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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*, Plaintiffs, v. CENTRAL INTELLIGENCE AGENCY, *et al.*, Defendants.	Case No. CV 09-0037-CW Noticed Motion Date and Time: April 5, 2012 9:00 a.m. **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY**

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INTRODUCTION

As this Court previously has recognized, "[t]he parties have engaged in substantial discovery in this action over the past two and a half years. Given the breadth of this action, which concerns the conduct of four government agencies over at least four decades, production of this discovery has taken longer than perhaps any party expected[.]" Dkt. 314 at 1-2. Indeed, discovery in this case has been expansive, as the parties have taken approximately 40 depositions, and Defendants have produced approximately 2 million pages of documents and responded to hundreds of requests for admission and interrogatories. Decl. of Joshua E. Gardner ("Gardner Decl.") at ¶ 2. Casting notions of proportionality, undue burden and cumulativeness to one side, Plaintiffs proceed to seek yet more discovery. For the reasons discussed below, Plaintiffs' latest attempts to compel yet more discovery in a case challenging agency delay and inherent facial bias should be rejected.[1]

ARGUMENT

I. PLAINTIFFS' CHALLENGES TO DEFENDANTS' DELIBERATIVE PROCESS PRIVILEGE ASSERTIONS ARE WITHOUT MERIT

Plaintiffs challenge the assertion of the deliberative process privilege by the Department of Defense and Department of the Army (collectively, "DoD") and the Department of Veterans Affairs ("VA") over documents identified on DoD's January 10, 2012 supplemental privilege log and VA's January 19, 2012 supplemental privilege log.[2] Plaintiffs assert that Defendants have

[1] Plaintiffs' contention that Defendants have produced approximately 41,000 pages of discovery since December 23, 2011 must be placed in context. Plaintiffs' Motion to Compel ("Mot.") 1. As Plaintiffs acknowledge, approximately 36,000 pages relate to VA's continuing production of claims files, which the parties agreed would be produced on a rolling basis. Moreover, the approximately 3,200 pages of non-claims files documents produced by VA since December 23 largely comprise ***re-productions*** of documents, where Plaintiffs indicted they had difficulty accessing the electronic files, and documents over which VA withdrew assertions of privilege or determined could be released in redacted form.

[2] In their briefing and proposed order, Plaintiffs appear not to challenge the validity of any other privilege assertion, such as the attorney-client privilege, work product protection, or the Executive Order. Nor do Plaintiffs seriously contend that DoD and VA have not satisfied the procedural or substantive requirements of the deliberative process privilege. Plaintiffs assert in passing that "Defendants have not established the foundation for the privilege," Mot. 3, but provide no explanation or basis for this claim. This is argument by assertion, and a review of Defendants' privilege logs reflect that they more than adequately describe the basis for the

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somehow waived the privilege assertions by failing to timely produce privilege logs and that they have a "substantial need" for these documents. Neither of these contentions has merit.

A. Defendants' Privilege Assertions Are Timely

The Ninth Circuit has rejected a *per se* waiver rule for the failure to timely produce a privilege log in favor of a case-by-case, holistic reasonableness analysis that considers: (1) the degree to which the assertion of privilege enables the litigant seeking discovery and the Court to evaluate the privilege assertion; (2) the timeliness of the objections and accompanying information about the withheld documents; (3) the magnitude of the document production; and (4) other particular circumstances that make responding to discovery unusually easy or hard. *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court,* 408 F.3d 1142, 1147–49 (9th Cir. 2005) (noting the magnitude of the production and difficulty in obtaining documents as factors to consider).[3] Furthermore, courts recognize the appropriateness of exchanging privilege logs at the end of discovery where, as here, the production of documents are large and made on a rolling basis. *See Best Buy Stores, L.P. v. Manteca Lifestyle Ctr., LLC*, No. 2:10-cv-0389, 2011 WL 2433655 (E.D. Cal. Jun. 14, 2011). Neither DoD nor VA has waived its privilege assertions.

(Footnote continued from previous page.)

privilege without revealing the privileged communication itself. Moreover, to the extent Plaintiffs seek to recycle their previous arguments concerning the timing of the declaration invoking the privilege, (Mot. 7, n.2), that contention should be rejected for all the reasons previously discussed in Defendants' opposition to Plaintiffs' previous motion to compel. Dkt. 276 at 7-8 & n.2. As reflected in the declarations of Dr. Michael Kilpatrick and John Spinelli, the documents that are being withheld on the basis of the deliberative process privilege are both predecisional and deliberative, and the public release of these documents would unduly chill agency deliberations. *See* Decl. of Dr. Michael Kilpatrick ¶¶ 5-14; Decl. of John Spinelli ¶¶ 7-41.

[3] *See Coal. for a Sustainable Delta v. Koch,* No. 1:08–CV–00397, 2009 WL 3378974, at *11–14 (E.D. Cal. Oct. 15, 2009) (holding that production of a privilege log two months after a production involving 80,000 documents and thousands of emails was reasonable); *Carl Zeiss Vision Int'l GmbH v. Signet Armorlite Inc.,* No. CIV 07CV–0894, 2009 WL 4642388, at *3–4 (S.D. Cal. Dec. 1, 2009) (holding that privilege objection wasnot waived despite a nine-month delay in production of privilege log); *Jumping Turtle Bar & Grill v. City of San Marcos,* No. 10-cv-270, 2010 WL 4687805, at *3 (S.D. Cal. Nov. 10, 2010) (holding that, "under the circumstances of this case, the production of a privilege log one and one half months late was not unreasonable"); *Quality Inv. Props. Santa Clara, LLC v. Serrano Elec., Inc.*, No. C-09-5376, 2011 WL 1364005 (N.D. Cal. Apr. 11, 2011) (concluding that privilege log was timely given that 11,796 documents were produced and almost 300 documents withheld, the breath of the requests and the intervening holidays).

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1. DoD Has Not Waived Its Deliberative Process Privilege Assertions

Plaintiffs contend that DoD has waived its privilege assertions over certain emails and attachments identified on its January 2011 privilege log because those documents "are responsive to discovery requests that have been pending for over two years." Mot. 10. DoD has routinely and timely produced updated privilege logs as appropriate given the history of this case. *See* Gardner Decl. ¶¶ 3-8. DoD produced the overwhelming majority of emails and attachments on a rolling basis between December 16 and December 23, 2011, and produced its supplemental privilege log reflecting documents withheld from that production less than one month later – despite the intervening holidays – on January 10, 2012. *Id.* ¶¶ 7, 9-14. Plaintiffs' claimed waiver lacks both factual and legal bases.

On July 4, 2011, Plaintiffs asked for DoD's confirmation that its search for emails included certain topics, such as communications with VA concerning notification efforts. Dkt. 259-14. After an exchange of letters, on August 12, the parties participated in a meet and confer, during which Defendants explained that to the extent Plaintiffs had concerns about DoD's production of emails, it would undertake reasonable efforts to ensure that responsive, ***non-privileged*** documents were produced. Dkt. 290-3. Despite Defendants' representation, on August 18, Plaintiffs filed a motion to compel seeking, among other things, emails from current or former DoD employees and contractors. Dkt. 258 at 15-18. On September 11, Defendants responded and noted that there was no ripe dispute concerning the DoD emails because it had agreed to conduct further searches for responsive, ***non-privileged*** emails. Dkt. 278 at 22 & Dkt. 279 ¶¶ 10-11 (discussing willingness, based upon Plaintiffs' request, to conduct additional searches and produce responsive, ***non-privileged*** emails).

