

1 GORDON P. ERSPAMER (CA SBN 83364)
 Gerspamer@mofocom
 2 MORRISON & FOERSTER LLP
 101 Ygnacio Valley Road, Suite 450
 3 P.O. Box 8130
 Walnut Creek, California 94596-8130
 4 Telephone: 925.295.3300
 Facsimile: 925.946.9912

5 SIDNEY M. WOLINSKY (CA SBN 33716)
 SWolinsky@dralegal.org
 6 MELISSA W. KASNITZ (CA SBN 162679)
 MKasnitz@dralegal.org
 7 JENNIFER WEISER BEZOZA (CA SBN 247548)
 JBezoza@dralegal.org
 8 KATRINA KASEY CORBIT (CA SBN 237931)
 KCorbit@dralegal.org
 9 DISABILITY RIGHTS ADVOCATES
 2001 Center Street, Third Floor
 10 Berkeley, California 94704-1204
 Telephone: 510.665.8644
 11 Facsimile: 510.665.8511

12 **[see next page for additional counsel for Plaintiffs]**

13 Attorneys for Plaintiff(s)
 14 VETERANS FOR COMMON SENSE and
 VETERANS UNITED FOR TRUTH, INC.

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 GORDON H. MANSFIELD, Acting Secretary of
 23 Veterans Affairs, *et al.*,

24 Defendants.

Case No. C-07-3758-SC

CLASS ACTION

**PLAINTIFFS' NOTICE OF
 MOTION AND MOTION FOR
 PROTECTIVE ORDER
 RESTRICTING DISCLOSURE OF
 CONFIDENTIAL AND PRIVATE
 INFORMATION AND
 PROHIBITING RETALIATION**

Date: January 4, 2008
 Time: 10:00 a.m.
 Place: Courtroom 1, 17th Floor
 Judge: Hon. Samuel Conti

Complaint Filed: July 23, 2007

1 **ADDITIONAL COUNSEL FOR PLAINTIFFS:**

2 ARTURO J. GONZALEZ (CA SBN 121490)
AGonzalez@mofo.com

3 HEATHER A. MOSER (CA SBN 212686)
HMoser@mofo.com

4 STACEY M. SPRENKEL (CA SBN 241689)
SSprenkel@mofo.com

5 PAUL J. TAIRA (CA SBN 244427)
PTaira@mofo.com

6 MORRISON & FOERSTER LLP
425 Market Street
7 San Francisco, California 94105-2482
Telephone: 415.268.7000
8 Facsimile: 415.268.7522

9 BILL D. JANICKI (CA SBN 215960)
WJanicki@mofo.com

10 MORRISON & FOERSTER LLP
400 Capitol Mall, Suite 2600
11 Sacramento, California 95814
Telephone: 916.448.3200
12 Facsimile: 916.448.3222

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1 **NOTICE OF MOTION AND MOTION**

2 TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on January 4, 2008, at 10:00 a.m., or as soon thereafter as the
4 matter may be heard, in the Courtroom of the Honorable Samuel Conti, United States District Court,
5 Northern District of California, San Francisco Division, Courtroom 1, 17th Floor, 450 Golden Gate
6 Ave., San Francisco, California 94102, Plaintiffs VETERANS FOR COMMON SENSE and
7 VETERANS UNITED FOR TRUTH, INC. will, and hereby do, move the Court for a protective
8 order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of
9 confidential and private information and prohibiting retaliation.

10 This Motion is based on this Notice of Motion, the Memorandum in support hereof, the
11 Declarations of Gordon P. Erspamer, Heather A. Moser, Paul Taira, and Philip E. Cushman, the
12 pleadings and other files herein, and such other written and oral argument as may be presented to the
13 Court. A proposed protected order has been submitted to the Court.

