Nos. 13-17430, 14-15108

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIETNAM VETERANS OF AMERICA, et al.,

Plaintiffs-Appellants/Cross-Appellees,

v.

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants-Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SUPPLEMENTAL RECORD EXCERPTS FOR DEFENDANTS-APPELLEES/CROSS-APPELLANTS

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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 (JC) **DECLARATION OF DEE DODSON MORRIS**

DECLARATION OF DEE DODSON MORRIS

I, Dee Dodson Morris, declare as follows:

1. I am the Chief of Staff for the Joint Requirements Office (JRO) for Chemical, Biological, Radiological and Nuclear Defense (CBRND) of the Joint Staff, J-8. I am responsible for the day-to-day operations of the JRO.

a. I was commissioned into the Army from the Virginia Tech Corps of Cadets in June 1976, graduating with a Bachelor of Science degree in Textiles.

b. Upon commissioning, I was detailed and later transferred to the U.S. Army Chemical Corps, where I served until September 1998. My military career began as an Escort and Disposal Officer in the U.S. Army Technical Escort Unit at Aberdeen Proving Ground, Maryland. I served in a variety of staff and leadership positions in Texas and Germany including activating commander of the 181st Chemical Company (Decon).

c. While serving in Detroit, Michigan, I was the Chemical Corps Branch Advisor to the Army National Guard and Reserve in the state, followed by an acquisition tour at the U.S. Army Tank and Automotive Command, where I was the warranted Weapons System Manager for the Nuclear, Biological and Chemical Reconnaissance System (Fox) Chassis. I served twice on Johnston Island, first as the Chemical Surety Officer managing the then largest Chemical Personnel Reliability Program, and later as Executive Officer of the US Army

Chemical Activity, Pacific. I supervised the destruction of chemical weapons and escorted recovered World War II mustard projectiles between Mbanika, Solomon Islands and Johnston Island.

d. Between my Johnston Island tours, I was a Conventional Armed Forces in Europe Treaty Liaison Officer and Chemical Weapons Agreements Mission Commander at the On-Site Inspection Agency located at Dulles International Airport, where I participated in humanitarian aid deliveries to Russia and Ukraine, escorted Russian inspectors for the first inspections of the United States' stationed forces in Europe, and led the first bilateral challenge inspection of a Russian chemical weapons storage facility. Upon my final return to the United States, I was the Independent Operational Evaluator for chemical, ordnance, military police and medical equipment at the Army Evaluation Command.

e. I completed my Army career as the Deputy Director, Investigations and Analysis of the Office of the Special Assistant for Gulf War Illnesses. I was appointed to the civil service in September 1998 and held several positions within the Office of the Special Assistant and the Office of the Deputy Assistant Secretary of Defense for Force Health Protection and Readiness before moving to the Joint Staff in December 2007. During this time, I was the principal investigator and exposure certification official for service members involved in chemical and biological tests and experimentation, including the test programs at issue in this case, and worked closely with the Department of Veterans Affairs (VA) on these matters.

f. More specifically, I was personally and directly involved in the search and outreach efforts associated with the chemical agent program at issue in this case during the early-to-mid 2000s. As discussed above, from 2000 to 2007, I was assigned to the Office of the Assistant Secretary of Defense for Health Affairs and held a variety of positions in that office. In that position, I conducted research into the exposures that test participants had undergone during the chemical and biological test program at issue in this case. In addition, my office was responsible for receiving information from Battelle Memorial Institute concerning the test programs, and developing the database shared between DoD and VA concerning the test program. I participated in numerous meetings with VA and DoD officials to discuss the implementation and

coordination of notification efforts, and assisted in the management of a call center that was used by test participants to obtain additional information about their tests. During this time period, I reported to Dr. Michael E. Kilpatrick who, at the time, was the Deputy Director, Force Health Protection and Readiness Programs. My understanding is that Dr. Kilpatrick was deposed for three days in this case and served as DoD and the Army's Rule 30(b)(6) designee. In addition, Plaintiffs took my deposition in this case.

g. In connection with my job responsibilities, I am familiar with this litigation brought by Plaintiffs as well as the government's efforts to identify and notify test participants. I base this declaration on both my personal knowledge and knowledge that has been made known to me during the course of this litigation in my official capacity.

2. The purpose of this declaration is to describe the efforts the government understands would be necessary to comply with the Court's injunction. As I understand the Court's injunction, the Army must search for and notify test participants of any "Newly Acquired Information" since 2006, as defined in paragraphs 2a-d of that injunction. I understand the "Newly Acquired Information" to fall into two broad categories: (1) information concerning the conduct of the test programs which ended more than 35 years ago (*i.e.*, the substances used during the test program, the doses used, the modes of administration); and (2) information concerning long-term health effects resulting from the test program.

3. Below I describe the efforts the government believes would be necessary to comply with the Court's injunction in three separate categories: (1) identification of additional information concerning the conduct of the program; (2) identification of new information concerning health effects of the program; and (3) the process of notifying participants of any new health effects.

4. The government has already undertaken exhaustive steps to identify all reasonably identifiable test participants for the test programs at issue in this case. Specifically, the government has conducted a voluminous search over the course of many decades and at the cost of millions of dollars, provided that information to the VA and the VA has provided notice to all test participants for whom contact information could be found. I am unaware of any "Newly

Acquired Information" to provide to class members that falls into the first category of Newly Acquired Information regarding the conduct of the test program. For this reason, the government believes this aspect of the Court's injunction should not impose any new additional burdens because nothing more could reasonably be done to comply.

5. The burdens the Court's injunction likely will impose with respect to the identification of new information concerning health effects of past programs and notifying participants of any new health effects are difficult to quantify with precision given the lack of clarity as to precisely what the injunction requires the Army to do. For example, the injunction does not specify what efforts are required to obtain new information about possible new health effects from the hundreds of substances at issue in this case or how often (and for how long) those efforts must be continued. Despite this uncertainty, however, I am confident that even a minimum level of compliance with the Court's injunction will impose substantial monetary and manpower burdens on the Army and may cause harm by unnecessarily alarming past test participants with additional notifications of minimal value to them. Assuming certain minimum parameters necessary to comply with the injunction, I outline the principal costs, burdens and concerns below.

6. My estimate of the costs and efforts necessary to comply with the aspect of the Court's injunction concerning health effects is based on my personal knowledge, as well as communications with other knowledgeable individuals within the Department of Defense, including Anthony Lee, Larry Sipos, and Dr. Phillip R. Pittman. Mr. Lee is a program analyst in the Office of the Assistant Secretary of Defense for Nuclear and Chemical Biological Programs. He has responsibility for managing and funding the U.S. chemical and biological test repository that is shared with VA to provide notifications to them, for reviewing monthly reports and data submissions from Battelle Memorial Institute, and conducting quarterly program reviews. Mr. Sipos is the Executive Officer to the Deputy Assistant Secretary of Defense for Force Health Protection & Readiness, the office primarily responsible for the service branches' search efforts related to the test programs at issue in this case. Dr. Pittman is Chief of the Department of Clinical Research at United States Army Medical Research Institute for Infectious Diseases

("USAMRIID"), Fort Detrick, and has been involved in conducting retrospective medical research studies concerning Project Whitecoat, which involved the military's biological test program at issue in this case.

7. With respect to the Court's requirement that the government locate, collect and disseminate, on an ongoing basis indefinitely, "Newly Acquired Information" pertaining to 1) inconveniences and hazards reasonably to be expected by test subjects as a result of their participation in the testing and 2) effects upon their health which may possibly come from such participation, it is my assessment that such compliance will impose significant costs burdens upon the government.

8. As an initial matter, I am unaware of any information discovered since June 30, 2006, that may affect the well-being of the test subjects that has not already been made available to class members. Nevertheless, there are several possible options for complying with this aspect of the Court's injunction, and each presents substantial costs and burdens.

9. One option would be to contract with the Institute of Medicine ("IOM"), or some other private contractor, to conduct new literature searches related to the pertinent test substances and compare the results of those comprehensive searches previously conducted by the IOM to determine whether there has been any material change in the state of the scientific literature. In the 1980s, the Department of the Army contracted with the National Research Council ("NRC") to conduct an extensive review of the Edgewood test program and assess the possible long-term health effects of exposure to the approximately 254 chemical substances used during the test program. The results of that study were reported in three voluminous reports between 1982 and 1985. In conducting its study, the NRC formed committees to review Edgewood reports, and extensive extracts were prepared of preclinical animal and human protocols and technical reports at Edgewood libraries and other Edgewood facilities where records of subjects and details of exposure conditions and clinical findings were maintained. Digests of the entire available literature, both classified and unclassified, were prepared by consultant pharmacologists. The NRC staff also organized the tests into several pharmacological classes and established two expert panels to evaluate potential adverse health effects. The panels then met on several

occasions to discuss the results of their findings. In addition, as reflected in volume 3 of the NRC study, the NRC conducted a mortality study based on questionnaires provided to all the living test participants who the NRC was able to locate.

10. Contracting with the NRC to re-evaluate or update the results of its 1980s studies would be both costly and time consuming. The original NRC study took five years to complete. And, while it is probable that an updated literature search and assessment of health effects may not take as long as the original study, there is no basis to conclude that it could be completed in ninety days, or even six months. Rather, consistent with the prior study, it is likely that such an effort would run into a year, if not years. In addition, once the NRC reaches its conclusions, those conclusions would still need to be reviewed and assessed by the Army to determine whether, in its judgment, any information exists that may adversely affect the well-being of the class members.

11. Although costs are difficult to estimate with precision, the federal government has contracted with IOM for scientific and medical evaluations of the literature and an assessment of the long-term health effects associated with certain exposures in comparable circumstances. For example, in 1998, the government contracted with the IOM to review the scientific and medical literature on the long-term adverse health effects to which Gulf War veterans may have been exposed. The results of that study were published in a multi-volume report entitled "Gulf War and Health." In 2000, the IOM released the first volume of the results of that study, which covered only four categories of substances: depleted uranium, pyridostigmine bromide, sarin, and vaccines. Additional volumes have been released covering different chemical substances in the following years. It is my understanding that volume two of that multi-volume study, which was released in 2003 and which focused on approximately 30 insecticide and solvents, involved the retrieval of approximately 30,000 abstracts, the review of approximately 3,000 peer reviewed publications, and took approximately five years to complete at a cost in excess of $1 million.

12. At my request, Mr. Lee asked the IOM for an informal estimate of the cost necessary to conduct a renewed evaluation of the scientific and medical literature concerning the potential health effects associated with the hundreds of substances used during the test program

involving the class members. The IOM's informal estimate reflected the following costs and time frames:

Year 1 . . . . . $ 2,000,000

Year 2 . . . . . $ 2,000,000

Year 3 . . . . . $ 2,000,000

Year 4 . . . . . $ 1,400,000

Year 5 . . . . . $ 1,400,000

Total for Years 1-5 . . . $ 8,800,000.

13. These figures are necessarily quite tentative at this stage, but reflect an initial good faith estimate of the potential costs involved in attempting to conduct a new evaluation of the medical literature on the substances used during the test program. In addition, this estimate does not include the additional time and cost necessary for the Army to evaluate the results of the IOM's findings and conduct any follow-on analyses that may be appropriate. Also, because the Court's injunction mandates updates to this effort on a continuing basis indefinitely into the future, the total cost of compliance with this aspect of the Court's injunction necessarily will be much greater.

14. As illustrated by the "Gulf War and Health" multi-volume study, the government often contracts with entities like the IOM to study the potential health effects associated with certain exposures, many times at the request of Congress. To the extent such studies reveal information that is germane to the long-term health of the test participants in this case, that information would be made available to test participants.

15. A second possible option for complying with this aspect of the Court's injunction is for the Government itself to conduct scientific and medical literature searches pertaining to the hundreds of substances at issue. This option also presents substantial burdens and costs to the government.

16. For example, I requested that Dr. Pittman estimate the costs associated with reviewing and evaluating the medical and scientific literature associated with just the

approximately twelve biological substances and vaccines used during the test program. Dr. Pittman estimates that conducting an in-depth literature search using a group of scientists and assistants would be as follows:

Two researchers	$640,000
Two administrative assistants	$180,000
Supplies	$40,000
Total	$860,000

17. In addition to identifying what, if any, additional research is out there, to meaningfully assess whether this additional literature is pertinent will require a comparison of the literature to the specific circumstances of the test programs at issue in this case. By that, I mean that health effects associated with exposure to a particular substance typically turns upon factors such as the substance or substances the individual was exposed to, the dose or doses administered, and the mode of administration. Accordingly, the government would need to compare the circumstances discussed in the literature to the specific circumstances of the thousands of test participants to determine, on an individualized basis, whether there is an increased risk of adverse health effects. While I cannot estimate such an undertaking with any precision, it is clear that such an effort would be extremely labor- and cost-intensive.

