IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NICHOLAS HARRISON and
OUTSERVE-SLDN, INC.
Plaintiffs,
v.

JAMES N. MATTIS, in his official capacity as Secretary of Defense; MARK ESPER, in his official capacity as the Secretary of the Army; and the UNITED STATES DEPARTMENT OF DEFENSE,
Defendants.

NO. 1:18-CV-00641-LMB-IDD

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL RESPONSES TO INTERROGATORIES

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I. INTRODUCTION

Defendants continue to stonewall Plaintiffs' discovery efforts. Defendants were recently ordered to produce numerous documents that they had refused to produce for various reasons. *See* Dkt. 81. Defendants similarly want to largely avoid providing written discovery, too. To that end, Defendants contend that Plaintiffs' 23 interrogatories should be counted as ***more than 156 interrogatories***, due to alleged "discrete subparts." As explained below, each of Plaintiffs' interrogatories is directed to a specific subject, and any alleged subparts are necessarily related to the broader subject matter of the interrogatory. Defendants also objected to responding to many interrogatories as contention interrogatories, although Rule 33 specifically requires responses to contention interrogatories. The Court should therefore overrule Defendants' objections and compel Defendants to respond to all of Plaintiffs' interrogatories.

II. BACKGROUND

A. Plaintiffs' Interrogatories and Defendants' Objections

On November 16, 2018, Plaintiffs served their First Set of Interrogatories to Defendants (Nos. 1-23). *See* Ex. A, Pls.' First Set of Interrogs. to Defs. These interrogatories sought discovery related to Defendants' policies regarding people living with HIV. On December 3, 2018, Defendants provided their objections.[1] *See* Ex. B, Defs.' Obj. to Pls.' First Set of

[1] Defendants also included objections regarding the scope of discovery that have been overruled by the Court. For example, Defendants objected to ***any discovery*** on the grounds that "Plaintiffs' claims should be reviewed by the Court on an administrative record and discovery should not be permitted." Ex. B, Defs.' Objs. at 1. Defendants indicated they lodged these objections to avoid waiver on various issues, particularly while they evaluate objections to the Court's ruling about the relevancy and proportionality of similar document requests. This motion does not address these relevancy or proportionality objections and is limited to Defendants' objections related to subparts and contention interrogatories.

Interrogs. These included objections regarding alleged "discrete subparts" that Defendants contended should be counted separately.

For example, for 16 of the 23 interrogatories, Defendants objected that "this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1)." Ex. B, at Obj. to Interrog. Nos. 1-15 and 19. For two interrogatories, Defendants claimed "this interrogatory contains ***an unknown number of distinct subparts***, and Plaintiffs have served more than the allowed 30 interrogatories." *Id.* at Obj. to Interrog. Nos. 17-18 (emphasis added). For the remainder, Defendants stated: "Defendants further object to this interrogatory on the ground that Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1)." *Id.* at Obj. to Interrog. Nos. 16 and 20-23.

The following table shows Defendants' interpretation of how many "distinct subparts" are allegedly contained within each interrogatory:

Interrogatory No.	**"Distinct Subparts" Claimed by Defendants**
1	2
2	2
3	2
4	4
5	2
6	2
7	2
8	2
9	2
10	2
11	2
12	15
13	20
14	75
15	15
16	no specific objection calculating subparts
17	"an unknown number of distinct subparts"

18	"an unknown number of distinct subparts"
19	2
20	no specific objection calculating subparts
21	no specific objection calculating subparts
22	no specific objection calculating subparts
23	no specific objection calculating subparts

Defendants also objected to numerous interrogatories on the basis that they constitute "contention interrogatories." *See* Ex. B, Objs. to Interrog. Nos. 3-10 and 17-22.

B. The Parties' Discussions

On December 5, 2018, Plaintiffs requested a call to discuss Defendants' objections. *See* Ex. C, Email from Frelinghuysen (Dec. 5, 2018). Defendants said they were unavailable to talk until earlier this week. The parties conferred on December 10, 2018, regarding various issues, including Defendants' objections. Defendants indicated they anticipated standing on their objections regarding subparts and only responding to the first 30 interrogatories based on Defendants' aforementioned calculations. Defendants suggested, however, that Plaintiffs could prioritize to which interrogatories Defendants should respond. Plaintiffs agreed to take that under consideration and get back to Defendants.

After that discussion, Plaintiffs provided the suggested prioritization. *See* Ex. D, Letter from Harding (Dec. 12, 2018). Plaintiffs also indicated they were still contemplating whether to move to compel. *See id.* Later that same day, Plaintiffs reiterated that Defendants' objections regarding subparts was without merit and urged Defendants to reconsider their position, indicating that otherwise Plaintiffs would move to compel. Ex. E, Email from Harding (Dec. 12, 2018). Following further exchanges between the parties, after which Defendants refused to reconsider their position, Plaintiffs moved forward with filing the present motion.

III. LEGAL STANDARDS

Rule 33 provides that "a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts." Fed. R. Civ. P. 33.[2] The language regarding "subparts" was included to ensure a party cannot "evade this presumptive limitation [of 25 interrogatories] through the device of joining as 'subparts' questions that seek information about ***discrete separate subjects***." Fed. R. Civ. P. 33(a) advisory committee's note (1993) (emphasis added). Rule 33 does not define what might constitute a "discrete subpart," though the advisory committee noted that "a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons, present, and contents be stated separately for each such communication." *Id*.

Given the language of Rule 33, courts interpreting the rule have generally concluded that what constitutes a "discrete subpart" is often case specific. Nevertheless, various "standards" have emerged. First, there is the "related question standard," which examines whether the main question sufficiently concerns the subpart such that both may be counted as one interrogatory. *See Clark v. Burlington N. R.R.*, 112 F.R.D. 117, 118-119 (N.D. Miss 1986) ("[T]he separate bits of information called for by each interrogatory can reasonably be said to be directly related to each other."). Second, there is the "discrete bits standard." Under that standard, a single question that asks for several pieces of information about the same subject may be considered a single interrogatory, but if they call for discrete bits of information, the subparts are separate. *See Prochaska & Assocs. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 155 F.R.D. 189, 191 (D. Neb. 1993) ("if the interrogatories require discrete pieces of information, those interrogatories are to be counted as if

[2] The Court has ordered that the parties in this case are permitted to serve no more than "thirty (30) interrogatories, including parts and subparts." Dkt. 64.

the sub-parts were specifically itemized"). Finally, there is the "logically subsumed standard," which has been described as "the better view." 7 James Wm. Moore et al., *Moore's Federal Practice*, ¶ 33.02[2] (3d ed. 1999) ("The better view is that subparts may be counted as part of one interrogatory if they are logically and necessarily related to the primary question.") (citing *Safeco Ins. Co. of Am. v. Rawstron*, 181 F.R.D. 441, 445 (C.D. Cal. 1998)).

IV. ARGUMENT

A. Defendants' Objections Should Be Overruled Because the Alleged "Subparts" Identified by Defendants Are Logically Related to the Primary Subject of the Interrogatories.

Each of Plaintiffs' interrogatories are focused on a specific subject and any alleged "subparts" Defendants have identified are logically and necessarily related to that subject. This is immediately apparent based on a review of Plaintiffs' interrogatories. Moreover, to facilitate the analysis, Plaintiffs' interrogatories (and Defendants' corresponding objections regarding subparts) can roughly be divided into four groups. First, there are interrogatories where Plaintiffs have requested the identification of individuals and the documents they considered or relied upon—either in reaching a decision regarding Sgt. Harrison or with respect to the military policies at issue in this case. *See* Ex. A, Interrog. Nos. 1-11. Second, there are the interrogatories where Plaintiffs have requested numerical data regarding accession and deployment waivers for people living with HIV and similar deployment-limiting medical conditions, as well as data on blood transfusions for service members while deployed. *See id.* at Interrog. Nos. 12-15. Third, there are contention interrogatories seeking an explanation of Defendants' reasons underlying their accession and deployment policies regarding people living with HIV. *See id.* at Interrog. Nos. 17-19. Finally, there are a handful of interrogatories seeking

information regarding medical conditions similar to HIV that require medication and/or medical monitoring.[3] Defendants' subpart objections almost entirely focus on the first two categories.

With respect to the first group of interrogatories, Defendants claim that each interrogatory that requests an identification of both individuals and documents should count as two interrogatories. *See* Ex. B, Objs. to Interrog. Nos. 1-11. Yet Plaintiffs' interrogatories that fall within this category all involve a single subject. For example, Interrogatory No. 1 seeks the identification of people who were involved in Sgt. Harrison's request for a medical waiver and the documents that were generated as part of that process. Similarly, Interrogatory No. 5 seeks the identification of three individuals who made the most substantive contributions to creating or updating the military's policy regarding HIV in service members (DoDI 6485.01) and the documents that they considered. "Subparts asking for facts, documents, and witnesses relating to a primary contention or allegation are logically or factually related, and thus should be construed as subsumed in the primary question." *Synopsys, Inc. v. ATopTech, Inc.*, 319 F.R.D. 293, 297 (N.D. Cal. 2016). Here, the identification of these individuals and the documents they relied upon are part of the same inquiry. The information sought by these interrogatories is necessary

[3] Interrogatories regarding medical conditions requiring similar levels of care to HIV are directly related to the issue of whether there is any rational basis for Defendants' asserted justification that they cannot ensure adequate care to deployed service members living with HIV. *See* DoD 2018 Report to Congress at 25 ("[C]urrent Service policies do not permit HIV-infected Service members to deploy to combat theaters of operation or in support of other contingency operations, given the austere environment, potential exacerbation of illness and lack of access to needed medical care, as well as risk of compromising unit readiness and successful mission completion.") (Dkt. 53-3); Hr'g Tr. at 6:16-21 (Nov. 30, 2018) ("My simple question is upon which—upon what information are you basing that comparison on? Because you haven't seemed to have requested from them any information concerning the difficulty of getting diabetic medication versus the difficulty of getting HIV medication. That would seem to be a proper request if that's their argument.")").

for Plaintiffs to potentially depose these individuals and probe the justifications for both the denial of Sgt. Harrison's waiver request and also the various military policies at issue.

