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

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

DECLARATION OF GORDON P. ERSPAMER IN SUPPORT OF PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL RULE 30(B)(6) DEPOSITIONS AND PRODUCTION OF DOCUMENTS

I, Gordon P. Erspamer, declare as follows:

1. I am an attorney licensed to practice law in the State of California and am admitted to practice before this Court. I am a senior counsel with the law firm of Morrison & Foerster LLP, counsel of record for 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") in this action. I submit this Declaration in Support of Plaintiffs' Reply in Support of Motion to Compel Rule 30(b)(6) Depositions and Production of Documents. I make this Declaration based on personal knowledge. If called as a witness, I would testify to the facts set forth below.

2. The purpose of this Declaration is to provide the Court with a chronological history concerning the CIA and DOD's handling of certain documents identified in Defendants' Rule 26(a)(1) disclosures and requested by Plaintiffs.

History of the CIA's Magnetic Tapes and other Files Obtained from Edgewood

3. Defendants' Rule 26(a)(1) Disclosures, dated March 4, 2010, identify, as documents on which Defendants may rely, "Historical Documentation of the [CIA's] Role in the Human Subject Test Program at Edgewood Arsenal Research Laboratories (Oct. 21, 1994). A copy is produced herewith as Bates-stamped VVA 023789-023965." Among the documents Defendants included with their initial disclosures is a "Records Retirement Request," with an Attachment B, labeled VVA023826 through VVA023831, and a May 22, 1974 document entitled "Project OFTEN Records" labeled VVA023834. These documents identify 11 boxes of CIA documents held in storage, including "magnetic tapes" listed as containing, among other things, "Original human clinical data from Edgewood." (*See* VVA023831.) Attached as Exhibit A to this Declaration is a true and correct copy of Defendants' March 4, 2010 Rule 26(a)(1) Disclosures and the two documents identified above.

4. In response to Plaintiffs' Interrogatory No. 9 ("For each database YOU have used to record or preserve information CONCERNING TEST SUBJECTS or the TEST PROGRAMS, please IDENTIFY each, including the purpose, period of time it was active, and software and hardware requirements"), the CIA responded on January 5, 2011: "The CIA has located some

magnetic computer tapes associated with Project OFTEN that CIA officers believe are copies of computer databases that the CIA received from DoD employees at Edgewood Arsenal in the early 1970s, and the CIA believes that some of the databases contain information about human testing. However, the CIA does not know whether the information contained on the magnetic tapes is understandable or even retrievable using available technology." Attached as Exhibit B to this Declaration is a true and correct copy of Defendants' Response to Plaintiffs' Interrogatory No. 9, served on January 5, 2011.

5. The boxes of documents and magnetic tapes sent to storage appear to be highly relevant to this action, as they contain contemporaneous information collected in databases that may show the names and other information concerning the exposures of service personnel and health effects. In addition, as discussed in DVA's Opposition to Plaintiffs' Motion to Compel, Defendants have claimed an inability to "confirm" the participation of large numbers of veterans who claim to have participated in the Edgewood experiments in an effort to explain why so few of the VA claims of participants have been granted.

6. On February 24, 2011, Plaintiffs' Counsel sent Defendants' Counsel a letter concerning the CIA's response to Interrogatory No. 9 and asking that the CIA produce the magnetic tapes immediately. The February 24 letter stated: "The CIA also admits that it is in possession and control of magnetic computer tapes associated with Project OFTEN that the CIA believes it received from DoD employees in the early 1970's, and 'the CIA believes that some of the databases contain information about human testing.' (Response to Interrogatory No. 9.) Remarkably, the CIA has neither attempted to retrieve or analyze the information on these tapes, and has not produced them to Plaintiffs. We believe that the information on these tapes is responsive to Plaintiffs' RFPs and should be produced immediately." Attached as Exhibit C to this Declaration is a true and correct copy of that February 24, 2011 letter from me to Joshua Gardner, counsel for Defendants. It is unclear the extent to which other documents contained in the boxes sent to storage have ever been produced, as the total number of pages of the CIA's production is far less than the estimated number of pages contained in these 11 boxes.

7. Instead of producing these tapes — or even maintaining custody of them — the CIA transferred possession of them to the DOD while the document requests were pending. Defendants' Counsel advised Plaintiffs in a March 11, 2011 letter as follows: "As we have previously explained, the CIA lacks the technological capability to read the information on these magnetic tapes, which have been marked as classified. The CIA has transmitted these magnetic computer tapes to the DoD for a classification review and, to the extent the DoD declassifies these magnetic computer tapes and determines that they are not privileged, they will be produced. To the extent DoD determines that these magnetic tapes are properly classified and/or privileged, we will identify these tapes on a privilege log." Attached as Exhibit D to this Declaration is a true and correct copy of that March 11, 2011 from Joshua Gardner to me.

8. Five months later, Defendants' Counsel sent Plaintiffs' Counsel a four-line letter, dated August 15, 2011, stating: "I am writing to inform you that the Department of Defense ('DoD') is unable to recover through existing processing systems the data on the magnetic tapes you previous requested. Accordingly, DoD is unable to undertake a classification review of these tapes, and they will remain designated as classified." Based upon this statement, it appears that the only effort to retrieve the information on the magnetic tapes was to try to run them using 2011 computer systems and software. Defendants have not provided any technical support for the statement that the content of the magnetic tapes cannot be retrieved by other methods or any indication that forensic computer experts or other professionals were ever involved in the review. Attached as Exhibit E to this Declaration is a true and correct copy of the August 15, 2011 letter from Joshua Gardner to me.

9. On September 13, 2011, despite the fact that Defendants had not reviewed the content of these magnetic tapes, they suddenly appeared on the **DOD's** Consolidated Privilege Log (not the CIA's log), which asserted the "state secrets" privilege. The privilege log entry for these magnetic tapes lists the dates as "unknown" and does not list any author or recipient, or any other foundation for assertion of a privilege. No explanation was provided as to why the magnetic tapes (or any other documents transferred by the CIA to the DOD) were not returned to the CIA, but instead appear to now reside with the DOD. Attached as Exhibit F to this

Declaration is a true and correct copy of the DOD's Consolidated Privilege Log, served on September 13, 2011.

The Time Limitation Issue

10. The Complaint contains a series of paragraphs chronicling the known history of the chemical and biological experiment program, dating back to the World War II era. (Recent documents produced by Defendants suggest that this program actually started earlier, in the mid to late 1930's). Without Plaintiffs' knowledge or consent, and without revealing the fact to Plaintiffs, Defendants in the earlier stages of discovery in the case, excised pre-1955 information from the version of the Chemical and Biological ("Chem-Bio") Database produced to Plaintiffs. After Plaintiffs detected and questioned the truncated time frame, Defendants later produced an updated version of the database on April 26, 2011, accompanied by a letter from Defendants' Counsel stating that, "it appears that the most recent version of the Chemical and Biological database that we produced omitted exposures and testing conducted prior to 1955. Enclosed is a version of the database that includes this information. . . ." Attached as Exhibit G to this Declaration is a true and correct copy of the April 26, 2011 letter from Joshua Gardner to me.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed in San Francisco, California on this 15th day of September, 2011.

/s/ Gordon P. Erspamer
Gordon P. Erspamer