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 Plowshares; Veterans Rights Organization; Bruce Price; Franklin  
 8 D. Rochelle; Larry Meirow; Eric P. Muth; David C. Dufrane;  
 9 Wray C. Forrest; Tim Michael Josephs; and William Blazinski

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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

**DECLARATION OF  
 BEN PATTERSON  
 IN SUPPORT OF PLAINTIFFS'  
 MOTION TO COMPEL DISCOVERY**  
**[AMENDED PURSUANT TO APRIL 5,  
 2012 ORDER]**

Complaint filed January 7, 2009

**EXHIBIT AA REDACTED**

1 I, Ben Patterson, declare as follows:

2 1. I am an attorney licensed to practice law in the State of California and am admitted  
3 to practice before this Court. I am an associate with the law firm of Morrison & Foerster LLP,  
4 counsel of record for Vietnam Veterans of America, Swords to Plowshares: Veterans Rights  
5 Organization, Bruce Price, Franklin D. Rochelle, Larry Meirow, Eric P. Muth, David C. Dufrane,  
6 Wray C. Forrest, Tim Michael Josephs, and William Blazinski (“Plaintiffs”) in this action.

7 I submit this Declaration in Support of Plaintiffs’ Motion to Compel Discovery. I make this  
8 Declaration based on personal knowledge and discussions with support staff working under my  
9 direction. If called as a witness, I would testify to the facts set forth below.

10 2. Attached hereto as **Exhibit A** is a true and correct copy of Defendants Department  
11 of Defense’s (“DOD”) and Army’s privilege log provided January 10, 2012, with cover letter.

12 3. Attached hereto as **Exhibit B** is a true and correct copy of an excerpt of Defendant  
13 Department of Veterans’ Affairs’ (“DVA”) privilege log dated January 19, 2012, with cover  
14 e-mail, which includes only the new privilege log entries.

15 4. Attached hereto as **Exhibit C** is a true and correct copy of the DOD’s production  
16 cover letter dated January 17, 2012.

17 5. Attached hereto as **Exhibit D** is a true and correct copy of a chart identifying  
18 “identical or substantively identical” duplicates, which was provided by DVA on February 17,  
19 2012.

20 6. Attached hereto as **Exhibit E** is a true and correct copy of the DOD’s production  
21 cover letter dated January 23, 2012.

22 7. The parties met and conferred by letter regarding various discovery disputes on,  
23 *inter alia*, December 23, 2011; January 3, 13, 17, 19, 20, 23, and 31; and February 1, 2, 6, 7, 8,  
24 13, and 29.

25 8. The parties engaged in meet and confer calls on, *inter alia*, December 29, 2011,  
26 January 5, January 12, February 13, and February 14, 2012, a call which lasted approximately  
27 3 hours.

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1           9.       Attached hereto as **Exhibit GG** is a true and correct copy of a March 1, 2012 letter  
2 from Joshua Gardner to Gordon Erspamer.

3           10.       Attached hereto as **Exhibit F** is a true and correct copy of DVA's privilege log  
4 dated February 24, 2012, with the following edits: Certain log entries have been crossed out in  
5 different colors. (1) Red indicates the prior section of the privilege log that was served before the  
6 fact discovery cut-off; (2) orange indicates documents being withheld under attorney-client  
7 privilege or work product (or entries Defendants designated as non-responsive or produced to  
8 Plaintiffs); (3) green indicates new documents that DVA claims are "identical or substantively  
9 identical" to documents the Court previously reviewed as part of its *in camera* review during the  
10 fall; and (4) blue indicates entries over which Plaintiffs assert their waiver argument but do not  
11 request an *in camera* review if the Court declines to enforce waiver.

- 12           • DVA has represented through the February 17, 2012 Chart at Exhibit D, and  
13 February 24, 2012 letter at Exhibit I, that the following entries are "identical or  
14 substantively identical." These have been crossed out in green: Entry Nos.  
15 DVA0078 000006-23 (6 documents), 29-37 (3 documents), 69, 99-103 (1  
16 document), 124 -129 (1 document), 147, 170-172 (1 document), 180-183 (1  
17 document), 267, 276-279 (1 document), 291-292 (1 document), 418-420 (1  
18 document), 434-451 (6 documents), 485-509 (5 documents), 565-570 (3  
19 documents), 1331-1333 (2 documents), 1367, 1372, 1751-1760 (7 documents),  
20 1830-1839 (4 documents), 1868, 2056-2059 (1 document), 2182-2183 (1  
21 document), 2217-2222 (4 documents), 2227-2239 (2 documents), 2241-2242 (1  
22 document), 2244-2245 (2 documents), 2247-2263 (5 documents), 2265,  
23 2315-2316 (1 document), 2319-2326 (3 documents), 2330-2333 (1 document),  
24 2340-2350 (3 documents), 2355, 2357-2359 (1 document), 2369-2391 (3  
25 documents), 2426-2433 (3 documents), 2478-2485 (1 document), 2494-2503 (1  
26 document), 2514-2539 (3 documents), 2559-2574 (2 documents), 2577-2618 (21  
27 documents), 2620-2622 (1 document), 2682-2683 (1 document), 2769-2779 (3  
28 documents), 2785-2792 (2 documents), 2916-2925 (2 documents), 2939-2952 (6

