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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

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

Hearing Date: September 1, 2011
Hearing Time: 2:00 p.m.

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INTRODUCTION

This motion represents no less than the Central Intelligence Agency's *fifth* motion attacking the pleadings in this action. This latest effort is styled as a Motion for Judgment on the Pleadings and, in the Alternative, Motion for Summary Judgment ("the Motion"). Through this Motion, the CIA asks the Court to dismiss Plaintiffs' "secrecy oath" claim, which the CIA (repeatedly and incorrectly) asserts is the "one remaining claim against the CIA." (Mot. at 2.) The CIA advances four reasons in support of this request. First, relying on a recent declaration, the CIA argues that Plaintiffs' secrecy oath claim is "moot." (*Id.* at 9-10.) Second, the CIA argues that it is entitled to judgment on the pleadings because the operative complaint fails to allege that the Plaintiffs have standing to pursue the secrecy oath claim against the CIA. (*Id.* at 10-16.) Third, the CIA argues that even if the complaint adequately alleges standing, "Plaintiffs lack evidence necessary to establish standing" and that the CIA is entitled to summary judgment on that ground. (*Id.* at 16-19.) Fourth, the CIA argues, in the alternative, that summary judgment is appropriate because the CIA now claims that it did not administer secrecy oaths to test participants. (*Id.* at 19-20.)

On August 9, the Court issued an order stating that it only "will consider the CIA's motion for judgment on the pleadings," and will not hear the CIA's motions for summary judgment or consider material beyond the pleadings. (*See* Docket No. 249.) Accordingly, the first, third, and fourth arguments advanced by the CIA, which request summary judgment or are based entirely on material outside the pleadings, are no longer at issue in this Motion. Plaintiffs therefore will restrict this opposition brief to discussing the CIA's argument that it is entitled to judgment on the pleadings because Plaintiffs have failed to allege standing.

The CIA's motion for judgment on the pleadings should be denied. Although the CIA argues that the Complaint fails to allege standing, the Complaint clearly alleges that the CIA was extensively involved in the testing programs and that Plaintiffs were injured through the administration of secrecy oaths or non-disclosure agreements during those testing programs. (*See, e.g.*, Third Amended Complaint ("3AC" or "Complaint") (Docket No. 180) ¶¶ 2, 26, 28, 35, 44, 55, 66, 78, 106, 132, 156-158, 197, 216.) These allegations are sufficient to show standing.

Indeed, the CIA's decision to now seek dismissal of the "secrecy oath" claim on the pleadings is puzzling given its express decision *not* to ask the Court to dismiss that claim in the CIA's most recent motion to dismiss filed on December 6, 2010. (Docket No. 187.) Nothing has changed in the Complaint during that time, which betrays the CIA's motion for what it is: the latest salvo in the CIA's effort to avoid its discovery obligations in this matter. (*See* Mot. at 8.)

More fundamentally, the CIA's statement that the "secrecy oath" claim is the only remaining claim against the CIA, and that the CIA should be dismissed from the case if the Court grants judgment on the pleadings with respect to that claim, is plainly wrong. As Plaintiffs repeatedly have pointed out to Defendants, and as Magistrate Judge Corley recognized during last week's discovery hearing, the Complaint also asserts on its face that Defendants violated Plaintiffs' Constitutional due process rights, which independently grounds Plaintiffs' claims for notice and health care. (*See, e.g.*, 3AC ¶¶ 184, 186; *see* Docket No. 250 at 12:23-25.) The Defendants never have briefed the merits of these Constitutional claims — even in the CIA's last motion to dismiss which challenged Plaintiffs' Administrative Procedures Act ("APA") claims — and the Court never has dismissed them. Yet, despite the CIA's knowledge of the existence of these claims and after Plaintiffs repeatedly advised the Agency of this omission from its prior motion — the parties even addressed it with the Magistrate Judge in connection with recent discovery disputes — the CIA once again **has not mentioned, briefed, or moved to dismiss Plaintiffs' Constitutional due process claims**. Thus, the CIA's argument that the entire action against the Agency would end if the Court were to dismiss the secrecy oath claim is patently frivolous.[1] The Court should reject the CIA's slight-of-hand effort to dismiss Plaintiffs' Constitutional claims by implication. Accordingly, while Plaintiffs would be prepared to brief the merits of their Constitutional due process claims at the proper time, it is clear that the CIA will remain a defendant in this action regardless of the Court's resolution of the CIA's Motion for Judgment on the Pleadings with respect to the "secrecy oath" claim.

