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16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA
 18 OAKLAND DIVISION

20 VIETNAM VETERANS OF AMERICA, et al.,
 21 Plaintiffs,
 22 v.
 23 CENTRAL INTELLIGENCE AGENCY, et al.,
 24 Defendants.

Case No. CV 09-0037-CW (EDL)

**DEPARTMENT OF THE ARMY
 REVISED REPORT PURSUANT TO
 THE COURT'S APRIL 2, 2014 ORDER**

1 Pursuant to the Court's April 2, 2014 Order, dkt. 562, the Department of the Army,
2 through undersigned counsel, hereby provides the following revised report addressing the issues
3 discussed in that Order.

4 **BACKGROUND**

5 On March 6, 2014, the Army filed a report describing its efforts to comply with the
6 Court's injunction, including the plan the Army developed in its discretion for periodically
7 collecting and transmitting Newly Acquired Information. Dkt. 561. In that report, the Army
8 explained that it construed the Court's definition of "Newly Acquired Information" to cover two
9 general categories of information: (1) information concerning the participant's experience during
10 his specific tests; and (2) information concerning the long-term health effects that may affect the
11 participant's well-being. *Id.* at 2. The Army then described the basis for its conclusion that no
12 Newly Acquired Information existed.

13 With respect to the first category, the Army described the substantial efforts it had
14 undertaken to notify test participants that it could identify and advised the Court that, because it
15 has completed its efforts to identify test participants, and because the government has provided
16 notice to each test participant for whom it could obtain accurate information, the Army has
17 reasonably concluded that no Newly Acquired Information exists as to this first category. *Id.* at
18 2-8.

19 With respect to the second category of Newly Acquired Information concerning long-term
20 health effects, the Army explained that based upon the number of studies evaluating the health
21 effects of both the test participants and the chemical and biological substances at issue in this
22 case, the Army reasonably concluded that it is unaware of any information concerning the long-
23 term health effects that may affect the class members' well-being that has not been made
24 available to them. *Id.* at 8-9. The Army then set forth a multi-step plan to further investigate
25 potential health effects. *Id.* at 9-11. Finally, the Army described its plan to transmit any Newly
26 Acquired Information concerning health effects that it may identify to class members, and its
27 plans for future collection and notification efforts. *Id.* at 11-12.
28

1 On April 2, 2014, the Court entered an “Order Regarding Defendant Department of the
2 Army’s March 6, 2014 Report.” Dkt. 562. In that Order, the Court stated that “[m]uch of the
3 report concerns the Army’s actions prior to this lawsuit and prior to the Court’s injunction,” and
4 that “[t]his information does nothing to satisfy the Army’s obligations under the injunction.” *Id.*
5 at 2. The Court also concluded that “this plan is unduly time-consuming and vague.” *Id.* The
6 Court thus directed the Army to file a revised plan. *Id.* at 4. The Court specified that, “[t]he
7 revised plan should have as its first step a method for determining whether the Army has in its
8 possession any Newly Acquired Information that has not yet been disseminated.” *Id.* at 3. The
9 Court further directed that “the plan must include an actual timeline for completion of the search
10 for Newly Acquired Information.” *Id.*

11 The Court also addressed the Army’s discretionary plans for periodically collecting and
12 disseminating Newly Acquired Information that becomes available to it. *Id.* The Court observed
13 that the Army stated in its plan that “Key Army leaders within Army Medical Command will be
14 tasked to inform the Army Surgeon General or his/her designee(s) of ‘Newly Acquired
15 Information,’ within their commands and area of responsibility.” *Id.* (quoting Dkt. 561 at 12).
16 The Court then directed that the Army identify the job titles of these “[k]ey Army leaders’ and
17 explain what it means to have Newly Acquired Information ‘within their commands and area of
18 responsibility.’” *Id.*

19 DISCUSSION

20 I. DESCRIPTION OF METHOD FOR DETERMINING WHETHER THE ARMY 21 HAS IN ITS POSSESSSION ANY NEWLY ACQUIRED INFORMATION THAT 22 HAS NOT YET BEEN DISSEMINATED.

23 The Army has determined that it does not possess any Newly Acquired Information that
24 has not yet been disseminated. Declaration of Lloyd Roberts (“Roberts Decl.”), at ¶¶ 7-8;
25 Declaration of Col. Bruce A. Schonenboom (“Schonenboom Decl.”), at ¶ 6; Declaration of Col.
26 Brian J. Gentile (“Gentile Decl.”), at ¶ 6. As described in the Army’s original report and above,
27 the Army construes the Court’s injunction to include two broad categories of Newly Acquired
28 Information: (1) information concerning the participant’s experience during his specific tests;

1 and (2) information concerning the long-term health effects that may affect the participant's well-
2 being. Dkt. 561 at 2.

