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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

Noticed Motion Date and Time:
September 1, 2011
2:00 p.m.

DEFENDANT CENTRAL INTELLIGENCE AGENCY'S REPLY BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS AND, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs remain unable to demonstrate that they have adequately pled standing to pursue a secrecy oath claim against the Central Intelligence Agency and its Acting Director Michael J. Morrell (collectively, "CIA" or "Agency"). The Individual Plaintiffs have failed to establish an injury that is traceable to the CIA and redressable with a favorable court decision. Nor do the organizational Plaintiffs—Vietnam Veterans of America ("VVA") or Swords to Plowshares ("Swords")—have standing to pursue a secrecy oath claim against the CIA. Indeed, the only plausible reading of Plaintiffs' Third Amended Complaint, (Dkt. 180 ("3AC")), is that Plaintiffs allege that the Department of Defense ("DoD") purportedly administered secrecy oaths. As such, Plaintiffs cannot survive the CIA's Motion for Judgment on the Pleadings.

Plaintiffs also contend that, even if the Court were to dismiss the secrecy oath claim against the CIA, the CIA would remain a party to this action. This argument is without merit. A plain reading of this Court's Orders, as well as Plaintiffs' course of conduct in this case, makes clear that the secrecy oath claim is the sole claim remaining against the CIA.

ARGUMENT

I. PLAINTIFFS' THIRD AMENDED COMPLAINT DOES NOT ESTABLISH STANDING TO PURSUE A SECRECY OATH CLAIM AGAINST THE CIA

Plaintiffs have the burden of establishing the elements of standing, namely that they have suffered (1) an "'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury must be fairly traceable to the challenged action of the defendant; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." (Dkt. 245 at 10–11 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).) As noted previously, the fact that this case is a putative class action is immaterial to the Court's standing analysis. "The only plaintiffs whose claims may be considered in deciding whether plaintiffs have standing to bring this lawsuit are the named plaintiffs." *Daley's Dump Truck Serv., Inc. v. Kiewit Pac. Co.*, 759 F. Supp. 1498, 1501 (W.D. Wash. 1991). Moreover, each named plaintiffs must establish that they have standing to pursue each individual legal claim against each individual defendant. Here, Plaintiffs failed to establish the elements of standing to

pursue a secrecy oath claim against the CIA.

A. The Individual Plaintiffs Do Not Have Standing to Pursue A Secrecy Oath Claim Against the CIA

1. The Individual Plaintiffs Have Not Met the Traceability and Redressability Elements of Standing

The CIA's Motion establishes that the Individual Plaintiffs failed to meet the traceability and redressability element of standing by failing to put forward a simple-yet-fundamental allegation—that they actually had a secrecy oath to which the CIA was a party. (Dkt. 245 at 13) ("Because the Individual Plaintiffs have made no allegations concerning the administration of secrecy oaths by the CIA, they fail to meet the 'fairly traceable' and redressability elements of standing.").) The CIA noted that the "Third Amended Complaint devotes over eighty paragraphs to their individual claims, but not once does it ever allege that one of them has or had a secrecy oath with the CIA." (*Id.* at 12–13.) Furthermore, the CIA discussed the fact that the Individual Plaintiffs had made only "generalized allegations of secrecy oaths by unnamed individuals." (*Id.* at 13.) As such, the CIA argued that Plaintiffs allegations were "not fairly traceable to the CIA." (*Id.*) Additionally, the CIA asserted that, accepting the Individual Plaintiffs' "allegations as true that some other government agency administered secrecy oaths," there was no basis to conclude that the CIA had any control over the DoD's, or any other government agency's, relinquishment of those oaths. (*Id.* at 14.) Accordingly, the CIA concluded that the Individual Plaintiffs had not "established that it is likely that the alleged injury will be redressed by a favorable decision" and that Plaintiffs lacked standing to assert a secrecy oath claim against the CIA. (*Id.*)

Plaintiffs do not discuss or otherwise address the CIA's arguments regarding the elements of standing. They do not point to anything in the Third Amended Complaint that alleges CIA involvement in the administration of secrecy oaths. They also fail to discuss how action generally attributable to "government personnel" is traceable to the CIA or could be redressed by a decision against it. Nor do Plaintiffs explain how a judgment against the CIA will provide them with any relief if the CIA was not a party to those agreements in the first place. Instead, Plaintiffs argue that they need not even plead that the CIA actually administered secrecy oaths to the Individual Plaintiffs. (Dkt. 251 at 8.) Plaintiffs argue that their allegations of "the CIA's extensive

