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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL

ARGUMENT

I. PLAINTIFFS' REQUEST FOR ANY MAGENTIC TAPES BEYOND THE SIX TRANSFERED FROM THE CIA TO DOD SHOULD BE DENIED.

A. Plaintiffs Have Waived Any Request For These Tapes.

Due to their lack of diligence, Plaintiffs have waived any claim to the eighteen magnetic tapes determined by the Central Intelligence Agency ("CIA") to be non-responsive, which is a distinct issue from the parties' on-going dispute about the Department of Defense's ("DoD") efforts to recover data on six magnetic tapes transferred from CIA to DoD. For more than two years, Plaintiffs have been aware of the fact that the CIA historic record retirement request form ("manifest"), Ex. A to Herb Decl., identified more than thirty magnetic tapes related to Project OFTEN. More than six months ago, Plaintiffs not only became aware of but also referenced the fact that only six of those tapes had been transferred to DoD, leaving the vast majority of the tapes in the possession of CIA. Yet, without explanation, Plaintiffs delayed some six months before raising, for the first time and in a single sentence in a reply brief, an issue regarding eighteen of the remaining tapes possessed by the CIA.[1] Dkt. 378 at 13-15. Indeed, even Plaintiffs recognized that they had not raised a dispute regarding the eighteen tapes; during the hearing before this Court on April 5, 2012, Defendants' counsel discussed Ms. Cameresi's testimony regarding the remaining tapes and Plaintiffs' counsel responded that "[n]one of that is before the Court on this Motion." Ex. B to Herb Decl. at 3:15-16. Because the local rules obligated Plaintiffs to raise all discovery disputes by December 30, 2011, their failure to timely raise the issue of the CIA's determination that the tapes were not responsive constitutes waiver. *See* Local Rule 37-3 ("no motions to compel fact discovery may be filed more than 7 days after the fact discovery cut-off").[2]

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[1] While there are more than thirty tapes listed on the manifest, the CIA transferred six tapes to DoD. Additionally, Plaintiffs informed Defendants that they do not challenge the CIA's non-production of the tapes in Boxes 5, 6, and 7. Ex. C to Herb Decl. at 2. Thus, there are only eighteen tapes in the possession of the CIA that are currently in dispute.

[2] Plaintiffs appear to believe that the CIA had somehow waived their right to offer a declaration from Ms. Cameresi concerning these eighteen tapes. Dkt. 433. Plaintiffs' position is meritless. As discussed above, Plaintiffs dedicated a single sentence to the issue in their *reply* brief, to which Defendants did not have the opportunity to respond, and stated the issue was not before the Court during the April 5, 2012 hearing. Additionally, Plaintiffs only recently offered a

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Plaintiffs have known for six months that the CIA retained and did not produce all but six tapes to the DoD. On October 31, 2011, DoD published a Request for Information ("RFI") that indicated that DoD was seeking to access data on six magnetic tapes. Pursuant to the Court's efforts to identify and "adopt a process for resolving ***all*** outstanding discovery disputes," Dkt. 314 at 3 (emphasis added), Defendants informed Plaintiffs in early November 2011 about the RFI, which identified the six tapes received by it from the CIA. In accordance with the Court's order seeking to resolve all remaining disputes, Plaintiffs prepared their portion of a joint statement; Plaintiffs' statement included not only a link to the RFI, but also noted that it "request[ed] work for 'six (6) UNIVAC 1108 system magnetic reels of tape.'" Dkt. 318 at 21 n.23 (quoting RFI). Yet, despite Plaintiffs' awareness that DoD was seeking to access only six of the more than thirty tapes listed on the CIA's manifest, and despite the fact that the Court ordered the parties to present all remaining disputes in their November 7, 2011 joint statement, Plaintiffs failed to identify any dispute with respect to the CIA's retention and non-production of the remaining eighteen tapes.

