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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' REPLY IN SUPPORT OF MOTION TO OVERRULE OBJECTIONS AND COMPEL PRODUCTION OF DOCUMENTS

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

Complaint filed January 7, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

I. INTRODUCTION

Plaintiffs' Motion to Overrule Objections and Compel Production of Documents (the "Motion") highlighted the serious deficiencies in Defendants' document production in this litigation, and showed that the Court should overrule Defendants' myriad inappropriate objections and compel production of relevant documents. In their Opposition to the Motion (Docket No. 143) ("Opp'n"), Defendants attempt to paint a different picture, calling their production "robust" and accusing Plaintiffs of "mischaracterizing" the record. To resolve this dispute, however, the Court need not rely on rhetoric: objective facts demonstrate Defendants' non-compliance with their discovery obligations and establish that Plaintiffs are entitled to relief.

For example, Defendants continually fail to address central, relevant issues at the core of the case — namely, the effects of the test substances on the health of the test subjects and the issue of the test subjects' consent to the testing. Although Defendants finally concede in their Opposition that documents concerning these two subjects are indeed relevant, this concession comes only after many months of denials that such documents bear on the litigation at all. Moreover, Defendants continue to object to numerous discovery requests that relate directly to these topics, and have produced next to nothing over the past six months — other than a handful of documents initially withheld as privileged — despite their oft-referenced "ongoing" search efforts.

Defendants' Opposition demonstrates Plaintiffs' entitlement to relief in other ways as well. For instance, although Defendants repeatedly claim that they have made "robust" document productions, Defendants admit that they have not even searched the most obvious, centrally located repositories of centrally relevant information — *the records of the test "volunteers"* themselves. In fact, Defendants still maintain that they will not search those records at all.

Moreover, the CIA claims that it should not be required to search for any documents because it asserts that it was not involved in testing on military subjects. Documents in Defendants' own initial disclosures state just the opposite, as does the only document cited by the CIA declarant. Moreover, the CIA's co-defendant, the Department of Defense ("DoD"), has concluded that the CIA *was involved* in drug testing on military personnel.

Defendants also attempt to tout the CIA's participation in discovery by citing 20,000 pages of MKULTRA documents provided to Plaintiffs, despite the fact that Defendants have steadfastly maintained that these documents (which merely constitute the CIA's standard FOIA release set) were provided *outside* of discovery, in an effort to avoid discovery obligations such as the need to justify redactions. As such, Defendants' [non]production of these documents illustrates the CIA's efforts to sidestep its discovery obligations rather than earnest participation in discovery. Put simply, any objective review of the record demonstrates Defendants' serial non-compliance with their obligations with respect to Plaintiffs' Requests for Production ("RFPs"). The Court should grant Plaintiffs' motion to compel.

II. ARGUMENT

A. In the Face of Plaintiffs' Motion To Compel, Only Now Do Defendants Concede Key Points.

Tellingly, after forcing Plaintiffs to engage in protracted negotiations and motion practice, Defendants now concede that many of the objections they asserted to resist discovery are unwarranted. First, Defendants now state that they are "amenable to an appropriate protective order" that would permit the production of information subject to Privacy Act or HIPAA protection. (Opp'n at 16 n.10.) Not only have Defendants explicitly rejected such a protective order for over a year, they have expended considerable effort in discovery to redact all such information from documents they have produced. (*See* Decl. of Daniel J. Vecchio in Supp. of Pls.' Mot. for Prot. Order (Docket No. 123) ¶ 4, Ex. A.) For example, although Defendants state that their document production "includes a copy of the database … that identifies each servicemember test participant," this is not accurate. (Opp'n at 9.) As Defendants well know, they redacted the names of all test participants based on the assertion of Privacy Act and HIPAA, even though they now admit that this information should be provided pursuant to a protective order. Defendants' Privacy Act and HIPAA objections permitted Defendants to withhold production of vital information for many months, but now it is clear that this information should have been produced under an appropriate protective order long ago.

