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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

JOINT LETTER CONCERNING DISCOVERY STATUS AND DISPUTES

I. INTRODUCTION

Pursuant to the Court's October 31, 2011 Order (Docket No. 314), the parties submit this Joint Letter to advise the Court of the status of outstanding discovery as well as discovery disputes in which parties have reached an impasse. The parties met-and-conferred at length by telephone concerning these topics on November 2, 2011. Unless marked differently below, the sections are joint submissions.

II. DISCOVERY STATUS

A. Outstanding Written Discovery

1. BATTELLE DOCUMENTS

Defendants' Statement: On Tuesday, November 1, 2011, Battelle Memorial Institute produced more than 50,000 pages of documents to Plaintiffs pursuant to a third-party subpoena. Battelle has completed its production of documents in response to that subpoena. Plaintiffs have noticed three depositions from Battelle Memorial: the deposition of John Sowa (November 17, 2011); the deposition of William McKim (November 18, 2011); and a Rule 30(b)(6) deposition.

Plaintiffs' Statement: After being screened by Defendants without Plaintiffs' consent, Battelle has produced roughly 58,000 pages of documents, but Plaintiffs do not agree with the assertion that Battelle has completed its production. Battelle (a third-party) is withholding a document under instruction of Defendants as privileged, and Plaintiffs have not yet received a privilege log. The depositions of two Battelle witnesses, John Sowa and William McKim, are also scheduled for November 17 and 18, and will be noticed shortly.

2. CWEST DOCUMENT INDEX

On October 31, 2011, Plaintiffs identified for the Department of Defense the documents Plaintiffs desired from the index to the "Chemical Weapons Exposure Project: Summary of Actions and Projects: 1993-2007." The Department of Defense anticipates that it will complete its production of non-privileged documents by December 1, 2011.[1]

[1] *Plaintiffs' Statement:* Plaintiffs note that the CWEST Index does not include any entries concerning certain topics such as the Brook Island mustard gas tests that used military prisoners as test subjects — more fully addressed in Plaintiffs' Supplemental Brief concerning Navy and Air Force documents (Dkt. No. 307 at 9 n.8). Because responsive documents concerning Brook

3. VA CLAIMS FILES

Defendants' Statement: VA is producing, on a rolling basis, the claims files for all identifiable test subjects who have sought VA service-connected disability compensation and whose survivors have sought DIC based upon the veteran's alleged service-connected deaths. VA anticipates completing its production of these claims files by December 23, 2011.[2]

Plaintiffs' request that all productions be completed by December 15, 2011 should be denied. During the October 31, 2011 conference call with the Court, the Court suggested a fact discovery cut-off of December 23, 2011, and the disclosure of expert witnesses on January 12, 2012. The Court expressly asked both parties if they agreed with the Court's proposal, and both sides expressed their agreement. Plaintiffs' new contention that Defendants should complete their productions by December 15, 2011 should be rejected, particularly given that Defendants need the additional time to complete the extensive discovery Plaintiffs have requested. In any event, because Plaintiffs' stated need for the claims files relates to expert discovery, the schedule identified in Magistrate Judge Corley's October 31, 2011 report and recommendation gives Plaintiffs' experts ample time to complete their reports.

Plaintiffs' Statement: Thus far, it appears that DVA has only produced the claims files for named Plaintiffs and four specifically requested VVA member third-parties. As addressed in the disputes section below, Plaintiffs have learned that DVA is withholding so-called "unverified" claims files (that it summarily denied), mustard gas/lewisite claims files, and perhaps other categories that collectively amount to the vast majority of chem/bio claims by veterans. Plaintiffs

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Island are not available via the CWEST Index, the Court should compel Defendants to search for such documents elsewhere.

Defendants' Statement: Plaintiffs' arguments concerning Brook Island directly contravenes the Court's order not to raise issues addressed in the current discovery disputes. Dkt. 314, n 2. Beyond that, Plaintiffs' sole basis for claiming that testing occurred at Brook Island appears to be a blog from the Internet. Plaintiffs' contention that Defendants should undertake the effort to engage in a broad-based search to satisfy what charitably can be characterized as a "fishing expedition" lacks merit.

[2] Plaintiffs inappropriately raise a spate of factually unsupported arguments in the section of the joint statement that is intended to simply discuss the status of discovery. Defendants will address issues associated with purported discovery disputes in the section below.

believe that one of the reasons DVA is not producing mustard gas claims files is that it did not even attempt to send the notification letter to approximately 55,000 of the veterans with mustard gas exposure, but only to the approximately 5,000 veterans who suffered whole body exposure and are entitled to a presumption of service connection for certain illnesses. (*See* Dkt. No. 256-17 at 3.)

That DVA's limited production's anticipated completion date is the last date of fact discovery raises concerns for Plaintiffs, including the short turnaround to review and tabulate the data from the files for use in expert reports, due on January 12, 2012. More generally, Plaintiffs propose that the Court order that the production of all written discovery by both sides be completed by December 15, 2011, to help address these concerns.[3]

4. DEATH CERTIFICATES AND NOTICE LETTERS

Defendants' Statement: On November 2, 2011, VA completed its production of the death certificates and notice letters for all identifiable test subjects held in VBA's electronic recordkeeping system. As noted in its Opposition to Plaintiffs' Motion to Compel, VA agreed to produce the claims files for identifiable test subjects, which would contain death certificates and notice letters if the claimant submitted the documentation to VA. VA also agreed to produce Notice of Death ("NOD") files for identifiable test subjects, which would contain death certificates if submitted by an identifiable test subject's survivor. In addition, VA agreed to search for death certificates in VBA's electronic recordkeeping system, to which VBA currently uploads evidence submitted in support of claims for burial benefits and produced all death

[3] *Plaintiffs' Statement*: With respect to experts, Plaintiffs have raised two concerns. First, Defendants' production will not be complete until, at the earliest, just a brief period of time before the expert reports are due — a problem which will be compounded by another round of discovery motions. Second, Plaintiffs anticipate that Defendants may not submit expert report(s) on known core issues such as health effects by the date specified in the scheduling order, and later claim that they are simply providing responding opinions to Plaintiffs' experts. Defendants have represented that they do not contemplate rebuttal expert reports and will comply with the Court's scheduling order concerning expert reports to the extent Defendants decide to submit one. Because these issues relate to discovery or issues that the Court has referred to the Magistrate Judge, Plaintiffs flag them for the Court's attention going forward.

Defendants' Statement: Defendants disagree with Plaintiffs' notion that these "concerns" are appropriately raised in this letter.

certificates found in that system to Plaintiffs. In addition, VA searched the electronic recordkeeping system for notice letters, which collects notice letters sent by VA after August 2011, and produced all notice letters found in that system to Plaintiffs. There is no other repository likely to contain either death certificates or notice letters.

Plaintiffs' Statement: DVA is only producing the death certificates and notice letters for so-called "identifiable" test subjects, including through its production of "identifiable" claims files (having represented to Plaintiffs that it did not keep copies of letters sent to participants whom had not filed claims). Since DVA is withholding the vast majority of the claims files, the death certificates and notification letters, if any, contained in the withheld claims files will not be produced. Thus, DVA is only producing a portion of the death certificates and notice letters. Yet, DVA have demonstrated repeatedly in reports prepared before this action was filed that DVA is fully capable of identifying and sorting chem/bio claimants' files. (*See* Dkt. No. 256-10.)

5. DTIC SEARCHES

Defendants' Statement: The parties have reached an agreement regarding new searches for documents in the Defense Technical Information Center ("DTIC"). Plaintiffs have committed to searching through the public side of DTIC for documents. DoD has committed to running searches, as described below, through the non-public side of the database, which includes both unclassified and classified documents. For those original bibliographies that resulted in less than 100 entries, DoD will not run any additional searches, and Plaintiffs will identify a reasonable number of documents that it wishes for DoD to search for and produce. To the extent the original bibliographies resulted in more than 100 entries, DoD has agreed to run new searches based upon the search terms proposed by Plaintiffs. In no event will DoD produce documents that are classified. DoD estimates that it will produce these new DTIC bibliographies by December 5, 2011. Plaintiffs will then have an opportunity to identify a reasonable number of documents from these new bibliographies. *See* Dkt. 294, at 12 ("Plaintiffs are cautioned to exercise reasonableness and discretion with respect to their document request."). Once Plaintiffs identify a reasonable number of documents from all of the bibliographies, DoD will update its privilege log.

Plaintiffs' Statement: Defendants are running new searches that are based on new search terms run within the original search results that were based on test agent names. Thus, the resulting search should be narrower and more focused. Defendants should produce all the documents identified by Plaintiffs, not just the ones or total that Defendants consider to be "reasonable." To the extent Defendants withhold selected documents as classified, Plaintiffs expect that those documents will be logged on an updated privilege log, and Plaintiffs reserve the right to challenge any such designations.

6. EMAIL SEARCHES

Defendants' Statement: The parties have reached an agreement regarding search terms and custodians concerning the search of DoD email. DoD anticipates that the production of all responsive, non-privileged emails will be completed by December 14, 2011.

Plaintiffs' Statement: A production date of December 14 raises concerns with respect to deposition scheduling. Many of the email custodians are individuals who Plaintiffs have sought leave from the Court to depose. If relevant emails are not received until December 14, Plaintiffs will have only 9 days to review those new documents and complete those depositions before the close of fact discovery. Plaintiffs note Defendants' lengthy delay in searching for emails, which Plaintiffs requested dating back two years to the initial document requests, and are concerned that many emails may have been lost or destroyed during that time period.

B. Outstanding Depositions

Outstanding depositions have been scheduled as follows:

- CIA Rule 30(b)(6) concerning CIA Involvement issues on November 9
- DOD & Army Rule 30(b)(6) concerning CIA Involvement issues on November 17
- Battelle witnesses, John Sowa and William McKim, concurrently in their Rule 30(b)(6) and individual capacity, on November 17 and 18

III. DISCOVERY DISPUTES

Plaintiffs' Introduction: Throughout the course of discovery in this case, Defendants have vehemently resisted Plaintiffs' discovery requests seemingly at every turn, and without regard to prior rulings in the case. Where agreements have been reached, Plaintiffs have been surprised to

learn that Defendants have applied undisclosed time or subject matter limitations on their productions (*e.g.*, producing only a small subset of the chem/bio DVA claims files, and not producing claim files where the DVA issued summary denials because the DOD has failed to "confirm" participation and refusing to produce mustard gas claim files).

