

1 GORDON P. ERSPAMER (CA SBN 83364)  
 Gerspamer@mofo.com  
 2 EUGENE ILLOVSKY (CA SBN 117892)  
 EIllovsky@mofo.com  
 3 STACEY M. SPRENKEL (CA SBN 241689)  
 SSprenkel@mofo.com  
 4 MORRISON & FOERSTER LLP  
 425 Market Street  
 5 San Francisco, California 94105-2482  
 Telephone: 415.268.7000  
 6 Facsimile: 415.268.7522

7 Attorneys for Plaintiffs Vietnam Veterans of America; Swords to  
 Plowshares; Veterans Rights Organization; Bruce Price; Franklin  
 8 D. Rochelle; Larry Meirow; Eric P. Muth; David C. Dufrane;  
 9 Wray C. Forrest; Tim Michael Josephs; and William Blazinski

10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

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

**Case No. CV 09-0037-CW**  
**PLAINTIFFS' REPLY IN SUPPORT  
 OF MOTION TO COMPEL  
 DISCOVERY FROM DEFENDANT  
 DEPARTMENT OF VETERANS  
 AFFAIRS**  
 Hearing Date: July 19, 2012  
 Time: 9:00 a.m.  
 Courtroom: F, 15th Floor  
 Judge: Hon. Jacqueline Scott Corley  
 Complaint filed January 7, 2009

1 Plaintiffs respectfully submit this Reply in support of Plaintiffs' Motion to Compel  
2 Discovery from Defendant Department of Veterans Affairs ("DVA") (Docket No. 447).

3 **I. DVA PRIVILEGE LOG**

4 Because the Court has already ordered an *in camera* review of the DVA's June 13, 2012  
5 Privilege Log documents withheld under claims of deliberative process privilege (Docket  
6 No. 456), Plaintiffs will only briefly address Defendant's Opposition (Docket No. 460 ("Opp.")).  
7 Despite the fact that the Court has already ordered an *in camera* review, Defendant DVA spends  
8 the majority of its Opposition recycling old arguments previously rejected by the Court  
9 concerning this topic. (Opp. at 1-7; Declaration of John J. Spinelli (Docket No. 460-1  
10 ("Spinelli Decl.")) ¶ 30; *cf.* Docket Nos. 327, 336 (District Court denying Defendant's  
11 objections), 423, 430.) Consistent with prior orders, the Court should once again reject DVA's  
12 attempt to withhold documents under purported claims of the deliberative process privilege.<sup>1</sup>

13 Based on a review of the Spinelli Declaration, DVA's current privilege log appears to  
14 suffer from similar deficiencies as prior logs. For example, DVA does not identify any final  
15 version, or admits there is no final document, for some entries, including: DVA097 0187, 0188-  
16 0189, and DVA090 0242-0244. (*See* Spinelli Decl. ¶¶ 11-12.) Consistent with prior orders, to  
17 the extent that no final document exists, the Court should compel DVA to produce the purported  
18 "draft" document because it may be the only source available for such information. (*See, e.g.,*  
19 Docket No. 430 at 5.) In other instances, it is unclear from the Declaration whether final  
20 documents have been produced to Plaintiffs because DVA does not identify the production  
21 number for the "final" document, including: DVA097 0010-0012 (claimed final document is  
22 mustard gas "final memorandum"); DVA097 0357-0368, 0369-0381, 0383, 0392-0410, 0411-

---

23  
24 <sup>1</sup> Plaintiffs received a new privilege log from DVA on June 29, 2012, logging 9 new  
25 entries. Plaintiffs have begun the meet and confer process with DVA regarding its new log, but  
26 would welcome the Court's guidance on how best to proceed, should the parties reach an  
27 impasse. Perhaps the simplest path would be for DVA to submit these few documents to be  
28 considered during the Court's current *in camera* review. Plaintiffs did not receive a new privilege  
log from Defendant Department of Defense ("DOD") on or before the June 29 deadline, and have  
still not received a new log. Therefore, Plaintiffs assume that the DOD has completed logging  
any remaining documents.

