

1 GORDON P. ERSPAMER (CA SBN 83364)
 Gerspamer@mofocom
 2 ARTURO J. GONZALEZ (CA SBN 121490)
 AGonzalez@mofocom
 3 HEATHER A. MOSER (CA SBN 212686)
 HMoser@mofocom
 4 STACEY M. SPRENKEL (CA SBN 241689)
 SSprenkel@mofocom
 5 PAUL J. TAIRA (CA SBN 244427)
 PTaira@mofocom
 6 MORRISON & FOERSTER LLP
 425 Market Street
 7 San Francisco, California 94105-2482
 Telephone: 415.268.7000
 8 Facsimile: 415.268.7522

9 **[see next page for additional counsel for Plaintiffs]**

10 Attorneys for Plaintiffs
 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
 VETERANS UNITED FOR TRUTH, INC.,
 16
 Plaintiffs,
 17
 v.
 18 JAMES B. PEAKE, M.D., Secretary of Veterans
 Affairs, *et al.*,
 19
 Defendants.
 20
 21
 22

Case No. C-07-3758-SC

CLASS ACTION

**ADMINISTRATIVE MOTION FOR
 ADEQUATE TIME TO RESPOND
 TO NEW LEGAL ARGUMENT
 RAISED ON REPLY**

Place: Courtroom 1, 17th Floor
 Judge: Hon. Samuel Conti

Complaint Filed July 23, 2007

1 **ADDITIONAL COUNSEL FOR PLAINTIFFS:**

2 SIDNEY M. WOLINSKY (CA SBN 33716)
3 SWolinsky@dralegal.org
4 JENNIFER WEISER BEZOZA (CA SBN 247548)
5 JBezoza@dralegal.org
6 KATRINA KASEY CORBIT (CA SBN 237931)
7 KCorbit@dralegal.org
8 DISABILITY RIGHTS ADVOCATES
9 2001 Center Street, Third Floor
10 Berkeley, California 94704-1204
11 Telephone: 510.665.8644
12 Facsimile: 510.665.8511

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

8 BILL D. JANICKI (CA SBN 215960)
9 WJanicki@mofo.com
10 MORRISON & FOERSTER LLP
11 400 Capitol Mall, Suite 2600
12 Sacramento, California 95814
13 Telephone: 916.448.3200
14 Facsimile: 916.448.3222

1 Pursuant to Northern District Civil Local Rule 7-11, Plaintiffs hereby move the Court for
2 an order for adequate time to respond to a new legal argument raised by Defendants in their Reply
3 Memorandum in Support of Motion to Dismiss Claims Against Defendants William P. Greene,
4 Jr. and Michael B. Mukasey.

5 For the second time, Defendants raise a new legal argument on reply. Defendants' first
6 motion to dismiss raised a sovereign immunity issue with respect to Defendant Greene in the last
7 paragraph of their reply brief in support of their motion to dismiss. Motion to Dismiss Order,
8 at 41. Because the issue was raised on reply, the Court did not rule on the issues but instead
9 allowed Defendants to refile their motion to dismiss Defendant Greene. *Id.* Defendants based
10 their refiled motion on the sovereign immunity argument raised in the previous reply brief.
11 Plaintiffs filed a timely response to that sovereign immunity issue. In their reply on the second
12 motion to dismiss,¹ Defendants once again raise a new legal argument in the last section of their
13 reply that Plaintiffs were not afforded the opportunity to address in their briefing.

14 Defendants' new legal argument in their reply, judicial immunity, was neither raised in the
15 initial reply argument to dismiss Greene or the second opening brief. Most importantly, the
16 relevant judicial immunity cases cited in the reply were not cited in either previous brief.
17 Judicial immunity is a defense wholly distinct from sovereign immunity. The Court cannot allow
18 Defendants to file seriatim motions until Defendants are satisfied that they have exhausted legal
19 research avenues. That holds particularly true when the new legal arguments are raised on reply,
20 depriving Plaintiffs of the opportunity to address them before the Court. It is axiomatic that
21 "reply papers may only address issues raised in the moving papers. It is improper to introduce
22 new facts or a different legal argument in the reply brief." Matthew Bender Practice Guide:
23 Federal Pretrial Civil Procedure in California, 26.50[1] (citing *Lujan v. Nat'l Wildlife Fed'n*,
24 497 U.S. 871, 894-95 (1990) and *United States ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117,
25

26 ¹ Defendants submitted their reply brief past the court-mandated deadline. The February 29, 2008
27 hearing for the Motion to Dismiss Greene was rescheduled for March 3, 2008. However,
28 Defendants were aware of the Court clerk's view that the briefing schedules remained unchanged
unless expressly noted in the order, which they were not. As a result, Defendants' reply brief was
due Friday, February 15, 2008; it was not filed until four days later, on Tuesday, February 19.

1 1127 (C.D. Cal. 2000)); N.D. Cal. Civ. R. 7-4(a)(3) (requiring moving papers to contain a
2 “statement of the issues to be decided”).

3 Plaintiffs respectfully request that the Court refuse to consider the newly raised judicial
4 immunity argument in ruling on Defendants’ motion to dismiss. Even if the Court is inclined to
5 address the new issue improperly raised on reply, it is a potentially complicated area of law.
6 Plaintiffs would be prejudiced without an opportunity to fully research and brief that issue for the
7 Court. Accordingly, Plaintiffs respectfully request that the hearing on the Motion to Dismiss
8 Greene be rescheduled for April 11, 2008, with Plaintiffs’ brief on that issue due on March 21,
9 and no opportunity for reply. Plaintiffs attempted to reach a stipulation with defense counsel on
10 the foregoing terms, but were unsuccessful. Declaration of Heather A. Moser, ¶ 2, Exs. A-B.

11
12 Dated: February 25, 2008

GORDON P. ERSPAMER
ARTURO J. GONZALEZ
HEATHER A. MOSER
BILL D. JANICKI
STACEY M. SPRENKEL
PAUL J. TAIRA
MORRISON & FOERSTER LLP

13
14
15
16
17 By: /s/ Heather A. Moser
18 Heather A. Moser (HMoser@mofo.com)

19 Attorneys for Plaintiffs
20
21
22
23
24
25
26
27
28