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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 Noticed Motion Date and Time: September 1, 2011 2:00 p.m. **DEFENDANT CENTRAL INTELLIGENCE AGENCY'S MOTION FOR JUDGMENT ON THE PLEADINGS AND, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**

NOTICE OF MOTION AND DEFENDANT CENTRAL INTELLIGENCE AGENCY'S MOTION FOR JUDGMENT ON THE PLEADINGS AND, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Please take notice that on September 1, 2011, or as soon thereafter as counsel may be heard by the Court, before the Honorable Claudia Wilken in the United States District Court for the Northern District of California, located at 1301 Clay Street, Courtroom No. 2, Oakland, CA 94612-5212, Defendant Central Intelligence Agency and its Acting Director Michael J. Morrell (collectively, "CIA"), by and through their attorneys, will, and do hereby, move the Court pursuant to Federal Rules of Civil Procedure 12(c) and 56 to grant Defendant CIA's Motion for Judgment on the Pleadings and, In the Alternative, Motion for Summary Judgment. The CIA seeks dismissal of Plaintiffs' sole remaining claim against the CIA, which concerns the validity of non-disclosure agreements – so-called "secrecy oaths" – that were allegedly administered to volunteer service members who participated in the test programs at issue in this case. There is no case or controversy between the CIA and Plaintiffs with respect to this claim because it would be moot and because Plaintiffs lack standing. Alternatively, the CIA is entitled to summary judgment on the merits.

The CIA's motion is based on this Notice, the accompanying Memorandum and attachments thereto, the pleadings in this matter, and on such oral argument as the Court may permit. A proposed order is attached.

Dated: July 28, 2011

Respectfully submitted,

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Plaintiffs,

v.

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Defendants.

Case No. CV 09-0037-CW

DEFENDANT CENTRAL INTELLIGENCE AGENCY'S MOTION FOR JUDGMENT ON THE PLEADINGS AND, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendant the Central Intelligence Agency and its Acting Director Michael J. Morrell[1] (collectively, "CIA" or "Agency") are compelled to seek this Court's intervention where, with only a single claim remaining against the CIA, Plaintiffs have already received all the relief to which they could have been entitled in relation to this claim and Plaintiffs have also acknowledged that they lack factual support it. Because Plaintiffs have refused on multiple occasions to withdraw this claim, the CIA must now move for judgment on the pleadings and, in the alternative, for summary judgment pursuant to Federal Rules of Civil Procedure 12(c) and 56 on Plaintiffs' sole remaining claim against the CIA, which concerns the validity of non-disclosure agreements – so-called "secrecy oaths" – that were allegedly administered to volunteer service members who participated in the test programs at issue in this case ("secrecy oath claim"). There is no case or controversy between the CIA and any of the Plaintiffs with respect to this claim and, therefore, it must be dismissed for lack of jurisdiction. Any theoretical claims of the Individual Plaintiffs or members of organizational Plaintiff Vietnam Veterans of America ("VVA") would be moot because the CIA has released them from any secrecy oaths, assuming *arguendo* that they ever existed. Furthermore, Plaintiffs have failed to establish standing to pursue this claim at every phase of the litigation, as they have not identified any service member who purportedly had such an oath with the CIA. As Plaintiffs themselves have admitted, they had no specific facts to support this claim at the time they filed their complaint (or at the present time). Finally, the CIA is entitled to summary judgment on the merits of this claim, as it is undisputed that the CIA did not participate in the administration of secrecy oaths to participants in the tests at issue in this case.

In short, Plaintiffs' secrecy oath claim against the CIA has no merit, and the CIA should be dismissed as a defendant in this case. Because the issues raised in this Motion go to the

[1] Leon Panetta, who was named as a defendant in his official capacity as Director of the CIA, became the Secretary of Defense on July 1, 2011, and Michael J. Morrell is currently serving as Acting Director of the CIA and is automatically substituted for Leon Panetta pursuant to Federal Rule of Civil Procedure 25(d).

Court's jurisdiction under Article III of the Constitution, they must be addressed now rather than at the conclusion of pre-trial proceedings in ten months. Furthermore, consideration of this motion now is appropriate because the CIA is substantially prejudiced by Plaintiffs attempts to use it to justify substantial discovery from the CIA. [2]

BACKGROUND

As Defendants previously noted, three narrow claims remained in this action following this Court's ruling in January, 2010, namely: (1) whether the service members who participated in the test programs are entitled to notice of the chemicals to which they were exposed and any known health effects ("notice claim"); (2) whether Defendants are obligated to provide medical care to the individual Plaintiffs ("health care claim"); and (3) the validity of the secrecy oaths. (Dkt. 187 at 1 (citing *Order Granting in Part and Denying in Part Defs.' Mots. to Dismiss and Den. Defs.' Alternative Mot. for Summ. J.* (Jan. 19, 2010) (Dkt. No. 59)).) Subsequently, however, the CIA sought "dismissal of two of Plaintiffs' claims against it: (1) Plaintiffs' claim that the CIA is obligated to provide the individual Plaintiffs with notice of chemicals to which they were allegedly exposed and any known health effects related thereto; and (2) Plaintiffs' claim that the CIA is obligated to provide medical care to the individual Plaintiffs." (Dkt. 187 at 6.) Because Plaintiffs had failed to identify any enforceable, legal basis on which to maintain the notice and health care claims, this Court granted the CIA's motion to dismiss these claims in their entirety on May 31, 2011. (Dkt. 233 at 11 ("Plaintiffs' notice and medical care claims against the CIA . . . are dismissed.").)

