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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 29, 2011 2:00 p.m. **DEFENDANTS' MOTION FOR PROTECTIVE ORDER LIMITING DISCOVERY**

NOTICE OF MOTION AND DEFENDANTS' MOTION FOR PROTECTIVE ORDER LIMITING DISCOVERY

Please take notice that on September 29, 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, Defendants Central Intelligence Agency and its Acting Director Michael J. Morrell (collectively, "CIA") and the Department of Defense, its Secretary Leon Panetta, Department of the Army, and its Secretary John McHugh (collectively, "DoD"), by and through their attorneys, will, and do hereby, move the Court pursuant to Federal Rules of Civil Procedure 26(c) to grant Defendants' Protective Order Limiting Discovery. During a hearing before Magistrate Judge Corley on August 4, 2011, Judge Corley advised the parties that certain issues related to discovery must be addressed by the District Court in the first instance. Accordingly, the CIA seeks to stay all discovery against it on the basis that Plaintiffs have a single claim against it and Plaintiffs' discovery requests far exceed that claim and Plaintiffs instead seek information that would be inadmissible in this action. Furthermore, as discussed in the CIA's pending motion for judgment on the pleadings, Defendants contend that the Court lacks jurisdiction over the CIA. Alternatively, discovery is not appropriate under the Administrative Procedure Act, in a class action under Federal Rule 23(b)(2), or pursuant to the Plaintiffs' facial bias claim against the Department of Veterans Affairs. With regard to DoD, discovery should be limited to testing programs that took place after 1953, the year in which the first memoranda allegedly creating duties of notice and health care were created.

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

Dated: August 15, 2011

Respectfully submitted,

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v.

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DEFENDANTS' MOTION FOR PROTECTIVE ORDER LIMITING DISCOVERY

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INTRODUCTION

After many months of extensive discovery, it has become clear that the parties' views of the scope of this litigation are intractably divergent. Despite numerous orders narrowing the scope of surviving claims in this action and requiring Plaintiffs to reduce their discovery requests, Plaintiffs' appetite for discovery into 70 years of government activities concerning chemical and biological testing, exposures, and research knows no limit. Defendants have produced over a million pages of documents, Plaintiffs have taken more than ten depositions (including a three-day 30(b)(6) deposition of a Department of Defense ("DoD") official), and Defendants have spent hundreds of thousands of dollars in discovery. Moreover, the only remaining claim against the Central Intelligence Agency ("CIA"),[1] which concerns the exceedingly narrow topic of secrecy oaths, is the subject of the CIA's pending motion for judgment on the pleadings. All these factors notwithstanding, Plaintiffs insist that they are entitled to wide-ranging discovery into every conceivable aspect of not only the Army test programs at issue, and also into any potential repositories of information concerning a wide range of substances tested or investigated at any since World War II. Plaintiffs also insist that, after months of litigation under the Administrative Procedures Act ("APA"), they are entitled to this discovery because, in their view, they have pending constitutional claims that have not been dismissed and that are not subject to the jurisdictional confines of the still-pending claims identified by the Court. Defendants disagree. These disagreements present a ripe dispute that calls for an orderly and timely resolution. Furthermore, at the request of Magistrate Judge Corley, Defendants address the issues to the District Court in the first instance, as they implicate questions concerning the District Court's prior orders. Accordingly, Defendants hereby seek a protective order and clarification from the Court.

[1] For purposes of this motion, the "Department of Defense" or "DoD" includes the Secretary of Defense Leon Panetta, the Department of the Army, and Army Secretary John McHugh. Robert Gates, who Plaintiffs had named as a defendant in his official capacity as Secretary of Defense, retired on July 1, 2011. Leon Panetta is the current Secretary of Defense and is automatically substituted for Robert Gates pursuant to Federal Rule of Civil Procedure 25(d). Additionally, the "Central Intelligence Agency," "CIA," or "Agency" encompasses Plaintiffs' claims against the Agency's Acting Director Michael J. Morrell.

BACKGROUND

In the wake of this Court's Order on Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, (Dkt. 59), three claims remained in this action: (1) "the lawfulness of the consent forms, to the extent that they required the individual Plaintiffs to take a secrecy oath"; (2) whether Defendants may be compelled to provide test participants with information about the nature of the tests; and (3) whether the individual Plaintiffs are entitled to medical care. (*Id.* at 12, 15, 17.) In a May 31, 2011 Order, the Court further limited these claims by dismissing Plaintiffs' notice and health care claims against the CIA. (Dkt. 233 at 11.) As even Plaintiffs recognized at the time, dismissal of the notice and health care claims left a single claim remaining against the CIA: "Plaintiffs also note that Defendants do not seek dismissal of the secrecy oath claim against the CIA. Thus, the CIA will remain a defendant in this action." (Dkt. 217 at 2 n.2.)

Despite this clear record, Plaintiffs now seek discovery from both the CIA and DoD on the basis of an alleged constitutional claim to notice and health care. Plaintiffs also refuse to acknowledge that, even with regard to their APA claims, further discovery is not warranted due to the limited review available in APA cases. During a discovery dispute hearing before Magistrate Judge Corley on August 4, 2011, the Magistrate Corley acknowledged that Plaintiffs' Third Amended Complaint "includes in the heading 'Constitutional' and 'APA' claims." (Ex. A to Herb Decl. at 12.) She then noted that "it's interesting because you look at each cause of action, it doesn't specify whether it's APA or Constitutional." (*Id.* at 13.) Nonetheless, she recognized that "there has not been a motion before [the District Court] to essentially preclude all discovery on the ground that it's an APA claim" and accordingly decided that "I think that is an issue for Judge Wilken. She is the one that knows what's in the complaint. She is the one to know what's been dismissed or not." (*Id.* at 13:4–9.) Because Magistrate Judge Corley directed the parties to address these issues in the first instance with this Court, Defendants hereby file the present motion for a protective order limiting discovery regarding Plaintiffs' alleged constitutional and APA claims. Defendants also seek to limit discovery related to Plaintiffs' facial bias claim against the Department of Veterans Affairs ("VA").

While Defendants are seeking a protective order before this Court related to the basis of

and right to discovery for the claims remaining in this action, the Magistrate Judge also has set a briefing schedule to consider other aspects of the parties' discovery disputes. In this briefing, Defendants will raise relevance or burden objection not addressed here. (Ex. A to Herb Decl. at 114–18.) The issues raised below, however, concern predicate questions regarding the claims remaining in this action and the scope of permissible discovery related thereto. As such, Defendants respectfully request that this Court coordinate with the Magistrate Judge regarding resolution of these issues.

ARGUMENT

I. THIS COURT SHOULD LIMIT ALL DISCOVERY DIRECTED TO THE CIA

As discussed above, Plaintiffs presently only have one remaining claim against the CIA, that is subject to a motion pending before the Court. (Dkt. 249). Nonetheless, Plaintiffs continue to seek extensive discovery from the CIA that would require it to search for and produce countless documents, respond to more than 140 requests for admission, and spend a considerable amount of time preparing Rule 30(b)(6) testimony, and yet none of this information would be admissible in an existing claim to this action. First, Plaintiffs seek extensive discovery regarding the nature of the CIA's behavior modification programs under the guise that these requests ostensibly relate to Plaintiffs' constitutional claims for notice and health care. However, since this Court's January 2010 Order significantly limited the scope of the remaining claims, Plaintiffs have not asserted that they have constitutionally-based notice and health care claims against the CIA. To the contrary, they have explicitly stated that their notice claim is not based on the Constitution, and they voluntarily conceded their health care claim. In any event, in May 2011, this Court dismissed these claims as they applied to the CIA in their entirety, and thus Plaintiffs are not entitled to discovery on these claims. Second, even if we accept as true that Plaintiffs have constitutional claims remaining against the CIA, those claims must be decided on the CIA's certified Administrative Record. Third, Plaintiffs are not entitled to discovery from the CIA regarding the health effects of over 40 substances that were only allegedly tested on service members by DoD. Such information would only be necessary if this Court were going to conduct a trial on the merits on each service member's individual claim (of which there are potentially

thousands). In this case, however, such discovery is inappropriate because the Court's review in an APA case is quite narrow and because a Rule 23(b)(2) class action is limited to the evaluation of group, not individual, injuries. Fourth, because Plaintiffs have a sole claim against the VA, which the Court has construed as a "facial attack on the DVA as the decision-maker," Plaintiffs may not seek discovery from the CIA to impute this knowledge to the VA. Finally, this Court should stay all requests for admission pending resolution of the CIA's pending motion for judgment on the pleadings. As a result, this Court should limit all discovery directed to the CIA.

A. Plaintiffs Do Not Have Constitutional Claims for Notice and Health Care Against the CIA, and Thus Are Not Entitled to Discovery on These Claims

There are three separate and independent reasons to conclude that Plaintiffs do not have a constitutional claim for notice and health care against the CIA.[2] First, in its January 2010 Order, this Court made clear that Plaintiffs' notice and health care claims arose under the APA. Second, the CIA argued in its November 2010 Partial Motion to Dismiss that Plaintiffs had failed to identify *any* substantive right to notice and health care. In their opposition, not only did Plaintiffs concede that there was no "independent duty" for the CIA to provide medical care, but they expressly stated that their claim for notice arose under the APA. Thus, when the Court agreed that Plaintiffs had failed to identify an substantive right to notice and health care, it dismissed these claims in their entirety. Third, Plaintiffs have disavowed to this Court having a notice and health care claim predicated on the Constitution, and they have repeatedly failed to identify the Constitution as a basis for their notice and health care claims against the CIA. Thus, Plaintiffs are not entitled to discovery on these issues.

1. Assuming *Arguendo* that Plaintiffs Ever Had Notice and Health Care Claims Under the Constitution, They Did Not Survive This Court's January 2010 Order

[2] Assuming *arguendo* Plaintiffs properly maintained a claim under the Constitution for notice and health care, such claims would lack merit as a matter of law. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) ("There is no discernable basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information."). Nor is the government aware of any case law to support the proposition that Plaintiffs enjoy a constitutional right to health care from the federal government. Of course, to the extent the Court deems that these constitutional claims remain in this case, Defendants respectfully request the opportunity to provide additional briefing on the merits of these constitutional claims.

Liability may be imposed upon instrumentalities of the United States such as the CIA only if two requirements are met: (1) there must be a waiver of sovereign immunity; and (2) there must be a source of substantive law that provides a claim for relief against that instrumentality. *See U.S. Postal Serv. v. Flamingo Indus.*, 540 U.S. 736, 743 (2004); *F.D.I.C. v. Meyer*, 510 U.S. 471, 483–84 (1994); *Currier v. Potter*, 379 F.3d 716, 724 (9th Cir. 2004). A waiver of sovereign immunity by itself is not sufficient; both conditions must be established by the plaintiffs. As the Supreme Court has stated, "An absence of immunity does not result in liability if the substantive law in question is not intended to reach the federal entity." *Flamingo Indus.*, 540 U.S. at 744.

Assuming *arguendo* Plaintiffs ever asserted the Constitution as the source of the substantive right to notice and health care, it is plainly apparent that such an assertion did not survive this Court's January 19, 2010 Order. As noted by the Court at the time, Defendants had "move[d] to dismiss Plaintiffs' Second Amended Complaint (SAC) *in its entirety* for lack of subject matter jurisdiction and for failure to state a claim." (Dkt. 59 at 1) (emphasis added). Among other things, Defendants argued that "[w]ith respect to Plaintiffs' claims for documents and other information [and] medical care, . . . the claims fail under the Rule 12(b)(6) standard." (Dkt. 34 at 20). There is nothing in this sentence or the remainder of Defendants' brief that limited this 12(b)(6) argument to agency regulations and memoranda as enforced through the APA. To the contrary, with respect to their notice claim, Defendants expressly argued that "Plaintiffs have no constitutional right to government information." (Dkt. 57 at 21). Indeed, at the time, Plaintiffs agreed with Defendants and represented to the Court that they "***do not seek relief based on . . . a 'constitutional right to information***.'" (Dkt. 43 at 24) (emphasis added). Instead, Plaintiffs asserted that their notice claim was based only on Defendants "own duties and regulations." (*Id.*). With respect to their health care claim, Plaintiffs similarly represented that the claim was "based on Defendants' obligation to provide medical care as required by their own duties and regulations" and again Plaintiffs made no mention of the Constitution. (*Id.*).

Not surprisingly then, when the Court identified the specific bases set forth by Plaintiffs as underlying their notice and health care claims, it did not mention the Constitution and instead only referenced the "duties and regulations" cited by Plaintiffs. With regard to Plaintiffs' notice

claim, the Court noted that "Plaintiffs cite the Wilson Directive, AR 70-25 (1962) and a DOJ opinion letter to show that Defendants had a legal duty to act." (*Id.* at 14; *see also id.* at 7 ("To demonstrate Defendants' legal obligation to disclose information, Plaintiffs cite various documents, including a 1978 DOJ opinion letter."); *id.* at 16 ("Plaintiffs' claims . . . [arise] under Defendants' own memoranda and regulations, and the common-law duty to warn.").) With respect to Plaintiffs' claim for medical care, the Court accurately recounted that "Plaintiffs assert that their right to medical care arises from 'obligatory duties' imposed by Defendants' own regulations." (*Id.* at 16; *see also id.* at 7 ("With regard to medical care, Plaintiffs assert that Defendants' legal duties arise from previously confidential Army documents and the 1962 version of AR 70-25.").) Accordingly, when the Court sustained Plaintiffs' notice and health care claims against the CIA in response to the Defendant's motion to dismiss the complaint in its entirety, it only did so only on the basis of the DOJ opinion and AR 70-25, not the Constitution. Plaintiffs did not move for reconsideration of this Order at the time. In such circumstances, the equities demand that Plaintiffs be estopped from re-casting their claims at this late stage. *See Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996) ("Judicial estoppels . . . precludes a party from gaining an advantage" by taking successive inconsistent positions); *see also Wagner v. Prof'l Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1044 (9th Cir. 2004) ("Judicial estoppel applies to a party's stated position whether it is an expression of intention, a statement of fact, or a legal assertion.").

2. The Court Dismissed Plaintiffs' Notice and Health Care Claims in Their Entirety Because Plaintiffs Failed to Identify *Any* Enforceable Basis for Them

Even putting aside the foregoing, there is no question that the Court dismissed Plaintiffs' notice and health care claims against the CIA in their entirety in its May 2011 Order. In December 2010, the CIA sought to dismiss Plaintiffs' notice and medical care claims in full, regardless of their potential legal basis. Defendants' partial motion to dismiss made clear that "[t]he 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.) Nothing in that language could be construed as limiting Defendants' partial motion to only some legal bases for the notice and health care claims. Indeed, Plaintiffs themselves recognized the broad sweep of the CIA's motion: "In a renewed effort to deprive Plaintiffs of their day in court, Defendants seek to dismiss [] Plaintiffs' notice and healthcare claims against the CIA." (Dkt. 217 at 1.)

In fact, Defendants expressly sought dismissal because Plaintiffs had not identified *any* enforceable, legal basis for an entitlement to notice or health care. With regard to notice, Defendants' argument was simply that "Plaintiffs have failed to establish an enforceable, substantive legal right to notice." (Dkt. 187 at 12). This argument was not limited to what Plaintiffs have deemed to be "APA claims." Rather, the entire thrust of the argument was that the APA does not create substantive rights and that, in addition to showing a waiver of sovereign immunity under 5 U.S.C. § 702, "Plaintiffs must [also] identify a source of substantive law that would require the CIA to provide notice to Plaintiffs." (Dkt. 187 at 1). Because state law (as articulated in the DOJ opinion) was the only potential basis that Plaintiffs had articulated for their notice claim, Defendants argued that "the legal duty that Plaintiffs are attempting to impose on the CIA through their notice claim does not arise from an independent ***federal legal authority***." (*Id.* at 8 (emphasis added).) Similarly, with respect to the health care claim, Defendants argued that "[b]ecause Plaintiffs have failed to identify *any legal basis in the Third Amended Complaint* for obligating the CIA to provide health care, Plaintiffs' *claims* for medical care must fail and should be dismissed under Rule 12(b)(6)." (*Id.* at 17 (emphasis added).) In light of these clear statements in Defendants' partial motion that Plaintiffs' claims lacked any enforceable legal basis, Plaintiffs were obligated to identify any and all alternate bases in their opposition.

Plaintiffs' insistence that they have a constitutional claim for notice and health care is even more confounding in light of statements made in their opposition. With regard to Defendants' arguments regarding the health care claim, not only did Plaintiffs drop this claim when they failed to respond to any of the CIA's arguments, but they also voluntarily conceded that "the medical care remedy they seek for test participants does not depend on the CIA's provision of that care." (Dkt. 217 at 2 n.2.) Then, they clarified that what they were seeking

from the CIA was an order requiring the CIA provide "basic (yet critical) information about the identity of the substances and does they received and the health effects." (*Id.*) Plaintiffs then expressly stated that "[t]he Court can achieve this result by enforcing the CIA's duty to notify test participants under Section 706(1) of the APA without finding (or enforcing) an independent duty for the CIA to provide medical care." (*Id.*) Thus, by Plaintiffs' own statements in response to the Partial Motion to Dismiss, they were conceding that (1) there was no *independent duty* for the CIA to provide medical care, and (2) they viewed their notice claim as being litigated under Section 706(1). Perhaps even more telling is the representation that Plaintiffs made in the very next sentence of their opposition, when they stated that "Plaintiffs also note that Defendants do not seek dismissal of the secrecy oath claim against the CIA. Thus, the CIA will remain a defendant in this action [even if the pending motion was granted]." (*Id.*) If Plaintiffs believed they had independent, viable claims for notice and medical claims under the Constitution, it is curious that they did not mention them in this footnote or elsewhere in their opposition.

In truth, even Plaintiffs recognized their obligation to identify alternate bases in support of their notice and medical care claims. In response to Defendants' arguments regarding the notice claim, Plaintiffs contended that the CIA's "motion fundamentally mischaracteriz[ed] Plaintiffs' notice claims as being 'solely rel[iant] on state tort law'" and then Plaintiffs identified what they believed were several alternative bases for their notice claims under federal law. (Dkt. 217 at 2.) If Plaintiffs believed the Constitution was yet another basis, they were obligated to identify this at the same time. Additionally, if Plaintiffs believed that the Constitution provided a viable basis for their health care claim, they were likewise obligated to identify that basis in their opposition as they had done by providing an alternate basis for their notice claim. But Plaintiffs did not do so.

The Court took note of Plaintiffs' concession that they did not seek the provision of medical care from the CIA, and then further stated that "Plaintiffs do not offer any other response to Defendants' arguments regarding this claim." (Dkt. 233 at 5–6.) The Court declared: "Accordingly, these claims are dismissed." (*Id.* at 6.) With regard to Plaintiffs' notice claim, the Court noted that "[n]othing now cited by Plaintiffs supports their claim against the CIA for notice." (*Id.* at 7.) Once again, the Court then dismissed this claim in its entirety: "Accordingly,

the Court dismisses Plaintiffs' claim against the CIA for its alleged failure to notify them about their chemical exposures and the known health effects, and failure to provide all available documents and evidence concerning their exposures." (*Id.* at 8.) There is nothing in this language that limits or in any way qualifies the dismissal of Plaintiffs' notice and health care claim in the manner Plaintiffs now suggest. As with the January 2010 Order, Plaintiffs have not moved for reconsideration of this Order.