Similarly, only now do Defendants concede that they are required to search for documents regarding the health effects of the test substances, which are plainly relevant to Plaintiffs' claims regarding notice and healthcare. (Opp'n at 2.) Such documents presumably include those sought by Plaintiffs' RFP Nos. 20-21, 29, 44-46, and 74-77, as described in Plaintiffs' Motion, as well as those sought by RFP Nos. 3, 5, 7, 23, 25, 36, 48, 57, 60-61 and 63-65, which relate to the substances themselves. (Mot. at 10-15.) Although Defendants claim that they *agreed* to do so as part of their meet-and-confer efforts, Defendants only *offered* to do so only *if* Plaintiffs agreed to *waive their right to future discovery*. Indeed, Defendants expressly offered to "undertake these [additional search] efforts in lieu of responding to Plaintiffs' second and third set of [RFPs]," and only if "Plaintiffs will not serve Defendants with additional" RFPs. (Decl. of Caroline Lewis-Wolverton in Supp. of Defs.' Opp'n to Pls.' Mot. to Compel Produc. of Docs. (Docket No. 143-8) ("Wolverton Decl.") ¶ 10, Ex. E at 2.) Defendants made clear that, under their offer, they would not respond to further RFPs, and would only "consider discrete requests from Plaintiffs for specific documents" that "Plaintiffs identify by name." (Wolverton Decl. ¶ 11, Ex. F at 4.) Defendants' "offer" was unreasonable at best — one might say extortionist — and clearly illustrates that Plaintiffs were right to seek Court intervention, the threat of which has caused Defendants to abandon their unreasonable demands.[1]

Moreover, Defendants now admit that they must search for and produce documents regarding the test participants' consent. (Opp'n at 2.)[2] Defendants claim that they now understand these documents to be relevant based on the Court's July 13, 2010 Order, but this

[1] Defendants' Opposition states that Plaintiffs "erroneously assert" that Defendants have not yet searched Edgewood Arsenal. (Opp'n at 8.) In Defendants' July 12, 2010 letter to Plaintiffs, however, Defendants proposed to search Edgewood Arsenal in exchange for Plaintiffs' agreement not to serve additional discovery. (Wolverton Decl. ¶ 10, Ex. E at 1-2.) This proposal suggests that Defendants had not yet searched Edgewood — otherwise this "offer" was nothing more than an offer to do what they already had done — hardly evidencing a good-faith effort to engage in earnest discovery. Indeed, Defendants explicitly state that Edgewood "[has] been the focus of DoD's and Army's ongoing document searches *since Defendants' production in response to Plaintiffs' first set of RFPs*." (Opp'n at 8 (emphasis added).)

[2] Such documents would include those sought by RFP Nos. 2, 4, 26, 30, 34, and 39. (*See* Mot. at 15-16.)

explanation is undermined by two critical facts. First, Defendants expressly raised the issue of consent themselves on March 17, 2010, through the Fourth Affirmative Defense in their Answer, yet Defendants inexplicably refused to search for documents regarding consent until the Court issued its July 13, 2010 Order some four months later. (Docket No. 71 at 40.)[3] Second, as of today, over six months after filing their Answer — and more than two months after the Court's July 13, 2010 Order — Defendants state that they still are searching for responsive documents. Other than ten documents initially withheld as privileged, however, *they haven't produced a thing*. (Decl. of Gordon P. Erspamer in Supp. of Pls.' Reply in Supp. of Mot. to Overrule Objections & Compel Produc. of Docs. ("Erspamer Decl.") ¶¶ 12-13, Exs. K and L.)[4]

Defendants further concede that the deliberative process privilege Defendants previously had asserted to avoid producing specific documents does not apply. In the course of meet-and-confer efforts, Defendants have reviewed and revised their privilege log multiple times, repeatedly citing the deliberative process privilege as grounds for withholding documents. Only now, *after* Plaintiffs sought Court intervention, do Defendants finally acknowledge that the privilege does not apply and that they will produce documents previously withheld improperly.

