GORDON P. ERSPAMER (CA SBN 83364)
GErspamer@mofo.com
TIMOTHY W. BLAKELY (CA SBN 242178)
TBlakely@mofo.com
STACEY M. SPRENKEL (CA SBN 241689)
SSprenkel@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

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

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

PLAINTIFFS' NOTICE OF MOTION AND MOTION TO COMPEL RULE 30(b)(6) DEPOSITIONS AND PRODUCTION OF DOCUMENTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: September 22, 2011
Time: 2:00 p.m.
Courtroom: E, 15th Floor
Judge: Hon. Jacqueline Scott Corley

Complaint filed January 7, 2009

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 22, 2011, at 2:00 p.m., or as soon thereafter as the matter may be heard before U.S. Magistrate Judge Jacqueline Scott Corley, at the United States District Courthouse, San Francisco, California, 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 ("Plaintiffs") will and hereby do move the Court for an order overruling objections and compelling Central Intelligence Agency; Michael Morell, Acting Director of the Central Intelligence Agency; United States Department of Defense; Leon Panetta, Secretary of Defense; United States Department of the Army; and John McHugh, United States Secretary of the Army ("Defendants") to (1) designate knowledgeable witnesses from the Central Intelligence Agency ("CIA") to testify on topics in Plaintiffs' June 15, 2011 Rule 30(b)(6) Notice; and (2) produce documents responsive to Plaintiffs' Requests For Production as specified in the attached Motion to Compel Production of Documents.

This motion is made pursuant to Federal Rule of Civil Procedure 37(a) and (b). Plaintiffs bring this motion on the grounds that the CIA has failed to designate knowledgeable witnesses under Rule 30(b)(6) and Defendants have failed to produce responsive documents pursuant to Rule 34. *See* Fed. R. Civ. P. 30(b)(6), 34. This motion to overrule objections and compel is based on this Notice of Motion, the Memorandum of Points and Authorities filed herewith, the Declaration of Ben Patterson ("Patterson Decl.") and attached exhibits filed herewith, all other pleadings and matters of record, and such further oral and documentary evidence as may be presented at or before the hearing on this motion.

On August 4, 2011, the parties appeared before Judge Corley to discuss outstanding discovery disputes. During the August 4 discovery hearing, Judge Corley invited the parties to engage in briefing on all discovery disputes remaining unresolved. (Docket No. 248.) Counsel for Plaintiffs certify that, prior to filing this motion, they have in good faith conferred with

Defendants' counsel in an effort to resolve these matters without court action, as required by Federal Rule of Civil Procedure 37(a) and Civil Local Rule 37-1.

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I. INTRODUCTION

This complex case involves chemical and biological weapons testing on tens of thousands of human subjects by multiple government agencies over many years. Nearly two and a half years have passed since Plaintiffs filed their original Complaint. Yet, Defendants' compliance with their discovery obligations has fallen far short of what the law requires in at least two key ways. First, despite Judge Larson's November 2010 Order overruling most of their objections to Plaintiffs' initial Rule 30(b)(6) Notice (*see* Docket No. 178 ("Nov. 2010 Order") at 18-29), Defendants have failed to designate witnesses to testify regarding topics that are fundamental to Plaintiffs' claims. Second, Defendants have vehemently resisted Plaintiffs' document requests throughout this litigation.

II. BACKGROUND

The scope of discovery has long been at issue in this case. The parties engaged in extensive motion practice last year, resolved by Judge Larson's Nov. 2010 Order. Nevertheless, Defendants have continued to resist discovery, continuing to operate based upon an unduly narrow and inaccurate view of what is still at issue in the Complaint. Recently, the parties filed Joint Statements of Discovery Dispute (Docket Nos. 239, 240), and the Court addressed them during an August 4, 2011 hearing. Even then, Defendants persisted in their objections to providing discovery — improperly constricting the scope of the case. This included arguments that Plaintiffs no longer have a Constitutional claim against the CIA — an argument that is patently frivolous — and that "pre-1953 testing" is not at issue, despite clear allegations in the Complaint to the contrary. The Court clearly rejected these arguments for purposes of discovery at this point, emphasizing, for example, that the pre-1953 testing claims are "in the Complaint." (*See, e.g.*, Docket No. 250 at 65:5.)

Three days ago, at 11:59 p.m. on August 15, 2011, Defendants filed a new Motion for a Protective Order Limiting Discovery ("Aug. 15 Motion" (Docket No. 252; Errata at Docket No. 254)). That motion addresses Defendants' two scope arguments, among others. Plaintiffs will, of course, fully address those arguments in their Opposition to Defendants' Aug. 15 Motion,

rather than repeating those objections here. Curiously, Defendants set the motion for hearing by Judge Claudia Wilken on September 29, 2011 — one-week *after* the current scheduled hearing on the discovery matters addressed herein.[1] While certain issues addressed in this Motion could be affected by Judge Wilken's resolution of Defendants' Motion for Protective Order, several issues would not. These include, as discussed below, DTIC bibliography documents, email searches, and Battelle-related documents. Nevertheless, given the current status of all disputes, Plaintiffs still need the discovery sought and an order compelling Defendants to provide it. Unless and until Judge Wilken orders that Plaintiffs cannot obtain specified discovery, Plaintiffs respectfully request that this Court resolve all issues briefed below.

A. Judge Larson's November 2010 Order

In Judge Larson's Nov. 2010 Order, the Court ordered Defendants to designate Rule 30(b)(6) witnesses to testify regarding the majority of the topics, sixteen in total, upon which Plaintiffs moved. (*See* Nov. 2010 Order at 18-29.) Further, Judge Larson ordered "the CIA to respond in earnest to all of Plaintiffs' RFPs." (*Id.* at 17.) The Court also gave both sides a final opportunity to resolve their document production disputes. (*See id.* at 8.)

Plaintiffs have in good faith complied with Judge Larson's instruction to make a "sincere effort to reduce the scope of discovery sought." (*See id.* at 7.) For instance, Plaintiffs reduced the scope of requested testimony to only seven Topics for the Department of Defense ("DOD") and Department of Army ("Army"), and — after the Court's May 31, 2011 Order on Defendants' latest motion to dismiss — only three topics for the Central Intelligence Agency ("CIA") (Patterson Decl. ¶¶ 2, 3, Ex. A, B.) In a March 21, 2011 letter, Plaintiffs also significantly reduced the scope of discovery requests to only sixty-three test substances, narrowed from the over 400 substances still at issue in this case. (Patterson Decl. ¶ 4, Ex. C.)

