GORDON P. ERSPAMER (CA SBN 83364)
GErspamer@mofo.com
TIMOTHY W. BLAKELY (CA SBN 242178)
TBlakely@mofo.com
ADRIANO HRVATIN (CA SBN 220909)
AHrvatin@mofo.com
STACEY M. SPRENKEL (CA SBN 241689)
SSprenkel@mofo.com
DANIEL J. VECCHIO (CA SBN 253122)
DVecchio@mofo.com
DIANA LUO (CA SBN 233712)
DLuo@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

Attorneys for Plaintiffs
Vietnam Veterans of America; Swords to Plowshares: Veterans Rights Organization; Bruce Price; Franklin D. Rochelle; Larry Meirow; Eric P. Muth; David C. Dufrane; and Wray C. Forrest

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

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

Hearing Date: To be determined
Time: To be determined
Courtroom: 2, 4th Floor
Judge: Hon. Claudia Wilken

Complaint filed January 7, 2009

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INTRODUCTION

Plaintiffs' Motion for Leave to File Third Amended Complaint simply asks the Court to allow Plaintiffs to file an amended complaint adding two new narrow, related claims against a new defendant, Department of Veterans Affairs ("DVA"), who has been aware of this case from its inception, and adding two new individual plaintiffs.[1]

Plaintiffs' proposed amendments arise out of the same central facts set forth in the original Complaint in this action — the top-secret government programs through which chemical and biological agents were tested on veterans deemed "volunteers." And the proposed amendments relate to one of the central questions at issue here — whether Defendants have fulfilled their obligation to locate test participants and to notify them regarding those exposures. Based on discovery to date, DVA belongs in this case. Through discovery, Plaintiffs learned that DVA has undertaken responsibility for providing notice to test participants. This notice is critical for these aging veterans who may be suffering from health ailments related to exposures to chemical and biological agents. Without notice, these test participants cannot identify the source of their health problems or obtain adequate health care. The existing Defendants in this action have continually treated the issue of notice as a hot potato for decades — tossing the obligation off because they do not want to handle it. Discovery has shown that the hot potato has landed in the lap of DVA. DVA has undertaken the obligation, has held itself out to the public as responsible for notifying veterans, and has committed to Congress that it would fulfill this obligation. Despite these commitments, discovery has shown that DVA has failed to fulfill its obligation.

Also in discovery, Plaintiffs have learned the extent of DVA's involvement in Defendants' testing programs. Plaintiffs have also become aware of evidence of DVA's bias in the adjudication of service connected death and disability compensation ("SCDDC") claims for test participants — for example, the fact that DVA has granted only two of 87 claims submitted by participants in the Chemical/Biological Weapons Group tests. And Plaintiffs have learned that

[1] Defendants do not oppose leave to amend to add the two new plaintiffs. (Defendants' Opposition to Plaintiffs' Motion for Leave to Amend Complaint ("Opp."), Docket No. 105 at 5.)

DVA — in the few notice letters that it actually has sent — provided misinformation to test participants, thus discouraging those veterans from seeking health care and compensation to which they are constitutionally entitled. These facts support the new claims alleged in the Proposed Third Amended Complaint ("TAC") (Exh. A to Memorandum of Points and Authorities in Support of Motion for Leave to File Third Amended Complaint, Docket No. 88-1), and are clearly related to the claims already at issue in this action. It is because of DVA's bias that test participants are not receiving the compensation or care to which they are entitled.

Defendants respond by mischaracterizing the new allegations in the proposed TAC, and by repeating many of the same arguments that this Court already rejected in its Order on Defendants' Motion to Dismiss the Second Amended Complaint. In a failed attempt to show that the proposed TAC would be futile, Defendants argue that Plaintiffs fail to challenge final agency action and that Plaintiffs lack standing. Yet, Individual Plaintiffs as well as Vietnam Veterans of America ("VVA"), one of the organizational plaintiffs, have standing here, and Plaintiffs, once again, properly challenge agency *inaction and delay*, not the sufficiency of any final agency action. Moreover, contrary to Defendants' misreading of 38 U.S.C. § 511, this Court has jurisdiction to hear Plaintiffs' challenges. Thus, Plaintiffs proposed new claims are related, would clearly survive a motion to dismiss, and are not futile.

Nor can any of the existing Defendants show that they would be prejudiced by the amendment, and they make no serious argument to the contrary. Rather, Defendants imply that *DVA* would be prejudiced. DVA — a nonparty — does not have standing to claim prejudice. But even if it did, DVA has known about and been involved in this action since its inception. It has actively participated in discovery and is represented by the same counsel as existing Defendants. Last, Plaintiffs' proposed claims are not the result of undue delay; they are the result of facts uncovered through the review of DVA's document production in this action.[2]

[2] On June 7, 2010, Plaintiffs filed their Motion for Leave to File a Third Amended Complaint, which Defendants opposed on June 24. On June 29, Plaintiffs moved the Court for additional time to file their Reply and for five additional pages of briefing. Plaintiffs stated that, should the Court deem Defendants' Opposition as a motion to dismiss the proposed TAC, the Court could consolidate the briefing and hearing on the Motion for Leave with the motion to

(Footnote continues on next page.)