On September 22, the Magistrate Judge held a hearing on, among other things, Plaintiffs' motion to compel DoD emails. Dkt. 292. The Magistrate Judge ordered DoD to identify: "(1) whose emails it had searched, (2) what search terms were used, and (3) what time period the search encompassed," and further directed the parties to meet and confer regarding DOD's email production. Dkt. 294 at 12. On September 27, the parties met and conferred, and on September

30, Plaintiffs sent Defendants a letter with additional questions about these issues. Dkt. 295-8. On November 7, pursuant to this Court's Order, the parties submitted a Joint Statement in which Defendants stated that "[t]he parties have reached an agreement regarding search terms and custodians concerning the search of DoD email. DoD anticipates that the production of all responsive, ***non-privileged*** emails will be completed by December 14, 2011." Dkt. 318 at 5.[4] (emphasis added). In that same Joint Statement, Plaintiffs did not challenge DoD's indication that it would withhold privileged documents, but simply requested an earlier date for the production of emails. *Id.* Despite a number of technological challenges, DoD produced the responsive, non-privileged emails and attachments on a rolling basis. *See* Gardner Decl. ¶¶ 9-14.

Given the magnitude of the Government's production efforts to date – approximately ***2 million pages*** on a rolling basis – the logistical challenges in obtaining responsive emails of former government employees and contractors from approximately the past dozen years, the intervening holidays in December and early January, and the parties' recent agreement as to the scope of DoD's email searches, DoD's most recent privilege log – provided less than 30 days after DoD's production of emails and attachments – is undoubtedly timely. Moreover, Plaintiffs could hardly be surprised by the fact that DoD might produce a supplemental privilege log, as it expressly stated in a May 18, 2010 letter to Plaintiffs that "[i]n accordance with continuing discovery obligations, Defendants will update the log if they become aware of additional documents that should be included." Gardner Decl. ¶ 15, Ex. 1. That is precisely what DoD did, and Plaintiffs' claim of waiver should be rejected.

2. VA's Deliberative Process Privilege Assertion Is Timely

Similarly, VA has not waived its right to assert privilege over its documents. Plaintiffs have known since their previous challenge to VA's assertion of privilege that VA was still reviewing documents and intended to submit a supplemental privilege log. Dkt. 255 at 3 ("DVA

[4] Up to this point, the parties had not previously discussed protocols for DoD email searches, such as agreed-upon search terms or the identification of relevant custodians. These discussions typically occur in the context of the parties' Rule 26(f) meeting of counsel before the commencement of discovery.

1 has represented that it is still in the process of reviewing five million pages of documents and ***that***
2 ***it intends to produce another privilege log identifying additional documents it is***
3 ***withholding.***")(emphasis added). As with DoD, the case-by-case factors considered by the Ninth
4 Circuit weigh strongly in favor of VA. *See Burlington,* 408 F.3d at 1147-49. Beyond the Rule
5 45 subpoena served upon VA, Plaintiffs have served six sets of requests for production of
6 documents on VA, totaling 236 separate requests, with the most recent set being served in
7 October 2011. Gardner Decl. ¶ 62. During the course of discovery, along with a substantial
8 portion of the overall discovery produced by Defendants, VA has also produced almost 900
9 claims files, which require VA to conduct a line-by-line review in accordance with the
10 requirements of 38 U.S.C. § 7332 and 42 U.S.C. § 290dd-2. *See* Decl. of Michael Hogan
11 ("Hogan Decl") at ¶¶ 7, 8. These production efforts utilized an enormous amount of VA's
12 resources, including the use of over 100 Office of General Counsel employees to review and
13 produce documents. *Id.* VA had previously produced a privilege log, and as Plaintiffs recognize,
14 the most recent version is simply a supplement that reflects VA's enormous, rolling document
15 production. VA's privilege log contains full descriptions of those documents withheld, and those
16 descriptions are more than sufficient to enable both the Plaintiffs and the Court to evaluate
17 whether each of the withheld documents is privileged.
18 Moreover, Plaintiffs have no viable argument that they have been prejudiced by VA's
19 assertion of privilege. Plaintiffs' sole contention regarding alleged prejudice is that they lacked
20 access to the documents contained on the privilege log during the depositions of certain VA
21 current and former employees. This assertion is belied by the fact that Plaintiffs chose to take
22 numerous depositions, including the individual capacity depositions of Paul Black and Joe
23 Salvatore, and four Rule 30(b)(6) depositions, in the summer and fall of 2011, before the Court
24 had resolved Plaintiffs' previous challenge to VA's assertion of privilege. *See* Gardner Decl.
25 ¶ 16, Ex. 2 ("Plaintiffs are moving forward with depositions of the DVA on topics that are less
26 dependent on Plaintiffs' review of DVA documents, including the . . . depositions of Messrs.
27 Salvatore and Black."); *see also* Gardner Decl. ¶ 17 , Ex. 3 (same). Plaintiffs' current claim of
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prejudice is contradicted by their tactical decision to proceed with numerous depositions while fully aware that VA had withheld documents on the basis of privilege.[5]

B. Plaintiffs Cannot Meet Their Burden of Establishing "Substantial Need" For Defendants' Deliberative Process Privilege Documents

Plaintiffs cannot establish a substantial need sufficient to overcome Defendants' privilege assertions. Plaintiffs' motion makes clear that they are impermissibly conflating the concepts of "substantial need" and "relevance," and their argument completely ignores the enormous amount of information Plaintiffs have gained through discovery. While Plaintiffs may be disappointed that the record provides less help to their theory of the case than hoped, Plaintiffs nevertheless cannot meet their burden of demonstrating a "substantial need" for yet more discovery.

As a threshold matter, Plaintiffs' reliance upon the Magistrate Judge's November 23, 2011 Order regarding VA's assertion of the deliberative process privilege is not only misplaced, but actually supports Defendants' privilege assertions here. Of the 483 documents over which VA asserted privilege and which the Magistrate Judge reviewed, the Magistrate Judge ordered that VA produce approximately only 50 documents, upholding VA's invocation of privilege over the vast majority of documents. Dkt. No. 327 at 3 n.1 ("Defendant properly asserted the deliberative process privilege over those documents not specifically referenced in this Order."). The Court predicated its determination that the privilege had been overcome in limited circumstances upon the conclusion that "the documents provide information which is extremely relevant to Plaintiffs' facial bias claim against DVA and their notice claim against the other Defendants, ***and because this information cannot be obtained from another source*** . . . ." Dkt. No. 327 at 4 (emphasis added). Of course, this conclusion was made well before the end of fact discovery Defendants' production of approximately 2 million pages of discovery and the conclusion of the parties' approximately 40 depositions. Consideration of any "substantial need" by Plaintiffs at this juncture must necessarily consider the massive discovery conducted to date. Finally, with respect

[5] Plaintiffs' claimed prejudice argument is also a tautology, as it assumes that they may obtain the documents over which DoD and VA have asserted privilege, and therefore that they were deprived of the opportunity to question witnesses about these documents. To the extent DoD and VA's privilege assertions are upheld, Plaintiffs' claimed prejudice necessarily fails.

to the categories of documents that are common to both VA's and DoD's privilege logs, the Magistrate Judge did not order the wholesale production of categories of documents, but rather ordered that very few of those documents be produced.[6] Plaintiffs' attempt to seek support from the prior order concerning privilege is unavailing.