18. These costs identified above necessarily would be substantially greater if these literature reviews included all of the hundreds of test substances used during the test programs, and had to be continuously updated, as may be required by the Court's injunction.

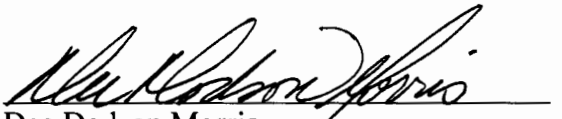
19. Regardless of which option is chosen, substantial efforts also would be necessary to effectively communicate the results of such additional scientific and medical literature searches should the results suggest that there is information that may affect the well-being of the test participants. Effective communication under these circumstances is critical because there is a substantial danger that the notifications contemplated by the injunction could create more harm than it prevents by unduly alarming test participants. More specifically, receipt of official notification by a test subject that he was exposed to a substance that the government has now

determined to be potentially harmful, if not communicated appropriately, is highly likely to cause anxiety, at least until the test subject has an opportunity to consult with his physician about the information he just received.

20. To minimize creating unnecessary anxiety, the government would need to carefully develop an appropriate risk communication plan for every communication that will potentially be disseminated to test subjects. When the DoD and VA sent notice letters with attachments to test participants previously, an extremely labor intensive risk communication review was undertaken to balance the need to provide pertinent information with the desire to avoid overly alarming recipients. This process took approximately five months, with extensive coordination between DoD and VA. Should additional notification efforts be undertaken, each new communication will have to be authored and packaged so as to avoid unnecessarily frightening recipients, including those who are not experiencing health problems. The information transmissions must be detailed enough to jog decades-old memories, but not so detailed as to possibly prompt fabrication of experiences. The language used must be clear and not subject to misinterpretation.

21. Given that this risk communication review effort took approximately five months for general notifications, providing a number of different notices based upon possible different health risks associated with a wide variety of different substances would necessarily require substantially more time, at additional cost and use of manpower.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Washington, D.C., on January 21, 2014.



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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 **NOTICE OF CROSS-APPEAL** Complaint filed January 7, 2009

NOTICE IS HEREBY GIVEN that Defendants United States Department of the Army and John McHugh, United States Secretary of the Army, hereby cross-appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment entered November 19, 2013, and any and all adverse orders and rulings. Plaintiffs have filed an appeal of the final judgment in this case to the United States Court of Appeals for the Ninth Circuit, docket number 13-17430.

Pursuant to Ninth Circuit Rule 3-2, Defendants concurrently submits a Representation Statement, attached hereto as Exhibit A, which identifies all parties to the appeal along with the names, addresses, and telephone numbers of their respective counsel.

Respectfully submitted,

January 21, 2014

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Exhibit 20

THE UNDER SECRETARY OF VETERANS AFFAIRS FOR BENEFITS
WASHINGTON, D.C. 20420

September 20, 2005
REDACTED

CSS REDACTED

Dear REDACTED

Certain documents recently declassified by the Department of Defense (DoD) show that you were exposed to mustard agents (mustard gas, sulfur mustard, nitrogen mustard) or Lewisite during your tour of service while in the Navy. This letter provides information that you may want to consider in determining whether to file a claim for benefits from the Department of Veterans Affairs (VA) based on this exposure.

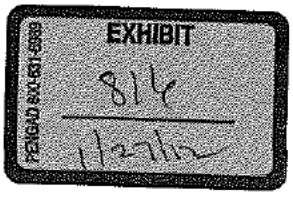
Exposure Periods and Locations

According to DoD, some chemical exposures occurred during combat or in the handling or destruction of chemical agents. However, most chemical exposures occurred in connection with World War II testing programs, via chamber, field, patch, drop, and syringe tests.

The following is a list of all known test, combat, and military occupational duty sites where exposures occurred:

- Bainbridge Naval Training Center, Maryland
- Bari, Italy
- Bushnell, Florida
- Camp Lejeune, North Carolina
- Camp Sibert, Alabama (1943-1944 only)
- Charleston, South Carolina
- Dugway Proving Ground, Utah
- Edgewood Arsenal, Maryland
- Hart's Island, New York
- Great Lakes Naval Training Center, Illinois
- Naval Research Laboratory, Virginia
- Ondal, India (1944 only)
- Rocky Mountain Arsenal, Colorado
- San Jose Island, Panama Canal Zone
- Naval Research Laboratory, Washington, D.C.
- *USS Eagle Boat No. 58*

Note: Some American servicemembers may have participated in Allied mustard agent testing in Finschhafen, New Guinea, and Porton Down, England.



Compensation for Full-Body Exposure

VA may grant compensation to veterans who have certain diseases associated with **full-body exposure** to mustard agents or Lewisite during military service. This means that the entire body was exposed rather than just one or more locations on the skin, such as in a "patch test."

DoD has confirmed that you were subjected to full-body mustard agent or Lewisite exposure during one of the following events:

- Battlefield conditions in World War I
- Field or chamber experiments to test protective clothing or equipment during World War II
- The German air raid on the harbor of Bari, Italy in 1943

Disabilities Due to Chemical Exposure

VA has determined full-body exposure of mustard agents or Lewisite may cause certain disabilities. These include:

- (From mustard agents only) Chronic conjunctivitis, keratitis, corneal opacities, scar formation, or the following cancers: nasopharyngeal; laryngeal; lung (except mesothelioma); or squamous cell carcinoma of the skin
- (From either mustard agents or Lewisite) A chronic form of laryngitis, bronchitis, emphysema, asthma, or chronic obstructive pulmonary disease
- (From nitrogen mustard only) Acute non-lymphocytic leukemia

Health Care

Most veterans are required to apply for enrollment to receive VA health care benefits. If you are not already enrolled with your local VA health care facility we encourage you to do so at your earliest convenience. Please be aware that VA is currently not enrolling new applicants who fall into high income brackets unless they have a service-connected disability. Also, some veterans are required to make co-payments for care and/or medications provided by VA.

What You Can Discuss About The Tests

You may be concerned about discussing your participation in mustard agent or Lewisite tests with VA or your health care provider.

On March 9, 1993 the Deputy Secretary of Defense released veterans who participated in the testing, production, transportation or storage of chemical weapons prior to 1968 from any non-disclosure restrictions. Servicemembers who participated in such tests after 1968 are permitted to discuss the chemical agents, locations, and circumstances of exposure only, because this limited information has been declassified.

If You Have Questions or Want to File a Claim for Benefits

If you have been diagnosed with one of the disabilities discussed above, you should apply for VA disability compensation. If you believe you have any other medical condition that is related to your military service, you should also file a claim for disability compensation.

- To obtain further information or file a claim, call us at 1-800-749-8387 (then select option 4). You may speak to a VA representative from 9:00 a.m. to 5:00 p.m. Eastern time. You can also email us at MUSTARDGAS@VBA.VA.GOV. If you go to one of our regional offices, please take this letter with you.

- If you have questions about mustard agents or Lewisite, contact DoD at (800) 497-6261, Monday through Friday, 9:00 a.m. to 9:00 p.m. Eastern time.

Sincerely yours,

Daniel L. Cooper
Under Secretary for Benefits

Exhibit 26

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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 **DEFENDANT'S RESPONSES TO PLAINTIFFS' SECOND SET OF INTERROGATORIES TO UNITED STATES DEPARTMENT OF VETERANS AFFAIRS**

Defendant Department of Veterans Affairs ("VA" or "Defendant"), by and through undersigned counsel, hereby submit the following objections and responses to Plaintiffs' Second Set of Interrogatories to United States Department of Veterans Affairs:

GENERAL RESPONSES

1. The information submitted herewith is being provided in accordance with the Federal Rules of Civil Procedure, which permit the discovery of any matter not privileged that is relevant to the claims in this civil action. Fed. R. Civ. P. 26(b)(1). Accordingly, Defendant does not, by providing such information, waive any objection to its admissibility on the grounds of relevance, materiality, or any other appropriate ground.

GENERAL OBJECTIONS

1. Defendant objects to Plaintiffs' definition of "TEST PROGRAMS", "TEST SUBJECT", and "TEST SUBJECTS" as overly broad. The term "TEST PROGRAM" is defined to encompass activities at 30 locations, many of which do not appear in Plaintiffs' Third Amended Complaint and/or have no nexus to the testing of volunteer service members. The term "TEST SUBJECT" is defined to include "any PERSON who . . . was a human subject in any experiment in any of the TEST PROGRAMS." This definition has the potential to encompass a wide array of clinical trials and other human tests in any setting, under any circumstances, and within any time frame, irrespective of any relation to the events that are the subject of the Third Amended Complaint.

2. VA is only aware of those volunteer Cold War-era chemical and biological test participants that are contained within the Chemical and Biological database maintained by the Department of Defense ("Chem-Bio database"), for whom sufficient identifying information exists, and: (1) who have filed VA claims for disability compensation; (2) whose survivors have filed VA claims for Dependency and Indemnity Compensation ("DIC"); or (3) who have received

health care from VA and as such, any response VA offers is limited to that population. Accordingly, insofar as Plaintiffs' second set of interrogatories seeks information concerning VA's actions with respect to "TEST PROGRAMS" and "TEST SUBJECT", VA's responses are necessarily limited to such individuals.

3. Defendant objects to Plaintiffs' definitions of "TEST SUBSTANCES" as overly broad because the Chemical and Biological Database ("Chem-Bio Database") contains hundreds of substances, including such substances as caffeine. Defendant further objects to the definition of "TEST SUBSTANCES" as overly broad and unduly burdensome because Plaintiffs have defined "TEST SUBSTANCES" to include chemical and biological substances that were not – and which Plaintiffs have not alleged to have been – tested on volunteer service members by VA. In addition, this definition is inconsistent with Plaintiffs' purportedly narrowed list of test substances, sent on March 21, 2011.

4. Defendant objects to the definitions of "YOU and "YOUR," which includes "attorneys," and therefore implicates the attorney-client privilege and work product immunity.

5. Defendant objects to Plaintiffs' instruction number 4, which purports to seek documents "created, received, or dated between January 1, 1941" and the present day, as being unduly burdensome and seeking information wholly unrelated to the claims remaining in this litigation. The DoD chemical and biological test program concerning volunteer service members ran from 1953 through 1975.

6. Defendant objects to Plaintiffs' interrogatories to the extent they seek information that could be discerned only from review of individual VA claims files of veterans identified in the Chem-Bio database. Obtaining such information would require VA: to conduct searches to identify the location of VA claims files, which may be at one of 57 VA Regional Offices nationwide or at a records archive facility; to pull the claims files, which are often voluminous,

and review them to identify the specific information sought; and to copy the relevant documents from the file. VA estimates that this would take more than 2,155 hours of labor.

VA has identified 862 identifiable test subjects who have filed claims for disability compensation or DIC with VA, to the extent such information has been made available by DoD in the ChemBio database. An attempt to locate and review the claim files of those 862 identifiable test subjects would be unduly burdensome. Defendant estimates that it would take a GS-7 Claims Assistant at least 30 minutes to locate each claim file, for a total of at least 431 hours, and it would take a GS-10, Step 5 Veterans Claims Examiner 2 hours to manually review each file to identify any and all responsive material (adding 1,724 hours) for a total of 2,155 hours to locate and review each file.

VA cannot determine whether the above described files are active or inactive before attempting to retrieve such files. Active files are located at one of the 57 Regional Offices ("ROs"); inactive files are likely archived in the VA Records Management Center in St. Louis, Federal Records Centers in Seattle and San Francisco, or National Archives in Lee's Summit, Missouri. Archival research for records at these facilities would require significant additional time, estimated at approximately 4 hours per file. Generally, VBA archive retrieval, from date of the initial request to the date of receipt of records, can take up to 90 days or more to complete. The cost associated with retrieval of archived records varies depending on the size of the request. In addition, all claims files would have to be screened to determine whether each file contains records relating to diagnosis, prognosis, or treatment related to drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia. *See* 38 U.S.C. § 7332. Such records may only be disclosed as provided by 38 U.S.C. § 7332(b).

Such a burden is unwarranted in this case. As noted in the Court's Order Granting in Part and Denying in Part Plaintiffs' Motion to File a Third Amended Complaint, 38 U.S.C. § 511(a)

"precludes federal district courts from reviewing challenges to individual benefits determinations." Order at 8. Plaintiffs' sole claim against VA does not involve "review of an[y] individual benefits determination," but rests solely on the claim that "because the DVA allegedly was involved in the testing programs at issue, the agency is incapable of making neutral, unbiased benefit determinations for veterans who were test participants." *Id.* at 11. Because Plaintiffs do not and cannot challenge the propriety of VA's actions in individual cases, the substantial burden of retrieving case-specific information from paper claims files is not justified in view of the minimal, if any, relevance of such information to Plaintiffs' facial bias claim.

