

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 09-00037 CW

VIETNAM VETERANS OF AMERICA; SWORDS
TO PLOWSHARES; VETERANS RIGHTS
ORGANIZATION; BRUCE PRICE; FRANKLIN
D. ROCHELLE; LARRY MEIROW; ERIC P.
MUTH; DAVID C. DUFRANE; TIM MICHAEL
JOSEPHS; and WILLIAM BLAZINSKI,
individually, on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY; MICHAEL
J. MORRELL, Acting Director of
Central Intelligence; UNITED STATES
DEPARTMENT OF DEFENSE; DR. ROBERT M.
GATES, Secretary of Defense; UNITED
STATES DEPARTMENT OF THE ARMY; PETE
GEREN, United States Secretary of the
Army; UNITED STATES OF AMERICA; ERIC
H. HOLDER, Jr., Attorney General of
the United States; UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS; and
ERIC K. SHINSEKI, UNITED STATES
SECRETARY OF VETERANS AFFAIRS.

Defendants.

ORDER DENYING
DEFENDANTS CENTRAL
INTELLIGENCE AGENCY
AND MICHAEL J.
MORRELL'S MOTION FOR
JUDGMENT ON THE
PLEADINGS, DENYING
WITHOUT PREJUDICE
CENTRAL INTELLIGENCE
AGENCY AND MICHAEL
J. MORRELL'S MOTION
TO AMEND THE
SCHEDULING ORDER,
AND GRANTING SECTION
I.A OF CENTRAL
INTELLIGENCE AGENCY
AND MICHAEL J.
MORRELL'S MOTION FOR
A PROTECTIVE ORDER
(Docket No. 245, 252
266)

Defendants Central Intelligence Agency and its Acting Director
Michael J. Morrell (collectively, the CIA) move for judgment on the
pleadings, to amend the scheduling order and for a protective
order. Only sections I.A and I.B of the CIA's motion for a
protective order are currently before this Court; the remaining
sections have been referred to Magistrate Judge Jacqueline Scott
Corley. Plaintiffs Vietnam Veterans of America, et al., oppose the
motions. The motions were heard on September 1, 2011. Having
considered oral argument and the papers submitted by the parties,

1 the Court DENIES the CIA's motion for judgment on the pleadings,
2 DENYING without prejudice the CIA's motion to amend the scheduling
3 order and GRANTS section I.A of the CIA's motion for a protective
4 order.

5 BACKGROUND

6 Because the Court's previous orders describe the allegations
7 of this case in sufficient detail, they will not be repeated here
8 in their entirety. In sum, Plaintiffs bring various claims against
9 Defendants arising from the United States' human experimentation
10 programs, many of which were conducted at Edgewood Arsenal and Fort
11 Detrick, both located in Maryland. The CIA, along with the United
12 States Army, allegedly "planned, organized and executed" these
13 programs. Third Am. Compl. (3AC) ¶ 2. According to Plaintiffs,
14 some individuals involved in administering these programs were on
15 the CIA's payroll. Plaintiffs further allege that others, who
16 represented themselves to be Army officers, were in fact CIA
17 agents. The CIA allegedly understood that its activities had to be
18 concealed from "enemy forces" and the "American public in general"
19 because knowledge of them "would have serious repercussions in
20 political and diplomatic circles and would be detrimental to the
21 accomplishment of its mission." Id. ¶ 145 (citation and internal
22 quotation marks omitted).

23 At issue in this motion are Plaintiffs' remaining claims
24 against the CIA. The parties do not dispute that Plaintiffs assert
25 claims against the CIA based on a so-called secrecy oath that test
26 participants were required to take. Pursuant to the oath, test
27 participants allegedly agreed they would

28 not divulge or make available any information related to

1 U.S. Army Intelligence Center interest or participation
2 in the [volunteer program] to any individual, nation,
3 organization, business, association, or other group or
entity, not officially authorized to receive such
information.

4 3AC ¶ 156. According to Plaintiffs, the test participants further
5 agreed that a violation of the oath would "render [them] liable to
6 punishment under the provisions of the Uniform Code of Military
7 Justice." Id. In or about September 2006, some test participants
8 allegedly received letters indicating that the Department of
9 Defense (DoD) granted them a partial release from the oath. The
10 letters stated that the test participants could "discuss exposure
11 information with their health care providers, but warn[ed] them not
12 to 'discuss anything that relates to operational information that
13 might reveal chemical or biological warfare vulnerabilities or
14 capabilities.'" Id. ¶ 160. Plaintiffs allege that the secrecy
15 oath violated their constitutional rights and seek a declaration
16 that they "are released from any obligations or penalties" imposed
17 by the oath. Id. ¶ 183.