Furthermore, rather than meet their burden of establishing substantial need for ***all*** of the deliberative process privilege documents identified on Defendants' logs, Plaintiffs instead identify several "examples" and request that the Magistrate Judge either order that Defendants produce ***all*** documents over which privilege has been asserted or entertain *in camera* review. Mot. 9, 13-14. Because Plaintiffs have the burden of showing a substantial need for the documents they seek which outweighs the government's interest in non-disclosure, they cannot meet that burden over documents or categories of documents not specifically addressed in their motion. *See Redland Soccer Club, Inc. v. Dep't of the Army*, 55 F.3d 827, 854 (3d Cir. 1995). This is particularly true here, where the declarations of Dr. Kilpatrick and Mr. Spinelli provide detailed discussions of the harm the agencies would face if the challenged documents were subject to public disclosure. *See generally*, Kilpatrick Decl., Spinelli Decl.

1. DoD Deliberative Process Privilege Documents

In those few instances where Plaintiffs identify specific categories of documents, they fall far short of establishing a substantial need given the vast discovery already adduced in this case and DoD's articulated reasons for non-disclosure. For example, Plaintiffs contend that they have a substantial need for drafts of DoD's fact sheet that accompanied the VA notice letter because: (1) a former DoD contractor, Roy Finno, could not recall some of the specifics of the drafting process; and (2) an email from former VA employee, Dr. Mark Brown, identified two statements in the fact sheet with which he did not agree. Mot. 12-13. Yet Plaintiffs deposed Dee Dodson

[6] For example, with respect to VA's Category 3, which involved collaboration between DoD and VA regarding providing notice to test subjects, the Magistrate Judge ordered the release of only 8 documents out of 38 over which VA had asserted privilege. Dkt. 294. Similarly, with respect to VA's Category 5, which included documents concerning DoD's "fact sheet," the Magistrate Judge only ordered the production of 2 documents – for both Categories 4 ***and*** 5, out of 105 documents over which VA had asserted privilege. *Id.*

Morris, the DoD employee responsible for drafting the fact sheet, (Gardner Decl. ¶ 18 , Ex. 4, Morris Tr. 65:5-12), and took a three day DoD Rule 30(b)(6) deposition of Dr. Michael Kilpatrick, who had the final say with respect to the contents of the fact sheet and who provided detailed testimony concerning the drafting process. Gardner Decl. ¶ 19, Ex. 5 (Kilpatrick Tr. 75:6-14).[7] The fact that this evidence may not further Plaintiffs' theory of the case does not provide a substantial need entitling Plaintiffs to yet more discovery on this topic.

Plaintiffs next contend that they have a substantial need for DoD privilege log entries 170 and 171, which are attachments to emails reflecting DoD's comments on a VA information letter. Mot. 11-12. They contend that they have a substantial need for these comments based solely upon an email from a DoD employee, Dr. Kelley Brix, suggesting a "major rewrite" of the VA information letter, which VA employee Dr. Brown did not accept. Mot. 11-12. First, Plaintiffs have the final version of the information letter, which has been used in numerous depositions of both DoD and VA employees. *See* Gardner Decl. ¶ 2, Ex. 6. Second, Plaintiffs mischaracterize the email upon which they rely. In Dr. Brix's email, she wrote that DoD "found several recurrent issues with the cover letter and attachment. We suggest that a major rewrite is required." Gardner Decl. ¶ 21, Ex. 7. Nowhere in this email does Dr. Brix suggest that she had "serious problems" with the actual content of the information letter or that her comments were "substantive," and, indeed, Dr. Brix suggested that "a major ***reorganization*** of the attachment is recommended." *Id.* (emphasis added). Third, the Magistrate Judge previously reviewed documents contained on VA's privilege log concerning the drafting of the VA information letter

[7] Discovery in this case revealed that DoD had the ultimate decision regarding the contents of the fact sheet. Gardner Decl. ¶ 19 , Ex. 5 (Kilpatrick Tr. 521:2-6). DoD typically tries to prepare fact sheets that do not exceed one page so as not to provide extraneous or confusing information, and tries to communicate at an appropriate level so that the information is understandable by the recipient. *Id.* (Tr. 686:19-687:11). In addition, Ms. Morris and DoD's Rule 30(b)(6) designee provided extensive testimony on the preparation of the fact sheet. For example, they explained the basis for the inclusion of the term "low doses" in the fact sheet, (*id.* Tr. 521:19-522:11; 526:18-527:4; 527:6-13); the basis for the inclusion of the term "no significant long-term health effects," (*id.* Tr.525:16-25; 718:17-719:10); Gardner Decl. ¶ 18 , Ex. 4 (Morris Tr. 224 & 227)); the basis for the use of the term "consent," and the reason DoD did not include a discussion concerning potential mental health issues associated with participation in the test program. Gardner Decl. ¶ 19 , Ex. 5 (Kilpatrick Tr. 83:18-84:9; 434:24-435:11; 630:12-631:10; 641:1-12).

and concluded that, for many of the documents, Plaintiffs failed to demonstrate need sufficient to overcome VA's substantial interest in non-disclosure. Dkt. 294. That conclusion is necessarily even stronger here, as Plaintiffs fail to explain how DoD's comments on VA's information letter relate in any way to ***DoD's*** claimed notice obligations. Similarly, given that Dr. Brown's response to Dr. Brix indicated that "[a] major rewrite of the information letter" was "unlikely since the letter writing campaign has already started" (Mot. 12), it is clear on the face of the document that VA did not reject DoD's comments based upon some alleged inherent bias, but rather because of the timing of the receipt of the comments. Plaintiffs' motion falls far short of establishing the substantial need necessary to overcome DoD's legitimate substantial interest in withholding these documents. Kilpatrick Decl. ¶ 10.

Plaintiffs next contend that they have a substantial need for documents concerning VA's outreach efforts, such as documents regarding the decision not to send individualized letters to veterans. Mot. 12. But Plaintiffs' contention is belied by the substantial evidence Plaintiffs already have obtained on this topic, and their suggestion that they have a substantial need on this issue fails.[8]

[8] Discovery has revealed the reasons why the VA notice letters and DoD fact sheets were not individually tailored to specific veterans. First, it would have taken too long to meet the Congressionally-requested deadline if VA and DoD had to generate notice letters and fact sheets for the approximately 400 chemical and biological agents. Gardner Decl. ¶ 22, Ex. 8 (Salvatore Tr. 85:25-86:18). Second, VA had much more of an ability to individualize the WWII-era and SHAD notification letters because DoD knew the specific locations of those tests and there were much fewer substances involved than in the Cold War-era tests. Gardner Decl. ¶ 19, Ex. 5 (Kilpatrick Tr. 369:1-18); ¶ 18, Ex. 4 (Morris Tr. 61:15-62:8). Third, because the information that DoD was collecting was constantly subject to refinement, there was a concern that, to the extent VA provided a notice letter with specific information about a test, that information might ultimately prove to be incorrect. Gardner Decl. ¶ 23 , Ex. 9 (Abbot Tr. 118:21-119:20). Beyond the concern of the possibility of VA sending multiple letters as DoD routinely refined the information contained in the database, DoD and VA recognized that not all of the details of the test program were known, which obviously made providing detailed, individualized letters difficult. *Id.* (Abbot Tr. 117:10-118:2; Tr. 126:5-127:9). Fourth, there was a concern that by placing too much information in the letter, it would suggest to the recipient that they had an ailment that they otherwise did not have. Gardner Decl. ¶ 18, Ex. 4 (Morris Tr. 189:25-191:6). Thus, VA and DoD agreed that the more appropriate approach was to inform veterans that if they had questions about their specific tests, or concerns about releasing classified information, they should contact DoD at a toll free number, which numerous veterans did. *See* Gardner Decl. ¶¶ 24, 25, Ex. 10; 11(call logs reflecting utilization by veterans); ¶¶ 18, 19, 26, Ex. 4, 5, 12 (L. Roberts Tr. 15:14-20) (114 requests in 5 years); 18:24-7 (400 Edgewood participant requests in

