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

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

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

17 Plaintiffs,

18 v.

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

20 Defendants.

Case No. C-07-3758-SC

**PLAINTIFFS' FIRST SET OF
 MOTIONS IN LIMINE, NOS. 1-4**

Complaint Filed July 23, 2007

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1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTE THAT on April 21, 2008 at 9:00 a.m. in the courtroom of the
4 Honorable Samuel Conti, United States District Court, 450 Golden Gate Avenue, San Francisco,
5 California, plaintiffs Veterans for Common Sense and Veterans United for Truth shall and hereby do
6 move *in limine* for an Order precluding Defendants from introducing evidence, testimony, and
7 argument regarding the matters set forth below. These Motions *in Limine* are based on this Notice of
8 Motion and Supporting Memorandum of Points and Authorities, the complete file on record in this
9 matter, and such other written or oral argument as may be presented at or before the time these
10 Motions *in Limine* are taken under submission. The trial in this case is scheduled for April 21, 2008.

11 **MOTION IN LIMINE NO. 1: DOCUMENTS NOT PRODUCED IN DISCOVERY**

12 Plaintiffs move to exclude all documents, as well as testimony and evidence based on such
13 documents, that Defendants failed to produce, including those documents listed in the Court’s March
14 13, 2008 Order Establishing Discovery Obligations in Connection with April 21, 2008, Hearing
15 (“Discovery Order”) and documents Defendants removed when they rewrote and limited Plaintiffs’
16 document requests.

17 Defendants have identified seventeen documents they intend to use at trial. (*See* Defs.’
18 Pretrial Statement 18:23-19:19, Apr. 14, 2008.) However, none of them have been identified by
19 Bates-stamp number. Thus, because many of Defendants’ document descriptions lack specificity,
20 Plaintiffs cannot be sure that they have received each of the proposed exhibits. Plaintiffs asked
21 Defendants to provide Bates numbers for their exhibits, but Defendants refused.

22 Defendants have now admitted that many of these documents have not been produced.
23 Defendants have refused to produce copies of these documents and say that they will provide them to
24 Plaintiffs for the first time on Monday.

25 If Defendants failed to produce documents listed in the Court’s March 13, 2008 Discovery
26 Order, the Court should prohibit Defendants from entering such materials as evidence at trial. *See*
27 Fed. R. Civ. P. 37(b)(2)(A)(ii).

1 Plaintiffs also move to exclude all documents that are outside the Court’s Discovery Order
2 due to Defendants’ rewriting and narrowing of Plaintiffs’ document request. On March 11, 2008,
3 Defendants wrote to the Court, stating that the document request in Plaintiffs’ Designation of
4 Documents and Depositions was unrealistic based, in part, on the volume of responsive documents,
5 their relevance, and the burden of collection. (*See Ex. A Letter from Bensing to the Court, Mar. 11,*
6 *2008.*) Thus, Defendants submitted a proposed order establishing discovery obligations, which the
7 Court adopted as its Discovery Order, limiting Plaintiffs’ discovery requests to documents that
8 presumably Defendants believed to be available, feasible to produce, and relevant. To the extent that
9 the documents Defendants seek to introduce at trial were not produced because they were written out
10 of Plaintiffs’ requests by Defendants, Plaintiffs move to exclude them.

11 Likewise, Plaintiffs move to exclude all testimony and evidence that relate to documents not
12 produced either in violation of the March 13 Discovery Order or because Defendants acted to limit
13 the scope of Plaintiffs’ document requests.¹ Plaintiffs also seek exclusion of all evidence and
14 testimony the authentication of which requires reliance on such documents. Should Defendants
15 attempt to rely in this manner, or in any other fashion, on withheld documents, including those
16 previously claimed to be unavailable or irrelevant, Plaintiffs will be prejudiced by their inability to
17 review, analyze, and question deponents about them prior to trial.

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24 ¹ For example, in the April 7, 2008 Hearing, during which the parties and the Court discussed
25 Defendants’ discovery obligations, Defendants’ counsel stated that Defendants eliminated from
26 Plaintiffs document request the VBA “STAR Reports,” which analyze the accuracy of VBA ratings.
27 (*See Tr. of Proceedings 44:18-22, Apr. 7, 2008.*) The Court agreed that the STAR Reports were not
28 necessary. (*Id.* at 45:8-10.) Nonetheless, Edna McDonald, Assistant Director for Quality Assurance,
Compensation & Pension Service – the office responsible for these reports – appears on Defendants’
witness list. Ms. McDonald should be prohibited from testifying about these reports and from
offering testimony that can only be supported or refuted by the STAR Reports.

1 **MOTION IN LIMINE NO. 2: EVIDENCE FROM OR REGARDING THE COURT**
2 **OF APPEALS FOR VETERANS' CLAIMS NOT PRODUCED DURING DISCOVERY**
3 **OR IN RESPONSE TO SUBPOENA**

4 Defendants, who have relied repeatedly on the dismissal of Chief Judge William P. Greene
5 and language in the Court's Discovery Order to avoid discovery responsibilities regarding the U.S.
6 Court of Appeals for Veterans Claims ("CAVC"), now seek to introduce evidence regarding the
7 CAVC.² Plaintiffs move to exclude any such evidence that was not produced during discovery or in
8 response to Plaintiffs' third party CAVC subpoena, as well as evidence or testimony that relates to
9 such unproduced documents.

