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 VETERANS FOR COMMON SENSE and
 11 VETERANS UNITED FOR TRUTH, INC.

12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 SAN FRANCISCO DIVISION

15 VETERANS FOR COMMON SENSE and
 16 VETERANS UNITED FOR TRUTH, INC.,

17 Plaintiffs,

18 v.

19 JAMES B. PEAKE, M.D., Secretary of Veterans
 Affairs, *et al.*,

20 Defendants.

Case No. C-07-3758-SC

CLASS ACTION

**PLAINTIFFS' DESIGNATION OF
 WITNESSES AND LIST OF
 REQUIRED DOCUMENTS FOR
 PRELIMINARY INJUNCTION
 HEARING**

Date: March 3, 2008
 Ctrm: 1, 17th Floor

Complaint Filed July 23, 2007

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1 Pursuant to the Court's order of February 11, 2008, Plaintiffs VETERANS FOR COMMON
2 SENSE and VETERANS UNITED FOR TRUTH, INC. hereby submit the following list of witnesses
3 and documents relevant to the preliminary injunction hearing commencing on March 3, 2008.

4 **I. ANTICIPATED WITNESSES TO BE CALLED AT THE PRELIMINARY**
5 **INJUNCTION HEARING**

6 Plaintiffs intend to call the witnesses listed below, subject to their availability. Several
7 anticipated witnesses are not within Plaintiffs' direct control, and thus Plaintiffs cannot be certain that
8 Defendants will produce every single one of the listed witnesses at the hearing. Moreover, a number
9 of the witnesses are being called to testify to discrete points and, accordingly, Plaintiffs do not
10 anticipate that those witnesses' testimony will be time-consuming.

- 11 • **Dr. Arthur Blank**
- 12 • **Dr. Chad Peterson**
- 13 • **Dr. Antonette Zeiss**, Deputy Chief Consultant, Office of Mental Health Services,
14 Patient Care Services, U.S. Department of Veterans Affairs
- 15 • **Mr. Tony A. Guagliardo**, Director, Business Policy of the Chief Business Office,
16 Veterans Health Administration, U.S. Department of Veterans Affairs
- 17 • **Mr. W. Paul Kearns III**, Chief Financial Officer, Veterans Health Administration,
18 U.S. Department of Veterans Affairs
- 19 • **Dr. Ira Katz**, Chief Patient Care Services Officer, U.S. Department of Veterans
20 Affairs Deputy
- 21 • **Dr. Michael J. Kussman**, Under Secretary for Health, Veterans Health
22 Administration, U.S. Department of Veterans Affairs
- 23 • **Ms. Belinda J. Finn**, Assistant Inspector General for Auditing, Office of Inspector
24 General, U.S. Department of Veterans Affairs
- 25 • **Ms. Kara Ziven**, Research Investigator, Serious Mental Illness Treatment Research
26 and Evaluation Center, U.S. Department of Veterans Affairs
- 27 • **Dr. Han Kang**, Director, Environmental Epidemiology Service, U.S. Department of
28 Veterans Affairs

- 1 • **Mr. Gary M. Baker**, Acting Chief Business Officer, Veterans Health Administration,
2 U.S. Department of Veterans Affairs
- 3 • **Ms. Laurie E. Ekstrand**, Office of United States Government Accountability Office
4 Director, Health Care
- 5 • **Dr. Stephen L. Rathbun**, Acting Department Head and Professor of Epidemiology
6 and Biostatistics, University of Georgia, Athens
- 7 • **Mother 1**

8 Plaintiffs will work with Defendants to decide upon an appropriate schedule for the VA witnesses'
9 appearances. Once witness availability and schedules have been negotiated between the parties,
10 Plaintiffs will submit a revised witness list to the Court with the anticipated schedule. Plaintiffs may
11 call the following witnesses, subject to their availability:

- 12 • **Ms. Cynthia A. Bascetta**, Associate Director, Veterans Affairs and Military Health
13 Care Issues, Health, Education, and Human Services Division, U.S. Department of
14 Veterans Affairs
- 15 • **Mr. John Brown**, Director, Seamless Transition Office, U.S. Department of Veterans
16 Affairs
- 17 • **Mr. Daniel Bertoni**, Acting Director Education, Workforce, and Income Security
18 Issues, Office of United States Government Accountability Office
- 19 • **Dr. Frances M. Murphy**, former Deputy Under Secretary for Health for Health
20 Policy Coordination, U.S. Department of Veterans Affairs
- 21 • **Mr. Michael McLendon**, Former Deputy Assistant Secretary for Policy, Planning and
22 Preparedness, U.S. Department of Veterans Affairs
- 23 • **Dr. Marcus Nemuth**, Medical Director of Psychiatry Emergency Service for
24 Veterans Affairs Puget Sound Health Care System
- 25 • **Dr. Sean Zielinski**, Las Vegas VA Health Administration, U.S. Department of
26 Veterans Affairs
- 27 • **Dr. William Phillips**
- 28 • **Mother 3 and/or Father 2**

- **Father 3**
- **Wife 1¹**

II. DOCUMENTS TO BE PRODUCED IN ADVANCE OF THE PRELIMINARY INJUNCTION HEARING

Discovery commenced over four months ago, yet Defendants have produced less than 2,000 pages purportedly in response to only three of the outstanding 191 document requests. The original document requests were served in mid-October. After a series of protective order motions that were ultimately mooted by the Court's ruling on the motion to dismiss, Plaintiffs identified thirteen of the highest priority requests aimed at obtaining the documents most relevant to the pending preliminary injunction motion. In response, Defendants produced under 2,000 pages of documents responsive to only three of the thirteen requests.² Plaintiffs believe that evidence highly relevant to Plaintiffs' motion has not been produced. In fact, just this week, VA released the results of a new suicide report to the national media. To Plaintiffs' knowledge, all underlying data and related documents have not been produced to Plaintiffs.³ The limited "suicide" documents produced to date in response to three requests is only the tip of the iceberg and is deficient for Plaintiffs' purposes on the preliminary injunction. Additional documentation responsive to the long-overdue requests is required for witness examination at the hearing, in particular with respect to unsupported factual claims by Defendants' declarants.

As a result, without prejudice to a full production in response to all of Plaintiffs' other outstanding document requests, Plaintiffs hereby request the following eight categories of documents

¹ All full names will be provided to defense counsel outside of the context of the public filing for witnesses with code names for reasons related to retaliation as set forth in the pending protective order motion.

² Many of those documents appear to be available in the public domain, such as published studies and articles, and the remainder is difficult to discern due to the lack of source information. In contravention of the specifications for electronic discovery clearly set forth in a letter dated October 10, 2007, Defendants produced electronic documents in .pdf format without any relevant metadata or other source information. A true and correct copy of counsel's October 10, 2007 letter is attached hereto as Exhibit A.

³ Plaintiffs' counsel contacted defense counsel to inquire about the newly released report and to request production of all related documents to the extent they have not been produced but had not heard back as of the time of the filing.

1 be produced (which fall generally within the ambit of thirteen outstanding document requests).⁴ In an
2 effort to further clarify the materials Plaintiffs require, examples are provided below the individual
3 categories:

4 **Category 1: Studies, statistical data, reports, meetings, communications, or VA policies**
5 **and practices concerning suicides or attempted suicides by OEF/OIF veterans, including**
6 **without limitation [See RFPs 35, 38]:**

