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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

JOINT STATEMENT OF DISCOVERY DISPUTE OVER PLAINTIFFS' REQUESTS FOR RULE 30(B)(6) DEPOSITIONS

Pursuant to Judge Corley's Standing Order, and as contemplated by the parties' June 20, 2011 Stipulation (Docket No. 237), the parties submit this Joint Statement to advise the Court of their impasse concerning Defendants the Department of Defense's ("DoD") and Central Intelligence Agency's ("CIA") refusal to designate witnesses to testify concerning certain Rule 30(b)(6) deposition topics. The parties will submit separate Joint Statements regarding Plaintiffs' document requests and discovery of Defendant Department of Veterans Affairs.

The parties have attempted to resolve their disputes via letter and by telephone on May 23, 2011, and May 26, 2011. Despite these good faith efforts to resolve their disputes, it is readily apparent to both sides that agreement cannot be reached on the items below and that the Court's intervention is necessary.

INTRODUCTION

Plaintiffs' Statement. Defendants' resistance to Plaintiffs' discovery requests is not a recent development. Defendants repeatedly have objected to Plaintiffs' Rule 30(b)(6) deposition topics throughout this litigation. The parties engaged in extensive motion practice last year, resolved by Judge Larson's November 12, 2010 Order (Docket No. 178). The Court ordered Defendants to designate Rule 30(b)(6) witnesses to testify regarding the majority of the topics upon which Plaintiffs moved — sixteen, in fact. (*See* Nov. 12, 2010 Order at 20-29.) These rulings are the law of the case, which Defendants continue to ignore.

Since that Order, Plaintiffs have in good faith reduced the scope of requested testimony to only seven topics for the Department of Defense (DOD) and Department of Army (Army), and, following the Court's latest order on Defendants' latest motion to dismiss, only three topics for the Central Intelligence Agency (CIA). Yet, Defendants DOD/Army still refuse to designate witnesses to testify regarding two important issues, as discussed below. Even more egregious, Defendant CIA has refused to designate a witness to testify regarding *any* topic.

Defendants' Statement. The Court did not conclusively resolve issues related to Plaintiffs' Rule 30(b)(6) requests. The Court denied without prejudice Defendants' request for a protective order so that Plaintiffs could narrow their requests, but also ruled some Rule 30(b)(6) testimony could proceed. Because the parties recognized that it would be futile to conduct 30(b)(6)

depositions when the parties had not resolved document request disputes, they agreed to negotiate to narrow discovery as it related to both. Thus, Defendants have not "ignored" the Court's Order, and instead have been engaging in those negotiations while producing more than a million pages of documents. Plaintiffs' statement that they have reduced the scope of requested testimony is misleading. They have consistently requested testimony on every aspect of the CIA's involvement in any test program, regardless of nexus to military service members, and despite the District Court's dismissal of Plaintiffs' notice and health care claims against CIA. Additionally, Plaintiffs only recently sought testimony regarding DoD's budget.

DOD/ARMY TOPICS 1 & 6

Among other things, DOD/Army Topic 1 seeks "information CONCERNING . . . the sources and amounts of funding for any notification and outreach efforts conducted or directed by YOU." Topic 6 seeks information concerning:

> the source and amount of funding for any notification or outreach efforts that potentially could apply to the TEST SUBJECTS, the source and amount of funding for YOUR health care or medical treatment systems, and YOUR budget since 2006 and any annual budget surplus since 2006.

Plaintiffs' Statement. The testimony sought goes to the core of Plaintiffs' Administrative Procedures Act (APA) Section 706(1) claims because the Court may elect to conduct a "*TRAC*" factors analysis in evaluating these claims. *See, e.g., Brower v. Evans*, 257 F.3d 1058, 1068 (9th Cir. 2001)(quoting *Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 507 n.7 (9th Cir. 1997)). If it does, information regarding Defendants' resources, funding, budget, and capacity will be required, particularly for the fourth *TRAC* factor regarding the effect of relief on competing or higher agency priorities. Although Defendants argue that a *TRAC* analysis is appropriate only where the agency seeks to explain its delay, Defendants have refused to stipulate that if the Court finds an enforceable duty, Defendants will not argue that they have not unreasonably delayed in fulfilling it. Defendants cannot reserve the right to make this argument yet refuse to provide information necessary to test it.