14 Dated: November 30, 2007

GORDON P. ERSPAMER
ARTURO J. GONZALEZ
HEATHER A. MOSER
BILL D. JANICKI
STACEY M. SPRENKEL
PAUL J. TAIRA
MORRISON & FOERSTER LLP

19 By: /s/ Heather A. Moser
Heather A. Moser

20 Attorneys for Plaintiffs

1 **CERTIFICATION OF GOOD FAITH ATTEMPT TO MEET AND CONFER**

2 The parties began their discussion regarding the appropriate scope of a protective order to protect
3 confidential private information and to protect parties and witnesses from retaliation almost
4 immediately after the Complaint was filed in this case, on August 1, 2007. Declaration of Gordon P.
5 Erspamer in Support of Plaintiffs’ Motion for Protective Order (“Erspamer Decl.”), ¶ 2. However,
6 Defendants have now brought these discussions to a grinding halt. *See* Erspamer Decl., ¶¶ 2-4, 8.
7 On November 13, 2007, the parties discussed the specific proposed terms for the draft protective
8 order. Declaration of Heather A. Moser in Support of Plaintiffs’ Motion for Protective Order
9 (“Moser Decl.”), ¶ 2. On November 21, 2007, Plaintiffs electronically sent defense counsel a written
10 draft of the proposed protective order, which was modeled in large part on the model Stipulated
11 Protective Order for the Northern District of California. Moser Decl., ¶ 3, Ex. A. During a pre-
12 scheduled follow-up telephonic meet and confer to discuss the written provisions of the draft
13 protective order, however, the three defense attorneys on the call advised Plaintiffs’ counsel that they
14 do not think it is “appropriate” to discuss the terms of a protective order before their Motion to
15 Dismiss (“MTD”) is decided and, in any event, cannot possibly conduct an “exhaustive” meet and
16 confer regarding the proposed provisions prior to January 2008. Moser Decl., ¶ 4. In a letter dated
17 November 28, 2007, defense counsel confirmed that they would be unable to “complete” any meet
18 and confer on the protective order prior to December 28, 2007, and instead suggested that the
19 protective order be resolved by the Court at the Case Management Conference on January 25, 2008.
20 Moser Decl., ¶ 4, Ex. B. The following day, Plaintiffs’ counsel informed defense counsel of their
21 intention to move the Court for a protective order in light of defense counsel’s refusal to “complete”
22 the meet and confer process, but allowed Defendants on last chance to change their minds. Moser
23 Decl. ¶ 4, Ex. C. The next day, Defendants confirmed that they are “not willing to change [their]
24 position” with respect to the meet and confer. Moser Decl., ¶ 5, Ex. D.¹

25
26
27 ¹ This Court may consider an appropriate sanction against Defendants for refusing or failing
28 to meet and confer to resolve this dispute pursuant to Civil Local Rule 37-1(a).

1 Already, over five *weeks* have elapsed since the written draft was sent to the VA and four
2 *months* have passed since Plaintiffs’ counsel’s initial request that the parties attempt to work together
3 to negotiate a suitable protective order. Moser Decl., ¶ 3, Ex. A; Erspamer Decl. ¶ 3. In sum,
4 Plaintiffs have refused to meet and confer since August under the auspices of awaiting their deadline
5 for a responsive pleading and then the hearing on that responsive pleading. Plaintiffs’ counsel
6 believes that they have made every good faith attempt to meet and confer possible under the
7 circumstances and regretfully inform the Court that agreement was not possible.

8 **MEMORANDUM IN SUPPORT OF PLAINTIFFS’ MOTION FOR PROTECTIVE ORDER**

9 **I. INTRODUCTION**

10 Plaintiffs have proposed a protective order based on the model Stipulated Protective Order for
11 the Northern District of California restricting the disclosure and use of confidential private
12 information and prohibiting retaliation for participation in this lawsuit. Plaintiffs seek protections
13 beyond those in the model order for circumstances in part unique to this case. First, because the case
14 involves the medical treatment and medical records of veterans with post-traumatic stress disorder
15 (“PTSD”), protections are necessary for the fundamental privacy rights of veterans in their medical
16 records, particularly as they relate to psychiatric conditions and treatment. Those records are
17 protected by statutory and constitutional rights to privacy and should be subject to limited disclosure.
18 Moreover, Plaintiffs seek to protect veterans, their family members, any claimant on behalf of a
19 veteran, third-party witnesses, and Defendants’ employees from retaliation of any sort for
20 participation in this lawsuit by limiting access to certain identifying information to outside counsel
21 and experts. As detailed in the Declarations of Gordon P. Erspamer, Paul Taira, and Philip E.
22 Cushman, the threat of retaliation and resulting fear of reprisal is serious and real.

