GORDON P. ERSPAMER (CA SBN 83364)
GErspamer@mofo.com
TIMOTHY W. BLAKELY (CA SBN 242178)
TBlakely@mofo.com
ADRIANO HRVATIN (CA SBN 220909)
AHrvatin@mofo.com
STACEY M. SPRENKEL (CA SBN 241689)
SSprenkel@mofo.com
DANIEL J. VECCHIO (CA SBN 253122)
DVecchio@mofo.com
DIANA LUO (CA SBN 233712)
DLuo@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

Attorneys for 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

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' OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER LIMITING SCOPE OF DISCOVERY

Date: October 27, 2010
Time: 9:30 a.m.
Ctrm.: F, 15th Floor
Judge: Hon. James Larson

Complaint filed January 7, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

RULES & REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION

Defendants' Motion for Protective Order Limiting Scope of Discovery (the "Motion") (Docket No. 140) is but the latest salvo in Defendants' long-running campaign of delay and resistance to their discovery obligations in this action. The Motion follows on the heels of Defendants' similarly-styled Motion for Protective Order to Stay Discovery (Docket No. 134), filed before Judge Wilken on August 27, 2010, in which Defendants asked the Court to shut down *all* discovery for a full year.[1] In support of their latest effort, Defendants again rely only on conclusory statements about their purported burden, the CIA's self-serving (and *contradicted*) conclusion that it was not involved in the matters at issue in this case, and the ongoing work of a private contractor retained by the Department of Defense to collect limited information. Defendants have entirely failed to show "good cause" for the relief they seek, much as they did in their earlier motion seeking a stay.

Defendants' serial refusals to comply with their obligations to respond to Plaintiffs' discovery requests has forced Plaintiffs to file multiple motions to compel, as well as a motion for a protective order governing confidential information and a motion for sanctions. Four of these motions are currently pending before the Court, and are scheduled to be heard on October 27, 2010. (*See* Docket Nos. 121, 125, 128, and 131.)

Against this backdrop, Defendants now ask the Court to limit unreasonably the scope of discovery by preemptively foreclosing relevant avenues of inquiry. Defendants seek to halt discovery into plainly relevant topics — such as possible health effects related to the substances administered during Defendants' human testing programs — even going so far as to claim that discovery into topics that the Court already has ruled are relevant to the action should be prohibited. Moreover, Defendants propose a vague and unworkable order that would only serve to further muddle a complex case that needs no further complication. Like the motion to stay all discovery that came before it, the instant Motion illustrates Defendants' clear intention to expend

[1] Judge Wilken took that motion under submission on September 30, 2010. (Docket No. 156.)

whatever resources necessary to avoid earnest participation in discovery — resources that Defendants should instead devote to meeting their discovery obligations in this case. Defendants' Motion should be denied.

II. BACKGROUND

Plaintiffs filed this action on January 7, 2009, asserting claims for injunctive and declaratory relief stemming from Defendants' actions and inactions regarding, *inter alia*, top-secret government programs through which chemical and biological agents were tested on soldiers deemed "volunteers." Defendants have failed to care for the service member test subjects as required by law, representing to Congress that they would do so but letting decades slip by as former test subjects continued to suffer unaided — often completely in the dark about the details of what Defendants had done to them as part of the testing programs. Plaintiffs — individual veterans who were subjected to Defendants' test programs and two veterans' rights organizations whose members include additional test subjects — seek to force Defendants to finally fulfill their obligation to locate participants in these tests and to notify them regarding those exposures, to compel Defendants to provide healthcare to test participants as required by Defendants' own regulations, and to release the test participants from improper "secrecy oaths" that have hindered the ability of test veterans to seek counseling and appropriate medical care.

Defendants moved to dismiss Plaintiffs' claims on June 30, 2009. (Docket No. 29.)[2] In moving to dismiss, Defendants recited their efforts to "continue to investigate, compile relevant documents and other information, and develop and implement appropriate responses and remedies" (Docket No. 29 at 3) — conceding, in essence, that Defendants still had not fulfilled duties to provide notice and health care *decades* after those obligations arose. The Court denied Defendants' motion to dismiss in part in an Order dated January 19, 2010, finding, *inter alia*, that Defendants owed a duty under the APA to provide notice and healthcare to test subjects. (*See*

[2] Defendants also subsequently moved to dismiss Plaintiffs' First and Second Amended Complaints, making essentially the same arguments each time. (*See* Docket Nos. 34 and 57.)