18 The parties dispute whether Plaintiffs have any other claims
19 against the CIA. Plaintiffs maintain they continue to assert
20 "Constitutional due process claims" against the CIA related to the
21 agency's alleged obligations to notify test participants of the
22 experiments' effects and to provide health care. Pls.' Opp'n at
23 10-11. The CIA disagrees, pointing to the Court's May 31, 2011
24 Order concerning the agency's December 6, 2010 motion to dismiss.
25 In its motion, the CIA sought

26 dismissal of two of Plaintiffs' claims against it:
27 (1) Plaintiffs' claim that the CIA is obligated to
28 provide the individual Plaintiffs with notice of
chemicals to which they were allegedly exposed and any
known health effects related thereto; and (2) Plaintiffs'

1 claim that the CIA is obligated to provide medical care
2 to the individual Plaintiffs.
3 Defs.' Partial Mot. to Dismiss Pls.' 3AC at 6. With respect to
4 Plaintiffs' so-called notice claim against it, the CIA asserted
5 that "Plaintiffs must identify a source of substantive law that
6 would require the CIA to provide notice to Plaintiffs." Id. at 7.
7 Likewise, the CIA asserted that Plaintiffs' so-called health care
8 claim against it had no legal basis. Id. at 15. In opposition to
9 the CIA's motion to dismiss their notice claim, Plaintiffs did not
10 assert that it was grounded in the United States Constitution.
11 Plaintiffs did not offer any substantive argument regarding their
12 health care claim against the CIA, asserting

13 Plaintiffs' core claim against the CIA seeks to require
14 the CIA to comply with its duty to notify test subjects
15 about tests to which they were subjected. Although
16 Plaintiffs believe that the Court also could require the
CIA to provide medical care to test subjects harmed by
the CIA's testing programs, Plaintiffs note that the
medical care remedy they seek for test participants does
not depend on the CIA's provision of that care.

17 Pls.' Supp. Opp'n to Defs.' Partial Mot. to Dismiss at 2 n.2.
18 After considering the parties' papers, the Court granted the CIA's
19 motion and dismissed Plaintiffs' claims against the agency for
20 notice and health care.

21 On July 28, 2011, the CIA filed its present motion, seeking
22 judgment on the pleadings or, in the alternative, summary judgment.
23 On August 9, 2011, the Court indicated that it would not convert
24 the CIA's motion into a motion for summary judgment, noting that
25 the parties had stipulated to have all dispositive motions heard on
26 April 5, 2012 at 2:00 p.m.

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DISCUSSION

I. Motion for Judgment on the Pleadings

Rule 12(c) of the Federal Rules of Civil Procedure provides, "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990).

The CIA asserts that, based on their allegations, Plaintiffs lack standing to bring claims against the agency regarding the alleged secrecy oath. To establish standing, a plaintiff must show: "(1) he or she has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1225 (9th Cir. 2008). The CIA contends primarily that, because Plaintiffs do not allege specifically that the agency administered the secrecy oath, Plaintiffs do not demonstrate traceability and redressability.

It is not evident from the 3AC that the CIA did not have any role in the secrecy oaths or that a court order against the agency would not redress Plaintiffs' alleged injuries. Plaintiffs plead facts about the CIA's pervasive involvement in planning, funding and executing the experimentation programs. Plaintiffs also plead that the CIA had an interest in concealing the programs from "enemy

1 forces" and "the American public in general." 3AC ¶ 145 (citation
2 and internal quotation marks omitted). These allegations,
3 construed in Plaintiffs' favor, suggest that the challenged secrecy
4 oath could be traced fairly to the CIA and that a court order
5 directed at the CIA could redress Plaintiffs' alleged injuries.

6 Based on their pleadings, Plaintiffs have standing to bring
7 claims against the CIA regarding the secrecy oath. Consequently,
8 the CIA's motion for judgment on the pleadings must be denied.

9 II. Motion to Amend the Scheduling Order

10 The CIA moves to amend the scheduling order to permit it to
11 have its summary judgment motion heard before April 5, 2012 at 2:00
12 p.m., the date and time set by Court order pursuant to the parties'
13 stipulation. The CIA seeks to move for summary judgment on
14 Plaintiffs' claim regarding the alleged secrecy oaths, which the
15 CIA understands to be the remaining claim against it.

16 As noted above, the parties dispute whether Plaintiffs have
17 claims against the CIA, other than that regarding the secrecy
18 oaths. Plaintiffs maintain that they have claims against the CIA
19 for notice and health care under the Fifth Amendment's Due Process
20 Clause.

21 The Court disagrees. The CIA's previous motion to dismiss
22 clearly specified that it was directed at Plaintiffs' claims for
23 notice and health care. The motion indicated that these claims
24 lacked any legal basis. Plaintiffs were on notice that the CIA was
25 challenging these claims and had the opportunity to oppose
26 dismissal by clarifying that the Due Process Clause afforded a
27 basis for them. They did not do so.