Despite these good faith efforts by Plaintiffs, Defendants repeatedly have refused both to designate a witness on topics that go to the core of Plaintiffs' claims and to provide relevant

[1] While the hearings would have been scheduled for the same date, Defendants could have noticed the hearing for September 22, in compliance with Local Rule 7-2(a). *See* L.R. 7-2(a).

documents. More egregious, Defendants are forcing the Court to revisit issues that it already has addressed, including a series of Rule 30(b)(6) topics previously ruled upon. (*See* Nov. 2010 Order at 18-29.) Defendants have not accepted any of the Court's prior rulings on scope. The primary disagreement underlying the parties' disputes continues to be the same — Defendants' narrow and non-textual interpretation of the scope of the relevant issues in this case. The parties disagree on a wide range of issues, from the time period of information sought to the number of test substances for which Defendants have searched. Defendants time and again have attempted to constrict improperly the relevant universe of discovery, and the Court's intervention again is necessary to resolve this fundamental disagreement.

B. Plaintiffs Have Attempted to Meet and Confer in Good Faith.

The parties have attempted to resolve these issues via letters dated March 21, 2011; April 1, 2011; April 14, 2011; April 26, 2011; May 11, 2011; June 8, 2011; July 4, 2011; July 21, 2011; July 29, 2011; and August 2, 2011. (Patterson Decl. ¶ 5.) The parties also conferred at length by telephone on May 23, 2011, and May 26, 2011. (Patterson Decl. ¶ 6.) On August 4, 2011, the parties met-and-conferred in person and then appeared before this Court to discuss outstanding discovery disputes. (Patterson Decl. ¶ 7; s*ee* Docket No. 248.) During that hearing, the Court ruled on certain issues and ordered the parties to submit formal briefing on remaining discovery disputes. (*Id.*) Following the hearing, the parties again met and conferred by telephone on August 12, 2011, and August 15, 2011. (Patterson Decl. ¶ 6.)

It is readily apparent that the parties will not be able to reach an agreement absent Court intervention on the issues addressed below. *See* Civil L.R. 37-1(b). Therefore, Plaintiffs again move to compel Defendants to designate Rule 30(b)(6) witnesses and produce relevant documents.

III. CONCISE OVERVIEW OF ISSUES IN DISPUTE

The following issues remain unresolved. They are included here in concise terms and elaborated upon below.

A. CIA's Refusal to Designate Witnesses

CIA Topics 1, 2, and 3: The CIA continues to refuse, despite Judge Larson's Nov. 2010 Order, to designate witnesses to testify regarding *any* topic, including topics concerning health effects arising from participation in test programs, the use of Department of Veterans Affairs ("DVA") patients in testing conducted or funded by the CIA related to chemical/biological weapons, and the CIA's involvement in test programs.

B. Defendants' Refusal to Produce Relevant Documents

RFP Issue 1: Defendants have refused to produce all documents from the entire timeframe of the testing programs, which began in approximately 1942.

RFP Issue 2: Defendants have refused to expand search parameters to respond to Plaintiffs' Requests for Production ("RFPs") concerning the CIA and other documents.

RFP Issue 3: Defendants have refused to search for and produce responsive documents identified in DTIC bibliographies.

RFP Issue 4: Defendant DOD must search for and produce all relevant emails.

RFP Issue 5: Defendant CIA has refused to expand its search for documents reflecting possible health effects beyond merely two of the many substances at issue in this case.

RFP Issue 6: Defendants have refused to produce various documents related to the efforts of Battelle Memorial Institute ("Battelle") to collect testing information and create the Chem-Bio Database.

IV. ARGUMENT

A. Discovery Under Federal Rule of Civil Procedure 26 Is a Liberal Standard; Defendants Face a Heavy Burden.

Federal Rule of Civil Procedure 26(b)(1) provides that a party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Relevance under Rule 26 is interpreted broadly and liberally, and encompasses not only information that would be admissible at trial, but also information "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); *see also* 6 James W. Moore *et. al., Moore's Federal Practice* § 26.41[6] (3d ed. 2010). A deposition taken pursuant to Federal Rule of Civil

Procedure 30(b)(6) may properly seek any evidence which may lead to the discovery of admissible evidence. *See Detoy v. San Francisco*, 196 F.R.D. 362, 366-67 (N.D. Cal. 2000) (holding that the scope of Rule 30(b)(6) deposition is determined solely by relevance under Rule 26). Additionally, any matter relevant to the subject matter involved in the action is discoverable, if the matter may reasonably assist a party in evaluating the case, preparing for trial, or facilitating a settlement. *See Moore's Federal Practice* § 26.41[6]; *see also, e.g., Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation").

Moreover, as the party resisting discovery, Defendants bear the "heavy burden" of "showing that discovery should not be allowed" and "clarifying, explaining, and supporting [their] objections." *See Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1998) (internal citation omitted); *Blankenship v. Hearst Corp*, 519 F.2d 418, 429 (9th Cir. 1975) ("Under the liberal discovery principle of the Federal Rules defendants [are] required to carry a heavy burden of showing why discovery was denied."). "[B]oilerplate objections that a request for discovery is 'overboard and unduly burdensome, and not reasonably calculated to lead to the discovery of material admissible in evidence,' . . . are improper unless based on particularized facts." *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008). Therefore, Defendants face a heavy burden under the Federal Rules in defeating Plaintiffs' requests for designation of witnesses and production.

B. Defendant CIA's Refusal to Designate Witnesses is Without Merit and Violates Judge Larson's Nov. 2010 Order.

Despite the Court's Nov. 2010 order to the contrary, the CIA has obstinately refused to designate a witness to testify regarding *any* of the three topics set forth below, which concern the health effects (physical and psychological) from participation in the test programs, the use of DVA patients for chemical and biological weapon testing, and the CIA's involvement in

Defendants' testing programs.[2] (*See* Nov. 2010 Order at 18-29.) These topics are all reasonably within the scope of discovery. Despite the CIA's protestations, the CIA "is still in this case" as a Defendant, as the Court made clear during the August 4 hearing. (*See* Docket No. 250 at 15:12.) As a defendant, the CIA must designate witnesses to testify regarding these key discovery topics, a responsibility it has brazenly shirked for nine months. Indeed, the CIA's blanket refusal to designate witnesses for a single one of the three topics flies in the face of the Court's previous Order requiring Defendants to designate witnesses to testify regarding health effects, interaction with the DVA, and the CIA's involvement in the Test Programs. (*See* Nov. 2010 Order at 20-29.) These rulings are the law of the case, the Court has rejected Defendants' previous excuses for resisting discovery (*see* Nov. 2010 Order at 18-20), and the CIA now is in contempt of the Court's Order. The Court should similarly reject Defendants' most recent efforts to avoid designating witnesses.[3]