Defendants' Statement. Depositions for purposes of a TRAC analysis are inappropriate in this case. TRAC factor analysis is only relevant when there is some clear obligation to act, but

the agency is seeking to explain its delay in doing so. *See Telecomms. Research & Action Ctr.* ("*TRAC*") *v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984). The TRAC factors do not apply here because DoD/Army have not acknowledged a duty to act and, in fact, have expressly disclaimed any such legal obligation. Additionally, DoD's past seven budgets are irrelevant as to how DoD would satisfy some duty going forward. Finally, Plaintiffs' request for testimony on the TRAC factors is substantially overbroad and unduly burdensome.

DOD/ARMY TOPIC 7

For DOD/Army Topic 7, Plaintiffs seek information concerning:

> the CIA's involvement (whether direct or through financial support) in the TEST PROGRAMS, including — but not limited to — CIA involvement of any kind in any test or experiments involving TEST SUBJECTS, for example, as reflected in the December 3, 1955 memorandum produced at MKULTRA 0000146141_002-03, and any CIA experimentation involving substances identified on Plaintiffs' March 21, 2011 narrowed list also administered to any TEST SUBJECT as part of the TEST PROGRAMS. Plaintiffs also seek testimony CONCERNING the content, compilation, and certification of the "Administrative Record" filed with the Court on February 18, 2011, and on the CIA's Victims Task Force.

Plaintiffs' Statement. The relevance of this information is clear; indeed, the Court already has ordered Defendants to designate a witness to testify regarding CIA involvement, and also held that Defendants cannot rely on documents in lieu of Rule 30(b)(6) testimony. (*See* Nov. 12, 2010 Order at 18-19, 22-23.) The DOD/Army's continuing violation of the Court's Order not only is improper, it is sanctionable under Federal Rule of Civil Procedure 37(b)(2).

Defendants' Statement. Plaintiffs seek testimony on this topic to bolster their non-existent claims against the CIA. This is made abundantly clear by the last line of Topic 7, which seeks information concerning the CIA's certification of its administrative record. Plaintiffs ignore the fact, however, that since the Court's Order, the District Court has dismissed all claims against the CIA other than one regarding alleged secrecy oaths. Further, as discussed more fully in Defendants' statements in the Joint Statement of Discovery Dispute Over Plaintiffs' Requests for Production of Documents ("Joint Statement"), Plaintiffs have no factual basis for the maintenance of their secrecy oath claim against the CIA. Accordingly, Plaintiffs cannot show how such discovery from DoD/Army regarding CIA's alleged involvement in the test programs is relevant.

Moreover, DoD/Army previously answered an interrogatory detailing their knowledge of the CIA's involvement in the test programs at issue in this case, and Rule 30(b)(6) testimony would be cumulative of that interrogatory response. Because the CIA's involvement in DoD's testing was fully vetted before Congress more than 35 years ago, there is no employee of the DoD/Army that could provide further testimony on this issue, and that testimony is fully reflected in DoD/Army's interrogatory response. Plaintiffs' request for sanctions is plainly unwarranted.

CIA TOPICS 1, 2, & 3

CIA Topic 1 seeks information concerning:

> the possible health effects of participation in the TEST PROGRAMS including physical, psychological, mental, emotional, or other effects from exposure to the substances administered during the testing or any possible health effects otherwise arising from participation in the TEST PROGRAMS, including information concerning health effects associated with exposure to substances utilized by the CIA that also were used during the TEST PROGRAMS.

