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14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 OAKLAND DIVISION

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

Case No. CV 09-0037-CW

Noticed Motion Date and Time:
 October 27, 2010
 9:30 a.m.

**DEFENDANTS' REPLY BRIEF IN
 SUPPORT OF MOTION FOR
 PROTECTIVE ORDER LIMITING
 SCOPE OF DISCOVERY**

1 The parties in this case agree on the fundamental scope of the claims before this Court.
2 Plaintiffs assert that they seek to compel Defendants to “locate participants in these tests and to
3 notify them regarding those exposures, to compel Defendants to provide healthcare to test
4 participants as required by Defendants’ own regulations, and to release the test participants from
5 improper ‘secrecy oaths’ that have hindered the ability of test veterans to seek counseling and
6 appropriate medical care.” (Pls.’ Opp’n to Defs.’ Mot. for Protective Order Limiting Scope of
7 Disc. (“Pls.’ Opp’n”) 2.) Likewise, Defendants recognize that there are three claims remaining in
8 this action: “(1) the validity of consent forms as they relate to secrecy oaths; (2) whether the
9 individual Plaintiffs are entitled to notice of substances to which they were exposed and any
10 known health effects; and (3) whether Defendants are obligated to provide medical care to the
11 individual Plaintiffs.” (Defs.’ Mot. for Protective Order Limiting Scope of Disc. (“Defs.’ Mot.”)
12 3.) Yet, Plaintiffs continue to seek discovery on issues that far exceed what they themselves
13 acknowledge are the limited claims here. Such efforts not only impose an extraordinary burden
14 on Defendants, but they also impede resolution of this case, as they would require Defendants to
15 spend time and resources on discovery requests that do not advance the litigation. Accordingly,
16 Defendants seek a manageable scope of discovery so that this case may be resolved as
17 expeditiously as possible.

18 **I. PLAINTIFFS’ OPPOSITION IS BASED ON MISCHARACTERIZATIONS OF**
19 **DEFENDANTS’ DISCOVERY EFFORTS, AND SHOULD BE REJECTED.**

20 Plaintiffs continue to mischaracterize Defendants’ discovery efforts in this case, which
21 have been, in reality, diligent and substantial. In their motions to compel production of
22 documents, compel 30(b)(6) depositions, and for sanctions, Plaintiffs made a number of patently
23 erroneous assertions regarding Defendants’ document searches and productions, requiring
24 Defendants to spend time in their responsive briefing correcting the record. (*See, e.g.*, Defs.’
25 Opp’n to Pls.’ Mot. to Overrule Objections and Compel Produc. of Docs. 1, 7–10.)
26 Notwithstanding Defendants’ efforts and the clear record in this case, Plaintiffs continue to
27 mischaracterize Defendants’ discovery efforts.
28

1 By way of example, Plaintiffs assert that “Defendants . . . have refused to produce
2 30(b)(6) witnesses.” (Pls.’ Opp’n 4.) Plaintiffs are well-aware, however, and the record makes
3 clear, that this statement is incorrect, as Plaintiffs have acknowledged and accepted several
4 deposition dates for 30(b)(6) witnesses in the months preceding the filing of their opposition. In
5 fact, Defendants offered deposition dates beginning in August 2010. (Ex. A to Decl. of Kimberly
6 L. Herb, Trial Attorney, U.S. Department of Justice (“Herb Decl.”).) Plaintiffs responded on
7 September 2, 2010 and acknowledged the offered deposition dates. (Herb Decl. ¶ 3.) On
8 September 24, 2010, during a meet-and-confer, Defendants also offered additional 30(b)(6)
9 deposition dates. (*Id.* ¶ 4.) Plaintiffs accepted several of these deposition dates by letter on
10 October 4, 2010, (Ex. B to Herb Decl. at 1), two days before Plaintiffs filed their opposition with
11 this Court and claimed that Defendants had refused to produce 30(b)(6) witnesses.
12

13 Plaintiffs also claim that “Defendants also have drastically constricted the scope of their
14 searches for documents, steadfastly refusing to search . . . the records of individual test subjects.”
15 (Pls.’ Opp’n 4.) Again, as Plaintiffs are well-aware, the records of individual test subjects are
16 being searched as part of this litigation. Pursuant to its contract with Battelle Memorial Institute,
17 the Department of Defense (“DoD”) is “review[ing] individual test records and other sources for
18 veterans’ identifying information and details about the tests they underwent.” (Decl. of Michael
19 Kilpatrick, Dir., Strategic Commc’ns for the Office of the Under Sec’y of Def. for Health Affairs
20 (“Kilpatrick Decl.”) ¶ 13.) Thus, it is inconceivable that Plaintiffs were, as they claim, unaware
21 that Defendants were searching individual test records.
22