1 0412, 0413-0423, 0426-0428 (claimed final document is “final version of [mustard gas] white  
2 paper”); and DVA097 0171-0174 (final version “may be available at the National Archives and  
3 Records Administration”).<sup>2</sup> (See Spinelli Decl. ¶¶ 30, 38, 50.)

4 DVA also tries out apparent summary judgment arguments concerning the DVA claim in  
5 opposition to Plaintiffs’ discovery motion. (Opp. at 3-4.) In a footnote, DVA even suggests that  
6 this Court should “defer consideration of Plaintiffs’ motion to compel pending the District  
7 Court’s resolution of [‘VA’s motion for reconsideration and Plaintiffs’ motion to substitute’].”  
8 (Opp. at 4 n.6.) This apparent request for a stay in a footnote should be denied. First, there is no  
9 motion for reconsideration currently pending; there is only a *motion for leave* to file, and that  
10 motion has been pending since May 24, 2012 (Docket No. 431). Leave to file has not been  
11 granted, and the District Court has not asked Plaintiffs to brief DVA’s motion, including DVA’s  
12 request for a stay embedded in its proposed motion for reconsideration (Docket No. 431-1 at  
13 14-15).<sup>3</sup>

14 Furthermore, even if the District Court were to grant DVA’s motion for leave and then  
15 subsequently grant DVA’s motion for reconsideration (dismissing DVA from the case), virtually  
16 all of the discovery sought is just as highly relevant to the claims against the other Defendants, if  
17 not more so. (See Docket No. 430 at 5 (finding that similar documents in these same categories  
18 were “extremely relevant to Plaintiffs’ bias claim against DVA *and their claims against the other*

---

19  
20 <sup>2</sup> To assist the Court during *in camera* review, Plaintiffs wanted to elaborate briefly on  
21 one example of their substantial need for documents concerning the DVA’s website. As  
22 explained in Plaintiffs’ Motion, the DOD argues that Plaintiffs’ proposed class representatives  
23 lack standing because the DOD has concluded that there are no long-term health effects from any  
24 of the over 400 agents used in the testing programs. (See Motion at 6 (citing Docket No. 393 at  
16.) Similar to other internal DVA and DOD documents, to the extent there is additional health  
effects or test substance information available that is being withheld or omitted, including as  
reflected in drafts of Defendants’ webpages, that discovery would further rebut the DOD’s  
argument.

25 <sup>3</sup> And, of course, a party may not avoid its discovery obligations by merely filing a motion  
26 for stay; the Court must grant the motion first. See, e.g., Cal. Prac. Guide Fed. Civ. Pro. Before  
27 Trial, Ch. 11 (III)-C (Rutter Group 2012) (“The mere fact that a motion for protective order is  
28 pending does not itself excuse the subpoenaed party from making discovery” (citing *Pioche  
Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964))). Otherwise, parties could  
delay producing discovery almost indefinitely by filing serial motions.

1 *Defendants*” (emphasis added); *see also* Docket Nos. 327 at 4-5; 423 at 2, 8.) Thus, DVA’s  
2 attempt to further delay the completion of discovery at this late stage should be rejected.

3 **II. DVA SHOULD REIMBURSE PLAINTIFFS’ COSTS RELATED TO**  
4 **DEPOSITIONS**

5 Pursuant to the Court’s invitation that it would “consider the question of remedy”  
6 concerning DVA’s February 2012 privilege log (Docket No. 420 at 3 n.3), Plaintiffs respectfully  
7 request the modest, but still symbolic, remedy that DVA reimburse Plaintiffs’ costs for resuming  
8 the depositions of Joe Salvatore and David Abbot.