23 Despite the fact that Plaintiffs have been raising this issue for four months, Defendants have
24 refused to address the provisions of this Order or engage in any meaningful meet and confer process
25 to resolve the parties’ potential disagreements. For these reasons and those set forth below, Plaintiffs
26 therefore request this Court enter the Proposed Protective Order restricting the disclosure and use of
27 confidential private information and prohibiting retaliation against any person because of their
28 participation in this lawsuit.

1 **II. RELEVANT BACKGROUND**

2 Plaintiffs filed a class action suit against the Department of Veteran Affairs (“VA”) on behalf
3 of veterans suffering from post-traumatic stress disorder. One week after filing their Complaint,
4 Plaintiffs initiated negotiations with Defendants for a protective order to protect confidential private
5 information, including medical records, and to protect parties and witnesses from retaliation or other
6 adverse actions by any party. As a threshold matter, a protective order is necessary in this case to
7 protect confidential private information. Specifically, medical information covered by the HIPAA or
8 other private medical information requires a protective order to protect such personal and private
9 information from public disclosure. Moreover, under the Privacy Act, the federal government is
10 bound to protect such information from public disclosure before producing individual veterans’
11 records during discovery. To address those concerns, Plaintiffs propose the following provision:

12 2.4 Confidential – Subject to Protective Order” Information or Items:
13 all information or items that qualify as (1) agency “records” as defined in
14 5 U.S.C. § 552a(a)(4); (2) individual veterans’ medical history or medical
15 records or any other information protected by constitutional or statutory
16 rights to privacy, including but not limited to information protected from
17 disclosure under the Health Insurance Portability and Accountability Act
(HIPAA), 42 U.S.C. § 201; or (3) information (regardless of how
generated, stored or maintained) or tangible things that qualify for
protection under standards developed under Federal Rule of Civil
Procedure 26(c).

18 In addition to general protections for private medical information, the proposed order includes
19 a special provision prevent retaliation against veterans, VA employees, or others with a fear of
20 retaliation who participate in favor of Plaintiffs. Those witnesses have a very real fear of retaliation,
21 as set forth in detail below, and the proposed protections would foster the goal of bringing forth the
22 most evidence possible before the Court, to which the witnesses, without these protections, might be
23 too afraid to testify. Plaintiffs propose the following specific provisions to prevent such retaliation:

24 12.1 No Retaliation. No Party shall take any retaliatory action against
25 any veteran, potential class member, third-party witness, or employee of a
26 Party based on that individual’s inclusion or participation in this lawsuit.
27 Retaliation shall include but is not limited to the following actions: (1)
28 pulling an individual veteran’s original claim file for use in the litigation,
which indefinitely delays any action in his or her benefits claim
proceeding or appeal; (2) the denial of benefits to individual veterans
based in whole or in part on his or her inclusion or participation in this

1 action; and (3) demotion, termination, or other retaliatory actions against
2 Department of Veterans Affairs employees or other federal government
3 employees based on whole or in part on that employee's inclusion or
4 participation in this action.

5 12.2 Veteran Records. The Department of Justice shall develop a
6 procedure for obtaining access to veteran records from the VA such as
7 claim files and medical records that, to the maximum extent possible,
8 protects the identity of the veteran or claimant and does not indicate the
9 specific purpose for the request. Should the VA or Department of Justice
10 determine that any veteran record such as claim files or medical records is
11 required for review, consultation, or evaluation for purpose of this lawsuit,
12 the VA or Department of Justice shall promptly make an electronic or hard
13 copy of the veteran's records and immediately return the records to their
14 appropriate location within the VA. No veteran record shall be removed
15 from the normal VA adjudication cycle appropriate to that record. This
16 provision applies equally any veteran made known to the VA in
17 Disclosure or Discovery Material, potential class members, claimants for
18 service-connected death or disability compensation as defined in the
19 complaint, declarants, witnesses, or veterans or claimants who participate
20 in any way in this lawsuit.

21 Despite a general refusal to address the proposed text of specific provisions, Defendants have
22 indicated that they are amenable to copying claim files necessary to the litigation to avoid taking
23 them out of circulation in the VA, but do not consent to inclusion of such a provision the protective
24 order itself. Moser Decl., ¶ 4.