Even if Plaintiffs' failure to identify this issue in the parties' November 7, 2011 joint statement was somehow excusable, their continued failure to timely raise it is not. Two days after the filing of the joint statement, Plaintiffs deposed CIA employee Patricia Cameresi as a Rule 30(b)(6) deponent. Ms. Cameresi was questioned extensively about the tapes, and she expressly testified that the CIA had transferred only "between three and six" tapes of the more than thirty tapes identified on the manifest to DoD for its review. Ex. D to Herb Decl. at 68:6. Additionally, she specifically discussed the contents of Boxes 8-10 at issue here and stated that the tapes in these boxes had not been transferred to DoD, as the CIA had determined that they were not relevant. *Id.* at 223:10-227:17. Given the RFI and deposition testimony from the CIA that only a portion of the tapes identified on the manifest had been transferred to DoD, Plaintiffs had an

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declaration from John Ashley purporting to discuss the potential contents of the eighteen tapes, and Ms. Cameresi's declaration responds to the speculation contained in Mr. Ashley's declaration. Accordingly, Ms. Cameresi's declaration is timely.

obligation to identify by December 30, 2011 any disputes regarding the eighteen tapes the CIA retained and did not produce. *See* Local Rule 37-3. Their failure to do so constitutes waiver.

B. The CIA's Conclusion That It Has Transferred Any Magnetic Tapes That May Contain Human Clinical Data Is Reasonable.

As to the merits, there is no basis for Plaintiffs' arguments as to the purported relevance of the eighteen tapes in Boxes 8-10.[3] The CIA recalled from storage Boxes 8-10[4] and reasonably concluded that all the tapes within those boxes are not responsive to a request for human clinical data related to testing on service members.[5]

Ten tapes are clearly labeled as being the product of a private contractor[6] that had been retained by the CIA for work involving animal testing – all six tapes in Box 8 (numbers 305, 190, 363, 204, 043, 260), two tapes in Box 9 (numbers 196 and 252), and two tapes in Box 10 (numbers 168 and 057). Decl. of Patricia Cameresi ("Cameresi Decl.") ¶ 8. The labels that remain on the tapes in these three boxes are entirely consistent with the manifest. Within Box 8, tapes 305 and 190 bear the label "[Contractor Name] Catch-up Raw Data Files," while tapes 363, 204, 043, and 260 have labels stating that they contain "[Contractor Name] Raw Data." *Id.* ¶ 8(a). Tapes 196 and 252 in Box 9 bear the label "8 [Contractor Name abbreviated] SYMOUT

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[3] In addition to their arguments regarding the eighteen tapes, Plaintiffs also contend that the CIA has knowledge of videos and photographs referenced in the magnetic tape printout. Dkt. 425 at 5. However, the document to which they cite is not a CIA document, but rather one from DoD. In the 1970s, the CIA generated a partial printout of the tape labeled as containing human clinical data, and the CIA produced this document at VET102-000518. However, the document to which Plaintiffs cite, VET102-000363-67, 71, 74-95, is a DoD document that it produced. The CIA has no knowledge of the videos and photographs referenced on the DoD printout cited by Plaintiffs. Furthermore, to the degree Plaintiffs argue that a printout referencing photographs and media means that this material is "likely . . . stored on the tapes," Dkt. 425 at 7, this is demonstrably incorrect because DoD produced the printout cited by Plaintiffs and it does not correspond to any tape located by the CIA, including the eighteen retained by the CIA and six transferred to DoD.

[4] Due to on-going archiving efforts, the box numbers referenced on the manifest are not the same as those currently used by the CIA. While the contents of the boxes are the same, the numbers assigned to the boxes have changed as the materials have been rearchived. For ease, however, the historic box numbers, as listed on the manifest, will be used here.

[5] All eighteen tapes have markings classifying them as "SECRET." Cameresi Decl. ¶ 8.

[6] The name of the contractor is redacted pursuant to CIA statutory privileges protecting the names of CIA sources and methods from unauthorized disclosure. 50 U.S.C. § 403-1(i)(1); 50 U.S.C. § 403g; *see also CIA v. Sims*, 471 U.S. 159, 167 (1985) (upholding the CIA's ability to protect the identities of MKULTRA researches from public disclosure). The contractor's name has been withheld here and replaced with "Contractor Name."