[1] Plaintiffs do not believe that the CIA's Motion satisfies the requirements of Rule 11.

BACKGROUND

This case arises out of top-secret government programs to test hundreds of biological and chemical agents on military service member "volunteers." Thousands of service personnel improperly received hundreds of different toxic agents, including sarin, VX, nerve agents, mustard gas, psychochemicals, irritants, anticholinesterase chemicals, biological agents, and mind control agents. (3AC ¶¶ 5, 10.)

Despite the CIA's wholesale destruction of its records as the Congressional investigation into its activities commenced in the early to mid-1970s, more than ample evidence of the CIA's extensive involvement in these testing programs remains. As the Complaint alleges, "[b]eginning in the early 1950s, the human experiment program was greatly expanded, as the Central Intelligence Agency ("CIA") and United States Army planned, organized and executed an extensive series of experiments involving potential chemical and biological weapons." (*Id.* ¶ 2.) "In early 1952, the CIA effected an agreement with the Army Chemical Corps for the performance of certain chemical and biological warfare research and development work by the Army Chemical Corps at the Army's laboratory facilities at Fort Detrick. CIA funding for this program continued until the 1970s." (*Id.* ¶ 106.) "The CIA, which referred to Edgewood as EARL (Edgewood Arsenal Research Labs), Department of Defense, and Special Operations Division of the U.S. Army were actively involved in human experimentation, which used soldiers as test subjects." (*Id.* ¶ 113.) "The links between the Army's Edgewood Arsenal and the CIA were close. Many scientists who worked at Edgewood, such as Dr. Ray Treichler, or under Edgewood contracts were on the CIA's payroll. Importantly, the CIA funded Edgewood research for over 20 years. The CIA financed, directed, and used the information derived from the tests at Edgewood for their own purposes." (*Id.* ¶ 132.) As Defendants' human testing program began to come to light in the early 1970s, "CIA Director Richard Helms authorized the destruction of the CIA's files regarding human experimentation. . ." (*Id.* ¶¶ 143-44.)

Test subjects, including the individual named Plaintiffs, were administered secrecy oaths or non-disclosure agreements as part of Defendants' testing programs. (*See, e.g., id.* ¶¶ 156-58.) They were told that the experiments were "top secret" and were instructed never to talk about

their experiences at Edgewood with anyone, and were threatened with punishment — including imprisonment — if they disobeyed. (*See, e.g.*, *id.* ¶¶ 35, 44, 55, 66, 78, 197, 216.) Plaintiff Vietnam Veterans of America ("VVA") has members who were test subjects and who were administered secrecy oaths as part of Defendants' testing programs, including two named individual plaintiffs. (*Id.* ¶ 26.)

The secrecy oaths administered during Defendants' testing programs have had a prolonged and profound effect on the test subjects. For example, the secrecy oaths have prevented test subjects from seeking timely medical care and other necessary services such as counseling. (*Id.* ¶¶ 158-59; *see also* Jan. 19, 2010 Order (Docket No. 59) at 12 (recognizing allegation that secrecy oaths prevent test subjects "from seeking treatment and counseling for the harm inflicted by the experiments").) Moreover, the secrecy oaths have impeded the ability of plaintiff Swords to Plowshares: Veterans Rights Organization ("Swords") to provide legal services to certain test subjects who "were not willing to disclose information related to potential VA claims due to perceived secrecy obligations." (*Id.* ¶¶ 28, 158.)

