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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

PLAINTIFFS' NOTICE OF MOTION & MOTION APPLYING FOR ATTORNEYS' FEES AND EXPENSES; MEMORANDUM IN SUPPORT THEREOF

Date: TBD
Time: TBD
Judge Claudia Wilken

Complaint filed January 7, 2009

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU ARE HEREBY NOTIFIED THAT at a date and time to be determined, before the Honorable Claudia Wilken in the United States District Court for the Northern District of California, located at 1301 Clay Street, Courtroom 2, 4th Floor, Oakland, California 94612, Plaintiffs Vietnam Veterans of America, Swords to Plowshares, Bruce Price, Franklin D. Rochelle, Eric P. Muth, David C. Dufrane, Tim Michael Josephs, and William Blazinski ("Plaintiffs") will, and hereby do, move for an award of fees, costs and other expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412.

This Motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the Declarations of Stacey M. Sprenkel and the named Plaintiffs with exhibits filed concurrently herewith, the Bill of Costs and exhibits filed concurrently herewith, all other pleadings and papers on file in this action, and such matters and arguments as may be presented at the hearing on this motion.[1]

[1] As reflected in the Stipulation filed on July 12, 2017, the parties have agreed to continue their efforts to negotiate a settlement in this case and respectfully request that the Court stay the litigation of this fees motion until that agreed-stay period concludes. (ECF No. 601.) Thereafter, Plaintiffs may notice a proposed hearing date.

MEMORANDUM OF POINTS AND AUTHORITIES

Under the Equal Access to Justice Act ("EAJA"), a court shall award attorneys' fees, costs, and other expenses to a prevailing party in a civil action brought against a United States agency, unless the court finds that the position of the government was substantially justified or that special circumstances make an award unjust. 28 U.S.C. § 2412(d)(1)(A). Here, as the prevailing party in this lawsuit, Plaintiffs are entitled to an award of reasonable fees and costs. The Army cannot demonstrate that its position was substantially justified or that special circumstances make an award unjust.

This is an important action. The named Plaintiffs and their pro bono counsel, Morrison & Foerster, LLP, sought to remedy a fifty year running public wrong, seeking notice and medical care for thousands of former service members who served as human test subjects during government-conducted chemical and biological weapons experiments. As reflected by considerable media coverage of the veterans' plight and this lawsuit, including on CNN, NPR, and in the New Yorker magazine, this case was of considerable public import.[2] Yet, Plaintiffs prevailed only after a lengthy eight year battle during which the government relentlessly resisted at every turn in both this Court and in the Ninth Circuit Court of Appeals.

Ultimately, Plaintiffs achieved their primary goals in this litigation—to obtain declaratory and injunctive relief compelling the Army to comply with its own regulations and promises to class members decades ago. (*See* ECF No. 486 ¶ 21.) Injunctions have now been entered compelling the Army to provide notice and medical care, as required in Army Regulation 70-25 ("AR 70-25"). Along the way, Plaintiffs were also released from secrecy oaths that had inhibited them from speaking freely about their testing experiences, even to their own doctors and the Department of Veterans Affairs ("VA").

Given the Army's clear violations of its own regulations, which form the basis of the

[2] *See, e.g.*, *Vets feel abandoned after secret drug experiments*, http://www.cnn.com/2012/03/01/health/human-test-subjects/ (Mar. 1, 2012); *Veterans Used In Secret Experiments Sue Military For Answers*, http://www.npr.org/2015/09/05/437555125/veterans-used-in-secret-experiments-sue-military-for-answers (Sept. 5, 2015); *Operation Delirium*, http://www.newyorker.com/magazine/2012/12/17/operation-delirium (Dec. 17, 2012).

Court's injunctions and judgment, Defendants cannot meet their burden to show that their position was substantially justified. There was no substantial justification for the Army's persistent failure to comply with AR 70-25. By the same measure, Defendants' decision to aggressively defend its illegal acts in this litigation, rather than to take action to remedy the violations immediately, cannot be substantially justified by any means.

Over eight years after the Plaintiffs filed their Complaint, this Court entered an amended judgment for Plaintiffs on both notice and medical care claims on April 19, 2017. Plaintiffs' victory in this case on behalf of the class was only accomplished through the expenditure of significant time, energy, and resources by a team of highly skilled litigation attorneys. In light of this, Plaintiffs' requested amount for fees, costs, and other expenses is reasonable. Plaintiffs seek only the statutory rate (adjusted for cost of living increases) for all but one of the attorneys and the prevailing market rate for a single attorney, the late Gordon Erspamer, because of his unparalleled expertise in complex litigation against these government agencies on behalf of veterans.

In order to lessen the burden on the Court and in hopes that the government will not contest the requested fees and costs, Plaintiffs have undertaken a considerable effort to narrow the fees and costs sought in this Motion. This was done by limiting time sought to key events in the litigation and to core timekeepers. The tasks for which recovery is sought relate to Plaintiffs' successful notice and medical care claims (e.g., opposing motions to dismiss, summary judgment, appeal, plaintiff depositions, and expert discovery and depositions), and exclude significant time spent on other tasks, such as litigating numerous discovery disputes, obtaining discovery from defendants who were ultimately dismissed (CIA and VA), non-working travel time, and answering questions from numerous class members. (Declaration of Stacey M. Sprenkel ("Sprenkel Decl.") ¶ 6, Ex. A.) Furthermore, only key timekeepers who spent significant time on the case or handled important litigation events, such as defending a key deposition, are included. Therefore, the amount requested is understated in light of the litigation. Plaintiffs' success was accomplished efficiently, and Plaintiffs could not have found other counsel with the expertise and

skill necessary to bring this case to a successful resolution at a reduced rate.

