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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

**PLAINTIFFS' NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Hearing Date: April 5, 2012
Time: 9:00 a.m.
Courtroom: F, 15th Floor
Judge: Hon. Jacqueline Scott Corley

Complaint filed January 7, 2009

**NOTICE OF MOTION AND MOTION**

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on April 5, 2012, at 9:00 a.m., before U.S. Magistrate Judge Jacqueline Scott Corley, at the United States District Courthouse, San Francisco, California, Plaintiffs, Vietnam Veterans of America; Swords to Plowshares: Veterans Rights Organization; Bruce Price; Franklin D. Rochelle; Larry Meirow; Eric P. Muth; David C. Dufrane; Wray C. Forrest; Tim Michael Josephs; and William Blazinski ("Plaintiffs"), will and hereby do move the Court for an order compelling Defendants Central Intelligence Agency, United States Department of Defense, United States Department of the Army, and United States Department of Veterans Affairs to produce discovery as specified in the attached Motion to Compel.

On February 27, 2012, the Court ordered a briefing schedule and set a hearing before the Court. (Docket No. 354.) This motion to compel discovery is based on this Notice of Motion, the Memorandum of Points and Authorities filed herewith, the Declaration of Ben Patterson ("Patterson Decl."), attached exhibits filed herewith, all other pleadings and matters of record, and such further oral and documentary evidence as may be presented at or before the hearing on this motion. Counsel for Plaintiffs certify that, prior to filing this motion, they in good faith conferred with Defendants' counsel in an effort to resolve these matters without court action, as required by Federal Rules of Civil Procedure 37(a) and Civil Local Rule 37-1.

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## MEMORANDUM OF POINTS AND AUTHORITIES

Tens of thousands of service members participated in ghastly chemical and biological weapons testing while serving this nation. Throughout this litigation, Defendants have vehemently resisted discovery at every turn, forcing Plaintiffs again and again to seek the Court's intervention to obtain critical discovery. Defendants' delays in production, untimely assertions of privilege, and unjustified refusal to produce key discovery have prejudiced Plaintiffs' ability to develop their case fighting for these service members. Defendants further persist in refusing to produce several discrete sets of key documents. For example, the Department of Veterans' Affairs ("DVA") continues to refuse to produce the e-mails from a single mailbox (the Mustard Gas Mailbox) under threadbare assertions of burden, Defendants continue to stall their production of critical documents stored on the magnetic tapes, and the CIA refuses to produce (or even log redactions for) any documents from the FOIA Set — even the mere 56 pages that Plaintiffs now seek. Plaintiffs must, therefore, once again respectfully ask this Court to intervene.

## BACKGROUND

On December 23, 2011, fact discovery under the extended schedule closed. Since then, and most recently on February 21, Defendants have produced roughly 41,000 pages of documents responsive to Plaintiffs' requests dating back to 2009, on 13 separate dates, excluding Defense Technical Information Center ("DTIC") documents. (Declaration of Ben Patterson ("Patterson Decl.") ¶¶ 48, 51.) The DOD and Army also served an "updated" privilege log on January 10, 2012, adding 84 pages and asserting privilege over 324 new documents. (Patterson Decl. ¶ 2, Ex. A.) Not to be outdone, DVA then "updated" its privilege log for the first time in fifteen months on January 19, 2012 — adding 93 pages and 751 entries. (Patterson Decl. ¶ 3, Ex. B.) The vast majority of these untimely entries are documents being withheld under the qualified privilege of deliberative process.

On December 19, 2011, Defendants represented to the Court that "DoD produced the responsive, non-privilege e-mails of Mr. Finno on Friday, December 16, 2011." (Docket No. 339-1 ¶ 6.) But on January 17 (ten days before his deposition), they produced additional e-mails of Roy Finno. (Patterson Decl. ¶ 4, Ex. C.) After withdrawing assertions of privilege over a few

documents, the DOD produced more Roy Finno e-mails on February 1 (five days *after* his deposition). (Patterson Decl. ¶ 51.) Also on December 19, Defendants represented to the Court that "DoD expects to produce the responsive, non-privileged e-mails from the remaining two custodians, Dee Dodson Morris and Kelly Brix, by December 23, 2011." (Docket No. 339-1 ¶ 8.) Yet Defendants produced additional Kelley Brix e-mails on January 17, and Dee Dodson Morris documents on January 23. (Patterson Decl. ¶¶ 4 , 6, 51, Exs. D, E.) Since December 23, moreover, DVA has produced 70 additional claims files, totaling over 36,000 pages, including a production as late as February 21. (Patterson Decl. ¶¶ 49, 51.) In addition, since December 23, DVA has produced over 3,200 pages of non-claims files documents. (Patterson Decl. ¶¶ 50, 51.)

Prior to and during this time, Plaintiffs were forced to take the depositions of several key witnesses without extremely relevant documents, which belatedly were produced. Defendants' late production and untimely assertions of privilege also prejudiced Plaintiffs' ability to both select the most important deponents, and to prepare for and take depositions.

## STATEMENT OF ISSUES TO BE DECIDED

Plaintiffs seek an order compelling: (1) Defendants Department of Veterans' Affairs ("DVA"), the Department of Defense ("DOD"), and Department of the Army ("Army") to produce documents withheld under assertion of deliberative process privilege; (2) Defendant DVA to produce the contents of the Mustard Gas Mailbox; (3) Defendant DVA to produce a subset of Mustard Gas claims files; and (4) Defendant Central Intelligence Agency ("CIA") to produce certain documents (or pages) from the FOIA Set. Plaintiffs also seek an order: (5) setting a deadline by which Defendants must produce the documents stored on the magnetic tapes or complete their declassification review thereof, among other relief; and (6) granting Plaintiffs leave to take or resume the deposition of four witnesses under limited circumstances.

## PLAINTIFFS HAVE MET AND CONFERRED IN GOOD FAITH

Some of these issues were addressed in the parties' November 7, 2011 Joint Letter (Docket No. 318). Following the Court's December 15, 2011 Hearing regarding those topics, the parties met and conferred in-person and then continued the meet and confer process by letter and telephone. Additional issues arose after the fact discovery cut-off. The parties met and conferred

by letter regarding these various discovery disputes on, *inter alia*, December 23, 2011; January 3, 13, 17, 19, 20, 23, and 31; and February 1, 2, 6, 7, 8, 13, and 29. (Patterson Decl. ¶ 7.) Furthermore, the parties engaged in meet and confer calls on, *inter alia*, December 29, 2011, January 5, January 12, February 13, and a three-hour call on February 14, 2012. (Patterson Decl. ¶ 8.) Despite these good faith efforts to resolve these disputes, the parties have reached an impasse regarding the issues discussed herein. Civil L.R. 37-1(b).

## ARGUMENT

### I. DISCOVERY UNDER FEDERAL RULE OF CIVIL PROCEDURE 26 IS A LIBERAL STANDARD; DEFENDANTS FACE A HEAVY BURDEN.

Federal Rule of Civil Procedure 26(b)(1) provides that a party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Relevance under Rule 26 is interpreted broadly and liberally, and encompasses not only information that would be admissible at trial, but also information "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); *see also* 6 James W. Moore *et. al.*, *Moore's Federal Practice* § 26.41[6] (Matthew Bender 3d ed. 2012). As the party resisting discovery, moreover, Defendants bear the "heavy burden" of "show[ing] that discovery should not be allowed" and "clarifying, explaining, and supporting [their] objections." *See Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1998) (internal citation omitted); *Blankenship v. Hearst Corp*, 519 F.2d 418, 429 (9th Cir. 1975) ("Under the liberal discovery principle of the Federal Rules defendants [are] required to carry a heavy burden of showing why discovery was denied.").