Faced with global objections or having discovered gaps in Defendants' productions, Plaintiffs have revised discovery requests to clarify or target documents which Defendants have claimed are not covered by specific requests, have not searched for in certain locations or at certain subparts of their organizations, or where Defendants have withheld documents relating to certain time periods or subject matters. This continuing discovery recalcitrance has led to serial discovery disputes, forcing Plaintiffs to expend considerable time and resources attempting to resolve them, including filing multiple motions with the Court. More recently, as the discovery cut-offs have loomed, Defendants have unilaterally taken the blanket approach that — Plaintiffs shall have no further discovery. Only by Court Order or extensive meet-and-confer processes have Defendants recently agreed to provide much of the discovery outlined above.[4]

Plaintiffs identify below a narrow set of key remaining discovery disputes in which the parties have reached an impasse and seek the Court's intervention. Those issues are as follows: (1) DVA Claims Files and Printout of EP 683 Data, (2) Magnetic Tapes, (3) Perry Memo related documents, (4) Rule 30(b)(6) Deposition of Dr. Peterson, and (5) Redactions of CIA FOIA documents.[5]

Defendants' Introduction: Undeterred by admonitions from two magistrate judges that they must narrow and reassess their demands for discovery in this case, Plaintiffs continue to

[4] Defendants in many ways either recapitulate relevancy arguments previously rejected by the Court (*see* Dkt. No. 294 at 10) — including by yet again ignoring Plaintiffs' Constitutional claims, or merely point to the volume of documents produced. While the number of pages on its face may seem extensive, roughly 600,000 pages consist of service member records which had previously been collected and centrally stored, and the production includes many clearly nonresponsive documents. For example, DVA produced extensive building access exit/entry logs.

[5] These are key documents containing wholesale redactions made 35 years ago that were contained in the a public domain FOIA response set Defendants shared early in the case, but insist were provided outside of discovery, and have never have been officially produced or with a more tailored and appropriate set of redactions.

insist, largely without any acknowledgement of the more than a million pages they have received and the many, comprehensive depositions they have taken, that they need yet more discovery in this action presenting largely legal questions concerning purported legal duties made reviewable under the limited review provisions of the Administrative Procedure Act ("APA") and allegations of inherent facial bias in VA adjudicatory procedures for Plaintiffs' claims for benefits brought as a putative class action.

By continuing in this manner, Plaintiffs refuse to recognize that the government has gone above and beyond any reasonable measure of effort and proportionality to satisfy Plaintiffs' unending demands. Plaintiffs refuse to acknowledge that the Government has gone to Herculean lengths to produce massive amounts of discovery, which has included, by way of mere example: hordes of original source documents, including the full breadth of original testing documents collected by Battelle over the course of a multi-year, multi-million dollar contract related to Cold War-era Army testing programs (and regular reports concerning that effort); original test protocol and test plan documents; original (*i.e.*, contemporaneous) service member test files documenting their participation in testing; relevant documents from yet another prior multi-year effort to gather mustard gas documents (CWEST); Defendants' own databases (also generated at great expense over many years of efforts) concerning research program participants; policy documents retrieved from the National Archives at great expense; thousands of documents collected directly from discovery searches conducted for this case in response to *hundreds* of requests for production of documents; repeated and extensive hand searches of CIA files related to testing on service members; and hundreds of thousands of pages of VA documents produced at great effort — including thousands of man-hours — and great expense.

Plaintiffs' continued demands for yet more documents (and yet more testimony), without anything more than cursory acknowledgment (if any) of what Plaintiffs already have received, both flaunt the Court's repeated direction to assess what Plaintiffs truly need, as opposed to merely want, and demonstrates that Plaintiffs' appetite for discovery is insatiable. In addition, Plaintiffs essentially ignore the fact that by stipulation, and for most purposes, discovery ended months ago, and that discovery was extended to complete VA productions and to resolve then-

existing disputes. Notwithstanding their own agreement to the contrary, Plaintiffs continue to raise new issues, present moving targets by re-casting old issues in new terms with new demands, and otherwise seek to extract every possible shred of information, documentation, and testimony they imagine might be of interest, with disregard for accumulation, reasonableness, and proportionality. Indeed, Plaintiffs apparently already contemplate yet another "round" of discovery motions. *See* n.1, *infra*.

On the merits, Plaintiffs' new discovery disputes should be cast aside. The purported "disputes" against VA, are attempts, in part, to relitigate issues on which this Court has already ruled. Contrary to this Court's denial of Plaintiffs' initial demands, Plaintiffs have now expanded their requests to VA with no regard for the burden placed on the agency and seemingly little concern for the irrelevance of their requests. Plaintiffs' claim against VA is limited to one of inherent facial bias in VA's adjudications of claims. The discovery Plaintiffs seek, however, extends far beyond the scope of that claim and is unjustified. To the extent that this Court allows Plaintiffs to pursue their arguments, VA requests that it be allowed time to respond with declarations regarding the enormous burden that would be engendered by Plaintiffs' demands. Nor do Plaintiffs present any legally-cognizable basis to challenge the testimony of Dr. Peterson. Their challenge to his Rule 30(b)(6) testimony should be denied.

The dispute over magnetic tapes is equally misguided, as DoD's substantial efforts to attempt to extract information from the tapes are ongoing, and Plaintiffs have received enormous amounts of contemporaneous documents concerning the test program. Plaintiffs' demands for deposition testimony and documents regarding the Perry memo cannot elucidate the claims presently pending before the Court and likewise seek cumulative discovery.

Finally, as to the CIA, Plaintiffs astonishingly insist that they require discovery on matters in contravention of two Court orders. First, the request does not pertain to testing on service members, and the Court has already ruled that programs that did not involve testing on service members are irrelevant to the case. Second, Plaintiffs' efforts are also in contravention of this Court's Order that Plaintiffs cannot seek health effects information from the CIA for their claims against DoD. Third, because a renewed review of the documents would not likely result in

material changes to the redactions, such a review likely would be a wasteful exercise. Finally, while Plaintiffs have not identified the documents for which they would like the CIA to conduct a renewed privilege review, Plaintiffs' request could be unduly burdensome and could potentially take as long as nine-to-twelve months depending on the volume of documents selected.

A. Department of Veterans Affairs Issues

1. DVA Claims Files

Plaintiffs' Statement: Plaintiffs requested that the Department of Veterans Affairs ("DVA") produce all claims files of putative class members: chemical and biological test participants, including mustard gas/lewisite test subjects, and understood that the DVA had agreed to do so. (Thus, Defendants' attempt to characterize Plaintiffs as making a new request for "additional" files is not accurate). Now DVA says that it will only produce the claims files of what they call "identifiable" (or "verified") test participants, and DVA refuses to produce the claims files of the so-called "unverified" test participants or for mustard gas test subjects, and perhaps other categories excluded from the scope of their amorphous term "identifiable."

Contrary to their position before this Court, DVA has shown a complete ability to isolate mustard gas claims and other claims for the purposes of reports such as the mustard gas section of the outreach activities report. (*See* Dkt. No. 256-10.) Moreover, DVA historically was also able to sort the components of the EP 683 end products for purposes of the outreach report, as it states separate information for each of the sub-categories of chem-bio, SHAD, and Project 112 claims. (*See id.*) The Court should view DVA's representation that it unable to sort the EP 683 end products with skepticism.

Without these excluded claims files, Plaintiffs cannot create the complete statistical analysis contemplated by the Court's October 5, 2011 Order. (*See* Dkt. No. 294 at 19.) In that Order, in lieu of compelling production of updated EP 683 statistics concerning claimant's success rates, the Court relied on DVA's agreement to provide Plaintiffs with claims files, which "would allow Plaintiffs to perform their own statistical analysis." (*Id.* at 19.) What Defendants intend to produce, however, is only a small subset of the claims files, totaling 862 in number, and

leaving out at least (1) claims that DVA summarily denied because participation could not be verified and (2) mustard gas claims.

In light of DVA's unpromulgated rule to "PCAN" (or cancel) those claims that supposedly cannot be verified by the DOD (*see* Docket No. 256-16 at 5-7), the withholding of "unverified" claims files excludes from Plaintiffs' sought statistics potentially thousands of test subjects that had claims denied from inception — masking the magnitude of DVA's bias and shortcomings in DVA's notification process, as well as the information concerning adverse health effects claimed by veterans.[6] Thus, it is crucial that Plaintiffs' statistics include both verified and unverified claims files, as this information goes to the heart of Plaintiffs' bias claim against DVA. If Defendants merely provide "verified" claims files, any analysis that Plaintiffs perform would be inaccurately skewed in favor of DVA because the claims summarily denied "as unverified" would be excluded.

Furthermore, DVA refuses to produce claims files relating to participation in mustard gas and lewisite, and other testing conducted in the initial decades of testing, on "relevancy" grounds. The Court made clear, however, that Plaintiffs are entitled to discovery regarding these earlier phases of the testing programs, including "the 55,000 mustard gas and lewisite test subjects that did not receive the DVA notification letter." (*See* Dkt. No. 294 at 10-11.) Yet Defendants continue to refuse to produce multiple categories of mustard gas documents.[7] While the Court denied Plaintiffs' motion to compel production of pre-1953 documents from DVA, this denial

[6] Significant questions exist about the "verification" process itself, in which DVA delegates the determination to another government agency with a decided self-interest, and ignores other evidence of participation. (*See* Dkt. No. 256-16.) DVA's Training Letter on the subject instructs that DVA shall rely *exclusively* upon the DOD to "confirm" a claimant's participation in testing, and if the DOD does not verify participation, DVA will not conduct a medical examination and the processing of the veteran's testing-related claim is truncated (*see id.* at 5-7) — leading to an automatic, threshold denial in the vast majority of cases. (*See, e.g.*, Docket No. 256-7 at 212 ("we had more denials than grants for the sole reason that most of the individuals submitting the claims were not verified by DOD as being participants.").) Moreover, DVA has admitted that DOD records of most participants are "poor or often incomplete." (Dkt. No. 256-17 at 3.) This suspect process, which is the exclusive method to confirm participation, makes the "unverified" claims — that are denied from inception — even more critical.

[7] For instance, Plaintiffs expected to receive relevant mustard gas production in the form of death certificates and treatment records, but Defendants have refused such production.

was without prejudice and included a crucial caveat: "Should Plaintiffs determine following review of the documents already produced, that it appears that DVA has not produced documents relating to pre-1953 testing and that such documents are relevant, then Plaintiffs may renew their motion to compel." (*Id.* at 20-21.)

Based on Defendants' refusal to produce claims files related to pre-1953 mustard gas and lewisite testing, as well as Plaintiffs' review of documents produced, Plaintiffs seek a further order compelling DVA to produce the pre-1953 mustard gas and lewisite claims files (as well as other chem-bio claim files withheld by Defendants).[8] These files of Plaintiffs' putative class members are fundamental to this case: Plaintiffs require them to perform the statistical analysis mentioned above, to identify problems with DVA's notification program, and to compile evidence regarding health effects experienced by veteran claimants.[9]

Accordingly, Plaintiffs respectfully ask that the Court require Defendants to produce the claims files of not only *verified* test participants, but of the "*unverified*" test participants as well, and claims files for mustard gas and lewisite testing participants.[10]

2. Printout of EP 683 Data

Furthermore, Plaintiffs seek a simple printout of the End Production 683 ("EP 683") data from DVA's systems. By contrast to updated EP 683 statistics that would have required DVA to perform some statistical effort, one push of the button and this raw printout requested can be generated. DVA admits that it has utilized EP 683 for tracking different types of chem-bio testing

[8] DVA's burden argument that Plaintiffs ask DVA to "produce more than 55 times that number of claims files" is a serious and clear exaggeration. While there are roughly 55,000 "lost" test subjects, that does not mean that all 55,000 have filed claims. In fact, DVA's 2009 Outreach Report stated that DVA had only received "1,536 claims for Veterans alleging disabilities related to exposure to Mustard Gas." (Dkt. No. 256-10 at 10.) This shows that apparently only 2.7% of the veterans exposed to mustard gas have filed claims, a low rate presumably linked to DVA's decision not to notify them.