Thus, in wake of this Court's Orders of January 19, 2010 and May 31, 2011, Plaintiffs have one remaining claim against the CIA, which concerns the validity of "secrecy oaths" allegedly administered to participants in the test programs at issue in this case to prevent them

[2] This motion is timely because jurisdictional defenses can be raised at "any time during the proceedings," *May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1216 (9th Cir. 1980), and "cannot be waived." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). In addition, the motion is permissible under the current scheduling order, which only states that dispositive motions from the Defendants must be filed "no later than" February 3, 2012, but does not prohibit the filing of such motions prior to that time. (Stipulation and Order Extending Deadlines (Dkt. 238) at ¶ 14.)

from discussing the programs. Specifically, Plaintiffs are seeking a declaration "that Plaintiffs are released from any obligations or penalties under their secrecy oaths." (Third Am. Compl. ("3AC") (Dkt. 180) at ¶ 183.) The factual basis for Plaintiffs' secrecy oath claim is set forth in paragraphs 28 and 156–160 of the Third Amended Complaint, in addition to allegations concerning the named Individual Plaintiffs. However, paragraphs 28 and 156–160 and the remainder of the Third Amended Complaint do not contain any allegation that the Plaintiffs or any other volunteer service member had a secrecy oath with the CIA. In fact, Plaintiffs' allegations concerning the nature of the secrecy oaths allegedly administered to test participants in this case are limited to two paragraphs. Not only is there no mention of the CIA in those two paragraphs, but it is clear that Plaintiffs are attempting to allege that the Department of Defense ("DoD"), rather than the CIA, administered the purported secrecy oaths. (3AC ¶ 156 (alleging that test participants were administered a "secrecy oath" that they would "not divulge or make available any information related to U.S. Army Intelligence Center" subject to "provisions of the Uniform Code of Military Justice); *id.* ¶ 157 (alleging that test participants signed an oath "implying that the Uniform Code of Military Justice applied to them after their discharge from service).)[3] In sum, Plaintiffs have made no allegations concerning the administration of secrecy oaths by the CIA.

Due to Plaintiffs failure to allege any facts to support this claim against the CIA, the CIA propounded an interrogatory on Plaintiffs asking them to identify the factual basis for a potential secrecy oath claim against the CIA. Plaintiffs acknowledged in their response in March 2011 that they "do not currently have facts identifying specific circumstances where the Central Intelligence Agency directly administered secrecy oaths to Plaintiffs . . . ." (Ex. A to Decl. of

[3] Not only do Plaintiffs fail to allege in their Third Amended Complaint that the CIA administered secrecy oaths to test participants, but their allegations concerning written secrecy oaths administered by DoD have proven incorrect. After a diligent search pursuant to Plaintiffs' discovery requests and after reviewing the test files of individuals subject to the test programs, DoD has not uncovered a single written secrecy oath concerning the test programs at issue in this case. (Ex. U to Herb Decl. (Kilpatrick Dep.) at 77:8–23.)

Kimberly L. Herb, Trial Attorney, U.S. Department of Justice ("Herb Decl.") at 15.)[4] Plaintiffs have not revised or supplemented this interrogatory response in the more than four months that have followed. (Herb Decl. ¶ 3.)

Furthermore, during their depositions in this case, each of the Individual Plaintiffs provided testimony that they had no personal knowledge of any CIA role in testing at Edgewood Arsenal (where the Individual Plaintiffs allegedly underwent tests) let alone personal knowledge of the CIA's administration of any secrecy oath. (Ex. B to Herb Decl. (Muth Dep.) at 136:23–137:2 ("Q. Do you think the CIA had any role in the administration of secrecy oaths or your non-disclosure agreement? A. To my knowledge that was Military Intelligence."); Ex. C to Herb Decl. (Blazinski Dep.) at 32:20–33:2 ("Q. So, other than just the fact that the CIA is a defendant in this case, do you have any knowledge whatsoever as to the CIA's involvement in testing at Edgewood? A. No."); Ex. D to Herb Decl. (Dufrane Dep.) 171:18–172:1 ("Q. Do you have any first-hand knowledge [of the CIA's alleged involvement in testing at Edgewood]? A. No."); Ex. E to Herb Decl. (Josephs Dep.) at 222:10–13 ("Q. Do you have any firsthand personal knowledge, Mr. Josephs, of the CIA's involvement of testing at Edgewood? A. No."); Ex. F (Meirow Dep.) at 115:4–7 ("Q. Do you have any firsthand knowledge of the CIA being involved in the tests? A. Did they come up and introduce their self as a CIA agent? No."); Ex. G to Herb Decl. (Rochelle Dep.) at 284:7–16 ("Q. Okay. Do you have any knowledge of CIA's involvement in the testing at Edgewood? A. Do I have any knowledge? Only what I've read . . . . Q. Okay. So do you recall about when you first heard something about the CIA being involved in Edgewood? A. Six – '06 or '07."); Ex. H to Herb Decl. (Price Dep.) at 137:10–138:4 (stating that he believed the CIA had a role in the administration of secrecy oaths because it was "the first time [he had] ever come, come in contact with such a secrecy item," but also stating that he did not recall personally having signed any secrecy oath form and that he did not begin to even suspect a CIA role in secrecy oaths until approximately the year 2000).)

[4] Plaintiffs' interrogatory response went on to state that "the Central Intelligence Agency provided financial support for testing by the Chemical Corps and the Office of Naval Research and had knowledge that secrecy oaths were administered by these organizations."