### II. DELIBERATIVE PROCESS PRIVILEGE

The Court is well familiar with these issues. Defendants' most recent "supplemental" privilege logs reflect their latest attempt to withhold documents crucial to Plaintiffs' claims, asserting the qualified privilege of deliberative process. These documents are responsive to document requests Plaintiffs served over two years ago. Defendants thus waived any privilege over these newly logged documents by failing to timely assert it. Moreover, Defendants have not established the foundation for privilege, and to the limited extent they have done so, Plaintiffs

have a substantial need for the documents being withheld under belated assertion of deliberative process privilege. Therefore, Plaintiffs respectfully ask the Court to compel their production.

The overwhelming majority of documents over which Defendants now claim deliberative process privilege fall into the *same* categories and cover the *same* subject matter as documents this Court ordered DVA to produce over its claims of deliberative process privilege on November 23, 2011, after *in camera* review. (*See* Docket No. 327.) After that extensive review, this Court concluded that many of the documents "over which Defendant has asserted deliberative process privilege are either not deliberative, and thus, not entitled to any protection, or that the qualified deliberative process privilege is overcome by Plaintiffs' substantial need for the documents." (*Id.* at 7-8.) The Court found that:

> [S]ome of the documents provide information which is extremely relevant to Plaintiffs' facial bias claim against the DVA and their notice claim against the other Defendants, and because this information cannot be obtained from another source Plaintiffs' substantial need for the documents overrides the government's interest in non-disclosure.

(*Id*. at 4.) Defendants' objections to that Order were denied. (Docket No. 336.)

The DOD and DVA now withhold an extraordinary number of new documents that appear strikingly similar to the documents the Court ordered DVA to produce in November. The vast majority of them fall into the following categories: the Fact Sheet and FAQ's, the Outreach ("Notice") Letter, outreach efforts, the DVA Information Letter, the DVA Training Letter, legislative proposals, test participant verification, the DOD Database, claims adjudication and tracking, and interactions with Congress and the GAO. That these privilege logs came years after the discovery requests were served, a month after the close of fact discovery, and in the middle of several relevant depositions makes this even more egregious, and constitutes waiver of any privilege claims, especially a qualified privilege.[1] Plaintiffs must now, once again, request the Court's assistance to obtain these key documents.

[1] Although Plaintiffs' waiver argument, as explained below, is equally applicable to all new privilege log entries untimely logged, Plaintiffs have decided not to make that waiver argument with respect to any valid attorney-client privilege entry. To assist the Court, the two privilege log exhibits filed as Exhibits F, ¶ 10 and G, ¶ 11 to the Patterson Declaration have

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### A. Department of Veterans' Affairs ("DVA")

#### 1. DVA Has Waived Privilege Over Untimely Logged Documents

DVA's "updated" privilege log, served on January 19, 2012, is untimely, having been served 15 months after DVA provided its last privilege log on October 21, 2010. Virtually all of the documents newly identified are responsive to Plaintiffs' original Rule 45 Subpoena served over two and half years ago on July 27, 2009. (Patterson Decl. ¶ 12, Ex. H.) As explained below, this substantial and prejudicial delay in identifying responsive documents being withheld alone justifies waiver.

In evaluating whether a party has waived privilege, the Ninth Circuit has found that district courts should consider the following factors:

> [T]he degree to which the objection or assertion of privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged (where providing particulars typically contained in a privilege log is presumptively sufficient and boilerplate objections are presumptively insufficient); **the timeliness of the objection and accompanying information about the withheld documents (where service within 30 days, as a default guideline, is sufficient)**; the magnitude of the document production; and other particular circumstances of the litigation that make responding to discovery unusually easy . . . or unusually hard.

*Burlington Northern & Santa Fe Ry. v. United States District Court*, 408 F.3d 1142, 1149 (9th Cir. 2005), *cert. denied*, 546 U.S. 939 (2005) (emphasis added). Importantly, the Ninth Circuit in *Burlington* held that untimely assertion of privilege alone can trigger waiver. *Id.* (holding defendants' filing of a privilege log five months late without mitigating considerations "alone" justified the district court's finding of waiver).

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colored lines crossing over entries in certain categories: (1) red indicates the prior section of the privilege log that was served before the fact discovery cut-off, which is not at issue; (2) orange indicates documents being withheld under attorney-client or work product (or non-responsive or produced to Plaintiffs); (3) green indicates new documents that DVA claims are "identical or substantively identical" to documents the Court previously reviewed as part of its *in camera* review during the fall; and (4) blue indicates entries over which Plaintiffs assert their waiver argument but do not request an *in camera* review if the Court declines to enforce waiver. (*See* Patterson Decl. ¶¶ 10, 11, Exs. F., G)

DVA's January 19 "supplemental" log added 93 pages and belatedly asserted deliberative process privilege over 747 new documents some *two and half years* after Plaintiffs served DVA with its Rule 45 Subpoena. (Patterson Decl. ¶ 3, Ex. B.) Many of these entries appear central to Plaintiffs' claims and refer to previously noticed deponents. On February 6, DVA "updated" its privilege log yet again, adding more entries and apparently subsuming others, which resulted in the current log's 705 new entries. (Patterson Decl. ¶ 10, Ex. F.) DVA's two and half year delay in asserting privilege — and failure to log a single new entry for over 15 months — constitutes waiver.

Indeed, DVA's delay is significantly longer than delays in other cases in which courts within the Ninth Circuit found waiver. *See Burlington*, 408 F.3d at 1149 (five months); *see also Flanagan v. Benicia Unified Sch. Dist.*, No. CIV S-07-0333 LKK GGH, 2008 U.S. Dist. LEXIS 39386, at *13-*20 (E.D. Cal. May 14, 2008) (holding service of boilerplate objections and nine-month delay in serving log waived privileges, citing *Burlington*); *Mansourian v. Bd. of Regents*, No. CIV S-03-2591 FCD EFB, 2007 U.S. Dist. LEXIS 88604, at *4 (E.D. Cal. Nov. 19, 2007) (same, after six-month delay).

These untimely logged documents are *in addition to* those that were the subject of Plaintiffs' Motion to Compel last August and that the Court already reviewed *in camera* in order to issue its November 23, 2011 Order (Docket No. 327). In fact, the vast majority of these documents relate to the same subject matter that the Court already addressed in its previous Orders — the mid-2000's Outreach Efforts and Outreach ("Notice") Letter. (Patterson Decl. ¶ 10, Ex. F.) DVA did not disclose to the Court (or to Plaintiffs) at that time, however, that it was withholding a large number of additional documents. Accordingly, DVA's untimely assertions of deliberative process privilege — well after the Court spent considerable time addressing the issue previously — constitutes waiver.