These facts demonstrate that Defendants repeatedly have hewn to inappropriate objections to avoid complying with their discovery obligations until finally forced to concede in the face of impending Court intervention.[5] The Court should grant Plaintiffs' Motion to Compel to ensure that Defendants' serial non-compliance will not continue.

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[3] Defendants again raised consent as their Fourth Affirmative Defense in their Amended Answer, filed April 7, 2010. (Defs.' Am. Answer to Second Am. Compl. (Docket No. 74) at 40.)

[4] Indeed, although Defendants repeatedly assert that they are conducting "additional searches" for responsive documents, nowhere in their Opposition or in the supporting declarations do they indicate when these searches began. Moreover, one of Defendants' declarants indicates that Defendants have searched only five locations where testing took place, whereas Defendants engaged in human testing in at least eleven locations. (*Compare* Decl. of Lloyd Roberts (Docket No. 143-4) ("Roberts Decl.") at ¶ 5 *with* Pls.' Mot. to Compel (Docket No. 128) at 4.)

[5] This appears to be a pattern for Defendants: In response to Plaintiffs' prior motion to compel interrogatory responses, Defendants served initial responses *the night before* the June 30, 2010 hearing on Plaintiffs' motion, after refusing to respond at all for months.

B. Defendants Admit That They Have Not Searched Individual Test Records and State That They Will Not Do So.

Despite Defendants' numerous concessions about the relevance of documents concerning health effects and test participant consent, and despite their insistence that they are engaged in ongoing searches for such documents, Defendants inexplicably refuse to search the most obvious and central source for this information: the records of individual test subjects. Defendants repeatedly assert that key responsive information about the test programs, the health effects related to the tests, the chemicals used in the tests, and consent to the tests is available in these records.[6] Nevertheless, Defendants refuse to search these documents, stating without any support that it is "not necessary" to do so. (Opp'n at 14.) Defendants claim that searching these records would cause undue burden, but this claim is unconvincing. Defendants are government agencies with hundreds of thousands of employees and hundreds of billions of dollars in budgetary resources, yet they claim that a search of records for fewer than 10,000 people — the very participants in the testing programs at issue — simply is not feasible.[7] The search Defendants describe is *typical* discovery, and should have been completed long ago.[8]

[6] Indeed, Defendants confirm that these records contain the test participants' consent forms and may contain records regarding withdrawal of consent. (*See* Roberts Decl. ¶¶ 5-6.) Defendants further admit that these documents would contain any records of hospitalization connected with the tests. (*See, e.g.*, Opp'n at 14; Roberts Decl. ¶ 8; Decl. of Lt. Col. Raymond Laurel (Docket No. 143-6) at ¶ 4.)

[7] As of May 2009 (the most recent data available), the Department of Defense alone employed over 700,000 civilian employees and has requested a budget of over $700 billion for 2011. (*See* United States Dep't of Defense Fiscal Year 2011 Budget Request, *available at* http://comptroller.defense.gov/budget.html (last visited Sept. 20, 2010); U.S. Office of Personnel Management, Federal Employment Statistics, *available at* http://www.opm.gov/feddata/html/2009/May/table2.asp (last visited Sept. 20, 2010).) The suggestion that such an organization cannot spare the man-hours to review a collection of documents central to ongoing litigation is disingenuous.

[8] For example, in her declaration, Ms. Cameresi estimates that it would take "approximately three months" to collect and review CIA documents responsive to Plaintiffs' RFPs. (Decl. of Patricia Cameresi (Docket No. 143-1) ("Cameresi Decl.") at ¶ 20.) Had the CIA begun collecting and reviewing these documents when Plaintiffs first served their RFPs, rather than focusing their efforts on resisting discovery, the search presumably would long ago have been completed.