7. With respect to the burden of Plaintiffs' discovery requests, VA further notes that, in response to the Rule 45 subpoena and Plaintiffs' Requests for Production VA has to date provided Plaintiffs' more than 177,000 pages of documents within VA's possession, custody, or control related to VA's efforts to provide notice to test subjects; meetings and communications between VA and DoD regarding compilation of the Chem-Bio database and the DoD Fact Sheet; VA adjudication procedures for claims for disability compensation and DIC based on exposure to test substances during the Edgewood Arsenal test programs; correspondence between VA and the other Defendants regarding VA's efforts to notify test participants; guidance provided to VA medical personnel regarding the testing; data regarding claims filed alleging death or disability due to the testing; Board of Veterans' Appeals decisions regarding claims alleging death or disability due to the testing; and claims files and health records for the individual Plaintiffs. VA is in the process of reviewing an additional four-to-five million pages of documents pursuant to those requests. VA has also provided Plaintiffs with statistical information concerning the number of claims received by identifiable test subjects and their survivors that have been granted and denied by VA, including identification of the veterans' disabilities and the ratings assigned by VA to those disabilities. In view of the substantial time and expense already undertaken by VA

with respect to Plaintiffs' narrow facial bias claim, the additional burden of reviewing individual claims files, where district court review of VA's actions on individual claims is barred by statute, is unwarranted.

8. Defendant objects to Plaintiffs' interrogatories on the grounds that they greatly exceed the scope of permissible discovery as to either the narrow facial bias case against VA or the APA claims remaining against the other Defendants. Defendant further objects to Plaintiffs' interrogatories on the grounds that they greatly exceed the scope of permissible discovery in a putative class action.

9. Defendant objects to each interrogatory to the extent that it is deemed to require disclosure of classified, confidential, or proprietary information or matters subject to the attorney-client privilege, the attorney work product doctrine, other applicable privileges, or any statutory or regulatory restriction upon disclosure.

10. Defendant objects to each interrogatory to the extent it seeks information derived from records relating to diagnosis, prognosis, or treatment of drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia. *See* 38 U.S.C. § 7332(a). Such records may only be disclosed as provided by 38 U.S.C. § 7332(b) and 38 C.F.R. §§ 1.460-1.496. *See* 38 U.S.C. § 7332.

SPECIFIC OBJECTIONS AND SUPPLEMENTAL AND AMENDED RESPONSES TO PLAINTIFFS' INTERROGATORIES

Each of the foregoing statements and/or objections is incorporated by reference into each and every specific response set forth below, and Defendant's responses below are not a waiver of any of its General Objections.

INTERROGATORY NO. 13:

For each TEST SUBJECT, please IDENTIFY whether that TEST SUBJECT received any notice or warning from YOU CONCERNING the TEST SUBJECT'S participation in the TEST

retrospectively. Accordingly, EP 683 has been assigned to a variety of different issues at different time periods. Currently, EP 683 is used to track not only claims based on testing at Edgewood Arsenal, but also claims based on exposures in Project Shipboard Hazard and Defense (SHAD) and claims based on other hazardous exposures, including current-day exposures. For this reason, a search of cases flagged with EP 683 would not be capable of distinguishing claims based on Edgewood Arsenal testing from other unrelated claims. Further, such a search would not identify any claim based on Edgewood Arsenal testing filed prior to September 2006, when VA began using EP 683 for such claims.

Defendant previously produced a statistics report that addresses the grant and denial rate of claims for disability compensation VA has received from identifiable test subjects, irrespective of the theory on which such claims were based. That data is reproduced below in response to Interrogatory 16 and is incorporated here by reference.

INTERROGATORY NO. 16:

Please IDENTIFY the total number of claims by TEST SUBJECTS for service-connected disability compensation that have been granted, the total number of such claims that have been denied, and the total number of such claims that are currently pending.

OBJECTIONS

Defendant objects to this interrogatory for the reasons described in General Objection Nos. 1-2; 5-10. Defendant also objects to this interrogatory as compound, overly broad and unduly burdensome because, as noted in General Objections 1 and 2, VA does not know the identity of "each TEST SUBJECT" as defined by Plaintiffs.

RESPONSE

Subject to these objections and Defendant's General Objections above, Defendant responds as follows:

Based on a search of VA electronic databases for data on claims for VA benefits filed by identifiable individuals on DoD's Chem-Bio database, Defendant previously produced a statistics report in response to Interrogatories No. 1 and 2 in Plaintiffs' First Set of Interrogatories to VA titled "Statistics on Known Claims Filed by ChemBio Veterans." As stated in that report, VA's search indicated that VA has received 843 claims for service-connected disability compensation from identifiable veterans on DoD's Chem-Bio database. The search further indicated that VA has granted service-connected disability benefits in 717 such cases and has denied such benefits in 193 cases. Although the total of grants and denials exceeds the number of claims received, this is in part because some claims involved multiple issues, some of which were granted while others were denied. Additionally, as explained in the statistical report, 38 of the denials were in cases in which VA's database did not indicate that a claim had been received. VA does not know the basis for this discrepancy in the data input to that database. VA currently does not have an accounting of pending disability compensation claims filed by identifiable test subjects, but will supplement its response with data on pending claims if it becomes available.

INTERROGATORY NO. 17:

Please IDENTIFY the number of claims by survivors of TEST SUBJECTS for Dependency and Indemnity Compensation in connection with a TEST SUBJECT's exposure or participation as a TEST SUBJECT that have been granted, the number of such claims that have been denied, and the number of such claims that are currently pending.

OBJECTIONS

Defendant objects to this interrogatory for the reasons described in General Objections 1-2; 5-10. Defendant objects to this interrogatory as compound, overly broad and unduly burdensome because, as noted in General Objections 1 and 2, VA does not know the identity of each "TEST SUBJECT" as defined by Plaintiffs. Defendant also objects to this interrogatory as

Defendant objects to this interrogatory for the reasons described in General Objections 1-2; 5-10. Defendant also objects to this interrogatory as compound, overly broad and unduly burdensome because, as noted in General Objections 1 and 2, VA does not know the identity of each "TEST SUBJECT" as defined by Plaintiffs.

RESPONSE

Subject to these objections and Defendant's General Objections above, Defendant responds as follows:

Based on a search of VA electronic databases for data on claims for VA benefits filed by identifiable individuals on DoD's Chem-Bio database, Defendant previously produced a claims statistics report, in response to Interrogatories No. 1 and 2 in Plaintiffs' First Set of Interrogatories to VA, titled "Statistics on Known Claims Filed by ChemBio Veterans." As stated in this report, VA's search indicated that VA has received 69 claims for dependency and indemnity compensation from survivors of identifiable test participants and VA has granted 51 of those claims. The database does not indicate the disposition of the remaining 18 claims. VA currently does not have an accounting of pending dependency and indemnity compensation claims filed by identifiable test subjects, but will supplement its response here with data on pending claims if it becomes available.

INTERROGATORY NO. 19:

Please IDENTIFY up-to-date statistics regarding claims by TEST SUBJECTS for service-connected disability compensation compiled in the same manner that Compensation and Pension Service has previously compiled statistics regarding "Chem-Bio Claims" in its report on Outreach Activities (*see* DVA003 013252).

OBJECTIONS

Defendant objects to this interrogatory for the reasons described in General Objections 1-2; 5-10. Defendant further objects to Plaintiffs' interrogatory as overly broad and unduly burdensome because, as noted in General Objections 1 and 2, VA does not know the identity of each "TEST SUBJECT" as defined by Plaintiffs. Defendant further objects to Plaintiffs' interrogatory as unduly burdensome because the statistics in the "Chem-Bio Claims" section of the "Outreach Activities" document (DVA003 013252) apparently were compiled based upon monitoring and analysis of contemporaneous data regarding VA's pending inventory of claims with an EP 683 and it is presently uncertain whether VA can, feasibly and without undue burden, retrospectively recreate the same or similar data with respect to claims that were pending after December 2009 but are not currently pending. Finally, Defendant objects to the terms "in the same manner" as vague and undefined.

RESPONSE

Subject to these objections and Defendant's General Objections above, Defendant responds as follows:

The statistics in the "Chem-Bio Claims" section of the "Outreach Activities" document (DVA003 013252) apparently were compiled pursuant to a multi-step process that involved generating contemporaneous reports of VA's pending inventory of claims with an EP 683, monitoring changes in the pending inventory based on such reports, and manually comparing the extracted data with other electronic records received via e-mail or maintained in VA's corporate data warehouse to identify claim dispositions. Because the EP 683 is used to monitor VA's pending inventory rather than to record dispositions historically, this approach may only identify contemporaneous dispositions made during the periods for which specific operational reports were generated and analyzed. VA has not continuously produced reports and analyses in the same manner as those in the "Outreach Activities" report and, therefore, does not have the

statistics requested by this interrogatory. As a result, VA cannot produce current statistics reported in the same manner as the "Outreach Activities" document (DVA003 013252).

VA will update this response as necessary if additional information becomes available regarding the feasibility of retrospectively recreating or approximating the methodology used to generate the statistics reported in the "Outreach Activities" document (DVA003 013252).

INTERROGATORY NO. 20:

Please IDENTIFY the rates at which claims by all veterans for service-connected disability compensation has been granted and denied.

OBJECTIONS

Defendant objects to this interrogatory for the reasons described in General Objections 7-8. Defendant further objects to Plaintiffs' interrogatory as overly broad and unduly burdensome, because VA has not formally compiled any list or database of the rates at which all claims filed by all veterans for disability compensation have been granted. In addition, Defendant objects to Plaintiff's interrogatory as overly broad given that there is no defined time frame. Defendant further objects that the term "claims by all veterans for service-connected disability compensation" is vague and undefined as to whether it refers to original claims for such compensation, claims for increased or additional compensation based on changed circumstances, reopened claims, and/or other types of claims.

RESPONSES

Subject to these objections and Defendant's General Objections above, Defendant responds as follows:

When a veteran files a claim for VA disability compensation, he or she may seek compensation for one or more disabilities that the veteran alleges are service connected. VA refers to each disability that is alleged to be service connected as an "issue." Based on a database

search conducted for purposes of responding to this interrogatory, in fiscal year 2010, VA rendered decisions on 2,541,115 issues for service connected disability and granted service connection for 1,089,733 issues or disabilities (43%). The grants of service connection were contained in 657,003 rating decisions. As a result, 56% of the decisions issued by VA granted service connection for at least one disability. A granted claim includes those claims in which service connected was granted for a disability that VA rated as non-compensable, i.e., 0% disabling. It does not include any claims granted as a result of an appeal or claims for an increased evaluation due to worsening of a service-connected disability.

INTERROGATORY NO. 21:

Please IDENTIFY the rates at which claims by all survivors of veterans for DIC have been granted and denied.

OBJECTIONS

Defendant objects to this interrogatory for the reasons described in General Objections 7-8. Defendant further objects to Plaintiffs' interrogatory as overly broad and unduly burdensome, because VA has not formally compiled any list or database of the rates at which all claims filed by all survivors of veterans for DIC are granted. In addition, Defendant objects to Plaintiff's interrogatory as overly broad given that there is no defined time frame. Defendant further objects that the term "claims by all survivors of veterans for DIC" is vague and undefined as to whether it refers to original claims for DIC, claims for increased or additional DIC, reopened claims, and/or other types of claims.

RESPONSES

Subject to these objections and Defendant's General Objections, Defendant responds as follows:

The information requested in this interrogatory is publicly available to Plaintiffs to the same extent it is available to Defendants. The CAVC's decisions are publicly available and may be term-searched on widely used legal research databases such as Westlaw and LexisNexis to identify claims based on exposure or participation as a test subject. Further, Defendant has produced to Plaintiffs a disc titled DVA007 (containing DVA007-000001-000071), which contains a list of names of identifiable test subjects who have filed disability compensation claims, and who have had DIC claims filed on their behalf, to the extent such information is available. Plaintiffs can use this list of names to search on their own using the CAVC website (http://www.uscourts.cavc.gov/) or at the CAVC courthouse, located at 625 Indiana Avenue, NW, Suite 900, Washington, D.C. 20004-2950.

As to the interrogatories, see Attachment A.

As to the objections:

Dated: July 15, 2011

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

JOSHUA E. GARDNER
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Attorneys for Defendant

For Interrogatories 13-19 and 24-25, I declare under penalty of perjury that the foregoing is true and correct as it relates to the Department of Veterans Affairs.

7-15-11

Paul Black
Assistant Director, Procedures,
Compensation Service,
Veterans Benefits Administration
Department of Veterans Affairs

For Interrogatories 20-21, I declare under penalty of perjury that the foregoing is true and correct as it relates to the Department of Veterans Affairs.