Furthermore, the untimely "supplemental" log was delivered in the middle of several depositions of DVA officials. For instance, the log was given on the eve of Dr. Mark Brown's deposition, yet it contains 69 new Mark Brown entries. (Patterson Decl. ¶ 3, Ex. B; ¶ 15.) The log also contains dozens of new entries relating to Dr. Craig Hyams, whose deposition had

*already occurred* a week before DVA provided the log. (Patterson Decl. ¶ 3, Ex. B.; ¶ 22, Ex. O.) Considering the lengthy delay and the prejudice it has caused to Plaintiffs' ability to prepare for and take depositions, the Court should find that DVA has waived the deliberative process privilege with respect to all new documents logged.

**2. Plaintiffs Have a Substantial Need for DVA Withheld Documents**

Plaintiffs' substantial need for the documents being withheld on the basis of deliberative process privilege overrides DVA's interest in non-disclosure.[2] As the Court explained in its October 5, 2011 Order:

> The deliberative process privilege is qualified and may be overcome by a strong showing of relevance and an inability to obtain the information from other sources. See Schwarzer, Tashima & Wagstaffe, Fed. Civ. P. Before Trial § 11:767 (TRG 2010) (citing Sanchez v. City of Santa Ana, 936 F.2d 1027, 1034 (9th Cir. 1990). Courts consider the following factors in determining substantial need: 1) the relevance of the evidence, 2) the availability of other evidence, 3) the government's role in the litigation, and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions. See F.T.C. v. Warner Comms. Inc., 742 F.2d 1156, 1161 (9th Cir. 1984).

(Docket No. 294 at 16.)

A significant number of documents in the privilege log contain descriptions that are remarkably similar to the descriptions and subject matters of documents that the Court has already ruled DVA cannot withhold (*see* Docket Nos. 327, 336) — *e.g.*, there are hundreds of documents related to the purported "notification" efforts and outreach, legislative proposals, and drafts of or documents concerning the drafting of "notice" documents, the Training Letter, and the Information Letter. (*See* Patterson Decl. ¶ 10, Ex. F.) These are the same types of documents that the Court previously ordered produced, finding that they were "extremely relevant" to

[2] In consideration of the Court's time, Plaintiffs will not repeat all the arguments made in their original motion to compel the production of deliberative process privilege withheld documents, filed on August 18, 2011. (See Docket No. 255 at 2-8.) Most of the same arguments are applicable here. For instance, neither DVA nor DOD has made a "formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Al-Haramain Islamic Found, Inc. v. Bush*, 507 F.3d 1190, 1202 (9th Cir. 2007) (citation omitted).

Plaintiffs' claims against both the DOD and DVA, and that "Plaintiffs' substantial need for the documents overrides the government's interest in non-disclosure." (*See* Docket No. 327 at 4.)

For example, this Court previously ordered DVA to produce numerous documents concerning DVA's decisions regarding how to notify test subjects and the content of the notice letter. (*Id.* at 4-6.) There are hundreds of new documents in the privilege log that touch on these very issues, including Entry No. DVA0078 000062 ("Discussion about which veterans to provide notice to and content of notice predating final VA notice letter"). (Patterson Decl. ¶ 10 Ex. F.)

Defendants' decisions regarding how and why to "notify" test subjects about the test programs and associated health risks not only go to the heart of Plaintiffs' bias claim, but are also extremely relevant to Plaintiffs' notice claims against the DOD and Army. (*See, e.g.*, Third Amended Complaint ("TAC") (Docket No. 180) ¶¶ 186-189, 231.) At the August 4, 2011 Hearing, the Court emphasized that such decisions would be centrally relevant to Plaintiffs' bias claim. (Docket No. 250 at 89:5-6 ("how they did the notice and decided what is evidence of the bias [Plaintiffs] claim is there.").) The Court stated in its October 5, 2011 Order, moreover, that "if there was evidence that DVA deliberately framed the notice documents or structured the notice process in such a way as to reduce the number of claims, this evidence would be extremely relevant to Plaintiffs' bias claim." (Docket No. 294 at 17.) The Court also found in its November 23 Order that many previously withheld documents were "extremely relevant to Plaintiffs' facial bias claim against the DVA *and their notice claim against the other Defendants*." (Docket No. 327 at 4 (emphasis added).)

The Court has also noted that some courts have found that deliberative process privilege does not apply where the government's intent is at issue. (Docket No. 294 at 16 (quoting *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1421 (D.C. Cir. 1998), *on rehearing* 156 F.3d 1279 (D.C. Cir. 1998) ("[i]f the plaintiff's cause of action is directed at the government's intent. . . it makes no sense to permit the government to use the privilege as a shield.").) The Court found, however, that "DVA's intent is properly considered as a factor in the substantial need analysis. . ." and, as here, where there is clearly a substantial need for the documents, the Court need not resolve the question of whether deliberative process

privilege is inapplicable in cases where intent is at issue. (*See* Docket No. 294 at 16.) Once again, Plaintiffs have a substantial need for these documents. Despite the Court's Orders, and Plaintiffs' detailed explanations of their substantial need, DVA agreed to produce only a tiny number of withheld documents during the meet and confer process. (*See* Patterson Decl. ¶ 51.)

There are also numerous other withheld documents for which Plaintiffs have a substantial need, including those regarding the DOD's Chem-Bio Database. For instance, No. DVA0078 000001-4 includes "[r]ecommendations on DoD database and how VA should conduct outreach to Edgewood Arsenal veterans" and No. DVA0078 000075 is a "[d]iscussion about adequacy of DoD database." (Patterson Decl. ¶ 10, Ex. F.) Plaintiffs have a substantial need for such documents concerning the DOD database because, as the source of exposure determination and participant verification, the database is crucial to both (1) the outreach effort and (2) the verification process for DVA claims adjudication. (*See, e.g.*, Docket Nos. 300 at 2; 307 at 3.)

As to any documents listed in DVA's Privilege Log for which there has been no final document created, Plaintiffs' need for the document is that much greater. With regard to legislative proposal documents, for example, the Court already has concluded that these documents are "extremely relevant to Plaintiffs' claims and that there is no other source of this information because Defendant has indicated that 'there is no final version of any VA draft legislative proposal. . .'" (Docket No. 327 at 5 (citation omitted).) Based on this reasoning, DVA should produce any newly logged legislative proposal documents they are withholding, and any other draft documents for which there is no final document.

These are but a few examples of the highly relevant documents contained in DVA's privilege log. Plaintiffs request that the Court find that Defendants have waived any claim of privilege as to all of these untimely privilege assertions; however, to the extent the Court disagrees, further *in camera* review may be necessary.[3] In light of the Court's prior Orders

[3] Based on representations made by Defendants' Counsel, Plaintiffs do not request *in camera* review of drafts of published scientific or technical reports (Entry Nos. 4470, 4768 — 5318 (60 documents), 5336, 5407 — 5702 (6 documents), and 5705). Plaintiffs' waiver argument still applies, but to the extent the Court declines to find waiver, Plaintiffs do not request *in camera* review of these documents. These entries are crossed out in blue on Exhibit F, ¶ 10 to the Patterson Declaration.