CIA Topic 2 seeks information concerning "the use of DVA patients in testing conducted or funded by YOU related to chemical and/or biological weapons." CIA Topic 3 is identical to DOD/Army Topic 7 above, except that Plaintiffs do not seek information from the CIA regarding the "content, compilation, and certification of the 'Administrative Record.'"

Plaintiffs' Statement. Plaintiffs contend that the CIA's blanket refusal to designate a witness for any topic once again ignores the Court's previous order that the CIA designate witnesses to testify regarding all three topics. (*See* Nov. 2010 Order at 20-29 (compelling testimony about health effects, interaction with DVA, and CIA involvement in testing).) As with the DOD/Army, the CIA's continuing violation of this Order is improper and sanctionable.

Moreover, the CIA's position that the Court dismissed constitutional claims that the CIA never moved on is preposterous. Throughout this litigation, Defendants repeatedly have miscast Plaintiffs' notice and health care claims as solely arising under the APA. In every version of the Complaint from the beginning, however, Plaintiffs also have asserted Defendants' violation of Plaintiffs' constitutional due process rights as a basis for seeking notice and health care from Defendants. (*See* Docket No. 180 at ¶¶ 186, 189.) Defendants never moved to dismiss these

claims, and never even discussed these constitutional claims in their two motions to dismiss. (*See* Docket Nos. 57, 187.) The Court also recognized these constitutional claims (*see, e.g.*, Docket No. 59 at 4-5) and never dismissed them in its previous orders (*id.* & Docket No. 233). Thus, discovery of the CIA relevant to those claims is entirely proper. Discovery of the CIA on these topics also is relevant to Plaintiffs' claims against the DOD/Army.

Furthermore, the filing of an "administrative record" does not relieve the CIA's discovery obligations for non-APA claims, and the Court already has stated that Defendants cannot rely on documents alone in response to Rule 30(b)(6) notices. (*See* Nov. 2010 Order at 18-19.)

Defendants' Statement. In addition to misrepresenting Judge Larson's November Order, Plaintiffs' argument ignores three critical facts. First, Plaintiffs do not have a viable claim against the CIA. As discussed more fully in Defendants' section of the Joint Statement, Plaintiffs have not only repeatedly disavowed having notice and health care claims based on the Constitution, but the District Court dismissed these claims in their entirety regardless. Second, the CIA located and certified an administrative record, which the District Court specifically admitted. (Dkt. 233 at 10). Discovery is now inappropriate, as courts have clearly held that APA review under these circumstances is conducted on the basis of the administrative record, regardless of whether the case proceeds under 706(1) or 706(2). *See, e.g., Sierra Club v. U.S. Dep't of Energy*, 26 F. Supp. 2d 1268, 1271 (D. Colo. 1998). Third, for the reasons articulated in Defendants' portion of the Joint Statement, these issues are not only irrelevant to any alleged claim against the CIA, but they are also irrelevant to Plaintiffs' claims against DoD and the VA in light of limited APA review and a Rule 23(b)(2) class. Finally, the requests are overly broad and unduly burdensome.

CONCLUSION

Plaintiffs' Statement. Plaintiffs respectfully request an order compelling Defendants to designate Rule 30(b)(6) witnesses to testify about the topics above. Alternatively, Plaintiffs request the opportunity to offer formal briefing, including a sanctions motion as appropriate.

Defendants' Statement. Defendants respectfully request an order precluding Rule 30(b)(6) testimony as discussed above. Alternatively, Defendants request that they be allowed to offer formal briefing, including declarations and a renewed motion for a protective order.

Respectfully Submitted, this 1st day of July, 2011.

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GENERAL ORDER 45 ATTESTATION

I, Gordon P. Erspamer, am the ECF User filing this Joint Statement of Discovery Dispute Over Plaintiffs' Requests for Rule 30(b)(6) Depositions. In compliance with General Order 45, X.B., I hereby attest that Joshua E. Gardner has concurred in this filing.

Dated: July 1, 2011

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