1 involvement in Defendants' testing programs" combined with the fact that "secrecy oaths were
2 administered as part of the testing programs and that 'government personnel' ordered the
3 individual plaintiffs 'never to talk about' their experiences" are "sufficient at the pleading stage to
4 show the CIA's involvement in the administration of secrecy oaths." (*Id.*) Thus, they contend the
5 generalized allegation "that the testing programs were carried out through concerted action
6 between the CIA and the Army" is sufficient to confer standing on the Individual Plaintiffs to
7 pursue a secrecy oath claim against both the CIA and DoD. (Dkt. 251 at 8)

8 As an initial matter, even if they were well-pled, mere allegations of conspiracy alone are
9 insufficient due to the nature of the secrecy oath claim involved in this case. Plaintiffs are not
10 seeking to impose tort liability under this claim, where the degree of involvement, collusion, or
11 contribution among the various defendants might be relevant. Rather, the Individual Plaintiffs are
12 alleging secrecy *agreements* existed between them and certain government agencies, and that the
13 Plaintiffs should be released from any obligations and penalties that might be imposed by the
14 agencies under those agreements. As such, this claim is much more akin to a contract claim,
15 where the plaintiff is seeking to be released from the contract. The only proper parties to such a
16 claim are the persons who were actually parties to the contract—not third-parties who might have
17 had some involvement in the circumstances leading to the contract but were not actually parties to
18 it. Thus, even accepting as true that there could be a conspiracy with regard to the administration
19 of secrecy oaths, such an allegation would be insufficient as a matter of law to establish the
20 redressability element of standing.

21 Here, this elementary privity of contract principle dictates that the CIA can only be a
22 proper defendant to an Individual Plaintiff's secrecy oath claim if the CIA was actually a party to
23 the agreement at issue. If the CIA was not the party that imposed the obligation, then quite
24 plainly, it would never be able to offer the relief necessary to address the alleged violation. And
25 if the CIA could not offer any relief in relation to the agreement, it would have no incentive to
26 defend the legal merits of the claim and thus dismissal for lack of standing would be warranted.
27 *See Covington v. Idaho*, 358 F.3d 626, 637 (9th Cir. 2004) ("This constitutional requirement [of
28 standing] ensures that litigants have an incentive to develop their case so that a court can correctly

address the issues presented.")[1] For these reasons, whether DoD and CIA were acting in concert with respect to the test programs is immaterial unless Plaintiffs also specifically allege that the CIA was actually a party to their purported secrecy oaths.

Even if the existence of an alleged conspiracy could be relevant with regard to secrecy oaths, Plaintiffs must then, at a minimum, adequately plead the existence of such a relationship. "A conspiracy is not an independent cause of action, but is instead 'a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design.'" *Green v. Alliance Title*, No. S-10-0242, 2010 WL 3505072, at *12 (E.D. Cal. Sept. 2, 2010). To withstand the pleading requirements of *Ashcroft v. Iqbal*, _ U.S. __, 129 S. Ct. 1937, 1949 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007), a plaintiff must offer more than conclusory allegations of concerted action and instead must allege a conspiracy to commit wrongful acts, commission of those acts, and resulting damage. *Robins v. Wolf Firm*, No. 2:10-cv-04424, 2010 WL 2817202, at *4 (D. Nev. July 15, 2010). Thus, "[b]road allegations of conspiracy are insufficient; the plaintiff must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end." *Arar v. Ashcroft*, 585 F.3d 559, 569 (2d Cir. 2009) (en banc) (internal quotation marks and citation omitted).

Furthermore, a plaintiff must "indicate exactly what the conspiracy was or how each individual Defendant was a part of it." *Robins*, 2010 WL 2817202, at *4. "Without this information, the Court has to speculate regarding the specific details of the alleged conspiracy and how it involves each Defendant." *Id.*; *see also In re Elevator Antitrust Litig.*, 502 F.3d 47, 50–51

[1] This concern is particularly acute here. As explained in the CIA's Motion, the Agency has searched its files and has represented to the Court that it has no secrecy oaths with any of the Individual Plaintiffs or VVA Members (nor does it believe it has such oaths with any other volunteer service members relating to the test programs at issue in this case). (Dkt. 245 at 9–10.) Notwithstanding this lack of evidentiary support for the administration of secrecy oaths, the CIA went further and released the Individual Plaintiffs and VVA Members from their perceived agreements, assuming *arguendo* that they ever existed. (*Id.* at 10.) Although not relevant to the present 12(c) motion, these facts make clear that the CIA has no incentive to defend the legal merits of oaths it does not believe exist. It is also unclear that Plaintiffs have an incentive to develop this claim given that they have abandoned their request for Rule 30(6)(6) testimony from the CIA regarding secrecy oaths. (*Id.* at 6.)