LEGAL STANDARD

Courts grant leave to amend pursuant to Rule 15(a) "with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (citations omitted). Leave to amend should be "freely given" in the absence of four factors: (1) bad faith; (2) undue delay; (3) undue prejudice to the opposing party; and (4) futility of the amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001). An amendment is "futile" only where it appears "*beyond doubt*" that the proposed claim will not survive a motion to dismiss. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 188 (9th Cir. 1987). As articulated by this Court in its Order on Defendants' previous motions to dismiss, in order to survive a motion to dismiss,

> [a] complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). . . . [D]ismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

(January 19, 2010 Order Granting in Part and Denying in Part Defendants' Motions to Dismiss and Denying Defendants' Alternative Motion for Summary Judgment ("MTD Order"), Docket No. 59 at 13.) Thus, the complaint need only state "a plausible claim for relief" to survive a motion to dismiss. *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1950 (2009) (citing *Twombly*, 550 U.S. at 556). It is the party opposing a motion for leave to amend who shoulders the substantial burden of demonstrating that the motion should not be granted. *LucasArts Entm't Co. v. Humongous Entm't Co.*, 870 F. Supp. 285, 288 (N.D. Cal. 1993). As explained herein, Defendants fail to meet their burden.

(Footnote continued from previous page.)

dismiss. On July 1, the Court gave Plaintiffs two additional weeks to file their Reply as well as additional pages. The Court did not rule on the proposed consolidation issue. Nonetheless, the Court, if it wishes, may treat this Reply as Plaintiffs' opposition to a motion to dismiss the TAC; alternatively, Plaintiffs stand ready to provide further briefing on a motion to dismiss.

ARGUMENT

I. PLAINTIFFS' PROPOSED CLAIMS AGAINST DVA ARE NOT FUTILE AND WOULD SURVIVE A MOTION TO DISMISS.

A. This Court Has Subject-Matter Jurisdiction.

Defendants' primary futility argument is premised on the misconception that Plaintiffs' claims "fall squarely within section 511's preclusion of review." (Opp. at 6.) To reach this mistaken conclusion, Defendants mischaracterize Plaintiffs' proposed claims, ignore the plain language of Section 511, and fail meaningfully to distinguish a long-standing body of jurisprudence allowing review of constitutional claims that do not involve individual veterans' benefits determinations.

1. Section 511 Does Not Preclude Jurisdiction in Article III Courts Over Plaintiffs' Proposed Constitutional Challenges or APA Claims.

Section 511 does not read nearly as restrictively as Defendants would have the Court believe. Section 511(a) specifically states that "[t]he Secretary shall decide all questions of law and fact *necessary to a decision* by the Secretary under a law that *affects the provision of benefits by the Secretary to veterans* or the dependents or survivors of veterans." 38 U.S.C. § 511(a) (emphasis added). Section 511 merely prevents district courts from "review[ing]" the Secretary's *individual* decision once made: "the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court." *Id.*

"Section 511(a) does not apply to every challenge to an action by the VA." *Bates v. Nicholson*, 398 F.3d 1355, 1365 (Fed. Cir. 2005). Nor, contrary to Defendants' assertion, does Section 511 preclude district court review of any DVA action "that affect[s] veterans' benefits." (Opp. at 5.) "Section 511(a) does not give DVA *exclusive* jurisdiction to construe laws affecting the provision of veterans benefits or to consider all issues that might *somehow touch upon* whether someone receives veterans benefits." *Broudy v. Mather*, 460 F.3d 106, 112 (D.C. Cir. 2006) (emphasis altered from original). Rather, Section 511 "only applies where there has been a 'decision by the Secretary' . . . [T]he statute plainly contemplates a formal 'decision' by the

Secretary or his delegate" on an individual claim brought by a veteran. *Bates*, 398 F.3d at 1365 (citations omitted).[3]

Thus, while Congress may have denied Article III courts jurisdiction to hear claims revisiting individual benefits determinations made by the Secretary, that in no way affects this Court's jurisdiction over the new claims in the proposed TAC. This Court's jurisdiction to hear broad questions of constitutional law separate from individual benefits decisions made by the Secretary is not restricted by Section 511. *See Veterans for Common Sense v. Nicholson*, No. C 07-3758 SC, 2008 WL 114919, at *10 (N.D. Cal. Jan. 10, 2008) ("As a threshold matter it is clear that § 511 does not strip this Court of the ability to hear facial constitutional challenges to the VA benefits system.")[4] The Court of Appeals for Veterans Claims ("CAVC"), the Article I court brought to life by the Veterans' Judicial Review Act ("VJRA") itself, interprets its jurisdiction in precisely the same fashion. *See Dacoron v. Brown*, 4 Vet. App. 115, 19 (1993) ("Nothing in title

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[3] Plaintiffs note that in *Vietnam Veterans of America v. Shinseki*, 599 F.3d 654, 658-59 (D.C. Cir. 2010), the D.C. Circuit recently recognized, in *dicta*, the "tension" in its decisional law regarding Section 511, but acknowledged that *Broudy v. Mather*, its most recent decision, held that Section 511 applies only to those questions "*explicitly* considered" by the Secretary and not to VA's *failure* to make a decision. *VVA v. Shinseki* does not change the analysis here. The issue there was whether the decision as to *when* to make a decision on a veteran's claim was a preliminary decision necessary to a final decision on the veteran's claim — and thus a decision of "law and fact" under Section 511. The D.C. Circuit did not decide that issue. But even if it had found that Section 511 precluded jurisdiction there, it would not preclude jurisdiction here, as the Court will not be required to review even questions implicitly decided in the course of an individual veteran's benefits claim. Plaintiffs also note that in *Beamon v. Brown*, 125 F.3d 965, 970 (6th Cir. 1997), the Sixth Circuit found that unreasonable delay claims would require the review of individual veterans' claims. The *Beamon* decision would not preclude jurisdiction here, where there is no need to review any individual veterans' claims, and Plaintiffs point to specific violations of their constitutional rights.