23 As a final example, Plaintiffs argue that it was “[o]nly *after* Plaintiffs filed motions to
24 compel following months of fruitless meet-and-confer efforts” that Defendants “admit[ed] that
25 they are required to search for documents regarding the health effects of the test substances.”
26 (Pls.’ Opp’n 6.) On the contrary, prior to the filing of Plaintiffs’ motions to compel, Defendants
27
28

1 made several proposals to Plaintiffs that would focus Defendants' document search efforts on the
2 health effects of the test programs on service members. (Exs. C, D to Herb Decl.) Defendants'
3 proposals arose out of an "understand[ing] that the central focus of Plaintiffs' discovery efforts is
4 obtaining documents related to known and possible health effects of chemical and biological
5 agents tested on Army servicemembers." (Ex. C to Herb Decl. at 1.) Plaintiffs also conveniently
6 omit that they failed to offer a counter-proposal that would advance the search for health effects
7 information.

8
9 **II. PLAINTIFFS PRIMARILY SEEK INFORMATION CONCERNING HEALTH**
10 **EFFECTS AND CONSENT, AND DEFENDANTS HAVE OFFERED A**
11 **WORKABLE PROPOSAL REGARDING BOTH.**

12 In their opposition, Plaintiffs focus on two primary issues before the Court: the health
13 effects of the test programs and consent. Defendants have put forth a reasonable proposal that
14 would enable Plaintiffs to receive documents tailored to these two issues, without encompassing
15 thousands of pages of irrelevant information. Given that discovery into testing on non-service
16 members and animals is particularly unwarranted in this case, for the four independent reasons
17 outlined below, Defendants respectfully request that this Court provide a meaningful framework
18 for the search for health effects information.

19 Earlier this summer, after a meet-and-confer with Plaintiffs, Defendants offered to
20 produce documents on the broad issues of health effects and consent. With regard to health
21 effects, DoD first proposed to provide Plaintiffs with a list of all substances administered to
22 service members. (Ex. C to Herb Decl. at 1.) Second, DoD proposed that it would use that list to
23 search Edgewood Arsenal and Fort Detrick,¹ the Army's primary research centers for chemical
24 and biological weapons, for records concerning the possible and actual health effects of service

25
26 ¹ DoD also offered to search for the documents underlying the report of the Inspector
27 General of the Department of the Army to determine if there were additional locations at which it
28 should conduct document searches. (Ex. D to Herb Decl. at 3.)

1 member testing, with the exception of individual service member test records.² (*Id.* at 1–2.) DoD
2 would then produce to Plaintiffs all non-privileged documents concerning the health effects of
3 service member testing, as well as a privilege log describing any withholdings.³ (*Id.* at 2.) With
4 regard to consent, DoD also proposed to search for documents addressing the consent of the
5 volunteers. (Ex. D to Herb Decl. at 3.) This proposal addressing both health effects and consent
6 was designed to provide Plaintiffs with information of greatest importance to Plaintiffs and most
7 central to the claims in this action. Additionally, it is more likely to produce relevant documents
8 expeditiously than a piecemeal response to countless vague and broadly-worded requests for
9 production.
10

11 Not only would Defendants’ proposal serve Plaintiffs’ needs by providing critical
12 information in a timely fashion, but it would prevent Defendants from needlessly expending
13 resources on unwarranted searches for information on animal and non-service member testing.
14 As discussed in Defendants’ opening memorandum, research into non-service member and
15 animal testing is not appropriate in this case. (Defs.’ Opp’n 13–14, 17.) First, as the declaration
16 of Dr. Michael Kilpatrick explains in more detail, DoD “has expended considerable resources to
17 determine the long-term health effects on the test volunteers.” (Kilpatrick Decl. ¶ 4.) In fact, the
18 Army Medical Command conducted an extensive study regarding the health effects associated
19

20
21 ² DoD is currently examining, pursuant to its contract with Battelle Memorial Institute, the
22 records of individual service members for information including the “chemical or biological agent
23 each [service member] was exposed to, and the amount administered and route of administration
24 (e.g., oral) where available.” (Kilpatrick Decl. ¶ 13.) If this Court were to require that these
25 records be searched for additional information, it would require “approximately 1680 man-hours
26 of effort” and would result in the researcher’s “other major duties . . . go[ing] undone for 10
27 months.” (Decl. of Lloyd Roberts, Biological Scientist, U.S. Army Med. Research Inst. of Chem.
28 Def. ¶ 7.)

