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13 Attorneys for DEFENDANTS

14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 OAKLAND DIVISION

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 18
 19 VIETNAM VETERANS OF AMERICA, *et al.*,
 Plaintiffs,
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 v.
 21
 22 CENTRAL INTELLIGENCE AGENCY, *et al.*,
 Defendants.

Case No. CV 09-0037-CW (JL)

Noticed Motion Date and Time:
October 7, 2010
2:00 p.m.

DEFENDANTS' MOTION FOR A
PROTECTIVE ORDER STAYING
FURTHER DISCOVERY AND FOR
MODIFICATION OF CASE
MANAGEMENT ORDER

NOTICE OF MOTION AND DEFENDANTS’ MOTION FOR A PROTECTIVE ORDER STAYING FURTHER DISCOVERY AND FOR MODIFICATION OF CASE MANAGEMENT ORDER

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Please take notice that on October 7, 2010, at 2:00 p.m., before the Honorable Claudia Wilken, Courtroom No. 2, 4th floor, 1301 Clay Street, Oakland, California, 94612, or as soon thereafter as counsel may be heard by the Court, Defendants, by and through their attorneys, will move pursuant to Rule 26(c) of the Federal Rules of Civil Procedure for a protective order staying further discovery and pursuant to Rule 16(b)(4) of the Federal Rules of Civil Procedure and Local Civil Rule 16-2(d) for modification of the Case Management Order.¹

Defendants’ motion is based on this Notice, their accompanying Memorandum, the Declarations of Michael Kilpatrick, Patricia Camerisi and Caroline Lewis Wolverton and attachments thereto, the pleadings on file in this matter, and on such oral argument as the Court may permit. A proposed order and revised case management schedule is attached.

In accordance with Fed. R. Civ. P. 26(c) and Local Civil Rule 16-2(d)(2), the undersigned certifies that she has in good faith met and conferred with counsel for Plaintiffs in effort to resolve Defendants’ requests without Court intervention and that Plaintiffs oppose Defendants’ requests.

¹ This case has been referred to Magistrate Judge Larson for discovery matters. Dkt No. 79. However, because Defendants seek modification of the Case Management Order entered by Judge Wilken, the motion is noticed for hearing before Judge Wilken.

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Dated: August 27, 2010

Respectfully submitted,

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/s/ Caroline Lewis Wolverton
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GENERAL ORDER 45 ATTESTATION

I, Caroline Lewis Wolverton, am the ECF User filing this Motion for a Protective Order Staying Further Discovery and for Modification of Case Management Order. In compliance with General Order 45, X.B., I hereby attest that Michael Kilpatrick and Patricia Cameresi have each concurred in the filing of their Declarations.

Dated: August 27, 2010

/s/ Caroline Lewis Wolverton
Caroline Lewis Wolverton
Attorney for Defendants

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14 Attorneys for DEFENDANTS

15
 16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

18 VIETNAM VETERANS OF AMERICA,)	Civil Action No. C 09-0037 CW
19 <i>et al.</i> ,)	
)	DEFENDANTS' MEMORANDUM IN
20 Plaintiffs,)	SUPPORT OF THEIR MOTION FOR A
)	PROTECTIVE ORDER STAYING
21 vs.)	FURTHER DISCOVERY AND FOR
)	MODIFICATION OF CASE
22 CENTRAL INTELLIGENCE AGENCY,)	MANAGEMENT ORDER
23 <i>et al.</i> ,)	
)	
24 Defendants.)	

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 26
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 28 No. C 09-37 CW
 DEFS.' MEM. IN SUPP. OF MOT. TO STAY FURTHER DISCOVERY AND MODIFICATION OF CASE MGMT. ORDER

INTRODUCTION

1
2 The Department of Defense (“DoD”) is in the midst of a large-scale investigation to
3 identify servicemembers who participated in chemical and biological tests by the Army and
4 compile details about the individual tests. Once the investigation is complete, the results —
5 together with the tens of thousands of pages of documents already produced and the results of
6 previous investigations which have been produced or are publicly available — should provide the
7 bulk of the information necessary to resolve the claims that remain before the Court. Any
8 additional discovery that is needed can then be undertaken far more efficiently and expeditiously
9 than by way of parallel discovery pursuant to Plaintiffs’ wide-ranging discovery requests.