Jan. 19, 2010 Order Granting in Part and Den. in Part Defs.' Mots. to Dismiss ("MTD Order"), Docket No. 59.) In the January 19 Order, the Court also ordered discovery to proceed.

Defendants immediately instituted a series of delay tactics, refusing to answer any of Plaintiffs' interrogatories, and forcing Plaintiffs to file a motion to compel responses. (Docket No. 76.) On the evening before the June 30, 2010 hearing on Plaintiffs' motion, Defendants served responses that consisted largely of objections. On July 13, 2010, the Court granted Plaintiffs' Motion to Compel, finding that — contrary to Defendants' arguments — the interrogatories "relate to claims which still remain" in this case. ("July 13 Order," Docket No. 112 at 5.) In the ensuing months, Defendants continued to stall and shirk their discovery obligations rather than cooperate with Plaintiffs.[3] After an exhaustive meet and confer process, Plaintiffs brought these issues to the attention of the Court in a series of motions filed in August, which the Court has scheduled to be heard on the same day as Defendants' Motion. Given this context, it is apparent that Defendant's Motion is simply another episode in Defendants' serial efforts to resist discovery in this matter rather than meeting their discovery obligations. Despite Defendants' concerted efforts, however, they once again fail to meet their burden to show that they are entitled to a protective order imposing the sweeping limitations on discovery that Defendants seek, and Defendants must not be allowed to continue their clear pattern of delay.

III. ARGUMENT

A. Defendants Have Not Met Their Heavy Burden of Justifying a Protective Order.

As an initial matter, Defendants (again) fail to meet their burden to show that they are entitled to a protective order limiting discovery in any way. A protective order places limits on discovery that is otherwise liberally permitted under Federal Rules. *See Neubronner v. Milken*,

[3] As another an example of Defendants' continued discovery recalcitrance, Defendants' amended interrogatory responses were largely unchanged from the initial responses, failed to account for or comply with the Court's July 13 Order, and once again "consisted mostly of objections." (July 13 Order at 6.) Plaintiffs have initiated a meet-and-confer process with Defendants in an effort to avoid burdening the Court with renewed motion practice over Defendants' responses to Plaintiffs interrogatories.

6 F.3d 666, 672 (9th Cir. 1993); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993). A protective order may be granted only when the moving party can show "good cause" by "demonstrating harm or prejudice that will result from the discovery." *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004).[4] Moreover, "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992).

Defendants have fallen far short of this standard. Aside from oblique references to the burdens associated with responding to Plaintiffs' long-standing requests, Defendants assert no specific justification for the entry of a protective order that would foreclose multiple avenues of discovery. Defendants' vaguely articulated claims of burden are unavailing, as "good cause is not established merely by showing that discovery may involve inconvenience and expense." *See* 6 James W. Moore, *Moore's Federal Practice* § 26.104[1] (3d ed. 2010); *see also Lehnert v. Ferris Faculty Ass'n—MEA-NEA*, 556 F. Supp. 316, 318 (W.D. Mich. 1983) (discovery burden party must bear is measured by nature, importance, and complexity of inquiry involved in case).

Defendants' claims of burden are further undercut by their repeated failures to earnestly participate in discovery throughout the course of this litigation. As noted above, Defendants have refused to answer relevant interrogatories and have refused to produce 30(b)(6) witnesses as well as volumes of relevant documents. Defendants also have drastically constricted the scope of their searches for documents, steadfastly refusing to search perhaps the single most obvious and central source for relevant information: the records of individual test subjects. (*See* Defs.' Opp'n to Pls.' Mot. to Compel Prod. ("Defs.' Opp'n"), Docket No. 143, at 14.) Defendants repeatedly have asserted that responsive information about the test programs, the nature and health effects of test substances, and test subject consent is contained in these records, yet they inexplicably refuse to search them, claiming only that it would be burdensome and is "not necessary." (*Id.*) Thus,

[4] *Rivera*, cited by Defendants, bears little resemblance to this case. The *Rivera* court issued a protective order barring discovery into the plaintiffs' immigration status because such discovery would "chill the plaintiffs' willingness and ability to bring civil rights claims." *Rivera*, 364 F.3d at 1064. Defendants offer no similar justification for a protective order here.