Kenneth Smith
Assistant Director,
Office of Performance Analysis & Integrity,
Veterans Benefits Administration
Department of Veterans Affairs

For Interrogatories 22-23, I declare under penalty of perjury that the foregoing is true and correct as it relates to the Department of Veterans Affairs.

Laura H. Eskenazi
Principal Deputy Vice Chairman,
Board of Veterans' Appeals
Department of Veterans Affairs

PROOF OF SERVICE

I declare that I am over the age of eighteen and not a party to the above captioned action. My business address is 20 Massachusetts Avenue, NW, P.O. Box 883, Washington, DC 20530.

I further declare that on July 15, 2011, I served a copy of:

DEFENDANT DEPARTMENT OF VETERANS AFFAIRS' RESPONSE TO PLAINTIFFS' SECOND SET OF INTERROGATORIES TO UNITED STATES DEPARTMENT OF VETERANS AFFAIRS

on counsel for Plaintiffs, as addressed below:

Gordon Erspamer
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

(X) By overnight delivery: I placed a true copy in a sealed envelope, with delivery provided, to the address and person stated above and, pursuant to the usual business practice of the Department of Justice for collection and processing of mail, deposited on the same day in a collection box regularly maintained by Federal Express.

(X) By electronic mail: I caused said document to be delivered to the above named individual by electronic mail.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 15, 2011 at Washington, D.C.

LILY SARA FAREL

Exhibit 31

Memorandum for the Record

Meeting on Follow-up to Information Provided by House Veterans' Affairs Committee on Veterans Possibly Exposed to Chemical/Biological Agents

February 2, 2006

House Veterans' Affairs Committee Staff Attending:
Jeffery Weekly, Kimo Hollingsworth, Len Sistek, Mary Ellen McCarthy, Beth Easter (VA Detailee)

House Armed Services Committee Staff Attending: Jeanette James and Debra Wada

Attending from the Office of Rep. Mike Thompson (D-CA): Colton Campbell

Attending from VA:
Office of Policy, Planning, and Preparedness – Mike McLendon and Joe Salvatore
Office of Congressional and Legislative Affairs – Doug Dembling

Attending from DoD: Mike Kilpatrick, Suzanne Albisu and Allen Edwards

Summary: On April 28, 2005, Reps. Evans and Strickland provided the Department of Veterans Affairs (VA) with lists totaling about 10,000 names of individuals who may have been exposed to hazardous materials while participating in tests or programs at Department of Defense (DoD) facilities, including Fort Detrick and Edgewood Arsenal, Maryland (see EDMS 310183). The Congressmen asked that VA provide written notice to the living veterans on the lists who may have an illness or injury related to their participation in the programs or tests managed at the two DoD facilities. The purpose of today's meeting – requested by Len Sistek – was to follow-up and see what VA and DoD have done to contact these veterans.

Mr. McLendon explained the process VA goes through to obtain validated information from DoD regarding veterans' exposures. He said this process was used successfully with veterans who had participated in Project 112/Project Shipboard Hazard and Defense (SHAD) as well as those who had been subjected to mustard gas and Lewisite. He noted that once VA has the necessary information on veterans' exposures, as well as addresses for those veterans, notification letters can be sent out. Mr. McLendon said that there were a couple hundred possible agents that veterans may have been exposed to and that DoD is developing information to more precisely identify what those agents were, why they were used, and the expected outcome.

Dr. Kilpatrick said that DoD is committed to notifying those individuals who were exposed to hazardous agents during their military service and that DoD wants to do this notification in a meaningful way.

Exhibit 32

NEWS RELEASE

House Committee on Veterans' Affairs--Democratic Office

LANE EVANS, RANKING DEMOCRATIC MEMBER
333 Cannon Office Building, Washington, D.C. 20515
http://veterans.house.gov/democratic/welcome.htm

Evans Welcomes VA's Long-Overdue Efforts to Notify Veterans of Possible Exposures to Chemical and Biological Agents

Washington – Rep. Lane Evans (D-IL), ranking Democratic member of the House Veterans Affairs Committee, today expressed support for the Department of Veterans Affairs' (VA) recent actions to make good on long-promised informational mailings to veterans regarding their possible exposure to chemical, biological or radiological agents while in military service. The initial mailing will reach more than 1,800 veterans and VA has indicated that additional notice letters will be mailed in the very near future.

The notification was in response to an April 28, 2005 request to VA from Evans and House Veterans Affairs' Oversight Subcommittee ranking Democratic member Rep. Ted Strickland (D-OH). The Evans/Strickland notification request specifically urged VA to make every effort to notify veterans identified by the Department of Defense (DoD) who may have been exposed to certain agents during training exercises while in military service.

DoD has identified approximately 6,700 such veterans since 1954 to the present. The identity and exposure data, which was ultimately provided to VA, included key information such as service number, Social Security number and unit of assignment and usually indicated the date and type of exposure.

"Previously VA indicated that they could not access the DoD lists of exposed servicemembers, however, Congressman Strickland and I were ultimately successful in facilitating the transfer of information from DoD to the VA," said Evans. "I am however disappointed that it took since April of 2005 for the transfer of information to occur and notification actions to begin. This delay does not give me confidence in DoD and VA seamless transition processes," observed Evans.

The letters advise or remind veterans of their possible exposures and note that some exposures may have a potential for presumptive or related service-connected conditions. Evans plans continued oversight over VA's efforts to notify all possibly exposed veterans and will press for VA to improve its outreach and services to all veterans.

###

Exhibit 34

DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Washington, D.C. 20420

JUN 30 2006

<<FNAME>> <<MI>> <<LNAME>> SSN # <<SSN>>
<<ADDRESS>>
<<CITY>>, <STATE>> <<ZIP>>

Dear Mr. <<LNAME>>:

According to records recently released by the Department of Defense (DoD), you participated in tests at Edgewood Arsenal in Maryland during your tour of service in the <<Branch>>. The purpose of this letter is to inform you about the tests and what to do if you have related health concerns.

Information About the Tests

The tests at Edgewood Arsenal exposed participants, with their consent, to a number of different chemicals. The tests' objectives were to determine specific health effects associated with exposure, to assess various pre-and post-exposure medical treatments, and to evaluate the effectiveness of personal protective equipment. Not all volunteers were exposed to chemical agents; some received placebos (harmless substances with no health risks). Others performed stress tests without exposure to chemicals. Please see the enclosed DoD fact sheet, *Edgewood Arsenal Chemical Agent Exposure Studies: 1955-1975*, for additional information.

What You Can Discuss About the Tests

You may be concerned about releasing classified test information to your health care provider when discussing your health concerns. To former service members who participated in these tests, DoD has stated:

> "You may provide details that affect your health to your health care provider. For example, you may discuss what you believe your exposure was at the time, reactions, treatment you sought or received, and the general location and time of the tests. On the other hand, you should not discuss anything that relates to operational information that might reveal chemical or biological warfare vulnerabilities or capabilities."

EXHIBIT 264
PENGAD 800-631-6989

VVA-VA023647

02742

VET001_014266

VVA-VA023647

<<LNAME>>, <<FNAME>> <<MI>>
SSN # <<SSN>>

If You Have Questions About the Tests

If you have questions about chemical or biological agent tests, or concerns about releasing classified information, contact DoD at (800) 497-6261, Monday through Friday, 9 a.m. to 9 p.m. Eastern time.

If You Have Health Concerns

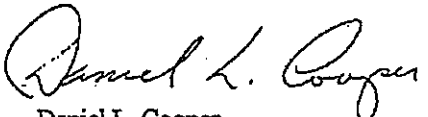
Although there is no specific medical test or evaluation for the types of exposures you might have experienced more than 30 years ago, VA is offering a clinical examination to veterans who receive this notification letter. If you have health concerns and wish to be medically evaluated, PLEASE BRING THIS LETTER WITH YOU TO THE NEAREST VA HEALTH CARE FACILITY. This letter will help you apply for the examination by providing needed documentation. Additional medical information about potential exposures is available through the "Environmental Health Coordinators," who are located in every VA medical center.

Note: The examination itself does not constitute, or provide eligibility for, enrollment in the VA health care system. If you are not already enrolled, you are encouraged to apply for VA health care benefits at the time you apply for the examination.

In addition to this clinical examination, if you think that you suffer from chronic health problems as a result of these tests, contact VA toll free at (800) 827-1000 to speak to a VA representative about filing a disability claim. You may also contact your local veterans service organization for assistance.

Scientists know much about many of the agents used in these tests. In order to best serve veterans and their families, VA continues to study the possibility of long-term health effects associated with in-service exposure to chemical and biological agents. If the medical community identifies such health effects, I assure you that we will share this information with you and other veterans as it becomes available to us.

Sincerely yours,



Daniel L. Cooper
Acting Under Secretary for Benefits

Enclosure

FACT SHEET
Deployment Health Support Directorate

For more information,
1-800 497-6261

Version 07-01-2006

Edgewood Arsenal Chemical Agent Exposure Studies: 1955 – 1975

The Department of Defense is committed to share with the Department of Veterans' Affairs the databases it compiles on military personnel who participated in prior military chemical and biological operational testing. During the 1990s, the Defense Department compiled the Mustard Participant Database and from 2000 to 2003, the Projects 112/SHAD Database. The Department is currently working to catalogue tests conducted since 1942 that were not included in the earlier databases. As part of this effort, the Defense Department is cataloguing the tests that were conducted at Edgewood Arsenal, Maryland from 1955 to 1975. The Institute of Medicine (IOM) published a three-volume study between 1982 and 1985 on the long-term health effects of exposure to the chemicals tested.[1] The study did not detect any significant long-term health effects in Edgewood Arsenal volunteers.

During the 1955-1975 Edgewood Arsenal testing, the Army Chemical Corps Medical Department conducted classified medical studies involving nerve agents, nerve agent treatments (antidotes), psychochemicals (hallucinogenic drugs), irritants, and blistering agents. The purpose of the studies was to ensure that the U.S. military could adequately protect its servicemembers from possible wartime exposures to chemical warfare agents. As part of this effort, the Army conducted testing on approximately 7,000 volunteers at Edgewood Arsenal. These studies exposed participants, with their consent, to a number of different chemicals. The study objectives were to determine specific health effects associated with exposure (particularly at low dosages), to assess various pre- and post-exposure medical treatments, and to evaluate the effectiveness of personal protective equipment in preventing exposure.

The program evaluated the effects of low-dose exposures to chemical agents and their treatments, how well personnel performed mentally and physically following exposure, how easily some chemicals were absorbed into the body through the skin, and the effectiveness of personal protective equipment. Not all volunteers were exposed to chemical agents. Some only received placebos (harmless substances with no health risks) or performed stress tests without any exposure to chemicals.

Initially investigators determined exposure levels based on known safe levels in laboratory animals. They increased exposure levels only when there was a low risk of

[1] Institute of Medicine, Possible Long-Term Health Effects of Short-Term Exposure To Chemical Agents, Volumes 1-3, 1982, 1984, 1985.

serious side effects. The study investigators assured that the exposure levels administered would not result in serious or life-threatening side effects. If required, the volunteers received treatment for any adverse health effects.

Frequently Asked Questions
Edgewood Arsenal Chemical Agent Exposure Studies: 1955 – 1975

Q: Where did the Army get its test participants?

A: Army enlisted men assigned to installations near Edgewood Arsenal were the initial source of volunteers. Over time, the Army recruited volunteers from throughout the United States and from other Services. About 75 service members participated during each 30-60 day testing period. As a group, the volunteers selected to participate in the studies were above average in physical and mental qualifications when compared to other service members.

Q: Were study participants true volunteers?

A: The Army obtained the voluntary consent of volunteers and provided them with study information.

Q: Does the Department of Defense still conduct human experimentation with chemical agents?

A: No. Current medical chemical defense programs involving human subjects do not involve the exposure of these subjects to chemical agents.

There are medical chemical defense programs that involve the use of human subjects in controlled clinical trials to test and evaluate the safety and effectiveness, of medical products (drugs, therapies, *etc.*) to protect against chemical agents. The use of human subjects in these trials involves volunteers who have provided informed consent. All use of human subjects in these trials is in full compliance with the "Common Rule," Federal Policy for the Protection of Human Subjects, Food and Drug Administration (FDA) regulations, Federal Acquisition Regulations (FAR), DOD Directives and Instructions, and *all* other applicable laws, regulations, issuances, and requirements.

Q: What databases are the Department of Defense maintaining on veterans exposed to chemical and biological agents?