10 With respect to the Central Intelligence Agency (“CIA”), further discovery in advance of
11 completion of DoD’s ongoing investigation likewise would not be warranted. CIA has only a
12 limited nexus to research conducted on military personnel, and Plaintiffs have not alleged that
13 CIA conducted testing of service personnel independently of DoD. Moreover, CIA conducted
14 extensive searches during the 1970s and 1980s of all of its records concerning CIA’s behavioral
15 research programs. In responding to discovery in this suit, CIA has reviewed the results of those
16 searches and conducted additional searches of its records for information relevant to Plaintiffs’
17 claims. CIA has produced responsive documents identified in these searches to the extent they
18 are not privileged. Accordingly, continuing discovery of the CIA during the pendency of DOD’s
19 investigation would be inefficient and unwarranted.

20 These circumstances establish good cause for entry of a protective order pursuant to Fed.
21 R. Civ. P. 26(c) staying Defendants’ obligation to respond to discovery requests and any further
22 discovery requests until the DoD investigation is complete and for a corresponding modification
23 of the Case Management Order pursuant to Fed. R. Civ. P. 16(b)(4) and Local Civil Rule
24 16-2(d).¹

25 _____
26 ¹ This case has been referred to Magistrate Judge Larson for discovery matters. Dkt No.
27 79. However, because Defendants’ request for a stay of further discovery implicates

BACKGROUND

This case arises out of chemical testing by the Army during the Cold War era. Each of the six named individual Plaintiffs, as well as the two proposed additional individual plaintiffs, is alleged to have undergone chemical testing at Edgewood Arsenal, an Army facility in Maryland. Second Am. Compl. ¶¶ 29-87 (Dkt. No. 53); Proposed Third Am. Compl. ¶¶ 201-230 (Dkt No. 88-1). Plaintiffs seek declaratory and injunctive relief requiring Defendants to release them from secrecy oaths; notify them and all military test participants of the tests in which they participated, their exposures and any known health effects; to search for and provide participants, as well as the Department of Veterans Affairs (“VA”) with available documentation concerning the tests; and to provide participants with medical examinations and care. Plaintiffs further request a declaration that consent forms signed by test participants are invalid, that the tests were unlawful and that the “*Feres* doctrine” — the Supreme Court’s interpretation of the Federal Torts Claims Act (“FTCA”) to bar tort suits against the government for injuries arising out of or incident to military service, first articulated in *Feres v. United States*, 340 U.S. 135 (1950) — is unconstitutional. See Second Am. Compl.

On January 19, 2010, the Court dismissed Plaintiffs’ claim that the tests were unlawful and the challenge to the *Feres* doctrine, and identified three issues that will proceed: “the lawfulness of the consent forms, to the extent that they required the individual Plaintiffs to take a secrecy oath”; whether Defendants may be compelled to provide test participants with information about the nature of the tests based on the Wilson Directive, Army regulation 70-25

modification of the Case Management Order entered by Judge Wilken, the motion is noticed for hearing before Judge Wilken. Defendants will separately present to Magistrate Judge Larson a motion for a Rule 26(c) protective order limiting the scope of discovery to the information relevant to the claims pending in this action. Defendants first sought a protective order staying further discovery and limiting its scope on June 3, 2010, via a statement of discovery dispute in accordance with Magistrate Judge Larson’s Standing Order ¶ 8. See Dkt. No. 93. On August 6, 2010, Magistrate Judge Larson ordered the parties to brief discovery disputes in accordance with Civil Local Rules 7-2 to 7-5. Dkt No. 120.

1 (1962), and the Department of Justice (“DOJ”) document cited in the Second Amended
2 Complaint; and whether test participants are entitled to medical care. Order of Jan. 19, 2010 at
3 12, 15, 17 (Dkt. No. 59).

4 **1. The Ongoing DoD Investigation and Previous Investigations of Army Chemical
5 and Biological Test Programs**

6 Consistent with congressional direction and under Congress’s supervision, DoD is in the
7 midst of an investigation to identify all servicemembers who participated in the Army’s
8 chemical and biological tests and to compile as much information about individual tests and
9 exposures as possible. Decl. of Michael Kilpatrick, DoD’s Director of Strategic
10 Communications, Office of the Under Secretary of Defense for Health Affairs, ¶¶ 10, 13-15
11 (Ex. 1); *see also, e.g.*, GAO, “Chemical and Biological Defense: DOD Needs to Continue to
12 Collect and Provide Information on Tests and Potentially Exposed Personnel,” GAO-04-410
13 (Washington, D.C.: May 14, 2004), available at <http://www.gao.gov/new.items/d04410.pdf>.