25 ³ The Central Intelligence Agency (“CIA”) has already searched for documents
26 concerning Edgewood Arsenal and Fort Detrick. (Cameresi Decl. ¶ 13.) It located six classified
27 DoD documents that potentially address the health effects of DoD’s test programs on service
28 members. (Ex. C to Herb Decl. at 2; Herb Decl. ¶ 8.) CIA has referred those documents to DoD
for a classification review. (Herb Decl. ¶ 8.)

1 with exposure to LSD. (*Id.*) DoD also commissioned two studies from the National Research
2 Council that examined the health effects of the Army’s chemical test program, including one
3 study that was based on responses from nearly two-thirds of all participants in that program. And
4 DoD has “analyzed the long term health effects of participation in the biological agent test
5 program.” (*Id.* ¶¶ 5–6, 9.) Thus, there has already been a significant evaluation of the health
6 effects of the test programs.

7
8 Second, as discussed in Defendants’ opening memorandum, research on non-service
9 members and animals would not be probative of the long-term health effects experienced by
10 service members. (Defs.’ Mot. 13–14, 17.) Documents regarding non-service member and
11 animal testing would reflect only short-term side effects and results. This is evidenced by the fact
12 that DoD has had to separately commission studies of the long-term health effects of the test
13 programs. (*See* Kilpatrick Decl. ¶¶ 4–9.) It is also demonstrated by the documents revealing the
14 nature of the animal studies—though Plaintiffs contend that the purpose of animal testing was
15 “predicting possible health effects,” (Pls.’ Opp’n 7), the document they cite makes clear that,
16 instead, “test procedures with animals” were established to predict the short-term “*behavioral*
17 *effects* of drugs and chemical compounds.” (Ex. E to Herb Decl. at 2 (emphasis added).) Thus, it
18 is clear that animal testing was used to determine the effects of the drugs in relation to the broader
19 purposes of the test programs.

20
21 Third, discovery into testing on non-service members and animals is particularly
22 unwarranted given that many of the substances administered as part of the Army’s test programs
23 were approved by the Food and Drug Administration and have been subject to testing for
24 decades. For instance, DoD administered drugs such as caffeine, Valium, Ritalin, Benadryl, and
25 Dilantin as part of its test programs. (Ex. F to Herb Decl. at 1.) It would be unduly burdensome
26
27
28

1 to require Defendants to search for and produce documents, many of which are sixty years old, on
2 substances that have been rigorously tested and widely evaluated elsewhere.

3 Fourth, even if this Court were to find tests on non-service members and animals of some
4 relevance, it would be unduly burdensome to require Defendants to search for this information.
5 For instance, the CIA estimated that it would take “three months to collect and to review
6 documents potentially responsive to” just two of Plaintiffs’ requests for production related to
7 animal studies. (Decl. of Patricia Cameresi, Assoc. Info. Review Officer for the Directorate of
8 Sci. & Tech., CIA (“Cameresi Decl.”) ¶ 20.) Requiring responses on requests of this nature
9 “would place an inordinate burden on Agency resources.” (*Id.* ¶ 21.)
10

11 Given that testing on non-service members and animals is of limited, if any, relevance,
12 Defendants’ proposal to concentrate on the health effects associated with tests on service
13 members is eminently reasonable. Furthermore, this approach would likely result in a more
14 expeditious production of relevant documents, as Defendants will be conducting a broad search
15 rather than responding to numerous, distinct requests for production. Accordingly, this Court
16 should permit Defendants to proceed with its proposal regarding health effects outlined above.
17

18 **III. THIS COURT SHOULD LIMIT DISCOVERY THAT CLEARLY EXTENDS** 19 **BEYOND THE CLAIMS IN THIS ACTION.**

20 **A. Plaintiffs Attempt to Disguise Broad Requests for All Documents Concerning** 21 **the Test Programs as Tailored Requests for Health Effects, and Plaintiffs’** 22 **Efforts Should Be Rejected.**