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Finally, Plaintiffs contend that they have a substantial need for drafts of a WWII-era mustard gas fact sheet because Mr. Finno did not remember his involvement in the preparation of the documents and "the documents themselves are likely the only source of such critical discovery." Mot. 13. The final version of the WWII-era fact sheet appears on the publicly-available DoD website. Kilpatrick Decl. ¶ 8. Furthermore, Plaintiffs have obtained extensive testimony from Martha Hamed, Colonel Frederick Kolbrener, and Norma St. Claire regarding DoD's efforts in identifying WWII-era test participants; have thousands of pages from the CWEST index reflecting those efforts, including the voluminous three-volume set that describes in great detail DoD's efforts; and have a copy of "Veterans at Risk," which provides a comprehensive overview of the WWII-era testing program. Gardner Decl. ¶ 63. Given the extraordinary amount of information that Plaintiffs already possess on this issue, they cannot demonstrate a substantial need sufficient to overcome DoD's legitimate interest in withholding these documents. Kilpatrick ¶ 8.

2. VA Deliberative Process Privilege Assertions[9]

Plaintiffs first claim a substantial need for documents concerning VA's decisions regarding how and why to notify test subjects and the content of the notice letter. Mot. 7-8. As

(Footnote continued from previous page.)

years prior to last 5); 65:4-13 (double the number of requests than in previous years); 25:8-11; 16:18-17:4); (Morris Tr. 234:1-24); (Kilpatrick Tr. 64:9–65:6; 153:10—154:1; 647: 24–648:6).

[9] Plaintiffs also express concern regarding VA's determination of "duplicate" documents. Mot. n. 4. VA considered a document to be a duplicate of a document on the prior privilege log if the documents are identical or substantively identical. For example, in the case of an email chain, VA considers two documents to be duplicates if the only difference between the two documents is a non-substantive addition to the document. If the email chain was forwarded to an additional person or substantively changed in any way, VA did not consider it to be a duplicate. If two documents had "subtle differences," such as those suggested by Plaintiffs ("handwritten notes" or substantive additional words (Mot. 10 n.4)), VA would *not* consider those documents to be substantively identical. Moreover, to the extent that VA has identified a document as a duplicate of a document contained on VA's initial privilege log and Plaintiffs declined to challenge that document in their previous motion to compel (Dkt. 255), Plaintiffs have now waived their challenge to the duplicate, a point Plaintiffs seem to acknowledge. Mot. 4-5 n.1 ("red indicates the prior section of the privilege log . . .which is not at issue."). Given this understanding, Plaintiffs' request that this Court review *in camera* documents that are "substantively identical" is unnecessary and wasteful of the Court's resources.

discussed above, the Magistrate Judge previously rejected Plaintiffs' claims of substantial need for a large number of documents that Plaintiffs had challenged in this category. Dkt. 294. Furthermore, Plaintiffs already have substantial information on both of these issues. With respect to the "why" of the notification efforts, Plaintiffs are well aware of the reasons for those efforts, including the requirements of section 709 of the National Defense Authorization Act that DoD identify chemical and biological test participants; a 2004 GAO report that suggested that VA's outreach efforts include Cold War-era test programs; VA's established practice of conducting outreach efforts to veterans groups; and requests from the House Veterans Affairs Committee that VA conduct outreach efforts to Cold War-era test participants. Gardner Decl. ¶¶ 18, 19, 22; Ex. 4, 5, 8 (Morris Tr. 135:14-136:4); (Kilpatrick Tr. 288:7-11; 326:6-20); (Salvatore Tr. 23:7–18). And with respect to questions concerning "how" notification efforts were implemented, Plaintiffs similarly have voluminous information on that issue.[10]

[10] Since November 2004, VA and DoD began meeting regularly to discuss notification efforts for the Cold War-era test participants. Gardner Decl. ¶¶ 27, 28; Ex. 13, 14. Defendants have produced numerous meeting minutes reflecting these discussions. Gardner Decl. at ¶ 29. VA and DoD agreed at the outset that DoD would be responsible for identifying veteran test participants, and VA would be responsible for notifying them to the extent possible. Gardner Decl. ¶¶ 19, 22, 28, Ex. 5, 8, 14 (Salvatore Tr. 14:3-8); (Kilpatrick Tr. 56:11-24; Tr. 62:4-17). To facilitate VA's outreach efforts, DoD created a database, which it has produced to Plaintiffs, that includes, among other things, the test participant names, the substances exposed to, the routes of administration, and doses, where this information is available. Gardner Decl. ¶¶ 18, 19 , Ex. 4, 5 (Morris Tr. 113:4-15); (Kilpatrick Tr. 168:7-22; 321:12-17); *see also* Gardner Decl. ¶ 30. The information in the database comes primarily from the test participant files for each veteran, which Defendants have also produced to Plaintiffs. Gardner Decl. ¶ 19, Ex. 5 (Kilpatrick Tr. 319:22-25); *see also* Gardner Decl. ¶ 31. DoD conducts quality control to ensure that source documents support the inclusion of names in the database. Gardner Decl. ¶ 32, Ex. 15 (Finno Tr. 63:10-24). DoD then provides the database to VA on an updated basis, as well as the actual test records that DoD locates. *See* Gardner Decl. ¶¶ 18, 19, 32, Ex. 4, 5, 15 (Finno Tr. 64:16-21; 65:1-7; 72:8-13);(Morris Tr. 130:25-131:2; 130:4-17); (Kilpatrick Tr. 105:13-106:11). In addition, Plaintiffs have adduced substantial evidence regarding the drafting of the notice letter. Gardner Decl. ¶¶ 22, 33, 34, 35, Ex. 8, 16, 17, 18 (Plaintiffs' Notice of Depositions to Department of Veterans Affairs and Department of Defense pursuant to Fed. R. Civ. P. 30(b)(6)); *see also, e.g.*, (Black Tr 17:21–68:6; 79:13–84:6); (Salvatore Tr. 13:5–17:5; 22:9–47:9).

Plaintiffs next claim a substantial need for "documents … regarding the DoD's Chem-Bio Database." Mot. 9. Yet, as discussed above, Plaintiffs possess everything they could possibly need on this issue. Beyond the Chem-Bio database itself, Plaintiffs have obtained substantial testimony from a number of witnesses, including Dee Dodson Morris, Martha Hamed, Dr. Kilpatrick, Roy Finno, Lloyd Roberts, David Abbot, and Joe Salvatore concerning DoD's search for source documents, creation and population of the database, efforts to verify participation in the test program, the transfer of the database from DoD to VA and discussions between the agencies regarding confirmation of participation.[11] Accordingly, Plaintiffs cannot establish a substantial need that outweighs VA's legitimate interest in withholding these draft documents. Spinelli Decl. at ¶ 14.

Finally, Plaintiffs claim a substantial need for draft legislative proposals. Predecisional, deliberative documents reflecting VA's internal deliberations regarding draft legislative proposals cannot bear on the claim of inherent facial bias in VA's adjudicators. Notably, this Court upheld VA's assertion of deliberative process privilege over many documents related to these proposals. Dkt. 327 at 3 n.1. Moreover, Plaintiffs now have some documentation of these legislative proposals. Gardner Decl. ¶¶ 36-40; Ex. 19 –23. The additional documents withheld by VA all relate to the same legislative proposals Plaintiffs already possess, which clearly advocate on behalf of the veterans involved in testing in this case and contradict Plaintiffs' assertion of bias. Plaintiffs have offered no argument for why they need further discussion of these proposals and thus, their purported need cannot overcome VA's legitimate interest in non-disclosure. Spinelli Decl. at ¶¶ 21-23.