With respect to the second group, Defendants contend that Interrogatory Nos. 12-15 should be counted as 15, 20, 75, and 15 interrogatories, respectively. As explained above, these interrogatories merely seek statistical data broken down into subsets. For example, Interrogatory No. 12 seeks data regarding (a) the total number of applicants to the military; (b) the number of applicants who did not meet medical accession standards (which is a subset of the total number of applicants); and (c) the number of applicants who were granted waivers (which is a subset of the applicants who did not meet the standards). Defendants claim this interrogatory seeks "three separate and independent categories of application information for each of the five Military Services" and therefore should be counted as 15 interrogatories. *See* Ex. B, Obj. to Interrog. No. 12. This claim rings false. First, both the Department of Defense and the Secretary of Defense are Defendants in this case, and the Military Departments are subject to the authority, direction, and control of the Secretary of Defense, who is the head of the Department of Defense. *See, e.g.*, 10 U.S.C. §§ 113, 3013, 5013, and 8013. Indeed, publicly-available information suggests that this information, broken down by each Military Department, may be readily available.[4] Second, these are not "separate" categories of information but one data set broken down into subsets. Accordingly, these interrogatories seeking data and certain subsets of that data should each only be counted as a single interrogatory.

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[4] The publication *Medical Surveillance Monthly Report* regularly publishes information regarding the number of applicants to the military who tested positive for HIV, as well as the number of HIV positive service members broken down by Military Department. *See, e.g.*, *Medical Surveillance Monthly Report*, Vol. 25, No. 9 (Sept. 2018), available at https://www.health.mil/Reference-Center/Reports/2018/01/01/Medical-Surveillance-Monthly-Report-Volume-25-Number-9.

B. The Cases Defendants Cite Are Distinguishable.

To support their argument about "discrete subparts," Defendants have identified two cases. First, for the proposition that interrogatories requesting the identification of individuals and documents should be considered two interrogatories, Defendants point to a D.C. district court decision *Smith v. Café Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009). In *Smith*, the court found that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories." *Id.* at 254. It is important to underscore that the court in *Smith* was concerned about an instance where a party was seeking both a substantive narrative answer and identification of the documents relied upon to create that answer.[5] The circumstances here are different. Each of the interrogatories within Plaintiffs' first group of interrogatories simply seeks the *identification* of individuals and documents, not a substantive narrative answer and the identification of documents that were relied upon to support that answer. Moreover, the court in *Smith* also explained that "[t]o determine whether an interrogatory is composed of 'discrete subparts,' the Court looks 'at the way lawyers draft interrogatories and see[s] if their typical approach threaten the purpose of the rule by putting together in a single question distinct areas of inquiry that should be kept separate.'" *Id.* (citation omitted). Again, in this case, there is no "threat" to the rule, as there are no "distinct areas of inquiry" within each of Plaintiffs'

[5] For example, a single interrogatory in *Smith* requested the following: "List and describe each and every communication which occurred between or among anyone (including but not limited to communications between or among any employee, managers, and customers of Café Asia or any other person) which is related to any allegation in Plaintiff's Complaint or Defendant's Answer. Include in your description an *identification* of the people who had the communication, the date and place of each communication, and the substance of the communication. Please note the definition of 'communication' and 'identify' which has been provided in the Definition section above. Identify all documents on which Defendant relies in support of its response(s) to this interrogatory pursuant to the Request for Production of Documents served herewith." *Id.* at 252.

interrogatories—each interrogatory is directed to a specific area of inquiry, as explained above. The *Smith* case is therefore inapplicable in these particular circumstances.

The second case Defendants rely upon is *Mezu v. Morgan State Univ.*, 269 F.R.D. 565 (D. Md. 2010).[6] This case is not at all similar to the situation at hand. In *Mezu*, the court found that the plaintiff's "multi-part interrogatories largely encompassed multiple questions." *Id.* at 573. For example, a single interrogatory in *Mezu* asked for the following:

> Please set forth all reasons Morgan State University, the employer had for giving the Plaintiff FMLA Request forms which she filled out on November 18, 2008 when the Plaintiff clearly stated that she needed leave to go to Nigeria to bury her mother. Please set forth all reasons why on November 25, 2008 (after the Plaintiff had left for Nigeria) the Human Resources Director denied the Plaintiff's request for FMLA leave and asked her to apply for 'sick-bereavement' leave. Please indicate also whether her application for 'sick-bereavement' leave has been to date approved or denied. Please indicate who participated in that decision, their reasons at the time for taking the adverse employment action against the plaintiff. Please set forth all individuals (by name, position held at the time, and current position, if different) that participated in the decision making process to take the adverse employment action against the plaintiff.

Id. at 572. This type of convoluted, multi-part interrogatory stands in stark contrast to Plaintiffs' interrogatories that Defendants contend contain "discrete subparts." Plaintiffs' interrogatories seek only identification of individuals and documents or individuals and statistical data regarding a narrowly tailored specific subject.

C. Defendants' Objections Regarding Alleged "Contention Interrogatories" Are Improper.

Defendants objected to responding to certain interrogatories they describe as "contention interrogatories." *See* Ex. B, Objs. to Interrog. Nos. 3-10 and 17-22. Plaintiffs disagree that all of these interrogatories constitute contention interrogatories. Moreover, Defendants' objections are

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[6] As Defendants acknowledge in their objections, the language cited from *Mezu* actually comes from *Kendall v. GES Expositions Servs.*, 174 F.R.D. 684, 685-686 (D. Nev. 1997). *See* Ex. B, Obj. to Interrog. No. 4.

in direct conflict with Rule 33, which plainly states: "An interrogatory is ***not objectionable*** merely because it asks for an opinion or contention that relates to fact or the application of law to fact[.]" Fed. R. Civ. P. 33(a)(2) (emphasis added). Nor did the Court's Scheduling Order indicate that contention interrogatories need not be answered until some other time. *See* Dkt. 68. Accordingly, there is no basis for Defendants' objections, and Defendants should not be permitted to further delay in responding to any interrogatories on this basis.

V. CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court overrule Defendants' objections and compel Defendants to respond to all of Plaintiffs' interrogatories in full.

Dated: December 14, 2018

Respectfully submitted,

/s/ *Andrew R. Sommer*
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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December 2018, I caused the foregoing to be filed electronically using the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: December 14, 2018

Respectfully submitted,

/s/ *Andrew R. Sommer*
Andrew R. Sommer

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NICHOLAS HARRISON and OUTSERVE-SLDN, INC. Plaintiffs, v. JAMES N. MATTIS, in his official capacity as Secretary of Defense; MARK ESPER, in his official capacity as the Secretary of the Army; and the UNITED STATES DEPARTMENT OF DEFENSE, Defendants.	NO. 1:18-CV-00641-LMB-IDD

PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANTS (NOS. 1-23)

Pursuant to Federal Rule of Civil Procedure 33 and Local Civil Rule 26, Plaintiffs Nicholas Harrison and OutServe-SLDN, Inc., by and through their undersigned counsel, propound their First Set of Interrogatories to which Defendants James N. Mattis, Mark Esper, and the United States Department of Defense (collectively "Defendants") shall respond separately and fully, in writing and under oath, no later than thirty (30) days after service of these interrogatories, and thereafter seasonably supplement such responses pursuant to Fed. R. Civ. P. 26(e) through the date of any trial in this action.

DEFINITIONS

Notwithstanding any definition set forth below, each word, term, or phrase used in these interrogatories is intended to have the brsoadest meaning permitted under the Federal Rules of Civil Procedure. In these interrogatories, the following terms are to be given their ascribed definitions:

1. The term "Plaintiffs" means Nicholas Harrison and OutServe-SLDN, Inc.

2. The term "Individual Defendants" means James N. Mattis and Mark Esper, including their predecessors.

3. The term "Military Services" means the United States Army, the United States Navy, the United States Marine Corps, the United States Air Force, or the United States Coast Guard.

4. The term "DoD" means the United States Department of Defense, including its various components and agencies (including but not limited to the Military Services), current or former officials, officers, subordinates, employees, contractors, agents, and attorneys.

5. The terms "Defendants," "you" and/or "your" means the Individual Defendants and the DoD.

6. The term "DoD 2014 Report to Congress" means the Report to Congressional Defense Committees on Department of Defense Personnel Policies Regarding Members of the Armed Forces with HIV or Hepatitis B (Sept. 2014) (ECF No. 53-2).

7. The term "DoD 2018 Report to Congress" means the Report to the Committees on the Armed Services of the Senate and House of Representatives on Department of Defense Personnel Policies Regarding Members of the Armed Forces Infected with Human

Immunodeficiency Virus (Aug. 2018) (ECF No. 53-3).

8. The term "DOGO Instruction" means DoD Instruction 1332.45, Retention Determinations for Non-Deployable Service Members (effective July 30, 2018) (ECF No. 53-1).

9. The term "DOGO Policy" means the Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, Deputy Chief Management Officer; Chief, National Guard Bureau; Director of Cost Assessment and Program Evaluation regarding "DoD Retention Policy for Non-Deployable Service Members" (Feb. 14, 2018) (ECF No. 26-1).

10. The term "DoDI 6485.01" means DoD Instruction 6485.01, Human Immunodeficiency Virus (HIV) in Military Service Members (June 7, 2013), including any prior versions or amendments thereof.

11. The term "DoDI 6130.03" means DoD Instruction 6130.03, Medical Standards for Appointment, Enlistment, or Induction into the Military Services (May 6, 2018), including any prior versions or amendments thereof.

12. The term "DoDI 6490.07" means DoD Instruction 6490.07, Deployment-Limiting Medical Conditions for Service Members and DoD Civilian Employees (Aug. 11, 2006; Certified Current as of September 30, 2011), including any prior versions or amendments thereof.

