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

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

REPLY IN SUPPORT OF NON-PARTIES UNITED STATES NAVY, UNITED STATES COAST GUARD, UNITED STATES AIR FORCE, AND UNITED STATES MARINE CORP'S RULE 72 OBJECTIONS TO MAGISTRATE JUDGE'S NON-DISPOSITIVE RULING

INTRODUCTION

Plaintiffs fail to establish in their response that they are entitled to the wide-ranging discovery that they seek from the Non-Party Military Services. As an initial matter, Plaintiffs are wrong that Defendants did not file objections or that the Non-Party Military Services cannot file an objection. With respect to the merits, Plaintiffs seek to rewrite the allegations of the complaint as if all the Non-Party Military Services were defendants and as if Plaintiffs challenged the regulations of the Non-Party Military Services. Indeed, over the course of this case—and indeed within the briefing of this motion to compel and objection—Plaintiffs have changed how they view their claims, who are Defendants in this case, and the arguments they offer to support their positions. This Court—which articulated its understanding of Plaintiffs' claims in ruling on Defendants' prior motion to dismiss in a far different way—should reject Plaintiffs' shifting litigation strategy. Rather, the scope of discovery here should be limited to the claims that were actually pled in the Complaint: a challenge to Department of Defense Instruction 6485.01 and Army Regulation 600-110.

ARGUMENT

I. Defendants And The Non-Party Military Services Timely Objected To The Magistrate Judge's Decision.

Plaintiffs contend that the objection was not filed by the named Defendants in this case, and so those Defendants waived their objections, and that the Non-Party Military Services (the United States Navy, United States Coast Guard, United States Air Force, and United States Marine Corps) cannot file the objection because they are not "parties" under Federal Rule of Procedure 72. Those arguments—which represent the height of a "heads I win, tails you lose" proposition—are without merit. Initially, Plaintiffs can cite no authority for their ostensible position that only named "parties" may file objections to a Magistrate Judge's non-dispositive ruling (and that, concomitantly, a Magistrate Judge's decision as to a third-party is final and unappealable). In fact,

courts reject such a claim. *See Diamantis v. Milton Bradley Co.*, 772 F.2d 3, 4-5 & n.2 (1st Cir. 1985) (holding that an entity that is neither a plaintiff nor defendant may file an objection under Rule 72 where the entity's "rights" are at stake and it would have to "bear the expense of producing the requested documents").

Plaintiffs' argument that the Non-Party Military Services were not "parties" who appeared before the Magistrate Judge also lacks merit. Plaintiffs have either brought claims against the regulations of the Non-Party Military Services or not. Once Plaintiffs represented in the hearing that they had challenged the regulations of the military services, counsel for the Government made clear that those agencies were not named Defendants here.[1] Dkt. 85-8 at 45:20-21. Further, the United States Code expressly authorizes the Attorney General to send any officer of the Department of Justice "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517. Pursuant to this statute, the Federal Government holds an absolute right to weigh in on controversies when it determines that its interests are implicated. *See, e.g.*, *United States ex rel. Prather v. Brookdale Senior Living Cmtys., Inc.*, 892 F.3d 822, 833 n.6 (6th Cir. 2018) (permitting the Government, based on § 517, to file a brief and participate in oral argument). Thus, the Non-Party Military Services participated in the hearing, through counsel for the actually-named Defendants here, and in any event, have an absolute right to join the objection filed in this case.

In any event, this entire issue is irrelevant. Even if the named Defendants per se were required to file the objection, the Court should find that they did so. There is substantial overlap between the aspects of Plaintiffs' written discovery that apply to the actual Defendants (*i.e.*, the

[1] And otherwise, that argument conflicts with Plaintiffs' newly expanded view of the scope of their claims. Plaintiffs have either brought claims against the regulations of the Non-Party Military Services or not.