(Docket Nos. 294, 327, 336), Plaintiffs' substantial need for the documents withheld, and the untimely nature of DVA's privilege log, Plaintiffs respectfully request that the Court compel DVA to produce documents withheld under assertion of deliberative process privilege.[4]

**B. The Department of Defense ("DOD") and Army**

**1. The DOD and Army Have Waived Privilege Over Untimely Logged Documents**

On January 10, 2012, the DOD and Army also served yet another "updated" privilege log, asserting deliberative process privilege over numerous documents that are responsive to document requests dating back to 2009 — and appear not to be privileged at all. (*See* Patterson Decl. ¶ 2, Ex. A.) The DOD further updated its log on January 30, 2012. (Patterson Decl. ¶ 11, Ex. G.) The new documents listed on the log appear central to Plaintiffs' claims and involve key witnesses. Much like DVA, the DOD's belated assertion of privilege relates to documents that are responsive to discovery requests that have been pending for over *two years*. (*See* Docket No. 129-1.) In addition to the lengthy delay, the new privilege log came in the midst of key depositions. Indeed, the log came just days before Roy Finno's deposition on January 27, despite containing over 140 new entries for him alone. (*See* Patterson Decl. ¶ 11, Ex. G; ¶ 2, Ex. A; ¶ 21, Ex. N.). This extreme delay has prejudiced Plaintiffs' ability to select deponents and to prepare for and take depositions.[5] Thus, the DOD has waived the deliberative process privilege with

[4] In light of the Court's prior Orders, Plaintiffs do not request any new entry that is exactly identical to a document that the Court previously reviewed during its *in camera* review during the fall and declined to order be produced. DVA has provided a list of entries that it represents are either identical or "substantively" identical duplicates. (Patterson Decl. ¶ 5, Ex. D.) Because "substantively" identical is vague, however, Plaintiffs requested a further explanation and that DVA differentiate between "exactly identical" and "substantively identical" documents. DVA refused to provide this information. (See Patterson Decl. ¶ 14, Ex. I at 3.) In Exhibit F to the Patterson Declaration, Plaintiffs have crossed out in green the 184 documents that DVA represents are "identical or substantively identical." (See Patterson Decl. ¶ 10, Ex. F.) To the extent documents are exactly identical, Plaintiffs do not request them again. Given the significance that seemingly subtle differences could have (*e.g.*, handwritten notes or certain additional words), and DVA's refusal to provide clarifying information regarding these differences, Plaintiffs cannot exclude merely similar documents at this time.

[5] As addressed in briefing on Plaintiffs' August 2011 Motion to Compel, earlier in the case the DOD unilaterally decided not to run keyword searches for e-mails. (*See* Docket No. 258 at 15-18; No. 289 at 12-13.) Only after Plaintiffs raised this issue and filed papers with the Court, did the DOD finally run keyword searches. The vast majority of these e-mails were eventually

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respect to the new documents listed in their privilege log. *See Burlington*, 408 F.3d at 1149; *see also Flanagan*, 2008 U.S. Dist. LEXIS 39386, at *13-*20; *Mansourian*, 2007 U.S. Dist. LEXIS 88604, at *4; *see also Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM, No. C-01-1351 TEH, 2008 U.S. Dist. LEXIS 123283, at *32 n.7 (E.D. Cal.; N.D. Cal. April 14, 2008) (denying assertion of deliberative process privilege on untimeliness grounds).

**2. Plaintiffs Have a Substantial Need for DOD and Army Withheld Documents**

The DOD's and Army's claims of deliberative process privilege are either improper or, to the extent they are legitimate, are overcome by Plaintiffs' substantial need for the documents. Much like DVA's privilege log, the DOD's privilege log contains many documents strikingly similar to documents the Court compelled DVA to produce three months ago. (*See* Docket No. 327.) For instance, the Court required DVA to produce e-mails related to the drafting of "notification" documents, including an e-mail from Dr. Mark Brown, describing "significant inaccuracies" in the DOD Fact Sheet, such as its characterization of scientific studies as denying adverse health effects and its representation that doses received were "low." (Patterson Decl. ¶ 16, Ex. J.) Yet, the DOD's current privilege log withholds numerous e-mails discussing that same Fact Sheet, which could be just as (or even more) "extremely relevant" as Dr. Brown's e-mail. (*See* Docket No. 327 at 4; Patterson Decl. ¶ 11, Ex. G.)

As another example, Entry Nos. 170-171 are attachments to an e-mail describing "a list of major comments on recurrent issues" with DVA's Information Letter for VHA clinicians regarding the Chem-Bio tests. (Patterson Decl. ¶ 17, Ex. K.) These describe a "major rewrite" which Dr. Kelley Brix thought was "required" for the DVA Information Letter. In response to

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produced right at or after the fact discovery cut-off under the extended schedule, or were logged after the cut-off. (*See* Background Section above.) The DOD should not be rewarded for failing to comply with its discovery obligations for over 2 years, as e-mails have always been responsive to Plaintiffs' discovery requests. (*See* Docket No. 129-1 at 2-3.) The Court should reject any attempt by the DOD to counter Plaintiffs' waiver argument on grounds that the DOD did not run e-mail searches until this past fall.

these attachments, Dr. Brown responded that "[a] major rewrite is unlikely since the letter writing campaign has already started . . . ." (*Id.*) Defendants now claim privilege over these attachments which describe serious problems with the DVA Information Letter, contain recommended substantive edits that DVA rejected, and are thus highly relevant to Plaintiffs' claims concerning bias, notice, and health care. (*See* Docket No. 294 at 17.) Plaintiffs were forced to depose Dr. Brown without these documents, not knowing they existed and were being withheld until just days before his deposition.[6] Despite Plaintiffs' detailed explanation of their substantial need for these specific attachments and why this discovery cannot be obtained elsewhere, the DOD refused to produce them. (Patterson Decl. ¶ 30.) During the entire meet and confer process, the DOD has agreed to produce relatively few of the withheld documents.[7]

As another example, Plaintiffs have a substantial need for documents concerning DVA's outreach efforts, as the Court has previously recognized. (*See* Docket No. 294 at 17 ("if there was evidence that DVA deliberately framed the notice documents or structured the notice process in such a way as to reduce the number of claims, this evidence would be extremely relevant to Plaintiffs' bias claim.").) Such documents include those concerning the decision *not* to send individualized letters to veterans, a decision in which the DOD was involved. (*See* Patterson Decl. ¶ 20, Ex. M at VET140-001353 ("Interesting that Tom Pamparin has an idea on what the letters are going to say to each individual. Sounds like what the agreement was last week is now out the window. Good luck on the VA creating a letter for each person.").) Plaintiffs have sought information about this decision elsewhere, such as the depositions of Roy Finno and Craig

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[6] Entry Nos. 53 is another example of a key document being withheld. Defendants produced an e-mail, and now withhold the accompanying attachment, which contains edits to the Fact Sheet that Mr. Finno sent to Ms. Morris and described as dealing "mainly with accuracy." (Patterson Decl. ¶ 18, Ex. L at VET143-000639.) Plaintiffs had to depose Mr. Finno and Ms. Morris without these accuracy-related edits, and did not know they were being withheld until days before Mr. Finno's deposition and several months *after* Ms. Morris' deposition. (Patterson Decl. ¶ 21, Ex. N; ¶ 13.)

[7] Today, Defendants informed Plaintiffs that the DOD will produce the following entries: Documents 52, 132, 134, 192-197, 234, 236, 290-295, 302-309, 315, and 317-322. (Patterson Decl. ¶ 9, Ex. GG.) Given the timing of Plaintiffs' filing, the DOD Privilege Log at Exhibit G does not reflect this information.