13. The term "AR 600-110" means Army Regulation 600-110, Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (Apr. 22, 2014), including any prior versions or amendments thereof.

14. The term "AR 40-501" means Army Regulation 40-501, Standards of Medical Fitness (June 14, 2017), including any prior versions or amendments thereof.

15. The term "person" or "persons" means and includes any natural person, corporation, company, proprietorship, partnership, joint venture, association, firm, government entity or any other entity recognized in law, and shall include the owners, officers, directors, agents, trustees, parents, subsidiaries, affiliates, assignees, predecessors, and successors of each such "person."

16. The phrase "third party" means and includes any person or persons other than Plaintiffs or Defendants.

17. "Communication" means any oral, written, electronic, or other exchange of words, thoughts, information or ideas to another person or entity, whether in person, in a group, by telephone, by letter, by Telex, by facsimile, or by any other process, electric, electronic, otherwise. All such communications in writing shall include, without limitation, printed, typed, handwritten, or other readable documents, correspondence, memoranda, reports, contracts, drafts (both initial and subsequent), computer discs or transmissions, e-mails, instant messages, tape or video recordings, voicemails, diaries, log books, minutes, notes, studies, surveys and forecasts, and any and all copies thereof. The definition is not limited to transfers between persons, but also includes other transfers, such as records and memoranda to file; any written letter, memorandum, or other document that was sent by one or more individuals to another or others; any telephone call between one or more individuals and another or others, whether such call was by chance or prearranged or not, formal or informal; and any conversation or meeting between one or more individuals and another, whether such contact was by chance or prearranged or not, formal or informal.

18. "Document" and "documents" shall have the broadest possible meaning allowed by Rule 34(a) of the Federal Rules of Civil Procedure, and includes (without limitation) any writing

of any kind, including originals and all non-identical copies (whether different from the original by reason of any notation made on such copies or otherwise). The terms "document" and "document(s)" shall include electronically stored information ("ESI") and shall also include, without limitation, the following items, whether printed or reproduced by any process, or written or produced by hand or stored in computer memory, magnetic or hard disk or other data storage medium, and whether or not claimed to be privileged, confidential or otherwise excludable from discovery, namely, notes, letters, correspondence, communications, telegrams, memoranda, summaries or records of telephone conversations, summaries or records of personal conversations or meetings, diaries, reports, laboratory and research reports and notebooks, recorded experiments, charts, plans, drawings, diagrams, illustrations, requests for proposals, press releases, drafts of documents, and all other materials fixed in a tangible medium of whatever kind known to you or in your possession, custody, or control.

19. The terms "thing" and "things" mean and include any tangible item other than a Document, and includes objects of every kind and nature.

20. "Identify," "identity," or "identification" means:

a. when used with reference to a natural person, to state the person's full name, address, and telephone number, and state the person's present or last known position and employer.

b. when used with reference to any entity (including without limitation corporation, company, firm, partnership, joint venture, association, governmental body or agency, or persons other than a natural person), to state the full legal name of the entity, the place of incorporation or organization, the address and telephone

number of the principal place of business, and the nature of the business conducted by that entity.

c. when used with reference to any document or ESI, to summarize the substance of the document or ESI and state the document's or ESI's title, date, form (e.g., letter, memorandum, email, etc.), production number range, author(s), recipient(s), the present location of the document or ESI, and the name of its present custodian; if the document or ESI existed at one time but does not presently exist, the reason(s) why it no longer exists and the identity of the last person having custody of it; and, if the document or ESI is in a foreign language, whether an English translation of the document or ESI exists, whether partial or complete.

d. when used with reference to a tangible thing, to provide: (i) any model or catalogue number; (ii) any article or model name; (iii) any technical or promotional materials describing the article or its use; and (iv) the dates and locations of its production.

e. when used with reference to any communication, to (i) summarize the substance of the communication; (ii) state the date and place of the communication; (iii) identify each person who was present at, involved in, connected with or who participated in the communication; (iv) state the form of communication (e.g., telephone call, meeting, letter, etc.); and (v) identify each document and ESI memorializing or referring to the communication.

21. As used herein, the present tense includes the past and future tenses. The singular

includes the plural, and the plural includes the singular. "All" means "any and all," "any" means "any and all." "Including" means "including but not limited to." "And" and "or" encompass both "and" and "or." Words in the masculine, feminine, or neutral form shall include each of the other genders.

22. The terms "reflect," "reflecting," "relate to," "refer to," "relating to," and "referring to" shall mean relating to referring to, referencing, concerning, mentioning, reflecting, pertaining to, evidencing, involving, describing, discussing, commenting on, embodying, containing, comprising, consisting of, responding to, supporting, showing, summarizing, memorializing, contradicting, or constituting (in whole or in part), as the context makes appropriate, including having any legal, logical, or factual connection with the designated subject matter referred to in the interrogatory.

INSTRUCTIONS

1. These interrogatories are intended to elicit as much information as possible concerning the issues, and to the extent any interrogatory could be interpreted in more than one way, you should employ the interpretation of the interrogatory most likely to encompass and elicit the greatest amount of information possible.

2. These instructions and the definitions above should be construed to require answers based upon the knowledge of, and information available to, you as well as your agents, representatives, and attorneys.

3. These interrogatories are continuing in nature, so as to require that supplemental answers be served promptly if further or different information is obtained with respect to any interrogatory.

4. No part of an interrogatory should be left unanswered merely because an objection is interposed to another part of the interrogatory. If a partial or incomplete answer is provided, you shall state that the answer is partial or incomplete.

5. If, in responding to these interrogatories, you contend that an ambiguity exists with respect to construing an interrogatory or definition, your response shall set forth the matter deemed ambiguous and the construction used in responding.

6. Whenever in these interrogatories you are asked to identify information or a document which is deemed by you to be properly withheld from production:

a) If you are withholding information or documents under a claim of privilege not covered by the exemptions covered by the parties' agreement set forth in the Joint Proposed Discovery Plan (ECF No. 67), please provide the information set forth in

Federal Rule of Civil Procedure 26(b)(5), including:

1. The date of the privileged information;
2. The author(s) of the privileged information;
3. The recipient(s) of the privileged information;
4. The subject matter of the privileged information; and
5. The basis of the claim of privilege.

b) If production of any requested information or document(s) is objected to on the grounds that production is unduly burdensome, describe the burden or expense of the proposed discovery;

c) If you are withholding information or document(s) for any reason other than an objection that it is beyond the scope of discovery or that a request is unduly burdensome, please provide the reason for withholding the information or document, and the information requested in sections 6(a) above. Regardless of whether a protective order is entered by the Court, in all instances in which you are withholding documents or things on the ground of confidentiality, please so indicate in your responses.

7. If you elect to specify and produce business records in answer to any interrogatory, the specification shall be in sufficient detail to permit the Plaintiffs to locate and identify, as readily as you can, the business records from which the answer may be ascertained.

INTERROGATORIES

INTERROGATORY NO. 1

Identify by name, title, and rank all individuals who reviewed, contributed, or reached a determination regarding Plaintiff Nicholas Harrison's request for a medical waiver under AR 40-501 and/or DoDI 6130.03, and identify all Documents or Communications generated as part of that process.

INTERROGATORY NO. 2

Identify by name, title, and rank all individuals who reviewed, contributed, or reached a determination regarding Plaintiff Nicholas Harrison's request for an exception to the policy under AR 600-110 and/or DoDI 6485.01, and identify all Documents or Communications generated as part of that process.

INTERROGATORY NO. 3

Identify the three individuals who made the most substantive contributions to the preparation of the DoD 2018 Report to Congress, as well as any Documents considered by such persons.

INTERROGATORY NO. 4

Identify the three individuals who made the most substantive contributions to the creation, promulgation, reconsideration, and revision of DoDI 6130.03, Section 5.23 (Systemic Conditions) (a) and DoDI 6130.03, Section 5.23 (Systemic Conditions) (b), the role that each person identified played, as well as any Documents considered by such persons.

INTERROGATORY NO. 5

Identify the three individuals who made the most substantive contributions to the creation,

promulgation, reconsideration and revision of DoDI 6485.01, the role that each person identified played, as well as any Documents considered by such persons.

INTERROGATORY NO. 6

Identify the three individuals who made the most substantive contributions to the creation, promulgation, reconsideration, and revision of DoDI 6490.07, Enclosure 3 ("Medical Conditions Usually Precluding Contingency Deployment"), section (e) ("Infectious Diseases"), the role that each person identified played, as well as any Documents considered by such persons.

INTERROGATORY NO. 7

Identify the three individuals who made the most substantive contributions to the creation and promulgation of the DOGO Instruction (*i.e.*, DoDI 1332.45), the role that each person identified played, as well as any Documents considered by such persons.

INTERROGATORY NO. 8

Identify the three individuals who made the most substantive contributions to the creation and promulgation of the DOGO Policy, the role that each person identified played, as well as any Documents considered by such persons.

INTERROGATORY NO. 9

Identify the three individuals who made the most substantive contributions to the creation, promulgation, and reconsideration of AR 600-110, the role that each person identified played, as well as any Documents considered by such persons.

INTERROGATORY NO. 10

Identify the three individuals who made the most substantive contributions in the promulgation and reconsideration of AR 40-501, Section 2-30 ("Systemic diseases") (a) and AR

40-501, Section 3-7 ("Blood and blood-forming tissues diseases") (h), Section 4-5 ("Blood and blood-forming tissue diseases") (b), Section 4-33 ("Medical standards for ATC personnel") (8), Section 5–14 ("Medical fitness standards for deployment and certain geographical areas") (12) and (17), the role the persons identified played, as well as any Documents considered by such persons.

INTERROGATORY NO. 11

Identify the current members of the Accession Medical Standards Working Group and all Documents reviewed or relied upon, either directly or indirectly, by the Accession Medical Standards Working Group concerning DoD's medical accession standards for individuals living with HIV.