14 The Statement of Work describing the DoD investigation, conducted through its
15 contractor Battelle Memorial Institute, provides for the Chemical, Biological, Radiological, and
16 Nuclear Information Analysis Center (“CBRNIAC”) to “analyze all documents at [relevant
17 records] sites for information on personnel potentially exposed to chemical and/or biological
18 agents while involved in tests and other ancillary events,” and to collect pertinent information
19 including “the test names, test objectives, chemical or biological agents involved, and number of
20 servicemembers and other personnel potentially affected by each test from 1942 to the present
21 timeframe.” Kilpatrick Decl. ¶ 13 & Ex. 1 thereto (Stmnt. of Work, CBRNIAC Task 729 ¶ 3.5).
22 DoD is compiling the information on individual exposures in a database known as the
23 “Chemical and Biological Tests Repository” or (“Chem-Bio Database”). *Id.* Defendants have
24 produced to Plaintiffs a copy of the database as of March 2011. Decl. of Caroline Wolverton
25 ¶ 2 (Ex. 3).

26 A primary objective of DoD’s investigation is to enable test participants to receive
27 pertinent information about the tests. Kilpatrick Decl. ¶ 15. Once test information is gathered

1 for a given participant, DoD enters it into the above-referenced Chem-Bio database and
2 transmits it to VA so that VA may notify the participant of the potential exposure and, in case
3 the individual has health concerns, provide guidance on scheduling a free clinical examination
4 at a VA health care facility, applying for VA health care benefits, and filing a VA disability
5 claim. *Id.* The DoD investigation is scheduled for completion in September 2011. *Id.* ¶ 14.

6 In addition to this ongoing DoD investigation, the Army's chemical and biological tests
7 involving human subjects have been the subject of previous large-scale investigations, the
8 reports of which are either publicly available or have been produced to Plaintiffs. *See id.* ¶¶ 3-
9 10. In 1975 and 1976, in response to congressional and public inquiry regarding the Army's
10 role in researching hallucinogenic drugs, the Inspector General of the Department of the Army
11 ("DAIG") conducted an historical research investigation of the Army's chemical agent testing
12 between 1950 and 1975. *Id.* ¶ 3. The following year, the Army published a report on the
13 biological testing program between 1942 and 1977 at Fort Detrick, Maryland, which is publicly
14 available. *Id.* DoD has also expended considerable resources to determine long-term health
15 effects on test participants, including on a follow-up study of test subjects exposed to LSD
16 conducted in the late 1970s and investigations conducted by the National Research Council in
17 the early 1980s and 2003 on possible long-term health effects of chemical substances tested at
18 Edgewood Arsenal. *Id.* ¶¶ 4-9. As a result of those investigations, congressional and other
19 public inquiries concerning the Army's tests since the 1970s, the subject has been aired
20 extensively. *Id.* ¶ 11.

21 Plaintiffs have served 193 document requests that seek extensive records pertaining to
22 chemical and biological tests conducted over a period spanning more than 20 years and which
23 began more than 60 years ago. Wolverton Decl., Ex. 1 thereto (Pls.' First, Second, Third and
24 Fourth Sets of Reqs. for Prod. of Docs.) (each instructing that "Unless otherwise specified, each
25 request calls for all documents created, received or dated between January 1, 1940 and the date
26 of YOUR response to the request," Instr. 10 to each set). The number of very old records

1 implicated by the requests is enormous. Kilpatrick Decl. ¶ 17. Conducting searches for all of
2 the records that Plaintiffs seek — which would require substantial by-hand review — would
3 require an enormous amount of time and resources. *Id.* Indeed, the ongoing DoD investigation
4 alone has spanned years and cost millions of dollars. *Id.*

5 **2. CIA’s Previous Exhaustive Searches of Its Records of Human Testing and the** 6 **Limited Nexus to Testing on Military Personnel**

7 Behavioral research conducted or sponsored by the CIA likewise has been the subject of
8 substantial congressional and public attention. Decl. of Patricia Cameresi, CIA Associate
9 Information Review Officer for the Directorate of Science & Technology, ¶ 6 (Ex. 2). During
10 the 1970s and 1980s, the CIA conducted exhaustive hand searches of its files in order to identify
11 all records in its possession relating to any drug testing program sponsored by the CIA in
12 response to Congressional investigations, executive investigations, numerous requests under the
13 Freedom of Information Act (“FOIA”), civil litigation, and an internal investigation
14 commissioned by the Director of Central Intelligence to notify human subjects of CIA research
15 programs. *Id.* ¶ 7. Information about the CIA’s behavioral research programs that resulted from
16 those searches has been made available to the public. *Id.* ¶¶ 6-7. Accordingly, after 1975, the
17 topic of CIA’s behavioral research programs became “one of the most thoroughly investigated
18 and exposed aspects of the CIA’s past activities.” *Id.* ¶ 5.

