IAN GERSHENGORN
Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney
VINCENT M. GARVEY
Deputy Branch Director
JOSHUA E. GARDNER
District of Columbia Bar No. 478049
KIMBERLY L. HERB
Illinois Bar No. 6296725
LILY SARA FAREL
North Carolina Bar No. 35273
BRIGHAM JOHN BOWEN
District of Columbia Bar No. 981555
JUDSON O. LITTLETON
Texas Bar No. 24065635
Trial Attorneys
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 305-7583
Facsimile: (202) 616-8202
E-mail: joshua.e.gardner@usdoj.gov

Attorneys for DEFENDANTS

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

Noticed Motion Date and Time:
September 22, 2011
2:00 p.m.

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL 30(B)(6) DEPOSITIONS AND PRODUCTION OF DOCUMENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

FEDERAL STATUTES

FEDERAL RULES

INTRODUCTION

After three amendments to Plaintiffs' complaint and multiple orders from the District Court narrowing the remaining claims, this case involves predominantly legal issues regarding alleged secrecy oaths; a determination of whether the Department of Defense or the Department of the Army (collectively "DoD") has a binding legal obligation to provide notice and health care to these veterans and, if so, whether DoD has unduly delayed in satisfying these obligations; and whether the Department of Veterans Affairs ("VA") is facially biased in its adjudication of claims of veteran test subjects.

Yet Plaintiffs' discovery demands – which broadly seek documents and other information stretching back over the course of 70 years – bear no reasonable relationship to the narrow claims that remain at issue in this case or the breadth of discovery to date. Indeed, contrary to Plaintiffs' assertions, Defendants have made enormous efforts to respond to Plaintiffs' voluminous discovery, including responding to over 550 requests for production collectively; over 105 interrogatories collectively, including discrete subparts; responding to 189 requests for admissions by DoD and VA; and producing more than 10 witnesses for deposition, including a three-day Rule 30(b)(6) deposition of a DoD designee. Defendants have produced approximately one million pages of documents, covering every conceivable issue in this case, and have admitted a substantial number of requests for admissions, which should have the effect of greatly streamlining this case. Plaintiffs' motion turns a blind eye to these critical facts.

With this background properly considered, and taking into account the burden associated with responding to Plaintiffs' demands for even more, predominantly cumulative discovery, Plaintiffs' motion should be denied.

ARGUMENT

I. PLAINTIFFS' MOTION TO COMPEL SEEKS DISCOVERY THAT IS IRRELEVANT, LARGELY CUMULATIVE, AND UNDULY BURDENSOME.

Plaintiffs present their motion to compel against DoD and the Central Intelligence Agency ("CIA") in a complete vacuum, without any consideration of the narrowness of the claims remaining in this case or the substantial discovery that already has occurred. Accordingly, to

properly evaluate Plaintiffs' motion, the Court must consider these facts as well as the Rule 36 admissions that substantially narrow the issues in dispute.

First, as Judge Larson recognized in his November 12, 2010 Order, and as Plaintiffs did not dispute at the time, Plaintiffs have only three remaining claims against DoD in this case. *See* Dkt. 178 at 3. First, Plaintiffs contend that DoD must release the putative class members from any secrecy oaths that DoD may have administered related to the test program. *Id.* Second, Plaintiffs contend that DoD has a binding legal obligation to notify volunteer service members of the health effects associated with the test program, and that DoD's alleged delay in providing such notice is unreasonable. *Id.* Finally, Plaintiffs contend that DoD has a legal obligation to provide health care to the veterans who participated in chemical and biological testing, and that DoD's delay in providing such health care is unreasonable. *Id.* As reflected in the Court's May 31, 2011 Order, the sole remaining claim against the CIA relates to the Agency's purported involvement in the administration of secrecy oaths. Dkt. 233. The narrowness of the claims remaining in this case must inform the appropriate scope of discovery. Fed. R. Civ. P. 26(b)(1) (stating that "parties may obtain discovery . . . that ***is relevant to a claim*** or a defense of any party") (emphasis added).

Moreover, any requested discovery in this case must take into account that this is a challenge to federal agency action and that Plaintiffs have brought their challenge as a putative class action. Because Plaintiffs have challenged agency action under the Administrative Procedure Act ("APA"), the Court's review is necessary limited. Challenges brought under the APA are not trials on the merits; rather, such claims involve mostly legal issues related to the administrative decision-making process. "[T]he focus of judicial review is not on the wisdom of the agency's decision, but on whether the process employed by the agency to reach its decision took into consideration all the relevant factors." *Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1159 (9th Cir. 1980). Accordingly, "[i]f the court determines that the agency's course of inquiry was insufficient or inadequate, it should remand the matter to the agency for further consideration and not compensate for the agency's dereliction by undertaking its own inquiry into

the merits." *Id.* at 1160; *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("The factfinding capacity of the district court is . . . typically unnecessary to judicial review of agency decisionmaking.").

The fact that this case is brought under Section 706(1) of the APA for action unreasonably delayed does not expand this scope of review; if anything, it narrows it. The Ninth Circuit has explained that "706(1) of the APA does not empower the district court to conduct a de novo review of the administrative decision and order the agency to reach a particular result . . . . Instead, § 706(1) generally only allows the district court to compel an agency to take action" *Mt. St. Helens Mining & Recovery Ltd. P'ship v. U.S.,* 384 F.3d 721, 728 (9th Cir. 2004) (citations omitted). For this reason, courts in the Ninth Circuit and other jurisdictions have expressly rejected the claim, made by Plaintiffs here, that an action brought under section 706(1) somehow warrants discovery. *Seattle Audubon Soc'y v. Norton*, No. C05-1835L, 2006 WL 1518895, at *1 (W.D. Wash. May 25, 2006); *Sierra Club v. U.S. Dep't of Energy*, 26 F. Supp. 2d 1268, 1271 (D. Colo. 1998) ("In both [§706(1) and §706(2)] cases, the court's review of the defendant agencies' actions is generally confined to the administrative record.") (citing *Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563, 570 (N.D. Tex. 1997) (judicial review under § 706(1) and (2) is based on administrative record already in existence)). At most, courts have held that some supplementation of the record (but not discovery) may be appropriate *in order to explain the reasons for the agency's delay*, but that is not what Plaintiffs are presently seeking.

This is true even if, as here, Plaintiffs purport to bring a constitutional challenge based upon the same challenged agency action that forms the basis for their APA claim. Section 706 of the APA sets forth the proper scope of judicial review regardless of whether the agency's action is challenged on statutory, regulatory, or constitutional grounds. It plainly states that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret *constitutional* and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (emphasis added). Section 706 also allows the court to "compel agency action *unlawfully* withheld" or to set aside agency action

that is "contrary to *constitutional right*, power, privilege, or immunity," 5 U.S.C. § 706 (emphasis added) — the precise remedies that Plaintiffs are seeking here. "In making [these] determinations," however, Congress clearly prescribed that "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. Thus, any constitutional challenges that Plaintiffs may have do not entitle them to develop some new record through discovery.[1] If they believe the record is insufficient, the proper remedy is remand to the agency for further consideration. *See Asarco*, 616 F.2d at 1160.