Army and the DoD) as opposed to the non-party other military branches. Further, the docket entry for the objection shows that it was filed by Defendants, and the objection itself begins its argument by stating that "Defendants' objections are . . . ." Dkt. 85 at 12. And the title that Plaintiffs chose for their own brief recognizes that the objection was brought on behalf of both the named Defendants and the Non-Party Military Services. *See* Dkt. 91. Plaintiffs' brief even repeatedly refers to the objection as having been filed by "Defendants." *See, e.g.*, *id.* at 9 (referring to the objection using phrases like "Defendants claim" and "Defendants appear").

Accordingly, the Court should find that the objection is properly before the Court, as Plaintiffs themselves seem to admit.

II. Plaintiffs Did Not Bring Claims Against The Non-Party Military Services' Regulations In The Complaint.

The Magistrate Judge's decision is based on the mistaken premise that Plaintiffs had brought facial challenges to the regulations of all the Military Services. Dkt. 85 at 13-16. Plaintiffs now point to vague references in their Complaint to support a new argument that they have, in fact, sued to enjoin the regulations of the Non-Party Military Services. Dkt. 91 at 11-14. Plaintiffs ask too much from too little.

A. Plaintiffs' Arguments Are Inconsistent With The Federal Rules and Pleading Standards

Plaintiffs are not proceeding *pro se*. They are represented by sophisticated, competent counsel who are expected to abide by the pleading standards and the Federal Rules of Civil Procedure. As Plaintiffs now construe their Complaint, their equal protection claims fall well below the pleading standards required by the Fourth Circuit. *See Giarratano v. Johnson*, 521 F.3d 298, 304 (4th Cir. 2008). A "complaint must be dismissed if it does not allege 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* at 302 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To satisfy Federal Rule of Civil Procedure 8(a)(2), a complaint must

"give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* at 304 n.5 (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). Plaintiffs' claim does not allege such facts or give Defendants or the Court such notice as it concerns the regulations of the non-party Military Services, which are neither identified nor challenged in the complaint.

The allegations in *Giarratano* are far more concrete than Plaintiffs' newly devised claims. The inmate in *Giarratano* identified the challenged statute, Plaintiffs here admit that that did not identify the challenged regulations. The inmate in in *Giarratano* named the proper official in his complaint, Plaintiffs here did not. And the inmate in in *Giarratano* at least tried to plead around the presumption of rationality that must be applied to the challenged statute, Plaintiffs here have not, opting instead to proceed under a legal standard rejected by the Fourth Circuit in the civilian context, *see Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1267 (4th Cir. 1995) (holding that the "alleged unequal treatment of HIV-positive [individuals]" is subject to rational basis review), and which is inapplicable to military personnel policy decisions, *see Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (rejecting application of heightened scrutiny when the challenged policy relates to military affairs).

In fact, the Complaint here cannot be construed as Plaintiffs now argue because to do so would violate several basic pleading requirements. Rule 10a, for instance, requires a plaintiff to list the names of all of the parties in the caption of the case. Fed. R. Civ. P. 10a; *see also, e.g., Londeree v. Crutchfield Corp.,* 68 F. Supp. 2d 718, 721 (W.D. Va. 1999) ("Under Rule 10(a) . . . the complaint must contain a caption setting forth the title of the action including the names of *all* the parties."); *Allison v. Utah Cnty. Corp.*, 223 F.R.D. 638, 639 (D. Utah 2004) (quashing service and granting dismissal for failure to state a claim where defendant was neither named in the caption nor mentioned in the body of the complaint). "The purpose of Rule 10(a) is to apprise parties of

who their opponents are and to protect the public's legitimate interest in knowing the facts at issue in court proceedings." *Doe v. Husband*, No. 4:03cv166, 2004 U.S. Dist. LEXIS 28345, at *15 (E.D. Va., Aug. 10, 2004). The Rule "exists both to clearly identify for the Court and the public the parties to an action and to provide notice to recipients of the complaint of their role, if any, in the action." *Richardson v. Union Pub. Safety Dep't Police*, No. 7:10-cv-2679, 2011 WL 2193330, at *12 (D.S.C., May 13, 2011) (quoting *Thompson v. Kramer*, No. 93-2290, 1994 WL 70297, at *11 (E.D. Pa., Dec. 13, 1994)). To the extent Plaintiffs contend that the unnamed Military Services are defendants to this action, Plaintiffs have failed to satisfy either the requirements or the intent of the pleading rule.

