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 VETERANS UNITED FOR TRUTH, INC.

11 UNITED STATES DISTRICT COURT  
 12 NORTHERN DISTRICT OF CALIFORNIA  
 13 SAN FRANCISCO DIVISION

14 VETERANS FOR COMMON SENSE, and  
 15 VETERANS UNITED FOR TRUTH, INC.,

16 Plaintiffs,

17 v.

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

19 Defendants.

Case No. C-07-3758-SC

**CLASS ACTION**

**PLAINTIFFS' RESPONSE TO  
 DEFENDANTS' LETTER OF  
 MARCH 11**

Trial Set April 21, 2008  
 Complaint Filed July 23, 2007

1 **ADDITIONAL COUNSEL FOR PLAINTIFFS:**

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1 Plaintiffs briefly respond to three<sup>1</sup> particular points raised in Defendants’ March 11th letter to  
2 the Court and proposed order. The 4-page letter was not authorized by the Court.

3 **Multiple Proposed Limitations on Discovery.** Defendants’ propose multiple limitations on  
4 discovery that would prejudice Plaintiffs. For example, Defendants propose that the Court limit the  
5 policies and procedures to be produced to VISN-level and national-level policies. (Proposed Order  
6 Establishing Discovery Obligations in Connection with April 21, 2008 Hearing, at I..3) Defendants’  
7 own witness, Dr. Murawsky, testified that written policies to be followed regarding clinical appeals  
8 are *facility-level*:

9  
10  
11 Q: “Does that policy that you would follow [VISN 12 Clinical Appeals  
12 process, D-537] include an immediate assessment to see if the veteran  
13 is in a safe environment? Yes or no?” A: “It would include an  
14 assessment to see whether the veteran is in a safe environment.” Q:  
15 “Show me where that is in your policy for your VISN.” “It’s not in  
16 your policy, is it Doctor?” A: “Not in the VISN policy. **It’s in the  
17 facility-level policies.**”

18 [TR 714:23-715:9 (emphasis added)]. Defendants should either produce the policies their own  
19 witnesses claim govern the VA’s mental health procedures, or an adverse inference should be drawn  
20 at trial that the facility-level policies do not exist or contain any statement of policy that would bind  
21 the VHA. That is only one example, and Plaintiffs believe there may be other such examples.  
22 Plaintiffs have already told defense counsel that they are willing to consider appropriate limitations to  
23 avoid unnecessary burden if those are so identified by Defendants and would not prejudice Plaintiffs.  
24 However, the Court should not enter Defendants’ proposed order alleviating Defendants of the  
25 burden of producing critical evidence to which their own witnesses testified on the stand. Plaintiffs’  
26 requests are more complete, and the parties will work together to limit burden where appropriate.

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<sup>1</sup> There are many other aspects of the March 11 letter with which Plaintiffs disagree but do not  
wish to burden the Court at this time.

1           **Number of Document Requests and Depositions.** Until today, Defendants have not  
2 propounded any written discovery or asked the Court for any discovery. Defendants now propose  
3 that the Court order Plaintiffs to respond to 60 document requests (30 requests, each with two  
4 subparts) and 10 depositions but at the same time Defendants object to Plaintiffs' 50 document  
5 requests and 12 depositions. Plaintiffs are willing to respond to the discovery listed by Defendants as  
6 long as Defendants are willing to respond to the limited discovery Plaintiffs have sought. Plaintiffs'  
7 requests are a small subset of the outstanding document requests and the minimum necessary for  
8 Plaintiffs to prepare for trial. Defendants should have been working since October 2007 to respond to  
9 a much broader group of requests in number and scope, which have been pending for six months. At  
10 a minimum, Defendants should have been diligently working on them since the Motion to Dismiss  
11 Order in early January. Defendants were on notice of the importance of those requests, and that point  
12 is underscored by the prevalence of those documents in Defendants' exhibits and witness testimony.

15           **Timing of Requests.** Plaintiffs' requested list contains only a handful of new requests on the  
16 VHA side, the subject of the preliminary injunction motion. Those requests were gleaned from  
17 Defendants' witnesses' testimony almost exclusively after Plaintiffs drafted the statement to  
18 exchange with Defendants. The remaining additional requests go to the adjudication process, which  
19 were not addressed in the preliminary injunction motion.

21 Dated: March 11, 2008

GORDON P. ERSPAMER  
ARTURO J. GONZALEZ  
HEATHER A. MOSER  
STACEY M. SPRENKEL  
MORRISON & FOERSTER LLP

26 By: /s/ Gordon P. Espamer  
Gordon P. Espamer

27 Attorneys for Plaintiffs

1 I, Heather Moser, am the ECF User whose ID and password are being used to file this  
2 Response to Defendants' Letter of March 11. In compliance with General Order 45, X.B., I hereby  
3 attest that Gordon P. Erspamer has concurred in this filing.

4 Dated: March 11, 2008

MORRISON & FOERSTER LLP

6 By: /s/ Heather A. Moser  
7 Heather A. Moser

8 Attorneys for Plaintiffs  
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