The CIA also certified what it casts as an "administrative record" on February 16, 2011, (*see* Docket No. 208), and now has moved to preclude discovery in deference to that "administrative record" in Defendants' Aug. 15 Motion (Docket No. 252). While Plaintiffs will brief the merits of Defendants' arguments in their Opposition to that motion, Plaintiffs note that the Court has already stated very clearly that Defendants cannot rely on documents alone in response to Rule 30(b)(6) notices. (*See* Nov. 2010 Order at 18-19.) Defendants' intent is obvious — to circumvent Judge Larson's Order and to delay discovery beyond the discovery cut-off, and thereby avoid discovery altogether. Accordingly, the time for discovery against the CIA should be extended if the Court grants this motion to compel, as respectfully requested in Plaintiffs' accompanying Motion to Extend Discovery of CIA.

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[2] These topics were identified in Plaintiffs' March 21, 2011 letter to Defendants (Patterson Decl. ¶ 4, Ex. C) as part of Plaintiffs' efforts to streamline discovery, reducing the number of Rule 30(b)(6) topics from 16 to only 7 topics. Per the parties' agreement, the final three topics were memorialized in a formal Rule 30(b)(6) deposition notice on June 15, 2011. (Patterson Decl. ¶ 3, Ex. B.)

[3] Defendants' Aug. 15 Motion essentially seeks to limit all discovery from the CIA. (*See* Docket No. 252.)

1. Health Effects of Participation in Test Programs.

CIA Topic 1 seeks information concerning:

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

The information Plaintiffs seek in CIA Topic 1 is clearly relevant. Information about the health effects potentially suffered by test subjects as a result of their participation in test programs bears directly on Plaintiffs' health care claim. Further, it bears on Defendants' knowledge of health effects, which is highly relevant to Plaintiffs' notice claim that seeks "full documentation of the experiments done on them and all known or suspected health effects." (Third Amended Complaint ("TAC") (Docket 180) ¶ 189.) Indeed, as the Court already has stated, "health effects of drugs used in MKULTRA known from [sic] to be similar to those in Edgewood Arsenal testing, are relevant to Plaintiffs' notice and healthcare claims."[4] (*See* Nov. 2010 Order at 26.)

2. Use of DVA Patients in Testing.

CIA Topic 2 seeks information concerning "the use of DVA patients in testing conducted or funded by [CIA] related to chemical and/or biological weapons." Such information is directly relevant to Plaintiffs' Fifth Amendment bias claim against the DVA. (*See* TAC ¶¶ 225-234.) Any DVA involvement in the testing programs sponsored by other Defendants, including the CIA, may demonstrate the DVA's bias in adjudicating the claims filed by test subjects for health problems caused by *those same tests*. (*Id.*)

Plaintiffs have grounds to believe that testing on DVA patients was closely connected with the tests performed by other Defendants on individual Plaintiffs and described in the TAC. In fact, in Defendants' Answer, "Defendants admit that DVA tested LSD on veterans in the past" and "that tests conducted in VHA research facilities include anthrax." (Docket No. 236 at ¶ 226.)

[4] MKULTRA is a former CIA human testing program. (*See, e.g.*, TAC ¶¶ 114-121.)

There also is evidence that the CIA tested amphetamines on patients at the Veterans Administration Center, Martinsburg, West Virginia. (*See* Docket No. 126-11 at 4.) Defendants also tested amphetamines on military servicemembers at Edgewood. (TAC ¶ 5.) As parties "may obtain discovery regarding any nonprivileged matter that is relevant to *any* party's claim or defense," this testimony relevant to the DVA claim is discoverable from the CIA. *See* Fed. R. Civ. P. 26(b)(1) (emphasis added).

3. CIA Involvement in Test Programs.

CIA Topic 3 seeks information concerning:

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

Topic 3 encompasses the CIA's involvement in the testing programs — a basic core issue in the Complaint that has been at issue from the very onset of this litigation. The Court just ordered Defendants DOD and the Army to provide testimony **regarding this nearly exact topic**. (*See* Docket No. 250 at 19-20.)[5] Given the topic (*i.e.*, CIA involvement in the testing programs), if the DOD must provide testimony, it appears axiomatic that the CIA must also testify about its *own* involvement in the test programs.

It is beyond doubt that the CIA played a prime role in the test programs. (*See, e.g.*, Docket Nos. 129-7, 129-8, 129-9; TAC ¶¶ 2, 106, 113, 132.) In a December 3, 1955 Memorandum for the Secretary of Defense, for example, CIA Director Allen Dulles stated that "this Agency has provided financial support for certain projects in the field of psychochemicals being conducted by the Chemical Corps and by the Office of Naval Research." (Docket No.

[5] This is the *second time* the Court has ordered Defendants to provide Rule 30(b)(6) testimony on this topic. (*See* Nov. 2010 Order at 22-23.)

129-7 at 3.) A "1952 Memorandum of Understanding between the CIA and the Army's Chief Chemical Officer" was the apparent charter for association concerning some experiments conducted at Fort Detrick. (Patterson Decl. ¶ 8, Ex. D at JK10 0016602.) With respect to later testing, the CIA's "work with Edgewood Arsenal Research Laboratories (EARL) began in 1967 and ended in 1973 . . . The latter work involved testing specific drugs on human subjects." (Patterson Decl. ¶ 9, Ex. E at VET001_009239.) "The records indicate that EARL was selected for this program because of their . . . exclusive experience with EA#3167, and because they had an established program using human volunteers." (*Id.* at VET001_009240.)

Unfortunately, as a direct result of the CIA's intentional destruction of evidence before Congressional hearings commenced in 1975 (*see* TAC ¶¶ 143-44), coupled with its more recent refusal to even look for documents or to comply with its discovery obligations, the details of the CIA's role remains incomplete. Information about the CIA's role in test programs could potentially inform Plaintiffs' notice and health care claims, and thus remains fundamentally relevant to this case.

In addition, during the deposition of a former contractor, Dr. Edward Pelikan, counsel for the CIA instructed the witness not to answer more than 130 times, preventing any substantive testimony about the CIA's involvement. (*See* Docket No. 190.) The lack of testimony from Dr. Pelikan further emphasizes the importance of Rule 30(b)(6) testimony from the CIA regarding its involvement in the testing programs.