The Complaint asserts (among other things) that: Defendants have violated, and continue to violate, their own regulations and directives (including a series of human testing rules Plaintiffs have defined as the "Official Directives") governing the human testing programs (*id.* ¶ 132, 184); Defendants have violated Plaintiffs' Constitutional due process rights by refusing to notify victims and continuing to conceal information about the tests and their "known or suspected" health effects, and "failing to provide" required medical care (*id.* & ¶ 186); and the "secrecy oaths" are invalid (*id.* ¶ 184). Plaintiffs have asked the Court for specific declaratory and injunctive relief, including for a declaration releasing Plaintiffs from their "consent forms and secrecy oaths." (Jan. 19, 2010 Order at 13; 3AC ¶¶ 184-187.) It is clear that the Complaint alleges substantive claims under the APA, and relies upon the APA's waiver of sovereign immunity for Plaintiffs' substantive claims for non-monetary relief under the United States Constitution. (*See, e.g.*, Plfs.' Opp'n to Defs.' Mot. to Dismiss First Am. Compl. (Docket No. 43) at 5.) *See Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989).

PROCEDURAL HISTORY

The CIA has filed four previous motions to dismiss — on June 30, 2009 (Docket No. 29); August 14, 2009 (Docket No. 34); January 5, 2010 (Docket No. 57); and December 6, 2010 (Docket No. 187). Each of those motions raised various legal challenges to Plaintiffs' complaint, including standing. In its January 19, 2010 Order, the Court dismissed with prejudice two of Plaintiffs' claims: (1) the "organization Plaintiffs' claim for declaratory relief that the *Feres* doctrine is unconstitutional," and (2) "Plaintiffs' claim for declaratory relief on the lawfulness of the testing program." (Jan. 19, 2010 Order at 19-20.) It permitted the remainder of Plaintiffs' claims to proceed.

The CIA's last motion to dismiss argued that the Court should dismiss Plaintiffs' claims seeking notice and healthcare because: (1) the Complaint identified no duty "Enforceable Against the CIA Through the APA" (Docket No. 187 at 6); (2) the APA prevented Plaintiffs from proceeding on a claim for notice under the Federal Tort Claims Act (*id.* at 12-13); and (3) Plaintiffs' APA claim failed to identify a policy or regulation requiring the CIA to provide healthcare (*id.* at 15). In its May 31, 2011 Order, the Court recognized that the CIA's motion attacked Plaintiffs' claims "under the [APA]," and dismissed them because the Complaint did not identify "discrete agency action that [the CIA] is required to take" as required by the APA. (May 31, 2011 Order (Docket No. 233) at 6, 11.) The CIA's prior motion expressly did not seek dismissal of the "secrecy oath" claim. (Docket No. 187 at 6 n.4.) The motion also did not mention, address, or brief Plaintiffs' Constitutional due process claims, nor did the Court's Order address, discuss, or resolve them.

ARGUMENT

In light of the Court's August 9, 2011 Order, Plaintiffs will not address the extrinsic evidence offered by the CIA in its Motion or any of the CIA's arguments on summary judgment. Plaintiffs will only respond to the CIA's argument that it is entitled to judgment on the pleadings

with respect to Plaintiffs' "secrecy oath" claim. (Mot. at 11-16.)[2]

The Federal Rules of Civil Procedure set a strict standard for evaluating a motion for judgment on the pleadings under Rule 12(c). Judgment on the pleadings is only proper where "the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990). "In ruling on a motion for judgment on the pleadings, district courts must accept all material allegations of fact alleged in the complaint as true, and resolve all doubts in favor of the non-moving party." *Carmen v. San Francisco Unified Sch. Dist.*, 982 F. Supp. 1396, 1401 (N.D. Cal. 1997). In evaluating a motion for judgment on the pleadings under Rule 12(c), courts apply the same standard used in assessing a motion to dismiss under Rule 12(b)(6). *See, e.g., id.* ("'Although Rule 12(c) differs in some particulars from Rule 12(b)(6), the standard applied is virtually identical.'" (citations omitted)). As the Court explained in its May 31, 2011 Order on the CIA's *fourth* motion to dismiss:

> A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). However, this principle is inapplicable to

[2] The CIA argues that it effectively has mooted the "secrecy oath" claims through a release contained in the June 28, 2011 Declaration of Patricia B. Cameresi (Ex. Q to Herb Decl.). (Mot. at 16-17.) This argument fails for two reasons. First, considering the declaration would convert the CIA's motion into a motion for summary judgment, which the Court has declined to do. *See* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.") Second, even if the Court were to consider it, the Ninth Circuit recently confirmed that defendants cannot — as the CIA has tried to do here — "pick off" an individual plaintiff's claim as a litigation tactic to defeat a putative class action before a class certification motion has been filed. *See Pitts v. Terrible Herbst, Inc.*, No. 10-15965, 2011 U.S. App. LEXIS 16368, at *21-23 (9th Cir. Aug. 9, 2011).