19 The Declaration of CIA Associate Information Review Officer for the Directorate of
20 Science & Technology Patricia Cameresi explains that “[a]fter scouring the Agency for
21 documents through these investigations and conducting extensive interviews of CIA personnel
22 and DoD personnel, the Agency has concluded that it did not fund or conduct drug research on
23 military personnel.” *Id.* ¶ 12. The Declaration explains that based on the extensive searches of
24 CIA records relating to its behavioral research programs only a discrete portion even arguably
25 could relate to Plaintiffs’ claims: those concerning “Project OFTEN,” which “contemplated, but
26 did not consummate, funding on military volunteer subjects at Edgewood Arsenal.” *Id.* ¶ 8.
27 CIA has produced to Plaintiffs the results of its review of its records concerning Project

1 OFTEN, as well as the results of its searches for documents relating to the named Plaintiffs,
2 Edgewood Arsenal (where Plaintiffs allege to have volunteered to participate in DoD drug
3 research) and Fort Detrick, except for the documents identified as privileged on Defendants'
4 privilege log. *Id.* ¶¶ 12-13. In addition, CIA has provided Plaintiffs outside of discovery over
5 20,000 pages of documents concerning CIA's behavioral research programs, including
6 documents relating to its broadest such program, named MKULTRA, even though that program
7 did not involve servicemembers as test subjects. Cameresi Decl. ¶¶ 6, 12, 24.

8 Additional searches beyond these topics in response to Plaintiffs' extensive and wide-
9 ranging discovery requests would be highly unlikely to identify additional documents relevant to
10 Plaintiffs' claims. *Id.* ¶ 23. However, they would impose an extreme burden on CIA's limited
11 resources, as Ms. Cameresi's Declaration explains. *Id.* ¶¶ 15-23.

12 **3. Defendants' Productions to Plaintiffs**

13 In response to Plaintiffs' first set of requests for production of documents, Defendants
14 produced over 14,000 pages of documents and a copy of the Chem-Bio database that, as
15 described above, DoD is compiling through its ongoing investigation and that identifies each
16 servicemember test participant, the substance(s) tested, and provides additional information
17 about the tests, including the amount administered and route of administration (e.g., oral), where
18 available. Wolverton Decl. ¶ 2. The Department of Veterans Affairs ("VA") has produced
19 another approximately 16,000 pages of documents under Fed. R. Civ. P. 45. *Id.* ¶ 3. In
20 addition, as described above, CIA has provided Plaintiffs outside of discovery over 20,000
21 pages of documents concerning CIA's behavioral research programs. Cameresi Decl. ¶¶ 6, 12.

22 **ARGUMENT**

23 An orderly plan for discovery in light of the massive DoD investigation currently
24 underway is extremely important given the magnitude of information sought by Plaintiffs'
25 discovery requests and the enormous expenditures of time and resources described above that
26 would be necessary to produce all of the information implicated by the requests, which date

1 back as far as 60 years. Under Rule 26(c)(1) of the Federal Rules of Civil Procedure, “[t]he
2 court may, for good cause, issue an order to protect a party . . . from . . . undue burden or
3 expense,” including “specifying terms, including time . . . for . . . discovery.” Fed. R. Civ. P.
4 26(c)(1)(B); *accord, e.g., Rivera v. Nibco, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004); *see also*
5 8A Charles Alan Wright, *et al.*, *Federal Practice and Procedure*, § 2036 at 163-65 (2010)
6 (“[T]he court has considerable latitude in focusing on the nature of the harm advanced to justify
7 the [protective] order. Thus a court may be as inventive as the necessities of a particular case
8 require in order to achieve the benign purposes of the rule.”); *id.* § 2038 at 188 (“The court has
9 great flexibility in devising appropriate terms and conditions for discovery in a given case.”).
10 Good cause supports entry of a protective order staying Defendants’ obligation to respond to
11 Plaintiffs’ discovery requests until the DoD investigation concludes.

12 Plaintiffs already have available to them substantial information relating to the tests at
13 issue in this case. As described above and in the Declarations of Michael Kilpatrick of DoD and
14 Patricia Cameresi of CIA, the government’s human testing programs have been the subject of
15 multiple investigations, congressional inquiries and public requests, and a great deal of
16 information about the tests has been publicly available for many years. Defendants have
17 produced a great number of documents concerning the tests, including reports on possible
18 associated health effects and a copy of the DoD Chem Bio Database as of March 2010.² In
19 addition, CIA has provided to Plaintiffs documents relating to its behavioral research programs
20 generally, and Plaintiffs are therefore effectively in the same position as CIA to review those
21 documents.