1 documents), 2992-3009 (3 documents), 3018-3027 (1 document), 3038-3063 (3  
2 documents), 3073-3092 (3 documents), 3095-3126 (13 documents), 3128-3131 (2  
3 documents), 3218-3230 (3 documents), 3346-3348 (2 documents), 3362-3365 (1  
4 document), 3564-3566 (3 documents), 3607-3608 (2 documents), 3610,  
5 3612-3583 (sic) (2 documents), 4207, 4241-4245 (1 document), 4250-4251 (2  
6 documents), 4266-4267 (1 document), 4382-4391 (3 documents), 4532-4561 (1  
7 document), 4665-4668 (2 documents), 4686-4695 (1 document), 4718-4726 (3  
8 documents), 4735-4736 (1 document), 5709-5715 (6 documents), 5741,  
9 5762-5763 (1 document), 5800-5802 (1 document), 5836-5841 (1 document),  
10 5866-5872 (5 documents), and 5874.

11 11. Attached hereto as **Exhibit G** is a true and correct copy of DOD's privilege log  
12 dated January 30, 2012, with the following edits: Certain log entries have been crossed out in  
13 different colors. (1) Red indicates the prior section of the privilege log that was served before the  
14 fact discovery cut-off; (2) orange indicates documents being withheld under attorney-client  
15 privilege or work product (or entries Defendants designated as non-responsive or produced to  
16 Plaintiffs); and (3) blue indicates entries over which Plaintiffs assert their waiver argument but do  
17 not request an *in camera* review if the Court declines to enforce waiver.

18 12. Attached hereto as **Exhibit H** is a true and correct copy of Plaintiffs' Rule 45  
19 Subpoena served on DVA on July 27, 2009.

20 13. The deposition of Dee Dodson Morris took place on July 6, 2011.

21 14. Attached hereto as **Exhibit I** is a true and correct copy of a February 24, 2012  
22 letter from Lily Farel to me.

23 15. The deposition of Mark Brown occurred on January 20, 2012.

24 16. Attached hereto as **Exhibit J** is a true and correct copy of what I am informed and  
25 believe is a June 29, 2006 email from Mark Brown to Kenneth Hyams and others, produced by  
26 Defendants at Bates labels DVA052 000113 - DVA052 000114 and is Deposition Exhibit  
27 No. 727 in this case.  
28

1           17. Attached hereto as **Exhibit K** is a true and correct copy of what I am informed and  
2 believe is a July 10, 2006 email from Mark Brown to Kelley Brix and others, produced by  
3 Defendants at Bates label VET140-000723 and is Deposition Exhibit No. 751 in this case.

4           18. Attached hereto as **Exhibit L** is a true and correct copy of what I am informed and  
5 believe is a March 6, 2006 email from Roy Finno to Dee Morris and others, produced by  
6 Defendants at Bates label VET143-000639.

7           19. During a March 1, 2012 call, the parties discussed the possibility of additional  
8 depositions. Defendants took the position that, unless Plaintiffs would identify specific topics of  
9 questioning that they sought to ask these witnesses, Defendants could not agree to produce the  
10 witnesses requested. Defendants did propose the idea that Dr. Kelley Brix could be made  
11 available to testify regarding only the specific topic of the DVA Information Letter edits.

12           20. Attached hereto as **Exhibit M** is a true and correct copy of what I am informed  
13 and believe is an April 3, 2006 email from Michael Kilpatrick to Dee Morris and others, produced  
14 by Defendants at Bates labels VET140-001353 - VET140-001357 and is Deposition Exhibit No.  
15 797 in this case.

16           21. Attached hereto as **Exhibit N** is a true and correct copy of excerpts from the  
17 transcript of the January 27, 2012 deposition of Roy Finno.

18           22. Attached hereto as **Exhibit O** is a true and correct copy of excerpts from the  
19 transcript of the January 13, 2012 deposition of Kenneth Craig Hyams.

20           23. Attached hereto as **Exhibit P** is a true and correct copy of what I am informed and  
21 believe is Training Letter 05-01, "Revised Mustard Agent and Lewisite Claims Processing  
22 Procedures", dated March 28, 2005, produced by Defendants at Bates labels VET001\_014953  
23 through VET001\_014970 and is Deposition Exhibit No. 588 in this case.