[9] Because DVA asserts that claims files may be the only source of the actual notification letters sent to veterans, many notification letters sent to mustard gas veterans would likely be excluded from production if those claims files are withheld.

[10] DVA's final point — that pre-1953 mustard gas test subjects enjoy a variety of service-connection presumptions — omits the fact that those presumptions only cover test subjects with "full-body" exposure, excluding the 55,000.

claims. (Decl. of Paul Black (Dkt. No. 276-5) at ¶10-12.) Thus, this printout will provide a centralized report of many of those claims and allow Plaintiffs to identify successful claims and validate DVA's own pre-litigation reports on success rates, numbers that DVA now seeks to disavow.[11] Defendants' argument that the Court has previously addressed the issue of production of the printout issue is incorrect, as the Court only addressed an interrogatory that requested updated success rate statistics.

Defendants' Statement:

1. Claims Files

Plaintiffs persist in their argument that if VA will not produce data based on EP 683, then VA must produce all claims files related to "putative class members."[12] Putting to one side that Plaintiffs have neither moved for class certification nearly three years after filing their lawsuit nor have even defined who falls within the putative class – despite multiple requests by Defendants – Plaintiffs' request should be rejected as a not-so-thinly veiled motion for reconsideration of the Court's October 5, 2011 order.

As an initial matter, Plaintiffs' claimed "surprise" as to the scope of VA's agreed upon production of claims files is meritless. Indeed, VA has been completely transparent about the scope of its production efforts. For example, since becoming a party to this litigation, VA has

[11] To the extent DVA asserts that "a search for cases flagged with EP 683 could not distinguish claims based on Edgewood Arsenal testing from other unrelated claims without reviewing the associated claims files," Plaintiffs are skeptical, and for good reason. In *National Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 549 (N.D. Cal 1987), Defendant DVA similarly asserted that it could not separate out certain radiation files from other files without a hand review, and its attorneys were later sanctioned when this assertion proved to be false. Moreover, DVA have previously established the feasibility of isolating the relevant claims by compiling pre-litigation reports separated by category (*i.e.*, Project 112/SHAD, Mustard Gas, and Chem-Bio), which DVA included in a monthly report on their Outreach Activities. (*See* Dkt. No. 256-10 at 9-12.)

[12] Notably, the content of these claims files is not reviewable by this Court. 38 U.S.C. § 511(a) "precludes federal district courts from reviewing challenges to individual benefit determinations, even if they are framed as constitutional challenges." (Dkt. 177 at 8). Even Plaintiffs disavowed any challenge to the content of these claims files, arguing that their challenge ***"will not require the review of any decision by the Secretary on any individual veteran's benefits claim, nor hinge on the specific facts of any veterans' claims.***" (*See* Dkt. 113 at 6) (emphasis added).

responded to all of Plaintiffs' discovery requests by explaining that "VA is only aware of those volunteer Cold War-era chemical and biological test participants who are contained within the Chemical and Biological database maintained by the Department of Defense and for whom sufficient identifying information exists and: (1) who have filed VA claims for disability compensation; (2) whose survivors have filed VA claims for dependency and indemnity compensation ("DIC"); or (3) who have received health care from VA and as such, any response VA offers is limited to that population." *See, e.g.,* Defs' Resp. to Pls' Second Set of Production Requests (Apr. 25, 2011).

Moreover, in response to Plaintiffs' motion to compel, VA explained that "in an effort to provide Plaintiffs with more reliable information regarding the outcome of claims based on exposures at Edgewood Arsenal, VA has offered to produce the claims files ***of all identifiable test subjects who have sought VA service-connected disability compensation and whose survivors have sought DIC based upon the veteran's alleged service-connected deaths.***" Dkt. 276, at 22 (emphasis added). VA further explained that these files "will contain all claims made by the identifiable test subjects and their survivors, including claims based on exposure to test substances." *Id.* Furthermore, VA explicitly addressed in its opposition to Plaintiffs' motion to compel the contention concerning "unverified" claims, and stated that:

> Plaintiffs' only articulation of their need for EP 683 statistics is that these statistics would reflect claims based on exposure for veterans whose participation in the testing programs was unverified, whereas the claims files that VA is producing only include veterans for whom DoD has verified participation in the test programs. (Dkt. 255 at 9). It is conceivable that, as the Plaintiffs note, an EP 683 *may* have been added to the claim of a veteran who alleged exposure at Edgewood Arsenal, but whose name is not contained in the DoD chem-bio database or for whom DoD could not further verify participation. But given the inherent unreliability of the EP 683 as a whole, it is impossible to state that statistics based on EP 683 are likely to include such veterans.

Id. at 23.

It is beyond dispute that Plaintiffs understood this limitation upon VA's production of claims files. As Plaintiffs noted in their reply to their motion to compel: "DVA is only providing to Plaintiffs the claims files of identified test subjects." Dkt. No. 287, at 12. Accordingly,

Plaintiffs' desire to re-litigate this issue based upon some sort of purported "surprise" as to the scope of VA's production of claims files should be denied.

More fundamentally, Plaintiffs seem to be operating under the misapprehension that VA can identify all claims files that are based on alleged participation in the testing programs at issue, and it is only producing to Plaintiffs a select number from that group.[13] This, as VA has explained many times before, is not the case.

VA can only provide to Plaintiffs the claims files for those whom VA can identify as both a testing participant and someone who has applied for benefits from VA. In other words, VA has only identified those volunteer chemical and biological test participants who are contained within the Chemical and Biological database maintained by the Department of Defense and for whom sufficient identifying information exists and: (1) who have filed VA claims for disability compensation; (2) whose survivors have filed VA claims for dependency and indemnity compensation ("DIC") or burial benefits; or (3) who have received health care from VA.[14] As such, any response VA offers is limited to that population. Based on that methodology, VA has located 862 claims files, which it will produce to Plaintiffs.[15]

Despite these representations by VA, Plaintiffs contend that VA must produce every claims file to which EP 683 has ever been appended. As explained in VA's opposition to

[13] Contrary to Plaintiffs' mischaracterization of VA's process for identifying test subjects and their claims, the term "PCAN" in the Training Letter does *not* indicate a denial or grant of a claim. Rather, in the context of EP 683, which is used as a workload management tool, "PCAN" is a code that was used to identify whether or not sufficient information about a veteran (e.g., full name, Social Security Number) appeared in the Department of Defense database to justify attaching an End Product, such as EP 683, to the claim. Unlike Plaintiffs' baseless accusations against VA about "verification", VA has attempted to verify that veterans' claims to which the EP 683 was appended were in fact in the Department of Defense database. If the veteran was not identifiable in the DoD database, without any additional available information, the policy was to remove the EP 683 from the veteran's claim.

[14] Regarding Plaintiffs' concerns about VA's ability to separate chem-bio claims as compared to radiation claims, the VBA Manual (M21-4) on end-product codes indicates that there is a specific "modifier" used to identify only radiation claims. The Manual also notes that EP 683 is generally used on "Central Office direction and apply to special reviews which require rating activity reviews," which indicates its more fluid (and less easily-tracked) nature.

[15] Pursuant to the statutory requirements of 38 U.S.C. § 7332 and 42 U.S.C. 290dd-2, records containing information about drug abuse, alcoholism or alcohol abuse, HIV, or sickle cell anemia will be removed from the claims file.

Plaintiffs' motion to compel, *dkt no.* 276, at 21-23, EP 683 is not a reliable way to track claims based on exposure at Edgewood Arsenal. Thus, production of all claims files with (or that ever had) an EP 683 would not identify any claims based on Edgewood Arsenal exposures filed prior to September 2006, but would result in a massive amount of irrelevant information, including claims files for veterans exposed during Project SHAD, claims brought by veterans based on accidental chemical exposures, and claims that were mistakenly marked with EP 683. Because the EP 683 files would in some respects be significantly overinclusive of the information Plaintiffs seek and would in other respects be significantly underinclusive, Plaintiffs' insistence that they need this information in order to perform a complete and accurate statistical analysis should be rejected.[16]

Moreover, Plaintiffs acknowledge that VA relies upon DoD to verify status as a test participant and that any claims VA may have denied because participation in a testing programs cannot be verified would have been a result of that procedure.[17] Thus, irrespective of the massive burden of the requested production (as explained below), Plaintiffs simply fail to show that review of individual claims relying upon DoD determinations as to participation or non-participation in test programs is necessary, or even relevant, to establish that VA is facially "incapable of making neutral, unbiased benefits determinations." Further, claims thus denied because DoD could not verify test participation would be significantly different from claims of verified test participants that Plaintiffs allege VA denies as a result of its inherent bias. Plaintiffs fail to explain how the absence of data on claims denied due to objective reliance on DoD

[16] Although VA, at one time, used EPs to provide updates regarding outreach activities being conducted by the VA Compensation and Pension Service, EP 683 does not itself provide a viable mechanism for discerning whether claims based on human-subject testing have been granted or denied.

[17] Plaintiffs' repeated assertion that DoD is somehow "self-interested" in its confirmation of test participation is simply argument by assertion. In any event it is contradicted by both the facts and common sense. It is undisputed that DoD has spent millions of dollars to identify volunteer test participants, create a database to allow VA the ability to notify the participants, and work with veterans' groups to notify test participants about the opportunity to go to VA to obtain health care. Plaintiffs have not and cannot reconcile these enormous efforts with their theory that DoD is somehow the beneficiary of denying veterans' participation in the test program.

findings that test participation is not verified would render inaccurate any data it compiles on VA's denial of claims by verified test participants.

Aside from the clear irrelevance of this production, the burden of such a production would be massive. VA has explained this burden to Plaintiffs many times in the past.

As noted previously, VA is already producing the claims files of all identifiable test subjects who have sought VA service-connected disability compensation and whose survivors have sought DIC based upon the veteran's alleged service-connected deaths or burial benefits. Production of these claims files requires an extraordinary effort. VA has already spent more than $44,000 to scan the 862 claims files of identifiable test subjects. This figure does not include the cost of locating, copying, and transporting the claims files. Nor does the figure include the time that VA has spent screening each claims file for information covered by 38 U.S.C. § 7332 and 42 U.S.C. § 290dd-2. VA has estimated that, given that many of the claims files are close to 1,000 pages, it takes three to six hours to screen each claims file.

Yet Plaintiffs are unsatisfied with this effort and now seek to add to VA's burden with their request that VA produce all "unverified" claims files. Simply put, Plaintiffs demand that VA undertake the financial burden[18] of locating, screening, and producing claims files that provide little or no relevant information.