> legal conclusions; "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not taken as true. *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009) (citing *Twombly*, 550 U.S. at 555).

(May 31, 2011 Order at 5.) Evaluated under these standards, it is plain that the CIA's motion for judgment on the pleadings must be denied.

I. THE CIA'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE DENIED BECAUSE THE COMPLAINT ADEQUATELY ALLEGES STANDING.

The CIA's sole argument in support of its Motion for Judgment on the Pleadings is a repackaging of its earlier standing arguments; CIA argues that the Complaint "does not sufficiently allege the elements of standing for any of the Plaintiffs with respect to a secrecy oath claim against the CIA." (Mot. at 12.) With respect to the individual plaintiffs, the CIA faults the Complaint for not containing specific "allegations concerning the administration of secrecy oaths by the CIA," and argues that the individual plaintiffs have not met the "fairly traceable" and "redressability" elements of standing. (*Id.* at 13.) With respect to the organizational plaintiffs, the CIA argues that VVA has no standing because the Complaint fails to allege standing for its members (*id.* at 14), and that Swords has no standing because the Complaint alleges only that Swords has been impeded in providing legal services to test subjects due to "perceived" secrecy obligations (*id.* at 14-15). Each of these arguments fail for the reasons discussed below.

First, the Court already has held that Plaintiffs' Complaint adequately alleges standing with respect to the "secrecy oath" claim. (*See* Jan. 19, 2010 Order at 12-13.) Indeed, the Complaint alleges that the named plaintiffs, members of VVA, and other test subject putative class members were administered secrecy oaths or non-disclosure agreements as part of their participation in Defendants' testing programs. (*See, e.g.*, 3AC ¶¶ 26, 28, 35, 44, 55, 66, 78, 156-158, 197, 216.) It alleges that "these oaths cause ongoing harm" because they prohibit test subjects from "seeking treatment and counseling for the harm inflicted by the experiments." (Jan. 19, 2010 Order at 12.) It also alleges that Swords has been prevented from fully performing its organizational mission because veterans "were not willing to disclose information related to

potential VA claims due to perceived secrecy obligations." (3AC ¶ 28, 158.) The Court previously ruled that these allegations were adequate to confer standing because the requested relief "would redress the[se] alleged injuries." (Jan. 19, 2010 Order at 12.)

Notwithstanding this ruling, the CIA quibbles that the Complaint does not specifically allege that *the CIA itself* administered secrecy oaths to the test subjects. (Mot. at 13.) This argument — which could have been, but was not, advanced in connection with any of the CIA's previous four motions to dismiss — need not detain the Court long. The Complaint alleges with some detail the CIA's extensive involvement in Defendants' testing programs. For example, it alleges that the CIA and the Army "planned, organized and executed" the chemical and biological warfare testing programs at issue. (3AC ¶ 2.) It specifically identifies a memorandum of understanding between the CIA and the Army concerning the Army's performance of chemical and biological warfare research at the CIA's direction, and with CIA funding. (*Id.* ¶ 106.) It alleges that "[m]any of the scientists who worked at Edgewood, such as Dr. Ray Treichler . . . were on the CIA's payroll." (*Id.* ¶ 132.) It alleges that "many of the Army officers running the Edgewood experiments were actually CIA agents." (*Id.*) In this context, the Complaint's allegations that secrecy oaths were administered as part of the testing programs (*see, e.g.*, *id.* ¶ 159), and that "government personnel" ordered the individual plaintiffs "never to talk about" their experiences (*see, e.g.*, *id.* ¶¶ 35, 55, 66, 78, 197, 204, 216), are sufficient at the pleading stage to show the CIA's involvement in the administration of secrecy oaths.[3]

The CIA's argument that the "implication from Plaintiffs' allegations" is that the Army rather than the CIA actually administered the secrecy oaths (*see* Mot. at 13) ignores the Complaint's allegations that the testing programs were carried out through concerted action between the CIA and the Army. The fair "implication" of those allegations is that the CIA indeed was also involved in the administration of secrecy oaths, and in fact may have originated them.