INTERROGATORY NO. 12

For each year since 2000, identify for each of the Military Services: (a) the total number of applicants for each of the Military Services on a yearly basis since 2000; (b) the number of applicants who did not meet the standards under DoDI 6130.03, segregated by the specific disqualifying conditions; and (c) the number of applicants who were granted medical waivers, segregated by the specific conditions for which waivers were granted.

INTERROGATORY NO. 13

For each year since 2000, identify for each branch of the Military Services: (a) the number of service members living with HIV; (b) the number of those individuals who were granted or denied a waiver for a regular deployment; the number of those individuals who were granted or denied a waiver for a contingency deployment; and (c) the number of those individuals who were involuntarily separated after a determination they were unfit for duty based primarily on their HIV-diagnosis.

INTERROGATORY NO. 14

Identify for each of the Military Services: (a) the number of service members living with deployment-limiting medical conditions, including but not limited to HIV, diabetes, hepatitis C, hypertension, and asthma, on a yearly basis since 2000, segregated by condition; (b) the number of those individuals who were granted or denied a waiver to deploy; and (c) the number of those individuals who were involuntarily separated after a determination they were unfit for further duty.

INTERROGATORY NO. 15

Identify for each of the Military Services: (a) the number of service members who received blood transfusions while deployed since 2000, broken down on a yearly basis; (b) the number of such transfusions that involved "fresh whole blood" collected from other service members (e.g., from a "walking blood bank" program); and (c) the number of such transfusions that involved blood that did not undergo rapid infectious disease testing.

INTERROGATORY NO. 16

Identify any individuals or groups of individuals who have been allowed to deploy even though they cannot donate blood (e.g., individuals who recently completed treatment for malaria; individuals who recently received tattoos in states that do not regulate tattoo facilities; sexually active gay or bisexual men).

INTERROGATORY NO. 17

Explain in detail each of the reasons underlying DoD's policies that, absent a medical waiver or exception to policy, prohibit HIV-positive persons from enlisting in the Military Services, being inducted into the Military Services, or being appointed as an officer in the Military Services as set forth in, *inter alia*, DoDI 6485.01 and DoDI 6130.03.

INTERROGATORY NO. 18

Explain in detail each of the reasons underlying DoD's policies that, absent a medical waiver or exception to policy, prohibit HIV-positive persons from deploying to regular operations or contingency operations areas, as set forth in, *inter alia*, DoDI 6480.07.

INTERROGATORY NO. 19

State all facts and identify any Documents that support your contention that "Defendants' policies are rationally related to their legitimate government interest in ensuring that every Service member is fit and capable of performing his or her job." Defs.' Answer at ¶3, ECF No. 62.

INTERROGATORY NO. 20

Identify all medical conditions other than HIV that require taking medication on a regular basis but do not inhibit or restrict a service member's ability to deploy.

INTERROGATORY NO. 21

Identify all medical conditions other than HIV that require medical monitoring through a visit with a healthcare provider one or more times a year but do not inhibit or restrict a service member's ability to deploy.

INTERROGATORY NO. 22

Identify all medical conditions other than HIV that require medical monitoring through blood testing one or more times a year but do not inhibit or restrict a service member's ability to deploy.

INTERROGATORY NO. 23

Identify any changes to any military regulations that were considered, implemented, or rejected based on the medical consensus that a person with well-controlled HIV has essentially no risk of transmitting HIV sexually.

Dated: November 16, 2018

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above document was served on this 16th day of November, 2018 to the following counsel of record via electronic mail.

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/s/ *Andrew R. Sommer*

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NICHOLAS HARRISON, *et al.*,	)	
	)	
Plaintiffs,	)	No. 1:18-cv-641-LMB-IDD
	)	
v.	)	
	)	
JAMES N. MATTIS, *et al.*,	)	
	)	
Defendants		

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANTS (NOS. 1-23)

Pursuant to Local Rule 26(C) and Federal Rule of Civil Procedure 33, Defendants, through undersigned counsel, provide the following objections to Plaintiffs' Interrogatories (Nos. 1-23). In presenting these objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Additionally, Defendants hereby reaffirm that the Administrative Procedure Act provides the proper vehicle for Plaintiffs' constitutional challenges to agency action, including agency policies, and therefore Plaintiffs' claims should be reviewed by the Court on an administrative record and discovery should not be permitted. *See* 5 U.S.C. § 706.

OBJECTIONS APPLICABLE TO PLAINTIFFS' INSTRUCTIONS THAT PLAINTIFFS STATE WILL APPLY TO EACH INTERROGATORY

1. Defendants object to Plaintiffs' interrogatories to the extent they seek information protected by the attorney-client privilege, the attorney work-product privilege, or the deliberative process privilege.

2. Defendants object to Plaintiffs' Definition No. 3 to the extent it seeks information in the custody of the U.S. Navy, U.S. Marine Corps, U.S. Air Force, or U.S. Coast Guard. Plaintiff Harrison, who is a soldier in the U.S. Army, is the only Plaintiff to have alleged an injury in this case, which stems only from application of Department of Defense Instruction ("DoDI") 6485.01 § 3(a) to the commissioning of Service members who are HIV positive. *See* Defs.' Opp. to Pls.' Mot. For Prelim. Inj. and Mem. in Supp. of Mot. to Dismiss at 20-21, ECF No. 43. Information in the custody and control of Military Departments to which Plaintiff Harrison does not belong have no bearing on this case and responding to requests for that information would impose a significant burden on these Military Departments.

3. Defendants object to Plaintiffs' Definition No. 4 to the extent it seeks information in the custody of the U.S. Navy, U.S. Marine Corps, U.S. Air Force, or U.S. Coast Guard. Plaintiff Harrison, who is a soldier in the U.S. Army, is the only Plaintiff to have alleged an injury in this case, which stems only from application of Department of Defense Instruction ("DoDI") 6485.01 § 3(a)to the commissioning of Service members who are HIV positive. *See* Defs.' Opp. to Pls.' Mot. For Prelim. Inj. and Mem. in Supp. of Mot. to Dismiss at 20-21, ECF No. 43. Information in the custody and control of Military Departments to which Plaintiff Harrison does not belong have no bearing on this case and

responding to requests for that information would impose a significant burden on these Military Departments.

4. Defendants object to Definition No. 10 to the extent it seeks drafts or any other information or documents that are protected by the deliberative process privilege, as is inherent in the phrase "prior versions or amendments thereof." Defendants further object to Definition 10 to the extent it seeks versions of policy documents that have been superseded and therefore have no bearing on the claims in this case.

5. Defendants object to Definition No. 11 to the extent it seeks drafts or any other information or documents that are protected by the deliberative process privilege, as is inherent in the phrase "prior versions or amendments thereof." Defendants further object to Definition 11 to the extent it seeks versions of policy documents that have been superseded and therefore have no bearing on the claims in this case.

6. Defendants object to Definition No. 12 to the extent it seeks drafts or any other information or documents that are protected by the deliberative process privilege, as is inherent in the phrase "prior versions or amendments thereof." Defendants further object to Definition 12 to the extent it seeks versions of policy documents that have been superseded and therefore have no bearing on the claims in this case.

7. Defendants object to Definition No. 13 to the extent it seeks drafts or any other information or documents that are protected by the deliberative process privilege, as is inherent in the phrase "prior versions or amendments thereof." Defendants further object to Definition 13 to the extent it seeks versions of policy documents that have been superseded and therefore have no bearing on the claims in this case.

8. Defendants object to Definition No. 14 to the extent it seeks drafts or any other information or documents that are protected by the deliberative process privilege, as is inherent in the phrase "prior versions or amendments thereof." Defendants further object to Definition 14 to the extent it seeks versions of policy documents that have been superseded and therefore have no bearing on the claims in this case.

9. Defendants object to Definition No. 17 to the extent it seeks information that is protected by the deliberative process privilege, as is inherent in the inclusion of "thoughts," "ideas," "drafts," "notes," "memoranda to file," and "any conversation or meeting between one or more individuals and another, whether such contact was by chance or prearranged or not, formal or informal." Defendants also object to this definition on the ground that the category of information it seeks is overly broad and unduly burdensome given the size of the organizations identified by Plaintiffs and the time period encompassed by the interrogatories.

10. Defendants object to Definition No. 20, including its five subparts, to the extent it seeks to require Defendants to create or otherwise produce documents not already in existence. *See* Fed. R. Civ. P. 34.

11. Defendants object to Definition No. 22 to the extent it seeks information that is protected by the deliberative process privilege, as is inherent in "reflecting," "discussing," "commenting on," and "memorializing."

OBJECTIONS TO SPECIFIC INTERROGATORIES

INTERROGATORY NO. 1

Identify by name, title, and rank all individuals who reviewed, contributed, or reached a determination regarding Plaintiff Nicholas Harrison's request for a medical

waiver under AR 40-501 and/or DoDI 6130.03, and identify all Documents or Communications generated as part of that process.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who "reviewed, contributed, or reached a determination regarding" Plaintiff Harrison's request for a medical waiver and identification of all documents and communications generated by that process. Thus, this interrogatory contains at least two distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith v. Café Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009) (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.").

Furthermore, because the answer to this interrogatory can be derived from documents that Defendants have produced or will produce to Plaintiffs, the burden of deriving or ascertaining the answer is substantially the same for both parties and the Plaintiffs cannot shift the cost of doing so to the Defendants. *See* Fed. R. Civ. P. 33(d).

Defendants further object to this interrogatory's use of the term "medical waiver" as vague and ambiguous.

INTERROGATORY NO. 2

Identify by name, title, and rank all individuals who reviewed, contributed, or reached a determination regarding Plaintiff Nicholas Harrison's request for an exception to the policy under AR 600-110 and/or DoDI 6485.01, and identify all Documents or Communications generated as part of that process.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who "reviewed, contributed, or reached a determination regarding" Plaintiff Harrison's request for an exception to the policy and identification of all documents and communications generated by that process. Thus, this interrogatory contains at least two distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 ("each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.").