9 In its Opposition, DVA argues that it should not cover costs related to Mr. Salvatore’s  
10 deposition because “Plaintiffs made the tactical decision to proceed with Mr. Salvatore’s  
11 deposition on June 29, 2011 despite full knowledge that VA had withheld a number of documents  
12 on the basis of privilege.” (Opp. at 7 (citing Docket No. 408 at 14).) But the Court has already  
13 rejected that exact argument in the context of Plaintiffs’ request to resume Mr. Salvatore’s  
14 deposition. (*See* Docket No. 408 at 14-15 (“Plaintiffs could not have anticipated the contents or  
15 volume of discovery outstanding regarding Mr. Salvatore that would be produced pursuant to the  
16 Court’s November 23, 2011 Order.”).)

17 With respect to David Abbot, DVA claims that “Plaintiffs’ request to re-open Mr. Abbot’s  
18 deposition is based largely upon the fact that VA recently discovered a file he placed onto an old  
19 server” and thus, “there is simply no connection between the Court’s order regarding a ‘remedy’  
20 and Plaintiffs’ justification for seeking to re-open Mr. Abbot’s deposition.” (Opp. at 9-10.) DVA  
21 ignores, however, the full context of Plaintiffs’ need to resume Mr. Abbot’s deposition. As  
22 explained during the June 21, 2012 discovery hearing, Plaintiffs sought to resume Mr. Abbot’s  
23 deposition not only because of the volume of pages produced from his back-up files, but also  
24 because of the numerous documents concerning Mr. Abbot that the Court ordered produced from  
25 DVA’s February 2012 privilege log after *in camera* review. Indeed, either basis independently  
26 would have justified resuming his deposition. Plaintiffs’ request is consistent with the Court’s  
27 invitation to consider the question of remedy.

1 DVA further argues that Plaintiffs should accept various “reasonable” proposals to reduce  
2 costs, such as deposing Dr. Brix (a DOD employee) and Mr. Salvatore (a DVA employee) on the  
3 same day, or that unidentified D.C. counsel without prior involvement in this complex case  
4 should conduct the depositions.<sup>4</sup> Contrary to these “reasonable” proposals, Plaintiffs’ counsel  
5 will, of course, proceed with these depositions in a manner consistent with our best preparation,  
6 professional judgment, and our obligations to our clients. This includes the standard practice of  
7 videotaping deponents who reside outside of the District, which Plaintiffs have done for many  
8 depositions taken in this case.<sup>5</sup>

9 In light of the prejudice caused by DVA’s untimely assertions of privilege in its February  
10 2012 log and improper withholding or redacting of such documents, Plaintiffs respectfully request  
11 that the Court impose any and all appropriate remedies, including that DVA reimburse the costs  
12 of resuming the depositions of Joe Salvatore and David Abbot. Considering the prejudice caused,  
13 the remedy sought in this instance is quite modest.

14  
15  
16  
17  
18  
19  
20  
21  
22  

---

23 <sup>4</sup> Despite the passage of three months since the Court’s April 6, 2012 Order (Docket No.  
24 408 at 14-16), Plaintiffs are having difficulty scheduling these depositions with Defendants, as  
25 Defendants have retracted their agreement to produce the witnesses on specified July dates. If the  
parties are unable to resolve this dispute, the Court’s intervention may unfortunately again  
become necessary.

26 <sup>5</sup> Plaintiffs included “host costs” because Mr. Abbot’s previous deposition occurred in  
27 Gainesville, Georgia, requiring Plaintiffs to pay the costs for a location to host the deposition  
there. To the extent both depositions can take place in Plaintiffs’ counsel’s office, “host costs”  
would be inapplicable.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**III. CONCLUSION**

For the foregoing reasons and those addressed in Plaintiffs' Motion to Compel, Plaintiffs respectfully seek an order compelling the discovery and costs requested.

Dated: July 3, 2012

GORDON P. ERSPAMER  
EUGENE ILLOVSKY  
STACEY M. SPRENKEL  
  
MORRISON & FOERSTER LLP

By: /s/ Gordon P. Erspamer  
Gordon P. Erspamer  
[Gerspamer@mofo.com]

Attorneys for Plaintiffs