Therefore, Plaintiffs respectfully request that the Court once again order the CIA to designate witnesses to testify regarding the above topics. Plaintiffs believe that the Court should consider appropriate monetary sanctions for the patent violation of Judge Larson's Order.[6]

[6] As Judge Larson noted in his Nov. 2010 Order, "if either party engages in future unjustifiable discovery recalcitrance, this Court will impose applicable Rule 37 sanctions on the offending party." (Nov. 2010 Order at 31.)

C. Defendants Must Produce Relevant Documents Framed by the Existing Pleadings.

1. Defendants must produce all documents from the entire timeframe of the testing programs, which began in approximately 1942.

Consistent with the Third Amended Complaint, Plaintiffs seek information regarding the entire time frame of the Testing Programs, which began in approximately 1942.[7] (*See, e.g.*, TAC ¶¶ 2, 103-105.) Instruction 10 to Plaintiffs' Amended Requests for Production states that, "[u]nless otherwise specified, each request calls for all documents created, received, or dated between January 1, 1940 and the date of YOUR response to the request." (Patterson Decl. ¶ 10, Ex. F at 9.) While Defendants assert that they have not completely excluded documents predating 1953, Defendants have claimed that information from before 1953 is irrelevant and have refused to specifically search for responsive documents from that time period. (Patterson Decl. ¶ 11, Ex. G at 2-3; *see also* Patterson Decl. ¶ 24, Ex. R at 5.) Defendants also have refused to specifically search for documents related to Mustard Gas and Lewisite testing during the 1940s. (*See* Docket No. 240 at 3.) This issue applies across many requests for production that call for documents from the pre-1953 timeframe or encompass Mustard Gas and Lewisite testing, including, for example, RFP Nos. 1, 2, and 3.[8] Defendants also expressly limited their responses to Plaintiffs' Requests for Admission ("RFA's") to information that post-dates 1953. (*See* Defendants' General Objection No. 5 to RFA's (Patterson Decl. ¶ 12, Ex. H at 2)). Information about pre-1953 testing plainly is relevant, however, for two independent reasons.

First, despite Defendants' protestations that pre-1953 testing is not relevant to this case, the Complaint makes clear that this litigation encompasses the entire time frame of the testing

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[7] Defendants' Aug. 15 Motion seeks to limit discovery on this topic. (*See* Docket No. 252.)

[8] "AMENDED REQUEST FOR PRODUCTION NO. 1: The types and properties of all TEST SUBSTANCES, including but not limited to studies, reports, surveys, amounts administered to participants in the TEST PROGRAMS, dose-response relationships, or other analyses of the health effects of the TEST SUBSTANCES." "AMENDED REQUEST FOR PRODUCTION NO. 2: Complaints, claims, allegations or notice provided to YOU, from any source, of any physical or psychological harm to any participant in the TEST PROGRAMS." "AMENDED REQUEST FOR PRODUCTION NO. 3: Deaths, hospitalizations, emergency room visits and diseases or medical conditions resulting from or related to the administration of TEST SUBSTANCES to participants in the TEST PROGRAMS." (Patterson Decl. ¶ 10, Ex. F at 10.)

programs, which began in approximately 1942. (*See, e.g.*, TAC at ¶¶ 102-05.) As the Court stated at the hearing, testing back to 1942 is "in the complaint." (Docket No. 250 at 65:5.) Defendants admit, moreover, in response to Plaintiffs' RFA No. 109 that "the first indication of formal authority sought to recruit and use volunteer subjects in chemical warfare experiments was in 1942." (Patterson Decl. ¶ 12, Ex. H at 43.) As the Court further recognized during the August 4, 2011 hearing, even if the individual named Plaintiffs were not exposed to mustard gas, veterans who were exposed are within Plaintiffs' contemplated class. (*See* Docket No. 250 at 53-54.)

Indeed, these pre-1953 putative class members are particularly vulnerable and dependent on the Court for relief. The Veterans' Benefits Association abandoned all efforts to notify Mustard Gas Group veterans in 2009, even though a substantial number of those veterans had not received notification. (*See* TAC ¶ 229.) Many of these members have never received any type of notification of their exposures, and the vast majority were excluded from the Chem-Bio database and excluded from DOD's and DVA's outreach efforts — providing one explanation for why Defendants have concocted the 1953 time limitation.[9] These lost test subjects include test subjects from the approximately 55,000 veterans with other than full-body exposure to mustard gas and Lewisite (those with full-body exposure benefit by a presumption of service-connection) and those veterans who participated in test programs after World War II but before 1953.

Second, as Defendants have conceded, Mustard gas testing occurred after 1953 at Edgewood Arsenal. (*See, e.g.*, Aug. 4 hearing (Docket No. 250) at 56:8-10 (Mr. Gardner: "There is no dispute in this case that there are a small number [sic] of Cold War era test participants who

[9] In Defendants' Answer: "Defendants admit that, according to the September 2009 report on outreach activities by the DVA Compensation and Pension Service, there were 4,495 veterans in a mustard gas and lewisite database provided by DoD to DVA." (Docket No. 236 ¶ 227.) By contrast, an August 14, 2006 Undersecretary of Health Information Letter states that "In earlier experiments concluded by the end of World War II, about 60,000 U.S. service members had been experimentally exposed to mustard and Lewisite blister agents." (Patterson Decl. ¶ 13, Ex. I at VET001_015606.) An August 30, 2006 "Chemical and Biological Task Force" presentation by Joe Salvatore also states that the mustard gas and lewisite "[e]stimated test population hovers near 60,000." (Patterson Decl. ¶ 14, Ex. J at DVA004 014829.) Thus, it appears that roughly 55,000 service member Mustard Gas and Lewisite test subjects have never been notified and were not included in Defendants' databases or outreach efforts.

had patch exposure to mustard gas.") Thus, regardless of the Court's determination as to whether the pre-1953 test subjects are in the case, health effects information from the early years of Mustard gas testing is entirely relevant to Plaintiffs' remaining claims concerning tests conducted at Edgewood after 1953. (*See* Nov. 2010 Order at 26 ("*health effects* of drugs used in MKULTRA known from [sic] to be similar to those in Edgewood Arsenal testing, are *relevant* to *Plaintiffs' notice and healthcare claims*.") (emphasis added).)

In sum, information about pre-1953 exposure and notification is just as relevant to Plaintiffs' notice and health care claims as is information about post-1953 testing — if not more critical, given those veterans' particularly vulnerabilities. Thus, Defendants must undertake reasonable efforts to locate and produce documents for the entire testing time frame, including the pre-1953 era, and those efforts must encompass mustard gas and Lewisite testing.