Accordingly, Plaintiffs respectfully request that the Court award, directly to Plaintiffs' counsel Morrison & Foerster, LLP, fees and costs in the amount of $4,515,868.21.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs were test subjects in secret government-conducted experiments of hundreds of chemical and biological substances, including nerve agents sarin and VX, mustard gas, LSD, and tularemia, which are known to likely produce immediate and potential long-term adverse health effects. Mindful of these health risks, the Army in 1962 initially promulgated and thereafter repromulgated AR 70-25, which required the Army to provide test subjects with medical care and notice. The regulation also provided that a Registry would be established to allow for monitoring of participants' conditions and ongoing notice of potential health risks identified as a result of that monitoring. AR 70-25 § 3-2(h), Appx. H (1990). As reflected in official Memoranda from 1979 that were uncovered during discovery, the Army long-ago recognized that its use of the veterans, essentially as human guinea pigs, was ethically dubious and that its legal duties to these veterans were "not open to dispute." (ECF No. 491-6; *see also* Nos. 491-7, 491-8, 491-9.)

Even though the Army had a regulation on the books since at least 1962 that required it to provide medical treatment and notice to these test subjects, these veterans were left to fend for themselves. The Army admits that it did not provide—and still has not provided—the medical care directed by AR 70-25. As a result of this continuing neglect, this lawsuit was filed on behalf of six named veteran Plaintiffs, along with Vietnam Veterans of America ("VVA") and Swords to Plowshares, and class certification was granted on September 30, 2012. (ECF Nos. 1, 485.) Sadly, during the course of this litigation that began in 2009, two named Plaintiffs have passed away. Wray Forrest died in August 2010, and Larry Meirow passed away last month.

As demonstrated by considerable news coverage, the official and public condemnation of the testing programs and the continuing neglect of these veterans continue to this date. Nevertheless, the government vehemently defended this lawsuit to a fault. The ultimate result of the litigation has been to vindicate the Plaintiff Class' rights to notice and medical care. Only

through considerable time and effort were the named Plaintiffs and their pro bono counsel able to achieve this successful result, given the remarkable and persistent objections by the Army throughout the case that it owed no obligations to the Class.

The Army repeatedly denied that it had any obligation to its former chemical and biological agent test subjects. For example, in its Motion to Dismiss the Second Amended Complaint, Defendants argued: "Neither version of Army Regulation 70-25 can supply a duty to provide the medical care that Plaintiffs seek," and also "Army Regulation 70-25 — the 1962 and the current versions — similarly does not support Plaintiffs' claim to notification and information." (ECF No. 57 at 8, 10.) The Army repeated similar arguments in its Opposition to Class Certification: "Nothing in this provision of AR 70-25 suggests that the 'duty to warn' applies retroactively." (ECF No. 393 at 3.) And again at summary judgment, the Army denied any obligation: "AR 70-25 cannot serve as a basis for Plaintiffs' APA health care claim against the Army," and "Plaintiffs similarly cannot locate the source of a discrete, nondiscretionary legal obligation on the part of the Army to provide Notice to test participants . . . in the 1962 or the 1974 versions of AR 70-25." (ECF No. 495 at 16, 38.)

Despite the Army's serial attempts to avoid honoring its obligations to the Class, Plaintiffs achieved a successful result on their key notice and medical care claims. This Court granted summary judgment in Plaintiffs' favor on the notice claim, holding that the Army has an ongoing duty to warn class members of any information that may affect their well-being, when that information becomes available, now or in the future. (ECF No. 544 at 44.) On appeal, Plaintiffs successfully defended the notice injunction, including defeating the Army's motion to stay the injunction pending the appeal, and were also able to obtain a more favorable ruling on their claim that the Army has an ongoing duty to provide medical care to test subjects. (ECF Nos. 560, 570.)

Following remand, Plaintiffs unsuccessfully attempted to reach a meaningful settlement or agreed injunction concerning the provision of medical care with the Army. (ECF No. 586.) Following further briefing on the injunction issue, and after eight years of litigation and appeal, this Court entered judgment in Plaintiffs' favor on April 19, 2017. (ECF No. 598.) The deadline

for any appeal from the judgment was June 19, 2017. Fed. R. App. P. 4(a)(1)(B). Plaintiffs filed this timely Motion for Fees and Costs within 30 days of that date. *See* 28 U.S.C. § 2412(d)(2)(G); *Al Harbi v. INS*, 284 F.3d 1080, 1083 (9th Cir. 2002).

Pursuant to Local Rule 54-5, the parties have met and conferred concerning this motion. (Sprenkel Decl. ¶ 35.) Per the Army's request, Plaintiffs provided the Army's counsel with time records and a fees demand on June 1, 2017, and the parties had a further meet and confer by telephone on June 30, 2017. (*Id.*)

II. LEGAL STANDARD

The EAJA states that "a court shall award to a prevailing party other than the United States fees and other expenses" in "any civil action . . . , including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action." 28 U.S.C. § 2412(d)(1)(A). As stated in the legislative history, the EAJA was enacted in order to eliminate the possibility that citizens "may be deterred from seeking review of, or defending against unreasonable government action because of the expense involved in securing the vindication of their rights." H.R. Rep. No. 96-1418, at 5-6 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984 ("The purpose of the bill is to reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney fees . . . ."); *see also Meinhold v. United States Dep't of Def.*, 123 F.3d 1275, 1280 n.3 (9th Cir.), *amended on other grounds by*, 131 F.3d 842 (9th Cir. 1997) (quoting legislative history).

Under the EAJA, an award of fees and costs is ***automatic*** "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A); *see also United States v. 313.34 Acres of Land*, 897 F.2d 1473, 1477 (9th Cir. 1989) ("[T]he 'shall . . . . unless' language of the EAJA creates the presumption of a fee award." (citation omitted)). The Court must award requested attorneys' fees and costs if (1) the award applicant is the prevailing party; (2) the government has not met its burden of showing that its positions were substantially justified or that special circumstances make the award unjust; and (3) the requested attorneys' fees and costs are reasonable. 28 U.S.C.