Defendants' refusal to search these records is made all the more preposterous by the fact that Defendants have listed these same records in their initial disclosures as documents that they "may use to support [their] claims or defenses." (Erspamer Decl. ¶ 11, Ex. J at ¶ 2.) Defendants cannot insist that they may search these records for information helpful to their defense in this action while simultaneously refusing to search them for information relevant to Plaintiffs' claims and responsive to Plaintiffs' requests for production. Defendants' stated intent to rely on documents from these records to support their defense completely undermines their claim of undue burden and evidences a double-standard in their approach to responding to discovery in this action.

Defendants concede that they have not searched this critical source of documents for responsive information. (*See, e.g.*, Opp'n at 17-18.) Instead, Defendants merely insist that they already have made a "robust" production, and that they are continuing to search for responsive documents. (*See, e.g.*, Opp'n at 1.) Defendants' characterization overlooks reality: the fact of the matter is that approximately 40% of the limited documents Defendants have produced to date in response to Plaintiffs' RFPs consist only of the service records for the *Individual Plaintiffs*. (*See* Pls.' Mot. for Sanctions (Docket No. 131) at 5.) In addition, many of the other documents Defendants have produced — indeed, many of the documents cited in Defendants' Opposition — are documents in the public record *that Plaintiffs cited in the Complaint*. (*Compare, e.g.*, Second Am. Compl. (Docket No. 43) at ¶¶ 4, 9, 103, 164 (citing Army Inspector General Report, "Use of Volunteers in Chemical Agent Research," March 10, 1976) *with* Opp'n at 15 (stating that Defendants produced this report to Plaintiffs).) Defendants' description of their production — which has ignored the most central records to this case — as "robust" simply is not credible.

C. The CIA's Self-Serving "Conclusion" That It Was Not Involved in Testing on Military Servicemembers Does Not Exempt It from Its Discovery Obligations.

Defendants claim that further discovery of the CIA is unwarranted because "the Agency has concluded that it did not fund or conduct drug research on military personnel." (*See, e.g.*, Opp'n at 10; Cameresi Decl. ¶ 3.) There is ample evidence to the contrary — even among the limited documents that the CIA provided with its initial disclosures. For example, numerous documents

state that testing *was* conducted on military personnel as part of the CIA's Project OFTEN, which focused on EA-3167 or BZ, a potent incapacitating agent:

- A CIA Memorandum for the Director of Research and Development, dated May 29, 1973, states: "Twenty human volunteer subjects, five prisoners (Holmesbur[g] State Prison, Holmesbur[g], Pa.) and fifteen military volunteers in the Edgewood program were tested. Both the oral and trans-dermal routes were found to be effective with symptoms lasting up to six weeks." (Erspamer Decl. ¶ 2, Ex. A at ¶ 5.)
- A May 6, 1974 Memorandum for the Inspector General, written by a CIA employee with personal knowledge of Project OFTEN states that Edgewood Arsenal "supplied U.S. Army volunteers for testing of our candidate compounds. We transferred funds to them for their efforts. As a result of this testing something called the 'Boomer' was developed." (Erspamer Decl. ¶ 3, Ex. B at ¶ 3.)
- A January 31, 1975 Memorandum for the Office of Inspector General attaches a document on Influencing Human Behavior describing Project OFTEN, stating that the CIA transferred funds to Edgewood "to support additional pharmacological studies and clinical testing with human volunteer subjects (five prisoners from Holmesburg State Prison, Holmesburg, Pa., and fifteen military volunteers)." (Erspamer Decl. ¶ 4, Ex. C at VVA023838; *see also* Cameresi Decl. Attach. A.) The document goes on to say that although "a final report on this effort is not available, we were informed that EA#3167 can be effectively administered by both oral and trans-dermal routes with after effects lasting up to six weeks." (*Id.* at VVA023839.)