Hyams. Mr. Finno, who was sent the e-mail referenced above, testified that he did not know or could not recall anything about this issue. (Patterson Decl. ¶ 21, Ex. N at 88:21 – 90:17.) More generally, Dr. Hyams testified that he could not remember anything about the outreach efforts for test participants at Edgewood. (*See, e.g.*, Patterson Decl. ¶ 22, Ex. O at 22:12 – 23:11.) As a result, it is even more crucial for Plaintiffs to get access to the documents themselves.

Plaintiffs have a particularly substantial need for documents regarding the creation of the DOD's fact sheets. Mr. Finno, the principal author of the Edgewood Fact Sheet, testified that he did not know or could not remember much of the specifics of the drafting process, including why parts of the Fact Sheet were included or deleted. (*See, e.g.*, Patterson Decl. ¶ 21, Ex. N at 20:7-9; 25:21-22; 27:13-17.) This huge gap in his testimony makes the contemporaneous drafting documents themselves even more vital. These include both drafts of the fact sheets and e-mails concerning them. Dr. Brown's "significant inaccuracies" e-mail, which the Court previously compelled DVA to produce, is an example of the type of critical Fact Sheet document potentially being withheld in this category.[8]

In addition, Plaintiffs have an equally particularized need for documents concerning the Mustard Gas Fact Sheet. Despite Mr. Finno having been listed on numerous DOD privilege log mustard gas related entries (Patterson Decl. ¶ 2, Ex. A), he refused to acknowledge *any involvement in the mustard gas outreach effort*. (*See, e.g.*, Patterson Decl. ¶ 21, Ex. N at 42:25 - 43:5 ("I do not remember being involved in any VA mustard gas notification.").) Therefore, the documents themselves are likely the only source of such critical discovery.

These are only examples of the relevant documents contained in the DOD's privilege log for which Plaintiffs have a substantial need.[9] In light of the Court's prior Orders, Plaintiffs' substantial need, and the untimely nature of the assertion of the privilege, Plaintiffs respectfully

[8] As identified on DVA's October 2010 Privilege Log, it appears that the Court reviewed only one draft "fact sheet" (Docket No. 256-14 at Entry No. 3455-3456) as part of its November 2011 *in camera* review, and ordered Defendants to produce it (Docket No. 327 at 6).

[9] In consideration of the Court's valuable time, and based on representations made by Defendants, Plaintiffs do not request Entry Nos. 5 and 323 – 328 for *in camera* review. These entries are crossed out in blue in the DOD's Privilege Log exhibit. (Patterson Decl. ¶ 11, Ex. G.)

ask the Court to compel the DOD and Army to produce documents withheld under assertion of deliberative process privilege, or to undertake an *in camera* review of these documents.

## III. DVA MUSTARD GAS MAILBOX

Despite the Court's observation that the DVA Mustard Gas Mailbox "is a very discrete thing" (December 15, 2011 Hearing Transcript (Docket No. 345) at 36:3-4), DVA continues to refuse to produce any e-mail sent to that mailbox under a claim of burden.[10] Mustard gas test participants — *e.g.*, those who participated in pre-1953 testing — are a part of Plaintiffs' proposed class. (*See* Motion for Class Certification (Docket No. 346) at 1-2; TAC (Docket No. 180) ¶¶ 102-04.) As the Court stated at the August 4, 2011 Hearing, testing back to World War II is "in the complaint." (Docket No. 250 at 65:5.) Despite these facts, Defendants refuse to produce these e-mails, claiming that producing them is too burdensome.

These highly relevant documents come from *one single* mailbox. At the December 15, 2011 Hearing, the Court expressed skepticism at the claim of burden in "just producing an e-mail mailbox." (Docket No. 345 at 36:10-12.) The only burden Defendants stated at that hearing was that the Mustard Gas Mailbox e-mails had been encrypted, and therefore, were inaccessible. (*See id.* at 36:3-7.) DVA has since represented to Plaintiffs that it had decrypted every e-mail in that mailbox. DVA nevertheless insists that producing the e-mails would be "extremely burdensome." (Patterson Decl. ¶ 24, Ex. Q.) The Court should reject this unjustified assertion of burden and order DVA to produce the contents of the Mustard Gas Mailbox.[11]

[10] Similar to the Chem-Bio Mailbox, the Mustard Gas Mailbox contains e-mails and ratings decisions related to the confirmation of test participation and adjudication of such claims. The DVA's Mustard Gas Training Letter 05-01 requires that "VAROs must send an e-mail to the mustard gas mailbox (MUSTARDGAS@VBA.VA.GOV) requesting verification of participation." (Patterson Decl. ¶ 23, Ex. P at VET001_014961.) Furthermore, the Training Letter states that "VACO needs to know the outcome of all mustard agent and Lewisite claims. At the time you notify the claimant about the rating decision, please e-mail the associated mustard agent and Lewisite rating decisions (under the subject name 'Mustard Agent and Lewisite Rating') to the mustard gas mailbox." (*Id.* at VET001_014962.) Thus, this single Mailbox contains critically important documents relevant to Plaintiffs' claims.

[11] With respect to the Chem-Bio Mailbox, DVA acknowledged during the December 15 Hearing that it had encrypted documents in that Mailbox *after the inception* of the lawsuit and claimed that those documents were inaccessible. (Docket No. 345 at 24:18 – 25:3.) The Court responded: "To say, 'We encrypted it and threw away the key' is destroying evidence." (*Id.* at 25:8-9.) While DVA has since represented that it has been able to decrypt additional e-mails,

(Footnote continues on next page.)

## IV. DVA MUSTARD GAS CLAIMS FILES

Based on this Court's Order at the December 15, 2011 Hearing, DVA ran social security numbers, names, and dates of birth from the mustard gas database, and identified approximately 1,200 mustard gas and lewisite test participants' claims files that have not been produced. (Patterson Decl. ¶ 24, Ex. Q.) Despite this Court's statement that mustard gas and lewisite testing is "in the complaint" and relevant to Plaintiffs' claims (*see* Docket Nos. 250 at 65:5; 345 at 34-35), DVA refuses to produce *any* of these claims files.[12]

DVA contends that producing these claims files at this time would be extremely burdensome. (Patterson Decl. ¶ 14, Ex. Q.) But DVA should have produced these claims files in the first place. Based on its own repeated self-serving misconceptions as to the scope of Plaintiffs' claims, DVA unilaterally imposed artificial restrictions on its initial searches for relevant claims files. (*See* Docket No. 318 at 9-11.) Had DVA run its searches appropriately in the first place, this would not be an issue. As the Court recognized at the December 15 Hearing with respect to the Chem-Bio claims files, but equally applicable here, "[i]t is a little late now to say it is so burdensome when you could have done it at the time." (Docket No. 345 at 19:1-2.)

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DVA still has produced virtually no e-mails or ratings decisions from 2008 or before. (Patterson Decl. ¶¶ 29, 26.) DVA suggested that these documents may reside in a "back-up" of the Chem-Bio Mailbox, which David Abbot maintained on a Compensation & Pension Service server. (*See* Patterson Decl. ¶ 27, Ex. S at DVA002 025769 (this information "can't be lost, now that it is on a server. . . nothing can be lost from today forward.").) Until just yesterday, however, DVA claimed that these documents had been lost and offered only speculation that Mr. Abbot may have been mistakenly referring to his own personal computer (which was repurposed after he left DVA). (Patterson Decl. ¶ 28, Ex. T.)

