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 13 Ulrike Willimon, the United States of America, Hon. Michael B. Mukasey, and Hon. William P.
 Greene, Jr.

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

17 VETERANS FOR COMMON SENSE and) No. C 07-3758-SC
 18 VETERANS UNITED FOR TRUTH,)
 19) **DEFENDANTS' OPPOSITION TO**
 Plaintiffs,) **PLAINTIFFS' FIRST SET OF**
 20) **MOTIONS IN LIMINE, NOS. 104**
 21 v.)
 22)
 Hon. JAMES B. PEAKE, Secretary of)
 23 Veterans Affairs, *et al.*,)
 Defendants.)
 24)
 25)

26
 27
 28 Defendants' Opposition to Plaintiffs' First Set of Motions in Limine (No. C 07-3758-SC)

1 **I. There is No Basis to Exclude Exhibits Which Defendants Were Under No**
2 **Obligation to Produce**

3 Plaintiffs' first motion in limine seeks to exclude a handful of documents on defendants'
4 exhibit list because they were not required to be produced by the Court's March 13 Order
5 Establishing Discovery Obligations in Connection with the April 21, 2008, Hearing (March 13
6 Order). This motion is nothing more than a thinly disguised attack on the scope of discovery as
7 established by this Court and is without basis.

8 The March 13 Order, as modified by the Court's April 7 Order, Dkt. Entry 182, settled
9 the parties' discovery obligations in this case. Put simply, defendants had no obligation to
10 produce documents that the Court did not order them to produce. There can be no doubt that
11 defendants' document production in this case has been a massive undertaking. There is simply
12 no basis to exclude documents that defendants were under no obligation to produce.¹

13 Plaintiffs are in a very poor position to suggest that the Court exclude documents that
14 defendants *were not ordered* to produce, when it is not at all clear that plaintiffs have produced to
15 defendants all documents on their exhibit list that they *were ordered* to produce. See March 13
16 Order ¶ III; Dkt. Entry 170(3) (requiring plaintiffs to produce documents in their possession that
17 supported the allegations in their complaint). Plaintiffs have failed to do the very things they
18 rebuke defendants for not having done. At no time have plaintiffs given to defendants *either*
19 copies of their 383 exhibits *or* Bates numbers associated with those exhibits.² At no time did

21 ¹Plaintiffs' attempt to exclude testimony that "relate[s]" to documents not included within
22 the Court's March 13 Order is all the more outlandish. Contrary to plaintiffs' unusual suggestion,
23 see Pls. Mot. at 2:14, witness testimony need not be "authenticated" by documents. Accordingly,
24 there is no conceivable basis to exclude testimony on topics for which plaintiffs unilaterally
25 believe themselves entitled to certain additional documents, despite this Court's orders to the
26 contrary.

27 ²Defendants informed plaintiffs that they were unable to provide Bates numbers for their
28 exhibits because they were not readily available. Defendants produced tens of thousands of
pages to plaintiffs during the course of discovery, and they are simply unable in the short time
available to locate Bates numbers for their seventeen exhibits among this sea of documents.

1 plaintiffs propose that the parties exchange exhibits prior to the trial, and such an exchange was
2 not contemplated by the pretrial order that plaintiffs themselves crafted. See Dkt. Entry 193.
3 Given the relative brevity of plaintiffs’ exhibit list in comparison with plaintiffs’, they can hardly
4 claim prejudice on this issue, as defendants are clearly more burdened by the absence of any
5 exhibit exchange prior to trial. Accordingly, plaintiffs’ first motion should be denied.

6 **II. Defendants Do Not Intend To Submit Evidence Obtained from the Court of Appeals
7 for Veterans Claims**

8 Plaintiffs second motion in limine moves to exclude evidence regarding the Court of
9 Appeals for Veterans Claims on the ground that “plaintiffs will be unfairly prejudiced if
10 defendants adduce evidence or testimony regarding the CAVC.” Plfs. Mot. at 3. Acknowledging
11 that this Court quashed plaintiffs’ subpoena to the Court of Appeals for Veterans claims because
12 the Court had already ruled that evidence regarding the CAVC’s actions irrelevant, plaintiffs
13 complain that defendants intend to show that “the U.S. Court of Appeals for Veterans Claims can
14 effect system-wide change by issuing precedential opinions in the context of individual appeals.”
15 *Id.* n. 2.

16 Plaintiffs confuse and conflate two separate issues. The Court rightfully held that
17 evidence allegedly probative of plaintiffs’ claim that the CAVC or its Chief Judge Greene acted
18 in an unconstitutional manner is irrelevant because the Court has already dismissed Judge Greene
19 as a matter of law. Defendants do not intend to submit evidence on this point nor present any
20 testimony or documents from the CAVC.

21 What defendants do intend to show, through the testimony of VA employees and
22 documents prepared by VA, is that the CAVC’s decisions sometimes require remands of entire
23 classes of cases when new procedural requirements are articulated in those decisions. This
24 responds directly to plaintiffs’ erroneous claim that CAVC decisions have no precedential effect
25 and is a subject on which plaintiffs were entitled to seek discovery throughout this case. This
26 fact is important not only because it illustrates the ability of the CAVC to remedy plaintiffs’
27 grievances without need for district court review, but also because the sweeping changes in law

1 effectuated by the CAVC comprise one factor affecting appeal processing times about which
2 plaintiffs complain so vociferously. Plaintiffs second motion in limine should be denied.