1 (2d Cir. 2007) ("[T]he complaint enumerates basically every type of conspiratorial activity that
2 one could imagine . . . . The list is in entirely general terms without any specification of any
3 particular activities by any particular defendant . . . . Such conclusory allegation[s] of agreement
4 at some unidentified point do[ ] not supply facts adequate to show illegality." (internal quotation
5 marks and citations omitted)); *Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, No. F09-0560,
6 ___F. Supp. 2d ___, 2011 WL 1677957, at *13 (E.D. Cal. Feb. 24, 2011) (finding allegations
7 insufficient where "[n]o specific agreements among and between defendants are alleged. All
8 defendants agreed to all agreements, notwithstanding their different . . . roles in and between
9 themselves"). The absence of factual allegations to support a conspiracy is particularly
10 problematic where the "[s]pecific allegations of the terms of" the agreement become significant.
11 *Id.*; *see also Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1268 (11th Cir. 2009) (finding factual
12 allegations of conspiracy insufficient where "[t]he scope of the conspiracy and its participants are
13 undefined. There are no allegations the treatment the plaintiffs received . . . was within the scope
14 of the conspiracy").

15 While Plaintiffs here have made broad allegations concerning cooperation writ large
16 between DoD and the CIA concerning the test programs, they have offered no allegations (let
17 alone factual support as required by *Iqbal* and *Twombly*) that agreement extended to the
18 administration of secrecy oaths. In fact, Plaintiffs have failed to plead anything at all regarding
19 the scope of the alleged agreement between the CIA and DoD—Defendants and the Court can
20 only guess as to whether the alleged agreement extends to, for instance, the selection, approval, or
21 procurement of test substances; the selection of test participants; what test participants were told
22 concerning the tests administered or test programs; the actual administration of tests; care
23 administered during and after the tests; etc. This shortcoming is fatal. As the *Arar* Court noted,
24 there must be some degree of tailoring between the allegations of concerted action and the harm
25 alleged. 585 F.3d at 569 (stating that there must be "some factual basis supporting a meeting of
26 the minds . . . to achieve the unlawful end"). Here, however, the harm alleged is the suppression
27 of test participants' First Amendment rights due to the administration of secrecy oaths, but
28 Plaintiffs' Third Amended Complaint is devoid of any allegations as to a conspiracy between

DoD and the CIA with regard to the administration of secrecy oaths. Thus, Plaintiffs seek the benefit of a conspiracy, but have not sufficiently alleged that conspiracy.[2]

Plaintiffs have not alleged concerted action in sufficient detail to allow the CIA, or the Court for that matter, to move beyond bald speculation to ascertain and understand the details and scope of any purported conspiracy. Because Plaintiffs have not sufficiently alleged conspiracy or concerted action, they cannot cite to generalized arguments regarding oaths administered by "government personnel" to establish the traceability and redressability elements of standing. Accordingly, Plaintiffs' secrecy oath claim against the CIA must be dismissed for lack of standing.

2. The Complaint Demonstrates that Plaintiffs Believed It Was DoD That Administered Secrecy Oaths

Though Plaintiffs' secrecy oath claim against the CIA fails for the reasons explained above, this claim also fails because the pleadings make apparent that Plaintiffs were alleging that DoD was the party to the purported secrecy oaths. As discussed in the CIA's Motion, there are only two paragraphs in the Third Amended Complaint that discuss the nature of the secrecy oaths administered to test participants. The CIA argued that not only had Plaintiffs failed to mention the CIA in those paragraphs, but that Plaintiffs instead were attempting to demonstrate a purported oath with DoD. (Dkt. 245 at 3, 13.) To support this contention, the CIA argued that the Third Amended Complaint "allege[d] that test participants were administered a 'secrecy oath' that they would 'not divulge or make available any information related to U.S. Army Intelligence Center' subject to 'provisions of the Uniform Code of Military Justice.'" (Dkt. 245 at 13 (quoting 3AC ¶ 156).) "Additionally, Plaintiffs allege that test participants signed an oath 'implying that the Uniform Code of Military Justice applied to them after their discharge from service.'" (*Id.* (quoting 3AC ¶ 157).) The CIA stated that "[t]he clear implication from Plaintiffs['] allegations is that it was DoD, rather than the CIA, that allegedly administered secrecy oaths." (*Id.*)

Plaintiffs baldly assert that, given that they have alleged "concerted action" between the

[2] Plaintiffs have had three opportunities to amend their original Complaint in this case. If Plaintiffs truly believed there was a conspiracy with regard to the administration of secrecy oaths, they have had more than sufficient opportunity to make such allegations.

