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 11 and William Blazinski

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

16 VIETNAM VETERANS OF AMERICA, *et al.*,
 17
 Plaintiffs,
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 v.
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 20 CENTRAL INTELLIGENCE AGENCY, *et al.*,
 Defendants.
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 22

Case No. CV 09-0037-CW

**PLAINTIFFS' OPPOSITION TO
 DEFENDANTS' PARTIAL
 MOTION TO DISMISS THIRD
 AMENDED COMPLAINT**

Date: January 13, 2011
 Time: 2:00 p.m.
 Ctrm: 2, 4th Floor
 Judge: Hon. Claudia Wilken

Complaint filed January 7, 2009

INTRODUCTION

1
2 Defendants' Partial Motion to Dismiss Plaintiffs' Third Amended Complaint (Docket
3 No. 187) (the "Motion") is a thinly-disguised attempt to seek reconsideration of the Court's
4 January 19, 2010 Order (the "Order") denying in part Defendants' Motions to Dismiss the First
5 and Second Amended Complaints. Plaintiffs' Third Amended Complaint (Docket No. 180), in
6 accordance with the Court's November 15, 2010 Order (Docket No. 177) granting Plaintiffs'
7 leave to amend their complaint, made no changes except to add a claim against two new
8 Defendants — the Department of Veterans Affairs and its Secretary, Eric Shinseki — and add
9 two new Individual Plaintiffs. It did not alter the previously existing claims, which had been the
10 subject of Defendants' earlier motions to dismiss, *in any way*.

11 Contrary to the Court's express direction, Defendants now seek to use the addition of the
12 new parties as a crass opportunity for another bite at the apple (their third), seeking to re-litigate
13 issues the Court already decided nearly a year ago. None of the arguments in Defendants' Motion
14 are directed at the newly-added material in the Third Amended Complaint. *Not one word* of the
15 Motion concerns the newly added claims. Indeed, the Department of Veterans Affairs and
16 Secretary Shinseki are not parties to the Motion, presumably because their response to the Third
17 Amended Complaint is not yet due. Instead, the Motion only presents argument on issues from
18 the Second Amended Complaint already decided by this Court in the Order. Defendants' Motion
19 violates the spirit and letter of the Court's prior instructions concerning responses to Plaintiffs'
20 Second Amended Complaint, improperly seeks to upset the Court's prior determinations without
21 complying with the rules pertaining to motions to reconsider, and threatens to undermine the
22 orderly progress of this litigation. Defendants previously filed an Answer to the very allegations
23 they now move to dismiss. The Court should not be required to re-decide, and Plaintiffs not be
24 required to re-brief, issues previously decided by the Court. The Court should deny Defendants'
25 Motion.

ARGUMENT

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27 A party may seek reconsideration of an interlocutory order made by the Court only if that
28 party "first obtain[s] leave of Court to file the motion." L.R. 7-9(a); *see also* Fed. R. Civ.

1 P. 59(e), 60(b). A party seeking leave to file a motion for reconsideration must show either: (1) a
2 “material difference in fact or law exists” from that which was presented to the Court initially; (2)
3 the “emergence of new material facts or a change of law” since the Court’s order was issued; or
4 (3) a “manifest failure” by the Court to consider “material facts or dispositive legal arguments
5 which were presented to the Court before such interlocutory order.” L.R. 7-9(b). Defendants
6 here did not seek leave to file such a motion, nor was leave granted. Even if Defendants had
7 obtained leave, their Motion does not present any of the three scenarios contemplated by the
8 Local Rules.

9 Moreover, a motion for reconsideration may not “repeat any oral or written argument
10 made by the applying party” in support or opposition to the order the party asks the Court to
11 reconsider. L.R. 7-9(c). A party violating this prohibition “shall be subject to appropriate
12 sanctions.”¹ *Id.* Defendants expressly violate this provision.²

13 Defendants’ Motion attempts to resurrect the same arguments Defendants previously
14 asserted in their earlier motions to dismiss the First and Second Amended Complaints. Once
15 again, Defendants argue that Plaintiffs have “failed to state a claim with regard to their requests
16 for documents and medical care.” (Order at 14.) Once again, Defendants base their argument
17 primarily on the notion that Plaintiffs have not alleged legally enforceable duties under the
18 Administrative Procedures Act (“APA”). (Motion at 6, 19.) And once again, the Court should
19 deny Defendants’ Motion.

20 First, Defendants argue that Plaintiffs do not state a claim for relief under the APA against
21 the CIA or the Department of Defense because they do not allege a legally enforceable duty
22 against those agencies. (Motion at 6-7, 19.) Defendants presented this argument in each of their
23 previous motions to dismiss, contending that Plaintiffs’ claims did not “fall within the scope” of
24 the APA’s waiver of sovereign immunity (Docket No. 29 at 17-18); that Plaintiffs “reference no

25 ¹ Here, these sanctions should include the time spent by Plaintiffs and costs incurred in
26 responding to the Motion.

27 ² Plaintiffs have submitted a letter to Defendants’ counsel pointing out these deficiencies
28 and asking that Defendants’ withdraw the Motion. (Decl. of Gordon P. Erspamer ¶ 2, Ex. A.)

