UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

VIETNAM VETERANS OF AMERICA, et al.,

Plaintiffs,

v.

Civil Action 2:11-mc-16
Judge Michael H. Watson
Magistrate Judge E.A. Preston Judge Deavers

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants.

DISCOVERY ORDER

On June 22, 2011, the Court held a hearing on the pending discovery motions, including Plaintiffs' Motion to Compel Battelle Memorial Institute to Produce Documents in Response to Subpoena (ECF No. 1); Battelle Memorial Institute's ("Battelle") Motion Quash (ECF No. 12); and Battelle's Motion to Quash Deposition Subpoenas, or in the Alternative, to Modify the Subpoenas and Grant a Protective Order (ECF No. 20). At the hearing, the parties reached a tentative agreement regarding many of the issues disputed in the aforementioned motions. Following the hearing, the parties continued negotiations relating to the outstanding discovery issues. On September 28, 2011, the Court held a telephonic status conference to ascertain what discovery issues remained in dispute. In the Court's view, the issues raised in Plaintiffs' Motion to Compel Battelle to Produce Documents in Response to Subpoena (ECF No. 1) and Battelle's Motion Quash (ECF No. 12) have been resolved, rendering them moot. Thus, the Clerk is **DIRECTED** to terminate these motions (ECF Nos. 1 and 12) from the Court's pending motions

list as **MOOT**.

The parties have also reached an agreement with regard to Battelle's Motion to Quash Deposition Subpoenas (ECF No. 20), with the exception of two proposed topics of examination. For the reasons that follow, the Court **GRANTS** Battelle's Motion insofar as the Court modifies the Sowa subpoena to limit it to the subjects upon which the parties have agreed upon.

I.

A. The Underlying Litigation

Plaintiffs, Vietnam Veterans of America, Swords to Plowshares: Veterans Rights Organization, and six individual veterans (collectively "Plaintiffs"), bring this action against Defendants, Central Intelligence Agency ("CIA"), Leon Panetta, Dr. Robert M. Gates, United States Department of the Army ("Army"), Pete Geren, United States of America, Eric H. Holder, Jr., United States Department of Veterans Affairs ("DVA"), and Eric K. Shinseki (collectively "Defendants"), arising from the United States' human experimentation programs that occurred from approximately 1950 through 1975 at the Edgewood Arsenal and Fort Detrick in Maryland. According to Plaintiffs, beginning in the 1950s, the CIA and Army engaged in human experiments upon then-active servicemen ranging from biological and chemical weapons testing to testing of psychochemicals. The 7,800 armed services personnel, including the six individual veterans named in this action, were exposed to various chemicals, drugs, and the implantation of electronic devices. According to Plaintiffs, although the test participants volunteered to participate in the experiments, they did so without informed consent because Defendants failed to fully disclose the risks associated withe the human experiments. The test participants were also required to sign a secrecy oath.

In September 2006, some, but not all, test participants received letters from the DVA,

advising them that the Department of Defense ("DOD") had authorized them to discuss their exposure to the biological and chemical compounds with their healthcare providers. As a result, these test participants have been notified and received information on their exposure. In January 2009, Plaintiffs filed their initial Complaint against Defendants in the Northern District of California, Case No. 09-0037, seeking declaratory and injunctive relief on behalf of the test participants. Specifically, Plaintiffs seek the following: (1) an order requiring Defendants to fully disclose to all test participants what they were exposed to and the possible health effects related to participation in the experiments; (2) an order releasing test participants from their secrecy oaths; (3) a declaration that test participants' consent forms are not valid or enforceable; (4) medical care for all casualties of Defendants' experiments; and (5) an order from the court requiring the DVA to remedy past denials of benefits to test participants and for the DVA to devise procedures to resolve future claims in compliance with the Due Process Clause of the Fifth Amendment. Plaintiffs' claims for declaratory relief have been dismissed.

