra* at pp. 12-13.

5. Defendants should produce documents concerning related testing conducted by the CIA, government contractors, and front organizations.

Defendants have not produced a single document responsive to Plaintiffs' document requests concerning testing conducted by the CIA, government contractors, and front organizations. (RFP Nos. 1, 9, 16, 18, 33, 37-38, 40.) The Complaint describes these programs, and their connection to testing conducted by Defendants at Edgewood Arsenal. (*See, e.g.*, Compl. ¶¶ 114-55.) Since many of the substances tested in these programs were the same as those tested on class members, the requested documents are relevant to Plaintiffs' Notice and Healthcare Claims.

Table 4: Defendants' objections to RFPs concerning testing conducted by the CIA, government contractors, and front organizations (RFP Nos. 1, 9, 16, 18, 33, 37-38, 40.)

Defendants' Objections	**RFP No(s).**
Request irrelevant and/or not reasonably calculated to lead to the discovery of admissible evidence.	9, 16, 18, 33, 37-38, 40
Request is unduly burdensome.	9
Request not limited to military service personnel.	16
Request seeks publicly available information or information from entity other than Defendants.	16, 18, 33, 38, 40

Relevance objections: Although the subjects of all of these RFPs are relevant to the CIA's involvement in and responsibility for the test programs, Defendants objected to all but one of them on relevance grounds. (RFP Nos. 9, 16, 18, 33, 37-38, 40.) As described in the Complaint, the CIA has long participated in the test programs, either directly or through various front organizations or "cut outs."[13] Specifically, the Complaint addresses: the CIA's destruction of documents pertaining to the test programs (Compl. ¶ 143; RFP No. 9); the CIA's testing of anectine on prisoners at the California Medical Facility at Vacaville (Compl. ¶ 137d; RFP No.

[13] For example, the Complaint alleges that the CIA used front organizations such as the Charles Geschtickter Fund for Medical Research and the Society for the Investigation of Human Ecology as cut-out sources for the CIA's secret funding for numerous MKULTRA human experiment projects. (Compl. ¶¶ 117, 137a.) Scientists who worked at Edgewood, such as Ray Treichler, also served as CIA monitors for MKULTRA sub-projects funded through cut-outs. (*Id.* ¶¶ 132, 154.)

16); the role of cut-outs in Defendants' testing programs (Compl. ¶ 137a; RFP No. 18); the death of Frank Olson, an Army scientist who fell out of a window after being surreptitiously dosed with LSD by the CIA (Compl. ¶ 141; RFP No. 37); MKULTRA experiments conducted by Harold Abramson (Compl. ¶ 114-55; RFP No. 38); and government-funded prison experiments, such as those conducted by the University of Pennsylvania at Holmesburg Prison (Compl. ¶ 10; RFP No. 40).[14] Plaintiffs also requested documents concerning current testing programs sponsored by Defendants (RFP 33), as health effects information from such tests bears directly on Plaintiffs' Healthcare and Notice Claims.

Objections on the grounds of undue burden: Defendants improperly objected to RFP No. 9 on the grounds it is unduly burdensome to the extent it seeks production of electronic records that are not in word searchable format. Simply asserting that word searches cannot be run on an electronic document is not a proper basis for withholding relevant documents. Moreover, RFP No. 9 seeks documents concerning the CIA's destruction of documents relevant to this case. Plaintiffs' discovery should not be limited on the basis of the burdens created by Defendants' misconduct.

Other objections: Defendants' objections concerning limiting requests to military personnel (RFP No. 16) and information that is publicly available and/or equally available to Plaintiffs (RFP Nos. 16, 18, 33, 38, 40) should be overruled. *See supra* at pp. 12-13.

6. Defendants should produce documents identifying individuals who participated in the test programs.

Defendants have made improper objections to all RFPs for documents concerning individuals who participated in the test programs. (RFP Nos. 11, 13-14, 19, 26, 49, 58.) In response to these RFPs, Defendants have turned over documents relating to the six Individual Plaintiffs and the DoD database described above. The names of all participants but the Individual Plaintiffs have been redacted.