1 DoD and the CIA, Paragraphs 156 and 157 of the Third Amended Complaint could support the
2 implication that the CIA was "involved in the administration of secrecy oaths, and in fact may
3 have originated them." (Dkt. 251 at 8.) Such an assertion is not plausible on its face. *Vera v.*
4 *O'Keefe*, _ F. Supp. 2d __, No. 10cv1422L, WL 2005196, at *2 (S.D. Cal. 2011) ("'To survive a
5 Federal Rule of Civil Procedure 12(c) motion, a plaintiff must allege enough facts to state a claim
6 to relief that is plausible on its face.'" (quoting *Lowden v. T-Mobile USA, Inc.*, 378 F. App'x. 693,
7 694 (9th Cir. 2010))). It is simply not possible to deduce that the CIA was involved in or
8 originated secrecy oaths from allegations where, not only was there no reference to the CIA, but
9 also participants were told not to divulge information regarding the "U.S. Army Intelligence
10 Center" and that violations would be punished pursuant to the "Uniform Code of Military
11 Justice." And at the very least, Plaintiffs' contention would not satisfy the pleading requirements
12 set forth in *Iqbal* and *Twombly* that an allegation must arise above a speculative level. *Loos v.*
13 *Lowe's HIW, Inc.*, _F. Supp. 2d __, No. CV11-232-PHX, 2011 WL 2457508, at *2 (D. Ariz.
14 2011).

15
16 **3. The Court Should Take Judicial Notice of Plaintiffs' Sworn Interrogatory Response Contradicting the Position They Take In Their Opposition**

17 Plaintiffs' assertion that the "fair implication" of their "concerted action" theory is that the
18 "CIA indeed was also involved in the administration of secrecy oaths, and in fact may have
19 originated them," (Dkt. 251 at 8), contradicts their sworn assertion that they "do not currently
20 have facts identifying specific circumstances where the Central Intelligence Agency directly
21 administered secrecy oaths to Plaintiffs . . .," (Dkt. 245 at 3–4). This sworn testimony by
22 Plaintiffs, of which this Court can take judicial notice, should be taken into account when this
23 Court considers and interprets the allegations in Plaintiffs' Third Amended Complaint.

24 Federal Rule of Evidence 201 states that a court may take judicial notice of those facts
25 that are "capable of accurate and ready determination by resort to sources whose accuracy cannot
26 reasonably be questioned." In this case, Defendants served an interrogatory on Plaintiffs stating
27 that "[t]o the extent you contend that the Central Intelligence Agency administered secrecy oaths
28 to Plaintiffs, identify the factual basis for your contention." (Ex. A to Decl. of Kimberly L. Herb

at 15.) Plaintiffs' sworn response was that "Plaintiffs do not currently have facts identifying specific circumstances where the Central Intelligence Agency directly administered secrecy oaths to Plaintiffs." (*Id.*) Given that this statement is contained within Plaintiffs' sworn interrogatory response, Plaintiffs cannot assert any question regarding the accuracy of this document. Accordingly, Defendants submit that the Court may properly take judicial notice of it and its contents. In addition, to the extent there is any ambiguity in the Plaintiffs' allegations relating to secrecy oaths, those allegations should be interpreted in a manner that conforms with Plaintiffs' admission.

Having taken Plaintiffs' sworn interrogatory response into consideration, Plaintiffs' allegations in the Third Amended Complaint crystallize. If Plaintiffs had no facts regarding the CIA's involvement of secrecy oaths, than surely Plaintiffs' references to those oaths being administered by "government personnel" could not have included the CIA. Likewise, any harm to test participants as a result of the administration of secrecy oaths cannot be attributable to the CIA. Thus, Plaintiffs have failed to demonstrate that they have standing to pursue a secrecy oath claim against the CIA.[3]

B. VVA Does Not Have Standing to Pursue A Secrecy Oath Claim Against the CIA

In its Motion, the CIA noted that "VVA must allege, at a minimum, that one of its members has a secrecy oath with the CIA." (Dkt. 245 at 14.) Plaintiffs did not separately address the alleged standing of VVA. Instead, they incorporate their allegations regarding the Individual Plaintiffs and therefore conclude that "the Complaint adequately alleges that its members have standing to pursue the 'secrecy oath' claim against the CIA." (Dkt. 251 at 9.) Thus, Plaintiffs

[3] Plaintiffs further suggest that their failure to properly allege standing as required by the Constitution should be excused because the CIA destroyed certain documents related to its human experimentation program in 1973. (Dkt. 251 at 9.) As Plaintiffs are well aware, however, the relevant records implicated in this case were not and have not been destroyed. As stated in the CIA's certified Administrative Record, Project OFTEN was the sole CIA program that contemplated testing on service members and "records pertaining to OFTEN/CHICKWIT were not among those destroyed in 1973." (Dkt. 208, AR-19 at VET022-000094.) Moreover, the Protect OFTEN records that pertain to potential testing on volunteer service members have been produced to Plaintiffs, and there is no suggestion in any of those records that the CIA administered secrecy oaths. Thus, there is no basis on which to argue that Plaintiffs are entitled to some sort of relaxed pleading requirement, even assuming the Court could do so.

make clear that the standing of VVA rises and falls with the Individual Plaintiffs discussed above. Accordingly, and for the reasons articulated above, VVA has failed to adequately plead the elements of standing.