22 _____
23 ² Our request for a stay notwithstanding, DoD and Army are willing, outside of discovery,
24 to continue searching for documents related to the Army’s chemical and biological agent testing,
25 including the documents listed in the footnotes and bibliography of the original DA IG
26 investigation, documents pertaining to health effects of tested substances, and documents relating
27 to test volunteers’ consent to the tests, as the Kilpatrick Declaration explains they have been
doing, Kilpatrick Decl. ¶ 16, and to produce identified documents on a rolling basis to the extent
that they are not privileged or otherwise protected from disclosure.

1 The ongoing DoD investigation's compilation of detailed information about individual
2 servicemember tests should largely, if not altogether, complete the picture of the tests in which
3 the individual Plaintiffs and other former Army servicemembers participated and provide the
4 bulk of any additional information necessary to decide the remaining claims in this case: "the
5 lawfulness of the consent forms, to the extent that they required the individual Plaintiffs to take
6 a secrecy oath"; whether Defendants may be compelled to provide test participants with
7 information about the nature of the tests based on the Wilson Directive, Army regulation 70-25
8 (1962), and the DOJ document cited in the complaint; and whether test participants are entitled
9 to medical care. Order of Jan. 19, 2010 at 12, 15, 17 (Dkt. No. 59). As the Declaration of
10 Michael Kilpatrick explains, DoD's ongoing investigation is designed "to consolidate as much
11 information as possible about the test volunteers, including their names, the chemical or
12 biological agent each was exposed to, and the amount administered and route of administration
13 (e.g., oral) where available." Kilpatrick Decl. ¶ 13.

14 In conjunction with the numerous investigations already conducted regarding testing and
15 health effects associated with exposure to test substances, as well as documents already
16 provided in discovery by Defendants, the post-investigation sum of all of this information about
17 the tests in which Army servicemembers participated should largely sufficient to decide the
18 claims remaining in the case. To the extent any further discovery may be warranted at that time,
19 such discovery can then be targeted appropriately.

20 By contrast, Plaintiffs seek to have Defendants wastefully expend tremendous resources
21 and time to satisfy vastly overbroad discovery demands. *See* Ex. 1 to Wolverton Decl. To the
22 extent that Plaintiffs' discovery requests seek relevant information that has not already been
23 produced or is not available publicly, the DoD investigation should produce much of that
24 information. Again, once the ongoing massive gathering of information about the Army's tests
25 is complete, the parties will be better positioned to assess the need for and to focus additional
26 discovery, if any.

1 Further discovery of the CIA also is not warranted at this juncture. First, Plaintiffs do
2 not allege that CIA conducted testing on military personnel independently of DoD. Further, the
3 CIA exhaustively searched its records in the 1970s and 1980s for information relating to all
4 Agency-sponsored drug testing programs, and CIA has conducted additional searches of its
5 records for information relevant to Plaintiffs' claims. CIA has produced responsive documents
6 identified in these searches to the extent they are not privileged. Cameresi Decl. ¶¶ 12-13.
7 Moreover, CIA's nexus to drug research on military personnel was limited to DOD tests
8 contemplated for a single substance in 1973 that were not consummated before CIA terminated
9 its funding of the program. *Id.* ¶¶ 8-12. Given CIA's limited nexus to Plaintiffs' claims,
10 interests of efficiency and conservation of taxpayer-funded resources counsel heavily in favor of
11 a stay until completion of DoD's investigation.

12 The DoD investigation is scheduled for completion in September 2011. The Court
13 should modify the Case Management Order so that the present case deadlines are extended to
14 accommodate a completion-of-fact-discovery deadline that follows conclusion of the DoD
15 investigation and a reasonable period of time for the parties to determine whether any additional
16 discovery is necessary and to conduct any such discovery. The current discovery deadline is
17 May 31, 2011. Dkt No. 54. An extension of that deadline to five months following completion
18 of the DoD investigation would require a nine-month extension of the current case schedule, as
19 reflected in the attached proposed order.

20 CONCLUSION

21 For the foregoing reasons, the Court should grant Defendants' motion and (i) enter a
22 protective order staying Defendants' obligation to respond to Plaintiffs' discovery requests until
23 completion of DoD's investigation and any further discovery requests, and (ii) modify the Case
24 Management Order to extend the remaining deadlines by nine months.

1 Dated: August 27, 2010

Respectfully submitted,

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