[3] The CIA's authority is not to the contrary. In fact, in *Easter v. America West Financial*, 381 F.3d 948 (9th Cir. 2004), the court recognized that the plaintiffs there — unlike the Complaint here — "presented *no* evidence that their alleged injuries were the result of a *conspiracy or concerted scheme* between the Trust Defendants." *Id.* at 962 (emphasis added).

At the very least, these allegations give the CIA "fair notice" of Plaintiffs' claims, especially when construed (as they must be) "in the light most favorable to plaintiff." (*See* May 31, 2011 Order at 5 (citations omitted).)

Moreover, it would be particularly unjust here to require more specificity from Plaintiffs in the Complaint. As Plaintiffs allege (*see* 3AC ¶ 143) — and as the CIA admits (*see* Defs.' Answer to 3AC (Docket No. 236) ¶ 143) — the CIA destroyed many of its documents related to its human experimentation programs.[4] Even in the face of the CIA's efforts to cover its trail, however, Plaintiffs have been able to allege the CIA's extensive involvement with the testing programs, which utilized "secrecy oaths" as a key tool. Requiring more at the pleading stage would unjustly reward the CIA's extensive wrongful efforts to conceal the extent of its involvement in the testing programs at issue.[5]

Second, the CIA's arguments with respect to the organizational plaintiffs fare no better. With respect to VVA, as discussed above, the Complaint adequately alleges that its members have standing to pursue the "secrecy oath" claim against the CIA. With respect to Swords, the Complaint clearly alleges that the "secrecy oaths" have "hindered Swords' efforts to provide —

[4] While discovery issues are not before the Court in connection with the present Motion, it is noteworthy that the CIA has resisted discovery at every turn. In fact, Magistrate Judge Larson had to order "the CIA to respond in earnest to all of Plaintiffs' RFPs." (Nov. 12, 2010 Order (Docket No. 178) at 17.) Yet, the CIA's obstruction of discovery continues. The CIA's supplemental initial disclosures failed to identify a single employee with knowledge of the testing programs. Moreover, during the deposition of a former contractor, Dr. Edward Pelikan, counsel for the CIA instructed the witness not to answer more than 130 times, preventing any substantive testimony about the CIA's involvement. (*See* Docket No. 190.)

[5] In light of the CIA's document destruction, Plaintiffs have sought — and should be permitted to continue seeking — discovery from the other defendants concerning the CIA's involvement in the testing programs. On August 4, 2011, Magistrate Judge Corley removed one of the many obstacles to that endeavor: she overruled the Department of Defense's objection to providing Rule 30(b)(6) testimony concerning the CIA's involvement in the testing programs and ordered that deposition to proceed. (*See* Docket No. 250 at 20:4-6.) As Plaintiffs have informed the CIA, they have no interest in pursuing any claim for which they have no factual basis. For that reason, if at the conclusion of discovery, Plaintiffs do not have sufficient evidence to continue to pursue a "secrecy oath" claim against the CIA, they will withdraw it at that time. The Complaint certainly alleges enough facts, however, to permit Plaintiffs to seek discovery in support of this claim.

and in some cases prevented Swords from being able to provide — comprehensive legal services to these veterans." (*See* 3AC ¶¶ 28, 158.) Ignoring this allegation, the CIA makes the curious argument (without authority) that because the Complaint describes the secrecy obligations of these veterans as "perceived" secrecy obligations, that these allegations fall short of establishing that Swords has standing. (Mot. at 15.) This argument presents a fine Catch-22: the Complaint alleges that the secrecy oaths have prevented test veterans from sharing details of their experiences with Swords — including details concerning the secrecy oaths — yet the CIA faults the lack of a specific allegation that any specific test subject had "secrecy oaths *with the CIA*." (Mot. at 15.) This is sophistry at its finest, and ignores the allegations of concerted action, as discussed above. Moreover, it mischaracterizes the allegations concerning **Swords'** injury. Plaintiffs are not claiming that Swords cannot prove that these test veterans are obligated by secrecy oaths — that the secrecy oaths are only "perceived." Rather, the injury to Swords exists entirely because the *secrecy oaths themselves* preclude Swords' ability to effectively assist test veterans hindered by them. (3AC ¶ 28, 158.) The Complaint, especially when construed in Plaintiffs' favor, alleges that Swords — like the other Plaintiffs — has standing.

