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

19 VIETNAM VETERANS OF AMERICA, *et al.*,  
 Plaintiffs,  
 20 v.  
 21 CENTRAL INTELLIGENCE AGENCY, *et al.*,  
 Defendants.

Case No. CV 09-0037-CW

**DECLARATION OF JOSHUA E.  
 GARDNER IN SUPPORT OF  
 DEFENDANTS' OPPOSITION TO  
 PLAINTIFFS' MOTION TO  
 COMPEL RULE 30(B)(6)  
 DEPOSITIONS AND PRODUCTION  
 OF DOCUMENTS**

1 I, Joshua E. Gardner, declare as follows:

- 2 1. I am a Trial Attorney in the Federal Programs Branch, Civil Division of the United States  
3 Department of Justice. I represent Defendants in this case. I submit this declaration in  
4 support of Defendants' Opposition to Plaintiffs' Motion to Compel Rule 30(b)(6)  
5 Depositions and Production of Documents. This declaration is based on my personal  
6 knowledge and on information provided to me in my official capacity.
- 7 2. Plaintiffs served a "First Set of Requests for Production of Documents To All  
8 Defendants," which included 77 separate requests for production, on May 15, 2009. A  
9 true and accurate copy of these requests is attached as Exhibit A to this declaration.
- 10 3. Plaintiffs served a "Second Set of Requests for Production of Documents To All  
11 Defendants," which included an additional 75 requests for production (for a total of 152  
12 requests), on May 10, 2010. A true and accurate copy of these requests is attached as  
13 Exhibit B to this declaration.
- 14 4. Plaintiffs served a "Third Set of Requests for Production of Documents To All  
15 Defendants," which included an additional 21 requests for production (for a total of 173  
16 requests) on July 1, 2010. A true and accurate copy of these requests is attached as  
17 Exhibit C to this declaration.
- 18 5. Plaintiffs served a "Fourth Set of Requests for Production of Documents To All  
19 Defendants," which included an additional 20 requests for production (for a total of 193  
20 requests) on August 2, 2010. A true and accurate copy of these requests is attached as  
21 Exhibit D to this declaration.
- 22 6. Plaintiffs served an "Amended Set of Requests for Production of Documents,"  
23 encompassing 118 separate document production requests, on December 2, 2010. A true  
24 and accurate copy of these requests is attached as Exhibit E to this declaration. These  
25 requests purport to replace the previous four sets of discovery requests. However, this  
26 "Amended Set of Requests for Production of Documents" largely combined multiple prior  
27 discovery requests into single requests for production, so that the information sought by  
28

1 Plaintiffs generally remained the same despite the absolute number of requests for  
2 production decreasing.

3 7. Plaintiffs served an additional set of discovery requests on the Department of Defense and  
4 the Department of the Army (collectively, "DoD") and the Central Intelligence Agency  
5 ("CIA"), described as "Plaintiffs' Further Requests For Production of Documents to All  
6 Defendants," which encompassed seven separate requests, on June 15, 2011. A true and  
7 accurate copy of these requests is attached as Exhibit F to this declaration.

8 8. In response to these numerous discovery requests, Defendants in this lawsuit have  
9 produced approximately one million pages of documents.

10 9. The majority of the documents produced by Defendants come from DoD. The documents  
11 produced by DoD generally fall into the following broad categories:

12 a. The approximately 7,000 test files of the volunteer service members who  
13 participated in chemical testing between 1953 and 1975. These files were  
14 contained on microfiche and were copied, processed and produced to Plaintiffs at  
15 substantial time and expense. In general, these test files include substantial  
16 information about the test program including, among other things, the identity of  
17 the test subject, the test substances administered, the number of tests administered,  
18 the doses administered, the participation agreement, additional signed consent  
19 forms, and a discussion of any acute health effects as a result of the tests, if any. A  
20 number of the test files also contain protocols discussing the nature of the testing  
21 performed. In addition, a number of the test files contain communications  
22 beginning after the end of the test program in 1975 between the test subjects and  
23 DoD concerning the nature of the tests and the substances and doses tested.

24 b. The Chemical and Biological Database. This database is maintained by DoD and  
25 contains information on each of the test subjects for whom any identifiable  
26 information exists. The database contains, when available, the name of the test  
27 subject, the location of the testing, the date(s) of the testing, the substances tested,  
28 the method of test administration, the doses administered, and any antidote that

1 may have been administered. The Department of Veterans Affairs has access to  
2 the database and uses it to obtain information necessary to provide notification  
3 letters to veterans who may have participated in the chemical and biological test  
4 program. Over the course of many months, counsel for the Defendants has  
5 repeatedly offered counsel for the Plaintiffs the same web-based access that  
6 counsel for the Defendants possesses. To date, Plaintiffs have not taken advantage  
7 of these repeated offers.

8 c. Documentation from Battelle Memorial Institute (“Battelle”). In the mid-2000s,  
9 DoD contracted with Battelle to visit the various test locations and collect and  
10 process information concerning the testing, including information that contains  
11 identifiable information regarding the volunteer test subjects. Battelle’s search  
12 effort has covered numerous locations, spanned years, and cost millions of dollars.  
13 DoD has produced to Plaintiffs the substantial underlying documentation collected  
14 by Battelle (*i.e.*, source documents containing information concerning tests and  
15 test participants), as well as, among other items, the contract between Battelle and  
16 the government (and modifications to the contract), the statement of work under  
17 the contract and regular, interim, and final reports prepared by Battelle that reflect  
18 its collection efforts.