In addition, plaintiff VVA is the sole membership-based organization in this lawsuit. It identified three individuals as likely to have information related to this lawsuit. (Ex. I to Herb Decl. at 3.) Each of the identified individuals testified that they did not have any information concerning the administration of secrecy oaths by the CIA. (Ex. J to Herb Decl. (Weidman Dep.) at 125:2–4 ("Q. Have you heard of any secrecy oaths being administered by the CIA? A. Not directly."); Ex. K to Herb Decl. (Edelman Dep.) at 181:18–22 ("Q. Do you know if the CIA had any role in the nondisclosure agreements? . . . . A. I don't know."); Ex. L to Herb Decl. (Berger Dep.) at 69:18–21 ("Q. You are aware of the CIA participating in testing at Edgewood Arsenal? A. I am not personally knowledgeable of that . . . .").)

Finally, Plaintiffs have identified only a single individual associated with Swords to Plowshares: Veterans Rights Organization ("Swords") who can testify regarding its provision of services to test participants and whether its services have been hampered by alleged secrecy oaths as alleged in Plaintiffs' Third Amended Complaint. (Ex. I to Herb Decl. at 4.) The identified individual, however, is a former employee who is not currently providing services on behalf of Swords, (*id.*), and thus cannot offer testimony regarding whether alleged secrecy oaths impact Swords. Additionally, she also lacks any knowledge of secrecy oaths being administered by the CIA. (Ex. M to Herb Decl. (Roberts Dep.) at 144:1–15 ("Q. Do you recall whether any veteran told you what government agency had imposed secrecy obligations on them? . . . . A. I don't recall anything specific. In general, when I talked to veterans who had a perceived secrecy or security obligation, they typically would refer to the government or to the military in the broadest terms. I have no specific recollection of agencies or other details.").)

On February 16, 2011, the CIA filed a certified Administrative Record in this case. With respect to Plaintiffs' secrecy oath claim, the CIA's certification stated that "[b]ased on a reasonable search of its records, the CIA has uncovered no records indicating that it ever administered or otherwise entered into 'secrecy oaths' or other types of nondisclosure agreements with volunteer service members (including the Individual Plaintiffs) relating to the testing of chemical or biological substances upon them, as alleged in this case." (Certification of Administrative R. (Dkt. 208-1) at ¶ 12.) The CIA has also provided an interrogatory response

reflecting this conclusion. (Ex. N to Herb Decl. at 2–3.) Based on this interrogatory response from the CIA, Plaintiffs abandoned their request for a Rule 30(b)(6) deposition from the CIA on the topic of secrecy oaths, (Ex. O to Herb Decl. at 1 ("Based on that updated response, Plaintiffs have agreed to withdraw their request for Rule 30(b)(6) testimony from the CIA concerning secrecy oaths.")), and they are not currently seeking any other deposition or document discovery from the CIA specifically concerning the possible administration of secrecy oaths by the CIA, (Herb Decl. ¶ 18). Nor do Plaintiffs have any outstanding discovery requests with DoD or the Department of Veterans Affairs, the only other defendants in this action, that directly request information concerning whether the CIA had a role in the alleged administration of secrecy oaths. (*Id.* ¶ 19.) Thus, there is no basis to conclude that discovery is likely to yield any additional information relevant to Plaintiffs' secrecy oath claim against the CIA.

On June 28, 2011, the CIA provided Plaintiffs with a sworn declaration that further detailed the CIA's position on Plaintiffs' secrecy oath claim. (Ex. P to Herb Decl.) With respect to the Individual Plaintiffs, the declaration explained that the CIA conducted a reasonable search of its records for information concerning the Individual Plaintiffs. (Ex. Q to Herb Decl. at ¶ 5.) "Included in this search were the records of the CIA's Office of Security, the Agency component that would typically maintain files concerning any 'secrecy oaths' (which the CIA refers to as 'non-disclosure agreements') if such records existed." (*Id.*) The CIA's declaration asserted that "[t]hese reasonable searches located no evidence of any 'secrecy oath' or any other type of non-disclosure agreement between the CIA and the Individual Plaintiffs" and that "[b]ased on this lack of evidence, the CIA has concluded that no such agreements exist between the CIA and the Individual Plaintiffs." (*Id.*)

The CIA also searched its Office of Security's files for information concerning potential secrecy oaths with the twelve members of organizational Plaintiff VVA who were identified by Plaintiffs as having participated in the test programs at issue in this case ("VVA Members"). (*Id.* at ¶ 6.) As with the Individual Plaintiffs, "these reasonable searches located no evidence of any 'secrecy oath' or any other type of non-disclosure agreement between the CIA and the VVA Members." (*Id.*) As a result, the CIA concluded "that no such agreements exist between the CIA

and the VVA Members." (*Id.*)

Although these representations conclusively resolve any issues concerning potential secrecy oaths between the CIA and the Individual Plaintiffs and VVA Members, the CIA took the following further steps in an effort to put the issue to rest. As explained by the CIA declarant:

> To resolve any lingering uncertainty that may be in the minds of the Individual Plaintiffs or the VVA Members, the CIA wishes to make abundantly clear that (a) it has no record of having any type of enforceable non-disclosure agreement, to include any oral agreements, with them; and (b) *to the extent the Individual Plaintiffs or VVA Members continue to believe that they are subject to any type of non-disclosure agreement with the CIA, they are hereby released from that agreement and any obligations or penalties related thereto by the CIA.*

(*Id.* at ¶ 7 (emphasis added).) Thus, to the degree that the Individual Plaintiffs and VVA Members had concerns regarding the existence of secrecy oaths, those concerns have been eliminated by the CIA's assurances to those individuals that no such secrecy obligations remain.