Files." *Id.* ¶ 8(b). Finally, tapes 168 and 057 in Box 10 bear a label stating that they contain "GULF/Backup of Current [Contractor Name abbreviated] Data Bases." *Id.* ¶ 8(c). CIA records indicate that the contractor conducted animal testing research for the CIA and that the ten tapes, in fact, contain animal data. As noted in Ms. Cameresi's declaration, not only do CIA records indicate that the CIA retained the contractor to conduct animal testing, but documents produced in this case confirm the nature of the contractual relationship. *Id.* ¶¶ 10; *see, e.g.*, Cameresi Ex. 5 at VET020-000165 (stating that "The principal contractor under Project OFTEN was [Contractor Name]" and that it "established and used test procedures with animals from which the behavioral effects of drugs and chemical compounds in humans could be predicted"). The CIA also is "unaware of a single indication in the CIA's records that this contractor ever conducted research on humans." *Id.* Additionally, a 1975 memorandum makes clear that the contractor tapes contained in Boxes 8-10 contained animal data. *Id.* ¶ 9. The memorandum establishes that Box 8 contained "raw data, compiled under Project OFTEN, concern[ing] testing on cats, rats, mice, and monkeys," while the contractor tapes in Boxes 9-10 contained "animal test data compiled by [the] Agency contractor." *Id.* Because CIA records make clear that the contractor conducted animal research for the CIA, and because historic evidence indicates that the tapes reflect that role and contain only animal data, the ten tapes referenced above would not be responsive to Plaintiffs' request for human clinical data.[7]

Although the remaining eight tapes, which are in Boxes 9 and 10, appear to be from Edgewood Arsenal, the record reflects that these tapes also likely contain animal data that was to be merged with the contractor's data. Tapes 283 and 366 in Box 9 are labeled as containing "Four EARL SYMOUTS"; EARL is the acronym for Edgewood Arsenal Research Laboratories. *Id.* ¶ 12. There are also six tapes in Box 10 that are believed to be from Edgewood.[8] *Id.*

[7] Plaintiffs' declarant John Ashley speculates that the tapes listed above could "contain different files created with different machines." Dkt. 425-1 ¶ 39a. There is no evidence to support Mr. Ashley's bald speculation. Furthermore, even if there are different files on a single tape, there is no indication that the tapes contain anything other than animal data.

[8] The manifest indicates that the eight tapes in Box 10 are from "Edgewood and [Contractor Name]." Ex. A to Herb Decl. at VET019-000043. As discussed above, two of the tapes are clearly labeled as being the product of the CIA contractor. Cameresi Decl. ¶¶ 8(c), 12. The

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Nonetheless, the CIA's records reflect that these six tapes likely do not contain human clinical data. First, in 1974, a CIA employee conducted a review of all the magnetic tapes relating to Project OFTEN. *Id.* ¶ 13(a). The employee's "review covered some 30 tapes," after which he concluded that there were only "four tapes from Edgewood that included the names along with biographic data of some of the people tested." *Id.* The four tapes referenced are most likely the four that bore the labels "human clinical data from Edgewood" that the CIA has transferred to DoD. *Id.* Second, the CIA also reviewed the magnetic tapes in its possession related to Project OFTEN in 1975. *Id.* ¶ 13(b). At that time, it noted that there were two boxes containing "what appears to be machine (computer) oriented data relating to the merging—without attribution to originator—of animal test data compiled by an Agency contractor and data from a third agency." *Id.* Boxes 9 and 10 are the only two boxes that contain CIA contractor data and data from another entity; thus, it appears reasonably likely that the Edgewood tapes in Boxes 9 and 10 contain "animal test data" that was to be merged with similar data by the CIA contractor. Accordingly, the CIA reasonably concluded that none of these tapes are responsive to Plaintiffs' request for human clinical data, and Plaintiffs' untimely request should be denied.

II. THE COURT SHOULD SHIFT THE COST OF ANY ADDITIONAL RETRIEVAL EFFORTS TO PLAINTIFFS.

A. Despite DoD's Substantial Efforts, The Data Contained On Four Of The Tapes Is Inaccessible Under The Federal Rules

DoD's efforts to recover data on the six magnetic tapes referred by the CIA has exceeded the requirements of Rule 26. Plaintiffs should bear all of the costs associated with any additional retrieval efforts because the information on those tapes is inaccessible under the Federal Rules.[9]

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remaining six tapes do not expressly state their origin and instead state the contents as follows: tapes 103 and 192 state "GULF Backup of DEFINES, SHOWS, and COMPOSE"; tapes 186 and 296 state "GULF P1CGEN P5GEN"; tape 296; tapes 398 and 307 state "GULF P1AGEN P1BGEN." *Id.* ¶ 12. Nonetheless, because the manifest indicates that Box 10 contains tapes received from Edgewood, the CIA presumes that the tapes without an express statement of origin are from Edgewood. *Id.*