23 Though Plaintiffs attempt to characterize their discovery requests as relating to health
24 effects, even a cursory reading of their requests makes clear that they seek documents and
25 information that extend well beyond that claim. For instance, Plaintiffs argue that they are
26 entitled to documents concerning the operational use of chemical agents because it “plainly is
27 relevant to the possible health effects of those chemicals.” (Pls.’ Opp’n 9.) However, Plaintiffs
28 omit that their document requests far exceed information about health effects, as demonstrated by

1 their requests for information related to individuals they characterize as “dusters.” Plaintiffs have
2 served two separate requests concerning “dusters,” the first of which seeks “[t]he activities,
3 orders, reports from, and other DOCUMENTS CONCERNING military personnel referred to as
4 ‘dusters,’” while a second seeks information on the “health effects reported by ‘dusters’ used to
5 deploy, release or spread chemicals in war zones . . . such as the Ho Chi Minh Trail.” (Ex. G to
6 Herb Decl. at 10.) A plain reading of these two requests makes clear that the latter seeks
7 information regarding health effects, while the former is a far broader request that would
8 encompass documents reflecting military strategy and orders in war zones.
9

10 Similarly, Plaintiffs claim that they are entitled to information concerning testing on non-
11 service members, such as by alleged CIA “cut-out” organizations, because the information “bears
12 directly on the known potential health effects of the test substances.” (Pls.’ Opp’n 8–9.) Once
13 again, however, Plaintiffs request information that reaches well beyond their claim for health
14 effects. As discussed in Defendants’ opening memorandum, Plaintiffs have demanded that the
15 CIA produce every document relating to the alleged cut-outs’ legal status, funding, contracts,
16 meetings, and other communications. (See Defs.’ Mot. 8–9.) Notwithstanding the fact that
17 Plaintiffs have not made *any* allegation about five of these alleged cut-outs (and make only a
18 single allegation concerning a sixth), this request evidences Plaintiffs’ efforts to seek wide-
19 ranging discovery into all aspects of government test programs, despite the District Court’s ruling
20 that Plaintiffs lacked standing to challenge their lawfulness.
21

22 **B. CIA Has Produced to Plaintiffs Documents Concerning Project OFTEN, and**
23 **Those Documents Support Its Conclusion that It Did Not Conduct Testing on**
24 **Service Members.**

25 In their opposition, Plaintiffs state that “CIA should be compelled to meet its discovery
26 obligations and search for and produce all documents in its possession, custody, or control that
27 relate in any way to CIA involvement in or sponsorship of any testing involving military
28

1 personnel — even if the CIA has interpreted those documents to mean that there was none.”

2 (Pls.’ Opp’n 11.) The CIA has done so:

3 Despite CIA’s conclusions about its limited nexus to drug testing on military
4 personnel, the CIA has conducted extensive searches focused on Project OFTEN
5 in response to Plaintiffs’ discovery requests. In an abundance of caution, CIA has
6 also searched for documents relating to the named Plaintiffs, Edgewood Arsenal,
7 and Fort Detrick, where Plaintiffs allege to have volunteered to participate in DoD
8 drug research. CIA has produced or noted in its privilege log all documents that
9 relate to these subjects responsive to Plaintiffs’ first set of Requests for
10 Production (“RFPs”).

11 (Cameresi Decl. ¶ 13.) This is demonstrated, not least of all, by the fact that Plaintiffs
12 cite to documents bearing Defendants’ bates stamp number. Furthermore, CIA has
13 acknowledged DoD’s testimony that CIA funds may have been used to conduct tests on
14 two service members in June 1973, but CIA provided Plaintiffs with documents
15 supporting its conclusion that CIA funds were not used for these tests. (*See* Ex. H to
16 Herb Decl. (discussing the documents underlying DoD’s testimony, and the CIA’s
17 evidence to the contrary).) Thus, Plaintiffs’ protests that they be given “evidence in
18 CIA’s possession . . . so that they can evaluate the evidence themselves and present it to
19 the Court” is much ado about nothing, as Plaintiffs already have those very documents.