§ 2412(d)(1)(A); *Love v. Reilly*, 924 F.2d 1492, 1494 (9th Cir. 1991).

III. ARGUMENT

A. Plaintiffs Are Prevailing Parties Under the EAJA.

On April 19, 2017, the Court entered a judgment against the Army that it had resisted throughout—for both Plaintiffs' notice and medical care claims, "Plaintiffs are entitled to an injunction . . . and such injunction has issued." (ECF No. 598 at 1-2.) Having obtained these notice and medical care injunctions sought in this litigation, Plaintiffs are the prevailing party.

"Prevailing party" status may be established by showing a "material alteration of the legal relationship of the parties." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989). Indeed, the "litigant need not prevail on every issue, or even on the 'central issue' in the case, to be considered the prevailing party." *Stivers v. Pierce*, 71 F.3d 732, 751 (9th Cir. 1995) ("It is enough that he succeed on any significant claim affording some of the relief sought, either *pendente lite* or at the conclusion of the litigation." (citation and quotation marks omitted)); *see also Animal Lovers Volunteer Ass'n v. Carlucci*, 867 F.2d 1224, 1225 (9th Cir. 1989).

After eight years of litigation and appeal, notice and medical care relief has been obtained for the Plaintiff Class. The Court's Notice Injunction enforces the Army's obligation, ordering that "Defendant shall provide such test subjects with newly acquired information that may affect their well-being that it has learned since its original notification, now and in the future as it becomes available." (ECF No. 545 at 1.) The Medical Care Injunction enforces the "ongoing duty to provide medical care to the members of the class for any injury or disease that is the proximate result of their participation in Defendant's chemical or biological substance testing programs." (ECF No. 597 at 1.) The Army can no longer ignore its legal obligations to test subjects to provide notice and medical care. This significant result alone, which places the veteran class members in a better position than before the lawsuit, undoubtedly makes Plaintiffs the prevailing party. Even though the Court declined to rule in Plaintiffs' favor on the constitutional basis for notice and medical care, the relief sought by those legal theories (i.e., notice and medical care) was achieved through the Administrative Procedures Act ("APA").

Furthermore, Plaintiffs also achieved a release from secrecy oaths from both the Army and the CIA, as sought in the Complaint. (ECF No. 486 ¶ 21.) Over the subsequent decades since participating in the testing programs, many test subjects had not come forward or told their doctors about their experiences because of secrecy oaths. Now, at least to some extent, the test subjects can feel free to talk about their experiences without fear of breaching secrecy obligations. (*See* ECF No. 245-18 at 5 ("to the extent the Individual Plaintiffs or VVA Members continue to believe that they are subject to any type of non-disclosure agreement with the CIA, they are hereby released from that agreement and any obligations or penalties related thereto by the CIA"); ECF No. 496-61 at 1 (Army Memorandum: "chemical or biological agent research volunteers are hereby released from non-disclosure restrictions, including secrecy oaths, which may have been placed on them").)

Because Plaintiffs succeeded on several significant issues in the litigation and achieved notice, medical care, and secrecy oath relief, they are a prevailing party under the EAJA and thus, entitled for an award of fees and costs. Awarding those fees and costs directly to Plaintiffs' pro bono counsel, as Plaintiffs request, is consistent with the purpose of the EAJA. *See, e.g.*, *Armstrong v. Astrue*, No. 07-1456 DAD, 2008 U.S. Dist. LEXIS 54807, at *6-8 (E.D. Cal. July 9, 2008) (collecting cases). The Plaintiffs each qualify as a "party" under the EAJA definition, 28 U.S.C. § 2412(d)(2)(B). As shown in the attached declarations, the individual net worth of each of the named individual Plaintiffs did not exceed $2,000,000 at the time this civil action was filed, and the two organizational Plaintiffs are tax-exempt and tax deductible organizations under the U.S. Tax Code. (Declaration of Bruce Price ¶ 2; Declaration of Franklin D. Rochelle ¶ 2; Declaration of Eric P. Muth ¶ 2; Declaration of David C. Dufrane ¶ 2; Declaration of Tim Josephs ¶ 2; Declaration of William Blazinski ¶ 2; Declaration of VVA (Bernard Edelman) ¶ 2; Declaration of Swords to Plowshares (Michael Blecker) ¶ 2.)

B. A Fee Award is Mandatory Here.

Congress designed the EAJA's fee provision to make it possible for individuals and groups with far fewer resources than the federal government to obtain counsel willing to invest

the time and effort to litigate lawsuits against the government. *See Meinhold*, 123 F.3d at 1280 n.3. This is why "[o]nce a party's eligibility has been proven, an award of fees is mandatory under the EAJA unless the government's position is substantially justified or special circumstances exist that make an award of fees unjust." *Love*, 924 F.2d at 1495 (citation omitted); *see also 313.34 Acres of Land*, 897 F.2d at 1477. To overcome this presumption, the Army bears the burden of showing that its position was "substantially justified," *ONRC v. Marsh*, 52 F.3d 1485, 1492 (9th Cir. 1995), or proving that any special circumstances make an award unjust, *Love*, 924 F.2d at 1495. The Army cannot meet either burden.

1. Defendants' Position Was Not Substantially Justified.

"If the government's position violates the Constitution, a statute, or *its own regulations*, a finding that the government was substantially justified would be an abuse of discretion." *Meinhold*, 123 F.3d at 1278 (citations omitted; emphasis added). That is precisely the situation presented here. The Ninth Circuit held that the Army has violated its own regulation AR 70-25, and this Court has ordered the Army to comply with that regulation. Accordingly, the Army cannot meet its steep burden to show that its regulation-violating position was "substantially justified."