2. Defendants Must Produce Responsive Documents Identified in the DTIC Database Bibliographies.

Plaintiffs seek the production of responsive documents that Defendants have identified through keyword searches of the Defense Technical Information Center ("DTIC") database. These documents are responsive to many RFPs, including, for example, RFP No. 1. (*See* n.8 above.) DTIC is the central repository for DOD technical documents, which would include technical documents concerning the testing programs. (Patterson Decl. ¶ 15.) There is a public part and a private, restricted part to the DTIC system. As a central repository, the DTIC database can be used to identify documents from Edgewood Arsenal and satellite locations where human testing was conducted. In fact, Defendants have explained that, given the closure of many of the testing location sites,[10] DTIC may be one of the *only* sources available to search for responsive documents. (Patterson Decl. ¶ 17, Ex. K at 2 n.1.)

[10] Locations known to Plaintiffs include: 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

(Footnote continues on next page.)

Rather than fulfilling their obligation to review and produce responsive documents identified by keyword searches of the DTIC database, however, Defendants merely provided "bibliographies" that contain short and vague abstracts of documents or in some cases, merely a title. These bibliographies are voluminous and repetitive; they do not provide sufficient information to evaluate the relevance and usefulness of the listed documents. It goes without saying that titles alone are insufficient in most cases — as you can't tell a book by its cover. With respect to the thousands of abstracts, Plaintiffs cannot assess the underlying document based solely on the limited, vague information provided.

Defendants claim that it is *Plaintiffs'* responsibility to identify potentially responsive documents based on these vague abstracts alone. This simply is not feasible; indeed the proposition is absurd. From Plaintiffs' limited review of these abstracts, it appears that these documents contain responsive information regarding the health effects of test substances and the procedures used in the test programs. As briefed above, this information is directly relevant to Plaintiffs' Administrative Procedures Act ("APA") and Constitutional due process claims for notice and health care. It also could aid in refuting Defendants' repeated assertions — including in the notification letter sent to test subjects — that exposure to the test substances causes no long-term health effects. (*See* Patterson Decl. ¶ 19, Ex. M at VET001_014268.)

On a more practical level, the documents in the DTIC bibliographies are particularly important because DTIC is the **sole repository** for many historical documents formerly maintained by Defendants in their files. For example, according to Defendants, the bibliographies contain technical reports from testing locations, including remote sites that Defendants did not search for test records. (Patterson Decl. ¶ 16; ¶ 17, Ex. K at 2 n.1.) Indeed, Defendants indicated that DTIC even has reports from Edgewood Arsenal that may not have previously been produced in discovery because they are no longer physically located at Edgewood. (*Id.* at ¶ 15.) Additionally, in the course of Battelle's compilation of documents for

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(Footnote continued from previous page.)

Guinea; Panama Canal Zone, Camp Seibert, Alabama, Camp Polk, Louisiana; El Centro, California; Fort Richardson, Alaska; and San Jose Island. (*See* Docket No. 129-6.)

its work related to the Chem-Bio Database, Battelle sent to DOD documents with individual service member information; Battelle sent other relevant documents it collected regarding the testing programs to DTIC. (*Id.* at ¶ 16.)

Plaintiffs cannot know for sure how relevant these documents may be because only *Defendants* have access to them. Yet, Defendants have refused to review and produce the responsive documents or even produce (without screening) all of the documents identified through the keyword searches. Instead, they insist that by providing vague abstracts (and in some cases, merely a title), they have somehow made the underlying documents available for inspection and copying as contemplated by Rule 34. (Patterson Decl. ¶ 17, Ex. K at 2.) They have not: vague abstracts or titles cannot comply with Rule 34 because Plaintiffs do not have access to the underlying documents. It is Defendants' responsibility to produce all documents responsive to Plaintiffs' discovery requests. If Defendants believe that these documents are responsive based on Defendants' good-faith keyword searching, *they should produce the documents identified.*

That said, in the spirit of compromise, Plaintiffs proposed that Defendants allow Plaintiffs access to the restricted portion of the DTIC database to review relevant documents themselves. (Patterson Decl. ¶ 20, Ex. N at 4.) Defendants responded that it would be logistically difficult for Plaintiffs to access the database in a meaningful way. (Patterson Decl. ¶ 15.) The parties could reach no other workable solution.

In order to review these documents efficiently, Plaintiffs need to load the documents themselves into a word-searchable database for review. Plaintiffs cannot do so, however, because Plaintiffs *do not have the documents*. Thus, Plaintiffs request that the Court compel Defendants to produce all documents identified through the keyword searches, so that Plaintiffs can review them. To further minimize Defendants' burden, Plaintiffs do not require any documents that Defendants already searched for and produced, nor documents available in the public portion of the DTIC database. Plaintiffs will assume the full burden of the public search to the extent full documents, as opposed to mere abstracts, are available.

3. Defendant DOD must search for and produce all relevant email.

It is beyond dispute that email is a potential source of relevant, responsive documents in this case. Yet, to date, DOD has produced virtually no email and certainly far fewer emails than the DVA has produced. In fact, the DVA production contains email with DOD employees that are responsive to Plaintiffs' discovery requests but that DOD failed to produce. For example: (1) David Abbott (DVA) emailed Dee Dodson Morris (DOD) for guidance regarding potential sections to include in the notification letter sent to test subjects. (Patterson Decl. ¶ 21, Ex. O.) (2) Abbott also emailed Morris to express his concern about the contents of the CBRNE database – specifically, that the database did not include a "test location" field that would enable DVA to "include the test location in the facts about a particular claimant's exposure." (Patterson Decl. ¶ 22, Ex. P.) (3) Similarly, Morris emailed Joe Salvatore (DVA) regarding the lists of surviving Edgewood and Fort Detrick test participants that were provided to DVA by Congressmen Evans and Strickland. (Patterson Decl. ¶ 23, Ex. Q.) Importantly, Morris discussed the relevance of that list to exposure databases that DOD and DVA had already created. (*Id.*) Plaintiffs received all of these key emails from the DVA; the DOD failed to produce a single one of them.

