GORDON P. ERSPAMER (CA SBN 83364)
GErspamer@mofo.com
TIMOTHY W. BLAKELY (CA SBN 242178)
TBlakely@mofo.com
STACEY M. SPRENKEL (CA SBN 241689)
SSprenkel@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; Tim Michael Josephs; and William Blazinski

Counsel for Defendants Listed on Signature Page

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 PRODUCTION OF DOCUMENTS

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 the responses and objections of Defendants Department of Defense ("DoD") and Central Intelligence Agency ("CIA") to Plaintiffs' document requests. 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, both sides agree that the issues below require the Court's intervention.[1]

INTRODUCTION

Plaintiffs' Statement. Defendants have vehemently resisted Plaintiffs' discovery requests throughout this litigation, erroneously claiming that Plaintiffs' claims arise solely under the APA. The parties engaged in extensive motion practice last year, resolved by Judge Larson's November 12, 2010 Order (Docket No. 178). The Court gave both sides a final opportunity to resolve their document production disputes. Plaintiffs significantly narrowed the scope of their requests in compliance with the Court's Order. For the purposes of discovery, Plaintiffs provided Defendants a list of test substances narrowed from over 400 substances, which are still at issue in the case, to only 63 substances. This significantly lessened Defendants' discovery burden. Half a year has passed since the November 2010 Order, yet Defendants still have not complied with their discovery obligations. The primary disagreement underlying the parties' disputes concerns the scope of relevant issues in this case. Defendants consistently attempt to constrict improperly the relevant universe, and Court intervention is necessary to resolve this fundamental issue.

Defendants' Statement. Defendants have fully complied with the Court's November 10, 2010 order and have produced over one million pages of documents at enormous time and expense, notwithstanding the fact that Plaintiffs' claims are made pursuant to the Administrative Procedure Act ("APA"). Accordingly, discovery is not appropriate in this case whether under

[1] The parties are in the process of attempting to resolve a few additional discovery disputes. These disputes are not addressed in this Joint Statement because the parties hope to resolve them without intervention. The parties also will submit separate joint statements regarding Plaintiffs' discovery requests to the Defendant Department of Veterans Affairs.

706(1) or 706(2). (*See* Dkt. 214 at 2–4). Plaintiffs have refused to narrow the definition of "test programs" and "reevaluate what information is central to their case, recognize the limits on the usefulness of some of the information they seek, and make a sincere effort to reduce the scope of discovery," as ordered by Magistrate Judge Larson. (Dkt. 178 at 7.) Indeed, Plaintiffs themselves recognize the substantial burden associated with their requests, as they have declined an invitation to inspect and copy thousands of documents on the basis of burden. Finally, Plaintiffs refuse to acknowledge that they have no viable claims against the CIA.

TIME LIMITATIONS

Plaintiffs' Statement. Plaintiffs seek information regarding the entire timeframe of the Testing Programs, which began in 1942. (*See, e.g.*, 3rd Am. Compl. ¶¶ 2, 103-105.) While Defendants assert that they have not completely excluded documents predating 1953, Defendants have claimed that information from before 1953 is irrelevant and have refused to specifically search for responsive documents from that time. They also have refused to specifically search for documents related to Mustard Gas and Lewisite testing during the 1940s. There is no basis for Defendants' refusal to search for this clearly relevant information.

Defendants' Statement. The District Court has expressly concluded that the jurisdictional bases for Plaintiffs' APA claim rested upon the Wilson Directive (1953), CS: 385 (1953); and Army Regulation 70-25 (1962). (Dkt. 59 at 2.) Nonetheless, DoD has conducted searches that pre-date 1953, including for documents concerning chemical and biological substances and its contract deliverables from Battelle. In addition, the Chem-Bio database includes some individuals from the 1940s. However, DoD has not specifically searched for documents related to the full-body Mustard Gas and Lewisite tests conducted in the 1940s, as the burden of undertaking a search effort for documents greatly outweighs its relevance, in any. This is particularly true given that none of the named individual plaintiffs have standing to pursue such claims, as they were all test participants in the late 1960s and were not subject to Mustard Gas or Lewisite exposure. With regard to the CIA, it searched for information from the inception of the CIA in 1947 and plainly cannot be expected to search beyond that.

BATTELLE MEMORIAL INSTITUTE

Plaintiffs' Statement. Defendants have failed to produce a wide range of documents concerning Battelle Memorial Institute's ("Battelle") work on (1) Defendants' "Chem-Bio database" and (2) gathering documentation of tests. Although Defendants agreed to provide all "contract deliverables," they have refused to search for and produce email and other communications with Battelle concerning the scope, modification, and execution of the contract — *i.e.*, the Chem-Bio Database and document collection project. Defendants also have failed to produce Battelle contract documents, including the contract, amendments, and contract correspondence; standard operating procedures; quality control measures such as the technical operating manual; interim and final reports; and narrative reports. This information is relevant to Plaintiffs' notice and healthcare claims and is critical to Plaintiffs' ability to assess the veracity of the database and the propriety of the document collection efforts. Moreover, Defendants have steadfastly sought to obstruct Plaintiffs' efforts to obtain relevant information from Battelle through a third-party subpoena (an issue now being considered by a magistrate judge in Ohio).

Defendants' Statement. The "veracity" of the information contained in the database and the "propriety of the document collection effort" are not issues in this action under Section 702(1) of the APA. Plaintiffs have failed to explain why the documents DoD already has produced related to Battelle's search efforts – including the locations searched and the status of those search efforts – as well as the documents collected by Battelle at those numerous locations and produced to Plaintiffs, are insufficient to meet their needs. Defendants' disagree with Plaintiffs' characterization that DoD has somehow "obstructed" Plaintiffs' efforts to obtain this information. In fact, Battelle has indicated that it will produce a substantial number of documents to Plaintiffs.