[4] The court in *Veterans for Common Sense v. Nicholson* stated that where plaintiffs challenged specific DVA procedures as violating veterans' rights, and the court is not required to examine individual claims in order to entertain plaintiffs' challenge, jurisdiction was not precluded under Section 511. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1059-60 (N.D. Cal. 2008). The court also concluded that challenges "aimed directly at the processes that the [DVA] use[s] to reach decisions on individual claims . . . as conceded by the CAVC itself, are, outside the purview of [CAVC] jurisdiction." *Id.* at 1078. The court nonetheless found that the plaintiffs' claims of unreasonable delay would hinge on the specific facts of individual veterans' claims, and that Section 511 thus precluded review. *Id.* at 1083-84. *Veterans for Common Sense* is currently on appeal, *see Veterans for Common Sense v. Peake*, No. 08-16728 (9th Cir., filed July 25, 2008), and, moreover, does not preclude review here where Plaintiffs' claims do not hinge on the specific facts of veterans' claims.

38 prohibits a constitutional challenge to any of the provisions of that title from being litigated in U.S. district court.").

Plaintiffs' proposed DVA claims do not involve individual benefits determinations and do not seek review of any decision by the Secretary relating to benefits sought by any individual veteran. Rather, Plaintiffs challenge — across the board — DVA's systemic, unconstitutional procedures and APA inaction. As the Federal Circuit recently and unequivocally stated:

> Veteran's disability benefits are nondiscretionary, statutorily mandated benefits. A veteran is entitled to disability benefits upon a showing that he meets the eligibility requirements set forth in the governing statutes and regulations. ***We conclude that such entitlement to benefits is a property interest protected by the Due Process Clause of the Fifth Amendment to the United States Constitution***.

Cushman v. Shinseki, 576 F.3d 1290, 1298 (Fed. Cir. 2009) (emphasis added). Plaintiffs seek a declaration that DVA, because of its active role in the chemical and biological testing programs, is an inherently biased decision maker, and is thus violating the due process rights of test participants across the board. Plaintiffs also seek an injunction forbidding DVA from using biased decision makers, and compelling DVA to devise procedures to resolve the claims of test participants that do not violate the due process clause and which involve, at a minimum, a neutral decision maker. Determining whether DVA is biased, and whether that bias violates the due process clause, is a facial challenge to DVA's procedures. It will not require the review of any decision by the Secretary on any individual veteran's benefits claim, nor hinge on the specific facts of any veterans' claims.

Nor will the APA claims set forth in the proposed TAC involve the review of any decision by the Secretary relating to a benefits claim. Plaintiffs seek a declaration that DVA's rating procedures violate DVA's own regulation, which requires that reasonable doubts be resolved in favor of the veteran.[5] And Plaintiffs seek an injunction compelling DVA to apply the rule of reasonable doubt to all test participants. DVA's rating procedure is set forth in an internal

[5] Plaintiffs do not — as Defendants allege — challenge any of DVA's regulations. (*See* Opp. at 5.) Rather, Plaintiffs challenge DVA's failure to comply with its own regulations.

training letter. (TAC ¶ 245.) A review of that training letter on its face shows that DVA is violating its own regulation. Thus, no review of any decision on any individual veteran's benefits claim will be necessary to make this determination; the training letter speaks for itself.

Defendants' authority is not to the contrary. In both *Zuspann v. Brown*, 60 F.3d 1156, 1159 (5th Cir. 1995) and *Larrabee ex. rel. Jones v. Derwinski*, 968 F.2d 1497, 1501 (2nd Cir. 1992), the Fifth and Second Circuits, respectively, found that the district court lacked jurisdiction because the plaintiffs in both of those actions challenged an individual veteran's benefits determination. Both the Fifth and Second Circuits made clear, however, that district courts, despite the passage of the VJRA, continue to have jurisdiction to hear facial constitutional challenges. *Zuspann v. Brown*, 60 F.3d at 1159; *Larrabee*, 968 F.2d at 1501. These cases are consistent with Plaintiffs' interpretation of Section 511 as permitting district court jurisdiction over the claims set forth in the proposed TAC.

The legislative history of Section 511 confirms, moreover, that Congress intended to preserve district court jurisdiction over constitutional and other challenges that are broader in scope than one individual veteran's benefits determination. H.R. Rep. No. 100-963, 1988 U.S.C.C.A.N. 5782, 5801-03. Before Congress adopted the VJRA, Section 211 precluded judicial review of veterans' benefits decisions. 38 U.S.C. § 211(a).[6] In *Johnson v. Robison*, 415 U.S. 361, 373 (1974), the Supreme Court held that, despite Section 211's broad jurisdictional prohibition, a district court *must* nevertheless have jurisdiction over constitutional challenges. The *Robison* court reasoned that such constitutional challenges implicate the most fundamental right to judicial review and, due to the absence of clear congressional intent to restrict review of constitutional questions, constitutional challenges must be permissible in Article III courts. 415 U.S. at 368-69, 373.