Furthermore, to the degree that VVA sought to establish standing on the basis of members other than the Individual Plaintiffs, they cannot do so. As discussed in the CIA's Motion, Plaintiffs have not alleged that even one of VVA's members had a secrecy oath with *any* entity. The CIA noted that Plaintiffs included only a single paragraph in their Third Amended Complaint regarding the alleged harm to VVA members, and the CIA argued that this paragraph alleged "solely that VVA members 'have been barred from asserting or deterred from asserting damages claims,' but fail[ed] to allege that this is due to [a] secrecy oath or to otherwise mention the administration of such oaths by any entity let alone by the CIA." (Dkt. 245 at 14 (citing 3AC at ¶ 26).) Plaintiffs did not respond to this argument in their opposition. Because Plaintiffs did not respond to the CIA's argument that VVA failed to allege that test participants' inability to assert claims arose from secrecy oaths, Plaintiffs thereby concede that these allegations are insufficient to confer standing on VVA members other than the Individual Plaintiffs.

C. Swords Does Not Have Standing to Pursue A Secrecy Oath Claim Against the CIA

Swords to Plowshares also lacks standing. In its Motion, the CIA presented numerous independent grounds for dismissal of the purported secrecy oath claim, most of which Plaintiffs have simply ignored—and therefore have conceded. Most notably, Plaintiffs fail to contest the CIA's assertion that Swords does not have a secrecy oath claim against any party to this action, let alone the CIA. (Dkt. 245 at 14–15.) Plaintiffs' request for relief with regard to the secrecy oath claim is limited to a declaration that "Plaintiffs are released from any obligations or penalties under their secrecy oath." (*Id.* at 14.) The CIA argued that because Swords is not a membership organization and has no secrecy oath with either the CIA or DoD, the Third Amended Complaint does not seek any relief from the CIA for Swords in relation to the alleged administration of secrecy oaths. (Dkt. 245 at 14–15.) Plaintiffs did not respond to this argument, and therefore have conceded it. This argument alone is fatal to Swords' assertion of standing. *See, e.g.*, *Hayton*

Farms Inc. v. Pro-Fac Corp. Inc., No. C10-520, 2010 WL 5174349, *11 (W.D. Wash. Dec. 14, 2010) ("Plaintiffs do not address and therefore concede that dismissal is proper as to [this] claim."); *In re PMI Group, Inc. Sec. Litig.*, Nos. C08-1405 & C08-1406, 2009 WL 1916934, at *9 (N.D. Cal. July 1, 2009) ("A point implicitly conceded by plaintiffs by their failure to address [the issue] in their opposition.")

Additionally, even if Swords had alleged an independent secrecy oath claim, the CIA argued that Swords had failed to "establish that it has an imminent, but redressable, injury that can be remedied by a favorable decision by the Court." (Dkt. 245 at 15.) In response, Plaintiffs point to two paragraphs in the Third Amended Complaint, the first of which alleges that Swords "*has provided* initial counseling services during telephone counseling hours to multiple Vietnam-era veterans who *were* not willing to disclose information related to potential VA claims due to perceived secrecy obligations." (Dkt. 251 at 9–10 (citing 3AC ¶ 28) (emphasis added).) On its face, however, this statement alleges only past harm to Swords. The second paragraph fares no better. Once again, Swords has alleged only past harm to it as a result of the alleged administration of secrecy oaths: "[D]uring telephone counseling hours *over the years*, Swords *has provided* initial counseling services to multiple Vietnam-era veterans who were unwilling to share information . . . these secrecy obligations *hindered* Swords' efforts." (3AC ¶ 158.) Because there is no allegation of ongoing or future harm, there cannot be any risk of an imminent, but redressable injury.[4]

II. PLAINTIFFS DO NOT HAVE ANY REMAINING CLAIMS AGAINST THE CIA CONCERNING NOTICE AND HEALTH CARE, AND THEREFORE THE CIA

[4] At most, Swords alleges that it "has diverted and devoted, and expects to continue to divert and devote, already scarce resources to provide additional services to veterans harmed by DEFENDANTS' actions and failures to act" and that "[a]s of December 2009, Swords is providing legal services to a U.S. Army veteran . . . who was a test subject in DEFANDANTS' human experimentation program at Edgewood Arsenal." (3AC ¶ 28.) As discussed above, however, these allegations are insufficient to demonstrate standing. Each plaintiff must establish standing for each claim against each defendant, but Swords cannot do that where it has made no allegation that it has diverted resources to aid a veteran who has a secrecy oath with the CIA. Alternatively, Plaintiffs must have alleged that the scope of the purported conspiracy between the CIA and DoD extended to the administration of secrecy oaths, which they also have failed to do for the reasons explained at length above. Accordingly, Swords' generalized allegations of harm are insufficient to establish an imminent injury that is fairly traceable to the CIA.