3 With respect to the first category, based upon the completion of the Army's substantial
4 efforts to collect information concerning participation in the test programs, and the fact that the
5 government has provided notice to each test participant for whom it could obtain accurate
6 information, the Army has reasonably has concluded that no Newly Acquired Information exists
7 as to this first category. *Id.* at 2-8.

8 With respect to the second category, the basis for the Army's conclusion that it possesses
9 no Newly Acquired Information is as follows. First, as the Army explained in its initial report,
10 based upon the number of studies evaluating the health effects of both the test participants and the
11 chemical and biological substances at issue in this case, the Army reasonably had concluded that
12 it is unaware of any information concerning the long-term health effects that may affect the class
13 members' well-being that has not been made available to them. *Id.* at 8-9.¹

14 Second, in response to the Court's injunction directing further efforts to identify Newly
15 Acquired Information, Army officials and scientists tasked with the responsibility for responding
16 to the Court's inquiries and creating the Army's March 6, 2014 Report (Dkt. 561), examined
17 whether they possessed any health-affecting information that remained un-disseminated to class
18 members, and concluded that they were unaware of such information. Roberts Decl. ¶¶ 6-7.

19 Third, in an effort to confirm the absence of the second category of Newly Acquired
20 Information in the Army's possession, the Army has also queried the two commands with
21 comprehensive knowledge concerning the Army's possession of information pertinent to this
22 litigation, U.S. Army Medical Research Institute of Infectious Diseases ("USAMRIID"), and U.S.
23 Army Medical Research Institute of Chemical Defense ("USAMRICD"). Schonenboom Decl. ¶

24
25 ¹ This conclusion that no Newly Acquired Information exists was further reinforced by the
26 opinions reached by the government's Rule 26(a)(2)(B) experts in this case. *See* Roberts Decl.
27 ¶ 8. The government's experts had canvassed the state of the scientific literature at the time of
28 their reports, and their conclusions are consistent with the Army's conclusion that it does not
possess Newly Acquired Information. *Id.*

1 6; Gentile Decl. ¶ 6. The Army also contacted the Department of Defense's Office of Force
2 Health Protection and Readiness (FHP&R), an office within the DoD that historically had been
3 responsible for outreach efforts associated with the test programs. Roberts Decl. ¶¶ 6-7. Based
4 on the information it received from the officials and scientists responsible for creating the Army's
5 March 6, 2014 Report and USAMRIID, USAMRICD, and FPH&R, the Army has determined
6 that it does not possess any Newly Acquired Information concerning health effects that has not
7 yet been disseminated. Schonenboom Decl. ¶ 6; Gentile Decl. ¶ 6; Roberts Decl. ¶¶ 6-7. Thus,
8 the task of "confirming the lack of information it its possession since the entry of the injunction,"
9 dkt. 562 at 3, has been completed. Because this task is completed, the Court's requirement for a
10 timeline in this regard is obviated.

11 **II. IDENTIFICATION OF THE JOB TITLES OF KEY ARMY LEADERS TASKED**
12 **TO INFORM THE ARMY SURGEON GENERAL OR THE SURGEON**
13 **GENERAL'S DESIGNEE OF NEWLY ACQUIRED INFORMATION WITHIN**
14 **THEIR COMMANDS AND AREAS OF RESPONSIBILITY.**

15 The key Army leaders responsible for informing the Army Surgeon General or the
16 Surgeon General's designee of Newly Acquired Information within their commands and areas of
17 responsibility are as follows: (i) Commander, USAMRIID; and (ii) Commander, USAMRICD.
18 Schonenboom Decl. ¶ 5; Gentile Decl. ¶ 5.

19 USAMRIID is the Department of Defense's lead laboratory for medical and biological
20 defense research. Gentile Decl. ¶ 1. Its core mission is to protect the military personnel from
21 biological threats. USAMRIID also investigates disease outbreaks and threats to public health.

22 *Id.*

23 USAMRICD is the nation's leading science and technology laboratory in the area of
24 medical chemical countermeasures research and development. Schonenboom Decl. ¶ 1.
25 USAMRICD manages a diversified portfolio of medical chemical warfare agent research projects
26 for the Department of Defense and other federal agencies. *Id.* Each command is led by an Army
27 Officer in the rank of Colonel (O-6) who exercises primary authority and assumes ultimate
28 responsibility over his or her personnel and missions. Schonenboom Decl. ¶ 1; Gentile Decl. ¶ 1.
USAMRIID and USAMRICD are subordinate Commands under the United States Army Medical

1 Research and Materiel Command (“USAMRMC”). Schonenboom Decl. ¶ 5; Gentile Decl. ¶ 5.
2 Army Medical Command (“MEDCOM”) is the superior supervising command over USAMRMC.
3 Schonenboom Decl. ¶ 5; Gentile Decl. ¶ 5.