As of yesterday, DVA now represents that "[l]ate last week, during preparations to move an old [VBA] server to another location, VA IT discovered a folder that was marked with Mr. Abbot's name and the letters 'CB.' . . . VA is currently reviewing the contents of this file, but it appears to contain Mr. Abbot's files related to Chem-Bio, including the Chem-Bio mailbox. . . VA will search the remainder of this server to ensure that it contains no additional documents that may be responsive. . ." (Patterson Decl. ¶ 28, Ex. T.) Depending on the result of this newly found repository, the Chem-Bio Mailbox discovery issue may finally be resolved.

[12] Plaintiffs have addressed the importance of the DVA claims files, which includes mustard gas claims files, at length in prior filings. (*See* Docket No. 318 at 9-11.) For example, without them, Plaintiffs cannot create the complete statistical analysis contemplated by the Court's October 5, 2011 Order. (*See* Docket No. 294 at 19.)

The parties have reached an agreement in principle regarding the production of additional Chem-Bio claims files which DVA initially withheld as a result of its inadequate searches (which numbered approximately 620 additional claims files). (Patterson Decl. ¶ 14, Ex. I.) DVA will produce additional claims files for veterans whose claims were based on exposure to chemical or biological substances, with some additional restrictions. (*Id.*) Plaintiffs proposed a similar limited production with respect to the mustard gas claims files. (Patterson Decl. ¶ 29.) DVA rejected this proposal, however, and explained that it would accept no compromise regarding these claims files. (*Id.*) Accordingly, Plaintiffs respectfully ask the Court to compel DVA to produce a subset of the 1,200 identified files, specifically all claims files for test participants whose claims are based on exposure to a chemical or biological substance, and who served in the military between 1938 and 1975.

## V. MAGNETIC TAPES

Plaintiffs respectfully submit this supplemental filing to again request the Court's intervention with respect to crucially important documents that Defendants have resisted producing for over two and a half years. The parties have already briefed extensively the chronology of this issue[13] as well as the importance of the information[14] on the magnetic tapes. To assist the Court, however, Plaintiffs submit a timeline summarizing this appalling history of stalling and evasion. (*See* Patterson Decl. ¶ 38, Ex. Z.) In short, two and a half years after propounding their discovery request, months after the close of fact discovery, and after the completion of all of the currently scheduled depositions in the case, Plaintiffs still have not received the information contained on the magnetic tapes, and Defendants refuse to commit to a timetable for producing the information. And, at best, only scant progress has been made by

[13] For previous filings concerning the magnetic tapes, *see* Pls.' Supplemental Filing Concerning Magnetic Tapes (Docket No. 334); Joint Letter Concerning Discovery Status and Disputes (Docket No. 318); Joint Statement of Discovery Dispute Concerning Magnetic Tapes Regarding Database of Edgewood Test Participants and Project "OFTEN" Documents (Docket No. 300); Decl. of Gordon P. Erspamer in Support of Pls.' Reply In Support of Mot. to Compel R. 30(b)(6) Depos. and Produc. of Documents (Docket No. 291).

[14] The Court has previously recognized that Defendants have not challenged the relevance of the documents on the magnetic tapes. (*See* Docket No. 345 at 75:4-12.)

Defendants since the last hearing. The Court should not allow Defendants to indefinitely delay the production of this crucial information and continue this pattern of stalling.

In 2011, Defendants repeatedly represented to this Court and to Plaintiffs that it was impossible to recover the data on the magnetic tapes. On August 15, 2011, Defendants informed Plaintiffs that DoD "is unable to recover through existing processing systems the data on the magnetic tapes. . . ." (Docket No. 291 at 3.) Again, on October 12, 2011, Defendants stated that "it appears that it simply is not feasible to recover the information contained on these magnetic tapes." (Docket No. 300 at 4.) Thereafter, in response to the Court's questions, Defendants' Counsel stated: "my understanding from the Government agencies is that they have been unable to access this information, and that's been the state of affairs since at least, I believe, 1978, well before the start of this litigation." (Docket No. 306 at 27:15-19.)

On December 14, 2011, Plaintiffs submitted the declaration of John Ashley which concluded that it was likely feasible to read or convert the data and records stored on the magnetic tapes. (Docket No. 335 at 2.) In addition, Defendants received two responses to Defendants' Request for Information ("RFI") that also indicate not only that retrieval is feasible, but also that it can be done at a relatively low cost. (*See* Patterson Decl. ¶ 39, Ex. AA.) Instead of accepting one of these bids, however, Defendants unilaterally sent the tapes last December to the Defense Logistics Agency ("DLA") in Florida,[15] claiming that the two capable bidders were not cleared to review classified information.[16] (Docket No. 345 at 69:4-7.) This is despite the fact that Defendants had advised the Court that *DLA did not have the ability to access the data on the*

[15] DLA's Mission Statement does not reflect any data recovery expertise, but rather states it "shall function as an integral element of the military logistics system of the Department of Defense to provide effective and efficient worldwide logistics support to the Military Departments and the Combatant Commands under conditions of peace and war, as well as to other DoD Components and Federal agencies, and, when authorized by law, State and local government organizations, foreign governments, and international organizations." (Patterson Decl. ¶ 40, Ex. BB at 1.)

[16] In light of Defendants' intention to refuse to accept any bids from contractors without appropriate security clearances, a serious question is presented as to why Defendants would delay this process for months while soliciting bids from companies who could not meet those clearances with respect to these tapes.

*tapes*. Defendants stated that "DLA could identify no current hardware capable of reviewing the tapes, but is continuing to search for possible hardware that could be used. . ." (Docket No. 318 at 27.) Nevertheless, Defendants updated Plaintiffs by e-mail dated January 9, 2012 (Patterson Decl. ¶ 41, Ex. CC), stating that DLA was unable to retrieve the data from the tapes and must acquire new hardware to retrieve the data — a process that took well over a month: *a conclusion about which they had already advised the Court on November 7, 2011, three months ago*. (Docket No. 318 at 27.) Only on February 24, 2012, did Defendants provide any new information, stating that they expected to receive a necessary "part" and that it would take approximately one week from the close of business on Tuesday, February 28, to determine whether the part will allow access to information on the tapes. (Patterson Decl. ¶ 14, Ex. I at 2.) Defendants still have yet to provide a timetable for completing declassification review and producing the documents contained on the tapes. (Patterson Decl. ¶ 42.)

In fact, Defendants searched for this hardware for a year and a half, remaining in the same stage of this process since their August 12, 2010 Amended Interrogatory Responses, which stated that the CIA would return the tapes to DOD for a determination of "whether DoD possesses the hardware to read the tapes." (Docket No. 123-6 at 8, 15.) When Plaintiffs recently inquired as to the specific technology sought by DLA and the prospective timeline by e-mail on January 17, 2012, Defendants did not respond for two weeks, and then provided scant information in a letter dated February 2, 2012. (*See* Patterson Decl. ¶ 43, Ex. DD, ¶ 44, Ex. EE.) It was not until February 24, 2012, over a month after the request for information, that a very limited update was provided. (*See* Patterson Decl. ¶ 14, Ex. I at 2.)