Plaintiffs' request that VA now produce all claims files based on exposure to mustard gas and lewisite ("mg/l") between 1942 and 1953 is both unduly burdensome and irrelevant to Plaintiffs' claim against VA. Setting to one side the burden of such a production, this Court has already ruled on this issue, finding that the burden of even a *lesser* search than the one Plaintiffs now seek "outweighs the discovery's relevance at this stage." (Dkt. 294 at 20). Plaintiffs have not articulated any reason[19] (new or otherwise) why such production of mg/l claims files is at all relevant to their claim of inherent facial bias by VA in adjudicating claims stemming from

[18] Such a burden would be a significant strain on VA and would require a substantial diversion from the agency's limited pool of resources.

[19] Plaintiffs' comment that they "expected to receive relevant mustard gas production in the form of death certificates and treatment records" is confounding and has never been explained to VA.

exposure to substances in DoD's Chemical, Biological, Radiological, Nuclear, and Explosives (CBRNE) database. Dkt. 59, at 2-3; *see* Dkt. 88 (3d Amended Complaint), ¶ 245 (citing to VA Training Letter 06-04). Moreover, the burden of such a production is incredibly onerous.

Nor does VA have a reliable way to identify the claims files of veterans who alleged exposure to mg/l from 1942 until 1953. Similar to chem-bio exposures, claims based on exposure to mg/l currently are flagged with an end product designation: EP 688. But also like EP 683, identifying claims based on EP 688 would be similarly unreliable. EP 688 was first applied to mg/l claims in 2005. Therefore a search for claims to which EP 688 was applied will not identify mg/l claims filed before 2005, but it would likely identify claims that are wholly unrelated to the Plaintiffs' claims in this lawsuit.[20] For example, in 2001 and 2002, EP 688 was used for ionizing radiation claims. Prior to 2001, EP 688 may also have been used for other types of claims completely unrelated to mg/l.

Furthermore, the burden associated with Plaintiffs' request is enormous. Plaintiffs estimate that more than 55,000 veterans were exposed to mg/l from 1942 through 1953. VA is already in the midst of spending at least 2,000 hours reviewing and screening the 862 claims files of identifiable test subjects (and this number does not include the time spent locating and copying the same files). Plaintiffs now ask VA to search for and produce potentially more than 55 times that number of claims files, many of which are likely older and therefore would be difficult and in some cases, impossible, to locate or read. Setting aside the time and expense of locating and copying the mg/l claims files, based on VA's experience with the claims files of the identifiable test subjects, even if only one-tenth of Plaintiffs' contemplated group of veterans filed claims based on exposure to mg/l, assuming a three-hour review of each claims file,[21] it would take a VA employee almost ***two*** years, working 24 hours a day, seven days a week, 365 days a year, to review and screen those files. To describe the burden of producing these claims files to Plaintiffs as undue would be an understatement. Given the lack of relevance of these files to the Plaintiffs'

[20] Therefore, Plaintiffs' insistence that only 1,536 veterans have filed claims based on exposure to mg/l is based upon fundamentally unreliable methodology.

[21] This is a low estimate, as reviewing files takes between three to six hours per file.

claim of inherent facial bias in the VA's adjudicatory process of chem-bio claims, such an enormous burden is completely unwarranted.

Finally, Plaintiffs' suggestion that VA adjudicators are somehow facially biased in the adjudication of pre-1953 test participants is at odds with the fact that these veterans are entitled to a variety of presumptions of service connection based upon their exposure to mustard agents and lewisite. 38 C.F.R. § 3.316(a)(1)-(3).

2. EP 683 "data"

Plaintiffs, once again, demand that VA provide "data" based on End Product ("EP") 683. Plaintiffs' arguments are familiar, as they made the identical arguments in their Motion to Compel as related to EP 683 statistics. (Dkt. No. 255 at 8.) For the same reasons explained in VA's Opposition to Plaintiffs' Motion to Compel with respect to the EP 683 statistics, (Dkt. 276 at 21-24), VA will not generate and produce this "data" to Plaintiffs.

Similar to the EP 683 statistics, any "data" VA could produce using EP 683 would be fundamentally flawed. EP 683 does not itself provide a viable mechanism for discerning whether claims based on human-subject testing have been granted or denied. The purpose of the EP 683 is to enable VA to track and manage its current caseload with respect to specific types of issues, rather than to track the outcome of claims retrospectively. Importantly, Plaintiffs have not and do not dispute any of this.

EP 683 has been assigned to a variety of different issues at different time periods. Currently, EP 683 is used to track not only claims based on testing at Edgewood Arsenal, but also claims based on exposures in Project Shipboard Hazard and Defense ("SHAD"), which Plaintiffs concede are not part of this lawsuit, and claims based on other accidental hazardous exposures, including current-day exposures. For this reason, a search for cases flagged with EP 683 could not distinguish claims based on Edgewood Arsenal testing from other unrelated claims without reviewing the associated claims files. Further, such a search would not identify any claim based on Edgewood Arsenal testing filed prior to September 2006, when VA began using EP 683 for

such claims. As such, Plaintiffs are asking VA to expend an unwarranted amount of money and time to undertake a meaningless exercise that would result in unreliable data.

Having heard identical arguments from Plaintiffs in their Motion to Compel to those that they present now, this Court "decline[d] Plaintiffs' request to require DVA to compile statistics it does not intend to compile", instead recognizing that "[t]o the extent that DVA conducts a statistical analysis regarding claims, whether using the Chem-Bio database or another source, the Court understands that Defendants will produce such an analysis to Plaintiffs." (Dkt. 294 at 20). Moreover, producing the requested data is not, as Plaintiffs allege, as simple as "one push of a button." Given that Plaintiffs have made no new arguments about their need for EP 683 data, the burden of producing this data is undue, and accordingly, Plaintiffs' requests should be denied.

B. Magnetic Tapes

Plaintiffs' Statement: Plaintiffs respectfully request that the Court set a deadline for production of files stored on the magnetic tapes first identified by Defendants in their Initial Disclosures almost two years ago, and which Defendants have been stalling on virtually the entirety of the case. Defendants now advise the Court, a disclosure that they were unwilling to make in the meet and confer session ordered by the Court,[22] that they are expecting a bidder on a request for information ("RFI") to begin attempting to retrieve the data on the tapes in early December, and, despite the Court's statement that the documents appear relevant, try to set up relevancy as the next line of battle over the tapes.

The content of the tapes is of such critical importance that it is imperative that the Court order production now and set firm deadlines. Otherwise, Defendants may not take their discovery obligations seriously, and let yet another deadline come and go, as they have done for the past two years. Thus, Plaintiffs respectfully request that the Court establish a firm date by which Defendants must meet their burden to produce this responsive, non-privileged information and grant Plaintiffs leave to file a Motion to Compel on this issue.

[22] Indeed, Defendants, during the court-ordered meet and confer, refused to disclose most of the information that they now have included in their section of this statement to the Court, raising a serious issue regarding their refusal to comply with the Court's order.

For two years, Defendants have failed to produce either the data files stored on the magnetic tapes or the magnetic tapes themselves, and refused to provide any specific information in the court-ordered meet and confer process concerning attempts to read or retrieve the data, including the hardware or software utilized. Defendants' assertion regarding the "classified" status of these documents — which have not been reviewed for nearly 40 years — is suspect, given the presumption of declassification after twenty-five years. *See* 6 CFR § 7.28; Exec. Order 12958 § 3.3 (Dec. 29, 2009) (subject to some exceptions, "all classified records that (1) are more than 25 years old and (2) have been determined to have permanent historical value under title 44, United States Code, shall be automatically declassified whether or not the records have been reviewed.") Moreover, even back four decades ago, the alleged classification was at one of the lowest levels: "Secret."

The relevance of the data contained on the magnetic tapes is beyond dispute, as more fully addressed in the Joint Statement of Discovery Dispute regarding the Magnetic Tapes filed on October 12, 2011. (Dkt. No. 300.) As the tapes contain contemporaneous testing data from Edgewood, at this very moment, there are veterans whose claims for health care may be denied because their participation supposedly cannot be "verified," and yet, that participation information may likely exist on the unexamined tapes at issue here, which, based on review of the produced printout, identify participants during years of the program in a database that includes name, volunteer number, social security number, test substances, and doses for each participant.

The October 17, 2011 meet-and-confer ordered by the Court was completely unsuccessful due to Defendants' continuing refusal, including during another conference on November 2, to answer any questions about issues relating to the magnetic tapes or technical issues relating to reading or converting the files. Contrary to the Court's suggestion, moreover, Defendants did not arrange for an Information Technology ("IT") representative to participate on the October 17 call. Defendants further refuse to respond to Plaintiffs' October 19, 2011 letter (Dkt. No. 308-13), which seeks answers to basic technological questions concerning the tapes. Defendants have ignored these requests, despite the fact that it is their legal burden to establish an inability to comply.

Despite steadfastly refusing to provide any information to Plaintiffs regarding the tapes or attempts to access the tapes during these prior meet and confer calls, Defendants have included in their statement below descriptions of recent attempts to access the tapes. Plaintiffs were informed of this information for the first time when they received Defendants' sections on November 4, 2011. The provision of this information now, only as the parties were about to file this Joint Letter, highlights Defendants' failure to meaningfully meet-and-confer, as ordered by the Court. Notably, Defendants include no information regarding the tapes themselves, the creation of the tapes, or any other information requested by Plaintiffs' October 19, 2011 letter. Information included in Defendants' RFI, but not previously disclosed to Plaintiffs, provide some limited additional information.[23]

Not only have Defendants failed to comply with the Court's October 14, 2011 Order to meet and confer (Dkt. No. 303 at 2), at no point in two years have Defendants ever moved for a Protective Order or provided any explanation or substantiation of their conclusory assertions that the data "cannot be accessed." Nor have Defendants made any effort to obtain the files from other sources such as the Office of the Joint Chiefs of Staff ("OJCS"), which received what appears to be the same set of files stored on the magnetic tapes.[24]

Despite the fact that Defendants bear the burden to produce properly requested discoverable documents or the burden to show why they will not produce such, Defendants have put forth virtually no information regarding the technological circumstances surrounding the

[23] On just October 31, 2011, Defendants posted their RFI requesting work for "six (6) UNIVAC 1108 system magnetic reels of tape." *See* Defendants' RFI, located at https://www.fbo.gov/index?s=opportunity&mode=form&id=dd35b20789a9d4d9312005e5588d8d71&tab=core&_cview=1

[24] A November 1, 1973 Memorandum for the Deputy Director of ORD indicates that the files may have been transferred to OJCS for conversion and that OJCS was in the process of converting these files before the project was abandoned. (*See* VVA023832.) Yet, Defendants have refused to even inquire of or search the files of the OJCS. Furthermore, Defendants have not searched for the originals or any other copies that were stored on the tapes and continue to refuse to do so without a court order. Given the specificity with which the Partial Printout describes these relevant and numerous files, Defendants should be required to conduct a thorough search of all available sources in an attempt to locate these important documents, all of which are encompassed within Plaintiffs' outstanding discovery requests.

creation of the tapes or the technological details of the tapes. As such, no progress has been made over the course of this lengthy dispute, and the parties have again reached a stalemate.