[14] Through Project OFTEN, the CIA funded Army studies of a glycolate compound which was tested on both servicemembers at Edgewood Arsenal and prisoners at Holmesburg State Prison. (Vecchio Decl. ¶ 12, Ex. H.)

Table 5: Defendants' objections to RFPs concerning individuals who participated in the test programs. (RFP Nos. 11, 13-14, 19, 26, 49, 58.)

Defendants' Objections	**RFP No(s).**
Request irrelevant and/or not reasonably calculated to lead to the discovery of admissible evidence.	11, 13-14, 19, 26, 49, 58
Request is unduly burdensome.	11, 13-14
Request seeks publicly available information or information from entity other than Defendants.	11, 19, 26, 49

Relevance objections: Defendants' boilerplate relevance objections cannot justify their failure to produce documents. Defendants made relevance objections to all RFPs concerning rosters and lists of all personnel involved in the test programs (RFP No. 11); correspondence, FOIA requests, and other inquiries made by participants (RFP No. 13); requests made by the individual plaintiffs (RFP No. 14); Defendants' meetings and communications with participants (RFP No. 19); the content of registries created concerning the test programs (RFP No. 26); summaries of information concerning veterans who called a DoD number to inquire about the test programs (RFP No. 49); and investigations and prosecutions and threatened prosecutions of participants (RFP No. 58).

These personnel are potential witnesses and fall within the class of test subjects entitled to relief as alleged in the Complaint. (Compl. ¶ 15.) Further, the identities of test subjects are relevant to the remaining claims in this case. To determine whether test subjects gave valid legal consent, received adequate notice and information, are entitled to health care, and are constrained by secrecy oaths, Plaintiffs must determine the identities of these individuals. Information about investigations and prosecutions of participants is relevant to whether they were forced to participate or remain silent about the programs. Further, Plaintiffs cannot accurately match adverse health effects to related chemicals, drugs, and doses without the test subjects' names.

Other objections: Defendants' objections concerning information that is publicly available and/or equally available to Plaintiffs (RFP Nos. 11, 19, 26, 49) or information that is not in word searchable format (RFP Nos. 11, 13-14) should be overruled. *See supra* at pp. 11-13.

7. Defendants should produce documents concerning individuals and entities that supervised, controlled, or contributed to the test programs.

Defendants object to all discovery requests concerning individuals and entities that supervised, controlled, or otherwise contributed to the test programs. (RFP Nos. 12, 24, 54, 55, 66.) Defendants have produced no documents responsive to these requests.

Table 6: Defendants' objections to RFPs concerning individuals that supervised, controlled, or contributed to the test programs. (RFP Nos. 12, 24, 54-55, 66.)

Defendants' Objections	**RFP No(s).**
Request irrelevant and/or not reasonably calculated to lead to the discovery of admissible evidence.	12, 24, 54-55, 66
Request is unduly burdensome.	12, 24
Request seeks publicly available information or information from entity other than Defendants.	12, 24, 54-55, 66

Relevance Objections: Without explaining their basis, Defendants asserted relevance objections to all RFPs concerning this topic. (RFP Nos. 12, 24, 54-55, 66.) These RFPs seek documents concerning rosters and lists of individuals who supervised or controlled the test programs, the last known address and other contact information of individuals who worked on test programs conducted both in and outside of Edgewood Arsenal, and the identities of hospitals, clinics educational institutions, prisons, cut-outs, among others, who participated in the test programs as alleged in paragraphs 9, 117, 137a, and 149 of the Complaint.