3. Plaintiffs Have Repeatedly Disavowed the Constitution as a Basis for their Notice and Health Care Claims, and Therefore, They Should Be Estopped from Asserting It Now

Plaintiffs' eleventh-hour assertion of some alleged constitutional basis for their notice and health care claims against the CIA is squarely contradicted by Plaintiffs' *repeated* representations to the Court and Defendants. As noted above, in Plaintiffs' Opposition to Defendants' Motion to Dismiss First Amended Complaint, Plaintiffs informed the Court that they "do not seek relief based on . . . a 'constitutional right to information'" and instead stated that "Plaintiffs assert a proper claim for relief requiring Defendants' to provide information as required by their own duties and regulations." (Dkt. 43 at 24.) In that same filing, Plaintiffs stated that their "claim for medical care is . . . based on Defendants' obligation to provide medical care as required by their own duties and regulations." (*Id.*) Similarly, Plaintiffs failed to identify the Constitution as the basis of their claims in yet another filing: "Plaintiffs . . . seek to force Defendants to finally fulfill their obligation to locate participants in these tests and to notify them regarding those exposures, to compel Defendants to provide healthcare to test participants as required by Defendants' own regulations." (Dkt. 151 at 2; *see also* Dkt. 216 ("The complaint in this action, the Court's substantive and discovery rulings, and the parties' actions throughout discovery all confirm that this is an action under Section 706(1) of the APA.").) Plaintiffs are bound by these representations to the Court, which make clear that Plaintiffs have never sought relief based on some independent claim for notice and medical care arising under the Constitution.

Nor had Plaintiffs previously identified in their interrogatory responses that the Constitution was a basis for their notice and health care claims against the CIA, a fact which they now seek to disguise. In Plaintiffs' March 2011 responses to Defendants' interrogatories,

Plaintiffs failed to identify the Constitution as a legal basis for their notice and medical care claims in response to several interrogatories seeking this information, despite identifying several other potential legal bases. (Ex. B to Herb Decl. at Nos. 2, 6, 8.) Defendants noted the absence of the Constitution as a basis for Plaintiffs' notice and health care claims in correspondence between the parties on June 13, 2011. (Ex. C to Herb Decl.) Yet, Plaintiffs still did not amend their interrogatory response until just twelve days ago. It was only upon the filing of the CIA's seeking to dismiss the sole remaining claim against it that Plaintiffs amended their interrogatory response to include the Constitution as a basis for their notice claim against the CIA.[3] (Ex. D to Herb Decl.) Plaintiffs' eleventh-hour attempt to recast their claims, effectively seeking to amend their complaint by motion, should not be rewarded. *Rissetto,* 94 F.3d at 600 ("Judicial estoppels . . . precludes a party from gaining an advantage" by taking successive inconsistent positions); *see also Wagner,* 354 F.3d at 1044 ("Judicial estoppel applies to a party's stated position whether it is an expression of intention, a statement of fact, or a legal assertion.").

4. This Court Should Deny All Discovery Ostensibly Related to Plaintiffs' Alleged Notice and Health Care Claims Against the CIA

Rule 26 provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." As such, Plaintiffs may not seek and obtain information related to claims that have been dismissed. In fact, courts have held that "it is proper to deny discovery of [a] matter that is relevant only to claims or defenses that have been stricken . . . ." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 (1978); *Jane Doe 130 v. Archdiocese of Portland in Or.*, 717 F. Supp. 2d 1120, 1141 (D. Or. 2010) (finding discovery requests irrelevant where, though "likely of significant relevance to [Plaintiff's] voluntarily withdrawn misrepresentation claim, they are not of clear relevance to her remaining claims").

In this case, as discussed extensively above, Plaintiffs have disavowed any right to health care from the CIA and have expressly said that their right to notice did not arise under the Constitution. Furthermore, because this Court found that Plaintiffs had not identified any

[3] To this day, Plaintiffs have still not amended their interrogatories to identify the Constitution as a basis for their health care claim against the CIA.

enforceable, substantive right to notice and health care, this Court then dismissed these claims in their entirety. Nevertheless, Plaintiffs are still actively seeking discovery predicated on their non-existent constitutional claims for notice and health care. Currently, Plaintiffs seek Rule 30(b)(6) deposition testimony from the CIA regarding "the CIA's involvement (whether direct or through financial support) in the TEST PROGRAMS . . . and any CIA experimentation involving substances identified on Plaintiffs' March 21, 2011 narrowed list also administered to any TEST SUBJECT as part of the TEST PROGRAMS." (Dkt. 239 at 4.) On its face, this request seeks information on every project within CIA's behavior modification programs, regardless of whether that program had some nexus to service members. Furthermore, it would require the CIA to review every document related to those test programs, including information regarding the financing, employees, administration, approval, conduct, etc. of the programs to become educated on these irrelevant topics in order to provide testimony. Plaintiffs have also served a request for production seeking information related to "the drugs and substances the CIA obtained from drug and pharmaceutical companies, other government agencies, including the VA, NIH, FDA, and EARL . . ."[4] (Ex. F to Herb Decl. No. 60.) Additionally, Plaintiffs have served numerous requests for admissions ostensibly related to Plaintiffs' notice and health care claims that seek admissions regarding, among other issues, the CIA's funding of and participation in the test programs, its notice efforts related to the test programs, and its document handling following conclusion of the test programs. (*See* Ex. E to Herb Decl. (Request Nos. 17, 19–22, 24–25, 27–34, 94, 105, 108, 119, 121, 122).) Finally, Plaintiffs seek deposition testimony, the production of documents, and numerous admissions regarding the alleged health effects of the test programs—the very same information the Court previously ruled that Plaintiffs were not legally entitled to on the merits.[5] (Dkt. 239 at 4; Dkt. 240 at 3–4; Ex. E to Herb Decl. (Request Nos. 33–93, 99, 106,

[4] While Plaintiffs have also argued this request is relevant to their facial bias claim against the VA (which is addressed below in Part I.D), the request on its face is not so limited. Clearly, Plaintiffs are seeking documents that concern alleged relationships between the CIA and not only non-party government agencies, but also private drug and pharmaceutical companies.

[5] The Court's May 31, 2011 Order the Court found that Plaintiffs had no cause of action against the CIA for its alleged "failure to notify them about their chemical exposures and the known health effects, and failure to provide all available documents and evidence concerning their exposures." (Dkt. 233 at 8). Yet Plaintiffs are continuing to seek the very same "health

(Footnote continues on next page.)

136–141.) Because Plaintiffs do not, as a matter of fact, have any remaining claims for notice or health care against the CIA, discovery on these subjects must be denied.

B. Even if Plaintiffs Had Claims Remaining Against the CIA, Discovery Would Not Be Appropriate Because those Claims Must Be Decided on the Basis of the CIA's Administrative Record.

Even if Plaintiffs' recent contention that they have notice and health care claims against the CIA that are based on the Constitution had merit, the APA's strict limits on the scope of judicial review would nonetheless apply. Regardless of how they want to characterize their purported claims, Plaintiffs are challenging the constitutionality of a federal agency's actions. Section 706 of the APA sets forth the proper scope of judicial review in precisely these types of actions. On its face, Section 706 of the APA states that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret *constitutional* and statutory provisions, and determine the meaning or applicability of the terms of an agency action." (Emphasis added.) Section 706 also allows the court to "hold unlawful and set aside agency action . . . found to be . . . contrary to constitutional right, power, privilege, or immunity," 5 U.S.C. § 706(2)(B)—precisely the type of ruling that Plaintiffs are seeking here. However, the same section of the APA directs that "[i]n making the [these] determinations, the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. Thus, the APA makes clear that, even if a party were to bring a constitutional challenge to an agency's actions, such a claim must be reviewed and decided upon the basis of the agency's record.

Courts have confirmed that "[t]he APA's restriction of judicial review to the administrative record would be meaningless if any party seeking review based on . . . constitutional deficiencies was entitled to broad-ranging discovery." *Harvard Pilgrim Health Care v. Thompson*, 318 F. Supp. 2d 1, 10 (D.R.I. 2004); *see also Gilbert v. Johnson*, 601 F.2d 761, 766 (5th Cir. 1979); *Malone Mortg. Co. v. Martinez*, No. 3:02-cv-1870, 2003 WL 23272381, at *2, *5 (N.D. Tex. Jan. 6, 2003). Discovery is particularly unwarranted when the facts

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effects" information—and much more—from the CIA in discovery. Allowing this discovery would render the Court's May 31, 2011 Order a nullity.

underlying an alleged constitutional claim are the same ones implicated in a challenge based on other provisions of federal law: "Nothing in the opinion supports plaintiffs' position that they should be allowed discovery of facts, *identical* to those argued in support of their APA claims, simply because such facts are argued to support their separate theory of recovery, their procedural due process claims." *Alabama-Tombigbee Rivers Coal. v. Norton*, No. CV-01-S-0194, 2002 WL 227032, at *5 (N.D. Ala. Jan. 29, 2002); *see also id.* ("plaintiffs are not entitled to discovery on their due process claim, and . . . such claim is limited to the administrative record"); *Tafas v. Dudas*, 530 F. Supp. 2d 786, 802–03 (E.D. Va. 2008) ("[Defendant agency] contends that [plaintiff] is not entitled to discovery on his constitutional claims because the administrative record already contains all of the documents required . . . . The Court agrees with [defendant] that the administrative record is sufficient for the Court to render a final decision as to the constitutionality of the Final Rules.").

The CIA certified Administrative Record, (Dkt. 208), contains a thorough accounting of the CIA's previous determination (made in the 1970s) that it had no duty to provide notice or health care to any volunteer service members. Though Plaintiffs filed a motion to strike that Administrative Record, (Dkt. 211), this Court denied the motion, (Dkt. 233 at 10). Thus, even if this Court were to find that Plaintiffs had constitutional claims for notice and health care against the CIA, the certified Administrative Record would form the basis of review of those constitutional claims. For the reasons discussed in further detail in Part I.C below, Plaintiffs cannot seek discovery in an attempt to create a new record. If the Court finds that the CIA's Administrative Record is insufficient, the proper remedy is to remand the matter to the Agency. As the Ninth Circuit has explained, "If the court determines that the agency's course of inquiry was insufficient or inadequate, it should remand the matter to the agency for further consideration and not compensate for the agency's dereliction by undertaking its own inquiry." *Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980). Accordingly, Plaintiffs are not entitled to discovery on the Rule 30(b)(6) topics, requests for admissions, and requests for production identified above, or on any other discovery request directed at some alleged CIA obligation to provide notice or health care.

C. The Court Should Limit Discovery Directed to the CIA for Plaintiffs' Claims Against DoD

Plaintiffs currently seek Rule 30(b)(6) testimony and the production of documents from the CIA regarding (1) any possible health effects associated with substances tested on service members as part of a CIA test program and (2) any possible health effects associated with substances used by DoD as part of its test programs. (*See* Dkt. 239 at 4–5; Dkt. 240 at 3–4.) In addition, Plaintiffs have served more than forty requests for admissions that request that the CIA admit, among many other issues directly related to DoD, "that neither DOD nor DOA has provided health care to TEST SUBJECTS," (RFA No. 1), "that DOD has not provided full information to the DVA regarding the possible health effects that may result from TEST SUBJECTS' participation," (RFA No. 18), and "that neither DOD nor DOA conducted regular follow-up with TEST SUBJECTS," (RFA No. 35). (Ex. E to Herb Decl. (RFA Nos. 1–8, 18, 23, 26, 35–38, 95–98, 100–04, 107, 109–18, 120, 123–35).) There is no basis for this discovery.

1. Information Possessed By the CIA, If Any, Concerning the Health Effects of Substances Tested By DoD Would Not Be Admissible Against DoD

With regard to Plaintiffs' requests for information related to health effects, the CIA has produced everything regarding any possible health effects associated with participation in the test programs. While the CIA's Administrative Record demonstrates that the CIA reached the conclusion that it never participated in or funded experiments on service members, the CIA nonetheless searched for and produced all non-privileged documents concerning EA 3167 and the "Boomer," the only substances mentioned as *potentially* being tested on volunteer service members as part of a CIA program. (Dkt. 208, Ex. 1.) Additionally, the CIA has provided Plaintiffs with more than 18,000 pages of previously-collected information regarding the CIA's behavior modification programs that did not involve service members, and these documents would form the basis of the CIA's response regarding the health effects of substances tested as a part of those programs.[6] (*Id*.) Thus, the CIA has provided Plaintiffs with (1) all information it

[6] As explained previously by the CIA, this document collection is the product of CIA's extensive efforts over the years to gather all historical records about its human test programs in

(Footnote continues on next page.)

has concerning the health effects of the substances it *contemplated* testing, but did not test, on service members, and (2) its historical collection of documents concerning its behavior modification programs that did not involve testing on service members, which would include related "health effects" information about these programs to the extent the CIA has that.

Plaintiffs, however, seek discovery from the CIA that extends far beyond the more than sufficient amount of information that the CIA has already produced. Among other things, Plaintiffs want the CIA to search for and produce any and all information concerning over forty substances tested on service members only by DoD, and Plaintiffs want the CIA to search across the Agency for this information from intelligence gathering contexts that have no nexus to the test programs at issue in this case or even human testing generally. Furthermore, as discussed above, Plaintiffs seek admissions from the CIA regarding DoD's alleged legal obligations and efforts related to its test programs. Such requests are not only irrelevant to the claims against the CIA, but it is also legally irrelevant to Plaintiffs' claims against DoD.

The CIA's production of documents concerning over forty test substances used on service members by DoD, to the degree the CIA has any such documents, would not be admissible in Plaintiffs' notice or health care claims against DoD because (a) this is an APA case, where the Court is limited to reviewing information previously put before DoD and (b) this is a proposed Rule 23(b)(2) class action, where only class-wide (not individual) injuries may be litigated.

a. CIA's Response to Discovery Would Not Result in Information Admissible in an APA Action

Any information that the CIA possesses about the health effects of substances tested by DoD would not be relevant or admissible in Plaintiffs' claims against DoD, as the Court's review is necessarily circumscribed and the Court cannot conduct a *de novo* review of the alleged health effects of any substance. As the Supreme Court explained, "the focal point for judicial review should be the administrative record already in existence, *not some new record* made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (emphasis added). "The task of

(Footnote continued from previous page.)

response to numerous congressional investigations, presidential commissions, FOIA requests, and FTCA claims. (Dkt. 134-2 at 3–5).

the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) (citation omitted). If this record "does not support the agency action, if the agency has not considered all the relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Id.* at 744. However, "[t]he *reviewing court is not generally empowered to conduct a de novo inquiry* into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Id.* (emphasis added); *see also Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980) (stating that a court cannot "compensate for the agency's dereliction by undertaking its own inquiry."). Accordingly, if there is a need for factual development in an APA case, that information must come from the government agency.[7]

This limited scope of review applies regardless of whether the case involves review under 706(1) or 706(2). The statute certainly makes no such distinction, as the plain text of the APA states that the court's review is based on the administrative record, regardless of whether the court is proceeding under 706(1) or 706(2). Under the APA, "[t]he reviewing court shall – (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Congress directed that "[i]n making the foregoing determinations [i.e., review under 706(1) or 706(2)], the court shall review *the whole record* or those parts of it cited by a party." *Id.* (emphasis added).

Furthermore, case law interpreting the APA confirms that all APA cases should proceed on the basis of a documentary record put forward by the agency-defendant. Indeed, courts have rejected arguments that 706(1) cases are not limited to review of an administrative record. *Sierra Club v. U.S. Dep't of Energy*, 26 F. Supp. 2d 1268, 1271 (D. Colo. 1998) (rejecting as meritless

[7] Consistent with this case law, and to facilitate the Court's review in this case, the Department of Defense and Department of the Army intend to seek leave of Court to file an administrative record.

the "plaintiff's position that 'this [706(1) case] is not a record review case'"). This is because "[t]he judicial review provisions of the APA do not distinguish between a claim that an agency unlawfully failed to act and a claim based on action taken. In both cases, the court's review of the defendant agencies' actions is generally confined to the administrative record." *Id.* As stated by another court in this Circuit, the APA "is relatively unambiguous in its statement that the administrative record should serve as the only basis for the Court's assessment of the validity [of the] agency's action *or inaction*, subject to a few judicially created exceptions." *Seattle Audubon Soc'y v. Norton*, No. C05-1835L, 2006 WL 1518895, at *1 (W.D. Wash. May 25, 2006) (emphasis added) (citing 5 U.S.C. § 706); *see also Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563, 570 (N.D. Tex. 1997) (stating that "[f]or either" 706(1) or 706(2), "judicial review must be based on the administrative record already in existence"). If anything, the role of a reviewing court in a 706(1) case is even more limited: "§ 706(1) generally only allows the district court to compel an agency to take action, rather than compel a certain result." *Mount St. Helens Mining & Recovery Ltd. P'ship v. United States*, 384 F.3d 721, 728 (9th Cir. 2004) ("§ 706(1) of the APA does not empower the district court to conduct a de novo review . . . and order the agency to reach a particular result."); *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004) APA: Legislative History, 79th Congress 1944–46, at 40 (1946).

Not only is Plaintiffs' 706(1) case against DoD limited to DoD's historical record setting forth or explaining its administrative actions (or perceived inaction), but Plaintiffs are not entitled to discovery beyond that from DoD, let alone from the CIA. While courts in this Circuit have admitted evidence outside the record in 706(1) cases, *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000); *Independence Min. Co., Inc. v. Babbitt*, 105 F.3d 502, 511 (9th Cir. 1997), the extra-record evidence has been limited to additional statements or studies *from the government agency explaining its position.* When deciding whether Plaintiffs are allowed to seek discovery beyond that extra-record evidence offered by the agency, courts have expressly foreclosed a plaintiff's right to addition discovery. In *Seattle Audubon Society*, the plaintiffs argued that the *Friends of the Clearwater* line of cases permitted "extensive discovery where the agency is sued for its failure to make any decision, rather than for having made the wrong

decision." 2006 WL 1518895, at *1. The court noted that the 706(1) cases permitting record supplementation were ones in which the agency sought to supplement the record for the "limited purpose" of explaining its delay. *Id.* The court also concluded that "the [APA] is relatively unambiguous in its statement that the administrative record should serve as the only basis for the Court's assessment of the validity agency's action or inaction." *Id.* (citing 5 U.S.C. § 706); *see also Sierra Club*, 26 F. Supp. 2d at 1271 ("The judicial review provisions of the APA do not distinguish between a claim that an agency unlawfully failed to act and a claim based on action taken. In both cases, the court's review of the defendant agencies' actions is generally confined to the administrative record." (citing *Saginaw*, 991 F. Supp. at 570); *Consejo de Desarrollo Economico de Mexicali v. United States*, 438 F. Supp. 2d 1207, 1221–22 (D. Nev. 2006).

Based upon the APA's clear language and court precedent interpreting it, this Court may not conduct a *de novo* review of the health effects associated with any substance allegedly tested by DoD, nor can it order DoD to reach specific conclusions related thereto. *See Mount St. Helens*, 384 F.3d at 727–28 (9th Cir. 2004). Plaintiffs' claims are limited to the historical record DoD produces. To the degree that this Court determines there are deficiencies in that record, the remedy available to the Court is a remand to DoD ordering it to reconsider the issue. As part of this remand order, the Court could conceivably direct DoD to obtain information from other governmental entities, including the CIA, but the Court may not consider that information in the first instance.[8] Thus, the discovery Plaintiffs seek from the CIA regarding the health effects of substances allegedly tested by DoD could not be admissible in relation to Plaintiffs' claims against DoD.

b. Plaintiffs' Requests Would Not Result in Admissible Evidence in a Rule 23(b)(2) Class Action

Likewise, this information would not be relevant to a putative class action under Rule 23(b)(2), which Plaintiffs have indicated they are pursuing in this case. In addition to meeting the

[8] Although these objections apply equally to DoD, in an effort to move discovery forward, DoD has provided massive numbers of documents responsive to Plaintiffs' inquiries regarding health effects, and elects not to move for a protective order at this time on this basis. Should the need arise, however, DoD may seek protection against further discovery beyond that already produced regarding health effects information.

commonality and other requirements of Rule 23(a), a (b)(2) class action may be certified only when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). As the Supreme Court recently explained in *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. ___, 131 S. Ct. 2541, 2550 (U.S. 2011):

> The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.' In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant.