In addition, as discussed in Defendants' motion for a protective order, *see* Dkt 254, because Plaintiffs have brought their lawsuit as a putative class action under Rule 23(b)(2), any discovery in this case must be informed by the fact that Plaintiffs are seeking group-wide relief based on common injuries to the class as a whole. Plaintiffs thus are conceding that their claims are "cohesive and homogeneous such that the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members." *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000). Accordingly, Plaintiffs' claimed need for even more discovery regarding the potentially unique health effects of over sixty different substances on thousands of individual volunteer service members is inappropriate and unnecessary.

Second, to the extent Plaintiffs claim that they do need such particularized evidence, they ignore the fact that Defendants have produced approximately ***one million*** pages of documents in

[1] Courts have confirmed that "[t]he APA's restriction of judicial review to the administrative record would be meaningless if any party seeking review based on . . . constitutional deficiencies was entitled to broad-ranging discovery." *Harvard Pilgrim Health Care v. Thompson*, 318 F. Supp. 2d 1, 10 (D.R.I. 2004); *see also Gilbert v. Johnson*, 601 F.2d 761, 766 (5th Cir. 1979); *Malone Mortg. Co. v. Martinez*, No. 3:02-cv-1870, 2003 WL 23272381, at *2, *5 (N.D. Tex. Jan. 6, 2003). Discovery is particularly unwarranted when the facts underlying an alleged constitutional claim are the same ones implicated in a challenge based on other provisions of federal law: "Nothing in the opinion supports plaintiffs' position that they should be allowed discovery of facts, *identical* to those argued in support of their APA claims, simply because such facts are argued to support their separate theory of recovery, their procedural due process claims." *Alabama-Tombigbee Rivers Coal. v. Norton*, No. CV-01-S-0194, 2002 WL 227032, at *5 (N.D. Ala. Jan. 29, 2002); *see also id.* ("plaintiffs are not entitled to discovery on their due process claim, and . . . such claim is limited to the administrative record"); *Tafas v. Dudas*, 530 F. Supp. 2d 786, 802–03 (E.D. Va. 2008).

response to Plaintiffs' broad discovery requests. *See* Gardner Decl. ¶ 8. DoD produced the majority of these documents, notable portions of which fall into the following broad categories:

- The approximately 7,000 test files of the volunteer service members who participated in testing between 1953 and 1975, which include, among other things, the identity of the subject, the substances administered, the number of tests administered, the doses administered, the participation agreement reflecting participants' informed consent, and any acute health effects resulting from the tests, if any. *See* Gardner Decl. ¶ 9(a).

- The Chemical and Biological Database, which contains information on each test subject for whom any identifiable information exists, including, when available, the name of the test subject, the location of the testing, the date(s) of the testing, the substances tested, the method of test administration, the doses administered, and any antidote that may have been administered. *See* Gardner Decl. ¶ 9(b).

- Documentation from Battelle Memorial Institute ("Battelle"). DoD contracted with Battelle to visit the various test locations and collect and process information concerning the testing, including information that might identify volunteer test subjects. Battelle's search effort has covered numerous locations, spanned years, and cost millions of dollars. DoD has produced to Plaintiffs the substantial underlying documentation collected by Battelle, as well as, among other items, the contract and contract modifications, the statement of work under the contract, and regular, interim, and final reports reflecting Battelle's collection efforts. *See* Gardner Decl. ¶ 9(c).

- Documents from National Archives, including test plans and reports and other historical records that describe, among other things, the purpose and methodology of the individual chemical tests. *See* Gardner Decl. ¶ 9(d).

- "Test protocols," which reflect the test plans and describe the purpose of the individual tests and the test methodology employed. *See* Gardner Decl. ¶ 9(e).

- Numerous, voluminous bibliographies from the Defense Technical Information Center, which, as discussed in detail *infra*, identify tens of thousands of technical documents that may contain information concerning the test program. *See* Gardner Decl. ¶ 9(f).

- Documents from the Office of the Deputy Assistant Secretary of Defense for Force Health Protection and Readiness Activities, the office within DoD responsible for identifying volunteer service members, maintaining the Chemical and Biological Database, and working with VA to support VA's notification efforts. *See* Gardner Decl. ¶ 9(g).

- Reports concerning the follow-on studies related to the test program that reflect the health effects, if any, associated with the test program, *see* Gardner Decl. ¶ 9(h); and

- Approximately 10,000 documents that pre-date 1953. These documents include, among other things, meeting minutes of the Chemical Corp. Technical Committee. *See* Gardner Decl. ¶ 9(i).

The CIA also searched for and produced a substantial number of documents, including:

- Documents concerning the actual or contemplated testing on volunteer service members as part of any CIA-sponsored project, including but not limited to Project OFTEN;
- Documents concerning testing on volunteer service members at Edgewood Arsenal or other military facilities, including studies or information provided to the CIA by the DoD concerning such testing;
- Documents concerning the substances known as EA 3167 and the Boomer, the only substances the CIA contemplated testing on service members;
- Documents relevant to the correspondence between the CIA and VA in 2006-07 about potential testing on volunteer service members; and
- Documents concerning the Individual Plaintiffs.

Cameresi Decl. ¶ 36.[2] The CIA also has certified an extensive Administrative Record ("AR") which reflects its conclusion that it did not conduct or fund testing on service members. Dkt. 208.

In addition, DoD has admitted a number of Fed. R. Civ. P. 36 requests for admissions ("RFAs"), which have the effect of greatly streamlining, if not completely eliminating, the need for discovery. With respect to Plaintiffs' secrecy oath claim, DoD admitted that it has released all volunteer test subjects who had participated in chemical or biological testing from any non-disclosure restrictions, including secrecy oaths, to the extent those restrictions pertain to addressing health concerns or seeking benefits from VA. Dkt. 259-8 (RFA Nos. 15-16). Given this admission by DoD, it is unclear what additional factual information Plaintiffs believe is necessary to establish whether, as a matter of law, Plaintiffs properly may be released from any remaining non-disclosure obligations.[3]

[2] In addition to the productions by DoD and CIA, as discussed in VA's opposition to Plaintiffs' motion to compel, which is being filed this same date, VA has produced tens of thousands of documents related to a number of topics, such as VA's notification efforts and the potential health effects of the chemical and biological substances administered to volunteer service members.

[3] For the reasons discussed in Defendants' motion for a protective order, motion to dismiss, or in the alternative, motion for summary judgment, and motion to amend the scheduling order, CIA has found no evidence of secrecy oaths with the plaintiffs, Plaintiffs have identified no such evidence, and regardless, out of an abundance of caution, the CIA has released the named Plaintiffs and VVA members identified by Plaintiffs' counsel from any purported non-disclosure agreement they erroneously believe they may have had with the CIA.