Finally, in addition to searches related to the Individual Plaintiffs and VVA Members, the CIA's declaration described its "broad-based search of its files designed to uncover records concerning the potential involvement by the CIA in testing on volunteer service members." (*Id.* at ¶ 8.) In other words, these searches were not focused on a specific individual, but rather were designed to locate information on potential testing on *any* volunteer service member. "These searches focused on, but were not limited to, records concerning (a) testing on volunteer service members at Edgewood Arsenal or Fort Detrick and (b) Project OFTEN, the only CIA program known to CIA to have contemplated testing on volunteer service members." (*Id.*) Based on these searches and others in the case, the CIA produced over 2,275 pages of responsive documents to Plaintiffs. (*Id.*) As explained in the CIA's declaration, however, "[t]here is no indication in these documents that the CIA ever administered or otherwise entered into 'secrecy oaths' or any other types of non-disclosure agreements with any volunteer service members relating to the testing of chemical or biological substances upon them, as alleged in this case." (*Id.*) Accordingly, the CIA "concluded that no such agreements with the Agency exist." (*Id.*)

This record makes clear that Plaintiffs have never seriously pursued their "secrecy oath" claim against the CIA. Due to the absence of allegations concerning the CIA with regard to this

sole remaining claim and Plaintiffs' own admissions that they do not have specific facts to support it, the CIA has repeatedly asked Plaintiffs to voluntarily withdraw the claim. In fact, Defendants have reminded Plaintiffs of their obligations to ensure that their allegations have factual support on four occasions and, because Plaintiffs lack such support for their secrecy oath claim against the CIA, Defendants have requested that Plaintiffs withdraw this claim. (Ex. R to Herb Decl. at 9–10; Ex. S to Herb Decl. at 1; Ex. T to Herb Decl. at 2; Ex. P to Herb Decl at 1.) Most recently, on June 28, 2011, Defendants provided Plaintiffs with a declaration from the CIA that confirmed, as Plaintiffs recognized, that there is no factual basis for this claim. (Ex. P to Herb Decl. at 1.) Furthermore, the CIA took further steps to assure the Individual Plaintiffs and VVA Members that no such secrecy obligation exists such that their claims would be moot, to the extent they ever existed. (Ex. Q to Herb Decl. ¶ 7.) Plaintiffs did not respond to Defendants' June 28, 2011 letter and, therefore, have not provided any basis for their continued maintenance of this claim. Plaintiffs failure to respond is particularly noteworthy given that, following Defendants' June 28, 2011 letter requesting that Plaintiffs withdrawal their sole remaining claim, Plaintiffs have filed a notice of discovery dispute with the magistrate judge that seeks substantial discovery from the CIA that not only does not pertain to secrecy oaths but also does not pertain to testing on volunteer service members. (Dkts. 239, 240.) In light of the burden of responding to such a request and its lack of relevance given this Court's May 2011 Order, the CIA now seeks dismissal of the only remaining claim against it.

ARGUMENT

Plaintiffs' secrecy oath claim against the CIA must be dismissed because this Court lacks jurisdiction over it. In order for jurisdiction to exist, there must be a live case or controversy between Plaintiffs and the CIA. This fundamental constitutional requirement is lacking for two independent reasons. First, any such claims of the Individual Plaintiffs and VVA would be moot in light of CIA's efforts, out of an abundance of caution, to address the concerns of the Individuals Plaintiffs and VVA Members related to any potential secrecy oath they continued to believe they had with the CIA (notwithstanding the lack of evidence of such oaths). Second, Plaintiffs have failed to establish that they have standing to pursue this claim because they do not

now, nor did they ever, have a factual basis for it. Accordingly, there is no live dispute between the CIA and the Plaintiffs with respect to this claim, and it must be dismissed for lack of jurisdiction. Finally, if the Court finds that there is jurisdiction, the CIA is nonetheless entitled to summary judgment on the merits, as it is undisputed that the CIA did not administer secrecy oaths to the participants in the test programs at issue in this case.

I. THE COURT SHOULD DISMISS PLAINTIFFS' SECRECY OATH CLAIM AGAINST THE CIA BECAUSE, EVEN IF SUCH A CLAIM EXISTED, IT WOULD BE MOOT

A federal court's jurisdiction is limited to actual cases or controversies. U.S. Const. art. III, § 2. As a result, "a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). A case becomes moot when it loses "its character as a present, live controversy." *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir.1997); *GTE Cal., Inc. v. FCC*, 39 F.3d 940, 945 (9th Cir. 1994) ("If an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed."). This can occur "when an administrative agency has performed the action sought by a plaintiff in litigation," thereby eliminating the ability of a federal court "to grant effective relief" and rendering the claim moot. *Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009). Furthermore, in cases such as the present one, mootness is evaluated at the time of the court's review. *Pub. Utils. Comm'n of State of Cal. v. F.E.R.C.*, 100 F.3d 1451, 1458 (9th Cir. 1996).

In this case, Plaintiffs' requested relief related to their alleged secrecy oaths is that they be "released from any obligations or penalties under their secrecy oaths." (3AC ¶ 183.) The CIA, however, has performed the requested action. As discussed above, the CIA provided Plaintiffs with a declaration on June 28, 2011. (Ex. P to Herb Decl.) This declaration recounted that the CIA has no evidence of any non-disclosure agreement or secrecy oath with any of the Individual Plaintiffs, nor does it have such an agreement or oath with the VVA Members. (Ex. Q to Herb

Decl. ¶¶ 5, 6.) Nonetheless, the CIA recognized that it was possible that some volunteer service members may continue to erroneously believe that they are subject to these oaths notwithstanding the evidence to the contrary. (*Id.* ¶ 7.) To put the issue conclusively to rest, and to alleviate any remaining potential concerns of the Individual Plaintiffs and identified VVA Members, the CIA expressly released those individuals from any non-disclosure agreement or secrecy oath to the extent they continued to believe one existed. (*Id.*) As explained by the CIA declarant:

> to the extent the Individual Plaintiffs or VVA Members continue to believe that they are subject to any type of non-disclosure agreement with the CIA, they are hereby released from that agreement and any obligations or penalties related thereto by the CIA.