A: DoD maintains a Project 112/SHAD (Shipboard Hazard and Defense) database. This database contains the names of veterans who were participated in Project 112/SHAD testing in the 1960s and 1970s. It contains more than 6,000 names and is updated as needed when we discover additional veterans who were part of this testing. We also maintain a database containing the names of veterans who participated in mustard agent tests during World War II. We are currently in the process of populating our third exposure database, the Edgewood Arsenal Chemical Agent Exposure Studies database (1955-1975). The Edgewood Arsenal Chemical Agent Exposure Studies Database (1955-1975) is part of the database of all other chemical and biological testing since World War II.

Q: Besides names and service numbers, what other information does the DoD database contain on the Edgewood volunteers?

A: For each individual, the database will contain the following:
- Type of test (i.e., performance, equipment etc.)
- Type of exposure (i.e., injection, intravenous (IV) etc.)
- Date of exposure
- *Agent/simulant name*
- Agent/simulant amount if recorded
- Treatments required as a result of the exposure
- Documents describing the test procedures, if available.

Q: Who maintains the database for veterans exposed to radiation?

A: The Defense Threat Reduction Agency maintains information on veterans exposed to radiation during the Nuclear Test Personnel Review (NTPR) Program.

Q: What types of tests were conducted at Edgewood?

A: Table 1 provides a rough breakout of volunteer hours against various experimental categories:

Incapacitating compounds (i.e. vomiting agent)	29.9%
Lethal compounds (i.e. sarin)	14.5 %
Riot control compounds (i.e. CS)	14.2%
Protective equipment and clothing (masks, rubber suits, etc.)	13.2%
Development evaluation and test procedures	12.5%
Effects of drugs and environmental stress on human physiological mechanisms (i.e. wakefulness)	6.4%
Human factors tests (ability to follow instructions)	2.1%
Other (visual studies, sleep deprivation, etc.)	7.2%

Q: Did the Army expose the volunteers to hallucinogenic compounds?

A: Yes, there were studies at Edgewood that exposed volunteers to hallucinogenic drugs like LSD. Although the current medical literature indicates that such exposure may have some long-lasting effects among some individuals, such as "flashbacks" (visual hallucinations without new drug exposure), the volunteer records from the times of the Edgewood studies did not record these kinds of after effects among the Edgewood study volunteers.

Exhibit 43

Search

Vietnam Veterans of America

800-VVA-1316 ★ NEED HELP WITH YOUR VA CLAIM? CLICK HERE.


Veterans protest a plan to turn sixteen acres of land at the West Los Angeles VA into a public park. Photo: Samir Twair

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MARCH/APRIL 2008

★**The Veteran Departments :** Featured Stories / President's Message / Government Affairs / Budget Request / Constitution / AVVA / Membership Affairs / Membership Notes / Minority Affairs / Veterans Benefit Update / Conference of State Council / Veterans Incarcerated / Homeless Veterans / Veterans of Modern Warfare / Ask The Parliamentarian / Region 3 / Region 4 / Region 8 / Region 9 / Women Veterans / Public Affairs / PTSD / POW-MIA / ETABO / National Secretary / ND State Council / Chapter 172 / TAPS / Reunions / The Locator / Letters / Arts of War / Book Review / In Memory Plaque / Armed With Toys / Join A Database / Erie County / Fueled By The Fallen / Grading VVAF / Inside The Vietnam War / Band Of Gold

PAST ISSUES

2010: JAN/FEB

2009: JAN/FEB | MAR/APR | MAY/JUNE | JULY/AUG | SEPT/OCT | NOV/DEC

2008: JAN/FEB | MAR/APR | MAY/JUNE | JULY/AUG | SEPT/OCT | NOV/DEC

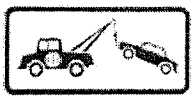
2007: JAN/FEB | MAR/APR | MAY/JUNE | JULY/AUG | SEPT/OCT | NOV/DEC

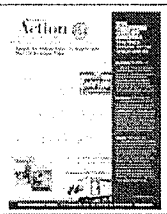
2006: JULY/AUG | SEPT/OCT | NOV/DEC

The VVA Veteran®
The Official Voice of Vietnam Veterans of America

Join A Database: 800-497-6261

The DoD's Force Health Protection and Readiness operation has set up three chemical/biological exposure databases. It is DoD's responsibility to collect and validate chem/bio exposures to service members while on active duty and to maintain these databases. It is theresponsibility of the VA to inform veterans about their exposures and the benefits to which they may be entitled, and to advise these veterans ofprocedures to folbw if they have health concerns.





One database—now basically complete—contains more than 6,300 names of veterans who participated in mustard and lewisite experiments in the 1940s. Some 4,600 of these veterans were exposed to mustard or lewisite. Data were collected in the mid-1990s; DoD does not have dose information.

The second database—not necessarily complete—has more than 6,440 names of veterans who participated in the Project 112/SHAD tests between 1963 and 1973. Work on this database commenced in 2000 and ended in 2003, although DoD says it will "continue to pursue all leads from veterans." Individual exposure data are not part of the database, as many documents are still classified.

The third database, which contains approximately 10,000 names including some 1,800 who participated in tests with no active agent involved, deals with a variety of other chem/bio exposures between World War II and today. These include: LSD exposures; experiments at Edgewood Arsenal and Fort Detrick in Maryland; and experiments at nineteen total locations, information about which DoD is obtaining at the Edgewood Historical Office, the Rocky Mountain Arsenal, Dugway Proving Ground in Utah, and other sites. DoD does have detailed exposure, treatment, and test information in this database.

In these tests, more than four hundred different compounds were involved. They included 46 chemical agents; biological agents and experimental vaccines; hallucinogens, including LSD; treatments, including atropine; and drugs such as Benadryl, Ritalin, and Dapsone.

Exhibit 44

Search

Vietnam Veterans of America

800-VVA-1316 ★ NEED HELP WITH YOUR VA CLAIM? CLICK HERE.


Patrick Hodgkins points to the name on The Wall of a 3rd Platoon, Hotel Company, 2nd Battalion, 3rd Marine who did not make it back. (Photo: Bernard Edelman)

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NOVEMBER/DECEMBER 2008

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PAST ISSUES

2010: JAN/FEB

2009: JAN/FEB | MAR/APR | MAY/JUNE | JULY/AUG | SEPT/OCT | NOV/DEC

2008: JAN/FEB | MAR/APR | MAY/JUNE | JULY/AUG | SEPT/OCT | NOV/DEC

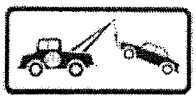
2007: JAN/FEB | MAR/APR | MAY/JUNE | JULY/AUG | SEPT/OCT | NOV/DEC

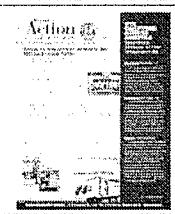
2006: JULY/AUG | SEPT/OCT | NOV/DEC

The VVA Veteran®
The Official Voice of Vietnam Veterans of America

DoD Launches Chem-Bio Warfare Exposures Website

The Department of Defense Force Health Protection and Readiness Directorate has launched the Chemical-Biological (CB) Warfare Exposures website to provide service members, veterans, their families, and the public information on the testing of chemical and biological warfare agents from 1942 to 1975. The website has sections on World War II, Project 112/SHAD (Shipboard Hazard and Defense), and the Cold War.





To evaluate the ability of U.S. forces to fight on a chemical and biological battlefield, DoD conducted testing programs. In some programs service members were present but were not test subjects. In other programs they were volunteer subjects. This testing ended in 1975. According to DoD, it has been actively engaged in an extensive search of official records to find the names of veterans who may have been exposed to the chemical or biological agents. DoD plans to complete the search in 2011.

Attention VVA Members: If you served at or participated in any of the chemical/biological experiments conducted at Fort Detrick, Edgewood Arsenal, or any other military facility between the late 1950s and the early 1970s, we would very much like to hear from you. Please call VVA at this toll-free number: 800-882-1316 and ask for Bernie Edelman or email bedelman@vva.org

The service member names identified by DoD, along with exposure information, are provided to the VA. The VA then notifies individuals of their potential exposure, provides treatment if necessary, and adjudicates any claim for compensation. For privacy reasons, the website does not contain the names of the veterans exposed.

Veterans who believe that they may have been exposed or who would like more information are advised to contact DoD via e-mail at CBWebmaster@tma.osd.mil or call DoD at 800-497-6261, Monday through Friday, 7:30 a.m. to 4:00 p.m., Eastern Time. Veterans also may write to DoD at: Force Health Protection and Readiness, ATTN: CB Exposure Manager, 5113 Leesburg Pike, Suite 901, Falls Church, VA 22041.
Click on the Chemical-Biological Warfare Exposures website for more information.

Report Website Errors Here | Advertise | Photo Descriptions & Credits

Exhibit 86

CB Exposures
World War II
Project 112/SHAD
Cold War
Policies, Briefings, Reports
FAQs

CB Warfare General FAQs
Project 112/SHAD
Fort Detrick FAQs
Edgewood FAQs
Dugway Proving Grnd FAQs
Hallucinogenic Agents FAQs

Chemical-Biological Warfare General FAQs

Back to MCM FAQs

Does the Department of Defense still conduct human experimentation with chemical and biological warfare agents?

September 08, 2008

No. Current medical chemical & biological defense programs involving human subjects do not involve the exposure of these subjects to chemical or biological warfare agents.

There are medical chemical & biological defense programs that involve the use of human subjects in controlled clinical trials to test and evaluate the safety and effectiveness, of medical products (drugs, therapies, etc.) to protect against chemical agents. The use of human subjects in these trials involves volunteers who have provided informed consent. All use of human subjects in these trials is in full compliance with the "Common Rule," Federal Policy for the Protection of Human Subjects, Food and Drug Administration (FDA) regulations, Federal Acquisition Regulations (FAR), DoD Directives and Instructions, and all other applicable laws, regulations, issuances, and requirements.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

VIETNAM VETERANS OF AMERICA; SWORDS TO PLOWSHARES: VETERANS RIGHTS ORGANIZATION; BRUCE PRICE; FRANKLIN D. ROCHELLE; LARRY MEIROW; ERIC P. MUTH; DAVID C. DUFRANE; TIM MICHAEL JOSEPHS; and WILLIAM BLAZINSKI, individually, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY; LEON PANETTA, Director of Central Intelligence; UNITED STATES DEPARTMENT OF DEFENSE; DR. ROBERT M. GATES, Secretary of Defense; UNITED STATES DEPARTMENT OF THE ARMY; PETE GEREN, United States Secretary of the Army; UNITED STATES OF AMERICA; ERIC H. HOLDER, Jr., Attorney General of the United States; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; and ERIC K. SHINSEKI, UNITED STATES SECRETARY OF VETERANS AFFAIRS.

Defendants.
_____/

No. C 09-0037 CW

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS IN PART PLAINTIFFS' THIRD AMENDED COMPLAINT AND DENYING PLAINTIFFS' MOTION TO STRIKE (Docket Nos. 187 and 211)

Defendants United States of America; U.S. Attorney General Eric Holder; the Central Intelligence Agency and its Director Leon Panetta (collectively, CIA); and the U.S. Department of Defense, its Secretary Robert M. Gates, the U.S. Department of the Army, and its Secretary Pete Geren (collectively, DOD) move to dismiss Plaintiffs Vietnam Veterans of America, et al.'s Third Amended Complaint (3AC). Defendants U.S. Department of Veterans Affairs

(DVA) and its Secretary Eric K. Shinseki do not join the motion.[1] Plaintiffs oppose the motion in part and move to strike the CIA's administrative record lodged by Defendants. Defendants oppose Plaintiffs' motion to strike. The motions were taken under submission on the papers. Having considered the papers submitted by the parties, the Court GRANTS in part Defendants' motion to dismiss and DENIES it in part, and DENIES Plaintiffs' motion to strike.

BACKGROUND

Because the Court's Order of January 19, 2010 describes the allegations of this case in sufficient detail, they will not be repeated here in their entirety. In sum, Plaintiffs charge Defendants with various claims arising from the United States' human experimentation programs, many of which were conducted at Edgewood Arsenal and Fort Detrick, both located in Maryland. At issue in this motion are the following: (1) Plaintiffs' claims against the CIA for notice of their exposure to chemicals and for medical care; (2) their claims against Attorney General Holder; and (3) their claims against the DOD for medical care.

Plaintiffs contend that their claim for notice against the CIA has three bases. First, they cite a Department of Justice (DOJ) letter, issued in response to a CIA request for an opinion on the CIA's "obligations to the subjects of the Project MKULTRA drug-testing activities sponsored by the CIA in the 1950s and 1960s." Compl., Ex. A, at A-006. The DOJ letter stated that

> the CIA may well be held to have a legal duty to notify

[1] For simplicity, the Court refers to the Moving Defendants as Defendants below.