B. Battelle's Relationship to the Underlying Litigation

Battelle is not a party to the underlying litigation. Battelle is a nonprofit charitable trust headquartered in Columbus, Ohio, which has performed research services pursuant to its contract with the DOD. Pursuant to a contract with the DOD, Battelle is developing the U.S. Chemical and Biological Tests Repository Program (the "Database").[1] The Database project's "Statement of Work" tasks Battelle with collecting, analyzing, and organizing information from various DOD sites and other repositories for the purpose of assembling information about participants

[1]The Court recognizes that the term "Database" does not accurately describe the program, which apparently is much more comprehensive and complex than the word connotes. The Court utilizes the term "Database" only for ease of reference and for purposes of conceptualizing the program as a whole.

who were involved in the government's chemical and biological testing programs from 1942 to the present. Battelle has been conducting this work for over six years, and the project is still ongoing.

Plaintiffs assert that the discovery they seek from Battelle is relevant to the underlying action because it will permit them to "assess the credibility of the database that Defendants will utilize to disclose to test participants what they were exposed to, the possible health effects, determine the extent of medical care required, and to process claims for service-connected death or disability compensation." (Pl.'s Mot. to Compel 9, ECF No. 1.) Plaintiffs further explain:

> Without the requested records, Plaintiffs will be unable to understand the formation of the project, Battelle's process for populating the fields in the database and resolving conflicts among available records, the process for identifying and collecting the relevant documents, why the time period covered by the database was limited in the manner it was, and the testing and reliability of the stored information. How data sources were gathered, sorted, and analyzed; what data sources were pursued; and what data sources were rejected are all questions answerable only by Battelle's production consistent with the Subpoena.

(*Id*. at 17.)

C. The Remaining Discovery Disputes

Plaintiffs served Battelle with a subpoena *duces tecum* in June 2010 and an amended subpoena in January 2011. Battelle objected to the amended subpoena, prompting Plaintiffs to file a motion to compel and Battelle to file a motion to quash. In May 2011, Plaintiffs served Battelle employees William D. McKim[2] and John Sowa with deposition subpoenas and Battelle with a Federal Rule of Civil Procedure 30(b)(6) subpoena covering six topics of examination. Battelle subsequently moved to quash or modify the deposition subpoenas.

[2]The District of Columbia District Court issued the McKim subpoena. Consequently, this Court cannot quash or limit the scope of the McKim subpoena. *See* Fed. R. Civ. P. 45(c)(3)(A).

In June 2011, the Court held a hearing at which Plaintiffs, Defendants, and Battelle reached a tentative agreement with regard to most of the discovery issues. After the hearing, the parties continued to negotiate a resolution of the outstanding issues. On September 28, 2011, the Court held a telephonic status conference to ascertain which discovery issues remained in dispute. As set forth above, in the Court's view, the disputes relating to the amended subpoena duces tecum have been resolved. Further, the parties have reached an agreement with regard to substantial portions of the deposition subpoena. Specifically, the parties have agreed that the depositions would be limited to two Battelle employees, Messrs. Sowa and McKim, who are most knowledgeable about the Database. In addition, of Plaintiffs' six proposed deposition topics, Battelle agrees to Plaintiffs' topics one through three, and Plaintiffs have withdrawn topic five. The following two proposed topics of examination, topics four and six, remain in dispute:

> 4. Contacts or communications between BATTELLE and DEFENDANTS concerning the Subpoena and/or its contents, BATTELLE's response to the Subpoena, the motion to compel production of documents, notes and correspondence, or any other aspect of this legal action;
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> * * *
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> 6. BATTELLE's involvement as a contractor or participant in the chemical and/or biological testing program, including: the projects worked on; research conducted; reports generated; and the short and long tern health effects of substance administration.

(Battelle Subpoena to Testify at a Dep. 5, ECF No. 20-1.)

II.

Battelle seeks a court order quashing or modifying the subpoenas. Rule 45 of the Federal Rules of Civil Procedure governs third-party subpoenas. Rule 45 permits parties in legal proceedings to command a non-party to attend a deposition, produce documents, and/or permit inspection of premises. Fed. R. Civ. P. 45(a)(1). The Rule provides that the person commanded

to produce documents may serve an objection on the party or attorney designated in the subpoena within the earlier of fourteen days after the subpoena is served or the time specified for compliance. Fed. R. Civ. P. 45(c)(2)(B). If the commanded person objects, as Battelle does here, "the serving party may move the issuing court for an order compelling production or inspection." *Id*.