Defendants refuse to engage in routine discovery, claiming that to do so somehow would cause them undue burden.[5]

B. Defendants Continue To Resist Proper Discovery Regarding Relevant Topics.

Time and again, Defendants have refused to provide answers or produce documents in response to discovery propounded by Plaintiffs, claiming that the information sought was "irrelevant" to this litigation — only to later concede, in the face of Court intervention, the relevance of such discovery.[6] Despite this fact, Defendants now ask the Court to allow them, effectively, to determine for themselves in advance what information is relevant and what is not, to enact a post hoc justification for their past discovery shortcomings, and to prohibit Plaintiffs from inquiring about numerous broad topics on the basis of Defendants' demonstrably fallible judgment. Defendants should not be allowed to make their own relevancy determinations and foreclose discovery on that basis. *See Dean Foods v. Eastman Chem. Co.*, No. C-00-4379 WHO, 2001 U.S. Dist. LEXIS 25447 at *12-13 (N.D. Cal. Aug. 13, 2001) (denying protective order, noting that defendant "should not be permitted to decide for itself which documents are evidence" of plaintiffs' claims).[7] It is clear that Defendants' requested relief impermissibly would preclude discovery of information that is highly relevant — indeed, critical — to Plaintiffs' claims.

---

[5] Defendants' unsubstantiated claims of burden are unconvincing. As of May 2009 (the most recent data available), the DoD alone employed over 700,000 civilian employees, and has requested a budget of over $700 billion for 2011. (*See* U. S. Dep't of Defense Fiscal Year 2011 Budget Request, *available at* http://comptroller.defense.gov/budget.html (last visited October 5, 2010); U.S. Office of Personnel Management, Federal Employment Statistics, *available at* http://www.opm.gov/feddata/html/2009/May/table2.asp (last visited October 5, 2010.) The suggestion that such an organization cannot spare the man-hours to review a centralized collection of documents central to ongoing litigation borders on the absurd.

[6] Defendants' belated concessions echo the government's historic tendency to admit the existence or extent of its human testing programs only after decades of denials. *See, e.g.*, Donald G. McNeil, Jr., *U.S. Apologizes for Syphilis Tests in Guatemala*, NEW YORK TIMES (October 1, 2010), *available at* http://www.nytimes.com/2010/10/02/health/research/02infect.html?_r=1&scp=2&sq=guatemala&st=cse (last visited October 5, 2010) (describing acknowledgement by U.S. government, more than sixty-four years after the fact, of "clearly unethical" syphilis tests conducted on humans).

[7] Even one of Defendants' declarants purports to offer testimony regarding what information is relevant to Plaintiffs' claims. *See* Decl. of Patricia Cameresi, Docket No. 140-14, at ¶ 10 ("Plaintiffs' discovery requests of the CIA sweep far beyond" their claims).

1. Information about health effects is critical to Plaintiffs' claims.

The Court has ruled that Defendants' duty to notify test subjects of "the effects upon his health or person which may possibly come from his participation in the experiment" is a central issue in this case. (*See* MTD Order at 15; *see also* Army Regulation ("AR") 70-25, *Use of Volunteers As Subjects of Research* (Mar. 26, 1962).) Similarly, the Court ruled that Defendants' own regulations require "medical treatment and hospitalization . . . for all casualties," and that the fact that "symptoms appear *after* the experiment ends does not obviate the need to provide [medical] care." (MTD Order at 16-17 (emphasis added).) And, as alleged in the Complaint, Defendants' own regulations also require them to warn test subjects and to provide "any newly acquired information that may affect their well-being . . . even after the individual volunteer has completed his or her participation in research." (Compl. ¶ 17, AR 70-25 (Jan. 25, 1990).) From these legal precepts flows a central category of relevant information central to Plaintiffs' claims: information concerning health effects that may "possibly come from" participation in Defendants' testing programs. Such information is relevant *regardless of its source*, whether learned from: the experiments themselves; field tests or operational use of the chemicals or biological agents; tests of these substances on civilians or prisoners; or, laboratory and animal research involving these substances. Moreover, given Defendants' ongoing duty to notify test subjects regarding possible health hazards and any newly acquired information that may affect the well-being of test subjects, this information is relevant *regardless of when* Defendants learned it.