[6] Section 211(a) stated that "decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision."

Fourteen years after *Robison* was decided, Congress enacted the VJRA, amending Section 211 (now Section 511) to provide limited review of individual benefits decisions in the Board of Veterans' Appeals, CAVC, and Federal Circuit. In revising Section 211, Congress expressed its intent not to disturb *Robison*'s principle of concomitant district court judicial review. H.R. Rep. No. 100-963, 1988 U.S.C.C.A.N. 5782, 5801-04 ("*Robison* was correct in asserting judicial authority to decide whether statutes meet constitutional muster").

Article III courts and the Article I veterans' court alike have affirmed the continuing vitality of *Robison* after the passage of Section 511. *See Dacoron*, 4 Vet. App. at 118-19 ("[N]othing in the VJRA or in the current provisions of 38 U.S.C. § 511(a) changes the Supreme Court's above-quoted analysis in *Johnson* [*v. Robison*] as to whether . . . such a challenge may be brought in U.S. district court without regard to those statutory provisions."); *see, e.g., Disabled Am. Veterans v. U.S. Dep't of Veterans Affairs*, 962 F.2d 136, 138, 140-41 (2d Cir. 1992) (finding jurisdiction where "Veterans neither make a claim for benefits nor challenge the denial of such a claim, but rather challenge the constitutionality of a statutory classification").[7]

2. Defendants' Reading of Section 511 Would Deny Plaintiffs a Forum for Their Challenges.

Defendants' reading of Section 511 would deny federal courts any jurisdiction to remedy unconstitutional procedures or APA inaction in DVA's adjudication system. Yet the Supreme Court in *Robison* made clear that Plaintiffs are entitled to a forum for their challenges. An individual veteran has no alternative forum to challenge DVA's unconstitutional bias or failure to follow the rule of reasonable doubt. Such a challenge in the course of that veteran's individual benefits determination would force the veteran to ask DVA to *judge itself biased* and to find that its own policies violate the rule of reasonable doubt. Reading Section 511 as a bar to Plaintiffs' claims in the Article III courts would effectively foreclose any remedy. A well-established line of authority supports greater access to district courts in the face of door-closing statutes. The

[7] The Ninth Circuit has relied upon the *Robison* principle to uphold jurisdiction over constitutional challenges to other benefits schemes, *see, e.g., Rodriguez v. Donovan*, 769 F.2d 1344, 1347 (9th Cir. 1985), but has not yet directly addressed *Robison* in light of Section 511 in a published opinion.

construction of statutes must be informed by a presumption "against slamming the courthouse door in the face of holders of constitutional claims." *Czerkies v. U.S. Dep't of Labor*, 73 F.3d 1435, 1441 (7th Cir. 1996); *Marozsan v. United States*, 852 F.2d 1469, 1478-79 (7th Cir. 1988); *see also Gete v. Immigration and Naturalization Serv.*, 121 F.3d 1285, 1292 (9th Cir. 1997) (citing *Marozsan* in support of district court jurisdiction over constitutional challenges to agency action after the passage of the VJRA). Thus, district court review is required where, as here, dismissal would close the door entirely on valid systemic constitutional challenges.

B. Plaintiffs Properly Seek to Compel Agency Action Unlawfully Withheld or Unreasonably Delayed Under the Administrative Procedure Act.

Defendants argue that the proposed TAC's APA claims are barred for two reasons: (1) because the APA only authorizes review of "final agency action"; and (2) because the Supreme Court's decision in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004), bars jurisdiction. (Opp. at 12.) Defendants are wrong on both counts.

Defendants' first argument was *already rejected by this Court* in its Order Denying in Part Defendants' Motion to Dismiss. As the Court explained, "section 702 provides a right of judicial review for persons who have suffered a legal wrong based on agency action *or inaction.*" (MTD Order at 14 (emphasis added).) Here, as before, Plaintiffs challenge DVA's *failure to comply* with its legal duties (*see* TAC ¶¶ 244-47), not "final agency action" as asserted by Defendants. (Opp. at 12-13.) Under Section 706(1) of the APA, a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1); *see, e.g.*, MTD Order at 14; *Liang v. Attorney Gen.*, No. C-07-2349 CW, 2007 WL 3225441, at *4 (N.D. Cal. Oct. 30, 2007). The proposed TAC identifies a number of legal obligations that DVA has either failed to fulfill, or has failed to fulfill within a reasonable time. *See Yu v. Chertoff*, No. C-06-7878 CW, 2007 WL 1742850, at *3 (N.D. Cal. June 14, 2007) (explaining that the APA requires agencies to conclude matters "within a reasonable time").

For example, Plaintiffs allege that DVA's own regulations require that it resolve all doubts in assessing the SCDDC claims brought by veterans in favor of the veteran. (TAC ¶ 245 (citing 38 C.F.R. § 3.102).) Plaintiffs allege that DVA, however, has unlawfully failed to comply

with this legal duty with regard to test participants. (*Id*.) DVA's explicit policy for adjudicating claims brought by test participants requires medical examiners to rule *against* the veteran if a definitive link cannot be shown, even if the chemical testing "could be a contributor" or "may have a relationship" to the veteran's illness. (*Id*.) This failure to comply with a legal duty constitutes agency inaction.