(*Id.*) Thus, to the degree that the Individual Plaintiffs and VVA Members had concerns regarding the existence of secrecy oaths, those concerns have been put to rest and those individuals have already received all of the relief to which they could have been entitled pursuant to this litigation. Accordingly, any secrecy oath claim by Plaintiffs against the CIA would be moot, and the CIA should be dismissed from this case. *See Rosemere Neighborhood Ass'n*, 581 F.3d at 1173 ("In general, when an administrative agency has performed the action sought by a plaintiff in litigation . . . the claim is moot.").

II. THIS COURT MUST DISMISS PLAINTIFFS' SECRECY OATH CLAIM AGAINST THE CIA BECAUSE PLAINTIFFS LACK STANDING

Even if Plaintiffs had not already received all of the relief to which they could have been entitled, Plaintiffs have not established that they have standing to pursue a secrecy oath claim against the CIA. "Article III of the Constitution requires that a plaintiff have standing before a case may be adjudicated." *Covington v. Idaho*, 358 F.3d 626, 637 (9th Cir. 2004). To have standing to sue in federal court, a plaintiff must allege "'such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). To satisfy the Constitution's standing requirements, a plaintiff must show (1) an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury must be fairly traceable

to the challenged action of the defendant; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *see also Covington v. Jefferson Cnty.*, 358 F.3d 626, 637–38 (9th Cir. 2004). As the party invoking federal jurisdiction, the plaintiff bears the burden of establishing these elements. *Lujan*, 504 U.S. at 561.

The fact that this case is a proposed class action is immaterial to the Court's standing analysis. "The only plaintiffs whose claims may be considered in deciding whether plaintiffs have standing to bring this lawsuit are the named plaintiffs." *Daley's Dump Truck Serv., Inc. v. Kiewit Pac. Co.*, 759 F. Supp. 1498, 1501 (W.D. Wash. 1991). "If the plaintiff has no standing individually, then no case or controversy arises, and the plaintiffs' claims are not typical of the claims of those who might otherwise litigate the action." 1 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 2:7 at 102 (4th ed. 2002). As explained by the Supreme Court, "[plaintiffs] must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless these [plaintiffs] can thus demonstrate the requisite case or controversy between themselves personally and [the defendant], 'none may seek relief on behalf of himself or any other member of the class.'" *Warth*, 422 U.S. at 502 (citation omitted).

The Plaintiffs in this case – the seven Individual Plaintiffs, VVA, and Swords – have failed to meet this burden with respect to their secrecy oath claim against the CIA. Because their Third Amended Complaint does not sufficiently allege standing to pursue a secrecy oath claim against the CIA, the CIA is entitled to a judgment on the pleadings under Federal Rule of Civil Procedure 12(c). Even if the Third Amended Complaint could survive a Rule 12 motion, the CIA is still entitled to summary judgment for lack of jurisdiction under Rule 56 because the Plaintiffs have admitted that they do not have specific facts to support this claim against the CIA, and therefore they do not have standing.

A. Plaintiffs' Third Amended Complaint Does Not Establish Standing to Pursue a Secrecy Oath Claim Against the CIA, and Therefore the CIA is Entitled to Judgment on the Pleadings

Under Rule 12(c), "a party may move for judgment on the pleadings" once "the pleadings are closed – but early enough not to delay trial." Fed. R. Civ. P. 12(c). Because the CIA filed its Answer to Plaintiffs' Third Amended Complaint on June 14, 2011, (Dkt. 236), and trial is not scheduled to commence until July 9, 2012, (Dkt. 238 at 4), the CIA may appropriately file a motion for judgment on the pleadings at this time.

A motion for judgment on the pleadings is "'functionally identical' to Rule 12(b)(6) and [] 'the same standard of review' applies to motions brought under either rule." *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 n.4 (9th Cir. 2011). In both, "the Court assumes the allegations in the complaint are true and construes them in the light most favorable to the plaintiff." *Vera v. O'Keefe*, __ F. Supp. 2d __, No. 10cv1422L, 2011 WL 2005196, at *2 (S.D. Cal. 2011). Furthermore, the standard articulated by the Supreme Court in *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) regarding pleading requirements apply equally to motions under 12(b)(6) and 12(c). *United States ex rel. Cafasso*, 637 F.3d at 1055 n.4; *see also Vera*, 2011 WL 2005196, at *2. Accordingly, while a complaint attacked under Rule 12(c) "does not need detailed factual allegations, the pleader's obligation to provide the grounds for relief requires 'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Loos v. Lowe's HIW, Inc.*, _F. Supp. 2d __, No. CV11-232-PHX, 2011 WL 2457508, at *2 (D. Ariz. 2011) (quoting *Twombly*, 550 U.S. at 555). Instead, "'[t]o survive a Federal Rule of Civil Procedure 12(c) motion, a plaintiff must allege enough facts to state a claim to relief that is plausible on its face.'" *Vera*, 2011 WL 2005196, at *2 (quoting *Lowden v. T–Mobile USA, Inc.*, 378 Fed. Appx. 693, 694 (9th Cir. 2010)); *Loos*, 2011 WL 2457508, at *2 ("The factual allegations of the complaint must be sufficient to raise a right to relief above a speculative level.").