For months, however, Defendants have objected to discovery requests for this information as irrelevant. Only *after* Plaintiffs filed motions to compel following months of fruitless meet-and-confer efforts did Defendants finally admit that they are required to search for documents regarding the health effects of the test substances. (Defs.' Opp'n at 2.) Notwithstanding this concession (made, Plaintiffs note, the same day Defendants filed the instant Motion), Defendants now insist that discovery clearly related to health effects has "no bearing" on Plaintiffs' claims and should be preemptively barred. (Motion at 13-14.) Defendants' position must be rejected.

For example, Defendants argue that research on the effects of test substances in animals has "limited utility" with respect to Plaintiffs' claims, insisting that there is "no evidence . . . that

animal studies are predictive of the long-term health effects experienced by human subjects." (Motion at 14.) Defendants' argument misinterprets the standard for discoverable information. Plaintiffs may seek discovery regarding information that is "reasonably calculated to *lead to* the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1) (emphasis added.) Whether the information sought is itself ultimately *admissible* — *i.e.*, its "utility" — is an issue to be determined after all discoverable information is gathered and evaluated.

More importantly, however, Defendants' own documents and regulations demonstrate that the very *purpose* of animal testing was to predict the effects of chemicals in humans. For example, the CIA memorandum attached to the Declaration of Kimberly L. Herb ("Herb Decl.," Docket No. 140-1) as Exhibit J, and again as Attachment A to the Declaration of Patricia Cameresi ("Cameresi Decl.," Docket No. 140-14), states that research was performed concerning "test procedures with animals *from which the behavioral effects of drugs and chemical compounds in humans could be predicted*." (Herb Decl. ¶ 17, Ex. J at 2 (emphasis added).) The CIA's declarant, Patricia Cameresi, reiterates this assertion. (Cameresi Decl. at 10 n.5.) Indeed, the 1953 Wilson Directive, prepared and issued by the DoD, provides that the test programs should be "based on the results of animal experimentation" so that the "anticipated results will justify the performance of the experiment." (Wilson Memo. at 2.d., Docket No. 53-3; *see also* Compl. ¶ 119.) It defies credulity for Defendants to claim today that the results of animal testing are not relevant to possible health effects when the animal testing was conducted for the very purpose of predicting possible health effects as part of Defendants' testing programs.[8]

Similarly, Defendants contend that human experiments conducted on non-military test subjects are not "of particular usefulness," and that discovery into such information should be prohibited. (Motion at 17.) Again, Defendants misstate the standard for discoverability under Rule 26: relevant information is discoverable, even if its "particular usefulness" is yet to be

[8] Even the language Defendants quote for this point indicates that animal studies "are not *as* valuable" as human studies in deriving "the truth about causes of human disease" — not that animal studies have no utility or relevance. (Motion at 14 (emphasis added).)

determined.[9] Here, Defendants' specific knowledge of the health effects of the test substances — from whatever source derived — directly impacts Defendants' duty to notify test subjects and is relevant to Plaintiffs' claims for notice and healthcare. No great leap in logic is required to see that information about the health effects caused by Defendants' experiments on non-military test subjects is relevant to possible health effects suffered by military test subjects *exposed to the same test substances*. Defendants' empty protestations that this information will not be "useful" to Plaintiffs' claims cannot justify their effort to avoiding producing this information in discovery.