Perhaps in recognition of these documents (and others), the CIA's October 1994 Memorandum to the File summarizing its review of the historical record of Project OFTEN admits that the records are "contradictory and incomplete." (Erspamer Decl. ¶ 5, Ex. D at VVA0237991.) It is not surprising, then, that as recently as July 2006, the CIA Director *admitted* that Project OFTEN "may have involved testing on volunteer military personnel." (*See* Erspamer Decl. ¶ 6, Ex. E.)

Indeed, based on its review of the records, Defendant DoD — the CIA's co-defendant in this action — concluded that the CIA *had* sponsored and funded experiments on human

volunteers through Project OFTEN. The DoD's conclusion is contained in internal DoD documents reviewed by the CIA, in a Memorandum that the DoD submitted to Congress, and was the subject of testimony given by DoD General Counsel, Deanne C. Siemer, to the Senate Subcommittee on Health & Scientific Research, which held hearings chaired by Senator Edward Kennedy in September 1977. During her testimony, Ms. Siemer testified that "Edgewood took the [CIA's] money, did the testing, and was successful in formulating a way to apply this compound as an adhesive" and that human testing of the compound "was a part of the CIA program." (Erspamer Decl. ¶ 7, Ex. F at VVA023925 and VVA023933.)[9] The CIA's involvement was so expansive that the CIA transferred at least eleven boxes of pertinent records to storage in 1974. (*See* Mot. at 5.) Defendants claim that they searched these records but did not locate any responsive documents beyond the approximately 200 pages they produced in their Initial Disclosures. (*See* Supp. Decl. of Patricia Cameresi (Docket No. 143-7) at ¶ 6.) This contention is dubious at best, as the CIA's records indicate that the boxes contained — for instance — a "printout of human clinical data from Edgewood." (*See* Decl. of Daniel J. Vecchio in Supp. of Pls.' Mot. to Overrule Objections & Compel Produc. of Docs. (Docket No. 129) ¶ 13, Ex. I at 5.) No such document was produced in Defendants' Initial Disclosures.[10]

Moreover, Defendants exaggerate the extent to which the CIA has participated in discovery by repeatedly referring to 20,000 pages of documents relating to MKULTRA that the CIA provided to Plaintiffs. (*See, e.g.*, Opp'n at 20.) Defendants have consistently maintained, however, that these documents — which merely consist of the standard FOIA release set concerning MKULTRA — are *not part of their document production*, and even have argued that

[9] Additional documents indicate that the CIA was connected in other ways with the DoD's testing programs. For example, documents produced by a non-party (Dr. James Ketchum) indicate that, through Project MKNAOMI, the CIA maintained close connections with — and provided funding for — chemical and biological testing done at Fort Detrick, a central location for the Army's biological warfare testing programs. (*See, e.g.*, Erspamer Decl. ¶¶ 8-9, Exs. G and H.) Similarly, documents produced by Dr. Ketchum indicate that the Army participated in the CIA's Project ARTICHOKE. (*See* Erspamer Decl. ¶ 10, Ex. I.)

[10] Even a lack of documents located by the CIA after a reasonable search would not indicate that the CIA was not involved in the test programs, given the CIA's wholesale destruction of records after a Congressional investigation into their activities was instigated.

they are not relevant to the litigation because they do not relate to testing on servicemembers. (*Id*.; Cameresi Decl. ¶ 6.) The CIA's insistence that these documents were provided outside of discovery is merely an effort by the CIA to avoid discovery obligations such as the need to justify the numerous redactions contained in this set of material. Further, these documents have not been subjected to an updated classification review — precisely the same sort of review that led Defendants to make "more than twenty" additional disclosures in connection with the 1963 CIA IG Report. (Defs.' Opp'n to Pls.' Mot. To Compel 30(b)(6) Depositions (Docket No. 142) at 23.) As such, the provision of these FOIA documents evidences the CIA's efforts to avoid discovery, not its effort to participate earnestly. Defendants cannot contest that, outside of the documents produced in connection with Defendants' initial disclosures (totaling fewer than 200 pages), the CIA has produced virtually nothing in response to Plaintiffs' RFPs.[11]

Furthermore, 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." (*See* Pls.' Opp'n to Defs.' Mot. for Protective Order Limiting Scope of Disc. (Docket No. 157) at 11 n.13.) Even accepting the CIA's "conclusion" that it did not directly 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.

