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' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL INTERROGATORY RESPONSES

I. STATUS OF THE PARTIES' CONTINUED MEET AND CONFER AND PLAINTIFFS' OFFERS TO COMPROMISE

Defendants have now answered, at least in part, 19 of the 23 interrogatories that were the subject of Plaintiffs' motion.[1] Defendants claim, however, that they have answered all 30 interrogatories that Plaintiffs were entitled to serve, and therefore, Plaintiffs have no more ability to seek discovery through interrogatory.

In an effort to narrow the issues for the Court, Plaintiffs have proposed compromises to Defendants. Defendants, however, have steadfastly refused to budge from their position. Nevertheless, Plaintiffs will withdraw their Interrogatory Nos. 12-15 in the spirit of compromise.

As explained below, Defendants are wrong in their counting of Interrogatory Nos. 1-11. Defendants are also estopped from arguing that Plaintiffs have exhausted their interrogatories because Defendants breached an agreement reached during the parties' meet and confer.

II. DEFENDANTS ARE ESTOPPED FROM CONTENDING PLAINTIFFS' INTERROGATORY NOS. 1-11 SHOULD BE COUNTED AS TWO INTERROGATORIES

While Plaintiffs maintain that Interrogatory Nos. 1-11 are not compound, Defendants are estopped from contending otherwise. Before this motion was filed, the parties met and conferred. During that meet and confer, Defendants requested an ordered list of interrogatories and indicated that they would answer them in the order Plaintiffs presented them. Defendants agreed that they would answer the interrogatories until they reached a total of 30. When Plaintiffs provided their list, they specifically instructed Defendants: "For purposes of this prioritization the Government should ***ignore the portion of the interrogatories asking for the identification of documents***." Dkt.

[1] While Defendants have "answered" 19 interrogatories by including responses, Plaintiffs do not concede that Defendants' responses are in all instances sufficient. Plaintiffs intend to raise certain deficiencies in Defendants' responses with Defendants and hope the parties are able to resolve any disputes without further burdening the Court.

84-4 at 3 (emphasis added); *see also* 93-2 (explaining "our letter yesterday merely provided a priority order (***with some portions to be ignored***) to allow Plaintiffs to receive certain information first") (emphasis added).

Nevertheless, while Defendants answered in the order provided by Plaintiffs—thus accepting the deal reached during the meet-and-confer—Defendants also chose to answer the parts that Plaintiffs told them to "ignore" so they would not count towards the 30 interrogatories that Defendants said they would answer under their own count. That Defendants did so was contrary to the agreement reached during the meet and confer. They did so on their own volition. Now they seek to prejudice Plaintiffs. But Defendants should be estopped from contending that Plaintiffs have no more opportunity to seek discovery through interrogatories. Doing so is gamesmanship and is unfairly prejudicial to Plaintiffs. Therefore, Defendants should be estopped from counting Interrogatory Nos. 1-11 as each constituting two separate interrogatories.

III. INTERROGATORY NOS. 1-11 REQUESTING IDENTIFICATION OF INDIVIDUALS AND THE DOCUMENTS THEY CONSIDERED SHOULD EACH BE COUNTED AS A SINGLE INTERROGATORY

As explained in Plaintiffs' motion, Interrogatory Nos. 1-11 requesting identification of individuals who prepared certain reports or regulations related to Defendants' HIV policies and the documents those individuals relied upon should each be counted as a single interrogatory. Defendants cling to precedent from another court for the proposition that each of these should be counted as two separate interrogatories. *See* Dkt. 93 at 7-8. Yet various other courts have held that a single interrogatory may reasonably seek facts, documents, and witnesses related to a certain issue or question. *See Synopsys, Inc. v. ATopTech, Inc.*, 319 F.R.D. 293, 297 (N.D. Cal. 2016) ("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.").

Moreover, by the standard Defendants claim should be applied—the "logically or factually subsumed" standard (Dkt. 93 at 6)—these interrogatories should count as single interrogatories. Each of these interrogatories is directed to a single issue or question: How were these reports or regulations regarding Defendants' HIV policies created? The Court recognized that Plaintiffs are entitled to this discovery. Dkt. 93-4, Tr. at 43:24-4:4 ("[T]hey 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."). But the materials Defendants considered are not as useful unless Plaintiffs also learn the identities of the individuals who relied upon those materials in creating or updating the regulations. That will allow Plaintiffs potentially to depose those individuals and discover whether the military has considered, for example, the major advancements in medical treatment for people living with HIV that have occurred over the past two decades. *See id.* at 9:21-10:1 ("[Y]our argument is that they started out with a policy, medical information and medical – how we dealt with HIV in the past is different than the way we dealt with it in the future, and you're trying to see whether or not their policies have evolved in the same way that the medical part of this case has evolved."). Those bits of information—who considered and what was considered—are necessarily intertwined or "logically subsumed" with each other. *See Clark v. Burlington N. R.R.*, 112 F.R.D. 117, 118-119 (N.D. Miss 1986) (finding that "the subparts call only for information directly related to other information called for by the same interrogatory, and should therefore not be counted separately").

IV. CONCLUSION

For the reasons set forth in Plaintiff's motion and above, Plaintiffs request that this Court find that Plaintiffs' Interrogatory Nos. 1-11 each constitute a single interrogatory, and for such further relief as this Court deems just and proper.

Dated: December 20, 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 20th day of December, 2018 to the following counsel of record via electronic mail.

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