Taking all of Plaintiffs' allegations as true and construing them in the light most favorable to Plaintiffs, the Court must deny the CIA's Motion for Judgment on the Pleadings. Plaintiffs have given Defendants "fair notice of a legally cognizable claim and the grounds on which it rests." (*See* May 31, 2011 Order at 5 (citing *see Twombly*, 550 U.S. at 555).)

II. THE CIA WILL REMAIN A DEFENDANT REGARDLESS OF THE COURT'S RESOLUTION OF THE MOTION BECAUSE THE CIA ONCE AGAIN HAS IGNORED PLAINTIFFS' CONSTITUTIONAL CLAIMS.

Regardless of the outcome of the CIA's Motion, the CIA will remain a defendant based on Plaintiffs' Constitutional due process claims, which Defendants never have challenged on the merits and which the Court never has dismissed. Plaintiffs are compelled to raise this issue because the CIA's Motion erroneously asserts that the "secrecy oath" claim is the sole remaining claim against the CIA, and requests that the Agency be dismissed from the case entirely based on the requested dismissal of the "secrecy oath" claim. (Mot. at 27.)

In every version of the Complaint from the beginning of this litigation, Plaintiffs have

asserted that Defendants violated Plaintiffs' Constitutional due process rights as a basis for seeking declaratory and injunctive relief requiring Defendants to notify test subjects. (*See, e.g.*, Docket No. 1 ¶¶ 162, 165; Docket No. 31 ¶¶ 177, 180; Docket No. 53 ¶¶ 186, 189; Docket No. 180 ¶¶ 186, 189.) For example, the current Third Amended Complaint alleges:

> A present controversy exists between Plaintiffs and DEFENDANTS in that Plaintiffs contend and DEFENDANTS deny that DEFENDANTS violated Plaintiffs' property and liberty rights protected by the Due Process Clause of the Fifth Amendment to the United States Constitution by concealing (and continuing to conceal) the extent and nature of the tests conducted on Plaintiffs and the known or suspected effects of such experiments, and failing to provide adequate medical treatment to Plaintiffs after Plaintiffs were discharged from the military.

(3AC ¶ 186; *see also id.* ¶ 184.) Many other sections of the Complaint elaborate on the facts upon which these claims are based, including, *inter alia*, notice, consent, and the deprivation of property rights.

Defendants themselves have *previously acknowledged the existence of the Constitutional due process grounds* for Plaintiffs' claims. In framing the standing argument in their first Motion to Dismiss, for example, Defendants acknowledged that, "Plaintiffs claim that Defendants violated their rights under the Fifth Amendment Due Process Clause." (Docket No. 29 at 20.) Moreover, in opposing Defendants' Motion to Dismiss the First Amended Complaint, Plaintiffs clearly articulated two of the due process theories underlying their claims for notice and health care. (*See* Docket No. 43 at 22-23 ("Defendants violated due process and fundamental constitutional rights (and binding regulations) by subjecting Plaintiffs to testing without informed consent and by failing to provide follow-up information and healthcare." (citing *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 813 (S.D. Ohio 1995) & *United States v. Stanley* 483 U.S. 669, 690 (1987) (Brennan, J., dissenting)).) Following the Court's January 19, 2010 Order, which did not evaluate, let alone dismiss, the Constitutional due process claims, the Court has had no occasion to consider or rule on the Constitutional bases for seeking notice and other relief against any of the defendants, including the CIA.

In their latest Partial Motion to Dismiss in December 2010, the CIA characterized Plaintiffs' injunctive and declaratory request for notice as *arising under the APA*, and neglected to address the Constitutional basis for the claims. (*See* Docket No. 187.) The CIA argued that a state tort common-law duty was not enforceable against the CIA through the APA and that the Court lacked jurisdiction to address Plaintiffs' request for notice under the APA because the Complaint did not identify any discrete agency action that the CIA was required to take. (Docket No. 187 at 6, 12.) Unremarkably, Plaintiffs' Opposition to that motion responded only to these APA-based arguments. (*See* Docket No. 217.) Because the CIA did not challenge or even mention Plaintiffs' Constitutional due process claims, Plaintiffs did not brief the due process claims, and the Court's order necessary could not and did not dismiss them.