In this case, Plaintiffs' Third Amended Complaint does not sufficiently allege the elements of standing for any of the Plaintiffs with respect to a secrecy oath claim against the CIA. With regard to the seven Individual Plaintiffs, the Third Amended Complaint devotes over eighty paragraphs to their individual claims, but not once does it ever allege that one of them has or had

a secrecy oath with the CIA. (3AC ¶ 34 (alleging solely that Mr. Price's secrecy oath resulted from an oral debriefing with "government personnel"; *id.* ¶ (alleging solely that Mr. Muth signed a non-disclosure form but failing to allege who presented it to him); *id.* ¶ (alleging solely that Mr. Rochelle was "instructed to never talk about any of his tests," but failing to allege who offered the instruction); *id.* ¶ 66 (alleging solely that Mr. Meirow participated in a "group presentation" during which soldiers were promised medals and "ordered to never disclose any details of their Edgewood experience"); *id.* ¶ 78 (alleging solely that, during an exit interview, Mr. Dufrane was instructed not to speak of his service and directed to sign a confidentiality agreement, but failing to allege who presented it to him); *id.* ¶¶ 197, 204 (alleging solely that Mr. Josephs was instructed never to discuss his experience); *id.* ¶ 217 (alleging solely that Mr. Blazinski was told the experiments were top-secret and he could not disclose anything about his experience).)

Furthermore, as discussed above, the only other allegations in the Third Amended Complaint regarding the nature of the secrecy oaths allegedly administered to test participants not only fail to mention the CIA, but also make clear that Plaintiffs are alleging that DoD was responsible for the administration of such oaths. For instance, Plaintiffs allege that test participants were administered a "secrecy oath" that they would "not divulge or make available any information related to U.S. Army Intelligence Center" subject to "provisions of the Uniform Code of Military Justice." (*Id.* ¶ 156.) Additionally, Plaintiffs allege that test participants signed an oath "implying that the Uniform Code of Military Justice applied to them after their discharge from service." (*Id.* ¶ 157). The clear implication from Plaintiffs allegations is that it was DoD, rather than the CIA, that allegedly administered secrecy oaths.

Because the Individual Plaintiffs have made no allegations concerning the administration of secrecy oaths by the CIA, they fail to meet the "fairly traceable" and redressability elements of standing. First, the Individual Plaintiffs' generalized allegations of secrecy oaths by unnamed individuals are not fairly traceable to the CIA. As the Ninth Circuit has recognized, in multi-defendant litigation, plaintiffs must establish standing for their claims against each individual defendant. *See Easter v. Am. W. Fin.*, 381 F.3d 948, 961–62 (9th Cir. 2004) ("Here, no named plaintiff can trace the alleged injury in fact – payment of usurious interest rates – to all of the

Trust Defendants, but only to the Trust Defendant that holds or held that plaintiff's note. As to those trusts which have never held a named plaintiff's loan, Borrowers cannot allege a traceable injury and lack standing."). Nor have the Individual Plaintiffs established that it is likely that the alleged injury will be redressed by a favorable decision. Taking the Individual Plaintiffs allegations as true that some other government agency administered secrecy oaths, there is no basis to conclude that the CIA controlled DoD's decision with regard to any perceived secrecy oaths, to the extent that Plaintiffs are attempting to allege that DoD was the agency that administered such oaths. *See Clouser v. Espy*, 42 F.3d 1522, 1535 (9th Cir. 1994) (noting that one government agency cannot bind another); *Reed v. Reno*, 146 F.3d 392, 397 (6th Cir. 1998) (stating that the Department of Justice "is not bound by the definitions set forth in the regulations promulgated by the OPM" where the relevant statute had not granted OPM the authority to promulgate definitions binding other agencies). Accordingly, Plaintiffs lack standing to assert this claim against the CIA.

Similarly, in order to have standing, VVA must allege, at a minimum, that one of its members has a secrecy oath with the CIA. *See Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977) ("An association has standing to assert its members' claims only where . . . its members would otherwise have standing to sue in their own right . . . ."). The Third Amended Complaint is devoid of such an allegation. In fact, Plaintiffs have failed to make a single allegation concerning the administration of secrecy oaths to any VVA member. (3AC ¶ 26 (alleging solely that VVA members "have been barred from asserting or deterred from asserting damages claims," but failing to allege that this is due to secrecy oath or to otherwise mention the administration of such oaths by any entity let alone by the CIA).) Accordingly, VVA (suing on behalf of its members) has failed to establish that it suffered an injury in fact that is traceable to any action by the CIA.

Swords fares no better. As a threshold matter, it is not even clear that Swords is seeking relief from the Court with respect to this claim. The only relief sought by Plaintiffs with respect to the secrecy oath claim is a declaration "that Plaintiffs are released from any obligations or penalties under their secrecy oaths." (3AC at ¶ 183.) Because Swords is not a membership

organization, and because Swords has no "secrecy oath" related to the test programs, Plaintiffs' request for relief for "Plaintiffs" must be referring to the Individual Plaintiffs or VVA Members, whose claims would be moot and lack standing. Thus, on the face of Plaintiffs' Complaint, it does not appear that Swords is pursuing this claim against the CIA, as Plaintiffs are not requesting relief from some perceived injury directly suffered by Swords.