Similarly, with respect to Plaintiffs' notice claim, in addition to producing to Plaintiffs the service member test files, the Chem-Bio database, the VA notification letters and the list of veterans who have received such notices, and voluminous studies reflecting DoD's repeated follow-up studies of the health of the test veterans, DoD has admitted a number of RFAs concerning the health effects associated with full body exposure to mustard gas and Lewisite (*i.e.,* the pre-1953 testing), as well as general health effects concerning exposure to other chemicals such as LSD, CS, VX, soman, sarin, CN and DM. *See* Dkt. 259-8 (RFA Nos. 39-91).

Finally, with respect to Plaintiffs' health care claim, DoD admitted that, assuming DoD has a mandatory duty to provide long-term health care, it has not generally provided such care. Dkt. 259-8 (RFA No. 10). Thus, there are ***no*** outstanding factual questions regarding Plaintiffs' health care claim, and no additional discovery could possibly lead to the discovery of admissible evidence on the pure legal question of whether a duty to provide care exists.[4]

In short, Plaintiffs' motion ignores the substantial discovery that already has taken place in connection with the narrow remaining claims in this case and the constraints on judicial review, and fails to articulate what additional, non-cumulative discovery they still need. For this reason alone, Plaintiffs' motion should be denied.

II. PLAINTIFFS' MOTION TO COMPEL DEPOSITION TESTIMONY AND DOCUMENTS DIRECTED TO THE CIA SHOULD BE DENIED.

A. Plaintiffs' Reliance Upon Magistrate Larson's Order Is Misplaced.

Plaintiffs claim that the CIA's refusal to designate a witness regarding the three topics identified in their motion violates Judge Larson's November 2010 Order and that the CIA is in contempt of that Order. Dkt. 258 at 6. They also argue that the CIA cannot rely on its certified AR because Judge Larson ruled that "Defendants cannot rely on documents alone in response to Rule 30(b)(6) notices." *Id.* Both arguments are misplaced.

[4] In addition to this extensive written discovery, DoD also has produced a Rule 30(b)(6) designee for three full days of deposition covering, among other topics, issues associated with "secrecy oaths," notice and heath care. In preparation for that deposition, the DoD designee, Dr. Michael Kilpatrick, spent approximately 200 hours reviewing documents and also spoke to at least seven individuals. Gardner Decl. ¶ 13 (Ex. H Rule 30(b)(6) Depo. Tr. 304:20-310:3).

Contrary to Plaintiffs' contention, Judge Larson did not conclusively resolve issues related to Plaintiffs' Rule 30(b)(6) or document requests. In fact, the Court denied without prejudice Defendants' September 2010 motion for a protective order on issues central to the instant discovery dispute to allow Plaintiffs to narrow their requests. Dkt. 178. Judge Larson also expressly required Plaintiffs to narrow their definitions of the "test programs" and "test substances" at issue, terms that are central to not only to Plaintiffs' document requests but also their Rule 30(b)(6) topics. Testimony on those topics could not go forward until those definitional issues were resolved. And, significantly, Judge Larson ordered Plaintiffs to "reevaluate what information is central to their case [and] recognize limits on usefulness of some of the information they seek." Dkt. 178 at 7. While Judge Larson also ruled some Rule 30(b)(6) testimony could proceed, the parties recognized that it would be futile to conduct 30(b)(6) depositions when the parties had not resolved document request disputes, and thus they agreed to negotiate to narrow discovery as it related to both. Gardner Decl. ¶ 16, Ex. K. The issues raised in Plaintiffs' present motion involve the same issues identified in Defendants' earlier protective order on which Judge Larson deferred ruling.

Furthermore, Plaintiffs' arguments ignore the fact that significant changes in the posture of this case have occurred since the issuance of Judge Larson's November 2010 Order, and that these changes form the basis for Defendants to renew their motion for a protective order. First, the CIA has certified an AR. Dkt. 208. The certification of the record brought about a significant change in the law applicable to the case, as "the focal point for judicial review should be the administrative record already in existence, *not some new record* made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (emphasis added). This, in turn, limits discovery directed to an agency where there is an administrative record and where there has been no showing that record is insufficient to rule on the legal issues before the court. *See, e.g.*, *Sierra Club*, 26 F. Supp. 2d at 1271.

Second, the District Court has dismissed the notice and health care claims directed against the CIA, leaving Plaintiffs with only their "secrecy oath" claim against the CIA. Dkt. 233 at 5, 8.

It is axiomatic that "it is proper to deny discovery of [a] matter that is relevant only to claims or defenses that have been stricken." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 (1978).[5] Plaintiffs' reliance upon Judge Larson's November 2010 Order as a basis for their motion to compel and for sanctions therefore is misplaced, particularly where there has been no resolution of the key terms used in Plaintiffs' discovery requests and where has been a significant change in the law applicable to this case.

B. Discovery From The CIA Concerning The Possible Health Effects Of The Test Programs Is Not Relevant To Any Of Plaintiffs' Claims And Would Be Unduly Burdensome.

Plaintiffs seek broad discovery — both in the form of a Rule 30(b)(6) deposition and in the production of documents — regarding the possible health effects of approximately 60 substances allegedly tested by DoD, regardless of the CIA's involvement or contemplated involvement in such testing. Dkt. 25 at 7, 18-19. As an initial matter, the CIA has produced everything regarding any possible health effects associated with the substances that the CIA contemplated testing on volunteer service members. While the CIA's AR demonstrates that the CIA reached the conclusion that it never conducted or funded testing on service members, the CIA nonetheless searched for and produced all non-privileged documents concerning EA 3167 and the "Boomer," the only substances mentioned as *potentially* being tested on volunteer service members as part of a CIA program. Dkt. 208, Ex. 1. Additionally, the CIA has provided Plaintiffs with more than 17,000 pages of previously-collected information regarding the CIA's behavior modification programs that did not involve service members, and these documents would form the primary basis of the CIA's discovery responses regarding the health effects of

[5] *See Jane Doe 130 v. Archdiocese of Portland in Or.*, 717 F. Supp. 2d 1120, 1141 (D. Or. 2010) (finding discovery requests irrelevant where, "[w]hile these documents . . . were likely of significant relevance to [Plaintiff's] voluntarily withdrawn misrepresentation claim, they are not of clear relevance to her remaining claims"); *Henry v. Rizzolo*, No. 2:08-cv-00635, 2011 WL 2970958, at *2 (D. Nev. July 20, 2011) (revisiting a prior order compelling discovery responses after the claim to which the discovery was directed had been withdrawn).

substances tested as a part of those programs.[6] *Id*. Thus, the CIA has provided Plaintiffs with (1) all information it has concerning the health effects of the substances it *contemplated* testing, but did not test, on service members, and (2) its historical collection of documents concerning its behavior modification programs that did not involve testing on service members, which would include related "health effects" information about these programs to the extent the CIA has that information.

Nevertheless, Plaintiffs argue that discovery directed to CIA concerning the health effects of the test programs are relevant because they bear on "Plaintiffs' notice claim that *seeks 'full documentation* of the experiments done on them and all known or suspected health effects.'" Dkt. 258 at 7 (citing 3AC ¶ 189) (emphasis added). As discussed below, this claim lacks merit.