4 **III. EXPLANATION OF WHAT IT MEANS TO HAVE NEWLY ACQUIRED**
5 **INFORMATION WITHIN THEIR COMMANDS AND AREAS OF**
6 **RESPONSIBILITY.**

7 As discussed above, the Army interprets Newly Acquired Information to generally cover
8 two categories of information: (1) information concerning the participant’s experience during his
9 specific tests; and (2) information concerning long-term health effects that may affect the test
10 participant’s well-being. Dkt. 561 at 1. As set forth in the Army’s initial Report, key Army
11 leaders within the U.S. Army Medical Command “will be tasked to inform the Army Surgeon
12 General or his/her designee(s) of any Newly Acquired Information within their commands and
13 areas of responsibility.” *Id.* at 11-12. The Army entities responsible for conducting chemical,
14 biological, and infectious disease research (*i.e.*, USAMRICD and USAMRIID), have been
15 directed to inform the Army Medical Command and/or the Army Surgeon General’s Office of
16 any new and pertinent information those entities may acquire during their normal and routine
17 research activities. Schonenboom Decl. ¶ 5; Gentile Decl. ¶ 5.

18 Thus, if USAMRICD or USAMRIID, while conducting their usual research missions,
19 acquire information that qualifies as Newly Acquired Information, the commanders of those
20 entities have been ordered to alert Army Medical Command or the Army Surgeon General’s
21 Office. Schonenboom Decl. ¶ 5; Gentile Decl. ¶ 5. Army Medical Command, which is the
22 supervising command of MRMC (which, in turn, is the supervising command for both
23 USAMRICD and USAMRIID), would then assess whether the information was appropriate for
24 dissemination to test subjects in light of the requirements of this Court’s injunction.

25 **IV. TIMELINE FOR COMPLETION OF THE SEARCH FOR FUTURE NEWLY**
26 **ACQUIRED INFORMATION.**

27 Finally, the Court stated in its April 2, 2014 Order that it found the Army’s plan to collect
28 and disseminate Newly Acquired Information in the future “unduly time-consuming and vague,”
and ordered that “the plan must include an actual timeline for completion of the search for Newly

1 Acquired Information.” Dkt. 562 at 3. The Army respectfully advises the Court that, because of
2 the contingent nature of some of the steps involved in this process, it cannot state with precise
3 certainty when the process directed by the Court will be completed, but we have endeavored to
4 provide more specific estimates in response to the Court’s April 2 Order.

5 In the Court’s November 19, 2013 injunction, it ordered the Army to “outline the plan and
6 policy it has in its discretion developed for (i) periodically collecting and transmitting Newly
7 Acquired Information that becomes available to it after the Entry Date.” Dkt. 545 at ¶ 4(e). In
8 addition to explaining that no Newly Acquired Information concerning health effects currently is
9 in the possession of the Army, the Army described in its March 6, 2014 report a multi-step plan
10 for periodically collecting Newly Acquired Information in the future. Dkt. 561 at 9-11. In
11 accordance with the plan outlined in its March 6 Report, the Army has undertaken measures to
12 determine the magnitude of the project of conducting future scientific literature searches
13 pertaining to chemical and biological substances at issue in this case. *Id.* The Army has
14 completed the first step of its plan and determined, in general terms, the magnitude of the project.
15 Roberts Decl. ¶ 9. The Army currently is working on the second step of its multi-step plan and,
16 in particular, is now developing a Performance Work Statement (PWS) designed to further
17 comply with the Court’s injunction that will describe the databases to be searched, date ranges of
18 publications, and keywords for searches. *Id.* The Army estimates that consultations within
19 MRMC and between MRMC and MEDCOM to finalize the PWS will be completed, and will be
20 forwarded to MEDCOM, by approximately May 5, 2014. *Id.*

21 Thereafter, an estimate of the time for completion of the search for future Newly Acquired
22 Information concerning health effects depends upon whether the project is executed “in-house” or
23 whether MEDCOM concludes that it is more appropriate to use a contracted third party. Dkt. 561
24 at 9-11. Until the PWS is finalized and a decision is reached on the process for going forward,
25 MEDCOM cannot provide a more definitive date upon which a decision will be made as to
26 whether to conduct future search efforts in house or through a contract to a third party. *See*

1 Declaration of LTC Marc Bustamante (“Bustamante Decl.”), at ¶¶ 3-16. The scope of the effort,
2 as reflected in the PWS, will inform which option MEDCOM ultimate chooses.

3 However, as a rough estimate, if conducted in-house, the search for Newly Acquired
4 Information concerning health effects is estimated to take approximately 1,800 work hours to
5 complete. Roberts Decl. ¶ 10. This is just an estimate, and may need to be revised as the project
6 progresses. Alternatively, should MEDCOM decide to contract out for the project, because of the
7 numerous steps in the contracting process, MEDCOM cannot currently provide a definite
8 deadline for the completion of any contract it ultimately enters into. Bustamante Decl. ¶¶ 3-16.
9 However, if MECOM decides to contract for the project, the Army will inform the Court upon
10 entering into the contract regarding the deadlines contained in that contract.

11 Respectfully submitted,

12 April 16, 2014

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