[9] Plaintiffs contend that because Defendants opted approximately 40 years ago to store information on now-obsolete technology, Defendants may not claim that the information is now inaccessible. Dkt. 334, at 3; Dkt. 425 at 4. Plaintiffs provide no legal authority for the proposition that a party that places materials on now-obsolete technology forty years before a

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DoD's recovery efforts have included consulting with numerous governmental and non-governmental organizations, including the Army's Medical Research and Materiel Command, the Defense Technical Information Center, the Defense Logistical Agency ("DLA"), Battelle Memorial Institute, and UNISYS, to determine whether the information could be accessed and converted into a reviewable format. Dkt. 318, at 26. UNISYS is the successor company to the one that made the UNIVAC, the system referenced on what appears to be a partial printout from the magnetic tapes. *Id.* at 27. Notably, 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. *Id.* DoD took the additional step of posting a Request for Information ("RFI") to solicit assessments from private companies concerning the cost and ability to convert or read the magnetic tapes. DoD only received two responses, neither from contractors with the necessary security clearances to review the currently classified tapes.

DoD did successfully access information on two of the magnetic tapes. Julie Parrish, a DLA employee, spent approximately 60 hours extracting data from the six magnetic tapes, and ultimately was successful in obtaining readable data from two of those six tapes. Dkt. 400-1, ¶ 2. Ms. Parrish purchased an additional tape drive for the sole purpose of seeking to recover data from the magnetic tapes. *Id.* ¶ 6. Despite those efforts, DoD has been unable to recover data from four of the six tapes. *Id.* ¶ 9. Ms. Parrish confirmed the appropriateness of her recovery

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lawsuit is filed must bear the costs associated with the attempts to recover that data, and neither of the cases Plaintiffs identify support such a conclusion. In one of the cases relied upon by Plaintiffs, *Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139 (D.D.C. 2007), the issue was whether a party that had archived data ***after*** a lawsuit had been filed was obligated to undertake the expense of recovering that data. *Id.* at 145-46. In the other, *Starbucks Corp. v. ADT Sec. Servs., Inc.*, 2009 U.S. Dist. LEXIS 120941 (W.D. Wash. Apr. 30, 2009), the district court held that where a company continued to use a certain technology for archiving data, the company could not claim the data that resided on that technology was inaccessible. *Id.* at *17-*18. Of course, in this case, it is undisputed that the magnetic tapes have not been exploited in approximately 40 years, and neither the CIA nor the DoD believe that they possess the technology capable of retrieving whatever information may be contained on those tapes. Plaintiffs' contention that Defendants have either "contributed to" or "caused" the inaccessibility of remaining data that may exist is without any support.

efforts with the vendor from whom DLA purchased the additional hard drive, as well as from other governmental entities, such as the Naval Education and Training Professional Development and Technology Center; the Defense Information Systems Agency Centralized Database and Storage Management, and two private vendors, Flashback Data and Kroll Ontrack. *Id.* ¶¶ 11-12. Ms. Parrish ultimately concluded that, with respect to tapes 3-6, "[g]iven the age of the tapes and the efforts I undertook to pull data from them I believe any data they contained may be irretrievable. I am not aware of any other reasonable efforts that could be taken to guarantee successful recovery of data from tapes 3-6." *Id.* ¶ 13.[10]

B. Plaintiffs Should Bear The Cost Of Any Additional Recovery Efforts.

Defendants have expended substantial efforts to recover whatever data may be on these six ancient tapes, and the Court should conclude that any theoretically remaining data properly is considered to be inaccessible under Federal Rule 26(b)(2)(B). Accordingly, even if further efforts are warranted (and they are not), the Court should order that Plaintiffs bear the costs of such recovery efforts. *OpenTV v. Liberate Tech.*, 219 F.R.D. 474, 476 (N.D. Cal. 2003) (holding that shifting the cost of production of inaccessible data to the requesting party may be appropriate). At least one court in this District has considered the following seven factors, weighted more or