In addition, Plaintiffs allege that DVA has committed to locating and notifying all test participants regarding their exposures. (*Id*. ¶ 246.) Plaintiffs further allege that despite this commitment, DVA has notified but a small fraction of test subjects. (*Id.*) To the extent that DVA claims that it is in the process of compiling a database to notify these veterans, DVA has still unreasonably delayed in fulfilling its obligation. The tests allegedly were concluded in 1975, and the participants are a dying population. Many of them may be suffering from health ailments that are related to exposures during testing, and many of them are unable adequately to obtain health care for those ailments, either because they do not know what they were exposed to, or because they believe they are subject to a secrecy oath. With regard to these veterans, DVA's delay is inexcusable and tantamount to a denial of notice.[8]

Defendants also argue that Plaintiffs' claims are barred by the Supreme Court's decision in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004). Defendants are wrong on the law. Both DVA's rule of reasonable doubt and DVA's obligation to provide notice are discrete and "required" as that term was used in *Norton*. This Court has already recognized that an agency may be held liable for a breach of its duty "even though [it] is not a statutory duty." (MTD Order at 15 (finding that an Army regulation and a DOJ letter support a claim for relief under APA Section 702).) It is well settled that an agency can bind itself to a course of action through internal policies less formal than regulations, particularly where individual rights are at

[8] Contrary to Defendants' assertion, Plaintiffs do not challenge the adequacy of the content of the notice under the APA. (*See* Opp. at 13.) Rather, Plaintiffs describe the inadequate and inaccurate notice sent by DVA as evidence that DVA is biased as an adjudicator and is discouraging veterans from exercising their rights. This relates only to Plaintiffs' due process claims, which Defendants only challenge as futile on jurisdictional grounds — not on the grounds that these claims would not survive a motion to dismiss.

stake. *See Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Alcaraz v. Immigration and Naturalization Serv.*, 384 F.3d 1150, 1162 (9th Cir. 2004) ("The legal proposition that agencies may be required to abide by certain internal policies is well-established.").

In *Norton*, the Supreme Court examined an *interim* land use plan to determine whether it legally obligated the agency. The *Norton* court emphasized that the agency had demonstrated no intention to be legally obligated by the plan at issue, explaining that it did not view the *interim* plan as a legal obligation, "at least absent clear indication of binding commitment." 542 U.S. at 69. In stark contrast to the *interim* land use plan at issue in *Norton*, the legal obligations here arise out of a regulation (which even under Defendants' own interpretation, constitutes a legal obligation (*see* Opp. at 12)) and arise out of commitments to Congress and to the public. DVA has clearly committed to notifying test participants. This commitment is evidenced on the very website that Defendants set up to communicate with test participants. That website clearly states that it is DVA who is responsible for "notifying individuals of their potential exposure, provid[ing] treatment, if necessary, for these individuals and adjudicat[ing] any claim for compensation." *See* http://fhpr.osd.mil/CBexposures/index.jsp. Moreover, former DVA Secretary R. James Nicholson told members of Congress that DVA is "committed to this effort," and that DVA is taking action. *See* Nicholson Letters to Congressmen Evans and Strickland, bates-labeled VVA-VA 009309-12, attached as Exhibit 1.[9] Thus, DVA has unequivocally treated its notification process as a binding commitment to Congress and to the public, satisfying the "required" prong of *Norton*. *See Soda Mtn. Wilderness Council v. Norton*, 424 F. Supp. 2d 1241, 1260 (E.D. Cal. 2006) (finding the "agency went out of its way to make clear it was committing to a certain process, and withdrawing from that 'compact with the public' would appear to subject the agency to suit under § 706(1)"). DVA should not be permitted to hold itself out to Congress as committed to providing notice to test participants — thus obviating the need for congressional action — only to turn around and argue that DVA need not comply with that very commitment.

[9] These documents were produced by DVA in response to a third party subpoena served by Plaintiffs on July 28, 2009.

C. Plaintiffs Have Standing to Pursue Their Claims Against DVA.

Defendants argue that Plaintiffs lack standing to bring claims against DVA on the ground that the proposed TAC fails to allege that any Plaintiff (individual or organizational) was subject to testing by DVA. (*See* Opp. at 8-9.) The argument is based on a fundamental misreading of the proposed TAC and can be easily rejected. Whether Plaintiffs were subjects in test programs administered by DVA is *irrelevant* — the TAC seeks *no* relief on such grounds. The proposed TAC alleges that DVA's testing programs, which were related to Defendants' testing programs, create an irreconcilable conflict of interest with DVA's duty to adjudicate claims brought by victims of such tests. (*See, e.g.*, TAC ¶¶ 246-47.) The proposed TAC asserts claims to remedy the violation of Plaintiffs' due process rights caused by that conflict of interest. (TAC ¶¶ 233-47.) For the claims that Plaintiffs *actually* seek relief against DVA (not as Defendants have misconstrued them), Plaintiffs indeed have standing.