Defendants further object to this interrogatory's use of the term "request for an exception to the policy" as vague and ambiguous. Plaintiff Harrison made several separate requests and this interrogatory does not specify to which request it refers. Moreover, if this interrogatory refers to more than one request for an exception, it contains additional discrete subparts and Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1), as described above. Defendants also object to this interrogatory on the basis that that the phrase "reviewed, contributed, or reached a determination" is vague, ambiguous, and unduly burdensome.

Furthermore, because the answer to this interrogatory can be derived from documents that Defendants have produced or will produce to Plaintiffs, the burden of deriving or ascertaining the answer is substantially the same for both parties and the Plaintiffs cannot shift the cost of doing so to the Defendants. *See* Fed. R. Civ. P. 33(d).

INTERROGATORY NO. 3

Identify the three individuals who made the most substantive contributions to the preparation of the DoD 2018 Report to Congress, as well as any Documents considered by such persons.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who contributed to the preparation of the DoD 2018 Report to Congress and identification of any documents considered by those individuals. Thus, this interrogatory contains at least two distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 ("each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.").

Defendants further object to this interrogatory on the basis that it is overly broad and unduly burdensome as to "any Documents considered by such persons" and therefore does not seek information that is both (1) relevant to any party's claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Plaintiffs' interrogatory does not limit its request for documents to any specified time period or to any particular matter involving the individuals to be identified and therefore is not limited to relevant documents or proportional to the needs of the case.

Additionally, Defendants object to this interrogatory on the basis that the phrase "most substantive contribution" is not defined by the interrogatories and is vague and ambiguous.

INTERROGATORY NO. 4

Identify the three individuals who made the most substantive contributions to the creation, promulgation, reconsideration, and revision of DoDI 6130.03, Section 5.23 (Systemic Conditions) (a) and DoDI 6130.03, Section 5.23 (Systemic Conditions) (b), the role that each person identified played, as well as any Documents considered by such persons.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of the individuals who contributed to the "creation, promulgation, reconsideration, and revision" of both DoDI 6130.03, Section 5.23(a) and DoDI 6130.03, Section 5.23(b). *See Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 572-73 (D. Md. 2010) ("[D]iscrete or separate questions should be counted as separate interrogatories notwithstanding they…may be related." (omission in

original) (quoting *Kendall v. GES Expositions Servs.*, 174 F.R.D. 684, 685-86 (D. Nev. 1997)). Additionally, Plaintiffs request identification of both the individuals who participated in the creation, promulgation, reconsideration, and revision of both DoDI 6130.03, Section 5.23(a) and DoDI 6130.03, Section 5.23(b) and identification of any documents considered by those individuals. Thus, this interrogatory contains at least four distinct subparts per version of each regulation, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 ("each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.").

Defendants further object to this interrogatory on the basis that it is overly broad and unduly burdensome as to "any Documents considered by such persons" and therefore does not seek information that is both (1) relevant to any party's claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Plaintiffs' interrogatory does not limit its request for documents to any specified time period or to any particular matter involving the individuals to be identified and therefore is not limited to relevant documents or proportional to the needs of the case.

Additionally, Defendants object to this interrogatory on the basis that the phrase "most substantive contribution" is not defined by the interrogatories and is vague and ambiguous.

INTERROGATORY NO. 5

Identify the three individuals who made the most substantive contributions to the creation, promulgation, reconsideration and revision of DoDI 6485.01, the role that each person identified played, as well as any Documents considered by such persons.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who contributed to the "creation, promulgation, reconsideration, and revision of DoDI 6485.01," and identification of any documents considered by those individuals. Thus, this interrogatory contains at least two distinct subparts per version of this regulation, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 ("each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.").

Defendants further object to this interrogatory on the basis that it is overly broad and unduly burdensome as to "any Documents considered by such persons" and therefore does not seek information that is both (1) relevant to any party's claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1).

Plaintiffs' interrogatory does not limit its request for documents to any specified time period or to any particular matter involving the individuals to be identified and therefore is not limited to relevant documents or proportional to the needs of the case.

Additionally, Defendants object to this interrogatory on the basis that the phrase "most substantive contribution" is not defined by the interrogatories and is vague and ambiguous.

INTERROGATORY NO. 6

Identify the three individuals who made the most substantive contributions to the creation, promulgation, reconsideration, and revision of DoDI 6490.07, Enclosure 3 ("Medical Conditions Usually Precluding Contingency Deployment"), section (e) ("Infectious Diseases"), the role that each person identified played, as well as any Documents considered by such persons.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories,

inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who contributed to the "creation, promulgation, reconsideration, and revision" of DoDI 6490.07, Enclosure 3, section (e), and identification of any documents considered by those individuals. Thus, this interrogatory contains at least two distinct subparts per version of this regulation, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 ("each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.").

Defendants further object to this interrogatory on the basis that it is overly broad and unduly burdensome as to "any Documents considered by such persons" and therefore does not seek information that is both (1) relevant to any party's claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Plaintiffs' interrogatory does not limit its request for documents to any specified time period or to any particular matter involving the individuals to be identified and therefore is not limited to relevant documents or proportional to the needs of the case.

Additionally, Defendants object to this interrogatory on the basis that the phrase "most substantive contribution" is not defined by the interrogatories and is vague and ambiguous.

INTERROGATORY NO. 7

Identify the three individuals who made the most substantive contributions to the creation and promulgation of the DOGO Instruction (*i.e.*, DoDI 1332.45), the role that each person identified played, as well as any Documents considered by such persons.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who contributed to the "creation and promulgation of the DOGO Instruction (*i.e.*, DoDI 1332.45)," and identification of any documents considered by those individuals. Thus, this interrogatory contains at least two distinct subparts per version of this regulation, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 ("each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.").

Defendants further object to this interrogatory on the basis that it is overly broad and unduly burdensome as to "any Documents considered by such persons" and therefore does not seek information that is both (1) relevant to any party's claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1).

Plaintiffs' interrogatory does not limit its request for documents to any specified time period or to any particular matter involving the individuals to be identified and therefore is not limited to relevant documents or proportional to the needs of the case.

Additionally, Defendants object to this interrogatory on the basis that the phrase "most substantive contribution" is not defined by the interrogatories and is vague and ambiguous.

INTERROGATORY NO. 8

Identify the three individuals who made the most substantive contributions to the creation and promulgation of the DOGO Policy, the role that each person identified played, as well as any Documents considered by such persons.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who

contributed to the "creation and promulgation of the DOGO Policy," and identification of any documents considered by those individuals. Thus, this interrogatory contains at least two distinct subparts per version of this regulation, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 ("each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.").

Defendants further object to this interrogatory on the basis that it is overly broad and unduly burdensome as to "any Documents considered by such persons" and therefore does not seek information that is both (1) relevant to any party's claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Plaintiffs' interrogatory does not limit its request for documents to any specified time period or to any particular matter involving the individuals to be identified and therefore is not limited to relevant documents or proportional to the needs of the case.

Additionally, Defendants object to this interrogatory on the basis that the phrase "most substantive contribution" is not defined by the interrogatories and is vague and ambiguous.

INTERROGATORY NO. 9

Identify the three individuals who made the most substantive contributions to the creation, promulgation, and reconsideration of AR 600-110, the role that each person identified played, as well as any Documents considered by such persons.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however,

that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who contributed to the "creation, promulgation, and reconsideration of AR 600-110," and identification of any documents considered by those individuals. Thus, this interrogatory contains at least two distinct subparts per version of this regulation, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 ("each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.").

Defendants further object to this interrogatory on the basis that it is overly broad and unduly burdensome as to "any Documents considered by such persons" and therefore does not seek information that is both (1) relevant to any party's claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Plaintiffs' interrogatory does not limit its request for documents to any specified time period or to any particular matter involving the individuals to be identified and therefore is not limited to relevant documents or proportional to the needs of the case.

Additionally, Defendants object to this interrogatory on the basis that the phrase "most substantive contribution" is not defined by the interrogatories and is vague and ambiguous.

INTERROGATORY NO. 10

Identify the three individuals who made the most substantive contributions in the promulgation and reconsideration of AR 40-501, Section 2-30 ("Systemic diseases") (a) and AR 40-501, Section 3-7 ("Blood and blood-forming tissues diseases") (h), Section 4-5 ("Blood and blood-forming tissue diseases") (b), Section 4-33 ("Medical standards for ATC personnel") (8), Section 5–14 ("Medical fitness standards for deployment and certain geographical areas") (12) and (17), the role the persons identified played, as well as any Documents considered by such persons.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure

33(a)(1). Specifically, Plaintiffs request identification of the individuals who contributed to the "promulgation and reconsideration" of AR 40-501, Section 2-30(a), AR 40-501, Section 3-7(h), AR 40-501, Section 4-5(b), AR 40-501, Section 4-33(8), AR 40-501, Section 5-14(12), and AR 40-501, Section 5-14(17). *See Mezu*, 269 F.R.D. at 572-73 ("[D]iscrete or separate questions should be counted as separate interrogatories notwithstanding they…may be related."). Additionally, Plaintiffs request identification of both the individuals who participated in the promulgation and reconsideration of these various sections and identification of any documents considered by those individuals. Thus, this interrogatory contains at least two distinct subparts per version of each of these six regulations, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 ("each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.").

Defendants further object to this interrogatory on the basis that it is overly broad and unduly burdensome as to "any Documents considered by such persons" and therefore does not seek information that is both (1) relevant to any party's claim or defense and (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Plaintiffs' interrogatory does not limit its request for documents to any specified time period or to any particular matter involving the individuals to be identified and therefore is not limited to relevant documents or proportional to the needs of the case.

Additionally, Defendants object to this interrogatory on the basis that the phrase "most substantive contribution" is not defined by the interrogatories and is vague and ambiguous.