10 After the dismissal of Judge Greene, Plaintiffs subpoenaed 16 categories of documents from
11 the CAVC. Two weeks later, on April 3, 2008, Counsel for Defendants wrote to Plaintiffs,
12 conveying CAVC's objections to the subpoena and refusal to produce the documents requested. (*See*
13 *Ex. B Letter from Schwartz to Sprenkel, Apr. 3, 2008.*) Among other objections, Defendants asserted
14 that the documents sought were irrelevant due to the dismissal of Judge Greene. (*Id.*) During the
15 April 7 Discovery Hearing, Defendants reiterated their objections to the relevance of these
16 documents. (*See Tr. of Proceedings 53:25-54:14, Apr. 7, 2008.*) The Court quashed Plaintiffs' third
17 party subpoena. (*Id. at 53:23-24.*)

18 Accordingly, Plaintiffs have received no documents requested in the third party CAVC
19 subpoena or any other documents regarding the CAVC. Plaintiffs will be unfairly prejudiced if
20 Defendants adduce evidence or testimony regarding the CAVC. Defendants should not be permitted
21 to introduce evidence that they have characterized as irrelevant and have successfully quashed.
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26 ² Defendants have asserted that "the evidence will show that the U.S. Court of Appeals for
27 Veterans Claims can effect system-wide change by issuing precedential opinions in the context of
28 individual appeals." (*See Defs.' Pretrial Statement 4:17-19, fn. 3, Apr. 14, 2008.*)

1 **MOTION IN LIMINE NO. 3: WITNESSES LISTED IN DEFENDANTS’ PRETRIAL**
2 **STATEMENT BUT NOT INCLUDED IN RULE 26 DISCLOSURES**

3 Defendants have listed a number of trial witnesses who were absent from their Rule 26(a)(1)
4 initial disclosures. Because these individuals were never disclosed as individuals likely to have
5 discoverable information, and were therefore unknown to Plaintiffs for purposes of discovery,
6 Plaintiffs move to exclude testimony from the following persons:

- 7 • Edna McDonald
- 8 • Patrick McCormack
- 9 • Diana Rubens³
- 10 • Lily Fetzer

11 (See Defs.’ Initial Disclosures 2:13-5:6, Oct. 18, 2007.)

12 Although Plaintiffs supplemented their initial disclosures in accordance with Rule 26(e) (See
13 Pls.’ Supplemental Initial Disclosures, Apr. 11, 2008),⁴ Defendants failed to comply with their duty
14 to supplement their earlier disclosures. See Fed. R. Civ. P. (26)(e)(1). Rule 37(c)(1) provides: “If a
15 party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is
16 not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a
17 trial, unless the failure was substantially justified or is harmless.” See Fed. R. Civ. P. 37(c)(1).
18 Defendants had ample opportunity to supplement their disclosures, but failed to do so. As a result,
19 Plaintiffs did not have knowledge of, opportunity to depose, or ability to request documents from four
20 of the six witnesses Defendants plan to call at trial.

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23 ³ Plaintiffs became aware of Ms. Rubens because she was designated, under Rule 30(b)(6) as
24 the person most knowledgeable to testify in deposition regarding VA’s incentive compensation.
25 Nonetheless, she does not appear in Defendants’ Initial Disclosures. (See Defs.’ Initial Disclosures,
26 Oct. 18, 2007.) Nor did Defendants supplement their disclosures to include Ms. Rubens and the
27 subjects about which she has knowledge. Thus, if Ms. Rubens testimony is permitted, it should be
28 limited only to the subject of incentive compensation.

29 ⁴ In fact, Defendants, in open court, insisted that Plaintiffs file supplemental disclosures. (See
30 Hr’g Tr. 53:11-16, Apr. 7, 2008 [“We would ask that they promptly comply with their initial
31 disclosure obligations in this case because there’s no reason not to”].)

1 **MOTION IN LIMINE NO. 4: ADVERSE INFERENCE REGARDING**
2 **DEFENDANTS' FAILURE TO PRODUCE AVAILABLE WITNESSES**

3 Should Defendants fail to produce witnesses under their control, including high level VA
4 employees, Plaintiffs request that an adverse inference be drawn that testimony would be unfavorable
5 to Defendants' positions and would fail to rebut Plaintiffs' evidence. An adverse inference is
6 justified where a potential witness, who is available to one party and has special, non-cumulative
7 knowledge or information, is not called to testify by the controlling party. *Kean v. Comm'r of*
8 *Internal Revenue*, 469 F.2d 1183, 1187-88 (9th Cir. 1972). If Defendants fail to call key VA
9 witnesses with particular knowledge about suicide rates, mental health treatment, claims backlog, and
10 other critical issues in this case, an adverse inference should be drawn that these individuals, if called,
11 would testify unfavorably for Defendants.

12 Dated: April 18, 2008

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