1. Individual Plaintiffs have standing to bring claims against DVA for injuries caused by DVA's bias.

In this action, the Court previously set forth the standard for determining whether a plaintiff has standing to sue generally and, specifically, whether Individual Plaintiffs have standing to pursue various claims asserted here. A plaintiff must allege that: "(1) he or she has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." (MTD Order at 10 (citing *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F. 3d 1220, 1225 (9th Cir. 2008))). The proposed TAC alleges facts sufficient to meet the elements for standing.

The first two elements go hand-in-hand. The proposed TAC sufficiently alleges that DVA caused Individual Plaintiffs concrete and particularized injuries by denying them services and information to which they are constitutionally entitled. For example, DVA denied William Blazinski's application for disability benefits in 2008 after he was diagnosed with chronic lymphocytic leukemia and ulcerative colitis. (TAC ¶ 230.) DVA turned away David C. Dufrane when he sought medical care for his Edgewood-related ailments; DVA told Mr. Dufrane that he

was hallucinating and making things up, that testing on veterans never happened at Edgewood and that he had never served there. (*Id.* ¶ 80.) DVA also told Eric Muth that his exposures at Edgewood did not produce any long-term health impacts, even though his physicians were able to link certain of his aliments and problems to the testing he experienced at Edgewood. (*Id.* ¶¶ 50-51.) But that is not all.

DVA's notification efforts have been wholly inadequate and prevented Individual Plaintiffs from identifying the dangerous substances to which they were exposed and seeking appropriate treatment. (*Id.* ¶¶ 235-38.) DVA, for instance, has done little, if anything, to identify or notify veterans exposed to chemical and biological weapons at locations other than Edgewood Arsenal. (*Id.* ¶ 235.) Indeed, DVA has notified a mere fraction of the veterans that DOD has identified as being part of the Chemical/Biological Weapons Group and has made no effort to notify veterans with "possible exposures." (*Id.* ¶ 237.) Misrepresentations in the few notifications provided by DVA may very well have discouraged test subjects from seeking needed treatment for their Edgewood-related illnesses. (*See, e.g., Id.* ¶ 238.)

As to the third and final standing element, Defendants' opposition offers little, if any, resistance. Nor could it. Each of the injuries alleged by Individual Plaintiffs in the proposed TAC is readily redressable by the injunctive and declaratory relief sought against DVA. The proposed TAC alleges that the injunctive and declaratory relief forbidding DVA from continuing to mislead test subjects and directing DVA to comply with statutory and constitutional requirements would allow Plaintiffs access to the treatment and information needed to address injuries caused by Defendants' testing programs. (*Id.* ¶¶ 242-43, 247.) Individual Plaintiffs meet each of the required elements for standing.

2. VVA has standing to bring claims on behalf of its members who have sustained injuries due to DVA's bias and inaction.

An organization has standing to sue on behalf of its members when "[1] members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the

participation of individual members' in the lawsuit." *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000). DVA meets all three associational standing requirements.

First, DVA members would have standing to sue in their own right. Many of VVA's members and former members participated in the Defendants' programs of human experimentation, including several of the Individual Plaintiffs. (TAC ¶ 26.) As shown above, these individuals satisfy the three elements of standing — injury, causation, and redressability. Second, the interests at stake in this case are germane to VVA's stated purposes of improving the condition of Vietnam-era veterans, eliminating discrimination suffered by Vietnam-era veterans, and assisting disabled and needy military veterans. (*Id.* ¶ 25.) Third, the claims asserted and relief requested in the proposed TAC do not require individual members' participation. Where a plaintiff seeks a declaration or injunction, "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth v. Seldin*, 422 U.S. 490, 515 (1975). This is particularly true where, as here, VVA seeks a broad-based change in procedure. *Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 284 n.3 (3d Cir. 2002) (quoting *Action Alliance of Senior Citizens v. Snider*, No. Civ. A. 93-4827, 1994 WL 384990, at *3 (E.D. Pa. July 18, 1994)).

3. DVA's biased administration of claims and other services poses a continued threat to Plaintiffs' rights under the due process clause and APA, warranting prospective injunctive relief.

Finally, Defendants argue that "because Plaintiffs' seek prospective injunctive relief . . . they must establish not merely that their members were injured in the past or that a veteran may be harmed in the future, but rather that the organizations' members themselves are 'realistically threatened by a repetition of [the alleged violations].'" (Opp. at 9 (citations omitted).) This argument does not help Defendants' cause.

Defendants again misread (intentionally or otherwise) the proposed TAC's claim for prospective injunctive relief. Defendants cite to *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), claiming that Plaintiffs are not "realistically threatened" by repeated violations of their rights by DVA and thus cannot seek prospective relief. In *Lyons*, the Supreme Court ruled the plaintiff's lack of standing to seek prospective relief rested on "the speculative nature of his claim

that he will again experience injury as a result of [defendants'] practice even if continued." *Id.* at 109. That is clearly not the case here. Defendants do not dispute that Plaintiffs have and will continue to seek services from DVA for injuries related to Defendants' testing programs. DVA is responsible for providing service connected death and disability compensation, including compensation for conditions connected to Edgewood service. (TAC ¶ 233.) DVA also provides outreach and notice to veterans who participated in Defendants' testing programs. (*Id.* ¶ 234.) Various Individual Plaintiffs continue to seek treatment and information related to their Edgewood service from DVA. Some Individual Plaintiffs' claims have been denied by DVA and will continue to be denied without the declaratory and injunctive relief sought here. (*See Id.* ¶¶ 51, 70, 80, 230.) In this way, the bias alleged in the proposed TAC poses a "realistic threat" to Plaintiffs' right to the impartial administration of services by DVA. There is no reason to believe that the injuries caused by DVA's institutional bias in the past are so "speculative" that they will not continue in the future, absent judicial intervention.