II. MUSTARD GAS MAILBOX AND CLAIMS FILES

Plaintiffs next seek to compel the production of the contents of VA's Mustard Gas mailbox and the production of additional claims files that may reflect claims for World War II-era mustard

[11] *See, e.g.,* Gardner Decl. ¶ 18, 32, 23, Ex. 4, 9, 15 (Abbot Tr. 284:7–21); (Morris Tr. 74:2–75:17; 76:1–77:25; 90:4–24; 93:4–94:2; 113:4–115:11; 117:2–118:20); (Finno Tr. 63:10–64:21; 65:1–7; 183:14–184:20).

agent exposure. Not only is Plaintiffs' request unduly burdensome on its face, but, Plaintiffs cannot establish as a threshold matter how such information is relevant.

The District Court limited Plaintiffs' claim against VA to one of inherent facial bias "concerning the DVA's adjudication of test participants' claims for [service-connected death or disability compensation]." Dkt. 177 at 7. Plaintiffs' sole claim, as articulated by the Court, "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. This bias . . . renders the benefits determination process constitutionally defective as to them and other class members." *Id*. at 11.

As reflected in Plaintiffs' Third Amended Complaint, their claim of bias is based on VA's alleged participation in the Cold War-era test program. Dkt. 180 ¶ 231. Nowhere in that paragraph of the Third Amended Complaint, which outlines the entirety of Plaintiffs' bias claim, do they claim that VA participated in the WWII-era testing of mustard agents. *See id*. Indeed, the only part of the Third Amended Complaint that does refer to WWII-era veterans is when Plaintiffs allege that VA has a duty to notify veterans exposed to mustard agents, a claim that the District Court expressly rejected. *Id.*; Dkt. 177 at 15-17.[12] This Court already has ruled on whether VA should be required to search for documents related to testing using mustard agents, finding that the burden of even a search for documents related to pre-1953 testing "outweighs the discovery's relevance at this stage." Dkt. 294 at 20. The Court further held that, after reviewing the documents they had received, if Plaintiffs could demonstrate that information related to pre-1953 testing was relevant to the claim against VA, Plaintiffs could renew their motion to compel. *Id*. at 20-21.

Plaintiffs have not, and indeed cannot, make that requisite showing. Fact discovery has closed, and Plaintiffs have adduced absolutely no evidence that VA was involved in the WWII-

[12] Plaintiffs' reference to this Court's statement at the August 4, 2011 Hearing that testing related to WWII-era testing is "in the complaint," Mot. 14, as it relates to claims against DoD completely ignores the fact that there are no allegations related to VA's involvement in mustard agent testing "in the complaint."

1 era mustard agent testing on service members conducted by the Army. In apparent recognition of
2 this complete absence of evidence, Plaintiffs have attempted to recast and expand their theory of
3 inherent facial bias to include VA involvement in health research using the same substances as
4 those used during the Army test program.[13] But Plaintiffs have found no evidence that VA has
5 ever been involved in mustard agent testing similar to the testing alleged in Plaintiffs' complaint.
6 *See* Declaration of Dr. Victor Kalasinsky, ¶¶ 4-9 (explaining that of the five articles Plaintiffs
7 identified as involving mustard agents, three studies involved no testing at all and two involved
8 experiments using a different compound from the mustard agents used in the Army test
9 programs). Because fact discovery has failed to establish the necessary predicate for the
10 relevance of these voluminous materials, Plaintiffs' motion to compel VA to search for and
11 produce discovery related to WWII-era testing using mustard agents should be denied.
12 Furthermore, the enormous burden of producing additional claims files far outweighs the
13 minimal, if any, relevance of these materials. VA has already spent more than $110,000 to copy
14 and scan claims files of identifiable test subjects. Hogan Decl. ¶ 9. More than 100 VA attorneys
15 and legal assistants have spent nearly 3,300 hours screening each claims file for information
16 covered by 38 U.S.C. § 7332 and 42 U.S.C. § 290dd-2. *Id.* ¶ 10. As explained in the declaration
17 of Michael Hogan, the process of copying, scanning, reviewing, and producing a possible
18 additional minimum of 650 claims files (identifiable veterans in the mustard gas database or their
19 survivors who filed a claim for disability or dependency and indemnity compensation) would cost
20 at least an additional $115,000 and entail at least 2,376 hours of regular time and 360 hours of
21 overtime for employees of the VA General Counsel Office to review these files. *Id.* ¶ 13.
22 Because this burden far exceeds any possible relevance and reflects no notion of proportionality,
23 Plaintiffs' motion to compel should be denied.
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25
26 [13] Gardner Decl. ¶ 41, Ex. 24 (Hearing Tr. 12.15.11 at 38:8-13)("So our argument is that VA, not just because of its involvement in Edgewood, but because it has conducted recently more than
27 250 tests of the very same substances that were tested in various government test programs, is a biased adjudicator of claims of test participants who are subjected to tests of the same
28 substances.").

III. MAGNETIC TAPES

Although Plaintiffs refuse to recognize it, DoD has gone to great lengths to access, convert, and produce the data on the six magnetic tapes dating from the early 1970s. Before the hearing in November, DoD referred the tapes to multiple offices within DoD, as well as to Battelle Memorial Institute, the contractor already engaged in collecting data regarding DoD's historical chemical and biological testing program. Dkt. 318 at 26-27.[14] After these efforts were unsuccessful, DoD solicited proposals from outside vendors to convert the tapes. *Id.* at 27. Of course, given that the tapes are marked as classified, a necessary prerequisite to any outside vendor's ability to convert them is clearance pursuant to Executive Order 13,526. *See* Exec. Order 13,526 ("E.O. 13,526"), 75 Fed. Reg. 707 (Jan. 5, 2010), revoking Exec. Order 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995), and Exec. Order 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003). Neither of the vendors who submitted responses had such a clearance. After this process failed to produce a satisfactory solution, DoD turned to the Defense Logistics Agency ("DLA"), which, although it lacked the necessary hardware at that time to perform the conversion, was able to acquire the hardware it deemed best suited to extract the information. Gardner Decl. ¶ 53.

Since acquiring the hardware, DLA has extracted information from two of the six magnetic tapes and referred them to DoD for classification review. Gardner Decl. ¶ 54. As to the remaining four tapes, the hardware used was unsuccessful in recovering information. Accordingly, DLA is undertaking alternative efforts to extract the data, including the possible acquisition of additional software, assuming the tapes contain retrievable data.[15]

[14] Attempts to access the tapes had been made long before the commencement of this lawsuit, to no avail. Dkt. 318 at 24, 26.

[15] At no point has DoD characterized DLA as incompetent to extract the information. Mot. 19. This is Plaintiff's self-serving gloss on the fact that DLA, prior to this winter, did not have the hardware it has since acquired. Dkt. 318 at 27 ("DLA could identify no current hardware capable of reviewing the tapes, but is continuing to search for possible hardware that could be used…."). Indeed, despite awareness for months that DoD had sent the magnetic tapes to DLA for review and recovery, Plaintiffs for the first time seek to challenge DLA's competence to perform such a task. Such a challenge is without merit, and is refuted by the fact that DLA has recovered information from two of the six tapes, and has identified possible technology that could allow for the recovery of additional information. Gardner Decl. ¶ 54.