> those MKULTRA drug-testing subjects whose health the CIA has reason to believe may still be adversely affected by their prior involvement in the MKULTRA drug-testing program; that an effort should be made to notify these subjects; that legal constraints and a concern for these subjects' privacy mandate that any notification effort be a limited and circumspect one; and, while the CIA might lawfully ask another agency to undertake the notification effort in this instance, the CIA also has lawful authority to carry out this task on its own.

Id. Specifically, the DOJ opined that, "under the common law of torts," "a duty would be found to exist on the part of the government to notify those subjects of the MKULTRA program whose health can be reasonably determined to be still adversely affected by their prior involvement in MKULTRA drug-testing." Id. at A-014.

Plaintiffs' second and third bases for their claim against the CIA for notice are testimony by its former director, Admiral Stansfield Turner, and the agency's conduct after Turner made his comments. At congressional hearings in 1977, Turner indicated that the CIA was working "'to determine whether it is practicable . . . to attempt to identify any of the persons to whom drugs may have been administered unwittingly,' and . . . 'if there are adequate clues to lead to their identification, and if so, how to go about fulfilling the Government's responsibilities in the matter.'" 3AC ¶ 13. At one of the hearings, Senator Edward Kennedy apparently asked, "Do you intend to notify those individuals?," to which Turner replied, "Yes." Additionally, Plaintiffs rely on the administrative record lodged by the CIA in this case, which contains statements made after the hearings which Plaintiffs believe demonstrate the CIA's understanding that it had a duty to afford notice.

To support their claim against the DOD for medical care,

Plaintiffs rely on a June 30, 1953 Memorandum from the Department of the Army Office of the Chief of Staff (CS: 385) and the 1962 iteration of Army Regulation 70-25 (AR 70-25 (1962)). CS: 385 provided "guidance for all participants in research in atomic, biological and/or chemical warfare defense using volunteers," whereas AR 70-25 (1962) governed "the use of volunteers as subjects in Department of Army research." 3AC ¶¶ 125 and 126. Both provided that medical treatment and hospitalization "will be provided for all casualties" of the experiments. Id. ¶¶ 125b and 128. An appendix to AR 70-25 (1962) provided "opinions of The Judge Advocate General" that were intended to "furnish specific guidance for all participants in research using volunteers." Defs.' Mot., Ex. B, at 4. There, the Judge Advocate General opined,

> Compensation for the disability or death of a civilian employee resulting from personal injury or disease proximately caused by his employment is payable under the Federal Employees Compensation Act, regardless of whether his employment was of a hazardous nature. The amount and type of disability compensation or other benefits payable by reason of the death or disability of a member of the Army resulting from injury or disease incident to service depends upon the individual status of each member, and is covered by various provisions of law. It may be stated generally that under present laws no additional rights against the Government will result from the death or disability of military and civilian personnel participating in experiments by reason of the hazardous nature of the operations.

Id. (citations omitted). This opinion was nearly identical to an opinion issued by the Judge Advocate General regarding CS: 385. See id., Ex. A, at 3.

On November 18, 2010, Plaintiffs filed their 3AC, which named the DVA and Secretary Shinseki as additional Defendants. On December 6, 2010, Defendants filed the current motion to dismiss.

This was their third such motion and raised arguments not contained in their two previous motions. On February 18, 2011, Defendants lodged with the Court an administrative record developed by the CIA. On February 25, 2011, Plaintiffs moved to strike the administrative record.

LEGAL STANDARD

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this principle is inapplicable to legal conclusions; "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not taken as true. Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550 U.S. at 555).

DISCUSSION

In response to Defendants' request for dismissal of their claim against the CIA for medical care, Plaintiffs state that "the medical care remedy they seek for test participants does not depend on the CIA's provision of that care." Pls.' Supp. Opp'n at 2 n.2. Plaintiffs do not offer any other response to Defendants' arguments

regarding this claim. Further, Plaintiffs do not oppose dismissal of their claims against Attorney General Holder. Accordingly, these claims are dismissed. The balance of Defendants' motion is considered below.

I. Claim Against the CIA for Notice

Plaintiffs' claim against the CIA for notice arises under the Administrative Procedure Act (APA), 5 U.S.C. §§ 702 and 706(1). Defendants contend that Plaintiffs' claim cannot arise under the APA, but rather must be brought under the Federal Tort Claims Act because Plaintiffs seek liability based on a duty to warn imposed by state tort law. See 28 U.S.C. § 1346(b); see also Broudy v. United States, 661 F.2d 125, 127 (9th Cir. 1981). Plaintiffs respond that they "do not rely on state tort law at all." Pls.' Supp. Opp'n at 3:5-6 (emphasis in original). Instead, Plaintiffs assert, they rely on the "DOJ Letter's conclusion," Turner's testimony before Congress and the CIA's course of conduct after Turner testified. Id. at 3-5 (emphasis in original).

Section 706(1) of the APA enables federal courts to "compel agency action unlawfully withheld or unreasonably delayed." A court's "ability to 'compel agency action' is carefully circumscribed to situations where an agency has ignored a specific legislative command.'" Hells Canyon Preservation Council v. U.S. Forest Serv., 593 F.3d 923, 932 (9th Cir. 2010).

In Norton v. Southwest Utah Wilderness Alliance (SUWA), the Supreme Court established that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." 542 U.S. 55, 64 (2004) (emphasis in original). "Discrete" actions include

providing "rules, orders, licenses, sanctions, and relief." Hells Canyon, 593 F.3d at 932. A discrete action is legally required when "the agency's legal obligation is so clearly set forth that it could traditionally have been enforced through a writ of mandamus." Id. (citing SUWA, 542 U.S. at 63). "The limitation to required agency action rules out judicial direction of even discrete agency action that is not demanded by law (which includes, of course, agency regulations that have the force of law)." SUWA, 542 U.S. at 65 (emphasis in original). "Even a less formal agency 'plan' may 'itself create[] a commitment binding on the agency,' if there is 'clear indication of binding commitment in the terms of the plan.'" Veterans for Common Sense v. Shinseki, ___ F.3d ___, 2011 WL 1770944, at *19 (9th Cir.) (quoting SUWA, 542 U.S. at 69, 71); see also Soda Mountain Wilderness Council v. Norton, 424 F. Supp. 2d 1241, 1260 (E.D. Cal. 2006).

Nothing now cited by Plaintiffs supports their claim against the CIA for notice. The DOJ's opinion on a legal matter, on its own, does not impose an obligation on the CIA. The opinion was not promulgated pursuant to APA procedures, nor did it reflect the CIA's commitment to a particular plan. The DOJ's conclusion was based on state tort law, which Plaintiffs now assert is not the basis of their claim.

Nor did Turner's testimony legally bind the CIA. Turner simply responded "yes" to Senator Kennedy's inquiry into whether the agency intended to provide notice. Intention and commitment are different concepts. Cf. Benitec Australia, Ltd. v. Nucleonics, Inc., 495 F.3d 1340, 1347 (Fed. Cir. 2007) (noting distinction between intention not to sue and commitment not to sue).

Furthermore, an agency may only be compelled to take discrete action. Turner's response, even if deemed to be a commitment, did not specify any particular steps the Court can order the CIA to undertake.

Finally, the CIA's conduct after Turner testified did not commit the agency to any particular action. Plaintiffs point to a July 24, 1978 memorandum from the CIA's general counsel to Turner, indicating that Turner had "already committed the Agency to supporting a [notification] program."[2] AR VET022-000012. However, this was "an internal administrative communication that lacks the force of law." Veterans for Common Sense, 2011 WL 1770944, at *19 (citing Rank v. Nimmo, 677 F.2d 692, 698-99 (9th Cir. 1982)). None of the internal memoranda cited by Plaintiffs legally bound the agency to take discrete agency action.

Accordingly, the Court dismisses Plaintiffs' claim against the CIA for its alleged failure to notify them about their chemical exposures and the known health effects, and failure to provide all available documents and evidence concerning their exposures.

II. Claim for Medical Care Against the DOD

As noted above, Plaintiffs' claim for medical care against the DOD is premised on CS: 385 and AR 70-25 (1962). Defendants argue that the Judge Advocate General's interpretations of CS: 385 and AR 70-25 (1962) demonstrate that the DOD never intended to provide

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[2] Defendants complain that this argument requires consideration of material beyond Plaintiffs' complaint. However, Plaintiffs' complaint relies on the July 24 memorandum, 3AC ¶ 14, which Defendants provided to the Court as part of the CIA's administrative record. Thus, the Court may consider this evidence without converting Defendants' motion into one for summary judgment. See Lee v. City of L.A., 250 F.3d 668, 688 (9th Cir. 2001).

lifetime medical care for experiment participants.

The Judge Advocate General's interpretations do not bear the weight of Defendants' argument. The Judge Advocate General opined that the benefit owed to military employees of the Army "by reason of the death or disability. . . depends upon the individual status of each member, and is covered by various provisions of law." Defs.' Mot., Ex. B, at 4. Defendants contend that this statement shows that neither CS: 385 nor AR 70-25 (1962) can provide a basis for a medical care claim because "neither the 1952 memorandum nor AR 70-25 is a law." Id. 22:9. However, as this Court stated in its January 19, 2010 Order on Defendants' first and second motions to dismiss, Army regulations have the force of law. See Nat'l Med. Enters. v. Bowen, 851 F.2d 291, 293 (9th Cir. 1988); Kern Copters, Inc. v. Allied Helicopter Serv., Inc., 277 F.2d 308, 310 (9th Cir. 1960). Thus, under the Judge Advocate General's opinion, AR 70-25 (1962), as a provision of law, supports Plaintiffs' claim.

Defendants also point to the Judge Advocate General's opinion that "under present laws no additional rights against the Government will result from the death or disability of military . . . personnel participating in experiments by reason of the hazardous nature of the operations." Defs.' Mot., Ex. B, at 4. This statement, however, does not establish that experiment participants are not entitled to medical care under AR 70-25 (1962). The passage states only that the "hazardous nature" of the experiments does not create additional rights. This is not inconsistent with providing medical care for injuries caused by the experiments.

Finally, Defendants argue that, because AR 70-25 (1962) was

promulgated pursuant to 5 U.S.C. § 301,[3] it cannot confer an entitlement, such as medical care. Section 301 provides heads of executive and military departments with authority to establish regulations pertaining to "'housekeeping' matters like internal policies and procedures." Schism v. United States, 316 F.3d 1259, 1277 (Fed. Cir. 2002). Because regulations issued pursuant to the statute are so limited, such regulations "cannot authorize the creation of a benefit entitlement." Id. However, there is nothing in AR 70-25 (1962) or Plaintiffs' complaint to suggest that the regulation was issued pursuant to section 301.

Accordingly, Defendants do not justify dismissal of Plaintiffs' claim against the DOD for medical care.

III. Plaintiffs' Motion to Strike Administrative Record

Plaintiffs move to strike the CIA's Administrative Record, lodged by Defendants on February 18, 2011, asserting that its submission violates the Civil Local Rules. Striking the Administrative Record is not necessary. Notably, Plaintiffs relied on the Administrative Record in their opposition to Defendants' motion to dismiss.

Accordingly, Plaintiffs' motion to strike is denied.

CONCLUSION

For the foregoing reasons, the Court GRANTS in part

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[3] In full, section 301 provides,

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Defendants' motion to dismiss and DENIES it in part (Docket No. 187), and DENIES Plaintiffs' motion to strike (Docket No. 211). Plaintiffs' notice and medical care claims against the CIA and their claims against Attorney General Holder are dismissed. In all other respects, Defendants' motion to dismiss is DENIED.

Pursuant to the Court's April 14, 2011 Order, Defendants DVA and Eric K. Shinseki shall answer Plaintiffs' complaint within fourteen days of the date of this Order.

IT IS SO ORDERED.

Dated: May 31, 2011

CLAUDIA WILKEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

VIETNAM VETERANS OF AMERICA; SWORDS TO PLOWSHARES: VETERANS RIGHTS ORGANIZATION; BRUCE PRICE; FRANKLIN D. ROCHELLE; LARRY MEIROW; ERIC P. MUTH; DAVID C. DUFRANE; and WRAY C. FORREST, individually, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants.
_____/

No. C 09-0037 CW

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS AND DENYING DEFENDANTS' ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

Plaintiffs Vietnam Veterans of America (VVA), Swords to Plowshares: Veterans Rights Organization and six individual veterans assert claims against Defendants Central Intelligence Agency (CIA), et al., arising from the United States' human experimentation programs. Defendants move to dismiss Plaintiffs' Second Amended Complaint (SAC) in its entirety for lack of subject matter jurisdiction and for failure to state a claim. In the alternative, they move for summary judgment on Plaintiffs' claims, arguing that they are time-barred. Defendants had previously moved to dismiss Plaintiffs' First Amended Complaint for improper venue, lack of subject matter jurisdiction, and failure to state a claim. At the December 3, 2009 hearing on that motion, the Court indicated that it would grant Plaintiffs leave to file an amended complaint to cure deficiencies in their claim of venue in the Northern District of California. Before this Court issued its written order

on that motion, Plaintiffs filed their Second Amended Complaint, which cures these deficiencies. Accordingly, the Court DENIES as moot Defendants' first Motion to Dismiss to the extent it is based on improper venue. (Docket No. 34.) The remaining arguments in Defendants' first Motion to Dismiss are repeated in its current motion. Thus, the Court does not require another opposition, reply or hearing on these issues. The Court GRANTS in part Defendants' first and second Motions to Dismiss and DENIES them in part. The Court DENIES Defendants' Alternative Motion for Summary Judgment.