It is clear that Defendants must produce the tapes as responsive, highly relevant documents in this case. To the extent that Defendants claim that they are unable to retrieve and produce the data on the tapes, under advisement of their computer forensics consultant, Plaintiffs request that the Court order Defendants to provide the following information to assess that assertion:

a) Confirmation that the UNIVAC 1108 computer system and ADEPT system was the origin for the data on the magnetic tapes?

b) If the hardware and software discussed in subparagraph (a) were not the origin, what is the make and model of the computer system and the make and version of the software used to create the magnetic tapes?

c) What are the make, model, and size of the backup tapes?

d) What tape drive was used to create the magnetic tapes?

e) What other systems, if any, were used to create the magnetic tapes?

f) Is the type of hardware and software used to create the magnetic tapes still in the possession or control of the Defendants or from any other government agency?

g) What employees, active or retired, still exist that have worked with the equipment used to write the data to the magnetic tapes?

h) What attempts have been made to consult or involve the employees or unit that first created the magnetic tapes or that provided the electronic files from Edgewood?

i) What sources has the government consulted to identify the equipment used to make the magnetic tapes?

j) Was the effort limited to employees involved in declassification review as appears to be the case?

k) What sources has the government consulted to attempt to access, read, or convert the magnetic tapes?

l) What is the current format of the magnetic tapes?

m) In what location have the tapes been stored?

n) In what condition have the magnetic tapes and duplicates been stored?

o) Have the tapes been rewound on a certain frequency?

p) Is there any external labeling on the tapes? If so, what does the label state?

Plaintiffs also ask the Court to order Defendants to produce a Rule 30(b)(6) witness regarding the magnetic tapes issues, as addressed in Plaintiffs' Supplemental Brief concerning depositions (Dkt. No. 307 at 6-7), within 15 days.

Plaintiffs have recently retained a computer forensic consultant who has opined, based on the limited information available and based on a number of assumptions, that it is possible to read or convert the data stored on the magnetic tapes.[25] With satisfactory answers to the questions posed above, this consultant could more definitively elaborate specific recommendations on the best alternatives to do so. Plaintiffs are prepared to submit a Declaration from this consultant as part of their motion to compel, and ask the Court for leave to file this motion, together with a supplemental brief of not more than ten pages, at a date determined by the Court.

Defendants' Statement: Plaintiffs' challenge to the government's repeated efforts to review the information contained on approximately 40-year-old magnetic tapes that have been marked as "***classified***" is without merit, and their request for Rule 30(b)(6) depositions from both the Central Intelligence Agency ("CIA") and the Department of Defense ("DoD") on this issue is unwarranted.

As an initial matter, absent the ability to review the materials on the magnetic tapes, they remain designated as "classified," and, therefore, are not subject to disclosure. Indeed, Plaintiffs

[25] These assumptions include, for example, that the tapes were stored properly and have not been physically damaged. Interestingly, Defendants' modified RFI offers to provide two photos of the tapes to bidders, which could help ascertain their condition. *See* Nov. 3, 2011 RFI, https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=dd35b20789a9d4d9312005e5588d8d71&_cview=0

have been aware of the classified status of these magnetic tapes since early in the litigation. For example, in Defendants' June 28, 2010 response to Plaintiffs' interrogatories, the CIA expressly stated that it "has a copy of certain potentially responsive, classified DoD information contained on magnetic tapes that are unreadable to CIA." In addition, in connection with Defendants' March 4, 2010 Rule 26(a)(1) initial disclosures, the CIA produced a February 6, 2007 letter from then-CIA Director Michael V. Hayden to then-Secretary of Veterans Affairs R. James Nicholson. In that letter, Director Hayden discusses the fact that CIA had located "some magnetic tapes associated with Project Often that Agency officers believe are copies of computer databases that the Agency received from Edgewood Arsenal in the early 1970s." Director Hayden further explained that "[i]t is not clear whether any information contained on the magnetic computer tapes is understandable or, even, retrievable using available technology," and that the databases are "marked at the SECRET level."[26]

Furthermore, as described in the CIA's January 5, 2011 response to Plaintiffs' interrogatory number 16, on May 8, 2007, the CIA provided access to the magnetic tapes to DoD employee Dee Dodson Morris (an individual whom Plaintiffs deposed on July 6, 2011). Ms. Morris concluded that "[t]he computer tapes in the CIA's Project Often records cannot be read by any system the CIA currently has available . . . . The tapes are marked as classified."

Accordingly, there can be no question that Plaintiffs have been on notice since early in the litigation that the magnetic tapes were marked "classified" and were unreadable using available technology. Plaintiffs cite to no authority for the proposition that they are entitled to access to classified information and, indeed, Defendants are unaware of any authority to support such an assertion. Furthermore, to the extent Plaintiffs suggest that the classification designation is "suspect" because of the "presumption of declassification after twenty-five years," *see* Exec.

[26] Contrary to Plaintiffs' insinuation, Defendants never identified the magnetic tapes themselves in Defendants' Rule 26(a)(1) initial disclosures. Rather, the magnetic tapes are referenced in historical documents identified by the Central Intelligence Agency in connection with Defendants' initial disclosures, and referenced in the correspondence discussed above. Furthermore, Plaintiffs' assertion that "secret" is the lowest level of classification is incorrect. "Confidential" is the lowest level of classification. Furthermore, "secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe. *See* Executive Order 13,526, § 1.2(a)(2), 75 Fed. Reg. 707 (Jan. 5, 2010).

Order 12,958 § 3.3 (Dec. 29, 2009), Plaintiffs ignore the fact that this presumption is subject to a number of exceptions, several of which may apply under the circumstances. *See* Exec. Order 13,526, §3.3(b) (Dec. 29, 2009). If there is reason to believe the material on the magnetic tapes may fall within one of those exceptions, as there is here, the tapes cannot be automatically declassified without further review. In any event, it is beyond dispute that in the absence of the ability to review the materials contained on the magnetic tapes, there is no ability or basis to declassify those materials and, accordingly, they remain subject to non-disclosure.

Second, Plaintiffs' repeated canard that the magnetic tapes are of "critical importance" because they "provide perhaps the sole contemporaneous and comprehensive information regarding testing at Edgewood," Dkt. 300, at 1, simply ignores the more than 1.2 million pages of documents produced by the Defendants in this case. In truth, the ***most*** relevant contemporaneous sources of information about the test participants are (1) the approximately 7,000 volunteer service member files and (2) other contemporaneous source documents (many of which were collected by Battelle over the course of many years pursuant to a multi-million dollar contract) Defendants have produced to Plaintiffs at tremendous time and expense. The service member files, for example, generally contain the name of the volunteer test participant, the chemicals used during the testing, the doses administered, the mode of administration, and any acute health effects experienced by the test subject. Those test files serve as one of the bases for information used to populate the DoD's Chem-Bio database, a copy of which has been produced to Plaintiffs. Beyond that, Defendants have produced the source material reflecting personally-identifiable information regarding the volunteer test subjects collected by Battelle Memorial Institute from the various test locations. Defendants have also produced the ***contemporaneous*** test plans and reports that describe the purpose of the individual chemical tests, the methodology employed, and in some cases contain information about the test participants. Furthermore, Defendants have produced "test protocols" which reflect the test plans and describe the purpose of the individual tests and test methodology employed. Defendants also have produced videos that were taken during the test program.

Nonetheless, even if the tapes somehow contained data not included in the robust contemporaneous research records already produced, Plaintiffs largely gloss over the fact that Defendants have produced the "partial" printout that appears to have come from the magnetic tapes. Further, Plaintiffs ignore the fact that DoD has also produced a variety of other spreadsheets containing information similar to the printout and likely derived from the same data. Despite having had the printed data for some time, Plaintiffs have not shown that the information differs in any way from other sources, such as the personnel research files that have already been produced. At bottom, Plaintiffs once again understate the substantial information that the Defendants have produced and overstate the purported need for the materials that may be contained on the magnetic tapes. Indeed, Plaintiffs' factually unsupported assertion that there "may" be information concerning the identity of volunteer service members contained on the magnetic tapes that is not contained in these other sources is pure speculation and, indeed, appears unlikely.

Third, failing to show an entitlement to classified information or that the information they seek is non-cumulative of the discovery produced to date, Plaintiffs' true challenge appears to be one targeting the government's attempts to review the information on the magnetic tapes to conduct a classification review. As discussed above, prior to this litigation, the CIA reached the conclusion that the magnetic tapes that it received from the DoD could not be read by any system it currently had available. The CIA subsequently transferred the magnetic tapes back to DoD so that DoD could try and read the tapes. DoD similarly was unable to convert and review these nearly forty-year-old tapes.

More recently, despite the historic inability to convert and review the information contained on these tapes, the Department of Defense, at Plaintiffs' request, agreed to endeavor yet again to access the information contained on these tapes. Those efforts to convert and review the information contained on those tapes has proceeded on multiple tracks. First, because the likely source of the data contained on the magnetic tapes is the Department of the Army's Medical Research and Materiel Command ("MRMC"), they were tasked with determining if the tapes could be converted to a reviewable format. MRMC did not possess the internal hardware

capability to read the tapes, and MRMC further determined that the contracted information technology personnel within the organization lack the ability to read or convert the tapes. Second, because the Defense Technical Information Center ("DTIC") is a technical information repository that includes some data conversion capability, they were asked whether they had the ability to convert and review the information contained on the magnetic tapes. DTIC lacked the internal hardware capability to read the tapes and had no knowledge of other internal DoD organizations that would have the technical capability to convert the tapes to a readable format. Third, the Defense Logistics Agency ("DLA"), an entity within DoD that has responsibility for, among other things, performing data conversion for DoD agencies, was asked whether it had the ability to convert the magnetic tapes to a readable format. DLA could identify no current hardware capable of reviewing the tapes, but is continuing to search for possible hardware that could be used and expects to have a final answer by December 1, 2011. In addition, DLA was unable to identify an internal DoD organization that has the capability to convert the tapes.

DoD has also made efforts outside the agency to convert the tapes. For example, Battelle Memorial Institute, an organization that currently has a contract with the Department of Defense to identify veterans exposed to chemical and biological agents, was asked if it possessed the ability to convert the tapes. Battelle indicated that it had no internal hardware capable of converting or reading the tapes, and Battelle could not identify a contractor that might possess such capability. In addition, DoD contracted UNISYS, the successor company to the one that made the UNIVAC, to inquire as to whether UNISYS possessed the capability to convert or review the magnetic tapes. UNISYS indicated that it was unable to convert the tapes and that even if DoD found the hardware and software to read the tapes, it was likely that the data contained on the tapes was degraded and potentially unreadable after decades of storage.

Despite the lack of success of these enormous efforts to convert and review these magnetic tapes, DoD has taken the further step of posting a request for information ("RFI") on FedBizOpps to solicit assessments from civilian companies concerning the cost and ability to convert or read the magnetic tapes. Responses to the RFI are due on November 18, 2011, and any positive responses from contractors will require coordination before contracting for services. To

the extent an acceptable bid is received, it is not expected that any action on converting the tapes will occur before December 1, 2011.