1. Plaintiffs Are Not Entitled To Discovery From The CIA Based Upon A Constitutional Notice Claim Against It.

Plaintiffs argue they may continue to seek discovery from the CIA on the topic of health effects, notwithstanding the Court's May 2011 Order dismissing their notice claim, on the basis of some alleged independent constitutional claim for notice. As an initial matter, this argument ignores the fact that the Court's May 2011 Order expressly held that Plaintiffs had no legal basis for any claim based on the CIA's "alleged failure to notify them about their chemical exposures and the known health effects, and failure to provide all available documents and evidence concerning their exposures." Dkt. 233 at 8.

But even if Plaintiffs did have a viable constitutional claim against the CIA, Plaintiffs' position is baseless. As discussed above, any constitutional claim that Plaintiffs possibly still maintain against the CIA must be decided on the basis of the certified AR. The CIA's certified AR, Dkt. 208, contains a thorough accounting of the CIA's previous determination (made in the 1970s) that it had no duty to provide notice or health care to any volunteer service members.

[6] As explained previously and in the attached declaration of Patricia Cameresi, this document collection is the product of CIA's extensive efforts over the years to gather historical records about its human test programs in response to numerous congressional investigations, presidential commissions, and FOIA requests. Dkt. 134-2 at 3-5; Cameresi Decl. ¶¶ 17–25.

Thus, the certified AR must form the exclusive basis of review of any constitutional claims. *Alabama-Tombigbee Rivers Coal.*, 2002 WL 227032, at *5.

2. Plaintiffs' Requested Discovery From CIA Is Not Relevant To Their Claims Against DoD.

As discussed in Defendants' Motion for a Protective Order, Dkt. 252 at 14-20, Plaintiffs' request to the CIA for information on the health effects concerning the test programs is not relevant to Plaintiffs' narrow claims against DoD. Among other things, Plaintiffs have not shown how this discovery — which is ostensibly third-party discovery — is relevant or necessary in an APA case, where the Court cannot create a new record nor conduct an inquiry into the merits, or a putative class action under Rule 23(b)(2), where the ultimate issues must be limited to group-wide injuries to the class as a whole. Beyond those reasons and the others addressed in that motion, two additional reasons support the denial of Plaintiffs' requested discovery.

First, DoD has answered more than sixty RFAs concerning the health effects of the test programs. Accordingly, it is unclear how information from the CIA would be relevant in light of these admissions. Second, through this discovery Plaintiffs are seeking the very same remedy that they are not legally entitled to on the merits. Plaintiffs cite to AR 70-25 as the basis for their notice claim against DoD. Even if this document could create a legal entitlement to information concerning the health effects of the test programs, a test participant would only be entitled to such information from ***DoD***. There is no reading of AR 70-25 that could lead to the conclusion either that any other government agency, such as the CIA, must provide this information to Plaintiffs, or that DoD must seek out such information from other entities. Indeed, AR 70-25 states on its face that its distribution was limited to "Active Army." *Id.* at 5. Nor could this Army regulation require the CIA to provide information to test participants, as the Army may not bind the CIA.[7] Thus, even if Plaintiffs could establish a legal entitlement to notice of the health effects of participation in the test programs from DoD, that would not entitle Plaintiffs to discover information on that topic from other entities, be they federal agencies or private entities. Because

[7] *Clouser v. Espy*, 42 F.3d 1522, 1535 (9th Cir. 1994) (finding "no authority for the proposition that one agency may promulgate regulations that bind another agency in that way").

Plaintiffs' discovery requests directed to the CIA concerning the potential health effects of participation in the test program are irrelevant and go well beyond the relief they could ever be legally entitled to, Plaintiffs' motion to compel should be denied.

3. Plaintiffs' Request Is Unduly Burdensome.

Finally, responding to Plaintiffs' "health effects" discovery — which is, in reality, third-party discovery — would be extraordinarily burdensome, and could take the CIA 12 to 18 months to complete at an expense over half a million dollars. Cameresi Decl. at ¶ 81. This burden is all the more undue given that Plaintiffs are seeking broad-based discovery on approximately 60 test substances, most of which the CIA has not tested on any human, let alone service members. *Id.* at ¶¶ 65-66; 88-93. Notably, Plaintiffs do not contend that this same information is not reasonably available from other sources. Nor do Plaintiffs address — let alone refute — the fact that they have received over 17,000 pages of documents from the CIA about its behavioral research programs and hundreds of thousands of pages of additional discovery concerning health effects from all the Defendants in this case, or that substantial information concerning the test substances at issue is publicly available. In light of the substantial discovery CIA (and the other Defendants) has produced and the enormous burden of complying with this third-party discovery, Plaintiffs' motion should be denied.

C. CIA Testimony Concerning The Use Of VA Patients Is Irrelevant.

Plaintiffs also seek Rule 30(b)(6) testimony from the CIA regarding the use of VA patients in the CIA's behavior modification programs, and claim that this information "is directly relevant to Plaintiffs' Fifth Amendment bias claim against the VA." Dkt. 258 at 7. Plaintiffs' sole claim against VA is one alleging facial bias, under which the relevant inquiry is not the nature of any alleged historical relationship between the CIA and VA, but whether VA's alleged role in the service member test program affects its ability to issue "neutral, unbiased benefits determinations" for test participants. Dkt. 177 at 11 ("The crux of their claim is that, because the DVA allegedly was involved in the testing programs at issue, the agency is incapable of making neutral, unbiased benefits determinations for veterans who were test participants.").

Here, Plaintiffs seek a Rule 30(b)(6) deposition of the ***CIA*** regarding alleged ***CIA*** testing on veterans at VA hospitals. Plaintiffs have failed to explain how such alleged testing by the CIA on one population decades ago could inform in any way whether VA's adjudicators are inherently biased in the adjudication of claims of another population today; namely, volunteer service members who participated in the Edgewood test program. Indeed, to the extent this topic was relevant at all — and it assuredly is not — it is directed to the wrong defendant. Because the issue concerning VA's alleged inherent facial bias necessarily relates to its awareness of its involvement in the volunteer test program, testimony from CIA on this issue is irrelevant. Plaintiffs' motion to compel CIA testimony on this topic should be denied.

D. Plaintiffs' Rule 30(b)(6) Topic Concerning The Role Of The CIA In Any Testing Program Is Both Irrelevant And Unduly Burdensome.