Id. at 2557 (citation omitted). The Eleventh Circuit has also noted that "[a]t base, the (b)(2) class is distinguished from the (b)(3) class by class cohesiveness . . . . Injuries remedied through (b)(2) actions are really group, as opposed to individual injuries." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1155 n. 8 (11th Cir. 1983); *see also Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 162 (2d Cir. 2001) ("The (b)(2) class action is intended for cases where broad, class-wide injunctive or declaratory relief is necessary to redress a group-wide injury."); *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, AFL-CIO*, 216 F.3d 577, 580 (7th Cir. 2000) (stating that "Rule 23(b)(2) operates under the presumption that . . . the case will not depend on adjudication of facts particular to any subset of the class nor require a distinct remedies).

Although it is not necessary for the Court to resolve conclusively class issues as part of this Motion, discovery in this case must still be tailored toward the fact that, if a class is certified, this Court will be limited to adjudicating group-wide injuries and questions of common policy that affect the class as a whole. The detailed "health effects" information that Plaintiffs are seeking about over forty test substances would only be necessary if the Court were going to consider the individual claims of each putative class member (of which there are potentially thousands) or if it were going to arbitrate issues relating to the health effects of each individual test substance. However, there is no conceivable (b)(2) class that could be certified that would permit such individualized factual inquiries; instead, this Court's consideration will be limited to

class-wide injuries and questions of policy that are common to all class-members. The "health effects" discovery that Plaintiffs are seeking should thus be limited.

2. Information Possessed By the CIA Concerning DoD's Legal Obligations and Conduct in the Test Programs, If the CIA Had Any, Would Not Be Admissible Against DoD in an APA Case

As discussed above, Plaintiffs have served more than forty requests for admissions that solely concern issues such as DoD's legal obligations (and whether it has met those obligations) and DoD's conduct during the test programs. (Ex. E to Herb Decl. (RFA Nos. 1–8, 18, 23, 26, 35–38, 95–98, 100–04, 107, 109–18, 120, 123–35).) This Court's review of any alleged claim for notice or health care against DoD must be evaluated on the basis of the information before the agency. To the degree that there needs to be factual development in relation to those claims, that information must come from DoD. Furthermore, if the Court finds DoD's efforts inadequate, the only remedy available to the Court is a remand to DoD for additional consideration. Accordingly, Plaintiffs' requests for admissions from the CIA related to DoD are not relevant or admissible to Plaintiffs' claims against DoD.

D. The Court Should Limit Discovery Directed to the CIA for Plaintiffs' Facial Bias Claims Against VA

Plaintiffs seek discovery from the CIA concerning the use of VA patients in chemical and biological testing. (Dkt. 239 at 4.) Plaintiffs also seek information concerning drugs and substances allegedly obtained by the CIA from the VA. (Dkt. 240 at 5.) While Plaintiffs argue that this information is relevant to their claims against VA, Plaintiffs' sole claim against the VA is a facial bias claim, under which the relevant inquiry is not the nature of any alleged historical relationship between CIA and the VA, but whether the VA's alleged role in testing hampers its ability to issue "neutral, unbiased benefits determinations" for test participants. (Dkt. 177 at 11.)

In cases involving allegations of an alleged bias or conflict of interest, discovery is necessarily limited. *Geiger v. Pfizer, Inc.*, 271 F.R.D. 577, 583 (S.D. Ohio 2010) ("[T]he requested discovery must be narrow in scope and must be specifically designed to discover the circumstances surrounding the conflict of interest.") Indeed, "[a]lthough the plaintiff has a right to obtain discovery regarding the defendant's conflict of interest, the scope of that discovery is

not unfettered. Specifically, any discovery must be limited to the conflict of interest and any allegations of bias." *Busch v. Hartford Life and Accident Ins. Co.*, No. 5:10-00111-KKC, 2010 WL 3842367, at *3 (E.D. Ky. Sept. 27, 2010). Furthermore, "discovery into broad categories of information, such as requests for all . . . materials not relied upon, submitted, considered, or generated" by an agency as part of its decision making process "is not sufficiently related to the issue of a conflict of interest." *Geiger*, 271 F.R.D. at 583.

In this case, the Court ruled that Plaintiffs could only challenge the VA's conduct to the degree Plaintiffs' raised "a facial attack on the DVA as the decision-maker." (Dkt. 177.) Plaintiffs could not, however, challenge VA's notification efforts; as such a challenge would be futile. (*Id.* at 16–18). The Court further identified the basis of Plaintiffs' claim: "The crux of their claim is that, because the DVA allegedly was involved in the testing programs at issue, the agency is incapable of making neutral, unbiased benefits determinations for veterans who were test participants." (*Id.*) Thus, discovery on this claim must be limited to what VA knows of its involvement in testing on human subjects and whether this knowledge, if it exists, inherently affects VA's ability to fairly adjudicate claims brought by volunteer service members. Additionally, any information potentially possessed by the CIA would be immaterial, as VA would not have relied upon or considered it in making its decision. To hold otherwise would be to impute the CIA's knowledge to VA for purposes of what the Court has held is a "facial attack on the DVA as a decision-maker." Thus, Plaintiffs inquiry into the alleged bias of VA adjudicators must be directed to the VA, not the CIA.

E. A Protective Order Concerning the CIA's Response To Plaintiffs' Outstanding Request for Admission and Interrogatories Is Appropriate

As explained above, the only discovery that potentially is appropriate concerning the CIA relates to Plaintiffs' claim concerning secrecy oaths—a claim that is currently the subject of a pending fully dispositive motion under Rule 12(c) based upon a lack of subject matter jurisdiction. If this motion is granted, the CIA will no longer be a party to this action, rendering any request for admission inappropriate. Accordingly, CIA respectfully requests that, with respect to the requests for admission concerning purported secrecy oaths (or any other topic), the

Court enter a protective order staying its obligation to respond to those requests pending the Court's resolution of the CIA's fully dispositive motion to dismiss.[9] *See Getz v. Boeing Co.*, No. 07-6396, 2008 WL 2705099 (N.D. Cal. Jul. 8, 2008); *see also Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 383 (9th Cir. 1993) (holding that district court did not abuse discretion in staying discovery in light of motion to dismiss for subject matter jurisdiction, where party opposing dismissal did not claim it needed discovery to survive motion).

II. PLAINTIFFS ARE NOT ENTITLED TO DISCOVERY FROM DOD REGARDING PRE-1953 TESTING

In addition to the relief sought herein by the CIA, DoD hereby seeks a protective order against Plaintiffs' broad-based discovery into pre-1953 chemical or biological exposures. As the Court is aware, this action concerns Army human research programs, conducted primarily at Edgewood Arsenal, from the 1950s through the mid-1970s. (*See* Dkt. 57 at 2). Defendants have produced hundreds of thousands of pages of documents at substantial time and expense concerning these programs, including individual service member test files, test plans and protocols, the Chem-Bio database DoD has created (over the course of many years and at great expense) for the purpose of gathering identifying information regarding test participants, and other technical documents. Unsatisfied, Plaintiffs now seek expansive discovery regarding potentially tens of thousands of full-body exposures to mustard gas and Lewisite that took place during or shortly after World War II, before the promulgation of the 1953 memoranda and Army regulations that the Court has identified as providing the jurisdictional basis for Plaintiffs' claims. Such an inquiry is unwarranted and DoD requests a protective order against such discovery.

As the Court has repeatedly held, the jurisdictional basis for Plaintiffs' health care and notice claims against the DoD is § 706(1) of APA, which requires a plaintiff to identify a discrete, nondiscretionary duty with which an agency has failed to comply. (Dkt. 59 at 14; *see also* Dkt.

[9] Plaintiffs have also served interrogatories requesting that "[f]or each of the following REQUEST FOR ADMISSION that YOU have not admitted without qualification during the course of discovery, please state the reason(s) why it was not admitted: REQUEST FOR ADMISSION Nos. 1, 4, 5, 6, 11, 14-17, 23, 35, 102, 110, 129, 136-141." (Ex. E to Herb Decl.) Because the CIA's response to these interrogatories is dependent on its response to the requests for admission, which are addressed in their entirety by the present motion, the Court should also foreclose discovery on these interrogatories.

233 at 6.) As discussed above, the specific potential sources identified by the Court for the discrete, nondiscretionary duty to notify and provide health care, to the extent such a duty arguably exists, are the 1953 Army memorandum and Army Regulation 70-25 (1962). (Dkt. 59 at 14.) As these documents provide the jurisdictional basis for Plaintiffs' claims, and any duties arising from such documents cannot have arisen prior to their existence, there is no basis for Plaintiffs to expand discovery into exposures that pre-date 1953.

Since the Court first articulated the bases for these surviving claims in its January 19, 2010 Order, the parties and the Court have consistently treated these claims as arising under the APA. (*See, e.g.*, Dkt. 216 at 2 ("The complaint in this action, the Court's substantive and discovery rulings, and the parties' actions throughout discovery all confirm that this is an action under Section 706(1) of the APA.").) As noted above, notwithstanding these jurisdictional limitations articulated by the Court and the course of dealing between the parties, Plaintiffs have in recent weeks begun to insist that their notice and health care claims are also brought directly under the Constitution. This position is inconsistent with the Court's prior orders and with the parties' positions throughout this litigation.

Regarding the notice claims, and as addressed above, Plaintiffs have specifically disclaimed a constitutional claim for information. In addition, in response to an interrogatory asking the legal source for the purported DoD duty to notify Plaintiffs regarding testing, Plaintiffs months ago failed to identify the Constitution as a source for such a duty. (Ex. B to Herb Decl. No. 8)[10] Such a glaring omission—and a representation upon which Defendants have relied upon for months—demonstrates that, during the course of litigation, not even Plaintiffs have recognized the constitutional theory of their case they now claim has been present all along.

[10] Tellingly, Plaintiffs amended their response to this interrogatory on the eve of a discovery hearing held on August 4. (Ex. D to Herb Decl.) In their revised response, Plaintiffs have identified various *post-1953* documents as supporting their claim of a duty to warn, as well as the due process clause of the Fifth Amendment. (*Id.*) While the failure to identify the post-1953 documents earlier in the litigation arguably may be excused (as they emerged in discovery), there is no plausible basis for failing to identify the Constitution as a basis for Plaintiffs' legal claims earlier in the discovery process. (*Id.*) Plaintiffs' last-ditch revision of their theories of liability undermines their assertion that their putative "constitutional" claims for notice and health care somehow have been operative all along.

Moreover, Plaintiffs' own filings, over the course of many months, have identified their notice and health care claims as based upon regulations and memoranda and arising under the APA, and Plaintiffs have failed to contest characterizations of their claims to that effect. (*See* Dkt. 43 at 24 (contending that "Plaintiffs assert a proper claim for relief requiring Defendants to provide information as required by their own duties and regulations" and stating that Plaintiffs' "claim for medical care is … based on Defendants' obligation to provide medical care as required by their own duties and regulations"); Dkt. 151 at 2 ("Plaintiffs … seek to force Defendants to finally fulfill their obligation to locate participants in these tests and to notify them regarding those exposures, to compel Defendants to provide healthcare to test participants as required by Defendants' own regulations.").)

Notably, in its motion to dismiss the Third Amended Complaint, DoD moved to dismiss the entirety of Plaintiffs' health care claims and contended that "Plaintiffs' *claims of entitlement to medical care from DoD* are predicated on DoD policy and regulations, namely a 1953 memorandum from the Army Chief of Staff and AR 70-25." (Dkt. 187 at 19 (emphasis added); *see also id.* (heading stating that "Plaintiffs' Claims for Medical Care Against the Department of Defense Must Be Dismissed").) In opposing this motion, Plaintiffs failed to contest this assertion, made no mention of any constitutional basis for their claims, and referred only to the APA and the previously identified memoranda and agency regulations as supporting their claims. (*See* Dkt. 217 at 7-11.) Plaintiffs' discovery filings similarly, and repeatedly, have identified the APA as the basis for their claims. (*See* Dkt. 157 at 2 (characterizing Court's order as holding that "Defendants owed a duty under the APA to provide notice and healthcare to test subjects"), 6 (citing "Defendants' own regulations" as basis for alleged duty to provide notice); Dkt. 162 at 6 (citing "Defendants' own regulations" as basis for duty to provide notice and health care), 7 ("Defendants' legal duties with respect to the test subjects, and whether Defendants have fulfilled those legal duties, are at the heart of Plaintiffs' claims under the APA."), 8 (repeatedly citing the APA and Army Directive CS: 385 as basis for health care claim against DoD).)

Put simply, there is no legitimate basis for Plaintiffs, at this late stage, to re-frame the case to assert notice and health care claims rooted in the Constitution, and they should be estopped from doing so.

Absent any constitutionally grounded claims against the DoD, Plaintiffs' efforts to obtain discovery must be limited by the jurisdictional bases for their suit. And those bases go back no earlier than 1953. Indeed, regardless of limitations imposed via the APA on the scope of this case, inquiry into pre-1953 mustard gas and/or Lewisite exposures is unwarranted here. Although Plaintiffs have cast their complaint as a putative class action, the case has been pending for years and Plaintiffs have declined to move for class certification. Accordingly, as it presently stands, this case is brought by seven individual former service members, none of whom were subject to pre-1953 mustard gas/Lewisite exposures. Setting aside Plaintiffs' inability to satisfy the commonality required for class certification (*see* Part I.C.1.b, *supra*), these exposures are irrelevant to the named Plaintiffs' claims. Moreover, the Plaintiffs' exposures differed both in kind and with respect to the legal principles that governed testing (*e.g.*, the 1953 memoranda). As such, none of the Plaintiffs could act as a class representative for a class that inlcluded pre-1953 mustard gas/Lewisite testing and they therefore lack standing to assert claims regarding or seek discovery concerning this topic.[11] For all these reasons, Defendants are entitled to a protective order against discovery into pre-1953 exposures.[12]

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court grant its Motion for a Protective Order Limiting Discovery. In the alternative, Defendants request the opportunity to brief Plaintiffs' purported constitutional claims on the merits.

[11] By definition, organizational plaintiff Vietnam Veterans of America cannot assert claims based on World War II exposures, as its membership is limited to Vietnam-era service members. (Dkt 180 ¶¶ 24-25; Ex. G to Herb Decl.) And there has been no suggestion to date that Swords to Plowshares, which is not a membership organization, has been negatively impacted by any failure to provide notice or health care with respect to World War II-era exposures. (Dkt. 180 ¶ 28 (referring to diverted resources devoted to assisting Vietnam-era veterans).

[12] Defendants also maintain numerous relevance- and burden-based objections to Plaintiffs' demands for pre-1953 exposure documents. As noted above, these objections will be provided to Magistrate Judge Corley in forthcoming briefing.

Dated: August 15, 2011

Respectfully submitted,

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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

EXHIBIT A TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER LIMITING DISCOVERY

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JACQUELINE SCOTT CORLEY, MAGISTRATE

VIETNAM VETERANS OF AMERICA, et al, Plaintiffs, VS. CENTRAL INTELLIGENCE AGENCY, et al, Defendants.	NO. C 09-0037 CW (JSC) San Francisco, California Thursday August 4, 2011 11:30 a.m.

TRANSCRIPT OF PROCEEDINGS

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Official Reporter - US District Court
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about -- that go into a due process analysis.

And at no time, your Honor, have the defendants ever moved to dismiss the Constitutional parts of the case. This is their fourth try now that they have moved -- they moved on. Twice they moved on the Constitutional claim. Once had to do with issues involving a completely different aspect of the case. One was standing. The first time it was standing. And then the second time they moved to dismiss on the second amended complaint, it was on statute of limitations.

So they know the Constitutional claim has been there from the very beginning of the case. Yet, we now have -- on the eve of this motion we have another motion to dismiss directed at the, quote, only remaining claim in the case.

THE COURT: Against the CIA.

MR. ERSPAMER: Against the CIA, which is not true. It is not the only remaining claim against the CIA. The CIA has never moved to dismiss the Constitutional claims. All the Constitutional claims remain against the CIA and, of course, in modern jurisprudence it's perfectly proper for a defendant to move against part of a cause of action or claim for relief.

THE COURT: Let me tell you my tentative view and maybe that will cut through and help with some of those things.

I read the third amended complaint that was filed in December and it includes in the heading "Constitutional" and "APA" claims. So that's there and has not been dismissed.

Now, it's interesting because you look at each cause of action, it doesn't specify whether it's APA or Constitutional, but that's fine, be that as it may.

Judge Wilken -- there has not been a motion before Judge Wilken to essentially preclude all discovery on the ground that it's an APA claim. I think that is an issue for Judge Wilken. She is the one that knows what's in the complaint. She is the one to know what's been dismissed or not.

As far as I'm concerned, discovery is going forward and has been going forward. If you have a new argument about there shouldn't be any discovery at all, that must be made to Judge Wilken in the first instance, because I don't know. I guess -- well, I don't know. She might refer it to me. I don't know, but I think it should probably be made to Judge Wilken in the first instance.

So today I'm not going to consider that argument because I don't think it's before me at all. So, hopefully, that sort of cuts off.

As far as I'm concerned, there is a case. Discovery has been going forward. And I'm here to resolve just those discovery disputes and not whether there should be discovery at all except, of course, relevance and burden. All right?

MR. ERSPAMER: That helps, your Honor. Then I should go on to the CIA discussion of the part of the motions in front

an opinion about what are the actual diseases being suffered by these men, diseases and conditions. So that's just one example.

There are a lot of different medical categories that I'm sure our experts are going to want to look at and that's why we have asked for them, frankly. So I have concerns about the time. And, believe me, I'm aware of the '09 date for the case, too. But everything has turned out to be much slower than we anticipated and just it's just where we are.

THE COURT: Well, I can't -- it's not my job to move the deadline anyway. I was just wondering. We do need to have time to get the motions briefed --

MR. ERSPAMER: I agree.

THE COURT: (Continuing) -- in any event.

So maybe I should do it this way. When do you think you can get your motion to compel on file?

MR. BLAKELY: We can do it in two weeks, your Honor.

MR. GARDNER: Then if we can have two weeks to respond?

THE COURT: And then two weeks to respond, and then one week for a reply.

MS. HERB: Well, I think one month will put us in the square of the summary judgment briefing on the CIA's motion for summary judgment. So, I very likely will be tied up. I mean, and we're also --

THE COURT: There are a lot of you. That I'm not going to -- that I'm not going to -- I'm not going to delay discovery because you decided to bring that motion now. So that I'm not -- there are five of you here, four or however many of you. That I'm --

MR. GARDNER: I'm short, so three-and-a-half. I understand your Honor.

No, I understand, your Honor. I think, you know, if they get two weeks, then I think we get two weeks and one week for reply.

THE COURT: And one week for reply? So then what would that put us out?

(Brief pause.)

MR. GARDNER: For the deliberative process privilege your Honor, of course, I mean, I think this is going to depend in part on how many claims they challenge. If they literally challenge a thousand claims and I have to get an expert to sit down and look through a thousand documents and the declaration, that's going to take time. I mean --

THE COURT: That's one issue.

