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 13 VETERANS FOR COMMON SENSE and
 VETERANS UNITED FOR TRUTH, INC.

14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 SAN FRANCISCO DIVISION

17 VETERANS FOR COMMON SENSE, and
 18 VETERANS UNITED FOR TRUTH, INC.,

19 Plaintiffs,

20 v.

21 JAMES B. PEAKE, M.D., Secretary of Veterans
 Affairs, *et al.*,

22 Defendants.

Case No. C-07-3758-SC

CLASS ACTION

**DECLARATION OF WILLIAM
 JANICKI IN SUPPORT OF
 PLAINTIFFS' REPLY TO MOTION
 FOR PROTECTIVE ORDER
 RESTRICTING DISCLOSURE OF
 CONFIDENTIAL AND PRIVATE
 INFORMATION AND
 PROHIBITING RETALIATION**

Date: March 7, 2008
 Time: 10:00 a.m.
 Place: Courtroom 1, 17th Floor
 Judge: Hon. Samuel Conti

Complaint Filed: July 23, 2007

1 **ADDITIONAL COUNSEL FOR PLAINTIFFS:**

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1 I, WILLIAM D. JANICKI, declare:

2 1. I am an associate at Morrison & Foerster LLP, counsel of record for Plaintiffs in this
3 action. I make this declaration on my own personal knowledge, and if called as a witness to testify, I
4 could and would testify competently to the following facts:

5 2. Plaintiffs served Defendants with their First Amended First Requests for Production of
6 Documents on October 19, 2007. Defendants did not object or respond to this discovery despite the
7 deadline being long past due and the Court's stay of discovery lifted January 10, 2008. A true and
8 correct copy of Plaintiffs' First Amended First Requests for Production of Documents served
9 October 19, 2007, is attached hereto as Exhibit 1. On February 4, 2008, Defendants responded to
10 three document requests on an expedited basis by providing publicly available documents and
11 promising a full response by February 11, 2008. Defendants objected to the production of any
12 documents covered by the Privacy Act.

13 3. Plaintiffs served Defendants with their Second Requests for Production of Documents
14 on November 16, 2007. Defendants never objected or responded in any way to this discovery. A
15 true and correct copy of Plaintiffs' Second Requests for Production of Documents served November
16 16, 2007 is attached hereto as Exhibit 2.

17 4. Defendants filed a motion to stay discovery on November 9, 2007 in which they did not
18 object or even mention the discovery obligations contained in the Privacy Act. A true and correct
19 copy of Defendants' Notice of Motion and Motion for Protective Order to Stay Discovery dated
20 November 9, 2007 is attached hereto as Exhibit 3.

21 5. In a letter dated December 11, 2007, Heather Moser attempted to meet and confer with
22 Defendants regarding the outstanding and overdue document requests. Ms. Moser stated that
23 Plaintiffs expect document production to begin immediately upon the Court's ruling on Defendants'
24 Motion to Dismiss. A true and correct copy of Heather Moser's letter to Mr. Bensing dated
25 December 11, 2007 is attached hereto as Exhibit 4.

26 6. The Court granted Defendants' Motion to Stay Discovery on December 14, 2007. A
27 true and correct copy of the Court's December 14, 2007 Civil Minutes Granting Defendants' Motion
28 to Stay Discovery is attached hereto as Exhibit 5.

1 7. In a letter dated December 21, 2007, Defendants responded for the first time to the terms
2 of Plaintiffs' proposed protective order three weeks after this motion was filed. When Defendants
3 finally responded, they objected based upon three primary concerns: (1) inadequacy of the Privacy
4 Act protections; (2) the witness confidentiality provisions; and (3) the retaliation provisions.
5 Defendants failed to identify how the Privacy Act provisions were deficient or propose additional or
6 alternative language. A true and correct copy of Mr. Bensing's letter to Heather Moser dated
7 December 21, 2007 is attached hereto as Exhibit 6.

8 8. The Court lifted the stay of discovery on January 10, 2008, stating "Plaintiffs may
9 proceed with discovery." Defendants continue their refusal to respond to the outstanding discovery
10 requests. Defendants object to the production of documents protected by the Privacy Act while at
11 the same time they oppose Plaintiffs' proposed protective order. A true and correct copy of the
12 Court's January 10, 2008 Order lifting the stay of discovery is attached hereto as Exhibit 7.

13 9. In a letter dated January 15, 2007, Mr. Bensing acknowledged that the Court's Order
14 January 10, 2008 lifted the stay of discovery yet continued his refusal to produce documents
15 protected by the Privacy Act because a protective order had not yet been entered. A true and correct
16 copy of Mr. Bensing's letter to Gordon Erspamer dated January 15, 2008 is attached hereto as
17 Exhibit 8.

18 10. In an attempt to meet and confer on the issue of a protective order and the production
19 of documents, Plaintiffs offered to provisionally mark documents as confidential under the terms of
20 the proposed protective order. A true and correct copy of Heather Moser's letter to Mr. Bensing
21 dated January 16, 2008 is attached hereto as Exhibit 9.

22 11. In a letter dated January 22, 2008, I attempted to further meet and confer on the terms
23 of the protective order by responding to each of Mr. Bensing's concerns in his letter of December
24 21, 2007. I stated that the Court's order granting Plaintiffs' Administrative Motion to File Veteran
25 And Family Member Declarations Under Seal effectively overruled Defendants' primary objections
26 to the protective order – namely the witness confidentiality and retaliation provisions. I also
27 explained that the provisions restricting disclosure and use of Privacy Act material were sufficient
28 and asked that Mr. Bensing identify where the proposed order was lacking. I also agreed to modify

1 some provisions of the proposed order to accommodate Defendants' concerns. A true and correct
2 copy of my letter to Mr. Bensing dated January 22, 2008 is attached hereto as Exhibit 10.

3 12. In a letter dated January 22, 2008, Mr. Bensing continued his refusal to produce
4 documents responsive to Plaintiffs' document requests and stated that only a court order would
5 provide Plaintiffs with the legal authority to disclose documents protected by the Privacy Act. A
6 true and correct copy of Mr. Bensing's letter to Heather Moser dated January 22, 2008 is attached
7 hereto as Exhibit 11.

8 13. In a letter dated January 25, 2008, Ms. Kyle Freeny repeated Defendants' refusal to
9 produce documents protected by the Privacy Act or stipulate to a protective order. Ms. Freeny again
10 objected to the Privacy Act provisions without stating how they were deficient. She also objected to
11 the witness confidentiality and retaliation provisions. A true and correct copy of Ms. Freeny's letter
12 to me dated January 25, 2008 is attached hereto as Exhibit 12.

13 14. In a letter dated January 29, 2008, I responded to Defendants by explaining that the
14 proposed protective order provides all the protections necessary to disclose Privacy Act materials
15 and that witness anonymity provisions for sensitive, private information, such as in this case, is
16 routinely used by the court to protect such information. A true and correct copy of my letter to Ms.
17 Freeny dated January 29, 2008 is attached hereto as Exhibit 13.

18 15. Plaintiffs are in contact with several veterans and family members who will not
19 authorize the use of their declarations in court proceedings precisely because of the fear of retaliation
20 from the VA.

21 I declare under penalty of perjury under the laws of the United States of America and the
22 State of California that the foregoing is true and correct.

23 Executed this 6th day of February, 2008, at Sacramento, California.

24
25 /s/ William D. Janicki
26 William D. Janicki
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