- 7 • Studies, reports, or underlying data therefore related to OEF/OIF veteran suicides,
8 including but not limited to the VA Office of Environmental Epidemiology report in
9 the San Francisco Chronicle article dated February 13, 2008;
- 10 • Internal analyses related to the suicide study conducted by Dr. Stephen Rathbun for
11 CBS News and communications with or documents obtained from either Dr. Rathbun
12 or CBS News concerning that study;
- 13 • Statistics, studies, or data concerning a link between PTSD and suicide or attempted
14 suicide;
- 15 • Reports or research commissioned by VA regarding veteran suicides, PTSD, or
16 traumatic brain injury, in addition to any contracts or proposed contracts with third
17 parties, including universities, commissioning the reports or research;
- 18 • Patient death, attempted suicide annual reports for VA medical centers or other VHA
19 facilities between 2004 and the present;
- 20 • Death certificates of OEF/OIF veterans who have committed suicide;
- 21 • Documents related to OIF/OEF veterans coded with potential PTSD, including copies
22 of any database, such as the National Mental Health Database, containing such data or
23 any reports or printouts of such data.

24 **Category 2: Suicide prevention, detection, screening, and/or treatment programs**
25 **administered by VA or under contract with VA, including without limitation [See RFP**
26 **102]:**

- 27 • Intake policies, procedures, or sample intake forms for veterans threatening suicide or
28 exhibiting suicidal symptoms;
- Documents related to Suicide Prevention Coordinator qualifications for each VA
medical center [Zeiss Declaration];
- Suicide Risk Assessment Pocket Cards and related drafts and documents [Zeiss
Declaration];
- Documents related to the suicide hotline, including documents concerning the
development of that hotline and analysis of calls [Zeiss Declaration];
- Internal reports, studies or analyses of or related to the Comprehensive Mental Health
Strategic Plan [Zeiss Declaration].

25 ⁴ On February 11, 2008, Defendants for the first time served written responses and objections
26 to all of Plaintiffs' document requests. Notably, this response marks the first time Defendants have
27 raised any privilege objections to Plaintiffs' document requests. Plaintiffs believe that those privilege
28 arguments have been waived, because the relevant privilege objections were not contained in either
timely written objections or the protective order motion.

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2 **Category 3: Documents related to a failure or delay in providing medical diagnosis or**
3 **treatment to a veteran with PTSD, including without limitation [RFPs 18, 20, 90, 154,**
4 **156]:**

- 5 • Reports and internal analyses related to VA benefits delays or waiting times for health
6 care at VA medical centers or other VHA facilities;
- 7 • Data and reports concerning the interval between the date a veteran requested a medical
8 appointment and the date the visit actually occurred, including data supporting the
9 claim that 95% of veterans receive a date for a medical appointment within 30 days
10 [Zeiss Declaration];
- 11 • Intake policies, procedures, and instructions for intake personnel for veterans seeking
12 medical care or treatment for PTSD and the criteria for admission to a VA hospital for
13 PTSD;
- 14 • Waiting lists for health care treatment for PTSD inpatient and outpatient programs;
- 15 • Communications and meetings concerning VA Inspector General reports 07-00616-
16 199 and 07-00050-146, including without limitation internal analyses, reports, studies
concerning the reports or VA comments on draft reports;
- 17 • Meetings and communications concerning the United States House of Representatives
Committee on Government Reform – Minority Staff Special Investigation Division
reports on Waiting Time for Veteran Health Care;
- 18 • Meetings and communications concerning the United States House of Representatives
Committee on Government Reform – Minority Staff Special Investigation Division
reports on Proposed Restrictions on Access to VA Health Care;
- 19 • Results of any investigation into the suicides of any OEF/OIF veterans, including the
20 suicides of veterans Jeffrey Lucey or Jonathan Schulze and the corresponding patient
21 death attempted suicide reports.