MR. GARDNER: Exactly, exactly.

THE COURT: But that shouldn't delay anything, any of the other issues.

MR. GARDNER: I agree. I think DoD and CIA are separate from the VA issue.

MR. BLAKELY: Your Honor, one thing we could on that point is we could identify those documents, you know, in a day or two and then file the motion in two weeks so that you can start preparing that.

MR. ERSPAMER: Yeah.

THE COURT: Right, right. I think that was the intention, I think, to identify them now.

MR. GARDNER: I understand. And just -- my concern, and I think this is going to be borne out, is they are literally going to challenge every single assertion, which I think is unreasonable, but that's another thing. It's going to take time to do a declaration if they do that.

THE COURT: Okay. So then that would be two weeks to -- September 15 for the hearing.

MR. ERSPAMER: Yes.

THE COURT: One week earlier.

MR. ERSPAMER: That helps.

THE COURT: Defendants still available that day?

MR. GARDNER: I believe so.

THE COURT: It's still going to have to be in the afternoon. 2:00 o'clock.

MR. GARDNER: Your Honor, actually, I completely apologize. I'm teaching down at the National Advocacy Center the 14th, 15th and 16th. Could we do it the 22nd?

THE COURT: We will do it the 22nd. That will give

me more time to prepare in advance. Then I will have my ruling more quickly.

MR. BLAKELY: Your Honor, could we have the extra week for our reply to address the burden arguments?

THE COURT: Certainly. So then you have two weeks for your reply.

MR. BLAKELY: Thank you.

THE COURT: So your replies will being do the 8th and hearing 22nd at 2:00 p.m.

MR. BLAKELY: Your Honor, one additional scheduling item. I'm just looking ahead and this has been presaged already. There are a handful of additional disputes that the parties are starting to work through. Obviously, we will follow your Honor's guidance on this, but it may not be the most efficient thing to do another joint statement process in advance of including those items in our motion to compel if we have reached impasse.

THE COURT: If you can't work it out, then just include them in those motions to compel.

MR. GARDNER: I will say on the record that it is not the case, I don't think anyway, that with respect to what they filed last night that we have exhausted the meet-and-confer effort. So I just want to put that on the record, that I think there is still room for meaningful discussion, at least with some of these topics.

THE COURT: Yeah. And your incentive to do that and get it done is that you don't have to write a brief on those issues. So try to work it out. I mean, just keeping in mind the more issues you give me, the harder it is for me to really go through. It's in everyone's interest to just present me what you have real disputes on.

MR. ERSPAMER: Okay.

THE COURT: Okay. So anything further then?

MR. BLAKELY: Thank you very much.

MR. ERSPAMER: Thank you.

MR. GARDNER: Thank you, your Honor.

(Whereupon, further proceedings in the above matter were adjourned.)

--oo--

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OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

EXHIBIT B TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER LIMITING DISCOVERY

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UNITED STATES DISTRICT COURT

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CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

PLAINTIFFS' AMENDED AND SUPPLEMENTAL RESPONSES TO DEFENDANTS' FIRST SET OF INTERROGATORIES

Complaint filed January 7, 2009

funded testing on military servicemembers dated September 20, 1977, produced by Defendants bearing the Bates numbers VVA023903 to VVA023919.

- A July 19, 2006 letter from CIA Director Michael V. Hayden to the Honorable R. James Nicholson, produced by Defendants bearing the Bates number VA023968, states that Project OFTEN "may have involved testing on volunteer military personnel," but that the CIA has not maintained records sufficient to identify the test subjects.

Plaintiffs anticipate that further discovery and investigation will disclose additional facts and provided meaning and context to the materials and information previously provided to Plaintiffs. Plaintiffs are unable to completely respond to this Interrogatory at this time, and the information set forth in this response is provided without prejudice to Plaintiffs' right to supplement or modify the information set forth herein to reflect materials or information subsequently discovered or developed.

INTERROGATORY NO. 2:

Identify each and every document that you allege supports your contention that the Central Intelligence Agency has an obligation "to notify and provide medical care to Plaintiffs and class members," as alleged in paragraph 21.b of the Third Amended Complaint.

RESPONSE TO INTERROGATORY NO. 2:

Plaintiffs object to this contention interrogatory as premature and cannot provide a full and complete response at this time. Discovery is not completed. Defendants have only recently begun to produce tens of thousands of documents previously withheld after extensive motion practice. Moreover, Defendants have yet to produce a single witness for deposition, and discovery remains in the very early stages. It is far too early for contention interrogatories.

Plaintiffs also object to this interrogatory as unduly burdensome, oppressive, and overbroad in that the request for "each and every document" calls for an exhaustive level of detail that is not justified at this stage of discovery. Plaintiffs further object to this Interrogatory on to the extent that it requires a legal conclusion. Plaintiffs further object to this Interrogatory on grounds that the Central Intelligence Agency has destroyed or withheld documents and

information relevant this request. Plaintiffs further object on grounds that the interrogatory seeks information equally available or more accessible to Defendants. Subject to and without waiving all foregoing general and specific objections, Plaintiffs respond as follows:

Based on Plaintiffs' review of Defendants' production to date, and Plaintiffs' further investigation the following documents prove, establish, confirm, corroborate, and/or provide relevant evidence that Defendant Central Intelligence Agency has an obligation to notify and provide medical care to Plaintiffs and class members:

- The July 17, 1978 Department of Justice Opinion Letter attached as Exhibit A to the Third Amended Complaint, which states that the CIA has a legal duty to notify participants in the test programs. Plaintiffs anticipate that further discovery and investigation will disclose additional facts and provided meaning and context to the materials and information previously provided to Plaintiffs. Plaintiffs are unable to completely respond to this Interrogatory at this time, and the information set forth in this response is provided without prejudice to Plaintiffs' right to supplement or modify the information set forth herein to reflect materials or information subsequently discovered or developed.

INTERROGATORY NO. 3:

Identify the specific "Vietnam-era veterans who were unwilling to share information relevant to possible VA claims because of perceived secrecy obligations" with Swords to Plowshares, as contended in paragraph 158 of Plaintiffs' Third Amended Complaint.

RESPONSE TO INTERROGATORY NO. 3:

Plaintiffs object to this contention interrogatory as premature and cannot provide a full and complete response at this time. Discovery is not completed. Defendants have only recently begun to produce tens of thousands of documents previously withheld after extensive motion practice. Plaintiffs further object that this interrogatory seeks information protected by the attorney-client privilege.

Subject to all foregoing general and specific objections, Plaintiffs respond as follows:

> In total, Army documents identifying 7,120 Army and Air Force personnel who participated in these tests. The Army's Medical Research and Development Command in Fort Detrick, Maryland, has the names and service numbers of all test participants and listings of the chemicals to which the service members were exposed." (VVA-VA 010297-298)

However, a later GAO report (below) indicates that the DOD has not provided all known exposure records and information to the Veterans Administration to assist in adjudicating claims. Also, Battelle's ongoing efforts (18 years after the GOA 1993 report) to identify and collect information about veteran's exposures to chemical and biological substances further undermine the assertions that the DOD possessed all records of exposures at for the 7,120 servicemen exposed to chemical or biological substances during experiments at Edgewood, Dugway Proving Grounds, and Forts Benning, Bragg and McClellan.

- United States General Accounting Office – Report to the Congressional Requestors (2008) stated:
  - "While DOD and VA have a process in place to share the names of sevicemembers who are identified as having been potentially exposed to chemical and biological substances, the transmission of information between the two agencies has been inconsistent." (VVA-VA 009278) The GAO report that the "transmission of information between DOD and VA has been inconsistent because, according to DOD officials, the exchange of information does not follow a specific schedule, there are competing priorities for resources, and the DOD has experienced database management issues." (VVA-VA 009261-9262)

INTERROGATORY NO. 6:

To the extent you contend that the Central Intelligence Agency and/or the Department of Justice has an obligation to "notify Plaintiffs and other test participants and provide all available documents and evidence concerning [the Plaintiffs'] exposures and known health effects," as

identified in paragraph 183 of the Third Amended Complaint, identify the factual and legal bases for that claimed obligation.

RESPONSE TO INTERROGATORY NO. 6:

Plaintiffs object to this contention interrogatory as premature and cannot provide a full and complete response at this time. Discovery is not completed. Defendants have only recently begun to produce tens of thousands of documents previously withheld after extensive motion practice. Moreover, Defendants have yet to produce a single witness for deposition, and discovery remains in the very early stages. It is far too early for contention interrogatories.

Plaintiffs object to this Interrogatory on grounds that the Central Intelligence Agency has destroyed or withheld documents and information relevant this request. Plaintiffs further object on grounds that the interrogatory seeks information equally available or more accessible to Defendants. Plaintiffs further object to this Interrogatory on to the extent that it requires a legal conclusion. Subject to all foregoing general and specific objections, Plaintiffs respond as follows:

Based on Plaintiffs' review of Defendants' production to date, and as described in the Third Amended Complaint the following facts and/or legal principles prove, establish, confirm, corroborate, and/or provide relevant evidence that the Central Intelligence Agency and/or the Department of Justice has an obligation to notify Plaintiffs and other test participants and provide all available documents and evidence concerning the Plaintiffs' exposures and known health effects:

- Administrative Procedures Act §§ 702, 706.
- The common law duty to warn.
- The July 17, 1978 Department of Justice Opinion Letter attached as Exhibit A to the Third Amended Complaint, which states that the CIA has a legal duty to notify participants in the test programs because the agency placed them in harm's way.
- The fact that Defendants conducted tests of chemical and biological agents on human subjects, as described at length in the Third Amended Complaint.

Plaintiffs anticipate that further discovery and investigation will disclose additional facts and provided meaning and context to the materials and information previously provided to Plaintiffs. Plaintiffs are unable to completely respond to this Interrogatory at this time, and the information set forth in this response is provided without prejudice to Plaintiffs' right to supplement or modify the information set forth herein to reflect materials or information subsequently discovered or developed.

INTERROGATORY NO. 7:

To the extent you contend that the Central Intelligence Agency administered secrecy oaths to Plaintiffs, identify the factual basis for your contention, including the identification of the service members to whom the Central Intelligence Agency allegedly administered such secrecy oaths and the date(s) of such administration.

RESPONSE TO INTERROGATORY NO. 7:

Plaintiffs object to this contention interrogatory as premature and cannot provide a full and complete response at this time. Discovery is not completed. Defendants have only recently begun to produce tens of thousands of documents previously withheld after extensive motion practice. Moreover, Defendants have yet to produce a single witness for deposition, and discovery remains in the very early stages. It is far too early for contention interrogatories.

Plaintiffs object to this Interrogatory on grounds that the Central Intelligence Agency has destroyed or withheld documents and information relevant this request. Plaintiffs further object on grounds that the interrogatory seeks information equally available or more accessible to Defendants. Subject to all foregoing general and specific objections, Plaintiffs respond as follows:

Plaintiffs do not currently have facts identifying specific circumstances where the Central Intelligence Agency directly administered secrecy oaths to Plaintiffs. However, 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.

Plaintiffs anticipate that further discovery and investigation will disclose additional facts and provided meaning and context to the materials and information previously provided to Plaintiffs. Plaintiffs are unable to completely respond to this Interrogatory at this time, and the information set forth in this response is provided without prejudice to Plaintiffs' right to supplement or modify the information set forth herein to reflect materials or information subsequently discovered or developed.

INTERROGATORY NO. 8:

Identify the specific source(s) and/or base(s) for the claimed "duty to locate and warn all test participants" alleged in paragraph 184.e of the Third Amended Complaint for:

a. The Central Intelligence Agency;

b. The Department of Defense;

c. The Department of Justice;

d. The Department of Veterans Affairs

RESPONSE TO INTERROGATORY NO. 8:

Plaintiffs object on grounds that this Interrogatory is compound. Plaintiffs further object to this Interrogatory on grounds that the Central Intelligence Agency destroyed or withheld documents and information relevant this request. Plaintiffs further object to this Interrogatory on to the extent that it requires a legal conclusion. Plaintiffs further object on grounds that the interrogatory seeks information equally available or more accessible to Defendants. Subject to all foregoing general and specific objections, Plaintiffs respond as follows:

Based on Plaintiffs' review of Defendants' production to date, and as described in the Third Amended Complaint the following are the sources and/or bases establishing that Defendants have a duty to locate and warn all test participants as alleged in the Third Amended Complaint at ¶ 184.e.:

- The Central Intelligence Agency
  - Administrative Procedures Act §§ 702, 706.
  - The common law duty to warn.

- The July 17, 1978 Department of Justice Opinion Letter attached as Exhibit A to the Third Amended Complaint, which states that the CIA has a legal duty to notify participants in the test.
- CIA Director Stansfield Turner's 1977 testimony before the Senate Select Subcommittee on Intelligence and the Senate Subcommittee on Health & Scientific Research, as described in the Third Amended Complaint at ¶ 13. Director Turner later described his promises in a letter to Clifford L. Alexander, Secretary of the Army, dated January 10, 1979, produced by Plaintiffs as PLTF000733.
- CIA Director Stansfield Turner's 10 August 1977 Memorandum for the Record, "Conversations with the Attorney General."

- The Department of Defense
  - Administrative Procedures Act §§ 702, 706.
  - The common law duty to warn.
  - AR 70-25
  - The Wilson Memorandum
  - Department of the Army, Chief of Staff Memorandum, CS-385: "Use of Volunteers in Research (30 June 1953).
- The Department of Justice
  - Administrative Procedures Act §§ 702, 706.
  - The common law duty to warn.
  - AR 70-25
  - The Wilson Memorandum
- The Department of Veterans Affairs
  - Administrative Procedures Act §§ 702, 706.
  - The common law duty to warn.
  - AR 70-25
  - The Wilson Memorandum

The information set forth in this response is provided without prejudice to Plaintiffs' right to supplement or modify the information set forth herein to reflect materials or information subsequently discovered or developed.

INTERROGATORY NO. 9:

Identify all material facts upon which you base your claim in paragraph 234 of the Third Amended Complaint that Defendants have used "biased decision makers to decide [Plaintiffs'] eligibility for free, priority health care and for SDDC, including DIC"

RESPONSE TO INTERROGATORY NO. 9:

Plaintiffs object to this contention interrogatory as premature and cannot provide a full and complete response at this time. Discovery is not completed. Defendants have only recently begun to produce tens of thousands of documents previously withheld after extensive motion practice. Moreover, Defendants have yet to produce a single witness for deposition, and discovery remains in the very early stages. It is far too early for contention interrogatories.

Plaintiffs object to this Interrogatory on grounds that Defendants have withheld documents and information relevant this request or that documents in Defendants sole possession and control and relevant to this request have been lost or destroyed. Plaintiffs further object on grounds that the interrogatory seeks information equally available or more accessible to Defendants. Subject to all foregoing general and specific objections, Plaintiffs respond as follows:

Based on Plaintiffs' review of Defendants' production to date, and as described in the Third Amended Complaint the following facts prove, establish, confirm, corroborate, and/or provide relevant evidence that Defendant DVA has used biased decision makers to decide test subjects' eligibility for free, priority health care and for SDDC, including DIC:

- The misleading notice provided by the DVA to test veterans, as described in paragraph 231 of the Third Amended Complaint.
- The small percentage of veterans located and the incomplete rosters of veterans selected to receive notice, as described in paragraphs 229-230 of the Third Amended Complaint.

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OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

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Defendants.

Case No. CV 09-0037-CW

EXHIBIT C TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER LIMITING DISCOVERY

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June 13, 2011

Via Electronic Mail

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RE: *Vietnam Veterans of Am., et al. v. CIA, et al.*, No. CV 09 0037-CW (N.D. Cal.)

Dear Mr. Blakely:

I write in response to your emails of May 27, 2011 and June 2, 2011. In your earlier email, you stated that Plaintiffs would forego Rule 30(b)(6) deposition testimony concerning secrecy oaths from the Central Intelligence Agency ("CIA") if the CIA revised its interrogatory response to state the CIA's knowledge, or lack thereof, regarding the administration of secrecy oaths by the CIA or any other Defendant in this case. Accordingly, the CIA supplements its interrogatory response in lieu of the provision of deposition testimony on the topic of secrecy oaths. As explained more fully in the attached supplemental response, the CIA has no information concerning the administration of secrecy oaths or non-disclosure agreements by the CIA or any other Defendant on volunteer service members.

In light of the CIA's representation in the attached, Defendants once again request that Plaintiffs withdraw their secrecy oath claim as it pertains to the CIA. There is simply no evidence to support this claim, nor has there ever been. Indeed, in Plaintiffs' Amended and Supplemental Responses to Defendants' First Set of Interrogatories, Plaintiffs stated that they "do not currently have facts identifying specific circumstances where the Central Intelligence Agency directly administered secrecy oaths to Plaintiffs." Dismissal is not only warranted, but also required under Rule 11 where (1) Plaintiffs acknowledged that they had no factual basis for the maintenance of a secrecy oath claim against the CIA at the outset of this litigation, and (2) the CIA conducted a reasonable search for information pursuant to its discovery obligations and uncovered no information regarding secrecy oaths or other non-disclosure agreements by it or any other Defendant. If Plaintiffs refuse to dismiss this claim against the CIA, please identify the factual and legal basis for the maintenance of this claim.

With regard to your email of June 2, 2011, you stated that Plaintiffs no longer sought Rule 30(b)(6) testimony from the CIA concerning: (1) regulations governing notice and health care; (2) *TRAC* factor analysis; and (3) the CIA's certification of its administrative record. Plaintiffs previously indicated, in their letter of April 14, 2011, that they do not seek testimony from the CIA regarding "information obtained from Test Participants and any information compiled in any database." Given

these concessions, as well as the CIA's amendment of its interrogatory response to address alleged secrecy oaths, we understand that the only remaining topics for which Plaintiffs seek deposition testimony from the CIA are those regarding: (1) the possible health effects of the substances used in the test programs; (2) CIA interaction with the Department of Veterans Affairs related to potential testing on service members; and (3) "CIA involvement of any kind in any test or experiments involving military service members and any CIA experimentation involving substances also administered to any military service member as part of the Test Programs." If this understanding is incorrect, please let us know.

You indicated in your email of June 2 that Plaintiffs believe they are entitled to testimony on these topics for two reasons, the first of which was that discovery was appropriate given "Plaintiffs' remaining declaratory and injunctive relief claims related to information and medical care based on Defendants' violations of Plaintiffs' constitutional rights." Your assertion that Plaintiffs have surviving constitutional claims for notice (which we interpret "information" to be referring to) and medical care is disingenuous, and the CIA will not be participating in any discovery based on this misguided proposition.

As an initial matter, Plaintiffs' assertion now that they have constitutional claims is squarely contradicted by Plaintiffs' *repeated* representations to the Court and Defendants that they were *not* alleging a claim for notice and medical care based on the Constitution. For instance, in Plaintiffs' responses to Defendants' interrogatories, Plaintiffs failed to identify the Constitution as a legal basis for their notice and medical care claims. (*See* Pls.' Am. & Supplemental Resps. to Defs.' First Set of Interrogs. Nos. 2, 6, 8.) And in Plaintiffs' Opposition to Defendants' Motion to Dismiss First Amended Complaint, Plaintiffs informed the Court that they "do not seek relief based on . . . a 'constitutional right to information'" and instead stated that "Plaintiffs assert a proper claim for relief requiring Defendants' to provide information as required by their own duties and regulations." (Dkt. 43 at 24.) In that same Court filing, Plaintiffs stated that their "claim for medical care is . . . based on Defendants' obligation to provide medical care as required by their own duties and regulations." (*Id.*) Similarly, Plaintiffs failed to identify the Constitution as the basis of their claims in yet another filing: "Plaintiffs . . . seek to force Defendants to finally fulfill their obligation to locate participants in these tests and to notify them regarding those exposures, to compel Defendants to provide healthcare to test participants as required by Defendants' own regulations." (Dkt. 151 at 2; *see also* Dkt. 216 ("The complaint in this action, the Court's substantive and discovery rulings, and the parties' actions throughout discovery all confirm that this is an action under Section 706(1) of the APA.").) Plaintiffs are bound by these representations to the Court and Defendants, which make clear that Plaintiffs have never seriously contended that their notice and medical care claims were based on the Constitution.