24           24. Attached hereto as **Exhibit Q** is a true and correct copy of a February 1, 2012  
25 letter from Stacey Sprenkel to Joshua Gardner.

26           25. Attached hereto as **Exhibit R** is a true and correct copy of a February 29, 2012  
27 letter from Gordon Erspamer to Joshua Gardner.

1           26.     Based on Plaintiffs' review of DVA's production, there appear to be virtually no  
2 Chem-Bio Mailbox e-mails or ratings decisions from 2008 or before.

3           27.     Attached hereto as **Exhibit S** is a true and correct copy of what I am informed and  
4 believe is a May 2, 2007 email from David Abbot to Glen Wallick and Brad Underwood,  
5 produced by Defendants at Bates label DVA002 025769 and is deposition Exhibit No. 777 in this  
6 case.

7           28.     Attached hereto as **Exhibit T** is a true and correct copy of a February 29, 2012  
8 letter from Lily Farel to me.

9           29.     During the parties' February 13, 2012 meet and confer call, Plaintiffs proposed a  
10 limited production of mustard gas claims files similar to the approach agreed to in principle  
11 regarding the Chem-Bio claims files. DVA rejected this proposal and explained that it would  
12 accept no compromise regarding mustard gas claims files. Also during that call, DVA stated that  
13 it had been able to decrypt additional mailbox emails.

14           30.     During the parties' February 14, 2012 meet and confer call, Defendant Department  
15 of Defense refused to produce any additional documents withheld on the basis of deliberative  
16 process privilege.

17           31.     Attached hereto as **Exhibit U** is a true and correct copy of excerpts from the  
18 transcript of the January 25, 2012 deposition of David Abbot.

19           32.     Attached hereto as **Exhibit V** is a true and correct copy of a December 6, 2011  
20 letter from me to Kimberly Herb, with enclosure.

21           33.     During the parties' January 5, 2012 and February 14, 2012 meet and confer calls,  
22 as well as directly after the December 15, 2011 hearing, the parties discussed Plaintiffs' request  
23 for CIA FOIA set documents.

24           34.     Attached hereto as **Exhibit W** is a true and correct copy of a February 7, 2012  
25 letter from me to Kimberly Herb, with enclosure. The enclosure is attached hereto as **Exhibit X**.

26           35.     During the parties' February 14, 2012 meet and confer call, Defendant Central  
27 Intelligence Agency ("CIA") offered to search for, produce, or log only two of the seven CIA  
28 FOIA set documents proposed in Plaintiffs' February 7 letter. Plaintiffs rejected this offer.

1           36. Attached hereto as **Exhibit X** is a true and correct copy of what I am informed and  
2 believe is an August 10, 2005 email from James Ketchum to Margaret Filbert, produced by  
3 Dr. James Ketchum in response to Plaintiffs' Rule 45 subpoena, with Bates labels JK09 0015341  
4 through JK09 0015343.

5           37. Attached hereto as **Exhibit Y** are true and correct copies of what I am informed  
6 and believe are documents from the MKULTRA FOIA set that CIA provided to Plaintiffs, with  
7 the following MORI ID numbers: 17383 (only pages 2, 13, 15-18, 20-22, 26, 28, 35-38), 17473  
8 (only page 19), 17755, 145893, 146143 (only page 2), 146172, 146195, 146200 (only page 2),  
9 146419 (only pages 2 and 3), 184548, and 184606.

10           38. Attached hereto as **Exhibit Z** is a timeline of events pertaining to Plaintiffs'  
11 request for production of magnetic tapes.

- 12           • Attached as **Exhibit Z-1** is a true and correct copy of Plaintiffs' First Set of  
13 Interrogatories to All Defendants, served on Defendants on November 16, 2009.

14           39. Attached hereto as **Exhibit AA** are copies of responses to Defendants' Request for  
15 Information (RFI). Defendants provided these responses to Plaintiffs on January 19, 2012.

16           40. Attached hereto as **Exhibit BB** is a true and correct copy of DOD Directive  
17 5105.22 entitled, "Defense Logistics Agency (DLA)," issued May 17, 2006.

18           41. Attached hereto as **Exhibit CC** is a true and correct copy of a January 9, 2012  
19 email from Joshua Gardner to Gordon Erspamer and others.

20           42. Defendants have not provided a set timetable for completing declassification  
21 review and producing the documents contained on the magnetic tapes.

22           43. Attached hereto as **Exhibit DD** is a true and correct copy of a January 17, 2012  
23 email from Joshua Gardner to Gordon Erspamer and others.