"[T]o make someone a party the plaintiff must specify him in the caption and arrange for service of process." *Myles v. United States*, 416 F.3d 551, 551 (7th Cir. 2005). If a potential defendant is omitted from the original title and caption, the plaintiff should file an amended complaint properly naming that defendant and then serve him. *Id.* at 522. In fact, Plaintiffs have not served process on any of the Non-Party Military Services, an error that they cannot correct because the time to serve process has passed. Fed. R. Civ. P. 4(m); *see also* Fed. R. Civ. P. 4(i)(2) ("To serve a United States agency . . . a party must . . . send a copy of the summons and of the complaint … to the agency, corporation, officer, or employee . . ."). Indeed, even if Plaintiffs could still serve process on these unnamed Military Services, that service would be insufficient to bring the Services into the case unless they were also added to an amended complaint, which Plaintiffs have not done. *See Londeree*, 68 F. Supp. 2d at 721-22 (holding that individuals who were served but never named in a complaint should be dismissed). As such, Plaintiffs' newly devised claims against the Non-Party Military Services must be dismissed, if they were asserted at all. *See Burke v. Hill*, No. 2:17-CV-1-FL, 2017 WL 4969687, at *3 (E.D.N.C. Oct. 31, 2017)

(dismissing claims against defendant who was not served process).

B. The Court Should Reject Plaintiffs' Shifting Litigation Strategy

From when Plaintiffs filed the Complaint until they moved to compel, Plaintiffs described their claims in a limited way. Plaintiffs conceded that their as-applied claim "focuse[d] on the Army's refusal, under Department of Defense Instruction ("DoDI") 6485.01 and Army Regulation ("AR") 600-110, to commission Sgt. Harrison as an officer." Dkt. 73 at 2. They also stated that "Plaintiffs' Complaint also presents a *facial* challenge to the DoD regulation pertaining to 'accessions,'" and cited to specific paragraphs of the complaint that raised this facial challenge. *Id.* at 2. Finally, Plaintiffs state that "the Complaint asserts the illegality of the Military's deployment policies for people living with HIV because [of] the ability (or inability) to deploy," and refer to paragraphs 37 through 39 of the complaint. *Id.* at 2-3. These paragraphs challenge only the DoD Retention policy. Dkt 1 ¶¶ 37-39. At no point in the motion to compel on which the Magistrate Judge's hearing and this subsequent Objection were based did Plaintiffs assert that they have made a facial challenged to any Non-Party Military Service's regulations or that they are entitled to information from these Military Services for the purpose of supporting such challenges. *See generally* Dkt. 73.

Indeed, Plaintiffs explicitly state that they seek this information for the purpose of assessing DoD's justifications for its HIV-related policies. *Id*. at 7 ("To respond to Defendants' purported justifications for this differential treatment, Plaintiffs not only need to uncover how the Military treats individuals with similar levels of healthcare needs, but also how the challenged DoD policies are implemented in other branches of the Military and the reasons behind those differing policies."). At the hearing, Judge Davis explicitly rejected this argument, and Plaintiffs have not challenged that ruling. *See* Dkt. 85-8 at 14:15-20 ("[W]hy is how the Navy or the Marines or the Air Force, how they implement a DoD instruction in the regulations that they executed based on

that instruction, have anything to do with whether or not the instruction or the regulations are facially unconstitutional or unconstitutional as-applied to Sgt. Harrison?"); *Id.* 40:5-10 ("[T]heir argument isn't as important now that the Court has determined that all the documents relating to the other branches . . . the Court has already concluded that it also concurs with them that all of those documents are not relevant.").