Defendants further claim that discovery regarding test programs conducted "at and through contracts with non-military installations" is inappropriate because Plaintiffs have not alleged that the Individual Plaintiffs or putative class members were exposed to chemicals at these specific installations. (Motion at 17.) Defendants again miss the mark: this information is relevant to Plaintiffs' notice claims because it bears directly on the known potential health effects of the test substances. Defendants frequently used private institutions to conduct their tests of chemical substances. For example, publicly available contemporaneous documents indicate that the Army Chemical Corps used contracts with private institutions "to enlarge its own research program economically and effectively." (*See* Erspamer Decl. Ex. B (Clarence J. Hylander, Chemical Corps Laboratories, *The Medical Laboratories of the Army Chemical Corps and Their Research Activities* (MLSR No. 59, January 1955) at 17.)[10] Moreover, the CIA used private contractors or front organizations (known as "cut-outs") to conduct research on its behalf, as acknowledged by Defendants. (*See* Cameresi Decl. ¶¶ 19-20 (noting CIA's contractors and

[9] Defendants also ignore the fact that some experimental programs, such as Project OFTEN's tests on variants of BZ (3-Quinuclidinyl benzilate, an incapacitating agent related to atropine), used military personnel *and* civilian prisoners as subjects. (*See* Erspamer Decl. ¶ 2, Ex. A at 2; *see also* Cameresi Decl., Attach. A at 2.)

[10] Indeed, the 1955 Chemical Corps Report states that, as part of its efforts to "accelerate" its research program, the Army contracted with more than two dozen private institutions and universities. (Erspamer Decl. ¶ 3, Ex. B at 17-18.) Included among these was Battelle Memorial Institute — the same entity that the DoD now has hired as part of its ongoing "investigation" into the test programs that Defendants have cited as the basis for seeking to stay all discovery. The irony is palpable.

subcontractors).) Plaintiffs properly seek discovery regarding testing programs carried out by these contractors: they are (or were) acting as extensions of Defendants themselves, and whether their tests involved military personnel or not, the information they obtained regarding the health effects of test substances is relevant to Plaintiffs' notice claims.[11]

Defendants also seek to bar Plaintiffs from serving discovery concerning the operational use of test substances due to the "absence of such allegations" in the Complaint. (Motion at 14-15.) Defendants' argument again misses the mark entirely: the very purpose of the test programs was to understand the capabilities (both offensive and defensive) of chemical and biological weapons in operational settings. (*See* Erspamer Decl. ¶ 3, Ex. B at 1 ("The chief mission of the Chemical Corps Medical Laboratories is to conduct basic and applied research essential to maximum *offensive* and defensive effectiveness in chemical warfare.") (emphasis added).) If these chemicals were used by Defendants in operational settings, information related to that use plainly is relevant to the possible health effects of those chemicals and to Defendants' duty to notify the test subjects. For instance, documents about the operational use of the test substances may describe the anticipated or observed casualty rate, dose-response relationships, side effects, method of administration, or other information that clearly bears on Plaintiffs' claims for notice and healthcare.

2. Information concerning test subject consent is relevant.

Defendants also consistently refused to produce information regarding the test subjects' consent to the testing, only to finally concede in their opposition to Plaintiffs' Motion to Compel that they must search for and produce documents regarding this subject. (Defs.' Opp'n at 2.) Unbelievably, Defendants claim that only *now* do they understand, as a result of the Court's

[11] Defendants' own references to the report of the Deputy Army Inspector General regarding the Army's contract with Tulane University, for example, undercuts their assertions that such issues are not relevant to this action. Defendants admit that the Army's interest in the Tulane studies involved "gathering evidence of the effects of LSD and mescaline in humans," illustrating precisely why these records are relevant to Plaintiffs' claims. (Motion at 23 (internal quotations omitted).)

July 13 Order, that information about consent is relevant — *despite having raised consent as an affirmative defense in their Answer more than six months ago*. (*See* Docket No. 71 at 40.)

Again, despite this concession, Defendants now seek to prohibit discovery into issues directly bearing on consent — including issues that the Court *already has ruled* are relevant to the claims in this action. For example, Defendants argue that because the Court dismissed Plaintiffs' claim for declaratory relief regarding the lawfulness of the test programs, Defendants should not have to respond to Plaintiffs' document requests regarding violations of testing protocols, which "concern the lawfulness of the test programs." (Motion at 9-10.) Perhaps Defendants have forgotten that the Court *explicitly rejected this argument* in its July 13 Order. There, Defendants had argued that Interrogatory No. 12, which sought information regarding violations of the Wilson Memorandum, sought information "beyond the scope of the case" because it was "directed toward the legality of the Army's testing programs." (July 13 Order at 5.) The Court rejected that argument, holding that the interrogatory sought "relevant evidence" because it also concerned the legality of consent, and ordered Defendants to answer. (*Id*. at 5-6.) Defendants' misguided attempt to resurrect the same flawed argument here is unavailing. The discovery Defendants seek to resist is relevant to the test subjects' consent, an issue that unequivocally remains alive in this litigation.