Plaintiffs' repeated suggestions of stalling and withholding information for tactical reasons requires little response, apart from the fact that they are baseless. As to whether DoD's efforts are adequate, Rule 26 requires only reasonable efforts to produce discoverable information, not Herculean ones. Fed. R. Civ. P. 26(b)(2)(C)(iii) (requiring court to limit discovery when "the burden or expense of the proposed discovery outweighs its likely benefit"); *Slate v. Am. Broad. Companies, Inc.*, 274 F.R.D. 350, 352-53 (D.D.C. 2011). And DoD's efforts here have gone above and beyond (and continue to exceed) the requirements of the rule. Nor do Plaintiffs' complaints about the frequency and quality of DoD's ongoing status updates have any basis. DoD has repeatedly provided status updates to Plaintiffs as that information has become available. *See*, *e.g.*, Pls' Ex. CC-EE. Plaintiffs have no response but further complaint. At present, DoD's efforts are ongoing. Given the nature of the effort, DoD cannot provide a firm date by which it expects to finish the data retrieval process (assuming more can be done than already has been done), but DoD hopes to complete its classification review of the data from the first two tapes by the date of the hearing scheduled in this matter and expects to provide a status update regarding the other tapes at that time. No further action is warranted.[16]

[16] Access to classified information is governed by Executive Order and lies within the control of the Executive Branch. The Constitution commits to the President the authority and responsibility to protect our Nation's security, including the obligation to protect certain information from disclosure, where such disclosure could be expected to harm national security. *See*, *e.g.*, *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) ("The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief."). Thus, courts have long recognized "the primacy of the Executive in controlling and exercising responsibility" over classified information. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (recognizing the Executive's "'compelling interest' in withholding national security information from unauthorized persons in the course of executive business") (internal citation omitted); *see also People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 327 F.3d 1238, 1242-43 (D.C. Cir. 2003). That deference is due not only to the constitutional role of the President, but also because of "practical" concerns: "[T]he Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information." *El-Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007); *see also Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) (recognizing that the disclosure of classified information may increase the risk to national security, irrespective of the trustworthiness of any particular individual: "It is not to slight judges, lawyers, or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised") (quoting *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975)). There is thus no basis for Plaintiffs' request that the Court appoint a special master or any other third party to attempt to access and review the tapes for purposes of discovery in this case. *See Egan*, 484 U.S. at 527 (authority to determine who may have access to classified information "is

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Finally, Plaintiffs' request that Defendants produce a witness "to testify regarding the contents and authentication of the magnetic tapes," (Mot. 20), is unwarranted. First, as Defendants repeatedly have explained to Plaintiffs, DoD is unaware of any employee within the Agency who could testify as to the contents of over approximately 40-year-old magnetic tapes. Second, with respect to the authentication of the contents of the tapes, Defendants are willing to provide a certification under Rule 902 that the contents of the magnetic tapes are, in fact, the contents of the magnetic tapes.[17] Third, as discussed below, Plaintiffs previously moved for 16 additional depositions – a request the Court granted, in part, by permitting 8 additional depositions. Plaintiffs elected not to use one of their 8 depositions on this topic. They should not be permitted now to effectively ignore the Court's order and allot themselves an extra deposition.

IV. PLAINTIFFS CANNOT ESTABLISH GOOD CAUSE FOR SEEKING NEW DEPOSITIONS AND RE-OPENING PRIOR DEPOSITIONS

In addition to the deposition concerning the magnetic tapes, Plaintiffs seek four additional depositions beyond the 24 they have already taken. Mot. 20. Plaintiffs have provided no basis, let alone established good cause, for re-opening fact discovery to depose DoD employee Dr. Kelley Brix or for re-opening the depositions of Dee Dodson Morris, Joe Salvatore or Dave Abbot.

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committed by law to the appropriate agency of the Executive Branch"); *In re Nat'l Sec. Agency Telecomm. Records Litig.*, 2011 WL 6823154, at *8 (9th Cir. Dec. 29, 2011) (referring to national security as "a concern traditionally designated to the Executive as part of his Commander–in–Chief power"); *In re United States*, 1 F.3d 1251 (Table), 1993 WL 262656 at * 9 (Fed. Cir. Apr. 19, 1993) (finding that, under separation of powers principles, "the access decisions of the Executive may not be countermanded by either coordinate Branch"); *Stehney v. Perry*, 101 F.3d 925, 931-32 (3d Cir. 1996) (finding that judicial review of the merits of an Executive Branch decision to grant or deny a security clearance would violate separation-of-powers principles); *People's Mojahedin*, 327 F.3d at 1242-43; *Holy Land*, 333 F.3d at 164. Nor is there any basis for Plaintiffs' request, at least at this juncture, that Defendants provide a declaration from DLA describing its retrieval efforts or to produce correspondence between counsel and DLA concerning those efforts (correspondence which not only does not relate to any discovery requests, but would be protected by the attorney-client privilege and/or the work product doctrine).

[17] Given that the magnetic tapes are inarguably ancient documents, it is unclear why Plaintiffs believe they need a witness to authenticate the contents of the tapes in the first instance. *See* Fed. R. Evid. 901(8).

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A. Kelley Brix

Plaintiffs have been well aware of Dr. Brix's involvement in the issues in this case for years and made the strategic decision not to depose her. On October 12, 2011, Plaintiffs filed a joint statement seeking an additional 16 depositions of current and former government employees and contractors (on top of the 16 depositions Plaintiffs had already taken or had scheduled to take). Dkt. 299. This request included Dr. Brix. *Id.* Plaintiffs filed a supplemental brief on October 21, which detailed the claimed need to depose each individual, including Dr. Brix. Dkt. 307. On November 17, the Court allowed Plaintiffs to depose any 8 of the requested 16 deponents. Dkt. 325. Plaintiffs did not seek relief from that Order with the District Court, as Plaintiffs have done with other matters in this case. *See, e.g.,* Dkt. 310. Instead, Plaintiffs selected the 8 individuals whom they wished to depose, and did not include Dr. Brix. Gardner Decl. ¶ 42; Ex. 25. The November 17 Order is law of the case, and Plaintiffs have failed to explain, either during the meet-and-confer process or in their brief, why they believe they can now ignore that Order. Gardner Decl. ¶¶ 43, 44; Ex. 26, 27.

Beyond that, the Ninth Circuit and lower courts routinely reject requests to re-open discovery to take additional depositions where, as here, Plaintiffs were aware of the existence of the witness and failed to diligently pursue the deponent. *See Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1027 (9th Cir. 2006) (holding that Plaintiff failed to demonstrate diligence where he knew of deponent prior to discovery cut-off and made a strategic decision not to depose individual); *Reliance Standard Life Ins. Co. v. Harrison*, No. S-09-532, 2011 WL 338449, at *3 (E.D. Cal. Jan. 31, 2011) (denying request to re-open discovery to take two additional depositions because of party's failure to show good cause where party was aware of identity of deponents before close of discovery and did not diligently pursue depositions); *New York Life Ins. Co. v. Morales*, No. 06-1022, 2008 WL 2622875, at *3 (S.D. Cal. Jul. 1, 2008) ("Insofar as it appears plain that Defendant Lopez knew of these witnesses and their potential as sources of discoverable information, he could have noticed their depositions at any time. The fact that he chose not to do so within the initial or supplemental discovery periods shows a lack of reasonable diligence.").