Furthermore, both the Ninth Circuit's discussion during oral argument and the published decision reinforce the unjustified nature of the Army's position. The Army cannot meet its burden to show that its underlying actions and its litigation position in defense of its underlying actions were both substantially justified. *See, e.g.*, *Wilderness Soc'y v. Babbitt*, 5 F.3d 383, 388-89 (9th Cir. 1993) (fact that government's litigation position may have been justified is not sufficient because court must also consider underlying government conduct); *United States v. Marolf*, 277 F.3d 1156, 1164 (9th Cir. 2002) (reversing denial of attorneys' fees as abuse of discretion).

On the notice claim, the Ninth Circuit determined that the Army "clearly anticipated," and in fact "already concluded," it was subject to a duty to warn all participants. (ECF No. 570 at 20.) Indeed, in 1979, the government was aware that "the legal necessity for a notification program is

not open to dispute." (*Id.* at 10.) In 1988, the government reiterated that it had a "[d]uty to warn" test subjects, including an obligation "to provide them with any newly acquired information that may affect their well-being when that information becomes available." (*Id.* at 13.) Yet, the Army failed to provide notice to class members in contravention of its recognized duty.

During oral argument, Judge Fletcher commented: "I don't really understand why the Army is taking this position on duty to warn. . . . I simply do not understand why the government is fighting this, because it seems to be such an elemental obligation for the Army, having gotten this from these patriotic volunteers. . . ." (Sept. 11, 2014 Oral Arg. at 37:36–38:38.)[3] Judge Fletcher further criticized the Army's litigation strategy, commenting: "I have to say, I don't understand why the government is appealing." (*Id.* at 40:18-21.)

The Ninth Circuit was similarly critical of the Army's conduct related to medical care. At oral argument, Judge Fletcher pushed back on the Army's position that the regulation was not forward-looking and somehow thus relieved the Army from providing care to test subjects: "That's a pretty cruel thing for the Army to do, and I don't think the Army is a cruel institution." (*Id.* at 23:10-15.) The Ninth Circuit ultimately concluded that the Army's proposed interpretation of the regulation was merely "a 'convenient litigation position' that does not warrant *Auer* deference." (ECF No. 570 at 21.) Indeed, the Ninth Circuit found: "Not only is the government's argument inconsistent with the text, but it also **makes little sense**." (*Id.* at 27 (emphasis added).) The Ninth Circuit reasoned that "[t]here is nothing in the text of the current version of AR 70-25, first promulgated in 1988, that supports" the government's litigation position; rather, the "government's argument is inconsistent with the plain text of subsection (k)," which "compels the conclusion that the Army must provide care to former test subjects." (*Id.* at 26-27.)

Both Defendants' underlying conduct that gave rise to the litigation *and* its litigation position were unjustified. The Army cannot meet its steep burden.

[3] The audio recording of the September 11, 2014 oral argument before the Ninth Circuit is available at http://www.ca9.uscourts.gov/media/view.php?pk_id=0000013289.

2. No Special Circumstances Make an Award Unjust.

The "special circumstances" exception to eligibility under the EAJA is a "'safety valve' [that] . . . gives the court discretion to deny awards where equitable considerations dictate an award should not be made." H.R. Rep. No. 96-1418, at 11, *reprinted in* 1980 U.S.C.C.A.N 4984, 4990. The exception is limited to cases in which "the government is advancing in good faith a credible, though novel, rule of law." *Grason Elec. Co. v. NLRB*, 951 F.2d 1100, 1103 (9th Cir. 1991) (citation omitted). This narrow exception has no application in this case. This litigation is precisely the kind of circumstances for which the EAJA was enacted to ensure that important governmental wrongs can be remedied regardless of the plaintiffs' economic status. Plaintiffs and their counsel successfully vindicated the rights of aging test subjects, who were being deprived of legally required notice and medical care, to correct a long standing public wrong. Defendants were not advancing a credible, novel rule of law in good faith, but rather, the Army was violating a regulation on its books since 1962. Not awarding fees here would be unjust.

C. Plaintiffs' Fees Request Is Reasonable and Appropriate.

If a party is entitled to recover attorneys' fees under the EAJA, courts fix the appropriate fee amount by multiplying the "number of hours reasonably expended on the litigation by a reasonable hourly rate." *D'Emanuele v. Montgomery Ward & Co., Inc.*, 904 F.2d 1379, 1383 (9th Cir. 1990). Here, Plaintiffs' request for a total of 13,399 hours in attorney and 2,910 hours in paralegal time is sufficiently documented and seeks a reasonable number of hours in light of the case's duration and complexity as well as Plaintiffs' degree of success on behalf of the class. (Sprenkel Decl. Ex. A.) Moreover, Plaintiffs' request for a total of $3,679,003.50 in attorney and paralegal fees is proper given that Plaintiffs seek only the statutory rate for all but one of their attorneys and the normal billing rate for one attorney because of his particular expertise that was necessary for this case.[4] In a comparable case where the Army agreed in settlement to provide lifetime medical care (Tricare) to veteran class members who served in Iraq and Afghanistan, the

[4] The time included in this fees application goes to the end of June 2017. If the parties are unable to reach a settlement, however, Plaintiffs may file a supplemental fees petition seeking recovery for time spent after June 30, 2017, including additional work on the fees filings.

court awarded $3,862,924 in attorney's fees and expenses to the plaintiffs' pro bono counsel, pursuant to the EAJA. *Sabo v. United States*, 127 Fed. Cl. 606, 640 (Ct. Fed. Claims 2016).