Plaintiffs' suggestion that Defendants somehow failed to comply with the Court's October 14, 2011 order to meet and confer regarding the ability to convert and review the information contained on the magnetic tapes is incorrect, and misperceives the purpose of the meet and confer. During the status conference with the Court, Mr. Erspamer raised for the first time the question of whether the magnetic tapes could be converted to a readable format, as if conversion might be somehow distinct from reading the data which DoD had already indicated it could not do. He further professed to possess expertise on issues concerning data conversation. Upon acknowledging that he had not shared his knowledge with the government, the Court ordered the parties to meet and confer so that Mr. Erspamer could provide the government with that information. *See* Dkt. No. 303, at 2 ("Plaintiffs contend that Defendants have not actually attempted to convert these magnetic tapes into a readable format and purport to have information regarding a program that would allow Defendants to do so. The parties are ordered to meet and confer on or before Monday, October 17, 2011 regarding this matter."). Mr. Erspamer subsequently proceeded to provide counsel for Defendants with links to such sources as Wikipedia and Google Books. During the meet and confer, Mr. Erspamer acknowledged that he lacked any expertise on the conversion of the magnetic tapes, and it became clear that his true goal was to obtain discovery on government classification review more generally – discovery to which Plaintiffs have shown no basis for entitlement. Moreover, during the November 2, 2011 meet and confer to discuss the instant filing, counsel for Defendants explained in detail the efforts taken by DoD to date to access the tapes, and further explained that DoD had submitted an RFI in an attempt to access the information contained on the tapes.

In light of the ongoing efforts to convert and review the magnetic tapes, Plaintiffs' request for either the tapes themselves or depositions is inappropriate. As a threshold matter, in contravention of Local Rule 30-1, Plaintiffs failed to meet and confer with Defendants prior to noticing Rule 30(b)(6) depositions of the CIA and DoD. Plaintiffs do not dispute this. For this reason alone Plaintiffs' request for successive Rule 30(b)(6) depositions should be denied.

Beyond that, Plaintiffs cite to absolutely no authority for the proposition that they are somehow entitled to discover information concerning DoD or CIA's classification review. Indeed, Plaintiffs fail to explain how these magnetic tapes are relevant to the narrow legal claims against DoD regarding whether there is a discrete legal obligation to provide notice to volunteer service members that has been unreasonably delayed. Consideration of the information contained on the magnetic tapes could only relate to a possible ***remedy*** the Court could consider to the extent it found such an obligation that had been unreasonably delayed by failure to read data from the tapes; it is not an independent basis for discovery. Moreover, Plaintiffs remarkably insist that they be granted leave to depose a witness concerning DoD's efforts to convert and review the tapes, *regardless* of whether the effort is successful. *See* Pls.' Stmt., *supra*. This is discovery for discovery's sake and should not be countenanced. Finally, Plaintiffs' contention that Defendants should search other sources, such as the Office of the Joint Chiefs of Staff ("OJCS"), based upon a November 1, 1973 memorandum by the CIA, is without merit. The reference to OJCS in that document refers to an office within the CIA entitled the Office of Joint Computer Service that no longer exists. Beyond that, the November 1, 1973 memorandum explicitly states that "[n]o Project OFTEN data remains in OJCS." Accordingly, there is no basis for CIA to conduct a search of an office within the Agency that does not possess information concerning Project Often. The Court should deny Plaintiffs' motion for leave to file a motion to compel.[27]

C. Perry Memorandum Documents

Plaintiffs' Statement: Plaintiffs seek the following two categories of documents, which Defendants refuse to produce based on boilerplate objections: (1) all drafts and versions of the March 9, 1993 memorandum, "Chemical Weapons Research Programs Using Human Subjects," issued by Deputy Secretary of Defense William Perry ("Perry Memo"); and (2) all communications between Norma St. Claire and Martha Hamed regarding the drafting of the Perry Memo. Plaintiffs long ago requested these documents as part of an early RFP, and then again

[27] A Rule 30(b)(6) deposition from the CIA concerning the tapes is likewise unwarranted. Such testimony has no relevance to the narrow secrecy oath claim against the CIA. Moreover, the tapes are DoD records, and the CIA has no knowledge about their contents or technical specifications that is not reflected in the documents it has already produced to Plaintiffs.

specifically requested these two categories of documents during the deposition of Ms. Hamed, who testified that she and Ms. St. Claire were personally involved in drafting the Perry Memo.

The Perry Memo is perhaps the key legal document in this case concerning secrecy oaths. It purported to release pre-1968 test subjects from certain of their secrecy oaths obligations. Both categories of documents sought are essential to understanding the process behind the creation of the Perry Memo, including, *inter alia*, its underlying purpose, the reasons for the 1968 cut-off, whether the memorandum was meant to be limited to mustard and lewisite tests, whether it was ever implemented or communicated to veterans, and the background behind preparation of the memorandum, including the factual basis for the release, and meetings and discussions relating to it. Further, as Martha Hamed testified, the Perry Memo was the impetus for the mustard gas and lewisite record collection and notification effort (*see* Dkt. No. 259-20 at 32-33), which is clearly relevant to Plaintiffs' notice claims.[28] Finally, Plaintiffs have sought leave to depose Ms. St. Claire (Dkt. No. 307 at 3), and these documents would likely be key deposition exhibits.[29]

Defendants' Statement: Plaintiffs challenge Defendants' objections and responses to two requests for production that Plaintiffs served on September 14, 2011. Contrary to Plaintiffs' assertion that Defendants raised "boilerplate" objections, the Defendants' objections provided an explicit factual basis for their contention that the requests were cumulative and lacked proportionality. Plaintiffs' broad request for all drafts of the 1993 Perry Memorandum ("Perry Memo") and all communications between two former government employees regarding the drafting of that memorandum runs roughshod over the admonition by Magistrate Judge Larson that "Plaintiffs shall reevaluate what information is ***central*** to their case, recognize limits on

[28] Defendants' cumulativeness argument that searches are being conducted of Ms. Hamed and Ms. St. Claire's emails omits a critical representation made by Defendants during meet-and-confer: because DOD does not perform automatic backup or archiving, DOD claims that there are few emails available for these two former employees.

[29] Defendants also point to the January 11, 2011 Memo as reason for withholding documents concerning the 1993 version. This new Memo was implemented after this litigation ensued. Interestingly, during the coordination of the Memo, Anthony Lee circulated a draft, copying, among others, former lead counsel for Defendants in this action, Caroline Lewis-Wolverton. (*See* Deposition Ex. 469.)

usefulness of some of the information they seek, and make a sincere effort to reduce the scope of discovery sought," Dkt. No. 178, at 33 – an admonition more recently echoed by Magistrate Judge Corley. Dkt. No. 294, at 4-5. Indeed, it is clear that Plaintiffs have all the information they could possibly need regarding the scope of the release from any purported secrecy oaths, and that this request is cumulative of substantial other discovery.[30]

Plaintiffs claim that they need these two categories of documents to "understand[] the process behind the creation of the Perry Memo, including, *inter alia*, its purpose, the reasons for the 1968 cut-off, whether the memorandum was meant to be limited to mustard and lewisite tests, whether it was ever implemented to communicated to veterans, and the background behind preparation of the memorandum, including the factual basis for the release, and meetings and discussions relating to the Perry Memo."

Once again, Plaintiffs' broad-based inquiry may be answered by the documents already produced in this litigation. For example, much of the information Plaintiffs claim to need is manifest on the face of the 1993 Perry Memo itself. The Perry Memo explains that it arose from the January 6, 1993 report by the National Academy of Sciences Institute of Medicine entitled "Veterans At Risk: The Health Effects of Mustard Gas and Lewisite." Defendants have produced to Plaintiffs a copy of "Veterans At Risk," and that report has been the subject of questioning at multiple depositions in this case. The Perry Memo further explains that "[b]ased on the findings of the report, Congressional inquiries, and requests from the Department of Veterans Affairs, I am releasing any individuals 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."[31]

[30] Discovery has failed to uncover any written "non-disclosure" agreements or so-called "secrecy oaths."

[31] Those Congressional inquiries and requests from the VA also have been produced to Plaintiffs. *See, e.g*, VET007_001241-42; VET001_011179-80;VET001_011176-73; VET01_011174-75.

The Perry Memo further stated the intention to "initiate procedures to declassify documents with respect to the issues listed above for chemical weapons research studies conducted after 1968 . . . and release participants from any non-disclosure restrictions (e.g, oaths of secrecy) that may have been placed on them concerning their possible exposures to any chemical weapons agents during testing, production, or transportation of such chemicals."

Accordingly, the Perry Memo makes clear on its face the purpose of the memorandum, the factual basis for the release, and that it is not limited to mustard gas and lewisite testing, but rather applied broadly to any chemical exposure. Furthermore, with respect to the issue of whether the Perry Memo was ever communicated to veterans, Plaintiffs also know the answer to that question. As reflected in Defendants' August 15, 2011 response to Plaintiffs' interrogatory number 26, DoD has provided notice to veterans concerning the 1993 Perry Memo through DoD's publicly available website. In addition, the notice letters prepared by the VA and sent to veterans who participated in post-1953 testing explicitly quotes the Perry Memo's release from secrecy oaths.

Beyond this, Plaintiffs ignore the fact that they deposed Martha Hamed regarding the drafting of the Perry Memo, took a Rule 30(b)(6) deposition of the Department of Defense and Department of the Army regarding the topic of secrecy oaths, and that Defendants have responded to a number of requests for admissions concerning the scope of the release from secrecy oaths. In addition, as discussed above, the parties have agreed upon parameters for emails searches, and those parameters include Martha Hamed and Norma St. Claire as custodians, among others, and the term "secrecy oath," among other terms. And, as discussed above, Plaintiffs have identified numerous documents from the voluminous CWEST index, and this index includes the development of the 1993 Perry Memo.

In addition, Plaintiffs' claim that they need to understand the rationale for "the 1968 cut-off" in the Perry Memo ignores the fact that this cut-off has been overcome by more recent events. As Plaintiffs well know, on January 11, 2011, the Department of Defense provided an update to the 1993 Perry Memo. That update expressly states that, "[t]o assist veterans in seeking care for health concerns related to their military service, chemical or biological agent research

volunteers are hereby released from non-disclosure restrictions, including secrecy oaths, which may have been placed on them. This release pertains to addressing health concerns and to seeking benefits from the Department of Veterans Affairs." By its very terms, the January 11, 2011 memorandum does not distinguish between pre- and post-1968 testing of volunteer service members.[32]

Accordingly, Plaintiffs' request for yet more broad-based discovery lacks any consideration of proportionality or burden, and Plaintiffs' demand for these two categories of documents should be denied.

D. Rule 30(b)(6) Deposition of Dr. Michael Peterson

Plaintiffs' Statement: Plaintiffs seek leave to file a motion to compel DVA to designate a new witness to testify to Rule 30(b)(6) Topic 1 because DVA designated a witness that was not prepared to testify on any topic for which he was designated. On October 25, 2011, Plaintiffs took the Rule 30(b)(6) deposition of the DVA on Topics 1 and 6. Topic 1 was the DVA's "involvement with any of the Edgewood Test Programs or any other testing of the chemical or biological substances that were part of the Edgewood test programs . . . ." Topic 6 was "[t]he diseases or conditions reported, claimed, or experienced by Test Subjects including, without limitation, summaries, tables, stored data, and/or computer printouts and all Communications and Meetings Concerning the same." DVA's designated witness, Dr. Michael Peterson, was wholly unprepared to testify on either topic.