25 Second, further to the goal of preventing retaliation against Plaintiffs' witnesses, Plaintiffs
26 propose to limit disclosure of testimony regarding the identities and any personal identifying
27 information of those with a fear of retaliation to outside counsel or experts. Plaintiffs propose the
28 following provisions in this regard:

29 2.3 Personal Identifying Information: (a) Testimony in any form that
30 contains information: (i) protected by the Privacy Act or the right of
31 privacy; (ii) relating to medical condition or treatment; and/or (b)
32 testimony submitted by a veteran or claimant or family members, or any
33 VA employee or consultant, containing identifying information where that
34 individual subjectively expresses a belief that he or she might be subject to
35 retaliation by Defendants. Identifying information would include names,
36 names of family members or relatives, addresses, phone numbers, email
37 addresses, Social Security numbers, current employment information or
38 employment history, details of military service or service-connected
injuries, or any other personal information that would in any way reveal or
provide evidence related to the individual's identity. Personal Identifying

1 Information applies equally to veterans, claimants for service-connected
2 death or disability compensation as defined in the complaint, declarants,
3 witnesses, Defendants' employees, or veterans or claimants who
4 participate in any way in this lawsuit.

5 2.5 "Personal Identifying Information – Attorneys' Eyes Only"
6 Information or Items: information or items that qualify as Personal
7 Identifying Information and are submitted in support of a witness's
8 participation in favor of Plaintiffs. A witness may be a veteran, one of
9 Defendants' employees, or any other relevant non-party.

10 A protective order is needed immediately to permit discovery and any appropriate protections for
11 information filed with the Court.

12 **III. LEGAL STANDARD**

13 Upon motion by a party and for good cause shown, the court "may make any order which
14 justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue
15 burden or expense." Fed. R. Civ. Proc. 26(c). Trial courts have broad discretion in determining what
16 constitutes good cause, whether good cause exists, and, if it does exist, what protection is appropriate
17 when considering a protective order. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984);
18 *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002) ("[t]he law [sic] gives district
19 courts broad latitude to grant protective orders to prevent disclosure of materials").

20 The application of Rule 26(c) is sweeping as "courts have consistently granted protective
21 orders that prevent disclosure of many types of information." *Id.* at 1212. Medical and psychiatric
22 records are routinely acknowledged as proper information for protective orders limiting disclosure
23 and use in litigation. *Id.* citing *Pearson v. Miller*, 211 F.3d 57, 62-64 (3rd Cir. 2000). The Ninth
24 Circuit specifically recognizes the privacy protection afforded to personal medical information.
25 *Roe v. Sherry*, 91 F.3d 1270, 1274 (9th Cir. 1996) (recognizing an individual's "strong interest in
26 protecting the confidentiality of [one's medical] status."); *Planned Parenthood Fed'n of Am., Inc. v.*
27 *Ashcroft*, No. C03-4872 PJH, 2004 WL 432222 at *2 (N.D. Cal. Mar. 5, 2004) (granting request to
28 seal medical record); *Samuels v. Cal. Dep't of Corrections & Rehab.*, No. CIV S-05-2337 GEB JFM
P, 2007 WL 1345701 (E.D. Cal. May 8, 2007) (documents containing mental health records ordered
filed under seal).

1 In addition, when “specific harm or prejudice will result if no protective order is granted”
2 there is good cause to limit disclosure and use of that information. *Phillips*, 307 F.3d at 1210-11.
3 This Court has found not only good cause, but “that compelling reasons exist to keep personal
4 information confidential to protect an individual’s privacy interest and to prevent exposure to harm.”
5 *Nursing Home Pension Fund v. Oracle Corp.*, C 01-00988 MJJ, 2007 WL 3232267 at *2 (N.D. Cal.
6 Nov. 1, 2007); *see also Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1134-37 (9th Cir.
7 2003). The protection of confidential private information “is of particular importance” when
8 “witnesses can be susceptible to retaliation and harassment.” *Nursing Home Pension Fund* at *2. A
9 protective order is warranted in such cases “to reduce fears about litigation (expense, invasions of
10 privacy, burdensome distractions, etc) that can dissuade parties whose rights have been violated from
11 even trying to use the courts to seek redress.” *Humbolt Baykeeper v. Union Pac. R.R. Co.*, 244
12 F.R.D. 560, 563 (N.D. Cal. 2007).