1. Plaintiffs Have Sufficiently Documented Their Time.

To meet the duty of documenting the appropriate hours expended in this litigation and submitting evidence in support of those hours worked, Plaintiffs' counsel submits the Declaration of Stacey Sprenkel and attached spreadsheet with verbatim time entries from Morrison & Foerster's billing software that reflect hours recorded working on this case. (Sprenkel Decl. ¶ 3, Ex. A.) The spreadsheet identifies the billing timekeeper in detailed time records, which were compiled regularly by attorneys and paralegals who worked on this case, and it identifies the subject matter of the time expenditures. (*Id.*)

2. Plaintiffs Seek Reasonable Time.

Plaintiffs' request is reasonable. It reflects a significant cut in the overall fees incurred during the litigation. The Ninth Circuit has held that "[b]y and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). Plaintiffs would be entitled to recover for significantly more time spent on the entire case, including pursuing unsuccessful claims, because they were all "related to the plaintiff's successful claims." *Thorne v. City of El Segundo*, 802 F.2d 1131, 1141 & n.10 (9th Cir. 1986). Indeed, all of the claims involved a common core of facts (i.e., human experimentation by the government on service members) and sought to vindicate the rights of those test subjects by obtaining care or removing obstacles from their ability to receive meaningful medical treatment. Furthermore, "[w]here a plaintiff has obtained 'excellent results,' his attorney should recover a fully compensatory fee." *NRDC v. Winter*, 543 F.3d 1152, 1162 (9th Cir. 2008) (citation omitted). In hopes of avoiding protracted litigation over fees and to minimize the burden on the Court, however, Plaintiffs have undertaken an extensive effort to narrow the fees requested. While the total amount of fees incurred based on counsel's standard billing rates were in excess of $20 million, Plaintiffs only seek fees in the amount of $3,679,003.50. (Sprenkel Decl. ¶¶ 4-5.)

Plaintiffs have limited the fees sought to events or filings directly necessary to Plaintiffs' success on the notice and medical care claims for the veterans' class or driven by the government's actions opposing the relief sought.[5] The fees sought were calculated by (1) narrowing the tasks included and (2) omitting time from non-core timekeepers. Plaintiffs endeavored to exclude time expended on activities not related to the notice and medical care claims, such as pursing discovery and taking depositions from the CIA and VA.

The key events for which Plaintiffs are seeking fees are identified in the detailed time records submitted with the Sprenkel Declaration, but generally fall into the following categories: preparing and filing the complaint and four amended complaints; opposing the Army's serial motions to dismiss the case; defending the depositions of the eight named individual Plaintiffs and representatives of the two organizational Plaintiffs; taking discovery related to the conducting of the testing programs; taking the three-day deposition of the Army's Rule 30(b)(6) designee; drafting requests for admission that were ultimately used on summary judgment; reviewing voluminous documents to unearth key records used at summary judgment and cited by the Ninth Circuit; successfully moving for class certification; working with several experts to prepare for trial, defending those experts' depositions, and taking the Army's experts' depositions; moving for and opposing summary judgment; successfully appealing to the Ninth Circuit and defending against a cross-appeal by the Army; attempting to negotiate the injunction and a potential settlement; and preparing this fee motion. (Sprenkel Decl. ¶ 6, Ex. A.)

Over the course of a decade, there were a total of 204 timekeepers on this matter, including support staff and e-discovery specialists. (*Id.* ¶ 9.) Plaintiffs are only seeking recovery for time spent by 19 attorneys and six paralegals, however. (*Id.* ¶¶ 9, 33.) Plaintiffs have excluded numerous timekeepers, such as summer associates, temporary paralegals, support staff, and attorneys who worked on the case only briefly. (*Id.* ¶ 9.) In so doing, Plaintiffs have

[5] In this regard, per the Army's request, Plaintiffs provided the Army with time records and a fees demand seven weeks before the motion filing deadline for the Army to review. (Sprenkel Decl. ¶ 35.) Plaintiffs are hopeful that the Army will consent to the fees requested before the Court is burdened with further briefing.

streamlined their request to avoid any potential concerns about overstaffing or time spent "getting up to speed" on the case or otherwise lost in transition between team members.

The core timekeepers for who fees are being sought are listed and discussed in greater detail in the Sprenkel Declaration. Generally, they include partners or former partners, who lead the litigation, oversaw substantial projects, took or defended key depositions, or argued in court, such as the late Gordon Erspamer, Eugene Illovsky, Tim Blakely, Jim Bennett, and Stacey Sprenkel. (*Id.* ¶¶ 9-21.) There were also key associates who had significant responsibility for researching and drafting substantive filings, conducting extensive document review, taking and defending depositions, working with experts, or preparing arguments, such as Ben Patterson, Daniel Vecchio, Grant Schrader, Jed Rich, Jae Hong Lee, and Adam Shapiro. (*Id.* ¶¶ 22-31.) In light of the complex nature of the case, voluminous discovery, and over 600 court docket filings, paralegals were also an essential part of the team. Key paralegals included Jennifer Dwight, Doug Loi, Gary Stenger, and Anne LePore. (*Id.* ¶¶ 32-34.)

a. Plaintiffs' Request Is Reasonable Given the Complexity and Duration of This Litigation.

Simply put, reaching the successful result in this litigation on behalf of the class took substantial effort. This case was factually and technically complex, requiring familiarity with, among other things, lengthy Army regulations, and the evolution and history surrounding those regulations over a period of decades. (Sprenkel Decl. ¶ 7.) A large number of factual and scientific issues were explored, through document review and with the assistance of experts, relating to the testing programs and the chemical and biological agents to which the Plaintiff class members were exposed. (*Id.*) The time records provided in support of this application establish that Plaintiffs' attorney and paralegal hours sought in this Motion were spent on appropriate and necessary activities in light of the case and the government's litigation tactics. (*Id.* ¶ 48, Ex. A.) As compared to the *Sabo* award of $3.8 million in a veterans medical care case that settled, the amount sought here of $4,515,868.21, where the parties went through a lengthy litigation and appeal to reach judgment, is understated. *See Sabo*, 127 Fed. Cl. at 640.