These actions, coupled with the lack of progress and the fact that nothing material has been done in the two and a half year history of this discovery dispute, strongly suggest that Defendants are tactically delaying this process. Presently, ignoring the bids of *two* capable contractors, Defendants attempt to perpetually delay the process even further while DLA, an organization whose capability to perform this conversion is completely suspect, studies these tapes, moving at a "snail's pace." Not only is DLA's technological capacity called into question by the very illogical (or, more likely, strategic) acts of Defendants to solicit bids from outside the

government only to reject those bids and keep the tapes "in house," DLA's qualifications were also *specifically negated* by Defendants as early as last November. (Docket No. 318 at 27.) Even in light of the lack of success Defendants have had in the last two years of retrieving this data in-house, Defendants still staunchly refuse to agree to turn the tapes over to a Court-appointed Special Master who would supervise the retrieval using qualified forensic experts. (Patterson Decl. ¶ 45.)

As a result of Defendants' continued pattern of delay, Plaintiffs have legitimate and significant concerns with respect to exactly what DLA is doing to retrieve data off of these tapes at this juncture or whether it might inadvertently lose or destroy evidence. Since the Court last addressed this issue over two months ago, the only progress has been that DLA attempted to load the tapes onto hardware in its possession, determined that the tapes had a density of 800 bpi, and ordered the part necessary for retrieving information. (Patterson Decl. ¶ 44, Ex. EE, ¶ 14, Ex. I.) It further offered that two of the tapes indicated "misload" or "blank" while the other four indicate "density unknown." (Patterson Decl. ¶ 44, Ex. EE.) These limited steps should have taken only a few hours, let alone a period of months.

Plaintiffs' expert has expressed concerns that, especially given the age of the tapes and the lack of technological specialty that DLA possesses, they may have compromised the tapes by loading them into improper hardware. (Patterson Decl. ¶ 46.) At the meet and confer call on February 14, 2012, **Defendants refused to provide any update on the magnetic tapes**. (Patterson Decl. ¶ 47, Ex. FF.) Not until February 24, 2012, could Counsel for Defendants assure Plaintiffs that the hardware had been definitively located or that the funding had been secured. (Patterson Decl. ¶ 14, Ex. I.) Defendants' refusal to commit to a timeline for completion of production causes Plaintiffs concern that any actual production of the data on the tapes may not occur until well into the summer or perhaps even later. In their most recent letters, Defendants have contemplated a timeline that includes approximate dates for accessing the information, but still no timeline for performing a declassification review and providing the data extracted.

At this late stage in the proceedings, when the fact discovery deadline has passed, and the expert discovery cut-off and other deadlines rapidly approach, Plaintiffs simply cannot afford to

allow Defendants to continue their tactics to strategically avoid production of these crucial documents. As such, Plaintiffs respectfully request that the Court order specific relief outlined in the Proposed Order, including: (1) setting a deadline by which Defendants must produce the documents stored on the magnetic tapes in computer readable format or complete their declassification review (and log any withheld documents stored on the tapes resulting from the review); (2) requiring Defendants to submit a Declaration detailing the steps they have taken to retrieve the data stored on the magnetic tapes; (3) compelling the production of all correspondence to and from DLA regarding the magnetic tapes; and (4) compelling Defendants to produce a witness to testify regarding the contents and authentication of the magnetic tapes. Alternatively, Plaintiffs request that the Court appoint a Special Master who would supervise the retrieval using qualified forensic experts at Defendants' expense.

## VI. PLAINTIFFS HAVE GOOD CAUSE FOR A LIMITED NUMBER OF ADDITIONAL DEPOSITIONS

Based on Plaintiffs' continuing review of very recently produced documents and recent deposition testimony, and in light of Defendants' voluminous new privilege log entries, the need to resume certain depositions and depose a new witness has become clear. Documents ordered produced by the Court's ruling on this Motion, in particular documents being withheld under assertion of deliberative process privilege, would inform Plaintiffs' selection and may offer additional good cause. Given the current timeframe, however, Plaintiffs raise this issue with the Court now. Plaintiffs respectfully request leave to depose Dr. Kelley Brix and to resume the depositions of Dee Dodson Morris, Joe Salvatore, and David Abbot. During the meet and confer process, Defendants took the position that, unless Plaintiffs would identify the specific topics of questioning they sought to ask these witnesses, Defendants could not agree to produce them. (Patterson Decl. ¶ 25, Ex. R., ¶ 19.) As addressed above, Plaintiffs also respectfully request to depose a witness concerning the magnetic tapes.

Based on voluminous discovery just recently produced or to be produced (*e.g.*, the new David Abbot mailbox documents), there is good cause to depose Dr. Brix and resume the depositions of Ms. Morris, Mr. Salvatore, and Mr. Abbot with time restrictions. For instance, as

addressed in Section II-B-2 above, Defendants just recently produced the e-mail regarding Dr. Brix's edits to the DVA Information Letter, recommending a "major rewrite" that DVA rejected. (Patterson Decl. ¶ 17, Ex. K at VET140-000723.) Plaintiffs have been unable to obtain discovery regarding these specific edits thus far.[17] Plaintiffs therefore request to depose Dr. Brix for no more than 6 hours.[18]

As for Ms. Morris, the DOD recently produced Ms. Morris' e-mails regarding, for example, the decision not to send individualized outreach letters to veterans, as addressed above in Section II-B-2. (*See, e.g.*, Patterson Decl. ¶ 20, Ex. M at VET140-001353 ("VA agreed not to include agent/dose in the letters to veterans.").) Plaintiffs deposed Ms. Morris without this e-mail and many other e-mails relevant to her.[19] Furthermore, Ms. Morris' central importance — as the ultimate decision-maker regarding verification of participation in testing programs — only solidified during David Abbot's deposition. (*See, e.g.*, Patterson Decl. ¶ 31, Ex. U at 416:2-6 ("Q. Was Dee Morris able to unilaterally decide which chemical exposures constituted exposures? . . . A. You might come to that conclusion, because she was the source for what ended up in the database. . ").) Plaintiffs request to resume her deposition for up to 4 hours.

With respect to Mr. Salvatore, the documents produced by DVA pursuant to the Court's deliberative process *in camera* order (Docket No. 327) are alone sufficient to demonstrate good

[17] Roy Finno revealed during his January 27 deposition, moreover, that Dr. Brix "didn't care for" the Edgewood test subjects IOM Study that "concluded that there wasn't any long term effects." (Patterson Decl. ¶ 21, Ex. N.) Given Defendants' reliance on this study — and because Mr. Finno could not remember any specifics (*id.* at 178:15-17), Plaintiffs have good cause to depose Dr. Brix regarding why she disliked how the study was done (*id.* at 178:11-14) and how Defendants addressed her concerns (if at all).

[18] Defendants apparently agree that some limited deposition of Dr. Brix would be acceptable, as Defendants offered to make her available to testify regarding just the specific topic of the DVA Information Letter edits (Patterson Decl. ¶ 19.)