BACKGROUND

The following allegations are contained in Plaintiffs' SAC.

Beginning in the early 1950s, the CIA and the Army engaged in experiments involving human subjects. The purposes of these experiments varied; some focused on determining the levels at which chemicals would cause casualties in order to develop new biological and chemical weapons. Other tests, including the "MKULTRA" program, involved researching "psychological warfare" and developing mind-control methods. The experiments exposed participants to various chemicals, drugs and/or the implantation of electronic devices. Many of the tests occurred at Edgewood Arsenal and Fort Detrick, both located in Maryland.

Various memoranda and regulations were intended to govern these experiments. In February, 1953, the CIA and the Department of Defense (DOD) issued the Wilson Directive, which was intended to bring the United States into compliance with the 1947 Nuremberg Code on medical research. The Directive stated that the "voluntary consent of the human subject is absolutely essential." SAC ¶ 119(a). A June, 1953 Department of the Army memorandum stated,

"Medical treatment and hospitalization will be provided for all casualties of the experiments" in order to protect volunteers. SAC ¶ 125(b) (emphasis in SAC). This language was codified in Army Regulation (AR) 70-25, which was promulgated on March 26, 1962. SAC ¶¶ 128, 130. AR 70-25 also echoed the Wilson Directive, stating that informed consent is "essential" and, to that end, a test participant "will be fully informed of the effects upon his health or person which may possibly come from his participation in the experiment." SAC ¶ 126(b).

Approximately 7,800 armed services personnel, including the six named individual Plaintiffs in this action, volunteered to participate in the experiments. However, the volunteers participated without giving informed consent because the risks of the experiments were not fully disclosed, despite the memoranda and regulation discussed above.

Test participants were required to sign a secrecy oath, which required their agreement that they would

> not divulge or make available any information related to U.S. Army Intelligence Center interest or participation in the [volunteer program] to any individual, nation, organization, business, association, or other group or entity, not officially authorized to receive such information.

SAC ¶ 156 (alteration in SAC). Any violation of the oath would result in punishment under the Uniform Code of Military Justice (UCMJ). Based on the form's language, participants erroneously believed that punishment under the UCMJ could occur even after their discharge from military service. In September, 2006, some, but not all, participants received letters from the Department of Veterans Affairs (DVA), advising them that the DOD had authorized

them to discuss their exposure with their health care providers.

Following congressional hearings in the 1970s on the program, the CIA, the Department of Justice (DOJ) and the Department of the Army stated that they would work to locate test participants and compensate those who had health conditions or diseases connected to their participation in the experiments. These efforts have not yielded substantial results. Although some participants have been notified and have received information on their exposure, others have not.

Based on these allegations, Plaintiffs seek declaratory and injunctive relief. They ask the Court to declare that the consent forms signed by the individual Plaintiffs are not valid or enforceable; that the individual Plaintiffs are released from the secrecy oaths; that Defendants are obliged to notify the individual Plaintiffs and other test participants about their exposures and the known health effects and to provide all available documents and evidence concerning their exposures; that Defendants violated the individual Plaintiffs' rights under the Due Process Clause; and that Defendants are obliged to provide medical care to the individual Plaintiffs. Plaintiffs also seek injunctive relief, requiring Defendants to notify volunteers of the details of their participation in the human experimentation program; to conduct a thorough search of "all available document repositories" and provide victims with all documents concerning their exposure; to provide examinations and medical care to all volunteers involved in the MKULTRA, Edgewood, and other human experiments, to the extent that the volunteers have a disease or condition related to their exposures; to supply the DVA with information on the individual

Plaintiffs' participation in the experiments, so that they may seek service-connected death or disability compensation; and to cease committing violations of United States and international law. Separately, the organization Plaintiffs seek a declaration that the Supreme Court's holding in United States v. Feres, 340 U.S. 135 (1950), is unconstitutional.[1]

Plaintiffs intend to move to certify this case as a class action encompassing "all veterans who were involved in the Human Test Series." SAC ¶ 174.

DISCUSSION

I. Dismissal under Rule 12(b)(1)

A. Legal Standard

Subject matter jurisdiction is a threshold issue which goes to the power of the court to hear the case. Federal subject matter jurisdiction must exist at the time the action is commenced. Morongo Band of Mission Indians v. Cal. State Bd. of Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988). A federal court is presumed to lack subject matter jurisdiction until the contrary affirmatively appears. Stock W., Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).

Dismissal is appropriate under Rule 12(b)(1) when the district court lacks subject matter jurisdiction over the claim. Fed. R. Civ. P. 12(b)(1). A Rule 12(b)(1) motion may either attack the sufficiency of the pleadings to establish federal jurisdiction, or

[1] In Feres, the Court held that injuries that "arise out of or are in the course of activity incident" to military service fall outside the sovereign immunity waiver of the Federal Tort Claims Act. 340 U.S. at 146. The Feres doctrine bars suits for money damages involving injuries incident to military service. See Costo v. United States, 248 F.3d 863, 866 (9th Cir. 2001).

allege an actual lack of jurisdiction which exists despite the formal sufficiency of the complaint. Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979); Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987).

B. Analysis

Defendants assert that the Court lacks subject matter jurisdiction because the United States has not waived sovereign immunity for Plaintiffs' claims, because the claims are time-barred and because Plaintiffs lack standing to bring their claims concerning the lawfulness of the testing, consent forms and secrecy oaths.[2]

1. Sovereign Immunity

To bring a claim against an agency of the United States, a plaintiff must establish a waiver of sovereign immunity. Rattlesnake Coalition v. U.S. EPA, 509 F.3d 1095, 1103 (9th Cir. 2007). Under 5 U.S.C. § 702, the judicial review provision of the Administrative Procedure Act (APA), sovereign immunity is waived "in all actions seeking relief from official misconduct except for

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[2] In asserting that the Court lacks subject matter jurisdiction over these claims, Defendants offer several arguments concerning Plaintiffs' entitlement to relief. These arguments are immaterial to whether Plaintiffs' complaint should be dismissed under Rule 12(b)(1). "Where a court initially has jurisdiction under the APA, . . . the existence of statutory limitations on the remedies that the court may impose does not defeat jurisdiction." Rosemere Neighborhood Ass'n v. U.S. EPA, 581 F.3d 1169, 1172 n.2 (9th Cir. 2009). "As a general rule, when '[t]he question of jurisdiction and the merits of [the] action are intertwined,' dismissal for lack of subject matter jurisdiction is improper." Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold & Easement in the Cloverly Subterranean Geological Formation, 524 F.3d 1090, 1094 (9th Cir. 2008) (quoting Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)). Defendants' arguments that Plaintiffs' claims lack merit and that relief is unavailable are considered below with respect to dismissal under Rule 12(b)(6).

money damages." The Presbyterian Church v. United States, 870 F.2d 518, 525 (9th Cir. 1989); see also Rosemere Neighborhood Ass'n v. U.S. EPA, 581 F.3d 1169, 1172 n.2 (9th Cir. 2009) ("Section 702 waives the government's sovereign immunity for actions, such as this one, that seek injunctive relief."). Section 702 "permits a citizen suit against an agency when an individual has suffered 'a legal wrong because of agency action' . . . ." Rattlesnake, 509 F.3d at 1103 (quoting 5 U.S.C. § 702). An agency's failure to act constitutes "agency action" for the purposes of section 702. See 5 U.S.C. § 551(13).

Defendants argue that the United States' sovereign immunity bars Plaintiffs' claims for (1) medical care; (2) notice and the production of documents on the known health effects of Defendants' human experimentation program; and (3) a declaration that the Supreme Court's Feres doctrine is unconstitutional.

Because Plaintiffs' claims for medical care and notice arise under section 702, sovereign immunity does not bar the Court's jurisdiction over these claims. Plaintiffs allege that Defendants' failure to provide medical care and to disclose information concerning the experiments is unlawful. With regard to medical care, Plaintiffs assert that Defendants' legal duties arise from previously confidential Army documents and the 1962 version of AR 70-25. As mentioned above, the documents and the regulation require that medical care will be provided for "all casualties" of the experiments. To demonstrate Defendants' legal obligation to disclose information, Plaintiffs cite various documents, including a 1978 DOJ opinion letter, which states that

the CIA may well be held to have a legal duty to notify

> those MKULTRA drug-testing subjects whose health the CIA has reason to believe may still be adversely affected by their prior involvement in the MKULTRA drug-testing program; that an effort should thus be made to notify these subjects; . . . and, while the CIA might lawfully ask another agency to undertake the notification effort in this instance, the CIA also has lawful authority to carry out this task on its own.

SAC ¶ 14; SAC, Ex. A at A-006. The DOJ opined that the CIA, "having created the harm or risk" to test participants' health, has a common-law duty "to notify individuals as an effort directed at rendering assistance and preventing further harm." SAC, Ex. A. at A-002. By citing these documents, regulation and letter, Plaintiffs sufficiently allege they have suffered a legal wrong based on agency inaction. They therefore state a section 702 claim, for which sovereign immunity is waived.

The Court, however, lacks subject matter jurisdiction over the organization Plaintiffs' request for a declaration that the Supreme Court's Feres doctrine is unconstitutional. Quite clearly, this Court cannot declare a United States Supreme Court case unconstitutional. Plaintiffs admitted as much at hearing, explaining that they wish to preserve the point for appeal. Accordingly, the Court dismisses with prejudice the request for a declaration that the Feres doctrine is unconstitutional.

2. Statute of Limitations under 28 U.S.C. § 2401(a)

Defendants assert that the Court lacks subject matter jurisdiction because Plaintiffs' claims are time-barred under 28 U.S.C. § 2401(a).[3] Defendants cite John R. Sand and Gravel Company

[3] Section 2401(a) provides:

> Except as provided by the Contract Disputes Act

(continued...)

v. United States and its holding that 28 U.S.C. § 2501, which provides a six-year limitations period for claims filed in the Court of Federal Claims, can constitute a jurisdictional bar. 552 U.S. 130, 133-36 (2008).

Because John R. Sand addressed a different statute, its holding does not apply here. As Defendants acknowledge, the Ninth Circuit has stated that "§ 2401(a)'s six-year statute of limitations is not jurisdictional." Cedars-Sinai Med. Ctr. v. Shalala, 125 F.3d 765, 770 (9th Cir. 1997). The Ninth Circuit has not reexamined Cedars-Sinai in light of John R. Sand. Defendants nevertheless argue that John R. Sand "casts substantial doubt" on Cedars-Sinai because the language of section 2501 parallels the language of section 2401(a). Defs.' Reply in Support of Mot. to Dismiss of August 14, 2009 at 8. However, John R. Sand is distinguishable from Cedars-Sinai. In rejecting the John R. Sand petitioner's argument that section 2501 is not jurisdictional, the Supreme Court reviewed its earlier decisions holding that section 2501's statutory predecessors were jurisdictional in nature. The Court followed those decisions based on stare decisis. See 552 U.S. at 139. Contrary to Defendants' argument, John R. Sand did not broadly hold that all federal statutes governing limitations periods are jurisdictional in nature. Thus, John R.

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[3](...continued)
of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

Sand is not clearly irreconcilable with Cedars-Sinai. The Court is still bound by Cedars-Sinai and does not find that section 2401(a) creates a jurisdictional bar. See, e.g., Sierra Club v. Johnson, 2009 WL 482248, *9 (N.D. Cal.); Public Citizen, Inc. v. Mukasey, 2008 WL 4532540, *8 (N.D. Cal.).

3. Plaintiffs' Standing to Seek Declaratory Relief Concerning the Legality of the Testing and Consent Forms

In order to provide declaratory relief, a court must have "an actual case or controversy within its jurisdiction." Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005). To satisfy the "case or controversy" requirement, a plaintiff must establish "the three elements of Article III standing: (1) he or she has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1225 (9th Cir. 2008). In the context of declaratory relief, a plaintiff demonstrates redressability if the court's statement would require the defendant to "act in any way" that would redress past injuries or prevent future harm. Mayfield v. United States, ___ F.3d ___, 2009 WL 4674172, at *6 (9th Cir. 2009).