INTERROGATORY NO. 11

Identify the current members of the Accession Medical Standards Working Group and all Documents reviewed or relied upon, either directly or indirectly, by the Accession Medical Standards Working Group concerning DoD's medical accession standards for individuals living with HIV.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the individuals who are current members of the Accession Medical Standards Working Group and identification of "all Documents reviewed or relied upon, either directly or indirectly" by the Working Group concerning "medical accession standards for individuals living with HIV." Thus, this interrogatory contains at least two distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 ("each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.").

Defendants further object to this interrogatory the extent it seeks information that the Working Group "reviewed but did not rely on concerning DoD's medical accession standards for individuals living with HIV because such information is not (1) relevant to any party's claim or defense or (2) proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Additionally, the phrase "reviewed or relied upon…indirectly" is problematic to the extent that it could be construed to apply to documents with mere peripheral connections to the claims and defenses of this case, and identifying all such documents would be excessively burdensome and disproportionate to the needs of the case.

Defendants further object to this interrogatory's use of "individuals living with HIV" because that phrase is vague and inconsistent with the applicable regulations, which apply once there laboratory evidence of HIV infection. Defendants also object to this interrogatory because "DoD's medical accession standards" is vague and ambiguous.

INTERROGATORY NO. 12

For each year since 2000, identify for each of the Military Services: (a) the total number of applicants for each of the Military Services on a yearly basis since 2000; (b) the number of applicants who did not meet the standards under DoDI 6130.03, segregated by the specific disqualifying conditions; and (c) the number of applicants who were granted medical waivers, segregated by the specific conditions for which waivers were granted.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however,

that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of three separate and independent categories of application information for each of the five Military Services defined by their First Set of Interrogatories for each of the preceding 18 years. Thus, this interrogatory contains at least 15 distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories. *See Mezu*, 269 F.R.D. at 572-73 ("[D]iscrete or separate questions should be counted as separate interrogatories notwithstanding they…may be related.").

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, Plaintiff Harrison is the only individual alleged to have been injured by Defendants' regulations and policies, and he is subject to those regulations and policies only as a member of the United States Army. Plaintiff OutServe-SLDN has not alleged any injuries to its own interests. Requests for this substantial amount of information are neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1). Furthermore, Plaintiffs request for records spanning 18 years of operations across all Military Services is neither relevant to any claims or defenses nor proportional to the needs of the case.

Defendants further object to this interrogatory to the extent it seeks information regarding individuals other than Plaintiff Harrison that is covered by the Privacy Act, 5 U.S.C. § 552(a), or by other medical privacy laws such as HIPAA, P.L. 104-191, 100 Stat. 2548.

INTERROGATORY NO. 13

For each year since 2000, identify for each branch of the Military Services: (a) the number of service members living with HIV; (b) the number of those individuals who were granted or denied a waiver for a regular deployment; the number of those individuals who were granted or denied a waiver for a contingency deployment; and (c) the number of those individuals who were involuntarily separated after a determination they were unfit for duty based primarily on their HIV-diagnosis.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of four separate and independent categories of information, including HIV status of service members, the status of those members' waivers for regular deployment, the status of those members' waivers for

contingency deployment, and those members' involuntary separation records based on HIV diagnosis, for each of the five Military Services defined by Plaintiffs' First Set of Interrogatories for each of the preceding 18 years. Thus, this interrogatory contains at least 20 distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories. *See Mezu*, 269 F.R.D. at 572-73 ("[D]iscrete or separate questions should be counted as separate interrogatories notwithstanding they…may be related.").

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, Plaintiff Harrison is the only individual alleged to have been injured by Defendants' regulations and policies, and he is subject to those regulations and policies only as a member of the United States Army. Plaintiff OutServe-SLDN has not alleged any injuries to its own interests. Requests for this substantial amount of information are neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1). Furthermore, Plaintiffs request for records spanning 18 years of operations across all Military Services is neither relevant to any claims or defenses nor proportional to the needs of the case.

Defendants further object to this interrogatory to the extent it seeks information regarding individuals other than Plaintiff Harrison that is covered by the Privacy Act, 5 U.S.C. § 552(a), or by other medical privacy laws such as HIPAA, P.L. 104-191, 100 Stat. 2548.

Defendants further object to this interrogatory's use of "individuals living with HIV" because that phrase is vague and inconsistent with the applicable regulations, which apply once there laboratory evidence of HIV infection. Defendants also object to

this interrogatory's use of "regular deployment" and "contingency deployment" which are vague and ambiguous.

INTERROGATORY NO. 14

Identify for each of the Military Services: (a) the number of service members living with deployment-limiting medical conditions, including but not limited to HIV, diabetes, hepatitis C, hypertension, and asthma, on a yearly basis since 2000, segregated by condition; (b) the number of those individuals who were granted or denied a waiver to deploy; and (c) the number of those individuals who were involuntarily separated after a determination they were unfit for further duty.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of three separate and independent categories of information including, medical condition status of service members, deployment waiver status of those service members, and those members' involuntary separation records, for each of at least five conditions, for each of the five Military Services defined by Plaintiffs' First Set of Interrogatories, for each of the preceding 18

years. Thus, this interrogatory contains at least 75 distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories. *See Mezu*, 269 F.R.D. at 572-73 ("[D]iscrete or separate questions should be counted as separate interrogatories notwithstanding they…may be related.").

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, Plaintiff Harrison is the only individual alleged to have been injured by Defendants' regulations and policies, and he is subject to those regulations and policies only as a member of the United States Army. Plaintiff OutServe-SLDN has not alleged any injuries to its own interests. Requests for this substantial amount of information are neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1). Furthermore, Plaintiffs request for records spanning 18 years of operations across all Military Services is neither relevant to any claims or defenses nor proportional to the needs of the case. Additionally, Plaintiff's request for involuntary separation records for individuals with deployment-limiting medical conditions encompasses determinations that those members were "unfit for further duty" for any reason. This information is not relevant to any party's claims or defenses nor proportional to the needs of this case.

Defendants further object to this interrogatory to the extent it seeks information regarding individuals other than Plaintiff Harrison that is covered by the Privacy Act, 5 U.S.C. § 552(a), or by other medical privacy laws such as HIPAA, P.L. 104-191, 100 Stat. 2548.

Defendants further object to this interrogatory's use of "waiver to deploy" as vague and ambiguous.

INTERROGATORY NO. 15

Identify for each of the Military Services: (a) the number of service members who received blood transfusions while deployed since 2000, broken down on a yearly basis; (b) the number of such transfusions that involved "fresh whole blood" collected from other service members (e.g., from a "walking blood bank" program); and (c) the number of such transfusions that involved blood that did not undergo rapid infectious disease testing.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of three separate and independent categories of blood transfusion information for each of the five Military Services defined by their First Set of Interrogatories for each of the preceding 18 years. Thus, this interrogatory contains at least 15 distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories. *See Mezu*, 269 F.R.D. at 572-73 ("[D]iscrete or separate

questions should be counted as separate interrogatories notwithstanding they…may be related.").

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, Plaintiff Harrison is the only individual alleged to have been injured by Defendants' regulations and policies, and he is subject to those regulations and policies only as a member of the United States Army. Plaintiff OutServe-SLDN has not alleged any injuries to its own interests. Requests for this substantial amount of information from the other four services identified is neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1). Furthermore, Plaintiffs request for records spanning 18 years of operations across all Military Services is neither relevant to any claims or defenses nor proportional to the needs of the case.

Defendants further object to this interrogatory to the extent it seeks information regarding individuals other than Plaintiff Harrison that is covered by the Privacy Act, 5 U.S.C. § 552(a), or by other medical privacy laws such as HIPAA, P.L. 104-191, 100 Stat. 2548.

Defendants further object to this interrogatory's use of "while deployed" as vague and ambiguous.

INTERROGATORY NO. 16

Identify any individuals or groups of individuals who have been allowed to deploy even though they cannot donate blood (e.g., individuals who recently completed treatment for malaria; individuals who recently received tattoos in states that do not regulate tattoo facilities; sexually active gay or bisexual men).

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. This interrogatory places no time limits whatsoever on the information it seeks and therefore calls for a substantial amount of information that is neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1). Additionally, this interrogatory places no limits whatsoever on the deploying agency or type of deployment, and therefore calls for a substantial amount of information that is neither relevant to any party's claims or defenses nor proportional to the needs of this case.

Defendants further object to this interrogatory to the extent it seeks information regarding individuals other than Plaintiff Harrison that is covered by the Privacy Act, 5 U.S.C. § 552(a), or by other medical privacy laws such as HIPAA, P.L. 104-191, 100 Stat. 2548.

Defendants further object to this interrogatory on the ground that Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1).

INTERROGATORY NO. 17

Explain in detail each of the reasons underlying DoD's policies that, absent a medical waiver or exception to policy, prohibit HIV-positive persons from enlisting in the Military Services, being inducted into the Military Services, or being appointed as an officer in the Military Services as set forth in, *inter alia*, DoDI 6485.01 and DoDI 6130.03.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, the only injury alleged by Plaintiffs in this case is that of Plaintiff Harrison, who was precluded from becoming a commissioned officer in the Army, not from enlisting or being inducted into the Army or any of the other Military Services identified by Plaintiffs in their First Set of Interrogatories. Requests for this substantial amount of unrelated information from the Army and the other four services identified are neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1).

Defendants further object to this interrogatory's use of "HIV-positive persons" because that phrase is vague and inconsistent with the applicable regulations, which apply once there laboratory evidence of HIV infection. Defendants also object to this interrogatory because its use of "DoD's policies" and "*inter alia*" are vague, undefined, overly broad and unduly burdensome.

Defendants further object to this interrogatory on the ground that Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request a detailed explanation of the reasons underlying each version of an undefined number of DoD policies. Thus, this interrogatory contains an unknown number of distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories.