24           44. Attached hereto as **Exhibit EE** is a true and correct copy of a February 2, 2012  
25 letter from Joshua Gardner to Gordon Erspamer.

26           45. During the parties' February 14, 2012 meet and confer, Defendants would not  
27 agree to turn over the magnetic tapes to a Court-appointed Special Master who would supervise  
28 the retrieval using qualified forensic experts.

1           46.     During a January 23, 2012 telephone call with Plaintiffs' Counsel, expert John  
2 Ashley expressed concerns that, especially given the age of the magnetic tapes and the lack of  
3 technological specialty that DLA possesses, DLA may have compromised the tapes by loading  
4 them into improper hardware.

5           47.     Attached hereto as **Exhibit FF** is a true and correct copy of a February 16, 2012  
6 letter from me to Joshua Gardner.

7           48.     Since December 23, 2011, Defendants have produced documents to Plaintiffs on  
8 the following thirteen dates: January 3, 17, 19, 23, and 30; February 1, 2, 7, 9, 10, 14, 16 and 21.  
9 These productions do not include the documents Defendants produced on February 1 and 6 in  
10 response to Plaintiffs' requests for documents identified through the Defense Technical  
11 Information Center ("DTIC") bibliographies.

12           49.     Since December 23, 2011, Defendant DVA has produced DVA Claim Files on  
13 January 3 (14 Claim Files), January 23 (31 Claim Files), January 30 (23 Claim Files), February 2  
14 (1 Claim File) and February 14 (1 Claim File). There are 36,011 pages in these seventy Claim  
15 Files.

16           50.     Since December 23, 2011, Defendant DVA has produced documents other than  
17 Claim Files on January 3, February 2, February 9 (identified by prefix "DVA078" consisting of  
18 380 inaccessible pages in encrypted PDF format), February 14, and February 21. These  
19 productions contain 3,277 pages of documents. Since February 9, eleven pages of the DVA078  
20 production were produced on February 21 while others appeared on the DVA's Privilege Log.

21           51.     The chart below reflects some document productions received from Defendants  
22 since December 23, 2011.

Date	Production Numbers	Description
1/3/2012	DVA076_000001-000061 DVA077_000001-003800	DVA076 consists of 1 document containing 61 pages of CBRNE e-mail and attachments;  DVA077 has 18 documents containing 3800 pgs. consisting of 14 VA Claims Files.

Date	Production Numbers	Description
1/17/2012	VET125 (various pages) VET144 (various pages)	Dr. Kelley Brix's e-mails and attachments begin at VET144_00001 (24 pages);  Roy Finno's e-mails and attachments begin at VET125_046501 (234 pages) - 98 new documents.
1/23/2012	DVA067_000001-013177 DVA074_000001-000620	DVA067 has 43 documents, 13,177 pages, and contains 31 VA Claims Files;  DVA074 has 1 document, 620 pages and consists of CBRNE e-mail and attachments
1/23/2012	VET143_000001-000159	Dee Dodson Morris documents, 66 documents, 160 pgs.
1/30/2012	DVA080 000001-016698	31 documents, 16,698 pages consisting of 23 VA Claims Files
2/1/2012	Parts of VET125, VET143 and VET144	14 documents, 23 pages consisting of Roy Finno e-mails
2/2/2012	DVA081 000001-001543	4 documents, 1,543 pages; 8 pages of VBAVACO E-mail and 1 VA Claim File
2/9/2012	DVA078 0000001-000380	Inaccessible encrypted PDFs.
2/10/2012	VET149_000001-000020	1 technical report document, 20 pages
2/14/2012	DVA084 000001-000835 DVA085 000001-000801	4 documents, 1,636 pages; DVA084 consists of CBRNE E-mail and attachments;  DVA085 consists of 1 VA Claim File.
2/14/2012	VET135_000001-000933	Documents related to the LSD Follow-up Study Report
2/16/2012	VET125_004758-004759	Previously withheld as entry 76 on DoD's Privilege Log
2/21/2012	DVA082 0000001-001362 DVA078 005183-005187 DVA078 005401-5406	Documents from DVA078 that were previously listed on VA's Privilege Log consisting of 20 documents, 1,373 pages.

1 I declare under penalty of perjury under the laws of the United States of America that the  
2 foregoing is true and correct and that this Declaration was executed in San Francisco, California  
3 on this 1st day of March, 2012.

4  
5 /s/ Ben Patterson  
6 Ben Patterson  
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**Attestation Pursuant to General Order 45, section X.B**

I hereby attest that I have on file all holograph signatures for any signatures indicated by a “conformed” signature (/S/) within this e-filed document.

\_\_\_\_\_  
/s/ GORDON P. ERSPAMER

Gordon P. Erspamer