[10] Plaintiffs have submitted a "supplemental" declaration from their purported expert, John Ashley, who questions whether Ms. Parrish has experience in the recovery of data contained on 9-track magnetic tapes. Dkt 425-1, ¶ 31. Yet Ms. Parrish clearly stated in her declaration that she has experience concerning 9-track tapes and, moreover, the supplemental Parrish declaration, filed herewith provides further background on her experience and expertise. Dkt. 400-1, at ¶ 2; Second Declaration of Julie Parrish ("2nd. Parrish Decl.") at ¶¶ 3-6. More fundamentally, as Magistrate Judge Corley recognized at the April 5, 2012 hearing, the fact that Ms. Parrish ultimately was successful in recovering data from two of the six tapes undermines Plaintiffs' assertion that she somehow lacks the requisite qualifications to recover data on the tapes. Mr. Ashley's criticism of the efforts taken by Ms. Parrish to recover whatever data may be contained on the magnetic tapes fares no better. For example, Mr. Ashley inconsistently claims that Ms. Parrish initially used the "wrong" equipment to read the tapes because two of the tapes "clearly" had labels that indicated that they were written in 800 BPI density, but then proceeds to conclude those labels are inconclusive because "a single magnetic tape can contain different files created with different machines, and can also include different file types." Dkt. 425-1 at ¶¶ 32, 39. Indeed, it is notable that one federal court recently rejected Mr. Ashley's opinions based upon his unsupported conclusions. *See E.I. Du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 803 F. Supp. 2d 469, 481 n.14 (E.D. Va. 2011). Other misguided contentions from Plaintiffs and Mr. Ashley, including the unsupported contention that Ms. Parrish may have somehow damaged the data, and the contention that Ms. Parrish used faulty methods in assessing the tapes, are refuted in Ms. Parrish's supplemental declaration. *See* 2nd Parrish Decl. at ¶¶ 7-13.

less in the following order, in determining the appropriateness of cost-shifting: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information. *Id.* (citing *Zubulake v. UBS Warburg LLC, et al.*, 216 F.R.D. 280, 284 (S.D.N.Y. 2003)).

Here, those factors weigh decidedly in favor of shifting the costs of recovery of the data, if any, on the magnetic tapes to Plaintiffs. First, any information concerning human clinical data maintained on the magnetic tapes cannot possibly be relevant to a determination of whether DoD has a discrete legal obligation to provide notice or health care to volunteer service members and, if so, whether any delay has been unreasonable as a matter of law.

Second, even if such information possibly could be relevant to Plaintiffs' claims, Plaintiffs acknowledge that they already have voluminous, cumulative information concerning human clinical data related to the test programs. This information includes, among other things:

- The DoD Chemical and Biological Database, which contains the names of all currently known volunteer test participants, as well as the chemical or biological substances those individuals were exposed to, the doses, and mode of administration, where that information is known. Dkt. 318 at 25.
- The over 7,000 volunteers' service member test files; *id.*[11]
- As reflected in Plaintiffs' *in camera* submission, numerous voluminous spreadsheets that contain the same types of information as reflected in the partial printout that DoD believes may have been a printout from one of the magnetic tapes; *id.*; Dkt. 425 at 2 n.1
- Test plans and test protocols, which provide yet more information about the test program, as well as a large variety of test studies and follow-on studies that consider the potential health effects of the test population; *id.*

[11] Those over 7,000 files, which were maintained on microfiche and had to be transferred to a usable format for Plaintiffs, contain substantial information about the tests performed, the substances administered, the dose and mode of administration, and any acute health effects that may have been experienced by the test subjects. *Id.*

- Voluminous contemporaneous source data concerning the test program produced by DoD and Battelle Memorial Institute; *id.* and
- Videos that were taken during the testing. *Id.*

Accordingly, this second factor weighs heavily in favor of shifting the cost of trying to access any data that may be on the magnetic tapes to Plaintiffs.[12]

Third, as reflected in the under seal version of the two responses to DoD's RFI, Dkt. 362, the estimated cost of retrieval is substantial. Plaintiffs contend that they are not seeking money damages, but rather seek only declaratory and injunctive relief. *See* Dkt. 180 at ¶ 21; 91 ("nothing herein is intended or should be construed as a request for money damages"). Under these circumstances, where the cost of recovery is high, and Plaintiffs do not claim monetary relief, this factor weighs in favor of shifting the costs of recovery onto the Plaintiffs.