Individuals and other entities identified from these documents are potential witnesses in this case and may have preserved important documents. This information is especially important because, over the years, Defendants destroyed much of the documentation of the testing programs, and these entities and persons may have relevant information not available through Defendants. (Compl. ¶ 2.) Discovery from universities, contractors, front organizations, and other entities involved in the testing may allow Plaintiffs to identify additional test subjects and

uncover relevant information concerning potential health effects related to the substances used in Defendants' test programs.[15]

Objections on the grounds of undue burden: Defendants improperly asserted boilerplate burden objections to two document requests on the grounds that Plaintiffs' requests are unduly burdensome to the extent they seek production of electronic records that are not in word searchable format. (RFP Nos. 12, 24.) Defendants failed to identify by category and type, the sources containing potentially responsive information that they neither produced from nor searched. Defendants' objections should be overruled.

Other objections: Defendants' objections concerning information that is publicly available and/or equally available to Plaintiffs (RFP Nos. 12, 24, 54-55, 66) should be overruled. *See supra* at pp. 11-13.

8. Defendants should produce documents concerning government investigations and litigation related to the testing programs.

While Defendants have produced some documents responsive to Plaintiffs' discovery requests concerning government investigations and litigation relating to the testing programs, it appears Defendants are withholding numerous relevant documents.

Table 7: Defendants' objections to RFPs concerning government investigations and litigation relating to the testing programs. (RFP Nos. 6, 17, 35, 72-73.)

Defendants' Objections	**RFP No(s).**
Request irrelevant and/or not reasonably calculated to lead to the discovery of admissible evidence.	6, 17, 35, 72-73
Request is unduly burdensome.	72, 73
Request seeks publicly available information or information from entity other than Defendants.	6, 17, 35, 72-73

[15] Indeed, Plaintiffs received in excess of 29,000 pages of documents from Dr. James Ketchum, a former employee of Defendants and researcher at Edgewood Arsenal, in response to a Rule 45 subpoena. (Vecchio Decl. ¶ 19.) Many of these documents were not found in Defendants' production; given Defendants' admitted destruction of documents concerning the test programs, it is quite likely that third parties may be a source for relevant information not produced by Defendants. (Compl. ¶ 130.)

Relevance objections: Defendants challenged the relevance of all RFPs on this topic. Once again, Defendants have provided no basis or explanation for their objections to RFPs tied to the allegations in the Complaint. Over the last several decades, Congress has held several hearings related to the testing programs. (*See, e.g.*, Compl. ¶¶ 13, 145.) The Inspector General and GAO have conducted their own investigations. (*See Id.* ¶¶ 114, 169.) Additionally, several civil actions, such as *Orlikow v. United States*, have been brought against the government based on injuries caused by the testing programs. Records of these hearings, investigations, and lawsuits bear directly on the open issues in the case. As such, Plaintiffs are entitled to the production of documents sent or shown to Congress (RFP No. 6), transcripts of hearings and depositions (RFP No. 17), documents produced at the *Orlikow* trial (RFP. No. 35), and documents concerning GAO and Inspector General investigations into these matters (RFP Nos. 72, 73).

Other Objections: Defendants' objections concerning information that is publicly available and/or equally available to Plaintiffs (RFP Nos. 6, 17, 35, 72, 73) and information not in word searchable format (RFP Nos. 72-73) should be overruled. *See supra* at pp. 11-13.

C. Defendants Have Provided No Basis for Sustaining Their Privilege Objections.

Defendants objected to forty RFPs on the grounds that responsive material is protected by the states secrets privilege, or another applicable privilege, but failed to identify any documents responsive to these requests in their privilege log. (RFP Nos. 1, 2, 9, 12, 16, 18, 19, 23-26, 29-30, 33-40, 44-46, 48, 54-55, 57-58, 60-61, 63-66, 73-77.) As an initial matter, Defendants privilege objections are inadequate since they have failed to identify specific documents that are being withheld on the basis of privilege. As such, Defendants have expressly violated the Rule 26 requirement that parties describe the nature of the documents withheld on the privilege grounds. *See* Fed. R. Civ. P. 26(b)(5). Moreover, Defendants have not shown that their privilege assertions have sufficient legal basis.

1. Defendants have failed to properly assert or establish sufficient grounds for withholding documents based on the deliberative process privilege.