A review of these DVA emails, among others, strongly suggests that DOD possesses unproduced emails responsive to Plaintiffs' discovery requests. For example, emails would be a particularly key source for documents responsive to RFP Nos. 21, 22, 102, and 118.[11] These encompass, for example, communications concerning the Chem-Bio Database (*see* RFP No. 21),

[11] "AMENDED REQUEST FOR PRODUCTION NO. 21: The content of registries YOU have created CONCERNING participants in the TEST PROGRAMS, including without limitation, rosters, lists or other DOCUMENTS identifying the participants in the TEST PROGRAMS, fields, manuals, data definitions, data, protocols and instructions." "AMENDED REQUEST FOR PRODUCTION NO. 22: MEETINGS or COMMUNICATIONS between YOU and any one or more of the participants in the TEST PROGRAMS." "AMENDED REQUEST FOR PRODUCTION NO. 102: All requests YOU have made for any records or DOCUMENTS CONCERNING any of the individual plaintiffs, including but not limited to, all requests directed to the Department of Veterans Affairs or any of its regional offices, and all DOCUMENTS that YOU have received pursuant to any such request." "AMENDED REQUEST FOR PRODUCTION NO. 118: All DOCUMENTS CONCERNING any of the individual plaintiffs, including but not limited to, military service records, physical or mental health records, correspondence and records CONCERNING all COMMUNICATIONS with any individual plaintiff." (Patterson Decl. ¶ 10, Ex. F at 13, 28, 31.)

and information related to any effort by Defendants to notify or communicate with test participants, including related communications with the DVA. (S*ee* RFP No. 22.) Such information is clearly relevant to Plaintiffs' notice and healthcare claims as well as Plaintiffs' bias claim against the DVA.

The DOD and the Army's email search efforts have been clearly inadequate to this point. Plaintiffs have raised this issue on several occasions. Defendants have responded that they "provided Plaintiffs' discovery requests to those components of DOD that are most likely to have responsive documents. . ." (Patterson Decl. ¶ 17, Ex. K at 2.) During the August 15, 2011 meet-and-confer call, however, Defendants stated that they have run **no keyword searches** of custodians' e-mail accounts. (*Id.* at ¶ 16.) Plaintiffs have asked for (1) a list of custodians from whom Defendants are collecting email, and (2) a description of the scope of email included in the search for each custodian (whether a current or former employee), including the timeframe of email that will be captured in the search. Defendants have not yet provided this information.

If the DOD refuses to produce emails by former employees, including any back-up tape emails, then a critical period of time for responsive emails will be excluded. This restriction would omit emails from 1993-1995 and 2004-2006 — the key time frames for DOD's (and as to the latter, DVA's) information gathering, outreach, and notification programs. (*See e.g.*, TAC ¶ 227.) Because many of the key individuals involved in these programs left DOD before 2009, their emails would be omitted. Given the considerable number of relevant DVA emails produced from the 2004-2006 time frame, Plaintiffs expect a large portion of the excluded DOD emails would be highly relevant.

Given the critical importance of email and the limited time remaining in discovery, Plaintiffs seek an order compelling the DOD and the Army to search for and produce responsive emails. Although Plaintiffs request that Defendants search through the emails (including archived or back-up tape emails, if necessary) of *all* relevant custodians (including former employees), at the very least, that would include the following key players: Dr. Michael Kilpatrick, Lloyd Roberts, Anthony Lee, Martha Hamed, Norma St. Claire, Col. Kolbrenner, Dee Dodson Morris,

Roy Finno, Dr. Kelley Brix, Lionel West, Roxana Baylor, and Arnold DuPuy. The importance of each of these key custodians is briefly described below.

Many of these custodians are listed on Defendants' April 1, 2011 Supplemental Initial Disclosures as having information pertinent to this litigation. This includes: Dr. Michael Kilpatrick – who also was designated by both the DOD and the Army to testify on their behalf regarding Plaintiffs' Rule 30(b)(6) topics; Lloyd Roberts; and Anthony Lee. (Patterson Decl. ¶ 25, Ex. S at 2.)

Martha Hamed was a DOD employee who, from 1993-95, worked on a project to obtain names of veterans exposed to mustard gas and Lewisite to provide those names to the DVA. (Patterson Decl. ¶ 26, Ex. T (Hamed Deposition Tr.) at 15-17.) Ms. Hamed reported directly to Norma St. Claire, and the two of them, among others, wrote the 1993 Perry Memo (*id.* at 16, 32-33) — which purported to partially release pre-1968 test subjects from their secrecy oaths. In 2007, Ms. Hamed worked as an independent DOD consultant and created a report documenting the military's history with chemical and biological testing. (*Id.* at 89-91.) She took direction from Ms. St. Claire during this project. (*Id.*)

Col. Fred Kolbrenner assisted Ms. Hamed on trips to review testing records. (*Id.* at 30-32). Col. Kolbrenner took over the mustard gas and lewisite database in 1994 (*id.*) and incorporated the names into the database in the Defense Manpower Data Center (DMDC) when he was transferred to there in 1995. (*Id.* at 74-76.)

Dee Dodson Morris was heavily involved in the DOD/DVA 2006 notification efforts. (Patterson Decl. ¶ 27, Ex. U (Morris Deposition Tr.) at 13-14.) Her office gathered documents regarding chemical and biological testing, assisted in the creation of the Chem-Bio Database, and worked with the DVA in drafting the notice letters and fact sheets sent to test subjects. (*Id.* at 35-36, 70, 76, 114.) Roy Finno was Ms. Morris' primary assistant in drafting test subject fact sheets. (*Id.* at 65, 68.) Ms. Morris also regularly discussed which testing veterans should be placed in databases with Mr. Finno. (*Id.* at 118-119.)

Dr. Kelley Brix works for DoD in the Health Affairs division, reporting to Dr. Kilpatrick. (Patterson Decl. ¶ 28, Ex. V (Lee Deposition Tr.) at 48-49.) She sometimes led DoD/DVA

Deployment Health Work Group Meetings. (*See, e.g.*, Patterson Decl. ¶ 29, Ex. W at VET007_000961.) According to Joe Salvatore of the DVA, Dr. Brix at one point expressed her belief that the "VA had not released a sufficient amount of notification letters." (Patterson Decl. ¶ 30, Ex. X (Salvatore Deposition Tr.) at 67-68.)

Lionel West worked for Ms. Morris as a Chemical Biological Investigative Analyst in the Deployment Health Support Directorate. (Patterson Decl. ¶ 31, Ex. Y.) He also was the "primary presenter" at a June 1, 2005 DoD/DVA meeting regarding declassification of chemical and biological tests. (Patterson Decl. ¶ 32, Ex. Z.)

Roxana Baylor was the individual who "for the longest time" helped Ms. Morris assemble DOD testing databases. (Patterson Decl. ¶ 27, Ex. U at 196.) She also participated in the June 1, 2005 DoD/DVA meeting regarding declassification of chemical and biological tests (Patterson Decl. ¶ 32, Ex. Z), and sent a December 1, 2005 email to DVA attaching a CBRNE Personnel spreadsheet (Patterson Decl. ¶ 33, Ex. AA).