Determining the scope of discovery is within this Court's discretion. *Bush v. Dictaphone Corp.*, 161 F.3d 363, 367 (6th Cir. 1998). As the United States Court of Appeals for the Sixth Circuit has recognized, "[t]he scope of discovery under the Federal Rules of Civil Procedure is traditionally quite broad." *Lewis v. ACB Bus. Serv., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998). In particular, discovery is more liberal than the trial setting, as Rule 26(b) allows any "line of interrogation [that] is reasonably calculated to lead to the discovery of admissible evidence." *Id.* (quoting *Mellon v. Cooper-Jarrett, Inc.*, 424 F.2d 499, 501 (6th Cir. 1970)). In other terms, the Court construes discovery under Rule 26 "broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). In considering the scope of discovery, the Court may balance Plaintiffs' "right to discovery with the need to prevent 'fishing expeditions.'" *Conti v. Am. Axle and Mfg., Inc.*, 326 F. App'x 900, 907 (6th Cir. 2009) (quoting *Bush*, 161 F.3d at 367).

III.

A. Topic Four—Discussions Related to the Subpoena

Battelle contends that topic four is vague and ambiguous in that it fails to define which subpoena and appears to include attorney work product and/or privileged communications. Battelle also maintains that topic four lacks relevance. Battelle asserts that the deposition should

be limited to topics relating to Battelle's involvement with the Database. Plaintiffs, in their June 17, 2011 Opposition to Battelle's Motion to Quash Deposition Subpoenas, did not respond to Battelle's objections to topic four. Instead, they indicated that they had offered to withdraw topic four, and "[t]hus, topic 6 is the only one seemingly still in dispute." (Pls.' Opp. to Battelle's Mot. to Quash Dep. Subpoenas 6, ECF No. 23.) In making these compromises, Plaintiffs emphasized that their goal was not to "embark on an open-ended fishing expedition," but rather to "assess the credibility of the Database central to [their] case." (*Id*.) During the September 28, 2011 telephone conference, however, Plaintiffs indicated that they once again dispute topic four.

The Court concludes that Plaintiffs' proposed topic four lacks relevance to their stated purpose of seeking discovery from Battelle. Plaintiffs' only justification for topic four appears to be an unsubstantiated suggestion of bias or collusion between Battelle and Defendants. This Court's review of the record reveals no such conspiracy. Accordingly, the Court **MODIFIES** the subpoena to eliminate topic four from the scope of inquiry.

B. Topic Six—Battelle's Involvement in Testing

Plaintiffs assert that topic six is necessary to determine the extent of Battelle's involvement in the testing and any bias that could result from any such testing. Plaintiffs allege that Battelle has connections to physical locations where chemical and biological testing has taken place. Plaintiffs offer two documents that they contend suggest that Battelle had a role in the chemical and biological testing program that is the subject of the underlying action. The first of these documents is a report entitled "The Medical Laboratories of the Army Chemical Corps and Their Research Activities." (ECF No. 23-16 at 17.) This report indicates that in 1953, Battelle was one of over twenty contractors with whom the Medical Laboratories contracted in

some unidentified capacity.[3] The second of these documents is a technical report issued by the Department of the Army Edgewood Arsenal which lists Battelle, among more than sixty others, on the distribution list.

Battelle counters that topic six is unduly burdensome and lacks relevance. At the June 22, 2011 hearing, counsel for Battelle explained the burdensome nature of topic six:

> Battelle has been doing research for over 75 years, much of that for the federal government and for the Department of Defense and related agencies. It's no secret that Battelle has a wealth of experience in performing research relating in some fashion to military affairs, chemical agents, biological agents. We do thousands of projects a year. The plaintiffs are now asking us to designate a witness to be interrogated about this history going back, apparently, 50, 60 or more years. First of all, just as a practical matter, I would be hard pressed -- In fact, I'll say impossible -- to identify -- and I have worked at Battelle for many years, over 20 years -- I would not be able to identify any individual at Battelle who would have such knowledge that could be conveniently produced for a deposition. In other words, the request to interrogate or depose Battelle on this broad subject would require us to probably do a great deal of research into Battelle archives, very burdensome, very expensive.

