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 13 VETERANS FOR COMMON SENSE, and
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15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA
 17 SAN FRANCISCO DIVISION

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

20 Plaintiffs,

21 v.

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

23 Defendants.

Case No. C-07-3758-SC

CLASS ACTION

**PLAINTIFFS' UPDATED WITNESS
 LIST AND, IN THE ALTERNATIVE,
 MOTION TO STRIKE
 DECLARATIONS AND PRECLUDE
 TESTIMONY**

Complaint Filed July 23, 2007

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1 Plaintiffs VETERANS FOR COMMON SENSE and VETERANS UNITED FOR TRUTH,
2 INC. hereby submit to the Court an updated witness list and, in the alternative, hereby move to strike
3 the declarations of Antoinette Zeiss, Paul Kearns and Tony Guagliardo, and to preclude their
4 testimony at the hearing on Plaintiffs' Motion for Preliminary Injunction ("MPI").

5 **I. FACTUAL BACKGROUND**

6 On February 11, 2008, this Court ordered the parties to file witness lists for the hearing on
7 Plaintiffs' MPI. Throughout their witness list filings and correspondence with Defendants, plaintiffs
8 have made clear their intention to call Dr. Zeiss, Mr. Guagliardo, Mr. Kearns and Dr. Katz, four
9 officers and/or high-level employees of Defendant Department of Veterans Affairs ("VA"). Three of
10 these witnesses, Dr. Zeiss, Mr. Guagliardo and Mr. Kearns, submitted declarations in support of
11 Defendants' Opposition to Plaintiff's MPI. Defendants' witness list, filed February 19, 2008,
12 included Dr. Zeiss, Dr. Katz and Mr. Kearns, and made clear that Defendants would make Mr.
13 Guagliardo available upon Plaintiffs' request. Defendants' Witness List, at 6.¹ Plaintiffs submitted
14 an amended witness list on February 21, 2008, again listing these same four witnesses. Plaintiffs'
15 Amended Witness List, at 4-5. On February 22, 2008, Defendants filed a response, reiterating their
16 position that they would not produce Ms. Finn, Dr. Ziven, Mr. Baker and Ms. Ekstrand, and offering
17 Plaintiffs the testimony of Dr. Gerald Cross, Principal Deputy Under Secretary of Health, in place of
18 Michael Kussman. Defendants' Response to Plaintiffs' Amended Witness List, at 4. Once again,
19 Defendants did not object to producing Dr. Zeiss, Mr. Guagliardo, Mr. Kearns or Dr. Katz.

20 In its February 25 Order, the Court allowed Defendants to produce Dr. Cross, provided that he
21 was competent to testify to all matters within Michael Kussman's competence. Order on PI Hearing,
22 at 2. On February 26, 2008, and in light of the Court's Order, Plaintiffs set forth by letter to
23 Defendants a proposed order for witness testimony. Exh. A. On February 27, Defendants sent a
24 letter to Plaintiffs, agreeing to make Dr. Cross available for testimony as directed by the Court, but

25 _____
26 ¹ Defendants objected to producing nine other witnesses under the control of VA: Michael J.
27 Kussman, Belinda J. Finn, Kara Ziven, Han Kang, Gary Baker, John Brown, Frances M. Murphy,
28 Michael McLendon, Marcus Nemuth and Sean Zielinski, Defendants did not object to producing Dr.
Zeiss, Mr. Guagliardo, Mr. Kearns or Dr. Katz.

1 notifying Plaintiffs, for the first time that, Dr. Zeiss, Mr. Guagliardo, Mr. Kearns, and Dr. Katz would
2 not agree to appear voluntarily. Exh. B. Defendants further ensured Plaintiffs that Dr. Zeiss would
3 be in San Francisco and available to testify on March 3, and that Messrs. Guagliardo and Kearns, and
4 Dr. Katz would be in San Francisco, and available to testify, on March 4. *Id.* at 2. Plaintiffs
5 responded in a letter reiterating their right to call the declarants and other party witnesses. Exh. C.
6 On February 28, Defendants informed Plaintiffs of their belief that Dr. Zeiss, Mr. Guagliardo, Mr.
7 Kearns, and Dr. Katz are not party witnesses, but reiterated that they will be in San Francisco and
8 available to testify should the Court so compel. Exh. D. That day, Plaintiffs responded, once again
9 reiterating their belief that the Court has the authority to compel the testimony of these witnesses.
10 Exh. E.

11 **II. LEGAL ARGUMENT**

12 **A. The Court Has The Power To Compel Party Witnesses to Testify.**

13 This Court has the power to compel the contested witnesses to testify at the preliminary
14 injunction hearing. Where it is “necessary to have a party appear at trial who it turns out will not
15 appear voluntarily – including the person who is in the control of a party ... the court has all the
16 leverage it needs to compel the party’s appearance.” Commentary C45-16, after Fed.R.Civ.P. 45, in
17 28 U.S.C.A. The issue, then, is not the issuance of subpoenas, because the witnesses at issue are
18 party witnesses. Rule 45, in this regard, only applies to non-party witnesses. *DeFazio v. Hollister*
19 *Employee Share Ownership Trust*, 406 F.Supp. 2d 1085, 1090 (E.D. Cal. 2005) (“The witnesses
20 named by defendants as crucial are all parties to the suit and would be required to testify regardless of
21 whether a subpoena is issued.”)²

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23 ² In an overabundance of caution, Plaintiffs subpoenaed the contested witnesses in the District
24 Court of District of Columbia. *See In re Vioxx Products Liability Litigation*, 438 F.Supp. 2d 664, 667
25 (E.D.La. 2006) (“Rule 45(b)(2), which imposes the 100 mile rule, is expressly limited by Rule
26 45(c)(3)(A)(ii) . . . Rule 45(c)(3)(A)(ii) supports the inverse inference that Rule 45(b)(2) empowers
27 the Court with authority to subpoena Mr. Anstice, an officer of a party, to attend a trial beyond the
28 100 mile limit.”). Plaintiffs do not believe that those subpoenas were unnecessary because the
contested witnesses are party witnesses.

