

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**

**DECLARATION OF GORDON P.  
ERSPAMER IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
PROTECTIVE ORDER**

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 I, Gordon P. Erspamer, declare:

2 1. I am a partner at Morrison & Foerster LLP, counsel of record for Plaintiffs in this action.  
3 I make this declaration on my own personal knowledge, and if called as a witness to testify, I could and  
4 would testify competently to the facts below. I was the lead attorney in the Northern District case of  
5 *National Association of Radiation Survivors vs. Turnage*, No. C83-1861 (MHP), which lasted for over a  
6 decade and involved a large volume of discovery against the Veterans Administration (now the  
7 Department of Veterans Affairs).

8 2. On August 1, 2007, I sent a letter to Steven Bressler, counsel for Defendants, raising the  
9 issues of the need for a Privacy Act protective order, document preservation, and our desire to begin the  
10 meet and confer process as soon as possible. I specifically raised the issue of a protective order that  
11 would protect parties and witnesses from retaliation or other adverse actions by any party. A true and  
12 correct copy of my letter to Steven Y. Bressler, dated August 1, 2007, is attached hereto as Exhibit A.  
13 Defendants' pattern of stalling began almost immediately. On August 31, 2007, I received the following  
14 e-mail from Mr. Bressler:

15 "As I said on your voicemail earlier today, we hope to have a draft preservation order to  
16 share with you the week of 9/17. I do not expect that it will be practicable for us to  
17 begin meeting and conferring with you pursuant to FRCP 16 and 26 until after our  
18 deadline to file a responsive pleading. Have a good Labor Day."

19 My reply to Mr. Bressler's e-mail, also sent on August 31, stated as follows:

20 "Defendants have had the complaint for five weeks, and a considerable period of time  
21 has elapsed since you received my letter addressing the preservation order and Rule 26  
22 conference. I am disappointed that you believe it will take an additional 2-3 weeks to  
23 draft a preservation order, particularly since we have received information regarding  
24 your internal instructions to preserve evidence, which, contrary to scope of the  
25 complaint and my remarks to you during our telephone conference, reportedly are  
26 restricted to documents relating to the Iraq and Afghanistan wars. Therefore, in an  
27 attempt to get the ball rolling, I will draft a preservation order over the weekend and get  
28 it to you Tuesday. I am also disappointed that you have not given me a date to resume  
our discussion of the outstanding issues, as you had promised. And I need you to give  
me a date certain for the Rule 26 conference rather than just a vague reference to some  
date after you file a responsive pleading. **"In short, this appears to me to be a "big  
stall" rather than an attempt to meet and confer in good faith as required by the  
Rules of Civil Procedure and the local rules.**" (emphasis added).

29 3. On August 23, Sid Wolinsky and I had a telephone conference with Steven Bressler and  
30 Richard Letley, who participated on behalf of Defendants. During this first conference, I advised Mr.  
31 Bressler that, although we were still working on it, Plaintiffs were planning to file a Motion for a

1 Preliminary Injunction, part of which might necessitate expedited discovery. At that time, I also  
2 explained the general sensitivity surrounding the public disclosure of private medical information  
3 contained in veterans' claim files or other medical records, and veterans' legitimate fears of retaliation  
4 by the VA, summarizing some of the examples of retaliation in the *NARS v. Turnage* case, including the  
5 carving of a swastika inside the Star of David on Ronald Abrams' desk at work (Mr. Abrams worked in  
6 the VA's Central Office in Washington, D.C. and had just testified at a hearing respecting document  
7 destruction). However, no agreement was reached at that time regarding the terms of a potential  
8 protective order. Defendants' document preservation obligations were also discussed during this  
9 telephone conference.

10 4. On August 28, 2007, I received a letter from Steven Bressler stating the VA's refusal to  
11 agree to a protective order preventing VA access to declarations containing confidential information and  
12 addressing a Privacy Act Protective Order respecting the VA's production of claim files. A true and  
13 correct copy of Mr. Bressler's letter to me, dated August 28, 2007, is attached hereto as Exhibit B.