13 **IV. ARGUMENT**

14 An order protecting private confidential information is without question required for this case.
15 Plaintiffs have proposed two provisions that go beyond those of the Northern District’s model order
16 (1) provisions governing retaliation, and (2) provisions restricting limited categories of information to
17 outside counsel. This case presents a unique risk of retaliation, as detailed below, requiring the
18 requested protection in Plaintiffs’ proposed order. Further, restricting limited categories of
19 information to outside is a common practice, and the specific information is properly protected by
20 privacy concerns.

21 **A. The Proposed Provisions Governing Retaliation Are Factually and Legally** 22 **Appropriate.**

23 **1. This Case Presents a Unique Risk of Retaliation Against Veterans, Their** 24 **Family Members, Other Federal Employees, and Third Party Witnesses.**

25 This is a class action lawsuit on behalf of veterans suffering from posttraumatic stress
26 disorder (“PTSD”). As such, counsel for Plaintiffs have been in contact with numerous veterans and
27 their family members regarding potential inclusion as class members. Declaration of Paul Taira in
28 Support of Plaintiffs’ Motion for Protective Order (“Taira Decl.”), ¶ 2. Literally hundreds of veterans
and family members have been interviewed regarding their military history and experiences with the

1 VA. *Id.* Many of those interviewed expressed concerns about retaliation from the VA if they were to
2 publicly testify about problems that they encountered in obtaining medical care or in the adjudication
3 of their disability claims. *Id.* There are several factors that give veterans concerns. *Id.* at ¶ 3. First,
4 veterans suffering from PTSD in conjunction with physical injuries are often unable to maintain
5 employment. *Id.* They are totally dependant on the VA for medical care and their disability benefits
6 may constitute their sole source of income. *Id.* Second, the VA has retaliated against veterans who
7 have spoken up about their poor care or delays in disability benefit adjudication. *Id.* In these
8 circumstances, many veterans have expressed serious concerns that they may be harassed or that they
9 may have increased difficulty obtaining medical care or that their disability claims may be delayed,
10 denied, or their benefits terminated. *Id.*; Erspamer Decl. ¶¶ 3, 5-7.

11 Specific examples of retaliation by the VA against a veteran are described in the Declaration
12 of Phillip E. Cushman in Support of Plaintiffs’ Motion for Protective Order (“Cushman Decl.”). Mr.
13 Cushman is a veteran of the United States Marine Corps who served in Vietnam and currently
14 receives service-connected disability from the VA. Cushman Decl., ¶ 2. Mr. Cushman has been a
15 highly visible public advocate for veterans’ rights, particularly regarding medical care and disability
16 benefits. *Id.* After appearing on a television broadcast in 1981 featuring VA officials, Mr. Cushman
17 had his first experience with VA retaliation. *Id.* at ¶ 4. At the time, Mr. Cushman was receiving
18 service-connected disability benefit payments based on a claim for 1974 with the VA. *Id.* at ¶ 3.
19 Two weeks after the broadcast, where he vigorously criticized the VA’s treatment of veterans, the
20 VA notified him to appear for an examination in Portland to re-evaluate his disability status. *Id.* Mr.
21 Cushman later learned that this re-examination was ordered from Washington, D.C. *Id.* In 1982, Mr.
22 Cushman created Veterans for Due Process, Inc., a non-profit veterans’ advocacy group. *Id.* He later
23 appeared in a televised debate with a VA General Counsel. *Id.* In March 1983, after receiving VA
24 benefits for nine consecutive years, he was again notified by the VA rating board to appear for an
25 examination to determine eligibility for benefits. *Id.* As a result of this examination, Mr. Cushman’s
26 VA benefits were abruptly terminated. *Id.* After fighting this termination for four years with the
27 assistance of Senator Gary Hart and Senator Wyden, his VA benefits were finally restored in 1987.
28 *Id.* at ¶ 6. The Director of the VA Compensation and Pension Service had determined the actions

1 terminating the payments were improper. *Id.* Mr. Cushman later discovered a VA employee had
2 fraudulently altered his VA records which resulted in a denial of Social Security benefits for over
3 thirty years. *Id.* at ¶ 7, Ex. A.