3. Information about CIA's participation in the test programs is relevant.

As they repeatedly have done in connection with the other discovery motions pending before the Court, Defendants again argue that discovery regarding the CIA's human testing activities should be curtailed due to the CIA's self-serving "conclusion" that it did not fund testing on military service members through Project OFTEN. (Motion at 16-17.) Defendants' position is undercut by ample contradictory evidence, including the determination of the CIA's co-defendant (the DoD) that Project OFTEN *was part of a CIA program* that *did* involve testing on military personnel at Edgewood Arsenal. (*See* Erspamer Decl. ¶ 4, Ex. C at 25 and 33.) Such contradictory evidence casts a long shadow over the CIA's oft-repeated contention that no other CIA program involved testing on military personnel. The CIA should be compelled to meet its discovery obligations and search for and produce all documents in its possession, custody, or

control that relate in any way to CIA involvement in or sponsorship of any testing involving military personnel — even if the CIA has interpreted those documents to mean that there was none. Plaintiffs are entitled to the evidence in CIA's possession under the Rule 26 standard of relevance so that they can evaluate the evidence themselves and present it to the Court so that it may do the same.[12]

Defendants further assert that discovery into the CIA's test programs is unwarranted "in light of the Court's finding that Plaintiffs lacked standing to challenge the lawfulness of the programs." (Motion at 17.) Again Defendants miss the point: the Court refused to dismiss the CIA from this action, holding — contrary to the CIA's arguments — that the CIA has a legal duty to notify test participants "because the agency placed test participants in harm's way." (MTD Order at 15.) The CIA now has an obligation to respond to Plaintiffs' discovery which seeks information relevant to that claim.[13]

C. Defendants' Requested Relief Is Unintelligible and Unworkable.

Even at a glance, it is clear that Defendants seek impermissibly broad and unworkable relief in their proposed protective order. Defendants ask the Court to enter an order that would

[12] The CIA cannot, for example, claim that it has somehow fulfilled its discovery obligations through the oft-cited FOIA release it provided to Plaintiffs *outside of discovery*. The CIA has not subjected these documents to an updated classification review, nor "produced" them in this action. In fact, Defendants repeatedly have made clear their position that these documents: (a) are irrelevant to this action; and, (b) have been provided outside of discovery. The FOIA collection does not represent any effort by the CIA to review the documents in its possession, custody, or control for relevance to this action — an effort that, according to the CIA's own declarant, the agency has not undertaken. (*See* Cameresi Decl. ¶¶ 16-20 (indicating that CIA has not searched either its archived records or its CADRE database).)

[13] Irrespective of Defendants' contention that the CIA did not participate in human testing on military personnel, it is beyond dispute that the CIA acquired relevant, responsive documents. The CIA contemporaneously reviewed the work done at Edgewood to determine whether the testing was "useful for the purposes that they had in mind." (Erspamer Decl. ¶ 4, Ex. C at 1; *see also* Cameresi Decl. Attach. A at 2 (noting that CIA obtained from Edgewood "results on the clinical testing and screening of new drugs and chemical compounds using animals and humans as test subjects," and saved data in a "computer controlled data base.").) Indeed, Defendants' initial disclosures include memoranda regarding observations CIA personnel made of human testing at Edgewood. (*See, e.g.*, Erspamer Decl. ¶ 5, Ex. D.) Even accepting the CIA's "conclusion" that it did not participate in testing on servicemembers (and there is ample reason *not* to), that conclusion would not shield the CIA from its obligation to produce the relevant, responsive information it possesses about the test programs.

exclude discovery requests that "encompass a broad swath of irrelevant documents" — a meaningless jumble that would be impossible for the parties to interpret or implement, or for the Court to enforce. Defendants' request to bar discovery concerning "issues previously examined" or that are "being investigated as part of the Battelle investigation" are similarly vague and unworkable; there simply is no functional way to define or anticipate the discovery that would be affected by such provisions.