3 **III. Plaintiffs Are Not Prejudiced by Rule 26 Initial Disclosures**

4 Plaintiffs Third Motion in Limine is not only unjustified, as plaintiffs have suffered no
5 prejudice, but particularly audacious because they have committed the precise procedural error of
6 which they accuse defendants.³ Plaintiffs complain that four witnesses on defendants’ witness
7 list are not listed in their initial disclosures, but fail to recognize that it is *plaintiffs’* refusal to
8 clearly articulate their claims in a timely fashion that caused defendants to prepare their defense
9 at a late stage.

10 Last fall, plaintiffs refused to identify persons with relevant knowledge based on the
11 unsupported claim that plaintiffs’ prospective witnesses would suffer if their identities were
12 revealed. Plaintiffs arrogated to themselves the authority to make this declaration without
13 seeking leave of the Court. Even after the Court had denied a subsequent motion to keep the
14 identity of witnesses concealed, plaintiffs ignored defendants’ request that they finally complete
15 their original initial disclosure obligation. Only after defendants raised the issue before the Court
16 did the plaintiff finally complete, as oppose to supplement, their Rule 26 disclosures on April 11
17 – a date too late for defendants to conduct discovery.⁴

19 ³ Defendants do not share plaintiffs’ “kitchen sink” approach to motions in limine and
20 have not moved for exclusion of plaintiffs’ witnesses on this ground. Witness qualifications can
21 be challenged at trial. However, should the Court wish to address alleged violation of initial
22 disclosure obligations under Rule 26(a)(1), plaintiffs refusal without justification to comply until
almost a week before trial cannot be overlooked.

23 ⁴ Even on April 11 plaintiffs submitted an incomplete disclosure. For example, on that
24 date, plaintiffs identified witness Rick Weidman as “likely to have information regarding VA’s
25 hiring practices.” Plfs. Supp. Disc. at 5. The next business day, April 14, plaintiffs submitted
26 their witness list identifying Rick Weidman as being able to testify regarding “VA’s failure to use
27 its resources for the treatment of veterans with mental health issues, including PTSD” – an
entirely different subject. Plfs’ Pretrial Statement at 3, Dkt. Entry 190. Two days later, Mr.
Weidman had morphed into an *expert* who could testify on “VA’s budget, VA’s failure to use
resources for the treatment of veterans with mental health problems, including PTSD, [and] VA’s

1 In contrast, defendants' inability to know seven months ago each witness that might have
2 relevant information regarding plaintiffs' claims was entirely due to the fact that plaintiffs
3 refused to articulate those claims with any clarity. In meetings with plaintiffs regarding
4 preliminary issues such as the scope of evidence preservation, defendants specifically requested
5 plaintiffs to outline their claims in light of the fact that the complaint speaks in generalities of
6 illegal practices and procedures. Defendants repeated the request several times in writing.
7 Plaintiffs' refused to do so. It was not until the Court pressed plaintiffs to set forth what they
8 were seeking that the boundaries of plaintiffs' claims became visible. Preparation for this case to
9 proceed to trial has moved quickly and defendants formulated their defense only in the last
10 several weeks.

11 Plaintiffs can hardly claim prejudice from the fact that defendants submitted their witness
12 list on April 14, as ordered by the Court, rather than transmitting to plaintiffs a supplement to
13 their initial disclosures one business day earlier. Even if defendants had supplemented their
14 initial disclosures on April 11 – the date on which plaintiffs made their first complete set of
15 disclosures – plaintiffs could not have conducted additional discovery in response, as the parties'
16 discovery obligations were set by this Court on March 13 and depositions concluded on April 11.
17 Plaintiffs' third motion should therefore also be denied.⁵

18 **IV. An Adverse Inference Is Not Warranted for Testimony Of Witnesses Not Required**
19 **to Appear**

20 Plaintiffs' fourth motion in limine adopts the remarkable position that an adverse
21 inference should be drawn about what an absent witness might have been able to address even
22 though there is no requirement that the witness appear. Plaintiffs argue that "if defendants fail to
23 call key VA witnesses with particular knowledge about suicide rates, mental health treatment,

24 _____
25 failure to provide adequate claims processing." Plfs' Supp. Expert Disc. at 1, Dkt. Entry196.

26 ⁵ Even were the Court to find any merit in plaintiffs' position, each of the witnesses
27 identified could be fairly considered a rebuttal witness who will address directly what plaintiffs
submit in their case-in-chief.

1 claims backlog, and other critical issues in this case, an adverse inference should be drawn that
2 these individuals, if called would testify unfavorably to Defendants.” Plfs. Mot. at 5.

3 This motion is based on a fundamental misunderstanding of trial procedure. Plaintiffs
4 have served many invalid subpoenas in this case issued by the district court in Washington, DC
5 allegedly ordering the presence of witnesses in California. Plaintiffs have also asked the Court to
6 compel the attendance of out-of-town witnesses, which it has declined to do. Now, plaintiffs
7 insist on calling and recalling the VA officials at the highest level to present what can only be
8 cumulative testimony on VA health care and other issues.

9 Defendants have agreed to provide high-level witnesses on each subject matter in this
10 case. The reality is that high level officials have many demands on their time; for example Dr.
11 Kussman, Dr. Cross, and Mr. Walcoff all are attending an international conference and Dr.
12 Kussman has international travel scheduled during the trial dates. Rather than cooperating and
13 jointly developing a witness schedule, plaintiffs have unilaterally announced that they will
14 submit their proposed witness order to defendants and the Court on Sunday night, just before
15 trial. Plfs’ Pretrial Statement at 1, n.4 Dkt. Entry 190. In this situation, defendants can only
16 make arrangements for their out-of-town witnesses for days they are available and ask the Court
17 to hear them on those dates.

18 Defendants have and will produce all witnesses it is directed to by the Court. Simply put,
19 there is no basis for drawing any inferences regarding witnesses who are not required to appear.

20 Dated: April 19, 2008

Respectfully submitted,

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