Plaintiffs' lack of diligence and strategic decision not to depose Dr. Brix during fact discovery doom their untimely request.[18]

B. Dee Dodson Morris

Plaintiffs provide two reasons for their claimed need to re-open Ms. Morris' deposition, neither of which is availing. First, they contend that the production of an email from Ms. Morris about the decision to send out individualized notice letters justifies re-opening her deposition. Mot. 21. As discussed in detail above, *supra* n. 8, Plaintiffs have obtained substantial testimony, both from Ms. Morris and other witnesses, concerning the reasons Defendants chose not to send individualized notice letters. Accordingly, Plaintiffs cannot show good cause for re-opening her deposition based upon their desire for more testimony on this topic.

Second, Plaintiffs claim that they need to re-depose Ms. Morris because her "central importance . . . as the ultimate decision-maker regarding verification of participation in the testing programs . . . [was] only solidified during David Abbot's deposition." Mot. 21. But this is no new revelation to Plaintiffs, as Ms. Morris testified extensively to this precise issue in her deposition, including how DoD determined who properly would be characterized as a test participant.[19] In the absence of any specific articulable, non-cumulative need to re-depose Ms.

[18] As discussed in the Gardner Declaration, Plaintiffs have mischaracterized Defendants' position regarding Dr. Brix, and Defendants at no point offered to make her available to testify concerning the specific edits she proposed concerning the VA information letter, testimony that Defendants believe is properly privileged. *See* Gardner Decl. ¶ 45.

[19] Ms. Morris testified that she oversaw DoD's efforts regarding the research into Cold War-era exposures. Gardner Decl. ¶ 18 , Ex. 4 (Morris Tr. 14:8-15). She testified extensively about DoD's process for verifying participation in the test program. For example, Ms. Morris explained that, in deciding which veterans would be included in the database, DoD considered the time frame, the circumstances of the exposure, and the location of the exposure. *Id.* (Tr. 117:2-10). DoD "was reviewing the documentation that we could find to determine if something had occurred that would create an exposure. And if we felt that it did, we added them." *Id.* (Tr. 122:18-24). In deciding who to include in the database, DoD followed the VA regulation of giving the veteran the benefit of the doubt. *Id.* (Tr. 122:24-123:1); Ex. 29 at 672 (statement from Ms. Morris that DoD "would liberally verify participation" and that "judgment calls would be exercised with collateral association, especially using buddy letters and rosters."). Accordingly, DoD included veterans in the chem-bio database even when the information about the veteran's exposure to chemical or biological agents was ambiguous. Gardner Decl. ¶ 18, Ex. 4 (Morris Tr. 123:2-14). In circumstances where records indicated that a veteran went to Edgewood, but there was no indication that he participated in tests, DoD would determine that it was unable to verify that the veteran was exposed to any chemical or biological substance, but his name would be

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Morris for "up to 4 hours," Plaintiffs' not-so-thinly veiled request for a second bite at the apple should be denied.

C. Joe Salvatore

With respect to Plaintiffs' claimed need to re-open the deposition of Joe Salvatore, who they deposed for a full day, they assert that "the documents produced by DVA pursuant to the Court's deliberative process *in camera* order (Docket No. 327) are alone sufficient to demonstrate good cause to resume his deposition." Mot. 21-22. This argument fails for at least two reasons. First, the fact that documents were produced after a witness's deposition does not, standing alone, justify re-opening that deposition. *Foster v. Metro. Life Ins. Co.*, No. C-03-02644, 2005 WL 1397512, at *1 (N.D. Cal. June 14, 2005) (denying request to re-open deposition where new documents had been produced after deposition). Second, as discussed above, *supra* at 5, Plaintiffs were well aware that Defendants were still producing documents at the time they sought Mr. Salvatore's deposition (and that VA had withheld a number of documents on privilege grounds), and they made the strategic decision to depose him despite that fact. Having made the tactical decision to depose Mr. Salvatore despite the awareness that additional responsive documents would be produced, Plaintiffs have no basis for re-opening Mr. Salvatore's deposition.

Indeed, the ***only*** specific document Plaintiffs claim justifies re-opening Mr. Salvatore's deposition is an email that he sent to a number of recipients, to which one of them, Dr. Brown, responded with an email noting what he perceived to be inaccuracies in the DoD fact sheet. Gardner Decl. ¶ 61, Ex. 37. Plaintiffs do not explain why they need to depose Mr.

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flagged in the database so that if something was later added, DoD could modify that database entry. *Id.* (Tr. 90:4-17). Even those veterans who were not tested were included in the database, but identified as a "no test." *Id.* (Tr. 125:1-6). Similarly, veterans who were a test subject for only one day were included in the database. *Id.* (Tr. 125:8-13). Participants in field tests were also included in the database once those records were located. *Id.* (Tr. 126:10-21). By contrast, DoD considered "confidence tests" utilized during basic training, gas mask or chamber exercises involving chlorine, sniff tests, and three-drop tests on the forearm to be training exercises rather than "exposures," and, accordingly, these were not included in the database. Gardner Decl. ¶ 46, Ex. 28; ¶ 48, Ex. 30 ("We are looking for veterans exposed during CB testing, not training. Consequently, exposure to mustard (three drop test) or tear agents during training does not count as a testing exposure"); ¶ 49, Ex. 31.

Salvatore on an email that he sent, particularly given that Plaintiffs already have obtained extensive testimony on this email from Dr. Brown himself, his supervisor, Dr. Kenneth Hyams; and two employees of the Veterans Benefits Administration, Glen Wallick and David Abbot. *See* Gardner Decl. ¶¶ 23, 50, 51, 52, Ex. 9, 32, 33, 34 (Hyams Tr. 123:14–155:10, 124:5–16; 163:22–177:1); (Wallick Tr. 128:22–136:16); (Brown Tr. 272:15–281:17); (Abbot Tr. 191:21–196:12; 197:16–207:23). Moreover, the emails in exhibit 37 included a number of high-ranking VA officials, including staff members from the office of the Undersecretary for Benefits, who was the ultimate signatory on the notice letter. Gardner Decl. ¶ 52, Ex. 34 (Hyams Tr. 124:5–6). These recipients, characterized by Dr. Hyams as "major players" in VBA, made the determination concerning whether comments were included in the notice letter. *Id.* (Tr. 124:5–16). There is no evidence that Mr. Salvatore responded to Dr. Brown's email, or that his comments or opinion would have any effect on the content of the notice letter itself. Plaintiffs cannot show how additional testimony on this email would be relevant or non-cumulative, let alone why they believe they are entitled to another 4 hours of deposition testimony from Mr. Salvatore based upon this email.

D. Dave Abbot

The ***sole*** basis for seeking an additional four hours of deposition testimony from Mr. Abbot beyond the ten hours (over two days) they have already taken is because VA recently identified additional documents that it found on an old server,[20] and Plaintiffs speculate that they ***may*** want to question him about those documents. Mot. 22. Notably, Plaintiffs do not identify any specific area that they believe they need to question Mr. Abbot about that they have not already covered with him, and any consideration of re-opening his deposition, ***before Plaintiffs have even reviewed the documents,*** is by definition premature.[21]

[20] *See* Declaration of Anne Moroz at ¶ 6 (explaining how VA discovered this file).

[21] Plaintiffs provide no factual or legal basis for their demand that "Defendants cover Plaintiffs' travel and lodging expenses," and accordingly, this bare assertion should be summarily rejected. Mot. 22.