The Constitutional due process claims also surfaced more recently in the discovery context. The parties discussed those claims in their meet-and-confer process, and both parties raised the issue with the Magistrate Judge in two recently filed Joint Statements of Discovery Dispute. (*See* Docket Nos. 239 at 5-6 & 240 at 4-5.)[6] In fact, the CIA's statement filed with the Magistrate Judge states that "[i]f 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*." (Docket No. 240 at 5 (emphasis added).) Yet, the CIA *once again* — in its *fifth* motion challenging the pleadings — fails to mention, move against, or make any argument with respect to those claims. Instead, the CIA asks the Court to dismiss the secrecy oath claim against it, while simultaneously representing to the Court that dismissal of that claim would leave no claims pending against the CIA — a bald and serious misrepresentation. The CIA cannot properly move to dismiss Plaintiffs' Constitutional due process claims by negative inference.

[6] Indeed, during the August 4, 2011 discovery hearing, the CIA attempted to argue that it should not be subject to further discovery, in part, because it disagreed that Plaintiffs had a viable Constitutional due process claim. The Magistrate Judge quickly dispensed of that argument, noting that the due process claim was clearly *in the Complaint* — without reaching the question of whether this Court already had addressed it. (*See* Docket No. 250 at 12:23-25.) Yet, the CIA has since made no apparent effort to correct its serious misrepresentations to the Court.

If the CIA intended to argue that Plaintiffs have somehow "disavowed" their Constitutional due process claims — as it suggests in the joint statements of discovery dispute — the CIA was required to make that argument in its original motion, which it clearly did not do.[7] And, in the context of a motion for judgment on the pleadings, the CIA simply could not argue that the relief Plaintiffs seek is not grounded in alleged violations of their Constitutional due process rights. (*See, e.g.*, 3AC ¶ 184, 186.)

Simply put, the CIA's Motion does not seek judgment on the pleadings with respect to the Constitutional due process basis for Plaintiffs' requested relief, and the Court never has dismissed Plaintiffs' Constitutional due process claims. Thus, although Plaintiffs are prepared to respond, at the appropriate time, to any arguments that the CIA (or any other Defendant) may advance with respect to the Constitutional due process basis for Plaintiffs' requested relief, the CIA will remain a defendant in this action regardless of the Court's resolution of the CIA's Motion for Judgment on the Pleadings.

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[7] For example, in Defendants' section of the parties' recent Joint Statement of Discovery Dispute (Docket No. 240 at 5), the CIA claimed that Plaintiffs had represented "that they were not alleging a constitutional claim for notice and medical care." (*See id.* (citing Docket No. 43 at 24 & Pls.' Am. & Supp. Resps. to Defs.' Interrogs. Nos. 2, 6, 8).) The quoted statement, however, was responding to Defendants' argument that "[t]here is no *First Amendment* right to access government information." (*See* Docket No. 34 at 19 (emphasis added).) As such, the statement did not address the *Fifth Amendment* due process basis for Plaintiffs' request that Defendants be required to notify test subjects, let alone "represent" that Plaintiffs were not pursuing a basis for relief plainly alleged — and later expressly realleged — in the Complaint. (*See, e.g.*, 3AC ¶ 186.) Regardless, Plaintiffs' claims are articulated in their pleadings, not in negative inferences that Defendants seek to draw from statements in briefs responding to Defendants' motions which never addressed Plaintiffs' Constitutional due process claims at all.

CONCLUSION

As explained above, Plaintiffs respectfully request that the Court deny the CIA's Motion for Judgment on the Pleadings and, in the Alternative, Motion for Summary Judgment. In any event, given the status of Plaintiffs' other claims against the CIA, if the Court grants the CIA's Motion, Plaintiffs respectfully ask that the Court deny the CIA's request that it be dismissed from this action as a Defendant.

Dated: August 11, 2011

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