Plaintiffs also seek a Rule 30(b)(6) deposition from the CIA concerning: (1) the Agency's involvement in any human test programs, regardless of whether those programs involved volunteer service members; (2) *any* CIA experimentation involving approximately sixty substances identified by Plaintiffs; and (3) the CIA's Victim Task Force. Dkt. 258 at 8. Plaintiffs suggest this topic is relevant because "[i]nformation about the CIA's role in the test programs ***could potentially*** inform Plaintiffs' notice and health care claims." *Id.* at 9 (emphasis added). This is argument by assertion and does not explain why this discovery is necessary.[8] For the same reasons discussed above concerning Plaintiffs' requests concerning health effects, Plaintiffs cannot establish how Rule 30(b)(6) testimony – or any discovery for that matter – could possibly be relevant regarding either the sole remaining claim against the Agency concerning purported secrecy oaths or to Plaintiffs' claims against DoD for notice and health care. Moreover, as described in detail in the Cameresi Declaration (*see* ¶¶ 82–93), the burden in preparing a CIA

[8] The claimed "intentional destruction of evidence" in the mid-1970s does not justify Plaintiffs' need for this third-party discovery. The document destruction occurred in the context of the MKULTRA program, which did not involve volunteer service members. Cameresi Decl. ¶¶ 10-16. The only CIA project that contemplated testing on service members was Project OFTEN, and those records were not subject to that destruction. *Id*. (citing AR-19 at VET022-000094 ("[R]ecords pertaining to OFTEN/CHICKWIT were not among those destroyed in 1973.")).

witness for such a broad-based Rule 30(b)(6) is substantial, and this burden dwarfs any possible relevance this discovery may have to the issues remaining in this case. Accordingly, Plaintiffs' motion to compel Rule 30(b)(6) testimony on this topic should be denied, particularly as it relates to test programs that have no relation to testing on volunteer service members.

E. Plaintiffs' Motion To Compel The Production Of Documents Related To Request For Production Number 60 Should Be Denied.

Plaintiffs also seek to compel both the CIA and DoD to search for and produce documents responsive to Plaintiffs' request for production number 60, which is based upon a single CIA document and requests documents concerning "the drugs and substances the CIA obtained from drug and pharmaceutical companies, other government agencies, including the VA, NIH, FDA, and [Edgewood Arsenal]." Dkt. 258 at 19-20. The relevance of such information, even should it be reasonably obtainable, is doubtful at best. Whether the CIA obtained substances from various entities four decades ago could not elucidate meaningful information regarding purported VA facial bias or any alleged notice or health care obligations. In any event, the CIA has already searched for documents responsive to this request that relate to Edgewood, and is currently conducting another search for documents relating to VA and other government agencies. Cameresi Decl. ¶ 39. In addition, pursuant to the parties' agreement, DoD has undertaken an effort to search for and produce responsive documents concerning a list of approximately 60 different chemical and biological agents used during the test program. Roberts Decl. ¶ 16; D'Eramo Decl. ¶ 8. To the extent that this list includes the same "drugs and substances" identified on a CIA document (a fact which, of course, DoD has no way of knowing), DoD has produced responsive documents.

III. PLAINTIFFS' MOTION TO COMPEL CERTAIN CATEGORIES OF DOCUMENTS FROM DOD SHOULD BE DENIED.

As to DoD, Plaintiffs raise five issues in their motion to compel documents production. First, Plaintiffs contend that DoD must produce documents related to pre-1953 testing. Second, Plaintiffs seek the production of documents reflected in bibliographies generated from the Defense Technical Information Center ("DTIC"). Third, Plaintiffs demand that DoD produce

emails from certain custodians. Fourth, Plaintiffs maintain that DoD must search for and produce documents related to a CIA document. Finally, Plaintiffs claim that DoD must produce all documents generated by or directed to Battelle related to its activities concerning the chemical and biological test program spanning over the last two decades. None of these claims have merit.

A. Plaintiffs' Request That DoD Produce Documents Reflecting Pre-1953 Testing Lacks Merit.

Plaintiffs contend that DoD must produce documents concerning testing conducted prior to 1953 because these documents are somehow relevant to their claims. Dkt. 258, at 10.[9] As discussed in Defendants' Motion for a Protective Order, documents concerning pre-1953 testing are irrelevant because this Court lacks subject matter jurisdiction to adjudicate such claims. Dkt. 252.[10] And, this is true regardless of whatever facts Plaintiffs may assert in their Third Amended Complaint. Beyond this, Plaintiffs' motion should be denied for the following reasons.

1. Plaintiffs' Motion Ignores The Fact That Much Of The Information They Seek Has Already Been Conclusively Established Pursuant To Rule 36.

Plaintiffs contend that "information about pre-1953 exposure and notification is just as relevant to Plaintiffs' notice and health care claims as is information about post-1953 testing[.]" Dkt. 258, at 12.[11] Yet Plaintiffs' motion wholly ignores the fact that DoD has admitted a substantial number of RFAs associated with the health effects concerning pre-1953 testing, as

---

[9] Plaintiffs refer throughout this part of their motion to "Defendants." To the extent this portion of the motion is directed to the CIA, it is baseless, as the CIA, an Agency that was created in 1949, has not limited its search for documents by timeframe. Cameresi Decl. ¶ 35.

[10] The Court has submitted this issue to the Magistrate for resolution. Dkt. 273. With respect to the Court's subject matter jurisdiction to provide any relief for pre-1953 testing, Plaintiffs appear to place significance upon DoD's response to RFA no. 109, which requested that the Army admit that it "sought formal authority to recruit and use human subjects in a chemical warfare experiment for the first time in 1942." Dkt No. 258, at 11. Whatever formal authority the Army sought to use human test subjects has no bearing on whether there is a discrete legal obligation that may form the basis for the waiver of sovereign immunity under the APA.

[11] Plaintiffs note that the Court recognized at the August 4, 2011 hearing that, even if the individual named Plaintiffs were not exposed to mustard gas, veterans who were exposed are within Plaintiffs' contemplated class. Dkt. 258, at 11. We respectfully disagree. If Plaintiffs do not have a class representative who participated in pre-1953 testing, Plaintiffs cannot satisfy the representative or typicality requirements of Rule 23.

well as the provision of health care and, accordingly, Plaintiffs fail to demonstrate what additional information they need to establish their purported claims concerning pre-1953 testing.[12]

For example, with respect to the health effects associated with pre-1953 testing concerning mustard gas and Lewisite, DoD admitted each of the RFAs propounded on this issue. *See* Dkt No. 259-8 (Defs' Resp. to RFAs No. 43-71).[13] These admissions were based largely upon the National Academy of Sciences' 1993 study entitled "Veterans at Risk: The Health Effects of Mustard Gas and Lewisite," which engaged in a comprehensive analysis of prior studies in reaching certain conclusions about pre-1953 mustard gas and Lewisite testing. *Id.* Because the issue of the health effects of mustard gas and Lewisite exposure pre-1953 is "conclusively" established based upon DoD's responses to Plaintiffs' RFAs, it is unclear what additional information Plaintiffs need to establish their purported claim.

Furthermore, it is undisputed that the Department of Veterans Affairs' ("VA") notification letter sent to identifiable volunteer service members who were exposed to World War II-era mustard gas and Lewisite informed those veterans of: (1) the locations where the exposures took place; (2) the fact that VA "may grant compensation to veterans who have certain diseases associated with full-body exposure to mustard agents or Lewisite during military service; and (3) the fact that "VA has determined fully-body exposure of mustard agents and Lewisite may cause certain disabilities," and that the notification letter identified those specific disabilities. *See* Gardner Decl. ¶ 14 (Ex. I (VA notification letter)).