Dr. Peterson, who is a veterinarian, admitted that he had no actual experience with either topic. In his over 40 years of professional experience, he had no experience with the testing of chemical or biological weapons, the clinical care of veterans, or veterans' claims for healthcare,

[32] Plaintiffs' obtuse contention, buried in a footnote, that the January 11, 2011 memorandum was issued after the litigation began, and that counsel for the government received a draft of this memorandum, is irrelevant. Plaintiffs do not dispute that the January 11, 2011 memorandum is the controlling document concerning Plaintiffs' challenge to the purported administration of secrecy oaths. Importantly, Plaintiffs' Third Amended Complaint seeks a declaration that "Plaintiffs are released from any obligations or penalties under their secrecy oaths[.]" Dkt. 180, at ¶ 183. Accordingly, the only inquiry before the Court is whether any limitations upon disclosure of information placed upon volunteer service members contained in the January 2011 memorandum are unconstitutional.

disability, or compensation. Indeed, Dr. Peterson testified that the sum total of his knowledge on Topics 1 and 6 were based on what proved to be a cursory review of a six-inch binder of materials provided to him by Defendants' Counsel. Dr. Peterson did not know the names or offices of the people who collected the materials for the binder, and Dr. Peterson admitted that he mostly skimmed the materials in the binder anyway. He also conceded that he did not know whether or not other documents existed that related to Topic 1.

Defendants' primary argument is the assertion that DVA was not involved in testing and therefore, there was nothing for Dr. Peterson to testify about concerning Topic 1. Yet, Dr. Peterson testified that certain documents shown to him during the deposition (but not contained in his binder) raised the possibility that DVA was involved in chem-bio testing on human subjects at Edgewood Arsenal. For example, Defendants are well aware that DVA provided substances for the testing programs: "[s]amples of drugs and chemicals for testing in the program were obtained from drug and pharmaceutical companies, government agencies (EARL [Edgewood Arsenal], NIH, FDA, *and VA*) . . ." (Dkt. No. 259-5 at 4 (emphasis added).) In the Answer, "Defendants admit that DVA tested LSD on veterans in the past." (Dkt. No. 236 ¶ 226.) Furthermore, Dr. Peterson testified that the DVA puts out annual reports regarding research in which DVA is involved. These reports would therefore likely include information concerning DVA's involvement in the testing of chemical and biological substances. Yet, Dr. Peterson did not review any such reports in preparation for the deposition.

During the November 2, 2011 meet and confer, Plaintiffs' counsel requested that DVA designate a second witness, who, unlike Dr. Petersen, is knowledgeable to testify on Topics 1 and 6. Counsel for DVA agreed to designate Paul Black to testify on Topic 6, but refused to designate a new witness to testify on Topic 1 at this time. Thus, Plaintiffs seek leave to compel DVA to designate a knowledgeable witness to testify on Topic 1 regarding DVA's involvement in the testing programs, a key aspect of Plaintiffs' constitutional bias claims.[33] While even Dr.

[33] Plaintiffs have serious concerns regarding Defendants' designation of Rule 30(b)(6) witnesses generally, as Defendants have designated witnesses who largely lack any personal knowledge concerning the topics and have based their testimony entirely on binders assembled by Defendants' counsel or information imparted by counsel during preparation sessions.

Peterson acknowledged that there was a possibility that DVA was involved, he was in no way prepared to testify on that topic.

Defendants' Statement: Plaintiffs misunderstand the requirements for Rule 30(b)(6) testimony and mischaracterize the testimony that was offered by Dr. Peterson. There is no requirement, as Plaintiffs seem to suggest, that a deponent have personal knowledge of the topic on which he is testifying. *Harris v. Vector Marketing Corp*., 656 F.Supp.2d 1128, 1132 (N.D.Cal., 2009) (holding that "a Rule 30(b)(6) witness need not have personal knowledge of the facts to which he or she testifies") *citing* (11-56 Moore's Fed. Prac.-Civ. § 56.14[l][c]). Rather, it is the obligation of the deponent to "review all matters known or reasonably available to [the organization]." *See Beauperthuy v. 24 Hour Fitness USA, Inc*., 2009 WL 3809815, *3 (N.D. Cal., 2009). That is precisely what Dr. Peterson did in this case. Indeed, Plaintiffs conflate a lack of evidence concerning VA involvement in the test program with an alleged lack of preparation by the VA Rule 30(b)(6) designee.

Topic 1 of Plaintiffs' Rule 30(b)(6) notice requested testimony regarding VA's "involvement" in the testing program at issue in this case. In connection with discovery in this case, VA has undertaken extensive document searches designed to undercover any evidence of VA involvement in the test programs. Those efforts have resulted in no such evidence being discovered. Accordingly, Dr. Peterson properly testified, consistent with VA's production efforts, that VA was not involved in the test programs at issue.

At the outset, Plaintiffs do not dispute that VA has found no evidence of VA's involvement in the test program. Rather, they make two arguments: (1) Dr. Peterson was unprepared to testify because he did not review a document prepared and produced by ***the CIA***; and (2) he did not review VA's annual reports in preparation for his deposition. Neither of these arguments have merit.[34]

[34] Plaintiffs insinuate that Dr. Peterson was unprepared to testify as a Rule 30(b)(6) witness on the topic of VA's involvement because he had "no actual experience" with the topic. Of course, it is not surprising that VA designated an individual without "actual experience" in a test program that ended in 1975 and in which there is no evidence of VA involvement in the first instance.

First, Plaintiffs cite to no authority that a Rule 30(b)(6) designee for an agency has an obligation to review documents that are not in its possession, custody and control and that were produced by another government agency. Indeed, Plaintiffs fail to explain how a document prepared and produced by the CIA, which VA does not possess and has no awareness of, could possibly form the basis for a claim that VA's adjudicators are biased. More fundamentally, contrary to Plaintiffs' suggestion, the CIA document to which Plaintiffs cite falls far short of somehow conclusively establishing VA's involvement in the testing of volunteer service members. A single sentence in that document states that "[s]amples of drugs and chemicals for testing in the program were obtained from drug and pharmaceutical companies, government agencies (EARL, NIH, FDA, and VA) . . ." Dkt. No. 295-5, at VET001_009241. Notably, the document does not explain whether the provision of drugs was in connection with Project CHICKWIT, which did not involve testing on volunteer service members, *id.*, or animal testing in connection with Project OFTEN. *Id.* And, in any event, whatever the CIA's judgment may be in a single sentence in this one document, the VA has reached a conclusion, after a comprehensive search, that it was not involved in the testing of volunteer service members.

Second, Plaintiffs have had months to review the publicly available VA annual reports to Congress. Presumably if evidence of VA's involvement in the test program existed, Plaintiffs would have brought that to Dr. Peterson's attention during his deposition. The fact that Plaintiffs to date cannot identify a single document from VA that indicates its involvement in the volunteer test program does not mean that Dr. Peterson was unprepared as a Rule 30(b)(6) witness; rather, it means that Plaintiff s lack any evidence to support their claim. Plaintiffs' request that VA designate a new Rule 30(b)(6) witness on the topic of its involvement in the test program should be denied.[35]

[35] Plaintiffs' reference to VA's answer is a complete red herring. In VA's answer, it admitted that VA has tested LSD on veterans in the past. That reference is not to the testing on volunteer service members, but rather to tests outside of that program. Indeed, such testing is plainly identified in the annual reports to Congress. Beyond that, VA expressly limited the scope of the Rule 30(b) deposition concerning Topic 1 to testing on volunteer service members, a limitation which Plaintiffs have never challenged.

E. Redaction of CIA FOIA documents

Plaintiffs' Statement: The CIA provided outside of discovery roughly 17,000 pages of documents assembled in the 1970's to produce to requesting parties under FOIA concerning the CIA's involvement in the human testing programs, which contain voluminous redactions made for purposes of FOIA. Defendants' refusal to produce these documents, which address the relationship amongst Defendants, is indefensible. Relying on their "non-production" of the documents, Defendants have never justified any of the "Swiss cheese-like" redactions or listed them on any privilege log, while at the same time the CIA has on numerous occasions relied on its provision of these documents to counter Plaintiffs' attempts to seek further discovery and in their count of documents produced to Plaintiffs. (*See* Dkt. No. 278 at 14-15.) Rather than undertake the review of all documents in this set, the CIA offered to review these redactions for particular documents selected by Plaintiffs. For the sake of proportionality, Plaintiffs are willing to do so and plan to make their selections by December 6, 2011, in order for the CIA to undertake its privilege review and either remove the redactions or justify them in this litigation.[36] It now appears, unfortunately, that the CIA is reneging on its offer and refuses to undertake any review whatsoever.

Given the central relevance of these documents for Plaintiffs' remaining claims and in lieu of seeking review of all 17,000 pages, Plaintiffs respectfully request that the Court compel the CIA to perform a privilege review of a narrow set of documents that Plaintiffs will designate by December 6, as contemplated by the CIA's previous offer.

Defendants' Statement: Plaintiffs seek to relitigate discovery disputes that they have lost, disguising issues previously decided by this Court under the cloak of the MKULTRA FOIA set. As an initial matter, this dispute is not properly before the Court. Despite having the documents in question for more than two years, Plaintiffs have not to date, including as part of this purported

[36] The joint programs between the CIA and Army were extensive. (*See, e.g.*, Dkt. Nos. 129-7, 129-8, 129-9, 259-4, 259-5.) Plaintiffs would request, for example, that the CIA undertake privilege review of the memos within the FOIA set concerning Project OFTEN — the *service member* testing program admittedly involving the CIA. (*See, e.g.*, MKULTRA 0000146191_0001; MKULTRA 0000146193_0004.)

dispute, carried out the simple task of identifying the documents they would like reviewed (which is especially curious given Plaintiffs' representation that these documents are allegedly of "central relevance" to their claims). The CIA cannot properly evaluate burden until Plaintiffs have identified the specific documents they would like reviewed, and thus this abstract dispute is not ripe for resolution by the Court.

Even if this dispute were properly before the Court, Plaintiffs are not entitled to a privilege review of the CIA's MKULTRA FOIA set for six independent reasons: (1) the documents do not pertain to testing on service members, and thus are not relevant to Plaintiffs' sole remaining claim in this action related to the purported administration of secrecy oaths; (2) the few documents within this set that mention Project OFTEN, the sole CIA program that contemplated testing on service members, have been properly produced and logged pursuant to discovery in this case, and Plaintiffs have not identified any deficiencies in that production; (3) through October 2011, the only argument ever offered by Plaintiffs regarding the purported relevance of these documents was that the documents might contain health effects information relevant to their notice and health care claims against DoD,[37] and Plaintiffs' efforts to seek those documents now is in direct contravention of this Court's order that Plaintiffs may not seek documents from the CIA for their claims against DoD; (4) Plaintiffs have waited for more than two years to ask this Court to require the CIA to conduct a renewed privilege review, despite having numerous opportunities to do so, and have done so only after numerous Court orders holding that Plaintiffs are not entitled to the information from the CIA; (5) a renewed privilege review the MKULTRA FOIA set would be futile, as the withholdings are based on unqualified statutory privileges designed to protect intelligence gathering information, and the redacted information has no relevance to this case; and (6) a revised privilege review would be unduly burdensome.