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SHOULD BE DISMISSED AS A DEFENDANT IN THIS CASE

Although extensively addressed in Defendants' Motion for a Protective Order Limiting Discovery, (*see* Dkt. 254), the CIA briefly addresses here Plaintiffs' unfounded claim that Plaintiffs have viable constitutional claims against the CIA in this case. First, Plaintiffs' reliance upon portions of their various complaints that purportedly address their constitutional claims is a red herring, as they fail to acknowledge, much less address, the statements they have made in repeated filings with this Court and in their discovery responses *disclaiming* any independent constitutional claim concerning notice or health care against the CIA.[5] Among other things, Plaintiffs have separately (a) told this Court that their notice claim does not arise under the Constitution;[6] (b) failed to identify the Constitution as a basis for their notice and health care claims in response to Defendants' interrogatories seeking precisely that information;[7] (c) voluntarily dropped any right to seek health care from the CIA;[8] and (d) acknowledged that their only remaining claim against the CIA would be the secrecy oath claim if the Court granted the CIA's November 2010 motion to dismiss (which it did).[9] In light of these actions and representations, the equities demand that Plaintiffs be estopped from re-casting their claims at this

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[5] Plaintiffs' contention that "Defendants themselves have previously acknowledged the existence of the Constitutional due process grounds for Plaintiffs' claims," is a mischacterization and cannot survive scrutiny. (*See* Dkt. 251 at 11.) To support this proposition, Plaintiffs cite to a portion of Defendants' original motion to dismiss that only addressed constitutional claims associated with the *lawfulness of the testing program.* (*See id.* (citing Dkt. 29 at 20).) There can be no dispute that the Court dismissed any claims—constitutional or otherwise—associated with the lawfulness of the test program. (Dkt. 59 at 13 ("[T]he Court dismisses with prejudice Plaintiffs' declaratory relief claim concerning the lawfulness of Defendants' testing program because a declaration would not redress their past injuries or prevent future harm to them.").)

[6] (Dkt. 43 at 24 (representing that Plaintiffs "*do not seek relief based on . . . a 'constitutional right to information*.'" (emphasis added)).)

[7] In Plaintiffs' March 2011 responses to Defendants' interrogatories, Plaintiffs failed to identify the Constitution as a legal basis for their notice and medical care claims in response to several interrogatories seeking this information, despite identifying several other potential legal bases. (Dkt. 253–2 at Nos. 2, 6, 8.) Defendants noted the absence of the Constitution as a basis for Plaintiffs' notice and health care claims in correspondence between the parties on June 13, 2011. (Dkt. 253–3.) Yet, Plaintiffs still did not amend their interrogatory response until *after* the Court dismissed Plaintiffs' notice and health care claims in full. It was only upon the filing of the CIA's motion seeking to dismiss the secrecy oath claim against it that Plaintiffs amended their interrogatory response to include the Constitution as a basis for their notice claim against the CIA (and, Plaintiffs to date still have not amended their interrogatory response concerning the basis for their health care claim against the CIA to include the Constitution). (Dkt. 253–4.)

[8] (Dkt. 217 at 2 n.2.)

[9] (*Id.*)

late stage. *See Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996) ("Judicial estoppels . . . precludes a party from gaining an advantage" by taking successive inconsistent positions); *see also Wagner v. Prof'l Eng'rs in Cal. Gov't,* 354 F.3d 1036, 1044 (9th Cir. 2004) ("Judicial estoppel applies to a party's stated position whether it is an expression of intention, a statement of fact, or a legal assertion.").[10]

Second, Plaintiffs' contention that they somehow have made clear their intention to assert constitutional claims concerning notice and health care in their opposition to Defendants' Motion to Dismiss the First Amended Complaint is plainly incorrect. (*See* Dkt. 251 at 11.) Indeed, Plaintiffs conveniently ignore that, in that opposition, Plaintiffs *agreed* with Defendants and represented to the Court that they "*do not seek relief based on . . . a 'constitutional right to information*.'" (Dkt. 43 at 24) (emphasis added).)[11] Instead, Plaintiffs asserted that their notice claim was based only on Defendants "own duties and regulations." (*Id.*). With respect to their health care claim, Plaintiffs similarly represented that the claim was "based on Defendants' obligation to provide medical care as required by their own duties and regulations" and again made no mention of the Constitution. (*Id.*).[12] Plaintiffs are bound by these representations to the