22 **Category 4: VA's policies and procedures for PTSD detection, diagnosis, and treatment,**
23 **including without limitation [RFPs 27, 108]:**

- 24 • Internal reports on symptoms and treatment of PTSD;
- 25 • Psychological standards for treatment of PTSD;
- 26 • PTSD detection, screening, and/or treatment programs administered by VA or under
27 contract with VA;
- 28 • Intake policies and procedures for veterans claiming PTSD or exhibiting symptoms of
PTSD, including sample intake and enrollment forms;
- Staffing shortfalls and/or vacant positions for mental health professionals (such as
psychiatrists, psychologists, and social workers) at VA medical centers and other
VHA facilities between 2004 and the present;
- Policies and procedures for inpatient PTSD programs, including training videos or
transcripts regarding PTSD.
- The minimum qualifications for the designated mental health staff for PTSD in each
Vet Center [Zeiss Declaration];
- Caseload reports and summary data including caseload averages for all VA mental
health care professionals.
- Documents related to hiring qualifications for mental health staff, including any
document related to hiring unqualified personnel;

- Documents related to open positions for mental health staff at VA medical centers or other VHA facilities.

Category 5: Policies, practices or procedures concerning implementation of or compliance or noncompliance with the two-year (now five-year) medical care statute, including without limitation [RFP 20]:

- Communications between VA and veterans concerning two or five years of medical care, including letters, brochures, or “array of other information” [Zeiss Declaration];
- Internal policies, procedures, or employee training concerning compliance with the two-year (or now five-year) statute, including reports or internal analyses related to the National Defense Authorization Act [Guagliardo Declaration].

Category 6: Documents regarding veteran health care priority levels, including without limitation [RFP 151]:

- Screening and intake procedures and forms related to priority levels and treatment and intake instructions related to priority levels;
- Documents regarding VA’s interpretation of priority care levels or any documents explaining the priority level system;⁵
- Documents related to funding for priority level health care;
- Documents regarding the nature of treatment in priority levels 1 through 6, including all veterans with PTSD.

Category 7: Documents related to congressional appropriations and funding and VA spending for fiscal years 2005 through 2008, including without limitation [RFPs 82, 89]:

- Documentation underlying the Kearns Declaration;
- Documents related to funding of or spending for the Mental Health Initiative;
- Documents related to work performed by third-party contractors, including without limitation PriceWaterhouse, with respect to VA spending and budget allocations;
- Communications and meetings concerning GAO Reports 07-66 and 06-1119T, including without limitation internal analyses, reports, studies concerning the reports or VA comments on draft reports.

Category 8: Any documents responsive to the requests that are found in the personal or working files of any witness called by plaintiffs or defendants at the hearing.

Without the production of the requested documents, Plaintiffs’ ability to properly examine witnesses at the preliminary injunction hearing could be severely prejudiced. At a minimum, Defendants should not be permitted to rely on any material that was not produced to Plaintiffs.

⁵ At this time, Plaintiffs do not require individual veterans’ priority level documents but rather seek high-level policies and procedures related to priority level assignments and budgetary concerns related to those decisions.

1 Plaintiffs respectfully request that the Court enter an order (a) requiring the attendance of the
2 VA witnesses Plaintiffs intend to call at the preliminary injunction hearing on March 3, and (b)
3 requiring the production of the documents requested herein in the requested electronic format by
4 Friday, February 22, 2008.

5 Dated: February 14, 2008

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October 10, 2007

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By Facsimile and U.S. Mail

Steven Y. Bressler
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington DC 20530

Re: *Veterans for Common Sense et al v. Nicholson et al*
Case No.: 07-03758 SC

Dear Mr. Bressler:

As promised, I am writing to follow up on our Rule 26(f) conference of last Thursday, October 4. As an initial matter, as I mentioned on the call, Plaintiffs do have particular positions with respect to the identification, preservation, collection, and form of production for electronically stored information ("ESI"). Those positions are consistent with federal law governing electronic discovery and are set forth in detail below.

Identification/Preservation of Electronic Data:

With respect to preservation of ESI, we understand that you are in the process of working on a proposed preservation order. We may, as you request, be able to assist in that process. As you mentioned during the conference, the General Counsel's August 2007 preservation hold would be a helpful starting point for the initial preservation order. We also stated that the CAVC should also have received a preservation hold. Please send us a copy of that order at your earliest convenience. As mentioned on the call, we look forward to seeing your proposal on or about October 15. In the meantime, Plaintiffs will review the August preservation order. Once it is in place, Plaintiffs do ask that you reissue any preservation hold on a regular basis.