Moreover, VVA members are also realistically threatened by DVA's dereliction of its duties. Many of VVA's 50,000 members were subjects of Defendants' testing programs and, as such, may bring new or renewed DVA claims for their testing-related injuries in the future. (*Id.* ¶ 24.) These veterans, too, will also continue to seek accurate information from DVA regarding the substances to which they were exposed due to Defendants' testing programs.[10]

II. PLAINTIFFS' PROPOSED AMENDMENTS ARE TIMELY AND DO NOT PREJUDICE DEFENDANTS.

Defendants argue that Plaintiffs' proposed amendments adding claims against DVA are the result of undue delay, and will prejudice Defendants, and therefore should be rejected by this

[10] Citing *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004), Defendants argue that a "request for injunctive relief does not automatically confer representational standing." (Opp. at 9 (citations omitted).) *Bano* is irrelevant, let alone inapposite. In *Bano*, the court held that organizational plaintiffs lacked standing since they sought damages rather than injunctive relief. 361 F.3d at 714. In *dicta*, the court recognized that organizations seeking injunctive relief generally have standing to bring claims on behalf of their members, but, in limited cases, standing may be lacking where the injury giving rise to claims for injunctive relief would require individualized proof. *Id.* Plaintiffs do not fall into that narrow exception, since they seek broad-based injunctive and declaratory relief.

Court. These arguments are without merit. First, Defendants' complaint of prejudice is nothing more than a conclusory statement, which is insufficient. Defendants have not come forth with any evidence to support their claim. Second, Defendants mischaracterize the newly-discovered facts as known to Plaintiffs "since prior to the beginning of this lawsuit," ignoring their protracted delays in responding to discovery. (Opp. at 14.) That contention is contradicted by the facts set forth in the proposed TAC, in Plaintiffs' Opening Memorandum, and in the Declaration of Gordon P. Erspamer. Defendants have not, and cannot, demonstrate prejudice or undue delay.

A. Current Defendants Are Not Prejudiced by the New Claims that Are Asserted Against DVA Only.

Although Defendants claim that the proposed TAC causes Defendants prejudice, they never actually explain how. Instead, they ignore the fact that the new claims are asserted against *DVA* only. DVA is not yet a party, and therefore has no standing to object to the motion — just as it would have no standing preemptively to block the filing of a new, separate complaint against it based on these same facts.[11] Defendants' claim of prejudice is nothing more than an ill-disguised attempt to circumvent the rules governing joinder of parties and claims.

The Federal Rules of Civil Procedure and applicable case law mandate the liberal joinder of parties and claims. "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties, and remedies is strongly encouraged." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966) *superceded by statute on other grounds*. Rule 20(a) sets forth two relevant prongs:

> [p]ersons . . . may be joined in one action as defendants if: (A) any right to relief is asserted against them jointly, severally, or in the alternate with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action.

[11] Although DVA does not have standing to assert that it will be prejudiced by the amendment, it clearly will not be. DVA has been aware of and involved in this litigation since its inception. It has participated in discovery in this action and is represented by the same counsel as the other Defendants.

Fed. R. Civ. P. 20(a). Plaintiffs have already shown their proposed joinder of DVA meets both prongs of the test.[12]

First, Plaintiffs' claims against the current Defendants and the proposed claims against DVA arise out of the same series of occurrences — the chemical and biological weapons testing program and its aftermath, and the subsequent obligations to notify veterans involved in the tests regarding their exposures. (*See, e.g.*, TAC ¶¶ 1-18, 235-38, 246.) Second, Plaintiffs' claims against current Defendants and DVA will raise common questions of law and fact regarding the failure of current Defendants and DVA to notify and provide medical care to test participants. (*See, e.g.*, TAC ¶¶ 16-17, 235-38, 246.) Defendants' opposition does not even address these fundamental issues; instead, Defendants attempt to restrict joinder of a related party and relevant claims based on an unsupported claim of prejudice. This is a waste of already limited judicial resources and runs contrary to the purpose of the Rules. *See League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977) ("Rule 20 . . . is to be construed liberally in order to promote trial convenience and to expedite the final determination of disputes, thereby preventing multiple lawsuits.").

Defendants rely on *Komie v. Buehler Corp.*, 449 F.2d 644, 648 (9th Cir. 1971) as support for the argument that they would be prejudiced by the amendment. This reliance is misplaced. In a later case the Ninth Circuit discussed and clarified its decision in *Komie*. The court stated that although the *Komie* court stressed the tardiness of the motion, there, the "prejudice to the opposing party was evident." *See Howey v. United States*, 481 F.2d 1187, 1190 n.2 (explaining that if leave to amend had been granted in *Komie*, the opposing party would have been prejudiced because amendment would have allowed the moving party to litigate an issue he had expressly conceded). *Komie* is inapposite here because there is no "evident" prejudice, as demonstrated by Defendants' failure to articulate any such prejudice.