[10] Plaintiffs failed to identify the Constitution as the basis of their claims in other filings as well: "Plaintiffs . . . seek to force Defendants to finally fulfill their obligation to locate participants in these tests and to notify them regarding those exposures, to compel Defendants to provide healthcare to test participants as required by Defendants' own regulations." (Dkt. 151 at 2; *see also* Dkt. 216 at 2 ("The complaint in this action, the Court's substantive and discovery rulings, and the parties' actions throughout discovery all confirm that this is an action under Section 706(1) of the APA.").)

[11] Such a concession is in accordance with binding Supreme Court precedent, which has rejected a constitutional right to information from the federal government. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978).

[12] To the extent constitutional claims were otherwise addressed in the briefing that led to the Court's January 2010 Order, it was only with regard to (a) Plaintiffs' request for a declaration that the testing programs violated their constitutional rights and (b) Plaintiffs' request for an order declaring the *Feres* doctrine to be unconstitutional. The Court squarely rejected both of these claims. As to the former claim, the Court found that Plaintiffs had no standing to challenge the legality—to include the constitutionality—of the test programs because such an order from the Court would not address any ongoing harm. (Dkt. 59 at 11–12.) Tellingly, when Plaintiffs' responded to Defendants' standing argument in their briefing, they did not claim that the perceived constitutional violations entitled them to ongoing notice and health care to this day. (Dkt. 43 at 15–16.) Rather, they only claimed that such a declaration about their alleged constitutional violations would "vindicate" their rights and educate the public. (*Id.* at 16.). The only basis identified by Plaintiffs for any ongoing harm related to notice and health care was the "continuing violation[] of Defendants' *directives and international law*"—once again, Plaintiffs did not identify the Constitution. (*Id.* (emphasis added).)

1 Court, which make clear that Plaintiffs have never sought ongoing relief based on some
2 independent claim for notice and medical care arising under the Constitution.
3 Third, assuming *arguendo* Plaintiffs somehow maintained constitutional claims for notice
4 and health care against the CIA after the Court's January 2010 Order and despite their course of
5 conduct in this case, the issue has been conclusively laid to rest by the Court's May 31, 2011
6 Order. That Order unambiguously dismissed in their entirety the notice and health care claims
7 against the Agency. Plaintiffs argue that in the CIA's partial motion to dismiss Plaintiffs' Third
8 Amended Complaint, the Agency "characterized Plaintiffs' injunctive and declaratory and
9 declaratory request for notice as arising under the APA, and neglected to address the
10 Constitutional basis for the claims." (Dkt. 251 at 12.) Plaintiffs are mistaken, as CIA addressed
11 every basis for the notice and health care claims *identified by Plaintiffs* and subsequently adopted
12 by the Court in its January 2010 order. And in any event, the CIA's motion invited Plaintiffs to
13 identify additional legal bases under federal law if they existed. Defendants' partial motion to
14 dismiss made clear that "[t]he CIA [sought] dismissal of two of Plaintiffs' claims against it: (1)
15 Plaintiffs' claim that the CIA is obligated to provide the Individual Plaintiffs with notice of
16 chemicals to which they were allegedly exposed and any known health effects related thereto; and
17 (2) Plaintiffs' claim that the CIA is obligated to provide medical care to the individual Plaintiffs."
18 (Dkt. 187 at 6; *see also id.* ("PLAINTIFFS' NOTICE AND HEALTH CARE CLAIMS
19 AGAINST THE CIA MUST BE DISMISSED.").) Nothing in that language could be construed
20 as limiting the CIA's motion to only some legal bases for the notice and health care claims but
21 not others. Plaintiffs themselves recognized the broad sweep of the CIA's motion: "In a renewed
22 effort to *deprive Plaintiffs of their day in court,* Defendants seek to dismiss [] Plaintiffs' notice
23 and healthcare claims against the CIA." (Dkt. No. 217 at 1 (emphasis added).)
24 In fact, the CIA expressly sought dismissal because Plaintiffs had not identified *any*
25 enforceable, legal basis for an entitlement to notice or health care. With regard to notice, the CIA
26 argued that "Plaintiffs have failed to establish an enforceable, substantive legal right to notice."
27 (Dkt. 187 at 12.) This argument was not limited to what Plaintiffs have deemed to be "APA
28 claims." Rather, the entire thrust of the argument was that the APA does not create substantive