INTERROGATORY NO. 18

Explain in detail each of the reasons underlying DoD's policies that, absent a medical waiver or exception to policy, prohibit HIV-positive persons from deploying to regular operations or contingency operations areas, as set forth in, *inter alia*, DoDI 6480.07.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants object to this interrogatory's use of "regular deployment" and "contingency deployment" which are vague and ambiguous. Defendants further object to this interrogatory's use of "HIV-positive persons" because that phrase is vague and undefined. Defendants also object to this interrogatory because "DoD's policies" and "*inter alia*" are vague and ambiguous, and also because those phrases are overly broad and unduly burdensome.

Defendants further object to this interrogatory on the ground that Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request a detailed explanation of the reasons underlying each version of an undefined number of DoD policies. Thus, this interrogatory contains an unknown number of policies with an unknown number of distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories.

INTERROGATORY NO. 19

State all facts and identify any Documents that support your contention that "Defendants' policies are rationally related to their legitimate government interest in ensuring that every Service member is fit and capable of performing his or her job." Defs.' Answer at ¶3, ECF No. 62.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on

an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery. Defendants expect to receive further documents through discovery that will concern and provide responsive information. Because Fed. R. Civ. P. 26 imposes a duty of supplementation, complying with such interrogatories would require defendants to continually supplement their responses each time they receive an additional document or information concerning the subject or contention on which the interrogatory seeks information. Doing so would cause defendants to suffer unnecessary burden and expense and would not serve to narrow the issues that are in dispute. Accordingly, Defendants will provide a response encompassing the current state of their knowledge, belief, and understanding, but reserve the right to supplement their interrogatory response pursuant to Fed. R. Civ. P. 26 at the conclusion of discovery, both as to the merits of this action and with respect to experts designated to testify at trial.

Defendants further object to this interrogatory to the extent that it is properly the subject of expert testimony. Defendants will disclose and permit discovery in connection with the opinions of the experts that they intend to call at trial only as required by the schedule established by the Court and in accordance with Rule 26 of the Federal Rules of Civil Procedure.

Defendants also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs request identification of both the facts in support of Defendants' response in paragraph 3 of their answer, and identification of any documents in support of that response. Thus, this interrogatory contains at least two distinct subparts, and Plaintiffs have served more than the allowed 30 interrogatories. *See Smith*, 256 F.R.D at 254 ("each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories.").

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, Plaintiffs' interrogatory does not limit its request to any particular policies of the defendant, whereas the Plaintiffs' statement to which the Defendants were responding in ¶ 3 of their answer is limited to DoD and the Army's "bar to enlistment and appointment of people living with HIV, as well as the restrictions on deployment." Compl. ¶ 3, (ECF No.1). Therefore this interrogatory requests information that is neither relevant to the claims or defenses of either party nor proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1).

INTERROGATORY NO. 20

Identify all medical conditions other than HIV that require taking medication on a regular basis but do not inhibit or restrict a service member's ability to deploy.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on

an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, the only injury alleged by Plaintiffs in this case is that of Plaintiff Harrison, who is subject only to deployment restrictions applicable to members of the United States Army. Requests for this information from the other four services identified are neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1). Furthermore, because the answer to this interrogatory can be derived from publicly available regulations and policies, or documents that Defendants have produced or will produce to Plaintiffs, the burden of deriving or ascertaining the answer is substantially the same for both parties and the Plaintiffs cannot shift the cost of doing so to the Defendants. *See* Fed. R. Civ. P. 33(d).

Defendants further object to this interrogatory on the ground that Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1).

Defendants further object to this interrogatory on the ground that the terms "regular basis," "inhibit or restrict," and "ability to deploy" are undefined, vague, ambiguous, overly broad, and unduly burdensome.

INTERROGATORY NO. 21

Identify all medical conditions other than HIV that require medical monitoring through a visit with a healthcare provider one or more times a year but do not inhibit or restrict a service member's ability to deploy.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, the only injury alleged by Plaintiffs in this case is that of Plaintiff Harrison, who is subject only to deployment restrictions applicable to members of the United States Army. Requests for this information from the other four services identified are neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1). Furthermore, because the answer to this interrogatory can be derived from publicly

available regulations and policies, or documents that Defendants have produced or will produce to Plaintiffs, the burden of deriving or ascertaining the answer is substantially the same for both parties and the Plaintiffs cannot shift the cost of doing so to the Defendants. *See* Fed. R. Civ. P. 33(d).

Defendants further object to this interrogatory on the ground that Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1).

INTERROGATORY NO. 22

Identify all medical conditions other than HIV that require medical monitoring through blood testing one or more times a year but do not inhibit or restrict a service member's ability to deploy.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

To the extent it could be construed as a contention interrogatory, pursuant to Fed. R. Civ. P. 33(a)(2), defendants object to this interrogatory on the grounds that it is premature in light of the present stage of discovery.

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. Specifically, the only injury alleged by Plaintiffs in this case is that of Plaintiff Harrison, who is subject only to

deployment restrictions applicable to members of the United States Army. Requests for this information from the other four services identified are neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1). Furthermore, because the answer to this interrogatory can be derived from publicly available regulations and policies, or documents that Defendants have produced or will produce to Plaintiffs, the burden of deriving or ascertaining the answer is substantially the same for both parties and the Plaintiffs cannot shift the cost of doing so to the Defendants. *See* Fed. R. Civ. P. 33(d).

Defendants further object to this interrogatory on the ground that Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1).

INTERROGATORY NO. 23

Identify any changes to any military regulations that were considered, implemented, or rejected based on the medical consensus that a person with well-controlled HIV has essentially no risk of transmitting HIV sexually.

OBJECTIONS: Defendants object to this interrogatory on the basis that it is overly broad and unduly burdensome because Plaintiffs' claims should properly be reviewed on an administrative record and discovery should not be permitted. Recognizing, however, that discovery has been ordered in this case, *see* Scheduling Order (ECF No. 68), Defendants object to the extent this interrogatory seeks information that is protected by the attorney-client privilege, attorney work product, and/or deliberative process privilege.

Defendants further object to this interrogatory on the ground that "any changes to any military regulations" and "considered" are vague, overly broad, and unduly

burdensome. Consequently this interrogatory seeks information that is neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1).

Defendants further object to this interrogatory on the ground that Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1).

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of this case. This interrogatory places no time limits whatsoever on the information it seeks and therefore calls for a substantial amount of information that is neither relevant to any party's claims or defenses nor proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1). Defendants object to this interrogatory on the basis that the phrase "any changes" is vague, undefined, and is not limited to information that is relevant to any party's claims or defenses. Defendants further object to this interrogatory on the basis that the phrase "military regulation" is vague, undefined, and overly broad. Defendants object to this interrogatory on the basis that the phrase "considered, implemented, or rejected" is overly broad and unduly burdensome, and because that phrase is directed to information that is protected from disclosure by the deliberative process privilege. Defendants object to this interrogatory on the basis that the phrase "medical consensus" is vague, ambiguous, and undefined by Plaintiffs. Defendants object further to this interrogatory on the basis that the phrase "well-controlled" is vague, ambiguous, and undefined by Plaintiffs.

DATE: December 3, 2018

Respectfully submitted,

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s/ Robert M. Norway
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Counsel for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above document was served on December 3, 2018, to the following counsel of record via electronic mail:

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/s/ Robert M. Norway

Exhibit C

From: Frelinghuysen, Cyrus T.
Sent: Wednesday, December 05, 2018 6:51 PM
To: Norway, Robert M. (CIV); Harding, John
Cc: Sommer, Andrew R.; Hemmings, Allie; Scott Schoettes; peterp@outserve.org; Anthony Pinggera; Swinton, Nathan M. (CIV); McCotter, Trent (USAVAE)
Subject: RE: Harrison v. Mattis - Letter re Defendants' Document Production and Privilege Log
Attachments: 2018.12.05 Letter re Defs Doc Prod and Priv Log.pdf

Rob, Nate, and Trent,

Please see the attached letter and let us know if you're available to meet and confer tomorrow at 2 pm ET.

We would also like to discuss Defendants' objections to Plaintiffs' First Set of Interrogatories that were served on Monday.

Thanks,
Cyrus

Cyrus T. Frelinghuysen
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From: Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>
Sent: Monday, December 3, 2018 8:14 PM
To: Harding, John <JWHarding@winston.com>
Cc: Sommer, Andrew R. <ASommer@winston.com>; Frelinghuysen, Cyrus T. <CFrelinghuysen@winston.com>; Hemmings, Allie <AHemmings@winston.com>; Scott Schoettes <sschoettes@lambdalegal.org>; peterp@outserve.org; Anthony Pinggera <anthony.pinggera@lambdalegal.org>; Swinton, Nathan M. (CIV) <Nathan.M.Swinton@usdoj.gov>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>
Subject: Harrison v. Mattis

John,

Attached please find Defendants' objections to Plaintiffs' first set of interrogatories to Defendants (Nos. 1-23).

Best,
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VIA EMAIL

December 5, 2018

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Re: *Harrison et al. v. Mattis et al.*, Civil Action No. 1:18-CV-00641

Rob, Nate, & Trent,

We write regarding certain issues related to Defendants' first production of documents that we received on Monday, November 26, 2018, and Defendants' privilege log that we received on Friday, November 30, 2018.

I. Defendants' Document Production

Defendants' first production of document consisted of 379 documents bearing Bates numbers US00000001-US00001966. At least 47 of these documents indicate "File Unreadable / Technical Issue." A full listing of such files appears at the end of this letter. The file names suggest these documents are relevant and should be produced. For example, the file with Bates number US00001173 has "FW_Policy Update IAW HIV ALARACT (UNCLASSIFIED).pdf" as its file name. Please investigate and resolve whatever technical issue(s) prevented the production of these files and produce them to us.