4 In addition to the very real fears expressed by veterans and their family members described
5 above and the example of Mr. Cushman, the VA has a history of retaliatory practices in the course of
6 litigation. These practices were witnessed in a case heard before this Court, *National Association of*
7 *Radiation Survivors v. Turnage*, No. C 83-1861 (MHP) (“*NARS v. Turnage*”), which lasted for over a
8 decade and involved a large volume of discovery against the Veterans Administration (now the
9 Department of Veterans Affairs). Erspamer Decl., ¶ 1. Examples of retaliation by the VA in the
10 *NARS v. Turnage* case include the carving of a swastika inside the Star of David on Ronald Abrams’
11 desk at work (Mr. Abrams worked in the VA’s Central Office in Washington, D.C. and had just
12 testified at a hearing respecting VA destruction of documents sought in discovery). *Id.* at ¶ 3.
13 Several other incidents occurred involving veterans, VA claimants and VA employees. *Id.* at ¶ 5.
14 One incident involved an elderly widow, Jackie Maxwell, whose husband Albert had died before
15 trial, whose bank account was seized by the VA a matter of weeks before her trial testimony based on
16 alleged overpayment of disability compensation the month her husband died. *Id.* Another incident
17 involved Barry Boskovich, another VA employee who had testified at his deposition about the VA’s
18 destruction of evidence that was responsive to an outstanding document request, and whose
19 supervisor had warned him the day before he left to testify at an evidentiary hearing that he ought to
20 give thought to how his testimony might affect his job and his family. *Id.*

21 Another problem repeatedly faced in the *NARS v. Turnage* case was that the VA pulled the
22 original claim files of veterans or family members who were class representatives, those who
23 submitted declarations or testimony, or others who were identified in interrogatory answers or other
24 means of discovery. *Id.* at ¶ 6. The original claim files were sent to VA attorneys for extended
25 periods of time, which had the effect of suspending action on that veteran’s or family member’s
26 claim. *Id.* Many veterans will not come forward or will hesitate to come forward without assurances
27 their claim files will not be pulled and adjudication suspended. *Id.*

1 Veteran and family members as well as VA employees have a reasonable fear of reprisal
2 should they offer testimony in this case. *Id.* at ¶ 7. Retaliation can take several forms, including
3 adverse action on a claim or appeal, the severance of service-connected death and disability
4 compensation, the suspension of action on a pending claim or appeal, the sudden inability to schedule
5 medical appoints, or a variety of other forms. *Id.*

6 **2. Federal Courts, Including the Ninth Circuit, Have Entered Witness-**
7 **Anonymity Protective Orders to Prevent Retaliation.**

8 The Ninth Circuit has upheld anonymity provisions much more restrictive than those
9 Plaintiffs propose here. In general, the Ninth Circuit will permit a party to proceed anonymously
10 when nondisclosure of a party's identity is "necessary...to protect a person from harassment, injury,
11 ridicule or personal embarrassment." *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1980)
12 (using pseudonyms for prison inmate who "faced a risk of serious bodily harm" if his role as a
13 government witness were disclosed); *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 834 n.1 (9th
14 Cir. 1998), *vacated on other grounds*, 177 F.3d 789 (9th Cir. 1999) (en banc) (plaintiff filed case as
15 "Jane Doe" because she feared retaliation by the community). In *Does I thru XXIII v. Advanced*
16 *Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000), the Ninth Circuit permitted plaintiff garment
17 workers who sued their employers under the Fair Labor Standards Act to proceed anonymously,
18 holding "a party may preserve his or her anonymity in judicial proceedings in special circumstances
19 when the party's need for anonymity outweighs prejudice to the opposing party and the public's
20 interest in knowing the party's identity." Where "pseudonyms are used to shield the anonymous
21 party from retaliation," the court employs considerations such as the severity of the threatened harm,
22 the reasonableness of the anonymous party's fears, and the anonymous party's vulnerability to
23 retaliation. *Id.* (internal citations omitted).