[12] Contrary to Defendants' assertion that Plaintiffs' claims against DVA "would add a separate, distinct cause of action," these claims are central to the case — relating to required notification of veterans exposed to harmful substances and adjudication of benefits claims and healthcare eligibility arising from the exposure.

In sum, no current Defendant is prejudiced by Plaintiffs' proposed amendments to add DVA as a defendant in this action and to add the two new, related claims against DVA.

B. Plaintiffs' Claims Against DVA Are Timely.

As explained in their moving papers, Plaintiffs have learned several new facts through recent discovery implicating DVA, including the extent of DVA's involvement in the chemical and biological weapons testing programs and that DVA had committed to providing notice to test participants. (Mot. at 2:12-28.) Plaintiffs have learned that DVA has provided notice, in fact, to very few test participants and that DVA has failed even to locate many test participants. (Mot. at 2:16-20.) Certain documents produced by DVA, such as its notification letters, "Fact Sheets," and answers to "Frequently Asked Questions" unearthed:

- false information regarding the safety of the test substances;
- descriptions of the drugs administered as "common approved pharmaceuticals";
- claims that the doses and safety of the doses had been pre-confirmed in animal tests;
- statements that participants' consent was "informed" because the Army had "provided study information to each volunteer";
- and failures to provide known, material information about the adverse physical and mental health effects of the chemical and biological substances that the veterans had been exposed to during the experiments.

(TAC ¶ 238.)

Based on this new evidence, Plaintiffs allege that "DVA cannot act as a neutral decision-maker under the due process clause because of its self-interest, conflict of interest, and bias in the underlying events." (Mot. at 3:2-3.) Plaintiffs have also alleged that DVA — by providing misinformation — is discouraging veterans from seeking out the medical care and compensation to which they are constitutionally entitled. (TAC ¶ 238.) Moreover, Plaintiffs have learned in discovery that DVA has granted service-connection for only 2 of the 87 test participants from the Chemical/Biological Weapons Test Group who have submitted claims. (*Id.* ¶ 237.) This inexplicably low grant rate — amounting to only 2% of claimants — is further evidence of DVA's bias. All of this new information — which Plaintiffs obtained in the last few months through discovery — forms the basis for Plaintiffs' amendments.

Rather than address this critical new information, Defendants once again mischaracterize Plaintiffs' claims against DVA as challenges regarding DVA's testing program, and by asserting that some of the information regarding DVA's involvement in the testing was previously available to the public. Defendants suggest this should preclude amendment.[13] Yet Defendants ignore all of the other new information that Plaintiffs only recently learned through discovery.

C. Undue Delay Alone Is Insufficient to Justify Denying a Motion to Amend.

Even if Plaintiffs' motion were not timely, which it is, "[u]ndue delay by itself . . . is insufficient to justify denying a motion to amend." *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999). Rather, "the crucial factor is the resulting prejudice to the opposing party." *Howey*, 481 F.2d at 1190. As described above, Defendants only rely on an unsupported conclusion that the "delay" results in prejudice, but have repeatedly failed to demonstrate prejudice with any specificity. This is clearly not enough.

"The Ninth Circuit has held that undue delay may result in prejudice when a motion for leave to amend is made on the eve of the discovery deadline, which would have required reopening discovery, or when an amendment is asserted at a late stage of the action and would inevitably lead to a delay in the trial and further expense to the opposing party." *Wixon v. Wyndham Resort*, No. C07-02361 JSW, 2010 U.S. Dist. LEXIS 13093, at *8 (N.D. Cal. Jan. 27, 2010) (citing *Solomon v. North Am. Life & Cas. Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir. 1998) (citations omitted) (motion to amend made on eve of close of discovery denied because it would require re-opening discovery and delay proceedings)). This is not the scenario here. This case is at an early stage — fact discovery only began in January of this year — and much discovery remains to be done. Only two depositions have been taken, and expert discovery has not begun. The trial date is not until 2012. Defendants have ample time to conduct further discovery, prepare their defenses, and reshape their strategy if necessary. Defendants cannot establish prejudice by pointing to Plaintiffs' alleged delay in requesting leave to amend.

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[13] To the contrary, Defendants' admission regarding DVA's involvement in the testing program is essentially an admission of DVA's bias, and suggests that Plaintiffs' constitutional challenge might be the appropriate subject of summary judgment.

CONCLUSION

In a preemptive effort to dismiss the claims against DVA in the proposed Third Amended Complaint, Defendants have opposed leave to amend on the inapplicable basis that Plaintiffs' proposed claims are futile, and could not survive a motion to dismiss. Defendants failed to show that it is "beyond a doubt" that the proposed new claims would be dismissed; to the contrary, the proposed claims will, indeed, survive a motion to dismiss. Nor have Defendants demonstrated that the amendment is a result of undue delay, or that they will be prejudiced in any way. For these reasons and those stated above, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Leave and, if the Court chooses to treat Defendants' Opposition as a Motion to Dismiss, Plaintiffs respectfully request that the Court deny that Motion.

Dated: July 15, 2010

GORDON P. ERSPAMER
TIMOTHY W. BLAKELY
ADRIANO HRVATIN
STACEY M. SPRENKEL
DANIEL J. VECCHIO
DIANA LUO
MORRISON & FOERSTER LLP

By: /s/ Gordon P. Erspamer
Gordon P. Erspamer

Attorneys for Plaintiffs