14 5. In addition to the Abrams incident, several other similar incidents stick out in my mind  
15 regarding the *NARS* litigation, some of which involved veterans or VA claimants and some of which  
16 involved VA employees like Mr. Abrams. One incident involved an elderly widow, Jackie Maxwell,  
17 whose husband Albert had died before the trial. Her bank account was seized by the VA a matter of  
18 weeks before her trial testimony based upon an alleged overpayment of disability compensation the  
19 month her husband died. The VA apparently used the first day of the month Mr. Maxwell died as the  
20 severance date for disability compensation. Another incident involved Barry Boskovich, another VA  
21 employee who had testified at his deposition about the VA's destruction of evidence that was responsive  
22 to an outstanding document request, and whose Supervisor had warned him the day before he left to  
23 testify at an evidentiary hearing that he ought to give thought to how his testimony might affect his job  
24 and his family.

25 6. Another problem we repeatedly faced in the *NARS case* was that the VA would pull the  
26 original claim files of veterans or family members who were class representatives, those who submitted  
27 declarations or testimony, or others who were identified in interrogatory answers or other means of  
28 discovery. The original claim files were sent to VA attorneys for extended periods of time, which had

1 the effect of suspending action on that veteran's or other family member's claim. While VA counsel in  
2 this matter has tentatively agreed to arrange for photocopies of any needed claim files, without assurance  
3 in the form of a court order, I believe that many veterans will not come forward or will hesitate to come  
4 forward.

5 7. Based upon these and other incidents that have occurred to clients or members of veterans  
6 organizations I have represented, as well as incidents reported to me by others during my twenty-five  
7 years of *pro bono* service to veterans, I believe that veterans and family members have a reasonable fear  
8 of reprisal should they offer testimony in this case. This retaliation can take several forms, including  
9 adverse action on a claim or appeal, the severance of service-connected death and disability  
10 compensation, the suspension of action on a pending claim or appeal, the sudden inability to schedule  
11 medical appointments, or a variety of other forms.

12 8. On October 4, 2007, the parties held their initial Federal Rule of Civil Procedure 26(f)  
13 conference. At that time, and in later sessions, we revisited the issue of a protective order that would  
14 protect the privacy rights of veterans regarding documents reflecting medical conditions or treatment.  
15 Despite these efforts, no agreement on the form of an order has been reached, as Defendants have taken  
16 the position that no discovery should take place in this action until after their Motion to Dismiss was  
17 resolved.

18 I declare under penalty of perjury under the laws of the United States of America and the State of  
19 California that the foregoing is true and correct.

20 Executed this 30<sup>th</sup> day of November, 2007, at Walnut Creek, California.

21  
22 /s/ Gordon P. Erspamer  
23 Gordon P. Erspamer

24 I hereby attest that I have on file all holograph signatures for any signatures indicated by a  
25 "conformed" signature (/S/) within this efiled document.  
26  
27  
28

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PLEASE RESPOND TO:  
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CALIFORNIA 94596-8130  
  
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SUITE 450  
WALNUT CREEK  
CALIFORNIA 94596-4094  
  
TELEPHONE: 925.295.3300  
FACSIMILE: 925.946.9912  
  
WWW.MOFO.COM

MORRISON & FOERSTER LLP  
NEW YORK, SAN FRANCISCO,  
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SINGAPORE, BRUSSELS

August 1, 2007

Writer's Direct Contact  
925.295.3341  
GERspamer@mofo.com

**VIA FAX AND U.S. MAIL**

Steven Y. Bressler, Esq.  
Trial Attorney, Civil Division,  
Federal Programs Branch  
United States Department of Justice  
P.O. Box 883  
Washington, DC 20044

Re: Protective and Preservation Orders and Rule 26 Conference  
*Veterans for Common Sense, et al. v. Nicholson, et al.*,  
USDC, Northern District of California, Case No. C 07 3758 SC

Dear Mr. Bressler:

We write to you with respect to certain items that require immediate attention.