If a court has subject matter jurisdiction, it may then consider whether it should exercise its discretion to grant declaratory relief. This decision is guided by the factors set out in Brillhart v. Excess Insurance Company, 316 U.S. 491 (1942). Principal Life Ins. Co., 394 F.3d at 672. Brillhart states that "1) the district court should avoid needless determination of state

law issues; 2) it should discourage litigants from filing declaratory actions as a means of forum shopping; and 3) it should avoid duplicative litigation." Principal Ins. Co., 394 F.3d at 672 (alteration marks and citation omitted). The Ninth Circuit has also noted other relevant considerations:

> whether the declaratory action will settle all aspects of the controversy; whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue; whether the declaratory action is being sought merely for the purposes of procedural fencing or to obtain a 'res judicata' advantage; or whether the use of a declaratory action will result in entanglement between the federal and state court systems. In addition, the district court might also consider the convenience of the parties, and the availability and relative convenience of other remedies.

Id. (quoting Gov't Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1225 n.5 (9th Cir. 1998) (en banc)).

Defendants argue that Plaintiffs lack standing to seek a declaration on the lawfulness of the testing and the associated consent forms because such relief would not redress their alleged injuries.

With regard to a declaration on the testing's lawfulness, Plaintiffs lack standing. A declaration would not redress their past injuries or those of putative class members. Nor would a declaration prevent future harm; the individual Plaintiffs are no longer members of the armed forces and they do not plead or argue that they might be subject to Defendants' experimentation programs in the future. Vindication through a declaration that they have been wronged does not redress the individual Plaintiffs' injuries for the purposes of Article III.

Plaintiffs cite Bilbrey v. Brown, 738 F.2d 1462 (9th Cir. 1984), and Greater Los Angeles Council on Deafness, Inc. v. Zolin,

812 F.2d 1103 (9th Cir. 1987). These cases are distinguishable and do not support their position. Neither case involved a challenge to the plaintiffs' standing to seek declaratory relief; instead, both cases inquired into whether the district courts properly exercised their discretion in denying such relief. See Bilbrey, 738 F.2d at 1470; Zolin, 812 F.2d at 1112. And unlike the Bilbrey and Zolin plaintiffs, the individual Plaintiffs and the putative class members will not face future harm by Defendants' experimentation programs.[4] Because the individual Plaintiffs do not satisfy the threshold issue of standing, the Court need not consider whether declaratory relief would be appropriate.

However, a declaration concerning the lawfulness of the consent forms, to the extent that they required the individual Plaintiffs to take a secrecy oath, would redress their alleged injuries. Plaintiffs assert that these oaths cause ongoing harm because they prohibit the individual Plaintiffs from seeking treatment and counseling for the harm inflicted by the experiments. Because a declaration that the oaths were unlawful would allow the individual Plaintiffs to speak freely about their experiences, they

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[4] In Bilbrey, two elementary school students alleged that their search by two school officials was unconstitutional. 738 F.2d at 1464. Although the named plaintiffs had moved on to high school by the time of their appeal, the court noted that they represented a class "including future persons attending Columbia County Elementary Schools" and, as a result, there were "persons before the court, other than appellants, who [stood] to benefit from such" declaratory relief. Id. at 1471.

In Zolin, the plaintiffs challenged county officials' refusal to provide sign-language interpreters to enable deaf individuals to serve as jurors. 812 F.2d at 1106. The plaintiffs argued that the officials' decision violated their rights under the Fourteenth Amendment and under Section 504 of the Rehabilitation Act. Id. Thus, a declaration could have redressed their injuries and those of class members because it could prevent future harm.

have standing to assert their declaratory relief claim concerning the consent forms and secrecy oaths. Further, such relief would avoid potential future litigation by clarifying whether the veterans may discuss their experiences without facing consequences.

Accordingly, the Court dismisses with prejudice Plaintiffs' declaratory relief claim concerning the lawfulness of Defendants' testing program because a declaration would not redress their past injuries or prevent future harm to them. Plaintiffs' claim for a declaration on the lawfulness of the consent forms, to the extent that they required the individual Plaintiffs to take a secrecy oath, may go forward.

II. Dismissal under Rule 12(b)(6)

A. Legal Standard

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this principle is inapplicable to legal conclusions; "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not taken as true. Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550

U.S. at 555).

B. Analysis

Defendants argue that Plaintiffs have failed to state a claim with regard to their requests for documents and medical care, which Plaintiffs assert under 5 U.S.C. § 702. As mentioned above, section 702 provides a right of judicial review for persons who have suffered a legal wrong based on agency action or inaction. The scope of this right is limited. The statute, in relevant part, provides:

> Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702. For section 702 claims, 5 U.S.C. § 706 "prescribes standards for judicial review and demarcates what relief a court may (or must) order." Rosemere, 581 F.3d at 1172 n.2. When a plaintiff asserts an agency's failure to act, a court can grant relief by compelling "agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). A "'claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.'" Sea Hawk Seafoods, Inc. v. Locke, 568 F.3d 757, 766 (9th Cir. 2009) (quoting Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004)) (emphasis in original).

1. Claims for Notice and Production of Documents

Plaintiffs cite the Wilson Directive, AR 70-25 (1962) and a DOJ opinion letter to show that Defendants had a legal duty to act. AR 70-25 (1962), which incorporates language from the Wilson

Directive, states that a participant "will be told as much of the nature, duration, and purpose of the experiment, the method and means by which it is to be conducted, and the inconveniences and hazards to be expected, as will not invalidate the results" and "will be fully informed of the effects upon his health or person which may possibly come from his participation in the experiment." AR 70-25 ¶ 4(a)(1) (1962). The DOJ letter states that the CIA has a legal duty to notify participants because the agency placed test participants in harm's way. SAC Ex. A at A-006; see also Restatement (Second) of Torts § 321 ("If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.").

AR 70-25 (1962) and the DOJ letter support a claim under section 702 for which the Court could compel discrete agency action. The 1962 version of AR 70-25 mandated the disclosure of information so that volunteers could make informed decisions. Army regulations have the force of law. See Nat'l Med. Enters. v. Bowen, 851 F.2d 291, 293 (9th Cir. 1988); Kern Copters, Inc. v. Allied Helicopter Svc., Inc., 277 F.2d 308, 310 (9th Cir. 1960). Plaintiffs allege that Defendants defaulted on this legal requirement. Plaintiffs also allege that the CIA remains under a legal duty to disclose, as explained by the DOJ opinion letter. Even though this is not a statutory duty, the government can be held liable for the breach of its duty to warn, so long as the decision on whether to warn is not considered a discretionary act. See In re Consol. U.S. Atmospheric Testing Litig., 820 F.2d 982,

996-99 (9th Cir. 1987); see generally 28 U.S.C. § 2680(a). Here, an Army regulation, buttressed by the DOJ opinion, suggests that Defendants had a non-discretionary duty to warn the individual Plaintiffs about the nature of the experiments. See AR 70-25 ¶ 4(a)(1) (1962).[5]

Defendants argue that, because Plaintiffs failed to exhaust administrative remedies under the Freedom of Information Act (FOIA) and the Privacy Act, they fail to state an APA claim. This argument fails because Plaintiffs' claims do not arise under the FOIA or the Privacy Act, but rather under Defendants' own memoranda and regulations, and the common-law duty to warn.

2. Claims for Medical Care

Defendants assert that, because government-provided medical care for veterans is governed by statute, Plaintiffs' claim for medical care must fail to the extent that it relies on an alleged contractual obligation. Plaintiffs assert that their right to medical care arises from "obligatory duties" imposed by Defendants' own regulations. Opp'n at 7. They dispute Defendants' assertion that this claim arises under a contract theory.

To demonstrate their entitlement to medical care, Plaintiffs cite AR 70-25 (1962). As noted above, the 1962 version of the regulation provided volunteers with the safeguard of requiring "medical treatment and hospitalization . . . for all casualties." AR 70-25 ¶ 5(c) (1962).

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[5] AR 70-25 ¶ 4(a)(1) (1962) requires notice to the extent that it would not "invalidate the results," which suggests that Defendants had discretion at the time of the experiments on the scope of what volunteers would be told. Because the results can no longer be invalidated, AR 70-25 (1962) does not give Defendants discretion concerning disclosure now.

Defendants concede that AR 70-25 (1962) accords a right to medical care, but contend that such care was "an 'additional safeguard' available to address a medical need during an experiment rather than care over the course of a test participant's lifetime." Defs.' Reply in Support of Mot. to Dismiss of August 14, 2009 at 4-5. The language of the regulation does not require this conclusion. The safeguards were put in place to protect a volunteer's health. The fact that symptoms appear after the experiment ends does not obviate the need to provide care.

Defendants also maintain that ordering the Army to provide medical care would conflict with 10 U.S.C. § 1074, which states in relevant part,

> Under joint regulations to be prescribed by the administering Secretaries, a member of a uniformed service described in paragraph (2) is entitled to medical and dental care in any facility of any uniformed service.

10 U.S.C. § 1074(a). The Court does not find a conflict. Although the statute creates an entitlement for active service members and certain former members to medical and dental care, it does not bar the Court from granting injunctive relief to vindicate Plaintiffs' claims.

Because Plaintiffs allege that their medical care has been wrongfully withheld and that they have been injured by Defendants' failure to act, they have sufficiently alleged a claim for medical care under section 702.

III. Defendants' Alternative Motion for Summary Judgment

A. Legal Standard

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the

evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987).

B. Analysis

Defendants argue that they are entitled to summary judgment as a matter of law because Plaintiffs' claims are time-barred. As noted above, 28 U.S.C. § 2401(a) provides a six-year limitations period for civil actions commenced against the United States. Defendants assert that the individual Plaintiffs knew of their injuries "either immediately or shortly after their tests ended," which was over six years prior to the filing of this action. Defs.' Mot. to Dismiss of Jan. 5, 2010, at 14.

Plaintiffs' claims concerning Defendants' failure to provide medical care and proper notice of the experiments' health effects arise under 5 U.S.C. § 706(1). Several courts have held that there is no applicable statute of limitations for claims under section 706(1). See Pub. Citizen, Inc., 2008 WL 4532540, at *7 (citing Am. Canoe Ass'n v. U.S. EPA, 30 F. Supp. 2d 908, 925 (E.D. Va. 1998) (stating that "application of a statute of limitations to a claim of unreasonable delay is grossly inappropriate"); see also Wilderness Soc'y v. Norton, 434 F.3d 584, 588 (D.C. Cir. 2006) (stating that the D.C. Circuit has "repeatedly refused to hold that actions seeking relief under 5 U.S.C. § 706(1) . . . are time-barred if initiated more than six years after an agency fails to meet a statutory deadline"). Defendants do not provide contrary authority, but instead argue that Plaintiffs do not assert valid

APA claims; the Court rejected this argument above.

Plaintiffs' claims concerning the consent forms and secrecy oaths, both of which appear to arise under the United States Constitution, might be time-barred by section 2401(a). At this early stage, however, the record does not offer the Court a basis to rule on the issue as a matter of law. The evidence proffered by Defendants addresses four of the six individual Plaintiffs' knowledge of their injuries allegedly attributable to the testing at Edgewood; this evidence does not shed light on these Plaintiffs' awareness as to the lawfulness of their consent or secrecy oaths.[6] Thus, the Court finds it premature to decide whether Plaintiffs' claims concerning the consent forms and their secrecy oaths are barred by the statute of limitations.

Accordingly, the Court denies Defendants' Alternative Motion for Summary Judgment as to Plaintiffs' claims under the APA; these claims are not time-barred. The Court denies without prejudice Defendants' Alternative Motion for Summary Judgment as to Plaintiffs' other claims; Defendants may renew their motion after a fuller record has been developed.

CONCLUSION

For the foregoing reasons, the Court GRANTS in part and DENIES in part Defendants' Motions to Dismiss (Docket Nos. 34 and 57) and DENIES Defendants' Alternative Motion for Summary Judgment. (Docket No. 57.) The organization Plaintiffs' claim for declaratory relief that the Feres doctrine is unconstitutional is

[6] Also, given that the individual Plaintiffs took an oath not to discuss the testing program, which presumably delayed their filing of this action, Defendants may be equitably estopped from asserting a statute of limitations defense.

dismissed with prejudice for lack of subject matter jurisdiction. Plaintiffs' claim for declaratory relief on the lawfulness of the testing program is dismissed with prejudice for lack of standing. Defendants' Motions to Dismiss are denied with regard to Plaintiffs' other claims.

In accordance with the Court's Case Management Order of December 23, 2009, discovery responses shall be due thirty days from the date of this Order. (Docket No. 54.) A further case management conference will be held on January 5, 2012.

IT IS SO ORDERED.

Dated: January 19, 2010

CLAUDIA WILKEN
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2014, I electronically filed the foregoing supplemental record excerpts with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Charles W. Scarborough
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