HEALTH EFFECTS

Plaintiffs' Statement. Defendant CIA has refused to search for and produce documents reflecting possible health effects of test substances other than only two chemical agents. The CIA has taken the preposterous position that the Court dismissed constitutional claims that Defendants never moved to dismiss. Relying on this argument, the CIA improperly frames its unfulfilled document production obligations as third-party discovery with a heightened burden.

This argument rests on a serious miscasting of 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 have moved to dismiss these constitutional claims, nor even discussed them 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.* and Docket No. 233). Thus, discovery of the CIA relevant to those claims is entirely proper. In addition, the CIA's "administrative record" does not relieve the CIA of its discovery obligations. Discovery concerning possible health effects of substances used in the test programs also is relevant to Plaintiffs' claims against the DOD/Army.

Defendants' Statement. Plaintiffs' assertion that they have remaining notice and health care claims based on the Constitution is frivolous and squarely contradicted by Plaintiffs' *repeated* representations that they were *not* alleging a constitutional claim for notice and medical care. (*See, e.g.*, Dkt. 43 at 24; Pls.' Am. & Supp. Resps. to Defs.' Interrogs. Nos. 2, 6, 8.) Also, Defendants' partial motion to dismiss was predicated on Plaintiffs' failure to identify *any* enforceable basis for these two claims, (Dkt. 187 at 1, 17), and the Court agreed and dismissed the claims in their entirety. (Dkt. 233 at 5–6, 11.). If the Court believes discovery is warranted on Plaintiffs' remaining notice and healthcare claims against the CIA, Defendants respectfully request that the Court refer the issue of the remaining claims to the District Court for resolution.

Additionally, the CIA produced all information related to the only two substances it contemplated testing on volunteer service members and provided Plaintiffs with 20,000 pages of additional documents concerning its unrelated historical testing programs (including health effects information). To require the CIA to search beyond this would be unduly burdensome, particularly since Plaintiffs' document requests do not define "health effects" and given that the CIA is an *intelligence* agency and not one involved in health matters. This information is also irrelevant in an APA case, *see Asarco, Inc. v. EPA*, 616 F.2d 1153 (9th Cir. 1980), and a Rule 23(b)(2) class action. *See Wal-Mart Stores, Inc. v. Dukes*, _ S. Ct.__, 2011 WL 2437013 (2011).

DRUGS AND SUBSTANCES OBTAINED BY CIA

Plaintiffs' Statement. Plaintiffs have requested documents concerning "the drugs and substances the CIA obtained from drug and pharmaceutical companies, other government agencies, ***including the VA***, NIH, FDA, and EARL . . ." Given Plaintiffs' remaining claims against the CIA, the CIA cannot avoid its obligations regarding this request. DVA's prior involvement in testing lies at the core of Plaintiffs' bias claim against the DVA. The DOD has limited its searches on this issue, claiming that it is unlikely it has responsive documents. Given the CIA's acknowledged document destruction and the clear connection between the CIA and the DOD's test programs, DOD should conduct a comprehensive search for responsive documents. Plaintiffs have not refused to inspect relevant documents; Defendants have provided only a vague index of potentially responsive documents rather than producing the documents themselves.

Defendants' Statement. For the reasons discussed above, Plaintiffs do not have any viable claims against the CIA, and in any event, the CIA produced all non-privileged records that would be responsive to this request. Also, Plaintiffs' sole claim against the VA is a facial bias claim, under which the relevant inquiry is whether it makes "neutral, unbiased benefits determinations for veterans who were test participants." (Dkt. 177 at 11.) This inquiry must focus on the present state of VA's decision-making process, not forty-year old records about the provision of drug samples to the CIA. This request would also be unduly burdensome, and Plaintiffs' assertion that the CIA's 1973 document destruction has any bearing on this request is incorrect. Finally, DoD has conducted reasonable searches for all the substances identified in Plaintiffs' "narrowed" list of chemical and biological agents, and Plaintiffs have refused invitations to inspect the results.

CONCLUSION

Plaintiffs' Statement. Plaintiffs respectfully request an order compelling Defendants to search for and produce the above information. Alternatively, Plaintiffs request the opportunity to offer formal briefing on these issues, should the Court deem it prudent.

Defendants' Statement. Defendants respectfully request that the Court deny Plaintiffs' requested order. Alternatively, Defendants request that they be allowed to offer formal briefing and declarations regarding these issues, as well as a renewed motion for a protective order.

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

GORDON P. ERSPAMER
TIMOTHY W. BLAKELY
STACEY M. SPRENKEL

MORRISON & FOERSTER LLP

/s/ Gordon P. Erspamer
Gordon P. Erspamer
[GErspamer@mofo.com]

Attorneys for Plaintiffs

IAN GERSHENGORN
Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney
VINCENT M. GARVEY
Deputy Branch Director

/s/ Joshua E. Gardner
JOSHUA E. GARDNER
KIMBERLY L. HERB
LILY SARA FAREL
BRIGHAM JOHN BOWEN
JUDSON O. LITTLETON
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 305-7583
Facsimile: (202) 616-8470
E-mail: joshua.e.gardner@usdoj.gov

Attorneys for Defendants

GENERAL ORDER 45 ATTESTATION

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

Dated: July 1, 2011

/s/ Gordon P. Erspamer
Gordon P. Erspamer
[GErspamer@mofo.com]

Attorneys for Plaintiffs