In the hearing on Plaintiffs' motion to compel, however, the Magistrate Judge misunderstood the scope of Plaintiffs' claims because Plaintiffs represented to the Court that they had actually challenged the facial constitutionality of the other branches' regulations. *See id.* at 40-45. On the basis of this incorrect and never previously raised assertion, Judge Davis remarked that it did not matter if the Military Services were named Defendants because "the defendants are the regulations." Dkt. 85-8 at 45:22-23. Rather than acknowledging this was a misunderstanding, Plaintiffs doubled down, arguing in their opposition that "Plaintiffs have mounted a broad facial challenge to the DoD regulations (*i.e.*, instructions), including those promulgated and implemented by the four Military Departments of the DoD." Dkt. 91 at 1. Putting aside the fact that the scope of Plaintiffs' newly devised claims omit the United States Coast Guard (a component of the Department of Homeland Security, not the Department of Defense), Plaintiffs' shifting litigation positions upend the breadth of the case from the limited challenge contemplated originally by the Court. This Court should reject Plaintiffs' new litigation strategy, and construe the claims in the Complaint in the same limited manner that the Court and the parties had up until the hearing on Plaintiffs' motion to compel.

III. The Court Should Reject Plaintiffs' New "Control" Argument.

And the Court should also reject the argument that Plaintiffs advance for the first time in their opposition to the Objection: that discovery was proper because the Secretary of Defense "controls" the military departments. *See* Dkt. 91 at 9-10, 12-13. First, this argument is not

consistent with Plaintiffs' own requests, which directly sought discovery from the "Military Services," including the United States Army, the United States Navy, the United States Marine Corps, the United States Air Force, or the United States Coast Guard. *See* Dkt. 85-6 at 2 (defining "Military Services"), 12 (RFP 9 seeking documents from the "Military Services").

Second, Plaintiffs' new control argument is premised on a fundamental misunderstanding of the relationship between DoD and the Military Departments. DoD and the Military Departments are, by statute, separate administrative agencies with separate authority to prescribe regulations. *See* 5 U.S.C. § 102 (defining Military Departments); *id.* § 301 ("The head of an Executive department or military department may prescribe regulations for the government of his department. . . .").[2] Moreover, the United States Coast Guard is not even a service within DoD, and is not a Military Department except when, under certain circumstances defined by statute, it is directed to operate within the Department of the Navy.[3] *See* 14 U.S.C. § 3(a) ("The Coast Guard shall be a service in the Department of Homeland Security, except when operating as a service in the Navy."). In fact, the United States Coast Guard's organic statute places it under the control of the Secretary of the Department of Homeland Security unless directed otherwise. *See* 14 U.S.C. § 4.

Third, Plaintiffs' new control argument is belied by their own strategic choices in prosecuting this case. Plaintiffs chose to name only the Department of the Army as a Defendant here. If they truly meant to bring claims against the other services, then they were required by the Federal Rules of Civil Procedure to name those services as defendants and properly serve process

[2] As argued in the opposition, the policy decisions of the Military Department are constrained by DoD through the use policy directives. Dkt. 13-14.

[3] The only time the Coast Guard operates within the Department of the Navy [and thus within the Department of Defense] is either upon a declaration of war by Congress or if the President, operating under his Article II powers as Commander-in-Chief, so directs. *See* 14 U.S.C. § 3(b). At present, neither condition has occurred.

on them. Fed. R. Civ. P. 4(i)(2) ("To serve a United States agency . . . a party must . . . send a copy of the summons and of the complaint . . . to the agency, corporation, officer, or employee"); Fed. R. Civ. P. 10(a). Because they have not done so, it is well-established that Plaintiffs cannot be granted relief against the Non-Party Military Services. *See, e.g.*, *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 890 n.7 (7th Cir. 2013); *see also Steans v. Combined Ins. Co. of Am.*, 148 F.3d 1266, 1270 (11th Cir. 1998) (recognizing "principle of general application that a judgment *in personam* is not binding on a person who is not designated as a party" (internal quotation marks omitted)); *Talbert v. Smith*, No. 7:05CV736, 2007 WL 773910, at *1 (W.D. Va. Mar. 9, 2007) ("It is well settled that except in limited circumstances, which are not alleged here, a court may not order injunctive relief against non-parties.").

In sum, Plaintiffs' new "control" argument conflicts with the way Plaintiffs have prosecuted this case and is based on a demonstrably flawed understanding of the organization of the United States military.

IV. Plaintiffs' Wide-Ranging Discovery Is Directed At The Non-Party Military Services, And Is Not Relevant Or Proportionate To The Needs Of The Case.