The core relief sought by Plaintiffs, regardless of which legal theory was employed, has been seeking injunctive and declaratory relief "stating that DEFENDANTS must fully disclose to Plaintiffs complete medical information concerning all tests conduct on Plaintiffs (including any results thereof)~~,~~ . . . and stating that DEFENDANTS' duty to provide Plaintiffs with all necessary medical treatment on an ongoing basis is mandatory." (ECF No. 1 ¶¶ 163, 165.) Unfortunately, given the Army's aggressive litigation tactics, the effort expended over the course of eight years of litigation to successfully obtain that notice and medical care relief was considerable.

After spending time conducting informal discovery, factual research, and legal research and analysis, Plaintiffs' counsel filed the original complaint on January 7, 2009. (ECF No. 1.) Between January 2009 and March 2011, Plaintiffs expended significant effort opposing the Defendants' various motions to dismiss (ECF Nos. 29, 34, 57, 187). In 2013, Plaintiffs had to respond to Defendants' 64-page summary judgment brief (ECF No. 495), as part of a protracted summary judgment fight requiring supplemental briefing after oral argument (ECF Nos. 517, 538, 539-543).

While Plaintiffs won both the medical care and notice claim issues in the Ninth Circuit on June 30, 2015 (ECF No. 567), the Army sought *en banc* review, which required further briefing. Following the Ninth Circuit's denial of the Army's petition for rehearing and rehearing *en banc* on January 26, 2016, the case was remanded on February 5, 2016. (ECF Nos. 570, 571.) This Court then ordered the parties to negotiate a proposed injunction in light of the Ninth Circuit decision, and if unable to do so, to file proposed competing injunctions with briefs in support. (ECF No. 572.) Plaintiffs' counsel spent considerable time and effort over the next year, attempting to reach a settlement with the Army. (ECF No. 586 at 1.) Unfortunately, these efforts were unsuccessful. Following contested briefing, the Court entered an injunction on April 4, 2017. (ECF No. 597.)

Along the way during this eight year litigation, the Army repeatedly raised the same or similar arguments throughout its various dispositive motions. In so doing, the Army unnecessarily increased costs and drove up Plaintiffs' fees, by forcing continued briefing on

issues that had already been decided by the Court. In ruling on summary judgment, for example, the Court acknowledged the unnecessary repetition:

> Defendants have previously made similar arguments. In their motion to dismiss Plaintiffs' third amended complaint, Defendants argued that the 1962 version of AR 70-25 was promulgated pursuant to 5 U.S.C. § 301, which was a housekeeping statute, and thus could not create a benefits entitlement. The Court rejected this argument . . . .

(ECF No. 544 at 22.) Similarly, the Court found:

> Defendants argue that they are entitled to summary judgment on Plaintiffs' claim for medical care because it is in fact a claim for money damages, not for equitable relief, and thus the APA's waiver of sovereign immunity is inapplicable. Defendants acknowledge that the Court considered this argument previously and rejected it, but argue that the prior decision should be reconsidered.

(*Id.* at 44.) Thus, Defendants' own litigation tactics, including briefing issues repeatedly and unnecessarily, drove up Plaintiffs' litigation fees.

The parties also engaged in extensive discovery during the course of the litigation. Because some of this discovery was related to claims against the CIA and VA, Plaintiffs intend to exclude those hours from this application for the sake of compromise. (Sprenkel Decl. ¶ 8.) Plaintiffs endeavored to limit discovery tasks time sought to (1) the depositions of named Plaintiffs, (2) the deposition of the Army's Rule 30(b)(6) designee Michael Kilpatrick, (3) the limited time spent drafting two sets of requests for admission, (4) document review, and (5) expert related time, such as deposing experts or defending expert depositions. (*Id.*) These tasks were necessary for the litigation and/or driven by the Army's litigation conduct, and therefore, reasonably included in this fee petition.

The parties produced approximately 1.8 million pages of documents. (*Id.*) Reviewing the government's voluminous productions in order to find needles in a haystack was tedious and expensive. (*Id.* Ex. A.) But it did pay off, including with the discovery of key historical documents from 1979, upon which the Ninth Circuit relied. (ECF No. 570 at 10-11.) These documents included an August 8, 1979 Memorandum, in which Army General Counsel Jill Wine-Volner urged top Army officials to quickly implement a notification program for test subjects, stating that its "legal necessity . . . is not open to dispute." (ECF No. 491-6.)

A September 24, 1979 Memorandum further advised the Director of the Army Staff that "[i]f there is reason to believe that any participants in such research programs face the risk of continuing injury, those participants should be notified of their participation and the information known today concerning the substance they received." (ECF No. 491-7.) An October 25, 1979 Army Chief of Staff Memorandum further stated that "[p]articipants in those projects who are considered by medical authority to be subject to the possible risk of a continuing injury are to be notified." (ECF No. 491-8.) The Ninth Circuit cited these documents as part of its analysis when holding that the Army owed a notice obligation to test subjects. (ECF No. 570 at 10-11, 19-20.)

With respect to experts, the Army's litigation position throughout this case lead to the reasonable conclusion that Plaintiffs needed to retain experts for potential health effects related testimony, if the case went to trial. Indeed, when opposing class certification, Defendants placed health effects and certain health studies squarely at issue, arguing that "the proposed class representatives can demonstrate no injury in fact with respect to receiving notice of the potential health effects associated with their participation in the testing . . . because DoD has concluded, after conducting multiple follow-up studies, that it is unaware of any general long-term health effects associated with the chemical and biological testing programs." (ECF No. 393 at 16.) Even on cross-appeal, the Army continued to press that Plaintiffs had some obligation concerning health effects discovery: Plaintiffs "had failed to satisfy that burden because they failed to show – and the district court failed to find – that there was any new information available to the Army that it had a discrete and mandatory duty to provide to veterans." (9th Cir. ECF No. 34 at 22.)