1 statute that makes their claim reviewable” under the APA (Docket No. 34 at 8); and that Plaintiffs
2 had not alleged “any legal obligation on the part of Defendants for the notice, information, and
3 medical care that they claim.” (Docket No. 57 at 22.)

4 The Court already has explicitly considered and rejected this line of argument, finding that
5 “AR 70-25 (1962) and the DOJ letter support a claim under section 702 for which the Court could
6 compel discrete agency action.” (Order at 15.) Defendants acknowledge as much, noting that
7 “Defendants have previously argued, and the Court has considered, whether AR 70-25 may form
8 the basis of a legally cognizable obligation to provide health coverage.” (Motion at 19.)
9 Nevertheless, Defendants again argue that the CIA has no enforceable duty under the APA,
10 despite the Court’s explicit ruling that “[e]ven though [the CIA’s legal duty to disclose] is not a
11 statutory duty, the government can be held liable for the breach of its duty to warn, so long as the
12 decision on whether to warn is not a discretionary act.” (Order at 15.)

13 Defendants also argue, again, that the Plaintiffs’ claims against the Attorney General
14 should be dismissed for failure to state a claim. (Motion at 17.) This argument is a simple rehash
15 of Defendants’ earlier arguments on the same point, which the Court rejected. (*See* Docket
16 No. 29 at 24 (“Plaintiffs name the Attorney General . . . but do not appear to assert any claims
17 against him.”).) Defendants’ recycled argument already has been adjudicated in connection with
18 the prior motions to dismiss, and Defendants cannot justify requiring the Court to revisit it.

19 This is not the first time Defendants have attempted to re-assert arguments previously
20 decided by the Court. At the December 3, 2009 hearing on Defendants’ motion to dismiss the
21 First Amended Complaint, the Court gave Plaintiffs leave to make limited amendments to the
22 First Amended Complaint, to add additional allegations concerning venue. The Court was clear
23 that it was not re-inviting motion practice concerning the issues it already had resolved at the
24 hearing. The Court provided clear instructions to Defendants: “[i]f something [Plaintiffs] say [in
25 the Second Amended Complaint] is exactly the same as they said before and I didn’t dismiss it,
26 then you wouldn’t repeat those same arguments.” (Decl. of Gordon P. Erspamer, ¶ 3, Ex. B
27 (Dec. 3, 2009 Hr’g Tr.) at 34.) Ignoring that instruction, Defendants re-argued the same issues in
28 their motion to dismiss the Second Amended Complaint (Docket No. 57) that they had already

1 argued in their motion to dismiss the First Amended Complaint (Docket No. 34). These are the
2 same issues that Defendants argue here, now for third time.

3 In response to Defendants' prior attempt to re-argue issues already decided, the Court
4 recognized that the "[non-venue] arguments in Defendants' first Motion to Dismiss are repeated
5 in its current motion," and consequently did not require a new opposition brief, reply, or hearing.
6 (Order at 2.) The same result is appropriate here. Indeed, in its November 15, 2010 Order
7 granting Plaintiffs leave to file the Third Amended Complaint, the Court instructed Defendants
8 that they "may not file a motion to dismiss based on the arguments made in this motion."
9 (Docket No. 177 at 18.) Defendants apparently interpreted that prohibition as an invitation to
10 instead re-raise arguments that they made in motions to dismiss filed and decided *nearly a year*
11 *ago*. Surely that interpretation does not comport with the spirit of the Court's order.

12 The filing of the Third Amended Complaint adding a new claim against two new
13 Defendants and two new individual Plaintiffs (as permitted by the Court) — without otherwise
14 amending the claims asserted in the Second Amended Complaint — should not give the existing
15 Defendants carte blanche to re-assert their arguments for the third time. The parties already have
16 briefed and argued these issues. The Court already has considered and decided them. Indeed,
17 Defendants have already *answered* these allegations. (Docket No. 74.) Defendants' attempt to
18 seek reconsideration of the Court's prior determinations through their latest Motion to dismiss
19 should be rejected.

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CONCLUSION

For these reasons, Plaintiffs respectfully ask the Court to deny Defendants' Partial Motion to Dismiss Plaintiffs' Third Amended Complaint. Alternately, should the Court desire briefing on the substantive issues raised in the Motion, Plaintiffs will provide it at the Court's convenience.

Dated: December 13, 2010

GORDON P. ERSPAMER
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Responses and Replies

[4:09-cv-00037-CW Vietnam Veterans of America et al v. Central Intelligence Agency et al](#)

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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

William Blazinski

Tim Michael Josephs

Document Number: [188](#)

Docket Text:

[Memorandum in Opposition re \[187\] MOTION to Dismiss Plaintiffs' Third Amended Complaint filed by William Blazinski, David C. Dufrane, Tim Michael Josephs, Larry Meirow, Eric P. Muth, Bruce Price, Franklin D. Rochelle, Swords to Plowshares: Veterans Rights Organization, Vietnam Veterans of America. \(Erspamer, Gordon\) \(Filed on 12/13/2010\)](#)

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