---

[12] Plaintiffs contend that DoD "also expressly limited their responses to Plaintiffs' Requests for Admissions ("RFAs") to information that post-dates 1953." Dkt. 258, at 10. This is not entirely accurate. First, DoD stated in its objections that "Plaintiffs have failed to specify a time limitation in their requests for admissions." Dkt No. 259-8 (DoD's Resps. To RFAs, p. 2). Second, DoD noted that its "responses shall be limited to the time period 1953 to the present, unless otherwise specified in its responses." *Id.* As discussed below, with respect to Plaintiffs' RFAs related to the health effects concerning mustard gas and Lewisite exposure, DoD responded both to the full body exposure testing that occurred prior to 1953 and to the Cold-War-era mustard gas patch testing.

[13] DoD did deny the potential health effects for those volunteer service members who were exposed to mustard gas after 1953, because, after a comprehensive study on this issue in the mid-1980s, DoD determined that there were no long-term health effects associated with such exposures. Gardner Decl. ¶ 15, Ex. J.

Finally, as discussed above, DoD has admitted that, to the extent the Court concludes that DoD has an enforceable duty to provide health care to test subjects for health effects possibly resulting from their participant in the test programs, DoD has not provided such care "to the extent a volunteer service participant who subsequently leaves the service and is not a military retiree entitled to military retirement pay and benefits under statute." *See* Gardner Decl. ¶ 11 (Ex. G, DoD's Resp. to RFA No. 10).

Because there is no dispute as to: (1) the potential health effects associated with pre-1953 exposure to mustard gas and Lewisite; (2) the content of VA's notification letter; and (3) the facts concerning DoD's provision of health care to pre-1953 test participants, Plaintiffs have failed to establish what additional discovery they need concerning this issue.

2. Defendants Have Produced Voluminous Information That Pre-Dates 1953 Or Relates To Pre-1953 Testing.

Plaintiffs similarly fail to recognize that DoD's search efforts have resulted in the production of a large number of pre-1953 documents which bear precisely on the mustard gas/Lewisite health effects information Plaintiffs purport to need. As but one example, DoD's production of bibliographies from DTIC demonstrates that Plaintiffs already have available to them information they contend they lack on this topic. In point of fact, DoD produced to Plaintiffs a bibliography reflecting documents concerning Lewisite ranging from 1944 to 2009, and another bibliography reflecting documents concerning mustard gas ranging from 1918 to 2010. *See* Gardner Decl. ¶ 9(f) Therefore, and as explained more fully *infra*, to the extent Plaintiffs seek health-effects information concerning pre-1953 mustard gas and Lewisite exposures, such information is available through DTIC.[14]

Defendants also have produced the National Academy of Sciences' 1993 study entitled "Veterans at Risk: The Health Effects of Mustard Gas and Lewisite," discussed *supra*. This

[14] As noted in Part III.B, *infra*, to the extent Plaintiffs find it unduly burdensome to search through the bibliographies provided to them for such information, Defendants have repeatedly asked Plaintiffs for narrowed search terms that might be used to run a more tailored search for relevant documents. Plaintiffs have refused to do so.

comprehensive study, not only of the topic of the potential health risks arising from mustard gas and Lewisite exposure, but concerning the *very population of veterans at issue in this expanded request for documents from 1940-1953*, provides, in great detail, precisely the information Plaintiffs purport to need here. Plaintiffs fail even to mention this study in their motion, instead choosing to discuss their purported "need" for further discovery without even addressing the discovery they already have been provided. In addition, DoD has produced a three-volume document, prepared through a multi-year effort, entitled "Chemical Weapons Exposure Project: Summary of Actions and Projects: 1993-2007." This 1,250-page document describes DoD's efforts concerning the search for test participants who were exposed to mustard gas and Lewisite prior to 1953. *Id.*[15] Beyond this, DoD has produced approximately 10,000 documents that pre-date 1953. Gardner Decl. ¶ 9(i); D'Eramo Decl. ¶¶ 7, 9; Roberts Decl. ¶ 8.

3. The Enormous Burden Of Specifically Searching For And Reviewing Up To 70-Year-Old Documents Greatly Outweighs The Marginal, If Any, Relevance Of The Requested Documents.

The burden of engaging in a broad inquiry for documents that are up to 70 years old relating to pre-1953 exposures — exposures that already have been assessed at great length in documents Plaintiffs have — should be obvious. To provide but one illustrative example, the research team that compiled the 1250-page three-volume report mentioned above also compiled a number of documents relating to the World-War-II-era exposures in preparing the report. The *index* of these documents is 147 pages long. Kilpatrick Decl. ¶ 4. DoD estimates that merely reviewing these documents would take over 833 employee hours (over 20 work weeks). *Id.* ¶ 5.

[15] Plaintiffs contend that mustard testing also is relevant to their post-1953 testing. Dkt. 258 at 11-12. Whatever the merits of this argument, it is undisputed that DoD has produced to Plaintiffs the Chem-Bio database, which reflects, among other things, all known mustard agent exposures — by servicemember name and location — during the 1953-1975 testing program. In addition, DoD has produced to Plaintiffs the long-term health studies reflecting the conclusions concerning mustard agent exposures during the Cold War-era testing, and has responded to a number of requests for admissions on this topic.

Broader searches would take significantly more time. *Id.* Given the cumulative nature of the requested information, there is no basis to require DoD to undertake such a burdensome effort.

B. Plaintiffs' Request That DoD Produce The Tens Of Thousands Of Documents Identified In DTIC Bibliographies Should Be Denied.

Plaintiffs also seek to compel DoD to produce the tens of thousands of documents identified in the bibliographies generated by the Defense Technical Information Center ("DTIC"),[16] without having actually reviewed those bibliographies to identify the documents it believes are necessary to establish its notice and health care claims against DoD. *See* Pls' Mot. at 12-13. Plaintiffs' request should be denied.

In response to Plaintiffs' broad discovery requests, DoD spent 300 hours conducting broad keyword searches in both the public and restricted collections of DTIC for unclassified responsive documents. Gardner Decl. ¶ 9(f); Roberts Decl. ¶¶ 15, 17; Bell Decl. ¶¶ 7, 16. Those searches, which for the most part were not restricted by date, yielded voluminous results. For instance, searches based on Plaintiffs' narrowed lists of test substances yielded 23,906 total results. Roberts Decl. ¶ 27; Bell Decl. ¶ 12. Searches for documents responsive to Plaintiffs' document requests yielded almost 38,000 results. Roberts Decl. ¶ 33; Bell Decl. ¶ 11. Not all of those results are relevant because they do not relate to the test program at issue. Bell Decl. ¶ 18.