[19] As addressed in briefing on Plaintiffs' August 2011 Motion to Compel, earlier in the case the DOD unilaterally decided not to run keyword searches for e-mails. (*See* Docket No. 258 at 15-18; No. 289 at 12-13.) Only after Plaintiffs raised this issue and filed papers with the Court, did the DOD finally run keyword searches. The vast majority of these e-mails were eventually produced right at or after the fact discovery cut-off under the extended schedule. (*See* Background Section above.) If Plaintiffs had known the volume of relevant e-mails that were being excluded from production because the DOD was not planning to search for e-mails, Plaintiffs likely would have not gone forward with Ms. Morris' deposition at that time.

cause to resume his deposition. DVA produced numerous e-mails, draft presentations, and other documents relevant to Mr. Salvatore long after his deposition, and some of which the Court classified as "extremely relevant" (*See* Docket No. 327 at 4.) For instance, Mr. Salvatore, who held a central role during the outreach efforts, and received the aforementioned Dr. Brown "significant inaccuracies" e-mail, having sent the initiating e-mail. (*See* Patterson Decl. ¶ 16, Ex. J.) Plaintiffs request to resume Mr. Salvatore's deposition for up to 4 hours.

For Mr. Abbot, as noted above, DVA revealed just yesterday that "during preparations to move an old [VBA] server to another location, VA IT discovered a folder that was marked with Mr. Abbot's name and the letters 'CB.'" (Patterson Decl. ¶ 28, Ex. T.) DVA represents that it will "produce to Plaintiffs all responsive, non-privileged documents contained in this file" and "search the remainder of this server to ensure that it contains no additional documents that may be responsive . . . ." (Patterson Decl. ¶ 28, Ex. T.) To the extent Defendants produces additional documents, Plaintiffs respectfully request leave to resume Mr. Abbot's deposition for up to 4 hours, and request that Defendants cover Plaintiffs' travel and lodging expenses, resulting from DVA's failure to timely identify Mr. Abbot's documents.

After the fact discovery cut-off, moreover, Defendants identified 96 new privilege log entries for Dr. Brix, 133 new entries for Ms. Morris, 82 new entries for Mr. Salvatore, and 127 new entries for Mr. Abbot. (*See* Patterson Decl. ¶ 11, Ex. G, ¶ 10, Ex. F.) At the time that Plaintiffs deposed Ms. Morris and Mr. Salvatore, and at the time Plaintiffs selected deponents pursuant to the Court's November 17, 2011 Order (Docket No. 325), Plaintiffs had no idea that Defendants were withholding such a substantial volume of documents relating to those deponents. As with the DVA documents ordered to be produced by the Court after its previous *in camera* review (Docket No. 327), many of these documents could be "extremely relevant" and warrant deposition questioning.

## VII. CIA FOIA SET DOCUMENTS

The Court is familiar with this issue, as it was raised in the parties' November 7, 2011 Joint Statement of Discovery Dispute (Docket No. 318 at 37). In short, the CIA provided "outside of discovery" roughly 17,000 pages of FOIA documents assembled in the 1970's

concerning the CIA's involvement in human testing programs. These documents contain voluminous FOIA redactions, which have never been logged on Defendants' various privilege logs. Defendants admit, moreover, that they have not reviewed unredacted versions of nearly all of these documents since the 1970's. (Docket No. 345 at 57:6-9)

Pursuant to the Court's November 30, 2011 Order (Docket No. 330 at 5), on December 6, 2011, Plaintiffs requested a list of 35 of the most relevant documents from the Set for the CIA to produce or log. (Patterson Decl. ¶ 32, Ex. V.) Following the December 15, 2011 Hearing, the parties met and conferred at length, including once in-person and twice by phone, regarding Plaintiffs' request. (Patterson Decl. ¶ 33.) Based upon representations made by Defendants' counsel during the meet and confer process, Plaintiffs offered to narrow their requests twice more — leaving only seven documents, totaling 51 pages. (Patterson Decl. ¶ 34, Ex. W.) Despite the considerable concessions Plaintiffs conditionally proposed in order to reach agreement, the CIA merely offered to search for, produce, or log *two* of the documents, and only if Plaintiffs would withdraw *all other* remaining FOIA Set document requests. (Patterson Decl. ¶ 35.) Plaintiffs rejected Defendants' unreasonable "proposal."

Plaintiffs respectfully request that the Court compel Defendants to produce (or log redactions for) the following documents (or pages), identified by MORI ID numbers: 17383 (only pages 2, 13, 15-18, 20-22, 26, 28, 35-38), 17473 (only page 19), 17755, 145893, 146143 (only page 2), 146172, 146195, 146419 (only pages 2 and 3), 146200 (only page 2), 184548, and 184606. Plaintiffs' current request of a mere eleven documents (56 total pages) is quite reasonable, especially in light of the Court's statement during the December 15 Hearing that the volume of Plaintiffs' December 6 selections of about 900 pages (or 200 documents) was "not a huge universe of documents. Not in this case." (Docket No. 345 at 52:17-22.) Plaintiffs have surgically selected these documents, going so far as to request only specific *individual* pages in several.[20] For ease of reference, Plaintiffs submit the redacted versions of these documents so that the Court can view the redactions. (*See* Patterson Decl. ¶ 37, Ex. Y.)

[20] Should Defendants' various representations related to the CIA FOIA documents — including their reliance on these documents to foreclose other discovery — prove erroneous,

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The documents that Plaintiffs seek all contain voluminous redactions (some with almost entire pages redacted), and are highly relevant to Plaintiffs' claims in this case. For instance, one document refers to individuals who thought LSD was "dangerous material," but the three preceding paragraphs (about half an entire page) are completely redacted. (*See* Patterson Decl. ¶ 37, Ex. Y at MORI ID 184548 at 1.) These redactions are likely to contain important information regarding *why* the individuals thought LSD was "dangerous" — *i.e.*, health effects observed after LSD administration. Another document similarly refers to health effects, as the single page that Plaintiffs seek refers to the "neurophysiological and pharmacological effects of central nervous system antagonists" before the next few lines are completely redacted. (*Id.* at MORI ID 17473 at 19.) A third document concerns Subproject 125, which involved testing of drugs conducted at a VA facility in Martinsburg, West Virginia, and contains considerable redactions. (*See id.* at MORI ID 17383; TAC (Docket No. 180) ¶ 226.) This document is highly relevant to Plaintiffs' DVA bias claim, as it relates to DVA's role in the testing programs. (*See, e.g.*, TAC (Docket No. 180) ¶ 226.)

Locating and reviewing redactions for just eleven documents (**56 total pages**) does not present a substantial burden. Furthermore, the Court has already stated in its November 30 Order that, "[t]o the extent the CIA intends to rely on the MKULTRA FOIA production to satisfy or relieve it of discovery obligations in this case, then the production should be in accordance with Federal Rule of Civil Procedure 26(b)(5)." (Docket No. 330 at 5.) Yet, the CIA refuses to produce these 56 pages or even log, let alone justify, redactions for them. Accordingly, Plaintiffs respectfully ask the Court to compel Defendants to do so.

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Plaintiffs may seek further leave from the Court. The Magnetic Tapes alone suggest far more comprehensive involvement by the CIA in the testing programs than it will admit — as the voluminous data contained on the dozens of tapes was provided to the CIA and stored by the Agency for decades. (*See* Docket No. 291-1 at 9-15.) Furthermore, Dr. James Ketchum, former head of the testing programs at Edgewood Arsenal, produced an e-mail, which states that the Army discussed LSD testing "in full detail with the CIA" and that the Army worked with the CIA to test LSD on "overseas unwitting subjects." (*See* Patterson Decl. ¶ 36, Ex. X at JK09 0015343.)

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request an order compelling discovery regarding the issues addressed above.

Dated: March 1, 2012

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