1 Mr. W. Paul Kearns III is the Chief Financial Officer of the Veterans Health Administration.
2 Defendants' Witness List, at 4. Dr. Ira Katz is the Chief Patient Services Officer of Mental Health,
3 and Dr. Antonette Zeiss is his Deputy. *Id.* at 3-4. Mr. Tony Guagliardo is Director of the Business
4 Policy of the Chief Business Office of the Veterans Health Administration. T. Guagliardo Decl., at
5 1:2-3. As their titles make clear, Mr. Kearns, Dr. Katz, Dr. Zeiss, and Mr. Guagliardo are high-level
6 VA employees, and thus, party witnesses. Defendants' argument that, for example, the Chief
7 Financial Officer of VA is a "lower-level employee" and therefore not a party witness, defies logic.
8 In addition, Drs. Zeiss and Katz have testified before Congress on behalf of the VA on several
9 occasions regarding the precise topics which Defendants have submitted to be issues presented in this
10 hearing. Defendants' Witness List, at 3-4. If they are in fact low-level witnesses, Plaintiffs ask that
11 the Court consider that fact in evaluating the weight of their testimony regarding the VA system.

12 **B. Defendants Cannot Rely On Inconvenience As An Excuse**

13 The witnesses at issue will not be inconvenienced if compelled to testify in Plaintiffs' case in
14 chief. In fact, Defendants have already made clear that these witnesses will be in San Francisco, and
15 available to testify, on the first two days of the hearing, notably the days on which Plaintiffs will
16 present their case in chief. Exh. B. Any concern about the inconvenience involved in travel to San
17 Francisco is further alleviated by the fact that Defendants plan to call three of these four witnesses in
18 their own case.³

19 **C. In the alternative, Plaintiffs move to strike the declarations and preclude
20 testimony from any witness Defendants refuse to produce.**

21 Pursuant to Civil Local Rule 7-5(b), Plaintiffs alternatively request that the Court strike the
22 declarations of Dr. Zeiss, Mr. Guagliardo, and Mr. Kearns and preclude the testimony of Dr. Zeiss,
23 Mr. Guagliardo, Mr. Kearns and Dr. Katz. Having submitted the testimony of Zeiss, Guagliardo and
24 Kearns in the form of declarations, Defendants now refuse to allow that testimony to be tested

25 ³ In fact, in *Mason v. Texaco, Inc.*, 741 F.Supp. 1472, 1504 (D.Kan. 1990), *aff'd and*
26 *remanded on other grounds*, 948 F.2d 1546 (10th Cir. Kan.), *cert denied*, 504 U.S. 910 (1992), the
27 Court held that the 100 mile limit of Rule 45 did not prohibit compelling an employee of a defendant
28 to appear in plaintiff's case in chief. Significantly, the court noted that defendant's argument to the
contrary was weakened by "defendant's stated intention to call this key witness in any event." *Id.*

1 through examination. Where declarants refuse to testify regarding their declarations, the proper
2 remedy is to strike the declarations. *See, e.g., United States v. Parcels of Land*, 903 F.2d 36, 42 n.6
3 (1st Cir. 1990) (disregarding affidavit because affiant refused to answer questions about its contents
4 at his deposition); *United States v. \$57,790.00 in U.S. Currency*, 2007 WL 433198, at *9 (S.D. Cal.
5 2007) (citing *Parcels of Land*).

6 For the same reasons, Defendants' proposal to call Zeiss, Guagliardo, Kearns and Katz as
7 rebuttal witnesses is unfairly prejudicial and should be denied. Defendants cannot refuse to produce
8 these witnesses on Monday and Tuesday, only to turn around and call them in their own case the
9 same day. Having waited until the very eve of the hearing to inform Plaintiffs they would not
10 produce party witnesses, Defendants should not be allowed rely on the testimony of those witnesses.
11 If the Court chooses to allow their testimony to go forward, Plaintiffs respectfully request that the
12 Court allow Plaintiffs to cross examine these witnesses outside of the scope of their direct
13 examinations. *US v. Lara*, 181 F.3d 183, 199 (1st Cir. 1999) (allowing, at the court's discretion,
14 expansion of the scope of permissible cross-examination); *US v. Carter*, 910 F.2d 1524, 1530 (7th
15 Cir. 1990) ("Courts are usually quite liberal in allowing cross-examination beyond the scope of
16 direct.").

17 **III. CONCLUSION**

18 For the reasons set forth herein, Plaintiffs respectfully ask the Court to compel the testimony
19 of Dr. Zeiss, Mr. Guagliardo, Mr. Kearns and Dr. Katz in Plaintiffs' case in chief, or, in the
20 alternative, to strike their declarations and preclude their testimony.

21 Dated: February 29, 2008

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