



U.S. Department of Justice

Civil Division

Washington, D.C. 20530

February 28, 2008

Mr. Gordon Erspamer
Morrison & Foerster
101 Ygnacio Valley Road, Suite 450
P.O. Box 8130
Walnut Creek, California 94596-8130
San Francisco, Cal. 94105-2482

RE: Veterans for Common Sense v. Peake, (N.D. Cal. No. C-07-3758)

By: Regular mail and E-mail (Gerspamer@MoFo.com)

Dear Mr. Erspamer:

This is in response to your letter dated February 27, 2008 relating to the order of presentation of witnesses at next week's hearing.

The very first sentence of your letter contains a factual misstatement. Government witnesses Zeiss, Katz, Kearns and Guagliardo are not "party witnesses." They are not named as parties in plaintiffs' Complaint and the Court has recognized this distinction between named defendants and VA employees in its February 25 Order.

Second, defendants are in full compliance with the Court's Order that all witnesses be in San Francisco and available to testify at the start of the hearing. Based upon Ms. Moser's scheduling letter of February 26, 2008, we have directed Dr. Cross and Dr. Zeiss to be available on Monday morning, March 3. Mr. Kearns, Dr. Katz and Mr. Guagliardo will be available for testimony on Tuesday morning, March 4. If plaintiffs want the witnesses available on dates other than those identified in Ms. Moser's letter, we will reschedule their travel times accordingly and they will be available when plaintiffs request them – subject of course to defendants' contention that plaintiffs do not have the right to call them in their case in chief. Judge Conti will undoubtedly resolve this issue March 3 at 9:30 so there will be no delay in the presentation of evidence or prejudice to plaintiffs.

Third, defendants' proposal on how to schedule witness testimony is not inconsistent with the Court's February 25 Order, because Judge Conti's February 25 Order does not require the government to produce witnesses for plaintiffs' case in chief merely because a witness has been listed on plaintiffs' Designation of Witnesses. Plaintiffs still have an obligation to compel the attendance of nonparty, non-voluntary witnesses by subpoena under Rule 45.

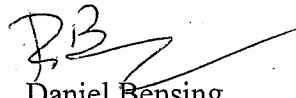
This brings us to your invalid subpoenas for Dr. Zeiss, Dr. Katz, Mr. Kearns, Mr. Guagliardo and Dr. Cross, received by the VA on February 27, 2008, for testimony on March 3, 2008 at 9:30 a.m. First, VA counsel will accept service of these subpoenas on behalf of the witnesses. Second, they are invalid on their face because they do not comply with Fed R. Civil P. 45(a)(2)(A) which requires that a subpoena for attendance at a hearing be issued "from the court for the district where the trial or hearing is to be held," which, in this case, is the Northern District of California. So, this District of Columbia subpoena (signed by one Alexandria A. Amezcue, an attorney who identifies herself as practicing with Morrison and Foerster in San Francisco) for testimony in San Francisco, is simply invalid on its face.

In light of plaintiffs' decision to resort to this simplistic and transparent attempt to avoid the operation of Rule 45, defendants can only conclude that plaintiffs have abandoned their argument that a San Francisco Court has the authority to issue a subpoena to compel the testimony of DC witnesses in San Francisco.

On the question of documents contained in your letter, please see my response to Heather Moser of yesterday enclosed with the CD containing 9,740 pages of documents that you should receive by Federal Express today.

There is a final matter I want to bring to your immediate attention. Your associate, Natalie N. Naugle sent the attached e-mail to my colleague Kyle Freeny yesterday. We are not aware of any request from the Court to submit a joint list of materials; instead defendants were requested to simply bring their exhibits to Court on Monday morning. Please look into this troubling communication. We request a response by close of business in San Francisco today.

Sincerely,



Daniel Bensing
Senior Counsel
Federal Programs Branch

cc: Heather Moser
Sidney Wolinsky

Freeny, Kyle (CIV)

From: Naugle, Natalie N. [NNAugle@mofo.com]
Sent: Wednesday, February 27, 2008 3:27 PM
To: Freeny, Kyle (CIV)
Subject: VCS, et al. v. Peake, et al. - PI Hearing

Good afternoon Ms. Freeny~

We haven't spoken before, but I am an attorney with Morrison & Foerster working with Heather Moser and the rest of the team in preparing for the upcoming hearing on Plaintiffs' Motion for Preliminary Injunction. I left you a voicemail this morning to discuss the list of materials Defendants intend to bring to the PI hearing. As you are likely aware, the court asked us to submit a joint list of materials in advance of the hearing to expedite our passage through security. We would like to get this list on file tomorrow at the latest. Please send me a list of items Defendants intend to bring and I will incorporate it into the letter I've drafted. Once the letter is finalized, I will send to you for your approval before we e-file.

If I should be coordinating this with someone else, please just let me know and I will contact them ASAP. Thanks for your cooperation!

Natalie Naugle

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2/28/2008