As is its standard practice for all other researches, DTIC generated bibliographies listing the results of the searches. Bell Decl. ¶¶ 15-16. Those bibliographies contain administrative data about each document, such as its title, author, an abstract, and the DoD organization that

[16] DTIC is a central repository of DoD- and government-funded scientific, technical, engineering, and business related information. It provides access to over 4.5 million documents. The full text of many of these documents can be accessed electronically through DTIC's online database, but a substantial number of publications, particularly older documents, are available only in hard copy. Those hard copies generally are not maintained by DTIC in a central location; rather, upon request for a particular document located in the DTIC database, DTIC staff must obtain the hard copy version of that document from the offsite location holding the document. DTIC maintains both public and restricted databases. The public collection is freely accessible to the public on the DTIC website. The restricted collection contains sensitive and in many cases classified documents and, for obvious reasons, is available only to eligible, registered users of the DTIC database. Bell Decl. ¶ 4.

originated the document. Particularly important are the abstracts, which are generally written by the authors themselves as summaries to allow researchers to quickly determine the contents of the document. The vast majority of these abstracts are not, as Plaintiffs suggest, vague or lean in the least. *Id.* ¶ 20.[17] DoD provided these bibliographies to Plaintiff and informed them that DoD would be willing to produce to them a subset of any non-classified documents that they identify from the bibliographies as relevant to their claims.

Plaintiffs have not identified the documents they wish to obtain from DTIC. Instead, Plaintiffs assert that it "simply is not feasible" for them to identify documents they wish DoD to produce from the bibliographies and abstracts, and that indeed it is "absurd" to expect them to do so.[18] Pls.' Mot. at 13. This is because, according to Plaintiffs, they do not have access to the full underlying documents and therefore cannot load them into "a word-searchable database for review." *Id.* at 14. Plaintiffs contend that it is DoD's responsibility to examine the bibliographies generated by DTIC and produce only those that appear to be responsive, or to produce the entire set of documents contained in a bibliography.

As an initial matter, Plaintiffs' contention that they are unable to ascertain from the titles and abstracts contained in the bibliographies which results they believe are relevant is suspect at best. These bibliographies contain detailed information both in the titles and especially the abstracts about the content of the documents. Bell Decl. ¶¶ 13-21. This is the precise information all other researchers use to ascertain the potential relevance of documents contained in DTIC, and there is no reason to believe that Plaintiffs are unable to do so.

Further, Plaintiffs' request that DoD undertake the effort to review for responsiveness in the first instance and produce all documents contained in these voluminous bibliographies is

[17] The only bibliography entries that consisted of "merely a title," Dkt. 258 at 14, were those for which the abstracts themselves were classified or for limited distribution. Bell Decl. ¶ 21.

[18] Plaintiffs state that from their "limited review of these abstracts, it appears that these documents contain responsive information." Dkt. 258 at 13. In other words, Plaintiffs acknowledge that they have the ability to discern from the abstracts whether a particular document, in their view, is likely to contain responsive information.

unduly burdensome given the sheer breadth of DTIC and the massive results of the keyword searches performed. As noted, the bibliography of search results keyed to Plaintiffs' list of approximately 60 test substances contains 23,906 entries. It would take approximately 10 work weeks simply to review the bibliographies, even when using a conservative estimate of one minute per bibliography entry. Roberts Decl. ¶ 28. It would then take an additional 87 weeks to process the results of those bibliographies and produce them to Plaintiffs. *Id.* ¶ 31. Furthermore, in addition to the tremendous amount of time it would require, production of *all* documents (without screening) contained in the massive bibliographies compiled by DTIC would result in needlessly overbroad discovery. *Daimler Truck N. Am. LLC v. Younessi*, 2008 WL 2519845, *3 (W.D. Wash. June 20, 2008) (unpublished) (holding that production of entire hard drive to locate certain emails contained therein "would be analogous to allowing the search of a party's entire collection of file drawers for the purpose of finding a single class of documents"). What Plaintiffs seek to compel here simply is not reasonable.

Nor does Plaintiffs' purported need for all the records located in DTIC pursuant to DoD's keyword searches justify the extraordinary expenditure of almost 2 years of work to locate and process all located documents. When considering the burden of discovery to be imposed on a party, courts should weigh that burden against the benefit likely to be obtained from such onerous discovery, *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005), particularly when a government agency is a responding party, *see Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 779–80 (9th Cir. 1994). Here, the Court should consider this tremendous burden in light of the abundant discovery already obtained by Plaintiffs. This is particularly true given that Plaintiffs have access to the public portion of DTIC. Dkt. 258 at 14.[19]

[19] In an effort to accommodate Plaintiffs' requests, DoD has repeatedly offered Plaintiffs the opportunity to provide additional search terms to run through the restricted DTIC database or to narrow existing searches by adding limiting terms, such as "Edgewood." Gardner Decl. ¶ 9(f). Instead, Plaintiffs' proposed "compromise" is to insist upon their being allowed access to DTIC's restricted database. There are several problems with this proposed "compromise." As an initial matter, courts have rejected parties' arguments that they should be given access to an opposing party's database in order to search for responsive records. *In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003); *U & I Corp. v. Adv. Med. Design, Inc.*, 251 F.R.D. 667, 674 (M.D. Fla.

(Footnote continues on next page.)

C. There Is No Ripe Dispute Between The Parties Regarding The Production Of Emails.

There is presently no dispute between the parties concerning this issue. When DoD provided Plaintiffs' requests for production of documents to the relevant components within DoD and the Army that would be likely to have responsive documents, these components were told not to exclude emails from their searches. Gardner Decl. ¶ 10. For example, Lloyd Roberts searched and produced all his email. Roberts Decl. ¶ 35. Nevertheless, Plaintiffs brought to Defendants' attention that they had received less email in discovery than they expected, and counsel for Defendants agreed to ask DoD to revisit the discovery requests with a particular focus on email. Gardner Decl. ¶ 11. DoD is currently conducting searches for relevant emails of pertinent custodians, and will produce all responsive, non-privileged documents that it can reasonably locate and obtain. Accordingly, there is no need for this Court to compel any action by DoD.

D. Plaintiffs' Demands For Additional Documents Relating To Battelle Memorial Institute Should Be Rejected.

In the mid-2000s, DoD contracted with the Battelle Memorial Institute to gather technical and service-member-identifying information concerning chemical and biological research programs. Lee Decl. ¶ 12. This initiative has taken years, is ongoing, and has cost millions of dollars. *Id.* Through this project, Battelle has provided to DoD personnel-identifying data, various reports, and original source documents from the relevant time periods and research programs. *Id.* Although of little, if any, relevance to Plaintiffs' claims in this case, DoD has

---

(Footnote continued from previous page.)