According to their privilege log, Defendants have withheld eight documents based on the deliberative process privilege, but have not properly invoked the privilege or demonstrated that the materials withheld are entitled to such protection. (Vecchio Decl. ¶ 17, Ex. K (entries 2-9).) The deliberative process privilege is a qualified privilege that allows the government to withhold only documents and other materials that reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Dep't of Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (internal citation omitted). Moreover, the deliberative process privilege may be overcome by a showing of need, such as when the documents sought may reveal government misconduct, as Plaintiffs anticipate the documents would show here. *See In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997). Successful assertion of the deliberative process privileges requires: "(1) a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation of why it properly falls within the scope of the privilege." *Landry v. Fed. Deposit Ins. Corp.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000). [16] Defendants fail to meet any of these requirements.[17]

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[16] The *Landry* court observed that "head of department" did not require the narrowest interpretation, but there is a "need for 'actual personal consideration'" by the asserting official, and that official must be of "sufficient rank to achieve the necessary deliberateness in assertion of the deliberative process . . . privilege[]." *See Landry*, 204 F.3d at 1135-36 (internal citation omitted); *United States v. O'Neill*, 619 F.2d 222, 225 (3rd Cir. 1980) (holding that there was no indication that a department head made the necessary consideration where the privilege was invoked by a city solicitor accompanied by city officials).

[17] Defendants must provide a factual foundation for its assertion of the deliberative process privilege supported by an affidavit from a person with sufficient personal knowledge and authority to assert on behalf of defendant agency that disclosure would be harmful. *See O'Neill*, 619 F2d at 225 (citing *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953)). *See also Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 93 (1973) (The burden is on the government agency resisting disclosure to establish that a document is "exempt from disclosure.") (superseded by statute on other grounds). Plaintiffs notified Defendants of these requirements during the meet and confer process, but Defendants have refused to comply. (Vecchio Decl. ¶ 16, Ex. J.)

2. Defendants have failed to properly assert or to establish sufficient grounds for withholding documents based on 50 U.S.C. § 403g.

Defendants have improperly withheld 21 documents based on the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403g. (Vecchio Decl. ¶ 17, Ex. K (entries 12-27, 29-31, 33-34).) Under Section 403g, the CIA "shall be exempted from . . . the provisions of any other law which requires the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." Defendant's privilege log provides no indication that the withheld documents contain such information. When section 403g is asserted in response to discovery requests, as opposed to FOIA requests, courts require the government to provide detailed information supporting its claim of privilege and explaining the potential harms to national security from disclosure. *See Linder v. Dep't of Def.*, 133 F.3d 17, 25 (D.C. Cir. 1998) (upholding CIA privilege claims based on "very detailed information" provided in an ex parte declaration). Defendants have made no such showing here.

Defendants claim that the documents withheld contain the names of CIA employees (presumably the authors or recipients of memoranda, reports or emails) and that this entitles Defendants to withhold entire documents. Defendants are wrong. Defendants are required to segregate and disclose those portions of documents that do not contain information specifically protected by section 403g. "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Church of Scientology v. Dep't of the Army*, 611 F.2d 738, 744 (9th Cir. 1979) (stating that "the doctrine of segregability applies to the national security exemption as well as to the exemptions under the Freedom of Information Act").

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court overrule General Objections 3 and 5, and all objections to RFP Nos. 1-7, 9, 11-14, 16-21, 23-26, 29-30, 33-40, 44-46, 48-49, 54-55, 57-58, 60-61, 63-66, and 72-77 from Plaintiffs' First Set of Requests for Production, and compel the production of all documents responsive to those requests. Plaintiffs

also ask the Court to order Defendants to produce all documents responsive to Plaintiffs Second and Third Sets for Production, as objections to those Requests have been waived. Finally, Plaintiffs ask the Court to order Defendants to produce those documents they are withholding based on their inappropriate claims of deliberative process and/or state secrets privilege.

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.

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