In addition, multiple documents indicate "Document Is Not Responsive." These include at least the following documents:

Bates Number	File Name
US00001165	AR 600-110 revision.msg
US00001327	RAR[1] AR 600-110.msg
US00001586	AR 600-110 RAR 2013.msg
US00001858	Warning.txt
US00001862	Warning.txt
US00001865	Warning.txt

Again, based on certain of the file names, at least some of these files appear to be responsive. For example, US00001165 indicates the file name is "AR 600-110 revision.msg." The subject of revisions to AR 600-110 falls squarely within the scope of discovery in this case. Please therefore confirm you will produce these files. Moreover, going forward, to the extent Defendants determine to withhold documents on the basis of alleged lack of responsiveness, please ensure that the Defendants do so taking into account the Court's ruling on Plaintiffs' motion to compel, which ordered production of documents related to the prior versions and revisions to the regulations at issue.

Based on the Court's ruling last Friday, November 30, 2018 (ECF No. 81), please confirm Defendants will supplement their Responses to Plaintiffs' First Set of Requests for Production of Documents and Things (Nos. 1-15) and will continue to produce documents on a rolling basis prior to the December 28, 2018, deadline for compliance set by the Court.

II. Defendants' Privilege Log

There is also at least one issue with Defendants' privilege log that must be addressed. As indicated in my November 28, 2018, letter, the Defendants' withholding of documents based solely on a claim of deliberative process privilege is improper. At least some of the entries on Defendants' log indicate documents were withheld entirely on the basis of this privilege. *See, e.g.*, US00001169 and US00001905-1907. However, that privilege does not apply in cases involving claims where the government's intent is at issue, as here. The government's attempt to invoke the privilege in similar types of cases has been rejected. *See Stone v. Trump*, No. CV GLR-17-2459, 2018 WL 3866676, at *3 (D. Md. Aug. 14, 2018) (ordering production of documents withheld on the grounds of the deliberative process privilege and explaining because the "compelled documents [are] likely to contain evidence reflecting Defendants' intent. [And] Defendants' intent—whether it was for military purposes or whether it was purely for political and discriminatory purposes—is at the very heart of this litigation."). Please confirm that you

[1] We understand that "RAR" refers to Rapid Action Revision.

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will produce any documents that have been withheld solely on this basis; otherwise, Plaintiffs intend to move to compel the production of such documents.

Please let us know when you are available to meet and confer on the issues set forth above.

Regards,

Cyrus T. Frelinghuysen

Cyrus T. Frelinghuysen

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Files indicating "File Unreadable / Technical Issue"

1. US00001173
2. US00001249
3. US00001325
4. US00001326
5. US00001328
6. US00001572
7. US00001573
8. US00001818
9. US00001831
10. US00001832
11. US00001833
12. US00001834
13. US00001835
14. US00001836
15. US00001837
16. US00001838
17. US00001839
18. US00001840
19. US00001841
20. US00001842
21. US00001843
22. US00001844
23. US00001845
24. US00001870
25. US00001891
26. US00001892
27. US00001893
28. US00001904
29. US00001920
30. US00001921
31. US00001922
32. US00001923
33. US00001925
34. US00001929
35. US00001935
36. US00001936
37. US00001942
38. US00001943
39. US00001944
40. US00001945
41. US00001946
42. US00001947
43. US00001948
44. US00001949
45. US00001950
46. US00001951
47. US00001961

WINSTON & STRAWN LLP

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above document was served on this 5th day of December, 2018 to the following counsel of record via electronic mail.

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/s/ *Cyrus T. Frelinghuysen*

Exhibit D

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December 12, 2018

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Re: *Harrison et al. v. Mattis et al.*, Civil Action No. 1:18-CV-00641

Rob, Nate, Carrie, & Trent:

We write to follow up on our meet and confer call yesterday, December 10, and memorialize what was discussed and provide responses to any outstanding issues.

I. Modifying Expert Dates

As Judge Davis recommended, the parties met and conferred about moving expert dates in light of the Court's production deadline. The Government's initial position is that, under Judge Davis' Order, all that it is required to produce is the other branches HIV regulations and this material would not be necessary for expert reports. Plaintiffs disagree and offered to provide citations to the transcript were that position is refuted:

> Regarding waivers, "So then you're going to the justification aspect of whether or not their concerns or whatever why they, why they adopted the

> instruction and the regulation is legitimate government interest.
> MR. HARDING: Correct, Your Honor.
> THE COURT: All right. Tr. 26:3-8.
>
> "If OutServe is arguing that the, the Navy's regulation, the Marines' regulation, and the Air Force regulation concerning how we commission or deploy, whatever, people who have HIV, then they have the right to get information concerning *what was considered in coming up with that regulation to determine whether or not there's a legitimate government interest that justifies that regulation in those other branches as well because their justification may be pretext*." Tr. 43:21-44:4 (emphasis added).
>
> [T]he justification of that regulation becomes relevant because the government is required in order to defend to prove that it had a legitimate basis in interest, governmental, in developing that regulation, and if they can show through discovery that no, you didn't, then you can't defend their attack on the constitutionality of those regulations. Tr. 46:3-9.

Additionally, at the Government's request, Plaintiffs provide the following proposed schedule for experts that will allow the experts to consider the material produced by the Government:

- Plaintiffs' reports – January 9, 2019
- Defendants' reports – January 30, 2019
- Rebuttal – February 6, 2019

Plaintiffs intend to call 3-4 experts.

III. 30(b)(6) Depositions Deadline

The Government requested that the noticed 30(b)(6) deposition be rescheduled to January 21, 2019. The Plaintiffs do not agree to the Defendants' proposal because the deposition should occur prior to the deadline for expert reports, which may necessitate supplementing reports. Plaintiffs remain willing to find an alternative date prior to the date expert reports are due.

IV. Errors in Initial Production

The parties discussed several errors in Defendants' initial production. Defendants noted that the "File Unreadible / Technical Issue" emails are encrypted and the Government is working to unencrypt those emails and include them in subsequent productions. Plaintiffs also informed the Government that they believed there was an error in the metadata in the production because the "extracted text" was still visible in withheld documents. The Government believed this was in error and Plaintiffs agreed not to

review the extracted text from the production until new data can be provided. Plaintiffs confirm that they will return the DVD containing the load file and delete all copies.

Additionally, Plaintiffs noted that many documents were withheld as non-responsive. The Government explained that these were actually privileged communications that did not need to be logged consistent with the Parties' Protective Order. Plaintiffs requested and the Government agreed that these documents will be marked privileged (but not logged) in the future instead of marked non-responsive.

V. Deliberative Process Privilege

Each party stated their position on the deliberative process privilege. The Government stated that they originally intended to produce documents on December 15, but, because December 15 is a Saturday, the Government would produce on December 14 or December 16. Plaintiffs agreed that December 16 was acceptable. The Government stated they thought it would be best to table the issue until after a more fulsome production has occurred. Plaintiffs recognized the benefit of waiting for additional production, but noted the need to get through discovery quickly and that they may need to raise this with the Court sooner rather than later.

VI. Objections to Interrogatories

Plaintiffs noted that the Government waived their APA objection because it wasn't raised in the initial objections or at oral argument before Judge Davis. The Government is continuing to object under the APA to preserve the issue, but will not withhold documents based on this objection. Plaintiffs believe many of the Government's objections fly in the face of Judge Davis' ruling. The Government cannot at this time state whether it will object to the Magistrate's ruling for certain, and, if it does, the extent of the objections. However, the Government stated that it would not object to the Magistrate's ruling that documents relating to the regulation(s) regarding deployment (DoDI 6490.07) are discoverable. The Government stated it will produce documents and respond to interrogatories consistent with any objections it files with Judge Brinkema.

Regarding their sub-part objection, the Government noted that it will likely not respond to some of the interrogatories based on its sub-part objection. The Government suggested that Plaintiffs prioritize their interrogatories, which Plaintiffs have done. For purposes of this prioritization, the Government should ignore the portion of the interrogatories asking for the identification of documents and should answer the interrogatories in the following order: 1-11, 16-23, 13, 15, 12, and 14. Plaintiffs are still contemplating moving to compel based on the government's sub-part objections.

VII. Time Limitation on Versions

Based on the Government's representation regarding the cycles under which the HIV-related regulations and policies are reviewed, the Plaintiffs assent to limiting the discovery regarding prior versions of regulations and policies to 2006 and later. Plaintiffs note, however, that their claims do not hinge upon the availability of single tablet regimens (STRs) to treat HIV, but rather on the relative ease of providing and adhering to most, if not all, of the antiretroviral therapy regimens currently prescribed to members of the military.

WINSTON & STRAWN LLP

Sincerely,

John W.H. Harding
John W.H. Harding

Exhibit E

From: Harding, John
Sent: Wednesday, December 12, 2018 9:05 PM
To: Norway, Robert M. (CIV); Sommer, Andrew R.; Frelinghuysen, Cyrus T.; Hemmings, Allie; Scott Schoettes; peterp@outserve.org; Anthony Pinggera; Swinton, Nathan M. (CIV); McCotter, Trent (USAVAE); Berman, Keri L. (CIV)
Subject: Harrison v. Mattis - Subpart Objection

Rob,

We just wanted to follow-up on Defendant's objection regarding our Interrogatories and the use of subparts that was discussed in the meet and confer. Plaintiffs maintain that the use of subparts is consistent with the Federal Rules because each subpart is "logically and necessarily related to the primary question." 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 33.02[2] (3d ed. 1999) ("The better view is that subparts may be counted as part of one interrogatory if they are logically and necessarily related to the primary question."); *see also* Fed. R. Civ. P. 33(a) advisory committee's note (1993 Amendments) ("[A] question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication."). The majority of cases you cite are in the minority view and not in circuit. *Mezu*, the only in circuit case, deals with real compound questions (*i.e.*, inquiring into separate and discrete areas), and not the related subparts at issue here. We urge you to reconsider your subpart objection and fully answer the interrogatories. If not, we plan to move to compel on Friday.

Thanks,
John

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