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Re: *Vietnam Veterans of America, et al. v. Central Intelligence Agency, et al.*
No. CV 09 0037-CW (N.D. Cal.)

Dear Counsel:

I write in response to Defendants' letter of July 12, 2010 regarding Defendants' proposal for resolving the parties' discovery disputes. As a threshold matter, your letter does not discuss several of the discovery issues that are pending, such as the protective order and others, and it is therefore unclear what you intend to propose about them.

Unfortunately, your proposals are unacceptable for at least three major reasons. First, your proposals backtrack from the points we discussed in our personal conference on the day of the first discovery hearing, presumably because you could not get your clients to agree. Second, your proposals are far too restrictive in scope. Third, your proposals are expressly contingent on Plaintiffs' agreement to withdraw their outstanding discovery requests and forego serving any additional ones, conditions that are not only objectionable in concept, but as a practical matter in a case of this magnitude.

Plaintiffs are entitled to discovery regarding any non-privileged matter that is relevant to any of its claims. Fed. R. Civ. P. 26(b)(1). The fact that document production may be time-consuming does not vitiate Defendants' discovery obligations. Indeed, the main conclusion we draw from your proposals is that Defendants' compliance with their discovery obligations thus far has been almost non-existent, as a search of the most obvious locations for documents has apparently never been conducted. Perhaps this explains the small volume

of Defendants' production to date, which barely exceeds the number of public domain documents. This comports with our own document analysis, which, as we have stressed before, reveals huge gaps in Defendants' production.

Plaintiffs disagree with Defendants' proposal to limit Defendants' search for materials describing or discussing the side effects of substances tested by Defendants to the Army records stored at Edgewood Arsenal and Fort Detrick. Discovery shows that human testing was also conducted at Fort Bragg, North Carolina; Fort Ord, California; Fort McClellan, Alabama (the headquarters for the Chemical Corps); Fort Benning, Georgia; Dugway Proving Ground, Utah; Horn Island, Mississippi; Fort Greely, Alaska; Yuma Proving Ground, Arizona; Marshall Islands; San Jose Island, Panama; Camp Siebert, Alabama; and Bushnell, Florida; among other places. Congressional testimony indicates that there is no central repository for information concerning historical data on chemical weapons testing programs and that there are at least six major DoD records holding sites and one University site where large volumes of records relating to the testing programs are stored. These repositories hold thousands of linear feet of paper relating to Defendants' testing programs. Defendants' proposal to search only those records located at Edgewood Arsenal and Fort Detrick would unreasonably limit the scope of discovery and could result in the withholding of relevant documents central to Plaintiffs' case. We cannot understand why these particular places were not searched in connection with Defendants' original search for documents.

Moreover, your proposal omits a search of CIA records, even though the CIA's involvement in the testing programs was both broad and ranged over a period of several decades. For example, Defendants' initial disclosures show a large volume of OFTEN Project documents being sent to CIA storage. The CIA must also produce documents that it created or maintained through the various "cut-out" entities that served as fronts for CIA funding of human experimentation projects by contractors and researchers, including the Geschtickter Fund for Medical Research, the Society for the Investigation of Human Ecology, the Josiah H. Macy, Jr. Foundation, the Granger Fund, the H.J. Rand Foundation, Medical Sciences Research Foundation, and Amazon Natural Drug Co., among others.

Plaintiffs also take issue with Defendants' refusal to produce individual records from the Chemical and Biological Test Repository. As Defendants concede in their July 12, 2010 letter, one focus of Plaintiffs' case is evaluating the known and possible health effects of substances tested on Army servicemembers and to identify which test subjects have and have not been notified. In order to assess the health effects, Plaintiffs must have access to more than the identities of the substances to which test subjects were exposed. Plaintiffs also need to determine the dose of each substance administered; the pathway (*e.g.*, injection, inhalation, absorption, etc.), frequency, and conditions of administration; the test subjects' actual physical and psychological response to the administration; whether and to what extent

test subjects received more than one substance and during what period; and other information available only through servicemembers' test records. Defendants cannot, for example, maintain that only "low" doses of BZ and LSD were administered to test subjects while simultaneously refusing to disclose the actual doses administered to test subjects. These records presumably would also show whether a particular exposure was witting or unwitting.

Defendants' proposal that the CIA produce just six documents is completely unacceptable and outrageous. Plaintiffs have served on Defendants dozens of document requests and interrogatories related to CIA testing of chemical and biological weapons. Inspector General Reports, Congressional testimony, the OFTEN box inventory referred to above, and other documents obtained through discovery suggest that there are, at least, tens of thousands of documents relating to the CIA's testing programs and its involvement in the Army's testing programs. Defendants, however, propose to refer to DoD for classification review a mere six documents relevant to Plaintiffs' Interrogatory No. 5. In other words, Defendants propose to neglect all but one of Plaintiffs' discovery requests related to the CIA and ignore almost the entire universe of documents relevant to the CIA's involvement in matters central to this case. Unfortunately, not only would this CIA document proposal plainly violate Defendants' discovery obligations, but it continues the pattern of the CIA's disregard of the fact that it is a party to this action, illustrated by its failure to send a representative to any of the settlement conferences.

To add further insult to injury, Defendants propose to undertake these meager efforts in lieu of responding to Plaintiffs second and third set of requests for production of documents and any additional document requests Plaintiffs may serve on Defendants. Plaintiffs note that this proposal would also effectively relieve Defendants of their responsibility to respond to much of Plaintiffs' first set of document requests as well as Plaintiffs' interrogatories – interrogatories which Defendants have been compelled to answer by Judge Larson's July 13, 2010 order. Plaintiffs will not relinquish their rights to discovery under any circumstances. Further, Plaintiffs will not agree to this or any alternative proposal without a deadline for production.

Finally, Defendants' 30(b)(6) proposal regarding witnesses to testify regarding the scope of search for responsive documents is also unacceptable. Plaintiffs first contacted Defendants to obtain dates for these depositions over two months ago, and first noticed the depositions over a month ago. First, the only explanation we can arrive at for Defendants' protracted delay in refusing to produce witnesses is that they are afraid to confront the patent inadequacies in their search for and production of responsive documents. Plaintiffs maintain that the 30(b)(6) depositions should proceed without delay, and we will proceed to file a motion with Magistrate Judge Larson in light of Defendants' failures to appear. Plaintiffs do not believe any "stay" of discovery appropriate, as the Court denied virtually all of Defendants' motion to dismiss and discovery is just beginning. Second, Defendants have

provided no legal basis, statutory or otherwise, for their request that Plaintiffs withdraw the 30(b)(6) notice served upon DOJ. Third, Plaintiffs insist on the right to an oral deposition of a CIA deponent, and refuse to agree to the "written description" of CIA's searches that you would propose to substitute. Accordingly, Plaintiffs intend to exercise their rights under 30(b)(6) to depose a designee from the CIA.

Sincerely,

Gordon P. Erspamer

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