Even assuming Plaintiffs originally intended to pursue a constitutional basis for their notice or medical care claims, the Court has dismissed Plaintiff's notice and health care claims in their entirety. In December 2010, the CIA sought to dismiss Plaintiffs' notice and medical care claims in full, regardless of their potential legal basis. Defendants' partial motion to dismiss made clear that "[t]he 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; *see also* Pls.' Opp'n, Dkt. 217 at 1 ("In a renewed effort to deprive Plaintiffs of their day in court, Defendants seek to

dismiss: (1) Plaintiffs' notice and healthcare claims against the CIA and (2) Plaintiffs' claims for medical care against the DOD.").) Nothing in that language could be construed as limiting Defendants' partial motion to dismiss to an alleged claim for notice and health care arising under the APA.

In fact, Defendants expressly sought dismissal because Plaintiffs had not identified *any* enforceable, legal basis for an entitlement to notice or health care. With regard to notice, Defendants stated that "[t]his claim must be dismissed because it is based solely on an alleged state common law tort duty that does not create an enforceable legal right against the CIA." (Dkt. 187 at 1.) Similarly, with respect to health care, Defendants argued that "[b]ecause Plaintiffs have failed to identify *any* legal basis in the Third Amended Complaint for obligating the CIA to provide health care, Plaintiffs' *claims* for medical care must fail and should be dismissed under Rule 12(b)(6)." (*Id.* at 17 (emphasis added).) In light of these clear statements in Defendants' partial motion that Plaintiffs' claims lacked any enforceable legal basis, Plaintiffs were obligated to identify any and all alternate bases in their opposition.

In truth, even Plaintiffs recognized their obligation to identify alternate bases in support of their notice and medical care claims. In response to Defendants' arguments regarding the notice claim, Plaintiffs contended that the CIA's "motion fundamentally mischaracteriz[ed] Plaintiffs' notice claims as being 'solely rel[iant] on state tort law'" and then Plaintiffs identified what they believed was an alternate basis for their notice claims. (Dkt. 217 at 2.) To the degree Plaintiffs sought to include the Constitution as yet another basis, they were obligated to do so at the same time. Additionally, if Plaintiffs believed that the Constitution provided a viable basis to their health care claim, they were likewise obligated to identify that basis in their opposition just as they had done by providing an alternate basis for their notice claim.

Not only did Plaintiffs fail to identify an alternate basis for their medical care claim, but they also expressly stated that "[a]lthough Plaintiffs believe that the Court also could require the CIA to provide medical care to test subjects harmed by the CIA's testing programs, Plaintiffs note that the medical care remedy they seek for test participants does not depend on the CIA's provision of that care." The Court took note of Plaintiffs' concession that they did not seek the provision of medical care from the CIA, and then further stated that "Plaintiffs do not offer any other response to Defendants' arguments regarding this claim." (Dkt. 233 at 5–6.) Accordingly, the Court dismissed this claim in its entirety: "Plaintiffs' notice and medical care claims against the CIA . . . are dismissed." (*Id.* at 11.) Once again, there is nothing in the Court's language that limits or in any way qualifies the dismissal of Plaintiffs' health care claim in the manner you are suggesting.

Your email identified a second basis for Plaintiffs' continued discovery requests against the CIA, namely "Plaintiffs' claims against other Defendants." As we discussed during the meet-and-confer, the CIA disagrees with Plaintiffs on the appropriateness of seeking what is essentially third-party discovery from the CIA to maintain separate claims against other parties. Not only are such requests irrelevant to an APA case and putative class action under Federal Rule of Civil Procedure 23(b)(2), they would be unduly burdensome.

For instance, many of Plaintiffs' discovery requests seek information concerning the health effects of substances administered by the Department of Defense ("DoD") as part of its test programs.

As you are aware, the CIA searched for and produced all non-privileged documents concerning EA 3167 and the Boomer, the only substances mentioned as potentially being tested on volunteer service members as part of Project OFTEN. Additionally, the CIA provided Plaintiffs with three discs of information concerning the CIA's behavior modification programs, and these discs would form the basis of the CIA's response regarding the health effects of substances tested as a part of those programs. During the meet-and-confer, you stated that Plaintiffs do not seek a revised classification and privilege review of the documents contained in these three discs, as the documents have only modest redactions that do not impair Plaintiffs' ability to derive information from them. Instead, you indicated that the remaining dispute is that Plaintiffs want the CIA to search for and produce all information concerning the test substances collected from contexts that have no nexus to the test programs at issue in this case.

Such a request is not only irrelevant to the claims against the CIA, but it is also legally irrelevant to Plaintiffs' claims against DoD. The CIA's production of documents concerning certain chemical substances, to the degree the CIA had any such documents, would not be necessary for Plaintiffs' notice claims against DoD. As Defendants have noted previously and Plaintiffs have not refuted, the only relief that Plaintiffs could obtain in their action against DoD for notice is a remand to DoD requiring it to obtain and consider health effects information potentially possessed by other organizations such as the CIA. *See Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980) ("If the court determines that the agency's course of inquiry was insufficient or inadequate, it should remand the matter to the agency for further consideration and not compensate for the agency's dereliction by undertaking its own inquiry into the merits."). Likewise, this information would not be relevant to a putative class action under Rule 23(b)(2). In such class actions, the issues before the court can only relate to a common policy or questions of law that do not depend on individualized factual determinations that vary among class members, such as the health effects associated with varying exposures to chemical or biological agents. *See Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1155 n. 8 (11th Cir. 1983) ("At base, the (b)(2) class is distinguished from the (b)(3) class by class cohesiveness . . . . Injuries remedied through (b)(2) actions are really group, as opposed to individual injuries."). And even assuming there is some potential legal relevance to this information, it difficult to understand why information from the CIA on the topic is necessary to litigate your claims; the CIA is a *clandestine intelligence agency*, not a health-focused organization such as the Food and Drug Administration or the National Institute of Health.

Furthermore, this request would be unduly burdensome. Because Plaintiffs are seeking this information from the CIA in its capacity as a third-party, Plaintiffs have the obligation to avoid imposing undue burden or expense on the CIA with respect to this request. Plaintiffs clearly have not complied with this obligation. The CIA previously estimated that it would take nine-to-twelve months to conduct a revised classification and privilege review of the discrete set of documents on the three discs provided to Plaintiffs; if the CIA were required to search beyond those discs and into all of its files over an unlimited period of time, the CIA's search for and review of potentially responsive documents would take well over a year. This process also could potentially raise some of the same classification and privilege determinations as the discs.

Serving as a final example of the breadth of Plaintiffs' discovery requests, Plaintiffs' third remaining request seeks information concerning "CIA involvement of any kind in any test or experiments involving military service members and any CIA experimentation involving substances

also administered to any military service member as part of the Test Programs." On its face, this request seeks information on every project within CIA's behavior modification programs, regardless of whether that program had some nexus to service members. Furthermore, it would require the CIA to produce every document related to those test programs, including information regarding the financing, employees, administration, approval, conduct, etc. of the programs – and to become educated on these irrelevant topics in order to provide testimony concerning the same. Such a broad request would be unwarranted in light of the Court's orders dismissing Plaintiffs' claims regarding the lawfulness of the test programs and claims against the CIA for notice and health care. We are hopeful that Plaintiffs will reevaluate the extent to which any of this discovery is actually necessary to litigating their narrow remaining claims against DoD and the DVA.

Sincerely,

Kimberly L. Herb
Trial Attorney

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Attorneys for DEFENDANTS

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

EXHIBIT D TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER LIMITING DISCOVERY

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

PLAINTIFFS' AMENDED & SUPPLEMENTAL RESPONSE TO DEFENDANTS' INTERROGATORY NO. 8

Complaint filed January 7, 2009

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, hereby provide amended and supplemental responses to Defendants' Interrogatory No. 8.

GENERAL OBJECTIONS

This response incorporates by reference all of Plaintiffs' General Objections contained within Plaintiffs' March 11, 2011 Amended and Supplemental Responses to Defendants' First Set of Interrogatories.

SUPPLEMENTAL AND AMENDED RESPONSES AND OBJECTIONS

INTERROGATORY NO. 8:

Identify the specific source(s) and/or base(s) for the claimed "duty to locate and warn all test participants" alleged in paragraph 184.e of the Third Amended Complaint for:

a. The Central Intelligence Agency;

b. The Department of Defense;

c. The Department of Justice;

d. The Department of Veterans Affairs

RESPONSE TO INTERROGATORY NO. 8:

Plaintiffs object on grounds that this Interrogatory is compound. Plaintiffs further object to this Interrogatory on grounds that the Central Intelligence Agency destroyed or withheld documents and information relevant this request. Plaintiffs further object to this Interrogatory to the extent that it requires a legal conclusion. Plaintiffs further object on grounds that the interrogatory seeks information equally available or more accessible to Defendants. Subject to all foregoing general and specific objections, Plaintiffs respond as follows:

This interrogatory is so broad that conceivably almost every document produced in this case bears on the question. Plaintiffs also have briefed this issue many times to the Court. Based on Plaintiffs' review of Defendants' production to date, and as described in the Third Amended Complaint, the following are the principal sources and/or bases establishing that

Defendants have a duty to locate and warn all test participants as alleged in the Third Amended Complaint at ¶ 184.e.:

- The Central Intelligence Agency
  - Administrative Procedures Act §§ 702, 706.
  - The common law duty to warn.
  - The July 17, 1978 Department of Justice Opinion Letter attached as Exhibit A to the Third Amended Complaint, which states that the CIA has a legal duty to notify participants in the test.
  - CIA Director Stansfield Turner's 1977 testimony before the Senate Select Subcommittee on Intelligence and the Senate Subcommittee on Health & Scientific Research, as described in the Third Amended Complaint at ¶ 13. Director Turner later described his promises in a letter to Clifford L. Alexander, Secretary of the Army, dated January 10, 1979, produced by Plaintiffs as PLTF000733.
  - CIA Director Stansfield Turner's 10 August 1977 Memorandum for the Record, "Conversations with the Attorney General."
  - The due process clause of the Fifth Amendment of the United States Constitution (*see* Third Amended Complaint at ¶¶184, 186).
- The Department of Defense
  - Administrative Procedures Act §§ 702, 706.
  - The common law duty to warn.
  - AR 70-25.
  - The Wilson Memorandum.
  - Department of the Army, Chief of Staff Memorandum, CS-385: "Use of Volunteers in Research" (30 June 1953).
  - The due process clause of the Fifth Amendment of the United States Constitution (*see* Third Amended Complaint at ¶¶184, 186).

- September 24, 1979 Army General Counsel Jill Wine-Volner Memorandum for the Director of the Army Staff, "Notification of Participants in Drug or Chemical/Biological Agent Research" (VET017-000279-80; subject to protective order).
- October 25, 1979 Army Chief of Staff Memorandum 79-385-39, "Notification of Participants in Drug or Chemical/Biological Agent Research" (VET030-022686-22691).
- November 2, 1979 Army Memorandum for Record: "Notification of Participants in Drug or Chemical/Biological Agent Research" (VET030-022692).
- November 2, 1979 Army Information for Members of Congress: "Notification of Participants in Drug or Chemical/Biological Agent Research" (VET030-022693).
- March 12, 1954 Use of Volunteers in Medical Research: Principles, Policies and Rules of the Office of The Surgeon General (VVA 024098-99).
- National Defense Authorization Act for Fiscal Year 1995, Sec. 1051: "Sense of Congress Concerning Commendation of Individuals Exposed to Mustard Agents During World War II Testing Activities."
- Bob Stump National Defense Authorization Act for Fiscal Year 2003, Public Law 107-314, Sec. 709.
- 1993 Secretary William Perry Memorandum, "Chemical Weapons Research Programs Using Human Test Subjects" ("Perry Memo") (VET001_011181-82).
- January 11, 2011 Deputy Secretary of Defense Memorandum, "Release from "Secrecy Oaths" Under Chemical and Biological Weapons Human Subject Research Programs" (VET021-000001 – 2).

- May 12, 1964 Department of Defense Instruction 5030.29: "Investigational Use of Drugs by the Department of Defense" (Deposition Ex. 319 at 15-16).
- May 12, 1964 Memorandum of Understanding Between the Department of Health, Education, and Welfare, and the Department of Defense Concerning Investigational Use of Drugs by the Department of Defense (VET001_010697 – 98).

The following documents may also in part support Defendants' duty to locate and warn all test participants:

- February 1993 GAO Report, "Veterans Disability: Information from Military May Help VA Assess Claims Related to Secret Tests."
- May 2004 GAO 04-410 Report, "Chemical and Biological Defense: DOD Needs to Continue to Collect and Provide Information on Tests and on Potentially Exposed Personnel."
- February 2008 GAO 08-366 Report, "DOD and VA Need to Improve Efforts to Identify and Notify Individuals Potentially Exposed during Chemical and Biological Tests."
- February 19, 1993 President Bill Clinton Letter to Congressman Glen Browder (VET017-000097; subject to protective order).
- March 9, 1993 Secretary William Perry Letter to Congressman Sonny Montgomery (VET017-000102; subject to protective order).
- February 10, 1994 Secretary Jesse Brown Letter to Secretary William Perry (VET017-000974; subject to protective order).
- April 7, 1942 Alfred Richards, Chairman of Committee on Medical Research, Letter to Secretary Frank Knox (VET017-000696; subject to protective order).
- May 8, 1942 Secretary Forrestal Letter to Alfred Richards (VET017-000695; subject to protective order).

- April 11, 1944 Memorandum for Chief Medical Division: "Procurement of Enlisted Volunteers" (VET017-000694; subject to protective order).
- January 7, 1983 Department of Defense Directive 3216.2: "Protection of Human Subjects in DoD-Supported Research."
- March 25, 2002 DOD Directive 3216.02: "Protection of Human Subjects and Adherence to Ethical Standards in DoD-Supported Research" (VET001_009144 - 9152).
- May 1, 1987 Department of the Army, CRDEC Regulation 70-3: "Policy for Use of Human Subjects" (VET014-002723 – 26; subject to protective order).
- November 1, 1989 Department of the Army, CRDEC Regulation 70-3: "Use of Human Subjects in Research Development, Test and Evaluation" (VET014-002702 - 2707; subject to protective order).
- November 1971 Memorandum of Agreement on Responsibilities for the Conduct of Research and Development for Defense Against Chemical Agents Between the Commanding General, US Army Material Command and the Surgeon General, Department of Army (Deposition Ex. 319 at 20-24).
- April 22, 1993 John Jemionek Memorandum for Director, Information Resources Management, OASD (FM&P): "Chemical Weapons Exposure Testing Program of Work Study Group" (VET017-000114 – 117 (subject to protective order) & Deposition Ex. 334).
- June 30, 1994 DoD/VA Reinvention Partnership, signed by Secretary Perry and Secretary Brown, and "Best Practices – Project Progress Reports" (VET017-000532 – 537; subject to protective order).
- GAO Code 709096: Human Subject Experimentation Audit Guidelines (VET017-000514 – 519; subject to protective order).

- July 11, 2005 Secretary R. James Nicholson Letters to Congressmen Strickland and Evans (VET001_015035 – 36).
- June 2006 Ellen Embrey Letter to Secretary Nicholson (VET001_014010).
- May 21, 1993 Milton Hamilton Department of Army Memorandum: "Chemical/Biological Weapons Research Programs Using Human Test Subjects" (Deposition Ex. 335).
- June 26, 2006 "Probable Inability to Meet Congressional Deadline for Edgewood Arsenal Notification Effort" (Deposition Ex. 349).
- August 30, 2006 "Chemical and Biological Task Force" (Deposition Ex. 312).
- May 19, 1997 Jeanne Fites Memorandum: "Final Report on Exposure Records Locator Project" (VET017-001036 – 37; subject to protective order).
- All drafts or versions of Defendants' notification letters, and emails and correspondence regarding the drafting of those notification letters (*see, e.g.*, Dr. Michael Kilpatrick deposition exhibits).

It is clear that Defendants have long known about the health effects that could result from exposures during or participation in the Testing Programs, including, for example:

- Department of Veterans Affairs admits that "long-term psychological consequences are possible from the trauma associated with being a test subject" (DVA's Response to Request for Admission No. 7).
- *Medical Aspects of Chemical and Biological Warfare*, edited by Frederick R. Sidell, Washington, Walter Reed Medical Center, May 1997, Chapter 8, "Long-Term Health Effects of Nerve Agents and Mustard" (VET004_001168-1187) lists long-term effects of nerve agents, including "disturbances in memory, sleep, and vigilance; depression; anxiety and

irritability; and problems with information processing" (VET004_001173).

- A 1993 study sponsored by the VA (Pechura CM, Rall DP. Eds, *Veterans at Risk: the Health Effects of Mustard Gas and Lewisite*, Washington, DC: Institute of Medicine, National Academy Press; 1993) reported a casual relationship between mustard gas exposure and the following conditions: chronic respiratory diseases (asthma, chronic bronchitis, emphysema, chronic obstructive pulmonary disease, chronic laryngitis), respiratory cancers (nasopharyngeal, laryngeal, and lung), pigmented abnormalities of the skin, chronic conjunctivitis, recurrent keratitis, leukemia (nitrogen mustard), bone marrow depression and (resulting) immunosuppression, psychological disorders (mood disorders, anxiety disorders, and traumatic stress disorders), and sexual dysfunction as a result of scrotal and penile scarring (*Medical Aspects*, p. 236).
- In an October 2003 VA Study: "Health Effects from Chemical, Biological, Radiological Weapons" (VVA 023979-024074), the NRC Committee included the following long-term health effects of CS exposure in Edgewood test subjects: allergic contact dermatitis, idiosyncratic hepatitis, and allergic pneumonitis (VVA 024010). Furthermore, "the mere act of participation in experiments such as these can lead to long-term psychological effects" (VVA 024012).
- As described in VA Updated: "Chemical Warfare Agent Experiments Among U.S. Service Members" (2006) (VVA-VA009949-009981), a LSD test subject reported LSD-related effects, including most prominently, flashbacks (VVA-VA009966-009967). "A significant body of literature suggests that the mere act of participating in military experiments can lead to long-term psychological effects" (VVA-VA 009968).