The scope and repercussions of Defendants' requested relief extend far beyond their elucidated concerns. Defendants ask the Court to "limit overly broad requests" based on their conclusion that certain of Plaintiffs' requests would "necessarily encompass" bills of lading and other "administrative minutiae." (Motion at 20.) Defendants never once raised this concern through meet-and-confer discussions — in fact, Defendants *never even responded* to the document requests at issue. Had Defendants responded to these requests and conferred with Plaintiffs regarding their intended scope, Plaintiffs would have informed Defendants that they (unsurprisingly) *do not want* bills of lading.[14] Asking the Court to now enter an indeterminate order to "limit overly broad requests" is a poor substitute for requiring Defendants to engage in earnest discovery practice, including appropriate meet-and-confer discussions about the reasonable scope of Plaintiffs' discovery requests.

Other relief that Defendants seek further illustrates their improper pursuit of broad preemptive limitations on discovery when the issues should be addressed through routine discovery practice. For example, Defendants ask the Court to prohibit any discovery request that would seek information protected by privileges pursuant to 50 U.S.C. §§ 403-1(i)(l) and 403(g), when in reality this is an issue properly addressed in a privilege log, not a protective order. If Defendants believe responsive information is protected by these statutes, they should state the basis for their position in their discovery responses and/or privilege log as appropriate so that

[14] Defendants further claim that Plaintiffs' requests would necessarily encompass herbicides used during the Vietnam War. Had Defendants met-and-conferred with Plaintiffs, they would have learned (again, unsurprisingly) that Plaintiffs' discovery efforts are focused on those chemical and biological substances that were tested on servicemembers in connection with the test programs at issue. (Motion at 19.)

Plaintiffs may evaluate the applicability of the privilege and proceed accordingly. Defendants should not be permitted to short-circuit this process before it even begins — especially in light of Defendants' recent production of documents previously withheld on the basis of the deliberative process privilege. (Defs.' Opp'n at 24.)

Similarly, Defendants seek to limit discovery directed to the Department of Justice ("DoJ") on the basis that responding to requests for which they have no information would be "unduly burdensome." (Motion at 21.) Such a limitation is not warranted — if the DoJ does not have responsive information, it should say so in its responses to Plaintiffs' discovery requests.

Finally, Defendants ask the Court to prohibit discovery requests that are "duplicative" of earlier investigations by the Defendants or their contractors. (Motion at 12.) Defendants have made no showing that any of the searches made in these "investigations" — some in response to FOIA requests filed decades ago — covered the same subjects as Plaintiffs' requests, or that the searches satisfied the requirements of Rule 34. Moreover, the cases cited by Defendants in support of their position are inapposite. In contrast to the plaintiffs in *In re Agent Orange Product Liability Litigation*, 517 F.3d 76 (2d Cir. 2008), for example, Plaintiffs here already have reviewed the pubic information on which Defendants seek to rely as a shield against responding to discovery. Indeed, the Second Amended Complaint cites the Congressional record as well as many of the studies referenced by Defendants. (*See, e.g.*, Compl. ¶¶ 4, 13-14.) Furthermore, many of Plaintiffs' discovery requests seek specific documents referenced in the public record, such as in the 1976 DAIG Report cited by Defendants. (Motion at 23.)

Regardless, Defendants' proposed restriction quite simply would establish an impossible standard. Defendants could conceivably claim that nearly *any* topic falls under the scope of one investigation or another, and thus avoid discovery into those topics altogether — whether or not the investigation actually gathered all responsive information. In fact, Defendants concede in the Motion that the ongoing investigation by Battelle would not provide responsive information to Interrogatory No. 14 — which seeks information about test participants who revoked their consent — noting that Defendants would be required to search the individual test subjects' personnel files, which they have unwaveringly refused to do. Nevertheless, Defendants ask that

discovery regarding that subject be foreclosed on account of Battelle's admittedly insufficient efforts. (Motion at 22.) Defendants' position is untenable; they must search for and produce relevant documents, including those found in the personnel files, or otherwise respond to discovery seeking the information underlying such "investigations" regardless of the investigation's ultimate "conclusion."