Defendants argued, and the Magistrate Judge agreed, that the Non-Party Military Services' implementation of DoD's policies is not relevant to the claims in the Complaint. Dkt. 78 at 13-14; Dkt. 85:8 at 12:1 to 13:16, 14:15 to 15:11. Plaintiffs argue that this is incorrect, but they did not timely file an objection to the Magistrate Judge's decision. Plaintiffs are therefore bound by that ruling and cannot challenge it here. More critically, whether the Military Services agree with DoD's policy, or choose to implement those policies with as much flexibility as they can, is irrelevant (or at a minimum overbroad and disproportionate) to whether there is a rational basis for DoD policies, *i.e.*, "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Comm.*, 508 U.S. 307, 313 (1993).

Notwithstanding the relevancy of discovery from the Non-Party Military Services, the wide-ranging discovery sought originally by Plaintiffs is not proportionate to the needs of this case. Contrary to their argument, Plaintiffs' discovery requests were not narrowly tailored. Indeed, the definitions of "Military Services" and "DoD" in Plaintiffs' discovery requests are so broad that they encompass the entire military establishment and military contractors. *See* Dkt. 85-4. These overly broad definitions and a lack of foundation for the requests to the Non-Party Military Services are what led the Magistrate Judge to remark that Plaintiffs were engaged in "a fishing expedition." Dkt. 85-8 at 16:18-20.

And none of the discovery referenced by Plaintiffs in their brief supports the wide-ranging requests that Plaintiffs have propounded here. For instance, Plaintiffs claim to be seeking documents relied on by DoD to create its reports to Congress. Dkt. 91 at 10. But those documents are in DoD's custody, and the non-privileged materials related to the reports have already been produced to Plaintiffs. So too for the "comments" on DoD's policies that Plaintiffs suggest support their wide-ranging discovery demands on the Non-Party Military Services. Dkt. 91 at 18. Plaintiffs have no need for such discovery because the official comment forms to DoD's policies are in DoD's custody, and the non-privileged information contained on those forms have been produced or will be to Plaintiffs. Additional discovery directed at the Non-Party Military Services on these topics is duplicative, wasteful, and not proportionate to the needs of the case. *See* Fed. R. Civ. P. 26(b)(2)(C) (the Court "must limit the frequency or extent of discovery otherwise allowed by these rules" if "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive").

CONCLUSION

For the reasons stated above, as well as in reasons in the Objection, Dkt. 85, and in opposition to the motion to compel, Dkt. 78, this Court should overrule the portion of the Magistrate Judge's November 30, 2018 decision compelling the Non-Party Military Services to produce materials to Plaintiffs, and limit discovery to only information that is relevant and proportionate to the Plaintiffs' claims challenging Department of Defense Instruction 6485.01 and Army Regulation 600-110.

DATE: December 20, 2018

Respectfully submitted,

G. ZACHARY TERWILLIGER
United States Attorney

/s/
R. TRENT MCCOTTER
Assistant United States Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3845
Fax: (703) 299-3983
trent.mccotter@usdoj.gov

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

ANTHONY J. COPPOLINO
Deputy Director
Federal Programs Branch

/s/ Robert M. Norway
KERI L. BERMAN
ROBERT M. NORWAY
Trial Attorneys
U.S. Department of Justice
Civil Division
Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20530
Telephone: (202) 353-0889
Facsimile: (202) 616-8460
robert.m.norway@usdoj.gov

Counsel for the Government

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I filed the foregoing using the Court's CM/ECF system, which will send a notification of electronic filing (NEF) to the following counsel of record:

ANDREW R. SOMMER
Va. Bar Number 70304
WINSTON & STRAWN LLP
1700 K St., NW
Washington, DC 20006
T: (202) 282-5000
ASommer@winston.com

Counsel for Plaintiffs

/s/
R. TRENT MCCOTTER
Assistant United States Attorney
Office of the United States Attorney
Justin W. Williams U.S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3845
Fax: (703) 299-3983
Email: trent.mccotter@usdoj.gov

Counsel for the Government