24 The protective order sought by Plaintiffs is much less restrictive than a party proceeding
25 anonymously. Plaintiffs propose that the Court restrict the disclosure and use of personal information
26 that would reveal the identities of veterans, claimants for service-connected death and disability
27 benefits, family members, third-party witnesses, or Defendants' employees who present information
28 in support of Plaintiffs' case who fear retaliation. Actual or threatened retaliation is not required for a

1 court to issue a protective order to prevent retaliation. All that is required is that the “witnesses can
2 be *susceptible* to retaliation and harassment.” *Nursing Home Pension Fund*, 2007 WL 3232267 at *2
3 (emphasis added). The threatened harm is real and there would be no prejudice to Defendants by
4 these restrictions. Plaintiffs have not only demonstrated that veterans, their family members, and
5 third party witnesses can be susceptible to retaliation, but have detailed specific examples of likely
6 retaliatory activities and past retaliatory actions by this Defendant.

7 **B. Restricting Limited Categories of Information to Outside Counsel is Common**
8 **Practice for Sensitive Information and Furthers the Goal of Preventing**
9 **Retaliation.**

10 One of the proposed provisions would restrict access to testimony submitted in favor of
11 plaintiffs that contains personal identifying information for a witness with a fear of retaliation to
12 outside counsel and experts. Courts routinely restrict certain confidential information to disclosure
13 only to outside counsel. *Charles O. Bradley Trust v. Zenith Capital LLC*, No. C-04-2239
14 JSW(EMC), 2005 WL 1030218, at *2 (N.D. Cal. May 3, 2005). This Court in *Charles O. Bradley*
15 *Trust* ordered “the production of [sic] documents under a strict protective order, *e.g.*, limiting
16 disclosure to counsel only (*i.e.*, no dissemination to Plaintiffs-clients, let alone the public...)” *Id.*
17 This practice is also recognized by the Supreme Court. *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S.
18 340, 363 n.24 (1979) (“[m]ore commonly, the trial court will enter a protective order restricting
19 disclosure to counsel”). The Northern District’s model Stipulated Protective Order specifically
20 contains provisions for certain information to be disclosed to attorneys only. Restricting the
21 disclosure and use of certain personal identifying information only to outside counsel will limit the
22 susceptibility of veterans, family members, third-party witnesses, and employees of Defendants to
23 retaliation.

23 **C. The Documents and Information That Should Be Restricted Are Properly**
24 **Protected by Privacy Concerns.**

25 Much of the information regarding veterans that may be used in this lawsuit concerns veterans
26 who suffer from PTSD, which is a severe mental condition. The veteran information may contain
27 detailed diagnoses and treatment for PTSD, as well as information relating to benefit claims for
28 PTSD with the VA. As the Ninth Circuit acknowledges, “Congress has recognized the importance of

1 privacy in medical records in a variety of contexts, most prominently in the Health Insurance
2 Portability and Accountability Act of 1996 (“HIPAA”), Pub.L. No. 104-191, 110 Stat. 1936 (1996).”
3 *United States v. Comprehensive Drug Testing, Inc.*, 473 F.3d 915, 970 (9th Cir. 2006); *see also*
4 *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1084 (9th Cir. 2007) (“Congress intended
5 through this legislation to ‘recogniz[e] the importance of protecting the privacy of health
6 information”).

7 The information is further protected from public disclosure by the Privacy Act, 5 U.S.C. §§
8 552a, *et seq.* The Privacy Act generally prohibits a “federal agency’s disclosure of information
9 pertaining to an individual” unless the individual has given consent or as authorized pursuant to a
10 court order. *St. Michael’s Convalescent Hospital v. California*, 643 F.2d 1369, 1372-73 (9th Cir.
11 1981). Defendants are bound by the provisions of the Privacy Act, and Plaintiffs sought to
12 accommodate their concern by defining “confidential information” to include “all information or
13 items that qualify as (1) agency “records” as defined in 5 U.S.C. § 552a(a)(4).” The information
14 sought to be protected here constitutes personal medical information subject to privacy protections
15 that cannot be publicly available and should be subject to a confidential designation and filing under
16 seal.

17 **V. CONCLUSION**

18 For the foregoing reasons, Plaintiffs request that the Court enter the Proposed Protective
19 Order filed herewith for the protection of confidential private information and prohibiting retaliation.

20 Dated: November 30, 2007

GORDON P. ERSPAMER
ARTURO J. GONZALEZ
HEATHER A. MOSER
BILL D. JANICKI
STACEY M. SPRENKEL
PAUL J. TAIRA
MORRISON & FOERSTER LLP

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22
23
24
25
26 By: /s/ Heather A. Moser
Heather A. Moser

27 Attorneys for Plaintiffs
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