Defendants' refusal to search the personnel files of the test subjects, and each of Defendants' other impermissibly broad requests to cut Plaintiffs' discovery off at the knees, betrays Defendants' true intentions — to continue to avoid discovery in this action altogether. It is clear that Defendants' Motion for a protective order is nothing more than another chapter in Defendants' consistent pattern of delays and obstruction in discovery, and that Defendants have fallen far short of meeting their burden to justify the protective order they seek. The Court should put an end to Defendants' efforts to avoid their discovery obligations in this action and deny Defendants' Motion.

IV. CONCLUSION

For the reasons described above, Defendants' Motion for Protective Order Limiting the Scope of Discovery should be denied.

Dated: October 6, 2010

GORDON P. ERSPAMER
TIMOTHY W. BLAKELY
ADRIANO HRVATIN
STACEY M. SPRENKEL
DANIEL J. VECCHIO
DIANA LUO
MORRISON & FOERSTER LLP

By: /s/ Gordon P. Erspamer
Gordon P. Erspamer
GErspamer@mofo.com]

Attorneys for Plaintiffs

Responses and Replies

4:09-cv-00037-CW Vietnam Veterans of America et al v. Central Intelligence Agency et al
ADRMOPTERM, E-Filing

U.S. District Court
Northern District of California
Notice of Electronic Filing or Other Case Activity

NOTE: Please read this entire notice before calling the Help Desk. If you have questions, please email the Help Desk by replying to this message; include your question or comment along with the original text.

Please note that these Notices are sent for all cases in the system when any case activity occurs, regardless of whether the case is designated for e-filing or not, or whether the activity is the filing of an electronic document or not.

If there are **two** hyperlinks below, the first will lead to the docket and the second will lead to an e-filed document.
If there is no second hyperlink, there is no electronic document available .
See the FAQ posting 'I have a Notice of Electronic Filing that was e-mailed to me but there's no hyperlink...' on the ECF home page at https://ecf.cand.uscourts.gov for more information.

The following transaction was received from by Erspamer, Gordon entered on 10/6/2010 4:21 PM and filed on 10/6/2010

Case Name:	Vietnam Veterans of America et al v. Central Intelligence Agency et al
Case Number:	4:09-cv-00037-CW
Filer:	Swords to Plowshares Veterans Rights Organization Vietnam Veterans of America Bruce Price Franklin D. Rochelle Larry Meirow Eric P. Muth David C. Dufrane Wray C. Forrest
Document Number:	157

Docket Text:
Memorandum in Opposition re [140] MOTION for Protective Order *Limiting Scope of Discovery* filed byDavid C. Dufrane, Wray C. Forrest, Larry Meirow, Eric P. Muth, Bruce Price, Franklin D. Rochelle, Swords to Plowshares, Veterans Rights Organization, Vietnam Veterans of America. (Erspamer, Gordon) (Filed on 10/6/2010)

4:09-cv-00037-CW Notice has been electronically mailed to:

Adriano Hrvatin ahrvatin@mofo.com, patherton@mofo.com

Brigham John Bowen Brigham.Bowen@usdoj.gov

Caroline Lewis Wolverton caroline.lewis-wolverton@usdoj.gov, caroline.lewis-wolverton@usdoj.gov, Stephanie.Parker@usdoj.gov

Gordon P. Erspamer GErspamer@mofo.com, jdwight@mofo.com, kbeaudoin@mofo.com, lsario@mofo.com

Kimberly L. Herb Kimberly.L.Herb@usdoj.gov

Lily Sara Farel lily.farel@usdoj.gov

Stacey Michelle Sprenkel ssprenkel@mofo.com, jhaskins@mofo.com

Timothy W. Blakely tblakely@mofo.com

4:09-cv-00037-CW Please see General Order 45 Section IX C.2 and D; Notice has NOT been electronically mailed to:

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename: C:\Documents and Settings\keb1 \Desktop\Fax_File_or_Docket\Opposition_to_Mot_to_Limit_Discovery.pdf
Electronic document Stamp:
[STAMP CANDStamp_ID=977336130 [Date=10/6/2010] [FileNumber=6790879-0] [58bf73c44ee37e11806f9a379b4dde9538e233ae41326d77f5134f8f3e8faccaef376 219cae1e34dd6abb4607841af4f5fb5e3343b146dfb48da1c21e32e8d5e]]