- A July 15, 1964 Memorandum from N.G. Bottinglieri, Chief Clinical Research Division, "Use of EA3580A in Human Subjects" (Deposition Ex. 91) reports severe renal toxicity problems occurring in dogs.
- In a January 29, 1969 "Memorandum for the Record" by Philip T. Shiner, Clinical Investigation Branch, regarding Use of EA 3834 in human volunteers, Shiner states that "Concern over the use of EA 3834 in human volunteers had arisen from the presence of elevated blood urea nitrogen values and hematuria in some initial animal studies and the development of persistent heaturia and transient RBC cylinduria in one previous volunteer who had received the agent."
- National Research Council, *Possible Long-Term Health Effects of Short-Term Exposure to Chemical Agents*, Vol. I (1982): "It is also possible that pre-existing psychopathologic conditions were exacerbated" (p. 31). "If a subject has latent psychopathology, the drug experience may precipitate the latent tendencies and create problems later" (p. 68).
- National Research Council, *Possible Long-Term Health Effects of Short-Term Exposure to Chemical Agents*, Vol. II (1984): "The clear mutagenicity of mustard gas in various assays is consistent with its carcinogenic potential" (p. 127). One subject experienced a grand mal seizure 3 hours after exposure to 2-PAM (p. 36).
- October 1980 LSD Follow-Up Study Report, U.S. Army Medical Department: 24 subjects reported "flashbacks, defined as spontaneous, transient occurrence of experiences reminiscent of the symptoms evoked by LSD exposure" (VET001_009608). 18 subjects had multiple episodes, and 14 subjects reported occasional recurrence (*id.*). 9 subjects reported post-LSD depression, including "one suicide attempt, one suicide gesture, and at least two cases in which suicidal ideation occurred" (*id.*).

- "Long-term psychological consequences, however, are possible from the trauma associated with being a human test subject" (August 14, 2006 VA Letter (VET001_015606 – 09)).
- "Health Effects of Perceived Exposure to Biochemical Warfare Agents" National Academies, Center for Research Information, Inc., Contract No. IOM-2794-04-001 (2004) describes PTSD and other psychological effects of participation in testing.
- *Gulf War and Health: Updated Literature Review of Sarin* (National Academy of Sciences 2004): "There is limited/suggestive evidence of an association between exposure to sarin at doses sufficient to cause acute cholinergic signs and symptoms and a variety of subsequent long-term neurological effects" (p. 93).
- January 2005 "Potential Military Chemical/Biological Agents and Compounds," Army, Marine Corps, Navy, Air Force (VET013-004661) discusses several test substances and their health effects.
- Reutter, Mioduszewski, & Thomson, "Evaluation of Airborne Exposure Limits for VX: Worker and General Population Exposure Criteria," U.S. Army Research and Technology Directorate (1999) discusses health effects of nerve agents, including that "in all species, examined and at all ages, exposure to [organophosphate (OP)] compounds can have deleterious and long-lasting, perhaps irreversible consequences" (VET013-012746). "[O]bserved EEG abnormalities, coupled with known long-term behavioral effects resulting from OP exposure, indicated that OP exposure might produce long-term changes in brain function" (VET013-012747).

- <u>The Department of Justice</u>
  - Plaintiffs have agreed to the dismissal of the Attorney General (Docket No. 217 at 2).

- The Department of Veterans Affairs
  - Administrative Procedures Act §§ 702, 706.
  - The common law duty to warn.
  - AR 70-25.
  - The Wilson Memorandum.
  - The due process clause of the Fifth Amendment of the United States Constitution.

Plaintiffs make this response based on currently known information, and the information set forth in this response is provided without prejudice to Plaintiffs' right to supplement or modify the information set forth herein to reflect materials or information subsequently discovered or developed.

As to the interrogatories, see Attachment A.

As to the objections:

Dated: August 3, 2011

GORDON P. ERSPAMER
TIMOTHY W. BLAKELY
STACEY M. SPRENKEL
MORRISON & FOERSTER LLP

By: Gordon P. Erspamer
Gordon P. Erspamer

Attorneys for Plaintiff

Attachment A

VERIFICATION

I, Bernard Edelman, _____, am authorized to make this verification for and on behalf of Vietnam Veterans of America, and I make this verification for that reason. I have read the foregoing PLAINTIFFS' AMENDED & SUPPLEMENTAL RESPONSE TO DEFENDANTS' INTERROGATORY NO. 8 (the "Responses"). I am informed and believe based on Plaintiffs' and Plaintiffs' counsel's investigation to date that the matters stated in the Responses are true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 2 August, 2011, at 1730 hours.

Bernard L. Edelman

VERIFICATION

I, BRUCE PRICE, have read the foregoing PLAINTIFFS' AMENDED & SUPPLEMENTAL RESPONSE TO DEFENDANTS' INTERROGATORY NO. 8 (the "Responses"). I am informed and believe based on Plaintiffs' and Plaintiffs' counsel's investigation to date that the matters stated in the Responses are true and correct.

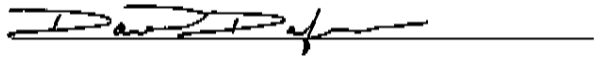
Executed on August 2, 2011, at 7:05 PM.

Bruce Price

VERIFICATION

I, David Duffrane, have read the foregoing PLAINTIFFS' AMENDED & SUPPLEMENTAL RESPONSE TO DEFENDANTS' INTERROGATORY NO. 8 (the "Responses"). I am informed and believe based on Plaintiffs' and Plaintiffs' counsel's investigation to date that the matters stated in the Responses are true and correct.

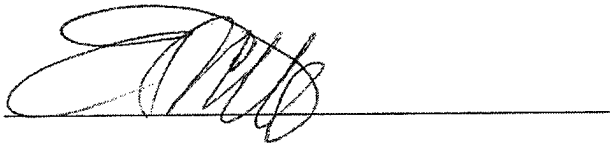
Executed on August 3, 2011, at 8:10 Am.



VERIFICATION

I, ERIC P. MUTH, have read the foregoing PLAINTIFFS' AMENDED & SUPPLEMENTAL RESPONSE TO DEFENDANTS' INTERROGATORY NO. 8 (the "Responses"). I am informed and believe based on Plaintiffs' and Plaintiffs' counsel's investigation to date that the matters stated in the Responses are true and correct.

Executed on AUGUST 2, 2011, at MILFORD, CT.



VERIFICATION

I, J Roche, have read the foregoing PLAINTIFFS' AMENDED & SUPPLEMENTAL RESPONSE TO DEFENDANTS' INTERROGATORY NO. 8 (the "Responses"). I am informed and believe based on Plaintiffs' and Plaintiffs' counsel's investigation to date that the matters stated in the Responses are true and correct.

Executed on Aug 2, 2011, at 10:00 AM.

J Roche

VERIFICATION

I, LARRY MEIROW, have read the foregoing PLAINTIFFS' AMENDED & SUPPLEMENTAL RESPONSE TO DEFENDANTS' INTERROGATORY NO. 8 (the "Responses"). I am informed and believe based on Plaintiffs' and Plaintiffs' counsel's investigation to date that the matters stated in the Responses are true and correct.

Executed on Aug 2, 2011, at 6:14 AM.

Larry Meirow

VERIFICATION

I, Richard Blecker, Executive Director, am authorized to make this verification for and on behalf of Swords to Plowshares: Veterans Rights Organization, and I make this verification for that reason. I have read the foregoing PLAINTIFFS' AMENDED & SUPPLEMENTAL RESPONSE TO DEFENDANTS' INTERROGATORY NO. 8 (the "Responses"). Swords to Plowshares: Veterans Rights Organization makes no representation as to the Responses to Interrogatory No. 8(d), as that interrogatory is directed at contentions made in the Fourth Claim for Relief, which is not asserted on behalf of Swords to Plowshares. With respect to the Responses to all other Interrogatories, I am informed and believe based on Plaintiffs' and Plaintiffs' counsel's investigation to date that the matters stated are true and correct.

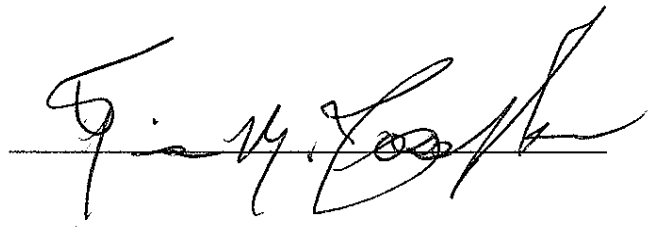
I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 2, 2011, at 1302 War Memorial Bldg. San Francisco, Ca.

VERIFICATION

I, TIM M. JOSEPH, have read the foregoing PLAINTIFFS' AMENDED & SUPPLEMENTAL RESPONSE TO DEFENDANTS' INTERROGATORY NO. 8 (the "Responses"). I am informed and believe based on Plaintiffs' and Plaintiffs' counsel's investigation to date that the matters stated in the Responses are true and correct.

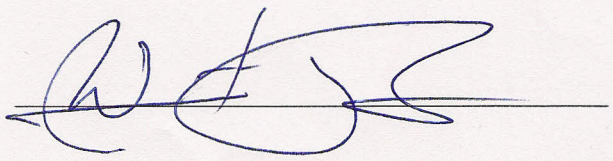
Executed on AUG 3RD, 2011, at 9:00 AM.



VERIFICATION

I, William Blazinski, have read the foregoing PLAINTIFFS' AMENDED & SUPPLEMENTAL RESPONSE TO DEFENDANTS' INTERROGATORY NO. 8 (the "Responses"). I am informed and believe based on Plaintiffs' and Plaintiffs' counsel's investigation to date that the matters stated in the Responses are true and correct.

Executed on August 2, 2011, at Avon, CT.



CERTIFICATE OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California 94105-2482. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on August 3, 2011, I served a copy of:

PLAINTIFFS' AMENDED & SUPPLEMENTAL RESPONSE TO DEFENDANTS' INTERROGATORY NO. 8

☒ **BY U.S. MAIL [Fed. Rule Civ. Proc. rule 5(b)]** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as follows, for collection and mailing at Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105-2482 in accordance with Morrison & Foerster LLP's ordinary business practices.

I am readily familiar with Morrison & Foerster LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service, and know that in the ordinary course of Morrison & Foerster LLP's business practice the document(s) described above will be deposited with the United States Postal Service on the same date that it (they) is (are) placed at Morrison & Foerster LLP with postage thereon fully prepaid for collection and mailing.

☒ **BY ELECTRONIC SERVICE [Fed. Rule Civ. Proc. rule 5(b)]** by electronically mailing a true and correct copy through Morrison & Foerster LLP's electronic mail system to the e-mail address(es) set forth below, or as stated on the attached service list per agreement in accordance with Federal Rules of Civil Procedure rule 5(b).

Joshua E. Gardner, Esq.
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
joshua.e.gardner@usdoj.gov

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California, this 3rd day of August, 2011.

Robin L. Sexton
(typed)

(signature)

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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

EXHIBIT E TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER LIMITING DISCOVERY

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PLAINTIFFS' AMENDED SET OF REQUESTS FOR ADMISSION TO DEFENDANTS DEPARTMENT OF DEFENSE, DEPARTMENT OF ARMY, AND CENTRAL INTELLIGENCE AGENCY

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, and in accordance with the parties' agreement of July 12, 2011, as memorialized in email between counsel of that date, 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 (collectively, "Plaintiffs") request that Defendants Department of Defense, Department of Army, and Central Intelligence Agency admit the truth of the matters set forth below within 33 days of the service of this request.

DEFINITIONS

Unless otherwise indicated, the following definitions shall apply:

1. "COMMUNICATION" or "COMMUNICATIONS" means, unless otherwise specified, any of the following: (a) any written letter, memorandum, DOCUMENT, or any other writing; (b) any telephone call between two or more PERSONS, whether or not such call was by chance or prearranged, formal or informal; and (c) any conversation or MEETING between two or more PERSONS, whether or not such contact was by chance or prearranged, formal or informal, including without limitation, conversations or MEETINGS occurring via telephone, teleconference, video conference, electronic mail (e-mail) or instant electronic messenger.

2. "CONCERNING" means constituting, summarizing, memorializing, referring to, regarding and/or relating to.

3. "MEETING" or "MEETINGS" means any coincidence of, or presence of, or telephone, television, radio or other electronic communication between or among persons, whether such was by chance or prearranged, informal or formal.

4. "NOTICE" means to inform, notify, or warn.

5. "PERSON" or "PERSONS" means, unless otherwise specified, any natural person, firm, entity, corporation, partnership, proprietorship, association, joint venture, other form of organization or arrangement and government and government agency of every nature and type.

6. "DEFENDANTS" means the Defendants in this action, and all of their past and present offices, departments, organizations, administrations, boards, commissions, task forces, management, and past and present employees and service members.

SPECIAL DEFINITIONS

Unless otherwise indicated, the following special definitions shall apply:

1. "CIA" means the Central Intelligence Agency of the United States, and all its offices, departments, organizations, administrations, boards, commissions, task forces, management, and past and present employees and service members.

2. "DEPARTMENT OF DEFENSE" or "DOD" means the United States Department of Defense, and all its offices, departments, organizations, administrations, boards, commissions, task forces, management, and past and present employees and service members.

3. "DEPARTMENT OF THE ARMY" or "DOA" means the United States Department of the Army, and all its offices, departments, organizations, administrations, boards, commissions, task forces, management, and past and present employees and service members.

4. "VA" or "DVA" means DEFENDANT the United States Department of Veterans Affairs, and all its offices, departments, organizations, administrations, boards, consultants, commissions, task forces, management, and past and present employees.

5. "TEST PROGRAMS" means any tests on human subjects using any of the TEST SUBSTANCES conducted as a part of any program of experimentation involving human testing at EDGEWOOD ARSENAL, Maryland; Fort Detrick, Maryland; Dugway Proving Ground, Utah; Naval Research Laboratory, Maryland; Fort McClellan, Alabama; Rocky Mountain Arsenal, Colorado; Fort Bragg, North Carolina; Fort Benning, Georgia; USAATRC, Fort Greely, Alaska; Horn Island Installation, Mississippi; Walter Island; Virgin Islands; Marshall Islands; Hawaii; England; Maryland; San Jose Island, Panama (also listed as Fort Clayton); Yuma Proving Ground, Arizona; Bushnell Field, Florida; Fort Pierce, Florida; Dry Tortugas, Florida Keys; Gulfport, Mississippi; San Carlos, California; New Guinea; Panama Canal Zone, Camp Seibert, Alabama, Camp Polk, Louisiana; El Centro, California; Fort Richardson, Alaska; San Jose Island; any other location where testing occurred under the auspices of Edgewood Arsenal; and/or each of them. Plaintiffs reserve the right to amend this definition to reflect additional programs and locations identified in discovery.

6. "TEST SUBSTANCES" means the substances tested in the TEST PROGRAMS as listed in the "Chem-Bio Database" produced by Defendants. Plaintiffs reserve the right to amend this definition to reflect additional substances identified in discovery.

7. "TEST SUBJECT" or "TEST SUBJECTS" means any PERSON who, either knowingly or unknowingly, was a human subject in any experiment in any of the EDGEWOOD TEST PROGRAMS.

8. "EDGEWOOD ARSENAL" means the southern sector of the military installation located northeast of Baltimore, Maryland, in the Northern Chesapeake Bay along a neck of land between the Gunpowder and Bush rivers.

CONSTRUCTION

The following rules of construction shall also apply:

1. "All" or "each" shall be construed as "all and each."

2. "Any" should be understood to include and encompass "all;" "all" should be understood to include and encompass "any."

3. "And" or "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

4. The use of the singular form of any word shall include the plural and vice versa.

INSTRUCTIONS

The following instructions shall apply:

1. All responses shall be complete and shall contain all information known or reasonably available to you at the time of the response. If information is not known, then state and describe the efforts made to obtain it. If partial information is known, it shall be provided and a date or time shall be stated when you expect to complete your response.

2. If YOU find the meaning of any term in these Requests unclear, YOU shall assume a reasonable meaning, state what the assumed meaning is, and respond to the Request according to the assumed meaning.

3. These Requests are continuing. You are required to file timely supplemental responses should additional responsive information become available to you and, if applicable, give timely notice of any additional witnesses to any of the issues herein prior to the time of any trial conducted in this matter. Please take notice that objection will be made at time of trial to any attempt to introduce evidence which is sought by these Requests as to which timely disclosure has not been made.

4. No documents or information shall be withheld on the grounds of privilege without full compliance with the Federal Rules of Civil Procedure.

5. For each request, in instances where Defendants have different answers, each Defendant shall answer that request separately.

6. In responding to each of the requests for admission, your answer shall specifically admit or deny the matter or set forth in detail the reasons why you cannot truthfully admit or deny the matter. The denial shall fairly meet the substance of the requested admission, and when good faith requires that you qualify an answer or deny only a part of the matter which the admission requests, you shall specify so much of it as is true and qualify or deny the remainder. You may not give lack of information or knowledge as a reason for failure to admit or deny unless you state that you have made a reasonable inquiry and that the information known or readily obtainable by you is insufficient to enable you to admit or deny. Failure to respond to these requests within 33 days of service will deem them admitted.

REQUESTS TO ADMIT

REQUEST TO ADMIT NO. 1:

Admit that neither DOD nor DOA has provided health care to TEST SUBJECTS for health effects possibly resulting from their participation in and/or exposures during the TEST PROGRAMS.

REQUEST TO ADMIT NO. 2:

Admit that neither DOD nor DOA has provided NOTICE to TEST SUBJECTS of the types of substances used during the TEST PROGRAMS.

REQUEST TO ADMIT NO. 3:

Admit that neither DOD nor DOA has provided NOTICE to TEST SUBJECTS of the doses of substances used during the TEST PROGRAMS.

REQUEST TO ADMIT NO. 4:

Admit that neither DOD nor DOA has provided NOTICE to TEST SUBJECTS of the possible health effects that may result from their participation in and/or exposures during the TEST PROGRAMS.

REQUEST TO ADMIT NO. 5:

Admit that DOD believes that it does not have a legally enforceable duty to provide health care to TEST SUBJECTS for health effects possibly resulting from their participation in and/or exposures during the TEST PROGRAMS.

REQUEST TO ADMIT NO. 6:

Admit that DOA believes that it does not have a legally enforceable duty to provide health care to TEST SUBJECTS for health effects possibly resulting from their participation in and/or exposures during the TEST PROGRAMS.

REQUEST TO ADMIT NO. 7:

Admit that neither DOD nor DOA has any agreements with the Department of Veterans Affairs ("DVA") for the DVA to provide health care specifically to TEST SUBJECTS for health effects possibly resulting from their participation in and/or exposures during the TEST PROGRAMS.

REQUEST TO ADMIT NO. 8:

Admit that, for any agreements between the DOD and/or DOA for the DVA to provide NOTICE to TEST SUBJECTS related to the TEST PROGRAMS, the DOD and DOA still have an enforceable duty to monitor and ensure that the DVA's provision of notice fully informs the TEST SUBJECTS of the types of substances, doses, and possible health effects that may result from their participation in and/or exposures during the TEST PROGRAMS.

REQUEST TO ADMIT NO. 9:

Admit that, if the Court finds that DEFENDANTS have an enforceable duty under the Administrative Procedures Act ("APA") to provide NOTICE to TEST SUBJECTS of the types of substances, doses, and possible health effects that may result from their participation in and/or exposures during the TEST PROGRAMS, DEFENDANTS have not fulfilled that duty.

REQUEST TO ADMIT NO. 10:

Admit that, if the Court finds that DEFENDANTS have an enforceable duty under the APA to provide health care to TEST SUBJECTS for health effects possibly resulting from their participation in and/or exposures during the TEST PROGRAMS, DEFENDANTS have not fulfilled that duty.

REQUEST TO ADMIT NO. 11:

Admit that TEST SUBJECTS in the TEST PROGRAMS were told that violations of their secrecy oaths or non-disclosure obligations would render them liable to punishment under the provisions of the Uniform Code of Military Justice.

REQUEST TO ADMIT NO. 12:

Admit that members of the U.S. military may not be punished under the Uniform Code of Military Justice after they are discharged from the U.S. military.