As detailed in Plaintiffs' Expert Disclosures, Plaintiffs' disclosed experts opined concerning, *inter alia*, the potential health effects of chemical and biological substances used during the testing program and the problem of PTSD resulting from testing participation. (Sprenkel Decl. ¶ 36, Ex. D.) The Curriculum Vitae for each of the experts, which describe their education, experience, and expertise, are attached to the Sprenkel Declaration. (*Id.* Exs. E-J.) In response to Plaintiffs' disclosed expert reports, the government disclosed six experts of their own, whom Plaintiffs needed to depose. (*Id.* ¶¶ 36-37, Ex. C.) Accordingly, Plaintiffs respectfully

submit that Plaintiffs' expert time and expenses were reasonable and should be awarded.

b. Time Spent on This Fees Motion Is Recoverable.

Time spent on this Fees Motion should also be awarded. Plaintiffs' counsel reviewed time notes for all billers, researched EAJA standards, and developed this reasonable request for fees and costs, which accounts for the complexity of the case as well as Plaintiffs' success. This time spent preparing a request for attorneys' fees and costs and associated materials is all recoverable. *Thompson v. Gomez*, 45 F.3d 1365, 1368 (9th Cir. 1995). As addressed above, Plaintiffs have cutoff the time requested at June 30, 2017, although hours have been and will be incurred after that date. If settlement cannot be reached, Plaintiffs may file a supplemental request for further time spent on the fees related filings.

3. Plaintiffs Seek a Reasonable Hourly Rate.

Although the EAJA contains a $125 cap for hourly rates that is applicable in some circumstances, it also specifically permits (a) district courts to adjust that base cap to compensate for an increase in the cost of living since 1996 and (b) the cap to be exceeded where "a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A); *see Sorenson v. Mink*, 239 F.3d 1140, 1148-49 (9th Cir. 2001). For all but one of the attorneys, Plaintiffs are merely asking for the cost-of-living adjusted EAJA rates. Those applicable statutory maximum hourly rates under the EAJA within the Ninth Circuit are as follows: $172.85 for 2008, $172.24 for 2009, $175.06 for 2010, $180.59 for 2011, $184.32 for 2012, $187.02 for 2013, $190.06 for 2014, $190.28 for 2015, and $192.68 for 2016 and 2017 (until a new figure for 2017 is released).[6] Those rates, rounded down to the nearest dollar for simplicity, are used in the time records spreadsheet attached to the Sprenkel Declaration. (Sprenkel Decl. ¶ 5, Ex. A.)

The Court should adjust upward the hourly rates of one of Plaintiffs' attorneys—Gordon Erspamer—to account for "special factors" present in this case. *See* 28 U.S.C. § 2412(d)(2)(A);

[6] *See* Statutory Maximum Rates under Equal Access to Justice Act, http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039 (last visited July 11, 2017); *Thangaraja v. Gonzales*, 428 F.3d 870, 876-77 (9th Cir. 2005); Ninth Circuit Rule 39-1.6.

Pierce v. Underwood, 487 U.S. 552, 572 (1988) (requisite special factors exist where there is a limited availability of "attorneys having some distinctive knowledge or specialized skill needful for the litigation in question"). Until his passing in November 2014, Mr. Erspamer was a renowned attorney and a determined crusader on behalf of veterans. (Sprenkel Decl. ¶ 12.) His specialized expertise and years of experience in this relevant area call for an upward adjustment.

In considering whether attorneys qualify for enhanced fees under the EAJA, the Ninth Circuit has held that courts should consider such factors as "expertise with a complex statutory scheme; familiarity and credibility with a particular agency; and understanding of the needs of a particular class of clients." *Pirus v. Bowen*, 869 F.2d 536, 541 (9th Cir. 1989); *Bondy v. Sullivan*, No. C 90-0223 TEH, 1991 WL 193535, at *3 (N.D. Cal. May 8, 1991) (awarding market rates). Relevant factors also include years of experience litigating in the area and local and national recognition for his or her skills. *Ibrahim v. Dep't of Homeland Sec*., No. C 06-00545 WHA, 2014 WL 1493561, at *16 (N.D. Cal. Apr. 16, 2014) (citing "46-years of trial experience," numerous awards, and service to the district to justify doubling the EAJA capped rates).

Mr. Erspamer was a well-recognized advocate for veterans' rights. (Sprenkel Decl. ¶ 12.) His father, Ernest Erspamer, died as a result of radiation exposure from his work as a navy engineer in the Bikini Atoll. (*Id.* Ex. B.) Starting in the 1980s, Mr. Erspamer dedicated a substantial portion of his career to helping veterans and veterans' organizations in pro bono cases. (*Id.* ¶ 12.) These matters included acting as class counsel on behalf of veterans challenging the validity and application of a federal statute limiting attorney fees in SCDDC claims, *National Association of Radiation Survivors v. Walters*, 111 F.R.D. 595 (N.D. Cal. 1986), and as counsel representing two veterans' organizations in an action challenging the VA's failures to provide timely mental health care and disability compensation determinations for veterans, *Veterans for Common Sense v. Shinseki*, No. 08-16728 (9th Cir. 2011). Unfortunately, the veteran test subjects in this case were similarly left to agonize while the government failed to provide the notice and medical care it was obligated to provide, which led Mr. Erspamer to bring his decades of experience to bear in this case.

When Mr. Erspamer received *The American Lawyer's* Lifetime Achiever award for his work on behalf of veterans, the article described him as "a legend in military circles." (Sprenkel Decl. Ex. B.) One plaintiff in the class action on behalf of Iraq and Afghanistan veterans, Sanford Cook, was quoted as saying: "If being a veteran were a religion, Gordon Erspamer would be our saint." (*Id.*) His remarkable persistence in bringing these complex cases has effected profound change. Over three decades, Mr. Erspamer became uniquely familiar with the relevant statutes, regulations, and agencies against which he litigated. (*Id.* ¶ 12.) That experience was necessary to achieving the outcome in this case. Accordingly, Mr. Erspamer's market billing rate should be awarded, as the "special factors" provision of the EAJA is clearly applicable.