Even if Swords intended to seek relief from the Court with respect to the secrecy oath claim, it still has failed to allege the elements necessary to establish standing. Although Swords does claim to have been inhibited from providing comprehensive legal services to certain unnamed service members who have "perceived secrecy obligations," (3AC at ¶¶ 28, 158), this allegation is insufficient to confer standing for several reasons. First, unlike VVA, Swords it not a membership organization, and therefore it does not have standing to sue on behalf of any volunteer service members. *See Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654 (D.C. Cir. 2010) ("[O]ne cannot have standing in federal court by asserting an injury to someone else."). Second, Swords alleges solely that service members to whom it has provided initial counseling had "*perceived* secrecy obligations," (*Id.* at ¶¶ 28, 158 (emphasis added)); Swords makes no allegation that it has any information concerning the actual administration of secrecy oaths by any entity. A "perceived" obligation that does not actually exist is not a concrete and particularized injury that can be remedied by the Court. Third, even if a *perceived* secrecy obligation could be construed as a concrete injury, Swords fails to satisfy the traceability requirement because it does not allege that any of the service members who allegedly refused to disclose information to it had secrecy oaths *with the CIA*. Finally, Swords fails to establish that it has an imminent, but redressable, injury that can be remedied by a favorable decision from the Court. Indeed, the only individual identified as having information regarding the impact of alleged secrecy oaths on Swords is a *former* employee. Having failed to plead any of the elements required to establish standing, Swords' secrecy oath claim must be dismissed along with those of the Individual Plaintiffs and VVA.

If the Court finds that the Plaintiffs have not adequately pled standing with respect to their secrecy oath claim against the CIA, the Court's inquiry must end there and Plaintiffs' claim

should be dismissed. While a court dismissing claims under Rule 12(c) may consider granting a plaintiff leave to amend his complaint, the Court should not do so where amendment would be futile. *Doe 1 v. AOL LLC*, 719 F. Supp. 2d 1102, 1108 (N.D. Cal. 2010); *see also Deveraturda v. Globe Aviation Sec. Servs.*, 454 F.3d 1043, 1050 (9th Cir. 2006). In this case, it would be futile to permit Plaintiffs to amend their complaint (a fourth time no less) because, among other reasons, they have admitted that they "do not currently have facts identifying specific circumstances where the Central Intelligence Agency directly administered secrecy oaths to Plaintiffs." (Ex. A to Herb Decl. at 15.) The lack of merit for such a claim is discussed in more detail below.

B. Alternatively, the Court Must Grant the CIA's Motion for Summary Judgment Because Plaintiffs Have Not Subsequently Identified Any Evidence to Establish Standing for Their Secrecy Oath Claim Against the CIA

Even if Plaintiffs have provided sufficient allegations of standing for purposes of surviving a motion for judgment on the pleadings, Plaintiffs lack the evidence necessary to establish standing at the summary judgment stage. As discussed above, Plaintiffs are invoking this Court's jurisdiction and therefore have the burden of establishing the element of standing. *Lujan*, 504 U.S. at 561. "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* Thus, on "a motion for summary judgment [concerning the existence of standing], 'a plaintiff must establish that there exists no genuine issue of material fact as to justiciability or the merits.'" *Hubbard v. 7-Eleven, Inc.*, 433 F. Supp. 2d 1134, 1141 (S.D. Cal. 2006) (quoting *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329 (1999)).

Because a plaintiff has the burden of establishing jurisdiction, a defendant does not need to "negate or disprove" the existence of standing and, instead, need "only point out to the Court that there is an absence of evidence to support the non-moving party's case." *Sluimer v. Verity, Inc.*, 606 F.3d 584, 586 (9th Cir. 2010) (citing *Celotex Corp.*, 477 U.S. at 325). Once the moving party has met this threshold requirement, "[t]he burden then shift[s] to the non-moving party to

'designate specific facts showing that there is a genuine issue for trial.'" *Id.* (citing *Celotex Corp.*, 477 U.S. at 324).

When putting forth evidence to establish standing, the plaintiff must "do more than simply show that there is some metaphysical doubt" regarding the existence of the elements, *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (citing advisory committee's note on 1963 amendments), and must instead "support its allegations of injury[, traceability, and redressability] by affidavit or evidence of specific facts," *Hubbard*, 433 F. Supp. 2d at 1141. *See also Snake River Farmers' Ass'n, Inc. v. Dep't of Labor*, 9 F.3d 792, 795 (9th Cir. 1993) ("The party invoking federal jurisdiction bears the burden of establishing standing, and in response to a summary judgment motion must provide cognizable evidence of specific facts, not mere allegations.") (citing *Lujan*, 504 U.S. at 561). Furthermore, with regard to standing, the non-moving party may not attempt to remedy their failure to sufficiently allege facts to support standing in their complaint by subsequently submitting affidavits or other evidence. *See La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1089 (9th Cir. 2010) ("Given its inadequate pleading regarding organizational standing, [plaintiff] may not effectively amend its Complaint by raising a new theory of standing in its response to a motion for summary judgment.").

In this case, there is a clear absence of evidence to support Plaintiffs' standing to assert a secrecy oath claim against the CIA. Plaintiffs have long acknowledged that they have no factual basis to support this claim and thus have no evidence of any alleged injury being suffered by Plaintiffs. After Defendants propounded an interrogatory requesting that Plaintiffs identify the factual basis for a potential secrecy oath claim against the CIA, Plaintiffs' sworn response was that they "do not currently have facts identifying specific circumstances where the Central Intelligence Agency directly administered secrecy oaths to Plaintiffs . . . ." (Ex. A to Herb Decl. at 15.) It is worth noting that Plaintiffs' interrogatory response came *after* the CIA had produced more than 2,200 pages of documents to Plaintiffs in response to their discovery requests.[5] (Ex. Q

[5] Plaintiffs have also received approximately a million pages of documents from the other defendants concerning the test programs at issue in this case. (Herb Decl. ¶ 25.)

to Herb Decl. ¶ 8.) It is also significant that Plaintiffs have not supplemented that response in the more than four months since they issued it, despite the fact that Defendants have notified Plaintiffs on multiple occasions in the intervening months that Defendants would seek to have the secrecy oath claim dismissed given the absence of factual support for it. (Herb Decl. ¶¶ 3, 21–24.)