REQUEST TO ADMIT NO. 13:

Admit that the Memorandum from William Perry, Deputy Secretary of Defense, to the Secretaries of the Military Departments, SUBJECT: Chemical Weapons Research Programs Using Human Test Subjects, March 9, 1993 (VET001_011171-72) ("the Perry Memo") has released any TEST SUBJECTS who participated in testing, production, transportation or storage associated with any chemical weapons research conducted prior to 1968 from any non-disclosure restrictions or written or oral prohibitions (e.g., oaths of secrecy) that may have been placed on them concerning their possible exposure to any chemical weapons agents.

REQUEST TO ADMIT NO. 14:

Admit that the Perry Memo did NOT release any individuals who participated in testing, production, transportation or storage associated with any chemical weapons research conducted after 1968 from any non-disclosure restrictions or written or oral prohibitions (e.g., oaths of secrecy) that may have been placed on them concerning their possible exposure to any chemical weapons agents.

REQUEST TO ADMIT NO. 15:

Admit that the January 11, 2011 Memorandum from the Deputy Secretary of Defense regarding "Release from 'Secrecy Oaths' Under Chemical and Biological Weapons Human Subject Research Program" (VET021-000001) ("January 2011 Secrecy Oaths Memo") released all TEST SUBJECTS who had participated as chemical or biological agent research volunteers from non-disclosure restrictions, including secrecy oaths.

REQUEST TO ADMIT NO. 16:

Admit that the release provided for in the January 2011 Secrecy Oaths Memo only pertains to COMMUNICATIONS necessary to address health concerns or to seek benefits from the DVA.

REQUEST TO ADMIT NO. 17:

Admit that the DEFENDANTS have not notified former TEST SUBJECTS of their release from secrecy oaths pursuant to the Perry Memo and the January 2011 Secrecy Oaths Memo.

REQUEST TO ADMIT NO. 18:

Admit that DOD has not provided full information to the DVA regarding the possible health effects that may result from TEST SUBJECTS' participation in and/or exposures during the TEST PROGRAMS.

REQUEST TO ADMIT NO. 19:

Admit that, during the time of the TEST PROGRAMS, the CIA provided funding to the DOA and/or DOD to support research into chemical and/or biological warfare agents.

REQUEST TO ADMIT NO. 20:

Admit that during the time of the TEST PROGRAMS, the CIA provided funding to (a) the DOA and (b) DOD to support research into (1) chemical weapons candidates and (2) biological weapons candidates.

REQUEST TO ADMIT NO. 21:

Admit that through Project OFTEN, TEST SUBJECTS were exposed to at least one TEST SUBSTANCE as part of a CIA program.

REQUEST TO ADMIT NO. 22:

Admit that, during the time of the TEST PROGRAMS, the CIA and the DOA jointly funded research into the identification of new drugs with behavioral effects.

REQUEST TO ADMIT NO. 23:

Admit that during the 1980's Notice Program, neither the DOD nor the DOA provided actual NOTICE to TEST SUBJECTS of the types of substances, doses, and possible health

effects that may result from their participation in and/or exposures during the TEST PROGRAMS.

REQUEST TO ADMIT NO. 24:

Admit that the CIA did not, at any time, provide NOTICE to any TEST SUBJECTS CONCERNING any testing as part of the TEST PROGRAMS.

REQUEST TO ADMIT NO. 25:

Admit that no DEFENDANT disclosed to the TEST SUBJECTS any involvement by the CIA in the TEST PROGRAMS.

REQUEST TO ADMIT NO. 26:

Admit that the DOA Surgeon General is required to direct medical follow-up on TEST SUBJECTS to ensure that any long-range problems possibly resulting from TEST SUBJECTS' participation in and/or exposures during the TEST PROGRAMS are detected and treated.

REQUEST TO ADMIT NO. 27:

Admit that the DOA conducted dermal tests with EA 3167 at the CIA's direction.

REQUEST TO ADMIT NO. 28:

Admit that the CIA funded DOA conducted dermal tests with EA 3167.

REQUEST TO ADMIT NO. 29:

Admit that the DOA developed a substance called "The Boomer" at the request of the CIA.

REQUEST TO ADMIT NO. 30:

Admit that the CIA conducted tests on service members at EDGEWOOD ARSENAL.

REQUEST TO ADMIT NO. 31:

Admit that relevant documents to this action within the meaning of the Federal Rules of Civil Procedure were destroyed by the CIA at the direction of Richard Helms.

REQUEST TO ADMIT NO. 32:

Admit that relevant documents to this action within the meaning of the Federal Rules of Civil Procedure were destroyed by the CIA at the direction of Sidney Gottlieb.

REQUEST TO ADMIT NO. 33:

Admit that the impetus for the CIA's destruction of documents under the direction of Richard Helms explained in Request to Admit No. 39 was the leakage of information regarding the TEST PROGRAMS to Congress and the resulting interest by Congress to investigate the TEST PROGRAMS.

REQUEST TO ADMIT NO. 34:

Admit that the impetus for the CIA's destruction of documents under the direction of Sidney Gottlieb explained in Request to Admit No. 40 was the leakage of information regarding the TEST PROGRAMS to Congress and the resulting interest by Congress to investigate the TEST PROGRAMS.

REQUEST TO ADMIT NO. 35:

Admit that neither DOD nor DOA conducted regular follow-up with TEST SUBJECTS after they left EDGEWOOD ARSENAL.

REQUEST TO ADMIT NO. 36:

Admit that the 2006 advisory summary of the TEST PROGRAMS sent to TEST SUBJECTS (VET001_014415) does not include unwitting tests.

REQUEST TO ADMIT NO. 37:

Admit that the 2006 advisory summary of the TEST PROGRAMS sent to TEST SUBJECTS (VET001_014415) does not include testing that occurred before 1953.

REQUEST TO ADMIT NO. 38:

Admit that the 2006 advisory summary of the TEST PROGRAMS sent to TEST SUBJECTS (VET001_014415) does not include field testing.

REQUEST TO ADMIT NO. 39:

Admit that exposure to LSD can cause flashbacks.

REQUEST TO ADMIT NO. 40:

Admit that repeat CS exposure can cause long-term allergic contact dermatitis.

REQUEST TO ADMIT NO. 41:

Admit that repeat CS exposure can cause long-term allergic pneumonitis.

REQUEST TO ADMIT NO. 42:

Admit that repeat CS exposure can cause hepatitis.

REQUEST TO ADMIT NO. 43:

Admit that exposure to mustard agents can cause nasopharyngeal respiratory cancer.

REQUEST TO ADMIT NO. 44:

Admit that exposure to mustard agents can cause laryngeal respiratory cancer.

REQUEST TO ADMIT NO. 45:

Admit that exposure to mustard agents can cause lung cancer.

REQUEST TO ADMIT NO. 46:

Admit that exposure to mustard agents can cause skin cancer.

REQUEST TO ADMIT NO. 47:

Admit that exposure to mustard agents can cause pigmentation abnormalities of the skin.

REQUEST TO ADMIT NO. 48:

Admit that exposure to mustard agents can cause leukemia.

REQUEST TO ADMIT NO. 49:

Admit that exposure to mustard agents can cause asthma.

REQUEST TO ADMIT NO. 50:

Admit that exposure to mustard agents can cause chronic bronchitis.

REQUEST TO ADMIT NO. 51:

Admit that exposure to mustard agents can cause emphysema.

REQUEST TO ADMIT NO. 52:

Admit that exposure to mustard agents can cause chronic obstructive pulmonary disease.

REQUEST TO ADMIT NO. 53:

Admit that exposure to mustard agents can cause chronic laryngitis.

REQUEST TO ADMIT NO. 54:

Admit that exposure to Lewisite can cause asthma.

REQUEST TO ADMIT NO. 55:

Admit that exposure to Lewisite can cause chronic bronchitis.

REQUEST TO ADMIT NO. 56:

Admit that exposure to Lewisite can cause emphysema.

REQUEST TO ADMIT NO. 57:

Admit that exposure to Lewisite can cause chronic obstructive pulmonary disease.

REQUEST TO ADMIT NO. 58:

Admit that exposure to Lewisite can cause chronic laryngitis.

REQUEST TO ADMIT NO. 59:

Admit that exposure to mustard agents can cause recurrent corneal ulcerative disease.

REQUEST TO ADMIT NO. 60:

Admit that exposure to Lewisite can cause acute severe injuries to the eye.

REQUEST TO ADMIT NO. 61:

Admit that exposure to mustard agents can cause delayed recurrent keratitis of the eye.

REQUEST TO ADMIT NO. 62:

Admit that exposure to mustard agents can cause chronic conjunctivitis.

REQUEST TO ADMIT NO. 63:

Admit that exposure to mustard agents can cause bone marrow depression and resulting immunosuppression.

REQUEST TO ADMIT NO. 64:

Admit that exposure to mustard agents can cause mood disorders.

REQUEST TO ADMIT NO. 65:

Admit that exposure to mustard agents can cause anxiety disorders.

REQUEST TO ADMIT NO. 66:

Admit that exposure to mustard agents can cause traumatic stress disorders, including post-traumatic stress disorder.

REQUEST TO ADMIT NO. 67:

Admit that exposure to Lewisite can cause mood disorders.

REQUEST TO ADMIT NO. 68:

Admit that exposure to Lewisite can cause anxiety disorders.

REQUEST TO ADMIT NO. 69:

Admit that exposure to Lewisite can cause traumatic stress disorders, including post-traumatic stress disorder.

REQUEST TO ADMIT NO. 70:

Admit that exposure to mustard agents can cause sexual dysfunction.

REQUEST TO ADMIT NO. 71:

Admit that exposure to mustard agents can cause reproductive dysfunction.

REQUEST TO ADMIT NO. 72:

Admit that exposure to soman can cause long-term health effects.

REQUEST TO ADMIT NO. 73:

Admit that exposure to VX can cause long-term health effects.

REQUEST TO ADMIT NO. 74:

Admit that exposure to sarin can cause vomiting.

REQUEST TO ADMIT NO. 75:

Admit that exposure to soman can cause vomiting.

REQUEST TO ADMIT NO. 76:

Admit that exposure to VX can cause vomiting.

REQUEST TO ADMIT NO. 77:

Admit that exposure to sarin can cause breathing difficulties.

REQUEST TO ADMIT NO. 78:

Admit that exposure to soman can cause breathing difficulties.

REQUEST TO ADMIT NO. 79:

Admit that exposure to VX can cause breathing difficulties.

REQUEST TO ADMIT NO. 80:

Admit that exposure to sarin can cause convulsions.

REQUEST TO ADMIT NO. 81:

Admit that exposure to soman can cause convulsions.

REQUEST TO ADMIT NO. 82:

Admit that exposure to VX can cause convulsions.

REQUEST TO ADMIT NO. 83:

Admit that exposure to sarin can cause a coma.

REQUEST TO ADMIT NO. 84:

Admit that exposure to soman can cause a coma.

REQUEST TO ADMIT NO. 85:

Admit that exposure to VX can cause a coma.

REQUEST TO ADMIT NO. 86:

Admit that exposure to sarin can cause death.

REQUEST TO ADMIT NO. 87:

Admit that exposure to VX can cause death.

REQUEST TO ADMIT NO. 88:

Admit that exposure to sarin can cause long-term changes in brain function.

REQUEST TO ADMIT NO. 89:

Admit that exposure to soman can cause long-term changes in brain function.

REQUEST TO ADMIT NO. 90:

Admit that exposure to VX can cause long-term changes in brain function.

REQUEST TO ADMIT NO. 91:

Admit that serious casualties and death can occur from exposure to CN and DM in confined areas.

REQUEST TO ADMIT NO. 92:

Admit that the perceived exposure to TEST SUBSTANCES in TEST PROGRAMS can lead to long-term psychological effects.

REQUEST TO ADMIT NO. 93:

Admit that the secrecy surrounding the TEST PROGRAMS and TEST SUBJECTS being forbidden from disclosing the circumstances of the TEST PROGRAMS can cause long-term psychological effects.

REQUEST TO ADMIT NO. 94:

Admit that at least one person died as a result of the experiments during the TEST PROGRAMS.

REQUEST TO ADMIT NO. 95:

Admit that, in 1944, DEFENDANTS carried out a mission to test the effects of mustard gas bombs on American prisoners on an island off the coast of Australia.

REQUEST TO ADMIT NO. 96:

Admit that, for the mission described in Request to Admit No. 95, DEFENDANTS used Australian pilots in American Air Force planes to conduct an air strike on the fortified bunkers.

REQUEST TO ADMIT NO. 97:

Admit that, for the mission described in Request to Admit No. 95, prisoners were killed in the bombing.

REQUEST TO ADMIT NO. 98:

Admit that, for the mission described in Request to Admit No. 95, DEFENDANTS suppressed or destroyed information concerning the mission.

REQUEST TO ADMIT NO. 99:

Admit that long-term psychological consequences are possible from the trauma associated with being a human TEST SUBJECT in the TEST PROGRAMS.

REQUEST TO ADMIT NO. 100:

Admit that the DOA did not obtain approval from the Surgeon General, as required by the Wilson Memorandum, before conducting tests on TEST SUBJECTS during the TEST PROGRAMS.

REQUEST TO ADMIT NO. 101:

Admit that, during unwitting tests, DEFENDANTS did not record the doses administered.

REQUEST TO ADMIT NO. 102:

Admit that, after TEST SUBJECTS left EDGEWOOD ARSENAL, neither the DOD nor the DOA conducted any follow-up monitoring of these TEST SUBJECTS.

REQUEST TO ADMIT NO. 103:

Admit that between 1943 and February 26, 1953, there was no official standard governing human testing with chemical or biological substances conducted by the DOA.

REQUEST TO ADMIT NO. 104:

Admit that between 1943 and February 26, 1953, there was no form used for the obtaining of informed consent from TEST SUBJECTS to participate in the TEST PROGRAMS.

REQUEST TO ADMIT NO. 105:

Admit that two military personnel at EDGEWOOD ARSENAL were tested with EA 3167 under the direction of the CIA.

REQUEST TO ADMIT NO. 106:

Admit that VX was used as an antidote for anticholinergic substances during the TEST PROGRAMS.

REQUEST TO ADMIT NO. 107:

Admit that no psychological screening of potential TEST SUBJECTS occurred at EDGEWOOD ARSENAL prior to the arrival of Dr. James Ketchum.

REQUEST TO ADMIT NO. 108:

Admit that the substance nicknamed “The Boomer” is EA 3167.

REQUEST TO ADMIT NO. 109:

Admit that the DOA sought formal authority to recruit and use human subjects in a chemical warfare experiment for the first time in 1942.

REQUEST TO ADMIT NO. 110:

Admit that Army Chief of Staff Memorandum 385 (Use of Volunteers in Research) implemented the eleven rules of volunteer testing contained in the Wilson Memorandum.

REQUEST TO ADMIT NO. 111:

Admit that the DOA offered soldiers special privileges or rewards to persuade them to volunteer as TEST SUBJECTS.

REQUEST TO ADMIT NO. 112:

Admit that the DOA promised three-day passes each weekend to TEST SUBJECTS while participating in TEST PROGRAMS.

REQUEST TO ADMIT NO. 113:

Admit that the DOA promised relief from all fatigue-type details to TEST SUBJECTS while participating in TEST PROGRAMS.

REQUEST TO ADMIT NO. 114:

Admit that the DOA guaranteed to TEST SUBJECTS that a letter of commendation would be placed in their official personnel files for participating in TEST PROGRAMS.

REQUEST TO ADMIT NO. 115:

Admit that the DOA assigned area commanders a quota of volunteers for TEST PROGRAMS to be furnished on a monthly basis.

REQUEST TO ADMIT NO. 116:

Admit that in 1954, the DOA Surgeon General prepared a set of principles, policies, and rules for the use of volunteers in medical research.

REQUEST TO ADMIT NO. 117:

Admit that, during the TEST PROGRAMS, the DOA did not comply with the 1954 DOA Surgeon General rule that "Adequate preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death. This includes hospitalization and medical treatment as may be required."

REQUEST TO ADMIT NO. 118:

Admit that the DOA destroyed individual records pertaining to the effects of LSD on the interrogation of TEST SUBJECTS.

REQUEST TO ADMIT NO. 119:

Admit that the CIA administered TEST SUBSTANCES to unwitting subjects.

REQUEST TO ADMIT NO. 120:

Admit that the Army has not followed up with and informed all former DOD TEST SUBJECTS, as Senator Schweiker said the Army promised him, as explained on page 154 of the

1977 Congressional Hearings before the Subcommittee on Health and Scientific Research of the Committee on Human Resources of the United States Senate.

REQUEST TO ADMIT NO. 121:

Admit that, after Admiral Turner responded "yes" to Senator Kennedy's question, "Do you intend to notify those individuals?" (Joint Hearing Before the Senate Select Comm. on Intelligence and the Subcomm. on Health and Scientific Research of the Senate Comm. on Human Resources, 95th Cong. (1977) at 36), the CIA did not provide NOTICE to TEST SUBJECTS who participated in the TEST PROGRAMS.

REQUEST TO ADMIT NO. 122:

Admit that, as Mr. Gordon indicated at page 128 of the 1977 Congressional Hearings before the Subcommittee on Health and Scientific Research of the Committee on Human Resources of the United States Senate, the CIA did no follow-up on volunteers of CIA-sponsored TEST PROGRAMS.

REQUEST TO ADMIT NO. 123:

Admit that, after February 26, 1953, neither the DOD nor the DOA obtained informed consent from TEST SUBJECTS before they participated in the TEST PROGRAMS.

REQUEST TO ADMIT NO. 124:

Admit that, after February 26, 1953, neither the DOD nor the DOA explained all inconveniences and hazards reasonably to be expected to TEST SUBJECTS before they participated in the TEST PROGRAMS.

REQUEST TO ADMIT NO. 125:

Admit that, after February 26, 1953, neither the DOD nor the DOA explained the possible health effects that could result from participation in experiments to TEST SUBJECTS before they participated in the TEST PROGRAMS.

REQUEST TO ADMIT NO. 126:

Admit that the DOA conducted unwitting tests with TEST SUBSTANCES.

REQUEST TO ADMIT NO. 127:

Admit that since March 26, 1962, neither DOD nor the DOA has informed TEST SUBJECTS of the (a) nature, (b) duration, and (c) purpose of the experiments conducted during the TEST PROGRAMS.

REQUEST TO ADMIT NO. 128:

Admit that since March 26, 1962, neither DOD nor the DOA has given TEST SUBJECTS NOTICE of the hazards associated with participation in the TEST PROGRAMS.

REQUEST TO ADMIT NO. 129:

Admit that since March 26, 1962, neither DOD nor the DOA has given TEST SUBJECTS NOTICE of the effects on his health of experiments conducted during the TEST PROGRAMS.

REQUEST TO ADMIT NO. 130:

Admit that since March 26, 1962, neither DOD nor the DOA informed TEST SUBJECTS of the right to withdraw from experiments during the TEST PROGRAMS.

REQUEST TO ADMIT NO. 131:

Admit that since March 26, 1962, neither DOD nor the DOA has provided TEST SUBJECTS with required medical treatment and hospitalization for all casualties of the TEST PROGRAM experiments.

REQUEST TO ADMIT NO. 132:

Admit that since March 26, 1962, the DOD and the DOA have refused to provide TEST SUBJECTS with required medical treatment and hospitalization for all casualties of the TEST PROGRAMS.

REQUEST TO ADMIT NO. 133:

Admit that since March 26, 1962, the DOA conducted experiments using TEST SUBJECTS who had mental conditions that made their participation in the TEST PROGRAMS more hazardous than a normal person.