In terms of what ESI is preserved, Plaintiffs expect that the scope of the preservation hold be consistent with Federal Rule of Civil Procedure 34(a), which defines "documents or electronically stored information" as "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information may be obtained – translated, if necessary, by the respondent into reasonably

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useable form.” Consistent with modern electronic discovery practices, all metadata associated with the “documents and electronically stored information” must be preserved and available for collection. Defendants are also required to refrain from engaging in routine document destruction activities with respect to documents within the scope of the preservation order. We remind you of these obligations simply because the failure to preserve ESI could result in penalties, such as monetary sanctions, adverse jury instructions, or even a directed verdict. Other activities aside from routine document destruction can also lead to the spoliation of discoverable information. For example, software upgrades can destroy ESI by overwriting existing data and must be avoided. Defendants are also required to preserve images of drives for any of defendants or relevant employees who leave their employment with the federal government during the course of the litigation.

Production of Electronic Data:

Plaintiffs request that Defendants produce responsive ESI in the form of searchable (using OCR) single-page TIFF images with accompanying Concordance load files. Plaintiffs, however, reserve the right to request ESI in native format. In the event that native files are required, Plaintiffs will send a list of the requested files by Bates number to Defendants. The following metadata fields should also be produced (where relevant) with comma-delimited fields and field names clearly listed in the header:

Bates Range	Source (Production Source)	Date Modified
Bates Start		Date Sent
Bates End	File Extension (Extension)	Date Received
Page Count	File Size (SizeinMB)	Original Volume Name
Attach Num	Subject/Title	(OriginalFileName)
Attach Range	Author	Original File Path (OriginalFullFilePath)
Attach Start	Recipients	Text
Attach End	CC	MD5Hash
Parent Bates	BCC	CreateDate
Attach Bates	Date Created	LastUsedDate

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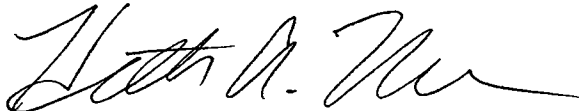
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When ESI is produced to Plaintiffs, it should be accompanied by a source log for the documents contained in that production set. To the extent that any ESI requires access to proprietary software, Plaintiffs will request access to the software. As identified on the call last week, there may be numerous databases containing responsive ESI. If these databases cannot be produced in the requested file format, Plaintiffs will request access to the data contained therein. As I mentioned last week, if there is any data that defendants deem "not readily accessible," Plaintiffs request that Defendants identify such data as soon as possible so that the parties may discuss a viable solution. To the extent that any documents are withheld or redacted, at the time of production, Plaintiffs are entitled to logs identifying the legal basis for withholding the information. Redaction logs should contain the following standard fields: Bates start and Bates end, document type, from, to, cc, bcc, date modified, date sent, date received, and the legal basis for redaction. Privilege logs should contain the following standard fields: Bates number, document type, date, description, to, from, cc, bcc, and privileges asserted. If Defendants have any issues with the foregoing, please feel free to contact me.

Just to confirm that we are on the same page with respect to the dates discussed, I've set forth my understanding of the dates on which the parties agreed during the Rule 26(f) conference: (1) October 12, 2007: parties to exchange proposed discovery plans; (2) October 18, 2007: parties to exchange initial disclosures; and (3) November 2, 2007: parties to exchange draft joint case management conference statement memorializing positions discussed during the Rule 26(f) conference. Please let me know if you had a different understanding of these dates. Also, as discussed during our call, we look forward to obtaining a copy of the DOJ's "standard" protective and privacy orders. Please forward them to us at your earliest convenience. We would prefer to get those orders in place as soon as possible.

We look forward to working with you on these issues. Thank you in advance for your anticipated cooperation throughout this process.

Regards,



Heather A. Moser