Fourth, the total cost of production as compared to the resources available to each party also weighs in favor of cost-shifting to the Plaintiffs. Defendants have shouldered the overwhelming majority of the costs associated with Plaintiffs' broad-based discovery and have produced in excess of 2 million pages of documents spanning a seventy year period, which have been maintained in a variety of media such as microfiche and video. As governmental entities, these costs are ultimately borne by the taxpayer. In contrast, Plaintiffs' counsel, who represents this putative class on a *pro bono* basis, recently contended in the context of Plaintiffs' motion for class certification that they have "more than 1,000 lawyers in 15 offices in the United States, Asia, and Europe," and have the "resources to vigorously represent the interests of the Proposed Class." Dkt. 346 at 23. Thus, even this less-important factor weighs in Defendants' favor.

Fifth, with respect to the "relative ability of each party to control costs and its incentive to do so," this factor does not appear to weigh decidedly in either party's favor. Sixth, while Plaintiffs undoubtedly believe the issues in this case are important, this factor does not outweigh

[12] Plaintiffs suggest that "Defendants subsequently failed to follow their own regulations with respect to data maintenance that required them to maintain the accessibility of the data on the tapes." Dkt. 334 at 4 (citing AR 25-400-2 § 3-12 (1993)). The suggestion is without merit, as Plaintiffs fail to explain how an Army Directive possibly applies to magnetic tapes that, until very recently, were in the possession, custody and control of the CIA for the past three decades.

the other factors. Finally, with respect to the relative benefits to the parties of obtaining this information, given the vast amount of information concerning human clinical data that Plaintiffs already possess concerning the test programs, any benefits of any additional information that may be obtained from the tapes is minimal, at best.

For all of these reasons, if any further extraction efforts are warranted, the costs of those efforts should be borne by Plaintiffs. All further requests for relief from Plaintiffs, including a resurrected request for witness testimony,[13] a request for photographs of the eighteen CIA tapes, and another for privileged internal government correspondence,[14] should be summarily denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to compel should be denied.

[13] Although they do not address the issue in the body of their current Motion, Plaintiffs request in their conclusion that Defendants produce a witness to "testify regarding the contents and authentication of the magnetic tapes." Dkt. 425 at 8. This request is unwarranted for at least three reasons. First, DoD is unaware of any employee within the Agency or any non-employee who could testify as to the contents of these ancient tapes. Nor is there anyone at the CIA who has personal knowledge of the tapes' contents. Ex. D to Herb Decl. at 307:4-14. In the absence of any individuals with personal knowledge of the contents of the tapes, it is entirely unclear how Defendants could properly prepare someone to testify as a Rule 30(b)(6) witness on this topic. Second — and Plaintiffs do not dispute this — the magnetic tapes are inarguably ancient documents under Federal Rule of Evidence 901(8). Plaintiffs appear to concede that a deposition for the purposes of establishing the authenticity of the contents of the magnetic tapes is unnecessary, but claim that "testimony ***may*** be required to provide evidentiary foundation for their admissibility." Dkt. 378 at 15 (emphasis added). Plaintiffs do not explain what specific testimony they need in that regard. Finally, Plaintiffs have previously moved for 16 additional depositions — a request the Court granted, in part, by permitting 8 additional depositions. Plaintiffs elected not to use one of their 8 depositions on this topic. They should not be permitted now to effectively ignore the Court's order and allot themselves yet another deposition.

[14] Plaintiffs also seek all correspondence to or from DLA regarding the magnetic tapes. These documents are not responsive to any of the hundreds of discovery requests propounded by Plaintiffs, and Plaintiffs have failed to explain how such correspondence possibly is relevant to any issue in this case. Furthermore, given that both parties agree that DLA cannot recover information from four of the six magnetic tapes, it is unclear why Plaintiffs need this correspondence. Beyond that, the correspondence amongst agency counsel and the Department of Justice and DLA are privileged. DLA undertook efforts to recover information that may be contained on the magnetic tapes at the direction of counsel, in response to Plaintiffs' request for the materials on those tapes. Accordingly, that correspondence implicates both the work product doctrine and, potentially, the attorney-client privilege. In addition, Plaintiffs' broad request for correspondence would include any correspondence related to the preparation of Ms. Parrish's declarations, which similarly is covered by the work product doctrine. Because these materials are not responsive to any of Plaintiffs' discovery requests, there is no need to provide Plaintiffs a privilege log identifying these documents.

Respectfully submitted,

June 6, 2012

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