Furthermore, as discussed above, deposition testimony from every one of the Individual Plaintiffs and the organizational plaintiffs fail to establish that any had suffered an injury traceable to the CIA due to the alleged administration of secrecy oaths. Each of the Individual Plaintiffs testified that they had no personal knowledge of the CIA's role in testing at Edgewood Arsenal (where the Individual Plaintiffs allegedly underwent tests), let alone personal knowledge of the CIA's administration of any secrecy oath. (*See, e.g.*, Ex. B to Herb Decl. at 136:23–137:2 ("Q. Do you think the CIA had any role in the administration of secrecy oaths or your non-disclosure agreement? A. To my knowledge that was Military Intelligence."). In addition, representatives of Plaintiff VVA had no information concerning the administration of secrecy oaths by the CIA, and thus did not identify any member who had suffered an injury traceable to the CIA. (*See, e.g.*, Ex. J to Herb Decl. at 125:2–4 ("Q. Have you heard of any secrecy oaths being administered by the CIA? A. Not directly."). Finally, Plaintiff Swords cannot claim to have suffered any injury as a result of the CIA's alleged administration of secrecy oaths given that the sole individual with information on how Swords' services have been impacted by Defendants' test programs not only was a former employee whose testimony cannot be used to support Swords' present standing, but she also stated that she had no knowledge of secrecy oaths being administered by the CIA. (Ex. M to Herb Decl. at 144:1–15 ("Q. Do you recall whether any veteran told you what government agency had imposed secrecy obligations on them? . . . . A. I don't recall anything specific. In general, when I talked to veterans who had a perceived secrecy or security obligation, they typically would refer to the government or to the military in the broadest terms. I have no specific recollection of agencies or other details.").)

In sum, there is "an absence of evidence to support" Plaintiffs' assertion of standing to pursue a secrecy oath claim, as Plaintiffs have not identified a single fact that establishes an injury

fairly traceable to the CIA. *Sluimer*, 606 F.3d at 586. Where a party fails to offer evidence sufficient to establish the essential elements of standing, no genuine issue of material fact can exist, because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 322–23. As such, summary judgment in favor of the CIA is warranted because Plaintiffs have not established standing and, therefore, jurisdiction is lacking.

III. THE CIA IS ENTITLED TO SUMMARY JUDGMENT ON THE MERITS BECAUSE THE CIA DID NOT ADMINISTER SECRECY OATHS TO TEST PARTICIPANTS

If this Court first determines that it has jurisdiction over Plaintiffs' secrecy oath claim against the CIA, then Defendant CIA respectfully requests that this Court grant the CIA summary judgment on the merits of that claim. *Unigard Ins. Co. v. Dep't of Treasury*, 997 F. Supp. 1339, 1343 (S.D. Cal. 1997) ("Because the court dismisses [plaintiff's] action for lack of standing, the court does not have jurisdiction to address the merits of the cross-motions for summary judgment.") As discussed above, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In this case, it is undisputed that the CIA did not participate in the administration of secrecy oaths, and thus the CIA is entitled to judgment as a matter of law.

Not only have Plaintiffs failed to identify a single fact in support of their secrecy oath claim against the CIA, as discussed in more detail above, but the CIA has conducted reasonable searches of its records and confirmed that it has no evidence regarding the administration of secrecy oaths by it to participants in the test programs at issue in this case. In February 2011, the CIA issued a certified Administrative Record concluding that it "has uncovered no records that it ever administered or otherwise entered into 'secrecy oaths' or other types of nondisclosure agreements with volunteer service members (including the Individual Plaintiffs) relating to the testing of chemical or biological substances upon them, as alleged in this case." (Certification of Administrative R. (Dkt. 208-1) at ¶ 12.) The CIA reaffirmed that it had not located any evidence

of alleged secrecy oaths in a subsequent interrogatory response. (Ex. N to Herb Decl. at 2–3.) Most recently, the CIA provided Plaintiffs with a sworn declaration stating that, in addition to searching for information related to secrecy oaths between certain named individuals and the CIA, the CIA "also conducted a more broad-based search of its files designed to uncover records concerning the potential involvement by the CIA in testing on volunteer service members.") (Ex. Q to Herb Decl. ¶ 8.) After once again reaffirming that the CIA's document searches had not located any records regarding secrecy oaths, the CIA declarant stated that "[b]ased on this lack of evidence, the CIA has concluded that no such agreements with the Agency exist." (*Id.*)

In this case, it is undisputed that the CIA did not participate in the administration of secrecy oaths. As detailed above in Part II.B above, which is incorporated by reference, Plaintiffs have acknowledged that they have no evidence that the CIA participated in the administration of secrecy oaths. After diligent broad-based searches, the CIA has confirmed that there is no evidence of CIA involvement in the administration of such oaths. With the parties in agreement on this material fact, summary judgment is mandated and the CIA should be dismissed from this case. Fed. R. Civ. P. 56 ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact . . . .").

CONCLUSION

For the reasons stated above, Defendant Central Intelligence Agency respectfully requests that the Court grant its Motion for Judgment on the Pleadings and, in the Alternative, Motion for Summary Judgment and that it dismiss the CIA as a Defendant in this case.

Dated: July 28, 2011

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