[37] In this letter, for the first time, Plaintiffs contend that the documents concern the "relationship among the Defendants." They do not clarify, however, the parties to which they are referring. Nor do they explain how the purported relationship between Defendants relates to testing on service members, which is problematic because CIA has had interactions with both DoD and VA that do not pertain to testing on service members or even human testing whatsoever. Thus, it remains unclear how the documents are relevant to this action.

First and foremost, the vast majority of the 17,000 page set of documents, known as the MKULTRA FOIA set, does not contain information related to testing on service members. This set of documents primarily concerns CIA programs MKULTRA, BLUEBIRD, and ARTICHOKE. (Dkt. 279-26 at 30.) As the CIA set forth in the Cameresi Declaration, none of those programs involved testing on service members: "Although MKULTRA and BLUEBIRD/ARTICHOKE involved human testing, this testing was confined to the members of the U.S. civilian population or to foreign nationals – not to volunteer service members." (*Id.* at 10.) In this Court's October 5, 2011 Order, the Court held that "[a]lthough Plaintiffs are entitled to some discovery regarding the test programs, it should be limited to discovery that is relevant to their claims in this case," and thus discovery should be limited to "the CIA's involvement (whether direct or through financial support) in test programs involving service members." (Dkt. 294 at 7-8.) Thus, because the vast majority of documents in the MKULTRA FOIA set concern programs that did not involve testing on service members, the Court has already ruled that those documents are not relevant to the present action. (Dkt. 294 at 7-8.)

Second, while the MKULTRA FOIA set does contain a very small number of documents that mention Project OFTEN, the CIA has separately searched for and produced all relevant, non-privileged documents relating to testing on service members (including the ones within the MKULTRA FOIA set identified by Plaintiffs); Plaintiffs have not pointed to a single document or redaction that appears to concern testing on service members that has not been produced and/or logged elsewhere. As discussed in the Cameresi declaration, the CIA has conducted extensive hand searches and has produced relevant documents related to Project OFTEN, the sole CIA project that contemplated testing on service members, pursuant to Plaintiffs' discovery requests. (Dkt. 279-26 at 26.) The CIA's search captured documents mentioning Project OFTEN that also may be found in the MKULTRA FOIA set. Indeed, to support their argument for a renewed privilege review, Plaintiffs cite to MKULTRA 0000146191_0001, which is a memorandum entitled "Protection of Project OFTEN Information." The CIA, however, produced this very document pursuant to discovery in this case. (*See* VET019-000033.) Furthermore, the produced document has only four minor redactions to the text that not only are logged on the CIA's

privilege log, but also are irrelevant as they do not contain any information related to testing on service members.[38] The only other document cited by Plaintiffs is a draft memorandum that they cite as MKULTRA 0000146193. Not only has the CIA produced the final, much more comprehensive version of this memorandum, (*see* VET 020-000291), but there is not a single redaction to the section of the memorandum that relates to Project OFTEN. Accordingly, even to the degree that the MKULTRA FOIA set contains a couple documents that mention Project OFTEN, Plaintiffs have received those documents elsewhere and they have not alleged a single instance where information relevant to this action has been withheld or not properly logged.

Third, Plaintiffs have repeatedly indicated that the purported relevance of the MKULTRA FOIA set is that the documents might contain health effects information relevant to their notice and health care claims against DoD, but this Court has already ruled that Plaintiffs are not entitled to such information from the CIA. Beginning in January 2011 during a meet and confer to narrow discovery disputes, the CIA conveyed that the documents in the MKULTRA FOIA set did not contain additional information concerning testing on service members and thus were not relevant to Plaintiffs' claims against the CIA. Plaintiffs, however, argued that this set of documents might contain information related to the health effects of DoD's test programs and thus would be relevant to their notice and health care claims against DoD; despite extensive correspondence and communication between the parties, this was the only purported relevance ever offered by Plaintiffs. In response, the CIA pointed out that the documents contained only minimal redactions that should not hamper Plaintiffs' efforts to derive so-called "health effects" information therefrom. Nonetheless, to avoid unnecessary litigation, beginning in January 2011, the CIA indicated that it would *consider* doing a renewed privilege review to an extremely limited

[38] There are four redactions to the substance of the memo. The first two are on page one of the memorandum in the following section: "The first data base was obtained from [redacted] under Agency contract and consisted of animal reactions to treatment with selected chemical materials. The [redacted] data on the reaction of mice was augmented by information obtained from Edgewood Arsenal." There are also two redactions on page two of the memorandum in the following section: "The latter tapes were originally transferred to [redacted] for possible use in his study of medications. [Redacted] did not use the information and recently directed the return of the tapes to secure storage in ORD." There is a fifth redaction on the memorandum, but it is not to the text of the memorandum. The redactions are based on CIA statutory privileges that enable it to protect the names of CIA employees and intelligence sources and methods; these privileges are discussed further below.

set of those documents. To this end, the CIA requested that Plaintiffs identify the documents they would like re-reviewed for health effects information, at which point the CIA would evaluate the burden of conducting such a review. Plaintiffs did not, and still have not to this day some ten months after the CIA first made this offer, provided a list of documents that they would like to have re-reviewed. Plaintiffs' request should be denied for this reason alone, as they have not even attempted to make a minimal showing of relevance and need. Furthermore, Plaintiffs rejected the CIA's offer and efforts to avoid litigation disputes (and thus the offer became null and void) when Plaintiffs moved to compel the CIA to search all documents from any test program, including the MKULTRA FOIA set, for health effects information potentially relevant to Plaintiffs' notice and health care claims against DoD. Plaintiffs lost their motion to compel on this issue, as this Court ruled that "Plaintiffs are not entitled to any further document production from the CIA on the subject of health effects." (Dkt. 294 at 9.) Plaintiffs now seek an end run around that holding.

Fourth, the CIA provided the MKULTRA FOIA set to Plaintiffs in October 2009, well before discovery began in this case. At that time, the District Court had not yet ruled on Defendants' motions to dismiss, the parties had not yet exchanged initial disclosures, and Defendants' had not served and were not yet required to serve responses to Plaintiffs numerous discovery requests. Because the documents had been made public in redacted form decades ago and exist in that form on discs that could be easily copied, the CIA provided them to Plaintiffs merely as a courtesy. But the CIA expressly did so *outside of discovery*, as the documents had no relevance to the claims against the CIA in this case. Plaintiffs have been aware of the circumstances in which they received the documents for more than two years. During that time, they have filed numerous discovery disputes with this Court, and yet not once have they sought to compel the CIA to officially produce and conduct a renewed privilege review of the MKULTRA FOIA set. Furthermore, Plaintiffs fail to acknowledge that much has changed since they first received the MKULTRA FOIA set – the District Court has ruled that Plaintiffs are not entitled to discovery related to their health care claims against the CIA, and this Court has ruled that Plaintiffs' discovery requests to the CIA must relate to testing on service members and that

Plaintiffs are not entitled to health effects information from the CIA. Plaintiffs' belated efforts to ask this Court to require the CIA to conduct a privilege review are too little too late.

Fifth, the redactions in the MKULTRA FOIA set are minimal and do not impede Plaintiffs ability to review the documents for allegedly relevant "health effects" information. As noted in the declaration of Patricia Cameresi, the "redactions in the MKULTRA FOIA collection consist primarily of the names of the specific researchers and organizations with which CIA contracted." This information may be properly withheld pursuant to Section 6 of the Central Intelligence Agency Act of 1949 ("CIA Act"), codified at 50 U.S.C. § 403g, which states that "the Agency shall be exempted from the . . . provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency."[39] *See also CIA v. Sims*, 471 U.S. 159 (1985) (holding the CIA could withhold the names of researchers and organizations involved in MKULTRA as "intelligence sources" of the CIA because that information was protected by statutory privileges). These privileges are absolute, not subject to a showing of need. *See Kronisch v. United States*, No. 83 CIV 2458, 1995 WL 303625, at *8 (S.D.N.Y May 18, 1995) ("[T]he privileges conferred by Sections 403-3(c)(5) and 403g are absolute."). Furthermore, these protections are not subject to an inherent time limit. *See id.* at *10 ("[W]hile we recognize that the documents at issue are approximately forty years old . . . we must ultimately defer to the CIA's considered judgment."). As a result, the CIA has stated that it expects "the overwhelming majority of the 'new' redactions" that would result from a renewed privilege review "to be the same as those" contained in the set previously provided to Plaintiffs. (Dkt. 279-26 at 40 n.12.) In light of the fact that the CIA has clear statutory privileges that enable it to withhold the information Plaintiffs' seek (information that is not relevant to "health effects" or any other claim in this case), and the privileges have been consistently upheld by Courts, a renewed privilege review of the MKULTRA set is likely to be a futile exercise.

[39] This information may also be withheld on the basis of the National Security Act of 1947, 50 U.S.C. § 403-1(i)(1).

Finally, depending on the volume of documents put forward by Plaintiffs, it could be unduly burdensome to require the CIA to conduct a renewed privilege review. The CIA has estimated that it would take nine to twelve months to conduct a privilege review of the entire MKULTRA FOIA set. Given that this Court has already ruled that test programs that do not concern testing on service members are not relevant to this action, even a minimal showing of burden would overcome the absence of relevance of the requested documents. Here, however, the burden could be far from minimal and could require extensive efforts to locate, sort, upload, research, and review documents. As discussed in the Cameresi Declaration, the MKULTRA FOIA set exists in the CIA's electronic database in "permanently redacted form, making it impossible to determine what specific information was redacted without referring to the original, hardcopy files." (*Id.*) As a result, Ms. Cameresi detailed that "officially 'producing' these documents in the case would be extraordinarily burdensome if a renewed privilege review were to be required. The CIA would have to locate, copy, scan, load, and re-review the original, unredacted versions of every document." (*Id.*) She estimated that "this process alone could take 9 to 12 months." (*Id.*) Thus, not only are Plaintiffs not entitled to discovery related to the MKULTRA FOIA set under Rule 26(b)(1), discovery is also inappropriate under Rule 26(b)(2)(C)(iii). As Plaintiffs have not attempted to make any showing of relevance and need, nor have they undertaken the minimal effort to even identify the documents that they would like to be reviewed so that the CIA can properly evaluate the burden, their request should be denied.

IV. CONCLUSION

Plaintiffs' Statement: For the forgoing reasons, Plaintiffs respectfully request that the Court grant the relief sought above.

Defendants' Statement: For the forgoing reasons, Plaintiffs' remaining discovery disputes should be rejected as untimely brought, irrelevant, cumulative of previously received evidence, and otherwise unwarranted.

Respectfully submitted, this 7th day of November, 2011.

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GENERAL ORDER 45 ATTESTATION

I, Gordon P. Erspamer, am the ECF User filing this Joint Letter Concerning Discovery Status and Disputes. In compliance with General Order 45, X.B., I hereby attest that Joshua E. Gardner has concurred in this filing.

Dated: November 7, 2011

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