I understand that you are out for a few days, but we would like to set up a meeting or phone conference with you as soon as practicable to discuss three topics. First, we would like to see if we can work out the terms of a protective order which would protect parties and witnesses from retaliation or other adverse actions by any party. This should include procedures for the filing of declarations and affidavits under seal or with aliases to protect their privacy and identities, with designated counsel only knowing their true identities. If we are unable to secure your cooperation in this regard, we would intend to prepare and file an *ex parte* motion with the Court.

Second, we would like to see if we can agree upon the terms of a preservation order which would insure that relevant evidence is not destroyed or disposed of before discovery can be initiated or during the term of this case. The DVA and other defendants are surely already aware that the obligation to preserve extends to e-mail, databases such as PIF and SIRS, and other electronic evidence, and to remote sites such as the Austin Automation Center. At the same time, we realize that the DVA is a large agency and that it would be prohibitively burdensome for it to save every single document that it creates. Our hope is that we can

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R. James Nicholson

August 1, 2007

Page Two

agree upon categories of documents and a set of preservation obligations without the need to seek relief from the Court.

Third, we would like to discuss the timing of our Rule 26 Conference with the goal of conducting that conference at the first available opportunity. Of course, protective orders are one topic that must be covered, and in addition to the protective order described above, we would need to discuss a general privacy act protective order to cover certain documents maintained by the Defendants.

Finally, if there are topics that Defendants would like to add to the above list, we would be happy to consider adding to the agenda.

Very truly yours,

A handwritten signature in black ink, appearing to read "Gordon P. Erspamer". The signature is fluid and cursive, with the first name "Gordon" being the most prominent.

Gordon P. Erspamer

cc: Melissa W. Kasnitz, Esq.

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\*\*\* TX REPORT \*\*\*  
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SUITE 450  
WALNUT CREEK  
CALIFORNIA 94596-4064  
  
TELEPHONE: 925.295.3300  
FACSIMILE: 925.946.9912  
  
WWW.MOFO.COM

MORRISON & FOERSTER LLP  
NEW YORK, SAN FRANCISCO,  
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ORANGE COUNTY, SACRAMENTO,  
WALNUT CREEK, CENTURY CITY  
  
TOKYO, LONDON, BEIJING,  
SHANGHAI, HONG KONG,  
SINGAPORE, BRUSSELS

To:

NAME:	FACSIMILE:	TELEPHONE:
Steven Y. Bressler, Esq. United States Department of Justice	(202) 318-7609	(202) 514-4781
Melissa W. Kasnitz, Esq. Disability Rights Advocates	(510) 665-8511	(510) 665-8644

FROM: Gordon P. Erspamer      DATE: August 1, 2007  
TIME: 3:20:14 PM

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 TELEPHONE: 925.295.3300  
 FACSIMILE: 925.946.9912  
  
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MORRISON & FOERSTER LLP  
 NEW YORK, SAN FRANCISCO,  
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 WALNUT CREEK, CENTURY CITY  
  
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 SHANGHAI, HONG KONG,  
 SINGAPORE, BRUSSELS

**To:**

NAME:	FACSIMILE:	TELEPHONE:
<b>Steven Y. Bressler, Esq. United States Department of Justice</b>	<b>(202) 318-7609</b>	<b>(202) 514-4781</b>
<b>Melissa W. Kasnitz, Esq. Disability Rights Advocates</b>	<b>(510) 665-8511</b>	<b>(510) 665-8644</b>

**FROM:** Gordon P. Erspamer      **DATE:** August 1, 2007  
**TIME:** 3:20:14 PM

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**U.S. Department of Justice**

Civil Division, Federal Programs Branch

**Via First-Class Mail**

P.O. Box 883  
Ben Franklin Station  
Washington, D.C. 20044

**Via Overnight Delivery**

20 Massachusetts Ave., N.W.  
Rm. 7138  
Washington, D.C. 20001

Steven Y. Bressler  
Trial Attorney

Tel: (202) 514-4781  
Fax: (202) 318-7609  
email: [steven.bressler@usdoj.gov](mailto:steven.bressler@usdoj.gov)