REQUEST TO ADMIT NO. 134:

Admit that since March 26, 1962, the DOA conducted experiments using TEST SUBJECTS who had physical conditions that made their participation in the TEST PROGRAMS more hazardous than a normal person.

REQUEST TO ADMIT NO. 135:

Admit that since March 26, 1962, neither DOD nor the DOA has followed up to monitor the health of TEST SUBJECTS.

REQUEST TO ADMIT NO. 136:

Admit that TEST SUBJECTS exposed to anticholinesterases during the TEST PROGRAMS have experienced significantly more sleep disturbance problems than TEST SUBJECTS not exposed to any chemical agents.

REQUEST TO ADMIT NO. 137:

Admit that DEFENDANTS have known since at least 2003 that TEST SUBJECTS exposed to anticholinesterases during the TEST PROGRAMS have experienced significantly more sleep disturbance problems than TEST SUBJECTS not exposed to any chemical agents.

REQUEST TO ADMIT NO. 138:

Admit that DEFENDANTS have not notified TEST SUBJECTS exposed to anticholinesterases of the possibility that they will experience more sleep disturbance problems than TEST SUBJECTS not exposed to any chemical agents.

REQUEST TO ADMIT NO. 139:

Admit that TEST SUBJECTS exposed to anticholinesterases during the TEST PROGRAMS are more likely to eventually be hospitalized for malignant neoplasms.

REQUEST TO ADMIT NO. 140:

Admit that DEFENDANTS have known since at least 1985 that TEST SUBJECTS exposed to anticholinesterases during the TEST PROGRAMS are more likely to eventually be hospitalized for malignant neoplasms.

REQUEST TO ADMIT NO. 141:

Admit that DEFENDANTS have not notified TEST SUBJECTS exposed to anticholinesterases of the possibility that they are more likely to be hospitalized for malignant neoplasms.

Dated: July 12, 2011

GORDON P. ERSPAMER
TIMOTHY W. BLAKELY
STACEY M. SPRENKEL
MORRISON & FOERSTER LLP

By: Gordon P. Erspamer
Gordon P. Erspamer

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California 94105-2482. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on July 12, 2011, I served a copy of:

PLAINTIFFS' AMENDED SET OF REQUESTS FOR ADMISSION TO DEFENDANTS DEPARTMENT OF DEFENSE, DEPARTMENT OF ARMY, AND CENTRAL INTELLIGENCE AGENCY

☒ **BY ELECTRONIC SERVICE [Code Civ. Proc sec. 1010.6; CRC 2.251]** by electronically mailing a true and correct copy through Morrison & Foerster LLP's electronic mail system to the email address(es) set forth below, or as stated on the attached service list per agreement in accordance with Code of Civil Procedure section 1010.6 and CRC Rule 2.251.

☒ **BY U.S. MAIL [Fed. Rule Civ. Proc. rule 5(b)]** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as follows, for collection and mailing at Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105-2482 in accordance with Morrison & Foerster llp's ordinary business practices.

I am readily familiar with Morrison & Foerster LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service, and know that in the ordinary course of Morrison & Foerster LLP's business practice the document(s) described above will be deposited with the United States Postal Service on the same date that it (they) is (are) placed at Morrison & Foerster LLP with postage thereon fully prepaid for collection and mailing.

Joshua E. Gardner, Esq.
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
joshua.e.gardner@usdoj.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California, this 12th day of July, 2011.

Adam Shapiro

IAN GERSHENGORN
Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney
VINCENT M. GARVEY
Deputy Branch Director
JOSHUA E. GARDNER
District of Columbia Bar No. 478049
KIMBERLY L. HERB
Illinois Bar No. 6296725
LILY SARA FAREL
North Carolina Bar No. 35273
BRIGHAM JOHN BOWEN
District of Columbia Bar No. 981555
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Attorneys for DEFENDANTS

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

EXHIBIT F TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER LIMITING DISCOVERY

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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

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, a Non-Profit Corporation; SWORDS TO PLOWSHARES: VETERANS RIGHTS ORGANIZATION, a California Non-Profit Corporation; BRUCE PRICE; FRANKLIN D. ROCHELLE; LARRY MEIROW; ERIC P. MUTH; DAVID C. DUFRANE; TIM MICHAEL JOSEPHS; and WILLIAM BLAZINSKI, individually, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY; LEON PANETTA, Director of the Central Intelligence Agency; UNITED STATES DEPARTMENT OF DEFENSE; DR. ROBERT M. GATES, Secretary of Defense; UNITED STATES DEPARTMENT OF THE ARMY; PETE GEREN, United States Secretary of the Army; UNITED STATES OF AMERICA; ERIC H. HOLDER, JR., Attorney General of the United States;

CAPTION CONTINUES ON NEXT PAGE

Case No. CV 09-0037-CW

PLAINTIFFS' AMENDED SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO ALL DEFENDANTS

Complaint Filed January 7, 2009

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; and ERIC K. SHINSEKI, UNITED STATES SECRETARY OF VETERANS AFFAIRS,

Defendants.

PROPOUNDING PARTIES: 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

RESPONDING PARTIES: Defendants Central Intelligence Agency; General Michael V. Hayden, USAF, Director of the Central Intelligence Agency; United States Department of Defense; Dr. Robert M. Gates, Secretary of Defense; United States Department of the Army; Pete Geren, United States Secretary of the Army; United States of America; Michael B. Mukasey, Attorney General of the United States; United States Department of Veterans Affairs; and Eric K. Shinseki, United States Secretary of Veterans Affairs

SET NUMBER: One

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, and in accordance with the Court's November 12, 2010 Order (Docket No. 178), 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 (collectively, "Plaintiffs") request that each of the named defendants (collectively, "Defendants") separately produce for inspection and copying the documents and things set forth below that are in their possession, custody or control, or in the possession, custody or control of their attorneys and/or accountants, their investigators and any persons acting on their behalf, at the offices of Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105, or another place as may be mutually agreed upon, by January 6, 2010, per terms of the stipulation filed by the parties on December 2, 2010.

DEFINITIONS

Unless otherwise indicated, the following definitions shall apply:

1. "COMMUNICATION" or "COMMUNICATIONS" means, unless otherwise specified, any of the following: (a) any written letter, memorandum, DOCUMENT or any

Edgewood Arsenal, on experiments with LSD, mescaline, peyote, and synthesized substance known as "Smasher" in the summer of 1951.

AMENDED REQUEST FOR PRODUCTION NO. 60:

The information, samples, data, risks, reports received or sent, qualities of, classification and other information CONCERNING the drugs and substances the CIA obtained from drug and pharmaceutical companies, other government agencies, including the VA, NIH, FDA, and EARL, research laboratories, and other researchers, as described in the DOCUMENT bearing Bates stamp VVA02387.

AMENDED REQUEST FOR PRODUCTION NO. 61:

Collaboration between officials within CIA's Security Office, scientists from Fort Detrick's Special Operations Division, and scientists from other Army installations, including Edgewood Arsenal, on experiments with LSD, mescaline, peyote, and synthesized substance known as "Smasher" in the summer of 1951.

AMENDED REQUEST FOR PRODUCTION NO. 62:

MEETINGS and COMMUNICATIONS between or among any of the following persons and the CIA CONCERNING psychochemicals:

Dr. L. Wilson Greene, Technical Director, Chemical Corps, Chemical and Radiological Laboratories, Army Chemical Center;

Dr. David Bruce Dill, Scientific Director, Chemical Corps, Medical Laboratory, Army Chemical Center;

Dr. Armedeo Marrazzi, a scientist at the Medical Laboratory, Army Chemical Center;

Capt. Clifford P. Phoebus, Chief, Biological Sciences Division, Office of Naval Research;

Brig. Gen. Don D. Flickinger, ARDC, U.S.A.F.; and

Lt. Col. Alexander Batlin, Office of the Assistant Secretary of Defense (Research and Development).

IAN GERSHENGORN
Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney
VINCENT M. GARVEY
Deputy Branch Director
JOSHUA E. GARDNER
District of Columbia Bar No. 478049
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Illinois Bar No. 6296725
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Attorneys for DEFENDANTS

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

EXHIBIT G TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER LIMITING DISCOVERY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

Vietnam Veterans of America, et al., Plaintiffs,	:	
v.	:	No. CV 09-0037-CW
Central Intelligence Agency, et al., Defendants.	:	

Washington, D.C.

Wednesday, June 22, 2011

Deposition of RICHARD WEIDMAN, a witness herein, called for examination by counsel for Defendants in the above-entitled matter, pursuant to notice, the witness being duly sworn by DENNIS A. DINKEL, a Notary Public in and for the District of Columbia, taken at the offices of the United States Department of Justice, 20 Massachusetts Avenue, Northwest, Washington, D.C. at 9:40 a.m., Wednesday,

A. Some against the VA, some to do -- they're still in the military.

Q. Those claims would be against DOD?

A. Their branch of service, yeah. But it is not so much against but it is a question of documenting.

The whole world is not a bunch of attorneys. Doing what's right and what's just as opposed to -- quote, unquote -- "winning" is what we're about, and should be what all the physical evaluation boards are all about.

Q. You said that you spoke to many young veterans who are not eligible to be members of VVA?

A. Yes, I did. I have. I continue to have communication with them.

Q. And my understanding is that veterans of the conflict in Iraq or Afghanistan are also members of VVA?

A. Negative.

Q. Membership in VVA is limited to those who served in Vietnam?

A. Limited to those who served in the

military between early 1961 and May 7, 1975.

Or who served on the ground in Vietnam, any time previous to that.

Q. In any branch of the military.

A. In any branch of the military.

You do not have to have served in the theatre of operations.

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

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

EXHIBIT H TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER LIMITING DISCOVERY

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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

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

PLAINTIFFS' AMENDED SECOND SET OF INTERROGATORIES TO DEFENDANTS DEPARTMENT OF DEFENSE, DEPARTMENT, OF ARMY AND CENTRAL INTELLIGENCE AGENCY

Complaint Filed January 7, 2009

PROPOUNDING PARTIES: 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

RESPONDING PARTIES: Defendants Central Intelligence Agency; Leon Panetta, Director of the Central Intelligence Agency; United States Department of Defense; Dr. Robert M. Gates, Secretary of Defense; and United States Department of the Army; John McHugh, United States Secretary of the Army

SET NUMBER: Two

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, and in accordance with the parties' agreement of July 12, 2011, as memorialized in email between counsel of that date, 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 (collectively, "Plaintiffs") request that each of the named defendants (collectively, "Defendants") separately answer the following interrogatories based upon information within their possession, custody or control, or the custody or control of their attorneys and/or accountants, their investigators and any person acting on their behalf within 33 days of the service of this request.

DEFINITIONS

Unless otherwise indicated, the following definitions shall apply:

1. "COMMUNICATION" or "COMMUNICATIONS" means, unless otherwise specified, any of the following: (a) any written letter, memorandum, DOCUMENT or any other writing; (b) any telephone call between two or more PERSONS, whether or not such call was by chance or prearranged, formal or informal; and (c) any conversation or MEETING between two or more PERSONS, whether or not such contact was by chance or prearranged, formal or informal, including without limitation, conversations or MEETINGS occurring via telephone, teleconference, video conference, electronic mail (e-mail) or instant electronic messenger.

2. "DOCUMENT" or "DOCUMENTS" means any tangible thing upon which any expression, COMMUNICATION or representation has been recorded by any means, including

but not limited to, handwriting, typewriting, printing, photostatting, photographing, magnetic impulse or mechanical or electronic recording and any non-identical copies (whether different from the original because of notes made on such copies, because of indications that said copies were sent to different individuals than were the originals or because of any other reason), including but not limited to, working papers, preliminary, intermediate or final drafts, correspondence, memoranda, charts, notes, records of any sort of MEETINGS, invoices, financial statements, financial calculations, diaries, reports of telephone or other oral conversations, desk calendars, appointment books, audio or video tape recordings, e-mail or electronic mail, electronic folders, microfilm, microfiche, computer tape, computer disk, computer printout, computer card and all other writings and recordings of every kind that are in YOUR actual or constructive possession, custody or control.

3. "IDENTIFY" or "IDENTITY" means:

a. with respect to a PERSON, to state the PERSON's full name, current or last known employer, that employer's address and telephone number, the PERSON's title and/or position with that employer, and the PERSON's current or last known home address and telephone number;

b. with respect to a DOCUMENT, to state the type of DOCUMENT (i.e., letter, memorandum, telephone note, computer floppy or hard disk, magnetic tape, etc.), the title of the DOCUMENT (if any), the date it was created, the author, all intended recipients including the addressee and any and all copyees, a brief description of the subject matter of the DOCUMENT, the present and/or last known location of the DOCUMENT, and to IDENTIFY all present or last known person in possession, custody or control of the DOCUMENT;

c. with respect to a COMMUNICATION to state the name and affiliation of all PERSONS participating in, or present for, the COMMUNICATION, the date of the COMMUNICATION, and whether it was conducted in person or by other means (such as telephone, correspondence, e-mail), and whether it was recorded (e.g., stenographically or by audio or videotape);

d. with respect to a MEETING to state the names and affiliations of all PERSONS participating in, or present for, the MEETING, the date of the MEETING, and the location of the MEETING and the purpose of the MEETING.

4. "MEETING" or "MEETINGS" means any coincidence of, or presence of, or telephone, television, radio or other electronic communication between or among persons, whether such was by chance or prearranged, informal or formal.

5. "PERSON" or "PERSONS" means, unless otherwise specified, any natural person, firm, entity, corporation, partnership, proprietorship, association, joint venture, other form of organization or arrangement and government and government agency of every nature and type.

6. "YOU" or "YOUR" means the Defendants in this action, and all of their offices, departments, organizations, administrations, boards, commissions, task forces, management, and past and present employees and service members. These terms also include any representatives or agents acting on YOUR behalf, including without limitation, attorneys, investigators or consultants.

7. "CONCERNING" means constituting, summarizing, memorializing, referring to, regarding and/or relating to.

SPECIAL DEFINITIONS

Unless otherwise indicated, the following special definitions shall apply:

1. "CIA" means the Central Intelligence Agency of the United States, and all its offices, departments, organizations, administrations, boards, commissions, task forces, management, and past and present employees and service members.

2. "DEPARTMENT OF DEFENSE" or "DoD" means the United States Department of Defense, and all its offices, departments, organizations, administrations, boards, commissions, task forces, management, and past and present employees and service members.

3. "DEPARTMENT OF THE ARMY" or "DoA" means the United States Department of the Army, and all its offices, departments, organizations, administrations, boards, commissions, task forces, management, and past and present employees and service members.

4. "REQUEST FOR ADMISSION" refers to Plaintiffs' Amended Set of Requests for Admission to Defendants Department of Defense, Department of Army, and Central Intelligence Agency.

CONSTRUCTION

The following rules of construction shall also apply:

1. "All" or "each" shall be construed as "all and each."

2. "Any" should be understood to include and encompass "all;" "all" should be understood to include and encompass "any."

3. "And" or "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

4. The use of the singular form of any word shall include the plural and vice versa.

INSTRUCTIONS

The following instructions shall apply:

1. If YOU contend that any of the following interrogatories is objectionable in whole or in part, YOU shall state with particularity each objection, the basis for it and the categories of information and documents to which the objection applies, and YOU shall respond to the interrogatory insofar as it is not deemed objectionable.

2. If YOU find the meaning of any term in these interrogatories unclear, YOU shall assume a reasonable meaning, state what the assumed meaning is, and respond to the interrogatory according to the assumed meaning.

3. The following interrogatories shall be deemed to be continuing. In accordance with Federal Rules of Civil Procedure, Plaintiffs request that if, after answering the interrogatories, YOU acquire additional knowledge or information responsive to the interrogatories, that YOU shall produce such documents or provide Plaintiffs with such additional knowledge or information.

4. Unless otherwise specified, each interrogatory calls for all documents created, received, or dated between January 1, 1941 and the date of YOUR response to the interrogatory.

INTERROGATORIES

PREAMBLE TO ALL INTERROGATORIES: Provide separate answers for each Defendant to the following Interrogatories:

INTERROGATORY NO. 26:

For each of the following REQUEST FOR ADMISSION that YOU have not admitted without qualification during the course of discovery, please state the reason(s) why it was not admitted: REQUEST FOR ADMISSION Nos. 1, 4, 5, 6, 11, 14-17, 23, 35, 102, 110, 129, 136-141.

INTERROGATORY NO. 27:

To the extent YOU deny REQUEST FOR ADMISSION No. 23, please IDENTIFY any person to whom YOU provided notice, as the basis for denying that Request.

INTERROGATORY NO. 28:

Pursuant to Federal Rule of Civil Procedure 26(e)(1), supplement YOUR previous interrogatory responses to the extent YOU have learned any new information that renders these previous responses incomplete or incorrect.

Dated July 12, 2011

GORDON P. ERSPAMER
TIMOTHY W. BLAKELY
STACEY M. SPRENKEL
MORRISON & FOERSTER LLP

By: Gordon P. Erspamer
Gordon P. Erspamer

Attorneys for Plaintiffs
Vietnam Veterans of America; Bruce Price; Franklin D. Rochelle; Larry Meirow; Eric P. Muth; David C. Dufrane; Tim Michael Josephs and William Blazinski

CERTIFICATE OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California 94105-2482. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on July 12, 2011, I served a copy of:

PLAINTIFFS' AMENDED SECOND SET OF INTERROGATORIES TO DEFENDANTS DEPARTMENT OF DEFENSE, DEPARTMENT, OF ARMY AND CENTRAL INTELLIGENCE AGENCY

☒ **BY ELECTRONIC SERVICE [Code Civ. Proc sec. 1010.6; CRC 2.251]** by electronically mailing a true and correct copy through Morrison & Foerster LLP's electronic mail system to the email address(es) set forth below, or as stated on the attached service list per agreement in accordance with Code of Civil Procedure section 1010.6 and CRC Rule 2.251.

☒ **BY U.S. MAIL [Fed. Rule Civ. Proc. rule 5(b)]** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as follows, for collection and mailing at Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105-2482 in accordance with Morrison & Foerster llp's ordinary business practices.

I am readily familiar with Morrison & Foerster LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service, and know that in the ordinary course of Morrison & Foerster LLP's business practice the document(s) described above will be deposited with the United States Postal Service on the same date that it (they) is (are) placed at Morrison & Foerster LLP with postage thereon fully prepaid for collection and mailing.

Joshua E. Gardner, Esq.
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
joshua.e.gardner@usdoj.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California, this 12th day of July, 2011.

Adam Shapiro

IAN GERSHENGORN
Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney
VINCENT M. GARVEY
Deputy Branch Director
JOSHUA E. GARDNER
District of Columbia Bar No. 478049
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Attorneys for Defendants

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

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION FOR A PROTECTIVE ORDER LIMITING DISCOVERY

This matter is before the Court on Defendants' Motion for a Protective Order Limiting Discovery. Upon consideration of the motion and finding it to be supported by good cause, it is hereby

ORDERED that the motion is GRANTED, and it is further

ORDERED that discovery against the Central Intelligence Agency in this action regarding any issue beyond the alleged administration of secrecy oaths is hereby precluded, and it is further

ORDERED that discovery against the Central Intelligence Agency in this action regarding the alleged administration of secrecy oaths is hereby stayed pending the resolution of the agency's currently pending motion for judgment on the pleadings, and it is further

ORDERED that discovery against the Department of Defense and the Department of the Army concerning chemical and biological testing conducted prior to 1953 is precluded.

Dated _____

_____
CLAUDIA WILKEN
United States District Judge