Arnold Dupuy was Anthony Lee's point of contact at DOD Health Affairs. (Patterson Decl. ¶ 28, Ex. V at 193.) He worked as a government contractor, receiving data from Battelle, working out quality issues, and then submitting the data to the DVA. (*Id.*)

4. Defendant CIA must expand its search to documents reflecting possible health effects beyond merely *two* of the many substances at issue in this case.

Defendant CIA has refused to search for and produce documents reflecting possible health effects of test substances by limiting its search to only two chemical agents: EA 3167 and "the Boomer." The CIA continues to hide from discovery, and to ignore its widespread participation in the test programs, which included planning and financing them, placing CIA personnel on site at Edgewood, reaping the results of the research, and a variety of other acts. (*See, e.g.*, TAC ¶¶ 2, 106, 113, 132.) In addition, the CIA was copied on distributions of many Edgewood technical reports discussing the results of and health effects caused by tests. (*See, e.g.*, Patterson Decl. ¶ 34, Ex. BB at JK02 0004308.) The CIA must fulfill its discovery obligations by searching for and producing relevant documents. (*See* Docket No. 250 at 15:12.) The type of health effects

information sought by this request is responsive to various RFP's, including RFP Nos. 1 and 3. (*See* n.8 above.)

As the Court acknowledged at the August 4, 2011 hearing, "regardless of the CIA's involvement" in the testing, the health effects caused by substances administered during the test programs are "certainly" relevant to the issues in this litigation. (*See* Docket No. 250 at 34-35.) Judge Larson reached the same conclusion previously, finding that health effects information possessed by the CIA would be relevant to Plaintiffs' claims against the other Defendants. (*See* Nov. 2010 Order at 26 ("health effects of drugs used in MKULTRA known from [sic] to be similar to those in Edgewood Arsenal testing, are relevant to Plaintiffs' notice and healthcare claims.").)

Any Defendant's knowledge regarding the health effects of the test substances is fundamental to Plaintiffs' notice and health care claims. This should not be controversial. At its core, Plaintiffs' case is that Defendants have a duty to notify test subjects of and provide treatment for any potential health effects arising from the testing programs. (*See, e.g.*, TAC ¶¶ 183, 187, 189.) The CIA was closely involved in the testing programs, as explained in section B-3 above. The concerted action between the CIA and the Army during those programs — including information exchange about the outcome of testing — supports the conclusion that the CIA has information about the health effects of the testing at issue in this case. If so, any relevant documents in the CIA's possession bearing on these health effects must therefore be produced.

5. Drugs and Substances Obtained by the CIA are Highly Relevant.

Plaintiffs have requested documents in RFP No. 60 concerning "the drugs and substances the CIA obtained from drug and pharmaceutical companies, other government agencies, including the VA, NIH, FDA, and EARL [Edgewood Arsenal]."[12] As explained above, DVA's prior

[12] "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 VVA0238[3]7." (Patterson Decl. ¶ 10, Ex. F at 20.)

involvement in testing lies at the core of Plaintiffs' bias claim against the DVA. Even setting aside the relevance of this discovery for the DVA claim, the CIA's involvement in the testing programs, as explained above — including through procurement of drugs from Edgewood — is highly relevant. In this instance, the particular discovery sought is even more essential. The document which RFP No. 60 is drawn from explains that most of the drugs obtained by the CIA "came from the drug industries where the substance had been rejected because of undesired side effects." (Patterson Decl. ¶ 9, Ex. E at VET001_009241 (VVA023837) (emphasis added)). Given that Defendants were on notice of the side-effects of such substances — the reason why those substances were *rejected* by drug companies, in fact — Defendants had a duty to notify based on that content *even before* their own experiments commenced.

The CIA should be compelled to search for and produce such responsive documents. In addition, the DOD has limited its searches on this issue, claiming that it is unlikely it has responsive documents. (Patterson Decl. ¶ 11, Ex. G at 4.) Given the CIA's acknowledged document destruction and the clear connection between the CIA and the DOD's test programs, as addressed above, DOD should conduct a comprehensive search for responsive documents, as well.[13]

6. Defendants must produce all requested Battelle Memorial Institute documents in their possession.

Defendants have failed to produce a wide range of documents concerning Battelle's work on the "Chem-Bio" Database and the notification/document collection project, including its apparent beginnings in 1993-94, which was abandoned for unexplained reasons. Plaintiffs' basic understanding is that Battelle was engaged to collect service member testing records and technical documents that would be used to compile the Chem-Bio Database. This database would include the names of test subjects, test substances, doses, and other information about individual tests.

[13] Defendants may claim that Plaintiffs have refused to inspect relevant documents "identified" in the DTIC bibliographies. Because Defendants have provided only a vague index of potentially responsive documents rather than producing the documents themselves, however, Defendants' offer does not satisfy Rule 34. *See supra* at Section C-2.

The database would then be used as part of Defendants' outreach efforts. Defendants have provided this database to Plaintiffs. In response to discovery requests — in particular, regarding doses and health effects — Defendants refer Plaintiffs to the database as a basis for refusing to search for additional discovery. (*See, e.g.*, Patterson Decl. ¶ 17, Ex. K at 2.)

Shortly before the August 4 discovery hearing, Defendants produced at least some Battelle monthly reports, standard operating procedures, and quality control documents, which Defendants claimed had been obtained through recently "renewed" search efforts. (*See* Patterson Decl. ¶ 35, Ex. CC.) On August 4, Defendants also agreed to produce the contract with Battelle (*see* Docket No. 250 at 46-48), but two weeks have passed and Defendants still have not produced it. As noted during the hearing, Defendants also continue to refuse to provide additional categories of Battelle documents:

- *Contract-related documents*. Quarterly program reviews by Battelle and DOD; lists of personnel and team leaders assigned to the Battelle Chem-Bio database and document collection projects; documents reflecting gaps in the files used by Battelle for the Chem-Bio database and document collection projects and documents explaining how those gaps are reconciled; documents related to contract renewal discussions with Battelle concerning the Chem-Bio database and document collection projects, including drafts related to these discussions.
- *Correspondence*. Email and other communications between Battelle and Defendants concerning the scope, modification, and execution of the Chem-Bio Database and document collection project.
- *1993-1994 Research and Notification Efforts*. Contract documents, including the contract, amendments, contract correspondence, and related statements of work pertaining to this notification project work conducted by Battelle beginning around 1993. Also, all reports and other contract deliverables produced by Battelle pursuant to this contract; all correspondence, including email, between Battelle and Defendants concerning the scope, modification,

and execution of the contract; and all documents concerning why the efforts under the contract were stopped or discontinued.