August 28, 2007

**BY EMAIL**

Gordon Erspamer  
Morrison & Foerster  
101 Ygnacio Valley Rd., Suite 450  
Walnut Creek, CA 94596-4094  
Email: [Gerspamer@mof.com](mailto:Gerspamer@mof.com)

Re: Veterans for Common Sense, et al., v. Nicholson, et al., No. C 07-3758-SC

Dear Gordon:

I write in response to your letter of August 24, 2007 purporting to memorialize our telephone conversation of August 23, 2007. Thank you for sending your letter to me via email. As we discussed, and as you noted, U.S. postal mail to the Department of Justice has been significantly delayed due to security measures undertaken since 2001. I believe you misstated or mischaracterized various other elements of our conference call, however. Those elements include, but are not limited to:

1. Protective Orders: As to your request for a protective order that would allow declarants to remain anonymous, I told you that we are not aware of any justification for such an extraordinary and broad measure at this time in this case, although we are willing to consider requests concerning specific individuals if the need arises. Richard Lepley and I also explained that the names of individuals who are making assertions about their experiences dealing with the Department of Veterans Affairs would have to be shared with our clients so that our client can assess the veracity of such individuals' claims. In response to a statement you made in previous correspondence that you may file an ex parte motion for an order allowing declarants to proceed anonymously, I stated that any such motion should be filed and served on defendants, not submitted ex parte. I also told you that we would consider a request for our consent to file such a motion or portions thereof under seal. As to a Privacy Act protective order, while we did not discuss the matter at length, we told you that such an order would be necessary over any information protected by the Privacy Act. Indeed, defendants cannot disclose any Privacy Act-protected information before a Privacy Act protective order is in place.
2. Preservation of Evidence: We suggested that plaintiffs prepare a draft preservation order and you declined. We then requested that you write us a letter or otherwise provide an informal list of issues on which you believe plaintiffs would like to take discovery. You refused, and directed us to plaintiffs' 278-paragraph Complaint. I then stated that defendants would draft

- 2 -

proposed language, and you agreed to respond with comments and plaintiffs' position. I did not tell you when I will have a draft to share because I did (and do) not yet know, and do not want to mislead you.

3. Rule 26 Conference: Defendants share your wish to have a Rule 26 conference as soon as practicable (as required by the rule itself), but, as I informed you over the telephone, it is not yet practicable. I did not state that I had calculated the last day the conference could be held as October 26, nor did I suggest we meet and confer on that date. Rather, I noted that the Court's Order Setting Initial Case Management Conference and ADR Deadlines (Docket Entry No. 2) identifies October 26 as the last day to meet and confer. Again, we share your desire to meet and confer as soon as possible but, given the length and complexity of the Complaint, we are not yet prepared to do so.
4. ADR: I told you that we had received Mr. Wolinsky's letter dated August 6, 2007 (though not received by me until about ten days later due to postal delays) noting plaintiffs' desire to "constructively discuss avenues for a potential resolution of this case" and stating plaintiffs "have a number of suggestions" as to how to do so. I asked you to identify those suggestions, but you declined. You stated you would like a confidentiality agreement in place before doing so. I stated that such a discussion would be a covered settlement communication pursuant to the Federal Rules of Evidence, but you said you would like a broader confidentiality agreement. I suggested you propose such an agreement, and you agreed.
5. Planned Motions: During the course of our conversation, you disclosed an intent to file motions for a preliminary injunction, expedited discovery, and a protective order to permit declarants to proceed anonymously. I asked when you expect to file these motions, but Mr. Wolinsky stated that plaintiffs are not interested in being that "transparent" at this time, and you said that you did not yet know. To the extent you plan to seek expedited discovery in connection with an emergency motion, however, it would be helpful for you to provide more information as to what discovery requests you anticipate making.

I share and appreciate your stated willingness to resolve as much as possible by agreement.

Sincerely Yours,

/s/

Steven Y. Bressler

cc: Sid Wolinsky