28 Plaintiffs argue that, because the CIA's motion to dismiss

1 "characterized Plaintiffs' injunctive and declaratory request for
2 notice as arising under the [Administrative Procedure Act (APA)]
3 and neglected to address the Constitutional basis for the claims,"
4 they were required to address only the "APA-based arguments" in
5 their opposition. Pls.' Opp'n to CIA's Mot. for J. on the
6 Pleadings at 12:1-2. The flaw in this argument is that the CIA
7 sought to dismiss Plaintiffs' claims for notice and health care in
8 their entirety. Nowhere in its motion did the CIA state that it
9 sought dismissal of these claims only to the extent that they were
10 based on the APA. If the CIA had mischaracterized the legal theory
11 underlying their claims, to avoid dismissal, Plaintiffs had a duty
12 in their opposition to inform the CIA and the Court. Indeed, in
13 their opposition to Defendants' motion to dismiss their first
14 amended complaint, Plaintiffs endeavored to clarify their claims
15 for relief to avoid dismissal. See, e.g., Pls.' Opp'n to Mot. to
16 Dismiss 1st Am. Compl. 5:10-11 (noting that Defendants' argument
17 "rests on a fundamental mischaracterization of Plaintiffs' claims
18 and a misinterpretation of the APA"); id. at 7:9-11 ("Once again,
19 Defendants mischaracterize Plaintiffs' claim: it is based on
20 Defendants' failure to act in accordance with their legal duties,
21 not a challenge to Defendants' final actions.") (emphasis in
22 original). Plaintiffs did not do the same in opposing the CIA's
23 December 6, 2010 motion to dismiss.

24 Plaintiffs' claims against the CIA for notice and health care
25 have been dismissed. If Plaintiffs wish to pursue these claims,
26 they may file a supplemental opposition to the CIA's December 6,
27 2010 motion to dismiss their claims against the agency for notice
28 and health care. In any supplemental opposition, Plaintiffs must

1 brief how such claims are cognizable under the United States
2 Constitution. The CIA may file a reply in support of its motion to
3 dismiss. The CIA's reply shall be due fourteen days after any
4 supplemental opposition is filed.

5 After it has been determined which claims Plaintiffs have
6 against the CIA, the agency may request leave to notice for hearing
7 an early motion for summary judgment. The CIA may file an
8 administrative motion, pursuant to Civil Local Rule 7-11, to make
9 this request. As discussed at the September 1, 2011 hearing,
10 Plaintiffs and the CIA may reach an agreement regarding Plaintiffs'
11 secrecy oath claim against the agency, which may eliminate that
12 claim. Whether Plaintiffs have claims for notice and health care
13 against the CIA will depend on their supplemental opposition to the
14 CIA's motion to dismiss.

15 III. Motion for a Protective Order

16 In section I.A of the CIA's motion for a protective order, the
17 CIA argues that Plaintiffs do not have constitutional claims for
18 notice and health care against the CIA and, accordingly, are not
19 entitled to discovery on such claims. As explained above,
20 Plaintiffs presently do not have any claims against the CIA for
21 notice and health care. Accordingly, Plaintiffs are not entitled
22 to discovery on these claims.

23 As it stands, Plaintiffs' secrecy oath claim will go forward.
24 Section I.B of the CIA's motion for a protective order concerns the
25 scope of discovery as to this claim and is referred to Magistrate
26 Judge Corley.

27 CONCLUSION

28 For the foregoing reasons, the Court DENIES the CIA's motion

1 for judgment on the pleadings (Docket No. 245), DENIES without
2 prejudice CIA's motion to amend the scheduling order (Docket No.
3 266) and GRANTS section I.A of the CIA's motion for a protective
4 order (Docket No. 252). Presently, Plaintiffs' claims against the
5 CIA for declaratory and injunctive relief regarding the challenged
6 secrecy oaths are their only outstanding claims against the agency.
7 Thus, Plaintiffs shall not take discovery based solely on claims
8 against the CIA for notice or health care. This ruling does not
9 address the scope of discovery against the CIA as to Plaintiffs'
10 secrecy oath claim or their claims against other Defendants.

11 As explained above, if Plaintiffs wish to pursue claims
12 against the CIA for notice and health care, they must file a
13 supplemental opposition to the CIA's December 6, 2010 motion to
14 dismiss. This supplemental opposition shall brief how claims
15 against the CIA for notice and health care are cognizable under the
16 United States Constitution. The CIA's response shall be due
17 fourteen days after any supplemental opposition is filed.
18 Plaintiffs' supplemental opposition and the CIA's response shall
19 not exceed ten pages. Unless a hearing is set, the Court will
20 decide the matter on the papers.

21 Once it is determined which claims Plaintiffs assert against
22 the CIA, the agency may file an administrative motion for leave to
23 file an early summary judgment motion on any claims against it. In
24 any administrative motion, the CIA must show that filing an early
25 motion would serve interests of judicial efficiency.

26 Section I.B of the CIA's motion for a protective order is
27 referred to Magistrate Judge Jacqueline Scott Corley.

28 A further case management conference and a hearing on

1 Defendants' dispositive motion will be held on April 5, 2012 at
2 2:00 p.m.

3 IT IS SO ORDERED.

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5 Dated: 9/2/2011


CLAUDIA WILKEN
United States District Judge

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