2008). More importantly, DTIC is a national defense-oriented database that contains sensitive and classified information. For national security reasons, DoD cannot give Plaintiffs access to a restricted database containing such information. Finally, even if Plaintiffs were granted access to the restricted portion of the DTIC database, that would create logistical difficulties and not fully provide them what they seek. Searching the DTIC database yields only search results, which are compiled into bibliographies; many of the underlying documents themselves, on the other hand, are stored only in hard copy and in many cases offsite. Accessing the restricted DTIC database would therefore provide little additional assistance to Plaintiffs in identifying responsive documents than they already have.

endeavored to produce to Plaintiffs all of these Battelle contract "deliverables," including all regular, interim and final reports, source documents, and standard operating procedures. Gardner Decl. ¶ 9(c). DoD's search for documents has been designed to encompass all documents delivered by Battelle to DoD in the course of the multi-year project. Lee Decl. ¶ 3. DoD has also produced the over-arching contract with Battelle, as well as pertinent modifications to the contract over time. Thomsen Decl. ¶ 3. Defendants also are producing e-mail communications with and regarding Battelle from Anthony Lee, the primary DoD manager of the Battelle contract. Plaintiffs also deposed Mr. Lee. And yet Plaintiffs remain unyielding in their demands for yet more documents, contending that they also need communications regarding the underlying contract (a contract that governs many more projects than the one at issue here), personnel lists, and other documents, in order to test the "veracity" of the Battelle collection effort. They do not.

First, Plaintiffs fail to explain how these requested documents are actually relevant. The legal questions before the Court regarding notice center squarely on the issue of the existence of a binding, nondiscretionary duty to provide notice, and derivatively regarding whether, if such a duty exists, such notice has timely been provided. The primary question is purely legal; the derivative question is largely, if not entirely, answered by the nature of the notice itself. The intricacies of the process by which DoD has sought to gather information are not properly before the Court. Moreover, the nature of what steps DoD has taken to engage Battelle in its identification efforts (to be distinguished from Battelle's actions) has been fully presented to Plaintiffs in multiple depositions and through thousands of pages of documents. In fact, the regular and summary reports provided by Battelle to DoD over the course of the project address precisely the questions Plaintiffs purport to ask: *i.e.*, what sites were visited and why, what information was gathered, what factors have influenced the timing of the process, *et cetera*. *See, e.g.,* Lee Decl., Ex. 1. As is their wont, Plaintiffs fail to acknowledge the breadth of the production they already have received, and instead merely demand that they need more documents.

Plaintiffs' insistence that they need still more "contract-related documents" is emblematic of this problem. As noted, DoD has, to its knowledge, produced all reports generated during the Battelle project. These reports address the exact questions Plaintiffs seek to explore: the course of performance under the contract, the reasons for actions taken, and explanations and status reports regarding resource allocation, progress, and timing. And Plaintiffs have the contract itself, with attendant modifications. Moreover, Plaintiffs have deposed the DoD contract officer, Mr. Lee (who already produced responsive documents), and will depose Battelle officials. Finally, as discussed above, DoD is searching for and intends to produce e-mail correspondence from relevant custodians, including Mr. Lee (the contract officer) and Mr. Dupuy (the Chem-Bio database manager). These documents and depositions should be more than sufficient to permit Plaintiffs to assess the nature, progress, and performance of the Battelle project. As to "documents reflecting gaps in the files," it is unclear what Plaintiffs are seeking, but the regular reports from Battelle, files produced by Mr. Lee and Mr. Dupuy, including e-mails, and the deposition testimony already obtained from Mr. Lee and to be obtained from Battelle should be more than adequate to address such questions. Finally, Plaintiffs' demands, not only for contract documents, but for "contract renewal discussions" and "drafts related to these discussions," are simply beyond the pale. Plaintiffs have made no showing regarding how deliberative discussions regarding modifications to the entire Battelle contract (let alone the singular project at issue here) could possibly elucidate matters pertinent to Plaintiffs claims, much less in a way the voluminous reports, documents, deliverables, and testimony already obtained has not. In any event, such documents would be expected to be held by the sponsoring organization (*i.e.*, Mr. Lee's office), and that office does not have such records. Thomsen Decl. ¶ 9; Lee Decl. ¶ 4.

As to the 1993-1994 notification effort, beyond the objections identified in the pending protective order motion, Plaintiffs' request suffers from similar defects to their other demands. Most notably, as discussed above, DoD has produced the three-volume *Chemical Weapons Exposure Project* report. This voluminous collection, which includes both original source documentation and narrative summaries, comprehensively memorializes DoD's identification and

notification efforts, with special emphasis on 1993 and 1994. In addition, Plaintiffs have deposed Martha Hamed, the person who generated the compilation and provided the executive summary narratives therein. If Plaintiffs wish to understand the nature and scope of these notification efforts (including Battelle's possible involvement and/or the reasons for the purported "abandonment" of the effort), the information is available to them through these sources.[20]

As with the burden associated with searching for pre-1953 documents, the burden associated with unearthing nearly twenty-year old information concerning Battelle activities relating to the mid-1990s-era mustard gas/Lewisite notification efforts would be significant. Such a search would include the same repository of CWEST documents discussed and would take more than 20 work weeks alone. *See generally* Part III.A.3, *supra*; Kilpatrick Decl. ¶ 5. Further searches would only add to this burden.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Compel should be denied.

September 1, 2011

Respectfully submitted,

IAN GERSHENGORN
Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney
VINCENT M. GARVEY
Deputy Branch Director

/s/ Joshua E. Gardner
JOSHUA E. GARDNER
KIMBERLY L. HERB
LILY SARA FAREL
BRIGHAM JOHN BOWEN
JUDSON O. LITTLETON
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch

[20] DoD's notification efforts relating to chemical and biological exposures, including the 1993-1994 efforts regarding mustard gas and Lewisite exposures, have also been addressed in congressional hearings (including hearings addressed and summarized in the three-volume set) and in General Accountability Office reports made available to Plaintiffs long ago.

P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 305-7583
Facsimile: (202) 616-8202
E-mail: Joshua.E.Gardner@usdoj.gov

Attorneys for Defendants

IAN GERSHENGORN
Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney
VINCENT M. GARVEY
Deputy Branch Director
CAROLINE LEWIS WOLVERTON
District of Columbia Bar No. 496433
Senior Counsel
Telephone: (202) 514-0265
E-mail: caroline.lewis-wolverton@usdoj.gov
KIMBERLY L. HERB
Illinois Bar No. 6296725
Trial Attorney
Telephone: (202) 305-8356
Email: Kimberly.L.Herb@usdoj.gov
LILY SARA FAREL
North Carolina Bar No. 35273
Trial Attorney
Telephone: (202) 353-7633
Email: lily.farel@usdoj.gov
BRIGHAM JOHN BOWEN
District of Columbia Bar No. 981555
Trial Attorney
Telephone: (202) 514-6289
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044
Facsimile: (202) 616-8470

Attorneys for DEFENDANTS

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

[PROPOSED] ORDER

Plaintiffs move to compel Defendants to produce documents and provide Rule 30(b)(6) testimony. Dkt. 258. For the reasons stated in Defendants' opposition to the motion, the motion is hereby DENIED.

IT IS SO ORDERED.

JACQUELINE SCOTT CORLEY
United States Magistrate Judge

DATED: _____