20 **C. Plaintiffs Have Failed to Rebut Defendants’ Argument that the Department
21 of Justice Is Not Relevant to Claims Outside of Notice.**

22 As discussed in Defendants’ opening memorandum, Plaintiffs have demanded that the
23 Department of Justice (“DOJ”) respond to each of their 193 document requests, despite the
24 breadth of those requests and the absence of allegations that DOJ participated in or had
25 information concerning the conduct of the test programs. Accordingly, Defendants argued that
26 “[b]ecause Plaintiffs’ have not made any allegations [concerning DOJ] beyond notice, Plaintiffs’
27 demands that DOJ respond to each discovery request are overbroad and not reasonably calculated
28 to lead to admissible evidence.” (Defs.’ Mot. 21.) Rather than address Defendants’ argument

1 that Plaintiffs' have repeatedly served irrelevant discovery requests on DOJ, or provide
 2 information that would substantiate DOJ's alleged nexus to this action, Plaintiffs glibly assert that
 3 "if DoJ does not have responsive information, it should say so in its responses to Plaintiffs'
 4 discovery requests." (Pls.' Opp'n 13.) The rules of discovery, however, make clear that
 5 Plaintiffs are only entitled to discovery "that is relevant to any party's claim or defense." Fed. R.
 6 Civ. P. 26(b)(1). Because Plaintiffs' have declined to provide any information as to how DOJ is
 7 relevant to their claims other than notice, this Court must deny discovery as to DOJ on all
 8 requests outside of this claim. *See Nugget Hydroelectric, L.P. v. Pac. Gas and Elec. Co.*, 981
 9 F.2d 429, 438 (9th Cir. 1992) (stating that plaintiffs had "demanded millions of pages of
 10 documents concerning every aspect of PG & E's relationships with private power suppliers, only
 11 a fraction of which could be deemed relevant to the subject matter of" plaintiffs' claims and that,
 12 as a result, "the requested documents fall outside the scope of discovery articulated in Federal
 13 Rule of Civil Procedure 26(b)(1)").

CONCLUSION

14
 15
 16
 17 For the reasons stated above, and in their opening memorandum, Defendants respectfully
 18 request that the Court grant their Motion for Protective Order Limiting Scope of Discovery.

19
 20 Dated: October 13, 2010

Respectfully submitted,

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From: ECF-CAND@cand.uscourts.gov
Sent: Wednesday, October 13, 2010 4:58 PM
To: efilings@cand.uscourts.gov
Subject: Activity in Case 4:09-cv-00037-CW Vietnam Veterans of America et al v. Central Intelligence Agency et al Reply to Opposition

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Case Name: Vietnam Veterans of America et al v. Central Intelligence Agency et al
Case Number: [4:09-cv-00037-CW](#)
Filer: United States of America
Central Intelligence Agency
United States Department of the Army
Leon Panetta
United States Department of Defense
Robert M. Gates
Pete Geren
Eric H. Holder, Jr

Document Number: [166](#)

Docket Text:

Reply to Opposition re [140] MOTION for Protective Order *Limiting Scope of Discovery* filed by Central Intelligence Agency, Robert M. Gates, Pete Geren, Eric H. Holder, Jr, Leon Panetta, United States Department of Defense, United States

10/14/2010

Department of the Army, United States of America. (Attachments: # (1) Exhibit A, # (2) Exhibit B, # (3) Exhibit C, # (4) Exhibit D, # (5) Exhibit E, # (6) Exhibit F, # (7) Exhibit G, # (8) Exhibit H, # (9) Kilpatrick Declaration, # (10) Cameresi Declaration, # (11) Roberts Declaration)(Herb, Kimberly) (Filed on 10/13/2010)

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Document description:Main Document

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Discovery\Reply\Reply Brief Final.pdf

Electronic document Stamp:

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Document description:Exhibit A

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Document description:Exhibit B

Original filename:K:\My Documents\Cases\VVA v. CIA\Discovery\Protective Order Limiting
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Electronic document Stamp:

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Document description:Exhibit C

Original filename:K:\My Documents\Cases\VVA v. CIA\Discovery\Protective Order Limiting
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10/14/2010

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Document description:Exhibit E

Original filename:K:\My Documents\Cases\VVA v. CIA\Discovery\Protective Order Limiting
Discovery\Reply\Exhibit E - CIA Doc re animal testing.pdf

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Document description:Exhibit G

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Document description:Exhibit H

Original filename:K:\My Documents\Cases\VVA v. CIA\Discovery\Protective Order Limiting
Discovery\Reply\Exhibit H - CIA doc on DoD testing.pdf

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7fb6771b32dd0ed0bc2058c44a4aa34e5165bb8fe2912345c33bce9dfe0f]]

Document description: Kilpatrick Declaration

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Document description: Roberts Declaration

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