(Hearing Transcript 61, ECF No. 25.) Battelle's counsel then explained why any purported bias lacks relevance to the credibility of the database:

> Your Honor, the plaintiffs argue that due to this long history of Battelle involvement in these research programs might be able to allow them to show bias with respect to this test repository program. I would like to point out simply that Battelle's role in the test repository program is taking government documents, copying them, taking data out of them and delivering those results to the government. No interpretation, no opinions, nothing. In what sense could bias even enter into that kind of work has not been shown here.

(*Id*. at 65.) Defendants agree that the information sought in topic six lacks a connection to the underlying litigation. They added that to the extent such information exists, the government should have it.

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[3]Other identified contractors included universities, hospitals, foundations, and private companies.

The Federal Rules of Civil Procedure guide this Court in its determination of the appropriate scope of the deposition subpoenas. Rule 45(c)(1) provides that "[a] party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing under burden or expense on a person subject to the subpoena." Fed. R. Civ. P. 45(c)(1). "[T]he issuing court must quash or modify a subpoena that . . . subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A)(iv); *see also Info-Hold, Inc. v. Sound Merch., Inc*., 538 F.3d 448, 457 (6th Cir. 2008) (quoting *Surles ex rel. Johnson v. Greyhound Lines, Inc*., 474 F.3d 288, 305 (6th Cir. 2007)) ("'[D]istrict courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce.'") In considering whether the discovery sought is unduly burdensome, the Court considers whether "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, and the importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(iii); *Surles*, 474 F.3d at 305 (same). In addition, "the status of a person as a non-party is a factor that weighs against disclosure." *See American Elec. Power Co., Inc. v. U.S.*, 191 F.R.D. 132, 136 (S.D. Ohio 1999) (citations omitted).

Weighing the foregoing factors, the Court concludes that the burden of Plaintiffs' proposed topic six outweighs any likely benefit. Battelle, a nonparty, has established that producing a witness to respond to topic six would be both expensive and burdensome. The Court finds that the evidence Plaintiffs offer does not, as Plaintiffs contend, suggest that Battelle had a role in the chemical and biological testing program that is the subject of the underlying action. The Court recognizes that generally, given the extremely liberal scope of discovery,

inquiry into the presence of bias of a witness is relevant.[4] Here, however, even assuming the record contains a suggestion of bias, the relevance of that bias is tangential to Plaintiffs' stated purpose in seeking discovery from Battelle and even more tenuous to the issues presented in the underlying litigation. This is especially so in light of Battelle's representations that its role in the repository program does not permit it to exercise independent discretion or to interpret the data. Put simply, Plaintiff's proposed topic six, like its proposed topic four, is of little importance to the resolution of the issues presented in the underlying litigation. Finally, the Court finds that Plaintiffs can achieve their stated goal of assessing the credibility of the database through other less burdensome means, namely, through the pursuit of the agreed-upon written discovery with Battelle, through deposition testimony from Battelle employees on the agreed topics, and through discovery from Defendants. Accordingly, the Court **MODIFIES** the subpoena to eliminate topic six from the scope of inquiry.

IV.

In sum, the Clerk is **DIRECTED** to terminate Plaintiff's Motion to Compel Battelle Memorial Institute to Produce Documents in Response to Subpoena (ECF No. 1) and Battelle's Motion Quash (ECF No. 12) from the Court's pending motions list as **MOOT**. Battelle's Motion to Quash Deposition Subpoenas, or in the Alternative, to Modify the Subpoenas and Grant a Protective Order is **GRANTED** such that the scope of the subpoena is **MODIFIED** to include only those topics upon which the parties have agreed, topics one through three. (ECF No. 20.)

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[4]"The term 'bias' describes 'the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party.'" *Robinson v. Mills*, 592 F.3d 730, 737 (6th Cir. 2010) (quoting *United States v. Abel*, 469 U.S. 45, 52 (1984))

IT IS SO ORDERED.

Date: October 5, 2011

/s/ *Elizabeth A. Preston Deavers*
Elizabeth A. Preston Deavers
United States Magistrate Judge