4. Plaintiffs' Requested Paralegal Fees Are Reasonable.

A prevailing party that satisfies the EAJA's other requirements may recover its paralegal fees from the government at prevailing market rates. *See Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008); *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. C 06-4884 SI, 2012 WL 273604, at *5 (N.D. Cal. Jan. 30, 2012) (rejecting agency's argument that paralegals should not be compensated above the EAJA cap). Indeed, the failure to make an award for paralegal time, "absent some explanation that the time was duplicative or insufficiently documented," constitutes an abuse of discretion. *D'Emanuele*, 904 F.2d at 1387 (finding district court abused its discretion by disallowing time expended by legal support staff).

Plaintiffs here reasonably request 2,910 hours of paralegal time. All of these hours were spent on appropriate and necessary activities in the various stages of litigation discussed above, such as handling document productions and the record; preparing documents for filing; assisting with depositions; and preparing for hearings and Court-ordered conferences. (Sprenkel Decl. ¶ 32.) The requested hourly rates for Plaintiffs' paralegals are capped at the EAJA statutory rate (adjusted for cost of living increases). (*Id.* ¶ 32, Ex. A.) As explained above, Plaintiffs have already omitted time billed by several paralegals who did not bill significant time on the case. (*Id.* ¶ 33.)

Plaintiffs' request for paralegal fees is reasonable, and they are entitled to recover such

fees in the amount of $538,917.50.

D. Plaintiffs' Request for Costs and Other Expenses Is Reasonable.

Plaintiffs are also entitled to compensation for costs and other out-of-pocket expenses. 28 U.S.C. §§ 2412(a)(1), (d)(1)(A). Under the EAJA, a judgment for costs to be awarded to the prevailing party includes such things as filing fees, service fees, court reporter's fees, and photocopying costs. *See* 28 U.S.C. § 2412(a)(1) (citing 28 U.S.C. §1920 (listing costs)). But "the expenses enumerated in Section 2412(d)(2)(A) are set forth as examples, not as an exclusive list." *Int'l Woodworkers of Am., AFL-CIO, Local 3-98 v. Donovan*, 792 F.2d 762, 767 (9th Cir. 1985). In addition, costs ordinarily billed to the client are recoverable under the EAJA, such as expert witness fees, docket fees, transcripts, witness fees, document productions, online research fees, travel expenses (including lodging, meals, travel, mileage, parking), postage, service fees, courier fees, telephone and fax, fees for copies of papers necessary for use in the case, and printing/copying/word processing costs. *See id.* (upholding award of telephone, air courier, and attorney travel expenses under the EAJA).[7] Costs are measured "from the perspective" of the client, not the attorney. *Chertoff*, 553 U.S. at 579.

A prevailing party can also recover reasonable expenses of expert witnesses. 28 U.S.C § 2412(d)(2)(A). Under the EAJA, expert compensation is capped at "the highest rate of compensation for expert witnesses paid by the United States" in the case. *Id.*; *ACE Constructors, Inc. v. United States*, 81 Fed. Cl. 161, 171-72 (Ct. Fed. Claims 2008). Here, all of Plaintiffs' experts charged less than $625 per hour, which Defendants disclosed as the compensation for its expert Dr. David Garabrant. (Sprenkel Decl. Ex. C.)

As reflected in the Bill of Costs and attached supporting exhibits, Plaintiffs seek to recover costs incurred in this litigation in the amount of $836,864.71. This includes costs

[7] *See also Lucas v. White*, 63 F. Supp. 2d 1046, 1063 (N.D. Cal. 1999) ("It is well established that [out-of-pocket] costs are recoverable as part of a fee award . . . ."); *In re Mgndichian*, 312 F. Supp. 2d 1250, 1266 (C.D. Cal. 2003) (on-line research charges, transcripts, photocopies, faxes, messenger service and postage recoverable); *Johnson v. Astrue*, No. C-07-2387 EMC, 2008 WL 3984599, at *3 (N.D. Cal. Aug. 27, 2008); *Soda Mountain Wilderness Council v. Norton*, No. CIV S-04-2583 LKK/CMK, 2006 WL 2054062, at *7 (E.D. Cal. July 21, 2006); *NRDC v. Locke*, 771 F. Supp. 2d 1203, 1218 (N.D. Cal. 2011).

incurred for certain attorney travel, court reporting fees and services (*e.g.*, costs incurred in obtaining hearing and deposition transcripts), document retrieval fees, filing fees, messenger services (*e.g.*, fees incurred in delivering documents to the court), outside and inside copying services, postage, service of process fees, online legal research fees (by core timekeepers), witness fees, and disclosed expert fees. (Sprenkel Decl. ¶ 46.)

Although Plaintiffs are entitled to all their costs under the EAJA, Plaintiffs' attorneys have reviewed the costs at issue and reduced the request in several ways in hopes of reaching agreement with the Army. The following types of expenses have been omitted: factual or background library research or investigator time, online legal research (LexisNexis and Westlaw) if conducted by non-core timekeepers, in house copying requested by non-core timekeepers, attorney travel expenses by non-core timekeepers, consultants' fees, class action website hosting and maintenance fees, overtime transportation, overtime secretarial time, and business and team meals. (*Id.* ¶ 47.)

Plaintiffs' request for costs (including fees of disclosed experts) is reasonable in light of the case's duration and complexity as well as necessary in pursuit of the outcome achieved on behalf of the class. Plaintiffs are thus entitled to recover such costs in the amount of $836,864.71.

IV. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court award to its counsel fees and costs in the amount of $4,515,868.21, plus fees and costs incurred in the continuing prosecution of this motion.

Dated: July 18, 2017

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