19 d. Certain documents from National Archives. DoD has also retrieved from National  
20 Archives and produced to Plaintiffs three boxes of documents containing test plans  
21 and reports. These documents describe the purpose of the individual chemical  
22 tests, the methodology employed, and in some cases contain information about the  
23 test participants. In addition, DoD retrieved from National Archives and produced  
24 to Plaintiffs two boxes of documents containing historical records concerning the  
25 chemical test programs and the volunteer service members.

26 e. “Test protocols,” which reflect the test plans and describe the purpose of the  
27 individual tests and the test methodology employed.  
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- 1 f. Bibliographies from the Defense Technical Information Center (“DTIC”). DTIC  
2 maintains an electronic database of information concerning the technical reports  
3 for the test program, which is key-word searchable. The technical reports describe  
4 the results of particular chemical tests. DoD ran a number of key word phrases  
5 into the DTIC database, and produced to Plaintiffs the bibliographies reflecting the  
6 results of those search efforts so that Plaintiffs could identify the specific  
7 documents they wished to have produced. Among these bibliographies, DoD has  
8 provided a bibliography reflecting documents concerning Lewisite ranging from  
9 1944 to 2009 and another bibliography reflecting documents concerning mustard  
10 gas ranging from 1918 to 2010. Plaintiffs have refused Defendants’ repeated  
11 offers to identify documents on these bibliographies for production, contending  
12 that reviewing the bibliographies is burdensome. Defendants have alternatively  
13 offered to run search terms identified by Plaintiffs. Despite these offers, Plaintiffs  
14 have not provided Defendants with any search terms.
- 15 g. Documents from the Office of the Deputy Assistant Secretary of Defense for Force  
16 Health Protection and Readiness (“FHP&R”) Activities. FHP&R is the office  
17 within DoD responsible for identifying volunteer service members, maintaining  
18 the Chemical and Biological Database, and working with the Department of  
19 Veterans Affairs (“VA”) to support VA’s notification efforts. Materials produced  
20 include presentations to veterans service organizations such as plaintiff Vietnam  
21 Veterans of America and meeting minutes reflecting discussions between VA and  
22 DoD regarding VA’s notification efforts.
- 23 h. Documents, many of which are publicly available, concerning the follow-on  
24 studies related to the chemical and biological test program, and which consider the  
25 possible health effects, if any, concerning participation in the volunteer test  
26 program. These studies include, among others:
- 27 i. David A. McFarling, “LSD Follow-Up Study Report,” Oct. 1980.
- 28

- 1                   ii. National Research Council, "Possible Long-Term Health Effects of Short-
- 2                   Term Exposure to Chemical Agents," 1985 (three volume set).
- 3                   iii. National Research Council, "Long-Term Health Effects of Exposure to
- 4                   Sarin and Other Anticholinesterase Chemical Warfare Agents," 2003.
- 5                   iv. Phillip R. Pittman, "An Assessment of Health Status Among Medical
- 6                   Research Volunteers Who Served in the Project Whitecoat Program at Fort
- 7                   Detrick, Maryland," 2005.
- 8                   v. J.A. Klapper, M.D., et al., Long Term Follow-up of Medical Volunteers,
- 9                   Edgewood Arsenal Technical Report (1972).
- 10                  i. Although DoD has not generally run specific searches targeted at documents
- 11                  regarding testing before 1953, its searches to date have resulted in the
- 12                  identification and production of approximately 10,000 documents that pre-date
- 13                  1953. These documents include, among other things, minutes of the Chemical
- 14                  Corp. Technical Committee.
- 15                  10. Plaintiffs' discovery requests were provided to each of the components with the
- 16                  Department of the Army and Department of Defense reasonably likely to have documents
- 17                  in their possession, custody or control responsive to Plaintiffs' requests. In conducting
- 18                  their searches, these components were not told to exclude emails.
- 19                  11. Recently, Plaintiffs' counsel expressed concerns that the volume of email from DoD
- 20                  employees was less than they expected. Accordingly, DoD has revisited their prior search
- 21                  efforts with a specific focus on emails. That renewed search effort is currently ongoing,
- 22                  and to the extent DoD can reasonably obtain emails from pertinent custodians, it will
- 23                  produce, subject to any applicable privilege or immunity, such documents.
- 24                  12. Attached hereto as Exhibit G to this declaration is a true and accurate copy of a February
- 25                  8, 2011 letter from Joshua E. Gardner to Gordon Erspamer.
- 26                  13. Attached hereto as Exhibit H to this declaration is a true and accurate copy of excerpts
- 27                  from the transcript of the July 7, 2011 deposition of the Department of Defense's Rule
- 28                  30(b)(6) designee, Dr. Michael Kilpatrick.

1 14. Attached hereto as Exhibit I to this declaration is a true and accurate copy of three sample  
2 full-body mustard gas veteran notification letters from the Under Secretary of Veterans  
3 Affairs for Benefits, bates labeled VET001\_015110 through VET001\_05119.

4 15. Attached hereto as Exhibit J to this declaration is a true and accurate copy of an excerpt  
5 from Volume 3 of the Three-Volume Report "Possible Long-Term Health Effects of  
6 Short-Term Exposure to Chemical Agents"

7 16. Attached hereto as Exhibit K to this declaration is a true and accurate copy of a November  
8 30, 2010 email from Tim Blakley to Joshua E. Gardner

9 I declare under penalty of perjury that the foregoing is true and correct. Executed in  
10 Washington, D.C. on September 1, 2011.

11  
12 /s/ Joshua E. Gardner  
13 Joshua E. Gardner  
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