V. CIA FOIA SET DOCUMENTS

Despite repeated requests by Defendants for the purported relevance of all the documents at issue, Plaintiffs attempt to offer a relevance basis for only three of the eleven sets of documents. These three sets of documents, however, are irrelevant, cumulative, and encompassed within prior orders of this Court denying Plaintiffs discovery related to VA. The remaining eight sets of documents fail if for no other reason than Plaintiffs themselves cannot identify how these documents are relevant to their claims. Additionally, the eight sets concern non-service member testing, which this Court already has ruled is outside the scope of Plaintiffs' claims against the CIA. Finally, even if some of the eleven sets of documents had some minimal relevance, it would impose an undue burden on the CIA to require it to search for and either log or produce them.

Plaintiffs have identified two sets of documents regarding LSD that they contend are relevant to their claims against DoD.[22] Pls.' Ex. Y, MORI ID Nos. 17473, 184548. Even if the LSD documents were relevant, which they are not, Plaintiffs' request is cumulative of the extensive discovery they already have received concerning LSD.[23] The Army provided Plaintiffs with a bibliography from the Defense Technical Information Center with more than 548 entries concerning LSD, and Plaintiffs chose the entries they wanted. Gardner Decl. ¶ 56. Additionally, Plaintiffs (1) received the Army's 1980 "LSD Follow-Up Study," for which the Army attempted to contact every service member exposed to LSD as part of its test programs and which analyzed

[22] Plaintiffs' claims that the eleven sets of documents are "highly relevant" to their claims, Mot. 24, is undercut by two facts. First, Plaintiffs have demonstrated a lack of diligence in bringing this dispute to the Court. Despite the CIA providing Plaintiffs with the MKULTRA FOIA documents more than two years ago, Plaintiffs did not pursue this discovery dispute until shortly before the close of fact discovery. Gardner Decl. ¶ 64. Second, Plaintiffs previously contended that only seven of the eleven sets of documents were relevant to their claims, and thus they have already effectively conceded that at least four sets are not. Pls.' Ex. W at 1 (failing to include MORI ID Nos. 17473, 146143, 146419, 146200).

[23] While it does not believe LSD documents are relevant, the CIA offered to search for and review two LSD documents in an effort to resolve the last dispute against the CIA (the two documents were the only ones identified by Plaintiffs at that time as being potentially relevant to health effects). Gardner Decl. ¶ 55. In return, however, the CIA asked that Plaintiffs agree to drop their request for the other FOIA documents, as Plaintiffs had not identified how the remaining documents would be relevant to their secrecy oath claim against the CIA. *Id.* Plaintiffs would not agree either to drop the remaining document requests or to identify the purported relevance of the remaining documents. *Id.*

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the potential health effects of LSD usage on test participants; (2) received test files of the service members involved in the Army's chemical test programs, which would include any recorded health effects they experienced at the time of administration; (3) received follow-up studies by the National Research Council that included an analysis of LSD usage during the experiments and also included participant surveys regarding health effects; and (4) deposed Dr. George Aghajanian, a neuropsychologist with extensive research experience related to LSD. Gardner Decl. ¶ 57. Furthermore, it is unclear how the few redacted paragraphs from nearly sixty-year old CIA documents, many of which appear to contain anecdotal discussions about LSD, would be relevant to Plaintiffs' third-party claims against DoD, particularly given the extensive discovery they have received. Plaintiffs' request for LSD documents is both irrelevant and cumulative.

The third and final set of documents discussed in Plaintiffs' motion pertains to a MKULTRA project involving retirees (not active service members) at a VA domiciliary. Pls.' Ex. Y, MORI ID No. 17383. Plaintiffs make clear that they seek this document for "Plaintiffs' DVA bias claim." Mot. 24. However, this Court previously ruled that Plaintiffs are not entitled to discovery from the CIA for their claims against VA or regarding programs that did not involve service members. Dkt. 294 at 6-8.

Plaintiffs' remaining requests are nothing more than a continuing fishing expedition that, in Plaintiffs' view, should be impeded by neither the close of discovery[24] nor this Court's prior orders.[25] As discussed above, Plaintiffs failed to identify a relevance basis for the remaining eight

[24] Indeed, Plaintiffs are clearly using this as an entryway to yet more discovery, despite the fact that discovery has already closed. Mot. 23 n.20 (noting that Plaintiffs "may seek further leave of the Court" for additional documents purportedly related to "involvement by the CIA in the testing programs" after the resolution of this discovery dispute).

[25] Plaintiffs cite to an email from Dr. James Ketchum to support their contention that the CIA had a broader role in DoD's test programs. Mot. 23 n.20. During the meet and confer process, however, Defendants reminded Plaintiffs that they questioned Dr. Ketchum about the very documents they cite and that Dr. Ketchum stated that he did not, in fact, have any personal knowledge about the CIA's involvement in the test programs or testing on service members. Gardner Decl. ¶ 58, Ex. 35 (Ketchum Tr. 289:14-17) (referring to the document to which Plaintiffs cite as evidence that "testing was discussed in full detail with the CIA" and responding that "[i]t wasn't discussed by me with the CIA"); *id.* (Tr. 127:4-13)(stating that he had no personal knowledge about the CIA's alleged role in testing overseas, and indeed that "a special purpose team" had been formed "*without any coordination with the CIA* and gone over to Europe

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sets of documents, which relate to CIA test programs that did not involve testing on service members. Indeed, Plaintiffs seek documents related to test programs, such as ARTICHOKE and MKNAOMI, *see, e.g.*, Pls.' Ex. Y, MORI ID Nos. 145893 (ARTICHOKE), 146172 (MKNAOMI), despite having received testimony and other evidence from the CIA that those programs did not involve testing on service members. *See, e.g.*, Gardner Decl. ¶ 60, Ex. 36 (Cameresi Tr. 302:13-16)(stating that no service members were tested under Project ARTICHOKE); *id.* (Tr. 301:21-22)(stating that "no human beings were tested upon" in connection with MKNAOMI). Plaintiffs' continued requests for these documents is in direct contravention of this Court's order that Plaintiffs' discovery requests "should be limited" to the "CIA's involvement (whether direct or through financial support) in test programs involving service members." Dkt. 294 at 7-8.

Finally, even if some of the documents could be relevant, this Court should deny Plaintiffs' request because it would impose an undue burden on the CIA. The documents from the CIA's FOIA set were redacted by hand and publicly released over thirty years ago, and the original, archived versions currently occupy some eighty linear feet of shelf space. Cameresi Decl., Dkt. 279-26, at ¶ 78. In order to conduct a renewed privilege review, a CIA employee would have to hand-search through these eighty feet of documents (which have become disorganized over time) to find the original, unredacted versions requested by Plaintiffs. *Id.* Furthermore, there is a distinct possibility that the unredacted versions may not even be located, as the documents may well have been misfiled or misplaced in the more than thirty years since the documents were reviewed and released in FOIA. *Id.* Given the at best minimal, if any, relevance of these documents, the burden of Plaintiffs' request outweighs any benefit. *Compaq Computer Corp. v. Packard Bell Elecs., Inc.*, 163 F.R.D. 329, 335-36 (N.D. Cal. 1995) ("[I]f the sought-after

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to administer LSD to suspected spies")(emphasis added); *see* Gardner Decl. ¶ 59 (noting that Defendants discussed these excerpts with Plaintiffs during a meet and confer teleconference). Despite Defendants pointing out that Dr. Ketchum had provided no basis on which to argue the CIA had a role in service member testing, Plaintiffs pressed ahead with their baseless assertion without even acknowledging Dr. Ketchum's deposition testimony in their motion.

documents are not relevant nor calculated to lead to the discovery of admissible evidence, then any burden whatsoever imposed . . . would be by definition "'undue.'").

CONCLUSION

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

Respectfully submitted,

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