This information is relevant to Plaintiffs' notice and health care claims and is critical to Plaintiffs' ability to assess the veracity of the database and the propriety of the document collection efforts — from the earliest phases of the project in 1993 to present. The information is responsive to RFP Nos. 21, 22, and 118. (*See* n.11 above.) If Plaintiffs are to rely on the Chem-Bio database in this case, moreover — as Defendants repeatedly have insisted — Plaintiffs are entitled to discovery to understand its creation, purpose, accuracy, completeness, and veracity, along with the credibility of the testing record collection effort.[14]

The requested information will help explain: (a) the formation of the Database project; (b) the process for identifying and collecting relevant documents; (c) what documents or repositories Battelle was instructed to ignore or exclude from its analysis or collection efforts and why; (d) Government instructions to Battelle regarding the implementation of the Project; (e) how conflicts were resolved among available records; (f) the testing and reliability of the stored information; and, (g) why the project was abandoned in 1994 and not resumed for over a decade. These documents are also necessary to adequately prepare for upcoming Rule 30(b)(6) depositions of Battelle.[15]

The 1993 notification effort documents are particularly important because they relate to the genesis of the Chem-Bio Database and the initial mustard gas notification effort. Because the 1993-1994 effort related to mustard gas testing, much of Defendants' resistance to producing these documents mirrors Defendants' unsupported position that pre-1953 testing, including World

[14] Defendants have stated that a different contractor than Battelle created and maintains the database. (Patterson Decl. ¶ 16.) Regardless of whether it is Battelle, the DOD internally, an independent contractor at DOD, or another separate contractor entirely, this information concerning the database is highly relevant. Defendants should be compelled to produce such documents.

[15] With respect to emails, Defendants have taken a similar position as with DOD emails in general. (Patterson Decl. ¶ 16.) Of particular relevance, Anthony Lee — who was responsible for quality control of the Chem-Bio database (Patterson Decl. ¶ 28, Ex. V at 12) — identified Arnold DuPuy as a key player involved in the database creation effort, as discussed above (*id.* at 193). Mr. DuPuy and Mr. Lee, thus, represent two examples of custodians from whom Defendants should be compelled to produce responsive emails regarding the Chem-Bio database.

War II mustard gas testing, is not in the case. As discussed above, pre-1953 testing is in the Complaint; it's in the case. This information is highly relevant because the reasons for the DOD's abandonment of the 1993 effort — especially given the apparently *55,000* completely unnotified test subjects (*see* n.9 above) — is still unexplained. Furthermore, the Rule 30(b)(6) witness offered by the DOD and Army, Dr. Michael Kilpatrick, lacked personal knowledge on this issue, making the need for the *documents themselves* even greater.

In the U.S. District Court for the Southern District of Ohio, Plaintiffs separately moved on April 12, 2011, to compel production of documents that Plaintiffs had subpoenaed from Battelle. (Case: 2:11-mc-00016-MHW-EPD, Docket No. 1.) Both Defendants and Battelle opposed Plaintiffs' motion. (*Id.* at Docket Nos. 10, 11.) During a June 22, 2011 hearing before Magistrate Judge Elizabeth Preston Deavers, the Ohio Court strongly recommended (without ruling on the requests) and the parties and Battelle agreed that Plaintiffs are to obtain documents in *Defendants' possession* from Defendants, not from Battelle — a non-party. (*See, e.g.*, Patterson Decl. ¶ 18, Ex. L (June 22, 2011 Hearing Tr.) at 88:4-7, 11-13 ("THE COURT: Would you be agreeable at least to waiting through the end of discovery and having the California Court address what you need in terms of the government's production, and then returning, if necessary . . ." "MR. ERSPAMER: At [sic] long as we are not going to have problems with the schedule of the case, that seems to be a reasonable notion.")) Thus, obtaining this discovery <u>from Defendants</u> is even more critical now.

Accordingly, Plaintiffs request that the Court compel Defendants to search for and produce the above-mentioned documents.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask that this Court order the CIA to designate a witness to testify regarding each of the three Topics identified above and in the Plaintiffs' Rule 30(b)(6) deposition notice. Plaintiffs also respectfully request that the Court order Defendants to produce all documents responsive to Plaintiffs' requests, as discussed above.

Dated: August 18, 2011

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

MORRISON & FOERSTER LLP

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

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION TO OVERRULE OBJECTIONS AND COMPEL RULE 30(B)(6) DEPOSITIONS AND PRODUCTION OF DOCUMENTS

Hearing Date: September 22, 2011
Time: 2:00 p.m.
Courtroom: E, 15th Floor
Judge: Hon. Jacqueline Scott Corley

Complaint filed January 7, 2009

Plaintiffs' Motion to Overrule Objections and Compel Rule 30(b)(6) Depositions and Production of Documents came before this Court for hearing on September 22, 2011. Having read and considered the submissions of the parties, and finding good cause therefore, the Court hereby GRANTS the motion to overrule objections and compel Rule 30(b)(6) depositions and production of documents.

The Court ORDERS Defendant Central Intelligence Agency to designate knowledgeable witnesses who can testify and provide testimony on Topics 1-3 of Plaintiffs' June 15, 2011 Rule 30(b)(6) Notice. These designations shall be provided within 10 days of the date of this Order.

Additionally, the Court ORDERS Defendants to produce, within 30 days of this Order, all documents responsive to Plaintiffs' Amended Requests for Production ("RFPs"), as described in Plaintiffs' August 18, 2011 Motion to Compel, as follows: (1) produce all responsive documents from the entire time frame of the testing programs, which began in approximately 1942, including mustard gas and Lewisite testing; (2) expand search parameters to search for and produce responsive documents to Plaintiffs' RFP No. 60; (3) search for and produce responsive documents identified through Defense Technical Information Center ("DTIC") bibliographies; (4) search for and produce all responsive emails; (5) produce various documents related to Battelle Memorial Institute's efforts to collect testing information and concerning the creation of the Chem-Bio Database, as outlined in Plaintiffs' Motion to Compel; and (6) Defendant CIA must expand its search for documents reflecting possible health effects to all test substances listed in Plaintiffs' March 21, 2011 narrowed list and produce those responsive documents.

IT IS HEREBY ORDERED that Plaintiffs' Motion is GRANTED.

Dated: _____

By: _____
UNITED STATES MAGISTRATE JUDGE
HONORABLE JACQUELINE SCOTT CORLEY