[11] In her declaration, Ms. Cameresi (who has no personal knowledge of the testing programs or of the CIA's "investigation" of the programs in the 1970s) identifies two core sources of CIA documents: archived hardcopy records and the electronic CADRE system. (Cameresi Decl. at ¶ 16.) Notwithstanding the fact that these are the core sources of agency records, Ms. Cameresi does not state that *either source* has been searched for information responsive to Plaintiffs' requests. Instead, she simply states that searching these sources "at this late date" would be burdensome, which is tantamount to saying that the CIA simply should not be required to participate in discovery because of its (dubious and contradicted) "conclusion" that it was not involved in testing on military personnel, and/or because of the delay *it has caused* by refusing to engage in earnest discovery for over a year. (*Id*. at 25.) Moreover, Ms. Cameresi is in no position to determine whether Plaintiffs' RFPs are "relevant" to the claims in this litigation.

D. Defendants Cannot Justify Their Failure To Respond to Plaintiffs' Requests for Production.

Defendants argue that they were excused from responding to Plaintiffs' Second, Third, and Fourth Sets of RFPs because "they have sought a protective order staying further discovery and a protective order limiting the scope of discovery." (Opp'n at 25.) This argument is based on a false premise. On June 9, 2010, Defendants filed a two-page Response to Plaintiffs' Statement of Discovery Dispute Regarding Requests for Production of Documents and Rule 30(b)(6) Notice in which they requested a stay of discovery in addition to stating their grounds for opposing Plaintiffs' statement. (Docket No. 93.) Defendants noted their intent to seek a protective order in meet-and-confer correspondence that was incorporated into two Joint Statements of Discovery Dispute filed by Plaintiffs on August 2, 2010. (Docket Nos. 115, 118.) Defendants did not actually move for a protective order until they subsequently moved for a stay of discovery *before Judge Wilken* rather than before this Court on August 27, 2010 — nearly a month *after* their responses to Plaintiffs' Third Set of RFPs were due. (*See* Defs.' Mot. for a Protective Order Staying Further Disc. (Docket No. 134).)[12] Defendants did not move for a protective order limiting the scope of discovery until September 15, 2010, two weeks after their responses to Plaintiffs' Fourth Set of RFPs were due. (*See* Defs.' Mot. for Protective Order Limiting Scope of Disc. (Docket No. 140).)[13] For this reason, Defendants have waived their objections to those RFPs, and the Court should compel Defendants to respond. *See* Fed. R. Civ. P. 37(d)(2); *Bernabe v. Schwartz*, No. CIV S-05-2522, 2009 U.S. Dist. LEXIS 10108, at *2 (C.D. Cal. Jan. 21, 2009) (failure to serve timely responses may not be excused unless there is "a motion for a protective order *pending*") (emphasis added).

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[12] Plaintiffs served their Third Set of RFPs on July 1, 2010; responses therefore were due on July 31, 2010. (*See* Wolverton Decl. ¶ 3, Ex. A.) On October 7, 2010, Judge Wilken summarily denied Defendants' request to stay discovery. (Docket No. 159.)

[13] Plaintiffs served their Fourth Set of RFPs on August 2, 2010; responses therefore were due on September 2, 2010. (*See* Wolverton Decl. ¶ 3, Ex. A.)

III. CONCLUSION

For the reasons described above and in Plaintiffs' Motion to Overrule Objections and Compel Production of Documents, Plaintiffs' Motion should be granted.

Dated: October 13, 2010

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Responses and Replies

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