1 rights and that, in addition to showing a waiver of sovereign immunity under 5 U.S.C. § 702,
2 "Plaintiffs must [also] identify a source of substantive law that would require the CIA to provide
3 notice to Plaintiffs." (Dkt. 187 at 1). Because state law (as articulated in the DOJ opinion) was
4 the only potential basis that Plaintiffs had articulated for their notice claim, the CIA argued that
5 "the legal duty that Plaintiffs are attempting to impose on the CIA through their notice claim does
6 not arise from an independent *federal legal authority*." (*Id.* at 8 (emphasis added).) Similarly,
7 with respect to the health care claim, the CIA argued that "[b]ecause Plaintiffs have failed to
8 identify ***any legal basis in the Third Amended Complaint*** for obligating the CIA to provide
9 health care, Plaintiffs' *claims* for medical care must fail and should be dismissed under Rule
10 12(b)(6)." (*Id.* at 17 (emphasis added).) In light of these clear statements in Defendants' partial
11 motion that Plaintiffs' claims lacked any enforceable legal basis, Plaintiffs were obligated to
12 identify any and all alternate bases in their opposition. They did not do so, and therefore they
13 have waived any ability to assert those legal theories now.

14 Instead, with regard to the CIA's arguments regarding the health care claim, not only did
15 Plaintiffs drop this claim when they failed to respond to any of the CIA's arguments, but they also
16 voluntarily conceded that "the medical care remedy they seek for test participants does not
17 depend on the CIA's provision of that care." (Dkt. 217 at 2 n.2.) Then, they clarified that what
18 they were seeking from the CIA was an order requiring the CIA to provide "basic (yet critical)
19 information about the identity of the substances and doses they received and the health effects."
20 (*Id.*) Plaintiffs also expressly stated that "[t]he Court can achieve this result by enforcing the
21 CIA's duty to notify test participants under Section 706(1) of the APA without finding (or
22 enforcing) an independent duty for the CIA to provide medical care." (*Id.*)

23 Plaintiffs' own statements in response to the partial motion to dismiss are concessions
24 that: (1) there was no *independent duty* for the CIA to provide medical care, and (2) they viewed
25 their notice claim as being litigated under Section 706(1). In fact, in the very next sentence of
26 their opposition, Plaintiffs stated that: "Plaintiffs also note that Defendants do not seek dismissal
27 of the secrecy oath claim against the CIA. Thus, the CIA will remain a defendant in this action
28 [even if the pending motion was granted]." (*Id.*) If Plaintiffs truly believed they had

independent, viable claims for notice and medical claims under the Constitution, it is curious that they did not mention them *anywhere* in their opposition.[13] In its May 31, 2011 Order, the Court agreed with the CIA's arguments and dismissed Plaintiffs' notice and health care claims against the CIA in full. (Dkt. 233 at 11.) The Court noted Plaintiffs' concession that they did not seek the provision of medical care from the CIA, and then further stated that "Plaintiffs do not offer any other response to Defendants' arguments regarding this claim." (Dkt. 233 at 5–6.) The Court declared: "Accordingly, these claims are dismissed." (*Id.* at 6.)

With regard to Plaintiffs' notice claim, the Court held that "[n]othing now cited by Plaintiffs supports their claim against the CIA for notice." (*Id.* at 7.) As with the health care claim, the Court dismissed Plaintiffs' notice claim in its entirety: "Accordingly, the Court dismisses Plaintiffs' claim against the CIA for its alleged failure to notify them about their chemical exposures and the known health effects, and failure to provide all available documents and evidence concerning their exposures." (*Id.* at 8.) There is nothing in this language that limits or in any way qualifies the dismissal of Plaintiffs' notice and health care claim in the manner Plaintiffs now suggest.

In sum, notwithstanding Plaintiffs' eleventh hour attempt to resurrect their previously-dismissed notice and health care claims, dismissal of the secrecy oath claim against the CIA would result in the CIA's complete dismissal as a defendant in this litigation.

CONCLUSION

For the reasons stated above and in Defendant CIA's Motion for Judgment on the Pleadings, the CIA requests that the Court grant its Motion and that it dismiss the CIA as a Defendant in this case.

[13] Even Plaintiffs recognized their obligation to identify alternate bases in support of their notice and medical care claims. In response to Defendants' arguments regarding the notice claim, Plaintiffs contended that the CIA's motion "fundamentally mischaracteriz[ed] Plaintiffs' notice claims as being 'solely rel[iant] on state tort law'" and then Plaintiffs identified what they believed were several alternative bases for their notice claims under federal law. (Dkt. No. 217 at 2.) If Plaintiffs believed the Constitution was yet another independent basis, as they now appear to contend, they were obligated to identify this at the same time. Additionally, if Plaintiffs believed that the Constitution provided a viable basis for their health care claim, they were likewise obligated to identify that basis in their opposition. But Plaintiffs did not do so.

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